NO:

IN THE
SUPREME COURT OF THE UNITED STATES

No:

YAMILET DIAZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether jury instructions, which require that the government prove a defendant *knew* the crimes were against the United States and involved a federal health care program, control the validity of a conviction rather than case law holding the government is not required to allege the United States was the intended victim under the offense clause of a §371 conspiracy.

II. Whether a defendant, who merely sells beneficiary information to a provider who violates the Anti-Kickback provisions of its agreement with Medicare, can be found guilty as a co-conspirator of that provider where the defendant does not engage in any other illegal acts with that provider.

PARTIES TO THE PROCEEDING

Respondent United States of America is an interested party and is named in the caption of this case.

RELATED PROCEEDINGS

United States District Court for the Southern District of Florida

United States v. Diaz, Case No. 18-20473-CR-JIC (judgment May 8, 2019).

United States Court of Appeals for the Eleventh Circuit

United States v. Diaz, 846 Fed. App'x 846 (11th Cir. 2021) (judgment March 31, 2021 after denial of petition for panel rehearing).

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Yamilet Diaz respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the opinion of the United States Court of Appeals for the Eleventh Circuit in *United States v. Diaz*, 846 Fed. App'x 846 (11th Cir. 2021) (A-1), issued on February 24, 2021 with the petition for panel rehearing denied on March 31, 2021. (A-2).

OPINION BELOW

The decision of the Court of Appeals is reported at *United States v. Diaz*, 846 Fed. App'x 846 (11th Cir. 2021) (A-1). The Eleventh Circuit's order entered on March 31, 2021, denying the petition for panel rehearing is not reported (A-2).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Part III of the Rules of the Supreme Court of the United States. In the underlying criminal case, the district court asserted jurisdiction over petitioner because she was charged with violations of federal criminal statutes, that is, 18 U.S.C. §371 and 42 U.S.C. §1320a-7b(b)(1)(A). The court of appeals had jurisdiction in her direct appeal, pursuant to 28 U.S.C. §1291 and 18 U.S.C. §3742, which provide that a United States court of appeals shall have jurisdiction for all final decisions of a United States district court. The Eleventh Circuit denied petitioner's petition for rehearing on March 31, 2021. Therefore, this petition for a writ of certiorari is timely under this Honorable Court's Order dated March 19, 2020 (589 U.S.).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition invokes the protections afforded under the Fifth Amendment's Due Process Clause which states, in pertinent part, that "no person...shall be deprived of life, liberty, or property, without due process of law." This petition

involves the following federal statutes: 18 U.S.C. §371 and 42 U.S.C. §1320a-7b(b)(1)(A). The former statute provides, in pertinent part: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both." The latter statute provides, in pertinent part, "(1) Whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind—(A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program...shall be guilty of a felony and upon conviction thereof, shall be fined not more than $100,000 or imprisoned for not more than 10 years, or both."

STATEMENT OF THE CASE

A. Overview.

Petitioner was charged with violations of 18 U.S.C. §371, the general conspiracy statute, and 42 U.S.C. §1320a-7b(b)(1)(A), the Medicare Anti-Kickback statute. The §371 conspiracy in count 1 had two objects: to defraud the

United States and to receive kickbacks from a federal health care program. Counts 2-5 charged Diaz with substantive kickback crimes, that is, soliciting and receiving money from a home health agency ("HHA"). The jury instructions for these crimes required there be proof beyond a reasonable doubt the defendant *knew* the crimes committed were against the United States and involved a federal health care program. On direct appeal, Diaz raised the issue there was no evidence at trial that she had knowledge of those facts. Yet, the Eleventh Circuit held "the government is not required to allege that the United States was the intended victim of a conspiracy under the offense clause of §371. *United States v. Harmas*, 974 F.2d 1262, 1268 (11th Cir. 1982). Thus, Ms. Diaz's knowledge of Medicare's status as a federal health care plan was not necessary for the jury to convict." United States v. Diaz, 846 Fed. App'x 846, 851 (11th Cir. 2021).

This petition raises what appears to be an issue of first impression in this Court: whether case law holding the government is not required to allege the United States was the intended victim under the offense clause of a §371 conspiracy can excuse the Government's burden of proof where the jury charges require the Government prove a defendant *knew* the crimes were against the United States and involved a federal health care program. The Eleventh Circuit's opinion in this case, *United States v. Diaz*, 846 Fed. App'x 846, 851 (11th Cir.

2021), relies solely on *United States v. Harmas*, 974 F.2d 1262, 1268 (11th Cir. 1982). *Harmas* has been followed in dozens of reported cases, and its validity has never been questioned. Thus, if *Diaz, supra*, is allowed to stand, *Harmas* can be applied in a way that violates Due Process: sustaining a conviction where the Government fails to adduce evidence beyond a reasonable doubt that a defendant *knew* her crimes were against the United States or involved a federal health care program. The jury instructions in Diaz's case required the Government fulfill that burden of proof. However, the record is completely devoid of any such evidence. Instead, the Eleventh Circuit's decision relies on a holding in *Harmas*, *supra*, irrelevant to this requirement.

The Government alleged that Diaz sold Medicare beneficiary information to Good Friends, an HHA and Medicare provider. At most, the Government proved a "buyer-seller" relationship between Diaz and Good Friends. However, the Eleventh Circuit held that the relationship between Diaz and Good Friends involved more than a mere "buyer-seller relationship." The "more" the Eleventh Circuit relied on were facts which did not implicate Diaz's participation in a conspiracy. Rather, they related to Diaz's own conduct which had no relationship to Good Friends' operations, including billing Medicare in violation of the Anti-Kickback provision of its Agreement with Medicare.

B. Factual Background.

In its opening statement, the Government said that Diaz was a patient recruiter who would find Medicare beneficiaries and help them obtain prescriptions for home health services. Diaz "would sell them to the [HHA] that would pay her the most money, without any regard to the quality of care," which was illegal. The jury would hear evidence about one particular HHA, Good Friends, where Diaz "sold Medicare beneficiaries to the owner," Suley Cao ("Cao"). The Government called a number of witnesses, and a brief summary of testimony of some of them is set forth below. Diaz presented a defense case and called one witness, Hector Hernandez ("Hernandez"), Diaz's live-in boyfriend at times relevant to this case, before she took the stand herself. Hernandez did not have any knowledge about Diaz's alleged illegal activities. The Government elected not to cross-examine Hernandez. During her testimony, Diaz was never asked, nor did she offer, whether she knew that receiving kickbacks for selling Medicare patient information was related in any way to the United States government or one of its agencies or a federal health care program.

Government Witness Stephen Quindoza ("Quindoza").

Quindoza worked for HMS Federal Solutions ("HMS"), a private company "focusing on program integrity" for Medicare and Medicaid programs." Quindoza

was a point of contact for federal and state law enforcement agencies who had oversight responsibilities for those programs. He testified as an expert witness but in this case could not say whether anybody did anything illegal, including Diaz.

Government Witness Rogelio Rodriguez ("Rodriguez")

In an unrelated case back in 2012, Rodriguez was convicted of conspiracy to commit Medicare fraud. He had an HHA, Caring Nurse Home Health ("Caring Nurse"), and paid kickbacks for patients. His company was Caring Nurse Home Health ("Caring Nurse"). He pled guilty, cooperated, and was sentenced to 109 months prison. Cristobal Gonzalez ("Gonzalez") was a patient seller to whom Rodriguez paid kickbacks. Gonzalez's company was Florida Network Providers ("FNP"). Diaz worked for Gonzalez. Between January 2006 and June 2011, Rodriguez's companies submitted around $48 million worth of false and fraudulent Medicare claims. Unlike Rodriguez and Gonzalez, Diaz never was charged for any crime relating to them or their companies.

Government Witness Abigail Aguila ("Aguila").

Aguila met Diaz in 2011 when Diaz was dating Hernandez who was a cousin of Aguila's husband. Diaz told Aguila she was "moving patients," and Aguila said that she was doing the same thing. Diaz introduced her to Cao, the owner of Good Friends. Aguila said that Diaz told her she paid patients and took

them to clinics to obtain prescriptions. Aguila did not share any patients with Diaz but rather provided her own patients to Good Friends. Aguila never saw Diaz pay any patients nor remembered ever telling the Government that Diaz knew doctors. Aguila did not know how Diaz got her patients.

Government Witness Suley Cao ("Cao").

Cao was still serving her sentence at a BOP facility in West Virginia. She had been convicted of Medicare fraud in a separate case and, on February 23, 2018, sentenced to fifity-seven months imprisonment. Cao started her HHA, Good Friends, in 2009. Cao paid individuals to "sell" her Medicare beneficiaries for Good Friends, and Diaz was one of them. For awhile Diaz sold her between six and eight patients per week, and Cao paid her $2,200 per patient. Good Friends closed in June 2013 after Medicare recommended its approval be revoked.

C. Procedural Background.

On February 7, 2018, the Government notified Diaz that she was the target of a Medicare fraud investigation. On February 13, 2018, the district court appointed the undersigned to represent her. On June 5, 2018, an indictment was returned against Diaz alleging: in count 1, conspiracy to defraud the United States by receiving illegal health care kickbacks in violation of 18 U.S.C. §371; in counts 2-5, substantive crimes of receiving illegal health care kickbacks in violation of 42

U.S.C. §1320a(7)b(b)(1) (A). Trial began on February 19, 2019, and ended on February 22, 2019. On February 22, the jury returned guilty verdicts on all five counts. On May 8, 2019, the Judge sentenced Diaz to 87 months imprisonment. On May 13, 2019, Diaz filed a timely notice of appeal. On October 28, 2020, the Eleventh Circuit conducted oral argument. On February 24, 2021, the Eleventh Circuit issued its opinion denying Diaz any relief. *United States v. Diaz*, 846 Fed. App'x 846 (11th Cir. 2021). Diaz filed a timely petition for panel rehearing which the Eleventh Circuit denied on March 31, 2021

REASON FOR GRANTING THE WRIT

I. The Failure Of The Eleventh Circuit To Require The Government To Prove All Elements Of The Offenses Set Forth In The Jury Charges Wrongly Excused The Government's Burden Of Proof In Violation Of The Due Process Clause Of The Fifth Amendment.

The Government failed to prove *essential* elements of the conspiracy and substantive crimes: that Diaz *knowingly* and willfully acted with the intent that the *United States or one of its agencies* would be defrauded, or that the kickbacks she solicited "could be paid for in whole or in part, by a *Federal health care program*." *See* Select Jury Instructions (A-3). The trial record contains portions where Aguila and Cao testify about Diaz receiving kickbacks for selling Medicare

patients to Good Friends. However, nowhere does there appear to be any evidence that Diaz knew Medicare was in some way connected to the "United States or one of its agencies" or was a "federal health care program." Without proof of such knowledge, Diaz could not have the intent to defraud the United States or one of its agencies nor to solicit kickbacks where a federal health care program would be the payor. The prosecutors simply could have asked its witnesses whether Diaz knew that Medicare was related to a United States or one of its agencies or was a federal health care program, but they never did. Nor did they bother to do so during Diaz's testimony. Thus, the Government failed to bring forth the evidence necessary to prove essential elements as specified in the jury instructions. *See* Select Jury Instructions (A-3).

The Eleventh Circuit relied on a single case, *United States v. Harmas*, 974 F.2d 1262, 1268 (11th Cir. 1982), which was completely irrelevant to this issue which Diaz had preserved below and argued in her direct appeal. The jury instructions for these crimes required there be proof beyond a reasonable doubt the defendant *knew* the crimes committed were against the United States and involved a federal health care program. On direct appeal, Diaz raised the issue there was no evidence that she had knowledge of either of those two facts. However, the Eleventh Circuit disposed of that preserved error, holding "the government is not

required to allege that the United States was the intended victim of a conspiracy under the offense clause of §371. *United States v. Harmas*, 974 F.2d 1262, 1268 (11th Cir. 1982). Thus, Ms. Diaz's knowledge of Medicare's status as a federal health care plan was not necessary for the jury to convict."

This petition presents what appears to be an issue of first impression in this Court: whether case law holding the government is not required to allege the United States was the intended victim under the offense clause of a §371 conspiracy can excuse the Government's burden of proof where the jury charges require the Government prove a defendant *knew* the crimes were against the United States and involved a federal health care program. Again, the Eleventh Circuit's opinion in this case, *United States v. Diaz*, 846 Fed. App'x 846, 851 (11th Cir. 2021), relies solely on *United States v. Harmas*, 974 F.2d 1262, 1268 (11th Cir. 1982). *Harmas* has been followed in dozens of reported cases, and its validity has never been questioned. Thus, if *Diaz*, *supra*, is allowed to stand, *Harmas* can be applied in a way that amounts to a constitutional violation: sustaining a conviction where the Government failed to adduce evidence beyond a reasonable doubt that a defendant *knew* her crimes were against the United States and involved a federal health care program.

The Supreme Court has made clear the required standard of proof: "Lest

there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). The jury charges in Diaz's case required the Government to carry that burden of proof. However, the record is devoid of any such evidence. Instead, the Eleventh Circuit's decision relies on a holding in *Harmas*, *supra*, which is irrelevant to this requirement.

If *United States v. Harmas*, 974 F.2d 1262 (11th Cir. 1982), can continue to be applied in this erroneous fashion, then lower courts will be able to disregard the Government's failure to adduce evidence the jury must find beyond a reasonable doubt on essential elements of crimes like those charged in Diaz's case. This would result in a violation of the Fifth Amendment's Due Process Clause as well as *In Re Winship*, 397 U.S. 358, 364 (1970).

II. The Eleventh Circuit's Refusal To Reverse The Convictions Of A Seller Of Patients To A Medicare Provider, Where The Seller Does Not Engage In Any Other Illegal Acts With That Provider, Allows For An Impermissible Expansion Of 18 U.S.C. §371.

The Government alleged that Diaz "sold" Medicare beneficiaries to Good Friends. At most, the Government proved a "buyer-seller" relationship between Diaz and Good Friends. The Eleventh Circuit held the relationship between Diaz and Good Friends involved more than a mere "buyer-seller relationship." However, the "more" that the Eleventh Circuit relied on were facts which did not implicate her participation in a conspiracy. Rather, they related to Diaz's conduct which had no relationship to Good Friends' billing of Medicare in violation of the Anti-Kickback provision in its Agreement with Medicare.[1]

The Eleventh Circuit agreed with Diaz that, "generally, a buyer-seller relationship by itself does not prove conspiracy." *United States v. Diaz*, 846 Fed. App'x 846, 851 (11th Cir. 2021)(citing *United States v. Solomon*, 686 F.2d 863, 877 (11th Cir. 1982)). What makes a difference between a mere buyer-seller relationship from a conspiratorial agreement "is the 'knowledge and understanding of the parties associated with the buying and selling." *Id.* (citation omitted). The Eleventh Circuit held there was more than a mere buyer-seller relationship because: a) some trial witnesses testified about "Diaz's knowledge and ongoing involvement," for example, Diaz admission about "moving patients" for a living

[1] It should be noted that the Government never attempted to prove whether the patients Diaz "sold" Cao actually needed and received the medical services for which Good Friends billed Medicare.

and paying beneficiaries to go to certain home health agencies; b) the fact that Diaz introduced Aguila to Cao "for the purpose of referring patients to Good Friends in exchange for kickbacks"; and c) that Cao met with Diaz in her office "where they discussed and negotiated the parameters of their arrangement." After mentioning these three sets of facts, the Eleventh Circuit held: "Simply stated, the parameters here went beyond simple buyer and seller logistics." *United States v. Diaz*, 846 Fed. App'x 846, 852 (11th Cir. 2021). That specific holding is factually erroneous because those things do not prove Diaz did anything except "sell" Cao Medicare beneficiaries. "Moving patients" was Diaz's own business of "selling" of Medicare patients to HHAs before she ever met Cao. Introducing Aguila to Cao had nothing to do with Diaz's own arrangement with Cao. There was no evidence that either Cao or Aguila compensated Diaz in any way for that introduction. Finally, Diaz meeting with Cao at Good Friends to discuss a business arrangement relates only to their mere buyer-seller relationship.

In *United States v. Solomon*, 686 F.2d 863 (11th Cir. 1982), the Eleventh Circuit discussed the difference between proof of a buyer-seller relationship "which may or may not be evidence of a conspiracy." *Id.* at 877 (citing *United States v. Ford*, 324 F.2d 950, 952 (7th Cir. 1963)). "The key factor is the knowledge and understanding of the parties associated with the buying and

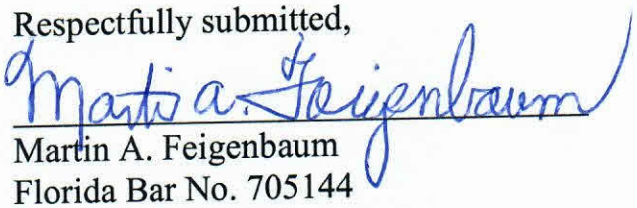
selling." *United States v. Solomon*, 686 F.2d 863, 877 (11th Cir. 1982). The *Solomon* Court reiterated that: "It 'is well settled that the existence of a simple buyer-seller relationship alone does not furnish the requisite evidence of a conspiratorial agreement.'" *Id.* at 877 (citing *United States v. Wright*, 63 F.3d 1067, 1072 (11th Cir. 1995)).

This case may be one of first impression. There are hundreds if not thousands of Medicare Anti-Kickback cases filed every year. The Government describes this case as Diaz "selling patients to the highest bidder." Diaz has not found any authorities deciding whether "selling" patients to HHAs without more should be deemed a buyer-seller agreement instead of a conspiratorial one. It makes sense the former be the legal principle classifying this offense conduct. In the instant case, in relation to Cao, there was no proof that Diaz did anything other than "sell" patients to Good Friends. There was no proof that Diaz had any dealings with Medicare (e.g. billing, collecting) or was involved in Good Friends' business activities. Rather, the Government had one fact it ran with from start to finish: Diaz "sold" individuals to Cao so she could increase the number of her Medicare patients. In *United States v. Diaz*, 846 Fed. App'x 846 (11th Cir. 2021), Allowing Diaz's conviction to stand as Cao's co-conspirator is an impermissible expansion of the limits of 18 U.S.C. §371.

CONCLUSION

This petition presents two important questions relating to criminal violations of health care law. The first question is of constitutional magnitude involving the denial of the Fifth Amendment's Due Process Clause. The second question impacts hundreds if not thousands of cases every year arising from the Anti-Kickback provisions of Title 42. Additionally, it appears that both questions presented would be of first impression in this Court. For all of these reasons, petitioner prays that this Honorable Court grant this petition for writ of certiorari.

Respectfully submitted,



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Dated: August 23, 2021
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APPENDIX

A-1

***United States v. Diaz*, 846 Fed. App'x 846 (11th Cir. 2021)**

United States v. Diaz

United States Court of Appeals for the Eleventh Circuit

February 24, 2021, Decided

No. 19-11909

Reporter
846 Fed. Appx. 846 *; 2021 U.S. App. LEXIS 5379 **; 2021 WL 717003

UNITED STATES OF AMERICA, Plaintiff-Appellee, versus **YAMILET DIAZ**, 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 Florida. D.C. Docket No. 1:18-cr-20473-MGC-1.

Disposition: AFFIRMED.

Core Terms

home health care, agencies, district court, patients, enhancement, calculation, kickbacks, amount of loss, sentence, indictment, inextricably intertwined, fail to prove, involvement, conspiracy, preponderance of evidence, clear error, recruited, argues

Case Summary

Overview

HOLDINGS: [1]-Defendant's claim that the district court erred by denying her motion to exclude Fed. R. Evid. § 404(b) and inextricably intertwined evidence was without merit because the record showed that defendant's prior involvement was highly probative of her intent under Fed. R. Evid. § 404(b)(2) and was not substantially outweighed by the risk of unfair prejudice since the evidence of the defendant's involvement with other home health care agencies explained how she came to know her co-conspirator and joined the conspiracy she found guilty of; [2]-Defendant's claim that the district court erred by denying her motion to dismiss the indictment against her for prejudicial pre-indictment delay was without merit because the defendant failed to establish that the pre-indictment delay was deliberate or that its purpose was to gain a tactical advantage.

Outcome
Conviction and sentence affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

Evidence > Admissibility > Conduct
Evidence > Prior Acts, Crimes & Wrongs

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

HN1 **Standards of Review, Abuse of Discretion**

The appellate court reviews rulings on admission of prior bad-act evidence for abuse of discretion. Fed. R. Evid. § 404(b) generally precludes the admission of evidence of a crime, wrong, or other act to prove a person's character or to show that the person acted in conformity with his or her prior act. Fed. R. Evid. 404(b)(1). But Rule 404(b) provides several exceptions to the exclusion of such evidence, including for the purpose of proving intent. Fed. R. Evid. 404(b)(2). Additionally, Fed. R. Evid. 404(b) does not apply, and the evidence need not meet one of the admissible categories in Fed. R. Evid. 404(b)(2), if it is: (1) part of the same transaction or series of transactions as the charged offense, (2) necessary to complete the story of the crime, or (3) inextricably intertwined with the

evidence regarding the charged offense. *Fed. R. Evid. 403* gives a district court the discretion to exclude otherwise admissible evidence, *Fed. R. Evid. 404* evidence, if its probative value is substantially outweighed by the danger of unfair prejudice. *Fed. R. Evid. 403*.

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

Criminal Law & Procedure > ... > Dismissal > Grounds for Dismissal > Delay in Filing

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Findings of Fact

HN2[] Standards of Review, Abuse of Discretion

The appellate court reviews a denial of a motion to dismiss for prejudicial pre-indictment delay for abuse of discretion and the underlying factual findings for clear error.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > ... > Dismissal > Grounds for Dismissal > Delay in Filing

HN3[] Procedural Due Process, Scope of Protection

For a defendant to prove a due process violation from pre-indictment delay, he or she must show: (1) that there was actual prejudice to her defense, and (2) that the government's delay was deliberate to gain a tactical advantage. This standard applies even when the government brings charges within the statute of limitations.

Criminal Law & Procedure > Trials > Motions for Acquittal

Evidence > Inferences & Presumptions > Inferences

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Sufficiency of Evidence

HN4[] Trials, Motions for Acquittal

The appellate court reviews de novo the district court's denial of a motion for judgment of acquittal. In doing so, the appellate court views the evidence in the light most favorable to the government and draw all reasonable inferences in favor of the jury's verdict.

Criminal Law & Procedure > ... > Fraud Against the Government > Conspiracy to Defraud > Elements

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

HN5[] Conspiracy to Defraud, Elements

While the government must prove that the **United States** was the ultimate target of the conspiracy under the defraud clause of *18 **U.S.**C.S. § 371*, the government is not required to allege that the **United States** was the intended victim of a conspiracy under the offense clause of *18 **U.S.**C.S. § 371*.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN6[] Conspiracy, Elements

Generally, a buyer-seller relationship by itself does not prove conspiracy. What differentiates a mere buyer-seller relationship from a conspiratorial agreement is the knowledge and understanding of the parties associated with the buying and selling.

Criminal Law & Procedure > ... > Appeals > Standards of Review > Clear Error Review

Evidence > Burdens of Proof > Preponderance of Evidence

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Findings of Fact

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

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Sentences

HN7 **Standards of Review, Clear Error Review**

The appellate court reviews the district court's interpretation of the Sentencing Guidelines de novo and the court's factual findings underlying the calculation of the Guidelines range for clear error. If the record supports the district court's factual findings, there is no clear error. When a defendant challenges one of the factual bases of his sentence as set forth in the PSR, the Government has the burden of establishing the disputed fact by a preponderance of the evidence.

Criminal Law & Procedure > Appeals > Procedural Matters > Briefs

HN8 **Procedural Matters, Briefs**

A legal claim or argument that has not been briefed before the court is deemed abandoned and its merits will not be addressed.

Criminal Law & Procedure > ... > Appeals > Standards of Review > Clear Error Review

HN9 **Standards of Review, Clear Error Review**

When a defendant's argument concerns only whether or not the facts underlying the enhancement were properly found by the district court, the appellate court reviews for clear error.

Counsel: For **UNITED STATES** OF AMERICA, Plaintiff - Appellee: Michael A. Rotker, Jeremy Raymond Sanders, **U.S.** Department of Justice, WASHINGTON, DC; Emily M. Smachetti, **U.S.** Attorney's Office, MIAMI, FL; **U.S.** Attorney Service - Southern District of Florida, **U.S.** Attorney Service - SFL, MIAMI, FL.

For **YAMILET DIAZ**, Defendant - Appellant: Martin Alan Feigenbaum, Martin A. Feigenbaum, Esq., SURFSIDE, FL.

Judges: Before JORDAN, JILL PRYOR, and BRANCH, Circuit Judges.

Opinion

[*848] PER CURIAM:

Yamilet Diaz appeals her convictions for one count of conspiring to defraud the **United States** and four counts of receiving illegal health care kickbacks for referring individuals to Medicare in violation of *18 **U.S.**C. § 371* and *42 **U.S.**C. § 1320a-7b(b)(1)(A)*. Following oral argument and a careful review of the parties' briefs and the record, we affirm.

I

The evidence at trial demonstrated that Ms. Diaz participated in an illicit business arrangement with Suley Cao. Pursuant to this arrangement, Ms. Diaz referred Medicare beneficiaries to Good Friends Services, Inc., a Medicare-approved home health care provider operated by Ms. Cao.

A

Rogelio Rodriguez incorporated **[**2]** and owned a company called Caring Nurse and obtained approval to become a Medicare provider. Mr. Rodriguez paid Cristobal Gonzalez and others to act as patient providers for Caring Nurse, and Mr. Gonzalez steered patients to Caring Nurse in exchange for kickbacks. Mr. Gonzalez then submitted fake invoices to Caring Nurse for services rendered on behalf of his company, Florida Network Providers (FNP), to cover up the kickbacks.

Ms. Diaz worked with Mr. Gonzalez and was the registered agent, an officer, and a director of FNP, as well as an authorized signer on FNP's bank account. Mr. Gonzalez later introduced Ms. Diaz to Mr. Rodriguez, and the two worked together. Mr. Rodriguez was subsequently arrested, charged, and convicted of conspiracy to commit Medicare fraud.

After Mr. Rodriguez's arrest, Ms. Diaz contacted Ms. Cao, the owner of a home health care agency called Good Friends, and arranged a meeting with her. At the meeting, Ms. Diaz proposed working with Ms. Cao and steering Medicare beneficiaries to Good Friends for $2,000 per patient. The two agreed to payment by check with an increased rate of $2,200 per patient to

account for Ms. Cao not being able to pay with cash. The checks **[**3]** were made out to Consulting Billing Services, a company incorporated by Ms. Diaz. Ms. Diaz **[*849]** and Ms. Cao then implemented their plan. Ms. Cao documented their exchanges and details about the Medicare patients in a ledger.

Ms. Diaz began dating Hector Hernandez in 2011. Through him, Ms. Diaz met Abigail Aguila. After finding out they both had the same type of job, Ms. Diaz eventually introduced Ms. Aguila to Ms. Cao. At the meeting, Ms. Aguila and Ms. Cao agreed to work together, and they discussed Ms. Cao paying Ms. Aguila kickbacks in Ms. Diaz's presence.

B

A grand jury returned an indictment against Ms. Diaz on June 5, 2018, charging her with one count of conspiracy to defraud the **United States** by receiving illegal health care kickbacks in violation of *18 U.S.C. § 371* and four counts of receiving illegal health care kickbacks in violation of *42 U.S.C. § 1320a-7b(b)(1)(A)*. Ms. Diaz pled not guilty and the case proceeded to trial.

At trial, the jury heard testimony from Stephen Quindoza, an expert witness on Medicare processes; Mr. Rodriguez; Ms. Aguila; Ms. Cao; Mr. Hernandez; Jarett Iliff, an investigator for the Department of Health and Human Services; Precious Sanchez, a forensic accountant; and Ms. Diaz. The jury found Ms. Diaz **[**4]** guilty on all five counts. The district court later sentenced Ms. Diaz to 87 months of imprisonment followed by 36 months of supervised release. This appeal followed.

II

Ms. Diaz contends that the district court erred when it denied her motion to exclude *Rule 404(b)* and inextricably intertwined evidence. The district court ruled that evidence of her prior involvement with other home health care agencies was admissible to prove her intent and that it was inextricably intertwined with the charged conduct. Ms. Diaz argues that the district court erred because the evidence was unfairly prejudicial; that it lacked the factual basis to prove intent; and that it was not inextricably intertwined with the charged conduct. The government responds that the district court did not err because the evidence was intrinsic to the charged conduct, as well as admissible to prove intent under *Rule 404(b)*.

HN1[↑] We review rulings on admission of prior bad-act evidence for abuse of discretion. *See* ***United States*** *v. Cooper, 926 F.3d 718, 733 (11th Cir. 2019)*. *Rule 404(b)* generally precludes the admission of **[**5]** evidence "of a crime, wrong, or other act . . . to prove a person's character" or to show that the person acted in conformity with his or her prior act. *See Fed. R. Evid. 404(b)(1)*; ***United States*** *v. Nerey, 877 F.3d 956, 974 (11th Cir. 2017)*. But *Rule 404(b)* provides several exceptions to the exclusion of such evidence, including for the purpose of proving intent. *See Fed. R. Evid. 404(b)(2)*. Additionally, *Rule 404(b)* does not apply, and the evidence need not meet one of the admissible categories in *Rule 404(b)(2)*, if "it is (1) part of the same transaction or series of transactions as the charged offense, (2) necessary to complete the story of the crime, or (3) inextricably intertwined with the evidence regarding the charged offense." *Nerey, 877 F.3d at 974* (citing ***United States*** *v. Baker, 432 F.3d 1189, 1205 n.9 (11th Cir. 2005))*. *Rule 403* gives a district court the discretion to exclude otherwise admissible evidence (including *Rule 404* evidence) if its probative **[*850]** value is substantially outweighed by the danger of unfair prejudice. *See Fed. R. Evid. 403*; ***United States*** *v. Shabazz, 887 F.3d 1204, 1216 (11th Cir. 2018)*.

In *Nerey, 877 F.3d at 975*, evidence of a defendant's "involvement with other home health care agencies . . . was inextricably intertwined with, and probative of, how [the defendant] became involved with the home health care agencies" at issue. Here, the evidence is almost identical to that in *Nerey*: Ms. Cao testified that Ms. Diaz was referred to her as a result of Ms. Diaz's work recruiting patients for other **[**6]** home health care agencies. The evidence of Ms. Diaz's involvement with other home health care agencies explains how she came to know Ms. Cao and joined the conspiracy she was found guilty of. It was therefore inextricably

III

Ms. Diaz argues that the district court erred when it denied her motion to dismiss the indictment against her for prejudicial pre-indictment delay. HN2[↑] We have previously reviewed the denial such of a motion for abuse of discretion and the underlying factual findings for clear error. *See* **United States** *v. Foxman, 87 F.3d 1220, 1222-23 (11th Cir. 1996)*. We apply that standard here.

HN3[↑] For Ms. Diaz to prove a due process violation from pre-indictment delay, she must show (1) that there was actual prejudice to her defense and (2) that the government's delay was deliberate to gain a tactical advantage. *See* **United States** *v. Gouveia, 467* **U.S.** *180, 192, 104 S. Ct. 2292, 81 L. Ed. 2d 146 (1984)*. *See also* **United States** *v. Thomas, 62 F.3d 1332, 1339 (11th Cir. 1995)*. This standard applies even when the government brings charges within the statute of limitations, as is the case here. *See Gouveia, 467* **U.S.** *at 192*.

Ms. Diaz maintains **[**7]** that she suffered prejudice because the government was able to obtain more evidence against her and secure Ms. Cao as a witness to testify against her at trial. Ms. Diaz claims that the government could have indicted her a year earlier because the indictment of Ms. Cao for related crimes occurred a year earlier than her own indictment, and the evidence brought against her was substantially similar to the evidence used against Ms. Cao. Ms. Diaz also casts doubt on Ms. Cao's discovery of a flash drive after Ms. Cao's guilty plea, claiming that the late discovery was the single most damaging piece of evidence against her at trial.

In response, the government says that the delay was based on legitimate investigatory reasons. One of those reasons was the collection of further evidence against Ms. Diaz, which included securing Ms. Cao's testimony against Ms. Diaz. The government also notes that even if Ms. Diaz is correct that charges could have been filed against her earlier, "prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt." **United States** *v. Lovasco, 431* **U.S.** *783, 791, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977)*. Finally, the government **[**8]** rejects Ms. Diaz's argument that collection of further evidence qualifies as prejudice.

Ms. Diaz did not successfully establish that the pre-indictment delay was deliberate or that its purpose was to gain a tactical advantage. She offered only a **[*851]** quote from her own attorney at trial, and the addition of Ms. Cao as a witness for the government, to prove the second prong. The prosecution waiting to secure Ms. Cao as a witness against Ms. Diaz was a valid reason to delay the indictment, as it was trying to bolster its case and wanted to be "completely satisfied that [it] should prosecute and will be able promptly to establish guilt beyond a reasonable doubt." *Lovasco, 431* **U.S.** *at 795*. Ms. Diaz, we note, also made no argument of bad faith on the part of the government.

Because Ms. Diaz failed to prove the second prong, we need not reach the question of whether she suffered prejudice as a result of the delay. *See Thomas, 62 F.3d at 1339*. Thus, the district court did not abuse its discretion by denying Ms. Diaz's motion to dismiss the indictment for pre-indictment delay.

IV

Ms. Diaz argues that the district court erred when it denied her motion for judgment of acquittal. *See Fed. R. Crim. P. 29*. HN4[↑] We review *de novo* the district court's denial of a motion for **[**9]** judgment of acquittal. *See* **United States** *v. Browne, 505 F.3d 1229, 1253 (11th Cir. 2007)*. In doing so, we view the evidence in the light most favorable to the government and draw all reasonable inferences in favor of the jury's verdict. *See* **United States** *v. Henderson, 893 F.3d 1338, 1348 (11th Cir. 2018)*.

Ms. Diaz raises two primary arguments about the evidence presented at trial. First, she claims that the government failed to prove that she knew Medicare was a federal health care plan, and thus failed to prove an essential element of one of the crimes she was accused of. Second, she claims that the government failed to prove a conspiratorial agreement and only proved a buyer-seller relationship. She contends that the government's witnesses provided no evidence that she had committed a crime and that their testimony did not include firsthand knowledge or accounts of any wrongdoing. Ms. Diaz also claims that Ms. Cao's spreadsheet was found 14 months after Ms. Cao pleaded guilty, and casts doubt on the veracity of its contents. And she notes alleged inconsistencies in Ms. Cao's testimony.

In response, the government recounts the testimony of

Mr. Rodriguez, Ms. Aguila, and Ms. Cao. And it describes the documentary evidence of payments by Ms. Cao to Ms. Diaz.

Ms. Diaz's argument that the government failed to prove **[**10]** an essential element is unavailing. Her claim that the government needed to prove she knew Medicare was a federal health care plan is foreclosed by precedent: ***HN5***[↑] "[W]hile the government must prove that the **United States** was the ultimate target of the conspiracy under the defraud clause of § 371, the government is not required to allege that the **United States** was the intended victim of a conspiracy under the offense clause of § 371." ***United States*** *v. Harmas, 974 F.2d 1262, 1268 (11th Cir. 1992)*. Thus, Ms. Diaz's knowledge of Medicare's status as a federal health care plan was not necessary for the jury to convict.

Ms. Diaz's argument that the government failed to prove a conspiratorial agreement also fails. She is correct that, ***HN6***[↑] generally, a buyer-seller relationship by itself does not prove conspiracy. *See* ***United States*** *v. Solomon, 686 F.2d 863, 877 (11th Cir. 1982)*. What differentiates a mere buyer-seller relationship from a conspiratorial agreement is the "knowledge and understanding of the parties associated with the buying and selling." *Id. See also* ***United States*** *v. Mercer, 165 F.3d 1331, 1335 (11th Cir. 1999)*.

[*852] Here, the parties' knowledge and understanding were sufficient to demonstrate more than a mere buyer-seller relationship. Several of the witnesses at trial testified to Ms. Diaz's knowledge and ongoing involvement. For example, Ms. Aguila testified that Ms. Diaz admitted **[**11]** to "moving patients" for a living and paying beneficiaries to go to specific health agencies. Ms. Aguila also testified that Ms. Diaz introduced Ms. Aguila to Ms. Cao for the purpose of referring patients to Good Friends in exchange for kickbacks. And Ms. Cao testified to meeting with Ms. Diaz in her office, where they discussed and negotiated the parameters of their arrangement. Simply stated, the parameters here went beyond simple buyer and seller logistics.

The evidence offered at trial was sufficient for a jury to find the existence of a conspiratorial agreement. The district court's denial of Ms. Diaz's motion for judgment of acquittal is therefore affirmed.

V

Finally, Ms. Diaz contests the district court's calculation of her imprisonment range under the advisory Sentencing Guidelines and the overruling of her objections to the presentence investigation report. ***HN7***[↑] We review the district court's interpretation of the Sentencing Guidelines *de novo* and the court's factual findings underlying the calculation of the Guidelines range for clear error. *See* ***United States*** *v. Barrington, 648 F.3d 1178, 1194-95 (11th Cir. 2011)*. If the record supports the district court's factual findings, there is no clear error. *See* ***United States*** *v. Petrie, 302 F.3d 1280, 1290 (11th Cir. 2002)*. "When a defendant challenges one of the factual **[**12]** bases of his sentence as set forth in the PSR, the Government has the burden of establishing the disputed fact by a preponderance of the evidence." ***United States*** *v. Lawrence, 47 F.3d 1559, 1566 (11th Cir. 1995)* (citations omitted).

Ms. Diaz made several objections to the PSR, including challenges to the offense conduct in paragraphs 7-19, certain factual statements in the PSR, and the assertion that she made false statements while testifying at trial. She also objected to the following sentencing enhancements: a 16-level enhancement for the loss amount, a three-level enhancement for her aggravating role pursuant to ***U.S.S.G.*** *§ 3B1.1*, and a two-level enhancement for obstruction of justice. She claims that these errors resulted in a procedurally and substantively unreasonable sentence.

A

Ms. Diaz contests the district court's application of a 16-level enhancement under ***U.S.S.G.*** *§§ 2B1.1(b)(1)(I)* and *2B4.1(b)(1)(B)* due to the value of the improper benefit conferred. She disputes the calculation of the loss amount and claims that the government did not satisfy its burden to prove the amount by a preponderance of the evidence. Further, she argues that the loss amount should have only included the sums Medicare paid to Good Friends, and none of the money it paid to other home health care agencies. And finally, **[**13]** at oral argument, Ms. Diaz's counsel argued that the amount should only include the amount of money she received as kickbacks. *See* ***United States*** *v. Medina*, 485 F.3d 1291 (11th Cir. 2007).

In response, the government submits that the district court calculated the proper loss amount—$1,605,927.17—which was the "total amount that Medicare paid to home health agencies for patients Diaz recruited." Appellee's Br. at 46. The government also

disputes Ms. Diaz's argument that only the payments to Good Friends should count towards the total value. At oral argument, the government **[*853]** noted that Ms. Diaz had not previously raised her *Medina* argument.

The district court found that the government had proven a loss amount of greater than $1,500,000 by a preponderance of the evidence. The district court based the calculation of this figure on payments by Medicare to Good Friends and other home health care agencies. The payments to Good Friends were set out in Government Exhibits 539 and 604, which documented the payments from Medicare and received by Good Friends in Ms. Cao's ledger. The payments made to other home health care agencies were admitted as Government Exhibit A at the sentencing hearing, and Ms. Diaz did not object to the factual basis of this **[**14]** document. Exhibit A documented Medicare payments over the time period that home health care agencies were paying Ms. Diaz. The district court also relied on Government Exhibit 540 to document patients whom Ms. Diaz recruited and who went to other home health care agencies. Ms. Aguila's testimony also supported a finding of Ms. Diaz's receipt of payment from other home health care agencies. Given this evidence, we conclude that the prosecution established the loss amount by a preponderance of the evidence and that the district court's finding was not clearly erroneous.

Under our precedent, payments made to other home health care agencies may be considered as relevant conduct in calculating the loss amount. In *Nerey*, for example, we affirmed the district court's loss calculation in a similar Medicare fraud scheme where the loss calculation included fraudulent payments by Medicare to different home health care agencies. *See* Nerey, 877 F.3d at 977-78. As here, those payments resulted from the defendant's referrals to other home health care agencies. *See id.* Ms. Diaz has identified no contradictory authority on this point.

Good Friends was not the only home health care agency to receive Medicare payments for Ms. **[**15]** Diaz's referrals, and under Nerey, the amount paid to those agencies could be properly included in the loss amount calculation. The district court did not err in including the payments to other home health care agencies.

Ms. Diaz's argument that only the kickback amounts, rather than the full amounts paid by Medicare, should be considered in the loss calculation was waived. Ms. Diaz did not make this argument in her initial brief or in her reply brief, and ***HN8***[↑] "a legal claim or argument that has not been briefed before the court is deemed abandoned and its merits will not be addressed." Access Now, Inc. v. Sw. Airlines Co., 385 F.3d 1324, 1330 (11th Cir. 2004). Raising the argument at oral argument for the first time was too late. *See* Mesa Air Group, Inc. v. Delta Air Lines, Inc., 573 F.3d 1124, 1130 n.7 (11th Cir. 2009).

B

Ms. Diaz argues that the district court improperly imposed a three-level enhancement pursuant to ***U.S.S.G.*** § 3B1.1(b). According to the PSR, Ms. Diaz "was a manager or supervisor in a criminal activity involving five or more participants." PSR ¶ 31. Ms. Diaz disputes that the government presented proof that satisfies the preponderance standard, and she claims that she only played a minor role. ***HN9***[↑] Ms. Diaz's argument concerns only whether or not the facts underlying the enhancement were properly found by the district court, so we review for clear error. **[**16]** *See* Barrington, 648 F.3d at 1194-95.

The district court found that Ms. Diaz exercised decision-making authority, dictated the kickback amounts, and recruited and coached her beneficiary accomplices. The district court relied upon Ms. Aguila's **[*854]** testimony, Ms. Cao's testimony, and Ms. Cao's ledger to find that the government had met its burden. Ms. Aguila testified about Ms. Diaz's payments to patients to go to home health care agencies for services, and both Ms. Aguila and Ms. Cao testified to Ms. Diaz directing the patients to clinics to receive prescriptions. Ms. Cao's ledger also established Ms. Diaz's recruitment of 150 Medicare beneficiaries. On this record, the district court's aggravating role determination was not clearly erroneous.

C

Ms. Diaz also challenges the two-level enhancement for obstruction of justice under ***U.S.S.G.*** § 3C1.1. Ms. Diaz points to alleged discrepancies in the testimony of Ms. Aguila and Ms. Cao that she claims undermine the enhancement.

Because Ms. Diaz again only challenges the facts underlying the district court's application of the enhancement, we review for clear error. *See* Barrington, 648 F.3d at 1194-95. The district court found that Ms.

Diaz committed perjury at trial by a preponderance of the evidence. For example, Ms. Diaz testified **[**17]** that Good Friends only paid her shell corporation for transporting patients. But the evidence at trial, including testimony from Ms. Cao and Ms. Aguila, contradicted Ms. Diaz's testimony. The record supports the obstruction enhancement, and the district court's ruling was not clearly erroneous.

VI

Ms. Diaz's conviction and sentence are affirmed.

AFFIRMED.

End of Document

A-2

Order Denying Petition for Panel Rehearing (3/31/2021)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-11909-AA

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

YAMILET DIAZ,

Defendant - Appellant.

Appeal from the United States District Court
for the Southern District of Florida

BEFORE: JORDAN, JILL PRYOR, and BRANCH, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by the Appellant is DENIED.

ORD-41

A-3

Select Jury Instructions

Conspiracy to Defraud the United States and Receive Health Care Kickbacks
18 U.S.C. § 371

It's a Federal crime for anyone to conspire or agree with someone else to defraud the United States or any of its agencies.

It's also a Federal crime for anyone to conspire or agree with someone to do something that, if carried out, would result in the crime of receiving health care kickbacks. I will instruct you on the elements of receiving health care kickbacks in a moment.

To "defraud" the United States means to cheat the Government out of property or money or to interfere with any of its lawful governmental functions by deceit, craft, or trickery.

As used in these instructions the term "Federal health care program" means any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government.

A "conspiracy" is an agreement by two or more persons to commit an unlawful act. In other words, it is a kind of "partnership" for criminal purposes. Every member of a conspiracy becomes the agent or partner of every other member.

The Government does not have to prove that all the people named in the indictment were members of the plan, or that those who were members made any kind of formal agreement. The heart of a conspiracy is the making of the unlawful plan itself, so the Government does not have to prove that the conspirators succeeded in carrying out the plan.

The Government does not have to prove that the members planned together all the details of the plan or the "overt acts" that the indictment charges would be carried out in an effort to commit the intended crime.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) Two or more people in some way agreed to try to accomplish a shared and unlawful plan;

(2) The Defendant knew the unlawful purpose of the plan and willfully joined in it;

(3) During the conspiracy, one of the conspirators knowingly engaged in at least one overt act as described in the indictment; and

(4) The overt act was committed at or about the time alleged and with the purpose of carrying out or accomplishing some object of the conspiracy.

An "overt act" is any transaction or event, even one that may be entirely innocent when viewed alone, that a conspirator commits to accomplish some object of the conspiracy.

A person may be a conspirator without knowing all the details of the unlawful plan or the names and identities of all the other alleged conspirators.

If the Defendant played only a minor part in the plan but had a general understanding of the unlawful purpose of the plan – and willfully joined in the plan on at least one occasion – that's sufficient for you to find the Defendant guilty.

But simply being present at the scene of an event or merely associating with certain people and discussing common goals and interests doesn't establish proof of a conspiracy. Also a person who doesn't know about a conspiracy but happens to act in a way that advances some purpose of one doesn't automatically become a conspirator.

Multiple Objects of a Conspiracy

In this case, regarding the alleged conspiracy, the indictment charges that the Defendant conspired to defraud the United States and to receive health care kickbacks. In other words, the Defendant is charged with conspiring to commit two separate substantive crimes.

The Government does not have to prove that the Defendant willfully conspired to commit both crimes. It is sufficient if the Government proves beyond a reasonable doubt that the Defendant willfully conspired to commit one of those crimes. But to return a verdict of guilty, you must all agree on which of the two crimes the Defendant conspired to commit.

Receipt of Kickbacks in Connection with a Federal Health Care Program (42 U.S.C. § 1320a-7b(b)(1)(A))

A Defendant can be found guilty of violating 42 U.S.C. § 1320a-7b(b)(1)(A), also called the Anti-Kickback Statute, only if the following facts are proven beyond a reasonable doubt:

(1) A Defendant solicited or received any remuneration (including any bribe or kickback), directly or indirectly, openly or secretly;

(2) A Defendant solicited or received payment in return for referring an individual to a person for the furnishing or arranging for the furnishing of an item or service that could be paid for, in whole or in part, by a Federal health care program which, in this case, is Medicare; and

(3) A Defendant did so knowingly and willfully.

The Government need not prove that the only or primary purpose of the remuneration, kickback, or bribe that was paid was for the referral of Medicare patients. If the Government proves beyond a reasonable doubt that one of the purposes of making the payment was in return for referring Medicare patients, that is sufficient.

As used in these instructions, the term "remuneration" means the transfer of anything of value from one person or entity to another person or entity. Remuneration includes money. Remuneration can be direct or indirect.

As used in these instructions, the term "bribe" means the corrupt transfer of anything of value from one person or entity to another person or entity usually to accomplish some unlawful result or to accomplish some lawful result by some unlawful means.

As used in these instructions the term "kickback" means the return of a portion of the original payment.

Again, as used in these instructions the term "Federal health care program" means any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government.