No. _____

In the
Supreme Court of the United States

OCTOBER TERM, 2023

YNEDRA DIGGS,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

WAS MS. DIGGS'S CONSTITUTIONAL RIGHT TO CONFRONTATION VIOLATED WHEN THE DISTRICT COURT ADMITTED RECORDED STATEMENTS OF UNAVAILABLE CO-DEFENDANTS INTO EVIDENCE OVER HER OBJECTION?

DID THE ADMISSION OF THE RECORDED STATEMENTS BY UNAVAILABLE CO-DEFENDANTS VIOLATE THIS COURT'S RULING IN *BRUTON V. UNITED STATES*, 391 U.S. 123(1968) ?

DID THE FIFTH CIRCUIT ERR BY HOLDING THAT THE RECORDED STATEMENTS OF THE UNAVAILABLE CODEFENDANTS WERE NON TESTIMONIAL AND THUS NOT PROHIBITED BY THE CONFRONTATION CLAUSE?

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The decision of the Court of Appeals for the Fifth Circuit is reported as *United States v. Diggs*, No. 22-20620 (5th Cir. February 21, 2024). It is attached to this Petition in the Appendix.

JURISDICTION

The decision by the United States Court of Appeals for the Fifth Circuit affirmed the District Court's judgment of conviction and sentence in the Southern District of Texas.

Consequently, Ms. Diggs files the instant Application for a Writ of Certiorari under the authority of 28 U.S.C., § 1254(1).

BASIS OF FEDERAL JURISDICTION

IN THE COURT OF FIRST INSTANCE

Jurisdiction was proper in the United States District Court for the Eastern District of Texas because Ms. Diggs was indicted for violations of Federal law by the United States Grand Jury for the Southern District of Texas.

CONSTITUTIONAL PROVISIONS

The Confrontation Clause of the Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him ...."). U.S. CONST. amend. VI.

The Fifth Amendment says to the federal government that "no person shall be. . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Due Process Clause provides "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

STATEMENT OF THE CASE

1. Procedural History.

On February 28, 2019, an eight-count Superseding Indictment was filed in the United States District Court for the Southern District of Texas, Houston Division, naming Dr. Paulo Bettega, Colin Wilson, Lindell King, Timothy Haynes, and Ynedra Diggs, as the defendants. ROA. 71-84.[1] Count 1 of the Superseding Indictment charged each defendant with conspiracy to defraud the United States and to pay and receive health care kickbacks, in violation of 18 § 371, and is alleged to have occurred from in or around March 2009 through in or around January 2018. Count 2 of the Superseding Indictment charged Dr. Paulo Bettega and Lindell King with violation of anti-kickback statute, aiding and abetting, in violation of 42 U.S.C. § 1320a-7b(b) and 18 U.S.C. § 2, and is alleged to have occurred on May 8, 2015. Count 3 of the Superseding Indictment charged Dr. Paulo Bettega and Ynedra Diggs with violation of anti-kickback statute, aiding and abetting, in violation of 42 U.S.C. § 1320a-7b(b) and 18 U.S.C. § 2, and is alleged to have occurred on May 8, 2015. Count 4 of the Superseding Indictment charged Dr. Paulo Bettega and Colin Wilson with violation of anti-kickback statute, aiding and abetting, in violation of 42 U.S.C.

[1]In the references to the Record on Appeal, references are made according to the pagination assigned by the Clerk of the Court.

§ 1320a-7b(b) and 18 U.S.C. § 2, and is alleged to have occurred on January 10, 2017. Count 5 of the Superseding Indictment charged Dr. Paulo Bettega and Lindell King with violation of anti-kickback statute, aiding and abetting, in violation of 42 U.S.C. § 1320a-7b(b) and 18 U.S.C. § 2, and is alleged to have occurred on May 11, 2017. Count 6 of the Superseding Indictment charged Dr. Paulo Bettega and Lindell King with violation of anti-kickback statute, aiding and abetting, in violation of 42 U.S.C. § 1320a-7b(b) and 18 U.S.C. § 2, and is alleged to have occurred on June 21, 2017. Count 7 of the Superseding Indictment charged Dr. Paulo Bettega and Ynedra Diggs with violation of anti-kickback statute, aiding and abetting, in violation of 42 U.S.C. § 1320a-7b(b) and 18 U.S.C. § 2, and is alleged to have occurred on July 21, 2017. Count 8 of the Superseding Indictment charged Dr. Paulo Bettega and Timothy Haynes with violation of anti-kickback statute, aiding and abetting, in violation of 42 U.S.C. § 1320a-7b(b) and 18 U.S.C. § 2, and is alleged to have occurred between November 8-14, 2017.

The case proceeded to a jury trial. Voir dire commenced on March 29, 2022. A jury was selected, seated and sworn. The Government presented the testimony of witnesses and introduced numerous exhibits. After the Government rested, Ms. Diggs made a motion for directed verdict. ROA. 4561. The Government responded. The District Court denied the motion. ROA. 4564. Ms. Diggs rested without presenting

evidence. Both sides then closed evidence.ROA. 4576. Ms. Diggs did not renew her Rule 29 motion. ROA.4576.

On April 4, 2022, the jury returned a "guilty" verdict against Ms. Diggs on all three counts. ROA.1619.

Ms. Diggs was sentenced on November 30, 2022. The District Court sentenced Ms. Diggs to a 70-month total term of imprisonment; the District Court imposed a 60-month sentence on Counts 1 and 3 concurrent and an additional ten-month sentence to run consecutive for a total sentence of 70 months. ROA. 165. A notice of appeal was then timely filed.

On February 21, 2024, a panel of the Fifth Circuit affirmed Ms. Diggs's conviction in a published decision.

2. Statement of Facts.

This criminal case arose from an alleged health care conspiracy fraud in the Houston, Texas area committed by Ms. Diggs and co-defendants. Behavioral Medicine of Houston PA (BMH) was a Medicare-certified CMHC located at various addresses, including 7830 Westglen Drive, Houston, Texas, within the Southern District of Texas. BMH billed Medicare and Medicaid for PHP and psychiatric services purportedly provided at BMH. Dr. Paulo Bettega (Bettega) was the owner, director, and president of BMH. Bettega was a medical doctor specializing in

psychiatry. Bettega was an enrolled Medicare provider and the Medicare-authorized/delegated official for BMH from at least in or around September 2008 to in or around January 2018. Bettega and his co-conspirators allegedly submitted approximately $26,226,463 in claims to Medicare for partial hospital and related services. Based on those claims, a benefit of $14,487,376.81 was conferred from Medicare and was deposited into bank accounts controlled by Bettega and others.

Ray Michael Garcia (Garcia) recruited the owners of group homes, those affiliated with group homes, and other marketers, to refer Medicare beneficiaries to receive purported HP services at BMH. Garcia also assisted Bettega in managing the day-to-day operations of BMH and handled the payment of illegal kickbacks to Wilson, King, Haynes, Diggs, and others for the referral of Medicare beneficiaries to receive PHP services from BMH and Bettega. Garcia was actually an informant working for the Government. Garcia often disguised the illegal kickbacks as payments for transportation, cleaning services, or other services to make the payment appear legitimate. Garcia would often pay the kickbacks in cash in an effort to disguise the payment. He also paid coconspirators through an account entitled "Ancillary Services" in a further attempt to hide the illegal kickback. Garcia died before trial.

The Government alleged that Ynedra Diggs operated and controlled multiple group homes in the Houston, Texas, area. She worked alongside her husband Lindell King. The residents of the group homes were often Medicare or Medicaid beneficiaries. Ms. Diggs' Medicare beneficiary residents went to BMH, and BMH provided psychiatric services to the Medicare beneficiaries. BMH then billed Medicare for services. The Government alleged that Ms. Diggs never transported the Medicare beneficiaries herself but was paid by check and cash for purported transportation of the individuals as a way of attempting to conceal the kickbacks. BMH paid co-defendant King and Ms. Diggs for providing 61 patients to the facility. Based on claims related to those 61 patients, BMH billed Medicare $1,095,930 for purported care. The Government alleged that the claims resulted in a benefit of $537,992.55 which was paid by Medicare.

Dr. Bettega is currently a fugitive and his location is unknown. Ray Michael Garcia, the government informant, was paid over $13,000 for his assistance and information. ROA. 4104. Garcia died before the trial. These two men were not involved in this trial. This the criminal conduct that comprised the charges for which Ms. Diggs was convicted after a jury trial. ROA.4682.

The Presentence Report assigned Ms. Diggs a base offense level of 20. The guideline for a violation of 18 U.S.C. § 371 is USSG §2X1.1. That guideline instructs

the base offense level is to be determined by the base offense level from the guideline for the substantive offense, plus any adjustments that can be established with reasonable certainty. The substantive offenses cited in the conspiracy count were violations of 42 U.S.C. §1320a-7b(b), the guideline for which is found at USSG §2B4.1. The base offense level at USSG §2B4.1(a) is 8. USSG §§ 2X1.1(a) and 2B4.1(a). Pursuant to USSG §2B4.1(b)(1)(B), because the greater of the value of the bribe or the improper benefit conferred exceeded $6,500, the offense level is increased by the number of levels from the table in USSG §2B1.1 corresponding to that amount. The PSR found that an improper benefit of $537,992.55 was conferred from Medicare as a result of Ms. Diggs's conduct. The offense level is increased by 12 because the improper benefit conferred was more than $250,000 but less than $550,000. USSG §§2B4.1(b)(1)(B) and 2B1.1(b)(1)(G). The resulting offense level is 20.[2]

Pursuant to U.S.S.G. § §3A1.1(b)(1), the PSR officer increased the offense level by two levels. The PSR officer found that Ms. Diggs' group home patients included individuals who were very ill. Two levels were added because the PSR

[2]"PSR" refers to the Presentence Investigation Report filed by the United States Probation Department (under seal). In the citations to the PSR, the numeral(s) to the left of "PSR" refer to page numbers and the numeral(s) to the right of "PSR" refer to paragraph numbers.

officer found that Ms. Diggs knew or should have known that a victim of the offense was a vulnerable victim. *See* USSG §3A1.1(b)(1).

The PSR assigned a three-level upward adjustment pursuant to U.S.S.G. § 3B1.1(b) because the PSR officer found that Ms. Diggs was a leader or organizer of criminal activity involving five or more participants, or was otherwise extensive.

The PSR assigned a two-level upward adjustment pursuant to U.S.S.G. § 3B1.3 because the PSR officer found that Ms. Diggs abused a position of public and private trust or used a special skill in a manner that significantly facilitated the commission or concealment of the offense.

Because Ms. Diggs proclaimed her innocence and proceeded to trial, no downward adjustment for acceptance of responsibility was made. Both the Government and Ms. Diggs filed objections to the PSR. Based upon a total offense level of 27 and a criminal history category I, the advisory guideline range of imprisonment was 70 to 87 months.

During the sentencing hearing, counsel for Ms. Diggs made the following argument to the Court:

> MR. JONES: 3553(a) takes into account some of these things. We're hoping that the Court will take into account that she didn't require the government to bring evidence, other than what it brought. And she stands by her view that she's not denying anything that she did. However, the things they said she did and how she did it, she's raising

> an issue to some of those things, because she did care about the people that she provided help for and did it over a series of years. No number of those people were brought in here to talk about those things. As a matter of fact, there was evidence to reflect that -- to reflect that there were those who spoke kindly of her. With that, Judge, we're simply asking the Court to sentence Ms. Diggs at the low end of the guideline range and to have a variance relative to her sentence based on the fact that she does not fit into that category where it would benefit society, benefit her or anyone in that regard. ROA. 4752-4755.

Ms. Diggs made the following statement before she was sentenced:

> THE DEFENDANT: Yes, ma'am. I want to start off by saying I'm sorry for the waste of the Court's time. And I really didn't expect to have to say too much here. Like I told you, I'm a mother, grandmother. I do have love and compassion for others. I want to say, you know, I'm sorry for anybody that what been hurt through this ordeal that I, you know, had a hand in causing. All I can do is just apologize and learn from here. Continue to learn from here. It's been a learning lesson for me and the shame that it has brought on me and my family. I just want to say sorry.
>
> THE COURT: Thank you. ROA. 4756.

Ms. Diggs was sentenced to a 70-month total term of imprisonment. This term of imprisonment is to be followed by a three-year term of supervised released. The District Court also ordered Ms. Diggs to pay $537,992.55 in restitution. After the District Court imposed the sentence, the Court made the following statement:

> THE COURT: These sentences are harsh. But there is a reason that they're harsh. And that is that this kind of fraud is hard to catch, and yet it undermines a system on which our most vulnerable citizens and residents depend. Ms. Diggs says she cares. I don't see it in this record.

> I see money. I see using people for the money they could bring. And that plus the difficulty of deterring by any means other than a harsh punishment does make sense under the guideline objectives and the 3553(a) factors. So how does that translate to an amount of time? That's not easy. I do accept that Ms. Diggs may have started with a desire to help people and provide the care that she says she feels. But she went seriously off track, and that is a grave concern, a concern that does not admit of home confinement as the appropriate sentence. More is needed. These are serious offenses. The guideline range is to the convictions for Counts 1, 3 and 7 are each up to five years and the statutory max is five years. The guideline range is 70 to 87 months. And the Court believes that a total sentence of 70 months is appropriate. That is, a 60-month sentence on Counts 1 and 3 concurrent and an additional ten-month sentence to run consecutive for a total sentence of 70 months.ROA. 4760-4761.

The District Court sentenced Ms. Diggs to a total term of 70 months imprisonment. The notice of appeal was then timely filed. On February 21, 2024, the Fifth Circuit affirmed Ms. Diggs 's conviction and sentence. *See United States v. Diggs*, No. 22-20620 (5th Cir. Feb 21, 2024)(published).

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. MS. DIGGS'S CONSTITUTIONAL RIGHT TO CONFRONTATION WAS VIOLATED WHEN THE DISTRICT COURT ADMITTED RECORDED STATEMENTS OF UNAVAILABLE CO-DEFENDANTS INTO EVIDENCE.

In this case, co-defendant Garcia died before trial and co-defendant Bettega absconded, most likely to another country, and has not been located. The District Court by admitting the recorded statements of unavailable co-defendants Bettega and Garcia speaking with Ms. Diggs and other people. These recordings include Exhibits 700C, 701C, 703B, 704B, 704C, 704D, 705,706B,706C, 707B, 707C, 708B, 709D, 710C, 711B, 711C, 713, and 715. Garcia, the dead confidential informant, made these recordings. ROA. 4106. The recordings were admitted during the testimony of Garcia's handler, Major Marlow. Certain recordings were also admitted during the direct examination of Reina Gonzalez. These recordings violated Ms. Diggs's constitutional right to confrontation as well as the Federal Rules of Evidence. This error requires reversal.

"The Confrontation Clause provides the accused with the right to be confronted with witnesses against him," U.S. CONST. amend. VI. "The Confrontation Clause guarantees a defendant the opportunity for effective cross-examination." *United*

States v. Lockhart, 844 F.3d 501, 510 (5th Cir. 2016); *Delaware v. Fensterer*, 474 U.S. 15, 19–20 (1985). When determining whether admitted evidence violated the Confrontation Clause, this court asks three questions: "First, did the evidence introduce a testimonial statement by a nontestifying witness? Second, was any such statement offered to prove the truth of the matter asserted? Third, was the nontestifying witness available to testify, or was the defendant deprived of an opportunity to cross-examine him?" *United States v. Meyer*, No. 20-20094, at *22 (5th Cir. Apr. 3, 2023); *see* also *United States v. Hamann*, 33 F.4th 759, 767 (5th Cir. 2022). If the answer to each question is "yes," then the Confrontation Clause was violated and this Court must review for harmless error. *Id*.

A out-of-court statement is "testimonial" if it was "'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *United States v. Santos*, 589 F.3d 759, 762 (5th Cir. 2009); *see* also *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2532 (2009). The circumstances must objectively indicate that the "primary purpose" of the testimonial statement is "to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 126 S. Ct. 2266, 2274 (2006); *see* also *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011) (if the "primary purpose" of the statement is not to create an out-of-court substitute for trial testimony, then "the

admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause"). The right to confrontation is abridged when a testimonial statement is put before the jury that a defendant cannot confront:

> Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.

See Crawford v. Washington, 541 U.S. at 68 (2004).

The recordings contain testimonial statements. Garcia made these recordings with the primary purpose of establishing or proving crimes for later prosecution. His truthfulness is at issue. As a Government informant who had been caught committing illegal acts, Garcia had motives to fabricate evidence against Ms. Diggs, and she had a Sixth Amendment right to confront him about these statements. His statements were never subject to cross-examination or confrontation. Her rights were violated by admitting the statements.

A violation of a defendant's confrontation clause rights "cannot be harmless if it might have contributed to the verdict, even taking account the other evidence."*United States v. Alvarado-Valdez*, 521 F.3d 337, 341–42 (5th Cir. 2008) Therefore, only if there was "no reasonable possibility" the evidence contributed to defendant's conviction can the error be harmless. *Id.* at 341. The government bears

the heavy burden of proving the violation harmless beyond a reasonable doubt. *Id*. at 342. This Court considers several factors to determine whether a violation was harmless. Those factors include "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *United States v. Barrera-Cervantes*, 713 F. App'x 404, 405 (5th Cir. 2018); *see* also *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986).

The recordings and the statements made therein were key to the Government's case against Ms. Diggs regarding the conspiracy and the kickbacks. The statements in the recordings came into evidence without any sort of confrontation. The Government cannot show that these recordings were harmless.

Further, these recordings also constituted inadmissible hearsay. They were also prejudicial and improper because they implicated Ms. Diggs's participation in the offenses and were introduced against Ms. Diggs in violation of Rule 802 and Rule 403 of the Federal Rules of Evidence. Statements not subject to the Confrontation Clause can still be inadmissible hearsay. Hearsay is "a statement that . . . the declarant does not make while testifying at the current trial or hearing; and . . . a party

offers in evidence to prove the truth of the matter asserted in the statement." FED. R. EVID. 801 (c). A district court can admit hearsay at trial pursuant to a recognized exception. *See* generally, Fed. R. Evid. 803. A party claiming such an exception, however, must lay the proper foundation for it. *See United States v. Towns*, 718 F.3d 404, 422 (5th Cir. 2013)("Rule 803 requires that the custodian of the business records or another qualified witness must lay a foundation before records are admitted.").

The statements were inadmissible hearsay because they were out of court statements made by a declarant who was not testifying at trial and offered in evidence to prove the truth of the matter asserted. Fed. R. Evid. 801©, 802. Additionally, the statement did not qualify as an exception to the hearsay rule as co-conspirator's statement under Rule 801(d)(2)(E) because the statement was not made "during the course and in furtherance of the conspiracy".

Additionally, the evidence was highly prejudicial to Ms. Diggs. Under Rule 403 of the Federal Rules of Evidence, the evidence was excludable because the probative value of the evidence was outweighed by a danger of unfair prejudice. Lastly, the statement implicated Ms. Diggs in charged and uncharged criminal conduct.

The government's case against Ms. Diggs was slim to non-existent without the recordings of fugitive Bettega and dead informant Garcia. Considering the lack of

evidence that would tie Ms. Diggs to the alleged conspiracy and health care fraud, the recorded statements impacted Ms. Diggs's rights to a fair trial. *Dudley* at 490 (Courts that have taken a similar approach have concluded that threat testimony is inappropriately admitted where the record suggests that the prosecutor is using the evidence under a pretext, i.e.more to prejudice the defendant than to explain away the witness's conduct).

This Court should grant the Petition for Writ of Certiorari, vacate the Fifth Circuit's decision and remand the case for proceedings consistent with this Court's decision. *Bruton v. United States*, 391 U.S. 12 (1968) (reversing for new trial where admission of codefendant's confession implicated defendant and even though trial court gave clear, concise and understandable instruction that confession could only be used against codefendant and should be disregarded with respect to *Bruton*).

CONCLUSION

This Petition for Writ of Certiorari should be granted and the decision of the Fifth Circuit should be vacated, and the case should be remanded for proceedings consistent with this Court's opinion.

Respectfully submitted,

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RELIEF REQUESTED

FOR THESE REASONS, the Petitioner moves this Court to grant a Writ of Certiorari in order to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 21st day of May 2024, I served one (1) copy of the foregoing Petition for Writ of Certiorari on the following individuals by mail (certified mail return receipt requested) by depositing same, enclosed in post paid, properly addressed wrapper, in a Post Office or official depository, under the care and custody of the United States Postal Service, or by other recognized means pursuant to the Rules of the Supreme Court of The United States of America, Rule 29:

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No. _____

In the
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OCTOBER TERM, 2023

YNEDRA DIGGS,

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UNITED STATES OF AMERICA

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APPENDIX

OPINION OF THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
February 21, 2024
Lyle W. Cayce
Clerk

No. 22-20620

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

LINDELL KING; YNEDRA DIGGS,

Defendants—Appellants.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:18-CR-345-3

Before JONES, HAYNES, and DOUGLAS, *Circuit Judges*.

EDITH H. JONES, *Circuit Judge*:

Defendants convicted of healthcare fraud and receiving Medicare kickbacks challenge the district court's admission of recordings involving them and other co-conspirators, the district court's calculation of the improper benefit received for the purposes of their sentence, and the restitution award. Finding no error, we AFFIRM.

I. BACKGROUND

Five individuals, including Lindell King and Ynedra Diggs, were charged in an eight-count superseding indictment with conspiracy to defraud

the United States and to pay and receive healthcare kickbacks and violations of the anti-kickback statute.[1] Dr. Paulo Bettega, who was named in the superseding indictment, was a Medicare provider who paid bribes and kickbacks to individuals, including King and Diggs, for referring Medicare beneficiaries to him for treatment that was unnecessary or not even provided. King and Diggs were married and owned and operated group homes for vulnerable individuals who could not care for themselves. Over a period of seven years, King and Diggs received $70,000 in known bribes from checks and additional, unknown amounts of cash. As a result, Bettega's clinic received $537,992.55 from Medicare associated with patients that were residents of the defendants' group homes.

Medicare covers partial hospitalization programs ("PHPs") connected with the treatment of mental illness. These programs are designed to serve patients in lieu of inpatient hospitalization when a patient suffers a flare-up of a preexisting chronic mental health condition and requires services at the intensity and frequency available to patients receiving in-patient psychiatric treatment. PHPs do not serve patients at their mental-health baseline or provide care for long-term conditions like dementia.

At his clinic, Bettega often admitted patients in large groups after providing only a short physical exam for non-psychiatric patients. Often, these patients had no psychiatric conditions and were not suffering from an acute mental-health crisis. Some of them spoke no English. Yet the clinic prescribed a homogenous regime of four group therapy sessions a day in its

[1] The indictment charged Dr. Bettega, who remains a fugitive, King, Diggs, and two other group home operators: Colin Wilson and Timothy Haynes. Garcia, who died prior to King and Diggs's trial, was charged in a prior indictment.

PHP program, which patients often skipped or could not understand or participate in.

Following a four-day jury trial, King and Diggs were convicted of conspiracy as well as individual counts for soliciting or receiving kickbacks. As part of the evidence, the Government introduced recordings made by Ray Garcia, a confidential informant who was paid more than $13,000 for his cooperation with the government. The district court denied the defendants' pre-trial motion to exclude the recordings, reasoning that they did not contain testimonial statements and Bettega was a coconspirator acting in furtherance of the conspiracy. At trial, King and Diggs did not specifically renew the prior objection, but they asked for and received limiting instructions to the jury in accordance with the district court's ruling on the motion in limine.

The district court sentenced King to 60 months in prison and Diggs to 70 months. King and Diggs's sentences were based on a finding of $537,992.55 of improper benefit, which yielded a 12-level adjustment under the Sentencing Guidelines for each defendant. U.S.S.G. § 2B1.1(b)(1) (loss attributable was more than $250,000 but less than $550,000). Their objections to the improper benefit amount reflected in the Pre-Sentencing Reports ("PSRs") and at sentencing were overruled. The court also held King and Diggs jointly and severally liable for $537,992.55 in restitution. Both defendants have appealed.

II. DISCUSSION

This court reviews preserved Confrontation Clause claims de novo, subject to a harmless error analysis. *United States v. Noria*, 945 F.3d 847, 853 (5th Cir. 2019). Evidentiary rulings preserved at trial are reviewed for abuse of discretion, subject to harmless error. *United States v. Sanjar*, 876 F.3d 725, 738 (5th Cir. 2017).

For sentencing, this court reviews the district court's loss calculations for clear error and the district court's methodology de novo. *United States v. Harris*, 821 F.3d 589, 601 (5th Cir. 2016). Restitution orders are reviewed de novo for legality, and the amounts for abuse of discretion. *United States v. Villalobos*, 879 F.3d 169, 171 (5th Cir. 2018).

The Mandatory Victims Restitution Act ("MVRA") states that "[t]he burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government" and that "[t]he burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires." 18 U.S.C. § 3664(e). This court "has interpreted these two statutory sentences to establish a burden-shifting framework for loss-amount calculations. The Government first must carry its burden of demonstrating the actual loss to one or more victims by a preponderance of the evidence. Then the defendant can rebut the Government's evidence." *United States v. Williams*, 993 F.3d 976, 980-81 (5th Cir. 2021). When the exact amount of actual loss is not clear, the district court is permitted to make reasonable estimates supported by the record. *See, e.g.*, *United States v. Mazkouri*, 945 F.3d 293, 304 (5th Cir. 2019); *United States v. Comstock*, 974 F.3d 551, 559 (5th Cir. 2020). Actual loss for restitution purposes is offset by the amount of the legitimate services provided to the patients in healthcare fraud cases. *See United States v. Sharma*, 703 F.3d 318, 324 (5th Cir. 2012); *United States v. Ricard*, 922 F.3d 639, 658 (5th Cir. 2019).

We address in turn the defendants' arguments surrounding (a) evidence submitted in recordings, (b) the sentencing calculations of improper loss, and (c) the restitution awards.

A. The recordings

The Confrontation Clause bars the admission of "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). A statement is "testimonial" if its "primary purpose … is to establish or prove past events potentially relevant to later criminal prosecution." *United States v. Duron-Caldera*, 737 F.3d 988, 992-93 (5th Cir. 2013) (internal quotation marks and citation omitted).

We reject the defendants' Confrontation Clause arguments. First, any confrontations between Garcia (the informant who worked at the clinic) and Dr. Bettega involved statements of co-conspirators—making them non-testimonial and thus not prohibited by the Confrontation Clause. *United States v. Ayelotan*, 917 F.3d 394, 403 (5th Cir. 2019). Second, the conversations between Garcia and King or Diggs are also not testimonial. In *United States v. Cheramie*, 51 F.3d 538, 540-41 (5th Cir. 1995), statements by an unavailable witness on a recording and a transcript of a conversation between the unavailable witness and the defendant did not violate the Confrontation Clause because the witness's statements were not offered to prove the truth of the matter asserted therein, but to provide context to the defendant's recorded statements. *Cheramie* held that the evidence did not violate the Confrontation Clause because they were part of a reciprocal and integrated conversation with the defendant and the Government sufficiently proved the reliability of the recording. *Id.* This case is indistinguishable from *Cheramie*. King and Diggs do not dispute that statements of Garcia and Bettega on the recordings were part of integrated and reciprocal conversations with them. Accordingly, they provided context to King's and Diggs's statements, were not admitted to prove the truth of the matters asserted, and did not violate the Confrontation Clause. *Id.* at 541.

Nor did the district court erroneously admit the recordings as impermissible hearsay. Hearsay is a statement that "(1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c). Federal Rule of Evidence 802 provides that hearsay generally is not admissible at trial. However, a defendant's out-of-court statements, when offered by the Government, "are those of a party opponent and thus not hearsay." *Sanjar*, 876 F.3d at 739; *see* Fed. R. Evid. 801(d)(2). This court has recognized that some statements made during recorded conversations are admissible as "reciprocal and integrated utterance(s)" between a defendant and another party, for the purpose of creating context and making them "intelligible to the jury and recognizable as admissions." *United States v. Gutierrez-Chavez*, 842 F.2d 77, 81 (5th Cir. 1988) (internal quotation marks and citations omitted); *see also United States v. Jones*, 873 F.3d 482, 496 (5th Cir. 2017). Thus, Rule 801(d)(2) applies to the recorded statements of both Garcia and Bettega.

We also reject King's assertion that the recorded conversations between Garcia and Bettega cannot be admitted under the "context" portion of Rule 801(d)(2). Rule 801(d)(2)'s party-opponent rule includes statements "made by the party's coconspirator during and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E). This portion of the Rule applies to Bettega's statements as a co-conspirator, and the evidence was sufficient to establish a conspiracy between King and Bettega.

Last, we reject the argument that admitting the conversations was error under Federal Rule of Evidence 403 because the resulting prejudice outweighed its probative value. "Relevant evidence is inherently prejudicial; but it is only *unfair* prejudice, *substantially* outweighing probative value, which permits exclusion of relevant matter under Rule 403." *United States v. Pace*, 10 F.3d 1106, 1115-16 (5th Cir. 1993) (citation omitted). As the trial

court concluded, the recorded conversations' prejudice did not substantially outweigh their probative value.

B. Loss Amount for Sentencing

Under the Sentencing Guidelines, defendants convicted of healthcare kickback offenses start with a base offense level of eight, U.S.S.G. § 2B4.1(a), which is moved upward according to the loss-amount table, U.S.S.G.§ 2B1.1. Applying the table, the Probation Office increased the defendants' levels by 12 points for losses it estimated at over $500,000, according to the "benefit" conferred on Bettega's clinic and loss to Medicare.

Generally, the government must show by preponderance of the evidence the amount of loss attributable to fraudulent conduct. *See United States v. Nelson*, 732 F.3d 504, 521 (5th Cir. 2013). "The loss amount 'need not be determined with precision,'" *United States v. Reasor*, 541 F.3d 366, 369 (5th Cir. 2008), nor "absolute certainty," *United States v. Goss*, 549 F.3d 1013, 1019 (5th Cir. 2008). A district court may rely upon information in the PSR in making its loss-amount estimate, so long as that "information bears some indicia of reliability." *United States v. Simpson*, 741 F.3d 539, 557 (5th Cir. 2014). A defendant who challenges a PSR's loss estimate "bears the burden of presenting rebuttable evidence to demonstrate that the information in the PSR is inaccurate or materially untrue." *United States v. Danach,* 815 F.3d 228, 238 (5th Cir. 2016) (quoting *Simpson*, 741 F.3d at 557).

The government here proved by preponderance of the evidence that Dr. Bettega's entire operation was fraudulent, and that no deference should be afforded to the clinic's medical records. The government's evidence showed that the pervasive scheme provided no legitimate medical care to patients residing at King's and Diggs's group homes. Reina Gonzalez, Dr. Bettega's assistant, testified at trial that the clinic billed Medicare for mental healthcare for patients with no mental health conditions and routinely

falsified medical records. *See Sanjar*, 876 F.3d at 748 (no deference to restitution testimony that assumed the accuracy of underlying records, even though "substantial evidence showed they were, in fact, falsified."). Reina Gonzalez also described how Dr. Bettega admitted patients to the program after quick evaluations for non-psychiatric symptoms and admitted large groups of patients from King's and Diggs's group homes at the same time.

King and Diggs, in contrast, failed to offer rebuttal evidence of *any* legitimate medical expenses billed to Medicare that should be set off from the $537,992.55 paid to Bettega for "treatment" provided to the residents of their group homes. This distinguishes their case from *Ricard*, where the defendant did offer testimony to show patients were receiving legitimate treatment. 922 F.3d at 659. Moreover, neither defendant offers a specific dollar amount, or even a rough estimate, of how much of the clinic's care may legitimately be offset against the improper benefit calculation. Therefore, the amount paid by Medicare to the clinic stands as the only amount available to the district court for assessing improper benefit—a calculation that need not be determined with "absolute certainty." *Goss*, 549 F.3d at 1019.

King and Diggs cite the medical charts of clinic patients who were also residents of their group homes. But apart from the charts, no evidence supports that these patients actually had the medical conditions described in the records or that their prescriptions—which may have been filled—were actually medically necessary. The district court was not required to credit the defendants' self-serving arguments, which assume that the treatment reflected in those records was "medically necessary and met the insurer's reimbursement standards." *Sharma*, 703 F.3d 326.

Similarly, none of the statements by Major Marlowe, Reina Gonzalez, or Timothy Haynes discuss specific medical services provided to specific

patients on specific occasions that qualified as "legitimate" and should be set off from the amounts paid by Medicare. All of the testimony pointed to by King and Diggs is qualified, provided at an extremely high level of generality, and not indicative that any of the patients were actually being provided legitimate and reasonably necessary medical care. Nor is background noise in one of the recordings between unnamed individuals discussing medical tests, medications, or patient treatments sufficient to show that the clinic legitimately provided medical care to patients from King's and Diggs's group homes.

Moreover, any error by the district court in calculating the legitimate care was harmless for the purposes of the improper benefit analysis. Under Section 2B1.1(b)(1), the district court would have had to apply a 12-point enhancement to any loss greater than $250,000. To receive relief on this issue, they would have to show that a majority of the $537,992.85 Medicare paid Bettega for claims related to the residents of the defendants' group homes was legitimate. But none of the isolated instances of allegedly legitimate medical care provided to the residents could yield an offset that high given the large number of patients at issue and significant amounts of PHP treatment that Medicare was billed for. *See United States v. Hamilton*, 37 F.4th 246, 266 (5th Cir. 2022) (loss-amount error harmless where same 20-level enhancement would have applied).

C. Restitution award

The analysis of the restitution award largely tracks that for improper benefit. The Government introduced evidence that Medicare paid Bettega's clinic $537,992.55 for claims related to the residents of the defendants' group homes and demonstrated that the medical services were fraudulent. King and Diggs failed to show that any of the billed medical care was legitimate,

and thus did not show that the total billed to Medicare was subject to an offset. Their case is amply distinguishable from *Ricard*.

Further, King's and Diggs's argument that their maximum restitution is limited to the $70,000 they received in kickbacks is legally erroneous. King and Diggs were convicted for conspiring to solicit and receive kickbacks and to defraud the United States through the Medicare program, in violation of 18 U.S.C. § 371. Thus, their restitution applies to any losses that Medicare "directly" suffered from their agreement to accept kickbacks and enable Bettega's Medicare fraud. *See United States v. Mathew*, 916 F.3d 510, 516 (5th Cir. 2019). The out-of-circuit cases cited by King in support of this argument are inapposite. *See United States v. Fennell*, 925 F.3d 358, 362 (7th Cir. 2019) (expressing no opinion about equating kickback amounts with victim's actual loss); *United States v. Vaghela*, 169 F.3d 729, 736 (11th Cir. 1999) (relying on the kickback amount because the government failed to prove that the relevant medical services were illegitimate).

That Bettega, rather than King or Diggs, received the primary benefit from fraudulent Medicare payments is irrelevant for assessing restitution. "Under the MVRA, members of a conspiracy may be 'held jointly and severally liable for all foreseeable losses within the scope of their conspiracy regardless of whether a specific loss is attributable to a particular conspirator.'" *United States v. Ochoa*, 58 F.4th 556, 561 (1st Cir. 2023) (quoting *United States v. Moeser*, 758 F.3d 793, 797 (7th Cir. 2014)). This is also consistent with the statutory text, under which a district court, on holding that more than one defendant caused the victim's loss, "may make each defendant liable for payment of the full amount of restitution *or* may apportion liability among the defendants to reflect the contribution to the victim's loss and economic circumstances of each defendant." 18 U.S.C. § 3664(h) (emphasis added). "[T]he MVRA imposes joint liability on *all* defendants for loss caused by others participating in the scheme." *United*

States v. Dokich, 614 F.3d 314, 318 (7th Cir. 2010) (emphasis added). *See also United States v. Goodrich*, 12 F.4th 219, 228 (2d Cir. 2021) (holding that the MVRA "does not limit restitution to losses caused by the actions of that defendant during the conspiracy, but also embraces losses flowing from the reasonably foreseeable actions of that defendant's co-conspirators.") (citation and quotation marks omitted). Consequently, though this is not required, "if more than one defendant contributes to the loss of a victim, the court may make each defendant liable for the payment of the full amount of restitution." *United States v. Verdeza*, 69 F.4th 780, 796 (11th Cir. 2023).

The district court did not abuse its discretion in imposing restitution on each defendant jointly and severally for the full amount of the Medicare fraud.

For the foregoing, the judgment and sentence of the district court are AFFIRMED.

United States Court of Appeals

FIFTH CIRCUIT
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February 21, 2024

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 22-20620 USA v. King
USDC No. 4:18-CR-345-3

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and Fed. R. App. P. 35, 39, and 41 govern costs, rehearings, and mandates. **Fed. R. App. P. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and Fed. R. App. P. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. Fed. R. App. P. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk

Christina Rachal

By:_____
Christina C. Rachal, Deputy Clerk

Enclosure(s)

Ms. Amy R. Blalock
Mr. Gregory Charles Gladden
Ms. Carmen Castillo Mitchell
Mr. Jeremy Raymond Sanders
Mr. William Connor Winn