IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

*

THE UNITED STATES OF AMERICA

*

v. **Criminal No. WMN-99-0275**

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DONALD L. MACNAY

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SENTENCING MEMORANDUM

This Memorandum is submitted in anticipation of the sentencing of Dr. Donald L. MacNay on October 13, 2000, and in answer to the Government's Sentencing Memorandum.

INTRODUCTION

There are several outstanding issues which will be addressed at the sentencing hearing. The defense requests a departure of four levels below the guideline range because of Dr. MacNay's diminished mental capacity. In the alternative, Dr. MacNay requests a departure, because of circumstances about Dr. MacNay and the offense which separately or in combination with the evidence of Dr. MacNay's diminished capacity, removes this case from the heartland of similar cases. These factors include Dr. MacNay's extraordinary family responsibilities and the harsher conditions of confinement he will suffer because of his citizenship status.

Apart from the defense's departure requests, other issues remain that must be resolved. The government mistakenly asserts in its Sentencing Memorandum that Dr. MacNay should only receive a two-level reduction for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1. Dr. MacNay is entitled to a full three-level reduction for his timely acceptance of responsibility. Furthermore, the government may not seek a four-level enhancement for Dr. MacNay for his "aggravated role" in the offense pursuant to U.S.S.G. § 3B1.1 because there is no factual or legal basis to support a

finding that Dr. MacNay was "a leader or organizer of a criminal activity that involved five or more criminal participants." Finally, the government cannot justify a nine-level upward departure pursuant to U.S.S.G. § 5K2.8 for Dr. MacNay, because stipulated Guidelines' enhancement already punish Dr. MacNay for the physical, mental and emotional harm to the patients and because there is no evidence that Dr. MacNay was intentionally "brutal" to the patients.

BACKGROUND

Dr. Donald MacNay is a sixty-three year old former physician. He was born in Ottawa, Canada. He remains a Canadian citizen. He has lived in the United States since 1968 as a resident alien of the United States. He faces deportation after his prison sentence.

His mother, Geraldine MacNay, resides in Canada and is ninety-three years old and in frail health. See Letters of Arthur A. MacLean and Terrill C. Jameson in Appendix A at pp. 8 & 11. He has not seen his mother since his incarceration on December 16, 1999 on the related[1] Virginia state charges. Dr. MacNay was sentenced to five years with all but two years suspended and three years of probation following the completion of his sentence.

Dr. MacNay has two sisters - Anne and Linda. His sister Anne lives with his mother and is in extremely poor health due to cerebral palsy.

In his professional life, Dr. MacNay was a caring, compassionate physician who has always been motivated by his sincere beliefs as to what was in the best interest of his patients. He has never been motivated by financial gain to himself. Testimony given at Dr. MacNay's sentencing in

[1] Dr. MacNay pleaded guilty on September 27, 1999, to the charges of false pretenses and attempted false pretenses for his aloe treatment of cancer patients. These patients also formed the basis of the instant federal prosecution.

Virginia and the character letters attached to this Memorandum as Appendix A ably demonstrate Dr. MacNay's true motivations.

Legions of Dr. MacNay's former patients attest to his professionalism, his compassion and the care he has provided over the years. Jerry Dillon, a patient of Dr. MacNay's from the 1970's to the time that Dr. MacNay's medical license was revoked, attests to "the professionalism and bedside manner of Dr. MacNay." Mr. Dillon states that for Dr. MacNay, "[h]is patients always came first." Letter of Jerry Dillon to Jonathan Shapiro, dated December 6, 1999 (Appendix A at p. 7).

Sherry Coffman states that she "just wished there were more compassionate [doctors] as Dr. MacNay was." Ms. Coffman says that "Dr. MacNay is a special person" who has done so much for her that she feels "like living because of his help." Letter of Sherry Coffman to the Court dated November 5, 1999 (Appendix A at p. 6).

C. L. Wadel, Jr., a patient of Dr. MacNay's for twenty years, has written that Dr. MacNay never mistreated him in any way. Mr. Wadel summarized: "I trust the man with my life." Undated "To Whom it May Concern" Letter from C. L. Wadel, Jr. (Appendix A at p. 15).

Mr. William W. and Margaret J. Young, both patients of Dr. MacNay since 1973, believe him to be "an exceptional Doctor [who] is to be commended for his helping people like ourselves to have a better quality of life." Undated "To Whom it May Concern" Letter from Mr. William W. and Margaret J. Young (Appendix A at p. 19).

Barbara Loveland, who was a patient of Dr. MacNay on and off for nearly 30 years, has testified that: "Dr. MacNay was wonderful. He was very, very compassionate. He cared about his patients." Sentencing Proceeding in Commonwealth of Virginia v. MacNay, December 16, 1999, Transcript (Appendix A at p. 63).

Carol Hall, who worked in Dr. MacNay's office characterized the office as "very professional" and Dr. MacNay as "very compassionate." (Appendix A at p. 59)

Dr. Joseph K. Statkus, a physician who took over Dr. MacNay's medical practice after Dr. MacNay lost his medical license, testified that the hundreds of former Dr. MacNay patients he has seen uniformly speak positively about him. "The feeling that I got from the patients almost universally was how much [Dr. MacNay] cared." (Appendix A at p. 34) Further, Dr. Statkus testified that he has had the occasion to review the medical records for these patients written by Dr. MacNay. He has testified that "the records were very thorough" and care provided "was quite good."

Dr. MacNay is not only a compassionate, caring physician, he is one who time and time again has demonstrated that he is not motivated by greed or by money. Shawn Al-Kurd, a patient of Dr. MacNay from 1996 through the revocation of his license, has stated that Dr. MacNay did "so much to help me and so many others (often without charge) . . . I am very grateful to this kind and gentle physician." "To Whom it May Concern" Letter from Shawn Al-Kurd dated October 6, 1997 (Appendix A at p. 1).

Anna Marie Gill, a patient of Dr. MacNay from 1994 until his license was revoked, has testified that, although she has no health insurance, Dr. MacNay treated her for years. She is indebted to Dr. MacNay for thousands of dollars, none of which he has ever made any effort to collect. Despite her inability to pay, he never refused her treatment. (Appendix A at p. 22)

Tasha Phillips has testified that when she first went to see Dr. MacNay with a back injury, she immediately told him she could not afford to pay for the visits. Dr. MacNay's response was: "Don't worry about it. Let's just take care of you." Dr. MacNay continued treating her for years, accepting whatever nominal payment, sometimes five dollars, sometimes twenty-five dollars, Ms.

Phillips could afford at any given time. Ms. Phillips testified that money was never an issue for Dr. MacNay. (Appendix A at p. 43)

Etta Rutley has testified that after she was in an automobile accident in which she lost her husband and sustained injuries that nearly required her to lose a leg, Dr. MacNay treated her for several months. He never sent her a bill. When she raised the issue of payment with him, he said:

> "You had seven children, babies practically, to take care of, a dead husband," and I left there in a full leg cast. And he said, "You didn't need anymore, you didn't need me, you know, to worry about a bill."

Appendix A at p. 28

Terrill Jameson, an attorney and friend from Dr. MacNay's native country of Canada who has known Dr. MacNay his entire life, writes that Dr. MacNay is

> a gifted, compassionate and caring physician whose main concern has been the welfare of his patients and who will go that all important extra mile to offer real assistance to those under his care. Monetary gain and status have never been important to him. In all the years I have known him I cannot remember a single time when his actions were motivated by financial gain.

Letter of Terrill Jameson, MacLaren Jameson Barristers and Solicitors, to the Court dated May 16, 2000 (Appendix A at p. 8). Mr. Jameson, who has never been a patient of Dr. MacNay's and whom Dr. MacNay would have absolutely no motivation to convince of the efficacy of aloe vera treatments for cancer, states that, prior to his legal difficulties, Dr. MacNay had talked to him about the treatments and showed genuine enthusiasm for the potential to help his patients:

> [Our] discussions have included his investigation and research into the use of aloe vera as a cancer treatment. He was not only enthusiastic about the potential benefits of aloe vera, but exhibited a true and passionate belief that aloe vera could offer real assistance in the treatment of patients with advanced cancer.

Id. Similarly, Mr. Richard Spears has testified that Dr. MacNay had discussed with him Dr. MacNay's excitement about aloe vera treatments that Dr. MacNay had observed in Mexico. This discussion occurred in approximately 1997 and was in the context of a casual, social conversation. At no time did Dr. MacNay try to interest Mr. Spears in the treatment. Mr. Spears testified that it was his belief that Dr. MacNay legitimately believed in the aloe vera course of treatment. Id.

Possibly the most extraordinary statement of all is from V. Gerald White, one of the alleged victims in this case. When asked whether he wanted to make a claim of restitution against Dr. MacNay as a result of Dr. MacNay's treatment of Mr. White's cancer with aloe vera, Mr. White responded by writing a letter to the Victim/Witness Specialist at the United States Attorney's Office and to the United States Attorney herself stating that, having been in Dr. MacNay's office for a half day for each of twelve days, he is "absolutely convinced" that Dr. MacNay "was duped by Alan Hoffman." Letter of V. Gerald White to Shari L. Heise and Lynn A. Battaglia dated May 19, 2000. Mr. White states that he has no doubt that Dr. MacNay sincerely believed (and believes to this day) in the efficacy of aloe vera as a cancer cure. Mr. White thinks that "it would be a great injustice to put Dr. MacNay in jail for what he believed was a possible cure for cancer." As to a restitution claim, Mr. White wrote: "I also believe that Dr. MacNay has suffered far more than I have from this experience and because of that would never seek compensation from him." (Appendix A at p. 18)

Dr. MacNay's personal life, however, began to change. In 1992, his wife of twenty-four years, Marilyn MacNay, divorced him. He grew increasingly isolated and delusional. According to his ex-wife and daughter, the marriage ended because of Dr. MacNay's "crazy thinking" and obsession with Lyndon Larouche. His wife reports that Dr. MacNay gave "all his money" to the Larouche organization. See Report of Dr. Carol Kleinman at Appendix B at p. 6.

After the divorce, Dr. MacNay's condition worsened. Dr. MacNay's isolation grew. His professional life became affected. He lost privileges at local hospitals. "Old family friends" stopped talking to him "because of his incoherent rambles." Id. His thinking became even more paranoid and delusional.

OFFENSE CONDUCT

Dr. MacNay pleaded guilty to three criminal offenses; conspiracy, distribution of an unapproved new drug, and mail fraud. Dr. MacNay acknowledged that he misrepresented that aloe vera was approved as a cancer treatment by the FDA.

Dr. MacNay believed in the potential effectiveness of aloe vera treatments. Allen Hoffman initially lied and promised Dr. MacNay that the use of aloe vera intravenously had been approved by the FDA as a non-drug "natural" substance. Such a substance reportedly did not need formal approval as a new drug. See Affidavit of Dr. John Grauerholtz.[2]

Dr. MacNay welcomed the opportunity to treat patients with aloe because he believed it was in the best interests of his patients. He had long been committed to alternative medical treatment. His lifetime of experience as a medical professional proved to Dr. MacNay that - time and again - effective treatments would be suppressed by the medical and pharmaceutical establishment. Thus, Dr. MacNay enthusiastically "sold" the effectiveness of aloe as a treatment. He had come to believe that the medical establishment was engaged in genocide against its patients because it allowed the spread of deadly disease and prevented cures. He thought the only hope for patients was to escape from institutional medical treatments.

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[2] This Affidavit will be submitted prior to the sentencing.

Dr. MacNay eventually learned that Hoffman had lied to him. Nevertheless, blinded by his delusions, he did not stop what he still believed was a potentially effective alternative.

For this, Dr. MacNay pleaded guilty in Virginia state court on September 29, 1999, to the charges of false pretenses. He pleaded guilty to the instant federal offenses on May 29, 2000.

DR. MACNAY SUFFERED FROM A DIMINISHED CAPACITY WHICH WARRANTS A DOWNWARD DEPARTURE

Section 5K2.13 provides in relevant part:

"A sentence below the applicable guideline range may be warranted if the defendant committed the offense while suffering from a significantly reduced mental capacity. . . If a departure is warranted, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense."

In the Application Note it is stated that: "'Significantly reduced mental capacity' means the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful."

Dr. MacNay has been evaluated by psychiatrist Carol Kleinman, M.D., J.D. Dr. Kleinman's report is attached as Appendix B. Dr. Kleinman reviewed the indictment and psychological testing completed by Dr. Lawrence Donner. She interviewed Dr. MacNay and family members. Dr. Kleinman will testify at the hearing.

Dr. Kleinman describes an increasingly isolated man who suffers from a severe psychiatric disorder. Dr. Kleinman relates in great detail Dr. MacNay's bizarre, delusional thinking, including his grandiose delusions of conspiracy and his infatuation with the Larouche organization. Dr.

Kleinman observed Dr. MacNay's "strange," tangential thinking during her meetings with him. Her observations were confirmed by his estranged wife, Marilyn, and daughter, Bonnie, who describe Dr. MacNay's decline into an isolated world of grandiose delusion and paranoia. (Appendix B at pp. 6 & 12)

Dr. Kleinman concludes:

> "However, it is my opinion, to a reasonable degree of psychiatric certainty that based upon my psychiatric evaluation of Dr. MacNay, the observations of family members, and a review of the indictment, that Donald MacNay suffered from a severe psychiatric disorder: alcohol abuse, nicotine dependence, dysthymia (long-standing depression), and a severe personality disorder not otherwise specified with narcissistic and paranoid traits. It is further my opinion to a reasonable degree of psychiatric certainty that because of his mental disorder, and impaired ability to reason and consider the consequences of his decisions, Dr. MacNay meets the criteria for diminished capacity departure. The facts and circumstances of Dr. MacNay's offense do not indicate a need to incarcerate him further in order to protect the public. He has lost his medical license and hospital privileges. He has no prior legal history. He is not a violent man; he can successfully be treated as an outpatient.

Appendix B at p. 12

Under the circumstances, the Court should grant Dr. MacNay's request for a four-level departure based upon his diminished capacity, pursuant to U.S.S.G. § 5K2.11.

THIS COURT SHOULD GRANT DR. MACNAY A DEPARTURE BASED ON A COMBINATION OF CIRCUMSTANCES WHICH REMOVES THIS CASE FROM THE HEARTLAND AND PROVES MITIGATING CIRCUMSTANCES NOT OTHERWISE TAKEN INTO ACCOUNT BY THE SENTENCING COMMISSION

A departure is justified when the court finds that there exists a mitigating factor of a kind, or to a degree, not ordinarily taken into account by the Commission in formulating the guidelines. U.S.S.G. § 5K2.0. There may be offender characteristics which the Commission has noted are not

"ordinarily relevant" in determining whether a sentence should be outside the applicable guideline range but may be relevant if: "such characteristic or circumstance is present to an unusual degree and distinguishes the case from the 'heartland' cases covered by the guidelines." Id.

The Sentencing Commission has stated that a departure may be appropriate in "an extraordinary case that, because of a combination of such characteristics or circumstances . . . differs significantly from the "heartland" cases covered by the guidelines in a way that is important to the statutory purposes of sentencing, even though none of the circumstances individually distinguishes the case." U.S.S.G. § 5K2.0 (commentary).

The Sentencing Reform Act, pursuant to 18 U.S.C. § 3553 sets forth the statutory purposes of sentencing and directs a court to consider:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
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> (2) the need for the sentence imposed -
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> > (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
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> > (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 and vocational training in the most effective manner;
>
> (3) the kind of sentences available;
>
> (4) the kinds of sentence and the sentencing range [established by the sentencing guidelines].

The following factors, alone or in combination with the evidence of Dr. MacNay's diminished capacity, justify a four-level departure below the Guideline range.

1. SEVERE CONDITION OF INCARCERATION

Since United States v. Koon, 518 U.S. 81 (1996), courts have almost uniformly held that they have the authority to depart downwards where a defendant's status as a deportable alien causes unusually harsh conditions of confinement. See United States v. Farouil, 124 F.3d 838, 847 (7th Cir. 1997) (court may depart downward where defendant's status as deportable alien results in "unusual or exceptional hardship in his conditions of confinement"); United States v. Angel-Martinez, 988 F. Supp. 475, 484 (D. N.J. 1997) (court may downward depart where deportable alien demonstrates unique circumstances); and United States v. Bakeas, 987 F. Supp. 44, 46 (D. Mass. 1997) (district court downwardly departed where defendant's immigration status resulted in "far more onerous" conditions of confinement).[3]

Due to Dr. MacNay's status as a deportable alien, the Bureau of Prisons will assign him what is known as a "Public Safety Factor (PSF)."[4] This Factor is a classification used to identify prisoners who are, for various reasons, a particular danger to the community or to other prisoners. Because

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[3] Courts in this District appear divided. In United States v. Holguin, 16 F. Supp. 2d 595 (D. Md. 1998), Judge Black denied a claim of ineffective assistance of counsel based on a failure to move for downward departure based on deportable status, whereas in United States v. Herrara, JFM-98-064 (October 8, 1998), Chief Judge Motz granted an 18-month downward departure based on the defendant's status as a deportable alien.

[4] A PSR is defined by the Bureau of Prisons Manual as: "There are certain demonstrated behaviors which require increased measures to ensure the protection of society. There are nine Public Safety Factors (PSFs) which are applied to inmates who are not appropriate for placement at an institution which would permit inmate access to the community (i.e. Minimum security). The application of a PSF overrides security points scores to ensure the appropriate security level is assigned to an inmate, based on his or her demonstrated current or prior behavior."

of this classification procedure, Dr. MacNay's conditions of confinement will be more onerous as a result of his deportable status. But for this status, he would, as a first-time offender convicted of a non-violent offense, be designated to a minimum security camp.

Instead, he is ineligible for such placement. See Bakeas, 987 F. Supp. at 44. Moreover, but for his deportable status, Dr. MacNay would serve the last six months of his sentence in community confinement. See 18 U.S.C. § 3624(c). Instead, he will serve his entire sentence in prison.

Not only will Dr. MacNay's future conditions of confinement be for more onerous than a similarly situated individual, he has already suffered substantially harsher conditions because of the circumstances of his case and the inadequate pretrial detention facility in the District of Maryland.

Dr. MacNay was initially released pretrial. Subsequently, he was sentenced in the State of Virginia for the same conduct. Dr. MacNay is serving that sentence in a local jail in Virginia.

Thus, when Dr. MacNay is brought in custody to this district from the Deep Meadow Correctional Center for his rearraignment and sentencing, he spends weeks at the maximum security prison that this district uses as a pretrial detention facility. The conditions of confinement that Dr. MacNay has suffered in that maximum security facility are far more onerous than a non-violent first-time offender should suffer. Under the circumstances, the Court should consider this factor as a basis for a departure, separately or in combination with the other factors described in this Memorandum.

2. DR. MACNAY'S EXTRAORDINARY FAMILY RESPONSIBILITIES

Family ties and responsibilities, while not "ordinarily" relevant in determining whether a sentence should be outside the guidelines, could be relevant in an "extraordinary" case. United States v. Brand, 907 F.2d 31 (4th Circ. 1990).

Geraldine MacNay, Dr. MacNay's 94-year old mother, resides in Canada with his invalid sister, Anne. Currently, Geraldine MacNay takes care of Anne who suffers from cerebral palsy.

Two Canadian attorneys, Arthur A. MacLean, Q.C. and Terrill C. Jameson, have submitted letters describing the "devastating effect of prolonging the current period of incarceration" will have for his mother and sister's welfare. See letters in Appendix A at pp. 8 & 11. Dr. MacNay hopes to return to the family home where he could help take care of his sister and mother.

Under the circumstances, the Court should consider Dr. MacNay's extraordinary family responsibilities as a basis for departure.

ACCEPTANCE OF RESPONSIBILITY

The government argues that Dr. MacNay should only receive two levels for his acceptance of responsibility, pursuant to U.S.S.G. § 3E1.1. Dr. MacNay's acceptance of responsibility is complete and timely. He should receive a full three levels pursuant to § 3E1.1.

At the earliest stages of this case, Dr. MacNay offered to cooperate with the government's investigation. Dr. MacNay communicated this through counsel in a meeting at the United States Attorney's Office in January of 2000. The government agreed to meet with Dr. MacNay in a proffer session. The government would not travel to Virginia so the proffer was scheduled for the afternoon of the motions hearing on February 25, 2000. The government failed to writ Dr. MacNay for the motions hearing. Thus, the proffer session was delayed. Counsel made no oral argument and presented no evidence in support of its pending motions. The government subsequently informed counsel that, regardless of Dr. MacNay's information, they would not move for a reduction in his sentence for his cooperation, pursuant to U.S.S.G. § 5K1.1. Counsel then negotiated a plea

agreement that Dr. MacNay signed on March 22, 2000. The trial was scheduled to begin on April 3, 2000.

After the mistrial against Hoffman, the government again initiated discussions with counsel as to whether Dr. MacNay would be interested in cooperating. After defense counsel informed the government that Dr. MacNay was still interested in a cooperation agreement, the government subsequently informed counsel again that they were not interested in Dr. MacNay's cooperation in exchange for a reduction in his sentence.

Recently, Dr. MacNay agreed to disclose to the government an affidavit counsel obtained from Dr. John Grauerholtz[5] that describes a conversation that he witnessed between Hoffman and Dr. MacNay in which Hoffman confirmed FDA approval of intravenous aloe treatments. In addition, Dr. MacNay has agreed to meet with the prosecutors and share with them his knowledge of Hoffman's misrepresentations. Dr. MacNay is willing to do this despite the government's refusal to even consider moving for a reduction in his sentence, pursuant to U.S.S.G. § 5K1.1.

Dr. MacNay signed a plea agreement on March 22, 1999, almost two weeks before the start of the federal trial. Dr. MacNay pleaded guilty in his Virginia state case on related charges on September 27, 1999. Dr. MacNay first communicated with the government through counsel that he intended to plead guilty and pursue a cooperation agreement in the federal case in January of 2000 - shortly after defense counsel completed its review of the extensive discovery in this case. It should also be noted that defense counsel was hesitant to resolve the case by plea agreement until counsel had confirmed Dr. MacNay's mental competency to enter into such an agreement. Indeed, Dr. Kleinman was initially retained to determine whether Dr. MacNay was competent.

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[5] This Affidavit will be submitted prior to the sentencing.

The delay in resolving the case by plea agreement has much to do with the complexities of the case, Dr. MacNay's detention in a remote facility and the government's indecision about Dr. MacNay's potential cooperation. It has nothing to do with Dr. MacNay's full, complete and timely acceptance of responsibility. He should receive a three-level reduction pursuant to U.S.S.G. § 3E1.1.

DR. MACNAY'S ROLE IN THE OFFENSE DOES NOT QUALIFY FOR A FOUR-LEVEL ENHANCEMENT AS A MATTER OF FACT OR LAW

The government seeks a four-level enhancement pursuant to U.S.S.G. § 3B1.1 because they claim that Dr. MacNay was an organizer or leader of five or more participants in the criminal offense.[6] There is no evidence that Dr. MacNay supervised anyone - in the criminal offense - other than Ron Sheetz.[7] More importantly, the guidelines specifically prohibit such enhancements where

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[6] The plea agreement specifically reserves this issue for determination at sentencing.

[7] The government argues in its Memorandum at p. 4, footnote 2, that the defendant must receive a four-level enhancement for organizing five or more individuals - because he supervised one individual - in a larger criminal enterprise. "Donald MacNay supervised and directed everything that Ron Sheetz did to his victims. Accordingly, a four-level adjustment (for being an organizer of five or more) must be imposed." Id.

According to the government's logic, all supervisors would get the same enhancement in every criminal enterprise. If they supervise one, they supervise all. That cannot be and is not the case. The Guidelines carefully try to calibrate the relative culpability of defendants in multi-defendant cases by providing for two, three and four-level enhancements based upon the amount of supervision that the individual provided. This is consistent with the Guidelines' goal of individualizing sentences.

The Fourth Circuit has affirmed this. In United States v. Moore, 129 F.3d 175, 176 (4th Cir. 1994), the Court held that "role in the offense" adjustments may not be based on a co-conspirator's actions, but "must instead result from an individualized determination of each defendant's conduct and culpability."

Furthermore, the government points to a long list of innocent individuals employed by Hoffman's company and in Dr. MacNay's clinic and implies that this is evidence of MacNay's extensive leadership. The plain language of the Guidelines limit its application to the supervision of participants in the "criminal activity." (emphasis supplied) Numerous courts, including the

the defendant receives an additional enhancement based upon U.S.S.G. § 3B1.3 for an abuse of position of trust or special skill.

The parties - and the Presentence Report - agree that Dr. MacNay should receive a two-level enhancement for an abuse of trust or special skill pursuant to U.S.S.G. § 3B1.1. The § 3B1.1 Guideline notes that "if this adjustment is based solely on the issue of a special skill, it may not be employed in addition to an adjustment under § 3B1.1 (Aggravating Role)." Application Note 3 to Guideline § 3B1.3 points out that "special skill" refers to a skill not possessed by members of the general public and usually requiring substantial training or licensing. Examples would include pilots, lawyers, doctors . . . (emphasis supplied).

The Guidelines recognize that those in possession of "special skills" deserve an enhancement for that skill if it is used to commit a crime. But the Guidelines also recognize that such skilled individuals inevitably supervise people when they are exercising the "special skill" and that to increase the sentence again for that supervision, ancillary to the special skill, would be unfair double counting.

The application of § 3B1.3, on the basis of Dr. MacNay's special skill as a physician, prevents the application of § 3B1.1.

Fourth Circuit, have acknowledged that only "criminally responsible" individuals may be counted as "participants" under § 3B1.1. United States v. Fells, 920 F.2d 1179, 1182 (4th Cir. 1990); United States v. Jarrett, 956 F. 2d 864, 868 (8th Cir. 1992); United States v. Henderson, 942 F.2d 606, 614-617 (9th Cir. 1991) (en banc)

Hoffman organized this enterprise. Dr. MacNay did not supervise anyone with criminal responsibility other than Ron Sheetz. There is no evidence to support a four-level enhancement.

A NINE-LEVEL UPWARD DEPARTURE FOR EXTREME CONDUCT IS NOT APPROPRIATE

The government argues for a nine-level upward departure pursuant to § 5K2.8 because they allege that Dr. MacNay's conduct was "particularly cruel, heinous and depraved and, thus, atypical of most financial fraud cases." The government specifically notes the "cruel" treatment of Dr. MacNay to nine individuals as its factual basis for its departure.

The government mistakenly tries to define the "heartland" of this case as an economic crime for which, without a departure, Dr. MacNay will go unpunished for the non-economic harm to the patients. This grossly misunderstands the working of the Guidelines in this case.

Dr. MacNay has stipulated to an additional two levels, pursuant to 2F1.1(b)(2), because his offense involved more than minimal planning/multiple victims; an additional two levels, pursuant to § 2F1.1(b)(4) for the reckless risk of serious bodily injury; an additional two levels, pursuant to § 3A1.1 because the patient victims were "unusually vulnerable;" an additional two levels, pursuant to § 3B1.3 for an abuse of position of trust (physician).

These factors are not in dispute. They constitute eight levels of additional sanctions against Dr. MacNay because he was a physician who caused "serious bodily injury" to cancer patients who were unusually vulnerable mentally, physically and emotionally. The Guidelines have already punished Dr. MacNay profoundly for the non-economic harm - "physically, mentally and emotionally" - that the government mistakenly claims can only be addressed by an upward departure.

Furthermore, as a factual matter, the government argues that "an upward departure is necessary to address the evil of MacNay's crimes because defendant MacNay not only intentionally harmed his patients financially, but also physically, mentally and emotionally." The government

bases its departure request upon § 5K2.8 of the Sentencing Guidelines, i.e. that Dr. MacNay's conduct was unusually heinous, cruel, brutal or degrading to the victim.

The Fourth Circuit has made clear that the defendant must intend to brutalize or torture to justify this departure. In United States v. Gary, 18 F.3d 1123 (4th Cir. 1994), the defendant was convicted of mailing threatening communications, which took the form of a year-long campaign of harassment that included the sending of detailed letters containing sexual and physical threats, often written in the defendant's own blood, and describing the specific tortures he planned to inflict on his victim, leaving her in fear of being raped, mutilated, and maimed. The Fourth Circuit found that this evidence supported departures under section 5K2.3 and section 5K2.8, but remanded so that the district court could explain its reasoning regarding the extent of the departure. In so ruling, the Fourth Circuit emphasized that the defendant "clearly intended his acts to have this harmful effect."

Thus, in Gary, the defendant clearly intended to cause extreme harm to the victim; indeed that was the whole point of his cruel actions. Dr. MacNay, on the other hand, was acting out of a sincere but badly misguided belief that aloe vera could actually help the cancer victims who were his patients.

Section 5K2.8 requires intent to torture the victims. The reported cases, including all of those cited by the government, involve perpetrators who viciously set out to cause their victims pain. This was the point of their crime. See United States v. Morrison, 153 F.3d 34 (2d Cir. 1998) (vicious threats and systematic harassment to ex-girlfriend, including bomb threats, false allegations of child molestation, etc.); United States v. Haggard, 41 F.3d 1320 (9th Cir. 1994) (defendant engages in cruel hoax in which he claims to know the whereabouts of a young girl who had disappeared years before); United States v. Bailey, 112 F.3d 758 (4th Cir. 1997) (defendant convicted of kidnapping and

interstate domestic violence where defendant transported victim for several days in the closed trunk of a moving automobile).

Dr. MacNay never intended to cause his patients any unnecessary pain - yet "unusually heinous, cruel, brutal or degrading" treatment. The numerous tributes in the character letters and in the testimony from the Virginia proceedings make clear that Dr. MacNay had a life-long commitment to the best interests of his patients. See Appendix A. Dr. Kleinman's report explains how Dr. MacNay's paranoid and delusional thinking blinded him from seeing the harm that he was doing to this patients. Dr. MacNay sincerely believed in the aloe treatments. He was initially deceived by Hoffman about the FDA approval. But Dr. MacNay fully believed that aloe offered a viable alternative - one that would come with terrible side effects similar to chemotherapy - to current cancer treatments .

There is no evidence that Dr. MacNay set out to torture his patients. Setting aside Dr. MacNay's long history as a caring physician, such a motive is inconsistent with the government's own theory. The government suggests Dr. MacNay was motivated by greed - a snake oil salesman. If that was his motive, then he should have given the patients a cheap, painless placebo, e.g., injections of sugar water, instead of continuing with the aloe and its dreadful side effects which might cause complaints that could lead to the scheme's discovery.

Dr. MacNay would not - could not - do the smart thing to preserve a fraud scheme. Deluded, he believed in the aloe treatments. He, for a time, believed Hoffman's representations that the treatments were approved by the FDA. He always believed that they were a potentially effective treatment. That is why he desperately continued the treatments - even after learning it was not FDA approved and that patients were suffering terrible side effects.

Finally, it is necessary to put the government's factual presentation in support of its request for this extraordinary departure in context. The Government's Sentencing Memorandum summarizes the understandably emotional testimony from loved ones of patients that succumbed to cancer. While Dr. MacNay in no way intends to minimize their losses, it is necessary for the Court to understand the emotional back-drop against which this testimony is given. In certain cases, the witness' recollections of the events may be less than objective.

For example, Claire Werthheimer, the daughter of patient Clarence Lander, has stated that when Mr. Lander, a late-stage cancer patient, starting experiencing difficulty at Dr. MacNay's clinic, Dr. "MacNay did virtually nothing to help Mr. Lander." Government's Sentencing Memorandum at 31-32. Further, she testified that "No one in the clinic called for an ambulance." Id. at 32. This testimony is wholly inconsistent with the recollection of a much less emotionally vested eyewitness. Martha Larsen, another patient who was in the clinic at the time, vividly recalls the incident. See Declaration of Martha Larsen.[8] She has stated under oath that when Mr. Lander starting experiencing difficulty, she immediately called "911." Ms. Larsen stated that she did so despite the fact that Mr. Lander's family members told her not to do so. Ms. Larsen also stated that Dr. MacNay rendered immediate assistance to Mr. Lander, doing everything possible to make him comfortable. After "911" was called, one of Mr. Lander's family members, who did not want extraordinary life-saving measures employed for the terminally ill Mr. Lander, and asked Ms. Larsen to call "911" back and tell the "911" operator that they did not require an ambulance. Ms. Larsen did not do so. Further, Ms. Larsen stated that the family members were not in the examining room with Dr.

[8] This Report will be submitted prior to the sentencing.

MacNay and Mr. Lander, so they simply were not in a position to witness the assistance that Dr. MacNay was rendering to Mr. Lander.

Similarly, Barbara Mulhan, the mother of patient Scott Mulhan, testified that "Sheetz, apparently unable to put the needle for the intravenous line into [his] portable catheter, stuck Scott several times in the chest area causing blood to spurt up with such force that it hit the wall and curtains behind where Scott was sitting." Government's Sentencing Memorandum at 41. Mr. Mulhan was in Dr. MacNay's clinic the day after this incident supposedly occurred, when Virginia state authorities executed a search warrant on the premises and shut down Dr. MacNay's clinic. Mr. Mulhan, and his mother Barbara Mulhan, both spoke with Virginia authorities that day. Neither of them told the Virginia authorities that Mr. Sheetz' efforts to put the needle into Mr. Mulhan's port the day before had caused any bleeding, much less the horrific excessive bleeding Ms. Mulhan now recalls from three years later. See Report of Investigator Sue S. Rich, R.N.[9]

As to the Government's evidence regarding Dr. MacNay's supposed greed and profit motive, it should be noted that Sharon Kohlmeier, one of the victims whose experience the Government cites in seeking an upward departure, was interviewed by Virginia authorities on September 15, 1997. Ms. Kohlmeier reported that she became ill following the receipt of cesium from Mr. Sheetz. She later went to Dr. Roy Beveridge, who treated her side effects of nausea and vomiting. Ms. Kohlmeier reported that she returned to Dr. MacNay's office the following day and received an immediate refund of all monies she had paid to the clinic. See Investigator's Report dated September 15, 1997.[10] Similarly, it should be noted that Dr. Beveridge, who now recalls Dr.

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[9] This Report will be submitted prior to the sentencing.

[10] This Report will be submitted prior to the sentencing.

MacNay having told him that treating cancer patients "was great way of earning extra income" (Government's Sentencing Memorandum at 35) did not contemporaneously report that Dr. MacNay had said anything to him about "income." Rather, at the time Dr. Beveridge stated that Dr. MacNay had said that "he felt cancer patients were a group he could treat." See Investigator's Report dated September 11, 1997.[11]

Dr. MacNay was obsessed with offering a treatment alternative. Because of his deluded thinking, he treated patients ineffectively and sometimes painfully - both physically and emotionally. For this, the Guidelines have punished him profoundly with enhancements for abusing his position of trust and for inflicting "serious bodily injury" on "unusually vulnerable victims." There is no evidence that Dr. MacNay intended to gratuitously torture his patients. Blinded by his delusions, Dr. MacNay intended no harm.

CONCURRENT SENTENCE WITH CREDIT FOR TIME SERVED

On September 27, 1999, Dr. MacNay pleaded guilty to false pretenses and attempted false pretenses in Virginia state court. That conviction is for the same conduct as the instant charges. Dr. MacNay was given a five-year sentence with all but two years suspended. He was given three months probation. He began serving that sentence on December 16, 1999.

The Presentence Report notes at ¶ 114 that Dr. MacNay is serving a sentence in the State of Virginia and that "he will not receive any credit toward any sentence of confinement" because this is not an undischarged term of imprisonment. Thus, the PSR notes that the Court "may want to consider a structured downward departure pursuant to § 5K2.1."

U.S.S.G § 5G1.3(b) provides:

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[11] This Report will be submitted prior to the sentencing.

§5G1.3. Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment

_____(a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.

(b) If subsection (a) does not apply, and the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.

Application Note 2 outlines a scenario involving a hypothetical defendant in a drug case which is analogous to Dr. MacNay's case.

2. Adjusted concurrent sentence - subsection (b) cases. when a sentence is imposed pursuant to subsection (b), the court should adjust the sentence for any period of imprisonment already served as a result of the conduct taken into account in determining the guideline range for the instant offense if the court determines that period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons. Example: the defendant is convicted of a federal offense charging the sale of 30 grams of cocaine. Under § 1B1.3 (Relevant Conduct), the defendant is held accountable for the sale of an additional 15 grams of cocaine, an offense for which the defendant has been convicted and sentenced in state court. the defendant received a nine-month sentence of imprisonment for the state offense and has served sic months on that sentence at the time of sentencing on the instant federal offense. The guideline range applicable to the defendant is 10-16 months (Chapter Two offense level of 14 for sale of 45 grams of cocaine; 2-level reduction for acceptance of responsibility; final offense level of 12; Criminal History Category I). The court determines that a sentence of 13 months provides the appropriate total punishment. Because the defendant has already served six months on the related state charge as of the date of sentencing on the instant federal offense, a sentence of seven months, imposed to run concurrently with the three months remaining on the defendant's state sentence, achieves this result. For clarity, the court should note on the Judgment in a Criminal Case Order that the sentence imposed is not a departure from the guideline range because the defendant has been credited

> for guideline purposes under § 5G1.3(b) with six months served in state custody that will not be credited to the federal sentence under 18 U.S.C. § 3585(b).

The sentencing court's authority to impose a "truly concurrent" sentence was recently clarified in United States v. Dorsey, 166 F.3d 558, 562 (3rd cir. 1999). In Dorsey, the Third Circuit found no conflict between a sentencing judge's ability, under 18 U.S.C. § 3584(a), to run a sentence retroactively concurrent to a prior sentence in a related case, and the Bureau of Prisons' sole authority, pursuant to 18 U.S.C. § 3585(b), to award sentencing credits. Dorsey at 562. See also, United States v. Kiefer, 20 F.3d 874 (8th Cir. 1994) (in firearm possession case, sentencing court had power to fashion sentence to allow for time already served for related robbery conviction).

Thus, the Court, after considering the defendant's departure requests should determine the appropriate total punishment. The Court should adjust downward Dr. MacNay's sentence by ten months (the amount of time he has served in Virginia custody) and run the remaining sentence concurrently.

CONCLUSION

Dr. MacNay, sixty-three years old, deluded about the effectiveness of the aloe vera treatments, misrepresented aloe's FDA approval status and its history as a treatment. For this, he has been and will be severely punished. He has lost his medical license. He is indigent with no apparent means of supporting himself. His mental health problems and legal trouble have cost him his marriage and further isolated him from his family and friends. He faces deportation.

Pursuant to the plea agreement, the parties stipulate to the following guidelines calculation.

BASE OFFENSE LEVEL	§ 2F1.1	6
SPECIFIC OFFENSE CHARACTERISTICS		
Loss (more than $120,000, less than $200,000)	§ 2F1.1(b)(1)(H)	+7
More than Minimal Planning		+2
Reckless Risk of Bodily Injury	§ 2F1.1(b)(6)(A)	+2
Abuse of Position of Trust	§ 3B1.3	+2
Vulnerable Victims	§ 3A1.1	+2

The defendant respectfully requests the following:

Acceptance of Responsibility	-3
Downward Departure Based Upon Diminished Capacity or a Combination of Factors Including Dr. MacNay's Family Circumstances and Conditions of Confinement	-4
FINAL OFFENSE LEVEL	14

The final offense level is a 14. Dr. MacNay has no criminal history and, thus, is a Criminal History Category I. The sentencing range is 15-24 months. Dr. MacNay will request a sentence in the middle of the range of 20 months. Pursuant to U.S.S.G. § 5G1.3, and Application Note 2, the defense requests a downward adjustment of 10 months. Thus, the final sentence should be a sentence of 10 months to run concurrently with the Virginia sentence. The defense will also request a recommendation that mental health treatment be a part of the sentence and a condition of supervised release.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of October, 2000, a copy of the foregoing Sentencing Memorandum was delivered to Virginia Evans, Assistant United States Attorney, Suite 604, United States Courthouse, 101 West Lombard Street, Baltimore, Maryland 21201

_____
James Wyda
Federal Public Defender