05-6439-cr

To Be Argued By:
ERIC J. GLOVER

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-6439-cr

UNITED STATES OF AMERICA,
Appellant,

-vs-

JOHN CANOVA,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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REPLY BRIEF FOR THE UNITED STATES OF AMERICA

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JOHN H. DURHAM
Acting United States Attorney
District of Connecticut

ERIC J. GLOVER
WILLIAM J. NARDINI
Assistant United States Attorneys

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Preliminary Statement

The defendant's theme, albeit in many variations, is that this case did not involve "mainstream fraud." But the reality is that the defendant charged Medicare for services which he knew were not being rendered, and then lied and manufactured false evidence when Medicare became suspicious and investigated, in order to get its money back. This is garden-variety fraud. Based on this conduct, the

defendant was convicted of fraudulently billing Medicare and of obstructing Medicare's audit to recover the money which the defendant and his company had obtained by that fraud. *See United States v. Canova* ("*Canova I*"), 412 F.3d 331, 354 (2d Cir. 2005) (discussing Canova's "first fraud" and his "second fraud").

This Court found that the intended loss for Canova's obstruction of Medicare's audit – his "second fraud" – was $5 million. *Id.* at 355. This Court concluded that Medicare was entitled to recover the full value of the tests that were not performed in accordance with Medicare's guidelines, and that Medicare made quite clear its intent to do so. *Id.* at 354-55. Moreover, this Court recognized, as did the jury, that there is no question that "Canova was aware of this right." *Id.* at 355. "Canova's trial testimony made plain that he understood what was at stake." *Id.* (quoting Canova's testimony that the audit presented "a large bullet to take as a financial hit").

Canova thus knew that his obstruction would prevent Medicare from recovering millions of dollars to which it was entitled. Indeed, that was the intended effect. Thus, a guidelines loss of that which he fraudulently sought to deprive the government – $5 million – does not overstate the seriousness of the offense. And at the very least, a $5 million loss does not overstate the seriousness of the offense to the extent found by the district court, which did not even address intended loss in sentencing Canova to probation in the face of a guidelines range of 46-57 months. The sentence should be vacated and remanded for re-sentencing.

I. THE $5 MILLION LOSS FOUND BY THIS COURT DID NOT OVERSTATE THE SERIOUSNESS OF THE OFFENSE

The defendant spends a great deal of his brief discussing the nature of the underlying billing fraud, the so-called actual loss.[1] Much of what the defendant states about that actual loss runs directly contrary to this Court's holding in *Canova I* – specifically, that where, as here, Medicare was "induced to pay for something that it wanted and was promised but did not get," it incurred pecuniary loss, and that "it is not the task of a sentencing court to second-guess the victim's judgment as to the necessity of

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[1] The government is obliged to correct at least one, if not all, of the misstatements in Canova's brief concerning the evidence. The defendant erroneously claims that the evidence showed that the only portion of the 30-30-30 test for which Medicare was shortchanged was the last part of the test. Def. Br. at 4. That is not what the evidence showed. Rather, the evidence showed that technicians would often monitor for about 10 seconds in the first two phases, and then skip the third phase altogether. (A-071, 077-080, 082-083, 108). The district court's finding in its order denying the defendant's motion for a new trial makes clear that "[d]espite knowledge of Medicare's coverage policy . . . the defendant, in an effort to increase the volume of tests and revenue, importuned technicians at Raytel to skip the third requirement and/or not take the minimum 30 seconds of ECG strip in each of the three portions of the test." (A-221) (emphasis added); *see also Canova I*, 412 F.3d at 349.

those specifications." *Canova I*, 412 F.3d at 352; *see also id.* at 351 (stating that "the very essence of Canova's scheme was to conceal from the government the fact that Raytel was *not* performing pacemaker tests according to Medicare specifications in order to induce payments that would otherwise not have been made").[2]

But of course this Court in *Canova I* did not reach the issue of quantifying the actual loss stemming from the billing fraud. *Id.* at 353-54. Rather, this Court decided the issue of what "the intended loss [was] from the recoupment fraud." *Canova I*, 412 F.3d at 355; *see also id.* (stating that the "intended loss calculation from a fraud scheme aimed at preventing . . . recoupment is . . . relatively straightforward"). This Court agreed with the government that "[t]he record supports an intended loss of recoupment in an amount of $5 million, and such a loss should have been factored into the Guidelines considered by the district court in imposing sentence." *Id.* at 355.

The district court did not even address the issue of intended loss in finding that the loss overstated the seriousness of the offense. Rather, much as the defendant does in his brief in this appeal, the district court addressed

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[2] Similarly, it is not necessary at this stage of the case to respond yet again to Canova's arguments about the evidence and the witnesses presented at trial. The jury rejected them, the district court denied the defendant's post-trial motion based on them, and this Court in *Canova I* affirmed his conviction over those objections. *See Canova I*, 412 F.3d at 349.

only the issue of actual loss. Although at the first sentencing hearing actual loss "understandably [was] the focus of the district court's attention," *Canova I*, 412 F.3d at 354, it is hard to see at the re-sentencing how the district court could conclude that the loss overstates the seriousness of the offense when it did not even address or mention the specific guidelines loss that this Court directed it to take into account on remand. *See id.* at 355, 359.

The defendant does not address the fact that the district court dealt only with the *actual* loss, not the *intended* loss, in finding that the $5 million loss overstates the seriousness of the offense. Rather, Canova argues that the $5 million intended loss figure is a "distorted measure" of his culpability because for Medicare to actually take action to get its money back for having been billed for non-compliant testing would have been "singularly unfair" and "punitive," Def. Br. at 23, not to mention "border[ing] on the unconscionable," Def. Br. at 28.

What the defendant's argument boils down to is this: It is not a serious crime to fraudulently obstruct and impede the government's right to recover millions of dollars if you believe that the government is being "unfair," "punitive," or "unconscionable" in taking its money back. But if the defendant viewed the recoupment provisions of the contract between Medicare and Raytel as being unfair, he should have made these arguments to

Medicare during the audit, not obstructed the audit.[3] Instead, he obstructed the audit, was caught, prosecuted, and convicted, and now argues to this Court that even if he did intend to obstruct the audit and prevent Medicare from recovering the $5 million for which it was overbilled, Medicare was "not the most sympathetic of victims" because of the unfairness of recoupment. Def. Br. at 28. Indeed, the defendant actually contends that his "alarm" at the prospect of recoupment – and presumably his conduct as well – was "understandable." Def. Br. at 27. This Court should reject the defendant's post hoc rationalizations of his obstruction offense and vacate the district court's departure based on the loss overstating the seriousness of the offense.

It is worth noting that in support of his argument, the defendant relies upon *United States v. Parsons*, 109 F.3d 1002 (4th Cir. 1997), in which a postal worker filed partially fraudulent travel vouchers, and the Fourth Circuit held that the loss amount for Guidelines purposes was only the amount of fraudulently claimed expenses. In *Parsons*, the Fourth Circuit rejected the notion that when a defendant is convicted of fraud in connection with some

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[3] *Cf. United States v. Cutler*, 58 F.3d 825, 833 (2d Cir. 1995) (affirming contempt conviction) ("Cutler could have, and should have, sought modification of the orders in district court, challenged them on a direct appeal, or sought a writ of mandamus or declaratory relief. Having failed utterly to make any good faith effort to undertake even one of these steps, he cannot now challenge the orders' validity.").

portion of a claim against the federal government, and the United States thereby gains the option of pursuing forfeiture with respect to entire claim, the loss amount for guidelines purposes is the amount fraudulently sought, not the entire amount which might hypothetically be forfeited. The defendant argues that under this Court's holding in *Canova I,* the loss would be the full amount of the claim in the voucher. Def.'s Br. at 23-24.

But this case is unlike *Parsons* for reasons recognized in *Canova I.* First, as the defendant acknowledges, Def. Br. at 24 n.21, the Medicare regulations at issue here involve not forfeiture penalties, but instead recoupment of funds that were contractually owing to Medicare for noncompliance with program regulations. Medicare was looking for a refund stemming from overbilling, not a penalty. Second, and more importantly, the defendant here did more than submit false claims; he also obstructed the Medicare audit, the foreseeable consequence of which would have been the recoupment action. The defendant claims that in his hypothetical – comparing employee Y who falsely claims $10,000 in expenses and then seeks to prevent recoupment of the full $10,000, to employee X who falsely claims only $100 of the $10,000 claim and then seeks to prevent recoupment of the entire claim – employee X is "less culpable." Def. Br. at 24. As a purely comparative matter as between X and Y, the defendant may very well be right. But that is true not because a $10,000 loss "overstates" the seriousness of employee X's offense, making him not such a bad fellow. It is because employee Y is *doubly culpable*, having attempted twice to steal the same amount of money, and if anything a loss

amount of $10,000 *understates* his culpability. If the defendant wishes to place himself in the company of employee X, who tried to deprive the victim of a smidge more than $10,000, so be it – both of them are still thieves.

II. THE "VICTIM'S OWN CONDUCT" SHOULD NOT HAVE BEEN A BASIS FOR DEPARTURE

In granting the downward departure, the district court stated that "there was evidence that even Medicare could not tell in the language of its own policy that all three parts of the test were required." A-308. The defendant maintains that the district court's consideration of the victim's conduct in this case was appropriate. Def.'s Br. at 27. But the simple truth is that confusion by an unidentified Medicare employee is hardly the sort of provocation or wrongdoing that justifies a downward departure. *See United States v. LeRose*, 219 F.3d 335, 340 (2d Cir. 2000) (vacating departure based on supposed bank misconduct in bank fraud case, and stating that "we have emphasized that not only must the victim's conduct be provocative, but 'the victim must actually have done something wrong'" (quoting *United States v. Morin*, 80 F.3d 124, 128 (4th Cir. 1996)).

Tellingly, the defendant never responds to the main point in the government's opening brief that regardless of what Raytel employee Steve Boecklin discussed with an unknown Medicare employee about Medicare's

requirements,[4] John Canova was not confused about the requirements. Nor was there any evidence that Boecklin ever reported to Canova about his communications with unknown persons at Medicare, much less that it confused Canova about the testing requirements. Rather, Canova clearly understood the 30-30-30 rule, as evidenced by his repeated efforts to deceive Medicare into believing that Raytel was in fact complying with that rule.

Simply put, the fact that an unknown Medicare employee did not know what 30-30-30 meant did nothing to lessen the defendant's responsibility for the offenses for which the jury convicted him. For the district court to find otherwise and blame the victim was error. *See United States v. Godding*, 405 F.3d 125, 126-27 (2d Cir. 2005) (per curiam) (finding it "troubl[ing]" that district court relied in part on bank's failure to detect embezzlement when granting downward departure to defendant employee).

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[4] The defendant persists in claiming that Boecklin spoke with "two supervisors." Def.'s Br. at 27. The fact is that when defense counsel asked Boecklin whom he called, Boecklin testified, "You know, I really don't know. I think I called direct[or]y assistance, and I said I needed to speak to someone that is in Medicare." A-91C & A-91D.

III. PAYMENT OF RESTITUTION BY THE DEFENDANT'S EMPLOYER WAS NOT A PROPER GROUND FOR DEPARTURE

The district court relied upon *United States v. Broderson*, 67 F.3d 452, 458 (2d Cir. 1995), in concluding that Raytel's payment to the government of $5 million in restitution was an "appropriate [reason] for departure" in this case. A308-09. In its opening brief, the government set forth at length the reasons why *Broderson* does not apply to the facts of this case. Notably, the defendant does not address the fact that Broderson "did not set out to mislead the government," *Broderson*, 67 F.3d at 459, which is precisely the basis on which Canova was convicted. The defendant also does not address the core concern over an employer's payment of restitution other than in the context of the sui generis facts of *Broderson*. The fact remains that payment by Raytel does not mitigate Canova's responsibility or provide any evidence that Canova has personally taken responsibility for his actions, and in fact Canova continues to deny such responsibility, even on appeal of his conviction and at resentencing on remand.

The defendant also does not address the government's point that allowing employer-paid restitution to serve as a basis for downward departure would create the potential for serious sentencing disparities based on the deep pockets of a co-defendant. These disparities could be particularly skewed in favor of white-collar offenders, if district courts were to follow the example set in this case, where the defendant received a sentencing windfall

because his employer was solvent enough to make criminal restitution. A sentencing regime that differentiates among equally culpable defendants based on whether other co-defendants can independently be brought to account by the criminal justice system loses sight of one of the key goals of the Sentencing Reform Act as well as one of the principal effects of *Booker*: the duty and ability to impose sentences that "continue to substantially reduce unwarranted disparities while now achieving somewhat more individualized justice." *United States v. Crosby*, 397 F.3d 103, 114 (2d Cir. 2005).

In short, Canova should not benefit because Raytel made restitution after prosecution of both had commenced.

IV. A SENTENCE OF PROBATION WAS UNREASONABLE WHERE THE DEFENDANT'S SENTENCING GUIDELINES RANGE WAS 46 TO 57 MONTHS OF IMPRISONMENT

The magnitude of the district court's departure cannot be overstated. The district court departed 15 levels, from level 23 to level 8. The departure to probation constituted a 100% variance from the applicable guidelines range of 46-57 months. The defendant vainly asserts that "[t]his Court has upheld downward departures of similar magnitude in other cases." Def. Br. at 25. But the only cases from this Court that the defendant cites involve departures that do not compare with the magnitude of the district court's departure here. *See Broderson*, 67 F.3d at 459 (holding that downward departure from 41-51 month

range to 18-24 month range was within district court's discretion but regarding "the case as a close one"); *United States v. Amor*, 24 F.3d 432, 437-40 (2d Cir. 1994) (upholding departure from 46-57 month range to 30 months); *United States v. Jagmohan*, 909 F.2d 61, 63-66 (2d Cir. 1990) (upholding a downward departure from 15-21 month range to probation); *United States v. Skinner*, 946 F.2d 176, 179 (2d Cir. 1991) (remanding for consideration of permissible departure basis, where defendant argued for departure from level 24 to level 16).

Nor are the departures involved in the district court cases the defendant cites (Def. Br. at 25) comparable to the extent of the departure here. *See United States v. Tunick*, 2001 WL 282698 (S.D.N.Y. 2001) (granting six-level departure, from a 30-37 month range to a 12-18 month range, in case involving conspiracy to defraud Medicare); *United States v. Costello*, 16 F. Supp.2d 36, 37 (D. Mass. 1998) (granting six-level downward departure, from level 21 to level 15, or from 37-46 months to 18-24 months).

The defendant also claims that appellate courts have upheld dramatic upward deviations from the sentencing guidelines. Def. Br. at 26. But the cases that the defendant relies upon do not match the extent of the departure in this case. *See, e.g., United States v. Karro*, 257 F.3d 112, 117 (2d Cir. 2001) (departing upward by five levels, from 10-16 months to 24-30 months); *United States v. Khan*, 53 F.3d 507, 518-19 (2d Cir. 1995) (upholding upward departure from 46-57 month range to 121-151 month range, after which district court departed

downward to impose 60-month sentence); *United States v. Merritt*, 988 F.2d 1298, 1311 (2d Cir. 1993) (upholding upward departure from 37 months to 60 months, a five-level increase); *United States v. Campbell*, 967 F.2d 20, 23 (2d Cir. 1992) (upholding upward departure from 15-21 month range to 54-month sentence).

There is no question at this point that a departure from the guidelines was authorized based on this Court's decision in *Canova I*. *See Canova I*, 412 F.3d at 359 & n.29 (affirming departure for civic and charitable works). But that authority to depart permitted the district court to deviate to a reasonable extent from the guidelines range, not to wholly abandon it. *See United States v. McMannus*, 436 F.3d 871, 874 (8th Cir. 2006) ("[T]he farther the district court varies from the . . . guidelines range, the more compelling the justification . . . must be.") (discussing review of non-Guidelines sentences). A sentence of a one-year term of probation and a $1,000 fine for the crimes the jury convicted the defendant of is nothing short of a slap on the wrist. The sentence undermines respect for the rule of law and sends the wrong message to those who would obstruct the federal government's ability to protect itself from fraudulent billing, and to conduct unimpaired audits. *See Khan*, 53 F.3d at 518 (stating that "the public's confidence in government" is undermined as a result of Medicare fraud).

The importance of punishing individuals who defraud the government was recently underscored by the Eighth Circuit in *United States v. Ture*, No. 05-3142, 2006 WL 1596754 (8th Cir. June 13, 2006). There, the defendant

pled guilty to tax evasion, and his sentencing guidelines range was 12 to 18 months of imprisonment. 2006 WL 1596754 at *1. The district court found "'no reason to sentence [the defendant] to prison,'" and sentenced the defendant to a two-year term of probation and 300 hours of community service. *Id.* at *2-*3. The government appealed, and the Court of Appeals vacated the sentence, holding that a reasonable sentence for Ture had to include a term of imprisonment. As the Court of Appeals noted, this sentence amounts to "100% variance from the Guidelines range, which amounted to a five-level reduction in [defendant's] total offense level" *Id.* at *3. The court stated that the district court "failed to consider the importance of a term of imprisonment to deter others from stealing from the national purse." *Id.* at *5. The Court of Appeals concluded that "[t]he goal of deterrence rings hollow if a prison sentence is not imposed in this case," and that "a proper evaluation of the relevant sentencing factors leads inexorably to the conclusion that a reasonable sentence for [the defendant] must include a term of imprisonment." *Id.* at *5-*6.

So too here. The offense was a serious one, and a sentence of probation and a nominal fine is not just punishment and does not promote respect for the law – it undercuts it and provides no deterrence to those who would commit fraud upon the government. The defendant's fraudulent conduct should be addressed through just punishment, and that punishment should include a term of incarceration that reflects the seriousness of the offense and promotes respect for the law. *See Godding*, 405 F.3d at 127.

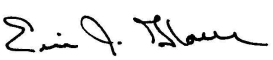
CONCLUSION

For the foregoing reasons, and for the reasons set forth in the government's Appellant's Brief, the Court should vacate the district court's judgment and sentence, and remand the case for resentencing.

Dated: June 16, 2006

Respectfully submitted,

JOHN H. DURHAM
ACTING UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT



ERIC J. GLOVER
ASSISTANT U.S. ATTORNEY

WILLIAM J. NARDINI
ASSISTANT U.S. ATTORNEY (of counsel)