

Mandatory Madness

What happened to a man whose only crime, it seems, was trying to ease his chronic pain

BY ERIC SNIDER – Weekly Planet, 6/17/2004.

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"You know when you have a toothache and the pain is so severe that you absolutely have to be seen immediately by a dentist?" says the man in the wheelchair. "Imagine if you had to grin and bear it for an undetermined period of time. You can't see straight. You think you'll pass out, and sometimes you do. And sometimes you pray you will."

Richard Paey, chronic pain patient, is describing how bad his body can hurt. He suffers from what is often called "failed back syndrome," an inoperable condition that has sentenced him to a life of pain that most of us hopefully will never have to comprehend. This is not his only sentence. On March 5, he was convicted of 15 counts of drug trafficking, obtaining a controlled substance by fraud and possession of a controlled substance, which earned him a mandatory minimum of 25 years in state prison and a \$500,000 fine.

This is what Richard Paey did -- or, more accurately, this is what a jury found Richard Paey (pronounced "Pay") guilty of: fraudulently obtaining prescriptions of Percocet (which contains the opiate oxycodone) and Lortab (which contains another opiate, hydrocodone), each of which exceeded 28 grams.

That's the magic number, 28 grams. Illegally possessing this amount gets you 25 years. It's the same mandatory minimum as 28 grams of heroin.

Richard Paey is the latest poster boy for advocates of chronic pain patients, who say that this legion of silent sufferers -- from nine to 17 percent of adult Americans, according to studies -- face an ongoing culture clash with the War on Drugs.

It's a war that pain patients are losing. The system is topsy-turvy, pain activists say, giving medically uneducated law enforcement the power to decide how much medicine someone is allowed to possess. Further, they maintain that many doctors who prescribe opiates remain anxious about that knock on the door from the law, and can thus become extremely conservative when treating chronic pain.

The drug war has turned cops into docs and docs into cops. Physicians constantly screen for "drug seekers" by looking for certain behaviors. They have taken to urine-testing and interrogating folks who are desperately trying to alleviate their pain. Pain patients often get under-prescribed or turned away, leaving many of them in unnecessary agony. "There's so much suffering," Paey says. "They need a war on pain."

Richard Paey knows agony. One afternoon last month, his muffled words echoed through the dank visitors room at the Pasco County jail. He spoke to me through thick glass. His once-athletic body, ravaged by nearly two decades of intractable pain and five years of multiple sclerosis, sat hunched into a crude wheelchair. Oval, wire-rim glasses framed his piercing brown eyes. His black hair, medium-length, was unkempt, and his moustache could have used a trim. His skin had that particular kind of pale hue that comes with extended periods of indoor confinement.

Paey's discourse ranged from pensive musings to indignant rants. His hands shook. While awaiting assignment to a prison, he said, he spent 23 hours a day in a bed in a small room with only jail-approved reading material. He didn't know this during the interview, but the next day he'd be transferred to a transitional facility in Orlando where the Florida Department of Corrections would figure out what to do with this most unusual inmate.

Paey is not doing time for just the opiates. Each of his Percocet pills contained 5 mg of oxycodone and 325 mg of acetaminophen (Tylenol). For sentencing purposes, though, the latter substance was weighed in as well. Eighty-five of his pills weighed 28 grams. If Paey were sentenced for just the oxycodone, he would've needed 5,600 Percocet tabs to earn a quarter-century behind bars. From January to March of '97, he bought 1,200 from area pharmacies.

This inflated numbers game is just one perplexing fact in the strange and scary case of Richard Paey, 45, husband and father of three, convict. Consider also that Pasco sheriff's deputies surveilled him for weeks and never found any evidence that he sold a single pill. Yet the state attorney's office charged him with trafficking -- because it could. In Florida, you can be charged with trafficking certain drugs, oxycodone and hydrocodone included, without actually peddling them. You merely need to possess them illegally.

For its part, the State Attorney's Office in Pasco offered Paey several plea deals -- including, early on, house arrest and probation, then shorter prison terms. For various reasons, each deal went south. Some onlookers have characterized Paey as stubborn, saying that he put one foot in a prison cell by not jumping at the state's plea offers. Paey came close to cutting a deal several times, mostly at the urging of his wife, Linda, and his lawyer, but his heart wasn't in it. Paey has maintained all along that he did nothing criminal, that he was only medicating his own severe pain, which required large doses, and that his scripts -- written, faxed and phoned in by a doctor in New Jersey -- were legitimate.

After one mistrial and another guilty verdict vacated by a judge who said Paey had not been competent to stand trial, he was convicted during a third proceeding. The jury was not permitted to know that Paey was facing a stiff mandatory minimum. One juror held out for acquittal but was eventually swayed toward a guilty vote when the jury foreman convinced him that the defendant would get only probation. The judge had no choice but to issue 25 years.

The Paeyes have hired high-powered appellate attorney Eli Stutsman of Oregon, while still retaining their regular local counsel, Robert Attridge. They figure that, even if an appeal is successful, Richard Paey will stay locked up for at least a year and a half. The Paey camp also holds out hope for clemency or a pardon from governor Jeb Bush, whose own daughter has experienced drug problems.

"I don't think the [Florida] Legislature had Richard Paey in mind when they set up these minimum mandatory sentences," says Attridge, "The punishment in this particular case is cruel and unusual."

On Feb. 11, 1985, Richard Paey was driving on Philadelphia's pocked and frantic Schuylkill Expressway, on his way to class at the University of Pennsylvania law school, when he got into a wreck that sandwiched his car between two others. He went to the ER the next day. Directly after the accident, Paey began taking sizeable doses of opiate pain relievers. A few months later, he underwent his first back surgery, but that only offered about a year's worth of limited relief. In 1987, he signed on for another operation. Unbeknownst to him, he received a fusion procedure that included an experimental "pedicle screw" implant that had been turned down for approval by the FDA. The implants became the focus of a high-profile class action lawsuit that was covered by the TV show *20/20*. Linda Paey said her husband never received a settlement because he got involved after a statute of limitations passed.

His back went from bad to worse. He'd get spasms that would hamper his breathing. The pain was always present, often excruciating. But that didn't prevent Paey from carrying on with life. He finished law school, then did a short stint as a law clerk, but had to quit because, among other limitations, he couldn't lift the hefty law books. He never took the bar exam.

Paey learned that further surgery was not an option, that to remove the screws in his back could cause paralysis. He tried to stay game, but eventually reality sunk in. "You had a young, virile guy thinking that all you need to do is have the will and you can make it happen," Linda Paey says. "The pain, you could control that. He was convinced he could mentally muscle his way through this problem and continue to work. Ultimately, he had to face facts that he just wouldn't be able to do it. Those years were hell."

Paey went on Social Security disability in 1989, his career dreams dashed. The Paeyes moved to Columbus, a town in central New Jersey. There he found a doctor, a general practitioner named Stephen Nurkiewicz, who prescribed him ample doses of medication, including opiates such as Percocet and Vicodin.

The two became friendly, and Paey did some small-claims legal work for Nurkiewicz's office. In 1994, the Paeyes --- now with three small children -- relocated to Hudson in Pasco County because Richard's father was dying of kidney cancer. Linda Paey, an optometrist, found work in New Port Richey. Richard mostly stayed in bed.

The couple looked for doctors to step in for Nurkiewicz, but encountered a lot of resistance. Staff people would tell the couple that the doctor didn't handle chronic pain patients or that the practice didn't treat people with failed back syndrome. Linda Paey feels that physicians avoided Richard because of his large need for prescription pain meds and his involvement in the experimental back surgery, a potential malpractice suit in waiting.

Dr. Nurkiewicz was sympathetic, say the Paeyes, and set up a plan where he would mail prescriptions for Percocet, Lortab and Valium. Some of the scripts were undated; others were faxed and then verified with the pharmacy over the phone. The system worked well for a while -- so well in fact that in 1996 Richard Paey started taking police academy classes at Pasco-Hernando Community College. Nurkiewicz wrote a letter to the school outlining Paey's health status.

Since the time of his botched back surgery, Paey also had tried virtually every conceivable treatment besides opiate drugs, including electronic stimulation, biofeedback, spinal injections, chiropractic, massage, physical therapy and hypnosis. None worked nearly as well as the pills.

'Untreated pain, it'll kill ya,' says Siobhan Reynolds, founder/director of the Pain Relief Network, based in New York. Increasingly, pain specialists and advocates characterize chronic pain as its own disease. "If it doesn't get resolved, in time it can become its own malignancy," says Dr. Frank Fisher of northern California. "It can spread and metastasize to other parts of the nervous system and ultimately destroy a person's health." Fisher recently was exonerated of running a pill mill in a rural town 150 miles from Sacramento. Authorities alleged that he indiscriminately wrote scripts for OxyContin (uncut oxycodone) that caused several deaths in the area. The five-year ordeal has left his practice moribund, though, and he still faces possible sanctions from the California medical board.

Chronic pain patients not only face discrimination from law enforcement, but also from society at large. Most of us simply do not understand what protracted, severe pain is like. Many sufferers who spend periods of time untreated (or undertreated) will seriously consider or attempt suicide. (Richard Paey tried twice.)

There's also the highly ingrained notion in our society that pain somehow ennobles us. Call it the grin-and-bear-it ethic. According to several historical accounts, it wasn't all that long ago that late-stage cancer patients were denied opiate drugs so they could more closely feel the pain of Christ on the cross.

Advocates of chronic pain patients see all this as a bunch of hokey; they maintain that with today's technology, there is no reason anyone should suffer unnecessarily.

While most pain docs favor an integrated treatment approach, almost all prescribe opiates, and many think these drugs are the single most effective option. The American Medical Association has dubbed opiates "the gold standard" of pain treatments.

Yet law enforcement and prosecutors -- and the public at large -- remain suspicious of them. One teen who dies of an OxyContin overdose can cause a media shit-storm that further demonizes the drugs.

In 1995, oxycodone and other painkillers were incorporated into Florida's drug trafficking laws, and big-ticket sentences followed.

In a phone interview from his Tallahassee office, James McDonough, director of the Florida Office of Drug Control, declined to comment on the Paey case, saying he wasn't familiar enough with it. He did explain that a proportionately high number of oxycodone deaths in recent years have reinforced the notion that the drug should remain in a class that requires stiff jail terms. (Consider this: If someone is convicted of trafficking in 28 grams of cocaine, Florida statutes call for a mandatory minimum sentence of just three years.)

Pain specialists counter that, yes, certain people are going to abuse prescription drugs, but when used properly they are completely safe. In fact, says Dr. Fisher, "Opioids resemble natural endorphins, which is probably our best natural defense against pain. People have opioids in them naturally. But when chronic pain takes hold, people simply need more of them. [Opiate] pain treatment can be envisioned as supplementation with natural substances, replacement therapy, like insulin for diabetes."

Here's another myth-buster: Chronic pain sufferers do not get a buzz from opiates. "I get no euphoria," Richard Paey says. "I get no mental effects, other than fatigue."

While the science is complicated, doctors essentially say that the effects of the opiates are so concentrated on dulling intense pain that they simply do not have the leftover strength to work on pleasure centers.

And further, the most sophisticated opiate medications are time-released to be effective for up to 12 hours. Sure, addicts can crush and snort them to disable the long-acting capabilities, but junkies aren't using them for physical pain.

"It's ridiculous that these drugs are seen as inherently evil," says Reynolds. "They save people's lives and families. That's more important than the fact that people abuse them; it's just that simple."

Pasco County deputy B.J. Wright got bumped up to detective in '96 and quickly took over the pharmacy beat. He encouraged drug store personnel to contact him if people filled what seemed like excessive prescriptions. Soon enough, Richard Paey popped onto his radar. Here was a guy who couldn't possibly be taking such a volume of pills himself; he had to be selling them, Wright

figured. Deputies started watching Paey, and eight times caught him on tape filling scripts of opiate medications -- each of which would later weigh out in excess of 28 grams.

Wright contacted Lisa Loos of the Tampa office of the Drug Enforcement Administration. She in turn called Dr. Nurkiewicz in New Jersey to inquire about his large prescriptions issued to Richard Paey in Florida. The doctor initially told her that Paey was his chronic pain patient who needed the meds.

When Wright and Loos visited Nurkiewicz at his office on March 5, 1997, however, the doctor started backpedaling. He asked if he was under investigation, and the cops matter-of-factly said yes. They also casually informed him that the penalty could run as high as 25 years in prison. Nurkiewicz then denied writing prescriptions after 1996, thus helping build a case against Paey for prescription fraud.

"When the DEA got involved, [Nurkiewicz] started throwing Richard Paey to the wolves," Attridge says. "And it was amazing how the investigators bought every word of it."

Wright still suspected Paey of drug dealing. He and other deputies tailed him and staked out his house over the course of several weeks. Their surveillance revealed nothing.

On March 12, 1997, Richard Paey was in the upstairs bathroom of his home. Linda and the kids were downstairs. His mother, who had been babysitting, prepared to leave. Around 7 p.m., a team of deputies burst into the home with black masks and automatic weapons drawn. Flashing a search warrant, the cops found a modest number of pills, a cache of empty pill bottles, and a bank of computer equipment that they would claim enabled Paey to forge scripts. They discovered letterhead from Dr. Nurkiewicz and other stuff that also suggested forgery. They led Richard Paey from his home in handcuffs. After being released from jail the following day, Paey entered an emergency room with symptoms of a bleeding ulcer.

Ironically, it was during this tense time that Richard Paey received his first truly effective treatment for chronic pain. A doctor surgically implanted a morphine pump that establishes a steady blood level of pain reliever. It was the first time his opiates weren't cut with large doses of Acetaminophen. Paey continued to take periodic pills for episodes of "breakthrough pain," but Linda Paey says he hasn't taken oral meds for a couple of years now.

Prosecutors estimated that Richard Paey filled prescriptions for 18,000 pills over a two-year period. Shocking, huh? Paey's accusers assumed that taking that much medicine would cause serious illness or death. Not likely, say pain doctors. If Paey took Percocet as directed for chronic pain -- two every four hours -- it would add up to 8,760 over two years. Add in doses of Lortab and Valium and it's easy to understand how Paey could eat 18,000 pills in two years.

The larger issue, Paey's backers say, is that cops and prosecutors got to decide at all. "We're asking prosecutors instead of doctors," says Dr. Alex DeLuca, a former pain specialist in New York, now a writer and advocate. "Where do they get the answers? 'Sounds like too many pills to me,'" he adds with a laugh.

Says Dr. Fisher of California: "If you use the concept of titration, where the doses are raised to the point that the patient functions optimally, then law enforcement standards can decide it's too much. You have conflicting ideologies, and law enforcement wins because they have the guns."

Such a system can cause a dangerous ripple effect. Some doctors become fearful of scrutiny by authorities, and the potential loss of professional standing and livelihood, as well as the possibility of incarceration. In a scholarly paper DeLuca presented in April, "The War on Drugs, the War on

Doctors, and the Pain Crisis in America," he says prosecutions of doctors for drug violations have risen during John Ashcroft's reign as attorney general.

There's even a name for doctor's anxieties over being labeled a drug dealer: "The Chilling Effect." DeLuca defines it as "the withdrawal by physicians from the appropriate treatment of pain resulting from fear of litigation."

Dr. Clifford A. Bernstein, a pain specialist in Beverly Hills, Calif., much prefers other treatments to opiates, but he still prescribes them. He says the way to avoid the Chilling Effect is to "keep good records. There's nothing wrong with people being on narcotics, but you have to assess the patient, warn about the dangers of these drugs and justify their use in your notes."

Apprehensive pain doctors blame the War on Drugs for the current predicament. It's a war that targets not just dealers and dopers, but doctors and their patients too. DeLuca writes: "The root cause of the widespread undertreatment of pain can be traced directly to the systematic, nationally coordinated, relentless harassment, arrest and prosecution of thousands of American physicians, many of whom had been engaged in nothing other than the standard care of pain and addiction of the day."

The big losers in all of this? Chronic pain sufferers.

Take the case of Robert Stevens, one of Dr. Fisher's patients, who has a ruined back. Five years ago, before Fisher was busted, Stevens, who was on Social Security disability for a mental condition, rode a bike several miles a day and enjoyed a decent quality of life. He took a maintenance dose of OxyContin.

With Fisher gone, Stevens immediately reduced his dose to the lowest he could stand. "I figured I needed to wean myself off," he explains. "But I wasn't prepared for the amount of pain I would be in. It was four years since I'd been in that kind of pain."

Stevens soon became bed-bound. "It felt like an abscess tooth for months upon months with no escape," he says by phone, the pain audible in his voice. "I got headaches from gritting my teeth all the time, my legs cramped up. I thought, 'This isn't living; why don't I just stop it?' Fortunately, I had a support system of people telling me to hang on, or I wouldn't be here now."

Stevens finally found a doctor willing to treat him in Fresno. Once a month, he would make the 656-mile round trip to fill his OxyContin script. It was worth it. But then his doctor dropped him, saying he had concerns about the toll the car rides were taking.

Stevens takes methadone now, which he says is about half as effective as OxyContin. He's in bed most of the time. "I've got paperwork to start going to mental health [care] for suicidal thoughts," he says in a monotone. "And depression."

Studies suggest there are a lot of Robert Stevenses in the country. Their supporters offer a simple solution: Let physicians assess pain patients and prescribe them the medication they need. And keep law enforcement out of the doctor's office. "We need to have the remedicalization of the whole arena," says Reynolds of Pain Relief Network. "Move controlled substances from the Justice Department over to the FDA; don't classify them according to superstitious notions; make distinctions between substances based on medical judgments."

Before the first trial in late 2001, Linda begged Richard to accept a period of house arrest, followed by probation. He already was under a sort of house arrest, she argued. Richard finally agreed, but when he got in front of the judge to seal his plea bargain, he balked, then broke down

sobbing. The judge canceled the deal. Two arduous trials ensued, each thrown out or overturned. And still the State Attorney's Office in Pasco pursued the drug trafficking charges. The prosecution made more offers, but each required jail time, and Paey passed.

"They should've dropped the trafficking charges," Linda Paey says, her voice rising. "They held this huge hammer over our heads, and then said they were being nice guys by offering plea deals. They should not have charged him with the trafficking statute knowing he was not a trafficker."

But the Paeyes overestimated the court's inclination toward mercy. Richard was, in effect, punished in part for not playing by the rules. The Paey camp insisted that the charges be dropped or reduced without concessions from them -- concessions that would essentially admit to a criminal act -- and such obstinacy does not play well to the prosecutorial mindset.

Assistant State Attorney Scott Andringa, the lead prosecutor, explained it this way: "As a trial lawyer, normally you charge the highest crime that you can prove. If it goes to trial, you might as well lean on that. Then there's [the option] to plead the case out. I understand someone wanting to have their day in court ... But they have to accept that with that there's a risk, and in the case of Richard Paey it was a 25-year mandatory minimum, which he knowingly and willingly accepted.

"While I have sympathy for him, the system did what it does. Everyone did their job. ... We made a decision based on laws passed by the Legislature and signed by the governor. We made the right filing decision as evidenced by the jury's verdict. I don't see this as an issue of whether our office did the right thing ... I have no personal or professional regret about what we've done in this case."

When asked if 25 years in state prison was a proper punishment for Richard Paey's crime, Andringa said, "It's not appropriate for me to give my personal opinion [about that]."

Reynolds replied passionately to Andringa's points in an e-mail: "When you take power away from judges, you give it to prosecutors. If they have the power to induce pleas with the threat of draconian sentences, the defense attorneys are reduced to making deals that minimize the damage done to the lives of defendants who, by the way, have at the time of making the deals, been convicted of absolutely nothing. What goes on, therefore, is a systematic denial of due process, a parallel criminal justice system that consists only of targeting and punishment, a parallel system that is essentially operating outside judicial review."

Eli Stutsman, the Paeyes' newly acquired appellate attorney, declined to comment on strategies, saying that he hadn't even received the trial transcript yet. But Attridge, who defended Paey at his last trial, said their main thrust for appeal would be "the perjured testimony of the doctor, which was what the verdict was based on. The state should've known it was perjured. He's entitled to a new trial."

Although Richard Paey was not allowed phone calls or visitors during his stay in the transitional facility, he did get a letter to Linda. They'd shorn his hair and put him in the infirmary because of his morphine pump.

He received some disquieting news. Department of Corrections policy is not to refill morphine pumps, although no decision had yet been made on his particular case. Stutsman called the DOC and impressed upon officials the importance of continuing the treatment.

In early June, Paey was moved to his permanent facility, Zephyrhills Correctional Institution in Pasco County. He wrote his wife and said, "I was told they're going to refill my pump." Then, in a

letter Linda received on June 7, he wrote, "I haven't heard anything about my [morphine] pump, other than the staff doctors remark that he didn't know how to handle one of them. It's been said, though, that I was sent here primarily because Zephyrhills could take care of the pump."

Meanwhile, Linda Paey, who for so long had fought the good fight, must confront reality. "Now they're processing him to be in *prison* for 25 years," she says, her voice cracking. "It's more than depressing. It's scary. This wasn't supposed to happen."

Information for portions of this story was culled from court testimony and depositions. Contact senior writer Eric Snider at 813-739-4853 or at eric.snider@weeklyplanet.com.