Nos. 16-11207, 16-11466, 17-11028 & 17-11059

In the United States Court of Appeals for the Eleventh Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID BROCK LOVELACE and TERRI L. SCHNEIDER,

Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Florida, Tampa Division
Case No. 8:14-cr-164, Hon. Steven D. Merryday

APPELLANT'S BRIEF OF TERRI L. SCHNEIDER

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1 and 26.1-3, the following is an alphabetical list of the trial judges, attorneys, persons, and firms with any known interest in the outcome of this case.

1. Adams, Natalie Hirt – Assistant United States Attorney;
2. Akerman Senterfitt, LLP – Trial counsel for Terri L. Schneider;
3. Arango, Jacqueline M. – Trial counsel for Terri L. Schneider;
4. Austin, Leonard – Defendant;
5. Barror, Darlene Calzon – Trial and appellate counsel for David Brock Lovelace;
6. Bentley, A. Lee, III – Former United States Attorney;
7. Burns, P.A. – Appellate counsel for Terri L. Schneider;
8. Burns, Thomas A. – Appellate counsel for Terri L. Schneider;
9. Blanco, Kenneth;
10. Caldwell, Leslie – Assistant Attorney General, Department of Justice;
11. Chang, William – Special Counsel (Trial), Fraud Section, Criminal Division;
12. Darlene Calzon Barror, P.A. – Trial and appellate counsel for David Brock Lovelace;
13. Delaughter, Christopher George – Trial and appellate counsel for David Brock Lovelace;
14. Gershow, Holly L. – Assistant United States Attorney;

15. Hall, Matthew F. – Trial counsel for David Brock Lovelace;

16. Hill, Ward & Henderson, P.A. – Trial counsel for David Brock Lovelace;

17. Hunter, Christopher J. – Assistant United States Attorney;

18. Jackson, Illya C. – Defendant;

19. Jancha, Ricky Lee – Trial counsel for Terri L. Schneider;

20. Jenkins, Elizabeth A. – United States Magistrate Judge;

21. Lavalle, Brown & Ronan, P.A. – Trial counsel for Gregory J. Sylvestri;

22. Kwall, Showers, Barack & Chilson, P.A. – Trial counsel for Illya C. Jackson;

23. LaFay, Michael Howard – Trial counsel for Terri L. Schneider;

24. LaSpada, Anthony J. – Trial counsel for David Brock Lovelace;

25. Law Office of Anthony J. LaSpada – Trial counsel for David Brock Lovelace;

26. Law Office of Richard G. Ozelie – Trial counsel for Leonard Austin;

27. Lori D. Palmieri, P.A. – Trial counsel for Leonard Austin;

28. Lovelace, David Brock – Defendant-Appellant;

29. Matheney, Erik R. – Trial counsel for David Brock Lovelace;

30. Matthew Pappas Law – Trial counsel for David Brock Lovelace;

31. McFadden, Trevor;

32. Medicare – Victim;

33. Meltzer, Ellen – Special Counsel (Appellate), Fraud Section, Criminal Division, Department of Justice;

34. Merryday, Hon. Steven D. – United States District Judge;

35. Muldrow, W. Steven – Acting United States Attorney;

36. NeJame Law, P.A. – Trial counsel for Terri L. Schneider;

37. Ozelie, Richard G. – Trial counsel for Leonard Austin;

38. Palmieri, Lori Doganiero – Trial counsel for Leonard Austin;

39. Pappas, Matthew S. – Trial counsel for David Brock Lovelace;

40. Pizzo, Mark A. – United States Magistrate Judge;

41. Ronan, Kenneth Joseph – Trial counsel for Gregory J. Sylvestri;

42. Schneider, Terri L. – Defendant-Appellant;

43. Showers, Gregory Keith – Trial counsel for Illya C. Jackson;

44. Shutts & Bowen, LLP – Trial counsel for David Brock Lovelace;

45. Sisco Law – Trial counsel for Gregory J. Sylvestri;

46. Sisco, Dale R. – Trial counsel for Gregory J. Sylvestri;

47. Suh, Sung-Hee – Deputy Assistant Attorney General, Department of Justice;

48. Sylvestri, Gregory J. – Defendant;

49. The Health Law Offices of Anthony C. Vitale, P.A. – Trial counsel for David Brock Lovelace;

50. Vitale, Anthony Conrad – Trial counsel for David Brock Lovelace.

No publicly traded company or corporation has an interest in the outcome of this appeal.

June 13, 2017

/s/ Thomas Burns
Thomas A. Burns

STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellant Terri L. Schneider requests oral argument. This Medicare fraud appeal arises from a 10-day jury trial and involves sufficiency of the evidence, the denial of a post-trial motion for new trial based on newly discovered evidence, and improper closing argument. Oral argument will assist the Court.

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STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER PARTIES

Dr. Schneider adopts the appellant's brief of Defendant-Appellant David Brock Lovelace in its entirety.

STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The District Court had subject-matter jurisdiction under 18 U.S.C. § 3231 because Dr. Schneider was indicted for federal criminal offenses. Docs. 1, 181. This Court has appellate jurisdiction because the District Court entered judgment against Dr. Schneider on March 22, 2016 (Doc. 432), which she timely appealed on April 1, 2016 (Doc. 448), and entered an order denying a motion for new trial on March 2, 2017 (Doc. 560), which she timely appealed on March 3, 2017 (Doc. 567). *See* 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Was the evidence for Counts Twenty, Twenty-One, and Twenty-Two sufficient when it never proved Dr. Schneider's Medicare claims for her own services were "materially false," as required by *United States* v. *Medina*, 485 F.3d 1291, 1297 (11th Cir. 2007)?

2. Did the District Court abuse its discretion when it denied a post-trial motion for new trial based on newly discovered evidence uncovered by private investigators without holding an evidentiary hearing, as required by *United States* v. *Gates*, 10 F.3d 765 (11th Cir. 1993)?

3. Did the District Court commit plain error when it failed at closing argument to *sua sponte* correct the prosecutor's rebuttal, which suggested defense counsel was unethically trying to "deceive" the jury?

STATEMENT OF THE CASE

Course Of Proceedings

A grand jury returned a 41-count superseding indictment against David Brock Lovelace (a businessman), Dr. Terri L. Schneider (an audiologist), and other defendants. Doc. 181. The grand jury charged Dr. Schneider as follows:

> **Count One:** Conspiracy to commit healthcare fraud (18 U.S.C. § 1347) and wire fraud (18 U.S.C. § 1343) in violation of 18 U.S.C. § 1349;
>
> **Counts Two through Nine:** Healthcare fraud in violation of 18 U.S.C. § 1347 and § 2;
>
> **Counts Twenty through Twenty-Nine:** Healthcare fraud in violation of 18 U.S.C. § 1347 and § 2;
>
> **Count Thirty:** Conspiracy to launder healthcare proceeds in violation of 18 U.S.C. § 1956(h);
>
> **Count Thirty-Eight:** Money laundering in violation of 18 U.S.C. § 1957 and § 2; and
>
> **Count Thirty-Nine:** Aggravated identity theft in violation of 18 U.S.C. § 1028A.

Doc. 181 at 1-14, 19-25, 27-28.

After a 10-day jury trial, a petit jury returned guilty verdicts on all counts. Doc. 387. The District Court sentenced Dr. Schneider to 94 months' imprisonment, to be followed by 3 years' supervised release, and restitution of $2,512,460.27. Doc. 528 at 53. The District Court entered judgment (Doc. 432), from which Dr. Schneider timely appealed (Doc. 448).

Approximately 10 months later, Mr. Lovelace and Dr. Schneider moved for a new trial based on newly discovered evidence uncovered by private investigators. Docs. 542, 543. The Government opposed. Doc.

544. Mr. Lovelace and Dr. Schneider replied. Docs. 550, 551. The District Court denied the motion without an evidentiary hearing. Doc. 560. Dr. Schneider timely appealed that denial. Doc. 567.

Statement Of Facts

A. The Medicare Program

Medicare is a federal insurance program. *See* 18 U.S.C. § 24(b). It provides coverage to seniors aged 65 and older, certain disabled people under 65, and people of all ages with end-stage renal disease. Doc. S411 at 15. Individuals who receive Medicare benefits are commonly referred to as Medicare beneficiaries. Doc. S411 at 15.

The Medicare programs have different parts. Doc. S411 at 15. Part A covers health services provided by hospitals, skilled nursing facilities, hospices, and home health agencies. Doc. S411 at 15. Part B covers certain physician services, outpatient services, and other services, including durable medical equipment that is medically necessary and ordered by a licensed physician or other qualified health care professional. Doc. S411 at 15. This case concerns Part B. *See* Doc. S411 at 15-16.

In Florida, First Coast Service Options, Inc. administered payments under Medicare Part B under a contract with the U.S. Depart-

ment of Health and Human Services. Doc. S411 at 16. First Coast received, adjudicated, and paid claims of authorized providers who sought reimbursement for radiology, audiology, neurology, and cardiology services, and other health care benefits, items, or services. Doc. S411 at 16. First Coast often made payments directly to providers rather than to patients. Doc. S411 at 16. If First Coast approved a claim, it paid a substantial portion of the total amount of the claim either by check or by wire transfer to the provider's designated account. Doc. S411 at 16.

B. The Scheme

Between June 2010 and May 2014, the Government claimed Mr. Lovelace, Dr. Schneider, and others conspired to commit healthcare and wire fraud, money laundering, and aggravated identity theft by controlling and operating healthcare clinics and shell companies. Doc. S411 at 16. Together, Mr. Lovelace and Dr. Schneider controlled and operated Cornerstone Health Specialists and Coastal Health Specialists LLC. Doc. S411 at 16. Without Dr. Schneider's knowledge, Mr. Lovelace also controlled Summit Health Specialists PL. *See* Doc. S411 at 16.

During the conspiracy, the Government claimed Mr. Lovelace and Dr. Schneider used Cornerstone, Summit, and Coastal to submit false

Medicare claims for reimbursement for radiology, audiology, neurology, and cardiology services purportedly provided at those clinics, by and under the supervision of a physician. Doc. S411 at 17. The Government claimed at least some of the false reimbursement claims included services that:

- were provided to dead patients;
- were never rendered;
- were not medically necessary;
- were purportedly rendered in the office setting at each of the three clinics;
- resulted from illegal kickback arrangements;
- were submitted based on forged reassignments.

Doc. S411 at 17.

To submit these false reimbursement claims, Mr. Lovelace and Dr. Schneider used the identities of physicians (i.e., Dr. T.G., Dr. P.R., Dr. R.N., Dr. R.R., and Dr. T.F.), including their names and Medicare provider numbers, to reassign their Medicare reimbursement benefits to Summit, Coastal, or Cornerstone. Doc. S411 at 17. To accomplish these reassignments, Mr. Lovelace and Dr. Schneider forged the doctors' signatures on certain Medicare forms. Doc. S411 at 17.

All told, Mr. Lovelace and Dr. Schneider used the three clinics to submit approximately $12,351,046 in false and fraudulent reimbursement claims to Medicare. Doc. S411 at 17. Due to those claims, Medicare paid $2,848,424 in reimbursement. Doc. S411 at 17.

C. The Evidence

1. The Dead Patients

If believed, the evidence was sufficient to establish Mr. Lovelace and Dr. Schneider submitted Medicare claims for services rendered to dead beneficiaries:

- **Counts Two, Three, and Four:** Patient M.B., *compare* U.S. Ex. 8 (death certificate), *with* U.S. Exs. 91-93 (claims);
- **Count Nine:** Patient J.H., *compare* U.S. Ex. 10 (death certificate), *with* U.S. Ex. 98 (claim);
- **Count Twenty-Four:** Patient R.V., *compare* U.S. Ex. 13 (death certificate), *with* U.S. Ex. 113 (claim);
- **Count Twenty-Five:** Patient R.E., *compare* U.S. Ex. 14, *with* U.S. Ex. 114 (claim);
- **Counts Twenty-Six and Twenty-Seven:** Patient A.G., *compare* U.S. Ex. 15 (death certificate), *with* U.S. Exs. 115-116 (claims);
- **Count Twenty-Eight:** Patient T.P., *compare* U.S. Ex. 16 (death certificate), *with* U.S. Ex. 117 (claim);
- **Count Twenty-Nine:** Patient H.M., *compare* U.S. Ex. 17 (death certificate), *with* U.S. Ex. 118 (claim).

2. The Services Never Rendered

If believed, the evidence was sufficient to establish Mr. Lovelace and Dr. Schneider submitted Medicare claims for services never rendered:

- **Counts Five and Six:** Services from Dr. T.D. to Patient A.W., *compare* Docs. 523 at 12-13; 526 at 134, *with* U.S. Exs. 94-95 (claims);
- **Count Seven:** Services from Dr. T.D. to Patient M.P., *compare* Doc. 523 at 12-13, *with* U.S. Ex. 96 (claim);
- **Count Eight:** Services from Dr. P.R. to Patient A.A., *compare* Doc. 521 at 97, *with* U.S. Ex. 109 (claim);
- **Count Twenty-Three:** Services from Dr. R.R. to Patient A.M., *compare* Doc. 521 at 106, *with* U.S. Ex. 112 (claim);

3. The Not Medically Necessary Services

If believed, circumstantial evidence sufficiently established Mr. Lovelace and Dr. Schneider conspired to submit some Medicare claims for services rendered that were not medically necessary. *See, e.g.*, Doc. 513 at 83-84. But none of that circumstantial evidence was linked to specific substantive counts. For instance, in Counts Twenty, Twenty-One, and Twenty-Two, Dr. Schneider submitted Medicare claims for her own services to Patients A.A., L.L., and B.P.:

- **Count Twenty:** Services from Dr. Schneider to Patient A.A., *compare* Doc. 521 at 105, *with* U.S. Ex. 97 (claim);

- **Count Twenty-One:** Services from Dr. Schneider to Patient L.L., *compare* Doc. 521 at 105, *with* U.S. Ex. 110 (claim);
- **Count Twenty-Two:** Services from Dr. Schneider to Patient B.P., *compare* Doc. 521 at 106, *with* U.S. Ex. 111 (claim);

But no witness or evidence indicated Dr. Schneider's services to Patients A.A., L.L, or B.P. were not medically necessary.

4. The Services Rendered Outside The Practice Location

If believed, the evidence was sufficient to establish Mr. Lovelace and Dr. Schneider submitted Medicare claims for services rendered somewhere other than the listed practice location. E.g., Doc. 513 at 91. But no evidence established how such claims would be false and material in violation of *United States* v. *Medina*, 485 F.3d 1291, 1297 (11th Cir. 2007).

5. The Services From Illegal Kickbacks

If believed, the evidence was sufficient to establish Mr. Lovelace and Dr. Schneider submitted Medicare claims for services to patients that were referred through illegal kickback arrangements. *E.g.*, Docs. 520 at 185; 521 at 110; 522 at 87-88, 119-23, 170. But no evidence established any particular Medicare claim charged in a substantive count derived from services to patients referred via the kickback scheme.

6. The Forgeries

If believed, the evidence was sufficient to establish Mr. Lovelace and Dr. Schneider forged doctors' signatures on Medicare reassignment forms before submitting Medicare claims for those doctors' services. *E.g.*, Doc. 521 at 119-122; 522 at 145; 523 at 18, 21, 30-33, 106, 120-121, 142-145, 154-155; 524 at 19, 21-23, 35-37, 83, 85-86, 88; 526 at 109, 115; 527 at 45; U.S. Exs. 88, 91-98 (claims), 109-118 (claims).

D. The Closing Argument

During his rebuttal, the prosecutor stated:

> Now, as I sit and listen to the closing arguments of the defense attorneys, there's a line from the Scottish battle poem that came to my mind, which is, "Oh what a tangled web we weave when first we practice to deceive." It's almost as if we have been in two different courtrooms for the past two weeks.

Doc. 513 at 157.[1] Neither defendant objected, and the District Court did not *sua sponte* correct this statement. *See* Doc. 513 at 157.

E. The Motion For New Trial

About 10 months after judgment was entered against Dr. Schneider (Doc. 432), which she had timely appealed (Doc. 448), Mr. Lovelace filed a redacted motion for new trial based on newly discovered evidence

[1] The line is from Sir Walter Scott's epic poem, *Marmion: A Tale of Flodden Field*.

uncovered by private investigators (Doc. 542). The motion argued Mr. Lovelace had been convicted of claiming Medicare reimbursement (1) in eight counts for services rendered to supposedly dead patients, and (2) in ten counts for services never rendered. Doc. 542 at 2. But the private investigators concluded those patients were alive or actually received the services. Doc. 542 at 2. Accordingly, the motion argued "the entirety" of Special Agent Isaac Bledsoe's grand jury testimony was false. Doc. 542 at 2. The motion requested an evidentiary hearing. Doc. 542 at 20. Dr. Schneider adopted the motion. Docs. 543, 545.

In opposition, the Government argued the motion should be denied because it did not satisfy the five-part test for new trial motions: (1) it was not newly discovered; (2) Mr. Lovelace did not exercise reasonable diligence; (3) it was merely cumulative impeachment; (4) it was immaterial; and (5) the other evidence at trial was so overwhelming a new jury would still return guilty verdicts. Doc. 544 at 12-16.

In arguing the motion should be denied without a hearing (Doc. 544 at 12), the Government cited *United States* v. *Jernigan*, 341 F.3d 1273, 1291 (11th Cir. 2003), which held a district court did not abuse its discretion when it concluded a new jury would still return guilty ver-

dicts without an evidentiary hearing because the newly discovered evidence was inadmissible, and *United States* v. *Thompson*, 422 F.3d 1285, 1294 (11th Cir. 2005), which did not indicate either way whether a district court could deny a motion without an evidentiary hearing. The Government did not, however, cite *United States* v. *Culliver*, 17 F.3d 349, 351 (11th Cir. 1994), or *United States* v. *Gates*, 10 F.3d 765, 768 (11th Cir. 1993), which held a district court must hold an evidentiary hearing before granting or denying a motion for new trial.

Focusing solely on the fifth element of the new trial test, the District Court denied the motion without an evidentiary hearing. Doc. 560. The District Court characterized the newly discovered evidence as "a characteristic diversion," trivialized the arguments as "meritless," and concluded the new evidence "neither individually nor collectively alter[s] the force of the [other trial] evidence." Doc. 560 at 1-2.

Dr. Schneider timely appealed from this order. Doc. 567.

Standard Of Review

1. Sufficiency is reviewed de novo, drawing all reasonable inferences in favor of the verdict. *United States* v. *Capers*, 708 F.3d 1286, 1296-97 (11th Cir. 2013). Federal Rule of Criminal Procedure 29's snap-

shot provision applies whenever, as here, a district court reserves ruling on a motion for judgment of acquittal. *United States* v. *Moore*, 504 F.3d 1345, 1346-47 (11th Cir. 2007).

2. The denial of a post-trial motion for new trial based on newly discovered evidence is reviewed for abuse of discretion. *United States* v. *Jernigan*, 341 F.3d 1273, 1287 (11th Cir. 2003).

3. The denial of a motion for a mistrial based on a prosecutor's statements during closing argument is reviewed for abuse of discretion." *United States* v. *Thompson*, 422 F.3d 1285, 1297 (11th Cir. 2005). Absent a contemporaneous objection, the district court's failure to correct improper closing argument is reviewed for plain error.[2] *United States* v. *Pendergraft*, 297 F.3d 1198, 1204 (11th Cir. 2002). "Absent a motion, the trial court should not declare a mistrial absent manifest necessity."[3] *United States* v. *Valdez*, 880 F.2d 1230, 1233 (11th Cir. 1989).

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[2] Plain error occurs when "(1) there is an error; (2) that is plain or obvious; (3) affecting [his] substantial rights in that it was prejudicial and not harmless; and (4) that seriously affects the fairness, integrity, or public reputation of the judicial proceedings." *United States* v. *Beckles*, 565 F.3d 832, 842 (11th Cir. 2009).

[3] "While 'manifest necessity' is not subject to precise formulation, it is described as a 'high degree of necessity.'" *United States* v. *Hoa Quoc Ta*, 221 Fed. App'x 938, 943 (11th Cir. 2007).

SUMMARY OF THE ARGUMENT

1. The evidence for Counts Twenty, Twenty-One, and Twenty-Two was not sufficient because it never proved Dr. Schneider's Medicare claims for her own services were "materially false," as required by *United States* v. *Medina*, 485 F.3d 1291, 1297 (11th Cir. 2007). No evidence established the specific services Dr. Schneider performed herself for those particular patients in those counts were provided to dead patients, never rendered, not medically necessary, resulted from illegal kickback arrangements, or were based on forged reassignments. Additionally, even if Dr. Schneider rendered those services outside her listed practice location, that was not material.

2. The District Court abused its discretion when it denied a motion for new trial based on newly discovered evidence without holding an evidentiary hearing. The Government's most powerful evidence concerned Medicare claims for services either rendered to dead patients or never rendered at all. But newly discovered evidence from a post-trial investigation cast serious doubt on those facts. When a defendant moves for new trial based on newly discovered evidence, a district court must conduct an evidentiary hearing, *see United States* v. *Culliver*, 17

F.3d 349, 351 (11th Cir. 1994), even if it is inclined to deny the motion, *see United States* v. *Gates*, 10 F.3d 765, 768 (11th Cir. 1993).

3. The District Court committed plain error when it failed to *sua sponte* strike or declare a mistrial when the prosecutor accused defense counsel of attempting to "deceive" the jury. Few things are more prejudicial than for a prosecutor to question defense counsel's ethics.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE EVIDENCE FOR COUNTS TWENTY, TWENTY-ONE, AND TWENTY-TWO WAS NOT SUFFICIENT

The evidence for Counts Twenty, Twenty-One, and Twenty-Two was not sufficient. No evidence established that the specific services Dr. Schneider performed herself for those particular patients were provided to dead patients, never rendered, not medically necessary, or resulted from illegal kickback arrangements. Additionally, even if Dr. Schneider rendered those services outside her listed practice location, that was not material.

In this Court, the leading Medicare fraud precedent is *United States* v. *Medina*, 485 F.3d 1291 (11th Cir. 2007). In *Medina*, this Court vacated convictions for health care fraud in violation of 18 U.S.C. § 1347 for lack of sufficient evidence. *Id.* at 1294. In particular, this Court held

"in a health care fraud case, the defendant must be shown to have known that the claims submitted were, in fact, false." *Id.* at 1297. As such, "paying kickbacks alone is not sufficient to establish health care fraud" "without someone making a knowing false or fraudulent representation to Medicare." *Id.* at 1298. Moreover, a "general allegation" of misrepresentation "is insufficient." *Id.* at 1299. Instead, the government must prove "at least one specific patient" was linked to the misrepresentation. *Id.*

Here, the Government had six theories of prosecution to prove the false reimbursement claims included claims for services that:

- were provided to dead patients;
- were never rendered;
- were not medically necessary;
- were purportedly rendered in the office setting at each of the three clinics;
- resulted from illegal kickback arrangements; and
- were submitted based on forged reassignments.

Doc. S411 at 17.

In Counts Twenty, Twenty-One, and Twenty-Two, there was no evidence that Patients A.A., L.L, or B.P. were dead, never received

treatment, received treatment that was not medically necessary, received treatment through an illegal kickback arrangement, or were submitted based on forged Medicare reassignments.[4] Additionally, even if Dr. Schneider's Medicare claims reported the wrong service locations, that was not a material misrepresentation that rendered the claim "materially false" within the meaning of *Medina*, 485 F.3d at 1299. As such, the evidence on those counts was insufficient, and those convictions must be reversed.

II. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED THE MOTION FOR NEW TRIAL WITHOUT AN EVIDENTIARY HEARING

For almost a quarter century, it has been the law in this Circuit that a district court generally cannot grant or deny a motion for new

[4] The fact that Dr. Schneider occasionally falsified medical records or provided services that were not medically necessary (Doc. 513 at 101) does not rescue those convictions because a "general allegation" of misrepresentation "is insufficient." *Medina*, 485 F.3d at 1299. Instead, the Government needed to prove Dr. Schneider committed that conduct as to each "specific patient" charged in the substantive counts. *Id.* Inferring anything further from her general conduct to specific patients in the substantive counts would give the jury a license to speculate. But jury verdicts can never be based on speculation or conjecture. Instead, juries are permitted to draw only "reasonable inferences" based on "reasonable constructions of the evidence"—"not mere speculation." *United States* v. *Mieres-Borges*, 919 F.2d 652, 657 (11th Cir. 1990); *United States* v. *Kelly*, 888 F.2d 732, 740 (11th Cir. 1989); *United States* v. *Perez-Tosta*, 36 F.3d 1552, 1557 (11th Cir. 1994).

trial based on newly discovered evidence without holding an evidentiary hearing. The District Court, however, paid no heed to that law.

Instead, focusing solely on the new trial test's fifth element (i.e., whether, notwithstanding the new evidence, a new jury would still return guilty verdicts), the District Court trivialized the newly discovered evidence as a "meritless" and "characteristic diversion" that "neither individually nor collectively alter[ed] the force of the [other trial] evidence." Doc. 560 at 1-2. Alas, the District Court's denial of the motion without an evidentiary hearing was an abuse of discretion.

A. Before Granting Or Denying A Motion For New Trial Based On Newly Discovered Evidence, The District Court Needed To Hold An Evidentiary Hearing

It was an abuse of discretion to deny the motion for new trial without an evidentiary hearing. Generally, district courts must hold such hearings, and the only exception this Court has acknowledged (i.e., when the newly discovered evidence is inadmissible) did not apply here.

1. Generally, District Courts Must Hold Evidentiary Hearings Before Ruling On Motions For New Trial Raising Newly Discovered Evidence

When a defendant moves for new trial based on newly discovered evidence, a district court must conduct an evidentiary hearing, *see*

United States v. *Culliver*, 17 F.3d 349, 351 (11th Cir. 1994), even if it is inclined to deny the motion, *see United States* v. *Gates*, 10 F.3d 765, 768 (11th Cir. 1993). *Culliver* and *Gates* are illustrative.

a. *United States* v. *Gates* Requires District Courts To Hold Evidentiary Hearings Before Denying Motions For New Trial

In *Gates*, Charles Gates and Moses James were convicted of armed bank robbery during which Gates used a firearm. 10 F.3d at 766. At trial, James exercised his Fifth Amendment privilege not to testify. *Id.* at 767. But Gates testified in his own defense, denied involvement, and denied knowledge of who might have been James's partner. *Id.* The jury rejected this testimony and convicted them both. *Id.* at 766. Six months later, Gates moved for a new trial based on newly discovered evidence: James swore an affidavit that Gates was not involved in the bank robberies. *Id.* at 767 & n.1. The district court denied the motion without a hearing. *See id.* at 768.

On direct appeal, this Court affirmed the defendant's conviction. *Id.* at 768. But it vacated the denial of the defendant's motion for new trial without a hearing. *Id.* In doing so, this Court rejected the Government's arguments that Gates had failed to establish: (1) the evidence

was newly discovered (element one); (2) he had exercised due diligence (element two); or (3) a new trial with the new evidence would probably produce a different result (element five). *Id.* at 767-68.

The first argument failed because the Government never "pointed to any evidence in the record indicating that before or during trial Gates knew or had access to knowledge that James would exculpate him and describe the robberies as involving other co-participants." *Id.* at 767.

The second argument failed because it "presuppose[d] that Gates knew that James would give exculpatory testimony." *Id.* at 768.

And the third argument also failed. *Id.* Although credibility concerns demand that "post-trial exculpatory statements given by a convicted co-defendant must be viewed with care," they cannot be rejected "without a[n evidentiary] hearing to explore further and determine whether [they] ha[ve] merit." *Id.*; *accord Thomas* v. *Evans*, 880 F.2d 1235, 1243 (11th Cir. 1989) (""A witness' status as a convicted felon may be relevant to that witness' credibility; however, it should go without saying that the factual testimony of other prisoners cannot be disallowed solely on the basis that they are convicted felons and prisoners.").

b. *United States* v. *Culliver* Requires District Courts To Hold Evidentiary Hearings Before Granting Motions For New Trial

Culliver involved a lovers' quarrel that escalated into a federal criminal offense. 17 F.3d at 349-50. Jerry Culliver and Willie Thomas met in prison and became lovers. *Id.* at 349. Upon release, they moved in together. *Id.* at 350. But their relationship was violent and tumultuous. *Id.* On numerous occasions, each tried to have the other arrested. *Id.* But each time, they asked the charges to be dropped. *Id.*

After Culliver finally moved out, he returned with a companion to retrieve his weight bench. *Id.* Thomas angrily responded by brandishing a firearm and pointing it at Culliver. *Id.* Culliver wrestled the gun away, took an ammunition clip from Thomas's car, and drove away in his own car. *Id.* Thomas flagged down a police officer and reported that Culliver threatened to kill him with a gun. *Id.* The officer pursued Culliver and found the loaded firearm and ammunition clip in his car. *Id.*

At trial, Thomas offered conflicting testimony whether he or Culliver ever possessed the firearm. *Id.* After the defendant's conviction was affirmed on direct appeal, the defendant moved for a new trial

based on newly discovered evidence: Thomas's recantation of his trial testimony. *Id.* at 349.

In his affidavit, Thomas claimed "the police made him bring the initial accusation," which he had done "'to avoid losing all the things I worked so hard for.'" *Id.* at 350. Thomas further averred he had placed the gun in his house because he was fearful of Culliver, which corroborated Culliver's contention that the gun belonged to Thomas. *Id.*

The district court granted the motion for new trial without an evidentiary hearing. *Id.* at 349. When the Government moved for rehearing, the district court denied the request but ordered a limited evidentiary hearing to determine whether Thomas planned to assert his Fifth Amendment privilege if called to testify at the new trial. *Id.* at 349-50. The Government appealed. *Id.* at 349; *see also* 18 U.S.C. § 3731 ("In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court … granting a new trial after verdict or judgment….").

On appeal, this Court vacated the new trial order. 17 F.3d at 350-51. An evidentiary hearing "would have afforded the [district] court a necessary opportunity to further examine defendant's claim that the af-

fidavit offered newly discovered evidence, and to more fully evaluate whether the criteria applicable to a motion for a new trial based on newly discovered evidence had been satisfied." *Id.* at 350. As such, "our holding today confirms that the district court *must* conduct a hearing to determine whether to grant a motion for a new trial based on newly discovered evidence." *Id.* at 351 (emphasis added).

2. The Only Exception Acknowledged In *United States* v. *Jernigan* (i.e., When The Newly Discovered Evidence Was Inadmissible) Does Not Apply Here

The sole exception this Court has acknowledged to the general requirement that district courts "must" convene evidentiary hearings before ruling on new trial motions is explained in *United States* v. *Jernigan*, 341 F.3d 1273 (11th Cir. 2003). There, this Court held a district court acted within its discretion when it denied a motion for new trial without an evidentiary hearing on the basis a new jury would still return guilty verdicts, but only because the newly discovered evidence was inadmissible hearsay. *Id.* at 1291.[5]

[5] *United States* v. *Schlei*, 122 F.3d 944, 994 (11th Cir. 1997) ("the acumen gained by a trial judge over the course of the proceedings [makes her] well qualified to rule on the basis of affidavits without a hearing" (citation and punctuation omitted)), and *United States* v.

Here, however, there is not the same concern that The Diaz Group's findings would be inadmissible at trial, either through the investigators themselves or the Medicare beneficiaries. The investigators could testify at length about the findings of their own investigation (e.g., who performed it, what they found, whom they interviewed, where they searched, when they found it, etc.) and be subject to cross-examination without raising any serious evidentiary problems.

For instance, the investigators could testify about the facts that the Medicare beneficiaries are still alive because they had firsthand knowledge. *See United States* v. *Baker*, 432 F.3d 1189, 1206 (11th Cir. 2005). In contrast, the investigators could not testify that the Medicare beneficiaries actually received medical treatment without raising a hearsay problem (because they lacked firsthand knowledge of those

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Hamilton, 559 F.2d 1370, 1373-74 (5th Cir. 1977) ("evidence not under attack amply sustains the conviction"), could be interpreted to empower district courts to deny motions for new trial based on newly discovered evidence without a hearing as a discretionary matter. To the extent *Schlei* and *Hamilton* are read to do so as a general matter, this creates an intra-circuit conflict with *Culliver* and *Gates* that either requires application of the prior-panel-precedent rule or en banc consideration. *See Smith* v. *GTE Corp.*, 236 F.3d 1292, 1302-03 & n.11 (11th Cir. 2001). Either way, Dr. Schneider preserves this issue for further appellate review. *Cf. United States* v. *Travis*, 747 F.3d 1312, 1314 n.1 (11th Cir. 2014) (allowing defendant to make argument "foreclosed by binding precedent" for "purposes of preservation only").

facts). *See id.* Nevertheless, now that she has located them, Dr. Schneider could subpoena those Medicare beneficiaries at a new trial. *See* Fed. R. Crim. P. 17(a).

B. The Appellate Remedy Is To Vacate The New Trial Order And Remand For The District Court To Consider The First Four Elements Of The New Trial Test And Hold An Evidentiary Hearing

The District Court did not consider the first four elements of the new trial test or hold an evidentiary hearing. At the very least, this Court must remand for the District Court to consider those elements in the first instance. *See, e.g.*, *United States* v. *Charles*, 757 F.3d 1222, 1227 (11th Cir. 2014) (remanding for district court to consider government's alternative argument for affirmance "in the first instance").[6]

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[6] Relatedly, in the civil summary judgment context, this Court routinely remands cases for district courts to resolve issues that were not addressed in the first instance. *E.g.*, *In re Prudential of Fla. Leasing, Inc.*, 478 F.3d 1291, 1303 (11th Cir. 2007) ("[w]hen the district court does not address an issue, the proper course of action often is to vacate the order of the district court and remand"); *Sierra Club* v. *Van Antwerp*, 526 F.3d 1353, 1363 n.8 (11th Cir. 2008) ("we think the better course is to vacate the [summary] judgment and remand for the district court to address the issues … in the first instance"); *Byars* v. *Coca-Cola Co.*, 517 F.3d 1256, 1267-68 (11th Cir. 2008) ("we refuse to consider the merits of the issue" because the "summary judgment opinion did not discuss" it); *Sierra Club, Inc.* v. *Leavitt*, 488 F.3d 904, 918 (11th Cir. 2007) ("[w]e believe that the district court should consider the question in the first instance, particularly in light of the factual matters that it

III. THE DISTRICT COURT PLAINLY ERRED WHEN IT FAILED TO *SUA SPONTE* CORRECT THE PROSECUTOR'S STATEMENT DURING CLOSING ARGUMENT THAT DEFENSE COUNSEL WAS TRYING TO "DECEIVE" THE JURY

The District Court committed plain error when it failed to strike or declare a mistrial *sua sponte* when the prosecutor's closing argument questioned defense counsel's ethics.

A. Generally, An Improper And Prejudicial Closing Argument Warrants Reversal

"Remarks made in the course of a prosecutor's closing argument will warrant reversal if the challenged remarks are (1) improper and (2) prejudicial to a substantial right of the defendant." *United States* v. *Boyd*, 131 F.3d 951, 955 (11th Cir. 1997) (citing *United States* v. *Blakey*, 14 F.3d 1557, 1560 (11th Cir. 1994)); *accord United States* v. *Lopez*, 590 F.3d 1238, 1256 (11th Cir. 2009) (citing *United States* v. *Eckhardt*, 466 F.3d 938, 947 (11th Cir. 2006)). "'A defendant's substantial rights are prejudicially affected when a reasonable probability aris-

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raises"); *Wilkerson* v. *Grinnell Corp.*, 270 F.3d 1314, 1322 (11th Cir. 2001) ("[w]e decline to consider whether summary judgment is otherwise appropriate on Wilkerson's Title VII claim" and therefore "vacate summary judgment and remand the case so the district court may consider [that question] in the first instance"); *Beavers* v. *Am. Cast Iron Pipe Co.*, 975 F.2d 792, 800 (11th Cir. 1992) (vacating and remanding summary judgment because "district court's opinion did not explicitly address this issue").

es that, but for the remarks, the outcome of the trial would have been different.'" *Lopez*, 590 F.3d at 1256 (quoting *Eckhardt*, 466 F.3d at 947). If "'the record contains sufficient independent evidence of guilt,'" however, "'any error is harmless.'" *Id.* (quoting *Eckhardt*, 466 F.3d at 947).

1. Closing Argument Is Improper When It Personally Attacks Defense Counsel

Generally, a prosecutor's closing argument is improper when it personally attacks the defendant's lawyer.

"A personal attack on an opposing lawyer may constitute prosecutorial misconduct," *United States* v. *Miranda*, 279 Fed. App'x 950, 952 (11th Cir. 2008) (citing *United States* v. *Young*, 470 U.S. 1 (1985)), and "'subsequent jury instructions aimed at rectifying this error may not ensure that these disparaging remarks have not already deprived the defendant of a fair trial,'" *United States* v. *De La Vega*, 913 F.2d 861, 867 (11th Cir. 1990) (quoting *Unites States* v. *McClain*, 823 F.2d 1457, 1462 (11th Cir. 1987), *overruled on other grounds by United States* v. *Watson*, 866 F.2d 381, 385 n.3 (11th Cir. 1989)); *accord United States* v. *Martinez*, 146 Fed. App'x 450, 458 (11th Cir. 2005).

2. The Prosecutor's Argument Was Improper

Judged by those metrics, the prosecutor's closing argument was improper.

During his closing argument, the prosecutor suggested Dr. Schneider's counsel was unethically trying to "deceive" the jury. The Fifth, Sixth, Eighth, and Ninth circuits have held that such personal attacks on defense counsel's representations and veracity are improper and affect a defendant's substantial rights.[7] In this Circuit, however, accusing defense counsel of misstating the evidence, making a "fic-ti[tious]" closing argument, and "impugn[ing] the integrity of" government witnesses by calling them liars with no factual basis, ordinarily

[7] *E.g.*, *United States* v. *Rodriguez-Lopez*, 756 F.3d 422, 434 (5th Cir. 2014) (prosecutor who "[d]isparag[ed] defense counsel's motives for representing a criminal defendant" acted improperly); *United States* v. *Carter*, 236 F.3d 777, 785-86 (6th Cir. 2001) ("prosecutor's misstatement of [a witness's] testimony and personal attacks on defense counsel's truthfulness were likely to mislead the jury and cause prejudice"); *United States* v. *Wadlington*, 233 F.3d 1067, 1080 (8th Cir. 2000) (prosecutor's accusations that defense counsel misstated evidence were improper "[t]o the extent that [they] [could have been] construed as personal attacks"); *United States* v. *Frederick*, 78 F.3d 1370, 1380 (9th Cir. 1990) (prosecutor who sarcastically "sought to compliment the defense lawyer on 'confusing'" the witness acted improperly because she implied defense counsel's tactics were underhanded).

does "not rise to the level of misconduct." *United States* v. *Calderon*, 127 F.3d 1314, 1333, 1336 (11th Cir. 1997).

Nevertheless, *Calderon* is distinguishable because it involved a three-week trial, whereas Dr. Schneider's trial was only 10 days long. Accordingly, there exists "'a reasonable probability … that, but for the remarks, the outcome of the trial would have been different,'" *Lopez*, 590 F.3d at 1256 (quoting *Eckhardt*, 466 F.3d at 947), so the prosecutor's remarks about defense counsel were both "improper" and "prejudicial," *Boyd*, 131 F.3d at 955 (citing *Blakey*, 14 F.3d at 1560).

3. The Closing Argument Was Prejudicial

Taken together, the cumulative effect of the prosecutor's improper comments during closing argument prejudiced Dr. Schneider and deprived her of a fair trial. *See Blakey*, 14 F.3d at 1561 ("[s]tanding alone none of the comments in this case would require reversal, but taken together, their cumulative effect presents a different problem"). Accordingly, this Court should vacate Dr. Schneider's conviction and grant her a new trial. *See, e.g.*, *id.* at 1559, 1562 (vacating conviction and ordering new trial because prosecutor called defendant "'professional criminal'").

B. The Failure To Strike Or Declare A Mistrial *Sua Sponte* Was Plain Error Because There Existed A Manifest Necessity For A Mistrial

Moreover, the comments substantially affected Dr. Schneider's rights and seriously affected the fairness of the judicial proceedings. The centerpiece of Mr. Lovelace's and Dr. Schneider's defense was to explain how their billing was not inappropriate. But the prosecutor's response was to question their counsels' ethics. This substantially affected Dr. Schneider's rights because there was a reasonable probability that a different outcome would have resulted absent the comments. *See United States* v. *Charniak*, 607 Fed. App'x 936, 943 (11th Cir. 2015) ("To show that an error affected a defendant's substantial rights, the defendant must establish a reasonable probability that the result would have been different but for the error."); *accord United States* v. *Hall*, 314 F.3d 565, 566 (11th Cir. 2002) ("In most cases, a determination of whether error affects a substantial right turns upon whether it affected the outcome of the proceedings.").

And it seriously affected the fairness of the judicial proceedings because the comments were "'particularly egregious,' and, if left uncorrected, would result in a miscarriage of justice." *Charniak*, 607 Fed.

App'x at 943. Few things are more prejudicial for a prosecutor to do than to question a defendant's lawyer's ethics.

CONCLUSION

The Court should reverse the convictions for Counts Twenty, Twenty-One, and Twenty-Two and remand for resentencing, *see supra* Argument I, vacate the order denying the motion for retrial and remand for an evidentiary hearing, *see supra* Argument II, or vacate the judgment and remand for a new trial, *see supra* Argument III.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)'s type-volume requirement. As determined by Microsoft Word 2010's word-count function, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 11th Circuit Rule 32-4, this brief contains 6,071 words.

2. This brief further complies with Federal Rule of Appellate Procedure 32(a)(5)'s typeface requirements and with Federal Rule of Appellate Procedure 32(a)(6)'s type-style requirements. Its text has been prepared in a proportionally spaced serif typeface in roman style using Microsoft Word 2010's 14-point Century font.

June 13, 2017

/s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I filed the original and six copies of the foregoing brief with the Clerk of Court via CM/ECF and regular mail on this 13th day of June, 2017, to:

David J. Smith, Clerk of Court
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ELEVENTH CIRCUIT
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I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via CM/ECF on this 13th day of June, 2017, to:

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