22-7773

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

BELKIS SOCA-FERNANDEZ,

And

DAVID SOSA-BALADRON — PETITIONERS

vs.

UNITED STATES OF AMERICA — RESPONDENT

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

I. Will jurists of reason find debatable the application of a double standard of law, by the Government's arguing of two opposite interpretations of the conspiracy statute in the present and related cases, and before the same court?

II. Should the United States Constitution protect Petitioners from violation of their substantial rights by the Government's proof at trial impermissibly amending the charging terms of an overly-broad indictment, which does not clearly set out a singular conspiracy in the first place?

III. Have the Law of the Case Doctrine, a matter of judicial administration, become an insurmountable catch-22 precluding petitioners' claims from review in detriment of the principle of Separation of Powers and Check-and-Balance of the United States Constitution?

IV. Did health care fraud and mail fraud become the same offense in the present case?

V. Did the Government properly establish its jurisdiction under the Interstate Commerce Clause of the United States Constitution as then Michigan's No-Fault Act could not have been sustained under the commerce power because it instituted an individual mandate which required each "applicable individual" to have purchased Personal Protection Insurance (PIP) by maintaining "minimum essential coverage"?

VI. Is a hearing warranted where petitioners have met the relatively light burden and supported their allegations with more than their own words and rather pointed at factual evidence or clear indicia on record supporting their claims?

VII. Did the Government unduly apply enhancements and impermissibly use sentencing liability to correct an offense not clearly set out in the indictment, which outlines multiple criminal agreements as a single conspiracy, and have the charge elected within such a duplicitous conspiracy count, exceeding the authority vested by Congress on the Sentencing Commission?

VIII. Did the Sixth Circuit improperly deny Petitioners' COA applications?

LIST OF PARTIES

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

RELATED CASES

- *United States v. Herrera-Enriquez et al*, No. 1:16-CR-62 (W.D. Mich. 2016)
- United States v. Gonzalez-Duran, No. 1:17-CR-1, 2017 U.S. Dist. LEXIS 15073 (W.D. Mich. 2017)
- United States v. Pardo-Oiz, No. 1:17-CR-02, 2017 U.S. Dist. LEXIS 18384 (W.D. Mich. 2017)
- *United States v. Ramirez Rodriguez et al*, No. 1:17-CR-259 (W.D. Mich. 2017)
- United States v. Martinez-Lopez, 747 F. App'x 326 (6th Cir. 2018)
- United States v. Martinez-Lopez, No. 1:16-CR-62 (W.D. Mich., Dec. 3, 2019) § 2255 motion denied.
- United States v. Sosa-Baladron, 800 F. App'x 313 (6th Cir.), cert. denied, 141 S. Ct. 315 (2020). Direct appeal.
- *Soca-Fernandez/Sosa-Baladron v. United States*, No. 1:16-CR-62 (W.D. Mich. 2022). § 2255 motions and COA application denied. Judgment entered Sept. 16, 2022.
- *Soca-Fernandez/Sosa-Baladron v. United States*, No. 22-1882, 22-1883 (6th Cir. 2023). COA petition denied. Judgment entered Apr. 27, 2023.

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TABLE OF AUTHORITIES CITED

STATUTES AND RULES

IN THE

SUPREME COURT OF THE UNITED

STATES PETITION FOR WRIT OF

CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals denying the COA application issued on 04/27/2023 and appears at Appendix A.

The opinion of the United States District Court denying the COA application issued on 09/16/2022 and appears at Appendix B.

JURISDICTION

The date on which the United States Court of Appeals for the Sixth Circuit decided our case was April 27, 2023. This petition is timely. Petitioners are filing a single petition pursuant to Rule 12(4) of the Supreme Court Rules. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. ARTICLE III, SECTION 2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;— between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

U.S. CONST. AMEND. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. AMEND. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 2: Principals.

18 U.S.C. § 4: Misprision of felony.

18 U.S.C. § 24(b): Definition relating to Federal health care benefit program.

18 U.S.C. § 1341: Frauds and swindles (Mail fraud).

18 U.S.C. § 1347: Health care fraud.

18 U.S.C. § 1349: Attempt and conspiracy to commit Mail Fraud and other fraud offenses.

28 U.S.C. § 1254: Court of Appeals; certiorari; certified questions.

28 U.S.C. § 2253: Bars plenary appellate review in a habeas corpus proceeding unless a court issues a certificate of appealability (COA).

28 U.S.C. § 2255: The primary avenue for collateral review of federal criminal judgments.

U.S.S.G. § 2B1.1: The Sentencing Guidelines.

The Sentencing Reform Act of 1984: Congress created an independent agency in the judicial branch of the federal government to ensure federal sentencing policy reflects certainty, fairness, and advancement in knowledge of human behavior.

The Telemarketing Fraud Prevention Act of 1998: Created by Congress to especially address the conduct of fraudulent telemarketers increasingly conducting their operations from Canada and other locations outside the United States, often relocating their schemes to other jurisdictions once they know or suspect that enforcement authorities have discovered the scheme, although the conduct also may occur in connection with fraudulent schemes perpetrated by other means in which deliberate steps are taken to make the offense, or its extent, difficult to detect. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts ordinarily indicates sophisticated concealment.

Michigan Compiled Laws § 500.3101: Security for payment of benefits required; period security required to be in effect; definitions; policy of insurance or other method of providing security; filing proof of security; exclusion.

Michigan Compiled Laws § 500.3104: Catastrophic claims association; board of directors; plan of operation; annual report; actuarial examination; refund; hearing; annual consumer statement; liability of association; definitions.

STATEMENT OF THE CASE

According to the Presentence Investigation Report, the investigation began when automobile insurers reported they were receiving billings for physical therapy services from *Primary Rehab Center*, a Wyoming, Michigan, physical therapy business.

This investigation ultimately comprised a total of four (4) physical therapy businesses:

- Primary Rehab Center (Primary) owned and operated by Maria Ramirez-Rodriguez.
- H&H Rehab Center (H&H) owned and operated by Yoisler Herrera-Enriquez (Herrera).
- Revive Therapy Center (Revive) owned and operated by Antonio Ramon Martinez-Lopez (Martinez).
- Renue Therapy Center (Renue) owned and operated by Gustavo Ramiro Acuna-Rosa (Acuna).

All four physical therapy clinics used a similar scheme to defraud automobile insurance companies:

- Physical therapy clinics were opened, staff was hired, including massage therapists. Under Michigan auto insurance law, massage therapists could provide covered physical therapy services.
- Putative patients were recruited and paid to be involved in staged car accidents.
- "Drivers" and "passengers" would fake car accidents and would be instructed by their recruiter to call the police to get an official accident report.
- Drivers and passengers were coached by their recruiter on how to inform the insurance company of the accident, and were referred by their recruiter to a physician who would evaluate them and write a prescription for physical therapy.

- Prescription in hand, drivers and passengers would go back to the clinic, sign blank therapy forms attesting falsely that they were receiving physical therapy at the clinic.
- The clinic staff would prepare and mail bills to the car insurance companies based on the information from the treatment forms. The massage therapist would have to sign the bills confirming treatment.

Belkis Soca Fernandez and David Sosa Baladron (hereinafter "Petitioners") were charged in the United States District Court for the Western District of Michigan in 2016 with dozens of criminal fraud counts related to their involvement in this scheme, and convicted after jury trial in March 2017 of Conspiracy to commit Mail Fraud, eleven substantive counts of Health Care Fraud, and six substantive counts of Mail Fraud.

Petitioners lived in Tampa, Florida but allegedly set up two sham physical therapy clinics in Michigan to perpetrate the fraud. Petitioners allegedly installed managers to run the two clinics, and then operated them from afar, traveling back to Michigan only periodically.

The original Indictment charged several Michigan-based co-defendants who were involved in the daily operations of three (3) of the clinics, H&H, Revive and Renue. The fourth clinic, Primary in Grand Rapids, Michigan was not included in the conspiracy charge, or mentioned in this indictment, and instead was prosecuted separately. As deals with the co-defendants were made and co-defendants cooperated, Petitioners were indicted.

Most of the evidence presented at trial had admissibility issues according to the Federal Rules of Evidence. Objected by counsel or not, the district court admitted everything.

At trial, it was proven that Petitioners were involved with two clinics that were arranging for patients to fake car accidents, Revive in Wyoming, Michigan and Renue in Lansing,

Michigan. Trial also proved that Petitioners had no involvement in or *knowledge* of a third clinic, H&H also in Wyoming, Michigan.

Regardless, a charge of conspiracy was made against Petitioners including the operations of *all three* clinics, not just the two with which they were involved. The Government legal analysis excluding the Primary clinic from the indictment is exactly the same that would have excluded H&H from the conspiracy charge in relation to Petitioners. But the Government argued the opposite in defending the inclusion of H&H in the conspiracy charges in relation to Petitioners, a double standard of law.

This is a case where one conspiracy was charged, yet two conspiracies proven. One conspiracy involving two clinics and Petitioners. The other conspiracy involved the H&H clinic but *not* Petitioners. Petitioners had no knowledge of the H&H clinic, and did not participate in it. At sentencing, the Government admitted that the H&H clinic operated independently of Petitioners and competed with the other clinics. This is a case where such a deprivation of significance of the essential elements of the conspiracy offense is an improper construction of a federal criminal statute and a violation of Petitioners' substantial rights.

The issue about multiple conspiracies was preserved by pre-trial motion and a request for a multiple conspiracy jury instruction, both of which were denied.

Moreover, the Government did not properly establish its jurisdiction under the Commerce Clause to support the Health Care Fraud charge. And stipulations before trial caused the jury to be presented with the same offense and elements of crime in the guise of two separate and distinct substantive offenses, Mail Fraud and Health Care Fraud.

Petitioners were sentenced to 120 and 135 months of imprisonment on August 21, 2017. Based on the harsh sentences and unwarranted application of sentencing enhancements, Petitioners were exceedingly punished simply for challenging the Government's theory of the case and exercising their constitutional rights of defending themselves from their accusations.

Timely appeals to the United States Court of Appeals for the Sixth Circuit followed. The Sixth Circuit affirmed convictions for both Petitioners on all issues and issued a consolidated-unpublished opinion. This Court denied the ensuing Petition for a Writ of Certiorari.

Facing hardship and unprecedented times, and continuous denials from the judicial system, Petitioners had no choice other than taking matters into their own hands and tried and elaborated their legal challenges and filed separate ***§ 2255*** motions in the District Court for the Western District of Michigan. Despite making substantial showing of denial of a constitutional right and, among other claims, that the unpublished appellate opinion was contrary to previous landmark decisions made by this Court, the district court held that the ***§ 2255*** motions were untimely for one day and that Petitioners' claims lack merit and denied both the motions and a COA. Petitioners timely appealed to the Court of Appeals for the Sixth Circuit which affirmed that, "assuming ***§ 2255*** motions were timely, [Petitioners] fail to meet a COA standard".

Petitioners themselves now take matters before this Court.

ARGUMENT FOR ALLOWANCE OF THE WRIT

I. DOUBLE STANDARD OF LAW

Just as H&H, the Primary clinic engaged in a conspiracy to defraud automobile insurers through the commission of mail fraud by submitting false billings and employed the same means and scheme.

In reality, the Primary's scheme differs from H&H's scheme only in the use of the doctor to evaluate patients and write prescriptions for physical therapy, the use of the law firm for collections and the use of accountants for filing tax documentation; and this, along with the scope of the investigation of confidential informants who turned out never saw Petitioners or heard their names, is what the Government contends to excuse the inclusion of the H&H clinic in the conspiracy charge against Petitioners.

But physicians and accountants were not considered conspirators in this case nor could their testimony be used to establish a criminal agreement between two persons. "Those having no knowledge of the conspiracy are not conspirators," even if one such person furthers the conspiracy's object. ***United States v. Falcone***, 311 US 205 (1940). "Moreover,[it is well settled that] proof of an agreement between a defendant and a government agent or informer will not support a conspiracy conviction." ***United States v. Pennell***, 737 F.2d 521, 536 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985). Undercover confidential informants "cannot be considered parties to the illegal agreement since government agents and informers cannot be conspirators." ***United States v. Rodriguez***, 765 F.2d 1546, 1552 (11th Cir. 1985).

Most importantly, *a conspiracy is not a scheme. The thrust of conspiracy is in the agreement for joint action and not in the method of accomplishing it. While a scheme could be devised by a single person, a conspiracy requires an agreement among several people.*

In some cases the interdependent nature of the criminal enterprise is such that each conspirator had to have realized that it extended beyond his individual role, and the Government need not demonstrate an actual agreement among the various conspirators, or even actual knowledge of each other, in order to establish a single conspiracy.
See ***Blumenthal v. United States***, 332 U.S. 539 (1947).

But the facts in this case do not support a single conspiracy of which several agreements are essential and integral steps or links. Nor the structure of the conspiracy describes a single source or vertical integration. Nor the charged conspiracy was characterized by different activities carried on with regard to the same subject such that each conspirator, in a chain-like manner, performs a separate function which serves as a step or phase in the accomplishment of the overall contrivance. Here, the end product in each clinic was the object of the conspiracy, defrauding insurance companies through the creation of false personal injury claims with a resultant use of the mails.

The scheme which is the object of the conspiracy does not depend on the successful operation of any of the other clinics. Each clinic was able to accomplish the object of the conspiracy and self-contained its own smaller conspiracy. Additionally, while two people may in fact conspire together through a specific clinic, there is no reason why one who has individually so acted must necessarily have inferred the existence and involvement of remote clinics in the conspiracy.

In the present case, the Government goes as far as to deprive knowledge and agreement, essential elements of the crime of conspiracy, of significance, leading to a multifarious interpretation of the conspiracy statute and a double standard of the law, during the same investigation and before the very same court.

II. WHY MULTIPLE CONSPIRACIES? VIOLATIONS AND PREJUDICE

In the present case, the Government claims that charging that Petitioners conspired through the H&H clinic without any showing of knowledge or agreement does not violate their substantial rights, that proofs at trial did not alter the terms of the indictment and rather narrowed the scope of the alleged scheme by proving only their involvement in the conspiracy encompassing the Revive and Renue clinics. See ***Stirone v. United States***, 361 U.S. 212 (1960).

The issue, in this instance, is that *permitting the narrowing through amendment of the charges returned by the grand jury is exactly the same as allowing them to be broadened by the Government's presentation at trial.*

A. The identity of the clinics, neither means nor surplusage.

Here, *proof at trial effectively removed the H&H clinic from the conspiracy charge in relation to Petitioners.* In justifying this, the Government is implying that references to the clinics in the indictment should be treated as merely means/methods or excess allegations. Thus, the question revolves around the identity of the clinics, whether they constitute excess allegations in the indictment that do not change the basic nature of the offense charged, and thus, need not be proven and should be treated as mere surplusage. See ***United States v. Miller***, 471 U.S. 130 (1985).

Thus, the Government suggests that the introduction/removal of evidence at trial in connection with any other clinic in the area which happens to use a similar scheme and/or have overlap in participation does not require proof of a common goal and criminal agreement, and does not violate Petitioners' substantial rights. But, could the Government have introduced evidence at trial in relation to the Primary clinic's conspiracy without impermissibly amending the indictment? Of course not, especially in this case where Petitioners' request for a jury instruction in multiple conspiracies was denied.

Thus, the identity of the clinics could not be considered surplusage and rather a factual allegation inextricably intertwined with the criminal agreement, an essential element of the conspiracy offense that the Government was required to prove. Removing the H&H clinic from the conspiracy charge in relation to Petitioners altered the charging terms of the indictment.

Here, the Government could have seen Petitioners' involvement in the Revive and Renue clinics as a consolidated agreement and single conspiracy but not the H&H clinic, in which they had no involvement in nor they had knowledge of.

The Sixth Circuit did not find any issue with the Government suggesting that similar schemes with overlap in participation can be charged as a single conspiracy without a showing of a common agreement so long as it charges too broad, versus too narrow.

This squarely contradicts this Court holding that:

> "the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes." *Braverman v. United States*, 317 U.S. 49, 53 (1942).

B. *Berger*, *Kotteakos* and *Miller*

Berger and *Kotteakos* are very old cases where this Court discussed the issue resulting from an indictment charging a single conspiracy while the evidence at trial proved multiple conspiracies.

In *Berger*,

> "the objection is not that the allegations of the indictment do not describe the conspiracy of which the petitioner was convicted, but, in effect, it is that the proof includes more." *Berger v. United States*, 295 U.S. 78, 81 (1935).

This Court recognized the limitations of its analysis in *Kotteakos*:

> "We need not inquire whether the Sixth Amendment's requirement, that 'in all criminal prosecutions the accused should enjoy the right... to be informed of the nature and cause of the accusation,' would be observed in a more generous application... than was made in *Berger*. Nor need we now express opinion whether reversal would be required in all cases where the indictment is so defective that it should be dismissed for such a fault." *Kotteakos v. United States*, 328 U.S. 750, 775 (1946).

Thus, neither *Berger* nor *Kotteakos* answered whether an indictment, charging a defendant broadly with a single conspiracy while the evidence proved multiple conspiracies and his involvement narrower and limited only to one or few of such several conspiracies, violated defendant's Fifth Amendment right to a grand jury by presenting unfounded and unwarranted charges as a result of the government's incomplete presentation to the grand jury, or its inadequate advice as to the law, or simply, the government's use of the grand jury as a prosecutorial tool causing the grand jury to abdicate its constitutional functions.

Similarly, *Berger* and *Kotteakos* were silent on whether the prosecution of defendants for multiple conspiracy offenses based on a single agreement violated their Fifth Amendment rights to be protected from Double Jeopardy. Moreover, neither of these cases addressed the right to be fairly informed of the nature and cause of the accusation, or the right not to

be tried on a duplicitous indictment, or the right to an unanimous verdict under Article III, section 2, clause 3, and Sixth Amendment of the United States Constitution.

The Government, in the present case, heavily relies on this Court's decision in ***Miller*** to argue its position:

> "As long as the crime and the elements of the offense that sustain a conviction are fully and clearly set out in the indictment, the right to a grand jury is not normally violated by the fact that the indictment alleges more crimes or other means of committing the same crime." *United States v. Miller*, 471 U.S. at 136 (1985).

But ***Miller*** is a mail fraud and not a conspiracy case, and does not help the Government here. Only by diluting the essential elements of knowledge and agreement in the conspiracy offense, and equaling a conspiracy to a scheme, could the Government rely on ***Miller*** to view the narrowing of the conspiracy that occurred in this case through the lens of different means of committing the same offense or multiple objectives rather than multiple agreements and, thus, assert that, within the narrower scheme, it still proved the essential elements of a criminal conspiracy offense and a criminal agreement with at least one other person to commit mail fraud. This is contrary to law and the United States Constitution.

C. Violation of Petitioners' rights to a grand jury, to be protected from unwarranted and unfounded charges of involvement in serious crime, to be properly informed of the nature and cause of the accusation, to be free from double jeopardy resulting from multiple prosecutions for conspiracy on the basis of a single agreement to commit mail fraud, to have the charge elected within such a duplicitous conspiracy count, to be entitled to a verdict based on jury unanimity and, finally, to a due process and a fair trial, in violation of the Fifth and Sixth Amendments of the Constitution.

The constitutional role of the grand jury is to protect accused individuals by serving as a check on prosecutorial power, not as a substitute for prosecutors. See *United States v. Mechanik*, 475 U.S. 66 (1986).

In this case, the government submitted a prepared and defective indictment for the grand jury's consideration, alleging that defendants conspired to commit mail fraud through the H&H clinic *in the absence of any evidence of such whatsoever*. But the submission of erroneous indictment forms to the grand jury does not explain why the grand jury would actually approve an erroneous document. One obvious possibility is that the grand jury did not actually read the indictment, suggesting that it was not acting independently of the prosecution. Alternatively, it may have read the indictment but not noticed the errors, suggesting that it was not adequately informed of the evidence and/or the law.

Here, the conspiracy offense involving the Revive and Renue clinics for which Petitioners were ultimately convicted is not clearly set out in the indictment that outlines multiple criminal agreements as a singular one in an impermissibly duplicitous manner. The trial evidence altered the charging terms in the indictment by narrowing the possible basis for conviction in such a manner that no longer corresponds to such not-clearly set out singular conspiracy. "The conviction of a defendant of an offense different from that which is included in the indictment violates the Fifth Amendment's grand jury guarantee." ***United States v. Miller***, 471 U.S. 130 (1985).

That is, evidence at trial dropped H&H from the conspiracy charge against Petitioners, a factual allegation inextricably intertwined with the criminal agreement, an essential element of the conspiracy offense that the Government was required to prove. See ***Russell v. United States***, 369 U.S. 749, 770 (1962).

Before trial, counsel filed a Motion to Dismiss Counts, therefore, the Government was formally on notice and compelled by law to remedy the issues in relation to the defective

conspiracy charge. Instead, the Government responded to the motion in opposition and the district court refrained from invoking its supervisory power to dismiss counts and/or quash the indictment, and denied the motion after hearing.

Consequently, the Government's proof at trial altered the indictment and Petitioners' requests that pattern instructions on multiple conspiracies be given to the jury, in an attempt for mitigating the prejudice caused by what already was a fatal modification of the essential elements of the conspiracy offense, were denied.

This amounted to a violation of Petitioners substantial rights to have the charge elected within such a count and be entitled to an unanimous verdict under Article III, section 2, clause 3 and Sixth Amendment of the Constitution. "Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply." ***Johnson v. Louisiana***, 406 U.S. 356, 383 (1972).

Not less important is the fact that although the district court did not explicitly give a ***Pinkerton*** instruction, "[the] ***Pinkerton*** rule is necessarily premised on the existence of a conspiracy", ***United States v. Henning***, 286 F.3d 914, 920 (6th Cir. 2002) and the jury was not limited in considering the substantive counts to Petitioners' own acts but it also was indirectly charged with the substantive charges of their confederates, including those offenses in connection to the H&H conspiracy, further exposing them to be convicted of an offense other than the ones charged in the indictment, and casting doubt on the reliability of the jury findings with respect to the actual elements of the charged offenses or, otherwise, impugning the integrity of the ultimate verdict of guilty as a result of a violation of the Sixth Amendment guarantee of jury unanimity. Certainly, Petitioners would have

been convicted of substantive offenses in connection with H&H if the Government had charged so.

Finally, the Government effectively prosecuted Petitioners for conspiracy twice on basis of a single agreement to commit Mail Fraud, running afoul of Fifth Amendment's prohibition against Double Jeopardy.

D. The Sixth Circuit improperly considered this claim barred.

The Sixth Circuit considered this claim procedurally barred because it had been raised or could have been raised on direct appeal, Petitioners do not show cause and prejudice, and jurists of reason would not debate the district court's resolution of this claim.

But, in their ***§ 2255*** motions petitioners are now presenting new facts contrasting the conspiracy encompassing the Primary clinic with the one encompassing the H&H clinic on grounds of a multifarious interpretation of the conspiracy statute and a double-standard application of the law. This is not an argument, this is a fact. The district court enabled the Government to argue and prevail now in its one and wrong interpretation of the conspiracy statute involving the H&H clinic and then in its other and quite opposite interpretation of the same conspiracy statute involving the Primary clinic.

Moreover, the Sixth Circuit opinion was unpublished and addressed an issue that was not necessary to the court's disposition and had not been briefed. New legal claims and factual issues now have given the prior decision a significance that the appellate court could not have predicted at the time. Petitioners are now offering a thorough argument on why this unpublished opinion was contrary to citations of law and to landmark precedents established by this Court. All while raising constitutional claims and factual issues that

were not litigated on appeal in a full and fair manner, thus, the issues decided adversely to Petitioners on direct appeal should be revisited.

"[T]he law of the case doctrine 'is not a matter of rigid legal rule, but more a matter of proper judicial administration'. [Courts] have thus recognized exceptions to the doctrine where new evidence becomes available, the controlling law changes, or the prior decision was clearly wrong." ***United States v. Bennerman***, 785 F. App'x. 958, 962-63 (4th Cir. 2019) (per curiam). See also ***Davis v. United States***, 417 U.S. 333, 342 (1974); ***Underwood v. United States***, 15 F.3d 16, 18 (2nd Cir. 1993) and ***English v. United States***, 998 F.2d 609, 612-13 (8th Cir. 1993), cert. denied, 510 U.S. 1001 (1994).

Finally, Petitioners are now challenging the indictment on grounds of being charging a not-clearly set out singular conspiracy in light of this Court's decision in ***United States v. Miller***, 471 U.S. 130 (1985), leading to a plethora of constitutional violations. See ***United States v. Harper***, 901 F.2d 471, 472-73 (5th Cir. 1990) (notwithstanding guilty plea and notwithstanding that issue was raised for first time in post-conviction proceeding, indictment's failure to charge offense was properly raised in section 2255 motion because alleged error is one that divests sentencing court of jurisdiction). See also ***Haynes v. United States***, 390 U.S. 85 (1968) .

Petitioners have made substantial showing that "jurists of reason could disagree with the district court's resolution of [their] constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." ***Miller-El v. Cockrell***, 537 U.S. 322, 327 (2003).

III. OVERLY-BROAD INDICTMENT

The objection to an overly broad indictment is the same as that to an overly broad statute. And an overly-broad prosecution cannot be saved by a limiting construction.

It is well settled that a person could be criminally liable for a fraud conspiracy and not commit the substantive fraud offense. See ***Pereira v. United States***, 347 U.S. 1 (1953). This, however, is no longer so with the Government interpretation of the conspiracy statute on the basis that a criminal agreement, an essential element of the conspiracy offense, and a fraud scheme, are the same.

The Government's reading of the conspiracy statute is overly broad as it would criminalize a broader swath of conduct than Congress intended when it enacted the fraud conspiracy statute, ***18 U.S.C. § 1349***, that is, in this case, that doctors, accountants and collection litigators would have been criminally liable for conspiracy simply for participating in a criminal scheme where they did not have knowledge of or agree to participate in.

Looking at the Government's proofs at trial and its theory of the case as to Petitioners' participation in the conspiracy, even with the greatest of the favoritism, since, whatever substantive crimes of aiding, abetting, and counseling, or whatever more specific conspiracies may have been committed, *the crime of conspiracy, as charged in the indictment, was not.*

Here, Petitioners are tried under one theory of an overarching conspiracy/agreement comprising H&H, Revive and Renue, and their convictions can be upheld only under an entirely different theory.

IV. HEALTH CARE AND MAIL FRAUD - SAME OFFENSE. THE COMMERCE CLAUSE. THE INDICTMENT AMENDED ONCE AGAIN. SUFFICIENCY OF THE EVIDENCE

Before trial, it was stipulated that automobile insurers were healthcare benefit programs within the meaning of the health care fraud statute. Therefore, the jury was never instructed regarding the jurisdictional element of the health care fraud statute, the "affecting commerce" element. Nor was the jury instructed to find that state no-fault automobile insurance, specifically personal protection insurance benefits (PIP), constituted federal health care benefit programs within the meaning of health care fraud statute *18 U.S.C. §§ 1347* and *24(b)*.

A. The *Blockburger* test

The district court's attempted analysis on this issue was inadequate and incomplete. And the Sixth Circuit refused to reach the merits.

On their face, it is correct that the statutes each require proof of an additional fact the other does not. Health care fraud does not require the use of mails; an individual could commit health care fraud and not use the mails. Mail fraud, on the other hand, requires the use of mails but does not require the victim to be a health care benefit program as defined in a different statute, *18 U.S.C. § 24(b)*.

But, in "examining whether the elements overlap the *Blockburger* analysis does require us to 'go further and look to the legal theory of the case or the elements of the specific criminal cause of action for which the defendant was convicted without examining the facts in detail.'" *United States v. Swafford*, 512 F.3d 833, 844 (6th Cir. 2008) (quoting *Pandelli v. United States*, 635 F.2d 533, 538 (6th Cir.1980)).

Thus, under *Blockburger* we must look at the proof required for each necessary element of each offense in the case and not just the abstract approach used by the district court. See *Whalen v. United States*, 445 U.S. 684 (1980) and *Illinois v. Vitale*, 447 U.S. 410 (1980).

The jury could have found defendants guilty of health care fraud if:

- defendants willfully participated in a scheme to defraud, defined in Count 1 of Conspiracy, by knowingly submitting false and fraudulent claims, through the use of mails as defined in such scheme, with the intent to profit from health care benefit programs (state no-fault automobile insurers),

and guilty of mail fraud if:

- defendant willfully participated in a scheme to defraud, defined in Count 1 of Conspiracy, by knowingly submitting false and fraudulent claims with the intent to profit from state no-fault automobile insurers,
- defendant used the mail or caused another to use the mail in furtherance of the scheme.

As shown in the analysis above, the jury could have convicted the defendants of health care fraud only and only if jurors found that the scheme to defraud was executed (as defined in Count 1 of Conspiracy, by knowingly submitting false and fraudulent claims, *through the use of mails* as defined in such scheme, with the intent to profit from health care benefit programs) and, consequently, the execution of the scheme comprehended *the use of mails.* Since "the crime of health care fraud is complete upon the execution of the scheme", *United States v. Hickman*, 331 F.3d 439 (5th Cir. 2003), here, the scheme could not have been completed, not even attempted, without the use of mails.

Moreover, the "legal theory" of this case is the same under both statutes, namely, Petitioners submitted false and fraudulent claims to state no-fault automobile insurers. Thus, the use of mails was part of the health care fraud, carrying exactly the same elements of crime required to convict the defendants of mail fraud. A jury could have found a violation of ***§ 1341*** simply by finding that the defendant violated ***§ 1347***, and vice versa.

B. Violation of Petitioners' rights to a grand jury, to be free from double jeopardy, to be entitled to a verdict based on jury unanimity and, finally, to a due process and a fair trial, in violation of the Fifth and Sixth Amendments of the Constitution.

Although the jury instructions contemplated a liability theory of aiding and abetting under ***18 U.S.C. § 2***, the jury communicated its verdict through a general verdict form that does not indicate which of the theories the jury *unanimously* agreed upon. See ***Griffin v. United States***, 502 U.S. 46, 53 (1991).

Rendering ***§ 1341*** and ***§ 1347*** the same offense amounted to a violation of Petitioners substantial rights to an unanimous verdict under Article III, section 2, clause 3 and Sixth Amendment of the Constitution.

Since looking at the elements of the crime, jurors could not tell one offense apart from the other, the convictions under the two statutes violate the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution. See ***United States v. Ogba***, 526 F.3d 214, 237-238 (5th Cir. 2008).

Moreover, according to this Court, "dropping from an indictment those allegations that are unnecessary to an offense that is clearly contained within it does not constitute an unconstitutional amendment of the indictment." ***United States v. Miller***, 471 U.S. at 130.

Here, dropping the jurisdictional element of *18 U.S.C § 1347*, an essential element of the offense, and rendering the indictment multiplicitous, and its terms altered by stipulating and not submitting to the jury that state no-fault automobile insurance, specifically personal insurance protection insurance benefits (PIP), constituted health care benefit programs within the meaning of the health care fraud statute *18 U.S.C §§ 1347* and ***24 (b)***, was.

A defendant is entitled to have *all* the essential elements of a charged offense submitted to a jury and proven beyond a reasonable doubt. *United States v. Gaudin*, 515 U.S. 506 (1995). "The right [to jury trial] includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty' ". *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993). Taking the question of jurisdiction and health care benefit programs from the jury denied Petitioners a right guaranteed by the Fifth and Sixth Amendments to the United States Constitution, and carried forward prejudice far beyond the mere knowledge on the part of the jury that defendants faced multiple charges.

C. The Interstate Commerce Clause. Lack of jurisdiction.

In the present case, the district court summarily established its jurisdiction by relying on the sister circuits and holding that automobile insurers are "health care benefit programs" to the extent they pay for medical treatment. See ***United States v. Collins***, 774 F.3d 256 (5th Cir. 2014); *United States v. Gelin*, 712 F.3d 612 (1st Cir. 2013) and ***United States v. Lucien***, 347 F.3d 45 (2nd Cir. 2003).

But "paying for medical treatment" is not the proper legal basis to establish that automobile insurers are "*federal* health care benefit programs".

"The phrase 'affecting commerce' indicates Congress' intent to regulate to the outer limits of its authority under the Commerce Clause", *Circuit City Stores v. Adams*, 532 U.S. 105, 115 (2001). However, this Court noted that the statute at issue in Lopez had nothing to do with commerce or any sort of commercial enterprise and was "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *United States v. Lopez*, 514 U.S. 549, 559-63 (1995).

Michigan Catastrophic Claims Association (MCCA) was established when the Michigan legislature enacted *Mich. Comp. Laws § 500.3104*. Pursuant to *Mich. Comp. Law Ann. § 500.3101*, "[t]he owner or registrant of a motor vehicle required to be registered in this state shall maintain security or payment of benefits under personal protection insurance, property protection insurance, and residual protection insurance."

Thus, Michigan's PIP was part of a minimum essential coverage plan needed to satisfy the individual mandate of the No-Fault Act in an already very regulated activity, affecting a class of residents in the state of Michigan –those who own or register a vehicle– and, thus, exceeding Congress regulatory powers under the Commerce Clause, *U.S. Const. art. I, § 8, cl. 3*, because it compelled citizens to engage in commercial activity and regulated activity. See *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012).

Thus, the health care fraud statute, ***18 U.S.C. § 1347***, has no scope and no application in the present case.

D. Sufficiency of the evidence

The Fifth and Sixth Amendments to the United States Constitution require that guilt for a charge be found only when the prosecution has established proof beyond reasonable doubt of each and every element of the offense charged. See *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Elements of an offense can be proved by direct evidence, circumstantial evidence and reasonable inferences that flow from that evidence. *Galloway v. United States*, 319 U.S. 372, 396 (1943). But the prosecution is only entitled to inferences that are reasonable, and it is unreasonable to pile inference upon inference to infer intent and knowledge. *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943).

Here, there was no proof that one of the Petitioners had anything to do with mailing or submitting bills to the insurance companies. It is improper to infer Petitioners' intent as to each specific bill submitted in support of the substantive counts simply because they were around and helped set up the clinics.

Particularly, the substantive counts require proof that Petitioners consciously shared in a criminal act, not just that they entered an agreement broadly to participate in a fraud scheme. See *Pereira v. United States*, 347 U.S. 1, 11-12, (1954). Unlike substantive mail fraud counts, mail fraud conspiracies do not require proof of the actual use of the mails, just that the agreement formed reasonably anticipated use of the mails.

In this case, Mail Fraud required proof that Petitioners used the mail, or aided and abetted someone in using the mail, as to the specific mailing for the specific patient on the specific date charged in the substantive count. Similarly, Health Care Fraud required proof that Petitioners executed a scheme to defraud health insurance companies by submission of

mails to the insurance companies of the specific form for the specific patient on the specific date charged in each substantive count. There was no such proof.

The finding of sufficient evidence conflicts with Pereira which requires proof that Petitioners consciously shared in a criminal act, not just that they agreed to the scheme more broadly.

E. The Sixth Circuit improperly considered this claim barred.

The Sixth Circuit considered this a Double Jeopardy claim and procedurally barred because it "could have been raised on direct appeal and the § 2255 motions did not argue cause and prejudice... Jurists of reason would not debate that fact".

But here, the withdrawal from jury's consideration of an essential element of the crime that defendants were entitled to be determined by the jury beyond a reasonable doubt, the rendering of the indictment multiplicitous and the alteration of its charging terms, and the summary establishment of jurisdiction to enter conviction the district court did not have, run afoul not only of the Double Jeopardy Clause, but also of the right to a grand jury, the right to a petit jury, the right to an unanimous verdict, and the right to a due process and fair trial, in violation of Fifth and Sixth Amendments of the United States Constitution.

Moreover, a failure to raise this issue on direct appeal is not a conclusive reason to bar collateral review as this claim is also raising questions of statutory interpretation. "Whether a criminal statute applies to the proven conduct of the defendant is an issue of statutory interpretation" *United States v. Miller*, 734 F.3d 530, 539 (6th Cir. 2013). See

also *United States v. Prince*, 868 F.2d 1379, 1383-84 (5th Cir.), cert. denied, 493 U.S. 932 (1989).

Here, a stipulation prematurely and inappropriately granted the district court the jurisdiction that it otherwise lacked under the Interstate Commerce Clause of the United States Constitution. An "indictment or information failed to state an offense, or[] statute providing the basis for the charge is unconstitutional" *United States v. Sepe*, 486 F.2d 1044, 1045 (5th Cir. 1973). See also *Gomez v. United States*, 490 U.S. 858, 876 (1989).

Therefore, the Sixth Circuit improperly considered this claim barred despite Petitioners clearly showing that "jurists of reason could disagree with the district court's resolution of [their] constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. at 327 (2003).

V. EVIDENTIARY ISSUES - GOVERNMENT MISCONDUCT - INEFFECTIVE ASSISTANCE OF COUNSEL

Here, Petitioners are supporting their allegations with more than their own words and rather pointing at factual evidence or clear indicia on record supporting their claims, and have met the relatively light burden for establishing an entitlement to an evidentiary hearing. For example:

- Custodial interview: Petitioners have technically shown that a camera running out of memory and recording only the fragment that suited the Government's purposes simply is *not* credible. The custodial interview video *in its entire version* would have presented to the jury a theory also corroborated by the same evidence used by the Government to

support their accusations. In fact, this whole recording represented what Petitioners would have testified without exposing themselves to the Government. If the whole recording was available and the Government purported to show only what they deemed convenient, the defense would have had the opportunity to introduce and play the entire video or any portion not played by the Government under the Doctrine of Completeness and ***Fed. R. Evid. 106***. See ***United States v. Spearman***, 186 F.3d 743 (6th Cir. 1999).

- Recorded telephone calls - The allegedly staged automobile accident: Several recordings of phone calls between Petitioners and their automobile insurers were never disclosed by the Government, and none of them were sought by the defense. Specifically, one call would have shown the Government knew the testimony presented at trial through Pardo-Oiz and Gonzalez-Duran was incorrect and solely driven by their desire to avert incarceration, and by binding promises and offering of guaranteed leniency that would only make for the perfect recipe for perjury. The Government charged these two defendants separately by Information with *18 U.S.C. § 4*, thus, allowing them to plead guilty to a misdemeanor with the inherent guarantee of a 3-year maximum sentence, a 17-years liability reduction. The district court ultimately awarded them a 2-month incarceration for their "cooperation". This evidence was impeaching the Government's theory of the case and relevant to show lack of intent, an essential element of the crimes, that the Government was required to prove.

- Forgery of documents and signatures: An Initial Evaluation and Dr. Examination Form, both bearing the physician's signature, were submitted to the car insurance of a confidential informant working for the Government undercover in the case (CI-2) where he never attended a Doctor's office, nor did he go through any medical examination. The

Government must have known that signature and document forgery was a theme in the fraud scheme, and likely rampant. Petitioners were denied this defense theory.

- The Whiting law firm. Paralegal testimony: The Government allowed the paralegal testimony erroneously identifying one of the Petitioners to go uncorrected.

- Acuna's personal debt. Family feud. Text messages: The official record shows the Government knew about Acuna's personal debt. Petitioners are now showing messages which are conspicuously missing from text messages which did not meet the *Enright* requirements and should have never been admitted into evidence in the first place. These missing text messages prove the family feud and the real context in which these text messages were made, and that the Government deliberately misled the district court. See *Bourjaily v. United States*, 483 U.S. 171, 175 (1987).

- Photographs of the residence in Florida. Petitioners are showing the Government knew but pretended to not know that Petitioners had a legitimate source of income which paid for the mortgage of this residence that was not connected to the fraud whatsoever. The Government argued differently in the official record and caused this evidence to be admitted where it was not permitted. See *Sizemore v. Fletcher*, 921 F.2d 667 (6th Cir. 1990).

- Financial records. Summary charts: Summary charts ripe with hearsay which failed to satisfy *Fed. R. Evid. 801* were improperly admitted under *Fed. R. Evid. 1006* in place of underlying financial documents that would have shown legitimate source of income and financial debt not correlating with profiting from the conspiracy.

- Law enforcement testimony: This testimony amounted to simply dressing up arguments as evidence, the Government's attempt to spoon-feed the prosecutor's theory of the case using a lay witness's opinion with the imprimatur of a law enforcement officer whose testimony's value was to tell the jury what result to reach. Though, admitted in violation of ***Fed. R. Evid. 403*** and ***701***. See ***United States v. Williams***, 827 F.3d 1134 (D.C. Cir. 2016) and ***United States v. Lopez-Medina***, 461 F.3d 724, 742-45 (6th Cir. 2006).

- Martinez's proffer: Knowing that Martinez confessed to having knowledge of the fraud previous to the conspiracy, that Martinez had previously participated in a staged automobile accident and a similar scheme of fraud in Tampa, Florida, before ever traveling to Michigan, the Government deliberately did not include this fact in Antonio's proffer which was used to impermissible inflate Petitioners' sentences.

The Sixth Circuit considered all evidentiary claims procedurally barred because they had been raised or could have been raised on direct appeal and Petitioners provided no justification for failing to do so.

According to this Court, the Government disclosure of material exculpatory and impeachment evidence is part of the constitutional guarantee to a fair trial. ***Brady v. Maryland***, 373 U.S. 83, 87 (1963); ***Giglio v. United States***, 405 U.S. 150, 154 (1972). Exculpatory and impeachment evidence is material to a finding of guilt – and thus the Constitution requires disclosure – when there is a reasonable probability that effective use of the evidence will result in an acquittal. ***United States v. Bagley***, 473 U.S. 667, 676 (1985). The failure of the prosecutor to correct the testimony of the witness which he

knew to be false denied petitioner due process of law. *Napue v. Illinois*, 360 U.S. 264 (1959).

Additionally, this Court has recognized that "the right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

If indeed there was a failure to raise these issues on direct appeal, it was because counsel failed to raise such claims or to fully argue them, or because some of the evidence was not available to Petitioners on direct appeal and only when they were released to home confinement under the CARES Act. For example, Petitioners' cell phone still had some messages that were missing from the text messages inappropriately deemed in furtherance of the conspiracy and used to establish that Petitioners exerted control over Acuna and were attempting to collect the fruits of the conspiracy.

A hearing is warranted. See *Martin v. United States*, 889 F.3d 827, 832-33, 835-36 (6th Cir. 2018) and *United States v. White*, 366 F.3d 291, 301-02 (4th Cir. 2004).

VI. SENTENCING. PUNISHMENT FOR CHALLENGING THE GOVERNMENT'S THEORY OF THE CASE AND EXERCISING THE CONSTITUTIONAL RIGHTS OF DEFENDING FROM ACCUSATIONS

Before trial, the Government, looking forward to making a deal that, according to counsel, would otherwise have represented a 3-year sentence approximately, approached Petitioners and still gave them an extension allowing for reconsideration when this deal was initially rejected. Rather, Petitioners ultimately chose to defend themselves at trial and afterwards found themselves facing a presentence investigation report wherein the Government recommended 14-17 years of imprisonment, an advisory guidelines range of 168-210 months.

Looking at this, and the harsh 120-month and 135-month sentences imposed by the district court, Petitioners cannot other than affirm they were exceedingly punished simply for challenging the Government's theory of the case and for exercising their constitutional rights of defending themselves from their accusations.

The Sixth Circuit considered Petitioners' claims barred simply because they were raised on appeal and, if they were not, because Petitioners failed to raise them on direct appeal, obviously a catch-22. The Sixth Circuit did not offer more, it summarily said so, it did not look at how inappropriate was the application of the sentencing enhancements as to represent a "*trial penalty*" in violation of a due process and Petitioners' rights to defend themselves from their accusations as protected by the United States Constitution.

Here, counsel was ineffective in failing to object to the miscalculation of Petitioners' base level under the United States Sentencing Guidelines. See ***Johnson v. United States***, 313 F.3d 815 (2nd Cir. 2002) and ***Jansen v. United States***, 369 F.3d 237 (3rd Cir. 2004); and for failing to argue against the application of these enhancements.

A. Loss calculation and restitution. Abuse of the Sentencing Guidelines

At sentencing, the district court found that indeed *there was no evidence that Petitioners received any money out of H&H and that the principals at H&H –the people you would expect to say [Petitioners] were involved if [Petitioners] were in fact involved– said they were not.* In effect, the district court recognized that H&H was *not* part of Petitioners' jointly undertaking activity and, therefore, when it comes to Petitioners, H&H was *not* part of a collective venture directed toward a common goal or a cohesive organization devoted itself with singleness of mind to one illegal purpose, and rather H&H was involved in a separate illegal agreement or, which is the same, a separate and distinct conspiracy.

Here, sentencing liability cannot be used to try and correct an offense not clearly set out in the indictment which outlines multiple criminal agreements as a single conspiracy, nor can it be used to have the charge elected within such a duplicitous conspiracy count. This is an impermissible use of the Sentencing Guidelines to save an overly-broad prosecution by a limiting construction. This inappropriate interpretation of the Sentencing Guidelines exceeds the authority vested by Congress on the Sentencing Commission.

Moreover, calculating the fraud loss based on "intended loss" rather than "actual loss" was another inappropriate interpretation of the Sentencing Guidelines in light of ***United States v. Banks***, Case No. 19-3812, 2022 US App LEXIS 33021 (3rd Cir. Nov 30, 2022). The Government also summarily used financial information, the total amount of deposits made in the clinics' business accounts, to calculate the loss amount instead of making determinations to distinguish between medically necessary and unnecessary medical treatments, leading to an improper calculation to determine the advisory sentencing range under the Sentencing Guidelines. See ***United States v. Fowler***, 819 F.3d 298 (6th Cir. 2016); ***United States v. Shannon***, 803 F.3d 778, 787-89 (6th Cir. 2015); and ***United States v. Mahmood***, 820 F.3d 177, 192-96 (5th Cir. 2016).

B. The Mastermind inference. Punishing for daring. Inflating sentences.

In applying this enhancement, the district court unreasonably piled inference upon inference.

These are the facts:

- That Petitioners trained others or prepared *false* billings is not a reasonable inference. Whoever entered codes, operated the billing software and generated therapy bills out of the computer did not necessarily know those therapy forms contained false information.

Knowledge and intent were necessary, especially in the present case where forgery of documents and signatures was rampant, made a fact by a Government undercover informant.

- The evidence shows no more than Petitioners helping Martinez overcome his shortcomings in conducting a professional pitch. The doctor did not see Petitioners after that initial meeting. Neither Petitioners had any part in negotiating compensation or making the ultimate call to hire the doctor. It was Martinez who introduced Herrera and Acuna to the doctor.
- Herrera learned how to do this type of fraud while working at Primary. When Primary no longer needed his services, the owner of Primary put Herrera in touch with Martinez at Revive. Martinez hired Herrera to work as a massage therapist at Revive.
- Petitioners are asserting the Government deliberately suppressed from Martinez's proffer his confession to having knowledge of the fraud previous to the conspiracy, that he had previously participated in a staged automobile accident and a similar scheme of fraud in Tampa, Florida, before ever traveling to Michigan.
- Petitioners can now prove those text messages were not made in the context alleged by the Government, and that the Government knew it.

This enhancement was exceedingly more applicable to other defendants, however, the underlying reasoning here is that Petitioners were the "*most culpable architects of the conspiracy*" simply for daring to reject the deal offered by the Government before trial, for daring to challenge the Government's theory of the case, and for daring to go to trial to defend themselves.

C. Risk of death or serious bodily injury

In a fraud case, application of this enhancement applies only when the defendant's fraudulent course of conduct recklessly created a risk that others would suffer serious bodily injury. *United States v. Hall*, 71 F.3d 569 (6th Cir. 1995); *United States v. Vivit*, 214 F.3d 908, 921 (7th Cir. 2000); *United States v. Lucien*, 347 F.3d 45, 56-57 (2nd Cir. 2003). Serious bodily injury is defined at *U.S.S.G. § 1B1.1*, Application Note 1(L) as "extreme physical pain or the protracted impairment of a bodily member, organ or mental faculty" or requiring hospitalization, surgery or physical rehabilitation.

For example, in ***Lucien*** and *United States v. Hoffman*, 9 F.3d 49 (8th Cir. 1993), collisions were planned, or "staged" but real. In contrast, in this case, the collisions were planned, or "staged" but fake, and Petitioners were convicted of devising a scheme where car insurance companies were billed for treatment that participants in the scheme *did not get* and *did not need* because they were not actually injured. If anything, Petitioners would have encouraged participants to avoid any injury, especially anything that could come close to being serious, so that the scheme would be more profitable.

That this enhancement applied even if no one actually got injured simply because it was possible that someone could get injured ignores case authority focusing on the risk created by the conduct of the defendants and that the risk must be reckless as to serious bodily injury. See *United States v. Greene*, 71 F.3d 232, 236 (6th Cir.1995).

D. Obstruction of justice

According to Martinez's wife, Katia Mok-Tornes (Mok), there was never an attempt to influence Martinez directly or an attempt to get Mok to communicate something to Martinez indirectly. Never once did Mok allege that Petitioners suggested that Martinez

should testify, or not testify, about anything. Mok did not allege that Petitioners wanted anything to be passed on to Martinez. And there is no evidence Mok told Martinez any of this.

One of the Petitioners did not communicate with Mok. There was no substantial step and no intent at obstructing justice. Mok herself was not going to be a witness at trial. Pretrial conditions did not mention visitation, contact, or communication restrictions other than the prohibition to discuss details about the case that could influence the Government's investigation and the prosecution of the case. Petitioners did not destroy or conceal evidence, nor did they commit perjury, or attempted or asked anyone to do it. Petitioners did not menace, intimidate, or suborn anyone to provide false statements or otherwise. Petitioners never committed any action that could have impeded the investigation and the prosecution of the case.

The district court, however, inappropriately increased Petitioners' sentences on the basis of Mok's belief and feelings, founding that "is quite convincing that this was an attempt by Miss [Petitioner]... in one means or another to influence the litigation in this particular case", that Acuna cooperating with the Government because of a fight was "*a concoction of a false story by Miss [Petitioner]*". See ***United States v. Griffin***, No.16-3072 (6th Cir. 2016) and ***United States v. Bazazpour***, 690 F.3d 796, 805-08 (6th Cir. 2012).

E. Sophisticated means - relocation

This amendment was originally created to implement, in a broader form, the directives to the Commission in section 6 of the Telemarketing Fraud Prevention Act of 1998. The Commission did not intend the application of this enhancement on the basis that the

offense was concealed simply because it was not committed in the face of law enforcement, or to artificially inflate a defendant's sentence.

Here, there was not a pre-existing fraudulent scheme in another jurisdiction before it was relocated. There is no relocation to evade law enforcement or regulatory officials. Petitioners always traveled in their own name and even when they drove, there were records of travel. Never Petitioners tried to hide any kind of transactions, or funds. See *United States v. Magaly Gonzalez*, No. 15-15712 (11th Cir. 2017).

REASONS FOR GRANTING THE PETITION

28 U.S.C. § 2253 requires a prisoner to make "a substantial showing of denial of a constitutional right" before an appeal will be authorized. In *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), this Court held that this statutory language essentially codified the *Barefoot* standard that only requires that the legal issue sought to be raised on appeal "be debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." It does not require the habeas petitioner to demonstrate a likelihood that he ultimately will prevail on appeal.

Recently, in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), this Court made clear that the *Barefoot* standard is not difficult for a habeas petitioner to meet. All that is required is for at least one claim raised by the petitioner to be reasonably "debatable" under the AEDPA's standards.

The question is the debatability of the underlying constitutional claim, not the resolution of that debate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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