Docket No. 18-10333

Consolidated with 18-10133 (lead)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee,

vs.

VILASINI GANESH, M.D.

Defendant-Appellant,

Appeal from Judgments of Conviction in the
United States District Court, Northern District of California (San Jose Division)
Case Number 5:16-cr-0211 LHK

APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT AND BAIL STATUS

Dr. Vilasini Ganesh was convicted in the United States District Court, Northern District of California on five counts pursuant to 18 USC §1347 and five counts pursuant to 18 USC §1035. Her Judgment, which included a 63-month sentence, was imposed on August 31, 2018 and her notice of appeal was timely filed on September 5, 2018.

This Court has jurisdiction over this appeal pursuant to 28 USC §1291. Dr. Ganesh's request for release pending appeal was granted by the district court.

STATEMENT OF THE ISSUES

1. Whether Ganesh was denied her right to retained counsel of her choice and whether the court failed to make an inquiry into the conflict with her trial counsel, both in violation of the Sixth Amendment?

2. Whether the District Court failed to properly consider Ganesh's Second Motion for New Trial based on newly discovered evidence?

3. Whether the Government engaged in prosecutorial misconduct in presenting spreadsheets that did not evidence fraud, as evidence of fraud?

4. Whether the District Court erred in refusing to allow a jury instruction based on the Belcher's proposed theory of the case instruction?

5. Whether the district court erred in allowing the government to expand the allegations in the superseding indictment with regard to Ganesh.

6. Whether the district court erred in computing Dr. Ganesh's sentence and restitution?

7. Whether the district court erred in denying Ganesh's Original Motion for Judgment of Acquittal and Motion for New Trial.

STATEMENT OF THE CASE

This is a case alleging health care fraud and false statements relating to health care. It's difficult to pinpoint the government's theory because it has evolved over time, but essentially it was alleged at trial that Dr. Ganesh engaged in myriad forms of billing fraud including upcoding, billing too many patients in one day, billing on Saturdays or on days different than when the work was performed and billing under the name (and address) of a different physician.

RELEVANT PROCEDURAL HISTORY AND FACTS

Vilasini Ganesh (hereinafter "Ganesh") and Gregory Belcher (hereinafter "Belcher") were initially indicted in May 2016. (Excerpts of Record, Volume 27,

page 7500, CM/ECF #1.)[1] The original indictment charged both Ganesh and Belcher with one count of conspiracy to commit health care fraud, one count of conspiracy to launder money, and six counts of money laundering and then Ganesh was charged with five counts of health care fraud and five counts of false statements relating to heath care matters. (28 EOR 7500-1.) A superseding Indictment was filed on July 13, 2017. (28 EOR 7424.) The superseding indictment added four counts of heath care fraud and two counts of false statements in relation to health care against Belcher. (Id.)

Trial commenced on October 23, 2017 and continued for 14 days, spread out across October, November and December. (See EOR volumes 24, 23, 22, 21, 20, 19, 18, 17, 16, 15, 14, 13, 12 and 11 generally.) The jury returned a verdict of guilty as to one count in violation of 18 USC 1035 as to Belcher and five counts in violation of 18 USC 1035 as to Ganesh in addition to five counts in violation of 18 USC 1347 as to Ganesh. Both were acquitted on the conspiracy counts and all money laundering counts. (EOR 2536.)

Ganesh was sentenced to a total of 63 months imprisonment. EOR 1.) Her motion for bond pending appeal was granted by the district court. (EOR 388.)

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[1] Hereinafter abbreviated as "EOR" followed by the page number. And, where reference is made to a docket entry, the CM/ECF number will follow the page designation for the docket, which is 7500. Example: EOR 7500-1, 2, 3, etc.

SUMMARY OF THE ARGUMENT

Ganesh was deprived of her right to the retained counsel of her choice and her case must, at a minimum, be remanded for sentencing. Additionally, she is entitled to reversal of her conviction due to the lower court's failure to make adequate inquiry into her conflict with her appointed counsel. Both were obvious deprivations of her Sixth Amendment rights.

All defendants are entitled to due process, a fair trial and to retained counsel of their choice if they are able to retain counsel. They are also entitled to conflict free counsel. Where they are not able to retain counsel, they are entitled to the effective assistance of appointed counsel. Furthermore, all defendants are entitled to a reliable sentence. Fifth, Sixth and Eighth Amendments to the United States Constitution.

There are substantial issues in this case related to the evidence the government used both before the grand jury and at trial in order to obtain convictions in this case. Unfortunately, no one realized the problems with the government's exhibits prior to trial or during trial. Rather, these issues were discovered after trial. The erroneous use of the exhibits permeated the proceedings and resulted in an unfair trial in violation of Ganesh's constitutional rights. This court must either reverse the convictions, or, in the alternative, remand this case to the district court with instructions to the district court to hear the motions for new

trial based on newly discovered evidence and to resolve them on their merits. The government's conduct involving the spreadsheets warrants reversal. At a minimum, an evidentiary hearing is required to determine whether the government understood that it was misusing its own evidence in a purposeful manner resulting in the violation of the appellants' constitutional rights, or whether their actions were inadvertent. The former would support a motion for dismissal with prejudice and the latter may not. For these reasons, an evidentiary hearing is necessary, and this case must be remanded for that purpose if this Court does not deem it appropriate to reverse the convictions altogether.

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LEGAL ARGUMENT

II. Ganesh was Denied Her Sixth Amendment Right to the Retained Counsel of Her Choice and Her Sixth Amendment Right to Counsel was Violated When the Court Failed to Make any Inquiry Into Her Conflict With Appointed Counsel

A. Relevant Facts

In January 2017 the district court and the parties set a trial date for October 23, 2017. (EOR 7500-30.) In February 2017 Ganesh's attorney filed a notice pursuant to Rule 12.2 of the Federal Rules of Criminal Procedure that he intended to present a mental state or mental defect defense on behalf of Ganesh and that the issue was relevant to both guilt and punishment. (EOR 7498.) Although the notice itself refers to mental state and a mental defect, the filing notice on PACER says, "Notice of Insanity Defense" and then states, in the part where the parties are permitted the opportunity to describe the relief sought "Mental State at issue, Not (NGI)." (EOR 7500-23, emphasis added.)

Counsel for Ganesh clearly identified the basis for the motion in the modification and within the text of the notice itself. (EOR 7498, 7500-23.) Nonetheless, the term 'insanity' generated into a movement of sorts throughout the proceedings. The government, for its part, thought that it would be wise to make sure that Ganesh was competent to stand trial given the "insanity" notice and it

requested an examination with its own expert to determine Ganesh's "competency to stand trial." (EOR 7500-38.) The government then filed a motion to determine competency, and Ganesh's attorney did not oppose the request. (EOR 7496.) The court granted the motion for a competency hearing (EOR 7494) and then things devolved from there, with the government requesting permission to invade attorney-client privilege in order to determine "competency," and five months of proceedings and filings related to Ganesh's "competency." (EOR 7442, 7348, 7344, 7334, 7285, 7273; 7123, 7072, 7067, 6926; 6843, 6735.) The references are included in the record not because the ultimate determination that Ganesh was competent is challenged, but because it shows that the government began a distracting course of conduct in the five months leading up to the trial and Ganesh's counsel followed government counsel down this path, wasting valuable time that he could have spent preparing to defend Ganesh at trial.

This context is the backdrop to Ganesh's issues with her trial counsel. Her lawyer (Horowitz), wanted to testify at the competency hearing and wanted to be questioned. (EOR 7455-60.) The court found her competent on September 21, 2017, a month before the trial. (EOR 6813-40.)

Ganesh had retained Horowitz shortly after her arrest and initial appearance in June 2016. (EOR 7500-14.) She borrowed money from her mother in order to retain him. (EOR 1612.) In the summer of 2017, he requested to be paid as CJA

counsel and it is not clear why he was appointed as CJA counsel for Ganesh because she paid him a substantial amount of money. Nonetheless, it appears that in August 2017, he was converted to CJA counsel. On September 8, 2017, prior to the competency hearing, Ganesh asked the magistrate court to dismiss her counsel, Horowitz. The request was denied. (EOR 7071.) Following the competency debacle, Ganesh became concerned that Horowitz was not prepared for trial and that he had not done anything other than the bare minimum required by the court to prepare for trial. EOR 1612.) The record certainly confirms that he did not file a single pretrial motion other than motions in limine prior to trial and he spent all of six months on a competency issue that the government raised only to assert that she was competent. She requested that he withdraw because he was not prepared for trial. (EOR 1612.) Accordingly, he filed a "Motion to Substitute Counsel," on October 13, 2017. (EOR 6480.) A hearing was held before the magistrate on October 18, 2017. (EOR 6459.) At the hearing the magistrate told her that he would not permit someone else to take over this close to trial and that her option was to continue with her "fine" lawyer or represent herself at trial, something that he did not advise. (Id.) Given these options, she chose to have Horowitz remain as her counsel.

Ganesh's trial counsel filed a motion to withdraw after the jury verdicts on December 19, 2017 at her request (again). EOR 2474. On January 9, 2018

attorney Ted Cassman appeared for Ganesh (EOR 2456) and the motion to withdraw was granted. (EOR 2454.) Both defendants requested additional time to file their post-trial motions pursuant to Rules 29 and 33 with the government only agreeing to very short extensions, the court agreeing to even shorter extensions and Ganesh getting more time than Belcher due to her new counsel. (EOR 2471, 2469, 2463, 2462, 2460, 2458, 2450, 2448, 2444, 2442; EOR 2098, 2096.)

Ganesh's motion for acquittal or new trial was filed on March 2, 2018. (EOR 2049.) Her stipulation to file an oversized brief was denied. (EOR 2094, 2093.) Her new attorney filed a motion for leave to file a supplement on March 9, 2018 (EOR 2038) and the court denied that motion too. (EOR 296.)

On March 29, 2018 Ganesh filed, in proper person, a Declaration in proper person outlining her problems with Horowitz and all his failings over the course of the period that he represented her. (EOR 1612.) She complemented Cassman on his work in the declaration. (EOR 1612.) Cassman became irritated that Ganesh filed a proper person declaration raising issues that he did not want to raise, and he filed a motion to withdraw the same day. (EOR 1605.) A hearing was held on April 3, 2018 on the motion to withdraw. (EOR 1527 and sealed portion at 7575.) It is clear from the hearing that Ganesh did not want Cassman to withdraw, that she did expect him to withdraw and that having once again borrowed money from her mother, she was not in a position to retain new counsel at that moment. (Id.) The

court permitted Cassman to withdraw and said that he would get CJA counsel for her. (Id.) William Whelan was appointed to represent Ganesh on April 6, 2018. (EOR 7500-408.) Whelan obtained a continuance of Ganesh's sentencing date until July 25, 2018. (EOR 7500-409.) Ganesh's Motion for new trial, filed by Cassman, was denied in June 2018 and the district court refused to hear the spreadsheet claims Cassman tried to raise on March 9, 2020. (EOR 165.)

Ganesh's CJA counsel, Whelan, retained an expert to assist him in understanding the government's alleged loss figures. The government's data has always been incomplete and non-sensical and it is no exaggeration to state that it took months to figure out. To that end, her attorney sought permission to issue subpoenas to the insurance companies requesting certain data in order to analyze the issues. (EOR 1464.) Per Rule 17 of the Federal Rules of Criminal Procedure, counsel, particularly CJA counsel, must first obtain permission to have a subpoena issued. The motion was denied (EOR 162) but the court encouraged the parties to confer and for Ganesh's counsel to work out the notice provisions of Rule 17. (Id.) The government filed a response to the order (EOR 1461) and her counsel filed a supplement to the motion (EOR 1451) and the government a reply (EOR 1448). The court issued another order regarding the subpoenas. (EOR 160.) Ganesh filed a second motion for Rule 17 subpoenas (EOR 1409) and the government again

opposed the motion (EOR 1399). The court denied the second motion for subpoenas. (EOR 158.)

Ganesh's sentencing memorandum was filed on July 17, 2018. (EOR 1342.) Ganesh also filed a thumb drive of data from her expert and a supplement (EOR 1337, 1340). At a July hearing, the court asked for clarification on certain issues and requested further briefing. Both parties filed their supplements on August 14, 2018. (EOR 982, 986.)

On August 9, 2018 attorney Sang Kim filed a notice of appearance on behalf of Ganesh. (EOR 999.) He is local counsel to the firm Womble Bond Dickinson. (Id.) He also a notice of substitution of attorney (EOR 997) and two pro hac vice applications for Mark Schamel and Pascal Naples. (EOR 993, 995.) The pro hac vice applications were granted. (Id.) A hearing was scheduled on the substitution of attorney for August 13, 2018. At the hearing, both Mr. Schamel and Mr. Naples appeared. (See EOR 129 (unsealed portion) and 7553 sealed portion).) Ganesh's appointed counsel recommended the substitution and the substitution was denied. (Id.) Ganesh manually filed, in proper person, a Motion for Relief from the magistrate's order (EOR 934) on August 27, 2018 and the district court ordered it stricken from the record the same day. (EOR 7500-523, 525, 526.)

Based on that, Ganesh filed, in proper person, a Petition for Writ of Mandamus in this court the morning of her sentencing. (See Docket 18-72388.)

The writ was docketed in the district court prior to sentencing. (EOR 527.) Ganesh was sentenced later that morning with the district court stating that the filing of the writ did not prevent sentencing. (EOR 9.)

On August 13, 2018, when the magistrate court denied Ganesh's request to substitute counsel over two weeks prior to her sentencing, he outlined what he believed was a pattern of requesting new counsel for the purpose of creating delay. (EOR 129; EOR 7553.) The district court, for its part, reiterated these findings at Ganesh's sentencing hearing. (EOR 12-15.)

Both courts fundamentally misapprehend and even misstate the record in this case, hence the lengthy procedural history of how and when things occurred in this case. First, both courts found that Ganesh's first change of counsel was when she hired Mr. Horowitz after having been represented by the Federal Public Defender. (EOR 134.) This is hardly a tactical delaying change of counsel and the suggestion of it is rather absurd. On June 8, 2016, Ganesh appeared with Mr. Horowitz who confirmed as counsel for her 15 days after her arrest. (Id, at 14.) To suggest that this was some sort of improper or unusual beginning of a pattern of "changing" counsel is ridiculous, but it is in keeping with the court and the government's proclivity to attribute a sinister motive to everything Ganesh has done during the proceedings in this case.

Second, both courts found that Ganesh "changed" counsel when she was represented by Cassman, prior to the appointment of Whelan. This is also untrue. Cassman filed a motion to withdraw over the objection of Ganesh, who was clearly shocked and not prepared with replacement counsel. See facts stated *supra*. The truth is, she changed counsel once in this case, from Horowitz to Cassman, and that was after she was convicted at trial. There is however a substantial record in this case that forms a legitimate basis for that change of counsel.

In February 2017 Horowitz filed a notice of intent to present a mental defect or mental health defense, specifically labeled "Not NGI." (28 EOR 7498.) He did this without consulting with Ganesh. (7 EOR 1612.) However, it is well documented throughout these proceedings that Ganesh suffers from panic disorder, depression and possibly bipolar disorder, thus, the notice as filed had a basis. What happened next, however, did not. The government filed a motion questioning Ganesh's competency to stand trial. (28 EOR 7496.) While competency and mental illness *can* be related, they are not the same thing. As noted above, this competency journey consumed five months of everyone's resources-- only to finish with the government arguing that Ganesh was competent. It was the government who requested the determination-- <u>not Ganesh</u>. This too, however, is attributed to her as evidence of some sort of sinister motive.

Within this backdrop, with the court accusing her of malingering because she was continuing to work (forgetting that the competency issue was the government's, not hers), Ganesh began to have difficulties with Horowitz. She had paid him a substantial amount of money and somehow, he ended up asking to be appointed. As she notes in her declaration, he was not hiring an investigator or an expert to prepare for trial, he was litigating her competency in a manner that even she felt was inappropriate. (EOR 1612.)

On September 8, 2017 Ganesh orally requested that new counsel be appointed to represent her. The request was summarily denied by the magistrate court. (EOR 7071.) Her competency issue was resolved on September 21, 2017 concluding with the district court making more sinister-type findings against her--all over a motion and inquiry that the government initiated. (EOR 6735.) It would be difficult to have confidence in your trial counsel at that point because he did nothing more than foster the incompetency theory, likely in the hopes that he could avoid the October 23, 2017 trial date. Even his experts conceded that they were retained to address mental health issues, not competency. (Id.) This strategy was attributed to Ganesh, of course, and then used as some indicator of her "tendency" to be manipulative.

Ganesh recognized between September 21, 2017 and October 15, 2017 two things: (1) the district court disliked her and disapproved of her (see EOR 6735)

and (2) that her counsel was not doing anything to prepare for trial. He was not interviewing witnesses that were available to him, he was not reviewing evidence with her and the court had been criticizing him for not filing things when ordered. (EOR 1612.) Ganesh asked Horowitz to withdraw from her case because she did not believe that he was adequately defending her, advocating for her and preparing for trial. (Id.) She had a barometer of measure in her husband's counsel, even though she had never been involved in a criminal proceeding. Horowitz filed a pro forma motion to substitute (rather than a motion to withdraw). (EOR 6480.) At the hearing, the magistrate court provided her two options: (1) continue with Horowitz or (2) represent herself at trial. (EOR 6459.) The court's only real inquiry was whether she had another attorney ready to represent her. (Id.) When she stated she did not, the court made no substantive inquiry into the difficulties she was facing with Horowitz and told her that if he were going to appoint anyone it would be Horowitz because he was a fine attorney. (Id.)

Although the record should be quite clear that she was not receiving the effective assistance of counsel at this point and that she was well within her rights to raise these issues with the court; this too became an example of her sinister motives. It's easy for those of us who navigate the system daily to forget how helpless, scared, intimidated and powerless a defendant can feel when they lack

resources and legal experience. She had an authority figure tell her she had no option and she fell in line accordingly.

After the jury found her guilty on ten counts, she realized that she needed a new attorney. This is also common. She borrowed money from her mother to retain Mr. Cassman. The government and the court were extremely concerned about any delays that would occur due to Cassman's January appearance in the case, but he managed to get a modest extension of time to file her post-trial motions and her sentencing was continued from April 4 to April 25 to give him an additional three weeks to prepare.

Ganesh had a good relationship with Mr. Cassman, and she did not want him to withdraw from her case. She valued the work he was doing but the record reflects that he was not interested in raising issues related to what she felt was her ineffective assistance of counsel at trial. Accordingly, she filed her own declaration on the advice of someone unknown. (EOR 1612.) This generated Cassman's withdrawal in early April 2018. Although his withdraw was not requested or desired (and in fact she said it was shocking), this too was attributed to some sinister motive on the part of Ganesh because it led to a delay in her sentencing which was moved to July 2018 and then August 2018.

Whelan was appointed to represent Ganesh. He did not get all of the funding he request for a health care expert and he certainly had a lot of ground to cover in a

short time. His efforts to secure data necessary to prepare cogent arguments for sentencing related to loss amounts were thwarted three times when the magistrate court refused to grant his Rule 17(b) motions for subpoenas.[2]

Belcher had filed a motion for new trial in late July 2018 and he did not join it, despite her request that he do so.[3] Ganesh was worried that she would end up in the same position she was in with Horowitz. She felt desperate to find someone who could help her.

Ganesh retained Mark Schamel and Pascal Naples to represent her for sentencing. They filed an appropriate substitution motion and pro hac vice applications, which were granted. (EOR 93-99.)

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[2] Although the district court would later criticize him for failing to comply with the court's request for a narrowed subpoena and a tailored justification of the need for the subpoenas, she alternatingly praised him for his advocacy of Ganesh. See 1 EOR 9, sentencing transcript.

[3] He ultimately did join the motion after her Motion to Substitute counsel was denied on August 13, 2018.

B. Legal Standard

(1) The Denial of Retained Counsel of Her Choice

The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." This bedrock principle of constitutional law has recently been restated by the United States Supreme Court in these words:

> We have previously held that an element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him. Wheat v. United States, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). Cf. Powell v. Alabama, 287 U.S. 45, 53, 53 S. Ct. 55, 77 L. Ed. 158 (1932) ("It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice").

United States v. Gonzalez-Lopez, 548 U.S. 140 (2006); see also Caplan & Drysdale Chtd. v. United States, 491 U.S. 617, 624 (1989)(noting that, although an indigent defendant is not entitled to have the attorney of his choice appointed, "the Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds.").

As this court has recognized, trial courts have a number of options available to ensure a fair trial and the integrity of the process without offending the Sixth Amendment. Bradley v. Henry, 510 F.3d 1093, 1103-04 (9th Cir. 2007)(*concurring opinion)*. Pursuant to United States v. Lillie*,* a court may "inquire into the new counsel's preparedness and condition the granting of a substitution on new counsel's willingness to continue with the existing schedule. United States v. Lillie, 989 F.2d 1054, 1056 (9th Cir. 1993) (applying Wheat, 486 U.S. at 159, and holding that a district court committed reversible error when it denied a motion for substitution of counsel filed the morning of trial), *overruled in part on other grounds*, United States v. Garrett*,* 179 F.3d 1143, 1145 (9th Cir. 1999).

Here, Mr. Schamel and Mr. Naples both stated that they were aware of the August 28, 2018 sentencing date and they would be present. In fact, Mr. Schamel noted that he had a hearing in the same court the day before. (29 EOR 7587.) The magistrate court asked if they would anticipate a need to continue the sentencing date and proposed counsel stated that they were not aware of a present basis, but that they could obviously not anticipate anything that could happen between then and the sentencing date. (Id.)

In Bradley v. Henry, this court found that the request to substitute counsel 42 days prior to trial was not likely to cause a delay, counsel had stated that he was prepared to proceed on the trial date and that even if a later issue arose that led to

an unanticipated request to continue the trial, the court was free to deny the request and that it was otherwise an unreasonable to deny the request out of fear that some future delay could occur. Bradley v. Henry, *supra* at 1103 (*concurring opinion).* Bradley v. Henry is a murder case. The issue here is substitution of counsel for sentencing.

The magistrate's reliance on Wheat v. United States is erroneous. Wheat is about Eugene Iredale's motion to substitute in as counsel for a defendant after he had already obtained an acquittal for a co-conspirator. There, the United States Supreme Court held that the right to the retained counsel of one's choosing was not absolute and in that case the potential for conflict was disqualifying. Wheat v. United States, 486 U.S. 1 3(1988). Wheat is irrelevant to this case because the proposed substituting counsel did not have a conflict. Additionally, the magistrate court relied on Morris v. Slappy, 461 U.S. 1 (1983) in issuing its denial. In that case the Supreme Court held that trial courts "necessarily require a great deal of latitude in scheduling trials" and are the often-accorded broad discretion on matters of continuances. In sharp contrast to the limited exceptions to the right to counsel of one's choice, only an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates the right to the assistance of counsel. Here, no one requested a delay and proposed counsel clearly stated that they did not see the need to request a delay. They said they would be there. Morris

v. Slappy is inapposite. The court also cited United States v. Gonzales-Lopez, 548 U.S. 140 (2006), but only for its dissent and even then, it was a nonsensical application to Ganesh's circumstance. (1 EOR 152-153.)

Immediately following the hearing denying the proposed substitution of counsel the court clerk terminated the pro hac vice status of Pascal and Schamel, leaving them no means to file anything in the case, in particular, objections to the magistrate's oral order. Although Mr. Whelan supported the substitution and agreed that he and Ganesh had a breakdown in the attorney-client relationship, he would not file objections to the magistrate's order for her. Ganesh timely filed her own request for relief from the ruling on August 27, 2018 EOR 934) and the district court promptly struck the pleading from the record. (EOR 7500-523, 525, 526.) Thus, not even Ganesh's proper person request was preserved for the record. Subsequently, Ganesh filed her writ with this court, the morning of her sentencing hearing.

At the sentencing hearing the district court stated that she struck the pleading because Ganesh is represented by counsel and she is not to file anything in proper person while represented by counsel. (EOR 10.) The court then acknowledged the writ and stated, not incorrectly, that the filing of the writ did not divest the court of jurisdiction, pursuant to Ellis v. USDC, Western District of Washington, 630 F.3d 1022 (9th Cir. 2004). She followed that with "because there is no objection

pending," we can proceed. (EOR 12.) The court then proceeded to list a litany of things that it believed Ganesh had done to delay proceedings, most of the actions appropriate (initial retainer of Horowitz and Horowitz to Cassman substitution) and many of them not attributable to Ganesh. This included the district court reading a declaration prepared by Cassman on April 6, 2018 (after he withdrew) outlining his basis for withdrawing-- that she promised when she retained him that she would not file a declaration related to the inefficacies of her former counsel (Horowitz) and since she filed the declaration two months later, he was forced to withdraw as her actions were against his advice, thereby creating a conflict. (EOR 10-12.) Cassman's declaration, partially read into the record by the district court, is not on the public docket in this case and the court stated that it was dated April 6, 2018-- after he was permitted to withdraw. The district court's basis for reading it into the record, however, was to use it as an example of Ganesh creating delays in her case, thereby justifying the denial of her request to substitute counsel on August 13, 2018.

The refusal to permit Ganesh to have retained counsel of her choice for the sentencing hearing was a violation of her right to counsel under the Sixth Amendment to the United States Constitute. It's a fairly inviolate right with few exceptions, none of them present in this case. Reversal for the purpose of sentencing is required here, but this does not end the inquiry.

(2) Denial of the Right to Conflict Free Counsel, Refusal to Make Inquiry as to the Conflict

Additionally, the magistrate court denied Ganesh's request to terminate counsel on two other occasions: September 8, 2017 and October 18, 2017. On October 18, 2017 the magistrate court failed to make an adequate inquiry a to the problems between Horowitz and Ganesh and merely instructed G nesh that she could take him or leave him and if she didn't want him to r present her, she would have to represent herself at trial.

Strickland v. Washington, 466 U.S. 688 (1984) guarantees a defendant the right to the effective assistance of counsel. This right may be infringed if an accused and his counsel become embroiled in an irreconcilable conflict. Stenson v. Lambert, 504 F.3d 873, 886 (9th Cir. 2007)("Forcing a defendant to go to trial with an attorney with whom he has an irreconcilable conflict amounts to a constructive denial of the Sixth Amendment right to counsel," *citing* Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970.)("[T]o compel one charged with a grievous crime to undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of counsel whatsoever.").) *See also* Daniels v. Woodford, 428 F.3d 1181, 1197 (9th Cir. 2005).

It is also true that not every conflict or disagreement between a defendant and her attorney implicates the Sixth Amendment. Schell v. Witek, 218 F.3d 1017, 1027 (9th Cir. 2000)(en banc)(citing Morris v. Slappy, *supra,* 461 U.S. at 13-14. Rather, the asserted conflict becomes a constitutional violation where there is a complete breakdown in communication between the attorney and the client and the breakdown prevents the effective assistance of counsel. Stenson, 504 F.3d at 886; Schell, 218 F.3d at 1026; Daniels, 428 F.3d at 1197.

It is well established and clear that the Sixth Amendment requires on the record an appropriate inquiry into the grounds for such a motion, and that the matter be resolved on the merits before a case can go forward. Schell, 218 F.3d at 1025; Bland v. California Dep't of Corrections, 20 F.3d 1469, 1475-76 (9th Cir. 1994), overruled in part on other grounds in Shell, 218 F.3d at 1025-26. *See also* Hudson v. Rushen, 686 F.2d 826, 828-29 (9th Cir. 1982); Smith v. Lockheart, 923 F.2d 1314, 1320 (8th Cir. 1991).

This court's precedent is clear that once a motion to substitute counsel has been made, an inquiry is required. Bland, 20 F.3d at 1476, *citing to* United States v. Robinson, 913 F.2d 712, 716 (9th Cir. 1990)(when defendant requests substitute counsel, court should make formal inquiry into the defendant's reasons for dissatisfaction with present counsel), *cert denied* 498 U.S. 1104 (1991). The

inquiry must focus on the nature and the extent of the conflict between counsel and the defendant, not upon counsel's legal competency. Bland, at 1476, *citing to* United States v. Walker, 915 F.2d 480, 482 (9th Cir. 1990)(inquired only as to counsel's legal competency when the inquiry should have focused upon the nature and extent of the conflict between counsel and defendant.) See also United States v. Torres-Rodriguez, 930 F.2d 1375 (9th Cir. 1991), reversing a conviction because the district court abused its discretion in denying the defendant's motion to substitute without inquiring as to his reasons for such a motion. Without an appropriate inquiry, there is no way to determine the nature and extent of the conflict resulting in a total lack of communication and thereby a deprivation of the Sixth Amendment right to counsel. Bland, 20 F.3d at 1476-77, *citing to* Brown v. Craven, 414 F.2d 1166, 1170 (9th Cir. 1970)(the problem was not in refusing to give an indigent defendant his choice of counsel, but rather the court made no inquiry to determine whether there was in irreconcilable conflict.).

Here, the record on the motion is 11 pages and it includes two breaks for the court to handle other matters. (24 EOR 6459-6470.) The court started by noting that the motion was not supported by much in the way of facts. (Id, at 6460.) Another attorney with whom Ganesh had consulted was present (Jinkerson). (Id, at 6461.) He noted that he would not be able to represent her at trial which was to commence in five days, that Ganesh does not always articulate well and she has

content to what she was trying to conveyed, that in talking to counsel for the co-defendant many of things she would like to address were verified and that she would like to address him in camera as to why she was not getting along with her current counsel. (Id.) The court inquired if there were any other attorneys that might be representing her beside Jinkerson and she replied, "No, your honor." (Id.) The court then instructed her to confer with Horowitz and Jinkerson for a few minutes and that her options were: (1) to go ahead at trial with Horowitz, or (2) to represent herself at trial. (Id, at 6462.) After they "conferred" Horowitz told the court that she had some concerns and that she was confused about the trial date and that he clarified that for her. (Id.) The court then reiterated her choices, Horowitz or represent herself, and asked spent a few paragraphs telling her that the latter was a bad idea and that it would require a different canvas by him on another day, which would have to be squeezed in before trial. (Id at 6462-63.) Ganesh asked to talk to her family. (Id, at 6463.) The court allowed said he would allow her to call her family and then Horowitz informed the court that "I just told her that her only chance is for me to still represent her, I need the time to prepare. So I suggested she take that.) (Id, at 6464.) The parties returned an hour later. (Id, at 6567-6468.) Ganesh stated that she decided to "go with an attorney," but she also noted that she needed a civil rights attorney because her rights were being violated and that the

documents in front of us "plead for help." (Id, at 6468.) The court cut her off and said the good news was that he had an appointed attorney for her, Horowitz:

> His cost has been born by the government. And he is skilled and experienced, and he's been working with you throughout this case and he's the best person to represent you at trial. And so even if I were considering someone else to represent you at trial, I wouldn't pick anyone else but Mr. Horowitz. He's the best one for you.
>
> And you may have disagreements with him. But from what I have seen, he's – he's advocating on your behalf and he's doing a skilled job at it, so as to the interest in getting another attorney for you, you're facing a criminal trial on Monday. That's your number one concern right now. Your civil rights are very much in jeopardy and you need his help and attention and focus in preparing and attending himself at that trial. . . .
>
> So thank you for thinking about it and deliberating. In conclusion, given that one potential new counsel is not interested and available and Dr. Ganesh has made the decision to continue with Mr. Horowitz, that will resolve the motion and the motion is denied and I will alert Judge Koh that--- how we've resolved things today.

(Id, at 6468-69.) That was the totality of the inquiry. There was no other inquiry and no sealed proceeding.

Ganesh's Sixth Amendment right to counsel was violated at this proceeding, prior to trial, because there was not an adequate inquiry as to the conflict. Horowitz had filed the motion at Ganesh's request, but neither provided the court with any detail as to the nature of the conflict. Whereas the denial of counsel for sentencing requires reversal with regard to sentencing, this requires reversal of Ganesh's conviction. Violations of the

right to counsel are structural error and not subject to harmless error analysis. Crandall v. Burnall, 144 F.3d 1213, 1216 (9th Cir. 1998).

II. The District Court Erred in Failing to Consider Belcher's Second Motion for New Trial and Subsequently Ganesh's Joinder

A. Introduction

Due process and the right to a fair trial require the government to introduce evidence that is relevant to the controversy at issue. It does not permit the government to fabricate evidence to "make its case" against a defendant in a federal criminal case. Fifth and Sixth Amendments to the United States Constitution.

In the trial of this case the government submitted medical insurance claims that were not related to Dr. Belcher or Dr. Ganesh. They were not patients of Dr. Belcher or Dr. Ganesh. Not only did the government seek admission of these source spreadsheets (over the objection of the defendants), the government used the spreadsheets containing irrelevant data as evidence of crimes committed by the defendants, argued in closing arguments to the jury that the irrelevant spreadsheets were evidence of crimes committed by the defendants thereby encouraging convictions on multiple counts for both defendants, and the government continues

to utilize the irrelevant source spreadsheets to compute its "alleged loss amounts" for the purpose of sentencing.

In addition to the government's presentation of literally thousands of completely irrelevant insurance claims, the government also introduced into evidence, argued to the jury and used/is attempting to use spreadsheets containing claims that were never submitted by Dr. Ganesh or Dr. Belcher. This category of claims are not just the claims lawfully submitted by other providers, these particular claims exist nowhere except on the insurer's source spreadsheets (that are allegedly reliable) and the no not exist in any other database that would have the same information had there been such a claim. The erroneous evidence in this category appears to have been fabricated from legitimate non-fraudulent claims of Dr. Dewees that are completely irrelevant to Ganesh and Belcher.

In addition to these two primary categories of improper and/or fabricated evidence used by the government throughout this case, there are myriad other errors too frequent to detail, but they include things such as inclusion of claims that were lawfully submitted by Dr. Dewees when he worked for KRD (the practice Ganesh purchased) in 2005 and 2006 that were used by the government as examples of illegal conduct by the defendants in this case. This is a third, category of errors made by the government. All of this is explained in great detail in the

Motion for New Trial filed by Belcher. (EOR 1000-1029; 1222, 1278 and sealed docs and electronic data.)

The parties objected to the spreadsheets early on. Prior to trial, the government sought to introduce spread sheets of data from the insurance company "victims" asserting that the data were business records and were admissible as such. (EOR 6879.) Belcher and Ganesh opposed the motion. (EOR 6691, 6727.) The court granted the government's motion. (EOR 372.)

B. Legal Standard

The standard of review for the denial of a motion for new trial is the abuse of discretion. United States v. Holmes. 229 F.3d 782, 789 (9th Cir. 2000). The appellants are entitled to a new trial pursuant to Federal Rules of Criminal Procedure Rule 33, which permits the court to grant a motion for new trial based on newly discovered evidence. To obtain a new trial based on newly-discovered evidence, a defendant must show that (1) the evidence is newly discovered and was unknown to him at the time of the trial; (2) the evidence is material, not merely cumulative or impeaching; (3) the evidence will probably result in an acquittal; and (4) the failure to learn of the evidence sooner was not the result of a lack of diligence. United States v. Davis, 960 F.2d 820, 824-25 (9th Cir. 1992) (quoting United States v. Walgreen, 885 F.2d 1417, 1428 (9th Cir. 1989).) To obtain a new trial based on newly-discovered evidence, a defendant must show that (1) the

evidence is newly discovered and was unknown to him at the time of the trial; (2) the evidence is material, not merely cumulative or impeaching; (3) the evidence will probably result in an acquittal; and (4) the failure to learn of the evidence sooner was not the result of a lack of diligence.

Here, the Belcher filed a motion alleging that a new trial was warranted, and the district court refused to hear the motion stating erroneously that it lacked the authority to grant the motion for new trial. (EOR 127.) This was an erroneous read of the statute and Rule 33 of the Federal Rules of Criminal Procedure.

Under Rule 33, the district court, upon a defendant's motion, may vacate any judgment and grant a new trial if the interests of justice so require. Rule 33(a). Where an appeal is pending the district court may not grant a motion for new trial, but the court may (1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remand for that purpose or that the motion raises a substantial issue. Fed. R. Crim. P. 37(a). If the district court issues an indicative ruling stating that it would grant the motion upon remand, or that the motion raises a substantial issue, "the movant must promptly notify the circuit clerk and the court of appeals may remand for further proceedings. Fed. R. App. 12.1. *See* United States v. Valverde-Rumbo, 2017 US Dist LEXIS 1444434 (N.D.Cal. San Jose 2017).

Although Ganesh joined Belcher's Motion for new trial, the district court denied her joinder stating, inter alia, that the motion for joinder by Ganesh was moot because she denied Belcher's motion. (EOR 121.) Furthermore, at Ganesh's sentencing, the district court said the following:

> Because the appeal-- I mean, that was the reason why I rejected Lisa Rasmussen's motion for new trial in Dr. Belcher's case. I no longer have jurisdiction. They can't litigate the same issues before me and on appeal-- and at the same time be appealing my rulings. Like, they've selected a forum, it's the Ninth Circuit, that's where they appropriately are. They should quit filing in this case.

(EOR 19.)

C. Factual Basis

(1) Source Spreadsheets

The motion very carefully articulated numerous identified errors in the spreadsheets admitted in the government's case in chief at trial and the entirety of the motion for new trial will not be reiterated verbatim herein because everything is set forth in the motion and its exhibits and is not reiterated herein. (EOR 1278, 1222; EOR 1029, 1002, 1000; EOR 675-033 and EOR 424-674.)

The so-called evidence of "fraud" that is not related to Ganesh and Belcher was used in the following ways at trial:

The exhibits were introduced by the government with no witness. (AOB 5815-17.) Exhibit 42(a) was referenced briefly with witness Kearney. (AOB

4829-31). There was no other specific use of the spreadsheets through witnesses prior to closing arguments and the government never called Dewees to testify at trial.

Then, in closing argument, the story became these "thousands of claims" submitted in the name of Dewees:

- "The claims submitted by Ganesh were commonly, if not always false." (11 EOR 2668.)
- "Dr. Ganesh frequently billed at least two of the insurance companies as if Dr. Dewees was the doctor providing care. This is another way in which the claims were false." "These claims frequently indicate that Dr. Dewees is the doctor in the room. That's not accurate. That's not true." "They commonly how that Dr. Dewees is the treating physician in 2011, 2012 and 2013. That's not true and that is false." (11 EOR 2670.)
- "One of the elements of health care fraud is that falsity is material." (Id.)
- "So, what did the doctors know? There could be no question that the claim is false. There could be no question that the claim is material." (11 EOR 2671.)
- "Look at Exhibit 38A. It's all Edward Dewees." (11 EOR 2688.)
- "Overwhelmingly Edward Dewees." (Id.)
- In reference to Exhibit 39(a), "It's always Kuhlman, Riley and Dewees as the name of the attending provider." "Keep scrolling. Overwhelmingly, Kuhlman, Riley & Dewees on those too. Now, what the significance of that? Remember Dr. Belcher testified that he was submitting claims from the superbills. So how would Dr. Belcher know that on these particular claims, he had to list that it was Edward Dewees? How would he know that? How could he know to get it synchronized on these insurers with what everyone else was doing? Everything is in synchronicity here. . . . How could he know that without an agreement... A joint plan?" (Id.)
- "And it lines up across these two insurers [Anthem and Blue Shield]. It lines up for a very long time. There's a similar pattern with Aetna Claims." (11 EOR 2689.)
- Exhibit 38(b) is presented on the projector as evidence of fraud because it says Dewees. (11 EOR 2694.)

- Stating that Exhibit 39(a) is "all Dewees" as evidence of fraud. (11 EOR 2695.)
- Bolstering the accuracy of its fraudulent spreadsheets: "All of the claims corroborate the accuracy of the source spreadsheets." (11 EOR 2699.)
- Stating that the fraud can be found and corroborated in the "source spreadsheets." (11 EOR 2700.)
- Stating that "source spreadsheet" 39(b) is evidence of fraud. (11 EOR 2701.)
- Stating that "source spreadsheet" 38(b) is evidence of fraud because it is Dewees. (11 EOR 2705.)
- "Dewees wasn't there, that's false." In reference to Exhibit 39(a). (11 EOR 2707.)
- Stating that Count 16 against Belcher can be corroborated by Exhibit 39(b). (11 EOR 2712.)

While the "source spreadsheets" referenced above were not relied upon during trial other than one instance, the were used by the government to create summary spreadsheets (trial exhibits no. 118 – 123) and summary claims calendars for each testifying patient witness (trial exhibits no. 146 – 153). In closing the government references them as evidence of fraud. They are not evidence of fraud. They are evidence of claims actually submitted by Dewees that are completely irrelevant to Ganesh and Belcher. What they are is the evidence of the government committing fraud against the defendants in this case, and a fraud upon the court. How do we know they are the claims of Dewees and not claims submitted by Ganesh? Because the patients do not match the patients in Ganesh or Belcher's databases. See Exabits Lodged for the Purpose of Appeal, redacted and abbreviated data bases of Belcher and Ganesh. (EOR 424-674; EOR 675-933; and Tangible Exhibits-Ganesh and Belcher databases.)

D. The Falsity of the Evidence is Newly Discovered

Ganesh's first post-trial attorney (Cassman) filed Ganesh's Motion for New Trial on March 2, 2018, as noted *supra.* On March 9, 2018 he filed a Motion seeking administrative leave to file a Supplement to her Motion for New Trial. (EOR 2038.) In his Declaration attached thereto, he explained that after he filed her Motion for New Trial, he turned his attention to sentencing matters and loss amounts. It was then that he discovered that there were thousands of inaccuracies in the government's so called "source-spreadsheets." (Id.) In the body of the Motion he describes the inaccuracies that he noticed in the following spreadsheets: 15(c), 37(e), 39(c), 40(a), 40(d), and 42(d),(e),(f),(g),(h) and (j). (Id.) He explains that it would be appropriate to supplement the Motion that he had filed exactly one week earlier to address these newly discovered claims. (Id.) The district court denied his Motion for leave to file the supplement. (EOR 296.)

It was Cassman's motion for leave and his declaration that caused all counsel to look at this issue. This was noticed on March 9, 2018. The district court has neither heard nor resolved these issues. Accordingly, due process and the right to a fair trial require that this Court remand this matter for the district court's resolution of these issues. Alternatively, this Court can reverse the conviction for other reasons provided herein.

III. The Government's Presentation of Evidence That Was Unrelated to Fraud as "Evidence of Fraud" Constitutes Prosecutorial Misconduct

A. Facts

The government's presentation of documentary evidence that is not in fact evidence of any fraud as "evidence of fraud" to secure convictions against Ganesh in this case is prosecutorial misconduct in violation of her Fifth and Sixth Amendment rights to due process and a fair trial. Reversal is required.

B. Legal Standard

With regard to the government's use of irrelevant spreadsheets the court has not substantively addressed that issue. However, it is well settled that a conviction obtained through the use of false evidence, known by to such by the government must be reversed because it is a due process violation. Napue v. Illinois, 360 US 264, 269, *citing to* Mooney v. Holohan, 394 U.S. 103 (1935); Pyle v. Kansas, 417 U.S. 213 (1942) and Curran v. Delaware, 359 F.2d 707 (3rd Cir. 1958). The same is true when the state may not knowingly present false evidence, but allows it to go uncorrected. Napue, at 1069, *citing to* Alcorta v. Texas, 355 U.S. 28 (1957). These principles are necessary to the concept of ordered liberty. Napue, at 270.

To prevail on a Napue claim a defendant must show that the (1) testimony was actually false, (2) the prosecution knew or knew that it was actually false, and (3) the evidence was material. United States v. Zuno-Arcef, 339 F.3d 886, 889 (9th Cir. 2003). False evidence is material if there is any likelihood that it could have

affected the judgment of the jury. United States v. Bagley, 473 U.S. 667, 678 (1985). Here, the spreadsheets contained evidence that was false in two different ways (possibly more): (1) the spreadsheets that contained thousands of entries for Dr. Dewees were in fact claims submitted by Dr. Dewees, not Ganesh and/or Belcher, yet they were presented as evidence of fraud by Ganesh and Belcher and (2) the data in the spreadsheets that allegedly came from the insurance company business records does not match the data in the Ganesh and Belcher databases maintained by Lytec/Gateway and thus it could not have come from them as that is how claims are submitted. In this context, the evidence is false, because it is not what the government purports it to be. The government knew that it was false as evidenced by its decision to not focus on it during trial after it was admitted with no witness, while using it extensively in closing argument (and sentencing). Finally, the evidence was material because it became the crux of the government's argument that there was fraud going on for years and years. The entire issue infected the proceedings and it would be impossible to say that it did not impact the jury.

Prosecutorial misconduct is determined by looking to whether the prosecution's actions so infected the proceedings with unfairness as to make the resulting conviction a denial of due process. Hein v. Sullivan, 601 F.3d 897 (9th Cir. 2000), *citing to* Darden v. Wainright, 477 US 168, 181 (1986), *quoting*

Donnelly v. DeChristoforo, 416 US 637, 643 (1973). In determining whether a trial is constitutionally unfair, factors that the court can consider are whether a comment misstated the evidence, whether the judge admonished the jury to disregard it, whether the comment was invited by the defense, whether counsel had the opportunity to rebut the comment and the prominence of the comment in the context of the entire trial. Hein v. Sullivan, 601 F.3d at 912-13.

This court should evaluate the government's evolving defenses to the "false" source spreadsheets. The government has been on notice of this issue since March 9, 2018, yet it continues to double down on the problem.

The government's response to Ganesh's Motion for Leave to File a Supplement to her motion for new trial (EOR 2038) makes several arguments: First, the government alleges that the information is not newly discovered. (8 EOR 2036) The government states, "Nothing in the Supplemental Motion is based upon new evidence. Instead, it is simply yet another effort to argue the admissibility and weight of the source spreadsheets." (Id.) Actually, Ganesh's Motion for Leave is not another argument about the admissibility of business records. It is an allegation that the spreadsheets are inaccurate and irrelevant to the defendants in this case. Second, the government falsely states that "The evidence has been known before and throughout the trial to Ganesh, which is reflected in her multitude of motions and trial objections concerning them." (EOR 2038.) While it is true there were

multitudes of trial objections and litigation about the source spreadsheets, those arguments were based on confrontation clause protections and a dispute as to whether they were admissible as business records. No one, prior to Cassman, realized that the government's so called "source spreadsheets" were actually inaccurate, false and misleading to everyone.

The government then doubles down with "The fact that Ganesh's attorney thinks that he has a new argument concerning the Source Spreadsheets does not mean that Ganesh has obtained new evidence to challenge the verdict." Id. Again, Cassman was the first person to notice the inaccuracies and his Motion is the first time this issue appears in the record. The government argues the business record doctrines and rules. (EOR 2035). The government then goes on to state that the Supplemental Memorandum has "no merit." Id. However, out of an abundance of some kind of caution, the government asks that if the supplement is permitted, that it be permitted sufficient opportunity to respond stating:

> In such a scenario, the government anticipates that it will argue that the Supplemental Motion adds nothing new to the argument, and contravenes nothing in the well-established law supporting, that the Source Spreadsheets were properly admitted as business records. Furthermore, to the extent that Ganesh is arguing that Rule 403 prohibited the introduction of the Source Spreadsheets (which she appears to be making -despite citing no legal authority- by suggesting that the Source Spreadsheets created jury confusion), this too has no merit. The government anticipates arguing that the Source Spreadsheets indicated a number of data points, including how Ganesh billed for Dr. Dewees' purported medical services during the

> relevant time period *and* what Dr. Dewees' actual billing and true medical services were. Ganesh confuses (perhaps intentionally) the data points in the Source Spreadsheets that illustrate when Dr. Ganesh billed as if Dr. Dewees provided the care, and the Spreadsheets that showed when he actually provided the care, including when he associated himself with another medical practice after separating from Ganesh. Both sets of data points are squarely relevant to determining when Ganesh fraudulently billed services to insurers that purported to be conducted by Dr. Dewees.

(EOR 2041.) This all sounds great and it is obviously the only place the government can lead this train while trying to keep it on the tracks, but it is not how the government actually used the inaccurate and irrelevant "source spreadsheets" at trial. They were used as evidence of fraud committed by Ganesh and not to make comparisons of what good billing actually looks like. This complete proposed re-write by the government was patently offensive.

The next events that cause the government to address the accuracy of the "source spreadsheets" is Belcher's sentencing. In that context, the government continues to maintain that the spreadsheets are accurate and there is even an attack on correspondence sent from Trizetto (Gateway) that causes the court to think, incorrectly, that Ms. Chung has somehow left off parts of the communication. She did not. (EOR 1513.)

After Belcher was sentenced, he filed a Motion for Release Pending appeal. In the government's response to that Motion, the government argues as follows regarding the source spreadsheets:

> Third, Belcher once again challenges the admission of the Source Spreadsheets. This issue has been raised multiple times in prior filings by Belcher, and each time, it has been exhaustively addressed by the government's response and thoroughly rejected by the Court's resulting order. (citing dockets 340,363). The only new argument that Belcher adds to this analysis is that the Source Spreadsheets are allegedly "riddled with errors." He provides no support for that assertion and it remains unsubstantiated by Belcher. In contrast, the overwhelming weight of the evidence at trial established that the Source Spreadsheets were reliable, accurate and that the creators of the spreadsheets (the insurers) had every reason to maintain the reliability and accuracy of the spreadsheets. [citations omitted]

(EOR 1486.)

After the district court denied Belcher's Motion for Release Pending Appeal, Belcher made his request for Release Pending Appeal in this Court. In response to the motion filed in this court, the government's position on the source spreadsheets was as follows:

> In his present motion, Belcher raises a new challenge to the spreadsheets, arguing they are "riddled with inaccurate and missing data." Mot. 11. For this claim, Belcher cites nothing more than a declaration drafted by Ganesh's attorney and attached to a supplemental post-trial motion that Ganesh attempted to file, on her own behalf, on March 9, 2018. CR 374. That was a month *after* the district court denied Belcher's own motion for acquittal or a new trial. GA 15-36.
>
> Belcher's new argument is frivolous. After the government demonstrated why Ganesh's supplemental motion was untimely and meritless (GA 77-79), the district court denied her leave to file it. GA 80. Therefore, Ganesh's unfiled supplemental motion and counsel's accompanying declaration—the basis for Belcher's present claim—are not part of the record.

> Moreover, because Belcher raised only a Confrontation Clause challenge to the spreadsheets when moving for acquittal or a new trial he waived this new evidentiary claim. (citations omitted) If he attempts to raise it on appeal, this Court will not consider it. (citations omitted) At most Belcher's new claim would be reviewed for plain error. Belcher would need to demonstrate that admission of the spreadsheets (1) was error, (2) that was plain, (3) that affected his substantial rights, and (4) that seriously affected the fairness, integrity, or public reputation of judicial proceedings. (citations omitted). Belcher cannot make those showings and does not try.
>
> At any rate, Ganesh did not assert, much less establish, any errors in the spreadsheets. She merely argued about the spreadsheets' relevance. Specifically Ganesh alleged that the spreadsheets included claim submissions data of doctors other than Ganesh or Belcher. CR 374. That is true: the spreadsheets included billing data of additional doctors associated with Ganesh's practice—Dr. Dewees (from whom Ganesh bought the practice, and whose identity Ganesh used for billing) and another doctor with whom Dr. Dewees later worked. But the spreadsheets were highly relevant at trial (citation omitted) and Belcher has no basis for claiming they are "riddled with errors and missing data." Moreover, when Belcher and Ganesh cross examined insurance witnesses about the spreadsheets, the defendants failed to identify any error. (citations omitted). In his bail motion to this Court, Belcher likewise fails to identify any error in the spreadsheets.

CA9 Docket 18-10133, 12-1, pages 17-19. Here, the government's theme there was that Belcher has forfeited his right to make the argument, that Becher has not shown any errors, and that even if he adopts the position Ganesh tried to assert (relevance) they were "highly relevant." The government declaring documents relevant does not make them relevant. Furthermore, this is yet another walk-back by the government to obscure the fact that even if the source spreadsheets could have had a possible relevant

use—that is clearly not how the government used the source spreadsheets in this trial. There is a record that belies all of these eleventh-hour suggestions by the government.

This is not the end of the source spreadsheet dance by the government. Its final chapter is perhaps the most egregious. In response to Dr. Ganesh's CJA counsel's Motion for Rule 17 subpoenas to issue, the government opposes the issuance of subpoenas to a third party through a process designed to ensure that indigent defendants have adequate resources to litigate their cases to the same extent a non-indigent defendant would be permitted to do so. Not only is it improper for the government to asserts a position on behalf of its witnesses and legal process related to them, it is improper for the government to assert itself into the strategy and decision-making process of appointed defense counsel. In its opposition to the Rule 17 subpoenas, the government:

- Complains that Ganesh could have made these requests prior to trial and that she should not need to do it now. (EOR 1399.)
- Complains she continues to assail the spreadsheets even though all of her prior efforts have failed. Id. (Maybe because the government has done everything it can to prevent her from actually making the challenges. (E.g. EOR 2035.)

- Asserts that random two-page sequences of questioning were a sufficient cross examination of insurance witnesses and that it yielded nothing so there is nothing to gain by subpoenaing information from the insurance companies now. (EOR 1399.)
- States that the proposed subpoenas are vague and Mark Flores's declaration is undated. (Id.)
- Asserts that Flores's declaration shows that the source spreadsheets are accurate. (EOR 1402.) (It actually does not say that.)
- Claims that the effort ignores the evidence at trial and misreads the spreadsheets. (Id.)
- Asserts that the government has standing to oppose the Rule 17 motion because the subpoenas would infringe on the government's interest. (Id.)
- Asserts that the requested subpoenas would harass the insurance company victims and delay sentencing and resolution of this case. (Id.)
- Claims that it might violate Ganesh's patients' right to privacy. (Id.)
- Asserts that Rule 17 subpoenas really aren't proper after trial. (EOR 1403.)
- States that the application must be made in food faith and not support a fishing expedition and that Ganesh is just doing this to harass the insurance companies. (Id.)

- States that the bulk of the loss associated to Ganesh is from Anthem and Exhibit 38(b). (EOR 1404.)
- Alleges that it is not feasible to analyze tens of thousands of claims to determine the loss applicable at sentencing. (EOR 1405.)
- Asserts that the government's loss amount is no mystery, it relies on claims submitted by Ganesh listing Dewees as the provider and everything needed to determine this is already in the source spreadsheets. Id.
- Reiterates that the source spreadsheets are accurate. (EOR 1406.) And this is the title of an entire subsection: "Neither Belcher or Ganesh have identified an inaccuracy in the spreadsheets." Id. Followed by: "Ganesh attempts to cite inaccuracies but merely cites to Belcher's sentencing documents." Id.
- Asserts that Belcher's sentencing documents prove the spreadsheets are accurate. (EOR 1406-7.)
- States "We can't trust Lytec or Gateway because the systems were not scrutinized at trial." (EOR 1407.)
- Asserts that Ganesh does not explain her pretrial lack of diligence. (EOR 1407-08.)
- States that Ganesh can just use the government's source spread sheets to prepare for her sentencing. (EOR 1408.)

- Reiterates a favorite recurring theme that Ganesh does not act in good faith, she is just trying to delay the sentencing. Id.

- Reiterates that would be unduly burdensome to the insurance company victims to have to comply with *Ganesh's subpoena*. Emphasis added. (EOR 1409.)

Over half of these assertions are belied by the record. All assertions show the government's desperate attempts to avoid any scrutiny of the government's use of false data at trial in order to secure convictions of these defendants. It is definitely a stellar effort by the government.

In the government's opposition to Belcher's motion for new trial filed in July 2018 (joined by Ganesh), the government argues that the spread sheets are not newly discovered, the defense had them prior to trial and they were admitted at trial; that Ganesh and Belcher rely on each other's arguments in a circular fashion; and then it cites all of the other reasons why they should have still been convicted regardless of the spreadsheets. (EOR 951.) The government also argues that a "few" examples of discrepancies do not invalidate the source spreadsheets. This is a reference to Belcher's small sample reports. The reports are samplings because it was physically impossible between May and July to examine all the data given the limited

time and resources available to Belcher. He specifically requested an evidentiary hearing so that he could procure an expert to continue examining the data and present a complete report to the court. More importantly, he requested an evidentiary hearing to determine if the government's use of false data and its false use of otherwise legitimate data were intentional and willful. Such a finding would support a motion for dismissal with prejudice. The district court, as noted, declined to hear the motion.

While it is true that the parties had the source spreadsheets prior to trial, both parties requested that the government present them through a witness so that they would ask questions about how the spreadsheets were compiled. They were denied that opportunity. Furthermore, the government should not be permitted to present a falsity to the jury and then complain that the defense should have figured out its false presentation at trial. Unclean hands to say the very least. The government's argument about other evidence being sufficient to convict is unavailing where it relied extensively on the false narrative that it knowingly presented at trial. It's a constitutional error that cannot simply be brushed off as harmless.

The point of all of this is to demonstrate the ongoing nature of the government's misconduct. It has done everything it can to avoid any scrutiny of the source spreadsheets and it continued to use them, in particular at Ganesh's

sentencing. Rather than agree that there are errors, it has doubled down and continues to do so. (*See* EOR 9-120.)

This court should either reverse both convictions or remand this matter to the district court for further determination regarding the government's misconduct. There is no doubt that the government used irrelevant and non fraudulent evidence against Ganesh at trial in order to prove that Ganesh committed fraud. The only issue, really, is whether the government did it intentionally. An evidentiary hearing would aid in resolving that question.

IV. The District Court Erred in Refusing to Allow Jury Instructions on Good Faith and the Defendants' Theory of the Case

Dr. Ganesh joins the arguments set forth by Dr. Belcher on this issue and those argument are located in his Opening Brief at section III, pages 43-53 and those arguments are incorporated herein.

As to Ganesh, the failure to permit a theory of the case instruction caused prejudice with regard to her counts of conviction because the government's theory of liability on the counts where she was convicted were mixture of allegations of whether or not she performed services on a certain date, sometimes a weekend.

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. . .

V. The District Court Erred in Allowing the Government to Expand the Allegations Alleged in the Superseding Indictment

A. Facts

Issues arose during trial that the government was expanding its theories upon which Ganesh could be found guilty. The court asked the parties to address the issue. Ganesh briefed the issue. (EOR 3183.) Her briefing asked the court to limit the jury's consideration to the parameters of the superseding indictment and to disallow the government from arguing all kinds of other theories of wrongdoing not presented and/or considered by the grand jury.

B. Legal Argument

A defendant may only be convicted on the basis of facts presented to the grand jury. United States v. DuBo, 186 F.3d 1177, 1179 (9th Cir. 1999), *citing to* Unites States v. Rosi, 27 F.3d 408, 414 (9th Cir. 1994). This is a due process guarantee pursuant to the Fifth Amendment to the United States Constitution. Du Bo, 186 F.3d at 1179, *citing to* United States v. Hooker, 841 F.2d 1225, 1230 (4th Cir. 1988). As this court noted in DuBo, failing to enforce this requirement would allow a court to "guess as to what was in the minds of the grand jury at the time they returned the indictment." DuBo, at 1179, *citing to* United States v. Keith, 605 F.2d 462, 464 (9th Cir. 1979); Russell v. United States, U.S. 749, 770 (1962). It is improper to permit a

defendant to be convicted on the basis of facts not found and perhaps not even presented to the grand jury that indicted her. DuBo, at 1179, citing to Russell, 369 at 770.

The court denied Ganesh's motion. (EOR 322.) The court's denial was based on the fact that the conspiracy count generally gave notice of multiple theories of fraud and therefore all of those theories could be argued with regard to any count. This was error. The court did limit the allegations of fraud alleged in the indictment regarding Belcher to the stated theory that he billed for physical therapy and that "massages" were performed. Id. This error requires reversal as to Ganesh.

VI. The District Court Erred in Ganesh's Sentencing Computations

A. Facts

Ganesh argued that her loss amount was less than $550,000. (EOR 1347.) The government argued that her loss amount was $688,000 based entirely on the claims submitted with Dr. Dewees's name on them. (EOR 1334.) The government asked for additional enhancements, some of which the court did not impose. The court determined Ganesh's guideline range to include a base level 6, a 14-level enhancement for a loss greater than $550,000, and three, two-level enhancements for obstruction of justice, more than 10 victims and abuse of a position of trust. (EOR 91, 101.)

. . .

B. Legal Argument

This court reviews the district court's interpretation of the sentencing guidelines to the facts of the case de novo, its application of the guidelines for abuse of discretion and its factual findings for clear error. United States v. Zolp, 479 F.3d 715 (9th Cir. 2007), *citing to* United States v. Kimbrew, 406 F.3d 1149, 1151 (9th Cir. 2005).

(1) Abuse of a Position of Trust

The court applied this loss to Ganesh under the USSG 3B1.3, citing application note 1 to the statute and in Ganesh's sentencing, referencing United States v. Rutgard, 116 F.3d 1270, 1293 (1997). The court's reasoning was that defrauding Medicare was considered an abuse of trust when done by a doctor, so defrauding a private insurance company must also be an abuse of trust. Application Note 1 actually does not say that, but it does refer to a doctor sexually assaulting a patient. Rutgard actually speaks to his taking advantage of elderly victim patients and does make a fleeting reference to the fact that the government depends on honest doctors and is also vulnerable. This provision of the guidelines, however, is geared toward persons who utilize a special skill to commit a crime, or to conceal a crime. There is no concealment issue here and there is nothing special about submitting billing to insurance companies for reimbursement. A guideline enhancement should identify a conduct that is particularly aggravated because

hundreds of thousands of doctors submit claims to insurance companies and insurance companies regularly deny claim and reduce the amounts they pay. It is a stretch to apply this enhancement to either defendant.

(2) Loss Amount

The loss amount attributed to Ganesh is not reliable. Ganesh's relies solely on claims that the government were submitted in Dewees's name (but she did not submit claims in Dewees's name) Application Note 3(C) to USSG 2B1.2 does permit a reasonable estimation, but the estimation must have some evidentiary basis. No fair or reliable computation was made by the district court regarding Ganesh and the district court failed to consider not only that Ganesh was never paid for most of the claims she submitted (hence the civil suits), there was no offset made by the district court for the fair market value of Ganesh's services, for which she was never paid. Here, Ganesh incorporates by reference the prevailing authority set forth by Belcher in his Opening Brief at Section V, pages 56 through 58. The amounts attributed to Ganesh are different than the are for Belcher, but the court made no analysis of any fair market value of her services. At a minimum, resentencing is required on this error.

Additionally, for Ganesh, the figure is based on evidence of claims that were not submitted by her, but rather claims submitted by Dr. Dewees, in his practice. Neither loss amount is appropriately determined in this case.

(3) Ten Or More Victims

The court listed 8 victims at sentencing and then stated that it was relying on the government's Exhibit 8, filed with its sentencing memorandum. The exhibit was filed under seal, like many documents in this case, and the undersigned does not have access to it. Presumably, if it comports with Exhibit 4 to the government's sentencing memorandum (EOR 1386) it lists patients that the government contends Ganesh billed using Dewees's name. As stated repeatedly, the government is using claims submitted by Dewees to prove fraud by Ganesh and this is improper. It was improper to add a two-level adjustment for 10 or more victims.

For each of these reasons, at a minimum, this case should be remanded for sentencing.

VII. The District Court Erred When It Denied Ganesh's Original Motion for New Trial and Motion for Judgment of Acquittal

A. Facts

Ganesh timely filed her motion for judgment of acquittal pursuant to Rule 29(c)(1) F. R. Cr. P. and her motion for new trial pursuant to Rule 33 F. R. Cr. P. on March 2, 2018. (EOR 2049.) Her motion for new trial raised the following issues: Judgment of acquittal should be entered on counts 2, 3, 5, 6, 12, 13, 14 and 15 because the evidence allegedly supporting these false and fraudulent statements

was not presented to the jury, and the evidence supporting counts 6 and 15 was insufficient to sustain a conviction because the government failed to prove that a claim for payment was ever submitted by Ganesh. (Id.) Her motion for new trial incorporates those arguments and requests that a new trial be granted because the government abandoned its theory that Ganesh falsely used another physician's TIN thereby constructively amending the indictment as to counts 11 and 12, and, the court erred by failing to give a unanimity instruction requiring the jury to agree which if any statements were false or fraudulent. (Id.) All of Ganesh's factual statements and exhibits are incorporated herein by this reference.

Ganesh attempted to supplement the motion one week later after her newly appointed counsel discovered errors with the source spreadsheets. (EOR 2038.) The government opposed this motion (8 EOR 2035.) The government filed its opposition to Ganesh's motion on March 23, 2018. (EOR 1972.) The court denied Ganesh's motion on June 8, 2018. (EOR 165.)

B. Legal Argument

1. Denial of the Supplement

As to the denial of the motion denying leave to supplement the motion: The Federal Rules of Criminal Procedure do not specifically address supplemental pleadings, but the Federal Rules of Civil Procedure do. Rule 15(d) F. R. Civ. P. provides that on motion and reasonable notice, the court may, on just terms, permit

a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. This court has held that the bringing of new claims via supplement promotes judicial economy and speedy disposition of a controversy. Keithy v. Volpe, 858 F.2d 467, 473 (9th Cir. 1988). Supplemental pleading is favored so long as some relationship between the newly alleged matters and the subject of the original action exists. Id, at 474.

The district court's denial provides no explanation. (EOR 296.) The motion sets forth a good faith basis and the fact that Ganesh's newly appointed attorney did not discover the issue sooner is explained in his declaration. (EOR 2038.) Counsel for Ganesh also states that he attempted to meet and confer with the government to no avail. (Id.) The government responded substantively to the new claims Ganesh wished to file, in staunch opposition, without addressing why leave to supplement was not appropriate. (EOR 2035.)

While district courts have broad discretion to manage pleadings and their calendars, this was an abuse of discretion in this instance. The claims raised in the supplement should have been permitted and this matter should be reversed to permit Ganesh to litigate the claims in the supplement, which were an early, but incomplete rendition of the arguments that she later joined in Belcher's second Motion for New Trial.

2. Denial of the Rule 29/Rule 33 Motion

Ganesh set forth, in her motion pursuant to Rule 29, that a Judgment of Acquittal was appropriate based on a lack of sufficiency to sustain convictions on the various counts. (EOR 2056-2067). Rule 29 mandates acquittal were evidence is insufficient to sustain a conviction if, viewing the evidence in the light most favorable to the prosecution, a rational trial of fact could not have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 324 (1979), United States v. Nevils, 598 F.3d 1158, 1164-1167 (9th Cir. 2010) (en banc); United States v. Milwitt, 475 F.3d 1150, 1152 (9th Cir. 2007). Where the government relies on circumstantial evidence, the inferences drawn therefrom must be reasonable and not speculative. United States v. Charles, 313 F.3d 1278, 1284 (11th Cir. 2002).

As Cassman pointed out on behalf of Ganesh in his first motion, there was not a single case involving a fraud conviction in which the actual fraudulent statement was not presented to the jury. (EOR 2069). Yet, for Ganesh, the government presented no evidence for eight of her ten charges in the indictment as to what the alleged fraud or fraudulent statement was. (Id, referencing Counts Two, Three, Five, Six, Twelve, Thirteen, Fourteen and Fifteen).

As this Court noted in United States v. Qing Chang Jiang, 476 F.3d 1026, 1029 (9th Cir. 2007), "When determining whether there is sufficient evidence to

satisfy these elements, we must 'begin with an appreciation of the context in which the statements was offered' . . . and look to the context of the defendant's statement to determine whether the defendant . . . knowingly uttered a false declaration." (Citing to United States v. Sainz, 772 F.2d 559, 562 (9th Cir. 1985). The problem in this case is that the "context" painted by the government was this picture of thousands of false claims submitted in the name of DeWees that were actually not fraudulent claims and not evidence of fraud by Ganesh. This is how the false spreadsheet issue permeates every aspect of the trial, requiring reversal.

Accordingly, it was error to deny Ganesh's original Rule 29/Rule 33 Motion and the convictions in this case must be reversed. At a minimum, these eight counts must be reversed.

CONCLUSION

For each of the reasons stated herein, reversal of the convictions in this case is required.

There are two structural errors here: the counsel issue and the spreadsheets.

Ganesh did not have conflict free counsel and the court failed to make any inquiry, as is required, prior to trial as to the conflict. Instead, the court gave her two absurd options: (1) proceed to trial with the attorney with whom she had a conflict, or (2) represent herself at trial. Appointing new counsel under the

Criminal Justice Act was what should have happened, but that is not what the court did. The conflict is clear by the multitude of filings in this case both prior to trial and after trial. Ganesh did not consent to an NGI defense, nor did she consent to the "competency" issue created by the government and furthered by her own counsel. This is a structural error whose only remedy is reversal. The failure to permit new counsel at sentencing requires remand for a new sentencing hearing. The use of the spreadsheets that were not relevant and not evidence of fraud requires an evidentiary hearing to determine whether the government's conduct was intentional and purposeful or simply reckless.

Dated June 19, 2020. Respectfully submitted,

/ s/ Lisa A. Rasmussen

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LISA A. RASMUSSEN, ESQ.
Counsel for Ganesh

STATEMENT OF RELATED CASES

This case has been consolidated with United States v. Belcher, lead case 18-10133.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a copy of the foregoing:

APPELLANTS' AMENDED CONSOLIDATED OPENING BRIEF,

upon the foregoing persons, via CM/ECF, on this 19th day of June 2020:

John Pelettieri, AUSA

/ s/ Lisa A. Rasmussen

_____

LISA A. RASMUSSEN, ESQ.

CERTIFICATE OF COMPLIANCE

Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4

This consolidated brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is 13,996 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type face complies with Fed. R. P, 32(a)(5) and (6).

Dated this 19th day of June 2020.

/ s/ Lisa A. Rasmussen

LISA A. RASMUSSEN, ESQ.