

**STATE OF VERMONT  
BOARD OF MEDICAL PRACTICE**

In Re:	)	MPC 15-0203	MPC 110-0803
	)	MPC 208-1003	MPC 163-0803
	)	MPC 148-0803	MPC 126-0803
	)	MPC 106-0803	MPC 209-1003
David S. Chase	)	MPC 140-0803	MPC 89-0703
	)	MPC 122-0803	MPC 90-0703
Respondent	)		MPC 87-0703

**STATE OF VERMONT'S MEMORANDUM IN OPPOSITION TO  
RESPONDENT'S PRE-HEARING MOTIONS**

**BACKGROUND**

Respondent has filed five pre-hearing motions<sup>1</sup> requesting the Hearing Committee ("Committee") appointed by the Vermont Board of Medical Practice ("Board") to issue the following rulings:

1. Exclude the testimony of patients who have not provided medical releases to Respondent;
2. Require the State to provide unspecified exculpatory material and other unspecified documents allegedly in the State's possession;
3. Require the State to provide to Respondent an update of its witness list one month before the scheduled hearing date and to provide Respondent with an "order of call" two days prior to hearing;

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<sup>1</sup> Respondent also filed a memorandum in opposition to the State's motion for admission of deposition of Stephen Green. The pre-hearing schedule ordered by the Board on April 25 does not provide for the filing of reply memorandum and the State does not wish to delay proceedings by responding to Respondent's opposition. Needless to say, the State disagrees with the Respondent's arguments in opposition to the State's motion regarding Mr. Green's deposition.

4. Exclude photocopies of Respondent's medical records as evidence and limit admissibility of Respondent's records to originals; and,
5. Recuse or disqualify Sharon Nicol from the Hearing Committee.<sup>2</sup>

The first three issues enumerated above have been addressed by the Board, either directly or indirectly, in previous rulings. Based on those rulings, the Committee must deny the Respondent's motions to exclude patient testimony, to require the State to rummage through State and federal files looking for unspecified documents, and to require the State to update its witness list.

Further, the Board must deny the Respondent's motion to unnecessarily limit the admission of Respondent's records to the originals. Respondent provides no factual basis that the photocopies themselves do not meet the requirements of the Best Evidence Rule. Instead, Respondent argues that the records must be presented as Respondent allegedly organized them. When Respondent's motion is read in conjunction with Respondent's motions filed in the federal criminal proceeding, it is clear that the purpose of Respondent's motion to exclude photocopies is to frustrate the progress of these proceedings.

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<sup>2</sup> The State had filed previously its opposition to the recusal or disqualification of Ms. Nicol.

## ARGUMENT

### I. THE BOARD HAS PREVIOUSLY RULED THAT EXCLUSION OF TESTIMONY OF PATIENTS WHO HAVE NOT PROVIDED RELEASES TO RESPONDENT IS NOT SUPPORTED BY LAW.

Respondent's motion to exclude testimony of patient-witnesses who have not provided medical releases is easily dispatched. Respondent filed a similar motion two years ago that the Board denied. *In re Chase*, Dk. Nos. 15-0203, et al., Decision on Respondent's Second Motion to Dismiss and Motion for Access to Patient Medical Records and Patient Exams, August 13, 2004 (Hereinafter cited to as "Bd. Dec. 8/13/04" and attached hereto as Attachment A). The Board's decision of August 13, 2004 controls the disposition of the Respondent's instant motion to exclude testimony of patient-witnesses and the motion must be denied.

Respondent argues that the previous order is inapplicable because in that order the Board observed that ". . . both parties at this motion hearing represented that the patients in question and their attorneys were willing to sign a limited release to allow Respondent certain access to medical records." Bd. Dec. 8/13/03, p.2, Respondent's Motion to Exclude Testimony of Witnesses, p. 15. Respondent's reliance solely on this sentence of the August 2004 order to the exclusion of the rest of the decision is exceedingly myopic. The Board went on to rule that the Board had no power to order patients to release their medical records. Bd. Dec., 8/13/04, p. 3. The Board further ruled that Respondent's request to exclude the testimony of patient-witnesses who had not provided releases was unsupported by both "the state of the evidence [and] the law governing administrative hearings." Id.

Nowhere in his instant motion does Respondent explain why these rulings by the Board in the August 13, 2004 decision are no longer controlling. The Respondent's motion to exclude testimony of patient witnesses who have provided Respondent with updated releases must be denied. The Board has already addressed the issue and its previous ruling is controlling.

**II. THE BOARD HAS PREVIOUSLY REJECTED RESPONDENT'S EXPANSIVE INTERPRETATION OF RESPONDENT'S ENTITLEMENT TO DOCUMENTS AND RESPONDENT'S MOTION FOR DISCLOSURE OF DOCUMENTS MUST BE DENIED.**

The Board has also addressed in previous decisions Respondent's access to documents in the State's possession. The Board has consistently stated that Respondent is entitled to the documents set forth in 26 V.S.A. §1318(e) and Board Rule 19.1. Bd. Dec., 8/13/04, p.2; In re Chase, Order re Respondent's Motion to Compel, November 19, 2003, pp.1-2 (Attached hereto as Attachment B and hereinafter cited to as "Order re Compel"). Notwithstanding the Board's pronouncements as to Respondent's limited access to documents, the Respondent again seeks to expand the his access to documents to include "all information from all sources that *may be relevant in any way* to the pending charges." Respondent's Motion for Disclosure, p. 3 (*emphasis added*). Neither the statute nor the rule relied upon by Respondent or the previous decisions of the Board support Respondent's expansive view of his right of access to documents.

To begin with the statute and rule relied upon by Respondent do not require production of any documents. The statute grants the Respondent the right "to

inspect and copy all information in the possession of the department of health pertaining to [Respondent] ...except investigatory files which have not resulted in charges of unprofessional conduct and attorney work product.” 26 V.S.A. §1318(e). Board Rule 19.1 allows access to all information in the Board’s possession with the same exceptions as the statute. The statute and rule create a right of access for the Respondent, not an obligation on the part of the State to produce documents. If Respondent wants to exercise his right of access under the statute and the rule he simply needs to contact the Board—again—to arrange access to the files of the twelve patients in the Amended Superceding Specification of Charges. The statute and the rule explicitly prohibit Respondent’s access to other complaint files that have not resulted in charges and to the files of the attorney general’s office.

Respondent cannot expand his access to documents by alleging that the State has a duty under *Brady v. Maryland*, 373 U.S. 83, 87 (1963) to disclose exculpatory documents. Whether the State has a duty under *Brady* to disclose exculpatory material in an administrative proceeding is an issue that has not been addressed by the Vermont Supreme Court. Justice Dooley did note in a dissenting opinion that there is no “constitutional right to present favorable evidence in a civil case.” *In re: Grievance of Danforth*, 174 Vt. 231, 246, 812 A.2d 845, 857 (2002)(Dooley, J., dissenting). Other jurisdictions have questioned the applicability of *Brady* to administrative proceedings. See e.g. *Sherman v. Washington*, 128 Wash. 2d 164, 191, 905 P.2d 355, 371 (Wash. 1995)(neither trial court nor plaintiff cite authority for applicability of *Brady* to administrative proceedings); See also, *Hachamovitch v.*

*Office of Professional Medical Conduct*, 227 A.D. 2d 686, 688, 641 N.Y.S. 2d 757, 758 (A.D. 3d 1996)(physician’s claim that Office withheld exculpatory material dismissed as meritless).

Even if *Brady* were applicable to these proceedings, *Brady* does not support either Respondent’s broad definition of “exculpatory” or Respondent’s assertion that the State must comb through state and (apparently) federal files. The definition of exculpatory evidence is evidence that is favorable to the accused and material to his guilt or innocence. *State v. Leclair*, 175 Vt. 52, 56, 819 A.2d 719, 723, 2003 VT 4, ¶8 (2003). Exculpatory evidence is *not* defined as “all information from all sources that *may be* relevant *in any way* to the pending charges.” Respondent’s Motion for Disclosure, p. 3 (*emphasis added*). Applied to these proceedings, exculpatory evidence would be defined as evidence favorable to Respondent and material to whether Respondent’s treatment of the twelve individual patients constituted unprofessional conduct. As has been represented before by the State, the State has produced to Respondent all material mandated by the statute and the rule related to the twelve individual patients. No additional statements or documents covered by the statute and rule and relating to the twelve individual patients have been created or received by the State. Further, the Respondent cites to no authority that would require the State in an administrative proceeding to conduct a grail quest for chimeric documents as has been argued by the Respondent.

Finally, the Respondent cannot seriously assert that his due process right to cross-examine witnesses has been violated. As stated above, the State has produced

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all the documents related to the twelve individual patients that are required by statute and rule. In addition, Respondent has deposed all twelve patients and the physicians for each patient that provided second opinions and other witnesses identified by the State. Respondent also had the opportunity to cross-examine many of the State's witnesses yet again at the criminal trial. Respondent has also been provided, through the largesse of some patient-witnesses, unwarranted and intrusive access to the patients' medical history. In light of the fact that there is no due process right to discovery in administrative proceedings, Respondent's right to cross-examine witnesses has been more than amply protected.

The Respondent has access to all the documents that statute, rule, and due process require and his instant motion for further document production, like his previous motions, must be denied.

**III. STATE IS NOT UNDER ANY OBLIGATION TO "UPDATE" ITS WITNESS LIST AND THE BOARD COMMITTEE MUST DENY RESPONDENT'S MOTION.**

Without citation to any authority whatsoever, Respondent requests that the Board order the State to provide Respondent an updated witness list and an order-of-call. With respect to the witness list request, the State has identified its witnesses. The State will not add any witnesses as part of its case-in-chief and reserves the right to call any witness identified to Respondent. Respondent therefore has an updated witness list. Previous decisions of the Board (Attachments A and B) delineating Respondent's limited access to information make clear that nothing in the Board's statutes or regulations require the State to update

its witness list. Further, even if the Committee uses the Vermont Rules of Civil Procedure as guidelines, nothing in those rules require a party to provide a witness list, let alone an updated witness list. Respondent's motion for an updated witness list must be denied.

Nor do the Board's statutes or rules require the State to provide Respondent with an order-of-call. Moreover, the State could not provide such information now even if it were inclined to do so. The order in which the State's witnesses are called is going to be determined by the hearing schedule (which has yet to be set), the schedule of the witnesses, and the ruling on the State's motion in limine. Though not required to do so, the State will provide to the Board and the Respondent a *tentative* order-of-call two days prior to hearing.

**IV. RESPONDENT HAS NOT MET HIS BURDEN OF DEMONSTRATING THAT ADMISSIBILITY OF COPIES OF HIS RECORDS IS UNFAIR AND MOTION TO EXCLUDE COPIES AS EVIDENCE MUST BE DENIED.**

Respondent requests the Board to exclude copies of Respondent's records notwithstanding V.R.E. 1003 which specifically allows the admission of copies to the same extent as the original. The only exception to the admission of duplicates is when there is a genuine issue as to authenticity of the original or where it would be unfair to admit the duplicate. Clearly, Respondent does not challenge the authenticity of the original records. However, Respondent wants only the original records to be admitted into evidence because, somehow, admission of the duplicates would be unfair to Respondent. At the same time, Respondent explicitly states he has no objection to copies being used in the course of the hearing.

The reporter's notes to V.R.E. 1003 state that the party opposing admission of the duplicate has the burden of showing there are "other circumstances, such as partial reproduction of the original, which makes use of the duplicate 'unfair.'" Respondent simply has not met his burden. Respondent cannot argue on one hand that admission of the duplicates is unfair and on the other hand agree that the duplicates can be used in the course of the hearing.

Respondent's issue with the use of copies of records seems to have more to do with the organization of the records than with any defect in the copying of the records. If this is the case, Respondent is free to submit the records he wishes admitted in the manner he wishes them admitted when proposed exhibits are exchanged by the parties in July. If the State has objections it will raise the objections at the pre-hearing status conference. Respondent simply has not met his burden of demonstrating the unfairness of allowing duplicates of his records to be admitted as evidence.

In addition, the State finds it difficult to reconcile Respondent's position in this proceeding with the position he adopted with respect to original files in the criminal trial. In the criminal trial, Respondent filed a motion to dismiss with memorandum and supplemental memorandum arguing that eleven of Respondent's original records of Respondent had been "irrevocably and purposefully rearranged" with "no way of returning these 11 medical records to their original order." Attachments C and D. If Respondent succeeds in confining the record to the original files, the State fears (and the Committee should be concerned) that a

similar motion to dismiss will be filed in this proceeding, resulting in further delay.  
The Respondent's motion to exclude copies of Respondent's records must be denied.

**CONCLUSION**

For all the reasons argued above and in the State's previous memorandum,  
all Respondent's pre-hearing motions should be **DENIED**.

Dated at Montpelier, Vermont this 15th day of June, 2006.

**WILLIAM SORRELL  
ATTORNEY GENERAL  
STATE OF VERMONT  
BY**



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Joseph L. Winn  
Assistant Attorney General

**ATTACHMENT A**



witnesses at the disciplinary hearing. Assuming that the Board has the right to dismiss the Specification of Charges at this point, Respondent's allegations fall well short of warranting such a drastic action as dismissal.

For these reasons, Respondent's second Motion to Dismiss Superceding Specification of Charges is unanimously **DENIED**.

## 2. MOTION FOR ACCESS TO PATIENT MEDICAL RECORDS AND PATIENT EXAMS

Respondent also moves the Board for access to patient medical records and patient exams. Essentially, Respondent complains that he has been denied the same access to patient medical records and opportunity for independent medical examinations that the State has had. Respondent further states that to the extent that he is not able to obtain equal access to what he seeks, the Board should exclude evidence pertaining to those witnesses. In a collateral request, Respondent asks that the Board order the Attorney General's Office from cooperating with malpractice attorneys involved in civil malpractice actions against Respondent.

Respondent bases his request for access to patient records and opportunity for an independent medical exam on law related to civil malpractice actions and other actions covered by the Vermont Rules of Civil Procedure. At the outset, the civil rules of procedure are inapplicable to administrative hearings. Condosta v. D.S.W., 154 Vt. 465, 467 (1990) and International Assoc. of Firefighters Local #2287 v. Montpelier, 133 Vt. 175, 177 (1975).

As the Board has established in previous rulings in this matter, it does not have a general grant of authority to provide for the full arsenal of discovery methods and tools that are available under the rules of civil procedure. A Board licensee is entitled to receive certain information under 26 V.S.A. § 1318(e), which reads in relevant part as follows:

A licensee ... shall have the right to inspect and copy all information in the possession of the department of health pertaining to the licensee ..., except investigatory files which have not resulted in charges of unprofessional conduct and attorney work product.

See also Board Rule 19.1. The Attorney General's Office has represented in hearing that it has provided everything that Respondent is entitled to under this statute. In addition, both parties at this motion hearing represented that the patients' in question and their attorneys were willing to sign a limited release to allow Respondent certain access to medical records.

The Vermont Administrative Procedure Act (VAPA) does not establish any type of discovery procedure that would give the Board the authority to compel what Respondent requests. VAPA does provide for the enforcement of agency subpoenas regarding testimony and production of documents. 3 V.S.A. § 809a. A Board statute, 26 V.S.A. § 1353(3), does grant the Board the power to "[T]ake or cause depositions to be taken as needed in any investigation, hearing or proceeding." Board Rule 16.2 covers "Discovery" and authorizes the Board or legal counsel to "issue orders regarding discovery and depositions." These are the procedures that the

Vermont Legislature gave the Board to carry out its administrative responsibilities. These are the procedures that are available for Respondent and the State to use to prepare for hearing. The Board does not have the authority to order patients to release their medical records or to submit to an independent medical examination. If the Legislature had intended the Board to exercise such intrusive procedures, it would have specifically granted such authority.

The Board notes that these issues were raised at the Prehearing Conference held on 11/12/03 and discussed in the Board's Order Re Respondent's Motion to Compel issued shortly thereafter. In addition, the issue of independent medical examinations was raised at the prehearing conference on 12/16/03 and discussed in the Board's Prehearing Conference Report issued shortly thereafter. Respondent was given adequate notice of the procedures that should be utilized in this matter.

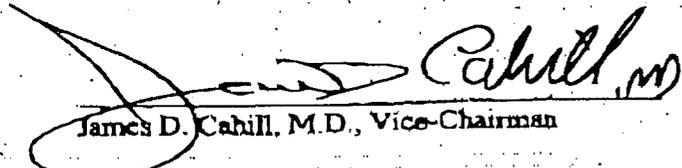
As for the exclusion of evidence at this stage of the proceeding, neither the state of the evidence nor the law governing administrative hearings support Respondent's request. The Board further notes that Respondent will have full opportunity to cross-examine witnesses and introduce his own evidence at the disciplinary hearing, at which the State must prove its allegation by a preponderance of the evidence. The rights provided under VAPA and the preponderance of evidence burden of proof placed on the State comply with "the constitutional process due" to the Respondent. In re Smith, 169 VT 162, 172 (1999).

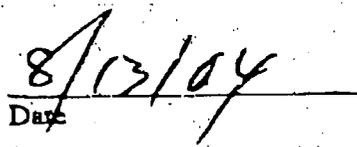
Lastly, Respondent requests the Board to order the Attorney General's Office to stop cooperating with malpractice attorneys involved in civil malpractice actions against Respondent. Beyond communicating with attorneys representing patients, it is not clear what the Attorney General's Office has done to "cooperate" with malpractice attorneys. The Board expects all attorneys to practice according to the law and the Code of Professional Responsibility. At any rate, it is highly questionable that the Board has the authority to control the professional activities of Assistant Attorneys General, and the board is not going to insert itself into the professional relationships among attorneys involved in parallel proceedings.

For these reasons, Respondent's Motion for Access to Patient Medical Records and Patient Exams is unanimously **DENIED**.

SO ORDERED.

FOR THE BOARD OF MEDICAL PRACTICE:

  
James D. Cabill, M.D., Vice-Chairman

  
Date

**ATTACHMENT B**

**STATE OF VERMONT  
BOARD OF MEDICAL PRACTICE**

In Re:

DAVID S. CHASE,  
Respondent

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)  
)  
)

Docket No. MPC 15-0203

**PREHEARING CONFERENCE REPORT**

**PARTICIPANTS:** Joseph L. Winn, Esq.; Assistant Attorney General  
Eric S. Miller, Esq.; Counsel for Respondent  
Sharon L. Nicol; Board Hearing Committee  
Lewis C. Blowers, M.D.; Board Hearing Committee  
Phillip J. Cykon, Esq.; Presiding Officer

On November 12, 2003, a Prehearing Conference was held concerning the above-captioned matter. The parties presented arguments regarding motions that had been filed. Respondent had filed a Motion to Compel and for Protective Order. The State filed a Memorandum in Opposition and filed its own Motion to Seal. The Board Hearing Committee (Board) deliberated and issues the following **ORDERS:**

**ORDER RE RESPONDENT'S MOTION TO COMPEL**

Respondent filed a Motion to Compel requesting the Board to compel the State to respond to his discovery requests and to comply with the Board's Stipulated Discovery Order by disclosing the names of any expert witnesses the State intends to call at the disciplinary hearing. Respondent specifically claims that he is entitled to receive from the state the material he requested through written interrogatories and requests for production of documents, and that the State has failed to disclose its expert witnesses. The State responds that Vermont statutes, Board Rules, or due process do not require the State to answer such discovery requests. The State further responds that its expert witnesses have been provided to Respondent.

There are no provisions in the Vermont Administrative Procedure Act (VAPA) that establish any type of discovery proceeding for administrative hearings. VAPA does provide for the enforcement of agency subpoenas regarding testimony and production of documents. 3 V.S.A. § 809a. Furthermore, VAPA does not subject administrative hearings to the Vermont Rules of Civil Procedure. In addition, Board statutes and rules do not incorporate the Civil Rules into the Board disciplinary process. Although the Board has suggested the use of the Civil Rules as a guideline to the discovery process, those rules are not required to be followed by the parties.

A Board statute, 26 V.S.A. § 1353(3), does grant the Board the power to “[T]ake or cause depositions to be taken as needed in any investigation, hearing or proceeding.” Board Rule 16.2 covers “Discovery” and authorizes the Board or legal counsel to “issue orders regulating discovery and depositions.” Since the Board has specifically been granted the authority to utilize depositions in its administrative process, the Board has allowed and supported the regular use of depositions. However, due to the lack of specific authority regarding other discovery methods, the Board has never ordered any party before it to use such methods; rather, has encouraged the parties to use whatever discovery methods they can agree upon. Respondent contends that the Board has a general grant of authority under 26 V.S.A. § 1353(4) to order full discovery analogous to the civil practice rules of procedure, however, the Board is reluctant to order such an extensive process without specific authorization in the statutes.

A Board licensee is entitled to receive certain information under 26 V.S.A. § 1318(e), which reads in relevant part as follows:

A licensee ... shall have the right to inspect and copy all information in the possession of the department of health pertaining to the licensee ..., except investigatory files which have not resulted in charges of unprofessional conduct and attorney work product.

See also Board Rule 19.1.

While the Board does not feel it has the specific authority to order the State to respond to Respondent’s written discovery requests, Respondent is entitled to have access to the material described in the above-quoted statute. Therefore, the Board ORDERS that the State allow Respondent to inspect and copy all information in the possession of the department of health, which includes any Assistant Attorney Generals working on the present disciplinary charges, pertaining to Respondent, except of course, investigatory files which have not resulted in disciplinary charges and any attorney work product.

Concerning Respondent’s request for disclosure of the State’s expert witnesses, the Board ORDERS that the State shall immediately disclose the names of any expert witness not previously disclosed that it intends to call as a witness in the hearing on the Specification of Charges, along with a summary of the opinion of the witness and the bases for the opinion.

The Board feels that these disclosures comply with the above-mentioned statutes and rules and with the general principles of due process that govern administrative hearings. See In re Green Mountain Power, 131 Vt. 284, 293 (1973); Mathews v. Eldridge, 424 U.S. 319 (1976) (due process requirements for administrative hearings); Pet v. Dept. of Health Services, 542 A.2d 672 (Conn. 1988) (party in an administrative hearing is not entitled to a right, constitutional or otherwise, to general pretrial discovery similar to that required in civil cases in general).

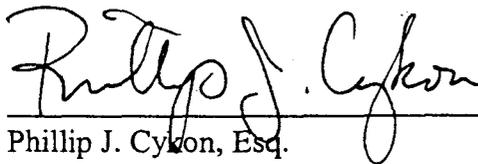
**ORDER RE RESPONDENT'S MOTION FOR PROTECTIVE ORDER**

Respondent further seeks a protective order from the Board preventing the State from deposing Respondent and Respondent's wife. Respondent contends that he and his wife should not be required to respond to questioning until they have had a chance to review the evidence that the State is required to disclose. The Board feels that Respondent's request concerning the depositions is reasonable. The Board ORDERS that the depositions of Respondent and his wife should not occur until the State has complied with the Board's discovery order set forth above; that is, until the State has allowed Respondent to inspect and copy all information in the possession of the department of health, which includes any Assistant Attorney Generals working on the present disciplinary charges, pertaining to Respondent, except of course, investigatory files which have not resulted in disciplinary charges and any attorney work product. Once the State has provided Respondent with this material, the State may depose the Respondent and his wife, and of course can issue subpoenas, if necessary, to accomplish the depositions.

**ORDER RE STATE'S MOTION TO SEAL**

The State requests that the Board issue an order to keep confidential the names of witnesses who have filed complaints with the Board, but whose complaints have not resulted in the filing of charges. If no disciplinary charges have been filed concerning the complaints filed by these individuals, then 26 V.S.A. § 1318(c) and (d) would operate to make such information confidential. Indeed, subsection (d) mandates that the commissioner not make public any information regarding disciplinary complaints except that which is authorized to be released under section 1318. Therefore, those names shall remain confidential and sealed. However, should disciplinary charges be filed concerning the complaint of any witness, that individual's name should no longer remain confidential. Furthermore, should any witness actually testify at the hearing in this matter, the identity of the witness would become part of the transcript of the hearing and no longer confidential. 26 V.S.A. § 1318(c)(2)(D).

This Report and these ORDERS were prepared and issued by the Presiding Officer on behalf of the Board Hearing Committee pursuant to Board Rule 16.2.

  
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Phillip J. Cykon, Esq.  
Presiding Officer

11/19/03  
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Date

**ATTACHMENT C**

U.S. DISTRICT COURT  
DISTRICT OF VERMONT  
FILED

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF VERMONT 2005 SEP 2 PM 4 50

CLERK

UNITED STATES OF AMERICA )  
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 v. )  
 )  
 DAVID S. CHASE, M.D. )

BY \_\_\_\_\_  
Docket No. 04-CR-135-~~135~~ TALLEY CLERK



**MOTION TO DISMISS FOR FAILURE TO PRESERVE  
MATERIAL EXCULPATORY EVIDENCE**

Defendant, Dr. David Chase, respectfully requests the Court to dismiss all counts in the Indictment relating to patients whose original medical records have been rearranged, and therefore irreversibly altered, by the Government. In support of his Motion, the Defendant relies upon the following Memorandum of Law. Because this Motion is in response to events which were made known to the Defendant just this morning, the Defendant also requests permission to file a supplemental memorandum on Tuesday morning. In light of the nature of the Motion, he Defendant requests that the Court hear argument on the Motion prior to the jury draw.

**Memorandum of Law**

**I. Introduction**

The Government has accused Dr. Chase of recording information in his charts in locations that may be misleading to people reviewing those charts. As a result, the precise arrangement of Dr. Chase's original medical charts is of paramount importance in this case. However, the Defendant learned just today, the last business day before jury draw, that the Government has irrevocably and purposefully rearranged the pages of approximately 11 of the 35 original medical records that form the basis of the Government's charges and of Dr. Chase's defense. There is no way of returning these 11 medical records to their original order. The

Government also disclosed this morning that it has similarly rearranged the remaining 24 original medical records, and that they may or may not be capable of restoring those charts to their original order and condition. Because the Government has accused Dr. Chase of placing test results in misleading locations within his charts, and because all of the Government's charges of falsification are rebutted by the information proximate to those alleged misrepresentations within the chart, the precise order of the pages of Dr. Chase's original medical records is itself material exculpatory evidence. Under controlling Supreme Court caselaw, because the Government has destroyed that material exculpatory evidence by rearranging the original charts, the charges that are based on the 11 irrevocably altered medical records must be dismissed. The remaining charges must be dismissed unless the Government is able to somehow immediately reconstruct the other 24 charts in a manner that exactly replicates their original order and condition.

## **II. Factual Background.**

From the outset of the Government's investigation in this matter, both parties have understood that the medical records of Dr. Chase's former patients, particularly those identified in the Indictment, are the most important evidence in this case. All of the Government's claims are premised on the notion that Dr. Chase made false or misleading entries in those charts as part of a scheme to defraud insurers by recommending and performing unnecessary cataract surgery. A key allegation in the Government's Indictment is that Dr. Chase misleadingly recorded contrast sensitivity results in cataract patient medical records in a location that suggested that they were actually Snellen test results and in a location and manner that a person reviewing the chart would find misleading. According to the Government, Dr. Chase did this in an effort to mislead auditors into believing that the patients' Snellen vision was worse than it actually was.

In his defense, Dr. Chase will prove that the location of the challenged test results, when viewed in the precise context of the other records in the chart, makes clear that Dr. Chase's manner of recording test results was not misleading. The exact arrangement of the original medical records is thus itself a critical piece of exculpatory evidence in this case.

All of the original medical charts for the 35 patients identified in the Indictment have been in the Government's sole possession since the outset of this case. The charts of the 11 of those 35 patients who actually had surgery were seized from Dr. Chase by the State in July 2003 and provided to the USAO. The charts of the 24 other patients, who did not actually undergo surgery, were for the most part provided to the Government by Dr. Chase pursuant to subpoena. All of the charts were provided to the Government in their original condition and with their pages in the order in which the records were kept in Dr. Chase's office.

This morning, only one day before the jury draw in this case, the Government informed the Defendant that it had at some point in the past intentionally, unilaterally, and without Defendant's prior knowledge rearranged the exam notes in Dr. Chase's *original* medical records to place them in strict chronological order. The Government did not make a copy of the records when they were in their original condition. The Government did not Bates number the pages when they were in their original condition. The Government took absolutely no steps that would allow the parties to reconstruct the order in which the records were kept. In their original condition, the exam notes were kept roughly, but not always, in reverse chronological order. As a result, absent the existence of a copy of the records before they were rearranged, there is simply no way to place them back in their original order.

When in their original order, the records demonstrated that the accurate information the Government claims was misleadingly hidden from reviewers is often directly proximate to the

allegedly misleading information that forms the basis of the Government's Indictment. The physical proximity of the entries and the manner in which they are displayed strongly tends to rebut any allegation of deception. However, the way the Government has rearranged the records, the accurate information regarding a patient's final visit (which is usually the most relevant visit) and the clarifying information may be separated by 30 or 40 sheets of other medical records. This reordering of the medical records vitiates the probative force of the challenged entries' context and is itself highly misleading.

As to the 11 original surgical records that were seized from Dr. Chase pursuant to a search warrant, there exists no way to put the pages back in their original order because the Government did nothing to record that order. However, as to the approximately 24 medical records that were produced to the Government by the Defendant pursuant to subpoena, the Defendant had the foresight to place Bates numbers on the pages of the records before producing them to the Government. As a result, it is possible, but not yet certain, that the Government can re-order the pages of the records based on the Defendant's Bates numbers to replicate their original positions.

### **III. Discussion.**

"To safeguard a defendant's due process right to present a complete defense, the Supreme Court has developed . . . the area of constitutionally guaranteed access to evidence." United States v. Wright, 260 F.3d 568, 570 (6<sup>th</sup> Cir. 2001) (citing California v. Trombetta, 467 U.S. 479, 485 (1984)). In Trombetta, the Supreme Court held that a defendant's due process rights are violated when the government fails to preserve material exculpatory evidence. Trombetta, 467 U.S. at 489. For evidence to meet the standard of constitutional materiality, it "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a

nature that a defendant would be unable to obtain comparable evidence by other reasonably available means.” Id. at 488-89. “The destruction of material exculpatory evidence violates due process regardless of whether the government acted in bad faith.” Wright, 260 F.3d at 571 (citing Trombetta, 467 U.S. at 488); see Illinois v. Fisher, 540 U.S. 544, 549 (2004).

There can be no doubt that the exculpatory nature of the evidence the Government destroyed was readily apparent to all before the pages of the original records were rearranged. The Government had explicitly alleged that Dr. Chase placed certain test scores at a misleading place within the charts, thereby making the location of the information within the records highly relevant. The Government also knew that clear and accurate test results and other information was placed up front in every chart, often right next to the exam notes from the patient’s most recent visit. Simply put, the value to the Defendant of the precise order of the original medical records was always clear.

Nor is there any way, much less a reasonable way, to obtain comparable evidence, at least for the 11 charts that we know cannot be reconstructed. The parties, the Court, and the jury can never know just how the medical records were arranged by Dr. Chase and his staff. They can never know just how powerfully exculpatory the precise order of those records was. Even if the Government could approximate the records’ original order, the result would be just that: an approximation. But “close enough” does not cut it in a criminal case where the Defendant’s freedom is at stake. Nor should the parties or the Court be in the business of attempting to reconstruct accurate evidence after the fact.

The only way to adequately remedy the Government’s decision to purposefully alter the order of the original medical records is to dismiss the Indictment as to those 11 patients whose charts have been irrevocably altered. The Government must be required to immediately attempt

to reconstruct the other 24 charts so that the parties can use those reconstructed records as they prepare their witness examinations. However, if a perfectly accurate reconstruction proves impossible for any reason, those counts, too, must be dismissed. Once some original charts, if any, are perfectly reconstructed, the Government must be required to place the original charts, in their original order and format, into evidence as its exhibits. The Government cannot, as it has proposed to the Defendant, re-order the charts shown to the jury for ease of use by Government attorneys and experts.

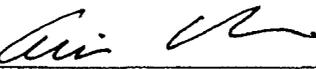
The Government has made the exact arrangement of the original charts relevant to its case and to Dr. Chase's defense: It must now make certain that the arrangement is intact. Anything short of that requires dismissal.

**IV. Conclusion.**

For the foregoing reasons, the Defendant respectfully requests that the Court dismiss all Counts in the Indictment relating to patients whose original charts were rearranged by the Government.

Dated: September 2, 2005

DAVID S. CHASE, M.D.

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# **ATTACHMENT D**

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF VERMONT

2005 SEP 6 AM 11 17

CLERK

BY \_\_\_\_\_  
DENNY OLIVER

ph

UNITED STATES OF AMERICA )  
 )  
 v. )  
 )  
 DAVID S. CHASE, M.D. )

Docket No. 04-CR-135-ALL

**DEFENDANT'S SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF  
MOTION TO DISMISS FOR FAILURE TO PRESERVE  
MATERIAL EXCULPATORY EVIDENCE**

Defendant, Dr. David Chase, respectfully submits the following incorporated Supplemental Memorandum of Law in Support of his Motion to Dismiss all counts in the Indictment relating to patients whose original medical records have been rearranged, and therefore irreversibly altered, by the Government.

**Supplemental Memorandum of Law**

**I. Introduction.**

The arrangement of Dr. Chase's original medical records is central to this case, in which Dr. Chase is accused of recording information in his charts in locations that may be misleading to people reviewing them. On Friday, September 2, 2005, the Defendant learned for the first time that the Government has purposefully rearranged the pages of all of the 35 original medical records that form the basis of the Government's charges and of Dr. Chase's defense. There is no way of returning 11 of these medical records to their original order. The Government may or may not be capable of restoring the other 24 charts to their original order. Because the Government has destroyed material exculpatory evidence by rearranging the original charts, Defendant has sought dismissal of the charges that are based on the 11 irrevocably altered

medical records. In the alternative, the Government should be prohibited from pursuing at trial any allegations that Dr. Chase placed information in a misleading location within his charts. Finally, the Government should not be allowed to introduce as evidence any photocopies of rearranged charts; only the original charts as originally arranged should go to the jury. The following is intended to supplement Defendant's Motion to Dismiss for Failure to Preserve Material Exculpatory evidence.

## **II. Factual Background.**

The evidence destroyed in this case by the Government is central to Dr. Chase's defense. The medical records of Dr. Chase's former patients, particularly those identified in the Indictment, are the most important evidence in this case. The Government's entire Indictment is premised on the notion that Dr. Chase made false or misleading entries in patient charts as part of a scheme to defraud insurers by recommending and performing unnecessary cataract surgery. A key allegation in the Government's Indictment is that Dr. Chase misleadingly recorded contrast sensitivity test results in cataract patient medical records in a location that suggested that they were actually Snellen test results and in a location that a person reviewing the chart would find misleading. When treating cataract patients, Dr. Chase often placed those patients' contrast sensitivity test results prominently at the top of his exam notes. The Government contends that the patients' Snellen test results should be placed in this prominent position and that Dr. Chase's records are therefore misleading. However, in their original order, Dr. Chase's records demonstrate that all of the patients' vision scores, including clearly labeled Snellen and contrast sensitivity scores, are often immediately adjacent to the very notation that the Government contends is misleading, thereby undermining the Government's central allegation. As a result, the arrangements of Dr. Chase's original medical charts is itself important evidence.

In rearranging Dr. Chase's original medical records, the Government has destroyed or lessened the proximity of the clearly labeled test results to the allegedly misleading test results. As a consequence, the records have lost a significant portion of their exculpatory value and, in fact, have been made to appear more inculpatory. Unfortunately, prior to rearranging Dr. Chase's original medical records, the Government did not: (1) make a reliable copy of the records when they were in their original order;<sup>1</sup> (2) Bates number the pages when they were in their original order; or (3) take any other steps that would allow the parties to reconstruct the order in which the records were kept.

Fortunately, Dr. Chase had previously Bates numbered 24 of the 35 charts that he produced to the Government pursuant to subpoena. It is possible, but not yet certain, that these 24 charts can be reconstructed. The other charts were seized by the Government by search warrant, were not Bates numbered or similarly labeled by Dr. Chase prior to the seizure, and cannot be put back together again. As a result, neither the Government nor Dr. Chase can tell the jury that those original medical records are, in fact, arranged as they were when Dr. Chase used them in the treatment of his patients.

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<sup>1</sup> On the morning of Monday, September 5, 2005, the Government indicated to the defense that it hoped it could reconstruct the 11 surgical charts by referencing copies made of those charts by the Vermont Attorney General's office near the time they were seized. However, even a cursory examination of those copies, which were made by temporary employees hired to come in and photocopy tens of thousands of pages of medical records on short notice, cannot be relied upon to accurately reconstruct the original medical records. The AG's office did not Bates number or otherwise identify the order in which the original pages were kept. The AG's copies often have two pages copied onto a single sheet of paper, with no indication of which page actually came first in the original medical record. In the versions supplied to the Defendant, some copied pages sit loose within the folders into which they were placed, while others are clipped together, with no apparent reason for the different treatment and no analogue in the original medical charts that are still intact. Simply put, the AG's copies of the documents are not a reliable guide to the arrangement of the originals.

### III. Discussion.

#### A. **Because The Government Has Destroyed Material Exculpatory Evidence, The Defendant Will Be Denied A Meaningful Opportunity To Present A Complete Defense, And Therefore, The Indictment Must Be Dismissed As To The 11 Patients Whose Charts The Government Has Irrevocably Altered.**

Pursuant to the constitutionally protected right to due process, criminal prosecutions must comport with prevailing notions of fundamental fairness. The United State Supreme Court has “long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense.” California v. Trombetta, 467 U.S. 479, 485 (1984). “To safeguard a defendant’s due process right to present a complete defense, the Supreme Court has developed . . . the area of constitutionally guaranteed access to evidence.” United States v. Wright, 260 F.3d 568, 570 (6th Cir. 2001) (citing Trombetta, 467 U.S. at 485).

The Government has a constitutionally imposed duty to preserve evidence “that might be expected to play a significant role in the suspect’s defense.” Trombetta, 467 U.S. at 488-89; United States v. Thristino, No. 01-1155, 2002 WL 31008776, at \*2 (2d Cir. Sept. 9, 2002). In Trombetta, the Supreme Court held that a defendant’s due process rights are violated when the government fails to preserve material exculpatory evidence. Trombetta, 467 U.S. at 489. For evidence to meet the standard of constitutional materiality, it “must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that a defendant would be unable to obtain comparable evidence by other reasonably available means.” Id. at 488-89. Where, as here, material exculpatory evidence is destroyed, no showing that the government acted in bad faith is required. See Wright, 260 F.3d at 571 (citing Trombetta, 467 U.S. at 488); see also Illinois v. Fisher, 540 U.S. 544, 549 (2004); cf. United States v. Dalisay, No. 03 CR. 1305, 2005 WL 1176115, at \* 7 (S.D.N.Y. May 17, 2005) (citing same standard for establishing violation of right to present a defense based on lost evidence).

**i. The Material Exculpatory Value Of The Medical Records As Arranged In Their Original State By Dr. Chase Was Apparent Before The Government Destroyed That Evidence By Rearranging The Records.**

The Government cannot credibly assert that it was unaware of the apparent exculpatory value of leaving the charts in their original state as Dr. Chase had them organized. The Government has alleged that Dr. Chase made a number of false statements in his medical records. By so doing, it made those records the primary piece of evidence in this case, for both the prosecution and the defense, and assumed an obligation to protect the integrity of that evidence. Even more importantly, the Government has specifically alleged that the charts were false because, among other things, certain test scores were placed in a misleading location within the chart. In making that allegation, the Government transformed the very organization and arrangement of Dr. Chase's charts into key evidence in this case. The Government also knew that clarifying information regarding the allegedly misleading test scores was available in the chart; indeed, the Government relies on that clarifying information to establish the "real" vision scores of the patients in the Indictment. It was obvious to the Government that Dr. Chase would rely on that clarifying information, and its proximity to the allegedly misleading information, in order to prove that a person reviewing the chart would not be misled.

Despite this knowledge, the Government purposefully rearranged Dr. Chase's medical charts. In doing so, the Government has forever robbed Dr. Chase of the opportunity to present large portions of his defense. He can no longer stand before the jury, point to the original medical records, and say that those records are arranged as they were when he was utilizing them to treat patients. He can no longer rely on those records to represent the truth of how he maintained patient information. The Government has, in short, stripped the medical records of their integrity. This prevents Dr. Chase from effectively making any arguments premised on the

integrity of the medical records---that integrity is crucial to his defense of all of the charges of misrepresentation contained in the Indictment.

More importantly, the Government's rearrangement of the charts has completely vitiated Dr. Chase's ability to counter the Government's allegations that contrast sensitivity test results were recorded in a misleading location within the chart and would be misinterpreted by a reviewer. He can no longer point out to the jury that, in the original charts as they were originally maintained in his office, clearly labeled Snellen vision scores were often right next to, and always close by, the allegedly misleading contrast sensitivity scores. The original arrangement of his medical records was Dr. Chase's chief defense to this specific allegation. That defense is now unavailable.

In United States v. Belcher, 762 F. Supp. 666, 672-73 (W.D. Va. 1991), the United States District Court for the Western District of Virginia, applying the Trombetta test, concluded that plants destroyed by the Government, which the Government claimed were marijuana plants, but had never chemically tested, had an exculpatory value apparent before they were destroyed. In reaching this conclusion, the Court observed that the destroyed plants were material to the case because "the very plants that the State officials destroyed will be the crucial item of evidence at trial." Id. at 673. Furthermore, the Court found it troubling that government officials could seek to prosecute individuals for drug-related crimes, destroy the drugs, and then argue that the drugs had no exculpatory value because the government "knew" that the drugs were indeed drugs. Id. at 672-73. The Court concluded that until laboratory testing was done, the government could not claim that the plants had no apparent exculpatory value based on a mere visual inspection. Id. at 673.

The same reasoning of the Belcher court applies here with even greater force. Like the drugs in Belcher, the arrangement of the original medical records will be a crucial item of evidence at trial. The Belcher court's concern about the Government seeking to prosecute crimes, altering or destroying the crucial evidence, and then attempting to justify its actions by claiming that it "knew" the evidence had no exculpatory value is particularly salient here. This case presents an even more troubling prospect because not only has the Government destroyed material exculpatory evidence, it has actually altered the medical records so that they appear more inculpatory and therefore support the claim that they are misleading. Whether the evidence is altered or destroyed, or made to appear more or less inculpatory, the essential problem remains: There no longer exists any positive evidence of how these records were kept in their original state. Without that evidence, the Defendant cannot mount an effective defense.

**ii. Dr. Chase Cannot Secure Comparable Evidence By Other Reasonably Available Means.**

Dr. Chase will be unable to obtain comparable evidence, by other means, reasonable or otherwise, for at least the 11 charts that we know cannot be reconstructed. Because the Government failed to make reliable copies of the original charts or to utilize Bates numbering before altering the charts, there is no adequate substitute for the medical records in their original state. Where, as here, the physical evidence central to the alleged crime has been destroyed, it is clear that no comparable evidence is reasonably available. See United States v. Bohl, 25 F.3d 904, 912 (10th Cir. 1994) (where defendants were charged with submitting false claims for payment, aiding and abetting and mail fraud in connection with government contract to build radar and radio transmission towers and chemical composition of steel in towers was critical to government's case, once tower legs were destroyed by the government, defendants had no adequate substitute to rebut government testing of the steel composition of the towers); United

States v. Cooper, 983 F.2d 928, 932-33 (9th Cir. 1993) (where defendants charged with offense related to manufacture of methamphetamine, the laboratory equipment government destroyed was central to case and therefore, because defendants could not test it, they did not have comparable, alternative means of defending themselves).

**B. The Court Should Dismiss The 11 Counts Relating To Patients Whose Records Have Been Destroyed.**

This Court has broad discretion in crafting a proper sanction for the destruction of evidence. See West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999). As the Second Circuit has observed, “the appropriateness and extent of sanctions in cases concerning Government failure to preserve discoverable evidence depends upon a case-by-case assessment of the government’s culpability for the loss, together with a realistic appraisal of its significance when viewed in light of its nature, its bearing upon critical issues in the case and the strength of the government’s untainted proof.” Dalisay, 2005 WL at \*7 (quoting United States v. Grammatikos, 633 F.2d 1013, 1019-20 (2d Cir. 1980)). A sanction for the destruction of evidence should be designed to “(1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore ‘the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by opposing party.’” Klezmer v. Desyatnik, 227 F.R.D. 43, 51 (E.D.N.Y. 2005) (quoting West, 167 F.3d at 779); In re Kelsey, Nos. 94-10415, 00-1034, 2001 WL 34050736, at \*3 (Bankr. D. Vt. Oct. 23, 2001) (same). At the very least, the sanction must ensure that the Government does not benefit from its destruction of the evidence. See West, 167 F.3d at 779 (noting the long recognized rule that spoliators should not benefit from their wrongdoing, as illustrated by that favorite maxim of the law, *omnia presumuntur contra spoliatorem*).

The only way to adequately remedy the Government's decision to purposefully alter the order of the original medical records, and to serve the goals articulated above, is to dismiss the Indictment as to those 11 patients whose charts have been irrevocably altered. See Bohl, 25 F.3d at 914 (dismissal warranted where government destroyed crucial evidence); Cooper, 983 F.2d at 933 (same); Belcher, 762 F. Supp. at 673, 675 (same); Scoggins v. State, 802 P.2d 631, 633 (N.M. 1990) (same). Simply put, because of the Government's actions, Dr. Chase can no longer credibly rely on the arrangement of those charts in any way in presenting his defense to the jury.

Although Dr. Chase maintains that dismissal is the appropriate remedy for the Government's failure to preserve evidence it knew would play a significant role in his defense, to the extent that the Court concludes that an alternative sanction is merited, Dr. Chase respectfully requests that the Court dismiss all allegations by the Government that Dr. Chase's charts are misleading by virtue of the location of any entries, including contrast sensitivity scores. While the integrity of the medical records affects Dr. Chase's defense to all of the Government's allegations, it is indispensable to Dr. Chase's ability to defend against claims based on the placement of information in his records: specifically that he recorded contrast sensitivity test results in a misleading place within his charts. Absent dismissal of all counts pertaining to the 11 patients, only dismissal of these specific allegations within those counts will begin to put Dr. Chase in approximately the same position that he would have been in absent the destruction of the evidence. To rule otherwise would allow the Government to impermissibly benefit from the destruction of evidence by allowing it to simultaneously prosecute Dr. Chase for the misleading placement of data in medical records while destroying the evidentiary basis for Dr. Chase's defense.

Imperfectly reconstructed medical records are of no help, and in fact raise even more serious concerns. Requiring the Government to simply put the records back together as best it can places the parties and the Court in the untenable position of re-manufacturing evidence that cannot be guaranteed accurate. If the Government cannot be absolutely certain exactly which pages go where, should the file be reconstructed in a manner that is more favorable to the defense? More favorable to the Government? Neither solution is acceptable, because neither solution would reliably represent the truth, which is now unknowable.

Moreover, the sanctions imposed by the Court for the Government's ill-advised decision to alter the arrangement of Dr. Chase's medical charts must be sufficiently strong to discourage similar future behavior by the Government in this or other cases. It should have been crystal clear to the Government from the outset that the integrity and arrangement of the most important evidence in this serious and high-profile case needed to be strictly preserved. The Court should express its disapproval of Government's conscious decision to nonetheless rearrange the pages of the original medical files the Government must be given serious disincentives to take action like this again.

Finally, if any counts remain, the Government must be required to use the original charts, in their original order, as exhibits in this case. The Government cannot, as it has proposed, use rearranged medical records in any way at trial. The arrangement of those medical records is too important to the Government's allegations and Dr. Chase's defense to do otherwise.

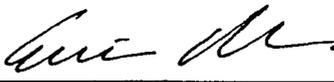
#### **IV. Conclusion.**

For the foregoing reasons, and the reasons already discussed in the Motion to Dismiss For Failure to Preserve Material Exculpatory Evidence, the Defendant respectfully requests that the Court dismiss all Counts in the Indictment relating to patients whose original charts were

rearranged by the Government. In the alternative, Dr. Chase requests that the Court dismiss all allegations related to the placement of information within the charts that have been reordered.

Dated: September 6, 2005

DAVID S. CHASE, M.D.

By: 

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF VERMONT

UNITED STATES OF AMERICA )  
 )  
 v. ) Criminal No. 04-CR-135-ALL  
 )  
 DAVID S. CHASE, M.D. )

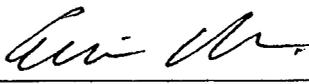
CERTIFICATE OF SERVICE

I, Eric S. Miller, attorney for David S. Chase, M.D., hereby certify that on September 6, 2005, I served **Defendant's Supplemental Memorandum of Law in Support of Motion to Dismiss for Failure to Preserve Material Exculpatory Evidence** via hand delivery, addressed as follows:

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Dated: September 6, 2005

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