UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CASE NO: 13-1164
(Consolidated with 13-1173, 13-1182, 13-1215 and 13-1216)

UNITED STATES OF AMERICA,

Appellee,

v.

BABUBHAI PATEL,

Appellant.

A DIRECT APPEAL OF A CRIMINAL JUDGMENT
FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

INITIAL BRIEF OF BABUBHAI PATEL

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REQUEST FOR ORAL ARGUMENT

The Appellant, BABUBHAI PATEL ("Mr. Patel"), hereby requests oral argument pursuant to Federal Rule of Appellate Procedure 34(a)(1) and Sixth Circuit Rule 34(a). Mr. Patel believes that oral discussion of the facts and applicable precedent would assist the Court in determining a just resolution, and therefore, believes that oral argument is appropriate.

STATEMENT OF JURISDICTION

The United States District Court for the Eastern District of Michigan had subject matter jurisdiction over this federal criminal prosecution pursuant to 18 U.S.C. § 3231. Pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), this Court has appellate jurisdiction to review the judgment and sentence, which were timely appealed on February 8, 2013. Notice of Appeal, RE 704, Page ID# 4485-4486. The judgment is a final order that disposed of all matters pending before the district court.

STATEMENT OF THE ISSUES

I. Did the trial court err in denying Mr. Patel's motion to suppress the fruits of intercepted wire communications where (a) the supporting affidavit provided strong evidence that normal investigative techniques in use had worked remarkably well; (b) the Government employed civilian monitors even though the court orders only authorized special agents of the Drug Enforcement Agency to

conduct surveillance; and (c) the civilian monitors minimized less than 1% of the calls and permitted the recording of all attorney-client communication?

II. Did the district court err when it sentenced Mr. Patel without explaining why it adopted the Government's loss amount and drug quantity amounts when Mr. Patel repeatedly challenged the Government's calculations during the sentencing proceedings?

III. Did the district court err when it adopted the Government's flawed method of calculating the amount of loss and drug quantities and where the Government failed to prove those amounts by a preponderance of the evidence?

STATEMENT OF THE CASE

Mr. Patel hereby appeals the judgment and sentence imposed by the United States District Court for the Eastern District of Michigan. On August 2, 2011, a grand jury returned an indictment against Mr. Patel, the owner of a number of pharmacies in the greater-Detroit area, charging him and his co-defendants with:

- Count 1: Conspiracy to commit health care fraud in violation of 18 U.S.C. § 1349;
- Counts 2-14: Aiding and abetting and health care fraud in violation of 18 U.S.C. §§ 1347 and 2;
- Count 15: Conspiracy to distribute controlled substances in violation of 21 U.S.C. § 846;
- Counts 16-34: Distribution of controlled substances and aiding and abetting in the distribution of controlled substances in violation of 21 U.S.C. § 841(a) and 18 U.S.C. § 2.

Indictment, RE 3, Page ID# 6-28.

On January 31, 2012, Mr. Patel and his co-defendants jointly moved to suppress the fruits of the electronic surveillance conducted by the Government and for an evidentiary hearing. Mtn. to Suppress, RE 361, Page ID# 1232-1271. The district court held an evidentiary hearing on June 14, 2012, and entered an order denying the motion that same day. Order, R.E. 528, Page ID# 2831.

The seven week jury trial of Mr. Patel and six co-defendants commenced on June 19, 2012. On August 10, 2012, the jury found Mr. Patel guilty of counts 1-5, 7-9, 12-15, 20-32 and 34. Jury Verdict Form, RE 565, Page ID# 2947-54. With respect to distribution of controlled substances, however, the jury found that Mr. Patel did not distribute any Schedule II controlled substances. *Id*. at 2950. The jury found Mr. Patel not guilty on counts 6, 10, 11, 16-19, and 33. *Id*. at 2947-54.

The district court sentenced Mr. Patel total term of 204 months of incarceration: 120 months on Count 1, 84 months on Count 2 to be served consecutively to Count 1, 120 months on counts 3-5, 7-9, 12-14, 15, 20-22, 27-32, and 34, to be served concurrently with Count 1, and 60 months on counts 23-26 to be served concurrently with Count 1. Judgment, RE 720, Page ID# 4533. The district court also ordered Mr. Patel to pay restitution in the amount of $18,955,869.00. *Id*. at 4536.

On February 8, 2013, Mr. Patel timely appealed the judgment and sentence to this Court. Notice of Appeal, RE 704, Page ID# 4485-4486. This appeal follows.

STATEMENT OF THE FACTS

A. Introduction

At trial, the Government alleged that Mr. Patel engaged in health care fraud by paying cash kickbacks to medical providers so they would write prescriptions which would be filled at various pharmacies Mr. Patel controlled. The pharmacies would purchase medications from wholesalers, not dispense the medications, bill the insurer, and return the non-dispensed medications to the wholesalers for cash or credit. Transcript, RE 911, Page ID# 7572-7576. The crux of the Government's case against Mr. Patel was that he orchestrated this "billed-but-not-dispensed" scheme. *Id*. at 7572.

On appeal, Mr. Patel challenges only the denial of the motion to suppress the wiretap evidence and raises two sentencing issues. Therefore, his Statement of the Facts does not include a detailed recap of the lengthy trial proceedings. The only facts from the trial proceedings pertinent to his appeal are those relied upon by the Government at sentencing to establish the loss amount and drug quantities. Thus, those facts will be discussed in the "Sentencing" subsection of the Statement of the Facts.

B. The Wiretap

The Government requested and received authorization to wiretap two telephones used by Mr. Patel for six months and twenty days. Declaration of DEA S.A. Parkinson, RE 459-1, Page ID# 2321. Each of the seven times the Government requested authorization to continue the wiretap, it submitted a wiretap affidavit. The first affidavit revealed that law enforcement had secured the assistance of two confidential informants. Affidavit, RE 361-2, Page ID # 1302-14. The first informant's cooperation permitted law enforcement to "observe and record . . . the actual execution of the alleged scheme." The second informant (1) described the functioning of the scheme in great detail, (2) arranged for surveillance of Mr. Patel unlawfully prescribing controlled substances, (3) furnished copies of the prescriptions to investigators, and (4) introduced Mr. Patel to an FBI agent posing as a physician who could have infiltrated the organization. *Id*.

The first affidavit also demonstrated that law enforcement, *inter alia*: (1) declined offers of help from another "Source of Information," who claimed to solicit patients for a doctor involved in the scheme; (2) recovered revelatory documents pertaining to the scheme from a trash pull; (3) conducted controlled purchases from a prescribing doctor; and (4) arrested 21 people and confiscated

illegally prescribed controlled substances based on information gleaned from the trash pull. *Id*. at 1301-1335.

Notwithstanding these successes, the first affidavit, and each one that followed, describes the proposed electronic surveillance as:

> the only available investigative technique which has a reasonable likelihood of revealing and of securing admissible evidence needed to establish the full scope and nature of the offenses being investigated, including determining the identity of all the members of the organization, to include additional pharmacies and other medical doctors.

Id. at 1336.

The investigative goals described in the wiretap applications are impressive in terms of their scope and ambition. Each of the applications sought, and each order granted, permission for the interceptions to "continue until all communications are intercepted that *fully reveal* the manner in which INTERCEPTEES participate in the specified offenses and that *fully reveal* the identities of their co-conspirators, their places of operation, and the nature of the conspiracy involved therein, or for a period of thirty (30) days." *Id*. at 1289 (italics added).

The failure to achieve these ambitious goals at the conclusion of each 30 day period was the impetus for each subsequent request. According to each affidavit, all the way through affidavit number seven and month six of constant surveillance, the intercepted communications "*are beginning to show, yet not fully reveal*, the

operational structure, roles, and identities of participants as well as locations utilized by the drug trafficking organization led by Patel." *See, e.g.*, RE 361-3, Page ID# 1372 (emphasis added).

Each wiretap order authorized "special agents of the Drug Enforcement Administration" to carry out the interceptions, with the following minimization directive:

> PROVIDING THAT, this authorization to intercept wire communications shall be. . . conducted in such a way as to minimize the interception of communications not otherwise subject to interception under Chapter 119 of Title 18 of the United States Code. That is, interceptions are to be minimized when it is determined through voice identification, physical surveillance or otherwise that none of the named interceptees or their confederates, when identified, are participants to the conversation, unless it is determined the conversation is criminal in nature. The agents shall spot monitor to determine that any minimized conversations have not become criminal in nature.
>
> Special attention shall be given to minimize all privileged conversations. In the event an intercepted conversation is in code or a foreign language, and an expert in that foreign language or code is not reasonably available during the interception period, minimization shall be accomplished as soon as practicable after the interception.

See, e.g., Order, RE 361-2, Page ID# 1280.

C. Suppression Proceedings

On January 31, 2012, the defendants jointly moved to suppress the fruits of the electronic surveillance conducted by the Government. Mtn. to Suppress, RE 361, Page ID# 1232-1271. In the Motion to Suppress, the defendants claimed that

the orders of authorization or approval were facially insufficient under 18 U.S.C. § 2518(10)(a)(ii), because neither the affidavits submitted in support of the wiretap, nor the orders authorizing the wiretap, provided a sufficient basis for concluding that normal investigative procedures had been tried and had failed, or reasonably appeared to be unlikely to succeed if tried, or were too dangerous. *Id*. at 1233. Instead, the defendants argued, normal investigative techniques had been effective and the Government had already secured sufficient evidence to prosecute a number of the defendants without the wiretap. *Id*. at 1247-1252.

The defendants also took umbrage with the unrealistically lofty investigative goals described in the wiretap applications, including a desire to uncover "the full extent of" the alleged enterprise and all its suspected activities and methods, "the full extent of knowledge, criminal intent, roles, and functions of" all of its members. *Id*. at 1254. The defendants maintained that when investigative goals are framed in this manner, a wiretap will always be necessary for an unlimited amount of time because of the inherent impossibility of determining when an investigation has revealed "the full extent" of a conspiracy or "the full extent" of the knowledge and intent of the conspirators. *Id*.

The defendants also argued that suppression was warranted because the Government failed to inform the district judge who signed the first order of its intent to use civilians in the wiretap project. *Id* at 1261. Because the majority of

the intercepted calls were conducted in a foreign language (usually Gujarati or Hindi), the investigators employed civilian monitors who were not sworn law enforcement members. *Id.* The defendants similarly claimed that the Government failed to adequately supervise those monitors. *Id.*

Finally, the defendants argued that suppression was warranted because the monitors failed to conduct the surveillance in accordance with 18 U.S.C. §2518(5) and the minimization requirements set forth in each order, which directed the Government "to minimize the interception of communications not otherwise subject to interception." *Id.* at 1233-34. In support of these assertions, the defendants highlighted the dearth of minimized calls. Based on a random sampling of 6,000 recorded phone calls, the defendants found that only 13, or .002%, were minimized. According to documentation provided by the Government, 25 of these calls, or .004%, were minimized. Reply to Gov't Response to Mtn. to Suppress, RE 474, Page ID# 2518-2520; RE 474-2 and 474-3, Page ID# 2525-2540; RE 474-9, Page ID# 2579-2582.

In response, the Government maintained that the affidavits met the obligation of showing that alternative means of investigation were given serious consideration. Response to Mtn. to Suppress, RE 459, Page ID# 2309-2315. The Government next contended that the use of civilian monitors comports with the

requirements of Title III because the monitors translated the calls from Gujarati and Hindi to English. *Id*. at 2316-2317.

Finally, the Government disputed the defendants' statistical analysis regarding the percentage of minimized calls. Since "the vast majority of the calls intercepted were extremely short," the Government argued that only calls lasting over one minute should be considered. Gov't Memo in Opp. To Evidentiary Hearing, RE 510, Pg ID# 2723. The wiretaps intercepted 11,145 calls which lasted over one minute. *Id*. The total amount of minimized calls, *including calls which lasted less than one minute*, was 685. The Government maintained that it minimized 6% of the calls, based on the ratio of all minimized calls (685) to calls over one minute (11,145). *Id*.

The district court conducted an evidentiary hearing on the issues raised in the Motion to Suppress. The Government relied primarily on the testimony of DEA Special Agent Tyler Parkinson, who, along with another agent, "was in charge of the investigation and ran the investigation." Suppression Hearing Transcript, RE 895, Page ID# 5487. Parkinson described the "Taint Team" which was established after the Government realized it was intercepting calls between Mr. Patel and his attorneys:

> A Taint Team, there were agents and investigators selected who were not a part of the investigation to monitor the attorney-client calls that came in over the wire. So, you know, we had translators who were monitoring the two lines. When an attorney call would come in, they

> would grab one of the taint agents and they would monitor those calls. Once the call was done, we would access the call from a different work station, write up a summary or transcribe it, and they would then provide the call to AUSA Dave Morris, who had been assigned to review those calls.

Id. at *5499*.

According to Agent Parkinson, he never received any additional information from AUSA Morris regarding the calls. Agent Parkinson admitted, however, that he had listened in on a "handful" of attorney-client privileged conversations prior to the implementation of the taint team. *Id*. at Page ID # 5500. Agent Parkinson testified that the taint agents who handled all attorney-client calls remained in the same room as the investigating agents. *Id*. at 5516.

Agent Parkinson initially testified that taint agents had discretion to minimize a call, but when pressed, ultimately admitted that all of the attorney-client communications - even minimized conversations - were recorded and preserved for AUSA Morris so he could "make a determination as to whether or not they should be part of the investigation." *Id*. at 5517, 5527. He elaborated that all attorney calls were recorded and "dumped onto the evidence and working copies that were made during the normal investigation." *Id*. at 5529. In other words, the communications were not segregated from the rest of the communications in the operating system, and anyone who had access to the "Red

Wolf" system, even investigating agents and attorneys, would have access to the attorney-client communications. *Id*. at 5531.

Agent Parkinson also testified that, in the case of foreign language calls, the foreign language translators – not DEA agents – determined whether or not to minimize any given call. *Id*. at 5511. He further conceded that he never informed the district court judge prior to the initial authorization of the Government's intent to allow civilian, non-agent translators to conduct the monitoring of all foreign language calls. *Id*. at 5514.

At the conclusion of the suppression hearing, the district court announced its decision and supporting rationale:

> I think there has to be some showing of deliberate violation of the rules. And I think, one, setting up the Taint Team to isolate the attorney-client or insulate it, insulate the agents in charge of the case from attorney-client violation is an indication that there was an attempt to substantially comply with the rules.
>
> I think the adding of the reference to the interpreters having a dual function as monitors as well, and to the extent that it was a technical violation, not to do that in the first place -- and I don't think it was, but even if it were, it doesn't show bad faith or deliberate intention to circumvent or violate the purpose of the wiretap authorization statutes. I don't think the Defendants have carried their burden of showing a deliberate violation. I think the Government has carried their burden of showing substantial compliance, if not exact compliance.

Id. at 5556-57. On this basis, the district court denied the motion to suppress. *Id*.

During its opening statement at trial, the Government stated that "[t]he most prolific, the most significant piece of evidence" which supported its case against Mr. Patel was the wiretap evidence. Trial Transcript, RE 904, Page ID# 6309-6310.

D. Sentencing Proceedings

The PSR ascribed a loss amount of approximately $19 million for Mr. Patel's fraudulent billing of Medicare, Medicaid, and Blue Cross/Blue Shield, "based upon the proofs presented at trial." PSR at 11. The $19 million dollar figure yielded a 20 point enhancement pursuant to U.S.S.G. § 2B1.1(b)(1)(K), for causing over $7 million, but under $20 million, in loss. The PSR also described the specific amounts of pills Mr. Patel distributed as part of the drug conspiracy, and the pills' marijuana equivalency. *Id*. The PSR notes that the loss and drug amounts were furnished by the Government, "who arrived at these amounts based upon the proofs at trial." *Id*. Mr. Patel filed objections to the PSR, claiming the loss amount and drug quantities were incorrect and that the Government could not prove the amounts by a preponderance of the evidence. Addendum to PSR at A-3, A-4.

The Government explained how it arrived at the loss and drug quantity amounts in its Sentencing Memorandum. The Government acknowledged that not all of the billing and dispensing of medication at the Patel pharmacies was

fraudulent during the timeframe alleged in the Indictment. Gov't Sentencing Memorandum, RE 634, Page ID# 3326. However, according to the Government, a "sizeable portion" of the billing and drug distribution "was in service of illegal ends." *Id*. The Government claimed that two principal sources of calculable loss were the basis for the $18.9 million loss figure: (1) Mr. Patel's relationship with a group of physicians called the Visiting Doctors of America ("VDA"); and (2) the "overall course of fraudulent conduct Patel set in place, oversaw, and nurtured in his pharmacies over the course of multiple years." *Id*. at 3328.

The Government claimed that 100% of the VDA billing was fraudulent. *Id*. at 3329. Because the Patel pharmacies billed Medicare and Medicaid approximately $2.9 million for prescriptions originating with VDA, the Government used $2.9 million as its first loss amount figure. *Id*. Instead of providing concrete evidence in support of the assertion that 100% of the VDA billing was fraudulent, such as a representative sample of fraudulent bills, the Government relied upon the testimony of three co-conspirators, Arpit Patel, Pinakeen Patel, and Lavar Carter, as well as Michael Gracer, a law enforcement officer who testified about a police raid where VDA controlled substances were recovered. *Id*. at 3328-3300. The Government also claimed that 100% of the drugs involved in the VDA scheme were unlawfully distributed, but only sought to hold Mr. Patel accountable for the Oxycontin prescriptions which originated from

the VDA group, even though the jury acquitted him on the Oxycontin counts. *Id*. at 3388.

Mr. Patel responded to the Government's claims regarding the VDA billing in his Sentencing Memorandum. He noted that none of the witnesses identified by the Government provided testimony at trial indicating that 100% of the VDA billing was fraudulent. Mr. Patel's Sentencing Memorandum, RE 693, Page ID# 4403. On the contrary, Mr. Patel argued that some of these witnesses' testimony expressly contradicted the Government's claim that all of the VDA billing was legitimate. *Id*. at 4403-4405. Mr. Patel also argued that he should not be held accountable for the Oxycontin quantities distributed in the VDA arrangement, because he was acquitted by the jury on the Oxycontin counts. *Id*.

The second source the Government used to determine the loss amount was the fraudulent billing involved in all non-VDA transactions in his pharmacies "over the course of multiple years." Gov't Sentencing Memorandum, RE 634, Page ID# 3328. The Government stated that 25% of all billing at the Patel pharmacies was fraudulent. *Id*. at 1331. The Government based the 25% figure on a single conversation between Mr. Patel and Pinakeen Patel which was intercepted by the Government. *Id*. at 3331. In the call, Mr. Patel told Pinakeen Patel that, ideally, his pharmacy should be grossing 25% profit. *Id*. Based on that information, the Government assumed that 25% of all billing at the Patel

pharmacies was fraudulent. The Government used the same analysis to assert that 25% of the total drugs distributed by the Patel pharmacies were unlawfully distributed. *Id*. at 3338.

In his Sentencing Memorandum, Mr. Patel challenged the logic underlying the 25% estimate. Mr. Patel argued that even if he had instructed all of the pharmacists that he expected a 25% profit margin, it does not follow that 25% of the transactions were fraudulent. Mr. Patel's Sentencing Memorandum, RE 693, Page ID# 4405. He noted that the estimated national average profit margin for independent pharmacies is 22%-24% of gross billing. *Id.* Thus, Mr. Patel argued, it is entirely conceivable that a pharmacy could attain a profit margin of 25% without engaging in any fraudulent billing. *Id*.

Conversely, Mr. Patel argued that a pharmacy could engage in fraudulent billing 75% of the time, but, because of other inefficiencies associated with the pharmacy, earn profits that equal less than 25% of gross billing. *Id*. Simply put, Mr. Patel maintained that the target profit margin is not probative of the percentage of fraudulent transactions that occur in a pharmacy, and the Government presented no credible evidence that 25% of the billing submitted by the Patel pharmacies was fraudulent. Mr. Patel also argued that the drug quantity asserted by the Government was flawed for the same reasons. *Id*. at 4409.

On February 1, 2013, the district court held Mr. Patel's sentencing hearing. Mr. Patel spent the majority of the sentencing hearing explaining, in detail, the objections identified in his Sentencing Memorandum and in his objections to the PSR to the loss amount and drug quantities proposed by the Government. Sentencing Transcript, RE 930, Page ID# 10479-10501. In response, the Government simply rested on its Sentencing Memorandum. *Id*. at 10482.

The district court ruled that it would not include the Oxycontin in the drug quantity proposed by the Government because Mr. Patel was acquitted on those counts. *Id*. at 10474-10479. The district court made no findings, however, regarding the loss amount or the drug quantities (other than the Oxycontin ruling), and simply stated: "All right. I understand your motion. I understand your brief and your objections, and I understand the Government's, and I will accept the Government's and leave the Presentence Report as it is." *Id*. at 10486. The district court found that the guideline range was 235 to 293 months, and sentenced Mr. Patel to 17 years in prison. *Id*. at 10479, 10508.

SUMMARY OF THE ARGUMENT

First, the district court erred in failing to suppress the fruits of illegally obtained wire communications. The Government submitted a wiretap affidavit that revealed law enforcement had secured the assistance of two confidential informants. The first informant's cooperation permitted the law enforcement to

"observe and record . . . the actual execution of the alleged scheme." The second informant (1) described the functioning of the scheme in great detail, (2) arranged for surveillance of Mr. Patel unlawfully prescribing controlled substances, (3) furnished copies of the prescriptions to investigators, and (4) introduced Mr. Patel to an FBI agent posing as a physician who could have infiltrated the organization.

The affidavit also demonstrated that law enforcement (1) declined offers of help from another "Source of Information," who claimed to solicit patients for a doctor involved in the scheme; (2) recovered revelatory documents pertaining to the scheme from a trash pull; (3) conducted controlled purchases from a prescribing doctor; and (4) arrested 21 people and confiscated illegally prescribed controlled substances based on information gleaned from the trash pull.

In other words, normal investigative techniques uncovered a stunning amount of incriminating evidence. Thus, the district court erred in concluding that the Government carried its burden of showing that the same successful techniques appeared unlikely to succeed or too dangerous to attempt and ratifying the wiretapping of Mr. Patel's calls for nearly seven months.

The district court also erred in endorsing the use of civilian monitors despite its own express order that only authorized special agents of the Drug Enforcement Agency to conduct surveillance. Worse still, the civilian monitors neglected to comply with the statutory minimization requirements. All calls were recorded,

rather than contemporaneously minimized, and less than 1% of all calls were minimized.

More troubling, the Government did not minimize any of the recorded calls between Mr. Patel and his half-dozen attorneys. Although the Government purportedly employed a "taint team" to handle these calls, the taint agent who listened to the calls sat in the same room as the investigating agents. Plus, all of the calls were accessible to the investigating agents and prosecuting attorneys through the Red Wolf system. This Court should not countenance such disregard for the mandates of 18 U.S.C. § 2518.

Second, the district court failed to meet its obligations under Federal Rule of Criminal of Procedure 32(i)(3)(B) when it summarily adopted the Government's factual findings concerning amount of loss and drug quantities. Additionally, the district court erred when it failed to respond to Mr. Patel's repeated objections during every phase of the sentencing proceedings.

Third, the district court erred when it calculated Mr. Patel's sentence based on the Government's flawed calculation of the loss amount and drug quantities, which were not proven by a preponderance of the evidence. The Government asserted that 100% of the billing for the VDA transactions and 25% of the total non-VDA billing was fraudulent. The VDA portion is flawed because the court held that it would not consider the distribution of Oxycodone because the jury

acquitted Mr. Patel of that count. Yet, the Oxycodone had to have accounted for a portion of the VDA billing because the Government claimed, and the court accepted, an estimate of 100% fraud with respect to the VDA billing. Plus, the testimony the Government relied on in support of the VDA estimate either contradicted the 100% estimate or was unreliable.

The non-VDA calculation is also flawed because it flows from a faulty premise. The Government argued that, since Mr. Patel encouraged his pharmacists to turn a 25% profit, then 25% of the billing was fraudulent, and 25% of the drugs were unlawfully distributed. This estimate lacks any basis in law or logic. Since the Government otherwise presented no evidence in support of its conclusion that 25% of the billing was fraudulent, or that 25% of the drugs were unlawfully distributed, this Court should reject the Government's arbitrary and logically flawed estimate of the non-VDA loss amount.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS THE FRUITS OF UNLAWFULLY INTERCEPTED WIRE COMMUNICATIONS.

A. Standard of Review

When reviewing a district court's denial of a motion to suppress, this Court reviews the district court's findings of fact for clear error and its conclusions of law *de novo*. *United States v. Graham*, 275 F.3d 490, 501 (6th Cir. 2001).

B. Argument on the Merits[1]

The district court erred in two respects when it denied the motion to suppress. First, the district court erred in concluding that the affidavits offered in support of the electronic surveillance adequately demonstrated the necessity of the wiretaps. Second, the Government's minimization efforts were objectively unreasonable because: (1) from the outset, the Government delegated the task of minimization to civilian, non-agent translators; and (2) the Government failed to minimize any of the attorney-client communications, despite the express directive to do so.

1. THE TRIAL COURT LACKED A SUFFICIENT BASIS FOR CONCLUDING THAT NORMAL INVESTIGATIVE PROCEDURES HAD FAILED OR REASONABLY APPEARED UNLIKELY TO SUCCEED IF TRIED OR TO BE TOO DANGEROUS.

An application for a wiretap order under Title III must contain "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. § 2518(1)(c). The purpose of this "necessity requirement" is to ensure that a wiretap "'is not resorted to in situations where traditional investigative techniques would suffice to expose the crime.'" *United*

[1] In addition to the suppression argument advanced by Mr. Patel in this Brief, pursuant to Federal Rule of Appellate Procedure 28(i), Mr. Patel adopts by reference the suppression argument contained in co-Appellant Brijesh Rawal's Initial Brief, filed November 11, 2013, at pages 8-58. Doc. #006111882348.

States v. Rice, 478 F.3d 704, 710 (6th Cir. 2007) (quoting *United States v. Alfano*, 838 F.2d 158, 163 (6th Cir. 1988), *cert. denied*, 488 U.S. 821 (1988)).

It is insufficient to aver to "generalized and uncorroborated information" regarding the insufficiency of alternative techniques. *Rice*, 478 F.3d at 711. Instead, the Government must demonstrate it has given "serious consideration to the non-wiretap techniques prior to applying for wiretap authority" and inform the issuing court of the reason for the investigator's belief "that such non-wiretap techniques have been or will likely be inadequate." *Id*. (quoting *Alfano*, 838 F.2d at 163). "Because the necessity requirement is a component of Title III, and because suppression is the appropriate remedy for a violation under Title III, where a warrant application does not meet the necessity requirement, the fruits of any evidence obtained through that warrant must be suppressed." *Rice*, 478 F.3d at 710. For this reason, the "good-faith exception to the warrant requirement is not applicable to warrants obtained pursuant to Title III." *Id*. at 711.

Here, the affidavit in support of the initial wiretap reveals the *remarkable success* of the Government in employing conventional techniques in its initial investigation. This includes the following:

- DEA agents met with a confidential informant, CS-1, who described his relationship with Mr. Patel, as well as the practice of recruiting patients for doctors, who prescribe controlled substances without examinations to be filled

at one of Patel's pharmacies which also bill the patients insurance for noncontrolled substances which are not dispensed. RE 361-2, Page ID # 1310-12.

- Between November, 2009 and January, 2010, the DEA agents observed and recorded meetings and telephone calls between CS-1 and Mr. Patel, as well as Dr. Paul Petre and others. During one recording, Dr. Petre discussed the payment of CS-1 with controlled substances and negotiated payments to physicians. In another recording, Mr. Patel agreed to pay CS-1 by writing him prescriptions for controlled substances. *Id*. at 1302-03.
- During this period, the agents also received information from a "SOI" (Source of Information), who claimed to work as a "marketer" for Dr. Petre, soliciting "patients" for him, but the agents declined his offers of help because, although they deemed his information "valuable," for unstated reasons, they did not find him "reliable" enough. *Id*. at 1303-04.
- A "trash pull" at Mr. Patel's home on February 1, 2010, provided the agents with documents reflecting extensive financial holdings, as well as mail pertaining to a number of pharmacies, a list of "thirty five employee names," and "a handwritten document listing what affiant believes are the names of 15 pharmacies that Patel is in charge of." *Id*. at 1307-08.

- On September 9, 2010, local police officers arrested 21 people and confiscated a large number of controlled substances which were filled, under what are described as suspicious circumstances, at one of the pharmacies identified in the "trash pull," all of which had been prescribed by a single Physician's Assistant, who was identified as such by a review of the Michigan Automated Prescription Service. *Id*. at 1310.
- On November 3, 2010, a different informant, identified as "CS-2," a person who employs physicians, told the agents that he had a "working relationship" with Patel, in which Patel paid him $5,000/month "for sending patients to have their prescriptions filled at one of Patel's pharmacies," and that "when Patel filled prescriptions, he added extra medications that had not been prescribed;" the affidavit alleges that CS-2 described Mr. Patel's practice as follows: "Patel recruits pharmacists from India who come to the United States on work visas to work at his pharmacies. CS-2 stated that each pharmacist is paid a salary and receives 20% of the pharmacy profits." *Id*.
- On November 3, 2010, CS-2 told the investigators "that Patel had been asking him/her for awhile about providing Patel with prescriptions for controlled substances that had been dispensed from his pharmacies. That is. . . Patel was asking CS-2 to provide him with the paperwork that would make the dispensing appear to have been lawful," and he arranged an undercover meeting with Patel

and a pharmacist that same evening to move forward with the plan, which, according to the affiant, was accomplished, under surveillance, the following day, when, in a surveilled meeting with Patel, an associate, and the pharmacist who filled the prescriptions which included prescriptions for the medications seized on September 9. *Id.*

- In November, 2010, CS-2 arranged by telephone with Bob Patel to write controlled substance prescriptions for patients identified as being supplied by a "marketer," and did so in controlled circumstances, furnishing copies to the investigators;
- In November, 2010, CS-2 told Bob Patel that he had a new doctor working for him, who was prescribing large quantities of controlled substances, and Mr. Patel expressed a keen interest in meeting him, in order to get him to send the prescriptions to him; although the physician was apparently fictional, CS-2 introduced Bob Patel to an FBI agent posing as a physician who was working with the supposed doctor, who was planning to start a new practice, and issue controlled substance prescriptions to "patients" provided by a marketer, and CS-2 suggested that they start working with him as an entree to the very busy physician;
- Over the course of a week or so, between November and December, 2010, in a series of consensually monitored calls, CS-2 and Bob Patel made arrangements

for undercover agents, posing as "patients" of the undercover "doctor," to fill fraudulent prescriptions for controlled substances written by the undercover "doctor" at a pharmacy designated by Patel (different from the sites of the previous undercover visits), and, in the course of the undercover visit, CS-2 told the pharmacist that he could also bill the "patients'" insurance "for whatever he wants;" afterwards, however, in a consensually recorded conversation, Patel told CS-2 that the pharmacist was suspicious of the undercover agents, apparently because they were "white people; in a subsequent call, Patel told CS-2 that "his pharmacists" are "scared/nervous about working with CS-2," and do not want to "work with him anymore," so they should plan "to take a month or two off," and that "Patel will contact CS-2 in the future"; approximately a week later, however, Patel re-contacted CS-2, complaining that "his pharmacists were 'stupid,'" inquiring about the quantity of business CS-2 was doing with another pharmacy, and arranged to meet the next week; the affidavit does not disclose whether that meeting occurred, or if it did, what transpired;

- Pen register and toll record analysis both confirmed the origin of many of the calls between the subjects, the informants, and the agents, as well as the fact that the subjects were in regular and continuing telephone contact. *Id.*

In short, the Government had gathered a host of information regarding the scheme at issue through other traditional investigative techniques. Plus, the

Government still had untapped resources, including statistical analysis of the prescriptions, and the Source of Information, whose offer to aid the Government was rebuffed. Nonetheless, the Government still claimed that normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous. There is no evidence of any danger to agents, and the Government could hardly claim that normal investigative procedures had failed to uncover evidence.

To circumvent the necessity requirement, the Government framed the goals of the investigation in terms such unrealistically lofty terms that conventional techniques could never achieve them, no matter how successful the conventional techniques. The Government claimed that it needed to discover, *inter alia*, "the full extent of the Patel drug trafficking organization" and the "the full extent of knowledge, criminal intent, roles, and functions of the target subjects."

However, as Judge Fletcher observed in *United States v. Blackmon*, 273 F.3d 1204, 1211 (9th Cir. 2001), the Government "may not cast its investigative net so far and so wide as to manufacture necessity in all circumstances. Doing so would render the requirements of § 2518 nullities." This is precisely the tactic the Government employed in this case. The district court should have granted the motion to suppress because the Government failed to fulfill the necessity component of Title III.

The district court's ruling on the sufficiency of the affidavits was cryptic, and does not address the necessity issue. The district court simply ruled that the affidavits were "too sufficient," without elaboration. Suppression Hearing Transcript, RE 895, Page ID# 5558. It is worth noting that the district court may have overlooked the significance of the necessity showing because the Government maintained throughout the suppression proceedings that there is no necessity requirement.

For example, in its response to the motion to suppress, the Government argued:

> The defendant claims that the affidavits did not meet the "necessity requirement" of the wiretap statute. The defendant's brief refers to this "need," "necessary" or "necessity" requirement more than a dozen times. The terms need, necessary, and necessity in the defendant's motions are misnomers, since none of these terms appear in the relevant statute, 18 U.S.C. § 2518(1)(c). The statute only requires "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." The requirement of a "need" or "necessity" is nowhere to be found in the statute.

Response to Mtn. to Suppress, RE 459, Page ID# 2309-2310.

Of course, this Court's precedent flatly rejects the Government's position. "Because the necessity requirement is a component of Title III, and because suppression is the appropriate remedy for a violation under Title III, where a warrant application does not meet the necessity requirement, the fruits of any evidence obtained through that warrant must be suppressed." *Rice*, 478 F.3d at

710. Mr. Patel urges this Court to pay special attention to the Government's response in its Brief to Mr. Patel's necessity argument, because it appears the Government is an intractable position.

On appeal, if the Government continues to press the argument that there simply is no necessity requirement under Title III, this Court should rule in Mr. Patel's favor given the clear precedent from this Circuit to the contrary. As a result, the Government will likely concede that there is a necessity requirement, and attempt to show, as it should have during the suppression proceedings, that it was fulfilled in this case. This argument was forfeited, however, because the Government not only failed to advance it below, but argued exactly the opposite. As a result, this Court should hold that the wiretap evidence should have been suppressed.

2. THE GOVERNMENT FAILED TO CONDUCT THE WIRETAP SURVEILLANCE IN A MANNER THAT WOULD MINIMIZE THE INTERCEPTION OF COMMUNICATIONS NOT OTHERWISE SUBJECT TO INTERCEPTION.

Not only did the Government fail to establish necessity to resort to the wiretap, when it secured the wiretap, it failed to minimize the interception of communications not otherwise subject to interception. Title III requires that each interception order contain a provision stating that the interception "shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter . . . ." 18 U.S.C. §2518(5).

As Professor Carr notes, the minimization requirement, while unknown in the area of conventional search warrants, is of constitutional stature, and "implements a constitutional pre-requisite to the validity of all court-ordered electronic surveillance." 1 J.G. Carr and P. L. Bellia, The Law of Electronic Surveillance, 5:16, p. 589 (2011). Professor Carr explains that:

> Minimization embodies the constitutional obligation of avoiding, to the greatest possible extent, seizure of conversations which have no relationship to the crimes being investigated or the purpose for which electronic surveillance has been authorized. Furthermore, the constitutional principle that all invasions of privacy must be limited in scope to the minimal intrusion necessary to fulfill their purpose is related to minimization, with particular reference to the problem of duration and termination.

Id.

The Sixth Circuit has long recognized that electronic surveillance evidence "secured without regard to the limitations set forth in the authorization order is inadmissible." *United States v. George*, 465 F.2d 772, 775 (6th Cir. 1972) (interior quotation marks omitted). To determine whether minimization requirements have been complied with requires an evaluation of "the reasonableness of the actual interceptions in light of the purpose of the wiretap and the totality of the circumstances." *United States v. Scott*, 436 U. S. 128, 131 (1978). "The government's efforts to minimize interception of non-pertinent conversations must be objectively reasonable in light of the circumstances confronting the interceptor." *United States v. Brown*, 303 F.3d 582, 604 (5th Cir. 2002).

Here, the Government's minimization efforts were objectively unreasonable. First, the overall pattern establishing an abject failure to make any meaningful attempts at minimization must be considered. Based on a random sampling of 6,000 recorded phone calls, the defendants found that only 13, or .002 percent, were minimized. According to documentation provided by the Government, 25 of these calls, or .004 percent, were minimized. *See supra* at 9.

The Government's response to this analysis is dubious. To arrive at its conclusion that it minimized 6% of the calls, the Government uses a ratio computation and compares the total number of minimized calls, even those lasting less than one minute, to the calls which it believes are the only ones that count – those which lasted over one minute. The Government offered no explanation as to why calls lasting over one minute are important for the overall amount of calls, but not to those which were actually minimized.

This is a transparent attempt to slant the percentage of calls the Government maintains were actually minimized, and does not provide an accurate portrayal of the true percentage of minimized calls. No matter how the numbers are sliced, it is clear that the Government's overall efforts to minimize do not meet the standards of Title III. The Supreme Court made clear in *Scott* that this Court should not blindly rely on minimization statistics. Mr. Patel is not requesting blind reliance. Instead, he urges this Court to note that *Scott* also teaches that minimization

statistics "may provide assistance" in determining the reasonableness of the Government's minimization attempts. *See Scott*, 436 U. S. 128 at 140.

It is against that backdrop that this Court should assess the two reasons which support Mr. Patel's argument that the flaws in the Government's minimization procedures require suppression of the wiretap evidence. First, from the outset, the Government delegated the task of minimization to civilian, non-agent translators. Second, the Government failed to minimize any of the attorney-client communications, despite the express directive to do so.

Under 18 U.S.C. § 2518(4)(d), the district court is required in each order authorizing a wiretap to specify "the identity of the agency authorized to intercept the communications." In *United States v. Lopez*, 300 F.3d 46, 55 (1st Cir. 2002), the First Circuit admonished the Government that it had a duty to disclose the use of civilian, non-agent monitors. "Title III generally places a burden of 'full and complete' disclosure on the government in its application for a wiretap . . . and the issuing judge is obliged to craft the order approving the wiretap with specificity. These provisions necessitate candor on the part of the government—a candor that, in our view, would generally be undermined if the government could withhold important information about the manner in which the wiretap will be conducted." *Id.*

Thus, according to the First Circuit:

> The government's failure to disclose its plans to use civilian monitors frustrates the objectives of other provisions of Title III as well. For example, the statute mandates that the issuing judge include in any order a provision requiring that the wiretap be conducted in such a way as to minimize nonpertinent communications. See *id*. § 2518(5). If the issuing judge is kept ignorant of the manner in which the government intends to execute the wiretap, this diminishes the judge's ability to craft an order that is sufficiently protective of the minimization requirement. In addition, the statute permits the issuing judge to require status reports showing "what progress has been made toward achievement of the authorized objective and the need for continued interception." *Id*. § 2518(6). Yet, without information on how the calls are being intercepted, and by what personnel, the judge's impression of the progress of the wiretap may be mistaken.
>
> In light of these considerations, we hold that the government must disclose, as a part of its application for a wiretap warrant, any intention to utilize the services of civilian monitors in the execution of the warrant. To hold otherwise would, in our view, run counter to the general duty of candor the statute imposes on the government and impair the issuing judge's ability to preserve important privacy interests protected by Title III.
>
> Having established that Title III requires the government to provide the issuing judge with information on any plans to employ civilian monitors, we turn to the question of whether the government's conduct in this particular case requires the suppression of the communications that incriminate Lopez. Title III sets out a broadly-worded statutory exclusion rule that, on its face, prohibits the use at trial of any evidence "derived from" a wiretap "if the disclosure of that information would be in violation of this chapter." Id. § 2515. The government's failure to disclose its intention to use civilian monitors, which violates an obligation under Title III, thus lays the foundation for a motion to suppress.

Id. at 55. Although *Lopez* established that Title III requires the Government to disclose plans to use civilian monitors, the First Circuit ultimately declined to order

suppression because the Government's violations of Title III were not "willful or knowing." *Id*. at 56.

The same is not true of the Government's conduct in this case. For instance, the Government planned on using civilian monitors before the wiretap operation was underway. R.E. 895, Page ID# 5510. Nonetheless, there is no mention of civilian monitors in the first wiretap application. *Id*. at 5514. Furthermore, in the first ten day wiretap report, the Government mentions civilian assistance for the first time, but fails to note that the civilians were not just translating. They were actually conducting the surveillance, *even when the intercepted communications were in English*. R.E. 1045-1, Page ID# 11359. These are not good-faith mistakes. These are knowing and willful violations of Title III.

More troubling, the Government recorded all of the conversations between Mr. Patel and his six attorneys. R.E. 895, Page ID# 5527. Thus, even though the district court expressly ordered the Government to take special precaution to minimize privileged communication, the agents, in fact, failed to minimize any of the attorney-client calls. Although handled by the Government's "taint team," the calls were nonetheless recorded and accessible to the prosecuting attorneys through the Red Wolf system. R.E. 895, Page ID# 5531.

As recognized by this Court, when the fox guards the henhouse, problems are inevitable:

> taint teams present inevitable, and reasonably foreseeable, risks to privilege, for they have been implicated in the past in leaks of confidential information to prosecutors. That is to say, the government taint team may have an interest in preserving privilege, but it also possesses a conflicting interest in pursuing the investigation, and, human nature being what it is, occasionally some taint-team attorneys will make mistakes or violate their ethical obligations.

In re Grand Jury Subpoenas, 454 F. 3d 511, 523 (6th Cir. 2006). The risk in this case is exacerbated by the accessibility of the attorney-client conversations in the Red Wolf system. Since the taint agent is listening to attorney-client calls in the same room as investigative agents, even non-verbal communication on the part of the taint agent, such as a nod of the head, a smile or a wink, could notify the investigative agents that the communications were potentially valuable to the investigations.

Moreover, the taint team would not even have to leak the confidential information; the investigative agents or attorneys could simply log into the system and listen for themselves. Or, alternatively, confidential information could be revealed accidentally. The attorney-client calls were never segregated or flagged within the Red Wolf system. Hence, investigating agents or attorneys might come across a privileged call by happenstance, thereby revealing confidential and privileged communication.

Although the Government informed the court that it would employ a taint team, it never disclosed that all of the attorney-client communications would be

captured. This violates both the Government's duty of candor, as well as the express mandate of the order, which requires minimization – not wholesale capturing – of privileged communications.

Other courts in similar circumstances have ordered the suppression of all evidence where the Government failed to properly minimize statements that were protected by attorney-client privilege. *United States v. Renzi*, 722 F. Supp. 2d 1100, 1104 (D. Ariz. 2010). This Court should not countenance such disregard for the mandates of 18 U.S.C. § 2518. Instead, as in *Renzi*, it should suppress the fruits of the illegal wiretap and remand this matter for further proceedings.

II. THE DISTRICT COURT FAILED TO COMPLY WITH FEDERAL RULE OF CRIMINAL PROCEDURE 32(i)(3)(B) WHEN IT SENTENCED MR. PATEL WITHOUT EXPLAINING WHY IT ADOPTED THE GOVERNMENT'S LOSS AND DRUG QUANTITY AMOUNT CALCULATIONS BECAUSE MR. PATEL CHALLENGED THE AMOUNTS AND CALCULATION METHODS REPEATEDLY DURING THE SENTENCING PROCEEDINGS.

A. Standard of Review

This Court reviews the district court's compliance with Federal Rule of Criminal Procedure 32(i) *de novo*. *United States v. White*, 492 F.3d 380, 414 (6th Cir. 2007).

B. Argument on the Merits

The district court failed to meet its obligations under Federal Rule of Criminal of Procedure 32(i)(3)(B) by summarily adopting the Government's factual

findings concerning amount of loss and drug quantities. Additionally, the district court erred when it failed to respond to Mr. Patel's objections.

This Court's decision in *U.S. v. White*, 492 F.3d 380 (6th Cir. 2007) controls. In *White*, just as in this case, the defendant objected to the loss amounts in his Sentencing Memorandum and pressed his objections at sentencing. *White*, 492 F.3d at 415-416. The sentencing court in *White* "blindly embraced the figures set forth" in the PSR and made no findings to resolve the factual dispute regarding the loss amount. *Id*.

This Court reversed. It noted that Federal Rule of Criminal of Procedure 32(i)(3)(B) requires the district court to rule on any disputed portion of the presentence report or other controverted matter at sentencing. *Id*. at 415. Once the defendant brings a factual dispute to the sentencing court's attention, the "court may not merely summarily adopt the factual findings in the presentence report or simply declare that the facts are supported by a preponderance of the evidence." *Id*. Rather, the district court must affirmatively rule on a controverted matter where it could potentially impact the defendant's sentence. *Id*. Finally, this Court requires "literal compliance" with Rule 32(i)(3)(B) "for a variety of reasons, such as enhancing the accuracy of the sentence and the clarity of the record." *Id*.

Reversal is compelled in this case under *White*. Mr. Patel filed objections to the PSR, claiming the loss amount and drug quantities were incorrect and that the

Government would not be able to prove the amounts by a preponderance of the evidence. Addendum to PSR at A-3, A-4. In his Sentencing Memorandum, Mr. Patel attacked the loss and drug quantity amounts and the Government's method of calculation. Mr. Patel's Sentencing Memorandum, RE 693, Page ID# 4403-4409. Finally, he pressed these issues at sentencing. Sentencing Transcript, RE 930, Page ID# 10479-10501.

The district court committed the same error as the sentencing court in *White* when it failed to make findings to resolve the factual dispute or otherwise explain why it was adopting the Government's amounts and calculations. The district court simply stated, "I understand your motion. I understand your brief and your objections, and I understand the Government's, and I will accept the Government's and leave the Presentence Report as it is." *Id*. at 10486. The district court's failure to comply with Federal Rule of Criminal of Procedure 32(i)(3)(B) warrants a remand to the district court for resentencing.

III. THE COURT ERRED BY ADOPTING THE GOVERNMENT'S FLAWED METHOD OF CALCULATING THE LOSS AMOUNT AND DRUG QUANTITIES AND THE GOVERNMENT DID NOT PROVE THE AMOUNTS BY A PREPONDERANCE OF THE EVIDENCE.

A. Standard of Review

This Court reviews *de novo* the district court's method of calculating loss for purposes of sentencing enhancements under the Guidelines. *United States v.*

White, 492 F.3d 380, 414 (6th Cir. 2007). When reviewing a district court's application of section 2B1.1(b)(1), this Court reviews the district court's factual finding as to amount of loss for clear error. An error with respect to the loss calculation is a procedural infirmity that typically requires remand. *United States v. Jones*, 641 F.3d 706, 712 (6th Cir. 2011) (citations omitted).

B. Argument on the Merits

The district court erred when it sentenced Mr. Patel based on an illogical and inherently flawed calculation of the loss amount. When applying section 2B1.1(b)(1) to determine the amount of loss, the district court must make a "reasonable estimate" to arrive at the appropriate amount. *Jones*, 641 F.3d at 712. The Government bears the burden of establishing the loss amount by a preponderance of the evidence. *Id*. While a statistical estimate may provide a sufficient basis for calculating the amount of loss, the Government must demonstrate the accuracy of any statistical extrapolation. *Id*.

In *Jones*, the district court relied on the Government's statistical estimate in establishing the defendant's loss amount during his sentencing for mail fraud convictions for fraudulent Medicare and Medicaid billing. *Id*. at 710-711. The Government argued for a sentencing enhancement pursuant to section 2B1.1(b)(1)(G), alleging the defendant caused over $200,000 of loss to Medicare and Medicaid. *Id*. at 711. To establish the loss amount, the Government used the

testimony of a statistician who identified a representative statistical sample encompassing 357 bills contained throughout 264 patient files. The Government, however, was only able to find 210 of those files. The district court adopted the Government's claimed loss amount. *Id*. at 712.

This Court reversed, holding the Government's statistical estimate was flawed. *Id*. To wit, the Government did not present evidence that the 210 patient files still formed a representative sample of bills without the missing fifty-four files. *Id*. Furthermore, the district court did not appear to realize that the fifty-four files were missing and never made a finding as to whether they contained evidence of fraudulent billing. *Id*. As a result, this Court remanded for resentencing, holding that the Government failed to establish the loss amount by a preponderance of the evidence and the amount of loss calculation was clearly erroneous. *Id*. at 712-713.

As in *Jones*, Mr. Patel's sentence was based on a flawed loss amount calculation. At Mr. Patel's sentencing, the Government sought to establish Mr. Patel's loss amount based on a loss estimate that held Mr. Patel responsible for 100% of the VDA transactions. The VDA transactions necessarily included transactions concerning oxycodone. The district court expressly stated that it did not intend to consider oxycodone for purposes of sentencing because the jury acquitted Mr. Patel of the oxycodone count; however, it had to have considered

oxycodone in order for the Court to have sentenced Mr. Patel in accord with the Government's loss estimate. Thus, the loss calculation was intrinsically flawed because it should have excluded the oxycodone transactions from the VDA portion of the loss amount calculation.

In addition, the Government failed to carry its burden of establishing by a preponderance of the evidence that Mr. Patel distributed the proposed amount of drugs, or caused the alleged amount of loss. Instead of providing concrete evidence in support of these amounts, such as a representative sample of fraudulent bills, the Government relied solely upon the testimony of co-conspirators and the testimony of a law enforcement officer regarding a single police raid.

First, none of the co-conspirators' testified that 100% of the VDA billing was fraudulent. In fact, their testimony either directly contradicts this assertion, or reflects a lack of knowledge regarding the VDA transactions that renders the testimony insufficient to support the assertion. For instance, Arpit Patel's testimony shows that he lacked sufficient knowledge to evaluate the entirety of the VDA transactions because he admitted that his supervisor handled the VDA prescriptions prior to the end of 2009, when Arpit Patel became involved in the VDA transactions. Trial Transcript, RE 907, Page ID# 6828-6829.

In addition, Arpit Patel testified that even when he was writing the prescriptions, many of the controlled medications were prescribed under the advice

of a doctor, who would visit the patient with a chart documenting the visit, a fact that suggests that not all of the prescriptions were illegitimate. *Id*. at 6842. It was only in mid-2010 that Arpit Patel began to sign blank prescriptions for both controlled and non-controlled substances. *Id*. at 6851. However, Arpit Patel stopped writing VDA prescriptions in December 2010, (Trial Transcript, RE 915, Page ID# 8172), prior to the conclusion of the VDA transactions, which the Government alleges ceased by January 2011. (Gov't Sentencing Memorandum, RE 634, Page ID# 3329). Thus, given the limited temporal scope of his involvement in the VDA transactions and the statements suggesting that not all the VDA billing was fraudulent, Arpit Patel's testimony is not a reliable basis for the Government to conclude that 100% of the VDA billing was fraudulent.

Likewise, Pinakeen Patel provided direct testimony that undermines the Government's VDA estimate. Pinakeen Patel testified, for instance, that non-controlled "maintenance medication" was "usually" distributed to patients. Trial Transcript, RE 915, Page ID# 8261. In addition, Pinakeen Patel affirmed that there were both "regular pharmacy practices" and "regrettable ones," which suggests that not all of the VDA billing was fraudulent but instead fell within the regular pharmacy practices. *Id*. at 8264. Finally, when asked to estimate the amount of fraudulent billing, Pinakeen Patel stated that 80% to 85% of the billing was

fraudulent. *Id*. at 8266. Therefore, the testimony of Pinakeen Patel directly contradicts the Government's VDA estimate.

Similarly, the testimony of Lavar Carter and Michael Gracer does not support the estimate. Mr. Carter was only one recruiter, so he could not possibly provide insight regarding the entirety of the VDA transactions. Likewise, Michael Gracer described only one specific raid. Thus, the testimony of these witnesses does not provide an adequate basis for the sweeping conclusion that 100% of the VDA transactions were fraudulent. Accordingly, Babubhai Patel maintains that the Government has not carried its burden of proving by a preponderance of the evidence that 100% of the VDA billing was fraudulent.

More troubling still is the Government's claim regarding the scope of the fraudulent billing in non-VDA transactions. The Government estimates that 25% of the total non-VDA billing is fraudulent. Gov't Sentencing Memorandum, RE 634, Page ID# 3331. The logic behind this estimate is as follows: Mr. Patel is recorded stating that a pharmacy's profit margin should equal 25% of the amount of gross billing; therefore, 25% of the total non-VDA billing was fraudulent. *Id*. at 3330-3331. The Government used the same analysis to "establish" the drug quantity amounts used to sentence Mr. Patel.

This reasoning is fatally flawed. Even if Mr. Patel instructed all of the pharmacists that he expected a 25% profit margin, it does not follow that 25% of

the transactions were fraudulent. The estimated national average profit margin for independent pharmacies is 22%-24% of gross billing. See National Community Pharmacists Association, 2010 NCPA Digest, Executive Summary at 1, available at http://www.ncpanet.org/pdf/digest/2010/2010digestexecsum.pdf. It is entirely conceivable that a pharmacy could attain a profit margin of 25% without engaging in any fraudulent billing. Conversely, it is possible that a pharmacy could engage in fraudulent billing 75% of the time, but, because of other inefficiencies associated with the pharmacy, earn profits that equal less than 25% of gross billing. Simply put, the target profit margin is not probative of the percentage of fraudulent transactions that occur in a pharmacy, and the Government presented no credible evidence that 25% of the billing submitted by the Patel pharmacies was fraudulent.

In addition, it is unclear from the sentencing proceedings what figure the Government ultimately ascribed to the fraudulent billing of the non-VDA transactions. Both the PSR and the Government's Sentencing Memo simply note that when "100% of the VDA billings plus 25% of the non-VDA billings at the Patel pharmacies" yields a total "loss figure of $18,955,869." *Id*. at 3331. It is similarly unclear which pharmacies the Government took into account to reach the (unspecified) figure for non-VDA billing. The time period the Government used to assess the revenue of the (unspecified) Patel pharmacies is unclear. The total amount billed by the (unspecified) Patel pharmacies is not identified, such that it is

unclear what 25% of the billing equals. The only number identified by the Government in its loss calculation regarding the non-VDA billing is the percentage of billing it believed to be fraudulent.

On remand, the Government should not be permitted to get a second bite at the apple. After a seven week jury trial and with the benefit of over six months of constant wiretap surveillance of Mr. Patel, the Government was unable to prove the claimed loss and drug quantity amounts by a preponderance of the evidence. These issues were hotly contested at sentencing, and the Government had a full opportunity to carry its burden. It failed to do so and this Court should not afford the Government another opportunity to carry its burden. *See, e.g., United States v. Washington*, 714 F.3d 1368 (11th Cir. 2013) (Because Government failed to carry its burden of proving by a preponderance of the evidence that the defendant deserved a "number of victims" enhancement, over strenuous objection, it would not get a chance to do so on remand: "a party who bears the burden on a contested sentencing issue will generally not get to try again on remand if its evidence is found to be insufficient on appeal").

CONCLUSION

Based upon the foregoing arguments and legal authority, Defendant-Appellant, BABUBHAI PATEL, respectfully requests that this Honorable Court vacate his judgment and sentence, remand this matter to the district court for

further proceedings, and afford any other relief deemed necessary.

DATED this 21st day of November, 2013.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii). This Brief also complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared in a proportionately spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

/s/Michael M. Brownlee
Michael M. Brownlee, Esquire

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was furnished to the Court and all counsel of record via electronic filing through the CM/ECF system on November 21, 2013.

/s/Michael M. Brownlee
Michael M. Brownlee, Esquire

DESIGNATION OF RELEVANT LOWER COURT DOCUMENTS

Pursuant to 6th Cir. R. 30(g), the Appellants hereby identify the record entries that are most relevant to his position on appeal:

Description of Entry	Date Filed	Record Entry No.	Page ID Range
Indictment	8/2/2011	3	6-28
Joint Motion to Suppress	1/31/2012	361	1232-1271
Response to Joint Motion to Suppress	11/30/2011	459	2309-2315
Joint Reply to Government's Response to Motion to Suppress	12/4/2011	474	2518-2520
Gov't Memorandum in Opp. To Evidentiary Hearing	5/11/12	510	2723
Suppression Order	6/14/2012	528	2831
Jury Verdict Form	8/10/2012	565	2974-2954
Gov't Sentencing Memorandum	12/7/2012	634	3321-3347
Mr. Patel's Sentencing Memorandum	1/30/2013	693	4400-4416
Notice of Appeal	2/8/2013	704	4485-4486
Judgment	2/20/2013	720	4533
Transcript of Motion to Suppress Hearing	4/30/2013	895	5480-5604

Jury Trial Transcript Volume 6	4/30/2013	904	6281-6459
Jury Trial Transcript Volume 9	4/30/2013	907	6790-6971
Jury Trial Transcript Volume 13	4/30/2013	911	1570-1758
Jury Trial Transcript Volume 17	4/30/2013	915	8142-8339
Sentencing Transcript	4/30/2013	930	10469-10511