

1 **BEFORE THE BOARD OF MEDICAL EXAMINERS**
2 **OF THE STATE OF NEVADA**

3 * * * * *

4 **In The Matter of Charges and**)
5)
6 **Complaint Against**)
7)
8 **MARK B. KABINS, M.D.,**)
9)
10 **Respondent.**)
_____)

Case No. 10-7510-1

FILED

FEB 03 2010

**NEVADA STATE BOARD OF
MEDICAL EXAMINERS**

11 **COMPLAINT**

12 The Investigative Committee of the Nevada State Board of Medical Examiners (Board),
13 composed of Charles N. Held, M.D., Theodore B. Berndt, M.D., and Ms. Valerie J. Clark, BSN,
14 RHU, LUTCF, by and through Edward Cousineau, General Counsel for the Board and counsel for
15 the Investigative Committee, having a reasonable basis to believe that Mark B. Kabins, M.D.,
16 hereinafter referred to as "Respondent," has violated the provisions of NRS Chapter 630, hereby
17 issues its formal Complaint, stating the Investigative Committee's charges and allegations, as
18 follows:

19 1. Respondent is currently licensed in active status to practice medicine in the state of
20 Nevada, and at all times alleged herein, was so licensed by the Nevada State Board of Medical
21 Examiners, pursuant to the provisions of Chapter 630 of the Nevada Revised Statutes.

22 2. On March 4, 2009, a United States District Court, District of Nevada, Grand Jury
23 returned an eight-count Indictment (See Exhibit 1) against Respondent, charging him with
24 multiple violations of federal law, including conspiracy, mail fraud and honest services fraud.

25 3. On November 23, 2009, a Criminal Information (See Exhibit 2) was filed with the
26 District Court, charging Respondent with one count of Misprision of Felony, a felony violation of
27 18 United States Code (U. S. C.) § 4.

28 ///

OFFICE OF THE GENERAL COUNSEL
Nevada State Board of Medical Examiners
1105 Terminal Way #301
Reno, Nevada 89502
(775) 688-2559

1 4. On November 23, 2009, a Memorandum of Plea Agreement (See Exhibit 3) was
2 filed with the District Court in which Respondent agreed to plead guilty to one count of
3 Misprision of Felony, a violation of 18 U .S. C. § 4. In conjunction with the felony plea,
4 Respondent agreed to be sentenced to five years probation with a condition of six months home
5 detention in lieu of imprisonment, to perform two hundred fifty hours of community service, and
6 to pay three million five hundred thousand dollars in restitution to a patient of Respondent related
7 to the felony plea.

8 5. On January 25, 2010, a Judgment in a Criminal Case (See Exhibit 4) was filed with
9 the District Court, which reflected acceptance by the District Court of Respondent's guilty plea
10 relating to the aforementioned Criminal Information and the probationary terms thereto.

11 **COUNT I**

12 6. All of the allegations in the above paragraphs are incorporated herein as if set forth in
13 full.

14 7. Section 630.301(9) of the Nevada Revised Statutes provides that engaging in conduct
15 that brings the medical profession into disrepute is grounds for discipline.

16 8. Respondent violated Section 630.301(9) when he plead guilty to and was convicted
17 of Misprision of Felony, a violation of 18 U .S. C. § 4.

18 **COUNT II**

19 9. All of the allegations in the above paragraphs are incorporated herein as if set forth in
20 full.

21 10. Section 630.301(11)(g) of the Nevada Revised Statutes provides that conviction of
22 any offense involving moral turpitude is grounds for disciplinary action.

23 11. Respondent violated Section 630.301(11)(g) when he plead guilty to and was
24 convicted of Misprision of Felony, a violation of 18 U .S. C. § 4.

25 12. By reason of the foregoing, Respondent is subject to discipline by the Nevada State
26 Board of Medical Examiners as provided in NRS 630.352.

27 ///

28 ///

COUNT III

1
2 13. All of the allegations in the above paragraphs are incorporated herein as if set forth in
3 full.

4 14. Section 630.306(2)(a) of the Nevada Revised Statutes provides that engaging in any
5 conduct which is intended to deceive is grounds for disciplinary action.

6 15. Respondent violated Section 630.306(2)(a) when the facts as acknowledged by
7 Respondent in the previously mentioned Memorandum of Plea Agreement indicate that he knew of
8 mail or wire fraud committed by others against a former patient of his, and that he concealed
9 material information about the crime, and that he did not as soon as possible make known the
10 crime to a proper legal authority.

11 WHEREFORE, the Investigative Committee prays that the Board conduct a hearing on the
12 Complaint herein as provided by statute, find and determine that Respondent has violated one or
13 more provisions of the Medical Practice Act (NRS Chapter 630), enter findings of fact, conclusions
14 of law and an order imposing sanctions upon Respondent according to NRS 630.352 and take such
15 other and further action as may be just and proper in these premises.

16 DATED this 3rd day of February 2010.

17
18 By: _____


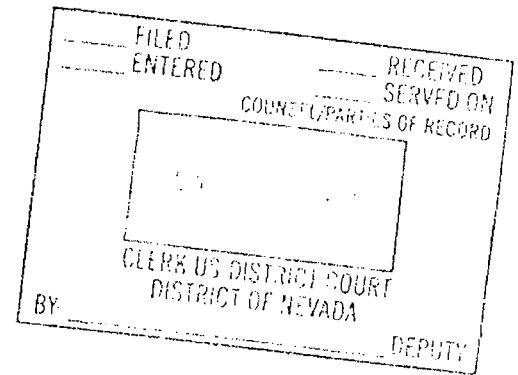

Edward Cousineau
Attorney for the Investigative Committee of the
Nevada State Board of Medical Examiners

Exhibit 1



1 GREGORY A. BROWER
United States Attorney
2 STEVEN W. MYHRE
DANIEL R. SCHIESS
3 Assistant United States Attorneys
333 Las Vegas Boulevard South, Suite 5000
4 Las Vegas, Nevada 89101
(702) 388-6336
5

6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**

8 -oOo-

9 UNITED STATES OF AMERICA,
10 PLAINTIFF,
11 vs.
12 MARK B. KABINS,
13 DEFENDANT.

CRIMINAL INDICTMENT

2:09-cr- 090

VIOLATIONS:

- 18 U.S.C. § 371 - Conspiracy
- 18 U.S.C. §§ 1341, 1346 - Mail Fraud/
Honest Services Fraud
- 18 U.S.C. § 2 - Aiding and Abetting

14
15 **THE GRAND JURY CHARGES THAT:**

16 At all times relevant to this Indictment:

17 **Background**

- 18 1. Defendant **MARK B. KABINS** was a medical doctor specializing in
19 orthopaedic spine surgery.
- 20 2. John Thalgot was a medical doctor specializing in orthopaedic spine surgery
21 and in a partnership with defendant **KABINS**.
- 22 3. Daniel Burkhead was a medical doctor specializing in anesthesiology.
- 23 4. Melodie Simon was a patient of defendant **KABINS**, Dr. Thalgot and Dr.
24 Burkhead.

25 . . .

26 . . .

1 5. Howard Awand was a medical consultant who referred personal injury
2 patients to doctors and personal injury clients to attorneys in return for payments of money.

3 6. Melodie Simon became paralyzed following complications that arose out of
4 routine spine surgery performed by defendant **KABINS** and Dr. Thalgott on August 3, 2000.

5 7. Melodie Simon had a potential medical malpractice claim against defendant
6 **KABINS** as a result of his actions and inactions during the course of her care and treatment.

7 8. Defendant **KABINS** and Dr. Thalgott believed that Melodie Simon could sue
8 them for her injuries.

9 9. Noel Gage was an attorney licensed to practice law in the State of Nevada.

10 10. In 2001, Melodie Simon hired Noel Gage to represent her in the pursuit of
11 medical malpractice claims against any medical care providers responsible for her injuries.

12 11. Noel Gage owed Melodie Simon the fiduciary duty to represent her in a way
13 that was honest and free from corruption, self-dealing, deceit, fraud, and undisclosed
14 conflicts of interest.

15 12. Defendant **KABINS**, Noel Gage, Howard Awand and Dr. Thalgott had
16 mutually beneficial financial arrangements among themselves that conflicted with Melodie
17 Simon's financial interests in her medical malpractice claims.

18 **The Scheme to Defraud**

19 13. Defendant **KABINS** and others known and unknown to the Grand Jury, aided
20 and abetted by each other, devised, intended to devise, and participated in a material
21 scheme and artifice to defraud and to obtain money and property from Melodie Simon and
22 Dr. Burkhead through false, fraudulent and material pretenses, representations, promises,
23 and half-truths, and to deprive Melodie Simon of her intangible right of honest services as
24 set forth below.

1 14. The purpose and object of the scheme and artifice was to prevent Melodie
2 Simon from suing defendant **KABINS** and Dr. Thalgott and thereby protect and conceal the
3 secret cooperation and financial arrangements that existed among the co-schemers. The
4 scheme and artifice defrauded Melodie Simon and Dr. Burkhead of money and property and
5 deprived Melodie Simon of the honest services of Noel Gage.

6 15. It was part of the scheme and artifice that defendant **KABINS** altered medical
7 records and created false and fraudulent medical records.

8 16. It was part of the scheme and artifice that defendant **KABINS** and Awand
9 corruptly referred lucrative personal injury cases to Gage to influence him not to sue
10 defendant **KABINS** and Dr. Thalgott and to compensate him for not doing so.

11 17. It was part of the scheme and artifice that defendant **KABINS** and Dr.
12 Thalgott secretly cooperated with Awand and Gage to give false and misleading testimony
13 during depositions to deceive others into believing that Dr. Burkhead was solely responsible
14 for all of Melodie Simon's injuries and that neither defendant **KABINS** nor Dr. Thalgott was
15 responsible for any of her injuries.

16 18. It was part of the scheme and artifice that defendant **KABINS** and Dr.
17 Thalgott secretly cooperated with Awand and Gage to obtain false medical evidence against
18 Dr. Burkhead and others in order to make it appear that Dr. Burkhead and others were solely
19 responsible for all of Melodie Simon's injuries and that neither defendant **KABINS** nor Dr.
20 Thalgott was responsible for any of her injuries.

21 19. It was part of the scheme and artifice that defendant **KABINS** and the co-
22 schemers concealed from Melodie Simon and Dr. Burkhead the true nature of the conduct
23 of defendant **KABINS**, the true nature of the cause of Melodie Simon's injuries, the viability
24 of her potential malpractice claims against defendant **KABINS** and Dr. Thalgott, and the true
25 nature of the cooperation, agreements and financial arrangements among the co-schemers.

26

1 20. It was part of the scheme and artifice that Gage sued Dr. Burkhead and
2 others for Melodie Simon's injuries but did not sue defendant **KABINS** and Dr. Thalgott, and
3 did, thereby, protect, conceal, and advance the financial arrangements and secret
4 agreements that existed among the co-schemers.

5 21. It was part of the scheme and artifice that defendant **KABINS** and others
6 caused Dr. Burkhead and his malpractice insurer to settle the lawsuit brought against him,
7 knowing that, as a result, Dr. Burkhead would have to pay higher insurance premiums in the
8 future.

9 COUNT ONE
10 Conspiracy
(Title 18, United States Code, Section 371)

11 22. The Grand Jury incorporates paragraphs 1 through 21 as paragraph 22 of
12 this Indictment as though set forth fully herein.

13 23. From in or about August 2000, to in or about October 2004, in the state and
14 federal District of Nevada,

15 **MARK B. KABINS,**

16 defendant herein, did conspire, confederate, and agree with others, known and unknown to
17 the Grand Jury, to commit the crime of mail fraud, in violation of Title 18, United States
18 Code, Sections 1341 and 1346.

19 The Object of the Conspiracy

20 24. The object of the conspiracy was to devise, intend to devise, and participate
21 in a material scheme and artifice to defraud and for obtaining money and property by means
22 of false, fraudulent and material pretenses, representations, and promises as to Melodie
23 Simon and Dr. Burkhead, and to deprive Melodie Simon of her right to the honest services
24 of her lawyer, Noel Gage, as set forth in paragraphs 1 through 21 of this Indictment.
25
26

Overt Acts

1
2 25. Defendant **KABINS** and others committed the following overt acts, among
3 others, in furtherance of the conspiracy.

4 A. In or about September 2001, defendant **KABINS** caused Awand to
5 refer a potentially lucrative medical malpractice case to Gage in order to influence him to not
6 to sue defendant **KABINS** and Dr. Thalgott.

7 B. In or about the fall of 2001, defendant **KABINS** and Dr. Thalgott
8 secretly met with Awand and Gage to discuss the Simon case.

9 C. In or about December 2001, Dr. Thalgott arranged for a doctor known
10 to Dr. Thalgott to act as a medical expert in the Simon case.

11 D. On or about January 1, 2002, Awand wrote a letter to defendant
12 **KABINS** wherein he confirmed a secret agreement between Gage, Awand, and defendant
13 **KABINS**, asked defendant **KABINS** to have others contact the expert whom Dr. Thalgott
14 had located, and discussed payments from **KABINS** and Thalgott to Awand for providing
15 them with malpractice protection.

16 E. In or about January 2002, defendant **KABINS** caused a report to be
17 prepared for Gage relating to the medical care and treatment provided to Simon, which
18 report contained false and fraudulent information.

19 F. On or about May 15, 2002, defendant **KABINS** falsely and fraudulently
20 testified in a civil deposition taken in Simon's case against Dr. Burkhead and others.

21 G. On or about July 24, 2002, defendant **KABINS** caused Gage to file a
22 complaint with the Southern Nevada Medical Dental Screening Panel fraudulently naming
23 Dr. Burkhead as a defendant but not naming defendant **KABINS** as a defendant.

24 H. In or about June 2003, defendant **KABINS** caused Gage to file a
25 complaint in the Eighth Judicial Court, in for Clark County, State of Nevada, fraudulently
26

1 naming Dr. Burkhead and others as defendants, but not naming defendant **KABINS** as a
2 defendant.

3 I. In or about June 2004, defendant **KABINS** caused Dr. Burkhead and
4 his malpractice insurer to agree to settle the lawsuit.

5 J. In or about October 2004, defendant **KABINS** caused Dr. Burkhead's
6 malpractice insurer to pay Simon approximately \$2,000,000 to settle the suit against Dr.
7 Burkhead.

8 K. On or about the dates set forth in Counts Two through Eight below,
9 defendant **KABINS** caused the mailings described therein to be made.

10 All in violation of Title 18, United States Code, Section 371.

11 **COUNTS TWO THROUGH EIGHT**
12 **Mail Fraud/Honest Service Fraud**
13 **(Title 18, United States Code, Section 1341 and 1346)**

14 26. The Grand Jury incorporates paragraphs 1 through 21 as paragraph 26 of
15 this Indictment as though set forth fully herein.

16 27. On or about the dates set forth below, in the State and Federal District of
17 Nevada, defendant **KABINS**, for the purpose of executing the scheme and artifice, and
18 attempting to do so, did knowingly cause to be placed in a post office and authorized
19 depository for mail matter to be sent and delivered by the United States Postal Service, and
20 deposited and caused to be deposited a matter to be sent and delivered by a private and
21 commercial interstate carrier, and knowingly caused to be delivered by mail and private and
22 commercial interstate carrier according to the direction thereon, the following items, with
23 each mailing or delivery constituting a separate count, as enumerated below:

24

25

26

<u>Count</u>	<u>Date</u>	<u>Description</u>
Eight	10/28/04	Letter from Wm. Killip to Dave Reeter, Interstate Insurance Group, Chicago, Illinois, enclosing "Notice of Entry of Order" and "Stipulation for Dismissal With Prejudice and Order."

All in violation of Title 18, United States Code, Sections 1341, 1346 and 2.

DATED: this 4 day of March 2009.

A TRUE BILL:

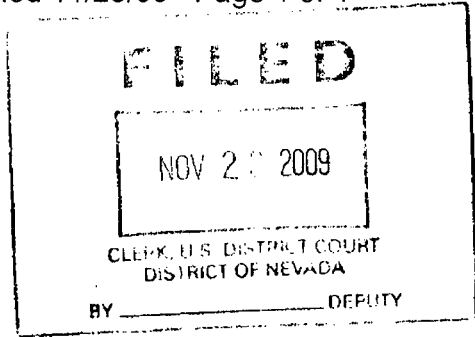
/S/
FOREPERSON OF THE GRAND JURY

GREGORY A. BROWER
United States Attorney



STEVEN W. MYHRE
DANIEL R. SCHIESS
Assistant United States Attorneys

Exhibit 2



1 DANIEL G. BOGDEN
United States Attorney
2 STEVEN W. MYHRÉ
DANIEL R. SCHIESS
3 Assistant United States Attorneys
333 Las Vegas Boulevard South
4 Suite 5000
Las Vegas, Nevada 89101
5 (702) 388-6336

6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**

9 UNITED STATES OF AMERICA,

10 Plaintiff,

11 vs.

12 MARK B. KABINS,

13 Defendant.

2:07-cr-00039-JLQ-LRL

CRIMINAL INFORMATION

14
15 The United States Attorney charges:

16 **MISPRISION OF FELONY**
17 18 U.S.C. § 4

18 1. From in or about 2001, to in or about July 2002, in the State and
19 Federal District of Nevada,

20 **MARK B. KABINS,**

21 defendant herein, having knowledge of the actual commission of a felony
22 cognizable by a court of the United States, did conceal and did not as soon as
23 possible make known the same to some judge or other person in civil or military
24 authority under the United States.

25 / / /

26 / / /

1 2. Defendant Mark B. Kabins was a medical doctor specializing in
2 orthopedic spine surgery, and practicing in partnership with Dr. John Thalgott,
3 M.D., in Las Vegas, Nevada.

4 3 On August 3, 2000, Kabins assisted Thalgott in performing spine
5 surgery on a patient named Melodie Simon. Following surgery, Ms. Simon
6 developed a severe headache, which Thalgott diagnosed as caused by a spinal fluid
7 leak. Thalgott ordered the placement of a spinal catheter, then left for vacation,
8 entrusting the postoperative care of Ms. Simon to Kabins. Dr. Daniel Burkhead, an
9 anesthesiologist, placed the catheter ordered by Thalgott on August 4, 2000, and
10 removed it on August 6, 2000.

11 4. Following removal of the catheter and while under the primary care of
12 Kabins, Ms. Simon experienced further complications that Kabins understood to be
13 caused by a spinal epidural hematoma, which required surgery. Kabins evacuated
14 the hematoma on the evening of August 9, 2000. Ms. Simon ultimately was
15 rendered paraplegic.

16 5. Kabins knew that medical experts could opine that he fell below the
17 standard of care by delaying surgery. Additionally, Kabins believed experts could
18 opine that his failure to timely remove the hematoma contributed to Ms. Simon's
19 permanent injury. Accordingly, Kabins believed that Ms. Simon could bring a
20 viable lawsuit against him.

21 6. Eventually Ms. Simon retained attorney Noel Gage to represent her in
22 a possible lawsuit against any doctor and/or other health care provider whose
23 potential negligence arguably caused her injury.

24 7. Howard Awand was a self-described medical consultant who, at all
25 relevant times, had an ongoing business and financial relationship with Kabins,
26

1 whereby Kabins received patient referrals from Awand. Kabins knew that Awand,
2 in turn referred cases from him and other doctors to certain personal injury lawyers
3 and that these lawyers made money in contingency fees from the referrals. Kabins
4 knew that these referrals could influence the personal injury lawyers' decisions
5 about whom to sue and whom not to sue.

6 8. Kabins asked Awand to intercede with Gage in order to persuade
7 Gage not to sue him and Thalgott in connection with their treatment of Ms. Simon.
8 Kabins believed Awand would seek to influence Gage by referring personal injury
9 cases to him. Awand told Kabins that he would approach Gage.

10 9. During or after a meeting in the fall of 2001, Gage told Kabins that he
11 had obtained an expert who would testify that he and Thalgott had fallen below the
12 applicable standard of care. This confirmed to Kabins that Gage could bring a
13 viable medical malpractice lawsuit against them. Nevertheless, neither Kabins nor
14 Thalgott was sued by Gage on behalf of Ms. Simon. Kabins believed that Gage's
15 decision as to whether he and Thalgott would be sued was influenced by Gage's
16 financial relationship with Awand arising from Awand's system of patient/client
17 referrals. Kabins further believed that he was not sued as a result of Awand's
18 relationship with Gage.

19 10. Kabins understood that Awand had referred personal injury cases to
20 Gage and believed that the referrals influenced Gage's decision not to sue him and
21 Thalgott. Kabins believed that the foregoing created a conflict of interest for Gage,
22 and Gage concealed this conflict of interest from Ms. Simon.

23 11. In or about January 2002, Kabins drafted a "Letter of Complaint" to
24 help Gage bring a lawsuit against other health care providers who were involved in
25 the treatment of Ms. Simon. Kabins intentionally omitted from this "Letter of
26 Complaint" material information about his meeting with Gage and Awand and about

1 Ms. Simon's condition as it related to the timing of the August 9, 2000 surgery.
2 Kabins caused Awand to mail or fax the "Letter of Complaint" from Colorado to
3 Gage in Nevada. The "Letter of Complaint" constituted an affirmative act of
4 concealment giving rise to misprision.

5 12. Based on the foregoing, Kabins knew about the crime of mail or wire
6 fraud committed by Awand and Gage, that he concealed material information about
7 the crime, and that he did not as soon as possible make known the crime to a judge
8 or other person in civil or military authority under the United States.

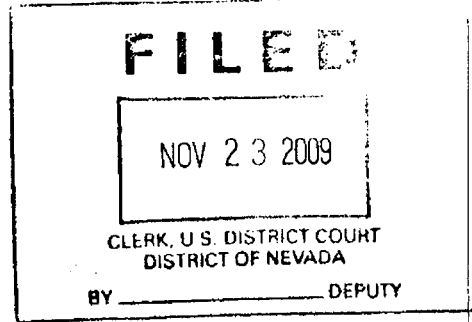
9 13. All in violation of Title 18 United States Code, Section 4.

10
11
12
13 11/23/09
14 DATED

DANIEL G. BOGDEN
United States Attorney


STEVEN W. MYHRE
DANIEL R. SCHIESS
Assistant United States Attorneys

Exhibit 3



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

DANIEL G. BOGDEN
United States Attorney
STEVEN W. MYHRE
DANIEL R. SCHIESS
Assistant United States Attorneys
333 Las Vegas Boulevard South
Suite 5000
Las Vegas, Nevada 89101
(702) 388-6336

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MARK B. KABINS,

Defendant.

2:07-cr-00039-JLQ-LRL

**MEMORANDUM OF PLEA
AGREEMENT**

The United States, by and through Daniel G. Bogden, United States Attorney, and Steven W. Myhre and Daniel R. Schiess, Assistant United States Attorneys, defendant Mark B. Kabins, M.D., and defendant's attorneys, David Z. Chesnoff, Donald M. Ré, John Spilotro, and Martin G. Weinberg, respectfully submit this Memorandum of Plea Agreement.

I.

PLEA AGREEMENT

The United States and defendant have reached the following plea agreement, which is binding on the Court under Federal Rule of Criminal Procedure 11(c)(1)(C) in the event the Court accepts the terms of this agreement as set forth below.

A. The Plea

1. On March 4, 2009, a federal grand jury in Las Vegas returned an eight-count Indictment against defendant Kabins, charging him with violations of Title 18, United States

1 Code, Sections 371 (conspiracy), 1341 (mail fraud) and 1346 (honest services fraud).

2 2. In return for the mutual promises set forth in detail herein, the parties agree
3 that the defendant will plead guilty to an Information charging one count of Misprision of
4 Felony, in violation of Title 18, United States Code, Section 4. Upon acceptance of the plea
5 under the conditions set forth below and following pronouncement of sentence on the
6 Misprision offense, the United States will move to dismiss the Indictment against the
7 defendant with prejudice.

8 **B. Additional Charges**

9 3. The United States Attorney's Office for the District of Nevada ("United States")
10 will bring no additional charge or charges against defendant arising out of the investigation
11 which culminated in the Indictment, Information, and this Plea Memorandum. The United
12 States further agrees not to bring any additional charge or charges against the defendant for
13 any offense that the defendant may have committed on or before the date he signs this plea
14 agreement and which relate to the defendant's business and practice of medicine, his
15 treatment of patients, his testimony or participation in legal cases as either a treating
16 physician or expert witness, or any financial transaction relating to any of the above, expect
17 for any offense that involves a crime of violence, unlawful distribution of narcotics, or
18 violations of federal tax laws.

19 **C. Binding Recommendations**

20 4. The parties agree that the defendant will be sentenced to five (5) years
21 probation that includes a condition of 6 months home detention as a substitute for
22 imprisonment. (USSG §5C1.1) The parties also agree that the court will order the defendant
23 to perform 250 hours of community service as directed by the Probation Office.

24 5. The parties agree that the defendant will pay restitution to Melodie Simon in
25 the amount of \$3,500,000 and will receive a waiver of claims from Ms. Simon relating to the
26 injuries she sustained during her stay at Sunrise Hospital Medical Center from August 3-19,

1 2000. Defendant agrees to cooperate with the United States Attorney's Office to effect
2 restitution on or before the date sentence is imposed by the Court.

3 **D. Sentencing Guideline Calculations**

4 6. The following guideline and sentencing provisions would apply:

5 a. The 2008 version of the Sentencing Guidelines applies;

6 b. The guideline for Misprision of Felony is USSG §2X4.1, which provides
7 as follows:

8 1) The Base Offense Level would be 13. The calculations
9 supporting this base offense level are as follows: USSG §2X4.1 provides for a base offense
10 level of "9 levels lower than the offense level for the underlying offense, but in no event less
11 than 4, or more than 19."

12 2) The underlying offense level could be 22. The calculations
13 regarding this underlying offense level are as follows: Pursuant to USSG §2B1.1, the base
14 offense level is 6 and, if the court finds the loss amount is between \$1 million and \$2.5
15 million, the special offense characteristic adjustment would be 16 levels. The parties agree
16 that the determination of the range is not relevant for purposes of this plea agreement
17 because the plea agreement binds the sentencing range to a level 10. Nonetheless, the
18 defendant takes the position that the loss is between \$1 million and \$2.5 million.

19 c. A downward adjustment of 2 levels would apply because the defendant
20 has accepted responsibility (USSG §3E1.1).

21 d. Based on the foregoing, the adjusted offense level would be 11.

22 e. The defendant's criminal history category is I.

23 f. Notwithstanding these calculations, the binding sentencing
24 recommendation is based on an offense level 10.

25 / / /

26 / / /

1 **E. Sentencing Acknowledgments**

2 7. The defendant agrees that the provisions contained in paragraphs 4 and 5
3 will not bind the Court or the government in the event that, before imposing sentence, the
4 Court determines, by a preponderance of the evidence, that the defendant:

5 a. fails to tell the truth, commits perjury, or obstructs justice in the course
6 of, or in connection with, any proceeding related to the plea to the offense of conviction or
7 to the determination and imposition of sentence for the offense of conviction;

8 b. engages in any criminal misconduct during the pendency of the
9 resolution of the instant Indictment;

10 c. fails to appear in any hearing ordered by the Court; or

11 d. violates any terms or conditions of pretrial release.

12 8. The defendant understands that the provisions of paragraphs 4 and 5 will bind
13 the Court only if and when the Court accepts this Plea Memorandum under Federal Rule of
14 Criminal Procedure 11(c)(3)(A). If the Court does not accept this Plea Memorandum, the
15 defendant may withdraw his guilty plea, and the provisions of this Plea Memorandum will be
16 null and void as to both parties.

17 9. The defendant agrees not to withdraw his plea of guilty in the event that the
18 Sentencing Guideline calculations set forth above differ from those determined by the Court
19 at sentencing, subject, however, to the Court imposing a sentence consistent with the
20 bindings recommendations in paragraphs 4 and 5 above.

21 **F. Other Sentencing Matters**

22 10. Both defendant and the United States are free to present any evidence, facts
23 or information relevant to sentencing to the United States Probation Office, or the Court, or
24 both.

25 / / /

26 / / /

1 **G. Fines and Special Assessment**

2 11. Defendant understands that the Court may impose a fine up to two-hundred
3 fifty-thousand dollars (\$250,000), due and payable immediately upon sentencing. The
4 parties are free to argue for or against a fine.

5 12. Defendant will pay the special assessment of \$100 for the count of conviction
6 at the time of sentencing.

7 **H. Civil Matter**

8 13. The defendant has reached a settlement agreement in the civil matter of
9 *Daniel Burkhead v. Mark Kabins*, Eighth Judicial District Court Clark County, Nevada, Case
10 No A587768. The parties agree that the defendant will seek a good faith settlement
11 determination by the Clark County District Court judge presiding over the matter and will
12 make a good faith effort to obtain the determination as expeditiously as possible. Should the
13 Eight Judicial District Court not approve the current settlement proposal, the parties agree
14 that the government will exclude the civil settlement condition from the terms of this
15 Agreement, and the defendant will, in good faith, continue to attempt to settle the civil matter.

16 **I. Future Proceedings and Waiver of Privilege**

17 14. Upon the entry of his plea as set forth above, the defendant knowingly and
18 voluntarily agrees to waive any claim of privilege relating to, and will allow the disclosure of,
19 any information or communication pertaining to any claim arising from the treatment and care
20 of Melodie Simon that may be protected by the attorney-client or work product privilege by
21 virtue of attorney Sherman Mayor's and/or attorney Cheryl Horner's representation of the
22 defendant. This agreement, and the waiver contained herein, is limited only to those
23 disclosures made in connection with, and sought by the parties to, the criminal proceedings
24 pending in federal court involving Howard Awand, Noel Gage, and/or the defendant, and is
25 not intended to operate as a general waiver of the aforementioned privileges extending to,
26 or for the benefit of, any third-party, any other proceeding, or any other attorney who has

1 represented the defendant. The government agrees not to oppose any motion the defendant
2 may make under Federal Rule of Evidence 502(d), requesting the Court to enter an Order
3 limiting the waiver as set forth above; however, neither this agreement, nor the waiver
4 contained herein, is contingent upon the Court entering an Order. The government agrees
5 that it will not seek any waiver of the privilege broader than that set forth above except as
6 provided by law and approved by this Court.

7 15. If the Court does not accept this plea agreement and the defendant exercises
8 his right to withdraw this plea, the government agrees that it will not use the following in any
9 future legal proceeding: (a) any information it obtains from Sherman Mayor and Cheryl
10 Horner pursuant to the defendant's waiver as provided in paragraph 14 above; (b) any
11 information resulting from any settlement or any attempts to settle the Burkhead civil matter;
12 or (c) any other matter that would be protected by Federal Rule of Evidence 410.

13 **J. Waiver of Appeal**

14 16. The defendant is aware that Title 18, United States Code, Section 3742, gives
15 the defendant a right to appeal from any sentence to be imposed for the offense of
16 conviction and that other federal statutes give the defendant the right to appeal other aspects
17 of his conviction. In exchange for concessions made by the United States in this agreement,
18 the defendant knowingly and voluntarily waives the following rights:

19 a. his right to appeal any sentence that is imposed under the terms of this
20 Plea Agreement, including his right to appeal the manner in which that sentence was
21 determined on the grounds set forth in Title 18, United States Code, Section 3742; and any
22 order of restitution, fine, and community service;

23 b. his right to appeal any aspect of his convictions, including any pretrial
24 suppression matters or other pretrial disposition of motions and issues; and

25 / / /

26 c. his right to bring any collateral attack against his convictions or

1 sentence, except for a claim of ineffective assistance of counsel.

2 **K. Additional Promises, Agreements, and Conditions**

3 17. The parties agree that no promises, agreements, and conditions have been
4 entered into other than those set forth in this Plea Memorandum, and not will be entered into
5 unless in writing and signed by all parties.

6 **L. Limitations**

7 18. This Plea Agreement is limited to the United States Attorney's Office for the
8 District of Nevada and does not bind any other federal, state or local prosecuting,
9 administrative, or regulatory authority. However, this Plea Memorandum does not prohibit
10 the United States through any agency thereof, the United States Attorney's office for the
11 District of Nevada, or any third-party from initiating or prosecuting any civil proceeding
12 directly or indirectly involving the defendant.

13 **II.**

14 **PENALTY**

15 19. The maximum penalty for violating Title 18, United States Code, Section 4,
16 is a term of imprisonment of not more than three (3) years, or a fine of not more than two-
17 hundred fifty-thousand dollars (\$250,000), or both.

18 20. The maximum term of probation is five (5) years, during which time the
19 defendant will be subject to various restrictions and requirements. Defendant understands
20 that if he violates one or more of any conditions of probation imposed, the probationary term
21 may be revoked and the defendant may be sentenced to a term of imprisonment not to
22 exceed the statutory maximum term of imprisonment provided for by law.

23 21. Defendant must pay a special assessment of \$100 for the count of conviction.

24 / / /

25 22. Defendant is required to pay for the costs of imprisonment, probation, and
26 supervised release, unless the defendant establishes that he does not have the ability to pay

1 such costs, in which case the Court may impose an alternative sanction such as community
2 service.

3 **III.**

4 **ELEMENTS**

5 23. The elements for the crime of Misprision of Felony in violation of Title 18,
6 United States Code, Sections 4, are the following:

7 First: Defendant had knowledge of the actual commission of a felony
8 cognizable by a court of the United States; and

9 Second: Defendant concealed and did not as soon as possible make known
10 the same to some judge or other person in civil or military authority
11 under the United States.

12 **IV.**

13 **FACTS THAT SUPPORT GUILTY PLEA**

14 24. Defendant is pleading guilty because he is guilty of the charged offense.

15 25. In pleading to the offense, defendant acknowledges that if he elected to go
16 to trial instead of entering this plea, the United States could prove facts sufficient to
17 establish defendant's guilt beyond a reasonable doubt.

18 26. Defendant specifically admits and declares under penalty of perjury that all
19 of the facts set forth below are true and correct:

20 a. At all relevant times, defendant Mark B. Kabins was a medical
21 doctor specializing in orthopedic spine surgery, and practicing in partnership with Dr.
22 John Thalgott, M.D., in Las Vegas, Nevada.

23 b. On August 3, 2000, Dr. Kabins assisted Dr. Thalgott in performing
24 spine surgery on a patient named Melodie Simon. Following surgery, Ms. Simon
25 developed a severe headache, which Dr. Thalgott diagnosed as caused by a spinal fluid
26 leak. Dr. Thalgott ordered the placement of a spinal catheter, then left for vacation,

1 entrusting the postoperative care of Ms. Simon to Dr. Kabins. Dr. Daniel Burkhead, an
2 anesthesiologist, placed the catheter ordered by Dr. Thalgott on August 4, 2000, and
3 removed it on August 6, 2000.

4 c. Following removal of the catheter and while under the primary care
5 of Dr. Kabins, Ms. Simon experienced further complications that Dr. Kabins understood to
6 be caused by a spinal epidural hematoma, which required surgery. Dr. Kabins evacuated
7 the hematoma on the evening of August 9, 2000. Ms. Simon ultimately was rendered
8 paraplegic.

9 d. Dr. Kabins knew that medical experts could opine that he fell below
10 the standard of care by delaying surgery. Additionally, Dr. Kabins believed experts could
11 opine that his failure to timely remove the hematoma contributed to Ms. Simon's
12 permanent injury. Accordingly, Dr. Kabins believed that Ms. Simon could bring a viable
13 lawsuit against him.

14 e. Eventually Ms. Simon retained attorney Noel Gage to represent her
15 in a possible lawsuit against any doctor and/or other health care provider whose potential
16 negligence arguably caused her injury.

17 f. Howard Awand was a self-described medical consultant who, at all
18 relevant times, had an ongoing business and financial relationship with Dr. Kabins,
19 whereby Dr. Kabins received patient referrals from Awand. Dr. Kabins knew that Awand,
20 in turn referred cases from him and other doctors to certain personal injury lawyers and
21 that these lawyers made money in contingency fees from the referrals. Dr. Kabins knew
22 that these referrals could influence the personal injury lawyers' decisions about whom to
23 sue and whom not to sue.

24 / / /

25 g. Dr. Kabins asked Awand to intercede with Gage in order to
26 persuade Gage not to sue him and Dr. Thalgott in connection with their treatment of Ms.

1 Simon. Dr. Kabins believed Awand would seek to influence Gage by referring personal
2 injury cases to him. Awand told Dr. Kabins that he would approach Gage.

3 h. During or after a meeting in the fall of 2001, Gage told Dr. Kabins
4 that he had obtained an expert who would testify that he and Dr. Thalgott had fallen
5 below the applicable standard of care. This confirmed to Dr. Kabins that Gage could
6 bring a viable medical malpractice lawsuit against them. Nevertheless, neither Dr.
7 Kabins nor Dr. Thalgott was sued by Gage on behalf of Ms. Simon. Dr. Kabins believed
8 that Gage's decision as to whether he and Dr. Thalgott would be sued was influenced by
9 Gage's financial relationship with Awand arising from Awand's system of patient/client
10 referrals. Dr. Kabins further believed that he was not sued as a result of Awand's
11 relationship with Gage.

12 i. Dr. Kabins understood that Awand had referred personal injury
13 cases to Gage and believed that the referrals influenced Gage's decision not to sue him
14 and Dr. Thalgott. Dr. Kabins believed that the foregoing created a conflict of interest for
15 Gage, and Gage concealed this conflict of interest from Ms. Simon.

16 j. Dr. Kabins thereafter drafted a "Letter of Complaint" to help Gage
17 bring a lawsuit against other health care providers who were involved in the treatment of
18 Ms. Simon. Dr. Kabins intentionally omitted from this "Letter of Complaint" material
19 information about his meeting with Gage and Awand and about Ms. Simon's condition as
20 it related to the timing of the August 9, 2000 surgery. Dr. Kabins caused Awand to mail
21 or fax the "Letter of Complaint" from Colorado to Gage in Nevada. The "Letter of
22 Complaint" constituted an affirmative act of concealment giving rise to misprision.

23 k. Based on the foregoing, Dr. Kabins admits that he knew about the
24 crime of mail or wire fraud committed by Awand and Gage, that he concealed material
25 information about the crime, and that he did not as soon as possible make known the
26 crime to a judge or other person in civil or military authority under the United States.

V.

ACKNOWLEDGMENT

1
2
3 28. Defendant acknowledges by his signature below that he has read this
4 Memorandum of Plea Agreement, that he understands the terms and conditions, and the
5 factual basis, set forth herein, that he has discussed these matters with his attorney, and
6 that the matters set forth in this Memorandum, including those facts which support a plea
7 of Guilty. The undersigned defendant acknowledges that he has been advised, and
8 understands, that by entering a plea of Guilty he is waiving, that is, giving up, certain
9 rights guaranteed to him by law and by the Constitution of the United States. Specifically,
10 he is giving up:

11 a. The right to proceed to trial by jury on the charges in the Indictment,
12 or to a trial by a judge if he and the United States both agree;

13 b. The right to confront the witnesses against him at such a trial, and
14 to cross-examine them;

15 c. The right to remain silent at such trial, with such silence not to be
16 used against him in any way;

17 d. The right, should he so choose, to testify in his own behalf at such
18 a trial;

19 e. The right to compel witnesses to appear at such a trial, and to
20 testify in his behalf; and

21 f. The right to have the assistance of an attorney at all stages of such
22 proceedings.

23 / / /

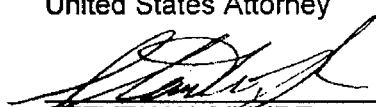
24 / / /

25
26 29. The undersigned defendant, his attorney, and the attorney for the United
States acknowledge that this Memorandum of Plea Agreement is the entire agreement

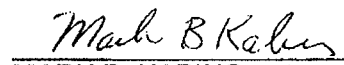
1 negotiated by and agreed to by and between the parties, and that no other promise has
2 been made or implied by either defendant, his attorney, or the attorney for the United
3 States.

4 DANIEL G. BOGDEN
United States Attorney

5
6 10/30/09
DATED


7 STEVEN W. MYHRE
8 DANIEL R. SCHIESS
Assistant United States Attorneys

9
10 10/30/09
DATED


11 MARK B. KABINS
12 Defendant

13
14 10/30/09
DATED

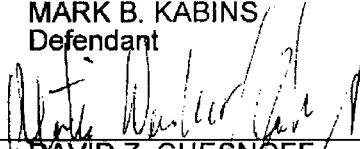

15 DAVID Z. CHESNOFF
16 DONALD RE'
17 JOHN SPILATRO
18 MARTIN G. WEINBERG
Attorneys for Defendant Kabins

Exhibit 4

AO 245B (Rev. 09/08) Judgment in a Criminal Case Sheet 1

UNITED STATES DISTRICT COURT

District of Nevada

UNITED STATES OF AMERICA
v.
MARK B. KABINS

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:07-CR-0039-JLQ-LRL

USM Number: 43751-048

David Chesnoff, Donald Re, Martin Weinberg,
John Spilotro
Defendant's Attorney

THE DEFENDANT:

X pleaded guilty to count(s) 1 of the Information

[] pleaded nolo contendere to count(s)
which was accepted by the court.

[] was found guilty on count(s)
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Table with 4 columns: Title & Section, Nature of Offense, Offense Ended, Count. Row 1: 18USC§4, Misprision of Felony, July 2002, 1

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[] The defendant has been found not guilty on count(s)

X Count(s) ALL REMAINING [] is X are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

January 14, 2010
Date of Imposition of Judgment

Justin L. Quackenbush
Signature of Judge

SENIOR, JUDGE JUSTIN L. QUACKENBUSH
Name and Title of Judge

January 22, 2010
Date

DEFENDANT: MARK B. KABINS
CASE NUMBER: 2:07-CR-0039-JLQ-LRL

PROBATION

The defendant is hereby sentenced to probation for a term of: 5 Years

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of placement on probation and at least two periodic drug tests thereafter, as determined by the court, not to exceed 104 tests annually. Revocation is mandatory for refusal to comply.

- The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. (Check, if applicable.)
- The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of probation that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) ~~the defendant shall not leave the judicial district without the permission of the court or probation officer;~~
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) ~~the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;~~
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) ~~the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;~~
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: MARK B. KABINS
CASE NUMBER: 2:07-CR-0039-JLQ-LRL

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall be confined to home confinement without electronic monitoring, for a period of 6 months.
2. The defendant during Home Confinement shall be at his residence between the hours of 9:00 pm - 6:00 am (except for religious/medical/school activities). The defendant may travel to Utah and Arizona without prior approval from probation office. Other travel through the United States the defendant must notify the Probation Officer (aside from work) not earlier than 3:00 am; if traveling.
3. The defendant when not employed at least part-time and/or enrolled in an educational or vocational program, the defendant shall perform 250 hours of community service as directed by the Probation Officer.

DEFENDANT: MARK B. KABINS
 CASE NUMBER: 2:07-CR-0039-JLQ-LRL

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 100.00	\$ Waived	\$ 3,500,000.00

- The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.
- The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
----------------------	--------------------	----------------------------	-------------------------------

TOTALS	\$ _____	\$ _____
---------------	----------	----------

X Restitution amount ordered pursuant to plea agreement \$ 3,500,000.00

- The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
 - the interest requirement is waived for the fine restitution.
 - the interest requirement for the fine restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: MARK A. KABINS
CASE NUMBER: 2:07-CR-0039-JLQ-LRL

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A Lump sum payment of \$ 3,500,100.00 due immediately, balance due
 - not later than _____, or
 - in accordance C, D, E, or F below; or
- B Payment to begin immediately (may be combined with C, D, or F below); or
- C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F Special instructions regarding the payment of criminal monetary penalties:
The defendant shall cooperate with the U.S. Attorney's Office to affect Restitution and or as directed by the U.S. Probation Office.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):
- The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.