

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	Criminal. No. 03-CR-0143-F-01
)	
v.)	
)	
PAUL V. MAYNARD,)	
)	
Defendant.)	
_____)	

EMERGENCY MOTION FOR BAIL PENDING SENTENCE
and
MOTION FOR NEW TRIAL

COMES NOW, Dr. Paul V. Maynard, Defendant herein, by undersigned counsel, John P. Flannery, II, appearing *pro hac vice*, with Clive Rivers, as local counsel, in accordance with 18 USC Sections 3142, 3143(a), and 3145(c), and the related case authority, to move this Honorable Court to grant bail on an emergency basis, and to release Dr. Maynard immediately from custody on the same bail conditions as prevailed before he was remanded without bail after his conviction on 4 of the 170 counts wrongly charged by AUSA Kim Chisholm;

COMES NOW FURTHER, Dr. Maynard, by undersigned counsel, in accordance with Rule 33, to move this Honorable Court to grant a new trial based on newly discovered evidence, and to schedule a hearing to consider the evidence in support of said motion;

In support of this emergency bail application, we respectfully demand this relief because:

- (1) Dr. Maynard is deserving of release under the ordinary standards by which bail is granted, i.e., there is clear and convincing evidence that he does not present either a risk of flight or danger to himself or others,
- (2) There are “exceptional reasons” why this detention pending sentencing is grossly “inappropriate” including:
 - a. the fact that Dr. Maynard’s life is at risk while in custody,
 - b. the federal institution has obstructed communications by and between Dr. Maynard and counsel,
 - c. there exists newly discovered evidence justifying a new trial – if not the dismissal of this prosecution; and
 - d. any sentence imposed might be probation but would likely not be more than three years; and
- (3) There is “substantial likelihood” that a new trial should be granted – despite this Court’s earlier expressed opinion as to this question.

In support of the motion for a new trial, we respectfully demand this relief because of the newly discovered evidence discussed hereinafter that is inextricably intertwined with Dr. Maynard’s request for bail pending sentencing.

I. REASONS FOR RELEASE PENDING SENTENCING

We make this emergency bail application as:

1. **Dr. Maynard is in serious danger of dying because of his confinement**

Dr. Maynard is in serious danger of dying because of the deplorable and dehumanizing conditions where he is detained at the MDC Guaynabo facility in Puerto Rico.

Almost from the day of his conviction on St. Thomas, Dr. Maynard has been seriously ill. His blood sugar went up to over 300, a critical level that is almost double what it should be and his blood pressure became dangerously elevated when it had been normal beforehand.

Since being transferred, Dr. Maynard has requested to be seen by a doctor on an almost daily basis but has had no medical attention.

Since he's been at MDC Guaynabo prison, as a consequence of not being given any medical help, Dr. Maynard's health has deteriorated to dangerous levels and, in addition to being severely congested to the point of sometimes having difficulty with breathing, he is now coughing up blood, suffering frequently from diarrhea and, as a consequence, has had an extremely rapid weight loss.

When last I spoke with Dr. Maynard he was hysterical, crying, fearful that, if he wasn't treated soon, that he might die.

This is a prosecution that might justify any sentence from probation to three years, but it could not ever justify death.

This Court is aware of similar civil rights complaints involving other prisoners at this same MDC facility since this Court refused to consider a civil rights complaint (on jurisdictional grounds) that charged, *inter alia*, that the MDC failed to provide anything like adequate medical attention. *See Parris v. Chavez*, 199 Fed. Appx. 198 (3rd Cir.

2006). It is unfortunate that those conditions have not been remedied, as demonstrated by Dr. Maynard's endangered physical state.

Congresswoman Donna Christensen who represents the Virgin Islands wrote to the Director of the Bureau of Prisons and demanded that Dr. Maynard be given the medical attention he requires. *See* Exhibit A, Christensen letter, dated April 12, 2007, attached hereto. She said that "as a physician [herself], [she] can well appreciate the [health] risk to Dr. Maynard under these conditions." *Id.* She suggested to the Director of the Bureau of Prisons that, "if [Dr. Maynard's] health and safety cannot be assured in custody, either in San Juan, or in St. Thomas, then we really should reconsider confining him at all – at least until after he is sentenced ..." *Id.*

She also spoke to what Dr. Maynard's release would mean and she said, "Dr. Maynard is a well-regarded member of his community despite this prosecution and I am confident that there is no danger that he will flee, nor does he present any danger to himself or to his community." *Id.*

But the Bureau of Prisons has done nothing in response to Congresswoman Christiansen's request to remedy Dr. Maynard's dire condition.

It is little wonder that members of the community signed a petition requesting that this Court release Dr. Maynard from prison; they have been generally aware of Dr. Maynard's ill health from shortly after his confinement by this Court. *See* Exhibit D.

One St. Thomas columnist, Whitman Browne, noted how Dr. Maynard has "successfully cared for many persons" but that "recently he has been jailed," that they "have even taken away his eyeglasses as they [the Government Agents] move to debase

him.” *See* Exhibit E. This Court has even been criticized for “fail[ing] to restrain the excesses of the prosecution.” *Id.*

Pastor Phillips of the St. Thomas Assembly of God since 1983 addresses the character of Dr. Maynard; he talks of how he has “personally sent individuals o[f] St. Thomas to [Dr. Maynard] for treatment, asking [Dr. Maynard] to bill the church and [Dr. Maynard] has consistently refused to do so,” rendering the medical service *gratis*. *See* Exhibit F. He underscores that “there has never been any indication of greed or selfishness ... [and] [Dr. Maynard] has consistently gone beyond the call of duty to assist many less fortunate individuals in the community.” *Id.* He does not believe Dr. Maynard “should be subjected to any additional jail time.” *Id.*

Reverend Niles of the Methodist Church looks forward to the day that Dr. Maynard may “be released to return to his family and work.” *See* Exhibit G.

Phelia A. Powell Torres, RN, MA spoke to the “jealousy among nationals here in the Virgin Islands. If you are not ‘born here’ as the Virgin Islanders would say, the people of VI hate you and will do everything in their power to retard you progress, if not destroy you. Dr. Maynard is a Nevisian; he was born on the island of Nevis. “ *See* Exhibit H. Nurse Torres wrote in conclusion to this Court: “Please release [Dr. Maynard] so that he can continue providing health care to the people of the Virgin Islands.”

Another Nurse, Elma Lewis, RN, spoke of Dr. Maynard’s “kindness to his patients” as “immeasurable.” *See* Exhibit I. Glenda Huggins, a classmate, friend and patient of Dr. Maynard, implored this Court to grant “expeditious bail.” *See* Exhibit J.

Only yesterday, I wrote to the MDC Warden, demanding that Dr. Maynard “be provided medical treatment for his nascent diabetes, hypertension, diarrhea, and general ill health that has reached a critical state.” *See* Exhibit B. But the Federal Express communiqué was refused by the MDC. *Id.* I have written, faxed, e-mailed, and called the Warden and that prison facility to no avail. This is not surprising as the prison has consistently compromised Dr. Maynard’s access to counsel – since I’ve been retained - even on something as routine as when we have tried to forward court pleadings to Dr. Maynard so that he may see what we have filed with this court. *See* Exhibit C (legal pleadings forwarded to the MDC’s Post Office Box was returned – although the address and manner of delivery was as instructed by the MDC).

Congresswoman Christensen complained to the Bureau of Prisons that Dr. Maynard had been denied access to counsel. *See* Exhibit A. But that has fallen on as silent a recipient as her request for medical treatment.

It is a matter of bitter irony that the federal government purports to prosecute Dr. Maynard for allegedly compromising his patients’ health, and then takes license by the federal facility where he’s lodged pending sentencing to risk his death. For this “exceptional reason” alone, we request that Dr. Maynard be released pending sentence.

2. Newly discovered evidence of prosecutorial bias and perjured testimony.

There is newly discovered evidence that raises grave and substantial questions about the impartiality of the government’s prosecution; we cite this evidence in support of the bail application and in support of Dr. Maynard’s motion for a new trial.

It involves the prosecutor of this case, AUSA Kim Chisholm, and the principal case agent, S/A Kevin Adams.

Each has evidenced an irreconcilable conflict and bias that should have barred their participation in this criminal prosecution.

The ethical conflicts themselves evidence an intolerable bias that encouraged both AUSA Chisholm and S/A Adams to see and to find and to frame Dr. Maynard's conduct as criminal when it was nothing of the sort.

These same conflicts evidencing bias also raise the question of selective and vindictive prosecution in violation of Dr. Maynard's "due process" rights.

Harkening back to the remarks of Nurse Torres, AUSA Chisholm told counsel that prosecuting Dr. Maynard was "different" than other cases and other jurisdictions "because it involved [a person from] Nevis":

- i. **Conflict and bias.** There is, in the most charitable reading of the facts, the appearance of disqualifying conflict and bias, by the fact that AUSA Chisholm continues to have an ongoing relationship with Dr. Maynard's estranged wife, former VI Senator Cleon Cleque, from whom Dr. Maynard was divorced based on "incompatibility."

1. **AUSA Chisholm**

- a. This relationship, by and between AUSA Chisholm and Ms. Cleque, goes back for years, and involved discussions by AUSA Chisholm with Ms. Cleque, regarding this prosecution before, during and since

the trial and conviction of Dr. Maynard. This was confirmed by an interview by undersigned counsel with Ms. Cleque following Dr. Maynard's conviction herein. AUSA Chisholm discussed with Ms. Cleque "off the record", according to Ms. Cleque, Dr. Maynard's selection of trial counsel, and "things" that Mr. Gordon Rhea, Dr. Maynard's trial counsel, could have challenged at trial -- but did not. Ms. Cleque also said that Dr. Maynard's wife, Patricia, was "not happy with me."

- b. AUSA Chisholm was also a tenant at the in-law's family home on St. John's, at Ms. Cleque's parents' home, and Ms. Chisholm was a friend to Ms. Cleque's elderly and frail mother whom Ms. Chisholm helped. Ms. Cleque said that "Kim [Chisholm] was helpful for my mother [Dr. Maynard's former mother-in-law]." Ms. Cleque stated that Ms. Chisholm dated her brother's friend.
- c. AUSA Chisholm was also a patient of Dr. Maynard during the undercover investigation, although Ms. Chisholm vigorously attacked Dr. Maynard's credentials as a physician at the trial had before this

Court; when asked as an officer of the court on April 9, 2007, by undersigned counsel, to confirm or deny the truth of this assertion, Ms. Chisholm refused to comment.

- d. In her summation, as further evidence of *animus*, AUSA Chisholm purposefully misled the jury when she said: “Narcotic pain medicine is a **last resort**, ladies and gentlemen. That is the testimony. It's not the first resort. It's the **last resort**, narcotics.” AUSA Chisholm knew or should have known that was not Dr. Parran’s testimony. AUSA Chisholm used Dr. Parran’s testimony about equivalencies between Oxycontin and Percocet in her closing to inflame the jury by doubling the equivalencies that Dr. Parran had described in his testimony. When Agent Poist presented himself with his back bent elbow as the source of his pain, she misled the jury, saying: “The doctor says, oh, okay, you gave me an excuse now.” She knew that Doctor Maynard made no such statement. (In this regard we incorporate by reference the arguments made in the reply filed in support of the earlier

motion for a new trial.)

2. S/A Kevin Adams.

- a. S/A Adams mother, Patricia M. Adams, born February 26, 1935, was a chronic pain patient attended by Dr. Maynard. *See* Exhibit P. Ms. Adams had osteoarthritis and terribly painful joints including her wrists and knees as well as low back pain that Dr. Maynard treated with Lorcet 10 mg (650 mg acetaminophen and 10 mg hydrocodone bitartrate). *Id.*
- b. Kevin Adams called the office and threatened “to get” Dr. Maynard for treating his mother’s pain with Lorcet’s but it was not clear that he was a DEA Agent, only that Patricia Adams’ son was upset with his mother’s medical treatment.
- c. Nevertheless after that call, Mr. Adams became the DEA case agent heading up a task force to investigate Dr. Maynard and he only visited Dr. Maynard once after that as part of the “investigative team,” under the false patient name of “Michael Lambert” (Count 11), lying that he had pain from old knee surgery, showing Dr. Maynard

the true scar from that knee surgery, and saying that it had acted up, causing him pain, when he was playing basketball. *See* Exhibit Q (and Agent Adams' testimony at trial). In Agent Adams' DEA 6, he objected that Dr. Maynard had examined his back and ankles, having been told the pain originated in Agent Adams' knee. *Id.* Agent Adams complaint, according to his report, appeared to be that Dr. Maynard examined him too closely. Dr. Maynard's examination "... culminated to be more of a search than [sic] an actual examination for [my] stated knee injury." *Id.*

- d. Toward the conclusion of the investigation, it was S/A Adams who then drafted the affidavit to conduct the search of Dr. Adams' medical practice. *See* Exhibit R. He confirmed he was a member of the "investigative team". *Id.* He also mis-stated, and therefore misled the warrant-issuing U.S. Magistrate, the Honorable Geoffrey W. Barnard, when he stated in his sworn affidavit, dated January 22, 2003, as to Aaron Houle, that Dr. Maynard was "a doctor that anyone could go to with money and

walk away with a prescription for anything that they wanted.” As indicated below, as of that date, the information that the government had regarding Mr. Houle was that he had pain and went to Dr. Maynard to be treated for pain.

- e. S/A Adams also testified before the grand jury against Dr. Maynard as the case agent, questioned by AUSA Chisholm, and he testified at the trial against Dr. Maynard. See Exhibit S (Grand Jury Excerpt).
- f. After the trial of this matter, Ms. Lynette Gumbs investigated whether Agent Adams was the son of Patricia Adams, and told undersigned counsel that she had confirmed that Mr. Adams was the son of Patricia Adams who had threatened “to get even” with Dr. Maynard.

ii. **Newly discovered evidence of perjured testimony at trial.**

- 1. There is newly discovered evidence that the principal government witness, Justin Krall, who testified as to the death of his “friend”, Aaron Houle, misled the jury when, under oath, he testified that Mr. Houle went to bed at 8:30 pm on May 26th instead of staying out with Mr. Krall until

2 AM the next morning drinking at a St. Thomas bar.

There is also newly discovered evidence that Mr. Houle was taking pills that were not prescribed by Dr. Maynard, as Mr. Houle was seen taking the pills from a tic-tac box rather than a prescription bottle:

- a. Following the trial of this matter, on or about April 5, 2007, Antoinette Rhymer, 43, a nurse at St. Thomas Hospital, after 20 years of nursing, stated that on the evening of May 26, 2001, she went to the bar, “Changes,” in St. Thomas, VI. She was there with three of her girlfriends and her brother, Antonio, now 41, and her Sister, Monique, now 35.
- b. She arrived at 10 pm on May 26, 2001, and met a heavy white person who was drunk already who identified himself, by name, as Aaron Houle. “He bought us all drinks,” said Ms. Rhymer. He was drinking a rum drink called, “Sex on the Beach,” consisting of several rums, peach schnapps, cranberry juice and grapefruit juice. He was with a “tall thin white guy” but she did not know his name. He bought her two of these rum drinks.
- c. While she was standing there, she saw Mr. Houle

reach into his pocket and take pills from a tic-tac box. She said that Mr. Houle said the pills were a controlled substance, Oxycodone. Asked if it could have been a prescription bottle that he had, she said that it was a tic-tac box.

- d. She thought Mr. Houle should have known better than drinking rum drinks, and taking these pills. She asked him what he was doing. She told him, as a nurse, that “you can’t drink and take these pills”. He said to “leave him alone”. She said that Mr. Houle was “taking them like they were candy,” that he had 7 to 10 of these pills while he was drinking four of these large rum “Sex on the Beach” drinks himself.
- e. They stood at the bar together drinking and talking from 10 pm on May 26, 2001 through 2 am on May 27, 2001 when Mr. Houle left with his friend; Ms. Rhymer left after Mr. Houle did. She said Mr. Houle was “totally out of it” when he left.
- f. When Mr. Krall was interviewed on May 27, 2001, the morning that Mr. Krall reported Houle’s death, he told the U.S. Virgin Islands Police Department

that he had put Mr. Houle to bed the night before at 8:30 pm. See Exhibit L, p. 1. When asked if Mr. Houle had taken any “medication,” he said yes, and, when asked what the “Oxy Cotton” was for, Mr. Krall said “pain.” *Id.* Asked what kind of pain, he said “back pain.” *Id.* Mr. Krall confirmed that Mr. Houle was also drinking alcohol.” *Id.*

- g. Several Years later, Mr. Krall made a negotiated plea agreement with AUSA Chisholm, on a simple drug possession charge, that could be violated if he didn’t “cooperate fully and truthfully” and if any statement or testimony he gave was “untruthful or incomplete.” See Exhibit M. His deal was also off if he had “any criminal liability for homicide,” presumably should he admit or be charged for his reckless conduct with his deceased friend, Mr. Houle, on that fateful night. *Id.*
- h. Mr. Krall told the grand jury that he had to be truthful as part of his agreement but he said on May 26th, the evening before Mr. Houle died, that he “put a movie in for [Aaron] to watch and told him to get some sleep.” See Exhibit N (excerpt of

grand jury). He also insisted to the grand jury that he “didn’t count [Mr. Houle’s] pills” or “watch what [Aaron] was doing.” *Id.*

- i. At that time before the grand jury, as for the period before he visited Dr. Maynard, his testimony was that he had prescriptions “for the medicines I needed ... and for the Oxycontin.” *Id.*, at p. 29. He explained to the grand jury in July, 2003 that he took these prescription drugs “for the pain...”. *Id.* He explained as well why he needed blood pressure medicine. *Id.*, at 31.
- j. Despite the agreement had with Mr. Krall, he was charged with a probation violation and an arrest warrant issued on June 23, 2006, then the warrant was stayed, then another arrest warrant issued on September 1, 2006, and his probation was finally extended by a year on February 15, 2007. *See* Exhibit O.
- k. At trial, on February 6, 2007, he testified that Mr. Houle did not go out the evening of May 26, 2007 – “not that I know of”, Tr. At 83, he “did not see [Mr. Houle] taking the pills,” Tr. At 82, but he was

“pretty sure he chewed” the Oxycodone pills, Tr.

At 105, but he had him “out of it” on the evening of May 26th, rather than the early morning hours of May 27th.

1. This new evidence prompts us to re-consider what Stephen McGarvey had to say, after he waived indictment and pleaded guilty to an information on or about February 6, 2003. *See* Exhibit K. Mr. McGarvey “confessed” that he engaged in a conspiracy with Aaron Houle to go to the Virgin Islands to obtain Oxycodone to sell in Boston. But then Mr. Houle got the pills in the Virgin Islands, telling Dr. Maynard that it was for back pain, and started downing them for himself, swallowing and chewing them, rather than hanging onto them, so that he could sell them. It makes any fair observer wonder if Mr. McGarvey didn’t give the government what prosecutor Chisholm plainly wanted – to get Dr. Maynard – in exchange for the deal that McGarvey wanted. There is good reason to question how uncritical AUSA Chisholm was when you consider that McGarvey – somewhat

inconsistently - told the grand jury that Mr. Houle was down in St. Thomas because he wanted to get a job down there. *See* Exhibit K (Grand Jury Excerpt), at pp. 4-5.

m. Mr. McGarvey apparently pleaded guilty but, at least according to the docket, has never been sentenced on that felony. Exhibit K (Docket Sheet), at p. 4 of 4.

(2) **Issues with a “substantial likelihood” to undermine the conviction**

- a. The prosecutor was biased against the Defendant and had a disqualifying conflict that should have resulted in the assignment of this case to another prosecutor;
- b. The case agent was biased against the Defendant and had a disqualifying conflict that should have resulted in the assignment of another agent to conduct and participate in this prosecution;
- c. The prosecution was “selective” – against a citizen from Nevis – and “vindictive” based on the prosecutor’s association with Dr. Maynard’s former wife, and because Dr. Maynard treated the case agent’s mother with controlled substances, of which the agent disapproved;
- d. The death of Aaron Houle could not be ascribed to Dr. Maynard, and the jury said so (See Exhibit T (the Jury Verdict Form – as to Count

One)¹ – and they said so despite this Court’s express jury instruction that the jurors should not reach that question in their verdict unless the jury resolved that Dr. Maynard was guilty as to count one.² When this Court denied Dr. Maynard’s first motion for a new trial “in the interests of justice,” disputing Dr. Maynard’s contention that this was “a compromise verdict”, this Court stated that the “jury’s verdict demonstrate[d] a careful debate about the effect of the evidence as to each count charged and a firm understanding of ‘proof beyond a reasonable doubt’ and ‘unanimous decision’ or lack thereof.” *See* Exhibit U (Court Order, dated April 4, 2007). If the jury had the “understanding” that the Court embraces in denying Defendant’s first motion for a new trial, then – we respectfully submit - how did they reach the question of Mr. Houle’s death, and decide that Dr. Maynard had nothing to do with it? The answer is manifest that they could not do this, except in contravention of this Court’s direction as to proof and the unanimous decision that this court required as a prerequisite before reaching the conclusion (we embrace) that Dr. Maynard did not

¹ The Jury Verdict Form offers the jury an alternative as to Count One, either “Not guilty” or “Guilty.” The jury checked neither. This is followed by the question, “Do you find the death of Aaron Houle was the result of unlawful distribution of OxyContin on May 23, 2001?” As to the latter question, the jury indicated by, X, that the answer to that question was “No.”

² This Court instructed the jury as to Count One as follows: “In Count One, which deals with the Houle recipient of a prescription, there are two parts. There’s a verdict sheet which shows you that there are two parts to it. The first is whether or not there was an unlawful prescription written to Houle. Only if the Government has met its burden or proof unanimously in your collective minds, do you go on to consider the second part of County One, which is whether or not, assuming in this instruction that there was unlawful drugs or drugs prescribed unlawfully beyond a reasonable doubt, whether the drugs prescribed resulted in any way in the death of Houle.” Tr. 2/13/07, at 61-62.

prescribe whatever caused Mr. Houle's death. What we have here, whether this Court acknowledges it or not, is a jury that had great difficulty with this prosecution despite an overreaching prosecutor, lying undercover patients, and the biased government expert who told the jurors, among other things, that they'd get high if they took a percocet. This court gave this jury instructions that embraced what the government expert told the jury was their duty. The jury resisted this overwhelming press of facts and law that just didn't fit their experience of what they thought was fair and just. In other words, what we have here is a combination of "jury nullification", to resist and extinguish a criminal charge brought by the government that they knew was false, but they then felt constrained that they had to do something, and proposed two guilty verdicts but, as we discuss shortly, that wasn't enough for this Court or for the government, so they were wrongly sent back to reconsider the verdict they had already rendered.

- e. There was also evidence of a conspiracy admitted, and conspiratorial statements by absent declarants, wrongly offered by the government through Mr. McGarvey, never "connected up" to Dr. Maynard, but nevertheless admitted at the trial of this matter to the prejudice of Dr. Maynard, as if he were a member of this conspiracy, had a meeting of the minds in this "conspiracy," and could be held accountable for the hearsay declarations that happened in his absence and without his

concurrence or knowledge.

- f. The agents all lied that they suffered from chronic pain; and this defense claim is not about “entrapment” (involving an innocent predisposition that a government agent somehow or other overcomes); this defense is instead about agents lying to deceive a citizen (Dr. Maynard) who had an innocent predisposition and never committed an illegal act; these agents therefore ultimately deceived the jury and this court in order to convict an innocent man. Nor was it evident – as this Court insisted in its earlier order - that the undercover agents were so obviously pretending to have pain. This court stated: “It was plain to the jury that the undercover agents were faking their complaints of pain.” See Exhibit U (Court Order). If any impartial observer would have concluded that the agents were transparently pretending, if it was so obvious, as this Court concluded, then the jurors would not have “split” on the 15 counts that involved 6 of the 9 agents including S/A Adams. Was it really obvious that Agent Adams was faking when he invited Dr. Maynard to scrutinize the knee injury he truly had? In the end, the jury focused on only three of those nine undercover agents and only four of the nine possible counts involving those three agents. Apparently, it was not so “plain” to the juror when the agents were “faking” and yet this court would hold Dr. Maynard liable on such questionable evidence. (In this regard we incorporate by reference the arguments

made in the reply filed in support of the earlier motion for a new trial.)

- g. The government's expert witness, on his most recent visit from Ohio where he practices addiction medicine, and not pain medicine, wrongly rendered an opinion on the ultimate issue of material fact as to what was "outside the course of professional practice" and, in so doing, set an *ad hoc* standard that violated constitutional due process and *ex post facto* standards and, most obviously, contravened the Supreme Court's holding in *United States v. Moore*, 423 U.S. 122, 143, 96 S.Ct. 335 (1975); *see also* Title 21, United States Code, Section 802(21). (In this regard we incorporate by reference the arguments made in the reply filed in support of the earlier motion for a new trial.)
- h. This court wrongly directed the jury to continue to deliberate when it had already rendered its compromise verdict on two counts, and said it had rendered its decision, in accordance with this Court's earlier instructions; although the jury posed no question to the Court, only its decision, this Court instructed the jury to continue to deliberate and thus coerced an additional two convictions when the jury had already announced a compromise verdict of two guilty counts:
 - i. The jury forwarded a note to this Court on February 15, 2007 that said: "The jury has gone through all counts three times and voted on each count. We have come to two unanimous guilty and two unanimous not guilty. All other charges are split." This note

was consistent with the instruction that the Court had earlier rendered and was sufficient unto itself.

ii. This Court next contradicted itself: "I'm not ... I'm prepared to accept the verdict now."

iii. Then this Court invited Mr. Rhea, Dr. Maynard's defense counsel to invite the jurors to continue deliberations: "If the defendant wishes the jury to deliberate further as to the split counts and run the risk of guilty verdicts on the split counts, I will do that, if that's what I understood you [Mr. Rhea, Dr. Maynard's trial counsel] to say."

iv. Mr. Rhea then plainly said: "That's not my desire."

v. Despite what Mr. Rhea said, this Court then, *sua sponte*, instructed the jurors to go back and deliberate. This Court gave an instruction to the jury that no one had requested or approved, at least not on the record, and that plainly led to two more guilty verdicts only minutes later. Thus did this Court impermissibly coerce – in a constitutional sense - two more guilty verdicts.

i. There is also good and sufficient cause to question whether Dr. Maynard did, in truth and fact, consent to the stipulation made to this court by Mr. Rhea that there was "a nexus" between the offense and to forego a jury determination as to that issue. This court did not question Dr. Maynard on the record. As undersigned counsel has been unable to

communicate with his client since discovering this representation in the transcript, I cannot confirm or deny that Dr. Maynard did agree. Family members insist that he did not consent and it was never discussed with him. I have not yet been able to confirm for myself that that is the case. Given that the jury asserted itself in nullification of this Court's directions in this case on at least one explicit matter, I would have been inclined to invite the jury to consider this issue, particularly after they hung on 164 counts of the indictment.

- j. When this Court considered bail, and AUSA Chisholm asked to remand Dr. Maynard and this Court invited argument, the arguments defense counsel made were not presented to the Court, particularly the discussion herein as to "exceptional reasons" that this Court may consider and, at that time, there was not before this court the question of Dr. Maynard's health. When you consider that Dr. Maynard practiced medicine from 2002 through 2007 when he was remanded, it is really hard to justify confinement pending sentence.
- k. The sentence here could rightly involve no jail time as the amount of the controlled substance involved was only 900 milligrams of opioids (see Chart – below), less than 1 gram, as the rest of the pills dispensed consist of Tylenol or Aspirin, available over the counter and not controlled substances. Arguably, a gram of opioid, if not under the sentencing guidelines, then at least under the sentencing factors merits

only the time that has already been served or even probation.

CHART: Less than 1 gram of opioid was dispensed in the four counts

Count 14	40 Percocet	200 mg – Oxycodone
Count 15	40 Percodan	200 mg – Oxycodone
Count 16	40 Vicodin ES	300 mg – Hydrocodone
Count 18	<u>40 Percodan</u>	<u>200 mg – Oxycodone</u>
TOTAL	160 pills	900 mg - Opioid

II. APPLICABLE LAW FOR GRANTING BAIL PENDING SENTENCING

A. General Remarks

For Dr. Maynard to be released immediately to bail, so that he may restore his health so thoroughly compromised by custody at MDC Guaynabo prison, in accordance with Title 18, USC, Section 3143(b), this Honorable Court must find not only that the traditional bail standards have been met, that is, that Dr. Maynard presents no flight risk, nor risk to himself or the community, but also that there is a “substantial likelihood” of granting Dr. Maynard a new trial, or that there are “exceptional reasons” why Dr. Maynard’s detention is inappropriate in accordance with 18 USC Section 3145(c).

When considering “exceptional reasons”, this Court may consider the principal statutory policy reason for detention pending sentence, the concern about recidivism. In this case, Dr. Maynard presents no chance of recidivism while released on bail, given that he has been practicing for years until the day he was remanded -- and there was not a single prescription that the government can say was wrongly issued.

B. THE STATUTORY FRAMEWORK

Under 18 U.S.C. § 3143(a)(2), if a defendant is convicted of an offense for which the maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act, 21 U.S.C. § 801, the presumption is that the Court detain the defendant.

Detainment is presumed unless (1) there is "a substantial likelihood that a motion for acquittal or new trial will be granted" or "the Government has recommended that no sentence of imprisonment be imposed" and (2) the Court "finds by clear and convincing evidence that the person is not likely to flee or pose a danger to any other person or the community." 18 U.S.C. § 3143(a)(2).

Once detained in accordance with § 3143(a)(2), an exception contained in § 3145(c) allows release pending sentencing or appeal "under appropriate conditions, by the judicial officer, if it is clearly shown that there are exceptional reasons why such person's detention would not be appropriate" and the defendant poses no risk of flight. *See* 18 U.S.C. § 3145(c) (emphasis added).

It is well-established among the circuit courts of appeals that district courts may apply section 3145(c). *United States v. Garcia*, 340 F.3d 1013, 1014 (2003); *United States v. Mostrom*, 11 F.3d 93, 95 (8th Cir.1993); *United States v. Koon*, 6 F.3d 561, 562-63 (9th Cir.1993); *United States v. Jones*, 979 F.2d 804 (10th Cir.1992); *United States v. Herrera-Soto*, 961 F.2d 645, 646-47 (7th Cir.1992); *United States v. DiSomma*, 951 F.2d 494, 496 (2d Cir.1991); *United States v. Carr*, 947 F.2d 1239 (5th Cir.1991)); *United States v. Thompson*, 951 F.2d 351 (6th Cir.1991)(unpublished).

As interpreted by the courts, to qualify for release under § 3145(c) based upon a finding of exceptional reasons, the defendant is not also required to meet the requirements of § 3143(a)(2). *See, e.g., United States v. Kinslow*, 105 F.3d 555 (10th Cir. 1997).

Thus, to qualify for the “exceptional reasons” exception a defendant does not have to additionally show that there is a likelihood of acquittal or new trial or that the Government has requested no imprisonment.

C. Legislative History

Prior to passage of the current version of § 3143 and § 3145, the Bail Reform Act afforded substantial discretion in the district court regarding detention of defendants who were convicted but awaiting sentencing or appeal.

Believing that there was "little need for judicial discretion to release those who have been found guilty," in 1989, Senator Paul Simon introduced the Mandatory Detention for Offenders Convicted of Serious Crimes Act. 135 Cong. Rec. S15201-02, S15202, 1989 WL 188196 (Nov. 7, 1989), cited in Jonathan S. Rosen, *An Examination of the "Exceptional Reasons" Jurisprudence of the Mandatory Detention Act: Title 18 U.S.C. §§ 3143, 3145(C)*, 19 Vt. L.Rev. 19 (1994).

The bill was intended to prevent defendants convicted of a violent or serious drug trafficking crime "from reentering the community where they pose a danger and can commit further offenses" 135 Cong. Rec. S7505-02, S7511, 1989 WL 192345 (June 23, 1989).

Senator Simon believed that "[t]here is simply no reason that an individual convicted of a violent crime or serious drug trafficking offense should be back on the street. This legislation would ensure that dangerous individuals are kept where they belong, in prison." *Id.*

Congressman Glickman addressed the House of Representatives regarding the Mandatory Detention for Defendants Convicted of Serious Crimes Act on March 6, 1990. Mr. Glickman stated:

“There is almost never a good reason for letting someone already convicted of a violent crime or serious drug trafficking offense back on the street.... There is no presumption of innocence once a defendant has been convicted, so the law should not allow a convicted criminal to enjoy the privileges of an innocent man.... It is difficult enough to convict drug dealers and violent criminals, without allowing them back on the street to commit more crimes before sentencing.”

136 Cong. Rec. H638-03, 1990 WL 30306 (March 6, 1990).

The intent of the bill was clearly to limit judicial discretion in the case of convicted drug traffickers or violent criminals who might commit crimes once released; but Dr. Maynard was released from 2002 through 2007 without any allegation that he committed any crime, so the fear of recidivism is chimerical.

In part, that is why the Justice Department suggested “exceptions” under which discretion should remain. *See United States v. DiSomma*, 951 F.2d 494, 497 (2d Cir.1991).

D. “Exceptional Reasons”

In a letter to Senator Simon, dated July 26, 1989, Assistant Attorney General Carol T. Crawford offered two examples of “exceptional circumstances”. *Id.* (stating that “the legislative history on the issue is sparse and uninformative” and concluding that “the only useful historical document” is the Justice Department letter).

The first example hypothesized an elderly man who was convicted of the mercy killing of his wife and who challenged the applicability of the federal murder statute on appeal. The second example hypothesized a seriously wounded drug dealer whose appeal raised a novel search and seizure issue. In both examples, as here, especially given the motion for new trial, the probability of repeat criminal behavior was slim and the validity of the conviction remained in question.

As noted by the Second Circuit, “[t]he examples given in the Crawford Letter present a unique combination of circumstances giving rise to situations that are out of the ordinary.” *Id.*

Ultimately, Senator Simon's bill, with the exceptional reasons provision, was added as an amendment to the 1990 Crime Bill, and was enacted November 29, 1990. Pub.L. No. 101-647, 104 Stat. 4827 (1990).

The mandatory detention provision was codified at 18 U.S.C. § 3143. Section 3143(a)(2) requires immediate detention upon conviction of a serious drug trafficking offense or a violent crime.

The “exceptional reasons” exception to mandatory detention pending sentencing or appeal was codified at 18 U.S.C. § 3145(c).

E. Defining Exceptional Reasons

Under § 3145(c), this Court may release Defendant pending sentencing upon a showing that an "exceptional reason" makes Defendant's further detention inappropriate. See 18 U.S.C. 3145(c).

The statute does not define the parameters of an "exceptional reason." While courts appear to agree that circumstances must be "out of the ordinary," "uncommon," or "rare," "[n]o opinion has even begun definitively to identify the factors a court must consider in deciding the exceptional reasons issue." *United States v. Koon*, 6 F.3d 561, 565 (9th Cir.1993).

In each case, "the determination of whether 'exceptional reasons' have been clearly shown is quintessentially a fact-intensive inquiry requiring a case by case analysis." *United States v. Herrera-Soto*, 961 F.2d 645, 647 (7th Cir.1992) and *United States v. DiSomma*, 951 F.2d 494, 497 (2d Cir.1991)).

Assistant Attorney General Crawford's letter demonstrates that the exception was intended for only those rare instances where there is little to no chance that the defendant can engage in recidivist conduct and legal questions involving the validity of the conviction remain unresolved, thereby making immediate detention of the defendant pending sentencing or appeal an unduly harsh consequence.

Upon review of cases which have applied the exceptional reasons exception, courts ordinarily find both extremely unique personal hardship and a potential for a reduced sentence or success on appeal. *See, e.g., United States v. Charger*, 918 F.Supp. 301 (D.S.D.1996) (finding exceptional reasons warranting release where a young Native American man was convicted of a "single aberrant act" of violence, he showed "almost

constant remorse," the court believed reasons for a downward departure existed, and imprisonment would hinder the defendant's ability to find guidance in his Native American traditions); *United States v. Banta*, 165 F.R.D. 102, 104 (D.Utah 1996) (stating that the "possibility that defendant may serve the imposed sentence of confinement before resolution of his appeal provides an 'exceptional reason' for release").

Considering the legislative history, the language of the statute, and relevant case law, this court should consider several salient factors that favor Dr. Maynard in this case:

(1) whether detention imposes an unusually harsh effect of a personal nature not ordinarily experienced by an individual facing incarceration,

(2) whether the defendant is incapacitated from or extremely unlikely to engage in recidivist behavior while released,

(3) whether additional incarceration would result in an unjust extended period of detention because the defendant's uniquely low culpability is likely to reduce the sentence or a novel legal question for appeal exists.

Courts view these factors as guiding principles and do not consider them exhaustive or binding – but they have great relevancy in Dr. Maynard's case – as the affirmative responses favor Dr. Maynard.

In light of the discretion granted to the courts by Congress, in each case the factors should be accorded varying weight and no one factor shall be determinative. *See DiSomma*, 951 F.2d at 497 (stating that the district courts maintain the "full exercise of discretion in these matters").

F. Application

In this case, we point to Dr. Maynard's questionable health, the newly discovered evidence, and invite this court to re-consider the remaining issues from Defendant's earlier motion, the demonstrated fact that Dr. Maynard presents no chance of any recidivism, and the sentence of probation or "relatively" brief time that this Court may impose at sentencing..

Most importantly, Congress' main goal in passing the mandatory detention provision was to keep drug traffickers and violent criminals off the streets. But Dr. Maynard was "on the street" from 2002 through 2007 without any alleged misconduct.

In the concluding aspect of this combined motion we discuss the legal merits of those issues raised herein.

III. APPLICABLE LAW FOR GRANTING NEW TRIAL UNDER RULE 33

Rule 33 of Federal Rules of Criminal Procedure provides, in relevant part, that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." A motion for a new trial based on newly discovered evidence must be filed within three years after the verdict is rendered. A motion based on any other reason must be filed within seven days of the verdict. *Id.* This motion, insofar as it is based on a claim of newly discovered evidence, is timely.

IV. DISCUSSION OF UNDERLYING ISSUES

A. The prosecutor suffered a disqualifying conflict

In *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935), the Court declared:

“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer.”

In the past, the Justice Department applied to its attorneys the ABA Model Code, 28 CFR § 45.735-1(b).

Rule 1.7 of the American Bar Association (ABA) Model Rules of Professional Conduct states that a “concurrent conflict of interest exists” if “there is a significant risk” that the representation of the government “will be materially limited by ... a personal interest of the lawyer.”

The personal relationship of AUSA Chisholm with the estranged wife and family of the defendant’s former in-laws raise serious questions about the “personal interest of the lawyer” in the conduct of this prosecution. This therefore involves a question of the fair administration of justice as bias for the family of Dr. Maynard’s estranged wife may have been the motive that drove AUSA Chisholm to pursue this case and to disregard indications of innocence, and alternative theories supporting innocence, that were in abundance in this case – as reflected by the jury’s split verdict.

In addition, AUSA Chisholm's attendance as a patient of Dr. Maynard makes Ms. Chisholm a witness and Rule 3.7 prohibits a lawyer "acting as advocate at a trial in which the lawyer is likely to be a necessary witness."

The disqualifying conflict that confounded AUSA Chisholm's participation as a prosecutor and her office visit to Dr. Maynard are an adequate basis to call her as a witness to illustrate to the jury her animus in this prosecution.

It is rudimentary that an advocate may not continue as counsel when her testimony undermines the interest of her client.

ABA Rule 1.16 states that a lawyer shall withdraw from representation when "the representation will result in violation of the rules of professional conduct or other law." In this case, there is no question that AUSA Chisholm could have withdrawn "without material adverse effect on the interests of the client [the US Government]." *Id.*

The requirement of a disinterested prosecutor is consistent with our recognition that prosecutors may not necessarily be held to as stringent a standard of disinterest as judges. "In an adversary system, [prosecutors] are necessarily permitted to be zealous in their enforcement of the law," *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248, 100 S.Ct. 1610, 1616, 64 L.Ed.2d 182 (1980).

While there are instances that might justify deference to prosecutorial zeal, the facts of this case do not justify such deference. We hasten to underscore that the determination whether there is an actual conflict of interest is distinct from the determination whether that conflict resulted in any actual misconduct.

The requirement of a disinterested prosecutor is the preferred course since any other schema impermissibly injects “a personal interest, financial or otherwise, into the enforcement process [that] may bring irrelevant or impermissible factors into the prosecutorial decision.” *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-250, 100 S.Ct. 1610, 1616-1617, 64 L.Ed.2d 182 (1980).

We respectfully submit that the error in this case is “so fundamental and pervasive” as to require reversal. *Compare Delaware v. Van Arsdall*, 475 U.S. 673, 681, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986). An error is fundamental if it undermines confidence in the integrity of the criminal proceeding. *Rose v. Clark*, 478 U.S. 570, 577-578, 106 S.Ct. 3101, 3105-3106, 92 L.Ed.2d 460 (1986); *Van Arsdall, supra*, 475 U.S., at 681-682, 106 S.Ct., at 1436-1437; *Vasquez v. Hillery*, 474 U.S. 254, 263-264, 106 S.Ct. 617, 623-624, 88 L.Ed.2d 598 (1986). And that’s what we have here.

It is a fundamental premise of our society that the state wield its formidable criminal enforcement powers in a rigorously disinterested fashion, for liberty itself may be at stake in such matters. We have always been sensitive to the possibility that important actors in the criminal justice system may be influenced by factors that threaten to compromise the performance of their duty. While the standards of neutrality for prosecutors are not necessarily as stringent as those applicable to judicial or quasi-judicial officers, *see Jerrico*, 446 U.S., at 248-250, 100 S.Ct., at 1616-1617, there is no real difference when a conflict is discovered.

This court may therefore not disregard a circumstance where the prosecutor is subject to influences that undermine confidence that a prosecution can be conducted in

disinterested fashion, in a proceeding in which this officer plays the critical role of preparing and presenting the case for the defendant's guilt.

Prosecutors “have available a terrible array of coercive methods to obtain information” such as “police investigation and interrogation, warrants, informers and agents whose activities are immunized, authorized wiretapping, civil investigatory demands, [and] enhanced subpoena power.” C. Wolfram, *Modern Legal Ethics* 460 (1986).

The misuse of those methods “would unfairly harass citizens, give unfair advantage to [the prosecutor's personal interests], and impair public willingness to accept the legitimate use of those powers.” *Id.*

A concern for actual prejudice in such circumstances misses the point, for what is at stake is the public perception of the integrity of our criminal justice system. “[T]o perform its high function in the best way [,] ‘justice must satisfy the appearance of justice,’” *Offutt v. United States*, 348 U.S. 11, at 14, 75 S.Ct. 11, at 13 (1954).

A prosecutor with conflicting loyalties presents the appearance of precisely the opposite. Society's interest in disinterested prosecution therefore would not be adequately protected by harmless-error analysis, for such analysis would not be sensitive to the fundamental nature of the error committed.

B. The case agent suffered from a disqualifying bias

Assuming, *arguendo*, that Agent Adams’ concealed bias and motive “to get” Dr. Dr. Maynard for treating his mother was not a constitutional error (although we insist it was), the error could only be harmless if “it [was] highly probable that the error did not

contribute to the judgment.” *See Government of Virgin Islands v. Toto*, 529 F.2d 278, 284 (3d Cir.1976). But “high probability” means it was a “sure conviction that the error did not prejudice” the defendant. *United States v. Jannotti*, 729 F.2d 213, 219-20 (3d Cir.), cert. denied, 469 U.S. 880, 105 S.Ct. 243, 244, 83 L.Ed.2d 182 (1984).

There is no “high probability”, nor “sure conviction,” that Dr. Maynard was not prejudiced. If Agent Adams’ bias and motive had been before the jury, then the jury could have considered the other agent’s conduct in the light of what motivated Agent Adams. As a former federal prosecutor, we must appreciate the fact that any jury, no matter what instructions may be rendered by the court, presumes the regularity of practice and honesty of a government prosecutor or agent – unless and until the contrary is demonstrated. It would have mattered to this jury that the case agent on the case set out “to get” Dr. Maynard for the medical treatment rendered to his mother. The error, even if not constitutional, was not harmless, and the only remedy here is a new trial.

C. The prosecution was “selective” – against a citizen from Nevis – and “vindictive” based on the prosecutor’s association with Dr. Maynard’s former wife, and because Dr. Maynard treated the case agent’s mother with controlled substances, of which he disapproved.

1. Selective

Under the equal protection component of the Fifth Amendment's Due Process Clause, the decision whether to prosecute may not be based on an arbitrary classification such as race or religion, and that includes the fact that Dr. Maynard came from Nevis and was not born or accepted in St. Thomas as were AUSA Chisholm and Ms. Cleque. *Oyler v. Boles*, 368 U.S. 448, 456, 82 S.Ct. 501, 505-506, 7 L.Ed.2d 446 (1962).

We allege that the prosecutorial policy was directed at Dr. Maynard because he was from Nevis, that the policy had a discriminatory effect and was motivated by a discriminatory purpose. *Id.*

Defendant Maynard further asserts that similarly situated individuals from St. Thomas were not prosecuted. *Ah Sin v. Wittman*, 198 U.S. 500, 25 S.Ct. 756, 49 L.Ed. 1142 (1905). *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and *Hunter v. Underwood*, 471 U.S. 222, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985).

2. Vindictive

In cases in which action detrimental to a defendant has been taken after the exercise of a legal right, in this case, the right to treat patients and to be treated, the presumption of an improper vindictive motive has been found where a reasonable likelihood of vindictiveness existed. *Compare North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); *Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974); cf. *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978).

Combining the disqualifying conflicts of the prosecutor and the chief investigative agent, there is a reasonable likelihood of vindictiveness.

D. There was evidence of a conspiracy, and conspiratorial statements by absent declarants, wrongly offered by the government and admitted at the trial of this matter by this Court when there was no evidence that Dr. Maynard was a member of that conspiracy, and when indeed the evidence was to the contrary.

In this case, conspiracy was not charged against Dr. Maynard but evidence of a conspiracy and the hearsay statements of absent declarants were admitted.

More particularly, Stephen McGarvey testified what the decedent, Aaron Houle told Mr. McGarvey: “He [Aaron Houle] said he had could get about 30 to 35 dollars for each [Oxycodone] pill.” Tr. 2/6/07, at 65. There was no other person who could make that statement except the absent and deceased declarant. There was no rule of evidence that permitted it to be admitted against Dr. Maynard.

Another illuminating bit of testimony, in this same vein, was Mr. McGarvey’s statement that: “the plan was with me and Aaron [Houle]” and not Mr. Krall, and, presumably, also not Dr. Maynard. Tr. 2/6/07, at 70.

The admissibility of this evidence was plain error and prejudicial and there was no exception that permitted this evidence to be considered by the jury.

E. The agents all lied that they suffered from chronic pain; and this defense claim is not about “entrapment” (involving an innocent predisposition that a government agent overcomes); this defense is instead about agents lying to deceive a citizen (Dr. Maynard) who had an innocent predisposition and never committed an illegal act.

In the 1970’s, the Supreme Court of the United States wrestled with the question of whether the Controlled Substances Act (“CSA”) even applied to physicians.

In the Supreme Court case of *United States v. Moore*, 423 U.S. 122 (1975), the court decided that the Act did apply to any physician who went outside the bounds of professional practice and who acted as a “pusher – not as a physician.”

This court rightly instructed the jury, consistent with *Moore, supra*, that it had to find that Dr. Maynard had the “specific intent” to become a drug pusher but this Court overlooked to instruct the jury that, if the Accused was “conned” by the undercover agents, or by any other patient for that matter, then he lacked the requisite specific intent to be convicted.

A medical practitioner who acts outside the course of professional medical practice may be convicted under Section 841 (a)(1) but only if he does so intentionally. *United States v. Moore*, 423 U.S. 122, 124, 96 S. Ct. 335 (1975). The practitioner had to have acted deliberately in order for him to be convicted of a crime. *See Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240 (1952)(“the contention that an injury can amount to a crime only when inflicted by an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.”)

In *United States v. Rosenberg*, 515 F.2d 190 (9th Cir. 1975), the Court said, “the jury [must] look into [a practitioner’s] mind to determine whether he prescribed the pills for what he thought was a medical purpose or whether he was passing out the pills to anyone who asked for them.” *Id.*, at 197.

Unfortunately, this Court in the case of Dr. Maynard did not instruct the jury as to one aspect of the case involving specific intent that we now have to consider and that is, if Dr. Maynard was “conned” by any patient, necessarily including the undercover agents, and any other patient for that matter, then he could not have formed the requisite

specific intent to commit the crime of drug distribution under 21 United States Code, Section 841(a)(1).

In *United States v. Tran Trong Cuong*, 18 F.3d 1132, 1144 (4th Cir. 1994), the court plainly stated that, if a patient “conned” a physician, who gave drugs to the conniving patient, the physician lacked the knowledge and the specific intent to commit the crime of distribution.

In *United States v. Feingold*, 454 F.3d 1001 (2006), the Court discussed the rationale for requiring proof of “specific intent,” for otherwise the standard for misconduct is no more rigorous than a negligence case, and thus insufficiently rigorous, in a constitutional sense, to prove a crime.

What we have in this case is a government that is not satisfied trying to detect crime; it goes out and makes it up. The government sent out undercover agents, posing as pain patients to visit a physician in his medical practice, and they lied as convincingly as their imaginations allowed, to the effect, that they had back pain or migraine headaches or bent elbows.

The agents appeared to prefer storied pain that neither surgery nor alternative therapies would cure and declared symptoms that imaging techniques almost certainly could not confirm. Agent Poist even resisted Dr. Maynards’ suggestion to have an x-ray – insisting he had no broken bones.

There are charts and records from the physician, from Dr. Maynard, that confirms what the agents did, providing evidence of pain and of Dr. Maynard’s evaluation for the pain that they claimed to have.

In each and every case, in other words, each of these undercover agents, posing as patients, gave the physician good and sufficient reason to believe that they had the pain that they said they had.

Unsurprisingly, the undercover agents were prescribed by the physician, by Dr. Maynard, according to the symptoms that they exhibited and the representations that they made.

The government's answer, in its various formulations, when not making inflammatory and conclusory declarations against Dr. Maynard, boils down to some variation or other of how the physician "could have" or "should have" understood that these agents were "faking it"— if he could have gotten their true medical records from DEA, or run one test or another that would have uncovered their deception, or if he could have just read their lying minds.

The physician's failure to figure out the agents' deception is treated as tantamount to drug dealing when it really couldn't be any more than bad medical practice—if that.

When I object that these undercover agents, by lying as they have, are committing a fraud on the physician and on the court, the government may say "but that's what the agents do."

As a former federal prosecutor who prosecuted drug cases, it is true that agents do tell lies when undercover but not these kinds of lies. For instance, we are accustomed to an agent pretending to be a drug dealer or customer who is engaged in unalloyed criminal conduct himself. That's an "acceptable" lie.

But how may it be a permissible investigative technique for an undercover agent to pose as a legitimate patient who has pain? Given the facts of this case, and the argument that Dr. Maynard was being “conned,” the jury should have been instructed that they could find Dr. Maynard innocent, if they found he had been conned, for had he been “conned”, as we insist that he was, then he could not form the requisite specific intent. In this case, Dr. Maynard was “conned” and, in the “interests of justice”, we now request that this Court cure that error by ordering a new trial and, if necessary, holding an evidentiary hearing so we may consider the perfect storm of injustice that was this trial, namely, agents lying they were ill, a bought and paid doctor selling junk science, and a prosecutor misrepresenting the facts and exaggerating the medical science to inflame the jury to convict on any charges on anything at all.

F. The government’s expert witness, on his most recent visit from Ohio where he practices addiction medicine, and not pain medicine, wrongly rendered an opinion on the ultimate issue of material fact as to what was “outside the course of professional practice” and, in so doing, set an *ad hoc* standard that violated constitutional due process and ex post facto standards and, most obviously, contravened the Supreme Court’s holding in *United States v. Moore*, 423 U.S. 122, 143, 96 S.Ct. 335 (1975).

If the expert is offering nothing more than a legal conclusion, and that is tantamount to telling the jury what result it should reach, that is properly excludable. See, eg., *Woods v. Lecureux*, 110 F.2d 1215, 1220 (6th Cir. 1997).

What purpose could the expert testimony in this case have except to direct the jury to embrace a legal conclusion, as the very language of the offending expert opinion

mimicked precisely the jury instruction that we've challenged herein?

Instead of aiding the jury's deliberation, the purpose of the expert opinion was to supplant it, and by the prosecution's own analysis.

G. This court wrongly directed the jury to continue to deliberate when it had already rendered its compromise verdict on two counts, and said it had rendered its decision, in accordance with this Court's earlier instructions

Well-settled precedent establishes that a criminal defendant being tried by a jury is entitled to an uncoerced and unanimous verdict of that body. *See Lowenfield v. Phelps*, 484 U.S. 231, 241, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988). In this case, the jury had told the court what was its decision, and this court coerced the jury to re-consider its decision, prompting additional convictions that, but for the Court, would not have occurred.

Plain error is that which is "clear" or "obvious." *United States v. Olano*, 507 U.S. 725, 734, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). That's what we have here.

FOR THE FOREGOING REASONS, based on the pleadings and proceedings had herein, Dr. Maynard urges this Honorable Court to grant him bail immediately, and to grant him the new trial he has requested and the concomitant evidentiary hearing, as a

predicate to granting that motion, and for such other relief as this Court deems fit and just.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Motion for Bail upon the Honorable Kim L Chisholm, Assistant U.S. Attorney, located at Ron De Lugo Federal Building, 5500 Veterans Drive, Suite 260, St. Thomas, VI 00802, by forwarding a copy by Federal Express (w/ the attachments), and by forwarding a facsimile copy (w/o the attachments) this 18th day of March, 2007.

John P. Flannery II