

**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  
RENEWED MOTION FOR JUDGMENT OF ACQUITTAL**

Defendant, Cyril H. Wecht, by and through his attorneys, Kirkpatrick & Lockhart Preston Gates Ellis LLP, hereby submits this Brief in Support of Renewed Motion for Judgment of Acquittal.

**I. INTRODUCTION**

Under Rule 29 of the Federal Rules of Criminal Procedure (“Rule 29”), a defendant may move for acquittal within seven days after the jury has been discharged, regardless of whether the jury reached a verdict and regardless of whether the defendant previously moved for acquittal. See Fed. R. Crim. P. 29(c)(1)-(3). If “no reasonable juror could accept the evidence as sufficient to support the conclusion of the defendant’s guilt beyond a reasonable doubt,” then the Rule 29 motion must be granted. United States v. Coleman, 811 F.2d 804, 807 (3d Cir. 1987).

Prior to submission of this case in its entirety to the jury, the defense filed a written 37 page brief on March 11, 2008, within hours of the close of the Government’s case, reciting the failures of proof of the Government’s case as well as the substantive law governing disposition of the Rule 29 motion. (Doc. 816)

In response, the Government filed a cursory opposition brief which cited no law, made no attempt to distinguish the controlling law cited by the defense, and which pointed to no specific facts of record indicating that its burden had been satisfied regarding key elements of the crimes. (Doc. 818) Instead, the Government provided the stock response it offers when it is unable to muster a real response – that it would not refute “each and every misstatement in the defense’s motion” – and then proceeded not to refute any statement of law or fact set forth in detail in the defense’s brief in support of the Rule 29 motion. Id. Instead, the Government’s response was essentially to write the names of various witnesses beside paragraphs of the Indictment as if that satisfied its burden of proof. See id.

Only one day after the Rule 29 motion was filed and briefed, the Court issued a brief page-and-a-half opinion summarily denying the defense’s motion without providing any substantive analysis. (Doc. 822) In conclusory fashion, the Court stated that “sufficient evidence has been adduced, as to each count of the indictment, upon which a rational trier of fact could find that all the elements of the respective offenses have been proven beyond a reasonable doubt.” Id.

After that, the jury – which this Court repeatedly and correctly credited as an excellent and rational trier of fact – could not and did not find Dr. Wecht guilty of a single count of the 41 charged counts submitted to it for decision. The standard of review for the sufficiency of the evidence in the face of a Rule 29 challenge is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 317-18 (1979). Here, the rational trier of fact that did hear all the evidence could not find that Dr. Wecht had committed any crime. Thus, the defense respectfully submits that a searching inquiry and analysis of the Government’s case against Dr. Wecht is especially appropriate now

given the unique circumstances of this case. Absent meaningful review and judicial analysis, Dr. Wecht will, on the extant orders of this Court, be compelled to endure another stressful and financially ruinous trial on charges the Government utterly failed to prove the first time and for which he is entitled to a judgment of acquittal by this Court.

Accordingly, the defense incorporates and restates by reference all of the arguments made in its Motion for Judgment of Acquittal and Brief in Support filed on March 11, 2008. (Docs. 815 and 816) The defense requests that the Court order the Government to respond specifically to the arguments presented by the defense in that motion so that the Court may engage in a meaningful analysis of those issues for purposes of deciding this motion. This would include the Government's position on the impact of the Third Circuit's decision in United States v. Kemp, 500 F.3d 257, 284 (3d Cir. 2007), cert. denied; Kemp v. United States, No. 07-8897, 2008 WL 219248 (Feb. 19, 2008) (holding that "the crucial issue is whether Kemp was required to report the loans . . .").

Having incorporated and restated by reference the issues raised in his previous motion, Dr. Wecht will, in this brief, principally highlight specific and more notable failures of proof in addition to those earlier, now-incorporated arguments.

Finally, in light of a clear failure of proof which became manifest during closing argument after the Court decided the Defendant's Motion for Judgment of Acquittal (Doc. 816), the defense first points out below additional reasons why the Government failed to produce sufficient evidence to support any finding of guilt on Counts 1-27.

**II. JUDGMENT OF ACQUITTAL MUST BE GRANTED ON COUNTS 1-27 BECAUSE NO REASONABLE JUROR COULD FIND THAT THE GOVERNMENT PROVED A MISREPRESENTATION OR CONCEALMENT OF A MATERIAL FACT BEYOND A REASONABLE DOUBT**

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The Supreme Court unquestionably held in Neder v. United States, 527 U.S. 1, 25 (1999), that materiality, defined as the misrepresentation or concealment of a material fact, is a distinct element of mail and wire fraud that must be proven beyond a reasonable doubt in all mail and wire fraud cases. See also, United States v. Antico, 275 F.3d 245, 263-64 (3d Cir. 2001). This Court has agreed that Neder so held and, notwithstanding that the Court would not separately charge materiality as an element because of its view that the instructions included that concept, there can be no serious issue that it is a distinct element of the crime. Thus, this Court must clearly now analyze the evidence to determine if the Government offered sufficient proof of this element at trial. Without proof beyond a reasonable doubt of the defendant's "misrepresentation or concealment of [a] *material fact*," no defendant can be convicted of mail or wire fraud. Neder, 527 U.S. at 22. (emphasis in original).

The Government completely failed to prove any misrepresentation or concealment of a material fact by Dr. Wecht as to the honest services mail and wire fraud counts. In fact, all of the evidence proved the opposite, as discussed previously in Doc. 815. Analytically, the Government never even alleged, let alone proved, an affirmative misrepresentation sufficient to support these counts. Thus, to determine if the Government presented sufficient evidence to prove this element of the crime, the issue is whether the Government produced competent evidence of deliberate concealment by Dr. Wecht within the meaning of the mail fraud statutes. In opening statements, the Government promised to prove concealment by two pieces of evidence, specifically (1) the Night Talk segment that was not ultimately admitted into evidence, and (2) the entirely false, and knowingly false, notion that Dr. Wecht ordered boxes of private

files moved from ACCO to his private office in response to the February 12, 2005, article in which District Attorney Stephen Zappala called for a federal investigation (the “Zappala article”). (Ex. A, p. 71) By closing argument, however, the Government completely abandoned any argument that it had proven concealment of any material fact.

In his opening statement, AUSA Stallings made a promise to the jury that the Government intended to show evidence of concealment necessary to satisfy the materiality requirement under Neder. Speaking of Eileen Young, AUSA Stallings said the following:

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 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:

(Whereupon, the Night Talk videotape was played.)

MR. STALLINGS: Not one single thing, not one single thing.

(Ex. A, pp. 70-71) (emphasis added).

AUSA Stallings failed on both of his promises to the jury that the Government would discharge its burden of proving the element of concealment. The Court properly excluded the Night Talk video and, in any event, it never was the kind of concealment evidence necessary to sustain a conviction for honest service fraud. (Doc. 792) More importantly, the Government

was not able to prove that the movement of the boxes was in response to the Zappala article. This failure is not surprising. What is surprising is that the Government would inject this issue into the trial, as it unquestionably knew it to be a false assertion that it could never prove. In fact, as Jencks material produced shortly before trial clearly proves, the Government has known for years that the boxes were not moved in response to the Zappala article.

Specifically, on April 5, 2005, FBI Agent Bradley Orsini contemporaneously memorialized his interview with Donald Kanai, the man who moved the boxes: “On Friday, February 11, 2005, Kanai loaded boxes in his vehicle.”<sup>1</sup> This statement, recorded in an FBI 302 by Agent Orsini and SA John Steiner, clearly negates that boxes were moved in response to an article on February 12, 2005. Yet, two days later, Agent Orsini, with the assistance of AUSA Stallings, took an oath in the probable cause affidavits and falsely claimed otherwise. Additionally, on June 15, 2005, Kanai appeared before a Grand Jury. First Assistant AUSA Robert Cessar and trial counsel AUSA Stallings were present, and AUSA Stallings questioned Kanai. Again, and under oath and in response to AUSA Stallings’ questioning, Kanai again put the movement of the boxes before the February 12, 2005, article.

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 . . . This is when she started showing me the boxes that were to be moved, and cleaning.<sup>2</sup>

(Ex. C, pp. 41-42)<sup>3</sup>

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<sup>1</sup> A redacted version of Kanai’s 302 statement is attached hereto as Exhibit B.

<sup>2</sup> Despite possessing for years this information that showed that it had made a false allegation on an element of the crime, the Government repeatedly advised the Court and counsel that it had no Brady material it had not produced. The 302 of Kanai and his Grand Jury testimony were never produced as Brady material by the Government but instead as Jencks material shortly before trial.

It is bad enough that the Government concealed this Brady information for years, through key suppression hearings where its relevance cannot be disputed and otherwise. Worse still, knowing beyond question that the boxes had not been moved in response to the February 12, 2005, article, the Government nonetheless falsely attempted to suggest otherwise to the jury during opening statements, as noted, and then in trial. On January 30, 2008, AUSA Stallings elicited testimony from Rick Lorah designed to support the knowingly false allegation regarding the movement of the boxes. Thus, Mr. Lorah testified that he was in Eileen Young's office on February 11, 2005 and saw stacked boxes of files, but when he went back into the office on February 12, 2005 around 8:00 – 8:15 AM the boxes were already gone. (Ex. D, pp. 46-47, 70-72)

After placing this false issue before the jury in a bad faith attempt to discharge a necessary part of its burden of proof, the Government finally called Eileen Young, the person who coordinated the movement of the boxes. She was on the stand for five days of direct testimony. She testified under immunity and had, as was ultimately revealed on cross examination, consistently and repeatedly told federal agents that the movement of the boxes had nothing to do with the Zappala article. Ms. Young's statements, which plainly corroborated Kanai's statements, were clearly Brady material, yet the Government withheld them as well. On direct, the prosecution never asked her about the movement of the boxes. Instead, it had to be established on cross examination of Eileen Young that the moving occurred prior to the Zappala article and that she had consistently told the Government that fact. (Ex. E, p. 110) Moreover, when asked, "[s]o this [Zappala] article had absolutely nothing to do with the decision to move

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<sup>3</sup> Kanai's Grand Jury testimony is redacted so as to include only the salient portions of this testimony at issue.

those boxes, did it?” she responded, “No.” (Ex. E, p. 115) In fact, she testified she did not even see the February 12, 2005 article until February 13, 2005.

Following Eileen Young’s testimony, the Government did not call Don Kanai, whom they had indicated would follow her on the stand.<sup>4</sup> Although it had injected a false premise into the trial in an attempt to sustain an element of the honest services charges, the Government made no further attempt to prove the requisite concealment necessary to sustain a conviction for honest services fraud. The Government, presumably recognizing its lack of proof as to this element of honest services mail and wire fraud, then made no argument in closing regarding how the Government proved concealment – despite the promise it made in its opening. Thus, because the Government failed to prove any fraudulent concealment or misrepresentation whatsoever on the part of Dr. Wecht as required by Neder, Dr. Wecht is entitled to this Court’s judgment of acquittal on Counts 1-27. Acquittal is especially appropriate here, since the prosecution knowingly tried to satisfy its burden by the presentation of false evidence—the epitome of acute prosecutorial misconduct.

**III. COUNTS 1 THROUGH 27 SHOULD BE DISMISSED BECAUSE NO REASONABLE JURY COULD DECIDE, AND THE ACTUAL JURY DID NOT DECIDE, THAT DR. WECHT CONCEALED HIS PRIVATE PRACTICE**

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As pointed out in the Rule 29 motion, and related to the prior argument, there is simply no valid jury issue on whether Dr. Wecht concealed that he maintained an active private practice while serving as coroner. Indeed, in a binding judicial admission that is fatal to a key element of the charges of honest services fraud, AUSA Stallings admitted twice in his opening statement

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<sup>4</sup> On February 25, 2008, the Government informed the defense via email that they were going to call Don Kanai as a witness. (Ex. F) On February 26, 2008, Eileen Young’s testimony confirmed that the boxes were not moved in response to the February 12, 2005 news article. Thereafter, Don Kanai disappeared from the list of witnesses that the Government intended to call.

that Dr. Wecht did not conceal his private practice, stating that Dr. Wecht “made no bones about having a private business” and “again, everyone knew the defendant had a consulting and autopsy business.” (Ex. A, p. 70)

This is not a state ethics prosecution. In order to prove honest services fraud, the Government must prove as a critical element of its case materiality or, as stated previously, “concealment or misrepresentation of a material fact.”

Under the recent guidance of the Third Circuit in Kemp, the crucial issue is what a public official is required to report under the Pennsylvania Ethics Act. Here, there can be no doubt that the only matter Dr. Wecht was required to report under state ethics law was his interest in Wecht Pathology, which the prosecution conceded from opening statement was concealed from nobody. From opening statement on, the prosecution in this case proved itself out of court on this element by the reams of evidence that Dr. Wecht was, as they put it, “making no bones” about his transparently open work for others, including law enforcement officials of this Commonwealth who repeatedly came to ACCO to consult with him on homicide cases in their jurisdictions.

The Government has not, and cannot, point to anything that Dr. Wecht was “required to report,” within the meaning of Kemp that he in fact concealed. Absent some such other reporting requirement, and concealment in disregard of such a reporting requirement, there is a complete failure of proof of an element of the crime, again entitling Dr. Wecht to a judgment of acquittal by this Court on the first 27 counts.

**IV. THE GOVERNMENT PROVIDED NO EVIDENCE TO PROVE MATERIALITY ON COUNTS 30, 32, AND 33 THROUGH 36**

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Counts 30 and 32 were two of the remaining so-called “limousine charge” counts that went to trial after the Government dismissed the others prior to trial. Counts 33 through 36 were the remaining counts charging Dr. Wecht with private mail fraud based on the allegation that Dr.

Wecht charged district attorneys for his mileage in traveling to their counties while allegedly using an Allegheny County car.

The Government did not even call the alleged “victims” of any of these counts to support the charges. Once again, under Neder, it is indisputably part of the Government’s burden to prove the element of materiality with respect to these counts. And, it is the statement itself, and not its falsity, that must be proven to be material. Neder, 527 U.S. at 16; see also United States v. Fallon, 470 F.3d 542, 546 (3d Cir. 2006) (“material means that the statement would have a natural tendency to influence or is capable of influencing the decision of a person or entity to which it is addressed.”) (emphasis added)

The Government wholly failed to prove that any statements made to the alleged victims were material to them or influenced their decisions in any way. Indeed, the Government did not even try to do so by failing to call the alleged victims to the stand. Counts 32 through 36 involve state prosecutors as alleged victims, and the failure of federal prosecutors to call their state counterparts not only causes these counts to fail, but is tantamount to an admission that state prosecutors value Dr. Wecht’s honest services to them more than the “victim” status involuntarily bestowed on them by overzealous federal prosecutors. Indeed, the evidence at trial proved that the district attorneys still hire Dr. Wecht, which is as powerful as evidence gets of lack of materiality. Thus, it is not a question of whether there was sufficient evidence to convict on these counts. There was a complete absence of evidence on a necessary element of the crimes, requiring acquittal.

**V. COUNTS 33 THROUGH 36 MUST BE DISMISSED BECAUSE THERE WAS NO EVIDENCE DR. WECHT DROVE THE COUNTY CAR**

The central factual tenet of these counts was that Dr. Wecht drove a car belonging to Allegheny County when he went to other counties to testify in his private capacity. Yet,

incredibly, the Government presented no evidence from any competent witness who actually saw Dr. Wecht drive a county car on the days in question. Likewise, the Government offered no documentary evidence that he did so. The closest the Government came was Ms. Young's testimony that she "assumed" he drove the county car, but she admitted to no personal knowledge that he did so. (Ex. G, pp. 111-12) An "assumption" is not evidence. See Fed. R. Evid. 602 (requiring personal knowledge). Evidence must rise above mere speculation and conjecture and must suffice to prove the elements beyond a reasonable doubt. United States v. Pepe, 512 F.2d 1129, 1134 (3d Cir. 1975); see also United States v. Stewart, 305 F. Supp. 2d 368, 375 (S.D.N.Y. 2004) ("The jury may not be permitted to conjecture merely, or to conclude upon pure speculation . . .") United States v. Hernandez, 176 F.3d 719, 732 (3d Cir. 1999) (A juror must subjectively believe that a defendant has been proven guilty upon a proper understanding of the quantum of proof necessary to establish guilty to a "near certitude.")

As noted in the opening section of this brief, it is submitted that the Court should require the Government to identify by transcript or exhibit reference where it contends it produced sufficient evidence for a reasonable juror to hold, to a near certitude, the conclusion that Dr. Wecht drove a county car on the days alleged. If not, this Court must dismiss those counts on this additional ground also.

#### **VI. COUNTS 28, 29 AND 31 WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE**

On these counts, the Government's own witnesses demonstrated affirmatively that no statement made regarding expenses to the private clients involved in those counts was in fact material to them. Mr. Buikema, the "victim" in Count 29, testified that he was very satisfied with Dr. Wecht's services and "[t]here was no scrutiny attached to his bills"—an admission fatal to any claim that the bills influenced or were capable of influencing his actions. (Ex. H, p. 24)

He indicated expenses were not material and that he would hire Dr. Wecht again. (Ex. H, pp. 18, 21-22)

Mr. Shapiro, the “victim” in Count 31, squarely testified that the cost of Dr. Wecht’s services was immaterial and the expenses were even less material. (Ex. H, pp. 45-47) Again, these candid testimonial admissions destroy the notion of materiality in fact to Mr. Shapiro.

Finally, the two Exxon representatives did not offer any testimony to establish the expenses were material. Indeed, they have not sought any refund despite being told by the Government they were victims.

The Government has not, and cannot, counter these fatal admissions with proof of materiality beyond a reasonable doubt. No reasonable jury could determine that materiality had been proven in the face of this testimony, and it is now a matter of record that the reasonable jury that did hear the evidence did not do so. Those counts must also be dismissed.

**VII. INSUFFICIENT EVIDENCE WAS OFFERED TO PROVE A VIOLATION OF 18 U.S.C. SECTION 666**

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As this Court will recall, prior to trial, the Government estimated that the loss to Allegheny County of Dr. Wecht’s alleged action was in excess of a million dollars. Notwithstanding these “estimates,” the Government refused to articulate the exact loss figure during pretrial proceedings, claiming only that it had to prove it to be in excess of \$5,000 in each of the years covered by the respective counts.

At no time during trial did the Government even attempt to prove an exact figure and certainly did not prove a loss of one million dollars. No attempt was made to place any figure on the alleged loss of employees’ time, be they associated with Wecht details or the secretarial time.

Thus, the defense respectfully submits that it was nothing more than speculation as to the value of Eileen Young’s time, which by closing argument was the only argument made to satisfy

the \$5,000 threshold. On the authorities previously cited, speculation is not proof beyond a reasonable doubt. Moreover, the defense directs the Court to the authorities cited at page 33 of Doc. 816, which do not permit an employee's time or working fewer hours than she is to work to be the requisite "property" within the meaning of 18 U.S.C. § 666.

Thus, even assuming that it was correct for the Court to instruct the jury that aggregation over a calendar year was permitted, a proposition found nowhere in the text of the charging statute, the Government wholly failed to offer sufficient evidence of the theft of \$5,000 in any one year. Once again, the failure to do so was of the Government's own making. The Government had a financial analyst, Lisa Ubinger, listed as a trial witness and had summaries of her work pre-admitted prior to trial. However, it did not call her, presumably because it knew she had not been able to put a value on the time Eileen Young allegedly spent doing Dr. Wecht's private work. Accordingly, those counts should also be dismissed.

#### **VIII. CONCLUSION**

For the reasons stated above, as well as those stated in Defendant's Motion for Judgment of Acquittal filed on March 11, 2008. (Doc. 815), incorporated by reference herein, the Government has failed to sustain its burden of proof as to even a single count of the Indictment against Dr. Wecht. As to each count, the Government failed to adduce sufficient evidence of at least one element of the crime charged. Thus, no reasonable juror could find that the Government has proven Dr. Wecht's guilt at all, much less beyond a reasonable doubt, and the reasonable jury which heard the evidence did not do so. Therefore, Dr. Wecht's Renewed Motion for Judgment of Acquittal should be granted.

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 17, 2008

Attorneys for Cyril H. Wecht

**CERTIFICATE OF SERVICE**

I hereby certify that on the 17th day of April, 2008, a true and correct copy of the within **DEFENDANT'S BRIEF IN SUPPORT OF RENEWED MOTION FOR A JUDGMENT OF ACQUITTAL** 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