

UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v.

RAPHAEL J. MUSTO

Defendant.

CRIMINAL ACTION

No. 3:10-cr-338

(Judge A. Richard Caputo)

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT,
RAPHAEL J. MUSTO'S, RENEWED AND AMENDED
MOTION TO CONTINUE THE TRIAL INDEFINITELY**

Raphael J. Musto ("Musto"), by and through his undersigned counsel, and pursuant to the Fifth Amendment's Due Process Clause and the Sixth Amendment's guarantee of a fair trial, respectfully submits this memorandum of law in support of his Renewed and Amended Motion to Continue the Trial Indefinitely.

I. PROCEDURAL HISTORY

On November 23, 2010, the government filed a six-count Indictment against Musto, a former Pennsylvania State Senator, charging him with violating 18 U.S.C. § 1341 (mail fraud), 18 U.S.C. § 1343 (wire fraud), 18 U.S.C. § 1346 (honest services fraud), 18 U.S.C. § 666 (corrupt receipt of a reward in connection with payments received in exchange for favorable official action concerning federal funding) and 18 U.S.C. § 1001 (false statement to a government agent).

On December 15, 2010, arraignment was held and Musto pleaded not guilty to the alleged violations.

On June 23, 2011, September 14, 2011, November 28, 2011, May 31, 2012 and August 31, 2012, this Court granted several unopposed motions for continuance of the trial dates, based upon the defendant's medical conditions.

On October 17, 2012, a Superseding Indictment was returned which added two counts charging violations of 18 U.S.C. § 666. On October 24, 2012, arraignment was held and Musto pleaded not guilty to the alleged violations in the Superseding Indictment.

On October 22, 2012, Musto filed a Motion to Dismiss the Superseding Indictment or Alternatively, to Continue the Trial Indefinitely Beyond the Time Limits of the Speedy Trial Act ("Motion to Dismiss or for Continuance")¹. In the motion, which was supported by three written reports by the defense medical expert, Dr. Cataldo Doria ("Dr. Doria") and one report by the government's expert, Dr. Ian R. Schreibman ("Dr. Schreibman"), Musto raised Sixth and Eighth Amendment issues regarding the District Court's compelling him to begin trial on November 13, 2012. Dr. Doria's three reports and Dr. Schreibman's report were attached to Musto's motion.

¹ On November 2, 2012, Musto filed a Motion to Dismiss Count 5 of the Superseding Indictment based on a violation of the Statute of Limitations. On November 21, 2012, the Court granted the Motion to Dismiss Count 5 of the Superseding Indictment.

The government did not file a response to Musto's motion. On October 24, 2012, this Court entered an order denying the Motion to Dismiss or for Continuance.

On October 31, 2012, Musto filed a Notice of Appeal to the Third Circuit, requesting review of this Court's decision denying the Motion to Dismiss or for Continuance. Musto filed a motion to stay the trial court proceedings pending a decision by the Third Circuit, in which the government concurred. On November 1, 2012, this Court entered an order staying the trial until disposition of this appeal.

On November 7, 2012, the Third Circuit Court of Appeals notified the parties of possible dismissal of the appeal as jurisdictionally defective because the District Court's Order denying Musto's Motion to Dismiss or for Continuance was not final and was not otherwise appealable at that time. The Court requested that the parties submit responses as to whether the appeal was jurisdictionally defective. Counsel for Musto and the government submitted responses on the Court's jurisdiction.

On March 12, 2013, the Court of Appeals entered an Order, without deciding whether it had jurisdiction over the appeal, but referred the appeal to a merits panel. The Court required the parties to submit briefs on both jurisdiction and the merits. After full briefing, the appeal was submitted for disposition on September 26, 2013, without oral argument.

On September 30, 2013, the Court of Appeals entered a non-precedential Order dismissing Musto's appeal for lack of jurisdiction. The mandate issued on October 22, 2013.

On October 24, 2013, this Court issued a Scheduling Order setting a trial date in this matter for January 6, 2014.

II. THE COURT OF APPEALS OPINION AND ITS APPLICABILITY TO THIS MOTION

In its opinion, the Third Circuit stated in its review of the proceedings below that, "On April 12, 2012, Dr. Doria issued an updated report indicating that Musto had undergone a successful repair of an aortic aneurysm but that any complications in his fragile health condition could be fatal." Slip op. at 2. The Court also reviewed the expert reports of Dr. K. Rajender Reddy ("Dr. Reddy") and Dr. Schreiberman. *Ibid.*

The Court summarized the contentions made by Musto in his motion in the following language:

First, he argued that he is physically impaired from assisting counsel in his defense such that trial would violate the Sixth Amendment. Second, he argued that compelling him to endure the stress of a criminal trial would present life-threatening complications constituting cruel and unusual punishment in violation of the Eighth Amendment.

Slip op. at 4.

The Court ruled that Musto's Sixth Amendment claim was inapplicable "because the District Court's order does not conclusively determine the disputed question and the order may

effectively be reviewed on appeal from a final judgment." Slip op. at 4. Explaining this conclusion, the Court stated, "Musto's health has changed over time. While he predicts an inability to assist counsel in his defense, he does not cite any particular difficulty he has already encountered in participating in his own defense." Slip op. at 4-5.

To the extent that Musto was considered as presenting a Sixth Amendment claim independent of the risk to his health, "a Sixth Amendment assistance of counsel claim is effectively reviewable post-judgment." Slip op. at 5. The Court of Appeals also ruled that Musto properly withdrew his claim of a violation of the Eighth Amendment.² *Ibid.*

Whatever the support may have been for the Third Circuit's determination that "Musto's health has changed over time" - which can be read to suggest that the defendant sometimes enjoyed periods of relatively good health - his prognosis is now even more guarded than it was before, as will be demonstrated below.

Moreover, to the extent that Musto may have "not cite[d] any particular difficulty he has already encountered in participating in his own defense," he will do that here with

² In addition, Musto advised the Court of Appeals that he "will not press his assertion that the indictment should be dismissed now." Op. Br. 51. Musto reaffirms that representation, based on current circumstances.

more particularity, based on the most recent report by Dr. Doria and on the new report by Dr. Richard E. Fischbein (Dr. Fischbein), a board-certified geriatric psychiatrist.

The Court of Appeals also observed, in granting the government's request that the appeal be dismissed, that the District Court's denial of Musto's claim that the Sixth Amendment supported his request for a continuance "cannot be characterized as conclusive" because the Court "is free, and evidently willing, to reassess Musto's medical needs as trial approaches and progresses." Slip op. at 5. The Court of Appeals noted that the District Court "concluded merely that Musto 'is physically competent to stand trial at the present time.' App. 6." *Ibid.* In this amended motion and supporting memorandum, Musto recognizes that the Court of Appeals' ruling that the District Court is the proper forum in which to present a renewed motion.

Musto has two reasons for coming now to this Court. First, the Court of Appeals specifically left the door open to a motion such as this one centered on a Fifth Amendment Due Process claim, even if based only on the allegations in the initial motion. The Court suggested that, while the two grounds for the initial motion - the Sixth and Eighth Amendments - were inapplicable, Musto's contention that "there is reasonable ground to believe that physical disability may ... endanger [his]

life," slip op. 6n.3, if "tethered" to a claim for Due Process relief under United States v. Knohl, 379 F.2d 427, 437 (2d Cir.), *cert. denied*, 389 U.S. 973 (1967), would be "a valid constitutional basis for th[e] claim." Slip op. 6, 6n.3. The Court specifically noted that, "Had Musto presented [the Due Process] ... claim, the District Court may have elected to hold a hearing to probe the experts, as both parties had requested." *Ibid.* In this amended motion, Musto, in the Court's words, "continues to rely on the potentially irreparable physical harm that the stress of trial may cause him, independent of his ability to assist counsel in his defense," slip op. 6, and asks for a hearing to present its support for this claim.

Second, Musto asks that the Court assess his current medical condition because he contends that there is significant new, particularized evidence that he is not "physically competent to stand trial," in violation of the Fifth Amendment, and that he is not physically competent to participate in a full defense, in violation of the Fifth and Sixth Amendments, and asks for a hearing to present his support for these claims.

Accordingly, Musto argues that the Court of Appeals opinion supports this motion in two respects. First, it endorses Musto's position that the Fifth Amendment's Due Process Clause is a valid basis for relief based on the contention made in the initial motion that, as stated by the Court, "the potentially

irreparable physical harm that the stress of trial may cause him, independent of his ability to assist counsel in his defense." Slip op. 6. Second, it stipulates that the District Court "is free, and evidently willing, to reassess Musto's medical needs as trial approaches and progresses." Slip op. at 5.

III. SUMMARY OF MUSTO'S ALLEGATIONS IN THE INITIAL MOTION AND SUPPORTING MEMORANDUM.

As stated in his initial "Motion to Dismiss or for Continuance"³ and supporting papers, Musto suffers from serious life-threatening medical conditions⁴ that render him incapable of participating in the presentation of a full defense at trial, incapable of assisting his attorneys in the preparation for and conduct of trial, and incapable of withstanding the rigors of trial preparation and trial itself. As to this last point, the reports of his medical condition submitted by Dr. Doria and by Dr. Schreiberman showed that Musto was in a precarious medical condition in several respects, and Dr. Doria concluded that

³ Musto uses this term, or "motion," to refer to his Motion to Dismiss the Superseding Indictment or, in the Alternative, to Continue the Trial Indefinitely beyond the Time Limits of the Speedy Trial Act.

⁴ Musto is suffering from a number of ongoing serious and life-threatening health issues related to a thoracic aortic aneurysm and non-alcoholic liver cirrhosis, which has caused permanent and ongoing impairment of his liver, diabetes, hypertension, hypercholesterolemia, and a family history of cardiovascular disease. See Exhibit A at 3.

there is a substantial risk that Musto will not be able to survive a trial in this matter. See Report of Dr. Doria dated November 10, 2011 attached hereto as Exhibit A at 9; Supplemental Report of Dr. Cataldo Doria dated April 12, 2012 attached hereto as Exhibit B at 5; Supplemental Report of Dr. Doria dated October 17, 2012 attached hereto as Exhibit C at 5; and Report of Dr. Schreibman dated August 29, 2012 attached hereto as Exhibit E at 4. Moreover, these reports state that there was no indication that Musto's condition will improve and, in fact, his serious physical and cognitive complications from his failing liver would only continue to deteriorate. See, e.g., Exhibit C at 4-5.

In June, 2011, Musto was diagnosed with non-alcoholic liver cirrhosis with an episode of ascites,⁵ along with a substantial loss of muscle mass. Exhibit A at 3. Dr. Cataldo Doria⁶ noted that the progression of the liver disease is evidenced by a progressive substantial decrease in the defendant's blood platelet count.⁷ Exhibit A at 6; Exhibit B at 4-5; Exhibit C at

⁵ Ascites is the accumulation of fluid in the abdomen most commonly due to cirrhosis. Merriam-Webster Medical Dictionary.

⁶ Dr. Doria is Associate Professor of Surgery and the Nicoletti Family Professor of Transplant Surgery at Jefferson Medical College. See Exhibit A at 1.

⁷ Musto's platelet count decreased from 96 on July 1, 2010, to 88 on August 18, 2011, to 78 on October 19, 2011, to 68 on March 15, 2012. Exhibit C at 4.

4. Dr. Doria stated that the defendant's health issues have not improved, they have only worsened, due to his age (then 83, now 84) and other medical conditions, including his not being a candidate for a liver transplant. See Exhibit B at 4-5; Exhibit C at 4.

In the course of his examinations of Musto and the review of his medical tests, Dr. Doria observed that Musto suffered from a "continuous lack of energy, with periods of confusion and somnolence to the point of being unable to cope with simple daily tasks such as eating and getting out of bed." Exhibit B at 3-4. Dr. Doria found that Musto "appears confused at times and his level of energy is so diminished that he spends the majority of the week in bed or in the chair." Exhibit B at 5. Dr. Doria concluded that "the stress of the trial preparation as well as the trial itself can induce life-threatening complications such as bleeding from rupture of gastro-esophageal varices"⁸ - which bleeding can be "massive" - "[and from] ascites," Exhibit B at 5. Exhibit A at 1, 6; see also Report of Dr. Doria dated October 23, 2013 attached hereto as Exhibit G at 5.

⁸ Esophageal varices are extremely dilated veins in the lower end of the esophagus that are prone to ulceration and massive bleeding, often the consequence of portal hypertension, commonly due to cirrhosis. See The Medical Dictionary.

Musto was hospitalized in July 2012 with pneumonia and blood infection resulting from his diminished resistance to infection. Exhibit C at 4. At that time, he was also diagnosed with a thoracic aneurysm, which cannot be surgically repaired because of his liver disease and elevated risk of hemorrhaging. See Geisinger Medical Records attached hereto as Exhibit F at 2-3. Dr. Doria concluded that the defendant is "at risk of developing serious health consequences including death if he will have to face the stress of trial preparation as well as trial itself."⁹ Exhibit A at 11; see also Exhibit B at 5.

Upon receipt of Dr. Doria's supplemental expert report dated April 12, 2012, the government filed, on April 23, 2012, a Motion for Court Appointed Expert To Conduct Medical Examination of Defendant and Render Expert Opinion. Dkt. 56. Musto did not object to the government's request for a doctor to examine him and agreed to make himself available for examination at any time. On May 8, 2012, the District Court entered an Order appointing a medical expert, Dr. Reddy to provide an independent evaluation concerning Musto's liver condition and his ability to

⁹ Dr. Doria noted that medical studies indicate that stressful events, such as trial preparation and trial for a criminal defendant, can produce profound adverse health consequences that could dramatically accelerate the progression of the cirrhosis and its symptoms and present even greater life-threatening complications. See Exhibit A at 9-10.

withstand the rigors of trial preparation and trial itself.
Dkt. 64.

Subsequently, Dr. Reddy, without physically examining or speaking with Musto, issued a two-page report dated June 15, 2012. Dr. Reddy acknowledged that Musto had been diagnosed with non-alcoholic cirrhosis and an episode of ascites in June of 2011. See Report of Dr. Reddy dated June 15, 2012 attached hereto as Exhibit D at 1. Dr. Reddy concluded that:

[w]hile [Musto's] prognosis is affected by the diagnosis of cirrhosis, I do not see a functional disability that would preclude the patient from attending a trial. Such a situation with regard to liver disease would not restrict patients from driving, visiting Physician offices for medical checkup, etc. If one were to look at it from an analogues (sic) perspective of patients going on to disability with such a clinical presentation, they would not be able to obtain it.

Exhibit D at 2.

Within days of counsel's receiving Dr. Reddy's report,¹⁰ Musto was hospitalized in early July, 2012 with pneumonia, a blood infection and diagnosed with a thoracic aneurysm. Exhibit F at 1-3. The government then retained Dr. Schreibman in August of 2012, to conduct an independent evaluation of Musto. As Dr. Schreibman stated in his report, in his evaluation he was "particularly focusing upon his [Musto's] liver disease and how

¹⁰ While the report was dated June 15, 2012, counsel for Musto and the government did not receive it until on or about July 2, 2012.

it would affect his ability to undergo the rigors of a defense trial." Exhibit E at 1.

In his report, Dr. Schreibman made three main findings. First, based on an examination of the records he reviewed, Dr. Schreibman stated that Musto had "probable cirrhosis" of the liver, as to which there was evidence of "stability." Exhibit E at 1-2. At the same time, Dr. Schreibman's report stated that he also had "multiple other co-morbidities (*i.e.* - vascular aneurysm, hypertension, hyperlipidemia,¹¹ non-occlusive coronary artery disease, etc.)." Exhibit E at 4.

Second, based on his physical exam and assessment of Musto, as well as his review of the medical records, Dr. Schreibman stated that the two tests used to determine the degree of the patient's liver disease (the Child-Pugh score and the MELD score) were "not ideal" and that "a significant number of patients have severe [liver] disease that is not reflected by these tools." Exhibit E at 4. Dr. Schreibman stated that he "believe[d]" that Musto is in this category - that he has "severe" liver disease. *Ibid.*

Dr. Schreibman's report stated that Musto's "clinical status remains very tenuous," particularly given that Musto had been admitted to the hospital in July of 2012 for pneumonia and

¹¹ The presence of excess fat or liquid in the blood. Merriam-Webster Medical Dictionary.

that Musto had been struggling with "extreme fatigue and lethargy." *Ibid.* His report also stated that he had "little doubt" that Musto, after pre-trial preparation, would "become tired and unable to adequately partake in his defense." *Ibid.* Third, at the end of his report, Dr. Schreibman stated,

I should also point out that I would most likely have reached the same conclusion independently of his liver disease. His advanced age and other medical co-morbidities would also severely affect his ability to stand trial.

Ibid.

In conclusion, Dr. Schreibman stated, "I conclude that Mr. Musto would not be able to withstand trial." *Ibid.*

Dr. Doria again examined Musto after Dr. Schreibman issued his report and concluded that Musto's decreased motor and cognitive abilities are evidenced in many ways - Musto is bedridden and is unable to cope with his normal life tasks, including reading the newspaper. See Exhibit C at 4. Finally, Dr. Doria concluded that Musto had a grave prognosis and was too sick to withstand the rigors of trial preparation and the stress of the trial itself. See Exhibit C at 5.

IV. SUMMARY OF MUSTO'S ALLEGATIONS AS TO HIS CURRENT MEDICAL CONDITION AS SET OUT IN HIS AMMENDED MOTION AND SUPPORTING DOCUMENTS.

Musto's medical condition has continued to deteriorate since October 2012, when he filed the initial Motion to Dismiss or for Continuance. As set forth at length below, based on the

attached supplemental report of Dr. Doria dated October 23, 2013 and the attached expert report of Dr. Fischbein dated October 3, 2013, Musto's cirrhotic condition has worsened and he is now experiencing additional deficits in his physical condition, resulting in an increased risk of bodily injury or death,¹² and in profound fatigue. As further discussed below, Musto's cognitive ability continues to deteriorate and now his cognitive impairment is more readily apparent in episodes of confusion, slurred speech and memory/attention deficits.

A. Changes in Physical Conditions

In the last year, there have been material changes in Musto's physical condition which are not only strong evidence that his liver cirrhosis is getting worse, but also strong evidence that he is not physically capable of participating in a trial. Among these declining physical conditions, Musto has experienced a substantial decrease in platelet count, a substantial decrease in weight and muscle mass, an increase in INR,¹³ and a skin condition diagnosed as an intractable pruritus.

¹² Dr. Doria noted in a report dated November 10, 2011 that a cirrhotic patient developing ascites has only a 40% chance of being alive two years after the onset of ascites; at this stage - over two years from the onset of ascites - Musto's risk of death is even greater. See Exhibit A at 6.

¹³ INR, International Normalized Ratio, is a measure of the extrinsic pathways of coagulation, which along with other tests is useful to determine the clotting tendency of blood in the measure of liver damage.

As set out below, the pruritus, which is caused by the liver disease, in turn produces constant and uninterrupted pain and itching, which, as explained below, has exacerbated his already severe fatigue problems. See Exhibit G at 5-6. Musto has also experienced episodes of slurred speech, confusion, dizziness and lightheadedness. See Exhibit G at 4; see also Report of Dr. Fischbein dated October 4, 2013 attached hereto as Exhibit H at 8-9; Wilkes-Barre General Hospital Medical Records attached hereto as Exhibit I at 1-2. These ailments, which are linked to his cirrhosis are, as explained below, evidence that he is experiencing worsening encephalopathy.

In addition, as more fully described below, after the doctors' reports were filed in connection with the prior motion, it has been determined that Musto's thoracic aneurysm is expected to grow in size. This aneurysm, which was discussed in Musto's prior motion as life-threatening, remains a separate and distinct condition posing an imminent risk of death, as explained by Dr. Doria. See Exhibit G at 5-6.

Each of these, individually, is a factor consistent with the continued decline of Musto's cirrhotic condition. Collectively, they are compelling evidence of the conclusion that Musto cannot withstand the rigors of preparation for or participation in trial, without an imminent risk of serious injury or death.

Platelet Count. In his October 23, 2013 report, Dr. Doria stated that there were several indications that Musto's physical condition was in a state of "progressive decline." First among these indications was the significant drop in his platelet count. From 2011 to 2013, Musto had blood work at different laboratories that measured, *inter alia*, the platelet count. In his most recent report, Dr. Doria stated that Musto's average platelet count in 2011 was 78 and his average platelet count in 2013 was 68. See Dr. Doria's October 23, 2013 report, Exhibit G at 6; see also Exhibit A at 6; Exhibit B at 4; Exhibit G at 5.

Dr. Doria opined to a reasonable degree of medical certainty that a lower blood platelet count is evidence of the worsening of the liver cirrhosis. See Exhibit G at 5. Dr. Doria also stated in his most recent report that a lower blood platelet count "is a sign of the degree of the portal hypertension, a common complication of liver cirrhosis." Exhibit G at 5. Dr. Doria has previously stated that any trend of lowering the platelet count and resulting worsening of Musto's cirrhosis means that there is an increased likelihood of such life-threatening complications as "bleeding from gastro-esophageal varices [and] ascites." Exhibit A at 1, 6; see also Exhibit G at 5.

Weight Loss. During his hospitalization at Wilkes-Barre General Hospital for three days starting on June 30, 2013, due

to symptoms of slurred speech, etc., Musto weighed 157 pounds. See Exhibit I. On September 5, 2013, at a doctor's visit, he weighed 160 pounds, while fully clothed. See Report of Dr. Brian Kim dated July 11, 2013 and September 5, 2013 attached hereto as Exhibit J at 5. In his report dated October 23, 2013, Dr. Doria stated that one of the indicators of Musto's declining physical condition was his weight loss of about 20 pounds, from June 2011 (apparently when Musto was first diagnosed with cirrhosis by Dr. Graham Jeffries) until September 2013. See Exhibit G at 4. Dr. Doria is expected to testify at a hearing that this weight loss and further loss of muscle mass is additional evidence of the advancement of the liver disease.

INR Level. In addition, Musto's INR increased from 1.16 in 2011 to 1.33 in 2013. See Exhibit G at 6. This INR reading is now above average. Dr. Doria noted that the increased INR is additional clinical evidence of the advancement of the liver disease, together with the disease's life-threatening and other complications noted above. See Exhibit G at 6.

Intractable Pruritus. In addition, Musto has been suffering for some time from a skin condition which has been diagnosed by Dr. Brian Kim, a dermatologist at the Hospital of the University of Pennsylvania, as intractable pruritus. This disease causes relentless pain and itching and, as noted by Dr. Doria, is a known complication of liver cirrhosis. See Exhibit

G at 5. The condition has caused such pain and itching that Musto has begun to bleed from scratching. See Exhibit G at 4. A medical examination by Dr. Kim revealed erythematous¹⁴ patches on Musto's back, arms and legs with excoriations.¹⁵ See Exhibit J at 2. In addition, the intractable itching also inhibits Musto from resting at night, further increasing his severe fatigue and diminishing his cognitive abilities, including his ability to concentrate and to properly perform his normal daily tasks. See Exhibit G at 4.

Although Dr. Kim noted that the skin condition is allergic in nature, Dr. Doria opined, to a reasonable degree of medical certainty, that intractable pruritus is a known complication of liver cirrhosis. See Exhibit G at 5. Dr. Doria further found that the "hematomas identified in the area of the scratching marks are reflecting of the low platelet count and the prolonged INR, two manifestations of liver cirrhosis." Exhibit G at 5. Finally, it should be noted that the intractable itching by this disease has been so serious in other cases that Dr. Doria noted that intractable itching in patients diagnosed with liver disease has been reported to be a reason for attempted suicide. See Exhibit G at 5.

¹⁴ Abnormal redness of the skin. Merriam-Webster Medical Dictionary.

¹⁵ A raw irritated lesion. Merriam-Webster Medical Dictionary.

Slurred Speech, etc. During Musto's admission on June 30, 2013, at Wilkes-Barre General Hospital, following his ambulance trip to the emergency room there, he was noted to have slurred speech, confusion, dizziness and vertigo.¹⁶ See Wilkes-Barre General Hospital medical records attached hereto as Exhibit I. In addition, he was unable to get out of bed. See *id.* at 1. Initially, it was thought that Musto had sustained a stroke, but a CT scan of the brain later ruled out any discernable evidence of a stroke. In his report dated October 23, 2013, Dr. Doria noted that, during his examination of Musto, he observed similar symptoms - confusion with episodes of slurred speech - and opined to a degree of medical certainty, that these were consistent with the advancement of his liver disease. See Exhibit G at 4, 6. Musto was discharged from the hospital on July 2, 2013. See Exhibit I at 3; Exhibit G at 3.

Thoracic Aneurysm. Musto's thoracic aneurysm was included in the initial Motion to Dismiss or for Continuance, based on the exam in July 2012 by Dr. Joseph J. Stella, who is a cardiac thoracic surgeon at Geisinger. Dr. Stella also diagnosed the thoracic aneurysm measuring 4.7 cm in a report dated February 12, 2013. See Report of Dr. Joseph J. Stella dated February 12, 2013 attached hereto as Exhibit K at 4. This aneurysm, which

¹⁶ His family called for the ambulance based on his confusion, incoherent behavior and inability to communicate which did not improve and appeared to get worse.

was discussed in Musto's prior motion as life-threatening, remains a significant and independent risk of death as explained by Dr. Doria. In his October 23, 2013 report, Dr. Doria stated that an "abrupt increase in blood pressure is a known biological response to stress of any kind." Dr. Doria also stated "[i]t is also known that such an increase in the blood pressure can be the cause of a rapid expansion in the size of an aneurysm and possibly, as a consequence of that, [the] aneurysm's rupture. Should that happen, more likely than not, Mr. Musto would not survive the event." Exhibit G at 5-6. Thus, there would be no reasonable precautions available should the increased pressure of preparation for trial or the trial itself result in an aneurysm rupture.

B. Changes in Extreme Fatigue

Musto's daily activity is at a minimal level and his daily activity is declining. Musto now suffers from more frequent and intense periods of extreme fatigue for two to three days a week during which he is bedridden. Dr. Fischbein noted that Musto reported that he "can have a good day but there are more bad days now [and] that his fatigue has increased significantly." Exhibit H at 7.¹⁷

¹⁷ Dr. Fischbein had first seen Musto October 17, 2012 and Musto was here explaining the differences from his last visit to his second visit on September 7, 2013.

In addition to the two to three days each week of being totally bedridden, Musto now experiences at least one day of what Dr. Doria terms "recovery" following each of the bedridden days to regain "enough energy to cope with his simple daily tasks at the conclusion of every episode of involuntary bed rest." Exhibit G at 4. On his "recovery" days, Musto is largely inactive. On the two or so days a week when he is not bedridden or in "recovery," he largely remains homebound and is only slightly more active than on the "recovery" days.

In discussing his status last year when Musto was showing fatigue two to three days a week, Dr. Schreiberman noted that "there is no way to predict when or how often he will have a bad day [a day of extreme fatigue]". See Exhibit E at 4. The increased number of days of extreme fatigue and the inability to forecast those days of extreme fatigue will only increase when Musto is placed under stress of preparing for trial and effectively render Musto unable to meaningfully prepare for or participate at trial. See Exhibit E at 4;

The increased fatigue caused by the sleeplessness due to the itching associated with the intractable pruritus, together with the already severely debilitating effects of his cirrhosis, has caused Musto to have even more difficulty sleeping than he did before, exacerbating the fatigue problem previously

identified by Dr. Doria and Dr. Schreiber. See Exhibit B at 5; Exhibit C at 4; and Exhibit E at 4.

For all of the above reasons, it is difficult to imagine that Musto could attend trial more than one or two days a week. In addition, it is difficult to imagine how Musto could be considered fully alert and able to concentrate for more than an hour or two a day during his anticipated trial, which would probably not be able to be convened more than one or two days a week.

C. Changes in Cognitive Function

Musto's cognitive functions have continued to decrease as a result of the onset and worsening of hepatic encephalopathy¹⁸ resulting from his failing liver function.

Musto's worsened cognitive impairment is evidenced in his memory loss, periods of confusion, and slurred speech. This impairment precludes him from concentrating sufficiently in order to process new information. Dr. Fischbein and Dr. Doria recently examined Musto and both determined that Musto's cognitive impairment is worsening and the impairment, in and of

¹⁸ If called to testify at a hearing, Dr. Doria is expected to state that hepatic encephalopathy is the occurrence of confusion, lethargy, somnolence, altered levels of consciousness, which come as a result of liver disease and liver failure. This condition is caused by the accumulation in the bloodstream of toxic substances that are normally removed by the liver but remain in the blood. These toxins are carried to the brain and cause continuing loss of brain cells, and result in continuing and ongoing decreased cognitive function.

itself, prevents him from assisting counsel at trial. See Exhibit G at 7; Exhibit H at 10.

On September 7, 2013, Dr. Fischbein, a psychiatrist who is board certified in adult, geriatric and forensic psychiatry, examined Musto.¹⁹ Dr. Fischbein determined that Musto has sustained cognitive impairment related to the early stages of encephalopathy or vascular dementia, "which will only worsen . . . in light of his failing health and liver dysfunction and encephalopathic picture."²⁰ Exhibit H at 10.

Dr. Fischbein stated that Musto does not read anymore because he cannot retain what he reads from paragraph to paragraph" and because he "can't concentrate and keep track of the characters in the book." Exhibit H at 8. This is a direct reflection of the loss of cognitive ability. Dr. Fischbein concluded that Musto's "concentration and ability to stay focused is greatly compromised and he would not be able to maintain the focus and concentration necessary to follow the trial." Exhibit H at 10.

Dr. Fischbein noted that Musto's "failing liver status due to cirrhosis and portal hypertension will only get worse. His

¹⁹ Dr. Fischbein had previously examined Musto in October, 2012. See Exhibit H at 4.

²⁰ Dr. Fischbein corroborated Dr. Doria's findings, in the reports which were filed in support of Musto's initial motion, that Musto's suffered from encephalopathy and cognitive impairment.

propensity towards developing an encephalopathic picture will only become more frequent over the next several months." Exhibit H at 10.

Dr. Fischbein concluded to a reasonable degree of medical certainty that Musto "does not maintain the capacity or competency to stand trial." Exhibit H at 10. Dr. Fischbein concluded that Musto's "cognitive abilities to maintain alertness, focus and process new information that would become available during the trial would be greatly compromised and not permit him to aid his attorneys." Exhibit H at 10. "It would be difficult for [Musto] to be able to aid his attorneys in confronting witnesses and statements that are made during a trial." Exhibit H at 10.

Dr. Doria examined Musto on October 17, 2013 and observed that Musto's cognitive functions have continued to decline from the time of his prior examination. During his examination of Musto, Doria observed that Musto "appears to be more confused and with episodes of slurred speech." Exhibit 6 at 4. Dr. Doria noted that the decline in Musto's cognitive functions is "multi-factorial in origin, and partially due to his liver cirrhosis and inability of his diseased liver to metabolize false-neurotransmitters and to the increased production of ammonia." Exhibit G at 6. Dr. Doria also concluded, to a reasonable degree of medical certainty, that Musto's "short term

memory is impaired and therefore his ability to retain information and interact properly at time of trial and to participate in his defense is not adequate." Exhibit G at 7. Dr. Doria concluded, based on a reasonable degree of medical certainty, that Musto is too sick to withstand the rigors of trial preparation and the stress of the trial itself. Exhibit G at 7.

V. ARGUMENT

A. THE FIFTH AND SIXTH AMENDMENTS REQUIRE INDEFINITE CONTINUANCE OF TRIAL SINCE MUSTO'S PHYSICAL CONDITION AND COGNITIVE IMPAIRMENT RENDER HIM PHYSICALLY INCOMPETENT, I.E., INCAPABLE OF ASSISTING HIS COUNSEL IN PREPARING FOR TRIAL OR DURING TRIAL, INCAPABLE OF ADEQUATELY PARTICIPATING IN THE TRIAL IN ANY MEANINGFUL WAY, AND INCAPABLE OF WITHSTANDING THE RIGORS OF TRIAL ITSELF.

Compelling Musto to trial in this matter, given his grave health condition and cognitive impairment, would result in a deprivation of his right to present a complete defense under the Due Process Clause of the Fifth Amendment and under the Sixth Amendment. Moreover, as the Third Circuit's opinion stated, Musto contends that "there is reasonable ground to believe that physical disability may ... endanger [his] life," if he is brought to trial, and that this claim is supported by the Due Process Clause, under such cases as United States v. Knohl, 379 F.2d 427, 437 (2d Cir.), *cert. denied*, 389 U.S. 973 (1967). Slip op. 6, n.3; see also United States v. Gunter, Crim. No. 12-394-4,

2013 U.S. Dist. LEXIS 158555, *2,*3 (EDPA Nov. 5, 2013)(Bartle, J.) (a copy of United States v. Gunter is attached hereto as Exhibit L).

"Whether rooted directly in the Due Process Clause ... or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " Holmes v. South Carolina, 547 U.S. 319, 324-25 (2006), quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)(other citations and internal quotation marks omitted). It is apparent, for the reasons set out above and below, that Musto's physical condition will not permit him to have "a meaningful opportunity to present a complete defense."

Regarding the physical incompetency issues raised by Musto in his Amended Motion, the Second Circuit has stated, "It is well settled that a defendant, who has been convicted while he is incompetent to stand trial, has been deprived of due process." Knohl, 379 F.2d at 434 (citing cases which concerned both mental and physical incompetency) (citations omitted).²¹ Similarly, in United States v. Schaffer, 433 F.2d 928 (5th Cir.

²¹ Although the Second Circuit stated that some of the cases cited as to the requirements of the Due Process Clause as to physical incompetency were only dicta, it is clear that the court considered the above-stated rule to be fully applicable under this clause to physical incompetency, which was the subject of the defendant's motion. *Id.*

1970), the Fifth Circuit held that the Due Process Clause fully applies to cases involving physical competency. *Id.* at 930. "The trial and conviction of a person ... incapable of making a defense violates certain immutable principles of justice which inhere in the very idea of free government." *Ibid.* (citation omitted).

Likewise, in Gunter, the Court considered a case similar to - but not as compelling as - the one here, and granted an indefinite continuance to a defendant who "has suffered and continues to suffer from a series of acute health conditions." *Id.* at *3.

As set out in detail above, Musto is physically incompetent to stand trial because his medical condition is such that he faces an imminent risk of serious bodily injury or death if he were to proceed with trial preparation and trial itself, due to the likelihood of an adverse reaction to the stress of such activities. Moreover, he is physically incompetent to stand trial because his fatigue is so severe that he may well not be able to stay awake for more than one or two hours at a time and that he may well not be able to attend court more often than one or two days a week. Finally, Musto is physically unable to prepare for or participate in a trial because his cognitive impairment is such that his memory and concentration are so limited that he could not have a substantial understanding of

the testimony in court and could not meaningfully assist his counsel in formulating defensive positions, in cross-examining witnesses, or in testifying on his own behalf.

Accordingly, the Fifth and Sixth Amendments require indefinite continuance of trial of this matter because Musto's medical conditions and cognitive impairment render him physically incompetent to stand trial.

- 1. There is a substantial likelihood of serious injury or death to Musto if he is required to undergo the pressure of preparing for trial and the rigors of trial**

A federal criminal trial is mentally, physically and emotionally draining. It is grueling for a healthy individual, let alone an 84²² year old man with a grave prognosis due to liver disease and a thoracic aneurysm. In his declining health condition, if Musto is forced to undergo the rigors of trial preparation and trial, he faces an imminent risk of serious injury or death.

Specifically, Dr. Doria and Dr. Schreibman²³ describe Musto's medical condition as perilous. Dr. Doria concludes that Musto is "at risk of developing serious health consequences

²² Musto will turn 85 on March 30, 2014.

²³ If this Court grants his request for a hearing, Musto expects to call Dr. Doria and Dr. Fischbein as witnesses at the hearing. No matter whether the government were to call Dr. Schreibman as its witness at the hearing, Musto would move to introduce his reports in his (Musto's) case.

including death if he will have to take the stress of trial preparation as well as trial itself." Exhibit A at 11. Dr. Doria stated that among the likely "life threatening complications [of the stress] were bleeding from rupture of gastro-esophageal varices," which bleeding could be massive, as set out above. Exhibit B at 5.

In addition, in his most recent report, Dr. Doria, in his discussion of Musto's thoracic aneurysm, concluded that "an increase in the blood pressure can be the cause of a rapid expansion in the size of an aneurysm and possibly, as a consequence of that, [the] aneurysm's rupture. Should that happen, more likely than not, Mr. Musto would not survive the event." Exhibit G at 6.

Therefore, Musto has supplied substantial, particularized information, as to which he will offer testimony and exhibits at the requested hearing, to support his claim that, under the Due Process Clause and the Sixth Amendment's guarantee of a fair trial, this Court should grant his motion for an indefinite continuance of trial.

2. Musto suffers cognitive impairment that renders him incapable of assisting his counsel in preparing for trial and participating in his defense at trial

Musto is suffering from decreased cognitive functions likely from the onset of hepatic encephalopathy that renders him

incapable of assisting his counsel in preparing for trial or participating in his defense at trial. Dr. Fischbein determined that Musto has sustained cognitive impairment related to the early stages of encephalopathy, "which will only worsen . . . in light of his failing health and liver dysfunction and encephalopathic picture." Exhibit H at 10. In addition, Dr. Fischbein concluded that Musto's "concentration and ability to stay focused is greatly compromised and he would not be able to maintain the focus and concentration necessary to follow the trial." Exhibit H at 10. Accordingly, Dr. Fischbein concluded to a reasonable degree of medical certainty that Musto "does not maintain the capacity or competency to stand trial." Exhibit H at 10. Dr. Fischbein concluded that Musto's "cognitive abilities to maintain alertness, focus and process new information that would become available during the trial would be greatly compromised and not permit him to aid his attorneys." Exhibit H at 10. "It would be difficult for [Musto] to be able to aid his attorneys in confronting witnesses and statements that are made during a trial." Exhibit H at 10.

Dr. Doria examined Musto on October 17, 2013 and observed that Musto's cognitive functions continued to decline from the date of his prior examination. During his examination of Musto, Doria observed that Musto "appears to be more confused and [afflicted] with episodes of slurred speech." Exhibit 6 at 4.

Dr. Doria noted that the decline in Musto's cognitive functions is "multi-factorial in origin, and partially due to his liver cirrhosis and inability of his diseased liver to metabolize false-neurotransmitters and [partially due] to the increased production of ammonia." Exhibit G at 6. Dr. Doria also concluded, to a reasonable degree of medical certainty, that Musto's "short term memory is impaired and therefore his ability to retain information and interact properly at time of trial and to participate in his defense is not adequate." Exhibit G at 7.

Therefore, compelling Musto to trial would deny him a fair trial in violation of the Due Process Clause and of the Sixth Amendment.

3. The combination of all of Musto's medical conditions cumulatively render him incapable of assisting his counsel in preparing for and during trial or withstanding the rigors of trial preparation and trial itself

As set forth at length herein, Musto suffers from numerous serious medical conditions from his liver disease, cognitive impairment and thoracic aneurysm that cumulatively render him incapable of assisting his counsel in preparing for trial or withstanding the rigors of trial. The cumulative impact of these issues mandate continuance of trial in order to ensure the fundamental fairness required under the Due Process Clause and under the Sixth Amendment.

As set forth at length *supra*, Musto currently experiences two to three days of extreme fatigue a week at a time necessitating mainly being bedridden all day. These days occur when he currently is subjected to little if any stress or physical exertion. Following those days, Musto has a "recovery" day in which he is largely inactive. Therefore, it is apparent that he will not be physically able to attend trial several days a week in that he will most likely experience several days of extreme fatigue and related recovery days each week. Moreover, the day or days on which he will be available cannot be predetermined. In addition, at least two of the experts - Dr. Doria and Dr. Schreibman - opine that the number of days he would be unavailable would only increase due to the stress and strain of preparation for and participation at trial.

If done in accordance with the Supreme Court's standard of reasonably effective assistance of counsel, *cf.* Strickland v. Washington, 466 U.S. 668, 684-85 (1984), trial preparation for this case would entail long days of working with Musto, interviewing him and reviewing of hundreds, if not thousands, of pages of documents with him. In addition, the Superseding Indictment includes references to transactions that allegedly occurred more than seven years ago. Accordingly, Musto would be required to recall those events and relate them to his attorneys in order to assist his attorneys in preparing for trial. As set

forth in Dr. Doria, Dr. Schreiberman and Dr. Fischbein's reports, given his medical conditions and his impaired and diminished cognitive abilities, Musto does not have the physical ability and stamina to undergo the rigorous process of preparing for trial.

As in any criminal case, one of the decisions for Musto is whether he will testify, to the extent he may be able to do so, in his defense. If so, he would likely be on the witness stand for more than one day, during which he could be expected to be subjected to thorough and intense cross-examination by the government attorneys. This would be particularly difficult since Musto would necessarily testify several days into the trial, after the government attorneys have presented their case in chief. Musto, accordingly, would face the awful dilemma of deciding to either forgo what may be his best defense or to take the risk that the stress of testifying might result in serious injury or death.

The medical evaluations of both the prosecution and defense experts indicate that Musto cannot withstand the rigors of trial. Dr. Doria concluded that subjecting Musto to trial and the excessive stressors that are presented would cause life-threatening complications from both the liver disease and the thoracic aneurysm.

Courts have discretion to determine if a defendant is physically incompetent to stand trial. Courts have recognized that a defendant who is "mentally competent" within the meaning 18 U.S.C. § 4244, *et seq.*, may yet be "physically incompetent" - unable to participate effectively in his own defense because of a physical condition. See Schaffer, 433 F.2d at 930; United States v. Bernstein, 417 F.2d 641 (2d Cir. 1969); Knohl, 379 F.2d at 436-37. A criminal defendant is not competent to stand trial if the court finds by a preponderance of the evidence that the defendant is presently suffering from a disease or defect rendering him incompetent to the extent that he is, *inter alia*, unable to assist properly in his defense. See Drope v. Missouri, 420 U.S. 162, 171 (1975).

Unlike determining mental competency, "no statutory standard exists for [determining] whether a defendant is physically incompetent to stand trial." United States v. Reddy, No. 01-CR-0058, 2003 U.S. Dist. LEXIS 18260, * 9 (S.D.N.Y. Oct. 14, 2003); *see also*, United States v. Jones, 876 F. Supp. 395, 397 (N.D.N.Y. 1995). As to the defendant's physical competence, the court must determine if the defendant's presence at trial would substantially increase the risks to his health or life and whether his present physical condition is such that it may substantially impair his ability to present a proper defense. See Knohl, 379 F.2d at 436-37; Reddy, 2003 U.S. Dist. LEXIS

18260, *3 ("A court may grant a continuance based on physical disability grounds if the trial poses a substantial danger to the defendant's life or health"); United States v. Sweig, 316 F. Supp. 1148, 1165-67 (S.D.N.Y. 1970).

The factors which courts have considered in determining whether to continue trial due to physical incompetency are set forth in United States v. Doran, 328 F. Supp. 1261 (S.D.N.Y. 1971). Under Doran, a court should examine the following: (1) the medical evidence on the defendant's physical condition; (2) the related evidence of defendant's activities outside the courthouse; (3) the possible availability of measures to minimize the risk to the defendant's health in subjecting him to trial; (4) the "temporary or permanent character of the physical problem"; and (5) the "magnitude and seriousness of the case - i.e., the degree of loss or injury to the public interest deemed to result from delay or total preclusion of a trial." Doran, 328 F. Supp. at 1263. All five factors are applicable to Musto's Due Process and Sixth Amendment claims, and four of these factors weigh heavily in favor of the Court's continuing trial in this matter.

Recently, a district court in the Eastern District of Pennsylvania granted a defendant's motion to continue trial indefinitely based on physical impairment. See Gunter, 2013 U.S. Dist. LEXIS 158555. In Gunter, the court concluded that

the defendant was physically incompetent to stand trial and granted defendant's motion to continue trial indefinitely. *Id.* at *7. The defendant, who was in his late seventies, suffered from serious medical conditions, including bladder cancer and prostate cancer. *Id.* at *3. In addition, the defendant had both kidneys removed and, accordingly, underwent dialysis three days a week for four and one-half hours a day. *Id.* at *4.

Musto's case presents an even more compelling basis to continue trial indefinitely than the facts in Gunter because (1) Musto, unlike Gunter, faces life-threatening complications due to the potential rupture of the varices and thoracic aneurysm if placed in stressful situations; (2) Gunter did not suffer cognitive impairment; and (3) the government's expert, Dr. Schreibman, agrees that Musto could not withstand trial.

In Gunter, the Court applied the Doran factors and determined that Gunter was not physically competent to stand trial. *Id.* at 5-7. The Court first noted that the medical evidence demonstrated that the defendant could not sit through a trial conducted on a daily basis because of his dialysis treatments three days a week. *Id.* at 5.

In connection with the defendant's activities outside the courtroom - the Court simply noted that defendant is retired and the Court did not have any "information that he engages in any

outside activity except to undergo dialysis and visit his physicians." *Id.* at 5.

In connection with potential measures that might be taken to minimize the risk to defendant's health in subjecting him to trial, the Court found that there was no "realistic court schedule" to accommodate defendant's health needs given his dialysis three days a week as well as his other medical conditions. *Id.* at 5.

The Court also noted that Gunter's health problems appear to be permanent and that his medial prognosis is poor and not likely to improve. *Id.* at 6.

The Court found that the final factor - the public interest in prosecuting the case that involves fraud charges serious in nature - weighed in favor of denying the motion to continue.

Considering all five Doran factors, the Court found that Gunter was not currently physically competent to stand trial because of his seriously deteriorating health and extreme difficulty in effectively assisting his counsel and presenting an effective defense and therefore, justice required the continuance of the trial. *Id.* at 7.

Musto argues that in his case, this Court should evaluate the five Doran factors in the following manner.

1. The Medical Evidence

As it pertains to medical evidence of physical condition, Musto's liver disease including his varices, cognitive impairment, a life-threatening thoracic aneurysm, extreme fatigue, and other medical conditions substantially impair his ability to present a proper defense, both in pre-trial preparation and presentation of a defense at trial, and that compelling Musto to trial would pose an imminent risk of serious injury and death.

Musto was diagnosed with non-alcoholic liver cirrhosis in June of 2011 and his condition has continued to worsen since his initial diagnosis. Musto's liver disease causes him to undergo days of extreme fatigue that prohibit him from adequately preparing for trial with his attorneys and from participating in a trial. For all of those reasons, set out fully at pages 30 to 35, *supra*, the uncontroverted medical evidence compels the conclusion that Musto's medical condition is perilous and continues to worsen, and that he faces life-threatening complications if brought to trial. The medical evidence criteria compels continuance of the trial indefinitely.

2. The Related Evidence of Musto's Activities Outside the Courthouse

Musto's current range of activities outside the courthouse is extremely limited. Even in a low stress environment, one

where his activities are extremely limited and he is not undergoing the rigors of preparing for a criminal trial, or a trial itself, he suffers from days of extreme fatigue each week. Following those days of extreme fatigue, Musto has "recovery" days in which his activity is extremely limited.

It follows that if Musto were forced to tax his mind and body in preparing for trial, the number of days of extreme fatigue would increase. See Exhibit E at 4. Even while experiencing a somewhat incubative routine, Musto contracted pneumonia, a blood infection, and was hospitalized in July of 2012. Musto was also hospitalized in July of 2013, suffering from periods of slurred speech, confusion and lightheadedness.

On those days - currently one to two days a week - when Musto is not homebound and/or bedridden, his activities outside the home are extremely limited. Musto's activity is largely confined to going with his wife to places such as church, the grocery store or the drug store and the like, and to appointments with his doctors. Musto no longer drives, and his outside activities are essentially limited to those which take him one to five miles from his home.

3. Measures to Minimize the Risks to Musto's Health

It does not appear that there are any suitable measures that could be undertaken to minimize the risk to Musto's health. Dr. Doria has concluded and several studies support the

conclusion that stressful events - including preparation for a criminal trial and undergoing the rigors of a criminal trial itself - can induce life-threatening complications. See Exhibit A at 11; Exhibit B at 5-6; Exhibit C at 5. Even the government's expert, Dr. Schreiberman, concluded that Musto cannot withstand trial. See Exhibit E at 4. In addition, there is no evidence that the risks to Musto's health could be "minimized" if a nurse or other medical professional attended the trial.

Moreover, as stated above, Dr. Doria concluded that "the stress of trial preparation as well as the trial itself can induce life-threatening complications such as bleeding from rupture of gastro-esophageal varices." Exhibit B at 5. In addition, Musto now faces a possible rupture of the thoracic aneurysm, the results of which are, by definition, life-threatening. Moreover, Dr. Doria in his most recent report concluded that stress can lead to an increase in blood pressure and cause a rapid expansion in the size of the aneurysm and possibly the aneurysm's rupture that Musto would not likely survive. Exhibit G at 5-6. Again, there is no showing that the presence of medical personnel could reasonably ensure against one of these episodes.

Musto's availability for trial appears to be limited to just one to two days a week. However, those days when Musto would be available for trial are unpredictable. Even within

those days when Musto is available for trial, it appears that his inability to concentrate and sustain the requisite energy to attempt to participate in a trial may well be limited to only a few hours a day, with rest periods even factored into the trial day.

Even assuming that appropriate rest breaks could be provided so as to minimize Musto's fatigue and difficulty paying attention on the one or two days a week he may be physically available for trial, such measures could not minimize the life-threatening risks to Musto - including possible rupture of the thoracic aneurysm or bleeding from rupture of gastro-esophageal varices - the likelihood of which are substantially increased with stress. Therefore, there are no sufficient measures to minimize the risks to Musto.

4. The Temporary or Permanent Character of the Physical Problem

The medical records show that Musto's liver disease has not stabilized and in fact has worsened and the thoracic aneurysm cannot be repaired. Dr. Doria concluded that Musto continues to show signs of progressive decline and that he could suffer from serious life-threatening complications if he is compelled to go to trial. See Exhibit G at 5-6. In addition, Dr. Schreiber characterized Musto's condition as "tenuous." Exhibit E at 4. Moreover, Dr. Fischbein determined that Musto has sustained

cognitive impairment related to the early stages of encephalopathy, "which will only worsen . . . in light of his failing health and liver dysfunction and encephalopathic picture." Exhibit H at 10. Counsel represent that, over the past year, the number of days during which Musto suffers extreme fatigue and is unavailable to prepare for trial with his attorneys or attend a trial have increased.

5. The Magnitude and Seriousness of the Case

This case involves allegations of political corruption. As Judge Bartle acknowledged in Gunter, Musto does not dispute that there is a public interest in prosecuting a case involving alleged political corruption and that this factor weighs against continuance of the trial. However, as in Gunter, this factor is not sufficient to outweigh the other Doran factors, all of which weigh heavily in favor of continuance.

Accordingly, Musto is not physically competent to stand trial, for the reasons stated above.

VI. CONCLUSION

WHEREFORE, Musto respectfully requests that this Court continue trial indefinitely due to Musto's grave health issues and decreased cognitive abilities that would prevent him from presenting a full defense, from being present at all critical stages of an expected multi-week trial, from avoiding the imminent risk of serious bodily injury and death which would

necessarily come with trial preparation and trial itself, and from assisting his counsel in preparing for trial and during trial itself.

Dated: November 15, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John E. Riley, hereby certify that on November 15, 2013, a true and correct copy of Defendant Raphael J. Musto's Renewed and Amended Motion to Continue the Trial Indefinitely and Memorandum of Law in Support thereof has been served through the ECF system and by email upon the following:

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