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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

UNITED STATES OF AMERICA, Plaintiff, vs. PLASTIC SURGERY INSTITUTE OF UTAH, INC.; MICHAEL KIRK MOORE JR.; and KRISTIN JACKSON ANDERSEN, Defendants.	Case No. 2:23-cr-00010-HCN **NOTICE OF INTENT TO USE FED. R. EVID. 609 IMPEACHMENT EVIDENCE** Judge Howard C. Nielson, Jr.

1. INTRODUCTION

Pursuant to Fed. R. Evid. 609, the United States files this Notice of Intent to use Rule 609 impeachment evidence, should Defendant Dr. Michael Kirk Moore elect to testify. Specifically, if Dr. Moore takes the stand at trial, the United States intends to introduce Dr. Moore's two 2016 misdemeanor convictions for insurance fraud to impeach his credibility.

2. LEGAL STANDARD FOR INTRODUCING RULE 609 IMPEACHMENT EVIDENCE

Fed. R. Evid. 609(a)(2) provides, in relevant part, "[t]he following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction: . . . (2) for any crime

regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving – or the witness's admitting – a dishonest act or false statement." F.R.E. 609(a)(2).

To be admissible under Rule 609(a)(2), the prior conviction must involve "some element of deceit, untruthfulness, or falsification which would tend to show that an accused would be likely to testify untruthfully." *United States v. Dunson*, 142 F.3d 1213, 1215 (10th Cir. 1998) (quoting *United States v. Seamster,* 568 F.2d 188, 190 (10th Cir.1978)). "[C]rimes such as perjury or subor[ ]nation of perjury, false statement, criminal fraud, embezzlement, or false pretense" and "those crimes characterized by an element of deceit or deliberate interference with the truth" are per se crimes of dishonesty or false statement. *United States v. Mejia-Alarcon,* 995 F.2d 982, 989 (10th Cir. 1993). Crimes like burglary, robbery, and theft are not part of the per se category and, therefore, "not automatically admissible under Rule 609(a)(2)," though the "the trial court may look beyond the elements of an offense that is not considered a per se crime of dishonesty to determine whether the particular conviction rested upon facts establishing dishonesty or false statement." *Mejia-Alarcon*, F.2d at 989-90.

The Tenth Circuit has found that convictions in the below cases constituted crimes of dishonesty or false statement:

- Making false claims to the United States government, *United States v. Wolf,* 561 F.2d 1376, 1381 (10th Cir. 1977);
- Issuing a bad check while knowing it will be dishonored, *United States v. Mucci,* 630 F.2d 737, 743-44 (10th Cir. 1980);
- Making false and misleading statements in the sale of securities, *United States v.*

O'Connor, 635 F.2d 814, 818–19 (10th Cir. 1980);

- Soliciting someone to commit perjury, *McCoy v. Meyers*, 825 F. App'x 560, 564 (10th Cir. 2020) (unpublished); and
- Committing grand larceny based on false pretenses rather than stealth, *United States v. Whitman,* 665 F.2d 313, 320 (10th Cir. 1981).

Once the Court determines that a certain crime is a crime of dishonesty or false statement, evidence concerning that crime "must" be admitted without any further balancing test, subject to the time limits under Rule 609(b). F.R.E. 609(a)(2), 609(b), *United States v. Begay,* 144 F.3d 1336, 1338 (10th Cir. 1998) ("Rule 403 balancing applies unless the prior crime involves dishonesty or false statements."). That is, a balancing test is required only if more than ten years have passed since the conviction or release from confinement. F.R.E. 609(b). That is not relevant here, however, as the 2016 convictions at issue fall within the past ten years.

Finally, "[t]he well-settled rule in this circuit is that the permissible scope of cross-examination under Rule 609 extends to the essential facts of convictions, the nature of the crimes, and the punishment." *United States v. Smalls*, 752 F.3d 1227, 1240 (10th Cir. 2014).

3. IMPEACHMENT EVIDENCE

Should Dr. Moore exercise his right to testify at trial, the United States provides notice that it intends to introduce the following convictions to impeach his credibility. Both convictions are for "False or Fraudulent Insurance Claim." The below facts provide more than a sufficient basis for the Court to determine that these convictions rested upon facts establishing dishonesty or false statement:

- On June 16, 2016, in Case No. 151401637, in the Third District Court, West Jordan, Dr.

Moore pleaded guilty and was convicted of two counts of False or Fraudulent Insurance Claim (amended from second-degree felonies to class A misdemeanors). The Felony Information[1] indicates that the allegations were based on two incidents in which Dr. Moore submitted fraudulent claims for loss to Farmers Insurance and to State Farm Insurance.

- The Farmers Insurance claim was based on an accident that occurred on August 14, 2012, in which Dr. Moore was riding a bicycle and struck by a vehicle. According to the Felony Information, Dr. Moore was taken to Alta View Hospital but was released and returned to work to see patients the same day. Nevertheless, he filed a claim for approximately $552,644.55 on the driver's insurance policy claiming missed work and "significant injuries." He claimed that "constant unbearable pain" rendered him unable to perform plastic surgery at the same level. He instructed staff to block out his schedule to create the appearance that he could not perform surgery and further instructed staff to report that Dr. Moore did not perform surgery due to his injured shoulder. However, the investigation, which included logbooks obtained pursuant to search warrant, revealed that Dr. Moore did not perform fewer surgeries than usual in the weeks following the accident and did not take time off due to injury.
- The State Farm Insurance claim was based on an alleged theft that Dr. Moore claimed took place on January 16, 2013 (five months later). According to the Felony Information, Dr. Moore filed a police report and a claim on his insurance

[1] The Felony Information is attached as Exhibit 1. The United States has requested but has not yet received audio from the June 16, 2016 change of plea hearing. The plea agreement available on the docket appears to be cut off after the first page and does not include any factual details.

policy claiming that his trailer full of office equipment was stolen. He claimed over $31,169.62 in losses. Because his insurance policy required proof of purchase to obtain reimbursement for items, Dr. Moore submitted receipts for several items including a new safe, two exam chairs, and a new couch. However, investigation by the insurance company revealed that Dr. Moore made these purchases, obtained the receipts, and then canceled the orders the same day. Dr. Moore was scheduled to submit to an evaluation under oath as part of the claim process but failed to show up. Two of Dr. Moore's employees reported the claim as fraudulent. Several employees indicated to investigators that Dr. Moore never had the items he claimed were stolen. When insurance fraud investigators interviewed Dr. Moore to ask why he had purchased items online, submitted the receipts for reimbursement, and then cancelled the orders, Dr. Moore replied that he did not know.

On June 16, 2016—immediately after his change of plea—Dr. Moore was sentenced to two concurrent terms of 365 days in jail (which were suspended), 24 months of probation, and 100 hours of community service. The Judgment[2] also indicates that Dr. Moore paid unspecified restitution in full by the date of sentencing. Dr. Moore's probation was terminated successfully on July 26, 2018 after serving the full 24-month term.

4. NOTICE OF INTENT TO USE THIS IMPEACHMENT EVIDENCE

Convictions for False or Fraudulent Insurance Claim under Utah state law meet the criteria under Rule 609(a)(2) for crimes of dishonesty or false statement. Here, Dr. Moore—the potential witness—pleaded guilty to two counts of insurance fraud in violation of Utah Criminal Code

[2] The Sentence, Judgment, and Commitment is attached as Exhibit 2.

Section 76-6-521, whose below elements include a dishonest act or false statement. The 2016 version of the statute[3] provides, in relevant part:

> (1) A person commits a fraudulent insurance act if that person with intent to defraud:
> [. . .]
> (b) presents, or causes to be presented, any oral or written statement or representation:
> (i)
> (A) as part of or in support of a claim for payment or other benefit pursuant to an insurance policy, certificate, or contract; or
> (B) in connection with any civil claim asserted for recovery of damages for personal or bodily injuries or property damage; and
> (ii) knowing that the statement or representation contains false or fraudulent information concerning any fact or thing material to the claim. UCA § 76-6-521(1)(b) (2016 version).

It further provides that violations of the relevant Subsection (1)(b) are punishable as prescribed by § 76-10-1801[4] (Communication Fraud) for property of like value. That subsection specifies that the degree of the crime shall be:

> (a) a class B misdemeanor when the value of the property, money, or thing obtained or sought to be obtained is less than $500;
> (b) a class A misdemeanor when the value of the property, money, or thing obtained or sought to be obtained is or exceeds $500 but is less than $1,500;
> (c) a third degree felony when the value of the property, money, or thing obtained or sought to be obtained is or exceeds $1,500 but is less than $5,000;
> (d) a second degree felony when the value of the property, money, or thing obtained or sought to be obtained is or exceeds $5,000; and
> (e) a second degree felony when the object or purpose of the scheme or artifice to defraud is the obtaining of sensitive personal identifying information, regardless of the value. UCA § 76-10-1801 (2016 version).

The conduct was charged as two second-degree felonies, meaning the value of each alleged act of insurance fraud exceeded $5,000. Dr. Moore ultimately pleaded to two amended counts of Class

[3] This notice references the 2016 version of UCA § 76-6-521, as Dr. Moore's conviction occurred in 2016.
[4] This notice references the 2016 version of UCA § 76-10-1801, as Dr. Moore's conviction occurred in 2016.

A misdemeanor, meaning he pleaded to insurance fraud greater than $500 but less than $1,500.

Both misdemeanor charges to which Dr. Moore pleaded guilty in 2016 required proof or admission of "intent to defraud" and a statement or representation containing "false or fraudulent information concerning any fact or thing material to the [insurance claim or civil] claim." UCA § 76-6-521. This meets Rule 609(a)(2)'s requirement for the element of "a dishonest act or false statement." Therefore, "the evidence must be admitted" concerning Dr. Moore's 2016 misdemeanor convictions for insurance fraud, should he testify. F.R.E. 609(a)(2).

In addition, if the Court were to look beyond the elements of the offense "to determine whether the particular conviction rested upon facts establishing dishonesty or false statement," *Mejia-Alarcon,* 995 F.2d at 989-90, the facts above also provide a clear basis to determine that each conviction was based on established dishonesty or false statements. On two separate occasions—one after an August 14, 2012 accident and one fabricating a January 16, 2013 theft—Dr. Moore submitted fraudulent claims on insurance policies to obtain damages for losses that he did not suffer, and which he knew he did not suffer. To submit these insurance claims, Dr. Moore had to make false statements and act with dishonesty. These convictions are proper for admission under Rule 609(a)(2) to impeach Dr. Moore's credibility.

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5. CONCLUSION

Should Dr. Moore choose to testify at trial, pursuant to Fed. R. Evid. 609(a)(2), the United States intends to cross-examine him concerning both of his two 2016 misdemeanor convictions for insurance fraud.

RESPECTFULLY SUBMITTED,

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