

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
HARRIET COMITE, M.D.	:	NO. 06-70

MEMORANDUM

Baylson, J.

December 21, 2006

I. Introduction

The Defendant is charged with eighty separate counts under 18 U.S.C. § 1347 of knowingly and willingly executing a scheme to defraud health care benefit programs, and obtaining money and property owned by those programs through false and fraudulent pretenses by submitting false and fraudulent claims for reimbursement. (Indictment ¶ 13.) A prior Memorandum dated November 17, 2006 WL 3360282, summarized the indictment in detail and ruled on a number of pretrial motions.

Presently pending before the Court are Defendant's Motion to Exclude the Testimony and Expert Report of Dr. Klaus Helm (Doc. No. 73) and Defendant's Motion to Exclude the Testimony and Expert Report of Dr. Paul Gross (Doc. No. 72). Both parties have extensively briefed the issues surrounding this proposed expert testimony. Defendant also asked the Court to hold a pretrial evidentiary hearing at which Drs. Helm and Gross would testify and be cross examined before a ruling on these Motions to Exclude. By Order dated November 28, 2006, the Court denied this request for an evidentiary hearing. Defendant has now moved for reconsideration of that Order (Doc. No. 98). Finally, Defendant has moved to preclude the

introduction of “other crimes” evidence proposed by the government (Doc. No. 99). The Court held an extensive hearing on November 22, 2006, and heard further argument on December 14, 2006 on the issues raised by Defendant’s motions.

For the reasons stated below, Defendant’s Motions to Exclude the Testimony and Expert Report of Drs. Helm and Gross will be denied without prejudice for renewal at trial, the Motion for Reconsideration of Order Denying an Evidentiary Hearing will be denied without prejudice for renewal at trial, and the Motion to Preclude the Introduction of Other Crimes Evidence will be granted in part and denied in part.

II. Proposed Expert Testimony

As noted in more detail in the Memorandum of November 17, 2006, sixty-eight counts of the indictment charge “upcoding” – that the Defendant committed fraud when she performed a dermatologic procedure known as a “shave” but billed this procedure as an “excision,” which is reimbursed at a higher rate than a shave.¹ The government seeks to call Drs. Helm and Gross to give their expert opinions in support of these allegations.

The initial opinion of Dr. Helm takes the form of a single-page letter dated June 16, 2006, followed by an extensive chart summarizing his review of 1,456 microscopic slides of tissues taken from Defendant’s patients. Dr. Helm is basically of the opinion that, in almost all of the examples he reviewed, Defendant billed procedures in which she used the shave technique as excisions. The Defendant has secured her own expert, Dr. Benedetto, who has provided different opinions on the same topic. Dr. Helm then submitted a multi-page rebuttal report which goes

¹ Twelve counts charge Defendant with submitting bills for procedures performed while she was “out of office” – because the payor regulations required Defendant to be in the office when these procedures were performed.

into significantly more detailed reasons for his own opinions as well as rebutting the opinions of Dr. Benedetto.

Dr. Gross submitted three letters containing his opinions, dated June 6, 2006, June 15, 2006, and September 5, 2006. Dr. Gross based his opinions on a review of Defendant's patient records rather than on the microscopic slides Dr. Helm reviewed. Dr. Gross similarly concludes, based on these patient records, that Defendant billed for excisions when she actually used the shave technique. Dr. Gross relied heavily on the absence of sutures as supporting his opinion that the Defendant performed a shave procedure. Dr. Gross concludes in his letter of June 15, 2006:

Regarding the distinction between full-thickness and "shave" excisions, this is clearly defined in Medicare and Blue Shield regulations. Full-thickness excisions are almost always performed with a scalpel and extend in the subcutaneous tissue (fat). The wound will almost always require sutures for closure. Shave excisions are partial-thickness only through the middle section of the skin, that is the dermis. These can be performed with a scalpel held parallel to the surface or at a slight angle rather than perpendicular to the skin surface as in excisions. It can also be performed with a razor blade or a sharp scraping instrument known as a curette.

The government alleges that the standard terminology and technology for these procedures is set forth in a publication entitled the "Physicians Current Procedural Terminology" known as the "CPT" Code. Defendant's brief notes that the definitions of excision and shave have changed over time. The 2003 CPT Code defines a shave as:

Shaving is the sharp removal by transverse incision or horizontal slicing to remove epidermal and dermal lesions without a full-thickness dermal excision. This includes local anesthesia, chemical or electrocauterization of the wound. The wound does not require suture closure.

The same code defines an excision as:

Excision is defined as full-thickness (through the dermis) removal of a lesion, including margins, and includes simple (non-layered) closure when performed.

The starting point for an analysis of this proposed expert testimony is Rule 702 of the Federal Rules of Evidence which reads:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The Third Circuit has expounded on the duty of a district court judge to act as a gatekeeper for expert testimony, preventing opinion testimony that does not meet the requirements of qualification, reliability and fit from reaching the jury, by means of a preliminary hearing pursuant to Federal Rule of Evidence 104(a). See Schneider v. Fried, 320 F.3d 396, 404 (3d Cir. 2003).

The Third Circuit has set forth the following explanation of the terms “qualification, reliability and fit”:

Qualification refers to the requirement that the witness possess specialized expertise. We have interpreted this requirement liberally, holding that “a broad range of knowledge, skills, and training qualify an expert.” Secondly, the testimony must be reliable; it “must be based on the ‘methods and procedures of science’ rather than on ‘subjective belief or unsupported speculation’; the expert must have ‘good grounds’ for his or her belief. In sum, Daubert holds that an inquiry into the reliability of scientific evidence under Rule 702 requires a determination as to its scientific validity.” Finally, Rule 702 requires that the expert

testimony must fit the issues in the case. In other words, the expert's testimony must be relevant for the purposes of the case and must assist the trier of fact. The Supreme Court explained in Daubert that Rule 702's 'helpfulness' standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility."

Schneider v. Fried, 320 F.3d at 404. In Schneider v. Fried, the Third Circuit reversed judgment in a civil case, reasoning that the lower court had erroneously precluded the testimony of a doctor because his speciality did not precisely deal with the subject matter of the case, although he had sufficient scientific background to give opinions in that general area of medicine. Id. at 406-407.

Defendant does not question the qualifications of Drs. Helm and Gross. However, Defendant does question the reliability of their testimony because neither doctor has given testimony in this area previously. Defendant asserts that there have been no cases in which the distinction between a shave and an excision has been the foundation of a criminal prosecution or expert testimony. No reported cases have been found. Defendant also asserts that there is no recognized or tested methodology for examining microscopic skin slides or patient records to determine whether skin lesions removed by a doctor should have been billed as a shave rather than an excision. According to Defendant, this methodology has not been discussed in any critical peer review publication, has not been tested by other dermatologists, and has not obtained general acceptance in the scientific and medical community. (Def.'s Reply Br. 2.)

The factors that the Court should consider on the issue of reliability are:

(1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the

qualifications of the expert witness testifying based on the methodology; and (8) the non-judicial uses.

Schneider v. Fried, 320 F.3d at 405. In Schneider, the Third Circuit noted, contrary to Defendant's argument, that an opinion of an expert witness is admissible even if it has not gained general acceptance or been subject to peer review, although these are factors which the district judge should consider. Id. at 406.

Further, in United States v. Syme, 276 F.3d 131 (3d Cir. 2002), a prosecution for inter alia healthcare fraud, the Third Circuit considered the admissibility of expert testimony only in a footnote and held the district court did not commit plain error by admitting expert testimony, based on a review of patient medical records, that ambulance transport was not medically necessary. Syme, 276 F.3d at 140 n.2. The expert in the case relied on Medicare standards in a manner similar to how the government's experts in this case are relying on the CPT Code.

By contrast, the opinion in U.S. v. Reicherter, 318 F. Supp. 2d 265, 269 (E.D. Pa. 2004), where Judge McLaughlin refused to allow an expert to give certain testimony, is distinguishable because of the type of underlying data on which Drs. Helm and Gross relied when they compared Defendant's conduct to what they assert are applicable and generally accepted medical standards.

Defendant asserts the expert opinions of Drs. Helm and Gross are not reliable because they are unable, based on the data given to them and the overall circumstances of their consultation, to legitimately reach any conclusion on the issues which the jury has to decide. Furthermore, Defendant asserts that their testimony does not "fit" into the issues in this case because the doctors have not performed this kind of analysis before, and there are no guiding medical standards for them or for any other practicing physician to follow in doing so.

Defendant further contends that the terms that the government uses in the indictment are not well defined and/or are ambiguous, and the proposed testimony would confuse rather than educate the jury if the Court were to allow it.²

At the hearing on November 22, 2006, the Court inquired into the chain of custody of the materials examined by Dr. Helm from the time they left the Defendant's office until they were received by Dr. Helm, and the government made representations about this issue. The Court also instructed the government to supply the specific portions of the CPT Code on which its experts would rely for the allegations that Defendant improperly upcoded her bills from a shave to an excision. In addition, the Court told the government to indicate which Medicare and private insurance companies' regulations it claims were violated when the Defendant sought reimbursement for procedures performed when she was out of the office.

After further briefing and argument on December 14, 2006, the Court concludes that the Defendant's Motions to Exclude the Expert Testimony of Dr. Helm and Dr. Gross should be

² The Defendant's briefs emphasize that Dr. Helm dwells on the absence of "fat" tissue in his reports as indicating that the Defendant was only performing shaves. Dr. Helm is of the view that an excision will almost always include some fat tissue in the microscopic slides. Defendant points out that there is no mention of "fat" in the CPT Code definition of either a shave or an excision and thus Dr. Helm's opinions do not "fit" into the charges in the case. The Court discussed this issue at the hearing on December 14, 2006, and believes that, although the Defendant raises a strong point for cross examination of Dr. Helm, this issue is not sufficient, as a matter of law, to exclude Dr. Helm's opinions. Every expert must be given an opportunity to explain his opinion and may use examples or other indicia that he has found sufficient in prior experience and expertise. See Forest Labs., Inc. v. Ivax Pharms., 237 F.R.D. 106, 113 (D. Del. 2006) (in a post-trial memorandum after a bench trial, the court announced its rulings on a number of evidentiary matters, allowing certain testimony by an expert which was not included in his report, but disallowing opinions as to how the Food & Drug Administration would have treated a certain matter that was not included in the expert report, relying on Minebea Co. v. Papst, 231 F.R.D. 3, 8 (D.D.C. 2005), which held that experts should be permitted a certain degree of latitude and allowed to explain the opinions and conclusions in their reports).

denied. The Court finds that the Daubert standards have been met. The doctors' reports are based on the CPT Code³ and set forth opinions which will assist the jury in understanding the charges in the indictment, specifically the 68 counts charging "upcoding." These charges relate to complex medical techniques and terminology, which a lay juror cannot be expected to understand. However, the Court will deny the motion without prejudice to be renewed at trial in accordance with the procedures outlined below.

III. Motion for Reconsideration

As noted above, the Court denied Defendant's request for a pretrial evidentiary hearing at which Drs. Helm and Gross would testify concerning their reports and be subject to cross examination by the Defendant. Although the Court will not change that ruling, the Court will grant the Motion for Reconsideration to the extent that Defendant may seek to have a hearing once the jury has been selected, perhaps in part outside the hearing of the jury, concerning the basis for the opinions and testimony of Drs. Helm and Gross. The government will be expected to lay an appropriate foundation for the admissibility of this testimony. This may require the doctors to describe the approach they used and the scientific and medical basis for their work leading up to their opinions in this case. At that point, defense counsel may seek a hearing or argument outside the presence of the jury to further pursue the points they have raised in their unsuccessful effort to receive a pretrial ruling to exclude the testimony of Drs. Helm and Gross.

³ Defendant also argues that the CPT Code definitions of excision and shave are confusing, if not ambiguous, and that the "out of office" regulations, whether those in the CPT Code or those issued by private insurers, are also confusing and ambiguous. In a pretrial context, the Court will reject this argument as grounds for any relief at this time, and notes that in United States v. Singh, 390 F.3d 168, 187 (2d Cir. 2004), the court rejected a similar attack on a different section of the CPT Code. However, Defendant may renew this contention at trial.

Thus, to this extent, consistent with the principles under Federal Rule of Evidence 104(a), the Court may allow an evidentiary hearing, but it will take place during, and not before, trial.

IV. Defendant's Motion to Preclude Testimony of Other Crimes

A. Admissibility of Summary Charts

The Court has heard extensive argument about the admissibility of the government's Summary Charts 1 through 6. Charts 1 and 4 relate to the government's out of office claims. Chart 1 contains a listing of all patients for whom the Defendant submitted claim forms for reimbursement on dates when the government alleges the Defendant was not present in the office. It shows the procedures performed on those dates and the bills submitted. While Chart 1 lists the names of 321 patients for whom Defendant submitted 426 claims, there are only 12 counts in the indictment charging improper out of office billing. Chart 4 summarizes the dates the Defendant was out of the office. The Court instructed the government to revise Chart 4 to limit it to the dates when the Defendant was out of the office but submitted charges for services that allegedly required her to be in the office.

Charts 2 and 3 relate to the government's upcoding claims. They list the patients for whom these claims were made and summarize the opinions reached by Dr. Helm on whether the 1,456 slides of tissues taken from these patients show that the Defendant performed either a shave or an excision. The upcoding charts were prepared in accordance with the sampling method developed by Mr. Cooke and Mr. Caimi (see note 5 below) and reflect all procedures performed by the Defendant from 1987 through February 10, 2004 that fell within the sample. The 68 counts of upcoding charged by the government are included in the 1,456 slides, but are

only a small fraction of the total number summarized in Charts 2 and 3.⁴

As indicated at the hearing on December 14, 2006, the Court will hold another hearing on January 10, 2007 at 10:00 a.m. in Courtroom 3A at which it will expect the government, unless agreement has been reached with defense counsel, to produce the summary charts, as revised, in the final form that will be shown to the jury, along with the data underlying those charts. The government will then call witnesses, as necessary, to testify that the summary charts are accurate. Defense counsel will be given the opportunity to cross examine. Assuming the government establishes that the information in the summary charts is accurate, they will be admitted under Federal Rule of Evidence 1006 because they present large volumes of data in a readily understandable format and will serve to dramatically shorten the length of the trial. There is some discussion in the briefing on the use of the charts under Federal Rule of Evidence 611(a) as a “pedagogical” assist to the jury, but the Court believes, assuming that the charts’ information is accurate, that they will be admissible under Rule 1006.

B. Legal Standards on Admissibility of the Government’s Evidence

As noted above, the government seeks to admit evidence of numerous other instances of upcoding and out-of-office billing that are not charged in the indictment. Defense counsel seeks to exclude this evidence as improper under Federal Rule of Evidence 404(b). The government suggests that these other instances are admissible either because they are “intrinsic” evidence of the charges actually made, or alternatively, because they serve other purposes under Rule 404(b).

⁴ Defense counsel also aggressively challenged the information represented on the charts because it was an inaccurate depiction of the underlying data. Under Rule 1006, if the charts contain data that is inaccurately represented, then the charts quite obviously should not be admitted.

Federal Rule of Evidence 404(b) provides that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith,” but, unless inadmissible under another Rule, is “admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

In United States v. Cross, 308 F.3d 308 (3d Cir. 2002), as in the present case, the government argued that the court need not apply Rule 404(b) because the evidence was “intrinsic,” a distinction the court noted and approved:

Rule 404(b) “does not extend to evidence of acts which are ‘intrinsic’ to the charged offense.” Fed.R.Evid. 404(b) advisory committee’s note (citing United States v. Williams, 900 F.2d 823 (5th Cir. 1990)). The distinction between intrinsic and extrinsic (i.e., “other acts” or “other crimes”) evidence is often fuzzy. One leading treatise calls the distinction “at best one of degree rather than of kind.” 1 Stephen A. Saltzburg et al., Federal Rules of Evidence Manual 397 (7th ed. 1998). Unfortunately, as the D.C. Circuit has explained, most circuit courts view evidence as intrinsic if it is “inextricably intertwined” with the charged offense (a definition that elucidates little) or if it “completes the story” of the charged offense (a definition so broad that it renders Rule 404(b) meaningless). United States v. Bowie, 282 F.3d 923, 927-29 (D.C. Cir. 2000); see also id. at 929 (stating that “it cannot be that all evidence tending to prove the crime is part of the crime” because that would make Rule 404(b) “a nullity”).

Cross, 308 F.3d at 320.

The difference is described in some detail in United States v. Janati, 374 F.3d 263 (4th Cir. 2004), as well as in Chief Judge Bartle’s recent decision in United States v. Jones:

Various courts of appeals, including ours, have held that Rule 404(b) does not bar the admission of evidence of other acts if those acts and the crime with which the defendant is charged “are inextricably intertwined, or both acts are part of single criminal

episode, or other act[s] [were] necessary preliminar[ies] to [the] crime charged.” United States v. Freeman, 434 F.3d 384, 389 n.9 (5th Cir. 2005).

United States v. Jones, Nos. 06-23, 00-660-1, 2006 WL 1737209, at *8 (E.D. Pa. 2006).

The Court’s examination of these cases indicates that so-called “intrinsic” evidence is usually introduced in conspiracy cases. Nonetheless, the general standard as it is stated in the case law is also applicable to a situation like the present one where the government has evidence of many instances of the allegedly illegal activity charged in the indictment, but has not charged each instance. The Court concludes that the evidence proffered by the government is admissible under either the intrinsic theory or the Rule 404(b) standard, remembering that the Third Circuit has recognized that the latter is a rule of inclusion rather than exclusion. See United States v. Givan, 320 F.3d 452, 460 (3d Cir. 2003); see also United States v. Sutton, No. 05-1808, 2006 WL 3227805, at *3 (3d Cir. 2006):

At the pretrial hearing, the government argued that evidence of the history of the sawed-off shotgun was intrinsic to Count 2, the firearm brandishing count, and therefore should be admitted notwithstanding Rule 404(b). The District Court agreed, and admitted the evidence over Sutton’s objection. That ruling was not an abuse of discretion. See United States v. Gibbs, 190 F.3d 188, 217 (3d Cir. 1999) (“Rule 404(b), which proscribes the admission of evidence of other crimes when offered to prove bad character, does not apply to evidence of uncharged offenses committed by a defendant when those acts are intrinsic to the proof of the charged offense.”)

In considering the evidence the government seeks to introduce beyond the 80 counts of the indictment, the Court discerns a distinct difference between the “upcoding” evidence and the “out of office” evidence. The Court has decided to deny the Defendant’s Motion to Preclude Evidence of Other Crimes as to the additional evidence of “out of office” billings, but to grant it

as to the allegedly fraudulent billings for excisions, for several reasons.

Another guidepost for the decision is based in Federal Rule of Evidence Rule 403 which reads:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

After a substantial number of lengthy pretrial hearings, the Court finds that the other evidence of “out of office” billings will not be unfairly prejudicial to the Defendant, confuse the issues, or mislead the jury. By contrast, the Court finds that the admission of the “upcoding” claims would be likely to be prejudicial to the Defendant, would take a great deal of additional time, particularly with respect to cross examination related to the government’s charts, and would be needlessly cumulative.

The huge magnitude of data in Charts 2 and 3,⁵ summarizing data of 1,456 allegations of

⁵ Among the issues raised at the November 22, 2006 hearing were the questions of how the various slides reviewed by Dr. Helm and the patient records reviewed by Dr. Gross were selected, and how the data was presented to them. Government counsel made a general offer of proof. The colloquy revealed that two non-attorney employees of the United States Attorney’s Office, Dennis Cooke and Ray Caimi, through a sampling procedure, determined which patient slides were presented to Dr. Helm, but the colloquy did not provide sufficient details about these procedures. Defendant asserts that the government must use a statistically random sample for which Mr. Cooke should have been designated as an expert. The government asserts that the sample was random and based on a mechanical sampling technique Mr. Cooke acquired from a textbook on sampling procedures. The government also contends that this sampling technique requires no expert knowledge. The Court instructed the government to present a detailed offer of proof for Mr. Cooke’s testimony, which was supplied by letter dated December 4, 2006. In view of the Court’s ruling, as stated at the hearing on December 14, 2006 and discussed below, the government’s Charts 2 and 3 summarizing Dr. Helm’s examination of 1,456 slides, are presumptively not admissible in the government’s case in chief unless Defendant “opens the door.” It is unnecessary to rule on the proposed testimony of Cooke and Caimi at this time.

upcoding by the Defendant, is troublesome in the trial context. The government submits that this evidence will not take much time to explain to the jury because it is summarized in a chart.

However, the Defendant still has the right to engage in extensive cross examination, possibly on every line entry, which could take days, if not weeks. Furthermore, if the Defendant is convicted on any of the “upcoding” charges, a proper punishment can be imposed. It would have been unnecessary, and possibly even inappropriate, for the government to have charged more than 68 “upcoding” counts in deciding to prosecute the Defendant. An indictment containing hundreds or even a thousand counts would serve no purpose.

There are other reasons for this distinction:

1. The difference between an incision and a shave requires the jury’s evaluation of medical terminology, which the government explicitly recognizes because it has retained two specialized physicians to give expert testimony in this case, on a topic which is within the knowledge of dermatologists, but not jurors.

2. The evidence of upcoding will largely depend on the jury’s evaluation of expert medical testimony, and case law does not establish the propriety of basing such extensive intrinsic or Rule 404(b) evidence on expert medical testimony.

3. The Defendant appears to base her defense, primarily if not exclusively, on her contention that the government cannot prove beyond a reasonable doubt that the procedures which she performed were, in fact, excisions as opposed to shaves. Instead, Defendant appears ready to argue that this is a topic on which physicians can have legitimate professional

disagreement including interpretation of the regulations.⁶

4. The upcoding evidence which the government wishes to introduce, aside from the 68 counts of the indictment which charge fraudulent billing for procedures as excisions rather than shaves, is over twenty times the number of charges in the indictment and would involve approximately 1,400 other instances. The huge volume would likely prejudice the jury, which would likely be diverted from the professional dispute which the defense will likely emphasize.

5. The introduction of this evidence would greatly increase the length of the trial, open up the government's witnesses to extended cross examination that could take many days, and is unnecessary for the resolution of the specific allegations of the indictment.

6. The total number of 68 alleged instances of fraudulent billing for excisions charged in the indictment would, if proven, give the jury enough evidence upon which to find that the Defendant's actions were intentional.

On the other hand, the Court has decided to allow all the government's evidence of allegedly fraudulent "out of office" billings because this is a concept that can be understood by lay jurors and does not depend on medical testimony. The evidence submitted in support of the government's allegations of fraudulent out of office billings more readily evinces intent, motive and the absence of mistake, based on alleged violations of relatively clear CPT regulations, rather than being subsumed within medical techniques, technology and terminology.

⁶ Defendant is, of course, free to defend on any ground, but as the Court advised counsel at the December 14, 2006 hearing, if she asserts (by evidence, argument or cross examination of government witnesses) that the "upcoding" was aberrant or unusual or the result of mistakes by her employees, for example, then the Court will likely admit Charts 2 and 3, containing the other evidence of 1,456 allegedly improper billing instances. At that point, the Defendant will have "opened the door" and most of the reasons as to why the Court is excluding this evidence will no longer be applicable.

An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
HARRIET COMITE, M.D.	:	NO. 06-70

ORDER

AND NOW, this 21st day of December, 2006, following evidentiary hearings and the foregoing Memorandum, it is hereby ORDERED as follows:

1. Defendant's Motion to Exclude the Testimony and Expert Report of Dr. Klaus Helm (Doc. No. 73) and Defendant's Motion to Exclude the Testimony and Expert Report of Dr. Paul Gross (Doc. No. 72) are DENIED, with leave to renew at trial.

2. Defendant's Motion for Reconsideration of Order Denying Evidentiary Hearing and Supplemental Authorities (Doc. No. 98) is DENIED, with leave to renew at trial.

3. Defendant's Motion to Preclude the Introduction of Other Crimes Evidence (Doc. No. 99) is GRANTED in part and DENIED in part.

4. A further pretrial hearing will be held on January 10, 2007 at 10:00 a.m. in Courtroom 3A.

5. Jury selection will take place on January 16, 2007 at 9:30 a.m. in Courtroom 3A. Testimony will start on January 17, 2007 at 2:00 p.m. or January 18, 2007 at 9:00 a.m.

BY THE COURT:

s/Michael M. Baylson

Michael M. Baylson, U.S.D.J.

