

25-7285  
No.           

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SUPREME COURT OF THE UNITED STATES

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Laura Perryman

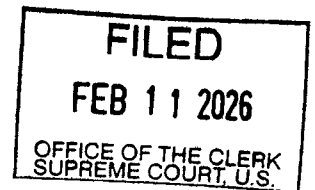
*Petitioner*

Vs

United States of America

*Respondent*

ORIGINAL



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

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**PETITION FOR A WRIT OF CERTIORARI**

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*Petitioner respectfully prays that a writ of certiorari be issued to review the judgment below.*

Laura Perryman, Reg No 48091510  
FBOP FCI Waseca, Unit E  
1000 University Dr SW  
Waseca, MN 56093-0741

## Questions Presented

1. Whether a violation of the Sixth Amendment right to present a complete defense may be deemed harmless where the trial court excluded defense expert and fact witness testimony bearing directly on whether the charged fraud was legally possible and whether the defendant possessed requisite intent?
2. Whether a defendant's Fifth and Sixth Amendment rights are violated when a trial court excludes exculpatory evidence and fact witness testimony negating intent, demanding the defendant testify personally, or not have critical defense evidence on the central element of the charge presented for jury consideration?
3. Whether the Fifth Amendment's Grand Jury Clause is violated by a constructive amendment of the indictment when the government's charged theory fails, and the conviction is sustained on an uncharged theory presented at trial?
4. Whether due process permits a sentence based on intended loss where no loss was possible, no victim existed, and no fraudulent healthcare payor claim was submitted or attempted?

### **List of Parties and Related Cases**

- United States of America v Laura Perryman, Case No. 23-cr-117 (DLC), US District Court for the Southern District of New York. Judgment entered June 17, 2024.
- Laura Perryman v United States of America, Case No. 24-1729-cr, US Court of Appeals for the Second Circuit. Judgment and Sentence Affirmed August 18, 2025. Reconsideration and En Banc Hearing denied November 18, 2025.

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### **OPINIONS BELOW**

The opinion of the United States Court of Appeals Second Circuit appears in Appendix A, and the hearing transcript appears in Appendix B, and is unpublished. The judgment of the United States Southern District of New York appears in Appendix C and is unpublished.

### **JURISDICTION**

The date on which the United States Court of Appeals Second Circuit decided my case was August 18, 2025 (Appendix A, B). A timely petition for rehearing was denied by the United States Court of Appeals Second Circuit on November 18, 2025, and a copy of the order denying rehearing appears in Appendix F. The jurisdiction of this Court is invoked under 28 USC 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this case include the following:

1.) United States Constitution, Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be put in jeopardy of life or limb; nor 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; nor shall private property be taken for public use, without just compensation."

2) United States Constitution, Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense."

3) 18 USC 1347 Health Care Fraud

"(a) Whoever knowingly and willfully executes or attempts to execute a scheme or artifice

(1) to defraud any health care benefit program; or

(2) to obtain, by means of false or fraudulent pretenses, representations or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program, in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 10 years, or both.

4) 18 USC 1349 Attempt and Conspiracy

"Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

5) United States Sentencing Guidelines 2B1.1 (Relevant Portions re Intended Loss), Application Note 3(A)(ii) Amendment 792

"Loss is the greater of actual loss or intended loss. 'Intended loss' means the pecuniary harm that the defendant purposefully intended to inflict, including intended pecuniary harm that would have been impossible or unlikely to occur."

6) United States Sentencing Guidelines 2X1.1

Attempt, Solicitation or Conspiracy (not covered by a specific offense Guideline)

2X1.1(a) Base Offense level: The base offense level from the Guideline for the substantive offense, plus any adjustments from such guideline for any intended offense conduct that can be established with reasonable certainty.

2X1.1(b)(1) Specific Offense Characteristics: If a conspiracy, decrease by 3 levels, unless the defendant or a co-conspirator completed all the acts the conspirators believed necessary on their part for the successful completion of the substantive offense or the circumstances demonstrate that the conspirators were about to complete all such acts but for apprehension or interruption by circumstances beyond their control.

2X1.1(c)(1) Cross Reference. When an attempt, solicitation, or conspiracy is expressly covered by another offense Guideline, apply that guideline section.

7) Federal Rule of Criminal Procedure 52(a)

"Any error, defect, irregularity, or variable that does not affect substantial rights must be disregarded."

## STATEMENT OF CASE

### OVERVIEW

This case goes to the core of constitutional liberty in the United States. If a court may prevent a defendant from presenting evidence that negates criminal intent where no crime has been committed and then excuse that deprivation as "harmless error," the right to a defense becomes illusory. Under such a precedent in the Second Circuit, prosecutors may advance unproven theories of intent, exclude refuting testimony, and secure convictions insulated from meaningful appellate review.

This case seeks to have the Court resolve the split decisions between the Second Circuit affirming a conviction and sentence in direct conflict with other Circuits and their own. In affirming a healthcare fraud conviction based on government evidence only, the Second Circuit 1) ignored its own Litvak and the Supreme Court Chapman harmless-error beyond a reasonable doubt doctrine supporting the exclusion of critical defense theory testimony; 2) confirmed evidence exclusions relevant to intent, denying the defendant the right to present a central defense unless she personally testified; 3) ignored the constructive amendment of the indictment framing the uncharged offense evidence of mislabeling as an essential element of healthcare fraud, and 4) willfully relied on speculative calculations under 2X1.1 instead of the Sentencing Commission 2015 intended loss definition, to affirm an unlawful sentence enhancement not based on economic reality.

If this decision stands, it establishes a precedent in which constitutional violations affecting the central element of guilt may be acknowledged, yet deemed inconsequential, effectively relieving the government of its burden to prove intent beyond a reasonable doubt. The Due Process Clause does not permit such a result. A system that allows the exclusion of the only

competent evidence rebutting intent, while affirming the conviction as harmless, risks converting criminal prosecutions into exercises of unchecked accusation rather than adjudications grounded in proof.

## **BACKGROUND**

The Petitioner was indicted for healthcare fraud and conspiracy to commit healthcare fraud based on an alleged scheme to cause false reimbursement claims to be submitted by doctors for a single, optional component of a permanent neurostimulator system to treat pain. The indictment's theory rested on alleged intent to defraud by promoting "billing" of a hair-like strand of plastic insulation as an optional component under a CPT code established almost 30 years ago, which, in actuality, covered payment for the entire system itself, not individual components. The Petitioner as a manufacturer, did not submit claims to healthcare payors nor have any involvement in submissions. Facilities (hospitals and surgery centers) are the only providers billing for medical device equipment utilizing CPT Code 64590. Facilities, not doctors, submit the claims for the complete system cost as invoiced, so the indictment allegations that doctors billed for an optional accessory to qualify for reimbursement were simply untrue (Appendix B, transcript).

At trial, the government failed to establish that any false claim was ever submitted or contemplated for reimbursement of the optional accessory component. Instead, the government's argument shifted from healthcare fraud statutes to alleged mislabeling or misnaming of an accessory component of the system. The government's intent theory relied exclusively on lay sales and marketing personnel testimony, offering inaccurate and unqualified opinions of how CPT coding works, a highly technical, specialized discipline. Over defense numerous objections, the district court excluded expert and fact witness testimony from clinicians, facility operators,

and coding specialists who would have explained CPT coding and billing practices and why the government's intent theory was legally and practically untenable (Special Appendix A, B, C).

The excluded evidence would have shown that facilities, not clinicians or manufacturers, submit healthcare claims for equipment and that reimbursement was the same with or without the optional, non-billable accessory that had no separate SKU. The district court prevented the jury from reviewing the indictment and described the indictment as "poorly drafted." The jury convicted the Petitioner. On appeal, the Court of Appeals acknowledged that the excluded evidence and testimony bore directly on intent, but held the constitutional errors harmless, affirming on a rationale untethered to the indictment's claims-based theory. At sentencing, the district court imposed a substantial enhancement based on intended loss calculated as a percentage of manufacturer revenue for legitimate and correctly audited procedures, despite the absence of actual loss, victims, false claims, or the viability of submitting a false claim, and the Second Circuit affirmed.

The Petitioner preserved the constitutional objections; however, the Second Circuit addressed the issues as harmless, citing overwhelming evidence. The Second Circuit's statement of facts was fundamentally flawed regarding the summation of evidence. The cited overwhelming evidence consisted of 1) training materials, 2) emails, and 3) an alleged statement about "copper in white stylet". However, these items were not related to healthcare fraud. The training materials consisted of a single slide in a 1,000-page deck called "Cut Lengths" listing seven different versions of the Stimulator, one with a white stylet accessory. The email referenced was sent to a single consultant whose testimony was barred at trial to opine on the meaning of the email discussing the pink stylet. Lastly, the statement from the coconspirator about copper being told to consultants was refuted by a clinician who attended the same meeting (Special Appendix

D). The government's evidence did not support the indictment, but provided a few elements of mislabeled materials, which trial testimony stated was due to "lack of bandwidth" of staff. The coconspirator himself testified that the scheme never resulted in fraud and was "ridiculous."

### **SUMMARY**

This case squarely presents whether a conviction may stand when the trial departs far from the grand jury's charged theory, when excluded defense scientific expert and fact witness testimony and exculpatory evidence negating intent is deemed harmless on appeal, and when sentencing rests on speculative intended loss divorced from any legitimate actual or intended fraudulent claim or pecuniary harm, because such a claim was impossible to take place.

The Constitution guarantees not merely a trial, but a fair one. If the right to present a defense may be nullified whenever an appellate court deems the government's case "strong enough," then the protections of due process and the reasonable-doubt standard lose their force. This Court's intervention is necessary to prevent that erosion and to preserve the foundational principle that criminal guilt must be established through lawful proof, not insulated error.

### **REASONS FOR GRANTING WRIT**

#### **GROUND 1: THE DECISION BELOW CONFLICTS WITH THIS COURT'S HARMLESS-ERROR JURISPRUDENCE AND THE MAJORITY OF CIRCUITS**

The court of appeals correctly recognized that the district court committed constitutional error by excluding defense expert and clinician fact witness testimony bearing directly on fraudulent intent and the viability of the charged healthcare-fraud theory. Nevertheless, the panel affirmed the conviction on the ground that the errors were harmless in light of what it characterized as "overwhelming" evidence.

That holding is incompatible with this Court's harmless-error jurisprudence and creates a dangerous precedent. It permits trial courts to exclude defense evidence that directly negates an essential element of the offense and the Government's theory of fraud, only to have those constitutional violations excused on appeal by labeling the prosecution's remaining evidence "overwhelming." Where excluded evidence goes to intent and the existence of fraud itself, such error cannot be harmless beyond a reasonable doubt.

The excluded testimony would have established that the charged conduct—fraudulent submission of healthcare reimbursement claims—could not have occurred as a matter of law and industry practice. That testimony directly refuted the Government's theory and undermined the credibility of the lay cooperating witness on whom the Government's case depended. The panel's harmless-error determination rested on that witness's testimony, despite his lack of expertise in CPT coding and reimbursement, while the jury was denied access to qualified clinicians and facility witnesses who would have explained the subject accurately and professionally. See Special Appx, A, B, C.

The panel's harmless-error holding cannot be reconciled with decisions of multiple circuits, including the Second Circuit itself. In *United States v. Litvak*, 808 F.3d 163 (2d Cir. 2015), the court reversed a conviction where the exclusion of defense expert testimony bore on an element of the offense. There, although the Government presented witnesses who testified that alleged misstatements were important to them, the court held that without expert testimony, the defendant "was left with little opportunity to present his non-materiality defense." *Id.* at 184. Because the subject matter was "highly specialized," the exclusion of expert testimony could not be deemed harmless. *Id.* at 183–84.

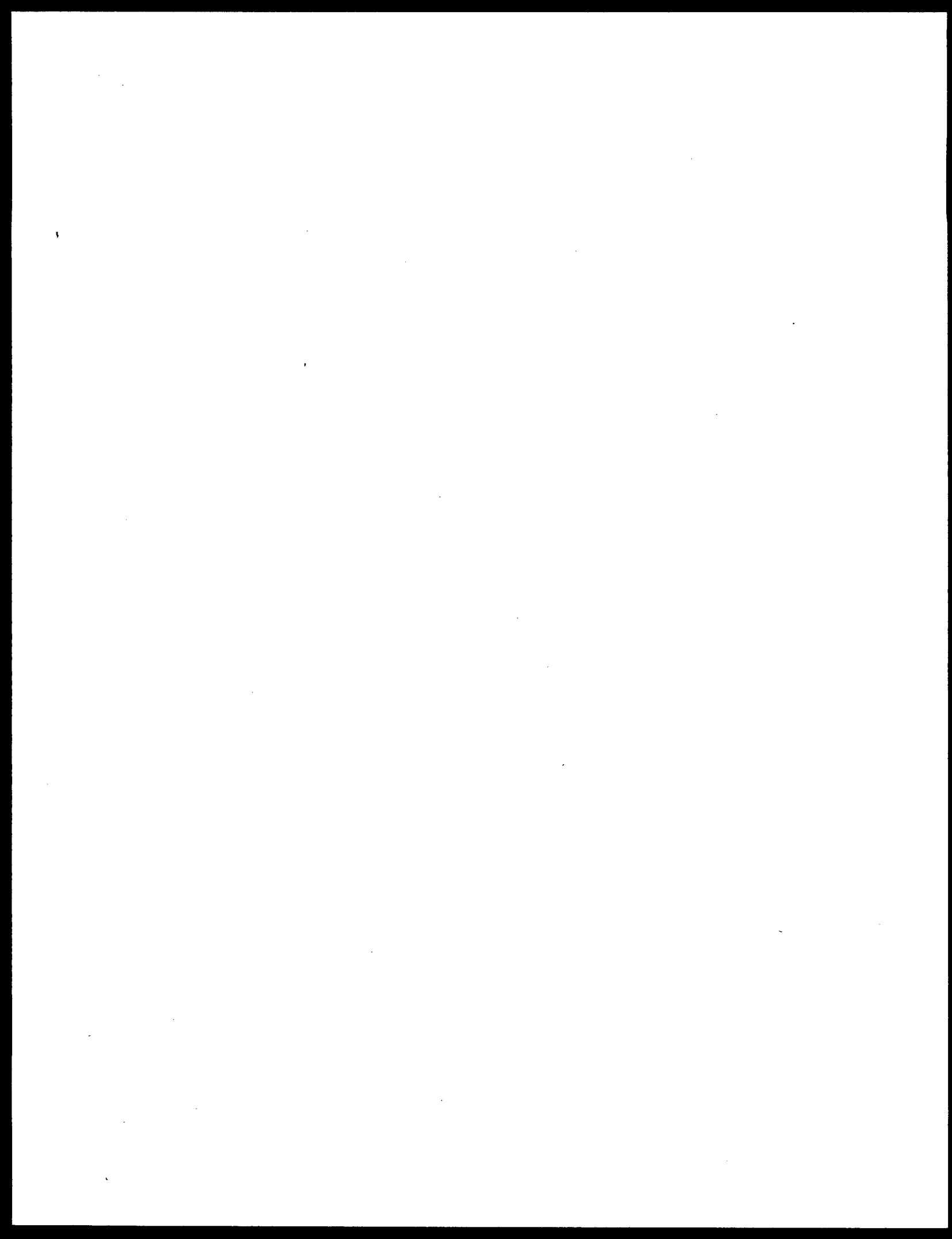
Petitioner sought to present an even stronger defense than the defendant in Litvak. The proposed expert and fact witness testimony exceeded the reliability and probative value of the Government's lay testimony and spoke directly to a critical element of the offense. As in Litvak, the excluded evidence would have assisted the jury in resolving a contested issue central to guilt. The district court's constitutional errors, therefore, were not harmless.

The court of appeals itself acknowledged that the excluded testimony from Drs. Arcos and Haider "was relevant to Perryman's intent" and "bore on whether Perryman could have reasonably believed" CPT Code 64590 was appropriate and "whether she acted with fraudulent intent in advocating the use of this code." App. A at 8. The Government's theory—that physicians had to implant a second receiver to trigger reimbursement—was not merely disputed; it was incorrect as a matter of billing practice, because facilities, not physicians, submit reimbursement claims for device-intensive codes. The excluded testimony would have impeached the credibility of the Government's witness and dismantled the core premise of the prosecution's case—the same testimony on which the panel relied to find harmlessness.

Had the jury been permitted to hear the excluded expert and clinician testimony, the Government's case would not have appeared "overwhelming." See Special Appx. D. The Government cannot establish beyond a reasonable doubt that the exclusion of this evidence "did not affect the verdict." *United States v. Stewart*, 907 F.3d 677, 699 (2d Cir. 2018).

#### **A. Governing Harmless-Error Standard**

A violation of the right to present a defense requires reversal unless the Government proves beyond a reasonable doubt that the error did not contribute to the verdict. *Chapman v. California*, 386 U.S. 18, 22–24 (1967). Constitutional error may be deemed harmless only in the



rare case where a reviewing court can be confident the error played no role in the jury's verdict. *Carella v. California*, 491 U.S. 263, 266–67 (1989).

The right to present witnesses in one's defense is a fundamental component of due process and compulsory process. *Washington v. Texas*, 388 U.S. 14, 33 (1967). Exclusion of evidence bearing directly on intent and the validity of the Government's theory cannot be harmless where that evidence would undermine the prosecution's entire narrative.

The harmless-error doctrine is reserved for minor defects with little or no likelihood of affecting the verdict. *Washington v. Recuenco*, 548 U.S. 212, 218 (2006). The burden of proving harmless-ness rests squarely with the Government. *United States v. Smart*, 98 F.3d 1379, 1390 (D.C. Cir. 1998). Where constitutional error concerns an essential element of the offense, that burden is especially demanding. *Neder v. United States*, 527 U.S. 1, 21, 26 (1999).

#### **B. The Government Failed to Meet Its Burden**

Under the Second Circuit's own precedent, exclusion of defense evidence is evaluated using a multi-factor harmless-error analysis, including: (1) the importance of the excluded evidence; (2) whether it was cumulative; (3) the presence or absence of corroborating or contradictory evidence; (4) the extent to which the defense was otherwise permitted to present its theory; and (5) the overall strength of the prosecution's case. *Litvak*, 808 F.3d at 183–84. Each factor weighs decisively against harmless-ness here.

The panel acknowledged the excluded evidence bore directly on intent. The testimony was not cumulative; it was the only evidence capable of explaining how CPT coding and reimbursement actually functioned, because the district court barred the defense entirely from presenting that subject. The Government presented no testimony from clinicians, facilities, payors, CMS, or coding specialists. The prosecution's case rested largely on a cooperating

witness whose assertions went un rebutted, including claims that reimbursement required insertion of a specific accessory.

Finally, the panel relied almost exclusively on the purported “overwhelming” nature of the Government’s evidence. That evidence consisted primarily of the cooperating witness’s testimony and related exhibits. See App. A at 7–8. When excluded evidence would have aided the jury in resolving a contested issue of intent, exclusion is not harmless. *United States v. Onumonu*, 967 F.2d 782, 788 (2d Cir. 1992). When excluded testimony goes to the core of the prosecution’s case, harmless ness is not possible. *United States v. Blum*, 62 F.3d 63, 69 (2d Cir. 1995).

#### **C. Exclusion of Expert Testimony Negating the Charged Fraud Cannot Be Harmless**

The jury was denied expert testimony establishing that reimbursement under CPT Code 64590 was proper regardless of whether any accessory was used and that the alleged fraud could not have occurred. That testimony would have eliminated the Government’s intent theory entirely. Expert testimony concerning industry practice and technical subjects beyond common juror knowledge is critical to the assessment of intent. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595–96 (1993). Error cannot be harmless when it prevents the defendant from establishing an evidentiary basis for the defense. *United States v. Saenz*, 179 F.3d 686, 689 (9th Cir. 1999). Courts have repeatedly reversed convictions where exclusion of expert testimony deprived the jury of the tools necessary to assess intent. *United States v. Lankford*, 955 F.2d 1545 (11th Cir. 1992); *United States v. Baird*, 29 F.3d 647, 653–55 (D.C. Cir. 1994).

#### **D. Conclusion**

The excluded testimony was not peripheral; it was the defense. By preventing the jury from hearing expert and fact witness testimony establishing that the alleged fraud was

implausible and that no intent to defraud could exist, the district court deprived Petitioner of a meaningful opportunity to present a defense. The court of appeals' conclusion that these errors were harmless conflicts with this Court's precedent and warrants review.

**GROUND 2: EXCLUSION OF FACILITY EVIDENCE AND CODING CONSULTANT TESTIMONY**

The exclusion of exculpatory facility payor submission evidence and the Petitioner's clinician coding fact witness testimony violated the Petitioner's Sixth Amendment right to present a complete defense. The District Court further violated Petitioner's Fifth Amendment rights by ruling that the only way exculpatory evidence concerning third-party reimbursement under CPT Code 64590 could be presented was if Petitioner personally testified, despite the undisputed fact that the Petitioner neither submits claims nor recommends coding to clinicians or facilities, she was aware of cases taking place through a notification email system..

The core defense theory was that the Government's healthcare fraud theory was legally and factually impossible. Because the alleged fraud could not occur, no motive could exist for the Government's asserted rationale that Petitioner supported engineering changes to "make more money" (Tr 21). The defense rested on objective evidence establishing that facility reimbursement for the peripheral nerve stimulation ("PNS") system occurred properly and independently of any optional accessory stylet used by clinicians.

This defense required the jury to hear two categories of evidence, both excluded at the Government's request:

1. Documentary evidence demonstrating that, prior to the creation of the white stylet in 2017, facilities properly submitted and received reimbursement under CPT Code 64590 for the PNS system before any stylets were included in the Stimulator Receiver kit (see testimony of

Greene, Vice-President of Regulatory Affairs, confirming no stylet inclusion prior to FDA clearance of 510(k) K171366 on August 4, 2017 (Tr 855–16)); and

2. Clinician testimony from a CPT coding consultant explaining how CPT codes are reimbursed and why facility equipment reimbursement is unaffected by the use or non-use of accessory stylets.

The exclusion of these categories of evidence prevented the jury from hearing the defense's central factual theory and resulted in a conviction based on a legally flawed narrative.

#### **A. Exclusion of Defense Coding Consultant Testimony**

The exclusion of Dr. Jeffrey Dann's testimony was critical to the defense. Trial counsel preserved the objection to Dr. Dann's removal from the stand (Tr. 1560), and the objection was never waived (Tr. 1594–95; Special Appx. D). Dr. Dann, Petitioner's reimbursement consultant, has more than forty years of experience with the American Medical Association Coding Committee and was a co-author of CPT Code 64590.

Dr. Dann would have explained that device-intensive CPT codes reimburse facilities—not clinicians—for the cost of equipment. The Government alleged that Petitioner “needed the pink receiver stylet so that doctors could bill that high-paying 64590 code” (Tr 1769), and that difficulties inserting the pink stylet led Petitioner to manufacture a “fake receiver”—the white stylet—to increase reimbursement (Tr 1782).

At trial, the government introduced "Commonly Used Reimbursement Code Guides" prepared by third-party coding specialists, listing payments for various codes, including CPT Code 64590, detailing clinician procedure time (\$167) and facility equipment and costs (~\$17,000) reimbursement ranges. These guides reflected the fact that CPT Code 64590 is a device-intensive code, basing the reimbursement on 80% of the invoiced equipment cost for the

system (GX-339, Tr 339-340). Despite this technical subject matter, only lay witnesses were permitted to testify, and the government opposed allowing coding explanations "from the mouths of doctors" (Tr 1390).

Dr. Dann would have explained how CPT codes are created, priced by CMS, and applied by facilities, and that reimbursement for the system is independent of the existence or use of any accessory stylet. This testimony was essential to demonstrating that the charged fraud was impossible as a matter of reimbursement mechanics. Its exclusion deprived Petitioner of the ability to rebut the Government's theory and present a defense.

#### **B. Exclusion of Exculpatory Facility Payor Claims Data**

The District Court also excluded exculpatory documentary evidence showing proper facility reimbursement under CPT Code 64590 in 2017, years before stylets were included in device kits beginning in 2019 (Tr 484, Tr 487). This evidence directly rebutted the Government's motive-and-intent theory by demonstrating that no additional payment was made for any receiver-stylet (Tr. 494).

The Second Circuit acknowledged that "there is no indication that Perryman knew about the particular procedures that were listed in the billing records" and that "there is no connection between the evidence and her motive" (Appx. A, 8). This conclusion by the Panel is illogical- not needing any accessory means there would be no motive to create a "fake" accessory. Nevertheless, the Panel held that the evidence could be presented only if the Petitioner personally testified, despite the fact that such evidence would have created a reasonable doubt (Appx A 9). This ruling violated Petitioner's Fifth Amendment rights by conditioning the presentation of exculpatory evidence on her decision to testify. See Modern Federal Jury Instructions: Criminal § 6-18 (2004).

The District Court stated:

*“Should she take the stand, she is free to give her understanding in respect to the proper CPT code... other than that, they seek to preclude the defendant from offering evidence or argument with respect to these uses of CPT Code 64590” (Tr. 21).*

When the prosecution advances a motive theory, exclusion of admissible rebuttal evidence is reversible error. *United States v. Simon*, 425 F.2d 796, 808 (2d Cir. 1969); *Rhodes v. Dittman*, 903 F.3d 646, 666–67 (7th Cir. 2015); *United States v. Whitman*, 771 F.2d 1348, 1351 (9th Cir. 1985). A trial court may not dismiss logically relevant defense evidence as speculative where it is calculated to cause the jury to doubt the prosecution’s theory. *United States v. Vallejo*, 237 F.3d 1008, 1023 (9th Cir. 2001).

### **C. Sixth Amendment Right to Present a Complete Defense**

The Sixth Amendment guarantees criminal defendants “a meaningful opportunity to present a complete defense.” *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). This includes the right to present evidence that could influence the jury’s determination of guilt. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987).

Erroneous exclusion of defense evidence rises to constitutional magnitude when it deprives the defendant of a fundamentally fair trial. *Chambers v. Mississippi*, 410 U.S. 284, 302–03 (1973). Courts assess whether excluded evidence was critical, central to the defense, and non-cumulative. *Alcala v. Woodford*, 334 F.3d 862, 873 (9th Cir. 2003); *Miller v. Stagner*, 757 F.2d 988, 994 (9th Cir. 1985). Here, the excluded testimony and documents constituted the entirety of

the defense's factual theory. Without them, the jury never heard evidence establishing that the charged fraud could not occur.

#### **D. Prejudice from Barring Rebuttal to Co-Conspirator Testimony**

The exclusion of defense evidence violates the Constitution where the omitted evidence creates a reasonable doubt that did not otherwise exist. *Justice v. Hoke*, 80 F.3d 43, 47 (2d Cir. 1996); *United States v. Agurs*, 427 U.S. 97, 112 (1976). Even evidence of relatively minor importance may suffice if it creates such doubt. *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993); *Kyles v. Whitley*, 514 U.S. 419, 436 (1995).

The Second Circuit deemed the Government's evidence "overwhelming," relying heavily on testimony from an alleged co-conspirator who testified pursuant to a cooperation agreement in a separate prosecution. The defense was barred from presenting evidence directly refuting that testimony through objective, credible sources, including physicians and facilities (Special Appx. D). Courts recognize that an alleged co-conspirator's guilty plea carries an inherent risk of prejudice. *United States v. Handley*, 591 F.2d 1125, 1128 (5th Cir. 1979); *United States v. Gullo*, 502 F.2d 759, 761 (3d Cir. 1974). In some cases, even cautionary instructions are insufficient. *United States v. Richardson*, 504 F.2d 357, 360 (5th Cir. 1974). No such instruction was given here.

#### **E. Circuit Split on Exclusion of Defense Evidence**

The circuits are divided on when exclusion of defense evidence constitutes reversible constitutional error. Some circuits strictly protect the right to present a defense where intent is an element of the offense. *United States v. Garber*, 607 F.2d 92, 99 (5th Cir. 1978); *United States v. Bearstons*, 987 F.2d 451 (8th Cir. 1993). Others have affirmed convictions despite exclusion of

critical defense testimony bearing directly on intent. *United States v. Hurn*, 368 F.3d 1359 (11th Cir. 2004). See Special Appendix E.

#### **F. Conclusion**

The District Court excluded both categories of evidence essential to the defense: (1) clinician fact witness testimony explaining why the charged fraud was impossible, and (2) documentary proof of proper reimbursement eliminating motive and intent. These exclusions prevented the jury from hearing the defense theory and resulted in a conviction obtained in violation of the Fifth and Sixth Amendments and fundamental principles of due process.

#### **GROUND 3: CONSTRUCTIVE AMENDMENT OF INDICTMENT**

In this case, the indictment charged a scheme involving fraudulent submission of healthcare claims under CPT code 64590 were made by "unwitting" clinicians for a PNS neuromodulation system invented by Perryman for a certain accessory component, called a receiver stylet. However, the evidence at trial failed to support the government's theory and instead focused on the mislabeling of a component of a kit that was unnecessary for reimbursement and physically incapable of being billed to any payor or listed on a healthcare claim. The indictment was constructively amended based on the district court's flawed assumption that if a label on a device kit box has a name not descriptive of the definition of a certain accessory, you have healthcare fraud (Tr 1446, 1165). The "overwhelming" evidence (Special Appendix D) was only for mislabeling of the names of the accessories, and there was no evidence of intended or actual submission of claims for healthcare fraud, even the customer invoice presented by the government didn't support their own flawed theory (GX-402). The District Court turned mislabeling into healthcare fraud, instructing the jury that the mislabeling was a "clear demonstration of healthcare fraud."

In light of the flawed government theory having no actual evidence to support it, the government shifted the definition of healthcare fraud to be the existence of a mislabeled (misnamed) accessory only, as sufficient to support healthcare fraud, although mislabeling was not charged in the indictment. The District Court supported that new definition in all of their instructions to the jury and throughout the trial to block evidence and the presentation of the defense as detailed in Grounds One and Two. The jury was instructed in a manner that permitted a conviction based on this alternative theory, and the jury was not provided a copy of what the district court characterized as a "poorly drafted" indictment, see Appendix G.

The Second Circuit acknowledged the government's original fraud theory was flawed (Appendix B), yet affirmed the conviction, stating a description of mislabeling existed even if not separately charged, and claimed that the constructive amendment objection was not made. (See Special Appendix D).

**A. NO UNWITTED DOCTORS EXISTED NOR EVIDENCE SUPPORTING EXECUTION OF ALLEGED SCHEME**

On October 11, 2023, the District Court denied the defense's Motion to Dismiss and, in the alternative, a request for a bill of particulars (Appx E). The defense articulated that in over 257,000 documents produced in discovery, not one piece of discovery supported the charged offenses in the indictment.

The trial started on February 21, 2024, and the prosecution's case had diverged so far from the indictment that the defense asked for a mistrial.

(Tr 341-342)

Defense Counsel: "*None of these people have any personal basis to have made testimony and the limiting instruction doesn't go far enough.*" "*Prejudice is too much to continue. I move for a mistrial.*"

(Tr 390)

The District Court denies the mistrial request.

(Tr 601-14:16, Tr 602-1:3)

Defense Counsel: "*Isn't it true there is zero money that you can correlate to these crimes you say you committed?*"

Andresen government coconspirator: "Yes."

Defense Counsel: "*Government claimed you made money in connection with the scheme you told them no correct?*"

Andresen government coconspirator: "*That's correct.*"

(Tr 643-21:24)

Defense Counsel: "*You weren't trying to get doctors to submit false reimbursements, lying about what they actually did, were you?*"

Andresen government coconspirator: "No."

(Tr 758)

Defense Counsel: "*All of us are interested in making sure the jury is not misled on an issue.*"

(Tr 1042)

Defense Counsel: "*...any other statement that they would be relying on would be a variance from what they charged.*"

(Tr 1166)

Defense Counsel: "*frauds required she engaged in scheme they charged- what you describe in mislabeling.*"

District Court: "*Counsel something can be misbranded and also a component of a fraud scheme.*"

This shift from a charged theory of healthcare fraud based on false claims to an uncharged theory grounded in labeling practices constitutes a constructive amendment of the indictment. Under *Stirone* and this Court's Fifth Amendment jurisprudence, such an amendment requires reversal, regardless of whether the error is reviewed under harmless-error or plain-error standards.

A conflict exists amongst the federal courts of appeals regarding whether a constructive amendment of an indictment constitutes per se reversible error, or whether it is subject to plain error review requiring a showing of prejudice when the issue is not preserved at trial. In this case, the defense contends prior to trial and throughout the trial, amendment issues were consistently noted by the defense trial counsel to the District Court, to no avail. Under the Fifth Amendment, a defendant may be tried only on charges returned by a grand jury.

#### **B. SUPREME COURT PRECEDENCE**

As the Supreme Court held in *Stirone v US*, 361 US 212, 217 (1960), "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." A constructive amendment occurs when the trial evidence, arguments, or jury instructions broaden the possible bases for conviction beyond those charged by the grand jury." Such an amendment alters the essential elements of the offense and violates the grand jury clause. This Court has repeatedly emphasized that certain constitutional violations are structural and not amenable to harmless error analysis. In *Chapman v California*, 381 US 18, 23 (1967), the Court stated "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless," and specifically identified "the right of a defendant to be tried only on charges presented in an indictment returned by a grand jury" as one such right.

At the same time, in *US v Olano*, 507 US 725 (1993), the Court articulated the four-part framework for plain-error review under Federal Rules of Criminal Procedure 52(b) to include 1) error 2) that is plain 3) that affects a substantial right and 4) that seriously affects the fairness, integrity, or public reputation of a judicial proceeding. The court of appeals are divided on how *Olano* applies to constructive amendment and whether prejudice must be shown at all.

### **C. JURY PROVIDED WITH CONFLICTING INFORMATION ON DEFINITION OF HEALTHCARE FRAUD**

In this case, the District Court sua sponte told the jury "it is not a defense that the government failed to prove...deceit of medical providers." (Tr 988). The District Court claimed the government's theory "has always been the doctors were witting or unwitting participants." (Tr 835). Contrary to the court's viewpoint, the express terms of the Indictment only described the doctors as "unwitting". (Tr 21). Perryman requested the District Court adhere to its customary practice of providing a copy of the indictment to the jury, but the District Court refused, stating the indictment was "poorly drafted." (Tr 844-45)

The District Court instructed the jury

*"The government need not prove that the person engaged in the scheme specifically intended to defraud or deceive a healthcare benefit program."* (Tr 962-963)

Absent actual fraud losses or victims, intention would be a necessary element. The

District Court said

*"there are two ways in which a defendant may commit healthcare fraud, and one of those ways requires the government to prove that the defendant acted with the intent to defraud."* (Tr 977-78).

The district court provided the jury with an instruction on misbranding to consider

*"for whatever light you find it sheds, if any, on the means through which the defendant committed one or more of the crimes with which she is charged."* (Tr 990).

### **D. CIRCUIT SPLIT ON CONSTRUCTIVE AMENDMENT**

Several circuits treat constructive amendment as per se reversible error, even under plain error review. The Fourth Circuit has taken the clearest position, holding that a constructive amendment "is error per se" and requires reversal when the indictment is broadened through

evidence or jury instructions. *US v Floresca*, 38 F 3d 706, 712-13 (4d C 1994) (en banc). That court has reasoned that constructive amendments are structural defects that undermine the grand jury's role and cannot be cured through harmless-error analysis.

Other Circuits apply plain-error review and require some showing of prejudice. The First, Fifth, Seventh, Eighth, and Tenth Circuits have held that where a defendant fails to object, reversal is not automatic and depends on whether the error affected the outcome of the proceedings. *US v Brandao*, 539 F 3d, 44 (1d C 2008); *US v Bohuehot*, 625 F 3d 892 (5d C 2010); *US v Remza*, 77 F 3d 1039 (7d C 1996); *US v Gavin*, 583 F 3d 542 (8d C 2003); *US v Brown*, 400 F 3d 1242 (10d C 2015).

Here, the defense objected before the trial, filed a Motion to Dismiss, and requested a Bill of Particulars (Appx E) and objected to the evidence presented at trial as being specific only to mislabeling and not one piece of evidence supporting the submission or contemplation of submission of a fraudulent healthcare payor claim. The defense counsel asked for a mistrial and dismissal after the prosecution lay person conclusions about CPT codes were allowed by the District Court and the after the prosecution rested for failure to produce any evidence to substantiate the charge of healthcare fraud. Mislabeling evidence was the only thing presented to the jury at trial.

The Third Circuit has adopted a middle position, holding that constructive amendment issues are core to a rebuttable presumption of prejudice and frequently warrant reversal even under plain-error review. *US v McKee*, 506 F 3d 225 (3d C 2007); *US v Syme*, 276 F 3d 131 (3d 2002). The Third Circuit defines a constructive amendment as occurring when "the possible bases for conviction are broadened beyond what is contained in the indictment," and recognizes that such amendments implicate the defendant's substantial Fifth Amendment rights.

### **E. INCONSISTENCY WITHIN THE SECOND CIRCUIT ITSELF**

The Second Circuit's own decisions are internally inconsistent. In some cases, it has recognized constructive amendment as a per se violation requiring reversal when there is a substantial likelihood that the defendant was convicted of an offense other than that charged. *US v Thomas*, 274 F 3d 655, 670 (2d C 2001); *US v Milstein*, 401 F 3d 53 (2d C 2015); *US v Woziak*, 126 F 3d 105 (2d C 1997).

In other cases, however, the Second Circuit has declined to reverse where it concluded that the defendant failed to preserve the objection or where it believed the defendant had notice of the "core of criminality," even though the theory of conviction differed from that charged in the indictment. *US v Dove*, 884 F 3d 138 (2d 2012); *US v Heimann*, 705 F 2d 662 (2d 1983). The Second Circuit has defined a constructive amendment as occurring when "the changing terms of the indictment are altered, either literally or constructively," such that there is a substantial likelihood of conviction for an uncharged offense. *US v Mollica*, 849 F 2d 723, 729 (2d C 1988); *US v Velaeliunas*, 76 F 3d 1283, 1290 (2d C 1996). Yet in practice, the Court has not applied that standard consistently.

### **F. CASE IDEAL VEHICLE RESOLVE CIRCUIT SPLIT CONFLICT**

The charged theory was unsupported by the evidence and the conviction was affirmed on an alternative theory that just a mislabeled accessory can support a conviction under healthcare fraud statutes. This case clearly presents the constitutional question of whether a conviction may stand when the trial departs from the indictment and the Court of Appeals refuses to reverse on the grounds that the error was unpreserved or harmless affects the rights of all citizens. The issue is dispositive. If the indictment was constructively amended, the conviction cannot stand. The

record is fully developed, and the Court of Appeals squarely addressed the legal standards covering constructive amendment.

## **G. CONCLUSION**

This Court's review is warranted to restore uniformity to the Fifth Amendment jurisprudence and to reaffirm that a defendant may be convicted only of the offense charged by the grand jury.

### **GROUND 4: WHETHER "INTENDED LOSS" REQUIRES PROOF OF PURPOSEFUL INTENT AND WHETHER A SENTENCING ENHANCEMENT MAY BE IMPOSED WHEN NO LOSS WAS POSSIBLE**

This case presents a deep and expanding conflict among the Courts of Appeals concerning the meaning and continued viability of "intended loss" under U.S.S.G. § 2B1.1, particularly after the Sentencing Commission's 2015 amendment defining intended loss as "the pecuniary harm that the defendant purposefully intended to inflict." U.S.S.G. § 2B1.1 cmt. n.3(A)(ii).

Here, the District Court imposed an 18-level sentencing enhancement based on "intended loss," resulting in a 72-month sentence, despite the undisputed absence of any actual loss, any identifiable victim, or any fraudulent claim submitted or contemplated. The indictment and trial never addressed intended loss. Nevertheless, at sentencing, the District Court adopted a new intended-loss theory not presented to the jury. The Second Circuit affirmed, permitting a sentencing enhancement based on a speculative loss theory untethered from proof of mens rea, legal possibility, or evidentiary support. That ruling conflicts with the Sentencing Guidelines, decisions of multiple circuits, and fundamental principles of due process.

#### **A. Conflict with Supreme Court Precedent Governing Sentencing Enhancements**

This Court has made clear that sentencing enhancements must be grounded in legally cognizable conduct supported by evidence, not speculation. *United States v. Booker*, 543 U.S.

220, 233 (2005). Sentencing must comport with due process and proportionality. *Gall v. United States*, 552 U.S. 38, 50 (2007). Procedural reasonableness requires use of a legally correct method to calculate the Guidelines range. *Id.* at 51. Where a district court errs in calculating the Guidelines range, resentencing is required unless the Government proves harmlessness. *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1907–08 (2018). Enhancements based on speculative or impossible loss amounts—particularly where the charged fraud could not have occurred—violate these principles and produce unwarranted sentencing disparities.

#### **B. Conflict with the Sentencing Commission’s Mens Rea Definition of Intended Loss**

In November 2015, the Sentencing Commission amended § 2B1.1 to define “intended loss” as “the pecuniary harm that the defendant purposefully intended to inflict.” U.S.S.G. § 2B1.1 cmt. n.3(A)(ii); Amend. 792. The amendment expressly refocused loss calculation on culpability rather than conjecture. “Intent” denotes a conscious objective or purpose. Under the amended Guidelines, intended loss includes only losses that were the object of the defendant’s deliberate aim—not hypothetical amounts never contemplated or incapable of occurring.

Accordingly, the Government must establish that the defendant consciously sought to cause a specific monetary loss. Courts applying the amended definition have emphasized that intended loss cannot be inferred where no loss was possible or where no evidence demonstrates a conscious objective to cause harm. *United States v. Pu*, 814 F.3d 818 (7th Cir. 2016); *United States v. Free*, 714 F. App’x 144 (3d Cir. 2017). The decision below conflicts with the Sentencing Commission’s clarified intent requirement and authorizes sentencing enhancements divorced from culpability.

#### **C. Circuit Split on Intended Loss Where No Pecuniary Harm Was Possible**

The circuits are divided on whether intended loss may serve as the basis for sentencing enhancements and, if so, what proof is required—despite the Commission’s 2015 clarification. Several circuits have rejected expansive interpretations of intended loss and held that loss must at least have been possible. Loss that could not have materialized cannot support a sentencing enhancement. *United States v. Banks*, 55 F.4th 246, 255–56 (3d Cir. 2022); *United States v. Egbert*, 562 F.3d 1092, 1098 (10th Cir. 2009); *United States v. Popov*, 742 F.3d 911, 915–16 (9th Cir. 2014). The Sixth Circuit has similarly emphasized that intended loss must have been possible and tied to actual harm. *United States v. Watkins*, 994 F.2d 1192 (6th Cir. 1993); *United States v. You*, 74 F.4th 378 (6th Cir. 2023); *United States v. Tate*, 999 F.3d 374, 378 (6th Cir. 2021).

Even the Second Circuit has previously rejected intended-loss enhancements where loss was legally or factually impossible. *United States v. Confredo*, 528 F.3d 143, 152 (2d Cir. 2008). Other circuits likewise require proof that the defendant purposefully sought to inflict pecuniary harm. *United States v. Manatau*, 647 F.3d 1048, 1050–51 (10th Cir. 2011); *United States v. McCoy*, 508 F.3d 74, 79 (1st Cir. 2007); *United States v. Bazemore*, 608 F. App’x 207, 215–16 (5th Cir. 2015). By contrast, the decision below—where the Government conceded actual loss was zero—approved an intended-loss enhancement untethered from evidence of subjective intent, causation, or possibility. The loss figure was derived from conjecture rather than proof of what the Petitioner purposefully sought to inflict.

#### **D. The Issue Is Important, Recurring, and Outcome-Determinative**

Loss calculations under § 2B1.1 frequently drive sentencing outcomes in fraud cases. Intended-loss enhancements can dramatically increase advisory ranges and often overwhelm all other sentencing considerations. Whether the intended loss requires proof of purposeful intent and a realistic possibility of loss recurs regularly and yields materially different sentences

depending on the circuit. The Second Circuit's approach permits punishment for imagined harm untethered from culpability, while other circuits require concrete proof of intent or reject intended loss altogether. This case squarely presents the issue. The record is fully developed, the Government conceded actual loss was zero, and the enhancement was affirmed as a matter of law.

In this case, the Second Circuit refused to conduct the mandatory 2B1.1 intended loss analysis, as required under the Sentencing Guidelines, citing that the second offense, 18 USC 1349, should be treated independently from Health Care Fraud and allow the Court to apply 2X1.1.

This logic is unfounded in the statutes as written by the Sentencing Commission and not a single case precedence exists in any United States Court of Appeals to independently apply 2X1.1 when sentencing an individual for BOTH the underlying offense of 18 USC 1347 and 18 USC 1349. 2X1.1(c)(1), expressly states, "When a conspiracy is expressly covered by another offense, the guidelines of that offense should be applied." Although 18 USC 1349 can be applied independently of 1347, that is not the situation for this case. 2X1.1(a) expressly states, "base offense level is determined by referencing the Guidelines for the substance offense, plus any adjustments from that Guideline that can be established with reasonable certainty. USSG 2B1.1 is the Guideline for healthcare fraud." 2X1.1 is meant for cover offenses not covered by another specific guideline of the resulting offense, not as an alternative.

Moreover, for a conspiracy, 2X1.1 "decreases by 3 levels the sentence, unless the defendant completed all of the acts the conspirators believed necessary on their part for the successful completion of the substantial offense or the circumstances demonstrate that the conspirators were about to complete all such acts before apprehension or interruption by bore similar court beyond their control." Here, 2X1.1 does not apply; the Second Circuit Court of

Appeals incorrectly negated remanding the case for resentencing under 2B1.1 intended loss analysis, which would have yielded no enhancement for intended losses, and if 2X1.1 was applied in conjunction with 2B1.1, a reduction of the base level for the Petitioner.


**E. This Case Is an Ideal Vehicle**

The question presented is purely legal: what “intended loss” means after the Sentencing Commission’s 2015 amendment and whether sentencing enhancements may be imposed absent proof of purposeful intent and possible loss. Resolution of this question will restore uniformity to federal sentencing law and ensure that punishment remains tied to culpability rather than speculation.

**CONCLUSION**

For the foregoing reasons, Laura Perryman, Petitioner, humbly requests that this Court issue a writ of certiorari to review the judgment of the Second Circuit Court of Appeals for her conviction and sentencing for health care fraud and conspiracy to commit health care fraud.

Respectfully Submitted,

  
/s/ \_\_\_\_\_

Laura Perryman, Pro Se Petitioner

February 11th, 2026

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