

No. 22-10

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IN THE  
**Supreme Court of the United States**

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DAVID DUBIN,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

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**JOINT APPENDIX**

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*Petition for Writ of Certiorari Filed June 30, 2022  
Certiorari Granted November 10, 2022*

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**RELEVANT DOCKET ENTRIES FOR THE  
UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF TEXAS**

1:17-CR-00227-XR-2

<b>Date Filed</b>	<b>#</b>	<b>Docket Text</b>
06/20/2017	3	SEALED INDICTMENT (Redacted Version) with Notice of Forfeiture included as to All Defendants. Unredacted document sealed pursuant to E-Government Act of 2002 as to William Joseph Dubin (1) count(s) 1, 7-11, 12, 13-19, 20-25, David Fox Dubin (2) count(s) 1, 7-11, 12, 13-19, 20-25, Glen Elwood McKenzie, Jr (3) count(s) 1, 2-6.
08/14/2017	40	MOTION to Strike Surplusage from Indictment by David Fox Dubin.
8/14/2017	41	MOTION to Dismiss Counts 13-19 and 20-25 Under the Rule Against Multiplicity by David Fox Dubin.
09/01/2017	57	ORDER DENYING 40 Motion to Strike as to David Fox Dubin (2); DENYING 41 Motion to Dismiss Counts as to David Fox Dubin (2). Signed by Judge Sam Sparks.
09/18/2018	148	SUPERSEDING INDICTMENT (Redacted

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		Version) with Notice of Forfeiture included as to William Joseph Dubin, David Fox Dubin, Glen Elwood McKenzie, Jr.. Unredacted document sealed pursuant to E-Government Act of 2002 as to William Joseph Dubin (1) count(s) 1s, 7s-11s, 12s, 13s-19s, 20s-25s, David Fox Dubin (2) count(s) 1s, 7s-11s, 12s, 13s-19s, 20s-25s.
10/09/2018	177	Minute Entry for proceedings held before Judge Xavier Rodriguez:Voir Dire begun on 10/9/2018 William Joseph Dubin (1) on Count 1s,7s-11s,12s,13s-19s,20s-25s and David Fox Dubin (2) on Count 1s,7s-11s,12s,13s-19s,20s-25s, Jury Selection as to William Joseph Dubin, David Fox Dubin held on 10/9/2018 (Minute entry documents are not available electronically.), Jury Trial as to William Joseph Dubin, David Fox Dubin held on 10/9/2018 (Minute entry documents are not available electronically.), Set/Reset Hearings:(Jury Trial continued to 10/10/2018 09:00 AM before Judge Xavier Rodriguez)

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10/10/2018	178	Minute Entry for proceedings held before Judge Xavier Rodriguez:Jury Trial as to William Joseph Dubin, David Fox Dubin held on 10/10/2018
10/11/2018	179	Minute Entry for proceedings held before Judge Xavier Rodriguez:Jury Trial as to William Joseph Dubin, David Fox Dubin held on 10/11/2018 (Minute entry documents are not available electronically.), Set/Reset Hearings: Jury Trial continued to 10/15/2018 09:00 AM before Judge Xavier Rodriguez.
10/15/2018	180	Minute Entry for proceedings held before Judge Xavier Rodriguez:Jury Trial as to William Joseph Dubin, David Fox Dubin held on 10/15/2018 (Minute entry documents are not available electronically.), Set/Reset Hearings: Jury Trial continued to 10/16/2018 09:00 AM before Judge Xavier Rodriguez.
10/16/2018	181	Minute Entry for proceedings held before Judge Xavier Rodriguez:Jury Trial as to William Joseph Dubin, David Fox Dubin held on 10/16/2018.

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10/17/2018	182	Minute Entry for proceedings held before Judge Xavier Rodriguez: Jury Trial as to William Joseph Dubin, David Fox Dubin held on 10/17/2018 (Minute entry documents are not available electronically.) Set/Reset Hearings: Jury Trial continued to 10/18/2018 09:00 AM before Judge Xavier Rodriguez.
10/18/2018	183	Minute Entry for proceedings held before Judge Xavier Rodriguez:Jury Trial as to William Joseph Dubin, David Fox Dubin held on 10/18/2018 (Minute entry documents are not available electronically.), Set/Reset Hearings: Jury Trial continued to 10/22/2018 09:00 AM before Judge Xavier Rodriguez.
10/22/2018	184	Minute Entry for proceedings held before Judge Xavier Rodriguez:Jury Trial as to William Joseph Dubin, David Fox Dubin held on 10/22/2018 (Minute entry documents are not available electronically.), Set/Reset Hearings:(Jury Trial continued to 10/23/2018 09:00 AM before Judge Xavier Rodriguez).

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10/23/2018	185	Minute Entry for proceedings held before Judge Xavier Rodriguez:Jury Trial as to William Joseph Dubin, David Fox Dubin held on 10/23/2018 (Minute entry documents are not available electronically.), Jury Trial continued to Wednesday, 10/24/2018 09:00 AM before Judge Xavier Rodriguez.
10/24/2018	188	Minute Entry for proceedings held before Judge Xavier Rodriguez:Jury Trial as to William Joseph Dubin, David Fox Dubin held on 10/24/2018 (Minute entry documents are not available electronically.), Set/Reset Hearings:(Jury Trial continued to 10/25/2018 09:00 AM before Judge Xavier Rodriguez).
10/25/2018	189	Minute Entry for proceedings held before Judge Xavier Rodriguez:Jury Trial as to William Joseph Dubin, David Fox Dubin held on 10/25/2018 (Minute entry documents are not available electronically.), Set/Reset Hearings: Jury Trial continued to 10/26/2018 09:00 AM before Judge Xavier Rodriguez.



10/25/2018	192	<p>EXHIBITS List from Jury Trial as to William Joseph Dubin, David Fox Dubin (td) (Additional attachment(s) added on 10/26/2018: # 1 JERS Exhibit List, # 2 Interactive Exhibit List) (klw). (Additional attachment(s) added on 1/11/2019: # 3 Dfts Exh 103, 106, 300, 801A-801G, 802, 900-902, 1000, 2026, 3074, 7000-7005, 7025-7029, 7044, 7048, 7066-7068, # 4 Dfts Exh 7069-7071, 8000, 8081, 9000, 9002, 15000, 16000-16003, 17046, 17047, 18004, 18023, 20001, 22004, # 5 Dfts Sealed Exh 100, 101, 104, 200-227, 301-305, 306-711, # 6 Dfts Sealed Exh 803, # 7 Dfts Sealed Exh 804, # 8 Dfts Sealed Exh 805, 806, # 9 Dfts Sealed Exh 807-809, # 10 Dfts Sealed Exh 810-811, # 11 Dfts Sealed Exh 812, # 12 Dfts Sealed Exh 813), # 13 Dfts Sealed Exh 814, # 14 Dfts Sealed Exh 815, 816, # 15 Dfts Sealed Exh 817, 818, # 16 Dfts Sealed Exh 819, # 17 Dfts Exh 820, # 18 Dfts Sealed Exh 821, # 19 Dfts Sealed Exh 822, 823, # 20 Dfts Sealed Exh 824, 825, 1001-1004, # 21 Dfts Sealed Exh 1005-1222), # 22 Dfts Sealed Exh 1223-2025, 2027-</p>
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	<p>Exh 1400, 1404, 1405-1500, 1504, 1505, # 59 Pltf Sealed Exh 1600, 1606, # 60 Pltf Sealed Exh 1612C), # 61 Pltf Sealed Exh 1612D, # 62 Pltf Sealed Exh 1612E, # 63 Pltf Sealed Exh 1700, # 64 Pltf Sealed Exh 1705, 1707, 1709, # 65 Pltf Sealed Exh 1800), # 66 Pltf Sealed Exh 1806A-1807B, 1807H-1900, 2604-2607A, # 67 Pltf Sealed Exh 2609-2610, 2611-2611B, 2614-2616D, 2618A-2619D, 2620, 2622A-2900, # 68 Sealed Pltf Exh 2901A-2903, 2914, 2915, 2917, # 69 Pltf Sealed Exh 2918, # 70 Pltf Sealed Exh 2919), # 71 Pltf Sealed Exh 2920 Part 1, # 72 Pltf Sealed Exh 2920 Part 2, # 73 Pltf Sealed Exh 2921 Part 1, # 74 Pltf Sealed Exh 2921 Part 2, # 75 Pltf Sealed Exh 2922 Part 1, # 76 Pltf Sealed Exh 2922 Part 2), # 77 Pltf Sealed Exh 2923, # 78 Pltf Sealed Exh 2924 Part 1, # 79 Pltf Sealed Exh 2924 Part 2, # 80 Pltf Sealed 2925, 2926, # 81 Pltf Sealed Exh 2927, 2928), # 82 Pltf Sealed Exh 2929, # 83 Pltf Sealed Exh 2930, # 84 Pltf Sealed Exh 2931, # 85 Pltf Sealed Exh 2932-2937, 2947), # 86 Pltf Sealed Exh 2947A,</p>
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10/26/2018	200	Minute Entry for proceedings held before Judge Xavier Rodriguez:Jury Trial as to William Joseph Dubin, David Fox Dubin held on 10/26/2018 (Minute entry documents are not available electronically.), Set/Reset Hearings: Jury Trial continued to 10/29/2018 09:00 AM before Judge Xavier Rodriguez.
10/29/2018	203	Minute Entry for proceedings held before Judge Xavier Rodriguez:Jury Trial as to William Joseph Dubin, David Fox Dubin held on 10/29/2018. Jury Note #4 was received by the Court. Judge Rodriguez was teleconferenced in from San Antonio and responded to by the Court with agreement from all parties as to acceptable response.

JA 11

10/29/2018	204	Minute Entry for proceedings held before Judge Lee Yeakel:Jury Trial as to William Joseph Dubin, David Fox Dubin held on 10/29/2018.
10/29/2018	205	JURY VERDICT (Redacted Version) as to William Joseph Dubin (1) Guilty on Count 1s,9s-10s, and David Fox Dubin (2) Guilty on Count 12s,19s,25sWilliam Joseph Dubin (1) Not Guilty on Count 7s-8s,11s,12s,13s-19s,20s-25s and David Fox Dubin (2) Not Guilty on Count 1s,7s-11s,13s-18s,20s-24s. filed. Unredacted Version Sealed pursuant to E-Government Act of 2002.
11/09/2018	208	MOTION for Acquittal , MOTION for New Trial by David Fox Dubin.
02/19/2019	221	ORDER DENYING 209 Motion for Acquittal as to William Joseph Dubin (1); DENYING 208 Motion for Acquittal as to David Fox Dubin (2); DENYING 208 Motion for New Trial as to David Fox Dubin (2). Signed by Judge Xavier Rodriguez.
08/26/2019	239	MOTION for Reconsideration re 221 Order on Motion for Acquittal,, Order on Motion for

		New Trial, 208 MOTION for Acquittal MOTION for New Trial filed by David Fox Dubin , MOTION for New Trial by David Fox Dubin.
09/16/2019	259	Minute Entry for proceedings held before Judge Xavier Rodriguez:Motion Hearing as to David Fox Dubin held on 9/16/2019 re 239 MOTION for Reconsideration re 221 Order on Motion for Acquittal,, Order on Motion for New Trial, 208 MOTION for Acquittal MOTION for New Trial filed by David Fox Dubin filed by David Fox Dubin
09/23/2019	271	JUDGMENT AND COMMITMENT as to David Fox Dubin (2), Count(s) 1, 12, 13-19, 13s-18s, 1s, 20-25, 20s-24s, 7-11, 7s-11s, Dismissed on government's motion; Count(s) 12s, Imprisonment 12 months + 1 day (concurrent to count 19s and consecutive to count 25s) 3 years supervised release (concurrent), Restitution \$282,019.92; Count(s) 19s, Imprisonment 12 months + 1 day (concurrent to count 12s and consecutive to count 25s), 3 years supervised release (concurrent), \$100.00 special

JA 13

		assessment; Count(s) 25s, Imprisonment 24 months (consecutive to counts 12s and 19s), 1 year supervised release (concurrent), \$100.00 special assessment. Signed by Judge Xavier Rodriguez.
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JA 14

**RELEVANT DOCKET ENTRIES FOR THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

No. 19-50912

<b>Date Filed</b>	<b>Docket Text</b>
10/04/2019	DIRECT CRIMINAL CASE docketed. NOA filed by Appellant Mr. David Fox Dubin [19-50912]
12/04/2020	PUBLISHED OPINION FILED. [19-50891; 19-50912 Affirmed] Judge: RHB, Judge: JWE, Judge: JCH. Mandate issue date is 12/28/2020 for Appellants William Joseph Dubin and David Fox Dubin.
03/03/2022	EN BANC PUBLISHED OPINION FILED. [19-50912 Affirmed ] Mandate issue date is 03/25/2022 for Appellant David Fox Dubin [19-50912]



JA 16

404 East Ramsey Road,  
Suite 102  
San Antonio, Texas 78216

Court Reporter: Ms. Lily Iva Reznik, CRR,  
RMR  
501 West 5th Street, Suite  
4153  
Austin, Texas 78701  
(512) 391-8792

Proceedings Recorded by Mechanical Stenography,  
Transcript Produced by Computer.

**I N D E X**

<u>Witnesses:</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
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Louie Ray Johnson	155	205, 215		
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\* \* \* \*

**[196] Johnson – Direct**

Q. (BY MR. BEASLEY) With regard the [Patient L] and [DE], it says that you have completed the evaluation of [DE]. That mean you'd done all the testing and the interview?

A. Yes.

Q. All right. And you had done all but the clinical interview of [Patient L]. What does that mean?

A. Well, generally you would do the clinical interview first. However, these kids are in a shelter. We already know the reason that we're there to see them. The [197] clinical interview is usually done at the beginning, but in a clinic, you don't always have that opportunity because of the way that you're seeing the kids or coming – it's difficult to explain.

Normally a clinical interview, I personally come into your office under the Medicaid guidelines, under any insurance, and you do a clinical interview to see what may be going on, to form a hypothesis of what you need to do. Do you even need to do a psychological evaluation.

Q. All right. Let me stop you there for a moment. I think we've covered that. What I'm looking at is, what are you conveying? How much of it has been completed and how much do you need to do yet with regard to [Patient L] when you say, I have completed the evaluation on [DE] and all but the clinical interview for [Patient L]? Does that mean that you have or have not completed the evaluation of [Patient L], except for the interview?

A. Have not. Right. That is right.

Q. Okay. So you had done the testing of [Patient L], had not interviewed him. And it says, when I was informed that they'd had psychological evaluations within the past year, who was it that informed you of that?

A. Yeah. I remember this. It was Dr. William Dubin. He just found out, and then, so he came and told me so we would know not to continue. We didn't know that ahead of [198] time.

Q. Okay. So you didn't know that they didn't have any hours and so -- but you started to work and did he tell you to stop?

A. Yes.

Q. Says according to the records, [Patient L] had an evaluation on 5-29 that apparently had been billed to Medicaid and an evaluation on September 10 of '12 that was not. [DE] had an evaluation on May 22 and 23, and the date of the report was May 23 of '2012.

So what I want to talk with you about and what I want you to explain is what you're planning to do when you have met with Bill. Is that Bill Dubin?

A. Yes. And I don't know who Carolynn is. Obviously I said that, but I don't remember who she is.

Q. All right. That doesn't matter right now.

A. Okay. But I was going back -- there were two kids who were on an outing and I was waiting for them, and I was told they may not be back for a while, you know.

Q. Let me ask a question. I don't care about the two kids on the outing. I want to find out who this person is that you met with Bill.

A. That would be Dr. William Dubin.

Q. And when you say to discuss the date situation, are you referring to [DE] and [Patient L]?

[199] A. It looks like. Yes.

Q. And so, when you say, so the report I will -- so the report I will complete will not be until May 23 for

[DE] and May 29, 2013 for [Patient L], what does that mean?

A. I guess that means that the date for the report would be those days that are stated in here.

Q. Were you aware of when Medicaid would now make these children eligible for more testing?

A. Yes, because it says when they were last seen. They could only have one -- one was in a twelve-month period.

Q. So what are you telling -- what is the plan? You've already done the work. What are you planning to do about the work you've already done? Are you going to just ignore it, or are you going to hold it?

A. Well, you would hold it. There's no reason to go back and do it again. You already have the data. So.

Q. And so, what's the purpose of holding work?

A. Then you can bill it.

Q. To wait till the clock has started again?

A. Yes.

Q. So with regard to [Patient L], you're going to hold on to the work that you did with [Patient L] until after May 29, when the clock has been reset?

A. Yes.

Q. Okay. Now, please go to Exhibit 2702. Go to the [200] bottom, please.

This is Dr. V, writing on May 10, 2013 to Jackie with regard to a report for a child by the name of [SB]. After discussing that, Dr. V says, I also have a question for you. I am not sure who on your team

started the assessment on [Patient L], but I know that it's not been completed. He's discharging on Thursday, the 16th. That would be May 16. She's asking to know if the psychological assessment could be completed with the data that was already in the file.

Did somebody come you, Mr. Johnson, and say, we want you to complete the information and write up a report for [Patient L]?

A. I don't remember.

Q. All right. Let's go up and see what you were instructed to do. So go to the next page, please, Ms. Ariza.

This is where the report for [SB] has been transmitted to Dr. V. Now, I want to go up on the page that she's now said, by the way, where's [Patient L]. So go up to the e-mail above that.

This is an e-mail that goes from Jackie Liles to Dr. V, responding that with regard to [Patient L], asking were you looking for a report or just wishing to close the file. My apologies. It reads, unfortunately, [201] for us, [Patient L]'s insurance is denying the claim because it has been less than a year since his last psychological assessment, but we'll do whatever is needed to assist you.

Did they show you this report, sir?

A. I don't recall seeing this.

Q. Go up to the top of this, please, Ms. Ariza. Stop right there. Dr. V says that's fine. We could do without a new psychological. Go to the very top now, please. And David Dubin in the e-mail response writes to

Jackie, nice job, Jackie, looks like you were right, dad. Were you advised of this, sir?

A. Not -- I don't remember. I don't remember being advised.

Q. Okay. So now, let's go to Exhibit 2702A. I'm sorry. 2702A. At the very bottom.

This is an e-mail from David Dubin to you wanting to make sure that you're still set to go to Hector Garza this Friday. So that would have been Friday, the 31st of May of 2013. Did you go there on a monthly basis to Hector Garza?

A. I think so.

Q. Okay. David Dubin's asking if you were going to go and go to the next -- his response, please. Okay. So you say that -- you respond that yes, you will be there, and when you were last there, you saw [Patient L] and [202] [DE] before your dad -- and your dad meaning who?

A. Dr. William Dubin.

Q. Came by and said, hold off the evaluations. And you repeat the fact that you'd completed the evaluations of [DE] and [Patient L], except for [Patient L]'s clinical interview.

So you then ask, can you have Rusty check to see if these evaluation reports can now be written? That is, are they now eligible for a new psychological evaluation, and if they are, you'll complete [DE] and do the interview of [Patient L] on the 31st to complete the report.

What did David Dubin tell you? Do you remember?

A. No, I don't.



Q. Scroll up to the response, sir. David responds to you: Go ahead and write up the report for [DE]. Regarding [Patient L], I had been told that he's been discharged. Don't write anything up. But feel free to charge for the time you spent on him. Charge who?

A. Psychological ARTS.

Q. They paid you \$50 an hour for work or something of that nature?

A. I think so. That sounds right.

Q. So David Dubin has told you -- well, Psychological ARTS has said to Dr. V, insurance was denying the claim, David Dubin tells you, don't write anything up. Did you [203] ever see [Patient L] again?

A. I don't remember.

Q. All right. After having told you, don't write anything up on [Patient L], go to the very top, David Dubin writes an e-mail to rusty@PsychARTS on May 30, 2013, telling him to bill for another two hours on [Patient L]. Did they tell you they were going to do that?

A. No.

Q. I want to turn to Exhibit 3019. This is an excerpt of the billing to the Medicaid program for services claimed to have been provided to [Patient L], and you see the receipt date there of 5-30 of '13?

A. Yes.

Q. And scroll over to the right, please.

It shows a billing date of 5-30 and a service date of 5-30-13, and it shows that what they were billing for was 96101. Do you know what that is?

JA 23

A. That is psychological testing.

Q. And they billed for three hours for \$540. Is that what that says? Is that the way you would read it?

A. I guess so. Looks like it.

Q. All right. With procedure modifier saying that services were provided on that day by a licensed psychologist.

A. I think that's what AH means.

\* \* \* \*

**[241] Johnson - Cross**

Q. All right, sir. And he asked you a series of questions on [Patient L], that particular client, I think, was back in April or May of 2013. Do you recall those series of questions?

A. Yes.

Q. And you performed testing on him, correct? Or was it just --

A. Yes.

Q. Okay. You did the work?

A. Yes.

\* \* \* \*



JA 25

404 East Ramsey Road,  
Suite 102  
San Antonio, Texas 78216

Court Reporter: Ms. Lily Iva Reznik, CRR,  
RMR  
501 West 5th Street, Suite  
4153  
Austin, Texas 78701  
(512) 391-8792

Proceedings Recorded by Mechanical Stenography,  
Transcript Produced by Computer.

**I N D E X**

<u>Witnesses:</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
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\* \* \* \*

**[43] Zvanka Vukmirovic Jakopovic – Cross**

Q. Okay. So I'd like to go to Exhibit 2702, please. And go to the bottom of this. Very bottom.

What you're looking at here is an e-mail and this is from you; is that right?

A. Uh-huh. Yes.

Q. And you are writing to a Jackie Liles. Do you know who Jackie was?

A. I don't remember.

Q. Okay. No worries.

You're writing to her on Friday, May 10 of 2013, and you're talking about a report on a person by the name of [SB]. And you're thanking her and it says, I also have a question for you. I'm not sure who on your team started the assessment on [Patient L], but I know it's not been completed. He's discharging on Thursday, the 16th, and I'd like to know if the psychological assessment could be completed with the data that is already on your file. Or on the file. Your help would be greatly appreciated.

So what does it mean that [Patient L] was discharging on Thursday, the 16th? Where was he going? I [44] mean, you don't necessarily need to know the physical place, but he was just going someplace other than Hector Garza.

A. Correct.

Q. And where would these children or young adults typically go when they were discharged from Hector Garza?

A. That depends. If he's JPD client, he would go back home. If he's CPS client, he would go to less restrictive placement, which means, I'm assuming just from this e-mail, that he -- it would be CPS client going to some less restrictive placement. But every placement would ask for updated psychological, just as we asked during the admission.

Q. And so, in any event, he's leaving your facility going someplace. And you're asking about the psychological assessment.

A. Uh-huh.

Q. Would that be something that would be necessary or important to follow this young man, [Patient L]?

A. Correct.

Q. Okay. Now, go up, if you would, to the next e-mail. So Jackie Liles writes back to you. Dr. V, that's what they called you?

A. Uh-huh.

Q. Right? Okay. And she says, in regards to [Patient **[45]** L], were you looking for a report or just wishing to close his file because he's discharging? If you are needing a report, we can provide an abbreviated one by the 16th with the information we did accumulate from the testing and we were able to accomplish. And then, the next part, unfortunately for us, meaning Psychological ARTS, [Patient L]'s insurance is denying the claim because it has been less than a year since his last psychological assessment, but they'll do whatever is necessary to assist.

So would you agree that what happened is, Psychological ARTS is doing an assessment of both [DE] as well as [Patient L], and then, they just about got it completed when they find out that there were no benefits available for that timeframe. So they just abandoned the patient; isn't that right?

MR. MORRIS: Objection, your Honor.

THE COURT: Rephrase your last word.

MR. BEASLEY: I'll rephrase.

Q. (BY MR. BEASLEY) When they found out that they weren't going to get paid for the work that they were doing, they stopped working, correct?

A. Correct.

Q. And so, the psychological evaluation for [Patient L] and [DE] that were needed at that time [46] weren't provided, correct?

A. Well, not quite, because if he's -- psychological was still current that he would need for the new placement, he would not need the new one because this one did not expire. It is same as with physical. A physical exam should be every year. So if your physical exam did not expire, then it's okay for the next facility the child is going to.

Q. So if you'll scroll up to the top, please. And you tell Jackie here at the middle of -- basically on May 10, don't go send a psychological on [Patient L], he's discharging basically. Don't send it, don't do anymore, we don't need it. Correct?

A. Correct, because it was obvious that the one that he had was still current. Was still updated.

\* \* \* \*





JA 30

404 East Ramsey Road,  
Suite 102  
San Antonio, Texas 78216

Court Reporter: Ms. Lily Iva Reznik, CRR,  
RMR  
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4153  
Austin, Texas 78701  
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Proceedings Recorded by Mechanical Stenography,  
Transcript Produced by Computer.

### **I N D E X**

<u>Witnesses:</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
David F. Dubin		4	64	
Diana Cantu			83	85
				<u>Page</u>
Charge Conference				90
Government's Closing Statements				178
Defendant William Dubin's Closing Statements				214
Defendant David Dubin's Closing Statements				247
Government's Closing Statements				283
Proceedings Adjourned				307

\* \* \* \*

**[182] Government's Closing Statements**

The allegation there is that throughout the period specified in the indictment, they were consistently, constantly and, almost without exception, billing incorrectly for their services, services that were provided by people who either had no license or a licensed psychological associate; and they billed them without the modifier so the system just paid them the full rate, or they would put in that AH modifier that we heard so much about so they would pay them at the rate as if it was performed by a licensed psychologist.

You heard the Judge talk to you about the ID fraud counts. We're going to go through that in a little bit. But essentially that's just saying that they used the children's identifications in the process of committing the Medicaid fraud. They basically go hand in hand. There's not really too much separate that you have to know in order to do that.

\* \* \* \*

**[208] Government's Closing Statements**

Finally, Count 19, that one's slightly different. That's the situation with [Patient L]. Again, that's not going to be in the 1900 series. That allegation there was that's the one where Louis Johnson was saying, hey, he came in, told me to stop, and then, they billed him for the work, anyways, after the deadline had passed.

That's a slightly different way of committing healthcare fraud. What I want to emphasize with that is, we have gone through a lot of detail about all the **[209]** different ways that these things can be

fraudulent. I want to emphasize the only -- for each of these counts, you only have to find one way. You know, if the -- and the main idea is that, yes, there was supposed to be a modifier fore all of these. But they could also be fraudulent because they split the time. They could also be fraudulent because they altered the service date. Those are all options for you, but at the end of the day, you only need to find one. All that other stuff was okay but that the modifier was wrong, still guilty.

And then, for the ID theft cases, you will see that all that's required there is that they used someone's ID in the facilitation of this healthcare fraud offense. So essentially I don't want to say it's automatic, but if you found that they committed this healthcare fraud offense, obviously they had to use this child's ID to use it -- use it without their permission to commit a crime. You can't give someone that kind of permission. So if you find that they have committed this healthcare fraud offense, then they are also guilty of those identity theft offenses.

\* \* \* \*

**[295] Government's Closing Statements**

Now, what did they do with [Patient L]? The same thing. They went out -- and here it is right here on 4-26. Ray Johnson says, I saw him, I saw these two kids with regard to [Patient L], and he's Count 19 and 25. And we had organized the files, at least they tried to, so that each of the counts, the exhibits were in that same series. So that Count 7, the 700 numbers were the same. **[296]** That didn't work out and it could get a little confusing.

But [Patient B]'s records are in the exhibits. And what did they do for [Patient B]? Well, they're out there interviewing [Patient B]. They've done all the work, he says. I've done the eval. The only thing left is the interview. But what happens? William Dubin comes by, says stop work. Stop work. Stop. We're not going to get paid. Why aren't we going to get paid? Because [Patient B] -- or because [Patient L] doesn't have any more benefits during this period. So he stops. Stopped working.

Now, there was a plan. If you'll notice in this exhibit, this is 2701B, what was the plan? It was described to you by Ray Johnson is, we're going to wait until the new benefit period starts, and then, we're going to bill it in the new benefit period as if it occurred during the new benefit period.

And Rusty told you the same thing. Rusty says, had we billed it for the service time of April 26, 2013, it would have been denied. We wouldn't have gotten our money. So by waiting to bill it in the new period, we're going to tell the program that we did the service in a new period, now we get paid. Well, that happened on other files, too. You saw that.

I believe it's Count 1800 where they didn't get [297] paid -- I mean, Count 18 where they didn't get paid because they were out of time. They had exceeded the 12 hours. So what did they do? They re-billed it, lying on the bill about when the services had actually occurred. Why did they do that? To get around the 12-hour rule.

But [Patient L] is similar but a little bit different. [Patient L] had no benefits. Now, Mr. McCrum was showing you something in the manual about -- and

there was testimony about the benefit period being a year, a calendar year, and so forth. That's not what they thought. That's not what the facts show with regard to this particular individual.

This is Government's Exhibit 2702. Look at this one. This is the one where Dr. V is asking, where's the [Patient L] report? What's up with that? And Jackie says, well, unfortunately for us -- not unfortunately for [Patient L], but unfortunately for us, Psychological ARTS, we ain't going to get paid. Insurance is denying the claim.

So after having told her that, David Dubin writes to Jackie, nice job, Jackie. Looks like you were right, Dad. I don't know what the "looks like you're right, Dad" statement means, but we sure know what the "nice job, Jackie" is.

So what happens next? The clock ticks, the new [298] benefit period starts, Ray Johnson's going to go back to Hector Garza, and he's going to see these kids again -- or see kids at Hector Garza again. And he asks David -- on May 28, Exhibit 2702A, he asks David: I could go back to Hector Garza. You know, do you want me to do the -- finish up the [Patient L]? And David says no. [Patient L], we've been told that he's been discharged. Don't write anything up. Okay. And he turns around and says, Rusty, bill another two hours, and he did. You don't have to know anything about modifiers to know that cheating like that is fraud. There's intent.

Government's Exhibit 3019 is the bill for [Patient L] -- or to the Medicaid program on [Patient L], and here, it went in on May 30, just like David told him to bill for this time. And there it is, claims that the date

of service, which remember all the evidence was all that service was back in April, when there were no benefits available. Now they're claiming it to have occurred on May 30, when there were no services provided.

Again, you don't have to know anything about modifiers. You don't have to know anything about supervision. You don't have to know anything about the billing rules, or the regulations, or the policies in the policy manual to know that that's just like stealing, you know, where your server's adding hours. They wanted to **[299]** know where the intent was, where the fraud is, that's an example. That's a perfect example and that's Count 19. Nineteen and 25.

And there's no doubt whatsoever that [Patient L]'s name was on that billing. They had to use his name. You heard the evidence that if they didn't use his name, they weren't going to get paid. So they had to use his name and they did. And when they sent in a bill for services that had not been provided and they said, we provided those to [Patient L] on a date when clearly, clearly the services had not been provided, that's fraud. And the use of his name on the bill is aggravated identity theft.

\* \* \* \*

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

UNITED STATES OF AMERICA            ) Docket No. 1:17-CR-  
  ) 227-XR-2  
  )  
vs.                                    )  
  )  
DAVID FOX DUBIN,                 )  
  )  
  )  
DEFENDANT.                        )  
  )

TRANSCRIPT OF MOTION FOR  
RECONSIDERATION AND SENTENCING  
PROCEEDINGS BEFORE THE HONORABLE  
XAVIER RODRIGUEZ  
UNITED STATES DISTRICT JUDGE  
SEPTEMBER 16, 2019

APPEARANCES:

FOR THE                            ) REX G. BEASLEY, ESQUIRE  
PLAINTIFF:                         ) JUSTIN CHUNG, ESQUIRE  
  ) U.S. ATTORNEYS OFFICE  
  ) 601 NW LOOP 410,  
  ) SUITE 600  
  ) SAN ANTONIO, TEXAS  
  ) 78216

FOR THE                            ) MICHAEL W. McCRUM,  
DEFENDANT:                         ) ESQUIRE  
  ) McCRUM LAW OFFICE  
  ) 404 EAST RAMSEY ROAD,  
  ) SUITE 102  
  ) SAN ANTONIO, TEXAS  
  ) 78216

REPORTED BY: GIGI SIMCOX, RMR, CRR  
OFFICIAL COURT  
REPORTER  
UNITED STATES DISTRICT  
COURT  
WESTERN DISTRICT OF  
TEXAS

\* \* \* \*

THE COURT: But your problem is here, I've looked up *United States versus Kelly-Tuorila*, T-U-O-R-I-L-A, 759, F Appendix 236, Fifth Circuit 2019. I believe it was just issued a month ago. It is an aggravated identity theft case. It is a healthcare fraud case. And the Court -- the Fifth Circuit found that use of the name and identifier number constitutes aggravated identity theft.

So what am I to do with that?

MR. McCRUM: I think there can be convictions where if you are using a patient's name in connection with a healthcare fraud offense that you can be found guilty with that. I don't think your finding to reverse the conviction here negates that case law. I think it's all case fact specific, I think, is what the law now is developing, and I'm going to ask that it be applied in that perspective here in this case.

THE COURT: You know, I don't want to cut you off, but so the facts of *Kelly-Tuorila* are right at equating with this one. I saw your other circuit cites, and I agree with you that to me this doesn't seem to be an aggravated identity [4] theft case. I mean, this is where you steal somebody else's credit cards, you do stuff like that.



Here, what the Dubins were doing were they were using names of patients and using their Medicaid identification numbers and then billing. But then the whole crux of this case is how they were billing, and it turns out that's criminal the way they were doing their business, but it wasn't aggravated identity theft. But the Fifth Circuit tells me otherwise, and I'm bound by it.

MR. McCRUM: But I'm not sure that that Fifth Circuit case, or any other, Judge, tells you that in this particular case where the -- and you would agree, I'm sure, Judge, that the Supreme Court is coming out with a whole new line of cases on the word "use" and how it is to be defined, particularly in the weapons context, but even in here. The Supreme Court has held that it has -- it's fraught with interpretational difficulties, given the different interpretations it can be.

In this particular case, there is no doubt that service was rendered in the testing of [Patient L]. There is no doubt that it was three hours. That didn't violate a 4-hour rule. Didn't violate --

THE COURT: Yeah, so, aside from that, though, I mean, so but the problem was it wasn't on the day and the Dubins improperly billed for that. That's the problem with it.

\* \* \* \*

[17] So I would ask you, Judge, please, please use this case to apply that analysis of causation and vacate the conviction as to that count, or those -- that count, Count 25, at the very least.

THE COURT: So, Mr. Beasley, let me hear you on the motion for reconsideration first. And so here, I

mean, these are my thoughts going into this. One is, you know, in light of all the acquittals for whatever reason the jury gave, they did find guilt on this one, but it begs to question, did they find guilt on this one based upon the argument that there was some 12-month billing cycle? And if that turned out to be an incorrect argument advanced by the government, why isn't that grounds for a new trial?

And then I think the Sixth Circuit is more persuasive on the aggravated identity theft. I still believe, despite Mr. McCrum's argument to the contrary, I don't have – I should not have and do not have the power to just ignore the Fifth Circuit, and so, but ultimately I think I may get reversed, and I hope I get reversed on the aggravated identity theft count. So what are we to do with all of this?

MR. BEASLEY: Well, if the Court is inviting me to address the agg ID, I will, but I don't think that's what you are asking me to do.

\* \* \* \*

[38] THE COURT: So with regard to the motion for reconsideration, the motion is denied. There was adequate notice given at various stages of this proceeding. This didn't open up a new avenue for the government to argue any new prosecutorial theories. There was no prosecutorial misconduct.

With regard to the overall argument that there was no evidence to support a conviction on Counts 12 and 19, that's overruled. The evidence established the defendant instructed his biller Rusty Gordon to bill Medicaid; he knew that no psychological testing had been done on May 30th, 2013; and the psychological testing in April had been by an LPA, was not a

licensed psychologist. Those were all adequate to support the jury's verdict.

The post-trial emails and Skype chats, the Fifth Circuit says the generally accepted standard is that a new trial ordinarily should not be granted unless there would be a miscarriage of justice or the weight of the evidence preponderates against the verdict. The defendant must prove that the evidence is newly discovered and was unknown to him at time of trial.

The failure to discover the evidence was not due to his lack of diligence, that the evidence is not merely cumulative but material, and the evidence would probably produce an acquittal. The emails and chats located by the [39] defendant now post-trial generally reference time frames patients can receive services and whether those services can be billed to Medicaid. The evidence was in the possession of the defendant and available to him at trial had he looked in the storage boxes.

The defendants had notice of the misrepresentation theories the government would be charging. More fatal, however, is that the emails and chats do nothing to counter the fact that he instructed his biller to charge Medicaid at a higher rate than authorized and instructed his biller not to utilize the appropriate billing modifier.

With regard to the placing of the wrong date of service not being materially false, the Medicaid program witness Paula Clark did testify that Medicaid would not have paid a claim if the Medicaid program had known that the services claimed had not actually been produced on the dates claimed, and,

accordingly, the jury had sufficient evidence before it to find materiality.

With regard to materially submitting a patient's name and Medicaid ID number, I've already said I agree with *Medlock*, but it's a Sixth Circuit case out of 2015, and I am bound as a trial judge sitting in the Fifth Circuit to follow the *United States versus Kelly-Tuorila*, a Fifth Circuit 2019 case, and for those reasons the motion is denied.

\* \* \* \*

JA 42

**GOVERNMENT EXHIBIT 2702**

**From:** David Dubin  
**To:** "Jackie Liles"  
**Cc:** bill@psycharts.com  
**Subject:** RE: Attached Report: [SB]  
**Date:** Friday, May 10, 2013 4:34:22 PM  
**Attachments:** image001.jpg

---

Nice job Jackie! It looks like you were right dad.

David Dubin, Ph.D.  
Psychological ARTS  
Office: 512-343-8307  
Fax: 512-524-2230  
E-Mail: David@psycharts.com

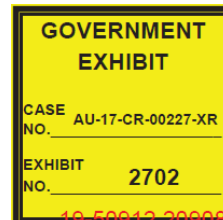
---

**From:** Jackie Lilies [mailto:Jackie@psycharts.com]  
**Sent:** Friday, May 10, 2013 4:30 PM  
**To:** 'David Dubin'  
**Subject:** FW: Attached Report: [SB]

Warm regards,

*Jackie Liles*

Administrative Assistant  
Psychological ARTS & Dr. Dubin's Office  
Phone: (512) 343-8307  
Fax: (512) 524-2230  
Email: jackie@psycharts.com  
Web: www.psycharts.com



JA 43

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---

**From:** Zvonka Vukmirovic [<mailto:zvukmirovic@abraxasyfs.com>]  
**Sent:** Friday, May 10, 2013 3:53 PM  
**To:** Jackie Liles  
**Subject:** RE: Attached Report: [SB]

That is fine, we can do without the new psychological. There was some confusion about when his last one was done. Thank you for the info.

Zvonka Vukmirovic, Ph.D. LPC  
CLINICAL DIRECTOR

Hector Garza Residential Treatment Center  
620 East Afton Oaks  
San Antonio, Texas 78232

Tel: 210 568 8559 • Fax: 210 403 9920

[zvukmirovic@abraxasyfs.com](mailto:zvukmirovic@abraxasyfs.com)

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JA 44

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---

**From:** Jackie Liles [<mailto:Jackie@psycharts.com>]  
**Sent:** Friday, May 10, 2013 3:44 PM  
**To:** Zvonka Vukmirovic  
**Subject:** RE: Attached Report: [SB]

Dr V,

In regards to [Patient L], were you looking for a report or just wishing to close his file because he is discharging?

If you are needing a report, we can provide an abbreviated one by the 16th with the information that we did accumulate from the testing we were able to accomplish.

Unfortunately for us [Patient L]'s insurance is denying the claim because it has been less than a year since his last psychological assessment, but we will do whatever is needed to assist you.

Please let me know how you would like me to proceed.

Thanks ☺

Warm regards,

JA 45

*Jackie Liles*

Administrative Assistant  
Psychological ARTS & Dr. Dubin's Office  
Phone: (512) 343-8307  
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---

**From:** Zvonka Vukmirovic [<mailto:zvukmirovic@abraxasyfs.com>]  
**Sent:** Friday, May 10, 2013 2:07 PM  
**To:** Jackie Liles  
**Subject:** RE: Attached Report: [SB]

Thank you. I also have a question for you. I am not sure who on your team started the assessment on [Patient L], but I know that it has not been completed. He is discharging on Thursday 16 and I would like to know if the psychological assessment could be completed with the data that is already on the file. Your help with that is greatly appreciated.

Zvonka Vukmirovic, Ph.D. LPC  
CLINICAL DIRECTOR

Hector Garza Residential Treatment Center  
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JA 46

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---

**From:** Jackie Liles [<mailto:Jackie@psycharts.com>]

**Sent:** Friday, May 10, 2013 1:03 PM

**To:** Zvonka Vukmirovic

**Subject:** Attached Report: [SB]

Afternoon Dr V,

Attached is the report you requested for [SB].

Please let me know if there is anything else I can do for you.

Thanks!

JA 47

Warm regards,

*Jackie Liles*

Administrative Assistant  
Psychological ARTS & Dr. Dubin's Office  
Phone: (512) 343-8307  
Fax: (512) 524-2230  
Email: [jackie@psycharts.com](mailto:jackie@psycharts.com)  
Web: [www.psycharts.com](http://www.psycharts.com)

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**GOVERNMENT EXHIBIT 3019**

Submitted Client PCN Nbr	Client Last Nm	Client First Nm	Receipt Dt
624471401	[PATIENT L]	[PATIENT L]	5/30/2013

Claim Program Cd	Claim Type Cd	Claim Media Type Cd	Claim Internal Control Nbr
100	020	030	201315047270235

Claim Current Status Cd	Claim Remittance Advice Nbr	Claim Check Nbr	Hdr Paid Dt
P	043888572	0000000403850 15	6/7/2013

Detail Sequence Nbr	Detail Current Status Cd	Dtl From Date of Service Dt	Submitted Perf Provider ID Nbr
1	P	5/30/2013	0323651

JA 49

Submitted Perf Provider Suffix	Procedure Cd	Procedure Modifier 1 Cd	Submitted Place of Service Code
01	96101	AH	56

Dtl Billed Quantity Amt	Dtl Billed Amt	Dtl Paid Amt
3.0	\$540.00	\$338.10

