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A Second Opinion Becomes a Guilty Verdict

By Kyle Clark and Andrew George

A renowned cardiologist, Richard Paulus spent 21 years treating thousands of patients in eastern Kentucky. King's Daughters Medical Center in Ashland even put his name on the front of its heart center. But in 2015 Dr. Paulus was indicted by federal prosecutors, accused of putting stents into the coronary arteries of people the government said didn't need them.

Concerned about the quantity of coronary-stent procedures performed at King's Daughters, federal prosecutors hired a pair of doctors to review Dr. Paulus's old cases. In some patients, Dr. Paulus had reported arterial blockages of 60% while the government's doctors said that the patients' angiograms—essentially chest X-rays—showed blockage of 30% or less. The government took this as proof that Dr. Paulus had misdiagnosed patients as part of a scheme to defraud Medicare, Medicaid or private insurance companies.

Unfortunately for Dr. Paulus, two federal appellate courts had previously ruled that cardiologists can't reasonably disagree by more than 10% to 20% about the extent of blockage in an artery. A precedent had been set, but it was a legal precedent, not a medical one: If a government doctor says an artery is 30% blocked, any doctor who says it's more than 70% blocked must be lying.

That didn't ring true to David L. Bunning, the federal judge who presided over Dr. Paulus's 2016 trial. After days of testimony, Judge Bunning had heard the government's doctors disagreeing with each other as well as Dr. Paulus. Judge Bunning became convinced that the whole business of using angiograms to determine the severity of arterial blockages was so subjective that no cardiologist ought to be convicted of fraud based on another cardiologist's opinion. When the jury convicted Dr. Paulus, Judge Bunning overruled the verdict and granted an acquittal.

Judge Bunning was right. Doctors can, and do, honestly disagree by wide margins. We have seen this repeatedly in consultation with expert witnesses while defending doctors like Dr. Paulus. Show two doctors the same image, and you may get wildly varying—yet highly confident—opinions of what it shows. That's why getting a second opinion before having a medical procedure is a good idea. Doctors tend to have strong views about their own competence and other doctors' lack of it.

While defending another doctor, we found 93 examples in scientific journals in which two cardiologists disagreed on the severity of a blockage by more than 40%. Sometimes they disagreed by 100%, meaning one doctor thought the artery was wide open while another thought it was completely blocked. The government's theory about how much cardiologists can honestly disagree is flat out wrong.

Honest disagreements between cardiologists fuel prosecutions for insurance fraud.

Prosecutors appealed Judge Bunning's ruling. On behalf of the Mid-Atlantic Innocence Project, we presented our 93 examples to a three-judge panel of the Sixth U.S. Circuit Court of Appeals. Citing the Sixth Circuit's ruling in a recent case that variability in cardiology is limited to 10%, the panel overruled Judge Bunning and reinstated Dr. Paulus's conviction. It did this without disputing our 93 examples proving its precedent couldn't be true.

Dr. Paulus's case is part of a disturbing trend in the enforcement of health-care fraud. Ten years ago, fraud usually meant billing for something you didn't do—a patient you didn't see, a procedure more expensive than the one you did. Those cases didn't ask judges and juries to play doctor. But then prosecutors became concerned with unnecessary and expensive tests or procedures and started pursuing what are known as "medical necessity" cases. It's now a federal felony to do a test or procedure if a doctor hired by the government later decides it was unnecessary.

Prosecutors find dozens of these cases every year by trolling Medicare and Medicaid data for providers with abnormally high (in the government's view) volumes of certain expensive procedures. They then subpoena the relevant X-rays and scans, many of which were digitally downgraded for long-term storage. The government doctor may be looking at X-rays with a quarter the resolution of those seen by the original prescribing doctor. Nevertheless, if the government doctor decides that a procedure was unnecessary, and that no other doctor could have honestly thought otherwise, prosecutors label it criminal fraud.

No one wants doctors performing unnecessary procedures for financial gain. But it's also wrong to rely on unproven or false scientific assumptions to determine guilt. Almost half of the first 325 criminal defendants exonerated from guilt for other crimes by DNA testing were previously convicted based on "scientific" evidence. Too many of these cases involved flawed assumptions by prosecutors and expert witnesses, as well as judges and defense lawyers who failed to question them. Undoing a conviction based on flawed science often takes decades.

That timeline may not work for Dr. Paulus, who is 71. Ohio-based cardiologist Harold Persaud, who was convicted in 2015 of similar charges, is serving a 20-year prison term. The Sixth Circuit denied Dr. Persaud's appeal last year, and Judge Bunning recently refused Dr. Paulus's request for a new trial. He will be sentenced in March. These doctors won't be the last the government targets. From what we've seen, any cardiologist can be accused of fraud if government doctors are allowed to review work they did five years earlier. All a prosecutor needs is a scientific claim that no one bothers to check.

Messrs. Clark and George are trial lawyers at Baker Botts in Washington. They have defended and advised health-care providers in criminal and civil investigations by the federal government. Mr. George is also a member of the Mid-Atlantic Innocence Project's board.