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

UNITED STATES OF AMERICA	)	Criminal No.
	)	(18 U.S.C. §§ 666(a)(1)(A),
v.	)	1341, 1343, 1346, and 2)
	)	
CYRIL H. WECHT	)	
	)	

INDICTMENT

The grand jury charges:

GENERAL ALLEGATIONS

1. During each of the years from 1996 through 2005, Allegheny County, Pennsylvania, was an organization of local government that received federal assistance in excess of $10,000.00.

2. During the years 1996 through 2000, Allegheny County was organized and governed by the provisions of the Second Class County Code, Act of July 28, 1953, P.L. 723, as amended, 16 P.S. §§ 3101-5106-A (hereinafter the "Second Class County Code"). The Second Class County Code provided that Allegheny County voters would periodically elect a Coroner of Allegheny County (hereinafter the "Coroner"). The Coroner was one of several elected county officials referred to as Row Officers. The Coroner managed the personnel and resources of the Allegheny County Coroner's Office and received funding for the operations of the Allegheny County Coroner's Office from Allegheny County and federal grants.

3. In May of 1998, Allegheny County voters approved by referendum the adoption of the Allegheny County Home Rule Charter (hereinafter the "Home Rule Charter"). The Home Rule Charter went

into effect on January 1, 2000, and stated in its preamble that a "home rule government that holds its officers and employees to high standards of conduct and behavior will enhance public trust in County government."

4. From 2000 through 2005, pursuant to the adoption of the Home Rule Charter, Allegheny County was organized and governed by the provisions of an administrative code promulgated pursuant to the Home Rule Charter (hereinafter the "Administrative Code.") The Coroner was bound by the Administrative Code.

Fiduciary and Ethical Duties of the Coroner

5. From 1996 through 2000, the Second Class County Code required the Coroner to comply with ethics and reporting requirements set forth in 65 Pa.C.S.A. § 1101.1 *et seq.* (hereinafter the "Pennsylvania State Ethics Code"). In addition, the employment policy promulgated by the Allegheny County Coroner's Office in 2000 provided that all employees of the Allegheny County Coroner's Office were subject to the Pennsylvania State Ethics Code.

6. Sections 1102 and 1103(a) of the Pennsylvania State Ethics Code prohibited the Coroner from using the authority of his office, or any confidential information received through his holding public office, for his private pecuniary benefit. In addition, Section 1103(d) prohibited the Coroner from accepting any honorarium.

7. The Second Class County Code provided, at 16 P.S. § 4235, that the Coroner could conduct autopsies and other

professional services for other counties, but required that any fees collected from other counties for such services be accounted for and paid to the Allegheny County Treasurer.

8. From 2000 through 2005, Section 601.01 of the Administrative Code required that all Independently Elected Officials (including the Coroner) devote a full-time effort to the duties of their offices.

9. From 2000 through 2005, Section 601.04 of the Administrative Code required that all Independently Elected Officials (including the Coroner) abide by the accountability, conduct and ethics code set forth under the Administrative Code, which, *inter alia*, prohibited the Coroner from using county resources for any non-County purpose or for his private financial gain, and required the Coroner to file annual financial disclosure forms.

10. At all times material to this indictment, 16 P.S. § 4233 required the Coroner to exercise the following duties with respect to unclaimed bodies:

> Whenever the body of any deceased person who is unidentified, or which body is unclaimed by proper persons, has been found within the county, it shall be removed to the county morgue. The coroner shall, if he deems it necessary, cause any such body to be properly embalmed or prepared for preservation for such length of time as he may think proper. Any such body shall be examined or inspected only by such persons as the coroner authorizes in writing or who are admitted in his presence. No such body shall be removed from any such morgue except upon the certificate of the coroner.

11. At all times material to this indictment, 16 P.S. § 4237 permitted the Coroner to perform an autopsy or order an autopsy on bodies under the jurisdiction of the Allegheny County Coroner's Office only if the Coroner was unable, upon investigation, to determine the cause and manner of death.

The Defendant

12. From 1970 through 1980, and again from 1996 through 2005, defendant CYRIL H. WECHT was the Coroner of Allegheny County. As the Coroner, he was responsible for managing the operations of the Allegheny County Coroner's Office.

13. At all times material to the indictment, defendant CYRIL H. WECHT was prohibited by state and local ethics requirements from using Allegheny County's resources for his private financial gain.

14. For the years 2001 through 2004, defendant CYRIL H. WECHT was required by his state and local ethical duties to file truthful annual financial disclosure forms.

15. Defendant CYRIL H. WECHT failed to timely file any financial disclosure forms for the years 2001, 2002, and 2003. On or about February 15, 2005, days after local newspapers reported that authorities had "launched a criminal investigation of county Coroner Dr. Cyril H. Wecht for possible violations of state and federal law," defendant CYRIL H. WECHT filed financial disclosure forms for years 2001, 2002, and 2003 for the first time.

16. On or about June 21, 2000, the defendant, CYRIL H. WECHT, filed a declaratory judgment action seeking to declare that

the ethics provisions of the Administrative Code did not apply to him as Coroner. On or about December 21, 2001, the Pennsylvania courts ruled that the ethics provisions of the Administrative Code did in fact apply to defendant CYRIL H. WECHT as the Coroner of Allegheny County.

The Defendant's Private Business

17. At all times material to the indictment, Cyril H. Wecht and Pathology Associates, Inc. (hereinafter "Wecht Pathology") was a domestic professional for-profit corporation registered with the Pennsylvania Department of State and located in Pittsburgh within the Western District of Pennsylvania.

18. At all times material to the indictment, the defendant CYRIL H. WECHT was the sole owner and principal officer of Wecht Pathology.

19. At all times material to the indictment, defendant CYRIL H. WECHT used an outside accounting firm to assist with certain financial matters, including preparation of Wecht Pathology's income tax returns and assistance with management of a pension plan.

20. From 1997 through 2004, while defendant CYRIL H. WECHT was the elected Coroner, Wecht Pathology generated over $8.75 million in gross income:

a) in 1997, Wecht Pathology reportedly received over $1,042,955.09 in gross receipts;

b) in 1998, Wecht Pathology reportedly received $1,059,426 in gross receipts;

WECHT000000005

c) in 1999, Wecht Pathology reportedly received $922,438.00 in gross receipts;

d) in 2000, Wecht Pathology reportedly received $1,090,039.00 in gross receipts;

e) in 2001, Wecht Pathology reportedly received $1,074,629.00 in gross receipts;

f) in 2002, Wecht Pathology reportedly received $1,114,236.00 in gross receipts;

g) in 2003, Wecht Pathology reportedly received $1,245,414.00 in gross receipts;

h) in 2004, Wecht Pathology reportedly received $1,202,204.00 in gross receipts.

21. From 1997 through 2004, while defendant CYRIL H. WECHT was the elected Coroner, Wecht Pathology paid defendant CYRIL H. WECHT over $4.65 million in officer compensation:

a) in 1997, Wecht Pathology reportedly paid approximately $500,000 in officer compensation payments to defendant CYRIL WECHT;

b) in 1998, Wecht Pathology reportedly paid approximately $600,000 in officer compensation payments to defendant CYRIL WECHT;

c) in 1999, Wecht Pathology reportedly paid approximately $540,000.00 in officer compensation payments to defendant CYRIL WECHT;

d) in 2000, Wecht Pathology reportedly paid approximately $623,527.00 in officer compensation payments to defendant CYRIL WECHT;

e) in 2001, Wecht Pathology reportedly paid approximately $550,000.00 in officer compensation payments to defendant CYRIL WECHT;

f) in 2002, Wecht Pathology reportedly paid approximately $620,000.00 in officer compensation payments to defendant CYRIL WECHT;

g) in 2003, Wecht Pathology reportedly paid approximately $664,000.00 in officer compensation payments to defendant CYRIL WECHT;

h) in 2004, Wecht Pathology reportedly paid approximately $555,000.00 in officer compensation payments to defendant CYRIL WECHT.

22. Defendant CYRIL H. WECHT represented to the Internal Revenue Service that from 1998 through 2004, 100% of his time was devoted to the business of Wecht Pathology.

23. Defendant CYRIL H. WECHT engaged in private income-generating business through Wecht Pathology, including:

a) providing medical-legal forensic pathology opinions, consultations, and expert testimony for private attorneys engaged in civil and criminal litigation in locations throughout the United States and in foreign countries;

b) providing medical-legal forensic pathology opinions, consultations, and expert testimony for public entities

such as legal-aid organizations, district attorney's offices, public defender's offices, and others engaged in civil and criminal litigation;

c) conducting autopsies for counties in Western Pennsylvania, including Armstrong, Clarion, Fayette, Greene, Indiana, and Westmoreland (but not for Allegheny County);

d) conducting autopsies for other clients;

e) speaking at private and public events for honoraria;

f) authoring publications for royalties; and

g) performing in shows at entertainment venues.

COUNTS ONE THROUGH TWENTY-FOUR
THEFT OF HONEST SERVICES - WIRE FRAUD

The Grand Jury further charges that:

24. Paragraphs one through twenty-three of this Indictment are re-alleged and incorporated fully herein by reference.

25. From in and around 1996, and continuing thereafter to in and around 2005, in the Western District of Pennsylvania, the defendant, CYRIL H. WECHT, devised and intended to devise a scheme to defraud, for obtaining money and property, and for depriving another of the intangible right of honest services, by means of breaching his fiduciary and ethical duties as Coroner of Allegheny County and making false and fraudulent pretenses and representations, well knowing at the time that he was breaching his fiduciary and ethical duties and that the pretenses and representations were false and fraudulent when made.

Purpose of the Scheme

26. It was the purpose of the scheme, among other things, to (a) obtain money, property, services and other things of value; (b) violate the fiduciary and ethical duties of defendant CYRIL H. WECHT as Coroner of Allegheny County to Allegheny County and it's citizens; and (c) deprive Allegheny County and its citizens of the intangible right to the honest services of defendant CYRIL H. WECHT as Coroner of Allegheny County and other employees of the Allegheny County Coroner's Office.

The Scheme

27. It was part of the scheme that, from 1996 through 2005, the defendant, CYRIL H. WECHT, used the position, authority, and resources of the Allegheny County Coroner's Office to assist with Wecht Pathology's business activities and thus generate income for Wecht Pathology and himself:

a) Allegheny County Coroner's Office employees were instructed to spend substantial portions of their time while on duty at the Allegheny County Coroner's Office working on private matters to assist with Wecht Pathology's business activities;

b) defendant CYRIL H. WECHT operated a substantial portion of his private consulting business using secretarial, computer, telephone, facsimile, and other general office resources of the Allegheny County Coroner's Office;

c) Wecht Pathology's billing, bookkeeping, client intake, consultation, investigation, research, correspondence, dictation, courier services, scheduling, and other private business activities were conducted at and by the Allegheny County Coroner's Office using Allegheny County Coroner's Office personnel, resources, space, and time;

d) defendant CYRIL H. WECHT personally examined slide tissues and prepared private consulting reports for Wecht Pathology's private "black lung" cases while at the Allegheny County Coroner's Office;

e) defendant CYRIL H. WECHT caused human brain tissues to be examined and stored at the Allegheny County Coroner's Office for use in private cases for his private financial gain;

f) defendant CYRIL H. WECHT caused on-duty Deputy Coroners to provide courier and transportation services for his private financial gain and in detriment to Allegheny County Coroner's Office business;

g) defendant CYRIL H. WECHT's transportation to and from Pittsburgh International Airport for private business trips was routinely provided by on-duty Deputy Coroners using county-owned vehicles, yet he billed his clients an "airport limousine charge" in connection with these private business trips; Allegheny County paid for the gas and maintenance on the county-owned vehicle used for these trips; nevertheless, defendant CYRIL H. WECHT did not remit the proceeds of his fraudulent "airport limousine charges" to Allegheny County, but retained the proceeds for his own benefit;

h) from in and around June 2003 through in and around December 2005, defendant CYRIL H. WECHT caused Allegheny County cadavers to be provided to Carlow College for use by students to perform autopsies in cases where autopsies were not permitted by 16 P.S. § 4237;

i) from in and around June 2003 through in and around December 2005, defendant CYRIL H. WECHT caused Allegheny County cadavers to be provided to Carlow College pursuant to an agreement whereby in exchange for those cadavers and other

consideration, he obtained the use of a laboratory at Carlow College at which he could engage in his private work;

j) Deputy Coroners were specifically instructed to refer any calls concerning private autopsies to J.M., Wecht Pathology's autopsy technician;

k) vehicles owned by and maintained at the expense of Allegheny County were used extensively to assist with Wecht Pathology's business activities;

l) defendant CYRIL H. WECHT did not pay Allegheny County the proceeds earned through his private business, and did not reimburse Allegheny County for the value of the resources he used.

28. It was further part of the scheme that when defendant CYRIL H. WECHT traveled for private business, he routinely sought and obtained reimbursement for the costs of his travel from his clients; he routinely asked his clients to make the expense reimbursement checks payable to him personally; he routinely asked that the fee checks be made payable to his business; and he routinely cashed the expense reimbursement checks without depositing the proceeds in his Wecht Pathology account or reporting the reimbursement in the Wecht Pathology books and records. In this manner, he retained the expense reimbursement proceeds for his use as "pocket money," and the expense reimbursement proceeds were concealed from Wecht Pathology's books and records, and thus were also concealed from Wecht Pathology's accountants.

29. It was further part of the scheme that defendant CYRIL H. WECHT routinely submitted false expense reimbursement invoices to his clients. He directed that fake travel agency bills and fake limousine receipts be created to support fraudulent and inflated expense invoices. The travel agency bills were in the name of a defunct travel agency, and they were submitted as support for fraudulently inflated airfare amounts. Defendant submitted the fake limousine receipts to his clients in cases where Deputy Coroners employed by Allegheny County actually provided his transportation in vehicles owned by Allegheny County. The checks defendant CYRIL H. WECHT received as a result of these fake and fraudulent billings were cashed in the manner described in paragraph 28 above, and thereby concealed from Wecht Pathology's books and records, and thus were also concealed from Wecht Pathology's accountants.

30. It was further part of the scheme that from 1996 through 2005, the defendant, CYRIL H. WECHT, used the position, authority, and resources of the Allegheny County Coroner's Office for the personal and political benefit of himself and his family:

a) Allegheny County Coroner's Office employees were instructed to perform numerous personal errands for defendant CYRIL H. WECHT while on county time, including dog-walking, picking up personal mail, purchasing sporting goods such as tennis balls and nostril swimming plugs, and hauling away rubbish;

b) Allegheny County Coroner's Office employees on county time were instructed to drive defendant CYRIL H. WECHT and

members of his family to Pittsburgh International Airport for travel unrelated to Allegheny County Coroner's Office business, including family vacations;

c) Allegheny County Coroner's Office employees on county time were instructed to drive defendant, CYRIL H. WECHT, and members of his family to events and locations unrelated to Allegheny County Coroner's Office business, such as media appearances, theater shows, sporting events, political functions, and other destinations;

d) Defendant CYRIL H. WECHT caused on-duty employees of the Allegheny County Coroner's Office to participate in campaign efforts for his 2000 campaign for the office of Chief Executive of Allegheny County;

e) Defendant CYRIL H. WECHT caused on-duty employees of the Allegheny County Coroner's Office to participate in his son's efforts to win political offices;

f) Defendant CYRIL H. WECHT used and caused to be used Allegheny County resources, including secretarial time, paper, computers, printers, and facsimile machines, to be used to organize political fund-raising activities, solicit financial support for his and his son's campaigns, and berate perceived political critics of him and his son;

g) Defendant CYRIL H. WECHT used and caused to be used Allegheny County secretarial and stationary resources to prepare and mail letters berating opponents of his political endeavors, including a June 15, 2000, letter to Mr. K.H.S. of

Pittsburgh, Pennsylvania, on Allegheny County Coroner's Office letterhead typed by K.M., an Allegheny County Coroner's Office employee.

31. It was further part of the scheme that defendant CYRIL H. WECHT used county-owned vehicles to drive outside of Allegheny County to perform pathology and consulting work in surrounding counties for his private financial gain.

32. It was further part of the scheme that defendant CYRIL H. WECHT billed surrounding counties for whom he did private work a mileage charge on trips where he actually used county-owned vehicles for the travel. Allegheny County paid for the gas and maintenance on the county-owned vehicles he used for these trips.

33. It was further part of the scheme that defendant CYRIL H. WECHT did not remit the said mileage reimbursements to Allegheny County, but rather retained the payments for his private financial gain.

34. It was further part of the scheme that defendant CYRIL H. WECHT made false public statements to conceal his use of the position, authority, and resources of the Allegheny County Coroner's Office for his own financial benefit, including the following false statements made on the television program "Night Talk" on or about February 17, 2005:

> Never brought in one single specimen; never requested one single test. I'm saying this now on T.V. with the Chief of Police here: not one urine specimen; not one piece of tissue; nothing from any of these cases. They're all handled privately at Carlow University -- my

own autopsy technician, my own secretary doing the typing

* * *

Nothing comes to the lab.

* * *

Do you understand that not one single thing is done in the Allegheny County Coroner's Office pertaining to any of my private work? ... What more can I say?

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The Wire Communications

35. On or about the dates set forth below, in the Western District of Pennsylvania and elsewhere, the defendant, CYRIL H. WECHT, for the purpose of executing and attempting to execute the scheme to defraud, did transmit and cause to be transmitted from the Allegheny County Coroner's Office, 542 4th Avenue, Pittsburgh, Pennsylvania, in interstate and foreign commerce, by means of certain writings, signs and signals described below as "material," each such use of the interstate wires being a separate count of this Indictment:

Count	Date	Recipient	Material
1	February 12, 2002	K.C., Annandale, New Jersey	Facsimile of invoice for expenses for a paid speaking engagement
2	April 29, 2002	D.J.G., Esq., Frankfort, Kentucky	Facsimile of fee schedule for private services re B.P.D., deceased
3	June 3, 2002	A.R.S., Esq., Akron, Ohio	Facsimile of invoices for private services re D.H., deceased
4	November 21, 2002	J.B., Springfield, Missouri	Facsimile of executed contract for paid teaching engagement
5	May 22, 2003	Chubb Insurance, New Jersey	Facsimile of invoice for private services re J.W.
6	June 26, 2003	Office of the County Auditor, El Paso, Texas	Facsimile of W-9 Tax Form for use in connection with private services re C.C., deceased

7	September 3, 2003	K.L.B., Esq., Cleveland, Ohio	Facsimile of invoice for private services re George T., deceased
8	September 3, 2003	F.E.H., Esq., Miami, Florida	Facsimile of invoice for private services re *G. v. Mt. Sinai Medical Center*
9	September 3, 2003	D.W., Esq., Denver, Colorado	Facsimile of invoice for private services re V.L.L., deceased
10	September 23, 2003	A.S., Esq., Canton, Ohio	Facsimile of invoice for private services re J.T., deceased
11	September 2003	Mississippi Attorney General's Office, Public Integrity Division	Facsimile of invoice for private services re C.T.B., deceased
12	October 1, 2003	R.M.S., Esq., Ithaca, New York	Facsimile of invoice for private services re M.R.W., deceased
13	October 24, 2003	V.W., Dayton, Ohio	Facsimile of invoice for private services re K.S., deceased
14	October 24, 2003	D.B.C, M.D., J.D., Omaha, Nebraska	Facsimile of invoice for private services re C.T.
15	October 24, 2003	H.C.L., Ph.D., Branford, Connecticut	Facsimile of invoice and request for payment for private services re *State of Arizona v. T.S.*
16	January 15, 2004	Public Defender for the District of Columbia, Washington, D.C.	Facsimile of invoice for private services re F.B.
17	January 22, 2004	E.A., Esq., Lakeport, California	Facsimile of invoice for private services re C.A.D.
18	May 19, 2004	S.D.C, Esq., Los Angeles California	Facsimile of invoice for private services re C.-F.Y., deceased

19	June 4, 2004	D.E.B.,Esq., Reserve, Louisiana	Facsimile of invoice for private services re W.M.A., deceased
20	June 10, 2004	J.F.G., Esq., Akron, Ohio	Facsimile of fee schedule and curriculum vitae for private services re "court-appointed homicide case"
21	July 14, 2004	T.M.E., Esq., Cincinnati, Ohio	Facsimile of invoice for private services re R.M., deceased
22	July 14, 2004	J.G., Esq., Cincinnati, Ohio	Facsimile of invoice for private services re R.M., deceased
23	August 24, 2004	Office of the Federal Public Defender, Nashville, Tennessee	Facsimile of invoice for private services re P.W.
24	February 7, 2005	J.F.L., Bluefield, West Virginia	Facsimile of invoice for private services re K.J., deceased

In violation of Title 18, United States Code, Sections 1343, 1346, and 2.

COUNTS TWENTY-FIVE THROUGH THIRTY-TWO
THEFT OF HONEST SERVICES - MAIL FRAUD

The Grand Jury further charges that:

36. Paragraphs one through twenty-three of this Indictment are re-alleged and incorporated fully herein by reference.

37. From in and around 1996, and continuing thereafter to in and around 2005, in the Western District of Pennsylvania, the defendant, CYRIL H. WECHT, devised and intended to devise a scheme to defraud, for obtaining money and property, and for depriving another of the intangible right of honest services, by means of breaching his fiduciary and ethical duties as Coroner of Allegheny County and making false and fraudulent pretenses and representations, well knowing at the time that he was breaching his fiduciary and ethical duties and that the pretenses and representations were false and fraudulent when made.

Purpose of the Scheme

38. It was the purpose of the scheme, among other things, to (a) obtain money, property, services and other things of value; (b) violate the fiduciary and ethical duties of defendant CYRIL H. WECHT as Coroner of Allegheny County to Allegheny County and its citizens; and (c) deprive Allegheny County and its citizens of the intangible right to the honest services of defendant CYRIL H. WECHT as Coroner of Allegheny County and other employees of the Allegheny County Coroner's Office.

The Scheme

39. Paragraphs twenty-seven through thirty-four of this Indictment are re-alleged and incorporated fully herein by reference as the description of the scheme to defraud.

The Mailings

40. On or about the dates set forth below, in the Western District of Pennsylvania, the defendant, CYRIL H. WECHT, for the purpose of executing and attempting to execute the scheme to defraud, did knowingly cause to be delivered by United States mail, according to the directions thereon, mail matter identified below, addressed to the addressees identified below, each such use of the United States mail being a separate count of this Indictment:

Count	Date	Addressee	Mail Matter
25	January 29, 2003	M.C.G., Esq., Pittsburgh, Pennsylvania	Package of Microscopic Autopsy Tissue Slides re S.E.D., deceased
26	June, 2003	S.O.R., Esq., Pittsburgh, Pennsylvania	Package of Microscopic Autopsy Tissue Slides re R.B., deceased
27	July, 2003	S.B.E., Esq., Pittsburgh, Pennsylvania	Package of Microscopic Autopsy Tissue Slides re G.B., deceased
28	October, 2003	D.J.R., Esq., Washington, Pennsylvania	Package of Microscopic Autopsy Tissue Slides in "black lung" case re E.J.H., deceased

29	May, 2004	E.H.B., Esq., Pittsburgh, Pennsylvania	Package of Microscopic Autopsy Tissue Slides re R.R., deceased
30	June 10, 2004	E.K., Esq., Pittsburgh, Pennsylvania	Package of Microscopic Autopsy Tissue Slides in "black lung" case re E.L., deceased
31	June, 2004	L.B., MCS, Pittsburgh, Pennsylvania	Package of Microscopic Autopsy Tissue Slides re L.S., deceased
32	June 25, 2004	L.J.P., Pittsburgh, Pennsylvania	Package of Microscopic Autopsy Tissue Slides in "black lung" case re T.J.B., deceased

In violation of Title 18, United States Code, Section 1341, 1346, and 2.

COUNTS THIRTY-THREE THROUGH FORTY-TWO
WIRE FRAUD

The Grand Jury further charges that:

41. Paragraphs one through twenty-three and twenty-seven through thirty-four of this Indictment are re-alleged and incorporated fully herein by reference.

Purpose of the Scheme

42. From on or about January 1, 1996, and continuing thereafter to on or about December 31, 2005, in the Western District of Pennsylvania and elsewhere, the defendant, CYRIL H. WECHT, devised and intended to devise a scheme to defraud and for obtaining money by means of false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises were false and fraudulent when made.

The Scheme

43. It was part of the scheme to defraud that defendant, CYRIL H. WECHT, caused fake and fraudulent expense reimbursement invoices to be prepared for his clients.

44. It was a further part of the scheme to defraud that defendant CYRIL H. WECHT charged his clients for "limousine service" expenses to and from Pittsburgh International Airport when in truth and in fact defendant CYRIL H. Wecht had traveled to and from Pittsburgh International Airport in vehicles owned by Allegheny County with the assistance of Deputy Coroners employed by the Allegheny County Coroner's Office.

45. It was a further part of the scheme to defraud that defendant CYRIL H. WECHT caused fake and fraudulent receipts to be created to support his "limousine service" expense charges when in truth and in fact defendant CYRIL H. WECHT had traveled to and from Pittsburgh International Airport in vehicles owned by Allegheny County with the assistance of Deputy Coroners employed by the Allegheny County Coroner's Office.

46. It was a further part of the scheme to defraud that defendant CYRIL H. WECHT charged some clients for airfare expenses significantly in excess of the amounts he actually paid for such airfares.

47. It was a further part of the scheme to defraud that defendant CYRIL H. WECHT caused fake and fraudulent travel agency bills to be created to support his charges to his clients for airfares significantly in excess of the amounts he actually paid for such airfares.

48. It was a further part of the scheme to defraud that defendant CYRIL H. WECHT caused the false expense reimbursement invoices, fake limousine bills, and fake travel agency bills to be transmitted from facsimile machines at the Allegheny County Coroner's Office to his clients in other states.

49. It was further a part of the scheme to defraud that defendant, CYRIL H. WECHT, directed his clients to make checks for his fee payments payable to his business, but asked his clients to pay the fraudulent expense reimbursements with a separate check payable to "Cyril H. Wecht M.D., J.D.".

50. It was further a part of the scheme to defraud that defendant, CYRIL H. WECHT, concealed his fraud from the books and records of Wecht Pathology and from Wecht Pathology's accountants by causing expense reimbursement checks to be cashed at a bank, rather than deposited into his corporate account.

51. It was further a part of the scheme to defraud that defendant, CYRIL H. WECHT, gave false testimony about his expenses under oath at depositions to conceal his fraud.

The Wire Communications

52. On or about the dates set forth below, in the Western District of Pennsylvania and elsewhere, the defendant, CYRIL H. WECHT, for the purpose of executing and attempting to execute the scheme to defraud, did transmit and cause to be transmitted from the Allegheny County Coroner's Office, 542 4th Avenue, Pittsburgh, Pennsylvania, in interstate and foreign commerce, by means of certain writings, signs and signals described below as "material," each such use of the interstate wires being a separate count of this Indictment:

Count	Date	Recipient	Material
33	February 12, 2002	K.C., Esq., Annandale, New Jersey	Facsimile of False Expense Reimbursement Invoice, Fake Travel Agency Bill, and Fake Limousine Receipt
34	June 3, 2002	A.R.S., Esq., Akron, Ohio	Facsimile of False Expense Reimbursement Invoice and Fake Travel Agency Bill

35	June 11, 2002	E.A.B., Esq., Royal Oak, Michigan	Facsimile of False Expense Reimbursement Invoice
36	October 7, 2002	E.E.H., Esq., Raleigh, North Carolina	Facsimile of Fake Limousine Receipt
37	August 21, 2003	M.J.G., Esq., Los Angeles, California	Facsimile of False Expense Reimbursement Invoice
38	September 10, 2003	M.S., Esq., Miami, Florida	Facsimile of False Expense Reimbursement Invoice
39	March 23, 2004	J.H., Esq., Roseland, New Jersey	Facsimile of False Expense Reimbursement Invoice
40	April 20, 2004	P.S.C., Santa Ana, California	Facsimile of False Expense Reimbursement Invoice
41	April 1, 2004	J.E., Esq., Cherry Hill, New Jersey	Facsimile of False Expense Reimbursement Invoice
42	March 9, 2005	D.E.B., Esq., Reserve, Louisiana	Facsimile of False Expense Reimbursement Invoice

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNTS FORTY-THREE THROUGH SEVENTY-NINE
MAIL FRAUD

The Grand Jury further charges that:

53. Paragraphs one through twenty-three and twenty-seven through thirty-four of this Indictment are re-alleged and incorporated fully herein by reference.

Purpose of the Scheme

54. From on or about January 1, 1996, and continuing thereafter to on or about December 31, 2005, in the Western District of Pennsylvania and elsewhere, the defendant, CYRIL H. WECHT, devised and intended to devise a scheme to defraud and for obtaining money by means of false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises were false and fraudulent when made.

The Scheme

55. It was part of the scheme to defraud that defendant, CYRIL H. WECHT, caused fake and fraudulent mileage reimbursement invoices to be prepared and sent to counties in Western Pennsylvania, including Armstrong, Fayette, Greene, and Westmoreland Counties, in connection with his private autopsy and consulting services.

56. It was further part of the scheme that defendant CYRIL H. WECHT billed surrounding counties a mileage charge on trips where he actually used vehicles owned by Allegheny County for the travel. Allegheny County paid for the gas and maintenance on

the county-owned vehicle he used for these trips. Defendant CYRIL H. WECHT did not reimburse Allegheny County for these mileage expenses.

57. It was a further part of the scheme to defraud that defendant CYRIL H. WECHT caused the false mileage reimbursement invoices to be mailed to Armstrong, Fayette, Greene, and Westmoreland Counties.

58. It was a further part of the scheme to defraud that defendant CYRIL H. WECHT requested that the counties mail to him separate checks in payment of the false mileage reimbursement invoices.

59. It was further part of the scheme to defraud that defendant CYRIL H. WECHT instructed K.M., an Allegheny County Coroner's Office employee, to type and send a 2003 letter to a police officer in Greensburg, Pennsylvania, who had issued a parking ticket to the county-owned vehicle driven by the defendant while he testified for personal profit.

The Mailings

60. On or about the dates set forth below, in the Western District of Pennsylvania, the defendant, CYRIL H. WECHT for the purpose of executing and attempting to execute the scheme to defraud, did knowingly cause to be delivered by United States mail, according to the directions thereon, mail matter identified below, addressed to the addressees identified below, each such use of the United States mail being a separate count of this Indictment:

Count	Date	Addressee	Mail Matter
43	January 23, 2001	Westmoreland County District Attorney's Office, Greensburg, Pennsylvania	Invoice with false mileage reimbursement expense re P.L.R., deceased
44	February 8, 2001	Westmoreland County District Attorney's Office, Greensburg, Pennsylvania	Invoice with additional false mileage reimbursement expense re P.L.R., deceased
45	February 8, 2001	Westmoreland County District Attorney's Office, Greensburg, Pennsylvania	Invoice with false mileage reimbursement expense re K.A.T., deceased
46	March 12, 2001	Armstrong County District Attorney's Office, Kittanning, Pennsylvania	Invoice with false mileage reimbursement expense re J.W.H., deceased

WECHT000000029

47	May 10, 2001	Armstrong County District Attorney's Office, Kittanning, Pennsylvania	Invoice with false mileage reimbursement expense re J.L.D., deceased
48	June 7, 2001	Fayette County District Attorney's Office, Uniontown, Pennsylvania	Invoice with false mileage reimbursement expense re G.L.D., deceased
49	June 11, 2001	Westmoreland County District Attorney's Office, Greensburg, Pennsylvania	Invoice with false mileage reimbursement expense re L.M.S., deceased
50	July 11, 2001	Fayette County District Attorney's Office, Uniontown, Pennsylvania	Invoice with false mileage reimbursement expense re M.E.K., deceased
51	July 13, 2001	Fayette County District Attorney's Office, Uniontown, Pennsylvania	Invoice with false mileage reimbursement expense re E.J.P. and K.M.P., deceased
52	October 3, 2001	Westmoreland County District Attorney's Office, Greensburg, Pennsylvania	Invoice with false mileage reimbursement expense re L.J.G., deceased
53	October 12, 2001	Fayette County District Attorney's Office, Uniontown, Pennsylvania	Invoice with false mileage reimbursement expense re R.D.C., deceased

54	November 9, 2001	Westmoreland County District Attorney's Office, Greensburg, Pennsylvania	Invoice with false mileage reimbursement expense re K.M.G., deceased
55	December 6, 2001	Westmoreland County District Attorney's Office, Greensburg, Pennsylvania	Invoice with false mileage reimbursement expense re D.G.J., deceased
56	January 10, 2002	Fayette County District Attorney's Office, Uniontown, Pennsylvania	Invoice with false mileage reimbursement expense re W.F.S., deceased
57	February 5, 2002	Fayette County District Attorney's Office, Uniontown, Pennsylvania	Invoice with false mileage reimbursement expense re S.S., deceased
58	April 3, 2002	Fayette County District Attorney's Office, Uniontown, Pennsylvania	Invoice with false mileage reimbursement expense re L.M.C., deceased
59	April 3, 2002	Fayette County District Attorney's Office, Uniontown, Pennsylvania	Invoice with false mileage reimbursement expense re E.P. and K.P., deceased
60	May 8, 2002	Fayette County District Attorney's Office, Uniontown, Pennsylvania	Invoice with false mileage reimbursement expense re G.L.T., deceased

61	May 22, 2002	Westmoreland County District Attorney's Office, Greensburg, Pennsylvania	Invoice with false mileage reimbursement expense re K.J.N., deceased
62	July 18, 2002	Westmoreland County Coroner's Office, Greensburg, Pennsylvania	Invoice with false mileage reimbursement expense re A.G.W., deceased
63	October 2, 2002	Westmoreland County Coroner's Office, Greensburg, Pennsylvania	Invoice with false mileage reimbursement expense re C.R., deceased
64	October 31, 2002	Westmoreland County District Attorney's Office, Greensburg, Pennsylvania	Invoice with false mileage reimbursement expense re T.M.G., deceased
65	November 7, 2002	Fayette County District Attorney's Office, Uniontown, Pennsylvania	Invoice with false mileage reimbursement expense re Z.J., deceased
66	January 27, 2003	Fayette County District Attorney's Office, Uniontown, Pennsylvania	Invoice with false mileage reimbursement expense re M.E., deceased
67	March 11, 2003	Fayette County District Attorney's Office, Uniontown, Pennsylvania	Invoice with false mileage reimbursement expense re C.D.S., deceased

WECHT000000032

68	April 8, 2003	Fayette County District Attorney's Office, Uniontown, Pennsylvania	Invoice with false mileage reimbursement expense re C.K., deceased
69	July 9, 2003	Fayette County District Attorney's Office, Uniontown, Pennsylvania	Invoice with false mileage reimbursement expense re T.L.T., deceased
70	July 24, 2003	Greene County District Attorney's Office, Waynesburg, Pennsylvania	Invoice with false mileage reimbursement expense re D.E.C., deceased
71	September 22, 2003	Greene County District Attorney's Office, Waynesburg, Pennsylvania	Invoice with false mileage reimbursement expense re D.M.M., deceased
72	November 11, 2003	Fayette County District Attorney's Office, Uniontown, Pennsylvania	Invoice with false mileage reimbursement expense re J.L., deceased
73	March 1, 2004	Fayette County District Attorney's Office, Uniontown, Pennsylvania	Invoice with false mileage reimbursement expense re H.E.P., deceased
74	April 22, 2004	Fayette County District Attorney's Office, Uniontown, Pennsylvania	Invoice with false mileage reimbursement expense re J.M.K., deceased

75	May 11, 2004	Fayette County District Attorney's Office, Uniontown, Pennsylvania	Invoice with false mileage reimbursement expense re L.A.B. et al..,
76	October 4, 2004	Fayette County Coroner's Office, Uniontown, Pennsylvania	Invoice with false mileage reimbursement expense re K.R.S., deceased
77	November 3, 2004	Fayette County District Attorney's Office, Uniontown, Pennsylvania	Invoice with false mileage reimbursement expense re J.L. and D.M., deceased
78	November 4, 2004	Armstrong County District Attorney's Office, Kittanning, Pennsylvania	Invoice with false mileage reimbursement expense re K.T., deceased
79	June 2, 2005	Greene County District Attorney's Office, Waynesburg, Pennsylvania	Invoice with false mileage reimbursement expense re E.K.M., deceased

In violation of Title 18, United States Code, Sections 1341 and 2.

COUNT EIGHTY
THEFT CONCERNING ORGANIZATION RECEIVING FEDERAL FUNDS

The grand jury further charges:

61. Paragraphs one through twenty-three and twenty-seven through thirty-four of this Indictment are re-alleged and incorporated fully herein by reference.

62. During the calendar year 2001, in the Western District of Pennsylvania and elsewhere, Defendant CYRIL H. WECHT, being an agent of Allegheny County, a local government organization that received benefits in excess of $10,000 during the calendar year 2001 through a variety of federal programs, did knowingly embezzle, steal, obtain by fraud and otherwise without authority convert to his own use property valued at $5,000 or more and owned by or under the care, custody, and control of Allegheny County, specifically the use of personnel, vehicles, facilities, resources, equipment, and space of the Allegheny County Coroner's Office used to conduct his private business activities.

In violation of Title 18, United States Code, Sections 666(a)(1)(A) and 2.

COUNT EIGHTY-ONE
THEFT CONCERNING ORGANIZATION RECEIVING FEDERAL FUNDS

The grand jury further charges:

63. Paragraphs one through twenty-three and twenty-seven through thirty-four of this Indictment are re-alleged and incorporated fully herein by reference.

64. During the calendar year 2002, in the Western District of Pennsylvania and elsewhere, Defendant CYRIL H. WECHT, being an agent of Allegheny County, a local government organization that received benefits in excess of $10,000 during the calendar year 2002 through a variety of federal programs, did knowingly embezzle, steal, obtain by fraud and otherwise without authority convert to his own use property valued at $5,000 or more and owned by or under the care, custody, and control of Allegheny County, specifically the use of personnel, vehicles, facilities, resources, equipment, and space of the Allegheny County Coroner's Office used to conduct his private business activities.

In violation of Title 18, United States Code, Sections 666(a)(1)(A) and 2.

COUNT EIGHTY-TWO
THEFT CONCERNING ORGANIZATION RECEIVING FEDERAL FUNDS

The grand jury further charges:

65. Paragraphs one through twenty-three and twenty-seven through thirty-four of this Indictment are re-alleged and incorporated fully herein by reference.

66. During the calendar year 2003, in the Western District of Pennsylvania and elsewhere, Defendant CYRIL H. WECHT, being an agent of Allegheny County, a local government organization that received benefits in excess of $10,000 during the calendar year 2003 through a variety of federal programs, did knowingly embezzle, steal, obtain by fraud and otherwise without authority convert to his own use property valued at $5,000 or more and owned by or under the care, custody, and control of Allegheny County, specifically the use of personnel, vehicles, facilities, resources, equipment, and space of the Allegheny County Coroner's Office used to conduct his private business activities.

In violation of Title 18, United States Code, Sections 666(a)(1)(A) and 2.

COUNT EIGHTY-THREE
THEFT CONCERNING ORGANIZATION RECEIVING FEDERAL FUNDS

The grand jury further charges:

67. Paragraphs one through twenty-three and twenty-seven through thirty-four of this Indictment are re-alleged and incorporated fully herein by reference.

68. During the calendar year 2004, in the Western District of Pennsylvania and elsewhere, Defendant CYRIL H. WECHT, being an agent of Allegheny County, a local government organization that received benefits in excess of $10,000 during the calendar year 2004 through a variety of federal programs, did knowingly embezzle, steal, obtain by fraud and otherwise without authority convert to his own use property valued at $5,000 or more and owned by or under the care, custody, and control of Allegheny County, specifically the use of personnel, vehicles, facilities, resources, equipment, and space of the Allegheny County Coroner's Office used to conduct his private business activities.

In violation of Title 18, United States Code, Sections 666(a)(1)(A) and 2.

WECHT000000038

COUNT EIGHTY-FOUR
THEFT CONCERNING ORGANIZATION RECEIVING FEDERAL FUNDS

The grand jury further charges:

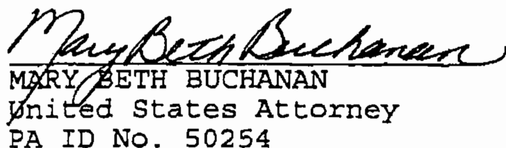
69. Paragraphs one through twenty-three and twenty-seven through thirty-four of this Indictment are re-alleged and incorporated fully herein by reference.

70. During the calendar year 2005, in the Western District of Pennsylvania and elsewhere, Defendant CYRIL H. WECHT, being an agent of Allegheny County, a local government organization that received benefits in excess of $10,000 during the calendar year 2005 through a variety of federal programs, did knowingly embezzle, steal, obtain by fraud and otherwise without authority convert to his own use property valued at $5,000 or more and owned by or under the care, custody, and control of Allegheny County, specifically the use of personnel, vehicles, facilities, resources, equipment, and space of the Allegheny County Coroner's Office used to conduct his private business activities.

In violation of Title 18, United States Code, Sections 666(a)(1)(A) and 2.

A True Bill,

FOREPERSON



MARY BETH BUCHANAN
United States Attorney
PA ID No. 50254

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

UNITED STATES OF AMERICA	)	Criminal No. 06-26
	)	
v.	)	Electronic Filing
	)	
CYRIL H. WECHT	)	

GOVERNMENT'S BRIEF IN OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS AT DOCKET NO. 180

AND NOW comes the United States of America, by and through its attorneys, Mary Beth Buchanan, United States Attorney for the Western District of Pennsylvania, and Stephen S. Stallings and James R. Wilson, Assistant United States Attorneys for said district, and submits this brief in opposition to defendant's Motion to Dismiss at Docket No. 180.

INTRODUCTION

The indictment in this case alleges that defendant, Cyril H. Wecht, breached fiduciary, ethical, and legal duties he owed to Allegheny County and its citizens by misusing county resources for his private benefit, and that defendant defrauded his private clients with fraudulent reimbursement requests. The indictment alleges the essential facts meeting each of the elements of honest services fraud (charged in counts 1-32), mail and wire fraud (charged in counts 33-79) and theft concerning an organization receiving federal funds (charged in counts 80-84).

The prosecution that led to this indictment was motivated by a belief that defendant's conduct constituted Federal offenses and that the admissible evidence would likely be sufficient to obtain and sustain a conviction. Contrary to defendant's unsupported (and false) accusations, the prosecution was not driven by "ill-will," "malevolence," "vindictiveness," or any other improper motive.

Accordingly, defendant's motion to dismiss should be denied.

OUTLINE OF THIS BRIEF

We first discuss, in Section I of this brief, the legal standards governing motions to dismiss.

In Section II, we explain how the indictment sufficiently alleges the essential facts meeting the elements of the charged offenses.

Section III addresses how defendant has not, and why he cannot, adequately allege vindictive prosecution or other government misconduct.

Finally, in Section IV of this brief, we analyze the flaws in defendant's legal arguments, pointing out that his brief in support of the motion fails to meet the basic legal standards for a motion to dismiss and explaining how he misstates the law governing honest services fraud, mail fraud, and theft concerning an organization receiving federal funding.

I. THE LEGAL STANDARDS FOR A MOTION TO DISMISS

Defendant seeks dismissal based upon (a) an alleged failure of the indictment to properly allege offenses, and (b) unsupported allegations of government misconduct. We discuss the legal standard governing each of these types of claims in turn.

A. The Standard for a Motion to Dismiss Based Upon Sufficiency of the Allegations

An indictment must contain "a plain, concise and definite written statement of the essential facts constituting the offense charged." Fed.R.Crim.P. 7(c)(1). See also United States v. Urban, 404 F.3d 754, 771 (3rd Cir. 2005). An indictment is legally sufficient if, when considered in its entirety, it adequately informs the defendant of the charges against him such that he may prepare a defense and invoke the double jeopardy clause when appropriate. Urban, 404 F.3d at 771; United States v. Whited, 311 F.3d 259, 262 (3rd Cir. 2002); United States v. Stansfield, 171 F.3d 806, 812 (3d Cir.1999); United States v. Turley, 891 F.2d 57, 59 (3d Cir.1989). A two part test is used "to

WECHT000000041

measure the sufficiency of an indictment: '(1) whether the indictment contains the elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet, and (2) enables the defendant to plead an acquittal or conviction in bar of future prosecutions for the same offense.'" United States v. Hodge, 211 F.3d 74, 76 (3d Cir.2000)(quoting Gov't of the Virgin Islands v. Moolenaar, 133 F.3d 246, 248 (3d Cir.1998)). Moreover, because "the Court is addressing a 12(b) motion to dismiss an indictment, the Court must assume that the pertinent allegations of the Indictment are true." United States v. Conley, 859 F.Supp. 909, 931 (W.D.Pa. 1994).

In this case, the indictment sufficiently alleges honest service fraud, mail and wire fraud, and theft concerning an organization receiving federal funds, as discussed in detail in Section II below.

B. The Standard for a Motion to Dismiss Based Upon Government Misconduct

In order to establish that an indictment should be dismissed for prosecutorial misconduct pursuant to the Court's supervisory powers, the defendant must first establish that there has been misconduct of a nature sufficient to invoke the Court's supervisory powers, and second that defendant was prejudiced by such misconduct. Bank of Nova Scotia v. United States, 487 U.S. 250, 263 (1988); United States v. Williams, 504 U.S. 36 (1992). In this case, it is difficult to pinpoint the precise legal nature of the prosecutorial misconduct defendant alleges, but it appears that defendant alleges primarily "vindictive prosecution." The defendant has the burden of proof on a vindictive prosecution claim, United States v. Schoolcraft, 879 F.2d 64, 68 (3rd Cir. 1989), and defendant's burden is a rigorous one. United States v. Jarrett, 447 F.3d 520 (7th Cir. 2006).

WECHT000000042

For purposes of evaluating defendant's motion, it is sufficient to note that defendant has not put forward any evidence supporting his allegations of misconduct, much less proof sufficient to meet his rigorous burden, as discussed in detail in Section III below.

II. THE INDICTMENT SUFFICIENTLY ALLEGES THE CHARGED OFFENSES

The indictment alleges three types of crimes. First, in counts 1-24 and 25-32, the indictment charges defendant with honest services fraud in violation of Title 18, United States Code, Sections 1341, 1343, 1346 and 2. Second, in counts 33-42 and 43-79, the indictment charges defendant with mail and wire fraud in violation of Title 18, United States Code, Sections 1341, 1343 and 2. Finally, in counts 80-84, the indictment charges defendant with theft concerning an organization receiving federal funding in violation of Title 18, United States Code, Sections 666(a)(1)(A) and 2. We discuss the sufficiency of the indictment's allegations as to each of these three types of crimes in turn below.

A. Honest Services Fraud (Counts 1-24 and 25-32)

______The elements of honest services fraud in violation of Title 18, United States Code, Sections 1341, 1343, and 1346 are:

First, the defendant's knowing and willful participation in the scheme or artifice to defraud described in the Indictment;

Second, that defendant acted with the specific intent to defraud, and

Third, the use of interstate wire communications or the U.S. mails in furtherance of the scheme.

See United States v. Antico, 275 F.3d 245, 261 (3d Cir.2001); United States v. Panarella, 277 F.3d 678 (3d Cir.2002); United States v. Murphy, 323 F.3d 102 (3d Cir.2002); United States v. Gordon,

WECHT000000043

2006 WL 1558952 (3d Cir. 2006) (unpublished, non-precedential opinion); Joint Proposed Jury Instructions 1 and 2, filed at Docket No. 233.

The indictment alleges the essential facts meeting each of these three elements.

First Element: Defendant's Knowing and Willful Participation in the Scheme to Defraud

The honest services fraud scheme is described in paragraphs 27 through 34 of the indictment. Defendant is alleged to have:

- used the position, authority, and resources of the Allegheny County Coroner's Office to assist with his private business activities and thus generate income for his business and himself through a variety of means (see paragraph 27 and 27(a) through (l) of the indictment);
- pocketed expense reimbursement proceeds fraudulently obtained using county resources (see paragraphs 28 and 29 of the indictment);
- used the position, authority, and resources of the Allegheny County Coroner's Office for the personal and political benefit of himself and his family through a variety of means (see paragraphs 30 and 30(a) through (g) of the indictment);
- used county-owned vehicles for his private business purposes, and fraudulently billed for and retained mileage reimbursement for such trips (see paragraphs 31-33 of the indictment);
- made false public statements to conceal his use of the position, authority, and resources of the Allegheny County Coroner's Office for his own financial benefit (see paragraph 34 of the indictment).

A "scheme to defraud" includes a scheme to deprive another of honest services. Using government resources for private purposes in violation of fiduciary, ethical and legal duties constitutes classic honest services fraud. See, e.g., McNally v. United States, 483 U.S. 350, 355

(1987) ("a public official owes a fiduciary duty to the public, and misuse of his office for private gain is a fraud"); Glover v. United States, 125 F.2d 291, 292-93 (5th Cir. 1942) (upholding the mail fraud conviction of a state highway supervisor accused of using state resources for his private benefit); United States v. Gordon, 380 F.Supp.2d 356, 361-63 (D.Del. 2005), rev'd in other respects, 2006 WL 1558952 (3d Cir. 2006) (denying motion to dismiss indictment, and holding that indictment "clearly" alleged honest services in charging that defendant "caused various County employees to engage in partisan political activity during working hours," "caused a County employee, during working hours, to spend about 10 days painting Ms. Freebery's house and doing yard work at her premises", "caused a County employee, during working hours, to decorate her benefactress's Christmas tree," and caused "County employees [to] perform[] personal errands"). See also United States v. Rostenkowski, 59 F.3d 1291, 1295 (D.C. Cir. 1995) (discussing a § 1346 scheme to defraud involving embezzlement); Valuing Honest Services: the Common Law Evolution of Section 1346, 74 N.Y.U. L. Rev. 1099, 1101 (Oct. 1999) ("Under the intangible rights theory, government officials and others standing in a position of trust with the public become public fiduciaries and thus owe fiduciary duties to the citizenry. When such officials scheme to breach those duties, the public is deprived of its intangible right to the "honest services" of their public officials. . . . the intangible rights theory has been applied to a wide range of public corruption schemes . . . ..")

The fiduciary, ethical, and legal duties defendant owed are spelled out in paragraphs 5 through 14 of the indictment,[1] and include:

[1] The indictment alleges additional statutory and regulatory requirements that delineate the scope of the Coroner's job, including the requirement that defendant devote a full-time effort to the duties of his offices (see paragraph 8 of the indictment; Section 601.01 of the Administrative). Despite defendant's suggestions to the contrary, this requirement is not the "operative theory" of the indictment, but merely one of several provisions that govern the execution of the Coroner's job. See

WECHT000000045

- a prohibition against defendant using the authority of his office, or any confidential information received through his holding public office, for his private pecuniary benefit (see paragraph 6 of the indictment; Sections 1102 and 1103(a) of the Pennsylvania State Ethics Code);
- a prohibition against defendant using county resources for any non-County purpose or for his private financial gain (see paragraph 9 of the indictment; Allegheny County Administrative Code);
- a requirement that defendant file annual financial disclosure forms (see paragraph 9 of the indictment; Allegheny County Administrative Code);
- a requirement that defendant handle unclaimed bodies pursuant to specific state requirements (see paragraphs 10 and 11 of the indictment; 16 P.S. § 4233);
- a responsibility upon defendant for managing the operations of the Coroner's office (see paragraph 12 of the indictment).

In addition, the indictment alleges defendant breached his fiduciary duty to the public. Under Pennsylvania law, the Coroner, as a public officer, owed a fiduciary duty to the public. Greater Fourth Street Associates, Inc. v. Smithfield Tp., 816 A.2d 388, 392 (Pa.Cmwlth. 2003) ("public officers . . . are fiduciaries and, when dealing with public property, must act with the 'utmost good faith, fidelity and integrity.'") See also Heilig Bros. Co. v. Kohler, 366 Pa. 72, 77-78, 76 A.2d 613, 616 (1950); Price v. Philadelphia Parking Authority, 422 Pa. 317, 329, 221 A.2d 138, 145 (1966); Schwartz v. Urban Redevelopment Authority of Pittsburgh, 411 Pa. 530, 536, 192 A.2d 371, 373 (Pa. Jul 02, 1963) Redevelopment Authority of City of Erie v. Owners or Parties in Interest, 1

Section IV.A. of this brief below.

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Pa.Cmwlth. 378, 383, 274 A.2d 244, 247 (Pa.Cmwlth. Feb 16, 1971); West Deer Civic Ass'n v. West Deer Tp., 75 Pa. D. & C.2d 611, 616 (Pa.Com.Pl. 1975).

The indictment alleges that defendant breached these fiduciary, ethical, and legal duties by, among other things, using his office for his private pecuniary benefit (see paragraph 27), using county resources for his private business and financial gain (see paragraph 27), failing to file financial disclosure forms as required (see paragraph 15), mishandling bodies by providing them to Carlow College as partial consideration for defendant's use of a laboratory for private work (see paragraphs 27(h) and (I)), and misusing his management authority over the Coroner's office resources in violation of his fiduciary duties (see paragraphs 27, 30, 31, and 34).

The indictment alleges that defendant knowingly participated in this scheme and knowingly breached his ethical and fiduciary duties (see paragraphs 25 and 37 of the indictment), and that defendant acted willfully, that is, with the specific purpose of obtaining moneys, violating his fiduciary duties, and depriving Allegheny County of honest service (see paragraphs 26 and 38 of the indictment).

The indictment thus properly alleges the first element of honest services fraud.

Second Element: Defendant Acted with the Specific Intent to Defraud

To act with "intent to defraud" means to act willfully and with the specific intent to deceive or cheat for the purpose of either causing some financial loss to another or bringing about some financial gain to oneself. See Joint Proposed Jury Instructions 1 and 2, filed at Docket No. 233. The indictment specifically alleges in paragraphs 26 and 38 that defendant acted with the purpose to:

> a) obtain money, property, services and other things of value; (b) violate the fiduciary and ethical duties of defendant CYRIL H. WECHT as Coroner of Allegheny County to Allegheny County and its citizens; and (c) deprive Allegheny County and its

citizens of the intangible right to the honest services of defendant CYRIL H. WECHT as Coroner of Allegheny County and other employees of the Allegheny County Coroner's Office.

The indictment, therefore, specifically alleges that defendant had the intent to "bring about some financial gain" to himself, specifically the intent to "obtain money, property, services, and other things of value." In addition, the indictment alleges that defendant had the intent to cause loss to others, including Allegheny County and its citizens. The indictment thus properly alleges the second element of honest services fraud.

Third Element: The Use of Interstate Wire Communications or U.S. Mails

Paragraphs 35 and 40 of the indictment specifically allege that defendant caused interstate wires and the U.S. Mails to be used in furtherance of the scheme to defraud, and counts 1-24 and 25-32 identify those wires and mailings with specificity. The indictment thus properly alleges the third element of honest services fraud.

B. Mail and Wire Fraud (Counts 33-42[2] and 43-79)

The elements of mail and wire fraud in violation of Title 18, United States Code, Sections 1341 and 1343 are:

First, the defendant's knowing and willful participation in the scheme or artifice to defraud described in the Indictment;

Second, that defendant acted with the specific intent to defraud, and

Third, the use of interstate wire communications or U.S. Mails in furtherance of the scheme.

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[2] The defendant's motion to dismiss does not challenge the wire fraud charges at counts 33-42 on any ground other than the Court's supervisory power to dismiss an indictment based upon government misconduct. Nevertheless, for the sake of completeness, the government sets forth the sufficiency of the allegations in counts 33-42 here as well.

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United States. v. Hedaithy, 392 F.3d 580 (3rd Cir. 2004); United States v. Antico, 275 F.3d 245, 261 (3d Cir.2001); Schmuck v. United States, 489 U.S. 705, 710 (1989); Joint Proposed Jury Instructions 3 and 4 at Docket No. 233. The indictment alleges the essential facts meeting each of these three elements.

First Element: Defendant's Knowing and Willful Participation in the Scheme to Defraud

The wire fraud scheme is described in paragraphs 43-51 of the indictment. Defendant is alleged to have:

- caused fake and fraudulent expense reimbursement requests and supporting documents to be sent to his private clients;
- cashed the checks received as a result of the fraud in a manner that concealed the transactions from the corporate books; and
- lied about his expenses in private expert depositions.

The mail fraud scheme is described in paragraphs 55-59 of the indictment. Defendant is alleged to have caused fraudulent mileage reimbursement requests to be sent to other counties for whom he did private autopsy work.

Defendant is alleged to have participated in these schemes knowingly (see paragraphs 42 and 54 of the indictment) and willfully, that is, with the specific purpose of "obtaining money by means of false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises were false and fraudulent when made" (see paragraphs 42 and 54 of the indictment). The indictment thus properly alleges the first element of mail and wire fraud.

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Defendant's motion to dismiss the mail fraud charges at counts 43-79 seems to be based on a mistaken view of the gravamen of these charges. Defendant asserts that the essence of these charges is a "failure to reimburse." This is not correct. The essence of the scheme, as set forth in paragraphs 55-57, is that defendant fraudulently billed surrounding counties for mileage expenses he did not incur. This is basic fraud at its simplest level. The fact that he did not reimburse Allegheny County compounds the crime, but it is not the gravamen of the crime. The fact that he used an Allegheny County vehicle, gassed and maintained at Allegheny County expense, simply means that the loss from his fraud will be at least double the amount that he fraudulently billed to the surrounding counties. An indictment is not rendered defective merely because a defendant's crime has multiple victims.

Second Element: Defendant Acted with the Specific Intent to Defraud

To act with "intent to defraud" means to act willfully and with the specific intent to deceive or cheat for the purpose of either causing some financial loss to another or bringing about some financial gain to oneself. See Joint Proposed Jury Instructions 1 and 2, filed at Docket No. 233. The indictment specifically alleges in paragraphs 42 and 54 that defendant acted with the purpose to obtain "money by means of false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises were false and fraudulent when made." The indictment, therefore, specifically alleges that defendant had the intent to "bring about some financial gain" to himself, specifically the intent to obtain money, by deceiving and cheating his private clients with fraudulent expense reimbursement requests. The indictment thus properly alleges the second element of mail and wire fraud.

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Third Element: The Use of Interstate Wire Communications or U.S. Mails

Paragraphs 52 and 60 of the indictment specifically allege that defendant caused interstate wires and the U.S. Mails to be used in furtherance of the scheme to defraud, and counts 33-42 and 43-79 identify those wires and mailings with specificity. The indictment thus properly alleges the third element of mail and wire fraud.

C. Theft Concerning an Organization Receiving Federal Funding (Counts 80-84)

The elements of theft concerning an organization receiving federal funding in violation of Title 18, United States Code, Section 666(a)(1)(A)[3] are:

First, that the defendant was an agent of Allegheny County;

______Second, that during each of the time periods alleged in Counts 80 through 84, the defendant embezzled, stole, obtained by fraud, converted to the use of another without authority, or intentionally misapplied property of a value of $5,000 or more as part of a single scheme or plan.

______Third, that the property was owned by, or was under the care, custody, or control of Allegheny County;

______Fourth, that Allegheny County received benefits in excess of $10,000 in each of the one-year periods alleged in Counts 80 through 84, pursuant to a federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of federal assistance.

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[3]Footnote 27 of defendant's Brief in Support of his motion to dismiss seeks to strike a supposed "reference to § 666(a)(2)" from the indictment, claiming there was a "gratuitous inclusion of a statutory provision that clearly has no application to the facts" and that this supposed reference was "another example of the Government's over-reaching." The indictment, however, does not refer to Section 666(a)(2) at all. Perhaps defendant was confused by the indictment's reference to Title 18, United States Code, Section 2 (the aiding and abetting provision of Title 18).

See Sabri v. United States, 541 U.S. 600 (2004); United States v. Guisard, 2006 WL 45856, *3 (3rd Cir. 2006); United States v. Urlacher, 979 F.2d 935, 938 (2d Cir. 1992); United States v. Miller, 725 F.2d 462, 468 (8th Cir. 1984); United Stated v. Sanderson, 966 F.2d 184 (6th Cir. 1992); United States v. Valentine, 63 F.3d 459 (6th Cir. 1995). The indictment alleges the essential facts meeting each of these four elements.

First Element: Defendant was an Agent of Allegheny County

Each of counts 80 through 84 specifically alleged: "Defendant CYRIL H. WECHT, being an agent of Allegheny County . . . ." See paragraphs 62, 64, 66, 68, and 70 of the indictment. Moreover, paragraphs 2-9 of the indictment elaborate on the nature of defendant's status as an agent of Allegheny County. See paragraphs 61, 63, 65, 67, and 69 of the indictment, specifically incorporating paragraphs 2-9 into counts 80-84. The indictment thus sufficiently alleges this element.

Second Element: During Each of the Time Periods Alleged in Counts 80 through 84, Defendant Embezzled, Stole, Obtained by Fraud, Converted to the Use of Another Without Authority, or Intentionally Misapplied Property of a Value of $5,000 or More as Part of a Single Scheme or Plan

Each of counts 80 through 84 specifically alleged this element, and specified that the property valued at $5,000 or more consisted of: "the use of personnel, vehicles, facilities, resources, equipment, and space of the Allegheny County Coroner's Office used to conduct his private business activities." Moreover, paragraphs 27-34 of the indictment elaborate on how defendant used these county resources for his private gain. See paragraphs 61, 63, 65, 67, and 69 of the indictment, specifically incorporating paragraphs 27-34 into counts 80-84.

WECHT000000052

Defendant attacks counts 80-84 of the indictment by arguing that "property" as used in section 666(a)(1)(A) means only "tangible property" -- physical items. The problem with defendant's argument is that every court to consider the issue has found that "property" as used in section 666(a)(1)(A) includes intangibles. See United States v. Sanderson, 966 F.2d 184, 188-89 (6th Cir. 1992) (employee time and services); United States v. Genova, 333 F.3d 750, 755 (7th Cir. 2003) (unused "comp time," of government workers); United States. v. Delano, 55 F.3d 720, 729 (2nd Cir. 1995) (government employee's labor).

Defendant also argues that property may not be aggregated to arrive at the $5,000 threshold. Yet every case to address the issue has held that property may be aggregated to arrive at the $5,000 threshold. See, e.g.,; United States v. Cruzado-Laureano, 404 F.3d 470, 484 (1st Cir. 2005) ("The total value of funds stolen can be aggregated to satisfy the $5,000 minimum that triggers criminal liability under § 666"); United States. v. Webb, 691 F.Supp. 1164, 1168 (N.D.Ill. 1988) ("aggregation [under section 666] is permissible where the thefts are part of a single plan"); United States v. Miller, 200 F.Supp.2d 616, 619 (S.D.W.Va.. 2002) ("Generally, the government is permitted to aggregate offenses involving discrete sums of money . . . where a series of unlawful acts, 'were part of a single continuing scheme.'") See also United States v. Billingslea, 603 F.2d 515, 520 (5th Cir.1979) ("[F]ormulation of a plan or scheme or setting up of a mechanism which, when put into operation, will result in the taking or diversions of sums of money on a recurring basis will produce but one crime [under § 665]"); United States v. Brown, 521 F.Supp. 511 (W.D. Wis. 1981) (a continuing course of conduct reflecting a single intent may be prosecuted in a single aggregate count for violations of 18 U.S.C. § 665).

The indictment thus sufficiently alleges this element.

Third Element: the Property was Owned by, or was under the Care, Custody, or Control of Allegheny County

Each of counts 80 through 84 specifically alleged that the property was "owned by or under the care, custody, and control of Allegheny County". In addition, paragraphs 27 and 30-33 refer to resources alleged to belong to Allegheny County. The indictment thus sufficiently alleges this element.

Fourth Element: Allegheny County Received Federal Benefits in Excess of $10,000

Each of counts 80 through 84 specifically alleged that Allegheny County received in excess of $10,000 for each of the periods in counts 80-84. The indictment thus sufficiently alleges this element.

III. There Has Been No Prosecutorial Misconduct

Defendant's motion to dismiss alleges that the United States Attorney's Office for the Western District of Pennsylvania, the First Assistant United States Attorney, and other members of the prosecution team pursued criminal charges against defendant because of "ill-will," "malice," "malevolence," and "vindictiveness." These allegations are false and defamatory. But for purposes of evaluating the motion to dismiss, the Court need only consider that these allegations are wholly unsupported by any proof whatsoever. In order to justify dismissal based upon allegations of government misconduct, a defendant must satisfy a rigorous burden of proof. Here, defendant has no proof.

Instead of proof, defendant offers bootstrapping of the lowest kind. Throughout the motion, defendant refers to the allegations of misconduct as if they were "facts" and a "matter of existing record" (see, e.g., defendant's brief at pp. 3, 9). However, the only "record" supporting such

WECHT00000054

allegations consists of defendant's own prior false and unsupported motions and memoranda. Defendant cannot convert a falsehood into the truth merely by saying it over and over, or louder and louder, and then claiming that since the falsehood has been oft repeated it is a matter of "existing record."

For example, defendant complains that letters sent to lawyer-witnesses requesting evidence show that prosecutors acted with "malevolence."[4] Defendant has not come forward with any proof of this accusation, and thus the government need not present evidence in rebuttal. The government proffers, however, that if such evidence were required, it would prove the following facts:

The truth is that the letters were a simple evidence gathering tool specifically required by career Department of Justice lawyers in Washington D.C. in lieu of the more invasive approach of using subpoenas.

In the course of the investigation, it became apparent that defendant had caused fake limousine receipts to be sent to his private clients in support of charges he did not incur. Instead of taking a "limousine," as he told his clients, defendant regularly required on-duty deputy coroners to provide his airport transportation. Most of these fake limousine receipts were sent to lawyers around the country who had arranged to retain defendant as an expert witness. In order to obtain the records kept by these lawyers, the government proposed to issue grand jury subpoenas.

Because the subpoenas would issue to practicing attorneys, the government, in an abundance of caution, sought approval to subpoena the attorneys from the Assistant Attorney General of the Criminal Division pursuant to section 9-13.410 of the United States Attorneys Manual. Accordingly,

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[4] See Brief in Support of Motion to Dismiss at footnote 8 ("The malevolence of this branch of the charges cannot be overstated")

on August 30, 2005, the government sent a "Request for Authorization to Issue a Subpoena to an Attorney for Information Relating to the Representation of a Client" to the Witness Records Division of the Department of Justice.

On September 2, 2005, the government sent a list of the proposed subpoena recipients to the Witness Records Division. On September 7, 2005, the Chief of the Witness Records Unit advised the government to first seek voluntary compliance from the attorney victims though a letter or phone call, before resorting to the subpoenas. On or about September 8, 2005, the government drafted a letter to the attorney victims and submitted the draft letter to the Professional Responsibility Officer for the Western District of Pennsylvania. On September 15, 2005, the letters, approved by the Professional Responsibility Officer and suggested by the Chief of the Witness Records Division of the Department of Justice, were sent to the attorney witnesses.

On or about September 30, 2005, the Chief of the Witness Records Division of the Department of Justice authorized the use of grand jury subpoenas for the attorney witnesses who did not agree to voluntarily provide evidence in response to the letters.

The letters and follow-up subpoenas yielded substantial evidence supporting the crimes with which defendant is charged. For example, government's exhibits G-775 at bates numbers 1A-171-000071-000074 and G-1121 at bates numbers 1A-186-000002, among many others, were gathered directly as a result of these letters. The evidence in those exhibits also forms the basis of specific counts of the indictment. See counts 1, 3, 33, and 34 of the indictment. The letters were nothing more nor less than a legitimate, approved, and successful evidence-gathering tool. There was nothing malevolent about them.

WECHT000000056

The government proffers that the facts set forth above related to the letters would be averred to, if necessary and relevant, by First Assistant United States Attorney Robert S. Cessar and Assistant United States Attorney Stephen S. Stallings, among others.[5] However, the government suggests that for purposes of resolving the instant motion to dismiss, such proof is not required, as the defendant has utterly failed to meet his burden of proof of showing any malevolence, ill-will, or vindictiveness on the part of the government.

Moreover, the cases defendant cites in support of dismissal on the grounds of prosecutorial misconduct do not, in fact, support defendant's motion. United States v. Hastings, 461 U.S. 499 (1983), for example, is a case involving the prosecutor's alleged improper comments on the defendant's right to silence in his closing argument at trial, and Government of the Virgin Islands v. Fahie, 419 F.3d 249 (3d Cir.2005), is a case involving the prosecutor's alleged failure to disclose Brady material. Notably, dismissal was deemed inappropriate in both case, and in Fahie, the Third Circuit noted that a court may only dismiss a criminal indictment under its supervisory powers for a discovery violation if there has been a showing of willful misconduct and prejudice. Id. at 259. More to the point, neither scenario is present here. There are no allegations of any discovery violations in the motion to dismiss, and we are obviously not faced with a situation involving improper comments at trial.

Defendant, in a footnote, also mentions United States v. Russell, 411 U.S. 423 (1973) and United States v. Twigg, 588 F.2d 373 (3d Cir. 1978). Both Russell and Twigg, however, are entrapment cases, and address situations where undercover agents engaged in conduct the defense

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[5] It is worth noting that nowhere does the defendant proffer what his source of proof would be for his numerous allegations of government misconduct. The government suggests that such a proffer will not be forthcoming because the allegations are, in fact, false.

WECHT000000057

alleged was "outrageous" in order to "entrap" the defendant in illegal conduct. These cases have no applicability to this case, because there was no undercover activity and there is no allegation of entrapment.

Finally, in another footnote, defendant cites two Seventh Circuit cases, United States v. Jarrett, 447 F.3d 520 (7th Cir. 2006) and United States v. Cyprian, 23 F.3d 1189 (7th Cir. 1994), in support of an argument that the government engaged in "vindictive and retaliatory prosecution." Jarrett, however, wholly undermines defendant's argument. In Jarrett, the court **reversed** a dismissal based upon alleged vindictive prosecution, and in so doing pointed out the extremely rigorous burden a defendant asserting such a claim must shoulder:

> When a defendant is challenging his indictment, the presumption of regularity in favor of the government's conduct, combined with the requirement of clear evidence to the contrary and the "rigorous standard" by which such evidence must be evaluated, means that a claim of vindictive prosecution is extremely difficult to prove.

Id. at 525-526 (Citations omitted). Cyprian is equally unhelpful to defendant; the Court in Cyprian summarily rejected the defendant's vindictive prosecution and outrageous government conduct arguments.

In sum, defendant's effort to obtain dismissal based upon allegations of government misconduct is factually unsupported and legally unfounded.

IV. DEFENDANT'S BRIEF IN SUPPORT OF HIS MOTION IGNORES THE APPLICABLE STANDARDS AND MISSTATES THE LAW

The indictment is clearly legally sufficient, and there has been no government misconduct as discussed above in detail. Defendant's brief in support of his motion to dismiss seeks to avoid these inconvenient truths by ignoring the legal standards for a motion to dismiss and misstating the

WECHT000000058

law of honest services fraud, mail and wire fraud, and theft concerning an organization receiving federal funding.

A. Defendant's Motion Ignores the Applicable Legal Standards

Defendant's motion to dismiss argues for dismissal in a backward fashion. Rather than applying the appropriate standard and analyzing whether the facts alleged in the indictment meet the elements of the charged offenses, defendant instead describes what he claims is the government's "charging theory," and then proceeds to attack that "charging theory" without any real consideration of what the indictment actually alleges.[6]

Moreover, the defendant takes pieces from the indictment out of context, rather than "considering it in its entirety," as required by law. For example, the defendant asserts that the indictment "opens with the charge that the mere use of the Coroner's fax machine . . . for personal business should be treated as federal felonies." See Defendant's Brief in Support of Motion to Dismiss at 5. This is not true. The indictment charges that defendant's scheme to defraud consisted of far more than the "mere use of the Coroner's fax machine." See, e.g. paragraphs 27-34 of the indictment. Similarly, defendant claims that the "operative theory" of the indictment is that defendant was required to devote a full-time effort to his duties as Coroner. See Defendant's Brief in Support of Motion to Dismiss at 6. Again, this is not true. The indictment alleges that defendant's

[6] The centerpiece of this argument is the assertion that the government set forth its "charging theory" in a document known as an "Indictment Memorandum." This is a baseless argument. The only place to look in determining whether defendant has been charged under a proper "charging theory" is the indictment. The "Indictment Memorandum" is not a legal brief. It is not the place where the government sets forth the entire breadth and scope of legal jurisprudence regarding a particular indictment. Instead, the Indictment Memorandum is merely a guide for use by the courts in certain limited proceedings, such as the initial appearance, arraignment, and, occasionally, change of plea hearings.

WECHT000000059

duties to Allegheny County stemmed from a number of statutes and rules, including statutes and rules that expressly prohibited him from using county resources for private gain. See paragraphs 6 and 9 of the indictment. The indictment also alleges that defendant owed duties to Allegheny County regarding the manner of handling deceased's bodies. See paragraphs 10 and 11 of the indictment. The allegations regarding defendant's "full-time" requirement, like the allegations regarding the prohibition on defendant's receipt of honoraria for appearances as Coroner (see paragraph 6 of the indictment) serve to further delineate the scope of the Coroner's duties, but by no means do they, standing alone, constitute the "operative theory" of the indictment.[7] Simply put, the "full-time effort" requirement shows that defendant owed a duty to provide honest services to Allegheny County in his role as Coroner, and illustrates that the job of Coroner was not simply a figurehead. Instead, it was a job, requiring its holder to abide by the rules, requirements, and duties of the job.

In sum, defendant's arguments crumble when the indictment is read in its entirety and when the facts alleged in the indictment are presumed to be true, as must be done under the standard for determining a motion to dismiss.

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[7] Defendant continues to misapprehend the importance of the prohibition in Section 1103(d) of the Pennsylvania State Ethics Code against the Coroner's acceptance of honoraria for appearances as Coroner. See Defendant's Brief in Support of Motion to Dismiss at footnote 19 (claiming, wrongly, that the government has "backtracked" regarding honoraria). This section means that every time defendant accepted honoraria (which was quite often) he was doing so in his private capacity, and not as part of his duties as Coroner. In other words, because Section 1103(d) prohibits the receipt of honoraria for appearances made in furtherance of public duties, all of the appearances for which defendant received honoraria were private appearances, and were not in furtherance of his public duties. The government has never asserted a different position than this regarding the prohibition on receipt of honoraria.

WECHT000000060

B. Defendant Misstates the Law of Honest Services Fraud

Defendant's motion to dismiss sets forth an incomplete and inaccurate picture of the law of honest services fraud. Defendant, citing Panarella, argues that Third Circuit law precludes any honest services fraud case based upon facts showing an elected official has used his public office for private gain in violation of fiduciary, ethical, and legal obligations. Defendant obviously misreads Paneralla in particular and the current state of the law in general.

Honest services fraud can consist of the misuse of public office for private gain in breach of fiduciary duties, in this as in any Circuit. Judicial opinions from as long ago as 1942 to as recently as this month, and from courts ranging from the Supreme Court to the District Courts, as well as our own Third Circuit, make this clear. But even if Paneralla were read in the inaccurate, overly restrictive way defendant asserts, the indictment would still sufficiently plead honest services fraud. In other words, even if Panarella required an allegation of concealment in violation state law as a predicate to an honest services fraud case, the indictment against defendant would meet that standard.

But in order to fully discuss the law of honest services fraud as it stands today in the Third Circuit, it is useful to first review the historical development of honest services fraud.

1. The Historical Underpinnings of Honest Services Fraud

Congress created what is now 18 U.S.C. § 1341 in 1877, with legislation that was intentionally expansive. After several weaker efforts to criminalize certain types of mailings (e.g., obscene material, lotteries), Congress provided the Postal Service with a great deal of latitude in its efforts to prevent all forms of fraud that utilized the mail. Passed as part of a recodification of the postal laws, the original version of § 1341 aimed to resolve growing concerns about mail fraud by

WECHT000000061

making it illegal to "devise any scheme or artifice to defraud . . . by means of the post-office establishment of the United States." Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323 (current version at 18 U.S.C. § 1341.

In the early decades of the twentieth century, judicial interpretations of several federal fraud statutes endorsed the "intangible rights" doctrine, holding that an act of fraud did not require a material loss. See, e.g., Hammerschmidt v. United States, 265 U.S. 182, 188 (1924) (explaining that in the context of a law against defrauding the United States, "[t]o conspire to defraud" does not necessitate property or pecuniary loss "but only that [the government's] legitimate official action and purpose shall be defeated by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention"); United States v. Barnow, 239 U.S. 74, 79 (1915) (allowing that the crime of fraudulently impersonating a federal officer or employee to obtain something of value need not result in financial loss to the victim to maintain a criminal conviction); United States v. Plyler, 222 U.S. 15, 17 (1911) (holding that the government need not show financial or property loss to get a conviction against a defendant for defrauding the government by forging "vouchers" required for the civil service exam).

The theory maintained that even when victims did not experience a pecuniary or property shortfall, those who defrauded them were unlawfully depriving the victims of a right. However, the initial applications of this theory to the mail fraud statute were arguably dicta; in most cases the defendants still realized some form of financial gain at the expense of the victims. Such was the case in Shushan v. United States, 117 F.2d 110 (5th Cir. 1941), overruled on other grounds by United States v. Cruz, 478 F.2d 408 (5th Cir. 1973), which jurists and scholars often cite as the foundation

WECHT000000062

for mail fraud's twin theories of intangible rights and honest services.[8] In Shushan, members of the Orleans Parish Levee Board conspired with bond businessmen to gain passage of a bond-refunding plan. The plan charged the Parish exorbitant fees pocketed by the conspirators. Id. at 114-115. Yet despite this pecuniary loss to the local government, the Fifth Circuit explicated a theory that seemed to abandon such a requirement:

> A scheme to get a public contract on more favorable terms than would likely be got otherwise by bribing a public official would not only be a plan to commit the crime of bribery, but would also be a scheme to defraud the public . . . . No trustee has more sacred duties than a public official and any scheme to obtain an advantage by corrupting such an one must in the federal law be considered a scheme to defraud.

Id. at 115.

Just one year later, the Fifth Circuit recognized that the mail fraud statute is an appropriate statute to charge public officials who use government resources for their private benefit. In Glover v. United States, 125 F.2d 291 (5th Cir. 1942), the court upheld the mail fraud conviction of a state highway supervisor accused of using state resources for his private benefit. The supervisor in Glover was responsible for managing the work of chain gangs along Georgia highways. Id. at 292. He used that position to direct that the chain gangs improve certain properties he owned along the highways. Id. The Fifth Circuit noted that construction of the improvements was accomplished by using state resources, and that this enhanced the value of defendant's properties. Id. at 292-93. The court held that this conduct constituted a scheme to defraud under the mail fraud statute. Id. at 293.

Thereafter, a long line of court of appeals decisions, including Third Circuit decisions, interpreted the mail fraud statute as proscribing schemes by government officials to defraud citizens

[8] See generally Betraying Honest Services: Theories of Trust and Betrayal Applied to the Mail Fraud Statute and § 1346, 61 N.Y.U. Ann. Surv. Am. L. 779, 822 (2006)

WECHT000000063

of their intangible rights to honest and impartial government.[9] These decisions, including the Third Circuit's contribution in United States v. Clapps, 732 F.2d 1148, 1152 (3d Cir. 1984), held that because a public official owes a duty of honesty and integrity to his constituency, any misuse of his office for personal gain is a fraud. See McNally v. United States, 483 U.S. 350 (1987); Asher, 854 F.2d at1489. See generally Comment, The Intangible-Rights Doctrine and Political-Corruption Prosecutions Under the Federal Mail Fraud Statute, 47 U.Chic.L.Rev. 562, 563 (1980).

Indeed, public corruption is "the paradigm case of honest services fraud." United States v. de Vegter, 198 F.3d 1324, 1327-28 (11 Cir. 1999); see also, e.g., United States v. Vinyard, 266 F.3d 320, 326 (4th Cir. 2001); United States v. Martin, 228 F.3d 1, 17 (1st Cir. 2000); United States v. Jain, 93 F.3d 436, 442 (8th Cir. 1996); John C. Coffee, Modern Mail Fraud: The Restoration of the Public/Private Distinction, 35 Am. Crim. L. Rev. 427 (1998). The mail fraud statute became an important check on public corruption, including corruption that arguably did not harm the public, but only benefitted the official. For example, in United States v. Isaacs, 493 F.2d 1124 (7th Cir. 1974), the defendant Isaacs and his co-defendant, Governor Otto Kerner of Illinois, engaged in a scheme to favor a political supporter's horse racing enterprises in exchange for stock in the businesses. Neither the Governor nor Isaacs, the Director of the Department of Revenue, engaged

[9]See, e.g., United States v. Clapps, 732 F.2d 1148, 1152 (3d Cir.), cert. denied, 469 U.S. 1085, 105 S.Ct. 589, 83 L.Ed.2d 699 (1984); United States v. Mandel, 591 F.2d 1347, 1359-60 (4th Cir.) aff'd in part on reh'g, 602 F.2d 653 (4th Cir.1979) (en banc) (per curiam), cert. denied, 445 U.S. 961, 100 S.Ct. 1647, 64 L.Ed.2d 236 (1980); United States v. Rabbitt, 583 F.2d 1014 (8th Cir.1978), cert. denied, 439 U.S. 1116, 99 S.Ct. 1022, 59 L.Ed.2d 75 (1979); United States v. Keane, 522 F.2d 534 (7th Cir.1975), cert. denied, 424 U.S. 976, 96 S.Ct. 1481, 47 L.Ed.2d 746 (1979); United States v. Isaacs, 493 F.2d 1124 (7th Cir.), cert. denied, 417 U.S. 976, 94 S.Ct. 3183, 41 L.Ed.2d 1146 (1974); United States v. States, 488 F.2d 761 (8th Cir.1973), cert. denied, 417 U.S. 909, 94 S.Ct. 2605, 41 L.Ed.2d 212 (1974). See, generally, United States v. Asher, 854 F.2d 1483, 1489 (3d Cir. 1988) (discussing history of honest services fraud through McNally).

WECHT000000064

in an actual misrepresentation, Id. at 1131-1140, and the state of Illinois experienced no loss during the period in question. In fact, state revenues from horse racing increased. Id at 1139. Conceding that a fiduciary duty existed, the defendants asserted that with no tangible loss to the state, their breach of duty amounted to constructive fraud, which past cases had excluded from the mail fraud statute Id. at 1149. The Seventh Circuit, however, cited Shushan for the notion that a public official's corrupt activities could always serve as a scheme to defraud. Reasserting the notion that the government need not experience a pecuniary shortfall, but must only suffer the intangible loss of having its "official action and purpose" defeated, the court found that the state's loss of its governor's loyal and honest services filled the "intangible loss" bill. Id. at 1150

2. McNally and Section 1346

The Supreme Court temporarily curtailed the doctrine of honest services fraud in 1987. In McNally, the Court rejected the intangible rights theory of liability, holding that the mail fraud statute required proof that a scheme involved a deprivation of money or tangible property. McNally, 483 U.S. at 358, 360-61. The Court indicated that Congress would have to speak more clearly if it intended the statute to extend to deprivations of intangible rights. Id.

The impact of McNally was short-lived. Congress quickly accepted the Court's invitation and enacted a statute that explicitly extended the scope of the mail fraud statute to encompass schemes to deprive others of "the intangible right of honest services." 18 U.S.C. § 1346; see Cleveland v. United States, 531 U.S. 12, 19-20 (2000)(describing § 1346 as a Congressional response to McNally). Section 1346 "was a clear statement by Congress that it wished to criminalize honest services fraud." United States v. Murphy, 323 F.3d 102, 116 (3d Cir.2002), and section 1346 restored the law of honest services fraud to its pre-McNally status. United States v. Bloom, 149 F.3d

WECHT000000065

649, 656 (7 Cir. 1998). See generally Thomas M. DiBiagio, Politics and the Criminal Process: Federal Public Corruption Prosecutions of Popular Public Officials Under the Honest Services Component of the Mail and Wire Fraud Statutes, 105 Dick. L. Rev. 57 (2000).

Section 1346's resurrection of honest services fraud jurisprudence gave new power to the Supreme Court's distillation in McNally of the essence of pre-McNally honest services fraud:

> a public official owes a fiduciary duty to the public, and misuse of his office for private gain is a fraud.

McNally, 483 U.S. at 355.

3. Third Circuit Law Post-McNally

Since McNally, the Third Circuit has addressed various aspects of honest services fraud in a quartet of cases: Antico, Paneralla, Murphy, and Gordon.

First, in Antico, the defendant Antico was employed by the Philadelphia Department of Licenses and Inspections ("L & I"). The government alleged that in order to avoid paying child support payments to Elizabeth Riccardi, Antico gave her a position as an "expediter." He then referred Riccardi clients, aided her in filling out L & I applications or completed them himself, allowed her to use his office, and even had city employees pick up and deliver her paperwork and watch her children. He never publicly disclosed any conflict of interest or disqualified himself from taking any official action in any L & I matter involving her.

The Third Circuit affirmed Antico's conviction for honest services fraud. In doing so, the court accepted "[t]he government's prosecutorial theory [that] ... by failing to disclose his personal interest in a matter over which he had discretionary decision-making authority," Antico committed honest services fraud by "depriv[ing] the public of its right to disinterested decision-making and of

WECHT00000066

its right to full disclosure of his personal motivation." Antico, 275 F.3d at 262. Antico had a duty to disclose information pertaining to a conflict of interest under state and local law, and his failure to do so constituted honest services fraud. Id. The court explained the violation of his duty as follows:

> Duties to disclose material information affecting an official's impartial decision-making and to recuse himself exist within th[e] fiduciary relationship [between a public servant charged with disinterested decision-making and the public he serves] regardless of a state or local law codifying a conflict of interest .... In the context of honest services fraud, where undisclosed, biased decision making for personal gain, whether or not tangible loss to the public is shown, constitutes a deprivation of honest services, an active fraud or deceit is not necessary.... [T]he prosecution need prove only a recognizable scheme formed with intent to defraud regardless of how that intent manifests itself in execution .... The legal meaning of fraud is not limited to deceit or misrepresentation; it includes overreaching, undue influence, and other forms of misconduct. Nor is a showing of public harm required.

Id. at 264 (internal citations and quotation marks omitted.

Accordingly, the court rejected Antico's argument that "'absent deceit, concealment, demonstrable public harm or other active fraud,' his conviction ... cannot stand." Id. at 264. The court concluded that "[A]n official's intentional violation of the duty to disclose provides the requisite 'deceit.'" Id. (quoting United States v. Sawyer, 85 F.3d 713, 732 (1st Cir.1996) (brackets in original). In reaching this conclusion, the court cited United States v. Woodward, 149 F.3d 46, 63 (1st Cir.1998) (omission in original), wherein the court stated that "[the defendant's] intent is ... demonstrated by his failure to disclose his conflict of interest although he was required to do so."

In Panarella, the defendant Panarella was convicted for being an accessory to honest services fraud based upon payments he made to a state senator, Loeper, who failed to disclose those payments while taking actions in the state senate that directly benefitted Panarella's delinquent tax collection business. The Third Circuit had to decide "whether allegations that Loeper unlawfully concealed

WECHT000000067

[that] income ... while taking discretionary action that Loeper knew would directly benefit Panarella amount[ed] to a scheme to deprive the public of his honest services, or whether an additional allegation that Loeper's discretionary action was influenced by Panarella's payments [was] necessary." Paneralla, 277 F .3d at 691. The court concluded that no additional allegation was needed, holding that:

> where a public official takes discretionary action that the official knows will directly benefit a financial interest that the official has concealed in violation of a state criminal law, that official has deprived the public of his honest services under 18 U.S.C. § 1346.

Id.

In reaching that holding, the court rejected the defendant Panarella's reliance on United States v. Bloom, 149 F.3d. 649 (7th Cir.1998). There, the Seventh Circuit had reversed the conviction of a Chicago alderman who had given advice as a private attorney. The court in Bloom held that honest services fraud **required** misuse of one's official position "for personal gain." Panarella, 277 F.3d at 692. The Third Circuit distinguished Bloom, and rejected its reasoning on this point. Instead, Paneralla held that "state law offers a better limiting principle for purposes of determining when an official's failure to disclose a conflict of interest amounts to honest services fraud." Id.

Accordingly, the Third Circuit has simply refused to **limit** honest services fraud to situations in which a public official uses his or her office for personal gain. Id. at 694 ("Rather than limiting honest services fraud to misuse of office for personal gain, we hold that a public official who conceals a financial interest in violation of state criminal law while taking discretionary action that the official knows will directly benefit that interest commits honest services fraud.") (citing Woodward, 149 F.3d at 62). Panarella thus establishes that an allegation of personal gain is not

necessary to establish honest services fraud. Paneralla does not, as defendant repeatedly asserts, say that misuse of an official position for personal gain is a **prohibited** theory of prosecution.

The Third Circuit again addressed the scope of honest services fraud in Murphy, There, the defendant was not a public official, but the former chairman of a county political party who was convicted of honest services fraud. The predicate offense for that conviction was a violation of a state bribery statute, N.J.S.A. 2C:27-2(a). The Third Circuit rejected the government's theory that Murphy had become so involved in county government "that he could be considered the equivalent of a publicly elected official." Murphy, 323 F.3d at 104. The court also rejected the contention that Murphy had a fiduciary relationship with the public.

In analyzing the law of honest service fraud, the Murphy court reiterated its statement in Panarella that the fraud or deceit endemic in honest services fraud may arise from "the deliberate concealment of material information in a setting of fiduciary obligation." Id. (quoting Panarella, 277 F.3d at 695 and United States v. Holzer, 816 F.2d 304, 307 (7th Cir.1987)). The Murphy court also endorsed the reasoning of the Court of Appeals for the Fifth Circuit in United States v. Brumley, 116 F.3d 728 (5th Cir.1997). In Brumley, the court interpreted § 1346 as requiring a state law limiting principle for honest services fraud. Murphy, 323 F.3d at 116 & n. 5. The court in Brumley stated that an official who does all that is required under state law but who is alleged to have not discharged his or her duties "honestly" cannot be convicted of honest services fraud. Brumley, 116 F.3d at 734. Rather, § 1346 "contemplates that there must first be a breach of a state-owed duty." Id.

Finally, on June 8, 2006, the Third Circuit issued an unpublished opinion in Gordon, 2006 WL 1558952 (3d Cir. 2006) (non-precedential opinion), surveying the jurisprudence on honest services fraud and succinctly summarizing the Third Circuit's view as follows:

> Thus, although a violation of a state criminal law may be sufficient to lay the foundation for honest services fraud, it is clear from our analysis of the requisite fiduciary duty that **honest services fraud does not require a violation of criminal law**, but rather a violation of a state-created **fiduciary duty**. At the very least, the government must allege a violation of some law--**or a recognized fiduciary duty**--to adequately charge honest services fraud.

(Emphasis supplied). Gordon shows that defendant's interpretation of the law of honest services fraud is simply wrong. More importantly, Gordon illustrates that the government's theory of the case is not only in accord with over sixty years of national jurisprudence on honest services fraud, but is in complete accord with the recent quartet of Third Circuit cases on the issue.

4. The Gordon Case Explored

The Gordon case and its underlying District Court proceeding are worth exploring in greater detail, since the indictment in that case alleged schemes that were similar in many material ways to the scheme at issue in the instant case. The District Court's underlying opinion in Gordon is published at United States v. Gordon, 380 F.Supp.2d 356, 361-63 (D.Del. 2005). The indictment in Gordon charged Thomas P. Gordon, the County Executive for New Castle County, Delaware and Sherry L. Freebery, that county's County Chief Administrative Officer ("CAO"), with honest services fraud and other charges. The indictment alleged five different honest services fraud schemes, including three which the court referred to as the "Election Scheme," the "Fieldstone Project," and the "Personal Benefits Scheme." The indictment, just like the indictment in the instant case, alleged that defendants' schemes violated defendant's fiduciary duties and defendant's ethical duties to avoid using County resources for private gain. Gordon, 2006 WL 1558952, *8-9. The defendant in Gordon moved to dismiss all schemes on the grounds that they did not properly allege honest services fraud under Third Circuit law.

The District Court in Gordon denied defendant's motion to dismiss as to the "Election Scheme," and the "Personal Benefits" scheme. It granted the motion to dismiss as to the "Fieldstone Project," but it was that dismissal that the Third Circuit reversed in Gordon. Thus, each of the following three honest services fraud schemes has now been sustained in the course of the Gordon proceedings as a valid honest services fraud scheme under Third Circuit law:

The Gordon "Election Scheme"

The indictment in Gordon charged that from 1994 through 2002, Gordon and Freebery caused various County employees to engage in partisan political activities during work hours, in violation of Delaware state law. Gordon, 380 F. Supp. 2d at 361-62. The government's theory of prosecution was that this activity caused resources of the County to be improperly diverted for the benefit of particular political candidates. Id. at 362. The court denied defendant's motion to dismiss this scheme, holding that such allegations: "clearly could constitute 'honest services' fraud." Id.

The government's theory of prosecution for the Gordon "Election Scheme" is similar to the theory in this case. Here, defendant Wecht is alleged to have caused various County employees to engage in partisan political activity during work hours, thereby causing County resources to be improperly diverted for the benefit of particular candidates. See paragraphs 30(d), (e), (f), and (g) of the indictment. Moreover, defendant Wecht is alleged to have diverted County resources for many additional improper purposes in violation of state law, including his own financial gain and his own personal benefit. See paragraphs 27-34 of the indictment. The scheme alleged in the instant case is very similar to, though more serious than, the one upheld by the District Court in Gordon, and like the "Election Scheme" in Gordon, the scheme in this indictment sufficiently alleges honest services fraud.

The Gordon "Personal Benefits Scheme"

The indictment in Gordon charged that defendants used County resources for their personal benefit in a variety of ways, including:

- causing a County employee, during working hours, to spend about 10 days painting defendant Freebery's house and doing yard work at her premises;
- causing a County employee, during working hours, to decorate a Christmas Tree;
- causing County employees, from time to time, to perform personal errands for defendant Freebery.

The court denied defendant's motion to dismiss these charges. Even though the court noted that the charges may appear "relatively trivial," it found that they "suffice to charge 'honest services' fraud." Id.

Again, the indictment in this case charges defendant Wecht with similar, though more serious, activity. In paragraphs 30(a), (b), and (c) of the indictment, defendant Wecht is charged with using County employees and resources for his personal benefit in a number of ways described in detail in those paragraphs. These allegations are similar to, though more extensive and serious than, those in Gordon, and like the "Personal Services Scheme" in Gordon, the scheme in this indictment sufficiently alleges honest services fraud.

The "Fieldstone Project"

The indictment in Gordon charged defendants with honest service fraud based upon loans to defendant Freebery by an entity seeking the assistance of the County for private business purposes, and later activity by defendants that assisted those business interests. The District Court dismissed

the counts of the indictment arising from the "Fieldstone Project" scheme on the grounds that the indictment did not allege that the loans were intended to influence defendants.

The Third Circuit in Gordon reversed the dismissal, holding that:

> The indictment clearly alleges the required violation of a fiduciary duty and deceit by averring Freebery's knowing and willful participation in the Fieldstone Scheme in the context of the alleged honest services fraud.

Gordon, 2006 WL 1558952, *10.

Just as in Gordon, here the indictment clearly informs defendant Wecht of the conduct upon which the criminal charges are based, and the fiduciary and other duties that conduct violated. This indictment, like the indictment in Gordon, adequately alleges that defendant breached fiduciary, ethical, and legal duties in the course of executing a classic honest services fraud scheme.

4. The Indictment Alleges a Paneralla-Like Concealment in Violation of State Law

Concealment of a financial interest in violation of state law is sufficient to allege honest services fraud, but not required. As Gordon, Glover, and other cases make clear, honest services fraud may be established by showing defendant used county resources for private benefit in violation of his fiduciary duty. But even if concealment in violation of state law were required by Paneralla as defendant asserts, the indictment in this case meets that standard.

The indictment alleges that defendant used county resources to further his private business, and that he failed to disclose the benefits he obtained from the improper use of county resources as required by state law and ethics rules. In fact, the indictment alleges that defendant failed to file his

financial disclosure forms at all for several years during the scheme, and that when he did finally file, he failed to disclose his use of county resources for private gain.[10]

Defendant's exercise of his discretion as Coroner directly benefitted this undisclosed source of income, despite defendant's protestations to the contrary in his brief. For example, defendant used the county vehicle and authorized the use of the county personnel to assist him with private business travel. He personally directed county personnel to assist his private business while at the Allegheny County Coroner's Office and while on county time.[11] And he used the authority of his office to make false public statements to conceal the fraud. His exercise of the power and authority as Coroner to unlawfully obtain private benefits is at the core of the allegations in the indictment.

This case thus falls squarely within the type of honest services fraud contemplated by Antico and Paneralla (even under defendant's inaccurate and overly restrictive view of these holdings): a

[10] Moreover, the indictment alleges defendant earned income by submitting expense reimbursement requests to private clients for expenses he did not incur, most of which were actually incurred by Allegheny County. For example, on-duty deputy coroners provided transportation for defendant to and from Pittsburgh International Airport so defendant could travel on his private business trips. Defendant then billed his private clients for a "limousine" trip and asked them to send a separate reimbursement check for the expenses, including the fraudulent limousine expense, which he then cashed. The expense reimbursement checks were fraudulently obtained, and were not deposited in defendant's corporate accounts. Pennsylvania law, at 65 Pa.C.S.A. § 1105(b)(5), required defendant to report these sources of income on his financial disclosure forms. Defendant, however, not only failed to include these sources of income on the required forms, he failed to file the required forms at all for the years 2001, 2002, and 2003. According to the indictment, on or about February 15, 2005, just days after local newspapers reported that authorities had "launched a criminal investigation of county Coroner Dr. Cyril H. Wecht for possible violations of state and federal law," defendant filed financial disclosure forms for years 2001, 2002, and 2003 for the first time. Yet even on the financial disclosure forms filed belatedly in 2005, defendant failed to disclose the benefits he received by misusing county resources.

[11] Sections 1346 (as well as section 666) apply to theft of the value of a public employee's time. See, e.g., Sanderson, 966 F.2d at 188-89; United States v. Valentine, 63 F.3d 459 (6th Cir. 1995).

WECHT000000074

failure to disclose, in violation of Pennsylvania state disclosure laws, a financial interest that was benefitted by the exercise of his office's discretionary powers.

5. Defendant's "Void for Vagueness" Argument Fails as a Matter of Law

In addition to misconstruing the law relating to honest services fraud, defendant makes an ill-founded argument that section 1346 is "void for vagueness" as applied in this case. Defendant relies primarily upon the overturned case of United States v. Handakas, 286 F.3d 92 (2d Cir. 2002).

Handakas, however, does not assist defendant. The Second Circuit expressly overturned Handakas in its en banc decision in United States v. Rybicki, 354 F.3d 124, 142-143 (2d Cir. 2003), holding:

> Because we find that the phrase "scheme or artifice to deprive another of the intangible right of honest services" has the meaning it had in the pre-McNally case law, we think that the potential reach of section 1346 is not "virtually limitless." We conclude that the statute, as applied to the defendants' intentionally fraudulent behavior, "define[s] the criminal offense with sufficient definiteness that ordinary people [such as the defendants] can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." It will also "channel the discretion of the prosecution," "it will provide[ ] explicit standards for those who apply it," The statute as applied to the facts of this case is therefore not unconstitutionally vague.

(Citations omitted). Defendant argues that Handakas should still be viewed as persuasive. This argument is hard to understand in light of the Rybicki court's express rejection of the Handakas court's analysis of Section 1346, and its express rejection of other dicta in the Handakas opinion.

Moreover, even before it was overturned, Handakas was the only case in which a court of appeals had sustained a vagueness challenge to Section 1346, and the court did so in a context that bears no similarity to the facts of this case. The court in Handakas held that Section 1346 was unconstitutionally vague as applied to a private defendant's breach of his contractual obligations to

a local government corporation. This case, in contrast, involves a public official's breach of his fiduciary, ethical, and statutory duties and his misuse of his public office for private gain.

Outside of the narrow circumstances involved in Handakas, the courts of appeal (including the Second Circuit) have, nearly uniformly, rejected claims that Section 1346 is void for vagueness.[12] See United States v. Szur, 289 F.3d 200, 209 n.5 (2d Cir. 2002); United States v. Frega, 179 F.3d 793, 803 (9th Cir. 1999), cert. denied, 528 U.S. 1191 (2000); United States v. Gray, 96 F.3d 769, 776-777 (5th Cir. 1996), cert. denied, 520 U.S. 1129 (1997); United States v. Paradies, 98 F.3d 1266, 1282-1283 (11th Cir. 1996), cert. denied, 522 U.S. 1014 (1997); Castro, 89 F.3d at 1455; United States v. Waymer, 55 F.3d 564, 568-569 (11th Cir. 1995), cert. denied, 517 U.S. 1119 (1996).

C. Defendant Misstates the Law Regarding Mailings and Wires in Furtherance of Fraud Schemes

Defendant argues that the mailings and wires identified in specific counts were not "sufficiently closely related" to the scheme to "bring his conduct within the statute," citing United States v. Tarnapol, 561 F.2d 466 (3d Cir. 1977). As a starting point, Tarnapol does not set forth the current standard for evaluating whether mailings and wires were in furtherance of a fraud scheme. The Supreme Court in Schmuck v. United States, 489 U.S. 705, 710-711 (1989), set forth the requirements of mailings in furtherance of a mail fraud scheme.

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[12]United States v. Giffen, 326 F. Supp. 2d 497 (S.D.N.Y. 2004), cited by defendant, is inapposite. Giffen dealt with efforts to charge violations of section 1346 based upon allegations that defendant deprived the citizens of **Kazakhstan** of the honest services of their government officials Id. at 504. The court noted that in order to determine whether 1346 had been violated under these circumstances, "the inquiry would require this Court to determine what constitutes honest services in the Kazakh landscape, untethered to any Kazakh statute analogous to Section 1346." Id. at 507. Needless to say, the indictment in the instant case requires no foray into the Kazakh landscape.

WECHT000000076

In Schmuck, the court held that an automobile wholesaler who rolled back odometers on used cars prior to their sale to unwitting retail dealers was properly convicted of mail fraud based upon the retailers' subsequent mailings of documents transferring title to their retail customers. The Schmuck court found that the mailings in question satisfied the mailing element of the mail fraud statute because they were "incident to an essential part of the scheme" and occurred before the scheme reached fruition. The court reached this result even though the mailings involved were not made by the defendant, did not deceive his victims, and had not occurred until after the defendant had realized the proceeds of his fraud. Cf. United States v. Cross, 128 F.3d 145 (3rd Cir. 1997) (mailing made after object of scheme was accomplished insufficient to establish mail fraud).

Each of the mailings and wires alleged in the indictment was "incident to an essential part of the scheme." In counts 1-32, each fax and mailing was sent to facilitate payment to the private business for work defendant accomplished with the assistance of county resources. In counts 33-79, each fax or mailing included a fraudulent reimbursement request. Indeed, it is hard to imagine individual mailings and wires more directly related to the schemes than the mailings and wires in this indictment. Certainly they are incident to an essential part of the schemes.

D. Defendant Misstates the Law of Section 666

Defendant's arguments regarding Title 18, United States Code, Section 666(a)(1)(A) rely heavily upon dicta in the overturned case of United States v. Zwick, 199 F.3d 672 (3d Cir. 1999), and defendant even misreads that dicta. Defendant cites Zwick for the proposition that the Third Circuit has construed section 666(a)(1)(A) "to cover only theft of tangible property 'in a classic sense.'" See Brief in Support of Motion to Dismiss at 42. Zwick, even if it were still good law, however, stands for nothing of the kind.

First, Zwick does not address Section 666(a)(1)(A). Instead, it addresses the bribery prong of section 666 -- 666(a)(1)(B). Second, Zwick does not anywhere analyze the meaning of "property" under section 666(a)(1)(A) or (B), much less state that "property" means only "tangible property." Indeed, the word "tangible" appears nowhere in the Zwick opinion. Third, defendant cites to the discussion in Zwick regarding section 666 covering theft and bribery "in a classic sense." That discussion, though, is part of a discussion of what a prior case, United States v. Cicco, 938 F.2d 441, 444 (3d Cir. 1991), held. Notably, Cicco also dealt only with subsection (B), not (A), and Cicco did not address the definition of "property" under either subsection (A) or (B). In sum, Zwick simply does not say what defendant inaccurately represents that it says, even in dicta. Moreover, Zwick's actual holding was expressly overruled in Sabri.

In fact, Defendant's entire legal discussion regarding Title 18, United States Code, Section 666(a)(1)(A) can be described as misleading, at best:

- Defendant asserts that Zwick addressed the definition of "property." But it did not.
- Defendant contends that United States Supreme Court did not overrule the reasoning of Zwick with Sabri. But it did.
- Defendant argues that employee services were not included within the meaning of "property" in section 666. But they are. See Sanderson 966 F.2d at 188-89 (employee time and services); Genova, 333 F.3d at 755 (unused "comp time," of government workers); Delano, 55 F.3d at 729 (government employee's labor).
- And defendant claims that the law does not permit aggregation to reach the $5,000 threshold. But it does. See, Cruzado-Laureano, 404 F.3d at 484 ("The total value of funds stolen can be aggregated to satisfy the $5,000 minimum that triggers criminal liability under § 666");

WECHT000000078

Webb, 691 F.Supp. at 1168 ("aggregation [under section 666] is permissible where the thefts are part of a single plan"); Miller, 200 F.Supp.2d at 619 ("Generally, the government is permitted to aggregate offenses involving discrete sums of money . . . where a series of unlawful acts, 'were part of a single continuing scheme.'") See also Billingslea, 603 F.2d at 520 ("[F]ormulation of a plan or scheme or setting up of a mechanism which, when put into operation, will result in the taking or diversions of sums of money on a recurring basis will produce but one crime [under § 665]"); Brown, 521 F.Supp. 511 (a continuing course of conduct reflecting a single intent may be prosecuted in a single aggregate count for violations of 18 U.S.C. § 665).

In sum, the law fully supports the section 666 counts as alleged in the indictment, despite defendant's wishes to the contrary.

CONCLUSION

The motion to dismiss should be denied in its entirety for the reasons and on the authorities set forth above.

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WECHT000000079

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Government's Brief in Opposition to Defendant's Motion to Dismiss at Docket No. 180 was served by ECF filing to and upon the following:

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

UNITED STATES OF AMERICA	)	
	)	
v.	)	**Criminal No. 06-0026**
	)	**Electronically Filed**
CYRIL H. WECHT	)	

Memorandum Opinion and Order of Court Denying Motion to Dismiss (Doc. No. 180)

I. Introduction

On January 20, 2006, the government brought an 84 count indictment alleging that defendant, Dr. Cyril Wecht, committed the crimes of theft of honest services - wire fraud and mail fraud, mail fraud, wire fraud, and theft concerning an organization receiving federal funds, in violation of 18 U.S.C. §§ 1341 1342, 1343 and 1346, 18 U.S.C. §§ 1341 and 1342, 18 U.S.C. §§ 1342 and 1343, and 18 U.S.C. § 666, respectively, when he unlawfully used his public office as the Coroner of Allegheny County, Pennsylvania, for his private financial gain (doc. no. 1). More specifically, the indictment alleges, among other things, that defendant falsely billed his clients (through the mail) for services such as limousine rides to the airport and other private engagements, while using County Coroner's office vehicles and employees to drive him to the airport and other private engagements; that defendant created false travel agency bills and false limousine reports and transmitted them via facsimile from the coroner's office to private clients in other states; and, that defendant otherwise used the Allegheny County Coroner's Office employees to perform other personal work, including secretarial work, for his own private financial gain. Defendant categorically denies these allegations. The trial of this case will commence on October 16, 2006, as agreed to by the parties in the March 1, 2006 Pretrial Order (doc. no. 42).

Currently pending before this Court is defendant's Motion to Dismiss the Indictment (doc. no. 180). After careful consideration of defendant's motion and supporting brief, the government's response thereto (doc. no. 249), and defendant's reply brief (doc. no. 252) and for the reasons that follow, said motion will be DENIED.

II. Standard of Review

Rule 7(c)(1) of the Federal Rules of Criminal Procedure provides that an indictment must contain the provision of law that the defendant is alleged to have violated and "a plain, concise and definite written statement of the essential facts constituting the offense charged." Fed.R.Crim.P. 7©)(1). The indictment must include all of the elements of the crime alleged, *United States v. Spinner*, 180 F.3d 514 (3d Cir. 1999), as well as specific facts that satisfy all those elements; a recitation "in general terms the essential elements of the offense" is not sufficient. *United States v. Panarella*, 277 F.3d 678, 684-85 (3d Cir. 2002). A district court may review the facts in the indictment to see whether, as a matter of law, they reflect a proper interpretation of criminal activity under the relevant criminal statute. 277 F.3d at 684-85. In considering a motion to dismiss an indictment, the district court must accept as true all factual allegations set forth in the indictment. *United States v. Besmajian*, 910 F.2d 1153, 1154 (3d Cir. 1990). The dismissal of an indictment is authorized only if its allegations are not sufficient to charge an offense, but such dismissals may not be based upon arguments related to the insufficiency of the evidence to prove the charges in the indictment. *United States v. DeLaurentis*, 230 F.3d 659, 660-61 (3d Cir. 2000). To the extent defendant alleges government misconduct in the form of a vindictive prosecution, the defendant must show that there has been misconduct of a nature sufficient to invoke the Court's supervisory powers, and that the

defendant was prejudiced by such misconduct. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1988); *United States v. Williams*, 504 U.S. 36 (1992). The defendant has the burden of proof on a claim of vindictive prosecution, *United States v. Schoolcraft*, 879 F.2d 64, 68 (3d Cir. 1989), and defendant's burden is a rigorous one. *United States v. Jarrett*, 447 F.3d 520 (7th Cir. 2006).

III. The Indictment

A. General Allegations and Background

Although there are 70 paragraphs (having numerous subparagraphs) and 84 Counts in the Indictment, it actually states three fairly simple and straightforward sets of charges, and is not nearly the complicated and vague charging document the defendant makes out. The three groups of charges in the indictment are: A. "Honest Services" mail and wire fraud, also known as "intangible rights" fraud, wherein the victims are Allegheny County and its citizens, pursuant to 18 U.S.C. §§ 1341, 1343, 1346 and 2; B. Simple mail and wire fraud, wherein the victims are various private clients and outlying counties which used Dr. Wecht's services, pursuant to 18 U.S.C. §§1341, 1343 and 2; and C. Theft concerning a public entity receiving federal funds, pursuant to 18 U.S.C. §§ 666(a)(1)(A) and 2. Accepting as true all facts properly pled in the Indictment for purposes of deciding the legal sufficiency of the Indictment and the merits of this motion to dismiss, the Indictment avers the following.

From 1996 through 2000, Allegheny County was organized and subject to the provisions of the Second Class County Code, 16 P.S. §§ 3101-5106-A, and the Coroner of Allegheny County was an elected "Row Office" official who managed the personnel and resources of the Allegheny County Coroner's Office ("ACCO"). Indictment, ¶ 2. In May 1998, the voters of

WECHT000000083

Allegheny County approved a Home Rule referendum, and effective January 1, 2000, Allegheny County became a Home Rule County. Indictment, ¶ 3. Pursuant to its Home Rule Charter, Allegheny County was organized and governed by the provisions of the Administrative Code that was promulgated pursuant to the Charter, and the Coroner was subject to the Administrative Code. Indictment, ¶ 4.

The Indictment specifically sets forth several state and local laws as the sources of the "Fiduciary and Ethical Duties of the Coroner" of Allegheny County. Indictment, ¶¶ 5-11. From 1996 through 2000, the Second Class County Code required the Coroner to comply with the "Public Official and Employee Ethics Act" of 1998 ("Ethics Act"), Oct. 15, P.L. 729, No. 93, §§1101-1113, effective December 15, 1998, 65 Pa.C.S. §§ 1101.1 - 1113, including its reporting and ethics requirements; additionally, Allegheny County's employment policy as of 2000 required all of its employees to abide by the Ethics Act. Indictment, ¶ 5. Paragraphs 1102 and 1103(a) of the Ethics Act,[1] 65 Pa.C.S. §§ 1102, 1003(a), prohibit an official of a political subdivision, including the Coroner, from using the authority of his office "for his private pecuniary benefit" and from "accepting any honorarium." Indictment, ¶ 6.

Additionally, the Second Class County Code provided that the Allegheny County Coroner could conduct autopsies and other professional services for other counties, but required all fees collected for such services to be accounted for and paid to the Allegheny County

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[1] Section 1102 defines "Conflict" or "conflict of interest" in relevant part as: "Use by a public official . . . of the authority of his office . . . or any confidential information received through his holding public office . . . for the private pecuniary benefit of himself, a member of his immediate family or a business with which he or a member of his immediate family is associated." 65 Pa.C.S. § 1102, Definitions.

Section 1103(a) provides, in relevant part: "Conflict of interest.--No public official . . . shall engage in conduct that constitutes a conflict of interest." 65 Pa.C.S. §1103(a).

WECHT000000084

treasurer. Indictment, ¶ 7. The Second Class County Code also required that bodies of unidentified deceased persons be taken to the Allegheny County morgue and, if the Coroner deems it necessary, embalmed and preserved, and, if the Coroner is unable to otherwise determine the cause and manner of death, to perform an autopsy; the Second Class County Code also proscribed the Coroner's removal of unclaimed corpses from the morgue, where they are to remain "except upon the certificate of the Coroner." Indictment, ¶ 10-11.

The Indictment also identifies Allegheny County laws that governed the ethics and accountability of officials from 2000 through 2005, namely, the Administrative Code adopted by Allegheny County under its Home Rule Charter to govern all employees and Independently Elected Officials, including the Coroner. Indictment, ¶ 8. The Administrative Code required the Coroner to devote "a full time effort to the duties" of his office, and prohibited officials, including the Coroner, from using Allegheny County resources for any non-county purpose, and from using the office for private financial gain, and required the Coroner to file annual financial disclosure forms. Indictment, ¶¶ 8-9.

The Indictment recites the following averments about defendant in his capacity as Coroner at paragraphs 12-23: as Coroner of Allegheny County from 1970 through 1980, and again from 1996 through 2005, Dr. Wecht was responsible for managing the operations of the ACCO, was prohibited from using the ACCO resources for private financial gain, and was required to file truthful annual financial disclosure forms, which he failed to do in 2001, 2002, and 2003, but belatedly filed, after news of the federal government's investigation became public in February 2005; Dr. Wecht filed a lawsuit in June 2000, seeking to exempt his office from the ethics and other provisions of the Administrative Code, which lawsuit was resolved against him

WECHT000000085

by the Pennsylvania courts, which ruled that the Coroner of Allegheny County was covered by the accountability, conduct and ethics provisions of its Administrative Code.[2] Indictment, ¶¶ 12-16.

The "Defendant's Private Business" is described at paragraphs 17-23 of the Indictment. Dr. Wecht is the sole owner and principal officer of Wecht Pathology and Associates, Inc. ("Wecht Pathology"), a domestic, professional for-profit corporation registered in Pennsylvania. The total and yearly incomes of Wecht Pathology, and Dr. Wecht's personally, for the years 1997 through 2004 are stated. Indictment, ¶ 20-21. The indictment also avers that from 1998 through 2004, Dr. Wecht stated to the IRS that he devoted 100% of his time to the business of Wecht Pathology. Indictment, ¶ 23. That business is described as providing medical-legal forensic pathology opinions, consultations and expert testimony in civil and criminal litigation throughout the United States and in foreign countries, providing medical-legal pathology opinions, consultations and expert testimony for public entities (e.g., public defender and district attorney offices) in civil and criminal litigation, conducting autopsies for other counties in Western Pennsylvania and private clients, speaking at public and private events for honoraria, authoring publications for royalties, and performing in entertainment venues.

B. "Honest Services" mail and wire fraud, also known as "intangible rights" fraud, wherein the victims are Allegheny County and its citizens, pursuant to 18 U.S.C. §§ 1341, 1343, 1346 and 2.

Paragraphs 24 through 35, and Counts 1 through 24, charge defendant with wire fraud -

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[2] *Wecht v. Roddy*, 815 A.2d 1146 (Pa. Cmwlth. Ct. 2002) (Allegheny County's Home Rule Administrative Code provisions which mandate independently elected officials to work full-time and to abide by the accountability, conduct and ethics code did not conflict with Second Class County Code; Allegheny County Coroner is subject to said provisions).

theft of honest public services from 1996 through 2005, wherein Dr. Wecht "devised and intended to devise a scheme to defraud, for obtaining money and property, and for depriving another of the intangible right of honest services, by means of breaching his fiduciary and ethical duties as Coroner of Allegheny County and making false and fraudulent pretenses and representations, well knowing at the time that he was breaching his fiduciary and ethical duties and that the pretenses and representations were false and fraudulent when made." Indictment, ¶ 25. The purpose of the scheme was allegedly to obtain money, property and other things of value, to violate the fiduciary and ethical duties owed by the Coroner to Allegheny County and its citizens, and to "deprive Allegheny County and its citizens of the intangible right to the honest service of defendant Cyril H. Wecht as Coroner of Allegheny County and other employees of the Allegheny County Coroner's Office." Indictment, ¶ 26.

The mechanics of the scheme is set forth in some detail, including the following: defendant used his position, authority and the resources of the ACCO to assist Wecht Pathology in generating private income; instructed ACCO employees to perform substantial private work for Wecht Pathology while on duty; used secretarial, computer, facsimile, and other general county resources of the ACCO in his private business; personally examined slide tissues and prepared private consulting reports in private "black lung" cases while at ACCO; used Deputy Coroners as couriers and as a private limousine service for him and his family for his own personal financial gain and for personal matters, and used Deputy Coroners and other ACCO employees to do personal and family matters for defendant; faked bills from a dummy limousine business, charged his clients for the services reflected in the fake bills, while actually using county personnel and vehicles and not limousines, and retained the proceeds generated by the

phoney limousine bills for his own benefit; faked receipts from a defunct travel agency for inflated travel expenses in private cases, submitted the receipts to his clients for payment of checks made out to him personally, and kept the proceeds as "pocket money" for his personal use; and exchanged Allegheny County cadavers to Carlow College for use by its students, in exchange for the use of a laboratory at Carlow for his private work. Indictment, ¶ 28-29. The Indictment lists numerous ways in which defendant "used the position, authority, and resources of the [ACCO] for the personal and political benefit of himself and his family," including: dog walking, shopping, errands, and driving family members to the airport and other locations and events unrelated to the business of the ACCO; causing ACCO employees to participate while on duty in his unsuccessful campaign for County Executive in 2000, and for his son's efforts to win political office, and expending Allegheny County resources such as secretarial time, paper, computers, etc., on his and his son's campaigns; and using Allegheny County vehicles and gas routinely to perform outside autopsies and consulting work in other counties in Western Pennsylvania, and receiving reimbursement from the other counties for mileage and expenses but retaining said monies for his own benefit without reimbursing the county for use of the vehicles and gas. Indictment, ¶ 30-33.

Paragraph 35 sets forth Counts 1 through 24, alleging instances of wire fraud committed in furtherance of the foregoing scheme, through facsimiles sent from the ACCO to private clients, from February 2002 through February 2005, in violation of 18 U.S.C. §§ 1343, 1346 and 2. The facsimiles were mostly of invoices for private services.

Paragraph 36-40 set forth Counts 25 through 32, alleging instances of mail fraud committed in furtherance of the foregoing scheme, averring that defendant had caused to be

mailed packages of "Microscopic Autopsy Tissue Slides" to various private clients, some in "black lung" cases, from January 29, 2003 through June, 2004, in violation of 18 U.S.C. §§ 1341, 1346 and 2.

C. Simple mail and wire fraud, wherein the victims are private clients and various outlying counties which used Dr. Wecht's services, pursuant to 18 U.S.C. §§ 1341, 1343 and 2.

Counts 33 through 42 allege a narrower scheme to defraud private clients, from February 2002 through March 2005, by using fake limousine receipts and reimbursements for expenses he did not actually incur because he used ACCO Deputy Coroners to provide transportation, at no cost to him, and for travel expenses based on fake travel agency bills, in violation of 18 U.S.C. §§ 1343 and 2. Indictment, ¶¶ 41-51. These clients were asked to make checks payable to defendant personally, and he retained the reimbursements for his own use, not as income to Wecht Pathology, and he testified falsely about his expenses under oath at depositions to conceal his fraud. Indictment, ¶¶ 50-51.

Counts 43 through 79 charge defendant with specific instances of mail fraud from January 2001 through June 2005, in violation of 18 U.S.C. §§ 1341 and 2, in furtherance of a scheme to obtain money by false pretenses, by preparing and having submitted fake and fraudulent mileage reimbursement invoices to the counties in Western Pennsylvania in connection with his private autopsy and consulting services.

D. Theft concerning a public entity receiving federal funds, pursuant to 18 U.S.C. § 666(a)(1)(A) and 2.

Counts 80 through 84 of the Indictment allege that during the calendar years of 2002, 2003, 2004 and 2005, defendant, being an agent of Allegheny County, a local government

WECHT000000089

organization that received benefits in excess of $10,000 during each of those calendar years, embezzled, stole, obtained by fraud and otherwise converted to his own use "property" valued at $5,000 or more, of Allegheny County; specifically, defendant used the personnel, vehicles, facilities, resources, equipment, and space of the ACCO, to conduct his private business activities, in violation of 18 U.S.C. § 666(a)(1)(A) and 2.

IV. Discussion[3]

A. Theft of Honest Services/Intangible Rights, Mail and Wire Fraud Pursuant to 18 U.S.C. §§ 1341, 1342, 1343, 1346

Just as the Court was almost finished gathering, reviewing and synthesizing the law on honest services or intangible rights fraud in the Third Circuit, but before commencing to draft this section for this opinion, the United States Court of Appeals for the Third Circuit decided *United States v. Gordon,* 2006 WL 1558952 (3d Cir. June 8, 2006) (non-precedential), in which Judge McKee thoroughly and completely summarized the Court's development of honest services/ intangible rights law. Since any attempt to improve on this most recent and complete summary would serve no useful purpose, this Court will rely on Judge McKee's summary of honest services/ intangible rights law as explained for a unanimous Court in *Gordon*.

Although *Gordon* is non-precedential, its accurate and thorough explanation of honest services/ intangible rights fraud, 18 U.S.C. § 1346, merely recaps the Court's recent precedent, upon which both defendant and the government rely, and sets the stage for application of that

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[3]The Court does not address each of defendant's points and sub-arguments, many of which are frivolous and repetitive, but instead will discuss only the central arguments raised in the 79 page brief in support of dismissal. Any points or sub-arguments not specifically addressed are deemed to be without merit.

WECHT000000090

fraud theory in this case. Accordingly, this Court will repeat the *Gordon* explanation at length, after first placing *Gordon* in context.

Defendant Thomas P. Gordon, the former elected County Executive of New Castle County, and defendant, Sherry L. Freebery, his Chief Administrative Officer ("CAO"), were the subjects of an 18-month federal investigation into the operations of the government of New Castle County, Delaware. The government indicted defendants on conspiracy, RICO, mail fraud, wire fraud and theft of honest services fraud, alleging five separate "schemes": (1) the "Election Scheme"; (2) the "Fieldstone Scheme"; (3) the "Harassment Scheme"; (4) the "Investigation Scheme"; and (5) the "Personal Benefits Scheme." The United States District Court for the District of Delaware, *United States v. Gordon*, 380 F.Supp.2d 356 (D.Del. 2005), dismissed Counts V, VI, and VII of the Indictment regarding the "Fieldstone Scheme," and struck from the Indictment prejudicial references to said scheme, because, in the District Court's view, the Indictment did not allege, and the government did not contend, that a $2.3 million transfer from a constituent to Freebery "was made for the purpose of influencing her official actions, or that Freebery was in fact influenced by the financial transaction, and because the indictment failed to allege that Freebery had a financial interest in the Fieldstone Project.

The District Court denied the motion to dismiss other counts of the Indictment, including the Election Scheme and the Personal Benefits Scheme, charging, *inter alia*, that defendants "had caused resources of the County to be improperly diverted for the benefit of particular political candidates," which "clearly could constitute 'honest services' fraud," *Id.* at 362, as well as "relatively trivial" charges that "defendants caused a County employee, during working hours, to spend about 10 days painting Ms. Freebery's house and doing yard work at her premises; that in

2001 Ms. Freebery caused a County employee, during working hours, to decorate her benefactress's Christmas tree; and that, from time to time, County employees performed personal errands for Ms. Freebery while being paid by the County." *Id.* at 363.

The government took an immediate appeal from the dismissal of Counts V, VI, and VII of the Indictment. Reversing and reinstating the dismissed counts and the stricken language, the Court of Appeals for the Third Circuit stated as follows:

> The federal mail fraud statute is codified at 18 U.S.C. § 1341, and provides, in relevant part:
>
> > Whoever, having devised or intending to devise any scheme or artifice to defraud . . . deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier . . . shall be fined under this title or imprisoned not more than 20 years, or both.
>
> The federal wire fraud statute is codified at 18 U.S.C. § 1343, and provides, in relevant part:
>
> > Whoever, having devised or intending to devise any scheme or artifice to defraud, . . . transmits or causes to be transmitted by means of wire . . . communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.
>
> "The term 'scheme or artifice to defraud,' " as used in Sections 1341 and 1343, "includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. Section 1346 was enacted in reaction to the Supreme Court's decision in *McNally v. United States*, 483 U.S. 350, 360 (1987), which held that the prior text of the mail and wire fraud statutes did not include honest services fraud, but was instead "limited in scope to the protection of property rights." Accordingly, "§ 1346 was a clear statement by Congress that it wished to criminalize honest services fraud." *United States v. Murphy*, 323 F.3d 102, 116 (3d Cir. 2002).
>
> The elements of mail or wire fraud are: "(1) the defendant's knowing and willful participation in the scheme or artifice to defraud, (2) with the specific

WECHT000000092

intent to defraud, and (3) the use of the mails or interstate wire communications in furtherance of the scheme." *United States v. Antico*, 275 F.3d 245, 261 (3d Cir. 2001). Honest services fraud ***typically*** is found in two situations: "(1) bribery, where a legislator was paid for a particular decision or action; or (2) failure to disclose a conflict of interest resulting in personal gain," which, "[i]n the public sector . . . ***is oftentimes prescribed by state and local ethics laws***." *Id.* at 262-63.

As we noted at the outset, the District Court was troubled because the instant indictment did not allege, and the government did not contend, that the $2.3 million transfer from Moseley to Freebery "was made for the purpose of influencing her official actions, or that Freebery was in fact influenced by the financial transaction[,]" and because the indictment failed to allege that Freebery had a financial interest in the Fieldstone Project. Dist. Ct. Op. at 9, App. A13. Accordingly, the District Court concluded that the allegations based upon the Fieldstone Project were consistent with appropriate constituent service and could not, therefore, support criminal charges. Dist. Ct. Op. at 9-10, App. A13-14. However, that ruling is clearly contrary to the law of this circuit.

We rejected a similar argument in *United States v. Antico*, 275 F.3d 245 (3d Cir. 2001). . . . [wherein we] affirmed Antico's conviction for honest services fraud. In doing so, we accepted "[t]he government's prosecutorial theory [that] . . . by failing to disclose his personal interest in a matter over which he had discretionary decision-making authority," Antico committed honest services fraud by "depriv [ing] the public of its right to disinterested decision-making and of its right to full disclosure of his personal motivation." *Antico*, 275 F.3d at 262. Antico had a duty to disclose information pertaining to a conflict of interest under state and local law, and his failure to do so constituted honest services fraud. *Id.* We explained the violation of his duty as follows:

> Duties to disclose material information affecting an official's impartial decision-making and to recuse himself exist within ***th[e] fiduciary relationship [between a public servant charged with disinterested decision-making and the public he serves] regardless of a state or local law codifying a conflict of interest***. . . . [FN5] ***In the context of honest services fraud, where undisclosed, biased decision making for personal gain, whether or not tangible loss to the public is shown, constitutes a deprivation of honest services, an active fraud or deceit is not necessary***. . . . [T]he prosecution need prove only a recognizable scheme formed with intent to defraud **regardless of how that intent manifests itself in execution**. . . . The legal meaning of fraud is not limited to deceit or misrepresentation; it includes overreaching, undue influence, and other forms of misconduct. Nor is a showing of public harm

WECHT000000093

required.

FN5. Although this language suggests that honest services fraud does not require a violation of underlying "state or local law codifying a conflict of interest," Antico was charged with violations of law and this portion of our discussion was therefore dicta. *See Murphy*, 323 F.3d at 117; *United States v. Panarella*, 277 F.3d 678, 699 n. 9 (3d Cir. 2002).

Id. at 264 (internal citations and quotation marks omitted, emphasis added). Accordingly, we rejected Antico's argument that " 'absent deceit, concealment, demonstrable public harm or other active fraud,' his conviction . . . cannot stand." *Id.* at 264. We concluded that "[A]n official's intentional violation of the duty to disclose provides the requisite 'deceit.' " *Id.* (quoting *United States v. Sawyer*, 85 F.3d 713, 732 (1st Cir. 1996) (brackets in original). In reaching our conclusion, we cited *United States v. Woodward*, 149 F.3d 46, 63 (1st Cir. 1998) (omission in original), wherein the court stated that "[the defendant's] intent is . . . demonstrated by his failure to disclose his conflict of interest although he was required to do so."

We again made this clear in *United States v. Panarella*, 277 F .3d 678 (3d Cir. 2002) [*cert. denied*, 537 U.S. 819 (2002)]. Panarella was convicted for being an accessory to honest services fraud based upon payments he made to a state senator, Loeper, who failed to disclose those payments while taking actions in the state senate that directly benefitted Panarella's delinquent tax collection business. We had to decide "whether allegations that Loeper unlawfully concealed [that] income . . . while taking discretionary action that Loeper knew would directly benefit Panarella amount[ed] to a scheme to deprive the public of his honest services, or whether an additional allegation that Loeper's discretionary action was influenced by Panarella's payments [was] necessary." *Id.* at 691. We concluded that no additional allegation was needed. We held: "where a public official takes discretionary action that the official knows will directly benefit a financial interest that the official has concealed in violation of a state criminal law, that official has deprived the public of his honest services under 18 U.S.C. § 1346." *Id.*

In reaching that holding, we rejected Panarella's reliance on *United States v. Bloom*, 149 F.3d. 649 (7th Cir. 1998). There, the court had reversed the conviction of a Chicago alderman who had given advice as a private attorney. The court in *Bloom* held that honest services fraud required misuse of one's official position "for personal gain." *Panarella*, 277 F.3d at 692. We distinguished *Bloom*, and rejected its reasoning. The *Bloom* analysis is

WECHT000000094

analogous to the District Court's concern that the instant indictment did not allege personal gain. *Panarella* establishes that ***an allegation of personal gain is not necessary to establish honest services fraud. Rather, "state law offers a better limiting principle*** for purposes of determining when an official's failure to disclose a conflict of interest amounts to honest services fraud." *Id.* Accordingly, ***we specifically refused to limit the offense to situations in which a public official uses his or her office for personal gain.*** *Id.* at 694 ("Rather than limiting honest services fraud to misuse of office for personal gain, we hold that a public official who conceals a financial interest in violation of state criminal law while taking discretionary action that the official knows will directly benefit that interest commits honest services fraud.") (citing *Woodward*, 149 F.3d at 62).

We again addressed the scope of honest services fraud in *United States v. Murphy*, 323 F.3d 102 (3d Cir. 2003). There, the defendant was not a public official, but the former chairman of a county political party who was convicted of honest services fraud. The predicate offense for that conviction was a violation of a state bribery statute, N.J.S.A. 2C:27-2(a). We rejected the government's theory that Murphy had become so involved in county government "that he could be considered the equivalent of a publicly elected official." *Id.* at 104. We also rejected the contention that Murphy had a fiduciary relationship with the public. In the District Court, the government had relied upon *United States v. Margiotta*, 688 F.2d 102 (2d Cir. 1982), in an attempt to stretch the offense of honest services fraud to a private citizen who was not a public employee or elected official. In *Margiotta*, the Court of Appeals for the Second Circuit had sustained an honest services mail fraud conviction of the chairman of a county political party under circumstances very similar to the facts surrounding Murphy's conviction. However, we rejected the rationale of *Margiotta* because it extended the mail fraud statute "beyond any reasonable bounds." *Murphy*, 323 F.3d at 104. We explained that, ***"[w]ithout the anchor of a fiduciary relationship established by state or federal law***, it was improper for the District Court to allow the jury to create one." *Id.*

We also explained that the *Margiotta* approach was inconsistent with principles of federalism that are preserved when ***federal honest services fraud is tied to a violation of a fiduciary relationship arising under state or local law***. *Id.* at 117. Violation of the bribery statute at issue in *Margiotta* did not, by itself, establish the ***required fiduciary relationship***. Rather, we reiterated our statement in *Panarella* that the fraud or deceit endemic in honest services fraud may arise from "the deliberate concealment of material information in a setting of fiduciary obligation." *Id.* (quoting *Panarella*, 277 F.3d at 695 and *United States v. Holzer*, 816 F.2d 304, 307 (7th Cir.1987)). [FN6]

WECHT000000095

FN6. In deciding *Murphy*, we also endorsed the reasoning of the Court of Appeals for the Fifth Circuit in *United States v. Brumley*, 116 F.3d 728 (5th Cir.1997). There, the court interpreted § 1346 as requiring a state law limiting principle for honest services fraud. *Murphy*, 323 F.3d at 116 & n. 5. The court in *Brumley* stated that an official who does all that is required under state law but who is alleged to have not discharged his or her duties "honestly" cannot be convicted of honest services fraud. *Brumley*, 116 F.3d at 734. Rather, § 1346 "contemplates that there ***must first be a breach of a state-owed duty***." *Id.*

Thus, although a violation of a state criminal law may be sufficient to lay the foundation for honest services fraud, ***it is clear from our analysis of the requisite fiduciary duty that honest services fraud does not require a violation of criminal law, but rather a violation of a state-created fiduciary duty***. At the very least, the ***government must allege a violation of some law -or a recognized fiduciary duty- to adequately charge honest services fraud***. Once again, we are here not required to delineate the parameters of the standard beyond this holding because here the government has alleged that Freebery and Gordon violated Delaware laws.

Gordon, 2006 Wl 1558952 at *5-*8 (emphasis added).

Gordon (or, more accurately, the recent Court of Appeals' precedent which is accurately summarized in *Gordon*) succinctly addresses and resolves, against defendant, nearly all of his arguments for dismissal of the honest services/ intangible rights counts in the Indictment. *Antico*, *Panarella* and *Murphy* do not, as defendant argues, hold that ***only*** those public officials who conceal a financial interest in violation of a state criminal law while taking discretionary action qualify for honest services/ intangible rights fraud; nor do *Antico*, *Panarella* and *Murphy* stand for the proposition that misuse of public office for personal financial gain can ***never*** qualify for honest services/ intangible rights fraud.

When the Court in *Panarella* "specifically refused to ***limit*** the offense to situations in which a public official uses his or her office for personal gain," 277 F.3d at 694, it implicitly but clearly recognized that "situations in which a public official uses his or her office for personal

WECHT000000096

gain" qualify for honest services/ intangible rights fraud status. The question presented on appeal in *Panarella* was "under what circumstances nondisclosure of a conflict of interest rises to the level of honest services fraud." 277 F.3d at 690. The Court of Appeals answered that question in rejecting Panarella's "argument that an allegation of bribery or other misuse of office is necessary to sustain a conviction for honest services wire fraud. Rather, for the reasons discussed above, we hold that if a public official fails to disclose a financial interest in violation of state criminal law and takes discretionary action that the official knows will directly benefit that interest, then that public official has committed honest services fraud." *Id.* at 697. However, the Court of Appeals took pains to "emphasize the narrowness of our holding." *Id* at 698-99. To say that an allegation of bribery or other misuse of office is ***not necessary*** to sustain an indictment or conviction for honest services/ intangible rights fraud is ***certainly*** not to say that bribery or misuse of office for personal financial gain is ***prohibited,*** and *Panarella* did not say that.

Pre *McNally* cases consistently recognized that the mail fraud statute "proscribes schemes to defraud citizens of their rights to honest and impartial government . . . , [and that] a public official owes a fiduciary duty to the public, and misuse of his office for personal gain is a fraud." *McNally,* 483 U.S. at 356. When Congress restored mail fraud to its pre *McNally* status in enacting section 1346, 18 U.S.C. § 1346, it expressed its intention to criminalize breach of fiduciary duty by misuse of office for personal gain.

As summarized in *Gordon*, therefore, the Court of Appeals' trilogy of honest services/ intangible rights cases stands, in part, for the proposition that the government must allege a violation of a "state-created fiduciary duty" arising from state ethics or criminal laws or from some well recognized common law fiduciary duty. Defendant's brief in support of his motion to

WECHT000000097

dismiss appears to argue that the Coroner of Allegheny County has no fiduciary duty to Allegheny County or its citizens; at a minimum, defendant vigorously asserts that the government has not identified any legitimate source of the Coroner's fiduciary duty. This argument is without merit, as the Indictment ***specifically*** identifies several state and local ethics and criminal laws as the ***anchors*** for the government's honest services/ intangible rights charges, namely, the state and local laws relating to the Coroner of Allegheny County's fiduciary duty to Allegheny County and its citizens. Indictment, ¶¶ 5-11.

The Coroner of Allegheny County is a public official.[4] As such, he was and is subject to, among other things, the "Public Official and Employee Ethics Act" of 1998, Oct. 15, P.L. 729, No. 93, §§1101-1113, effective December 15, 1998, 65 Pa.C.S. §§ 1101.1 - 1113. The Ethics Act opens with the Legislative Declarations that "public office is a public trust and that any effort to realize personal financial gain through public office other than compensation provided by law is a violation of that trust. . . . [T]he people have a right to be assured that the financial interests of holders of or nominees or candidates for public office do not conflict with the public trust." 65 Pa.C.S. § 1101.1(a).

To achieve the Legislative purpose, the Ethics Act requires annual financial disclosures, 65 Pa.C.S. § 1104, and lists "restricted activities," the first of which is: "(a) Conflict of interest.--No public official or public employee shall engage in conduct that constitutes a conflict

[4] The Ethics Act defines "public official" as: "Any person elected by the public or elected or appointed by a governmental body, or an appointed official in the executive, legislative or judicial branch of . . . any political subdivision thereof, provided that it shall not include members of advisory boards that have no authority to expend public funds other than reimbursement for personal expense, or to otherwise exercise the power of the State or any political subdivision thereof." 65 Pa.C.S. § 1102.

WECHT000000098

of interest." 65 Pa.C.S. § 1103(a). The Ethics Act provides the following definition of "Conflict of Interest":

> "Conflict" or "conflict of interest." Use by a public official or public employee of the authority of his office or employment . . . for the private pecuniary benefit of himself, a member of his immediate family or a business with which he or a member of his immediate family is associated. The term does not include an action having a de minimis economic impact or which affects to the same degree a class consisting of the general public or a subclass consisting of an industry, occupation or other group which includes the public official or public employee, a member of his immediate family or a business with which he or a member of his immediate family is associated.

65 Pa.C.S. § 1102.

The Coroner of Allegheny County is also subject to Allegheny County's Administrative Code enacted in 2000 pursuant to its Home Rule Charter, as is well known to defendant who brought suit in state court against the Allegheny County Executive and other Allegheny County officials seeking a declaration that exercise of power and control over him through the Administrative Code was constitutionally impermissible and in irreconcilable conflict with the Second Class County Code. *Wecht v. Roddy*, 815 A.2d 1146 (Pa.Cmwlth. Ct. 2002). The Commonwealth Court disagreed, and held that the Coroner was, indeed, bound by Allegheny County's Administrative Code, including section 601.01, requiring public officials to devote "a full-time effort" of at least 35 hours a week to the duties of their offices, and section 601.04, which provides that all Independently Elected Officials (such as the Coroner) "abide by the accountability, conduct and ethics code set forth under the Administrative Code." *Roddy*, 815 A.2d at 1149.

The Accountability, Conduct and Ethics Code of Allegheny County provides, in relevant part, as follows:

WECHT000000099

- Section 101.02 Purpose. . . . B. Allegheny County's elected and appointed officials set the ethical tone and environment that will prevail in the County. It is the special obligation of these officials to set the example of proper comportment . . . .
- Section 101.03 Definitions. . . . "Authority of Office or Employment." The actual power provided by law, the exercise of which is necessary to the performance of duties and responsibilities unique to a particular office or position of employment." . . . "Conflict" or "conflict of interest." Use by a public official or public employee of the authority of his office or employment . . . for the benefit of himself, a member of his immediate family or a business with which he/she or a member of his immediate family is associated. The term does not include an action having a de minimis economic impact or which affects to the same degree a class consisting of the general public or a subclass consisting of an industry, occupation or other group which includes the public official or public employee, a member of his immediate family or a business with which he or a member of his immediate family is associated.
- Section 102.01 Initial/ Annual Disclosure of Interest. . . . D. The requirements set forth in this code do not replace those in the State Elections Law and do not constitute the filing of Financial Interest Forms . . . otherwise required by law.
- Section 103.04 Standards of Conduct. . . . F. Private Business/ Financial Interests; Exerting Improper Influence. 1. No covered person shall engage in any business transaction . . ., or have any financial or other private interest, direct or indirect, which is to the detriment of the proper discharge of his or her official duties. 2. No Covered person shall use, or attempt to use, his or her position to obtain financial gain . . .or other personal advantage, either direct or indirect.
- Section J. Honoraria. No covered person shall accept an honorarium for any activity related to his or her official capacity. . . .
- Section N. Misuse of County Resources. 1. No Covered Person shall use, request, or permit the use of County resources, including, but not limited to, motor vehicles, equipment, and materials, except for County purposes. 2. No Covered Person shall use County mail to transmit mail that is personal; or political in nature. . . .

WECHT000000100

- Section O. Political Activity... 3. No Covered Person shall solicit, directly or indirectly, any employee . . . to engage in political activity or to suggest that such covered employee engage in such political activity. . . .

From the foregoing list of Pennsylvania and Allegheny County ethics laws, it cannot ***seriously*** be maintained that the Coroner of Allegheny County has no fiduciary duty to Allegheny County and its citizens to avoid conflict of interests, as those terms are defined and explained in the Public Official and Employee Ethics Act and the Accountability, Conduct and Ethics Code of Allegheny County, nor that the Coroner is exempt from the provisions of those Codes, nor that the Coroner has not been given fair warning of the type of unethical conduct he must avoid. See *Gordon* (Delaware and local ethics laws created fiduciary duty, and indictment adequately charged a viable mail fraud offense for misuse of office for personal financial gain and for other personal reasons); *Panarella* (Pennsylvania Ethics Act, 65 Pa.C.S. § 1101 et seq., provides the anchor upon which a federal prosecution for honest services/ intangible rights mail and wire fraud may be moored); *Antico* (Pennsylvania's former Ethics Act, 65 Pa.C.S. § 402, and Philadelphia's local ethics code, provide the anchor upon which a federal prosecution for honest services/ intangible rights mail and wire fraud may be moored).

The Court has carefully reviewed the Indictment, and finds that it adequately alleges defendant's knowing and willful participation in a scheme or artifice to defraud Allegheny County and its citizens, that he had the specific intent to defraud, and that the mails and interstate wire communications were used in furtherance of the scheme.

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B. Simple mail and wire fraud pursuant to 18 U.S.C. §§ 1341, 1343 and 2.

The Court has also carefully examined the Counts of the Indictment charging defendant with mail and wire fraud with regard a scheme to defraud private clients, including various outlying counties which used Dr. Wecht's services, and finds that it adequately alleges defendant's knowing and willful participation in a scheme or artifice to defraud these victims, that he had the specific intent to defraud, and that the mails and interstate wire communications were used in furtherance of the scheme.

C. Theft or bribery concerning programs receiving federal funds under 18 U.S.C. § 666

18 U.S.C. § 666(a)(1)(A) entitled "Theft or bribery concerning programs receiving Federal funds," states in pertinent part, as follows:

> (a) Whoever, if the circumstance described in subsection (b) of this section exists-
> > (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof-
> > > (A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that -
> > > (I) is valued at $5000 or more, and
> > > (ii) is owned by, or is under the care, custody, or control of such organization . . . shall be fined under this title, imprisoned not more than 10 years, or both.

As rehearsed, in Counts 80 through 84 of the Indictment, the government alleges that during the calendar years of 2002 through 2005, defendant, being an agent of Allegheny County, a local government organization that received benefits in excess of $10,000 during each of those calendar years, embezzled, stole, obtained by fraud and otherwise converted to his own use "property" valued at $5,000 or more, of Allegheny County, specifically, he used the personnel, vehicles, facilities, resources, equipment, and space of the ACCO, to conduct his private business

WECHT000000102

activities.

In the Indictment Memorandum, the government states that in order for a violation of section 666 to be established, the government must prove that defendant was an agent of Allegheny County, that he stole, obtained by fraud and/or without authority converted to the use of someone other than the rightful owner, or intentionally misapplied some money, property or employee service, that the money, property or employee service was under the care, custody and control of the organization, that said money, property or employee service had a value of $5,000 or more, and that Allegheny County, in a one year period, received more than $10,000 of federal monies/assistance. (Doc. No. 3).

Defendant argues that the government has failed to allege a violation of 18 U.S.C. § 666 and in support, argues that the meaning of "property" does not include (employee) "services"; and that aggregation is not a proper means to meet the jurisdictional requirements under section 666. This Court will address defendant's arguments seriatim.

In support of defendant's first argument that the theft of "property" in section 666(a)(1)(A), does not include theft of "employee services," defendant asks this Court to compare section 666 with section 641, and he urges this Court to ignore the only case law that is directly on point.

In the government's response to the motion for bill of particulars and in its response to the motion to dismiss, the government sets forth its authority on the issue of whether the term "property" may include "employee services" under section 666(a)(1)(A). The government cites to two Sixth Circuit cases as precedential authority for this charging theory. First, in *United States v. Sanderson*, 966 F.2d 184 (6th Cir. 1992), and later, in *United States v. Valentine,* 63

WECHT000000103

F.3d 459 (6th Cir. 1995), the United States Court of Appeals for the Sixth Circuit held that the theft of property included theft of employee services. Both cases are factually analogous to the present case because, in both cases, defendants were charged with using employees to perform private work.[5]

In the *Sanderson* case, the Sixth Circuit addressed the statutory construction of section 666(a)(1)(A), compared it with section 641, and ultimately found that section 666's notion of property was intended to "dovetail" with the notion of "property" in section 641 and to be "coextensive in its reach." The *Sanderson* Court set forth the following analysis which this Court finds to be instructive:

> We look first to the intent of the statute. Admittedly, determining what facts are necessary to constitute a criminal act is a "value choice more appropriately made in the first instance by a legislature rather than by a court." The express terms of the section, however, provide no clues as to what forms of stolen "property" are prohibited by the statute. We look next at the legislative history of the statute, which unfortunately, is scant. What little can be gleaned from the section's general legislative history is that the section was designed to create new offenses to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies which are disbursed to private organizations or State and local governments pursuant to a Federal program. Thus it seems Congress intended this statute to augment the prosecutorial powers of 18 U.S.C. § § 641 and 665. . . Application of section 641, which prohibits thefts of a wide variety of federal property, is restricted to instances where the property stolen can be shown to be property of the United States. Very often then, prosecution under section 641 "is impossible because title has passed to the recipient before the property is stolen, or the funds are so commingled that the Federal character of the funds cannot be shown."

[5]In its response to the motion to dismiss, the government also cites to two other cases, without analysis, that allegedly support its proposition that employee services may be defined as "property" under section 666(a)(1)(A). *United States v. Genova*, 333 F.3d 750, 755 (7th Cir. 2003). *United States v. Delano*, 55 F.3d 720, 729 (2nd Cir. 1995). However, because those cases do not contain a statutory construction, this Court will confine its analysis to the *Sanderson* case.

> Thus it seems that Congress intended section 666 to augment the general theft statute of section 641. Accordingly, we look at section 641 and its applicability to prosecutions for multiple actus reus elements. By its literal terms, section 641's notion of property is broader than section 666. Section 641 provides for prosecution of any one who "knowingly converts . . . any . . . *thing of value*." We have previously found that the theft prohibition in section 641 applies where both intangible and tangible property has been stolen. Section 666 does not use the "thing of value" language of 641. Nonetheless, Congress seems to have intended section 666 to *expand* the ability of prosecutors to prosecute persons who were for technical reasons out of section 641's reach. Consequently, we find section 666's notion of "property" was intended to dovetail with the notion of property in section 641 and to be coextensive in its reach-Sanderson's theft of employee time is as much a theft of property as his theft of paint supplies, for the purposes of his section 666(a)(1)(A) conviction.

Sanderson, 966 F.2d 184, 188-189. We find the above analysis to be compelling.[6] Therefore, despite defendant's arguments to the contrary, this authority, although not binding on this Court, is persuasive authority to support the government's charging theory under section 666(a)(1)(A), and is not inconsistent with any other precedential authority within this circuit or otherwise.[7]

Further, significantly, while defendant focuses his argument on whether theft of "property" includes "employee services," this Court notes that defendant is not only charged with theft of employee services under section 666, but rather, he is also charged with using "vehicles,

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[6]This Court will not further analyze the *Valentine* case because the analysis relies primarily on the *Sanderson* case.

[7]Although defendant argues that counts 80-84 of the Indictment are somehow deficient because they are inconsistent with the analysis of section 666 in *United States v. Zwick*, 199 F.3d 672 (3d Cir. 1999), this Court does not agree. First of all, the *Zwick* case does not even address section 666(a)(1)(A), but rather, it addresses section 666(a)(1)(B), which relates to bribery. Second, unlike the *Sanderson* case, the *Zwick* case does not analyze the meaning of "property" under section 666(a)(1)(A), much less does it state that "property" means only "tangible property," as defendant suggests. Third, the core holding of the *Zwick* case was overruled by the United States Supreme Court in *Sabri v. United States*, 541 U.S. 600 (2004). While this Court agrees with defendant that *Sabri* did not overrule the analysis of the legislative history of section 666, that analysis is not inconsistent with the well reasoned statutory analysis set forth in the *Sanderson* case.

WECHT000000105

facilities, resources, equipment, and space of the ACCO to conduct his private business activities," - - none of which can arguably be considered as anything other than "property." Moreover, even if the Court of Appeals for the Third Circuit would decline to follow the Sixth Circuit in finding that theft of employees services is covered under section 666 as theft of "property," counts 80-84 of the Indictment would still survive the motion to dismiss because the government alleges theft of other things, namely, vehicles, facilities, resources, equipment, and space of the ACCO, all of which are commonly considered to be property.

Defendant next argues that the government may not aggregate "insignificant" acts of alleged theft to meet the jurisdictional minimum of $5,000, under section 666. In support thereof, defendant contends that the plain language of section 666(a)(1)(A) and the rules of statutory construction prohibit aggregation of multiple alleged thefts to satisfy the statutory minimum of $5,000; that if Congress had intended to criminalize multiple acts as a single offense, it would have explicitly used language authorizing aggregation; and, any claim that aggregation is proper where separate act of thefts are alleged to be part of a "common scheme" should be rejected because Congress did not define section 666(a)(1)(A) to include "common scheme" offenses.

In its response to the motion for bill of particulars and in its response to the motion to dismiss, the government avers that the aggregation of alleged thefts of property is permissible in order to meet the $5000 jurisdictional threshold under the above cited *Sanderson* and *Valentine* cases, as well as a host of other cases from district courts of Illinois, West Virginia and Wisconsin, and the United States Court of Appeals for the First and Fifth Circuits. The source of the case law on this subject, again, although not binding, is still persuasive to this Court.

In the *Sanderson* case, the Sixth Circuit held that "under section 666, where multiple conversions are part of a single scheme, it seems appropriate to aggregate the value of property stolen in order to reach the $5,000 minimum required for prosecution." 966 F.2d at 189. In that case, the indictment aggregated paint and supplies with the actions of employees who were ordered by defendant to these materials in private contract work, and the Court in *Sanderson* held that both actions were correctly considered as components of a larger, single fraudulent action of theft from the local government. *See also, United States v. Cruzado-Laureano*, 404 F.3d 470, 484 (1st Cir. 2005), citing *Sanderson* at 189. ("The total value of funds stolen can be aggregated to satisfy the $5,000.00 minimum that triggers criminal liability under § 666.") While defendant makes numerous arguments in support of his theory that aggregation is not an acceptable means to meet the jurisdictional requirements, this Court finds none of them convincing, and finds that the plain meaning of the statute does not require that the $5,000.00 jurisdictional requirements be satisfied as a result of one theft totaling $5,000.00 or more. Rather, where, as here, the government alleges a common scheme or plan for theft of services and other property that took place over the course of a calendar year in an amount equal or greater to $5000.00, this Court declines defendant's invitation to dismiss the Indictment.[8]

D. Vindictive Prosecution

Throughout defendant's motion and supporting brief, defendant urges this Court to exercise its supervisory authority to dismiss this Indictment on the basis that this prosecution was brought by the Federal government merely because of Dr. Wecht's unharmonious relationship

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[8]The Court recognizes defendant's argument that a determination of whether the $5000.00 jurisdictional requirement was met should be a jury question. The Court will resolve that issue in due course.

WECHT000000107

with the Allegheny County District Attorney Stephen Zappala. According to defendant, the United States Attorney's Office vindictive prosecution stemmed from some "ill will and animosity toward Dr. Wecht." Doc. No. 207, at 76, fn 35. Defendant alleges only conclusory speculation in support of his claim of vindictive prosecution.

As the government emphasizes, and this Court agrees, throughout its motion and accompanying brief, defendant repeatedly refers to allegations of misconduct as if they were facts of record. However, the only record supporting these allegations are defendant's own prior motions and supporting memoranda. Simply because defendant repeats the same allegations (that District Attorney Zappala had a vendetta against Wecht and that vendetta somehow transferred to the United States Attorney's Office) does not suffice to state a claim for vindictive prosecution. Further, such unfounded allegations do nothing to advance defendant's burden of proof, which this Court has already described as a rigorous one. *See United States v. Schoolcraft,* 879 F.2d 64, 68 (3d Cir. 1989) ("In this kind of case, our focus is not on the district attorney's actions, but rather on the actions of the United States attorney who prosecuted this case. We note that the role of a separate sovereign in bringing charges against a defendant minimizes the likelihood of prosecutorial abuse."); *United States v. Jarrett*, 447 F.3d 520 (7th Cir. 2006).

As this Court stated in denying defendant's motion to suppress (doc. no. 55), provocative speculation and conclusory proclamations about "local public officials who might have gotten the United States Attorneys Office interested in how Dr. Wecht conducts his private autopsy practice and other private business affairs may make interesting reading and attract much publicity, but it does not satisfy the *legal* threshold, i.e., the substantial preliminary showing, that a defendant must make before the Court will grant a request for a *Franks* hearing." Memorandum

Order (doc. no. 193) Re: Motion to Suppress (Doc. No. 55), at 11. Defendant has repackaged those conclusory speculations in the pending motion to dismiss, and they are no more impressive in the context of a motion to dismiss than they were in the context of the motion to suppress.

E. Constitutionality of Honest Services/ Intangible Rights Theft Counts As Applied

While the United States Court of Appeals for the Third Circuit has not explicitly addressed defendant's various constitutional challenges (i.e., vagueness/ failure to give adequate warning of conduct proscribed) to these charges, most Courts examining such challenges have routinely found that 18 U.S.C. § 1346 is not unconstitutionally void for vagueness and/or unconstitutionally overbroad and that, as applied to the particular facts and circumstances of the case, it gave the defendant sufficient notice that the conduct in question was unlawful. *See, e.g.*, *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003); *United States v. Czubinski*, 106 F.3d 1069 (1st Cir. 1997); *United States v. Bryan*, 58 F.3d 933 (4th Cir. 1995) (abrogated on other grounds *sub nom*, *United States v. O'Hagan*, 521 U.S. 642 (1997); *United States v. Gray*, 96 F.3d 769 (5th Cir. 1996); *United States v. Brumley*, 116 F.3d 728 (5th Cir. 1997), *reh'g denied*, (1997) (not specifically addressing constitutionality but related question whether Congress intended section 1346 to extend to ethical misconduct by state officials and, if so, whether it did so with the clarity required whenever Congress extends a federal statute to cover state officials); *United States v. Waymer*, 55 F.3d 564 (11th Cir. 1995). Defendant's constitutional challenges in this case are without merit.

V. Conclusion

For the reasons set forth above, defendant's Motion to Dismiss the Indictment (doc. no. 180) will be DENIED in its entirety. An appropriate order follows.

s/Arthur J. Schwab
Arthur J. Schwab
United States District Judge

Date: June 29, 2006

cc: All counsel of record

WECHT000000110

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

UNITED STATES OF AMERICA	)	
	)	
v.	)	**Criminal No. 06-0026**
	)	**Electronically Filed**
CYRIL H. WECHT	)	

Order of Court

And now, this 29th day of June, 2006, upon consideration of defendant's Motion to Dismiss the Indictment (doc. no. 180) and supporting brief, the government's brief in opposition thereto, and defendant's reply thereto, **IT IS HEREBY ORDERED** that said motion (doc. no. 180) is **DENIED** in its entirety.

SO ORDERED this 29th day of June, 2006.

s/Arthur J. Schwab
Arthur J. Schwab
United States District Judge

cc: All counsel of record

WECHT000000111

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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CYRIL H. WECHT,

Defendant.

Criminal Action

No. 06-26

Transcript of proceedings on February 10, 2006, United States District Court, Pittsburgh, Pennsylvania, before Arthur J. Schwab, District Judge

APPEARANCES:

For the Government: Stephen S. Stallings, Esq.
Robert Cessar, Esq.

For the Defendant: J. Alan Johnson, Esq.
Cynthia Reed Eddy, Esq.
Mark Rush, Esq.

Court Reporter: Richard T. Ford, RMR, CRR
619 U.S. Courthouse
Pittsburgh, PA 15219
(412) 261-0802

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription

1 (Proceedings held in open court; February 10, 2006).
2 THE COURT: This is the time and place that has
3 been set for an initial conference relating to scheduling in
4 United States of America versus Cyril Wecht, Criminal
5 No. 06-26.
6 I would ask counsel for the Government to enter
7 your appearance, please.
8 MR. STALLINGS: Good morning, Your Honor, Stephen
9 Stallings and Robert Cessar on behalf of the United States.
10 With us is FBI Special Agent Bradley Orsini.
11 THE COURT: Welcome. On behalf of Defendant.
12 MR. JOHNSON: Jerry Johnson.
13 MS. EDDY: Cynthia Eddy.
14 MR. RUSH: Mark Rush, Your Honor.
15 THE COURT: Defendant is with you also, counsel?
16 MR. JOHNSON: He is, Your Honor, Dr. Wecht.
17 THE COURT: Good morning to all of you. I
18 apologize for being late, we had a brief Board of Judges
19 meeting that held me back from being here on time. So I
20 apologize.
21 First of all, I am pleased we have such good
22 counsel representing the Government and the Defendant in this
23 case. You all have a very professional reputation; and I know
24 some of you by reputation, I know some of you personally, so I
25 look forward to working with you.

1 I thought it was important to get together and talk
2 about scheduling, and I just will tell you if you work with
3 me, things will go smoothly and I expect everyone to conduct
4 themselves in a professional way throughout the proceedings
5 and be courteous to each other in this process.
6 I would like to determine when the Defendant would
7 like to try this case. I realize the Government, if
8 necessary, would have to try the case within 70 days. I am
9 prepared to try the case as quickly as the parties wish,
10 including as early as April of this year. I realize that the
11 Government may have a head start in this process and the
12 Speedy Trial Act sometimes -- the rights created by the Speedy
13 Trial Act, the Defendant doesn't necessarily want to exercise,
14 but I would like to determine today a firm trial date and then
15 back from that into a schedule that you all can work out
16 together or separately to handle the preliminary motions and
17 other practices that will occur here.
18 I did schedule this day at 9 o'clock just for the
19 convenience of counsel and the Defendant and in light of the
20 fact that they are proceeding before a magistrate at 9:30. If
21 we don't complete today by 9:30 or 9:25, we will recess and
22 come back up here whenever you are done with the magistrate.
23 But I set this date and time for your respective convenience.
24 Mr. Johnson, it is good to see you.
25 MR. JOHNSON: Yes, Your Honor, good to see you.

1 One thing that will determine when it would be
2 timely to go to trial from the standpoint of the defense will
3 have to do with the discovery because there will be a certain
4 amount of discovery that we need before we can file pretrial
5 motions, No. 1.
6 There will be other discovery motions we can file
7 before that. We will present to the Court a motion for
8 extension of time to file motions, but we are now speaking to
9 the Government about times to go through various documents.
10 I think that we would probably not be ready to go
11 to trial, based on our need to review the documents and file
12 motions, until at the very earliest September. We would like
13 to go to trial sooner, but I just don't think in light of the
14 voluminous documents and the motions that are going to be
15 filed -- we also will be filing certain Rule 17 subpoenas
16 under seal for Your Honor's consideration and ruling.
17 THE COURT: Let's say tentatively, and I will come
18 back with a firmer date, we are talking early fall. In light
19 of my civil calendar, what I wish to do is to get a firm trial
20 date because if we set a particular date and then the case is
21 continued, then I have empty space and the taxpayers wouldn't
22 want me to have empty space.
23 So let's talk in terms of early fall and we will
24 work on a firm trial date before we leave today.
25 What is your advice as to, with that time frame,

1 your ability, working with the Government, to come up with a
2 firm schedule for the various items that have to occur,
3 discovery, motions, responses? With the sophistication of
4 Government's counsel and Mr. Johnson and the rest of your
5 team, it seems to me you all ought to be able to sit down and
6 work out a schedule.
7 We can do that one of two ways. We can do that
8 now, you all can try to do it together for a week and then
9 come back and see me in about a week and see if you have
10 worked it all out, but it seems to me that professionally we
11 collectively ought to be working out an orderly time schedule
12 for this case that preserves everyone's rights in the process.
13 So what is your advice as to whether we should do
14 it today or whether you and counsel for Government ought to
15 sit down and work through a thorough schedule and come back
16 and see me in a week or ten days?
17 MR. JOHNSON: Ms. Eddy has been in conversations
18 with Mr. Stallings and I think they spoke late last week if I
19 am not mistaken to come up with a number of dates that we can
20 agree on to begin looking at some of the documents. If I am
21 incorrect or they would like to address it, that's fine.
22 THE COURT: Back to the scheduling issue, do you
23 think this is something that you all can do over the next week
24 and come back to me with a proposed schedule or alternative
25 dates that the Government is in favor of and you are in favor

1 of? I would like to come up with a schedule that includes
2 everything that possibly could happen with specific dates.
3 MR. JOHNSON: We can do that within a week I
4 believe.
5 MR. STALLINGS: We agree, Your Honor.
6 THE COURT: And that order would include everything
7 that could be anticipated to occur in this case, for instance,
8 a particular type of motion would be listed, it may or may not
9 be filed. But if it is going to be filed, it will be filed by
10 a particular date. Do you understand what I am talking about?
11 MR. STALLINGS: We do, Your Honor.
12 MR. JOHNSON: Yes, Your Honor. Subject obviously,
13 as I mentioned before, to things we may find as we go through
14 discovery in the next months ahead. If there is a need to
15 file an additional motion, we would, of course, come to the
16 Court and ask for permission to do that before we file it.
17 THE COURT: Certainly. The other thing I am
18 willing to help, if for some reason one side or the other is
19 not moving with the deliberate speed that one could be moving,
20 then I am available to help the process move in an orderly way
21 working with all of you collectively.
22 MR. JOHNSON: We hope that won't be necessary.
23 THE COURT: Then I would also like your proposed
24 order to choose one of these trial dates with the knowledge
25 that you have got to hold this date. So once you pick the

1 date, then we are going to hold to that date. So the first
2 date you get is September 5th. Second date you get is
3 September 11th. The third date you get is October 16th. Does
4 the Government need more than those three dates?
5 MR. STALLINGS: No, Your Honor. Either of those
6 would be fine.
7 THE COURT: You don't need -- you just have to work
8 together. Are those sufficient dates for the Defendant to
9 pick a date that works?
10 MR. JOHNSON: They are, Your Honor, yes, sir.
11 THE COURT: All right. Would you all like to come
12 back and see me next Friday, February 17th? Does that give
13 you enough time to work on your schedule?
14 MR. STALLINGS: That's fine with me.
15 MR. JOHNSON: It certainly does, Your Honor.
16 THE COURT: As I would envision this, you would
17 have a joint order, a joint scheduling order, and where there
18 is an agreement, you would have in a single date. Where there
19 is a disagreement, you would put in the Government's proposed
20 date, the Defendant's proposed date. Then we will work
21 through the order together and we will leave next Friday with
22 a scheduling order, including a firm trial date.
23 Would 8 o'clock be a convenient time for you all
24 next Friday? Is that -- I am here at 7, so I can come as
25 early as you like.

1 MR. JOHNSON: Certainly, Your Honor.
2 THE COURT: 8 o'clock?
3 MR. JOHNSON: That is fine.
4 MR. STALLINGS: Yes, sir.
5 THE COURT: So then we will have a second
6 scheduling hearing on February 17th at 8 o'clock. If you
7 could have a proposed draft to me by February 16th by noon,
8 filed electronically, does that work for the Government?
9 MR. STALLINGS: It does, Your Honor.
10 THE COURT: Defendant?
11 MR. JOHNSON: It does, Your Honor.
12 THE COURT: Is there anything else I can do today
13 to be of help? On behalf of the Government?
14 MR. STALLINGS: No, Your Honor.
15 THE COURT: On behalf of Defendant?
16 MR. JOHNSON: No, Your Honor.
17 THE COURT: I did want to put a couple things on
18 the record. First of all, you should be advised that my
19 senior law clerk, who is not assigned to this case, Michael J.
20 Lydon, is married to Caroline M. Roberto, who represents one
21 of the Government witnesses, Eileen Young. He is not assigned
22 to this case, will not be assigned to this case.
23 It is my practice from time to time to involve the
24 non-assigned law clerk in matters if things are pressing, so
25 that could happen in the future. If either side or both of

1 you have an objection to Mr. Lydon having a secondary role as
2 a law clerk in this case assisting the main law clerk, just
3 please file an objection on the record, and he has had no
4 substantive involvement and won't until you all make a
5 decision, so I would just ask if someone has an objection to
6 his having a secondary involvement in the case, please file a
7 notice to that effect by noon on February 16th, 2006, and I
8 will respect your judgment in that regard, whatever you think
9 is best is fine, but I need a decision one way or the other
10 from both of you.
11 Also, when I was president of the American Inns of
12 Court in Pittsburgh, or president or chairman of one of the
13 bar associations, I think the Civil Litigation Section of the
14 Allegheny County Bar Association, on behalf of one of those
15 groups from time to time I would have members of those
16 respective organizations to my house for dinner at the start
17 of a new year, which is usually in September. I think on one
18 and maybe two occasions the Defendant's wife and son might
19 have been at one of those gatherings, I believe the Defendant
20 was not at any of those gatherings, and I presume they
21 occurred somewhere certainly more than five years ago and
22 maybe ten years ago. So I just wanted to put that on the
23 record, I don't believe that that affects my handling of this
24 case at all, but I just thought it would be wise to share that
25 information with all of you.

1 Anything else that the Government would like to put
2 on the record today?
3 MR. STALLINGS: No, Your Honor.
4 THE COURT: On behalf of the Defendant?
5 MR. JOHNSON: No, Your Honor.
6 THE COURT: You all are now going to proceed down
7 to Magistrate Judge Caiazza's chambers, is that correct?
8 MR. JOHNSON: Yes, Your Honor.
9 THE COURT: That is for the arraignment?
10 MR. JOHNSON: It is.
11 THE COURT: After that if you would kindly have the
12 Defendant report to the Marshal's Office on the second floor,
13 I would appreciate that.
14 MR. JOHNSON: We will do that.
15 THE COURT: All right. Thank you all, have a great
16 day.
17 (Record closed).
18
19
20 C E R T I F I C A T E
21 I, Richard T. Ford, certify that the foregoing
22 is a correct transcript from the record of proceedings in the
23 above-titled matter.
24 S/Richard T. Ford ______________________________
25

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

UNITED STATES OF AMERICA	)	Criminal No. 06-26
	)	
v.	)	**Electronic Filing**
	)	
CYRIL H. WECHT	)	

GOVERNMENT'S MOTION FOR SANCTIONS

AND NOW comes the United States of America, by and through its attorneys, Mary Beth Buchanan, United States Attorney for the Western District of Pennsylvania, and Robert Eberhardt and Stephen S. Stallings, Assistant United States Attorneys for said district, and submits this Motion for Sanctions against Mark A. Rush and Jerry S. McDevitt, counsel for defendant Cyril H. Wecht. In the course of this case, Mr. Rush and Mr. McDevitt have repeatedly lied to the court, lied to the media, breached their ethical obligations as lawyers, violated the rules of the United States District Court for the Western District of Pennsylvania, and flaunted the orders of this Court. On or before June 6, 2007, Mr. Rush and Mr. McDevitt committed their latest, and perhaps most egregious, act of professional misconduct, displayed on the front page of the June 7, 2007, Pittsburgh Post-Gazette (article attached as Exhibit "A".) In one fell swoop, Mr. Rush and Mr. McDevitt made improper extrajudicial statements about plea discussions and the merits of the case that were both knowingly false and substantially likely to prejudice the case, all the while violating some of the most basic and fundamental principles of professionalism.

In this motion, the United States first describes the false and prejudicial extrajudicial statements made to the Post Gazette on or before June 6, 2007. In Section II, the motion recounts the previous history of dishonesty, lack of candor, and improper extrajudicial statements by Mr. Rush

and Mr. McDevitt over the course of these proceedings. Section III of this motion discusses how the egregious misconduct of Mr. Rush and Mr. McDevitt warrants the imposition of sanctions. The final section discusses the nature of sanctions that are appropriate in this case.

I. The False and Prejudicial Extrajudicial Statements on or before June 6, 2007

The June 7, 2007, Post-Gazette article attached as Exhibit "A" consists almost entirely of allegations made expressly by Mr. Rush and Mr. McDevitt. The material allegations are false, and the statements taken individually, and as a whole, are clearly substantially likely to prejudice this trial. There are four primary allegations set forth in the article: (A) that Assistant United States Attorney Stephen S. Stallings was instructed by United States Attorney Mary Beth Buchanan to contact Mark Rush on June 1, 2007, because "[s]he wants make sure [defense counsel] keep [their] mouths shut while she's down there before Congress"; (B) that the decision to allow Cyril Wecht to voluntarily surrender pursuant to a summons rather than an arrest warrant was made only because of intervention by the Department of Justice, specifically Paul McNulty or his staff, and that the United States Attorney's Office planned to "perp walk" Cyril Wecht; (C) that key Carlow personnel were not interviewed about the Carlow agreement before Indictment; and (D) that the prosecution of Cyril Wecht is politically motivated. All four of these allegations are false, and all four are substantially likely to prejudice the trial.

A. The June 1, 2007 discussion was not an attempt to "quell" public statements on the eve of Congressional testimony, and Mr. Rush's public dissemination of those discussions was unethical

As detailed in the affidavit of Stephen S. Stallings (attached as Exhibit "B") United States Attorney Mary Beth Buchanan had nothing whatsoever to do with Mr. Stallings' call or meeting with Mark Rush on June 1, 2007. Indeed, the United States Attorney was not aware that the Mr. Stallings

had contacted Mark Rush until June 6, 2007, when the Post-Gazette reporter called for comment on the story.

There have been intermittent plea discussions between lawyers for the defense and lawyers for the government, but few since last summer. *See* Stallings Affidavit at ¶4-5. However, in light of the current hiatus resulting from pending appellate matters, Assistant United States Attorney Stephen S. Stallings realized that if further plea negotiations were to take place at all, they would need to happen soon before the full intensity of trial preparation resumed. *Id.* at ¶5.

Thus, on Friday, June 1, 2007, Mr. Stallings telephoned Mark A. Rush, counsel for defendant Cyril H. Wecht, and spoke to him personally. *Id.* at ¶6. He asked if he would like to meet briefly, and Mr. Rush agreed. *Id.* They met that afternoon for a short period of time. *Id.* In that meeting, they discussed, among other things, that there had not been much in the way of serious discussion between defense lawyers and government lawyers regarding whether a plea agreement could be reached. They agreed that a plea agreement was not likely, but also agreed that it made sense to explore whether a process could be started to determine whether serious plea discussions would be worthwhile. *Id.* In an effort to give such a process the best chance of success, Mr. Stallings suggested it might make sense to have attorneys who had not been as involved in the day-to-day litigation engage in a preliminary discussion to determine whether further discussions were appropriate, and he proposed that Bob Eberhardt might be such a person on behalf of the government. *Id.* Mr. Rush agreed that the suggestion was a good one, thanked Mr. Stallings for suggesting it, and shook Mr. Stallings' hand as they parted. *Id.* Mr. Rush called Mr. Stallings back later that day to again thank him for the suggestion, and to confirm that he would attempt to contact Richard Thornburgh on his end in order to begin the process they had discussed. Mr. Stallings' call

and meeting with Mr. Rush was part of a good faith effort, initiated entirely and solely by Mr. Stallings, to explore whether there was any reason to engage in further plea discussions, and to explore whether the parties could come up with a process to do so.

Given the very preliminary nature of these discussions, Mr. Stallings did not speak to United States Attorney Mary Beth Buchanan in advance about his decision to talk with Mark Rush. Indeed, United States Attorney Mary Beth Buchanan did not even know that Mr. Stallings called Mark Rush or met with Mark Rush that day. *Id.* at ¶7. As set forth in Mr. Stallings' affidavit:

> Again, Mary Beth Buchanan did not instruct me to approach counsel for defendant, and was not even aware that I had done so. The decision to do so was mine and mine alone. So the assertion in the June 7, 2007 Post-Gazette article by defendant's counsel that Mary Beth Buchanan initiated the request to meet because "[s]he wants make sure [defense counsel] keep [their] mouths shut while she's down there before Congress" is absolutely false.

Id. at ¶8.

Consequently, the June 1, 2007 discussion was a preliminary, good faith discussion in an effort to determine if a plea agreement could be reached. What did Mr. Rush do in response to this discussion? He went straight to press. He recounted (and misstated) the contents of the preliminary plea discussion to the Post-Gazette reporter a mere few days after thanking the Assistant United States Attorney and shaking his hand. Mr. Rush went so far as to provide the reporter little details, such as the fact that the initial request to meet suggested coffee, but that neither side drank coffee at the meeting, and the location of the meeting. He also provided the reporter with significant distortions, such as that the defendant's position in plea negotiations has always been dismissal of the "entire indictment" while the government was willing to take a guilty plea to "a" felony count.[1]

[1] Again, this is not the appropriate forum to air the details of what plea negotiations have taken place. What is particularly egregious about Mr. Rush's comments in that he knows full well

Not only did Mr. Rush unethically disseminate information about plea discussions directly and intentionally to the media, he did so in a manner exhibiting a new low in professionalism.

B. The decision to allow Wecht to surrender was made locally, and not by the D.O.J.

Before the January 20, 2006 indictment in this case, the United States Attorney determined that she would seek only a summons permitting defendant to voluntarily surrender, rather than an arrest warrant. *Id.* at 10. In so deciding, the United States Attorney was following the unanimous recommendation of all of the Assistant United States Attorneys handling the case, and was following common practice in this District. *Id.* The United States Attorney would, of course, have been well within her rights in seeking an arrest warrant given the very serious nature of the charges,[2] yet she chose to issue a summons. *Id.* No Department of Justice personnel had any input or any role whatsoever in the Assistant United States Attorney's recommendation to issue a summons. *Id.* The allegation in the June 7, 2007, article that there was some kind of intercession by Paul McNulty or his staff that resulted in the United States Attorney's deciding to issue a summons is thus false. *Id.*

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the government cannot respond to his misstatements about plea negotiations, and that he can thus leave his false impression as the only impression the public will read.

[2]*See Matter of Sturman*, 604 F.Supp. 278, 279 (N.D. Ohio 1984)("The act of being arrested is certainly not one of those experiences in life which one welcomes; for the most part, with the exception of those who view being arrested as a symbolic and inevitable event in their opposition to what they regard as an "unjust" or unprincipled law or policy, individuals view arrest as a humbling if not humiliating experience. It represents the most visible assertion of the state's authority over an individual. At the same time, arrest serves an appropriate function. Its unpleasantness and visibility not only notifies the community at large that an individual has been accused of a crime but it also may admonish and deter the arrested individual and others from future entanglements with the law. This Court is reluctant to grant today's motion which would have the effect of permitting some people, particularly those who are affluent, with counsel and with accessibility to the criminal indictment and charging authorities, to "select" themselves out of the normal criminal process.")

WECHT000000126

Mr. Rush and Mr. McDevitt also assert in the June 7, 2007 article that "Ms Buchanan wanted to take [defendant] into custody and walk him in front of media cameras -- what's called a 'perp walk' -- rather than letting him turn himself in." At no time however, did the United States Attorney ever seek to require defendant to submit to a so-called "perp walk." *Id.* at ¶11. To the contrary, the government issued a summons permitting voluntary surrender. *Id.* Indeed, even in cases where arrest is appropriate, it is the practice of this office to take reasonable steps to avoid subjecting a defendant to a "perp-walk." *Id.* For example, in another recent high-profile corruption case, the case of *United States v. Dennis Skosnik*, the defendant was arrested, but processed at the FBI and brought into the building in such a matter so as to avoid unnecessarily subjecting him to the cameras. *Id.* At no time did the United States Attorney's Office seek to conduct a "perp-walk" of the defendant. The assertions to the contrary by Mr. Rush and Mr. McDevitt in the June 7, 2007 Post-Gazette article are thus false.

C. The key Carlow personnel were interviewed before Indictment

The June 7, 2007 article refers to defense lawyer's allegation that the investigation of the Carlow agreement and interviews of key Carlow personnel were not performed before the indictment. These allegations echo allegations made by Mr. Rush and Mr. McDevitt in court pleadings:

> Exactly none of the personnel at Carlow who were knowledgeable about agreements with Dr. Wecht were even interviewed before that odious and recklessly false charge was made.

See October 3, 2006, Reply Brief in Support of Motion to Compel Discovery at 2, at Docket No. 455. This allegation is not only false, it is knowingly false.

WECHT000000127

Before Indictment, the government obtained a copy of an executed agreement between Carlow, signed by the Provost Gary Smith, and Wecht Pathology and Associates, signed by Cyril H. Wecht (copy attached as Exhibit "C"), which provides in relevant part:

> 4. Contributions. ***Carlow agrees to contribute the premises and use of one gross anatomy laboratory, one office and one supply room*** on the basement level in A.J. Palumbo Hall (AJP) located at 3333 Fifth Avenue, Pittsburgh, PA 14213. Appropriate security measures shall be implemented by Carlow.
> Carlow agrees to maintain supplies that directly support instruction for the Autopsy Specialist Program, and Wecht Pathology Associates will maintain supplies and equipment for their private autopsies.
> The primary instruction mode will be autopsies provided by Wecht Pathology Associates, ***augmented by additional cadavers procured by Wecht Pathology Associates Group. Carlow will continue to pay for transportation up to one (1) cadaver a week to and from the University for insruction in BIO 375 during the fall term of every year.***

[Emphasis supplied].

Several witnesses, most prominently Gary Smith, Provost of Carlow and executor of the agreement, confirmed ***before indictment*** that this was the agreement between Carlow and Wecht.[3] *Id.* at 12. In fact, the FBI 302 report of the interview of Gary Smith was produced to the defense very early in this case at Bates # GJ-US-01-000204, and is attached as Exhibit "D". *Id.* Sister Grace Ann Geibel left Carlow in 2005 and did not even execute the written agreement at issue. *Id.* All of these facts are well-known to Mr. Rush and Mr. McDevitt, and they actually possessed Gary Smith's 302

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[3] The indictment alleges in this regard:

> from in and around June 2003 through in and around December 2005, defendant CYRIL H. WECHT caused Allegheny County cadavers to be provided to Carlow College pursuant to an agreement whereby in exchange for those cadavers and other consideration, he obtained the use of a laboratory at Carlow College at which he could engage in his private work;

See Indictment at paragraph 27(i).

WECHT000000128

in early 2006, so their statement to the Court that "[e]xactly none of the personnel at Carlow who were knowledgeable about agreements with Dr. Wecht were even interviewed before" indictment is false, and knowingly so. *Id.*

D. The prosecution of Cyril Wecht is not politically motivated

The underlying and over-arching assertion, both express and implied, of the statements made my Mr. Rush and Mr. McDevitt is that the prosecution of Wecht is politically motivated. This assertion is false. As set forth in Mr. Stallings' affidavit:

> At no time have I made any decisions in this case, whether in connection with the investigation, the indictment, or the pretrial litigation, that were motivated by political factors or, for that matter, by any goals other than achieving justice and representing the interests of the United States.

Id. at ¶16.

Moreover, Mr, Rush and Mr. McDevitt have now changed their "politically motivated" story. According to the original conspiracy theory, this case was motivated by Allegheny County District Attorney Steven Zappala's political "vendetta." Mr. Rush and Mr. McDevitt repeatedly alleged that the United States Attorney, the FBI, and Steven Zappala secretly conspired to bring this prosecution in order to silence Wecht's criticisms of Mr. Zappala. The government has exposed the falsity and ludicrousness of this charge in numerous prior filings. Yet now the very same lawyers are alleging that the United States Attorney is carrying out the prosecution to satisfy the alleged political agenda of the Department of Justice. This new conspiracy theory is equally false, and is wholly inconsistent with the earlier conspiracy theory. They can't both be right (in fact both are false), and yet Mr. Rush and Mr. McDevitt have now asserted both theories as if they were fact.

Mr. Rush and Mr. McDevitt have never come forward with any real evidence supporting their conspiracy theories -- they have instead been satisfied to make naked false allegations to the court and the press. The government has provided a sworn statement disavowing their latest conspiracy theory. *See* Exhibit B, ¶16. Thus, the accusations leveled by Mr. Rush and Mr. McDevitt are now not only unsupported by any evidence (as they have always been) but directly refuted by sworn testimony.

II. The History of Dishonesty and Lack of Candor by Rush and McDevitt

The scope and breadth of dishonesty and lack of candor by Mr. Rush and Mr. McDevitt in this case is staggering. Here is a chart setting forth, as examples only, some of the dishonest statements they have made to the Court in this case:

Date	Pleading	False Statement	Truth
3/17/06	Transcript of Fourth Status Conference at #52	Rush: "I have in fact spoken to my other client about it. I haven't gone into tremendous detail because of the time issue, but we could obtain waivers, should they be necessary."	Rush's "other client," Christopher Fekos, did not agree to grant waivers at the time, and has not to this day granted waivers.

WECHT000000130

4/7/06	Brief in Support of Motion to Suppress at 1 at #56	Rush and McDevitt: "The rogue agent of the FBI doing Zappala's bidding, Bradley Orsini, deliberately falsified affidavits of probable cause to obtain facially defective search warrants." and similar allegations at p. 13 of the motion to suppress	The FBI has conducted its investigation with full independence and without outside influence, and there were no falsehoods, deliberate or otherwise, in the search warrant affidavits, as the Court has previously found.
4/7/06	Brief in Support of Motion to Suppress at 8 at #56	Rush and McDevitt: "Orsini deliberately concocted a fanciful and false yarn that Dr. Wecht was concealing his private work for others . . .." and similar allegations at p. 10 of the motion to suppress	As explained in prior filings, nowhere in the affidavits is there any allegation that defendant concealed the fact that he had a private business. Instead, the affidavits allege that defendant took steps to conceal evidence that he was **using county resources** to further that private business, not that he concealed the private business itself.

WECHT000000131

4/7/06	Brief in Support of Motion to Suppress at 8 at #56	Rush and McDevitt: "The warrants were no doubt prepared by Orsini	The warrants were not prepared by Orsini, *see* Mr. Stallings' affidavit at ¶15(a)
4/7/06	Motion to Suppress at 7 at #62(55).	Rush and McDevitt: "United States Magistrate Judge Amy R. Hay issued the search warrants in question solely on the affidavits of FBI Agent Bradley Orsini, a Government agent with a known bad reputation within the FBI, *including having urged witnesses to perjure themselves in a case involving his own misconduct.*"	As the Court is aware from its review of Document No. 60, there is absolutely no such finding in Special Agent Orsini's disciplinary report.

5/26/06	Reply Brief in Support of Motion to Suppress at 9, n. 7 at #182	Rush & McDevitt: "The Government attached a document from Ms. McCabe's personnel files, in blatant disregard of this Court's Protective Order that the Government sought, again showing that the Government had no concern about those records and used it to camouflage the true purpose of the Protective Order, which was to place the Orsini records under seal."	The government did not attach a document from Ms. McCabe's personnel file, but rather a computer usage policy form executed by Ms. McCabe from the files of the Allegheny County computer department.
6/6/06	Reply Brief in Support of Motion to Vacate/Modify at 1 at #205-1	Rush and McDevitt: "Likewise, Orsini and the AUSA on the case had no problem with private photo ops for a Tribune Review front page story executing subsequent Grand Jury subpoenas."	No "private photo-op" was ever arranged. *See* Mr. Stallings' affidavit at ¶15(d)

WECHT00000133

6/6/06	Reply Brief in Support of Motion to Vacate/Modify at 2 at #205-1	Rush and McDevitt: "The Government also had no problem with free speech when it leaked information to the press about a looming superseding indictment on tax charges, even though Grand Jury proceedings must remain secret, or when it publicly filed a document last Friday indicating that a superseding indictment will be sought in August all in direct violation of Rule 6(e)."	The government did not "leak information to the press about a looming superseding indictment on tax charges" and its filing of documents with the Court on the timing of any superseding indictment were done in compliance with an ***agreed upon pretrial order***, and not in violation of Rule 6(e), *see* Mr. Stallings affidavit at ¶15(e)

6/6/06	Brief in Support of Motion to Dismiss at 4 at #207-1	Rush and McDevitt: " . . . Panarella, a decision not even considered by the prosecution when it indicted Dr. Wecht." [Emphasis in original.]	The government attorneys were aware of and considered *Paneralla* and many many other cases when considering the appropriate charges to recommend the Grand Jury bring against Cyril Wecht in the Indictment, *see* Mr. Stallings' affidavit at ¶15(f)
6/6/06	Brief in Support of Motion to Dismiss at 63 at #2017-1	Rush and McDevitt: "The cumulative effect of the Government s overzealous prosecution and *repeated instances of misconduct* . . "	There has been no prosecutorial misconduct in this case. *See* Mr. Stallings' affidavit at ¶15(g)

6/6/06	Brief in Support of Motion to Dismiss at 66, n. 35 at #207-1	Rush and McDevitt: "The Government engaged in vindictive prosecution because its prosecution stemmed from ill will and animosity toward Dr. Wecht,"	The prosecution was motivated solely by the facts and the law, and has not been driven in any way by who defendant is or is not; indeed, before arriving in Pittsburgh in 2004 one of the lead prosecutors did not even know who Cyril Wecht was. *See* Mr. Stallings' affidavit at ¶15(h)

WECHT000000136

6/6/06	Brief in Support of Motion to Dismiss at 66, n. 35 at #207-1	Rush and McDevitt: "Likewise, the Government engaged in retaliatory prosecution, only indicting Dr. Wecht at the behest of Zappala after Dr. Wecht voiced his disapproval over Zappala s failure to investigate certain officers allegedly involved in the death of Charles Dixon in other words, in retaliation for engaging in constitutionally protected speech."	As set forth above, the investigation and prosecution was independent and based solely on the facts and the law.
10/3/06	Reply Brief in Support of Motion to Compel Discovery at 2 at #455	Rush and McDevitt: "Exactly none of the personnel at Carlow who were knowledgeable about agreements with Dr. Wecht were even interviewed before that odious and recklessly false charge was made."	This is false as explained in Section I.C. above

10/30/06	Brief at #469	Several false statements as detailed in e-mail attached as Exhibit "E"	*See* attached e-mail detailing false statements

Indeed, this Court has expressly found Mr. Rush and Mr. McDevitt to have lacked candor or flaunted court orders:

1. On June 14, 2006, the Court found that one "statement [by K&L Gates] is simply false" and another statement was "disingenuous at best." *See* 6/14/2006 Memorandum Opinion re: Denial of Motion for Reconsideration at Docket No. 224, p. 34, 19.

2. The Court also found, on June 14, 2006, that counsel has repeatedly ignored the court's order, and scheduled a contempt hearing to adjudicate whether such conduct constituted contempt of court. *See* 6/14/2006 Memorandum Opinion re: Denial of Motion for Reconsideration at Docket No. 224, p. 37 ("After the trial, the Court will schedule a contempt hearing to adjudicate whether defense counsel's conduct in repeatedly ignoring this Court's Pretrial Order without taking appropriate steps to modify said Order constitutes contempt and, if so, what would be the appropriate penalty").

3. On July 20, 2006, the Court expressly found Mr. Rush and Mr. McDevitt to have made a false accusation. *See* 7/20/2006 Memorandum Opinion and Order Denying Motion for Recusal at Docket No. 302, p. 11 ("While defendant speculates that the fact that this Court issued an order granting the motion for leave to file under seal, in a timely manner, evidences some antecedent improper ex parte communication with the government, again, such accusation is false").

WECHT000000138

4. On July 20, 2006, the Court also specifically found "that the numerous allegations contained in said filings [by Mr. Rush and Mr. McDevitt] are incorrect, inconsistent with the record, based upon speculation, or false . . ." as well as "factually incorrect." *See* 7/20/2006 Memorandum Opinion and Order Denying Motion for Recusal at Docket No. 302, p. 55, 6.

In addition, on April 12, 2007, the Third Circuit Court of Appeals issued an opinion specifically finding that a claim by Mr. Rush and Mr. McDevitt "distorts the record" and unfairly characterizes the course of the proceedings in this case. *See United States v. Wecht,* April 12, 2007 at p. 39. The Third Circuit has questioned Mr. Rush's good faith in another case as well. *See Smalis v. Pappert*, 152 Fed.Appx. 252 (3rd Cir. 2005) (unpublished opinion). In *Smalis*, a case involving defendant's assertion that Mr. Rush's representation of him was so ineffective as to deny his constitutional right to counsel, the court doubted Mr. Rush's professed ignorance of the meaning of the word "concurrent":

> The meaning of the word "concurrent" is not debatable or malleable. "Concurrent" does not mean "coextensive," and its plain meaning cannot simply be defined away. ***The likelihood of a former Assistant United States Attorney and a partner in a law firm who specializes in "white collar" criminal practice either not reading the plea agreement or not understanding the term "concurrent" in the context of entering a client's plea is sufficiently remote to justify the trial court in rejecting those hypotheses. There is additional record support, however, for the conclusion that Smalis and counsel were, if you will, playing dumb*** about the word "concurrent." Rush's post-sentencing testimony, Smalis's criminal history, and certain conduct at the sentencing hearing all provide support for that conclusion.

Id. at 256 (emphasis supplied). The *Smalis* court went on to question Mr. Rush's good faith in the proceedings below:

> ***It is difficult to believe that Rush failed to understand what "concurrent sentences" were when the plea was entered. But while his pre-sentence confusion about the meaning of "concurrent" is difficult to understand, his post-sentence confusion is even more baffling.*** According to everyone's version on the facts in this case, the purported confusion regarding "concurrent" was revealed to all on

> September 5, 2000, when the sentence of 10-20 years was imposed. Assuming that Rush had truly understood "concurrent" to mean "not in excess of" prior to that point in time, one would have expected that he would have consulted a dictionary and confessed, at the very least, to misleading his client. Instead, he continued to insist at the post-sentencing hearing that the plea agreement foreclosed a state sentence in excess of the federal one. ***This was less consistent with Smalis and his counsel's having made a good faith mistake than with the stratagem*** which the court apparently found to have existed-an agreement, after they were unable to secure a "coextensive" plea agreement, to pretend to see what they wanted to see in "concurrent," thereby providing a possible way out in the event the state sentence exceeded the federal one.

Id. (emphasis supplied).

Mr. Rush and Mr. McDevitt also have a long history of making improper extrajudicial statements in this case, including the following:[4]

- "'This investigation started with the fanciful allegations made against Dr. Wecht by his political rival, the Allegheny County District Attorney, concerning the respective authority of their offices during the course of homicide investigations,' Rush said in a written response to the indictment." *See* January 20, 2006, Pittsburgh Pose-Gazette.
- "One of Dr. Wecht's defense attorneys, Mark Rush, agreed. 'They're [the cadavers referenced in the Indictment] being donated as a teaching tool,' Mr. Rush said. 'They're being donated for the honorable purpose of instructing students at Carlow University.'" *See* January 25, 2006, Pittsburgh Post-Gazette.

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[4]In addition, on Monday, February 6, 2006, the defendant and his counsel, Dick Thornburgh, of Kirkpatrick & Lockhart Nicholson Graham LLP, appeared on CNN's nationally televised talk show "Larry King Live." A transcript of the statements made by the defendant and his counsel on the Larry King Live broadcast is attached to previous court filings, and details numerous improper extrajudicial statements.

- "Dr. Wecht's attorney, Mark Rush, said, 'Many references to events that are included in the indictment are there solely to unfairly prejudice the public against Dr. Wecht, and we intend to take up these matters with the court.'" *See* February 2, 2006 Pittsburgh Post-Gazette.
- "'He'd received the room space [at Carlow College] long before there was a document discussing cadavers,' said Mark Rush, another attorney representing Dr. Wecht. 'It wasn't a quid pro quo.'" *See* February 8, 2006, Pittsburgh Post-Gazette.
- "Yesterday, Mr. Rush said there has 'never' been any talk of a plea between the two sides. Instead, Dr. Wecht looks forward to going to trial, he said, 'because he's innocent.'" *See* February 8, 2006, Pittsburgh Post-Gazette.
- The government attached to an earlier filing a video tape containing six local television broadcasts featuring extrajudicial comments from Mr. McDevitt: a May 5, 2006, WPXI-TV 6:00 p.m. broadcast (direct comment on the evidence and merits of the case); a May 3, 2006, WPXI-TV 5:00 p.m. broadcast (direct comment on the credibility of a witness and possibility of a plea); two April 28, 2006, broadcasts on WPXI-TV and KDKA-TV (direct comment on the evidence and false statements about the government's theory of the case and motives); and two April 21, 2006, broadcasts on WPXI-TV (commenting on a witness).
- Mr. Rush made extrajudicial statements quoted in the April 22, 2006, Pittsburgh Tribune-Review regarding the credibility of a witness and the evidence in the case:

> In a development yesterday, Wecht's attorneys said they plan to put an FBI agent on the stand for Wecht's hearing scheduled in June. The lawyers, who made the announcement following a court hearing earlier yesterday, said they believe the testimony of Special Agent Bradley Orsini will prompt U.S. District Judge Arthur J. Schwab to toss out evidence and possibly dismiss the case. Orsini had investigated Wecht. In court papers, Wecht's attorneys claim that Orsini failed to provide probable cause before getting search warrants, then overstepped the limits of one

WECHT000000141

warrant while searching Wecht's private office. Orsini's "voracity [sic] and truthfulness" will be attacked, Wecht attorney Mark Rush said. Wecht's attorneys have requested documents from federal prosecutors related to an internal FBI investigation about Orsini. The defense attorneys say they have a witness who will testify that Orsini asked him or her to lie under oath during that investigation. "We believe when his truthfulness is put to issue, those search warrants will fall," Rush said. The FBI has declined to comment on the allegations. A federal grand jury indicted Wecht in January on fraud and theft charges. He is accused of using the coroner's office to benefit his private consulting business, Cyril H. Wecht & Pathology Associates, and is charged with 84 counts of wire fraud, mail fraud and theft from an organization receiving federal funds. His trial is scheduled to begin in October.

See Wecht Indirectly Spars with Zappala in Speech, April 22, 2006, Pittsburgh Tribune-Review.

- Mr. McDevitt further commented on the credibility of another witness and about the merits of the case to local reporters on April 21, 2006:

The D.A. has not responded. He ran out of a news conference. The highest ranking law enforcement official in this county ran out of a news conference rather than answer a single question how much money have you been paid by the law firm that you left 9 years ago, to whom you have sent no-bid contracts valued at least 300,000 dollars and from whom you received legal advice to the discharge of your office. He hasn't answered any questions. Every time he opens his mouth he changes his story. You can see that he's using them to gather intelligence on his political foes, ranging from Mayor Murphy to the Sheriff's Office to Doctor Wecht. And he's hiding behind secrecy. This buyout agreement (pause) ask him to turn it over to you in redacted form. It's humongous. He won't turn it over because he knows it raises more questions than answers.

(Emphasis supplied).

Thus, the statements to the Post-Gazette set forth in the July 7, 2007 article are merely the latest in a string of unethical and prejudicial extrajudicial statements by Mr. Rush and Mr. McDevitt.

III. The False and Prejudicial Extrajudicial Statements Warrant Sanctions

Mr. Rush and Mr. McDevitt are bound by the rules regulating attorney conduct promulgated by the Pennsylvania Bar,[5] which include the following prohibition:

> Rules of Professional Conduct
>
> Rules of Prof. Conduct, Rule 3.6, 42 Pa.C.S.A.
>
> (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
> (b) Notwithstanding paragraph (a), a lawyer may state:
> (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
> (2) information contained in a public record;
> (3) that an investigation of the matter is in progress;
> (4) the scheduling or result of any step in litigation;
> (5) a request for assistance in obtaining evidence and information necessary thereto;
> (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
> (7) in a criminal case, in addition to subparagraphs (1) through (6):
> (I) the identity, residence, occupation and family status of the accused;
>
> (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
>
> (iii) the fact, time and place of arrest; and
>
> (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.
> (c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable

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[5] In addition, the Court instructs counsel appearing before the Court to adhere to the Code of Trial and Pretrial Conduct, published by the American College of Trial Lawyers (2002), which provides that: "Because a lawyer should try the case in court and not in the newspapers or through other media, a lawyer should not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding."

WECHT000000143

> lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
> (d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).
> EXPLANATORY COMMENT
>
> [5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to: (2) ***in a criminal case or proceeding that could result in incarceration, the possibility of a plea*** of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement . . . .

See, PA Eth. Op. 92-70, 1992 WL 810275 (Pa.Bar.Assn.Comm.Leg.Etc.Prof.Resp.) (emphasis supplied).

Moreover, the local rules of the Western District of Pennsylvania, as modified by the Third Circuit panel's decision in this case, track the Pennsylvania requirement.

There can be no question that the comments of Mr. Rush and Mr. McDevitt set forth in Section I above substantially prejudice this case. The comments allege -- falsely -- that the prosecution is malicious and based upon political motivations, that one of the lead prosecutors engaged in an unethical stratagem to dupe defense lawyers into silence at the nefarious behest of a United States Attorney seeking to avoid problems with Congressional inquiries, and that one of the key allegations (relating to Carlow) is unsupported by the evidence and was uninvestigated. Indeed, it is difficult to imagine comments more prejudicial to a case -- and these comments were made in a front page article in the District's leading daily newspaper.

The Appropriate Sanctions

This Court has the power to sanction lawyers who act in contempt of court by violating the Local Rules and making false statements to the Court, and this Court has the inherent power to exercise control over the conduct of the proceedings in order to ensure a fair trial for all parties. Here, Mr. Rush and Mr. McDevitt have repeatedly made false statements to the Court and have willfully and egregiously violated the Local Rules and their ethical obligations by making false and prejudicial extrajudicial comments. In a less egregious case, at least one court has placed defense counsel in jail and suspended his admission to practice in federal court. *See In re Morrissey*, 168 F.3d 134 (4th Cir. 1999). A similar punishment is appropriate here. The conduct is willful, egregious, prejudicial, and false, and justifies serious sanctions.

MARY BETH BUCHANAN
United States Attorney

By: S/STEPHEN S. STALLINGS
STEPHEN S. STALLINGS
Assistant U.S. Attorney
Fla. Bar No. 958859

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Government's Motion for Sanctions was served by ECF filing to and upon the following:

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WECHT000000146

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

UNITED STATES OF AMERICA)
)
v.) **Criminal No. 06-0026**
) **Electronically Filed**
CYRIL H. WECHT)

ORDER OF COURT DENYING DEFENDANT'S MOTION TO VACATE ORDER OF JUNE 11, 2007 (DOC. NO. 480) AND HOLDING THAT THE DISTRICT COURT RETAINS JURISDICTION OVER PRETRIAL MATTERS IN THIS CASE

While a notice of appeal generally acts to divest the district court of jurisdiction to address and decide matters that would implicate issues raised on appeal, the general rule is subject to numerous exceptions. One well-established exception, operative herein, is that an appeal does not divest the district court of jurisdiction to entertain collateral matters pending the appeal, especially where the appeal is of an interlocutory nature. For the reasons to follow, this Court will deny defendant's motion to vacate its scheduling order.[1]

Background.

By the Pretrial Order of March 1, 2006 (doc. no. 42) drafted by the government and Dr. Wecht and approved by this Court, the "Final" Pretrial Conference in this case was scheduled for Monday, September 18, 2006 at 8:00 AM. Late on Friday, September 15, 2006, the United States Court of Appeals for the Third Circuit entered the following order: "The trial of the above-captioned matter is stayed pending the opinion of this Court." Doc. No. 445 (emphasis added).

[1] Defendant filed a similar motion with the United States Court of Appeals for the Third Circuit seeking to say this Court's consideration of the motion for sanctions. On June 14, 2007, that Court entered its order stating: "This Court's stay order of September 15, 2006, extends only to the trial that had been scheduled for October 2006. It does not extend to the district court's continuing supervisory powers over the conduct of the case."

This Court did not learn of this stay order until Saturday, September 16, 2006, when it checked the Court of Appeals' docket, and thus had to decide which of the pending matters to handle at the too-late-to cancel "Final" Pretrial Conference.

While it stayed the actual trial, the Court of Appeals explicitly (as will be discussed) declined to stay all pretrial proceedings, and did not divest this Court of jurisdiction to handle all pretrial matters, and this Court therefore struck the following balance, as set forth in the Minute Entry of Hearing on Final Pretrial Conference (doc. no. 446):

* * *

2. In light of the Order of September 15, 2006, of the United States Court of Appeals for the Third Circuit staying the trial of the case, the Court cancelled the review of the Jury Questionnaire scheduled for September 19, 2006. The Court also informed counsel that the jury selection schedule for October 11, 2006, would be postponed if no opinion is received from the Court of Appeals by then, and if there was a delay beyond October 11, 2006, the 300 jurors would be released. See doc. no. 444.
3. Jury Instructions and Verdict Form: The Court informed counsel that jury instructions and jury verdict form would be dealt with again only after the Court rules on defendant's Motion to Dismiss at the close of the government's case-in-chief.
4. Pending Motions: The Court ordered the government to file responses to defendant's two pending motions (doc. nos. 437 and 441) (together with a proposed Order re: schedule for the production of Jencks Act material) on or before noon on September 28, 2006 and defendant's replies thereto shall be filed by noon on October 3, 2006.
5. Trial Preparation: The Court directed all counsel to continue to diligently prepare for trial and to adequately prepare to utilize courtroom technology.

The parties complied with paragraph 4 above (and, presumably, paragraph 5), and the Court implemented paragraph 2 by its order of October 10, 2006 (doc. no. 457).

In support of his motion to vacate this Court's scheduling order of June 11, 2007 with regard to the government's motion for sanctions, defendant cites only one case (*Sullivan v.*

WECHT000000148

Sullivan, 904 F.2d 826 (3d Cir. 1990)), a complicated civil proceeding, bearing little or no resemblance to this matter. There is much more relevant authority, however, that defendant does not mention.

In *Smith v. Township of Aleppo*, 2005 WL 4984381 (W.D. Pa. 2005), this Court summarized the relevant principles with regard to the effect of interlocutory appeals on the jurisdiction of the district court (albeit in a civil proceeding for equitable relief injunction proceeding) as follows:

> While the United States Court of Appeals for the Third Circuit stayed further proceedings in this Court with regard to the permanent injunction, it did not purport to stay all collateral proceedings. On the contrary, the Order of the Court of Appeals granting the motion to stay the scheduled hearing on permanent injunction stated "judicial economy warrants a stay of further proceedings in the District Court regarding a permanent injunction while this Court considers the appeal from the preliminary injunction."
>
> This Court does not interpret that order to prevent this Court's proceeding to address and resolve collateral matters that do not implicate the merits of the preliminary injunction or that preserve the status quo, such as contempt proceedings to enforce the Court's order or proceedings on plaintiff's application for attorney's fees. Generally, the timely filing of a notice of appeal divests the district court of any further authority over those aspects of the case on appeal. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) ("[A] federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance -- it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal") (per curiam); Allan Ides, *The Authority of a Federal District Court to Proceed After Notice of Appeal Has Been Filed*, 143 F.R.D. 307, 309 (1992) ("the filing of a timely and sufficient notice of appeal automatically transfers jurisdiction from the district court to the court of appeals"). There are exceptions, however, and in appropriate circumstances, the filing of an appeal does not divest the district court of jurisdiction.
>
> As the Court of Appeals for the Third Circuit summarized the relevant principles:

> It is well established that "[t]he filing of a notice of appeal . . . confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs* [*supra* 459 U.S. at 58]. Likewise, a notice of appeal from an unappealable order does not deprive the district court of jurisdiction.
>
> Exceptions to the rule in *Griggs* allow the district court to retain jurisdiction to issue orders staying, modifying, or granting injunctive relief, to review applications for attorney's fees, to direct the filing of supersedeas bonds, to correct clerical mistakes, and to issue orders affecting the record on appeal and the granting or vacating of bail. *See Bensalem Township v. International Surplus Lines Ins. Co.*, 38 F.3d 1303, 1314 & n. 9 (3d Cir. 1994) (describing some exceptions to general rule); *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 97 (3d Cir. 1988) (same). . . .

Sheet Metal Workers' Intern. Ass'n Local 19 v. Herre Bros., Inc., 198 F.3d 391, 394 (3d Cir. 1999) (additional citations omitted).

Appeals from interlocutory orders are generally authorized by the "collateral order" exception to the final order rule and by 28 U.S.C. § 1292(a)-(b). . . . In such cases, jurisdiction is divested only with respect to "issues decided in the order being appealed." . . . There is no complete divestiture of jurisdiction where "the judgment appealed from does not determine the entire action, in which case the district court may proceed with those matters not involved in the appeal." . . .

For this reason, the filing of the interlocutory appeal in this case did not automatically divest this Court of jurisdiction to proceed to the merits of the request for permanent injunction. Although this Court might have, in its discretion, stayed the permanent injunction proceedings pending the interlocutory appeal, the Court declined to do so in the interests of judicial economy . . . Although the Court of Appeals, in its discretion, decided that "judicial economy" was sufficient grounds for staying the hearing on the permanent injunction, it did not otherwise suggest that this Court lacked jurisdiction to do what district courts must do to maintain the status quo, enforce its orders, award attorney's fees, or take other collateral actions that do not implicate the merits of the injunction.

* * *

The Court deems it appropriate and necessary to maintain the scheduled hearing on plaintiff's motion for contempt in order to maintain the status quo

WECHT000000150

> and preserve the integrity of the Court, and that the public interests in conducting the hearing far outweigh the interests of the defendants in further delaying resolution of this important public matter. . . .

Township of Aleppo, 2005 WL 4984381 at *1-*3 (numerous citations omitted).

Interlocutory orders in criminal proceedings are not the norm, and stays of such orders do not ordinarily divest the trial court from proceeding to final resolution of the charges because the inherent delays "inhibit 'the smooth and effective functioning of the judicial process.'" *United States v. Wilkes*, 368 F.Supp. 2d 366, 369 (M.D. Pa. 2005).

Moreover, the Court of Appeals for the Third Circuit has made it quite clear that a motion for sanctions is a uniquely collateral matter that may be entertained by the trial court -- indeed, that should be entertained by the trial court -- pending an appeal. In *Lingle*, the Court of Appeals held that a notice of appeal did not divest the district court of jurisdiction to hear and resolve a motion for sanctions filed after summary judgment had been granted, explaining that the *Griggs* general rule ("filing of a notice of appeal divests the district court of jurisdiction over the case pending disposition of the appeal") is subject to numerous exceptions ("for example, to issue orders staying, modifying or granting injunctions, to direct the filing of supersedeas bonds, and to issue orders affecting the record on appeal, the granting of bail, and matters of a similar nature"), explaining as follows:

> The rule is a judge-made, rather than a statutory, creation that is founded on prudential considerations. It is designed to prevent the confusion and inefficiency that would result if both the district court and the court of appeals were adjudicating the same issues simultaneously. As a prudential doctrine, the rule should not be applied when to do so would defeat its purpose of achieving judicial economy. . . .
>
> An appellate court's decision is not final until its mandate issues. *Finberg v. Sullivan*, 658 F.2d 93, 99 (3d Cir. 1981) (in banc). Thus, until the Clerk of Court issued the certification in lieu of a mandate on February 19,

the underlying controversy is pending. The Fifth Circuit has described this rule as a "well-recognized exception" to the transfer of jurisdiction principle [and] the 'basis for this exception is that attorney's fees/sanctions are matters collateral to the merits of the action.'" In fact, this rule is not an exception to the general principle; rather *it is a precise application of that principle*. The award of attorney's fees and the imposition of sanctions are separate from the merits. Therefore, the appeal on the merits of a decision will not oust the district court's jurisdiction to award fees or impose sanctions." emphasis added; footnotes omitted).

It is important to note the procedural appellate history of this case, which leads this Court to conclude that the Court of Appeals' stay of the "trial" was not accidental, and that it explicitly did not divest this Court of jurisdiction to address pretrial matters. Defendant sought, but did not receive, from the Court of Appeals, a "stay [of] district court proceedings pending disposition of petition for writ of mandamus." Instead, the Court of Appeals stayed only the trial, and the Court's stay order was not filed at that Court's case number for defendant's mandamus action (06-3704), but only at the case numbers for the other related appeals.

This Court does not interpret the precise stay language used by Court of Appeals as inadvertent, and even in the unlikely event that it was inadvertent, this Court is not at liberty to disregard the plain language of that Court staying the "trial." Obviously, the Court of Appeals knows the difference between "trial," "pretrial," and "district court proceedings," and it chose to stay the "trial," not the "trial and all pretrial proceedings" or "the district court proceedings."

Additional reasons in support of continued jurisdiction over pretrial matters are as follows. First, no issue was raised on appeal related to the underlying merits of the case - - only as to who would be the trial judge, whether the then-existing Local Rule 83.1 would govern this

WECHT000000152

case, and whether certain disciplinary records (i.e., Orsini records) that were already in the possession of defense counsel would be made public. Secondly, continued diligent trial preparation by the parties and by the Court was -- and still is -- in the interest of the parties and public so this matter could be promptly and fairly tried upon remand. Thirdly, nothing in this Court's exercise of jurisdiction to date has been contrary to the stay of the trial as entered by the Court of Appeals, and defendant could have but did not seek clarification from the Court of Appeals to amend the "trial" stay to include suspension of pretrial preparation, at least not until *after* this Court entered its briefing schedule by Order of June 11, 2007. Fourth, defendant has sought to avail himself of – and received -- the jurisdiction of the district court when he sought - and received - modifications of his conditions of pretrial release so that he could leave the country for professional reasons, which shows some recognition on defendant's part that a notice of appeal of an interlocutory order does not divest the district court of all jurisdiction over all pretrial matters.

Had the Court of Appeals in this case ordered all pretrial proceedings stayed, this Court certainly would be bound by that order and not by the above general principles, and would not hesitate to stay all pretrial proceedings, including on the motion for sanctions, pending the mandate issuing. But, of course, the Court of Appeals did not stay all proceedings; instead, it explicitly stayed only the trial. Because this Court retains jurisdiction to entertain motions for sanctions and other collateral matters pending the mandate from the United States Court of Appeals for the Third Circuit, defendant's motion to vacate the scheduling order (doc. no. 480) will be denied.

Accordingly,

WECHT000000153

IT IS HEREBY ORDERED, this 14th day of June, 2007, that defendant's Motion to Vacate Order of June 11, 2007 (doc. no. 480) is **DENIED.**[2]

SO ORDERED.

s/ Arthur J. Schwab
Arthur J. Schwab
United States District Judge

cc: All counsel of record

[2] This Order rules only that this Court maintains continued jurisdiction over "pretrial" matters, and expresses no opinion as to the merits of the government's motion for sanctions or any other pending pretrial matters, nor as to the appropriate procedure for addressing the motion for sanctions (doc. no. 477). Plausible alternative procedures include referring the matter to the Office of Disciplinary Counsel for the Supreme Court of Pennsylvania for proceedings under that Court's Rules of Professional Conduct, or proceeding under Rule 83.3.5 of the Local Rules for the United States District Court for the Western District of Pennsylvania ("A. Reference to Counsel. When . . . allegations of misconduct which, if substantiated, would warrant discipline on the part of an attorney . . . shall come to the attention of a court, whether by complaint or otherwise, . . . the chief judge shall refer the matter to counsel for investigation and the prosecution of a formal disciplinary proceedings or the formulation of such other recommendation as may be appropriate."), or proceeding before this Court. Alternatively, the Court of Appeals might decide, in the exercise of that Court's supervisory authority, to appoint one of its Senior Judges or, perhaps, a Senior Judge from some other district court within the Third Circuit, to preside over said motion for sanctions.

WECHT000000154

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

UNITED STATES OF AMERICA	)	Criminal No. 06-26
	)	
v.	)	**Electronic Filing**
	)	
CYRIL H. WECHT	)	

GOVERNMENT'S REPLY IN SUPPORT OF MOTION FOR SANCTIONS

The government's goals are simple: a fair trial and a speedy trial.

In order to have a fair trial, all lawyers must abide by the court's orders and the local rules on extrajudicial statements, and must comply with their duties of candor. Unfortunately, defendant's counsel have not done so. This Court is the only authority that has the means to ensure counsel's future compliance with their obligations and the ability to protect the possibility of a fair trial.

In order to have the trial soon, this Court should hold a hearing immediately to ascertain defense counsel's compliance with their obligations and court orders, whether their non-compliance constitutes contempt of court, and what sanctions are appropriate and necessary to prevent further breaches. Holding such a hearing immediately is also consistent with the suggestion in the Third Circuit's panel decision at United States v. Wecht, 484 F.3d 194, 219-20 (3d Cir. 2007):

> Certainly, we do not approve of the practice of scheduling contempt proceedings in the midst of a hard fought case without immediately resolving the issue. It is possible that the shadow of such punishment may chill the zealous advocacy of defense counsel.

The government does not advocate creating any lingering shadow that might chill counsels' advocacy. Accordingly, the matter should not await conclusion of the trial or be referred to remain pending at the hands of a disciplinary counsel or outside disciplinary agency. The matter should be resolved by this Court at an immediate evidentiary hearing. Now is the time to end the circus, before it engulfs the case.

In this Reply, the government first discusses the fact that defendant's response does not rebut the central facts warranting sanctions. In the second section, the government examines the law related to contempt of court and sets forth the procedures and specific sanctions it believes would be most conducive to conducting a fair and speedy trial. Finally, the government briefly responds to the cross-allegations in defendant's response.

1. Defendant's Response Fails to Rebut the Central Facts Supporting Sanctions

The most significant aspect of defendant's response is what it lacks. It lacks any rebuttal of the central points in the government's motion for sanctions. There is no factual rebuttal of the fact that Mr. McDevitt made false extrajudicial statements about plea discussions that were substantially likely to materially prejudice the case, including his accusation that a call to Mark Rush was a pretext made at United States Attorney Mary Beth Buchanan's behest in order to chill defense counsel from commenting to Congress or the press in advance of Ms. Buchanan's Congressional testimony. There was no rebuttal of the fact that defense counsel's assertion that "[e]xactly none of the personnel at Carlow who were knowledgeable about agreements with Dr. Wecht were even interviewed before that odious and recklessly false charge was made[1]" was knowingly false when made in October of 2006 to the Court, and when repeated on the evening news on June 11, 2007.[2] Nowhere in the defendant's response or its attachments is any factual support for either of these assertions, or for the continued false assertion that this prosecution is politically motivated. Indeed, the instigator of these

[1] See October 3, 2006, Reply Brief in Support of Motion to Compel Discovery at 2, at Docket No. 455.

[2] See June 12, 2007, Notice of Filing DVD in Support of Motion for Sanctions, at Docket No. 479.

WECHT000000156

false missives, Jerry S. McDevitt, did not even submit an affidavit in response to the motion for sanctions.

Instead, Mr. McDevitt offers only the following explanation for his assertion about the call to Mark Rush:

> This is Mr. McDevitt's view about Ms. Buchanan's desire that there be no publicity about this case while she is speaking with Congress. Ms. Buchanan is an important public figure in the ongoing Congressional investigation into the alleged politicization of the Justice Department. The publicity concerning Ms. Buchanan s potential role has come from disparate sources. At least one former well respected former AUSA, Thomas Farrell, has openly called for her resignation. (Ex. 6) Another well-respected former United States Attorney, Fred Thieman, has made public statements criticizing the legal basis for the investigation of Mayor Tom Murphy. (Ex. 7) Indeed, the day before the June 7, 2007 article, it was revealed in the press that she had retained counsel for her appearance in Washington. (Ex. 8) Given the facts known to him, counsel expressed his view that she wanted no publicity on the Wecht case while she is before Congress. (The Motion would tend to support his view.) The opinion of counsel on such important matters is simply not subject to regulation and cannot be proven to be false or true.

See Defendant's Response to Motion for Sanctions at 11, at Docket No. 485. This position is truly remarkable, for it is wrong in three separate ways.

First, and most fundamentally, Mr. McDevitt's justification is wrong because his assertion can, indeed, be proven to be false or true. In fact, his assertion was proven false in the Motion for Sanctions and attached affidavit of Stephen S. Stallings:

> Again, Mary Beth Buchanan did not instruct me to approach counsel for defendant, and was not even aware that I had done so. The decision to do so was mine and mine alone. So the assertion in the June 7, 2007 Post-Gazette article by defendant's counsel that Mary Beth Buchanan initiated the request to meet because "[s]he wants make sure [defense counsel] keep [their] mouths shut while she's down there before Congress" is absolutely false.

See Exhibit "B" to Motion for Sanctions at ¶8, at Docket No. 477.

Second, the "opinions of counsel on such important matters" are most certainly "subject to regulation." Section C of Local Rule 83.1, which now provides "attorneys with examples of subjects that are likely to be materially prejudicial if spoken about," states in relevant part:

> C. From the time of arrest, issuance of an arrest warrant, or the filing of a complaint, information, or indictment in any criminal matter until the commencement of trial or disposition without trial, a lawyer or law firm associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement which a reasonable person would expect to be disseminated by (for dissemination by any) means of public communication, relating to that matter and concerning:
>
> * * *
>
> 4. The identity, testimony or **credibility** of prospective witnesses, except that the lawyer or law firm may announce the identity of the victim if the announcement is not otherwise prohibited by law;
> 5. The **possibility** of a plea of guilty to the offense charged or a lesser offense;
> 6. **Any opinion** as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.

Emphasis supplied.

Third, Mr. McDevitt did not qualify his statement as an "opinion," or a surmise, or a speculation, or a supposition. Rather he asserted the statement as a fact -- an assertion the government has now shown to be false and for which he has failed to provide a supporting affidavit or any other shred of support.

Mr. McDevitt's assertions to the Court and the media that no Carlow representatives were interviewed before indictment is also false, as Mr. McDevitt knew, and nothing in defendant's response provides any support for his assertion. Notably, Mr. McDevitt has repeated this particular falsehood on several occasions. As set forth in the motion for sanctions, he made the following assertion on October 3, 2006:

WECHT000000158

> Exactly none of the personnel at Carlow who were knowledgeable about agreements with Dr. Wecht were even interviewed before that odious and recklessly false charge was made.

See October 3, 2006, Reply Brief in Support of Motion to Compel Discovery at 2, at Docket No. 455. He repeated and embellished on this assertion on October 30, 2006:

> As the prosecution now knows, none of the persons actually involved in the establishment of the educational program at Carlow University being challenged by this prosecution were even interviewed before the charges were made and then emphasized as gospel truth at an ensuing press conference. The prosecution and Orsini did not even talk to Sister Grace Ann Geibel, a wonderful person, educator, and past President of Carlow, who originated the relationship with Dr. Wecht and Carlow. They did not even talk to the faculty or academic deans who put together what in reality is a remarkable one-of-a-kind educational program. They did not talk to any of these people until September of this year, when Agent Orsini, AUSA Stallings, and other members of the prosecution team interviewed the aforementioned people with knowledge for the very first time.

See Reply Brief at Docket No. 469. Interestingly, both this false statement about Carlow and the earlier false statement cited above were set forth in Reply briefs, to which the government had no ability to respond. However, when the government reviewed the October 30, 2006 Reply Brief, the government sent an e-mail to Mr. McDevitt and Mr. Rush demanding that the numerous false statements in the Reply be retracted, including, specifically, the false statements about Carlow. See Exhibit "D" to Motion for Sanctions at Docket No. 477. Nevertheless, despite having repeated the false statements on multiple occasions, and having been placed on actual notice of the falsity of the statements, Mr. McDevitt persisted in making such false statements to the media, including the following June 11, 2007 statement made, remarkably, after the government filed its motion for sanctions:

> Neither her nor any member of that prosecutorial team spoke to any member of Carlow University before making those charges, not one.

Nothing short of sanctions can hope to prevent such continued disregard for candor and compliance with local rule.

Finally, defendant's response provides no support whatsoever for counsels' continued assertions that this prosecution is politically motivated. It is not, and no affidavit or exhibit produced by defense counsel suggests otherwise.

While defendant's response fails to rebut the central facts warranting sanctions, it devotes much of its length to addressing, in a misleading fashion, the irrelevant details of plea negotiations that took place between Wecht's counsel and the government before indictment, including at a January 5, 2006, meeting at the United States Attorney's Office. Of course, defendant's decision to set forth their misleading account of the details of such negotiations is unfortunate, and improper. In rebuttal, the government is compelled to inform the Court that at the January 5, 2006, meeting, counsel for Wecht assured the government that they were interested in negotiating, in good faith, a pre-indictment resolution of the charges. In fact, at that meeting, Mark Rush indicated that a potential resolution might include Wecht agreeing to re-pay his clients, and might include Wecht agreeing to pay his outstanding tax liability. In other words, the January 5, 2006, meeting and surrounding discussions were, in part, plea negotiations, initiated by defense counsel.

Moreover, defendant's response is flat-out wrong when it suggests that the Department of Justice interceded to prevent defendant's arrest. Defendant's response goes to great lengths to detail the events of January 19, 2006, implying that Paul McNulty and his chief of staff led Mark Rush and Dick Thornburgh to believe the Department of Justice had interceded on the issue of defendant's arrest. However, as detailed in the attached affidavit of First Assistant United States Attorney Robert S. Cessar, and alluded to in the March 13, 2006, letter from Paul McNulty to Mr. Thornburgh,

defendant's response leaves out the most important facts and the most relevant day in the chronology. On January 18, 2006, a day before Mr. Thornburgh claims he sought Paul McNulty's intercession, Mr. Cessar telephoned Jerry Johnson in response to Mr. Johnson's January 17th letter requesting that defendant be permitted to self-report. See Affidavit of Robert S. Cessar at ¶ 7, attached as Exhibit "A". Mr. Cessar then informed Mr. Johnson that the government would seek a summons if defendant agreed to surrender his passport. Id. Mr. Johnson readily agreed. Id. Defendant's surrender of his passport to counsel ultimately became a formal condition of defendant's bond. Indeed, Mark Rush is well aware of this because he filed a motion in June of 2006 requesting that Mr. Johnson be permitted to transfer custody of the passport to Mr. Rush, in light of Mr. Johnson having stepped aside from his representation of defendant. See Motion for Transfer of Passport at Docket No. 195. Thus, the government and defendant's counsel reached an agreement on January 18, 2006, for defendant's voluntary surrender pursuant to summons. This agreement was reached prior to Mr. Thornburgh's efforts to obtain Mr. McNulty's intercession on the issue. Id. at ¶ 8.[3] In fact, Ms. Buchanan informed Mr. McNulty of this agreement on January 19, 2006. Id.

In light of the fact that defendant's counsel had reached an agreement with the government on January 18, 2006, for defendant's surrender, the conversations with Paul McNulty and his staff the next day, on January 19, 2006, do not and cannot show that the Department interceded on the issue; the issue of defendant's surrender had already been decided by the time Mr. Thornburgh contacted Paul McNulty, as defendant's counsel well-knew.

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[3]This chronology is further corroborated by the supplemental affidavit of Stephen S. Stallings at Exhibit "B," which sets forth that a Request for Summons, rather than an arrest warrant, was prepared and included in the indictment paperwork on January 18, 2006.

It is worth noting that the description of the alleged call from the Department of Justice to defendant's counsel on January 19, 2006, contained within defendant's response is materially different from the description contained within the supporting affidavits, and is grossly misleading at best. Defendant's response describes the contact from the Department of Justice like this:

> Mr. Thornburgh attests to the substance of a call with Mr. McNulty on January 19, 2006, and learning the next day that, although DOJ would not prevent the indictment, they had informed Ms. Buchanan that Dr. Wecht was not to be arrested.

A casual reader would be justified in concluding from this statement that Mr. Thornburgh was told by the Department of Justice that they had told the United States Attorney not to arrest defendant. But the actual text of Mr. Thornburgh's affidavit at ¶ 28 reads differently:

> On the morning of January 20, 2006, I was contacted **by Mr. Rush**, who advised that Mr. McNulty's Chief of Staff had contacted him, and advised that he and Mr. McNulty had spoken with Ms. Buchanan about the Wecht case. Mr. Rush further advised that he was told that they would not intervene on behalf of Dr. Wecht to delay the indictment. . . . Mr. Rush did advise that they had granted my request, and informed Ms. Buchanan that Dr. Wecht should be notified by summons in lieu of arrest warrant when he was, in fact, indicted.

So the actual text of Mr. Thornburgh's affidavit reveals that while he did "learn[] the next day" about a call from the Department, he learned about the call from **Mr. Rush**, not directly from the Department. The use of the passive voice in defendant's response creates the contrary misleading impression.

Moreover, Mr. Thornburgh's affidavit indicates that the better source for determining what the Department actually told defendant's counsel is Mr. Rush. In Mr. Rush's affidavit, at ¶¶ 18-19, he states merely:

> Later that day [January 19, 2006] I received a telephone call from an individual that identified himself as the Chief of Staff to Paul McNulty. He indicated that Mr. McNulty and Mr. Thornburgh had spoke earlier in the day, and that thereafter Mr.

> McNulty and he had a conversation with the United States Attorney Mary Beth Buchanan about the Wecht case. . . . he also advised that they took up with Ms. Buchanan the issue of self reporting versus arrest and, as a result, Dr. Wecht would be permitted to self-report in lieu of being arrested.

Even taking these two affidavits as completely true, Mr. Rush was told that the Department had discussed the issue of self-reporting with the United States Attorney and that defendant would be permitted to self-report. (This would not have been surprising to Mr. Rush since his co-counsel, Mr. Johnson, had reached an agreement with Mr. Cessar to allow self-reporting **the day before**.) Then, again taking these two affidavits as true, Mr. Rush embellished somewhat on this conversation by relaying to Mr. Thornburgh that "they had **granted my request**, and **informed Ms. Buchanan** that Dr. Wecht should be notified by summons in lieu of arrest warrant . . . ." This embellishment is dressed up further in the actual response brief as:

> Mr. Thornburgh attests to the substance of a call with Mr. McNulty on January 19, 2006, and learning the next day that, although DOJ would not prevent the indictment, they had informed Ms. Buchanan that Dr. Wecht was not to be arrested.

Defendant's counsel thus employ a nefarious version of "telephone tag" to morph Mark Rush's ambiguous description of an innocuous statement he could not possibly have interpreted as a statement that the Department had interceded (because the agreement to surrender had already been reached) into "proof" of such intercession.

The cherry on top of this misleading account is the March 13, 2006, letter from Mr. McNulty ("Paul") to Mr. Thornburgh ("Dick") attached as Exhibit 9-I to defendant's response. Defense counsel use this letter to argue, in "gotcha" style, that the government's account was incorrect, and itself sanctionable:

> Lastly, Mr. Thornburgh discloses the existence of a letter from Mr. McNulty, one which was evidently not sent to either Stallings or Ms. Buchanan, and perhaps not

known to them when crafting the testimonial position under oath that DOJ intercession did not occur. (Ex. 9, ¶ 30) In that letter, Mr. McNulty states to Mr. Thornburgh:

> Thank you for your letter dated December 20, 2005 regarding your client, Dr. Cyril Wecht. As you know, we discussed this matter on the phone shortly before the grand jury returned its indictment. I am glad that an agreement was reached to allow your client to surrender voluntarily. (Emphasis added)

(Ex. 9, ¶ 30, Attachment I)

The conclusion from all of this, although regrettable, is inescapable. Notwithstanding the affidavit of Stallings designed to create a contrary impression to support the notion that defense counsel are liars, Ms. Buchanan did in fact take the position that Dr. Wecht was to be arrested and her stated plan was, in fact, not carried out after contact with Mr. McNulty. To date, Ms. Buchanan has not filed an affidavit denying that she told counsel that Dr. Wecht would be arrested, nor swearing she never received a call from Mr. McNulty. Perhaps she will do so in a subsequent filing, which at most would give rise to an actual factual dispute. If she does not and the Government nonetheless stands by Stallings affidavit on this issue and its position that defense counsel have lied and misled the court and the public on this point, this Court should consider the appropriate sanctions against the appropriate representative of the Government.

See Defendant's Response to Motion for Sanctions at p. 15, at Docket No. 485.

However, Mr. McNulty's March 13, 2006, letter is easy to understand in light of the fact that "an agreement was reached to allow [defendant] to surrender" on January 18, 2006, before Mr. Thornburgh called Mr. McNulty. The March 13, 2006, letter does not, in any way, show that the Department interceded to force the decision.

Yet there can be little question that, as a rhetorical device designed to create that "gotcha" impression, defendant's passage succeeded wildly. For example, the account of defendant's response on the front page of the Pittsburgh Post-Gazette left the indelible impression that the government had it wrong:

> Following that conversation, on Jan. 19, Mr. Thornburgh called Paul McNulty, deputy attorney general, in Washington, D.C., to try to stave off an indictment. If that wasn't possible, Mr. Thornburgh, the former attorney general, requested that Dr. Wecht be allowed to turn himself in. Later that evening, Mr. Thornburgh recounted, a staff person from Mr. McNulty's office called Mr. Rush and said they would not intervene in the indictment but that they had spoken with Ms. Buchanan, and there would be no physical arrest. In addition to an affidavit from Mr. Rush, the defense team attached to its filings yesterday a letter from Mr. McNulty, written March 13, which was informally addressed to "Dick: As you know, we discussed this matter on the phone shortly before the grand jury returned its indictment. I am glad that an agreement was reached to allow your client to surrender voluntarily." In the government's motion for sanctions, Mr. Stallings vehemently denied that the Justice Department was involved in the decision to allow Dr. Wecht to self-report.

See June 16, 2007, Front Page Article in the Pittsburgh Post-Gazette. The actual facts are, of course, that defense counsel knew before Mr. Thornburgh ever sought intercession from Mr. McNulty that defendant would not be arrested, and thus that defense counsel's claims that the Department had to intercede to prevent defendant's arrest and "perp-walk" are yet another example of their efforts to mislead the Court and the media.

III. The Appropriate Legal Framework, Procedures and Sanctions

The Court's power to punish contemptuous conduct arising from violations of court orders and false statements is well-established. "To prove civil contempt the court must find that (1) a valid court order existed, (2) the defendant had knowledge of the order, and (3) the defendant disobeyed the order." John T. ex rel. Paul T. v. Delaware County Intermediate Unit, 318 F.3d 545, 552 (3d Cir.2003) (citations and quotations omitted). These "elements must be proven by clear and convincing evidence, and ambiguities must be resolved in favor of the party charged with contempt." Id. (citations and quotations omitted).

The local rules impose on attorneys appearing before this Court a duty of candor to the tribunal and opposing counsel, and prohibit extrajudicial statements substantially likely to materially

WECHT000000165

prejudice the trial. Defendant's counsel are clearly on notice of such rules, as they have been heavily litigated in this matter. Violations of the local rules may be punished as contempt of court.

As set forth in the proposed order to the motion for sanctions, the government suggests the best procedure would be to schedule an immediate evidentiary hearing to determine whether Mr. Rush and Mr. McDevitt should be held in contempt for the extrajudicial statements and false statements set forth in the motion. The government believes an appropriate sanction could include a fine and injunction against further violations, with any subsequent violations punishable by summary criminal contempt under Rule 42(b) of the Federal Rules of Criminal Procedure.

In a footnote to the Court's Order denying defendant's motion to vacate the briefing schedule, the Court references Section 83.3.5 of the Local Rules, relating to referrals of misconduct allegations to the disciplinary counsel for the Western District. However, Local Rule 83.3.11 additionally provides:

> LR 83.3.11 RETENTION OF CONTROL
> Nothing contained in these rules shall be construed to deny to this court such powers as are necessary for the court to maintain control over proceedings conducted before it, such as proceedings for contempt under Title 18 of the United States Code or under Fed.R.Crim.P. 42.

The government submits that this Court is the only entity able to the expeditiously and appropriately control the proceedings such that a fair and speedy trial remains possible. If this matter were referred, the investigation could take significant time. During the pendency of any referred investigation, counsel would be under precisely the shadow the Third Circuit cautioned against.

III. Defendant's Cross-Allegations are Frivolous and Not Properly Framed

A great portion of defendant's response brief is devoted to accusing the United States Attorney of herself violating the local rule in her press conference. As a threshold matter, the cross-

WECHT000000166

allegations have not been brought properly before the Court. As a practical matter, the allegations are frivolous, because prosecutors are permitted by the local rule to announce the indictment, discuss the nature of the charges, and elicit evidence and information from potential victims.[4] Ms. Buchanan's comments were all squarely within the provisions of the local rule.

Perhaps the surest proof of the disingenuousness of these cross-allegations is that Richard Thornburgh himself has conducted countless similar press conferences in his prosecutorial roles. Attached as Exhibit "C" are copies of news reports of several of these press conferences, including:

- October of 1988:("The announcement of the arrests by federal and local police was made in Washington by Attorney General Dick Thornburgh as U.S. attorneys around the country made public the indictments of hundreds of alleged drug traffickers. The indictments were returned by federal grand juries late last month, but sealed while police moved to arrest as many of the suspects as possible. A total of 435 arrest warrants were issued in 20 metropolitan areas. Thornburgh said the Jamaican gangs were 'among the largest traffickers in crack cocaine,' adding that the posses 'have staked out a large piece of the nation's drug and firearms trafficking' through murder, kidnaping, robberies, assaults, domestic and international gun trafficking, money laundering and fraud. Crack is a cocaine derivative that can be bought cheaply'")
- March of 1989:("Announcing the charges on Wednesday, Mr Dick Thornburgh , the US Attorney General said indictments by a federal grand jury in Atlanta accused the Banco de Occidente of Panama and the Banco de Occidente of Colombia of conspiring to transfer funds from the US to foreign accounts controlled by Colombia's Medellin cocaine cartel. . . . Mr Thornburgh said 127 people have been charged in what he described as 'the largest money-laundering crackdown ever carried out by the federal government.'")

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[4]See Local Rule 83.1 ("The foregoing shall not be construed to preclude the lawyer or law firm during this period, in the proper discharge of his/her or its official or professional obligations, from announcing the fact and circumstances of arrest (including time and place of arrest, resistance, pursuit, and use of weapons), the identity of the investigating and arresting officer or agency, and the length of the investigation; from making an announcement, at the time of seizure of any physical evidence other than a confession, admission or statement, which is limited to a description of the evidence seized; from disclosing the nature, substance, or text of the charge, including a brief description of the offense charged; from quoting or referring without comment to public records of the court in the case; from announcing the scheduling or result of any stage in the judicial process; from requesting assistance in obtaining evidence; or from announcing without further comment that the accused denies the charges made against him/her.")

- April of 1989: (""Today's indictments highlight the growing problem of the illegal use of anabolic steroids and the abuse of them by college athletes,"Attorney General Dick Thornburgh said in a prepared statement.")
- June of 1989: ("At the time of the indictment, U.S. Attorney General Richard Thornburgh said a half-ton of cocaine had been confiscated and more than $45 million in cash, jewelry and real estate had been seized from the money-laundering ring, which was based in Los Angeles.")
- August of 1989: (Mr. Thornburgh announces charges against Chicago traders, to the criticism of defense lawyers who complained about his "blasts of publicity")
- November of 1989: (Mr. Thornburgh announces that an indictment involved "the theft of more than $1 million from HUD" and indicates that the investigation may result in additional charges)
- December of 1989: ("U.S. Attorney General Dick Thornburgh called the indictment and arrests 'a notable victory against international consumer fraud, money laundering and smuggling.'")

Mr. Thornburgh, of course, like Ms. Buchanan, was doing nothing wrong at these press conferences.

MARY BETH BUCHANAN
United States Attorney

By: S/STEPHEN S. STALLINGS
STEPHEN S. STALLINGS
Assistant U.S. Attorney
Fla. Bar No. 958859

WECHT000000168

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Government's Reply in Support of Motion for Sanctions was served by ECF filing to and upon the following:

Richard L. Thornburgh, Esq.
Kirkpatrick & Lockhart Nicholson Graham LLP
1800 Massachusetts Avenue, N.W.
Washington, DC 20036-1221.

Mark A. Rush, Esq.
Jerry S. McDevitt, Esq.
Kirkpatrick & Lockhart Nicholson Graham LLP
Henry W. Oliver Bldg.,
535 Smithfield Street
Pittsburgh, PA 15222-2312

S/STEPHEN S. STALLINGS
STEPHEN S. STALLINGS
Assistant U.S. Attorney

WECHT000000169

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

UNITED STATES OF AMERICA	)	Criminal No. 06-26
	)	
v.	)	
	)	
CYRIL H. WECHT	)	

AFFIDAVIT OF FIRST ASSISTANT UNITED STATES ATTORNEY ROBERT S. CESSAR IN SUPPORT OF MOTION FOR SANCTIONS

The undersigned, being duly sworn, deposes and says:

1. My name is Robert S. Cessar, and I am the First Assistant United States Attorney for the Western District of Pennsylvania.

2. I am one of several Assistant United States Attorneys assigned to the matter of United States v. Cyril H. Wecht, at Case No. 06-26. Stephen S. Stallings and James R. Wilson, Assistant United States Attorneys, have also been assigned to handle aspects associated with the indictment and trial of this matter. Robert Eberhardt, Assistant United States Attorney, has been assigned to handle aspects associated with various appeals of this matter. The United States Attorney, the Criminal Chief, and the former Deputy Chief of the White Collar Crimes Section of the United States Attorney's Office have also been involved in various aspects of this matter. This affidavit is based solely on my personal knowledge, and does not speak for any of the other persons from our office involved in this matter.

3. On January 5, 2006, I participated in a meeting with Cyril Wecht's counsel and representatives of the United States Attorney's Office. Representing Mr. Wecht were Richard Thornburgh and Mark Rush. The United States was represented by United States Attorney Mary Beth Buchanan, Assistant United States Attorney Stephen Stallings, FBI Special Agent Bradley Orsini and IRS CI Agent Robert Elias. One of the issues addressed during the meeting was whether the government would seek an arrest warrant or a summons if an indictment was

returned. Our office had legitimate concerns about Mr. Wecht's retention of his passport and the possibility of his risk of flight if indicted. United States Attorney Buchanan raised this issue with defense counsel. At no point during the meeting did Ms. Buchanan state that a decision had been made to seek an arrest warrant of Mr. Wecht.

4. On January 17, 2006, Mr. Wecht's counsel, J. Alan Johnson, authored a letter to United States Attorney Mary Beth Buchanan. I also received a copy of the letter. The letter was hand delivered to our receptionist that day.

5. The letter requested that if indicted, Mr. Wecht would "be notified by Summons in lieu of an Arrest Warrant pursuant to Federal Rule of Criminal Procedure 9(a) and (b)(2)."

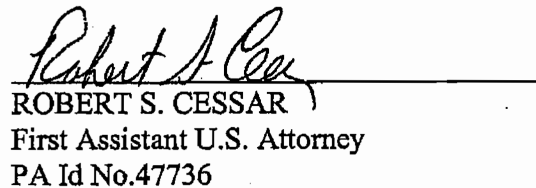
6. I received a copy of the letter late in the afternoon of that day. The next morning, January 18, 2006, I discussed the letter with Assistant United States Attorneys Stephen Stallings and James Wilson. We decided to recommend to United States Attorney Buchanan that we seek a summons rather than an arrest warrant if Mr. Wecht would surrender his passport. I subsequently spoke with Ms. Buchanan, who agreed that we would seek a summons if Mr. Wecht agreed to surrender his passport. Ms. Buchanan requested that I discuss and resolve this issue with Attorney Johnson.

7. In the early afternoon of January 18, 2006, I called Attorney Johnson and informed him that we would seek a summons if Mr. Wecht agreed to surrender his passport. Mr. Johnson readily agreed and we mutually decided that if Mr. Wecht would provide his passport to Mr. Johnson for safekeeping, we would not seek an arrest warrant. Mr. Johnson assured me that he would obtain the passport from Mr. Wecht forthwith.

8. On January 19, 2006, I participated in a call between United States Attorney Buchanan and Acting Deputy Attorney General Paul McNulty which discussed the pending indictment of Mr. Wecht. There also was a discussion of an arrest warrant or summons. Ms.

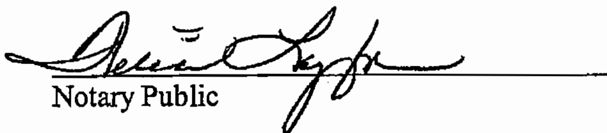
Buchanan informed Mr. McNulty that we had decided to seek a summons since Mr. Wecht had agreed to surrender his passport.

9. On February 10, 2006, Mr. Wecht was arraigned in this matter. As one of the conditions of release, Attorney Johnson maintained control of Mr. Wecht's passport. In June of 2006, control of the passport was given to current counsel, Mark A. Rush.



ROBERT S. CESSAR
First Assistant U.S. Attorney
PA Id No.47736

Sworn and subscribed to this
19th day of June, 2007.



Notary Public

COMMONWEALTH OF PENNSYLVANIA
Notarial Seal
Felicia Langford, Notary Public
City Of Pittsburgh, Allegheny County
My Commission Expires Feb. 12, 2009
Member, Pennsylvania Association of Notaries

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

UNITED STATES OF AMERICA	)	Criminal No. 06-26
	)	
v.	)	
	)	
CYRIL H. WECHT	)	

**SUPPLEMENTAL AFFIDAVIT OF
ASSISTANT UNITED STATES ATTORNEY STEPHEN S. STALLINGS IN
SUPPORT OF MOTION FOR SANCTIONS**

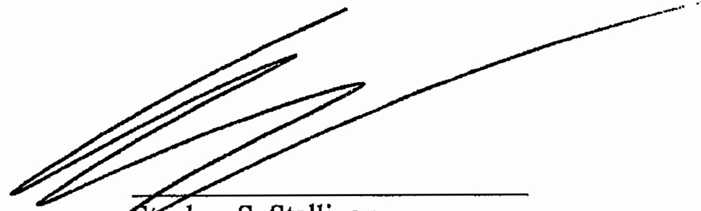
The undersigned, being duly sworn, deposes and says:

1. My name is Stephen S. Stallings, and I am an Assistant United States Attorney for the Western District of Pennsylvania.

2. I am one of several Assistant United States Attorneys assigned to the matter of *United States v. Cyril H. Wecht*, at Case No. 06-26. Robert S. Cessar, First Assistant United States Attorney, and James R. Wilson, Assistant United States Attorney, have also been assigned to handle aspects associated with the indictment and trial of this matter. Robert Eberhardt, Assistant United States Attorney has been assigned to handle aspects associated with various appeals of this matter. The United States Attorney, the Criminal Chief, and the Deputy Chief of the White Collar Crimes Section of the United States Attorney's Office have also been involved in various aspects of this matter. I make this affidavit from my personal knowledge. This affidavit is based solely on my personal knowledge, and does not speak for any of the other persons from our office involved in this matter.

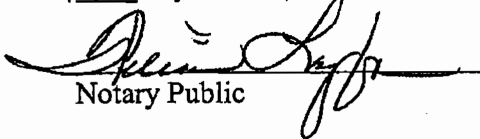
3. The paperwork necessary to obtain approval for seeking an indictment in our office must be prepared in advance of appearing before the Grand Jury. Various documents within this

paperwork package indicate whether or not an arrest warrant, versus a summons, will be requested for the defendant. The indictment paperwork for Cyril H. Wecht indicated that a summons, rather than an arrest warrant, was to be sought. The Request for Summons within the paperwork package was prepared on January 18, 2006. In addition, I have reviewed the electronic versions of the indictment paperwork package for Cyril H. Wecht and confirmed that the last edit, of any nature, to that package occurred at 9:21 a.m. on January 19, 2006.



Stephen S. Stallings
Assistant U. S. Attorney
Fla. Bar No. 958859

Sworn and subscribed to this
19th day of June, 2007.



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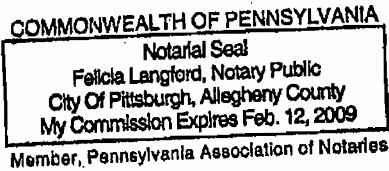

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	
v.	)	**Criminal No. 06-0026**
	)	**Electronically Filed**
CYRIL H. WECHT	)	

ORDER OF COURT REFERRING MOTION FOR SANCTIONS (DOC. NO. 477) TO THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA

Pending before this Court is a Motion for Sanctions (doc. no. 477) (with supporting brief - doc. no. 478) filed on behalf of the United States of America, Defendant's Response thereto with supporting attachments (doc. no. 485), and the Government's Reply (doc. no. 486). The Motion for Sanctions alleges that counsel for defendant have repeatedly violated Rule 3.6 of the Pennsylvania Rules of Professional Conduct, relating to extrajudicial statements in the above criminal case, and requests this Court to consider the motion, to find that counsel have violated the Pennsylvania Rules of Professional Conduct, and thereafter to issue appropriate sanctions. Counsel for defendant deny that they have violated the Pennsylvania Rules of Professional Conduct in any way, and suggest that the government's attorneys have themselves violated the rules with regard to extrajudicial pretrial publicity.

Whether or not the extrajudicial statements of counsel violate Rule 3.6, in whole or in part, is not only important to the parties and counsel in this case, it is also of significant interest to attorneys admitted to practice in the state and federal courts in the Commonwealth of Pennsylvania, and to the public.

Since defendant's counsel are admitted to practice before the Supreme Court of Pennsylvania, and their admission to this Court was based thereon, and since the Local Rules with regard to attorney practice before the United States District Court for the Western District of

Pennsylvania adopt the Rules of Professional Conduct as adopted by the Supreme Court of Pennsylvania, LR 83.3.1(B), this Court respectfully requests the Disciplinary Board of the Supreme Court of Pennsylvania to consider the government's complaint and determine whether or not the Pennsylvania Rules of Professional Conduct have been violated by counsel for defendant, and, if so, determine an appropriate sanction.[1] This issue and these attorneys are within the express jurisdiction of the Disciplinary Board,[2] which has exceptional expertise and experience, and specialized staff and procedures, to investigate complaints about attorneys and to take the appropriate action, and the Supreme Court of Pennsylvania specifically created the Disciplinary Board to handle such matters.

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[1] As stated by the Disciplinary Board of the Supreme Court of Pennsylvania:

> "Every licensed attorney in Pennsylvania takes an oath to abide by the Rules of Professional Conduct. These rules define proper and improper conduct for a lawyer handling legal matters. A lawyer who violates these rules may be disciplined and given penalties ranging from a private reprimand to a loss of privilege to practice law."

[2] The "Jurisdiction" of the Disciplinary Board of the Supreme Court of Pennsylvania is stated in Section 85.3 as follows:

> "(a) *General rule.* Enforcement Rule 201(a) provides that the exclusive disciplinary jurisdiction of the Supreme Court and the Board under the Enforcement Rules extends to:
>
> (1) Any attorney admitted to practice law in this Commonwealth.
> (2) Any attorney of another jurisdiction specially admitted by a court of this Commonwealth for a particular proceeding."
>
> * * *

Accordingly, the government's Motion for Sanctions (Doc. No. 477) is **HEREBY REFERRED** to the Disciplinary Board of the Supreme Court of Pennsylvania for its consideration in due course, in accordance with its rules and procedures.

SO ORDERED this 20th day of June, 2007.

Arthur J. Schwab
United States District Judge

cc: All counsel of record

District IV Office
Office of Disciplinary Counsel
The Disciplinary Board of the
Supreme Court of Pennsylvania
Frick Building, Ste. 1300
437 Grant Street
Pittsburgh, PA 15219
(with attachments:
doc. nos. 477, 478, 485, 486)

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