No. 2020-1335

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL GURRY,

Defendant-Appellant.

On Appeal from the United States District Court for the District of Massachusetts (Case No. 1:16-cr-10343), Judge Allison D. Burroughs

REPLY BRIEF OF DEFENDANT-APPELLANT MICHAEL GURRY

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INTRODUCTION

The government agrees with Mr. Gurry and with the district court that Mr. Gurry is not a risk of flight and is not a danger to the community, that Mr. Gurry's appeal is not for the purpose of delay, and that if Mr. Gurry prevails on appeal he may receive a reduced sentence or an acquittal.[1] The sole issue is therefore whether Mr. Gurry's appeal presents a substantial question of law or fact. This appeal presents a close question of both fact and law, see United States v. Bayko, 774 F.2d 516, 523 (1st Cir. 1985), on the issues discussed herein and in the Reply Brief of Defendant-Appellant John Kapoor ("Dr. Kapoor's Reply"), which Mr. Gurry expressly incorporates by reference.

Mr. Gurry submits this reply to highlight three issues that pertain directly to his appeal. First, the verdict in this case was tainted by prejudicial spillover both (a) because the verdict against Mr. Gurry's codefendants on the CSA and honest services predicates, which was later overturned by the district court, is evidence that the jury was swayed by unduly prejudicial patient testimony and (b) because the verdict against Mr. Gurry was internally inconsistent, suggesting the prejudicial spillover infected the verdict against him. Second, the government's improper rebuttal closing argument, including the government's assertion that Mr. Gurry "is

[1] On April 14, 2020, the district court granted Mr. Gurry's motion to continue his self-surrender date to July 20, 2020 in light of the COVID-19 pandemic.

responsible for the IRC" and "bears the responsibility" as a "corporate officer," JA455, warrants a new trial. Third, Mr. Gurry should be granted a new trial because the government does not dispute that the case against him depended on the testimony of a single cooperating witness whose credibility on key points was both contradicted by other witnesses and utterly implausible.

ARGUMENT

I. Mr. Gurry is Entitled to a New Trial Because Prejudicial Spillover from Highly Emotional Patient Testimony Tainted the Verdict

Dr. Kapoor's Reply, which Mr. Gurry incorporates by reference, addresses the emotional impact of the patient testimony at trial. Mr. Gurry writes separately to address the import of the split verdict against him. The government would ask this Court to assume that whenever a defendant is convicted of some but not all counts, the jury necessarily rendered a "discriminating" verdict and was able to set aside any prejudicial testimony. The Court should not adopt the government's assumption uncritically. If the Court accepts the government's logic, then the government could tack on more serious charges in any case, introduce highly emotional testimony relevant to those charges and designed to tug at jurors' heart strings, make no effort to connect that testimony to the defendant, and then point to the inevitable split verdict as evidence that the defendant has no cause for complaint. That cannot be the law, yet that is what happened in Mr. Gurry's case. He was compelled to sit through a ten week trial that had little to do with the

government's actual case against him. The government made no serious effort to connect the fraud in the speakers program to Mr. Gurry, and introduced no evidence whatsoever tying Mr. Gurry to any Subsys prescribers. Yet the CSA and honest services predicates served as a vehicle for the government to introduce heart wrenching testimony from patients that they were "unable to function" and "addicted," that they would "watch the clock" waiting for their next dose, with "slobber . . . run[ning] down my mouth." Tr. 39:78; 40:56.[2] Patient harm served as the backbone of the government's closing arguments, which repeatedly emphasized that defendants put "[p]rofits over patients," who the government claimed were "broken," "exploited," and "used by Mike Gurry" and his co-defendants. JA442-44. The government went on to argue that Mr. Gurry was motivated by "greed to transfer the profound risk of fentanyl to people who did nothing more than seek medical treatment." JA445. Although the jury did reject the government's ploy to some degree by acquitting Mr. Gurry of the CSA and honest services predicates, it did so imperfectly.

There are strong indications that the verdict against Mr. Gurry was tainted by prejudicial spillover, for at least two reasons. First, substantial portions of the jury's verdict against the other defendants were later overturned by the district

[2] Citations to "Tr." refer to the trial day followed by the relevant page. For example, "Tr. 39:78" references page 78 of the transcript from trial day 39.

court. The district court's decision to set aside the verdict with respect to the CSA and honest services predicates against the other defendants is evidence that the jury did not follow instructions in every respect and that the jury *was* swayed by the emotional nature of the patient testimony. The district court instructed the jury that it may not find any defendant responsible on the CSA or honest services counts unless the jury found that defendant specifically intended that a health care provider would prescribe Subsys "outside the usual course of professional practice and without a legitimate medical purpose." Tr. 49:43-44, 50-51. The district court later found, contrary to the jury's verdict, that there was insufficient evidence "to prove that Defendants specifically intended, much less intended beyond a reasonable doubt, that healthcare practitioners would prescribe Subsys to patients that did not need it or to otherwise abdicate entirely their role as healthcare practitioners." JA563. The patient testimony went, in part, to this very issue – namely whether defendants succeeded in inducing physicians to prescribe Subsys even when it was not medically necessary. JA157-58. The jury's verdict here, which was contrary to the court's instructions and the evidence in at least some respects, is evidence that the jury was swayed by prejudicial spillover.

Second, the conclusion that the split verdict is evidence that prejudicial spillover did not taint the verdict does not follow when the jury rendered an *inconsistent* verdict, as it did with respect to Mr. Gurry. An inconsistent verdict

"can be probative of whether a jury was confused . . . ." United States v. Paniagua-Ramos, 135 F.3d 193, 199 (1st Cir. 1998). The only way Mr. Gurry could have been acquitted on the CSA and honest services predicates but convicted on the mail fraud predicate was if the jury concluded that Mr. Gurry intended to pay prescribers to induce fraudulent Subsys prescriptions, but did not intend for those same physicians to write medically unnecessary Subsys prescriptions. But that conclusion makes no sense and does not comport with the evidence at trial, at which there was no proof that Mr. Gurry had *any* interactions with prescribers. If Mr. Gurry had no interaction with prescribers, there was no basis to convict him on the mail fraud count that depended on the mailing of bribes to those same prescribers. The only logical explanation of the verdict is that the jury was willing to overlook the lack of evidence against Mr. Gurry on the mail fraud predicate in order to paint him with the same broad brush that infected the verdicts against his co-defendants. Evidence of the jury's confusion should be weighed in evaluating whether prejudicial spillover from vivid patient testimony unduly influenced the verdict.

This was an extremely long and complex trial, lasting over fifty days and with thirty-nine witnesses. The jury was asked to render a verdict on five separate predicates and a complicated RICO conspiracy count, one of the more complicated federal criminal statutes. See United States v. Manzella, 782 F.2d 533, 547 (5th

Cir. 1986) ("A RICO case is an unusually complex criminal proceeding, providing many possibilities of confusion and ambiguity."). As the district court noted, the testimony regarding the IRC calls, i.e., the testimony most relevant to the government's case against Mr. Gurry, was "not exactly gripping." Tr. 23:113. That testimony stood in stark contrast with the vivid and memorable testimony offered by patients. Whether the jury was unduly swayed by patient testimony is a substantial question on appeal.

II. Mr. Gurry is Entitled to a New Trial as a Result of the Government's Improper Closing Rebuttal

Dr. Kapoor's Reply, which Mr. Gurry incorporates by reference here, addresses the logical flaws at the heart of the government's argument that defendants waived their objections to most of the improper comments in the rebuttal closing argument. Mr. Gurry writes separately to specifically address the government's statement that he "is responsible for the IRC" and "bears the responsibility" as a "corporate officer." JA455.

The government's attempt to paper over the improper comments in its rebuttal closing is unavailing. The government's contention that it was only arguing that Mr. Gurry would have been aware of what was going on in the IRC ignores both the plain language of the government's rebuttal and the district court's conclusion that the comment was improper. JA587. On its face, the government's statement that Mr. Gurry "bears the responsibility" as a "corporate officer" invites

the jury to convict him by virtue of his role in the company. JA455. That argument was improper, as the district court found. JA587. The impropriety of that remark is not mitigated merely because the government went on to make a permissible argument, namely that the fraud in the IRC was apparent to others in the company.

The government's contention that the jury would not have put much weight on whether Mr. Gurry was a corporate officer, which he was not, as opposed to his title of Vice President of Managed Markets is not well taken. If the government did not see any difference between "corporate officer" and "vice president," the government would have used the term "vice president." The government went to great pains to emphasize defendants' positions in the company in its closing argument. Tr. 49:72-75. The choice to falsely label Mr. Gurry a "corporate officer" was part of an overall strategy to depict Mr. Gurry as one of the most senior executives in the company. The government's contention also ignores the other problematic aspect of its statement, namely that it invited the jury to convict Mr. Gurry on the basis of his position in the company, which was improper regardless of his precise title.

Nor was the improper comment isolated in the context of the case against Mr. Gurry. First, the rebuttal closing was replete with improper statements. For example, the government and the district court agreed below that the "loaded gun"

demonstration was improper. JA590. As discussed in Dr. Kapoor's Reply, the government also repeatedly referenced defendant's failure to testify, including telling the jury that Mr. Gurry "wants to sit there and tell you, 'I had no idea.' It's preposterous." JA455. Second, the argument that Mr. Gurry "bears the responsibility" by virtue of his position at Insys was one of the few statements the government made about Mr. Gurry in its closing arguments. The vast majority of the government closings, and indeed the vast majority of the evidence at trial, concerned the speakers' program, not the IRC. Over the course of the closing argument, which lasted well over two hours, the government only briefly discussed the IRC in any detail. Tr. 49:91-94, 96-97, 100-04. Likewise, the government used Mr. Gurry's name only seven times during its rebuttal, and two of those instances occurred during improper comments that are the subject of this appeal. JA450, JA455, JA462-63. The government's improper comments were not isolated in the context of the small amount of testimony and argument that pertained to Mr. Gurry specifically.

Although the district court did give curative instructions after the government's rebuttal, which were insufficient for all the reasons discussed in Dr. Kapoor's Brief and Reply, those instructions did not outweigh the prejudice to Mr. Gurry in light of the thin evidence against him.

III. Mr. Gurry is Entitled to a New Trial Because the Weight of the Evidence Against Him was Thin

On a motion for a new trial, the district court is required to consider the evidence favorable to the government as well as the defendant's contrary view. See United States v. Ayala-Garcia, 574 F.3d 5, 7 (1st Cir. 2009). The government does not disagree with Mr. Gurry that the case against him rested squarely on the testimony of Elizabeth Gurrieri and that Ms. Gurrieri's testimony suffered from serious credibility issues. Nor does the government dispute that the district court did not address Mr. Gurry's argument regarding Ms. Gurrieri's credibility in its decision on defendants' post-trial motions, and that omission alone was an abuse of the district court's discretion. See Munoz-Pacheco v. Holder, 673 F.3d 741, 745 (7th Cir. 2012) ("Failure to exercise discretion is not exercising discretion; it is making a legal mistake."). Instead, the government contends that the jury was free to accept portions of Ms. Gurrieri's testimony even if it did not credit her testimony in its entirety.

There are two problems with the government's position. First, the problems with Ms. Gurrieri's testimony cut straight to the heart of the government's case against Mr. Gurry. To take one glaring example, Ms. Gurrieri falsely told the jury that Mr. Gurry had an office in the IRC. JA279-80. The IRC was located in a separate building down the road from the Insys headquarters. In fact, Mr. Gurry had one office in the headquarters building and rarely visited the IRC. JA170,

JA212, JA279-80. Lacking any documentary evidence or other corroboration that Mr. Gurry instructed her to commit insurance fraud, Ms. Gurrieri simply claimed, falsely, that he was in the IRC regularly and would have routinely overheard the IRC's calls.[3] To take another example, the evidence at trial demonstrated that Mr. Gurry tried to have IRC calls recorded, and hired an employee to conduct quality control of IRC calls. Ms. Gurrieri needed to undermine that evidence to maintain the fiction that Mr. Gurry had instructed her to lie. She therefore constructed the incredible story that Mr. Gurry hired someone to listen in on calls to ensure that the IRC was lying. JA294-96, JA321 (Question: "So you wanted to create a record of the crimes you were committing and the crimes you were instructing other people to commit?" Answer: "Correct."). The government does not dispute that these stories were false, contradicted by other witnesses, and lacked credibility. Without these falsehoods, the government cannot prove that Mr. Gurry was aware of the fraud in the IRC and cannot explain Mr. Gurry's efforts to ensure that the IRC was operating aboveboard.

Second, it is one thing to reject portions of testimony in the typical case where multiple witnesses and documents support the government's case. It is quite

[3] Notably, the government's brief references only Ms. Gurrieri's office at the IRC and the government does not dispute that Mr. Gurry never had an office at the IRC. Gov. Brief at 12.

another to base a criminal conviction on the testimony of a *single* cooperating witness while acknowledging that witness suffers from serious credibility concerns. This Court has previously warned of the "myriad credibility problems" of cooperator testimony. See United States v. Flores-De-Jesus, 569 F.3d 8, 26-27 (1st Cir. 2009). Ms. Gurrieri's testimony was not corroborated by other witnesses. She was the only witness who testified that Mr. Gurry told her to defraud insurance companies. The only other IRC employees who testified at trial, Kimberly Fordham and Lyndsey Meyer, testified that it was Liz Gurrieri, or people who reported directly to her, who instructed them to lie to insurance companies, both during and after Mr. Gurry's tenure. JA206-09, JA215, JA218-19, JA222, JA367, JA371. And Ms. Gurrieri, who began cooperating with the government immediately after her arrest in 2016 and met with prosecutors numerous times over the course of the investigation and to prepare for her testimony at trial, acknowledged that she could not identify a single document in which Mr. Gurry told her to lie. JA317.

This case is very different than United States v. Sabian, on which the government relies. In Sabian, the defendant physician was convicted of tax evasion, unlawful distribution of a controlled substance, and health-care fraud counts stemming from large cash payments and prescriptions the defendant provided to his adult daughter. See 885 F.3d 27, 32-33 (1st Cir. 2018). The

district court admitted testimony by the defendant's daughter that the two had been in a sexual relationship since she was twelve. Id. at 34. That testimony was imperfect, but it was corroborated by other evidence, including sexually explicit emails. Id. at 34, 37. That testimony went to a peripheral issue, namely whether the defendant had a motive to send money to his daughter. Id. at 35. The defendant's guilt on the elements of the crimes charged was established by other credible evidence, such as prescriptions the defendant wrote for his bedridden wife that were filled in the state where their daughter lived and where his wife never set foot. Id. at 33. Against that background, this Court found the jury was entitled to credit some portions of the daughter's testimony while ignoring other portions. Id. at 36-37.

The contradictions and falsehoods in Ms. Gurrieri's testimony are significantly more problematic. Ms. Gurrieri's uncorroborated testimony was the foundation of the government's case against Mr. Gurry. The government could not have convicted Mr. Gurry without her. And her falsehoods went to the heart of the most critical issue in the case, that is, whether Mr. Gurry knew and specifically intended that the IRC would lie to insurance companies. Under these circumstances, whether Mr. Gurry is entitled to a new trial is a substantial question on appeal.

CONCLUSION

For the foregoing reasons, Michael Gurry respectfully requests that the Court stay his sentence of imprisonment pending the outcome of his appeal.

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By his attorneys,

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Dated: April 17, 2020

CERTIFICATION OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 2,926 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Megan A. Siddall
Megan A. Siddall

Dated: April 17, 2020

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served by ECF on counsel for the government on April 17, 2020.

/s/ Megan A. Siddall
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