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 REPLY BRIEF

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF CASES, STATUTES, & AUTHORITIES

CASES PAGE

STATUTES, COURT RULES, AND OTHER AUTHORITIES

RESPONSE TO GOVERNMENT'S STATEMENT OF THE CASE

Since Dr. Fata is not challenging the substantive reasonableness of his sentence, it is difficult to see any legitimate need for the government's extensive discussion of the details of the allegations of medical misconduct which it leveled against him. That discussion is not, on the other hand, surprising, given the government's history of inflammatory rhetoric in this case - including the accusation, made in its 95-page sentencing memorandum, seeking a sentence of 175 years in prison, that Dr. Fata "is the most egregious fraudster in the history of this country." Sealed App'x, pp. 11, 104.

As is inherent in this kind of argumentative overreaching, not all of the government's allegations will survive any kind of meaningful scrutiny. Because most of the specifics of the government's claims are simply irrelevant to the legal issues presented, and because they are confident that the Court will not be distracted from the merits of those issues by the corrosive nature of those claims, the writers will not undertake a point-by-point traverse, but, by way of example, and to put things in something approaching a proper perspective, will offer some brief rejoinder to the government's claims regarding two of the first three patients discussed by the government, J.M. and R.S..

Referring to an HHS memorandum of interview of J.M., the government states that prior to receiving unnecessary chemotherapy, "[J.M.] was in good health, walking

two miles, three times a week, and regularly bowling," and that after (and supposedly as a result of) his treatment, his "health deteriorated significantly." Government Brief, p. 6.

While acknowledging that J.M. received unnecessary treatments with the chemotherapy drug Velcade, Dr. Fata's sentencing memorandum challenged the narrative of good health and iatrogenic decline, on the basis that "[a]n examination of his medical records, however, tells a different story:"

> [J.M.] was referred to Dr. Fata by his internist, Dr. James Gibson, for anemia and his long standing MGUS.[1] When first seen by Dr. Fata, [J.M] reported that prior to seeing Dr. Fata "he became increasingly weak and fatigued over the last 4-6 weeks. Prior to the onset of fatigue, he was walking 2 miles up to three times a week. He feels unable to exercise now." In fact, [J.M], in filling out his medical history, stated that he was suffering from fatigue. Thus, the side effects that [J.M.] claims were caused by Dr. Fata's unnecessary Velcade treatments were the precise reason [J.M.] was referred to Dr. Fata in the first place and the symptoms he claims were caused by the Velcade are fully consistent with the anemia that caused Dr. Gibson to refer [J.M.] to Dr. Fata.
>
> [J.M.] also blames his diminished kidney function on his Velcade treatments. An examination of his medical records, however, reveal that

[1] "Monoclonal gammopathy of unknown significance (MGUS) is characterised by the presence of an abnormal protein in the blood that is produced by plasma cells. Plasma cells are cells in the bone marrow that normally produce antibodies to fight infection. . . . MGUS can be referred to as a benign condition as there is only a small risk that MGUS can develop into myeloma or a related blood disorder." Leukemia Foundation, Monoclonal gammopathy of unknown significance (MGUS), http://www.leukaemia.org.au/blood-cancers/myeloma/mgus, as viewed February 1, 2016.

> [J.M.] had decreased kidney function prior to receiving Velcade. His GFR was 47 prior to being placed on Velcade. A person with a GFR of 47 has severe kidney impairment. After starting the Velcade, his GFR remained relatively unchanged. It should also be noted that [J.M.] was suffering from other health problems such as hypertension which also impacted his heart disease. While heart failure has been linked to Velcade, the studies note that the incidence of heart failure due to Velcade is rare. Heart failure occurs in less than one of every ten thousand patients. Honton B[1], Despas F, Dumonteil N, Rouvellat C, Roussel M, Carrie D, Galinier M, Montastruc JL, Pathak A, *Bortezomib and heart failure: case-report and review of the French Pharmacovigilance database,* See comment in PubMed Commons belowFundam Clin Pharmacol. 2014 Jun;28(3):349-52. doi: 10.1111/fcp.12039. Epub 2013 Jun 19.

Sealed App'x, pp. 350-351.

So too with respect to the patient R.S., as to whom the government claims that the (admittedly) unnecessary administration of the chemotherapy drug Zometa caused to lose all of his teeth. As explained in defendant's sentencing memorandum:

> A review of [R.S.]'s medical and dental file, however, makes clear that [R.S.] had significant dental problems independent of the Zometa and that his loss of teeth was due to his poor dental hygiene and was not the result of the Zometa treatments.
>
> When [R.S.] was seen on December 20, 2013 at the University of Michigan Dental School, an examination revealed that he had cavities in four teeth and five broken teeth. Indeed, the University of Michigan noted that [R.S.] admitted to having poor dental hygiene:
>
> > Patient reports having bad teeth for a long time and denied having had a regular dentist for a long time.

> None of the aforementioned problems were related to his use of Zometa or related to the osteonecrosis of the jaw. Osteonecrosis of the jaw is a breakdown of the bone in the jaw. In [R.S.]'s case, the osteonecrosis of the jaw was only 1 x 1 cm and would not have caused any dental problems outside the area of the osteonecrosis. (See declaration of Dr. Earl Bogrow, D.D.S. attached as **Exhibit E**). Moreover, the dental records also state that [R.S.] had no tooth mobility which means that the teeth were intact and not loose. If the osteonecrosis of the jaw was responsible for his dental problems, you would expect to see a loosening of the teeth because of bone damage.
>
> Although not diagnosed with osteonecrosis of the jaw at his initial visit to the University of Michigan dental clinic, [R.S.] was so diagnosed a month later by Dr. Gutierrez, a professor at the University of Michigan Dental School. Dr. Gutierrez recommended that all of his teeth be extracted with the exception of teeth 6 & 11. These extractions were caused, not by the osteonecrosis of the jaw, but by [R.S.]'s poor dental hygiene. The dental records make clear that his dental disease was pre-existing and unrelated to the osteonecrosis of the jaw. Dr. Fata suspended the use of Zometa while undergoing dental treatment. It should be noted that it was Dr. Fata who referred [R.S.] to the University of Michigan Dental Clinic because he was concerned about [R.S.]'s dental care.

Sealed App'x, pp. 348-350.

Dr. Fata forthrightly acknowledged and expressed his remorse for the conduct underlying the Health Care Fraud counts to which he pled guilty.[2] He has, throughout,

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[2] Thus, in the course of his allocution, Dr. Fata said, in part, the following:

> Your Honor, I stand before you so ashamed of my action. That's for me, from a successful doctor who -- who had excellent profile, to what I am today. I had a gift, and I violated the gift. . . . I have violated the medical oath, and I have caused anguish, hardship and pain to my patients and their families. I do not know what else I can do to heal their

acknowledged the seriousness of that conduct - indeed, in his sentencing memorandum, he sought a sentence of 25 years, which, he noted, "is very close to life in prison, given Dr. Fata's life expectancy," Sealed App'x, p. 378 - and he does not now seek to minimize it.

But the assignments of error he advances on appeal do not turn on whether or not he "poisoned his patients for profit," as the government alliteratively alleges at page one of its brief, or the degree to which he resembles the caricature of evil the government seeks to draw throughout its submission. He trusts that the Court will not be distracted in its analysis of those issues by the government's overheated rhetoric and overblown claims of wrongdoing.

> wound. I do not know what to do more to express my sorrow and shame . . . I misused my talents, and permitted the sin to enter me because of power and greed. . . . I also grossly abused the trust that my patients placed in me. They came to me seeking compassion and care. I failed them.

R. E. 161, Transcript, Pg ID 2487-2488.

ARGUMENT

I

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

In weighing the government's response to defendant's arguments regarding the applicability of the abuse of trust/special skill enhancement set forth in U.S.S.G. § 3B1.3, the Court should bear in mind that the question before the trial court was *not* whether Dr. Fata should receive the two-level enhancement - indeed, he did not object to it - but rather whether the enhancement should be applied in such a way as to make him eligible for a further enhancement under § 3B1.1. It was the government, it should be remembered, that raised this issue, when it objected to the Probation Department's failure to calculate a § 3B1.1 enhancement, and when it did, it did so in a way which is contradictory to the position it now advances.

Specifically, the government argued 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.

The government argues at some length (and in the overheated fashion that has typified its advocacy in this case) that Dr. Fata certainly violated his patients' trust, as well as that of the insurers, by "submitting fraudulent claims for chemotherapy and other dangerous treatments that his patients simply did not need," government brief, pp. 27-28, and, as it notes therein, the defendant does not dispute those arguments. What it does *not* argue, however - and could not, one would think - was that these abuses of trust were particularly germane to the theory on which it sought the enhancement under § 3B1.1 - for Dr. Fata's leadership role in a "kickback conspiracy." And in so doing (or failing to do), the government simply fails to frame a meaningful response to the principal thrust of defendant's argument. *See*, Brief on Appeal, pp. 19-22.

More significantly, perhaps, the government also seeks to reframe the issue which it initially framed below as a *choice* between alternative theories (special skills/abuse of trust), when, at page 29 of its response, it accuses Dr. Fata of "misreading" § 3B1.3:

> He *appears to argue* that where both "use of a special skill" and "abuse of trust" apply to a defendant's conduct, the district court is required to pick the best rationale before applying § 3B1.3. (Fata Br. at 19). Nothing in the guidelines supports that reading. Rather, where both rationales

> apply, the district court simply applies § 3B1.3 and increases the defendant's guideline calculation by two levels. [Emphasis supplied].

Ever mindful of the principles of civility which both guide and limit appellate advocacy, the writers will eschew characterizing this argument as "disingenuous," but would merely point out that the government should have no difficulty understanding the argument that the two bases for the § 3B1.3 enhancement should be read as alternatives to each other *because that was exactly the way the government framed the issue in the district court.*

Indeed, as noted above, this was *exactly* the way that the government's objection to the Presentence Investigation Report stated the question for the district court to decide. Indeed, in its Sentencing Memorandum the subheading relating to this issue read:

> **C. Section 3B1.3: Abuse of Trust is More Appropriate Than Use of Special Skill**

R. E. 135, Sentencing Memorandum, Pg ID 1336. (Emphasis in original).

Unsurprisingly, that memorandum specifically presented the thrust of the government's quarrel with the Presentence Investigation Report as a choice between competing alternative theories:

> The government objects to Probation's application of the special skill enhancement *rather than* the abuse of trust enhancement under Section 3B1.3.

Id., at Pg ID 1337. (Emphasis supplied).

Nowhere in its pleadings, or in argument to the district court did the government take the position which it now does - that the court need not weigh the competing applicability of the two alternative theories of enhancement under § 3B1.3. Quite to the contrary, as the following colloquy between the district judge and government counsel illustrates, it consistently posited a *choice* between the two:

> MS. DICK: Your Honor, I'll address them in turn. First the *abuse of trust versus special skill* and then the leadership role because I think they have to be taken in turn.
>
> THE COURT: Well, one lets you coordinate; the other doesn't.
>
> MS. DICK: Exactly. If the Court chooses to apply the special skill enhancement as probation has recommended, it forecloses the consideration of leadership. And we submit for two reasons the abuse of trust should be applied. The first and most important is that *it is the most relevant and it, in fact, is the most appropriate to this Defendant's crimes and what he did*. Second, of course, we don't see a reason to choose a special skill enhancement which we agree could apply also given that it would foreclose the consideration of his leadership role. So just going briefly to the Defendant's abuse of trust --
>
> THE COURT: Let me just ask and I know you're aware of this, but the definition in 3B1.3 of special skill says, "...refers to a skill not possessed by members of the general public and usually requiring substantial education, training or licensing. Examples would include...doctors..."
>
> MS. DICK: Absolutely. And we absolutely concede that special skill applies here. *We just believe the abuse of trust is the more appropriate of the two.*

R. E. 170, Transcript, Pg ID 2905-2906. (Emphasis supplied).

In light of all this, it is hardly surprising that the trial judge decided the question posed on the basis of the way that question was posed *by the government - i.e.*, whether or not "abuse of trust is more appropriate" than use of a special skill. *Id.*, at Pg ID 2936.

Whatever the merits of the government's new position - and the only case it cites in support of that position, *United States v. Sawaf*, 129 Fed. Appx. 136 (6th Cir. 2005) is an unpublished decision of this Court in which the question was not even presented or discussed- the government's attempt to change its position, and press an argument not made below, simply should not be countenanced.

As Judge Hardiman, writing for the Third Circuit in *United States v. Dupree*, 617 F.3d 724, 727-728 (3d Cir. 2010), put the matter:

> I begin with the well-established proposition that arguments not raised in the district courts are waived on appeal. *See Steagald v. United States*, 451 U.S. 204, 209, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981). . . . Just as a defendant may not introduce new "theories of suppression" on appeal that were never argued below, *United States v. Lockett*, 406 F.3d 207, 212 (3d Cir.2005), the Government is "subject to the ordinary rule that an argument not raised in the district court is waived on appeal[,]" [*United States v.*] *Stearn*, 597 F.3d [540,] 551 n. 11 [(3d Cir. 2010)] (citing *Steagald*, 451 U.S. at 209, 101 S.Ct. 1642).
>
> This raise-or-waive rule is essential to the proper functioning of our adversary system because even the most learned judges are not

> clairvoyant. *See United States v. Nee*, 261 F.3d 79, 86 (1st Cir.2001). Thus, we do not require district judges to anticipate and join arguments that are never raised by the parties. *See United States v. Griffiths*, 47 F.3d 74, 77 (2d Cir.1995). Instead courts rely on the litigants not only to cite relevant precedents, but also to frame the issues for decision. See id. ("The government was required to offer some argument or development of its theory. It failed to do so, and has therefore waived the issue.").

See also, *United States v. Davis*, 751 F.3d 769, 777 (6th Cir. 2014) ("we will not consider this argument here because the government waived it below by failing to make it in the district court."); *United States v, Piazza*, 647 F.3d 559, 565 (5th Cir. 2011) ("The Government failed to raise this argument in its response to the defendant's motion for a new trial or at the hearing on the motion in district court. . . . Thus, the Government has waived this argument.")

The Court should, therefore, consider and decide the issue raised in defendant's opening submission on the basis that it was framed by the government and decided by the district court, and, for the reasons set forth in that submission, should reverse and remand 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.

The writers acknowledge that the argument advanced here is an unusual one - that a trial judge's exposure to significantly inflammatory information, the reliability of which was impossible for him to test, requires a remand for further exploration of the facts notwithstanding the judge's profession that he did not rely on the material in the first place. That argument arises, however, out of an extremely unusual set of facts and circumstances, in which the trial judge's ability to fairly compartmentalize unusually prejudicial information was sorely tested, and compromised by his refusal to allow the defendant to present information necessary to allow him to reasonably evaluate the reliability of that information.

Unsurprisingly, the government seeks to minimize the issue of unreliability. Thus, the government claims, at page 33 of its brief, that "[o]nly two of the oral statements came from family members who were not confirmed as victims by the

government or told by a second opinion doctor that the patient's treatments were inappropriate."

The difficulty with this claim, however, is that, as it repeatedly complained, R. E. 171, Transcript, Pg ID 2959-2960, 2964-2965, the defense was never presented with any of these supposed "second opinions," and, in fact, as government counsel ultimately admitted, the government had not independently confirmed that any such opinions had in fact been given, much less what, or how accurate, they were , but that, instead, it relied solely on the statements of the alleged "victims" that they had, in fact, received them. *Id.*, at 2970-2971. Thus, the trial court had no way to weigh, much less verify, the reliability of the "victims'" claims. And, of course, as pointed out at pages 42-45 of defendant's opening brief, independent review of a random sample of the claims of the supposed "victims" revealed grave reason to doubt the reliability of a majority of those claims.[3]

In fact, as pointed out at pages 41-42 of defendant's original submission, and as reflected in defendant's exhibit J,[4] as to the vast majority of the supposed "victims"

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[3] A summary of the findings of that review, as well as the report of the independent examiner, may be found at pages 333-347 and 385-403 of the Sealed Appendix, respectively.

[4] Exhibit J was filed under seal in the trial court. It is a slightly modified version of the chart which appears at pages 310-313 of the Sealed Appendix filed by the government, but does not appeal in that appendix. Accordingly, and for purposes

there was simply no information available to the trial judge which would have him to meaningfully weigh the reliability of their assertions of victimhood - and, as Judge Borman himself pointed out, "I'm not a doctor." R.E. 171, Transcript, Pg ID 2986.[5]

Defendant does not argue, as pages 33-35 of the government's brief seems to suggest, that the admission of the speakers' or writers' statements hinged on the application of the Crime Victims' Rights Act, 18 U.S.C. § 3771.[6] Nor does the defendant quarrel with "the longstanding principle that sentencing courts have broad discretion to consider various kinds of information," codified in 18 U.S.C. § 3661, *United States v. Watts,* 519 U.S. 148, 151 (1997), notwithstanding the government's arguments in that regard. Government's brief, pp. 35-36. Above and beyond these principles, however, is the supervening requirement of reliability, or, as expressed in *Tucker v. United States,* 404 U.S. 443, 447 (1972) that a sentence may not be

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of completeness and ease of access, defendant is filing it under seal with the Court, as a part of his own Sealed Appendix, at the same time it files this reply brief.

[5] Qualifying this remark, Judge Borman added: "but I'm reading, I'm learning from your side, from the Government's side, from statements, from documents that are filed in the case, and I will get further education from the Government's witnesses, from your witnesses." The difficulty, or course, as pointed out at pages 41-45 of defendant's opening submission, is that as to the vast majority of the supposed "victims," including those who spoke at sentencing, this additional education would have added little, because their claims were not shown to have been meaningfully tested by anyone.

[6] Indeed, the Act itself provides that "[a] person accused of the crime may not obtain any form of relief under this chapter." 18 U.S.C. § 3771(d)(1).

"founded," even "in part upon misinformation of constitutional magnitude"[7] that is at issue here.

While the available evidence certainly suggests a great likelihood that the statements of the alleged "victims" *flooded* the trial judge with information which was *at least* in part incorrect, the more basic problem is that the information, which was of a character which was bound to influence the trial judge's view of the case, was not subject to meaningful testing, which is the *sine qua non* of the cluster of rights and interests protected by the Due Process guarantee, and it is this guarantee which lies at the heart of defendant's challenge, and the protections defined by the cases cited to

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[7] The government cites *Tucker* at pages 34-35 of its brief for the proposition that "[a]s long as the defendant has notice and an opportunity to be heard, it is well established that the judge has largely unlimited discretion 'either as to the kind of information he may consider, or the source from which it may come.'"

The *Tucker* majority indeed wrote 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," *id.*, at 446, but was quick to point out that, given the inaccuracy found in that case, "these general propositions do not decide the case before us."

The same may be said, *mutatis mutandis*, here, for a number of reasons, including the unknown, but likely, unreliability of the information presented to the district judge, and the fact that the defendant was denied a meaningful opportunity to engaging in the kind of testing that it called for. Indeed, if nothing else, the trial judge's refusal to allow the defense the opportunity to undertake a detailed evaluation of the claims of the supposed "victims," *see,* Defendant-Appellant's Brief on Appeal, pp. 26-32, denied him the "opportunity to be heard" which the government seems to acknowledge was his right.

the district court, including *Gregg v Georgia*, 428 U.S. 153 (1976), *United States v. Tucker, supra, Williams v New York*, 337 U.S. 241 (1949), and *Townsend v Burke*, 334 U.S. 736(1948).

Unfortunately, the factual assertions of the government's brief only compound the problem. Thus, although the government argues, at page 37 of its brief, that the distinction the defense drew in the court below and here between solid tumor and hematology patients is "incorrect," the record does not support this claim:

- The material to which it first cites, set forth in a response to the defendant's sentencing memorandum was never presented in open court, or otherwise made subject to meaningful testing - and, of course, nothing in that memorandum, or in the government's brief on appeal, in any way contradicts the import of the fact, pointed out at page 44, n. 27, or defendant's opening submission, and at page 33 of the sentencing memorandum filed in the district court, Sealed App'x p. 347, that a physician's treatment of solid tumor patients is ordinarily subject to peer review by a hospital "tumor board;" and

- Neither does the government's assertion in support of this claim that "a different medical expert, who reviewed 100 of Fata's patient files, found that Fata had mistreated every single patient in some fashion," government's brief, p. 37, support this claim, because as the cross-examination of that expert, David Steensma, made clear, virtually *none* of the he examined were of solid tumor patients, even though solid tumors account for the vast majority of cancers:

> Q. Out of the 100 patients that you reviewed, how many were solid tumor patients?

> A. All of the patients that I reviewed had blood disorders. There were just a few that were sent right at the end, less than five that were solid tumor patients.
>
> Q. You know -- in a typical community practice, what percent would be solid tumors, would you estimate?
>
> A. Probably at least 80 percent in a typical community practice, the most common ones being breast, lung, colorectal and prostate.

R. E. 169, Transcript, Pg ID 2837.

The government suggests that the decision of the Supreme Court in *Harris v. Rivera*, 454 U.S. 339 (1981) represents a "rejection" of the defendant's argument that the trial judge could not have actually (as opposed to aspirationally) gone uninfluenced by the statements of the alleged "victims." Government's brief at 8. This assertion is apparently based on the *Harris* majority's statement that, just as judges guide juries with curative instructions about evidence which should not have been heard in the first place, then "surely we must presume that they follow their own instructions when they are acting as factfinders." *Id.*, at 46.

Unquestionably this is ordinarily the case, but few presumptions are irrebuttable. Indeed, as the analogy to *Bruton v. United States*, 391 U.S. 123 (1968) in the arguments before Judge Borman, and at pages 34-35 of defendant's opening

brief suggest, just as in the case of the similar presumption ordinarily applied to jurors - that they can and do follow instructions, including curative instructions - "that presumption may be overcome," *Williams v. Swarthout*, 771 F.3d 501, 507 (9th Cir. 2014), where "there is an overwhelming probability" that the factfinder 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 (1987) (internal quotations omitted). Defendant suggests that that is the case here.

In so doing, defendant takes no issue with the Circuit precedent set forth at pages 38-39 of the government's brief, or the sincerity of Judge Borman's comments and intentions, alluded to at page 40, but merely suggests that the situation in the case is unique, and presented a unique challenge that not even a well-meaning and sincere jurist could, as a practical matter, be expected to overcome without the information necessary to put the extremely disturbing claims in perspective.

This is, of course, an extremely fact-bound assertion. To test it, the Court should examine the submissions of the persons claiming to have suffered at Dr. Fata's hands in detail - certainly, the excerpts of the testimony set forth at pages 37-40 of defendant's opening brief, but, ideally, the entirety of the transcript of that day's proceedings, R. E. 168, Transcript, Pg ID 2528-2615, and also to review, or at least sample, the 638 pages of the letters, photographs, and other documents submitted to

the trial court under the supposed aegis of 18 U.S.C. § 3771, all of which are contained in Defendant's Sealed appendix, which is being filed along with this brief.

The weight of these submissions resides not so much in the individual stories they tell - although the stories themselves are at time gripping - as much as they are in the wellsprings of emotion they represent, and, of course, in their remarkable volume. Over and over, for pages and pages on end, the writers claim to have had their own, and the lives of their loved ones and families ruined and diminished in various ways by a man described over and over as a monster. No one with a heart bigger than a mustard seed could read them and not be touched. And no one so moved could fail to respond, at least on some level, to the fact that, *en masse*, they laid the blame for the suffering at Dr. Fata's door.

It is of course difficult (and perhaps pointless) to try to quantify suffering, especially when viewed in hindsight, or through any of the various lenses which may have been brought into play here, and it is not defendant's position that he should have been given a greater opportunity to litigate precisely *how much* each of the respondents or their loved ones had suffered, or exactly *how much* of that suffering was attributable to him.[8] He does, however, maintain that he should have been - but

[8] The writers do not mean in any way to demean or dismiss the feelings or perceptions of the respondents, but suggest instead that those perceptions may have been distorted by their circumstances, and, as has been said, "the most dangerous

was not - given a meaningful opportunity to supply Judge Borman with a body of countervailing information, which would have put the enormously troubling body of information supplied by the respondents in some proper context.

While the writers understand the gravity of the interest in finality - from both a practical and institutional point of view - in the end, one wonders, what harm would it do to for the trial judge another chance to examine his sentencing decision in the light of a full factual record? It would involve more work for all concerned (including, of course, the undersigned), but would insure that the sentence upon which Judge Borman ultimately settled is one that truly serves the ends of the sentencing process, fully complies with Due Process protections, and is based on the best, best informed, and most reliable evaluation of the factual matrix.

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untruths are truths slightly distorted."

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.

The government argues, first, that because F. R. Cr. P. 11(b)(3), "Determining the Factual Basis for a Plea," specifically provides that the determination of a factual basis must be made "[b]efore entering judgment on a guilty plea," rather than before accepting it, the question of whether the record adequately supports the plea is not limited to the plea colloquy itself. Government brief, pp. 41-42. The case law certainly supports that assertion, *see.,e.g, United States v. Mobley,* 618 F.3d 539, 545 (6th Cir. 2010),although it is to be noted that in the case at bar, Judge Borman actually (if inaccurately) made the required findings at the time of the plea colloquy itself. R. E. 111, Transcript, Pg ID 1131.[9]

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[9] Specifically, the trial judge there found as follows:

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

As noted in defendant's opening submission, "promotional" money laundering, as charged in Counts 22 and 23, is subject to "stringent mens rea requirement," *United States v. Trejo*, 610 F.3d 308, 314 (5th Cir. 2010), which is, in fact "the 'gravamen' of a § 1956(a)(1)(A)(i) violation," citing *United States v. Carcione*, 272 F.3d 1297, 1303 (11th Cir.2001). And nothing in the factual record cited by the government at pages 45-47 of its brief comes even close to satisfying it - that is, as proving it "as an independent fact" rather than presuming it "from the commission of the unlawful act." *United States v. Cortes-Caban,* 691 F.3d 1, 37 (1st Cir. 2012).

While some cases, including this Court's decision in *United States v. Mobley*, *supra*, have held it appropriate, in weighing factual basis challenges, to consider the information furnished by a Presentence Investigation Report, in this case, the Report, including the passage from Paragraph 69 set forth at page 47 of the government's brief, does not in any way address the critical *mens rea* issue, stating only that the defendant "admittedly funded [United Diagnostics] with money he fraudulently received from medically unnecessary treatment and/or services provided by [Michigan Hematology Oncology]."

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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 rest of the government's arguments, which suggest that purpose can be inferred from the temporal proximity of the offenses to which Dr. Fata pled guilty, are mere exercises in *ipse dixit*, and suffer from the logical fallacy *post hoc ergo propter hoc* ("after this, therefore because of this"), and fail to supply an appropriate basis for the required finding of "an independent fact.'" *United States v. Cortes-Caban, supra.*

Finally, the government argues that the defendant cannot prevail on "plain error" review, based on language from the supreme Court's decision in *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004) to the effect that "a defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea. Government brief, p. 47.

Such a rule makes a good deal more sense in a case like *Dominguez Benitez*, which involved a failure to adequately advise a defendant of the consequences of his plea than it does here, where the issue is whether the factual record adequately supports the defendant's plea-based conviction. Still, defendant concedes that in *United States v. Taylor*, 627 F.3d 1012, 1018 (6th Cir. 2010), cited by the government, the Court did apply the *Dominguez Benitez* rule in the context of challenges to a plea's

factual basis, noting that "plain error review requires a heightened showing of prejudice." *Ibid.*

At the same time, it hardly strains credulity to suggest that a defendant, including Dr. Fata, "would not have pled guilty to a statutory offense that subjected him to a prison sentence[10] if he had realized that the factual basis relied on by the court and the government to support the conviction on that count failed to show that his conduct violated the statute." *United States v. Garcia-Paulin,* 627 F.3d 127, 134 (5th Cir. 2010). Moreover, as Judge Torruella observed, dissenting in *United States v. Caraballo-Rodriguez,* 480 F.3d 62, 87 (1st Cir. 2007), even under a "heightened" standard, "[i]t is hard for me to see how [the defendant] would not be prejudiced, or the public reputation of judicial proceedings would not be adversely impacted if we affirm his conviction without any factual basis to support it."

Defendant's argument in regard to remedy is premised on the less-than-obscure notion that a conviction premised on an insufficient factual basis simply cannot stand - however, if the Court is persuaded by the government's remedy argument, at the very

[10] It may be noted in this connection that, not only did the money laundering convictions result in a two-level increase in Dr. Fata's offense level, R. E. 170, Transcript, Pg ID 2938, but that as to Count 22, Judge Borman imposed a sentence of 240 months, to run consecutively to all other counts. R. E. 158, Judgment, Pg ID 2461.

least the matter should be, as the government suggests, remanded "for a trial or a new plea hearing on the money laundering counts." Government brief, p. 47.

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 should be vacated, as well as his sentences as a whole, and the case remanded for resentencing - or, at least for a new plea hearing.

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 6,278 words, exclusive of the Table of Contents, Table of Authorities, 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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CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2016, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of such filing to all counsel of record.

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