

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

UNITED STATES OF AMERICA,)	Criminal No. 06-26
)	
Plaintiff,)	
)	Honorable Arthur J. Schwab
v.)	
)	
CYRIL H. WECHT,)	
)	ELECTRONICALLY FILED
Defendant.)	

**DEFENDANT’S BRIEF IN SUPPORT OF MOTION FOR
DISMISSAL OF THE INDICTMENT DUE TO PROSECUTORIAL
MISCONDUCT AND RENEWED MOTION TO SUPPRESS**

I. PRELIMINARY STATEMENT

This motion consolidates two arguments of a case dispositive nature due to the commonality of a central factual pattern involved in both motions. Regrettably, it is now crystal clear, as a result of Jencks disclosures made shortly before trial and the events at trial, that pretrial proceedings and the trial itself were infected with a deliberate falsification known to the Government for years. Specifically, the Government has known for years that a central tenet of its case—one essential to the opening search warrants and also an element of the honest services fraud charges leveled at Dr. Wecht—was simply false. That tenet was that Dr. Wecht caused boxes of his private files to be removed from ACCO as an act of concealment following publication of an article on February 12, 2005, in which the district attorney of Allegheny County, Stephen Zappala (“Zappala”) called for a federal investigation. That false tenet was central to the search warrant obtained to search Dr. Wecht’s private place of business and central to the materiality element of the honest services charges made against Dr. Wecht. The falsity of that contention was concealed by the Government for years and during the entirety of prior

suppression hearings established specifically to determine if Special Agent Bradley Orsini (“Orsini”) had, consistent with his past, deliberately falsified evidence. Moreover, as set forth herein, despite knowledge of the falsity of this key allegation, AUSA Stallings overstepped the bounds of proper prosecutorial ethics and zealousness at trial by injecting this false theme into the trial of the case—one of several acts of prosecutorial misconduct prior to and at trial.

Accordingly, the defense brings this motion to dismiss the indictment on the authority of Government of Virgin Islands v. Fahie, 419 F.3d 249, 254-255 (3d Cir. 2005), which held that dismissal of an indictment with prejudice is a remedy for Brady violations, Rule 16 violations and is within the trial court’s supervisory powers under certain circumstances. Under Fahie, dismissal is appropriate where there has been both prejudice to the defendant and willful misconduct by government agents. The essence of Fahie is that courts should exercise Article III powers when necessary to deter willful misconduct in situations which prejudice the defendant. Id. at 255, n. 7. In assessing whether the deterrent principle of dismissal is appropriate, Third Circuit guidance focuses on the mens rea of government agents as a critical factor, and the central issue is whether there is a “pattern of recurring violations by investigative officers.” Id. at 253. Likewise, the materiality of the information withheld is probative of bad faith under Fahie. Ultimately, willful misconduct is shown by either a particular purpose or a pattern of reckless discovery abuse. Id. at 255. The remedy of dismissal is definitely appropriate where government attorneys have willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice.¹ See also, United States v. Lewis, 368

¹ Ironically, before the Court could even have known the basis for this motion, which goes to the heart of the orderly administration of justice, the Court prejudged this motion as an attempt by the defense “to halt the orderly judicial process.” (Doc. 911, p. 1) It is precisely because of the Court’s repeated refusal to conduct itself impartially, as exemplified once again in the caustic prejudgment of this and other defense motions embodied in Doc. 911, that the defense will again

F.3d 1102, 1107 (9th Cir. 2004); United States v. Dollar, 25 F. Supp. 2d 1320 (N.D. Ala. 1998) (indictment dismissed where government breached duty of candor to the court and repeatedly failed to disclose undeniably probative documents). As set forth herein, all the factors outlined by the Third Circuit are present in this case.

Insofar as the renewed motion to suppress is concerned, the legal authority to reconsider past decisions on that subject for the reasons set forth herein is clear. The availability of new evidence which was not available when the Court issued its orders, and the need to correct a manifest injustice stemming from a clear error of law or fact, are recognized grounds for reconsideration. See Massie v. US Dept. of Housing, No. 06-1004, 2007 WL 674597 (W.D. Pa. March 1, 2007); United States v. Tulu, 535 F. Supp. 2d 492 (D.N.J. 2008) (applying the aforementioned standard to a suppression motion).

II. RELEVANT LEGAL BACKGROUND TO SUPPRESSION MOTION

This Court conducted two suppression hearings, with the second occurring after the Third Circuit remand and highly instructive dicta that the defense should have been afforded the opportunity to prove that Orsini deliberately falsified his probable cause affidavits and to pursue his documented history of dishonesty in such a hearing. See United States v. Wecht, 484 F.3d 194, 210-11 (3d Cir. 2007) Indeed, this Court established that as one of the purposes of the hearing.

As this Court knows, it was the contention of the defense that Orsini deliberately falsified his probable cause affidavits, and there was no more central allegation alleged to have been falsified than paragraphs 19 and 20 of his probable cause affidavit for boxes said to have been

seek recusal of this Court. To prejudge a motion, especially one intended to place new and important facts before an Article III court regarding misconduct rising to constitutional dimension, is the epitome of bias.

removed from ACCO as an act of concealment in response to alleged knowledge of a criminal probe becoming public. Relying on a single source, styled as “ACCO 11” and identified in the suppression hearing as Don Kanai (“Kanai”), Orsini included a segment called “Attempted Concealment and Removal of Evidence” as section 9 of his affidavit. (Ex. A) In the directly relevant section of the sworn affidavit in paragraph 19, Orsini swore on April 7, 2005:

In early February of 2005, a criminal probe of WECHT’s use of county resources for private work became public. According to ACCO 11, sometime during the week of February 6, 2005, Young asked ACCO 11 to obtain boxes for the purpose of moving large numbers of files from her office at the ACCO. ACCO 11 provided Young with boxes into which Young loaded files reflecting WECHT’s private autopsy work. ACCO 11 moved those boxes from the ACCO to WECHT’s private pathology office at 1119 Penn Avenue, Suite 4001, Pittsburgh, Pennsylvania after business hours.

(Ex. A, ¶ 19)(emphasis added)

To further the clear thrust that this move was an act of concealment in response to the publication of a criminal probe, Orsini went on to state that Kanai had said “Young was very rushed and upset about having to move the boxes quickly.” (Ex. A, ¶ 20)

The language of this probable cause affidavit was drafted by Orsini and AUSA Stallings. (June 8, 2006 Tr., Doc. 285, p. 229) Under oath, Orsini has admitted that paragraphs 19 and 20 of his affidavit were essential to obtaining the warrant and that if those paragraphs were not in the affidavit, then no warrant would have been sought. (September 18, 2007 Tr., Doc. 545, p. 131) Orsini has also admitted that Eileen Young denied that the boxes were moved to conceal evidence the night he got the warrant and before it was executed (Id. at 135), which she consistently affirmed at the recent trial after the Government injected this issue into the trial in an attempt to prove an element of honest services fraud, specifically concealment.

It is indisputable that this tenet of the case was not only central to the warrant, but injected into the trial by AUSA Stallings in an attempt to prove the requisite concealment element required by Neder.

Speaking of Eileen Young, and being vague as to dates he knew for certain as did Orsini in the probable cause affidavit, AUSA Stallings stated in opening statements:

She had file after file after file like this at her desk in early 2005, files of private work. ***In the week before Valentine's Day of 2005***, reports began to surface in the local media indicating the defendant might be under criminal investigation. ***That weekend***, boxes and boxes of private files just like these were moved from Eileen Young's office to the defendant's private office on Penn Avenue. That same weekend, boxes and boxes of private histology slide materials were removed from the coroner's office as well. Just a few days later, on Thursday, February 17 of 2005, the defendant appeared on a local talk show called Night Talk. Now, at that time having for ten years used administrative assistants, deputy coroners, histology technicians, either [sic] bodies of the dead to run his private business at County expense, despite having done that for over ten years, in ways large and small, persistent and consistent ways, the defendant appeared on Night Talk and attempted to deceive the public in believing he had not used County resources to run his private business. This is what he said:

(January 28, 2008 Tr., Doc. 883, pp. 70-71)(emphasis added)

Thereafter, and as set forth in the Defendant's Brief in Support of Renewed Motion for Acquittal (Doc. 913), AUSA Stallings attempted to develop this theme by the direct examination of Rick Lorah.

There is no question, therefore, that this tenet of this case infected the search warrant process and the trial. As in the prior suppression hearings, this Court denied all relief following the second hearing. The defense filed a motion for reconsideration which pointed out that the Government had not even presented an argument to save the boxes warrant from a facial invalidity finding associated with Orsini's admitted failure to include known limitations in the

warrant and which also pointed out that the Government had not contested the defense showing that Orsini had directed that the warrant be executed in unconstitutional fashion. (Docs. 602 and 603) The Court directed the Government to respond to the reconsideration motion. (Text Order dated December 4, 2007) When the Government did so, it still presented no opposition. (Doc. 616) After the defense pointed out repeatedly that the two aforementioned arguments were unopposed (Doc. 625), the Court denied the reconsideration motion by a two-sentence order which simply ignored the uncontested nature of those arguments. (Doc. 632, pp. 12-13)

As to the trial, the jury did not return a verdict on any counts and was discharged by the Court on April 8, 2008.

III. NEWLY DISCOVERED EVIDENCE OF FALSITY AND CONCEALMENT BY THE GOVERNMENT

It is known to all, and undisputed, that the date of the article by which knowledge of an alleged criminal probe became public was Saturday, February 12, 2005. On that date, Zappala called out for a federal investigation of Dr. Wecht. Indeed, the Government offered this article into evidence in pretrial proceedings as government exhibit 1279, and it was admitted at trial.

On April 5, 2005, just two days before he applied for the search warrant to seize boxes at Dr. Wecht's place of business, Orsini interviewed Kanai.² Orsini, who testified he never falsified a 302 in direct response to a question by AUSA Stallings (Doc. 545, p. 190) recorded what Kanai told him about the date the movement of boxes began as follows: "On Friday, February 11, 2005, Kanai loaded boxes in his vehicle." (Doc. 913-3, p. 3) This statement of

² None of the information in the possession of the Government regarding Kanai's statements to Orsini on April 5, 2005, or his subsequent Grand Jury testimony on June 15, 2005, was provided to the defense until January 18, 2008, as Jencks material prior to trial. Prior to that date, the Government consistently advised the defense and this Court that it did not have any Brady material. Kanai's statements and Grand Jury testimony on the relevant subject are clearly exculpatory on an element of the crime and were improperly withheld.

Kanai, recorded by an agent who has professed never to have falsified a 302, utterly destroys the truthfulness of Orsini's probable cause affidavit that the boxes were moved as an act of concealment following publication of an article on February 12, 2005. Knowing that, Orsini then saw fit to record in a 302 what he knew to be an erroneous belief of Kanai. Specifically, Orsini recorded Kanai's belief that the boxes were moved because of the investigation into ACCO by Zappala. The 302 does not indicate that Orsini showed Kanai the February 12, 2005 article to refresh his recollection or correct the supposed belief of Kanai as to why the boxes were moved.

In the affidavit of probable cause filed two days later, Orsini deliberately omitted that Kanai had moved the boxes on February 11, 2005, and deliberately omitted the date of February 12, 2005 article, since to disclose those dates would have clearly exposed the lie. Instead of stating that the criminal probe became public on February 12, 2005, Orsini swore that the criminal probe had become public "in early February of 2005" to camouflage the actual date. (Ex. A, ¶ 19) Then, instead of stating that Kanai had moved the boxes on February 11, 2005, the magistrate was told he was asked to move boxes "sometime during the week of February 6, 2005." (Ex. A, ¶ 19)

Months later, Kanai was questioned on the same subject in the Grand Jury by AUSA Stallings who, as noted, helped draft the aforementioned affidavit. Once again, the Grand Jury transcript does not reveal that Kanai was shown a copy of the February 12, 2005 article to refresh his memory. Nevertheless, AUSA Stallings questioned him on the same subject, i.e., the movement of the boxes. The relevant testimony was as follows:

- Q. All right. I want you to step back a minute, and to the best you can, tell the grand jury what happened in connection with that?
- A. It was a very hectic week. It was the week of February 10th, and this was, like, one thing after an other between Cyril and Stephen Zappala. And you know, it was events, like, machine gunfire is the only way to describe it.

The one particular day, and it was the 12th, whatever the date was –

- Q. Just so the calendar is clear in your mind, February 10th was a Thursday, February 11th was a Friday, and February 12th was a Saturday.
- A. Okay. The 10th.

As soon as – I was working 3:00 to 11:00. As soon as I walked into the door, the place was just nuts. Everyone's running around, you know. I got up to the second floor, and if I remember correctly, I didn't even get to get into the office to punch in.

And everybody was running around, and people – and I even think Flo said, "Oh, you're here, you have to do this and that." And then whether it was Terry Brown or Joe Dominic or both of them, or someone else said, "You have to get in there. You've got to get this moved, or something – there's something – you have to get something done right away."

This has to be taken care of, whatever. And see Eileen, and I went into Eileen's office. This is when she started showing me the boxes that were to be moved, and cleaning.

(Doc. 913-4, pp. 2-3)(emphasis added)

Thus, when refreshed as to the dates involved, Kanai actually moved the date he moved the boxes to February 10, 2005—two full days before the February 12, 2005 article was even published.³

There is, therefore, no question that the man who moved the boxes never told Government agents, in 302s or sworn testimony, that the boxes were moved on a date after the

³ The deputy log books confirm that Kanai worked the 3:00-11:00 shift on February 10, 2005. (See G98.215.)

February 12, 2005 article initially publicizing the criminal probe. Consistently, he told them the move occurred on a date prior to the date that article even appeared.

The Government knew Orsini had falsified his probable cause affidavit for years but never told the defense or this Court. Instead, the Government removed him from the warrant process, made a prosecutorial decision never to sponsor him as a witness, and went into a cover-up mode. At the time the defense filed its initial suppression motion, AUSA Stallings used the ex parte tactic embodied in Doc. 60 in an attempt to shield Orsini's disreputable past from the defense and the public by a secret pleading which deliberately downplayed Orsini's role in the search warrant process and which nowhere disclosed that he had in fact falsified key provisions of his probable cause affidavit. Instead, the Court was told he was "one" of the case agents involved in the investigation and not told he was the lead agent. According to all the Court was told, Orsini "was the affiant on two search warrants," but others would testify about the chain of custody and that "Orsini will not be a government witness." (Doc. 60, pp. 4-6) Throughout the ensuing collateral litigation before the Third Circuit of the sealing order regarding Document 60 and related matters regarding Orsini, that Court was also not told what the Government knew about Orsini's deliberate falsification of the probable cause affidavits. And, consistently, as is a matter of record, the Government responded it had no Brady material.

Prior to the suppression hearing following the remand, by letter dated July 31, 2007, the defense specifically requested the Government to produce the FBI 302 for ACCO 11 who, as stated, was Kanai. (Ex. B) Again, instead of providing it for the suppression hearing, the Government chose again to conceal the truth and did not provide it. Orsini, however, squarely testified during that second suppression hearing that he had reviewed Kanai's Form 302, so he

unquestionably knew during that hearing that Kanai had told him that the boxes were moved prior to the February 12, 2005 article.⁴ (Doc. 545, p. 8)

During the entirety of that hearing, the Government did not disclose to the defense or the Court the information in its possession which showed that Orsini's probable cause affidavit was false in relevant respect on the highly critical averments of paragraphs 19 and 20. While otherwise admitting that he had violated the Department of Justice's Giglio policy; had been removed from the warrant process; and that a prosecutorial decision had been made not to have him testify, neither he nor the Government disclosed to the Court or defense counsel the reason why—they knew he had lied to get the search warrant.

IV. LEGAL ARGUMENT

A. THE BOXES WARRANT AND ALL EVIDENCE SEIZED MUST BE SUPPRESSED

Even prior to the receipt of the information outlined above, the record before this Court included two uncontested arguments for suppression of the evidence which the Court denied without reasoned explanation. The defense submits that was plain error for the Court to do, especially after it had ordered the Government to respond to those points and they did not do so—a position which virtually mandated suppression as a result.

Now, the record is even more compelling for suppression in the face of evidence showing not only that an agent with a history of falsifying evidence plainly and clearly did so here on the central and absolutely necessary aspect of the probable cause affidavit, but also that the prosecution concealed that fact from this and other tribunals as well as the defense.

⁴ By the time of the second suppression hearing, the Government had actually obtained a ruling that government exhibit 1279, which was the February 12, 2005 article, was admissible. Thus, the prosecution not only clearly knew the date of the article it had introduced into evidence, but was clearly planning on using it at trial to further the false inference that the boxes were moved after that article appeared.

The Court's Order of April 16, 2008 referred to this anticipated motion as nothing more than "old objections in new clothes." (Doc. 911, p. 5) Plainly, that is not the case. In fact, it is the first time these troublesome facts have been brought to the Court's attention.

For this Court to ignore the deliberate misconduct by Orsini and this prosecution team without reasonable explanation is to condone practices which run afoul of the Constitution and the much desired orderly administration of justice referenced by the Court in its April 16, 2008 Order prejudging this motion. No matter what has transpired to date, Dr. Wecht is entitled to have this Court act impartially and enforce the Constitution even if it means there will be no further trial proceedings in this case. On the law previously presented to this Court in prior suppression briefing (Doc. 547), Orsini's false allegations regarding the movement of the boxes must be excised from the affidavit and, once done, that warrant fails for yet another reason in addition to the two uncontested reasons already presented to the Court. The defense respectfully requests, again, suppression or a reasoned decision as to why constitutionally mandated relief is being denied to Dr. Wecht.

B. THE INDICTMENT SHOULD BE DISMISSED UNDER THE PRINCIPLES ARTICULATED IN GOVERNMENT OF VIRGIN ISLANDS v. FAHIE

As noted, the Third Circuit in Fahie held that dismissal of an indictment is appropriate when there is both prejudice and willful misconduct. The prejudice to Dr. Wecht associated with the concealment of Orsini's deliberate falsification is manifest. Dr. Wecht was subjected to unreasonable searches and seizures based on false declarations of an FBI agent with a well-documented history of falsifying evidence. Due to the failure to turn over this Brady information in a timely fashion and the associated lack of candor to the tribunal by prosecutors well aware of the problem, he was denied critical evidence when it mattered most—for the suppression hearing aimed at determining whether Orsini had falsified his affidavit—a truth the Government knew all

along. Indeed, despite being specifically asked to provide Kanai's 302 prior to that hearing, the prosecution did not do so.

In the context of a hearing specifically established by this Court for the purpose of determining whether Orsini had falsified his probable cause affidavit, prosecutors allowed Orsini, who had read the 302 of Kanai before testifying, to portray himself as not having lied in the affidavit all the while sitting on the 302 of Kanai and his Grand Jury testimony which proves otherwise. (Doc. 913-3) By the time of the second suppression hearing, AUSA Stallings had proffered into evidence the February 12, 2005 article which was the linchpin of Orsini's fabricated tale that boxes were moved in response to that article. Kanai's 302 clearly and directly establishes that the boxes were being moved prior to that article, as does his Grand Jury testimony, and any prosecutor who has not lost his compass would immediately recognize the evidentiary value of Kanai's 302 and Grand Jury testimony to the issue of deliberate falsification by Orsini.

When the suppression decision was decided unfavorably to Dr. Wecht because the Government withheld the truth, Dr. Wecht was subjected to a long, lengthy and costly pretrial proceeding which was financially ruinous, including the cost of having to review hundreds of thousands of pages of exhibits the Government had no intention of offering at trial and did not offer at trial.⁵

Dr. Wecht was then required to endure a long and expensive trial, with evidence that was obtained on the false oath of an FBI agent with a known history of deliberate falsification and

⁵ It is now a matter of record that the Government offered only a fraction of the exhibits it represented it intended to offer, and that the undue cost and burden imposed on Dr. Wecht of reviewing and preparing detailed objections to the document dump of the Government was wholly unnecessary.

cutting corners.⁶ In that trial, he had to defend the same knowingly false allegations made by AUSA Stallings regarding the movement of the boxes. In a trial tainted by that prosecutor's misconduct, and other misconduct, Dr. Wecht was able to fend off conviction solely because the jury refused to convict him of any charges. And, incredibly, the instant it was clear that the Government had not secured a conviction following this most unfair trial tainted by such improprieties, AUSA Stallings announced the desire to do it again. The prejudice element of Fahie is clearly satisfied, leaving only the issue of whether the deterrent aspect is necessary due to willful misconduct—a concept that looks to whether there is a pattern or history of misconduct. As set forth below, that element is present here in spades.

1. Orsini Has a Clear History of Investigative Misconduct

Orsini was assigned as the lead public corruption agent on Dr. Wecht's case in September 2004. (Doc. 545, p. 77) Prior to this assignment, Orsini was formally reprimanded by the FBI's Office of Professional Responsibility ("OPR") twice in his career. (Doc. 545, p. 77; Doc. 510-2, pp. 10-13, 14-42) In both reprimands, the OPR expressly found that Orsini engaged in repeated and intentional acts of dishonesty extending over several years. The FBI found that Orsini falsified records at the core of the criminal justice system, including FBI Forms 302 as well as other types of records. (Doc. 510-2) Orsini's misconduct was extensive and pervasive, and it is described in some detail in Dr. Wecht's earlier filings. (Doc. 547)⁷ For purposes of this brief,

⁶ This evidence included not only documents seized from Dr. Wecht's place of business on the false declarations of Orsini, but also the laptop computer provided to Eileen Young by Dr. Wecht. As is also well documented in the history of the suppression record, the Government presented no legal argument to counter the defense's suppression motion on that computer, but the Court also denied suppression of that evidence.

⁷ Defendant's Proposed Findings of Fact and Conclusions of Law, filed after the September 18, 2007 suppression hearing.

Dr. Wecht expressly incorporates those proposed findings (Doc. 547), and Dr. Wecht will only briefly address here Orsini's troubled and extraordinarily concerning past.

The OPR conducted an initial investigation of Orsini centered on his falsification of records between May 1995 and January 1997. (Doc. 510-2, p. 22) During that investigation, Orsini admitted that he and two other FBI agents participated in a scheme in which they falsely verified drug packaging and money seized during drug purchases made by them. (Id. at 10) The OPR stated that Orsini's first reprimand on November 2, 1998 was "on the substantiated charges that you falsified chain of custody forms and evidence labels between May 1995 and January 1997." (Id. at 22)

In 1997, after Orsini built his career on evidence-falsification schemes, the FBI reassigned Orsini to work public-corruption cases. In 2000, the FBI again moved Orsini – amidst an ongoing OPR investigation that commenced after he threatened to assault another FBI agent and intimidated a witness in the course of the investigation. (Id. at 28-33) During the time he was assigned to public corruption, many of Orsini's acts of dishonesty came to the attention of the FBI and the OPR and, based on available evidence, the FBI and the OPR conducted another investigation of Orsini from August 1997 until September 24, 2001. This second investigation arose because a number of Orsini's fellow FBI agents accused him of ongoing misconduct. (Id. at 23) During this investigation, the OPR learned of additional improprieties by Orsini regarding search warrant procedures. (Id. at 15-19) Specifically, Orsini failed to obtain the required written consent to search premises, and he failed without any explanation properly to document the evidence he seized during that illegal search. (Id. at 18) As a result of these and other forms of frankly bizarre misconduct described therein, including using a bullhorn in FBI offices to taunt gays, the OPR issued a second reprimand of Orsini on September 24,

2001. (Id. at 14) Among other substantiated findings, the OPR found that Orsini had “repeatedly and intentionally falsified a number of official documents in the form of FD-302s” and had “engaged in words and actions which were indicative of intimidation and the threat of physical violence.” (Id. at 39)

Remarkably, although the FBI expressly told Orsini in its first reprimand that it would fire him if he engaged in such conduct again and, despite the fact that Orsini in fact engaged in that conduct again, the FBI did not discharge Orsini. Instead, it demoted him from being a supervisor, suspended him without pay for 30 days, placed him on probation for 12 months and required him to undergo sensitivity training. (Id. at 40) After this slap on the wrist and the conclusion of the required probationary period, the FBI removed Orsini from public-corruption cases in Newark, New Jersey, and eventually reassigned him to Pittsburgh in September 2004 to be the lead public corruption agent on Dr. Wecht’s case. (Doc. 545, p. 77)

Upon his transfer to Pittsburgh, unambiguous and longstanding Department of Justice (“DOJ”) policy required Orsini to disclose fully his past reprimands as early as possible to the DOJ prosecutors supervising his conduct – and absolutely required him to do so before he provided a sworn statement or testimony in any investigation or case. Notwithstanding this requirement, Orsini failed to disclose this information prior to signing his first and only Affidavits of Probable Cause in this District, which were the Applications and Affidavits of Probable Cause in Dr. Wecht’s case dated April 7, 2005. (Doc. 545, p. 98) It is a matter of evidentiary record that the only time Orsini was permitted to take an oath after being reprimanded was the day he did so to get warrants in the Wecht case, and by the next day was not permitted to do so ever again. (Doc. 545, p. 135) Of course, Orsini knew that he had been

reprimanded twice for acts of dishonesty and falsification of evidence records, but he disclosed none of that to Magistrate Judge Hay in his Affidavit of Probable Cause.

Thus, on April 7, 2005, Orsini signed and submitted the Application and Affidavit for Search Warrant that was the basis for the search of Wecht Pathology that took place on April 8, 2005. (Ex. A) As he would later admit, a “prosecutorial decision” was made thereafter never to sponsor him as a witness, albeit neither he nor the prosecutors informed this Court of the reasons for that “prosecutorial decision.” (Doc. 545, p. 100) The inference is overwhelming that this decision was due to his falsification of the affidavits in question, since on the testimony provided by him, the reprimand history of Orsini did not arrive in Pittsburgh until after he signed that affidavit. (Doc. 545, p. 81) Thus, the arrival of that file could not and did not explain why Orsini was removed from the warrant process the day after he signed the affidavit for the April 7, 2005 warrants.

Additionally, deterrence is necessary here for the additional reason that neither the FBI nor this prosecution team dealt with the issue properly or at all. Initially, the Government no doubt thought it best to be quiet about Orsini’s falsification given the high profile execution of the warrant at ACCO, which was filmed and broadcast. Thus, despite knowledge that he had a history of dishonesty and had falsified the opening warrants in this case, and despite deciding he would never be permitted to testify, the Government incredibly kept Orsini in the position of lead agent. This permitted an agent with a history of dishonesty to continue to deal with witnesses and, as was shown at trial, conduct himself improperly. Then, the Government no doubt believed the issue would never see the light of day following the high profile press conference of the United States Attorney to tout the original 84 count indictment—a tactic which would bludgeon most human beings into pleading guilty to something just to avoid the expense and

ordeal of trying to defend oneself from seven dozen charges. That miscalculation became obvious when Dr. Wecht decided to exercise his right to defend himself causing the problem to become acute for the Government—one which had become even more pronounced given the elevated profile caused by the decision to have a demonizing press conference to tout salacious charges which, in reality, had not been thoroughly investigated and in many respects not investigated at all.

Thus, a conscious decision was made to hide the truth first by attempted ex parte practice and a series of misleading filings with this Court and then the Third Circuit—not one of which disclosed the full truth known to the Government about Orsini or the reasons for the Government hiding the truth. When public disclosure was finally ordered by the Third Circuit, then and only then was Orsini transferred to a newly formed administrative unit and promoted! Still, the silence continued about what he had done in this case, through the ensuing suppression hearing and limine rulings. Indeed, it is a matter of record that the Government actually sought a limine ruling which, if granted, would have precluded the defense from even mentioning Orsini or the conduct of the investigation at the trial of the case despite his status as lead case agent on it. (Doc. 401) Once again, these limine rulings were sought, and in part obtained, without full disclosure of Orsini's deliberate acts of falsification. At trial, even more questionable conduct of Orsini emerged, with a constant pattern being the failure to record Brady information as well as highly questionable tactics, such as the odious innuendo directed to Eileen Young about “traveling” with Dr. Wecht. Time and again, the evidence showed questionable tactics by this agent towards witnesses and ultimately towards Dr. Wecht. Having falsely suggested that the boxes were moved in response to the February 12, 2005 article, the prosecution chose not to call Kanai, as planned, so as not to have Orsini's falsification exposed at trial.

2. Prosecutorial Misconduct Plagued this Case

Unfortunately, Orsini's investigative misconduct was not checked by the prosecution. Instead, the prosecution compounded the problem, beyond the obvious impropriety of advancing the false notion that the movement of boxes was concealment within the meaning of the mail fraud statute.

AUSA Stallings' behavior before and during trial showed consistent and abusive prosecutorial misconduct in a win-at-all-costs attitude. Prosecutorial misconduct is generally defined as behavior by the prosecuting attorney that "overstep[s] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." Berger v. United States, 295 U.S. 78, 84 (1935). It is the duty of a prosecutor "to refrain from improper methods calculated to produce a wrongful conviction." Id. at 88. Where prosecutorial misconduct occurs, the court considers the legal norm violated by the prosecutor and determines if its violation actually impacted on a substantial right of an accused (i.e., resulted in prejudice). See generally United States v. Hasting, 461 U.S. 499 (1983); United States v. Morrison, 449 U.S. 361 (1981).

Here, there is no question as to whether AUSA Stallings injected a false issue in this trial through the opening statement and witnesses regarding the alleged attempt to conceal evidence by moving the boxes. To determine if there was prejudice to a defendant amidst such misconduct, the Court is to look at three factors. First, the scope of the improper comments is to be examined in the overall trial context. Second, the effect of any curative instructions given is considered. Lastly, the strength of the evidence against the defendant is considered. Absent a "sure conviction" that such misconduct did not prejudice the defense and have a significant effect on the jury decision, reversal is the norm. United States v. Mastrangelo, 172 F.3d 288 (3d

Cir. 1999). Here, Dr. Wecht was not found guilty, but the prejudice remains the same as it cannot be said with a “sure conviction” that the misconduct did not cause some jurors to believe Dr. Wecht was guilty on the basis of such misconduct. The false statement was a central part of the opening statement by the Government on a necessary element of proof. Indeed, as argued in the Defendant’s renewed Rule 29 motion, the false evidence of moving boxes was the only evidence of concealment offered by the Government to support a necessary element of the crime of dishonest services. No curative instruction was given, and the evidence was not strong enough to secure a conviction on anything, but may well have caused holdout jurors in the minority on the honest services charges to believe Dr. Wecht was guilty and that the Government had offered evidence on an essential element of the crime. Thus, the prejudicial impact is obvious.

Moreover, the misconduct of injecting into trial the false notion that Dr. Wecht acted to conceal his private work by moving the boxes does not stand alone. Dr. Wecht could point to innumerable instances of prosecutorial misconduct. Below are just a few examples.⁸

Prior to trial, AUSA Stallings generated filings with this Court falsely suggesting Dr. Wecht had intimidated witnesses and would intimidate jurors, citing information he knew to be false and wholly irrelevant to the charges. Despite previously representing to the Court that Dr. Wecht had supposedly intimidated a material witness, no such evidence was ever offered at trial. This caused massive adverse pretrial publicity which also served, not coincidentally, to place Dr. Wecht’s Jewish faith before the jury pool about to hear a nickel and dime case.

⁸ The instances of prosecutorial misconduct noted are only a few of many that occurred during the course of this trial and the defense respectfully reserves the right to raise other specific instances if necessary to make a complete record.

On the eve of trial, the Government dropped forty three of the charges it had brought against Dr. Wecht, citing a professed need to simplify its case. Yet, as AUSA Stallings knew, many of those charges were improperly brought in the first place, as neither Agent Orsini nor the prosecution team had confirmed the most basic tenet of a mail fraud prosecution—that a mailing had in fact occurred.

AUSA Stallings indicated at the final pretrial conference that the Wecht Institute was out of the case causing the Court to preclude defense counsel from opening with an admitted exhibit regarding the Wecht Institute. Then, however, AUSA Stallings elicited testimony regarding the Wecht Institute at trial notwithstanding his prior express representation to the court. The jury was also told, in opening statement, that the Government would prove that Dr. Wecht knew of George Hollis' ("Hollis") activities at ACCO, when in fact the Government knew it could not be proven and did not call Hollis to prove it. In closing, Mr. Wilson relied on Dr. Bennett Omalu's "common knowledge" remark to prove that Dr. Wecht knew about Hollis' activities, only to be contradicted by AUSA Stallings in rebuttal that it did not matter where Hollis made the slides.

A Catholic nun sharply critical of the prosecution's spurious allegation of a body-trading agreement was attacked with a letter she never saw and which was used to show that she and Dr. Wecht supposedly had "disrespect for the dead." When asked if a foundation would be laid for that letter, AUSA Stallings represented he would but never did and knew he could not prove that ACCO, Dr. Wecht, or Sister Grace had ever seen the letter. Indeed, a subsequent prosecution witness testified nobody had ever seen that letter.

Reams of evidence were introduced by the Government knowing it could not be, and was not, linked to Dr. Wecht in any way from the beginning of this case to the end—ranging from hot

dogs at political events in the last century to friends of decedents expressing personal views about autopsies on the last day of trial.

Dr. Wecht's personal tax accountant was put on the stand in a transparent attempt to place tax violations before the jury, with no relevant purpose to any of the charges, as evidenced by the fact his testimony was not even mentioned in closing argument. Notably, and not surprisingly, AUSA Stallings then ended the trial with one last desperate act of misconduct. Despite the Court's having removed references to a prejudicial letter which proved nothing about using ACCO for personal gain from the jury's copy of the indictment, AUSA Stallings grabbed an enlarged poster board of that letter and displayed it to the jury at the very end of his rebuttal argument. It was a fitting end to a trial that opened with misconduct and ended with it.

V. CONCLUSION

For the reasons stated herein, it is respectfully submitted that this Court should dismiss the indictment for the reasons stated herein. Alternatively, and if the Indictment is not dismissed under Fahie, the Court should order suppression of all evidence seized from Dr. Wecht's place of business.

Respectfully submitted,

S/Jerry S. McDevitt, Esquire
Jerry S. McDevitt, Esquire
(Pa. I.D. No. 33214)

Richard L. Thornburgh (Pa. I.D. No. 01048)
Jerry S. McDevitt (Pa. I.D. No. 33214)
Mark A. Rush (Pa. I.D. No. 49661)
Amy L. Barrette (Pa. I.D. No. 87318)

KIRKPATRICK & LOCKHART PRESTON GATES
ELLIS LLP
Henry W. Oliver Building
535 Smithfield Street
Pittsburgh, PA 15222-2312
(412) 355-6500 – Telephone
(412) 355-6501 – Facsimile

Dated: April 21, 2008

Attorneys for Cyril H. Wecht

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of April, 2008, a true and correct copy of the within **DEFENDANT'S BRIEF IN SUPPORT OF MOTION FOR DISMISSAL OF THE INDICTMENT DUE TO PROSECUTORIAL MISCONDUCT AND RENEWED MOTION TO SUPPRESS** was served by electronic filing upon:

Stephen S. Stallings, Esquire
Assistant United States Attorney
United States Attorney's Office Western District of Pennsylvania
U.S. Post Office & Courthouse
700 Grant Street
Suite 400
Pittsburgh, PA 15219

James R. Wilson, Esquire
Assistant United States Attorney
United States Attorney's Office Western District of Pennsylvania
U.S. Post Office & Courthouse
700 Grant Street
Suite 400
Pittsburgh, PA 15219

S/Jerry S. McDevitt, Esquire
Jerry S. McDevitt, Esquire