

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

KIRAN SHARMA,
Petitioner, Pro Se

VERSUS

THE UNITED STATES OF MAERICA
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR THE WRIT OF CERTIORARI

Respectfully submitted,

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QUESTIONS PRESENTED

1(a): Does the language in the Mandatory Victim Act (MVRA) 18 USCS 3663A, and 21 USCS 853(a), and this court's opinions in Hughey v. United States, 495 US 411, 109 L.Ed.2d 408, 110 S.Ct.1979 (1990) and in Honeycutt v. United States ,137 S.Ct.1626, 198 L.Ed.73 (2017), allow the courts to forfeit the third party beneficiary's 'Trust Corpus' valued at \$1.5 million, which is not a proceed of fraud in the plea agreement but later forfeited to compensate the victims towards restitution, without the appropriate party's "Evidentiary Hearing".

1(b): "Does the counsel's failure to object to the forfeiture of the "Trust Corpus" within thirty days period of the "the preliminary order of the forfeiture" under 21 USCS 853(n) (2), constitute an "Ineffective Assistance of Counsel" ("IAC") for the purpose of 28 USCS 2255 (Habeas Corpus Petition) and the Certificate Of Appealability if the Trust was a "Non-dispositive issue" for the defendants to sign the plea agreement and the counsel concedes in his affidavit to the court that "I WAS INEFFECTIVE"(IAC) and the appeal court also cites the same deficient performance of counsel in their opinion.(US v. Sharma 509 Fed Appx. 381(CA5, 2013) and US v. Sharma 585 Fed Appx. 861(CA5, 2014)).

2(a): In the Plea Cases, does the language in 18 USCS 3663A, 21 USCS 853(a) and this Court's opinion in Hughey v. United States 495 US 411, 109 L.Ed. 2d 408,110 S.Ct. 1979 (1990) and in Honeycutt v. United States, 137 S.Ct. 1626, 198 L.Ed. 73(2017), allow restitution and forfeiture to compensate the victims of crime based on a relevant conduct and an allegation that is originally absent in the indictment, plea, plea colloquy, PSR, Pretrial Hearings and directly at the defendant's sentencing hearing and district court's opinion?

2(b): "Based on 'Ineffective Assistance of Counsel', did the court of appeals violate Sharma's 'Due Process' Right under the Constitutions' Fifth and Sixth Amendment Rights by denying relief for "evidentiary hearing" and 'Certificate Of Appealability' ("COA") where the Defendant was exclusively 'assured' by the counsel that there would be a "credit for legitimate injections services", a "Non-dispositive issue" for signing the plea-agreement. However, counsel's failure to properly acknowledge and carry the burden to prove, rendered Sharma deprived of any 'credit'. The counsel conceded in open court that "I was ineffective", based on 18 USCS 3664(e) ["...the burden to show credit for the services is on the defendant..."]; and 42 USCS 1320c-3(a) ["...dispute of medical necessity is best resolved by 'medical expert' testimony...peer-review...]; and Fifth Circuit's opinion in Sharma I, 703 F.3d 318 (CA5, 2012), ("...the defendants failed to show that not even one injection to even one patient was medically necessary...").

3 (a) Should the remand by the appellate courts to District Courts be "cabined and limited" as the Fifth Circuit and some other Circuits adopt or "de novo" which is consistent with the majority of the Circuits to protect the "DUE PROCESS RIGHT" of the parties under the Fifth (5th) Amendment of the Constitution in such cases, (Sharma I, 703 F.3d 318 (CA5, 2012))?
On appeal, should this court allow appellate review of a new issue under the standard of the plain error; harmless error; or NOT AT ALL?

3(b) Reasonable Jurists could differ as to whether District Court correctly determined without an evidentiary hearing that K. Sharma had failed to provide sufficient evidence that Counsel provided 'Ineffective Assistance of Counsel' to merit further proceedings in the District Court, which resulted in Sharma's "COMPLETE LOSS OF LIFE TIME EARNING "WITHOUT a DUE-PROCESS" to Sharma's prejudice .

PARTIES TO THE PROCEEDING

Petitioner's husband and co-defendant/appellant, Arun Sharma, is a party to these proceedings.

TABLE OF CONTENTS

QUESTIONS PRESENTED-----	i
PARTIES TO THE PROCEEDING-----	ii
TABLE OF CONTENTS-----	ii, iii
TABLE OF CITATIONS-----	iv, iv, v
PRAYER-----	1
OPINIONS BELOW-----	1, 2
JURISDICITION-----	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED-----	2-5
INTRODUCTION AND STATEMENT OF THE CASE -----	6, 7
BASIS OF FEDERAL JURISDICTION -----	7
REASONS FOR GRANTING THE WRIT -----	8 - 25
1. Statutory violation on 18 USCS 3663A -----	8
2. Precedent violation and 21 USCS 853 (n)(2) -----	8
3. Constitutional violation -----	10
4. Ineffective Assistance of Counsel -----	10
5. Statutory violation under MVRA, 18 USCS 3663A and 3664 -----	10
6. Statutory violation and 42 USCS 1320c-3 (a) -----	10
7. Appeal Court's precedent and Statutory violation on 18 USCS 3664 (e)---	11
8. Violation of Appeals Court's Precedent -----	11
9. Due Process Violation -----	18
10. 'Circuit Split' and Illegal Restitution -----	19

The circuits are deeply divided on whether a district court, during resentencing, should as a default rule, -----

CONCLUSION ----- 25

TABLE OF CONTENTS – Cont'd

APPENDICES -----

Appendix A. On 08/23/2018, the United States of Appeals for the Fifth Circuit Denied its opinion on the Petition for Rehearing En Banc as a motion for Reconsideration. See USA v. Kiran Sharma, No.17-20636, USDC No. 4:16-CV-2977.

Appendix B. On 07/13/2018, the United States of Appeals for the Fifth Circuit Denied its opinion on the motion for Certificate of appealability (COA).See USA v. Kiran Sharma, No. 17-20636,Doc. No. 00514554183, USDC No. 4:16-CV-2977.

Appendix C. On 04/21/2015, the United States Court of Appeals for the Fifth Circuit entered its opinion affirming the restitution order. See USA v. Sharma, No. 13-20325, 609 Fed. Appx. 797(CA5, 2015) (unpublished opinion) ("Sharma II").

Appendix D. "Opinions pertaining to the Trust issue", See USA v. Sharma, No. 13-20403, 585 Fed. Appx.861 (CA5, 2014).

Appendix E. "Opinions pertaining to the Trust issue", the preliminary forfeiture order of Trust was Denied because the counsel failed to raise objection within thirty days of the preliminary order of forfeiture, 21 USC 853(n) (2). See USA v. Sharma, No.12-20209, 509 Fed. Appx.381 (CA5, 2013).

Appendix F. On 12/20/2012, the United States Court of Appeals for the Fifth Circuit entered its opinion vacating the order of restitution. See USA v. Sharma, No.11-20102, 703 F.3d 318 (CA5, 2012), cert. denied, -----US----, 134 S.Ct.78 (2013) ("Sharma I").

Appendix G. On 08/17/2017, the United States District Court for the S.D. of Texas Houston Division entered its order that Petitioner Kiran Sharma's Pro Se Motion Under 28 USC 2255 to vacate, set aside, or Correct Sentence by a person in Federal Custody and reply to US response to motion under 28 USC 2255 (Criminal Doc. No. 544, 580 & 584) is Denied.

TABLE OF CITATIONS

	Page
<u>CASES</u>	
Massaro v. United States, 538 US 500,504(2003) -----	3
Strickland v. Washington, 466 US 668,687 (1984) -----	3, 8
Cullen v. Pinholster, 563 US 170,189(2011) -----	3
Hill v. Lockhart, 474 US 52, 59 (1985) -----	3, 9
US v. Arledge, 553 f.3d 899 (CA5, 2008) -----	3
US v. Freeman, 640 F.3d 180, 193-94 (CA6, 2011) -----	5
US v. Gordon, 393F.3d 1044, 1050, (CA9, 2004) -----	5
US v. Gordon, 480 F.3d 1205, 1209 (CA10, 2007) -----	5
US v. Broughton-Jones, 71 F.3d 1143, 1147 (CA4, 1995) -----	5
Slack v. McDaniel 529, 473,484,120 S.Ct. 1595 (2000) -----	5
Miller El v. Cockrell 537 US 322, 123 S.Ct. 1029, 1039 2d 931(2003) -----	5
US v. Farias 469 F.3d 393, 397 & n.4 (CA5, 2006) -----	5
Santebello v. New York, 404 US 257, 263, (1971) -----	5
See US v. Valencia 958 F2d. 758, 761-62 (CA5, 1993) -----	5
United States v. Sharma (Sharma I), 703 F.3d 318,327(CA5, 2012) -----	6, 7, 11, 13,14,18,19
cert. denied _ US _, 134 S.Ct. 78 (2013) -----	6, 7
United States v. Sharma (Sharma II), No. 13-20325, 2015 WL 1798516 *4-6 (5 th Cir. 2015) -----	7, 21
Hughey v. United States, 495 US 411, 109 L.Ed.2d 408, 110 S.Ct.1979 (1990) -----	8, 12, 14
Honeycutt v. United States, 137 S.Ct.1626, 198 L.Ed.73 (2017) -----	8
US v. Sharma 509 Fed Appx. 381 (CA5, 2013) -----	8
US v. Sharma 585 Fed Appx. 861(CA5, 2014) -----	8

TABLE OF CITATIONS – (Cont'd)

See Andrew v. Gonzales 459 F.3d, 538,543 (CA5, 2006) -----	8
Blackledgev. Allison, 431 US 63, 74, 97, S.Ct. 1621(1977) -----	9
Santobello v. New York 404 US at 257,262, 363 (1971) -----	9
US v. Cothran, 302 F.3d 279, 289-90, CA5, 2002) -----	12
US v. Hensley, 91 F3d. 274,277 (CA1, 1996) -----	12
US v. Turino, 978 F2d 315 (CA7, 1992) -----	12
US v. Scheinbaum, 136 F.3d at 443,449 (CA5, 1998) -----	13, 19, 21
US v. Archer, 671 f.3d 149,168-69(CA2, 2011) -----	14
US v. Whitelaw, 580 f.3d 256, 259 (CA5, 2009) -----	14
US v. Cavallo, 790 F.3d 1202, 1238 (CA 11, 2015) -----	14
US v. Bane, 720 F.3d at 818, 828 (CA 11, 2013) -----	14, 20
US v. Huff, 609 F.3d at 1247 (CA 11, 2010) -----	14
US v. Vaknin, 112 F.3d 579, 587 (CA 1, 1997) -----	14
Stewart Glass & Mirror, Inc. v. US Glass Disc. Ctrs., Inc., 200, F.3d 307, 316 -17(CA 5, 2000) -----	15
Von kerssenbrock - Praschmas v. Saunders,121 F.3d 373, 376(CA8, 1997) -----	15
Corkill, M.D. v. Donna E. Shalala 109 F.3d 1348 (CA9, 1996) -----	18
US v. Rutgard 116, F.2d, 1270, 1294 (CA9,1997) -----	18
US v. Patel, 485 fed. Appx. 702 (CA5, 2012) -----	18
Russel v. US 369,749, 82 S.Ct.1038 (1962) and US v. Spinner, 180 F.3d, 514 (CA3, 1999) --	18
US v. Spinner, 180 F.3d, 514 (CA3, 1999) -----	18
Cf. paroline v. United States, --US --, 134 S.Ct. 1710, 1718 –1722 (2014) -----	19
Robers v. United States, - US, -, 134 S. Ct. 1854, 1858 (2014) (citation Omitted) -----	19
Cf. United States v. Flanagan, 80 F.3d 143, 146-47 (5 th Cir. 1996) -----	19

TABLE OF CITATIONS – (Cont'd)

United States v. Ron Pair Enterprises, 489 US 235, 242 (1989) (citation omitted) -----	20
US v. Ruff, 420 F.3d 772,776 (CA 8, 2005) -----	20
US v. Brayant, 655 F.3d 232, 254 (CA3, 2011) -----	21
US v. Elson 577 F.3d 713, 734 (CA6, 2009) -----	21
E.G. US v. Miller, 594 F.3d 172,179-180 (CA3, 2010) (recognizing split); -----	22
US v. Whren, 111 F.3d 956, 959 (D.C. Cir. 1997), (collecting cases) -----	22
US v. Russel 411 US 423, 366, 93 S.Ct. 1637 (1973) -----	24
Blackedge v. Perry 417 US 21, 628, 94 S.ct. 2098 (1974) -----	24
young v.US ex rel. Vuition 481 US, 787, 107 S.Ct. 2124 (1987) -----	24
Williams v. Pennsylvania ---- (2016) -----	24

FEDERAL STATUTES AND RULES page

U.S. Const. Amend. V. and VI -----	2, 3
28 U.S.C. 2255 -----	3, 5,9,17
42 U.S.C 1320c-3 (a) -----	4,10,11,12,15,16,17,20,21
21 U.S.C 853(n) (2) -----	4,8,10
18 U.S.C. 3663 A -----	4, 8,10,15,22
18 U.S.C. 3663 A (b) (i) -----	14
18 U.S.C. 3664 -----	4, 10
18 U.S.C. 3664 (e) -----	4,5,8,10,11,13,17,19,20,21
18U.S.C. 3664 (f) (1) -----	13
18 USCS 1347 -----	5, 10, 18
18 U.S.C 371 -----	7, 18
18 U.S.C.3231-----	7
RULE 11(C) -----	9

PRAYER

The Petitioner, Kiran Sharma ("K. Sharma"), Pro Se, respectfully prays the Honorable Justices that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit for "denial of Certificate of Appeal ability, Evidentiary Hearing and "Due – Process Right" issues due to Ineffective Assistance of Counsel (IAC)"28 U.S.C.2255 Habeas Corpus Petition". This case has many "Novel Issues "due to "Circuits 'Split" that needs to be resolved in the public interest for fair and balance Justice and to bring the uniformity among all the Circuits. A defendant must not suffer adversely for her Constitutional and Statutory Rights because he/she is in a particular Circuit. This is a tragic example in the instant case that is unprecedented in the history of "Health Care Fraud". Additionally, Fifth Circuit is in violation of Kiran Sharma's "Constitutional, Statutory and its Precedent's violation" in the instant case affecting the 'Due-Process Rights' of defendant Kiran Sharma.

"K. Sharma has accepted the responsibility and pled guilty in 'good faith' on the promises of the Govt. of United States and the assurances of her lawyer. Now K. Sharma prays and ask the Honorable justices of the Supreme (Highest) Court of United States to protect the 'Due Process and the Constitutional Rights' of the defendant's in this case to preserve the confidence of the citizens of this Nation in the Justice system.

OPINIONS BELOW

1. On 08/ 23/2018, the United States of Appeals for the Fifth Circuit Denied its opinion on the Petition for Rehearing En Banc as a motion for Reconsideration. See USA v. Kiran Sharma, No.17-20636, USDC No. 4:16-CV-2977, petitioner's case is attached as **Appendix A**.
2. On 07/13/2018, the United States of Appeals for the Fifth Circuit Denied its opinion on the motion for Certificate of appealability (COA).See USA v. Kiran Sharma, No. 17-20636,Doc. No. 00514554183, USDC No. 4:16-CV-2977,petitioner's case is attached as **Appendix B**.
3. On 04/21/2015, the United States Court of Appeals for the Fifth Circuit entered its opinion affirming the restitution order. See USA v. Sharma, No. 13-20325, 609 Fed. Appx. 797 (CA5, 2015) (unpublished opinion) ("Sharma II"), as **Appendix C**.
4. "Opinions pertaining to the Trust issue", See USA v. Sharma, No. 13-20403, 585 Fed, Appx.861 (CA5, 2014) Case is attached as **Appendix D**.
- 5 "Opinions pertaining to the Trust issue", the preliminary forfeiture order of Trust was Denied because the counsel failed to raise objection within thirty days of the preliminary order of

forfeiture, 21 USC 853(n) (2). See USA v. Sharma, No.12-20209, 509 Fed. Appx.381 (CA5, 2013), petitioner's case is attached as **Appendix E**.

6. On 12/20/2012, the United States Court of Appeals for the Fifth Circuit entered its opinion vacating the order of restitution. See USA v. Sharma, No.11-20102, 703 F.3d 318 (CA5, 2012), cert. denied, -----US----, 134 S.Ct.78 (2013) ("Sharma I").petitioner's case is attached as **Appendix F**.

7. On 08/17/2017, the United States District Court for the S.D. of Texas Houston Division entered its order that Petitioner Kiran Sharma's Pro Se Motion Under 28 USC 2255 to vacate, set aside, or Correct Sentence by a person in Federal Custody and reply to US response to motion under 28 USC 2255 (Criminal Doc. No. 544, 580 & 584) is Denied. **Appendix G**.

JURISDICTION

The Judgement of the United States Court of Appeals for the Fifth Circuit was entered on 08/23/2018 on Petition for Rehearing En Banc as a motion for Reconsideration, was denied on 08/23/2018. This petition is filed within ninety days after entry of the Fifth Circuit Court of Appeals Judgment. See Sup. Ct. R. 13.1. The Jurisdiction of this Court is invoked under 28 USC 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The "DUE PROCESS" clause of the Fifth Amendment, which provides in pertinent part: "**{N} or shall any person -----be deprived of life, liberty, property, without due process of law----**" U.S. Const. Amend. V.
2. (a) U.S. Const. Amend. VI ---- "defendants have Sixth Amendment Right for effective assistance of Counsel ----". (b) Restitution and forfeiture are part of sentencing and an illegal restitution and forfeiture are illegal sentence. Sharma's plea agreement restricts forfeiture only to the extent of amount the restitution is ordered to compensate the victims. Sharma's signed the plea on Counsel's two assurances that:
(A) Sharma's son would receive the "whole sum of \$1.5 million in a "Trust" for his medical education, Tuition and related living expenses (Doc.181, pgs.6-7). **(B)** Sharma's would receive the "credit for the legitimate services" they provided to their patients. (Doc.446, pg16, In 22-23, pg.17, In1-5). However, none of the assurances came to fruition due to Ineffective Assistance of Counsel ("IAC") and both the counsels conceded in open court, "I WAS INEFFECTVE".
The question comes: 1. Is the plea rendered 'unknowingly and involuntarily'? 2. Would reasonable jurists find the district court's assessment of the Constitutional claims debatable or wrong? 3. Would the reasonable jurists remand the case to district court for "Evidentiary Hearing"?

“-----Defendants have Sixth amendment right for “effective assistance of counsel” under the Constitution. Ineffective assistance of counsel claims are Constitutional claims recognized under section 28 USC 2255. In *Massaro v. United States*, 538 US 500,504(2003) such claims require prisoners to prove that his attorney’s performance was constitutionally deficient and defendant suffered actual prejudice as a result. See case *Strickland v. Washington*, 466 US 668,687 (1984). The Supreme Court has repeatedly made clear that the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation but only to “ensure that criminal defendant receive a fair trial”. See case *Cullen v. Pinholster*, 563 US 170,189(2011). Accordingly, “the benchmark for judging any claim of ineffectiveness must be whether Counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be on as having produced a just result”. ID. (emphasis in original). The movant must show his counsel’s performance was both deficient and prejudicial to prevail on an ineffective assistance of counsel claim. *Strickland*, 466 US at 700.

To prove prejudice, a defendant must establish “a reasonable probability that, but for Counsel’s unprofessional errors, the result of the proceeding would have been different”. *Strickland*, 466 US at 694. This showing “requires a substantial not just conceivable, likelihood of a different results” See case *Cullen*, 563 US at 189. To show that the deficiency caused prejudice during the plea process. “The defendant must show that there is a reasonable probability that, but for Counsel’s errors, defendant would not have plead guilty and would have insisted on going to trial”. *Hill v. Lockhart*, 474 US 52, 59 (1985).

In the instant case the defendant has lost her life time earnings due to ‘IAC’ and lack of Due Process. Additionally, but for Counsel’s ineffective advise K. Sharma would not have signed the plea and would have proceeded to trial for different outcome. K. Sharma has suffered both illegal forfeiture and restitution due to ‘IAC’ by pleading guilty. Illegal sentence is an illegal punishment. A defendant has a Constitutional right to receive effective assistance ,a fair and just punishment with proper ‘due process’ and fair hearing on both restitution and forfeiture for fair justice; as per Fifth and Sixth Amendments. Because [“every dollar must be supported by record evidence”, “vacating the restitution award because less than 1% of the total was not supported by evidence of causation of fraud”.] *US v. Arledge*, 553 f.3d 899 (CA5, 2008). Due to ‘IAC”, absent competent medical expert testimony , genuine victim impact statement (‘VIS’) at the sentencing and absent patient medical records ‘discovery”, the Honorable judges at the Fifth Circuit abused their discretion to determine that “not even one injection to even one patient was medically necessary in 11 years of Sharma’s medical practice,” just a

fiction". More specifically, The Fifth Circuit is at odd with the other Circuits on some of the following issues:

- (i) Whether the review should be "de novo" on Remand to protect the "Due-Process" Rights of the parties?**
- (ii) Whether the allocation of the burden to show the "CREDIT" for the services should be at the District Court and not at the Appellate Court?**
- (iii) Whether a party is allowed to raise a "New-Issue" for the first time on appeal?**

3.42 USC 1320c-3 (a), relates with standards of medical care and statue to resolve disputes of "Medical Necessity". 1320c-3(a), specifically dictates 'Peer Review', PSRO (Professional Services Review Organization) which functions to resolve the dispute on" Medical Necessity", quality of medical care and prevailing standards of medical practice and evaluation of physicians services. 42USC 1320c-5(a) specifically deals with obligations of health care practitioners and providers of health care services; sanctions, penalties, hearing and reviews.

4.21 USC 853(n) (2) dictates that "3rd party must raise objection within 30 days of the preliminary order of forfeiture and notice to the third party".

5. Restitution: 18 USCS 3663A and 3664(e). Title 18, United States Code, Section 3663 A (the mandatory Victim Restitution Act), provides that:

An order of restitution under this section shall be issued and enforced in accordance with section 3664.

Title 18, United States Code, 3664, provides that:

- (a) For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall inform the court.**

Please Note: Probation officer never had findings that K. Sharma provided "Medically Unnecessary Services").

- (e) Any dispute as to the proper amount or type of restitution shall be resolved by the preponderance of the evidence. The burden of demonstrating the amount of loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.**

Courts of appeals apply the same logic to reach challenges that a restitution award exceeds the limits of the MVRA. See case US v. Freeman, 640 F.3d 180, 193-94 (CA6, 2011) ("Just as defendants are not at a District Court's whim regarding their terms of imprisonment, they must also be able to appeal restitution orders that have no basis in law". Also see US v. Gordon, 393F.3d 1044, 1050, (CA9, 2004) ("A restitution order which exceeds its authority under MVRA is equivalent to an illegal sentence. Such restitution order is in excess of the maximum penalty provided by the statue"). See also US v. Broughton-Jones, 71 F.3d 1143, 1147 (CA4, 1995) ("Because a restitution order imposed when it is authorized Is no less 'illegal' than a sentence of imprisonment that exceeds the statutory maximum" see also US v. Gordon, 480 F.3d 1205, 1209 (CA10, 2007) (same). **However, because 18 USC 3664 (e) allocates the burden on defendants to show "the credit for legitimate services", the burden must be allocated at the district level not at the Appellate level. Additionally, Government (Govt.) should first show the Actual loss by proper burden and evidence then only burden falls on the defendants.**

6. The health care fraud Statute, 18 USC 1347, provide in relevant part:

- (a) Whoever knowingly and willfully executes, or attempts to execute , a scheme or artifice ---
 - (1) to defraud any health care benefit program; or
 - (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program, In connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 10 years, or both. If the violation results in serious bodily injury shall be fined under this title or imprisoned not more than 20 years, or both; and if the violation results in death, such person shall be fined under this title, or imprisoned for any term of years or for life, or both.
- (b) With respect to violations of this section, a person need not have actual knowledge of this section or specific intent to commit a violation of this section.

7. 28 USC 2255 habeas corpus petition and 28 USC 2253 (c) (2):

In order to obtain COA, A 2255 movant must make a "Substantial showing of the denial of a Constitutional right. The Movant satisfies this requirement by demonstrating that "Reasonable Jurists would find the District court's assessment of the Constitutional claims debatable or wrong" or that the issue deserves encouragement to proceed further, see Slack v. McDaniel 529, 473,484,120 S.Ct. 1595 (2000) and Miller El v. Cockrell 537 US 322, 123 S.Ct. 1029, 1039 2d 931 (2003).

8. It is well established that "the error and omissions in the plea agreement" is always construed against the drafter, US v. Farias 469 F.3d 393, 397 & n.4 (CA5, 2006). Also Govt.'s breach of the plea agreement must be construed against the Govt. **The Government's obligation to honor the terms of a plea agreement is well settled. When a guilty plea "rest in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled; see Santebello v. New York, 404 US 257, 263, (1971). See US v. Valencia 958 F2d. 758, 761-62 (CA5, 1993).**

INTRODUCTION AND STATEMENT OF THE CASE

Defendant/appellant, Dr. Kiran Sharma (K. Sharma) and defendant Dr. Arun Sharma (A. Sharma) are former board certified medical doctors who owned and operated the Allergy, Asthma, Arthritis and Pain Center in Baytown and Webster, Texas (the "Clinics"). Two foreign medical graduates worked as medical assistants for the Clinics. During their employment, they witnessed the Sharmas filing what they believed were fraudulent claims with Medicare, Medicaid, and Private insurance companies. In 2007, based on their observations, they drafted an anonymous letter setting forth details of the fraudulent claims the Sharmas submitted to Medicare, Medicaid and various private insurance companies and sent this letter to various government agencies.

On July 16, 2009, a federal grand jury in Houston, Texas indicted the Sharmas, charging with 64 counts of conspiracy, health care fraud, mail fraud, conspiracy to unlawfully distribute and dispense controlled substances outside the scope of legitimate medical practice and money laundering, based primarily on submitting false bills to insurance providers for injection therapy. Specifically, billing was fraudulent in one of two ways. **The first and most regular practice was to billing to the insurance companies for trigger point injections, facet joint or nerve block injections without Fluoroscope when A. Sharma in reality performed these injection procedures. The second and less regular practice was to "phantom bill" for injection procedures that "were not performed".**

On April 26, 2010, the Sharmas both pleaded guilty to a conspiracy to commit health care and mail fraud and one substantive count of health care fraud in violation of 18 USC 371 and 1347. In 2011, at their sentencing, the district court, in addition to imposing fixed prison terms in accordance with the plea agreements, ordered the Sharmas to pay over \$43 million in restitution to Medicare, Medicaid, and certain private insurers. K. Sharma was sentenced to 96 months of imprisonment. A. Sharma was sentenced to 180 months. **The Sharmas appealed [Sharma I], and the Fifth Circuit Court of Appeals vacated the restitution order and remanded the case to the district court for a recalculation because the amount computed in the presentence report and adopted by the district court "exceeded the insurers' actual losses by millions of dollars". United States v. Sharma (Sharma I), 703 F.3d 318,327(CA5, 2012), cert. denied ___ US __, 134 S.Ct. 78 (2013).**

The Fifth Circuit also held, *inter alia*, that the Govt. sufficiently carried its burden to defeat a claim of offset by the Sharmas regarding certain injections that they contended, were medically necessary and compensable under Govt. health care regulations even though it was unclear in

the district court that had the burden of proof for the offset. *Sharma*, 703 F.3d at 324-26. The order of remand specifically limited the scope of the rehearing to a “recalculation consistent with this opinion and based solely on the evidence already in the record” and to conform the forfeiture award to the new recalculation of restitution. 703 F.3d at 327.

Shortly before the resentencing hearing on remand the defendants filed joint motions for continuance and discovery in an effort to evaluate their seized patient files for information that might establish the medical necessity of certain procedures and exclude the payments for those procedures from restitution. The District Court denied both motions without explanation.

On June 3, 2013, the district court conducted a hearing limited to (1) the redetermination of the amount of restitution and (2) conforming that the amount to a personal forfeiture judgement against the defendants. The Govt. contended that the new amount of restitution was \$37,636,436.39 while the counsels argued that the proper amount was not more than \$21,028,963.61. **The defendants again claimed, as they did during the first appeal, that they were entitled to an offset for legitimate, medically necessary injection procedures that they in fact performed and billed correctly, that the Govt. nonetheless deemed part of the total fraud without showing that they were medically necessary.** In the district court, the Sharmas asserted that any order of restitution could not include payments for legitimate services that were actually provided at the Clinics. **The Govt., on the other hand, took the position that all provider payments to the Clinics were based on fraudulent billing and, therefore, the district court’s restitution order should account for every penny billed by the Clinics.** The district court found against the defendants on the issue of consideration of the offset. The district court agreed with the Govt. and entered judgment against the defendants jointly and severally for restitution and a personal judgment in the amount of \$37,636,436.39. **The Sharmas again appealed.**

The Court of Appeals held: that law of case doctrine barred any claim that the defendants was entitled to offsets for injection procedures that were actually performed and administered to their patients and that insurers allegedly would have paid for; the requirement that defendants prove that they were entitled to restitution credits for injection procedures that were actually given did not violate due process; and ultimately that the restitution award of \$37,636,436.39 was proper. *United States v. Sharma (Sharma II)*, No. 13-20325, 2015 WL 1798516 *4-6 (5th Cir. 2015).

BASIS OF FEDERAL JURISDICTION IN THE U.S. DISTRICT COURT

Petitioner was convicted and sentenced Under 18 USC 371 and 1347. The district court therefore had jurisdiction pursuant to 18 USC 3231.

REASONS FOR GRANTING THE WRIT

1. Statutory violation on 18 USCS 3663A: In violation of the Mandatory Victim Act (MVRA) 18 USCS 3663A, and 21 USCS 853 (a), this court's opinions in *Hughey v. United States*, 495 US 411, 109 L.Ed.2d 408, 110 S.Ct.1979 (1990) and in *Honeycutt v. United States*, 137 S.Ct.1626, 198 L.Ed.73 (2017), the district court forfeited the third party beneficiary's "Trust Corpus" valued \$1.5 million, which is not a proceed of fraud, legitimately earned, that was allocated in the plea agreement for son's medical education, tuition and related living expenses. MVRA does not allow third party to pay for the defendant's restitution.

2. Precedent violation and 21 USCS 853 (n)(2); The counsel for K. Sharma failed to make objections to the forfeiture of the "Trust Corpus" within thirty days of the issuance of the third party notice "the preliminary order of the forfeiture" under 21 USCS 853(n) (2), and the counsel conceded in his affidavit to the court that "I WAS INEFFECTIVE"(IAC) and the appeal court also cites the same deficient performance of counsel in their opinion.(US v. Sharma 509 Fed Appx. 381 (CA5, 2013) and US v. Sharma 585 Fed Appx. 861(CA5,2014)).

K. Sharma is pro se, therefore she asks Honorable Justices to be mindful that she is entitled for the liberal construction of her pleadings. (See Andrew v. Gonzales 459 F.3d, 538,543 (CA5, 2006).

As the preliminary matter, nowhere, 18 USC 3663 A, 18 USC 3664 and 21 USCS 853 (a) command that third party beneficiary has any responsibilities to pay for the restitution to compensate the victims of crime. **The "Trust Corpus" valued at \$1.5 million was specifically established for medical education, tuition and related living expenses for Sharma's son Gaurav Sunny Sharma.** The Trust Corpus funds were 'untainted and not a proceed of Fraud, came from the patients co pays and cash payments from the patients with no insurance. At K. Sharma's sentencing it was proved by the counsel that it was "untainted money" and not a proceed of fraud. (Doc.No.242, dt 02/25/2011). The district court also acknowledged the same. Sharma's never agreed to the district court to forfeit any of the "Trust Money". Sharmas agreed to forfeit only funds equal to restitution which were proceed of fraud. (Doc. No. 178, para 18-20, Doc. No.181). The Govt. misled the Fifth Circuit that Sharmas agreed to forfeit all the seized funds. Fifth Circuit opinion based on that assumption is in violation of the plea agreement. Counsels failed to represent the defendants competently.

Additionally the counsel failed to make objection within 30 days of the notice of the preliminary forfeiture order and notice to the third party, see 21 USC 853(n) (2), Counsel performance (1) fell below the reasonable expectation of a counsel under 28 USC 2255 and (2) to K. Sharma's prejudice because 'Trust issue was a non-negotiable and non-dispositive issue' for signing the plea, Strickland, 466 US 668, 687-91. K. Sharma would

not have signed the plea agreement and proceeded to trial. See Hill, 474 US 52, 59. Statement in open court carries presumption of verity "Blackledgev. Allison, 431 US 63, 74, 97, S.Ct. 1621(1977). If the 'Officer of the Court' the Judge, acknowledges and asks the defendant if she "understood" the plea with respect to the Trust at plea colloquy he administered, K. Sharma had no reason to distrust the Court. However, the court without 'evidentiary hearing of the parties' retroactively converted the "Trust Corpus" of \$1.5 million in to an stipend of \$2300 per month for four years upon Govt.'s recommendation and forfeiting remainder. **District Court's favor to a party gave appearance that he inadvertently interjected himself in violation of plea agreement and in violation of Rule 11(c). Counsel failed to ask Judge's recusal is clear "IAC". Additionally, in light of district court's silence on this issue in K. Sharma's Habeas Corpus Petition, 2255 gives an appearance of Court's admission. If Judge is a party, K. Sharma is entitled for hearing before a new district court judge.**

[“Ms. Sharma claim’s that I failed to assert an objection to the forfeiture of assets in the \$1.5 million trust that were not used for the stated purpose of funding her son’s medical school education. **I acknowledge that objection to the forfeiture of leftover funds from the trust was not made until the funds were actually taken from the trust, which the fifth Circuit later held was untimely.** Declaration of Dan Cogdell (Doc. 569 at 5)”. Counsel conceded in his affidavit that he did not object to the forfeiture of the trust until late after the preliminary order of forfeiture was issued, **The Govt. conceded that counsel was ineffective (Doc.571 at 16.f.n.9). Counsel failed and did not respond timely manner.** Lower court's opinion that Government did not breach the Plea Agreement and Counsel did not provide Ineffective Assistance of Counsel is in direct conflict with this Court's opinion in Santobello v. New York, 404 US 257, 363 (1971).**Counsel was Ineffective, this is not K. Sharma's but the Fifth Circuit's opinion. See (US v. Sharma 509 Fed Appx. 381 (CA5, 2013) and US v. Sharma 585 Fed Appx. 861(CA5, 2014). Nonetheless, forfeiture of the “Trust Corpus” fund was a breach of plea agreement and must be construed against the drafter. Such promise must be fulfilled.” Santpobello, 404 US at 262.** If a guilty is entered as part of the plea agreement, the Government must strictly adhere to the terms and condition of its promises. **In determining whether the terms of the plea agreement have been violated, this Court must determine whether the Government's conduct is consistent with the Defendant's reasonable understanding of the agreement.**

This is “The complex health Care Fraud Case” in which the defendant has been over punished unfairly due to “CIRCUITS' SPLIT” on remand and by default rule by Fifth Circuit over riding its own precedent misinterpreting the statutes in violation of the Constitutional Rights of K. Sharma. Additionally “Ineffective Assistance of Counsel (IAC)”, Government's (Govt.'s) misleading facts at all the level of the Courts' proceedings and appearance of possible District Court's

participation in the plea agreement, is a tragic example in the instant case that is unprecedented in the history of Health Care Fraud.

K. Sharma, wherefore, prays to this Court to grant the review and the Certiorari for 'COA' and an 'Evidentiary Hearing' before a new district Judge in consideration of all the facts bound case as above, specifically the District Court's forfeiture of the third party beneficiary's trust money to compensate the victims of crime for restitution purpose without an evidentiary hearing for restitution in direct violation of the 18 USCS 3663 A and 18 USCS 3664(e) and 21 USCS 853 (a). **Additionally the counsel failed to make objection within 30 days of the notice of the preliminary forfeiture order and notice to the third party in violation of 21 USC 853(n)(2).**

3. Constitutional violation: Govt. never apprised Sharma through the indictment, plea, plea colloquy, PSR, Pretrial Hearings, directly at the defendant's sentencing hearing and other proceedings that Sharma has to defend against an allegation of "medically unnecessary services". U.S. Constitution allows a defendant to be apprised of what he or she is charged with, not only by statue, 18 USC 1317 Health Care Fraud, but also by what unlawful relevant conduct (men's rea) make actions unlawful.

4. Ineffective Assistance of Counsel: Counsel also failed to realize and apprise Sharma that she provided "medically unnecessary services" in this large and complex health care fraud case. Counsel on remand, conceded in open court he was "ineffective".

5. Statutory violation under MVRA (Mandatory Victim Restitution Act), 18USCS 3663A AND 18 USCS 3664, to punish and sentence Sharma to pay in restitution for the conduct that lacks in the indictment, plea, plea Colloquy, PSR, Pre- trial hearing and sentencing at the district court. In her plea agreement, Sharma did not concede to that she provided procedures and services that were 'medically unnecessary'.

6. Statutory violation and 42 USCS 1320c-3 (a): This is a large and complex health care fraud case and 'Due Process' allows Sharma to deserve a day in an 'evidentiary hearing' to prove her innocence that she did not provide' medically unnecessary service'. But she needs 'discovery' of patient medical records to arrange medical experts' testimony and for 'insurance claim data' to show what diagnosis she used in her billings as per 'insurance claim data'. The prevailing standard is in the Statue that parties should settle the dispute on 'medical necessity' by proper standard that is 'medical expert testimony' that the lower courts have denied. **Govt. has not proven their case at the Appellate level by proper standard and district court never took evidence on 'medically unnecessary services' at either the first sentencing or on remand.** By law and for the sake of' Due Process' justice require that Govt. prove their claim by proper burden and standard that is 'medical expert testimony', 42 USCS 1320c-3(a) which dictates that' dispute on medical necessity' be resolved by 'peer-review' and 'medical expert testimony'. Sharma's' counsels failed to retain 'competent medical expert' because they were not aware that the case is going to rest on the question of 'medical necessity' at the appellate level absent in indictment, plea , PSR and all other proceedings, additionally counsel was denied the 'discovery' and 'continuance' on remand. **However, counsel's failure to properly carry the burden rendered Sharma deprived of any 'credit' and the counsel conceded in open court that "I was ineffective", based on 18 USCS 3664(e) ["...the burden to show credit is on the**

defendant..."]; and 42 USCS 1320c-3(a) ["...dispute of medical necessity is best resolved by 'medical expert' testimony...peer-review...]; and Fifth Circuit's opinion in *Sharma I*, 703 F.3d 318 (CA5, 2012), ("...the defendants failed to show that not even one injection to even one patient was medically necessary...").

7. Appeal Court's precedent and Statutory violation on 18 USCS 3664(e): This Statute allows district court to transfer the burden of proof of 'actual loss amount' on to the Govt. and for the 'credit of legitimate services' on to the defendant. Appellate Court is a 'review Court' not the forum for raising a new issue by any party. Additionally, law has not allocated the authority on to the appellate court to transfer the burden on to the parties for showing either the 'actual loss amount or credit amount'. Sharma is prejudiced because it is at the Appellate level where it allocated the burden on to the Sharmas for showing the credit for the legitimate services for the first time.

8. Violation of Appeals Court's Precedent: The Fifth Circuit's decision to allow the Govt. to raise a new issue on allegation of 'medically unnecessary services' for the first time on appeal and disallowing Sharma to prove her innocence on this new allegation at the district court by the doctrine 'law of the case' is prejudicial to Sharma because she was never apprised of that at the district court level and did not have any hearing at the district court. By Fifth Circuit's own precedent, the circuit should have not allowed the Govt. to raise a new issue for the first time on appeal, or it should have reviewed this new allegation under the 'plain error'.

Congress amended the Victims Witness protection Act (VWPA) to expand the definition of "victim" to include any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern of criminal activity. Congress included an identical definition of "victim" when it enacted the Mandatory Victims Restitution Act (MVRA), 18 USCS 3663(A). Under the MVRA, if someone is convicted of conspiracy, the court can order restitution for damage resulting from any conduct that was "part of conspiracy" and not just from specific conduct that met the overt act requirement of the conspiracy conviction. **However, the court is required to exclude injuries caused by the offenses that are" not a part of the conspiracy" of which the defendant has been convicted.**

In Sharma's case, indictment, plea agreement, plea colloquy or PSR lack allegation, MENS REA, for providing "Medically Unnecessary Services". The Govt.'s unfounded statement at the "sentencing and sentencing memorandum" were rebutted by the counsels; Nonetheless, Appellate Court turned a 'Blind Eye' to Sharma's prejudice (see A. Sharma's Doc.205 pg. 4-10, (" Most clinic patients were poor, elderly and suffering from chronic debilitating pain in their joints, neck, and/or back that reduced and at times, prevented general mobility and function, causes ranged from traumatic injuries to every day Rheumatoid arthritis and Osteoarthritis at pg.4) ("Sharma's commitment to his patients never wavered, but his frustration with medical insurance companies grew because they reimbursed for an ever decreasing amount of the services"). A. Sharma persisted in giving as many injections as he believed were "Medically Necessary", at pg.10.(See addendum to PSR , Doc. No. 210, pg. 3 --- " number of Superbills sometimes exceeded the number of patients actually seen in one day, Hence " average numbers of patients per day is based on superbill data is incorrect, actual number of patients seen per day is much lower; **"The defendant objects to para 21 on pg.10 wherein it alleges that he attempted to convince all patients to have shots at every visit --**

---- he only recommended injections therapy when he believed it to be medically necessary" at pg.4).

Sharmas were ordered by the district court to pay \$37,636,436 in restitution pursuant to the Mandatory Victims Restitution Act of 1996 (MVRA) which requires certain offenders to restore property lost by their victims as a result of the crime. **Sharmas contended that the losses were some \$16 million less because they were entitled to offsets for medical injection procedures that they had administered, performed and billed properly, but that the Govt. had not proven to be medically unnecessary by proper burden of 'medical expert testimony under 42 USCS 1320c-3(a).** Where a defendant is convicted pursuant to a guilty plea rather than by a jury, the court should look into the plea agreement, the plea colloquy and other statement made by the parties to determine the scope of the "offense of conviction" for purpose of restitution. Where a defendant is convicted based on guilty plea, the scope of the underlying scheme is defined by the parties themselves through the plea negotiations and plea agreement. **Fundamentally, restitution should reflect the consequences of the defendant's own misconduct.** *Hughey v. US, 495 U.S. 411,421,110 S.Ct.1979 (1990).* ("The Essence of a plea agreement is both prosecution and defense make concessions to avoid potential losses"; *US v. Cothran, 302 F.3d 279, 289-90, CA5, 2002*); *US v. Hensley, 91 F3d. 274,277 (CA1, 1996)*, ("determining the scope of the {363F.3d,367} scheme "by examining the terms of the indictment and the plea agreement"); *US v. Turino, 978 F2d 315 (CA7, 1992)* (" reviewing the plea agreement and statements made by the parties at the plea hearing to define the scope of the scheme to defraud").

The issue of "Medical Necessity" or allegation of "Medically Unnecessary Services" was not a part in Sharma's case and it is nowhere to be found in the Indictment, Plea, Plea colloquy, pretrial hearing, PSR, government's objections, sentencing transcript or district court's opinion. The case instead turned on whether and what kind of treatment was provided – phantom billing and up-coding, respectively. On April 8, 2010 at pretrial hearing Govt. overwhelmingly denied that" this case is not a medical necessity case. (Doc.No.141, pgs.126, 128) not that nothing was done at the clinic, but that nothing that was done at the clinic was billed properly". This is a fraud case"; pg.143 "The position has always been when we say nothing, It's a fraud case again"); Doc.217, pg.29 "we are not talking about medical necessity here". (**Emphasis added**).Repeatedly the district court and Sharmas heard the same comments by the Govt. over and over. Whether the injection procedures provided by A. Sharma was medically necessary, was never an issue at sentencing on February 1, 2011. In fact, as before, comments by the Govt. confirmed that "Medical Necessity" was not in dispute.

Counsel, when representing K. Sharma in her forfeiture proceedings, did not understand the "coding and up coding" issues in this complex health care fraud case. There were witnesses who were knowledgeable, ready and willing to testify on K. Sharma's behalf. (Doc. No. 205, Ex.34, 37, 38, Letters by "peer-physicians"). Mr. Cogdell's failure to call such witnesses violated

K. Sharma's constitutional right to effective assistance of counsel. Due to 'IAC' the information regarding the "Medically Unnecessary Services" charges which were initially presented to the appellate court were not introduced in K. Sharma's case No. 17-20636, Doc.00514554183, pg.12.

"TRIGGER POINT INJECTIONS" with CPT CODE 20553 were billed correctly without any up coding. Please note that Fluoroscopy was not the requirement to perform Facet Joint Injections until 2010, therefore there was "NO UP CODING ISSUE". Counsel failed to understand up coding issue and failed to inform K. Sharma that "Medically Unnecessary Services" could be a factor at the proceedings. Counsels never realized that "medical necessity and burden of proof" was an issue in this complex case. Forensic Accountant retained by counsels was an inexperienced and not a "Competent Expert" in medical billing and coding CPT (Current procedural Terminology) and ICD (International Classification of Diseases) codes issue to analyze the essential for Insurance Claim Data. The court stated that although "anecdotal statements" from some patients claimed "some degree of pain relief" from the trigger-point injections, Sharmas did not present evidence suggesting that "even one injection to even one patient was medically necessary and met the insurers' reimbursement standards" Ibid. Rather, Sharma's forensic accountant was asked to assume by counsels and "assumed without explanation" that medically necessary injections were administered in some percentage of cases and would have been covered by the insurers. Ibid (emphasis omitted).Sharma I, 703 F.3d, 318 (CA5, 2012).

As the Fifth circuit has stated, " [I]logically, the burden of proving an offset should lie with the defendant." Scheinbaum, 136 F.3d at 449. The Defendant is in the best position to know whether he has provided any legitimate services or compensation to his victims that might qualify as an offset and his interest in reducing the amount of restitution gives him the incentive to litigate the issue. **Sharmas counsels ignored this complex and most important issue and failed to retain a "competent Medical Billing Expert or an Interventional Pain Medical Expert" in alleged complex Health care fraud case, which resulted in erroneous and illegal restitution and forfeiture for providing " MEDICALLY UNNECESSARY SERVICES".** Because of this fact, K. Sharma's constitutional rights under Fifth Amendment of the United States Constitution have been violated. K. Sharma was denied due process and as a result she has had "all property and money improperly seized". K. Sharma's motion was denied in violation of the laws of United States.

18 USCS 3664(f) (1) (A): General rule is that statute does not authorize a restitution order that exceeds the victim's losses. (See US v. Norris 217 f.3d 262, 271-72(CA5, 2000). "An order of restitution that exceeds the victim's actual losses or damages is an illegal sentence. (See US v. Middlebrook, 553 f.3d 572, 579 (CA7, 2009).Circuit reviews de novo whether a sentence exceeds the statutory maximum. See US v. Shabazz 633 f.3d 342,344 (CA5, 2011). Both fines and restitution are subject to this argument.

18 USCS 3664 (e) under MVRA Act allocates the various burden of proof among the parties who are best able to satisfy those burden. Because a defendant should know the value of any compensation he has already provided to a victim in 'civil proceedings', the burden should fall on him to argue for a reduction in his restitution order. In contrast, Sharma's case is not a civil case, but a criminal case. **Other circuits would place the burden at the Govt. to prove the losses by proper evidence such as "Medical Records Discovery and Medical Testimony of physicians to substantiate the allegations of 'Medically Unnecessary Services' then only shifting the burden on Sharma's to prove otherwise and credit for legitimate services".**

"Government generally may not present "New Evidence" on remand when reversal is required due to failure to present evidence originally". See US v. Archer, 671 f.3d 149,168-69(CA2, 2011). When a litigant fails to object in the district court, this Court does not usually return the case but reviews for plain error. See US v. Whitelaw, 580 f.3d 256, 259 (CA5, 2009). However, Fifth Circuit shifted from its precedent again to Sharma's prejudice and failed to review Govt.'s new allegation under 'plain error'.

"18 USCS 3663 A (b) (i): In reviewing a district court's calculation of a restitution amount, two principles govern our inquiry. The first is that a victim is entitled to be compensated for the "value" it lost and that "the purpose of restitution is not to provide a windfall for crime victims but rather to ensure that victims, to the greatest extent possible, are made whole for their losses. See US v. Cavallo, 790 F.3d 1202, 1238 (CA 11, 2015). Hughey v. US, 495 US 411, 416 110 S.Ct.1979 (1990). "[T] HE ordinary meaning of 'restitution' is not designed to punish the defendant"; US v. Bane, 720 F.3d at 818, 828 (CA 11, 2013). "Thus the amount of restitution owed to each victim must be based on the amount of actual loss caused by the defendant's conduct." See US v. Huff, 609 F.3d at 1247 (CA 11, 2010). Congress did not conceive of restitution as being an entirely standard less proposition; See US v. Vaknin, 112 F.3d 579, 587 (CA 1, 1997). "[A]n award can't be woven solely from the Gossamer strands of speculation and surmise. "ID.

District Court never had its own findings that Sharmas "provided medically unnecessary services", district court only conceded after the 5th Cir. Appeal court's opinion on remand (Sharma I, 703F.3d 318 (CA5, 2012)). Sharma failed to show "not even one injection to even one patient was medically necessary" based on unfounded statements of the Govt. at A. **Sharma's sentencing** ["Sharma conceded at debriefing that his 50% patients were drug addicts, he intentionally misdiagnosed all his patients with Rheumatoid Arthritis to give injections, gave injections without sanitary precautions in an assembly line fashion and the patients new physicians discontinued the injection treatment because they were medically unnecessary"]. These statements were rebutted by the defense counsel Chris Flood by one sentence that ["This idea that 50 percent of the people that went to the clinic, "first of all, a number drawn out of fresh --- thin air, Counsel Chris Flood was also in that debriefing and there was nothing sort of any drilling down on any numbers."] (Doc. 217 pg.34, ln 6-14), but the court of appeals concluded that Sharmas had failed to produce sufficient evidence to rebut that conclusion and that "the district court did not abuse its discretion in declining to apply a restitution credit."

Sharmas signed the plea because counsels assured that Sharmas would receive "credit for legitimate services". Counsel should have insisted during the plea agreement that most injections services which Sharmas provided were legitimate and medically necessary. Sharmas pled, but the plea agreements did not states that those injections were medically necessary or that the insurers would have covered the cost of the injections absent the fraudulent up-coding. An allegations of "Medically Unnecessary Services" is absent in all court proceedings and transcripts. "Most of the Circuits would have disallowed the Govt. to bring a new issue for the first time on appeal", and if reviewed at best under the 'plain error'. It's troubling since Fifth Circuit itself has opined that "[i]t is a bedrock principle of appellate review that claims raised for the First time on appeal will

not be considered". See *Stewart Glass & Mirror, Inc. v. US Glass Disc. Ctrs., Inc.*, 200, F.3d 307, 316 -17(CA 5, 2000). Further, requiring the Sharma's to establish 'medical necessity' without having been given the opportunity to review the records on the point in the district court was inherently unjust. See *Von kerssenbrock – Praschmas v. Saunders*, 121 F.3d 373, 376(CA8, 1997) ("There is an inherent injustice in allowing an appellant to raise an issue for the first time on appeal".) Therefore, under 18 USCS 3663A Sharma's restitution is creating 'windfall' on victims by over \$16 million and therefore is illegal and in violation of the laws of the United States. Accordingly, this Court should exercise its supervisory power and Grant review of this case in public interest.

WHAT WAS SHARMAS' EVIDENCE IN THE CASE?

Facts bound claims warrant further review by this Court. The Govt.'s 'Evidence' do not rise to the level of testimony by a 'Medical Expert Witness' as required by 42 USCS 1320c-3(a). 'Hearsay' unsworn statements of the prosecutor were manufactured after they reviewed the 'sentencing memorandum in support of Sharmas' (Doc. 205). The Govt.'s sentencing memorandum (Doc.207, pg.11) are misleading and false to accuse that "A. Sharma has admitted falsely diagnosing all patients with Rheumatoid Arthritis (RA), so he could bill for injections (shots) -----Patients who left the Sharmas after they were indicted, universally reported that their new doctors discontinued the shots as 'Medically Necessary'. **These statements are Irrelevant in light of rebuttal by Counsel Chris Flood at his sentencing, ---- "coming from fresh thin air" (Doc. 217, pg.34).** Prosecutorial false allegations incidentally rebutted by Sharma's' patient's and few physician's letters even before Govt.'s allegations were manufactured. See examples of following letter's statement by patients and physicians:

Ms. Sharon Likwartz (Doc.205, Ex. 9), this patient states in her letter, ("when Dr. Sharma was no longer able to treat me, I went into a panic mode. I was afraid that I would not be able to get this same treatment and would be faced with horror that I had suffered for so many years. Because Dr. Sharma took the first step and took the chance of giving me the needed medications, [injections], my current doctor was willing to follow, seeing through blood records and medical history, that the treatments had not affected my liver in any way, and remain pain free today.

Mr. Heston Hill, (Doc.205, Ex. 17), another patient, **(initially, I was treated by Dr. Grabois in the Texas medical center (one of the Govt.'s Medical Expert Witness))** until I was referred by another treating physician. Dr. Sharma immediately changed my life. I would receive injections from him in the middle of my back and in the joints of my shoulder. The pain would subside in a couple of hours and relief allowed me to do daily activities with my my son which I was unable to do.

Ms. Lynch (Doc.205, Ex.18) (" Ms. Lynch a patient, wrote that she was diagnosed with Rheumatoid Arthritis not by Dr. A. Sharma, but by another physician. She was then

referred to Dr. A. Sharma for injection treatment, which alleviated her symptoms. (Id). This further supports in favor of Dr. A. Sharma that he was providing medically necessary and legitimate injections to the patient for adequate relief for the symptoms of joint Arthritis.

Also see letter from "peer – physicians', Dr. Siddhartha Acharya, M.D. (Doc. 205, Ex.34), he wrote about a patient with "painful Arthritis" That Dr. Sharma ("worked very hard in bringing her relief from, often times, incurable and debilitating pain conditions"). (Id.).

Dr. Reynolds, M.D. (Doc., Ex.37), wrote "I have had many patients that were referred to Dr. Sharma in the past. The majority of the patients that I did refer to Dr. Sharma had problems that could not solve surgically and these patients had to be managed with chronic measures primarily involving medication and injections. He was very helpful with these patients". (Emphasis added).

Dr. Kalyanam Subramanyam, M.D. (Doc.205, Ex.38), Dr. wrote ("I have referred to Dr. Sharma patients with Arthritis resulting from chronic hepatitis and inflammatory bowel disease. He has treated them very well and they were satisfied with his care and had only positive comments with his care").

Counsels failed to get "victim Impact Statement" (VIS) before sentencing in 2011 from the insurance provider for "Actual loss Amount Affidavit". Counsels easily could have called each victim- Insurance provider to analyze the fraudulent injections with and without up-coding for those specific CPT codes but they failed to do so. (Medicine and Medical billing is a Science and Art and it's not in the syllabus and curriculum of Doctor Juris. (Doc. 580, dt 7/11/17, Ex. #4). As per new Medicare Guidelines effective 2011 , Fluoroscope is required in order to perform facet joint injections, however if a fluoroscope is not used the procedures is paid less or at the rate of Trigger point injections or 1/3rd of facet joint injections. However these injections are not considered "medically unnecessary" contrary to what FBI Agent Ms. Judy Sly said and delivered a false statement at Grand Jury hearing. (Doc. No. 141 at 129, line 1-6). From Trailblazer Health provider specialist, Mr. Dean Richardson that fluoroscope was not necessary before 2010. (Doc.580, dt 7/11/17, Ex. #1). Therefore taking the burden of making an opinion by this court's panel that " all the injection procedures Sharma provided were medically unnecessary" was against this Court's precedents, and the law enacted by Congress to resolve the dispute of medical necessity.(F.N.3).

Fifth Circuit disregarded all the favorable evidence provided by Sharmas including patients', Medicare insurance experts and physician's letters. Over 30 of the patients' letters were presented at A. Sharma's sentencing memorandum in his favor. The Brady evidence (Doc.145) that Govt. provided in which Govt. interviewed over 60 patients ,who testified to them that ["sometimes Dr. Sharma gave some type of injections which helped them"]. **Peer –Physicians letter also rebuts the allegations of the Govt. that 'A. Sharma' misdiagnosed all his patients with 'Rheumatoid Arthritis' and provided medically unnecessary treatment.** Sharmas are accused for not providing 'competent medical and billing expert but the counsels ignored Sharma's request to retain such expert and instead retained ' inexperienced Forensic accountant ignoring 42 USC 1320c-3(a).

Foot note 3. Sharmas were audited regularly by Medicare and other private Insurance providers without any citation or penalties.. Their patient's files carried labs, X-rays, MRIs, Nerve conduction studies, psychological exams, consultations, consents of patients for procedures. All the patient's medical records were complete and maintained following all the standards of medical practice Act.

However, statement's in 'Govt.'s sentencing memorandum' that contradicts Govt.'s own theory (Doc. 207, pg.10) [”most of the patients contact was done by the two foreign medical graduates who were 'NOT' busy falsifying the patients Files”]. This statement itself signifies that the most of the Sharma's practice was legitimate and not fraud. However, Fifth Circuit ruled that patients are not victims. That is true, however patients are beneficiaries and physicians are provider with credibility with insurance companies to impart value of the services directly or through the referrals, but Appellate court ignored this important information completely. **These statements from “peer –physicians” are more credible and consistent with 42 USCS 1320c-3(a) than the prosecutorial unfounded statements at the Govt.'s sentencing memorandum, to which appellate judges weigh in more.**

Additionally, at A. Sharma's sentencing (Doc.217, pg.27-28), Govt.'s attorney Mr. Balboni asserted [“----The Govt. would have testimony at trial that the way you can tell the fraudulent from non- fraudulent in two ways. One, the page themselves would be folded - ---- and two, almost without exception, all of the patients got some form of prescription drug every visit, when you look at your fraudulent sheets based on that fold, they also don't have prescriptions associated for that day with those”]. Thusley, by Govt.'s own criteria in the Ex. E and Ex. F of their sentencing memorandum that they have shown, there are total six progress and procedure notes and out of those only one does not have the prescription of that date, that is one out of six are fraudulent or 16 percent, therefore the restitution should be 16 % of 37 million or between \$6-7 million in fraud. Prosecutorial unfounded statements and even by the Govt. itself in their own statement and exhibits, in opiniating that “not even one injection to even one patient was medically necessary” absent even one medical record in discovery and one medical expert input. **The patients, Medicare insurance expert and physicians who gave letters to Sharmas could have easily testified the same at the sentencing hearing and trial.** However, counsels failed to call and retain those medical experts and did not ask patients to come forward and testify in the belief that, this case was not about the 'Medical Necessity'. The implication and importance of those testimonies for rebuttal of the Govt.'s false allegations, is the 'key', for "Ineffective Assistance of Counsel" claim under 18 USCS (3664) (e) and 28 USCS 2255 and 'Certificate of Appealability', especially when Sharmas were assured by the counsels that they would receive the 'credit for the legitimate services" and absent that Sharmas would not have signed the plea agreement and had proceeded to trial.

SHARMA'S COUNSEL FAILED TO RETAIN AND PRODUCE EVIDENCES: At the sentencing evidences were lacking to the satisfaction of the court in line with 42 USCS 1320c-3(a). See

Corkill, M.D. v. Donna E. Shalala 109 F.3d 1348 (CA9,1996) (a civil matter case). A "peer-review organization took action against appellant doctor Neurosurgeon claiming that his services failed to meet a professionally recognized standard of care in five cases and his services were not justified by documenting evidence of 'medical necessity' in four cases. On five different occasions he performed procedures without attempting a bone graft. See US v. Patel, 485 fed. Appx. 702 (CA5, 2012); Dr. Patel was charged for performing 'medically unnecessary angioplasties as per indictment and Govt.'s medical expert testimony revealed the same. See US v. Rutgard 116, F.2d, 1270, 1294 (CA9,1997); Dr. Rutgard was charged in criminal indictment for performing 'medically unnecessary cataract operations' and Govt.'s medical expert testimony revealed the same. Both Patel and Rutgard were charged and convicted for performing 'medically unnecessary' services, as per indictment. **In Sharma's case 'medically unnecessary' services were lacking in indictment, plea, plea colloquy, PSR and all other significant court's proceedings.**

This is in conflict with Supreme Court opinion in Russel. See Russel v. US 369,749, 82 S.Ct. 1038 (1962) and US v. Spinner, 180 F.3d, 514 (CA3, 1999). "Supreme Court has stated that a defendant has substantial right to be tried on charges presented in the indictment returned by the Grand Jury, Deprivation of such a basic right is far too serious to treat as harmless error". **In Sharma's case, See indictment (Doc.64, pg.22-23); Count 1-18 'services "not" performed'. Count 33-36 'services "not" performed', (pg.37). As per Plea agreement (Doc. 178, pg.1-2, Doc.181, pg.1-2)."The defendant agrees to plead guilty to counts one and four of the Second Superseding Indictment ("Indictment"). Count one charges the defendant with conspiring to commit health care fraud and mail fraud, in violation of Title 18, United States Code, Section 371. Count Four charges the defendant with health care fraud, in violation of Title18, United States Code, and Section 1347. Factual basis for Guilty Plea (pg.8-14);The defendant is pleading guilty because she is guilty of the charges contained in Counts One and Four of the Indictment and Plea Colloquy (Doc. 182,pg. 5 and 15-20), the same. However, now, Sharmas stand convicted for "providing medically unnecessary services".**

9. Due Process violation: Sharma has a Constitutional Right to have 'Due Process' and 'discovery' on these new allegations The Govt. and the courts continue to deprive Sharma of such a basic right by denying 'discovery' and 'evidentiary hearing' at the district court level. Reasonable Jurists could differ as to whether District Court correctly determined that K. Sharma had failed to provide sufficient evidence that Counsel provided "IAC" to merit further proceedings in the District Court, which resulted in Sharma's " complete loss of life time earning "without a due -process" to Sharma's prejudice.

10. 'Circuit Split' and Illegal Restitution: Current restitution exceeds by \$ 16 million causing windfall on victims in violation of MVRA because of the new allegations on 'medically unnecessary services' and Govt. has forfeited Sharma's life time earnings without a "due process". If Sharmas were at the Sister Circuits such as 11th Circuit, they would have an opportunity to rebut this new allegation upon remand. However, the Fifth Circuit's precedent restricts this opportunity to Sharmas because of the doctrine 'Law of the Case' which 'cabines or limits' the hearing at the district court and disallows the 'de novo' hearing'. This creates not only 'Circuit Split' but also unduly puts the defendants of the Fifth Circuits at odds with the defendants of the Sister Circuits which allow the 'de novo' hearing. Therefore, Justices should resolve this 'Circuit Spilt' to prevent the prejudicial disparity Sharmas are facing. Sharmas are therefore praying to deserve a day for an 'evidentiary hearing' to prove that they did not provide 'medically unnecessary services' which was not the issue at the onset in this case, (Sharma I, 703, F.3d, 318(CA5, 2012). **On appeal, should this court allow appellate review of a new issue under the standard of the plain error; harmless error; or not at all?**

There is a little doubt that the Govt. bears the "burden of demonstrating the amount of the loss sustained by a victim as a result of the offense" 18 USCS 3664 (e). Cf. *paroline v. United States*, ---- US ----, 134 S.Ct. 1710, 1718 –1722 (2014). Fundamentally, restitution should reflect the consequences of the defendant's own conduct. See *Hughey v. US*, 495 Us 411, 416(1990). And the Govt. before this court in somewhat different context acknowledged that 18 USCS 3664 "provides room for "credits against an offender's restitution obligation "to prevent double recovery to the victims." See *Robers v. United States*, ---- US, ---, 134 S. Ct. 1854, 1858 (2014) (citation Omitted).

Section 3664 (e) authorizes the district court to designate whether the Govt. must disprove a proffered offset or the defendant must prove it by a preponderance ("The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires"). **It is clear that the district court did not do so at the First hearing in Sharma's case. It was the court of appeals in the first instance that announced that the burden of proof was on the Sharmas regarding the offsets.**

See Sharma I, 703 F.3d at 326.

The Sharmas' claimed below that this preclusive appellate allocation of the burden of proof was unfair and a denial of due process. They appealed from the second restitution hearing where the district court, interpreting the remand of the court of appeals narrowly, denied them the opportunity to conduct discovery or offer evidence of the claimed offsets. The Fifth Circuit in Sharma II relied on *US v. Sheinbaum*, 136 F.3d 443, 449 (5th Cir. 1998). A case that blessed shifting the burden of proof to defendant as to restitution offsets and which oddly was premised on an earlier non-restitution case that approved placing the burden on the defendant to come forward with information in order to qualify for the "safety valve" benefit to avoid a mandatory drug sentence. Cf. *United States v. Flanagan*, 80 F.3d 143, 146-47 (5th Cir. 1996). Flanagan

involved the interpretation of a completely different statute, 18 USCS 3553 (f) (5) (the defendant must have "truthfully provided to the Govt. all information and evidence" he has regarding the offenses). The language of section 3553 (f) (5) is unambiguous; it literally places on the defendant the obligation to come forward with information for the Govt. by the time of sentencing. In contrast, in the plain language of the restitution statute, Section 3664 (e) ("Shall be upon the party designated by the court as justice requires") Congress directs the district court [and not the court of appeals post hoc] to allocate responsibility for proof of "such other matters as the court deems appropriate."

In sum, the district court never designated the responsibility for proving the offsets despite statutory language that clearly envisioned that it do so. The court of appeals in Sharma I then announced that the Sharmas had both unknowingly borne the burden of proof and failed to meet it. When on remand the Sharmas tried to get discovery of their own files seized by the Govt. so that they might show their entitlement to offsets the district court, interpreting the remand narrowly, denied them that opportunity. The court of appeals in Sharma II then affirmed the new restitution order holding that it was not a denial of due process because the Shamas should have known that the [undesignated] burden of proof was on them in the original district court proceeding. Section 3664 (e) is not ambiguous and places the burden of proof for offsets. "The plain meaning of legislation should be conclusive, except in the "rare cases [in which] the literal application of a statue will produce a result demonstrably at odds with the intentions of its drafters." United States v. Ron Pair Enterprises, 489 US 235, 242 (1989) (citation omitted). **If the burden properly is placed on them, the Sharmas deserve their day in court to prove the medical necessity of the offsets they claim and not the catch -22 scenario crafted by the court of appeals.** Sharmas are not asking a second bite on apple but their "Due -Process Right" under Fifth Amendment of the Constitution. See US v. Bane 720 F.3d 818, 828 (CA11, 2013) ("on remand Bane must offer evidence about what goods or services he provided that were medically necessary and the value of them to receive offset."). Please note that 11th Cir. did not deprive Bane from showing of the credit at the district court under the "Due -Process Right". However, Fifth Circuit deviated from the standard and deprived Sharmas to offer evidence on remand under 3664 (e). Additionally, neither Govt. presented nor the district court took any evidence on 'medical necessity' by proper standard under 42 USCS 1320c-3(a) by medical expert testimony after discovery of the patient's medical records.

"Due Process" means both party needs to be heard for fair justice in public interest. Clearly, it is the burden of the district court to listen to the arguments in the first instance and shift the burden under 18 USC 3664(e) for showing the credit for the legitimate services and offsets. See US v. Ruff, 420 F.3d 772,776 (CA 8, 2005). (We decline to

consider; in the first instance, the proffered explanation and supporting documentary evidence [about the value of offsets to restitution]. The duty to hear and determine evidentiary issues most appropriately rests in the district court.”)(emphasis added). Thus Fifth Circuit splits not only in their opinion to conclude that “Not even one injection to even one patient was medically necessary” but also on remand it cabined what district court do leaving Sharma’s having no ‘Due Process Right’ for the claim of legitimate services. Nonetheless, thusly, the counsels failed to carry the burden of showing the ‘Medical Necessity’ by the proper standard under 3664(e) and 1320c-3(a) and they conceded in open court that they were “INEFFECTIVE”(Doc.447,pg.16-17). See US v. Brayant, 655 F.3d 232, 254 (CA3, 2011) (emphasizing that the “defendant has the burden of establishing offsets to restitution because he is in the best position to know the value of the legitimate goods or services provided to his victims”); US v. Elson 577 F.3d 713, 734 (CA6, 2009) (same).US v. Sheinbaum 136 F.3d 443, 449 above (“logically, the burden of proving an offset should lie with the defendant”). **In light of these fact-bound claims warrant further review of this court and, in any event, is correct in light of court’s records for the balance of justice which is unduly in favor of the Govt. at present absent “Discovery” and “Medical Expert Testimony” on ‘medical necessity’ and credit for the legitimate services to avoid windfall, on victims of crime.**

“LAW OF THE CASE DOCTRINE AND CIRCUIT SPLIT”:

The Fifth Circuit’s application of the law of the case doctrine requires district courts to follow a default rule of limited resentencing, in which resentencing is not considered to be de novo unless expressly designated. Therefore, the resentencing court can consider only issues the Circuit Court directs. The First, Fifth, Seventh and D.C. Circuits also follow this rule. Conversely, the Fourth, Sixth, Eighth, Ninth, Tenth and Eleventh Circuits have adopted a de novo sentencing default rule, absent explicit direction otherwise from the remanding appellate court. The majority view allows a district court to consider any matters relevant to sentencing. The Second and Third Circuits each have their own approaches. The Circuit Court’s application of the law of the case doctrine has a wide range of impacts for defendants upon resentencing. Courts following the majority rule of de novo general remand sentencing have often discussed how many variables go in to determining a defendant’s sentencing. **Changing one factor of a defendant’s sentence may affect other factor’s and these court advocate a “Holistic “ approach in viewing a defendant’s “sentencing package”.** Courts following the default rule of limited remand often look to “judicial economy” and do not want to give defendants a “second bite of the apple”. Interestingly, de novo review does not always work to the defendant’s benefit. Some defendants have ended up with larger sentences follow de novo review of their appeal.

If Sharmas had pleaded guilty in the Fourth, Sixth, Eighth, Ninth, Tenth or Eleventh Circuits, the law of the case doctrine would not have prevented them from providing evidence of offsets for ‘Medical Necessity’ to the district court at the resentencing hearing. Sharma’s case was remanded to “recalculate the gross restitution amount”. (Sharma II). Whether Sharma should

receive credit for providing medically necessary services was a factor in the gross restitution amount. Moreover, the circuit court "said nothing about reconsidering the offsets issue at resentencing," and therefore, did not specifically limit the district court considering the issue. The same result would have occurred in the First, Seventh, and D.C. Circuits. It is unclear how Sharma would have fared in the Second Circuit or Third Circuit.

There is deep divide among the Circuits and requires this Court's intervention. The Fifth Circuit's opinion adds to an acknowledged split among the Circuits on whether a general de novo remand or a limited remand is appropriate for resentencing. See E.G. US v. Miller, 594 F.3d 172,179-180 (CA3, 2010) (recognizing split); US v. Whren, 111 F.3d 956, 959 (D.C. Cir. 1997), (collecting cases). However, because Sharmas were in the Fifth Circuits, they were barred from providing the evidence, even though it had formed a part of the argument on their First appeal. All the Circuits have formed case law on this issue, and the issue is recurring. No prevailing view has emerged, nor have any Circuits reconsidered their positions in light of the split. **This Court should hear and resolve this very important issue. The Circuits are deeply divided on whether a district court on resentencing, should as a default rule, conduct de novo review or if remand should be limited. This split warrants this Court's attention and review in the interest of justice on this in public interest and for the Due-Process Rights of Sharma. It affects many people over and over every year.**

EVENTS ON REMAND AT THE RESENTENCING ON 06/03/2013: (Doc. 447, pg. 16-36).

Mr. Flood: "Your Honor, I told them when they entered their plea that they would get credit for the legitimate medical services they were providing. And the fact that they are not getting credit for that, to the extent I was ineffective." Mr. Cogdell: "---- so to the extent that Mr. Flood suggests that we may be ineffective on that issue, I agree."(pg. 16-17).

In response to the Counsel's remarks Mr. Flood: "---- and I just disagree with that because they say it's foreclosed because we failed to prove at the initial sentencing that the trigger –point injections were medically necessary or would have been reimbursed. That wasn't the issue. The issue was how many fraudulent bills are there? What was the Delta between what they should have been paid and what they were paid?

Mr. Varnado: "Judge, the problem for the defendants, and as much as Mr. Flood wants to couch this as the Govt.'s position and probation's position, it is the Fifth Circuit's position. And all of these arguments ----- These are not probation's positions, not the Govt.'s positions. This is the position of the Fifth Circuit. It is the law of the case; it's what the Court's required to do". (Pg.21-22).

Sharma's problem is that no one is willing to take responsibility. Govt. is accusing Fifth Circuit; Fifth Circuit is accusing the counsels and counsels are accusing the Govt. to bring the issue of the "Medical Necessity" and in this "Dispute of trio", the Sharmas are slapped with over \$37 million restitution without their "Due Process Right" under the Fifth amendment of the Constitution and in Violation of MVRA 3663A, Therefore fact bound claims warrant further review of this Court. "K. Sharma has accepted the responsibility and pled guilty in 'good faith' on the promises of the Government of United States and the assurances of her lawyer. Now K. Sharma prays and ask the Hon. Justices of the HIGHEST (Supreme) COURT OF UNITED STATES to protect the 'Due Process and

the Constitutional Rights" of the Defendants in this case to preserve the confidence of the citizens of this country in the Justice System".

Arun Sharma was asked to put "under -oath" by the Govt.to give his allocution. (Doc. 447, pg 24-33) Defendant Arun Sharma: because, your honor, when you decided last time the judgment, the judgment says, your Honor, that these procedures he billed unnecessary which were deemed to be fraudulent on these occasions, which were deemed to be fraudulent, is in your sentencing transcript, your Honor, and your Judgment. **You did not say, your Honor, that all the procedures were fraudulent. After the decision, your Honor, this Court gave us \$43 million for restitution. Despite the probation Department the same argument that this conservative calculation was burden of defendant's and this is the same argument. They conceded that they do not have the resources for an independent investigation.** (pg.24). Your Honor, they are depending on the Government. The Govt. is opposed to our party. Your Honor, the Govt. and probation department has misled this honorable Court a number of times, before in Klein case and a number of times in our case.

Defendant Arun Sharma: Your Honor, I am Triple Board certified doctor ----- Mr. Balboni did not tell you what kind of clinic I was running -----".

The Court: No, you're not. I will allow you to visit with me. But we are not going into any kind of an evidentiary matter. You're entitled to allocate ----- I suggest, doctor, that you ----you discuss the narrow point we are here on today. Otherwise, I will ask you that you be seated. Okay. Under the law that's all we're here for. The Circuit Court, The Appeals Court, sent it back on a narrow matter.

Defendant Arun Sharma: There have been all kinds of things in the sentencing memo. ---- Your Honor and every single thing in the sentencing memorandum was wrong.

The Court: everything? Defendant: Arun Sharma: everything was wrong, your Honor. (pg. 25).

Defendant Kiran Sharma: "restitution can't compensate a victim for losses caused by the conduct not charged in the indictment or specified in the guilty plea or for losses caused by the conduct that falls outside the scope of the actual conviction". Every dollar must be supported by record service. I believe that all of the injections are not fraud, as accused by the prosecution. (pg.34-35).

Thus, the hearing on remand was in violation of the "Due -Process" right's of Sharmas under Fifth Amendment. The hearing should be fair for both parties and should be meaningful. The Fifth Circuit affirmed Sharmas' second appeal in pursuit of finality of the case. See Honorable Judge Edith Brown's comments at the oral arguments ["well we can't go on with appeal after appeal and we need to see the finality in the case. [Sharmas' both children are going to be physicians and they will take care of them"]. Such comments are not only prejudicial to K. Sharma but they undermine the whole judicial process with regards to K. Sharma's' Due Process and their Constitutional Rights. Therefore this Court's review is necessary in this complex case.

When the Govt. deprives a person of life, liberty or property, it is required to use fundamentally fair process. The Supreme Court has made clear that when Governmental action "shocks the conscience", it violates the 'DUE -PROCESS' such conduct includes investigative or prosecutorial efforts that appear, under the totality of the circumstances, to be motivated by corruption bias or entrapment. In US v. Russel 411 US 423, 366,93 S.Ct. 1637 (1973), the justices observed; we may someday be presented with the situation in which the conduct of 'LAW ENFORCEMENT AGENTS' is so outraged that due process principals would absolutely bar the Govt. from invoking judicial process to obtain a conviction. "It didn't take long, in Blackedge v. Perry 417 US 21, 628, 94 S.ct. 2098 (1974). The Court concluded that the 'due process' was offended by a prosecutor's "realistic likelihood of 'vindictiveness' that tainted the "very initiation of proceedings".

In young v.US ex rel. Vuition 481 US, 787, 107 S.Ct. 2124 (1987), The justices held that because prosecutors have "power to employ the full machinery of the state in scrutinizing any given individual ----- We must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of Justice". Prosecutor must be "Disinterested and make dispassionate assessment", free from any personal bias.

In Williams v. Pennsylvania ----- (2016), The Supreme Court held that a state judges' potential bias violated 'Due-Process' because he had a role ---".

K. Sharma has lost her "LIFE, LIBERTY OR PROPERTY" without a "DUE – PROCESS" under her Fifth Amendment Right of the Constitution without a "DUE –PROCESS". The Govt. has forfeited over \$31 million dollar on the basis of unfounded' hearsay statements' absent any 'Medical Expert Testimony' and denying the medical records 'Discovery' which is essential in a large and complex health care fraud case where a defendant physician is accused of , at the appellate level for the first time, for proving " **EVERY SINGLE INJECTION PROCEDURE FROM THE DAY ONE TO THE VERY FIRST PATIENT UNTIL THE LAST DAY OF HER PRACTICE TO THE LAST PATIENT" OVER THE ELEVEN YEARS OF PERIOD, ALL 'MEDICALLY UNNECESSARY', AND THAT TOO ABSENT SHOWING ANY RECOVERY BY THE HEALTH CARE INSURANCE COMPANIES AND MEDICARE ON THE BASIS OF THE SAME ALLEGATIONS DESPITE SHARMA'S TWO YEARLY ROUTINE INTERNAL AUDITS.**

K. Sharma was 'Not' on notice for providing 'Medically Unnecessary Services' directly at-least until at the appellate level. The Medically unnecessary services were not in the indictment, plea agreement, plea colloquy, PSR or at any other proceedings of the District Court. This was even more complicated by the ineffective assistance of counsels and possible participation of district

judge in the matter of 'Trust Issue' to net the Sharmas by 'entrapment'. Additionally, the Govt.'s and the courts' continuous denying 'Discovery' and hiding the 'Evidence', is in the gross violation of Sharma's 'Due -Process' Rights. This is one of the Govt.'s most egregious and gluttonous pursuits of forfeiting 'life time earnings of Sharmas' with tens of millions of dollars absent focus on fair justice creating a landslide 'windfall' on the medical insurance companies.

Wherefore, K. Sharma prays that on the basis of the facts bound 'Evidence' of the case on the gross violation of the K. Sharma's 'Due -Process Rights' and Fifth Circuits violation of its own precedents, statutory and Constitutional Violation and Circuit split, This Court grant review and Certiorari and exercise its supervisory power.

CONCLUSION:

For the foregoing reasons, pro se petitioner Kiran Sharma respectfully prays that this Court grant Certiorari to review the Judgement of the Fifth Circuit in denying 'Certificate of Appelability and Evidentiary hearing'.

Respectfully submitted,



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