

No. 17-821

In the Supreme Court of the United States

WARREN DAILEY, M.D.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR REHEARING

Joseph R. Willie, II, D.D.S., J.D.
Counsel of Record
WILLIE & ASSOCIATES, P.C.
4151 Southwest Freeway
Suite 490
Houston, Texas 77027
(713) 659-7330
attyjrwii@wisamlawyers.com

Counsel for Petitioner

**INTERVENING CIRCUMSTANCES OF A
SUBSTANTIAL OR CONTROLLING EFFECT**

Before the filing of the Petition for Writ of Certiorari and before this Court rendered its decision to deny said writ, the Department of Health and Human Services, on February 2, 2016, promulgated new rules to enforce 42 U.S.C. § 1395n(a)(2)(A) (as amended) to clarify that a physician must have a face-to face meeting with the patient in order to certify that the patient required home health services. At the time Dr. Dailey certified the patients for home health services, such was not the law. Dr. Dailey's use of physician-assistants to perform the diagnosis was consistent to the applicable federal and Texas law in force at that the time and the examinations were performed by qualified physician-assistants. Further, the law in effect at that time allowed a physician to solely rely on the examination of a physician-assistant to determine if home health services were required. Thus, the charges contained in the Indictment definitely violate the *Ex Post Facto* Clause of the United States Constitution.

LIST OF PARTIES

Petitioner certifies that the following is a complete list of the names of all parties.

PETITIONER:

Warren Dailey, M.D.

RESPONDENT:

United States of America

ATTORNEYS:

Joseph R. Willie, II, D.D.S., J.D.
4151 Southwest Freeway, Suite 490
Houston, Texas 77027
(713) 659-7330
Warren Dailey, M.D.

Andrew R. Gould, Esquire
Assistant United States Attorney
1000 Louisiana Street, Suite 2300
Houston, Texas 77002
(713) 567-9102
United States of America

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CASES

<i>Carella v. California</i> , 109 S. Ct. 2419 (1989)	3, 4
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CONSTITUTION, STATUTES, AND RULES

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PRAYER

TO THE HONORABLE CHIEF JUSTICE AND THE
ASSOCIATE JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES

Petitioner herein prays that a Writ of Certiorari
issue to the United States Court of Appeals for the
Fifth Circuit to review that court's August 17, 2017
Opinion and Judgment.

RELEVANT RULE AND REGULATION

The rule and regulation promulgated by the
Department of Health and Human Services to
implement 42 U.S.C. § 1395n(a)(2)(A) (as amended),
issued on February 2, 2016, is attached as Appendix A.

JURISDICTION

The Order of the Supreme Court of the United
States denying the Writ of Certiorari was entered on
January 8, 2018. This Petition for Rehearing is within
25 days of that date. The jurisdiction of this Court is
invoked under Rule 44.2 of the Rules of the Supreme
Court.

REASONS FOR GRANTING REHEARING

I. The *Ex Post Facto* Clause of the United States Constitution concerning the allegations contained in the Indictment has definitely been violated.

The Petitioner realleges that he has an absolute statutory defense. The Petitioner provided consulting services to Candid Home Health Services, Inc. pursuant to the provisions of 42 U.S.C. § 1395n(2)(A) (before amendment) and 22 TEX. ADMIN. CODE § 185.10. These were the statutes in effect at the time of the alleged offenses contained in the Indictment. Said services are completely legal and ethical. Simply put, there was **no crime** committed by receiving 400.00 a month to evaluate whether a patient qualified or did not qualify for home health services. Additionally, since the Petitioner, as a matter of law, was allowed to rely on the examination of a physician-assistant in making his diagnosis and determination, there were no false statements on the Form 485's used to certify the patients that can be attributed to the Petitioner. All the Petitioner evaluated was whether the patient required home health services based upon the examination and evaluation provided by a physician-assistant or nurse practitioner. This Court in *Collins v. Youngblood*, 110 S. Ct. 2715, 2718-2722 (1990), held that laws violate the *Ex Post Facto* Clause if they punish as a crime an act previously committed which was innocent when done or deprives one charged with a crime of any defense available under law in effect when committed. Further, the concurring opinion in *Collins* specifically stated that the *Ex Post Facto* Clause is applicable to procedural changes in the law.

See, e.g., Collins, 110 S. Ct. at 2725-2729. (Stevens, J., concurring). The changes to the statute and applicable rule are attached as Appendix A.

In denying review to the Petitioner, this Court has refused to enforce precedent, ignored *stare decisis* and has endorsed the violation of the constitutional rights of the individual by the Government, as held by this Court in *Collins* and *Samuels v. McCurdy*, 267 U.S. 188, 193 (1925). This first impression situation, concerning alleged Medicare fraud and the applicability of the *Ex Post Facto* Clause, requires stability and a definite, concrete ruling from the Supreme Court.

II. It is error *per se* for the district court to deny submission of the Petitioner's Supplemental Jury Instructions.

This Court is requested to take judicial notice of Jury Note # 1, which is attached as Exhibit B and is incorporated by reference the same as if fully set out at length herein. The issues of practicing medicine, providing care and the scope of practice of a physician assistant were constantly proffered by both the Government and the Petitioner during the entire course of the trial. Jury Note No. 1 asked the question that would have been answered if the district court would have submitted Defendant's Supplemental Jury Instructions to the jury. *See Exhibit C*. This Court in *Carella v. California*, 109 S. Ct. 2419, 2420 (1989), held:

The Due Process Clause . . . denies [the Government] the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged

offense. (citations omitted.) Jury instructions relieving [the Government] of this burden violate a Petitioner's due process rights.

(Emphasis added.)

Said instructions, in all likelihood would have caused the Petitioner to be found not guilty. The district court erred by not submitting the Petitioner's properly requested jury instructions. The actions of the district court and the opinion of the Fifth Circuit are in direct conflict with Supreme Court binding precedent announced in *Carella* and the Petitioner's Due Process Rights guaranteed by the Fifth Amendment to the United States Constitution have been violated in the process. The doctrines of *stare decisis* and "rule of the case"¹ demand that this issue be resolved on the merits by the Supreme Court.

III. The Government never supplied Petitioner's counsel with an expert report from its expert witness.

Although the district court ordered the Government to produce an expert report from its expert witness, Lisa Garcia, the Government never produced said report and did not comply with the mandates of FED. R. CRIM. P. 16(a)(1)(G) and FED. R. EVID. 702. (R.O.A. 16-20517.123-126; R.O.A. 16-20517.220-229.) By not supplying the mandatory expert report, the Petitioner was deprived of the opportunity to challenge the Government's expert witness pursuant to the mandates of this Court, as set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho*

¹ Cf. *Union Pacific Railroad Co. v. Snow*, 231 U.S. 204, 213 (1913).

Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999). The witness' proposed testimony was not fully summarized, the witness' opinions were not supplied and no basis and reasons for her opinion were supplied and no curriculum vitae of the Government's expert witness was supplied to ascertain if the witness was truly competent to testify as an expert. Further, and before allowing Ms. Garcia to testify as an expert witness, the district court did not perform the mandated "gatekeeper" function to determine if Ms. Garcia was truly an expert witness. *See Khumo Tire*, 526 U.S. at 137-139. Lastly, the fact that the Government stated that Ms. Garcia did not produce a written expert report is no excuse and has been so held by the applicable law. *See Kansas v. Cheever*, 134 S. Ct. 596, 601-603 (2013); *United States v. Willner*, 795 F.3d 1297, 1316-1318 (11th Cir. 2015). Again, Jury Note #1 shows, without contradiction, that the jury reached its verdict partly based on the "expert testimony" of Lisa Garcia. This Court in *Kotteakos v. United States*, 328 U.S. 750, 765 (1946), succinctly and unambiguously held:

[I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous actions from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if

one is left in grave doubt, the conviction cannot stand.

(Emphasis added.)

The admission of the expert testimony of Lisa Garcia by the district court is reversible error. The Petitioner's Equal Protection and Due Process Rights guaranteed by the Fifth Amendment to the United States Constitution have been violated and the doctrine of *stare decisis* requires that this Court rule on the merits of this issue.

CONCLUSION

For the foregoing reasons and for the reasons as set forth in the Petition for Writ of Certiorari, Petitioner prays that a Writ of Certiorari issue to review the August 17, 2017 Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

Joseph R. Willie, II, D.D.S., J.D.

Counsel of Record

WILLIE & ASSOCIATES, P.C.

4151 Southwest Freeway, Suite 490

Houston, Texas 77027

(713) 659-7330

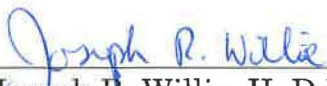
attyjrwii@wisamlawyers.com

Counsel for Petitioner

CERTIFICATION OF COUNSEL

The undersigned hereby certifies that the Petition for Rehearing is presented in good faith, restricted to the grounds set forth in Rule 44.2 and not for delay.

Respectfully submitted,

 *Joseph R. Willie*

Joseph R. Willie, II, D.D.S., J.D.
Counsel of Record
WILLIE & ASSOCIATES, P.C.
4151 Southwest Freeway, Suite 490
Houston, Texas 77027
(713) 659-7330
attyjrwii@wisamlawyers.com

Counsel for Petitioner

Dated: January 22, 2018

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APPENDIX 1

81 FR 5530-01, 2016 WL 370654(F.R.)

**RULES and REGULATIONS
DEPARTMENT OF HEALTH AND
HUMAN SERVICES**

Centers for Medicare & Medicaid Services

42 CFR Part 440

[CMS-2348-F]

RIN 0938-AQ36

**Medicaid Program; Face-to-Face Requirements for
Home Health Services; Policy Changes and
Clarifications Related to Home Health**

Tuesday, February 2, 2016

**AGENCY: Centers for Medicare & Medicaid Services
(CMS), HHS.**

***5530 ACTION: Final rule.**

SUMMARY: This final rule revises the Medicaid home health service definition consistent with section 6407 of the Patient Protection and Affordable Care Act of 2010 (the Affordable Care Act) and section 504 of the Medicare Access and CHIP Reauthorization Act of 2015 (MACRA) to add requirements that, for home health services, physicians document, and, for certain medical equipment, physicians or certain authorized non-physician practitioners (NPP) document the occurrence of a face-to-face encounter (including through the use

App. 2

of telehealth) with the Medicaid eligible beneficiary within reasonable timeframes. This rule also aligns the timeframes for the face-to-face encounter with similar regulatory requirements for Medicare home health services. In addition, this rule amends the definitions of medical supplies, equipment, and appliances. We expect minimal impact with the implementation of section 6407 of the Affordable Care Act and section 504 of MACRA. We recognize that states may have budgetary implications as a result of the amended definitions of medical supplies, equipment and appliances. Specifically, this rule may expand coverage of medical supplies, equipment and appliances under the home health benefit. There will be items that had previously only been offered under certain sections of the Act that will now be covered under the home health benefit.

DATES: Effective date: This rule is effective on July 1, 2016.

Compliance date: Based on public comments, we recognize that there may be operational and budgetary implications with this rule and that states and providers may need time to implement this provision. To ensure that states and providers are implementing the rule appropriately, we are delaying compliance with this rule for up to one year if legislature has met in that year, otherwise 2 years.

Exception for State Legislation.—In the case of a State plan under title XIX of the Social Security Act (42 U.S.C. 1396 et seq.), which the Secretary determines requires state legislation in order for the respective plan to meet one or more additional requirements imposed by this rule, the respective state shall not be

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regarded as failing to comply with the requirements of this rule solely on the basis of its failure to meet such an additional requirement before the first day of the first calendar quarter beginning after the close of the first regular session of the state legislature that begins after the date of enactment of this rule. For purposes of the previous sentence, in the case of a state that has a 2-year legislative session, each year of the session shall be considered to be a separate regular session of the state legislature. States will be expected to be in compliance by July 1, 2017 or July 1, 2018 based on legislative timeframes as described above.

APPENDIX 2

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

C.R. ACTION H-15-308

[Filed March 30, 2016]

United States of America,)
)
V.)
)
Warren Dailey,)

)

JURY NOTE# 1

[handwriting]

WHAT IS RELATIONSHIP BETWEEN DR AND P.A.?

DOES THE PA → OR NURSE PRACTITIONER HAVE
TO WORK FOR DR? → WHAT DEFINES WORK FOR?

DR.=DR. WHO SIGNS BOX 26 OF 485.

Please recall the testimony on these matters presented
to you during the trial. /s/ David Hittner

MAY WE PLEASE HAVE FULL TRANSCRIPT OF
LISA GARCIA

Yes. /s/ David Hittner

APPENDIX 3

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

NO. 4:15-CR-00548

[Filed March 29, 2016]

UNITED STATES OF AMERICA	)
	)
VS.	)
	)
WARREN DAILEY, M.D.	)
	)

**DEFENDANT'S SUPPLEMENTAL PROPOSED
JURY INSTRUCTIONS**

TO THE HONORABLE JUDGE OF SAID COURT:

In addition to the standard jury instructions included by the Court in its Jury Charge, the Defendant is hereby filing his Supplemental Proposed Jury Instructions to be submitted if raised by the evidence admitted at trial.

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Respectfully submitted,

WILLIE & ASSOCIATES, P.C.

By: /s/ Joseph R. Willie, II, D.D.S., J.D.

Joseph R. Willie, II, D.D.S., J.D.

4151 Southwest Freeway, Suite 490

Houston, Texas 77027

(713) 659-7330

(713) 599-1659 (FAX)

Federal Bar I.D.# 13746

SBOT# 21633500

attyjrwii@wisamlawyers.com

ATTORNEY FOR DEFENDANT

*[Certificate of Service Omitted
in Printing of this Appendix.]*

App. 7

**Definition of Practicing Medicine
and Providing Care**

“Practicing medicine” or providing “care” means the diagnosis, treatment, or offer to treat a mental or physical disease or disorder or a physical deformity or injury by any system or method, or the attempt to effect cures of those conditions.

Source

TEX. OCC. CODE § 151.002(13) [The Texas Medical Practice Act]; *The Methodist Hospital v. German*, 369 S.W.3d 333, 342 (Tex. App.--Houston [1st Dist.] 2011, pet. denied).

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Physician Assistant Scope of Practice

The physician assistant shall provide, within the education, training and experience of the physician assistant, medical services that are delegated by the supervising physician. The activities listed in paragraphs (1) – (10) of this section may be performed in any place authorized by a supervising physician, including, but not limited to a clinic, hospital, ambulatory surgical center, patient home, nursing home, or other institutional setting. Medical services provided by a physician assistant may include, but not limited to:

- (1) obtaining patient histories and performing physical examinations;
- (2) ordering and/or performing diagnostic and therapeutic procedures;
- (3) formulating a working diagnosis;
- (4) developing and implementing a treatment plan; . . .

Source

22 TEX. ADMIN. CODE § 185.10.