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Appendix A.

Decision by Summary Order of the Second Circuit Court of Appeals, August 18, 2025

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UNITED STATES OF AMERICA, Appellee, v. LAURA PERRYMAN, Defendant-Appellant.
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
2025 U.S. App. LEXIS 20977; 2025 LX 364726
24-1729-cr
August 18, 2025, Decided

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Prior History

{2025 U.S. App. LEXIS 1}Appeal from a judgment of the United States District Court for the Southern District of New York (Denise L. Cote, District Judge).United States v. Perryman, 2023 U.S. Dist. LEXIS 182981, 2023 WL 6622233 (S.D.N.Y., Oct. 11, 2023)

Counsel

For Appellee: MÓNICA P. FOLCH (Jacob M. Bergman, Steven J. Kochevar, Olga I. Zverovich, on the brief), Assistant United States Attorneys, for Matthew Podolsky, Acting United States Attorney for the Southern District of New York, New York, NY.

For Defendant-Appellant: BRIAN E. SPEARS (Janna D. Eastwood, on the brief), Spears Manning & Martini LLC, Southport, CT.

Judges: Present: WILLIAM J. NARDINI, SARAH A. L. MERRIAM, MARIA ARAÚJO KAHN, Circuit Judges.

CASE SUMMARYNo constructive amendment occurred because the Government's theory consistently focused on Perryman's misrepresentation of the White Stylet as a receiver, the court issued limiting instructions regarding misbranding, and the jury instructions on deception were consistent with precedent.

OVERVIEW:

Key Legal Holdings

Material Facts

Controlling Law

Court Rationale

OUTCOME:

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Procedural Outcome

LexisNexis Headnotes

Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Indictments

A constructive amendment of an indictment claim raised on appeal for the first time is subject to plain-error review.

Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Indictments Criminal Law & Procedure > Appeals > Reversible Errors > Charging Instruments Criminal Law & Procedure > Grand Juries > Indictments > Right to Indictment by Grand Jury

A constructive amendment occurs when the charge upon which the defendant is tried differs significantly from the charge upon which the grand jury voted. Not every alteration of an indictment rises to the level of a constructive amendment. For a defendant to prevail on such a claim, she must demonstrate that either the proof at trial or the trial court's jury instructions so altered an essential element of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury's indictment. An indictment is not constructively amended, however, where a portion of the indictment that is unnecessary for a conviction of the crime charged is removed or altered.

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Jury Instructions Criminal Law & Procedure > Jury Instructions > Objections

The court reviews preserved objections to jury instructions de novo but will reverse only if all of the instructions, taken as a whole, caused a defendant prejudice. Thus, a defendant challenging a jury instruction as erroneous must show both error and ensuing prejudice.

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Evidence Evidence > Relevance > Confusion, Prejudice & Waste of Time Evidence > Procedural Considerations > Rulings on Evidence Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Evidence

The court reviews evidentiary rulings for abuse of discretion. So long as the district court has conscientiously balanced the proffered evidence's probative value with the risk for prejudice, its conclusion will be disturbed only if it is arbitrary or irrational. That is, a trial court's evidentiary decision will be sustained unless manifestly erroneous. Even if a decision was manifestly erroneous, the court will affirm if the error was harmless.

Evidence > Testimony > Experts > Qualifications

Under Federal Rule of Evidence 702, a witness may be qualified as an expert by knowledge, skill, experience, training, or education where their scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Cumulative Errors

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The strength of the government's case is the most critical factor in assessing whether error was harmless.

Criminal Law & Procedure > Sentencing > Appeals > Proportionality Review

The court reviews a sentence for procedural reasonableness under a deferential abuse-of-discretion standard. This standard incorporates de novo review of questions of law (including interpretation of the Guidelines) and clear-error review of questions of fact.

***Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Conspiracy > Penalties
Criminal Law & Procedure > Sentencing > Imposition > Factors***

The text of USSG § 2X1.1(a) requires courts to consider any intended offense conduct when applying any adjustments to the offense level for the substantive offense, meaning that defendants are responsible for the losses their conspiracy intends to create.

***Evidence > Procedural Considerations > Burdens of Proof > Preponderance of Evidence
Criminal Law & Procedure > Sentencing > Imposition > Factors***

Although the district court's factual findings relating to loss must be established by a preponderance of the evidence, the court need not establish the loss with precision but rather need only make a reasonable estimate of the loss, given the available information.

USSG § 3B1.1(a) provides for a four-level increase in the offense level if the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive. Three factors weigh in determining the extensiveness of the fraud: (i) the number of knowing participants; (ii) the number of unknowing participants whose activities were organized or led by the defendant with specific criminal intent; (iii) the extent to which the services of the unknowing participants were peculiar and necessary to the criminal scheme.

Opinion

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Defendant-Appellant Laura Perryman appeals from a judgment of the United States District Court for the Southern District of New York (Denise L. Cote, *District Judge*) entered on June 17, 2024, sentencing Perryman principally to 72 months of imprisonment, to be followed by three years of supervised release. Following a two-week trial, Perryman was found guilty of conspiracy to commit wire fraud and health care fraud, in violation of 18 U.S.C. § 1349, and health care fraud, in violation of 18 U.S.C. § 1347. Perryman founded **{2025 U.S. App. LEXIS 2}** a company called Stimwave, which manufactured implantable devices used to treat chronic pain. The fraudulent scheme involved Perryman's creation of an inert device component called the "White Stylet," which she marketed as a functional receiver so that she could advise doctors to bill insurance companies for implanting the Stylet through a billing code designated for receivers. Perryman now appeals, challenging her

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conviction and sentence by arguing that: (i) the indictment was constructively amended by the trial evidence and the district court's jury instructions; (ii) the district court erred in its jury instructions regarding misbranding and intent under the health care fraud statute; (iii) the district court improperly excluded witness testimony and evidence; (iv) the district court erred in its loss amount calculation; and (v) the district court erred in applying a leadership-role enhancement. We assume the parties' familiarity with the case.

I. Constructive Amendment

A constructive amendment claim raised on appeal for the first time is subject to plain-error review. See *United States v. McGinn*, 787 F.3d 116, 128 (2d Cir. 2015).¹ Here, Perryman did not make any of the constructive amendment challenges at the district court that she now{2025 U.S. App. LEXIS 3} makes on appeal. We therefore review for plain error.

"A constructive amendment occurs when the charge upon which the defendant is tried differs significantly from the charge upon which the grand jury voted." *United States v. Dove*, 884 F.3d 138, 146 (2d Cir. 2018). "Not every alteration of an indictment, however, rises to the level of a constructive amendment." *Id.* For a defendant to prevail on such a claim, she "must demonstrate that either the proof at trial or the trial court's jury instructions so altered an *essential element of the charge* that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury's indictment." *United States v. Salmonese*, 352 F.3d 608, 620 (2d Cir. 2003) (emphasis added). "An indictment is not constructively amended, however, where a portion of the indictment that is unnecessary for a conviction of the crime charged is removed or altered." *Dove*, 884 F.3d at 146.

Perryman contends that the Government's proffered evidence and the district court's jury instructions constructively amended the indictment because: (i) the Government changed its theory that the White Stylet was a "useless piece of plastic" to a theory that the stylet was being misbranded as a receiver; (ii) the district court instructed the jury on the misdemeanor offense of{2025 U.S. App. LEXIS 4} misbranding despite the fact that Perryman was not charged with misbranding; and (iii) the district court instructed the jury that it was "unnecessary for the government to prove that any doctors were deceived" by Perryman's actions. Appellant Br. at 25-27.

We find these arguments unavailing. First, both the Government's theory of the case and the indictment focused primarily on Perryman's misrepresentation of the White Stylet as a receiver. See, e.g., App'x 45 ("LAURA PERRYMAN, the defendant, lied directly to doctors, and directed Company staff to lie to doctors, falsely stating that the White Stylet was a receiver."). Though the indictment also alleged that the White Stylet served no medical purpose, that allegation was non-essential and "does not affect the core elements of the crime." *Dove*, 884 F.3d at 147; see also *United States v. Autorino*, 381 F.3d 48, 54 (2d Cir. 2004) ("The government need not prove allegations of an indictment that are surplusage to the essential elements of the offenses charged."). Next, when the district court instructed the jury on misbranding, the court also issued a limiting instruction making clear that Perryman was not being charged with misbranding and that even if the jury were to find that misbranding occurred, they "may not{2025 U.S. App. LEXIS 5} consider evidence of misbranding as a substitute for proof that the defendant committed a crime with which she is charged in the indictment." App'x 990. The court's limiting instructions therefore eliminated any possibility that the instructions would modify an essential element of the offense such that the jury might convict Perryman of an offense other than those charged in the indictment. Finally, the district court's instruction stating that the Government did not need to prove any doctors were deceived is consistent with this Court's precedent. See *United States v. Reiffer*, 446 F.3d 65, 96 (2d Cir. 2006) ("[T]he defendant need not have completed or succeeded in his scheme to defraud . . ."). Because

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the jury did not need to find that any doctors were deceived to convict Perryman of fraud, no essential element of the charge was altered, and no constructive amendment occurred.

II. Jury Instructions

Perryman next argues that the district court erred in issuing jury instructions regarding misbranding and intent under the health care fraud statute. This Court reviews preserved objections to jury instructions *de novo* but will reverse only if all of the instructions, taken as a whole, caused a defendant prejudice." *United States v. Applins*, 637 F.3d 59, 72 (2d Cir. 2011). Thus, "[a] defendant{2025 U.S. App. LEXIS 6} challenging a jury instruction as erroneous must show both error and ensuing prejudice." *United States v. Sabhnani*, 599 F.3d 215, 237 (2d Cir. 2010).

We need not reach the correctness of Perryman's challenge to the jury instructions because she has failed to show how any claimed error caused her prejudice. With respect to the court's instructions regarding misbranding, Perryman's argument fails for the reasons we state above—any possibility of prejudice was eliminated by the court's limiting instructions. Perryman's challenge to the health care fraud instructions is likewise without merit. The district court's instruction tracked the two-pronged health care fraud statute, which criminalizes a scheme "(1) to defraud any health care benefit program" or "(2) to obtain, by means of false or fraudulent pretenses . . . money . . . under the custody or control of, any health care benefit program." 18 U.S.C. § 1347(a). The court clarified that the second prong did not require the Government to prove that Perryman specifically intended to defraud a healthcare benefit program. Perryman argues that the court's instruction with respect to the second prong allowed for conviction without finding that Perryman possessed any intent to defraud. But Perryman cannot show any prejudice{2025 U.S. App. LEXIS 7} from the instruction: the verdict form shows that the jury found her guilty under both prongs and so necessarily found that she intended to defraud a healthcare benefit program (*i.e.*, Medicare). Any alleged error would therefore be harmless.

III. Exclusion of Defense Witnesses and Billing Records

This Court reviews evidentiary rulings for abuse of discretion. *See United States v. Fazio*, 770 F.3d 160, 165 (2d Cir. 2014). "[S]o long as the district court has conscientiously balanced the proffered evidence's probative value with the risk for prejudice, its conclusion will be disturbed only if it is arbitrary or irrational." *United States v. Scully*, 877 F.3d 464, 474 (2d Cir. 2017). That is, a trial court's evidentiary decision "will be sustained unless manifestly erroneous." *United States v. Tapia-Ortiz*, 23 F.3d 738, 740 (2d Cir. 1994). And "[e]ven if a decision was manifestly erroneous, [this Court] will affirm if the error was harmless." *United States v. Litvak*, 889 F.3d 56, 67 (2d Cir. 2018).

Perryman challenges the district court's exclusion of testimony from two expert witnesses (Dr. David Spinner and Philip Desjardins) and three fact witnesses (Drs. George Arcos, Nameer Haider, and Jeffrey Dann). She also argues that the district court improperly excluded records of patients being reimbursed under the CPT 64590 code for implantation of a prior version of the StimQ PNS system without any stylet.

As to Dr. Spinner,{2025 U.S. App. LEXIS 8} Perryman contends that the district court erred in finding that he was not qualified to opine on CPT coding and that his testimony on this topic was irrelevant. We agree. Under Federal Rule of Evidence 702, a witness may be "qualified as an expert by knowledge, skill, experience, training, or education" where their "scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Dr. Spinner was the lead author of a textbook on the techniques used in PNS procedures, published extensively on this subject, performed hundreds of PNS procedures, trained other physicians on the StimQ PNS system, and regularly applied CPT codes to such procedures in his

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practice. This experience was sufficient to qualify Dr. Spinner to offer expert testimony on CPT coding with respect to the PNS procedures at issue in this case. Requiring Dr. Spinner to also have expertise in drafting CPT codes and implanting the White Stylet to qualify as an expert, as the district court did here, exceeded the court's proper gatekeeping function under Federal Rule of Evidence 702. Dr. Spinner's proposed testimony was also relevant to Perryman's intent, as it pertained to any ambiguity inherent in the {2025 U.S. App. LEXIS 9} relevant CPT codes, the responsibility of doctors for medical billing, and the appropriate coding for the StimQ PNS system, all of which bore on what Perryman should have understood to be covered by the CPT code 64590. The district court abused its discretion in concluding otherwise.

However, this error was harmless. Dr. Spinner's proposed testimony, had it been admitted, would not have refuted the overwhelming evidence of Perryman's fraudulent intent. See *United States v. McCallum*, 584 F.3d 471, 478 (2d Cir. 2009) ("[T]he strength of the government's case is the most critical factor in assessing whether error was harmless."). For example, Chad Andresen, Stimwave's Vice President of Marketing, testified that Perryman directed him and others to create the White Stylet knowing that it could not perform as a receiver, and that Perryman directly lied to, and instructed others to lie to, physicians about the White Stylet's ability to function as a receiver. The Government also introduced several exhibits, including training materials created by or at the direction of Perryman, that corroborated Andresen's testimony about Perryman's knowledge that the White Stylet was not a receiver and that it could not be billed under CPT code 64590, as well as Perryman's intent {2025 U.S. App. LEXIS 10} to deceive doctors into billing that code. In view of this evidence and the other trial evidence, excluding Dr. Spinner's proposed testimony was harmless.

The district court also erred in excluding the testimonies of Drs. George Arcos and Nameer Haider on their use of the StimQ PNS system in the field, as well as their beliefs about its functionality and proper billing codes. The district court concluded that this testimony was irrelevant because whether doctors were deceived did not bear on Perryman's participation in a scheme to defraud or to make false statements with intent to deceive, and unduly prejudicial because it risked confusing the jury with irrelevant evidence. However, this testimony was relevant to Perryman's intent. Drs. Arcos's and Haider's independent beliefs, based on Medicare guidelines, that the White Stylet could be billed under CPT code 64590 bore on whether Perryman could have reasonably believed the same and whether she acted with fraudulent intent in advocating for use of this code. The district court's exclusion of this testimony was thus in error. See *Litvak*, 889 F.3d at 68 ("Relevancy is a very low standard."). However, given the overwhelming evidence of Perryman's fraudulent intent, this {2025 U.S. App. LEXIS 11} error too was harmless.

Perryman's challenge to Philip Desjardins's exclusion also fails. Perryman does not acknowledge, much less rebut, the district court's conclusion that Philip Desjardins's expert testimony on whether the White Stylet would require a new FDA approval process constituted improper testimony on domestic law. See *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 144 (2d Cir. 2016) ("[O]ur longstanding rule [is] that expert testimony on issues of domestic law is not to be considered."). Her challenge to the exclusion of his testimony is therefore forfeited on appeal.

As to Jeffrey Dann, we conclude that Perryman has waived any challenge to the exclusion of portions of his testimony. Perryman confirmed in the district court that its preliminary ruling to strike parts of his testimony was "agreeable to the defendant." Trial Tr. 1732-33.2 This objection was therefore waived. See *United States v. Spruill*, 808 F.3d 585, 597 (2d Cir. 2015) ("We have identified waiver where a party asserts, but subsequently withdraws, an objection in the district court."). Perryman later attempted to question Dann about the purpose of certain emails exchanged between her and Dann that had been introduced as exhibits by the Government. The district court excluded this testimony, holding that the testimony already adduced-Dann's {2025 U.S. App. LEXIS 12}

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identity and area of expertise-was sufficient to allow Perryman's counsel to argue that the emails were not evidence of deception. See Trial Tr. 1566-67. Even if this were error, Perryman has not shown how the exclusion of this detail caused her prejudice, and we therefore find no reversible error.

Finally, with respect to the billing records, we hold this evidence was properly excluded. Perryman argues that the billing records were relevant to her motive because they showed successful reimbursement claims for implantations of the device without the White Stylet under the receiver billing code. This argument misses the point. There is no indication that Perryman knew about the particular procedures that were listed in the billing records or how they were billed, meaning there is no connection between the evidence and her motive. The district court therefore did not abuse its discretion in excluding the records. See *United States v. Townsend*, 987 F.2d 927, 930-31 (2d Cir. 1993) (finding no abuse of discretion where the district court excluded evidence that defendant claimed was necessary to establish motive because there was no connection between the evidence and the criminal conduct).

IV. Sentence Challenges

This Court reviews a sentence for procedural{2025 U.S. App. LEXIS 13} reasonableness under a "deferential abuse-of-discretion standard." *United States v. Singh*, 877 F.3d 107, 115 (2d Cir. 2017). This standard incorporates "de novo review of questions of law (including interpretation of the Guidelines) and clear-error review of questions of fact." *United States v. Legros*, 529 F.3d 470, 474 (2d Cir. 2008).

a. Loss Amount Calculation

Perryman first argues that "loss" under the Sentencing Guidelines is limited to actual losses and that the district court erred in using "intended loss," as opposed to "actual loss," when determining the loss amount under U.S.S.G. § 2B1.1(b)(1). However, whether Section 2B1.1(b)(1) covers intended loss has no effect on the Guidelines loss amount, because Perryman was separately convicted of conspiracy to commit fraud, which is governed by U.S.S.G. § 2X1.1. The text of that Guidelines section requires courts to consider "any *intended* offense conduct" when applying any adjustments to the offense level for the substantive offense, meaning that defendants are responsible for the losses their conspiracy *intends* to create. U.S.S.G. § 2X1.1(a) (emphasis added); see *United States v. Rosa*, 17 F.3d 1531, 1549-50 (2d Cir. 1994) (affirming the district court's consideration of the intended loss amount under Section 2B1.1(b)(1) based on the application of Section 2X1.1(a)). Perryman does not challenge the calculation under Section 2X1.1. Her challenge is therefore without merit. See *United States v. Kukoyi*, 126 F.4th 806, 812 (2d Cir. 2025) ("[W]e affirm the district court's . . . intended{2025 U.S. App. LEXIS 14} loss amount pursuant to the language of Section 2X1.1(a) and need not address [defendant's] arguments regarding the Guidelines commentary to . . . Section 2B1.1(b)(1) because an independent ground for the district court's decision remains unchallenged.").

Perryman next argues that the intended loss amount calculation was speculative and unreliable. "Although the district court's factual findings relating to loss must be established by a preponderance of the evidence, the court need not establish the loss with precision but rather need only make a reasonable estimate of the loss, given the available information." *United States v. Uddin*, 551 F.3d 176, 180 (2d Cir. 2009). The district court properly relied on sales data for the device and testimony from sales professionals, which provided a range of estimates for how often the White Stylet was implanted with the device, to arrive at a reasonable approximation of how many times the White Stylet was implanted in a given year. The loss amount calculation was therefore reasonably extrapolated from ample evidence in the record.

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Perryman also argues that the use of the White Stylet had no bearing on whether the procedure was reimbursable under the billing code, and that the district court erred in finding Perryman intended to inflict{2025 U.S. App. LEXIS 15} any pecuniary harm. These arguments, too, are unpersuasive. The district court's loss amount calculation was based on the loss Perryman *intended*-whether an implantation of the device without the White Stylet is reimbursable under the same code is irrelevant because the evidence shows Perryman created the White Stylet with the *intention* that it would trigger a separate reimbursement under the code. That evidence also supported the district court's finding that Perryman intended to inflict pecuniary harm-evidence which includes testimony from other employees that Perryman's purpose in creating the White Stylet was to allow doctors, when they could not implant an actual receiver component, to still implant something and bill it as a receiver to collect reimbursements under the code. The record thus amply supported the district court's findings.

b. Leadership-Role Enhancement

Lastly, Perryman challenges the district court's imposition of a leadership-role enhancement. Section 3B1.1(a) of the Sentencing Guidelines provides for a four-level increase in the offense level "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was *otherwise extensive*." U.S.S.G. § 3B1.1(a) (emphasis added). This Court{2025 U.S. App. LEXIS 16} has held that "[t]hree factors weigh in determining the extensiveness of the fraud: (i) the number of knowing participants; (ii) the number of unknowing participants whose activities were organized or led by the defendant with specific criminal intent; (iii) the extent to which the services of the unknowing participants were peculiar and necessary to the criminal scheme." *United States v. Archer*, 671 F.3d 149, 165 (2d Cir. 2011).

Perryman argues that the district court erred in applying the enhancement because there was inadequate evidence to establish "unknowing participants whose activities were organized or led by [Perryman] with criminal intent." Appellant Br. at 76. We disagree. The record contains sufficient evidence to support the district court's finding that Perryman organized or led the activities of unknowing participants with criminal intent, including: (i) testimony that an engineer was present at a company meeting with Perryman when the White Stylet was first conceived and developed; (ii) testimony that, at a "masterclass" for doctor-trainers, Perryman falsely taught the doctor-trainers that the White Stylet was functional and made of copper, though it had no copper component and therefore could not function as a receiver; and{2025 U.S. App. LEXIS 17} (iii) testimony regarding training materials approved by Perryman and given to sales representatives that identified the White Stylet as a receiver so that the reps would know which billing code to use.

We have considered Perryman's remaining arguments and find them unpersuasive. For the foregoing reasons, the judgment of the district court is **AFFIRMED**. Perryman's motion for bail pending appeal is **DISMISSED** as moot.

Footnotes

1

Unless otherwise indicated, when quoting cases, all internal quotation marks, alteration marks, emphases, footnotes, and citations are omitted.

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The appendices prepared by the parties do not include all of the trial transcripts. The portions of the trial transcript quoted here are docketed in the Southern District of New York docket, case number 1:23CR00117(DLC), at Docket Number 117.

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Appendix B.

Transcript and Link to Second Circuit Court of Appeals Hearing, May 29, 2025

May 29th, 2025, Second Circuit Court of Appeals

Case Number 24-1729,

Laura Perryman V. the United States

Transcript

<https://ww3.ca2.uscourts.gov/decisions/isysquery/79d61a8e-c29a-4dab-a8d4-a44c7b8daee8/301-310/list/>

Court Deputy

All persons having business before this court in the United States, Court of Appeals for the Second Circuit, are pending; give your attention to any showing that does not say United States of America and this honorable court.

Judge William J Nardini

Please be seated. Good morning, everyone. I understand from our courtroom deputy that all attorneys are present and accounted for, so we will dispense with the reading of the calendar. I will note in advance that we have a number of motions, all of which I believe are on submission, and we will take those under advisement. In addition, at the end of the. Calendar case 24-1890, United States versus Abdullah is also on submission and we will be taking that case under advisement as well before anybody starts. I do want to remind you that on the right side of the podium is a little black switch, and it raises and lowers the lectern. And I would encourage you, as you come up for your oral argument, to please adjust that you can move the microphones around. We want to hear every word of what are sure to be very enlightening or arguments today. And we're also streaming this. So we want to make sure that our remote audience can hear you as well. So with that, why don't we start with 24 Dash 1729 United States versus Perryman. I see Mr. Spears is here. bright and early. Mr. Spears, I understand you would like to reserve 2 minutes for rebuttal, is that right?

Brian Spears

Right, your honor. Thank. You.

Judge William J Nardini

Please proceed whenever you're ready.

Brian Spears

Brian Spears, for the appellant, Laura Perryman, may it please the court. I'd like to begin by discussing the constructive amendment that occurred in this case, and there are two clear examples of how the trial presentation and the jury instructions significantly altered the criminality alleged in the Indictment. First, the indictment alleges that Miss Perryman's scheme involved deceiving doctors. That was the essence of the core of the indictment: there's this lying to doctors, this deceit of doctors. But remarkably, the District Court instructed the jury that Miss Perryman was not charged with deceiving medical providers. That's the Appendix 988 that she

was not charged with deceiving medical providers. the government never called any doctors to testify, and all of this changed the core of the criminality. The essence of the fraud charge was that Miss Perryman deceived doctors. The District Court charged those core allegations right out of the case. The second example is that the indictment was predicated on this notion.

Judge William J Nardini

So why don't we just match that up? And thank you for directing us to 988, I think I see the line. That you're referring to the defendant is not charged with causing harm to patients or for deceiving medical providers, is that?

Brian Spears

Yes, your honor

Judge William J Nardini

Would you just point us to where in the indictment you're saying that there is that dramatic mismatch?

Brian Spears

Yes, your honor. So paragraph one refers to. Um, the notion that the doctors were unwittingly submitting fraudulent claims. ... Paragraph..

Judge William J Nardini

So wait a minute, say that again,

Brian Spears

right. So paragraph one and the overview.

Judge William J Nardini

The doctors were doing it unwittingly.

Brian Spears

Sorry, unwittingly correct. I mean essentially that they have been deceived by Miss Perriman to and unwittingly, thereby submitted fraudulent claims.

Judge William J Nardini

Does it? Do you have to be deceived to do something on unwittingly?

Brian Spears

I would, I would submit yes and then when?

Judge William J Nardini

I mean, Unwittingly just means you don't know what you're doing, right? I don't know that you have to be tricked into believing something contrary to what you're doing.

Brian Spears

Well. I I think give it read as a whole the indictment. If you look at paragraph 16, it says further Laura Perryman, the defendant, lied directly to doctors and directed company staff to lie to doctors.

Judge William J Nardini

Sir, which paragraph, just give me that again?

Brian Spears

thank your Honor. That's paragraph 16.

Judge William J Nardini

16. thats instructed, doctors. Where does it say lied?

Brian Spears

First, since further Laura Perryman, the defendant lied directly to doctors.

Judge William J Nardini

Paragraph 16 AM I looking at the right place?

Brian Spears

There is a superseding indictment.

Judge William J Nardini

I'm I'm probably looking at the wrong page. Give me a page in the appendix. I'm sorry.

Brian Spears

845 you're honor

Judge William J Nardini

On 845. Yeah, I'm looking at the. Wrong place. I'm sorry. So lied directly to doctors. But you have to, you have to. I'm just trying to follow. Why do you have to prove that they were deceived? Cause I thought a scheme to defraud means that you create a scheme. You lie to people. Maybe in an effort to get them tricked. But you don't have to succeed in tricking them, right? I mean, it's the creation and and execution of the scheme. To defraud.

Brian Spears

Correct.

Judge William J Nardini

That's a crime.

Brian Spears

I understand that, your honor, but. But but here, where the core of the indictment is that Miss Perryman was lying to doctors to deceiving them by making them believe that the white stylet was functional. Our position is that in fact it was functional, but. At the at the theory of the

government's case was that Miss Perryman was peddling his scheme to these doctors, which essentially was that they had to implant this white style. Which the the allegation is was was had no medical function and and and and by implanting that they would thereby qualify for reimbursement under CPT Code 64590. So that's that is the essence of the scheme and and and the other essence of the scheme which goes to the second example of constructive. Is in fact that the white style. was non functional, that it served no medical purpose. That was again, that's paragraph one. It's throughout the complaint that paragraph one of the indictment specifically says that the device served no medical purpose. And was inert and non-functioning again. A core allegation here now, as the trial wore on, I should back up the government in its opening statement, developed that theory very clearly argued to the jury that the white style was a "useless piece of plastic" and putting that in quotations. Looks as the trial wore on it be claimed, it became clear that there were purposes served by the white stylet and so the the the claims began to morph into this notion of, well, it wasn't serving as a receiver.

Judge William J Nardini

Well, that's what paragraph 16 says, right?

Brian Spears

Right.

Judge William J Nardini

Well, so stating that it was. Receiver so and then it had no receiver capabilities at all. So that theory was disclosed to the defense in the indictment, right?

Brian Spears

In part, your honor. I mean, I I do think that the essence of the. Charge was that the medical that the white style had served no medical purpose and the government opened on that and it became it it evolves into this notion that while it didn't have a receiver function and and and as a result of that the District Court accommodated that evolution by then. Injecting this notion of misbranding into.

Judge Maria Araújo Kahn

What I'm more interested in and and you've got about two minutes left in your argument, is not. I think I understand about your your argument on this. of the constructive modification of the of the indictment. But how does that relate to then denying the testimony, in essence, of almost every expert, the defense Proposed?

Brian Spears

yes, your honor

Judge Maria Araújo Kahn

I mean how does that then even if OK, the claim is the essence? Is you billed something as a receiver, it's not a receiver under a wrong code which is either up coding in this case or the wrong code for for a device that that isn't the one that was implanted. How does then that further affect the denial Of experts testifying about the proper use of the code?

Brian Spears

Right. Well, it it as as we've argued it, it denied Miss Perryman's right to present a defense in a fundamental way. There were multiple theories of the defense that were shut down. One of them was that the white style had actually served medical purposes. Another one was that you didn't need the white stylet it. To bill under CPT Code 64590 and Doctor Spinner would have testified to both of those points. Other witnesses would have. Well, so that was that. Shut down the defense in a fundamental way. Similarly, there was a tranche of doctor billing records that also would have established that insurance providers were providing coverage for the device before there were any stylets, white, pink or otherwise.

Judge Maria Araújo Kahn

And if if we were to agree with you that the defense was precluded from, in essence presenting these experts that went to its defense, how did that harm your client at all? How would you respond to sort of a harmless error?

Brian Spears

Right, your honor. Well, it deprived the defense. Of. Her ability to explain in a thorough way that the white style served medical purposes, that the white style it critically was not necessary for CPT code 64590 to apply, that was the whole theory of the case, and the motive was this stylet that was created so that this building code would apply and doctor Spinner, who was more than qualified to opin it in. This would have explained you don't need to stylet it to Bill this code other witnesses would have addressed that as well. And again, the billing records would go to that. There's another piece too, which was Doctor Dan. There was a good-faith defense presented. My client engaged Doctor Dan, who was one of the drafters of 64590, and that testimony was shut down as well. A little bit of the testimony. Came out, but eventually was stricken.

Judge Maria Araújo Kahn

That was the urologist.

Brian Spears

Correct. Yes, your honor. I see that my time is up.

Judge William J Nardini

OK, we're going to see you again shortly, so. Don't go away. Thank you. I want to hear from the government now.

Monica Folch

Good morning and may It please the court. My name is Monica Folch. I represent the United States in connection with this appeal, and I represented the United States in the proceedings below. Miss Perryman's conviction and her sentence should be affirmed here. There was no constructive amendment in this case. The government's case was consistent from the indictment through the trial that Miss Perryman invented the white stylet, the white stylet was not a receiver. It had no receiver functionality. Nevertheless, she told. Doctors falsely and instructed others at her company to tell doctors, falsely that it was receiver, that it had receiver functionality, and she did that in order to tell them to instruct them that they could also bill for the implantation of the white stylet using CPT code 64590.

Judge Maria Araújo Kahn

So, And I and I understand that. So help me understand how. It was not error for the court to preclude, for example, Doctor spinner doctor Eric's testimony when the court and I'm reading from a-475 of the appendix. The court says in in ruling on doctor Spinner he does not opine on the facts that are at the heart of the indictments, charges and the court says Perryman and her company told medical providers that the white stylet was a receiver and that they could use CPT code 64590 to bill. Insurers for implanting it as a receiver. When the court identifies that as the the heart of the government's case. Why would it preclude Dr. Spinner? Who is the head, the director of Pain Management who trains on the implementation of these types of devices? Maybe not this particular stylet at from testifying about the proper use of 64590. I'm struggling to understand how under Rule 702, his years of experience, his practice in billing that code does not make him a sufficient expert to get through the gatekeeping function and allow that testimony. Can you explain that to? Me.

Monica Folch

That's right. Judge Cote found excluded the testimony on 2 grounds, first under 702 because it was unreliable and separately under 403 because it was.

Judge Maria Araújo Kahn

I'm not talking about, you know, the the production of the stylet at itself. I'm focused on the use she's charged with up coding, misusing a CPT code. I tried many cases as a healthcare fraud prosecutor. I never had it. Space, perhaps? I wish I had now..where the court didn't allow the defense to present a coding expert to talk about the proper use of the code. And so I'm struggling to understand why that was not allowed.

Monica Folch

Here. Well, Doctor Spenner was Simply put, it was not a coding expert. Doctor Spinner had no experience. Crafting codes he had no.

Judge Maria Araújo Kahn

You don't have to have experience drafting codes under Rule 702. dot. Aren't doctors supposed to? Doctors ..who use these codes and bill under the codes have a responsibility under Medicare and insurance providers to understand the codes to keep up with the updates on the codes and to Bill adequately. Why isn't that sufficient to allow them to testify now you. You know, the fact that he didn't draft the coats have at it on cross examination. Why doesn't that go to weight instead of the gatekeeping function of his ability to testify?

Monica Folch

Well here, doctor spinner. Did not refer to any guidance. Any information about what the codes were, how they how they applied in particular circumstances.

Judge Maria Araújo Kahn

Its a doctor using code right? Do you agree with that? Do you can see that he's a doctor using these codes day-to-day and as a as a training head of the department of a major hospital in New York.

Monica Folch

Doctor spinner. Bills for the implantation of PNS devices he did not offer any information about how often he used 64590, the circumstances under which he used 64590, even though Judge Cote offered him an opportunity to supplement his report to provide any basis for actually. Giving the proposed opinion but.

Judge Sarah A. L Merriam

Well, he says I'm frequently. Called upon to provide input and advice on CPT codes and with regard to procedures involving the STIM Q system, I would typically advise that 64590 would be applicable. That's in his report, so he says he's frequently called on to give this kind of advice and he gives advice that 64590 is appropriate. What? What more would be required for him to say he has experience and expertise in the question of whether 64590 applies?

Monica Folch

What the District Court asked doctor the District Court found that that was insufficient.

Judge Sarah A. L Merriam

That's in the revised version. I don't know that's.

Monica Folch

That was in the original as well. There was no additional information that he provided about and in this case the code of 64590 does have quite a lot of background, which was. In the record, because the the question of the appropriateness of that code where you have on the one hand an integrated receiver and separately your implanting making a separate incision. To implant a separate receiver that actually was the subject of guidance by the AMA, asked to that specific code and it was in the record because that was an issue that Miss Perryman had to confront when she was marketing this device. Doctor Spinner did not address any of that guidance, did not address. Anything other than what he said was quote "the plain language". A plain reading of 64590, that is, he said, as a Doctor Who implants this device. Often, frequently I look at the 64590, the plain language of that code, and I say it's OK, the District Court said that in light of the issues, in this case, more was required to be an expert than just a consumer.

Judge Maria Araújo Kahn

But here's here's here's. Here's the issue though. All the. May have been a perfect cross examination for the government of this expert that seems to me goes to weight the extent to which he has used this goes to the weight, not the courts gatekeeping function, particularly when the court did allow, for example, staff. Of this company who aren't doctors who don't didn't draft CPT codes to testify about. about the coding and how the the coding should be appropriately done. There were other experts. The court allowed correct? for the government?

Monica Folch

Your honor, the quote allow. The court allowed one expert who did not opine on the appropriateness of the code because he would have just been he had the same exact experience that doctor Spinner had. That that was just somebody who performed these and sought reimbursement under them.

Judge Sarah A. L Merriam

So was the jury required to find that the code was inappropriate, and if so, what did they base that on? If nobody opined on it?

Monica Folch

What? The jury, what the jury was presented with, and this goes to Judge Kahn's point about the testimony of when 64590 was allowed. What the jury was presented with was testimony from Stimwave employees, who were trained by Miss Perryman and others in in her staff, that's 64590 was required it when you had a separate incision. When you're implanting a separate receiver, Miss Perryman put out presentations. That Said that, this is it is a myth that the the the device has an integrated receiver. The device has a separate receiver that has to be separately implanted and it is only if you are separately implanting a receiver that you are entitled to separately Bill 64590. There are two codes at issue at fault here

Judge Sarah A. L Merriam

right I that false, though? is that the government theory. But that's not right. I'm trying to figure out how. You're just you're telling us that there was nobody who testified about the appropriate use of 64590? But it feels....

Monica Folch

there's no expert testimony about the appropriate use of 64590.

Judge Sarah A. L Merriam

Did the jury conclude somehow that that the defendant urged doctors to improperly use 64590? Is that the government's Theory?

Monica Folch

The government's theory is that the defendant urged doctors to implant a nonfunctioning component as a receiver and bill it as a receiver. That is the governments theory, because that is what evidence.

Judge William J Nardini

But I'm sorry, just to go back there, I think the question was and ..therefore,, it wasn't the government theory and therefore the use of the code was improper. Because if you don't have the, therefore ..you don't have any fraud, ...do you?

Monica Folch

You're right, you're you're right that that. Is correct.

Judge William J Nardini

So I guess just following up on Judge Miriam's question. The government's theory, I thought, did rest on the notion that. People were tricked or whatever into using a code they ought not to have used because if your theory was this is a perfectly good code for this procedure. But she tricks people into using the wrong reason to use an otherwise permissible code, then there be no fraud, right?

Monica Folch

That's right, the government. The government did present evidence that 64590 required a the separate implantation of a receiver.

Judge Sarah A. L Merriam

and from whom did that evidence come? Because you just told it wasn't from your expert,

Monica Folch

it wasn't from it you took from our experts.

Judge Sarah A. L Merriam

you told us that a doctor like Spinner, who has experience with training on this was not qualified to explain that. So who was qualified to tell the jury that 64590 was the wrong code? Who testified competently that that was the wrong code.?

Monica Folch

There was ample documentary evidence and evidence from the witnesses themselves.

Judge Sarah A. L Merriam

Give me. Point me to something. Give me something that starts with A... I'm sorry... Of a witness... just how does the jury know this? Because you're you're telling us your expert didn't tell them. But it doesn't feel like lay testimony, or if it were, it'd be weird that spinner wasn't allowed to testify about it. So.

Monica Folch

I don't have the I I regret that I don't have sites right now, but. It was Chad Andreessen testified about what the coding were, and um Erin Wilt, who was a. A sales representative.

Judge Sarah A. L Merriam

So he was qualified to testify about whether 64590 was the appropriate code for the white stylet.

Monica Folch

He was qualified to testify about what, Everybody's understanding.

Judge Sarah A. L Merriam

Who gets us to the "and therefore"

Monica Folch

And the the, the well, the language of the code, the codes were in. And the and guy.

Judge Sarah A. L Merriam

So the plain language of the code?

Monica Folch

The language of the code... The documentary evidence about what the code meant. All of that was in the record. There was ample evidence of what the code was for the jury to make its own determination. ..Yes, about what the code required.

Judge Sarah A. L Merriam

That was something a lay person, a lay jury, was capable of doing?

Monica Folch

That was something that, that.

Judge Sarah A. L Merriam

They and that those documents came in through whom?

Monica Folch

Those documents came in through Mr. Andreessen. They came in through Miss Wilt. They came in through the Miss Fuchs who was the government. Uh. I'm sorry, summary witness.

Judge Maria Araújo Kahn

Thank you. Yes.

Judge William J Nardini

I think. We've. Kept you up a little long, so thank you for that. And why don't we hear from Mr. Spears again and and Mr. Spears. Why don't. We try to keep it to two minutes.

Brian Spears

Yes, Sir.

Judge William J Nardini

If you could focus maybe on responding. To some of the issues that were. Vetted with the government,.

Brian Spears

yes your honor, will do so. I think we can all agree that whether 64590 applied under the circumstances. It was fundamental to this case. It was the IT was the premise on which the governments fraud claim was. Doctor Spinner was the most qualified witness or potential witness to to opine on this period, and he was precluded. Andreessen cooperating witness employees Stimwave, wilt sales representative employee of Stimwave this is a very specialized area CPT coding. The use of medical devices, how they're implanted, whether they qualify for the the provisions of this particular code. This is exactly what the court was concerned about in the United States versus litvackin a highly specialized area. That particular case involved bond trading. Expert testimony is is fundamental, and it was fundamental to the defense and Litvack, and it's fundamental to the defense here. And just I just wanted before I conclude, just step back a little bit. Further, because the the preclusion of Doctor Spinner is emblematic of the way this trial went there, it was. There were many witnesses, 2 experts, 2 non expert witnesses precluded. Dr. Dana's testimony was cut off after 2 minutes and generally stricken. And and it it really, truly compromised the defense here and in a fundamental way can't possibly be considered to be harmless under the circumstance. If you read this record, it is striking. There are no further questions. I'll sit.

Judge William J Nardini

Down thank you to both sides. Very well argued, very helpful arguments. We will take the case Under advisement.

Appendix C.

Southern District of New York Judgment and Sentencing Order, June 17, 2024

UNITED STATES DISTRICT COURT

Southern District of New York

UNITED STATES OF AMERICA

v.

LAURA PERRYMAN

JUDGMENT IN A CRIMINAL CASE

Case Number: S1 23-CR-00117-01 (DLC)

USM Number: 48091-510

Derek Cohen

AUSA Steven Kochevar

Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) _____

pleaded nolo contendere to count(s) _____
which was accepted by the court.

was found guilty on count(s) 1s & 2s
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 1349	Conspiracy to Commit Health Care Fraud and Wire Fraud		1s
18 U.S.C. § 1347	Health Care Fraud		2s

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

Count(s) 1-2 & 3s is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Judgment 6/17/2024

Signature of Judge *Denise Cote*

Name and Title of Judge Denise Cote, U.S. District Judge

Date June 17, 2024

DEFENDANT: LAURA PERRYMAN
CASE NUMBER: S1 23-CR-00117-01 (DLC)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

72 months

The court makes the following recommendations to the Bureau of Prisons:
that the defendant be designated to a facility as close to Florida as possible.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on 7/26/2024

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: LAURA PERRYMAN
CASE NUMBER: S1 23-CR-00117-01 (DLC)

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

3 years

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: LAURA PERRYMAN
CASE NUMBER: S1 23-CR-00117-01 (DLC)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: LAURA PERRYMAN
CASE NUMBER: S1 23-CR-00117-01 (DLC)

SPECIAL CONDITIONS OF SUPERVISION

You shall submit your person, and any property, residence, vehicle, papers, computer, other electronic communication, data storage devices, cloud storage or media, and effects to a search by any United States Probation Officer, and if needed, with the assistance of any law enforcement. The search is to be conducted when there is reasonable suspicion concerning violation of a condition of supervision or unlawful conduct by the person being supervised. Failure to submit to a search may be grounds for revocation of release. You shall warn any other occupants that the premises may be subject to searches pursuant to this condition. Any search shall be conducted at a reasonable time and in a reasonable manner.

You must provide the Probation Department access to any and all requested financial information.

You shall be supervised by the district of residence.

DEFENDANT: LAURA PERRYMAN
 CASE NUMBER: S1 23-CR-00117-01 (DLC)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
TOTALS	\$ 200.00	\$	\$	\$	\$

The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(f), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss***</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
----------------------	----------------------	----------------------------	-------------------------------

TOTALS	\$	0.00	\$	0.00
--------	----	------	----	------

Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the fine restitution.

the interest requirement for the fine restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: LAURA PERRYMAN
CASE NUMBER: S1 23-CR-00117-01 (DLC)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A Lump sum payment of \$ 200.00 due immediately, balance due
- not later than _____, or
 in accordance with C, D, E, or F below; or
- B Payment to begin immediately (may be combined with C, D, or F below); or
- C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- Joint and Several

Case Number
Defendant and Co-Defendant Names
(including defendant number)

Total Amount

Joint and Several
Amount

Corresponding Payee,
if appropriate

- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):
- The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

Appendix D.

Opinion of Southern District of New York Denying Motion in Limine, February 1 and 15, 2024

UNITED STATES OF AMERICA -v- LAURA PERRYMAN, Defendant.
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
2024 U.S. Dist. LEXIS 17528
23cv117 (DLC)
February 1, 2024, Decided
February 1, 2024, Filed

Editorial Information: Prior History

United States v. Perryman, 2023 U.S. Dist. LEXIS 182981 (S.D.N.Y., Oct. 11, 2023)

Counsel {2024 U.S. Dist. LEXIS 1} For the United States of America: Jacob Max Bergman, Monica Pilar Folch, U.S. Attorney's Office, SDNY, New York, NY; Steven John Kochevar, U.S. Attorney's Office, SDNY, White Plains, NY.

For the defendant Laura Perryman: Derek A. Cohen, Jenifer Camilla Berger, Walden Macht & Haran, New York, NY; Daniel Post Filor, Greenberg Traurig, New York, NY; Jared Edward Dwyer, Greenberg Traurig, P.A, Miami, FL.

Judges: DENISE COTE, United States District Judge.

Opinion

Opinion by: DENISE COTE

Opinion

OPINION AND ORDER

DENISE COTE, District Judge:

The defendant has been charged in a three-count indictment with conspiracy, health care fraud and securities fraud based on the defendant's alleged material misrepresentations about components of a medical device. The Government and the defendant each filed motions in limine on January 12. Trial is scheduled to commence on February 20.

To assist in the resolution of the issues to be addressed at the final pretrial conference of February 2, this Opinion sets out some of the well-established legal principles that will be incorporated into the rulings at the conference. They are the evidentiary standards under Rules 401, 403, 404, 702, and 704(b) of the Federal Rules of Evidence.

Rule 401

Evidence is relevant if it has any tendency to make a fact of consequence in {2024 U.S. Dist. LEXIS 2} determining the action "more or less probable than it would be without the evidence." Fed. R. Evid. 401. "To be relevant, evidence need not be sufficient by itself to prove a fact in issue, much less prove it beyond a reasonable doubt." United States v. Litvak, 808 F.3d 160, 179-80 (2d Cir. 2015) (citation omitted). The Rule 401 standard is "low" and "easily satisfied." United States v.

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Gramins, 939 F.3d 429, 450 (2d Cir. 2019). "Unless an exception applies, all relevant evidence is admissible." Id. (citation omitted).

Rule 403

Under Rule 403, courts may exclude relevant evidence "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. The term unfair prejudice refers "to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." United States v. Massino, 546 F.3d 123, 132-33 (2d Cir. 2008) (citation omitted). The question of whether evidence is unduly prejudicial to a criminal defendant

is not whether the evidence [is] suggestive of guilt -- as all relevant evidence offered against the defendant would suggest guilt -- but rather, whether it tends to have some adverse effect upon a defendant beyond tending to prove the fact or issue that justified its{2024 U.S. Dist. LEXIS 3} admission into evidence. This adverse effect may consist of a tendency of the evidence in question to prove some adverse fact not properly in issue or unfairly excite emotions against the defendant.Id. (citation omitted).

Rule 702

Federal Rule of Evidence 702 governs the admission of expert testimony. Rule 702 allows a "witness who is qualified as an expert by knowledge, skill, experience, training, or education" to testify, "in the form of an opinion or otherwise," if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.Fed. R. Evid. 702. Under this rule, the trial judge must first address "the threshold question of whether a witness is qualified as an expert by knowledge, skill, experience, training, or education to render his or her opinions." Nimely v. City of New York, 414 F.3d 381, 396 n.11 (2d Cir. 2005) (citation omitted).

If the trial judge finds the witness is qualified, she then has a "gatekeeper function," which requires her to ensure that any and all scientific testimony or evidence{2024 U.S. Dist. LEXIS 4} admitted "is not only relevant, but reliable." Restivo v. Hessemann, 846 F.3d 547, 575 (2d Cir. 2017) (citing Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)). Expert testimony is relevant where it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Amorgianos v. AMTRAK, 303 F.3d 256, 265 (2d Cir. 2002) (citation omitted). To determine whether expert testimony has a sufficiently reliable foundation to be admissible at trial, a district court should consider the "indicia of reliability identified in [Rule] 702." Clerveaux v. E. Ramapo Central School Dist., 984 F.3d 213, 233 (2d Cir. 2021) (citation omitted). A district court may consider as well the Daubert factors in its assessment of the reliability of expert testimony. These factors include: "(1) whether the methodology or theory has been or can be tested; (2) whether the methodology or theory has been subjected to peer review and publication; (3) the methodology's error rate; and (4) whether the methodology or technique has gained general acceptance in the relevant scientific community." Id. (citing Daubert, 509 U.S. at 593-94).

The Daubert inquiry, however, is "fluid and will necessarily vary from case to case." In re Mirena IUS Levonorgestrel-Related Prods. Liab. Litig. (No. II), 982 F.3d 113, 123 (2d Cir. 2020) (citation omitted). The gatekeeping inquiry must, of course, "be tied to the facts of a particular case." United States v. Requena, 980 F.3d 29, 47 (2d Cir. 2020) (citation omitted).

"[T]here are many different kinds of experts,{2024 U.S. Dist. LEXIS 5} and many different kinds of expertise." United States v. Romano, 794 F.3d 317, 330 (2d Cir. 2015) (quoting Kumho Tire Co. v. Carmichael, 526 U.S. 137, 150, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)). A court must "assess whether the expert employs the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." Restivo, 846 F.3d at 577 (citation omitted). Expert testimony should be excluded "if it is speculative or conjectural or based on assumptions that are so unrealistic and contradictory as to suggest bad faith or to be in essence an apples and oranges comparison." Zerega Ave. Realty Corp. v. Hornbeck Offshore Transp., LLC, 571 F.3d 206, 214 (2d Cir. 2009) (citation omitted). Contentions that an expert's "assumptions are unfounded," however, "go to the weight, not the admissibility, of the testimony." Id. (citation omitted). "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." Daubert, 509 U.S. at 596.

To be admissible, an expert's analysis must be reliable "at every step." Amorgianos, 303 F.3d at 267. "[A]ny step that renders the analysis unreliable under the Daubert factors renders the expert's testimony inadmissible." Id. (emphasis omitted). Moreover, "nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the{2024 U.S. Dist. LEXIS 6} ipse dixit of the expert." Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997).

"The role of an expert is not to displace the jury but rather to provide the groundwork to enable the jury to make its own informed determination." In re Methyl Tertiary Butyl Ether (MTBE) Products Liab. Litig., 725 F.3d 65, 114 (2d Cir. 2013) (citation omitted). Expert testimony assists the trier of fact "when it sheds light on activities not within the common knowledge of the average juror." United States v. Wexler, 522 F.3d 194, 204 (2d Cir. 2008) (citation omitted).

Finally, expert testimony is inadmissible where it will "usurp either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying that law to the facts before it." United States v. Stewart, 433 F.3d 273, 311 (2d Cir. 2006) (citation omitted). An opinion "that purports to explain the law to the jury trespasses on the trial judge's exclusive territory." Id. Courts therefore must exclude "testimony that states a legal conclusion." United States v. Feliciano, 223 F.3d 102, 121 (2d Cir. 2000) (citation omitted).

Rule 704(b)

Under Federal Rule of Evidence 704(b), an expert witness in a criminal case "must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense." Fed. R. Evid. 704(b). "Those matters are for the trier of fact alone." Id. Rule 704(b) "disables even an expert from expressly stating the final conclusion or inference as to a defendant's actual mental state at the time{2024 U.S. Dist. LEXIS 7} of a crime." United States v. Haynes, 729 F.3d 178, 196 (2d Cir. 2013) (citation omitted). "Such testimony is prohibited because it poses a uniquely heightened danger of intruding on the jury's function." Id. (citation omitted).

Rule 404(b)

Under Rule 404, "evidence of a crime, wrong, or other act is not admissible to prove a person's

character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b) (1). Rule 404 permits the use of evidence of a "crime, wrong, or other act" for "another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b) (2). Other act evidence offered to show knowledge or intent must be "sufficiently similar to the conduct at issue to permit . . . a reasonable inference of knowledge or intent from the other act." United States v. Zhong, 26 F.4th 536, 551 (2d Cir. 2022) (citation omitted). "[P]ursuant to this Circuit's 'inclusionary approach' to such evidence, other-crimes evidence is admissible if offered for any purpose other than to show a defendant's criminal propensity." United States v. Williams, 930 F.3d 44, 62 (2d Cir. 2019) (citation and emphasis omitted).

To determine if prior act evidence pursuant to Rule 404(b) is properly admitted, courts consider whether: "(1) the prior act evidence was offered for a proper purpose; (2) the evidence was relevant{2024 U.S. Dist. LEXIS 8} to a disputed issue; (3) the probative value of the prior act evidence substantially outweighed the danger of its unfair prejudice; and (4) the court administered an appropriate limiting instruction." United States v. Dupree, 870 F.3d 62, 76 (2d Cir. 2017) (citation omitted).

Evidence of uncharged criminal conduct is not evidence of other crimes, wrongs, or acts under Rule 404(b) if that conduct arose out of the same transaction or series of transactions as the charged offense, if it is inextricably intertwined with the evidence regarding the charged offense, or if it is necessary to complete the story of the crime on trial.United States v. Robinson, 702 F.3d 22, 37 (2d Cir. 2012) (citation omitted). A district court may admit "evidence of uncharged criminal conduct to complete the story of the crime on trial or to demonstrate some fact in issue other than a defendant's criminal propensity" only if it "satisfies the probative-prejudice balancing test of Rule 403 of the Federal Rules of Evidence." United States v. Zhong, 26 F.4th at 551 (citation omitted).

Dated: New York, New York

February 1, 2024

/s/ Denise Cote

DENISE COTE

United States District Judge

UNITED STATES OF AMERICA -v- LAURA PERRYMAN, Defendant.
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
2024 U.S. Dist. LEXIS 26530
23cr117 (DLC)
February 15, 2024, Decided
February 15, 2024, Filed

Editorial Information: Prior History

United States v. Perryman, 2023 U.S. Dist. LEXIS 182981 (S.D.N.Y., Oct. 11, 2023)

Counsel

{2024 U.S. Dist. LEXIS 1}For the United States of America: Jacob Max Bergman, Monica Pilar Folch, U.S. Attorney's Office, SDNY, New York, NY; Steven John Kochevar, U.S. Attorney's Office, SDNY, White Plains, NY.

For the defendant Laura Perryman: Derek A. Cohen, Jenifer Camilla Berger, Johnson Li Lin, Sean T. Haran, Walden Macht & Haran, New York, NY.

Judges: DENISE COTE, United States District Judge.

Opinion

Opinion by: DENISE COTE

Opinion

OPINION AND ORDER

DENISE COTE, District Judge:

The defendant has been charged in a three-count indictment with conspiracy, health care fraud, and securities fraud based on the defendant's alleged material misrepresentations about a component of a medical device. Trial is to begin on February 20. Following the exclusion the defendant's medical expert, Dr. David Spinner, the defendant was granted permission to file a supplemental report. The Government has renewed its motion to exclude Dr. Spinner's testimony. For the following reasons, the Government's motion is granted.

Background

The defendant, Laura Perryman, is the founder and former CEO of Stimwave Technologies Incorporated and Stimwave LLC (together, "Stimwave"). The defendant oversaw the design of the StimQ Peripheral Nerve Stimulation ("PNS") System (the "Device"),**{2024 U.S. Dist. LEXIS 2}** a medical device that treats chronic pain by producing electrical currents to target peripheral nerves, that is, the nerves outside the spinal cord. During the time at issue, the Device consisted of four components relevant to the indictment's charges: the Lead, the Battery, the Pink Stylet, and the White Stylet. The Lead is an implantable electrode array that stimulates the targeted nerve. The externally worn Battery provides power to the Lead. The Pink Stylet contains copper and is implanted

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into the body to function as an "antenna" and thereby to lengthen the transmission range of the Battery.

In its product materials for the Device, Stimwave identified both the Pink Stylet and the White Stylet as "receivers." When selling the Device to medical providers, Perryman informed them that they could bill insurers for implanting the White Stylet as a receiver using CPT code 64590.1 It is undisputed, however, that the White Stylet cannot function as a receiver; it has no copper.

On December 19, 2023, the Government filed a superseding indictment against the defendant, charging her with one count of conspiracy to commit health care fraud and wire fraud, one count of health care fraud, and one{2024 U.S. Dist. LEXIS 3} count of securities fraud. The Government and the defendant filed their respective motions in limine on January 12, 2024. Among the Government motions was a motion to exclude the testimony of Dr. Spinner. His expert report was attached to the Government's motion. The parties filed their opposition to these motions on January 19.

At a February 2 final pretrial conference, the Court excluded the testimony of Dr. Spinner pursuant to Fed. R. Evid. 401, 403, and 702. One of Dr. Spinner's opinions pertains to the functionality of the White Stylet. Dr. Spinner stated that the White Stylet served a medical purpose, namely that it helped prevent fluid ingress into the Lead. He added that it may also assist in preventing the collapse of the Lead's lumen. The Court held that Dr. Spinner's opinion as to the White Stylet's functionality was inadmissible. Dr. Spinner's report did not provide a description of how he formed his opinion on functionality. His report did not detail his experience with the White Stylet or his basis for opining that it served a medical purpose. It was just the ipse dixit of the expert. He didn't describe any testing or experimentation with the White Stylet or any generally accepted view of the{2024 U.S. Dist. LEXIS 4} medical community. The Court also found that Dr. Spinner's opinion as to the White Stylet's potential for preventing collapse of the lumen was inadmissible speculation.

Dr. Spinner also opined that claims for reimbursement for implanting the Device could have been appropriately submitted to medical insurers using CPT code 64590 whether the White Stylet, the Pink Stylet, or no stylet was used with the StimQ PNS System. The Court noted that the jury needs to understand something about CPT codes because they were the mechanism through which medical providers were paid and were thereby able to cover the cost of the Device. It did not appear from his report, however, that Dr. Spinner was an expert on CPT codes. Dr. Spinner's opinion on CPT codes was given without any explanation for its basis. He failed to identify any sources or authorities on which his opinion was based, nor did he demonstrate that he has specialized knowledge as to the interpretation or application of CPT codes. The Court also found that Dr. Spinner's opinion regarding CPT codes was irrelevant since it didn't confront the fact that Stimwave had sold the White Stylet by describing it as a receiver.

In light of the Court's{2024 U.S. Dist. LEXIS 5} ruling, the defendant requested leave to supplement Dr. Spinner's expert report. The Court granted this request, ordering the defendant to provide the supplemental report to the Government by February 6. The Court requested that the defendant point to any passage in the Stimwave materials that described the functionality of the White Stylet as Dr. Spinner did. The Government renewed its motion to exclude Dr. Spinner's testimony on February 9 and the defendant opposed that motion on February 12. This Opinion addresses the admissibility of the opinions offered by Dr. Spinner in the February 6 report.

Discussion

The Government has renewed its motion to exclude the testimony of Dr. Spinner, as described in the February 6 report, as unreliable, unsupported, irrelevant and unduly prejudicial. Dr. Spinner was given an opportunity to supplement his earlier report to demonstrate that the opinions he expressed

in his initial report were sufficiently reliable to meet the requirements of Rule 702 and Daubert. This he has failed to do. In addition, he used the opportunity to add new opinions regarding CPT codes and the functionality of the White Stylet, and an entirely new opinion regarding patient harm. **{2024 U.S. Dist. LEXIS 6}** Each of these new opinions is untimely and stricken on that ground alone. In addition, the defendant has failed to show that any of the opinions expressed in the February 6 report are admissible under Rule 702.

In an Order of February 1, the Court outlined the law to be applied to the motions in limine addressed at the final pretrial conference on the following day. For ease of reference, several of those legal principles are repeated here and additional evidentiary rules relevant to the issues raised by the parties in the discussion of Dr. Spinner's recent report are also described. Those legal standards pertain to Rules of Evidence 403, 702 and 703.

I. Legal Standards

A. Rule 403

Under Rule 403, courts may exclude relevant evidence "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. The term unfair prejudice refers "to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." United States v. Massino, 546 F.3d 123, 132-33 (2d Cir. 2008) (citation omitted).

B. Rule 702

Federal Rule of Evidence 702 governs the admission of expert testimony. Rule 702 allows a "witness who is qualified **{2024 U.S. Dist. LEXIS 7}** as an expert by knowledge, skill, experience, training, or education" to testify, "in the form of an opinion or otherwise," if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case. Fed. R. Evid. 702. Under this rule, the trial judge must first address "the threshold question of whether a witness is qualified as an expert by knowledge, skill, experience, training, or education to render his or her opinions." Nimely v. City of New York, 414 F.3d 381, 396 n.11 (2d Cir. 2005) (citation omitted).

If the trial judge finds the witness is qualified, she then has a "gatekeeper function," which requires her to ensure that any and all scientific testimony or evidence admitted "is not only relevant, but reliable." Restivo v. Hesseman, 846 F.3d 547, 575 (2d Cir. 2017) (citing Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)). Expert testimony is relevant where it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Amorgianos v. AMTRAK, 303 F.3d 256, 265 (2d Cir. 2002) (citation omitted). **{2024 U.S. Dist. LEXIS 8}** To determine whether expert testimony has a sufficiently reliable foundation to be admissible at trial, a district court should consider the "indicia of reliability identified in [Rule] 702." Clerveaux v. E. Ramapo Central School Dist., 984 F.3d 213, 233 (2d Cir. 2021) (citation omitted). A district court may consider as well the Daubert factors in its assessment of the reliability of expert testimony.

These factors include: "(1) whether the methodology or theory has been or can be tested; (2) whether the methodology or theory has been subjected to peer review and publication; (3) the methodology's error rate; and (4) whether the methodology or technique has gained general acceptance in the relevant scientific community." Id. (citing Daubert, 509 U.S. at 593-94).

The Daubert inquiry, however, is "fluid and will necessarily vary from case to case." In re Mirena IUS Levonorgestrel-Related Prods. Liab. Litig. (No. II), 982 F.3d 113, 123 (2d Cir. 2020) (citation omitted). The gatekeeping inquiry must, of course, "be tied to the facts of a particular case." United States v. Requena, 980 F.3d 29, 47 (2d Cir. 2020) (citation omitted).

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To be admissible, an expert's analysis must be reliable "at every step." Amorgianos, 303 F.3d at 267. "[A]ny step that renders the analysis unreliable under the Daubert factors renders the expert's testimony inadmissible." Id. (emphasis omitted). Moreover, "nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert." Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997). "[W]hen an expert opinion is based on data, a methodology, or studies that are simply inadequate to support the conclusions reached, Daubert and Rule 702 mandate the exclusion of that unreliable opinion testimony." Amorgianos, 303 F.3d at 266 (citation omitted).

"The role of an expert is not to displace the jury but{2024 U.S. Dist. LEXIS 10} rather to provide the groundwork to enable the jury to make its own informed determination." In re Methyl Tertiary Butyl Ether (MTBE) Products Liab. Litig., 725 F.3d 65, 114 (2d Cir. 2013) (citation omitted). Expert testimony assists the trier of fact "when it sheds light on activities not within the common knowledge of the average juror." United States v. Wexler, 522 F.3d 194, 204 (2d Cir. 2008) (citation omitted).

C. Rule 703

Rule 703 of the Federal Rules of Evidence allows an expert to present opinions derived from facts and data that are not otherwise admissible. It provides:

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect. Fed. R. Evid. 703.

"A district court has discretion under Federal Rule of Evidence 703 to determine whether the expert acted reasonably in making assumptions of fact upon which he would base his testimony." Electra v. 59 Murray Enterprises, Inc., 987 F.3d 233, 254 (2d Cir. 2021) (citation omitted).

Although the Rules permit experts some leeway with respect to hearsay evidence, Fed. R. Evid. 703, a party{2024 U.S. Dist. LEXIS 11} cannot call an expert simply as a conduit for introducing hearsay under the guise that the testifying expert used the hearsay as the basis of his testimony. Marvel Characters, Inc. v. Kirby, 726 F.3d 119, 136 (2d Cir. 2013) (citation omitted).

II. Dr. Spinner's Opinions

In his February 6 report, Dr. Spinner provides opinions addressed to three topics: CPT codes, the functionality of the White Stylet, and patient harm. Although he was allowed to file a supplemental report to provide support for the opinions he had timely disclosed to the Government, he has used this opportunity to add additional opinions as well. The opinions addressed to each of these three topics are inadmissible for the reasons described at the final pretrial conference and below.

A. CPT Codes

Dr. Spinner first opines in his February 6 report that CPT codes are "drafted in a manner that contemplates application to the medical procedure employed." He adds that CPT codes may be susceptible to "varying interpretation." Based on "[his] familiarity with the Device itself, and [his] familiarity with the procedure to implant neurostimulator devices to treat chronic pain", he opines that the procedure to permanently implant the StimQ PNS System "came within the plain language interpretation" {2024 U.S. Dist. LEXIS 12} of CPT code 64590. This was so when the provider "utilized" the White Stylet, the Pink Stylet, or no stylet "because the procedure always involved the insertion of a receiver." Dr. Spinner also explains his understanding of how CPT codes generally come to be drafted and why CPT code 64590 was revised in January 2024. He concludes that the revised CPT code 64590 and a new code that was created were "issued to cover new and innovative PNS devices such as the StimQ PNS System."²

Dr. Spinner's report does not provide a basis to find that he has any expertise in the drafting or revision of CPT codes. He is a physician who specializes in pain management. In giving his background he emphasizes the following. He is personally responsible for claims submitted to insurers when he has implanted PNS devices. He highlights a book for which he is the lead author that addresses the use of ultrasound techniques, which he explains are used to properly place neurostimulators implanted to treat peripheral nerve pain. He trains other physicians in PNS procedures. During that training he is frequently asked to give advice on CPT codes and "would typically advise that the prior version of CPT Code 64590 would be applicable" {2024 U.S. Dist. LEXIS 13} prior to the release of new CPT codes in 2024."

Dr. Spinner also fails to show that he has acquired experience with implanting the White Stylet that qualifies him in opining on the use of CPT codes for that procedure. Dr. Spinner does not say that he ever implanted the White Stylet as a component of the StimQ PNS System. He does say that he "led trainings" on implanting the Device but does not say whether the White Stylet was a component of the Device at that point in time and whether his advice on CPT Codes addressed what code should be used in connection with a procedure that included implanting the White Stylet. He does not opine on facts that are at the heart of the indictment's charges: that Perryman and her company told medical providers that the White Stylet was a receiver and that they could use CPT code 64590 to bill insurers for implanting it as a receiver.

In sum, the revised report does not cure the deficiencies that the Court highlighted at the February 2 conference. Thus, Dr. Spinner's testimony on CPT codes is excluded under Rule 702 as beyond his areas of expertise, as unreliable and as irrelevant. Pursuant to Rule 403, it is excluded as creating an unacceptable risk of unfair prejudice {2024 U.S. Dist. LEXIS 14} and as highly likely to confuse the jury and distract their attention from the issues that they must resolve. These concerns far outweigh

any minimal probative value from the testimony.

In her opposition to the Government's motion to preclude Dr. Spinner from testifying, the defendant does not suggest that Dr. Spinner has any expertise in CPT codes other than through his experience as a practitioner. She argues that, because it is the responsibility of the provider to determine which CPT code applies to their medical procedures, Dr. Spinner's experience as a provider qualifies him to serve as an expert. But Dr. Spinner's experience as a provider does not qualify him to opine on the drafting or revision of CPT codes. He is not involved in those processes and to the extent his February 6 report addresses those topics, it is beyond his area of expertise and inadmissible.

While the defendant has shown that Dr. Spinner is an experienced practitioner in the use of PNS devices, it bears repeating that his expert report remains silent as to his experience with the White Stylet. He does not explain whether he has ever personally implanted the White Stylet or trained others to do so, or whether{2024 U.S. Dist. LEXIS 15} he has ever had to decide in either context which CPT code should he used to bill for a procedure in which the White Stylet is implanted. Nor does the fact that he has experience selecting CPT codes when implanting PNS devices make him an expert in CPT codes. Nor does the fact that he may be asked and choose to answer questions about CPT codes when training others how to implant a PNS device make him an expert on the codes. These deficiencies are directly relevant to whether he is qualified to serve as an expert regarding CPT codes in general and more specifically as an expert on CPT codes that will be relevant to the issues here.

B. Functionality of the White Stylet

Dr. Spinner next opines that the White Stylet served "a number of medical functions." He does not discuss whether it could serve as a receiver. He opines instead that it performed three other functions.³ It "filled the inner lumen, thereby helping to prevent fluid ingress into the stimulator receiver and electrode array, which could result in a loss of function and heightened risk of infection or other collateral complications." He adds that it "would also assist in preventing the collapse of the" lumen and in "stabilizing{2024 U.S. Dist. LEXIS 16} and providing additional rigidity to stimulator receiver."

Dr. Spinner's opinion regarding the functionality of the White Stylet is excluded under Rules 702 and 403. Dr. Spinner has provided no basis to find that this testimony constitutes a reliable expert opinion as required by Rule 702 and Daubert. Any probative value, which is minimal, is substantially outweighed by the risks of confusion, misleading the jury, and unnecessarily prolonging the trial.

Dr. Spinner does not explain the basis for his opinions regarding functionality. He does not refer to any testing that supports these opinions of the need to use the White Stylet, which was sold as a receiver, to perform entirely separate functions. He does not point to any company-issued literature that describes any of these separate functions as necessary to the success of its electrode array or as reasons for implanting the White Stylet. This absence is striking since, during the February 2 conference, the Court requested that the defendant identify any company-issued literature regarding this functionality. He does not even describe his own experience with the White Stylet, for example to explain why he found it necessary to implant the White Stylet even though{2024 U.S. Dist. LEXIS 17} he understood it was not a receiver. There is simply no support or explanation given to allow a finding that these opinions on functionality rest on a reliable basis or are anything other than Dr. Spinner's pronouncements.

The two documents to which Dr. Spinner cites do not fill this gap. One is a document co-authored by the defendant. While the defendant will be given an opportunity at trial to explain her understanding of functionality, an expert cannot be a substitute for that testimony. Fed. R. Evid. 704(b). In any

event, Dr. Spinner does not quote any passage explaining that the stylet assists the functionality of the Lead by sealing the lumen, preventing the lumen's collapse, or stabilizing the Lead. His citation to a book regarding pacemakers is similarly vague.

Nor is Dr. Spinner's testimony salvaged by his observation that he is unaware of any study suggesting that leaving an implantable device "open" in the body is "desirable or beneficial". He adds that there is no PNS device on the market that leaves the device "open". But Dr. Spinner does not explain how the White Stylet prevents fluid ingress into the lumen, does not describe any testing to confirm that the White Stylet succeeds in that function, {2024 U.S. Dist. LEXIS 18} nor does he compare its success in doing so with any other solution for that issue. His testimony, again, is simply a bald, unsupported statement of opinion.

In her opposition to the Government's motion, the defendant argues that Dr. Spinner's expert opinion is reliable because it is based on his professional experience. But again, Dr. Spinner does not describe any professional experience with the White Stylet, the functions it has served when he implanted the Device, and how he knows that the White Stylet has in fact prevented fluid from entering the Lead. In fact, Dr. Spinner does not state that he ever implanted the Device during the years when it was sold with the White Stylet. Dr. Spinner also does not state that he described the functionality of the White Stylet during the training sessions he conducted on PNS devices. Therefore, even if use of the White Stylet in his own practice would be sufficient to find Dr. Spinner an expert on its functionality, his expert report does not describe that use. His testimony is not sufficiently reliable to meet the Rule 702 standard.

Finally, the defendant asserts that Dr. Spinner's testimony is supported by a learned treatise, specifically the publication {2024 U.S. Dist. LEXIS 19} that the defendant co-authored in 2015. See Fed. R. Evid. 803(18). The authoritative nature of a study, and its admissibility into evidence, may be adequately established through the testimony of an expert witness. Caruolo v. John Crane, Inc., 226 F.3d 46, 55 (2d Cir. 2000). Dr. Spinner, however, fails to explain why this article is trustworthy or authoritative. While defense counsel provides citation to that article, nothing in that article addresses the role of a stylet in preventing fluid from entering the lumen of the Lead, preventing the collapse of the lumen or stabilizing the Lead. The only function of the antenna that is discussed is its function as a receiver. To wit, "[t]he deeper a device antenna is placed in tissue, the longer the antenna must be to receive sufficient power from the emitted microwave frequencies due to the wavelength of the electromagnetic energy." The article that the defendant co-authored does not, therefore, provide a basis to find that Dr. Spinner's opinion about the functionality of the White Stylet is supported by a learned treatise or is otherwise sufficiently reliable to be presented to a jury.

C. Patient Harm

Finally, Dr. Spinner adds new opinions on the topic of patient harm that were not included in his initial report. He says {2024 U.S. Dist. LEXIS 20} that he is unaware "of any indication" that use of the White Stylet "caused patient harm". He adds that it is "highly unlikely" in his experience that its use would be the cause of any "actual patient harm."

These opinions are untimely. His expert report was due January 5 and these opinions were not included in that report. They are therefore excluded on that basis alone. The defendant has also failed to show that Dr. Spinner's testimony regarding patient harm is admissible evidence.

In any event, it appears that the reason for proffering these opinions no longer exists. The defendant feared that the Government would offer evidence at trial that use of the White Stylet had caused patient harm. For this reason, one of her motions in limine requested that the Government be precluded from introducing such evidence. The Court required the parties to confer regarding the

issue. In a letter of February 13, the Government represents that it will not offer evidence of patient harm unless "the defense opens the door to the question of patient harm or benefit."

D. Rebuttal of Government Experts

The defendant argues that she has a right to rebut the Government's experts and that the exclusion of {2024 U.S. Dist. LEXIS 21} Dr. Spinner's testimony will deprive her of a fair trial. She points out that Dr. Spinner is a recognized expert in PNS procedures. These arguments do not confront the legal impediments to the admission of testimony by Dr. Spinner. His proffered testimony is inadmissible under the well established legal standards recited above. The Rules of Evidence play an essential role in protecting a party's right to a fair trial and the defendant will be allowed to offer evidence and confront the Government's evidence to the extent permitted by those rules.

Conclusion

The Government's renewed motion in limine of February 9 to exclude the expert testimony of Dr. Spinner is granted.

Dated: New York, New York

February 15, 2024

/s/ Denise Cote

DENISE COTE

United States District Judge

Footnotes

1

Current Procedural Terminology ("CPT") codes are used to track and bill medical, surgical, and diagnostic services. Medical insurers use CPT codes to determine how much money to pay medical providers.

2

As noted above, the opinions offered for the first time in the February 6 report must also be excluded as untimely.

3

Two of these three opinions must be excluded as untimely.

Appendix E.

Opinion of Southern District of New York Denying Defense Motion to Dismiss, October 11,

2023

UNITED STATES OF AMERICA, -v- LAURA PERRYMAN, Defendant.
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
2023 U.S. Dist. LEXIS 182981; 2023 LX 76685
23cr117 (DLC)
October 11, 2023, Decided
October 11, 2023, Filed

Editorial Information: Subsequent History

Later proceeding at United States v. Perryman, 2024 U.S. Dist. LEXIS 17528 (S.D.N.Y., Feb. 1, 2024) Motion denied by United States v. Perryman, 2024 U.S. Dist. LEXIS 23373, 2024 WL 515248 (S.D.N.Y., Feb. 9, 2024) Motion granted by United States v. Perryman, 2024 U.S. Dist. LEXIS 26530, 2024 WL 639332 (S.D.N.Y., Feb. 15, 2024) Decision reached on appeal by, Motion dismissed by, As moot United States v. Perryman, 2025 U.S. App. LEXIS 20977 (Aug. 18, 2025)

Counsel {2023 U.S. Dist. LEXIS 1} For the United States of America: Jacob M. Bergman, Monica P. Folch, United States Attorney's Office, SDNY, New York, NY; Louis A. Pellegrino, United States Attorney's Office, SDNY, New York, NY; Steven J. Kochevar, USAO, White Plains, NY.

For the defendant Laura Perryman: Derek A. Cohen, Jennifer C. Berger, Johnson L. Lin, Sean T. Haran, Walden Macht & Haran LLP, New York, NY.

Judges: DENISE COTE, United States District Judge.

Opinion

Opinion by: DENISE COTE

Opinion

OPINION AND ORDER

DENISE COTE, District Judge:

On March 6, 2023, Laura Perryman was charged in a two-count indictment for health care fraud and for conspiring to commit health care fraud and wire fraud, in violation of 18 U.S.C. §§ 1347, 2, and 1349. Trial is set to begin on February 12, 2024.

On September 15, Perryman filed a motion to dismiss the indictment for lack of specificity and for being unconstitutionally vague. In the alternative, the defendant seeks a bill of particulars. For the following reasons, the motion is denied.

As described in the Indictment, Perryman was the CEO of Stimwave Technologies Incorporated and Stimwave LLC (together, the "Company"). It asserts that from at least from 2017 to 2020, she engaged in a scheme to design and market an inert, non-functioning component {2023 U.S. Dist. LEXIS 2} of a medical device known as the StimQ PNS System (the "Device"). According to the

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indictment, the component at issue, known as the White Stylet, served no medical purpose, but was marketed to be implanted into patients to make the product more profitable for billing doctors and medical providers, and thereby support the Company's price for the Device. In turn, those providers would unwittingly submit fraudulent claims for reimbursement to Medicare or medical insurers for the implantation.

Perryman argues that the indictment is defective because it fails to identify any specific claim for reimbursement that was fraudulent or any single wire transaction that furthered the conspiracy. She argues that the voluminous discovery provided by the Government is useless and does not help her to identify the charged conduct or to prepare a defense.

I. Lack of Specificity

The law regarding the adequacy of an indictment is well established. Rule 7(c), Fed. R. Crim. P., requires an indictment to be a plain, concise, and definite written statement of the essential facts constituting the offense charged. "When the charges in an indictment have stated the elements of the offense and provided even minimal protection against double jeopardy, [the Court of Appeals] has repeatedly refused, in the absence of any showing of prejudice, to dismiss charges for lack of specificity." U.S. v. Stringer, 730 F.3d 120, 124 (2d Cir. 2013) (citing U.S. v. Walsh, 194 F.3d 37, 45 (2d Cir. 1999)). It has long been true that "the government need not particularize all of its evidence" in an indictment. U.S. v. Cephas, 937 F.2d 816, 823 (2d Cir. 1991).

The indictment identifies with sufficient particularity the nature of the charge against Perryman. It includes the elements of the offenses and sufficient factual information to enable her to prepare for trial and to interpose a plea of double jeopardy should she be indicted again for the charged conduct.

II. Void for Vagueness

Perryman's argument that the indictment must be dismissed as void for vagueness is no more successful. She contends that the statutory elements of charges in the indictment, as applied to her, are not conveyed by terms with clear definitions and settled meanings.

The void for vagueness doctrine generally requires that a penal statute "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." U.S. v. Napout, 963 F.3d 163, 181 (2d Cir. 2020) (citation omitted). This doctrine does not require "meticulous specificity." U.S. v. Farhane, 634 F.3d 127, 139 (2d Cir. 2011) (citation omitted). "[I]t requires only that the statutory language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." Id. (citation omitted).

"[V]agueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis." U.S. v. Coppola, 671 F.3d 220, 235 (2d Cir. 2012) (citation omitted). "In an as-applied challenge, one whose conduct is clearly proscribed by the statute cannot successfully challenge it for vagueness." U.S. v. Nadirashvili, 655 F.3d 114, 122 (2d Cir. 2011) (citation omitted).

The indictment, and its statutory components, more than meet the requirements of due process. They provide Perryman with fair notice of the conduct which the indictment asserts violated the cited statutes. The scheme to defraud on which the two counts are based is clearly stated. It charges Perryman with designing a non-functional component of the Device, with misrepresenting that the White Stylus was functional when it was not, with allowing and encouraging providers to implant this non-functional component of the Device into their patients' bodies, and with encouraging providers to

bill insurers for doing so. If proven at trial, this conduct{2023 U.S. Dist. LEXIS 5} falls within the heartland of the healthcare fraud statute and, when advanced through wire communications, within the heartland of the wire fraud statute. There is no ground to dismiss the indictment as unconstitutionally vague.

Perryman argues that the indictment's charges are vague because the Government will have to rely at trial on an interpretation of Current Procedural Terminology ("CPT") codes, which can be ambiguous. The White Stylus is either functional or not. If the Government shows at trial that it is not functional, there is no CPT code that would permit reimbursement for implanting it. The defendant does not contend otherwise.

The defendant relies on Siddiqi v. U.S., 98 F.3d 1427 (2d Cir. 1996). In Siddiqi, the court examined the defendant doctor's use of a CPT code to determine whether an inference of "dishonest intent" could be "drawn from use of the code." Id. at 1439. Here, the Government's allegations of Perryman's dishonest intent do not depend on her interpretations of ambiguous CPT codes. The Government's allegations instead rely on the functionality of the White Stylet and Perryman's representations to doctors about its functionality. While CPT codes are used to obtain insurance reimbursement, the defendant has not shown{2023 U.S. Dist. LEXIS 6} that there is any ambiguity about the meaning of a particular code that is pertinent to the indictment's charges or to her defense to its charges.

III. Bill of Particulars

Perryman seeks a bill of particulars in which the Government would identify each false claim that Perryman caused providers to submit to insurers, the total amount billed for those claims, the specific misrepresentations made by Perryman regarding the Device or the White Stylet, the wire communications made in furtherance of the conspiracy, and her coconspirators. This application is denied.

Rule 7(f), Fed. R. Crim. P., permits a defendant to move for a bill of particulars. Rule 7(f) "permits a defendant to seek a bill of particulars in order to identify with sufficient particularity the nature of the charge pending against him, thereby enabling defendant to prepare for trial, to prevent surprise, and to interpose a plea of double jeopardy should he be prosecuted a second time for the same offense." U.S. v. Bortnovsky, 820 F.2d 572, 574 (2d Cir. 1987).

But a bill of particulars is required "only where the charges of the indictment are so general that they do not advise the defendant of the specific acts of which he is accused." U.S. v. Chen, 378 F.3d 151, 163 (2d Cir. 2004) (citation omitted). "[A] bill of particulars is not necessary where the government{2023 U.S. Dist. LEXIS 7} has made sufficient disclosures concerning its evidence and witnesses by other means." Id. (citation omitted). "Acquisition of evidentiary detail is not the function of the bill of particulars." U.S. v. Torres, 901 F.2d 205, 234 (2d Cir. 1990) (citation omitted). Since the Government's evidence at trial may be limited by a bill of particulars, care must be taken to require it only when necessary. U.S. v. Rosa, 507 F.3d 142, 154 (2d Cir. 2007).

Perryman has not shown that she needs a bill of particulars. The indictment's charges and the theory of the prosecution are easily understood. The Government has made substantial discovery, including production of the § 3500 material months before trial. The defendant has abundant evidence and time to prepare for trial.

The defendant's arguments for a bill of particulars largely miss the point. The Government has no burden to identify a specific fraudulent insurance claim. The defendant is charged with engaging in a scheme to defraud; she is not charged with submitting any particular claim to an insurer with intent to defraud that insurer.

Dated: New York, New York

October 11, 2023

/s/ Denise Cote

DENISE COTE

United States District Judge

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Appendix E.

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Appendix G.

Superseding Indictment, December 19, 2023

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X

UNITED STATES OF AMERICA :

- v. - : **SUPERSEDING INDICTMENT**

LAURA PERRYMAN, : S1 23 Cr. 117 (DLC)

Defendant. :

----- X

COUNT ONE
(Conspiracy to Commit Health Care Fraud and Wire Fraud)

The Grand Jury charges:

OVERVIEW

1. LAURA PERRYMAN, the defendant, is the former Chief Executive Officer (“CEO”) of Stimwave Technologies Incorporated and Stimwave LLC (together, “Stimwave” or the “Company”). From at least in or about 2017, up to and including in or about 2020, PERRYMAN, as the Company’s CEO, engaged in a multi-year scheme (the “Scheme”) to design, create, manufacture, and market an inert, non-functioning component of a medical device that served no medical purpose, but was implanted into patients, in order to make the product more profitable by billing doctors and medical providers, who in turn would unwittingly submit fraudulent claims for reimbursement to Medicare and private insurance for the implantation of this medical device.

Background on PERRYMAN

2. At all relevant times, LAURA PERRYMAN, the defendant, claimed to have multiple degrees, including a PhD in Bioengineering and Biomedical Engineering, and claimed to have over 30 years of engineering development experience creating innovative, state-of-the-art, artificial intelligence wireless transmission systems for micro-sized, nanotechnology-based medical devices.

3. In or about 2010, LAURA PERRYMAN, the defendant, and others, founded Stimwave in Arizona. PERRYMAN served as CEO of the Company from in or about 2010 through in or about November 2019, when she was terminated by the Company.

Background on Stimwave

4. Stimwave was founded on the premise that its products would provide non-opioid alternatives to chronic pain management.

5. In or about 2013, Stimwave relocated from Arizona to Florida. The Company ultimately grew from several employees to over 100 personnel. Despite its growth, the Company remained a closely-held company that was controlled by LAURA PERRYMAN, the defendant.

6. At all times relevant to this Indictment, Stimwave was primarily a device manufacturer and provider of implantable neurostimulation products that treated chronic pain. As the founder and CEO of Stimwave, LAURA PERRYMAN, the defendant, oversaw the design of the StimQ PNS System (the "Device"), a neurostimulator medical device that treated chronic pain by producing electrical currents to target peripheral nerves outside the spinal cord.

The Fraud Scheme

7. Beginning in or about 2017, Stimwave designed, manufactured, and distributed the Device, which was cleared by the U.S. Food and Drug Administration (the "FDA") that same year.

8. LAURA PERRYMAN, the defendant, was, at all relevant times, extensively involved in overseeing all aspects of the Company, including product design and manufacture, hiring and firing of employees, marketing of the Device to doctors, training regarding the implantation of the Device into patients (including by approving training materials and by participating in cadaver labs where a trainer demonstrated implantation of the Device by performing the procedure on a cadaver), research into and development of improvements to the Device, and the billing and reimbursement coding associated with the sale of the Device to doctors and medical providers.

9. When Stimwave brought the Device to market in or about 2017, the Device contained three primary components: (i) an implantable electrode array (the "Lead") that stimulated the nerve; (ii) an externally worn battery that sat outside the body and wirelessly provided power to the Lead through the patient's skin (the "Battery"); and (iii) a separate implantable receiver measuring approximately 23 cm in length with a distinctive pink handle (the "Pink Stylet").

10. The Pink Stylet contained copper that functioned like an antenna to transmit energy from the Battery to the Lead under circumstances where, because of the location of the implant of the Lead, the Battery could not be placed directly on or next to the Lead.

11. Stimwave sold the Device to doctors and medical providers for over approximately \$16,000. Medical insurance providers, including Medicare, would reimburse

medical practitioners for implanting the Device into patients through two separate reimbursement codes, known as CPT codes¹ - one for implantation of the Lead, and a second for implantation of the Pink Stylet. The billing code for implanting the Lead, CPT code 64555, provided for reimbursement at a rate of between approximately \$4,000 and \$6,000, while the billing code for implanting the Pink Stylet, CPT code 64590, provided for reimbursement at a rate of between approximately \$16,000 and \$18,000.

12. Soon after the Device was released, physicians informed Stimwave that they were having trouble implanting the Pink Stylet in certain patients because the Pink Stylet was too long. At all relevant times, LAURA PERRYMAN, the defendant, knew that the Pink Stylet could not be cut or trimmed to shorten it without interfering with the functionality of the Pink Stylet as a receiver. PERRYMAN also knew that the Device could function without a receiver, so long as the Battery was placed close enough to the Lead.

13. LAURA PERRYMAN, the defendant, nevertheless insisted that the Device ship with two implantable components, because without a second component for doctors to implant and seek reimbursement for, the Device would likely not be profitable for doctors and medical providers, thereby making it far more difficult for Stimwave to sell the Device to doctors and medical providers.

14. LAURA PERRYMAN, the defendant, did not lower the price of the Device so that its cost to doctors and medical providers could be covered by reimbursement for the implantation of only the Lead – by utilizing CPT code 64555, which provided for reimbursement

¹ Current Procedural Terminology, or “CPT,” codes offer doctors and health care professionals a uniform language for coding medical services and procedures to streamline reporting to entities such as Medicare and private insurance companies. Among other things, CPT codes are used for administrative management purposes such as claims processing, and for developing guidelines for medical care review.

at a rate of between \$4,000 and \$6,000 – nor did PERRYMAN recommend that doctors not implant the Device or its receiver component in cases where the Pink Stylet could not fit comfortably. Instead, PERRYMAN directed that Stimwave create a new stylet – known as the “White Stylet” – that served no medical purpose, but could be cut to size by the doctor, so that doctors and medical providers would continue to purchase and use the Device in smaller anatomical spaces and continue to bill for the implantation of a receiver component using the reimbursement CPT code 64590. The White Stylet was not submitted to the FDA for clearance.

15. LAURA PERRYMAN, the defendant, oversaw all relevant aspects of the design and creation of the White Stylet. For example, PERRYMAN personally approved the design of the White Stylet, which showed that it contained no copper or other conductive material, and therefore could not function as a receiver.

16. Further, LAURA PERRYMAN, the defendant, lied directly to doctors, and directed Company staff to lie to doctors, falsely stating that the White Stylet was a receiver and therefore purportedly provided some functionality. In fact, the White Stylet was non-functional, and had no receiver capabilities at all. PERRYMAN also told doctors, and directed Company staff to tell doctors, that the White Stylet should be implanted in patients for whom the Pink Stylet was too long. In addition, PERRYMAN directed other employees at the company to “vouch” for the efficacy of the White Stylet, when she knew that the White Stylet was non-functional.

17. While CPT code 64590 may have been appropriate for implantation of a functioning receiver such as the Pink Stylet, it would not have covered the implantation of a component with no receiver or other medical functionality, such as the White Stylet. Nonetheless, LAURA PERRYMAN, the defendant, instructed doctors and other medical personnel, and directed Company staff to instruct doctors and other medical personnel, to use the second billing

code, CPT 64590, when implanting the White Stylet, resulting in a reimbursement rate of approximately \$16,000 by Medicare and private insurers.

18. As a result of these misrepresentations regarding the functionality of the White Stylet, LAURA PERRYMAN, the defendant, caused doctors and medical providers to unwittingly submit fraudulent reimbursement claims for implantation of the White Stylet to Medicare, resulting in millions of dollars in losses to the federal government.

PERRYMAN Lies to Her Investors About Stimwave and the Device

19. Between April 2018 and July 2019, Stimwave raised a total of approximately \$40,999,501 through a Series D offering of shares of preferred stock. In connection with the sale of certain of these shares (the “Securities”), LAURA PERRYMAN, the defendant, made representations to certain investors about Stimwave and the Device which were false and misleading. Specifically, PERRYMAN, who was the primary point of contact for the Series D investors, provided the investors with materials that falsely and misleadingly depicted the Device as containing only the Pink Stylet (and not the White Stylet), described the functionality of the receiver component of the Device, and stated that the Device had achieved regulatory clearance in the United States. Indeed, PERRYMAN materially misled certain investors, in substance and in part, by suggesting and representing to investors that the Device’s implantable components were reimbursable and cleared by the FDA, whereas in fact the Device actually contained the White Stylet, which, as PERRYMAN well knew, was a dummy component that was not reimbursable through CPT Code 64590, had not been disclosed to the FDA, and that doctors were being instructed to implant and then separately bill insurers for as a functioning receiver. The investors purchased the Securities, in large part, based on PERRYMAN’s and others’ representations about the Device. Had these investors known of the White Stylet—including that it was made entirely

of plastic, was not reimbursable through CPT Code 64590, could not function as a receiver, and was not disclosed to the FDA—they would not have purchased the Securities.

STATUTORY ALLEGATIONS

20. From at least in or about 2017, up to and including 2020, in the Southern District of New York and elsewhere, LAURA PERRYMAN, the defendant, and others known and unknown, willfully and knowingly combined, conspired, confederated, and agreed together and with each other to commit wire fraud and health care fraud, in violation of Title 18, United States Code, Sections 1343 and 1347.

21. It was a part and an object of the conspiracy that LAURA PERRYMAN, the defendant, and others known and unknown, knowingly having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, would and did transmit and cause to be transmitted by means of wire, radio, and television communication in interstate and foreign commerce, writings, signs, signals, pictures, and sounds for the purpose of executing such scheme and artifice, in violation of Title 18, United States Code, Section 1343, to wit, PERRYMAN and others agreed to and did make material misrepresentations in the course of the Scheme, namely about the White Stylet, which served no medical purpose, thereby causing doctors and medical providers to purchase the Device and seek fraudulent reimbursement payments from insurance providers, including federal healthcare payors, such as Medicare, and, for the purpose of executing such Scheme, transmitted and caused to be transmitted wire transfers and wire communications in interstate commerce.

22. It was a further part and an object of the conspiracy that LAURA PERRYMAN, the defendant, and others known and unknown, knowingly and willfully would and

did execute, and attempt to execute, a scheme and artifice to defraud a health care benefit program, and to obtain, by means of false and fraudulent pretenses, representations, and promises, money and property owned by, and under the custody and control of, a health care benefit program, in connection with the delivery of and payment for health care benefits, items, and services, in violation of Title 18, United States Code, Section 1347, to wit, PERRYMAN and others agreed to and did make material misrepresentations in the course of the Scheme, thereby causing doctors and medical providers to purchase the Device and seek fraudulent reimbursement payments from insurance providers, including federal healthcare payors, such as Medicare.

(Title 18, United States Code, Section 1349.)

COUNT TWO
(Health Care Fraud)

The Grand Jury further charges:

23. The allegations contained in paragraphs 1 through 19 of this Indictment are repeated and realleged as if fully set forth herein.

24. From at least on or about 2017, up to and including 2020, in the Southern District of New York and elsewhere, LAURA PERRYMAN, the defendant, knowingly and willfully executed, and attempted to execute, a scheme and artifice to defraud a health care benefit program and to obtain, by means of false and fraudulent pretenses, representations, and promises, money and property owned by, and under the custody and control of, a health care benefit program, in connection with the delivery of and payment for health care benefits, items, and services, to wit, PERRYMAN made material misrepresentations in the course of the Scheme, thereby causing doctors and medical providers to purchase the Device and seek unlawful reimbursement payments from insurance providers, including federal healthcare payors, such as Medicare.

(Title 18, United States Code, Sections 1347 and 2.)

COUNT THREE
(Securities Fraud)

The Grand Jury further charges:

25. The allegations contained in paragraphs 1 through 19 of this Indictment are repeated and realleged as if fully set forth herein.

26. From at least in or about 2018, up to and including 2019, in the Southern District of New York and elsewhere, LAURA PERRYMAN, the defendant, willfully and knowingly, directly and indirectly, by use of a means and instrumentality of interstate commerce, and of the mails, and of a facility of a national securities exchange, used and employed, in connection with the purchase and sale of a security, a manipulative and deceptive device and contrivance, in violation of Title 17, Code of Federal Regulations, Section 240.10b-5, by (a) employing a device, scheme, and artifice to defraud; (b) making an untrue statement of a material fact and omitting to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and (c) engaging in an act, practice, and course of business which operated and would operate as a fraud and deceit upon a person, to wit, PERRYMAN misled Stimwave investors regarding material aspects of the Device and Stimwave's business in an effort to induce those investors to purchase Stimwave securities.

(Title 15, United States Code, Sections 78j(b) and 78ff;
Title 17, Code of Federal Regulations, Section 240.10b-5;
and Title 18, United States Code, Section 2.)

FORFEITURE ALLEGATIONS

27. As a result of committing the wire fraud offense charged in Count One of this Indictment and the securities fraud offense charged in Count Three of this Indictment, LAURA PERRYMAN, the defendant, shall forfeit to the United States, pursuant to Title 18, United States Code, Section 981(a)(1)(C) and Title 28, United States Code, Section 2461, any and all property,

real and personal, which constitutes or is derived from proceeds traceable to the commission of said offenses, including but not limited to a sum of money in United States currency representing the amount of proceeds traceable to the commission of said offenses.

28. As a result of committing the health care fraud offenses charged in Counts One and Two of this Indictment, LAURA PERRYMAN, the defendant, shall forfeit to the United States, pursuant to Title 18, United States Code, Section 982(a)(7), any and all property, real or personal, that constitutes or is derived, directly or indirectly, from gross proceeds traceable to the commission of said offenses, including but not limited to a sum of money in United States currency representing the amount of proceeds traceable to the commission of said offenses.

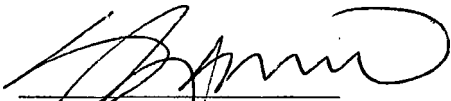
Substitute Assets Provision

29. If any of the above-described forfeitable property, as a result of any act or omission of the defendant:

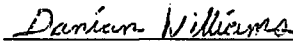
- (a) cannot be located upon the exercise of due diligence;
- (b) has been transferred or sold to, or deposited with, a third person;
- (c) has been placed beyond the jurisdiction of the Court;
- (d) has been substantially diminished in value; or
- (e) has been commingled with other property which cannot be subdivided

without difficulty; it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), and Title 28, United States Code, Section 2461(c), to seek forfeiture of any other property of the defendant up to the value of the above forfeitable property described above.

(Title 18, United States Code, Sections 981 and 982;
Title 21, United States Code, Section 853; and
Title 28, United States Code, Section 2461.)



FORFEITURE PERSON



DAMIAN WILLIAMS
United States Attorney

Appendix F.

Order of Second Circuit Court of Appeals Denying Rehearing and En Banc, November 18, 2025

**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 10th day of November, two thousand twenty-five.

United States of America,

Appellee,

v.

Laura Perryman,

Defendant - Appellant.

ORDER


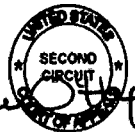
Docket No: 24-1729

Appellant Laura Perryman, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

**Additional material
from this filing is
available in the
Clerk's Office.**