RECORD NO. 11-5130

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN R. McLEAN,
Defendant-Appellant.

REPLY BRIEF OF APPELLANT JOHN R. McLEAN

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, NORTHERN DIVISION

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INTRODUCTION

The government claims that its evidence at trial "proved that the Defendant intentionally implanted scores of medically unnecessary stents in his patients." (GB/1)[1] However, this overstatement bears little resemblance to the proof the government offered at trial.

The evidence established that Dr. McLean performed approximately 700 stent procedures between 2003 and 2006. (JA 2455-95) Yet, the indictment focused on only six individual patients – five were the subject of trial evidence. The conduct relating to one, HW, was dismissed from the indictment by the government on the morning of trial. (JA 6) Of the five individuals identified in the indictment, the evidence was unequivocal as to only a single one – AW – who the defendant's expert agreed received an unnecessary stent. The remaining four were the subject of contradictory expert testimony. Indeed, while the government's expert, Dr. Gilchrist, testified that the stents received by these four patients were unnecessary (JA 353, 354, 360 & 366), the defense expert, Dr. Marmur, found that the stents were implanted to

[1] References to the Government's Brief will be cited as (GB/pg), references to Dr. McLean's opening brief will be cited as (MB/pg).

address borderline lesions and that they were within the standard of care. (JA 2108-09, 2110, 2111 & 2119)[2]

In addition to these five individual patients, Dr. Gilchrist, opined that another 54 individuals received unnecessary stents. (JA 366 & 2502-08) Thus, while Dr. Gilchrist addressed a total of 59 inappropriate stent procedures, these procedures represent a small fraction of the 700 procedures Dr. McLean performed during the relevant period. Even viewing Dr. Gilchrist's testimony in the light most favorable to the government, only approximately 8.5% of Dr. McLean's stent procedures may have been inappropriate. This rate is substantially lower than the 12% inappropriateness rate[3] established by the Chan Study[4] of 145,000 stent procedures across the United States. (MB/6)

In light of this, it is difficult to see how the government can brazenly claim that it "proved" that Dr. McLean implanted "scores" of unnecessary stents. To do so the

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[2] The government's fact/expert witness, Dr. Cinderella, included these four patients in his summary chart, but did not specifically address any of them in his testimony.

[3] According to Dr. Gilchrist the Chan Study found procedures "inappropriate" where they involved "stenting arteries that didn't have lesions, stenting arteries that had less than 50 percent, stenting arteries that were nonocclusive, that type of thing." (JA 466)

[4] *See* P. Chan, et al, *Appropriateness of Percutaneous Coronary Intervention*, 306 JAMA 53, 57 (2011) ("Chan Study").

government relies entirely on the summary testimony of Dr. Joseph Cinderella. Indeed, in describing Dr. Cinderella's testimony the government's overstatement reaches a new zenith. The government claims: "Dr. Cinderella subsequently reviewed every stent procedure conducted by the Defendant from early 2003 through the summer of 2006, and **testified that, in his opinion, approximately half of all stents done by the Defendant were medically inappropriate**." (GB/11)(emphasis added) The record does not support this statement.

Dr. Cinderella testified that in his opinion approximately 101 stents (inclusive of the ones addressed by Dr. Gilchrist) were unnecessary. (JA 2496-2501) He rated these procedures as "5s" a category he described as "inappropriate" or "inappropriate by usual criteria." (JA 727)

Dr. Cinderella also mentioned an additional group of patients that he placed in category 4 – which he said were "more questionable, probably not okay." (JA 727) He further stated "I think the 5s and for the most part the 4s were pretty black and white. I think there would be a small minority of physicians who might feel one or two of those, perhaps, might be reasonable. But I think, by and large, the 4s and particularly the 5s would be unreasonable." (JA 724) This testimony, along with a summary exhibit listing the patients and their ratings, was the sum total of the trial evidence relating to this group of patients

Significantly, Dr. Cinderella did not provide specific testimony about any of these patients. He also acknowledged that his review was conducted as part of the PRMC risk assessment process and was not accompanied by the rigors of the peer review process. (JA 734)

As noted in Dr. McLean's opening brief, even accepting Dr. Cinderella's number, the rate of "inappropriate" stents – those in category 5 – would be approximately 15%, which is only slightly higher than the rate established by the Chan study. (MB/6)

The government is clearly relying upon both the Cinderella "4s" and "5s" to make its claim that Dr. Cinderella testified that "half" of Dr. McLean's stents were inappropriate. But even those numbers do not add up. At best, the evidence relied upon by the government could provide cover for a claim that Dr. Cinderella testified that 30% of the stents were questionable. There is simply no record support for the government's claim of "half."[5]

The government's exaggeration of its trial evidence is not surprising in light of the issues that this Court is called upon to decide in this appeal. It is also not

[5] The government cites to page 705 of the Joint Appendix in support of its claim. That reference, however, is to a discussion by Dr. Cinderella of the sample of 25 to 30 cases pulled during the peer review process.

surprising given the government's effort throughout trial to present the jury with a one-sided view of the evidence. In particular the issues of trial error relating to the district court's limitation of the testimony of the defendant's cardiology expert and the government's suppression of favorable impeachment evidence turn, in large, part on whether the defendant was prejudiced and the strength of the government's other evidence plays some role in that determination. Contrary to the government's claim, the evidence against Dr. McLean was not overwhelming. As a result, the issues raised in this appeal are ripe for this Court's careful attention and consideration.

ARGUMENT

I. VAGUENESS

The government attempts to dismiss the constitutional vagueness concerns out-of-hand suggesting that this is a garden-variety health care fraud case. According to the government, "[although] the health care fraud statute does not (and could not) specify the innumerable fraud schemes one may devise, a person of ordinary intelligence would understand Defendant's conduct to be the very conduct contemplated by 18 U.S.C. § 1347." (GB/35) (*quoting United States v. Franklin-El*, 554 F.3d 903, 910-11 (10th Cir 2009)). The government's argument, however, misses the mark.

This is an as-applied challenge. Dr. McLean acknowledges that an individual can violate the health care fraud statute, 18 U.S.C. §1347, in a number of ways that do not raise the void-for-vagueness issue present in his prosecution. The issue here is whether Dr. McLean's due process rights have been violated by convicting him of health care fraud due to his medical judgments about implanting coronary artery stents where the "medical necessity" of those judgments is called into question solely by the testimony of a government expert. As Dr. McLean addressed in detail in his opening brief, there is no bright-line rule or "magic number" for a coronary artery blockage to warrant placement of a stent. Indeed, the only guidance as to "medical necessity" in this context is provided by flexible professional practice guidelines. (MB/26) The medical necessity standard is not fixed by statute, rule, or regulation.

A. This case is unlike *Janati* and *Franklin-El*

The government primarily relies on *United States v. Janati*, 237 Fed.Appx. 843 (4th Cir. 2007) (unpublished), when arguing that Dr. McLean's vagueness challenge should be rejected. Unlike Dr. Janati, Dr. McLean's case involves only medical procedures that were, in fact, rendered. Here the critical inquiry under the health care fraud statute is whether Dr. McLean's medical judgments about implanting stents were appropriate, questionable, or fraudulent.

In contrast, Dr. Janati billed for tests never conducted, he upcoded those services he did provide, and inflated the number of performed tests. *Id.* at 267. As a result, the government demonstrated clear scienter that Dr. Janati acted knowingly. Dr. Janati had access to a manual detailing which billing codes were appropriate; he had used the appropriate billing codes for years until changing his practice; he billed *every* visit at the highest billing level; and Dr. Janati continued using improper billing codes even after Medicare officials specifically warned him to stop using the improper codes. *Id.*

This case is different. Dr. McLean did not have access to any analogue to a CPT manual in *Janati*—indeed no manual exists for cardiac stenting as Medicare defers to professional practice guidelines and the physician's judgment. There was also no proof that Dr. McLean stented even a majority of patients, unlike Dr. Janati who billed every visit at the highest level. Indeed, the evidence revealed that Dr. McLean stented only approximately 16 out of every 100 patients in his practice. (JA 1304), and that that vast majority (85%) of the stents he implanted were appropriate.

Similarly, in *United States v. Franklin-El*, 554 F.3d 903 (10th Cir. 2009), the Court rejected an "as-applied" challenge where the defendants billed Medicaid for providing drug abuse treatment to very young children; billed for services never

rendered; and had their clients sign blank attendance logs. *Id.* at 906.[6] Clearly, the cases relied upon by the government do little to inform the Court's inquiry here.

B. "Not insubstantial concerns"

Recently in *United States v. Patel*, No. 09-30490, 2012 WL 3289956 (5th Cir. Aug. 13, 2012), the Fifth Circuit recognized the seriousness of the vagueness argument in the context of a health care fraud case based upon the medical necessity standard for coronary artery stents.[7] While declining to find the health care fraud statute vague-as-applied to Dr. Patel, the Court noted Dr. Patel's arguments that "judgments may be quite subjective and be based on observations that misdiagnose arterial blockage by a wide margin of error," showed that the concerns raised, liked the ones raised here, were "not insubstantial [ ] as 'all persons are entitled to be informed as to what the state commands or forbids.'" 2012 WL 3289956 at *3. (citing *F.C.C. v. Fox Television Stations, Inc.,* 132 S. Ct. 2307, 2317 (2012).

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[6] The government also cites *United States v. Sachakov*, 812 F. Supp. 2d 198 (E.D.N.Y. 2011) to support its argument. While the district court in *Sachakov*, rejected the vagueness claim, it did so based upon *Janati* and *Franklin-El* with little additional discussion and none of the factual analysis that usually accompanies the consideration of an as-applied vagueness challenge.

[7] The *Patel* case was under submission to the Fifth Circuit at the time of Dr. McLean and the government's initial briefing in this appeal. The case was decided on August 13, 2012.

In denying relief, the Fifth Circuit avoided the difficult vagueness question stating: "We need not decide on this appeal whether the standard of 'medical necessity' furnishes adequate notice for criminal liability beyond the facts of this case. Dr. Patel admitted in his testimony that medical necessity was personally intelligible as applied to the procedures underlying his convictions." *Id.* The Court cited trial testimony from Dr. Patel acknowledging that lesions of 30% or less should not be stented. Based upon this testimony, the Court concluded that "the concept of medical necessity meant something concrete for Dr. Patel, and he did not have to guess at its contours." *Id*. (internal citations omitted).

In contrast to the *Patel* case, here, the record is devoid of any evidence regarding Dr. McLean's understanding of when a coronary artery stent placement would be inappropriate. The government relies on a letter written by Dr. McLean during the peer review process to suggest that he adopted a 70% standard. (GB/37) In that letter Dr. McLean notes, "[t]here is subjectivity regarding the degree of stenosis, but standard practice is a lesion above 70% is felt to be significant and does receive intervention." (JA 2606) The government's reliance on the letter is unavailing. The letter adds nothing to the effort to determine the lower threshold for medical necessity or to assess Dr. McLean's understanding of that threshold. The letter does little more than acknowledge that a 70% blockage clearly justifies the placement of a stent. In

the absence of record evidence regarding Dr. McLean's understanding of the lower threshold of medical necessity, this Court must address "whether the standard of 'medical necessity' furnishes adequate notice for criminal liability" in a prosecution of a cardiologist for his medical stenting decisions. *See Patel*, 2012 WL 3289956 at *3.

C. Specific intent does not cure the vagueness problem

The government claims the health care fraud statute's requirement of "specific intent" or "scienter" sufficiently addresses any vagueness issue. (GB/36-37) The Supreme Court's decision in *Skilling v. United States*, 130 S.Ct. 2896 (2010), however, suggests the government reliance upon the intent standard as a savior is misplaced.

Like health care fraud, mail fraud is a "specific intent" crime. Despite the same specific intent standard, the *Skilling* majority found the "honest services" statute raised "due process concerns" under "the vagueness doctrine," and saved the statute only through narrowly defining "honest services." *Id.* at 2931.

The definition of "medical necessity," and what is prohibited as "medically unnecessary" in this health care fraud case, presents the same problem addressed in *Skilling* with regard to defining what conduct violates the "honest services" fraud provision. There is little reason to see the "intent" or "scienter" issue as more helpful in this case than it was in *Skilling*.

Moreover, specific intent or scienter requires two elements: (1) that the defendant knew the standard and (2) that the defendant knowingly violated the standard. *See Screws v. United States*, 325 U.S. 91, 101-102 (1945). The government's proof at trial did nothing to establish either (1) a clearly defined and previously articulated standard for when a stent is medically necessary or (2) Dr. McLean's knowledge of such a standard. The government attempts to argue that the standard was "known" in the medical community. According to the government, "there *was* a generally accepted medical standard for the medical use of cardiac stents." (GB/37) (emphasis in original). Indeed, the government has continued to claim that "it is generally accepted in the medical community that a cardiac stent is not medically necessary unless there is 70% stenosis and symptoms of blockage." (GB/37)

The government's own brief undermines this "generally accepted medical standard." According to the government, "in the 'borderline' range between 50% and 70% stenosis, if there is any doubt that a stent is necessary, a doctor should not perform the procedure." (GB/38) The conflict in these statements demonstrates the vagueness problems associated with determining when cardiac stenting is medically necessary. On the one hand, the government claims that it is "not medically necessary" to perform a stent if there is less than 70% stenosis. On the other hand, the

government's brief acknowledges that stents may be necessary when there is between 50% and 70% stenosis. These statements are wholly inconsistent and further exacerbate the vagueness problem here.

Indeed, the government's prosecution of Dr. Patel further undermines its reliance on a "generally accepted" 70%-medical-necessity-magic-number standard. In the government's principal brief in *Patel*, it explained that stenting patients with 50-70% stenosis may be medically necessary and is "left open for clinical judgment on the part of the individual physician balancing the totality of the patient's picture." (Patel Brief at 8).

In sum, the prosecution of Dr. McLean comes down to a debate between his treatment decisions regarding his patients and the latter-day judgments of the government's medical experts. This cannot be a constitutionally acceptable standard upon which to impose criminal liability. In light of the moving standards of medical appropriateness within the government's evidence a trial and paying particular note to the fact that even the 50% standard discussed above is the result of a professional practice **guideline** – not a rule, regulation, or statute, the government's prosecution of Dr. McLean presents an insurmountable vagueness-as-applied problem and his conviction should be reversed.

II. SUPPRESSION OF MATERIAL IMPEACHMENT INFORMATION

In arguing to uphold the district court's ruling on the motion for a new trial based upon nondisclosure, the government argues that the undisclosed information was not "favorable" or "material." (GB/54) Indeed, the government goes further and argues that "it cannot be said that the government suppressed the information in question." (GB/54, n. 13) The government suggests that it did not suppress the PRMC settlement information because (1) the settlement was not finalized prior to trial and (2) the defense counsel did not specifically ask for the information. *Id.*

Despite the government's protestations to the contrary, there is no question that the government made an intentional decision not to make the PRMC settlement known prior to the criminal trial. The record before both the district court and this Court demonstrate that the government was aware of the information – the on-going settlement discussions and the verbal agreement to settle the PRMC false claims investigation. Indeed, the government has specifically acknowledged that it actively considered the timing of the settlement with the criminal trial in mind and affirmatively decided not to announce the settlement to the public or defense counsel until after the criminal trial. (JA 2943-44) It is hard to see how this intentional decision not to make the PRMC settlement public, or to provide any related information in discovery, does not amount to suppression.

The government also notes that defense counsel did not ask for this information. At the outset of discovery, the defense was required to sign a standard discovery agreement with the government which specifically acknowledged the government's discovery obligations. This is not a situation in which the government can blame its decision not to provide this information on any failure of diligence by the defense.

The government also argues that the Dr. McLean has failed to proffer the ways in which the impeachment material would have been used at trial. (GB/54) Dr. McLean has made clear that the primary value of this information would have been the ability to question the three physician witnesses about possible bias or desire to ensure that the government was going to find their testimony acceptable. It is significant that the government's press release noted that "senior medical staff," presumably including the three physicians who testified, Drs. Lawrence, Wieland and Cinderella, "to follow up" on complaints. (JA 2678) Notably, the government has not argued that these three physicians were not among the "senior medical staff" members referred to in the press release.

The defense's questioning of these witnesses would have been aimed at addressing the government's allegation (set forth in the press release) that they had some individual liability or fault in failing to act in response to the McLean situation, that their lack of action (a picture contrary to the one created by their testimony at trial

which suggested diligence) indicates that they found the complaints about Dr. McLean incredible or unworthy of belief, and that they and the hospital they worked for, or worked in, had something to gain ensuring that the government felt they had cooperated in the government's prosecution of Dr. McLean. Defense counsel was deprived of the ability to intelligently address these issues during cross-examination because the government failed to make Dr. McLean aware of its negotiations and settlement with PRMC and its allegations relating directly to the physician witnesses the government called at trial.

These issues become even more significant when the role of Dr. Cinderella's expert testimony is taken into account. Dr. Cinderella was the sole witness the government presented in an effort to suggest that Dr. McLean implanted more than one-hundred unnecessary stents; almost doubling the number of stents at issue in the case. Yet, knowing that Dr. Cinderella was the only witness providing this testimony and knowing that he was being used as a second "unbiased expert" to back up Dr. Gilchrist's testimony, the government failed to provide the defense with key evidence with which to challenge his independence, his judgment and his bias. Indeed, the government went further. After the defense attempted to suggest Dr. Cinderella's bias based upon the facts known to the defense at the time of the cross-examination (*i.e.,* without the benefit of the PRMC settlement information), on redirect examination the

government attempted to rehabilitate Dr. Cinderella. (JA 748-53) Despite its knowledge of the PRMC settlement and the allegations relating to Dr. Cinderella, the government solicited testimony that did not have an interest in the outcome of the stenting review (JA 753), and that he did not have an ax to grind with Dr. McLean. (JA 748)

As noted above, the evidence in this case, the government's arguments notwithstanding, was not overwhelming. A significant portion of the government's pattern evidence was supplied by Dr. Cinderella who was presented as a disinterested expert. Clearly, the ability to attack his bias based upon known facts, rather than mere guesses would have made his cross-examination far more effective. Moreover, the ability to chip away, if not completely undermine, his testimony and his "unbiased expert" role could clearly have affected the outcome of the trial. The government argues otherwise stating that:

> [I]t is hard to fathom how asking the doctor witnesses about PRMC's decision to settle with the government because it failed to take prompt remedial action would have been exculpatory in the slightest, much less material to the jury's resounding guilty verdict in this case.

(GB/57)

The impeachment value of this evidence relates to more than PRMC's failure to take prompt remedial action. The failure alleged in the government's press release was an

individual failure of Drs. Lawrence, Wieland and Cinderella – members of PRMC's senior medical staff – and the reasons for their action or inaction was highly relevant to the issues in this case. Moreover, whatever those reasons, these three individuals clearly had reason to ensure that they presented testimony that would support the government's case against Dr. McLean. The government's failure to disclose this information made an exploration of those issues – issues that could undermine the independence of and suggest bias on the part of three important fact and/or expert witnesses – impossible. The government's actions deprived Dr. McLean of a fair trial. Meaningful and informed cross-examination of the physician witnesses clearly could have resulted in a different outcome. Accordingly, the district court abused its discretion in failing to grant a new trial.

III. EXPERT TESTIMONY

The government argues that the district court's voir dire remedy was appropriate in this case in light of the alleged deficiency of Dr. McLean's expert disclosure. Putting aside the issue of whether the disclosure was deficient, a point that Dr. Mclean does not concede, the district court's remedy was an abuse of discretion. Allowing the prosecution to depose a defense expert prior to his testimony is unprecedented.

The government cites a single case in which a district court addressed a

deficient disclosure by the government regarding a DNA expert by allowing the defense to voir dire the witness outside the presence of the jury. (GB/64) *See United States v. Millhouse*, 346 Fed. Appx. 868 (3rd Cir. 2009)(unpublished). While *Millhouse* may be an example of a district court using expert voir dire as a remedy for government non-disclosure, it does not provide any support for the propriety of the remedy imposed in this case. The appeals court addressed the voir dire issue in *Millhouse* based solely on whether it was sufficient to cure an expert disclosure issue raised by the defense.

The government suggests that Dr. McLean is unable to demonstrate any prejudice from the district court's limitations on Dr. Marmur's testimony. In particular the government argues that Dr. McLean was not prejudiced by (1) the limitations relating to testing; (2) the limitations relating to the JAMA article addressing the Chan Study; (3) the limit on the number of patients that Dr. Marmur could address; and (4) the standard of care. (GB/65-72)

Dr. McLean was prejudiced in each of these areas. While the government contends that the district court's limitations were appropriate in light of the deficient disclosure, in reality, the district court's approach to the expert issues elevated form over substance. Each of these four areas had been addressed to by the government's own experts. There was no surprise in the sense that the government was going to

have to take on an expert on a new topic or new discipline. Rather, the government simply wanted to ensure that no contrary evidence reached the jury and, as a result, used all its effort to limit Dr. Marmur's testimony. Two of these subjects require further discussion in light of the government's brief.

First, the government argues that the defense has not proffered any information regarding what testimony Dr. Marmur would have presented regarding additional patients. To the contrary, prior to Dr. Marmur's voir dire deposition the defense provided the government with Dr. Marmur's notes relating to additional patients. (JA 2679-82) The notes set forth Dr. Marmur's review of 17 additional patients that also appear on Dr. Gilchrist's list of 59 patients. (JA 2502-08; Gov. Ex. G-9)[8] In each case, Dr. Marmur would have opined that the treatment rendered by Dr. McLean was within the standard of care and would have taken issue with Dr. Gilchrist's testimony regarding medical necessity. There can be little doubt that the expert's ability to address more than 20 patients, as compared to only five, could have resulted in a different outcome in this case. Indeed, the government demonstrated the importance of this issue in its rebuttal closing argument when it argued that Dr. Marmur had only addressed five patients in this testimony. (MB/70) In doing so, the government

[8] Dr. Marmur was prepared to testify regarding the patients on lines 17, 22, 23, 25, 31, 40, 43, 44, 45, 47, 48, 50, 51, 52, 56, 58, and 59 of Government Exhibit G-9.

acknowledged the importance of Dr. Marmur's ability to address additional patients and implied that the this issue – the number of patients Dr. Marmur opined on – was material to the jury's deliberations.

The government acknowledges the Marmur notes, while suggesting it would have been prejudiced by allowing Dr. Marmur to address these patients. (GB/69) Notably, the government does not explain what the prejudice would have occurred. Dr. Marmur would not have addressed issues or patients that the government had not already addressed with its own experts. Indeed, he would have been doing little more than expressing his opinion, based upon his own visual observation of the cath lab images, about the degree of stenosis and the appropriateness of the stent procedures consistent with the methods he used for the five patients he did testify about. It is difficult to see how this would have prejudiced the government. While it can be said that all evidence that is inconsistent with a party's case is prejudicial, such evidence is not unfairly or improperly prejudicial. The government's primary complaint seems to be that the defense would have been allowed to put on evidence to rebut the government's own expert testimony. Moreover, if the issue was prejudice and the extensive voir dire examination was insufficient to permit the government to overcome this prejudice, the district court could have permitted the government a brief continuance in the trial to adequately address the prejudice, rather than limiting the

testimony of the defense expert.

While the government complains about Dr. Marmur's notes and claims that they did not satisfy Rule 16, these notes included Dr. Marmur's summary of the observed degree of stenosis in each procedure. This is precisely the content of the expert disclosure provided by the government to the defense as to both Dr. Gilchrist and Dr. Cinderella. It rings hollow for the government to complain that the same information it believed constituted a sufficient disclosure is somehow deficient because it is not presented in a different format.

Second, the government argues that the limitation of Dr. Marmur's testimony regarding the community standard of care was appropriate. In making this argument the government relies on a case that deals with a wholly different issue –whether an expert can opine on the meaning of a "reasonable degree of medical certainty." *See United States v. DeLeon*, 678 F.3d 317, 329 (4th Cir. 2012). Significantly, in *DeLeon* the court allowed "testimony verifying the standard applied by forensic pathologists" but limited testimony relating to the medical certainty standard. *Id.* Yet, it was the standard applied by interventional cardiologists that Dr. Marmur sought to address, an area which the *DeLeon* Court would have permitted him to address.

Moreover, the community standard is important in evaluating medical necessity particularly where there is no clearly articulated standard in relevant rules or

regulations. As has been noted repeatedly, stenting decisions default to the professional practice guidelines. These are not hard and fast rules but general guidelines to assist practicing cardiologists. The jury should have been permitted to hear testimony regarding the community standard of care, a standard which would have indicated a much broader scope of practice than the government's experts relied upon during their testimony. At bottom, while the district court may have properly limited Dr. Marmur from discussing what he has seen "other doctors do," that limitation should not have been a basis to prevent testimony that suggested that in the relevant time period 2003 through 2006, it was not atypical for interventional cardiologists to stent blockages that were less than 50% occluded.

CONCLUSION

For the foregoing reasons, as well as those set forth in Dr. McLean's opening brief, the convictions should be reversed and or vacated, and/or the sentence should be vacated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of FED R. APP. P. 32(a)(7)(B) because this brief contains 4,848 words, excluding the parts of the brief exempted by Fed R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED R. APP. P. 35(a)(5) because this brief has been prepared in proportionally spaced, serif typeface using Times New Roman 14 point font in text and Times New Roman 12 point font in footnotes produced by Microsoft Word software.

3. Undersigned counsel understands that a material misrepresentation in completing this certificate may result in the Court's striking this brief and imposing sanctions against the person signing the brief.

September 5, 2012
Date

/s/ Richard W. Westling
RICHARD W. WESTLING

CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief has been served upon:

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through the Court's ECF system and by paper copy on this 5th day of September 2012.

/s/ Richard W. Westling
RICHARD W. WESTLING