IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA,	*	
v.	*	**CRIMINAL NO. 1:22-336-SAG**
ANNA GABRIELIAN and JAMIE LEE HENRY,	*	
Defendants.	*	

* * * * * * * * * * *

ANNA GABRIELIAN AND JAIME LEE HENRY 'S MOTION UNDER FED. R. CRIM. P. 29 FOR JUDGMENT OF ACQUITTAL

As the Court instructed the jury, Dr. Gabrielian and Dr. Henry are starting with a clean slate at trial. Even after giving the government the benefit of all reasonable inferences, there is not sufficient evidence from which a rational jury could find Dr. Gabrielian and Dr. Henry guilty beyond a reasonable doubt. For this reason, the Court should enter judgments of acquittal under Fed. R. Crim. P. 29.

The underlying premise of the Government's case is that Dr. Gabrielian and Dr. Henry transferred individually identifiable health information ("IIHI") to Russian intelligence with at least one of the following specific intents: (1) to maliciously harm the United States, (2) to maliciously harm her patients, (3) to elevate her status with Russian intelligence, or (4) to avoid potential retaliation by Russian intelligence.

The Government has not presented substantial evidence to support any of its theories of specific intent. Further, the Government entrapped Dr. Gabrielian and Dr. Henry as a matter of law because the Government took advantage of their "non-

criminal type of motive" to induce them to commit a crime they were not predisposed to commit prior to the UC's approach.

STANDARD OF REVIEW

Under Federal Rule of Criminal Procedure 29(a), "the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a); *see United States v. Bonner*, 735 F. Supp. 2d 405, 406 (M.D.N.C. 2010) (granting Rule 29 motion for judgment of acquittal based on insufficient evidence). In considering a Rule 29 motion, the "determination [] focuses on both the elements of the offense charged and on the factual sufficiency of the evidence." *United States v. Alerre*, 430 F.3d 681, 693 n.3 (4th Cir. 2005). Although the evidence is to be "viewed in the light most favorable to the prosecution," *United States v. Collins*, 412 F.3d 515, 519 (4th Cir. 2005), a conviction can only be sustained where the evidence is "substantial." *United States v. Burgos*, 94 F.3d 849, 862 (4th Cir. 1996) (quoting *Glasser v. United States*, 315 U.S. 60, 80 (1942)). "[S]ubstantial evidence is evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *Id.*; *see also United States v. Roe*, 575 F. Supp. 2d 690, 692 (D. Md. 2008) (granting Rule 29 motion for judgment of acquittal).

Thus, the question raised by a motion for a judgment of acquittal is whether "as a matter of law the government's evidence is insufficient 'to establish factual guilt' on the charges in the indictment." *United States v. Alvarez*, 351 F.3d 126, 129 (4th Cir. 2003) (quoting *Smalis v. Pennsylvania*, 476 U.S. 140, 144 (1986)). "[T]o avoid a

Rule 29 judgment of acquittal, the government must have presented sufficient evidence to support a conviction based on reasonable inferences, as the fact finder is not entitled to make 'leaps of logic.'" *United States v. Crounsset*, 403 F. Supp. 2d 475, 479 (E.D. Va. 2005) (quoting *Evans-Smith v. Taylor*, 19 F.3d 899, 908 n.22 (4th Cir. 1994)). Consequently, the Court should grant a Rule 29 judgment of acquittal where the government's case rests on "missing, flawed, or contradictory facts" that lead to the conclusion that no reasonable trier of fact could hold the defendant guilty beyond a reasonable doubt. *United States v. Bonner*, 648 F.3d 209, 213 (4th Cir. 2011).

ARGUMENT

I. THE GOVERNMENT HAS NOT PRESENTED SUBSTANTIAL EVIDENCE THAT DR. GABRIELIAN AND DR. HENRY TRANSFERRED IIHI INFORMATION FOR "PERSONAL GAIN" OR "MALICIOUS HARM."

42 U.S.C. § 1320d-6(b)(3) requires the Government to prove beyond a reasonable doubt that Dr. Gabrielian and Dr. Henry had the specific subjective intent to "transfer… [IIHI] for . . . personal gain, or malicious harm." First, the Government's failure to produce "substantial" evidence to prove the element of intent warrants judgments of acquittal. *United States v. Burgos*, 94 F.3d 849, 862 (4th Cir. 1996) (quoting *Glasser v. United States*, 315 U.S. 60, 80 (1942)). The only direct evidence of Dr. Gabrielian and Dr. Henry's specific subjective intent is Dr. Gabrielian's own words, which contradict the Government's theory of intent. Further, the government has presented no circumstantial evidence that could prove the requisite subjective intent beyond a reasonable doubt unless the jury were to make impermissible "leaps of logic." *United States v. Crounsset*, 403 F. Supp. 2d 475, 479 (E.D. Va. 2005) (quoting

Evans-Smith v. Taylor, 19 F.3d 899, 908 n.22 (4th Cir. 1994)). Finally, the Government failed to negate innocent explanations for Dr. Gabrielian and Dr. Henry's conduct. *United States v. Law*, 528 F.3d 888, 896 (D.C. Cir. 2008).

A. The Direct Evidence Shows Only That The UC Pressured Dr. Gabrielian And Dr. Henry To Commit An Irrelevant Crime As Part Of A Test To Give Russian Intelligence Blackmail Over Them.

The question before the jury is: What was Dr. Gabrielian and Dr. Henry's subjective reason for turning over IIHI information to someone they believed to be a Russian intelligence agent? The only direct evidence was provided by Dr. Gabrielian in the transcripts: Dr. Gabrielian and Dr. Henry viewed transferring the records as providing "precious blackmail." Govt. Ex. 6 at 293 Dr. Gabrielian and Dr. Henry felt pressure to do what everyone involved viewed as an irrelevant and useless crime so that Russian intelligence could have leverage, in the form of blackmail, over them. Turning over useless scraps of information from random medical records does not cause "malicious harm." And giving what you believe to be a murderous organization blackmail against you is certainly not personal gain, under any reasonable definition of the term. It does not even meet the government's overly broad definition of "an action [] done to gain a substantial advantage or to rid oneself of a substantial difficulty." ECF at 89-1. Dr. Gabrielian and Dr. Henry intended the opposite. They felt pressured to create a substantial disadvantage for themselves because they feared what it meant to cross the KGB, and because they thought it might help them get closer to saving lives with humanitarian aid.

The uncontradicted evidence shows that Dr. Gabrielian and Dr. Henry viewed the records they turned over as utterly useless – so useless that its disclosure could

not conceivably result in any sort of "gain" or "harm" to anybody, much less "personal" gain or "malicious" harm. When Dr. Gabrielian acknowledged that she had access to medical records, she repeatedly explained that the information was useless and irrelevant and tried to talk the UC out of asking for it:

> "But regarding such very-very good information . . . I really don't have it . . . ***In other words, what can I do?*** Well, yes - someone important is possibly being treated at Hopkins. . . ***I can access the chart one time, and after that I will be fired with such scandal!*** . . . That--If I publish something with a Russian institute, that can be explained - those are my colleagues-- that is still international work, I have now become the director of international anesthesia, so here-- ***But if I open a chart of a person that someone wants to know something about--just to check it out - I will be fired immediately."*** (Govt. Ex. 6 at 65).

> "If- if it would somehow radically change the situation, then——I would even be prepared to do it. But after that, I could boldly wave bye-bye Russia— I mean, goodbye to the States—and go to Russia— because, here, I would no longer be able to find a good job. In other words, to collaborate with Russia, yes; to publish everything, yes——but to rummage around in political . . . records——now, that's . . . ***Now, that's a 'no.' [exhales]"*** (*Id.* at 69).

> "[OV] And for Jamie . . . ***for Jamie, it's even worse*** . . . because he still has this access, but he said to me, "two more weeks,"— —and . . . and ***I don't think that what we can give you will change everything to the extent——that it would be justifiable."*** (*Id.*)

> ***"Abstract help, yes. . . Non-specific things, yes.*** The protocols on how to build a hospital – he can always say, "I wanted to help my friends." . . . Even in Ukraine . . . Because we meet with this person – and it's true that we talk with him – because he is a good person – what else can be done, and [U/I] how to optimize. . . so it would be entirely reasonable to say, "I just wanted to help him." . . . ***But . . . this- I think this information would be even more useful to you then "at some time, someone had some kind of colonoscopy done, and the findings were. . ." . . . Because that is pretty irrelevant."*** (*Id.* at 71).

> "[OV] [UI] Well, I think that, here, it is pretty clear how it is possible to provide specific help. . . And I think that a doctor at Hopkins will always be useful to you. . . And now I'm not just some doctor there [UI] . . . That

> is to say, they have already made me a director, um, quality improvement for obstetric anesthesia. . . When my colleague . . . leaves his post—and he will do that two months from now—I will become the director of international, uh, obstetrical anesthesia. . . . . and I don't want to take this job, but they are offering to make me the director of Wilmer Eye Institute— . . .And a Hopkins director – no matter what kind – will always be useful." (*Id.* at 72).

Govt. Exhibit 6. In response, and throughout meetings two and three, the UC reassured Dr. Gabrielian that they would not ask for the information:

> "we don't want to condemn you to that, so I- I will not even ask for that sort of thing." (*Id.* at 69).
>
> "Uh-huh. I do not want to ruin ei-either your or your husband's career. Therefore, if, um, it is possible to obtain something along the lines of assistance, spe-specifically——that we cannot obtain—for instance, uh, well, from open sources—right?—then, but- but without exposing you-you, like" "Uh-huh. Well, just out of curiosity, [noises] to what level can someone have this access, with regard to political figures?" (*Id.* at 71).
>
> "[OV] Well, it's just interesting. I'm just asking out of curiosity. I am not asking to open. . . We won't. Okay. . . . Well, all right, then. Go ahead to him" (*Id.*).
>
> "your wife before, we-we're not trying to, in any way, shape, or form, put you at risk, right? Or-o-or put you in the position in where you sacrifice your whole life." (*Id.* at 122).

Id.

In a "Eureka" moment two days after meeting three, an AUSA found in the U.S. Code a 10-year felony for transferring IIHI for "malicious harm" or "personal gain" and there was a change in the script. The Government instructed the UC to specifically ask the defendants to provide medical records "in a way that would be most persuasive." Tr. of Lena Cross at 88. The UC agreed that when she asked defendants for the records she was "trying to be persuasive, to get [Dr. Gabrielian] to do it" and that it was her "goal" to obtain the records. *Id.* at 87, 88 to 89. The UC

framed the request as a "test" and used her judgment to "minimize" the significance of the requested information. *Id.* The UC explained that this was a "tactic" to make the request more persuasive. *Id.*

> "they did not really explain why to me, but it seems to me that, as a test, they have asked me to have him, like, get some documents – medical information, or, well, the eq-eq-equivalent, probably of a medical card, like what we have. Um, for a few people—4 or 5 people—uh, at a level so that there will not, like, well, so the system doesn't kick him out, or whatever—so it doesn't expose the fact that he is checking. Would that be possible to do, or not?" (Govt. Ex. 6 at 204).

> "—or whatever they say—what he said. Um, I think that would be . . . more than enough—for them—so, so, specifically to satisfy this test—information, because you understand that, well, usually verifications take a long time, right? But in your situation, because, well, he has, like, such a unique position, in that he has access to medical information, too, and wants to help in a humanitarian way, but as you yourself know, where a person works is also important to our services—" (*Id.* at 205).

> "Uhh, I honestly don't know. It will all depend, like, on . . . on his answer, right? That is, well, I-I-I know that you, well, can sort of speak for him, because you are, so to speak, on the same page, and-- uh, but frankly speaking, I-I don't know what will happen then, because, um, if it's, um, well . . .. The fact that he is an American . . . For us, it is much harder to check an American, and this would be the sort of test that, well, sort of, would make it possible, for us to make sure that—honestly it's not just, uh, well, the access, but the fact that the person really is serious about it—about this offer of assistance, because any other way—" (*Id.* at 211).

> "we, like, are not asking for an-anyone really important or anyone whose medical information is guarded there by some kind of special, uh, means It's just—and, there—it seems to me that it doesn't even need to be particularly, uh, detailed information." (*Id.* at 212)

> "Yeah? Yeah? Medical . . . um . . . Well, I think maybe, well, if Jamie still does not agree to it, what could be an alternative to having . . . like . . . to replace, um, the test with something else. . . . Well, so, you know him well. How do you think he will respond?" (*Id.* at 217)

Id. When Dr. Gabrielian and Dr. Henry relented to the "test" by transferring the records, Dr. Gabrielian again told the UC that the information was useless:

"no one thinks that this is. . . a useful person;" (*Id.* at 205).

"these are not people who are actually interesting;" (*Id.* at 259).

"she is fairly useless to you, and it seems to me that he is also wrapping up his career;" (*Id.* at 267).

"But this is also completely useless;" (*Id*. at 291).

"This is old and not too useful this;" (*Id*. at 325).

"No just as useless;" (*Id*.).

"These are random [UI] patients;" (*Id*. at 326).

"But they are also useless;" (*Id*.).

"But this is also completely useless;" (*Id*. at 291).

"This is- This is useless." (*Id.* at 289).

Id. These words – the only direct evidence in the government's case – are insufficient to prove beyond a reasonable doubt that Dr. Gabrielian and Dr. Henry transferred this "useless" IIHI for "personal gain" or "malicious harm."

B. There Is Insufficient Circumstantial Evidence To Prove Dr. Gabrielian And Dr. Henry Intended To Transfer IIHI For Malicious Harm Or Personal Gain.

With regards to intent, as with other elements of a crime, all possible inferences from the facts should not be granted to the government; only those that are reasonable need be granted. *See Evans-Smith*, 19 F.3d at 908 n.22; accord, *United States v. Gen. Elec. Co.*, 869 F. Supp. 1285, 1290 (S.D. Ohio 1994) (the court need not

"blindly and uncritically accept that every inference the prosecution argues can be reasonably be drawn from the circumstantial evidence in the record").

In opening statements, the Government highlighted the following evidence: (1) Dr. Gabrielian said she did not want to lose her career or freedom for the sake of an adventure; (2) Dr. Gabrielian wanted little in writing; (3) Dr. Gabrielian referred to humanitarian aid as a "cover story;" (3) Dr. Gabrielian did not have "good information;" (4) Dr. Gabrielian could access patient records "one time. And after that, I'll be [fired with such scandal!"]; (5) Dr. Gabrielian referred to herself as a "long term weapon" and "long term investment" for Russia; (6) Dr. Gabrielian showed the UC her military spouse ID card; (7) Dr. Gabrielian and Dr. Henry read *Inside the Aquarium*; (8) Dr. Gabrielian loved Russia; and (9) Dr. Gabrielian asked the UC to not take photos of her patients' records. Even viewing these tidbits in the light most favorable to the Government, a reasonable juror could not find beyond a reasonable doubt that Dr. Gabrielian and Dr. Henry intended "malicious harm" or "personal gain" based on the Government's benign circumstantial evidence without making impermissible "leaps of logic." *United States v. Crounsset*, 403 F. Supp. 2d 475, 479 (E.D. Va. 2005) (quoting *Evans-Smith v. Taylor*, 19 F.3d 899, 908 n.22 (4th Cir. 1994)). As explained above, the record makes absolutely clear that Dr. Gabrielian, Dr. Henry, and the UC viewed the medical records as "useless" to Russia.

1. There is insufficient circumstantial evidence to prove Dr. Gabrielian and Dr. Henry intended to transfer IIHI for "malicious harm."

The Government's theory on "malicious harm" is that Dr. Gabrielian and Dr. Henry transferred IIHI to cause "malicious harm" (1) to the United States generally

or (2) to their specific patients. But where is the evidence? Defense Counsel are as confused today as at the start of trial. There is no evidence of how the transferred medical records conceivably *could* cause harm, let alone evidence of why Dr. Gabrielian or Dr. Henry would want to harm the United States or their patients. The Government's case is essentially: Dr. Gabrielian loves Russia, she gave medical records to Russia, and Russia is bad; therefore, Dr. Gabrielian must have done it for "malicious harm." Even if jurors were permitted to make these leaps of logic (they are not), the Government's tragically simplistic theory "mistakes motive for intent." *See United States v. Walli*, 785 F.3d 1080, 1088 (6th Cir. 2015). "Motive is generally not an element of a criminal offense unless specifically stated." *Alvarado v. Whitaker*, 914 F.3d 8, 14 (1st Cir. 2019) (citing Jerome Hall, *General Principles of Criminal Law* 88 (2d ed. 1960) ("[H]ardly any part of penal law is more definitely stated than motive is irrelevant."); James Fitzjames Stephen, 3 *A History of the Criminal Law of England* 18 (1883) ("[T]he motives of the offender ought never . . . enter into the definition of an offence . . . because they do not affect the public danger or actual mischief of the crimes which they cause."). Even if these two American doctors had a motive to cause "malicious harm" to the United States, which is frankly ridiculous and unsupported by the evidence, that could not have been their specific "intent" in the act of disclosing several inconsequential scraps of medical records.

As the Sixth Circuit explained in *Walli*:

> "Motive is what prompts a person to act or fail to act." *United States v. Harvey*, 653 F.3d 388, 396 (6th Cir. 2011)). In contract, "[i]ntent refers only to the state of mind with which the act is done or omitted." *Id*. The

> distinction is one of immediacy – not in a temporal sense, but in the sense of the defendant's purposes.

Id.

The defendants in *Walli* were convicted under 18 U.S.C. § 2155(a) for committing acts that "injure[d]. . . [a] national defense premises" "with intent to. . . interfere with. . . the national defense." *Id*. One of the questions on appeal was whether "defendants consciously meant to interfere with the nation's ability to attack or defend when they" cut four layers of fencing and then hung banners, splashed blood, and painted slogans at a military facility used to manufacture components for nuclear weapons, test the reliability of the components, and store enriched uranium. The Sixth Circuit found that no rational jury could find the defendants had the requisite intent. "True, their ultimate goal in engaging in those activities was to advance the cause of disarmament by persuading Y-12's employees to abandon their pursuits there. But 'the ultimate end' that 'compel[s] the defendant to act. . . is more properly labeled a 'motive.'" *Id*. (quoting *United States v. Kabat*, 797 F.2d 580, 586 (8th Cir. 1986)). "And the defendants' immediate purpose . . . was simply to protest."

The Government's theory of "malicious harm" against the United States has the same flaw. Even if Dr. Gabrielian and Dr. Henry desired malicious harm against the United States, which again is preposterous, no rational juror could find that they *intended* that specific harm to the United States by engaging in the act of disclosing a few random scraps of medical records. As the evidence clearly shows, both the undercover and the defendants viewed the records as "useless," "irrelevant," and simply part of a "test." There is not "substantial" evidence indicating Dr. Gabrielian

and Dr. Henry specifically intended "malicious harm" to anyone or anything from the disclosure of IIHI.

2. There is insufficient evidence to prove Dr. Gabrielian and Dr. Henry intended to transfer IIHI for "personal gain."

The Government conceded in opening that Dr. Gabrielian and Dr. Henry did not disclose IIHI for "monetary gain." Instead, the Government's bizarre theories on personal gain are that Dr. Gabrielian and Dr. Henry transferred the medical records to either (1) gain a substantial advantage by enhancing their status with the KGB or (2) avoid a substantial disadvantage or credible threat by getting the KGB off her back.

As an initial matter, the Government's theories on "personal gain" are not supported by a reasonable construction of 42 U.S.C. § 1320d-6 and would present serious due process issues. Defense Counsel briefed this issue in ECF 90.[1] The Court has deferred a ruling on this issue until the final charging conference. *See* ECF 92.

Even under the Government's overly broad definition, there is not substantial evidence that Dr. Gabrielian and Dr. Henry intended to transfer IIHI for "personal gain." Throughout the meetings, Dr. Gabrielian and Dr. Henry consistently explained their altruistic reason for being there and their view that there was no benefit for them:

> Dr. Gabrielian: "Uh, and I don't want neither money nor—" (Govt. Ex. 6 at 46).
>
> Dr. Gabrielian: "And I also see to what extent--in other words, I have to tell you the whole story. When I came to Hopkins, I was working with a Ukrainian doctor. . . And I can see how much he helps his country. How

[1] Defense Counsel incorporates the arguments made in ECF 90 into this motion.

> can I do better than he does? Moreover, he is now going to the war zone, to help them. . . And how can I not do such a minimal thing as to meet with a person and say, "Well, here, I can help in some way". (*Id*. at 46).
>
> Dr. Gabrielian: "how can I just sit and not help at all?" (*Id*. at 50).
>
> Dr. Gabrielian: "this is more of an altruistic action – than anything, then—that we would benefit from. . . We have more to lose than we do to gain – from this. And truly, my love of my country is what's driving me" (*Id*. at 95).
>
> Dr. Henry: "For me, it's my hate of war. and just, uh, you know, I-I think the United States, in my experience, having been in the military for twenty-two years, is—We instigate a lot, and we are very, uh, arrogant in what we think we know and what we can do with the tools that we have—you know? And it has— hurt many, many people. . ." (*Id*. at 96).
>
> Dr. Henry: "We don't need money" (*Id*. at 168).
>
> Dr. Gabrielian: "You know, [noises] but we don't want money because it's not like we're desperately in need of funds. Um—[noise] We should be okay." (*Id*. at 306).

Id.

There is simply no evidence for the Government's theory that Dr. Gabrielian and Dr. Henry wanted to "personally gain" by elevating their status with Russian intelligence. In fact, the evidence suggests the opposite. Dr. Gabrielian repeatedly told the UC that she did not want more excitement in her life and that she did not want to lose her freedom or career for this. In meeting two, when the UC asked what kind of assistance Dr. Gabrielian was offering, she proposed taking a stand and "establish[ing] a connection . . . but I would not want, for the sake of some adventure, to lose my career—freedom, and everything else—if it is just an adventure." *Id*. at 33. When the UC was fishing for more information, Dr. Gabrielian said, "I mean – I have plenty of excitement in my life. . . [UI] everyday life. . . uh, and I don't want neither

money nor – I don't want anyone to know much about this." *Id*. at 46 to 48. Immediately after seeing the camera near the end of meeting two, Dr. Gabrielian said, "But I hope it will not be more dangerous than that. . . because I truly have enough excitement, up to here. . ." *Id*. at 78. She constantly told the UC that she did not want to go further than legitimate "above board" assistance. *Id*. at 99.

The Government's reliance on *Inside the Aquarium* is frankly nonsensical. Does the Government seriously believe that it can ask a juror to find that Dr. Gabrielian and Dr. Henry gave random medical records to the KGB for the purpose of enhancing her status with the KGB because she was reading a book about a KGB defector? The entire book, which is in evidence, is about the horrors of Russian intelligence. As the UC explained on cross, "[t]he book begins with a GRU officer being burned alive in." Tr. of Lena Cross at 76. The UC agreed that message of the scene is "[t]his is what happens if you betray the GRU." *Id.* at 81. The book goes on to vaguely suggest another colleague met the same fate for extremely minor misconduct. *Id*. The colleague failed to immediately tell his supervisors that somebody had a Bible in his mailbox. *Id.* This is who Dr. Gabrielian and Dr. Henry thought they were dealing with. The contents of this book blatantly contradict the Government's theory on personal gain.

The evidence shows Dr. Gabrielian and Dr. Henry feared what Russian intelligence was capable of if they did not comply with the UC's requests:

> Dr. Gabrielian: "If it does fall, then the access falls…then what happens to him? Does he get filtered out as a candidate?" (*Id*. at 211).
>
> Dr. Gabrielian: "is this being recorded on camera right now?" (*Id*. at 77).

> In reference to her Ukrainian friend and colleague, Oleg, Dr. Gabrielian asked the UC to "Try not to kill him." (*Id*. at 125).
>
> Dr. Gabrielian: "If you're worried at all about our phones should we put them somewhere else? Do we not worry about our phones?" (*Id*. at 93).

Id. Dr. Gabrielian and Dr. Henry feared what would happen if they did not satisfy the UC's test. To the extent *Inside the Aquarium* has any relevance, it suggests only that Dr. Gabrielian and Dr. Henry understood what everyone in the world already assumes -- that failing the KGB's tests can have dire consequences. Dr. Gabrielian also repeatedly reassured the UC that it was okay if the UC was recording them after the UC had previously lied when Dr. Gabrielian saw the hidden camera.

In opening statements, the Government portrayed Dr. Gabrielian's comments about being a "long term weapon" or "long term investment" as evidence that she wanted to be valuable to the KGB. But that is not what Dr. Gabrielian said. The quotes are trying to convince the UC not to ask for patient records because, if Dr. Gabrielian looked up a patient record, JHU Hospital would fire her immediately and Russia would lose access to a John Hopkins Director who could take a stand and restore medical connections:

> "But [medical records] also doesn't benefit you. Because if you have a useful long-term weapon that can be yours——for years, ***if you use it for something that's not tactically advantageous, you've lost it, for nothing. So, if Jamie can't practice medicine—he can't be in the National Guard—you've lost an Army doctor. . . If I have to look somebody up, and I do look somebody up, and I lose my spot at Hopkins, you've lost your director at Hopkins——to establish those medical connections.*** So if that's done, it has to be something that's awesomely important—not just, "Let's just check if this person has polyps." (Govt. Ex. 6 at 122 to 123).
>
> "And my offer of help will be the same tomorrow versus five years from now, versus ten years from now. So this a --count as a long-term

> investment—--that doesn't need to be nurtured because I don't need anything back. It-it sits there." (*Id.* at 168).

To the extent the Government intends to conflate Dr. Gabrielian and Dr. Henry's desire to provide humanitarian aid to Russia with its theory of personal gain, that is "the government's taking advantage of an alternative, non-criminal type of motive" (i.e., inducement), not personal gain. *See United States v. Hsu*, 364 F.3d 192, 201 (4th Cir. 2004); *United States v. Prange*, 771 F.3d 17 (1st Cir. 2014) (same); *United States v. Ross*, 379 Fed. Appx. 683 (9th Cir. 2010) (same); *United States v. Dixon*, 396 Fed. Appx. 183 (6th Cir. 2010).

C. The Government Fails To Negate Innocent Explanations For Dr. Gabrielian and Dr. Henry's Conduct.

Although intent can be established through circumstantial evidence, when there are innocent explanations for a defendant's conduct, the government has the burden of negating them. *United States v. Law*, 528 F.3d 888, 896 (D.C. Cir. 2008). This record is full of innocent explanations for Dr. Gabrielian and Dr. Henry's conduct.

Throughout the transcripts, Dr. Gabrielian repeatedly interrupts Dr. Henry's political statements and redirects the discussion back to humanitarian aid. The UC recalled these instances in meeting three. Dr. Gabrielian showed the UC "Some kind of articles and list of things that are needed in Ukraine." Tr. of Lena at 71. "She was telling [the UC] that these technologies were being used in Ukraine partly with the help of the Ukrainian colleague of hers." *Id.* at 72. "And she was talking to [the UC] about how valuable those portable ultrasounds could be . . . Both to civilians and to wounded soldiers." *Id.* The UC explained that "And she wished that it could be used

for the Russian side as well. That's the context." *Id*. The Government claimed in opening statements that humanitarian aid was a "cover story." But that is not what the evidence shows. Throughout all five meetings, Dr. Gabrielian and Dr. Henry discussed the humanitarian aid she wanted to provide to Russia. Dr. Gabrielian did talk about a "cover story," but it was because she feared providing medical aid to Russian soldiers would ruin her professional and personal reputation within the United States:

> AG: —Like, **I could not develop this program in Russia. That would look really bad.**
> UC: Mm-hmm.
> AG: **Like, help save Russia's soldiers. Um, I can develop it, but I can never publish it.**
> JH: [OV] I would do it.
> AG: No. **You could never publish it, and you would get blacklisted forever.**
> JH: From who?
> AG: From all future career opportunities to publish. That would be quite bad. [noises] I can: A) give you the information of what's being done right now.
> UC: Mm-hmm.
> AG: And uh, B) I could still do it for [UI], and C) **I can do a benign-sounding program for, like, ultrasound for parturients**—
> UC: Mm-hmm.
> AG: —which, um, **is only one step away from ultrasound for soldiers.** And let's develop a regional program. Who knows what the regional program—
> UC: [OV] Mm-hmm.
> AG: —is used for? It could be used for anything. You could be doing surgery so far in the field, where you have no electricity.

Govt Ex. 6 at 117 to 118. That is her secret. That is what she did not want to get out.

Rather than present evidence to negate these innocent explanations, the Government's approach has been to ignore their existence entirely. Neglecting such explanations is especially shocking given that the Government presented this

evidence to the jury in its own case in chief. The Court should grant the Rule 29 judgment of acquittal because the government's case rests on "missing, flawed, or contradictory facts" that lead to the conclusion that no reasonable trier of fact could hold the defendant guilty beyond a reasonable doubt. *See United States v. Bonner*, 648 F.3d 209, 213 (4th Cir. 2011). And the Government has failed to negate innocent explanations for the defendants' conduct. *United States v. Law*, 528 F.3d 888, 896 (D.C. Cir. 2008).

II. THE GOVERNMENT ENTRAPPED DR. GABRIELIAN AND DR. HENRY AS A MATTER OF LAW.

A finding of entrapment as a matter of law, followed by judgment of acquittal, is appropriate when the evidence clearly shows (1) that the government induced the defendant to engage in the criminal conduct, and (2) that the defendant lacked the necessary predisposition to perform the criminal conduct. *United States v. Crump*, 934 F.2d 947, 956 (8th Cir. 1991); *United States v. Hinton*, 908 F.2d at 357; *see also United States v. Pfeffer*, 901 F.2d at 656.

As the Supreme Court explained in *Jacobson*, Congress did not intend criminal statutes to allow government agents to "originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime . . ." *Jacobson v. United States,* 503 U.S. 540, 548 (1992). "The concern is thus that the accused is not guilty, since he had no criminal intent not implanted by the government, rather than that he is guilty but may avoid the consequences of his criminal conduct because of the government's undue inducement." *United States v. Henry*, 749 F.2d 203, 210 (5th Cir. 1984) (*en banc*). *See*

also United States v. Perl, 584 F.2d 1316, 1320-21 (4th Cir. 1978); *United States v. Lard,* 734 F.2d 1290, 1292-93 (8th Cir. 1984).

To raise an entrapment defense, a defendant has the initial burden to produce "more than a scintilla of evidence that the government induced him to commit the charged offense." *United States v. Daniel*, 3 F.3d 775, 778 (4th Cir. 1993). *See also United States v. Hackley*, 662 F.3d 671, 681 (4th Cir. 2011) ("mere scintilla"); *United States v. Phan*, 121 F.3d 149, 154 (4th Cir. 1997) ("more than a mere scintilla"); *United States v. Hunt*, 749 F.2d 1078, 1085-86 (4th Cir. 1984) (citing *United States v. Perl*, 584 F.2d 1316, 1321 (4th Cir. 1978)). The defense may make this initial showing "through government witnesses or otherwise." *United States v. DeVore*, 423 F.2d 1069, 1071 (4th Cir. 1970). *See Sherman v. United States*, 356 U.S. 369, 373 (1958) ("We reach our conclusion from the undisputed testimony of the prosecution's witnesses.").

Once the evidence establishes inducement, "the prosecution must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents." *Jacobson*, 503 U.S. at 548-49 (emphasis added). *United States v. Meyer*, 803 F.2d 246, 249 (6th Cir. 1986), cert. denied, 480 U.S. 936 (1987); *Jacobson v. United States*, 503 U.S. 540 (1992); United States v. Meyer, 803 F.2d 246, 249 (6th Cir.1986), cert. denied, 480 U.S. 936, 107 S.Ct. 1580, 94 L.Ed.2d 770 (1987); *United States v. Jones*, 575 F.2d 81, 83–84 (6th Cir.1978). "'[T]he principal element in the defense of entrapment [is] the defendant's

predisposition to commit the crime.'" *United States v. Squillacote*, 221 F.3d 542, 569 (4th Cir. 2000), quoting *United States v. Russell*, 411 U.S. 423, 433 (1973).

A. There Is More Than A Mere Scintilla Of Evidence On Inducement.

The elements of inducement and predisposition are closely related, and lack of predisposition informs the issue of inducement. "A person's lack of predisposition to commit a crime distinctively reveals whether the government has ensnared 'an unwary innocent' in a criminal enterprise of its own design." *United States v. Stallworth*, 656 F.3d 721, 726 (7th Cir. 2011).

Several circuits have developed a series of factors to assist Courts in determining the issue of entrapment: (1) the defendant's character or reputation; (2) whether the government made the initial suggestion of criminal activity; (3) whether the defendant engaged in the activity for profit; (4) whether the defendant showed any reluctance; and (5) the nature of the government's inducement. *United States v. Bonanno*, 852 F.2d 434, 438 (9th Cir. 1988), cert denied, 488 U.S. 1016 (1989); *United States v. Nelson*, 922 F.2d 311, 317 (6th Cir. 1990); *United States v. Hilliard*, 851 F.3d 768, 771 (7th Cir. 2017). *See also United States v. LaChapelle*, 969 F.2d 632, 635 (8th Cir.1992) (finding a defendant is entrapped as a matter of law if "a government agent originated the criminal design," the agent implanted in the mind of an innocent person the disposition to commit the crime," and "the defendant committed the crime at the urging of the government agent."); *United States v. Williams*, 873 F.2d 1102, 1104 (same); *United States v. Richard*, 872 F.2d 253, 254 (8th Cir. 1989) (same). Applying these factors, there is clearly more than a "scintilla" of evidence on inducement. Dr. Gabrielian and Dr. Henry were entrapped as a matter of law.

1. Whether the Government made the initial suggestion of criminal activity

"[T]he Government may set decoys to entrap criminals. But it may not provoke or create a crime and then punish the criminal, its creature." *Casey v. United States*, 276 U.S. 413, 423 (1928) (Brandeis, J. dissenting). Here, the Government approached Dr. Gabrielian after Dr. Gabrielian sent an innocuous email to the Russian embassy offering humanitarian aid and medical collaboration. Five and a half months later, with no additional evidence, the FBI sent the UC to confront Dr. Gabrielian in a parking lot as she was walking into JHU Hospital for work. Dr. Gabrielian met with the UC three times on August 17, 2022. By the end of the third meeting, Dr. Gabrielian did not want to provide medical records and the UC was still reassuring Dr. Gabrielian that they would not ask for medical records.

Two days later, on August 19, 2022, an Assistant United States Attorney ("AUSA") wrote an email to the case agent, which in relevant part says, "I found an offense under HIPPA that has a 10-year max that I think fits well."[2] On August 22, 2022, the AUSA wrote another email providing the "definition of medical record" under 42 U.S.C. 1320d-6. Sometime prior to the fourth meeting on August 24, 2022, the Government instructed the UC to specifically ask the defendants to provide medical records "in a way that would be most persuasive." Tr. of Lena Cross at 88. The UC agreed that she was "trying to be persuasive, to get [Dr. Gabrielian] to do it" and that it was her "goal" to obtain the records. *Id*. at 87, 88 to 89. The UC framed

[2] While the email itself is not in evidence, as ask the Court to take it into consideration when performing its "gatekeeper function" and determining if there is a "scintilla" of evidence of inducement.

the request as a "test" and used her judgment to employ a "tactic" to "minimize" the significance of the requested information "to be persuasive." *Id.* On August 24, 2022, five days after AUSA's first email, the UC asked Dr. Gabrielian to provide medical records for the first time.

2. Dr. Gabrielian's character and reputation.

The Government has not presented any evidence challenging Dr. Gabrielian and Dr. Henry's character. The Government investigated Dr. Gabrielian and Dr. Henry during the five and a half months between when Dr. Gabrielian sent her email to the Russian embassy offering humanitarian aid and when the Government decided to send an undercover to confront her. That investigation found absolutely nothing to tarnish Dr. Gabrielian and Dr. Henry's character or reputation. For years, Dr. Gabrielian has been providing humanitarian aid to parts of the world in need. Dr. Gabrielian was actively providing humanitarian aid to Ukraine during this time, as described at length in the recorded meetings with the UC, and was hoping to have the opportunity to do the same for civilians and soldiers from her home country. Similarly, as seen in the transcript, Dr. Henry joined the military as a doctor because he wanted to go on humanitarian missions.

3. Whether Dr. Gabrielian and Dr. Henry engaged in the activity for profit.

The uncontradicted evidence shows that Dr. Gabrielian and Dr. Henry were not doing this for profit. In fact, the Government conceded this point in opening.

4. Whether Dr. Gabrielian and Dr. Henry showed any reluctance.

Courts find that inducement can be satisfied where the Government agents "persist in encouraging criminality after a defendant rejects overtures." *United States*

v. Theagene, 565 F.3d 911, 922 (5th Cir. 2009) (quoting *Jacobson*, 503 U.S. at 546-47). Dr. Gabrielian repeatedly told the UC that she would be fired if she accessed patient records just one time, that she didn't want to risk her career for some "risky adventure," that patient records would be irrelevant anyway, and that the UC shouldn't request patient records because Dr. Gabrielian would be more valuable as a long-term asset to promote collaboration with the Russian medical establishment. She literally said, "Now, that's a 'no' [exhales]" when she first expressed what the Government argued was a willingness to access medical records. Govt. Ex. 6 at 69. She told the UC that the same went for Dr. Henry: "So as for this information, we cannot give it to you." *Id.* at 68.

5. The nature of the Government's inducement.

Weaponizing the defendants' fear of the KGB and appealing to defendants' desire to provide humanitarian aid to encourage a crime is the definition of inducement. The Fourth Circuit has recognized that "the government's taking advantage of an alternative, non-criminal type of motive" is the kind of excessive conduct or overreach that supports an entrapment defense. *See United States v. Hsu*, 364 F.3d 192, 201 (4th Cir. 2004).

In *Jacobson*, two years of occasional Government undercover mailings appealing to First Amendment values were enough to create entrapment as a matter of law for a defendant who ordered child pornography shortly after receiving the first suggestive catalog. *See* 503 U.S. at 554.

In *United States v. Barta*, 776 F.3d 931, 933 (7th Cir. 2015), the court explained that "inducement" means "'government solicitation of the crime plus some other

government conduct that creates a risk that a person who would not commit the crime if left to his own devices will do so in response to the government's efforts.'" *Id*. 776 F.3d at 937 (quoting *United States v. Mayfield*, 771 F.3d 417, 434–35 (7th Cir. 2014) (en banc)). The Seventh Circuit found inducement because the government: frequently emailed and telephoned the defendant, with no response from him; invented false deadlines and problems; significantly sweetened what already would have been an attractive deal; and impressed on the defendant that making the deal would help his less fortunate friend. *Barta*, 776 F.3d at 937.

Surely the UC's statements that she would pass on Dr. Gabrielian's suggestions to improve Russian medical care, followed by her request for a few random medical records as a test of loyalty, was more clear-cut entrapment than the mailings in *Jacobson* or false deadlines and problems in *Barta*.

Dr. Gabrielian and Dr. Henry clearly feared what would happen if they said "no" to the KGB. Although the UC never overtly threatened Defendants, she didn't have to. Implying that she was working for the KGB and lying about the recordings was enough. Fear of retaliation is obviously relevant to whether the Government's conduct overcame Defendants' lack of predisposition. In combination with the other relevant factors, the Government's strategic utilization of fear of Russian intelligence retaliation supports a finding that Defendants were entrapped as a matter of law.

The Government alleges that Dr. Gabrielian and Dr. Henry transferred IIHI to get the "KGB off their back." The Government apparently contends that it can deceive its citizens into believing a foreign intelligence service would retaliate against

them for refusing a request to provide confidential medical records, and then charge those citizens for not being brave or foolhardy enough to refuse. In a final cruel twist, the Government claims that by acceding to the threat that the Government scripted, the defendants were after "personal gain." After all, by giving in to the Government's deceptive threat, the Defendants eliminated a fictional "substantial disadvantage." It makes perfect sense—the more convincing and frightening the Government's fictional threat, the greater the intent to avoid a "substantial disadvantage." If that is not government inducement, nothing is.

B. There Is No Evidence Of Predisposition.

If a lack of predisposition is apparent from the uncontradicted evidence, entrapment can be determined as a matter of law. *United States v. Silva*, 846 F.2d 352, 354–55 (6th Cir.1988); *United States v. Thoma*, 726 F.2d 1191 (7th Cir.1984), cert. denied, 467 U.S. 1228, 104 S.Ct. 2683, 81 L.Ed.2d 878 (1984). "Predisposition has been defined as 'the defendants state of mind before his initial exposure to government agents.'" *United States v. Johnson*, 855 F.2d 299 (6th Cir. 1988).

There is no evidence of predisposition in this case. The only evidence from before the Government's approach are the March 1, 2022, emails and phone call to the Russian embassy, the fact that Dr. Gabrielian and Dr. Henry were reading a spy novel about a KGB defector, and that Dr. Gabrielian and Dr. Henry were assisting Ukraine with humanitarian assistance. That's it. There is plainly insufficient evidence to find predisposition beyond a reasonable doubt.

The idea of predisposition in this case is especially nonsensical given the Government's theories of intent. *See United States v. McGill*, 754 F.3d 452, 459 (7th

Cir. 2014). The lack of "substantial" evidence after a five-and-a-half-month investigation indicates that Dr. Gabrielian and Dr. Henry were in no way predisposed to transfer IIHI to enhance their status with the KGB or to get the KGB off their backs before the Government approached. Dr. Gabrielian and Dr. Henry were not dealing with the KGB before the Government sent the UC impersonating a KGB agent.

CONCLUSION

For the reasons stated, Dr. Gabrielian and Dr. Henry, by counsel, respectfully requests that the Court grant the defendants' motion for judgments of acquittal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of May 2023, a true and correct copy of the foregoing was electronically filed and served on counsel for the United States through ECF.

/s/ Noah Cherry