

No. —

IN THE SUPREME COURT OF THE UNITED STATES

JUAN JOSE TULL-ABREU, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the First Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the petitioner participated in a conspiracy to commit health care fraud, in violation of 18 U.S.C. § 1349. Count One of the Indictment.
2. Whether the petitioner committed health care fraud, in violation of 18 U.S.C. § 1347. Counts Two through Nine of the Indictment.
3. Whether the petitioner committed aggravated identity theft, in violation of 18 U.S.C. § 1028A(a)(1). Counts Ten through Fifteen of the Indictment
4. Whether the petitioner provided false material information in required documents under the Controlled Substances Act, in violation of 21 U.S.C. § 843(a)(4)(A). Counts Sixteen through Nineteen of the Indictment.
5. Whether the petitioner had a meaningful opportunity to present a complete defense and to have a fair trial, as guaranteed by the Due Process Clause of the Fourteenth Amendment, the Compulsory Process or Confrontation Clauses of the Sixth Amendment, and the jurisprudence of this Court.

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Petitioner Juan Jose Tull-Abreu (Tull-Abreu) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINION BELOW

The First Circuit Court of Appeals opinion was published in *United States v. Juan Jose Tull-Abreu*, 921 F.3d 294 (1st Cir. 2019). Appendix A.

JURISDICTION

The First Circuit Court of Appeals entered its decision on April 19, 2019, and on May 23, 2019, issued an order denying petitioner’s pro se petition for panel rehearing and petitioner’s petition for rehearing en banc. Appendix B. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court’s decision on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED
(See also Exhibit C)

1. Conspiracy to commit health care fraud under 18 U.S.C. § 1349. Count 1.
2. Health care fraud under 18 U.S.C. § 1347. Counts Two through Nine.
3. Aggravated Identity Theft under 18 U.S.C. § 1028A. Counts Ten through Fifteen.
4. Providing false material information in required documents under the Controlled Substances Act under 21 U.S.C. § 843(a)(4)(A).
5. Denial of a meaningful opportunity to present a complete defense and to have a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment, the Compulsory Process or Confrontation Clauses of the Sixth Amendment, and the jurisprudence of this Court.

STATEMENT OF THE CASE

On August 12, 2014, the petitioner, Juan Jose Tull-Abreu, M.D., was indicted in the United States District Court for the District of Puerto Rico, that exercised jurisdiction under 18 U.S.C. § 3231. Criminal case 14-484 (JAG). The charges in the Indictment were: one count of a conspiracy to commit health care fraud, in violation of 18 U.S.C. § 1349; eight counts of health care fraud, in violation of 18 U.S.C. § 1347; 6 counts of aggravated identity theft, in violation of 18 U.S.C. § 1028A(a)(1); and four counts of furnishing false and fraudulent material information in prescriptions for controlled substances, in violation of 21 U.S.C. § 843(a)(4)(A).

During the 14-day jury trial, some incidents took place that stopped Dr. Tull-Abreu from testifying on his own behalf, as it had been his expressed wish in different occasions, in order to clarify and explain the complexities of his medical practice, his dealings with the insurance companies, billing practices, secretarial personnel, and other matters. Petitioner Tull-Abreu was

found guilty on all 19 counts of the Indictment. After a timely notice of appeal, the Court of Appeals for the First Circuit assumed jurisdiction under 28 U.S.C. § 1291.

Tull-Abreu's trial counsel filed the 3rd Rule 29 motion together with a Rule 33 motion for new trial, and the same unsworn statement under penalty of perjury, under 28 U.S.C § 1746, was attached to both motions. Basically, Tull-Abreu requested in his statement under penalty of perjury, the Rule 29 acquittal granting, or a new trial where he could tell his side of the story, because at the trial he felt overwhelmed and was intimidated by the prosecution's remarks after he was called to the stand. Appendix E, p. 22 Both motions were denied by the district court judge. Since Tull-Abreu's appeal's counsel was not the same as his trial counsel, and Dr. Tull-Abreu knew his case very well, it was decided that he was going to file pro se supplemental briefs where he could explain and clarify what he was not allowed to say at the trial.

In his first intervention, on his Supplemental Pro Se Brief, Dr. Tull-Abreu raises three grounds to give his side of the story. Appendix F: Excerpt from Supplemental Pro-Se Brief, pp. 23-24.

The Conspiracy to commit health care fraud.

Count One of the Indictment, the conspiracy to commit health care fraud charge. The essence of a conspiracy is the agreement to commit an *illegal* act. The agreement is what differentiates it from aiding and abetting. *Iannelli v. United States*, 420 U.S. 770 (1975) And what makes a conspiracy so dangerous? *Iannelli*, at 778, citing *Callanan v. United States*, 364 U.S. 587, 593-594(1961), gives some reasons; like, e.g, that "the danger that a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise." In this case, the government did not offer evidence of an agreement; it simply told the judge at sidebars that

Tull-Abreu's three secretaries were coconspirators and it called them as government witnesses against Dr. Tull-Abreu. It did not ask any of them if they had an agreement to commit health care fraud with Tull-Abreu; on the contrary, each of the secretaries testified that they followed the orders that he gave them in relation to their job duties - the Nuremberg defense. See Appendix H: Excerpt from Tull-Abreu's secretaries' testimonies at trial as government witnesses: Jury Trial Day 5: Maritza Nunez Nieves; Jury Trial Day 9: Shenna Mendez Gonzalez; Jury Trial Day 12: Nilda Velez Roman. Besides, the government did not contradict any of the secretaries' testimony, none of them made any money, besides their meager salary, nor fit the profile of a danger to society depicted in *Callanan, supra*.

Health Care Fraud.

In Counts Two through Nine of the Indictment, the health care fraud, the government charged Tull-Abreu with 8 specific instances of 18 U.S.C. § 1347 violations, involving 6 different patients; the 6 patients were included in the government's trial witness list, but at the trial only one of them testified: Harry Gomez Zeno (Counts Four and Five of the Indictment), Jury Trial Day 10 transcript. pp. 4-29. Any clarification to be made by Dr. Tull-Abreu, regarding Gomez Zeno's testimony was truncated by the incident stated above that started when Tull-Abreu took the stand to testify and the prosecutor interrupted him. Although Gomez Zeno's testimony did not offer anything to find him the petitioner guilty, Tull-Abreu could have clarified many things.

In Counts Two, Three, Six, Seven, Eight, and Nine the government did not present evidence and they should be dismissed outright. See Appendix G: Excerpt from Appellant's Pro Se Rebuttal Brief to the Supplemental Answering Brief for the United States. The government violated Tull-Abreu's Sixth Amendment rights when it chose not to call the 5 witnesses to the stand at trial,

thus impeding, among other things, cross-examination by Tull-Abreu. The government argues that Tull-Abreu could have called them as witnesses himself, but they were already announced as government witnesses in their trial list. And, it is not a criminal defendant's duty to put on witnesses that are part of an indictment count against him. The government failed to prove these counts by failing to call the witnesses to testify, the individuals named as parts of the allegations.

Aggravated Identity Theft.

The petitioner challenges the decision of the First Circuit in this case, because now it backs up from its findings in *United States v. Berroa*, 856 F.3d 141,155-157 (1st Cir. 2017), or now its interpretation of the holdings: “Notably, each of these examples involved the defendant’s use of personal information to pass himself or herself off as another person, **or the transfer of such information to a third party for use in a similar manner.**” (Emphasis added). *Berroa*, at 156, I read the emphasized addition to mean the transfer to a third party to pass himself or herself off also for the victim, and not like the government that went back to its old definitions and unlimited interpretation of the statute and of the definition of the term “use”. See *Bailey v. United States*, 516 U.S. 137, 143 (1995), to continue with the ambiguity, which usually works in their favor. See also, Appendix I: Excerpt from Petition for Rehearing En Banc pp. 43-46.

Providing false material information in Controlled Substances Act documents.

There was no false material information provided in any of the four Percocet prescriptions issued by Dr. Tull-Abreu (Counts Sixteen through Nineteen of the Indictment) to four different patients, on four different dates, the Title 21 Counts. The jury during deliberation sent their First Jury Note asking for guidance, basically, about what was the material information or false statements in the four Percocet prescriptions. According to the government, the dates on the four

prescriptions were the material false statements or information, since they were issued while Dr. Tull-Abreu was traveling outside of Puerto Rico on those dates. The second Jury Note asked for additional clarification as to the writing of prescriptions for controlled substances. One of the government witnesses, DEA investigator Zaphir Narvaez had testified that controlled substance prescriptions can be predated, and the jury wanted to confirm if that was true. During the cross examination of DEA investigator Narvaez, defense counsel gave her a copy of 21 Code of Federal Regulations § 1306.12 to refresh her memory, and then counsel asked her if medications like Percocet could be prescribed in advance and she answered: “They can be prescribed in advance.” And then proceeded to describe the procedure that had to be followed. (Jury Trial Transcript Day 2, pp. 47-48). The answer given to the Jury Note was to refer to the jury instruction on credibility of witnesses and evaluate the witness testimony accordingly.

21 CFR § 1306.05 reads:

“Manner of issuance of prescriptions.

(a) All prescriptions for controlled substances shall be dated as of, and signed on, the day when issued and shall bear the full name and address of the patient, the drug name, strength, dosage form, quantity prescribed, directions for use, and the name, address and registration number of the practitioner.”

The text of this CFR section was supposed to be effective until June 1, 2010 (See Appendix L: Excerpt from 21 CFR § 1306.05 p.78; however, it was extended and it is still valid and this date was precisely what was missing from the four prescriptions: the date of issuance. (See Appendix J pp. 51-56: Excerpt from Brief for the Appellant. Four Percocet prescriptions omitting the four dates of issuance, but giving the date to be dispensed by the pharmacist; not giving false material information or statements Note that the four prescriptions were dispensed by the Pharmacy on the date that Dr. Tull-Abreu wrote on each prescription. See Appendix J pp. 57-68: Excerpt from Brief

for the Appellant: Date on prescription, dispensed on: pp. 57 and 58; 60 and 61; 63 and 64; and 66 and 67.

These four patients were regular patients at the Arecibo office that received this medication periodically, so the secretaries called them and they picked the prescription when it was time to have it dispensed at the Pharmacy in Arecibo. No false information or statements. If Tull-Abreu had been able to testify, he could have explained and clarified the situation.

Meaningful opportunity to present a complete defense and to have a fair trial.

Dr. Tull-Abreu's rights under the Sixth and Fourteenth Amendments of the U.S. Constitution to a fair trial and to present a complete defense were violated. Tull-Abreu expressed his intention and desire to testify in at least four occasions: when defense counsel called him to the witness stand; twice when the judge asked him during the trial; on a statement under penalty of perjury (Appendix E p. 22); when he filed his supplemental pro se briefs in the First Circuit Court of Appeals, to no avail. Tull-Abreu knows that he is the only one who can clarify and explain things, otherwise he could not present a complete defense. See Appendix I: Excerpts from Petition for Rehearing En Banc, pp. 47-50.

Although Tull-Abreu keeps trying to be heard, he has been denied the complete opportunity to do so like in a new trial. He has heard different reasons for the denial, e.g.: because he was allowed to confer with his counsel for half an hour before he decided not to testify; because all the things that judge and prosecutor told him were true; that there was a jury instruction to the effect that they could not infer anything from Tull-Abreu's silence; that when it is obvious the defendant is guilty, since there was a substantial amount of evidence against him; etc; however, Tull-Abreu expressed how he felt about it in his statement under penalty of perjury. Appendix E p.22.

A criminal defendant is guaranteed by the Constitution a meaningful opportunity to present a complete defense. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). *Holmes v. South Carolina*, 547 U.S. 319 (2006), discusses the federal constitutional rights of a criminal defendant and rules of evidence that deny the exclusion of defense evidence. In this case there were four Rule 403 objections that the judge denied for evidence that was repetitive, cumulative, or highly prejudicial to defendant. Appendix I pp. 48-50.

We respectfully request a new trial.

REASONS FOR GRANTING THE PETITION

1. A conspiracy needs more proof than relying on the impression of the jury, mainly if the reasons given in *Callanan v. United States*, 364 U.S. 587 (1961), have the importance that it deserves otherwise it is just another weapon in the government's arsenal to obtain more convictions.

2. In this case, the health care fraud had to be proven with all the witnesses that were announced in the governments' witness list provided at trial, or a presumption in favor of the defendant should immediately arise and the charges dismissed.

3. The aggravated identity theft need this Court's guidance to clarify the different views of some of the Circuits and to define its language to avoid vagueness.

4. The false statements and information in the four controlled substances of prescriptions are obvious errors of the government and the charges should be dismissed, or allow Dr. Tull-Abreu to have a new trial where he explains the missing issuance date on the prescription, because a rational jury could not draw any conclusion with the confusing and misleading evidence submitted.

5. A new trial should be ordered where Dr. Tull-Abreu has a meaningful opportunity to present a complete defense and have a fair trial.

CONCLUSION

For the foregoing reasons, the petitioner, respectfully requests that the petition for a writ of certiorari be granted

Respectfully submitted.

In San Juan, Puerto Rico, on August 19, 2019.

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