IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.) No. 00-CR-DRH
)
)
Defendants.)

DEFENDANT'S SENTENCING MEMORANDUM

Comes now Defendant by his John D. Stobbs II, and for his Sentencing Memorandum states:

I. Introduction

Crimes have motives. In practically every criminal case, the overriding motive is greed. In white collar cases, the greed is evident from changes of lifestyle, maintaining an extravagant lifestyle, maintaining some sort of an addiction, or purchasing new "toys."

Not one of these motives exist for Dr.. He enjoyed an unchanged upper middle-class lifestyle. He never moved. The cars he drove were not new. There was no "flash" in his lifestyle.

The vast majority of Medicare/Medicaid fraud cases involve "ghost patients." Providers bill for work which was not done. The overwhelming majority of evidence against Dr. Trikha consists of him billing for work he actually performed but done in a manner not consistent with medical norms. As will be seen below, this is not a "typical" fraud case and Dr. Trikha is not a "typical" fraud Defendant.

Gall requires that before making any sort of final sentence the District Court must first make Guideline calculations. As such this Sentencing Memorandum will be divided as follows: 1. the Plea Agreement including Guideline calculations; 2. *Gall v. United States*; and 3. Conclusion.

This is not a garden variety fraud case. Dr. XXXXXX is not a garden variety Medicare cheat. The purpose of this Sentencing Memorandum is to put this case into perspective and to show why a sentence of 366 days—a "year and a day" is appropriate.

II. The Plea Agreement

Prior to the Supreme Court's decision in *Gall v. United States*, Dr. XXXXXX and the Government entered into a Plea Agreement which envisioned a sentencing range of 30-37 months. At the time plea negotiations were conducted, it would have been difficult to negotiate a non-Guideline sentence. As such the parties conducted protracted plea negotiations involving what ***specific*** Guideline enhancements might/might not apply.

Dr. XXXXXX was lucky to be prosecuted by Mike Quinley, a good and honorable man, who was willing to look at everything and listen to what the undersigned had to say regarding certain facts of the case so that a fair Plea Agreement could be reached.

A. Guideline Calculations

It is always disconcerting to negotiate a Plea Agreement, only to see different Guideline calculations as a result of a Presentence Investigation Report. This was not a *rushed* Plea Agreement. Numerous conversations over several weeks culminated in a Plea Agreement both sides felt was fair and in accordance with the laws in existence at that time. A massive case like this cannot be boiled down into a 15 or 20 page Presentence Investigation Report that relies solely on the Government's interpretation of events through Government reports. Negotiations cut through what "might have been" and encapsulated what both parties felt ***could*** be proved at sentencing.

The Presentence Investigation Report in this case is extraordinarily well-prepared. Perhaps if this were a contested sentencing where neither side agreed to certain enhancements or if this were a straightforward drug case, it would be easier to follow the PSR's recommendations. Here, the parties envisioned a total offense level 19 and the well-prepared PSR concluded that the total offense level should be a 27 and nearly triples the sentence envisioned by the parties.

The parties ***specifically*** determined that ***no*** Guideline enhancements were applicable to Dr. XXXXXX for vulnerable victim, role in the offense and obstruction of justice. These 6 points mean a difference between 37-46 months or 70-87 months.

1. PSR Objections

The undersigned is hopeful that the Government will not oppose his objections to paragraphs 48, 49 and 51 since these enhancements were *specifically* negotiated and contained in the Plea Agreement.

Turning first to paragraph 48, *U.S.A. v. Hogenboom* 209 F. 3d 665 (7th Cir. 2000) seems to be a death blow to Dr. XXXXXX's objection regarding vulnerable victim. The Defendant in *Hoogenboom* objected to her patients being deemed "vulnerable victims." Judge Evans correctly pointed out that Dr. Hoogenboom's "best argument against the "vulnerable victim" enhancement might have been that the ***victim was really the government***, not the infirm nursing home patients who were denied services. ***But that argument wasn't made below.***" (p. 670 emphasis added) When negotiating the Plea Agreement, the parties took into consideration and discussed the *vulnerable victim* enhancement and it was agreed that the victim was the Government who was not *vulnerable*.

Similarly with regard to any enhancement for obstruction of justice, the Government is in the best position to determine the credibility of witnesses such as Carolin XXXXXXXXXXX. The parties discussed this enhancement and it was determined by both sides that this enhancement was not appropriate vis-a-vis her grand jury testimony.

The enhancement for role in the offense is a stickier wicket. Under the "captain of the ship" analysis Dr. XXXXXX would seem to be a candidate for this enhancement. As this Honorable Court can imagine, discovery in this case is massive. The facts cannot be broken down in a simple fashion and placed in a 15 or 20 page Presentence Investigation Report. For purposes of role in the offense, this is not a black and white case. There are multiple layers of shades of gray which were taken into consideration by both sides when determining whether or not Dr. XXXXXX should receive a role adjustment. Just because Dr. XXXXXX's

signature was required to be paid, does not automatically qualify him for a role adjustment. The focus is ***not*** on titles or positions. The focus has to be on ***control***. Did Dr. XXXXXX control Carolin XXXXXXXXXXX?

Carolin XXXXXXXXXXX is no shrinking violet. Bluntly stated, she wore the pants in their romantic relationship and had an iron-fist at work. When Dr. XXXXXX decided to open his own office, he took Ms. John along as his office manager. She ran the office. Part of her job was to ensure that the "Government forms" were properly completed including the coding that is at issue here. At trial the evidence would have shown that Dr. XXXXXX was "guilty" for having signed the documents. But, who controlled the paperwork and what went on the coding forms is something altogether different. Carolin XXXXXXXXXXX was not controlled by anyone, especially Ajit XXXXXX. At most it was a 50-50 "partnership" with neither being the leader and neither being the follower.

In *U.S.A. v. Ramos-Paulino*, 488 F.3d 459 (1st Cir. 2007) the court reversed a role enhancement that was based on control over activities rather than participants. There is no doubt that Dr. XXXXXX's leadership might be a close call, but it was discussed at length by attorneys who literally spent months pouring over the facts of this case in preparation of trial. After weighing the involvement of Dr. XXXXXX and his former paramour Carolin XXXXXXXXXXX, the parties determined that no role adjustment applied.

Regarding Dr. XXXXXX's objection to paragraph 50, after reviewing 7th Circuit caselaw, it does not appear that a good argument can be made to support the objection as it applies to the use of a special skill as defined in §3B1.3. As such Dr. XXXXXX withdrew his objection to paragraph 50 and acknowledges that the crime was facilitated through his skills as a medical doctor.

Of course, now that he has capitulated on the issue of the §3B1.3 enhancement, which incidentally was ***not*** negotiated as part of the Plea Agreement, Dr. XXXXXX should not be assessed two points for role in the offense, since to do so would constitute impermissible double counting under §3B1.3. The obvious argument in favor of double counting is for the

Government to claim that the §3B1.3 applies to his position of trust and therefore Dr. XXXXXX could receive two points for his role in the offense and two points for abuse of trust. Double counting would be proper.

This issue was raised in *U.S.A. v. Vivit*, 214 F. 3d 908 (7th Cir. 2000) and unfortunately it was not answered head on by the Seventh Circuit. The Court affirmed the District Court's conclusion that "it is fair to say that he [Vivit] counted upon that the insurance companies would extend trust to him, and certainly after a period of time doing this it is quite clear that he understood that they did trust him; so that he did abuse his trust relative to the insurance companies." *Vivti* dealt with a doctor bilking private insurance companies. *Hoogenboom* dealt with a psychiatrist billing Medicare. *Hoogenboom* did not deal with the issue of double counting vis-a-vis role in the offense and use of special skill.

There is no doubt whatsoever that in order to be ***approved*** by Medicare Dr. XXXXXX had to use his medical license. He had to use his special skill in order to be approved by Medicare. Medical doctors in Illinois are "supervised" by the Department of Financial and Professional Regulation (DFPR) which is similar to the Attorney Registration and Disciplinary Commission for Attorneys. Upon pleading "guilty" Dr. XXXXXX notified the DFPR who determined that his medical license should be suspended once he is sentenced. In essence the DFPR determined that Dr. XXXXXX used his special skill to bill Medicare. *Even if* he partially abused the trust he built up with Medicare, the overwhelming evidence is that Dr. XXXXXX's special skill as a doctor is what permitted him to be in the position to commit the crimes which he pleaded guilty to. As such it would be double counting for this Honorable Court to impose on Dr. XXXXXX a two point enhancement for leadership points ***and*** two points for his abuse of skill.

So, before moving to any substantial assistance departure pursuant to U.S. Sentencing Guideline Section 5K1.1, it is Dr. XXXXXX's hope that this Honorable Court will determine that he has a Total Offense Level of 21, which when combined with a Criminal History Category I produces a sentence of 37-46 months.

B. 5K1.1

It is the undersigned's hope that the Government will file a Motion pursuant to U.S. Sentencing Guideline Section 5K1.1 for the substantial assistance he rendered regarding an international fraud that was committed against him. If this Motion is filed, Dr. XXXXXX would request that his sentence be reduced to 21 months before considering any other reductions.

1. The Nigerian Scam

Prior to meeting Dr. XXXXXX, whenever an e-mail arrived to the undersigned from a Nigerian with promises of immediate riches, the first thought was, "who could conceivably be gullible enough to fall for that?" Now, the undersigned grimaces when these e-mails flash across his screen because Dr. XXXXXX fell for the scam to the tune of over ***$750,000.00.***

The epicenter of *U.S.A. v. XXXXXX* is the Nigerian Scam. It literally ruined Dr. XXXXXX. He siphoned his entire life savings into recovering a chest supposedly filled with $19,000,000.00 in U.S. currency. Since the Presentence Investigation Report practically ignores and only devotes one-half of a sentence in paragraph 24 to the Nigerian Scam it will be fleshed out in detail here.

In the summer of 2004 Dr. XXXXXX received an e-mail from Chanty Martens, indicating that she was a recently widowed "Christian woman" in Nigeria. She indicated that her husband had been poisoned and that she was the sole care giver for her 24 year old son. Chanty told Dr. XXXXXX that before his death her husband had placed $19,000,000.00 in a box and sent it to a secure location in the Ivory Coast. Chanty indicated that there was a provision in her husband's will prohibiting the disbursement of any of the money to her son unless she found someone of reputable character abroad who could assist her.

Sensing something illegal was taking place, Dr. XXXXXX asked for information such as telephone numbers. Dr. XXXXXX did what he considered due diligence—he asked Carolin XXXXXXXXXXX what she thought. She suggested Dr. XXXXXX contact

Chanty's son, which Dr. XXXXXX did. He also spoke to Mr. Jwara, who was the attorney Chanty hired. Mr. Jwara advised Dr. XXXXXX that Chanty's son would take whatever money he needed from the box and out as a gesture of thanks to Dr. XXXXXX would gift the box and its remaining contents to Dr. XXXXXX in Missouri.

Mr. Jwara told Dr. XXXXXX that $1,750.00 needed to be sent by Western Union to process the legal documents. Dr. XXXXXX again asked Ms. XXXXXXXXXXX what she thought. She believed everything to be above board so Dr. XXXXXX immediately sent this money in September of 2004.

Of course the $1,750.00 was "only" to complete the paperwork. In order to actually ship the box, Dr. XXXXXX would need to send an additional $70,000.00 to Abidjan, Ivory Coast. Dr. XXXXXX demanded that he see the requisite paperwork showing that the box had been shipped, and Mr. Jwara complied. Dr. XXXXXX was provided documentation showing the box had been airlifted to Missouri. Dr. XXXXXX was satisfied that everything was going as Mr. Jwara promised.

A few months went by and not surprisingly, Dr. XXXXXX was informed that there was a "minor snag" and that due to "9/11 concerns" regarding a box containing so much cash, it had to be inspected in Monaco. Mr. Jwara appeared angry that something like this could happen, but told Dr. XXXXXX that all hope was not to lost because he would have Nigerian Government officials become involved to ensure that this delay would be short. Dr. XXXXXX spoke to a member of Econas, which allegedly was the company responsible for the hold-up. Dr. XXXXXX was assured that everything was being done to have the box shipped to Missouri, but that a certificate indicating that the box was not terrorist or drug related needed to be completed.

Unfortunately, and not surprisingly, "anti-terrorism certifications" in Monaco aren't cheap. Inspections had to be conducted before any certification would issue. Dr. XXXXXX was given good news and bad news by Mr. Jwara. The good news was that the "anti-terrorism certification" could be completed. The bad news was that the cost involved was

$425,000.00. By not paying the $425,000.00 Dr. XXXXXX was told the box would be returned to the Ivory Coast. He wired the money.

Now that he was into Chanty, Mr. Jwara and Econas to the tune of one-half a million dollars, Dr. XXXXXX was in almost constant contact with them. He was assured that it would be just a matter of weeks before the box arrived in St. Louis. He was understandably surprised when in November of 2004 the courier, specially hired by Econas to hand-deliver the box to Dr. XXXXXX in St. Louis, called with some disappointing news. There was a snafu; not quite as big as the "anti-terrorism certification," but a snafu nonetheless. The courier had a smooth trip from Monaco through Switzerland but was unable to walk the box across the French border. Security was tight and additional fees would be required in order for the courier and the box to cross into France. Again, Dr. XXXXXX was given good news and bad news. The good news was that the courier believed that with the payment of additional fees, the box would be able to cross into France. The bad news was that the additional fees were $250,000.00.

Dr. XXXXXX turned to the two people he trusted most. His ex-wife Sara told him he was being scammed. She told him that he shouldn't send another dime. Carolin XXXXXXXXXXX told him that he almost had the box and should send money. She actually lent him $25,000.00 and her husband lent $7,000.00 so that the box could proceed through France and hopefully arrive in the United States shortly thereafter.

Upon wiring the money one other complication presented itself. The box was now in London, England but Mr. Jwara was unable to get clearance for the box to be sent to the United States of America. Mr. Jwara was furious. Heads were going to roll and his Government was definitely going to get involved. Sensing something might be amiss, Dr. XXXXXX demanded to see the box with his own eyes.

Mr. Jwara thought this was an excellent idea, because perhaps this would get the Brits to allow the box to be shipped to Missouri. Mr. Jwara told Dr. XXXXXX of his Government's interest in what was transpiring. ***The*** vice-president of Nigeria called Dr.

XXXXXX several times to tell him everything the Nigerian Government was doing to pressure England to allow the box to be sent to him in Missouri.

Eventually, Dr. XXXXXX flew to London and was shown a beautiful box by Mr. Alexander. Inside the box was what appeared to be U.S. currency. Until he was told of a "slight" problem, Dr. XXXXXX was no doubt relieved to know that the nearly $750,000.00 that he poured into this venture was worth it. But, there was a "slight" problem. The good news bad news scenario presented itself once again.

The bad news was that the U.S. currency had aged and deteriorated in such a way that it could not be used. The U.S. currency appeared to be charcoal stained. The good news though was that the money could be washed and cleaned with a "special" chemical to make it legal tender. In order to show he wasn't being scammed, several of the bills were taken from the box, immersed in a chemical and magically restored. Of course, magic chemicals like this don't come cheap. It would cost $200,000.00 in order to clean all of the money.

He paid $600.00 per month to rent space to store the box and it was there for a total of two years and Dr. XXXXXX ended up paying $14,400.00 total to essentially store a nice box filled with worthless paper.

That in a nutshell is the "Nigerian Scam." The question in this Honorable Court's mind has to be "how on earth could an educated man allow himself to get swindled out of **three-quarters of a million dollars**?" At what point would it or should it have become obvious that there was no pot of gold? The "Nigerian Scam" is a two edged sword for Dr. XXXXXX. On the one hand it shows a certain amount of greed. On the other hand it shows that Dr. XXXXXX is gullible. He is overly trusting. There has to be skepticism regarding this scam because 99.99% of people who receive these e-mails immediately delete them.

It is virtually impossible for anyone to put themselves in Dr. XXXXXX's shoes. But, as will be shown below, what makes him such an outstanding psychiatrist is that he is so trusting which allows him to connect with his patients.

Fortunately, the Government realizes that scams of this type exist and that good

people allow themselves to become victims. For whatever reason they are vulnerable. Attached and marked Exhibit A is a "gold mine" fraud being prosecuted in this District. In the "gold mine" fraud, Government agents interviewed victims—some of whom are well educated—who helped in the investigation of the fraud.

Here, Dr. XXXXXX gave a full and complete accounting of everything he knew about the "Nigerian Scam." The overriding difference between the "gold mine" fraud and the "Nigerian Scam" is that terrorists could be operating the "Nigerian Scam" and funds could be used to assist enemies of the United States of America. As it must, the Government has taken Dr. XXXXXX's cooperation very seriously.

Due to the length of time it took to suck $750,000 out of Dr. XXXXXX, there is a paper trail leading back to the scammers. Dr. XXXXXX provided telephone numbers. Dr. XXXXXX provided a great deal of detailed information which will allow the Government and *other foreign law enforcement agencies* to trace the money back to the "scammers."

C. Suggested Guideline Sentence

Dr. XXXXXX would suggest that before considering his cooperation his Total Offense Level be 21. Since he has no criminal history and there exist no aggravating factors, a low-range sentence of 37 months would seem appropriate.

Taking the 5K1.1 into account, a reduction from a total offense level of 21 to a level 16, which carries a low-end sentence of 21 months would seem fitting. In reality it is only a 9 month reduction from the sentence envisioned by the Government and Dr. XXXXXX in the Plea Agreement.

III. Gall v. United States

The Sentencing Guidelines were enacted to ensure that "the crime fit the time." The goal was to reduce sentencing disparities. Over time though Circuit court decisions have slowly eroded a sentencing judge's ability to ensure that a particular Defendant is treated fairly. Relevant conduct was liberalized in such a way so that a first time non-violent drug offender could easily receive a 20 year sentence. Appellate decisions ensured that various

enhancements were practically "automatic." Downward departures of practically any kind were frowned upon.

Booker began the slow and seemingly tedious return to a system where the sentencing judge could view the entirety of the circumstances and not rely solely on the Guidelines. A sentencing judge could now have true input into the sentence that he handed out.

The culmination of *Booker* is *Gall v. United States*, 128 S. Ct. 586; 169 L. Ed. 2d 445; 2007 U.S. LEXIS 13083; 76 U.S.L.W. 4009 (Dec. 2007) But for *Gall*, Dr. XXXXXX would be hamstrung to try and argue what he feels is an appropriate sentence. Once this Honorable Court determined how much of a reduction was warranted under the 5K1.1 Motion, realistically the sentencing would conclude.

The language in *Gall* is breathtaking. The Supreme Court held that a District Judge "may not presume that the Guidelines range is reasonable but must make an individualized assessment based on the facts presented." (p. 3) As will be shown below, a sentence of one year and one day is appropriate and meets all of the factors set out in 18 U.S.C. §3553 (a).

A. Dr. Ajit XXXXXX

It has been an honor to represent Dr. XXXXXX. He is a good man. Simply stated, he is a wonderful psychiatrist but a poor businessman. A benefit of the requests for continuances being filed and granted due to the enormity of the case is that it has taken nearly two years to get to sentencing. That has allowed the undersigned to get to know Dr. XXXXXX in a way that is uncommon in criminal defense work. He has a calm, uplifting, innocent demeanor.

An unfortunate and unintended result in criminal cases is that the Judge sees the worst side of the Defendant. Here, a physician who bilked the system. Pre-*Gall* it was practically impossible to humanize a Defendant because once the Offense Level was decided, the sentencing concluded.

Dr. XXXXXX is a psychiatrist. His "sub-specialty" is working with the mentally disabled—modern day lepers. His practice consisted of visiting nursing homes and

conducting group therapy sessions at his office. Dr. XXXXXX pleaded guilty to and will be sentenced for the crimes he committed. It is counter-productive to try and explain his conduct. The undersigned will simply state that Dr. XXXXXX's overriding concern was and is the well-being of his patients. What distinguishes Dr. XXXXXX from any other physician similarly situated is that he ***DID NOT*** abandon his patients. Attached is Exhibit B, a letter from Dr. XXXXXX showing that to this day he continues visiting 5 care facilities and continues helping nearly 200 patients. He continues making weekly visits to see his disabled patients. Since being charged Dr. XXXXXX has literally worked hundreds of hours without submitting a bill. He has worked for free.

The skeptic will immediately think that Dr. XXXXXX is doing this to curry favor with this Honorable Court for sentencing. But, the skeptic doesn't know Dr. XXXXXX. The people he is helping do. As witnessed by the attached letters, ***not*** one facility has a bad thing to say about Dr. XXXXXX or his commitment and dedication to his patients.

The skeptic's position is further weakened by testimony from families of his patients and his co-workers. Exhibit C is a note Dr. XXXXXX received from Jeanne XXXXXXX, the mother of one of his patients. She thanks Dr. XXXXXX "for taking care of my dear son Thomas XXXXXXX for years." Exhibit D is a letter from Heidi XXXXXXX, a nurse at the University Nursing and Rehabilitation Center. Nurse XXXXXXs writes:

> "Dr. XXXXXX's recent absence from practicing his profession has not been good for our residents. We tried to have other psychiatrists take over the care of his patients. It has proved impossible to find a doctor of his caliber. If one does exist, we haven't found him/her. No other doctor has treated my residents with the respect and dignity Dr. XXXXXX showed them. His absence from practice is a huge loss to our residents. Having him back, giving the individualized care only he can provide would improve the quality of lives of our residents and their families."

Dr. XXXXXX was trained as a psychiatrist in London, England. He was trained in "group therapy" where groups consisted of as many as 100 patients in a group. Dr. XXXXXX's case is an example of the friction between American and British "group"

psychotherapy. In the United States, the WPS mandates groups no larger than 12. For purposes of the counts related to "group therapy," by doing what he was trained to do, Dr. XXXXXX committed a crime.

The insinuation is that the large groups of up to 60 that Dr. XXXXXX saw in his office were not beneficial to the patients. Anyone who looks at this case will ask the common sense question of how can a group of 60 people possibly benefit from "group therapy" in an hour? The answer—and proof—is in what has transpired since Dr. XXXXXX closed his practice. Now that he no longer conducts his IOP Group Program, facilities such as Park Haven are unable to assist their patients, as witnessed by Exhibit E which is a letter from Susan XXXXX, RN, BSN, MDSC who writes:

> "During the time Dr. XXXXXX served our residents, he provided a stable and consistent continuum of care. Many of our residents do not have family or friends who can provide emotional or social outlets. While it is a goal of our facility to assist our residents with these things, his outside IOP program was a wonderful outlet to these residents outside of the facility services. Since the time this program has been disbanded, some of these residents and our staff have struggled to find other ways to fill these needs."

This is echoed by Shannon XXX, from University Nursing and Rehabilitation who writes in Exhibit F:

> "I have worked in long term care for over twenty years the last five with Dr. XXXXXX. During this time I have dealt with many physicians. It is my professional opinion that Dr. XXXXXX embodies what all long term care physicians should be. Dr. XXXXXX showed true care and compassion for his patients. He spent time talking with them and listening to them. He successfully managed the care of over forty of our most challenging Residents. Dr. XXXXXX took the time to mentor myself and the other nurses. He explained the aspects and clinical presentations of many diagnoses and helped to formulate effective treatment plans. His involvement at University Nursing and Rehabilitation Center improved the lives of many.
>
> Since Dr. XXXXXX's inability to practice, we have had to seek alternate psychiatric assistance. While we have sought out the best

> available psychiatrist in our area, he does not compare to Dr. XXXXXX. Dr. XXXXXX's absence in the field has left an irreparable void. Dr. XXXXXX came every week to our facility to see his patients, now they are seen every thirty to sixty days. Dr. XXXXXX would spend hours interacting with his patients, now their interaction time is brief. Dr. XXXXXX would educate the nurses and work towards effective treatment plans that included more than medications. Now the focus is in pharmacological interventions. Because of this we have seen an increase in the risk for medication side effects and potential negative outcomes to our Residents. Our nurses are not receiving the necessary direction to effectively manage some of our most challenging Residents. Our facility is at great risk for an overall decline in the well-being for those Residents with mental illness."

Dr. XXXXXX has had a dramatic, ***positive***, impact on his patients and the facilities where he works. Without his IOP Group Program, patients are now being medicated into zombies as opposed to benefitting from Dr. XXXXXX's IOP Group Programs. Like the "Nigerian Scam" Dr. XXXXXX didn't know when to say—"stop, no more patients for the group." Those saying that his patients benefitted from the IOP Group Therapy are the ones who would know—the caregivers who have seen patients being medicated and not having any treatment at all since the IOP Group Program was disbanded.

Once he was charged, Dr. XXXXXX was prohibited from working for Medicare or Medicaid. His practice closed. The Government has moved to forfeit the building that housed his practice. Rather than abandoning his patients, as he had every right to do, Dr. XXXXXX has stood by them and continued to help them. That says a great deal about Dr. XXXXXX.

In Exhibit G, Terri XXXXXXXX who is the Administrator at City Care Center in Cobden truly describes to this Honorable Court ***who*** Dr. XXXXXX is by writing:

> "I am writing this letter in regards to Dr. Ajit XXXXXX. My name is Terri XXXXX and I am the administrator at City Care Center of Cobden. We are known as the nursing home that will admit residents that no one else will accept due to behaviors or psychosis. The only other option, most of our referrals have, is to stay in the state facilities where they eventually become conditioned to that environment and get lost in the system. Structure,

> understanding and compassion are the three most important factors involved in maintaining the stability of our residents and creating a home-like environment. We could not do what we do without the loyalty and dedication of Dr. XXXXXX.
>
> Dr. XXXXXX has been coming to this facility for approximately nine years and during that time he has always put the welfare of the residents first. When he first encountered legal issues, he was very honest with me about the situation and gave us the choice to find another psychiatrist if we had any doubts about his character or ethics. Based on his past service and loyalty to the facility, it was never even a consideration for us, and I told Dr. XXXXXX we held him above reproach and would not consider replacing him. Due to his familiarity and compassion, our residents have come to trust and depend on Dr. XXXXXX. Over the years, he has taken many phone calls, during off hours, in which a resident wanted to talk to him personally. Many times, a mere phone call made the difference in the resident remaining stable or becoming psychotic. The facility nurses call Dr. XXXXXX, day and night, many times on a daily basis to report behaviors and get medication changes. He has been very dependable, throughout the years, and has always conducted routine visits to the facility, which is approximately a 2 hour drive from his home. Even throughout his current legal issues, he has continued to routinely serve our residents regardless of extenuating circumstances. He has always remained professional, continued to be available 24/7, completed documentation in a timely manner and has maintained the respect of both staff and residents, throughout his affiliation at this facility. At no time, has he ever denied services to any of our resident in need. I sincerely hope that we have many years left to work with Dr. XXXXXX to give our residents a chance that other facilities were unable or unwilling to give. Staff and residents alike have come to strongly depend on Dr. XXXXXX. In my opinion, I feel the stability of both the residents and the facility would be in jeopardy without his unconditional support and continued service."

It speaks volumes about Dr. XXXXXX that his support group is led by his ex-wife Sara. Their marriage was wrecked by Dr. XXXXXX's affair with his assistant Carolin XXXXXXXXXXXX. Yet, when Dr. XXXXXX is in his most dire need of help, Sara has proved to be the rock he can depend on. When they were divorced, Dr. XXXXXX and Sara shared equal custody of their minor children. He is presently residing in Sara's house.

It says a great deal about Dr. XXXXXX and his abilities that the Illinois Department

of Financial and Professional Responsibility has agreed to suspend his license for ***only two years.*** If Dr. XXXXXX were a bad doctor, presented a danger to his patients, or was seen as a pariah in the medical community he would have been suspended for much, much, much longer. Exhibit H is a letter written to the IDFPR setting out this agreement. For purposes of sentencing it is important to note that the IDFPR has suspended Dr. XXXXXX for the least possible time. It is the hope of the undersigned that this Honorable Court could sentence Dr. XXXXXX to a year and a day and upon completion of the sentence he could immediately begin taking the requisite courses to regain his medical license, and begin helping his patients, as soon as possible.

This is not a case where the blame is being shifted elsewhere or trying to minimize what Dr. XXXXXX has done. He is going to be sentenced for crimes he committed. It is hoped that his Guideline sentence will be 21 months. Fortunately, though in the post-*Gall* world ***who*** Dr. XXXXXX is can be taken into consideration so that this Honorable Court can sentence Dr. XXXXXX to one year and one day in jail. Dr. XXXXXX is someone who has accomplished a great deal in his professional and personal life. He is gullible and easily led on the one hand which allows him to be compassionate and trusting on the other hand—all ingredients necessary to be a competent and good psychiatrist.

B. 18 U.S.C. 3553(a)(1)

At page 22, *Gall* lists and discusses the seven factors that a sentencing court ***must*** consider. The first factor is a broad command to consider "the nature and circumstances of the offense and the history and characteristics of the defendant." *18 U.S.C. § 3553(a)(1)*. It is the undersigned's position that this is a "draw." The nature and circumstances of the offense are not such that no services were provided. The history and characteristics of Dr. XXXXXX are trumpeted in the attached letters. A "cheat" is ***not*** going to get glowing letters of reference from places he worked. A "cheat" is going to be more worried about himself than his patients. A "cheat" is not going to continue helping his patients for free.

The second factor requires the consideration of the general purposes of sentencing, including:

"the need for the sentence imposed --

"(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

"(B) to afford adequate deterrence to criminal conduct;

"(C) to protect the public from further crimes of the defendant; and

"(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." *§ 3553(a)(2)*.

Starting with (D), any sentence imposed should require that Dr. XXXXXX undergo some sort of training to ensure that he bills in accordance with accepted practices. Medicare/Medicaid doesn't require full training of medical providers which is somewhat amazing, but any sentence Dr. XXXXXX receives should require that he be trained so that he knows and understands the billing requirements. This would dovetail with the IDFPR's requirements that Dr. XXXXXX undergo training to avoid future problems.

Protecting the public from further crimes of the Defendant assumes that there will be further crimes. Dr. XXXXXX is willing to be placed on as tight a leash as this Honorable Court deems just. Dr. XXXXXX had a spotless and exemplary record prior to being charged in this case. There came a point where his billing got out of hand. He is a convicted felon as a result of this. It is implausible to think that he has not learned his lesson.

Subsections (A) and (B) are the difficult hurdles to clear. Requesting what might be considered a "light" sentence seems to be contrary to just punishment and deterrence. The argument will go that if Dr. XXXXXX gets off easy, no message will be sent to other doctors who might bilk the system. That point would be well-taken if Dr. XXXXXX were supporting some sort of a lavish lifestyle or in some way used the money for illegitimate purposes.

The carrot and stick analogy seems to fit. Each crime and Defendant have their own unique set of circumstances. A Defendant who constantly breaks the law and for whom prison is a home away from home needs the stick. How is it possible to quantify the fear that

an upper middle class person has of going to prison? How is it possible to quantify the humiliation and degradation that Dr. XXXXXX's family has been caused as a result of his actions? How is it possible to quantify the stress and anxiety that Dr. XXXXXX has felt since he was charged? Post-*Gall* these seemingly small matters figure into the just punishment and deterrence equation.

The third factor § 3553(a)(3) pertains to the kinds of sentences available and is a perfect seguey regarding just punishment and deterrence. *Gall* discussed probation which to a casual observer is viewed as "getting off easy." *Gall* held:

> "We recognize that custodial sentences are qualitatively more severe than probationary sentences of equivalent terms. Offenders on probation are nonetheless subject to several standard conditions that substantially restrict their liberty. See *United States v. Knights, 534 U.S. 112, 119, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001)* ("Inherent in the very nature of probation is that probationers 'do not enjoy the absolute liberty to which every citizen is entitled'" (quoting *Griffin v. Wisconsin, 483 U.S. 868, 874, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987))*.
> 4 Probationers may not leave [*596] the judicial district, move, or change jobs without notifying, and in some cases receiving permission from, their probation officer or the court. They must report regularly to their probation officer, permit unannounced visits to their homes, refrain from associating with any person convicted of a felony, and refrain from excessive drinking. *USSG § 5B1.3*. Most probationers are also subject to individual "special conditions" imposed by the court. Gall, for instance, may not patronize [***19] any establishment that derives more than 50% of its revenue from the sale of alcohol, and must submit to random drug tests as directed by his probation officer. App. 109.
> 4 See also Advisory Council of Judges of National Council on Crime and Delinquency, Guides for Sentencing 13-14 (1957) ("Probation is not granted out of a spirit of leniency . . . . As the Wickersham Commission said, probation is not merely 'letting an offender off easily'"); 1 N. Cohen, The Law of Probation and Parole § 7:9 (2d ed. 1999) ("The probation or parole conditions imposed on an individual can have a significant impact on both that person and society . . . . Often these conditions comprehensively regulate significant facets of their day-to-day lives . . . . They may become subject to frequent searches by government officials, as well as to mandatory counseling sessions with a caseworker or psychotherapist")."

Incarceration is no longer mandated. It is wholly unfair to take the position that the ***only*** just punishment is a long imprisonment so as to act as a deterrence to other fraud Defendants. To follow this approach would violate the legislative history to Section 3553 (a) where a sentencing court should not show a preference for one purpose of sentencing over another.

The fourth and fifth elements discuss the Sentencing Guidelines and policy statements and have been thoroughly discussed above.

3553(A)(6) deals with "the need to avoid unwarranted sentence disparities." During his psychiatric residency in London, all residents including Dr. XXXXXX were required to have self-analysis conducted. Dr. XXXXXX's self-analysis was that he was "too trusting" of others. One need look no further than the "Nigerian Scam" and Dr. XXXXXX's relationship with Carolin XXXXXXXXXXX to see the truth in that self-analysis. The parties agreed not to increase Dr. XXXXXX's offense level for role in the offense. As was discussed above, Dr. XXXXXX and Carolin XXXXXXXXXXX were co-equals. Actually, Ms. XXXXXXXXXXX reaped the benefits of a luscious lifestyle thanks to her participation in the underlying crime. The fact that the Government chose to charge Ms. XXXXXXXXXXX separately and with a misdemeanor does not impact this Honorable Court's ability to take into consideration her actions. The distinguishing factor between Dr. XXXXXX and Ms. XXXXXXXXXXX is that Dr. XXXXXX was the "captain of the ship" and should receive a harsher sentence—but hopefully not too harsh.

The final element, "the need to provide restitution to any victim," will be dealt with once an order of restitution is entered to the Government for the amount of the fraud. The "victim" is the United States of America. The faster Dr. XXXXXX repays the Government, the sooner he can satisfy this element of §3553.

Again, once Dr. XXXXXX pleaded "guilty," he immediately notified the Illinois Department of Financial and Professional Responsibility who told him that he would lose his medical license for at least 5 years. Apparently, the IDPR took a long look at Dr. XXXXXX and his record of helping poor mentally challenged patients and as witnessed by Exhibit H

has agreed to suspend his license for only two years. That means Dr. XXXXXX would be able to begin repaying the Government within two years.

Preceding the 3553 list is a general directive to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of sentencing described in the second factor. It has been discussed above that home confinement or probation can be deemed a sentence which is not greater than necessary to comply with the purposes of sentencing. The undersigned is requesting a sentence of one year and one day which is much greater than probation.

IV. Conclusion

In all candor it is the undersigned's hope that this Honorable Court will sentence Dr. XXXXXX to a sentence less than one year and one day in jail. But, the undersigned has appeared before this Honorable Court on numerous occasions and realizes that this is not realistic.

The undersigned has developed a great deal of respect and appreciation for Dr. XXXXXX. It has been hard getting to know someone like Dr. XXXXXX, realizing that the "best" he can hope for is imprisonment of one year and one day. But for these crimes Dr. XXXXXX has led an unblemished life, loved and respected by everyone who crosses his path. It is hard to tell Dr. XXXXXX that the "reality" is that he will be sentenced to imprisonment and removed from his family and patients for any period of time.

For the foregoing reasons, Dr. XXXXXX requests a sentence of one year and one day.

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CERTIFICATE OF SERVICE

I hereby certify that on March 27 a copy of the attached *Defendant's Sentencing Memorandum* was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following:

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