NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2020

JOHN DUBOR

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

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

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, JOHN DUBOR, pursuant to Rule 39 and 18 U.S.C. § 3006A(d)(6), asks leave to file the accompanying Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of costs and to proceed in forma pauperis. Petitioner was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A (b) and (c), on appeal to the United States Court of Appeals for the Fifth Circuit.

Date:
November 2, 2020.

Respectfully submitted,
/s/Yolanda Jarmon
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QUESTIONS PRESENTED

I. On Appeal JOHN DUBOR challenged his 108-month sentence including the Restitution Award for Medicare fraud calculated under 2B1.1(b) arguing that the PSR's loss determination amount was unreliable, unreasonable and led to an inflated restitution award.

The Fifth Circuit affirmed the district court's findings.

In light of the foregoing, the question presented is as follows:

Did the Fifth Circuit's cursory review of the district court's record lead to an illegal, unreasonable sentence. Because the application of the sentencing guidelines is of exceptional importance to the administration of justice in federal criminal cases, this Court should grant certiorari in this case to decide this question and, and upon review, should reverse the judgment of the Fifth Circuit.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings are named in the caption of the case before the Court.

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Appendix B: Opinion of the Court of Appeals in United States v. John Dubor, 821 Fed. Appx.327 (5th Cir. 2020), 2020, U.S. App. LEXIS 24375(5th Cir. 2020)(affirmed).

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PRAYER

The petitioner, JOHN DUBOR (Hereinafter "DUBOR"), respectfully prays that a writ of certiorari be granted to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit issued on August 3, 2020.

OPINIONS BELOW

The original judgment *United States v. John Dubor,* Cr. No.4:17:CR:384-01(S.D. Tex. Jan. 7, 2019) is attached as (Exhibit A). On August 3 2020, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming Dubor's convictions. *United States v. John Dubor,* 821 Fed. Appx.327 (5th Cir. 2020), 2020, U.S. App. LEXIS 24375(5th Cir. 2020)(affirmed). (Exhibit B).

On appeal, John Dubor challenged his 108-month sentence for Medicare fraud. He argued that the district court improperly calculated his loss amount by failing to account for legitimate services that his home health care company performed. That failure, he contended, dramatically increased his offense level and inflated his restitution obligation. *United States v. Dubor,* 821 F. App'x 327, 328 (5th Cir. 2020). The PSR calculated Dubor's total offense level at 40, which resulted in a recommended Guidelines range of 292 to 365 months. A big contributor to that offense level was an

18-level enhancement for causing a loss exceeding $3.5 million. U.S.S.G. § 2B1.1(b)(1)(J) (2016). That amount was tied to the $3,534,972 that Medicare reimbursed Dubor. The PSR recommended restitution in the same amount. Dubor primarily argued that the government failed to prove that the loss amount equaled the reimbursement total and, as a result, that the PSR's loss determination was unreliable. Dubor argued that Medicare's loss was only $242,657. That amount corresponds to only a 10-level enhancement. *Id.* § 2B1.1(b)(1)(F) (2016). *United States v. Dubor*, 821 F. App'x at 328 (5th Cir. 2020).

The Fifth Circuit affirmed Dubor's conviction and sentence. *Id.* at 330. It found that the record supported the court's loss. In affirming the conviction, the Fifth Circuit stated that there was reliable evidence of pervasive fraud. The court added that "when a PSR describes "fraud [that] is so pervasive that separating legitimate from fraudulent conduct 'is not reasonably practicable,' the defendant bears the burden of proving any legitimate amounts." *Id.* (citing *United States v. Mazkouri*, 945 F.3d 293, 304 (5th Cir. 2019) (quoting *United States v. Hebron*, 684 F.3d 554, 563 (5th Cir. 2012)). *Id.* at 329-330. The court also opined that Dubor did not establish that he was entitle to an offset. *Id.*

No petition for rehearing was filed.

JURISDICTION

On August 3, 2020, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming the judgment of conviction and sentence in this case. This petition is filed within ninety days after entry of the judgment. See. Sup. Ct. R. 13.1 and 13.3. Jurisdiction of the Court is invoked under Section 1254(1), Title 28, United States Code.

FEDERAL STATUTES INVOLVED

Section 2B1.1 provides in relevant part:

(b) Specific Offense Characteristics
(1) If the loss exceeded $6,500, increase the offense level as follows:
LOSS (APPLY THE GREATEST) INCREASE IN LEVEL
(A) $6,500 or less no increase
(B) More than $6,500 add 2
(C) More than $15,000 add 4
(D) More than $40,000 add 6
(E) More than $95,000 add 8
(F) More than $150,000 add 10
(G) More than $250,000 add 12
(H) More than $550,000 add 14
(I) More than $1,500,000 add 16

STATEMENT OF THE CASE

A. Course of Proceedings And Facts

In an eight- count indictment, John Dubor (Hereinafter Dubor) was charged with various crimes related health care fraud/Medicare fraud. In Count One Dubor was charged with conspiracy to commit healthcare fraud in excess of 3.5 million dollars in violation of 18 U.S.C. §§ 1347 and 1349. (ROA.19-26).

Counts 2 to 7 charged Dubor with health care fraud aiding and abetting, in violation of 18 U.S.C. §§ 1347 and 2 citing eight (6) who were erroneously characterized as "homebound." (ROA.27). The charges are listed as follows:

Count	Medicare/ Medicaid Beneficiary	Purported Type of Service	Approx. Dates of Service Range	Approx. Billed Amount
2	Y.G.	Home Health	05/2014-12/2014	$12095
3	W.M.	Home Health	08/2014-10/2014	$4600
4	R.M	Home Health	11/2014-01/2015	$4664
5	J.S.	Home Health	11/2015-02/2016	$9900
6	K.R	Home Health	01/2015-01/2016	$14265
7		Home Health	10/2014-01/2015	$4200

(ROA.27).

In Count Eight, Dubor was charged with conspiracy to pay and receive health care kickbacks in violation of 18 U.S.C. § 371 and 42 U.S.C. 1320-7b(b)(1), which allegedly occurred on or about January 2011, to on or about June 2016. The Government alleged that all of the violations committed in the instant case occurred in the Southern District of Texas. (ROA. 19-31):

The Indictment included a notice of forfeiture. (ROA.30-31).

Medicare Home Health Care Program

The Medicare Program is a federally funded health care benefit program. The Medicare Program provides health benefits to

individuals over the age of 65 and individuals with disabilities. Individuals receiving benefits under the Medicare Program are commonly referred to as "beneficiaries." (ROA.2113). The Medicare Home Health Care benefit is a health care service provided in the home of the beneficiaries and paid for by Medicare. For a Medicare beneficiary to be eligible for home health the following conditions apply: 1) the beneficiary must be under the care of a doctor; 2) the beneficiary must need, and the doctor must certify the need for skilled nursing care, physical therapy and/or occupational therapy; and 3) the Medicare beneficiary must be homebound. (ROA.2114).

Care Committers Health Service, Inc. (Hereafter, "Care Committers") was a Texas business entity located and operating in Richmond, Texas. Care Committers was an approved Medicare provider claiming to be providing home health services to Medicare beneficiaries located in the Richmond, Texas area and Nacogdoches, Texas area. John Dubor, a licensed Registered Nurse (RN), owned and operated Care Committers. Lorine Whitaker was a Medicare beneficiary and patient recruiter from East Texas. She recruited for John Dubor and Care Committers. (ROA.2114).

The Government alleged that Whitaker and Dubor paid Medicare beneficiaries to sign blank home health forms. According to the Government, Whitaker would recruit Medicare beneficiaries from Nacogdoches, Texas and surrounding areas for home health services that were not medically needed. Many of the beneficiaries recruited by Whitaker were friends and family members. Whitaker

gave cash to many of the Medicare beneficiaries she recruited. (ROA.2114).

The Government further alleged that, as part of Whitaker and Dubor's agreement, Dubor paid Whitaker in cash for home health certifications and re-certifications. Dubor would pay Whitaker up to $500 per home health beneficiary recruited. The Government argued that Medicare paid Dubor, through Care Committers, approximately $82,000 for Medicare beneficiaries referred by Whitaker from in or about April 2014, through March 2016. The Government claimed the home health services paid for by Medicare were not medically necessary, were not provided, and were based upon illegal health care kickbacks. (ROA.2114).

The Government alleged that bank records reflected that Medicare paid Dubor approximately $3,534,972 for home health services from January 2011 through June 2016. The home health services were not medically necessary, were not provided, were based upon false documentation and physician orders, and based upon illegal kickbacks. Dubor, on the other hand, maintained that he did not defraud Medicare for the alleged amount of $3,534,972. (ROA.2114).

The Government's Key Witnesses

Inger Michelle Pace testified that she was the owner of boarding homes for mentally disabled clients. (ROA.438,465). The purpose of the homes is to care for mentally disabled people who are unable to care for themselves. (ROA.438). She was indicted

and had pled guilty in an unrelated case involving conspiracy to commit healthcare fraud and kickbacks for crimes involving another company called Continuum. (ROA.438-439, 450,463). At the time of trial she had not been sentenced for the health care fraud/kickback charges, but was on probation for a 1996 escape charge for which she received a sentence of 25 years. (ROA.438-439,455.) She met Dubor about ten years prior to the trial in this case, approximately 2008, when he was working as a nurse for another home health care company. (ROA.440-441). Dubor served her clients for free in his capacity as a nurse for 2 years, from 2005 until 2007. (ROA.458).

She testified that Dubor started his own company, Care Committers, in 2010, and that's when he asked her for clients. (ROA.441,459). She told him she had home health clients that needed help. Mostly all of her clients were Medicare beneficiaries. (ROA.443). Dubor then evaluated them and began providing services to them. Dr. Al Hassan approved her patients for home health care and came out to the home to see them. (ROA.442-443). Dubor and a nurse would see her clients over a three to four-year period. (ROA.448). She testified that she was paid $400 to $500 per client by check bimonthly for at least 24 clients. (ROA.444-445). He paid her at least $140,000 from 2010-2014, a period of about five combined years. She was paid for her role as a marketer. (ROA.449,456-457,459,460). She testified that the clients Dubor paid her for were not "homebound." (ROA.447).

Ms. Pace testified that she knew another home health owner named Pat Thomas. She introduced Ms. Thomas to Dubor, but knew nothing about Dubor's doing any business or anything else with Thomas. (ROA.452-453).

Next, Pat Thomas testified for the Government. She also owned homes for the mentally disabled. However, the clients were not homebound. She typically had 12 or 13 clients in her "home" at one time. (ROA.469). Thomas had pled guilty to a charge of providing false statements to FBI agents in an unrelated case. (ROA.470,480). She was prosecuted by the same prosecutor in the instant case. (ROA470-471). She was sentenced to six months in prison and had four months remaining on her sentence at the time of the trial in this case. (ROA.471).

Thomas testified that she met Dubor through Ms. Pace and that Dubor came to visit the clients in her home along with Dr. Al Hassan. (ROA.472). Dr. Al Hassan had already been the doctor for her clients prior to her meeting Dubor. (ROA.472-473). Dubor would come to the home and visit with all 12 clients. He visited with each patient one-by-one to attend to their medical needs. (ROA.473-474). She was promised $500 for each client and $300 for each additional recertification of a client. (ROA.473). She was paid in cash. Dubor also gave the clients money to buy clothes and different things. (ROA.474). Thomas did not keep the money she was given by Dubor. She turned the money over to Federal Agent Portillo because he had revealed to her that the federal government

was conducting an investigation into health care fraud. (ROA.477-478,486). She was asked for her cooperation because she had been involved with other home health care companies outside of Dubor's company. (ROA.478).

A phone call (Exhibit 8) was played before the jury in open court. (ROA.480). Thomas explained that the during the call recorded on April 24, 2015, she requested that Dubor not forget about her package, referencing the money he owed her for the patients. (ROA.480-481). Exhibit 8C, a video, was also played in open court. Thomas testified that the video showed that she was at her care home when Dubor came for a visit. She videotaped the visit on May 19, 2015. (ROA.481). On the video she stated she was to be paid for 13 clients. She testified that she was paid a total of $2600-- $200 for each patient. (ROA.482). She also explained that in another video, Exhibit 8D, she was given money by Dubor. The two also discussed Medicare and Medicaid patients. (ROA.483-484). She testified that the patients in her home were not "homebound." (ROA.485,499). Dr. Al Hassan prescribed home healthcare for the patients and Dubor's agency provided the services. (ROA.493). Dubor would come in and give shots to patients with psychiatric issues because they needed the medication. (ROA. 494-495,500). Dubor would also provide care to the stroke victims. (ROA.495). At trial, Dubor contested the charges against him. On May 16, 2018, Dubor testified and tried to explain the money he gave to Patricia Thomas was a loan.

(ROA.836).

Lorine Whitaker, a/k/a "Pie," a co-defendant in this case, also testified for the Government. (ROA.516). Whitaker testified that she had lived in Nacogdoches, Texas all of her life. At the time of trial, she had pled guilty, but had not yet been sentenced. (ROA.517-518).

Whitaker testified that she first met Dubor through someone named Yulanda Nash. Whitaker met Dubor over the phone and learned that he wanted her to find patients for him. (ROA.518). She provided patients to Dubor and other similar companies. (ROA.519). She received money in return for providing the patients. ROA.520). She testified that she was a patient at Dubor's agency, but that she was never "homebound." (ROA.523). She did however, receive therapy on her left hand. (ROA.529). Furthermore, she testified that she did not know the doctor, Dr. Rafael Moncayo who was listed as the physician who ordered home healthcare for her. (ROA.524).

Another Medicare beneficiary, Wilmer Mosely, a 63 year- old man from Nacogdoches, Texas testified for the Government. (ROA.546-547). When showed his medical records from Care Committers, Exhibit 3, he testified that he had never heard of Care Committers Home Health Care. (ROA.547,549). He also had never heard of physicians Daniel Tuft and William Tuft whose names were listed on his medical records. (ROA.547,549-550). He stated that he was capable of riding his bicycle and had never been homebound; therefor the information in the medical record was false. (ROA.550-

551,548-549). Yulanda Nash, a/k/a "Sugar Momma," paid him $200 to sign a form included in his medical records, but he didn't know what agency she represented when she paid him. (ROA.552-553,557). He telephoned Medicare to report the scheme. (ROA.555). According to Mosely, he did not receive $1800 worth of services form Care Committers. (ROA.556).

Joan Shepherd, a resident of Nacogdoches, Texas testified for the Government. Shepherd was shown, Exhibit 5, a patient record for Care Committers Health services. Shepherd indicated that she had never heard of John Dubor. Shepherd stated that someone named "Pie" (Lorine Whitaker) had been to her house and stated that she was giving her money for her time. (ROA.564). Shepherd signed up for homebound services, but testified that she was not homebound nor did she ever need homebound services. (ROA.565,567-568). When told that Medicare paid Care Committers and Dubor over $6300 for health care services for her, Shepherd stated that she never received those types of services from Dubor. (ROA.570).

Sylvia Estrada, a former employee for Care Committers also testified for the Government. (ROA.579,581). She was hired by the company in 2012. She was fired and then re-hired and stayed with the company until it closed in 2016. She was responsible for completing Medicare Form 485 also called and "Oasis" form. This form included the patient's health information such as Medicare number, date of birth, and medical history. (ROA.583-584,595-596). She testified that she would, at Dubor's request, forge physicians

signatures on the form. (ROA.586-587,590-593). Estrada testified that she also completed nursing notes, but knew that the information Dubor gave to her to include in the notes was not accurate. (ROA.586-587). Dubor gave her ranges for blood pressure and heart rates to include in her nursing notes. (ROA. 586). She was also instructed to assign patients the more "lucrative" diagnoses. She did not understand what lucrative meant but transferred the information as Dubor directed. (ROA.595,608-609).

Reannie McDaniel, an 81-year old resident of Nacogdoches, Texas testified for the Government. (ROA.611-612). She testified that she had never received any home healthcare nor did she ever have a need for it. (ROA.612-613,616,619). According to McDaniel, "Pie" Jones and Yulanda Nash ("Sugar Momma") contacted her to get her set up with home healthcare (ROA. 614-615). She testified that she was promised $250.00, but Pie Jones only paid her $150.00. (ROA.615). She never heard of Care Committers and never received the $2,900.00 documented home health service. (ROA.620).

Karen Rodriguez, another resident of Nacogdoches, Texas testified that she was homebound at one point when she shattered the bones in her arm. (ROA.642-643). Dubor and another lady came out to her home and rendered her home health care. (ROA.643). She had never heard of Care Committers or a physician by the name of William Coleman Pearce. The evidence showed her signature on a document dated November 14, 2015. She testified that the information on the form reflecting that she was homebound on

November 14, 2015 was false. (ROA.614). According to Rodriguez, "Pie" paid her to sign up for home healthcare. (ROA.641-642).

Yulanda Nash, a/k/a, "Sugar Momma" testified for the Government as well. (ROA.644-645). She testified that she had known Lorine Whitaker "Pie" Jones for a long time. (ROA.645). She worked with "Pie" for about three years. She testified that "Pie" would pay her $100 per patient to sign up with home healthcare. According to Nash, she and "Pie" worked with a log of home healthcare companies in Houston, Texas and in Nacogdoches, Texas. (ROA.647). Dubor never gave her money and she never heard him discuss money with Whitaker. (ROA.650,655,659). She saw Dubor visit and care for patients. In fact, her mom was one of Dubor's patients and he took good care of her mother. (ROA.660,661).

George Sterns testified, a Medicare Beneficiary and life-long resident of Nacogdoches, Texas testified for the Government. (ROA.662-663). He testified that the he had never been homebound. (ROA.663). He did not need the assistance indicated on the Oasis Form in 2014 or 2015. (ROA.668). He did not recall Dr. Candace Winful ever recommending him for home healthcare. He testified that he had never given Dr. Candice Winful his Medicare number, name, date of birth, or social security number (ROA.669). He testified that he had never heard of Care Committers Health Services. (ROA.664). He testified that he did not receive the estimated $3200 of skilled home healthcare services from Care Committers as indicated in the Care Committers Medicare data for December 2014

thru January 2015, or any home health service. (ROA.669-670,675). He testified further that he did not have a primary doctor, but that he used the emergency room when needing medical attention. He also testified that he might have given his date of birth, and Medicare number to Care Committers Health Service when some people came to his home and had him sign a form. (ROA 665-666). He wasn't given much money in exchange, but was given tobacco and $20 to buy "snuff." (ROA.666).

According to Sterns, his niece, Yulanda Nash (Sugar Momma), was involved in getting him signed for home health services. Also, the people working with Nash told him that they were working with Medicaid. A nurse came to his home to check his blood pressure. (ROA.670-671). However, he did not recognize Dubor. (ROA.671).

Shen Wong, an employee of the Texas Attorney General's Medicaid Fraud Control Unit testified for the Government. (ROA.676). As part of her duties with the Medicaid Fraud Control Unit, she participated in the investigation of Care Committers Health Services. She analyzed Medicaid claims data and Dubor's bank records. According to Wong's analysis, from January of 2011 through June of 2016, Medicare paid Care Committers over 3.5 million dollars.[1] (ROA.677-678).

She testified that she made summary charts of the data as follows:

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1 The 3.5 million dollar figure was hotly contested by Dubor and at sentencing, the sentencing court found the number to be at least one million, not exceeding 3.5 million dollars.

Name	Time Period	Amount Medicare Paid	Government Exhibit
Yolanda Garrett	2014-2015	$7,949.82	2A
Wilmer Mosley Jr.	August 30, 2014 to October 28th, 2014	$1,775.21.	3A
Reannie McDaniel	November 4th, 2014 to January 2, 2015	$2,902.32	4A
Joan Shepherd	November 4th, 2015 to February 29th, 2016	$6,359.5	5A
Karen Rodriguez	January 2nd, 2015 to March 2nd, 2016	$7,466.50	6A
George Sterns	October 3rd, 2014 to January 14, 2015.	$3,269.7	7A
Lorine Whitaker	May 6th, 2014 to March 1st, 2016	$16,219.87	15
Charles James	July 6th, 2014 to October 28th, 2014	$3,386.73	16

Wong testified that, over a five-year period of time, from January 1, 2011 to June 30, 2016, Medicaid deposited $3,560,960.5

into Dubor's bank account ending in 7520. She testified that she was able to determine the most significant withdrawal sources from the account. (ROA.684). According to Wong's analysis most of the money went to Dubor. Michelle Pace received $140,200. Mirna Sambula received $107,598.09 and Esther Fokam received $61,551.77. (ROA.685-686). She testified that she did not know what the monetary withdrawals were used for. (ROA.686).

Mirna Sambula, a former Care Committers employee, testified for the Government. She testified that she began working for Dubor in April of 2012. (ROA.687). She was hired as an office clerk. She worked with Sylvia Rios and Mary Oben. (ROA.687-688). She was trained to enter personal, patient's personal information to the system. (ROA.689). She also completed nursing notes which included a patient's vital signs. (ROA.691). She testified that at some point Dubor began forging doctors' signatures and that he directed her to forge signatures as well. (ROA.695). She testified that she knew it was wrong to forge the signatures. (ROA.700). According to Sambula, Sylvia forged signatures as well and eventually assumed that role. (ROA.695-696). She stopped working for Dubor when he closed the business. (ROA.698). Dubor, while operating Care Committers, used physical therapists and nurses out in the field to treat patients. Dubor would work in the office as well as in the field treating patients. (ROA.705).

Yolanda Garrett, another Nacogdoches resident and Medicare beneficiary testified for the Government. (ROA.713). She

testified that she did not know of Dr. Carey Lindemann. She testified that she knew of Dubor because of Lorine Whitaker, "Pie" Jones. Dubor came to her home with Whitaker and a nurse. Dubor had been to her home approximately 3 or 4 times. Dubor never provided medical care to her. (ROA.715).

Garrett testified further that Whitaker gave her an envelope with $100 in it for herself and $100 for her boyfriend, Charles James as compensation for signing up with home health. (ROA.716). Garrett was asked about a medical record that Care Committers Health Services created for her. She testified that the information in the record (Exhibit 2) was false. (ROA.717-719). She testified that she never received over $7900 of home health services from Dubor during May of 2014 through December of 2014. (ROA.720).

Raul Portillo Jr., a criminal investigator for the Department of Health and Human Services Office of Investigations (HHS), testified for the Government. HHS's mission is to prevent fraud, waste and abuse, and to investigate various schemes, which would include home health, durable medical equipment, physicians, opioid cases and ambulance cases. Portillo investigated John Dubor and Care Committer Health Services. The case was a spinoff of the Pat Thomas case which started April of 2015. (ROA.731). Portillo first learned about John Dubor when speaking to Pat Thomas. Thomas mentioned that she was dealing with some home health agencies which included Care Committers at that time. Thomas made several

recordings, and she was working with the government. Five of the recordings were between her and John Dubor. Money exchanged hands during some of those recordings; however the money was turned over to Portillo as evidence. (ROA. 732). Portillo confirmed that Dubor owned and controlled Care Committers Health Services. (ROA.736). Approximately six years. Mr. Dubor and Care Committers Services were compliant with Medicare regulations by keeping those patient files. He also testified that all the records and exhibits that the Government had shown that day at trial had come from Dubor's home. As part of the investigation, Portillo asked Dubor whether he had ever received or paid any kickbacks, and Dubor stated that he had not. (ROA.735). He began going to Nacogdoches to investigate Mr. Dubor in Approximately in 2015, after it closing date of June 2016 as indicated by Dubor. (ROA.752).

Dr. Carey Lindemann, a family medicine physician who practiced in Nacogdoches since 2010, testified for the Government. (ROA.751-752). Lorine Whitaker was one of her patients in 2014-2015. (ROA.752). She testified that she never referred Whitaker to home health during the time period of 2014 and 2015. (ROA.752-753). Joan Shepherd was her patient in 2015 and 2016. (ROA.752-753). She did not refer her for home health during this time period. (ROA.757). Yolanda Garrett was her patient but she could not recall whether she saw her in 2014 or not. She did not refer Garrett to home healthcare, but did not know what her condition was in 2014. (ROA.761-762). The Government then rested its case

in chief.

Defense Witnesses

The Defense did not request a Rule 29 motion for judgment of acquittal. However, the defense called several character witnesses on Dubor's behalf. Nekpen Izevbigie, an LVN nurse who once worked for Care Committers, was the first witness to testify for the defense. She began working for Care Committers in 2011-2012 and although she wasn't sure testified that she may have worked there three to five years. (ROA.765-766,771). She would visit patients' homes to provide medical care to them. (ROA.766-777). As an LVN, she provided, shots, injections, IV's and medicine Subcutaneously. (ROA.768). She would treat approximately 8-12 patients per week. (ROA.773). She knew nothing about any recruiters. (ROA.772). She never witnessed anything fraudulent, forgeries or anything like that when you were in the offices of Care Committers. She testified that Dubor had a reputation for truthfulness. (ROA.769). She never went to any of the group homes owned by Michell Pace or Pat Thomas. She never travelled to Nacogdoches, but only cared for patients in the Houston area. (ROA.771). Dubor paid her with checks and she received W-2's. (ROA.776).

Irene Egbon-Dubor, Appellant's wife since 2013, testified for the defense. (ROA.777). She worked for Care Committers from to 2015 to 2016. She worked with Mirna Sambula and Cynthia Perez. (ROA.779). She never witnessed any forging of documents nor did she ever forge any signatures on any forms. (ROA.779-780). She

testified that Dubar was truthful and an honest man. (ROA.782).

Esther Fokam, another LVN nurse, testified for the defense. She started working there in 2011. (ROA.790). She worked as a nurse out in the field in the Houston/Sugarland Texas area, but never went to Nacogdoches or Beaumont, Texas. She was paid by Care Committers and received a W-2. She testified that Dubor had a reputation for truthfulness. (ROA.793). She never saw anyone forge signatures. (ROA.794).

Chris Gaulden performed marketing for Care Committers Health Services. His role as a marketer was to go out and build relationships with referral sources, hospitals, doctors, rehab facilities and like places. (ROA.807). Gaulden had his own brochures and Care Committers had a brochure as well that they used to try to grow the business. (ROA.808). He worked for Care Committers for four to six months until the business closed. He was paid a salary. He was never asked to pay patients or to participate in anything fraudulent and he never did. (ROA.811-812,815). He testified that Dubor had a reputation for truthfulness and honesty because Dubor always did everything that he discussed with him. (ROA.811-812).

Finally, John Dubor testified. He holds a bachelor degree in nursing and at the time of trial, was a licensed registered nurse. (ROA.820,822). He was also a certified psyche nurse by Medicare. (ROA.831). He applied for the licensing for home healthcare patients in 2007. He began caring for patients in 2008.

(ROA.820). He testified that the conversation on the video regarding the money was actually about a loan that he was giving to Patricia Thomas because she was moving, and that the money he gave her was not for patients at all. (ROA.836).

After three days of trial, On May 17, 2018, a jury convicted Dubor on all counts. (ROA.230-232).

The 2016 edition of the Guidelines Manual has been used in this case. Due to the multiple counts of conviction, the grouping rules contained in U.S.S.G. Chapter Three, Part D, are applicable. All of the counts are grouped pursuant to U.S.S.G. § 3D1.2(b) and (d), since the counts of conviction involved the same victim, two or more acts connected by a common criminal objective and represent an aggregate measure of harm, loss or substance. The grouping of these counts resulted in a combined offense level. Due to the operation of U.S.S.G. § 1B1.3, the counts relating to healthcare fraud result in the greatest offense level; therefore Count 2 was used to portray the guideline computations. (ROA.2116).

The United States Sentencing Commission Guideline for violation of 18 U.S.C. § 1347 is found in U.S.S.G. § 2B1.1(a)(2) and calls for a base offense level of 6. Pursuant to U.S.S.G. § 2B1.1(b)(2)(A)(i), the offense level was increased by two points because the offense was deemed to involve 10 or more victims, i.e., Medicare and Medicare beneficiaries.

An additional two level increase was applied pursuant to

U.S.S.G. § 2B1.1(b)(7)(A) and (B)(i), because Dubor was convicted of a Federal health care offense involving a Government health care program, i.e., Medicare, and the loss to that program was calculated at more than $1,000,000. (ROA.2117).

Pursuant to U.S.S.G. § 2B1.1(b)(10)(C), a 2-level increase was applied because the offense allegedly "otherwise involved sophisticated means in that the defendant falsified documentation and physician orders." (ROA.2117). The offense involved the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification. Two more additional points were assessed pursuant to U.S.S.G. § 2B1.1(b)(11)(C)(i), because the offense allegedly "involved the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification." (ROA.2117).

Dubor was assessed a four level adjustments for Role in the Offense. Pursuant to U.S.S.G. § 3B1.1(a), he was deemed an organizer/leader of criminal activity that involved five or more participants. (ROA.2117). The offense level was increased by two, Pursuant to U.S.S.G. § 3B1.3, because Dubor was accused of abusing "a position of trust which significantly facilitated the commission or concealment of the offense." He is alleged to have used his status as a licensed registered nurse — "a position of trust" which significantly facilitated the commission or concealment of the offense. (ROA.2117).

Finally, Dubor was assessed a two- level increase in the offense level pursuant to U.S.S.G. § 3C1.1, as an adjustment for obstruction of justice. According to the PSI, Dubor allegedly "willfully obstructed or impeded the administration of justice during the course of the prosecution of the offense of conviction." (ROA.2117).

In written objections and during the sentencing hearing, Dubor lodged objections to the PSI. First, Dubor objected to Paragraph 8 of the PSI. Dubor argued that Paragraph 8 was factually incorrect based upon the evidence adduced at trial. He argued that the loss amount attributed to him, 3.5 million for home health services from January 2011 thru June 2016 was much less than 3.5 million dollars. Dubor argued that the loss amount from the personal care owners as well as the six beneficiaries referenced at trial did not amount to 3.5 million dollars. (ROA.960). Here, the Government argued that all of the Medicare services Dubor rendered were fraudulent, but Dubor argued that he did give legitimate medical care service to some patient. Therefore, not everything that was billed to Medicare was fraudulently billed. (ROA.960-962).

Dubor objected to paragraphs 12(a), 13 and 21, the intended loss amount of approximately 3.5 million. He argued that the Government had not proven the loss amount by a preponderance of the evidence. (ROA.2104-2105). He also objected to paragraphs 11, 12(a), and 13 that alleged: "(1) Medicare paid Mr. Dubor through CCHS approximately $82,000 for Medicare beneficiaries

referred by Lorine Whitaker from in or about April 2014 through March 2016; and (2) Evidence revealed the home health services provided by CCHS were not medically necessary, were not provided, and were based upon illegal kickbacks." He argued that the Government had to prove the $82,000 by a preponderance of the evidence. (ROA.963,2103-2104). The objection was overruled. (ROA.978-979).

However, Dubor's objections to Paragraphs 8 and 21 were granted to the extent that the district court assessed a two point downward departure finding that a safer figure was the million to 3.5 million dollar amount. (ROA.962-963).

Dubor objected to paragraphs 12(b)and 22, a +2 level increase, if the offenses involved 10 or more victims pursuant to U.S.S.G. § 2B1.1(b)(2)(A)(i). He argued that there were not 10 victims in this case because Medicare was one victim. (ROA.963, 2105-2106). The objection was overruled. (ROA.965).

Dubor objected to paragraph 12(c) and 23, that he was convicted of a Federal health care offense involving a Government health care program, i.e., Medicare and the loss to that program was more than $1,000,000. Dubor argued that the government failed to prove the loss amount to Medicare by a preponderance of the evidence. Furthermore, the PSR does not provide a sufficient indicia or reliability as an evidentiary basis for this court to conclude by a preponderance of the evidence that the loss amount to Medicare was more than $1,000,000. ROA.965,2106). The objection

was overruled. (ROA.965).

Dubor objected to paragraph 12(d) and 24 (c) that the offense involved sophisticated means. He argued that there was nothing particularly sophisticated, especially complex, or intricate about the alleged conduct. (ROA.966,2106-2107). The objection was overruled. (ROA. 967).

Defendant objected to paragraphs 12(e) and 25 alleging that the offense involved the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification. He argued that the Commission's primary response to this directive was to add a two-level enhancement in the fraud and theft guideline at U.S.S.G. § 2B1.1(b)(10)(C)(I) and (ii) for cases that involve identity theft in certain circumstances; therefore, there is no identity theft in this case as contemplated by the sentencing guidelines. (ROA.967, 2107). The objection was overruled. (ROA.968).

Dubor objected to paragraphs 12(f) and 27 assessing a four-level increase, if the Defendant is deemed an organizer/leader of a criminal activity that involved 5 or more participants or was otherwise extensive. He argued that there was insufficient evidence to support that he was an organizer or leader of a criminal activity involving five or more participants or was otherwise extensive. He argued for that a two-level increase would be more appropriate. (ROA.968-969,2107-2108). The objection was overruled. (ROA.970).

Dubor objected to paragraphs 14 and 29 that Defendant willfully obstructed justice. He argued that the enhancement did not apply in his case where he simply chose to exercise his constitutional right to a jury trial, rather than enter a plea of guilty. (ROA. 970-971, 2108). The objection was granted. (ROA.972).

Dubor also objected to the abuse of trust enhancement in paragraph 28 U.S.S.G. § 3B1.3. He contended that this factor had already been considered in the Medicare fraud offense and therefore the enhancement essentially amounted to double counting. (ROA. 973). The objection was overruled. (ROA.974).

Based upon the foregoing, the total offense level was reduced to a level 36 with a Criminal History Category of I, resulting in a guideline range of 188 to 135. (ROA.975). U.S.S.G. Chapter 5 Part A. The sentencing court adopted the factual findings and guideline applications of the presentence investigation report with the exception of the two objections. (ROA. 987).

The court granted Dubor's motion for downward departure and Dubor was sentenced to a term of 108 months imprisonment as to Counts One and Two to run consecutive to each other and 60 moths on Count 8 also to run concurrently, so a total of 108 months in all. A term of three years of supervised release as to each count to run concurrently was also imposed. (ROA.977,979,982). The amount of restitution was set at 3,534,972 million dollars jointly and

severally with Lorine Whitaker from 17-cr-384 up to the amount of $82,000. (ROA. 979,980). A special assessment of $800 dollars was imposed, $100 as to each count pursuant to 18 U.S.C. 3013). The fine was waived. (ROA.980).

Dubor was ultimately sentenced to a total term of 108 months imprisonment; 108 months as to each of Counts 1-7 and 60 months as to Count 8, to run concurrently on each count. (ROA.275,979). The court ordered supervised release for a total term of 3 years, 3 years as to each of Counts 1-8, to run concurrently. (ROA.276,979).

The monetary penalties included an $800 special assessment pursuant to 18 U.S.C. 3013 and restitution in the amount of $3,543,972.00. (ROA.278,980). The fine was waived. (ROA.980).

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

This case was brought as a federal criminal prosecution involving health care fraud violation of 18 U.S.C. § § 372,1347 and 2. The district court therefore had jurisdiction pursuant to 18 U.S.C. § 3231.

REASON FOR GRANTING THE WRIT

This Court should grant certiorari because the improperly calculated loss amount calculated in this health care fraud case resulted in an unreasonable sentence including an illegal sentence and an excessive restitution award. The Fifth Circuit's cursory review of the record reached the wrong conclusion on both points. Because the proper application of the sentencing guidelines are of exceptional importance to the administration of justice in federal criminal cases, this Court should grant certiorari in this case to decide this question and, and upon review, should reverse the judgment of the Fifth Circuit.

ARGUMENTS

I. ISSUE ONE RESTATED: THE FIFTH CIRCUIT ERRONEOUSLY AFFIRMED THE LOSS AMOUNT IN THIS HEALTH CARE FRAUD CASE UNDER U.S.S.G. 2b1.1(B)(1)(1) BECAUSE IT RENDERED ONLY A CURSORY REVIEW OF THE FACTS, THUS LEADING TO AN ILLEGAL SENTENCE OF IMPRISONMENT AND RESTITUTION AWARD.

A. The Illegal Term of Imprisonment:

Dubor was assessed an 18 point increase in points pursuant to U.S.S.G. 2B1.1(B)(1)(j). (ROA.2116). Section 2B1.1(B)(1)(j) provides if the loss exceeds 3.5 million add 18 points to the base offense level. Dubor objected to paragraphs 12(a), 13 and 21, the intended loss amount of approximately 3.5 million. (ROA.2104-2105). Paragraph 8 of the PSR states the following:

Dubor, a licensed Registered Nurse (RN, owned and operated Care Committers. Bank records reflected that Medicare paid Dubor approximately $3,534.972 for home health services from January 2011 through June 2016. The home health services were not medically necessary, were not provided, were based upon false documentation

and physician orders, and based upon illegal kickbacks. (ROA.2114).

Paragraph 12(a) states that: "John Dubor, owner and operator of Care Committers, is held accountable for the following: 'a total intended loss amount of approximately $3,500,000 as a result of the Medicare fraud.'" Paragraph 13 states that pursuant to the Mandatory Victims Restitution Act of 1996, Dubor is accountable for restitution to Medicare in the total amount of $3,534,972 jointly and severally under Docket No. 4:17-CR00384 with Lorine Whitaker (up to the amount of $ 82,000). (ROA.2115). In written objections and at sentencing, Dubor objected to these figures. (ROA.2104-2105). Paragraph 21 stated that since the loss to Medicare was $3,534,972 which exceeds $3,500,000 but not $9,5000 U.S.S.G. §2B1.1(b)(1)(J) directs an increase of 18 levels. (ROA.2116). The district court granted the objection to Paragraph 21 of the PSR and the court assessed a two-point downward departure, holding that a more appropriate figure would be one million to 3.5 million. (ROA.960, 962-963). The sentencing court stated:

> All right. I'm going to out of an abundance of caution grant the objection to the extent of the 3.5 million and grant a two-point downward departure, in essence, holding that a safer figure is the million to 3.5 million figure. And I'm not doubting the government's proof, but this is a figure that is just barely over the 3.5 figure.

(ROA.962).

The two point decrease resulted in a score of 16 points pursuant to U.S.S.G. §2B1.1(b)(1)(I).

Dubor maintains that the government did not prove the loss amount of one million to 3.5 million by a preponderance of the evidence for purposes of his sentencing calculation. The applicable law states that the amount of loss resulting from the fraud is a specific offense characteristic that increases the base offense level under the U.S. Sentencing Guidelines. U.S.S.G. § 2B1.1(b)(1) (2010). "Loss" is defined in the commentary to § 2B1.1 as "the greater of actual loss or intended loss." *Id.* cmt. n.3(A). "Intended loss" includes "intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value)." *Id.* cmt. n.3(A)(ii); *United States v. Isiwele*, 635 F.3d 196, 202 (5th Cir. 2011).

While the loss amount billed to Medicare and Medicaid is "prima facie evidence of the amount of loss [the defendant] intended to cause, it is not conclusive evidence of [the] intended loss." (ROA.2102-2103). *United States v. Isiwele* 635 F.3d 196 at 203. Fifth Circuit case law requires the government [to] prove by a preponderance of the evidence that the defendant had the subjective intent to cause the loss that is used to calculate a defendant's offense level." *United States v. Sanders*, 343 F.3d 511, 527 (5th Cir. 2003); *United States v. Isiwele*, 635 F.3d 196, 203 (5th Cir. 2011).

In *United States v. Isiwele*, 635 F.3d 196, 198 (5th Cir. 2011), Defendant–Appellant Enitan Isiwele was convicted on multiple

counts of health care fraud and conspiracy to pay kickbacks in connection with a scheme to fraudulently bill Medicare/Medicaid for power wheelchairs. This Court vacated Isiwele's sentence holding that the court's method for determining the "loss amount" attributable to the fraud required clarification.

In *Isiwele*, Appellant Enitan Isiwele was the owner of a durable medical equipment ("DME") supply company called Galaxy Medical Supply ("Galaxy"), which was a supplier to both Medicare and Medicaid. DME includes power wheelchairs. Medicare rules relating to power wheelchairs provide that a beneficiary must first obtain a prescription from a physician who determines that the beneficiary cannot use a cane, walker, rollator, or manual wheelchair. Upon submission of such a prescription to a DME supplier, the supplier must complete a Certificate of Medical Necessity, to be signed by the physician and then sent together with the prescription to Medicare. Medicare then reimburses the supplier for the power wheelchair. Medicaid's procedures for DME reimbursement are similar to Medicare's. *Id.* at 198.

In an effort to meet urgent medical needs in the wake of Hurricanes Katrina and Rita, Medicare eliminated these documentary requirements for the replacement of any power wheelchairs lost or damaged in those hurricanes. This waiver applied only to beneficiaries who had already met the requirements for a doctor's prescription and Certificate of Medical Necessity before obtaining their original power wheelchairs. Galaxy used this waiver to bill

Medicare and Medicaid a total of $587,382.65 for power wheelchairs and related accessories, and was reimbursed a total of $297,381.04. *Id.*

Isiwele was tried on sixteen counts of health care fraud, in violation of 18 U.S.C. § 1347, and one count of conspiracy to pay illegal remunerations, in violation of 42 U.S.C. § 1320a-7b(b)(2)(A). The indictment alleged that Isiwele instructed a "recruiter," Linda Patterson, to go into elderly and low-income communities and gather billing information from Medicare/Medicaid beneficiaries. Isiwele paid Patterson for this information, which he then used to claim reimbursement from Medicare/Medicaid under the new hurricane exception for power wheelchairs provided to these beneficiaries. At trial, the government presented testimony from Patterson, as well as from eleven such beneficiaries who testified that they did not need a power wheelchair and never had a power wheelchair prior to Hurricanes Katrina or Rita, much less one that was damaged in those hurricanes. The jury found Isiwele guilty on all counts. *United States v. Isiwele*, 635 F.3d 196, 198 (5th Cir. 2011).

At sentencing, the district court applied a fourteen-level increase to Isiwele's base offense level pursuant to U.S.S.G. §2B1.1(b)(1)(h) based on a total of $587,382.65 for power wheelchairs and related accessories on the basis of the "loss amount" occasioned by Isiwele's fraud. The court calculated the loss amount according to the amount that Isiwele billed to

Medicare/Medicaid. Isiwele objected, arguing that the proper loss amount was the total of the fixed allowances paid for the wheelchairs by Medicare/Medicaid. *Id.* at 199 (5th Cir. 2011).

The district court determined the loss amount in *Isiwele* to be $587,382.65. In making this determination, the district court measured the amount of intended loss by the amount that Isiwele billed to Medicare/Medicaid, rather than the lower amount that Medicare/Medicaid allowed and paid for the wheelchairs. On appeal, Isiwele challenged this method as overstating the loss amount because Medicare/Medicaid had a fixed fee schedule for DME and did not reimburse a supplier for any amount billed over those fixed allowances. He alleged that he knew he would receive these lower capped amounts, and that he therefore did not have the subjective intent to cause a loss equal to the amount he billed. *Id.* at 202-03 (5th Cir. 2011).

On Appeal, the court noted that it had endorsed a fact-specific, case-by-case inquiry into the defendant's intent in determining "intended loss" for sentencing purposes. It went on to say that "Although it may be theoretically possible to intend a loss that is greater than the potential actual loss, case law required the government [to] prove by a preponderance of the evidence that the defendant had the subjective intent to cause the loss that is used to calculate his offense level." *Id.* at 203 (citing *United States v. Sanders*, 343 F.3d 511, 527 (5th Cir. 2003). This Court then explicitly applied this standard to the

health care fraud context, adopting the approach taken by the Fourth Circuit in *United States v. Miller*, 316 F.3d 495 (4th Cir. 2003).

The court opined in *Isiwele* that the amount fraudulently billed to Medicare/Medicaid is "prima facie evidence of the amount of loss [the defendant] intended to cause," but "the amount billed does not constitute conclusive evidence of intended loss; the parties may introduce additional evidence to suggest that the amount billed either exaggerates or understates the billing party's intent." *United States v. Isiwele*, 635 F.3d 196 at 203 (5th Cir. 2011)(citing Id. at 504; *United States v. Hearne*, Nos. 09-60613, 09-60750, 397 Fed. Appx. 948, 2010 U.S. App. LEXIS 21648, 2010 WL 4116663, at *1-2 (5th Cir. Oct. 20, 2010) (considering evidence that the defendant lacked knowledge of the billing procedures for Medicare and therefore did not understand the amounts that Medicare likely would pay); *United States v. Singh*, 390 F.3d 168, 193-94 (2d Cir. 2004) (remanding for resentencing in order to give the defendant an opportunity to show that the total amount he expected to receive was less than the amount he actually billed to Medicare/Medicaid). *Isiwele* at 203.

In *Isiwele*, the court pointed out that a close reading of the record below left it uncertain as to what the district court understood the law to be. There was some evidence in the record on the basis of which the court could have concluded that *Isiwele*

intended to receive only the lower capped amount. Therefore, the court remand for resentencing on this issue of calculating the loss amount for sentencing purposes. It also stated that "the district court may take additional evidence if it deems it necessary." Id.

Like the Defendant in *Isiwele*, Dubor objected to the methodology used to calculate the loss to Medicaid in this case. He objected to the district court' use of the entire amount billed to Medicare to calculate his sentence. (ROA.2102-2105). Specifically, Dubor objected to paragraphs 11, 12(a), and 13 alleging that the government failed to prove by a preponderance of the evidence that he had the subjective intent to cause the loss amount used to calculate his offense level. (ROA.2104). He argued that the government did not prove by a preponderance of the evidence the allegations in Paragraph 12(a) of the PSR that: "John Dubor, owner and operator of Care Committers, is held accountable for the following: ' a total intended loss amount of approximately $3,500,000 as a result of the Medicare fraud.'" (ROA.2104-2105).

Dubor also argued that the government did not prove by a preponderance of the evidence the allegations in Paragraph 13 of the PSR erroneously stating " that pursuant to the Mandatory Victims Restitution Act of 1996, Dubor is accountable for restitution to Medicare in the total amount of $3,534,972 jointly and severally under Docketed no. 4:17-CR00384 with Lorine Whitaker (up to the amount of $ 82,000). Dubor objected to these figures. (ROA.2104-2105). Dubor argued that the Government has to prove

the $82,000 and the $3,500,000 by a preponderance of the evidence. (ROA.963, 2103-2104).

The district court rejected these arguments and, relying on Medicare billing data presented at trial, ordered Dubor to pay $3.5 million to Medicare in restitution pursuant to the Mandatory Victim Restitution Act (MVRA). 18 U.S.C. § 3663A. He was also ordered to pay up to the amount of $82,000 jointly and severally with Lorine Whitaker (ROA.980).

The instant case is analogous to *Isiwele*. As in *Isiwele*, the amount billed in the instant case does not constitute conclusive evidence of intended loss. Here, Shen Wong, an employee of the Texas Attorney General's Medicaid Fraud Control Unit testified for the Government. (ROA.676). As part of her duties with the Medicaid Fraud Control Unit, she participated in the investigation of Care Committers Health Services. She analyzed Medicaid claims data and Dubor's bank records. (ROA.676-677).

According to Wong's analysis, from January of 2011 through June of 2016, Medicare paid Care Committers over 3.5 million dollars. (ROA.677-678). Wong testified that, over a five-year period of time, from January 1, 2011 to June 30, 2016, Medicaid deposited $3,560,960.5 into Dubor's bank account ending in 7520. (ROA.683). However, Wong did not credit Dubor for any services rendered to Medicaid patients that Medicaid would have paid for absent any fraud. The government did not prove beyond a reasonable doubt that all of the Medicare payments deposited into Dubor's

account were fraudulent. Therefore, the government did not meet its burden of proof as to the 3.5 million loss amount. Furthermore, the Government did not prove the $82,000 that he was held to jointly and severally liable for with Whitaker by a preponderance of the evidence. (ROA.963, 2103-2104).

If the Fifth Circuit had conducted more than a cursory review of the fact of this case, it would have remande the sentence for a recalculation of the loss amount assessed to calculate Dubor's sentence as it did in *Isiwele*. (See also *United States v. Singh*, 390 F.3d 168, 193-194 (2d Cir. 2004) remanding for re-sentencing in order to give Appellant an opportunity to show that the total amount he expected to receive was less than the amount he expected to receive was less that the amount he actually billed to Medicare/Medicaid)).

In this case, the government has not met its burden to prove by a preponderance of the evidence that Defendant intended to defraud Medicare of approximately 3.5 million dollars. Furthermore, the PSR does not provide a sufficient indicia of reliability as an evidentiary basis for this court to conclude that Appellant intended to defraud Medicare of approximately 3.5 million. Even the Fifth Circuit has opined that blanket assertions in a PSR are unreliable. See, e. g. *United States v. Rome*, 207 F.3d 251,254 (5th Cir. 2000) (per curium)(determining that " the statement that the defendant and his accomplice would have stolen all the guns if they had not been interrupted" was a bald

assertion); *United States v. Williams*, 22 F.3d 580, 581 n.3 (5th Cir. 1994) determining that law enforcement's statement that the defendant was the "muscle" behind the conspiracy was a bald assertion."

In written objections to the PSR, Dubor argued that the Government proved at trial through Govt. Exhibits 2a, 3a, 4a, 5a 6a, a total intended loss amount of $69,960.74 and an actual loss amount of $29,723.14. Additionally, the Government proved through the testimonies of Michelle Pace and Patricia Thomas (personal care home owners) that claims of their clients totaled $172,696.67 of intended loss. Therefore, the total intended loss of proven by the Government amounted to $242,657.41. (ROA.2109). Here, the district court wholly failed to consider Dubor's arguments that the 3.5 million dollar amount and the $82,000 dollar amount were not proven by a preponderance of the evidence. At sentencing, the Government argued that the fraud in this case was pervasive. (ROA.961-962). However, the sentencing court disagreed with the government, refrained from issuing such a finding and reduced the loss amount to two levels pursuant to U.S.S.G. 21.1(b)(1)(I). Moreover, the PSI did not conclude that the fraud in this case was pervasive. Therefore, this Court should grant certiorari and clarify that an appellate court must properly conduct a de novo review in cases such as the instant case. See Isiwele, at 202 (5th Cir. 2011).

B. The Illegal Restitution Award

The district court awarded restitution pursuant to the Mandatory Victim Restitution Act ("MVRA") in the amount of 3.5 million dollars and held Dubor jointly and severally liable with Lorine Whitaker for restitution up to $82,000. (ROA.980

As stated beforehand, Restitution under the MVRA is limited "to the actual loss directly and proximately caused by the defendant's offense of conviction." *United States v. Mahmood*, 820 F.3d 177, 196 (5th Cir. 2016). Here, the Government did not prove the 3.5 million restitution amount by a preponderance of the evidence. The Government did not prove the $82,000 00. At sentencing, the Government argued that the fraud in this case was pervasive. (ROA.961-962). However, the sentencing court disagreed with the government, refrained from issuing such a finding and reduced the loss amount to two levels pursuant to U.S.S.G. 21.1(b)(1)(I). Moreover, the PSI did not conclude that the fraud in this case was pervasive. No burden shifting occurred to Dubor. Furthermore, the Government did not offer any rebuttable evidence to refute Dubor's calculations. Therefore, the restitution award must be reversed, vacated and the case remanded. *See e.g. United States v. Ricard, 922 F.3d 639,658-659 (5th Cir. 2019); Mahmood* at 196.

Based upon the forgoing law and analysis, the entire restitution order must be reversed, vacated and remanded for

recalculation.

CONCLUSION

For the foregoing reasons, petitioner JOHN DUBOR respectfully prays that this Court grant certiorari, to review the judgment of the Fifth Circuit in this case, and to remand and reverse the judgment.

Date: November 2, 2020.

Respectfully submitted,

/s/Yolanda Jarmon
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NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2020

JOHN DUBOR,

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

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

CERTIFICATE OF SERVICE

YOLANDA E. JARMON, is not a member of the Bar of this Court but was appointed under the Criminal Justice Act 18 U.S.C. § 3006 A(b) and (c), on appeal to the United States Court of Appeals for the Fifth Circuit, certifies that, pursuant to Rule 29.5, On November 2,2020, she served the preceding Petition for Writ of Certiorari and the accompanying Motion for Leave to Proceed in Forma Pauperis on counsel for the Respondent by enclosing a copy of these documents in an envelope, first-class postage prepaid, Certified Mail No. 7011 0110 0000 9045 6313, return receipt requested, and depositing the envelope in the United States Postal Service located at 3520 Jensen Dr. Houston, TX 77026 and further certifies that all parties required to be served have been served and copies addressed to:

The Honorable Noel J. Francisco
Solicitor General of the United States

Room 5614, Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

/s/ Yolanda Jarmon
YOLANDA E. JARMON

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APPENDIX

UNITED STATES DISTRICT COURT
Southern District of Texas
Holding Session in Houston

UNITED STATES OF AMERICA
V.
JOHN DUBOR

JUDGMENT IN A CRIMINAL CASE

CASE NUMBER: 4:17CR00384-001
USM NUMBER: 28044-479

☐ See Additional Aliases.

Teana Viltz Watson and Annie Scott Bogwu
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) 1-8 on May 17, 2018, after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §§ 1349 and 1347	Conspiracy to commit healthcare fraud	06/30/2016	1
18 U.S.C. §§ 1347 and 2	Healthcare fraud, aiding and abetting	12/31/2014	2
18 U.S.C. §§ 1347 and 2	Healthcare fraud, aiding and abetting	10/31/2014	3

☒ See Additional Counts of Conviction.

The defendant is sentenced as provided in pages 2 through 7 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) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the .

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.

December 18, 2018
Date of Imposition of Judgment

Signature of Judge

ANDREW S. HANEN
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

January 7, 2019
Date

Appendix A

DEFENDANT: JOHN DUBOR
CASE NUMBER: 4:17CR00384-001

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §§ 1347 and 2	Healthcare fraud, aiding and abetting	01/31/2015	4
18 U.S.C. §§ 1347 and 2	Healthcare fraud, aiding and abetting	02/28/2016	5
18 U.S.C. §§ 1347 and 2	Healthcare fraud, aiding and abetting	01/31/2016	6
18 U.S.C. §§ 1347 and 2	Healthcare fraud, aiding and abetting	01/31/2015	7
18 U.S.C. § 371	Conspiracy to pay and receive healthcare kickbacks	06/30/2016	8

☐ See Additional Counts of Conviction.

DEFENDANT: JOHN DUBOR
CASE NUMBER: 4:17CR00384-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 108 months.
This term consists of ONE HUNDRED EIGHT (108) MONTHS as to each of Counts 1-7 and SIXTY (60) MONTHS as to Count 8, to run concurrently, for a total of ONE HUNDRED EIGHT (108) MONTHS.

☐ See Additional Imprisonment Terms.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:
- ☐ at _____ ☐ a.m. ☐ p.m. on _____.
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before 2 p.m. on _____.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: JOHN DUBOR
CASE NUMBER: 4:17CR00384-001

SUPERVISED RELEASE

Upon release from imprisonment you will be on supervised release for a term of: 3 years.
This term consists of THREE (3) YEARS as to each of Counts 1-8, to run concurrently, for a total of THREE (3) YEARS.

☐ See Additional Supervised Release Terms.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   ☒ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. ☒ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
7. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

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

STANDARD CONDITIONS OF SUPERVISION

☒ See Special Conditions of Supervision.

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment, you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

SPECIAL CONDITIONS OF SUPERVISION

You must provide the probation officer with access to any requested financial information and authorize the release of any financial information. The probation office may share financial information with the U.S. Attorney's Office.

You must not incur new credit charges or open additional lines of credit without the approval of the probation officer.

You shall not participate in any Government programs without prior approval of the Court.

☐ See Additional Special Conditions of Supervision.

DEFENDANT: JOHN DUBOR
CASE NUMBER: 4:17CR00384-001

CRIMINAL MONETARY PENALTIES

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

	Assessment	Fine	Restitution
TOTALS	$800.00		$3,534,972.00

A $100 special assessment is ordered as to each of Counts 1-8, for a total of $800.

☐ See Additional Terms for Criminal Monetary Penalties.

☐ 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 payees must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Medicare		$3,534,972.00	

☐ See Additional Restitution Payees.

TOTALS	$0.00	$3,534,972.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☒ 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:

☐ Based on the Government's motion, the Court finds that reasonable efforts to collect the special assessment are not likely to be effective. Therefore, the assessment is hereby remitted.

* 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: JOHN DUBOR
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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 $800.00 due immediately, balance due
- ☐ not later than _____, or
- ☒ in accordance with ☐ 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 _____ installments of _____ over a period of _____, to commence _____ days after the date of this judgment; or

D ☐ Payment in equal _____ installments of _____ over a period of _____, to commence _____ days after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ 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:

Payable to: Clerk, U.S. District Court, Attn: Finance, P.O. Box 61010, Houston, TX 77208.

Balance due in payments of the greater of $25 per quarter or 50% of any wages earned while in prison in accordance with the Bureau of Prisons' Inmate Financial Responsibility Program. Any balance remaining after release from imprisonment shall be paid in equal monthly installments of $250 to commence 90 days after release to a term of supervision.

The defendant's restitution obligation shall not be affected by any payments that may be made by other defendants in this case, except that no further payment shall be required after the sum of the amounts paid by all defendants has fully covered all the compensable losses.

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

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate
John Dubor, 4:17CR00384-001	$3,534,972.00	$8,200.00	
Lorine Whitaker, 4:17CR00384-002	$8,200.00	$8,200.00	

☐ See Additional Defendants and Co-Defendants Held Joint and Several.

☐ 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:

☐ See Additional Forfeited Property.

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.

United States v. Dubor

United States Court of Appeals for the Fifth Circuit

August 3, 2020, Filed

No. 19-20001

Reporter
821 Fed. Appx. 327 *; 2020 U.S. App. LEXIS 24375 **

UNITED STATES OF AMERICA, Plaintiff - Appellee v. JOHN DUBOR, Defendant - Appellant

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [**1] Appeal from the United States District Court for the Southern District of Texas USDC. No. 4:17-CR-384-1.

Core Terms

restitution, calculation, actual-loss, enhancement, recommended, sentencing, reimbursed, estimate, patients, reliability, fraudulent, kickbacks, pervasive, referrals, exceeded, dollar, offset, rebut

Case Summary

Overview

HOLDINGS: [1]-District court did not err in applying the 16-level enhancement or in imposing restitution because the district court did not improperly calculate defendant's loss amount pursuant to *U.S. Sentencing Guidelines Manual § 2B1.1*, cmt., application n.3(C) since the presentence report and ample trial evidence showed, he committed extensive Medicare fraud for over five years; and he merely objected to the loss amount and made unsubstantiated assertions about legitimate services.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN1[] **Standards of Review, Questions of Fact & Law**

Like any other factual finding, the district court's actual-loss determination is reviewed for clear error. That deferential standard is satisfied only if the appellate court are left with the definite and firm conviction that a mistake has been committed. Conversely, the appellate court must affirm if the finding is plausible in light of the record as a whole.

Criminal Law & Procedure > Sentencing > Restitution

HN2[] **Sentencing, Restitution**

Actual loss under the Guidelines is the reasonably

Appendix B

foreseeable pecuniary harm that resulted from the offense. *U.S. Sentencing Guidelines Manual § 2B1.1*, cmt., application n.3(A)(i). When the Mandatory Victim Restitution Act controls, the district court's restitution award can go no higher than the actual-loss amount. Restitution cannot exceed actual losses. *18 U.S.C.S. § 3663A(a)(1)-(2)*.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Evidence

Evidence > Burdens of Proof > Allocation

Criminal Law & Procedure > ... > Departures From Guidelines > Upward Departures > Property Damage

Criminal Law & Procedure > Sentencing > Presentence Reports

HN3[] **Imposition of Sentence, Evidence**

Considering the difficulties of calculating loss in some cases, exactitude is not required. Loss need not be determined with absolute certainty. The district court may make a reasonable estimate of the loss, *U.S. Sentencing Guidelines Manual § 2B1.1*, cmt., application n.3(C), and it enjoys wide latitude in doing so. In estimating loss, a district court may rely upon information in the presentence report so long as that information bears some indicia of reliability. And when a presentence report describes fraud that is so pervasive that separating legitimate from fraudulent conduct is not reasonably practicable, the defendant bears the burden of proving any legitimate amounts.

Counsel: For United States of America, Plaintiff - Appellee: Jessica Carol Akins, Carmen Castillo Mitchell, Assistant U.S. Attorney, U.S. Attorney's Office, Houston, TX.

For John Dubor, Defendant - Appellant: Yolanda Evette Jarmon, Esq., Law Office of Yolanda Jarmon, Houston, TX.

Judges: Before STEWART, CLEMENT, and COSTA, Circuit Judges.

Opinion

[*328] PER CURIAM:*

John Dubor challenges his 108-month sentence for Medicare fraud. He argues that the district court improperly calculated his loss amount by failing to account for legitimate services that his home health care company supposedly performed. That failure, he contends, dramatically increased his offense level and inflated his restitution obligation. But Dubor did not submit any evidence of legitimate services or otherwise rebut the presentence report's loss calculation, so we affirm.

I.

A federal grand jury charged Dubor with eight counts of Medicare fraud. At the trial that followed, the government alleged that Dubor paid kickbacks for client referrals, billed Medicare for services that were never provided, and "treated" patients with services that were not medically [**2] necessary. After three days of evidence showing that Medicare reimbursed Dubor $3,534,972 during his scheme, the jury convicted him on all counts.

The PSR calculated Dubor's total offense level at 40, which resulted in a recommended Guidelines range of 292 to 365 months. A big contributor to that offense level was an 18-level enhancement for causing a loss exceeding $3.5 million. *U.S.S.G. § 2B1.1(b)(1)(J)* (2016). That amount was tied to the $3,534,972 that Medicare reimbursed Dubor. The PSR recommended restitution in the same amount.

Dubor filed an objection. He primarily argued that the government failed to prove that the loss amount equaled the reimbursement total and, as a result, that the PSR's loss determination was unreliable. By his math, Medicare's loss was only $242,657. That amount

* Pursuant to *5TH CIR. R. 47.5*, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in *5TH CIR. R. 47.5.4*.

corresponds to only a 10-level enhancement. *Id.* § 2B1.1(b)(1)(F) (2016).

At sentencing, Dubor repeated his argument that the loss amount was based on the mistaken premise that every dollar he billed Medicare was fraudulent. Without citing any evidence or a specific amount, he also argued that he was entitled to an offset because he had provided legitimate services to legitimate patients.

The district court granted Dubor's objection in part. [**3] Noting that the loss amount exceeded the $3.5 million threshold by only $35,000, it imposed the 16-level enhancement for loss between $1.5 million and $3.5 million. *Id.* § 2B1.1(b)(1)(I) (2016). The court made clear, however, that it did "not doubt[ ] the government's proof" and reduced Dubor's offense level "using the rule of leniency," not a lower loss amount.

[*329] This reduction meant Dubor's Guidelines range was 188 to 235 months. The court sentenced Dubor well below that range to 108 months in prison, using its discretionary authority to vary from the Guidelines' recommendation. It otherwise adopted the PSR, including its actual-loss amount and recommended restitution award of $3,534,972.

II.

Dubor makes the same argument in challenging both his Guidelines calculation and restitution award: Medicare's loss from his crimes was far less than $3,534,972. HN1[↑] Like any other factual finding, the district court's actual-loss determination is reviewed for clear error.[1] *United States v. Glenn, 931 F.3d 424, 430 (5th Cir. 2019)*. That deferential standard is satisfied only if we are "left with the definite and firm conviction that a mistake has been committed." *United States v. Mata, 624 F.3d 170, 173 (5th Cir. 2010)* (per curiam) (quoting *United States v. Castillo, 430 F.3d 230, 238 (5th Cir. 2005)*). Conversely, we must affirm if the "finding is plausible in light of the record as a whole." [**4] *United States v. Guidry, 960 F.3d 676, 681 (5th Cir. 2020)* (quoting *United States v. Serfass, 684 F.3d 548, 550 (5th Cir. 2012)*).

The record supports the court's loss finding. HN2[↑] "Actual loss" under the Guidelines is "the reasonably foreseeable pecuniary harm that resulted from the offense." *U.S.S.G. § 2B1.1 cmt. n.3(A)(i)*. When, as here, the *Mandatory Victim Restitution Act* controls, the district court's restitution award can go no higher than the actual-loss amount. *United States v. Dickerson, 909 F.3d 118, 129 (5th Cir. 2018)* ("Restitution cannot exceed actual losses."); *see 18 U.S.C. § 3663A(a)(1)-(2)*.

HN3[↑] Considering the difficulties of calculating loss in some cases, exactitude is not required. *See United States v. De Nieto, 922 F.3d 669, 675 (5th Cir. 2019)* (noting that loss need not be determined with "absolute certainty" (quoting *United States v. Goss, 549 F.3d 1013, 1019 (5th Cir. 2008)*)). The district court may make a "reasonable estimate of the loss," *U.S.S.G. § 2B1.1 cmt. n.3(C)*, and it enjoys "wide latitude" in doing so, *United States v. Jones, 475 F.3d 701, 705 (5th Cir. 2007)*. In estimating loss, a "district court may rely upon information in the PSR . . . so long as that 'information bears some indicia of reliability.'" *United States v. Danhach, 815 F.3d 228, 238 (5th Cir. 2016)* (quoting *United States v. Simpson, 741 F.3d 539, 557 (5th Cir. 2014)*). And when a PSR describes "fraud [that] is so pervasive that separating legitimate from fraudulent conduct 'is not reasonably practicable,'" the defendant bears the burden of proving any legitimate amounts. *United States v. Mazkouri, 945 F.3d 293, 304 (5th Cir. 2019)* (quoting *United States v. Hebron, 684 F.3d 554, 563 (5th Cir. 2012)*).

This is where Dubor's challenge fails. As the PSR and ample trial evidence show, he committed extensive Medicare fraud for over five years by paying tens of thousands [**5] of dollars in illegal kickbacks for referrals, performing services that were not medically necessary, falsifying patient documentation and physician orders, and charging the government for services that [*330] were never provided. Given that reliable evidence of pervasive fraud, Dubor had to establish that he was entitled to an offset against the PSR's actual-loss estimate. *Id.*

He did not. At sentencing, Dubor merely objected to the loss amount and made unsubstantiated assertions about legitimate services. The district court thus reasonably adopted the government's unrebutted loss calculation. *See United States v. Ayika, 837 F.3d 460,*

[1] Although the parties agree that the factual dispute underlying Dubor's restitution challenge is reviewed for clear error, they disagree over whether his enhancement challenge is subject to plain-or clear-error review. We need not resolve the parties' disagreement, as Dubor's challenge fails under either standard. *See United States v. Infante, 404 F.3d 376, 389 (5th Cir. 2005)* (holding that the court did not need to "decide the proper standard of review" because the defendant's argument "fail[ed] under either standard").

468 (5th Cir. 2016) (holding that the defendant's mere objections, "without more," were not competent evidence to rebut the district court's findings).

* * *

The district court did not err in applying the 16-level enhancement or in imposing restitution. Its judgment is AFFIRMED.

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