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MEMORANDUM* OPINION OF THE NINTH CIRCUIT (FEBRUARY 7, 2019)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KAITLYN PHUONG NGUYEN,

Defendant-Appellant.

No. 18-50052

D.C. No. 8: 16-cr-00079-JVS-2

Appeal from the United States District Court
for the Central District of California
James V. Selna, District Judge, Presiding

Submitted February 5, 2019**
Pasadena, California

Before: GOULD, NGUYEN, and
OWENS, Circuit Judges.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Defendant-Appellant Kaitlyn Nguyen appeals from her conviction, following a jury trial, for one count of conspiracy to distribute, and nine counts of distributing, controlled prescription drugs outside the usual course of professional practice and without a legitimate medical purpose, in violation of 21 U.S.C. §§ 841(a)(1) and 846. As the parties are familiar with the facts, we do not recount them here. We affirm.

1. Nguyen argues that the district court erred in admitting her post-arrest statements because they were coerced. However, there is no indication that Nguyen's "will was overborne" when she gave her post-arrest statement to the officer. *United States v. Preston*, 751 F.3d 1008, 1016 (9th Cir. 2014) (en banc) (quoting *Dickerson v. United States*, 530 U.S. 428, 434 (2000)). Rather, almost all of the relevant factors—including Nguyen's age, education, advisement of her constitutional rights, and brief detention—show that her statement was voluntary. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) (summarizing relevant factors to determine whether a defendant's will was overborne). That Nguyen was petite, handcuffed, and still in a pajama dress (with a jacket) does not show that her "will was overborne" in light of the totality of the circumstances. *See Preston*, 751 F.3d at 1016.

2. Nguyen also contends that the district court erred in admitting testimony from family members of a deceased patient because it was unduly prejudicial under Federal Rule of Evidence 403. However, the district court did not err because the family testimony was probative of Nguyen's knowledge and intent, not "dragged in by the heels for the sake of its prejudicial effect." *United States v. Haischer*, 780 F.3d 1277,

1282 (9th Cir. 2015) (quoting *United States v. Hankey*, 203 F.3d 1160, 1172 (9th Cir. 2000)).

3. Nguyen next argues that the district court erred in admitting audio recordings of Nguyen's patient visits because the government failed to lay sufficient foundation to identify Nguyen's voice on the tapes. However, a witness—who was familiar with Nguyen's voice based on a 30-minute phone call and 30-minute, in-person interview—testified that she heard Nguyen's voice on the audiotapes. Therefore, the district court did not err in admitting the audiotapes because the witness's identification was "based on hearing the voice at any time under circumstances that connect it with the alleged speaker." Fed. R. Evid. 901(b)(5).

In addition, for the first time on appeal, Nguyen appears to argue that the district court erred by failing to require the witness to listen to the tapes in open court. However, Nguyen cites no authority establishing such a requirement. And, to the extent Nguyen is actually alleging a defect in the tapes' chain of custody, that "goes to the weight, not the admissibility, of the evidence introduced." *United States v. Matta-Ballesteros*, 71 F.3d 754, 769 (9th Cir. 1995), *amended by* 98 F.3d 1100 (1996).

4. Finally, Nguyen argues that the district court erred by failing to provide the jury with each element of the instruction required under *United States v. Newhoff*, 627 F.3d 1163, 1167-68 (9th Cir. 2010). However, *Newhoff* only governs readbacks of a transcript of witness testimony. *See id.* Here, the jury requested a playback of admitted audio exhibits. *See United States v. Chadwell*, 798 F.3d 910, 915 (9th Cir. 2015) (holding that the "concern for avoiding undue emphasis on particular trial testimony" is not

present when "permitting a jury to view properly admitted exhibits" (emphasis in original)). Therefore, the *Newhoff* instruction was not required, and the district court did not err.

AFFIRMED.

JUDGMENT AND PROBATION/ COMMITMENT ORDER (FEBRUARY 5, 2018)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

KAITLYN PHUONG NGUYEN
MINH DO PHUONG NGUYEN; MINH PHUONG NGUYEN; MINH PHUONG DO NGUYEN; KAITLYN P. NGUYEN; KAITLYN NGUYEN; PHUONG NGUYEN; AND MINH AKAS: PHUONG D. NGUYEN,

Defendant.

Docket No.: SACR 16-00079 JVS

Social Security No. 9669 (Last 4 digits)

Before: James V. SELNA, U.S. District Judge.

In the presence of the attorney for the government, the defendant appeared in person on this date. Feb 05, 2018.

Finding

There being a finding/verdict of GUILTY, defendant has been convicted as charged of the offense(s) of:

> Conspiracy to Distribute Controlled Substances in violation of Title 21 U.S.C. § 846 as charged in Count 1 of the Indictment; Distribution of Controlled Substance in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C) and Aiding and Abetting and Causing an Act to be Done in violation of Title 18 U.S.C. § 2(a) and 2(b) as charged in Counts 6, 7, 8, 26 and 27 of the Indictment; and Distribution of Controlled Substance in violation of 21 U.S.C. § 841(a)(1), (b)(2) and Aiding and Abetting and Causing an Act to be Done in violation of Title 18 U.S.C. § 2(a) and 2(b) as charged in Counts 39, 40, 41 and 42 of the Indictment.

Judgment and Prob/Comm Order

The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of FORTY-ONE (41) Months.

This term consists of forty-one (41) months on each of counts 1, 6-8, and 26-27 of indictment and forty-one (41) months on each of counts 39-42, all to be served concurrently.

It is ordered that the defendant shall pay to the United States a special assessment of $100, which is

due immediately. Any unpaid balance shall be due during the period of imprisonment, at the rate of not less than $25 per quarter, and pursuant to the Bureau of Prisons' Inmate Financial Responsibility Program.

It is ordered that the defendant shall pay to the United States a total fine of $12,500, consisting of the following: Count 1, a fine of $12,500. The total fine shall bear interest as provided by law. The fine shall be paid at the rate of $1,000 per quarter.

The defendant shall comply with General Order No. 01-05.

The Court recommends that the Bureau of Prisons conduct a mental health evaluation of the defendant and provide all necessary treatment.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three (3) years. This term consists of three (3) years on each of counts 1, 6-8, 26-27, and 39-42 of indictment, all such terms to run concurrently under the following terms and conditions:

1. The defendant shall comply with the rules and regulations of the United States Probation Office, General Order 05-02, and General Order 01-05, including the three special conditions delineated in General Order 01-05;

2. The defendant shall refrain from any unlawful use of a controlled substance, and shall abstain from using alcohol. The defendant shall submit to one drug and alcohol Breathalyzer test within 15 days of release from imprisonment and at least two periodic drug/Breathalyzer tests thereafter, not to exceed

eight tests per month, as directed by the Probation Officer;

3. The defendant shall participate in an outpatient substance abuse treatment and counseling program that includes urinalysis, breath and/or sweat patch testing, as directed by the Probation Officer. The defendant shall abstain from using alcohol and illicit drugs, and from abusing prescription medications during the period of supervision.

4. As directed by the Probation Officer, the defendant shall pay all or part of the costs of the Court-ordered treatment to the aftercare contractors during the period of community supervision. The defendant shall provide payment and proof of payment as directed by the Probation Officer. If the defendant has no ability to pay, no payment shall be required.

5. During the period of community supervision, the defendant shall pay the special assessment and fine in accordance with this judgment's orders pertaining to such payment.

6. The defendant shall participate in mental health treatment, which may include evaluation and counseling, until discharged from the treatment by the treatment provider, with the approval of the Probation Officer.

7. The defendant shall not be employed in any position that requires licensing and/or certification by any local, state, or federal agency without the prior written approval of the Probation Officer.

8. The defendant shall apply all monies received from income tax refunds to the outstanding Court-ordered financial obligation. In addition, the defendant shall apply all monies received from lottery winnings, inheritance, judgments and any anticipated or unexpected financial gains to the outstanding Court-ordered financial obligation.

9. The defendant shall cooperate in the collection of a DNA sample from the defendant.

The Court authorizes the Probation Office to disclose the Presentence Report to the substance abuse treatment provider to facilitate the defendant's treatment for narcotic addiction or drug and alcohol dependency. Further redisclosure of the Presentence Report by the treatment provider is prohibited without the consent of the sentencing judge.

The Court authorizes the Probation Officer to disclose the Presentence Report, and/or any previous mental health evaluations or reports, to the treatment provider. The treatment provider may provide information (excluding the Presentence report), to State or local social service agencies (such as the State of California, Department of Social Service), for the purpose of the client's rehabilitation.

It is ORDERED that the defendant surrender herself to the institution designated by the Bureau of Prisons on or before 12 noon, on April 6, 2018. In the absence of such designation, the defendant shall report on or before the same date and time, to the United States Marshal located at: United States Court House, 411 West Fourth Street, Santa Ana, California 92701-4516.

The defendant's bond shall be exonerated upon surrender.

The Court recommends placement in the RDAP Program and the facility at Dublin, California.

The Court advises the defendant of her right to appeal.

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release within this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

/s/ James V. Selna
U.S. District Judge

Date: February 6, 2018

It is ordered that the Clerk deliver a copy of this Judgment and Probation/Commitment Order to the U.S. Marshal or other qualified officer.

Clerk, U.S. District Court

By Karla J. Tunis
Deputy Clerk

Filed Date: February 6, 2018

ORDER OF THE NINTH CIRCUIT DENYING PETITION FOR REHEARING (FEBRUARY 21, 2019)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KAITLYN PHUONG NGUYEN,

Defendant-Appellant.

No. 18-50052

D.C. No. 8: 16-cr-00079-JVS-2
Central District of California, Santa Ana

Before: GOULD, NGUYEN, and OWENS, Circuit Judges.

The panel has voted to deny Appellant's petition for panel rehearing.

Appellant's petition for panel rehearing is DENIED.

**REPORTERS TRANSCRIPT OF PROCEEDING—
RELEVANT EXCERPTS
(SEPTEMBER 14, 2017)**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

KAITLYN PHUONG NGUYEN,

Defendant.

No.: SACR 16-00079 JVS

TRIAL DAY 3

Before: The Hon. James V. SELNA, Judge Presiding

[September 14, 2017 Transcript, p.6]

MS. WOLF: Thank you, Your Honor.

MR. STEWARD: I have one issue, Your Honor, if I may. I was going to take this up with counsel, but it's short. I'll just blurt it out.

I note that they have someone from the coroner's office on the witness list. I just wondered if that individual is going to testify. It seems to me any evidence would be cumulative of what we've

already heard. We have the actual death certificates. They have a cause of death on them. I just don't see why somebody like that would be necessary.

MS. WOLF: She has a little bit of percipient information about one of the death scenes that we believe is relevant, and then in addition to that was simply going to explain in addition to cause of death one other bit of information off of the death certificates.

MR. STEWARD: Except that the cause of death is clearly stated in great detail on the death certificates.

THE COURT: Why is evidence—I take this assistant coroner actually went out and recovered the corpse?

MS. WOLF: Correct, Your Honor. Yes.

THE COURT: What's the relevance of the death scene?

MS. WOLF: It is only relevant again to the fact that the individuals—in this particular case that a pill bottle of Methadone was found in the decedent's pants pocket, and she found it. That's pretty much it.

THE COURT: Okay.

MS. WOLF: And then I intend to also ask her about where the information—because on the death certificate it's not the cause of death, but there is a statement about—I think it's clinical—I forget the exact terminology.

THE COURT: Why don't you take a look?

MS. WOLF: Okay.

(Pause in proceedings)

MS. WOLF: So there is a statement below the cause of death that there is a clinical history of back pain and anxiety. I simply want to ask her where that information comes from.

THE COURT: Mr. Steward.

MR. STEWARD: It seems irrelevant to me, Your Honor. The other problem, of course, is the whole area of the patient deaths is a very thorny area within this case. It just seems to me staying away from it at this point would be prudent particularly with really, really little bit of relevance.

THE COURT: Well, it seems to me if the decedent had bottles of drugs on the decedent at the time, I mean, that's relevant. So I think you can go very briefly into those two areas.

MS. WOLF: She will be very brief. She will be on and off.

THE COURT: Okay.

Anything further on that, Mr. Steward?

MR. STEWARD: No, Your Honor. Just to note my objection to the witness.

THE COURT: Okay. Noted. Overruled except to the extent—well, overruled. I will allow the testimony to go forward to the extent I've outlined.

MS. WOLF: Thank you, Your Honor.

(Recess taken at 9:13 a.m.;
proceedings resumed at 9:35 a.m.)

(Jury not present.)

THE COURT: I understand we're going to have a video with transcript this morning.

MS. WANG: Yes, Your Honor. When I call Paul Yasutake, he's going to be doing the first—it's actually an audio recording is the first one that's going to be played. At that point we would ask that the Court read the instruction.

THE COURT: Okay.

MR. STEWARD: Your Honor, I'm going to have foundational objections to all of these audios and videos if . . .

[. . .]

MOTION IN LIMINE TO EXCLUDE EVIDENCE; POINTS AND AUTHORITIES; EXHIBIT (AUGUST 4, 2017)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES,

Plaintiff,

v.

KAITLYN NGUYEN, ET. AL.,

Defendants.

Case No. SA-CR-16-79-JVS

Comes now defendant Kaitlyn Nguyen, together with counsel, and moves this honorable Court for an order excluding three types of proposed government evidence, as set out below.

/s/ H. Dean Steward
Counsel for Defendant
Kaitlyn Nguyen

Dated: August 4, 2017

POINTS AND AUTHORITIES

I. Introduction

Kaitlyn Ngugen was employed as a physician's assistant in 2012. For less than 6 months that year, she worked for Dr. V[redacted] S[redacted] as one of his assistants at his clinic in Fountain Valley, California.

The indictment herein covers 51 counts of conspiracy to distribute controlled substances, distribution and aiding and abetting. Ms. Nguyen is charged in 10 of the 51 counts. Dr. Siew and co-defendant T[redacted] P[redacted] have pled guilty.

The essence of the charges are that Dr. S[redacted] ran a clinic that would readily prescribe drugs to addicts and others, knowing they were addicts, with little or no medical necessity.

The government has given the defense broad notice that they intend to try to admit a number of types of objectionable evidence at Ms. Nguyen's trial. They suggest that the items below are admissible under either Federal Rules of Evidence [FRE] 404(b), or are inextricably intertwined with the facts of the case. They seek to introduce:

1. Patient records/files for 58 patients at Dr. V[redacted] S[redacted] clinic in Fountain Valley, California.
2. Evidence regarding dead Dr. [redacted] patient J.H.
3. Evidence regarding 5 other dead patients who saw staff or Dr. S[redacted] at the clinic.

The defense objects to all of the above, on multiple grounds.

II. Patient Records

The government's theory for admission of records from 58 patients who were treated by the clinic is that they claim that Ms. Nguyen issued prescriptions for each of the 58, and therefore each is relevant.[1]

As a threshold matter, even if true that Ms. Nguyen wrote prescriptions for each of the 58, the records become cumulative and a waste of time after 15 or 20 files. Surely the government can make whatever point they seek with less than 58 files.

In addition, each file most likely contains more irrelevant material than relevant material. Personal histories, historic medical conditions and ailments and insurance documents are not relevant, and may send the jury in directions not relevant to the case at hand. "The medical record [patient files] typically include a variety of types of 'notes' entered over time by health care professionals, recording observations and administration of drugs and therapies, orders for the administration of drugs and therapies, test results, x-rays, reports, etc." *Wikipedia*, https://en.wikipedia.org/wiki/Medical_record, (last visited 8-4-17).

Further, records such as these are filled with opinions and hearsay, inadmissible under FRE 401 and 403. They violate the defendant's constitutional right to confront and cross-examine her accusers. *Crawford v. Washington*, 541 U.S. 36, 50-51 (2004); *Davis v. Alaska*, 415 U.S. 308, 315-317 (1974).

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[1] The government has not put forth the foundational grounds or how they intend to prove foundation. The defense will no doubt challenge these records, absent a solid foundation.

III. The Death of J.H. Should Be Excluded Because the Government Cannot Connect the Death to The Clinic Run by Dr. Siew and The Fact of His Death is Highly Prejudicial

The only patient death that occurred while Ms. Nguyen was employed at the clinic was J.H. In addition to being highly prejudicial, the defense believes that the government cannot link J.H.'s death to any activity at the clinic.

In an investigative report dated 4-9-15, (attached as Ex. "A"), Special Agent P[redacted] Y[redacted] of the California Department of Justice wrote about his interview with forensic pathologist Dr. A[redacted] S[redacted]. Dr. [redacted] worked at that time for the Orange County Coroner's office. Dr. [redacted] reviewed her own report of the death of J.H. She apparently did the autopsy on J.H., and found that she "was not able to determine if the methadone or ethanol [J.H. got from the Siew clinic 2 days before his death] would have caused [his] death."

As such, on this lack of causation alone, the death of J.H. should be excluded from the trial.

IV. The Other Dead Patients

The government claims that the other dead patients, D.C., J.N., J.S and J.W., received at least one prescription from Ms. Nguyen. This is a slight connection to the death of each, and a slight connection to causation involving Ms. Nguyen. Weighed against the clear prejudice from such evidence, this evidence must be excluded under FRE 403 (Please see section V., below)

The defense requests an offer of proof as to how many prescriptions were allegedly written by Ms. Nguyen, when and for which patient. Surely a single prescription, without more, is an insufficient link to the defendant.

Additionally, one of those patients, J.W., died before Ms. Nguyen came to work at Dr. Siew's clinic. The government attempts to bootstrap this death into evidence because they allege that Ms. Nguyen saw and issued scripts to his relatives and referrals later. Surely this is no reason to admit such inflammatory evidence, lacks relevance, and is short on a basic foundation for admission.

V. The Law

403 and 404(b)—Massive Prejudice Outweighing Any Probative Value

Few facts are as stark, tragic and emotionally moving as the death of an individual. *U.S. v. Layton*, 855 F.2d 1388 (9th Cir. 1988), (unduly prejudicial tape recordings of multiple suicides, conviction reversed). The Rule 403 weighing process-that of balancing the probative value of the proffered evidence against its potential for unfair prejudice or confusion of issues-is primarily for the district court to perform. *U.S. v. Rincon*, 28 F.3d 921, 925 (9th Cir. 1994), cert denied 513 U.S. 1029 (1994). The fact of the deaths is highly prejudicial and inflammatory. The government will seek to admit the deaths for the primary purpose of seeking sympathy, pity, and perhaps even outrage from the jury.

Further, the Ninth Circuit has held:

> On objection, the court would decide whether a particular item of evidence raised a danger of unfair prejudice. If it did, the judge would go on to evaluate the degrees of probative value and unfair prejudice not only for the item in question but for any actually available substitutes as well. If an alternative were found to have substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk.

U.S. v. Merino-Balderrama, 146 F.3d 758, 761-762 (9th Cir.1998), citing, *Old Chief v. U.S.*; see Advisory Committee's Notes on Fed. Rule Evid. 404.

In *U.S. v. Bradley*, 5 F.3d 1317 (9th Cir. 1994), the defendant was charged with felon in possession of a firearm. The prosecution successfully entered into evidence a separate homicide. The Ninth Circuit reversed the conviction, finding that the homicide was of "dubious value". *Id.* at p. 1321: "Our review of the record leads us to conclude that the trial judge abused his discretion in admitting the evidence of the . . . homicide." *Id.* at p. 1320.

The Ninth Circuit has been very cautious in the area of the admission of inflammatory evidence with marginal or no connection to the issues in the case. *U.S. v. Bland*, 908 F.2d 471(9th Cir. 1990), (details of murder inadmissible); *U.S. v. Ellis*, 147 F.3d 1131, 1136 (9th Cir. 1998), (defendant charged with receiving and concealing stolen explosives-trial court allowed evidence of the destructive capability of the stolen

explosives-reversed: evidence was "unfairly prejudicial and had virtually no probative value to the actual charges Ellis faced." Accord: *U.S. v. Merriweather*, 78 F.3d 1070 (6th Cir. 1996), (taped conversations relating to uncharged conspiracy were more substantially prejudicial than probative and should not have been admitted, conviction reversed).

The admissibility of "crimes, wrongs or other acts" must also be carefully examined by the Court. Such evidence is always a risk to cause a jury to make a decision based on uncharged events, and not on the elements of the crime. The danger in admitting other acts evidence is that the jury may convict a defendant for the extrinsic offenses, rather than the offenses charged. *See Old Chief v. U.S.*, 519 U.S. 172 (1997).

Inextricably Intertwined

The deaths of the 5 patients is not an integral part of the circumstances surrounding the offenses charged. The offenses charged in the indictment are drug and conspiracy accusations, not homicides. In order to be inextricably intertwined, " . . . these crimes [must] be seen as direct evidence of the ongoing conspiracy charged in the indictment." *U.S. v. Ripinsky*, 109 F.3d 1436, 1442, as amended 129 F.3d 518 (9th Cir.1997), overruled on other grounds by *U.S. v. Sablan*, 114 F.3d 913, 916 (9th Cir.1997) (en banc). Patient deaths here, while deeply tragic, are not "direct evidence of the ongoing conspiracy".

> "Extrinsic act evidence is not looked upon with favor. We have stated that [o]ur reluctance to sanction the use of evidence of other crimes stems from the underlying pre-

> mise of our criminal system, that the defendant must be tried for what he did, not for who he is. Thus, guilt or innocence of the accused must be established by evidence relevant to the particular offense being tried, not by showing that the defendant has engaged in other acts of wrongdoing."

U.S. v. Bradley, supra at 1320, (quoting *U.S. v. Hodges*, 770 F.2d 1475, 1480 (9th Cir.1985)); *U.S. v. Vizcarra-Martinez*, 66 F.3d 1006 (9th Cir. 1995).

The proffered evidence is not an integral part of the circumstances surrounding the offenses charged, and should not be admitted. *U.S. v. Foster*, 889 F.2d 1049, 1053 (11th Cir. 1989).

VI. Conclusion

For the reasons set out above, the three types of proffered evidence from the government should be excluded.

/s./ H. Dean Steward
Counsel for Defendant
Kaitlyn Nguyen

Dated: August 4, 2017

RESPONSE TO GOVERNMENT OPPOSITION TO MOTION IN LIMINE TO EXCLUDE PATIENT RECORDS AND DEATHS (AUGUST 24, 2017)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES,

Plaintiff,

v.

KAITLYN NGUYEN, ET. AL.,

Defendants.

Case No. SA-CR-16-79-JVS

Comes now defendant, together with counsel, and responds to the government's opposition to her motion to exclude several types of evidence.

/s/ H. Dean Steward
Counsel for Defendant
Kaitlyn Nguyen

Dated: August 24, 2017

I. Introduction

The defense responds below to the government's opposition in limine to admission of patient records and deaths. In addition, for the first time, the government revealed in their opposition that they intend to try to call family members of dead Dr. S[redacted] patients to show: " . . . the circumstances of the patients' deaths . . . " [govt. opp, p. 18, ln. 22-27]. The defense strongly objects on relevance and prejudice grounds under FRE 403.

II. Patient Records

The defense continues to object to the admission of the actual patient files. These files are a mishmash of many types of information, and constitute "needless piling on of cumulative evidence". *U.S. v. Brown*, 597 F.3d 399, 407 (D.C. Cir. 2010), (cited by the government). Even the government concedes that while "many of the items contained in the patient files are not hearsay", [govt. opp., p. 6, ln 10-11], it stands to reason that many other items ARE hearsay and inadmissible.

The government has now apparently trimmed the number of actual files to be presented to 15-20. The defense concedes that this is a far more manageable number than 58. However, FRE 403 permits courts to exclude cumulative evidence when it has little incremental value. ("Evidence may be excluded if its probative value is substantially outweighed . . . by considerations of undue delay, waste of time, or needless presentation of cumulative evidence"). *U.S. v. Miguel*, 87 Fed. Appx. 67 (9th Cir. 2004). Even the paired down version of the government's plan is cumulative and a waste of the jury's time.

III. Dead Patient Evidence

Assuming for the moment that the patient death evidence is otherwise admissible, the government opines that:

> "Here, the evidence of overdose deaths is prejudicial primarily because its probative value is so great."

Govt. opposition, p. 20, line 13-14

This response misses the mark entirely. The death of any human being is tragic in the extreme.[1] Evidence of multiple deaths by over-dose is too much for an average juror. It is all the more heightened as the government proposes calling family members to recount the downward fall of their loved ones, ending in death. Either the government cannot or will not recognize the stark, harsh reality of this proposed evidence. Surely Ms. Nguyen cannot get a fair trial with the presentation of evidence such as this, extreme and horribly prejudicial.

It will cause pity, empathy and emotions that have no place in jury deliberations. It will cause jurors to make decisions, not based on facts, but based on emotions. Living up to the jury instruction #1.1 [Duty of the Jury] from the Ninth Circuit will be next to impossible:

> You must decide the case solely on the evidence and the law before you and must not be influenced by any personal likes or

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[1] "Death, so called, is a thing that makes men weep . . . " *George Noel Gordon, Lord Byron*

> dislikes, opinions, prejudices, or sympathy. [emphasis added]

Under FRE Rule 403, a balancing and weighing of the prejudicial effect of proposed evidence against its probative value is required. The government, in their opposition, declines to address this test, preferring instead to tout probative value exclusively. Indeed, the government cannot explore balancing, because the horror of the dead patients will always outweigh the probative value.[2]

> " . . . [U]nfair prejudice refers to an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one or evidence designed to elicit a response from the jurors that is not justified by the evidence."

U.S. v. Ellis, 147 F.3d 1131, 1135 (9th Cir. 1998).

The government has not yet indicated what type of evidence they intend to introduce in regards to the deceased patients. If they intend to propose autopsy photos and the like, the defense would object vehemently.

IV. Jury Confusion

The jury here will likely be confused about whether the allegation is that Ms. Nguyen killed the decedents. If she's not charged with a homicide, why is this evidence being presented? With minimal probative

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[2] For the first time, the government revealed in their opposition that they intend to try to admit evidence of the death of a sixth patient, one T.M. The defense repeats the objections above to this evidence and all of Dr. S[redacted] dead patients.

value, even a "small risk of misleading a jury . . . " should be cause for exclusion. *U.S. v. Hitt*, 981 F.2d 422, 424 (9th Cir. 1992); FRE 403(b).

V. Dr. S[redacted]s Medical Practice

At several points in their opposition, the government refers to the "defendant's practice". For example, at p. 12, lines 14-17, the government writes," . . . the number of deaths in the defendant's practice is highly probative of defendant's extreme departure from the usual standard of care in medical practices." This passage misstates the obvious: The clinic belonged to, was run by, and produced substantial profits for Dr. V[redacted] S[redacted] not physician's assistant Kaitlyn Nguyen. It was not, at any time, "the defendant's practice". Ms. Nguyen, as her job title well describes, was Dr. S[redacted]'s helper, along with many other people.

The defense brings this concern to the Court's attention, as there's little doubt that the prosecution will utter the phrase in front of the jury. The defense objects now, as such statements mislead the jury and prejudice the defendant.

VI. Inextricably Intertwined & 404(b)

The government argues that the patient deaths are somehow intertwined with the charge of drug distribution. First, factually, the deaths are not related to the defendant, with the possible except of J.H. Even with J.H., the defendant told investigators that she heard of the death, and then left the clinic. Deaths that occurred before she started in the late Spring of 2012 were wholly unrelated to Ms. Nguyen, and cannot show her knowledge and intent.

Second, they are remote in time, as to Ms. Nguyen. The defendant only worked in the clinic for less than 6 months. The government sets out the over-all conspiracy as beginning in 2009. Certainly, that's the charge, but Ms. Nguyen did not begin at the clinic until mid-2012.

Finally, Ms. Nguyen is only charged with prescription writing for deceased patient J.H. in Counts 1, 26, 27, and 41. The rest of the charges as to Ms. Nguyen relate to alleged prescription writing for informants, and for one random patient, G.R.. There is little to no relevance, let alone interrelationships, to these other deaths and Ms. Nguyen, given the narrow charges pending against defendant.

VII. Conclusion

For the reasons set out above, the hearsay filled and relevance challenged patient files should be excluded. In addition, the defense strongly suggests that the defendant cannot get a fair trial if the evidence of the dead patients is admitted, and the tales from family members about their loved ones' death spiral surely must be excluded as well excludable.

/s./ H. Dean Steward
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Dated: August 24, 2017