IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No.: 12-2559

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

Jonathan Agbebiyi,
Defendant-Appellant.

A DIRECT APPEAL OF A CRIMINAL CASE FROM THE
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

INITIAL BRIEF ON APPEAL ON BEHALF OF Defendant-Appellant

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure Rule 34(a), Appellant, Jonathan Agbebiyi, M.D. ("Dr. Agbebiyi"), respectfully requests oral argument because the Court's consideration of the issues presented by this appeal may be assisted or advanced by the presence of counsel before the Court to comment upon the issues and respond to inquiries from the Court.

JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction over the direct appeal of criminal convictions and sentences, pursuant to 18 U.S.C. § 3742(A) and 28 U.S.C. § 1291. Final Judgment and Sentence were entered November 14, 2012. (D.E. 316, Pg ID 2128-36). A timely notice of appeal was filed on November 28, 2013. (D.E. 318, Pg ID 2139). The Appeal was dismissed for want of prosecution, but then reinstated on September 12, 2013. (D.E. 336, Pg ID 2772-73; D.E. 342, Pg ID 2797-98). This Brief follows.

STATEMENT OF THE ISSUES

I. Whether the District Court committed plain error at sentencing when it failed to make an individualized finding as to the amount of loss attributable to Dr. Agbebiyi after he purportedly joined the existing conspiracy?

II. Whether Dr. Agbebiyi's sentence, where there was no finding by the jury of the total amount of the loss attributable to him and where this finding established the basis for increasing punishment at sentencing and the restitution order, violated his Sixth Amendment right?

III. Did the District Court, where there was no evidence that Dr. Agbebiyi knowingly and voluntarily joined or participated in an ongoing conspiracy with knowledge of, or intent to, further the conspiracy to commit Medicare fraud, err in failing to enter a judgment of acquittal?

STATEMENT OF THE CASE

On February 17, 2011 Dr. Agbebiyi was indicted with ten other individuals for conspiracy to commit healthcare fraud, and subjected to criminal forfeiture. (D.E. 3, Pg ID 7-17). Also charged were Karina Hernandez, Marieva Briceno, Dora Binimelis, Santiago Villa-Restrepo, Juan Villa, Isaac Carr, Diana Brown, Jasmine Oliver, and Henry Briceno. *Id*. The original indictment was superseded on August 18, 2011, September 12, 2011, and April 24, 2012. (D.E. 104, Pg ID 422-38; D.E. 113, Pg ID 457-74; D.E. 246, Pg ID 1327-39). As to Dr. Agbebiyi, the original indictment was expanded to include six counts of healthcare fraud. (D.E. 246, Pg ID 1327-39). Specifically, the third superseding indictment alleged that Dr. Agbebiyi was a physician and ordered medically unnecessary tests for Medicare beneficiaries while at Blessed MC, LLC ("Blessed"), Alpha & Omega MC, LLC ("A&O"), and Manuel MC, LLC ("Manuel"). *Id*.

Count One alleged that Dr. Agbebiyi entered into a healthcare fraud conspiracy with all the co-defendants in violation of 18 U.S.C. § 1349. *Id*. It alleged that from May 2007 to October 2009, Dr. Agbebiyi conspired to violate 18 U.S.C. § 1347 by submitting false and fraudulent claims to Medicare. *Id*. Counts Two through Seven alleged that Dr. Agbebiyi participated in the scheme to defraud Medicare by fraudulent submitted claims on July 2, 2008 ("Count Two"), July 16, 2008 ("Count Three"), February 9, 2011 ("Count Four"), January 12, 2009 ("Count

Five"), November 24, 2009 ("Count Six"), and November 24, 2009 ("Count Seven") in violation of 18 U.S.C. §§ 287 and 2. *Id.*

The matter was tried to a jury from May 7 to May, 2012. Following the trial, Dr. Agbebiyi was convicted of Counts One through Five and Seven. (D.E. 316, Pg ID 2128). Count Six of the third superseding indictment was dismissed on Motion of the United States. *Id.* The Government filed its Sentencing Memorandum on October 11, 2012. (D.E. 310, Pg ID 1846-2104). A sentencing memorandum was not filed on the behalf of Dr. Agbebiyi. After the sentencing hearing on November 6, 2012, the District Court entered a Judgment on November 14, 2012, sentencing Dr. Agbebiyi to serve concurrent terms of five years' imprisonment. (D.E. 316, Pg ID 2130).

On November 28, 2012, Dr. Agbebiyi filed a timely notice of appeal. (D.E. 318, Pg ID 2139). The Appeal was later dismissed for want of prosecution, but then reinstated on September 12, 2013. (D.E. 336, Pg ID 2772-73; D.E. 242, Pg ID 2797-98).

This appeal follows.

STATEMENT OF FACTS

A. Development and Operation of Blessed, A&O, and Manuel Clinics

Prior to opening clinics in Michigan, Karina Hernandez lived in Miami, Florida and worked as the president for a rehabilitation clinic with Ingrid Marsola and Marieva Briceno. (D.E. 323, Pg ID 2432-33). In 2007, Karina Hernandez decided to move to Michigan to open clinics that specialized in neurology. *Id*. at 46. The State of Michigan was chosen by Karina Hernandez because of its high government assistance population. *Id*. at 2434.

Starting in August of 2007, Karina Hernandez, opened three clinics specializing in neurology, Blessed, A&O, and Manuel, with the assistance of Juan Villa, Marieva Briceno, Dora Binimelis, and Emilio Haver in Livonia, Michigan. *Id*. at 2434-36. The clinics were stocked with diagnostic equipment capable of performing various test including "EKG, nerve conduction, ultrasound, transcranial and pulmonary." *Id*. at 2432-33. Karina Hernandez testified that she opened the clinics with the purpose fraudulently billing Medicare for diagnostic tests, and partly to provide good medical services. (D.E. 323, Pg ID 2434 and D.E. 324, Pg ID 2476). The clinics remained open for approximately two-and-a-half years. (D.E. 323, Pg ID 2440).

To obtain patients with Medicare benefits, the clinics would pay recruiters who, in turn, paid patients to attend the clinics. *Id*. at 2438-39. In particular, the

recruiters would recruit qualified patients from soup kitchens in the area and drive them to and from the clinics. (D.E. 321, Pg ID 2320). The clinics, in turn, would pay the recruiters for the patients that attended the clinics and visited with a physician. The patients were coached by the recruiters to give certain symptoms to the staff and doctors, typically complaints of lower back pain, ankle and knee swelling, and headaches. *Id*. at 2329.

When the patients arrived to the clinics, staff at the reception would ask for their personal and Medicare identification cards and to provide their personal and medical history. (D.E. 323, Pg ID 2445-46). The patients also completed various forms, such as a malpractice form. *Id*. at 2446. While at the clinics, the patients would be provided with fastfood, usually Taco Bell, White Castle, or McDonalds. (D.E. 321, Pg ID 2153-54).

Once a patient was properly checked-in, the patient would go through an initial evaluation with the clinics' medical assistant. This evaluation included the assistant obtaining the patient's vital signs, such as blood pressure and weight, and recorded the patient's complaints on a symptoms form "so that way we would know what complaints that person had and then that would lead us to know what studies to present to that person." (D.E. 323, Pg ID 2448).

The assistant would provide the patient file to the doctor with the completed symptom form and a recommendation of diagnostic tests available to the patient.

The patient would then see the doctor who would "generally" order the same diagnostic tests that were being recommended. *Id*. at 2451. Many of the diagnostic tests were completed on the clinics' equipment and then sent to neurologists or cardiologists in Miami, Florida every week or two for analysis. *Id*. at 2447, 55. The results of the diagnostic tests would be placed in the patient's file. If an abnormality appeared, it would be reviewed by the doctor and a follow up would be scheduled. *Id*. at 2456.

The clinics would bill Medicare for the various diagnostic tests performed. The billing was completed by Alejandro Haver. *Id*. at 2449.

B. <u>The Hiring and the Performance of Dr. Agbebiyi at the Clinics</u>

Dr. Agbebiyi was not employed by the clinics when they first opened. Three doctors preceded Dr. Agbebiyi's tenure; Dr. Chan, Dr. Acosta, and Dr. Leet. Dr. Agbebiyi's hiring occurred in 2008 when Karina Hernandez searched the Detroit Medical Center database for another phyisican. *Id*. at 2441. Karina Hernandez then contacted Dr. Agbebiyi to determine whether he was interested in working at the clinics. *Id*. Thereafter, Karina Herandez interviewed Dr. Agbebiyi for the position. *Id*. During the interview, Karina Hernandez provided Dr. Agbebiyi with a tour of Blessed so that he could observe the diagnostic equipment. *Id*. She also explained to Dr. Agbebiyi his role: "the patient had to be seen by him, and after that, that they would have to be referred to the diagnostics" "[d]epending on the complaint that the

patient would have, we would be - - they would be sent to the studies that we had, would it be EKGs or ultrasound." *Id*. at 2441-42.

According to Karina Hernandez, Dr. Agbebiyi, a doctor who specialized in obstetrics and gynecology, never expressed concerns about ordering any of the diagnostic tests, but did ask about the facilities that would be interpreting the tests. *Id*. at 2443. Karina Hernandez advised Dr. Agbebiyi that all diagnostics would be sent to a specialized company in Miami, Florida. *Id*. Karina Hernandez did not tell Dr. Agbebiyi that the purpose of the clinic was to defraud Medicare. (D.E. 324, Pg ID 2502-03).

Dr. Agbebiyi accepted the position and worked at the clinics for approximately a year-and-a-half. (D.E. 323, Pg ID 2443). Dr. Agbebiyi worked part-time three days a week; Tuesday, Thursday, and Friday. *Id*. at 2444. As for compensation, Dr. Agbebiyi received $100 per hour, the same rate as similarly employed doctors at the clinics. (D.E. 323, Pg ID 2443; D.E. 324, Pg ID 2493). When Karina Hernandez later opened the Manuel clinic, Dr. Agbebiyi received a 15 percent raise. (D.E. 323, Pg ID 2444).

According to Karina Hernandez, Dr. Agbebiyi ordered many diagnostic tests and never expressed any concern. *Id*. Nevertheless, Jasmine Oliver, the clinics medical assistant from the fall of 2007 to January of 2010, testified that while Dr. Agbebiyi would frequently order the diagnostic tests she recommended, based upon

the patient's initial evaluation, she did believe that Dr. Agbebiyi never ordered a test that was not necessary. (D.E. 321, Pg ID 2208, 22, 33). She further testified that Dr. Agbebiyi was always strict with prescribing medication to the patients. *Id*. at 2246.

Another employee at the clinics, Seung Hee Kim, an ultrasound technician, testified that she believed too many ultrasounds were being ordered at the clinics, but maintained that Dr. Agbebiyi always remained concerned that the ultrasounds were being performed correctly. (D.E. 324, Pg ID 2252, 55-56). On one occurrence, Seung Hee Kim recalled that she reported to Dr. Agbebiyi that an ultrasound was not properly conducted by another technician. From that point forward, Dr. Agbebiyi forbade the other technician from conducting further ultrasounds. *Id*. at 2255-56.

Several of Dr. Agbebiyi's patients at the clinics testified at the trial. Isaac Carr, who happened to be one of the clinics' recruiters, testified that while working at the clinic he and his wife saw Dr. Agbebiyi on several occasions. (D.E. 321, Pg ID 2337-41). In his mind, Dr. Agbebiyi properly treated his weight, knee, ankle, and back problems. *Id*. at 2337-39. Jasmine Oliver also testified that she saw Dr. Agbebiyi as a patient during and after the period he worked at the clinics because she believed that he was providing legitimate medical care. *Id*. at 2229.

C. Investigation of the Clinics

The clinics were reported for fraudulent conduct by Trustsolutions, a safeguard contractor for Medicare, in March of 2010. (D.E. 299, Pg ID 1718-19). As a result, the Federal Bureau of Investigation ("FBI") began its investigation of the clinics. *Id*. at 1719). During its investigation, the FBI made several efforts to locate the medical records of the clinics. *Id*. at 1719-20. Ultimately, Juan Villa provided the FBI with the medical records. *Id*. at 1721. However, the FBI only asked Mr. Villa to provide the medical records for the top twenty beneficiaries that were billed by the clinics and also the beneficiaries that were interviewed during the process of the investigation, despite its knowledge that over 500 patient files existed. *Id*. at 1721, 1734. The FBI also obtained Medicare data from Trustsolutions related to the clinics. *Id*. at 1721.

The Government's expert, Dr. James Teener, was provided with the medical records for the top twenty beneficiaries. (D.E. 321, Pg ID 2299-00). Dr. Teener's review was limited because he was not provided with the patient's background. *Id*. at 2295. Nevertheless, Dr. Teener testified in his opinion that several tests that were ordered by Dr. Agbebiyi, but performed by someone else, were not correctly conducted and rendered worthless. *Id*. at 2296-97 (emphasis added).

Kelly Hartung, a Medicare contractor, testified that her review of Medicare data revealed that from April 29, 2008 to January 29, 2010, 499 surface nerve conduction tests were ordered and attributable to Dr. Agbebiyi's National Provider Identifier, which resulted in Medicare being billed for $2,200,000.00 and Medicare reimbursing $1,100,000.00 to the clinics. (D.E. 324, Pg ID 2527-28). Her review of Medicare data also attributed 372 transcranial doppler tests to Dr. Agbebiyi's National Provider Identifier, resulting in a billing amount of $178,702.00 and reimbursement amount of $88,171.00 to the clinics. Finally, approximately 457 h-reflex tests were attributable to Dr. Agbebiyi's National Provider Identifier. *Id*. at 2530. A billing amount of $97,650.00 and reimbursement amount of $38,686.00 resulted from these h-reflex tests being performed. *Id*. As such, the total billing amount for these tests were $2,476,352.00 and total reimbursement amount $1,226,857.00.

According to an FBI agent, Alfred Burney, the three clinics billed Medicare for a total of approximately $6,700,000.00 while open. D.E. 299, Pg ID 1722. The total amount reimbursed, regardless of service performed or ordered by Dr. Agbebiyi, totaled $2,011,092.00. *Id*. at 1725. The agent also testified that Dr. Agbebiyi personally received $183,000.00 in compensation for his work at the clinics.

D. Sentencing

The case was given to the jury after the Government and Dr. Agbebiyi rested, no motion for judgment of acquittal was entered by Dr. Agbebiyi's trial counsel, closing arguments were heard, and the jury instructed. *Id*. at 1757-1812. Part of the Defense's theory was that the patient files were being altered unbeknownst to Dr. Agbebiyi, which both Karina Hernandez and Jasmine Oliver acknowledged had or had suspicions of occurring. (D.E. 324, Pg ID 2479-80, D.E. 321, Pg ID 2224-25, 43; D.E. 299, Pg ID 1782). After deliberating, the jury convicted Dr. Agbebiyi of conspiracy to commit Medicare fraud and five counts of Medicare fraud.

A Presentencing Investigation Report ("PSR") was generated. According to the PSR, Dr. Agbebiyi's Base Offense Level was calculated at 6. Because the loss exceeded $2,500,000.00, but was less than $7,000,000.00, the offense level was increased by 18 levels. The total amount paid by Medicare to the three clinics was used to calculate the sentencing guidelines, $2,982,029.19. The PSR also increased the offense level by 2 for the sophistication of the offense and 2 levels for his role in the offense. Dr. Agbebiyi's criminal history was calculated as a category of I. With a total offense level of 28 and a criminal history category of I, the guideline imprisonment range was 78 months to 97 months.

The Government filed a sentencing memorandum requesting the District Court to impose a sentence of 90 months' imprisonment. (D.E. 310, Pg ID 1846-

2104). Despite requesting and being granted an extension, Dr. Agbebiyi's sentencing counsel failed to file a sentencing memorandum on Dr. Agbebiyi's behalf. (D.E. 328, Pg ID 2636; D.E. 292, 296, 312). Dr. Agbebiyi's sentencing counsel lodged no objection to the PSR's calculation of Dr. Agbebiyi's guideline range, but instead presented "arguments as to the meaning and to the weight of those variables." *Id*. at 2646. Ultimately, the District Court sentenced Dr. Agbebiyi to concurrent terms of 60 months' imprisonment. *Id*. at 2663.

SUMMARY OF ARGUMENT

The evidence at trial established that if Dr. Agbebiyi joined the conspiracy to defraud Medicare, then it would have been after the conspiracy's inception. Nevertheless, the PSR calculated the amount of loss attributable to Dr. Agbebiyi to include the loss caused by the conspiracy prior to him purportedly joining. By including this amount at sentencing, the District Court erroneously increased Dr. Agbebiyi sentencing guidelines by over 15 months imprisonment. As such, the matter should be remanded for resentencing.

In part, the jury found Dr. Agbebiyi guilty of conspiring to defraud Medicare. This finding of guilt did not require the jury to find a loss amount beyond a reasonable doubt despite the loss amount becoming tantamount to raising Dr. Agbebiyi guideline range from 6 to 12 months' imprisonment to 78 to 97 months' imprisonment. Dr. Agbebiyi asserts that the Constitution requires findings of fact that substantially increase a sentence, regardless of whether it raises the statutory maximum or mandatory minimum, to be determined beyond a reasonable doubt. Therefore, this matter should be remanded for the loss amount to be found by the jury beyond a reasonable doubt.

Finally, this court should reverse Dr. Agbebiyi's conviction for conspiracy under 18 U.S.C. § 1349 because the record is devoid of evidence which demonstrates that he voluntarily and intentionally joined or participated in a conspiracy, with

knowledge of, or intent to, further the objective of the conspiracy to defraud Medicare.

ARGUMENT

I. THE DISTRICT COURT COMMITTED PLAIN ERROR AT SENTENCING WHEN IT FAILED TO MAKE AN INDIVIDUALIZED FINDING AS TO THE AMOUNT OF LOSS ATTRIBUTABLE TO DR. AGBEBIYI AFTER HE PURPORTEDLY JOINED THE EXISTING CONSPIRACY.

A. Standard of Review

Prior to sentencing, Dr. Agbebiyi's sentencing counsel failed to file a sentencing memorandum, despite being granted multiple extensions by the District Court. At sentencing, sentencing counsel lodged only an objection as to the forfeiture amount and argued the weight the guidelines should be afforded at the sentencing hearing. As such, Dr. Agbebiyi failed to object to the 18 level enhancement for the amount of loss used by the PSR. Although the issue was not preserved for appellate review, this Court reviews the District Court's sentencing decision in applying the 18 level enhancement for plain error. *United States v. Lewis*, 157 Fed. Appx. 803, 806 (6th Cir. 2005).

> Under the plain error test, before an appellate court can correct an error not raised at trial, there must be (1) an error; (2) that was plain (i.e., clear and obvious); (3) that affected substantial rights. *United States v. Hamm*, 400 F.3d 336, 339 (6th Cir.2005) (quotations omitted). If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if 'the error seriously affects the fairness, integrity, or public reputation of the judicial proceedings.' *Id.*

Id. at 807.

B. Argument on the Merits

To calculate the loss amount, the PSR used the amount the Government claimed was reimbursed to the clinics by Medicare during the entirety of the conspiracy, $2,982,029.19. However, since the Government did not allege that Dr. Agbebiyi joined the conspiracy until after its inception, this total includes an amount that should not have been attributed to Dr. Agbebiyi. Had the loss amount incurred prior to Dr. Agbebiyi purportedly joining the conspiracy not been included, the District Court would have added only 16 levels to the base offense level of 6, and not 18 levels. This 2 level swing in Dr. Agbebiyi's favor would have resulted in the guideline range being lowered by 15 months or more.

The Federal Sentencing Guidelines define the actual loss amount as "the reasonably foreseeable pecuniary harm that resulted from the offense." USSG §2B1.1, comment. n. 3(A)(i). "Reasonably Foreseeable Pecuniary Harm" is defined as pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense." USSG §2B1.1, comment. n.3(A)(iv). USSG § 1B1.3 (a)(1)(B) specifies that "in the case of a jointly undertaken criminal activity... all *reasonably foreseeable* acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense. In

explaining "reasonably foreseeable," the commentary emphasizes that "the scope of the criminal activity jointly undertaken by the defendant... is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant." USSG § 1B1.3 comment. n. 2(B). The commentary specifies that "[a] defendant's relevant conduct does not include the conduct of members of the conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct," *Id*. (emphasis added).

Based off these guideline principles, the Eleventh Circuit in *United States v. Goodheart*, 345 Fed. Appx. 523 (11th Cir. 2009) held that attributing the total intended loss of the conspiracy to a defendant who joined after the conspiracy's inception was inappropriate. In *Goodheart*, the defendant was convicted for joining a conspiracy within the prison that filed false and fraudulent income tax returns. His contributions to the conspiracy included providing co-conspirators with social security numbers of inmates from the prison systems databases and helping circumvent the prison's mail systems when sending out the fraudulent tax returns. The total actual amount of fraudulent refunds achieved by the conspiracy totaled $902,487.87, while the intended loss of the scheme was $2,733,525.00. In sentencing the defendant, the district court determined that the scope of the entire conspiracy reasonably was foreseeable to him and attributed the entire amount of the

intended loss was over $2,500,000.00 and less than $7,000,000.00, his base offense level was increased by 18 levels pursuant to U.S.S.G. § 2B1.1(a), (b)(1)(J).

On appeal, the defendant asserted that the district court erred in attributing the full amount of intended loss to him because the loss that occurred before his entry into the conspiracy should not be attributed to him. The Eleventh Circuit agreed, and held the district court made no required individualized findings about when the defendant joined the conspiracy. Because it was unclear what loss occurred before the defendant joined the conspiracy and how much should have been attributed to him, the Eleventh Circuit vacated and remanded so that the district court could make the appropriate findings and determine the proper amount of loss attributable to the defendant.

Here, as in *Goodheart*, the District Court attributed the entire amount reimbursed by Medicare to the conspiracy at Dr. Agbebiyi sentencing for loss purposes. This was error because the evidence at trial undoubtedly established that Dr. Agbebiyi joined the conspiracy after its inception. The District Court's failure to take into account Dr. Agbebiyi allegedly joining the conspiracy after its inception is significant because the testimony at trial established that the correct loss amount was below $2,500,000.00, the difference between a 16 and 18 level enhancement.

In particular, the Government's witnesses testified at trial that between April 29, 2008 and January 29, 2010 approximately $1,226,857.00 of Medicare

reimbursement was attributable to Dr. Agbebiyi for nerve conduction, transcranial doppler, and h-reflex tests, and that the total reimbursement amount attributable to Dr. Agbebiyi while at the clinics was $2,011,092.00.[1] (V.2 at p. 58-61 and V. 4 at p. 12). Either of these amounts would have fallen in $1,000,000.00 and $2,500,000.00 range instead of $2,500,000.00 and $7,000,000.00 range, and resulted in a 16 level rather than 18 level enhancement. Accordingly, this 2 level swing in Dr. Agbebiyi's favor would have lowered his guideline range to 63 to 78 months instead of 78 to 97 months' imprisonment.

Since the District Court plainly erred at sentencing when it failed to make an individualized finding as to the loss attributable to Dr. Agbebiyi, this Court should remand the matter for resentencing.

[1] Even this figure is inflated because it fails to account for services that were legitimately required for patients and performed by the clinics.

II. DR. AGBEBIYI'S SENTENCE VIOLATED HIS SIXTH AMENDMENT RIGHT WHERE THERE WAS NO FINDING BY THE JURY OF THE TOTAL AMOUNT OF THE LOSS ATTRIBUTABLE TO HIM AND WHERE THIS FINDING ESTABLISHED THE BASIS FOR INCREASING PUNISHMENT AT SENTENCING AND THE RESTIUTION ORDER.

A. Standard of Review

This issue was not preserved for appeal. Therefore, this Court should review it for plain error. *Lewis*, 157 Fed. Appx. at 806.

B. Argument on the Merits

This Court has already held that restitution is punitive. *United States v. Sosebee*, 419 F.3d 451, 461 (6th Cir. 2005) (citing cases). If a person received a sentence of probation, a restitution order may be the primary punishment they face, as a fine cannot interfere with a defendant's ability to pay restitution. 18 U.S.C. § 3572(b). If convicted of a misdemeanor, it may be the only punishment a person faces. 18 U.S.C. § 3663(a)(1)(A) (restitution may be ordered in lieu of any other penalty).

In *Sosebee*, the Sixth Circuit considered for the first time, but rejected, the application of *United States v. Booker*, 543 U.S. 220 (2005), to restitution, reasoning that "the statutes authorizing *restitution*, unlike ordinary *penalty* statutes, do not provide a determinate statutory maximum." *Sosebee*, 419 F.3d at 454, 461 (emphasis added). To the *Sosebee* court, the Supreme Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (facts of an offense that increase the maximum

potential punishment must be found by a jury beyond a reasonable doubt) did not apply to restitution because there was no statutory maximum amount.

The decision in *Apprendi* did not spring from a vacuum. In *Jones v. United States*, 526 U.S. 227, 251-52 (1999), the U.S. Supreme Court concluded that a single statute – in that case 18 U.S.C. § 2119 – may establish separate offenses, by specifying distinct elements that increase the potential sentence and each element must be charged by indictment, proved beyond a reasonable doubt, and submitted to a jury for a verdict. Post-*Apprendi*, the Court has continued on this trajectory.

In *United States v. O'Brien*, 130 S.Ct. 2169, 2180 (2010), the Court concluded that carrying a machine gun, which increases the mandatory minimum sentence under 18 U.S.C. § 924(c) to thirty (30) years, is an element of the offense – not a sentencing factor. As such, it must be proved to a jury beyond a reasonable doubt. *O'Brien*, 130 S.Ct. at 2172.

In *Southern Union Co. v. United States*, 132 S.Ct. 2344, 2349-49 (2012), the Court held that the *Apprendi* rule applies to the imposition of fines. The *Southern Union* reasoning is applicable to the issue of restitution; the Court rejected an argument, based on the premise that fines involved on "quantifying the harm" such as how much the victim lost, that fines fall outside the bounds of *Apprendi*. *Southern Union*, 132 S.Ct. at 2356. The Court even framed its review of precedent in a way directly applicable to the question of restitution: "the salient question here is what

role the jury played in prosecutions for offenses that did peg the amount of a fine to the determination of specified facts – often the value of damaged or stolen property." (*Id.* at 2353). Review of federal and state precedent revealed "that the predominant practice was for such facts to be alleged in the indictment and proved to the jury." (*Id.* at 2353-54).

The *Southern Union* reasoning is actually more pertinent to the restitution question than the normal common issue of fines in a criminal case. In most criminal cases, there is a maximum fine set by statute. Under 18 U.S.C. § 3571, most felonies carry a maximum fine of $250,000. 18 U.S.C. § 3571(b)(3). In most cases then, a jury finding of guilt suffices to establish a maximum potential fine of $250,000. In *Southern Union*, however, the question was not as clear cut. In *Southern Union*, the statute under which Southern Union was penalized established a maximum per day fine but not cap. Probation set the fine amount based upon a conclusion the violation lasted 762 days. *Southern Union*, 132 S.Ct. at 2349. The jury never found specifically how long the violation occurred. *Id*. Southern Union objected arguing this fact was critical to the punishment to which it would be subjected. *Id*.

In concluding that *Apprendi* applied, the Supreme Court emphasized that the rule that a jury must determine facts that set a maximum fine amount is an

application of two longstanding tenets of common-law criminal jurisprudence, two tenets undergirding *Apprendi*.[2]

This reasoning in *Southern Union* is then tailored to fit the issue of loss and restitution. Any fact that, by law, increases the *penalty* for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt. *Apprendi*, 530 U.S. at 483, n. 10. The Sixth Amendment provides that the right to a jury trial, in conjunction with due process, requires that each element of a crime be proved to the jury beyond a reasonable doubt. *United States v. Gaudin*, 515 U.S. 506, 510 (1995); *In re Winship*, 397 U.S. 358, 364 (1970).

The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an "element" or "ingredient" of the charged offense. *United States v. O'Brien*, 560 U.S. 218 (2010); *Apprendi, supra*, at 483, n. 10. Consistent with this connection between crime and punishment, various treatises defined "crime" as consisting of every fact which "is in law essential to the *punishment* sought to be inflicted," 1 J. Bishop, Criminal Procedure 50 (2d ed. 1872) (emphasis added), or the whole of the wrong "to which the law affixes ... punishment."; 1 J. Bishop, New Criminal Procedure § 84, p. 49 (4th ed.

[2] Looking to historically significant sources, the Supreme Court confirmed that there is first the principle that "the truth of every accusation which lacks any particular fact which the law makes essential to the punishment is … no accusation within the requirements of common law, and it is no accusation in reason." *Southern Union*, 132 S.Ct. at 2349 (omission in the original).

1895) (defining crime as "that wrongful aggregation [of elements] out of which the punishment proceeds"). Numerous high courts agreed that this formulation "accurately captured the common-law understanding of what facts are elements of a crime." *Apprendi*, 530 U.S. at 511–512. If a fact was by law essential to the *penalty*, it was an element of the offense.

Consistent with common-law and early American practice, *Apprendi* concluded that any "facts that increase the prescribed range of penalties to which a criminal defendant is exposed" are elements of the crime. *Apprendi*, 530 U.S. at 490 (internal quotation marks omitted). The Court has held that the Sixth Amendment provides defendants with the right to have a jury find those facts beyond a reasonable doubt. *Id.* at 484.

In the instant case, two government witnesses summarized the clinics' billing of Medicare and Medicare's corresponding reimbursement, which were the sole basis upon which the Government asserted both its monetary judgment under the forfeiture allegation in the indictment, and the basis for 18 levels being added to Dr. Agbebiyi's base offense level, thus subjecting him to greater punishment. But this summary evidence is a far cry from proving that each and every billing and subsequent reimbursement was attributable to fraudulent practices beyond a reasonable doubt. In fact, there was no testimony presented by the Government that each billing or reimbursement were personally reviewed to establish that the service

or test were fraudulent. Rather, the testimony indicated that the Government purposefully overlooked nearly 95 percent of the clinics' patient files, and only analyzed the top twenty beneficiaries, through which it cherry picked for its presentation.

Even of the selected beneficiaries, the Government never presented testimony which revealed that 100 percent of the services provided to these beneficiaries were fraudulent. To the contrary, the Government's expert testified only to a few instances in which the tests ordered by Dr. Agbebiyi were improperly performed by another individual. To further the point that 100 percent of the services were not fraudulent, even the Government's witnesses testified that they believed Dr. Agbebiyi provided them with legitimate medical services at the clinics by treating their medical conditions. As such, the testimony summarizing the amount of billing and reimbursement clearly could not have proven beyond a reasonable doubt that 100 percent of the services provided by the clinics were fraudulent.

Where the total loss amount is not an insignificant sentencing factor, but rather a substantive punishment and the basis for a restitution award, the jury, as in *Southern Union*, should have been required to find specifically the total loss amount upon which Dr. Agbebiyi's sentence and restitution would be based. The amount of loss attributed to Dr. Agbebiyi, a fact not found by the jury, took Dr. Agbebiyi's guideline range from 6 to 12 months to 78 to 97 months. Dr. Agbebiyi asserts that

the Constitution requires findings of fact that substantially increase a sentence, regardless of whether it raises the statutory maximum or mandatory minimum, to be determined beyond a reasonable doubt.

III. DR. AGBEBIYI IS ENTITLED TO A JUDGMENT OF ACQUITTAL ON THE CHARGE OF CONSPIRACY TO DEFRAUD MEDICARE UNDER 18 U.S.C. § 1349 BECAUSE THERE WAS NO EVIDENCE THAT HE KNOWINGLY AND VOLUNTARILY JOINED OR PARTICIPATED IN THE CONSPIRACY, WITH KNOWLEDGE OF, OR INTENT TO, FURTHER THE OBJECTIVE OF THE CONSPIRACY TO DEFRAUD MEDICARE.

A. Standard of Review

Dr. Agbebiyi did not timely move for a judgment of acquittal. Thus, he has failed to preserve the sufficiency of the evidence for appellate review. Notwithstanding trial counsel's failure to preserve this issue, this Court will review the sufficiency of evidence for a "manifest miscarriage of justice." *United States v. Williams*, 940 F.2d 176, 180 (6th Cir. 1991); *see also United States v. Carr*, 5 F.3d 986, 991 (6th Cir. 1994). "A 'miscarriage of justice' exists only if the record is 'devoid of evidence pointing to guilt.'" *United States v. Price*, 134 F.3d 340, 350 (6th Cir. 1998) (citation omitted).

B. Argument on the Merits

When reviewing a sufficiency of the evidence claim, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Hunt*, 521 F.3d 636, 645 (6th Cir. 2008). A judgment of acquittal is appropriate where no rational trier of fact could conclude from the evidence presented by the

government that each element of the offense was proved beyond a reasonable doubt. *United States v. Pearce*, 912 F.2d 159, 161 (6th Cir. 1990).

To convict Dr. Agbebiyi of conspiracy to commit healthcare fraud, the Government must establish that Dr. Agbebiyi's actions violated 18 U.S.C. § 1349, which provides:

> Any person who attempts or conspires to commit any offense under this chapter [18 U.S.C. §§ 1341 *et seq*.] shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Viewing the evidence in the light most favorable to the government, there was insufficient proof to establish beyond a reasonable doubt that Dr. Agbebiyi knowingly and voluntarily joined or participated in the conspiracy, with knowledge of, or intent to, further the objective of the conspiracy to defraud Medicare. See *United States v. Sliwo*, 620 F.3d 630 (6th Cir. 2010) (reversing a conviction for conspiracy under 21 U.S.C. § 846 and 21 U.S.C. § 841(a)(1), finding that '"the web of inference is too weak'" on these facts to permit any rational trier of fact, absent sheer speculation, to find *beyond a reasonable doubt* that [Defendant] had knowledge of the hidden *drugs*.") (quoting *United States v. Morrison*, 220 F. App'x 389, 396 (6th Cir. 2007)(emphasis in original)(quoting *United States v. Wilson,* 160 F.3d 732, 737 (D.C. Cir. 1998)).

1. **There was no evidence showing that Dr. Agbebiyi knowingly and voluntarily joined or participated in the conspiracy to defraud Medicare with knowledge of, or the intent to, further its objective.**

While there was evidence of an agreement among Karina Hernandez, Juan Villa, Marieva Briceno, Dora Binimelis, and Emilio Haver to commit healthcare fraud, there was no evidence that Dr. Agbebiyi knew of their agreement or that he voluntarily participated in it. Rather, the proof at trial, established that Dr. Agbebiyi lacked actual knowledge about the existence of an agreement to defraud Medicare, and thus did not have the requisite state of mind to be guilty of conspiracy to defraud Medicare, i.e., the specific intent to further its unlawful objective. Dr. Agbebiyi is entitled to a judgment of acquittal as to the conspiracy charge under § 1349 since there was no proof that he knowingly joined or voluntarily participated in the conspiracy with the intent to defraud Medicare because to sustain the conviction would result in a miscarriage of justice.

The evidence showed that three clinics were opened under the direction of Karina Hernandez. While the clinics were opened by Karina Hernandez for the primary purpose of defrauding Medicare, there was no evidence offered suggesting that Dr. Agbebiyi had actual knowledge of any agreement to defraud Medicare or that he voluntarily joined or participated in any conspiracy to defraud Medicare. Importantly, he was never told by Karina Hernandez that the clinics intended to defraud Medicare.

To the contrary, the evidence established that the clinic was set up to appear as a legitimate clinic practicing in neurology. When patients would come, reception would check them in. The patients would then be screened by an assistant and their vitals taken. The doctor would then see the patient, order tests based on the patient's complaints, and the tests were performed. The performed tests would then be sent to a specialist in Florida, who would review the tests for abnormalities. If the tests revealed abnormalities, the doctor would be advised and a follow up with the patient scheduled.

Dr. Agbebiy worked part-time at the clinics for a year-and-a-half and received reasonable compensation for his services, the same rate as other doctors that had been employed at the clinics. He visited with the patients, ordered tests, prescribed medication, and showed a general concern with his patients well-being. When problems arose with the ultrasounds not being properly conducted, he forbade the technician who had made the mistake from conducting further ultrasounds. To his co-workers, Dr. Agbebiyi never ordered a test they believed was unnecessary and was strict with prescribing medication to his patients.

Critically, there was no direct evidence that he knew that recruiters were being paid by the clinics to recruit Medicare patients from local soup kitchens. Dr. Agbebiyi also was not involved with the billing and thus was unaware that the clinics had been fraudulently billing Medicare. In fact, it was a matter of design and intent

on the part of the real conspirators -- Karina Hernandez, Juan Villa, Marieva Briceno, Dora Binimelis, and Emilio Haver – to keep its employees in the dark about the existence of the conspiracy. Simply put, there was no evidence that Dr. Agbebiyi knew of the conspiracy concocted by Karina Hernandez and her counterparts to defraud Medicare. Nor was there any evidence that Dr. Agbebiyi voluntarily participated in any conspiracy; instead, he was merely the perfect pond who fell into a trap set by others to defraud Medicare.

The absence of proof that Dr. Agbebiyi had actual knowledge of any agreement to defraud Medicare, or that he voluntarily joined or participated in any conspiracy to defraud Medicare, is driven home by the fact that the evidence tended to indicate that Karina Hernandez, or others, would alter Dr. Agbebiyi's patient files to order tests necessary to bill Medicare. Moreover, there were instances in which Dr. Agbebiyi would be asked to perform certain tests on patients, which he would "generally" order. Indeed, the acts of altering Dr. Agbebiyi's patient files in order to defraud Medicare and having to ask him to order additional tests were necessary precisely because Dr. Agbebiyi was not part of the conspiracy.

Tellingly, the government did not charge Dr. Chan, Dr. Acosta, or Dr. Leet, even though they operated in the same physician capacity prior to Dr. Agbebiyi working for the clinics. Therefore, it is reasonable to believe that these doctors, along with Dr. Agbebiyi, were not co-conspirators but pawns in Karina Hernandez's

general scheme to defraud Medicare. *United States v. Garcia-Torres*, 280 F.3d 1, 4 (1st Cir. 2002) (stating that while the defendant may have unwittingly performed some peripheral acts that furthered the conspiracy, he did not become a co-conspirator because he neither knew the conspiracy existed nor agreed to join).

Simply stated, there was no evidence that Dr. Agbebiyiy "knew the object of the conspiracy and voluntarily associated himself with it to further its objective." *United States v. Crossley*, 243 F.3d 847, 856 (6th Cir. 2000). Indeed, he had no idea whatever that "he was participating in a joint venture" to defraud Medicare. *United States v. Caver*, 470 F.3d 220, 234 n.6 (6th Cir. 2006). Accordingly, this Court must reverse Dr. Agbebiyi's conviction for conspiracy under § 1349 because the record is devoid of evidence that he voluntarily joined or participated in the conspiracy to defraud Medicare, with knowledge of, or the intent to, further its objective.

CONCLUSION

This Court should reverse Dr. Agbebiyi's conviction for conspiracy under 18 U.S.C. § 1349 because there was no evidence that he voluntarily and intentionally joined or participated in the conspiracy to defraud Medicare and because the jury failed to determine the loss amount attributable to Dr. Agbebiyi beyond a reasonable doubt.

Alternatively, Dr. Agbebiyi is entitled to be resentenced because the sentencing guidelines were erroneously calculated.

DATED this 25th day of November, 2013.

Respectfully Submitted,

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DESIGNATION OF RELEVANT DISTRICT COURT RECORDS

Pursuant to 6th Cir. L.R. 30(b), Dr. Agbebiyi hereby designates the following filings in the district court's record as items to be included in the Addendum:

Docket Entry No.	Description of Entry	Date	PG ID
3	Indictment	2/17/11	7-17
104	First Superseding Indictment	7/14/11	422-38
113	Second Superseding Indictment	9/12/11	457-74
246	Third Superseding Indictment	4/24/12	1327-39
N/A	Presentence Investigation Report	8/6/12	N/A
292	Stipulation and Order Adjourning Sentencing	8/6/12	1644
296	Second Stipulation and Order Adjourning Sentencing	8/14/12	1703
299	Trial Transcript from May 10, 2012	8/27/12	1718-22, 1725, 1734, 1782
310	Government's Sentencing Memorandum	10/11/12	1846-2104
312	Third Stipulation and Order Adjourning Sentencing	10/23/12	2122
316	Judgment	11/14/12	2128-36
318	Notice of Appeal	11/28/12	2139
321	Trial Transcript from May 9, 2012	12/17/12	2155-54, 2208, 2222-25, 2229, 2233, 2295-97, 2299-00, 2320, 2329, 2337-41
323	Trial Transcript from May 7, 2012	12/17/12	2432-40, 2443-56
324	Trial Transcript from May 8, 2012	12/17/12	2476, 2479-80, 2493, 2502-03, 2527-28, 2252-56
328	Sentencing Transcript from November 6, 2012	1/22/13	2636, 2646, 2663

336	Order Dismissing Appeal for Want of Prosecution	6/5/13	2772-73
342	Order Reinstating Appeal	9/12/13	2797-98

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of November 2013, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF System and that a true and correct copy has thereby been served upon Phillip Ross, counsel for Appellee.

Robert L. Sirianni, Jr., Esq.
Robert L. Sirianni, Jr., Esq.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because the word count is 7957 words. This brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in 14-point Times New Roman Font.

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