However, the physician had committed the acts at least six years earlier. *Id.* Most importantly, in addition to presenting evidence of his rehabilitation, the physician admitted that he had violated Federal law and "testified as to his remorse for his past misconduct and his determination that he [would] not engage in such conduct in the future." *Id.* at 11870. The case thus provides no comfort to Respondent.

In another portion of his brief, Respondent cites three additional cases in which the Agency granted a restricted registration to a practitioner. *See* Resp. Summation Br. at 26–27 (citing *Karen A. Kruger,* 69 FR 7016 (2004); *Wesley G. Harline,* 65 FR 5665 (2000); *Paul J. Caragine, Jr.,* 63 FR 51592 (1998)). However, none of these cases support granting Respondent a restricted registration.

In *Caragine,* unlike here, there was no evidence of intentional diversion and the physician testified that he had undergone training to help him better identify and manage drug-seeking patients.[39] *See* 63 FR at 51601. Likewise, in *Harline,* there was no evidence of intentional diversion. Indeed, the Agency specifically held that the prescriptions in dispute were issued for a legitimate medical purpose and thus did not violate the CSA. *See* 65 FR at 5671. Furthermore, the practitioner admitted that he had violated State law and gave assurance that he would not do so in the future. *Id.* Finally, *Kruger* involved a practitioner who wrote fraudulent prescriptions to obtain drugs for self-abuse and not to divert to others. The practitioner, however, readily admitted her misconduct and provided evidence that she had undergone treatment.

In contrast to these cases, Respondent does not remotely meet the Agency's standards for obtaining a restricted registration. His failure to testify precludes a finding that he has accepted responsibility for his misconduct. His misconduct is egregious; that he continued to provide unlawful prescriptions even when he knew he was under investigation renders it especially so. Thus, even if Respondent provided treatment to some legitimate patients and those patients benefitted from his treatment of them, the evidence with respect to M.R. and K.D. establishes that he is still a drug dealer.

In short, Respondent has not rebutted the Government's *prima facie* case that he has committed acts which "render his registration * * * inconsistent with the public interest." 21 U.S.C. 824(a)(4). Accordingly, I conclude that the public interest requires that his registration be revoked and his pending application be denied. And because of the egregiousness of his misconduct, I conclude that the public interest requires that his Order be effective immediately. *See* 21 CFR 1316.67.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) & 824(a), as well as by 28 CFR 0.100(b) & 0.104, I order that DEA Certificate of Registration, AM9742380, issued to Dewey C. MacKay, M.D., be, and it hereby is, revoked. I further order that any pending application to renew or modify the registration be, and it hereby is, denied. This Order is effective immediately.

Dated: August 3, 2010.

Michele M. Leonhart,

Deputy Administrator.

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[39] In *Krishna-Iyer,* I made clear that while there may be a few isolated decisions that suggest that a practitioner who has committed only a few acts of diversion may regain his registration "without having to accept responsibility for his misconduct, the great weight of the Agency's decisions is to the contrary." 74 FR at 464 (citation omitted). I explained that "[b]ecause of the grave and increasing harm to public health and safety caused by the diversion of prescription controlled substances, even where the Agency's proof establishes that a practitioner has committed only a few acts of diversion, this Agency will not grant or continue the practitioner's registration unless he accepts responsibility for his misconduct." *Id.* I further held that to the extent any decision of this Agency suggests otherwise, it is overruled. *Id.* at n.9. Thus, were a case to present facts similar to those of *Caragine,* I would likely deny the practitioner's application.

As I also noted in *Krishna-Iyer:* "The diversion of controlled substances has become an increasingly grave threat to this nation's public health and safety. According to The National Center on Addiction and Substance Abuse (CASA), '[t]he number of people who admit abusing controlled prescription drugs increased from 7.8 million in 1992 to 15.1 million in 2003.'" 74 FR at 463 (quoting National Center on Addiction and Substance Abuse, *Under the Counter: The Diversion and Abuse of Controlled Prescription Drugs in the U.S.* 3 (2005) [hereinafter, *Under the Counter*]). CASA also found that "[a]pproximately six percent of the U.S. population (15.1 million people) admitted abusing controlled prescription drugs in 2003, 23 percent more than the combined number abusing cocaine (5.9 million), hallucinogens (4.0 million), inhalants (2.1 million) and heroin (328,000)." *Id.* (quoting *Under the Counter* at 3). Finally, CASA found that "[b]etween 1992 and 2003, there has been a * * * 140.5 percent increase in the self-reported abuse of prescription opioids," and in the same period, the "abuse of controlled prescription drugs has been growing at a rate twice that of marijuana abuse, five times greater than cocaine abuse and 60 times greater than heroin abuse." *Id.* (quoting *Under the Counter* at 4).

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Nicholas J. Jerrard, M.D.; Revocation of Registration

On September 30, 2009, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to Nicholas J. Jerrard, M.D. (Respondent), of San Diego, California. The Show Cause Order proposed the revocation of Respondent's DEA Certificate of Registration, BJ6361036, which authorizes him to dispense controlled substances as a practitioner, on the ground that he does not "have authority to practice medicine or handle controlled substances in the state of California." Show Cause Order at 1. The Order also proposed the denial of "any pending applications for renewal or modification of" Respondent's registration. *Id.*

Specifically, the Order alleged that the Medical Board of California (MBC) had "revoked [Respondent's] State medical license" and that he is "currently without authority to handle controlled substances in the State of California." *Id.* The Order also alleged that the Board based its revocation of his license "on a report from the Oregon Board of Medical Examiners" which indicated that he "failed a pre-employment drug screen by testing positive for two Schedule IV controlled substances and failed to provide proof of valid prescriptions for the medications." *Id.* at 2. Finally, the Order alleged that in an interview with an MBC investigator in June 2008, Respondent "admitted that [he] had used methamphetamine approximately every two months since 2005." *Id.* Finally, the Order notified Respondent of his right to request a hearing on the allegations, the procedure for doing so, and the consequences for failing to do so. *Id.*

On December 10, 2009, a DEA Diversion Investigator (DI) served Respondent by leaving a copy of the Show Cause Order at Respondent's registered address. Moreover, on December 22, 2009, the DI left a copy of Show Cause Order at an address in San Diego for Respondent which he had obtained from the MBC.[1]

[1] In addition, the DI had previously gone to Respondent's registered address and met its "current occupant," who stated that he was in contact with Respondent but that the latter "had been out of the country for a few years." The DI gave this person his contact information and asked that he have Respondent contact him; however, Respondent did not contact the DI. The DI also

Since the date of service of the Show Cause Order, more than thirty days have passed and neither Respondent, nor anyone purporting to represent him, has requested a hearing. I therefore find that Respondent has waived his right to a hearing and issue this Decision and Final Order based on the record submitted by the Government. 21 CFR 1301.43. I make the following findings.

Findings

Respondent holds DEA Certificate of Registration BJ6361036, which was last renewed on January 1, 2008. The registration does not expire until December 31, 2010.

On March 24, 2009, the MBC adopted a Default Decision and Order in a case brought against a Respondent's State medical license. *In re Nicholas Joseph Jerrard, M.D.,* No. 10–2006–179554, Decision at 1 (Med. Bd. Cal. 2009). According to the decision, in November 2006, the MBC received a report from the Oregon Board of Medical Examiners (Oregon Board) which indicated that Respondent "had failed a pre-employment drug screen by testing positive for nordiazepam and temazepam and had failed to provide proof of a valid prescription for the medication." *In re Jerrard,* Default Decision and Order at 5. After an investigation, the Oregon Board allowed Respondent to withdraw his application to reactivate his medical license and closed the matter with no action taken. *Id.*

On June 10, 2008, an Investigator from the MBC interviewed Respondent. During the interview, Respondent admitted that "he had used methamphetamines approximately every two months since 2005." *Id.* at 6.

The MBC further found that following the pre-employment drug screen which he failed, Respondent was evaluated at the Betty Ford Center. *Id.* The Center recommended that he undergo six months of inpatient treatment. *Id.* Because of financial reasons and his fear of losing two jobs, Respondent did not follow through with the recommendation. *Id.*

However, around January 2008, he underwent some ten weeks of treatment at Rancho L'Abri, another inpatient facility. *Id.* After his discharge, Respondent found out that he had been fired from both his jobs and experienced a relapsed. *Id.* Thereafter, he was readmitted to Rancho L'Abri for one month and discharged to a 90-day outpatient program. *Id.* Respondent, nevertheless, participated in the program for only one day, indicating that he did not "feel comfortable there." *Id.* Subsequently, he joined another outpatient treatment program from which he graduated in September 2008. *Id.*

The MBC further concluded that Respondent had "[s]elf-administered controlled substances" in violation of California Business and Professions Code section 2239(a), and that he "[e]ngaged in conduct which breaches the rules or ethical code of the medical profession, or conduct which is unbecoming to a member in good standing of the medical profession, and which demonstrates an unfitness to practice medicine" in violation of California Business and Professional Code section 2234. *Id.* at 7. The MBC then revoked Respondent's license to practice medicine effective April 23, 2009. Decision at 1.

Discussion

Under the Controlled Substances Act (CSA), a practitioner must be currently authorized to handle controlled substances in "the jurisdiction in which he practices" in order to maintain a DEA registration. *See* 21 U.S.C. 802(21) (defining the term "practitioner" as a person "licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices * * * to distribute, dispense * * * [or] administer * * * a controlled substance"); *id.* § 823(f) ("The Attorney General shall register practitioners * * * to dispense * * * controlled substances * * * if the applicant is authorized to dispense * * * controlled substances under the laws of the State in which he practices.").

Accordingly, DEA has held repeatedly that the CSA requires the revocation of a registration issued to a practitioner whose State license has been suspended or revoked. *David Wang,* 72 FR 54297, 54298 (2007); *Sheran Arden Yeates,* 71 FR 39130, 39131 (2006); *Dominick A. Ricci,* 58 FR 51104, 51105 (1993); *Bobby Watts,* 53 FR 11919, 11920 (1988). *See also* 21 U.S.C. 824(a)(3) (authorizing the revocation of a registration "upon a finding that the registrant * * * has had his State license or registration suspended [or] revoked * * * and is no longer authorized by State law to engage in the * * * distribution [or] dispensing of controlled substances"). Because Respondent is no longer licensed to practice medicine and therefore cannot dispense controlled substances in California, the State in which he is registered with DEA, under the CSA, he is no longer entitled to hold his registration. Accordingly, his registration will be revoked.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) & 824(a), as well as 28 CFR 0.100(b) & 0.104, I order that DEA Certificate of Registration, BJ6361036, issued to Nicholas J. Jerrard, M.D., be, and it hereby is, revoked. I further order that any pending application of Nicholas J. Jerrard, M.D., to renew or modify his registration, be, and it hereby is denied. This Order is effective September 15, 2010.

Dated: July 30, 2010.

Michele M. Leonhart,

Deputy Administrator.

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performed an Internet search for Respondent's "possible practice locations" but was "unable to locate any pertinent information."

As regards the sufficiency of service of the Order to Show Cause, I conclude that notwithstanding that Respondent was not personally served, the Government has met the requirements of the Due Process Clause. As to notice, due process is satisfied when "[t]he means employed [are] such as one desirous of actually informing the absentee might reasonably adopt to accomplish." *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306, 315 (1950). More recently, the Supreme Court has held that "[d]ue process does not require that a property owner receive actual notice before the government may take his property." *Jones* v. *Flowers,* 547 U.S. 220, 226 (citing *Dusenbery* v. *United States,* 543 U.S. 161, 170 (2002)). Furthermore, due process does not require "heroic efforts," *Dusenbery,* 534 U.S. at 170, but rather only that "the government * * * provide 'notice reasonably calculated, under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" 547 U.S. at 226 (quoting *Mullane,* 339 U.S. at 314). I accordingly find that the DI's efforts to serve the Order on Respondent satisfied due process notwithstanding the Government's inability to effectuate personal service as the DI's efforts were "reasonably calculated, under all the circumstances, to apprise [Respondent] of the pendency of the action." *Mullane,* 339 U.S. at 314.

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 09–8]

Tony T. Bui, M.D.; Revocation of Registration

On September 15, 2008, the Deputy Assistant Administrator, Office of Diversion Control, issued an Order to Show Cause to Tony T. Bui, M.D. (Respondent), of Bedford, Texas. The Show Cause Order proposed the revocation of Respondent's DEA Certificate of Registration, BB8997857, which authorizes him to dispense controlled substances as a practitioner, and the denial of any pending applications to renew or modify his registration, on the ground that his "continued registration is inconsistent