UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA v. SCOTT REUBEN	Criminal No.: 10-CR-30002-MAP

DEFENDANT'S SENTENCING MEMORANDUM

Dr. Scott Reuben comes before this Court a broken and greatly diminished man. Under the raw calculus of the United States Sentencing Guidelines ("U.S.S.G." or "Guidelines"), Dr. Reuben is guilty of publishing six fraudulent articles which generated in excess of $360,000 in research funds. However, to properly sentence Dr. Reuben, it is critically important to consider what drove him to engage in that wrongful conduct. It is undisputed that Dr. Reuben was not motivated by greed; the research funds he obtained from the pharmaceutical companies went to his employer, Springfield Anesthesia Service. Dr. Reuben also did not need these publications to further his career. At the time these fraudulent articles were published his reputation was already earned – as a highly respected anesthesiologist at Baystate Medical Center, and as a teacher with a position at Tufts University Medical School. Instead, what fueled Dr. Reuben's wrongful acts between 2000 and 2008 was his undiagnosed bipolar disorder. This disorder does not excuse his behavior, but it provides the key to understanding his motivations. It is not coincidental that in 2002, contemporaneous with the beginning of this professionally destructive criminal behavior, Dr. Reuben also engaged in the most self-destructive act of all – he attempted suicide. Unfortunately, that attempt resulted in a misdiagnosis of depression and his manic conduct

continued, undiagnosed, until a second suicide attempt in 2008, which occurred contemporaneously with the discovery of his fraudulent research.

Dr. Reuben therefore respectfully asks that, in consideration of all of the factors set forth in 18 U.S.C. § 3553, he be sentenced to a period of home confinement. Dr. Reuben fully recognizes that such a sentence constitutes a departure or deviation from the range recommended by the fraud section of the Guidelines. However, the unique circumstances of this case, taken together with the goals and objectives that the Guidelines seek to accomplish warrants such a departure for three distinct reasons:

First and foremost, Dr. Reuben suffers from a serious medical condition that renders any period of incarceration an unduly harsh and potentially life threatening sentence. His bipolar disorder has impelled him to make multiple suicide attempts in the past ten years, most recently in 2008. Dr. Reuben's treating psychiatrist has written to this court that Dr. Reuben's mental health is likely to deteriorate significantly if he is incarcerated, thereby further exacerbating his already high risk of suicide. Although his disease does not excuse his crime, the Guidelines encourage this Court to consider the extent to which his disordered fueled, worsened, and, to a significant extent, caused his conduct.

Second, Dr. Reuben has, to date, suffered substantial punishment for his research fraud. Although his crime did not involve any allegation of improper or inadequate patient care, he lost his ability to practice medicine, something to which he has devoted his entire life, and at which he excelled. Indeed, Dr. Reuben's former colleagues have written to this Court to stress that he was an excellent and dedicated anesthesiologist. His marriage to his wife has ended, he has moved in with his parents, and he has liquidated nearly all of his savings to meet his obligation to make full restitution to the pharmaceutical companies who funded his research.

Third, one of the principal goals of incarceration – deterrence – has already been met. There is no possibility that Dr. Reuben will ever again engage in research, let alone research misconduct. The investigation and subsequent notification process carried out by Bay State Hospital has ensured that no institution or publication will ever fund or publish research by Dr. Reuben. In addition, as part of his plea, Dr. Reuben has agreed to being placed on a life time ban from any federally funded research.

Dr. Reuben therefore asks for the reasons discussed in more detail below, that the Court permit him to continue with his current course of treatment and impose a period of home confinement in lieu of incarceration.

I. BACKGROUND

A. Early Manifestations of Dr. Reuben's Bipolarity

Dr. Scott Reuben has dedicated more than twenty-five years of his life to the practice of medicine. After completing his fellowship at Mount Sinai, Dr. Reuben and his wife decided to move to Massachusetts. PSR ¶ 47. Dr. Reuben accepted a position with Springfield Anesthesia Services ("SAS"), the group of anesthesiologists who provide services to the Baystate Medical Center ("BMC") in Springfield, Massachusetts. *See* PSR ¶ 48. Dr. Reuben accepted the position at BMC, in part, because it offered him the opportunity not only to treat patients, but also to conduct research and to teach medical students and fellows.

Dr. Reuben's bipolar disorder began to manifest itself shortly after he arrived at BMC as he assumed a workload that would have been impossible for him to maintain without the aid of the tremendous energy supplied by his undiagnosed condition. Ironically, what now can be recognized as evidence of his illness initially appeared to be spectacular success. At BMC, Dr. Reuben worked as an anesthesiologist, a pain specialist, a teacher, and as a researcher and he

appeared to excel in all of these areas. Spurred on by his mania, Dr. Reuben's workload at BMC continued to swell. He worked as an anesthesiologist in an operating room for as many as 40 hours a week. In addition, he spent one or two days a week on the post-operative pain service, and one day a week seeing chronic pain patients on an out-patient basis. Dr. Reuben was also involved in developing the pain management curriculum for the medical students, residents, and fellows, and he would give approximately a dozen lectures each month.

In addition to these responsibilities, Dr. Reuben also pursued his interest in improving the treatment options for patients suffering from post-operative and chronic pain. After he arrived at BMC, he carried out a significant amount of clinical research to develop new approaches to treating pain. He would spend an average of twelve hours a week working on his various research projects. From the time that Dr. Reuben first arrived at BMC in 1990 until 2000, Dr. Reuben carried out his research without any grants other than the funding provided by BMC. In this early period he published twenty-four articles. *See* Ex. 1 (list of publications obtained from PubMed). Over time, Dr. Reuben's research work – most of which remains unchallenged – brought about significant improvements in the treatment of chronic and post-operative pain. *See* Letter of Support from Dr. Steinberg, Tab I.

The hypomania produced by his bipolar disorder initially allowed Dr. Reuben to shoulder this tremendous workload. His former colleagues have written letters to the Court attesting to Dr. Reuben's success as an anesthesiologist, a pain specialist, a teacher, and a researcher. For example, Dr. Robert Steinberg, the Chief of the Pain Management Division at BMC, writes:

> [Dr. Reuben was] a skilled, knowledgeable partner who immediately proved an asset to our busy practice. ... He was respected by our colleagues and residents as an excellent instructor, and was designated "Teacher of the Year" both at Baystate and at his previous institution, Mt. Sinai in New York. Scott is a talented anesthesiologist who provided excellent OR care, with obvious attention to postoperative pain control.

Letter of Support from Dr. Steinberg, Tab I. Similarly, Dr. Howard Krasner writes:

> While on staff at BMC, [Dr. Reuben] was very active in all aspects of anesthesia care. Dr. Reuben has provided excellent anesthesia care for thousands of patients over the years. He was always attentive to his patients and considerate to all the staff at BMC. ... Another of Dr. Reuben's responsibilities was being the Director of our Acute Pain Service. The patients and staff at BMC were very pleased with his work and contributions to patient care in this role. Baystate Medical Center is a large teaching hospital with an active Anesthesiology Residency Program. His contributions to resident education were substantial, such that he had been voted the best clinical instructor in the Anesthesiology Department by our residents several times over his teaching career.

Letter of Support from Dr. Krasner, Tab E. It is clear from these letters that despite assuming a tremendous number of responsibilities, during these early years at BMC, Dr. Reuben managed to succeed as a doctor, a teacher, a researcher, and a lecturer.

The effects of Dr. Reuben's bipolarity did not go unnoticed by his family, though they tragically did not recognize these changes in his personality were symptoms of a terrible disease. In their letter to this Court, Dr. Reuben's parents write that they saw a dramatic change in their son's personality after he began his career at BMC. *See* Letter of Support from Roberta and John Reuben, Tab H. As a child, Dr. Reuben had been very quiet and shy and public speaking had been very difficult for him. *Id.* Now they witnessed their son become an extrovert who gave numerous and dynamic lectures. *Id.* They also noticed that he seemed to be overexerting himself, taking on too much work, and constantly travelling. *Id.* Although this behavior was a dramatic departure from the child they had known, they sadly did not know that they were witnessing an escalation of Dr. Reuben's bipolar condition.

B. Dr. Reuben's Research Activities Begin to Spin Out of Control

In 2000, Dr. Reuben obtained a significant grant from Merck Pharmaceuticals to study the use of rofecoxib to treat post-operative pain. *See* PSR ¶¶ 9-10. After obtaining this grant, Dr. Reuben decided to take a sabbatical year to focus on his research and writing. Relieved of

his responsibility to treat patients, Dr. Reuben delved into a frenzied year of research, writing, and lectures. During his sabbatical year – between June 2000 and June 2001 – Dr. Reuben published eight papers and one review article, meaning he published nearly one article every month. *See* Ex. 1. He also made more than 70 presentations during that time, including multiple presentations on the West Coast and one presentation in Stockholm.

The sabbatical year had a terrible effect on Dr. Reuben's mental health. While on sabbatical, he lacked the routines and structure provided by working in the operating room and in the hospital treating patients, and he spent long periods of time isolated from both co-workers and family. As a result, mental health problems that had already been evident before the sabbatical year, worsened dramatically. *See* PSR ¶¶ 48, 52. His current mental health providers believe that Dr. Reuben suffered one or more significant periods of hypomania during this year, which helps to explain why he attempted to maintain such an extraordinary schedule of research, publications, and lectures. *See* Ex. 2 (Diagnostic Letter from Dr. Elin)

Not surprisingly, Dr. Reuben ultimately could not keep up with the demands created by the enormous number of commitments he had made, and he engaged in his first act of research fraud. In connection with the grant from Merck, Dr. Reuben was studying the use of rofecoxib in total knee replacement surgeries. In the article that was ultimately published in January 2002 based on that research, Dr. Reuben reported that he had data from 100 patients, when, in fact, he had only collected data from 26 patients. Although Dr. Reuben's then undiagnosed bipolar disorder does not excuse this misconduct, it clearly fueled his behavior.

Lacking proper diagnosis and treatment for his bipolarity, after the manic activity of his sabbatical year, Dr. Reuben crashed into a deep depression and attempted to commit suicide. In April 2002, Dr. Reuben took an overdose of sleeping pills and had to be admitted to BMC. *See*

Ex. 3 (medical records). In May 2002, Dr. Reuben went to a hotel where he drank a third of a cup of malathion (an insecticide) and cut his left wrist. *Id.* Fortunately, he was found in time and was transported to a local hospital. He then was hospitalized at an inpatient psychiatric center in Pittsfield for seven days. *Id.* During this hospitalization he unfortunately was misdiagnosed with major depressive disorder and was not placed on the medications that could truly control his mental illness. *Id.*

Not long after this suicide attempt, Dr. Reuben reassumed his full workload at BMC. Returning to his old habits, Dr. Reuben's hypomania soon returned, as is reflected by the incredible level of research and lecture activity between 2000 and 2008. During these eight years, he made more than 300 presentations, and according to PubMed,[1] he published more than 35 papers and review articles. *See* Ex. 1. It is important to recall that the majority of these articles and review papers were based on actual research data. In addition, during these years, not only was he was a researcher, an author, a prolific speaker, and a teacher, he also was an anesthesiologist who regularly worked long shifts at the hospital and maintained a separate caseload as a pain specialist. This incredible level of activity was clearly the result of the extraordinary drive that resulted from his bipolar illness. Without his mental disorder, he simply would not have had the stamina to maintain all of this activity.

As during his sabbatical year, Dr. Reuben ultimately could not meet all of the commitments his mania drove him to seek and to accept. Dr. Reuben has admitted that he published five additional fraudulent articles between 2004 and 2008. PSR ¶¶ 10-15. Again, Dr. Reuben's mental illness cannot excuse his crimes, but it helps to explain his decision-making. Indeed, some of his behavior was so illogical and outrageous that it is plain that he was not

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[1] PubMed is a service similar to Lexis/Nexis and Westlaw that catalogues and makes available articles published in various medical journals.

capable of completely rational thought at the time. For example, in 2008, Dr. Reuben published an article relating to the use of celecoxib (Celebrex) in connection with total knee arthroplasty. *See* PSR at ¶ 10. In that article, he reported that he had collected data from 200 patients, when, in fact, he had not enrolled a single patient in the trial. A rational person would have known that this fraud could not go unnoticed. Anyone with any familiarity with BMC would know that only a handful of total knee arthroplasty surgeries are carried out there each year. It therefore would have taken Dr. Reuben several years to enroll and collect data from 200 patients. At a minimum, a rational person would have realized that the data reported in this article would be highly suspect to his co-authors. However, Dr. Reuben's bi-polar disease not only helped drive him to author such a ludicrous article, it also distorted his ability to recognize the possible consequences.

Dr. Reuben's mental illness also manifested itself in his private life. For example, in 2007, Dr. Reuben left his house intending to bring in his car for an oil change. However, driven by his illness's impulsiveness and lack of sound judgment, he spontaneously decided that instead of an oil change, he would buy a new car. Much to his wife's surprise and dismay, he returned to the house with a new Subaru.

By early 2008, Dr. Reuben was exhausted and he again slid into a period of serious depression. In April, his depression was so severe that his wife convinced him to be hospitalized. On April 8, 2008, Dr. Reuben checked in to the Holyoke Medical Center for depression and suicidal ideation. *See* Ex. 4 (medical records). It was during this hospitalization that he came under the care of Dr. Kenneth Jaffe, who finally diagnosed his bipolar disorder. While Dr. Reuben was at the Holyoke Medical Center, one of his colleagues at BMC began to inquire into some of Dr. Reuben's recent research findings and sent Dr. Reuben an email

indicating that he had some concerns about the data. In response to this email, Dr. Reuben became intensely anxious and depressed, and on April 24, 2008, Dr. Reuben again attempted to commit suicide. *See* Ex. 5 (medical records). Fortunately, one of Dr. Reuben's daughters caught him preparing a lethal injection of an anesthetic medication and was able to prevent him from completing his plan. He was then readmitted to the Holyoke Medical Center for another eight days. *Id.*

After his research fraud came to light, Dr. Reuben was fully cooperative with the investigation carried out by BMC. He made no attempts to conceal his conduct and instead provided all of the information he had and answered all questions posed to him to the best of his ability. Similarly, once the United States Attorney's Office initiated an investigation, he agreed to make a proffer statement and again made a full and complete disclosure of his conduct.

II. ARGUMENT

The appropriate sentence for Dr. Reuben a period of home confinement. As even the Guidelines recognize, Dr. Reuben's sentence should not merely be set by the impersonal calculus of the fraud sentencing table of Section 2B1.1. Instead, the Guidelines specifically encourage this Court to recognize the role that Dr. Reuben's mental illness has played in his wrongful acts and to consider the undue harm he would suffer from incarceration. In addition, Dr. Reuben urges this Court to recognize that he has already suffered substantial punishment for his crime, including the loss of his ability to practice medicine, the loss of his financial security, and the loss of his home and family.

A. A Downward Departure Is Warranted for Dr. Reuben's Diminished Mental Capacity

While Dr. Reuben does not contend that his bi-polar illness prevented him from knowing right from wrong or from understanding the nature of these proceedings, the facts show that Dr. Reuben suffers from a diminished mental capacity that had a substantial impact on the commission of this offense. The extraordinary level of work that Dr. Reuben sought to undertake a well as the ludicrous claims he made in some of his articles show that Dr. Reuben was not thinking rationally during the relevant time period. Under Section 5K2.13, a downward departure is appropriate where, as here, a "significantly reduced mental capacity" is a "contributing cause" of the offense. *United States v. Sandolsky*, 234 F.3d 938 (6th Cir. 2000). *See also United States v. Lauzon*, 938 F.2d 326, 331 (1st Cir. 1991) (the impairment need not be the "but for" or "sole" cause of the offense as long as the condition contributed to the offense to some extent).

"The sentencing guidelines identify 'diminished capacity' as a factor that may not have been adequately taken into consideration by the Sentencing Commission in promulgating the guidelines – that is, an encouraged factor." *See United States v. Menyweather*, 447 F.3d 625, 630 (9th Cir. 2006). Accordingly, sentencing courts have granted significant downward departures when a defendant's mental condition substantially contributed to the offense. *See e.g., United States v. Boutot*, 480 F.Supp.2d 413 (D. Mass. 2007) (departing downward to a sentence of two weeks of incarceration based on defendant's schizophrenia); *United States v. Shore*, 143 F. Supp. 2d 74, 80 (D. Mass. 2001) (departing downward to a sentence of two years probation with four months home confinement in tax prosecution based on defendant's major depressive disorder and post traumatic stress syndrome); *United States v. Ribot*, 97 F. Supp. 2d 74, 82 (D. Mass. 1999) (departing downward to a sentence of three years probation with six

months home confinement in prosecution for income tax evasion and embezzlement based on defendant's major depressive disorder); *United States v. Herbert*, 902 F. Supp. 827, 829-830 (N.D. Ill. 1995) (departing downward to a sentence of forty-two months probation with six months home confinement in embezzlement and tax fraud case based on defendant's longstanding mental depressive/personality illness).

It is undisputed that Dr. Reuben suffers from serious mental health problems. Dr. Reuben's psychotherapist, Dr. Mark Elin, has determined that Dr. Reuben suffers from "Bipolar Disorder with psychosis, as well as Narcissistic and Borderline Personality Disorders with dissociation. He also has features of Asperger's Syndrome." Ex. 2. Dr. Reuben's psychiatrist, Dr. Kenneth Jaffe, writes to this Court that Dr. Reuben suffers from bipolar disorder and that he "has had several hypomanic episodes over the years characterized by hyperactivity, decreased sleep, and impaired judgment." Ex. 6 (Diagnostic Letter from Dr. Jaffe). As a result, Dr. Jaffe has placed Dr. Reuben on numerous medications, including lithium, depakote, and klonopin. *Id.* Dr. Reuben has also been independently evaluated by Dr. Russell Vasile, a psychiatrist selected and retained by the United States Attorney's Office. After careful evaluation, Dr. Vasile confirmed that Dr. Reuben suffers from bipolar disorder. *See* Ex. 7 (Letter to Attorney Cirel from AUSA Sternberg).

The fact that Dr. Reuben functioned as a successful anesthesiologist during the relevant time period is not evidence that he was not then suffering from a severe mental illness. To the contrary, the workload that Dr. Reuben maintained between 2000 and 2008 is evidence of his disease. The American Psychiatric Association's Fourth Edition of the Diagnostic and Statistical manual of Mental Disorders ("DSM-IV") describes the hypomanic episodes from which Dr. Reuben suffered as follows:

> A Hypomanic Episode is defined as a distinct period during which there is an abnormally and persistently elevated, expansive, or irritable mood that lasts at least 4 days (Criterion A). This period of abnormal mood must be accompanied by at least three additional symptoms from a list that includes inflated self-esteem or grandiosity (nondelusional), decreased need for sleep, pressure of speech, flight of ideas, distractibility, increased involvement in goal-directed activities or psychomotor agitation, and excessive involvement in pleasurable activities that have a high potential for painful consequences (Criterion B). ... The list of additional symptoms is identical to those that define a Manic Episode except that delusions or hallucinations cannot be present. ... In contrast to a Manic Episode, a Hypomanic Episode is not severe enough to cause marked impairment in social or occupational functioning or to require hospitalization, and there are no psychotic features (Criterion E). The change in functioning for some individuals may take the form of a marked increase in efficiency, accomplishments, or creativity. However, for others, hypomania can cause some social or occupational impairment. ...
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> The elevated mood in a Hypomanic Episode is described as euphoric, unusually good, cheerful, or high. Although the person's mood may have an infectious quality for the uninvolved observer, it is recognized as a distinct change from the usual self by those who know the person well. The expansive quality of the mood disturbance is characterized by enthusiasm for social, interpersonal, or occupational interactions. ... Characteristically, inflated self-esteem, usually at the level of uncritical self-confidence rather than grandiosity, is present (Criterion B1). ...
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> The increase in goal-directed activity may involve planning of, and participation in, multiple activities (Criterion B6). These activities are often creative and productive (e.g., writing a letter to the editor, clearing up paperwork). ... There may be impulsive activity such as buying sprees, reckless driving, or foolish business investments (Criterion B7). However, such activities are usually organized, are not bizarre, and do not result in the level of impairment that is characteristic of a Manic Episode.

See Ex. 8 (DSM-IV at 335-337). With this understanding of hypomania, it is clear that Dr. Reuben could simultaneously function as a competent anesthesiologist and suffer from a serious mental condition. Dr. Elin points out in his letter that the influence of the other, trained professionals in the operating room created boundaries and limitations on Dr. Reuben's behavior in his clinical practice that were absent when Dr. Reuben was alone in his research office. *See* Ex. 2. Moreover, as the anesthesiologist in the operating room, Dr. Reuben was accorded a significant amount of respect in that setting. Accordingly, to the extent that Dr. Reuben's disease

ignited a craving for importance and respect, that need was met. His research and writing activities, in contrast, lacked such constant oversight and were not required to adhere to strict routines and so could readily spin out of control.

The DSM-IV's description of Bipolar II Disorder confirms that Dr. Reuben's mental illness fueled his research activities in at least four distinct ways: (1) it drove and enabled him to engage in an excessive amount of professional activity; (2) it ignited Dr. Reuben's overwhelming need for attention; (3) it gave him an irrational sense of invincibility; and (4) it compelled him to engage in high risk behaviors.

As described above, the level of research activity – both legitimate and fraudulent – that Dr. Reuben engaged in between 2000 and 2008 is stunning. During these eight years, he made more than 300 presentations, and published more than thirty-five papers and review articles. Without his mental disorder, he simply would not have had the stamina to maintain all of this activity. Stated crudely, his bipolar disorder acted like a drug, giving him an extraordinary amount of energy and drastically lowering his perceived need for sleep and down-time.

Dr. Reuben's bipolar disorder also distorted his sense of reality and gave him a false sense of importance. Indeed, it is almost impossible to read the foregoing excerpt from the DSM-IV, without creating a mental checklist of Dr. Reuben's conduct in this case, including the focus on research. The fact that his disorder expressed itself most obviously in the area of research also may be due in part by his desire to impress his parents, both of whom are accomplished academics.

Dr. Reuben's bipolar condition also drove him to seek the adrenaline rush offered by high risk activities. At the same time, it made him feel invincible and blocked his ability to perceive the consequences of his actions. As outlined in the DSM-IV, a person suffering from bipolar II

disorder commonly exhibits an "excessive involvement in pleasurable activities that have a high potential for painful consequences." Dr. Elin believes that Dr. Reuben's undiagnosed condition has compelled him to engage in high risk activities with minimal appreciation of their possible negative consequences since he was a child. Dr. Elin describes that as a child and adolescent Dr. Reuben repeatedly engaged in activity that led to "suturing, fractures, lacerations, and even burns." Ex. 2. For example, he deliberately went out onto thin ice on a pond and fell through, and had to be rescued by his brother. In another instance he left a thorn stuck in his eye for twelve hours before seeking help. On yet another occasion he melted a model airplane and gave himself third degree burns.

Once Dr. Reuben became an adult, this risk seeking behavior evolved to more abstract forms of injury. It is also important to note that Dr. Reuben continually escalated the risk and the outrageousness of his conduct. At the outset, Dr. Reuben's articles were based on actual research, albeit with inflated numbers of enrolled patients. By 2008, however, the data in articles that Dr. Reuben fabricated was well beyond what any rational person would have expected to get away with. Tragically, Dr. Reuben's mental condition also handicapped his ability to halt this hypomanic, wrongful behavior. Dr. Elin concludes that Dr. Reuben was aware that his behavior was out of control, but that he lacked a rational understanding of how to stop himself. Thus, Dr. Elin believes that the only method that Dr. Reuben could devise for halting his hypomania was to kill himself, which he has attempted to do repeatedly. Suicide is also a well-established feature of Dr. Reuben's condition. The DSM-IV reports that persons suffering from bipolar II disorder are at a "significant risk" of completed suicide which occurs "in 10%-15% of persons with Bipolar II Disorder." *See* Ex. 8 (DSM-IV at 360).

B. Bipolar Disorder Is a Valid Ground for a 5K2.13 Departure

Bipolar disorder has formed the basis for substantial departure under Section 5K2.13 of the Sentencing Guidelines. In *United States v. Follette*, 990 F.Supp. 1172 (D. Neb. 1998), a defendant who was facing a recommended sentence of thirty to thirty-seven months of incarceration was given a probationary sentence of five years, including six months of home confinement and "intensive court-ordered treatment with a board-certified psychiatrist." *Id.* at 1179. Similar to Dr. Reuben, the Court in *Follette* recounted that the defendant had begun inflicting harm on herself at a young age. It also recounted that on at least two occasions, the defendant had to be hospitalized as a result of her mental disorders. It held that, "People with Bipolar disorder are seriously mentally ill. ... These patients frequently have difficulty conforming their conduct to the law because the unrealistic and extreme moods that characterize the illness seriously impair their judgment." *Id.* at 1174. It went on to reason that a substantial downward departure was warranted "to reflect the extent to which [this] reduced mental capacity contributed to the commission of the offense." *Id.* at 1178. *See also United States v. Silleg*, 311 F.3d 557 (2d Cir. 2002) (remanding to district court to examine extent to which defendant's bipolar disorder entitled him to a downward departure).

A departure under Section 5K2.13 is appropriate even when a defendant's mental illness does not impair his ability to understand the wrongfulness of his actions. For example, in *United States v. Liu*, 267 F.Supp.2d 371 (E.D.N.Y. 2003), the Court granted a four point downward departure based on the defendant's diagnosis of gambling addiction. In that case the defendant did not argue that he was unaware that the fraud he committed was wrongful. Instead, he demonstrated that his mental illness "impaired his ability to control behavior that he knew was wrong." *Id.* at 374. The Court held that "either a cognitive or volitional impairment" may serve as the basis for a 5K2.13 departure. *Id.* at 375. "[S]ection 5K2.13 does not differentiate between

instances in which the reduced mental capacity explains the behavior that constituted the crime or motivated the crime." *Id.* at 375. The focus is simply on whether the reduced mental capacity was a "contributing" cause of the offense.

As these cases instruct, the question for purposes of sentencing is not whether Dr. Reuben's mental illness prevented him from appreciating the wrongfulness of his conduct – it did not – but whether the mental illness was a contributing factor to that misconduct – it surely was. In fact, Dr. Reuben's psychotherapist believes that Dr. Reuben's undiagnosed bipolar disease not only contributed to his misconduct but was its driving force. *See* Ex. 2. His hypomania supplied the abnormal bursts of energy and drive that allowed him to write, travel, and speak at a breakneck pace, even while maintaining his busy and successful career as an anesthesiologist. The government has had Dr. Reuben independently evaluated by their own, hand-picked expert, and does not challenge this assessment. Indeed, in the context of a fraud that was so clearly not driven by greed or avarice, Dr. Reuben's mental illness provides the otherwise absent motive.[2] Finally, Dr. Reuben's disease diminished his ability to halt his misconduct, and instead impelled him to tell ever more outrageous lies. Thus, in the unchallenged opinion of his psychiatrist, the only exit strategy from this cycle of hypomanic behavior that his troubled mind could conjure was suicide.

C. Dr. Reuben Extraordinary Physical Impairment Renders Incarceration an Inappropriate Sentence

Dr. Reuben's vicious cycle of wrongful and illogical behavior has been broken by his current treaters who have successfully diagnosed Dr. Reuben and who have created a proper treatment regimen for him. He is now living with his parents who keep a careful eye on his

[2] As set forth in the Statement of Facts submitted to the Court, the grant monies generated by Dr. Reuben's research replaced fees that he would have earned practicing medicine, and like those fees, the money he received went to his practice group, Springfield Anesthesia Services. *See* Docket No. 9. There is no allegation that Dr. Reuben personally profited from his misconduct.

behavior. He also attends several support group meetings and finds solace in living with his brother, who suffers from schizophrenia. Although Dr. Elin and Dr. Jaffe both continue to consider Dr. Reuben at high risk for further suicide attempts, they believe that the stability afforded by familiar surroundings and by Dr. Reuben's regular attendance at both individual and group therapy sessions have helped him reclaim some balance in his life. Careful monitoring of medications has also stabilized his moods and has to date have staved off further suicide attempts.

Under Guideline Section 5H1.4, a sentence of home confinement is appropriate for a defendant like Dr. Reuben who suffers from "an extraordinary physical impairment." The Sentencing Guidelines do not define the term "extraordinary physical impairment" other than to explain that for a seriously infirm defendant, "home detention may be as efficient as, and less costly than, imprisonment." Therefore, Courts have relied on at least three distinct factors to determine whether a defendant's physical impairment is sufficiently "extraordinary" to warrant a downward departure under 5H1.4. These factors are: (1) whether the defendant's physical impairment would have a substantial effect on her ability to function in the prison environment, *see United States v. Johnson*, 318 F.3d 821, 826 (8th Cir. 2003); (2) if, as a result of the impairment, imprisonment would shorten the defendant's life span, making a given term a more harsh punishment than the same term for a healthy person, *see United States v. Martin*, 363 F.3d 25, 49 (1st Cir. 2004); *United States v. Krilich*, 257 F.3d 689, 693 (7th Cir. 2001); and (3) an analysis of the efficiency and cost of a full term of incarceration versus a lesser or alternative sentence in achieving deterrence, incapacitation, just punishment, and rehabilitation, *see United States v. Martinez-Guerrero*, 987 F.2d 618, 621-22 (9th Cir. 1993) (Judge Ferguson concurring); *United States v. Willis*, 322 F.Supp.2d 76, 84 (D. Mass. 2004); *United States v. Jiminez*, 212

F.Supp.2d 214, 219-20 (S.D.N.Y. 2002). As another member of this Court has stated, "Extraordinary cannot mean only those conditions which the BOP cannot handle. … If that were so, there would be no need for the [Guidelines commentary] balancing the costs of home detention and incarceration. Nor would there be any need for the modifier, 'adequately.' The BOP can take care of a given individual, but at a cost that makes no sense given the other purposes of sentencing." *Willis*, 322 F.Supp. at 84.

All three of these considerations weigh in favor of sentencing Dr. Reuben to a period of home confinement and probation rather than incarceration. Dr. Reuben's bipolar condition would lessen his ability to function in a prison setting and incarceration would very likely trigger further attempts to commit suicide. Thus, Dr. Reuben's psychiatrist, Dr. Jaffe, has opined in his correspondence to this Court that he and Dr. Elin believe that Dr. Reuben is already at a "high suicide risk," and that, "incarceration with its associated disruption of his medically necessary treatment for his serious illness, would substantially increase the likelihood of Dr. Reuben taking his own life." Ex. 6. In short, incarceration carries an unacceptably high risk that Dr. Reuben will kill himself. Moreover, it is not only more humane, but also more efficient for Dr. Reuben to remain confined to his home and continue with his currently successful the treatment regimen, than to send him to a BOP facility where he will likely need twenty-four hour surveillance and where a new treatment regimen will need to be developed.

D. Dr. Reuben Has Already Suffered Considerable Consequences For His Crime

The consequences to Dr. Reuben for his crimes began long before his guilty plea before this Court. In the Spring of 2008, Dr. Reuben went on leave from his position at BMC, and he has never returned to that facility or to the practice of medicine. After an extensive investigation into Dr. Reuben's research misconduct – in which he was completely cooperative – BMC sent notification letters to all of the journals that had published articles whose data BMC was not able

to confirm with 100% accuracy. When the medical community became aware of the numerous article retractions that flowed from these notifications, Dr. Reuben's reputation was destroyed, and there is no possibility that any journal would ever again publish an article authored by Dr. Reuben. In addition, Dr. Reuben lost his position with Springfield Anesthesia Services, and he has entered into voluntary agreement not to practice medicine with the Board of Registration in Medicine ("Board").[3] Finally, Dr. Reuben has agreed to be placed on a life-time ban from any federally funded research.

In addition to Dr. Reuben's professional losses, he has also suffered more personal losses. The stress of the events of the past two years has ended Dr. Reuben's marriage. To meet his obligation to pay restitution to the pharmaceutical companies who funded the six research articles at issue in this case and the substantial forfeiture demanded by the government, Dr. Reuben has liquidated nearly all of his savings. In sum, Dr. Reuben's crime and his illness have taken a respected researcher, anesthesiologist, and family man and left him broke and broken with no profession, and under the constant careful watch of his parents. He has lost all that he worked for over twenty years to achieve, and regardless of the sentence imposed by this Court, he will never be able to return to the work or the community that once sustained him.

III. CONCLUSION

A period of home confinement is a proper sentence in this case. As the Supreme Court has recently reiterated, there are four "goals of penal sanctions that have been recognized as legitimate -- retribution, deterrence, incapacitation, and rehabilitation." *Graham v. Florida*, ___ U.S. ___ (2010), 2010 WL 1946731 at *15. All of these objectives are achieved through a sentence of home confinement. As for retribution, Dr. Reuben already has paid a heavy price for

[3] That agreement has served as a place holder until this federal criminal proceeding is complete. Counsel anticipates that Dr. Reuben will face the option of either permanently and irrevocably resigning from the practice of medicine or undergoing a licensure revocation proceeding.

his misconduct, even though his behavior was heavily influenced by his undiagnosed bipolar condition. As for deterrence and incapacitation, there is no possibility that Dr. Reuben will ever engage in research again, and so there is no possibility that his misconduct will ever recur. Finally, as for rehabilitation, it is clear that Dr. Reuben's best chance at recovery and re-entry into society as a law abiding and productive citizen is by permitting him to continue with his current treaters and support groups and by sentencing him to home confinement under the careful attention of his family.

Respectfully submitted,

DR. SCOTT REUBEN,

By his attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that this 16th day of June, 2010, this Memorandum was filed via the Court's electronic filing system. The accompanying Exhibits and Letters of Support were mailed by first class mail to the Court and to Mr. Richard Rinaldi and were served on AUSA Jeremy Sternberg by hand delivery.

/s/ Ingrid S. Martin

Dated: June 16, 2010