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"Twisted" Path to New Trial for Dr. Paulus

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A 2018 Sixth Circuit panel upheld a jury verdict convicting Dr. Richard Paulus of submitting fraudulent medical claims. That same panel, with 2020 hindsight(!), reversed that conviction. It held that the trial court's order unconstitutionally blocked exculpatory evidence.

Jury Verdict Set Aside

The "twisted" history of the verdict began when a jury deadlocked twice and needed an *Allen* charge in order to convict Dr. Paulus of billing angiograms that were unnecessary. The trial court rejected the jury's verdict and set aside the conviction: a doctor's decision about the degree of blockage of an artery was a matter of subjective medical opinion that "could be neither be false nor fraudulent." The government disagreed and appealed. (Double jeopardy does not prevent appeal of a judgment of acquittal after verdict.)

Verdict Reinstated

In the first appeal, the panel (McKeague, Batchelder, Griffin) recognized the difficulty of distinguishing a fraudulent medical opinion from mere expert disagreement. Relying on the *U.S. v. Persaud*, however, the panel reaffirmed that fraud occurs when a doctor deliberately inflates artery blockage in order to bill for unnecessary procedures. The panel emphasized that "it is up to the jury – not the court – to decide whether the government's proof is worthy of belief." Deferring to the jury, the panel reversed, reinstated the conviction, and remanded the case for sentencing.

Claim of *Brady* Violation

Before sentencing, Dr. Paulus learned that his hospital had audited his angiograms long before trial. More important: the government knew about the audit but did not disclose it. That audit revealed a 7% rate of misdiagnosis whereas government experts testified during trial to a nearly 50% error rate. Dr. Paulus moved for a new trial, claiming that the government withheld exculpatory evidence in violation of *Brady v. Maryland*.

Trial Court Error

The trial court denied the motion for a new trial. It turns out the trial court had known about the hospital audit all along. The *government* actually wanted to disclose the audit, but

the *hospital* objected on attorney-client privilege grounds, demanding an ex parte hearing. The trial court declined to rule on the privilege claim, holding instead that the report was not admissible. The trial court concluded the ex parte hearing, as the second appellate decision described it, by "inexplicably ordering" the parties not to disclose the information to Dr. Paulus.

Back at the Sixth Circuit, the same appellate panel held that a new trial should have been ordered because the doctor satisfied each of the three prongs of *Brady:* favorable evidence, suppression (albeit by the court's order), and prejudice.

Although the panel "sympathize[d] with the prosecution" for being bound by the trial court's order, it rejected the government's attempts to blame Dr. Paulus for not trying harder to discover the information before trial. The panel did not think Dr. Paulus needed to "follow a trail of crumbs in search of a cookie" that the hospital possessed a larger sample size. Further, the panel did not think Dr. Paulus "should have just made his own cookie" by hiring his own expert to analyze his procedures.

Criticism of Ex Parte Hearing

Although resting its decision solely on the *Brady* violation, the panel also criticized the ex parte process. It recognized that an ex parte hearing may be appropriate when justified by a compelling interest. But the panel also cautioned that an ex parte hearing is "problematic because 'the Court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate.'"

Assuming attorney client privilege may be such a compelling interest, the panel pointed out that the privilege issue had not been decided. Instead, the trial court acted without obtaining "the defense's input in many ways" that would have been possible "without vitiating [the hospital]'s asserted privilege." The "risks of proceeding ex parte," the court concluded, "were realized in this case."

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