

IN THE
SUPREME COURT OF THE UNITED STATES

Michael D. Bikundi, Sr.

v.

**UNITED STATES OF AMERICA
AND FLORENCE BIKUNDI,**

Respondents

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit**

PETITION FOR A WRIT OF CERTIORARI

STEVEN R. KIERSH
Counsel of Record
5335 Wisconsin Avenue, N.W., Suite 440
Washington, D.C. 20015
Skiersh@aol.com

Counsel for Petitioner
Michael Bikundi

*Member of the Bar of the
United States Supreme Court*

QUESTION PRESENTED

1. Whether a district court has an obligation to impose a meaningful sanction for a material and highly prejudicial violation of Federal Rule of Criminal Procedure 16

TABLE OF CONTENTS

| | Page |
|--|------|
| QUESTIONS PRESENTED..... | i |
| PARTIES TO THE PROCEEDINGS..... | ii |
| RELATED PROCEEDINGS..... | iii |
| TABLE OF AUTHORITIES..... | iv |
| OPINIONS BELOW..... | v |
| JURISDICTION..... | vi |
| STATEMENT OF THE CASE..... | ix |
| REASONS FOR GRANTING THE PETITION..... | ix |
| ARGUMENT..... | 1 |
| CONCLUSION..... | 4 |

PARTIES TO THE PROCEEDINGS

Petitioner Michael Bikundi was a defendant in the district court proceedings and an appellant in the court of appeals proceedings.

Respondent United States of America initiated the proceedings in the district court and was the appellee in the court of appeals proceedings.

Florence Bikundi was a defendant in the district court proceedings and an appellant in the court of appeals proceedings.

Christian S. Asongcha a/k/a Chris Asong; Melissa A. Williams; Elvis N. Atabe; Carlson M. Igwacho; Irene M. Igwacho; Bernice W. Igwacho; and Atawan Mundu John were defendants below but did not participate in the trial or court of appeals proceedings, except, in some cases, as trial witnesses.

RELATED PROCEEDINGS

The following reflects related cases pertaining to the various defendants named in the December 18, 2014 Superseding Indictment:

1. *United States v. Michael Bikundi Sr.* No. 14-CR-30 (D.D.C.), judgment entered June 3, 2016 (ECF #542)
2. *United States v. Florence Bikundi*, No. 14-CR-30 (D.D.C.), judgment entered June 3, 2016 (ECF #544)
3. *United States v. Christian S. Asongcha*, No. 14-CR-30 (D.D.C.), pending
4. *United States v. Melissa A. Williams*, No. 14-CR-30 (D.D.C.), judgment entered May 27, 2016 (ECF #532)
5. *United States v. Elvis N. Atabe*, No. 14-CR-30 (D.D.C.), judgment entered June 10, 2016 (ECF #555)
6. *United States v. Carlson M. Igwacho*, No. 14-CR-30 (D.D.C.), judgment entered June 10, 2016 (ECF #557)
7. *United States v. Irene M. Igwacho*, No. 14-CR-30 (D.D.C.), judgment entered May 20, 2016 (ECF #521)

8. *United States v. Berenice W. Igwacho*, No. 14-CR-30 (D.D.C.), judgment entered April 25, 2016 (ECF #505)
9. *United States v. Atawan Mundu John*, No. 14-CR-30 (D.D.C.), pending
10. *United States v. Florence Bikundi*, No. 15-3013 (D.C. Cir.), judgment entered March 25, 2015
11. *United States v. Michael Bikundi, Sr.*, No. 16-3066 (D.C. Cir.), judgment entered June 11, 2019
12. *United States v. Florence Bikundi*, No. 16-3067 (D.C. Cir.), judgment entered June 11, 2019

TABLE OF AUTHORITIES

| CASES | PAGE |
|--|-------------|
| United States v. Brazil, 102 F.3d 1120 (1999)..... | 3 |
| United States v. Trevino, 556 F.2d 1265 (5 th Cir. 1977)..... | 3 |
| Wardius v. Oregon, 412 U.S. 470 (1993)..... | 1 |
| TREATISE | |
| 2 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure (4 th Ed. 2018)..... | 1 |
| FEDERAL RULES | |
| Federal Rules of Criminal Procedure 16..... | 1 |

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-68a) is reported at 926 F.3d 761. The memorandum opinion of the district court denying petitioner's motion for judgment of acquittal or, alternatively, new trial (App. 98a-225a) is not reported.

JURISDICTION

The court of appeals entered its judgment on June 11, 2019, and denied a petition for rehearing on October 4, 2019 (App. 226a-227a). On December 11, 2019, Chief Justice Roberts extended the time for filing a petition for a writ of certiorari to and including March 2, 2020. App. 235a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULES INVOLVED

Federal Rule of Criminal Procedure 16

STATEMENT OF THE CASE

The opinion of the D.C. Circuit, while acknowledging a serious and material violation to Federal Rule of Criminal Procedure 16, simply discounted the necessity of imposing a significant sanction for the violation. This allowance is in conflict with decisions of this Court and other Circuits.

In the concurring opinion, Circuit Judge Rogers noted,

In other circumstances, such conduct as occurred here would raise concerns identified by the Supreme Court and this court in view of the underlying purposes of Rule 16. That would oblige a district judge to ensure an appropriate sanction for a violation of Rule 16.

The distinguishing feature between this case and other cases referenced by Judge Rogers appears to be the vigorous cross-examination of the witness who presented the subject data. However, the record was clear that despite the rigorous cross-examination, defendant was unable to present a complete defense because he was deprived of an opportunity to investigate the data. The report was produced at the end of the government's case and there simply was no way to investigate the data. A mistrial with prejudice would have satisfied Michael Bikundi's right to present a complete defense by allowing a complete investigation of a material evidence.

Defendants, during the pre-trial phase of the proceedings, repeatedly requested the government to identify all patients alleged to be involved with Medicaid submissions and false and fraudulent claims. It was not until three weeks into the trial that the government notified the defendants of the existence of 567 beneficiaries who received services from defendants but who did not qualify for such services. The government made repeated reference to this information during the evidentiary phase of the proceedings and during closing arguments. The trial record was clear that at least a month before commencement of the trial the prosecutor had requested that the Director of Health Care operations for the District of Columbia government (Shearer) prepare a report to quantify the scope of the fraud as charged to defendants related to 567 beneficiaries.

Michael Binkundi vigorously opposed the introduction. Of the testimony related to the 567 beneficiaries, defendants argued that it was highly prejudicial as the inference was that the Medicaid services stopped upon the arrests of the defendants therefore demonstrating that the Medicaid services were not necessary. This argument was advanced by the United States during trial and during closing argument.

The United States was permitted to proceed with highly prejudicial testimony at the end of its case that defendants had no means to challenge.

REASONS FOR GRANTING THE PETITION

In a concurring opinion Circuit Judge Rogers clearly recognized the importance of this issue and how it affects the integrity of the trial proceedings. Her very narrow distinction from opinions of this Court and other circuits, that defendants vigorously cross-examined the witness through whom the testimony was admitted, did not satisfactorily address the central issue of whether defendants were denied their right to present a complete defense.

This Court should address and reiterate that in order for the federal rules work to enforce the rights of individuals charged with crimes it is imperative that significant sanctions should be imposed for violations of the rules of criminal procedure.

i. Whether a district court has an obligation to impose an actual sanction for an acknowledged, material and highly prejudicial violation of Fed. R. Crim. Pro. 16 (a)(1)E.

Rule 16 requires the government to produce, upon a defendant's request, "books papers, documents, data, photographs..." if the item is "within the government's possession, custody or control." Fed. R. Crim. Pr. 16. Rule 16 has been amended to provide for broader discovery in criminal prosecutions. Adv. Comm. Note 10 1993 Amendment; see also 2 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 251 (4th ed. 2018).

This Court has for decades demanded that a person charged with criminal offenses be afforded the opportunity to learn of the existence of potentially favorable and/or exculpatory evidence and be afforded an opportunity to investigate the material information.

The adversary system of trial is hardly an end in itself; It is not a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as due process is concerned, for (a rule) which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State have ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.

Wardius v. Oregon, 412 U.S. 470, 474 (1993).

Defendants, during the pre-trial phase of the proceedings, repeatedly

requested the government to identify all patients alleged to be involved with Medicaid submissions and false and fraudulent claims. It was not until three weeks into the trial that the government notified the defendants of the existence of 567 beneficiaries who received services from defendants but who did not qualify for such services. The government made repeated reference to this information during the evidentiary phase of the proceedings and during closing arguments.

The trial record was clear that at least a month before commencement of the trial the prosecutor had requested that the Director of Health Care operations for the District of Columbia government (Shearer) prepare a report to quantify the scope of the fraud as charged to defendants related to 567 beneficiaries.

Defendants forcefully and correctly argued that disclosure of the report during trial violated their constitutional rights to mount a complete defense. Defendants argued that had the report been disclosed in a timely manner they could have investigated the content of the report and determined the existence of legitimate reasons why the beneficiaries stopped receiving

Medicaid claims.¹ An investigation could have “undermined the inference of fraud the government asked the jury to draw.”

Rather than impose any meaningful sanction for the Rule 16 violation, the government was permitted to argue the reports in an impermissible and highly prejudicial manner.

The concurring opinion of Judge Rogers is compelling.

Mr. Shearer disclosed prior to trial the prosecutor had requested he prepare a report to “quantify the amount of actual fraud...In closing argument, the prosecutor told the jury that the report provided “very compelling evidence that Medicaid had to pay almost \$29,500,000 for 567 people [who]...did not qualify for or need personal care services.

D.C. Circuit opinion, 611, 2019, concurring page,5, Rogers, J.

The failure of the district court to impose a meaningful sanction thereby avoiding what clearly was irreparable prejudice to defendants is in conflict with other opinions of this Court, the United States Court of Appeals for the District of Columbia Circuit and other Circuits.

A prosecutor may not sandbag a defendant and “avoid disclosure of evidence by the simple expedient of leaving relevant evidence to repose in

¹ Defendants presented to the trial court a number of reasons why Medicaid benefits could have legitimately been terminated.

the hands of another agency while utilizing his access to it in preparing his case for trial." *United States v. Brazil*, 102 F.3d 1120, 1150 (1999) citing *United States v. Trevino*, 556 F.2d 1265,, 1272 (5th Cir. 1977).

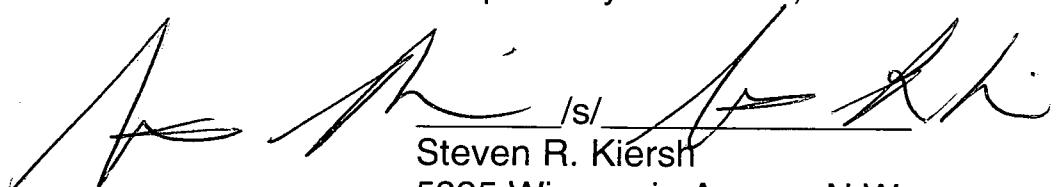
Dismissal of the indictment without prejudice and allowing defendants to investigate the 567 beneficiaries was a meaningful, appropriate and available sanction. The failure to impose such a sanction completely interfered with the rights of defendants to present a meaningful defense.

This Court should resolve disagreements between the D.C. Circuit and other circuits, as well as with this Court, in order to finalize a significant discovery issue.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,



/s/

Steven R. Kiersh
5335 Wisconsin Avenue N.W.
Suite 440
Washington, D.C. 20015
(202) 347-0200