20-6885

No.

IN THE

Supreme Court of the United States

David Alan Vogel

Petitioner, v.

United States of America

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Federal Circuit

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David Alan Vogel
Pro Se Indigent Prisoner (On Covid Home Confinement)
27 Route 11 D
Alton Bay, New Hampshire 03810

December 7, 2020

Question Presented

1. **Did the 5th Circuit violate the precedent of this Supreme Court and the legal standard of every other circuit when it denied Certificate of Appealability on a 2255 appeal which questions whether this Supreme Court's precedent coupled with the precedent of other Circuit Courts, would nullify the appellant's conviction based on 10th and 6th Amendment Constitutional Grounds?**

LIST OF PARTIES

All parties appear on the caption of this case on the cover page.

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TABLE OF AUTHORITIES CITED

**Very Important Note: The two aforementioned Texas Laws are quoted as they were in 2004 to 2010 the time relevant to Mr. Vogel's business and trial. Long after, Mr. Vogel's business cease to exist these laws have been modified by the Texas Legislature.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner David Alan Vogel asks the Court to grant a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit denying:

OPINION BELOW

The Opinion of the Fifth Circuit, David Alan Vogel v. United States, No. 18-40925 (5th Circuit August21, 2020), is attached as Appendix A.

JURISDICTION

The Fifth Circuit Court of Appeals filed its opinion finalizing all issues on August 21, 2020. Writ of Certiorari is filed within one-hundred-fifty days of that decision (per COVID RULES), and pursuant to Supreme Court Rule 10 (c) and this Court has jurisdiction pursuant to U. S. C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth (6th) Amendment of the United States Constitution which states: *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.*
2. The Tenth (10th) Amendment of the United States Constitution which states: *The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.*

3. TEXAS INTRACTABLE PAIN ACT - - TEX OCCUP. Code 107.001 which because of its long length is displayed in Appendix B herein.

4. Texas Administrative Code 174.4 - - because of its long length it is displayed in Appendix C herein

****Very Important Note: The two aforementioned Texas Laws (Appendix B & C) are quoted as they were in 2004 to 2010 the time relevant to Mr. Vogel's business and trial. Long after, Mr. Vogel's business cease to exist these laws have been modified by the Texas Legislature.**

STATEMENT OF RELEVANT FACTS

David Alan Vogel, Petitioner, is a federal prisoner (serving his sentence on home confinement) who was convicted by a jury in 2010 of one drug conspiracy count (U. S. C. § 846), and three money laundering counts (18 U. S. C.§ 1956 and § 1957). Mr. Vogel appealed his conviction and the 5th Circuit Court of Appeals affirmed. Mr. Vogel subsequently filed a 2255 Motion to Vacate which was denied by the District Court. The District Court also denied a Certificate of Appealability. Mr. Vogel then filed documents with the 5th Circuit requesting a Certificate of Appealability. On August 7, 2019, in direct conflict with its own precedent on the instant issue, and in direct conflict with the rulings of this Supreme Court, the 5th Circuit denied Mr. Vogel's Certificate of Appealability based on an erroneous interpretation of a technical rule. Mr. Vogel subsequently filed a *Writ of Certiorari* with this Supreme Court. Not surprisingly, on July 10, 2020 this Supreme Court vacated the Order of the 5th Circuit and remanded the case back to the 5th Circuit for further consideration. Without any analyzation of Mr. Vogel's 25-page arguments the 5th Circuit denied Certificate of Appealability in a one line explanation simply stating that Mr. Vogel did not meet the standard for COA. The 5th Circuit in denying Mr. Vogel Certificate of Appealability once again, violated the precedent of this Supreme Court and the legal standard of every other circuit.

REASON FOR GRANTING THE WRIT

This is a case that cries out for Supreme Court review. The integrity of the criminal justice system is at issue. Petitioner David Vogel presented to the Court of Appeals an in-depth brief, including a memorandum of law. This document concludes, amongst other arguments, that even if the facts that the government alleges are true, Supreme Court precedent coupled with relevant Circuit Court rulings require Mr. Vogel's conviction be vacated. The 5th Circuit simply chooses to deny Mr. Vogel without any opinion other than a one-line general denial. The 5th Circuit could not offer any substantive or reasoning as to why Mr. Vogel's legal analysis was flawed.

Justice Neil Gorsuch proffered that the judge cannot be pleased with his ruling all of the time. Circuit Judge Joan Larsen proffered that the law "is an '**is**' not a '***should be.***'" The fact is that Mr. Vogel's conduct was controversial and the morality of this conduct is subject to honest debate. Mr. Vogel does not believe he was morally wrong, however, whether, Mr. Vogel's conduct was moral or reprehensible should not be at issue in a Court of Law. Mr. Vogel maintains his conduct was consistent with the law. That should be the only issue.

Mr. Vogel pleads to this Supreme Court that the 5th Circuit is simply applying the law as they think it "***should be***," not as it "***is.***" This undermines the credibility of the United States Judicial System. Mr. Vogel pleads that the 5th Circuit once again choose to ignore established law, which again brings Mr. Vogel back again to this Supreme Court.

Judges should interpret the laws according to what they say, not according to what the judges wish they would say.

Circuit Court Judge Joan Larsen

This Court has the authority to Order that the 5th Circuit hear Mr. Vogel's appeal. This Court's also set a standard that Circuit Court's grant a Certificate of Appealability if the issue(s) presented are subject to legitimate debate amongst jurists . . . a very low burden to meet. Mr. Vogel pleads to this Court that he easily met that low burden and that the 5th Circuit is, once again, ignoring established law and precedent. A discussion and detailed analysis follows.

Background

David A. Vogel was convicted of conspiring to distribute hydrocodone (an opiate pain medication) "*outside the usual course of practice*" in conjunction with his ownership of Madison Pain Clinic (hereinafter MPC). Mr. Vogel was also convicted of three related money laundering counts that were derivative of his drug conviction.

The crux of Mr. Vogel's case is that the United States Constitution, and Supreme Court precedent, (which were followed by various circuit courts interpretive precedents) should persuade this Court to conclude that Mr. Vogel is both legally and factually innocent of the drug conspiracy charge. Assuming that is true, the money laundering counts cannot stand on their own. At best Mr. Vogel's conviction should be overturned and dismissed and his order of forfeiture reversed. At worst Mr. Vogel is entitled to a new trial.

Mr. Vogel operated MPC from 2001 to 2007. Opiates therapy was controversial back then and subject to debate amongst honest professionals regarding its use and morality in treating moderate-to-severe pain. Albeit, Mr. Vogel is aware of the current "*opiate crisis*" and the different standards and viewpoints regarding the use of opiates to treat pain that are currently mainstream. Mr. Vogel wants to stress this is **not** and should not be a case about morality. It is clear that the judge and the Circuit Court in Mr. Vogel's case are morally opposed to Mr. Vogel's conduct and misapplied the law. However, regardless of whether a judge thinks Mr Vogel's conduct was just or reprehensible, Mr. Vogel maintains MPC's medical practice was consistent with the law, and he should be granted the relief he requests. **The law should dictate**. Federal law and precedent dictate state law defines the parameters of a bona fide doctor-patient relationship. In 2007 and prior there was no federal standard. Attorney Susan Henricks testified at Mr. Vogel's trial that the MPC protocol was consistent with state law and established a proper doctor-patient relationship. As Mr. Vogel will demonstrate herein, the Texas Medical Board policy statement on internet prescribing later codified as Texas Administrative Code 174 .4 confirms that Attorney Henricks was correct.

****Very Important Note: Mr. Vogel quotes Texas Administrative Code 174.4 as it was in 2004 to 2010 the time relevant to Mr. Vogel's business and trial. Long after, Mr. Vogel's business ceased to exist these laws have been modified by the Texas Legislature.**

The government blatantly proffered that the **Crux** of their case was that there was no bona fide doctor- patient relationship and in their brief opposing Vogel's 2255 motion and at trial cited what they considered major inadequacies with the way MPC doctors did business. Perhaps state law **should** have been more stringent and perhaps the state standards **should** have been more in line with what the prosecution thought the standards **should** have been . . .but the law was **not**! The law is not a ***should***

be . . . it is an ***is***! . As long as MPC complied with the **minimum** prerequisite requirements of establishing a bona fide doctor-patient relationship, then no crime was committed. Based on legal case law, that Mr. Vogel will discuss herein, if MPC was compliant with Texas State Law, then Mr. Vogel is factually and legally innocent.

Note: In actuality the law did change and the Texas Administrative Code became more in line with what the Prosecutor, District Court Judge, Circuit Court Judge, etc. thought the law should be. But, the change in law was LONG AFTER MPC ceased to do business and long after Mr. Vogel's trial for that matter.

Mr. Vogel asked the 5th Circuit Court of Appeals to grant him a Certificate of Appealability on the five specific issues raised in his 2255 Motion. Each of the five issues and the arguments Mr. Vogel made to the 5th Circuit are presented below for this Supreme Court to review. Each issue, at a minimum is a debatable legal issue, which is all that is required for a Certificate of Appealability. This Supreme Court should remand this case back to the 5th Circuit and Order that they hear Mr. Vogel's appeal.

Issue #1 (Presented to the 5th Circuit for COA): Was trial counsel ineffective by his lack of understanding of key forensic issues and not introducing exculpatory forensic evidence?

For the purposes of this appeal, the focus of this issue will be limited to the fact that trial counsel did not enter into evidence and cross-examine government witnesses regarding two documents:

1. The Texas Board of Medical Examiners Policy Statement on Opiate Therapy;
2. A DEA FAQ/Pain Policy Study that once appeared on the DEA's website

The prosecution in their reply brief claimed that these documents are irrelevant and based on the false premise that this case was about issues like pill quantity, duration of treatment, solely prescribing

opiates, prescribing to patients that abused illegal drugs, etc. The prosecution claims the lypchin of its case was that MPC failed to establish a legitimate bona fide doctor-patient relationship with their patients. While the prosecution did claim that MPC patients had no valid doctor-patient relationship with the clinic doctor, the prosecution used a "*shock and awe*" campaign to falsely convey to the jury that the parameters of acceptable Medical Practice did not include the treatment protocol MPC doctors employed. The record is replete with government witnesses testifying at trial that MPC doctors were issuing prescriptions quote outside the usual cost of professional practice on quote for five key reasons:

1. Quantity of pills prescribed;
2. The duration of treatment with opiates;
3. The strength of the medication;
4. Escalating doses given the patients;
5. Solely prescribing opiates as a treatment

The District Court ruled that the government witnesses were adequately cross-examined and that Vogel "*fails to cite specific portions of the two studies he identifies that would have materially strengthened his defense*" (in the Court's final order in response to Vogel's rule 59 e motion). This conclusion is debatable. A discussion follows:

The Texas Board of Medical Examiners Policy Statement

At the time MPC was an operation (2001 to 2007) and today to some extent, there is no National Standard regulating medical practices. As the 11th circuit stated in US v. Tobin (676 f 3d 1264) "*when Congress enacted the Controlled Substance Act (hereinafter CSA), it thus manifested it's intent to leave it to the states to define applicable standards of professional medical practice.*" In light of this legislative scheme, which underscores Congress's desire to defer to the standards of professional practice set by

the states, it is not surprising that when the Supreme Court examined the CSA structure in Gonzales v. Oregon (546 U.S. at 270, 126 S. Ct at 923) it observed that *"the statute manifests no intent on the part of Congress to regulate the practice of medicine generally."*

The State Sets The Standard

As the 11th circuit summarized in Tobin (676 F. 3d 11264) *"consistent with the statute's (the CSA's) recognition of the state regulation of the medical profession the CSA incorporates the applicable* ***state standard"***.

The State of Texas and their agency set certain standards regarding opiates therapy, yet these standards were presented to the jury as a doctor acting *"outside the usual course of practice."* In other words, criminals. Albeit, the State Standards were in place at the time MPC operated, trial counsel never cross-examined witnesses regarding these. Nor were these standards entered into evidence.

Texas had in its place it's Intractable Pain Act, TEX OCCUP. Code 107.001, et seq., which was a legislative act with the goal to ensure that no Texan requiring narcotics for pain relief, for whatever reason was denied them because of a physician's real or perceived fear that state regulatory agencies would take disciplinary measures against the physician for prescribing narcotics to relieve pain. This act was in fact talked about and introduced as evidence, however the interpretive State Standards set forth by the Texas Board of Medical Examiners which issued a **policy statement** was not introduced as evidence. Nor were government experts cross-examined regarding this state standard/ policy statement.

In its official newsletter to doctors that was drafted by board members, C. Richard Stansney, MD, and Statton Hill, it was announced that the board would use **treatment outcome** not quantity or duration of prescribing as a standard for evaluating cases against doctors. In other words, under Texas

law and Medical Board policy, the operative question was whether the patient was improving - - **not** the hyper technical issue of how many pills were prescribed, or for how long did the patient take them.

Government witnesses, including doctors and DEA agents, arbitrarily attacked and MPC doctors based on pill quantities, duration of treatment, etc. These witnesses did not evaluate any specific patient file, nor did they examine or testify to the **treatment outcome** of any individual patient.Which begs the question: Why didn't trial counsel present as evidence the Texas policy statement and properly cross-examine witnesses regarding the same. There is no excuse as to why government witnesses were not properly cross-examine about the fact that the **treatment protocol** utilized by MPC doctors was in compliance with State Standards!

The DEA FAQ / Wisconsin University Pain Study

A very powerful piece of defense evidence if it was introduced would have been the **Last Act Partnership Pain Policy Studies Group at the University of Wisconsin.** This very credible study was produced in cooperation with Patricia Good, Chief Liaison Officer of diversion at The Drug Enforcement Administration (DEA), Robert C. Williamson, Deputy Chief DEA, Dr. Kathleen Foley, Chief of Pain Services at Memorial Sloan-Kettering, Dr. Russell Portenoy, Chairman of Beth Israel Medical, Dr. Nathan Katz of Harvard Medical School, as well as dozens of the leading pain doctors and addiction specialists in the United States. This study was posted on the DEA'S website under the heading "***Prescription Pain Medication: Frequently Asked Questions (FAQ) for Healthcare Professionals and Law Enforcement Personnel.***" This study and the DEA's website clearly conceded that the parameters of acceptable medical practice included the very items the prosecution used in this instant case that support the fact that MPC doctors did not issue prescriptions in the usual cost of professional practice.

The DEA FAQ conceded, contrary to the prosecution's trial position that in cases of chronic pain *"the parameters of acceptable medical practice include patterns of drug prescriptions such as the long-term administration of an opioid drug, escalating dosages, and the administration of more than one drug."* Moreover, the FAQ supported the principles of the Texas State Standard previously mentioned. Out of the blue this FAQ was taken off the DEA website. This FAQ obviously triggered some at the DEA to realize it would be difficult to win prosecution of doctors and pain clinics if it remained.

The prosecution in this case created their own standard to judge the MPC practice. It was crucial for the jury to understand that the prosecution standards were not the standards put forth in the DEA FAQ (nor were they the State Standards). This FAQ should have been entered into evidence and also been the basis of cross-examining government witnesses.

In sum, the DEA FAQ, which again was online during the time MPC did business, clarified the government's position on opiate therapy and most importantly contradicted the prosecution's witnesses in this case. A few notable examples include:

1. The study conceded that the consensus now is that some patients with moderate as opposed to severe non-malignant pain should be considered for long-term opiate therapy;

2. It is the scope of federal law to prescribe opiates to patients with a history of substance abuse or addiction;

3. **In states with no specific legal requirements on the subject, if continued opiate therapy makes medical sense, then the therapy may be continued, <u>even if drug abuse has occurred</u>;**

4. Federal law and regulation do not prohibit the use of opiates to treat pain if a patient is abusing controlled Substances;

5. This study generally supports the Texas policy previous mention by stating *"the number of patients in the practice that receive opioids, the number of tablets prescribed for each patient, and the duration of therapy with these drugs do not by themselves indicate a problem."*

Conclusion

The parameters of acceptable Medical Practice detailed in both the Texas Policy Statement and the DEA FAQ included the **very items** the prosecution used in the instant case to support the fact that MPC doctors issue prescriptions "outside the usual course of professional practice." Trial counsel had these documents available to him, yet overlooked the same. They should have been entered into evidence and multiple government witnesses, not limited to expert doctors and special agents, should have been cross-examined properly regarding the issues raised herein

Note: Issues 2, 3, and 4 that were presented to the 5th Circuit for COA are interrelated and will be discussed together as follows:

Issue # 2 (Presented to the 5th Circuit for COA) -Was trial counsel ineffective for not arguing at trial and on appeal that in the absence of any national standard for prescribing opiates therapy for management of pain by applying the Controlled Substance Act as it was applied in this case to the prosecution of Mr. Vogel, the prosecution exceeded its powers under the Constitution thus intruding upon the sovereignty and authority reserved for the states by the 10th Amendment?

Issue # 3 (Presented to the 5th Circuit for COA) - Notwithstanding the affirmation issue does the United States Constitution as well as federal statute (at the time of Mr Vogel's operation) coupled with binding precedent place the particular conduct alleged in this case beyond the federal government's power to punish?

Issue # 4 (Presented to the 5th Circuit for COA) - - Was trial counsel ineffective by not requesting a jury instruction that would require the jury to acquit Mr. Vogel if it found he complied with state law regarding the prescribing of opiate drugs?

In light of recent precedent it's clear that state law should define the parameters of a bona fide doctor-patient relationship. The prosecution claims the lack of a bona fide doctor-patient relationship between MPC patients and doctors was the lypchin of their case. More specifically in its reply brief to Vogel's original 2255 motion, the prosecution claims that the **Crux** of their case was the lack of a face-to-face encounter between MPC doctors and patients. If we take the prosecution's **CRUX** statement on its face and this case boils down to whether MPC doctors had a bona fide and legal doctor-patient relationship with their patients, then Mr. Vogel is both factually and legally innocent of the drug conspiracy charge. This is because under Texas State Law MPC met the legal requirement to establish said relationship.

The operative question is; Did the prosecution violate the 10th Amendment by displacing the state stand of medical practice with their own standards? MPC and Vogel should have been judged solely on the state standard of treatment protocol and solely on the state standards defining a bona fide doctor- patient relationship.

Trial counsel was ineffective for not requiring the prosecution, the district and appeals court, and also of course the original jury to assess the validity of the MPC doctor-patient relationship in light of State Standards. The 10th amendment requires this. By convicting Mr. Vogel of violating a standard which was legal under state law the prosecution infringed upon the powers reserved to the state by the 10th Amendment.

There were no national standards at the time of Mr. Vogel's prosecution defining the basis of a bona fide doctor-patient relationship. State laws and protocols varied dramatically. Moreover, the CSA's non- preemption clause provides that the CSA shall not be construed to preempts state-law unless there is a positive conflict between the text of the statute and state law. At the time of Mr. Vogel's

prosecution, no provision of the CSA directly conflicted with Texas State Law. **Without any express statutory Federal Authority, the prosecution, replacing the Texas State Law defining a bona fide doctor-patient relationship with their own standards, signals a massive and unjustifiable expansion into state-regulated domain which the 10th Amendment cannot countenance.**

Rejecting Vogel's argument The District Court ruled the 5th Circuit concluded that the CSA did not violate the 10th Amendment nor did it invade upon the states power to regulate medical practices. It also ruled that compliance with state law did not entitle Vogel to relief and even so no reasonable jury would have found that the pain clinic operated in compliance with state law.

Mr. Vogel never argued and is not now arguing that the 10th Amendment makes the CSA unconstitutional. **This is not and never was Mr. Vogel's argument**. His argument is that "*as applied to this case*" the 10th Amendment precludes the prosecution from **displacing** state standards with a non-existent "*national standard.*"

As far as the District court's conclusion that assuming MPC was in compliance with State Law he is not entitled to relief, that ruling is clearly erroneous and contrary to established law. Equally, erroneous is the conclusion that no reasonable jury would have found the pain clinic was operating in compliance with Texas law. A discussion follows.

Madison Pain Clinic Was In Compliance With State Law

In Carol Ann Bond vs. US (131 s. CT. 2355; 180. L.ED 2d 269 2011 Lexis 4558;22), the Supreme Court ruled that the petitioner could assert her own injury resulting from the disregard of the federal structure; federalisms limitation was not a matter of rights belonging to the states. Absent any statute

to the contrary it is the state, not a federal prosecutor, to determine the standard defining a legitimate and bona fide doctor-patient relationship.

The government's trial position was that doctors must physically touch the patient. In their brief, (responding to Mr Vogel's 2255 motion), the prosecution makes a glaring and bold statement that the lack of a face-to-face interaction between the doctor and patient was the **Crux** of the government's case. By holding MPC doctors to this National Standard of care the prosecution displaced state standards of care. **This was an impermissible Federal Regulation of Medical Practice without any direct statutory authorization from Congress at that time**.

In Tobin, (676 F. 3d 1264) the 11th Circuit ruled on this very issue stating... "*some states do not specifically require in-person consultations for prescriptions... Congress's decision to enact the Ryan Haight Act (requiring in-person consultations) underscores the fact that prior to the CSA's amendment in 2008 the statute was not ambiguous as to whether an in-person consultation was required to a prescription to be valid over the internet. Rather, consistent with the statute's recognition of the state regulation of medicine,* ***the CSA incorporated the applicable State standard on this issue***."

In Oregon vs Ashcroft (368 F. 3d 11, 18, 2004), Judge Richard C Tolman Tallman wrote that: " *State lawmakers, not the federal government, are the primary regulators and professional medical conduct.*" Affirming Judge Talman's ruling in Gonzales it's not surprising that when the Supreme Court examined the CSA's structure and operation it observed that "*the statue manifests no intent on the part of Congress to regulate the practice of medicine generally*" (546 U. S. at 270 126 S. Ct. at 923). This Supreme Court reasoned that this was "*understandable*" because under our federal system "*the regulation of health and safety is primarily a matter of local concern.*" (Id. At 271, 126 S. Ct.at 923-24). It also should be noted that in the Tobin opinion cited above, the 11th Circuit quoting a

Congressional House Report stated that "*the different states have divergent approaches as to whether they required practitioners to conduct in person evaluations of a patient before issuing a prescription.*" Note: See H. R. Rep. No. 110 - 869, at 17 reprinted 2009 U. S. C. C. A. N. at 2133.

Long after MPC ceased to do business Congress enacted the Ryan Haight act which created a National Standard requiring the prescribing doctor to personally examine the patient face-to-face. However, this was not a standard or law that was relevant to Mr. Vogel's trial.

A Discussion of Texas Standards and Law

Attorney Susan Henricks testified at Mr. Vogel's trial: "*well in my opinion the protocol they were following if it was followed as prescribed, would not violate Texas law that I am aware of.*" Miss Henricks was retained by MPC and was asked for advice on how to conduct business in compliance with Texas law. She was aware that MPC operated the pain clinic providing schedule 3 Controlled Substances for pain management. She understood that the pain patients found the clinic through a website; they completed an extensive questionnaire (149 questions); the clinic obtains the patient's medical records; the patient had to provide a state-issued photo identification with the records; the patient coordinator then screens the application which is forwarded to a clinic doctor who orders blood work and a urine drug screen; a licensed substance abuse counselor reviews the application; then when the lab work is in, the doctor reviews the file and lab tests, and telephones the patient. The Texas Board of Medical Examiners Policy Statement on Internet Prescriptions later codified as Texas Administrative Code 174.4 confirms that Attorney Henricks was correct in assessing that the affirmation protocol was **more than sufficient** for clinic doctors to develop a bona fide doctor-patient relationship with patients. Moreover, the lack of a face-to-face requirement is also apparent. This

specific language of the Texas Administrative Code 174.4, intended to address the relatively new practice of Internet prescribing, states in relevant part as follows:

"It is unprofessional conduct for a physician to initially prescribe any dangerous drug or controlled substance without first establishing a proper physician-patient relationship. A proper relationship at a minimum requires:

1. **Verifying the person requesting the medication is who they claim to be**: Note: Clinic protocol required each patient submit a state issued ID. Except for undercover DEA agents who submitted fake driver's licenses, there wasn't a single case documented of a patient using a fake ID.

2. **Establishing a diagnosis through the use of accepted medical practices such as patient history, mental health status exam, physical examination and appropriate diagnostic and laboratory testing**. Note: Contrary to the prosecution's trial position this provision clearly states that the doctor can base the diagnosis based on a past diagnosis given by another doctor (patient history). This is yet another example of the prosecution creating their own standard in contradiction of state law. Moreover, the minimum requirements of this provision were well exceeded. If one reads this provision carefully, the required factors include a list of items "**such as**" a patient history . . . etc. This provision specifically does not require All the items listed, but the fact is MPC doctors did them ALL.

3. **Discussing with the patient the diagnosis and evidence for it, the risk and benefits of various treatment options**. Note: the risks and benefits and alternative treatment options were clearly and in great detail spelled out in the contract of every patient signed electronically.

4. **Ensuring the availability of the physician or coverage for the patient for follow-up care**. Note: Patients submitted very detailed monthly status reports to the clinic. Moreover, the doctors

were always available to patients if they needed to talk. It was not unusual for patients to call in to follow up with doctors.

The law clearly did **NOT** require a face-to-face encounter between the doctor and patient as a requirement to establish a bona fide doctor-patient relationship. **The Crux of the prosecution's case is based on a false premise!**

Note: Once again, Mr. Vogel wants to remind this Court that the law did change and the Texas Administrative Code became more in line with what the Prosecutor, District Court Judge, Circuit Court Judge, etc. thought the law should be. But, the change in law was LONG AFTER MPC ceased to do business and long after Mr. Vogel's trial for that matter. Judges should interpret the laws as to what they say, not according to what the Judges wish they would say (Joan Larsen). Mr. Vogel pleads that is exactly what happened here - - the Judges ruled based on what the law "was to be in the future," not what it "was."

A Discussion of the District Court's ruling

On the 10th Amendment issue presented herein, the District Court ruled that even if MPC was compliant with Texas law, Vogel is not entitled to relief. This conclusion is based on an erroneous concept. The District Court reasoned it is an issue for the jury, not a judge to determine if Vogel is breaking the law.

It is a well established principle that a jury determines issues of fact and judges make rulings of law. Whether the MPC protocol was legal or not is an issue for a judge. Whether, for example a face-to-face examination between patient and doctor is required under Texas law is an issue for a judge. The jury in this case was told by the prosecution that conduct legal under state law was "*outside the usual course of practice.*" A lay jury cannot be expected to understand legal statutes. That is why a judge makes the ultimate ruling as to what is legal.

In rejecting Dr. Tobin's appeal (676 f 3d at 1281), on the very same issue Mr. Vogel presents herein, the 11th Circuit ruled that "*none of the appellants argue that the district court should have instructed the jury to assess their behavior in light of the* ***state standards*** *that apply to them.*" In another notable case, US v. Joseph Mack Green, (709 F. 3D 1082), the 11th Circuit in rejecting the appeal of a doctor accused of writing illegal prescriptions stated "*in fact, the defendants do not even argue there was any difference between the Georgia standards of practice and the supposed national standards that the jury purportedly considered.*" **But, this is exactly what Mr. Vogel argued to the 5th Circuit in support of his COA. That he was in compliance with State Standards, the controlled substance act, based on legal precedent incorporates those standards, therefore he was in compliance with the law.**

Mr. Vogel is pleading that there is a substantial difference between the made-up National Standard that the prosecutor presented to the jury and the correct legal Texas Standard. Moreover, Mr. Vogel's counsel never argued on appeal that MPC's doctors should have had their behavior assessed in light of the state standards. The appeal was based on the mens rea defense. However, the mens rea of Mr. Vogel is not relevant to this instant issue. Even if Mr. Vogel thought he was breaking the law, if he wasn't, then no crime was committed. It defies the imagination to believe that even if MPC was compliant with state law, he is not entitled to relief. Certainly there are debatable legal issues, so at the very least COA should have been granted by the 5th Circuit.

The Jury Charge

In reference to Mr. Vogel's alternative argument the trial counsel was ineffective for not requiring an instruction that would require the jury to acquit Mr. Vogel if it found MPC was in compliance with State Standards, the District Court ruled that "*no reasonable jury would have found that the movant*

was operating a compliance was Texas law." The court cites the "*totality of the evidence*" without further explaining its position but limits its explanation to an out-of-context remark by defense counsel. The fact that Mr. Vogel cited the correct Texas Legal Standard codified under the color of law was ignored and never addressed. This issue alone sufficiently meets the low burden required for COA and the 5th Circuit should have granted same.

Regarding the out-of context remark by defense counsel mentioned in the previous paragraph, the fact is that defense counsel remarked that "*MPC protocol wasn't always followed.*" But, Mr. Vogel fully briefed this issue and explained it as follows: The true fact is that the government took information from a very finite number of files and bootstrap this to me they were pervasive inadequacies. The DEA scrutinized 4000 patient files with a fine-tooth comb and as a result of this exhaustive audit produced approximately one dozen files to show deviation from MPC protocol. It was a rare anomaly that MPC protocol wasn't followed. Simple mathematics demonstrate the number of files the prosecution presented that did not follow protocol was a mere zero 0.3% of the total. This translates into a 99.7% compliance rate with its own protocol by MPC.

Most importantly, the deviations made from its protocol were consistent with Texas state law. Almost every deviation from MPC protocol was a violation of MPC's internal written policy which stated "*any use of illegal drugs will disqualify a patient from our program.*"

The important point to understand is that prescribing pain medication to a drug abuser is clearly allowed under the color of Texas law (it is also interesting to note that the DEA FAQ referenced in the first issue herein stated that federal law does not prohibit prescribing opiates to drug abusers). In any event, **a doctor's duty to follow applicable state law trumps and MPC's internal policy**. The fact is that the Texas Intractable Pain Act addresses the fact that someone who abuses drugs might have a

real pain problem and should not suffer in pain because of their addiction. Furthermore, patients who did use illegal drugs were only discovered because it was part of MPC's protocol to require a urine drug test before they received the prescription. This is consistent with the proper development of a bona fide occupational relationship as defined by Texas administrative code 174.4. Finally, the infinitesimal percentage (0.3% of the total patient base) that used an illegal drug had a genuine pain condition. The prosecution never claimed otherwise.

The fact is that the District Court never responded to Mr. Vogel's explanation above. Certainly this presents yet another debate issue worthy of COA.

The Totality of the Evidence

The plain language of Texas law defining a bona fide patient-doctor relationship clearly substantiates that MPC was compliant with state law. The 0.3% deviations from MPC's internal protocol was 100% consistent with Texas law. Absent a national standard, as the 11th Circuit points out in Tobin, the CSA incorporates state standards of medical practice. Rejecting Dr. Pickens' defense (Tobin's co-defendant) that he didn't dispense drugs outside "*the usual course of practice*", the 11th Circuit ruled, "*we are not persuaded. Pickett did not assert that his conduct was consistent with the standards set by the state where he was practicing.*" **This is exactly what Vogel is asserting here**. Mr. Vogel pleads that assuming his clinic complied with the minimum prerequisite standards of establishing a bona fide doctor-patient relationship, then no crime was committed. Mr. Vogel pleads that if the minimum requirements under Texas state law at that time to establish a bona fide doctor-patient relationship may be considered very lax by many doctors and judges, as long as these

requirements were met, no crime was committed. Obviously the district court believed the face-to-face between patient and doctor was lawfully required.

For reasons outlined herein, as a matter of law, a face-to-face requirement was not a prerequisite in establishing a bona fide doctor-patient relationship under Texas law at the time and MPC did business. Mr. Vogel's clinic was judged on an unauthorized and undefined standard of medical practice. This resulted in the federal government impermissibly applying their regulation – face-to-face interaction between doctor and patient – – and using this unauthorized and it as a standard of care applicable to doctors at Vogel's Clinic. Since this was the **CRUX of the government's case** (by their own admission), had the jury been properly charged, Vogel would have been acquitted. It should be noted there was no factual evidence in The District Court's order and no substantive explanation explaining just what the "*totality of the evidence was.*"

The legal issues presented in Issues # two (2), three (3), and (4) of Mr. Vogel's brief for COA clearly meet the burden of presenting numerous debatable issues and this Supreme Court should order that the 5th Circuit hear this appeal.

Issue # 5 (Presented to the 5th Circuit for COA)- - Was trial counsel ineffective by not noticing and taking action regarding a serious incident of prosecutorial misconduct? Alternatively was this misconduct so serious and grave that Mr. Vogel's conviction must be vacated because his 6th Amendment rights to a fair trial were violated?

The prosecution took two paragraphs out of a 3-page memo (Government Exhibit 199a) that Mr. Vogel wrote to his attorney Douglas Grover, then they "*cut and pasted*" it together with three words from another document. This altered exhibit, coupled with a false and misleading closing argument,

took Mr. Vogel's words ***out of context*** and inflamed the jury to reach a conclusion that was not a reasonable deduction from the evidence.

The admissibility of government exhibit 199a as a trial exhibit was one of the issues presented in Mr. Vogel's direct appeal. However, the fact that Government Exhibit 199a was exhibited during the prosecution's closing statement in an altered state, coupled with a false assertion was never the subject of any appeal. **The district court accepted this as a separate and distinct argument**, but ultimately ruled against Mr. Vogel. The District Court found the cut-and-paste drop permissible and dismissed Mr Vogel's claim regarding the false argument by the prosecutor because it was not properly raised. A discussion follows.

THE PROSECUTOR STRIKES A FOUL BLOW

In Berger v. United States (295 US 78, 88 (35)) Justice Sutherland wrote "... *Well (a prosecutor) may strike hard blows, he is not at liberty to strike foul ones.*" Consequently, improper suggestions, insinuations, and especially assertions of personal knowledge are app to carry much more weight against the accused when they should probably carry none. **It is certainly misconduct that the prosecutor created a false deduction about evidence by using a totally false argument as was done in this case!!**

Government Exhibit 199a, the subject of this issue, is two paragraphs taken out of a 3-page memo Vogel wrote seeking advice from Attorney Grover regarding helping the government with its criminal case against Clayton Fuchs.

Fuchs owned and operated a rogue internet pharmacy. There was nothing similar about Fuchs's operation and Vogel's. Unlike MPC Fuchs' company requested no medical records, did no diagnostic testing and did not require any government-issued identification. Fuchs' doctors never even spoke to

any of the individuals they wrote prescriptions for. All the doctors did was "review" the customers one line/one-page order form which asked one medical question; the reason why the medication was needed.

Fuchs was convicted of various federal charges. The facts stated above can be verified by reviewing Fuchs' 5th Circuit opinion of his appeal (467 F 3d.889: 2006).

Mr. Vogel's three page memo to Attorney Gorver regarding assisting law enforcement prosecute Fuchs was redacted - - only the last two paragraphs of that communication was entered into evidence. As the prosecution brazenly admits in its brief opposing Mr. Vogel's 2255 motion, the prosecution took the words "*Be Wicked Smart*" from another document exhibit and pasted it on top of exhibit 199a. This altered slide was used in the prosecution's closing argument.

The prosecution falsely claimed in their closing that exhibit 199a was "*Mr. Vogel planning his criminal defense 7 years in advance.*" The prosecution knew good and well that this was not a reasonable deduction from the evidence. The unredacted three (3) page memo was obviously about one thing - - Mr. Vogel seeking advice and counsel from Attorney Grover regarding helping the government prosecute Clayton Fuchs. Even the redacted version, If read carefully, will reveal the true meaning of what the memo is really about.

Note: a copy of the fabricated Slide the prosecutor showed the jury during the closing arguments is presented herein in the Appendix D of this document.

The Prosecutor's Justification and the District Court's Ruling

Showing contemptuous boldness and gall, the prosecution first justifies this cute "*cut-and-paste*" job by claiming that placing the words "*Be Wicked Smart*" on top of exhibit 199a, was merely the act of placing a title on this slide. Random House Webster's unabridged dictionary defines "*title*" as a

"descriptive name." While titles on other government exhibits like *"Vogel's Own Words, "Controlled Substances,"* are just that --- descriptive names----- the words *"Be Wicked Smart"* are considerably different. These words are an assertion, and an insinuation. They are a suggestion, and words that were cut and pasted from another document, that were used totally out of context!

The District Court ruled that since the words, *"Be Wicked Smart,"* was lifted from other documents entered into evidence, what the prosecutor did was not impermissible. This is highly debatable, especially considering that the prosecution admitted in their brief opposing Vogel's 2255 motion, that they pasted the quote *"Be Wicked Smart"* on to exhibit 199a because *"it would establish Vogel was an arrogant, clever criminal."* This is especially prejudicial when one takes into consideration the **false** and inflammatory conclusion the prosecutor used in his closing; **that Vogel was plotting years in advance, his criminal defense with his attorney.**

Regarding the prosecutor's **false** statement at closing the District Court ruled that after reviewing Vogel's initial pleadings, they do not reveal any allegation to a false statement by the prosecutor and items first raised in a reply brief need not be considered. This seems like deja vu all over again for example, the same court and judge claim that Mr. Vogel never raised several other issues in this original 2255 motion, but he clearly did.

A careful reading of Vogel's original pleadings, will reveal that Mr. Vogel pleaded that *"counsel was ineffective by not objecting to multiple examples of the prosecution's vouching of evidence and the prosecution's improperly framed questions to witnesses."* Albeit this was listed as #4 and the exhibit 199a issue was listed as ground # 5, Pro Se pleading should be construed liberally as opposed to narrowly. Brevity is requested in the original 2255 form given out by the prison Law Library. Moreover, in Mr.

Vogel's reply brief he discussed Ground #4 and # 5 de facto as one ground as they are obviously interrelated. Mr Vogel's reply brief stated both issues are related in no uncertain terms.

A FAIR TRIAL WAS DENIED

Trial counsel was ineffective because he neither objected to the false altered exhibit nor did he object to the false closing argument. If the jury believed Mr. Vogel was plotting with his attorney years in advance concerning his criminal defense, the jury had to believe Mr. Vogel was breaking the law. The prosecution knew good and well that this very insinuation during the closing was not a reasonable deduction from the evidence.

Closing Statement

The prosecution vouched that a bona fide doctor-patient relationship required a face-to-face interaction between doctors and patients. The prosecution vouched that the dosages, length of treatment and general treatment protocol used by doctors working in MPC were "not in the usual course of practice." The prosecution made its case based on its own standards, **contrary to state law**.

Vouching is a powerful prosecutorial technique because the average person is going to believe the prosecution is truthful. For reasons stated herein, counsel was ineffective in dealing with the prosecutor's vouching of evidence at trial and on appeal. Mr. Vogel did not receive a fair trial as he was prejudiced by the false conclusion that MPC treatment protocol and prerequisite evaluation of establishing a bona fide doctor-patient relationship was legally inadequate. **The prosecution ran afoul of the 10th Amendment by displacing the State Standards on medical practice and substituting them with their own**. This was an impermissible Federal Regulation of medical practice that is not authorized by federal statute. By its own brazen admission, the prosecution cut and pasted, from another document the words "*Be Wicked Smart*" on to Government Exhibit 199a to

communicate that Vogel was and "*an arrogant, clever criminal*", and vouched falsely that Government Exhibit 199a, a memo to Vogel's attorney, was in fact Vogel "*planning is criminal defense seven years in advance.*" Note: As a reminder in the Appendix of this document is a copy of Government Exhibit 199A.

Justice Scalia

In his book: ***Making Your Case: The Art of Persuading Judges***, Justice Scalia makes a very profound point. He advises lawyers not to limit their arguments to the technical merits of his position, but to convince the judge that his position is morally right. Justice Scalia begins these thoughts by quoting a famous judge who suggests that a judge will tend to impose his or her moral will into a ruling. In other words, the judge is likely to nullify the law so that "*right prevails over wrong.*" Although not technically relevant to the facts and law of this instant memorandum, Mr. Vogel would like to very briefly discuss the moral issues relevant to his conduct and the conduct of his pain clinic.

Opiate therapy in general is subject to moral. The issues in this case are morally debatable. The fact is MPC treated over 4,000 patients during a seven-year period. Almost every patient was legitimately suffering from pain and benefited greatly from the medication they received from MPC. Albeit some illicit addicts got medication, they did so by fraud and deceit (the fact is <u>they</u> violated the law by committing fraud). Even DEA Agent Fairbanks had to admit on the stand that he could have gotten medication from any walk-in clinic using the level of the deceit he used when dealing with MPC doctors.

The "political wind" has swayed over the years and is ever-changing. **<u>Circa the time MPC did business, the law considered the right of pain patients paramount</u>**, later on, long after MPC was

gone, addiction prevention became more of a priority then pain patients' rights. The debate goes on. Morality is not always such a consensus.

Note: In actuality the law did change and the law (both on a State and Federal level) became more in line with what the Prosecutor, District Court Judge, Circuit Court Judge, etc. thought the law should be. But, the change in law was LONG AFTER MPC ceased to do business and long after Mr. Vogel's trial for that matter.

In any event, the law should be applied as it was at the time Mr. Vogel did business. **The law should really be the only issue.** Circuit Judge Joan Lawson said "**The law is an *"IS"* not a *"SHOULD BE."*** Vogel prays that the law dictate in this case.

THE 5th CIRCUITS DENIAL OF COA IS CONTRARY TO LAW AND PRECEDENT

The 5th Circuit, denying Mr. Vogel an appeal based on a one line ruling stating that "*Vogel has not met this standard* (for COA)" (see Order in the Appendix) is clearly contrary to the established standard of this Supreme Court. Considering Mr. Vogel's claim of actual innocence it would be a travesty of justice if Mr. Vogel's case was not decided on its merits. The 5th Circuit previously avoided addressing Mr. Vogel's legal claims by dismissing his case based on a hyper-technical ruling contrary to the rulings of this Supreme Court (and its own established precedent for that matter). Fortunately this Supreme Court intervened and granted Mr. Vogel's Writ of Certiorari remanding the issue back to the 5th Circuit. Mr. Vogel is back again asking this Court to once again give him a fair hearing on his claims.

The importance of this case, not only to Mr. Vogel, but to the public in general is of extreme importance. Any criminal defendant who is actually innocent and also can meet the high burden of proving a Constitutional error should not be subject to summary dismissal (a one line ruling) based on a ruling that fails to address any of the highly debatable legal issues raised. This case involves the

sovereignty of States Rights (10th Amendment issues). This case also puts at issue the credibility of the office of the United States Prosecutor - - in the instant case, the prosecutor falsely conveyed to the jury that the defendant was "*plotting his criminal defense seven years in advance,*" with his attorney.

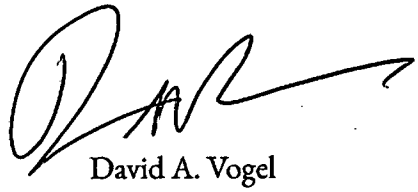
The issues herein cry out for appellate review. Mr. Vogel prays that this case be remanded to the 5th Circuit with an Order requiring COA.

> A judge who likes every outcome he reaches is very likely a bad judge... stretching for results he prefers rather than those the law demands.
>
> **Neil Gorsuch**

Conclusion

Petitioner Prays that this Writ be granted.

Respectfully submitted,



David A. Vogel

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