

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

**REPLY 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;
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18. Jackson, Illya C. – Defendant;
19. Jancha, Ricky Lee – Trial counsel for Terri L. Schneider;
20. Jenkins, Elizabeth A. – United States Magistrate Judge;
21. Lavallo, Brown & Ronan, P.A. – Trial counsel for Gregory J. Sylvestri;
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23. LaFay, Michael Howard – Trial counsel for Terri L. Schneider;
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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;

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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;
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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. Taddei, John P. – Attorney, Appellate Section, Criminal Division, Department of Justice;
50. The Health Law Offices of Anthony C. Vitale, P.A. – Trial counsel for David Brock Lovelace;
51. Vitale, Anthony Conrad – Trial counsel for David Brock Lovelace.

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

September 19, 2017

/s/ Thomas Burns

Thomas A. Burns

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**STATEMENT REGARDING ADOPTION
OF BRIEFS OF OTHER PARTIES**

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

ARGUMENT AND CITATIONS OF AUTHORITY¹

I. THE EVIDENCE FOR COUNTS 20, 21, AND 22 WAS NOT SUFFICIENT

In contending sufficient evidence supports Dr. Schneider's convictions for Counts 20, 21, and 22, the Government incorrectly (1) blurs the line between reasonable inferences drawn from direct and circumstantial evidence, which can support a jury verdict, and speculation, which cannot, and (2) fails to appreciate the distinction between deceiving a victim (*i.e.*, without harming them), which may be a false statement in violation of 18 U.S.C. § 1001 but cannot constitute Medicare fraud, and defrauding a victim (*i.e.*, by harming the victim or depriving it of the benefit of its bargain), which is Medicare fraud. *See* U.S. Br. 19-25.

A. Jury Speculation Is Forbidden

The Government points to a great deal of evidence that was sufficient to establish Dr. Schneider committed numerous instances of conspiracy, Medicare fraud, and money laundering. *See* U.S. Br. 5-15, 19-25. But the Government does not point to any direct or circumstantial evidence from which a jury could reasonably infer that the specific ser-

¹ The parties have already staked out their positions with respect to the denial of the motion for new trial, *compare* Schneider Br. 16-24, *with* U.S. Br. 42-50, and the failure to declare a mistrial *sua sponte*, *compare* Schneider Br. 25-30, *with* U.S. Br. 50-53. Nothing further needs to be said about those issues.

vices Dr. Schneider provided to Patients A.A., L.L., or B.P. (*compare* Doc. 521 at 105-106, *with* U.S. Exs. 97, 110, 111) were not medically necessary, rendered outside the practice location, or were referred through illegal kickback arrangements. To the extent the jury bridged that evidentiary gap, it necessarily relied on impermissible speculation.

According to what the parties agree is the leading Medicare fraud case, a “general allegation” of misrepresentation “is insufficient.” *United States v. Medina*, 485 F.3d 1291, 1299 (11th Cir. 2007). Instead, the Government needed to prove Dr. Schneider committed that conduct as to each “specific patient” charged in the substantive counts. *Id.* By inferring from Dr. Schneider’s general conduct to these specific patients in Counts 20, 21, and 22, the Government asks this Court to 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).

That is why the fact that Dr. Schneider occasionally falsified medical records or provided services that were not medically necessary (Doc. 513 at 101) does not rescue the convictions for Counts 20, 21, and 22. In that regard, an example is illustrative.

Suppose a defendant were convicted of five murders after a jury trial at which the prosecutor introduced video evidence that the defendant committed four of the murders. Based on that evidence alone, could the jury reasonably infer the defendant committed the fifth murder? Obviously not. “[I]ntuition cannot substitute for admissible evidence when a defendant is on trial.” *United States v. Hamblin*, 911 F.2d 551, 558 (11th Cir. 1990) (reversing conviction for insufficient evidence (citing *In re Winship*, 397 U.S. 358, 363-64 (1970))). For instance, this Court recently reversed a conviction for insufficient evidence when “government presented no evidence of the third element—that Williams’s codefendants intended to aid him in failing to heave to.” *United States v. Williams*, 865 F.3d 1328, 1347 (11th Cir. 2017).

Moreover, the jury instructions in this case provided, “A separate crime or offense is charged against one or more of the defendants in each count of the superseding indictment. Each charge and the evidence

pertaining to it should be considered by you *separately*.” Doc. 513 at 72 (emphasis added). So the fact that the evidence was sufficient for convictions on other counts did not mean it was sufficient for Counts 20, 21, and 22.

B. Deception Is Not Fraud

Generally, *deceiving* victims (*i.e.*, without harming them) is different from *defrauding* victims (*i.e.*, by harming them or depriving them of the benefit of their bargains). The former is not fraud, whereas the latter is. Specifically, the fraud statutes “forbid[] only schemes to *defraud*, not schemes to do other wicked things, e.g., schemes to lie, trick, or otherwise deceive.” *United States v. Takhalov*, 827 F.3d 1307, 1310 (11th Cir. 2016) (vacating wire fraud conviction) (emphasis in original). The difference “is that deceiving does not always involve harming another person; defrauding does.” *Id.* For example, if a defendant “merely ‘induce[d] [the victim] to enter into [a] transaction’ that he otherwise would have avoided,” but the victim nevertheless received the benefit of his bargain (*i.e.*, suffered no harm to a property interest), that would be “‘insufficient’ to show wire fraud.” *Id.*

Here, even if there were some direct or circumstantial evidence the specific services Dr. Schneider provided to Patients A.A., L.L., or B.P. (*compare* Doc. 521 at 105-106, *with* U.S. Exs. 97, 110, 111) were rendered outside the practice location (as opposed to being not medically necessary or referred through illegal kickback arrangements), at most she would have deceived Medicare and perhaps uttered false statements in violation of 18 U.S.C. § 1001 in Counts 20, 21, and 22 rather than defrauded it. Deceit about the practice location where medically necessary services were provided does not amount to fraud because it does not harm the Government. To the extent the convictions rest solely on incorrect practice locations, then, they cannot stand.

CONCLUSION

The Court should reverse the convictions for Counts 20, 21, and 22 and remand for resentencing, *see* Schneider Br. 14-16, vacate the order denying the motion for retrial and remand for an evidentiary hearing, *see* Schneider Br. 16-24, or vacate the judgment and remand for a new trial, *see* Schneider Br. 25-30.

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 978 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 Schoolbook font.

September 19, 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 19th day of September, 2017, to:

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I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via CM/ECF on this 19th day of September, 2017, to:

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