

**IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA**

PASCUAL HERRERA, JR., M.D.)	
)	
Petitioner,)	
)	Civil Action No.
<i>vs.</i>)	
)	CV-01-2232-H
JERRY N. GURLEY, M.D., etc., et al.,)	
)	
Respondents.)	

**AMICUS CURIAE BRIEF OF THE ASSOCIATION OF AMERICAN
PHYSICIANS & SURGEONS (AAPS) IN FAVOR OF PETITIONER**

The Association of American Physicians & Surgeons, Inc. (“AAPS”) is a nationwide nonprofit physicians’ organization founded in 1943, dedicated to defending the ethical practice of private medicine. AAPS respectfully submits this memorandum in support of Petitioner Pascual Herrera, Jr., M.D.

Identity of *Amicus Curiae* and Its Interest in the Case.

AAPS has members in Alabama and nationwide who, like Dr. Herrera, prescribe pain management treatment. Such treatment can include OxyContin, a drug susceptible to abuse by patients without the knowledge of the physician. Occasionally such abuse can lead to a tragic death, as occurred here at no fault by Dr. Herrera. Publicity about OxyContin deaths creates pressure to find a scapegoat, and the nearest physician is a vulnerable target. The result is a miscarriage of justice for a good doctor, and an enormous chilling effect for all

other physicians. As explained more fully below, the evidence indicates that such an injustice occurred here.

More than a dozen physicians on the Board of Directors of AAPS met with Dr. Herrera on January 31, 2003, and reviewed his case in detail. We subsequently arranged for another AAPS director—an expert in pain management—to review his case as well. The conclusion was unanimous: Dr. Herrera’s treatment was completely appropriate, and he was punished for a tragedy unrelated to him. We respectfully submit this brief to correct this gross injustice.

Courts have previously found AAPS briefs to be helpful in clarifying legal issues concerning medicine. *See United States v. Rutgard*, 116 F.3d 1270 (9th Cir. 1997) (reversing, on the strength of AAPS’ *amicus curiae* brief, many of the convictions related to Medicare fraud); *see also United States v. Sell*, 282 F.3d 560 (8th Cir. 2002) (noting *amicus* by AAPS), *cert. granted*, 123 S. Ct. 512 (2002) (granting *certiorari* as briefed by *Amicus* AAPS).

Argument

Dr. Herrera lost his medical license here for one and only one reason: three young adults from prominent families died from an overdose of OxyContin in Gadsden, Alabama.

Dr. Herrera had no connection or culpability with that tragedy, but as a foreign-born physician he was a convenient scapegoat. The attorney for the Alabama Board of Medical Examiners (the “Board”), Jim Cooper, objected to questions raised by the Alabama Medical Licensure Commission (the “Commission”) about the tragedy. Tr. Feb. 28, 2001, at 658.

Dr. Herrera was himself even interrupted and ordered not to discuss it at the hearing. *Id.* at 622.

While the OxyContin deaths were on everyone's minds at the hearing, the reasons given for revoking Dr. Herrera's license were entirely pretextual. The questioning of Dr. Herrera by the Commission members was incoherent. The questioning of Dr. Herrera by the Board's attorney was insubstantive. The questioning by the Commission members and Board's attorney of patients supposedly harmed by Dr. Herrera was virtually non-existent. The record reflects that neither the Commission members nor the Board's attorney had any real interest in or complaint about Dr. Herrera's actual care given to specific patients.

The Commission's asserted reasons for revoking Dr. Herrera's license are woefully inadequate. The Commission based its revocation in part on the alleged sloppiness of Dr. Herrera's handwriting. That rationale, if affirmed, would support the revocation of the licenses of hundreds of thousands of physicians, and quite a few attorneys as well. If that were truly the Commission's concern, then it could simply require training and monitoring to address the issue. In fact, the handwriting of the Board's own expert was no more legible than Dr. Herrera's. The other cited bases for revocation are even less legitimate, and self-contradictory. The Commission found that Dr. Herrera failed to perform an adequate history and physical on three patients, but that he also performed unnecessary diagnostic tests on them and prescribed excessive medication. Thus, he supposedly tested too little and also tested too much. In fact, Dr. Herrera's care was entirely appropriate in these cases, and the

questioning by the Commission members and the Board's attorney of several of these patients revealed how pretextual this claim was.

Dr. Herrera was an innocent casualty in the witchhunt against OxyContin. As shown below, the Commission violated Dr. Herrera's due process rights and had insufficient basis for revoking his license.

1. The Commission Violated Dr. Herrera's Due Process Rights.

The Commission has publicly promised to "get" any physician who prescribes large amounts of a pain killer like OxyContin if someone, perhaps unbeknownst to the physician, is abusing them.

Senator Larry Dixon, Executive Director of the Commission, put it this way:

It takes a doctor who is prone to writing large amounts of controlled substances, and it takes a 'drug shopper.' You get those two together and you've got a good relationship **until we get you.**

"OxyContin Crackdown Raises Physician, Patient Concerns," *AM News* June 25, 2001 (available at http://www.ama-assn.org/sci-pubs/amnews/pick_01/pr110625.htm, emphasis added).

This published statement by the Commission illustrates that it is not sufficiently concerned whether the physician has engaged in any wrongdoing. Instead, it promises to automatically "get" a physician based entirely on the conduct of his patient, or even his patient's friends. The Commission cares not whether the physician is innocent or guilty. Rather, the Commission has seized the power to ruin the career of any physician without proving fault, in order to mollify the public.

The Commission did indeed "get" Dr. Herrera, but not for any wrongdoing. Dr. Herrera testified that he had screened out 200 addicts from his practice and prescribed OxyContin for only

ten percent (10%) of his patients. Tr. Feb. 28, 2001 at 620-21. He did not cause the drug addiction problem in his town, nor should he be held accountable for it. The Federal Drug Administration has approved OxyContin for use, and the overwhelming percentage of patients take it responsibly. Dr. Herrera did nothing improper in prescribing this drug, and none of his patients was injured by it while in his care. Dr. Herrera was in full compliance with his responsibilities as a licensed physician in Alabama.

As Dr. Herrera's attorney explained at the hearing, however, there was undue media pressure on the Commission to take action against the physician's license even in the absence of fault:

There has been, as you are probably aware given the fact that we have Press here today, a great deal of public attention focused on some very unfortunate recent events in Gadsden. In particular, I understand that there have been as many as 12 deaths in the recent months in Gadsden as a result of abuse of a painkiller known as OxyContin. That is a drug that Dr. Herrera has prescribed for people who need it. The fact that these events have occurred in coincidence with these proceedings I think has been an opportunity that the Press has seized upon to, frankly, sell newspapers. That is very unfortunate. We regret that. The television stations have done interviews in which people have stated publicly that they hope Dr. Herrera is put in the penitentiary. These kind – this kind of public hysteria about what's going on has placed a lot of stress on Dr. Herrera. It's, I'm sure, going to matter that this Commission is concerned about it.

Tr. Feb. 28, 2001, at 14-15. No one at the hearing doubted the magnitude of this media pressure.

Although a State may regulate medical licensure, it can only deny or revoke licenses under procedures that comport with constitutional due process. *See Benton v. Alabama Bd. of Med. Examiners*, 467 So. 2d 234, 237 (1985) (“The right to practice medicine is a property right which may be denied only if the denial is consonant with due process.”). “Due process requires, among other things, a hearing consistent with the essentials of a fair trial.” *Id.* *See also Matter of Bender*

v. Board of Regents, 30 N.Y.S.2d 779, 784, 262 App. Div. 627, 631 (3d Dept. 1941); *Farney v. Anderson*, 56 Ill. App. 3d 677, 372 N.E.2d 151 (4th Dist. 1978); *Campbell v. Board of Med. Examiners*, 16 Ore. App. 381, 518 P.2d 1042 (1974); *cf. In re Ruffalo*, 390 U.S. 544 (1968) (holding that an attorney’s right to practice is protected under constitutional due process).

The revocation of Dr. Herrera’s license by the Commission was for the media, not individual justice. Prescribing OxyContin constituted a small fraction of Dr. Herrera’s practice. The Commission could have simply prevented him from continuing such prescriptions, or it could have imposed monitoring of that aspect of his practice. Nothing in the record supports the draconian and career-ending punishment meted out by this Commission. There was no evidence of any wrongdoing by Dr. Herrera in connection with the OxyContin tragedy, and Commission relied on pretextual reasons instead. As explained below, Dr. Herrera’s care of the patients cited by the Commission was exemplary. Simply put, the Commission failed to comply with constitutional due process in revoking Dr. Herrera’s license.

2. The Commission Had Insufficient Basis for Revoking Dr. Herrera’s License.

Where “the Board has failed to articulate with specificity any offense which [the physician] is alleged to have committed,” the extremely harsh penalty of revocation is unwarranted. *Benton*, 467 So. 2d at 238. The charges made against Dr. Herrera—allegedly poor handwriting and both too few and too many tests—do not justify license revocation. Even if true, these charges should be addressed through monitoring of his practice and possibly some additional training. Moreover, as shown below, the charges themselves cannot withstand scrutiny.

A. Revocation for Allegedly Poor Handwriting is Unprecedented and Unjustified.

The revocation of Dr. Herrera's license based on allegedly poor handwriting is the ultimate pretext, one that could apply equally to thousands of good physicians. Where, as here, there is no evidence of the poor handwriting causing any meaningful problems, it was an abuse of discretion for the Commission to revoke Dr. Herrera's license on this ground. AAPS is unaware of any precedent for such a harsh sanction, and affirmance would expose most of the medical profession to the whim of medical boards.

The Board's own expert witness, Michael McBrearty, M.D., testified that what matters is whether a physician's staff can read his handwriting, and that Dr. McBrearty had no idea whether Dr. Herrera's staff had any trouble reading his handwriting:

Q: And do you agree that, for example, when you bring in a new staff person into your practice, that there is a period of time during which your staff person learns to read your writing?

1. Sure. Particularly the nurse. I mean the really critical one is your nurse. That's the one that has to make the decision.

17: The ones involved with patient care?

A: Correct.

17: And that over time, staff becomes as familiar with your writing as you are, correct?

A: Generally, I think that's probably true.

17: And do you know whether or not Dr. Herrera's staff could read his writing?

A: **I have no clue.**

Tr. Mar. 28, 2001, at 300-01 (emphasis added).

In this case, as in the Alabama Supreme Court decision of *Benton*, the “conclusions are not supported by the record and are clearly erroneous” in holding against the physician. 467 So. 2d at 237. There was simply no evidence suggesting *any* past or continuing harm from Dr. Herrera’s handwriting. The *Benton* Court reversed the Commission because it “has failed to articulate with specificity any offense which Dr. Benton is alleged to have committed.” *Id.* at 238. Likewise, there is no specific, grave offense here in connection with Dr. Herrera’s handwriting or any other aspect of his care.

A revocation of a medical license without proof of harm is unconscionable and unprecedented. Nothing in *Benton* or its progeny even remotely supports the revocation of a physician’s license for poor handwriting.

B: Patient Testimony at the Hearing Demonstrated that Dr. Herrera’s Care was Adequate, Even Exemplary.

In revoking Dr. Herrera’s license, the Commission relied on his care of patients James Whitten and Debra Lowe. But these patients were willing to testify at the hearing about Dr. Herrera’s care. Their testimony overwhelmingly demonstrated that the Board had no basis for complaining about their treatment. Indeed, the Commission members were not even the slightest bit interested in how well Dr. Herrera had cared for these patients.

Patient James Whitten testified that he had injured his back while working at his job hanging sheetrock. Tr. Mar. 28, 2001, 197-99. He emphasized the high quality of Dr. Herrera’s care:

17: Have you ever had any doubt about whether Dr. Herrera had your best interest at heart?

A: No.

Q: Have you ever felt rushed when you went in to see him?

A: No.

Q: Has he always discussed your problems and listened to what problems you were having?

A: If I had something to say, yes. If I didn't have anything to say, then he would – he always examined me every single time I came in there. He would check my back. He would check my heart. You know, he checked my legs every single time. ... He's always made his self available I felt like. I actually can call his office and get him on the phone if I needed to

Q: Did anybody from the State Board of Medical Examiners contact you to ask you how you felt about your treatment with Dr. Herrera?

A: No, sir.

Id. at 214-15. At the hearing, no one on the Commission had even a single question for this patient, whom Dr. Herrera had supposedly mistreated. The Board's attorney did not ask any questions of consequence either. *Id.* at 215. In fact, Dr. Herrera had never even prescribed OxyContin for patient Whitten, despite his back pain. *Id.* at 204. Dr. Herrera was even successful in helping patient Whitten quit his three-and-a-half-pack daily cigarette smoking habit. *Id.* at 205.

Patient Debra Lowe, also cited by the Commission as a reason for license revocation, likewise provided compelling testimony *in favor of* Dr. Herrera at the hearing. *Id.* at 216-30. She had been in "severe, real bad pain, so bad [she] couldn't stand it" from an automobile accident. *Id.* at 219. She testified how valuable Dr. Herrera's care had been to her:

Q: Ms. Lowe, in the course of your treatment with Dr. Herrera, do you feel that he has adequately explained to you the medications that he prescribed for you?

1: Oh, yes, sir, very definitely.

Q: Did he tell you about the pros and cons of each medication?

A: Yes, sir. He always has done that. Yes, sir.

Q: Did he tell you things that you should look out for in the way of adverse side effects?

A: Yes, sir. He's always gave me complete physicals and went over everything with me.

Q: Have you ever wondered about whether Dr. Herrera had your best interest at heart?

A: No. I never questioned that. I knew he saved my life, I feel like.

Id. at 227. Like patient Whitten, patient Lowe also testified that Dr. Herrera persuaded her to finally quit smoking cigarettes. *Id.* at 220.

Even though this patient was central to the Board's case against Dr. Herrera, the attorney for the Board only had two questions for her and the Commission only had a single question. The Board attorney's questions only reinforced how good a physician Dr. Herrera is, demonstrating that he gave this patient "complete physicals, [thorough examinations], run lab tests and urinalysis, [and] whatever [Dr. Herrera] thought was appropriate." *Id.* at 230. Dr. Bates of the Commission simply asked the patient how she could "afford to buy the Duragesic patches," which the patient explained. *Id.* at 231. Neither the Commission members nor the Board's attorney had any questions with respect to their charges against Dr. Herrera for his treatment of this patient, one of the bases upon which his license was subsequently revoked.

The Alabama Supreme Court made clear in *Benton* that the Commission cannot arbitrarily revoke a physician's license. There should be "'no question that denial of reinstatement to the practice of medicine is not grounded upon unreasonable or arbitrary bases.'" 467 So. 2d at 237 (quoting *Katz v. Alabama State Board of Medical Examiners*, 351 So. 2d 890, 893

(Ala. 1977)). The record here is replete with evidence of unreasonable or arbitrary bases for revoking Dr. Herrera's license, and the decision of the Commission should be reversed.

III. Conclusion.

Amicus AAPS urges this Court to reverse the order revoking the license of Pascual Herrera, Jr., M.D. to practice medicine.

Respectfully submitted this _____ day of _____, 2003.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing upon:

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