Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Raymond Lamont Shoemaker,
(O.I. No. 4-10-41039-9),

Petitioner,

v.

The Inspector General.

Docket No. C-13-839

Decision No. CR2993

Date: November 13, 2013

DECISION

This matter is before me on the Inspector General's (I.G.'s) Motion for Summary Disposition affirming the I.G.'s determination to exclude Petitioner Raymond Lamont Shoemaker from participation in Medicare, Medicaid, and all other federal health care programs for a period of 10 years. The I.G.'s Motion and determination to exclude Petitioner are based on section 1128(a)(1) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a)(1). The undisputed material facts of this case demonstrate that the minimum five-year exclusion must be imposed, and that the I.G.'s determination to enhance that period to 10 years based on proof of the aggravating factors found at 42 C.F.R. §§ 1001.102(b)(2) and (b)(5) is supported fact and law. However, the proposed 10-year term is unreasonably short. Accordingly, I grant the I.G.'s Motion for Summary Disposition but enhance the period of Petitioner's exclusion to 12 years.

I. Procedural Background

On September 21, 2011, Petitioner was named as one of three co-defendants in a 14-count Superseding Indictment handed up by the Federal Grand Jury sitting for the United States District Court for the Northern District of Mississippi. He was charged in Counts One, Three, Four, Six, Seven, Eight, Nine, Ten, Eleven, Twelve, and Fourteen of that Superseding Indictment.

That document charged Earnest Levi Garner, Jr., and Robert S. Corkern as additional co-defendants. More specifically, it charged Petitioner and Garner as co-conspirators, and named David Chandler as an unindicted co-conspirator, in Counts One and Four. It charged Petitioner and Corkern as co-conspirators, and named David Vance as an unindicted co-conspirator, in Count Eight. Petitioner and Corkern were also charged as co-defendants in Counts Nine, Ten, and Eleven, and Vance was named as an unindicted aider-and-abettor of Petitioner and Corkern in Counts Nine, Ten, and Eleven. Petitioner was charged individually as a defendant in Counts Three, Seven, and Twelve. I.G. Ex. 3.[1]

Corkern pleaded guilty to one count of violating 18 U.S.C. § 666, while Petitioner and Garner pleaded not guilty and went to trial. On a jury verdict they were both found guilty of all of the charges they faced at trial in February and March 2012. P. Ex. 1.[2]

Post-trial practice pursuant to FED. R. CRIM. P. 29 and 33 resulted in the District Court's granting defense motions for judgment of acquittal on two of the conspiracy counts on which guilty verdicts had been returned against Garner and Petitioner, Counts One and Four, and for a new trial on another count, Count Three, in which Petitioner was charged and found guilty. P. Ex. 1. Those proceedings notwithstanding, Petitioner remained convicted of seven felonies: Count Six, Health Care Fraud (Kickback, Bribe, or Rebate), in violation of 42 U.S.C. § 1320a-7b; Count Seven, False Statements to the United States, in violation of 18 U.S.C. § 1001; Count Eight, Conspiracy to violate 18 U.S.C. § 1014 (False Statements in a Federal Loan or Credit Application), in violation of 18 U.S.C. § 371; Counts Nine, Ten, and Eleven, False Statements in a Federal Loan or Credit Application, in violation of 18 U.S.C. § 1014; and Count Twelve, Embezzlement from an Organization Receiving Federal Assistance, in violation of 18 U.S.C. § 666. I.G. Ex. 2; P. Ex. 5.

On September 24, 2012, Petitioner was sentenced to seven concurrent 55-month terms of imprisonment, one on each of the seven counts. I.G. Ex. 2.

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[1] I have prepared and attached to this Decision an Appendix that may be helpful in the discussion that follows. It sets out — so far as this evidentiary record permits — the disposition of each of the 14 Counts in the Superseding Indictment.

[2] It does not appear that Petitioner stood trial on Count Fourteen, but nothing in this record explains its disposition. Petitioner was charged in Count Fourteen, but given the details of that Count, it seems possible that it was severed from the charges on which Petitioner and Garner stood trial in February and March 2012.

On March 29, 2013, the I.G. wrote to Petitioner giving notice of his exclusion for a period of 10 years pursuant to the terms of section 1128(a)(1) of the Act. The I.G.'s letter told Petitioner that the mandatory minimum five-year period of exclusion was to be enhanced by an additional five years based on the presence of two aggravating factors.

Acting through counsel, Petitioner sought review of the I.G.'s determination on May 30, 2013.

In order to discuss procedures for addressing the issues presented by this case, I convened a prehearing conference by telephone on June 13, 2013, pursuant to 42 C.F.R. § 1005.6. By order of June 14, 2013, I established those procedures and a schedule for the submission of documents and briefs. The record in this case closed for purposes of 42 C.F.R. § 1005.20(c) on September 19, 2013.

The evidentiary record on which I decide the issues before me contains eight exhibits. The I.G. proffered three exhibits marked I.G. Exhibits 1-3 (I.G. Exs. 1-3). Petitioner proffered five exhibits marked Petitioner's Exhibits 1-5 (P. Exs. 1-5). I have admitted all proffered exhibits as marked.

II. Issues

The legal issues before me are limited to those set out at 42 C.F.R. § 1001.2007(a)(1). In the context of this record, they are:

> a. Whether the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(1) of the Act; and
>
> b. Whether the 10-year length of the proposed period of exclusion is unreasonable.

For all of the reason set out below, the first issue is here resolved in favor of the I.G.'s position. Because Petitioner's predicate conviction is established in the record before me, section 1128(a)(1) of the Act mandates Petitioner's exclusion. A five-year period of exclusion is the minimum period established by section 1128(c)(3)(B) of the Act, 42 U.S.C. § 1320a-7(c)(3)(B). The enhancement of that period to 10 years is authorized and supported because the two aggravating factors relied on by the I.G. and found at 42 C.F.R. § 1001.102(b) (2) and (b)(5) are established in the record, but the 10-year period is unreasonably short. A 12-year period of exclusion is not unreasonable. Petitioner has demonstrated no mitigating factor that would reduce the proposed period of his exclusion.

III. Controlling Statutes and Regulations

Section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), requires the exclusion from participation in Medicare, Medicaid, and all other federal health care programs of any individual or entity convicted of a criminal offense related to the delivery of an item or service under Title XVIII of the Act (the Medicare program) or any state health care program (the Medicaid program). The terms of section 1128(a)(1) are restated in similar language at 42 C.F.R. § 1001.101(a).

The Act defines "conviction" as including those circumstances "when a judgment of conviction has been entered against the individual . . . by a Federal . . . court, regardless of . . . whether the judgment of conviction or other record relating to criminal conduct has been expunged," section 1128(i)(1) of the Act; "when there has been a finding of guilt against the individual . . . by a Federal . . . court," section 1128(i)(2) of the Act; "when a plea of guilty or nolo contendere by the individual . . . has been accepted by a Federal . . . court," section 1128(i)(3) of the Act; or "when the individual . . . has entered into participation in a . . . deferred adjudication . . . program where judgment of conviction has been withheld," section 1128(i)(4) of the Act. 42 U.S.C. §§ 1320a-7(i)(1)-(4). These definitions are repeated at 42 C.F.R. § 1001.2.

An exclusion based on section 1128(a)(1) is mandatory and the I.G. must impose it for a minimum period of five years. Act § 1128(c)(3)(B), 42 U.S.C. § 1320a-7(c)(3)(B). The regulatory language of 42 C.F.R. § 1001.102(a) affirms the statutory provision.

The mandatory minimum period of exclusion may be enhanced in some limited circumstances, but only on the I.G.'s proof of certain narrowly-defined aggravating factors listed at 42 C.F.R. § 1001.102(b). In this case, the I.G. relies on the two aggravating factors set out at 42 C.F.R. §§ 1001.102(b)(2) and (b)(5) to enhance the period of Petitioner's exclusion to 10 years. The aggravating factor set out at 42 C.F.R. § 1001.102(b)(2) is present when "acts that resulted in the conviction, or similar acts, were committed over a period of one year or more." The aggravating factor set out at 42 C.F.R. § 1001.102(b)(5) is present when the "sentence imposed by the court included incarceration."

In cases when the I.G. proposes to enhance the period of exclusion by relying on one or more aggravating factors, a petitioner may attempt to limit or nullify the proposed enhancement through proof of certain mitigating factors, carefully defined at 42 C.F.R. § 1001.102(c)(1)-(3). The petitioner who claims the mitigating factor or factors bears the burden of proving any mitigating factors claimed. 42 C.F.R. § 1005.15(b)(1).

IV. Findings and Conclusions

I find and conclude as follows:

1. In the United States District Court for the Northern District of Mississippi, Petitioner Raymond Lamont Shoemaker was found guilty on a jury verdict of, *inter alia*, one count of Health Care Fraud (Kickback, Bribe, or Rebate), in violation of 42 U.S.C. § 1320a-7b; one count of False Statements to the United States, in violation of 18 U.S.C. § 1001; one count of Conspiracy to violate 18 U.S.C. § 1014 (False Statements in a Federal Loan or Credit Application), in violation of 18 U.S.C. § 371; three counts of False Statements in a Federal Loan or Credit Application, in violation of 18 U.S.C. § 1014; and one count of Embezzlement from an Organization Receiving Federal Assistance, in violation of 18 U.S.C. § 666. I.G. Exs. 2, 3; P. Exs. 1, 5.

2. Judgment of conviction on that verdict was entered against Petitioner and sentence was imposed on him in the District Court on September 24, 2012. As part of his sentence, Petitioner was ordered to serve seven concurrent 55-month terms of imprisonment, and was ordered to pay a fine and an assessment in the total sum of $10,700.00. I.G. Ex. 2.

3. The judgment of conviction and finding of guilt described above in Findings 1 and 2 constitute a "conviction" within the meaning of sections 1128(a)(1) and 1128(i)(1) and (2) of the Act, and 42 C.F.R. § 1001.2.

4. A nexus and a common-sense connection exist between the criminal offenses of which Petitioner was convicted, as noted above in Findings 1, 2 and 3, and the delivery of an item or service under the Medicare and Medicaid programs. I.G. Exs. 2, 3; *Berton Siegel, D.O.*, DAB No. 1467 (1994).

5. By reason of Petitioner's conviction, a basis exists for the I.G.'s exercise of authority, pursuant to section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1), to exclude him from participation in Medicare, Medicaid, and all other federal health care programs.

6. Because the acts resulting in Petitioner's conviction were committed over a period of one year or more, the aggravating factor set out at 42 C.F.R. § 1001.102(b)(2) is present.

7. Because Petitioner was sentenced to a term of incarceration, the aggravating factor set out at 42 C.F.R. § 1001.102(b)(5) is present.

8. None of the mitigating factors set out at 42 C.F.R. § 1001.102(c)(1)-(3) is present.

9. The I.G.'s exclusion of Petitioner for an enhanced period of ten years is supported by fact and law. It is, however, unreasonably short. On the evidence before me, a period of exclusion of 12 years is not unreasonable. *See* Findings 1-8 above.

10. There are no disputed issues of material fact and summary disposition is appropriate in this matter. *Michael J. Rosen, M.D.*, DAB No. 2096 (2007); *Thelma Walley*, DAB No. 1367 (1992); 42 C.F.R. § 1005.4(b)(12).

V. Discussion

The parties do not debate the I.G.'s authority to exclude Petitioner for the mandatory minimum period of five years as provided by section 1128(a)(1) of the Act. They agree that the elements essential to that exclusion are present. Those two essential elements Act are: (1) the individual to be excluded must have been convicted of a criminal offense; and (2) the criminal offense must have been related to the delivery of an item or service under Title XVIII of the Act (Medicare) or any state health care program. *Tamara Brown*, DAB No. 2195 (2008); *Thelma Walley*, DAB No. 1367; *Boris Lipovsky, M.D.*, DAB No. 1363 (1992); *Lyle Kai, R.Ph.*, DAB CR1262 (2004), *rev'd on other grounds*, DAB No. 1979 (2005). *See Russell Mark Posner*, DAB No. 2033, at 5-6 (2006).

Petitioner implicitly conceded the presence of those elements in his May 30, 2013 hearing request, and has done so explicitly on the first pages of his August 16, 2013 Answer Brief and his September 19, 2013 Response Brief. In any case, Petitioner's conviction and its relation to the protected programs are manifest in the United States District Court's records. I. G. Exs. 2, 3; P. Ex. 1, 5. Thus, the first issue before me is resolved in the I.G.'s favor: the I.G. has a basis for excluding Petitioner from participating in Medicare, Medicaid, and all other federal health care programs pursuant to section 1128(a)(1) of the Act.

It is the second issue, the reasonableness of the I.G.'s proposed 10-year period of exclusion, that the parties vigorously debate. Petitioner denies that any of the crimes for which he has been convicted were committed over the period of a year or more, and thus denies the application of the aggravating factor set out at 42 C.F.R. § 1001.102(b)(2). Petitioner admits that he was sentenced to 55 months of incarceration, but argues that even the conceded fact of his incarceration and the length of his confinement do not support the reasonableness of a 10-year exclusion pursuant to 42 C.F.R. § 1001.102(b)(5). The debate over these two questions — and especially over the first, involving 42 C.F.R. § 1001.102(b)(2) — requires a careful review of the Superseding Indictment and the charges on which Petitioner was actually convicted. I.G. Ex. 3.

The Superseding Indictment on which Petitioner and his co-defendant Garner went to trial comprised 14 counts and 29 pages. All but the final count (which may not have been at issue at the trial) bore some relation to a hospital located in Batesville, Mississippi called Tri-Lakes Medical Center (TLMC). During the times material to the Superseding Indictment — that is, between May 2005 and March 2010 — TLMC participated in the Medicare and Medicaid programs. At the times material to the charges he faced, Petitioner was TLMC's chief management official, first designated chief operating officer and later chief executive officer. Over that period, and while Petitioner exercised his management role at TLMC, he became a co-conspirator in three schemes to which his authority at TLMC was essential. I.G. Ex. 3, at 1-6; 8-9; 12-20. These three conspiracy charges are the best points to begin review of the Superseding Indictment and the charges on which Petitioner stands convicted.

The first charged conspiracy was formed among Petitioner, Garner, and Chandler, and is set out in Count One of the Superseding Indictment as a violation of 18 U.S.C. § 371. I.G. Ex. 3, at 1-6. The statute intended to be violated by the conspirators was 18 U.S.C. § 666. In its essence, the conspiracy aimed at gaining, by bribery of Petitioner and Chandler, a preference for Garner's nursing staffing businesses when workloads at TLMC required hiring temporary nursing staff. Garner believed — incorrectly, as the District Court later found — that Chandler's position as the county administrator where TLMC was located would allow Chandler to influence the hiring process in Garner's favor, and believed that Petitioner's position at TLMC would be useful in influencing that hiring process. Following a meeting among the three in November 2005, Garner over the course of the next year and a half paid Chandler approximately $268,000 in bribes for what Garner believed was Chandler's influence in the hiring process. Between January 27 and July 27, 2006, Chandler paid five checks totaling approximately $12,000 to Petitioner, who demanded the money as his share of Garner's payment for the scheme to favor Garner's nursing staffing businesses. The overt acts of conspiracy charged in Count One began on May 25, 2005 and continued until June 15, 2007. The District Court treated the activities described in Count One as two separate conspiracies, but they were charged as only a single scheme. P. Ex. 1, at 13-16.

The second conspiracy was charged in Count Four of the Superseding Indictment, also as a violation of 18 U.S.C. § 371. I.G. Ex. 3, at 8-9. The statute intended to be violated by the conspirators was 42 U.S.C. § 1320a-7b. Count Four named the same three conspirators — Petitioner, Garner, and Chandler — and adopted literally all of the language of Count One's paragraphs 1 through 13 in setting out the background and overt acts of the overall scheme to obtain preference for Garner's businesses at TLMC. The gravamen of Count Four lay in the charge that the TLMC funds paid to Garner's businesses came from the Medicare and Medicaid programs; the overt acts of conspiracy charged in Count Four were explicitly based on Garner's payment to Chandler of the $268,000 between May 2005 and June 2007, and on Chandler's payment to Petitioner of the $12,000 between January 27 and July 27, 2006.

The substantive violation of 42 U.S.C. § 1320a-7b with which Petitioner was charged in Count Six, and of which he remains convicted, is based on his demanding and receiving the five payments totaling $12,000 from Chandler between January and July 2006. I.G. Ex. 1, at 10. Count Seven charged Petitioner with violating 18 U.S.C. § 1001 when he lied to investigators in October 2009 and March 2010 about those five payments, and he remains convicted of that charge.

The third conspiracy was charged in Count Eight of the Superseding Indictment, and was formed by Petitioner, Corkern, and Vance. Corkern was a physician in Batesville, but he was also associated with Petitioner in the management of TLMC through his business Physicians and Surgeons Hospital Group (PSHG). Vance was a business consultant, and though his firm MTV Healthcare (MTVH) represented Corkern. Count Eight charged a complex scheme to facilitate the purchase of TLMC by Corkern and PSHG, and to do so through a series of false statements to the federal agency whose approval, cooperation, and assistance became essential to the success of the purchase. This TLMC-purchase conspiracy was also charged as a violation of 18 U.S.C. § 371, and the statute the conspirators intended to violate was 18 U.S.C. § 1014, which forbids the making of false statements to certain federal agencies in support of loan or credit applications. I.G. Ex. 3, at 12-20.

The course of the Count Eight TLMC-purchase conspiracy was tortuous, but at two points Petitioner's help was a necessary factor. The first point was reached when the conspirators learned that the federal agency's participation required the entity proposing to buy TLMC to be a non-profit organization. As it happened, Petitioner had formed a non-profit called Kaizen CMR (KCMR) in March 2003. This record does not show what Petitioner did with KCMR before 2005, but as charged in Count Eight, in the summer of 2005 Petitioner sold KCMR for $250,000 to Corkern, who then used it as the nominee purchaser of TLMC. I.G. Ex. 3, at 13. The second point was reached at a particularly delicate stage of the purchase process when the federal agency's essential approval of a four million dollar interim line of credit appeared doubtful. I.G. Ex. 3, at 17. At that point Vance and Petitioner — in his role as chief executive officer at TLMC — submitted to the agency a flurry of materially-false statements in which they misrepresented the uses to which the interim credit would be put, and in which they concealed the fact that Corkern was to take $291,508.31 from the line of credit and Petitioner was to take $250,000 from it. The agency acted on these false statements and approved the line of credit. The funds received by Petitioner were diverted to him through KCMR. I.G. Ex. 3, at 17-19. The overt acts of conspiracy charged in Count Eight began on March 6, 2006 and continued until April 11, 2006, but Count Eight charged that the conspiracy had actually begun in June 2005 with Corkern's purchase of KCMR from Petitioner.

Counts Nine, Ten, and Eleven were based on Petitioner's submission of three of the false statements identified as overt acts in Count Eight, and charged him with substantive violations of 18 U.S.C. § 1014. Count Twelve was based on Petitioner's diversion to himself of the $250,000, another overt act in the Count Eight conspiracy, and charged him with the substantive violation of 18 U.S.C. § 666.

Once two or more persons agree to violate a federal criminal statute, as soon as one of them commits an "overt act" intended to effect or bring about the violation, the crime of conspiracy as defined at 18 U.S.C. § 371 is complete. That "overt act" need not in itself be illegal, and indeed may be perfectly innocent *per se*, but if it is completed with the goal or intended effect of furthering the agreement to violate a federal criminal statute then the crime of conspiracy itself is complete; the ultimate success of the overall conspiracy is only very rarely material. But overt acts can be and often are criminal in themselves, and when they are it is not at all unusual for grand juries to charge them both as overt acts and as additional substantive counts based on the statute or statutes the overt acts violated. As I have noted, the Superseding Indictment involved here reflects that practice: Count Two charged Garner with a substantive Count of violating 18 U.S.C. § 666 based on the payments he made to Chandler, which payments were charged as overt acts in Counts One and Four; similarly, Petitioner was charged in Count Three with the substantive violation of 18 U.S.C § 666 based on the payments he solicited in return for favoring Garner's businesses, charged as overt acts in Counts One and Four. But — and this point is central to the following discussion — Petitioner remains convicted of the substantive crimes set out in Counts Six, Seven, Nine, Ten, Eleven, and Twelve, as well as the conspiracy charge set out in Count Eight.

Now, it is true that Petitioner and Garner have been acquitted on Counts One and Four via FED. R. CRIM. 33. The reason is quite clear: following the jury's guilty verdict on those charges, the District Court found that Chandler was simply not in a position to affect or influence in any way the selection of Garner's businesses when extra nursing staff was needed at TLMC, and concluded that because he was not, whatever Garner and Petitioner may have agreed to do, even if carried to completion, could not have resulted in the bribery of an "agent of an organization" with sufficient authority to be within the reach of 18 U.S.C. § 666 and 42 U.S.C. § 1320a-7b.[3] P. Ex. 1, at 5-13. As to the six payments totaling $12,000 Chandler made to Petitioner in 2006, the District Court found that other than the hearsay statements Chandler attributed to Petitioner, there was no

[3] The validity of the "impossibility" defense to a conspiracy charge brought under federal law is discussed with interesting implications for this appeal in *United States v. Recio, et al.*, 537 U.S. 270 (2003). *Recio* itself is discussed in terms of interest in this context in *United States v. Min, et al.*, Nos. 11-4702, *etc.*, (4th Cir. Jan. 3, 2013); *United States v. Corson*, 579 F.3d 804 (7th Cir, 2009); *United States v. Orisnord*, 483 F.3d 1177 (11th Cir. 2007); and *United States v. Rodriquez*, 360 F.3d 949 (9th Cir. 2004).

direct evidence that those payments, although made, were part of a conspiratorial agreement between Garner and Petitioner.[4] P. Ex. 1, at 13-16. It is also true that after the jury's guilty verdict on it, the District Court granted Petitioner a new trial on Count Three via FED. R. CRIM. P. 29, based on Chandler's status and a related jury instruction.[5] As far as this record shows, no further action has been taken in the District Court on Count Three. As far as this Decision is concerned, Petitioner has not been convicted on those three Counts.

That does not mean, however, that the chronology of the overt acts charged in those Counts cannot be considered as a measurement for the aggravating factor set out at 42 C.F.R. § 1001.102(b)(2). Those overt acts were re-asserted and recited as the core evidentiary facts in the charge for which Petitioner was and remains convicted on Count Six, the substantive violation of 18 U.S.C. § 1320a-7b. By Count Six's terms that violation began in November 2005 and continued until June 2007. Count Six alone is sufficient to support the I.G.'s reliance on 42 C.F.R. § 1001.102(b)(2).

Nor does it mean that the six payments from Chandler to Petitioner between January and July 2006 do not mark the beginning of another such measurement, for it was about those five payments that Petitioner lied to investigators nearly four years later in October 2009 and March 2010. Petitioner was and remains convicted on Count Seven of violating 18 U.S.C. § 1001 by falsely telling investigators that the five payments were sums he had borrowed from Chandler. It seems perfectly reasonable to understand Count Seven as a charge requiring proof first of Petitioner's receipt of the five payments in 2006, then of the corrupt nature of those payments, and finally of his lies about their nature in 2010, a series of criminal acts plainly "committed over a period of one year or more." As an alternate and independent measure of the temporal span of Petitioner's crimes, I find and conclude that the facts of Count Seven support the I.G.'s invocation of 42 C.F.R. § 1001.102(b)(2).

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[4] Hearsay statements attributed to one co-conspirator by another co-conspirator can be admissible, but only under certain conditions. *Bourjaily v. United States*, 483 U.S. 171 (1987). The District Court specifically noted that the prosecution never attempted to meet those conditions, and thus Chandler's testimony that Petitioner had told him of Garner's agreement to bribe Petitioner, although presented to the jury, was of no probative value. P. Ex 1, at 16.

[5] The final disposition of Count Three is unclear on this record. On August 23, 2012, Petitioner's motion for judgment of acquittal on that Count was denied; in that same document his motion for new trial was granted per FED. R. CRIM. P. 33. P. Ex. 1, at 2, 20-21. In its Order of September 21, 2012, the District Court appeared to reconsider the motion for new trial on Count Three and to deny it, but that may simply be a clerical error, since Petitioner was not sentenced on Count Three. P. Ex. 5; I.G. Ex. 2.

And the fact that Petitioner has not been convicted on Counts One, Three, and Four most certainly does not mean that his convictions on Counts Eight, Nine, Ten, Eleven, and Twelve — charges based on the TLMC-purchase conspiracy and the substantive crimes Petitioner committed during the spring of 2006 in connection with it — are not to be treated as "similar acts" related to the crimes detailed in Counts Six and Seven and therefore suitable as yet another alternate and independent measuring point for the beginning of Petitioner's criminal activity. Count Eight alleged that the TLMC-purchase conspiracy began in June 2005. Counts Nine through Twelve represent convictions for substantive felonies committed in March and April 2006 as that TLMC-purchase conspiracy was carried through to completion. Accordingly, even the last of Petitioner's substantive crimes in the TLMC-purchase scheme, his violation of 18 U.S.C.§ 666 on or about April 7, 2006 as charged in Count Twelve, precedes Count Six's end-date of June 2007 by more than one year and Count Seven's end-date of March 2010 by almost four. Should it be objected that the crimes charged in Counts Eight through Twelve are not acts similar to those in Counts Six and Seven, I note that they have in common Petitioner's abuse of his position at TLMC, his apparent avidity for under-the-table profit, his manifest willingness to heap untruth upon misrepresentation and to then attempt to conceal both by prevarication, and his ability to accomplish all this at the same time in two simultaneous, parallel campaigns of criminality. These "similar acts" provide a third basis for the I.G.'s reliance on 42 C.F.R. § 1001.102(b)(2).

Thus, in summary, the evidence as to the aggravating factor dependent on Petitioner's criminal conduct lasting more than a year is this: Count Six supports a finding that Petitioner's criminal conduct continued from November 2005 to June 2007; Count Seven supports a finding that Petitioner's criminal conduct continued from January 2006 to March 2010; and Counts Eight, Nine, Ten, Eleven, and Twelve support a finding that Petitioner's interconnected, contemporaneous, and similar crimes began as early as June 2005 and not later than April 2006, and continued thereafter until March 2010. The I. G. has proven the aggravating factor set out at 42 C.F.R. § 1001.102(b)(2).

The I.G. has also invoked the aggravating factor requiring proof that Petitioner's sentence included incarceration. Petitioner does not deny the nature and 55-month length of his sentence, and the records of the District Court support the I.G.'s reliance on the terms of 42 C.F.R. § 1001.102(b)(5). It is important to note that Petitioner's argument about this second factor is in large part dependent on his assertion that the I'G.'s proof has failed as to the first aggravating factor, and that only Petitioner's incarceration should be weighed against him. Put simply, Petitioner begins his argument in the faulty assumption that the incarceration factor is the only one actually proven against him. He then argues:

> This Court cannot genuinely assess the reasonableness of Shoemaker's exclusion beyond the statutory minimum by relying solely on the length of Shoemaker's prison term. It is certainly relevant to this Court's consideration of Shoemaker's trustworthiness that Shoemaker did not

> cause or intend to cause Medicare and Medicaid financial loss and that his sentence was four years and seven months based in greater part on his other convictions, not the single healthcare related crime.

Pet. Ans. Br. 8.

This argument overlooks the "similar acts" language in 42 C.F.R. § 1001.102(b)(5), and appears to trivialize the degree of untrustworthiness demonstrated by Petitioner's calculated commission of several similar acts against non-program victims while he himself was in a position of authority and trust. But it is most seriously flawed in its failure to accept that both aggravating factors, and not merely one, have been established here. And of course it is quite true that no Medicare or Medicaid funds were lost as a consequence of Petitioner's crimes, but Petitioner's all-but-explicit claim that an absence of loss by those programs amounts to a factor in mitigation is impossible to accept when it is recalled that Petitioner illegally skimmed and diverted to his own use a quarter-million dollars from the federally-guaranteed line of credit as charged in Count Twelve, and channeled an even greater sum to Corkern as charged in Count Eight, funds to which he gained access through the criminal transactions set out in Counts Eight through Eleven.

Let me be clear on this point: I have not assumed that Petitioner's defalcations from the line of credit constitute program losses that could prove the aggravating factor at 42 C.F.R. § 1001.102(b)(5). Nor have I weighed the amounts involved in those diversions in my considerations of the two proven aggravating factors. But I reject his argument that the absence of loss to the Medicare and Medicaid programs is in any fashion a diminution of the serious implications of his long prison sentence. To accept his argument would simply reward him for being lucky, or cunning, or both, in his choice of victims. If *Manocchio v. Sullivan*, 768 F. Supp. 814, 817 (S.D. Fla. 1991), *aff'd*, 961 F.2d 1539 (11th Cir. 1992) and *Joann Fletcher Cash*, DAB No. 1725 (2000) are still the law in this forum and a petitioner's trustworthiness is still the touchstone for evaluating an exclusion, then this forum should blush if it can hold that stealing from a federal health-care program reflects a different degree of untrustworthiness than stealing from a line of credit guaranteed by another federal agency and intended to be applied toward the purchase of a hospital.

But even though this record fully demonstrates the two aggravating factors the I. G. relied on and proved — one precisely as alleged by the I.G., and one even more glaring on the record before me — and even though Petitioner has offered to prove not a single mitigating factor defined by regulation,[6] Petitioner's claim that the 10-year length of his exclusion is unreasonably long raises questions that have recently grown clouded, if not vexed.

For at least a decade, the Administrative Law Judge (ALJ) evaluating such a claim was guided by a settled line of authority in doing so. Consistent with that line of authority, the I.G.'s discretion when weighing the importance of aggravating and mitigating factors commanded great deference in this forum. *Jeremy Robinson*, DAB No. 1905 (2004); *Keith Michael Everman, D.C.*, DAB No. 1880 (2003); *Stacy Ann Battle, D.D.S., et al.*, DAB No. 1843 (2002). The rationale for that doctrine was anchored by the drafters of the regulations in the I.G.'s "vast experience" in implementing exclusions. 57 Fed. Reg. 3298-3321 (Jan. 24, 1992). According to that doctrine, an ALJ was forbidden to substitute his or her own view of what period of exclusion might seem best in any given case for the view taken by the I.G. on the same evidence. So long as the period chosen by the I.G. was within a reasonable range and was based on demonstrated criteria, the ALJ was forbidden to alter it. *Jeremy Robinson*, DAB No. 1905; *Joann Fletcher Cash*, DAB No. 1725, at 20. According to that line of authority, an ALJ might reduce an exclusionary period only when the ALJ discovered some meaningful evidentiary failing in the aggravating factors upon which the I.G. relied, or when the ALJ was shown evidence reliably establishing a mitigating factor not considered by the I.G. in setting the enhanced period.

That line of authority was for all useful purposes abandoned by the Departmental Appeals Board (the Board) in *Craig Richard Wilder, M.D.*, DAB No. 2416 (2011). Although the *Wilder* ALJ found that the I.G. had considered all proven aggravating and mitigating factors, and although the Board acknowledged that there were no differences whatsoever between the record of those factors before it and the record before the ALJ and the I.G., the Board nevertheless departed from its own settled rule and revised the 35-

[6] In particular, Petitioner has declined to claim or to attempt proof of the mitigating factor based on "a mental, emotional, or physical condition" set out at 42 C.F.R. § 1001.102(c)(2). For that reason I attribute no weight whatsoever to the many references to alcohol abuse that appear in Petitioner's briefing, or to its asserted influence on the District Court in sentencing him. There is nothing in the record before me, and particularly nothing in pages 3 and 5 of I.G. Ex. 2, that would suggest otherwise. *See Russell Mark Posner*, DAB CR1410 (2006), *aff'd*, DAB No. 2033 (2006).

year period of exclusion downward to 18 years, so that the period might conform more satisfactorily to what the Board, viewing the matter at two steps' removal from vast experience, considered best. In doing so, the Board implicitly rejected the I.G.'s and the ALJ's identical assessment of the *value* of Wilder's cooperation and, on exactly the same evidence, substituted its own assessment.

The Board next considered this issue in *Vinod Chandrashekhar Patwardhan, M.D.*, DAB No. 2454 (2012). That decision declined any mention or discussion of *Wilder*, and seemed at least to pay lip-service to the *Robinson-Everman-Battle-Cash* line of authority. But it also affirmed — on proof of the same two aggravating factors here proven, plus the factor set out at 42 C.F.R. § 1001.101(b)(1), and in the absence of any mitigating factors, as here — the ALJ's reduction of the I.G.'s proposed 23-year period of exclusion to 12 years. And eight months later the Board decided *Sushil Anniruddh Sheth*, DAB No. 2491 (2012).

There the Board set out at length both its theoretical justification for its *de novo* review of enhanced periods of exclusion in general and the specific rationale for its *de novo* determination that a 95-year period of exclusion was unreasonable if imposed on Dr. Sheth, but that a 60-year period was best.[7] The Board accomplished this substitution of judgment on precisely the same evidence considered by the I.G. who set the 95-year term, and on precisely the same evidence examined thoroughly and with approval by the ALJ who found the 95-year period perfectly reasonable and declined to reduce it. I shall return to certain portions of the Board's decision in *Sheth* below, but for now it is enough to note that it is the latest expression of the Board's understanding of its authority in assessing enhanced exclusions.

It seems to me certain that the *Robinson-Everman-Battle-Cash* line of authority has been overruled *sub silentio* by *Wilder, Patwardhan*, and now, by *Sheth*. I am convinced that *Wilder, Patwardhan*, and *Sheth* announce the Board's assumption of a new authority in overseeing the I.G.'s application of his "vast experience." If that is the case then it is impossible not to understand that *Wilder, Patwardhan*, and *Sheth* go further and vouchsafe on the ALJ discretion to alter — that is, to lengthen or to shorten — the period of exclusion determined by the I.G. upon the same facts and circumstances relied upon by the I.G. I have suggested as much in *Keith Nisonoff*, DAB CR2927, at 8, n.1; *Jose C. Menendez Campos, M.D.*, DAB CR2923, at 8, n.2 (2013); *Ollie Futrell*, DAB CR2901, at 9 (2013), *Anthony Lynn Hester*, DAB CR2529, at 9 (2012); *Edward Alexander Birts*, DAB CR2516, at 9, n.1 (2012) and *Marcellius Jhekwuoba Anunobi*, DAB CR2480, at 10 (2012). Those decisions were not appealed to the Board and no further explication of

[7] In considering the difference between a 95-year exclusion and the Board's preference of a 60-year period effective October 2011 — in terms of reasonableness, of course — it may be illuminating to note that Dr. Sheth was 50 years old when convicted in 2010.

Wilder, *Patwardhan*, and *Sheth* is available in any other Board decision to date.[8] But if the *Robinson-Everman-Battle-Cash* rule has been abandoned and no longer restricts the Board's considering what term of exclusion might be best on the facts of record, I can see no reason why an ALJ should now lack the authority to alter by lengthening as well as by shortening the term proposed by the I.G.

This case presents both an opportunity and an obligation to exercise that authority and lengthen the period of this exclusion. Given the weight I accord below to the length of Petitioner's sentence, and considering the weight I accord to the extended temporal span of his criminal activity, I find and conclude that the proposed 10-year term of Petitioner's exclusion is unreasonably short. The Board has reiterated and its decisions show that comparisons with other cases are of limited utility and are certainly not controlling, but comparisons can still illustrate what a reasonable range has been understood to mean when the Board and ALJs evaluate an exclusion period longer than the statutory minimum. *Paul D. Goldenheim, M.D., et al.*, DAB No. 2268, at 29 (2009). The length of this exclusion is commensurate with the range established as reasonable in *Kamron Hakhamimi, M.D*, DAB No. 2408 (2011); *Rajashakher P. Reddy, M.D.*, DAB CR2681 (2013); *Tamara Varnado*, DAB CR2305 (2011); *Doantrang Thi Nguyen, et al.*, DAB CR2191 (2010); *James A. Holland, M.D.*, DAB CR2169 (2010); *Victor E. Igiebor*, DAB CR2114 (2010); *Mukunda Mukherjee, M.D.*, DAB CR1835 (2008); *Thomas P. Donahue, U.S.M.*, DAB CR1057 (2003); *Cheryl Elizabeth Richardson, M.D.*, DAB CR682 (2000). These cases suggest that a 12-year period of exclusion is squarely within a reasonable range.

The 10-year period ought to be lengthened because the full span of Petitioner's criminal exploitation of his position at TLMC lasted from not more recently than June 2005, when he and Corkern formed their conspiracy to manipulate for corrupt purposes the purchase of TLMC as charged in Count Eight, paragraphs 5, 6, and 7, through at least March 2010, when he lied to investigators about the five checks he received from Chandler in 2006, checks he demanded as his payoff for facilitating the TLMC nursing scheme, as charged in Count Seven. Before the aggravating factor set out at 42 C.F.R. § 1001.102(b)(2) can be invoked there must be proof that "The acts that resulted in the conviction, or similar acts, were committed over a period of one year or more." Petitioner was convicted of interconnected acts at TLMC that spanned almost five years, and those acts were marked by an abuse of his position in that federally-funded health care facility, by peculation and deceit as his chosen path to corrupt personal financial gain, and by attempted deception and concealment of that abuse and deceit as an ongoing *modus operandi*. It is not enough simply to note that the span of Petitioner's criminal conduct exceeds the regulatory

[8] In *Nisonoff*, *Menendez Campos*, *Hester*, *Birts*, and *Anunobi*, the petitioners appeared *pro se*. For what the observation may be worth, however, I point out that *Anunobi* was cited by the Board without obvious disapproval in *Sheth*, although not on the precise point here under discussion.

threshold more than fourfold: what must also be recognized is Petitioner's willingness to exploit opportunistically such varied aspects of his position at TLMC, and to persist in his variegated and calculated *crimen falsi* for so long, even in the face of questioning by law enforcement officials. Petitioner's conduct at TLMC was no "short-lived lapse of integrity," in the sense that phrase is used in *Donald A. Burstein, Ph.D.*, DAB No. 1865 (2003) to suggest a certain transient and presumably therefore pardonable impulsiveness or short-term venality: Petitioner's convictions are based on criminal conduct undertaken thoughtfully, craftily, deliberately, and repeatedly, and undertaken from a position of trust. This sustained demonstration of untrustworthiness is entirely sufficient to warrant a substantial enhancement of the proposed 10-year exclusion, even if no other aggravating factor were present.

The 10-year period ought to be lengthened because Petitioner was sentenced to a substantial term of confinement. It may be significant that the length of that term is commensurate with the temporal span of his crimes: he has been sentenced to prison for 55 months, and his criminal conduct as described in the paragraph above continued over approximately 57 months from June 2005 to March 2010. It is certainly significant that the vast part of the mandatory minimum exclusion of five years will have no more than a trivial effect as a prophylactic against Petitioner's abuse of the protected programs and their beneficiaries, simply because he will for 55 months be in no position to harm them. For all practical purposes, it is the period following Petitioner's release from prison when the programs and their beneficiaries will need protection from him. As matters stand, that period would extend approximately five more years after his release, and after that the programs must rely on Petitioner's trustworthiness and welcome him if he chooses to take up his former occupations. On this evidence, and relying substantially on the length of Petitioner's sentence, I cannot regard that as a reasonable proposition: if the programs and their vulnerable beneficiaries are to be protected, and if schemes like those described here are to be discouraged, then a material extension of the proposed exclusion beyond the end of Petitioner's prison sentence is essential. Even if no other beneficial purpose might be served by requiring Petitioner to wait an extra two years before being eligible for reinstatement, those two extra years will allow an extra span of time for him to demonstrate his trustworthiness *vel non*.

The length of that sentence seems an unmistakable reflection of the District Court's assessment of Petitioner's untrustworthiness, and I rely on it in reaching the conclusions I announce in the paragraph above. But any application of the aggravating factor set out at 42 C.F.R. § 1001.102(b)(5) must come to terms with the Board's observations regarding it in *Sheth*, which now assume obvious importance in assessing the weight to be given Petitioner's four-and-a-half-year imprisonment:

> The regulations do not rank factors by importance, and the incarceration factor rests merely on whether the sentence included incarceration; it does not specify that more or less weight should be given based on the length

> of a prison term. Furthermore, the length of a criminal sentence is influenced by factors not present in the exclusion context, such as sentencing guidelines and the number of counts . . . . A criminal sentence also serves different purposes than those of the exclusion statute and regulations, including punishment which . . . is not a purpose of the exclusion statute. Moreover, as stated earlier, financial loss to health care programs is "an exceptional aggravating factor" . . . that the I.G. may reasonably conclude outweighs the incarceration factor in any given case.

Sushil Anniruddh Sheth, DAB No. 2491, at 9.

It may very well seem that Thomas Selden's comment about equity and the length of the Chancellor's foot has a certain application to the Board's evaluation of aggravating factors, and that there may be a certain tension between the Board's assertions that "The regulations do not rank factors by importance" on the one hand and "financial loss to health care programs is an 'exceptional aggravating factor'" on the other. When the Chancellor's foot trips over equal factors because one factor is more equal than the others, a stumble should surprise no one. The stumble here is that if the language above means what it says, then the incarceration factor becomes to the Board a mere "on/off switch," either present or not, but deriving no intrinsic significance from its length or conditions. If the language above says what it means, a three-month term of home confinement or a 30-day ankle-bracelet sojourn in a halfway house reveals to the Board exactly as much about a petitioner's trustworthiness as a 50-year commitment to the federal prison in Joliet. And finally, if the language above is a correct expression of the Board's thinking, then the measure of loss to a protected health care program is such "an exceptional aggravating factor" that it tells the Board more about a criminal's trustworthiness than the character and duration of his scheme, the nature, number, and vulnerability of his victims, the number of discrete dishonest acts involved, or even the nature of the trust he betrayed in committing his crime. Effect — in this example, simple pecuniary loss or damage — will have replaced motive, method, and *mens rea* as the yardsticks by which trustworthiness is tested.

It is possible that when the Board wrote *Sheth* it had forgotten the wisdom of its approach to this aggravating factor a decade before. In *Jason Hollady, M.D.*, DAB No. 1855 (2002), one of the issues before the Board required it to decide whether the incarceration factor was entitled to more or less weight if the incarceration included work-release. The Board expressed itself satisfied that a nine-month jail term was *per se* "relatively substantial," but rather clearly found that its amelioration through a work-release program demanded that the incarceration factor, although proven, be given less weight in assessing the reasonableness of a term of exclusion:

> Moreover, there is no evidence that . . . the I.G. took into account the fact that the sentence included work release. This is a *circumstance relevant in*

> *weighing* the aggravating factor since it is an aspect of the sentencing judge's evaluation of Petitioner; compared to a nine-month period with no release *it has less weight* . . . The sentence of incarceration for nine months, even with the work release, also is more than a token incarceration and, in that sense, relatively substantial, as the ALJ found.

Jason Hollady, M.D., DAB No. 1855, at 12 (emphasis added).

When the Board applied that analysis in *Hollady*, it had quite recently employed an approach very like it in *Gary Alan Katz, R.Ph.*, DAB No. 1842 (2002):

> Incarceration for an indeterminate period with a minimum of one year and a maximum of seven is significant in itself and *certainly justifies a longer period of exclusion than* if there was no incarceration or *incarceration of a lesser type or shorter period*.

Gary Alan Katz, R.Ph., DAB No. 1842, at 10.

And perhaps most significantly, the Board's decision in *Sheth* was preceded only sixteen months earlier by its action in *Enitan Osagie Isiwele*, DAB No. 2405 (2011). There, the Board remanded an exclusion proceeding with instructions that the ALJ consider whether a trial-court ordered reduction of the length of Isiwele's prison sentence from 97 to 78 months warranted a reduction in the length of the I.G.'s proposed exclusion, the period of which the I.G. had already reduced from 17 to 15 years. The Board wrote that "we remand the case to the ALJ to determine whether the revised period of exclusion is reasonable, given the federal court's reduction of the period of imprisonment." The totality of the Board's *rationale* in doing so was this:

> We accordingly remand the appeal to the ALJ to review the reasonableness of the 15-year period of exclusion imposed by the I.G. *in light of the district court's decision, subsequent to the ALJ hearing, to reduce Petitioner's sentence of imprisonment from 97 to 78 months*.

Enitan Osagie Isiwele, DAB No. 2405, at 4 (emphasis added).

The nuanced *Hollady-Katz-Isiwele* analysis seems much more likely to produce sound results than the simplistic "either-or" approach suggested in *Sheth*. The *Hollady-Katz-Isiwele* analysis would also be of obvious importance in a situation where the incarceration factor were the only aggravating factor involved, but where the I.G. was obliged to set a period of exclusion within "a reasonable range." In such a situation, *the length of incarceration would be the only metric available*. I believe that the Board was right in *Hollady*, *Katz*, and *Isiwele*, and I believe further that it would not intentionally abandon such a rational position without saying so. Accordingly, I follow *Hollady-Katz-*

Isiwele here and give great weight to the 55-month length of Petitioner's prison term as a measure of his trustworthiness. The weight I accord the length of Petitioner's sentence is, I believe, sufficient in itself to justify an increase in the proposed 10-year exclusion. Having given great weight to the long temporal span of Petitioner's crimes proven as an aggravating factor, and having given great weight to the length of his prison sentence proven as an aggravating factor, I find and conclude that both the factors and their proven circumstances show a degree of untrustworthiness that requires Petitioner's exclusion from the protected programs for a period of 12, not merely 10, years.

Resolution of a case by summary disposition is fitting when settled law can be applied to undisputed material facts. *Michael J. Rosen, M.D.*, DAB No. 2096; *Thelma Walley*, DAB No. 1367. Summary disposition is authorized by the terms of 42 C.F.R. § 1005.4(b)(12). This forum looks to FED. R. CIV. P. 56 for guidance in applying that regulation. *Robert C. Greenwood*, DAB No. 1423 (1993). The material facts in this case are undisputed and unambiguous. They support summary disposition as a matter of settled law. This Decision issues accordingly.

VI. Conclusion

For the reasons set forth above, the I.G.'s Motion for Summary Disposition should be, and it is, GRANTED. The I.G.'s exclusion of Petitioner Raymond Lamont Shoemaker from participation in Medicare, Medicaid, and all other federal health care programs pursuant to the terms of section 1128(a)(1) of the Act, 42 U.S.C. § 1320a-7(a)(1) is SUSTAINED. Based on the provisions of 42 C.F.R. §§ 1001.102(b)(2) and (b)(5), the period of Petitioner's exclusion is 12 years.

/s/
Richard J. Smith
Administrative Law Judge

APPENDIX

This appendix shows the disposition of each Count of the 14-Count Superseding Indictment returned in *United States v. Shoemaker, et al.*, Criminal No. 2:11CR38 (N. D. Miss.), insofar as a disposition appears in the exhibits submitted by the parties. It should be noted that those exhibits are, by the parties' choice, few in number and include a very limited number of court records. The exhibits do not include the District Court's docket sheet for the entire proceedings or any judgments, orders, memoranda opinions, or other documents relating to the final disposition of Counts Three and Fourteen as to Petitioner.

COUNT ONE: 18 U.S.C. § 371. Petitioner and Garner charged in this Count. Both found guilty on jury verdict. Defense motions for judgments of acquittal granted per FED. R. CRIM. P. 29 in favor of Petitioner and Garner; defense motions for new trial (in the event that the judgments of acquittal should be appealed and reversed) granted per FED. R. CRIM. P. 33 in favor of Petitioner and Garner. P. Ex. 1, at 2, 20-21.

COUNT TWO: 18 U.S.C. § 666. Petitioner was not charged in this Count. Defense motion for judgment of acquittal granted per FED. R. CRIM. P. 29 in favor of Garner; defense motion for new trial (in the event that the judgment of acquittal as to Garner should be appealed and reversed) granted per FED. R. CRIM. P. 33 in favor of Garner. P. Ex. 1, at 2, 20.

COUNT THREE: 18 U.S.C. § 666. Petitioner charged in this Count and fund guilty on jury verdict. On August 23, 2012, Petitioner's motion for judgment of acquittal was denied; in that same document his motion for new trial was granted per FED. R. CRIM. P. 33. P. Ex. 1, at 2, 20-21. In its Order of September 21, 2012, the District Court reconsidered Petitioner's motion for new trial and appeared to deny it, but that may simply be a clerical error, since Petitioner was not sentenced on Count Three, and there is no mention of that Count in Petitioner's sentencing document. P. Ex. 5; I.G. Ex. 2. No further information is available in this record as to the disposition of Count Three.

COUNT FOUR: 18 U.S.C. § 371. Petitioner and Garner charged in this Count. Both found guilty on jury verdict. Defense motions for judgments of acquittal granted per FED. R. CRIM. P. 29 in favor of Petitioner and Garner; defense motions for new trial (in the event that the judgments of acquittal should be appealed and reversed) granted per FED. R. CRIM. P. 33 in favor of Petitioner and Garner. P. Ex. 1, at 2, 20-21.

COUNT FIVE: 42 U.S.C. § 1320a-7b. Petitioner was not charged in this Count. Defense motion for judgment of acquittal granted per FED. R. CRIM. P. 29 in favor of Garner; defense motion for new trial (in the event that the judgment of acquittal as to Garner should be appealed and reversed) granted per FED. R. CRIM. P. 33 in favor of Garner. P. Ex. 1, at 2, 20-21.

COUNT SIX: 42 U.S.C. § 1320a-7b. Petitioner was convicted as charged and sentenced. I.G. Ex. 2, at 1.

COUNT SEVEN: 18 U.S.C. § 1001. Petitioner was convicted as charged and sentenced. I.G. Ex. 2, at 1.

COUNT EIGHT: 18 U.S.C. § 371. Petitioner was convicted as charged and sentenced. I.G. Ex. 2, at 2.

COUNT NINE: 18 U.S.C. § 1014. Petitioner was convicted as charged and sentenced. I.G. Ex. 2, at 2.

COUNT TEN: 18 U.S.C. § 1014. Petitioner was convicted as charged and sentenced. I.G. Ex. 2, at 2.

COUNT ELEVEN: 18 U.S.C. § 1014. Petitioner was convicted as charged and sentenced. I.G. Ex. 2, at 2.

COUNT TWELVE: 18 U.S.C. § 666. Petitioner was convicted as charged and sentenced. I.G. Ex. 2, at 2.

COUNT THIRTEEN: 18 U.S.C. § 666. Petitioner was not charged in this Count. No further information is available in this record.

COUNT FOURTEEN: 18 U.S.C. § 666. Petitioner was charged in this Count, but no further information as to its disposition appears in this record. Given that the details of this Count charge Petitioner with misconduct not obviously connected with TLMC, and at a different county hospital in a different town, it seems possible that it was severed from the charges on which Petitioner and Garner stood trial in February and March 2012. *See* FED. R. CRIM. P. 14(a).