

**UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND**

UNITED STATES OF AMERICA)	
)	
)	
v.)	CR. NO. 17-09-JJM
)	
JERROLD ROSENBERG)	

THE GOVERNMENT’S SENTENCING MEMORANDUM

Defendant Jerrold Rosenberg is due to be sentenced by this Court on March 9, 2018, having pleaded guilty to one count of carrying out a health care fraud scheme (Count 1), and one count of conspiracy to solicit or receive kickbacks (Count 14) in connection with his prescription of Subsys, a profoundly powerful, orally administered, fentanyl spray approved by the federal Food and Drug Administration exclusively for the treatment of breakthrough cancer pain.

At the time of his crimes, Defendant was a Rhode Island-licensed physician, specializing in physiatry and the management of pain. Defendant’s scheme to defraud involved the deliberate falsification of patient diagnoses in order to falsely indicate to insurers that the patients met the criteria for coverage of Subsys: generally breakthrough pain from active cancer, when he in fact knew that they did not. At the same time, the Defendant solicited and accepted significant sums – nearly \$200,000 -- in kickbacks disguised as speaker program fees from Subsys’ manufacturer, Insys Therapeutics, payments that, as he admitted during his plea colloquy, were a significant factor in his decision to prescribe the drug.

Defendant's crimes resulted in hundreds of thousands of dollars in payments for Subsys that should never have been made. Far more importantly, however, as discussed below, Defendant's crimes had a real, substantial, and adverse impact on human lives: on patients with significant and debilitating chronic pain who placed their trust in his experience and expertise, only to receive treatment that was based on medical judgment corrupted by kickbacks and concerned more with securing payment than in assuring patient well-being. In several cases, this treatment continued even in the face of pleas from these patients that the drug was ineffective or had serious side effects; on two occasions, at least potentially, the treatment resulted in the near-death of a patient from overdose. This conduct was criminal, but it was also more than that. It represented a grave betrayal of the duty every physician owes to his or her patients. By allowing financial gain to serve as a significant factor in his decision to prescribe Subsys, Defendant placed those patients at risk, furthered the potentially unnecessary use of a profoundly powerful opioid, and set his own financial gain above his patients' interests. For these reasons, as discussed in greater detail below, the Government respectfully submits that this Court should impose a significant term of incarceration in this case, as just punishment, and equally if not more importantly, for its deterrent value to others.

The United States notes in this regard that the parties have engaged in substantial briefing and argument as to whether this Court should receive testimony and evidence concerning Defendant's former patients, and the applicability of certain enhancements to the Sentencing Guidelines for Defendant's crimes. Rather than reiterate those arguments here, the Government

incorporates by reference its prior filings on these issues.¹ It bears emphasis, however, that regardless of the Court's ultimate determination on the Guideline enhancement disputes, the experiences of Defendant's patients, and the suffering they endured so that Defendant could benefit financially, is unquestionably relevant to this Court's evaluation of the factors set forth in 18 U.S.C. § 3553(a). Evidence on that issue will be presented at the upcoming sentencing proceeding in this case, and the bulk of it, together with a memorandum summary of the relevant patient evidence, has been previously filed with the Court as part of the United States' February 1, 2018 submission (Docket No. 28). The Government is aware of no legal principle, and Defendant has cited none, that precludes consideration of that testimony and evidence in this context, particularly given the clear command of 18 U.S.C. § 3661, and we respectfully submit that it is profoundly relevant to the Court's fashioning of an appropriate sentence in this case.

I. GUIDELINE RANGE AND DEFENDANT'S OBJECTIONS

The Probation Department's calculation of the applicable Sentencing Guidelines places Defendant at an offense level of 27 within Criminal History Category I; this results in a Guideline range of seventy to eighty-seven months. For the reasons articulated in its prior briefing and at oral argument on January 16, 2018, the Government believes the Probation Department's Guidelines calculation is correct and should be employed by the Court at sentencing.

¹Those filings are the Government's January 3, 2018 response to Defendant's Objections to certain aspects of the PSR, (Docket No. 22), its January 9, 2018 Response to Defendant's Motion to Exclude Patient Testimony (Docket No. 26), and its Supplemental Memoranda of January 12, 2018 and February 1, 2018 (Docket Nos. 27 and 28, respectively).

A. Guideline Calculation Issues

1. *Base Offense Level and Agreed Loss*

The Government, Probation, and the Defendant are all in agreement that the Base Offense Level applicable to Defendants' offenses is 6. *See* U.S.S.G. §2B1.1(a)(2). Pursuant to his plea agreement, Defendant has stipulated that the loss involved with respect to Count 1 (Health Care Fraud) is between \$550,000 and \$1,500,000, resulting in a 14 level increase for loss. *See* U.S.S.G. §2B1.1(b)(1)(H). Defendant has not disputed the proposed enhancement for the abuse of a position of private trust or use of a special skill, *see* U.S.S.G. §3B1.3, which incurs a further two-level increase. Defendant similarly agrees that the loss amount implicated in Count 14 (Conspiracy to Receive Kickbacks) is \$188,000, which represents the amount of kickbacks he received. *See* U.S.S.G. §2B1.1(b)(1)(F). This results in a ten level increase.

2. *Disputed Guideline Calculation Issues*

As noted, the parties hotly dispute the applicability of three remaining Guideline Enhancements. These are: (1) the number-of-victims enhancement under U.S.S.G. §2B1.1(b)(2)(A)(i), which requires a showing that ten victims were harmed;² (2) the enhancement under U.S.S.G. §2B1.1(b)(15)(A) for conscious or reckless disregard of risk of death or serious bodily injury; and (3) the enhancement under U.S.S.G. §3A1.1(b)(1) for vulnerable victims. Each enhancement carries a two-point increase if applied. Defendant also disputes the proposed application of the grouping rule to the kickback count, which results in a one-level increase.

² As five insurers suffered undisputed financial losses, the dispute relates to whether five or more patients suffered bodily injury as required by this specific Guideline.

II. SENTENCING FACTORS UNDER 18 U.S.C. § 3553

After determining the Guideline range, the Court must consider the statutory sentencing factors delineated in 18 U.S.C. § 3553(a):

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant; and
- (2) the need for the sentence imposed –
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other corrective treatment in the most effective manner.

A review of these factors in this case supports the imposition of a meaningful sentence of incarceration as commensurate with Defendant's crimes.

A. The Nature and Circumstances of The Offense Call for A Significant Sentence

1. *The Nature and Circumstances of the Offense*

The first, and by implication, foremost factor under 18 U.S.C. § 3553(a) is the nature and seriousness of the offense. Here, that factor weighs heavily in favor of a substantial sentence of incarceration. As the Court is aware, Defendant has admitted his guilt to two distinct, but intertwined crimes: health care fraud conspiracy and the solicitation and receipt of kickbacks. For sentencing consideration purposes, the Government suggests it is useful to consider these in reverse order. It is undisputed that Defendant accepted kickbacks for prescribing the drug Subsys. Even if this Court elects not to consider that Defendant's prescriptive practices were a substantial factor in his son's compensation as a sales representative for the drug,³ it is beyond question that

³ The Government notes that Defendant denies that this influenced him, and he distinctly declined to admit to such influence in his plea. Respectfully, the notion that Defendant was not influenced by the fact that his prescription practices had a substantial impact on his son's livelihood in a job that his father helped to procure for him, is simply

Defendant received almost two hundred thousand dollars in direct kickbacks to prescribe this drug to his patients. As such, at a minimum, those patients received something very different from what they had every right to expect: treatment based solely on medical judgment and experience, rather than treatment based, at least significantly, on the corrupt bargain of a kickback. Defendant's choice to allow these kickbacks to serve as at least a significant motivating factor in his prescription decisions represents a corruption of medical decision-making and a breach of the core duty of a doctor to his patients. Moreover, as the Government noted at oral argument on January 16, 2018, Defendant's crimes were intertwined: the health care fraud scheme resulted in a loss to insurers, but not a direct gain to Defendant; instead, the health care fraud scheme was necessary to ensure that Insys would continue or increase the flow of kickbacks to him. With respect to both offenses, defendant accordingly subordinated patient care to the execution of scheme that guaranteed he would continue to receive the benefit of Insys' illicit largesse.

But that was not all that Defendant did. As the Government has argued, Defendant placed his patients, many of whose age, infirmity, lack of sophistication, and need for the treatment of serious chronic pain all rendered them exceptionally vulnerable and at risk of serious harm from an extremely powerful opioid painkiller. While those actions should, as the Government has maintained in its earlier filings, trigger specific Guideline enhancements,⁴ they should also be considered, more generally, as circumstances of the offense under § 3553(a).

not credible, and the Court can appropriately find that this was yet another form of kickback to Defendant and constitutes "Relevant Conduct" of the offense. *See* U.S.S.G. § 1B1.3. Even without doing so, however, the undisputed facts show that Defendant accepted substantial sums to promote the drug.

⁴ As the Government has noted, the overwhelming weight of authority holds that each of the Guideline enhancements, other than that for the number-of-victims, requires no showing of bodily harm or lack of medical necessity.

This is equally true of the final enhancement question that the Court must resolve: whether patients suffered bodily harm as a result of Defendant's actions. While the United States expects Defendant to focus on certain aspects of patient medical histories to maintain that other drugs, other illnesses, or personal issues caused them harm, or preclude a finding that any harm was causally linked to Defendant's actions, these arguments miss the point. Based on the evidence presented, the Court will be fully capable of determining whether it credits these patients' accounts of what happened to them and whether and how it was causally related to the prescription of Subsys. Even if the Court ultimately concludes that some or all of these patients were not victims in the narrow sense of U.S.S.G. §2B1.1(b)(2)(A)(i), it can still properly evaluate their experiences as relevant conduct at sentencing. As the evidence will show, those experiences frequently involved pain, a refusal by the Defendant to heed their concerns and often desperate requests to come off the drug, and a callous disregard of their complaints and general wellbeing. Being told to "[s]top crying, you're acting like a child," in the face of complaints about constant vomiting and extreme weight loss that a patient had never experienced before taking Subsys,⁵ and other patients' experiences of that ilk, are unquestionably part of the nature and circumstances of the offense and should properly be considered by the Court in fashioning sentence in this case.

2. The Characteristics of Defendant

Also significant in the 18 U.S.C. § 3553(a) calculus are the characteristics of the Defendant. There is no question that Defendant is an intelligent, well-educated, and well-credentialed individual. These factors are of particular significance here because without them, Defendant

⁵ See Government Supplemental Submission on Patient Injury (Docket No. 28) at 4.

would not have been able to carry out his crimes. It was precisely Defendant's status as a physiatrist, and his relative eminence as a physician, that made him an appealing co-conspirator to receive kickbacks, under cover of conducting "speaker programs" for Insys. Similarly, it was his knowledge of the insurance reimbursement process, and his willingness and ability to convincingly falsify medical and insurance documentation that allowed him to perpetrate the health care fraud scheme. In both instances, Defendant used both his gifts and his professional attainments to bad ends, and to the detriment of his victims.

Defendant may well argue that, as a result of his actions he has suffered public shame, and that, at 63 years of age, he is no longer a licensed physician or in a position to cause future harm. All of these things may be true. At the same time, it cannot be sufficient that these harms, which Defendant has brought upon himself, are the only consequences of significant wrongdoing that had profound impact on the lives of his patients, and that caused significant financial losses. To put it in the most stark terms possible, Defendant should not be permitted to effectively retire early from the practice of medicine at the cost of personal shame and a substantial fine. Rather he should receive an incarcerative sentence commensurate with the severity of his crimes.

B. The Need for Deterrence Similarly Calls for a Meaningful Sentence of Incarceration.

As the Government notes above, the execution of Defendant's health care fraud scheme required time, deliberation, conscious thought, and the deployment of Defendant's status, prestige, and expertise as a physician. Far from being a spur-of-the-moment choice or an aberration in behavior, the scheme required careful and conscious exploitation of almost every aspect of the patient care process: the falsification of medical history and diagnoses in patient treatment records, the submission of false claim forms, and, on many occasions, the preparation and submission of

falsified letters of medical necessity purporting to justify the need for the drug. The kickback conspiracy was similarly dependent on Defendant's status as a doctor to achieve the goal of the scheme: inducing Subsys prescriptions. In both instances, Defendant's crimes required, and explicitly leveraged, his status as a doctor at every stage. Based on his knowledge and experience, Defendant could confidently expect that, when he submitted falsified patient documentation or diagnoses to insurers, they would pay the claim, and that if they resisted, a letter under the insignia of his practice and the seal of Brown University (his letterhead noting his status as an Assistant Professor) would suffice to allay any remaining doubts.

These facts underscore an essential truth: crimes such as Defendant's are not impulsive fits of passion. They require careful deliberation and planning by highly-credentialed, well-educated professionals who consciously decide to utilize their expertise and prestige in the service of greed, rather than care. At each stage in this process, there exists time for reflection, and with it the chance to choose not to further the fraud. Other professionals in the medical community, acutely aware of their status and prestige, look to the consequences on their peers in cases such as this. And there can be little question that this case, and others like it, receive significant attention from both the general and medical media, and that other physicians cannot help but be aware of, and govern themselves in accordance with, the consequences that this Court imposes at sentencing. A review of the Westlaw News database⁶ reveals at least seventeen entries in local, regional, national, and international media outlets referencing Defendant's criminal prosecution, as well as

⁶ See, e.g. Katie Mulvaney, *N. Providence Doctor Pleads Guilty To Health-Care Fraud, Conspiracy Involving Fentanyl*, The Providence Journal, 2017WLNR33095773, Oct. 26, 2017; *Doctor Admits Accepting Nearly \$200,000 In Kickbacks To Illegally Prescribe Fentanyl Spray To Patients Who Did Not Need It*, Daily Mail, U.K., AP & Reuters, 2017WLNR33064054, Oct. 25, 2017; Lisa Chedekel, *Highest Prescribers Of Cancer Drug Paid As Speakers*, Connecticut Health Investigative Team, 2015WLNR21155142, July 12, 2015.

his historical status as one of the top national prescribers of Subsys. The ongoing prosecutions of other medical providers involved in the alleged improper prescribing of Subsys, as well as those of Insys officers and employees involved in promoting the drug, have received similarly widespread attention.⁷ Given the scourge of opioid abuse and addiction with which our nation and our communities suffer, and the attention those issues have received, there is every reason to believe that Defendant's sentence will be carefully noted in the broader medical community, and that it therefore carries great potential for deterrent effect to others who may contemplate a similar course of conduct.

As noted above, Defendant's crimes, in of themselves, merit significant punishment.⁸ But the punishment that this Court imposes ultimately sends a message to others who are, or might contemplate, similar frauds. That message should ensure that other physicians think of this case at each point when they consider falsifying medical records to get a claim paid; in each quiet

⁷ Nate Raymond, *Nevada Doctor Indicted After Patient Overdoses On Insys-Produced Opioid*, Reuters, Feb. 14, 2018; Jill Riepenhoff, *Doctors Get Rich From Controversial Drug Maker As Patients Become Addicts*, Crossville Chron., 2018WLN5696820, Feb. 20, 2018; Megan Luther, *Drug Largess Makes Doctors Rich, Patients Addicts*, Enid News & Eagle, 2018WLN6753386, Mar. 4, 2018; Nate Raymond, *Judge Delays Opioid Bribe Trial Of Insys Founder, Others To January 2019*, Reuters, Jan. 19, 2018.

⁸ The Government notes that a former Alabama physician, John Patrick Couch, was recently sentenced to a 240-month term of incarceration following conviction after trial on a variety of charges relating to the distribution of controlled substances, notably including Subsys. See *United States v. Couch*, No.15-R-88 (S.D. Ala.). While the *Couch* case involved both other drugs and conspiracy charges under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(d), Couch's improper prescription of Subsys, and his receipt of kickbacks from Insys Therapeutics, were prominent aspects of the offense conduct. See Nate Raymonds, [Alabama Doctor Tied To Insys Gets 20 Years For Illegal Prescriptions](#), Reuters, May 25, 2017. In addition, 59-year old Michigan physician, Gavin Awerbuch, was recently sentenced to 32 months in prison for prescribing medically-unnecessary Subsys; in that case, unlike the matter at bar, the defendant received substantial credit for his cooperation and assistance in an ongoing investigation. See *United States v. Awerbuch*, 16-CR-20636-AJT (E.D. Mich.); Steve Freiss, [Doctor Tied To Insys Opioid Kickback Probe Gets Prison Term](#), Reuters, Feb. 26, 2018). Awerbuch pleaded guilty to prescribing Subsys without a legitimate medical purpose, specifically in one instance where he prescribed the drug to an undercover officer, and to participating in a health care fraud scheme that involved billing for medically unnecessary tests. *United States v. Awerbuch*, 16-CR-20636-AJT (E.D. Mich.), Docket No. 19 (Information) (Describing alleged criminal conduct); Docket No. 25 (Plea Agreement).

evening hour when they sit in their offices, considering whether to accept payment from some pharmaceutical company in exchange for prescribing its drug, or deliberating how to phrase letters that would falsely justify the payment of claims that should not be paid. That in those individual moments of choice, other doctors remember the consequences to *this* Defendant, and know that the choice to act as he did carries with it substantial penalties, beyond mere injury to reputation and affluence.

III. CONCLUSION

For the reasons detailed above and in its prior briefing, the Government submits that this case involves serious criminal conduct that wrought substantial financial, personal, and emotional harm, and that a significant sentence is required to appropriately reflect that fact. The Government therefore recommends that the Court impose a total sentence of seventy months incarceration, combined, for both counts. The Government believes that such a sentence would be sufficient, but not greater than necessary, to meet the requirements of 18 U.S.C. § 3553(a) and to reflect the severity of Defendant's crimes and the important deterrence interests presented in this case.

Dated: March 5, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on March 5, 2018, I caused the foregoing document to be filed by means of this Court's Electronic Case Filing (ECF) system, thereby serving it upon all registered users in accordance with Local Rules Gen 304 and 305.

Dated: March 5, 2018

By: /s/ Zachary A. Cunha
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