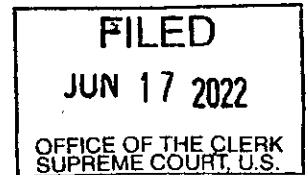


22-5168

ORIGINAL

No. 22-

IN THE
Supreme Court of the United States



UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RODNEY MESQUIAS,

Petitioner-Appellant.

*On Petition for a Writ of Certiorari to the United States
Court of Appeals For The Fifth Circuit*

PETITION FOR A WRIT OF CERTIORARI

RODNEY MESQUIAS
REG. No. 99600-380
FCI BASTROP
FEDERAL CORR. INSTITUTION
P.O. BOX 1010
BASTROP, TX 78602
APPEARING *PRO SE*

QUESTIONS PRESENTED

- I. Whether the United States Court of Appeals for the Fifth Circuit erred in affirming Mesquias' convictions and sentences.

PARTIES TO THE PROCEEDINGS

Petitioner-Appellant, RODNEY MESQUIAS ("Mesquias"), was a criminal Defendant in the United States District Court for the Southern District of Texas, Brownsville Division, in USDC Criminal No. 1:18-cr-00008-1; and as Appellant in the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") in USCA No. 20-40869. Respondent, United States of America, was the Plaintiff in the District Court and Appellee in the Fifth Circuit.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
APPENDIX TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES	v
OPINION BELOW.....	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	9
The United States Court of Appeals for the Fifth Circuit Erred in Affirming Mesquias’ Convictions and Sentences.	10
CONCLUSION.....	16

APPENDIX TABLE OF CONTENTS

	Page
Fifth Circuit Order in USCA No. 20-40869 dated March 24, 2022, Affirming Mesquias' Convictions and Sentences	1A
Judgment in Criminal Case No. 1:18-cr-00008-1, dated December 30, 2020.....	2A

TABLE OF AUTHORITIES

Cases	Page
<i>Estelle v. Gamble</i> , 429 U.S. 97, 106 (1976)	8
<i>Haines v. Kerner</i> , 404 U.S. 519, 520 (1972)	8
<i>Sanjar</i> , 876 F.3d at 746	9
<i>United States v. Ganji</i> , 880 F.3d 760, 773–78 (5 th Cir. 2018)	9
<i>United States v. McClaren</i> , 13 F.4th 386, 399 (5 th Cir. 2021)	10
<i>United States v. Mesquias</i> , 29 F.4th 276 (5 th Cir. 2022)	1, 3, 8
<i>United States v. Nora</i> , 988 F.3d 823, 833–34 (5 th Cir. 2021)	9

Statutes, Rules and Regulations

	Page
18 U.S.C. § 371	2
18 U.S.C. § 1347	2
18 U.S.C. § 1349	2
18 U.S.C. § 1512(k)	2
18 U.S.C. § 1956(h)	2
28 U.S.C. § 1254(1)	1

28 U.S.C. § 2254	2
42 U.S.C. § 1395f(a)(2)(C).....	14
42 U.S.C. § 1395f(a)(7)	14
42 U.S.C. § 1395x(dd)(3)(A).....	14
USSG § 2B1.1cmt 3(E)(i)	7
USSG § 2B1.1(b)(7)(A).....	7
USSG § 2B1.1(b)(7)(B)(iii).....	7
USSG § 2B1.1(b)(10)(C)	7
USSG § 3A1.1(b)(1).....	7
USSG § 3B1.1(a)	7
USSG § 3C1.1(1)	7
USSG § 3C1.1(2)	7

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is published, *United States v. Mesquias*, 29 F.4th 276 (5th Cir. 2022), is attached in the Appendix at 1A.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on March 24, 2022. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254, in its pertinent part, provides:

“(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.”

STATEMENT OF THE CASE

A. The Proceedings Below

On October 16, 2018, a federal grand jury sitting in the United States District Court for the Southern District of Texas, Brownsville Division, returned a twelve (12) count federal criminal Superseding Indictment charging Mesquias. See Doc. 126.¹ Count 1s charged Mesquias with one Conspiracy to Commit Healthcare Fraud, in violation of 18 U.S.C. § 1349. *Id.* Counts 2s-7s charged Mesquias with Healthcare Fraud, in violation of 18 U.S.C. § 1347. *Id.* Count 8s charged Mesquias with Conspiracy To Commit Money Laundering, in violation of 18 U.S.C. § 1956(h). *Id.* Count 11s charged Mesquias with Conspiracy To Obstruct Justice, in violation of 18 U.S.C. § 1512(k). *Id.* and Count 12s charged Mesquias with Conspiracy To Pay and Receive Kickbacks, in violation of 18 U.S.C. § 371. *Id.*

On October 22, 2019, a 12-day jury trial commenced. No docket entry.

1

“Doc.” refers to the Docket Report in the United States District Court for the Southern District of Texas, Brownsville Division in Criminal No. I :18-cr-00008-1, which is immediately followed by the Docket Entry Number, and Page number where appropriate.

On November 6, 2019, the jury found Mesquias guilty on Counts 1s, 2s, 3s, 4s, 5s, 6s, 7s, 8s, 11s, and 12s of the Superseding Indictment. See Doc. 369.

On December 16, 2020, Mesquias was sentenced to total term of 240 months imprisonment, 3 years of Supervised Release, Restitution in the amount of \$120,000,000.00, no Fine, and a Mandatory Special Assessment Fee of \$1,000. See Doc. 519; Appendix 2A.

On December 22, 2020, Mesquias filed a timely notice of appeal of his conviction and sentence in the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit"). See Doc. 515.

On March 24, 2022, the Fifth Circuit in a published opinion affirmed Mesquias' convictions and sentence. See *United States v. Mesquias*, 29 F.4th 276 (5th Cir. 2022).

B. The Factual Background

1. Offense Conduct

The following information was provided by the government, considered as "overwhelming" evidence that Mesquias and Henry McInnis ("McInnis"), a co-defendant, committed health care fraud by abusing Medicare's reimburses-first-verify-later system from 2009 to 2018:

Through their respective positions as owner-president and CEO of the Merida Group—the umbrella company for several businesses purportedly offering home health and hospice care—Mesquias and McInnis orchestrated a scheme of certifying patients for home health and hospice care regardless of their eligibility. They certified all patients

who came to their facilities, regardless of eligibility. After the patients were certified once, defendants recertified them indefinitely, again without consideration of their eligibility. An estimated 70 to 85 percent of the Merida Group's patients were ineligible for the care they received.

A few examples show that many certifications were not borderline cases. One hospice patient had a regular job at Walmart, even though having employment disqualifies patients from hospice. Another, who supposedly had terminal-level dementia, recounted to his nurse a days-old memory of twisting his knee while dancing the Macarena at a family celebration. And one home health patient was actually a boxing instructor at a local gym; he was spotted drinking a beer while driving when he was supposed to be stuck at home with a disability.

To facilitate the fraudulent certification, Mesquias and McInnis built a roster of compliant in-house medical directors at Merida Group. The medical directors routinely lied about having seen patients face-to-face as Medicare requires, exaggerated how sick the patients were and made up diagnoses so that the patients would appear eligible for hospice, and fabricated medical records to cover their tracks. The directors also circumvented the patients' primary-care physicians and often referred patients to hospice at one of the Merida Group's entities over the objections of those physicians.

The carrot-and-stick approach defendants used to control the actors in their scheme reveals their fraudulent intent. The carrots were financial incentives like raises and bonuses to participate in the fraud. The sticks were harsh. Defendants intimidated their employees into submission. When employees pushed back against his excesses, Mesquias warned them not to "f*** with his money." McInnis was the enforcer. He "cuss[ed] out" skeptical nurses and "yell[ed] at the staff" if patients were not certified. For those who failed to go along, consequences were severe. One medical director lost his job for refusing to refer patients to hospice. Other employees, like nurses, who raised questions were also fired or threatened with termination.

Taxpayers were not the only victims of defendants' scheme; patients suffered too. Defendants lied to patients and families about the eligibility requirements for home health and hospice care and roped them in by exaggerating potential benefits. They targeted poor and elderly non-English speakers in San Antonio housing projects and used the language barrier to trick them into signing up for hospice care. Defendants also told patients that they had terminal illnesses when they did not. Those lies took a psychological toll. To take an example, one patient who was told that she had less than six months to live began thinking about ending her life so that her family would not have to watch her die slowly. She lost her appetite, cried incessantly, confined herself at home because

she did not want to burden her family, and stopped sleeping out of the fear that she would never wake up. Five years after the diagnosis telling her that she had six months to live, that patient testified at trial.

The scale of the scheme matched its cruelty. By the time they were caught, defendants had submitted over 47,000 claims for over 9000 patients. They billed over \$152 million to Medicare and received \$124 million.

Id. at 4-5.

2. Trial Proceeding

On October 22, 2019, a 12-day jury trial commenced before Honorable Rolando Olvera. To prove Mesquias' and McInnis' fraud at trial, the government called nineteen witnesses—fourteen of whom were involved with Merida Group and three of whom were also charged in the conspiracy²—who established the facts just discussed. On November 6, 2019, the jury found Mesquias and McInnis guilty on Counts 1s, 2s, 3s, 4s, 5s, 6s, 7s, 8s, 11s, and 12s of the Superseding Indictment. See Doc. 369. The case was referred to the Probation Office for the preparation of the

2

The government charged four others: an administrator named Jose Garza and three medical directors, Jesus Virlar, Eduardo Carrillo, and Francisco Pena. Garza, Virlar, and Carillo pleaded guilty and testified at trial. Pena faced trial with Mesquias and McInnis and was convicted on all counts but died before sentencing.

PSR.³

3. Sentencing Proceeding

Prior to sentencing, Mesquias objected to the Initial PSR findings, methodology and calculation of amount of the actual loss (\$124,213,530) and intended loss (\$152,731,019.00), the interpretation and application of the sentencing guidelines under § 2B1.1 and the resulting twenty-six (26) point enhancement [PSR ¶ 368] on the basis that there is insufficient reliable scientific evidence or otherwise to support the loss finding, and the loss amount fails to credit the fair market value of the services provided per USSG § 2B1.1cmt 3(E)(i); the four (4) point enhancement for a federal health care fraud offense involving a loss more than \$20 million under §§ 2B1.1(b)(7)(A) and (B)(iii) [PSR ¶ 369]; the two (2) point increase under § 2B1.1(b)(10)(C) for an offense involving “sophisticated means”; the two (2) point increase under § 3A1.1(b)(1) for an offense involving “vulnerable victims” [PSR ¶ 372]; the four (4) point enhancement as an “organizer or leader” under § 3B1.1(a) [PSR ¶ 373]; the two (2) point enhancement for obstruction of justice under §§ 3C1.1(1) and (2); inaccurate information utilized in calculating a guideline score; the absence of mitigating and exculpatory evidence and calculations predicated on the conduct of others rather than on Mesquias’ conduct. Mesquias objected to the Total Offense Level calculation of forty-eight (48) and resulting guideline range of life imprisonment and corresponding statutorily maximum terms of imprisonment [PSR ¶¶ 421-426].

On December 16, 2020, a Sentencing Hearing was held before Judge Rolando Olvera. The Court sentenced

3

“PSR” refers to the Presentence Report in this case, which is immediately followed by the paragraph (“¶”) number.

Mesquias to a total term of 240 months, which consisted of 120 months as to each of Counts 1s through 7s, 240 months as to each of Counts 8s and 11s, and 60 months as to Count 12, to be served concurrently, for a total term of 240 months. Judgment was entered on December 30, 2020. See Doc. 519; Appendix 2A. A timely Notice of Appeal was filed on December 22, 2020. See Doc. 515.

4. Appellate Proceeding

On Appeal, Mesquias and McInnis raised the following grounds, whether: (1) sufficient evidence supports the fraud convictions; and (2) the district court properly calculated loss when sentencing defendants. On March 24, 2022, the Fifth Circuit in a published opinion affirmed Mesquias' convictions and sentence. See *United States v. Mesquias*, 29 F.4th 276 (5th Cir. 2022); Appendix 1A.

REASONS FOR GRANTING THE PETITION

As a preliminary matter, Mesquias respectfully requests that this Honorable Court be mindful that *pro se* litigants are entitled to liberal construction of their pleadings. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); and *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

The United States Court of Appeals for the Fifth Circuit Erred in Affirming Mesquias' Convictions and Sentences.

Mesquias contends that the Fifth Circuit erred affirming his convictions and sentences, for the following facts and reasons:

The evidence belies their claims of ignorance. Mesquias was the driving force behind the false certifications and doctored medical

records. He established the rule of admitting every patient and not discharging them. He ordered that medical directors spend multiple days creating “boxes” of falsified medical records. McInnis enforced Mesquias’s rules. He ran the day-to-day operations of the organization from its “nerve center” in Harlingen, issuing directives on how to circumvent objecting physicians, falsify medical records, dupe auditors, and lie to patients. And he aggressively confronted employees who questioned the scheme. Unlike cases in which we have found insufficient evidence to support health care fraud convictions, see *United States v. Nora*, 988 F.3d 823, 833–34 (5th Cir. 2021) (reversing an officer manager’s conviction because he did not know that his work was unlawful); *United States v. Ganji*, 880 F.3d 760, 773–78 (5th Cir. 2018) (reversing doctors’ convictions because the government offered no proof that they were involved in the fraud scheme), Mesquias and McInnis were intimately involved with the fraud. See *Sanjar*, 876 F.3d at 746 (affirming the convictions of two doctors who orchestrated a fraud scheme).

...

Second, defendants argue that the government did not prove the ineligibility of the six patients whose claims were listed as the substantive fraud counts. Again, the record tells a different story. Merida Group medical directors testified that the certifications for all six patients were either outright lies or based on fabricated medical records. Such testimony

of a co-conspirator, as long as it is not incredible, is alone sufficient to support a conviction. *United States v. McClaren*, 13 F.4th 386, 399 (5th Cir. 2021) (explaining that such testimony is incredible only if it defies the laws of nature or involves matters the witness could not have observed). Although corroboration of these damaging admissions was not required for the jury to convict, ample circumstantial evidence backed up the co-conspirators' testimony. The named patients were in hospice for an average of three years, a far cry from Medicare's six-months-to-live eligibility requirement.⁴ Some patients were alive when they were discharged; one even testified at trial five years after being certified.

...

Defendants' arguments do not show that the jury lacked evidence to find them guilty. We therefore affirm their convictions.

See Appendix 1A.

Medicare's Hospice and Home-Health Benefits

In this case, the District Court concluded that Mesquias and his co-defendants executed a sophisticated scheme to defraud Medicare out of millions by billing for hospice services for patients who were not terminally ill and did not qualify for hospice care. However, it is

4

Medicare allows for recertification beyond six months because medical predictions are not always accurate. Still, the length of the lives at issue support the co-conspirators' testimony.

essential to note that the United States did not allege or produce any evidence of phantom patients or that hospice services were billed but not provided. The government's theory rested on the falsity of the certifying physicians clinical judgment / prognosis that the patients were terminally ill. As such, the central issue became the sufficiency of evidence required to prove a certifying physician's prognosis or clinical judgment false.

In sum, the government's theory was not every claim submitted contained false information but Counts 2s through 7s are fraudulent because the patients were falsely certified as terminal. The government predicated its case on the theory that Counts 2s through 7s are examples of a greater conspiracy. Nonetheless, contrary to the government's theory, its failure to present sufficient evidence to support convictions of Counts 2s through 7s unraveled its entire case.

Specifically, the government deviated from the accepted methods utilized in prosecuting similar health care matters, and electing not to illicit any expert witness testimony or independent review of patient records to prove an objective falsehood that could establish the patients in Counts 2s through 7s were ineligible for hospice. Instead, the government called to testify a series of fact witnesses - former medical directors, nurses and staff - to opine that patients were ineligible for hospice because they "disagreed" with the prognosis of terminal

illness. The government performed an evidentiary short-cut by substituting required, reliable expert testimony with after the-fact guesstimates of patients' ineligibility for hospice. Except for cooperating witnesses who pled guilty prior to trial, each government witness denied engaging in any fraud while employed at Merida.

Despite having paid over \$250,000 to a statistician, Michael Petron, the government did not ask him to prepare a statistical model to extrapolate from the six patients' additional fraudulent diagnoses from within Mesquias' entire patient census. The government presented no statistical model or evidence that the six patients were a statistically valid and representative sample of the entire patient population. The government failed to show that a reliable amount of loss could be extrapolated from these six patients across the entire population of over nine thousand patients and tens of thousands of claims.

Finally, over Mesquias' objection, the entirety of Merida's Medicare claims data was admitted into evidence. Said claims data included approximately \$150 million in submitted claims and \$125 million in payments to nine distinct providers over a nine-year period (2009 to 2018). At all times, the government argued these claims proved a \$150 million fraud. The jury convicted on all counts, and the Court erroneously denied Mesquias' motions for acquittal and new trial.

On December 30, 2020, at sentencing, the Court overruled Mesquias' objection to the PSR guidelines calculation including the 24-level enhancement for amount of loss over \$65,000,000; 4-level enhancement for a greater than \$20,000,000 loss resulting from health care fraud; and the \$120,000,000 in restitution. See Doc. 519; Appendix 2A. The District Court further denied live witnesses testimony at the sentencing hearing, resulting in an erroneous and unsupported determination of an amount of loss as well other enhancements. *Id.* Consequently, Mesquias subsequently received an unreasonable, unduly long sentence of twenty (20) years imprisonment with \$120,000,000 in restitution. Mesquias appealed the conviction and sentence. *Id.*

The Fifth Circuit erred when it affirmed the judgment of the District Court based on the so-called "overwhelming" evidence presented by the government.

Loss Amount Calculation

Mesquias concedes that he is guilty on all counts charged on the Superseding Indictment, but argues that the loss amount was not properly calculated. The government used hearsay of 70% to 80% fraud to calculate the loss amount. Hence, the PSR's calculation of Mesquias' Total Offense Level was overstated, which resulted in a substantially harsh guideline range.

As mentioned above, Michael Patron, the statistician, was not utilized to calculate the loss amount. Patron did nothing but look into Mesquias' spending habits.

Medicare Statutes and Regulations

A web of statutes and regulations governs whether Medicare will pay for these services. Medicare covers

home health services when a doctor certifies that the patient is confined at home and needs skilled nursing or therapy. 42 U.S.C. § 1395f(a)(2)(C). Hospice care is reimbursed when both the patient's primary-care physician and the medical director of the hospice certify that the patient has a life expectancy of six months or less. *Id.* §§ 1395f(a)(7), 1395x(dd)(3)(A). The hospice certification lasts ninety days, *id.* § 1395f(a)(7), but Medicare acknowledges that estimating life expectancy is an inexact science and allows for periodic renewal of hospice lasting beyond six months upon recertification by either the primary-care physician or medical director. See *id.*; 79 Fed. Reg. 50452, 50470 (Aug. 22, 2014).

Hospice rule states that a patient can enter the program when a Medical doctor uses his medical opinion to prescribe hospice. There were 198 doctors that prescribed hospice and they never check or interview them.

Mesquias was the owner of Merida entities and did sign 855 agreements. However, Mesquias did NOT sign or certify a single hospice or home health patient. As a registered nurse Mesquias was not qualified to certify a patient for Medicare services. Mesquias' ownership and/or signature of 855s did not proximately cause Dr. Virilar, Dr. Carrillo or any other primary care provider or medical director to certify a single patient. To reiterate, Mesquias is not a medical doctor, hence, he could write "the order". It is noteworthy to mention that the six patients (whose claims were listed as the substantive fraud counts) were all prescribed from another doctor, and not from Dr. Virilar nor Dr. Carrillo.

Mesquias urges this Court to consider the following facts:

- Dr. Virilar was not the certifying physician in Count 2s (Jack High), Count 3s (Fransica Perez), Count 6s (Petra Cerda), and Count 7s

(Joann Conti). Dr. Virlar did certify the patient in Counts 4 (Teresa Calvillo) and 5s (Arcadio Castaneda). However, the medical records of the primary care provider for Ms. Calvillo (Dr. Arizaca) and Mr. Castaneda (Dr. Tom Gonzaba) support hospice referral, admission and certification.

- Ms. Calvillo's primary care provider who the government elected not to call at trial but introduced her medical records as GX D1 ordered her hospice admission to Merida without any evidence Mesquias was aware or involved in Dr. Arizaca's hospice order.
- Mr. Castaneda's primary care provider Dr. Tom Gonzaba who the government elected not to call at trial but introduced his medical records into evidence as GX D2 which reflect the following on February 28, 2014: "due to decline in your health and progression of your disease ...I recommend you consider hospice services. Hospice services are free for appropriate patients such as you." There is no evidence that Mesquias was involved, aware or played any part in Dr. Gonzaba's hospice recommendation to Mr. Castaneda. The required causation component to establish relevant conduct is absent. See *Olin*. Nor is there any evidence or testimony that Dr. Gonzaba's clinical judgment was fraudulent.
- Dr. Virlar admits the patients in Counts 2s, 3s, 6s, and 7s were "not under his service" so he cannot competently offer any fact witness testimony about them.
- Counts 2s through 7s involve six (6) cherry-picked hospice beneficiaries from a body of thousands of unique hospice beneficiaries with thousands of claims spanning multiple years of service involving

dozens of professional healthcare providers from across the State of Texas. The government elected a cherry-picking strategy rather than evaluating all claims; and at sentencing sought to punish Mesquias solely based on "estimates" of tens of thousands of fraudulent claims related to 9,333 beneficiaries the government choose not to evaluate. The District Court should have rejected the government's attempt to avoid its most fundamental function – proving its allegations, but the Court failed.

Kickbacks

Hospice is a program that is a safe harbor program. The program allows an agency to hire medical doctors and it is their medical judgment companies like Merida rely on. Thus, Mesquias did not conspire with them. There were no kickbacks in this case, only payments to physicians for work performed or service rendered. More so, Mesquias was advised by his health care attorney, John Rivas, that he could pay them [Dr. Virlar and Dr. Carrillo].

Accordingly, this Court should reverse the Fifth Circuit's affirmance of Mesquias' convictions and sentences and remand to the District with instructions to vacate his sentence.

CONCLUSION

For the above and foregoing reasons, Mesquias' petition for a writ of certiorari should be granted.

Respectfully submitted,

Dated: June 15, 2022

Rmesquias
RODNEY MESQUIAS
REG. NO. 99600-380
FCI BASTROP
FEDERAL CORR. INSTITUTION
P.O. BOX 1010
BASTROP, TX 78602
APPEARING *PRO SE*