



U.S. Department of Justice

Executive Office for United States Attorneys

Freedom of Information and Privacy Staff

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September 23, 2024

VIA

Neil Anand
1313 Cheltenham Drive
Bensalem, PA 19020
cardiacgasman@gmail.com

Re: Request Number: EOUSA-2024-002389
Date of Receipt: July 02, 2024
Subject of Request: OIP FOIA Litigation Referral: Anand v. DPJ, No; 23-cv-02527 (EDPA)

Dear Neil Anand:

This is in reply to your Freedom of Information Act/Privacy Act request to the Office of Information Policy (OIP). Records were referred to us by the aforementioned government component for direct response to you.

The referred material has been considered under both the FOIA and the Privacy Act to provide you the greatest degree of access. The records you seek are located in a Privacy Act system of records that, in accordance with regulations promulgated by the Attorney General, is exempt from the access provisions of the Privacy Act. We have processed your request under the Freedom of Information Act and are making all records required to be released, or considered appropriate for release as a matter of discretion, available to you. An enclosure to this letter explains the exemptions in more detail.

(b)(5)
(b)(6)
(b)(7)(C)

We have reviewed approximately 18 pages of material:

18 pages are being released in part (RIP)

This is the final action on this above-numbered request. If you are not satisfied with my response to your request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Sixth Floor, 441 G Street, NW, Washington, DC 20530 or you may submit an appeal through OIP's FOIA STAR portal by creating an account following the instructions on OIP's website: <https://www.justice.gov/oip/submit-and-track-request-or-appeal>. Your appeal must be postmarked or electronically transmitted within ninety

(90) days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

You may contact our FOIA Public Liaison at the telephone number listed above for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001; e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Sincerely,

A handwritten signature in blue ink, appearing to read "Kevin Krebs", is written over a light blue rectangular background.

Kevin Krebs
Assistant Director

Enclosure(s)

FOIA: TITLE 5, UNITED STATES CODE, SECTION 552

- (b)(1) (A) specifically authorized under criteria established by and Executive order to be kept secret in the in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
 - (b)(2) related solely to the internal personnel rules and practices of an agency;
 - (b)(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
 - (b)(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
 - (b)(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
 - (b)(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
 - (b)(7) records or information compiled for law enforcement purposes, but only the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual.
 - (b)(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
 - (b)(9) geological and geophysical information and data, including maps, concerning wells.
- PRIVACY ACT: TITLE 5, UNITED STATES CODE, SECTION 552a**
- (d)(5) information compiled in reasonable anticipation of a civil action proceeding;
 - (j)(2) material reporting investigative efforts pertaining to the enforcement of criminal law including efforts to prevent, control, or reduce crime or apprehend criminals;
 - (k)(1) information which is currently and properly classified pursuant to Executive Order 12356 in the interest of the national defense or foreign policy, for example, information involving intelligence sources or methods;
 - (k)(2) investigatory material compiled for law enforcement purposes, other than criminal, which did not result in loss of a right, benefit or privilege under Federal programs, or which would identify a source who furnished information pursuant to a promise that his/her identity would be held in confidence;
 - (k)(3) material maintained in connection with providing protective services to the President of the United States or any other individual pursuant to the authority of Title 18, United States Code, Section 3056;
 - (k)(4) required by statute to be maintained and used solely as statistical records;
 - (k)(5) investigatory material compiled solely for the purpose of determining suitability eligibility, or qualification for Federal civilian employment or for access to classified information, the disclosure of which would reveal the identity of the person who furnished information pursuant to a promise that his identity would be held in confidence;
 - (k)(6) testing or examination material used to determine individual qualifications for appointment or promotion in Federal Government service the release of which would compromise the testing or examination process;
 - (k)(7) material used to determine potential for promotion in the armed services, the disclosure of which would reveal the identity of the person who furnished the material pursuant to a promise that his identity would be held in confidence.

From: "Furst, Mona (USADC)" (b)(6); (b)(7)(C)

To: "Liu, Christina (USACAN)" (b)(6); (b)(7)(C), USAEO-Drug-Diversion

(b)(6); (b)(7)(C)

USAEO-Opioid-Coordinators (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

Cc: "Weingarten, Ross (USACAN)" (b)(6); (b)(7)(C)

Subject: RE: Constitutional briefing in dirty doctor case

Date: Wed, 20 Oct 2021 16:06:59 +0000

Importance: Normal

Attachments: 274 - US Resp to (b)(6); (b)(7)(C) Mot to Dismiss.pdf; 268 -

(b)(6); (b)(7)(C) Motion to Dismiss Indictment.pdf

(b)(5) Good luck

Regards,

Mona Lee Furst
SLC/AUSA
District of Kansas
Detailee – District of Columbia
Direct line (b)(6); (b)(7)(C)

From: Liu, Christina (USACAN) (b)(6); (b)(7)(C)

Sent: Tuesday, October 19, 2021 6:55 PM

To: (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

Cc: Weingarten, Ross (USACAN) (b)(6); (b)(7)(C)

Subject: Constitutional briefing in dirty doctor case

Hi everyone,

My colleague has this question about MTD briefing in a dirty doctor case:

(b)(5)

I'm wondering if you or your colleagues have briefed either of these issues before? If so, I'd love to take a look!

Thanks,
Ross

Ross Weingarten
Assistant United States Attorney
450 Golden Gate Ave.
San Francisco, CA 94114

(b)(6); (b)(7)(C)

If you've briefed these issues before, please respond directly to Ross.

Thank you!

Christina Liu

Assistant United States Attorney
Northern District of California
450 Golden Gate Avenue, 9th Floor
San Francisco, California 94102

(b)(6); (b)(7)(C)



**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

UNITED STATES OF AMERICA,)
Plaintiff,)
v.)
(b)(6); (b)(7)(C))
et al.,)
Defendant.)

CASE NO: (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C) **MOTION TO DISMISS
AND MEMORANDUM OF LAW IN SUPPORT**

(b)(6); (b)(7)(C) moves this Court pursuant to Federal Rule of Criminal Procedure 12(b) and the Due Process Clause of the Fifth Amendment, for an order dismissing the indictment against him because it improperly declares illegitimate a medical standard of care not delineated as such by state law and because 21 U.S.C. §841 is unconstitutionally vague as applied to (b)(6); (b)(7)(C)

FACTS

The indictment, filed January 12, 2016, charges (b)(6); (b)(7)(C) with multiple counts of conspiracy to distribute controlled substances outside the usual course of medical practice and without a legitimate medical purpose, distributing controlled substances outside the usual course of medical practice and without a legitimate medical purpose, and one count of possessing a fire arm in furtherance of drug trafficking. The indictment also charges five counts of engaging in a monetary transaction which involved the proceeds of unlawful activity, conspiracy to distribute a controlled substance and the distribution of a controlled

substance; and six counts of money laundering the proceeds of unlawful activity, conspiracy to distribute a controlled substance and the distribution of a controlled substance.

All of these counts hinge on whether (b)(6); (b)(7)(C) acted outside of the usual medical practice and without a legitimate medical purpose.¹

During the dates in the indictment, (b)(6); (b)(7)(C) practice focused on treating chronic pain patients. He is a medical doctor who obtained his medical license from the University of Kansas School of Medicine (b)(6); (b)(7)(C) worked in Emergency Medicine for most of his career, working in emergency departments at Via Christi, Salina Regional Health Center, Great Bend Regional Health Center, and Galichia Heart Hospital.

(b)(6); (b)(7)(C) traveled throughout the world providing medical care to underserved people with Christian medical missionary teams so he could provide care to those with no other option for care. This has been a driving belief in (b)(6); (b)(7)(C) career: care for those in the community with no other option and relieve suffering wherever you can. (b)(6); (b)(7)(C) realized there was a lack of treatment options for those suffering from pain and began providing pain treatment for this under-served population.

(b)(6); (b)(7)(C) was registered with the Drug Enforcement Administration to dispense, administer, and prescribe controlled substances during the time at issue in the indictment.

¹ The indictment also charges (b)(6); (b)(7)(C) with one count of presenting a false record in response to a grand jury subpoena and one count of obstruction of justice. These two discrete counts do not hinge on a determination of acting outside the usual course of medical practice and without a legitimate medical purpose. However, they arise from an investigation of this issue.

ISSUES PRESENTED

1. Whether the Controlled Substances Act as applied in this case is unconstitutionally vague?
2. Whether the indictment improperly declares illegitimate a medical standard of care not delineated as such by state law?

ARGUMENT AND AUTHORITY

I. The statute is void for vagueness as applied and violates due process.

A. Vague statutes are unconstitutional.

The Constitution's guarantee of due process prohibits laws so vague that persons "of common intelligence must necessarily guess at [their] meaning and differ as to [their] application." *Smith v. Goguen*, 415 U.S. 566, 572 n.8 (1974) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). "It is a fundamental component of due process that a law is void-for-vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); accord, *Jane L. V. Bangerter*, 61 F.3d 1493, 1500 (10th Cir. 1995), *rev'd and remanded on other grounds sub.nom. Leavitt v. Jane L.*, 518 U.S. 137 (1996).

Vague laws offend due process in two ways. First, they fail to provide the persons targeted by the statute with a "reasonable opportunity to know what is prohibited, so that [they] may act accordingly." *Grayned*, 408 U.S. at 108; *Jane L.*, 61 F.3d at 1500 (abortion restriction prohibiting "experimentation on "live unborn children" void for vagueness).

Second, by failing to provide explicit standards by which to assess conduct, vague laws "impermissibly delegate basic policy matters...for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory enforcement." *Grayned*, 408

U.S. at 108-09; *see also Jane L.*, 61 F.3d at 1500. In other words, by failing to define explicitly what conduct is proscribed, vague laws invite arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972).

“[T]he degree of vagueness that the Constitution tolerates...depends in part on the nature of the enactment.” *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). Statutes that impose criminal penalties are subjected to a higher standard of certainty in their language than is applicable to other statutes. *See, e.g., Kolender*, 461 U.S. at 357; and *Goguen*, 415 U.S. at 574-75.

B. A statute deemed to be unconstitutionally vague as applied is void.

Even if a statute is not void for vagueness on its face, it can still be found void for vagueness if the charged conduct falls outside the scope of the statute’s stated prohibitions. This is generally denominated as the void for vagueness as applied doctrine. Facial-vagueness and vagueness-as-applied claims are not the same thing. *See Palmer v. City of Euclid*, 402 U.S. 544 (1971) (majority opinion finding suspicious-person ordinance vague as applied; concurring opinion finding ordinance facially vague). Facial-vagueness claims are concerned only with the language of a statute standing alone, and not with any particular application of the statute. *See, e.g., State v. Bryan*, 259 Kan. 143 (1996) (finding Kansas stalking statute facially vague on basis of statutory language alone; noting that facts of particular case not in record). In contrast, vagueness-as-applied claims ask (1) whether the language of a statute gives adequate notice that it covers the conduct at issue (in this case “usual course of professional practice” “legitimate medical purpose”) and/or (2) whether the statute was

applied in such a way to guard against arbitrary enforcement (in this case the interpretation by federal agents with no medical training of whether a particular medical practice falls within the usual course of professional practice.). See *United States v. Salisbury*, 983 F.2d 1369, 1378 (6th Cir. 1993).

An “as applied” void-for-vagueness challenge has two elements: fair notice and enforcement standards.

A statute is impermissibly vague if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Additionally, a statute that authorizes or encourages arbitrary and discriminatory enforcement can be impermissibly vague.

United States v. Franklin-El, 554 F.3d 903, 910 (10th Cir. 2009) (internal citations and quotations omitted).

In *Washington v. Locklear* Eddie James Locklear was a passenger in a car. When it stopped, he got out, walked two blocks, and fired a gun at an occupied house. 105 Wash.App. 555, 20 P.3d 993 (Wash.App. Div. 2 2001). He was convicted under a drive-by shooting statute which prohibited firing a gun “either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport [him] or the firearm, or both, to the scene of the discharge.” *Id.* at 995.

The *Locklear* court held:

Undoubtedly, a person of ordinary intelligence would know without guessing that this nexus exists when a car transports the shooter or the gun to the scene, and the shooter fires from inside the car. . . . Undoubtedly, a person of ordinary intelligence would know without guessing that the required nexus exists when a shooter is transported to the scene in a car, gets out, and fires from within a few feet or yards of the car. . . . In contrast, however, a person of ordinary intelligence would *not* know without guessing whether the required nexus exists when a shooter is transported to the scene in a car, *walks two blocks away*,

then fires the gun. Although the term “immediate area of a motor vehicle” includes at its core the area within a few feet or yards of the motor vehicle, how is one to know whether it includes a location two blocks away? Although the term “scene of the discharge” includes at its core the area within a few feet or yards of the gun when the gun is fired, how is one to know whether it includes a location two blocks away? A person of common intelligence cannot answer these questions without guessing, and the statute is unconstitutionally vague as applied to this case.

Id. at 996. The *Locklear* case provides a vivid example of the underlying doctrine. As the Supreme Court has explained, “there are statutes that by their terms or as authoritatively construed apply without question to certain activities, but whose application to other behavior is uncertain.” *Goguen*, 415 U.S. at 577-578.

Regarding fair notice, [o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness.

* * *

Regarding the adequacy of enforcement standards, [d]ue process requires that legislation state reasonably clear guidelines for law enforcement officials, juries, and courts to follow in discharging their responsibility of identifying and evaluating allegedly illegal conduct. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections. A statute is unconstitutionally vague if its language and construction by the courts vest authority in law enforcement officers, prosecutors, and juries to assign their own subjective meaning to an element of the offense.

United States v. LaHue, 261 F.3d 993, 1006 (10th Cir. 2001) (internal citations quotations and footnotes omitted).

C. The Controlled Substances Act as applied in this case is unconstitutionally vague.

The first question presented as to vagueness as applied in this case is whether there are standards which give a medical doctor adequate notice that the Controlled Substances Act prohibite [redacted] from practicing medicine in the manner in which he did.

The Controlled Substances Act prohibits a person from dispensing or distributing a controlled substance. 21 U.S.C. § 841(a)(1). But a physician is exempt from this prohibition as long as he is registered and acting as authorized. 21 U.S.C. §§ 802(21), 822(b). For a controlled substance prescription to be effective, the prescription “must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.” 21 C.F.R. § 1306.04(a).

In *Gonzales v. Oregon*, the Supreme Court stated, “[a]ll would agree, we should think, that the statutory phrase ‘legitimate medical purpose’ is a generality, susceptible to more precise definition and open to varying constructions, and thus ambiguous in the relevant sense.” 546 U.S. 243, 258 (2006). Yet, this is the standard the government is using to prosecute (b)(6); (b)(7)(C)

Here the United States Attorney’s Office has been given complete discretion to determine what constitutes a “usual course of professional practice” and a “legitimate medical purpose.” As the *Gonzales* Court noted, the federal government has only set standards in one area for physicians under the CSA: the treatment of narcotic addicts. 546 U.S. at 271. The *Gonzales* Court recognized that the federal government could choose to legislate physicians more under the CSA but had chosen not to do so except in the area of narcotics addiction. *Id.* As the Tenth Circuit noted in *LaHue*, “[d]ue process requires that legislation state reasonably clear guidelines for law enforcement officials . . . to follow in discharging their responsibility of identifying and evaluating allegedly illegal conduct.” 261 F.3d at 1006.

In fact the Centers for Disease Control and Prevention recognized there were no existing guidelines for prescribing opioids for the treatment of chronic pain and recently

developed guidelines. The CDC noted:

Across specialties, physicians believe that opioid pain medication can be effective in controlling pain, that addiction is a common consequence of prolonged use, and that long-term opioid therapy often is overprescribed for patients with chronic noncancer pain. These attitudes and beliefs, combined with increasing trends in opioid-related overdose, underscore the need for better clinician guidance on opioid prescribing. Clinical practice guidelines focused on prescribing can improve clinician knowledge, change prescribing practices, and ultimately benefit patient health.

Centers for Disease Control and Prevention (2016). *CDC Guideline for Prescribing Opioids for Chronic Pain*. Retrieved from

<https://www.cdc.gov/drugoverdose/prescribing/guideline.html> (last visited February 26, 2018).

However, the CDC guidelines for prescribing opioids for chronic pain were adopted *after* (b)(6); (b)(7)(C) was indicted. (b)(6); (b)(7)(C) could not have consulted the guidelines when the allegations took place because they did not exist. Consequently, the guidelines cannot be used by the Government as a guidepost for interpreting whether (b)(6); (b)(7)(C) prescribing practice was in the usual course of professional practice.

In 2005, the DEA sought comments on the subject of dispensing controlled substances and issued agency policy related to the subject in 2006. Dispensing Controlled Substances for the Treatment of Pain, 71 Fed. Reg. 52,716-52,723 (2006). When evaluating what guidelines should be in place, the DEA stated:

Among the questions that have been proposed for inclusion in these guidelines are:

- What should be the goals of pain management?
- How can a clinician assess a patient's pain?
- When should a primary care physician turn to a pain medicine

specialist to manage a patient's pain?

- How are opioids used to manage chronic pain?

It is certainly appropriate for physicians and medical oversight boards to explore these types of questions. However, for the following reasons, it is not appropriate for DEA to address these questions in the form of a guidance document (or to endorse such a guidance document prepared by others).

First, one cannot provide an exhaustive and foolproof list of “dos and don’ts” when it comes to prescribing controlled substances for pain or any other medical purpose . . . Second, as stated earlier in this document, DEA’s authority under the CSA is not equivalent to that of a State medical board. DEA does not regulate the general practice of medicine . . . For these reasons, DEA is not proposing any medical guidelines on prescribing controlled substances for the treatment of pain.

Id. at 52,719. At the time of the events in the indictment, the DEA’s own policy stated the DEA would not propose any medical guidelines on prescribing substances for the treatment of pain. Thus, it was left to individual DEA agents and US Attorney’s Offices to determine when a prescribing practice ran afoul of the CSA.

This approach to law enforcement smacks, on its face, of a lack of proper notice or due process. Dr. Henson is charged with crimes merely because he did not interpret the law in the same manner as government agents. As noted by now-Justice Gorsuch:

Ours is not a legal system like Caligula's, “who reportedly ‘wrote his laws in a very small character, and hung them up upon high pillars, the more effectually to ensnare the people.’ ”

United States v. Lovern, 590 F. 3d 1095, 1103 (10th Cir. 2009)(internal citations omitted).

Notably, (b)(6); (b)(7)(C) has a medical license and has practiced medicine for several decades; conversely, the agents interpreting “usual course of medical practice” and “legitimate medical purpose” have never practiced medicine.

Admittedly, the Supreme Court upheld a physician’s conviction under the CSA in

United States v. Moore, 423 U.S. 122, 96 S.Ct. 335 (1975). However, the facts here do not align with those in *Moore* where the defendant “conducted a large-scale operation.” *Id.* at 126, 96 S.Ct. 335. *Moore* was a physician who treated narcotic addicts with methadone prescriptions. *Id.* The *Moore* court noted that “‘criminal prosecutions’ in the past had turned on the opinions of federal prosecutors” which jeopardized physicians’ careers without standards. *Id.* at 144. To avoid the arbitrary prosecutions, Congress required the Secretary of Health, Education, and Welfare after consulting with the Attorney General to determine appropriate treatment standards for narcotic addicts. *Id.*

Gonzales v. Oregon further clarified that *Moore* was a specific instance. *Moore* does not stand for the principle that the Government and the DEA can interpret what “professional practice” is. *Gonzales* cited *Moore* for the premise that in enacting the addiction-treatment provisions, Congress sought to change the fact that the criminal prosecutions in the past had turned on the opinions of federal prosecutors. *Gonzales*, 546 U.S. at 266. *Gonzales* did not cite *Moore* for the broad sweeping notion that the DEA can interpret “professional practice” as it sees fit. In fact, *Gonzales* held the opposite. In *Moore* there were specific standards the defendant could follow.

In this case, there were no federal regulations for treating chronic pain patients under which to evaluate (b)(6); (b)(7)(C) medical decisions. The CSA as applied to (b)(6); (b)(7)(C) as a pain management physician is unconstitutionally vague. Therefore, Counts 1-18 and 21-31 should be dismissed.

II. The indictment improperly declares illegitimate a medical standard for care and treatment of patients that is within the contours of Kansas law.

An indictment is deemed constitutionally sufficient if it contains the essential elements of the offense intended to be charged; sufficiently apprises the accused of what he must be prepared to defend against; and enables the accused to plead an acquittal or conviction under the indictment as a bar to any subsequent prosecution for the same offense. *U.S. v. Taff*, 400 F.Supp.2d 1270, 1271 (D.Kan. 2005). The indictment in this case does none of these things.

An indictment may be dismissed under Rule 12(b) of the Federal Rules of Criminal Procedure when, as a matter of law, the government is incapable of proving its case beyond a reasonable doubt. *See United States v. Pope*, 613 F.3d 1255, 1260 (10th Cir. 2010). Such is the case here.

The *Gonzales* court upheld Oregon's right to establish physician-assisted suicide. The Attorney General "is not authorized to make a rule declaring illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law." *Gonzales*, 546 U.S. at 258. Just as the Attorney General was prohibited from criminalizing actions taken by physicians under the Oregon law, the United States Attorney's Office should not be able to criminalize actions permitted under Kansas law for treatment of pain patients.

The indictment at Paragraph 7 references K.S.A. § 65-2837 and states unprofessional conduct, which may result in a physician's license being revoked, is "prescribing, dispensing administering or distributing a prescription drug or substance, in an improper or inappropriate manner, for other than a valid purpose, or not in the course of the licensee's professional practice."

Under Kansas' Pain Patient's Quality of Care Act, the Kansas legislature found that "pain is a significant health problem, and that the diagnosis and treatment of pain is complex, and can involve several therapeutic modalities. The treatment of pain may require the use of controlled substances in appropriate circumstances." K.S.A. § 65-4976. A patient has the right to "accept or reject the use of any or all diagnostic and therapeutic modalities which may be recommended to treat such person's pain." K.S.A. § 65-4977(a)(2). Additionally, a patient "[s]hould accurately, completely, and honestly report all symptoms and concerns to physicians and other health care professionals conducting assessment and treatment of such person's pain." K.S.A. § 65-4977(a)(3).

The Kansas Pain Patient's Quality of Care Act dictates that the "state has a duty to restrict the inappropriate use of controlled substances while supporting a physician's or other health care provider's ability to provide appropriate pain treatment consistent with patient needs and sound clinical judgment." K.S.A. § 65-4976.

The Kansas legislature has delineated rules and laws related to the treatment of pain patients. The indictment federally criminalizes (b)(6); (b)(7)(C) treatment of his chronic pain patients which is permitted under Kansas law. As the DEA states in its own policy statement, "DEA does *not* act as the Federal equivalent of a State medical board overseeing the general practice of medicine. *State* laws and *State* licensing bodies (such as medical licensing boards) collectively regulate the practice of medicine." Dispensing Controlled Substances, *supra.*, *emphasis in original.*

The indictment alleges that (b)(6); (b)(7)(C) distributed and dispersed controlled substances "outside the usual course of professional medical practice and without a legitimate medical

purpose, to wit:” and then lists six ways in which the Government alleges (b)(6); (b)(7)(C) acted improperly. The ways delineated are not based on any national standard because none existed at the time in question. The *Gonzales* court recognized the federal government could pass national safety standards in connection with the CSA, however, the federal government had not passed any such standards except related to narcotics addicts. 546 U.S. at 271. Thus, the state law is preemptive. *See* 21 U.S.C. § 903.

The indictment references guidelines adopted by the Kansas Board of Healing Arts. *See* D.E. 1 at 4-5. However, those are merely guidelines which state explicitly:

Each case of prescribing for pain will be evaluated on an individual basis. The board will not take disciplinary action against a physician for failing to adhere strictly to the provisions of these guidelines, if good cause is shown for such deviation. The physician's conduct will be evaluated to a great extent by the treatment outcome, taking into account whether the drug used is medically and/or pharmacologically recognized to be appropriate for the diagnosis, the patient's individual needs - including any improvement in functioning - and recognizing that some types of pain cannot be completely relieved.

Kansas Board of Healing Arts Guidelines, “Guidelines for the Use of Controlled Substances for the Treatment of Pain,” Adopted October 17, 1998.

The Board of Healing Arts, the Board of Nursing and the Board of Pharmacy adopted a Joint Policy Statement on June 1, 2002 which states:

The following guidelines are not intended to define complete or best practice, but rather to communicate what the boards consider to be within the boundaries of professional practice. This policy statement is not intended to interfere with any healthcare provider's professional duty to exercise that degree of learning and skill ordinarily possessed by competent members of the healthcare provider's profession.

Joint Policy Statement of the Boards of Healing Arts, Nursing and Pharmacy on the Use of Controlled Substances for the Treatment of Pain, Adopted June 1, 2002.

If (b)(6); (b)(7)(C) actions fell outside of the usual course of medical practice, the proper course of reprimand is through the Kansas Board of Healing Arts not a federal indictment.

The Kansas law says the patient is responsible for providing accurate and complete information to a physician about medical history. *See* K.S.A. § 65-4977(a)(3). Even under federal law, if a patient through lies and deception convinces a doctor of a legitimate medical purpose for the drugs prescribed, the physician is not guilty of a crime. *See United States v. Greenfield*, 554 F.2d 179, 183 (5th Cir. 1977)(“If the government agent through lies and deception convinces a physician that a legitimate medical need exists for the drugs, the physician is simply not guilty of a crime.”)

A review of the statutes shows that Kansas set standards delineating how physicians in Kansas may treat pain patients. Under *Gonzales*, federal agents and the United States Attorney’s Office cannot preempt state law and arbitrarily decide what constitutes a “legitimate medical purpose.”

(b)(6); (b)(7)(C) was treating patients for pain management in Kansas where he was specifically instructed under Kansas law to “provide appropriate pain treatment consistent with patient needs and sound clinical judgment.” K.S.A. § 65-4976. Furthermore, the Kansas Legislature specifically held that “the diagnosis and treatment of pain is complex, and can involve *several therapeutic modalities*.” *Id.* There is not one correct way to treat pain. The fact that (b)(6); (b)(7)(C) followed a different therapeutic modality than the government’s expert, or how an unqualified DEA agent interpreted the “usual course of professional conduct”, does not render Dr. Henson’s choice of how to treat pain patients outside the usual course of professional conduct.

The allegations that (b)(6); (b)(7)(C) pain management practice was not for a legitimate medical purpose is comparable to the Government's position that physician-assisted suicide was not for a legitimate medical purpose contrary to Oregon's statute. The United States Attorney's Office does not have the power to make the determination and legislate what treatment of pain patients is not for a legitimate medical purpose when the Kansas Legislature has explicitly noted there is more than one way to treat pain.

The indictment unlawfully and arbitrarily sets a federal standard declaring illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law and should be dismissed.

Respectfully submitted,

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ATTORNEYS FOR (b)(6); (b)(7)(C)

CERTIFICATE OF SERVICE

I do hereby certify that on the 8th day of March, 2018, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing and a copy of the filing to all counsel of record.

/s/Erin C. Thompson

Erin C. Thompson