

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

|                             |   |                             |
|-----------------------------|---|-----------------------------|
| UNITED STATES OF AMERICA    | ) |                             |
|                             | ) | Criminal No.: 03-162        |
| Plaintiff,                  | ) |                             |
|                             | ) | DR. ROTTSCHAEFER'S REPLY TO |
| vs.                         | ) | GOVERNMENT'S RESPONSE TO    |
|                             | ) | SECOND MOTION FOR NEW TRIAL |
| BERNARD ROTTSCHAEFER, M.D., | ) |                             |
|                             | ) |                             |
| Defendant.                  | ) | (Electronically Filed)      |
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## **I. Introduction**

This case is before the court on Dr. Bernard L. Rottschaefer's motion for a new trial. The motion is based on newly discovered evidence from each of five complaining witnesses that rebuts evidence offered to prove the first and third elements of the crimes for which he was convicted. In the opening memorandum in support of his motion, Dr. Rottschaefer provided the court detailed examples of the areas in which the new evidence rebutted material parts of the prosecution evidence.

The government's response does not directly address the new, contradictory evidence. The government's response relies primarily on the evidence presented at trial, and other testimony given in the civil cases, to argue that other evidence of guilt exists. That argument cannot avoid the conclusion that a new trial is required, for two reasons. First, it ignores the primacy of the new evidence. Only the women could answer the ultimate question before the jury: Did the women have medical conditions or complaints that justified the treatment provided? The other evidence could show a lack of documentation, or lax treatment, or other problems, but the question for the jury was whether or not the prescriptions were issued as medical treatment. Only the women could say what they felt, and what pains or anxiety they suffered, and their testimony on those points affects the light in which the jury views the charts, the expert witness's interpretations of the charts, and the concerns from family members and law enforcement about whether the women needed the medication.

Second, the government's argument misunderstands the standard for granting a new trial and ignores this court's broad discretion to pursue the interest of justice. The government relies on a misstatement of the standard for granting a new trial to emphasize other evidence supporting

the government's case, but that is only part of this court's inquiry. The court must evaluate the other evidence in light of the newly discovered evidence, to determine the effect of the new evidence on the other evidence and the resulting strength of the government's case on retrial. This court's ultimate determination is whether the new evidence would probably produce an acquittal on retrial (the standard as expressed in case law); that is, whether the interest of justice requires a new trial (the standard as expressed in Rule 33). That determination requires the court to consider the light in which the newly discovered evidence puts the case, a consideration the government ignores. Viewed in its totality, the government's evidence on retrial is not "overwhelming," as the government asserted. The women's confirmation, in sworn testimony, that they had the very conditions that Dr. Rottschaefer claimed to be treating is likely to produce an acquittal. A new trial is required.

## **II. The Government's Response in Summary**

### **A. Summary of trial evidence (Response at 6-32)**

After recounting the procedural history of the case, the first half of the government's response summarizes the evidence from the prosecution. This is only a summary of the evidence already heard by the court; it does not present any new information to the court. It is most notable for its repeated reliance on the very evidence now rebutted: the women's claims during the underlying prosecution that they had no medical conditions requiring treatment, but instead received prescriptions to feed their drug addictions. It is also notable for illustrating the government's previous non-reliance on the sexual allegations.

This summary of the underlying trial helps illustrate exactly why the newly discovered evidence is material and requires a new trial. The government's case hinged on the jury finding

that the prescriptions were not intended to treat a medical condition, but rather to feed a drug addiction. Given the prevalence and importance of the women's denials and misrepresentations of their medical conditions and complaints in the prosecution, the evidence rebutting that testimony--and establishing in its place that the women did, in fact, have the very conditions and complaints that the medications are intended to treat--is likely to produce an acquittal.

**B. Standards for evaluating a motion for new trial (Response at 32-37)**

**1. The legal standard**

The standard for evaluating a motion for new trial is well-settled. A new trial should be granted when the "interest of justice" requires it. Fed. R. Crim. P. 33. The parties agree that the courts employ a five-part test for measuring the interest of justice. *United States v. Iannelli*, 528 F.2d 1290, 1292 (3rd Cir. 1976). The test is simply a tool; it does not supplant the interest of justice standard. *United States v. Taglia*, 922 F.2d 413, 415-16 (7th Cir. 1991); *United States v. Custis*, 988 F.2d 1355, 1359 (4th Cir. 1993). On the fifth prong of the test, Dr. Rottschaefter provided the Supreme Court's explanation of the relevant analysis of a motion for new trial based on new evidence (there, new evidence discovered as a result of a *Brady* violation):

"The second aspect of \* \* \* materiality bearing emphasis here is that it is not a sufficiency of the evidence test. \* \* \*. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."

*Kyles v. Whitley*, 514 U.S. 419, 434-35 (1995), quoted in Dr. Rottschaefter's opening memorandum at pp. 8-9. That is, the analysis is "not a sufficiency of the evidence test," because a motion for new trial based on newly discovered evidence does not seek to establish "that some

of the inculpatory evidence should have been excluded." *Id.* Rather, because the motion asks the court to determine the effect of the newly discovered evidence, the court's analysis is whether the new evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.*

The government is mistaken when it responds by narrowing the question to "whether there was sufficient independent evidence to support a conviction, *instead of* whether the new evidence was likely to create a reasonable doubt." Government's Response ("Response") at 36-37 (emphasis added), citing *United States v. Saada*, 212 F.3d 210, 216 (3rd Cir. 2000). The government's use of "instead of" shows that it views the two inquiries as distinct; in fact, they are two ways to say the same thing (*i.e.*, whether the effect of the new evidence on retrial would be to "probably produce an acquittal"), and *Saada* does not say otherwise.

Both *Saada* and the case it cites, *United States v. Adams*, 759 F.2d 1099 (3rd Cir. 1985), *cert. denied*, 474 U.S. 906 (1985), cited and relied upon the well-settled standard: whether the new evidence would "probably produce an acquittal." *Saada*, 212 F.3d at 216 (citing, *inter alia*, *Iannelli* for the standard to apply); *id.* at 217 (holding that the newly discovered evidence in that case "failed another requirement for a new trial--that it would probably produce an acquittal"); *Adams*, 759 F.2d at 1108 (citing *Iannelli* for standard); *id.* ("The evidence, however, was merely impeaching and almost certainly would not produce an acquittal"). Those cases do not provide an alternate test; rather, *Saada* and *Adams* merely allow that a district court's statement that there is sufficient independent evidence of guilt is an acceptable way to say that the newly discovered evidence is not likely to produce an acquittal on retrial. They do not controvert *Iannelli*.

Likewise, *Saada* and *Adams* do not controvert the Supreme Court's explanation of the analysis in *Kyles*. In *Saada*, father and son defendants owned a business facing significant financial difficulties. 212 F.3d at 213-14. They contacted a cousin, Rishty, "for help in an insurance fraud scheme." *Id.* at 214. Rishty brought in three others--Beyda, Marchello, and Wagner--to execute the fraud. *Id.* The younger Saada and Beyda intentionally broke a sprinkler head in the business's warehouse to flood the merchandise. *Id.* The Saadas then filed an insurance claim, and from their respective business positions, Rishty, Marchello, and Wagner investigated and processed the claim, resulting in an insurance payout to the Saadas. *Id.* at 214-15. The Saadas paid a cut of the proceeds to Rishty, who paid Beyda, Marchello, and Wagner out of his share. *Id.* at 215.

The newly discovered evidence showed that, after the defendant's trial, in a different case, Rishty induced a person to give false testimony. *Id.* at 215-16. The Third Circuit concluded that such evidence was merely impeaching, because there was "no exculpatory connection" between the newly found evidence and the case against the Saadas. *Id.* at 216. The evidence only impeached Rishty's credibility; it did not show that the Saadas did not intentionally flood their warehouse. The Third Circuit also concluded that the newly found evidence would not probably produce an acquittal, because evidence independent of Rishty's testimony, including Beyda's testimony, separately established guilt. *Id.* at 217. Because the only effect of the new evidence was to impeach Rishty, it did not affect the other trial evidence (*i.e.*, did not put it in a different light), and so would not probably produce an acquittal.

The Third Circuit's analysis in *Saada* does not employ or endorse a different standard, and does not call into question the Third Circuit's standard as expressed in *Iannelli* or the

Supreme Court's explanation of the analysis as expressed in *Kyles*. *Saada* simply accepts that there is more than one way to express the standard; it does not change the standard. However the district court expresses its finding--that the evidence is or is not put in such a different light as to probably produce an acquittal; that other trial evidence independent of (or unaffected by) the newly discovered evidence is or is not sufficient to produce a conviction (*i.e.*, will not probably produce an acquittal); or that the trial evidence viewed in light of the new evidence is or is not likely to produce reasonable doubt (*i.e.*, produce an acquittal)--the standard remains the same.

The same is true for *Adams*. In *Adams*, the witness admitted at trial "to a minimum of twenty instances of unsavory conduct, ranging from infidelity to his wife to a conviction of misconduct in office while a public official." 759 F.2d at 1108. After trial, the defendant discovered new evidence of an additional instance of misconduct: a jewel robbery. *Id.* The Third Circuit concluded that such evidence was merely impeaching, and that even if the jury disregarded that witness's testimony, the other, unaffected evidence "was more than sufficient to sustain a finding of guilt." *Id.* In other words, the new evidence that only impeached a single witness did not put the whole case in a different light and would not probably produce an acquittal. As discussed above with *Saada*, *Adams* did not employ or endorse a different standard, and does not suggest that the various ways of expressing the standard in fact provide different tests.

In sum, the government makes a crucial mistake, which then shapes its response, when it argues that *Saada* provides one standard *instead of* another. There is only one standard, and it is settled: whether a new trial, with the new evidence, is likely to produce an acquittal.

Because this motion for new trial is based on newly discovered evidence, it asks the court to consider more, not less, evidence. As *Kyles* explains, that is why a straight sufficiency of the evidence test is not used. If the evidence were not sufficient, there would not be a judgment of conviction to move against in the first place. The question on newly discovered evidence is how the new evidence affects the case as it was presented to the jury. The court must determine the effect of the new evidence and the strength of the government's case in light of the new evidence, to determine whether a jury hearing all of the evidence would be likely to find guilt or to acquit.

Because the court's task is to pursue the interest of justice, the court is given broad discretion in making that determination, and will be reversed only for abusing its discretion. *United States v. Rutkin*, 208 F.2d 647, 654 (3rd Cir. 1953) ("It is the law that the trial court must be allowed wide discretion in granting or refusing a new trial on the ground of newly discovered evidence"); *Saada*, 212 F.3d at 215 (Third Circuit reviews for an abuse of discretion).

## **2. The primacy of the newly discovered evidence**

The newly discovered evidence in this case is the complaining witnesses' own sworn testimony that they did, in fact, have the very medical conditions and complaints that were at issue in the underlying prosecution. That evidence puts the whole case in a different light. All of the other prosecution evidence went to the same question: whether the women had medical conditions or complaints that Dr. Rottschaefer believed he was treating, or whether there was no medical treatment occurring but instead Dr. Rottschaefer was engaged in conventional drug dealing. Importantly, only the women could say what they felt; only the women could tell the jury whether they did, in reality, feel pain, anxiety, or panic.

The government relies heavily on the medical charts and on Dr. Clough's interpretations and conclusions from what he read in those charts.<sup>1</sup> But the charts are not independent of the women's medical conditions. If a medical condition or complaint is not properly charted, that does not mean it doesn't exist. A jury viewing the charts, and Dr. Clough's conclusions that a chart doesn't support a conclusion that the woman had pain, anxiety, or panic disorder, must still evaluate that conclusion in light of the woman's own sworn testimony that she did, in fact, have pain, anxiety, or panic disorder. The women's substantive testimony that they suffered those conditions puts the evaluation of the charts and the interpretation of the charts in a different light.

Any deficiencies in the charts, and Dr. Clough's identification of such deficiencies, are not a crime. A failure to properly chart something, to order additional tests, or to follow standards or best practices, is not a Controlled Substances Act (CSA) crime. The CSA does not "regulate the practice of medicine generally"; it regulates the practice of medicine only "insofar as it bars doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking *as conventionally understood*." *Gonzales v. Oregon*, 546 U.S. \_\_\_, 126 S.Ct. 904, 923 (2006) (emphasis added). That is, a CSA drug crime occurs only if a physician ceased "to act as a physician" and acted as a mere "pusher." *United States v. Moore*, 423 U.S. 122, 141, 143 (1975) (internal quotation marks omitted).

Therefore, evidence of deficient medical practices may be relevant, but it is not the crime

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<sup>1</sup>Dr. Clough did not speak with or examine any of the women. His testimony was based only on what he read in the parts of the patient charts that he reviewed. He had no independent knowledge of the women's medical conditions.

itself.<sup>2</sup> The jury must find more: to find guilt, the jury must infer from the deficient medical practices that the practice was a sham and the physician actually was not acting as a physician but was acting as a conventional drug dealer. Consequently, the charts and Dr. Clough's testimony do not establish a crime themselves; they are relevant evidence from which a jury may infer, or not, that the physician was not really practicing medicine when he prescribed the medications. In deciding whether to make that inference, the jury will be informed by its consideration, on retrial, of the new evidence that the women indeed suffered from the conditions which the medications are intended to treat. The newly discovered evidence thus puts the government's other evidence in a different light, and will probably produce an acquittal.

Similarly, testimony from the women's family members and from a law enforcement officer, to beliefs or indicators that the women were abusing their medications, is not independent evidence of guilt. Response at 30-32. Again, that evidence requires an additional inference before the jury could find guilt; whether a prescription is issued "to act as a physician" is not determined by what the patient ultimately does with the prescription, it is determined by the physician's intent in issuing the prescription. When a prescription is issued in a good faith

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<sup>2</sup>*See, e.g., United States v. Tran Trong Cuong*, 18 F.3d 1132 (4th Cir. 1994). In *Tran Trong Cuong*, the Fourth Circuit explicitly stated that, while evidence concerning the "standard of care" and "the usual course of treating a patient" may be relevant,

"A criminal prosecution requires more--that is, proof beyond a reasonable doubt that the doctor was acting outside the bounds of professional medical practice, as his authority to prescribe controlled substances was being used not for treatment of a patient, but for the purpose of assisting another in the maintenance of a drug habit."

*Id.* at 1137. *See also, United States v. Alerre*, 430 F.3d 681, 690-91 (4th Cir. 2005), *cert. denied*, 126 S.Ct. 1925 (2006) (citing *Tran Trong Cuong* with approval).

belief that it is medically treating a patient, there is no crime. *Moore*, 422 U.S. at 139, 142-43 (Supreme Court noted district court's two "good faith" instructions in finding evidence sufficient to uphold conviction); *United States v. Hurwitz*, 459 F.3d 463, 476-77 (4th Cir. 2006) ("Building on the Supreme Court's approach in *Moore*, \* \* \* courts have consistently concluded that it is proper to instruct juries that a doctor should not be held criminally liable if the doctor acted in good faith when treating his patients") (citing cases from several circuits). Thus, while concerns about or indicators of potential drug abuse are relevant evidence, the jury must still decide whether, or not, to infer from such evidence that Dr. Rottschaefter issued the prescriptions specifically to cater to the drug abuse. That is, the jury must decide *why* Dr. Rottschaefter prescribed the medications: to practice medicine or to deal drugs. In deliberating that question, the new evidence of the women's sworn testimony about their medical problems will inform the jury's decision.

In sum, all of the evidence offered against Dr. Rottschaefter is affected by the newly discovered evidence. The new evidence from the women themselves, admitting to the medical conditions and complaints that the prescriptions would medically treat, puts the case in a different light in determining whether the prescriptions were issued for medical treatment.

**C. Review of depositions (Response at 37-51)**

**1. The rebutted evidence that the women had no medical problems for which the medications would be prescribed**

The government largely ignores the newly discovered evidence that the women did, in fact, suffer from and complain of the very conditions the prescriptions at issue treat. The government does not contest that evidence or the fact that it contradicts the testimony presented

during the prosecution. Instead, the government focuses on other evidence, to support its "sufficiency of the evidence" argument. The government's arguments are not availing.

## **2. The government changes its theory of conviction**

The government makes a noticeable and telling shift in its theory of conviction. Throughout this case, the government has steadfastly maintained that the theory of conviction was that there was no medical justification for the medications prescribed. See discussion, opening memorandum at 2-4. The government has consistently disavowed that the convictions were based on a findings of "sex-for-drugs." The government pointed to the convictions regarding Corey Schlemmer, who did not allege sexual contact, as an example. The government described the sexual evidence as relevant only to motive, not to an element of the crime, and pointedly stated: "The government need not prove motive." *United States v. Rottschaefer*, Third Circuit Case Nos. 04-4015 & 05-1229, United States' Appellee's Brief at 51. The government argued that the crime occurred "[w]hether or not Rottschaefer had sex with his patients," and that "[t]hat, in fact, is exactly how the jury understood its duty. It convicted Rottschaefer on 153 counts, without regard to sex." Appellee's Brief at 52. The government then gave examples illustrating that the jury could not have relied on sexual allegations in reaching its verdicts. Appellee's Brief at 52, 54. The government stated unequivocally: "[S]ex did not govern the elements of this offense; and it did not sway this jury." Appellee's Brief at 53.

Now, in light of the new evidence rebutting the women's prosecution claims that they did not have medical conditions to treat, the government relies heavily on the sexual allegations in its response. In its introductory paragraph to its review of the depositions, the government alleges that Dr. Rottschaefer acted "for his sexual gratification." Response at 37. In discussing Pammy

Miller's deposition, the government argues, apparently seeking an adverse inference, that Dr. Rottschaefer's civil attorney did not question Miller about her sexual allegations. As the review of Miller's claims shows, Miller did not allege sexual activity in her complaint, despite the fact that it is grounds for finding malpractice.<sup>3</sup> Exhibit M at 82-122 (reviewing allegations in civil complaint by paragraph). Consequently, there was no reason for Dr. Rottschaefer's malpractice defense attorney to depose Miller on that ground, and no adverse inference follows.

The government began its discussion of Jennifer Riggle's and Amy Vivio's depositions with the sexual allegations. Response at 40 (Riggle), 43 (Vivio). The government could not raise the issue regarding Corey Schlemmer, because she never alleged sexual activity. The government relied on Sue Leskovic's "sex for drugs" allegations in discussing her civil case. Response at 49.

This shift is telling. It suggests that the government recognizes that the newly discovered evidence undermines confidence in the theory relied upon at trial. But the government cannot now rely on the sexual allegations, when it admits that the jury did not base the judgment on that ground, many counts cannot be supported on that ground, and the remaining counts carry a probability of acquittal.

First, fatal to the government's argument is exactly what it conceded before: the jury did not base its verdict on sex. Courts should be reluctant to "hypothesize a guilty verdict that was never in fact rendered," because it runs afoul of the Sixth Amendment. *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). The Sixth Amendment guarantees a right to a jury determination, and it is for the jury, in the first instance, to judge credibility and find facts.

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<sup>3</sup>In fact, none of the women advanced that claim in their civil suits.

*Sullivan* expresses the following limitation on an appellate court's power to sit in place of the jury:

"The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee."

*Id.* (emphasis in original). A similar appellate rule is expressed in *Yates v. United States*, 354 U.S. 298 (1957), *overruled on other grounds by Burks v. United States*, 437 U.S. 1 (1978), for situations in which the jury is instructed on two theories of conviction, one of which is legally infirm:

"In these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected."

*Id.* at 312 (citations omitted).

Although these are appellate cases, the reasoning applies here and an analogy is apt. The "interest of justice" standard that applies to this motion is also served by employing a jury, in the first instance, to decide credibility and facts, rather than "hypothesiz[ing] a guilty verdict that was never in fact rendered."

Moreover, the judgment as it stands cannot be upheld on the new theory of conviction, because by the government's own admission, several counts could not have resulted in conviction on a "sex for drugs" theory.

On the remaining counts, it is unlikely the jury would find the allegations credible. Each woman denied having sexual relations with Dr. Rottschaefer, even when it was suggested to her

by law enforcement. Each women changed her story while incarcerated, in conversations with authorities. Each denied or minimized that they received government leniency for testifying to the new story. However, the evidence establishes that Riggle and Vivio received downward departure sentences in their own criminal cases for their testimony, and Leskovic did not deny that the federal officers interviewing her said they would contact the local police holding her and inform them of her cooperation. Tr. (3/1/04) 174-75. The Third Circuit recognizes that testimony given with an expectation of leniency may be discounted by a jury, which may conclude that the witness is lying out of personal interest. *United States v. Risha*, 445 F.3d 298, 303 n 5 (3rd Cir. 2006).

Furthermore, Leskovic testified that she and Dr. Rottschaefer regularly had sexual encounters, but was unable to obtain proof of a single one while wearing a wire for the federal officers. *See*, Tr. (3/1/04) 152. Riggle's allegations are thoroughly impeached by her private correspondence, in which she affirmatively states that she fabricated the allegations out of personal interest, to secure a favorable plea agreement and release from prison. Miller affirmatively stated that the prescriptions were *not* issued in exchange for sexual favors, but rather because she needed them for "legitimate pain" stemming from her slipped disc and metal screws in her arm.<sup>4</sup> Tr. (2/26/04) 48. Moreover, although Miller claimed to have had Dr. Rottschaefer's penis in her hand and mouth (*id.* at 42, 45), and to have seen his penis clearly (*id.* at 50-51), she could not say whether he was circumcised. *Id.* at 51. A jury would not struggle to

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<sup>4</sup>Whether the prescriptions were illegal depends on whether they were issued as medical treatment, or not. If they were medical treatment, then a physician having sex with a patient, even if true, may be an ethical violation, but it does not render an otherwise legal prescription illegal.

recognize that a circumcised penis and an uncircumcised penis look very different, and would likely view Miller's testimony as not credible. Vivio claimed that she changed her story out of a sense of self-esteem (Tr. (2/24/04) 205) and not due to her plea agreement, asserting that her plea agreement's requirement to cooperate in other investigations did not necessarily refer to Dr. Rottschaefer's case, and that her plea agreement was completely separate and independent of Dr. Rottschaefer's case. In addition to presenting its own problems (discussed *infra*), that testimony gives the jury two reasons to doubt Vivio's veracity on her sexual allegations: first, the very existence of the plea bargain can affect the jury's determination, because the jury may consider plea-bargained testimony as given in self-interest and not credible (*Risha*); and second, Vivio affirmatively lied about her plea bargain, giving the jury further reason to doubt her.

In conclusion, the government's position that the rebutted medical evidence would not probably produce an acquittal, because the sexual evidence would still lead to conviction, cannot and does not carry the day. The jury in the underlying prosecution did not find that the sexual allegations were true, and on remand, the government's evidence is not strong on the sexual allegations. A jury should decide, in the first instance, whether those allegations are true. Because a jury is unlikely to find guilt beyond a reasonable doubt on that theory, a new trial is warranted.

### **3. Evidence of a lack of diagnostics and referrals**

The government also returns to its argument that the record shows a lack of, or insufficient, diagnostic testing and referrals. The government argues that the depositions do not rebut that evidence. However, as addressed *supra*, the amount of diagnostic testing, referrals, and other evidence of medical practices only goes so far. It does not stand independent of the

newly discovered medical evidence, because it all informs the same single question for the jury: were the prescriptions issued for medical treatment, or as drug deals?

The jury must still decide whether to infer that the lack of diagnostics and referrals indicates that the physician was not, in fact, acting as a physician but was conducting a sham medical practice as cover for drug dealing, or whether the lack of diagnostics and referrals shows nothing more than an unaggressive approach to controlling the existing pain.<sup>5</sup> On that ultimate question, one cannot disassociate the newly discovered evidence from the evidence on which the government relies. Again, because the new evidence puts the case in a different light, these questions should go to a jury.

#### **4. Other evidence**

The government relies on other miscellaneous parts of the deposition, but much of the conclusions the government draws and the strength of that evidence does not hold up to a review in light of the evidence as a whole.

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<sup>5</sup>That is, of course, if one is of the view that searching for surgical or other options is the "aggressive" form of treatment. Some physicians view the use of opioids such as OxyContin as the aggressive form of treatment, and advocate for increased reliance on such non-invasive methods of pain management. See, e.g., Stephen P. Long, M.D., *Opioids Have Been, Are and Always Will Be an Essential Tool in the Management of Patients with Acute, Chronic and Cancer Pain: There Is No Debate*, American Society of Anesthesiologists Newsletter, Vol. 69, No. 9 (September 2005), available at [http://www.asahq.org/Newsletters/2005/09-05/long09\\_05.html](http://www.asahq.org/Newsletters/2005/09-05/long09_05.html) (accessed November 17, 2006) (advocating for opioid treatment of pain); Drake Bennett, *The Politics of Pain*, The Boston Globe (April 24, 2005), available at [http://www.boston.com/news/globe/ideas/articles/2005/04/24/the\\_politics\\_of\\_pain](http://www.boston.com/news/globe/ideas/articles/2005/04/24/the_politics_of_pain) (accessed November 17, 2006) (citing studies indicating widespread undertreatment of pain, and the opinions of physicians Kathleen Foley, of Memorial Sloan-Kettering Cancer Center, and Russell Portenoy, of Beth Israel Medical Center, that more aggressive treatment and increased reliance on opioids--"by far the most reliable and the most powerful analgesics available to humankind"--should be pursued).

For example, the government begins its review of the depositions by quoting Miller's assertion that she lost her house due to, in the government's words, "the defendant's OxyContin." Response at 37. As questioning continued, however, Miller admitted that she had never owned a house. She previously lived with a boyfriend, but he threw her out. Then she got a place of her own, but she lost it when she went to jail, for driving under the influence of methadone and assault with a vehicle in the same incident. Exhibit M at 116.<sup>6</sup> Miller was not taking any medications prescribed by Dr. Rottschaefer at the time of that accident. Exhibit K at 12, 63; Exhibit M at 112-13. Miller was still incarcerated for those crimes at the time of her first deposition, and had been recently released by the time of her second deposition. She had not yet found housing. Exhibit M at 4, 116.

Similarly, the government argues that Miller has not been prescribed OxyContin or Xanax since leaving Dr. Rottschaefer's care, and suggests that the court infer that that means there was "no medical reason" to prescribe those drugs. Response at 38-39. The government is forced to acknowledge that Miller was given two prescription medications for panic attacks (Neurontin and Seroquel), one prescription medication for pain (Indocin), and one prescription medication as a sleep aid (Trazodone) (see Exhibit K at 26-27), and simply ignores the fact that Miller had been incarcerated almost the entire time since leaving Dr. Rottschaefer's care and was unable to see a physician or take medications not approved by the jail. Even the jail provided Miller with a number of prescription drugs to treat her conditions, justifying both their existence

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<sup>6</sup>This deposition, and others, is printed in a format of four transcribed pages per printed page. Dr. Rottschaefer cites to the transcript page (indicated in the top corner of each of the four transcript pages on each printed page). The government cites to the printed page (in the bottom corner of each piece of paper).

and their need for medical treatment. And before her incarceration, two other physicians prescribed Vicodin to Miller for her pain (Exhibit K at 121), one other physician prescribed OxyContin for her pain (Exhibit M at 48), her former family physician had prescribed Xanax to her for years before she began seeing Dr. Rottschaefer (Exhibit M at 53), and one other physician prescribed Klonopin, a medication very similar to Xanax, to her for her panic attacks (Exhibit M at 50-52). Furthermore, to the extent the government wishes to rely on that rationale, the depositions for the other women contain several references to other physicians prescribing the same medications to them that Dr. Rottschaefer was prosecuted for prescribing. By the government's rationale, that evidence of similar prescribing by other physicians is also exculpatory on those counts, and calls the verdict into doubt.

Regarding Riggle, the government relies almost exclusively on Riggle's claims of sexual activity, and her retrospective belief that she must have been addicted to "keep \* \* \* doing those shameful things." Response at 40-43. The government's heavy reliance on Riggle's sexual allegations is discussed above. The government offers no other response to the new evidence of her medical condition and complaints.

Regarding Vivio, the government relies on the sexual allegations and lack of referrals, discussed above. The government also repeats its suggestion that there was no reason to switch Vivio from Percocet to OxyContin in February 2000, and that Dr. Rottschaefer did not respond appropriately to Vivio's June 2000 car accident. Response at 10 (no reason for switch), 15 (reference to "June 2000" car accident), 44 (nothing supported switch in medication). The government ignores Vivio's deposition testimony that, after she took time to "stop and think," the car accident was, in fact, in June 1999. Exhibit H at 141. *See also*, Trial exhibit 209 (Vivio

patient chart) at 28-29 (file note describing car accident June 16, 1999, and insurance notes), 34, 36 (letter from insurance adjuster processing claim from car accident, and response letter). After the car accident, in which she was thrown 10-20 feet, her pain worsened, leading up to the change in medication. Exhibit H at 143-44; Trial exhibit 209 at 58 ("pain not controlled with percocet"). The deposition also suggested that there was a liver enzyme issue, for which blood work was done, preceding the change in medication. Exhibit H at 161-64. Thus, the government's contention does not hold up in view of the evidence as a whole.

Regarding Corey Schlemmer, the government argues, "Her life, however, changed dramatically after months of the defendant's OxyContin," pointing to Schlemmer becoming "suicidal, unbalanced, and mutilating herself" and eventually being "involuntarily admitted to the hospital." Response at 46. That response is remarkable, because it is exactly that argument which was made in the prosecution and which is put in a completely different light by the newly discovered evidence. The government completely ignores the problem in this case, which is that, while Schlemmer testified to the same effects from her problems, her deposition testimony identifies a completely different source of those problems: the onset of schizophrenia and psychosis. That the government would ignore that substantial and compelling new evidence is disquieting.

As discussed at length in Dr. Rottschaefers opening memorandum (pp. 12-29), Schlemmer did suffer a dramatic downward spiral, but she misled the jury into believing it was a result of her OxyContin use, when in fact it was the result of the onset of schizophrenia and psychosis. The government relies on the same misdirection in its response, in arguing that Schlemmer's deposition corroborates the government's case, when the civil deposition testimony

illustrates that Schlemmer's behavior, hallucinations, and ultimate breakdown were due to the adult onset of mental disorders. Dr. Rottschaefers opening memorandum discussed the deposition testimony in great detail, and that discussion will not be repeated here. Suffice to say that, given the government's reliance during the prosecution, and continued reliance, on Schlemmer's mental deterioration and its side effects, the newly discovered evidence of the source of those difficulties requires a new trial.

Finally, regarding Sue Leskovic, the government relies on the lack of diagnostics and sexual allegations in the underlying prosecution, which have been discussed above. The government dedicates almost a full page to an extended quotation of Dr. Clough's trial testimony. The government offers no other response to the newly discovered evidence from Leskovic which rebuts the theory of the prosecution and establishes that Leskovic truly suffered anxiety and significant pain.

In short, the government has not established sufficient other evidence that would not be affected by the newly discovered evidence. The new evidence puts the entire case in a different light. The government failed in its attempt to argue otherwise.

**D. Legal argument (Response at 51-64)**

The government advances four legal arguments: the evidence is not new, the evidence is impeaching only, Dr. Rottschaefers presented no evidence of undisclosed promises of leniency, and the new evidence is not likely to result in an acquittal. Dr. Rottschaefers discusses each below.

### **III. Reply to Government's Legal Arguments**

Because the standards for granting a new trial based on a *Giglio* violation and based on other newly discovered evidence are different, Dr. Rottschaefer takes the government's arguments out of turn to address the two issues separately.

#### **A. The evidence is newly discovered**

The government concedes that "[t]he defendant's attorney vigorously cross-examined each of the five victim patients" at trial. Response at 52. Nevertheless, the government asserts that Dr. Rottschaefer has "failed to demonstrate that he could not have obtained the substance of the deposition testimony" for use at the criminal trial. The women refused to admit the truth through no fault of Dr. Rottschaefer's. Their motivations to withhold certain information and to affirmatively lie and misrepresent the truth were their own. Their failure to admit the truth on concededly vigorous cross-examination is no fault of Dr. Rottschaefer's.

"Cases in this circuit have held that if evidence was not available during the trial through no fault of the defendants, then the second element of the test is met." *United States v. Carmichael*, 269 F.Supp.2d 588, 597 (D. N.J. 2003), citing, *inter alia*, *Adams*, 759 F.2d at 1108. In *Adams*, the Third Circuit stated: "The evidence \* \* \* clearly was newly discovered evidence, coming to light only after the conclusion of the trial, and was not available during trial through no fault of appellants." 759 F.2d at 1108. It was not Dr. Rottschaefer's fault that the women testified falsely and withheld information during his prosecution, and it was not his fault that they would not admit to doing so despite vigorous cross-examination. The newly discovered evidence satisfies the first two prongs of the *Iannelli* test.

Furthermore, the interest of justice is not served by allowing the alleged victim (much less five alleged victims), as primary witnesses, to testify falsely about the material aspects of the case and then to fault the defendant for failing to get the witness to admit the lie. It simply flies in the face of justice to suggest that the reliance on false testimony was Dr. Rottschaefer's fault.

**B. The new evidence is substantive**

The government also argues that the newly discovered evidence only serves to impeach the women, and does not have any probative value. Under that reasoning, the government further argues it is cumulative "since the credibility of the [women] was thoroughly debated at trial." Response at 53. Because the newly discovered evidence is substantive, admissible, and probative of the material issue in the case, the government is wrong.

As detailed extensively in Dr. Rottschaefer's opening memorandum, the evidence establishes that the women had the very medical conditions and complaints that were at issue in the prosecution. The jury had to decide whether Dr. Rottschaefer was providing medical treatment for pain, anxiety, and panic when he issued the prescriptions at issue. Part of that consideration was whether the women suffered or complained of those conditions. Certainly, the government offered evidence from the women during the prosecution that they did not have those problems requiring medical treatment. That evidence was not intended to impermissibly buttress their credibility; it was probative of whether the prescriptions were intended to treat a medical condition. Likewise, the newly discovered evidence from the women that they did suffer and complain of those conditions is probative of whether the prescriptions were issued to treat those conditions. It just supports the defense position this time, not the government's.

The newly discovered evidence is sworn, so it is not hearsay and is admissible on retrial. It is material to the question for the jury on the determination of guilt or innocence. It is disingenuous to say that it has no probative value.

The fact that the new evidence may *also* impeach the women's credibility is not the issue. The question on a motion for new trial is whether the evidence has other value. It is abundantly clear in this case that it does. That is, there is an "exculpatory connection" between the women admitting they had the conditions which the medication is intended to treat, and Dr. Rottschaefer's issuance of the prescriptions. *Saada*, 212 F.3d at 216 (new evidence is only impeaching if there is no exculpatory connection between the new evidence and the criminal charge). *See also*, discussion in opening memorandum at p. 8 (citing cases from Second, Fourth, and Ninth Circuits for proposition that evidence is "merely impeaching" when it bears only on the credibility of the witness and not on guilt or innocence). Because this newly discovered evidence bears on the question of guilt or innocence, as also explained in Dr. Rottschaefer's analysis of the material in his opening memorandum, it is not merely impeaching.

**C. The new evidence is likely to result in reasonable doubt and acquittal**

**1. The government refuses to recognize or respond to the probative value and effect of the new evidence**

The government argues that the new evidence "might, at best, help Dr. Rottschaefer undermine the victims' credibility. That impeachment, however, would not make a difference." Response at 59. Again, the government seeks to avoid the impact of the newly discovered evidence by ignoring it. The evidence is not merely impeaching. It rebuts the government's theory that the prescriptions were issued in the absence of medical justification. It comes from

the women themselves--the only people who could say, conclusively, whether they suffered pain, anxiety, or panic.

The government asserts that the remainder of its evidence "remain[s] unscathed."

Response at 60. As discussed in this reply brief, that is not so. All of the government's evidence is affected by the women's own reports of their medical conditions. *See supra*, pp. 7-10. The government simply devalues the new evidence. Because the new evidence has substantial value, as it goes straight to the heart of the issue, the government's arguments are unavailing.

## **2. Dr. Rottschaefer asks only for a fair trial**

This is not a motion for judgment of acquittal. It is not a question of whether the evidence in the light most favorable to the government could support a guilty verdict, or a question of letting Dr. Rottschaefer go free. It is only a question of whether, in light of the new evidence, a new trial should be held.

A new trial gives a jury the opportunity to decide the case based on *all* the facts. The only question at this stage is whether the new evidence is substantial enough that a jury should hear it and decide the facts anew. That is, whether the jury is likely to view the facts differently in light of the new evidence, and whether, having done so, the jury is likely to have reasonable doubt and acquit. Dr. Rottschaefer does not have to prove his innocence here, nor must this court find that he is innocent here.<sup>7</sup> He just has to show a likelihood that the new evidence would lead

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<sup>7</sup>*See, Carmichael*, 269 F.Supp.2d at 598-99 ("Defendant correctly points out that all that is required for an acquittal is a reasonable doubt that defendant committed this crime, and not a belief that the defendant is necessarily innocent of the crime."). *See also, id.* at 599, citing with approval *United States v. Morales*, Crim. No. 90-441-2, 1991 WL 276022, at \*2 (E.D.Pa. Dec. 18, 1991) (although there were inconsistencies in the new evidence in *Morales*, the district court concluded that a jury should evaluate the witness's credibility and resolve the factual inconsistencies). In *Carmichael*, the district court granted a new trial, despite inconsistencies in

a jury to have reasonable doubt. At retrial, the jury will hear all the evidence and will decide the ultimate questions.

The new evidence is substantial enough to warrant a new trial. It is remarkable; it is the kind of evidence that would lead any lay person to question a justice system that permits a verdict to stand when all five complaining witnesses gave false testimony on the material aspects of the alleged crime.

Although a new trial is a rare remedy, this is a rare case. Each of the five complaining witnesses withheld evidence and affirmatively testified falsely, on the ultimate issue in the case. This extraordinary circumstance requires a new trial, for the jury to hear all the facts and decide the case in the first instance.

**D. There were undisclosed promises of leniency, in violation of *Giglio***

A violation under *Giglio v. United States*, 405 U.S. 150 (1972), is not evaluated under the five-prong test of *Iannelli*. A new trial should be granted for a *Giglio* violation when three requirements are met:

"(1) evidence was suppressed;

"(2) the evidence was favorable to the defense; and

"(3) the evidence was material to guilt or punishment."

*Risha*, 445 F.3d at 303 (paragraphing added). The government responds to the allegations of *Giglio* violations by asserting that no evidence was suppressed. Response at 54-59. The

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the new evidence and between the new evidence and the trial evidence, because the evidence had a strong potential to exonerate the defendant and thus carried a "distinct possibility" that the defendant would be acquitted on retrial. 269 F.Supp.2d at 599-600.

government argues that Dr. Rottschaefer has presented no evidence of any hidden promises to Riggle or Vivio.

Dr. Rottschaefer's newly discovered evidence shows that Amy Vivio knew that she would receive a reduced sentence if her performance on the witness stand against Dr. Rottschaefer was good enough. See discussion, opening memorandum, p. 49. She told her therapist she would get probation in exchange for her testimony. In fact, she did get probation, on the government's motion. This is more than coincidence. Vivio knew she would get leniency, including a sentence of probation, because someone told her.

The government responds by discussing Vivio's state case, and asserting that Dr. Rottschaefer's reliance on Vivio's statements to her therapist are misplaced, because those statements concerned her federal case. Response at 56-57. This is not about Vivio's state case. It is about her federal case. She was promised benefits in her federal case, which she conveyed to her therapist (as the government admits), and the federal government did not disclose them. The government is charged with responsibility for all officers working on its behalf. *Risha*, 445 F.3d at 303 ("prosecutors have a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case," and are charged with constructive knowledge thereof); *United States v. Pelullo*, 399 F.3d 197, 218 (3rd Cir. 2005), *cert. denied*, 126 S.Ct. 1141 (2006) (government is obligated to disclose information "known to others acting on the government's behalf in a particular case"). The government offered the affidavits of three officers, in support of its response, who state that they did not make a promise of leniency. Either one of those officers has forgotten the discussion, or a different federal officer (perhaps even a member of the prosecution team, and not a law enforcement officer) made the promise.

But it strains credibility to suggest that Vivio reported she would receive certain benefits, and then received those exact benefits, by lucky guess or sheer coincidence. A promise of leniency was made, and the government did not disclose it; the government violated *Giglio* by doing so.

Then, the government committed a second, more egregious, violation, by allowing Vivio to testify that the government had made no promises to her, and that she would not be receiving a sentence reduction as a result of testifying against Dr. Rottschaefer. "The same result obtains when the [government] \* \* \* allows [false testimony] to go uncorrected when it appears." *Giglio*, 405 U.S. at 153. The government cannot deliberately deceive, or allow the deception of, the court and jurors. *Id.* But that is what happened with Amy Vivio. The government knew that Vivio would receive leniency for her testimony, but allowed her testimony to go uncorrected.

In fact, the government went further than that. On the second page of direct testimony, the government elicited evidence from Vivio that the government made "no promises" to her in exchange for her testimony, and that "it has nothing to do with this case." Tr. (2/24/04) 168. The government elicited false testimony, and allowed it to go uncorrected.

The government claims Dr. Rottschaefer's only evidence is the government's motion for sentence reduction. That is not the evidence on which Dr. Rottschaefer relies. But, the government's motion corroborates the truth of Vivio's assertions, made contemporaneously with Dr. Rottschaefer's trial, that she would receive a sentence reduction, to probation, based on her performance during Dr. Rottschaefer's prosecution. Because the new evidence shows that Vivio knew this at the time of trial, her false testimony and the government's failure to correct it constitute *Giglio* violations.

The same is true of Jennifer Riggle. Riggle's private correspondence establishes that federal agents told her "they will cut my time for a good testimony." *See*, opening memorandum at 39; Riggle letter of September 2, 2002. Later, the federal officers told Riggle "they will probably give [her] time served." *See*, opening memorandum at 39; Riggle letter of October 21, 2002. Although that letter is private correspondence, not sworn testimony, Dr. Rottschaefer is not seeking to admit that evidence at a trial; he is seeking to establish a *Giglio* violation, and that evidence may be considered to answer the preliminary question of fact which determines whether the *Giglio* violation occurred.

As with Vivio, Riggle received exactly the sentence she said she would receive. As with Vivio, this is no sheer coincidence. Riggle was promised leniency, and a sentence that would not include additional incarceration, in exchange for her testimony. That promise was not disclosed, and Riggle's false and misleading testimony regarding it was not corrected. Even worse, as with Vivio, the government affirmatively elicited testimony that the government made "no promise" to Riggle in exchange for her testimony. Tr. (2/24/06) 134. For the same reasons discussed regarding Vivio, above, the government's conduct violated *Giglio*.

The government must be above misleading the court and jurors, but unfortunately here, it was not. The *Giglio* violations themselves require a new trial.

#### IV. Conclusion

For the reasons explained in this reply and in Dr. Rottschaefer's opening memorandum, based upon the newly discovered evidence, Dr. Rottschaefer urges this court to reach the following findings:

1. that the evidence was newly discovered since trial;
2. that Dr. Rottschaefer acted diligently;
3. that the newly discovered evidence is not merely cumulative or impeaching;
4. that the newly discovered evidence is material to the issues involved;
5. that the evidence is of such nature that the newly discovered evidence would probably produce an acquittal on most, if not all, counts; and
6. that, in all events, Rule 33's interest of justice standard requires a new trial.

RESPECTFULLY SUBMITTED this 20th day of November, 2006.

s/ Eli D. Stutsman

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IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA )  
 )  
 ) PLAINTIFF, ) Criminal No.: 03-162  
 )  
 ) vs. )  
 )  
 ) BERNARD ROTTSCHAEFER, M.D., ) (Electronically Filed)  
 )  
 ) DEFENDANT . )  
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**CERTIFICATE OF SERVICE**

I hereby certify that on November 20, 2006, I electronically filed the foregoing REPLY TO GOVERNMENT'S RESPONSE TO SECOND MOTION FOR NEW TRIAL with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following: Mary Houghton, Assistant United States Attorney.

s/ Eli D. Stutsman

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