APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-50912

United States Court of Appeals
Fifth Circuit
FILED
March 3, 2022
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID FOX DUBIN,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:17-CR-227-2

Before: OWEN, *Chief Judge*, and JONES, SMITH, BARKSDALE, STEWART, DENNIS, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, COSTA, WILLETT, HO, DUNCAN, ENGELHARDT, OLDHAM and WILSON, *Circuit Judges*.

PER CURIAM joined by OWEN, *Chief Judge*, and SMITH, BARKSDALE, STEWART, DENNIS, SOUTHWICK, GRAVES, HIGGINSON, and HO, *Circuit Judges*:

William Joseph Dubin and his son David Fox Dubin were convicted of several offenses related to Medicaid fraud. They appealed, and a panel of this court affirmed the district court's judgment.[1]

The court granted rehearing en banc[2] to consider whether there was sufficient evidence to support David Dubin's conviction under 18 U.S.C. § 1028A(a)(1). We now affirm the district court's judgment for the reasons set forth in the panel's majority opinion.

We need not resolve whether our review of the § 1028A issue is de novo or for plain error because the conviction stands regardless of which standard of review applies.

Accordingly, the district court's judgment is AFFIRMED.

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[1] *United States v. Dubin*, 982 F.3d 318 (5th Cir. 2020); *but see id.* at 330, 332 (Elrod, J., concurring) (concurring "reluctantly" concluding that binding circuit precedent governed).

[2] *United States v. Dubin*, 989 F.3d 1068 (5th Cir. 2021).

PRISCILLA R. OWEN, *Chief Judge*, joined by SMITH, BARKSDALE, HIGGINSON, and HO, *Circuit Judges*, concurring:

Much ink has been spilled about "identity theft" in dissenting opinions in today's case.[1] However, the text of 18 U.S.C. § 1028A(a)(1) does not contain the words "identity theft" or even "theft." The text of the statute instead imposes a sentencing enhancement for the commission of enumerated federal felonies when the criminal "knowingly . . . uses, without lawful authority, a means of identification of another person."[2] Our focus must be on the actual text of the statute and not the meaning or scope of "identity theft."

David Dubin was convicted under 18 U.S.C. § 1347(a) of "defraud[ing] a[] health care benefit program" or "obtain[ing], by means of false or fraudulent pretenses [or] representations . . . money . . . owned by, or under the custody or control of, a[] health care benefit program" (in this case Medicaid), "in connection with the delivery of or payment for health care benefits, items, or services."[3] He was also convicted under 18 U.S.C. § 1349 of conspiracy to commit a § 1347(a) offense. The en banc court has held that these felony convictions stand.

The principal issue that has divided our court is the proper construction of § 1028A(a)(1), which sets

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[1] *Post*, at 32-39 (Elrod, J., dissenting); *post*, at 41-46 (Costa, J., dissenting).

[2] 18 U.S.C. § 1028A(a)(1).

[3] 18 U.S.C. § 1347(a).

forth a sentencing enhancement. That section provides "[w]hoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person" shall receive an additional two years of imprisonment.[4] The health care fraud and conspiracy offenses of which Dubin was convicted are felony violations enumerated in subsection (c)(5) of § 1028A.[5]

The resolution of this issue turns on the meaning of the phrase "uses, without lawful authority, a means of identification of another person" in § 1028A(a)(1).[6] At Dubin's trial, the jury found that he did "use[], without lawful authority, a means of identification of another person" in committing the offenses set forth in § 1347(a) and § 1349. That sentencing enhancement conviction must be affirmed based on a straightforward reading of § 1028A(a)(1) and the evidence before the jury. Relevant here is Dubin's fraudulent billing pertaining to Patient L, who was a minor and whose initials are AS. Dubin had the "lawful authority" to use Medicaid Patient L's identifying information to obtain lawful reimbursements from the government for covered services, but Dubin also "use[d]" Patient L's identifying information "during and in re-

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[4] 18 U.S.C. § 1028A(a)(1).

[5] 18 U.S.C. § 1028A(c)(5) (listing as enumerated felony violations "any provision contained in chapter 63 (relating to mail, bank, and wire fraud)"; both § 1347 and § 1349 are contained in chapter 63 of Title 18).

[6] 18 U.S.C. § 1028A(a)(1).

lation to" the felonies of Medicaid fraud and conspiracy to commit Medicaid fraud. That "use" was "without lawful authority."

Though there is undeniably a split among circuit courts as to how § 1028A(a)(1) should be construed,[7] the Fourth Circuit's analysis is solidly supported by the text of the statute and familiar principles of statutory interpretation. In *United States v. Abdelshafi*,[8] the Fourth Circuit eloquently and ably addressed how § 1028A(a)(1) applies to facts indistinguishable from those in the present case. Abdelshafi owned and operated a company that transported Medicaid patients.[9] He lawfully received information about those patients including their names and Medicaid identification numbers.[10] In billing for transportation services, Abdelshafi "not only inflated mileage amounts, but also submitted claim forms for trips that did not, in fact, occur."[11] The Fourth Circuit affirmed his conviction under § 1028A(a)(1), rejecting the same arguments now asserted in the case before us by Dubin and the dissenting opinions of JUDGE ELROD and JUDGE COSTA. The Fourth Circuit held:

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[7] *Compare United States v. Abdelshafi*, 592 F.3d 602, 606-610 (4th Cir. 2010), *with United States v. Hong*, 938 F.3d 1040, 1051 (9th Cir. 2019), *and United States v. Medlock*, 792 F.3d 700, 707 (6th Cir. 2015).

[8] 592 F.3d 602.

[9] *Id*. at 605.

[10] *Id*.

[11] *Id*.

- "While Abdelshafi had authority to possess the Medicaid identification numbers, he had no authority to use them unlawfully so as to perpetuate a fraud. We, therefore, decline to narrow the application of § 1028A(a)(1) to cases in which an individual's identity has been misrepresented, as it would clearly be inappropriate for us 'to adopt an interpretation [ ] not supported by the plain text of the statute.' *United States v. Pressley*, 359 F.3d 347, 351 (4th Cir. 2004)."[12]
- "Our conclusion in this regard is not altered by Abdelshafi's representation that 'every single incident of health care fraud by a provider would also constitute aggravated identity theft' if his conduct is deemed to violate the statute."[13]
- "Section 1028A(a)(1) provides an enhanced penalty for those who unlawfully use another's identifying information during and in relation to a broad array of predicate offenses, including crimes related to the 'theft of government property' and 'fraud,' as well as offenses involving 'unlawful activities related to passports, visas, and immigration.'"[14]

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[12] *Id*. at 609.

[13] *Id*.

[14] *Id*. (quoting *Flores–Figueroa v. United States*, 556 U.S. 646, 647-48 (2009)).

- "That a single type of health care fraud related to provider payments—a subset of crimes involving fraud and theft—may fall within the statutory ambit is not particularly noteworthy."[15]
- "'Even if we were more persuaded than we are by [this] policy argument [ ], the result in this case would be unchanged. Resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress.' *United States v. Rodgers*, 466 U.S. 475, 484 (1984). We adhere to the principle that '[f]ederal crimes are defined by Congress, and so long as Congress acts within its constitutional power in enacting a criminal statute, this Court must give effect to Congress' expressed intention concerning the scope of conduct prohibited.' *United States v. Kozminski*, 487 U.S. 931, 939 (1988)."[16]

JUDGE ELROD and JUDGE COSTA's dissenting opinions disagree with the Fourth Circuit's interpretation of § 1028A(a)(1). As noted above, in advocating for their contrary view, those opinions deflect focus from the actual text of § 1028A(a)(1) by characterizing the offense defined in that statute as "identity theft."[17] It is much easier to argue, as the dissenting opinions do,

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[15] *Id*.

[16] *Id*. at 609-10.

[17] *See*, *e.g.*, *post*, at 34 (Elrod, J., dissenting); *post*, at 46 (Costa, J., dissenting).

about whether Dubin committed "identity theft"[18] and "what ordinary people understand identity theft to be"[19] as opposed to whether he "use[d] . . . a means of identification of another person" in committing his crimes or what ordinary people would understand the text of § 1028A(a)(1) to prohibit. We must not lose sight of the fact that the offense Congress concluded warranted a two-year sentencing enhancement is defined in § 1028A(a)(1), and the elements of that offense are not captured or even fairly described by the words "identity theft."

The aim of the dissenting opinions is to cabin the sentencing enhancement substantially. But in attempting to do so, they do not give effect to both "lawful" and "authority." JUDGE COSTA's dissenting opinion draws a distinction not found in the text of § 1028A(a)(1). That opinion says that § 1028A(a)(1) applies only when an entity was billed but no services were provided ("made-up billing cases" in the dissenting opinion's words) and does not apply to cases in which bills were fraudulently inflated ("overbilling cases," again in the dissenting opinion's words).[20]

With great respect, it is unreasonable to construe "uses, without lawful authority, a means of identification of another person" as drawing a distinction based on whether some services or no services were provided, as JUDGE COSTA's dissenting opinion[21] and two

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[18] *Post*, at 34 (Elrod, J., dissenting).

[19] *Post*, at 43 (Costa, J., dissenting).

[20] *Post*, at 45.

[21] *Post*, at 45.

decisions from other circuits have done.[22] In health care benefit fraud cases that use real people's identifying information to perpetrate the fraud, the criminal enterprise depends entirely upon access to and unlawful use of "a means of identification of another person." There is a direct causal link between the "use[], without lawful authority, [of] a means of identification of another person" and the offense, regardless of whether the offense was overbilling for services provided or billing when no services at all were provided. Those engaged in health care fraud like that committed by Dubin actively seek, then mine, sources of "a means of identification of another person" because those "means of identification of another person" are what they use to perpetrate the fraud. Health care fraud like that committed by Dubin costs taxpayers billions of dollars each year.

Why is a criminal who uses a person's means of identification to bill for medical services when none were provided more culpable than a criminal who uses a person's means of identification to bill more for medical services than the law allows? How can it logically be said that there is a causal nexus between the use of the identifying information as a means of committing the former crime but not as a means of committing the latter? In both cases, benefits were paid because the criminal used a person's means of identification as the key to duping the government. In both situations, the fraud causes precisely the same type of loss to taxpayers. I see no textual basis for concluding

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[22] *See United States v. Hong*, 938 F.3d 1040, 1051 (9th Cir. 2019); *United States v. Medlock*, 792 F.3d 700, 707-08 (6th Cir. 2015).

that Congress drew a distinction in § 1028A(a)(1) between use of identifying information to obtain benefits when no services were provided and use of identifying information to obtain benefits by inflating the cost of services that were provided.

There is certainly nothing "breathtaking"[23] about punishing a criminal who, for example, commits fraud by overbilling $100,000 for medical services the same as a criminal who bills $100,000 for medical services that were not provided. Both have committed the *same crime* (defined by § 1028A(a)(1)) by equally culpable means when they use a real person's "means of identification" "during and in relation to" a violation of § 1347(a). Nor is there any issue of "fair notice" or "fair warning" as to what conduct is prohibited.[24] The statute plainly states that it is a crime to use a means of identification of another person in committing enumerated offenses that include health care benefit fraud.

I.

It should be beyond debate that Dubin "used" Patient L's identifying information[25] "during and in relation to" the offenses for which he was convicted. He

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[23] *Post*, at 32 (Elrod, J., dissenting).

[24] *Post*, at 42, 44 (Costa, J., dissenting).

[25] See 18 U.S.C. § 1028(d)(7), defining "means of identification" for both § 1028 and § 1028A:

> (7) the term "means of identification" means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any--

could not have effectuated the health care fraud or the conspiracy to commit health care fraud without using Patient L's identifying information.[26]

The focus should be on whether he "use[d]" the identifying information "without lawful authority." The authority to use Patient L's identifying infor-

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> (A) name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number;
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> (B) unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;
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> (C) unique electronic identification number, address, or routing code; or
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> (D) telecommunication identifying information or access device (as defined in section 1029(e)). . . .

[26] *See, e.g.*, *Bailey v. United States*, 516 U.S. 137, 145 (1995) (quoting *Smith v. United States*, 508 U.S. 223, 228-29 (1993)) ("The word 'use' in the statute must be given its 'ordinary or natural' meaning, a meaning variously defined as '[t]o convert to one's service,' 'to employ,' 'to avail oneself of,' and 'to carry out a purpose or action by means of.'"); *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 880 (9th Cir. 2002) (quoting *Webster's Ninth New Collegiate Dictionary* (1985)) (applying the "ordinary definition" of use, which is "'to put into action or service, avail oneself of, employ'"); *United States v. Ramsey*, 237 F.3d 853, 859 (7th Cir. 2001) (quoting *Black's Law Dictionary* (6th ed. 1990)) (interpreting "use" according to its dictionary definition of "'to avail oneself of; to employ; to utilize; to carry out a purpose or action by means of; to put into action or service, especially to attain an end'").

mation came from both Patient L (or someone authorized to act on the minor patient's behalf) and the Medicaid program itself. But neither Patient L nor Medicaid authorized Dubin to use that information or Patient L's name to commit health care fraud. (There is no evidence or even a suggestion that Patient L was a party to the fraud.) Though Dubin was authorized to use Patient L's identifying information, he had no "lawful" authority to use the information in the manner he did when he committed the felonies for which he was convicted.

Dubin, a managing partner at a psychological services company, directed that company to overbill for mental health evaluations at an emergency shelter for children. Dubin falsified information in at least four respects. First, he billed at a rate set for a licensed psychologist, even though a clinician without that credential saw Patient L (AS), and the billing rates for the actual provider could only be billed under Medicaid regulations at a much lower rate. Second, Dubin instructed employees to bill the maximum number of hours (eight) permitted by Medicaid regulations for certain services, even if the actual number of hours they spent performing the services was less. Third, Dubin billed for an evaluation that his company only partially performed. Patient L underwent psychological testing but did not receive a clinical interview. Nor did the shelter receive any report describing the patient's condition or any recommended treatment, which was necessary in order to bill for the evaluation. The fact that an evaluation occurred was useless to the shelter, and to Patient L, unless the

provider furnished a report of the outcome of the evaluation. Fourth, Dubin falsified the date that services were provided since, had he used the correct date, the services would have been ineligible for reimbursement because they were performed within a twelve-month period for which maximum benefits had already been paid. Medicaid covers one psychological evaluation each year. After Dubin learned that Patient L (AS) had already been evaluated within a one-year period, Dubin billed Medicaid using a falsified treatment date.

Dubin challenges his § 1028A(a)(1) conviction on the ground that he did not "use" Patient L's identity within the meaning of the statute. He contends that his overbilling concerned only "how and when" Patient L was evaluated, since Patient L did receive some services. He attempts to limit "use" to false claims in which the patient received no services at all. JUDGE COSTA's dissenting opinion agrees with that interpretation of § 1028A(a)(1).

This dichotomy finds no support in § 1028A(a)(1)'s text. If Dubin's company had provided no services at all to Patient L, but had billed for services, Dubin would have "used" Patient L's identifying information (the patient's name and unique Medicaid identification number) to make the false claim. If Dubin's company provided some services but "used" Patient L's identifying information to overbill, the fact remains that Dubin could not have effectuated the false claim without the identifying information. There is no principled or textual basis for concluding that Dubin "used" Patient L's identifying information "without

lawful authority" in the first scenario but not the second. Nothing in the statute permits a distinction between using identifying information to submit an entirely fabricated claim for Medicaid benefits and using the same information to submit a partially fabricated claim. Moreover, as noted above, in both scenarios, the "use" of the identifying information would be "without lawful authority."

II.

JUDGE ELROD's dissenting opinion would reverse Dubin's conviction under the sentencing enhancement statute on the basis that Dubin did not commit "identity theft."[27] That opinion asserts "Dubin did not commit identity theft,"[28] and "[t]he only identity theft here is simple healthcare fraud impersonating aggravated identity theft under 18 U.S.C. § 1028A."[29] But none of the elements in the text of 18 U.S.C. § 1028A(a)(1) requires "theft" of any kind. Instead, the statute speaks in terms of "use[], without lawful authority." The words "without lawful authority" contemplate that the use of "a means of identification" can be authorized but that authorized "use" can be violative of § 1028A(a)(1) if the use is "unlawful."[30]

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[27] *Post*, at 34 (Elrod, J., dissenting).

[28] *Post*, at 34.

[29] *Post*, at 34.

[30] *See generally United States v. Lumbard*, 706 F.3d 716, 725 (6th Cir. 2013) (concluding "that the phrase 'without lawful authority' in § 1028A is not limited to instances of theft, but includes cases where the defendant obtained the permission of the person whose information the defendant misused"); *United States v.*

Though the caption of 18 U.S.C. § 1028A is indeed "Aggravated identity theft," the text of § 1028A(a)(1) does not require "theft" or set forth elements that are traditionally considered "theft." We cannot import *the caption* of § 1028A, which is "Aggravated identity theft", into *the text* of the statute defining the offense.[31] That would impermissibly add elements not found in the statute's text.[32]

The Seventh Circuit's en banc decision in *United States v. Spears*,[33] on which JUDGE ELROD's dissenting opinion relies, imported a "theft" requirement.[34] I have great respect for our sister circuit, but I cannot

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Ozuna–Cabrera, 663 F.3d 496, 501 (1st Cir. 2011); *United States v. Retana*, 641 F.3d 272, 275 (8th Cir. 2011) (holding father's authorization of his son to use his social security number does not amount to "lawful authority" to excuse son's fraudulent use of the information to commit crimes); *United States v. Hines*, 472 F.3d 1038, 1040 (8th Cir. 2007) (holding that even if the defendant obtained consent to use another person's name and social security number in exchange for illegal drugs, the defendant acted without lawful authority when using the information to defraud police).

[31] *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 256 (2004) (quoting *Bhd. of R.R. Trainmen v. Balt. & Ohio Ry. Co.*, 331 U.S. 519, 529 (1947)) ("The caption of a statute, this Court has cautioned, 'cannot undo or limit that which the [statute's] text makes plain.'").

[32] *Id.*; *see also United States v. Gomez*, 960 F.3d 173, 178 (5th Cir. 2020); *Knapp v. U.S. Dep't of Agric.*, 796 F.3d 445, 465 (5th Cir. 2015).

[33] 729 F.3d 753 (7th Cir. 2013).

[34] *Id.* at 756.

agree with its analysis because there is no textual basis for requiring "theft."

JUDGE COSTA's dissenting opinion concludes that § 1028A(a)(1) is an "aggravated-identity-theft law"[35] but rejects the argument that § 1028A requires actual theft. That opinion advocates that "consent" is the "dividing line," emphasizing, "[n]ote that this interpretation does not require that the identity be stolen, just that it be used without consent."[36] JUDGE COSTA's opinion points out, "[i]ndeed, nearby statutes include a 'stolen' requirement while section 1028A does not. *See* 18 U.S.C. § 1028(a)(2) (criminalizing the transfer of an 'identification document . . . knowing that such document . . . was stolen'); *id.* § 1028(a)(6) (criminalizing the knowing possession of a document that appears to be identification of the United States 'which is stolen')."[37]

JUDGE ELROD's dissenting opinion states "I join Judge Costa's dissent in full. Contrary to Chief Judge Owen's assertion, I do not read the statute as requiring that the defendant stole the identification."[38] With respect, that assertion is difficult to reconcile with

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[35] *Post*, at 42 (Costa, J., dissenting).

[36] *Post*, at 45 & n.2.

[37] *Post*, at 45 n.2.

[38] *Post*, at 32 n.1 (Elrod, J., dissenting).

what JUDGE ELROD's opinion actually says. That opinion is insistent that § 1028A(a)(1) requires "identity *theft*."[39]

III.

As noted above, the dissenting opinion authored by JUDGE COSTA posits that § 1028A(a)(1) draws a distinction between "an overbilling case and a made-up bill case."[40] This distinction rests on "consent" according to JUDGE COSTA's opinion, which says, "[t]he meaningful difference for identity theft purposes between an overbilling case and a made-up bill case is that in only the former did the patient consent to use of identifying information for the transaction."[41] But here again, the text of the statute does not draw this distinction. The statute says that "[w]hoever . . . uses, without lawful authority, a means of identification of

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[39] *Post*, at 34 (emphasis added); *see also post*, at 34 ("The only identity theft here is simple healthcare fraud impersonating aggravated identity theft under 18 U.S.C. § 1028A."); *post*, at 34 ("Dubin did not commit identity theft."); *post*, at 35 ("What Dubin did is not identity theft."); *post*, at 36 (citing the *Spears* decision with approval, saying "[w]riting for the *en banc* court, Judge Easterbrook agreed with Spears: 'Providing a client with a bogus credential containing the client's own information is identity fraud but not identity theft; no one's identity has been stolen or misappropriated.'"); *post*, at 38 ("Dubin lied only about the nature—the when and how—of the services provided to Patient L. That is not identity theft."); *post*, at 38-39 ("Dubin's conviction should be vacated because he had permission to use Patient L's means of identification on this Medicaid bill and did not commit identity theft.").

[40] *Post*, at 44 (Costa, J., dissenting).

[41] *Post*, at 44.

another person" "during and in relation to any felony violation enumerated" shall be sentenced to a term of imprisonment of two years.[42] It bears repeating that a Medicaid beneficiary can consent to the use of her unique identifying number for lawful purposes, such as filing a claim for covered benefits.[43] But when the provider fraudulently overbills for services in a case such as the present one, the provider is doing so "without lawful authority" because fraudulent billing submissions are unlawful.[44]

In this regard, and with great respect, JUDGE COSTA's dissenting opinion meets itself coming around. That opinion acknowledges that "section 1028A applies if a defendant initially has consent to use identifying information for a certain purpose but then later engages in a separate transaction without permission."[45] That is exactly what happened in this case. Both Patient L (AS) and Medicaid consented to

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[42] 18 U.S.C. § 1028A(a)(1).

[43] *See generally United States v. Lumbard*, 707 F.3d 716, 725 (6th Cir. 2013); *United States v. Ozuna–Cabrera*, 663 F.3d 496, 501 (1st Cir. 2011); *United States v. Retana*, 641 F.3d 272, 275 (8th Cir. 2011); *United States v. Hines*, 472 F.3d 1038, 1040; *United States v. Carrion–Brito*, 362 F. App'x 267, 273 (3d Cir. 2010) (unpublished opinion).

[44] *See United States v. Abdelshafi*, 592 F.3d 602, 610 (4th Cir. 2010) (holding that the defendant "came into lawful possession, initially, of Medicaid patients' identifying information and had 'lawful authority' to use that information for proper billing purposes" but "[h]e did not have 'lawful authority' . . . to use Medicaid patients' identifying information to submit fraudulent billing claims").

[45] *Post*, at 45 n.2 (Costa, J., dissenting).

the use of the patient's name and unique identifying number to seek reimbursement for services provided. But Dubin then went beyond that consent and claimed inflated reimbursements based on fraudulent representations as to who provided services and when, and the extent of services provided. An example of a factual scenario set forth in JUDGE COSTA's dissenting opinion as to when § 1028A would apply drives home the point that the statute does not distinguish "services-provided" cases from "no-services-provided" cases. The example given in JUDGE COSTA's dissenting opinion is that "[i]t thus is a crime if a waiter who is given a customer's credit card to pay the restaurant bill later uses that credit card number to buy products on the internet."[46] There was consent to use the credit card number, but that consent extended only so far. In other words, the waiter had the lawful authority to use the credit card number to charge for dinner but was "without lawful authority" to use the number for internet purchases for himself. By the same token, Dubin was authorized to bill for services provided by a licensed psychological associate at a particular rate but not to bill at a higher rate based on the misrepresentation that the services were provided by a psychologist. Dubin was authorized to bill for an evaluation if it was the only one performed in a twelve-month period, but not if it was a second evaluation within a year. Dubin was authorized to bill for an evaluation and report but not for an evaluation that was not followed by a report. The "consent" dis-

[46] *Post*, at 45 n.2.

tinction that JUDGE COSTA's dissenting opinion attempts to construct folds in on itself, as reflected by the illustration it proffers.

Dubin used Patient L's identifying information to commit health care fraud. A straightforward reading of § 1028A compels the conclusion that this was "use, without lawful authority," and the two-year sentencing enhancement applied.

IV.

As already discussed above, the Fourth Circuit's holdings and reasoning in *Abdelshafi*[47] support affirming Dubin's conviction under § 1028A(a)(1). I will not repeat that discussion.

There is contrary authority. At least two other circuit courts, the Sixth and the Ninth, have held, on facts similar to those in the present case, that the health care fraud for which the defendant was convicted did not involve the "use" of a patient's identity within the meaning of § 1028A(a)(1). In *United States v. Medlock*,[48] the government alleged that the defendants "'used' the name and Medicare Identification Numbers of Medicare beneficiaries when they 'caused a claim to be submitted to Medicare for reimbursement that contained' such names and numbers 'without lawful authority to do so because the claim falsely stated that' stretchers were required for transport."[49]

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[47] 592 F.3d 602 (4th Cir. 2010).

[48] 792 F.3d 700 (6th Cir. 2015).

[49] *Id*. at 705.

The Sixth Circuit held that this was not "use" within the meaning of § 1028A.[50] It reasoned:

> The Medlocks *did* transport the specific beneficiaries whose names they entered on the forms; they lied only about their own eligibility for reimbursement for the service. There was nothing about those particular beneficiaries, rather than some other lawful beneficiaries of Medicare, that entitled them to reimbursed rides.[51]

Later in the opinion, the court seems to amplify upon or at least repeat this reasoning, stating, "the Medlocks' misrepresentation that certain beneficiaries were transported by stretchers does not constitute a 'use' of those beneficiaries' identification under the federal aggravated-identity-theft statute, 18 U.S.C. § 1028A, because their company really did transport them."[52]

With great respect to the Sixth Circuit, I find that reasoning wholly unpersuasive. It does not even attempt to engage with the text of § 1028A(a)(1). When the text is examined, the fact that the defendants lied about their own eligibility for reimbursements does not take the defendants' conduct outside the statute. The fact remains that the defendants "knowlingly . . . use[d], without lawful authority," Medicare identification numbers "during and in relation to" the underlying felony of falsely representing that the Medicaid

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[50] *Id.* at 708.

[51] *Id.* at 706.

[52] *Id.* at 708.

beneficiaries whose numbers were provided met federal regulatory requirements for transportation by stretcher. Without the beneficiaries' identifying information, the fraud could not have occurred.

In *Medlock*, the court also observed "the Medlocks did not attempt to pass themselves off as anyone other than themselves. Their [sic] misrepresented *how and why* the beneficiaries were transported, but they did not use those beneficiaries' identities to do so."[53] The text of § 1028A(a)(1) does not require that the person who committed the predicate felony violation "attempt to pass [him or herself] off as anyone other than [him or herself]." Further, as just explained, the defendants in *Medlock* identified specific beneficiaries with their individual Medicaid numbers as having the physical impairments necessary to qualify for transportation by stretcher, which was a "use" of that identifying information "during and in relation to" the underlying felony violation. The phrase "during and in relation to" sweeps broadly enough to encompass the manner in which the Medlocks "use[d]" the identification of another person.

The Sixth Circuit offered a hypothetical about "an overcharging merchant" in *Medlock*:

> In the course of the [sic] committing healthcare fraud, our hypothetical defendant bills his patient (or that patient's insurer, public or private) in his actual name, stating that the medical service, which the defendant really did provide, costs $200, when really it costs

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[53] *Id*. at 707.

> $100. On the government's logic, that lie would constitute a use of the patient's name, and so would be aggravated identity theft.[54]

But here again, this discussion was not tied to the text of § 1028A(a)(1), nor, I submit, can it be.

For the same reasons, the Ninth Circuit's decision in *United States v. Hong*[55] is not persuasive authority. In that case, "Hong provided massage services to patients to treat their pain, and then participated in a scheme where that treatment was misrepresented as a Medicare-eligible physical therapy service."[56] Concluding that "[t]his case is analogous to *Medlock*," the Ninth Circuit reversed the conviction under § 1028A.[57]

The Sixth Circuit's decision in *United States v. White*,[58] cited in JUDGE ELROD's dissenting opinion,[59] adds little. It discusses at some length the court's prior decisions in *Medlock* and *United States v. Miller*,[60] but decided, "we cannot conclude that they counsel in favor of reversal."[61] In *White*, a travel agent had falsely represented to airlines that passengers were

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[54] *Id*.

[55] 938 F.3d 1040 (9th Cir. 2019).

[56] *Id*. at 1051.

[57] *Id.*

[58] 846 F.3d 170 (6th Cir. 2017).

[59] *Post*, at 37 (Elrod, J., dissenting).

[60] 734 F.3d 530 (6th Cir. 2013).

[61] *White*, 846 F.3d at 175.

members of the military and qualified for military fares.[62] When questioned by airlines, she "manufacture[d] fake Armed Forces Identification Cards, which she then sent by means of interstate wire communications" to those airlines. The Sixth Circuit affirmed her conviction under § 1028A(a)(1), because she "creat[ed] false military identification cards and attempt[ed] to pass them off as her clients' own personal means of identification."[63]

The facts in *United States v. Michael*,[64] also cited in JUDGE ELROD's dissenting opinion,[65] were quite different from those in the present case. "Philip Michael used a doctor's means of identification (his name and identification number) and a patient's means of identification (his name and birth date) to request insurance reimbursement for a drug the doctor never prescribed and the patient never requested."[66] In the course of affirming the conviction under § 1028A(a)(1), the Sixth Circuit discussed and distinguished its prior decisions in *Miller* and *Medlock*.[67]

The rationale of the decision in *United States v. Munksgard*[68] does not clearly lead to the conclusion

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[62] *Id.* at 172.

[63] *Id.* at 177.

[64] 882 F.3d 624 (6th Cir. 2018).

[65] *Post*, at 37-38 (Elrod, J., dissenting).

[66] *Id.* at 625.

[67] *Id.* at 627-29.

[68] 913 F.3d 1327 (11th Cir. 2019).

that the Eleventh Circuit would reverse Dubin's conviction under § 1028A(a)(1) were his appeal pending in that court, as JUDGE ELROD's dissenting opinion asserts.[69] In *Munksgard*, "in an effort to obtain financing to support his land-surveying business, [Munksgard] forged another person's name to a surveying contract that he submitted to a bank in support of his loan application."[70] In affirming the conviction, the Eleventh Circuit examined the first five subsections of § 1028A(c)(1) that enumerate the predicate felony violations, including subsection (5), which enumerates the offenses of which Dubin was convicted.[71] The Eleventh Circuit reasoned that these references "support . . . an interpretation of 'use[ ]' that more broadly forbids one from 'employ[ing]' or 'convert[ing] to [his] service' another's name."[72] The court then discussed the meaning of "use" in other federal statutes, which confirmed its conclusion that the word "use" "entail[s] employing or converting an object to one's service."[73] Dubin employed a patient's identifying information to his own service in committing fraud.

JUDGE ELROD's opinion[74] cites the First Circuit's decision in *United States v. Berroa,*[75] but it involved

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[69] *Post*, at 37 (Elrod, J., dissenting).

[70] *Munksgard*, 913 F.3d at 1329-30.

[71] *Id.* at 1335.

[72] *Id.*

[73] *Id.*

[74] *Post*, at 38 (Elrod, J., dissenting).

[75] 856 F.3d 141 (1st Cir. 2017).

facts very different from those in Dubin's case. The defendants in *Berroa* aspired to become physicians in Puerto Rico but failed a requisite exam.[76] They then persuaded (bribed)[77] an employee of the Board of Medical Examiners to falsify their test scores and place that false information in their files.[78] The mail was used to notify the defendants that licenses to practice medicine had been issued and could be obtained from the Board.[79] The defendants were convicted of "honest-services mail fraud conspiracy," and those convictions were affirmed on appeal.[80] Two of the defendants also appealed convictions under § 1028A, and the First Circuit reversed.[81] It is unclear how the allegations in support of the § 1028A offenses related to the honest-services mail fraud conspiracy. The opinion in *Berroa* reflects that it was alleged that patients obtained prescriptions from the defendants, and the government contended "that the use of patient names and addresses on the prescriptions constituted use without lawful authority of the identification of another person."[82] In any event, the First Circuit rejected that argument, concluding the "use" language in § 1028A(a)(1) was ambiguous and "require[d] that the defendant attempt to pass him or

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[76] *Id*. at 147.

[77] *Id*. at 154.

[78] *Id*. at 147.

[79] *Id*. at 154-55.

[80] *Id*. at 163.

[81] *Id*. at 155-57.

[82] *Id*. at 155.

herself off as another person or purport to take some other action on another person's behalf."[83] This latter statement would mean that § 1028A(a)(1) would not apply to individuals who steal a means of identification and sell it to a third person for an unlawful use. That certainly cannot be a correct interpretation of § 1028A(a)(1).

The decisions that have attempted to narrow the application of § 1028A(a)(1) have seized upon varying rationales for doing so, and those rationales often conflict with one another.[84] A "straight line" cannot be drawn through those cases. That is because they are unmoored from the text of § 1028A(a)(1).

* * *

Dubin's conviction must be affirmed based on the text of § 1028A(a)(1). Nor is § 1028A(a)(1)'s scope "breathtaking" when applied to health care fraud like that committed by Dubin. Neither Medicaid beneficiaries nor taxpayers who are the actual victims of Medicaid fraud would find it shocking or unreasonable to impose an additional sentence of two years of imprisonment when health care providers use unique Medicaid identifying numbers and Medicaid patients'

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[83] *Id*. at 156.

[84] Even were there merit to any narrowing construction, the multitude of them is all the more reason that preservation of any one is mandatory when a district court has its jury charge conference and asks the government and defense what legal theory they request before a case is given to a jury.

names to submit fraudulent claims that result in billions of dollars of losses to the health care system each year.

ANDREW S. OLDHAM, *Circuit Judge*, joined by SMITH, BARKSDALE, HIGGINSON, and HO, *Circuit Judges*, concurring:

Today's two dissenting opinions eloquently argue that David Dubin's conduct did not amount to "use" of Patient L's identity within the meaning of 18 U.S.C. § 1028A(a)(1). But the issue is not properly before us. That's because Dubin did not raise a timely sufficiency-of-the-evidence challenge to the "use" element of his § 1028A conviction in the district court. Under two different Federal Rules, Dubin's failure to properly raise the "use" element means he's entitled only to plain-error review. And Dubin cannot come close to showing such error.

I.

The first relevant Rule is Federal Rule of Criminal Procedure 29. It supplies the framework for sufficiency-of-the-evidence challenges to criminal convictions. The Rule allows a defendant to move for "a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). The motion, *inter alia*, must be made "within 14 days after a guilty verdict or after the court discharges the jury, whichever is later." *Id.* 29(c)(1). Such a motion must "specify . . . the particular basis on which acquittal is sought so that the Government and district court are provided notice." *United States v. McDowell*, 498 F.3d 308, 312 (5th Cir. 2007). Of particular importance here, if a defendant raises a sufficiency objection to one element of a charged crime, he waives any sufficiency objections to other elements of that crime. *See United States v. Huntsberry*, 956 F.3d

270, 282 (5th Cir. 2020); *United States v. Herrera*, 313 F.3d 882, 884 (5th Cir. 2002) (en banc) (per curiam).

In this case, Dubin raised a timely sufficiency challenge under Rule 29. But that challenge was specific, not general, because he objected only to the predicate-felony element of his § 1028A conviction. Under *Huntsberry* and *Herrera*, Dubin thus waived any objection to the sufficiency of the evidence for any other element—including the "use" element. That means we can review the sufficiency of the evidence to convict Dubin of the "use" element only for plain error. *See Huntsberry*, 956 F.3d at 282 ("When a sufficiency challenge is not preserved, we review for plain error."); *Herrera*, 313 F.3d at 884 ("Where, as here, a defendant asserts *specific grounds* for a specific element of a specific count for a Rule 29 motion, he waives all others for that specific count.").

More than six months *after* the verdict, Dubin belatedly objected to the "use" element. The Federal Rules make clear that this objection was untimely. *See* FED. R. CRIM. P. 29(c)(1). The district court's conflicted musings about the "use" element—invoked by the dissenters, *see post*, at 33 (Elrod, J., dissenting)—were thus irrelevant because they did not occur until Dubin's sentencing, long after he had waived his objection. *Cf. Rollins v. Home Depot USA, Inc.*, 8 F.4th 393, 398 (5th Cir. 2021) ("Courts should not selectively address forfeited arguments just because they have sympathy for a particular litigant.").

Judge Elrod responds that Dubin's untimeliness under Rule 29 does not matter because the district court eventually addressed the "use" argument. *See*

post, at 35 n.3 (Elrod, J., dissenting). But Judge Elrod cites just one case involving a Rule 29 motion—and there we *did* apply plain-error review. *See United States v. Cooks*, 589 F.3d 173, 184 (5th Cir. 2009). Judge Elrod claims we only did so because the district court did not rule on the merits of the defendant's untimely motion. But we announced no such rule, and we cited authorities that affirmatively preclude such an approach. *See ibid.* ("It is well-established that the failure to timely and properly raise these contentions before the district court . . . *precludes us from reviewing them unless they constitute plain error*." (emphasis added) (quoting *United States v. Ortega–Chavez*, 682 F.2d 1086, 1088 (5th Cir. 1982)).

Judge Elrod does not explain why her other three cases—which do not involve criminal defendants and the strictures of Rule 29—have any relevance here. To the contrary, her reliance on civil cases is particularly inapposite because Judge Elrod fails to consider the distinct operation of the jury system in criminal cases. Her theory would allow criminal defendants to argue one legal theory to the jury, lose on that theory, wait six months, and argue a completely new theory after dismissal of the jury. By that point, the defendant has nothing to lose; the jury already convicted him. And he has everything to gain; if the court accepts his new legal argument, he's protected by the Double Jeopardy Clause. *See Tibbs v. Florida*, 457 U.S. 31, 41 (1982) ("A verdict of not guilty, whether rendered by the jury or directed by the trial judge, absolutely shields the defendant from retrial."). This creates precisely the sort of incentives for sandbagging that our system is designed to prevent. *See Wainwright v.*

Sykes, 433 U.S. 72, 89 (1977) (overruling a precedent that incentivized "sandbagging"); *Lucio v. Lumpkin*, 987 F.3d 451, 474–76 (5th Cir.) (en banc) (plurality opinion) (applying the anti-sandbagging principle), *cert. denied*, 142 S. Ct. 404 (2021).

Finally, Judge Elrod asserts that "if anyone is sandbagging, it is the [G]overnment," and she says that the Government forfeited plain-error review by belatedly raising it. *Post*, at 35 n.3 (Elrod, J., dissenting). But again, the law says the precise opposite. As we've emphasized time and time and time again: "A party cannot waive, concede, or abandon the applicable standard of review," so the Government's position on the matter "is irrelevant." *United States v. Vasquez*, 899 F.3d 363, 380 (5th Cir. 2018) (quotation omitted); *see also id.* at 381 (reviewing only for plain error, notwithstanding the Government's concession that *de novo* review should apply).[1] It was Dubin's

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[1] *See also, e.g.*, *United States v. Gaspar-Felipe*, 4 F.4th 330, 341 n.9 (5th Cir. 2021); *United States v. Quinn*, 826 F. App'x 337, 339 (5th Cir. 2020); *United States v. Griffin*, 780 F. App'x 103 (5th Cir. 2019) (per curiam); *United States v. Johnson*, 760 F. App'x 261, 265 (5th Cir. 2019) (per curiam); *United States v. Valle-Ramirez*, 908 F.3d 981, 985 n.5 (5th Cir. 2018); *United States v. Warren*, 728 F. App'x 249, 254 n.4 (5th Cir. 2018) (per curiam); *United States v. Escobar*, 866 F.3d 333, 339 n.13 (5th Cir. 2017) (per curiam); *United States v. Suchowolski*, 838 F.3d 530, 532 (5th Cir. 2016); *United States v. Torres-Perez*, 777 F.3d 764, 766 (5th Cir. 2015); *United States v. Schofield*, 802 F.3d 722, 725 (5th Cir. 2015); *Ward v. Stephens*, 777 F.3d 250, 257 n.3 (5th Cir. 2015); *United States v. Whitworth*, 602 F. App'x 208, 208 (5th Cir. 2015) (per curiam); *Pisharodi v. Columbia Valley Healthcare Sys., LP*, 615 F. App'x 225, 225 n.2 (5th Cir. 2015) (per curiam); *United States v. Herrera-Alvarez*, 753 F.3d 132, 135 (5th Cir. 2014); *United States v. Sanchez*, 458 F. App'x 374, 377 (5th Cir.

job—and his alone—to preserve his "use" argument under Rule 29. His failure to do that means our review is only for plain error.

II.

The second relevant Rule is Federal Rule of Criminal Procedure 30. It gives defendants the opportunity to object to the court's jury instructions. FED. R. CRIM. P. 30(d). And "[f]ailure to object in accordance with [Rule 30] precludes appellate review," except for plain error. *Ibid.* Thus, we have held that when a defendant "failed to object to [a jury] instruction, which is directly adverse to the argument he now advances on appeal, we review only for plain error." *United States v. McRae*, 702 F.3d 806, 834 (5th Cir. 2012). This principle prevents defendants from bringing a sufficiency-of-the-evidence challenge premised on an interpretation of the relevant statute that contradicts an unop-

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2012); *United States v. Wilson*, 453 F. App'x 498, 511 n.5 (5th Cir. 2011) (per curiam); *Sykes v. Public Storage Inc.*, 425 F. App'x 359, 363 (5th Cir. 2011) (per curiam); *United States v. McCall*, 419 F. App'x 454, 456 (5th Cir. 2011) (per curiam); *United States v. Breland*, 366 F. App'x 548, 551 (5th Cir. 2010) (per curiam); *United States v. Rodriguez*, 602 F.3d 346, 351 (5th Cir. 2010); *United States v. Bueno*, 585 F.3d 847, 849 n.2 (5th Cir. 2009); *Mushtaq v. Holder*, 583 F.3d 875, 876 (5th Cir. 2009); *United States v. Molina*, 174 F. App'x 812, 816 (5th Cir. 2006) (per curiam); *United States v. Civil*, 174 F. App'x 221, 222 n.3 (5th Cir. 2006) (per curiam); *United States v. Vasquez-Castaneda*, 185 F. App'x 351, 352 (5th Cir. 2006) (per curiam); *United States v. Davis*, 380 F.3d 821, 827 (5th Cir. 2004); *United States v. Milton*, 147 F.3d 414, 420 n.* (5th Cir. 1998); *St. Tammany Parish Sch. Bd. v. Louisiana*, 142 F.3d 776, 782 (5th Cir. 1998); *United States v. Vontsteen*, 950 F.2d 1086, 1091 (5th Cir. 1992) (en banc).

posed jury instruction. *See id.* at 835 (holding a defendant may not argue "that there was insufficient evidence to convict [the defendant] under the jury instruction that the court should have given, despite his acquiescence to the instruction the court actually gave" (quotation omitted)).

In this case, Dubin acquiesced to the following jury instruction: "To be found guilty of this crime, the defendant does not have to actually steal a means of identification. Rather, the statute criminalizes a situation in which a defendant gains access to a person's identifying information lawfully but then, proceeds to use that information unlawfully and in excess of that person's permission." This unopposed jury instruction is "directly adverse to the argument [Dubin] now advances on appeal"— namely, that he did not "use" Patient L's identity because he lawfully acquired her identifying information. *Id.* at 834. Because Dubin did not challenge the correctness of the court's jury instruction regarding the meaning of "use," he cannot now advance an argument contradicting that instruction unless the instruction was plain error.[2]

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[2] The Chief Judge's thorough concurring opinion highlights the need for *contemporaneous* objections to the content of jury instructions in the district court. As the Chief Judge details at length, each dissent proposes a different limiting principle that it would tack onto § 1028A(a)(1)'s text. *See ante*, at 7–9, 12–13 (Owen, C.J., concurring). But neither of these limiting principles were argued to the jury—or to the district court as it formulated the jury instructions. Under Rule 30, such arguments must be proposed through contemporaneous objections, so that the district court may sort through any interpretive disputes regarding

Under the applicable plain-error standard, Dubin cannot come close to winning relief. Plain-error review is required by Federal Rule of Criminal Procedure 52(b). And it involves four steps:

> First, there must be an error or defect—some sort of deviation from a legal rule—that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the district court proceedings. Fourth and finally, if the above three prongs are satisfied, the court of appeals has the discretion to remedy the error—*discretion* which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

Puckett v. United States, 556 U.S. 129, 135 (2009) (quotation omitted). It's Dubin's obligation to satisfy all four prongs of this standard, which "is difficult, as it should be." *Ibid.* (quotation omitted). Because Rule 52(b) is phrased in discretionary terms, we have discretion in how to apply the four-part test—including whether to grant relief where all four parts are met. *See United States v. Olano*, 507 U.S. 725, 735–37

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the charged offense and properly instruct the triers of fact as to the meaning of each element.

(1993); *see also* FED. R. CRIM. P. 52(b) ("A plain error that affects substantial rights *may* be considered even though it was not brought to the court's attention." (emphasis added)).

Prong two is most important here. An error is "plain" only if it's "'clear' or 'obvious.'" *Olano*, 507 U.S. at 734. "[A] court of appeals cannot correct an error pursuant to Rule 52(b) unless the error is clear *under current law*." *Ibid.* (emphasis added). And "[a]n error is not plain under current law if a defendant's theory requires the extension of precedent," or if "[w]e have not directly addressed" the defendant's theory in the past. *United States v. Lucas*, 849 F.3d 638, 645 (5th Cir. 2017) (quotation omitted).

All members of our court agree that Dubin cannot show plain error because his interpretation of "use" in § 1028A is not plain, clear, or obvious under current law. One of the dissents describes the statutory word "use" as a non-obvious "chameleon-like word." *Post*, at 34 (Elrod, J., dissenting). The other dissenting opinion recognizes that both parties have strong textual arguments for their interpretation of "use." *Post*, at 42–43 (Costa, J., dissenting); *cf. Bailey v. United States*, 516 U.S. 137, 143 (1995) ("[T]he word 'use' poses some interpretational difficulties because of the different meanings attributable to it."). In fact, a major reason we took this case *en banc* is because the parties assured us—wrongly, as it turns out—that the "use" question was properly before us, and because the parties agreed—correctly, as it turns out—that the answer to that question was *not* obvious. *See, e.g.*, Blue Br. at 28–29 (arguing the standard of review is *de novo*); Red Br. at 24 (same). And whatever § 1028A

might mean at some future point, there is no debate that today, under current law, it means that Dubin is plainly wrong not plainly right. *See United States v. Mahmood*, 820 F.3d 177, 187–88 (5th Cir. 2016) (foreclosing Dubin's interpretation of "use"); *United States v. Dubin*, 982 F.3d 318, 330 (5th Cir. 2020) (Elrod, J., concurring) (conceding *Mahmood* controls this case).

* * *

In some future case, where the "use" question is properly preserved, it might be wise for our court to reconsider our interpretation. In the posture of this case, however, the majority is quite right to refuse the dissents' efforts to enter the fray today. Our refusal reaffirms the centrality of the Federal Rules and the consequences of ignoring them.

JENNIFER WALKER ELROD, *Circuit Judge*, joined by JONES, COSTA, WILLETT, DUNCAN, ENGELHARDT, and WILSON, *Circuit Judges*, dissenting:[1]

The panel majority opinion adopted an interpretation of the Aggravated Identity Theft statute as expansive as it was erroneous. I had hoped that we took the case *en banc* to fix that mistake but, regrettably, the court today chooses to remain both wrong and out of step with our sister circuits. Moreover, as Judge Costa explains in his superb dissent, the court fails to heed the "unmistakable" message of the Supreme Court—that we ought "not assign federal criminal statutes a 'breathtaking' scope when a narrower reading is reasonable." *Post* at 41 (quoting *Van Buren v. United States*, 141 S. Ct. 1648, 1661 (2021)). I respectfully dissent.

I.

David Dubin worked at his father's psychological services company. The company provided mental health testing to youths at an emergency shelter. The services generally consisted of a clinical interview, testing, assessments, and a report containing findings and recommendations.

As pertinent here, a licensed psychological associate working for the Dubins conducted psychological testing of Patient L but did not do a clinical interview. After the testing, the Dubins realized that Patient L

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[1] Judge Jones joins in all but the second paragraph of n.3 of this opinion. I join Judge Costa's dissent in full. Contrary to Chief Judge Owen's assertion, I do not read the statute as *requiring* that the defendant stole the identification.

had already been evaluated within the past year. Medicaid will not reimburse for more than one of these evaluations per year, so Dubin told the psychological associate to wait until the one-year mark had passed before conducting the clinical interview and writing the report about Patient L. The one-year mark was May 29th, but Patient L had been discharged and the post-evaluation report and clinical interview were never finished. On May 31st, Dubin directed an employee to bill Medicaid for three hours of psychological testing of Patient L by a psychologist—not a psychological associate—as having been provided on May 30th.

A jury convicted Dubin and his father of various healthcare fraud and related offenses. As to Patient L, Dubin was convicted of healthcare fraud under 18 U.S.C. §§ 1347 and 1349 because he fraudulently billed Medicaid for services on May 30th (when no services were performed on that day) and for services conducted by a licensed psychologist (when a psychological associate evaluated Patient L).

Dubin was also convicted under 18 U.S.C. § 1028A, the Aggravated Identity Theft statute, for his billing of services provided to Patient L. The statute provides: "[w]hoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years." 18 U.S.C. § 1028A(a)(1).

At trial, the government argued that Dubin's "committ[ing] this healthcare fraud offense[] obviously" meant that he was "also guilty of" aggravated identity theft. The government argued that aggravated identity theft is an "automatic" additional offense whenever someone commits provider-payment healthcare fraud. In the district court, Dubin moved for judgment of acquittal on his aggravated-identity-theft conviction. The district court judge reluctantly denied the motion, thinking he was bound by an unpublished decision of our court, and stated that he "hope[d] [he] get[s] reversed on the aggravated identity theft count." In the district court's view, the Dubins were certainly running a criminal enterprise based on "how they were billing" but "it wasn't aggravated identity theft."

A panel of this court affirmed Dubin's automatic identity-theft conviction, holding that he "used" Patient L's means of identification under § 1028A. Puzzlingly, the panel majority's reasoning was based entirely on dictionary definitions of the word "use." *See United States v. Dubin*, 982 F.3d 318, 325 (5th Cir. 2020), *reh'g en banc granted*, *opinion vacated*, 989 F.3d 1068 (5th Cir. 2021).[2] Yet, this is not the way that we are to interpret that chameleon-like word, "use." *See Bailey v. United States*, 516 U.S. 137, 143 (1995) ("[T]he word 'use' poses some interpretational

[2] Although dictionaries certainly can be helpful, we must remember that a word can be defined "inadequately—without accounting for its semantic nuances as they may shift from context to context." Antonin Scalia & Bryan A. Garner, *A Note on the Use of Dictionaries*, 16 Green Bag 2d 419, 422 (2013).

difficulties because of the different meanings attributable to it. . . . 'Use' draws meaning from its context, and we will look not only to the word itself, but also to the statute and the sentencing scheme, to determine the meaning Congress intended.").

II.

The only identity theft here is simple healthcare fraud impersonating aggravated identity theft under 18 U.S.C. § 1028A. Dubin did not commit identity theft. His fraud concerned the exact contours of the services Patient L received, but he did not misrepresent that Patient L did indeed receive services. Patient L's not receiving the full array of psychological services does not erase the fact that Patient L—and not someone else—received services. Dubin did not lie about Patient L's identity or make any misrepresentations involving Patient L's identity. Nor did anyone else pretend to be Patient L. Any forgery alleged in this case relates only to the nature of the services, not to the patient's identity. And, as Judge Costa explains in his dissent, Dubin had permission to use Patient L's means of identification on this Medicaid bill. What Dubin did is not identity theft.[3]

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[3] Judge Oldham's concurrence claims that Dubin forfeited his "use" argument and thus concludes we should review for plain error. But the panel that first considered this appeal applied *de novo* review, with no judge or party even suggesting that Dubin forfeited the issue. As the government itself acknowledges, Dubin *did* raise the issue in the district court, albeit in his motion for reconsideration. Though the issue could have been raised earlier (i.e., in his Rule 29 motion), the district court considered and rejected the argument on the merits. *Cf. United States v. Cooks*, 589 F.3d 173, 184 (5th Cir. 2009) ("If an issue is raised for the

first time on an untimely motion before the district court and the district court does *not* consider it, the issue is not preserved for appeal." (emphasis added)); *see also United States v. Hassan*, 83 F.3d 693, 696–97 (5th Cir. 1996) (government's argument was preserved, even though it was late, because the district court ultimately rejected the argument on the merits). We have applied *de novo* review in similar situations. *See Am. Elec. Power Co., Inc. v. Affiliated FM Ins. Co.*, 556 F.3d 282, 287 (5th Cir. 2009); *Quest Med., Inc. v. Apprill*, 90 F.3d 1080, 1087 (5th Cir. 1996) ("[A]n issue first presented to the district court in a post-trial brief is properly raised below when the district court exercises its discretion to consider the issue."). Because the district court considered and rejected Dubin's "use" claim on the merits, *de novo* review applies.

Judge Oldham's opinion dubs Dubin a sandbagger and contends that we are "selectively address[ing]" forfeiture out of "sympathy for" Dubin. But if anyone is sandbagging, it is the government. Even if the district court's ruling on the issue was not enough to trigger *de novo* review, the government did not say a word about forfeiture until its *en banc* response brief. *Cf. Eberhart v. United States*, 546 U.S. 12, 19 (2005) (the government forfeited its defense of untimeliness to a tardy new-trial motion). And it does so now only half-heartedly, suggesting that the "use" argument *may* have been forfeited and thus plain-error review *might* apply. The United States, being "the richest, most powerful, and best represented litigant to appear before us," does not need us to make its arguments more forcefully than it does for itself. *Greenlaw v. United States*, 554 U.S. 237, 244 (2008) (citation and quotations omitted); *see also Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.) ("[A]ppellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them."). In other words, we need not feel sympathy for the government. *Cf. Rollins v. Home Depot USA, Inc.*, 8 F.4th 393, 398 (5th Cir. 2021) ("It would surely be unacceptable, for example, if courts granted motions for extension of deadlines only for prosecutors and not for criminal defendants. Addressing forfeited issues in a biased manner is no different.").

Moreover, Dubin's conviction would be vacated under the reasoning of the overwhelming majority of published opinions in our sister circuits. In *United States v. Spears*, the *en banc* Seventh Circuit declined a maximalist interpretation of § 1028A—similar to what the majority adopts here—that would have given the statute "a surprising scope." 729 F.3d 753, 756 (7th Cir. 2013) (*en banc*) (Easterbrook, J.). In *Spears*, the defendant, Spears, made a counterfeit handgun permit for Payne using Payne's real name and birthdate. *Id.* at 754. Payne took the fake permit and unsuccessfully attempted to buy a gun. *Id.* Spears was convicted under § 1028A. *Id.* On appeal, Spears argued that he did not "'transfer[]' anything 'to another person' because Payne used her own name and birthdate." *Id.* at 755 (alteration in original). After all, "[f]rom Payne's perspective, the card she received did not pertain to 'another'; it had her own identifying details." *Id.* at 755–56. Writing for the *en banc* court, Judge Easterbrook agreed with Spears: "Providing a client with a bogus credential containing the client's own information is identity *fraud* but not identity *theft*; no one's identity has been stolen or misappropriated." *Id.* at 756.

Judge Oldham's concurrence also contends that we (and apparently the panel opinion) are allowing the parties to manipulate the standard of review by applying *de novo* review. That misunderstands what occurred here. Simply put, the *en banc* majority opinion takes no position on the matter, and we think the panel opinion properly applied *de novo* review—not because the parties tell us so, but because we have deduced that from the proceedings.

Ninth Circuit precedent, likewise, would dictate that Dubin's conviction be vacated. *See United States v. Hong*, 938 F.3d 1040, 1051 (9th Cir. 2019) (defendant, like Dubin, did not steal or use patient's identity and thus did not violate § 1028A); *United States v. Gagarin*, 950 F.3d 596, 603–04 (9th Cir. 2020) (defendant, unlike Dubin, attempted to pass herself off as the victim and used forgery and impersonation, thus violating § 1028A), *cert. denied*, 141 S. Ct. 2729 (2021).

So too would Eleventh Circuit precedent require vacating Dubin's conviction. *See United States v. Munksgard*, 913 F.3d 1327, 1334 (11th Cir. 2019), *cert. denied*, 140 S. Ct. 939 (2020) (defendant, unlike Dubin, forged the victim's identity and misrepresented the victim's actions, thereby violating § 1028A).

Take your pick of the Sixth Circuit's cases. Applying the reasoning of any one of them would result in Dubin's conviction being vacated. Dubin's conviction would be vacated under the Sixth Circuit's decision in *White* because, unlike the defendant there, Dubin did not fraudulently represent Patient L's identity nor did he fraudulently purport to act on Patient L's behalf. Unlike the defendant in *White*, Dubin "lied about [his] own actions," but not about Patient L's actions. *See United States v. White*, 846 F.3d 170, 177 (6th Cir. 2017). Dubin's conviction would also be vacated under the Sixth Circuit's decision in *Medlock* because he lied only about the nature of the services provided. *United States v. Medlock*, 792 F.3d 700, 707 (6th Cir. 2015) ("[The Medlocks] misrepresented *how and why* the beneficiaries were transported, but they did not use those beneficiaries' identities to do so.").

Dubin's conviction would surely be vacated on Judge Sutton's reasoning in *United States v. Michael*, 882 F.3d 624 (6th Cir. 2018). In that case, favorably citing *Medlock*, the court held that the defendant had violated § 1028A because he did more than "inflate" the price of services. *Id.* at 629.[4] Unlike the defendant in *Michael*, Dubin merely "inflated" the price of the services provided to Patient L. *See also* Panel Oral Argument at 11:29–12:38 (Dubin's counsel explaining that *Michael* compels reversal here because *Michael* held that inflating the bill does not qualify as "use" under § 1028A and all Dubin did here was inflate the Medicaid bill).

Add the First Circuit to the chorus. In *Berroa*, that court held that "use" in § 1028A "require[s] that the defendant attempt to pass him or herself off as another person or purport to take some other action on another person's behalf." *United States v. Berroa*, 856 F.3d 141, 156 (1st Cir. 2017). Under this rule, Dubin's conviction would be vacated because he did not "pass him[self] . . . off [as Patient L or] another person or

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[4] As Judge Sutton, writing for the Sixth Circuit, explained:

> Had Michael, in the course of dispensing drugs to a patient under a doctor's prescription, only *inflated* the amount of drugs he dispensed, the means of identification of the doctor and patient would not have facilitated the fraud. But that is not what he did. He used [the victims'] identifying information to fashion a fraudulent submission *out of whole cloth*, making the misuse of these means of identification "during and in relation to"—indeed integral to—the predicate act of healthcare fraud.

Michael, 882 F.3d at 629 (emphasis added).

purport to take some other action on [Patient L's or another person's] behalf." *Id.*

Here, the result should be the same as that reached by our sister circuits. The district court recognized as much when it hoped that it would be reversed. The government also recognized the true nature of the case when it said at oral argument: "The fraud here is that the hours that were charged were billed as being performed as a licensed psychologist, when it was performed by a licensed psychological associate . . . ." Panel Oral Argument at 17:43–17:55. Dubin lied only about the nature—the when and how—of the services provided to Patient L. That is not identity theft.

III.

Dubin's conviction should be vacated because he had permission to use Patient L's means of identification on this Medicaid bill and did not commit identity theft. Indeed, it would be vacated under the reasoning of the vast majority of published opinions in our sister circuits. Against that unison, the court today strikes a discordant note. I respectfully dissent.

HAYNES, *Circuit Judge*, dissenting:

I respectfully dissent from the en banc court's judgment in this case for the reasons set forth in Sections II and III of Judge Elrod's dissenting opinion.

GREGG COSTA, *Circuit Judge*, joined by JONES, ELROD, WILLETT, DUNCAN, ENGELHARDT, and WILSON, *Circuit Judges*, dissenting:

The Supreme Court's message is unmistakable: Courts should not assign federal criminal statutes a "breathtaking" scope when a narrower reading is reasonable. *Van Buren v. United States*, 141 S. Ct. 1648, 1661 (2021). In the last decade, it has become nearly an annual event for the Court to give this instruction. *See id.* at 1661 (avoiding reading Computer Fraud and Abuse Act in a way that "would attach criminal penalties to a breathtaking amount of commonplace . . . activity"); *Kelly v. United States*, 140 S. Ct. 1565, 1568 (2020) (avoiding reading federal fraud statutes to "criminalize all [] conduct" that involves "deception, corruption, [or] abuse of power"); *Marinello v. United States*, 138 S. Ct. 1101, 1107, 1110 (2018) (looking to "broader statutory context" of tax obstruction law to reject reading that would "transform every violation of the Tax Code into [a felony] obstruction charge"); *McDonnell v. United States*, 136 S. Ct. 2355, 2372–73 (2016) (rejecting "expansive interpretation" of bribery law and refusing to construe it "on the assumption that the Government will 'use it responsibly'" (citation omitted)); *Yates v. United States*, 574 U.S. 528, 540 (2015) (plurality opinion) (looking to obstruction statute's caption and context to avoid reading it as an "across-the-board ban on the destruction of physical evidence of every kind"); *Bond v. United States*, 572 U.S. 844, 863 (2014) (rejecting government's interpretation of chemical weapons ban when it would transform statute "into a massive federal anti-poisoning regime that reaches the simplest of assaults"); *see also*

Skilling v. United States, 561 U.S. 358, 410–11 (2010) (adopting a "reasonable limiting construction" of honest-services wire fraud statute and "resist[ing] the Government's less constrained construction absent Congress' clear instruction otherwise"); *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703 (2005) (exercising "restraint" in interpreting obstruction statute to avoid criminalizing "innocuous" acts of persuasion). This tradition of "exercis[ing] restraint in assessing the reach of a federal criminal statute" comes "both out of deference to the prerogatives of Congress, . . . and out of concern that 'a fair warning should be given, . . . in language that the common world will understand, of what the law intends to do if a certain line is passed.'" *United States v. Aguilar*, 515 U.S. 593, 600 (1995) (citations omitted).

Despite the frequency and firmness of this instruction from above, the majority fails to heed it. In adopting the government's broad reading of the statute—something the Supreme Court has not done once this century for a white collar/regulatory criminal statute—the majority allows every single act of provider-payment health care fraud involving a real patient to also count as aggravated identity theft. After all, any payment form submitted to Medicare, Medicaid, or an insurer needs identifying information for the patient. This means that section 1028A's mandatory two-year sentence can be tacked on to each and every act of such fraud when the listed patient is a real person. *See* 18 U.S.C. § 1028A(a)(1), (b).

To be sure, a textual case can be made for such an expansive reading of the aggravated-identity-theft

law. But strong textual support existed for the government's broad interpretations of other criminal laws—interpretations the Supreme Court did not buy. *See, e.g.*, *Marinello*, 138 S. Ct. at 1112–13 (Thomas, J., dissenting) (arguing that the majority's approach went against a "straightforward reading" of the statute); *Yates*, 574 U.S. at 552–53 (Kagan, J., dis senting) ("This case raises the question whether the term 'tangible object' means the same thing in [this statute] as it means in everyday language—any object capable of being touched. The answer should be easy: Yes."); *see also* Miriam H. Baer, *Sorting Out White-Collar Crime*, 97 Texas L. Rev. 225, 264 (2018) ("The authors of the *Skilling*, *Yates*, and *McDonnell* opinions narrowed key statutory terms—sometimes beyond the point of recognition—to keep a criminal statute from diverging too far from its intended prototype."). Because those sweeping interpretations were not the only plausible reading of the statute, the Supreme Court adopted also-plausible narrower interpretations.

As JUDGE ELROD's dissent chronicles, such reasonable, alternative interpretations exist that would limit section 1028A to what ordinary people understand identity theft to be—the unauthorized use of someone's identity. The Sixth Circuit reads "uses" in tandem with "during and in relation to" to hold that an aggravated-identity-theft conviction requires the government to show that a defendant "used the means of identification to further or facilitate the health care fraud." *United States v. Michael*, 882 F.3d 624, 628 (6th Cir. 2018). If a defendant's use of another's name is only incidental to the fraud, there is

no identity theft. *Id.* at 629. But if the use of the name is "integral" to the fraud, there is identity theft. *Id.*

My concern with this approach is that a facilitation standard, with its incidental/integral dividing line, lacks clear lines and a limiting principle. The Sixth Circuit has said that the use of a patient's identifying information in a prescription that increases the amount of an otherwise validly prescribed drug is incidental and thus not a crime. *Id*. On the other hand, use of a patient's identifying information in a prescription that is invented out of whole cloth is integral to the fraud and thus a crime. *Id.* But why is that so? In both cases, use of the identifying information facilitates the fraud in that the fraud could not have occurred without it. *Facilitate*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 415 (10th ed. 2001) (defining facilitate, in part, as "[to] help bring about"). In both cases, use of the identifying information seems integral to the fraud because it is a necessary part of the fraud. *Integral*, *id.* at 606 (defining integral, in part, as "essential to completeness"). The facilitation requirement thus does not appear to preclude identity theft liability in overbilling cases. It certainly does not provide helpful guidance to juries that would have to figure out the difference between an incidental use of identifying information and an integral one. Worse yet, it does not provide notice to the public of what the law prohibits. *See United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) (explaining that criminal "statutes must give people 'of common intelligence' fair notice of what the law demands of them" (citation omitted)).

The meaningful difference for identity theft purposes between an overbilling case and a made-up bill case is that in only the former did the patient consent to use of identifying information for the transaction. A Seventh Circuit decision lends support for a reading of the statute that accords with this commonsense notion that identity theft means using another's identity without consent. *See United States v. Spears*, 729 F.3d 753, 758 (7th Cir. 2013) (en banc). *Spears* addressed a section 1028A charge against a defendant who made a counterfeit handgun permit for someone else, with permission to use the permitee's name and birthdate. *Id.* at 754. The government argued that Spears committed aggravated identity theft because he used the "means of identification" of "another person" on the permit in the course of committing a predicate felony (making false statements in connection with acquisition of a firearm). *Id.* at 755 (quoting 18 U.S.C. § 1028A). The en banc court disagreed, observing that the government's reading of "another person" to include any "person other than the defendant," would give section 1028A "a surprising scope" as it would apply even when the supposed identity theft victim granted full permission to use the identity. *Id.* at 756.

Judge Easterbrook's opinion followed recent Supreme Court guidance in looking to the statutory language and context to discern a reasonable limit on the reach of aggravated identity theft. Because section 1028A "deals with identity *theft*," the court reasoned, the law's "another person" requirement is best understood as a "person who did not consent to the information's use" rather than any "person other than the

defendant." *Id.* The statute's "without lawful authority" language may provide additional support for reading the statute to apply only when "another person's" identity was used without permission. 18 U.S.C. § 1028A.

Reading "another person" as applying only to people who did not consent to disclosure of identifying information prevents every fraud case from becoming an identity theft case. It distinguishes overbilling cases, in which a person knows her identity will be used for that transaction (no aggravated identity theft), from made-up billing cases, in which the person is unaware her identity is being used as she didn't receive any service (aggravated identity theft). This dividing line captures how most section 1028A cases have come out in other circuits.[1] But it does so with a

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[1] *See, e.g.*, *United States v. Munksgard*, 913 F.3d 1327, 1330, 1336 (11th Cir. 2019) (using another's name without permission on loan application violated 1028A); *United States v. Hong*, 938 F.3d 1040, 1050–51 (9th Cir. 2019) (misrepresenting massage services provided to patients as Medicare-eligible physical therapy did not violate 1028A); *Michael*, 882 F.3d at 625 (pharmacist submitting insurance reimbursement using names of doctor and patient without permission violated 1028A); *United States v. Berroa*, 856 F.3d 141, 155–57 (1st Cir. 2017) (doctors who fraudulently obtained licenses and issued prescriptions using patients' names with patients' permission did not violate 1028A); *United States v. Medlock*, 792 F.3d 700, 708 (6th Cir. 2015) (claiming Medicare beneficiaries were transported by stretcher when no stretchers were used during transport did not violate 1028A). *But cf. United States v. Osuna-Alvarez*, 788 F.3d 1183, 1186 (9th Cir. 2015) (using twin brother's passport at border crossing with brother's permission violated 1028A).

principled interpretation that turns on consent rather than blurry causation inquiries.[2]

Reading section 1028A to require a lack of consent would mean no aggravated identity theft happened in this case. Indeed, who would be the victim of that

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[2] Note that this interpretation does not require that the identity be stolen, just that it be used without consent. Indeed, nearby statutes include a "stolen" requirement while section 1028A does not. *See* 18 U.S.C. § 1028(a)(2) (criminalizing the transfer of an "identification document . . . knowing that such document . . . was stolen"); *id.* § 1028(a)(6) (criminalizing the knowing possession of a document that appears to be identification of the United States "which is stolen").

This means that section 1028A applies if a defendant initially has consent to use identifying information for a certain purpose but then later engages in a separate transaction without permission. It thus is a crime if a waiter who is given a customer's credit card to pay the restaurant bill later uses that credit card number to buy products on the internet. Every circuit to consider the question agrees that section 1028A does not require that the initial receipt of the identifying information be unlawful. *See, e.g.*, *United States v. Mahmood*, 820 F.3d 177 (5th Cir. 2016) (holding that "§ 1028A unambiguously criminalizes a wider array of conduct than actual theft"); *United States v. Lumbard*, 706 F.3d 716, 721 (6th Cir. 2013) (citing seven circuits decisions all concluding that section 1028A does not require an initial act of stealing the identity).

Although *Mahmood* correctly rejected an actual theft requirement, it was a case in which the doctor had upcoded treatments that patients had actually received. 820 F.3d at 182–84 Because the *Mahmood* patients agreed to use of their identifying information for the Medicare bills—they were just unaware that those bills were going to include codes for more expensive services than they received—it is an overbilling case. I thus now believe that Mahmood should not have had an aggravated identify theft conviction added to his fraud convictions.

crime? Patient L consented to the use of her name for this Medicaid claim. Although Dubin falsified the claim by misrepresenting the services performed, Patient L understood that her identifying information would be used on the paperwork. Fraud? Yes. Identity theft? No.

* * *

Identity theft is one of the scourges of our high-tech society. The aggravated identity theft law recognizes that when fraud occurs in connection with identity theft, the financial loss targeted by fraud laws is not the only harm. Untold inconvenience, perpetual concern about another privacy breach, and loss of trust result when a person's identity is used without permission. Section 1028A targets such identity theft. Fairly read, it does not criminalize the use of another's identity when that person consented to the use.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-50891

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM JOSEPH DUBIN,

Defendant-Appellant.

CONSOLIDATED WITH

No. 19-50912

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID FOX DUBIN,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:17-CR-227-1
USDC No. 1:17-CR-227-2

Before: BARKSDALE, ELROD, and Ho, *Circuit Judges*.

RHESA HAWKINS BARKSDALE, *Circuit Judge*:

William Joseph Dubin and David Fox Dubin were convicted on charges arising from a scheme to defraud Texas' Medicaid program. Between them, they raise eight issues: sufficiency of the evidence for their convictions; running of the statute of limitations based on the superseding indictment; restitution and forfeiture amounts; and William Dubin's length of sentence. An issue of first impression for our court is whether David Dubin's fraudulently billing Medicaid for services not rendered constitutes an illegal "use" of "a means of identification of another person", in violation of 18 U.S.C. § 1028A. AFFIRMED.

I.

William Dubin was a licensed psychologist in Texas, and formed "Psychological A.R.T.S., P.C." (PARTS), in Austin, Texas, for his psychology practice. He served as its chief officer and director. His son, David Dubin, later began working for PARTS on the business side of the corporation, and provided no psychological services.

PARTS is an enrolled Medicaid provider and, as such, agreed to comply with Medicaid laws and regulations. Texas' Medicaid program provides, *inter alia*, funding for psychological evaluations of children within Texas' emergency-shelter system. In that regard, McKenzie served as the president of the board of directors of Williams House, an emergency youth shelter located approximately 80 miles from Austin. As a part of its operations, Williams House arranged

for mental-health assessments and psychological evaluations at the shelter.

Former PARTS office manager King testified at trial that, between January and March 2011, McKenzie and William Dubin discussed an opportunity for PARTS to conduct evaluations at Williams House. The email discussion concluded with William Dubin's offering McKenzie "10% off the top of the first year's gross income from this project". After the discussions, PARTS began to send its employees and clinicians to Williams House and billed Medicaid for the work, as well as paying ten percent of the gross income to McKenzie.

PARTS employees performed intake interviews and psychological evaluations at Williams House. To receive Medicaid reimbursement for the work, PARTS had to certify whether a licensed psychologist performed it. Work performed by a licensed psychologist had a higher Medicaid reimbursement rate than that performed by other clinicians. At trial, King testified that she explained billing procedures and requirements to William Dubin, but that he insisted that PARTS bill at the higher rate, despite services not being performed by a licensed psychologist.

In April 2011, William Dubin directed King to pay McKenzie ten percent, in advance, of the amount estimated to be billed to Medicaid for the upcoming month. One group of evaluations that stemmed from Williams House was largely performed by a non-licensed psychologist. But, PARTS billed Medicaid for those evaluations as if they had been performed by a licensed psychologist.

Eventually, McKenzie received a contract providing $50 per hour for his referral services as an independent contractor. The contract purportedly served as a means to provide McKenzie with an above-board role for which he could be paid for his referrals. Based on time cards he submitted, McKenzie would be paid $50 per hour for referrals; but, the rate was not a "real number". Along this line, McKenzie routinely failed to submit time cards or other estimates of time spent under this contract. Instead, King devised a method to calculate McKenzie's hours after-the-fact. She calculated ten percent of the gross amount reimbursed by Medicaid for Williams House patients, divided it by McKenzie's contract hourly rate of $50, and entered the resulting number as McKenzie's hours worked. This ten-percent calculation practice continued after King left PARTS in December 2011. After a PARTS employee resigned, she provided the calculation material to the Texas Attorney General.

Townsend worked as a biller at PARTS, reporting to David Dubin. Townsend billed Medicaid for PARTS' services rendered. David Dubin and Townsend discussed PARTS' billing procedures, and he instructed her to bill Medicaid for the licensed-professional rate, despite this being a violation of Medicaid rules because some services were performed by students or interns, and were, therefore, ineligible for reimbursement.

Medicaid rules limit the number of billable hours per patient. After a conversation with David Dubin, Townsend frequently received his questions about how many hours remained for a patient, and she was

often instructed to add hours to a patient's record after the patient had been examined and PARTS had billed for reimbursement. In one instance, Townsend was asked to add three hours of bills as "corrected claims" for 19 previously seen patients. These added-claims generated additional payments from Medicaid.

David Dubin similarly instructed Townsend's replacement, Gordon, to continue these practices, and included additional instructions for Gordon to work around other Medicaid limits. David Dubin told Gordon to bill the maximum of eight hours regardless of whether they had been performed.

After receiving a tip, Texas' Medicaid Fraud unit inquired into PARTS' billing practices. After receiving patient files and communications related to PARTS' billing procedures, it was revealed that PARTS billed for services provided by a licensed psychologist and received by 300 patients totaling 1,896 hours, although those services were not performed by a licensed psychologist.

William Dubin, David Dubin, and McKenzie were charged in June 2017 for, *inter alia*, violating: 18 U.S.C. §§ 2 (aiding and abetting); 1349 (conspiracy to commit health-care fraud); 1347 (health-care fraud); 1028A (aggravated identity theft); 371 (conspiracy to violate 42 U.S.C. §§ 1320a-7b (b)(1) and (2)); and 42 U.S.C. §§ 1320a-7b (b)(1) and (2) (soliciting or receiving illegal remuneration and offering to pay illegal remuneration). The superseding indictment in September 2018 did not include earlier charges against McKenzie; he pleaded guilty prior to the Dubins' trial.

Trial began on 9 October 2018 and ended on the 26th. William and David Dubin testified.

For the 25 counts against him, William Dubin was convicted on three: count one, violating 18 U.S.C. § 371 (conspiracy to pay and receive healthcare kick-backs); and counts nine and ten, violating 42 U.S.C. § 1320a-7b(b)(2) (offering to pay, and paying, illegal remuneration for Patients C (count nine) and D (count ten)). For the 25 counts against him, David Dubin was convicted on three: count twelve, violating 18 U.S.C. § 1349 (conspiracy to commit health-care fraud); count nineteen, violating 18 U.S.C. §§ 2, 1347 (aiding and abetting and health-care fraud for Patient L); and, count twenty-five, violating 18 U.S.C. §§ 2, 1028A (aiding and abetting and aggravated identity theft for Patient L).

At sentencing, the court adopted the presentence investigation report (PSR), as modified, for William Dubin and imposed, *inter alia*: five years' probation; restitution of $61,230; and forfeiture in the same amount. For David Dubin, the court adopted the PSR, as modified, and imposed, *inter alia*: imprisonment of twelve months and one day for counts twelve and nineteen; two years' imprisonment for count twenty-five; restitution of $282,019.92; and forfeiture of $94,006.64.

II.

David Dubin claims the superseding indictment substantially amended the charges so that the statute of limitations had run. Both defendants challenge: the sufficiency of the evidence for their convictions; and the restitution and forfeiture amounts. And, William

Dubin challenges the length of his sentence. Each challenge fails.

A.

For counts nineteen and twenty-five, David Dubin asserts the Government's amended indictment substantially altered the charges such that the superseding indictment may not revert back, and thus the two counts were time-barred. If so, his sufficiency-of-the-evidence challenges become moot because the statute ran, and those two convictions would be vacated. Essentially, if David Dubin's assertions are correct on this issue, he is also without a charge for his third conviction, on count twelve.

David Dubin failed, however, to raise this statute-of-limitations defense until in a post-trial motion for ineffective assistance of counsel, filed by his trial counsel, that admitted as much. His appellate counsel (different from trial counsel) acknowledged this at oral argument. Failure to raise this issue until post-trial waives it. *United States v. Lewis*, 774 F.3d 837, 845 (5th Cir. 2014) (holding criminal defendant must raise statute-of-limitations issue at trial, and defendant waives the defense if raised for first time in post-trial motion).

B.

For William and David Dubin's sufficiency-of-the-evidence challenges for their convictions, if defendant timely moves for judgment of acquittal, as in this instance, the preserved challenge is reviewed *de novo*. *E.g.*, *United States v. Oti*, 872 F.3d 678, 686 (5th Cir.

2017) (citation omitted). Such review "is highly deferential to the verdict" and "consider[s] the evidence in the light most favorable to the [G]overnment, with all reasonable inferences and credibility determinations made in [its] favor". *Id.* (internal quotation marks and citations omitted). For that review, "[t]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt". *Id.* (emphasis in original) (citation omitted). In that regard, "it [is] within the sole province of the jury as the fact finder to decide the credibility of the witnesses and to choose among reasonable constructions of evidence"; accordingly, "[w]e will not second guess the jury in its choice of which witnesses to believe". *United States v. Zuniga*, 18 F.3d 1254, 1260 (5th Cir. 1994) (citations omitted). Among the evidence the jury considered was the Dubins' trial testimony. The jury, as a result, was able to weigh this testimony against the evidence offered by the Government.

1.

David Dubin's sufficiency challenges are addressed first. We then turn to William Dubin's.

a.

David Dubin challenges his conviction on count twelve for conspiracy to commit health-care fraud, in violation of 18 U.S.C. §§ 1347, 1349. Again, a conviction is affirmed unless no rational juror could have convicted defendant. *United States v. Gonzalez*, 907 F.3d 869, 873 (5th Cir. 2018) (citing *Jackson v. Vir-*

ginia, 443 U.S. 307, 319 (1979)). Conspiracy to commit health-care fraud requires the Government to show beyond a reasonable doubt: "(1) two or more persons made an agreement to commit health care fraud; (2) . . . defendant knew the unlawful purpose of the agreement; and (3) . . . defendant joined in the agreement with the intent to further the unlawful purpose". *United States v. Sanders*, 952 F.3d 263, 273 (5th Cir. 2020) (quoting *United States v. Ganji*, 880 F.3d 760, 767 (5th Cir. 2018)).

David Dubin's sufficiency challenges are based on his being acquitted on other health-care-fraud counts, and his assertion that, therefore, the only evidence that can be considered to support a conviction for conspiracy to commit such fraud is the evidence for his three counts of conviction: twelve, nineteen, and twenty-five. Further, he contends there is no Medicaid 12-month-cycle that he could violate under this scheme. In doing so, he discusses his theory of the Government's case: bills for Patient L, whose examination and billings the Government used to charge David Dubin on count twelve, were held in abeyance until a later date to avoid a Medicaid rule proscribing multiple billings in a 12-month-cycle; and, because he forced PARTS' billing team to hold Patient L's reimbursements, he purposefully avoided the rule, and therefore committed health-care fraud. His claim relies, however, on there being no 12-month rule, and accordingly he could not violate it.

But, the conviction does not hinge on whether there is a 12-monthcycle. David Dubin's conviction is valid, regardless of whether the crime was completed,

if he entered into *any* scheme to defraud, including a scheme to bill Medicaid for services not provided.

The superseding indictment charged him with, *inter alia*, conspiracy to defraud Medicaid under 18 U.S.C. § 1349. Significant evidence established the elements of conspiracy, showing David Dubin's: direction of licensed psychological associates (a post-doctoral associate position requiring licensure by the Texas Behavioral Health Council; not equivalent to a licensed psychologist) and unlicensed students to conduct psychological tests on behalf of PARTS; submitting bills to Medicaid with improper modifiers to obtain a higher reimbursement rate; and, directing tests not to be supervised as required.

The evidence established a valid basis for conviction on conspiracy to commit health-care fraud. As discussed, we cannot reconsider the weight of the evidence or attempt to balance the credibility of witnesses—that task is "the sole province of the jury". *United States v. Hernandez-Palacios*, 838 F.2d 1346, 1350 (5th Cir. 1988); *see also United States v. Duvall*, 846 F.2d 966, 975 (5th Cir. 1988) ("It is not possible, or even proper for us to speculate about the basis of the jury's decision."). David Dubin's attempt to exclude evidence on other counts for which the jury returned not-guilty verdicts is similarly unavailing. Not-guilty verdicts may not be used to attack the evidence supporting a guilty verdict. *United States v. Powell*, 469 U.S. 57, 66 (1984) ("We also reject, as imprudent and unworkable, a rule that would allow criminal defendants to challenge inconsistent verdicts on the ground that in their case the verdict was not

the product of lenity, but of some error that worked against them.").

b.

In challenging his conviction on count twenty-five for aggravated identity theft and aiding and abetting, in violation of 18 U.S.C. §§ 2 and 1028A, David Dubin claims his acts did not constitute "use" within the meaning of the statute. The identity-theft statute requires a two-year sentence for "[w]hoever . . . knowingly transfers, possesses, or *uses*, without lawful authority, a means of identification of another person" during the commission of an enumerated felony. 18 U.S.C. § 1028A(a)(1) (emphasis added). The statute stacks the two-year sentence with any sentence arising from an enumerated felony, which includes health-care fraud, in violation of 18 U.S.C. § 1347. *See* 18 U.S.C. § 1028A(c)(5).

Our court has not previously considered the definition of "use" pursuant to the identity-theft statute, § 1028A. It has, however, considered whether a person acted "without lawful authority" under that statute. *See United States v. Mahmood*, 820 F.3d 177, 187 (5th Cir. 2016). Looking to the plain language of the statute, our court held it "proscribes the . . . use of another person's means of identification, absent the right or permission to act on that person's behalf in a way that is not contrary to the law". *Id.* at 188 (citing *United States v. Osuna-Alvarez*, 788 F.3d 1183, 1186 (9th Cir. 2015) (alteration in original) ("[I]llegal use of the means of identification alone violates § 1028A."); *United States v. Ozuna-Cabrera*, 663 F.3d 496, 499 (1st Cir. 2011) ("[R]egardless of how the means of

identification is actually obtained, if its subsequent use breaks the law—specifically, during and in relation to the commission of a crime enumerated in subsection (c)—it is violative of § 1028A(a)(1).")).

In claiming he did not "use" the identity of another in the commission of the health-care fraud, David Dubin does not claim he had *lawful authority to use* the identities of patients that comprised the health-care fraud. Restated, he claims only that he did not *use* those identities. In doing so, he relies upon *United States v. Medlock*, 792 F.3d 700 (6th Cir. 2015), and contends, under that decision's holding on "use", he cannot be convicted under the identity-theft statute. Notably, the court first looked to the plain meaning of the word to hold that "use" means, *inter alia*, to avail oneself of. *Id.* at 705–06. But *Medlock*'s holding is also based in part on a prior decision's defining "use" in the identity-theft statute, various canons of construction, and the Sixth Circuit's Pattern Jury Instructions "contemplat[ing] a narrow reading of 'use'". *Id.* at 706. The "use" in *Medlock* turned on what kind of service defendants provided, and whether they overbilled for services. *Id.* at 709. We do not accept *Medlock's* definition.

As we did in *Mahmood*, we look to the plain language of the statute. We hold the plain meaning of "use" answers the question at issue: whether David Dubin "use[d]" the means of identification of another, without lawful authority, to violate § 1028A. The plain meaning of "use" is: "take, hold, or deploy (something) as a means of accomplishing a purpose or achieving a result; employ: [as in] 'she used her key to open the front door'", *Oxford Dictionary of English* (3d

ed. 2010); and, "to employ for the accomplishment of some purpose" and "to avail oneself of", *Black's Law Dictionary* (10th ed. 2014). 913 F.3d at 1334. In short, deciding whether a person "use[d]" something seems to be a relatively straightforward yes or no, despite David Dubin's contention to the contrary. Although David Dubin urges our adopting the holding on "use" from *Medlock*, the facts of this case do not fit squarely into the holding or facts of *Medlock*. There defendants, who operated a non-emergency ambulance company that transported Medicare patients to certain medical appointments, ultimately provided the transportation service but falsely stated that stretchers were required for transport. *Medlock*, 792 F.3d at 703–05. In contrast, Patient L did not receive services. While Patient L did undergo psychological testing by a psychological associate, there was no clinical interview, evaluation, or report provided to the shelter that assessed the patient's needs or made any recommendations with respect to the best program or treatment for the patient. ROA.19-50912.3151-57, 3958-59.

Furthermore, the sixth circuit, in two subsequent cases, took different approaches to "use" than it did in *Medlock*, one of which was a health-care fraud/identity-theft case, *United States v. Michael*, 882 F.3d 624 (6th Cir. 2018). *See also United States v. White*, 846 F.3d 170 (6th Cir. 2017). Both cases provide a slightly different definition of "use" than what David Dubin urges our adopting and are more compatible with the issue at hand. *Michael* does, it is true, cite *Medlock* favorably, but only insofar as "[t]he definition[] noted in . . . *Medlock* cover[s] the conduct alleged in this

case." *Michael*, 882 F.3d at 628. It does not, however, explicitly adopt *Medlock*'s definition. *Michael* also favorably cites *White*, which "rejected a cramped reading of 'uses[.]'" *Id.*

The eleventh circuit also addressed the definition of "use" under the identity-theft statute, holding that the plain, ordinary meaning of the statute resolves the question. *United States v. Munksgard*, 913 F.3d 1327, 1334 (11th Cir. 2019) (citing *Michael*, 882 F.3d at 628). *Munksgard* confronted circumstances similar to those in this case, albeit bank fraud's being the predicate offense. *Id.* at 1333. There, defendant admitted he acted "without lawful authority", there was an enumerated predicate felony, and there was no dispute whether defendant used a "means of identification". *Id*. at 1333–34. Holding that the plain meaning of "use" resolved whether defendant "use[d]" a means of identification, the court held defendant had violated the statute. *Id*. at 1334. Simply put, "to use an object is [t]o convert [it] to one's service; to avail oneself of [it]; to employ [it]; as, to use a plow, a chair, a book". *Id*. (citing *Webster's Second New International Dictionary* 2806 (1944)).

Consistent with the plain meaning of "use", the statute operates simply as a two-part question to determine criminal conduct: did defendant use a means of identification; and, was that use either "without lawful authority" or beyond the scope of the authority given? Our court's opinion in *Mahmood* alludes to this approach. *See Mahmood*, 820 F.3d at 187–90 ("the statute plainly applies to circumstances like these, where [defendant] gained access to his patients' identifying information lawfully, but then proceeded to

use that information unlawfully and in excess of his patients' permission").

Pursuant to that two-part standard, David Dubin "use[d]" the means of identification of the patients; and he did so without their lawful authority, as well as in a manner beyond the scope of their lawful authority. At oral argument here, David Dubin's counsel admitted as much by noting that resolution of this question is ultimately a scope-of-authority issue.

Patient L's means of identification—the patient's Medicaid reimbursement number—was used, or employed, by David Dubin in the reimbursement submissions to Medicaid. Based upon the records provided to Medicaid for reimbursement, David Dubin asserted Patient L received services that he did not receive. Needless to say, in order to be eligible for Medicaid reimbursement as submitted, the services provided to Patient L had to have been performed as submitted. PARTS submitted Patient L's information for reimbursement as having been performed by a licensed psychologist; instead, it was only partially performed by a licensed psychological associate, as defined *supra*. Patient L was never interviewed, despite PARTS' usual procedure, and David Dubin instructed the psychological associate that performed some of the services to cease evaluation of the patient, yet David Dubin submitted the evaluations as though they had been completed. Effectively, part performance of the psychological services rendered them illusory, but David Dubin billed Medicaid for a completed service.

Applying these facts to our two-part standard for the statute: David Dubin "use[d]" means of identification when he took the affirmative acts in the healthcare fraud, such as his submission for reimbursement of Patient L's incomplete testing; he used the means of identification. Next, David Dubin does not dispute he had no lawful authority to submit these tests for reimbursement, like the defendant in *Mahmood*. 820 F.3d at 189. In short, David Dubin "use[d]" Patient L's means of identification "without lawful authority" under § 1028A.

2.

Turning to William Dubin, he challenges the sufficiency of the evidence for: his conviction of conspiracy to pay and receive health-care kickbacks, in violation of 18 U.S.C. § 371 and 42 U.S.C. § 1320a (count one); and, his convictions for offering to pay, and paying, illegal remunerations, in violation of 42 U.S.C. § 1320a-7b(b)(2) (counts nine and ten).

a.

Regarding his conviction on count one—conspiracy to pay and receive health-care kickbacks—the statute criminalizes: "knowingly and willfully giv[ing] or receiv[ing] a benefit for referring a party to a health care provider for services paid for by a federal health care program". *United States v. Sanjar*, 876 F.3d 725, 746 (5th Cir. 2017). A conspiracy to violate the healthcare kickback statute requires "an agreement to do so, knowing and voluntary participation in the conspiracy, and an overt act by one member in fur-

therance of the unlawful goal". *United States v. Gevorgyan*, 886 F.3d 450, 454 (5th Cir. 2018) (citation and quotation omitted).

William Dubin primarily attacks the evidence by asserting: his coconspirator, McKenzie, had no power to control patients' receiving PARTS' care; and, therefore, the co-conspirator could not refer patients in violation of the statute. He also claims he lacked the requisite intent under the statute: the Government had to show he intended to gain undue influence over the reasoning of another person; and it failed to do so. *See United States v. Miles*, 360 F.3d 472, 477–78 (5th Cir. 2004). Finally, he asserts that, because McKenzie was paid *after* the services were rendered to patients, the payments to him could not have been to induce the services.

The Government presented evidence from former PARTS employees regarding William Dubin's agreement with McKenzie to provide him a ten-percent fee for patients referred to PARTS by Williams House. Emails described the relationship between them as a fee-for-referral arrangement, and the two outlined their arrangement in a contract that provided for McKenzie's being paid $50 an hour. But, the Government presented testimony undermining that hourly rate. William Dubin emailed McKenzie about the "opportunity" previously offered, reiterating that, under their agreement, McKenzie would receive "10% off the top of the first year's gross income from this project".

As discussed *supra*, once PARTS began working with the Williams House patients, William Dubin directed McKenzie's fees to be calculated after-the-fact,

so they would consistently add up to ten percent of PARTS' reimbursements for patients from Williams House. And as also discussed, because McKenzie rarely submitted time sheets, the PARTS administrative assistant, King, calculated ten percent of the Williams House patient-payments from Medicaid, and then McKenzie's hours "worked" was calculated to reflect the ten percent he was owed. The primary PARTS employee calculating McKenzie's fee left PARTS during the scheme, but trained her replacement to continue carrying it out. According to King's testimony, William Dubin admitted it was "unethical for [PARTS] to pay somebody for referrals, so we needed to show it as an hourly rate".

William Dubin's reading of *Miles* ignores a critical fact pattern that violates the kickback statute: "payments to a [party] based on the number of patients that he signed up with the service". 360 F.3d at 480. As in *Miles*, William Dubin and PARTS paid McKenzie based on the number of patients referred.

b.

Concerning William Dubin's convictions on counts nine and ten for offering to pay, and paying, illegal remunerations, in violation of 42 U.S.C. § 1320a-7b(b)(2), the Government was required to show defendant, beyond a reasonable doubt: knowingly and willfully offered to pay, or paid, any remuneration to any person; to induce that person; to refer anyone for a service eligible for payment under a federal healthcare program, or to arrange for the furnishing of such a service. *See* 18 U.S.C. § 1320a-7b(b)(2)(A). As with his conspiracy conviction in count one, William Dubin

claims the jury ignored evidence that McKenzie could not assert control over the Williams House patients. He also claims: Williams House's remote location necessarily limited which psychological providers were willing to provide services, so the relationship between PARTS and Williams House was out of necessity and was not an illegal remuneration scheme.

This sufficiency challenge improperly asks our court to reweigh presented to the jury and hold it was legally impossible for him to induce McKenzie to refer patients, or that the payments to McKenzie were not remunerations under the statute. As discussed *supra*, the payments constituted health-care kickbacks under the statute.

Regarding whether William Dubin could not induce McKenzie to refer patients, the Government presented evidence to show William Dubin did so: McKenzie's role as an executive in the decision-making process at Williams House; his updating on the "99% probability that [he] can get [PARTS patients] in to the emergency shelter for testing"; and, William Dubin's emphasizing to PARTS staff the need to keep McKenzie happy in order to "keep getting referrals". This evidence could reasonably describe a relationship by which McKenzie had the power and ability to provide PARTS with access, and William Dubin sought to ensure that continued.

C.

With evidence sufficient for each of the convictions, we turn to the Dubins' challenges to restitution and forfeiture. Both use the same theories to challenge the district court's calculation of each.

1.

The legality of a restitution award is reviewed *de novo*; if legally permitted, the amount ($61,230 for William, and $282,019.92 for David, Dubin) is reviewed for abuse of discretion. *United States v. Cothran*, 302 F.3d 279, 288 (5th Cir. 2002). Along that line, the Mandatory Victims Restitution Act of 1996 requires defendant to pay restitution to the victim in a property-loss case. 18 U.S.C. § 3663A. When the underlying offense of conviction is fraud, the court may award restitution for actions taken as part of the scheme. *Cothran*, 302 F.3d at 289 ("[W]here a fraudulent scheme is an element of the conviction, the court may award restitution for 'actions pursuant to that scheme'". (quoting *United States v. Stouffer*, 986 F.2d 916, 928 (5th Cir. 1993))).

For the Dubins' crimes, the victim is the Government, *vis-à-vis* Texas' Medicaid program, which receives funding from the United States Department of Health and Human Services. *See*, *e.g.*, *United States v. Jones*, 664 F.3d 966, 984 (5th Cir. 2011); *see also Mahmood*, 820 F.3d at 193 ("We must consider that Medicare is the victim of [the] fraud . . . ."). Restitution awards are limited "to the actual loss directly and proximately caused by . . . defendant's offense of conviction". *Mahmood*, 820 F.3d at 196 (citation omitted). In calculating loss amounts for purposes of restitution, the Government bears the burden to demonstrate the loss. *See* 18 U.S.C. § 3664(e); *see also Mahmood*, 820 F.3d at 196. The burden then shifts, and "a defendant, to be entitled to an offset against an actual loss amount for purposes of restitution, must establish (1) 'that the services . . . were legitimate' and

(2) 'that Medicare would have paid for those services but for his fraud'". *United States v. Mathew*, 916 F.3d 510, 521 (5th Cir. 2019) (quoting *Mahmood*, 820 F.3d at 194); *see also United States v. Ricard*, 922 F.3d 639, 659 (5th Cir. 2019) ("The defendant meets this burden by establishing '(1) that the services [he provided to Medicare beneficiaries] were legitimate' and (2) 'that Medicare would have paid for those services but for his fraud'") (quoting *Mathew*, 916 F.3d at 521 (alteration in original)).

The Dubins claim our court's recent decision in *Ricard* entitles them to an offset calculated at actual value of services provided. *See* 922 F.3d at 658–59. *Ricard* and *Mahmood*, they assert, require deducting the amount Medicaid would have paid, but-for the fraud. *See Ricard*, 922 F.3d at 659–60; *see also Mahmood*, 820 F.3d at 196.

But the Dubins have the burden to satisfy both prongs of the standard set out in *Mahmood*, and they fail on both fronts. 820 F.3d at 194. At sentencing, the Dubins claimed the services provided by PARTS "were valuable to those . . . to whom they were provided" and, as a result, the Dubins should receive the offset. This claim is unavailing, however.

At trial, and again at sentencing, the Government provided substantial evidence that the purported services were illegitimate: poor record keeping by the Dubins, improper billing based on who performed the services, and services performed by individuals who were not employees at the time they provided services. The Dubins failed to overcome this strong showing and thus fall short of carrying their burden on the

first prong. They also failed to prove that Medicaid would have paid for the services because their bills were submitted in violation of Medicaid rules and regulations for psychological treatment and without modifiers for testing administered by psychological associates, interns, and students (as opposed to licensed psychologists). The evidence of work done by students and unlicensed individuals shows illegitimate services that were billed for reimbursement by PARTS and the Dubins.

2.

Next, we consider the Dubins' challenge to the forfeiture orders: $61,230 for William, and $94,006.64 for David, Dubin. A forfeiture order's legality is reviewed *de novo*; its factual bases for clear error. *United States v. Reed*, 908 F.3d 102, 125 (5th Cir. 2018), *cert. denied* 139 S. Ct. 2655 (2019).

The PSR calculated the total amount of improper benefits conferred on William Dubin from the kickback scheme to be $61,230. For the intended loss related to the health-care fraud perpetrated by William and David Dubin, the PSR found it totaled $659,085.98, of which $282,019.92 was paid to PARTS, because the poor record keeping at PARTS made it impossible to separate legitimate, from illegitimate, Medicaid claims. *See United States v. Hebron*, 684 F.3d 554, 563 (5th Cir. 2012) ("[Defendant] should not reap the benefits of a lower sentence because of his ability to defraud the [G]overnment to such an extent that an accurate loss calculation is not possible."). When the fraud cannot be parsed for properly-obtained amounts, "the burden shifts to . . .

defendant to make a showing that particular amounts are legitimate. Otherwise, the district court may reasonably treat the entire claim for benefits as intended loss". *Id.* The loss amount for David Dubin of $94,006.64 was based on his share of PARTS being one-third, and accordingly his share of the impermissible benefit to be one-third. *See Reed*, 908 F.3d at 127 (holding the court must apportion forfeiture amounts between defendants).

The Government demonstrated the Dubins' mutual failures to separate proper payments and valid records from improper payments and invalid records. After acquiring case-file information, the PSR presented the total amounts to be forfeited by William Dubin and David Dubin, and it bears sufficient indicia of reliability. *See United States v. Dickerson*, 909 F.3d 118, 130 (5th Cir. 2018).

D.

The final issue is William Dubin's assertion that the district court erred by failing to adjust his sentence downward based on a lower restitution amount. A downward sentence, he contends, necessarily flows from his restitution claim: as a result of his claim that he should receive a vacated or revised restitution amount, his sentence must be lowered according to the newly calculated or vacated restitution. Because his challenge to the restitution calculation fails, this one does as well.

III.

For the foregoing reasons, the judgments are AFFIRMED.

JENNIFER WALKER ELROD, *Circuit Judge*, concurring:

I concur in the majority opinion's affirmance of David Dubin's identity-theft conviction (Count 25) because our precedent requires it. *See United States v. Mahmood*, 820 F.3d 177, 187–90 (5th Cir. 2016). But I do so reluctantly and write to explain why the Sixth Circuit's decision in *United States v. Medlock*, 792 F.3d 700 (6th Cir. 2015) better interprets the statute at issue, 18 U.S.C. § 1028A.

Title 18 U.S.C. § 1028A is the "Aggravated Identity Theft" statute. That law imposes a mandatory two-year sentence on anyone who uses another person's means of identification without lawful authority during and in relation to theft of government funds. 18 U.S.C. § 1028A(a)(1); *see also Mahmood*, 820 F.3d at 188. In *Mahmood*, we held that § 1028A "plainly criminalizes situations where a defendant gains lawful possession of a person's means of identification but proceeds to use that identification unlawfully and beyond the scope of permission granted." 820 F.3d at 187–88. Hence, under *Mahmood*'s broad language, David Dubin violated § 1028A when he used Patient L's identity to lie about the exact contours of the services provided to Patient L.

But the statute does not require such a broad interpretation, and the Sixth Circuit explained why in *Medlock*. The Medlocks owned a nonemergency ambulance company. 792 F.3d at 703. Medicaid agreed to reimburse the Medlocks for patients' ambulance rides if the rides were "medically necessary." *Id.* Reimbursable transportations had to have an Emergency Medical Technician on board with the patient,

and the Medlocks' company had to document each trip with a certification of medical necessity describing why the transportation qualified for reimbursement. *Id.* at 703–04. The Medlocks submitted certificates of medical necessity that contained several lies. For example, the Medlocks lied about patients being transported on stretchers and said that the patients were accompanied by someone inside the ambulance when, in fact, the patient rode alone with the driver. *Id.* at 704, 708.

The Sixth Circuit reversed the identity-theft conviction because the Medlocks "misrepresented *how and why* the beneficiaries were transported, but they did not use those beneficiaries' identities to do so." *Id.* at 707. "[T]he Medlocks' misrepresentation that certain beneficiaries were transported by stretchers does not constitute a 'use' of those beneficiaries' *identification* . . . because their company really did transport them." *Id.* at 708.

In my view, the Sixth Circuit has the better interpretation of the statute.[1] There was simply no identity theft in *Medlock*, and there is none here. David Dubin lied to Medicaid about the exact contours of the services Patient L received, but did not misrepresent

[1] In *United States v. Michael*, Judge Sutton, writing for the panel, favorably cited *Medlock*, which he said "held, quite correctly, that submitting false reimbursement requests about the nature of a service provided did not constitute 'use' of another's 'means of identification' but that forging a doctor's signature to bolster those submissions satisfied the statute." 882 F.3d 624, 628 (6th Cir. 2018). Again, here, as in *Medlock*, the forgery was about the nature of the services provided, not about anyone's identity.

that Patient L did indeed receive services. Patient L's not receiving the full array of psychological services does not erase the fact that Patient L—and not someone else—received services. When he billed Medicaid, he lied about when a clinical interview was performed and about the type of person that performed the services. Thus, David lied about *when* and *how* Patient L received services, but did not lie about Patient L's identity or make any misrepresentations involving Patient L's identity. Nor did anyone else pretend to be Patient L. Therefore, any forgery alleged in this case, as in *Medlock*, was related only to the nature of the services, not to the patient's identity.

We recently affirmed a § 1028A conviction in a healthcare fraud case where the defendants, unlike in this case, committed actual identity theft. *United States v. Anderson*, 822 Fed. App'x 271, 280 (5th Cir. 2020), *reissued as published on* November 6, 2020. Terry Anderson owned an optical and hearing aid center at which his son, Rocky Anderson, also worked. *Id.* at 273. Terry forged Rocky's signature to file insurance claims, and vice versa. *Id.* at 280. The Andersons also used the names of two people to file insurance claims for hearing tests and hearing aids when the people had never been tested by the Andersons and never received hearing aids. *Id.* Unlike in this case, there was real identity theft in *Anderson*.

For these reasons, if I were writing on a blank slate, I would follow the Sixth Circuit's interpretation of § 1028A as outlined in *Medlock*. Because we are bound by the holding in *Mahmood*, however, I concur in full.

APPENDIX C

RELEVANT STATUTORY PROVISION

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18 U.S.C. § 1028A. Aggravated identity theft

(a) Offenses.—

(1) In general.—Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

(2) Terrorism offense.—Whoever, during and in relation to any felony violation enumerated in section 2332b(g)(5)(B), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person or a false identification document shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 5 years.

(b) Consecutive sentence.—Notwithstanding any other provision of law—

(1) a court shall not place on probation any person convicted of a violation of this section;

(2) except as provided in paragraph (4), no term of imprisonment imposed on a person under this section shall run concurrently with any other term of imprisonment imposed on the person under any other provi-

sion of law, including any term of imprisonment imposed for the felony during which the means of identification was transferred, possessed, or used;

(3) in determining any term of imprisonment to be imposed for the felony during which the means of identification was transferred, possessed, or used, a court shall not in any way reduce the term to be imposed for such crime so as to compensate for, or otherwise take into account, any separate term of imprisonment imposed or to be imposed for a violation of this section; and

(4) a term of imprisonment imposed on a person for a violation of this section may, in the discretion of the court, run concurrently, in whole or in part, only with another term of imprisonment that is imposed by the court at the same time on that person for an additional violation of this section, provided that such discretion shall be exercised in accordance with any applicable guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28.

(c) Definition.—For purposes of this section, the term "felony violation enumerated in subsection (c)" means any offense that is a felony violation of—

(1) section 641 (relating to theft of public money, property, or rewards1), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), or section 664 (relating to theft from employee benefit plans);

(2) section 911 (relating to false personation of citizenship);

(3) section 922(a)(6) (relating to false statements in connection with the acquisition of a firearm);

(4) any provision contained in this chapter (relating to fraud and false statements), other than this section or section 1028(a)(7);

(5) any provision contained in chapter 63 (relating to mail, bank, and wire fraud);

(6) any provision contained in chapter 69 (relating to nationality and citizenship);

(7) any provision contained in chapter 75 (relating to passports and visas);

(8) section 523 of the Gramm-Leach-Bliley Act (15 U.S.C. 6823) (relating to obtaining customer information by false pretenses);

(9) section 243 or 266 of the Immigration and Nationality Act (8 U.S.C. 1253 and 1306) (relating to willfully failing to leave the United States after deportation and creating a counterfeit alien registration card);

(10) any provision contained in chapter 8 of title II of the Immigration and Nationality Act (8 U.S.C. 1321 et seq.) (relating to various immigration offenses); or

(11) section 208, 811, 1107(b), 1128B(a), or 1632 of the Social Security Act (42 U.S.C. 408, 1011, 1307(b), 1320a-7b(a), and 1383a) (relating to false statements relating to programs under the Act).