UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
	)	Crim. Case. 03-467-A
v.	)	
	)	Hon. Leonie Brinkema
	)	
	)	
WILLIAM ELIOT HURWITZ,	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S RESPONSE TO GOVERNMENT'S POSITION ON SENTENCING FACTORS

The government seeks a life sentence for a 61-year-old physician with significant health issues who, according to the testimony at trial, saved many lives with his medical treatment and who has lost forever the ability to write prescriptions, the very conduct for which he was convicted.

In seeking a life sentence, the government stakes out a position that completely ignores what actually occurred at trial. The government maintains that Dr. Hurwitz is a drug kingpin pushing pills indiscriminately and criminally -- yet the jury convicted him on less than 1/3 of the charges, surely a rejection of the "kingpin dealer" characterization. In seeking a life sentence, the government describes horrific facts attributable to Dr. Hurwitz's conduct, yet these are facts that were actually disproved at trial or never admitted into evidence. In seeking a life sentence, the government acts as if the most serious bodily injury counts resulted in convictions, yet these counts did not even make it to the jury due to lack of evidentiary support.

Perhaps most telling is the government's palpable violation of *North Carolina v. Pearce*, 395 U.S. 725 (1969), which prohibits the imposition of a harsher sentence on retrial after a defendant's successful appeal of a prior wrongful conviction. Particularly after a trial in which the Court and the jury *rejected* most of the charges as insufficient, it is simply inexplicable, not to mention unconstitutional, to impose a *higher* sentence than was imposed the first time around.

The government may have calculated that, by recommending a grossly excessive sentence, it can induce the Court to "compromise" by imposing a sentence that seems mild by comparison to the government's extreme recommendation, even if that sentence is, in reality, far greater than necessary to achieve the purposes of 18 U.S.C. § 3553. But whatever the government's tactical calculation, its recommendation is so pervasively flawed with both legal and factual misstatements that it should be entirely disregarded.

I. The Government's Recommendation Is Riddled With Factual Misstatements, Exaggerations, and Fabrications

The "facts" recited by the government contain countless misstatements and exaggerations of the testimony at trial. Even worse, many of the government's "facts" are complete fabrications or are "facts" that were convincingly *disproved* at trial, often by the government's own witnesses. The government convinced the Probation Office to include some of these "facts" in the Presentence Report ("PSR"); the defense will not repeat here its detailed response to those many errors, which it provided first in a letter to the Probation Office and then to the Court as an attachment to Defendant's sentencing memorandum. Neither will we burden the Court with another sentence-by-sentence refutation of the new "facts" that the government asserts now for the first time, contrary to the requirements of Rule 32(f). See Section II, *infra*. The Court will undoubtedly recall much of the evidence that contradicts the government's description. We

discuss here only illustrative examples, taken from just one paragraph in the government's memorandum (at pages 2-3).

First, in a single sentence in that paragraph, the government makes three factual assertions that are entirely unsupported or patently false. The government claims that Patrick Snowden (1) took 1600 pills daily, (2) had ten car wrecks caused by his medication, and (3) suffered four narcotics overdoses. The first assertion, that Mr. Snowden took 1,600 pills daily, was refuted by Mr. Snowden himself, who testified at retrial that he did not ever fill both prescriptions totaling 1,600 pills. *See* 3/27/07 Testimony (Snowden) (testifying that he only filled the prescription for the Roxicodone 5 mg, not the prescription for Roxicodone 15 mg); *see also* 4/18/07 Tr. (Hurwitz) at 9 ("Q. [D]id Mr. Snowden testify that one or the other of those two alternative [Roxicodone] prescriptions that you wrote, in fact, was not filled? A. I think he testified that the one for 15 mg was not filled and the one for 5 mg was filled."); *see also id.* at 10 (Dr. Hurwitz testifying that he issued two prescriptions for Roxicodone in two different sizes because he was not sure which size pill the pharmacy had in stock); 4/17/07 Tr. (Hurwitz (cross)) at 91-92 (testifying that he instructed Mr. Snowden that the two Roxicodone prescriptions totaling 1,600 pills were to be taken as alternatives to each other, depending on which size pill the pharmacy had available).

Furthermore, there was absolutely no evidence at trial about Mr. Snowden's car accidents. The Court properly excluded testimony about his accidents, ruling that the testimony was irrelevant because Snowden had never notified Dr. Hurwitz about them (if indeed they occurred). *See, e.g.*, 4/17/07 Tr. (Hurwitz (cross)) at 84-86 (ruling by the Court that the government cannot ask about Mr. Snowden's car accidents because there was no evidence that Mr. Snowden ever "told the doctor" about these accidents). Thus, the record contains no

evidence that any accident was caused by medication (much less that it was caused by improperly or illegally prescribed medication), and the defense has had no opportunity to examine the basis for, or challenge, the government's unsupported assertion to the contrary.

Finally, the assertion that Mr. Snowden suffered four narcotics overdoses, is worse than unsupported; it is contradicted by the government's own evidence. Dr. David Medland, the only doctor who testified about the cause of Mr. Snowden's medical emergency, did *not* testify that Mr. Snowden suffered an overdose. Rather, he believed Mr. Snowden suffered seizures because he had stopped taking benzodiazepines as a result of a temporary lapse in insurance coverage. The government's claim of an overdose is a complete fabrication. And the government neglects to remind the Court of the obvious facts that the jury acquitted Dr. Hurwitz of illegally prescribing to Mr. Snowden and that there was no evidence that Mr. Snowden was a recreational drug user or dealer and, therefore, no basis to believe that his treatment was for anything other than legitimate medical purposes.

The same paragraph also asserts that Dr. Hurwitz caused "[a]t least five (if not more)" patient deaths. That claim rests on a contention that an illegal prescription caused Linda Lalmond's death by overdose, notwithstanding (1) unchallenged expert testimony that the reported level of narcotics on which her autopsy relied was the result of postmortem redistribution, and that the prescribed medication could not have produced that level while she was living; (2) expert testimony that her death was likely caused by a pre-existing heart condition, and that the circumstances and timing of her death were inconsistent with a narcotics overdose; and (3) that there was no evidence that could support a finding that the prescription was written for an improper and illegal purpose, rather than a legitimate, good faith medical purpose. It also rests on a contention that Rennie Buras's death was caused by an illegal

prescription, notwithstanding the evidence suggesting that Mr. Buras's death, too, was caused by a pre-existing heart condition and the complete absence of evidence that the prescription was written for an improper and illegal purpose. It also rests on the contention that Mary Nye's death was caused by illegal prescriptions, despite the fact that (1) Dr. Hurwitz was never charged with causing her death, (2) there was no evidence at trial concerning the cause of her death, and (3) there was no evidence that an overdose caused the separate *injury* alleged in the Indictment. The government fails, again, to note that Dr. Hurwitz was *acquitted* of prescribing illegally to Mr. Buras and Ms. Nye -- and that the evidence concerning Ms. Lalmond's death and Ms. Nye's injury was insufficient even to submit those charges to the jury.

The government's assertion that two other patients died because of illegal prescriptions also relies on speculation about matters that were not explored at trial because they were not even charged by the government. The only evidence concerning these patients that was admitted at trial was the 1996 order of the Virginia Board of Medicine (GX 53-8). That order was admitted for limited purposes which did *not* include the purpose of proving prior illegal acts or the causation of those patients' deaths. The defense, therefore, had no opportunity at trial to challenge the basis for the government's assertion, now, that illegal prescriptions caused those deaths. In any event, the order does not even purport to pass judgment on whether Dr. Hurwitz prescribed illegally; it merely addresses the medical soundness of his treatment.

The same paragraph asserts that Dr. Hurwitz's illegal prescriptions harmed two babies. Of course, the government presented evidence concerning only one baby at trial, and now -- even while asserting that the second baby and mother were "vulnerable victims" whose treatment requires a sentence enhancement -- fails even *to identify* the second baby or the second mother who were allegedly harmed. As for Taya Rutherford, the medical records say *nothing* about

narcotics addiction. The Court heard testimony from multiple experts questioning whether any such addiction was involved and opining, in any event, that it was medically appropriate to continue prescribing opioids to Taya's mother because of the substantial risks associated with withdrawal. The government's ludicrous response is that Dr. Campbell testified that he would not prescribe even penicillin, let alone opioids, to a pregnant patient. The government tries to pretend that Dr. Campbell believed that it was medically inappropriate (and, presumably, in the government's view, a felony) to prescribe penicillin, just as it was wrong to prescribe opioids. But Dr. Campbell plainly was not asserting that prescribing either drug was improper. He was saying only that his personal medical practice (neurosurgery) does not encompass treatment of pregnant patients for pain. 4/11/07 Tr. (Campbell) at 109-10 ("I haven't prescribed anything for any pregnant patient."). The jury had no difficulty understanding this obvious point; it credited Defendant's experts and acquitted on this count.

These examples -- *all taken from a single paragraph of the government's recommendation* -- illustrate plainly the government's gross distortion of the factual record. The government's version of the "facts" bears little relation to reality.

II. The Court Should Disregard The Government's Recommendations Because Of Its Flagrant Violation Of Rule 32(f)

The government's sentencing recommendation should be disregarded in any case because of the prosecutors' violation of Rule 32(f). That rule requires that, within 14 days after receiving a PSR,"the parties *must state in writing any objections*, including objections to material information [and] sentencing guideline ranges." FED. R. CRIM. P. 32(f)(1) (emphasis added). Furthermore, the objecting party "*must* provide a copy of its objections to the opposing party." *Id.* at 32(f)(2) (emphasis added). These Rules are couched in mandatory, not permissive, terms and, for the 14-day period between the first release of the PSR and its finalization, plainly

prohibit any unwritten, *ex parte* communications between the parties and the Probation Office regarding the PSR. *United States v. Nelson-Rodriguez*, 319 F.3d 12, 62 (1st Cir. 2003). These safeguards -- requiring written objections and service on the other side -- are vitally important because they protect against the appearance of any impropriety in the sentencing process. *See United States v. Huff*, 512 F.2d 66, 70, 71 (5th Cir. 1975) ("emphatically" disapproving of a "prejudicial and impermissible *ex parte* communication" between prosecutor and the court in sentencing process because it is a "gross breach of the appearance of justice when the defendant's principal adversary is given private access to the ear of the court").

The government's willful refusal to comply with Rule 32 has prejudiced the defense in two ways. First, compliance would have provided timely notice of the basis for the government's sentencing recommendations, on or about June 21, the date on which Defendant provided his detailed written objections to the Probation Office and to the government. Because of the government's non-compliance, the bases for the government's recommendation were disclosed for the first time late on July 6, less than one week before the sentencing hearing. Second, because of the government's violation of Rule 32, it is impossible to know the extent to which the recommendations in the PSR reflect information -- quite possibly information that is *false* -- that the government provided to the Probation Office through its *ex parte* contacts. Rule 32 was drafted precisely to prevent these kinds of prejudice. *See Nelson-Rodriguez*, 319 F.3d at 62-63 (the underlying purpose of the Rule is to ensure that "both sides [] know the scope of the objections . . . [and] what issues are on the table concerning the presentence report so they can present counter-arguments").

Specifically, Defendant has been prejudiced by the government's belated request for a 2-level enhancement for aggravating role. Government's Position on Sentencing Factors ("Gov't

Mem.") at 62-64. This objection does not appear in either the final PSR or the Addendum to the PSR, which purports to "fairly state all objections which have not been resolved." PSR at A-1; *see also id.* (noting that the government's only objection was to the calculation of the attributable drug quantity). The government also requests a 2-level obstruction enhancement and has identified at least *21* different instances of alleged obstruction of justice[1] by Defendant. Gov't Mem. at 42-56. Only 5 of these allegations, at most, appear in the PSR. *See* PSR ¶¶ 56-59 (identifying statements pertaining to Rita Carlin and Timothy Urbani as grounds for obstruction adjustment); *see also* Def. Mem. at 26-30. The Addendum to the PSR, again, contains nothing even hinting at the sweeping scope of the government's last-minute obstruction allegations.

Rule 32(f) should be rigidly enforced. Compliance is not difficult; no proper purpose can possibly be served by non-compliance; and anything less than rigid enforcement will require the Court to waste time resolving objections on a case-by-case basis. There is no reason to countenance this flagrant violation of the Rule. The Court should exercise its discretion by disregarding the government's recommendations. *United States v. Morsley*, 64 F.3d 907, 915 (4th Cir. 1995) (upholding district court's refusal to rule upon objections filed in violation of local rule similar to Rule 32); *see also United States v. Edouard*, 485 F.3d 1324, 1351 (11th Cir.

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[1] *See, e.g.*, Gov't Mem. at 45 ("Hurwitz creatively noted on April 2002 prescriptions for Urbani and his wife . . ."); *id.* at 46 ("the significant theme of Hurwitz's false testimony was that at the moment he approved a prescription, he never knew that a patient was going to sell and divert pills *in the future*"); *id.* at 46 n.12 (noting "several other misleading statements in the second trial," including testimony relating to "making 'fun' on a Woodson tape of Snowden," "Hurwitz's clever definition of what he meant on a Woodson tape about McCarter's 'snitching'," and "denying that he was familiar with the criminal process"); *id.* at 48 ("the medical encounters seen and approved by Hurwitz falsely contained notations about the absence of track marks" for Urbani, Carlin, Fuller, Grant, Mullins, McCarter, and Santmyers); *id.* at 50 (Dr. Hurwitz "refused to admit that he knew that [Mary Nye's] [insurance] plan had run out"); *id.* at 50-51 (Dr. Hurwitz made "one of his many false exculpatory statements" on an undercover tape with Kelly Latimer and at the second trial, "refused to admit that his comment to Latimer was a lie").

2007) (affirming district court's refusal to consider the merits of an objection that was not in compliance with Rule 32); *United States v. May*, 413 F.3d 841, 849 (8th Cir.) (district court can disregard objection that was not filed in compliance with Rule 32(f)), *cert. denied*, 126 S. Ct. 672 (2005); *United States v. Jones*, 70 F.3d 1009, 1009 (8th Cir. 1995) (district court has discretion to decline to rule on a sentencing objection that was not filed in compliance with Rule 32).

III. The Government's Recommendation Invites Reversible Error Under *North Carolina v. Pearce*

The life sentence recommended by the government would violate the well-established principle that "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969); *see also Blackledge v. Perry*, 417 U.S. 21, 27-28 (1974) (extending the *Pearce* rule to prosecutors). If a defendant is sentenced more severely on retrial following his appeal of the original convictions, the harsher sentence raises a "*presumption* of vindictiveness," namely, a presumption that the increased sentence is a penalty for the defendant's successful appeal. *United States v. Bello*, 767 F.2d 1065, 1068 (4th Cir. 1985). Furthermore, given the potential chilling effect on defendants' exercises of their rights to appeal, the rule in *Pearce* "prohibits both the likelihood of actual vindictiveness and the *apprehension of retaliation* by either judge or prosecutor." *United States v. Whitley*, 734 F.2d 994, 997 (4th Cir. 1984) (emphasis added); *see also Pearce*, 395 U.S. at 725 ("since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal . . . due process also requires that a defendant be freed of apprehension of such a retaliatory motivation").

The government's recommendation plainly raises a reasonable apprehension of vindictiveness. *See Blackledge*, 417 U.S. at 27 (due process clause is offended by increased sentences that "pose a realistic likelihood of vindictiveness"); *Whitley*, 734 F.3d at 997 (vacating

sentence and remanding because "to uphold the sentence would create a reasonable apprehension of vindictiveness"); *United States v. Gray*, 852 F.2d 136, 138 (4th Cir. 1988) (the rule in *Pearce* "is directed against the *possibility or appearance* of vindictiveness") (emphasis added). The appearance of vindictiveness or impropriety is of particular concern in this case. First, this case is much broader than most in scope and complexity. The "prosecutor clearly has a considerable stake in discouraging" defendants from appealing because an appeal "will clearly require increased expenditures of prosecutorial resources," and a retrial may furthermore result in a more favorable decision for the defendant (as, indeed, it did here). *Blackledge*, 417 U.S. at 27-28. Second, Dr. Hurwitz's successful appeal defeated a concerted effort by the government to expand the scope of the Controlled Substances Act to permit criminal convictions even if a doctor acted in good faith and for legitimate medical purposes. The government fought very hard to establish this principle, but Dr. Hurwitz's successful appeal defeated the government's misguided efforts. Third, this prosecution has attracted national attention to the government's efforts to criminalize legitimate medical practice treatment, based in large part on popular misconceptions about the appropriate use of opioid medication to treat pain. The government has faced blistering criticism for its misunderstanding of basic medical principles and its extremist legal positions. In these circumstances, there is more than ample reason to find a disturbing possibility of vindictiveness, or perhaps an effort to seek vindication in public opinion, in the government's sentencing recommendation.

Under the rule in *Pearce*, the presumption of vindictiveness can be rebutted only by proof that new information or conduct after the first sentence justifies an increased sentence. *Pearce*, 395 U.S. at 726; *see also Alabama v. Smith*, 490 U.S. 794, 797 (1989) (increased sentence justified where "new information" arose after first sentencing about the exceedingly horrendous

nature of defendant's crimes). Here, just the opposite is true. Dr. Hurwitz was wrongly convicted of 34 charges in the first trial (including the death, bodily injury, and conspiracy counts) for which he was *not* convicted in the second. What is more, on retrial Dr. Hurwitz was permitted to present his defense of good faith which included, among other things, the testimony of pre-eminent medical experts and ten former patients. These patients testified in detail about Dr. Hurwitz's conscientious, compassionate, and effective treatment of their chronic pain. Such evidence was largely absent from the first trial. All of the information that has come to light since the first trial indicates that a *less* severe sentence is appropriate. Far from *refuting* the inference that a life sentence is unconstitutionally vindictive, this new information strongly *supports* that inference. Adoption of the government's recommendation would constitute reversible error.

IV. The Government's Guidelines Analysis Is Fundamentally Flawed

The government's calculation of the sentencing range that would be produced by the Sentencing Guidelines is fundamentally flawed.

A. The Government's Drug Weight Arguments Should Be Rejected Outright

The government's sentencing memorandum completely ignores Defendant's detailed objections regarding the proper calculation of drug weight in this case and instead offers three higher estimates of the total attributable drug quantity, backed up by nothing more than *ipse dixit* assertions and misstatements of the evidence at trial.[2] These estimates are notable for both the

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[2] Due to the government's failure to comply with Rule 32(f), these calculations were made available to Defendant for the first time only in the government's sentencing memorandum. The sentencing process and simple fairness demand more than what the Government has provided Defendant and the Court here. *See, e.g.*, *United States v. Howard*, 80 F.3d 1194, 1204 (7th Cir. 1996) ("Where either the probation officer or the prosecution offers an estimate of the drug quantities for which the defendant should be held responsible, the defendant ought to be on notice of all the assumptions, rationale, and methodology underlying the calculation.").

complete absence of any principled rationale supporting them and their utter disconnect from the record at trial. As such, the government's drug calculations lack "sufficient indicia of reliability to support [their] probable accuracy" (U.S.S.G. § 6A1.3(a)) and should be disregarded by the Court.

The government first claims that Dr. Hurwitz should be held to account "for the illegal distribution of over 1.7 million pills" (Gov't Mem. at 41), thus resulting in a base offense level of 38 according to the government's calculations. There is perhaps no greater example of the government's overreaching in its sentencing recommendation than in this suggestion that *each and every* pill prescribed by Dr. Hurwitz to a patient named in the Indictment (*see id.*, citing GX 2-2) was illegal. This assertion is entirely at odds with the jury's verdicts, the Court's dismissal of the death and bodily injury counts, and the evidence before this Court (especially with regard to patients such as Linda Lalmond, Rennie Buras, and Patrick Huber). Moreover, this claim betrays the erroneous belief, previously articulated by the government in this case, that the law criminalizes the prescription of high doses of opioids. *See* Government's Opposition to Defendant's Motion For Judgment Of Acquittal (filed April 18, 2007) at 2 ("the validity of a drug distribution count does not turn on the actual use to which the patient puts the drug, but on whether the drug has a *high potential* for physical dependence, abuse, and diversion, and whether the doctor prescribed within the bounds of medicine"); *id.* at 3 (arguing, with regard to Defendant's treatment of Ms. Lalmond, that "the jury could reasonably conclude that the defendant's general method of operation was to act as a drug pusher by prescribing large amounts of drugs to patients, causing the patients to become physically dependent on the drugs, and reaping the financial benefits of long-term provision of drug amounts that the patient could obtain only from him and from no other doctor.").

The government's other two estimates also are unsupported by the law and the record before this Court. Assuming the Court rejects its first drug weight calculation, the government next argues that the Court "must, at least, consider the prescriptions issued by the defendant which occurred after the first conviction for each patient where the jury reached a verdict of conviction." Gov't Mem. at 41. But merely saying it does not make it so, and the government offers no rationale at all for deeming illegal each and every subsequent prescription issued to a patient after a prescription for which the jury convicted. The government also argues that the Court should consider all of the prescriptions issued to Bret McCarter, Peter Grant, and Robert Woodson after the first charged prescription for these patients. *See* Gov't Mem. at 41 & Ex. 3. Here, again, the government offers no principled explanation for why these prescriptions are relevant. Instead, the government offers the self-serving (but plainly incorrect) hyperbole that at trial the government "presented overwhelming and unrefuted evidence that the prescriptions issued to these patients" were illegal. Indeed, the government's own sentencing memorandum (pages 30-35) acknowledges that these patients were treated by Dr. Hurwitz for legitimate pain and that they sold or abused only a "portion" of the prescriptions issued to them by Dr. Hurwitz.

In the end, the government has asked this Court to calculate a total drug weight based solely on the government's own general -- and unsupported -- estimation of the illegality of the prescriptions issued by Dr. Hurwitz. But the Court cannot and should not make a drug weight determination -- especially one that can so significantly impact the sentence here -- merely on the government's say-so. *See United States v. Gilliam*, 987 F.2d 1009, 1014 (4th Cir. 1993) (vacating sentencing because neither the probation officer nor the district court had insufficient information "to permit a reasoned estimate of the quantity of drugs attributable" to the defendant). This Court likewise cannot rely on the mere speculation of either the Probation

Officer or the government as to the attributable drug weight, *Howard*, 80 F.3d at 1205, nor should it rely on the government's "sweeping generalities" as to the amounts of illegal prescriptions involved here, *see United States v. Sepulveda*, 15 F.3d 1161, 1197-99 (1st Cir. 1993). Certainly, it is not enough for the government to assert as a given "facts" that have no basis in the record. *See United States v. Lopez*, 219 F.3d 343, 348-49 (4th Cir. 2000) (vacating and remanding for sentencing where district court relied on FBI agent's testimony and prosecution's representations of evidence that were not supported by the record).

Moreover, the government's kitchen sink approaches to tallying up pills and prescriptions is contrary to the requirement that courts "err on the side of caution" when calculating total drug weights for sentencing purposes. *See, e.g.*, *United States v. Acosta*, 85 F.3d 275, 282 (7th Cir. 1996); *United States v. Cook*, 76 F.3d 596, 604 (4th Cir. 1996); *United States v. Jennings*, 83 F.3d 145, 150 (6th Cir. 1996), *amended by* 96 F.3d 799 (6th Cir. 1996). This is especially true here, where the evidence at trial established that, even if some portion of a prescription may have been diverted or abused, thus rendering the prescription illegal, other portions of that same prescription would have been for a legitimate medical purpose to treat the patient's legitimate pain and to avoid withdrawal for patients who had developed tolerance to the medicine. In sum, the Court should disregard the government's drug weight calculations.

B. The Government's Position On Enhancements, Reductions, And Departures Cannot Be Squared With The Evidence

The government's support for every conceivable enhancement and upward adjustment (for obstruction, abuse of patients' trust, vulnerable victims, and aggravating role) and its opposition to every reduction and downward departure (for minimal participation, the safety valve departure, victims' wrongful conduct, avoidance of greater harm, and for a case outside the heartland of the Guidelines) reflects many legal errors that were addressed in Defendant's

sentencing recommendation. The government's position on those matters is also of a piece with its view -- the evidence be damned! -- that Dr. Hurwitz should receive the maximum possible punishment because he was both a drug kingpin and a bad doctor who was indifferent to his patients' welfare.

That portrayal of Dr. Hurwitz, whatever his failings, cannot be reconciled with the evidence at trial or his acquittal on most of the government's charges. The evidence and the jury's verdicts refute any notion that Dr. Hurwitz was the leader, mastermind, or organizer of a vast drug distribution conspiracy. The evidence, instead, shows convincingly that a handful of patients targeted Dr. Hurwitz to further their own illicit activities and that they did so precisely because his medical philosophy of trusting his patients and his willingness to prescribe *medically appropriate* pain medication that other doctors refused to prescribe made him particularly vulnerable to their scam. The government refuses to recognize this reality. It continues to pretend that Dr. Hurwitz deserves the harshest possible punishment and that the true drug dealers were trusting "victims" who were mere pawns supervised by Dr. Hurwitz.

This upside-down perspective is revealed most clearly in the government's disparate treatment of Dr. Hurwitz and Tim Urbani. Mr. Urbani was an undisputed drug "kingpin." He earned millions of dollars distributing drugs throughout Virginia and Tennessee. He participated in two pharmacy robberies and conspired to commit arson. He recruited his entire extended family and an untold number of friends and associates to assist him in his drug distribution. And, even before he was apprehended, Mr. Urbani conspired with Matt Hirschberg to save himself by blaming it all on the "Oxy man" -- Dr. Hurwitz -- if he was caught. *See* DX 621-2. The disparity between the government's treatment of Mr. Urbani and its recommended treatment of Dr. Hurwitz is shameful. Mr. Urbani ultimately received a six-year sentence,

largely because his "cooperation" helped the government to prosecute Dr. Hurwitz.[3] And his many co-conspirators -- drug dealers for profit, every one -- received even shorter sentences than that.

The government's proposed Guidelines calculations depend on a description of Dr. Hurwitz and the evidence that no reasonable observer of the trial could endorse and that the jury plainly did not endorse. That recommendation reflects, at best, the government's own willful blindness to the facts. We respectfully submit that this Court's calculations under the Guidelines should reject the government's position and should adopt Defendant's.

V. No Fine Should Be Imposed, And Any Forfeiture Should Be Limited To Dr. Hurwitz's Medical License

In its only apparent concession of the obvious, the government acknowledges that it can obtain forfeiture only of proceeds relating to the counts of conviction. The government offered no evidence at trial that would prove the amount of those proceeds, and it offers none now. Rather than seek forfeiture of Dr. Hurwitz's only remaining financial assets -- a retirement account worth slightly more than $200,000 -- the government requests only that those funds be applied towards the payment of the $1 million fine that the government recommends. The only forfeiture the government seeks, and the only forfeiture that would be permissible in these circumstances, is the forfeiture of Dr. Hurwitz's medical license.

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[3] In its sentencing recommendation, as it did at trial, the government expounds at great length on Mr. Urbani's testimony -- much of it unconfirmable through any other source. Tellingly, while its sentencing recommendation points to every other conceivable basis for a maximum sentence (and some that are not conceivable), the government has now abandoned its reliance on Mr. Urbani's perjured testimony about his 65-pound weight loss under Dr. Hurwitz's treatment. The government's decision to reward the *most* culpable defendant to secure a conviction of the *least* culpable defendant reflects incomprehensible priorities; to reward the most culpable defendant *when he commits perjury* is an outrage. The Court should have no part of it.

The government offers no persuasive reason, however, to impose a $1 million fine against Dr. Hurwitz. "[I]n determining whether to impose a fine, and the amount, . . . the court *shall consider* . . . the defendant's income, earning capacity, and financial resources [and] the burden that the fine will impose upon the defendant." 18 U.S.C. § 3572(a) (emphasis added); *see also* U.S.S.G. § 5E1.2(a) (court shall not impose a fine "where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine"). As the PSR notes, Dr. Hurwitz has no source of income and has approximately $1,400 in debts. PSR at ¶¶ 94-97. Furthermore, Defendant's earning capacity and financial resources are limited, to say the least. Even if Dr. Hurwitz is released immediately, his earning potential is doubtful. He is a 61-year-old man with no real work experience other than in the medical field. He will have no ability to practice in the medical profession again, few opportunities to secure other employment (because of his lost vision, among other reasons), and no assets other than his modest retirement account to sustain him in the years to come. A fine would impose a severe burden on Defendant and therefore would be inconsistent with the requirement of § 3553 that punishment not be "greater than necessary." 18 U.S.C. § 3572 (in setting a fine, the court should also consider the factors set forth in §3553(a)).

CONCLUSION

For these reasons, we respectfully request that the Court impose a sentence of time served.

Respectfully submitted,

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July 11, 2007

CERTIFICATE OF SERVICE

I, Michael J. Anstett, hereby certify that one copy of the foregoing Defendant's Response to Government's Position on Sentencing Factors was e-mailed and hand delivered, this 11th day of July 2007, to:

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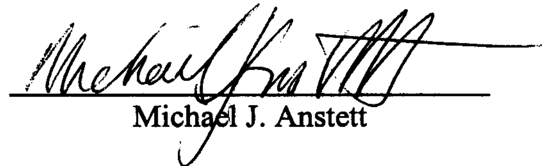

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