CASE NO. 15-1935

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FARID FATA,
Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Michigan
Southern Division

DEFENDANT-APPELLANT'S BRIEF ON APPEAL

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ORAL ARGUMENT REQUESTED

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

This case should not be submitted without oral argument. The factual matrix and the issues presented are of sufficient complexity as to require the interplay of oral argument to properly present them for review.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The indictment in which Farid Fata was charged stated offenses against the United States, defined in Title 18, United States Code. The trial court had jurisdiction under 18 U.S.C. §3231. Defendant-appellant appeals from a final judgment of the district court which disposed of all claims of all parties ripe for adjudication as of the time of its entry. The Judgment and Commitment Order (R. E. 158), which completed the proceedings in the district court, was entered July 14, 2015. An Order extending the time to appeal therefrom until August 17, 2015 was entered July 23, 2015 (R. E. 160), and a Notice of Appeal timely filed on August 5, 2015 (R. E. 165). This Court has jurisdiction pursuant to 28 U.S.C. §1291.

STATEMENT OF ISSUES FOR REVIEW

I. WHETHER THE TRIAL COURT ERRED IN ITS APPLICATION OF "ROLE IN THE OFFENSE" ENHANCEMENTS?

II. WHETHER THE DISTRICT COURT'S AGREEMENT TO ALLOW VICTIM IMPACT STATEMENTS FROM PERSONS WHOSE STATUS AS ACTUAL "VICTIMS" HAD NOT BEEN DETERMINED REQUIRES THAT DEFENDANT'S SENTENCE BE VACATED AND THE CASE REMANDED TO ALLOW HIM AN OPPORTUNITY TO PRESENT NECESSARY COUNTERVAILING EVIDENCE?

III. WHETHER THE DISTRICT COURT ERRED IN ACCEPTING DEFENDANT'S PLEAS OF GUILTY TO MONEY LAUNDERING CHARGES IN THE ABSENCE OF A SUFFICIENT FACTUAL BASIS TO SUPPORT THOSE PLEAS?

STATEMENT OF THE CASE

Defendant-appellant Farid Fata, M.D., was originally charged in a criminal complaint filed in the United States District Court for the Eastern District of Michigan on August 6, 2013. (R. E. 1) Shortly thereafter, on August 14, the first of a series of Indictments (R. E. 20) was returned against him, culminating in the Fourth Superseding Indictment (R. E. 66), which was filed on January 15, 2014.

That charging instrument consisted of 19 counts of Health Care Fraud, 18 U.S.C. § 1347, one count alleging a conspiracy to pay unlawful kickbacks, 18 U.S.C. § 371, one count charging the unlawful procurement of naturalization (by concealing the commission of the crime of health care fraud), 18 U.S.C. § 1425(a), and three counts of "promotional" money laundering under 18 U.S.C. § 1956(a)(1)(1)(A)(i).

On September 16, 2014, Dr. Fata appeared before the Hon. Paul D. Borman, District Judge, and, without the benefit of a Rule 11 plea agreement, pled guilty to thirteen of the health care fraud counts, the kickback conspiracy count, and two of the money laundering charges. R. E. 111, Transcript, Pg ID 1104 - 1131.

Sentencing hearings were held July 6-10, 2015, at the conclusion of which Judge Borman imposed sentence as follows: concurrent and consecutive terms totaling 240 months for the health care fraud counts, a consecutive term of 60 months for the kickback conspiracy charge, and concurrent terms of 240 months for the money

laundering charges, to run consecutively to the other sentences, for a total term of imprisonment of 45 years, followed by three years of supervised release, and special assessments totaling $1,600. R. E. 161, Transcript, Pg ID 2503 - 2504.

A Judgment and Commitment Order incorporating that sentence was entered July 14, 2015 (R. E. 158), an Order extending the time appeal therefrom until August 17, 2015 entered July 23, 2015 (R. E. 160), and a Notice of Appeal timely filed on August 5, 2015 (R. E. 165).[1]

[1] The remaining counts were subsequently dismissed on motion of the government. (R. E. 162 and 163)

STATEMENT OF FACTS

Without doubt, the charges against Dr. Farid Fata, a prominent and well-respected oncologist in the Detroit area,[2] were shocking, involving, according to the Fourth Superseding Indictment, submission of " claims for years of medically unnecessary treatments including the following repeated and unnecessary chemotherapy and cancer drug treatments for individuals who did not, in fact, have cancer and/or did not require treatment for cancer." R. E. 66, fourth Superseding Indictment, Pg ID 746. Unsurprisingly, his arrest and prosecution was a matter of extreme public interest and concern. Thus, a Google search for "Farid Fata" conducted

[2]As Paragraph 122 of the Presentence Investigation Report (lodged with the Court, D. E. 14) reflects:

> According to the Editor-in-Chief for *Cancer*, the medical journal selected and published several of the defendant's articles. Furthermore, FATA M.D. served as a member of the Board of Reviewers for *Cancer*. The defendant's responsibilities included reviewing the works of others and recommending reports for publication. On November 13, 2009, FATA M.D. received a certificate of recognition from the Physician's Council for Responsible Reforms for his role as a Physician Consultant. In 2009 and 2010, the defendant received the Patient's Choice award from *MDx Medical, Incorporated*, an online medical resource helping patients find doctors and medical facilities. According to records, patients rate medical professional on areas such as bedside manner, doctor patient face time, and degree of follow-up. In 2007, 2008, 2009, 2011, and 2012, FATA M.D. was reportedly listed as a Top Doc in Hour Detroit Magazine.

a few months after the return of the Fourth Superseding Indictment generated approximately 381,000 results, or "hits."[3]

Ultimately, and without the benefit of a Rule 11 plea agreement, Dr. Fata pled guilty to thirteen of the health care fraud counts (Counts 3-6 and 9-17), the kickback conspiracy count (Count 20), and two of the money laundering charges (Counts 22 and 23). R. E. 111, Transcript, Pg ID 1104 - 1131. In the course of those guilty pleas he acknowledged, *inter alia,* that he ordered medically unnecessary injections of Neulasta (a drug intended to boost white blood cell counts which have been eroded by chemotherapy[4]) and Velcade (a chemotherapy drug for the treatment of an iron

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[3] *See*, R. E. 87, Motion for Change of Venue, Pg ID 848. As noted there, these postings included a local television station's exploration of previous complaints by an alleged "whistleblower," an organization which organized a petition drive to make patient records available, a Crain's Business essay on how Dr. Fata resembled other health care "culprits," and the Facebook page of the organization of Dr. Fata's alleged "victims" and their families, with 1,473 members, and which described him as "This MONSTER." Other websites served as aggregators of vituperation, such as a Good Morning America comments page on which Dr. Fata is described as "scum," and "an awful human being," calls for a "Death sentence," or to "EXEcUTE [*sic*] him I am serious," "Hang him high," or "put him through a wringer drain every blood from his body,"and which furnishes an outlet for other hate speech, such as "His Allah don't care about infidels."*See*, R. E. 87-2 - 87-9, Exhibits to Motion for Change of Venue, Pg ID 856-911.

[4] Neulasta.com, https://www.neulasta.com/?WT.z_co=A&WT.z_in=FN&WT.z_ch=PDS&WT.z_st=&WT.z_mt=&WT.z_pdskw=&WT.z_ag=&WT.z_se=G&WT.srch=1&WT.z_prm=&WT.mc_id=A_FN_PDS_G, as viewed November 17, 2015.

replacement product[5]), and medically unnecessary infusions of Feraheme (an iron replacement product[6]), Rituxan (a type of antibody therapy used for the treatment of Non-Hodgkin's Lymphoma and Chronic Lymphocytic Leukemia[7]), and Octagam (a sterilized solution made from human plasma used to prevent infections[8]), as well as medically unnecessary PET scans. The government, however, argued that Dr. Fata's medical misdeeds went far beyond this. *See, e.g.*, R. E. 135, Government Sentencing Memorandum, Pg ID 1274-1276.

Because of the intense public interest, as well as the complexities of the medical issues raised by the differing positions of the parties,[9] the trial court

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[5] Velcade.com, http://www.velcade.com/What-velcade-treats/Multiple-myeloma, as viewed November 17, 2015

[6] Rxlist, Feraheme, http://www.rxlist.com/feraheme-drug.htm, as viewed November 17, 2015.

[7] Rituxan.com, What is Rituxan? http://www.rituxan.com/hem/patient/what-is-rituxan?cid=rth_PS_00001048&mkwid=s7DInNq6n_dc|pcrid|84713826260|pkw|rituxan|pmt|p&utm_source=google&utm_medium=cpc&utm_campaign=&utm_term=rituxan&gclid=CjwKEAiAvauyBRDwuYf3qNyXmW4SJACX9-fX_T0-InvJMEDin9GttFa0dsTWPr8kvCs-RHvjvNVFbBoCNeLw_wcB, as viewed November 17, 2015

[8] Drugs.com, Octagam, http://www.drugs.com/octagam.html, as viewed November 17, 2015.

[9] At times, the submissions of the parties more resembled medical journals than legal pleadings. Thus, for example, as to the drug Neulasta, the government argued, in part:

> Fata pleaded guilty to ordering unnecessary Neulasta [Count 3], an injection that is used to increase white blood cell counts and decrease the risk of fever or infection during periods of low white cell counts (neutropenia). Fata ordered it with numerous chemotherapy regimens regardless of whether the patient had low white blood counts or whether there was a danger of neutropenia, as he did to W.D. on multiple occasions, including on June 26, 2013 [Count 3].

R.E. 135, Government Sentencing Memorandum, Pg ID 1296-1297.

> The defense responded, in part, as follows:
>
> [T]he government fails to identify, with the exception of W[] D[], any patients that who received unnecessary Neulasta. Thus, it is impossible for undersigned counsel to respond to the government's sweeping allegation.
>
> It should be noted, however, that it is perfectly acceptable for an oncologist to administer Neulasta without determining the white blood cell count if a particular chemotherapy drug carries with it a 20% or greater chance of causing febrile neutropenia. In fact, it is acceptable to administer Neulasta even with a normal white blood cell count because the administration of the Neulasta may prevent the development of a low white count.
>
> In fact, studies suggest that Neulasta may be administered to a patient receiving chemotherapy even if the chemotherapy carries with it only a 10% chance of febrile neutropenia if the patient also has certain co-morbidities such as chronic kidney, heart, or lung disease because the consequences of febrile neutropenia can be dire. Aapro MS, Cameron DA, Pettengell R, Bohlius J, Crawford J, Ellis M, Kearney N, Lyman GH, Tjan-Heijnen VC, Walewski J, Weber DC, Zielinski C, *EORTC Guidelines for the Use of Granulocyte-Colony Stimulating Factor to Reduce the Incidence of Chemotherapy-Induced Febrile Neutropenia in Adult Patients with Lymphomas and Solid Tumours*, Eur J Cancer. 2006 Oct;42(15):2433-53. Epub 2006 Jun 5.

held a Status Conference on July 1, 2015, to determine the details of the procedure to be followed, *see*, R. E. 171, Transcript, Pg ID 2946 - 2995, and thereafter entered a detailed order setting forth procedures for seating at a projected multi-day sentencing proceedings (to "begin on Monday, July 6, 2015, at 9:00 a.m., and continue every day thereafter from 9:00 a.m. to 1:30 p.m. until the sentence is imposed."), establishing a seating plan for the courtroom (reserving seats for the press, the public, and "victims/former patients of Dr. Fata"), and providing for "victim and public seating in overflow courtrooms with live feed transmission." R.E. 140, Order, Pg ID 1490-1496.

While both sides offered numerous objections to the Presentence Investigation Report (19 by the government, 18 by the defense), most were resolved by stipulations or otherwise,[10] so that, when the time for sentencing proceedings came, only a handful of Guidelines-related issues remained for decision.

The five days of sentencing hearings, however, were not limited to the resolution of Guidelines disputes. In addition, the government presented testimony

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Defense Sentencing Memorandum (filed under seal, per R. E. 143), pp. 36-37.

[10] *See, e.g.*, Exhibit A to Defendant's Sentencing Memorandum (filed under seal per R. E. 143).

from two physicians, and 22 former patients or relatives of former patients offered statements.

In the end, Judge Borman calculated Dr. Fata's Guideline Sentencing Range at 360 months - life, based on an Offense Level of 42, and a Criminal History Category of I. R. E 170, Transcript, Pg ID 81. The defense argued for a sentence of 25 years, R. E. 161, Transcript, Pg ID 2480, and the government for 175 years, the cumulative total of statutory maximum punishments for the counts to which Dr. Fata had pled guilty, which it characterized as "punishment . . . . to the fullest extent of the law." *Id.*, at 2491. Judge Borman imposed the following sentences:

> With regard to Count 3, the Court commits the Defendant to the custody of Bureau of Prisons for a period of 120 months.
>
> With regard to Counts 4 through 6 and 9 through 17, the Court commits the Defendant, Dr. Farid Fata, to the custody of the U.S. Bureau of Prisons for a period of 120 months on all counts to run concurrent to each other but consecutive to all other counts.
>
> With regard to Count 20, the Court commits Defendant, Dr. Farid Fata, to the custody of the Bureau of Prisons for a term of 60 months to run consecutive to all other counts.
>
> With regard to Count 22, the Court commits Defendant, Dr. Farid Fata, to the custody of the Bureau of Prisons for a term of 240 months to run consecutive to all other counts.
>
> With regard to Count 23, the Court commits Defendant to the custody of Bureau of Prisons for a period of 60 months to run concurrent to all other counts which creates a total sentence of 45 years.

Id., at Pg ID 2503.

Such additional facts as are necessary to the understanding of the issues raised will be set forth in connection with the discussion of those issues.

SUMMARY OF ARGUMENT

The trial court erred in its application of the "Role in the Offense" enhancements contained in Part B of Chapter Three of the Sentencing Guidelines. This error was premised on an incorrect application of the enhancement provided for in U.S.S.G. § 3B1.3 for "abuse of trust," rather than on the alternative basis, the use of a "special skill. Proper application of § 3B1.3 would have foreclosed a "leadership role" enhancement under § 3B1.1, and would have reduced the Adjusted Level by two. This error was not harmless, and requires the vacation of Dr. Fata's sentences.

The trial court improperly permitted the presentation of deeply disturbing narratives from supposed "victims" of Dr. Fata's misconduct under circumstances that did not allow the defense to meaningfully test their accuracy and truthfulness, where the circumstances strongly suggested the likelihood that testing would have revealed significant flaws in their reliability. Although the trial judge expressed the belief that he was not affected by these presentations, it is difficult to see how he could have truly put these highly evocative, deeply compelling, narratives of pain and suffering out of mind. Accordingly, the Court should vacate Dr. Fata's sentences and remand with instructions to allow the defense to present the evidence it sought to in the first instance - regarding the care and treatment of those patients who claimed to be, but were not in fact "victims" of the offenses to which he pled guilty.

The trial judge erred in accepting Dr. Fata's pleas of guilty to two counts of "promotional" money laundering under 18 U.S.C. § 1956(a)(1)(A)(i) because the plea colloquy did not provide a sufficient basis for the plea, as required by F. R. Cr. P. 11(b)(3), insofar as it failed to establish that Dr. Fata engaged in the identified financial transaction with the specific intent to promote the specified underlying unlawful activity. Although this argument was not raised below, it should be held to constitute "plain error." As a result, Dr. Fata's convictions and sentences for Counts 22 and 23 of the Fourth Superseding Indictment must be vacated, as well as his sentence as a whole, and the case remanded for resentencing.

ARGUMENT

I

THE TRIAL COURT ERRED IN ITS APPLICATION OF "ROLE IN THE OFFENSE" ENHANCEMENTS.[11]

The Presentence Investigation Report Guidelines calculations included a single enhancement under Part B of Chapter Three of the Sentencing Guidelines, regarding the defendant's role in the offense: a two-level upward adjustment under U.S.S.G. § 3B1.3 on the basis that Dr. Fata, "a medical doctor licensed in the State of Michigan," employed "a special skill in a manner that significantly facilitated the commission or concealment of the offense." Presentence Investigation Report (lodged with the Court, D. E. 14), ¶ 81.

Under the terms of § 3B1.3, two levels may be added to the scoring of a defendant's Offense Level "[i]f the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense;" however, "[i]f this adjustment is based solely on the use of a special skill, it may not be employed in addition to an adjustment under §

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[11] "To determine if the district court properly calculated the applicable Guidelines range, we review the district court's findings of fact under the clear-error standard and its legal conclusions regarding application of the Guidelines de novo." *United States v. Holcomb*, 625 F.3d 287, 291 (6th Cir. 2010).

3B1.1 (Aggravating Role)." Accordingly, the Presentence Investigation Report did not add an enhancement under § 3B1.1.[12]

The government objected, arguing that the application of a § 3B1.3 enhancement under an "abuse of trust" theory would be "more appropriate" than under the "special skill" finding suggested by the Probation Department, and that Dr. Fata's offense level would therefore also be subject to a four level enhancement under § 3B1.1(a), on the basis that he was the organizer or leader of "an otherwise extensive kickback conspiracy." *see, e.g.,* R. E. 135, Sentencing Memorandum, Pg ID 1336-1340.

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[12] This provision reads in full as follows:

§ 3B1.1. Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

In its Addendum to the Presentence Investigation Report, the Probation Department rejected the government's arguments in this regard, Presentence Investigation Report, pp. A-1 - A-4, but the trial judge ultimately partially agreed with the government's position, applying the § 3B1.3 enhancement under an "abuse of trust" theory and adding a further two levels under § 3B1.1(c), applicable by its terms to an organizer, leader, manager, or supervisor in any criminal activity that did not involve "five or more participants or was otherwise extensive:"

> The second issue relates to the leadership -- I should say whether it's -- let me just look at that correct -- whether it's an abuse of trust or special skill under 3B1.3. The first one, the amount, comes to the loss provision in the fraud provision, and the Court finds that it is a abuse of trust.
>
> The Court explained earlier that -- and I think defense can see it's abuse of trust but also argue that special skill was more appropriate.[13] I

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[13] The colloquy Judge Borman was referring to had occurred earlier in the proceeding, in the course of defense counsel's argument on the issue:

> THE COURT: Well, let's then talk a minute about abuse of trust. And the statute, you know, talks about abuse of trust -- not the statute, the guideline. And while the definition of special skill in Application Note 4 says examples would include lawyers or doctors, the other definition in Application Note 1, private trust, it says: "Thus, for example, this adjustment applies in the case of an embezzlement of a client's funds by an attorney serving as a guardian or sexual abuse of a patient by a physician under the guise of an examination."
>
> So even though the special skill definition talks about doctors and lawyers, the public or private trust definition also mentions where an

> think abuse of trust is more appropriate given the testimony in this case, the facts of this case in terms of the trusting role, and I note that the guideline provision 3B1.3, while it mentions special skill referring to lawyers or doctors, it also notes, that's in Application Note 4 to the commentary, also notes that there may be conduct by an attorney or physician in Application Note 1 that would support the abuse of position of trust, and I believe that it does apply in this case.[14]
>
> And I think that then permits the Court to consider the role in the offense under guideline 3B1.1, and the Court will apply 3B1.1C. I

> attorney or a physician could be coming under that provision as well. So can you discuss that?
>
> MR. KRIGER: Well, I guess when you're deciding which is the most appropriate, which is the ultimate decision you have to make, I think given the two, the more appropriate one is the special skill. I mean, I think I've said that one could argue in this case the abuse of trust and that such an argument wouldn't be without merit, but if you're going to choose between the two, the special skill is everything. I mean, without that we're not here today.

R.E. 170, Transcript, Pg ID 2914-2915.

[14] Application Note Four reads as follows:

> "Special skill" refers to a skill not possessed by members of the general public and usually requiring substantial education, training or licensing. Examples would include pilots, lawyers, doctors, accountants, chemists, and demolition experts.

The reference to lawyers and doctors in application Note One, defining "public or Private Trust," is as follows:

> This adjustment, for example, applies in the case of an embezzlement of a client's funds by an attorney serving as a guardian, a bank executive's fraudulent loan scheme, or the criminal sexual abuse of a patient by a physician under the guise of an examination.

> believe that Dr. Fata was an organizer, leader in criminal activity and is increasing his offense level by two levels.

R. E. 170, Transcript, Pg ID 2936-2937.

As counsel acknowledged in the colloquy set forth in the margin, one could certainly make a case for the proposition that Dr. Fata may have abused positions of trust with both insurers and patients - at least in connection with the Health Care Fraud violations to which he pled guilty - in determining which of the alternatives to enhancement disjunctively set forth in § 3B1.3 would be most appropriate. On the other hand, as counsel also there pointed out, the heart of the matter - the *sine qua non* of the offense behavior in this case - was Dr. Fata's medical skills, without which *none* of the offense conduct would have been possible ("without that we're not here today").

As the Third Circuit pointed out in *United States v. Hickman,* 991 F.2d 1110, 112 (3d Cir. 1993) the alternative bases for the § 3B1.3 enhancement, are conceptually and effectively distinct:

> To abuse a position of trust, a defendant must, by definition, have taken criminal advantage of a trust relationship between himself and his victim. *See, e.g., United States v. Hill*, 915 F.2d 502, 506 & n. 3 (9th Cir.1990). The additional wrong undergirding the upward adjustment is the corrupt abuse of that trust relationship. The use of a special skill, on the other hand, does not require the existence of a relationship between the defendant and his victim. *See, e.g., United States v. Hummer*, 916 F.2d 186, 191 (4th Cir.1990) (defendant's use of his special skills in threatening to tamper with consumer products accomplished in the

> absence of any relationship between himself and his victims), *cert. denied*, 499 U.S. 970, 111 S.Ct. 1608, 113 L.Ed.2d 670 (1991).

These two alternative bases for enhancement have been disjunctively stated in § 3B1.3 since the inception of the Guidelines in 1987, but as first written, the application of the enhancement on *either* basis foreclosed the application of a further Role in the Offense enhancement under § 3B1.1.[15] In 1990, by Amendment 346, The Sentencing Commission added the language now found in the provision that allowed the additional § 3B1.1 enhancement "[i]f this adjustment is based upon an abuse of a position of trust," but did so without explaining why,[16] and the reason for treating the two alternative - and disjunctively stated - rationales differently in this regard is not readily apparent.

However, the distinction between the alternative avenues to § 3B1.3 enhancement drawn by the Third Circuit in *Hickman*, *supra*, - that the "abuse of trust"

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[15] As originally written, § 3B1.3 read as follows:

> If the defendant abused a position of public or private trust, or used a special skill, to a manner that significantly facilitated the commission or concealment of the offense, increase by 1 levels. This adjustment may not be employed in addition to that provided for in §3B1.1, nor may it be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic.

[16] Indeed, Amendment 346 is a model of opacity: "Reason for Amendment: This amendment provides that the enhancement for abuse of a position of trust may apply in addition to an enhancement for an aggravating role under §3B1.1."

rationale requires a relationship with the victim, while the "special skill" predicate does not - suggests a functional explanation: it may be appropriate to further punish a person who amplifies the effect of his relationship with a victim through the use of others (as, perhaps, by "ganging up"), while the use of confederates does not necessarily, in and of itself, amplify the impact of (or damage done by) an individual defendant's "special skill."

If, indeed, this is the functional basis for the distinction between the alternative bases for enhancement under § 3B1.3, in determining which of the rationales is, to use the government's phrase, "more appropriate" in a given case, one should perhaps look to the nature of the conduct involved in which the numerosity upon which any proposed § 3B1.1 enhancement might be based.

Here, the numerosity enhancement sought by the government was premised on Dr. Fata's involvement in the payment of kickbacks for hospice referrals) ("he was a leader/organizer of the kickback conspiracy") - an activity which had nothing whatever to do with any abuse of trust, and everything to do with his status as a physician, with patients to refer. R. E. 135, Government Sentencing Memorandum, Pg ID 1339-1345. As explained in the defense sentencing memorandum:

> Dr. Fata also agrees with the probation department's assessment that because defendant has received an enhancement for special skill, he cannot be given an enhancement under §3B1.1. Although a doctor may be in a fiduciary relationship with its insurers and patients, in this case

> the government argues that Dr. Fata abused his position of trust because he "lied to his patients and insurers, as well as his staff, and even to charitable foundations to fraudulently obtain payment for **medically unnecessary services**." (Emphasis added). In contrast, the government based its §3B1.1 argument on his kickback scheme - not on the medically unnecessary services, and did not claim that the patients received unnecessary hospice care. Dr. Fata's ability to refer the patients to Guardian Angel was based on his special skill of being an oncologist, thereby having the ability to refer his terminal patients to hospice. This is precisely the type of special skill envisioned by §3B1.3.

Sentencing Memorandum (filed under seal per R. E. 143), pp. 15-16.

Accordingly, the trial court's application of the two-level "leadership role" enhancement under § 3B1.1 - which was premised on its improper attribution of the § 3B1.3 enhancement on the basis of "abuse of trust" rather than use of a "special skill" - should be held to be erroneous.

Without this two level adjustment, Dr. Fata's Guidelines Sentencing Range would, have been at most 292-365 months, and the 45 year (540 month sentence) imposed would have represented an upward variance. Thus, the error is of manifest significance to the sentencing calculus, and cannot be considered harmless. *Cf.*, *United States v. Anderson*, 526 F.3d 319, 329 (6th Cir. 2008) ("it is unclear that an error in determining the Guidelines recommendation can ever be considered harmless post- *Gall*."). As a result of this error in the calculation of Dr. Fata's Guidelines, his sentence should be vacated *in toto*, and the case remanded for resentencing.

II

THE DISTRICT COURT'S AGREEMENT TO ALLOW VICTIM IMPACT STATEMENTS FROM PERSONS WHOSE STATUS AS ACTUAL "VICTIMS" HAD NOT BEEN DETERMINED REQUIRES THAT DEFENDANT'S SENTENCE BE VACATED AND THE CASE REMANDED TO ALLOW HIM AN OPPORTUNITY TO PRESENT NECESSARY COUNTERVAILING EVIDENCE.[17]

In the course of the July 1 Status Conference, defense counsel raised a concern regarding the large number of "victim impact statements" which had been received from the government, and the large number of persons claiming to have been "victims" of Dr. Fata's misconduct whose claims either seemed to be unfounded, or the validity of which the defense had not had sufficient opportunity to evaluate:

> [MR. ANDREOFF:] When Dr. Fata was indicted in September of 2013,there were roughly ten patients that were identified in the indictment with their initials. The Court has the fourth superseding indictment so I don't have to go through those.
>
> In December of 2013 we received a supplement from the United States Attorney's Office and the Department of Justice indicating

[17] **Standard of review.** This issue presents both factual and legal questions. While defendant's research has unearthed no Sixth Circuit case specifically setting forth the proper standard of review for a trial court's decision to admit evidence at a sentencing proceeding, there is no reason to believe that the ordinary distinction between questions of fact and law would apply: questions of law are subject to *de novo* consideration and questions of fact are reviewed under the "clearly erroneous" standard. *See, e.g., United States v. Williams,* 753 F.3d 626, 632 (6th Cir. 2014).

approximately 125 other patients that were being identified as relevant conduct that were not going to be part of any superseding indictment.

As the Court knows, from December of 2013 up to and through May of 2015, with the exception of some computer data analysis identifying other patients that may have received medications that were not warranted or unnecessary treatments, that 550, 525, are basically data driven. They have been identified, but they are data driven. And none of those patients, maybe with some minor exceptions, are part of the victim impact statements, except for there will be a few that are mentioned on the sheet that you have before you.

To our surprise, which Mr. Kriger addressed with you last week informally, we have received approximately 150 victim impact statements that were typewritten for the Court and received, I believe, the end of May of this year, 2015.As the Court may or may not know, we have the electronic medical record consisting of most of Dr. Fata's patients, which my client has had access to, and our two experts have. And this Court recalls, as well, that this Court issued subpoenas on the 120 -- actually, the 125, plus the ten indictment patients to access other medical records from other doctors as well as the hospitals. . . .

* * *

. . . Roughly 80 to 90 percent of those patients identified in that 150 letters, and we're approximating approximately about 100, are patients that have had solid tumor cancer.

When we received those typewritten impact statements that have been submitted to the Court under -- ostensibly under Title 18, Section 3771, we did not have an opportunity, and still to this day have been -- it's been a very difficult task to review those patient files, because they're incomplete.

What I mean by that is, at least we have given the Court, in a sampling as part of the sentencing memoranda on behalf of Dr. Fata, roughly 20, 15 to 20 that had been reviewed very carefully by the two doctors, and we have given the Court and opined as it relates to the treatment that they received, which in our opinion is -- was acceptable.

> The difficulty is, number one, the Government's own experts or no one on behalf of the Government have reviewed those patient files, in large measure, maybe with some minor exceptions, and have verified that they are, in fact, victims under 18 U.S.C. 3771(e).
>
> And if the Court looks at that subsection, it indicates that a victim is defined as a person directly or proximately harmed as a result of the commission of a federal offense; again, 18 U.S.C. 3771(e); and also, under Title 42United States Code Section 10607(e)(2).
>
> The problem I have is that those letters are extremely damaging and very prejudicial to my client, our client, Mr. Kriger and my client, and can -- and I understand the Government is going to stand up here and say you can give it whatever discretion you want to give it or every weight you want to give it, but the problem is, those victim statements may not only end here with you, but may go, if there is any appeal -- which there may not be, I don't know what will happen in the future -- to the United States Court of Appeals.
>
> And my concern is, when you read those letters --and they are horrible to read. I mean, I have members of my family that have gone through cancer, my wife's, and I understand not only the trauma but the emotion that comes with that disease.
>
> But the problem is, just as a quick example, of those100 patients, we have no hospital records. We have no other primary care doctor's records. We don't have the second opinion letters indicating that my client may have mistreated this particular patient. . . .

R. E. 171, Transcript, Pg ID 2956 - 2960.

Counsel argued, first, that the unsubstantiated claims of victimhood should be struck, *id*, at 2960, but that, failing that, that the defense be given time - a number of weeks - to gather and review the necessary medical records and present the court with its analysis of the merits of each of the claims; to fail to do so, counsel argued, would

implicate Due Process concerns as to the reliability of the information underlying the trial court's sentencing decision. *Id.*, at Pg ID 2963 - 2966.[18]

While the trial judge expressed some dubiety regarding a continuance of the length counsel described, *id.*, at 2991, in keeping with his direction that any objections be made in writing, *id,*, at 2960-291, later that day the defense filed a Motion to Strike any written or oral statements from persons "Who do Not Qualify as a Victim Under 18 U.S.C. § 3771(e) or Who Will be Providing Information that is not Reliable and Accurate," R. E. 146, which requested "that in the absence of a finding that each of the patients identified in the 150 victim impact letters or who will speak in Court, are in fact victims under 18 U.S.C. 3771(e), or that their information is reliable and accurate, that this Court should strike those written statements, and not permit those relatives to speak in open Court." *Id.*, at 1252-1253.

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[18] That not all of the patients who were the subjects of the written statements and proposed expositions were in fact "victims" was not disputed by government counsel:

> THE COURT: So you're saying that some of the letters are individuals that could be victims and that -- or might not be victims?
>
> MS. DICK [Government counsel]: Exactly.

R. E. 171, Transcript, Pg ID 2981. The dispute, rather, centered on what level of examination - if any - their claims to victimhood s should be subjected.

The memorandum brief in support of that motion argued, in pertinent part, as follows:

> Without restating all of the arguments to the Court on July 1, 2015, there must be a finding that the relatives of patients and/or the patients are indeed victims as defined in 18 U.S.C. 3771(e), and that they will not present materially false and misleading information which will prejudice Defendant and constitute a violation of due process.
>
> As was stated in *United States v Bradley*, 628 F3d 394 (7th Cir 2010) the Court stated:
>
> > A defendant has a due process right to be sentenced based on accurate information, and the threshold for accuracy is whether the information has sufficient indicia of reliability to support its probable accuracy. *United States v. Pulley*, 601 F.3d 660, 665 (7th Cir. 2010). Sentencing judges necessarily have discretion to draw conclusions about the testimony given and evidence introduced at sentencing, but due process requires that sentencing determination be based on reliable evidence, not speculation or unfounded allegations. [citations omitted]
>
> When the Supreme Court in *Williams v New York*, 337 U.S. 241 (1949) determined that the Constitution does not give a criminal defendant the right to cross-examine witnesses against him at sentencing, it was careful to point out that this did not mean that sentencing procedures are immune from scrutiny under the due process clause. See *Townsend v Burke*, [334 U.S. 736,] at 741 [(1948) (due process right to ensure that sentence was not based upon assumption s concerning defendants criminal record which were materially untrue).
>
> In *United States v. Hamad*, 495 F3d 241 (6th Cir 2007) the Sixth Circuit held:
>
> > Although the district court may consider hearsay evidence in determining a sentence, the accused must be given an

> opportunity to refute it, and the evidence must bear some minimal indicia of reliability in respect of defendants right to due process. *Silverman*, 976 F.2d at 1512U (internal quotation marks and emphasis omitted); *see Scalzo*, 716 F.2d at 466 (noting the fundamental and undisputed due process right of a defendant to be sentenced o n the basis of accurate information).
>
> *See also United States v Tucker*, 404 U.S. 443 (1972); *Gregg v Georgia*, 428 U.S. 153, 190 (1976)
>
> To rely on the 150 victim impact statements which relate to solid tumor patients, and to permit relatives of deceased patients or those patients to provide prejudicial and inflammatory statements to the Court, without a determination that they are victims or are providing reliable and accurate information, constitutes a violation of due process of law. Many of those patients were properly diagnosed, treated and were subject to an intensive review by the Tumor Boards at their applicable hospitals.
>
> The Government cannot be permitted to be a clearinghouse to provide all kinds of extremely prejudicial and inflammatory letters to the Court that are either factually inaccurate, misleading or materially false. Consequently, they should be struck and those patients or relatives should not be permitted to speak at sentencing.

Idi, at Pg ID 1525-1526.

The government filed its response in opposition the next day, R. E. 150, and on July 6, Judge Borman denied the motion from the bench as follows:

> With regard to one issue, I want to make a ruling on the issue of the Defendant's motion to not allow the victims to speak. And the Congress passed a law which governs what takes place under the Victim Act which gave the victims of crime an independent right to speak. Congress placed it within the Justice Department in terms of saying that's where the coordination is going to be, but that the victims have a right

to speak, and even went so far as to say that if a person in the Justice Department doesn't properly administer the act with regard to victims, there should be disciplinary sanctions of Justice Department people who willfully and wantonly, W-A-N-T-O-N-L-Y, fail to comply with the provisions of federal law pertaining to the treatment of crime victims.

So the law says that they -- there should be a reasonable procedure to allow them to speak. I have indicated that tomorrow the session from 9:00 to 1:00 will have victim statements up to ten minutes, one person per family, and I think the Justice Department has coordinated that.

So the act itself talks about victims of a crime. There are cases that talk about the right to have a victim speak, and the Court ultimately at the end, when it does proceed to sentence, will decide after hearing from the victims what it will accept as a basis in imposing sentence, what it --or if it doesn't accept things or that's the Court's decision to make at that time.

The Court recognizes that the Supreme Court has said that the -- well, the Supreme Court has said no limitation, also -- not Supreme Court, the Congress in 18 U.S.C. 3661 says,"No limitation shall be placed on the information concerning the background, character, and conduct of the person convicted of an offense," and that's cited in *Pepper versus United States*, 131 Supreme Court 1229.

There's also issues of the minimum standard of reliability, and, of course, the Supreme Court in *Townsend* said that there is to be the question of the reliability of the statement indicating the reliability of the evidence, but the Supreme Court in *Pepper versus United States* said they should permit sentencing courts to consider the widest possible breadth of information and that ensures that the punishment will suit not merely the offense but the individual Defendant.

And both the Supreme Court and *Pepper* also said both Congress and the Sentencing Commission expressly preserves a traditional discretion of sentencing courts to conduct an inquiry broad in scope largely unlimited either as to the kind of information they may consider

> or the source that it came from. That's Justice Sotomayor's majority opinion in that case.
>
> At the end of the day, the *Townsend,* Supreme Court decision in *Townsend,* 334 U.S. 741, says that there is a due process component, and the sentence cannot be founded on misinformation of constitutional magnitude.
>
> So the question is what the Court demonstrably relies on at the end when the Court imposes a sentence, and that's what we'll see after all the testimony and after the Court takes into consideration that testimony which it is required to do under the Victim Witness Protection Act, Crime Victims' Rights Act. And the Court has a responsibility for implementing that act as well to ensure the victims are afforded those rights.
>
> So, finally, the Supreme Court in *Roberts versus U.S.*,100 Supreme Court 1358 says: "The fundamental sentencing principles that a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider or the source from which it may come," but there are due process objections if the information is misinformation of constitutional magnitude.
>
> So that's my job to deal with that at the end of this sentencing process. Before I do impose sentence, I should say, but at the end of this informational and legal process.
>
> So that's the ruling of the Court with regard to the Defendant's motion.

R. E. 156, Transcript, Pg ID 2292 - 2295.

Later that day, he entered an Order denying the motion "[f]or the reasons stated on the record." R. E. 152, Order, Pg ID 2036.

At the end of the day on July 7, after all concerned had spent several hours listening to the statement of some 20 persons (about which more later), defense counsel expressed concern regarding the trial judge's ability to put the horrific - although in many cases wholly untested - recitals out of his mind, but Judge Borman opined that he could, that the matter ultimately rested on whether or not his judgment was not swayed, and that he would "not utilize what I think is inappropriate:"

> [MR. KRIGER:] In the victim impact statements today which anybody that sat here would understand the power of those statements, some of the statements which I indicated when we were here the very first time when we'd spoken informally without the client here.
>
> THE COURT: Because it was a scheduling conference.
>
> MR. KRIGER: That's right. But some of the statements, for example, while they may have been improper ancillary care, there was appropriate chemotherapy or there was appropriate chemotherapy that went on too long. But in these victim impact --
>
> THE COURT: Well, then it's not appropriate, it went on too long.
>
> MR. KRIGER: No, I agree with that. But in these victim impact statements, for example, one today said the person never had non-Hodgkin's lymphoma. There was a biopsy confirming the non-Hodgkin's lymphoma. There's a biopsy confirming it. Another one where it said that Dr. Fata killed her father. He was a patient that had Stage IV lung cancer which was -- had metastasized and nobody can cure.
>
> So the point that I'm trying to make is while some of it says confirmed, not everything in these horribly powerful impact statements is, in our opinion, accurate. And that's why I asked the last time we were here as an alternative relief to allow us time to at least do a random

sample, and I just want to make the record and I understand the Court has ruled, but it wasn't in the motion but we would still like time to at least do a random sample. As I told you, it takes two to seven hours to review each file, so for us to come and try to rebut each one of the 20 would take a few hundred hours which we don't have the time or the resources nor is the Court inclined to let us do that.

MR. ANDREOFF: We don't even have all the files.

MR. KRIGER: That's the problem.

THE COURT: The question is fast forward to the sentencing, is am I going to rely on what information, and that information that you're speaking about, if I don't rely on it with regard to the sentence, then it is not an issue.

MR. KRIGER: Right. But I have to say, Judge, you know, it's sort of like in the Bruton case.

THE COURT: What?

MR. KRIGER: The Bruton case, the confession case where the co-defendant's confession, and the Supreme Court says it's impossible for a fact finder to put it out of it's mind. Now, I understand you're not a jury and I don't in any way suggest that the Court doesn't understand its duties. But to put what -- out of your mind some of the statements that went today, I think, is going to be next to impossible.

THE COURT: It is my job to follow the law and to rely on what I feel is appropriate and to not rely on what I feel is not appropriate. And if I don't rely on it, it doesn't in anyway indicate the determination of the validity or invalidity from the speaker's point of view. But every judge throughout the year has motions to suppress where you hear things and then it's a bench trial and you grant the motion to suppress, you don't go in front of another judge, you heard something that shouldn't be heard. We all do this in making rulings. And so that -- I've got a job to do.

MR. KRIGER: I understand.

> THE COURT: You've got a job to do. The government has a job to do. And yes, I will put in what I think is appropriate, and I will not utilize what I think is inappropriate. And we'll go from there.

R. E. 168, Transcript, Pg ID 2638-2641.

Defense counsel's reference to *Bruton v. United States*, 391 U.S. 123 (1968) was, of course, meant to highlight the intuition which underlies that case's holding: that in some situations, human nature, and human intelligence, is not always capable of obedience to duty, where that duty requires the compartmentalizing of information whose power resists compartmentalizing.

Thus, in *Bruton*, and cases like it, the law recognizes that jurors have their limitations:

> Juries are presumed to follow the court's instructions, *Richardson v. Marsh*, 481 U.S. 200, 210, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987), but that presumption may be overcome when "there is an 'overwhelming probability' that the jury will be unable to [do so], and a strong likelihood that the effect of the evidence would be 'devastating' to the defendant." *Greer v. Miller*, 483 U.S. 756, 766 n. 8, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987) (citing *Richardson*, 481 U.S. at 208, 107 S.Ct. 1702; *Bruton v. United States*, 391 U.S. 123, 136, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968)).

Williams v. Swarthout, 771 F.3d 501, 507 (9th Cir. 2014).

Of course, as Judge Borman recognized, the duties of a federal trial judge "[s]ometimes . . . requires difficult mental gymnastics-as in a bench trial where the judge decides both what facts to admit into evidence and how to weigh that evidence-

but trial judges manage such feats of objectivity all the time." *United States v. Abanatha*, 999 F.2d 1246, 1250 (8th Cir. 1993). Indeed, in *Rogers v. McMackin*, 884 F.2d 252, 256 (6th Cir.1989), this Court held that the *Bruton* rule did not apply to bench trials, "indulg[ing] the usual presumption that" a trial judge, sitting as a finder of fact, "considered only properly admitted and relevant evidence in rendering its decision." *United States v. McCarthy*, 470 F.2d 222, 224 (6th Cir.1972).

Yet, as Justice Hand's well-known admonition that a court should avoid "the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else" illustrates, *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932), some feats of mental discipline are beyond the reach of even duly appointed United States District Judges.

The case law, of course, recognizes that there are limits to the mental dexterity of district judges, and appellate courts often seek to avoid rules that would ask a sentencing judge to engage in "complex mental and psychological gymnastics." *United States v. Hernandez Camacho*, 779 F.2d 227, 232 (5th Cir. 1985).

True enough, when Judge Borman ultimately pronounced sentence, he stated that he was not relying on the written or oral statements of the persons claiming to be victims:

> And with regard to the victims' oral and written statements, the Court finds it unnecessary to rely on them insofar as the testimony of the

> doctors and the plea -- pleas recorded by the Defendant provide a basis for the sentencing.

R.E. 161, Transcript, Pg ID 2499, as corrected by R. E. 178, Stipulation, Pg ID 3025.

However, as the Second Circuit noted in *United States v. Griffin,* 510 F.3d 354, 366 (2d Cir. 2007), a trial judge's claim "not to have been influenced by . . . improper advocacy" is not conclusive, where the circumstances are such that "a reviewing court can do no more than speculate as to whether the judge was in fact influenced, even unconsciously." quoting *United States v. Amico,* 416 F.3d 163, 168 (2d Cir. 2005).

Defendant presumes that Judge Borman honestly believed in his ability to compartmentalize, and to "not rely on" the statements of the people who appeared before him and laid out their stories. He submits, however, that it would have been impossible for Judge Borman to do so - if even subconsciously.[19] This assertion is not intended as a slight on Judge Borman's fairness or integrity, or his good faith in asserting that he was capable of - and in fact did - disregard what he had heard. Rather, it is based on having heard those statements himself, and on a well-founded

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[19] The case law makes clear, of course, that a substantial possibility that a sentencing judge relied, even subconsciously, on significant improper information is sufficient to require resentencing, *See, e.g., United States v. Reese*, 775 F.2d 1066, 1078 (9th Cir. 1985) (possibility of "reliance, conscious or otherwise, on [an] *ex parte* submission" raised a sufficiently serious question to warrant resentencing, "[n]otwithstanding the district court's conscientious efforts to assure that the sentencing proceedings were conducted in as fair and equitable a manner as possible . . .").

belief that *no one*, no matter how well-intentioned, could have failed to have been moved by them. It is no discredit to Judge Borman that he would assert otherwise, and might be wrong - after all, "[o]ur society demands much of trial judges in this day and time; it cannot, however, fairly demand that they be omniscient." *Washington v. Strickland*, 673 F.2d 879, 905 (5th Cir.) *on reh'g*, 693 F.2d 1243 (5th Cir. 1982) *rev'd on other grounds*, 466 U.S. 668 (1984).

Here, then, is a small sampling of what transpired in Judge Borman's courtroom on July 7, 2015 - 87 pages of the printed record, and clearly, in one of the writers' experience, the longest and most painful day to pass in a courtroom in more than thirty years at the bar - in the form of brief excerpts from the statements of persons claiming to have suffered at Dr. Fata's hands:

From the daughter of a patient, E.P.:

> He preyed on our trust and exhaustion and fears. He threatened my father at least twice that if he quit chemo, he would have to go onto hospice and if he went on hospice, they would not allow him to dialyze. To a dialysis patient, that is death.
>
> * * *
>
> For me it seemed life was one crisis after another. I was angry at life often. It just seemed so unfair. We had so much stress and suffering at the time. At the same time to me it was like a cruel twist of fate. But that's all I thought it was, and I accepted it and I lovingly took care of them. But to find out in 2013 what Fata did was unbelievable. To know he caused so much pain and suffering that was unnecessary. I know my father could have been there more for my mother, and I needed him too. He passed away in November, 2012, two months after my mom died.

R. E. 168, Transcript, Pg ID 2544 - 2546.

From patient C. S.:

I didn't realize until my records were gone over with me at this time the magnitude to the life-threatening treatments and improper procedures Dr. Fata had subjected me to. The amount of negligent, improper procedures, gross overtreatment, surgery, complications and side effects are too long to list. Dr. Fata took full advantage of my trust in him, my fear of dying from this disease and, first and foremost, my top-of-the-line health insurance.

These almost fatal decisions Dr. Fata made have affected almost every one of my bodily functions and my life. My kidneys almost failed due to poisoning and subsequent overdose of specific chemo drugs. My bladder has been compromised due to the improper sequence in administering of protective drugs before certain chemotherapy drugs were given. My liver function has been compromised due to numerous medically unnecessary iron infusions and the 7,000 plus oral medications.

My heart has sustained unnecessary abuse and wear due to going into an atrial fibrillation condition due to the overdosing of chemo. This condition required me to have three cardioversions within a 24-hour period in hope of surviving.

My hands and feet have severe chemo-induced neuropathy. In my case this is one of the first symptoms an oncologist doctor has to indicate that too much chemo has been given and to back off or change chemo drugs.

* * *

Dr. Farid Fata doesn't deserve the title of "doctor" anymore. He is a manipulative, deceptive, devious, greedy, cold hearted, lying, cowardly bastard who has no inkling or compassion or regard for human life. Trust, loyalty, responsibility, accountability, respect, reverence, kindness and compassion are traits I have lived by and have treated everyone with my whole life. I only expected the same in return from him, my doctor.

He has violated all of these. He can use every last breath of his remaining life to reflect on how his hideous and greedy choices affected me, my family and so many others. He is an evil person.

Id., at Pg ID 2551-2552, 2556.

From P. L., the wife of a former patient:

Oh, my 60th birthday was coming. I prayed that my wish would be granted for K[] to go home. As K[] being in constant pain for two and a half years was enough, I granted that wish on 9-2-14. My husband is gone. Our money is gone. But the bills continue to grow. I don't know where I'll be without K[]. This is a nightmare I wish I could wake up from.

Id., at Pg ID 2586.

And from K. T., a patient's wife:

On J[]'s 57th birthday, he was diagnosed with a mass on his pancreas. J[] and I were told by Fata and his hospital team that it was too dangerous to biopsy this mass for fear that if they nicked the pancreas, it would cause infection. Fata informed us that J[] needed chemo and radiation treatments.

July 19th, 2012, J[] was told he needed surgery before treatments could begin. J[] never fully recovered from his surgery and was pushed into having radiation chemo in August, 2012. The radiologist informed J[] that he could eliminate the mass by radiation alone but Fata said that J[] needed the chemo as well.

J[] had a chemo pump. They gave him chemo 24/7 in addition to the four- to five-hour chemo treatments once a week at Fata's office. J[]'s body became weaker and weaker, and by the 1st of November J[] could no longer walk and his body became very bloated.

* * *

> February 8th, 2013. An x-ray revealed the mass on the pancreas was gone. Despite J[]'s other major organs being in distress, Fata insisted that the chemo treatments continue. J[] declined. Fata then had J[] admitted to the physical therapy in the hospital for ten days of nothing but torture which resulted in further deterioration of J[]'s already weakened body.
>
> Upon the completion of the rehab, Fata recommended J[] go home and sign up for hospice. J[] passed away a week later.
>
> A part of me died back on Thursday, March 7, 2013. My life will never be the same. . . .

Id, at Pg ID 2608-2609.

As painful as these recitations are, there is good reason to believe that some of them were simply untrue.

At the close of the first day of the in-court presentation of "victim" statements, defense counsel pointed out that in the case of "11 or 12" of the 20 people who had come to court, "there has been no confirmation of their – the statements relative to Dr. Fata's treatment or care." *Id.*, at Pg ID 2619. The government disputed this statement as to only three of the patients, *id.*, at Pg ID 2624 - 2526 - although, as to two of the three, the defense contended that while Dr. Fata had conceded some misconduct in their cases, such as the unnecessary administration of a medication, he had *not*, and

the defense did not, concede that the broader claims of mistreatment advanced by the patients or their representatives were true. *Id.*, at Pg ID 1626 - 2627.[20]

All in all, of the 165 victim impact statements submitted to the trial court, including the statements made or read in open court, only 56 were "confirmed" in any sense of the word - *i.e.,* that either some or all of the claims of mistreatment had been verified in any way whatsoever. *See,* Defense Exhibit J, admitted under seal at R. E. 168, Transcript, Pg ID 2940 - 2941. As to the remaining 109, there was simply *no* extrinsic information corroborating their claims.[21]

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[20] For example, as to the first of these patients, T. M., defense counsel pointed out:

> We are confirming portions of her treatment in terms of some of the medications she received. The problem is, which was the Rituxan protocol, the problem was she indicated, the victim representative indicated, that she was misdiagnosed with non-Hodgkin's lymphoma and we are letting the Court know in her own statement to the Court, one of the victims of the -- indicate that there was a biopsy as well as a bone marrow confirmation not from Dr. Fata but from a hospital that confirmed the diagnosis of non-Hodgkin's lymphoma.

Id., at Pg ID 2626.

[21] The limited nature of the government's review of the patients who were the subject of the victim impact statements was confirmed by the testimony of the two physicians called by the government in the course of the sentencing proceedings. The first, Dr. Dan Longo, testified that he had looked at "eight or ten" of the patients as to whom victim impact statements had been submitted, and was not sure if he had access to the complete medical and hospital records for al of them. R. E. 156, Transcript, Pg ID 2408. The other, Dr. David Steensma, said that he only "looked at a few of the files" on the victim impact statement list, and as to most of them "had only files from

Prior to sentencing, the defense had commissioned a physician, Dr. Jack Goldberg, a Clinical Professor of Medicine at the University of Pennsylvania, to conduct a review of a random sample of the written victim impact statements submitted by individuals whose cases had not previously been evaluated by the government's experts - *i.e.*, the "unconfirmed" victims. As pointed out in defendant's sentencing memorandum, that review established that in the vast majority of cases, the claims of the "victims" were either unfounded or overstated:

> The majority of the victim impact letters, are from patients who were treated for solid tumors. The victim impact letters contain approximately 100 letters from patients who were not previously identified by the government. Of the approximately 100 letters, approximately 1/3 of the letters referenced patients treated for hematological diseases and the remaining 2/3 were treated for solid tumor cancers. It is certainly not surprising that many of Dr. Fata's former patients, after reading and listening to the sensational media accounts, assume that that they too were mistreated whether or not they actually were. Family members are understandably upset about the death of a loved one and Dr. Fata has become the natural target of their anguish and anger over losing a loved one. As to those whose diseases were not fatal, it is also understandable for them to assume that the chemotherapy that they received was unnecessary and that the debilitating side effects associated with the chemotherapy could have avoided.
>
> Dr. Fata does not dispute that some of the victims suffering from blood disorders who wrote letters to this court received unnecessary treatments, others, however did not. He submits that the vast majority of the patients suffering from solid tumor cancers who wrote letters to

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subsequent referrals." R. E. 169, Transcript, Pg ID 2844.

> this court received appropriate treatments and that lives were saved or prolonged because of the treatment.
>
> Counsel for Dr. Fata directed him to provide summaries of the treatment rendered to the patients that are referenced in the victim impact letters but whose files were not previously reviewed by the government experts. Because of time limitations and lack of resources, undersigned counsel's consultant and expert were not able to review the patient files of each and every patient listed in the victim impact letters. Counsel for Dr. Fata directed their consultant to randomly select patients referenced in the victim impact letters whose files had not previously been reviewed by the government experts and compare the complaints contained in the victim impact letters to the patient's medical file. In the time available, the consultant and expert reviewed 27 randomly selected medical files. Because counsel for Dr. Fata does not have medical records from health facilities other than MHO for the newly identified patients, counsel's expert and consultant were unable to form an opinion on whether Dr. Fata's treatment was appropriate for 7 of the patient files reviewed. As to the 20 patients for which the expert and consultant were able to render an opinion, they concluded that the treatment rendered to 17 of the patients was appropriate and that statements contained in the victim impact letters for the 17 patients are simply inaccurate, or the letters blamed Dr. Fata for the death of their loved one when death was inevitable, or accused Dr. Fata for inappropriate treatment when in fact, the treatment was appropriate, or a combination thereof. (Footnote omitted)

Defendant's Sentencing Memorandum (filed under seal per R. E. 143, pp. 18-20).[22]

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[22] As the sentencing memorandum notes, the distinction between "solid tumors" and other forms of cancer is significant because the treatment of solid tumors is ordinarily subject to peer review by a hospital "tumor board:"

> It should also be noted that many of the solid tumor patients referenced in the victim impact letters had their cases reviewed by the hospital tumor board before the treatment regimen was established. The tumor board is a board certified by the American College of Surgeons and

As noted above, it happened that two of the "unconfirmed" speakers who appeared in court on July 7 had been evaluated by Dr. Goldberg[23] - however, the defense simply had not had the opportunity to evaluate the majority of them - including *every one of the speakers whose statements are excerpted hereinabove* at pp. 36-39.

However, Judge Borman's rulings prevented the defense from subjecting these accounts to the kind of meaningful testing which their severity - and Due Process - demanded - a demand especially compelling where the circumstances, as illustrated

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> consists of several physicians, including a radiation oncologist, surgeon, oncologist, primary care physician, and a tumor registrar. The physicians review the case prior to the board meeting and come to a consensus on a multi-disciplinary treatment regimen.

Defendant's Sentencing Memorandum (filed under seal per R. E. 143), p. 33. It is to be noted, as the sentencing memorandum pointed out, that fully two-thirds of the 109 "unconfirmed" cases identified in the victim impact statements were treated for solid tumor cancers. *Id.*, at 18.

[23] In one case, the patient J. T., Dr. Goldberg's conclusion was that "[g]iven the myriad of medical problems and the advancement of his disease, Dr. Fata's care was exemplary." Defendant's Sentencing Memorandum, filed under seal pursuant to R. E. 143, p. 23. In the other, the patient P. Z., he observed:

> His type of lung cancer has 1%-5%, 5-year chance of survival. The administration of the chemotherapy was necessary to alleviate the pain, shortness of breath, and to slow the progression of the cancer. Dr. Fata took all the appropriate steps to prolong the life of a man who unquestionably was suffering from a terminal illness.

Id., at p. 27.

by Dr. Goldberg's analysis, so strongly suggested the likelihood that testing would have revealed significant flaws in the reliability of the information which the statements conveyed in such stark and arresting terms.

In order to ensure that the trial judge was *not* subject to the undue influence of highly evocative, deeply compelling narratives of pain and suffering that, however moving, wrongly sought to lay the burden of that suffering at Dr. Fata's door, it would have been necessary to give the defense the opportunity to do the research and review necessary to put those narratives into proper perspective.

Again, Dr. Fata does not question Judge Borman's desire to impose a fair and just sentence in this case. Rather, he questions whether his ability to do so was fatally tainted by rulings which deprived him of all the information necessary for him to do so - and which the evidence suggests was likely to have borne fruit. Accordingly, the Court should vacate Dr. Fata's sentences an remand with instructions to allow the defense to present the evidence it sought to in the first instance - regarding the care and treatment of those patients who claimed to be, but were not in fact "victims" of the offenses to which he pled guilty.

III

THE DISTRICT COURT ERRED IN ACCEPTING DEFENDANT'S PLEAS OF GUILTY TO MONEY LAUNDERING CHARGES IN THE ABSENCE OF A SUFFICIENT FACTUAL BASIS TO SUPPORT THOSE PLEAS.[24]

The Fourth Superseding Indictment framed the two money laundering charges (Counts 22 and 23), sounding under 18 U.S.C. § 1956(a)(1)(A)(i), as follows:

> On or about the dates specified as to each count below, in the Eastern District of Michigan, defendant FARID FATA, M.D. did knowingly conduct and attempt to conduct a financial transaction affecting interstate commerce, which involved the proceeds of a specified unlawful activity, that is health care fraud, with the intent to promote the carrying on of specified unlawful activity, that is health care fraud, and that while conducting and attempting to conduct such financial transaction, knew that the property involved in the financial transaction represented the proceeds of some form of unlawful activity

R. E. 66, Fourth Superseding Indictment, ¶ 47, Pg ID 753.

The guilty plea colloquy as to those two counts reads in full as follows:

> [THE COURT:] Okay. Mr. Andreoff, if we go to Count 22, please.

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[24] **Standard of review.** Because defendant did not question the sufficiency of the factual basis for his plea in the district court, this claim is reviewable under a "plain error" standard. *United States v. Trejo*, 610 F.3d 308, 313 (5th Cir. 2010). Under this standard, he must show "(1) error (2) that was obvious or clear, (3) that affected [his] substantial rights[,] and (4) that affected the fairness, integrity, or public reputation of the judicial proceedings." *United States v. Vonner*, 516 F.3d 382, 386 (6th Cir.2008) (*en banc*).

MR. ANDREOFF: Yes, Your Honor. It's Count 22 and 23. They're both the money laundering counts.

THE COURT: Okay.

MR. ANDREOFF: The recitation of facts, with the Court's permission, will relate to both counts.

THE COURT: Okay.

MR. ANDREOFF: Go ahead, Doctor.

THE DEFENDANT: As I previously stated in the other counts, I submitted claims to various insurance companies and Medicare for unnecessary services and infusions through my company, Michigan Hematology Oncology. In 2013 I incorporated a new company, United Diagnostics, that would perform tests such as PET scan, P-E-T. United Diagnostics was funded in part using funds that I had earned through my submission of claims for unnecessary services. I had ordered that Michigan Hematology Oncology, specifically I deposited or caused the deposit of two checks from MHO to United Diagnostics --

THE COURT: From who?

THE DEFENDANT: Michigan Hematology Oncology to United Diagnostics on May 3rd, 2013, and May 2nd -- and July 2nd,2013.

THE COURT: Okay.

THE DEFENDANT: Each written in the amount of $100,000.

THE COURT: Okay.

THE DEFENDANT: After United Diagnostics became operational, I submitted false claims of certain -- for certain patients for unnecessary PET scans through United Diagnostics.

THE COURT: Okay. And you knew that the checks that you received were going to be going through interstate commerce; is that correct, Mr. Andreoff?

MR. ANDREOFF: Yes, Your Honor.

THE COURT: And you understand that as well, that when you write a check and it goes through the clearing process, you accept that as interstate commerce?

THE DEFENDANT: Yes.

THE COURT: Okay. And this took place in Oakland County again?

THE DEFENDANT: Yes.

THE COURT: That's the Eastern District of Michigan. Ms. Dick, any questions you want to ask to further establish a factual basis?

MS. DICK: No, Your Honor.

THE COURT: As to Count 22, how do you plead? How do you plead, Dr. Fata?

THE DEFENDANT: Guilty.

THE COURT: The Court finds Defendant's plea as to Count 22 is knowingly, freely, voluntarily made. The elements of the offense to which he pleads guilty have been made out by his statements in court. Accept the plea to Count 22.

And as to Count 23, how do you plead, Dr. Fata?

THE DEFENDANT: Guilty.

THE COURT: The Court finds Defendant's plea as to Count 23 is knowingly, freely, voluntarily made. The elements of the offense to

> which he pleads guilty have been made out by his statement in court. And that also took place in Oakland County as well, correct?
>
> THE DEFENDANT: Correct.
>
> THE COURT: Any question you want to ask with regard to Count 23, Ms. Dick?
>
> MS. DICK: No, Your Honor.

R. E. 111, Transcript, Pg ID 1129-1131.

F. R. Cr. P. 11(b)(3), "Determining the Factual Basis for a Plea," specifically provides as follows: "Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea." This provision "requires the district court to satisfy itself that there is a factual basis for all elements of the offense charged before accepting a guilty plea." *United States v. Alber*, 56 F.3d 1106, 1110 (9th Cir.1995).

The elements of the offense defined by § 1956(a)(1)(A)(i), and charged by the Fourth Superseding Indictment, are that the defendant "1) conducted a financial transaction with the proceeds of an illegal activity; 2) knew that the property represented illegal proceeds; and 3) *conducted the transaction with the intent to promote the carrying on of the unlawful activity.*" *United States v. Malone*, 484 F.3d

916, 920 (7th Cir. 2007) (quoting *United States v. Febus*, 218 F.3d 784, 789 (7th Cir.2000)) (emphasis supplied).[25]

Here, the plea colloquy entirely fails to address the third of these essential elements - that Dr. Fata conducted the financial transactions "with the intent to promote the carrying on of specified unlawful activity."

As the Fifth Circuit observed in *United States v. Trejo*, 610 F.3d 308, 314 (5th Cir. 2010), "[t]he 'specific intent to promote requirement' has been called the 'gravamen' of a § 1956(a)(1)(A)(i) violation," citing *United States v. Carcione*, 272 F.3d 1297, 1303 (11th Cir.2001), and is subject to "stringent mens rea requirement:"

> Essentially, the government must show the transaction at issue was conducted with the intent to promote the carrying on of a specified unlawful activity. [*United States v. Brown*, 186 F.3d 661, 670 (5th Cir.1999)] *It is not enough to show that a money launderer's actions resulted in promoting the carrying on of specified unlawful activity. Id. Nor may the government rest on proof that the defendant engaged in "knowing promotion" of the unlawful activity. Id.* Instead, there must be evidence of intentional promotion. *Id*. In other words, the evidence must show that the defendant's conduct not only promoted a specified

---

[25] The statutory provision defines the offense as follows:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity–
>
> > (A)(i) with the intent to promote the carrying on of specified unlawful activity

> unlawful activity *but that he engaged in it with the intent to further the progress of that activity*. *Brown*, 186 F.3d at 670. The justification for this rigorous *mens rea* requirement is that, in enacting the statute, Congress meant to create a separate crime of money laundering, discrete and apart from the underlying substantive offense. *United States v. Febus*, 218 F.3d 784, 790 (7th Cir.2000) (citing *United States v. Jackson*, 935 F.2d 832, 841 (7th Cir.1991); *United States v. Heaps*, 39 F.3d 479, 486 (4th Cir.1994)). Strict adherence to this standard "helps ensure that the money laundering statute will punish conduct that is really distinct from the underlying specified unlawful activity and will not simply provide overzealous prosecutors with a means of imposing additional criminal liability any time a defendant makes benign expenditures with funds derived from unlawful acts." *Brown*, 186 F.3d at 670. [Emphasis supplied]

The case law makes clear that "where specific intent is an element of a crime, 'the specific intent must be proved as an independent fact and cannot be presumed from the commission of the unlawful act.'" *United States v. Cortes-Caban*, 691 F.3d 1, 37 (1st Cir. 2012) (quoting *United States ex rel. Vraniak v. Randolph*, 261 F.2d 234, 237 (7th Cir.1958)).

Here, while the plea colloquy shows only that Dr. Fata used ill-gotten funds to underwrite the opening of United Diagnostics ["United Diagnostics was funded in part using funds that I had earned through my submission of claims for unnecessary services"], and that subsequently ["[a]fter United Diagnostics became operational"] he submitted false claims through that entity ["I submitted false claims of certain -- for certain patients for unnecessary PET scans through United Diagnostics"], but it wholly fails to establish that he engaged in the financial transactions funding United

Diagnostics with the specific intent to promote the submission of false claims; rather, all that colloquy says regarding the purpose with which United Diagnostics was formed was that it "would perform tests such as PET scan."

Clearly, and without more, then, acceptance of Dr. Fata's guilty plea to Counts 22 and 23 on this record violated Rule 11. As this Court explained the governing law in *United States v. Tunning*, 69 F.3d 107, 111 (6th Cir. 1995):

> In *McCarthy v. United States*, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969), the Supreme Court adopted a rule of strict compliance with the procedures of Rule 11. This rule was modified in 1983 with the adoption of Rule 11(h), which provides that variations from the requirements of Rule 11 are excusable so long as they do not affect the "substantial rights" of the defendant. *See, e.g., United States v. Goldberg*, 862 F.2d 101 (6th Cir.1988). However, this "harmless error" analysis does not apply to appellate review of the sufficiency of the factual basis supporting the guilty plea. "'[W]hile the exact method of producing a factual basis on the record is subject to a flexible standard of review, the need to have *some* factual basis will continue to be a rule subject to no exceptions.'" *Id.* at 106 (quoting *United States v. Fountain*, 777 F.2d 351, 357 (7th Cir.1985), *cert. denied*, 475 U.S. 1029, 106 S.Ct. 1232, 89 L.Ed.2d 341 (1986)). [Emphasis supplied]

Admittedly, this claim was not raised below. As the Court explained in *Henderson v. United States*, ___ U.S. ___, 133 S.Ct. 1121, 1124 (2013):

> A federal court of appeals normally will not correct a legal error made in criminal trial court proceedings unless the defendant first brought the error to the trial court's attention. *See United States v. Olano*, 507 U.S. 725, 731, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). But Federal Rule of Criminal Procedure 52(b), creating an exception to the normal rule, says that "[a] plain error that affects substantial rights may be considered even though it was not brought to the [trial] court's attention."

As the *Henderson* Court explained the application of these principles, pursuant to *United States v. Olano*:

> There, we said that Rule 52(b) authorizes an appeals court to correct a forfeited error only if (1) there is "an error," (2) the error is "plain," and (3) the error "affect[s] substantial rights." 507 U.S., at 732, 113 S.Ct. 1770 (internal quotation marks omitted). Pointing out that Rule 52 "is permissive, not mandatory," *id.*, at 735, 113 S.Ct. 1770, we added (4) that "the standard that should guide the exercise of remedial discretion under Rule 52(b)" is whether "the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings,'" *id.*, at 736, 113 S.Ct. 1770 (quoting *United States v. Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, 80 L.Ed. 555 (1936); brackets in original).

Id., at 1126 -1127.

Defendant submits that even under this exacting standard, he is entitled to relief.

As noted above, there was an "error." And, in contrast to *United States v. Trejo*, *supra*, at 319, where the Fifth Circuit declined to set aside an inadequately supported guilty plea because existing circuit precedent did not then sufficiently define the *mens rea* element of the statute in light of the defendant's admissions, this Circuit's repeated explications of the "specific intent to promote requirement" mandates the conclusion that the error residing in the wholesale failure to even *address* the matter of intent is indeed "plain." *See*, *e.g.*, *United States v. Reed*, 264 F.3d 640, 651 (6th Cir. 2001) (discussing cases defining the "intent to promote" requirement, including *United States v. King*, 169 F.3d 1035, 1039 (6th Cir. 1998), which the panel described as "upholding defendant's "promotion" money laundering

conviction for wiring money to his drug couriers in payment for prior marijuana deliveries and for current expenses incurred while making deliveries," *United States v. Reed*, 167 F.3d 984, 992-993 (6th Cir. 1999), holding that payment of "an antecedent drug debt" was sufficient where the defendant "acted with the intent to facilitate the continuation of drug trafficking (rather than simply with the intent to facilitate the payment of an antecedent debt)," and *United States v. Baez*, 87 F.3d 805, 810-11 (6th Cir.1996), which the panel described as "upholding defendant's money laundering conviction under 'promotion' prong of statute for sending a courier to pick up drug proceeds in one state and deliver them in another,"

That Dr. Fata's "substantial rights" were affected seems clear enough as well. Most obviously, Judge Borman imposed a 20-year sentence on Count 22, to run consecutively to the Health Care Fraud sentences. Although even without doing so he could have reached a total sentence of 45 years with reference only to these latter charges, the application of the Money Laundering Guideline, U.S.S.G. § 2S1.1 (specifically, § 2S1.1(b)(2)(B)) resulted in a two-level enhancement of his Offense Level from 40 to 42. R. E. 170, Transcript, Pg ID 2938. This Adjusted Offense Level called for a Guideline Sentencing Range of 360 months - life, and the 45 year (540 month) sentence imposed by Judge Borman was within that range. It would *not*, however, have been within the 292-365 month range called for if that Offense Level

had not been subject to the two-level enhancement, and had remained at 40. Judge Borman's determination to impose a within-Guidelines sentence, which would have been an above-Guidelines sentence absent the erroneous acceptance of Dr. Fata's pleas to the money laundering counts clearly establishes that his "substantial rights" were affected by the error.

As to the fourth factor - the impact on the "fairness, integrity or public reputation of judicial proceedings," as this Court observed in *United States v. Oliver*, 397 F.3d 369, 380 (6th Cir. 2005): "[a] sentencing error that leads to a violation of the Sixth Amendment by imposing a more severe sentence than is supported by the jury verdict 'would diminish the integrity and public reputation of the judicial system [and] also would diminish the fairness of the criminal sentencing system.'" (quoting *United States v. Bostic*, 371 F.3d 865, 877 (6th Cir.2004) (internal quotation and citation omitted)).

The same may be said, *mutatis mutandis*, where the basis for the defendant's conviction is a guilty plea. *See, e.g.*,*United States v. McCreary-Redd*, 475 F.3d 718, 726 (6th Cir. 2007) *(*upholding conviction in absence of sufficient factual basis "would be inconsistent with the purposes of Rule 11 . . . [which] helps to ensure that a defendant's guilty plea is truly voluntary, a constitutional requirement," and "would have an adverse impact which would seriously affect the fairness and integrity of the

judicial proceeding." *see also, United States v. Hildenbrand*, 527 F.3d 466, 474 (5th Cir. 2008) (holding that "[e]ven valid waivers do not bar a claim that the factual basis is insufficient to support the plea.")

Dr. Fata's convictions and sentences for Counts 22 and 23 of the Fourth Superseding Indictment must be vacated, as well as his sentence as a whole, and the case remanded for resentencing.

CONCLUSION

Because he trial judge erred in accepting Dr. Fata's pleas of guilty to money laundering under 18 U.S.C. § 1956(a)(1)(A)(i), Dr. Fata's convictions and sentences for Counts 22 and 23 of the Fourth Superseding Indictment must be vacated, as well as his sentences as a whole, and the case remanded for resentencing.

Because the trial court erred in its application of the "Role in the Offense" enhancements, and because proper application of these provisions would have reduced his Adjusted Offense Level by two, this error was not harmless, and requires the vacation of Dr. Fata's sentences.

Because the trial court improperly permitted the presentation of deeply disturbing narratives from supposed "victims" of Dr. Fata's misconduct under circumstances that did not allow the defense to meaningfully test their accuracy and truthfulness, where the circumstances strongly suggested the likelihood that that testing would have revealed significant flaws in their reliability, the Court should vacate Dr. Fata's sentences and remand with instructions to allow the defense to present the evidence it sought to in the first instance - regarding the care and treatment of those patients who claimed to be, but were not in fact "victims" of the offenses to which he pled guilty.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C), Federal Rules of Appellate Procedure, the undersigned certifies that this brief complies with the type-volume limitations of Rule 32(a)(7)(B), Federal Rules of Appellate Procedure.

The brief contains a total of 13,997 words, exclusive of the Table of Contents, Table of Authorities, Statement in Support of Oral Argument, Addendum and Certificates of Compliance and Service. It has been prepared, and this word count generated, using WordPerfect X7. The typeface is 14pt Times New Roman.

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ADDENDUM
DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record Entry	Description	Pg ID Range
1	Complaint	1 - 21
20	Indictment	357 - 365
66	Fourth Superseding Indictment	738 - 758
87	Motion for Change of Venue, with exhibits	844 - 941
111	Transcript of guilty plea	1096 - 1139
135	Government Sentencing Memorandum, with exhibits	1263 - 1448
140	Order Establishing Plan for Sentencing Hearing	1490 - 1496
143	Order granting Motion to Seal	1499
146	Motion to Strike	1519 - 1527
150	Response to Motion to Strike, with exhibits	1961 - 1992
152	Order Denying Motion to Strike	2036 - 2037
156	Transcript of proceedings, July 6, 2015	2287 - 2457
158	Judgment and Commitment Order	2459 - 2468
160	Order extending time to file Notice of Appeal	2470 - 2471
161	Transcript of proceedings, July 10, 2015	2472 - 2508
162	Motion to Dismiss Remaining Counts	2509 - 2510
163	Order Dismissing Remaining Counts	2511
165	Notice of Appeal	2513 - 2514
168	Transcript of proceedings, July 7, 2015	2517 - 2642
169	Transcript of proceedings, July 8, 2015	2643 - 2856
170	Transcript of proceedings, July 9, 2015	2857 - 2945

171	Transcript of Status Conference, July 1, 2015	2946 - 2996
	DOCUMENTS FILED UNDER SEAL	
	Defense Sentencing Memorandum, with exhibits	
	Defense Exhibit J	
	DOCUMENTS LODGED WITH THIS COURT	
[14]	Presentence Investigation Report, with Addendum	

CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2015, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of such filing to the following:

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