

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
0:05-CR-282-001 (MJD)

United States of America,)
)
Plaintiff,)
)
vs.)
)
Christopher William Smith,)
)
Defendant.)

**DEFENDANT’S POSITION
REGARDING SENTENCING**

INTRODUCTION

Defendant Christopher William Smith, by and through his undersigned attorney, Joseph S. Friedberg, respectfully submits this position paper to address the following: (1) the most significant of Mr. Smith’s objections to the Presentence Investigation; (2) the Court’s request for information on sentences meted out in similar cases; and (3) a request by Mr. Smith that the Court implement a non-Guidelines variance in its sentence down to the mandatory minimum should the Court conclude that the guidelines range as calculated in the PSI is correct.

In this case, the Guidelines as applied in the PSI indicate a total offense level of 42 and a criminal history category of I, resulting in the guideline range for imprisonment of 360 months to Life. PSI at ¶ 169. Pursuant to the CCE conviction in Count 9, the minimum term of imprisonment is 20 years and the maximum is life. PSI at ¶ 168. The government may move for an upward departure or variance from the guideline range. PSI at ¶ 184. Defendant urges this Court to sentence him to the mandatory minimum of 240 months in prison, contending the guidelines as appropriately calculated allow for such a sentence, or in the alternative that a moderate variance is warranted to arrive at such a sentence.

The government will be moving to dismiss the convictions of conspiracy and distribution of controlled substances in Counts 1 through 4 because they are lesser included offenses of the Continuing Criminal Enterprise offense for which Mr. Smith was also convicted in Count 9. Therefore, while Mr. Smith lodged, and for purposes of sentencing maintains, numerous objections relating to the facts underlying the calculations and the application of the guidelines based on those facts, the adjusted offense level of Group 1 as calculated in paragraphs 93 through 99 of the PSI is, in fact, legally irrelevant to the ultimate sentence of Mr. Smith.

The adjusted offense level for Group 3, money laundering, was calculated at 32, *see* PSI at ¶ 115, which when considered in light of Mr. Smith's criminal history category, creates a guideline range well below the mandatory minimum sentence in this case. Again, both Mr. Smith's objections and the calculations and application of the Guidelines for Group 3 are thus equally immaterial for the sentencing of Mr. Smith.

Mr. Smith will direct the Court in this memorandum to his objections that have a potential impact on his actual sentence, and he will therefore address in detail the facts underlying and application of the Guidelines for Group 2, the introduction of misbranded drugs into interstate commerce, and for Group 4, continuing criminal enterprise.

ARGUMENTS

I. BASED ON MR. SMITH'S OBJECTIONS TO PSI, THE TOTAL OFFENSE LEVEL UNDER THE GUIDELINES SHOULD BE NO HIGHER THAN 38, AND THE GUIDELINES RANGE SHOULD BE 235 TO 293 MONTHS.

Since the Guidelines are now merely advisory for the Court, the main controlling factor in Mr. Smith's ultimate sentence is the statutory mandatory minimum sentence of 20 years, or 240 months, that applies due to Mr. Smith's conviction for CCE. Certainly, the Guidelines range as determined in the PSI to be 360 months to life, is significantly higher than the mandatory

minimum. However, that range is based on an offense level of 42. If, based on any of Mr. Smith's myriad objections, the total offense level was appropriately calculated at 40, Mr. Smith's Guidelines range goes down to 292 to 362 months. Further, if the total offense level was actually only 38, the Guidelines range would be 235 to 293 months, and Mr. Smith could receive a Guidelines sentence at the mandatory minimum of 240 months.

Group 2 – Misbranded drugs

Under the calculations in the PSI, the adjusted offense level for Group 2 is 42. PSI at ¶ 109. This is based on seven different upward adjustments from a base level of 6. *See id.* at ¶¶ 100-109. Mr. Smith objects to virtually every calculation and application of the Guidelines for Group 2, reaffirms them here, but directs the Court to the following arguments.

Mr. Smith objects to the 22-level enhancement in **paragraph 101** of the PSI. The enhancement is based on the gross sales of Mr. Smith's operation, approximately \$24 million. While Mr. Smith's scheme defrauded government agencies, there was not a monetary loss. Other courts have concluded that it is inappropriate to substitute the defendant's gain in such a case as a proxy for loss. *See, e.g., United States v. Andersen*, 45 F.3d 217, 222 (7th Cir. 1995) (reversing increase in offense level under Section 2F1.1(b)(1) on basis of financial loss because harm caused by defendant's acts was non-monetary); *see also United States v. Kimball*, 291 F.3d 726 (11th Cir. 2002) (in misbranding case, expressing no opinion on district court's determination that it was inappropriate to substitute defendant's gain as proxy for loss because no connection existed between defendant's gain and agencies' loss). The Court should conclude that the 22-level enhancement is inapplicable, although the Court might, as the *Andersen* and *Kimball* sentencing judges did, determine that an upward adjustment is necessary for the non-monetary loss caused by the fraudulent scheme.

Mr. Smith objects to the two-level enhancement in **paragraph 103** of the PSI. The relevant guideline provides for a two-level upward adjustment “[i]f *the offense* involved ... a violation of any prior, specific judicial or administrative order, injunction, decree, or process....” U.S.S.G. §2B1.1(b)(8)(C) (emphasis added). Application note 7.(C) indicates the enhancement applies if the defendant commits the fraud offense of conviction “in contravention of a prior, official judicial or administrative warning, in the form of an order, injunction, decree, or process to take or not to take a specified action.” Here, the fraud offenses were three convictions for the introduction of misbranded drugs. These offenses, which were sting operations by the government, simply did not take place after and “in contravention” of any official judicial or administrative warning that Mr. Smith not sell prescription drugs. Nor was there a “prior, official” injunction precluding Mr. Smith from setting up a web site to sell misbranded drugs at the time of the commission of these fraud offenses. The Court should conclude that the two-level enhancement under §2B1.1(b)(8)(C) is not applicable in this case.

Mr. Smith objects to the two-level enhancement in **paragraph 104** of the PSI. Mr. Smith denies the allegations contained throughout the PSI, including but not limited to those in **paragraphs 39, 47-50, 75, and 104**, setting forth Mr. Smith’s foreign activities and concluding that those activities were fraudulent and undertaken to evade law enforcement. The underlying theory in the PSI is that all conduct by Mr. Smith in relation to establishing the Internet pharmacy was not just criminal but was clearly or obviously criminal, and further that, after court action was taken on May 9, 2005 to shut down the Online Payment Solutions operations, all activities or planned activities in foreign jurisdictions were similarly criminal and undertaken with the purpose of evading U.S. authorities. The PSI applies a two-level enhancement pursuant to U.S.S.G. §2B1.1(b)(9)(A).

The evidence at trial revealed that at the relevant times, there were no laws directly prohibiting Internet pharmacies and that those operations were not in all cases illegal. The evidence also showed that Mr. Smith hired and utilized legal counsel for his operations, including Daniel Atkins and John Nelson, as well as an accountant, Bruce Lieberman. Furthermore, there is no evidence that the Internet pharmacy ever actually relocated and operated in any foreign jurisdiction. The Court should determine that the two-level enhancement under §2B1.1(b)(9)(A) is not applicable in this case.

Mr. Smith objects to the two-level enhancement in **paragraph 105** of the PSI. The relevant guideline provides for such an enhancement if the offense involved “(A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense....” U.S.S.G. §2B1.1(b)(12).

As to the enhancement factor for risk of death of injury, Mr. Smith denies the allegations included in **paragraphs 65-67** and throughout the PSI that there were deaths associated with prescription drug purchases from his company. Mr. Smith objects to application of U.S.S.G. §2B1.1(b)(12) in **paragraph 105** because his offenses did not involve conscious or reckless risk or death or serious bodily injury.

As to the enhancement factor for possession of a dangerous weapon, Mr. Smith denies various allegations contained throughout the PSI as misleading or irrelevant. Specifically, while **paragraphs 51 and 71** state that Mr. Smith used a taser gun on his employees, including Alton Scott Poe, the PSI omits the fact that the use on Poe was with Poe’s consent and does not identify any other employee that was tasered. Mr. Smith denies the allegation in **paragraph 71** that he used a Glock pistol to threaten and intimidate people. Mr. Smith objects to application of U.S.S.G. §2B1.1(b)(12) in **paragraph 105** on the ground that Mr. Smith’s possession at various

times of firearms was not in connection with the offenses committed here.

Mr. Smith objects to the two-level enhancement in **paragraph 108** of the PSI. The relevant guideline provides for such an enhancement where there is obstructive conduct. U.S.S.G. §3C1.1. Mr. Smith sharply contests the charges contained in *United States v. Smith*, case no. 06-CR-97 (MJD), which are referenced throughout the PSI, including but not limited to those in **paragraphs 18-20**, and objects to an adjustment for obstruction of justice based on those alleged acts. The theory for application of the enhancement is that Mr. Smith “obstructed the administration of justice in this case by threatening, intimidating, or otherwise unlawfully influencing a codefendant, directly or indirectly, or attempting to do so.” PSI at ¶ 78 (citing Application Note 4(a) to U.S.S.G. §3C1.1). The person who was allegedly the subject of the attempted unlawful influence was Bernardette Hollis. Mr. Smith has not been convicted or adjudicated guilty of the charges in case number 06-CR-97. He has pleaded not guilty to the charges and will contest them in a trial.

On similar grounds, Mr. Smith objects to the obstruction enhancement being applied here, where a review of the uncontested facts show that he did not endeavor to obstruct justice, or that if he did, his conduct did not rise to the level of an attempt to unlawfully influence as set forth under U.S.S.G. §3C1.1 in this case. An endeavor must have the natural and probable effect of obstructing the due administration of justice, which means the effect is more likely to happen than not to happen. Merely discussing or inquiring into the possibility of obstructing or attempting to obstruct justice is not an endeavor, because an endeavor requires that the defendant actually undertook an act, or attempted to effectuate an arrangement, or tried to do something the natural and probable cause of which is to influence, obstruct or impede the due administration of justice. *See United States v. Silverman*, 745 F.2d 1386, 1396 n.12 (11th Cir. 1984). Here, in the

first of five tape-recorded conversations between Mr. Smith and Roanna Cloefe that occurred over the course of two weeks, Mr. Smith made inquiries as to whether Cloefe knew of anyone that could be hired to kill Ms. Hollis. During that first tape recording, Cloefe did not agree to make specific arrangements to have Ms. Hollis killed or take further action to aid Mr. Smith in finding a hit-man. And in statements to investigators, Cloefe stated that she did not take Mr. Smith seriously and did not follow up on the discussion. That the matter was never discussed again in the remaining four conversations corroborates that there was never an agreement between Mr. Smith and Cloefe to harm or otherwise influence Ms. Hollis, nor did Mr. Smith's actions rise to the level of an attempt to unlawfully influence as set forth under U.S.S.G. §3C1.1.

On the other hand, Mr. Smith cannot contravene some of the other allegedly obstructive conduct raised by the government and incorporated into the final version of the PSI. Although defense counsel was unaware of it at the time, Mr. Smith did lie to the government during his proffers. Mr. Smith contends these allegations are far less serious than the charges in the Hollis case, and was not actually very obstructive because the government knew, at the time, that Mr. Smith was lying.

In the event the Court agrees with two or more of Mr. Smith's objections to the Group 2 calculations, therefore bringing the adjusted offense level down to 38 or lower, the calculations for Group 4 then become relevant.

Group 4 – Continuing criminal enterprise

Under the calculations in the PSI, the adjusted offense level for Group 4 is 40. PSI at ¶ 121. This is based on a base offense level of 38, plus one two-level upward adjustment for obstruction of justice. *See id.* at ¶¶ 116, 120. Mr. Smith has lodged a strong objection to the adjustment for obstruction of justice that was based on unlawfully influencing Bernardette

Hollis, which objection was addressed in detail *supra*. That same objection applies to the adjustment set forth in **paragraph 120** of the PSI. However, Mr. Smith concedes that there is other, less serious, obstructive conduct that the government could prove.

Additional Objections

Besides the objections addressed in detail *supra*, there were numerous other objections. The defense letter raising objections to the probation officer includes no less than 38 specifically enumerated and emboldened paragraph numbers of the PSI to which Mr. Smith was lodging some objection. The addendum to the PSI does not list or specifically address a number of these objections. In the addendum, the probation officer discusses eight areas of controversy raised by Mr. Smith and then in a ninth area, described as “offense conduct,” states only that “[t]he presentence report contains sufficient information in the offense conduct section to support the guideline calculations. Several of the proposed amendments are directly related to the defendant’s denial of the factual basis of which he was found guilty.” PSI at p. A.4. This is, quite frankly, an inadequate response to Mr. Smith’s specifically enumerated objections. The probation officer has an obligation in the addendum to present “*any* unresolved objections, the grounds for those objections, and the probation officer’s comments on them.” Fed.R.Crim.P. 32(g) (emphasis added). For each of the unresolved objections, the Court has an obligation to “rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing.” Fed.R.Crim.P. 32(i)(3)(B). By failing to identify for the Court Mr. Smith’s specific factual objections, Mr. Smith risks a denial of the process to which he is due. Mr. Smith reiterates his additional factual objections here:

Paragraph 12: Mr. Smith has denied that he violated the preliminary injunction and the Court's pretrial orders by planning to open and operate a new Internet pharmacy. In light of the Court's April 27, 2007 conclusion that Mr. Smith was not guilty of the offense of criminal contempt for marketing prescription drugs on the internet in violation of the Court's order for preliminary injunction, this objection seems to merit at least a mention in the addendum.

Paragraphs 27-31, 69: Mr. Smith has denied that he engaged in spamming for his prescription drug operation. Further, Mr. Smith objects to the omission in these paragraphs that his spamming for prior businesses was, at the time it was conducted, legal activity. Considering that no less than six different paragraphs in the PSI allege spamming, this objection should be addressed.

Paragraph 31: Mr. Smith denies that through an Internet-based pharmacy, he imported prescription drugs from India and distributed those drugs to customers without requiring a prescription and without the involvement of any physician. This is an entirely different and prejudicial allegation that was not the subject of any proof at trial, and should have been addressed by the PSI.

Paragraph 41: Mr. Smith denies that he ordered returned drugs to be repackaged for possible resale.

Paragraphs 53-56, 58-64: Mr. Smith specifically denies the allegations of violence or threatening behavior contained in each of these paragraphs.

Paragraph 69: Mr. Smith denies that the drug orders through the Internet pharmacy were primarily for Hydrocodone.

Paragraph 122: Mr. Smith objects to the determination that the greater of the adjusted offense levels is 42, and that instead the greater is the correct Group 4 calculation of 38. Therefore, the total offense level in **paragraph 124** should be 38.

Paragraph 125: Mr. Smith objects to the contents of this paragraph as there are no allegations and no proof of any tax violations; this paragraph should be stricken.

Paragraph 143: Mr. Smith denies that he asked a fellow inmate to kill Anita Smith.

Paragraph 165: Mr. Smith denies that he has the listed assets.

Paragraph 167: Mr. Smith objects to the conclusion that he has not demonstrated an inability to pay a fine.

Paragraph 169: Mr. Smith objects. Based on a total offense level of 38 and a criminal history category of I, the guideline range for imprisonment should be 235 to 293 months.

Based on Mr. Smith's objections to the PSI, the total offense level under the Guidelines should be no higher than 40, and the Guidelines range should be 292 to 363 months.

II. A NON-GUIDELINES VARIANCE IS APPROPRIATE IN THIS CASE TO SENTENCE MR. SMITH TO THE MANDATORY MINIMUM OF 240 MONTHS.

The guidelines, as calculated in the PSI, advise a sentence range of 360 months to life based on a total offense level of 42 and a criminal history category of I. PSI at ¶ 169. Mr. Smith has lodged numerous objections and urges that the Court to appropriately calculate the total offense at 40, with a resulting sentencing range of 292 to 362 months. There is a statutory mandatory minimum sentence of 240 months that applies, and Mr. Smith urges that a sentence of 240 months is appropriate in this case. In the event that the Court calculates the advisory guidelines range at 360 to life, based on an offense level of 42, or a guidelines range of 292 to 362, based on an offense level of 40, Mr. Smith seeks a downward variance.

Now, following the issuance of *United States v. Booker*, this Court must consider statutory factors to impose a sentence "sufficient, but not greater than necessary" to satisfy "the need for the sentence imposed." The 18 U.S.C. § 3553(a) factors include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (3) the need for deterrence; (4) the need to protect the public; (5) the need to provide the defendant with educational or vocational training or medical care; (6) the kinds of sentences available; (7) the advisory guidelines range; (8) the need to avoid unwarranted sentencing disparities; and (9) the need to provide restitution to victims. Pursuant to *Booker*, a sentencing judge should consult the Guidelines and the factors listed in Section 3553(a), apply the

Guidelines where those factors are met, and feel free to depart from the Guidelines when they are not.

There are several factors about the nature of this case, and how it was charged and prosecuted, that exaggerate the actual criminality and the guidelines range as calculated by the PSI. These considerations are relevant under the Section 3553(a) factors and are a basis for a downward variance to the mandatory minimum sentence of 240 months.

Nature and Circumstances of the Offense

As the Court is aware, the very long sentence that will be imposed in this case is going to be determined based on the convictions for misbranded drugs and CCE. Yet this case is atypical for either crime.

The introduction of misbranded drugs as occurred here is not the typical fraud case – where a person, business or government agency is essentially cheated out of something worth monetary value. There is really no evidence here that Mr. Smith’s customers did not usually get exactly the prescription drugs they wanted for the price they expected in a manner they preferred (quickly, without having to go to and pay for an in-person visit to a physician to get or renew a prescription).

The fraud theory eventually espoused by the government is that the sale of misbranded drugs defrauds regulatory agencies. If the Court applies it, a 22-level fraud enhancement for loss of more than \$20 million is really overstating the criminality here where generally neither the suppliers (the pharmacies) nor the customers involved in the \$24 million in sales were cheated out of anything. And enhancing for utilizing mass-marketing in a fraud is duplicative when one is being punished for \$24 million in sales – what misbranding case involving \$24 million in sales could ever be achieved without mass marketing? The aspect of mass-marketing is subsumed by

the offense level adjustment which uses gross sales as a measure. Further, consider that federal prosecution for this type of offense was virtually unheard of when Mr. Smith got into the business. The evidence at trial revealed that at the relevant times, there were no laws directly prohibiting Internet pharmacies per se, and that those operations were not in all cases illegal. (The legislation named after Ryan Haight that was later presented in Congress is indicative of the lack of a clear legal proscription on this type of business.) The evidence also showed that Mr. Smith hired and utilized legal counsel for his operations, including Daniel Atkins and John Nelson, a physician, Phillip Mach, as well as an accountant, Bruce Lieberman. This case cannot be compared to the typical fraud case.

Nor is this case the typical CCE. It will be left for Mr. Smith's appellate attorney to argue that the CCE conviction should be reversed because it does not apply in this arena. But for sentencing purposes, this Court should certainly consider that CCE and its mandatory minimum sentence were directed at traditional street-level drug dealing.

Reflecting seriousness of offense, Providing just punishment

Under the government's theory, this is a case of misbranded drugs. They argued and proved to the satisfaction of the jury that Mr. Smith operated a fraudulent scheme, defrauding government agencies, by introducing misbranded drugs into interstate commerce by providing prescription drugs without a valid prescription. Mr. Smith was convicted of the three counts of which he was charged. It is this group of convictions, according to the PSI, that results in the highest adjusted offense level under the Guidelines and sets the range at a very high 360 months to life.

By charging misbranding, the government was able to make this a high-dollar-value fraud case and ratchet up the guidelines range dramatically. The upward adjustment for the

amount of loss alone was itself 22 points, comprised of all of Mr. Smith's sales of prescription drugs on the basis that those sales were part of a common scheme or plan – i.e., relevant conduct. The misbranding theory of the case allowed for other enhancements as well. For example, Mr. Smith's post-injunction behavior, where the government contends he participated in relocating his fraudulent scheme outside of the United States, also resulted in enhancements under U.S.S.G. § 2B1.1(b)(9)(A) for relocating a fraudulent scheme and under U.S.S.G. § 3C1.1 for obstruction of justice.

There are significant sentencing limitations from a misbranding case, however. Under the misbranding counts, the maximum term of imprisonment is three years. 21 U.S.C. §§ 331(a), 333(a)(2), and 353(b)(1). Even if the sentences for the three counts were stacked, the maximum sentence achievable is nine years. So while misbranding can result in a high guidelines range, statutory maximum sentencing law limits what can actually be imposed.

So, in addition to charging and proving the government's theory that this is a misbranding case, the government charged a typical drug conspiracy – more typically utilized for the conventional street sales type of drug dealing, and not involving a fraud component. Only by including this alternate theory could the government then also charge continuing criminal enterprise, which of course has the 20-year mandatory minimum sentence.

Unwarranted sentencing disparities

In a letter dated June 19, 2007, this Court requested the types of sentences that have been imposed on defendants who are similarly situated to Mr. Smith, including both situations where the defendant pled guilty and went to trial. Mr. Smith has located the following cases, presented in no particular order:

DEFENDANT/CASE	CHARGES	CONVICTIONS	SENTENCE	SOURCE
(E.D. Va. CR-03-530)	108-ct initial Indictment			PACER docket report
Vineet Chhabra	108 cts	Plea to conspiracy to distribute and dispense c/s and 1 ct unlawful distribution of c/s	33 months	<i>U.S. v. Thompson</i> , 191 Fed. Appx. 185 (4 th Cir. 2006)
Daniel L. Thompson, MD	conspiracy to distribute and dispense c/s, 5 cts distribute and dispense c/s	Jury conviction of conspiracy and 2 cts of distributing and dispensing c/s, not guilty of some counts	37 months	
Sabina S. Faruqui	most of the initial 108 counts	conspiracy to distribute and dispense c/s	12 months probation	
James A. Travato, Jr.	10 cts	conspiracy to distribute and dispense c/s	30 months	
Daniel M. Varalli	9 cts	plea to conspiracy to distribute and dispense c/s	30 months	
Laurence L. Cockerill, Jr.	5 cts	plea to conspiracy to distribute and dispense c/s	2 yrs probation	
Arturo L. Portales	~20 cts	plea to conspiracy to distribute and dispense c/s	12 mos + 1 day	
Russell A. Johnson	~17 cts	plea to conspiracy to distribute and dispense c/s	2 yrs probation	
Sunil K. Sethi	most of the initial 108 counts	Jury acquitted and/or deadlocked		
William Thompson, MD	11 cts	Jury acquitted and/or deadlocked		
(S.D. Tx 4:04-CR-442)	169-ct superseding Indictment			PACER docket report
Callie Hall Herpin, MD	100+ counts	Pled to conspiracy to defraud US and unlawful distribution of c/s	10 yrs	http://houston.fbi.gov/dojpressrel/pressrel06/ho022806a.htm
Etta Mae Williams, Herpin's employee		Pled to conspiracy to defraud US, and money laundering	84 months	and http://houston.fbi.gov/dojpressrel/pressrel06/ho071006.htm

Karen B. Williams, Herpin's employee		Pled to 2 cts unlawful distribution, and money laundering	24 months	
Darryl Armstrong, pharmacist		Pled to 2 cts unlawful distribution, and money laundering	24 months	
Otukayode Adeleke Otufale, pharmacist		Pled to 11 cts	10 years	
Chicha Kazembe Combs, Pharmacist		Jury conviction of conspiracy to distribute c/s; multiple cts drug distribution; money laundering	10 years	
Andre Dion Brown, Pharmacist		Jury conviction of conspiracy to distribute c/s; multiple cts drug distribution; money laundering	10 years	
Isaac Simeon Achobe, pharmacist		Jury conviction of conspiracy to distribute c/s; multiple cts drug distribution; money laundering	5 yrs, 3 mos	
John David Wiley III, pharmacist		Jury conviction of conspiracy to distribute c/s; multiple cts drug distribution; money laundering	10 yrs	
Anthony Dwayne Essett, pharmacist		Jury conviction of 2 cts drug distribution, money laundering	12 yrs, 7 mos	
Paul Allen Henry, Pharmacist		Jury conviction	37 months	
Omar Fahie, street dealer		Pled	41 months	
Will Bailey III, street dealer		Pled	46 months	
Eric Earl Craft, street dealer		Jury conviction of conspiracy and aiding unlawful distribution of c/s, money laundering, and more	72 months	<i>U.S. v. Craft</i> , 2007 U.S. App. LEXIS 4724 (5 th Cir. 2007)
(N.D. Tx 02-cr-369)	6-ct Indictment			PACER docket report
Clayton H. Fuchs (pharmacist)	Conspiracy to distribute c/s, CCE, 3 cts dispensing c/s, conspiracy to launder money	Jury conviction on all counts	20 years	<i>U.S. v. Fuchs</i> , 467 F.3d 889 (5 th Cir. 2006)
Eugene Gonzales (pharmacy	Conspiracy to launder	Jury conviction	30 months	

supervisor)	money			
Waldrick Lemons (pharmacist)	Conspiracy to distribute c/s	Jury conviction	5 yrs probation	
Kenneth Speak, MD	Conspiracy to distribute c/s	Plea to charge	4 yrs probation	
Robert Ogle, MD	Conspiracy to distribute c/s, conspiracy to launder money	Plea to both	24 months	
Stephen Thompson, MD	Conspiracy to distribute c/s, conspiracy to launder money	Plea to both	12 mos. + 1 day	
(W.D. Okla. CR-01-142)				PACER docket report
Ricky Joe Nelson, MD		Jury conviction of conspiracy to distribute c/s, conspiracy to launder money	51 months	<i>U.S. v. Nelson</i> , 383 F.3d 1227 (10 th Cir. 2004)
Jerry Shokrallah Shadid, pharmacist		Plea to unlawful dispensing of c/s	3 yrs probation	
(E.D. Va. CR-03-467)				
William Elliot Hurwitz, MD	Conspiracy to engage in drug trafficking, CCE, 2 cts healthcare fraud, 58 cts drug trafficking, including 2 cts each resulting in serious bodily injury and resulting in death	Jury conviction of conspiracy to engage in drug trafficking, 46 cts drug trafficking, 2 cts drug trafficking resulting in serious bodily injury and 1 ct resulting in death	25 years*** ***The 841 and 846 convictions were vacated and remanded by the 4 th Circuit	<i>U.S. V. Hurwitz</i> , 459 F.3d 463 (4 th Cir. 2006)
(M.D. Fla. 99-00256 CR-T- 001 or 8:99-cr-355)				
James T. Kimball, MD		Jury conviction of conspiracy to distribute misbranded drugs, distributing misbranded drugs, making false statements	13 years	<i>United States v. Kimball</i> , 291 F.3d 726 (11 th Cir. 2002)
(M.D. Ala. 00-109 CR-N-2)	30-ct Indictment			PACER docket report
Anton Pusztai	Mail fraud, conspiracy to launder money, conspiracy to violate FD&C Act, dispensing misbranded drugs, operating drug repackaging facility	Jury conviction of mail fraud, conspiracy to violate FD&C Act, dispensing misbranded drugs, operating drug repackaging facility; conviction reversed; pled to 1 ct of conspiracy	Originally sentenced to 188 months, but after conviction vacated and plea to one conspiracy count, sentenced to 60 mos	http://www.fda.gov/ola/ 2003/southfl0310.html ; <i>U.S. v. Yates</i> , 438 F.3d 1307 (11 th Cir. 2006)
Anita Yates	Similar charges	Jury convictions reversed, pled guilty to 1 ct of conspiracy	Originally sentenced to 78 months, but after conviction vacated and plea to	

			one conspiracy count, sentenced to 49 mos time served	
(E.D. Tenn. 02-cr-115) Carl David Roberts	4-ct Information conspiracy to distribute c/s, distributing c/s, use of minor to distribute c/s, conspiracy to violate FD&C Act	Plea to conspiracy to distribute c/s, distributing c/s, use of minor to distribute c/s, conspiracy to violate FD&C Act	57 months	PACER docket report http://www.fda.gov/ola/2003/southfl0310.html
(S.D. Calif. 01-cr-324) Gerald Bevins Priscilla E. Bevins Michelle L. Bevins	14-ct Indictment conspiracy to defraud U.S, conspiracy to import c/s, 6 cts introducing misbranded drugs, 6 cts smuggling all 14 cts all 14 cts	Plea to conspiracy to defraud U.S. by introducing misbranded drugs Case dismissed, defendant deceased Plea to introducing misbranded drugs	24 months 3 yrs probation	PACER docket report http://www.fda.gov/ola/2003/southfl0310.html
(W.D. Pa. 03-cr-00162) Bernard Rottschaefer, MD	208-ct Indictment	Jury conviction of 153 counts of distributing oxycodone, fentanyl, alprazolam,	Original sentence of 78 months under mandatory guidelines, sentence was vacated and remanded under <i>Booker</i> , resentenced to 60 months	PACER docket report <i>U.S. v. Rottschaefer</i> , 178 Fed.App. 145 (3 rd Cir. 2006)
(S.D. Ga. 06-cr-382) Jared Wheat Stephen D. Smith Tomasz Holda Sergio Oliveira David Brady, online marketer David D. Johnson	42-ct Indictment conspiracy to defraud U.S., importing c/s, CCE, fraud, introducing unapproved drugs, introducing adulterated or misbranded drugs, wire fraud most counts most counts most counts most counts most counts	 Pled guilty to conspiracy to defraud, conspiracy to introduce unapproved new drugs, conspiracy to introduce adulterated drugs Pled guilty to misprision of felony	 As part of plea, Govt will recommend 5-yr sentence No agreement as to sentence	PACER docket report and http://www.justice.gov/criminal/cybercrime/bradyIndict.pdf

David Watkins	2 cts	Pled to conspiracy to import c/s		
Brad Watkins	2 cts			
Steven Blinder	2 cts			
Michele Young	most counts			
Guillermo Pech	most counts			
(E.D. Pa. 06-cr-394)	85-ct Indictment			PACER docket report
Michael Bezonsky	most cts of conspiracy to distribute c/s, 26 cts distribution of c/s, 25 cts distribution of misbranded drugs, 23 cts money laundering	Rule 20 transfer		
Thomas Beaulieu	distribution of misbranded drugs	Pled to distribution of misbranded drugs	2 yrs probation	
Ranvir Ahlawat	conspiracy to distribute c/s, money laundering			
Steven Klinman, MD	conspiracy to distribute c/s, money laundering	Pled to conspiracy to distribute c/s, money laundering	In plea, estimate guideline offense level at 20, with possibility of the "safety valve" provision	Govt's Plea Memo
Alexander Atchildev	distribution of misbranded drugs	Pled to distribution of misbranded drugs		
(N.D. Iowa 06-cr-459)	1-ct Information			
Steven Klinman	conspiracy to distribute c/s	Pled to conspiracy to distribute c/s	In plea, estimate guideline offense level at 20, with possibility of the "safety valve" provision	
(S.D. Calif. 04-cr-2523, 04-cr-1114)	2-ct complaint			PACER docket report
Mark Anthony Kolowich	Conspiracy to defraud US, conspiracy to launder money	Pled to charges	51 months	
(E.D. Pa. 05-cr-193)	44-ct Indictment			PACER docket report
17 defendants, including				
Akhil Bansal	most counts, including CCE	Jury conviction of CCE	Awaiting sentencing	
Atul Vijaykumar Patil		Pled	Disposition sealed	

Jitendra Arora		Pled	Disposition sealed	
Victor DeVore		Pled	Disposition sealed	
Kelly Ann Couchman	7 cts money laundering	Pled to 1 ct tax evasion	18 months	
Matthew Joseph Melao	various conspiracy cts	Pled to conspiracy to distribute c/s, conspiracy to import c/s, conspiracy to introduce misbranded drugs, and 2 cts of money laundering	37 months	
Christopher Geoff Laine		Pled	Disposition sealed	
Rohn Wallace		Pled	Disposition sealed	
Richard Dabney		Pled	Disposition sealed	
(D. Ariz. 02-cr-993)	198-ct Indictment			PACER docket report
Keith B. Salvato, Website owner/operator	conspiracy to introduce misbranded drugs; 95 cts introducing misbranded drugs; 3 cts drug repackaging; 16 cts introduction of adulterated drugs, 24 cts mail fraud, 57 cts money laundering	Pled	*** it appears from a PACER docket report that on 5/11/2007 in document number 208, the Court ordered the sentencing hearing for Keith and Kimberlyn Salvato to be held on JULY 30, 2007	
Kimberlyn L. Salvato, Website owner/operator		Pled		
Ronald N. Wanchuk Janice G. Gamblin William J. Clemans Adalberto Robles		Pled Pled Pled Pled	To be sentenced later	

If this were prosecuted solely as a drug conspiracy case, Mr. Smith would not face 360 months to life as an advisory guidelines range. If this were prosecuted solely as a misbranded drugs case, Mr. Smith would not face more than nine years in prison because of the statutory maximum. Yet, by combining the theories, the government is able to seek much more. The question for this Court, in considering the variance, is whether a sentence of 240 months in this case adequately reflects the seriousness of the offense, promotes respect for the law, and

provides just punishment for the offense. Mr. Smith urges that, particularly in light of sentences imposed in other cases, it does each of those things.

CONCLUSION

Based on the foregoing, Mr. Smith respectfully requests this Court grant a variance from the Guidelines sentencing range to sentence him to no more than 240 months of incarceration.

Dated: July 19, 2007

/s/ Joseph S. Friedberg

Joseph S. Friedberg
Attorney Reg. No. 32086
Lisa Lodin Peralta
Attorney Reg. No. 254484
Suite 320 Fifth Street Towers
150 South Fifth Street
Minneapolis, MN 55402
(612) 339-8626

Attorneys for Defendant Smith