21-1025

No. _____

In The Supreme Court of the United States

Ashwani Sheoran, RPh

Petitioner,

v.

Wal-Mart Stores East, LP, et al.

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Ashwani Sheoran, RPh
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Petitioner

QUESTIONS PRESENTED

1. Whether a circuit split on how to apply Fed. R Civ. P. 9(b) in pleading cases under the False Claims Act requires a more rigorous approach, such as requiring "representative examples," as the Fourth, Sixth, Eighth, and Eleventh Circuits hold or a more nuanced approach such as allowing for "reliable indicia that leads to a strong inference that claims were actually submitted" as the First, Fifth, and Ninth Circuits hold.

2. Whether each section of the False Claims Act, 31 U.S.C. § 3729(a)(1)(A) and (B), constitutes a separate violation with a separate analysis as the Seventh and Eleventh Circuits hold or whether the two sections can be combined into one analysis to find an FCA violation as the Sixth and Ninth Circuits hold.

3. Whether pleading retaliation under the False Claims Act, 31 U.S.C. § 3730(h), requires the defendant to know that an employee is pursuing an FCA action as the Sixth Circuit held in this case, or whether the post-2009 amendment to the statute removes that sole outdated requirement.

4. Whether Sheoran has been denied his constitutional rights under the Fifth and Fourteenth Amendments of the United States Constitution without due process of law.

LIST OF PARTIES

Petitioner Ashwani Sheoran, RPh was the plaintiff-relator in the district court, appellant in the court of appeals, and petitioner in this Court.

United States of America, although the real party in interest in a *qui tam* action, it is not a party to this litigation.

State of Michigan, although the real party in interest in a *qui tam* action, it is not a party to this litigation.

Respondents listed below were defendants in the district court, appellees in the court of appeals, and respondents in this Court:

Wal-Mart Stores East, LP
Richard Lockard, M.D.
Toi Walker
Alfred Rodriguez
Doug Henger

RELATED PROCEEDINGS

Sheoran et al. v. Wal-Mart Stores East, LP, No. 20-2128 (6th Cir. filed November 16, 2020); opinion entered June 4, 2021; petition for rehearing *en banc* denied August 29, 2021.

Sheoran, et al., v. Wal-Mart Stores East, LP, No. 4:13-cv-10568, (E.D. Mich. filed February 11, 2013; judgment entered October 19, 2020).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case under Supreme Court Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Ashwani Sheoran, RPh, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's opinion entered on June 4, 2021, is not published in the Federal Reporter (Appx. A). The order denying the petition for rehearing *en banc* was entered on August 9, 2021 (Appx. B). The district court's opinion and order was entered on August 20, 2019 (Appx. C). The district court's opinion and order denying Sheoran's motion for reconsideration was entered on September 28, 2020 (Appx. D).

STATEMENT OF JURISDICTION

The Sixth Circuit entered its opinion on June 4, 2021. The order denying Sheoran's petition for rehearing *en banc* was entered on August 9, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

31 U.S.C. § 3729(a)(1) *et seq.* provides liability for any person who:

> (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
> (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim; [or]
> (C) conspires to commit a violation of subparagraph (A) [or] (B)....

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall...be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This opioid whistleblower *qui tam* case under the False Claims Act, 31 U.S.C. § 3729 *et seq.*, has been pending since February 11, 2013. It remained under seal for over five (5) years while the government decided whether to intervene. When the government did not intervene, the district court unsealed the complaint on March 8, 2018, at which time Sheoran's original counsel decided not to represent him any longer. He had limited time to

find other counsel before losing his claims. Attorney Ann Marie Stinnett has represented Sheoran at the federal district level, appellate level, but now cannot represent him as counsel of record at the U.S. Supreme Court level for reasons explained below.

The original and amended complaint were filed under seal by Sheoran's original counsel. Walmart moved to dismiss the amended complaint. Sheoran's new counsel moved to amend it by adding, *inter alia,* a Medical Expenses Summary as Exhibit A. The district court granted the motion to amend, and Sheoran filed the second amended complaint. Walmart and Dr. Lockard moved to dismiss it. Two other doctors who are no longer part of this case answered the complaint. The district court granted the Rule 12(b)(6) motions to dismiss on August 20, 2019 (Appx. C). Sheoran moved for reconsideration, and after a year the district court denied Sheoran's motion in a 9-page opinion and order entered on September 28, 2020 (Appx. D). Sheoran appealed.

Sheoran appealed two (2) issues in his Appellant Brief in the Sixth Circuit Court of Appeals: 1) whether the district court erred by waiving oral argument due to the numerous factual and legal mistakes in the resulting opinion and 2) whether the district court erred by dismissing Sheoran's state law claims without notice or argument. On June 4, 2021, the Sixth Circuit affirmed the district court's decision to grant summary judgment to Walmart and Dr. Lockard (Appx. A). Sheoran filed a petition for rehearing based on the Sixth Circuit ignoring

relevant facts favorable to Sheoran and using incorrect law. The Sixth Circuit denied Sheoran's petition for rehearing and issued a show cause order why Sheoran's counsel Ann Marie Stinnett should not be sanctioned under Fed. R. Civ. P. 11 (Appx. B). This petition for writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

I. There is a circuit split on how to plead False Claims Act violations under Fed. R. Civ. P. 9(b). Clarification must come from the U.S. Supreme Court, and this case is the perfect vehicle to provide this clarification.

The Third Circuit describes the circuit split between those courts using a more rigid pleading standard under Fed. R. Civ. P. 9(b) and those using a more nuanced application of Rule 9(b) under the False Claims Act:

> The Fourth, Sixth, Eighth, and Eleventh Circuits have held that a plaintiff must show "representative samples" of the alleged fraudulent conduct, specifying the time, place, and content of the acts and the identity of the actors. See *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 455-56 (4th Cir. 2013), cert. denied, 134 S.Ct. 1759, (2014) (No. 156*156 12-1349); *United States ex rel.*

> *Bledsoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493, 510 (6th Cir. 2007); *United States ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 557 (8th Cir. 2006); *United States ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1308, 1312 (11th Cir. 2002). The First, Fifth, and Ninth Circuits, however, have taken a more nuanced reading of the heightened pleading requirements of Rule 9(b), holding that it is sufficient for a plaintiff to allege "particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009); see also *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998-99 (9th Cir. 2010).
>
> Furthermore, ... the Solicitor General indicated that the United States also believes that the heightened or "rigid" pleading standard required by the Fourth, Sixth, Eighth, and Eleventh Circuits is "unsupported by Rule 9(b) and undermines the FCA's effectiveness as a tool to combat fraud against the United States."

Foglia, et al. v. Renal Ventures Management, LLC, No. 12-4050 (3rd Cir. 2014) (unpublished).

Since the events in this case occurred in Michigan, this case falls under Sixth Circuit jurisdiction—one of the jurisdictions identified above as having a "rigid" pleading standard. *Id.*

To overcome this standard, Sheoran attached a Medical Expenses Summary to his second amended complaint. In addition, Sheoran added two new allegations concerning the Medical Expenses Summary:

> 77. One example of over 5,000 seen by Relator for Dr. Lockard on Walmart's computers and Walmart's log book is attached as Exhibit A, which contains a list of filled prescriptions for one person over the course of five (5) years that if actually taken would kill the person.
>
> 78. Medicare or Medicaid was used in each entry of Exhibit A wherein the cost to the patient is about $1-$2.

Sheoran's pleading should satisfy Fed. R. Civ. P. 9(b) under the False Claims Act in the Sixth Circuit.[1] Otherwise, his complaint satisfies the "reliable indicia that leads to a strong inference that claims were actually submitted" found in those courts taking a more nuanced approach to Rule 9(b). *Id.*

Rule 9(b) has four purposes:

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[1] At this stage of the proceedings, Sheoran is not able to access the government's data absent a subpoena since the government did not intervene. Walmart has the data in the Medical Expenses Summary and did not argue the non-usage of Medicare or Medicaid like the lower courts did.

> First, the rule ensures that the defendant has sufficient information to formulate a defense by putting it on notice of the conduct complained of....
> Second, Rule 9(b) exists to protect defendants from frivolous suits.
> A third reason for the rule is to eliminate fraud actions in which all the facts are learned after discovery.
> Finally, Rule 9(b) protects defendants from harm to their goodwill and reputation.

Harrison v. Westinghouse Savannah River Co., 176 F.3d. 776, 784 (4th Cir. 1999).

In this case, Sheoran's pleading satisfies all four purposes of Rule 9(b). First, this case is limited to one doctor at one pharmacy location. Thus, Walmart is on notice of the conduct complained of and can either admit or deny the allegations. *Id.*

Second, this is not a frivolous suit. Sheoran has seen thousands of examples of grossly over-prescribed opioids from Dr. Lockard, provided an example of one patient as Exhibit A, and alleges that if the narcotics in the Medical Expenses Summary were actually taken, then that person

would not be alive.[2] Sheoran made this allegation before the Department of Justice filed a nationwide lawsuit against Walmart based on many pharmacists' observations of grossly over-prescribed narcotics that Walmart filled.[3]

Third, all of the facts in this case are already established and will not be learned after discovery—there are over 5,000 patients of Dr. Lockard at a pharmacy in Bad Axe, Michigan, with Medical Expenses Summaries similar to the one attached to the second amended complaint.

Fourth, Walmart's goodwill and reputation have already been harmed based on the Department of Justice's sweeping complaint and the pharmacists' allegations contained within it. So far, Walmart's attempt for declaratory relief from the Department of Justice's lawsuit has been unsuccessful.[4]

Sheoran has satisfied all of the purposes of Rule 9(b) with respect to the False Claims Act and

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[2] A 160-page complaint in *USA v. Walmart, Inc.*, Case No. 1:20-cv-01744, (Dist. Del., filed December 22, 2020), provides some explanation of the opioids used in the Medical Expenses Summary in this case. For example, a monthly supply of 450 methadone (10 mg) tablets was enough to give the patient an average daily MME of 1800 called "massive quantities of methadone" when the CDC-recommended maximum...[is] 90 MME."

[3] *USA v. Walmart, Inc.*, Case No. 1:20-cv-01744 (District of Delaware, filed December 22, 2020).

[4] *See* Walmart's Motion for Declaratory Relief in *Walmart, Inc. v. U.S. Dep't of Justice*, et al., Case No. 4-20-cv-00817 (E.D Tex., filed October 22, 2020) currently on appeal at *Walmart, Inc. v. U.S. Dep't of Justice, et al.*, Case No. 21-40157 (5th Cir.).

should be allowed to proceed with his second amended complaint.

II. Each section of the False Claims Act, 31 U.S.C. § 3729(a)(1)(A) and (B), constitutes a separate violation rendering *Sheldon v. Kettering* bad law.

The actual complaint in *Sheldon v. Kettering Health Network*, 816 F.3d 399 (6th Cir. 2016) did not specify 31 U.S.C. § 3729(a)(1)(A) or (B) as separate avenues for liability. Rather, that complaint grouped them together under "31 U.S.C. § 3730 et seq." Thus, the distinction between the two sections was never at issue, and the Sixth Circuit treated the two sections together. So, the "presentment" requirement in 31 U.S.C. § 3729(a)(1)(A) but not in (B) and the "material" requirement in 31 U.S.C. § 3729(a)(1)(B) but not (A) were improperly merged. Therefore, *Sheldon* incorrectly holds that a litigant must plead both presentment and materiality for a valid FCA claim. This is not true from the statute itself, which uses the conjunction "or" not "and" when delineating what sections constitute an FCA violation. Further, at least the Seventh and Eleventh Circuits analyze the two sections separately for an FCA violation. Like the Sixth Circuit, however, the Ninth Circuit analyzed both sections together in *Campie v. Gilead Sciences, Inc.*, 862 F.3d 890, 898-899 (9th Cir. 2017). In that case, the Ninth Circuit left out "presentment" altogether as one of the elements. This Court should clarify that each section should be analyzed

separately under 31 U.S.C. § 3729(a)(1)(A) and (B) to rectify the circuit split.

III. Requiring a defendant to know that an employee is pursuing an FCA action to show retaliation under the False Claims Act is no longer good law.

The Sixth Circuit does not yet have a published case that reflects the post-2009 amendment to the False Claims Act, 31 U.S.C. § 3730(h). The lower courts have simply listed the old law with the updated statute:

> The FCA was amended in 2009 and now protects two categories of conduct. In addition to protecting lawful acts taken in furtherance of an action under the FCA, it now also protects employees from being fired for undertaking other efforts to stop violations of the Act, such as reporting suspected misconduct to internal supervisors.

Crocket v. Complete Fitness Rehabilitation, Inc., Case No. 13-12362, (E.D. Mich. 2016) (citations and quotations omitted).

Judge McKeague who wrote the Sixth Circuit opinion in this case using the old law also wrote another unpublished Sixth Circuit opinion a few years ago in which he used the new post-2009 amendment law for an FCA retaliation claim. *See Fakorede v. Mid-South Heart Center, P.C.*, No. 16-5722 (6th Cir. 2017) (unpublished). Unfortunately,

Judge McKeague did not use the updated law in this case like he did a few years ago. If he did, Sheoran would have definitely satisfied the pleading requirements for an FCA retaliation claim because, *inter alia*, the second amended complaint shows 1) Sheoran reported his concerns of illegal activity to all levels of upper management, including the CEO of Walmart; 2) he told his supervisor and upper management to contact the Drug Enforcement Agency about Walmart filling illegal narcotics prescriptions; 3) he informed his supervisor that he contacted the Taylor Police Department about Walmart filling illegal narcotics prescriptions and filed a police report; and 4) he was chastised for allegedly removing copies of illegal prescriptions from the pharmacy. Despite being chastised by Walmart, the law is supposed to protect Sheoran, and any whistleblower, by allowing them to gather HIPPA documents for a whistleblower action so long as the information is given to private attorneys or the government. 45 CFR § 164.502 (j)(1) of HIPPA.

All these allegations listed above satisfy the post-2009 amendment criteria for a valid FCA retaliation claim. The Sixth Circuit was incorrect in using outdated law that required an employer to know an employee was pursuing an FCA claim. *See Miller v. Abbott Labs*, No. 15-5762, (6th Cir. 2016) (unpublished), "Therefore, pre-amendment case law holding that activity is protected only if it is in furtherance of a potential or actual *qui tam* [FCA] action is no longer applicable (citation omitted)."

IV. Sheoran has been denied his constitutional rights under the Fifth and Fourteenth Amendments of the United States Constitution without due process of law.

> As a registered pharmacist, Sheoran must take continuing education classes every two (2) years in Michigan. Continuing education includes identifying when narcotics are being overprescribed. Pharmacists are trained to identify the illegal diversion of narcotics and are the first line of defense against the opioid crisis as a gatekeeper for the public's safety. Pharmacists cannot fill prescriptions they believe were written for illegal purposes. In addition, Sheoran is a licensed pharmacist in ten (10) states, unlike most pharmacists, and took a separate examination for all ten (10) states. Each examination required him to identify when narcotics are being overprescribed. A pharmacist can get into trouble with the police, the Drug Enforcement Agency, and/or the State Board of Pharmacy if he or she filled prescriptions that they were trained to know are illegal....
>
> As a pharmacist, Sheoran's pharmaceutical responsibility is to

> make sure patients pay by Medicare or Medicaid, if eligible, before releasing medication to them. Further, unlike most pharmacists, Sheoran was a Pharmacy Manager at two locations and even owned a pharmacy. He has knowledge about billing Medicare and Medicaid from all his experiences.

Sixth Circuit Petition for Rehearing *En Banc,* Section 5, Pages 11-12, filed June 21, 2021.

Sheoran should have had oral argument before the district court granted Walmart's motion to dismiss under Fed. R. Civ. P. 12(b)(6). The district court used an incorrect legal standard to grant the 12(b)(6) motion (used the summary judgment standard requiring evidence). Further, the district court also misread the Medical Expenses Summary attached as Exhibit A to the second amended complaint by confusing the number of tablets with the number of milligrams in its analysis. Either one of these mistakes alone is error, which would require Sheoran to have had oral argument. *In re Whirlpool Corp. Front-Loading Washer Prods. Litig.*, 678 F.3d 409, 416 (6th Cir. 2012). The Sixth Circuit ignored both of these mistakes completely.

Further, the lower courts routinely disregarded Sheoran's factual allegations in his complaint as well as the corroborating declaration from another registered pharmacist Amrinder Thind. Instead, they substituted their own opinions as to the education, knowledge, and training of pharmacists,

without providing any bases for such opinions in the record. How can a judge know more about the education, knowledge, and training of pharmacists than the two (2) pharmacists themselves (Sheoran and Thind)?[5]

Specifically, the lower courts used the following incorrect factual conclusions against Sheoran to deny his claims without a hearing or an opportunity to be heard:

> This Court cannot accept Relator's unsupported assertions of fraud or falsity because it cannot accept his speculations, as a pharmacist, as to what constitutes "high doses" for unidentified patients from whom he had no other medical information. Neither can it accept Relator's bare-bone [*sic*] assertion that each entry shows the patient used Medicare or Medicaid funds.

Appx. C, pp. 27a-28a.

> Even if the Court were to consider the Thind affidavit, while the fact that the patient associated with Exhibit A paid $1 to $2 for each filled prescription may suggest that the prescriptions were

[5] Rule 12(b)(6) requires all well-pled facts be accepted as true and viewed in the light most favorable to the plaintiff (Sheoran).

> subsidized, it does not suggest that Medicare or Medicaid—as opposed to, for example, a private insurance company—did the subsidizing.

Appx. D, p. 39a.

> Sheoran argues that because some of the payments were for $1-2, the patient must have received government reimbursement through Medicare or Medicaid.... As the district court noted, many reasons could exist for the low costs to the patient, such as subsidizing by private insurance companies.

Appx. A, p. 7a.

> [Sheoran claims] that the "high doses" listed "would kill the person" if taken as prescribed.... It is impossible to evaluate whether the doses were too high without more information regarding the patient's medical history or needs.

Appx. A, pp. 7a-8a.

In addition, during the five (5) years Sheoran was waiting for the government's decision, *Sheldon v. Kettering* became law in the Sixth Circuit. As previously discussed, *Sheldon* is bad law because it combines the elements of two sections to create a more rigorous standard for pleading a False Claims Act violation. Is it fair for Sheoran to be held to this

higher pleading standard when his complaint was filed under seal years before *Sheldon* was decided?

On appeal, the Sixth Circuit masked the fact that Walmart never moved to dismiss the state law claims against it. This is why the parties never argued them, and Sheoran was given no notice or an opportunity to be heard before they were dismissed. Justice requires he be given the opportunity to address any pleading issues with his state law claims before they are dismissed.

Finally, the Sixth Circuit's draconian response to Sheoran's motion for reconsideration violated Sheoran's due process rights. The Michigan Ethics Hotline advises attorneys of their right to be direct and blunt in their writing. In practice, stating words like "judges who ignore relevant facts compromise judicial integrity" is blunt. The fact that the Sixth Circuit overreacted to these statements by sanctioning Sheoran's attorney under Fed. R. Civ. P. 11 is telling. It also helps Walmart—not only by disqualifying Sheoran's counsel from appealing this case but also by taking time away from preparing this petition.

At a basic level, the Federal Rules of Civil Procedure govern the district courts.[6] The Sixth Circuit is an appellate court. The Sixth Circuit is governed by the Federal Rules of Appellate

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[6] Fed. R. Civ. P. 1 states "These rules govern the procedure in all civil actions and proceedings in the United States district courts...."

Procedure.[7] The Sixth Circuit is not governed by the district court rules and vice-versa.

The courts of appeals are the reviewing authority when district courts use Fed. R. Civ. P. 11. A litigant is guaranteed a review of a Rule 11 sanction, if he or she chooses, at the appellate level. There is no case selection process at the court of appeals like there is at the Supreme Court level. Further, a Rule 11 sanction does not automatically disqualify an attorney from joining the Sixth Circuit Bar to argue an appeal of the Rule 11 sanction. Thus, a litigant can keep his or her attorney at the appellate level despite the Rule 11 sanction.

When an appellate court invokes a district court rule, who is the reviewing court? The U.S. Supreme Court. Unlike the Sixth Circuit Bar, the U.S. Supreme Court Bar prohibits an attorney from arguing before it if that attorney has "been the subject of any adverse disciplinary action pronounced or in effect during that 3-year period" before applying. Supreme Court Rule 5. In effect, the Sixth Circuit's erroneous show cause order (Appx. B) disqualified Sheoran's attorney from filing this petition for a writ of certiorari. Further, given the selective nature of U. S. Supreme Court cases, Sheoran is not guaranteed the right to have the Sixth Circuit's erroneous sanctions reviewed.

If appellate courts are able to have unreviewed sanction authority, then certain safeguards should be

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[7] Fed. R. App. P. 1(a)(1) states "These rules govern procedure in the United States courts of appeals."

put in place to ensure that the sanctions do not negatively impact a litigant and his right to counsel of his choosing or being able to appeal the sanction to a higher authority such as the U. S. Supreme Court.

Further, the Sixth Circuit's notice under Fed. R. Civ. P. 11 is insufficient (Appx. B). Citing "multiple specious allegations of judicial misconduct" is just as specious and vague when Rule 11(c)(3) requires specificity. Which statements are causing the issue? A reasonable observer would note the self-serving nature of the Sixth Circuit's improper show cause order issued by the same panel that was challenged, with no apparent oversight authority. Assuming the attorney is willing to represent him, Sheoran has a right to use counsel of his choosing without the unnecessary interference from a court overstepping its judicial authority.

CONCLUSION

For these reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,
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Petitioner

November 8, 2021

APPENDIX A

NOT RECOMMENDED FOR PUBLICATION
File Name: 21a0275n.06

Case No. 20-2128

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES	)	
OF AMERICA and	)	ON APPEAL
STATE OF MICHIGAN,	)	FROM THE
ex rel.,	)	UNITED
Plaintiffs-Relators,	)	STATES
	)	DISTRICT
ASHWANI SHEORAN, RPh,	)	COURT
Plaintiff-Relator/	)	FOR THE
Appellant,	)	EASTERN
	)	DISTRICT
v.	)	OF MICHIGAN
	)	
WAL-MART STORES	)	
EAST, LP, TOI WALKER;	)	
DOUG HENGER;	)	**O P I N I O N**
ALFRED RODRIGUEZ;	)	
RICHARD LOCKARD, M.D.,	)	
Defendants-Appellees.	)	