

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

ORDER

v.

04-cr-30-bbc

DIOGENES A. DIONISIO

Defendant.

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Attached for the parties' consideration are draft voir dire questions, jury instructions and a verdict form..

Entered this 14<sup>th</sup> day of October 2008.

BY THE COURT:

/s/

STEPHEN L. CROCKER  
Magistrate Judge

Voir Dire: U.S. v. Dionisio, 04-cr-30-bbc

Statement of the case: This is a criminal case in which the defendant, Diogenes Dionisio, a physician in the Philippines, is charged with unlawfully conspiring to submit false medical insurance claims to WPS insurance company for payment under an insurance program for military veterans called CHAMPUS and TRICARE. The defendant also is charged with actually submitting several false claims to this program. The defendant has entered a plea of not guilty to these charges.

Have any of you heard of this case before today? Would this affect your ability to serve impartially as a juror in this case?

1. Scheduling: this case will begin this morning and finish by this Wednesday. Are any of you actually unable to sit as jurors because of this schedule?

2. Is there anything about the nature of the charges in this case that might affect your ability to be impartial in this case?

3. The court reads these pattern jury instructions:

The defendant is presumed to be innocent of the charges. This presumption remains with the defendant throughout every stage of the trial and during your deliberations on the verdict, and is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty.

The government has the burden of proving the defendant's guilt beyond a reasonable doubt, and this burden remains on the government throughout the case. The defendant is not required to prove his innocence or to produce any evidence.

The defendant has an absolute right not to testify. The fact that the defendant does not testify cannot be considered by you in any way in arriving at your verdict.

Would any of you be unable or unwilling to follow these instructions?

4. Ask counsel to introduce themselves, the defendant, and the case agent. Ask whether jurors know them.

5. Invite each juror, in turn, to rise, and provide the following information:

Name, age, and city or town of residence.

Marital status and number of children, if any.

Current occupation (former if retired).

Current (or former) occupation of your spouse or partner and any adult children.

Any military service, including branch, rank and approximate date of discharge.

Level of education, and major areas of study, if any.

Memberships in any groups or organizations.

Hobbies and leisure-time activities.

Favorite types of reading material.

Favorite types of television shows.

Whether you regularly listen to talk radio and if so, to which programs.

6. Do any of you in the jury box know each other from before today?

7. The defendant is a citizen of The Republic of the Philippines, a democracy in Southeast Asia that is allied with the United States. Is there anything about the defendant's nationality or his Asian heritage that would affect your ability to be impartial in this case?

8. Have any of you, your relatives or your close friends ever worked for WPS insurance company? Would this affect your ability to be impartial in this case?

9. Have any of you, your relatives or your close friends ever been covered by or made a claim for any medical insurance program for military personnel or for veterans, including but not limited to CHAMPUS and TRICARE? [*Sidebar if necessary for details?*] Would this affect your ability to be impartial in this case?

10. Do any of you have strong feelings or opinions about health insurance programs or about health insurance fraud? [*Sidebar for follow up*] Would this affect your ability to be impartial in this case?

11. Have any of you, your relatives or close friends ever lived in or visited the Philippines? [*Sidebar if necessary for follow up?*] Would anything about this experience affect your ability to be impartial in this case?

12. Have any of you, your relatives, or close friends ever been accused of, or convicted of any criminal offense? [*Sidebar if necessary*]. Would this affect your ability to be impartial in this case?

13. Have any of you, your relatives, or close friends ever been the victim of any crime? Would this affect your ability to be impartial in this case?

14. Do any of you, by virtue of past dealings with the United States government, or for any reason, have any bias for or against the government in a criminal case?

15. Have any of you, your relatives, or close friends ever worked for the local, county, state, or federal government? Would this affect your ability to be impartial in this case?

16. Have any of you, your relatives, or close friends ever worked for, or had other professional contact with any law enforcement, investigative or security company or agency, or any prison? Would this affect your ability to be impartial in this case?

17. Have any of you ever belonged to any organization or group that excluded people because of their race, gender, religion or national origin?

18. Would any of you judge the credibility of a witness who had been convicted of a crime in the past differently from other witnesses solely because of this prior conviction?

19. Would any of you judge the credibility of a witness who was a law enforcement officer or government employee differently from other witnesses solely because of his or her official position?

20. Would any of you judge the testimony of a witness who was Asian differently from other witnesses solely because of the witness's race?

21. If the defendant were to choose to testify, would any of you judge his credibility differently from other witnesses solely because it was a defendant who was testifying?

22. Have any of you, your relatives, or close friends ever been a witness in a trial? Is there anything about this experience that might affect your ability to be impartial in this case?

23. Have any of you, your relatives, or close friends ever had any negative experience with any lawyer, any court, or any legal proceeding that would affect your ability to be impartial in this case?

24. How many of you have served previously as a juror in another case? Please tell us in which court you served, approximately when, the type of cases you heard, whether you were foreperson, and the verdicts.

25. If at the conclusion of the trial you were to be convinced of the defendant's guilt beyond a reasonable doubt, is there any one of you who would not, or could not, return a verdict of guilty?

26. If at the conclusion of the trial you were not to be convinced of the defendant's guilt beyond a reasonable doubt, is there any one of you who would not, or could not, return a verdict of not guilty?

27. The court will instruct you on the law to be applied in this case. You are required to accept and follow the court's instructions in that regard, even though you may disagree with the law. Is there any one of you who cannot accept this requirement?

28. Do you know of any reason whatever, either suggested by these questions or otherwise, why you could not sit as a trial juror with absolute impartiality to all the parties in his case?

## JUROR BACKGROUND INFORMATION

When asked to do so by the court, please stand and provide the following information about yourself:

Name, age, and city or town of residence.

Marital status and number of children, if any.

Current occupation (former if retired).

Current (or former) occupation of your spouse or partner and any adult children.

Any military service, including branch, rank and approximate date of discharge.

Level of education, and major areas of study, if any.

Memberships in any groups or organizations.

Hobbies and leisure-time activities.

Favorite types of reading material.

Favorite types of television shows.

Whether you regularly listen to talk radio and if so, to which programs.

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UNITED STATES OF AMERICA,

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JURY INSTRUCTIONS

04-cr-30-bbc

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Members of the jury, you have seen and heard all the evidence and the arguments of the attorneys. Now I will instruct you on the law.

You have two duties as a jury. Your first duty is to decide the facts from the evidence in the case. This is your job, and yours alone.

Your second duty is to apply the law that I give you to the facts. You must follow my instructions on the law, even if you disagree with them. Each of the instructions is important. You must follow all of them.

Perform these duties fairly and impartially. Do not allow sympathy, prejudice, fear or public opinion to influence you. Do not allow any person's race, color, religion, national ancestry or sex to influence you.

Nothing I say now and nothing I said or did during the trial is meant to indicate any opinion on my part about what the facts are or about what your verdict should be.

The evidence consists of the testimony of the witnesses, the exhibits admitted in evidence and stipulations.

A stipulation is an agreement between both sides that certain facts are true.

I have taken judicial notice of certain facts that may be regarded as matters of common knowledge. You may accept those facts as proved, but you are not required to do so.

You are to decide whether the testimony of each of the witnesses is truthful and accurate, in part, in whole, or not at all, as well as what weight, if any, you give to the testimony of each witness. In evaluating the testimony of any witness, you may consider among other things: the witness's age; the witness's intelligence; the ability and opportunity the witness had to see, hear, or know the things the witness testified about; the witness's memory; any interest, bias, or prejudice the witness may have; the manner of the witness while testifying; and the reasonableness of the witness's testimony in light of all the evidence in the case.

You should judge the defendant's testimony in the same way that you judge the testimony of any other witness.

You should use common sense in weighing the evidence. Consider the evidence in light of your own observations in life. You are allowed to draw reasonable inferences from facts. In other words, you may look at one fact and conclude from it that another fact exists. Any inferences you make must be reasonable and must be based on the evidence in the case.

Some of you have heard the phrases "circumstantial evidence" and "direct evidence." Direct evidence is the testimony of someone who claims to have personal knowledge of the commission of the crime which has been charged, such as an eyewitness. Circumstantial evidence is the proof of a series of facts that tend to show whether the defendant is guilty or not guilty. The law makes no distinction between the weight to be given either direct or circumstantial evidence. You should decide how much weight to give to any evidence. You should consider all the evidence in the case, including the circumstantial evidence, in reaching your verdict.

Certain things are not evidence. I will list them for you:



First, testimony and exhibits that I struck from the record or that I told you to disregard are not evidence and must not be considered.

Second, anything that you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded. This includes any press, radio, or television reports you may have seen or heard. Such reports are not evidence and must not influence your verdict.

Third, questions and objections by the lawyers are not evidence. Lawyers have a duty to object when they believe a question is improper. You should not be influenced by any objection or by my ruling on it.

Fourth, the lawyers' statements to you are not evidence. The purpose of these statements is to discuss the issues and the evidence. If the evidence as you remember it differs from what the lawyers said, your collective memory is what counts.

It is proper for a lawyer to interview any witness in preparation for trial.

You may find the testimony of one witness or a few witnesses more persuasive than the testimony of a larger number. You need not accept the testimony of the larger number of witnesses.

You have received evidence of statements said to be made by the defendant to \_\_\_\_\_ . You must decide whether the defendant made any of the statements attributed to him. If you find that the defendant did make this statement, then you must decide what weight, if any, you believe the statement deserves. In making this decision, you should consider all matters in evidence having to do with the statement, including those concerning the defendant himself, and the circumstances under which the statement was made.

The defendant has an absolute right not to testify. In arriving at your verdict, you must not consider the fact that the defendant did not testify.

You have heard evidence of acts of the defendant other than those charged in the indictment. Specifically, you've heard evidence that the defendant \_\_\_\_\_. You may consider this evidence only on the question \_\_\_\_\_. You should consider this evidence only for these limited purposes.

You have heard evidence that \_\_\_\_\_ have been convicted of crimes. You may consider this evidence only in deciding whether the testimony of any of these witnesses is truthful in whole, in part, or not at all. You may not consider this evidence for any other purpose.

You have heard evidence about the character trait of \_\_\_\_\_ for untruthfulness. You should consider this evidence in deciding the weight that you will give to their testimony.

You have heard evidence that before the trial, witnesses made statements that may be inconsistent with their testimony here in court. If you find that it is inconsistent, you may consider the earlier statement only in deciding the truthfulness and accuracy of that witness's testimony in this trial. You may not use it as evidence of the truth of the matters contained in that prior statement. If that statement was made under oath, you may also consider it as evidence of the truth of the matters contained in that prior statement.

You have heard evidence about a number of the witnesses that may affect your evaluation of their testimony:

\_\_\_\_\_ have admitted lying under oath.

You have heard testimony that \_\_\_\_\_ have received benefits from the government in connection with this case. Specifically, they received reduced charges or were not charged with all the crimes they could have been charged with or both and they have the possibility of reduced sentences.

You have heard testimony from \_\_\_\_\_, who each stated that he or she was involved in the commission of the alleged crimes charged against the defendant.

The witnesses \_\_\_\_\_ have pleaded guilty to crimes arising out of the same allegations for which the defendants are now on trial.

The witness \_\_\_\_\_, has received immunity; that is, a promise from the government that any testimony or other information she provided would not be used against her in a criminal case.

You may give the testimony of these witnesses such weight as you believe it deserves, keeping in mind that it must be considered with caution and great care. Moreover, the guilty pleas of witnesses \_\_\_\_\_ cannot be considered as evidence against the defendants on trial now.

Certain summaries are in evidence. They truly and accurately summarize the contents of voluminous books, records or documents, and should be considered together with and in the same way as all other evidence in the case.

Certain summaries are in evidence. Their accuracy has been challenged by [the government] [the defendant]. Thus, the original materials upon which the exhibits are based have also been admitted into evidence so that you may determine whether the summaries are accurate.

You have heard a witness give opinions about matters requiring special knowledge or skill. You should judge this testimony in the same way that you judge the testimony of any other witness. The fact that such a person has given an opinion does not mean that you are required to accept it. Give the testimony whatever weight you think it deserves, considering the reasons given for the opinion, the witness' qualifications and all of the other evidence in the case.

### THE INDICTMENT

The defendant is charged in the indictment as follows:

*[Court reads the indictment]*

The indictment in this case is the formal method of accusing the defendant of crimes and placing the defendant on trial. It is not evidence against the defendants and does not create any implication of guilt.

The defendant is not on trial for any act or any conduct not charged in the indictment.

The defendant is presumed to be innocent of the charges. This presumption continues during every stage of the trial and your deliberations on the verdict. It is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty as charged.

The government has the burden of proving the guilt of the defendant beyond a reasonable doubt. This burden of proof stays with the government throughout the case. The defendant is never required to prove his innocence or to produce any evidence at all.

The indictment charges that the offenses were committed "on or about" certain dates. The government must prove that the offenses happened reasonably close to those dates but it is not required to prove that the alleged offenses happened on those exact dates.

## THE ELEMENTS OF CONSPIRACY: COUNT 1

The defendant is charged in Count 1 with conspiring with other people to commit fraud by means of unlawful kickbacks on claims made to the CHAMPUS/TRICARE federally-funded health insurance program. A conspiracy is an agreement between two or more persons to accomplish an unlawful purpose. To sustain the charge in Count 1, the government must prove these elements:

First, the conspiracy charged in Count 1 existed;

Second, the defendant knowingly became a member of this conspiracy with an intention to further the conspiracy; and

Third, an overt act was committed by at least one conspirator in furtherance of the conspiracy.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt as to Count 1, then you should find the defendant guilty of Count 1.

If, on the other hand, you find from your consideration of all of the evidence that any of these propositions has not been proved beyond a reasonable doubt as to Count 1, then you must find the defendant not guilty of Count 1.

Count 1 specifically charges the defendant with conspiring to violate Title 42 of the United States Code, Section 1320a-7b(b)(1)(B). This statute states:

Whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program, will be guilty of a crime.

As used throughout these instructions, all forms of the verb “to know” and the adverb “knowingly” mean that a defendant realized what he was doing and was aware of the nature of his conduct and did not act through ignorance, mistake or accident. Knowledge may be proved by a defendant's conduct and by all the facts and circumstances surrounding the case.

A conspiracy may be established even if its purpose was not accomplished.

To be a member of the conspiracy, the defendant need not join at the beginning or know all the other members or the means by which its purpose was to be accomplished. The government must prove beyond a reasonable doubt that the defendant was aware of the common purpose and was a willing participant.

As to the first element of Count 1, in deciding whether the charged conspiracy existed, you may consider the actions and statements of every one of the alleged participants. An agreement may be proved from all the circumstances and the words and conduct of all of the alleged participants which are shown by the evidence.

As to the second element of Count 1, in deciding whether the defendant joined the charged conspiracy, you must base your decision solely on what the defendant personally did or said. In determining what the defendant personally did or said, you may consider his own words and acts. You also may consider the words and acts of other people to help you determine what the defendant personally did or said, and you may use the words and acts of other people to help you understand and interpret the defendant's own words and acts. Keep in mind, however, that the defendant's membership in the charged conspiracy can only be proved by his own words or acts.

By themselves, the defendant's presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish the defendant's guilt.

The defendant's association with conspirators is not by itself sufficient to prove his participation or membership in a conspiracy.

If a defendant performed acts that advanced a criminal activity but had no knowledge that a crime was being committed or was about to be committed, those acts alone are not sufficient to establish the defendant's guilt.

To meet its burden of proof as to Count 1, the government must prove that the defendant knowingly and intentionally joined the charged conspiracy, knowing the conspiracy's aim and intending to achieve it.

In meeting its burden of proof for the third element of Count 1, the government does not need to prove all of the overt acts charged in the conspiracy. It only needs to prove one. However, you must unanimously agree on at least one overt act. It is not sufficient for some of you to find that the government has proved one overt act and the rest of you to find that the government has proved a different overt act. All twelve of you must agree on a particular act or acts.

The overt act proved may itself be a lawful act.

#### ELEMENTS OF THE OFFENSE: COUNTS 2 AND 3

The defendant is charged in Counts 2 and 3 with wilfully making false statements. To sustain this charge the government must prove these elements:

First, the defendant made or a claim against a department of the United States as charged in the count that you are considering;

Second, this claim was false, fictitious or fraudulent;

Third, the defendant knew that this claim was false, fictitious or fraudulent; and

Fourth, the defendant acted willfully.

If you find from your consideration of all the evidence that each of these elements has been proved beyond a reasonable doubt as to the count that you are considering, then you should find the defendant guilty of that count.

If, on the other hand, you find from your consideration of all the evidence that any of these elements has not been proved beyond a reasonable doubt as to the count that you are considering, then you should find the defendant not guilty of that count.

A claim is false or fictitious if untrue when made and then known to be untrue by the person making it. A claim is “fraudulent” if known to be untrue and made with intent to deceive. The government does not need to prove that a claim was both false or fictitious and fraudulent. It only has to prove one or the other with regard to a particular claim. However, before you may find that the government has met its burden of persuasion on this element, you must unanimously agree on at least on these characteristics of a claim. It is not sufficient for some of you to find that a claim was false or fictitious and the rest of you to find that it was fraudulent. All twelve of you must agree on one, the other, or both.

As used in these instructions, the word “willfully” means that a person acts voluntarily, intentionally, and with the intent to do something the law forbids.

*[Note: the law of this circuit does not necessarily require the government to prove willfulness, see Committee Comment to elements instruction for § 287, 1999 Pattern Jury Instructions at 163, but that’s how the grand jury charged it in this case]*

A defendant does not act willfully if he believes in good faith that he is acting within the law. However, you may consider the reasonableness of that defendant's belief together with all the other evidence in the case in determining whether the defendant held the belief in good faith. The burden of proving good faith does not rest with the defendant because



the defendant has no obligation to prove anything to you. The government has the burden of proving to you beyond a reasonable doubt that the defendant acted willfully.

An offense may be committed by more than one person. A defendant's guilt may be established without proof that the defendant personally performed every act constituting the crime charged.

If the defendant knowingly caused the acts of another, the defendant is responsible for those acts as though he personally committed them.

Any person who knowingly aids, counsels, commands, induces or procures the commission of an offense may be found guilty of that offense. However, that person must knowingly associate himself with the criminal activity, participate in the activity, and try to make it succeed.

Upon retiring to the jury room, select one of your number as your presiding juror. This person will preside over your deliberations and will be your representative here in court. A verdict form has been prepared for you. [*Court reads the verdict form*]

Take this form to the jury room, and when you have reached unanimous agreement on the verdict, your foreperson will fill in, date and sign the form.

Each count of the indictment charges the defendant with having committed a separate offense. You must consider each count and the evidence relating to it separate and apart from the other count. Your verdict of guilty or not guilty of an offense charged in one count should not control your decision as to the other count.

The verdict must represent the considered judgment of each juror. Whether your verdict is guilty or not guilty, it must be unanimous. You should make every reasonable effort to reach a verdict. In doing so, you should consult with one another, express your own views and listen to the opinions of your fellow jurors. Discuss your differences with an open mind. Do not hesitate to re-examine your own views and change your opinion if you come to believe it is wrong. But do not surrender your honest beliefs about the weight or effect of evidence solely because of the opinions of your fellow jurors or for the purpose of returning a unanimous verdict.

The twelve of you should give fair and equal consideration to all the evidence and deliberate with the goal of reaching an agreement consistent with the individual judgment of each juror. You are impartial judges of the facts. Your only interest is to determine whether the government has proved its case beyond a reasonable doubt.

If it becomes necessary during your deliberations to communicate with the court, you may send a note by a bailiff, signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with the court by any means other than a signed writing, and the court will never communicate with any member of the jury on any subject touching the merits of the case otherwise than in writing, or orally here in open court. You will note from the oath about to be taken by the bailiffs that they too, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case. You must not reveal to any person, including the court, your numerical split on any verdict question until you have reached a unanimous verdict on every count.

IN THE UNITED STATES DISTRICT COURT  
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UNITED STATES OF AMERICA,

Plaintiff,

v.

DIOGENES DIONISIO,

Defendant.

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VERDICT

04-cr-30-bbc

COUNT 1

We, the Jury in the above-entitled cause, find the defendant, Diogenes Dionisio,

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("Guilty" or "Not Guilty")

of the offense charged in Count 1 of the indictment.

COUNT 2

We, the Jury in the above-entitled cause, find the defendant, Diogenes Dionisio,

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("Guilty" or "Not Guilty")

of the offense charged in Count 2 of the indictment.

COUNT 3

We, the Jury in the above-entitled cause, find the defendant, Diogenes Dionisio,

\_\_\_\_\_  
("Guilty" or "Not Guilty")

of the offense charged in Count 3 of the indictment.

\_\_\_\_\_  
Presiding Juror

Madison, Wisconsin

Date: \_\_\_\_\_