NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

ADELFO PAMATMAT,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. WHETHER PETITIONER RECEIVED THE EFFECTIVE REPRESENTATION OF TRIAL COUNSEL WHEN COUNSEL FAILED TO PROPERLY INVESTIGATE THE CASE AND THE SIXTH CIRCUIT COURT VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS AND THE U.S. SUPREME COURT'S HOLDING OF *STRICKLAND V WASHINGTON*, BY APPLYING THE WRONG STANDARD TO DETERMINE PREJUDICE AND IGNORING PETITIONER'S REQUEST FOR AN EVIDENTIARY HEARING?

II. WHETHER THE SENTENCE IMPOSED BY THE DISTRICT COURT WAS PROCEDURALLY UNREASONABLE AS THE DRUG QUANTITIES AND FRAUD AMOUNTS USED TO CALCULATE THE ADVISORY GUIDELINE RANGE ARE NOT SUPPORTED BY THE EVIDENCE NOR REASONABLY FORESEEABLE TO DR. PAMATMAT?

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Petitioner Adelfo Pamatmat respectfully prays that a Writ of Certiorari issue to review the Opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on November 26, 2018. The Sixth Circuit Court of Appeals decided two important federal and constitutional questions in ways that conflict with relevant decisions of this Court. Pursuant to Rule 10 (c) of the Supreme Court, Dr. Pamatmat's Petition should be reviewed by this Honorable Court.

OPINION BELOW

The Sixth Circuit Court of Appeals issued an opinion and order denying Petitioner Adelfo Pamatmat's appeal from his jury conviction and sentence imposed following a jury trial in the U.S. District Court for the Eastern District of Michigan at Detroit. A copy of that order is attached as

Appendix A. The Sixth Circuit Court erroneously upheld the district court's denial of Dr. Pamatmat's Motion for a New Trial based on the ineffectiveness of trial counsel. The Sixth Circuit did not address Petitioner's request for an evidentiary hearing. The Sixth Circuit also upheld the sentence imposed by the district court.

Dr. Pamatmat was named in a 13 count Second Superceding Indictment filed under seal in the U.S. District Court, Eastern District of Michigan (Indictment, RE 189 Pg ID#832-862). Count I charged Dr. Pamatmat with Conspiracy to Distribute and Possess with Intent to Distribute Controlled Substances, in violation of 21 U.S.C. §§ 846 and 841(a)(1). Count 2 charged Dr. Pamatmat with Health Care Fraud Conspiracy, in violation of 18 U.S.C. §§ 1347, 1349. Dr. Pamatmat, along with his co-defendants Sardar Ashrafkhan and John Geralt, proceeded to trial on May 26, 2015. The trial continued to July 2, 2015. After two days of deliberation, Dr. Pamatmat was found guilty as charged. With respect to Count 1, the jury found Dr. Pamatmat guilty for unlawfully prescribing schedule II, III, IV and V drugs. However, the jury did not determine any drug quantities. (Jury Verdict, RE 1160 Pg. ID# 8142)

Following the jury verdict, Judge Cleland revoked Dr. Pamatmat's bond and remanded him to the custody of the U.S. Marshal. Dr. Pamatmat's trial counsel filed a Motion for a New Trial (Motion, RE 1180, PG ID#8557) and Motion for Judgment of Acquittal (Motion, RE 1181, PG ID# 8579). However, over the course of the next several weeks, it became clear that the attorney-client relationship was deteriorating. Dr. Pamatmat filed a request for a court appointed attorney and his trial attorney filed a motion to withdraw as his counsel. (Request, RE 1187, PG ID# 8614; Motion, RE 1304, PG ID#10241). Subsequently, current Counsel was appointed to represent Dr. Pamatmat. (Order, RE 1331, PG ID#10368)

Current Counsel reviewed the trial transcripts and on October 13, 2016, filed a Supplemental Motion for a New Trial, based on the ineffective assistance of trial counsel. (Supplemental Motion for a New Trial, RE 1538, PG ID#15609-15629). Counsel also filed multiple objections to the calculation of Dr. Pamatmat's advisory sentencing guideline range, as well as a detailed sentencing memorandum arguing for a sentence of no more than 10 years incarceration. (Motion for Variance and Sentencing Memorandum, RE 1642, PG ID #16497-
16540).

Prior to the imposition of sentence, the Court conducted oral arguments on the motion for a new trial and Counsel's objections to the scoring of the guidelines. Judge Cleland denied the motion and upheld the probation department's scoring. (Sentencing Transcript RE 1684 PG ID#17088; 17137) Dr. Pamatmat was sentenced to concurrent terms of 228 months on Count 1 and 120 months on Count 2. (Sentencing Transcript RE 1684 PG ID#17141). A copy of his Judgment is attached as Appendix B.

The Sixth Circuit Court of Appeals dismissed both of the above issues, finding that Petitioner had not met his burden to show that his counsel rendered ineffective assistance of counsel and that his sentence was correctly calculated. However, the unpublished opinion did not address the failure of the district court to hold an evidentiary hearing on the ineffective assistance of counsel, nor the request before it to remand so that a hearing could be conducted. Additionally, the opinion applies an incorrect analysis in determining whether Petitioner was prejudiced due to his trial attorney's failure to investigate his defenses, follow federal court rules and the trial orders of the district court. The Sixth Circuit upheld the sentences imposed by the district court.

JURISDICTION

The Opinion and Order upholding Dr. Pamatmat's convictions and sentences was entered by the United States Court of Appeals for the Sixth Circuit on November 26, 2018. This Petition is filed within ninety (90) days of that date, as required by Rule 13.1 of the Supreme Court Rules. Two critical rulings of the district court, upheld by the Sixth Circuit Court of Appeals, violated relevant decisions of this Court. Jurisdiction is proper under Rule 10(c) of the Supreme Court and 28 U.S.C. § 1254(1) and Article III, § 2 of the U.S. Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 5 of the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6 of the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE AND UNDERLYING FACTS

A. Nature of the Case

Petitioner Adelfo Pamatmat brings before this Honorable Court two erroneous constitutional rulings, made by the District Court and upheld by the Sixth Circuit Court of Appeals. The trial court erred in denying Dr. Pamatmat's motion for a new trial based on the ineffective assistance of trial counsel without conducting an evidentiary hearing on the issues raised. Specifically, Dr. Pamatmat's trial attorneys rendered ineffective assistance of counsel in the following ways:

- Failing to investigate and obtain the underlying raw data which was relied upon by Government Witness Scott O'Connell in preparing several charts, entered as Exhibit 60-A, as to the amount of illegal drugs, supposedly the exact number of pills, that Dr. Pamatmat allegedly prescribed, when that raw data is given to the State of Michigan from the pharmacies, many of which were named in the conspiracy and Dr. Pamatmat maintains filled fraudulent scripts that were not signed by him;

- Failing to present a witness to challenge the findings of Witness O'Connell and the data testified to by him;

- Failing to present evidence that Dr. Pamatmat, due to suffering a heart attack in January of 2012 and a subsequent bypass operation with complications which resulted in Dr. Pamatmat being in a coma from January 19, 2012 to March 14, 2012 and an extensive stay in a rehabilitative facility, did not work for over one year. Yet, the Government introduced evidence alleging that Dr. Pamatmat engaged in illegal conduct during the time he was hospitalized. That contention went unchallenged by the Defense due to Counsel's failure to investigate and present evidence of Dr. Pamatmat's medical disability and hospitalization;

- Failing to follow established Federal Rules of Criminal Procedure, specifically Rule16, as well as the Court's established trial order, in providing notice to the Government as to the hiring of a handwriting analyst.

Trial Counsel's failure to timely retain a handwriting analyst not only impacted the analyst's ability to review all of the prescriptions and charts alleged to have been signed by Dr. Pamatmat, but also resulted in the Court striking half of her testimony on evidence she had examined. In waiting until two weeks before the trial ended in hiring an expert, the quality of the expert was negatively impacted. Additionally, because Counsel failed to follow Rule 16, the Defense was precluded from arguing that the Government, in not offering a handwriting analyst, had failed to prove that Dr. Pamatmat had signed the charts and prescriptions.

During the oral arguments conducted on the motion, the error of the trial court in failing to conduct an evidentiary hearing became clear. Both Judge Cleland and AUSA Wayne Pratt speculated as to the different scenarios which could explain trial counsel's failure to investigate and to follow the mandates of the Federal Rules of Criminal Procedure. (Transcript, RE 1684, PG ID# 17078, 17085-17086) Had a hearing been conducted, there would have been no need for speculation as Arthur Landau would have had to testify, under oath, as to his failures in representing Dr. Pamatmat. Without an evidentiary hearing, no record was made to establish the clear constitutional deficiencies in trial counsel's representation.

The magnitude of the error in denying Dr. Pamatmat an evidentiary hearing was not addressed by the Sixth Circuit Court of Appeals. The opinion is silent on Dr. Pamatmat's request. However, the opinion again points out how necessary an evidentiary hearing is to fully develop the facts of this claim. The Court denied Dr. Pamatmat's claim that trial counsel was ineffective because he failed to fully investigate and obtain the raw data for the MAPS compilations, allowing the Government's expert, Scott O'Donnell to testify unchallenged. The Sixth Circuit states that "Pamatmat has not shown a reasonable probability that (1)an expert would have determined any of

the signatures on those prescriptions were forgeries; (2) a jury would have believed expert testimony that the signatures were forgeries"....Pg. 11, *unpublished opinion* of November 26, 2018.

That is exactly why an evidentiary hearing should have been held! In order to factually establish the reasonable probability sufficient to undermine confidence in the outcome, Dr. Pamatmat needed to present testimony from expert witnesses not called by his trial counsel. Further, trial counsel needed to explain why he believed it was "sound trial strategy" to wait until two weeks before the jury trial ended before obtaining a handwriting analyst, when the defense centered on the fact that Dr. Pamatmat's signature had been forged. Had Dr. Pamatmat been afforded an evidentiary hearing, the MAPS raw data could have been analyzed by an expert to determine the authenticity and reliability of that data. Without such an evidentiary hearing, no such record can be made. Yet, the Sixth Circuit opinion is silent on Dr. Pamatmat's request for the hearing and the correctness of the trial court's denial of one. Clearly, by asking for a factual finding which cannot be provided without an evidentiary hearing, the Sixth Circuit Court is validating Dr. Pamatmat's legal necessity to conduct one.

Additionally, the Sixth Circuit Court violated longstanding precedent from this Honorable Court in applying the prejudice standard under an ineffective assistance of counsel claim. The Court found that Dr. Pamatmat had failed to meet the prejudice element in *Strickland v Washington,* 466 U.S. 668; 104 S. Ct. 2052; 80 L. Ed.2d 674 (1984) by repeatedly stating that Dr. Pamatmat "has not shown that the outcome of his trial would have been different."[1] That is not the test. In fact, the *Strickland* Court specifically rejected that test by stating"We believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland*

[1]Pgs. 11, 12, 13 and 14, *unpublished opinion* of November 26, 2018.

at 693. The test to establish prejudice under *Strickland* is that the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome" *Strickland* at 694.

Finally, the trial court erred by imposing a sentence that was both procedurally and substantively unreasonable. Procedurally, the district court erred by adopting the drug quantity and fraud amount used by the probation department in the PSR-which was dictated to the probation department by AUSA Pratt. The amounts were based on pure speculation and not supported by the record. Substantively, Dr. Pamatmat's sentence was unreasonable because the district court gave undue weight to two of the statutory sentencing factors. Resentencing is warranted. The Sixth Circuit Court upheld the district court's calculations and sentence.

B. Course of Proceedings

On January 10, 2013, Dr. Adelfo Pamatmat was named in a 13 count Second Superceding Indictment filed under seal in the U.S. District Court, Eastern District of Michigan (Indictment, RE 189 Pg ID#832-862). Count I charged Dr. Pamatmat with Conspiracy to Distribute and Possess with Intent to Distribute Controlled Substances, in violation of 21 U.S.C. §§ 846 and 841(a)(1). Count 2 charged Dr. Pamatmat with Health Care Fraud Conspiracy, in violation of 18 U.S.C. §§ 1347, 1349. Dr. Pamatmat, along with his co-defendants Sardar Ashrafkhan and John Geralt, proceeded to trial on May 26, 2015. The trial continued to July 2, 2015. After two days of deliberation, Dr. Pamatmat was found guilty as charged. With respect to Count 1, the jury found Dr. Pamatmat guilty for unlawfully prescribing schedule II, III, IV and V drugs. However, the jury did not determine any drug quantities. (Jury Verdict, RE 1160 Pg. ID# 8142)

The trial was the culmination of an investigation which began in 2009. According to the Offense Conduct as reported in Dr. Pamatmat's presentence report (PSR), in 2009 law enforcement agencies began an investigation into the prescription medication distribution activities of a group of individuals known as or associated with the "Stay Real/East Warren" organization. Through various investigatory means, including surveillance, search warrants, interviews and police contacts, agents determined the conspirators obtained large quantities of prescription medications. (PSR, pg. 10).

The conspirators obtained prescription medications from physicians operating out of medical clinics and/or practices including Compassionate Care Doctors, Preferred Home Health Care, Visiting Doctors for America, Palace Home Health Care, Delta Home Care, Inc., and Reliance Home Care. The physicians wrote controlled substance prescriptions or signed blank prescriptions, which were later completed by a conspirator. The prescriptions were issued by the prescribing doctor with or without a cursory examination. Further, either an unlicensed medical school graduate or someone else would prepare a chart which the medical doctor would sign along with a prescription, as if the patient had been examined. At times, unlicensed graduates of medical schools, not legally authorized to prescribe controlled substances or practice as physicians, posed as doctors and conducted limited examinations. Along with the narcotic prescriptions, expensive non-controlled substance prescriptions were also issued to add legitimacy to the doctor's prescribing practices and to provide a financial benefit to the pharmacy to fill the controlled substance prescriptions. *Id.*

The prescriptions were taken by conspirators to cooperating Michigan pharmacies. The pharmacies filled prescriptions for both controlled and expensive non-controlled substances. If the non-controlled medications were not needed and/or not retrieved from the pharmacy, the medications were returned to the pharmacies inventory. Either way, however, the pharmacy billed and kept the

entire payment received from the insurance companies for the controlled and non-controlled medications. *Id.*

Dr. Pamatmat's connection to the illegal activities was primarily due to his brief employment at Compassionate Doctors, P.C., a health care agency owned and operated by his co-defendant, Sardar Ashrafkhan. Dr. Pamatmat was only employed at Compassionate from 2008-2009, earning $19,610.00. (Transcript, RE 1468, PG ID# 14849-14850)

Dr. Pamatmat's brief and sporadic employment with Compassionate was clear when compared with the earnings of several of the Government's informants, as well as other named defendants in the indictment. For example, Javar Myatt-Jones, a medical school graduate who fraudulently presented himself as a medical doctor, earned $104,272.93 at Compassionate, over a 19 month period. Ravi Iyer earned $50,350.00 in just 14 months. From 2008 through 2010, Compassionate was yearly grossing between one million and two million dollars. In that time period, Medicare paid Compassionate roughly $4.9 million. (Transcript, RE 1468, PG ID#14851, 14854, 14860, 14867).

The Government alleged that after Dr. Pamatmat left Compassionate, he continued in the conspiracies primarily through his interactions with Myatt-Jones. Myatt-Jones testified that he would bring Dr. Pamatmat medical charts on individuals that he had examined and have Dr. Pamatmat sign the charts that would then be billed to Medicare. He would pay Dr. Pamatmat for his signatures. Additionally, Dr. Pamatmat would sign prescription pads, which Myatt-Jones would then fill out for narcotic medications and sell the drugs on the street. Dr. Pamatmat had no knowledge that Myatt-Jones was selling narcotics on the street, or signed script pads for money. (Transcript, RE 1123, PG ID# 6995-6999). Finally, Myatt-Jones opened his own health care agency,

Michigan Elderly Home Care. Myatt-Jones ordered prescription pads, with Dr. Pamatmat's name and DEA number pre-printed on them. These scripts were either sold on the street, or Myatt-Jones would fill the prescriptions and sell the illegal narcotics on the street. He admitted Dr. Pamatmat had no idea he was engaging in this activity. (Transcript, RE 1134, PG ID# 7390-91; 7405-7407).

Cooperating witness Ali Malik, who also worked at Compassionate, testified that he left Dr. Khan's employment sometime in 2009. He opened his own health care provider service, Visiting Doctors of America (VDA), in 2009. Ravi Iyer became one of VDA's primary physicians. After he left Compassionate, Malik maintained contact with the office staff, including the woman who submitted all of the Medicare billing. He was told that Compassionate was still submitting both Dr. Pamatmat's and Dr. Iyer's NPI numbers to Medicare to obtain approval for prescription medication. The NPI numbers were being used for maintenance drugs. (Transcript, RE 1453, PG ID# 12665-12667).[2]

Dr. Pamatmat did not work at VDA. Ali Malik had no interactions with him. However, Myatt-Jones was a regular contributor to Malik's illegal enterprise. Myatt-Jones provided Malik with prescription pads from an entity called "Michigan Elderly Home Care." Some of the prescription pads contained a signature alleged to be Dr. Pamatmat's; other pads had no signatures. (Transcript, RE 1453, PG ID# 12675-12678).

[2] Government witness James Grzeszczak, from Health and Human Services, testified that under Medicare regulations, it is the responsibility of the health care providers to notify Medicare when a physician no longer works for that provider. Compassionate, not Adelfo Pamatmat, was legally obligated to notify Medicare that he no longer worked there. It was illegal for Compassionate to continue using Dr. Pamatmat's NPI number to validate prescriptions after he no longer worked at Compassionate. (Transcript, RE 1455, PG ID# 13231).

Scott O'Connell, an analyst with the U.S. Attorney's Office, prepared several Government exhibits, which purported to be compositions of data obtained from both the Michigan Automatic Prescription Service (MAPS) and the STARS database. STARS is a tool that allows access to Medicare claim data. The MAPS database contains prescriptions that are filled at pharmacies. Once a pharmacy fills a prescription, a record of that prescription is sent to the MAPS database in Lansing, Michigan. (Transcript, RE 1455, PG ID# 13235-13236).

Mr. O'Connell testified that Exhibit 60A (Exhibit, RE 1553-8; PG ID# 15834-15846) was an accurate compilation of the MAPS spread sheet that he received from the State of Michigan, as to the number of dosage units (pills) that Dr. Pamatmat allegedly prescribed. At the request of AUSA Wayne Pratt, Mr. O'Connell calculated the number of **pills** allegedly prescribed, not the number of **scripts** written. Using that data, he prepared several different summaries. 60A, pages 1-4 allegedly represented pills prescribed by Dr. Pamatmat from January 1, 2008-September 15, 2009. Pages 5-9 of the Exhibit allegedly detailed pills from May 1, 2010-January 10, 2013, although the summary on page 9 ends in November of 2011. The remaining pages contain graphs detailing Dr. Pamatmat's alleged pill prescriptions. (Exhibit, RE 1553-8; PG ID# 15834-15846)

During cross-examination by Dr. Pamatmat's attorney, Mr. O'Connell admitted that he did not personally obtain the MAPS data for Dr. Pamatmat for the years prior to 2010. He received that information from the DEA. (Transcript, RE 1456, PG ID# 13311). Mr. Landau did not have the underlying MAPS print out from the State of Michigan for any of the years charted by Mr. O'Connell. Nor did he question Mr. O'Connell about how the information is obtained by the State of Michigan. If Mr. Landau had obtained the MAPS print out, he would have known that the pharmacies that fill the scripts are the reporting entities to Lansing. Many of the pharmacies listed

on the MAPS print out had been indicted as part of the health care fraud conspiracy. (Affidavit, RE 1538-1, PG ID# 15630-32).

During cross examination, Mr. Landau did attempt to question Mr. O'Connell about the percentage of prescriptions for hydrocodone that are fulled in certain years. Mr. O'Connell was not aware of the percentages of any of the prescriptions for any given year. Without the raw data to show Mr. O'Connell, or a witness to testify that in fact the raw data confirmed those percentages, Mr. Landau was admonished by the Court. Specifically, the following exchange took place:

> "THE COURT: Mr. Landau–
>
> MR. ARTHUR LANDAU: I'll go on.
>
> THE COURT: –it's clear this is not within the witness's knowledge, nor within the scope of his direct examination.
>
> MR. ARTHUR LANDAU: Okay. I'll continue.
>
> THE COURT: Thank you. So the jury understands that those are facts not proven. They are simply questions by counsel. Go ahead, Mr. Landau.
>
> MR. ARTHUR LANDAU: They are questions, but I'm basing it on the MAPS data.
>
> THE COURT: So you say, but you're not a witness. You're not under oath.
>
> MR. ARTHUR LANDAU: Okay.
>
> THE COURT: And the data is not in evidence. And the jury...are reminded that things that are said by an attorney not supported by evidence, whether in the question or argument are not facts...." (Transcript, RE 1456, PG ID# 13321).

Scott O'Connell was the last witness presented by the Government. On behalf of Dr. Pamatmat, two witnesses were presented. Dr. Tim Gardner Adams from Caro Hospital testified that Dr. Pamatmat was employed as an Emergency Room physician until June of 2010 and made

approximately $200,000.00 (two hundred thousand and zero) dollars per year. The second witness presented was Wendy Carlson, who was a forensics handwriting analyst.

Prior to Ms. Carlson's testimony, AUSA Wayne Pratt outlined the Government's issues with Ms. Carlson's testimony and the resulting compromises that had been reached. First, Mr. Pratt did not receive the required documents pursuant to Rule 16 by the Court's ordered deadline. He received her report the following day. Given the late notice, the Government did not have time to obtain its own expert. Therefore, the parties agreed that in lieu of asking the Court to completely bar Ms. Carlson's testimony, the Defense would be precluded from arguing that the Government failed to hire its own expert to prove that the signatures on the patient files and prescription pads were Dr. Pamatmat's. If Defense Counsel did argue that fact, then the jury would be informed that:

> "MR. PRATT: ...the reason the Government doesn't have an expert is because the defendant provided their disclosure late in violation of the Court order, that the Government had no reasonable opportunity to obtain a responsive opinion, and the defendant's argument in that regard should be disregarded." (Transcript, RE 1458, PG ID# 13718-19).

Further, the Government moved to exclude Ms. Carlson from testifying about additional exemplars that she examined and which were submitted to Mr. Pratt on Sunday afternoon, almost 24 hours after the first production. Defense Counsel argued that the additional items that Ms. Carlson examined and analyzed were all exhibits from the Government, not new samples that were taken by Ms. Carlson. Additionally, the report which Ms. Carlson prepared was extremely thorough and comprehensive. (Transcript, RE 1458, PG ID# 13720-21; 13723-24).

Judge Cleland ruled:

> "THE COURT: I'm going to accept the Government's suggestion and the evidence will be limited to those matters disclosed 24 hours, more than 24 hours late. I shall

> exclude those additional examples provided 48 hours late and only about less than 18 hours before commencement of trial this morning.
>
> So you're limited to the Saturday disclosures. The Sunday updates are too late to be acceptable. And please govern your testimony accordingly"...
> (Transcript, RE 1458, PG ID# 13724).

Kevin Landau began by asking Ms. Carlson questions about her professional training and achievements. Following multiple questions which detailed her education, prior court experience and publications, Mr. Landau moved to have the Court recognize Ms. Carlson as an expert in handwriting analysis. The Court responded:

> "THE COURT: That proposition is rejected consistent with Sixth Circuit law, which I explained to Counsel, actually, before we came on the record."
> (Transcript, RE 1458, PG ID# 13807)

Mr. Landau continued to argue the point, however, asking the Court to recognize her "experience in this field." Again, the Court explained that under "longstanding" Sixth Circuit law, it was not up to the Court to recognize or qualify the witness. It was defense counsel's responsibility to ask questions, including whether or not the witness had any opinion, and if there were any objections to those questions, the Court would rule on those objections. (Transcript, RE 1458, PG ID# 13808).

Ms. Carlson testified that of the 19 samples she examined, none were signed by Dr. Pamatmat. (Transcript, RE 1458, Pg ID# 13825, 13911). The samples were Government exhibits, including signed prescriptions and patient charts. Several of the forged signatures misspelled Dr. Pamatmat's name.(Transcript, RE 1458, Pg. ID# 13821-13823).

On cross examination, Ms. Carlson admitted that she was hired by Dr. Pamatmat's lawyers "four or five days ago."[3] (Transcript, RE 1458 Pg. ID #13843). No original samples were examined. Both the known signatures from Dr. Pamatmat and the questioned signatures were photocopies. Her analysis was performed on an "expedited basis" which obviously limited the amount of samples she could review. (Transcript, RE 1458, Pg. ID# 13883).

Following closing arguments, the jury deliberated for approximately a day and a half before finding all three defendants guilty as charged. Dr. Pamatmat was convicted of participating in the drug conspiracy, concerning Schedule Drugs II, III, IV and V. He was also convicted of participating in the health care fraud conspiracy.

Judge Cleland revoked Dr. Pamatmat's bond after the reading of the verdicts and remanded him to the custody of the U.S. Marshal. Dr. Pamatmat's trial counsel filed a Motion for a New Trial (Motion, RE 1180, PG ID#8557) and Motion for Judgment of Acquittal (Motion, RE 1181, PG ID# 8579). However, over the course of the next several weeks, it became clear that the attorney-client relationship was deteriorating. Dr. Pamatmat filed a request for a court appointed attorney and his trial attorney filed a motion to withdraw as his counsel. (Request, RE 1187, PG ID# 8614; Motion, RE 1304, PG ID#10241). Subsequently, Current counsel was appointed to represent Dr. Pamatmat. (Order, RE 1331, PG ID#10368)

Current counsel reviewed the trial transcripts and on October 13, 2016, filed a Supplemental Motion for a New Trial, based on the ineffective assistance of trial counsel. (Supplemental Motion for a New Trial, RE 1538, PG ID#15609-15629). Counsel also filed multiple objections to the

[3]Wendy Carlson testified on June 29, 2015. "Four or five days ago" would establish that she was hired on either June 24th or June 25th, 2015. The trial began May 26, 2015. The Government completed its case in chief on June 24, 2015.

calculation of Dr. Pamatmat's advisory sentencing guideline range, as well as a detailed sentencing memorandum arguing for a sentence of no more than 10 years incarceration. (Motion for Variance and Sentencing Memorandum, RE 1642, PG ID #16497-
16540).

Prior to the imposition of sentence, the Court conducted oral arguments on the motion for a new trial and Counsel's objections to the scoring of the guidelines. Judge Cleland denied the motion and upheld the probation department's scoring. (Sentencing Transcript RE 1684 PG ID#17088; 17137) Dr. Pamatmat was sentenced to concurrent terms of 228 months on Count 1 and 120 months on Count 2. (Sentencing Transcript RE 1684 PG ID#17141)

The Court released an opinion and order on May 23, 2017 denying Dr. Pamatmat's post-conviction motions. (Opinion Denying Defendant's Motion, RE 1648 PG ID# 16699-16708). Dr. Pamatmat's Judgment of Sentence was entered on May 25, 2017 (Judgment, RE 1651, PG ID# 16791). His appeal was filed on May 26, 2017 (Claim of Appeal, RE 1653, PG ID# 16800). Additional relevant facts are set forth in the arguments presented herein.

The Sixth Circuit Court of Appeals dismissed both of the above issues, finding that Petitioner had not met his burden to show that his counsel rendered ineffective assistance of counsel and that his sentence was correctly calculated. However, the unpublished opinion did not address the failure of the district court to hold an evidentiary hearing on the ineffective assistance of counsel, nor the request before it to remand so that a hearing could be conducted. Additionally, the opinion applies an incorrect analysis in determining prejudice pursuant to *Strickland.* A close review of the opinion shows that the Court applied a standard specifically rejected by the *Strickland* Court.

Finally, the Sixth Circuit upheld Dr. Pamatmat's sentence. The Court held that the district court correctly estimated the amount of drugs and fraud calculations by using the figures supplied by the Government. Despite the fact that these calculations came in uncontested, due to trial counsel's ineffective representation, the Court found that the advisory guideline range was correctly calculated.

REASONS IN SUPPORT OF GRANTING THE WRIT

ARGUMENT

I. PETITIONER DID NOT RECEIVE THE EFFECTIVE REPRESENTATION OF TRIAL COUNSEL WHEN COUNSEL FAILED TO PROPERLY INVESTIGATE THE CASE AND THE SIXTH CIRCUIT COURT VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS AND THE U.S. SUPREME COURT'S HOLDING OF *STRICKLAND V WASHINGTON* BY APPLYING THE WRONG STANDARD TO DETERMINE PREJUDICE.

In the instant case, Dr. Pamatmat asserts that his trial attorneys rendered ineffective assistance of counsel primarily because they failed to conduct reasonable pre-trial investigation. The failure to conduct reasonable pre-trial investigation included the following actions, or inactions, which denied him the effective assistance of counsel. Specifically, the Landaus:

- Failed to investigate and obtain the underlying raw data which was relied upon by Government Witness Scott O'Connell in preparing several charts, entered as Exhibit 60-A, as to the amount of illegal drugs, supposedly the exact number of pills, that Dr. Pamatmat allegedly prescribed when that raw data is given to the State of Michigan from the pharmacies, many of which were named in the conspiracy and Dr. Pamatmat maintains filled fraudulent scripts that were not signed by him;

- Failed to present a witness to challenge the findings of Witness O'Connell and the data testified to by him;

- Failed to present evidence that Dr. Pamatmat, due to suffering a heart attack in January of 2012 and a subsequent bypass operation with complications which resulted in Dr. Pamatmat being in a coma from January 19, 2012 to March 14, 2012 and an extensive stay in a rehabilitative facility, did not work for over one year. Yet, the Government introduced evidence alleging that Dr. Pamatmat engaged in illegal conduct during the time he was hospitalized. That contention went unchallenged by the Defense due to counsel's failure to investigate and present evidence of Dr. Pamatmat's medical disability and hospitalization;

- Failed to follow established Federal Rules of Criminal Procedure, specifically Rule 16, as well as the Court's established trial order, in providing notice to the Government as to the hiring of a handwriting analyst.

Trial counsel's failure to timely retain a handwriting analyst not only impacted on the analyst's ability to review all of the prescriptions and charts alleged to have been signed by Dr. Pamatmat, but also resulted in the Court striking half of her testimony on evidence she had examined. Further, the failure to timely investigate and hire an expert greatly limited the quality of the expert available. Finally, because Counsel failed to follow Rule 16, the Defense was precluded from arguing that the Government, in not offering a handwriting analyst, had failed to prove that Dr. Pamatmat had signed the charts and prescriptions.

The *Strickland* Court addressed the standard that must be met when the claim centers on the adequacy of trial counsel's pre-trial investigation. The Court held:

> "Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, at 690-691.

The defendant must overcome the presumption that, under the circumstances, a challenged action or omission might be considered sound trial strategy. In order to establish prejudice, a defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability does not mean that the defendant must prove his innocence. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Strickland* at 694. Federal courts have consistently applied the *Strickland* standard in determining whether, under Fed.R.Crim.P. 33, a defendant is entitled to a new trial due to the ineffective assistance of counsel. See *U.S. v. Munoz,* 605 F.3d 359, 373 (6th Cir. 2006); *U.S. v. Bass*, 460 F.3d 830, 838 (6th Cir. 2006); *U.S. v. Arny*, 831 F.3d 725 (6th Cir. 2016). The proper inquiry for the Court is not whether counsel's choices were strategic, but whether they were *reasonable*. *Roe v. Flores-Ortega*, 528 U.S. 470, 481; 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000), (emphasis added). In *Towns v. Smith,* 395 F.3d 251 (6th Cir. 2005), the Sixth Circuit held that courts have not hesitated to find ineffective assistance in violation of the Sixth Amendment when counsel fails to conduct a reasonable investigation into one or more aspects of the case and when that failure prejudices his or her client. *Towns* at 258. In *Towns*, the Sixth Circuit found that trial counsel's failure to conduct a reasonable investigation into a "known and potentially important witness" violated the petitioner's Sixth Amendment right to the effective assistance of counsel. *Id* at 259.

Trial Counsel Failed to Investigate and Challenge MAPS Data

In this case, it was objectively unreasonable for Trial Counsel to fail to investigate the State of Michigan's MAPS database and the raw data that it allegedly represents. Dr. Pamatmat was charged in participating in both a health care fraud and drug distribution conspiracy. His trial

attorneys knew that the Government alleged Dr. Pamatmat was fraudulently prescribing drugs to patients that he either never examined or, even worse, was signing blank prescription forms which were then sold on the street and ultimately used to buy narcotic medication, that was then sold on the street. The failure to investigate the information contained in the MAPS system was unreasonable. Trial Counsel did not even have to obtain that information from the Government. As a provider, Dr. Pamatmat could have requested all MAPS data pertinent to him and it would have been provided.

As set forth in the Affidavit by James D. Hoppe, (Affidavit, RE 1538-1, PG ID#15630-32) the MAPS information is reported to the State of Michigan by the pharmacies who fill the prescriptions. Mr. Hoppe is a retired agent from the Federal Bureau of Investigation (FBI) who worked white collar criminal investigations and now is a private investigator. He determined that the MAPS information is not raw data. The raw data is kept at the pharmacies which report the prescriptions. The MAPS print out lists the name and address of the person receiving the prescription, the name and DEA number of the prescribing physician, the name of the pharmacy filling the prescription, the date the prescription was written and the date it was filled. The raw data for the MAPS print out is maintained by the pharmacies.

In evaluating the information contained in the MAPS spread sheet, Mr. Hoppe was able to state that Dr. Pamatmat did write scripts to individuals that he examined as an emergency room physician at Caro Hospital. Further, Mr. Hoppe discovered that almost 3,000 prescriptions (2,863) were filled by pharmacies involved in the health care conspiracy-calling into question the veracity of these scripts. From January 16, 2012 through December 31, 2012, a year in which Dr. Pamatmat

was physically unable to work, 2,360 prescriptions were filled using Dr. Pamatmat's DEA number. See (Affidavit, RE 1538-1, PG ID#15630-32).

The failure of Trial Counsel to hire a witness to examine the MAPS data was unreasonable trial strategy. First of all, the raw data used to prepare the MAPS spread sheet should have been requested. That data, the prescription forms, especially from the pharmacies allegedly involved in the conspiracy, could have undergone a forensic examination as to the legitimacy of the signature. Despite the Government's contention, limiting that request to only one physician would not have been overly burdensome.

Secondly, given Dr. Pamatmat's hospitalization, the 2012 scripts that were written prove a critical element of Dr. Pamatmat's defense, namely, that his name was being forged without his knowledge. A handwriting analyst is not necessary to prove that while hospitalized following a heart attack and comatose due to complications, Dr. Pamatmat could not have signed those scripts. At a minimum, the 2012 scripts should have been struck from the compilation of allegedly illegal pills outlined in Exhibit 60-A. Trial Counsel was ineffective for not objecting to the inclusion of the 2012 scripts and for failing to produce evidence as to Dr. Pamatmat's hospitalization.

Both of the lower courts dismissed trial counsel's error in failing to present evidence of Dr. Pamatmat's hospitalization by relying exclusively on the testimony of Government witness Javar Myatt-Jones, an indicted co-conspirator who was cooperating. Myatt-Jones testified that he never forged Dr. Pamatmat's name and that Dr. Pamatmat pre-signed prescription pads. The Courts' reliance is misplaced, as the credibility of a cooperating witness is always questionable. But specifically in this instance, because trial counsel failed to follow federal rules regarding timely retaining an expert and providing a report, Myatt-Jones took the stand knowing no defense witness

would be able to refute his statements. Had trial counsel obtained those scripts from the pharmacies in 2012 in a timely fashion, a qualified expert could have examined the scripts. If the expert determined the scripts were forged, certainly that would undermine Myatt-Jones's statements and establish a reasonable probability to undermine the outcome of the case.

None of the analysis and information prepared by former FBI Agent James Hoppe was ever presented to the jury, because Trial Counsel failed to hire an expert to investigate, obtain and analyze MAPS data. Trial Counsel should have hired an analyst to review the MAPS print out and detail for the jury the above facts. Mr. Landau attempted to cross examine Scott O'Connell about other information contained in the MAPS print out, as well as the percentage of certain prescriptions written in any given year. Without the MAPS print out, however, Mr. O'Connell "could not recall" just what information was prepared. Mr. Landau's cross examination was stopped by the Court, and he was admonished in front of the jury that he "was not a witness, not under oath" and the jury was again reminded that questions from the attorneys "are not evidence." (Transcript, RE 1456, PG ID# 13319-22).

Scott O'Connell's testimony went in completely unchallenged. Mr. O'Connell admitted that the charts and compilations that were contained in Government Exhibit 60-A were created at the direction of AUSA Wayne Pratt. Mr. Pratt requested him to focus on certain pieces of information, including the number of pills allegedly prescribed, as opposed to the number of prescriptions written, in preparing Exhibit 60-A.

Exhibit 60-A also included the number of pills allegedly written by Dr. Pamatmat in 2012. The MAPS information for 2012 should never have been allowed in against Dr. Pamatmat. Trial Counsel failed as effective advocates by not investigating or presenting any evidence that Dr.

Pamatmat did not work in 2012. Dr. Pamatmat suffered a severe heart attack in January of 2012. He underwent coronary bypass surgery at Royal Oak Beaumont Hospital on January 17, 2012. Dr. Pamatmat suffered complications and was in a coma until March 14, 2012. He was released to Bloomfield Nursing Home and Rehabilitation Center until July of 2012. He was released from Bloomfield, continued to receive at home care and did not return to work as a physician until January of 2013. (Affidavit, RE 1642-3, PG ID#16522-24)

Yet, pursuant to the MAPS data, prescriptions were being filled that had been signed by Dr. Pamatmat. Trial Counsel should have moved to strike all MAPS data in Exhibit 60-A for 2012. Those 2012 scripts should not have been included in any data compilation which purported to establish Dr. Pamatmat's alleged involvement in the conspiracies. At a minimum, the fact that in 2012 scripts allegedly signed by Dr. Pamatmat were being filled shows the absolute lack of control or verification for the raw data sent to MAPS.

In dismissing Dr. Pamatmat's claim that the lack of investigation into the MAPS data was ineffective representation, the Sixth Circuit Court stated:

> "Even had Pamatmat's trial counsel obtained the prescription forms underlying the MAPS compilations, Pamatmat has not shown a reasonable probability that (1) an expert would have determined any of the signatures on those prescriptions were forgeries; (2) a jury would have believed expert testimony that the signatures were forgeries; (3) the jury would have correspondingly discounted the government's evidence regarding the legitimacy of the signatures, including Pamatmat's confession, the video, and Myatt-Jones's testimony that he had never forged Pamatmat's signature; and (4) finding that some or all of the signatures had been forged, the jury would have acquitted Pamatmat despite the existence of separate evidence of Pamatmat's involvement in the conspiracy." Appendix A, pg. 11.

The Sixth Circuit's analysis is fatally flawed and does not correctly apply the prejudice standard as set forth in *Strickland*. The test annunciated by the Sixth Circuit is impossible to meet and a misstatement of U.S. Supreme Court law. The *Strickland* prejudice standard does not mandate that a claimant prove that but for trial counsel's action or inaction, the jury would have acquitted him. In fact, the *Strickland* Court specifically rejected that standard. A reasonable probability is not proving an acquittal; a reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland* at 694.

The Sixth Circuit's erroneous analysis does support Dr. Pamatmat's request for an evidentiary hearing, however. Had he received an evidentiary hearing in the district court, Dr. Pamatmat could have presented expert testimony and an evaluation of the raw data used to compile Government's Exhibit 60-A-which went before the jury uncontested. Attacking the credibility of the MAPS data, showing that Dr. Pamatmat's signature had been forged, clearly would have established the prejudice necessary to order a new trial. The testimony of Myatt-Jones would have been impeached. The calculations of the drug amounts used to calculate Dr. Pamatmat's advisory sentencing guideline range would have been correctly challenged. The Sixth Circuit is requesting a factual analysis that could only have been provided had an evidentiary hearing been held. Clearly, the district court erred in denying Dr. Pamatmat an evidentiary hearing.

Trial Counsel Failed to Timely Investigate a Valid Defense

A cornerstone of Dr. Pamatmat's defense was the fact that his signature was being forged on both patient charts and prescription pads. Inexplicably, a handwriting analyst was not retained by Dr. Pamatmat's trial counsel until the last week of the jury trial. The failure of Trial Counsel to timely

retain the services of a handwriting analyst, given the facts of this case, is inexcusable. Clearly, Trial Counsel's failure prejudiced Dr. Pamatmat, undermining confidence in the outcome.

Initially, the late retention of a handwriting analyst severely limited the amount of exhibits she could examine. In the "four or five days" that she was examining handwriting samples, Wendy Carlson examined a total of 32 samples. However, because Trial Counsel initially violated Fed. R. Crim. Pro. 16's deadlines, and subsequently violated the Court's deadline of Friday at 4:00 p.m. to provide Ms. Carlson's report to the Government, only 19 samples were allowed to be testified to by Ms. Carlson. (Transcript, RE 1458 PG ID# 13724).

Had Counsel followed Fed.R.Crim.P. 16 and reasonably conducted an investigation and timely hired a handwriting expert, she could have analyzed every single exhibit offered by the Government during the multi-week trial. Certainly, many of the exhibits offered by the Government were provided to counsel before trial. The failure to timely retain a handwriting analyst undermined the adversarial process. Most damaging to Dr. Pamatmat's defense was the fact that because of Trial Counsel's errors, Counsel was precluded from arguing to the jury that the Government had not presented an expert to prove that Dr. Pamatmat had signed those documents.

The U.S. Supreme Court has consistently found trial counsel ineffective for failing to conduct reasonable pre-trial investigation, including the review of documentation and the presentation of witnesses. In *Rompilla v. Beard*, 545 U.S. 374; 125 S.Ct. 2456, 162 L.Ed.2d 360, (2005) the Court found counsel ineffective for failing to obtain and review material in a court file, that counsel knew the prosecution will "probably rely on" as evidence of aggravation at a sentencing phase at trial. Even when the defendant and members of his family told the attorney that there probably wasn't any mitigating evidence in the file, the attorney was ineffective in not reviewing the material. Similarly,

in *Sears v. Upton*, 561 U.S. 945, 130 S.Ct. 3259; __L.Ed.2d __ (2010) defense counsel's performance was constitutionally deficient when he failed to conduct adequate mitigation investigation, which would have revealed significant mental and psychological impairments.

It was entirely unreasonable for Dr. Pamatmat's trial counsel to fail to timely retain the services of a handwriting analyst. Dr. Pamatmat's defense was largely based on the fact that any involvement in the drug conspiracy, especially, was due to his signature being forged. Dr. Pamatmat was prejudiced by the failure of his trial attorneys to timely hire a handwriting analyst and follow the requirements of Fed.R.Crim.P. 16, as well as the trial court's subsequent order. Ms. Carlson was severely limited in the number of samples and exhibits she could examine. Almost half of the samples she did examine and found to be forgeries, were excluded from evidence. Counsel was not allowed to argue that the Government had failed in its burden of proof to establish, beyond a reasonable doubt, that Dr. Pamatmat signed those documents.

As stated above, in order to establish prejudice, a defendant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland* at 694. When counsel's representation is deficient in several aspects, as in this case, the trial court does not measure the result of each individual error, but "considers the errors of counsel in total, against the totality of the evidence in this case." *Stewart v. Wolfenbarger*, 468 F.3d 338, 361 (6th Cir. 2006). See also *U.S. v. Dado,* 759 F.3d 550, 563 (6th Cir 2014) ["examining an ineffective assistance of counsel claim requires the court to consider the combined effect of all acts of counsel found to be constitutionally deficient, in light of the totality of the evidence in the case." (quoting *Lundgren v. Mitchell,* 440 F.3d 754, 770 (6th Cir. 2006)] Clearly, the combined actions of

Dr. Pamatmat's trial counsel were constitutionally deficient, violating his constitutional right to the effective assistance of counsel.

Despite the litany of pretrial and trial errors, Judge Cleland summarily denied Dr. Pamatmat's request for a new trial as well as his request for an evidentiary hearing. Judge Cleland found that "given the weight of the evidence against Defendant, including his oral confession, the court is not persuaded that his retained trial counsel's arguably sub-optimal performance actually prejudiced Defendant to that degree." (Opinion Denying Defendant's Motion, RE 1648 Pg.. ID# 16708).

Respectfully, Judge Cleland's holding is contrary to federal law. Dr. Pamatmat strongly contested the testimony from a Government witness that he confessed-no record, either written, audio or video substantiated that claim.[4] More importantly, however, by stating that trial counsel's representation was "arguably sub-optimal" the Court should have held an evidentiary hearing. Judge Cleland erred by excusing the "arguably sub-optimal" representation based on his interpretation of the weight of evidence presented against Dr. Pamatmat. In *Arny, supra.,* the Government presented the exact same logic; basically, given the fact that the case against the defendant was strong, defendant testified in his own defense yet the jury deliberated for less than three hours before convicting him, trial counsel's failure to call certain witnesses and present a stronger defense would not have changed the outcome of the trial. *Arny*, at 734-735.

The defendant in *Arny* was a physician, convicted of conspiracy to distribute and unlawfully dispense prescription pain medications. Following his conviction, he obtained new counsel, who filed a motion for a new trial based on the ineffective assistance of counsel. The trial court

[4] Defendant filed a Motion to Suppress and an Evidentiary hearing was held. Trial Court denied Motion to Suppress Defendant's Inculpatory Statements. (Motion, RE 909 PG ID #4064; Order, RE 1031 PG ID #5103).

conducted an evidentiary hearing and granted him a new trial. The Government appealed, arguing that the mistakes made by trial counsel (aka "arguably sub-optimal performance") would not have changed the outcome of the trial, based on the strong evidence against the defendant. The defendant even testified in *Arny* and clearly, the jury did not believe him. *Id.*

The *Arny* Court dismissed that logic. The Court found that the witnesses trial counsel should have called "would have helped refute the government's argument that the defendant distributed controlled substances outside the ordinary course of medical practice and that his prescriptions lacked a legitimate medical purpose." *Id.* Specifically, the *Arny* Court found that trial counsel presented no evidence to counter the damaging testimony of the government-selected former patients; certainly "the helpful testimony of six of Arny's former patients would have shifted the jury's reasoning on whether Arny acted in the usual course of medical practice." *Arny,* at 736.

Clearly, the same logic can be applied to Dr. Pamatmat's case. The most critical pieces of evidence against him were the calculations presented by Mr. O'Connell, consisting of handpicked data from MAPS system. The Government directed the compilation of that data. The jury was never informed that the vast majority of the reporting pharmacies were engaged in the conspiracy-pharmacies that made more money the more scripts that were filled. No evidence was admitted or testimony presented to challenge the numbers calculated by Mr. O'Connell. Because of his attorney's deficient performance, Dr. Pamatmat was held responsible for scripts written when he was in a coma!

Further, the complete failure to timely find and hire a handwriting expert clearly prejudiced Dr. Pamatmat. Inexplicably, Judge Cleland completely dismisses that failure by stating "Defendant

offers no reason why allowing Carlson to testify as to her opinion on more documents would make her opinion more persuasive to the jury." (Opinion, RE 1648, PG ID# 16707).

The failure of trial counsel to timely hire Ms. Carlson (or another expert) severely restricted the scope of her testimony before the jury. She was only able to testify as to 19 specific exhibits. Judge Cleland and the Sixth Circuit Court incorrectly presume that the jury did not find her credible. The jury could have found her credible, but the small number of exhibits she testified were forgeries did not affect the jury's final determination. Alternatively, if the lower courts were correct and the jury did find her unbelievable, that is further support for the ineffective assistance of trial counsel. As the Government repeatedly pointed out, there are retired federal agents and law enforcement personnel who are regularly hired to provide expert analysis of handwriting exhibits. The failure to timely hire an expert significantly limited the quality of the expert available. Either way, trial counsel provided ineffective and unreasonable representation.

At a minimum, Dr. Pamatmat should have been given an evidentiary hearing at the district court level so that a full record could be made as to the actions (or inactions) of trial counsel. The Sixth Circuit opinion is completely silent on Petitioner's request for a remand for a hearing. The trial court denied it completely. As the *Strickland* holding directs, in any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances. Trial counsel violated Rule 16, waited until two weeks before the trial was concluded to hire an expert when the defense was one of forgery and failed to comply with the trial court's order directing disclosure of the expert's findings. On its face, those actions scream ineffectiveness. Certainly, Dr. Pamatmat should be afforded a hearing so that trial counsel can explain his strategy in failing to follow the district court trial orders and federal court rules.

The Sixth Circuit Court opinion highlights the obvious need for an evidentiary hearing. Had Dr. Pamatmat been afforded an evidentiary hearing, the MAPS raw data would have been analyzed by an expert to determine the authenticity and reliability of that data. Without such an evidentiary hearing, no such record can be made. Yet, the Sixth Circuit opinion is silent on Dr. Pamatmat's request for the hearing and the correctness of the trial court's denial of one. Clearly, by asking for a factual finding which cannot be provided without an evidentiary hearing, the Sixth Circuit Court is validating Dr. Pamatmat's legal necessity to conduct one.

Additionally, in precluding an evidentiary hearing, trial counsel's failure to timely hire a handwriting expert and an explanation for the quality of the individual hired is not explained. The Government maintains that Wendy Carlson was completely unqualified and no matter how many exhibits she had examined, the jury would not believe her. Typically, handwriting experts are formal federal agents or law enforcement personnel; Ms. Carlson was neither. But in failing to order an evidentiary hearing, the reasonableness as to the late retention of Ms. Carlson and her lack of qualifications cannot be established.. The inexcusably late retention of the handwriting analyst severely limited the amount of exhibits she could examine. In the "four or five days" that she was examining handwriting samples, Wendy Carlson examined only 32 samples. Had Counsel reasonably conducted an investigation and timely hired an expert, that expert could have analyzed every single exhibit offered by the Government against Dr. Pamatmat.

The lower courts clearly erred in dismissing this claim. The failure to timely retain a handwriting analyst undermined the adversarial process. Most damaging to Dr. Pamatmat's defense was the fact that because of Trial Counsel's errors, Counsel was precluded from arguing to the jury that the Government had failed in its burden of proof that Dr. Pamatmat had signed those documents

by failing to hire an expert. As in *Arny*, had counsel rendered effective assistance, the "jury's reasoning could very well have shifted" and questioned the legitimacy of the Government's evidence, and ultimately, the Government's case against Dr. Pamatmat.

II. PETITIONER'S SENTENCE WAS PROCEDURALLY UNREASONABLE AS THE DRUG QUANTITIES AND FRAUD AMOUNTS USED TO CALCULATE DR. PAMATMAT'S ADVISORY GUIDELINE RANGE ARE NOT SUPPORTED BY THE EVIDENCE NOR REASONABLY FORESEEABLE TO DR. PAMATMAT.

Subsequent to the U.S. Supreme Court's landmark holding of *Booker*,[5] rendering the U.S. Sentencing Guidelines advisory and not mandatory, the Court further articulated the role of the circuit courts in reviewing a district court's sentence. In *Gall, supra*., the U.S. Supreme Court stated:

> "Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard. It must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the 3553(a) factors, selecting a sentence based on clearly erroneous facts or failing to adequately explain the chosen sentence...
>
> Assuming the district court's sentencing is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." 128 S Ct 597-598.

In the instant case, the district court imposed a procedurally unreasonable sentence because the court improperly calculated the advisory sentencing guideline range. In the post-*Booker* era, the Guidelines are a beginning calculation and not an ultimate determination. While no longer mandatory, a sentencing court must begin any sentencing determination by calculating the

[5] *U.S. v. Booker*, 543 US 220, 125 Sct 738, 160 L Ed 2d 621 (2005).

appropriate advisory guideline range. After correctly calculating the applicable Sentencing Guideline range, the district court must then consider the arguments of the parties and the statutory sentencing factors. The district court may not presume that the Sentencing Guideline range is reasonable and it may, in appropriate cases, impose a non-Guideline sentence based on disagreement with the Sentencing Commission's views. *Peugh v. U.S.,* 133 S Ct 2072, 2080-2081 (2013). The *Peugh* Court further held:

> "Overall, the federal sentencing system requires a court to give **respectful consideration** to the Guidelines, but it permits the court to tailor the sentence in light of other statutory concerns as well." *Id, (emphasis added).*

In determining the correct guideline range, the government bears the burden of proving the base offense in the Guidelines and aggravating facts and the defense bears the burden of proving mitigating facts. See *Rita v. U.S.,* 551 U.S. 338, 356 (2007); *U.S. v. Ameline,* 409 F.3d 1073, 1086 (9th Cir. 2005). Since the guidelines have become advisory, and not mandatory, the federal courts generally agree that factors supporting the scoring of certain guidelines must be found by a preponderance of the evidence. *U.S. v. Brika*, 487 F.3d 450, 457 (6th Cir. 2007); *U.S. v. Villareal-Amarillas*, 562 F.3d 892, 898 (8th Cir. 2009).

The evidence cited by the Government to support the scoring of Dr. Pamatmat's advisory sentencing guideline range as to both the drug quantities and fraud amounts fails to meet the preponderance standard. Initially, Dr. Pamatmat only worked at Compassionate Care from 2008-2009. He left Dr. Khan's company at the end of 2009. Yet, the Government insists that Dr. Pamatmat should be held accountable for a significant portion of Compassionate's Medicare billings from January 1, 2007 through January 10, 2013. Specifically, Dr. Pamatmat is being assessed 18

additional levels for a loss amount over $2.5 million but less than $7.0 million. (PSR pg. 16). That calculation is simply ridiculous given that Dr. Pamatmat left Compassionate in 2009.

While Compassionate continued to bill under Dr. Pamatmat's identification numbers, there was no way Dr. Pamatmat would have known that was what Dr. Khan was doing. Cooperating witness Malik, who also worked at Compassionate, testified that he left Dr. Khan's employment sometime in 2009. He opened his own health care provider service, Visiting Doctors of America (VDA), in 2009. Ravi Iyer became one of VDA's primary physicians. After he left Compassionate, Malik maintained contact with the office staff, including the woman who submitted all of the Medicare billing. He was told that Compassionate was still submitting both Dr. Pamatmat's and Dr. Iyer's NPI numbers to Medicare to obtain approval for prescription medication. The NPI numbers were being used for maintenance drugs. (Transcript, RE 1453 PG ID# 12665-67).

Government witness James Grzeszczak from Health and Human Services, testified that under Medicare regulations, it is the responsibility of the health care providers to notify Medicare when a physician no longer works for that provider. (Transcript RE 1455, PG ID# 13231). Compassionate, not Adelfo Pamatmat, was legally obligated to notify Medicare that he no longer worked there. It was illegal for Compassionate to continue using Dr. Pamatmat's NPI number to validate prescriptions after he no longer worked at Compassionate. Further, given Compassionate's illegal actions, it was not foreseeable to Dr. Pamatmat that his NPI number would continue to be used.

U.S.S.G. 1B1.3(a)(1)(B) states that a defendant is only held accountable for the conduct of others when the court determines that the conduct was: (1) within the scope of the defendant's jointly undertaken criminal activity; (2) in furtherance of the defendant's undertaking; and (3) reasonably foreseeable in connection with the defendant's undertaking. Dr. Pamatmat left Compassionate after

a falling out with Dr. Khan. He was no longer a part of that entity. The fact that Compassionate continued to illegally use his federal identification for Medicare billing was not reasonably foreseeable. Clearly, the fraud calculation cannot stand.

During the sentencing hearing, Judge Cleland acknowledged Dr. Pamatmat's objection to the fraud calculation, but dismissed it completely. Judge Cleland did not make any specific findings of fact. (Transcript, RE 1684, PG ID#17111) Judge Cleland abused his discretion in upholding the fraud calculation of 28. Based on the testimony adduced at trial, Dr. Pamatmat should have been scored no more than 12 points.

Similarly, in advocating for a drug quantity which places Dr. Pamatmat at a Level 38, the Government begins with the MAPS data which was examined and testified to by Scott O'Connell. As argued in Issue I, *supra.,* his trial attorney rendered ineffective assistance in failing to fully investigate and prepare for Mr. O'Connell's testimony, allowing the MAPS data to come into evidence unchallenged. James Hoppe, former FBI agent, examined the MAPS data and submitted an affidavit, which was admitted into the lower court record. Essentially, the MAPS data is unreliable due to the following:

1. MAPS data is not original data or raw data-it is a compilation of information received from the reporting pharmacies;

2. The reporting pharmacies would have the original scripts and in order to verify the MAPS information, the prescriptions would have to be obtained from the pharmacies;

3. At least four of the pharmacies listed in the MAPS data were named in the conspiracy, and allegedly reported 2,863 prescriptions attributed to Dr. Pamatmat;

4. From January 16-December 31, 2012, a period during with Dr. Pamatmat was hospitalized and, at times, comatose, 2,360 scripts

were allegedly written by him. (Affidavit, RE 1538-1, PG ID #15630-32).

Most critically, it is clear from the testimony of the Government's own witnesses that not only was Compassionate using Dr. Pamatmat's credentials without his knowledge to bill Medicare, but Myatt-Jones testified that he had fake prescription pads printed up, under the name of his fraudulent company, Michigan Elderly Home Care. He printed Dr. Pamatmat's name and DEA number on the pads. Myatt-Jones would use those pads without Dr. Pamatmat's knowledge. He also sold them on the street and other individuals would fill them out. Myatt-Jones blithely told the jury the forged prescription pads was something he was "doing on my own." (Transcript, RE 1134, PG ID# 7391).

Further, any MAPS data generated in 2012 under Dr. Pamatmat's DEA number was not written by Dr. Pamatmat. From January of 2012 to May of 2012, Dr. Pamatmat was hospitalized at Royal Oak Beaumont Hospital. From January 19 to March 14, 2012, he was in a coma following complications from heart bypass surgery. Following his discharge on May 4, 2012 he was admitted to Bloomfield Nursing Home and Rehab. (Affidavit, RE 1538-1, PG ID# 15630-32).

Despite Dr. Pamatmat's total incapacitation, MAPS data from 2012 was utilized in calculating his drug and fraud quantity. Dr. Pamatmat had withdrawn from any illegal activities and was certainly not engaged in the conspiracy during 2012. Clearly, those prescriptions were not written by Dr. Pamatmat. The actions of Myatt-Jones (and others) in printing off fake prescription pads and forging Dr. Pamatmat's name appears to be much more wide spread than even the Government knows. On July 30, 2015 a young woman, who said her name was Devon Vann, walked into a Walgreens in Clinton Township, with a signed prescription for Adderall. The

prescription was allegedly signed by Adelfo Pamatmat. The pharmacists thought the prescription was suspicious and would not fill it. Ms. Vann walked out of the Walgreens. Further investigation by the Clinton Township Police Department established that the signature was a fake. More importantly, the prescription was signed on July 27, 2015-several weeks after Dr. Pamatmat had been taken into federal custody. (Exhibit, RE 1642-4 PG ID#16525-27.)

Dr. Pamatmat's trial attorney presented testimony from Ms. Carlson that on 19 of the Government's exhibits (prescriptions and medical records) Dr. Pamatmat's signature had been forged. However, the failure to timely and fully investigate that issue by trial counsel was ineffective. The fact that Dr. Pamatmat's signature had been repeatedly forged without his knowledge or consent clearly undermines the data compiled from MAPS and does not prove, by a preponderance, the amount of drugs or fraud calculations advocated by the Government.

Finally, the Government admits that during the relevant period of time, Dr. Pamatmat was employed at legitimate health care facilities, including Caro Hospital in Caro, Michigan. To account for his legitimate employment, the Government asserts that "only" 90% of the information gleaned from MAPS should be used to calculate his drug quantity; 10% will be attributed to his legitimate employment. The Government asserts that the 90% figure is "an abundance of caution" and in support of that statement, points to the testimony of Verdell Lovett, a street marketer, and Dr. Ravi Iyer, a physician initially employed by Compassionate, who later opened VDA with Ali Malik. (Transcript, RE 1684 PG ID# 17102). Dr. Iyer confirmed Myatt-Jones's testimony that Dr. Pamatmat never worked at VDA. (Transcript RE 1468, PG ID# 14694-96) Mr. Lovett testified that he had dealings with Dr. Khan and Dr. Geralt, but not Dr. Pamatmat. (Transcript, RE 1120, PG ID# 6219-6344)

The 90-10 calculation is a completely arbitrary figure, groundless in fact or reason. Dr. Pamatmat worked at Caro Hospital full-time as an emergency room physician until 2010, making an annual salary of $200,000.00. The total amount he was paid by Compassionate was $19,610.00. He never worked at VDA. Dr. Pamatmat was physically unable to work in 2012. Clearly, his signature and DEA identification number were forged and continued to be forged even after his incarceration in the BOP. There is simply no evidence to support the 90-10 calculation.

Yet, that is exactly the calculation adopted by Judge Cleland and upheld by the Sixth Circuit Court. In denying Counsel's objection to the drug calculation, Judge Cleland stated:

> "THE COURT: The Court's findings about the percentage of illegality should be held consistent from defendant to defendant. And as Mr. Pratt indicates, the findings with respect to co-defendant Dr. Geralt were aired in court, discussed, decided, resolved and tested on appeal and affirmed my findings as to percentage of legality and illegality shall be the same here as were rendered in the Geralt case."
>
> (Transcript, RE 1684, PG ID# 17109).

Judge Cleland abused his discretion as the Government failed to show that the 90% fraudulent;10% legitimate ratio applied to Dr. Pamatmat given his personal situation. Judge Cleland's holding also violates longstanding federal law. Specifically, where the amount of drugs is uncertain, the sentencing court should "err on the side of caution and only hold the defendant responsible for that quantity of drugs for which the defendant is more likely than not *actually* responsible. *U.S. v. Meacham,* 27 F.3d 214, 216 (6th Cir. 1994). In *U.S. v. Walton,* 908 F.2d 1289 (1990), the Court stated:

> "We believe the guidelines do not permit the District Court to hold a defendant responsible for a specific quantity of drugs unless the court can conclude the defendant is more likely than not actually responsible for a quantity greater than or equal to the quantity for

> which the defendant is being held responsible. If the exact amount cannot be determined, an estimate will suffice, but here also a preponderance of the evidence must support the estimate....
>
> Allowing a court to find a defendant responsible for the maximum quantity of drugs that can plausibly be found could result in defendants receiving excessive sentences based on a finding of quantity that is more likely than not excessive." *Walton,* at 1302.

In the instant case, Judge Cleland and AUSA Pratt parried back and forth, throwing out different percentages that "would make no difference in the offense level." (Transcript, RE 1684 PG ID# 17102-17103; 17106-17107). Finally, Judge Cleland stated:

> "THE COURT: Lovett and Iyer said either zero percent legitimate, or maybe as many as 5 percent, in an abundance of caution, you suggest though double that to 10 percent...it has been borne out that doubling it again, doubling that 10 percent again to 20 percent would make no difference in the offense level. Doubling it again to 20 percent to 40 percent legitimate, that is and 60 percent illegitimate would make no difference in the offense level..." (Transcript, RE 1684, PG ID# 17107).

The fact that the Government was equivocating and applying a "discount" to the MAPS calculations indicates that Mr. O'Connell's calculations were speculative. Had the data been reliable, the scripts not forged and the numbers accurate, no "legitimacy discount" would have to have been applied. Sentences have been vacated where there was not sufficient evidence to support the amount of drugs attributable to an individual defendant. See *Walton, supra.,* and *U.S. v. Baro,* 15 F.3d 563, 569 (6th Cir 1994).

The Government failed to meet its burden of establishing by a preponderance of the evidence both the fraud and drug amounts necessary to calculate Dr. Pamatmat's advisory sentencing guideline range. Dr. Pamatmat, 72 years old, is serving 19 years based on speculation and

conjecture. Therefore, he is entitled to have his sentences vacated and his case remanded for resentencing.

CONCLUSION

THEREFORE, based on the above arguments and case law, Dr. Adelfo Pamatmat respectfully requests that his convictions be reversed and his judgement vacated. Alternatively, that his convictions be set aside and the matter remanded for an evidentiary hearing on the ineffective assistance of trial counsel. In the event that his convictions are affirmed, the matter should be remanded for resentencing.

Respectfully Submitted,

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