No. _____

In The

Supreme Court of the United States

SHELTON BARNES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Does the Panel Decision of the United States Court of Appeals for the Fifth Circuit, rendered October 28, 2020 (979 F.3d 283 (5th Cir. 2020), WL 6304699, rehearing denied January 4, 2021 (hereinafter Panel Decision), conflict with its own authority, holding and reversal in *U.S. v. Ganji*, 880 F.3d 760 (5th Cir. 2018), which is not substantially distinguishable from the present case, and with the same lack of criminal intent and sufficiency of evidence?

(2) Does the Panel Decision conflict with the holding and reversal in the co-defendant and alleged co-conspirator appeal in *United States v. Nora*, 988 F.3d 823 (5th Cir. 2021), WL 716628, No. 18-31078, rendered February 24, 2021, by a different Panel of the Fifth Circuit?

(3) Does the Panel Decision conflict with *U.S. v. Nora*, *supra*, and *U.S. v. Ganji*, *supra*, both decisions from the Fifth Circuit?

(4) Does the Panel Decision create a lack of uniformity with *U.S. v. Nora*, *supra*, and *U.S. v. Ganji*, *supra*, and other cases, particularly regarding sufficiency of evidence for the knowledge and intent requisite to sustain a conviction?

(5) Did the improper comments and conduct by the government prosecutor, during the government's rebuttal closing argument, as repeatedly found by the District Court and Fifth Circuit Panel, constitute a violation of Petitioner's rights to due process of law and a fair trial; and, unconstitutionally and

QUESTIONS PRESENTED – Continued

substantially impeach the integrity of the proceedings, at that key and crucial time period, especially without the ability of the victim, Petitioner, to defend himself from it?

(6) Was the District Court's and Panel's reading and interpretation of the obstruction statute, 18 U.S.C. 1516(a), as applied to that count of conviction, Count 47, reasonable; or, unconstitutionally overly broad to fit the government's case and sustain the convictions, even though the statute can clearly and reasonably be read to require that Petitioner, and not Medicare, be the recipient of $100,000.00 per year benefit from his Medicare billings, or, at least, so confusing as to violate the rule of lenity, and due process of law.

(7) Did the purported expert, Dr. Brobson Lutz's unqualified, confusing, misleading and uneducated testimony as an expert, particularly in the area of homebound status, unconstitutionally and unreasonably confuse the jury and deprive Dr. Barnes of due process of law and a fair trial?

PARTIES TO THE PROCEEDING

Petitioner, Shelton Barnes, was the defendant in the District Court proceedings and appellant in the Court of Appeals proceedings. Respondent, United States of America, was the plaintiff in the District Court proceedings and appellee in the Court of Appeals proceedings. App. 1, 64, 66.

RELATED PROCEEDINGS

United States v. Shelton Barnes, 979 F.3d 283 (5th Cir. 2020).

United States v. Nora, 988 F.3d 823 (5th Cir. 2021).

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

PETITION FOR A WRIT OF CERTIORARI

Petitioner/Appellant/Defendant, Shelton Barnes, through undersigned counsel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case. App. 1, 64, 66.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is published at 979 F.3d 283 (5th Cir. 2020), WL 6304699. The proceedings and record in the District Court are filed in Case No. 15-cr-61, Section E, The Honorable Susie Morgan presiding. On January 24, 2021, the Petition for Rehearing was denied. App. 80.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered on October 28, 2020. This Court extended the time within which to file any Petition for a Writ of Certiorari to 150 days from this date of rendering by the Court of Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the U.S. Constitution, 5th Amendment – Due Process of Law, 6th Amendment – Fair Trial, 18 U.S.C. § 371, 18 U.S.C. § 1347, 18 U.S.C. § 1516, 18 U.S.C. § 1516(a).

STATEMENT OF THE CASE

On March 12, 2015, the grand jury in the Eastern District of Louisiana, returned a 26-Count Indictment against twenty African-American healthcare providers, ranging from aides and nurses to physicians, for conspiracy to commit healthcare fraud, 18 U.S.C. § 1347; conspiracy to pay and receive kickbacks, 18 U.S.C. § 371; and nineteen substantive counts of healthcare fraud, pertaining to specified patient beneficiaries, 18 U.S.C. § 1347. The original Indictment also named and included lead defendant, Lisa A. Crinel, the owner of Abide Home Health, her daughter, manager, Wilnesha Jakes. Lisa Crinel and others were also charged separately in Counts 23-26, for fraud in connection with BP claims.

Petitioner, Dr. Barnes, now age 67, was a named defendant in both conspiracy counts and many of the substantive counts. Prior to these charges, Petitioner had a completely clean record, and served his community for more than forty years treating low economic, Medicaid and Medicare, patients in Orleans Parish, and mainly African Americans and minorities.

Petitioner, as an internal medicine specialist, shared office space with his Pediatrician wife, who testified at trial. Petitioner taught medical students, residents, and nurse practitioners for many years.

After the First Superseding Indictment, filed April 21, 2016, and numerous guilty pleas, the Second Superseding Indictment was filed September 8, 2016, against the remaining six defendants, including Dr. Barnes and three other physicians, Dr. Henry Evans, Dr. Gregory Molden, Dr. Michael Jones; Paula Jones, the wife of defendant Dr. Michael Jones; and Abide's administrator, clerk or dispatcher, Jonathan Nora. These are the six defendants that proceeded jointly to trial.

Dr. Barnes was named in the conspiracy Counts 1, healthcare fraud, and 2, kickbacks, and with substantive healthcare fraud Counts 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17; along with obstruction of a federal audit in Count 47, 18 U.S.C. § 1516. He exercised his right to a jury trial, which commenced on April 10, 2017, and concluded on May 9, 2017, with a guilty verdict against him on all counts in which he was charged. ROA.2887, 15853.

At the close of the government's evidence, and at the close of all evidence prior to submission to the jury, Dr. Barnes moved for Judgment of Acquittal under Rule 29, F.R.Crim.P. Dr. Barnes filed post-trial motions challenging the sufficiency of the evidence and errors committed by the government and the court, to wit: Memorandum in Support of Dr. Shelton Barnes Rule

29 Motion (Doc. 1052, ROA.2702); Motion for Judgment of Acquittal, and, in the Alternative for New Trial, and in Further Alternative, to Arrest Judgment (Doc. 1074, ROA.2908), Rebuttal Memorandum Submitted by Dr. Shelton Barnes (Doc. 1168, ROA.3083), Supplemental Memorandum (Doc. 1419, ROA.3166), Second Supplemental Memorandum by Dr. Shelton Barnes (Doc. 1435, ROA.3192), Reply Memorandum (Doc. 1461, ROA.3304). All defense motions were denied by the District Court.

Dr. Barnes was sentenced to a term of imprisonment for 60 months, and restitution in the amount of $10,850,229.00. ROA.3508, 3547.

Dr. Barnes perfected his appeal. Oral argument was held on November 6, 2019. The Panel rendered its unanimous decision on October 28, 2020, affirming the District Court rulings and convictions. *U.S. v. Barnes, et al.*, 979 F.3d 283 (5th Cir. 2020). Rehearing was denied on January 4, 2021. Petitioner, Dr. Barnes, thus, files this Petition.

REASONS FOR GRANTING THE PETITION

SUMMARY

The Opinion and holding of the Fifth Circuit Panel, 979 F.3d 283 (5th Cir. 2020), is erroneous and unconstitutional. Due to the shortened time and space limitations, Petitioner is unable to set forth all pertinent facts, so he adopts, repeats and incorporates his

statement of facts in his Brief of Appellant, Doc. 514957710, Pgs. 5-49. These facts show that Petitioner is covered by the precedent of *U.S. v. Ganji, et al.*, 880 F.3d 760 (5th Cir. 2018), and that there was no criminal intent according to the *Ganji*, *supra*, standard, imputed to Dr. Barnes for the violations of conspiracy, healthcare fraud and kickbacks, and obstruction of justice. The Fifth Circuit abandoned and disregarded its own holding and description of specific intent described in *Ganji*, *supra*, and refused to apply it in the present case, or ignored facts in the record that would require application of *Ganji*, *supra*, thereby setting forth a conflict in the standards in two cases in the Fifth Circuit, emanating from the Eastern District of Louisiana.

The companion case of Petitioner's co-defendant, Jonathan Nora, *U.S. v. Nora*, 988 F.3d 823 (5th Cir. 2021), followed the same reasoning as *Ganji*, *supra*, and held the government to the strict standard of knowledge and intent, similar to *Ganji*, *supra*, and reversed and vacated Mr. Nora's convictions, tragically, after he had begun serving his sentence of imprisonment. The standard of knowledge and criminal intent in *Ganji*, *supra*, and *Nora*, *supra*, on the one hand, and the lower standard, in the Fifth Circuit's affirmation herein, on the other hand, are at substantial odds and cannot be reconciled.

The Fifth and Sixth Amendment requirements of due process of law and a fair trial mandate reversal under the Constitutional standards described in *Ganji*,

supra, and *Nora*, *supra*, rather than the present Fifth Circuit lower standard.

The government's closing rebuttal argument constituted improper prosecutorial comment and conduct, as repeatedly recognized by the District Court and the Fifth Circuit, and substantially and materially infected the proceedings and impeached the integrity of them.

The jurisdictional element of $100,000 per year in 18 U.S.C. § 1516(a) was totally lacking.

The testimony of the purported expert, Dr. Brobson Lutz, should never have been allowed.

ARGUMENT

The Supreme Court must grant this Petition for the following reasons.

CONFLICT OF AUTHORITIES – INSUFFICIENCY OF KNOWLEDGE AND INTENT

If the reasoning, holding and precedent of *U.S. v. Ganji*, *supra*, and *U.S. v. Nora*, *supra*, were followed, as they should be, the Panel erroneously upheld the guilty verdicts against Dr. Barnes. There is no question that, if Dr. Barnes' facts are similar to the healthcare providers in *Ganji*, *supra*, and the reasoning in *Nora*, *supra*, the verdicts and Panel opinion must be reversed. The Panel admitted that " . . . , of [c]ourse Barnes' case

bears some similarities to *Ganji*. But we strongly disagree with his assessment that his case is 'practically identical, or more than substantially so,' to *Ganji*. Perhaps the most significant difference is the fact that this case is one of 'the vast majority' of concert of action cases [] [in which] the [government] presents an insider with direct evidence of the conspiratorial scheme." *U.S. v. Barnes*, *supra*, at Page 296.

The Panel emphasized the lack of proof of knowledge on the part of the *Ganji*, *supra*, defendants, thus justifying reversal therein, and, particularly, that there was no "insider" proof in that case, but that Petitioner, Dr. Barnes, was a knowing member of the conspiracy and committed the acts in the Indictment per insider testimony. The Panel relied on testimony of Rhonda Maberry, Dr. Barnes' PA, who pleaded guilty to conspiring with him to commit healthcare fraud; and the testimony of Lisa Crinel, the owner of the Abide facility and lead witness for the government, who also pleaded guilty, and her daughter Wilnesha Jakes, who was given a pass, diversion, in return for her mother's guilty plea. The Court also relied on testimony by Eleisha Williams, Dr. Barnes' biller, who, along with Ms. Maberry, prepared documents for an audit that the government claimed was fraudulent and obstructed justice. Ms. Williams also pleaded guilty without mentioning Dr. Barnes in her Factual Basis. The Panel found that the testimony of these felons, pleading and cooperating witnesses, created sufficient inferences of guilt beyond a reasonable doubt. What the Panel did, however, was cherry pick certain statements made by

these witnesses, mainly on direct examination, without mentioning, much less considering, substantial countervailing statements by them in direct and cross examination. The Panel simply ignored other key facts, which taken as true from government witnesses, can lead only to a conclusion of reasonable doubt – both respective sets of testimony cannot be true.

The following ignored facts and evidence that came out under oath during the government's case substantially oppose and contradict the cherry picked, out of context statements of these witnesses on which the Panel's opinion was based to show, non-substantially, that there was "insider" proof of criminal intent. The following facts in the record, when considered and weighed along with the Panel's limited chosen facts, necessarily result in reason doubt.

The lead government witness, and owner of Abide, Lisa Crinel, made so many exculpatory statements, countervailing to the Panel's distinguishment of *Ganji*, *supra*, that the government prosecutor blew up and attempted to impeach her own witness. First, Ms. Crinel testified repeatedly that she did not believe that she had violated the law (ROA.8171, 8172, 8174, 8188, 8191, 8192, 8190), in any aspect of the charges against her and the defendants, except for her own violations of fraudulent case mix diagnosis committed with her own internal staff, with no involvement by any of the doctors, which was confirmed by government witnesses Linda Johnston, who was not charged in this case, ROA.8460, 8463-8468, and Gaynell Leal, ROA.9016,

9023-9028, 9060, 9063. ROA.7122-7126, ROA.8267, 8270. That was not mentioned in the Panel opinion.

Next, Ms. Crinel testified that the only reason she pleaded guilty was that the government gave diversion to her daughter (ROA.6931-6933), who was at the top management of Abide, and the return of much jewelry and other expensive items. ROA.6937-6942, ROA.8178-8182.

The Panel also failed to mention that, in no part of Ms. Crinel's direct or cross examination, did she testify to any knowledge on the part of Dr. Barnes regarding eligibility of patients and the homebound status that he referred and certified. She did not testify in direct or cross examination that Dr. Barnes knowingly certified or recertified ineligible patients.

It is true that Ms. Crinel stated on direct, equivocally, that her patients did not need home health, (ROA.7143, 7144), but, on cross examination, she stated emphatically that "they were all medically necessary" . . . "they were all good, right? – Correct." ROA.8269. The Panel made no mention of that key fact.

Contrary to Lisa Crinel's testimony regarding Dr. Barnes' Medical Director contract, and what she expected of him, she stated that he fulfilled the terms of his contract and even earned a raise without requesting one. ROA.8018, 8019, 8026, 8027, 8194, 8195, 8196, 8197.

The Panel also did not mention that Ms. Crinel stated *under cross examination* that there was *no*

conspiracy whatsoever with Dr. Barnes and the other doctors. ROA.8329, 8331, to wit:

Leading up to a later impeachment of its own witness, Ms. Crinel, the government asked her on direct examination if the Abide patients needed home health, and she stated that they did, but then reversed her answer:

BY MS. SULLIVAN:

Q. Okay. Did all of your patients need home care?

A. I would like to think they did.

Q. Did they?

A. No, they didn't.

ROA.7143, 44.

On cross examination, Ms. Crinel testified that she believed that all Abide patients certified by the defendant doctors were eligible and medically necessary, to wit:

Q. And you just testified earlier today that none of these doctors were certifying any 485s that weren't medically necessary, correct?

A. *I would think they were all medically necessary.*

Q. *They were all good, right?*

A. *Correct*.

(Emphasis added.) ROA.8269.

So, the government's lead witness, Ms. Crinel, an alleged conspirator, to prove that patients were not homebound, were not eligible, the witness who completely ran Abide, and was there all day, every day and night, stated that *all of the Abide patients, including those referred and/or certified, recertified by Dr. Barnes, were homebound*. This defeated the entire government case and was not brought out by the government on direct examination.

Ms. Crinel provided all information to Mark Dyer, her CPA, and held nothing back. ROA.8047. He reviewed regular day-to-day bookkeeping at month end, and spoke to him every week and month. ROA.8047. He never told her she was doing anything wrong – his advice was financial. ROA.8051, 8054. She gave all the facts regarding marketers to Mr. Dyer and attorney Pizza. ROA.8059. Mr. Dyer knew that Dr. Barnes was being paid monthly checks under his Medical Director contract, and referring patients, and knew of payments to Ms. Maberry and Ms. Williams, as a marketer. ROA.8006, 8065, 8066.

Ms. Crinel stated *under cross examination* that she disclosed to her CPA, Mr. Dyer, that these doctors were being paid for referrals, and that there was *no* conspiracy, to wit:

> Q. And with regard to your CPA, Mr. Dyer –
>
> A. Correct.
>
> Q. – did you tell him, "Look, I'm paying money to these doctors for referrals"? Did you tell him that directly and say that?

> A. I'm sure Mark and I had a conversation.
>
> Q. Now, was he part of the conspiracy?
>
> A. Was Mark part of the conspiracy? He knew I was paying for referrals to the doctors. Now, as far as being part of a conspiracy, *I never thought I had a conspiracy going on*. So I would say, no, I didn't think he was part of a conspiracy.
>
> Q. So when you talked with Mr. Dyer about the referrals, you didn't think you were doing anything wrong; and he didn't correct you, correct?
>
> A. Correct.

ROA.8329. (Emphasis added.)

She repeated that there was no conspiracy with the doctors. ROA.8329, 8331.

> Q. But to your knowledge, he was not a member of the conspiracy?
>
> A. *I didn't think it was a conspiracy going on for him to be a member of*.
>
> Q. *Because you didn't think you were in a conspiracy at that time?*
>
> A. *No, I didn't*. (Emphasis added.)

Following the truthful testimony under oath by Ms. Crinel during cross examination, the government erupted and attempted to impeach her. The government reminded Ms. Crinel of her plea, and Factual Basis, and other statements, but she stood firm that she

first learned of any criminal exposure from her new counsel. ROA.8403, 8405, 8422, 8423, 8428. In spite of the government's repeated leading questions, Ms. Crinel reconfirmed the internal case manager conspiracy for changing diagnosis, without knowledge or input from doctors. ROA.8440, 8442, 8444.

Why did not the Panel even address those sworn exculpatory statements?

So, the "insider" testimony arguably required by *Ganji*, *supra*, was not supplied by the lead government conspirator and witness, Lisa Crinel.

The testimony of Lisa Crinel's daughter, Wilnesha Jakes, which provided her mother with the motive to plead guilty to a crime that her mother did not think was illegal at pertinent times, also did not provide "insider" information. She actually supported his work under his Medical Director contract. ROA.6462-6464. She also believed that there was nothing illegal about paying Dr. Barnes for patient referrals. ROA.6307, and did not believe it was illegal to employ marketers. ROA.6442. This was hardly an inculpatory insider testimony.

The testimony of Eleisha Williams also directly contradicted any contention by the Panel that she was an insider providing insider information incriminating to Dr. Barnes. Yet, her exculpatory facts were not mentioned by the Panel. She did not discuss Dr. Barnes' G-Code billing with him. ROA.9725. Dr. Barnes did not instruct her or anyone else to perform any fraudulent or unlawful services in addressing the batch of

rejection letters from Medicare that were holding up Dr. Barnes' billings, and was the subject of the government's claims of obstruction of justice in the audit. ROA.9726-9728, 10301. There was no input from Dr. Barnes for her preparation of the documents that were needed for the audit. ROA.9729, 9734, 9735, 10394. Dr. Barnes was not even present when she was performing the supposed illegal services. ROA.10321.

The Panel also did not address Ms. Williams' private, secret and concealed arrangement with others to split referral fees, all without the knowledge of Dr. Barnes. ROA.9741, 9742, 10321-10323.

Much unlike an insider, Ms. Williams never believed that she was violating any laws. ROA.10312. Dr. Barnes never told her to do anything wrong, she never suspected that he was doing anything illegal, and would not have worked for him if she had believed so. ROA.10312, 10313, 10321, 10352. Ms. Williams pleaded guilty to a marketing offense, which was probably lawful under *Ganji*, *supra*, ROA.10330, as she never felt like she was violating the law at any pertinent time. Her marketing plea under her Factual Basis made no mention of Dr. Barnes and it had nothing to do with him. ROA.10330, 10331. The government followed its *modus operandi* and also sought to impeach Ms. Williams, rather than accept her's and Ms. Crinel's truth. ROA.10343, 10344, 10347.

There was no information from Ms. Williams that could remotely be deemed "insider" knowledge of Dr. Barnes' criminal intent.

The only other witness that could provide "insider" testimony was Rhonda Maberry, Dr. Barnes' PA. Certain statements that she made regarding her personal violations, and not necessarily Dr. Barnes', was also mentioned by the Panel as probative of Dr. Barnes' criminal intent, and contrary to the treatment of Dr. Murray's admission or plea in *Ganji*, *supra*, which were found not to be probative of Dr. Ganji's intent.

The Panel ignored the following.

Ms. Maberry never told Dr. Barnes that she was signing 485 voucher forms for Dr. Barnes for patients she had not seen. ROA.1391. She never did tell Dr. Barnes that she was billing for patients she had not seen and was committing fraud on Medicare. ROA.13196. This is completely contrary to nefarious insider, conspiratorial, information requisite for criminal intent.

Ms. Maberry also testified that she told Dr. Barnes that patients were kept in home health for long periods of time, but not that she or Dr. Barnes were doing anything wrong – she only impuned Lisa Crinel for that. ROA.13080.

Ms. Maberry also stated on direct examination that she told Dr. Barnes that some of the patients were not homebound, but that's all she said about it. ROA.13129. She did not specify that she or Dr. Barnes were responsible for that. And, again, she reasonably could again have been impuning Lisa Crinel.

Ms. Maberry testified that Dr. Barnes merely "implied" that she should fill in information on audit forms. ROA.13151. Similarly, it was only "implied" that she had to do wrong as part of her job. More specifically, Dr. Barnes never told her to violate the law. ROA.13171. She also fessed up to Dr. Barnes that she was going to the FBI, which she did not, "and tell them everything that has been going on that *I've done*. I did say that to him." But, she never did say to Dr. Barnes that *he* was also committing fraud in any way – only what she had done. ROA.13195. Dr. Barnes did not respond – he did not tell Ms. Maberry not to report to the FBI.

With regard to the "bag of audit letters," Dr. Barnes only told her that the forms had to be completed for the audit. ROA.13221, 13222. He never did direct and tell her what to do, only to answer the letters, but not how to do it. ROA.13221, 13222. He did not tell her to falsify or make up any records.

Actually, Ms. Maberry's testimony about Dr. Barnes being a bad record keeper fits within the negligence or lax category in *Ganji*, *supra*, which does not establish a crime.

The above, as well as the entire record, supports a finding that there was not sufficient evidence, especially from an "insider," to establish guilty knowledge, specific intent on the part of Dr. Barnes. It is clear that the testimony of the above witnesses, and others, establish guilt on their own part, but without any proof of knowledge or involvement by Dr. Barnes, which falls

within the exonerating treatment of Dr. Murray's guilt in *Ganji*, *supra*.

To the extent that *Ganji*, *supra*, requires an "insider" to establish knowledge and intent on the part of Dr. Barnes, these "insiders," Ms. Crinel, Ms. Williams and Ms. Maberry, as well as Ms. Jakes, provided no such linkage, criminally, to Dr. Barnes. This was tantamount to the admissions by government witness, Dr. Murray, in *Ganji*, *supra*, admitting his own guilt, but not being able to impute that guilty knowledge to Dr. Ganji. *Ganji*, *supra*, at 772, 773, 778. The above facts, which were not considered, or were ignored by the Panel, actually exonerate Dr. Barnes.

This also applies to all of the substantive counts in the Indictment for specific beneficiaries. Neither Dr. Lutz nor any other witness testified, or could have testified, that they told Dr. Barnes that patients were not homebound. None of them provided such assessment to Dr. Barnes. All inferences fail.

The above justification for reversal under *Ganji*, *supra*, is more than sufficient. Adding to that is the properly applied standards in *U.S. v. Nora*, *supra*, from the same Court of Appeals, *but a different Panel*, resulting in reversal for Mr. Nora, a co-defendant of Petitioner, strictly on grounds of lack of knowledge and intent like in *Ganji*, *supra*. It is hard to find a more telltale, glaring admission of the inconsistency, conflict, and lack of due process of law, when one Panel, in the present case, disregards facts showing lack of

knowledge and intent for Petitioner, but, yet, a different Panel, a short time later, finds them.

If the standards described in *Nora*, *supra*, as well as *Ganji*, *supra*, had been followed in the present case, Petitioner's convictions would have been reversed. Mr. Nora was a dispatcher for the criminal enterprise, Abide Home Health, working directly under lead admitted and convicted conspirator, Lisa Crinel, and was truly an insider in the illegal organization. The facts are well set forth in *Nora*, *supra*. What the court in *Nora*, *supra*, found lacking, was that even though fraud and wrongdoing was taking place all around him, and probably even in the same room, he lacked knowledge of the illegality of billing for ineligible patients and the other allegations of fraud similar to those against Dr. Barnes. The court found that there was no specific evidence that Mr. Nora was involved with these allegations, even though they were happening all around him, or that unlawful kickbacks were occurring for doctors that he lined up for unlawful services not provided, *et al*. The court found that there simply was no evidence that "Nora acted with 'bad purpose' in carrying out his responsibilities at Abide." *Id.* at Page 831. The Panel found that the following is insufficient evidence to justify a conviction, to wit: "A juror would have to make a speculative leap about the content of these trainings and meetings – that they somehow alerted Nora to the unlawfulness of Abide's practices and the actions he took to support them. A rational juror would need more to conclude that Nora acted 'willfully.'" *Id.* at Page 831. The same should apply to Petitioner –

neither Dr. Lutz, nor Lisa Crinel, nor the nurses who pleaded guilty, even those close to him, *never* told Dr. Barnes that, based on their observations, patients he was certifying were not homebound and eligible. The jury had to make a "speculative leap" to reach that conclusion.

Directly on point with Petitioner herein, "the government identifies no evidence that he [Nora] knew of any of Abide's patients were not actually homebound, or that he knew he was assigning patients to nurses or doctors who were willing to run a file of regulations and risk their licenses. *Id.* at Page 832. Further, in spite of the fact "that the government had the cooperation of chief orchestrator of Abide's fraud but nevertheless failed to elicit testimony directly establishing the knowing complicity of Nora is especially telling." This is exactly what occurred with Petitioner, Dr. Barnes. Lisa Crinel would not testify explicitly, specifically or directly, that she had conspiratorial conversations with Dr. Barnes, or gave him knowledge of such activities. She even stated that she believed that all of the patients were eligible and there was no conspiracy with the doctors. *Id.* at Page 833.

The court also found lacking the government's position that Mr. Nora must have known the unlawfulness, because of his longtime role working for Abide, and his "proximity to the fraudulent activities" can lead to an inference of knowledge of fraud. *Id.* at Page 833. Well, if it were not a sufficient inference of Mr. Nora, it absolutely cannot be for Dr. Barnes, who did not work on the premises of Abide, and evidence

suggested that he only visited a couple of times a month when necessary to serve as Medical Director. No one bothered to tell him of the fraud and the illegal activities, including his own nurses on whom he relied, lawfully under the regulations. And, the "culture" at Abide is not sufficient to input "bad purpose." *Id.* at Page 830.

Similar to the fallback position in *Ganji*, *supra*, that negligence and lax practices do not satisfy criminal intent, the Panel found that Mr. Nora's closeness "would only make Nora guilty of negligently participating in a fraud – it does not prove that Nora acted 'willfully' in facilitating ghosting and the fraud it furthered." *Id.* at Page 832.

The entire decision in *Nora*, *supra*, is commended to this Court for obvious resolution in favor of Petitioner, Dr. Barnes.

REVERSIBLE ERROR BY IMPROPER PERSONAL ATTACK BY PROSECUTOR DURING REBUTTAL CLOSE

During the cross examination on the traverse of Dr. Lutz's qualifications to testify as an expert, he was describing his medical practice, in part, as follows:

> Q. Do you see patients in the morning and in the afternoon?
>
> A. Yes, sir. Except we don't see them on Friday afternoons.

> Q. Why is that?
>
> A. We take Friday afternoons off.
>
> Q. That's where we know each other from, from Galatoire's, right?
>
> A. I learned that from attorneys, yes, sir, to take Friday afternoon off.
>
> Q. But you only have lunch at Galatoire's on Fridays?
>
> A. No, I don't eat there on Galatoire's at lunch. There's too many attorneys. They make too much noise.

(ROA.10067, 10068.)

During the closing argument by counsel for Paula Jones, he stated, inoffensively, that "Dr. Lutz goes to Galatoire's." (ROA.15764.)

Substantively, offensively and inflammatorily, the government counsel, during her rebuttal closing argument, responded, as follows:

> He [Dr. Lutz] is not an elitist. He worked for the City of New Orleans when these defendants, *these elite defendants* probably weren't out of medical school. He worked for the City of New Orleans in home health for the inner city. So that's offensive that this man can't go out and have a martini at a place he said he did. *Well, he won't because these defense attorneys are there*.

(Emphasis added.) ROA.15769, 15770.

> . . . These are *elite* people in the city of New Orleans. They've got four medical degrees among them. They've got a cardiologist fellowship among them. We've got a nurse. We've got somebody that brags about having a –

(Emphasis added.) ROA.15770.

Government counsel did so in an explosive and boisterous way, after she crossed the courtroom from the podium near the jury to the other side of the room where the defense tables were located, and looked directly at undersigned counsel and others, just a few feet away, and made these statements.

Shortly thereafter, and at the appropriate time, undersigned counsel and others, particularly Jonathan Nora's counsel, who is an Episcopal Priest, interrupted and approached the bench just as government counsel was about to repeat that Dr. Lutz "brags about having a. . . ." Counsel gave the court reasons for their objections, as well as in post-trial motions, that the attack against the defendants as elitist appealed to character and class; that it was a fiction that undersigned counsel had ever gone to Galatoire's and drank liquor; that he has not consumed an alcoholic beverage since the early 1970's; that it was downright offensive; and, that the government counsel should make an apology to the court and jury. ROA.15771. The government's statement also implicated Rule 404(a)(1), Federal Rules of Evidence, as impugning the character of the defendants and their counsel to bring about a conviction. Shockingly, government counsel did not apologize either at the bench or in open court in front of the jury,

and the court did not instruct the jury to disregard the government's non-evidentiary and unconstitutional statements.

Although the court passed up the opportunity in front of the jury to right the wrong committed by the government's improper argument, the court did address these errors in its Order and Reasons denying all post-trial motions. ROA.3315, 3400. After citing Fifth Circuit standards for prosecutorial statements during closing argument, the court held that "[w]ith regard to the government's rebuttal comments on the 'elite' status of the Defendants and temperance of defense counsel, the *Court find that the comments were improper*." (Emphasis added.) ROA.3402. "The court did not admonish the government in front of the jury or otherwise issue a curative instruction at the time, *which weighs in favor of Mr. Barnes*." (Emphasis added.) ROA.3402, 3403. The court reasoned that these improper comments did not constitute reversible error, and may have been partially induced by other counsel. The court failed to recognize, however, that undersigned counsel for Dr. Barnes, who needed credibility for himself and his client at that crucial time in the trial, was deemed a boozer by the government, and his client an elitist. Nothing counsel for Dr. Barnes said induced or caused the government's inflammatory reaction, and the court failed to recognize that government counsel approached undersigned counsel and Dr. Barnes right in front of where they were sitting, in full view and hearing of the jury, who would soon deliberate. So, even if another party at the table somehow

induced the comment, which did not happen, reversible harm was caused against Dr. Barnes and his counsel.

The prosecutor's rebuttal argument violated Dr. Barnes' rights to due process of law and a fair trial, the Fifth and Sixth Amendments. She referred to the doctor defendants as "elite," apparently because they became specialized physicians and "highly educated." ROA.15435. On top of that, she attacked the integrity and credibility of defense counsel charged with the highest responsibility in our profession – representing citizens charged with crimes, who suffer the risk and penalty of loss of freedom and property. She stated, unprovokedly, that "these defense attorneys," including undersigned counsel, frequent Galatoire's for martinis on Friday afternoons. "These defense attorneys" represented their clients in the most ethical and professional way possible, and nothing they did justified such an attack on their character in front of the jury. Undersigned counsel has devoted himself solely to the practice of law for more than forty-seven years, and has not consumed any alcoholic beverage for more than forty-five of them to the present. And, he has *never* attended Galatoire's on any Friday afternoon, or any other time and drank alcohol.

It was shocking, especially without reprimand by the Court, for the United States government to make such a claim, publicly, in front of the jury, without apology, and without correction and instruction by the court. It should have been told to the jury that the government attorney did not tell the truth to the jury on

that point, which, if reprimanded and corrected by the court, would have impugned her credibility. Yet, she proceeded with impunity. Her conduct was so wrong, that speculation on whether it had an impact on the jury need not be suggested.

The improper comments and conduct by government counsel were not limited to any particular count in the Indictment for which Dr. Barnes was convicted – it applied to the entire case against him.

The following jurisprudence supports reversal for the "improper" comments, as found by the trial judge. ROA.3402. *United States v. Bennett*, 874 F.3d 236, 254 (5th Cir. 2017); *United States v. Mendoza*, 522 F.3d 482, 491 (5th Cir. 2008); *United States v. Morganfield*, 501 F.3d 453, 467 (5th Cir. 2007); *Morganfield*, *supra* (quoting *United States v. Insaulgarat*, 378 F.3d 456, 461 (5th Cir. 2004); *United States v. Andrews*, 22 F.3d 1328, 1341 (5th Cir. 1994); *United States v. Murrah*, 888 F.2d 24, 26 (5th Cir. 1989); *United States v. Dorr*, 636 F.2d 117, 120 (5th Cir. Unit A Feb. 1981).

In the instant case, the prosecutor made statements similar to ones that this Court has condemned on multiple other occasions. Specifically, she urged convictions based, in part, on her own personal belief and on evidence that had not been presented at trial. She said of defendants, "these are elite people," which is a statement not based on any witness's testimony or documentary evidence and amounts to nothing more than her own personal opinion. Similarly, the accusations leveled against defense counsel that they spend their

Friday afternoons drinking martinis at Galatoire's has no basis in reality, let alone the trial record. As the district court admits, these statements were improper and constitute error.

Accord: United States v. Smith, 814 F.3d 268, 276 (5th Cir. 2016); *United States v. Garza*, 608 F.2d 659, 666 (5th Cir. 1979); *United States v. Gracia*, 522 F.3d 597 (5th Cir. 2008); *United States v. Raney*, 633 F.3d 385, 395-396 (5th Cir. 2011) ("*These types of improper remarks substantially effect a defendant's rights and the integrity of this court.*") (Emphasis added.)

The jury was not instructed to disregard the prosecutor's comments on his "elite" status or his attorney's allegedly lush behavior. Instead, the trial court's overruling of defense counsel's objections invited consideration of those negative and false attack's on their character. The context in which the statements were made is vitally important on this point – here sits a doctor accused of neglecting the care of patients who primarily are impoverished and underserved members of our community, and a United States prosecutor – the voice of the United States Government – calls him an elitist. Indeed, any reasonable beliefs jurors held that Dr. Barnes cared enough about his patients not to defraud them intentionally were likely dashed when the prosecutor labeled him an elitist. And, these statements were made on the prosecutor's closing rebuttal, so the jurors' last mental image before they went into deliberation was likely the false one of the elitist doctors and their defense counsel cavorting in the rooms of Galatoire's, martinis in hand, while their patients

and clients were left to fend for themselves. Here, the prosecutor crossed the line. She forgot her role as prosecutor "is not that it shall win a case, but that justice shall be done." *United States v. Smith*, *supra*, Pg. 277. Because the prosecutor's misconduct substantially affected the fairness, integrity, and public reputation of the proceedings, a reversal is warranted.

The prosecutor's statements also constituted prohibited character evidence, in violation of Federal Rule of Evidence, Rule 404(b)(1).

The prosecutor's accusations that the defendants are elite and their legal representatives lushes bear not just on their credibility, but on their character as well. The negative connotation that comes with being an "elitist," especially in this day and age where class awareness seems heightened, was that those in the elite class do not care about those in classes below them. The implication is that Dr. Barnes and his co-defendants were not concerned with the little people they were supposed to be serving and, therefore, were more likely to defraud them. This false and unfounded character attack was a thinly veiled offer of proof that Dr. Barnes acted in accordance with his alleged "elite" character on the specific occasions that the Government claims were fraud, which is, by definition, prohibited character evidence. Being that this was one of the last points made to the jury before deliberation, it is likely that the verdict was seriously affected.

The District Court acknowledged that the prosecutors' comments during its rebuttal closing argument

was "improper," but that the Court erroneously, and mistakenly, did not take any action in front of the jury. Also, not unexpectedly, the government did not apologize for its conduct. The District Court felt that this was a small part of a very long trial, with much evidence adduced against the defendants, which belied the crucial and strategic fact that it occurred during the government's rebuttal closing, emotionally and boisterously, when the defense had no opportunity to rebut it. Actually, that was one of the last things the jury heard before deliberating – that the defendant doctors were elitists and their lawyers hung out at the elite restaurant, Galatoires, on Friday afternoons, sipping alcohol. And, it was not just one blip in the trial, or the government's closing, it was a major part thereof. Government counsel at the top of her voice approached the defense table and shouted her remarks to everyone, including undersigned counsel who does not consume alcohol and has never gone to Galatoires on any afternoon and drink alcohol. But, that was the impression given to this jury, who must stand guard on justice, and the lives of these highly qualified African-American doctors, healthcare providers, sitting next to their lawyers who were doing everything they could to save and preserve their clients' freedom. Yet, the District Court and the Panel throw all of that out of the window, thereby permitting it to happen again, and destroy the integrity of the trial proceedings.

The Panel mentioned multiple times that, along with the District Court, "the prosecutor's comments were improper."

> The prosecutor's description of the defendants as elitist was arguably in response to the defenses initial attacks against Dr. Lutz. But even assuming that comment was appropriate, no similar justification validates the prosecutions comments aimed at defense counsel. Attacking defense counsel was unwarranted, unprovoked, and irrelevant. The district court therefore correctly concluded that the prosecution's remarks during rebuttal were improper.

979 F.3d at 299.

Nevertheless, in spite of this lower standard, the Panel agreed with the District Court that "the comments were but a small part of a long trial," with "abundant evidence of [Barnes'] guilt." *Id.*, 979 F.3d at 299. The Panel found "the case against Barnes was strong," as a viewpoint for the prosecutors' improper comments, thereby providing justification and a green light for it to happen again. *Id.* at Page 299. The government, in effect, was permitted to attack the character, not only of the defendants, but of their counsel, all outside any rule of evidence. The jury was then free to disregard everything that the defendants' attorneys stated to the jury.

COUNT 47 – OBSTRUCTION OF FEDERAL AUDIT – LACK OF JURISDICTIONAL ELEMENT

Following the close of the government's evidence, and at the close of all evidence, defendant, Dr. Shelton

Barnes, made his oral Rule 29 motion. One of the grounds thereof was that the government did not prove beyond a reasonable doubt the jurisdictional and essential element under Count 47, Obstruction of a Federal Audit, 18 U.S.C. § 1516(a), and set forth in Count 47 of the Second Superseding Indictment, and on ROA.5201, 5202 of the Court's Jury Instructions. ROA.25169.

In further support thereof, Dr. Barnes filed his post-trial memorandum in support (Doc. 1052, ROA.2702). In its Order and Reasons (Doc. 1078, ROA.2937), the court erroneously denied the Rule 29 motion for Count 47. The court ruled that Dr. Barnes' interpretation of 18 U.S.C. § 1516, that the $100,000 jurisdictional amount applied to Dr. Barnes, and his receipts, was unreasonable, as the $100,000 jurisdictional element falls on another government agency, Medicare, as the only reasonable interpretation. Supporting or countervailing jurisprudence and authorities could not be found by the parties and the court.

The reasons for this jurisdictional deficiency, and the grounds for the Rule 29 motion, are as follows.

The government must prove beyond a reasonable doubt that Dr. Barnes, "with intent to deceive or defraud the United States" influenced, obstructed or impeded Pinnacle in the performance of its official duties "relating to a *person*, entity, or program receiving in excess of $100,000, directly or indirectly, from the United States in any one-year period under a contract or subcontract, ..." (Emphasis added.) The common-sense

view of this statute is that Dr. Barnes, "as a person," must have received funds of the United States exceeding $100,000 "in any one-year period." The government failed to prove this jurisdictional threshold. The government may have proven that Dr. Barnes received in excess of $100,000, total, during the six-year period of the indictment, but it did not prove, and could not prove, because it did not happen, that Dr. Barnes received in excess of $100,000 in any one year. That was fatal to the existence of Count 47.

It is clear from government Exhibit 1211, *et seq.*, (ROA.82857) containing the numerous Pinnacle audit letters, which are addressed solely to Dr. Barnes, in Logansport, Louisiana, "Dear Doctor or Supplier," that he, and he alone, was being audited. Clearly, it was Dr. Barnes' oversight, G-code billing that was the sole target and subject of Pinnacle's audit contract.

The government may argue that the recipient of the statutory threshold was a "program," and that "program" is Medicare, itself. This makes no sense, because that would mean that the United States, paid $100,000, to an agency of the United States, i.e., Medicare – that the United States paid *to itself* $100,000 in any one year. Medicare is the government. The intent on the face of the statute is that any person, such as Dr. Barnes, or a program, must be separate from the United States, and receive in excess of $100,000 from the U.S., in any one-year period, to be covered by 18 U.S.C. § 1516(a).

The face of the statute further illustrates the unreasonableness of the government's and the court's interpretation that the government itself, i.e., Medicare, is the recipient, when the statute states that the funds are provided " . . . *from* the United States in any one year period. . . ." (18 U.S.C. § 1516(a).) There would be no need to show funds *from* the payor, the United States, to itself, Medicare, because the United States already has the money – it is only sending funds to itself, according to the government and the court. This is an unreasonable interpretation and must be stricken.

If there is any doubt on this coverage, and this Court believes that the statute is ambiguous, the Rule of Lenity applies. *U.S. v. Plasser American Corp., et al.*, 57 F.Supp. 140 (E.D. PA, 1999).

The exceptional importance of the Panel's affirmation of this Count is that it writes out of Congress' statute, 18 U.S.C. § 1516(a), the jurisdictional element that the government must prove beyond a reasonable doubt – that "a person, entity or program . . . " must receive "an excess of $100,000, directly or indirectly, *from the United States* in any one year period under a contract or subcontract. . . ." (Emphasis added.) How can the United States provide something to itself, in excess of $100,000, yearly, when it already has the $100,000? The Panel's opinion makes no sense. The government already has the $100,000, and it is a fallacious requirement to say that it must provide $100,000 annually to itself, i.e. the Medicare program. The recipient of the $100,000 must, in reasonable interpretation, be a third party, such as Dr. Barnes. Medicare has received more

than $100,000 from the United States, as Medicare *is* the United States – it does not have to receive anything from itself, from what it already has in its coffers. To make that element sensible, the recipient has to be someone who receives the money "from the United States," and that can only be a third party, such as Dr. Barnes. The Panel was interpreting the statute to suit the government's lack of evidence, and created a new rule.

The Panel's explanation that, "in this case, the audit was undoubtedly *related* to Medicare, a program receiving in an excess of $100,000 . . . from the United States." (Pg. 10.) But, being "related" to Medicare, is not part of the statute – it has nothing to do with providing money from the United States to a person or entity. Certainly, the audit was "undoubtedly related to Medicare," but, so what? That does not mean that the vendor or contractor, Dr. Barnes, received that jurisdictional amount. Further, how can, according to the statute, funds be provided "from the United States in any one year period" the payor, to any payee, who is the United States, itself, i.e. Medicare. The United States already has the money – it would only be sending funds to itself, according to the government and the Court. This is an unreasonable interpretation and must be stricken by the Panel.

The Panel states that this clear interpretation from the face of the statute "would inherently thwart Congress's intentions. . . ." (Pgs. 10, 11.) But, Congress's intentions must be reasonable and make sense, and

not be a twisted view for the government to send money to itself to save the statute.

The government completely failed to even attempt to prove that Dr. Barnes received $100,000 in any year. The evidence showed that he clearly did not.

DR. LUTZ

Petitioner/Appellant Dr. Barnes adopts as his own the briefs, argument and presentation of Co-Defendants/Appellants, Petitioner, Dr. Henry Evans, and others, on all issues related to Dr. Lutz.

CONCLUSION

For the foregoing reasons, Dr. Shelton Barnes prays the Court to grant his Writ of Certiorari and reverse the convictions against him.

Respectfully submitted,

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