FILED
2018 Feb-16 AM 10:32
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	
	)	Case No. 2:17-cr-00417-RDP-HNJ
JONATHAN WILLIAM CLICK,	)	
	)	
Defendant.	)	

UNITED STATES' SENTENCING MEMORANDUM

The United States of America, by and through its attorney, Jay E. Town, the United States Attorney for the Northern District of Alabama, and Mohammad Khatib, Assistant United States Attorney, submits the following sentencing memorandum:

I. STATEMENT OF THE CASE

This case is about one man's opioid addiction and its devastating impact on the health and well-being of his innocent, unfortunate victims. While employed as a pharmacy technician at ContinuumRX ("CRX"), the defendant, Jonathan William Click, tampered with safe and sterile vials containing liquid morphine and hydromorphone. These potent narcotics were destined to treat patients suffering from debilitating pain. Despite knowing their intended purpose, the defendant used subterfuge to surreptitiously remove the vials of morphine and hydromorphone from

CRX's controlled substances cabinet. He broke the seals of these sterile vials and used a syringe to remove anywhere from twenty to forty cubic centimeters of the opioids from the vials in order to feed his insatiable drug habit.

The defendant's actions were deliberate and calculated. To secure his easy and practically unlimited supply of free narcotics, the defendant concocted an elaborate scheme to avoid detection. He replaced the medicine from the now tampered vials with saline or sterile water. He erased the signs of product tampering using tape, clear superglue, and a silver-colored Sharpie pen. *See* Photographs of Tampering, attached as **Exhibit A**. Because he knew that CRX monitored its controlled substances, the defendant returned the tampered vials to CRX's inventory. The defendant used the tampered vials to compound CRX's intravenous ("IV") bags containing the adulterated and diluted morphine and hydromorphone. As the lead pharmacy technician, the defendant was responsible for compounding the vast majority of these IV bags, which further safeguarded his scheme. Although CRX conducted drug screening in 2014, 2015, and 2016, the defendant somehow passed each time.

The defendant's product tampering and opioid diversion scheme continued for approximately two years before it was finally foiled. On September 12, 2016, a CRX pharmacist caught the defendant removing two vials of morphine from the controlled substances cabinet without authorization. Initially, the defendant feigned

innocence and tried to deflect responsibility onto others. When that failed, he left the pharmacy for a supposed doctor's appointment. In the days that followed, CRX conducted an internal investigation and discovered that, among their current inventory, sixteen vials of 50 ml morphine (50 mg/ml) and five vials of 50 ml hydromorphone (10 mg/ml) appeared to have been subject to tampering.

CRX provides injectables and IV compound opioid prescriptions exclusively to hospice and home care providers. The pharmacy fills over one hundred prescriptions each day. Prior to his termination, the defendant prepared the vast majority of CRX's IV bags. These IV bags were distributed to CRX's hospice and home care customers where they were administered to patients—the majority of whom were terminally ill cancer patients suffering breakthrough pain. The defendant knew all of this.

Patients suffered or were at risk of suffering bodily injury as a result of receiving IV bags prepared by the defendant over the course of his two-year diversion scheme; and he knew it. IV bags prepared with diluted morphine sulfate and hydromorphone hydrochloride are not as effective at relieving pain as are IV bags prepared with the fully potent, undiluted medicine. *See, e.g., United States v. Cunningham*, 103 F.3d 553, 555-56 (7th Cir. 1996) (rejecting defendant nurse's argument that withholding pain medication does not place anyone "in danger of bodily injury" within the meaning of 18 U.S.C. § 1365(a)). Mental anguish

associated with protracted pain can result in post-traumatic stress disorder ("PTSD"). PTSD represents a protracted impairment of a mental faculty, and the risk of PTSD represents a risk of bodily injury. *See* March 1, 2010, Letter of Stephanie Wolf-Rosenblum, M.D., at 4, filed in *United States v. Trinidad Smith*, Case No. 1:09-cr-00113-JL (D.N.H. 2010), attached as **Exhibit B**.

One of the defendant's victims, D.N., suffered from breakthrough pain caused by liver cancer. D.N. was a patient of New Beacon Hospice from approximately January of 2016 until March of 2016. D.N.'s pain was unrelieved during this time. CRX replaced D.N.'s pain pump two or three times because something wasn't right. Of course, the pain pumps functioned as designed. The problem was the defendant's adulterated and diluted IV bags. D.N.'s first Dilaudid (hydromorphone) infusion prescription, dated January 7, 2016, called for a basal rate of 1 mg per hour and a bolus rate of .5 mg at 15 minute intervals. D.N.'s prescription was increased three times due to unrelieved pain. By the time of D.N.'s death, on March 1, 2016, D.N. had reached a basal rate of 4 mg per hour and a bolus rate of 1 mg at 15 minute intervals. That represents a change in maximum allowable dosage from 3 mg per hour to 8 mg per hour—nearly a threefold increase. According to D.N.'s nurse, even at that dosage level, which was high, D.N.'s pain was still unrelieved. The defendant personally fielded at least three complaints related to D.N.'s uncontrolled pain. He knew.

Another of the defendant's victims, M.B., suffered from colon cancer. M.B. was a patient of Alacare Home Health & Hospice from approximately August 19, 2016, to the time of M.B.'s death on August 20, 2016. M.B. was screaming and moaning loudly in pain during this time. M.B.'s hydromorphone prescription had to be increased from a basal rate of 1 mg per hour and a bolus rate of 1 mg at 15 minute intervals, to a basal rate of 4 mg per hour and a bolus rate of 3 mg at 15 minute intervals. That represents a change in maximum allowable dosage from 5 mg per hour to 16 mg per hour—more than a threefold increase. The defendant fielded a call from M.B.'s nurse in August of 2016 regarding M.B.'s unrelieved pain. He knew.

Tampering with vials and diluting medications, as the defendant did, also created a risk of infection to patients. Tampering with vials, which are supposed to be sterile, prior to their being used to compound IV bags, heightens the risk that bacteria will be introduced into patients' bodies when the IV fluid is administered. *See* Exhibit B at 3. As part of his employment with CRX, the defendant was trained in sterile/aseptic compounding practices and techniques. He understood the importance of ensuring sterility assurance and contamination avoidance. He knew the health risks. He callously ignored them.

For two years, the defendant inflicted untold pain and suffering on terminally ill cancer sufferers. He abrogated his duty as a health care provider. He tricked and bamboozled his co-workers. It was all in pursuit of one thing—a high.

II. CASE POSTURE

On September 25, 2017, the United States filed a plea agreement and information charging the defendant with one count of tampering with consumer products, in violation of 18 U.S.C. § 1365(a). (*See* Docs. 1 and 2). On November 8, 2017, the defendant formally entered his guilty plea. (*See* Docket Sheet). An amended plea agreement was also filed. (Doc. 10).[1] Under the terms of the amended plea agreement, the United States agreed to recommend a custodial sentence consistent with the low end of the sentencing guidelines range. (*See id.* at 12). Sentencing is set for February 21, 2018, at 2:00 p.m. before United States District Court Judge R. David Proctor. (*See* Doc. 11).

III. PRESENTENCE INVESTIGATION REPORT

The United States Probation Office submitted a presentence investigation report ("PSR") on December 20, 2017. Neither party filed any objections to the PSR. (*See* Docket Sheet).

A. *Sentencing Calculations*

The defendant's base offense level for tampering with consumer products, in violation of 18 U.S.C. § 1365(a), is 25. *See* USSG §2N1.1(a); and PSR at ¶34. No specific offense characteristics, cross references, or special instructions apply. *See* USSG §§2N1.1(b)-(d); and PSR at ¶35.

[1] The amended plea agreement is substantively identical to the originally filed plea agreement.

The defendant knew that the victims of his offense were hospice and home care patients suffering from terminal illnesses, typically cancer. His offense level is subject to a 2-level vulnerable victim enhancement. *See* USSG §§3A1.1, comment. (n.2) & (b)(1); and PSR at ¶36.

The defendant abused his position as a pharmacy technician to gain unlawful access to vials of morphine and hydromorphone. As CRX's lead pharmacy technician, the defendant was also responsible for opening and using those vials to compound IV bags. The defendant also fielded calls concerning untreated pain from hospice and home health care providers. Thus, his tampering of vials of morphine and hydromorphone went undetected for years. Accordingly, the defendant's offense level is subject to a two-level enhancement for abusing a position of trust and employing special skills to facilitate and conceal the commission of the offense. *See* USSG §3B1.3; and PSR at ¶37.

The defendant clearly accepted responsibility for the offense by entering a guilty plea to an information, warranting a two-level reduction in his offense level. *See* USSG §3E1.1(a); and PSR at ¶41. He assisted authorities in the investigation of his misconduct and assisted in his own prosecution by timely notifying the United States of his guilty plea. Accordingly, the United States moves for an additional one-level reduction of his offense level. *See* USSG §3E1.1(b); and PSR at ¶42. The defendant's resulting total offense level is 26. *See* PSR at ¶43.

The defendant's Criminal History Category, as calculated by the United States Probation Office, is I. Based on these calculations, the defendant has an advisory guideline sentencing range of 63 – 78 months of imprisonment. *See* USSG §5A. The range is within Zone D of the Guidelines Sentencing Table. *See id.*

IV. SENTENCING FACTORS UNDER 18 U.S.C. § 3553(a)

In *United States v. Booker*, the Supreme Court excised the provisions that made the Guidelines mandatory, and thus "made the Guidelines effectively advisory." *Booker*, 125 S. Ct. 738, 756-57 (2005). As modified, the Sentencing Reform Act now "requires a sentencing court to consider Guideline ranges, see 18 U.S.C. § 3553(a)(4), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a)." *Id.* at 757. Further, "district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." *Id.* at 767; *See* 18 U.S.C. § 3553(a)(4) & (5). "[T]he Act nonetheless requires judges to impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, [and] protect the public...." *Id.* at 765; *See* 18 U.S.C. § 3553(a)(2).

The Eleventh Circuit has held that the Guidelines "are to serve as a starting point for consideration as to whether a given sentence is 'reasonable' in view of the entirety of section 3553(a). Whether, after consideration of section 3553(a) in its entirety, a court finds the Guidelines to be compelling is a fact-specific judgment

…." *United States v. Hunt*, 459 F.3d 1180, 1185 (11th Cir. 2006).

The United States addresses each of the Section 3553(a) factors as follows:

A. Nature and Circumstances of the Offense and Characteristics of the Defendant

The nature and circumstances of this offense shock the conscience. The defendant obviously struggled with drug addiction. The United States is not suggesting any malevolence on the defendant's part. However, the United States cannot simply gloss over his reckless disregard for, and extreme indifference to, the health and well-being of society's most vulnerable people. His victims were dying. They were in pain. They were painfully dying—because the defendant tampered with their medicine for his own gratification. In their final days on earth, the defendant denied them the comfort of pain remediation they so desperately needed. The defendant knew what he was doing each time he tampered with those vials of medicine. Yet, he persisted for ***two years***.

The defendant did not end his criminal conduct of his own accord. He was caught. No one knows how long his nefarious scheme might have continued, or how many more helpless victims would have fallen prey to it, were it not for the serendipitous glance of a co-worker. That question is haunting.

Once caught, the defendant cooperated fully with law enforcement and disclosed particular details of his criminal scheme, particularly its duration, which might otherwise never have been discovered. The defendant also voluntarily

surrendered his technician registration to the Alabama State Board of Pharmacy. The defendant voluntarily admitted himself for inpatient substance abuse treatment at Bradford Health Services for approximately 2 months immediately following the discovery of his crimes. (*See id.* at ¶¶70 & 71). The defendant has also taken steps to continue his recovery and maintain his sobriety. (*See id.* at ¶¶71 & 72).

The defendant is a life-long resident of Alabama. (*See* PSR at ¶59). Although his upbringing and family life may have fallen short of some utopian ideal, he was afforded a mostly normal life. (*See id.* at ¶¶52-58). He was not abused or neglected. (*Id.*). While the United States recognizes the defendant's familial history of drug and alcohol abuse, some family members, notably his own brother, managed to avoid these pitfalls. (*See id.*).[2] The defendant does not suffer from any physical impairment. (*See id.* at ¶¶61-64). Nor does he suffer from any current or enduring mental health issues. (*See id.* at ¶¶65-72). The defendant does have a long history of substance abuse. (*See id.* at ¶¶66-68). However, his drug abuse preceded his ankle surgery at the age of twenty, when he reportedly first used opioids. (*See id.*).

The defendant may urge the Court to consider his opioid addiction as a mitigating factor in his offense. The Court should be wary of such an entreaty. "Drug or alcohol dependence or abuse ordinarily is not a reason for a downward departure.

[2] In any event, "[l]ack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds in determining whether a departure is warranted." USSG §5H1.12.

Substance abuse is highly correlated to an increased propensity to commit crime." USSG §5H1.4. Further, the defendant did not merely feed his addiction. He denied terminally ill cancer sufferers their desperately needed medicine for his own recreational enjoyment.

B. Need for the Sentence Imposed to Reflect the Seriousness of the Offense, Promote Respect for the Law, and to Provide Just Punishment for the Offense

Dual goals of promoting respect for the law and providing just punishment for the offense may not be achieved without a custodial sentence commensurate with the serious nature of this offense. The United States refers specifically to the Information (Doc. 1), pages two through eleven of the plea agreement (Doc. 10), paragraphs seven through thirty of the presentence investigation report, and Section I, *supra*.

C. Need for the Sentence Imposed to Afford Adequate Deterrence to Criminal Conduct

There is a need for both specific and general deterrence. The defendant must understand the seriousness of his offense and the need to atone for his malfeasance. *See* USSG §5K2.0(d)(2) (defendant's acceptance of responsibility for the offense may only be taken into account under §3E1.1 (acceptance of responsibility)). The public should be advised that health care workers have a special duty to protect the well-being of those under their care and, at the very least, to not knowingly cause them bodily injury.

D. Need for the Sentence Imposed to Protect the Public from Further Crimes of the Defendant

The defendant has virtually no criminal history other than this offense. (*See id.* at ¶¶44-51). Besides his drug addiction, the defendant is not a danger to the public. However, as a condition of his supervised release, the defendant should be prohibited from working with or around controlled substances.

E. Need for the Sentence Imposed to Provide the Defendant with Needed Educational or Vocational Training, Medical Care, or other Correctional Treatment in Most Effective Manner

The defendant is a high school graduate. (See PSR at ¶73). As previously mentioned, the defendant surrendered his pharmacy technician registration, and should otherwise be barred from pursuing a career in the pharmaceutical industry as a condition of his supervised release. Accordingly, the defendant may benefit from the various vocational programs offered by the Bureau of Prisons.

F. The Kinds of Sentences Available

The defendant's applicable guideline range is in Zone D of the Sentencing Table, which requires a sentence of imprisonment. USSG §5C1.1(f).

G. The Kinds of Sentence and the Sentence Range Established Under the Guidelines

The Guidelines provide for a term of imprisonment between 63 to 78 months. The United States believes the Guidelines sentencing range is fair and reasonable given the defendant's relevant conduct to the current offense.

H. Any Pertinent Policy Statements Issued by the Sentencing Commission

"Substance abuse is highly correlated to an increased propensity to commit crime. Due to this increased risk, it is highly recommended that a defendant who is incarcerated also be sentenced to supervised release with a requirement that the defendant participate in an appropriate substance abuse program (*see* §5D1.3(d)(4)). If participation in a substance abuse program is required, the length of supervised release should take into account the length of time necessary for the probation office to judge the success of the program." USSG §5H1.4.

I. The Need to Avoid Unwarranted Sentence Disparities Among Defendants with Similar Records Who Have Been Found Guilty of Similar Conduct

The United States believes that a sentence of imprisonment within the applicable Guidelines range will avoid any unwarranted sentence disparities.

J. The Need to Provide Restitution to Any Victims of the Offense

The defendant agreed to pay restitution to CRX in the amount of $934.57, representing the value of the controlled substances CRX was required to destroy as a result of the defendant's tampering. (Doc. 10 at 1). The presentence investigation report notes that this restitution amount includes the value of quantities of lorazepam that were not destroyed by CRX due to this offense. PSR at ¶30. The United States has contacted CRX and determined that the PSR is correct. The actual value of the controlled substances destroyed as a result of this offense is $856.74, and the

restitution amount should be reduced accordingly.

V. CONCLUSION

Pursuant to the plea agreement entered in this case, the United States recommends a sentence consistent with the low end of the applicable guideline sentencing range, or 63 months. The United States also recommends a three-year term of supervised release to follow, no fine, an order of restitution in the amount of $856.74, and a $100 special assessment. Such a sentence is appropriate and reasonable given the applicable guideline sentencing range and the factors set forth in 18 U.S.C. § 3553(a).

Respectfully submitted this the 16th day of February, 2018.

JAY E. TOWN
United States Attorney

/s/ *Electronic Signature*
Mohammad Khatib
Assistant United States Attorney