ORIGINAL

20-6422
No.

IN THE
Supreme Court of the United States

NAZARIY KMET,
Petitioner,
v.
UNITED STATES,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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Pro se

QUESTIONS PRESENTED

Question I: **Whether** the 3rd Circuit's denial of the Petitioner's 2255 Motion directly violate this Court's decisions in the *U.S. v. Lee, Hinton v. Alabama and Strickland v. Washington*, and shouldn't this Court exercise its supervisory powers, when the counsel admitted failing to research and inform the Petitioner regarding the federal regulations that will reveal a defense to the allegations in Indictment to which, a misadvised Petitioner pled guilty to, instead of exercising his constitutional right to a trial, resulting in a denial of the whole judicial process?

Question II: **Whether** it violate the U.S. Constitution's Due Process Clause when a defendant pleads guilty to a crime, which, at the time of the plea, was based on confusing federal regulations which allowed and did not prohibit his conduct, and doesn't at least a rule of lenity apply?

Question III: Here, reasonable jurists have debated whether the relevant clause of the Medicare regulation in effect at the time of the underlying conduct, i.e., 42 C.F.R. § 410.40(d)(2), accepted certificates of medical necessity as the only proof of medical necessity for ambulance rides, or whether this provision required additional and separate proof of the medical necessity requirements listed in § 410.40(d)(1)? See 42 C.F.R. § 410.40(d)(2) (2012). (specifically requested by the district court in Certificate of Appealability for guidance and answer omitted by the Third Circuit)

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

- *U.S. v. KMET,* No. 2:14-CR-00319-NIQA, U.S. District Court for the Eastern District of Pennsylvania, Judgment entered April 01, 2015.
- *U.S. v. KMET, 667 F. App'x 357, 358 (3d Cir. 2016)* No. 15-1891,U.S. Court of Appeals for the Third Circuit, Judgment entered July 14, 2016 (Appeal of Denial guilty plea withdraw.).
- *KMET v. U.S.*, No.16-8414, Supreme Court of the United States, Date terminated April 17, 2017.
- *KMET v. U.S.*, No. 2:17-CV-02311-NIQA, U. S. District Court for the Eastern District of Pennsylvania, Date terminated: July 16, 2019 (2255);
- *U.S. v. KMET,* No. 19-2718 U.S. Court of Appeals for the Third Circuit, Decided March 31, 2020, (Appeal of 2255 Denial), Petition for panel and en banc rehearing June 19, 2020, Judgment entered *June 29, 2020.*

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- The opinion of the United States court of appeals appears at Appendix B to the petition and is unpublished.
- The opinion of the United States district court appears at Appendix A to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided Petitioner's case was March 31, 2020. A timely petition for rehearing was denied by the United States Court of Appeals on the following date: June 19, 2020, and a copy of the order denying rehearing appears at Appendix D.

STATUTORY PROVISIONS INVOLVED

This case involves the statutory interpretation of 42 C.F.R. 410.40(d)(2) and its apparent element of designating Medicare beneficiary's attending physician to be the sole legal certifier of medical necessity for ambulance service.

INTRODUCTION

If a person establishes a business which is governed by regulations and relies upon the law for guidance in the right operations of their service it is a travesty that the government would overreach the statute to criminalize business and hold business owners legally liable for conduct that is facially compliant with the letter of the law. When the government malpractices the accusatory process in a manner which elongates a person's legal liability beyond that conferred by agency regulations while contemporaneously jettisoning that regulation's precepts the resulting chasm deprives one of the Right to Notice. More so where also a want of Effective Assistance of Counsel fails to avail an untangling of the undue assignment of legal liability.

STATEMENT OF CASE

The Petitioner from 2010 to 2012 owned Life Support Corporation ("Life Support"), a company that transported patients by non-emergency, scheduled, repetitive ambulance services and billed Medicare for those services. Transported patients were almost exclusively undergoing in-hospital weekly dialysis treatment. The Indictment alleged that the Petitioner, with others, billed Medicare for medically unnecessary trips. Acting upon the faulty advice of his counsel, the Petitioner pled guilty to one count of conspiracy to commit health care fraud in violation of 18 U.S.C. § 1349 (and to one count of violating the anti-kickback statute 42 U.S.C. § 1320a-7b(b)(2)(B), a count utterly dependent on the health care fraud count). The Indictment's health care fraud count is entirely predicated upon a simple question: whether the Petitioner's ambulance transport

was medically necessary or not and corresponding Medicare billing was justified. When transporting patients and billing Medicare, the Petitioner fully and honestly relied on the applicable federal Medicare regulations in effect at that time, set forth at 42 C.F.R. §410.40 (2012). These regulations, when defining medical necessity requirements for non-emergency, scheduled, repetitive ambulance services (the type of service provided by the Petitioner), at the time stated that Medicare covers ambulance services "if the ambulance provider or supplier, before furnishing the service to the beneficiary, obtains a written order from the beneficiary's attending physician certifying that the medical necessity requirements...are met", 42 C.F.R. §410.40(d)(2).

The Petitioner possessed such attending physician's orders (also known as Certificates of Medical Necessity ("CMN")) in each and every case he transported. The regulations also required that the "physician's order must be dated no earlier than 60 days before the date the service is furnished". Needless to say, the Petitioner met that condition, too.

However, another paragraph (d)(3) of the same Regulations that governs unscheduled or that are scheduled on a nonrepetitive basis (Petitioner did not provided this type of service) , heavily relied on by the Indictment, appeared to require that before transporting patients, in addition to a physician issued CMN, the Petitioner also had to (somehow) independently determine whether it was medically necessary to transport the patients by (his) ambulance, and had to ensure that no transported patients "were fully mobile and able to take ordinary transportation", 3rd Cir. Judgment, p. 2, Appendix at B. The Petitioner or EMT's is

not a medical professional, and cannot possible be a person who could made a complicated determination of medical necessity, especially for dialysis patients *see United States v. Advantage Med. Transp. Inc., 2014 U.S. Dist. LEXIS 76186 (M.D. Pa., 03/05/14)*. Despite such a backdrop of highly conflicting and confusing federal regulations, which served as a legal basis for the Petitioner's Medicare billing fraud prosecution, the Petitioner's counsel admitted, under oath, that he completely failed to research the regulations and fully relied on Indictment interpretation of regulation and requirements. Moreover, in spite of such a colossal failure, counsel advised the Petitioner to plead guilty and not proceed to a trial, regardless of federal regulations that makes Petitioner's conduct completely innocent, of which counsel was not aware of at the time of his advice (he became aware of the regulations only when he was called to testify at Section 2255 evidentiary hearing, well after his client already served time in jail). Shortly after pleading guilty and before the sentencing, upon learning of the regulations and the fact that his conduct was indeed innocent, the Petitioner moved to withdraw his guilty plea, in open Court Petitioner declared that he is factually and actually innocent of any charges and want to proceed to trial, the district court denied his plea withdrawal motion, see Appendix B p. 3.

The Petitioner's Section 2255 claim is simple. Had he known about the existence of federal regulations, including the ones making his conduct completely innocent, he would not have pled guilty and would have proceeded to the trial instead. The existence of the physician issued CMN in each and every case transported by the Petitioner's ambulance was a complete defense to any fraud

allegations. In addition to the existence of conflicting and confusing federal regulations, as even noticed by the 3rd Circuit Court of Appeals Judgment. There was also a conflicting case law interpretation regarding whether a CMN alone was sufficient under regulations for such patient transport and billing see 3rd Cir. Opinion, Appendix B p. 5. The case law is indeed so confusing that the 3rd Circuit Court of Appeal had to reverse itself and conflict its own previous decision in an identical case to try to find grounds to deny the Petitioner's Section 2255 Appeal, *see U.S. v. Advantage Med. Transport, 698 App'x 680 (3d Cir. 2017)*, . It can't be any worse than that. Conflicting federal regulations were later on amended and clarified, 42 C.F.R. Section 410.40(d)(2)(ii)(2013) (current version 42 C.F.R. Section 410.40(e)(2)(ii)(2020). The clarifying amendment went into effect January 1, 2013, after the Petitioner's conduct but before Indictment, prosecutor applied the amended text of regulation in to the Indictment underlying the Petitioner's conduct.

There is a reasonable probability that Petitioner would not have plead guilty and would have insisted on going to trial but for counsel's failure to properly research the relevant Medicare regulations on whether a CMN was sufficient to establish medical necessity for the ambulance transports of the dialysis patients for which Petitioner billed Medicare. Counsel's failure to research and communicate to Petitioner the operative versions of 42 C.F.R. §410.40(d)(2), in effect between 2010 and 2012, that a CMN alone establish medical necessity, rendered counsel's advice to Petitioner to plead guilty uninformed and deficient. Counsel's failure to properly research and understand the impact a CMN had in the determination of medical

necessity prevented him from fully and adequately informing petitioner of the consequences of his guilty plea and the defenses available to him. Given that Petitioner had valid CMNs for all of the transports, he specifically asked counsel to research whether the valid CMNs establish medical necessity and a defense to the Indictment, and moved immediately to withdraw his guilty plea after consulting new counsel, there is a reasonable probability, if not certain that, but for counsel's neglect, petitioner would not have plead guilty and would have insisted on going to trial.

However, none of it was researched and presented to the Petitioner by his former counsel. The counsel advised the Petitioner to plead guilty and quickly disposed of the case. The Petitioner, a father of two, was incarcerated for over 60 months and now, upon the completion of his sentence, faces removal from the United States based on this conviction.

The petition should be granted.

REASONS FOR GRANTING THE PETITION

I. Doesn't the 3rd Circuit's denial of the Petitioner's 2255 Motion directly violate this Court's decisions in the *U.S. v. Lee, Hinton v. Alabama and Strickland v. Washington*, and shouldn't this Court exercise its supervisory powers, when the counsel admitted failing to research and inform the Petitioner regarding the existence of unclear and confusing federal regulations, which formed the legal basis for the indictment to which, a misadvised Petitioner pled guilty to, instead of exercising his constitutional right to a trial, resulting in a denial of the whole judicial process?

A. Third Circuit's Decision Conflicts With Key Supreme Court Decisions, Particularly *Hinton v. Alabama; U.S. v. Lee; and Strickland v. Washington; This Court Should Employ Its Prerogative of Establishing and Maintaining Civilized Standards of Procedure and Evidence In the Exercise of Supervisory Authority Over the Administration of Criminal Justice in the Federal Courts Where the Third Circuit Committed Structural Error in Foregoing* Strickland Standard

It is a well-established policy of this Honorable Court to be favorably disposed to grant certiorari to review the decision of a United States Court of Appeals if it has so departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of the (Supreme) Court's supervisory powers. This is especially when considering "serious questions in the administration of federal criminal practice." *McNabb v. U.S., 318 U.S. 332 (1943).* The Court has also exercised its supervisory powers in order to clarify certain controversial requirements (e.g. *Zahn v. International Paper Co, 414 U.S. 291 (1973))*, or to define the scope of specific constitutional protections (e.g. *Hickman v. Taylor, 329 U.S. 495 (1947)).* See also *Chemical Waste Management v. Hunt, 504 U.S. 334 (1992)* (certiorari

granted because of the "importance of the federal question and the likelihood that it had been decided in a way conflicting with applicable decisions (of the Supreme Court)", comment added). Unfortunately, the Petitioner's case covers all of the criteria enumerated above. In its essence and spirit, the 3rd Circuit's decision, denying the Petitioner's 2255 motion completely disregarded that the record of the case reflects the ***Strickland*** standard being met at both prongs.

Decision of Circuit Court on first Strickland prong, first and foremost, directly conflicts with the Supreme Court's decision in *Hinton v. Alabama, 571 U.S. 263 (2014)*. In that seminal decision, this Court determined that "an attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland. As stated above, the issue of federal Medicare billing requirements and regulations was central to the Petitioner's case. It is well established that the "....counsel is required to give a defendant information sufficient to make a reasonably informed decision whether to....." (e.g. accept a plea offer), *Shotts v. Wetzel, 724 F.3d 364 (3d Cir. 2013)*,. Actually, nothing else mattered. During the evidentiary hearing, the Petitioner's counsel admitted, under oath, his complete failure to perform even basic research regarding such regulations is unreasonable performance under Strickland, heavily prejudicing the Petitioner by advising him to plead guilty based on a complete lack of any legal research. Such an outrageous failure and a lack of research is even more problematic when both the district court and the 3rd Circuit Court of Appeals admitted the existence of the conflicting case law in this matter, clearly an aggravating factor when judging the counsel's ineffectiveness and resulting prejudice to the Petitioner. Even more importantly, the 3rd Circuit's decision directly conflicts with this Honorable Court's central holding in *Lee v. United States, 198 L. Ed. 2d 476 (2017)*. The key Lee holding is that the prejudice resulting from an attorney's improper advice regarding a guilty plea may be shown even if the defendant had a substantial likelihood of

conviction after trial. It is a defendant's preeminent constitutional right to choose whether to go to trial or not and is not up to the courts to speculate and measure his success chances. But the 3rd Circuit would have none of it. In a blatant disregard of the Supreme Court's decision in Lee, the 3rd Circuit concluded that the Petitioner had not proven any prejudice, as had he opted for a trial "it is unlikely that the defense would have been successful", 3rd Cir. Judgment, p. 9, Appendix B. It is not only that such a conclusion by the 3rd Circuit's Panel conflicts with their own statement on p.3 regarding the existence of conflicting case law on this point (thus greatly increasing the Petitioner's chances at trial), it directly conflicts with the Court's main holding in Lee, contemporaneous evidence substantiates a Petitioner's expressed preferences that he would proceed to trial. The historical facts of this case, including Petitioner's near-immediate decision to move to withdraw his plea upon obtaining a second opinion on available defenses, confirms had counsel properly consulted with Petitioner, it is reasonably probable (if not, certain) that he would not have entered the guilty plea and would proceed to trial as the courts have to look at the facts from a defendant's and not the Court's point of view (once again, even if the facts don't go into the defendant's favor, which is not the case in the Petitioner's matter).

Finally, in order for the Petitioner to prove prejudice, Strickland teaches us that there only needs to be a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington, 466 U.S. 668 (1984)*. Given the fact that the regulations in question were so confusing and conflicting that the Department of Health and Human Services had to subsequently amend and adopt clarifying regulations, the existence of a mere reasonable probability of a different result is hardly questionable. Moreover, under Strickland and other case law, as pronounced by this Honorable Court, it has been well established that "courts must indulge every reasonable presumption against the loss of

constitutional right." *Illinois v. Allen, 397 U.S. 337 (1970)*, in this case the Petitioner's right to trial. A right forfeited due to his attorney's omission of due advice as relates to 410.40(d)(2) (2012) and its directive concerning medical necessity certification.

The Third Circuit's Judgment denying the Petitioner's 2255 Motion upon basis that the ineffectiveness claim failed to meet the Strickland standard itself failed to observe the structural error doctrine. The judgment failed to realize the structural error albeit its own holding that "the prejudice standard is not a stringent one and is less demanding than the preponderance standard." *Bey v. Superintendent, 856 F. 3d 230 (3d Cir. 2017)*. It is equally well established that "prejudice is inherent in this case because unconscious or sleeping counsel is equivalent to no counsel at all." *Javor v. U.S., 724 F.2d 831 (9th Cir. 1984)*. Finally , the Third Circuit's assessments about what would or could have, etc., happened at the trial (had petitioner been allowed one), and estimates of the Petitioner's chances in front of the jury, is not only a complete speculation, but runs contrary to what at least one famous justice on this Court noted by saying "by my count, this Court has adopted no fewer than four assertedly different standards of probability relating to the assessment of whether the outcome of trial would have been different if error had not occurred..." Scalia, J, concurring in *U.S. v. Dominguez Benitez, 542 U.S. 74 (2004)*,. This is, of course, in addition to the fact that we should have never arrived to the point of having to make such "estimates" in the first place. Therefore, the Third Circuit's entire Strickland analysis is a pure and unconstitutional speculation and the Petitioner calls on the Supreme Court to step in, exercise its supervisory powers and issue certiorari in this matter.

B. Grave and Manifest Injustice Caused to the Petitioner: Forfeiture of the Entire Judicial Proceedings.

The Supreme Court is well known for granting certiorari in cases which cause grave and manifest injustice. Such is the case of the Petitioner. Both the district

and the Third Circuit's court decisions caused a grave and manifest injustice to the Petitioner. It is not only their denial of the counsel's evident ineffectiveness and the alleged lack of prejudice that caused a grave and manifest injustice to the Petitioner, but also the denial of the whole, entire, judicial process to the Petitioner. "The right to a jury trial in criminal cases is fundamental to the American system of justice." *Duncan v. Louisiana, 391 US 145 (1968).* Criminal defendants are "entitled by the Constitution to a meaningful opportunity to present a complete defense" *Wade v. Mantello, 333 F. 3d 51 (2d Cir. 2003)*, see also *Clark v. Arizona, 548 U.S. 735 (2006)*, holding that a right to present a complete defense is " a matter of simple due process." Due to the counsel's laziness and ineffectiveness, the Petitioner has forfeited that right. The existence of such a serious due process problem had been noted by this Honorable Court in *Flores-Ortega v. U.S., 528 U.S. 470 (2007)*, and the need for this Court's intervention in the Petitioner's matter is even more obvious. The Petitioner's Section 2255 Motion claims that had his counsel performed his job reasonably and informed him of the existence defense to the Indictment he would have opted to go to the trial instead of pleading guilty.

However, due to this attorney's glaring ineffectiveness, he pled guilty to a "crime" in which his conduct did not reaches the statutory elements of the crime, especially the scheme to defraud element, as detailed below. See also *Hill v. Lockhart, 474 U.S. 52 (1985).* The Petitioner's constitutionally guaranteed right to present his case to the jury was lost forever. Therefore, this Honorable Court's intervention is necessary to prevent grave and manifest injustice to the Petitioner and to ensure the integrity of the American judicial process.

C. Circuit Court's Decision Also Opens Circuit Split.

It is also well known that this Court is usually more favorably disposed to grant certiorari when circuit court decisions are mutually inconsistent or open splits with other circuit courts of appeal exist. 3rd Circuit's decision in *U.S. v. Advantage Medical Transport, 698 F. App'x 690 (3d Cir. 2017)*, which stated that "at the time these transports took place, the regulation did not say that a physician's certification was insufficient in and of itself to establish medical necessity" directly contradicts the 5th Circuit decision in *U.S. v. Read* stating that "possession of a CMN - even one that is legitimately obtained - does not permit a provider to seek reimbursement for ambulance runs that are obviously not medically necessary", *U.S. v. Read 710 F.3d 219 (5th Cir. 2012)*. All of this is in addition to a clear intra-circuit split in the 3rd Circuit, as the 3rd Circuit's holding in the Petitioner's case contradicts numerous district court decisions within the Third Circuit (see *U.S. v. Hlushmanuk, No. 12-327, E.D. Pa., 2014 fully relied on Read decision.*), and once again, split from other circuits (see *MooreCare Ambulance Serv. LLC v. Dep't of Health and Human Servs, No. 09-78, M.D. Tenn, 2011)* also *First Call Ambulance Servs., Inc. v. Dep't of Health & Human Servs., No. 10-247, 2012 WL 769617, M.D. Tenn. March 8, 2012)* also *Nationwide Ambulance Servs. v. SafeGuard Serv. LLC. 2012 U.S. Dist. Lexis 119502 (D.N.J. October 07,2011)* also *Nationwide Ambulance Servs. v. Sebelius, 2013 U.S. Dist. LEXIS 126246 (D.N.J. 09/03/13) also United States v. Advantage Med. Transp. Inc., 2015 U.S. Dist. LEXIS 76186 (M.D. Pa., 03/05/14)*

The need for the Supreme Court to step in and properly interpret the law cannot be more pressing. Also, further underscoring the disastrous extent of the Petitioner's former counsel's ineffectiveness, the case law was clearly unsettled in the area of medical necessity establishment at the time of the Petitioner's conduct. Therefore, in view of the open district and circuit courts split, the disparity of statutory interpretations alone substantiated viable defense grounds for Petitioner had he gone to the trial. A viable defense that availed to Petitioner but for counsel's admitted omission of research and informing concerning the establishment of medical necessity.

II. Doesn't it violate the U.S. Constitution's Due Process Clause when a defendant pleads guilty to a crime, which, at the time of the plea, was based on confusing federal regulations which either allowed or did not clearly prohibit his conduct, and doesn't at least a rule of lenity apply?

A. Grave and Manifest Injustice Caused to the Petitioner- Guilty Plea to a Non-Crime; Strict Reading of Criminal Statutes; Lenity.

For Petitioner's conduct to have violated 18 U.S.C. § 1347 either would have had to knowingly and willfully execute a fraud upon any health care benefit program; or 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. The conduct which putatively meets a § 1347 element as

the government explains, by the Indictment is unequivocally to have defrauded Medicare by false representation of the company's patients' medical necessity for ambulance transport service. So unambiguous is the accusatory quintessence that the government refers to no other concept by accusatory instrument with its emphatic repetition; to wit; patients [who] did not qualify for ambulance service", and their being "unqualified" were putatively induced to subscribe to transport service that was "not medically necessary", and Life Support and Petitioner fraudulently misrepresented that serving the patients was "medically required". However, 42 C.F.R. § 410.40(d)(2) (2012) provided at the time of the "crimes", the "Special rule for nonemergency, schedule, repetitive ambulance services.", which delineated for the American public and particularly as meant to affect ambulance transport business that, "Medicare covers medically necessary nonemergency, scheduled, repetitive ambulance services if the ambulance provider or supplier, before furnishing the service to the beneficiary, obtains a written order from the beneficiary's attending physician certifying that the medical necessity requirements of paragraph (d)(1) of this section are met. The physician's order must be dated no earlier than 60 days before the date the service is furnished."

Petitioner timely obtained the requisite valid written order as referred by § 410.40(d)(2) for each of the "criminal" services in this case. A beneficiary's attending physician was the lawful certifier of medical necessity for every performance of service in this case, making it lawfully impossible for Petitioner to fraudulently misrepresent that serving the patients was "medically required", for the fact of medical necessity, by any contest, certified by the physicians here not only as a

matter of fact but as a matter of law. Notwithstanding any interpretation of the law which could suggest that the regulatory directive for an ambulance service to maintain records and to make them available upon request made one legally liable to share with attending physicians in the certification of beneficiary medical necessity that conclusion was not stated directly in Medicare regulations and therefore it was impossible for Petitioner to knowingly and willfully execute a fraud of that certification.

Where there could not lawfully had been a defrauding of Medicare by false representation of medical necessity as a matter of law, 18 U.S.C. § 1347, Health Care Fraud did not reach Petitioner's actions and it nor he could not be lawfully charged under that federal law. See *Bond v. United States, 572 U.S. 844 (2014)* (follows up on the Supreme Court's 2014 case of the same name in which it had reversed the Third Circuit and concluded that both individuals and states can bring a Tenth Amendment challenge to federal law. The case was remanded to the Third Circuit, for a decision on the merits, which again ruled against Bond. On appeal, the Supreme Court reversed and remanded again, ruling that the Chemical Warfare Act (CWA) did not reach Bond's actions and she could not be charged under that federal law).

For each trip in this case Petitioner obtained a written order from the beneficiary's attending physician certifying that the medical necessity requirements of paragraph (d)(1) of § 410.40(d)(2) are met. An ambulance transport service company incurring legal liability for putatively misrepresenting a patient health

fact that was predetermined and certified by the patient's attending physician cannot be by that lawful deference to that physician ascribed as a fraud for it. Despite the Third Circuit's split on the final statutory interpretation of § 410.40(d)(2) (2012), the just and best tradition of the Supreme Court can ascertain that CMN-sufficiency arrives by the lenity-first approach. This case is monumental in its advancing what may be one of the last bastions of citizens' constitutional safeguards from overcriminalization; the Rule of Lenity.

Petitioner avers that his and Life Support convictions, as the Supreme Court can conclude have as their premise the putative overt act of misrepresenting medical necessity as the element of Health Care Fraud, violate the Court's Rule of Lenity and Petitioner's Rights to Notice and to the Effective Assistance of Counsel and certiorari should grant in aid of the much needed curbing of American overcriminalization.

It has been a cardinal principle of the American jurisprudence for over a hundred years that "there are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute" *Fasulo v. U.S., 272 US 620 (1926).* To put it even more simply, "a criminal statute must clearly define the conduct it proscribes." *Grayned v. City of Rockford, 408 US 104 (1972).* When it doesn't, it offends the Constitution's Fifth Amendment Due Process Clause.

This Honorable Court has warned us, time and again, that the regard for the requirements of the due process clause "inescapably imposes upon this court an

exercise of judgment upon the whole course of the proceedings (resulting in a conviction) in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English speaking people even toward those charged with the most heinous offenses." *Malinski v. New York, 324 US 416 (1945).* The issue in this matter is not only "the Government's boundless interpretation of the statute" as this Court noted in *McDonnell v. U.S., 195 L. Ed. 2d 639 (2016).* The situation also reminds us of, in effect, creating a common law crime (not supported by federal regulations and inventing new federal crimes), see *U.S. v. Holzer, 816 F. 2d 304 (7th Cir. 1987).* The Petitioner's predicament is best described by the 1st Circuit telling us that "the conviction of a defendant for a conduct that a criminal statute, as properly interpreted, does not prohibit violates due process." *U.S. v. Fernandez, 722 F.3d 1 (1st Cir. 2013).* Even the 3rd Circuit's law teaches us that "to be sufficient, an indictment must allege that the defendant performed acts which, if proven, constitute a violation of the law that he is charged with violating" *U.S. v. Small, 793 F.3d 350 (3rd Cir. 2015).*

Since the Petitioner's conduct fully adhered to the Medicare billing regulations in effect at that time, the Indictment in this matter survived only due to the fact that it went unchallenged. The counsel was "asleep at the switch" and never mounted any pretrial challenges to the Indictment. Worse, due to the proven (admitted) lack of research, he advised the Petitioner to plead guilty to such a defective indictment. Both the district and the 3rd Circuit Court of Appeals completely disregarded this Honorable Court's instructions that "the penal laws must be strictly construed, and if there is any doubt concerning the application of a

criminal statute, it must be resolved in favor of the defendant." *Williamson v. U.S., 207 US 425 (1908).*

The District Court and Court of Appeals decisions below all paid an undue deference to the Magistrate's Report and Recommendation which observably based its conclusions upon a comparative review of the conflicting case laws concerning CMN-sufficiency, effectively discounting the Supreme Court's standard of review as required under *Strickland v. Washington, 466 US 668 (1984).* Consequently, the apparent fact that Petitioner would have exercised his Right to Trial but for counsel's admitted omissions has unduly excluded in exchange for the Third Circuit conflict on CMN-sufficiency. A conflict which, of course, would not have concerned Petitioner upon the backdrop of counsel's succeeding to research and communicate to him the operative versions of 42 C.F.R. § 410.40(d)(2), 42 C.F.R. § 410.40(d)(3)(v), 77 FR 44722, 44800 (2012), January 1, 2013 amendment to 42 C.F.R. § 410.40(d)(2).

We also know as to how to interpret conflicting regulations or laws. "The court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language" *U.S. v. Bass, 404 US 336 (1971).* These are long-standing cannons of the American jurisprudence which cannot be just forgotten and forsaken overnight. They equally apply to the Petitioner like to any other criminal defendant. Given the confusing Medicare billing regulations at the time of the Petitioner's conduct, and the subsequent amendments and clarifying regulations, the Petitioner's counsel should have also argued that the Government's

reading is overbroad, and if the statutes are read that way, particularly criminal statutes, "hardly a building in the land would fall outside the federal statute's domain" *U.S. v. Bond, 189 L Ed 2d 1, 2014.* The counsel should have also noted that the "Supreme Court has also recognized that incautious reading of the statue could dramatically expand the reach of federal criminal law, and we refused to apply the proscription exorbitantly" Ginsburg, J., dissenting in *Pasquantino v. U.S., 544 US 349 (2005).* Such wise warnings are particularly suitable when adjudicating complex "white collar" matters and terms undefined by the statutes. We are reminded that as "the word "defraud" (is) not being defined in the statute itself, nor in any other statute....an interpretation will not be given to a statute which would lead to injustice, oppression, or absurd consequences" *U.S. v. Keitel, 53 L Ed 230 (1908).* But this is precisely what happened in the Petitioner's case. Moreover, "because mail fraud is a specific intent crime, the government must prove beyond a reasonable doubt that the defendant was guilty of a conscious knowing intent to defraud and that the defendant contemplated or intended some harm to the property rights of the victim..." *U.S. v. Parse, 789 F. 3d 83 (2nd Cir. 2015)* (same as healthcare fraud, comment added). As the Petitioner's conduct fully adhered to the Medicare regulations (in effect at the time of the conduct), it is unclear as to how he was able to form "conscious knowing intent to defraud" anyone? The issue is especially acute in light of the fact that this Honorable Court in *McNally v. U.S., 483 U.S. 350 (1987)* reminded us that "the words "to defraud" commonly refer to wronging one in his property rights by dishonest methods or schemes, and usually signify the deprivation of something of value by trick, deceit, chicane or

overreaching", same again in *Carpenter v. U.S., 484 U.S. 19 (1987)*, and see the same in J. Story: "Equity Jurisprudence", p. 189-190 (1870). Given his adherence to the regulations, how was the Petitioner able to deprive Medicare of something of value by trick, deceit, etc, remains unknown. However, what is well known is that the issue was never raised by the Petitioner's counsel. Equally, the Petitioner's counsel never raised the issue of good faith defense, never defended the Indictment's additional "side effect" charges such as kickback issues, limiting principles and the most important of all - the rule of lenity, all fully applicable in the Petitioner's matter. It is well established that good faith conduct (such as relying on CMNs when transporting dialysis patients) is a complete defense to charges of healthcare fraud, *U.S. v. Curry, 681 F.2d 406 (5th Cir. 1982)*, same *U.S. v. Hopkins, 357 F.2d 14 (6th Cir. 1966)*;

As for the Indictment's "side effect" charges and others allegations that was never proved to be true or agreed by Petitioner prominently mentioned by the 3rd Circuit judgment, which are completely dependent on the main healthcare fraud charges, we first note that "not all conduct that strikes a court as sharp dealing or unethical conduct is a scheme or artifice to defraud. The healthcare fraud statutes do not cover all behavior which strays from ideal". *U.S. v. Colton, 231 F. 3d 890 (4th Cir. 2000)*. Equally, not all deceits are criminal fraud, *U.S. v. Bloom, 149 F. 3d 649 (7th Cir. 1998)*, even if there was any "side effect" deceit in this matter. "A misrepresentation cannot be deemed material merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment. Nor is it sufficient for a finding of

materiality that the Government would have the option to decline to pay if it knew of the defendant's noncompliance. Materiality, in addition, cannot be found where noncompliance is minor or insubstantial." *see. Universal Health Services, Inc. v. United States ex rel. Escobar, 195 L. Ed. 2d 348 (2016).* Moreover, when necessary - "given the amorphous and open-ended nature of Section 1364, in order to avoid both absurd results and constitutional issues, courts have felt the need to find limiting principles" *U.S. v. Sorich, 523 F.3d 702 (7th Cir. 2008)*, a point never mentioned or advocated by the Petitioner's prior counsel. Last but not the least, both the district and Court of Appeals' decisions completely overlook the fact that "the doctrine of constitutional doubt enters only where a statute is susceptible of two constructions. The rule of lenity applies only in cases of genuine ambiguity." *Voisine v. U.S., 195 L. Ed. 736 (2016).* Once again, needless to say, when federal regulations are so conflicting and confusing, prompting the need for them to be amended and clarified, the ambiguity clearly exists. Just on that basis alone, this Court should overturn the 3rd Circuit's decision and send the matter back to the district court. Clearly, this Honorable Court intervention is necessary to prevent both the grave and manifest injustice to the Petitioner and the violation of the Fifth Amendment's Due Process Clause.

B. United States Between Democracy and Dictatorship: Public Policy Issue of Exceptional Constitutional Importance

As per Supreme Court's Rule 10(c), this Honorable Court will be also more favorably disposed to grant certiorari to review the decision of a U.S. Court of

Appeals if the decision raises a federal issue of such compelling importance and public interest that the law would be best served if the Supreme Court resolved or settled the matter. It is indeed difficult to find more compelling public interest issue than someone pleading to a non-crime, or to a conduct which is, from the legal standpoint and due to the confusing regulations, problematic whether it is criminal or not. While America stands on the crossroad between democracy and dictatorship, it is the Petitioner's high expectation that, by granting the Certiorari and overturning the 3rd Circuit judgment, this Honorable Court will chose to protect those constitutional guarantees which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental" *Snyder v. Massachusetts, 291 U.S. 97 (1934)*, or are "implicit in the concept of ordered liberty". *Palko v. Connecticut, 302 U.S. 319 (1937).*

CONCLUSION

By virtue of the foregoing, the Petitioner prays for the issuance of Certiorari in this matter and for the Judgment of the United States Court for the Third Circuit in this matter to be vacated and overturned.

Respectfully submitted,

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