

No. **24 - 5108**

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**IN THE**  
**Supreme Court of the United States**

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<b>FILED</b> <b>JUN 14 2024</b> <small>OFFICE OF THE CLERK SUPREME COURT, U.S.</small>
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**KAREN TUCKER,**  
**Petitioner,**  
**v.**  
**UNITED STATES OF AMERICA,**  
**Respondent.**

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**On Petition for a Writ of Certiorari to the**  
**United States Court of Appeals**  
**for the Fifth Circuit**

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTION PRESENTED

I. Whether a petitioner must show he suffers from a "civil disability"—that is, a collateral consequence that causes a substantial and present harm, is specific to the criminal context, and arises solely from the erroneous conviction—before a court can grant a writ of error coram nobis, as the First, Second, Sixth, and Seventh Circuits have held, or whether a court may instead presume that every conviction has collateral consequences that provide adequate standing to seek relief, as the Fourth, Ninth, and Eleventh Circuits have held?

II: Whether a writ of error coram nobis should issue for a petitioner who presents "compelling" new evidence and intervening change of law that establishes his actual innocence of the crime of conviction and as a continued collateral consequence loss of civil disabilities loss of right to vote or sit for jury trial?

III. Whether the Fifth Circuit requires more than actual innocence before a writ of coram nobis vacating the conviction could be issued. This holding conflicts with the holdings of three other circuits (the Fourth, Sixth, Eighth, Ninth, Tenth and Eleventh) that actual innocence itself is a basis for coram nobis relief. The Court should grant review to address the circuit split on this important question, and should hold that at least where advances in science establish innocence, coram nobis relief is appropriate?

iv. Whether new evidence and controlling law presented in CMS exhibits 82-142 can demonstrate insufficient evidence to support civil or criminal charges for healthcare fraud. Specifically, the question involves whether the District Court Judge erred in holding that Petitioner's counsel was constitutionally effective (new evidence exhibit 80-81) and whether the Petitioner was guilty of treating without a specific referral based on a misinterpretation of CMS laws (exhibits 82-142; 90, 133, 140, 141, 142). Additionally, whether medical doctors should be held liable as gatekeepers for non-compliant referrals, referencing CMS requirements and new evidence in exhibit 90, 133, 140, 141, 142 showing compliance with CMS guidelines for routine foot care, which could invalidate the Petitioner's conviction for wrongful treatment without referral.

V. Whether the court erred in finding the referring medical doctor not guilty and the consulted podiatrist guilty for not instructing the medical doctor on how to write referral orders, which the court construed as healthcare fraud. Additionally, whether the consulted podiatrist, who follows directions in referral orders and patient charts according to CMS Certifying Orders/Referrals exhibits 82-142, 133; is wrongfully convicted of healthcare fraud because they cannot produce a "more specific order" than required by CMS. This question considers whether new evidence shows conflict between CMS guidelines and court interpretations, highlighting plain errors that need correction to prevent manifest injustice and protect healthcare providers and public interest.

vi. Whether the petitioner has satisfied the actual innocence prerequisites for coram nobis relief by demonstrating errors of fact against the Northern District Court of Texas in a felony conviction. This includes jurisdiction under 28 U.S.C. § 1332, involving a controversy amount exceeding \$75,000, Nature of Suit 151 Medicare Act. The petitioner claims actual and factual innocence, wrongful conviction, ineffective assistance of counsel, and miscarriage of justice, supported by new evidence and controlling law presented in exhibits 80-142, and requests review by the Court of Appeals for the Fifth Circuit under 28 U.S. Code § 1291, highlighting the need to correct plain, factual, fundamental, constitutional, and procedural errors to prevent manifest injustice.

vii. Whether a petitioner can demonstrate new evidence, an intervening change in controlling law in CMS/HCFR Judicial Review Guidelines, Laws, and Rules presented in exhibits 82-142, to show that certifying orders/referrals are not standing orders, and thus prove the court made errors in law. This includes whether federal courts can issue writs of coram nobis to correct fundamental errors when new information proves actual innocence, as determined in *United States v. Morgan*. Additionally, whether the Fifth Circuit and Northern District Court of Texas recognize that coram nobis relief can be granted under circumstances involving new evidence, a change in law, or the need to correct clear errors to prevent manifest injustice, referencing *Santos-Sanchez v. United States* and *Lazaridis v. Wehmer*.

(i)  
ii.

**PARTIES TO THE PROCEEDING**

**[X ] All parties appear in the caption of the case on the cover page.**

**Karen Tucker, petitioner on review,  
was the petitioner-appellant below.**

**United States of America, respondent on review,  
was the respondent-appellee below.**

**iii**  
**RELATED PROCEEDINGS**

**Civil Action**  
**Docket No. 23-10709**  
**Court of Appeals for the Fifth Circuit**  
**March 19, 2024 *En banc denied***

**Civil Action**  
**Docket No. 23-10709**  
**Court of Appeals for the Fifth Circuit**  
**February 7, 2024 Denied**

**Civil Action**  
**Docket No. 3:20-CV-810-S-BH**  
**United States District Court, Northern District of Texas**  
**Decided June 16, 2023**

**Civil Action**  
**Docket NO. No. 3:20-CV-810-S (BH)**  
**(No. 3:97-CR-337-K-1)**  
**United States District Court, Northern District of Texas**  
**March 31, 2023**

**Civil Action**  
**No. 3:97-CR-337-R**  
**No. 3:99-CV-2599-R**  
**Karen E. Tucker, Petitioner, seeks to vacate, set aside or correct her sentence pursuant to**  
**28 U.S.C. § 2255 denied**  
**November 9, 2001 Judge Stickney**  
**December 12, 2001 Judge Buchmeyer**

**Civil Action**  
**Case Number 3:97-CR-337-R (01)**  
**United States District Court Northern District of Texas, Dallas Division**  
**JUDGMENT IN A CRIMINAL CASE May 10, 1998**

**Civil Action**  
**CRIM. NO. 3-97:CR-337-R(1)**  
**Plea Agreement**  
**December 18, 1998**

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In the light of newly discovered Rule 60 (b) (1) exculpatory material evidence presented in Appendix I exhibits 82-142 and intervening change in new laws applicable Centers for Medicare and Medicaid Services (CMS) Guidelines for Routine Foot Care that Medicare Will Cover.....6

In the Light of Newly Discovered Evidence Presented in Appendix H-I: Exhibits 80-142 and Intervening Change in Applicable Controlling CMS Laws that can Establish and Prove Dr. Tucker Has Not Willfully Committed Healthcare Fraud Since Dr. Martin Certified Order/Referral Complied with CMS Rules; Exhibit 26-A Order Show "NO" Standing "PRN" order for Podiatry was written; Dr. Martin documented systemic diagnosis codes, and Dr. Tucker can present Mycotic Nails Lab Reports that Support Clinical Findings for Onychomycosis that can show Routine Foot Care Services were Covered for Podiatry Care Provided under CMS Medicare Part B Standards.....6

- Dr. Karen Tucker, DPM has met her burden of proof to prove claim for actual innocence, factual innocence, ineffective assistance of counsel, wrongful conviction on count 16 that new evidence can prove she has not willfully committed Healthcare Fraud is a claim for total miscarriage of justice
- Petitioner can show errors that are constitutional, jurisdictional, procedural, statutory, fundamental error, error of facts, and plain errors that show a need to be corrected to prevent manifest injustice to achieve justice that the US Supreme Court can grant order for extraordinary relief pursuant All Writs Coram nobis .
- New evidence can establish and prove no reasonable jury could find Petitioner guilty of healthcare fraud;
- New evidence can establish and prove a reasonable fact finder could find Petitioner did obtain Dr. Kathleen Martin, MD "specific" written and signed referral order that certified that she evaluated count 16 patient Zala Farley within 60 days is presented in Appendix H exhibit 26-A;
- Appendix H can shows that Dr. Martin documented in the order systemic diagnostic codes, referenced a right toe foot diagnosis condition/problem, written order for may see podiatrist of choice that was not written "PRN" Standing order

- Appendix H can show patient Zala Farley nursing home admission face sheet documents Dr. Karen Tucker, DPM as podiatrist of choice to provide and bill medically necessary patient covered foot care podiatry services, visit, evaluation and management according to CMS.

## ARGUMENT .....10

### I. THERE IS AN CLEAR, ACKNOWLEDGED, AND ENTRENCHED CIRCUIT SPLIT ON THE QUESTION PRESENTED. ....10

### II. Dr. Tucker's Defense Against Healthcare Fraud Allegations.....12

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Petitioners claim for actual innocence of the count 16 charge of health care fraud 18 U.S. Code § 1347 in this circumstance, the rule of Meacham, that a district court lacks jurisdiction when a person conviction of a non-offense. The Northern District Court of Texas, Dallas had no jurisdiction to accept a plea to conduct that does not constitute health care fraud, and the doctrine of procedural default therefore does not bar Karen Tucker's petition present challenge. The Courts finding that a "genuine claim that the district court lacked jurisdiction to adjudicate the petitioner guilty may well be a proper ground for coram nobis relief as a matter of law. Id. At 734. Indeed, jurisdictional error is by its nature of such a "fundamental character" as to render proceedings "irregular and invalid," Morgan. 346 US at 509n. 15, 74 S.Ct. 247, and coram nobis relief affords a procedural vehicle through which such error may be corrected .....16

Prerequisites for coram nobis relief. A writ of error coram nobis is a remedy available to vacate a conviction when the petitioner has served his sentence and is no longer in custody, as is required for post-conviction relief under 28 U.S.C. § 2255. As the Supreme Court explained in *United States v. Morgan*, 346 U.S. 502 (1954), coram nobis relief is available after sentence has been served because "the results of the conviction may persist.....16

### IV. New Evidence and New Intervening Change In Controlling Law for CMS Appendix I Exhibits 82-142

The question revolves around whether new evidence and controlling law presented in CMS Appendix I exhibits 82-142 can demonstrate that there is insufficient evidence to support civil or criminal charges for healthcare fraud. Additionally, it questions the effectiveness of Petitioner's counsel and the interpretation of CMS laws regarding referrals for podiatry services.....23

### V. The District Court Erred In Finding Dr. Tucker's Counsel Was Constitutionally Effective And in Holding That Dr. Tucker Was Guilty on Count 16 Zala Farley Appendix H Exhibit 26-A Referral Certified Ordered, Written By Dr. Kathleen Martin, MD for Treating Without Verbally Consulting Referring Physician; Treating Without a Specific Referral; Treating With a Referral that Was a "PRN" Standing Order for May See Podiatrist of Choice Shows Petitioner's Plea, Charge and Conviction Was Not Made Intelligently, Knowingly, or Voluntarily.....29

### The Petitioner asserts that her Sixth Amendment right to conflict-free counsel was violated.....29

- Mr. Bailey became one of the Respondent(s) star witnesses during ineffective assistance trial court 2255 hearing on May 14-15, 2001, before the Trial Court against Petitioner to win favorable US Attorney Assistance in a lower court for lesser sentence in criminal cases against him that he was guilty and convicted on 6/1/2001 Appendix I new exhibit 80.
- Mr. Bailey was found guilty on 7 counts of attorney misconduct by the Florida Supreme Court, and on 11/21/2001 he was disbarred Appendix I exhibit 81.
- Massachusetts disbarred Bailey two years later. In early 2003, a judge ordered Bailey to pay \$5 million in taxes and penalties on income connected with the Duboc case. That is, in exchange for Mr. Bailey having provided Respondent(s) with substantial assistance in the investigation or prosecution of another person like Karen Tucker, Petitioner who has allegedly committed an offense, the Government agreed to permit Mr. Bailey to receive a reduced sentence. U.S. Sent'g Guidelines Manual § 5K1.1.

The Petitioner rightly asserts that the Sixth Amendment guarantees not just any counsel, but effective and conflict-free representation. This principle extends to all stages of the criminal proceedings, including pretrial negotiations and plea bargaining. The failure of counsel to adequately research and advise the Petitioner on the charges against her, coupled with his personal and professional issues, raise serious concerns about the fairness and accuracy of the Petitioner's conviction.....34

The petitioner argues that the district court judge erred in holding that the petitioner's counsel was constitutionally effective and in finding the petitioner guilty based on a misinterpretation of CMS laws. The Petitioner contends that as "gatekeepers" medical

doctors, such as Dr. Kathleen Martin, should be held solely responsible for healthcare fraud if their referral orders were in compliance with CMS guidelines, as demonstrated by exhibit 26-A and the Court finds that the orders were not specific for podiatrist to provide services and bill for covered foot care under Medicare Standards.

**VI. The First, Second, Fifth, Sixth, And Seventh Circuits Hold That A Coram Nobis Petitioner Must Show He Suffers From A Civil Disability To Prevail .....36**

**VII. The Fourth, Ninth, And Eleventh Circuits Hold That The Government Must Rebut A Presumption Of Continuing Consequences To Prevent The Court From Reaching The Merits Of A Coram Nobis Petition... ..37**

The Fifth Circuit is at times considered to be aligned with the Ninth and Fourth. It appears that the Fifth Circuit requires collateral consequences but, like the Ninth Circuit, takes a lenient approach. *U.S., v. Marcello* (noting collateral-consequences requirement and granting writ but not identifying particular consequences suffered). Because the minority approach recognizes that reputational harm from a conviction is damaging enough for federal relief, coram nobis is available under this approach even if the petitioner has other convictions that would remain intact. *U.S. v. Walgren*.....36

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**C. The Question Presented Is Important .....40**

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## **INDEX TO APPENDICES**

**APPENDIX A Court of Appeals for the Fifth Circuit March 19, 2024, En banc Denied.**

**APPENDIX B Court of Appeals for the Fifth Circuit February 7, 2024, Denied**

**APPENDIX C United States District Court, Northern District of Texas Decided June 16, 2023**

**APPENDIX D United States District Court, Northern District of Texas Denied March 31, 2023**

**APPENDIX E Karen E. Tucker, Petitioner, seeks to vacate, set aside or correct her sentence pursuant to 28 U.S.C. § 2255 Denied: November 9, 2001, May 14-15, 2002 Judge Stickney and December 12, 2001 Judge Buchmeyer**

**APPENDIX F United States District Court Northern District of Texas, Dallas Division Judgement in a Criminal Case May 10, 1998**

**APPENDIX G Factual Resume Plea Agreement December 18, 1998**

**APPENDIX H Count 16**

**Dr. Kathleen Martin, MD Certified Referral and Order for Exhibit 26-A Zala Farley and Progress Notes**

**Dr. Karen Tucker, DPM Zala Farley Progress Notes, Overall Care Plan and Outcomes and Orders**

**APPENDIX I New Evidence and New Intervening Change In Controlling CMS Laws exhibits 80-142**

**No.**

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**IN THE  
Supreme Court of the United States**

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**KAREN TUCKER,  
Petitioner,  
v.  
UNITED STATES OF AMERICA,  
Respondent.**

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**On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Fifth Circuit**

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**PETITION FOR A WRIT OF CERTIORARI**

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IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR A WRIT OF CERTIORARI TO

Petitioner respectfully prays for that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is  
☐ reported at ; or  
☐ has been designated for publication but is not yet reported; or  
☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is  
☐ reported at ; or  
☐ has been designated for publication but is not yet reported; or  
☒ is unpublished.

**JURISDICTION**

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was February 7, 2024

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: March 19, 2024 and a copy of the denying rehearing appears at Appendix A.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including (date) on (date) in Application No. \_\_\_\_\_ A \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

The Fifth Circuit entered judgment on February 7, 2024. Appendix A. Petitioner timely sought rehearing, which was denied on March 19, 2024. Appendix B. The deadline for filing a petition for certiorari June 19, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

**STATUTORY PROVISION INVOLVED**

28 U.S.C. § 1651 provides: (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

**CONSTITUTIONAL AND STATUTORY  
AND PROVISIONS INVOLVED**

Under the All Writs Act, Title 28, United States Code § 1651(a) provides, "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." To be sure, federal courts have authority to issue writs of error coram nobis under the All Writs Act, 28 U.S.C. § 1651(a). United States v. Mills, 221 F.3d 1201, 1203 (11th Cir. 2000). by a preponderance of the evidence, that the delay in making a claim was unreasonable and that this unreasonable delay was prejudicial.

## **The Accepted Principles on Corum Nobis Relief**

The writ of coram nobis is an extraordinary remedy available to a petitioner no longer in custody who seeks to vacate a criminal conviction in circumstances where the petitioner can demonstrate civil disabilities as a consequence of the conviction, and that the challenged error is of sufficient magnitude to justify the extraordinary relief. *Jimenez v. Trominski*, 91 F.3d 767, 768 (5th Cir. 1996). [C]ourts must be cautious so that the extraordinary remedy of coram nobis issues only in extreme cases. *United States v. Denedo*, 556 U.S. 904, 916 (2009). Coram nobis relief will be granted to correct only fundamental errors that result in a complete miscarriage of justice. *United States v. Dyer*, 136 F.3d 417, 422, 430 (5th Cir. 1998).

Karen Tucker, petitioner seeking the writ has met burden of proof and was denied All Writs Act, Title 28, United States Code § 1651(a) showing: (1) a continuing civil disability as a consequence of her prior conviction, *United States v. Castro*, 26 F.3d 557, 559 (5th Cir. 1994); that (2) she exercised reasonable diligence in seeking prompt relief, *Dyer*, 136 F.3d at 427; (3) Karen Tucker has no other remedy is available, *id.* at 422; and (4) unless relief is granted, there will be a complete miscarriage of justice, *Castro*, 26 F.3d at 559.

Petitioner ask for review of the district court's factual findings for clear error, questions of law de novo, and the district court's ultimate decision to deny the writ for abuse of discretion. *Santos-Sanchez v. United States*, 548 F.3d 327, 330 (5th Cir. 2008), vacated on other grounds, 559 U.S. 1046 (2010).

The Eleventh Circuit explained the writ as such:

Federal courts have authority to issue writs of error coram nobis under the All Writs Act, 28 U.S.C. § 1651(a). A writ of error coram nobis is a remedy available to vacate a conviction when the petitioner has served his sentence and is no longer in custody, as is required for post-conviction relief under 28 U.S.C. § 2255. The writ of error coram nobis is an extraordinary remedy of last resort available only in compelling circumstances where necessary to achieve justice. The bar for obtaining coram nobis relief is high, and the writ may issue only when there is and was no other available avenue of relief and the error involves a matter of fact of the most fundamental character which has not been put in issue or passed upon and which renders the proceeding itself irregular and invalid. Further, courts may consider coram nobis petitions only where the petitioner presents sound reasons for failing to seek relief earlier.

**28 U.S. Code § 1251 - Original jurisdiction** -The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States. All actions or proceedings by a State against the citizens of another State or against aliens.

### **Subject Matter Jurisdiction and Diversity of Citizenship**

The Northern District Court of Texas, Dallas, has original jurisdiction over this case, as per 28 U.S.C. § 1332, which grants district courts original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between citizens of a State and citizens or subjects of a foreign state. The amount in controversy in this case is \$1,652,000, which exceeds the required \$75,000 for statement of a claim for actual innocence, factual innocence, wrongful conviction, total miscarriage of justice that deprive colorable due process clause rights of the Fourteenth Amendment, and ineffective assistance of counsel that deprived sixth amendment rights.

### **Evidentiary Framework**

The defendant cites several cases, including *People v. Vasilyan*, *People v. Welch*, *People v. Brady*, *People v. Kennedy*, *Ex parte Chaney*, and *Ex parte Elizondo*, as providing the evidentiary framework for the claim. The phrase "in the light of newly discovered evidence" is key to an *Elizondo* claim. The defendant also cites *McQuiggin v. Perkins*, 569 U.S. 383 (2013), which states that actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar or expiration of the statute of limitations.

### **18 U.S.C. § 1347. Health care fraud:**

Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice--

(1) to defraud any health care benefit program; or (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program, in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 10 years, or both. If the violation results in serious bodily injury (as defined in section 1365 of this title), such person shall be fined under this title or imprisoned not more than 20 years, or both; and if the violation results in death, such person shall be fined under this title, or imprisoned for any term of years or for life, or both.

## INTRODUCTION

"The metes and bounds of the writ of coram nobis are poorly defined and the Supreme Court has not developed an easily readable roadmap for its issuance." *United States v. George*, 676 F.3d 249, 253 (1st Cir. 2012). The general outline of the right is clear: A writ of error coram nobis provides a way to collaterally attack a criminal conviction when the petitioner is no longer "in custody," and therefore cannot seek relief under 28 U.S.C. § 2255. See *Chaidez v. United States*, 568 U.S. 342, 345 n.1 (2013); see also *United States v. Morgan*, 346 U.S. 502, 505-511 (1954); *United States v. Mayer*, 235 U.S. 55, 67 (1914). But the Court has not "addressed the precise standards that lower courts should use in deciding whether to issue" the writ. *Murray v. United States*, 704 F.3d 23, 29 (1st Cir. 2013).

One question, in particular, that arises on coram nobis review is whether a court may grant the writ based on new evidence of actual innocence. It often takes years for new evidence to materialize, by which point defendants have frequently completed any term of imprisonment and coram nobis is the only avenue for seeking relief. The courts of appeals have taken differing positions on whether an actual innocence claim warrants coram nobis relief. The Court should grant certiorari to resolve that split and confirm that where a petitioner presents compelling evidence of actual innocence, coram nobis relief is available.

Petitioner can show the US Supreme Court, recognizing that movant is pro se, can afford her liberal construction pursuant to *Haines v. Kerner*. 404 U.S. 419 (1972).

Petitioner case is a claim of actual innocence, a delay in seeking relief does not bar relief. *McQuiggin v. Perkins*, 569 U.S. 383 (2013) (actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar ... or, as in this case, expiration of the statute of limitations.

Karen Tucker, Petitioner has established that she was charged with a non offense, and she has demonstrated that in the light of newly discovered intervening change in law for Centers for Medicare and Medicaid Services (CMS) guidelines and laws for Health care fraud 18 U.S.C. § 1347 under **United States v. Nora**, \_\_\_, F.3d \_\_\_, No. 18-31078, 2021 WL 716628, at \*2 (5th Cir. Feb. 24, 2021) that is reliable evidence of changes in CMS Laws, Rules and Regulation that was not available before the trial court that can prove her actual innocence and factual innocence would have changed the outcome undermining the factual basis of her conviction demonstrating factual innocence constitutes a fundamental miscarriage of justice that made her criminal proceedings irregular and invalid. (*United States v. Miles*, 553 F. App'x 846, 848 (10th Cir. 2014); (*Kandiel v. United States*, 964 F.2d 794, 797 n.1 (8th Cir. 1992). *Alikhani v. United States*, 200 F.3d 732, 734 (11th Cir. 2000).

Karen Tucker, Petitioner has established that she was charged with a non offense, and she has demonstrated that in the light of newly discovered and reliable evidence of **changes in CMS Laws, Rules and Regulation presented in Appendix I (Exhibits 80-142)** can prove her actual innocence, factual innocence and indicate that she did not commit healthcare fraud. Additionally, Dr. Tucker presents Dr. Kathleen Martin, MD's referral order (Appendix H, Exhibit 26-A) that new evidence presented in Appendix I exhibits 142-82 can prove the certified order documents the "Medicare" standards specific referral requirements for foot care services covered by Medicare that was not available before the trial court that can prove her actual innocence would have changed the outcome undermining the factual basis of her conviction demonstrating factual innocence constitutes a fundamental miscarriage of justice that made her criminal proceedings irregular and invalid. *United States v. Miles*, 553 F. App'x 846, 848 (10th Cir. 2014); (*Kandiel v. U.S.*, 964 F.2d 794, 797 n.1 (8th Cir. 1992). *Alikhani v. U.S.*, 200 F.3d 732, 734 (11th Cir. 2000).

Petitioner states a substantial claim for actual innocence and factual innocence that shows a **constitutional error** has caused the conviction of an innocent person Karen Tucker. Petitioner has met her burden of proof to prove her claim is credible for the Court to grant order for extraordinary relief coram nobis to achieve justice.

Petitioner has presented new intervening change in health care fraud law under *United States v. Nora*, \_\_\_, F.3d \_\_\_, No. 18-31078, 2021 WL 716628, at \*2 (5th Cir. Feb. 24, 2021) and in the light of newly discovered factual exculpatory material evidence discovered due to due diligence and excusable neglect Rule 60 (b) (1) (6) presented in Appendix I exhibits 142-82 can prove Dr. Martin referral presented in exhibit 26-A documents the "Medicare" standards specific referral requirements for foot care services covered by Medicare that Dr. Tucker provided to count 16 Zala Farley and submitted a \$75 dollars billing claim for reimbursement of services she provided support her allegations of constitutional error with new reliable evidence that is critical physical evidence-that was not presented at trial.



Petitioner can argue that the Northern District Court of Texas, Dallas and the Court of Appeals for the Fifth Circuit denied Karen Tucker's coram nobis petition for a lack of subject matter jurisdiction that has been recognized as **fundamental error character**, for which coram nobis relief may be proper as a matter of law which renders the proceeding itself irregular and invalid. *Jackson vs United States*. 375 Fed.Appx. 958, 959 (11th Cir. 2010) *United States v. Peter*. 310 F.3d at 715.

Karen Tucker, Petitioner presents sound reasons for failing to seek relief earlier in the light of newly discovered evidence that was not available until January 2010-2023 or was not in effect until March 14, 2024 presented in Appendix I exhibits 142-82 can prove Dr. Kathleen Martin, MD's referral order (Appendix H, Exhibit 26-A) documents the "Medicare" standards specific referral requirements for foot care services covered by Medicare for Dr. Tucker to provide count 16 patient Zala Farley medically necessary foot care and submit a \$75 dollar billing claim for podiatry care Dr. Tucker provided. *Mills*, 221 F.3d at 1204.

Petitioner was charged and pleaded guilty to one count of health care fraud. Petitioner is attacking the constitutionality of her conviction for 1 count health care fraud that Petitioner seeks an Order vacating the judgment and dismissing the charge.

Petitioner can establish actual innocence, petitioner can demonstrate that ... "it is more likely than not that no reasonable [trier of fact] would have convicted her.

Petitioner can argue that there was insufficient evidence to prove that no rational juror could have concluded that Karen Tucker, Petitioner committed conspiracy to commit healthcare fraud beyond a reasonable doubt. *Salinas v. United States*, 522 U.S. 52, 63 (1997); *United States v. Merino*, No. 19-50291, 2021 WL 754589 (9th Cir. Feb. 26, 2021).

Petitioner can argue that there was insufficient evidence to conclude that Karen Tucker **acted willfully, as required under both the health care fraud statute, 18 U.S.C. § 1347(a)(1)**. The Fifth Circuit's decision emphasizes that mere exposure or blind involvement in unlawful activity and evidence that "everybody knew" of the unlawful activity is not sufficient to constitute willfulness under the health care fraud statute, 18 U.S.C. § 1347(a)(1), or the anti-kickback statute, 42 U.S.C. § 1320a-7b(b)(2). Instead, the government must establish that the defendant knew that the precise conduct constituting fraud was unlawful; merely showing the defendant received general compliance training will not be sufficient.

Moreover, because the Fifth Circuit opined on the definition of willfulness in a criminal statute, Nora's reasoning could very likely have implications beyond the Medicare fraud context to other areas of the law where **willfulness** is an element of the crime, including white-collar crimes and securities fraud. In this sense, it may reflect a growing trend among circuit courts of raising the bar for prosecutors to show willfulness sufficient for criminal conviction where it is not clear that the conduct in question was intentional. For example, the District of Columbia Circuit's 2019 decision in *Robare Group, Ltd., v. SEC*, 922 F.3d 468, 480 (D.C. Cir. 2019) held that negligent conduct cannot constitute willfulness under the Investment Advisers Act of 1940. At the very least, these decisions should be something practitioners consider when analyzing criminal issues regarding willful conduct. *United States v. Nora*, \_\_\_, F.3d \_\_\_, No. 18-31078, 2021 WL 716628, at \*2 (5th Cir. Feb. 24, 2021). *Schlus v. Delo*. 513 U.S. 298, 327-328, 115 S.Ct. 851, 867-868, 130 L.Ed.2d808 (1995)." *Bouslev v. United States*. 523 U.S. 614, 623, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998). *Schlup* observes that "a substantial claim that constitutional error has caused the conviction of an innocent person.

Petitioner's evidence warrants a review and potential reversal of the conviction to uphold justice and rectify the constitutional and procedural errors that have occurred. Petitioner can argue that the Court of Appeals for the Fourth Circuit declared that it is difficult to imagine an error of more fundamental character than a conviction for an offense the person did not commit. Thus, the Court could conclude that Karen Tucker, Petitioner is like *Lesane* satisfied the requirements for coram nobis relief, and the District Court abused its discretion by denying the writ. The Court explained: We emphasize that an essential purpose of the coram nobis remedy ... is to achieve justice. In order to achieve justice in this situation —where it is clear that the coram nobis petitioner is actually innocent yet spent several years in custody for an offense she did not commit — we are obligated to set the record straight. Accordingly, the Court reversed the judgment of the District Court and remanded for an award of coram nobis relief. *United States v. Lesane*, 40 F.4th 191 (4th Cir. 2022).

Had Dr. Tucker, Petitioner been tried in the Sixth, Eighth, or Tenth Circuits, the compelling evidence of innocence would likely have warranted coram nobis relief. In these circuits, newly discovered evidence demonstrating actual innocence is sufficient to justify relief. The Sixth Circuit, for instance, requires showing an error of fact unknown at the time of trial that would have altered the outcome (*United States v. Johnson*, 237 F.3d 751, 755 (6th Cir. 2001)). Similarly, the Eighth Circuit recognizes coram nobis relief for compelling new evidence undermining the factual basis of a conviction (*Kandiel v. United States*, 964 F.2d 794, 797 n.1 (8th Cir. 1992)). The Tenth Circuit has also held that demonstrating factual innocence constitutes a fundamental miscarriage of justice (*United States v. Miles*, 553 F. App'x 846, 848 (10th Cir. 2014)). Thus, had Dr. Tucker's case been tried in these

jurisdictions, her new evidence would likely have overturned her conviction. However, because her case fell under the Fifth Circuit, where a freestanding actual innocence claim is not sufficient for coram nobis relief without an accompanying constitutional or jurisdictional error, her conviction remains, despite the compelling evidence of her innocence. This discrepancy in outcomes based solely on jurisdiction is an intolerable result that undermines the pursuit of justice.

The conviction of an innocent person is arguably the most fundamental error. The Court should recognize that coram nobis relief is appropriate for petitioners demonstrating actual innocence, particularly when based on a new scientific consensus or significant legal changes. In *Kuhlmann v. Wilson*, the Supreme Court recognized a powerful interest in obtaining release from custody for those innocent of the charge (477 U.S. 436, 452 (1986)). *Kuhlmann v. Wilson* a plurality of the Court recognized that "a prisoner retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated." 477 U.S. 436, 452 (1986). Thus, a defendant who shows that "a constitutional violation has probably resulted in [his] conviction" though he is "actually innocent" can show a "fundamental miscarriage of justice" that will excuse any procedural default of a claim on habeas review.

Similarly, in *Schlup v. Delo*, (513 U.S. 298, 321 (1995)), the Court held that a fundamental miscarriage of justice occurs when a constitutional violation results in the conviction of an innocent person. The fundamental miscarriage of justice is just as clear here, and warrants extending collateral relief to a defendant who can demonstrate his innocence without regard to whether there was also independent constitutional error in the proceedings leading to his conviction.

In recognizing that a showing of actual innocence can excuse a procedural default, the Court adopted a standard proposed by Judge Friendly. *Kuhlmann*, 477 U.S. at 454 (plurality opinion) (citing Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970)); see also *Schlup*, 513 U.S. at 328 (adopting Judge Friendly's description of the actual-innocence inquiry, that the habeas court must determine the petitioner's innocence "in light of all the evidence"). Judge Friendly recognized that substantive claims of actual innocence should be considered on collateral review, even without an independent constitutional error. 38 U. Chi. L. Rev. at 159 n.87, 160.

Moreover, *Herrera v. Collins* and subsequent opinions highlight the intolerability of executing or punishing a legally and factually innocent person (506 U.S. at 417). Although this principle was considered in a capital context, the implications extend to any conviction, as subsequent convictions, deportation risks, and civil rights deprivations (such as the right to vote or hold office) can significantly impact an individual's life (*Fiswick v. United States*, 329 U.S. 211, 222 & n.10 (1946)). Court should take this opportunity to confirm that coram nobis can be used to grant relief from a conviction for a defendant who is able to make a compelling showing of innocence based on new evidence.

New evidence often becomes available years after a verdict, making other remedies like new trial motions impractical. This is particularly relevant when new scientific evidence or legal interpretations, such as changes in the Secretary's Agency CMS Guidelines, discredit the government's case.

The Court should take this opportunity to affirm that coram nobis is a suitable remedy for addressing wrongful convictions based on new, compelling evidence of innocence. This would align with the recognized need to correct fundamental miscarriages of justice and ensure that individuals wrongfully convicted can seek redress, even in the absence of independent constitutional errors in their original proceedings.

Karen Tucker, Petitioner can show that the All Writs Act, 28 U.S.C. § 1651(a), provides a federal court with authority to issue a writ of error coram nobis, which allows a petitioner to vacate a conviction after she has served her entire sentence that was completed on March 10, 2002. *United States v. Mills*, 221 F.3d 1201, 1203 (11th Cir. 2000); *Peter*, 310 F.3d at 712. Coram nobis relief is available after the sentence has been served because "the results of Karen Tucker, Petitioner, conviction persist. *United States v. Morgan*, 346 U.S. 502, 512-13 (1954).

Petitioner can argue that the Northern District Court of Texas, Dallas and the Court of Appeals for the Fifth Circuit denied Karen Tucker's coram nobis petition for a lack of subject matter jurisdiction that has been recognized as fundamental error character, for which coram nobis relief may be proper as a matter of law. *United States v. Peter*. 310 F.3d at 715. The coram nobis writ is an extraordinary remedy that is only available where:

- (1) Petitioner's May 14-15, 2001 28 U.S.C. § 2255, hearing was denied and no other avenue of relief is or was available, and ("A writ of error coram nobis is a remedy available to vacate a conviction when the petitioner has served her sentence and is no longer in custody, as is required for post-conviction relief under 28 U.S.C. §2255.");
- (2) Petitioner presents actual innocence and factual innocence as a fundamental error that made her criminal proceedings

irregular and invalid. *Alikhani v. U.S.*, 200 F.3d 732, 734 (11th Cir. 2000). *Jimenez v. Trominski*, 91 F.3d 767, 768 (5th Cir. 1996).

3. Petitioner presents in the light of newly discovered factual intervening change in CMS Health care law *United States v. Nora*, \_\_\_, F.3d \_\_\_, No. 18-31078, 2021 WL 716628, at \*2 (5th Cir. Feb. 24, 2021) occurred after the May 14-15, 2002 trial court 2255 hearing and new CMS Laws, Regulation and Rules were not available until 2019-2024 that can prove Petitioners actual and factual innocence are sound reasons for failing to seek relief earlier. *Mills*, 221 F.3d at 1204. *Jimenez v. Trominski*, 91 F.3d 767, 768 (5th Cir. 1996).

Petitioner can show that her petition for coram nobis is not frivolous. Petitioner can show that the Northern District Court of Texas, Dallas Division and the Court of Appeals for the Fifth Circuit are federal courts that have authority to issue a writ of error coram nobis under the All Writs Act, Title 28, Section 1651(a). *United States v. Mills*, 221 F.3d 1201, 1203 (11th Cir. 2000). See also *Bonadonna v. Unknown Defendant*. 181 Fed.Appx. 819, 822 n.2 (11th Cir. 2006). The Supreme Court recognized long ago that a writ of coram nobis is available to correct errors "of the most fundamental character" that have occurred in a criminal proceeding. *United States v. Morgan*. 346 U.S. 502, 512, 74 S.Ct. 247, 98 L.Ed. 248 (1954). Such "extraordinary" relief is only available, however, "under circumstances compelling such action to achieve justice." *Id.* at 511, 74 S.Ct. 247.

**Petitioner can argue that her coram nobis petition was denied in the Northern District Court Texas, Dallas and the Court of Appeals for the Fifth Circuit for a lack of subject matter jurisdiction that has been recognized as fundamental character, for which coram nobis relief may be proper as a matter of law to achieve justice.** *United States v. Peter*. 310 F.3d at 715. However, a writ of error coram nobis "is only appropriate when claims could not have been raised by direct appeal, or the grounds to attack the conviction become known after a completed sentence when \$2255 relief is unavailable." *Sun v. United States*. 342 F.Supp.2d 1120, 1126 (N.D. Ga. 2004) . Further, the Eleventh Circuit has also made clear that coram nobis relief is available only if the petitioner "presents sound reasons for failing to seek relief earlier." *Jackson v. United States*, 375 Fed.Appx. 958, 959 (11 Cir. 2010)(affirming denial of petition); see also *United States v. Morgan*, 346 U.S. 502, 512 (1954) .

Karen Tucker, Petitioner has alleged entitlement to review based on a newly recognized right made retroactively applicable by the United States Supreme Court to cases on collateral review. Petitioner does allege and can demonstrate, that there are newly discovered facts and impediment created by the government which prevented an earlier filing are sound reasons for failing to seek relief earlier, petitioner is entitled to review of her claims.

In *Peter*, a rare case where coram nobis relief was granted, the Eleventh Circuit found that the facts supporting the guilty plea did not constitute an offense in light of a Supreme Court case decided after Petitioner's sentence had expired. *Peter*. 310 F.3d at 711. Because the district court lacked jurisdiction to accept a guilty plea to a "non-offense," the Eleventh Circuit held in *Peter* that "a writ of error coram nobis must issue to correct the judgment that the court never had power to enter." *Id.* at 716. Also, a writ of error coram nobis may be justified in light of a retroactive dispositive change in the law. *United States v. Mandel*, 862 F.2d 1067 (4th Cir. 1988); see generally *Brooks v. United States*. 2 M.J. 1257 (Army Ct. M. Rev. 1976) (when the exceptional circumstance alleged is a subsequent court decision, that decision must necessarily have retroactive application or extraordinary relief will be denied) ; *United States v. Hav*. 702 F. 2d 572 (5th Cir. 1983) .

Petitioner can argue, the Court has not "spoken on the issue of whether proof of an ongoing civil disability is required in coram nobis cases, and courts that have considered the issue are divided." *Blanton v. US*, 94 F.3d 227, 232 (6th Cir. 1996).

Four circuits require a coram nobis petitioner to show that he suffers from a "civil disability"—that is, a collateral consequence that causes a substantial and ongoing harm, is specific to the criminal context, and arises solely from the erroneous conviction (like an enhanced sentence imposed in a later criminal case or a deportation order based on the conviction)—in order to reach the merits of the petitioner's claim. *U.S. v. Delhorno*, 915 F.3d 449, 453 (7th Cir. 2019); *U.S. v. Castano*, 906 F.3d 458, 463 (6th Cir. 2018); *Kovacs v. U.S.*, 744 F.3d 44, 49 (2d Cir. 2014); *United States v. George*, 676 F.3d 249, 255-256 (1st Cir. 2012).

Three circuits do not impose this requirement, acknowledging instead that all criminal convictions come with the potential for collateral consequences, and accepting the reputational harm of a criminal record as sufficient standing to reach the merits of the coram nobis claim. *United States v. Lesane*, 40 F.4th 191, 203 (4th Cir. 2022); *United States v. Kroytor*, 977 F.3d 957, 961 (9th Cir. 2020); *United States v. Peter*, 310 F.3d 709, 715-716 (11th Cir. 2002).

In the decision below, the Northern District Court of Texas, Dallas November 9, 2001 Magistrate Stickney Findings and the Fifth Circuit applied the civil disability requirement, lack of jurisdiction and frivolous complaint to avoid reaching the merits of Karen Tucker's coram nobis petition finding Tucker offers no cogent explanation how any of the purportedly new evidence upon which

she relies supports her conclusory claims for coram nobis relief. *Coleman v. Lincoln Par. Det Ctr.*, 858 F.3d 307, 309 (5th Cir.2017) *U.S. v. Esogbue*, 357 F.3d 532, 535 (5th Cir. 2004) (holding that petitioner fails to show complete miscarriage of justice. The Supreme Court must make changes to the law; in the meantime, this Court's refusal to weigh in is inflicting real-world harm by preventing individuals from clearing their names simply because of geographic happenstance. As even the Seventh Circuit admits, "[e]ventually these disputes must be put to rest." *United States v. Bush*, 888 F.2d 1145, 1149 (7th Cir. 1989). The Court should grant certiorari and provide the guidance that the lower courts are asking for.

Petitioners claim for actual innocence of the count 16 charge of health care fraud 18 U.S. Code § 1347 in this circumstance, the rule of *Meacham*, that a district court lacks jurisdiction when a person conviction of a non-offense. The Northern District Court of Texas, Dallas had no jurisdiction to accept a plea to conduct that does not constitute health care fraud, and the doctrine of procedural default therefore does not bar Karen Tucker's petition present challenge. The Courts finding that a "genuine claim that the district court lacked jurisdiction to adjudicate the petitioner guilty may well be a proper ground for coram nobis relief as a matter of law to achieve justice. *Id.* At 734. Indeed, **jurisdictional error** is by its nature of such a "**fundamental character**" as to render proceedings "irregular and invalid," *Morgan*. 346 US at 509n. 15, 74 S.Ct. 247, **and coram nobis relief affords a procedural vehicle through which such error may be corrected.** *United States v. Nora*, \_\_\_, F.3d \_\_\_, No. 18-31078, 2021 WL 716628, at \*2 (5th Cir. Feb. 24, 2021); *Salinas v. U.S.* 522 U.S. 52, 63 (1997); *United States v. Merino*, No. 19-50291, 2021 WL 754589 (9th Cir. Feb. 26, 2021).

When a court without jurisdiction convicts and sentences a defendant, the conviction and sentence are void from their inception and remain void long after a defendant has fully suffered their direct force. Moreover, as the Supreme Court reiterated in *Spencer v. Kemna*, 523 U.S. 1, 118 S. Ct. 978, 140 L.Ed. 2d 43 (1998) it is an obvious fact of life that most criminal convictions do in fact entail adverse collateral consequences. *Id.* At 12, 118 S.Ct.978. *Wolfe v. Coleman*, 681 F.2d 1302, 1305 (11th Cir. 1982); *Minor v. Dugger*, 864 F.2d 124, 126 (11th Cir. 1989). A writ of error coram nobis must issue to correct the judgment that the court never had power to enter. Since coram nobis relief is available in this circumstance as a matter of law, the district court abused its discretion in summarily dismissing Karen Tucker's petition. *U.S. v. Peter*, 310 F.3d 709 (11th Cir. 2002). Thus, the facts to which Tucker pled guilty did not constitute a crime for healthcare fraud 18 U.S. Code § 1347 under *Cleveland*. *Cleveland v. United States*, 531 U.S. 12 (2000), established that the conduct with which she was charged is not proscribed by the statute she was convicted of violating. Decisions of the Supreme Court construing substantive federal criminal statutes must be given retroactive effect. *Bousley v. United States*, 523 U.S. 614, 620-21, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998).

The law recognizes that there must be a vehicle to correct errors "of the most fundamental character; that is, such as rendered the proceeding itself irregular and invalid." *Morgan*, 346 U.S. at 509 n. 15, 74 S.Ct. 247 (*U.S. v. Mayer*, 235 U.S. 55, 69, 35 S.Ct. 16, 59 L.Ed. 129 (1914); *US v. Mills*, 221 F.3d 1201, 1204 (11th Cir.2000). In essence, the writ of error coram nobis acts as an assurance that deserved relief will not be denied as a result of the technical limitations of other post-conviction remedies. *Romualdo P. Esclavea*, Availability, Under 28 U.S.C.A. § 1651, Of Writ of Error Coram Nobis to Vacate Federal Conviction Where Sentence Has Been Served, 38 A.L.R. Fed 617, § 2(a) (1978).

A writ of error coram nobis is a remedy available to vacate a conviction when the petitioner has served his sentence and is no longer in custody, as is required for post-conviction relief under 28 U.S.C. § 2255. As the Supreme Court explained in *U.S. v. Morgan*, 346 U.S. 502 (1954), coram nobis relief is available after sentence has been served because the results of the conviction may persist. **Petitioner as continued present collateral consequence of loss of civil disabilities for her count 16 conviction, Karen Tucker, cannot vote in any election held in New Jersey or Texas; [and] she cannot serve as a juror.** *Id.* at 237. Because of these disabilities or burdens, **the Court has held that the petitioner** maintained a substantial stake in the judgment of conviction which **survives the satisfaction** of the sentence imposed on her shows the US Supreme Court can grant an order for extraordinary relief coram nobis.

Petitioner petitions the US Supreme Court for an order is granted for extraordinary relief pursuant All Writs Act, 28 U.S.C. § 1651(a) that provides a way to collaterally attack the Trial Court clearly erroneous in error erred June 20, 2023, April 7, 2020 final judgment err to vacate May 14-15, 2001 trial court, March 10, 1999, December 18, 1998 Plea Agreement and Court of Appeals for the Fifth Circuit March 19, 2024 and February 7, 2024, decision for 1 count on 16 criminal conviction to achieve justice.

Petitioner is no longer in custody, and therefore cannot seek relief under 28 U.S.C. §§ 2241 or 2255. *Chaidez v. U.S.*; *U.S. v. Morgan*. Petitioner's suit against the Respondent(s) was based upon Coram nobis, provides a federal court with authority to issue a writ of error coram nobis, which allows a petitioner to vacate Karen Tucker conviction after she has served her entire sentence. *U.S. v. Mills*; *Peter*, 310 F.3d at 712. Coram nobis relief is available after Petitioner's sentence has been served because the results of the conviction persist.

## STATEMENT OF THE CASE

Karen Tucker respectfully petitions for a writ of certiorari to review the judgment of the Fifth Circuit in this case.

### **Petition for Writ of Certiorari**

Karen Tucker is petitioning for a writ of certiorari to review the judgment of the Fifth Circuit in her case. A writ of certiorari is a request for a higher court to review the decision of a lower court. In this case, Karen Tucker is asking the Supreme Court to review the decision of the Fifth Circuit.

This case involves a crucial question: whether a court may grant coram nobis based on new evidence of actual innocence. There is an entrenched circuit split on whether a civil disability—substantial and ongoing harm specific to the criminal context—is required for coram nobis relief. Four circuits, including the Fifth Circuit, require proof of a civil disability, while three others presume any conviction has sufficient collateral consequences. This split necessitates the Supreme Court's intervention. Petitioner Karen Tucker seeks coram nobis relief based on new evidence of actual innocence and changes in CMS laws. She was convicted of healthcare fraud under 18 U.S.C. § 1347 but argues that new evidence and legal changes demonstrate her innocence. Dr. Tucker's case, involving new evidence and significant legal changes, warrants coram nobis relief. The Supreme Court should grant certiorari to resolve the circuit split and confirm that compelling evidence of actual innocence justifies relief through a writ of error coram nobis.

### **Health Care Fraud Conviction**

Karen Tucker was convicted on one count of health care fraud under 18 U.S.C. § 1347 on December 18, 1999, and March 10, 1999. The conviction was related to her work as a podiatrist, whereas, of May 7, 1995, Medicare "required" a Podiatrist to consult with the attending physician Dr. Kathleen Martin, MD for the nursing home resident and obtain a specific order or authorization for the service or services provided.

### **Denial of Acquittal**

Karen Tucker's motion to vacate/set aside sentence under 28 U.S.C. § 2255 was denied on May 14-15, 2001. The court found that she had not obtained a specific authorization and referral from Dr. Kathleen Martin, MD (exhibit 26-A order) for the medically necessary services sufficient to satisfy Medicare's requirements.

### **Appeal of Denial**

Karen Tucker is appealing the denial of her petition for a writ of error coram nobis. She is challenging the court's order from March 19, 2024, February 7, 2024, May 14-15, 2001, March 5-10, 1999, December 18, 1998 which found her guilty of receiving a "PRN" May See Podiatrist of choice standing order that was not "specific" for podiatry certified order referral written by Dr. Kathleen Martin, MD. This order was presented in exhibit 26-A the Trial Court's interpretation findings were that Dr. Martin order did not meet Medicare Standards.

Karen Tucker's case involves complex legal issues related to health care fraud, Medicare requirements, and the legal process for challenging a conviction. She is currently seeking a writ of certiorari to have her case reviewed by the Supreme Court. The outcome of this case could have significant implications for her and potentially for other health care providers facing similar issues.

## REASONS FOR GRANTING THE PETITION

Petitioner states a claim for actual innocence, factual innocence, wrongful conviction, ineffective assistance of counsel and total miscarriage of justice that can show the Court's **made constitutional errors, fundamental errors, and jurisdictional errors** in her appeal of the district court's denial of her petition for writ of coram nobis challenging the 1 count on 16 conviction in the light of newly discovered evidence dated 2010-2024 presented in Appendix I exhibits 82-142 and new intervening change in controlling laws for The Centers for Medicare and Medicaid Services (CMS) Laws that can establish and prove Dr. Kathleen Martin, MD certified order referral presented in exhibit 26-A did meet specific Medicare Standards for routine foot care that Medicare will cover Rule 60 (b) (1) (6) discovered due to due diligence and excusable neglect.

Dr. Tucker is contesting the District Court's ruling, claiming that her counsel was constitutionally ineffective and that she was wrongly found guilty of treating without consulting Dr. Martin, MD, to confirm a referral. She argues that the new evidence presented in Appendix I (Exhibits 80-142) and intervening changes in the Centers for Medicare and Medicaid Services (CMS) guidelines and laws indicate that she did not commit healthcare fraud. Additionally, Dr. Tucker presents Dr. Martin, MD's referral order (Appendix H, Exhibit 26-A) as evidence that documents a specific referral for foot care services covered by Medicare.

Petitioner can argue that there was insufficient evidence to prove that no rational juror could have concluded that Karen Tucker, Petitioner committed conspiracy to commit healthcare fraud beyond a reasonable doubt. *Salinas v. United States*, 522 U.S. 52, 63 (1997); *United States v. Merino*, No. 19-50291, 2021 WL 754589 (9th Cir. Feb. 26, 2021).

Petitioner can argue that there was insufficient evidence to conclude that Karen Tucker acted willfully, as required under both the health care fraud statute, 18 U.S.C. § 1347(a)(1). The Fifth Circuit's decision emphasizes that mere exposure or blind involvement in unlawful activity and evidence that "everybody knew" of the unlawful activity is not sufficient to constitute willfulness under the health care fraud statute, 18 U.S.C. § 1347(a)(1), or the anti-kickback statute, 42 U.S.C. § 1320a-7b(b)(2). Instead, the government must establish that the defendant knew that the precise conduct constituting fraud was unlawful; merely showing the defendant received general compliance training will not be sufficient. Moreover, because the Fifth Circuit opined on the definition of willfulness in a criminal statute, Nora's reasoning could very likely have implications beyond the Medicare fraud context to other areas of the law where **willfulness** is an element of the crime, including white-collar crimes and securities fraud. In this sense, it may reflect a growing trend among circuit courts of raising the bar for prosecutors to show willfulness sufficient for criminal conviction where it is not clear that the conduct in question was intentional. For example, the District of Columbia Circuit's 2019 decision in *Robare Group, Ltd., v. SEC*, 922 F.3d 468, 480 (D.C. Cir. 2019) held that negligent conduct cannot constitute willfulness under the Investment Advisers Act of 1940. At the very least, these decisions should be something practitioners consider when analyzing criminal issues regarding willful conduct. *United States v. Nora*, \_\_\_, F.3d \_\_\_, No. 18-31078, 2021 WL 716628, at \*2 (5th Cir. Feb. 24, 2021).

Petitioner Dr. Karen E. Tucker seeks review of the denial of her motion to vacate, set aside, or correct her sentence following her guilty plea to healthcare fraud under 18 U.S.C. § 1347. Petitioner asserts a claim for actual innocence, she received ineffective assistance of counsel and that her actions did not constitute a crime, based on CMS Mark G. Barrett, Administrative Law Judge's, Medicare Appeals Board Judge Gipe and NJ District Court, Camden Judge Ireanus decision indicating that consultation with the attending physician was not necessary.

**1. Guilty Plea and Sentencing:**

- Dr. Karen E. Tucker pleaded guilty on December 18, 1998, to Count 16 of a superseding indictment, charging her with providing unauthorized podiatry services to a Medicare beneficiary.
- She was sentenced to three years of probation and a ten-year preclusion from participating in federally funded healthcare programs.
- The government dismissed the other 24 counts and sought a downward departure due to her assistance in another investigation.

**2. Ineffective Assistance of Counsel Claim:**

- The petitioner claims her counsel, F. Lee Bailey, was ineffective, advising her to plead guilty to conduct that was not criminal.
- Mark G. Barrett, Administrative Law Judge opined that consultation with the attending physician was not necessary, contradicting the prosecution's and the trial court's interpretation of Medicare policy.

**3. Legal Proceedings:**

- A hearing before U.S. Magistrate Judge Paul D. Stickney on May 14-15, 2001, resulted in the denial of her motion to vacate, set aside, or correct her sentence.
- Petitioner's request for a certificate of appealability was denied by both the U.S. District Court of Texas, Dallas Division, and the U.S. Court of Appeals for the Fifth Circuit.

**4. Appeal Arguments:**

- The petitioner argues the Magistrate Judge did not give proper deference to the Administrative Law Judge's decision.
- She contends her counsel's performance was constitutionally ineffective, as he advised her to plead guilty to non-criminal conduct.
- Petitioner maintains she would have chosen to go to trial despite the risk of being retried on all counts.
- Petitioner can show a reasonable probability that, but for counsel's errors and conflict of interest, the petitioner would not have plead guilty and would have insisted on going to trial.

The Supreme Court did not, however, alter or address the prejudice requirement for obtaining relief, which continues to demand a showing that there was a reasonable probability that, but for counsel's errors, the petitioner would not have pleaded guilty and would have insisted on going to trial. See *id.* at 130 S.Ct. at 1478, 1483-84; *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

**5. Reasons for Granting the Petition:**

**Deference to Administrative Law Judge Decisions:**

- The case raises questions about the appropriate level of deference to Administrative Law Judges, particularly those with expertise in healthcare regulations.

In the Light of Newly Discovered Evidence Presented in Appendix H-I: Exhibits 82-142 and Intervening Change in Applicable Controlling CMS Laws that can Establish and Prove Dr. Tucker Has Not Willfully Committed Healthcare Fraud Since Dr. Martin Certified Order/Referral Complied with CMS Rules; Exhibit 26-A Order Show "NO" Standing "PRN" order for Podiatry was written; Dr. Martin documented systemic diagnosis codes, and Dr. Tucker can present in Appendix H Mycotic Nails Lab Reports that Support Clinical Findings for Onychomycosis that can show Routine Foot Care Services were Covered for Podiatry Care Provided Petitioner provided and billed under CMS Medicare Part B Standards.

- In the light of newly discovered Rule 60 (b) (1) exculpatory material evidence presented in Appendix I exhibits 82-142 and intervening change in new laws applicable Centers for Medicare and Medicaid Services (CMS) Guidelines for Routine Foot Care that Medicare Will Cover:
- Dr. Karen Tucker, DPM has met her burden of proof to prove claim for actual innocence, factual innocence, ineffective assistance of counsel, wrongful conviction on count 16 that new evidence can prove she has not willfully committed Healthcare Fraud is a claim for total miscarriage of justice.
- Petitioner can show errors that are constitutional, jurisdictional, procedural, statutory, fundamental error, error of facts, and plain errors that show a need to be corrected to prevent manifest injustice to achieve justice the US Supreme Court can grant order for extraordinary relief pursuant All Writs Coram nobis.
- New evidence can establish and prove no reasonable jury could find Petitioner guilty of healthcare fraud;
- New evidence can establish and prove a reasonable fact finder could find Petitioner did obtain Dr. Kathleen Martin, MD "specific" written and signed referral order that certified that she evaluated count 16 patient Zala Farley within 60 days is presented in Appendix H exhibit 26-A;
- Appendix H can shows that Dr. Martin documented in the order systemic diagnostic codes, referenced a right toe foot diagnosis condition/problem, written order for may see podiatrist of choice that was not written "PRN" Standing order
- Appendix H can show patient Zala Farley nursing home admission face sheet documents Dr. Karen Tucker, DPM as podiatrist of choice to provide and bill medically necessary patient covered foot care podiatry services, visit, evaluation and management according to CMS.

**See Appendix I Exhibit 80-142**

- Appendix I Exhibit 142 Billing and Coding: Covered Routine Foot Care A56680
- Appendix I Exhibit 141 PRN Orders Medicare Benefit Policy Manual
- Appendix I Exhibit 140 Billing and Coding Covered Routine Foot Care A57759
- Appendix I Exhibit 133 Regulations and Final Review Laws for Ordering & Certifying
- Appendix I Exhibit 90 CMS Rules and Regulations for Nursing Home Orders Frequency of Physician Visits
- Appendix I Exhibit 86 Medicare Signature Requirements

**Constitutionally Ineffective Counsel:**

- It challenges the standard of attorney performance, arguing that advising a plea to non-criminal conduct falls below reasonable professional standards.
- Petitioner requests certiorari to address these critical legal questions and rectify the errors in the lower courts' decisions.

Petitioner Dr. Tucker, no longer in custody, seeks a writ of error coram nobis to address the lingering adverse consequences of her conviction. Dr. Tucker presented Appendix I exhibits CMS 82-142, citing newly discovered exculpatory evidence under Rule 60(b)(1)(6) and an intervening change in CMS law. This new evidence and legal context demonstrate that a fundamental error occurred before the Northern District Court of Texas, Dallas, resulting in a manifest injustice warranting the issuance of the writ.

**ARGUMENT**

**I. There is a Clear, Acknowledged, and Entrenched Circuit Split on the Question Presented**

This case implicates an entrenched circuit split on whether a "civil disability"—that is, a collateral consequence that causes substantial and ongoing harm, is specific to the criminal context, and arises solely from the erroneous conviction—is a prerequisite to grant coram nobis relief. Four circuits, including the court below, hold that a petitioner must prove she suffers from a civil disability in order to receive relief. Three circuits, by contrast, hold that a court may instead presume that any conviction has collateral consequences that provide adequate standing to seek relief. More than 30 years have elapsed since the courts first split from one another, *Keane*, 852 F.2d 199; *U.S. v. Mandel*, 862 F.2d 1067 (4th Cir. 1988), cert. denied, 491 U.S. 906 (1989), and although courts on both sides of the split have acknowledged the disagreement, *Bush*, 888 F.2d at 1149; *Mandel*, 862 F.2d at 1075, none has indicated a willingness to switch sides. Only this Court's intervention can end the impasse.

The Fifth and Ninth Circuits have deepened a circuit split over whether a petitioner is entitled to coram nobis relief upon showing new evidence of actual innocence, or whether the petitioner must also allege a constitutional or jurisdictional error in the proceedings leading to the conviction. This Court should grant certiorari to resolve this critical question.

In these cases, the only potential remedy is a freestanding claim of actual innocence based on new evidence presented in Appendix I exhibits CMS 82-142. Given the extensive time the Secretary's Agency has taken to review and correct healthcare CMS judicial review guidelines, laws, and rules, defendants are often out of custody before discovering the evidence proving their innocence. Consequently, a coram nobis petition remains the sole mechanism for seeking relief.

Under the current rule in the Fifth and Ninth Circuits, along with four other circuits, innocent defendants whose convictions are based on discredited and misinterpreted local and national policies lack a plausible avenue for relief. This Court should grant certiorari to resolve the circuit split and affirm that, at least where new CMS/HCFA evidence irrefutably establishes actual innocence, defendants may obtain relief through a petition for a writ of error coram nobis.

Petitioner Dr. Tucker seeks a writ of error coram nobis to address the lingering adverse consequences of her conviction. Dr. Tucker presents newly discovered factual evidence and an intervening change in controlling CMS law, as outlined in Appendix I Exhibits 82-142; 142, 141, 140, 133, 90 and 80-81 Mr. F. Lee Bailey June 2001 felony conviction and disbarment under Rule 60(b)(1)(6), demonstrating her actual innocence that can show a fundamental error in this civil cases, and the prosecution cannot prove Karen Tucker, Petitioner guilty by the preponderance of the evidence standard.

**Misinterpretation of CMS Laws:** The Petitioner asserts that the court misinterpreted CMS laws regarding medical doctors' roles in writing referrals for podiatry services. Specifically, the Petitioner argues that medical doctors are the gatekeepers and should be liable for non-compliant referrals, not the practitioners following these referrals.

**Compliance with CMS Guidelines:** Exhibit 26-A exemplifies a referral order complying with CMS guidelines. Dr. Kathleen Martin, MD, certified in October 1996 that she evaluated patient Zala Farley within 60 days, diagnosed multiple systemic conditions (CVA, CVD, osteoarthritis, depressive disorder, HTN, pernicious anemia), and wrote an order for podiatry services. The documentation supports the claim that no healthcare fraud was committed.

**Attending evaluation and referral" (Appendix H) Exhibit 26-A.**

**New Evidence Supporting Compliance:** Exhibit 142 and 140 provides new evidence showing Dr. Martin documented systemic diagnosis codes and a right toe complaint, meeting CMS guidelines for routine foot care coverage. Exhibit 142, "Billing and Coding: Routine Foot Care A56680," outlines CMS billing and coding guidelines for routine foot care, including systemic conditions qualifying for coverage.

**Exhibit Highlights:**

- **Exhibit 26-A:** Dr. Martin's referral order showing compliance with CMS guidelines, detailed systemic conditions, and specific service requests.
- **Exhibit 140:** New evidence confirming compliance with CMS guidelines for routine foot care coverage.
- **Exhibit 142:** CMS Internet-Only Manual and billing guidelines supporting the legitimacy of the services provided.
- **The orders were part of Dr. Tucker's overall plan of treatment and in conjunction with specific anticipated outcomes.**

The Overall Care Plan describes Dr. Tucker's approaches, including partial removal of nail plates and surgical debridement of necrotic skin to healthy granular tissue. It also notes, "podiatry will follow as needed and deemed medically necessary as per Medical Attending evaluation and referral" (Appendix H).

Appendix H: Dr. Tucker's overall plan of care documents, detailing the treatment plan and anticipated outcomes for patient Zala Farley.

**Overall Plan of Care:** The orders found on the physician order sheets were part of an overall treatment plan with specific anticipated outcomes, as evidenced by Dr. Tucker's progress notes and the "overall plan of care" documents for Zala Farley (Appendix H). The plan of care statement, dated October 21, 1996, details the patient's complaint, such as "Elongated painful ingrown thickened, discolored, dystrophic, onychomycosis painful symptomatic toenails."

The specific goals outlined include:

1. Prevention of localized cellulitis, osteomyelitis, and amputation.
2. Relief of painful symptomatic toenails and feet.
3. Prevention of digital ulceration.
4. Promotion of tissue granulation and wound healing.

The Fifth and Ninth Circuits' current rules deny relief to innocent defendants based on discredited and misinterpreted policies, lacking a plausible avenue for correction. This Court should grant certiorari to resolve the circuit split and affirm that new CMS evidence establishing actual innocence warrants relief through a writ of error coram nobis.



## **THIS CASE PRESENTS A GOOD VEHICLE TO ADDRESS THE STANDARD FOR CORAM NOBIS RELIEF**

This case presents an ideal vehicle to address the question presented because the Court need not resolve any factual issues to reach that question. In particular, the Fifth Circuit should find Dr. Tucker's new evidence of actual innocence "compelling." It denied relief although Dr. Tucker did point to "change in controlling law."

The question whether new evidence of actual innocence justifies coram nobis relief is thus cleanly presented here and requires no fact finding from this Court.

Many coram nobis cases raising claims of actual innocence, by contrast, will raise subsidiary factual questions. But the Court need not address any of those questions in the present case because the new Secretary's Agency CMS Guidelines, Laws and Rules evidence presented in Appendix I exhibits 82-142 undermines the government's entire theory of guilt. Nor need the Court worry that it will not be able to reach the question presented because Dr. Tucker could not demonstrate her innocence under the appropriate standard in any event. Because in the light of newly discovered exculpatory factual material evidence the Secretary's Agency CMS consensus undermines the theory of conviction, Dr. Tucker can demonstrate her actual innocence, however stringent the standard.

## **II. Dr. Tucker's Defense Against Healthcare Fraud Allegations**

### **Newly Discovered Evidence (Exhibits 80-142):**

This newly presented evidence is detailed in Appendix I, which contains Exhibits 80-142.

The evidence includes recent changes in the Centers for Medicare and Medicaid Services laws regarding routine foot care.

#### **Compliance with CMS Laws:**

Dr. Tucker asserts that Dr. Martin's order/referral adhered to CMS guidelines. This compliance is crucial for validating the legitimacy of the services provided and ensuring they fall within Medicare's coverage.

#### **Specificity of the Order:**

Appendix H Exhibit 26-A is cited to show that there was no standing "PRN" (as needed) order for podiatry.

Instead, it was a specific order that indicated a right toe particular problem, aligning with Medicare Part B standards.

#### **Clinical Findings and Diagnosis:**

Systemic diagnosis codes and lab reports for mycotic nails (onychomycosis) support the necessity and specificity of the foot care services provided. These findings demonstrate that the treatment was clinically justified and necessary under Medicare guidelines.

#### **Intervening Change in CMS Laws:**

Changes in CMS laws between 2010 and 2024 have affected the guidelines for routine foot care.

These changes support Dr. Tucker's position that her actions were in compliance with the most current CMS rules.

#### **Court's Error:**

The District Court's judgment is contested on the grounds that Dr. Tucker's counsel was ineffective.

The court's finding of guilt was based on the belief that Dr. Tucker treated patients without confirming referrals or with non-specific standing orders.

The newly presented evidence and the intervening changes in law should be considered to reassess the validity of the court's decision.

Dr. Tucker's defense is built on the presentation of new evidence and changes in CMS laws that demonstrate her adherence to the required legal and medical standards for providing routine foot care services covered by Medicare Part B. This evidence challenges the initial findings of healthcare fraud by showing that the treatments were necessary, specific, and compliant with updated CMS guidelines.

#### **References**

- Newly discovered evidence detailed in Appendix I (Exhibits 80-142).
- Specificity of Dr. Martin's order/referral and Exhibit 26-A showing no standing "PRN" order.
- Clinical findings for onychomycosis and systemic diagnosis codes supporting the necessity of the foot care services.

Petitioner states a claim for actual innocence, factual innocence, ineffective counsel and wrongful conviction on 1 Count 16 conviction Zala Farley 10/21/1996 exhibit 26-A referral order signed by Dr. Kathleen Martin, MD that was certified within 60 days that the referral order for May See Podiatrist of Choice that did not have "PRN" Standing order written and documented a right foot toe problem, Foot care services are covered in the presence of a systemic diagnosis codes conditions (exhibit 140 and 142), was signed by referring physician Dr. Kathleen Martin that in the light of newly discovered due to due diligence and excusable neglect Rule 60 (b) (1) (6) presenting exculpatory factual material evidence and new intervening change in controlling laws from CMS presented in exhibits 141 PRN Orders Medicare Benefit Policy Manual (CMS Pub. 100-02, Ch. 7 §30.2.2) 7/31/2015 -2021

and new controlling CMS Rules, Regulations and Final Review Laws for Ordering & Certifying Exhibits 133, 90; see Appendix I Exhibits 80—142 that can undermine the validity of count 16 conviction; that new evidence could not in the exercise of due diligence have been discovered earlier (People v. Shipman; People v. Vasilyan) before the Court on May 14-15, 2001 28 U.S.C. § 2255 are clearly sufficient to establish and prove that a reasonable fact finder could find Petitioner not guilty; actual innocence, factual innocence, wrongful conviction, and ineffective assistance of counsel shows a plain error needs to be corrected to prevent manifest injustice, errors of facts, constitutional error, fundamental error, jurisdictional error, and procedural error that has resulted loss of civil disabilities and complete miscarriage of justice that the court can grant an order for All Writs Act, 28 U.S.C. § 1651(a).

Petitioner presents in the light of newly discovered factual CMS evidence and intervening change in controlling law in **Appendix I Exhibit 142 and 140** Rule 60 (b) (1) (6) that can explain why new evidence is relevant to proof of actual innocence.

**Misinterpretation of CMS Laws:**

The Petitioner claims that the court misinterpreted CMS laws, particularly regarding the role of medical doctors in writing referrals for podiatry services. The argument is that medical doctors are the gatekeepers and should be held liable for non-compliant referrals.

**Compliance with CMS Guidelines:**

Exhibit 26-A is cited as an example of a referral order that complies with CMS guidelines. The referral includes necessary details such as:

Dr. Kathleen Martin, MD October 1996 certified referral order presented in exhibit 26-A shows she certified that she evaluated patient Zala Farley within 60 days;

Dr. Martin verified patient had a right foot toe condition that nursing staff was applying dressing changes;

Dr. Martin wrote an order for may see podiatrist of choice that was not a "PRN" Standing order Dr. Martin documented in her order systemic diagnosis codes:

(1). CVA (2). CVD (3). Osteoarthritis (4). Depressive Disorder (5) HTN (6) Anemia; order for treat niacin 12 for anemia treatment;

the specific service requested (podiatry), and the physician's signature.

Petitioner can show that patient Zala Farley presents with atherosclerosis, pernicious anemia and niacin systemic conditions that meet the qualification modifiers for exception for podiatry including treatment of mycotic nails presenting lab reports finding that support diagnosis of onychomycotic fungal nails in progress notes and overall plan of care that support treatment provided presented with exhibit 26-A show no crime of health care fraud was committed.

**New Evidence Supporting Compliance:**

Exhibit 140 is presented as new evidence showing that Dr. Martin documented in her order presented in exhibit 26 -A the Zala Farley's systemic diagnosis codes and right toe complaint, which should meet CMS guidelines for routine foot care coverage.

**Exhibit 142 Billing and Coding: Routine Foot Care A56680**

CMS Internet-Only Manual, Pub. 100-02, Medicare Benefit Policy Manual, Chapter 15, §290 Foot Care

Article Title: Billing and Coding: Routine Foot Care Article Type: Billing and Coding

Original Effective Date: 07/25/2019

Revision Effective Date: 03/14/2024

The information in this article contains billing, coding or other guidelines that complement the Local Coverage Determination (LCD) for Routine Foot Care L37643.

**Coding for Mycotic Nails See Appendix H Zala Farley Lab Report**

Although CPT® coding does not exclusively apply CPT® codes 11720 and 11721 to mycotic nails or to the feet, Medicare assumes these are the CPT® codes usually used to code for services related to debriding mycotic nails.

Assuming services are being provided based on this indication, and the above requirements are documented, the claim should be coded with ICD-10-CM code B35.1 as a primary code AND L02.611- L02.612, L03.031-L03.032, L03.041-L03.042, M79.671-M79.672, M79.674-M79.675 or R26.2 as a secondary code. Systemic condition modifiers are not necessary for services performed for this indication with these diagnosis codes.

The nail debridement procedure codes (11720-11721) are considered noncovered routine foot care when these services do not meet the guidelines outlined above for mycotic nail services or are not based on the presence of a systemic condition. If the nail debridement procedures are performed in the absence of mycotic nails and as part of foot care, they must meet the same criteria as all other routine foot care services to be considered for payment.

### **Coding for Systemic Conditions**

Foot care services are covered in the presence of certain conditions described in the CMS Internet-Only Manual, Pub 100-02, Medicare Benefit Policy Manual, Chapter 15, §290 identified by the following ICD-10-CM codes:

Arteriosclerosis obliterans (A.S.O., arteriosclerosis of the extremities, occlusive peripheral arteriosclerosis)

Peripheral neuropathies involving the feet: Pernicious Anemia\* D51.0 and G63

When the patient's condition is 1 of those designated by an asterisk (\*) above, routine procedures are covered only if the patient is under the active care of a doctor of medicine or osteopathy who documents the condition. This must be indicated by the name and national provider identifier (NPI) of the attending physician in block 17 and 17B of the CMS-1500 or the equivalent electronic claim format. The date the patient was last seen (DPLS) by the attending physician should be billed in block 19. Claims for such routine services should show the complicating systemic disease in block 21 of the CMS-1500.

A presumption of coverage will be applied when the physician rendering the routine foot care has identified:

1 Class A finding using modifier Q7;

2 Class B findings using modifier Q8; or

1 Class B and 2 Class C findings using modifier Q9.

In addition to a valid billing indicator, these services must include a systemic condition diagnosis listed above. All claims for routine foot care based on the presence of a systemic condition should have a billing indicator of Q7, Q8 or Q9 to be considered for payment.

Claims without a systemic diagnosis listed will be denied as non-covered routine-type foot care services.

Services not meeting the instructions and criteria in this statement of national coverage will be denied as statutory non-covered services. For ICD-10-CM codes designated by an asterisk (\*), we will require the DPLS and the NPI of the doctor of medicine or osteopathy.

In 1954, the Supreme Court determined in *United States v. Morgan* or like the Fifth Circuit and Northern District Court of Texas have held it is a claim that coram nobis relief can be granted. *Santos-Sanchez v. United States*, 548 F.3d 327, 330 (5th Cir. 2008), vacated on other grounds, 559 U.S. 1046 (2010). Indeed, Congress has abolished the writ in civil cases, see Fed. R. Civ. P. 60(e), and the traditional view is that coram nobis relief is only available in criminal cases "from the court that issued the criminal judgment." *Phillips*, 614 F. App'x at 586 (citing *Sinclair v. Louisiana*, 679 F.2d 513, 514 (5th Cir. 1982); (1) an intervening change in controlling law; (2) the availability of new evidence; or (3) the need to correct clear error of law or prevent manifest injustice." *Lazaridis v. Wehmer*, 591 F.3d 666, 669 (3d Cir. 2010); *McQuiggin v. Perkins*, 569 U.S. 383 (2013) (actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar ... or, as in this case, expiration of the statute of limitations.

Petitioner can establish and prove in the light of newly discovered factual undisputed CMS Rules, Regulations and Final Review Laws for Ordering & Certifying presented in Exhibit 133 09/06/2023 05:05 PM and New exhibit 90 CMS Final Review Rules and Regulations for Nursing Home Orders Frequency of Physician Visits 4/16/2014 Retroactive: F385 §483.40 F386 §483.40(b); F387 §483.40(c); 6698.1; 6698.3 that are Appellee(s) documents that prove Dr. Martin orders were not standing orders; thus, there is no additional requirements for a physician responding to the referral like Dr. Karen Tucker, DPM to obtain an additional specific authorization and referral for the medically necessary services sufficient to satisfy Medicare's requirements can prove Petitioners' actual innocence, factual innocence, wrongful convicted on count 16 and ineffective assistance of counsel in fundamental error shows a total miscarriage of justice that this US Supreme Court can grant extraordinary relief All Writs Coram nobis to correct clearly erroneous Courts in erred judgments All Writs Act, 28 U.S.C. § 1651(a) on March 19, 2024, February 7, 2024, April 7, 2020, Hearing 28 U.S.C. § 2255 on May 14-15, 2001, Plea Agreement on March 10, 1999 and Dec. 18, 1998.

The Supreme Court noted that the writ may issue to correct factual errors only in "those cases where the errors were of the most fundamental character; that is, such as rendered the proceeding itself irregular or invalid." *U.S. v. Mayer*, 235 U.S. 55, 69 (1914).

Petitioner can argue that she has met her burden of proof to establish entitlement for an order is granted for extraordinary relief pursuant coram nobis relief showing that: (1) Petitioner can established the grounds for challenging the criminal conviction are of a constitutional, jurisdictional, or fundamental character; (2) Petitioner can show some error occurred despite the presumption of regularity; (3) she is suffering from or facing significant collateral consequences from a prior criminal conviction; (4) the allegation has not been waived; and (5) no other common law remedy is available to petitioner.

In *Skok*, Judge John C. Eldridge, writing for the unanimous Court of Appeals, discussed the expanded scope of the writ of error

coram nobis in Maryland. What is clear is that Skok did not create a generalized common law post-conviction, post-custody remedy. *People v. Kim*, 202 P.3d 436, 456 (Cal. 2009). Skok set forth as follows:

In light of these serious collateral consequences, there should be a remedy for Karen Tucker a convicted person who is not incarcerated and not on parole or probation, who is suddenly faced with a significant collateral consequence of his or her conviction, and who can legitimately challenge the conviction on constitutional or fundamental grounds.

Karen Tucker should be able to file a motion for coram nobis relief regardless of whether the alleged infirmity in the conviction is considered an error of fact or an error of law.

This expanded scope of coram nobis to challenge criminal convictions is, however, subject to several important qualifications which are set forth in *United States v. Morgan* and the cases applying *Morgan*. Thus, the grounds for challenging the criminal conviction must be of a constitutional, jurisdictional or fundamental character.

*United States v. Morgan*, 346 U.S. at 512[.]” *Skok*, 361 Md. at 78. The Court then laid out the important qualifications that we have summarized above. Significantly, coram nobis relief still presupposes a qualifying challenge to the underlying conviction by a person who is no longer serving a sentence but who is nonetheless facing serious consequences from that conviction.

- I. The legal question at hand concerns whether a freestanding claim of actual innocence, based on newly discovered evidence, meets the standard for coram nobis relief.
- II. This issue has resulted in a split among the federal circuits.

#### **Circuits Rejecting Freestanding Actual Innocence Claims for Coram Nobis Relief Second, Third, Seventh, Ninth, and Eleventh Circuits:**

- These circuits require that a coram nobis petition allege a constitutional or jurisdictional error. They do not recognize freestanding claims of actual innocence based solely on newly discovered evidence.
  - **Byrnes v. United States**, 408 F.2d 599 (9th Cir. 1969): Emphasized the need for a constitutional controversy to grant coram nobis relief. see also *Telink, Inc. v. United States*, 24 F.3d 42, 45 (9th Cir. 1994) (The writ of error coram nobis affords a remedy to attack an unconstitutional or unlawful conviction in cases when the petitioner already has fully served a sentence). A freestanding claim of actual innocence—one in which the petitioner has discovered new evidence presented in exhibits 82-142 that proves that Petitioner did not commit the 1 count on 16 crime of conviction, but where she can establish that an independent constitutional error infected the proceedings that led to conviction—does warrant coram nobis relief. *Jones v. State*, 445 Md. 324, 338 (2015).

#### **Circuits Recognizing Freestanding Actual Innocence Claims for Coram Nobis Relief Sixth, Eighth, and Tenth Circuits:**

These circuits allow coram nobis relief based on compelling new evidence that demonstrates actual innocence, even without an independent constitutional or jurisdictional error.

**Kandiel v. United States**, 964 F.2d 794 (8th Cir. 1992): Recognized that coram nobis can be used to address compelling new evidence proving innocence. The Eighth Circuit confirmed that coram nobis relief is available for compelling new evidence that undermines the factual basis for a conviction. *Id.* at 797 n.1; *Azzone v. United States*, 341 F.2d 417, 419 (8th Cir. 1965) (considering petitioner’s claim that he has newly discovered evidence which proves that he did not violate 18 U.S.C.A. § 1073).

**United States v. Bustillos**, 31 F.3d 931 (10th Cir. 1994): Allowed coram nobis relief for errors resulting in a complete miscarriage of justice, including actual innocence.

**United States v. Johnson**, 237 F.3d 751 (6th Cir. 2001): Permitted coram nobis relief based on new evidence of a fundamentally unjust character that would have altered the trial outcome.

#### **Analysis and Implications**

The Ninth Circuit, in particular, takes a stringent approach, requiring constitutional or jurisdictional errors for coram nobis relief, thus denying petitions based solely on actual innocence claims. This approach aligns with the Eleventh Circuit’s stance in **Moody**, where even conclusive new evidence of innocence was deemed insufficient without an accompanying constitutional error.

In contrast, the Sixth, Eighth, and Tenth Circuits acknowledge that a fundamental miscarriage of justice, such as convicting an innocent person, warrants coram nobis relief. The **Kandiel** and **Bustillos** cases exemplify this perspective, where the courts are willing to correct errors purely based on new evidence of innocence.

Dr. Tucker’s case, presenting new evidence of actual innocence, would likely have warranted coram nobis relief in the Fourth, Sixth, Eighth, Ninth or Tenth Circuits due to their broader interpretation of what constitutes a “complete miscarriage of justice.” However, in the Fifth Circuit, where the case was adjudicated, the stricter requirement of showing a constitutional or jurisdictional error precludes relief based solely on new evidence of innocence.

This discrepancy illustrates a significant legal divide on the availability of coram nobis relief, emphasizing the need for the Supreme Court to address and harmonize the standard across circuits, ensuring that claims of actual innocence receive consistent consideration.

### **Dr. Tucker's Compelling New Evidence of Actual Innocence Would Have Warranted Relief in the Sixth, Eighth, and Tenth Circuits**

Thus, had Dr. Tucker's case been tried in these jurisdictions, her new evidence would likely have overturned her conviction. However, because her case fell under the Fifth Circuit, where a freestanding actual innocence claim is not sufficient for coram nobis relief without an accompanying constitutional or jurisdictional error, her conviction remains, despite the compelling evidence of her innocence. This discrepancy in outcomes based solely on jurisdiction is an intolerable result that undermines the pursuit of justice.

### **III. Coram Nobis Relief, Jurisdictional Issues and Loss of Civil Disabilities**

The question addresses whether the petitioner has satisfied the prerequisites for coram nobis relief and whether there were errors of fact in the original conviction by the Northern District Court of Texas, Dallas Division. It also examines the jurisdictional aspects under 28 U.S.C. § 1332 and the potential for correcting fundamental errors to prevent a miscarriage of justice. *United States v. Delhorno*, 915 F.3d 449, 453 (7th Cir. 2019) (*United States v. Wilkozek*, 822 F.3d 364, 368 (7th Cir. 2016)). "A fundamental error that invalidates a criminal proceeding is one that undermines our confidence that the defendant is actually guilty." *Wilkozek*, 822 F. 3d at 368.

#### **Prerequisites for Coram Nobis Relief:**

Coram nobis relief is a rare remedy used to correct errors of the most fundamental character when no other remedy is available. The petitioner has demonstrated:

1. A more usual remedy is not available.
2. Valid reasons exist for not attacking the conviction earlier.
3. Adverse consequences exist from the conviction.
4. The error is of the most fundamental character

(1) Petitioner's time to appeal the 2001 conviction expired, habeas corpus 28 U.S.C. § 2255 was held on November 16, 1999, and an evidentiary hearing concerning her claims was ultimately conducted on May 14-15, 2001 was denied.

In the light of newly discovered undisputed factual exculpatory material evidence presented in Appendix I exhibits 80-142 dated from 2010-2024 discovered due to due diligence and excusable neglect Rule 60 (b) (1) (6) could not in the exercise of due diligence have been discovered earlier and presented before the Northern District Court on May 14-15, 2001. *People v. Shipman*; *People v. Vasilyan*.

The petitioner had served the entire sentence and is no longer in custody. As a result, more usual remedies are not available to Karen Tucker, Petitioner according to both the Government and the Court.

Petitioner case is a claim of actual innocence, a delay in seeking relief does not bar relief. *McQuiggin v. Perkins*, 569 U.S. 383 (2013) (actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar ... or, as in this case, expiration of the statute of limitations.

Petitioner states a claim for actual innocence. Petitioner can show she presently suffers loss of civil disabilities as a collateral continued consequence of count 16 wrongful conviction in fundamental error and miscarriage of justice that the Court can grant order for All Writs Act, 28 U.S.C. § 1651(a) to prevent manifest injustice to achieve justice.

#### **Karen Tucker, Petitioner argues that because her conduct was never a crime under 18 U.S. Code § 1347, she is entitled to a writ of error coram nobis to invalidate the judgment.**

Petitioner can show the District Court's denial of coram nobis relief is reviewed for abuse of discretion, keeping in mind that "an error of law is an abuse of discretion per se." *Alikhani v. US*, 200 F.3d 732, 734 (11<sup>th</sup> Cir. 2000).

The district courts of the United States have original and exclusive jurisdiction over "all offenses against the laws of the United States." 18 U.S.C. § 3231. Despite this broad grant of power, the decision in *United States v. Meacham*, 626 F.2d 503 (5th Cir.1980), establishes that a district court is without jurisdiction to accept a guilty plea to a "non-offense."

Petitioners claim for actual innocence of the count 16 charge of health care fraud 18 U.S. Code § 1347 in this circumstance, the rule of Meacham, that a district court lacks jurisdiction when a person conviction of a non-offense. The Northern District Court of Texas, Dallas had no jurisdiction to accept a plea to conduct that does not constitute health care fraud, and the doctrine of procedural default therefore does not bar Karen Tucker's petition present challenge. The Courts finding that a "genuine claim that the district court lacked jurisdiction to adjudicate the petitioner guilty may well be a proper ground for coram nobis relief as a matter of law. Id. At 734. Indeed, jurisdictional error is by its nature of such a "fundamental character" as to render proceedings "irregular and invalid," Morgan. 346 US at 509n. 15, 74 S.Ct. 247, and coram nobis relief affords a procedural vehicle through which such error may be corrected.

When a court without jurisdiction convicts and sentences a defendant, the conviction and sentence are void from their inception and remain void long after a defendant has fully suffered their direct force. Moreover, as the Supreme Court reiterated in Spencer v. Kemna, 523 U.S. 1, 118 S. Ct. 978, 140 L.Ed. 2d 43 (1998) it is an obvious fact of life that most criminal convictions do in fact entail adverse collateral consequences. Id. At 12, 118 S.Ct.978. Wolfe v. Coleman, 681 F.2d 1302, 1305 (11<sup>th</sup> Cir. 1982); Minor v. Dugger, 864 F.2d 124, 126 (11<sup>th</sup> Cir. 1989). Accordingly, a writ of error coram nobis must issue to correct the judgment that the court never had power to enter. Since coram nobis relief is available in this circumstance as a matter of law, the district court abused its discretion in summarily dismissing Tucker's petition. U.S. v. Peter, 310 F.3d 709 (11<sup>th</sup> Cir. 2002).

Thus, the facts to which Tucker pled guilty did not constitute a crime for healthcare fraud 18 U.S. Code § 1347 under Cleveland. Cleveland v. United States, 531 U.S. 12 (2000), established that the conduct with which she was charged is not proscribed by the statute she was convicted of violating. Decisions of the Supreme Court construing substantive federal criminal statutes must be given retroactive effect. Bousley v. United States, 523 U.S. 614, 620-21, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998).

The law recognizes that there must be a vehicle to correct errors "of the most fundamental character; that is, such as rendered the proceeding itself irregular and invalid." Morgan, 346 U.S. at 509 n. 15, 74 S.Ct. 247 (quoting United States v. Mayer, 235 U.S. 55, 69, 35 S.Ct. 16, 59 L.Ed. 129 (1914)); see also United States v. Mills, 221 F.3d 1201, 1204 (11<sup>th</sup> Cir.2000). In essence, the writ of error coram nobis acts as an assurance that deserved relief will not be denied as a result of the technical limitations of other post-conviction remedies. See Romualdo P. Esclava, Availability, Under 28 U.S.C.A. § 1651, Of Writ of Error Coram Nobis to Vacate Federal Conviction Where Sentence Has Been Served, 38 A.L.R. Fed 617, § 2(a) (1978).

A writ of error coram nobis is a remedy available to vacate a conviction when the petitioner has served his sentence and is no longer in custody, as is required for post-conviction relief under 28 U.S.C. § 2255. As the Supreme Court explained in United States v. Morgan, 346 U.S. 502 (1954), coram nobis relief is available after sentence has been served because "the results of the conviction may persist.

Petitioner moves the US Supreme Court for an order is granted for extraordinary relief pursuant All Writs Act, 28 U.S.C. § 1651(a) that provides a way to collaterally attack the Trial Court clearly erroneous in error erred 6/20/2023, April 7, 2020 final judgment err to vacate May 14-15, 2001 trial court, March 10, 1999, December 18, 1998 Plea Agreement and Court of Appeals for the Fifth Circuit March 19, 2024 and February 7, 2024, decision for 1 count on 16 criminal conviction.

Petitioner is no longer in custody, and therefore cannot seek relief under 28 U.S.C. §§ 2241 or 2255. Chaidez v. U.S.; U.S. v. Morgan. Petitioner's suit against the Respondent(s) was based upon Coram nobis, provides a federal court with authority to issue a writ of error coram nobis, which allows a petitioner to vacate Karen Tucker conviction after she has served her entire sentence. U.S. v. Mills; Peter, 310 F.3d at 712. Coram nobis relief is available after Petitioner's sentence has been served because the results of the conviction persist.

In other words, dismissal is not warranted where Karen Tucker, petitioner succeeds to meet even one of the coram nobis requirements. Rodriquez-Lucro v. U.S.; Murray v. U.S.

It has taken Petitioner years to discover new evidence of actual innocence that has materialized. Petitioner has completed terms of imprisonment and All Writs Act, 28 U.S.C. § 1651(a) extraordinary relief is the only avenue for seeking relief.

The writ of coram nobis is an extraordinary remedy available to Karen Tucker, Petitioner no longer in custody who seeks to vacate her criminal wrongful conviction on count 16 in circumstances where Petitioner can demonstrate errors of facts that can prove actual innocence, factual innocence, plain errors, constitutional error, jurisdictional errors, procedural errors and fundamental errors that show a complete miscarriage of justice exist and loss of civil disabilities, as a present continued consequence of the count 16 conviction, and that the challenged error is of sufficient magnitude to justify the extraordinary relief.

U.S. v. Esogbue; Jiminez v. Trominski. The writ is intended to achieve justice when errors of the most fundamental character have occurred in a criminal proceeding. Mwalumba v. U.S.; U.S., v. Dyer; U.S. v. Morgan.

**First**, Karen Tucker, petitioner has shown she has completed her terms of probation and is no longer in custody since March 10, 2002. U.S. v. Singh.

**Second**, Petitioner presents a detailed account of the civil disabilities she continues to suffer as a present and continued consequence of her prior wrongful conviction. These civil disabilities include the loss of various rights such as the right to vote, the right to bear arms deprivation of Second Amendment Right, the right to sit for jury trial duty, and the right to hold occupational licenses.

1. District of Columbia v. Heller (2008) In a landmark 5-4 decision, the Supreme Court ruled that the Second Amendment protects an individual's right to possess a firearm, unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.

The decision struck down a Washington, D.C. handgun ban and requirement that lawfully owned rifles and shotguns be kept "unloaded and disassembled or bound by a trigger lock."

2. McDonald v. City of Chicago (2010): This decision extended the Second Amendment protections recognized in Heller to the states through the Fourteenth Amendment's Due Process Clause.

The ruling invalidated Chicago's handgun ban, emphasizing that the right to keep and bear arms for self-defense is a fundamental constitutional right.

Petitioner is required to register yearly as a convicted felon with various databases, faces limitations on pursuing certain professional opportunities, and is barred from obtaining certain licenses and certifications. The Petitioner's argument emphasizes the ongoing and significant impact of the wrongful conviction on her civil rights and professional opportunities. The Petitioner cites legal precedents and cases to support her position, highlighting the substantial and enduring nature of the civil disabilities resulting from the wrongful conviction. The Petitioner's petition for a writ of error coram nobis is grounded in the assertion of the continuing civil disabilities as a present and continued consequence of the wrongful conviction. The Petitioner argument underscores the profound and lasting impact of the wrongful conviction on her civil rights and professional pursuits.

Petitioner must register yearly as a convicted felon with Healthcare Integrity and Protection Data Bank, National Practitioner Data Bank and Medical Examiners is a CMIT felon stigma, barred from podiatry and medical licensure in Florida and other states; barred from security exchange as MBA degree graduate, allopathic medical degree license cannot sit for ECFMG exam that Petitioner has earned degrees or certifications shows a fundamental error that the Court can grant order for extraordinary relief pursuant Coram nobis. Chico v. U.S.; U.S. v. Castro.

Petitioner is a federal felon that can show she suffers loss of right to bear arms showing, the US Supreme Court's 1994 decision in Beecham v. U.S. In that case, the Court held that federal felons remain subject to the firearms disability of 18 U.S.C. § 922(g)(1) until their rights are restored by a federal procedure, and therefore the disability continues to apply to a federal felon even if her civil rights have been restored under state law. As a result of Beecham, a federal felon's only means of regaining firearms privileges is through a presidential pardon or through the restoration process provided under 18 U.S.C. § 925(c).

Petitioner is a resident of the state of New Jersey that as present continued collateral consequence of the count 16 conviction suffer civil disabilities explain as follows: A person serving a sentence for, or on parole or probation as a result of, a conviction of any indictable offense under the laws of any state or the United States forfeits the right to vote, N.J. Stat. Ann. §§ 2C:51-3(a), 19:4-1(8), and to sit on a jury. N.J. Stat. Ann. § 2A:168A-3. For a consideration of the interaction between the federal firearms disability and New Jersey law concerning the loss and restoration of civil rights and firearms privileges, U.S. v. Breckenridge. N.J. Stat. Ann. § 2C:39-1(r)). N.J. Stat. Ann. §2C:39-7(a). No person convicted of a crime may obtain a permit to receive or purchase a handgun, nor may such a person obtain a firearms purchaser identification card to receive, acquire, purchase, or sell a rifle or shotgun. N.J. Stat. Ann. §§ 2C:39-5(b), (c); 2C:58-3(a), (b), (c). Persons convicted of any felony are ineligible to vote, subject to exceptions imposed by the legislature.

Texas Const. art. 6, § 1. This disqualification applies to federal and state felons. Shepherd v. Trevino; Hayes v. Williams. Petitioner is a person convicted of a felony is disqualified from sitting on petit and grand juries. Tex. Gov't Code § 62.102(7); Tex. Crim. Proc. Code art. 19.08(4). A prospective petit juror may be challenged for cause if convicted of theft or any felony. Tex. Crim. Proc. Code art. 35.16(a)(2). Texas Const. art. 16, § 5. Persons convicted of a felony or misdemeanor that directly relates to the duties and responsibilities of the licensed occupation are subject to license revocation, suspension, or denial. Texas Rev. Civ. Stat. art. 6252-13c, § 4(a).

The Ninth Circuit concludes that reputational harm alone suffices for coram nobis relief. *Hirabayashi v. US*

The Fourth Circuit takes a similar approach. *U.S. v. Mandel*, granting coram nobis relief and noting that, without it, petitioners would face the remainder of their lives branded as criminals. The Fourth Circuit also noted that conviction of a felony imposes a status upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities. *Parker v. Ellis*; *Loftus*. The Fourth Circuit's observation in *Mandel* that petitioners would be branded as criminals without coram nobis relief aligns the Fourth Circuit with the Ninth Circuit. In essence, the *Mandel* Court, like the *Hirabayashi* Court, presumes that consequences collateral to an invalid conviction exist.

The Fifth Circuit is at times considered to be aligned with the Ninth and Fourth. It appears that the Fifth Circuit requires collateral consequences but, like the Ninth Circuit, takes a lenient approach. *U.S., v. Marcello*, (noting collateral-consequences requirement and granting writ but not identifying particular consequences suffered). Because the minority approach recognizes that reputational harm from a conviction is damaging enough for federal relief, coram nobis is available under this approach even if the petitioner has other convictions that would remain intact. *U.S. v. Walgren*.

The mere possibility that a conviction for a crime Tucker did not commit could adversely affect any sentence she might receive on pending charges is sufficient to satisfy the case or controversy requirement of Article III, the Court stated. *Akinsade* (third prong satisfied where invalid conviction resulted in threat of deportation); *Bereano v. United States*, 706 F.3d 568 (4th Cir. 2013) (third prong satisfied where challenged conviction resulted in disbarment).

### **Third, Argument for Reasonable Diligence in Seeking Prompt Relief**

Petitioner has demonstrated reasonable diligence in seeking prompt relief, as supported by the precedent set in *Dyer*, 136 F.3d at 427. This diligence includes the pursuit of legal remedies following the 3/10/1999 count 16 conviction and subsequent efforts to establish actual and factual innocence regarding allegations of health care fraud.

## **II. Timeline of Legal Actions and Diligence**

### **A. Initial Conviction and Legal Pursuits**

1. After the count 16 conviction on 3/10/1999, the Petitioner pursued legal litigation to demonstrate that the referring physician orders were valid and qualified under Medicare standards.
2. On November 16, 1999, Petitioner filed a motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody under 28 U.S.C. § 2255 in the Trial Court seeking to dismiss the count 16 conviction. On May 14-15, 2001, the case was heard and denied on November 11, 2001.
3. Petitioner was denied on April 5, 2002 a certificate of appealability by the Northern District Court of Texas, Dallas and the Court of Appeals for the Fifth Circuit finding the petitioner "overlooked the fact: that she would have been retried on all the counts in the indictment.
4. The petitioner, in her motion for reconsideration, presented credible evidence consisting of trial testimony that she would have proceeded with trial, despite the possibility of retrial on all counts.
5. Nonetheless, Petitioner was again denied, and she hereby respectfully requests review.

### **B. Appeals and Continued Efforts**

Petitioner appealed to the Fifth Circuit, invoking Rule 60(a)(b)(1)(2)(3)(6), arguing that any delays were equitably tolled under Rule 4(a)(4)(vi) due to factors beyond personal neglect, including misplacement of the case file and pending hearings.

Hearings and decisions were pending before several courts and administrative bodies, including:

Judge Barrett, ALJ; Medicare Appeals Board Judge Gipe; Judge Ireanus, New Jersey District Court, Camden;

Court of Appeals for the Third Circuit; Federal Claims Court; Northern District Court of Texas, Dallas; Fifth Circuit Court of Appeals; U.S. Supreme Court; The Covid-19 pandemic further prevented earlier relief, necessitating ongoing legal actions and presentations of new evidence.

## **III. Newly Discovered Evidence and Factual Innocence and intervening change in CMS LAW**

### **A. Presentation of New Evidence**

1. In September 2010 – March 2024, Petitioner discovered new factual material evidence in CMS documents, which were not previously available due to diligence and excusable neglect under Rule 60(b)(1).
2. New exhibits (80-142) demonstrate that the orders (ex. 26-A, 41-A) were valid, not standing orders, and qualified under Medicare standards, specifically for count 16 patient Zala Farley on October 21, 1996 diagnosis covered for routine foot care.

### **B. Impact on Health Care Fraud Allegations**

1. New CMS Law can prove actual and factual Petitioner innocence on count 16 health fraud under *United States v. Nora*, \_\_\_, F.3d \_\_\_, No. 18-31078, 2021 WL 716628, at \*2 (5th Cir. Feb. 24, 2021)
2. The newly discovered evidence supports that the \$75 billing claim submitted was legitimate, proving Petitioner did not commit health care fraud.



3. This evidence can alter the opinion of a reasonable fact finder, showing that Petitioner did not knowingly make any false material declarations (18 U.S.C. § 1623(a)) nor corruptly obstruct, influence, or impede any official proceeding (18 U.S.C. § 1512(c)(2)).

The Petitioner has exercised reasonable diligence in pursuing legal relief for the count 16 conviction. The discovery of new evidence substantiates the claim of actual and factual innocence, necessitating a review and potential reversal of the conviction due to constitutional and procedural errors that impeded a fair trial.

#### **Fourth, Lack of Available Remedies and Impact of Newly Discovered Evidence**

##### **A. Absence of Available Remedies**

###### **1. Plea Agreement (3/10/1999):**

At the time of the plea agreement on March 10, 1999, the Petitioner had no other remedy available to contest the charges effectively. The plea was entered based on the evidence and legal circumstances at that time.

###### **2. Trial Court 28 U.S.C. 2255 Hearing (May 14-15, 2001):**

During the trial court hearing on May 14-15, 2001, the Petitioner continued to lack alternative legal remedies to challenge the conviction effectively. Efforts to dismiss the count 16 conviction were pursued but were constrained by the available evidence and procedural limitations.

###### **3. Trial Court Hearing (June 20, 2023):**

Even as of the trial court hearing on June 20, 2023, the Petitioner had no other effective legal remedies to address the conviction, pending the discovery of new evidence.

##### **B. Newly Discovered Factual Evidence**

###### **1. Introduction of New Evidence:**

Newly discovered factual evidence, presented in Appendix I exhibits 80-142, and intervening change in CMS controlling Law for health care fraud *United States v. Nora*, \_\_\_, F.3d \_\_\_, No. 18-31078, 2021 WL 716628, at \*2 (5th Cir. Feb. 24, 2021); includes critical documentation that was previously unavailable. This evidence was uncovered through diligent efforts and addresses key factual elements of the case.

###### **2. Validity of Referring Physician Orders:**

The new evidence demonstrates that the referring physician orders (Appendix H. 26-A, 41-A) were valid and met Medicare standards.

These orders were not standing orders but legitimate requests for patient evaluation and management.

###### **3. Specific Case of Patient Zala Farley:**

For patient Zala Farley, the billing claim submitted on October 21, 1996, for \$75 was valid and compliant with Medicare requirements. This directly contradicts the allegations of health care fraud against the Petitioner.

##### **C. Impact on Guilt and Conviction**

###### **1. Clear and Convincing Evidence:**

If the newly discovered evidence is proven and considered alongside the existing evidence, it would establish by clear and convincing evidence that the Petitioner, Karen Tucker, is factual and actually innocent of the charges.

###### **2. Reasonable Factfinder Standard:**

No reasonable factfinder, when presented with the new evidence and viewing the case, would have found the Petitioner guilty of health care fraud. This new evidence significantly undermines the basis of the original conviction. Given the newly discovered factual evidence and the lack of available remedies at the time of the plea agreement and subsequent hearings, the Petitioner has demonstrated that no reasonable factfinder would have found her guilty of the offense.

This evidence warrants a review and potential reversal of the conviction to uphold justice and rectify the constitutional and procedural errors that have occurred.

Petitioner can argue that the Court of Appeals for the Fourth Circuit declared that it is difficult to imagine an error of more fundamental character than a conviction for an offense the person did not commit. Thus, the Court could conclude that Karen Tucker, Petitioner is like Lesane satisfied the requirements for *coram nobis* relief, and the District Court abused its discretion by denying the writ. The Court explained: We emphasize that an essential purpose of the *coram nobis* remedy ... is to achieve justice. In order to achieve justice in this situation —where it is clear that the *coram nobis* petitioner is actually innocent yet spent several years in custody for an offense she did not commit — we are obligated to set the record straight. Accordingly, the Court reversed the judgment of the District Court and remanded for an award of *coram nobis* relief. *United States v. Lesane*, 40 F.4th 191 (4th Cir. 2022).

#### **1. Jurisdictional Basis:**

The petitioner argues that the Northern District Court of Texas, Dallas had subject matter jurisdiction under 28 U.S.C. § 1332 due to diversity of citizenship and an amount in controversy exceeding \$75,000.

**2. Nature of the Suit and Cause of Action:** The nature of the suit involves the Medicare Act, and the cause of action includes claims of actual innocence, factual innocence, wrongful conviction, ineffective assistance of counsel, and miscarriage of justice.

#### **3. New Evidence and Controlling Law:**

The petitioner presents new evidence (Appendix I exhibits 80-142) that was not available during the original 28 U.S.C. § 2255 hearing. This evidence includes new evidence and new controlling CMS laws, rules and regulations, and specific referral orders that comply with Medicare Part B standards.

#### **4. Errors of Fact and Fundamental Errors:**

The petitioner argues that the court made stating it lacked subject matter jurisdiction shows a plain errors, fundamental errors, constitutional errors, jurisdictional errors and procedural errors that led to a wrongful conviction. The new evidence suggests that the referral orders were compliant with CMS guidelines, and the consulted podiatrist followed these orders appropriately.

#### **Legal and Evidentiary Considerations**

##### **1. Coram Nobis Relief:**

The writ of coram nobis is available to federal courts in criminal matters under the All Writs Act, 28 U.S.C. § 1651(a). It is used to vacate a conviction when the petitioner has served their sentence and is no longer in custody.

##### **2. Jurisdiction Under 28 U.S.C. § 1332:**

Federal courts have original jurisdiction over \$1,652,000-dollar civil actions where the matter in controversy exceeds \$75,000 and the parties are citizens of different states.

**The Petitioner has met her burden of proof to establish that these criteria are met to invoke federal jurisdiction.**

#### **New Evidence and Rule 60(b):**

**1. Rule 60(b)** allows for relief from a final judgment based on newly discovered evidence presented in Appendix I exhibits 80-142 or other reasons justifying relief. The petitioner can show that the new evidence is dated after the May 14-15, 2001, motion 28 U.S.C. 2255 Hearing shows it could not have been discovered earlier with due diligence and that it is relevant to the verdict

#### **2. Fundamental Errors and Miscarriage of Justice:**

The Petitioner argues that the court's decision resulted in a miscarriage of justice due to a misinterpretation of CMS laws and ineffective assistance of counsel. The new evidence suggests that the referral orders were compliant, and the consulted podiatrist's actions were appropriate, warranting a review of the conviction to prevent manifest injustice.

The petitioner has presented a compelling argument for coram nobis relief based on newly discovered evidence, new controlling laws and fundamental errors in the original conviction. The evidence suggests that the referral orders complied with CMS guidelines and that the consulted podiatrist followed these orders appropriately. The court must carefully review this new evidence to determine if it constitutes a fundamental error that warrants vacating the conviction to prevent a miscarriage of justice. The jurisdictional basis under 28 U.S.C. § 1332 also appears to be satisfied, allowing the court to review the case.

#### **Coram Nobis Relief and New Evidence**

The question addresses whether the petitioner can show the availability of new evidence and an intervening change in controlling law presented in Appendix I exhibits 82-142, specifically in CMS Judicial Review Guidelines, Laws, and Rules, to correct clear errors of law or prevent manifest injustice. The petitioner argues that the court made plain errors in interpreting how referral orders are written and that these are not standing orders but specific for podiatry services.

##### **1. Availability of New Evidence:**

The petitioner presents new evidence (Appendix I exhibits 82-142) that was not available during the original trial. This evidence includes CMS rules and regulations and specific referral orders that comply with Medicare Part B standards.

##### **2. Intervening Change in Controlling Law:**

The petitioner argues that there has been an intervening change in controlling law regarding CMS Judicial Review Guidelines, Laws, and Rules. This change impacts the interpretation of referral orders and their compliance with Medicare standards.

##### **3. Correction of Clear Errors of Law:**

The petitioner claims that the court made clear errors in interpreting how referral orders are written, mistaking them for standing orders. The new evidence shows that the referral orders were specific and met Medicare Part B standards.

##### **4. Preventing Manifest Injustice:**

The petitioner argues that correcting these errors is necessary to prevent manifest injustice. The new evidence suggests that the consulted podiatrist followed the referral orders appropriately, and the conviction was based on a misinterpretation of the law.

## **Legal and Evidentiary Considerations**

### **1. Coram Nobis Relief:**

The writ of coram nobis is available to correct errors of the most fundamental character when no other remedy is available. The Supreme Court in *United States v. Morgan* (1954) established that coram nobis relief can be granted to correct fundamental errors, including those where new evidence proves actual innocence.

### **2. Jurisdiction and Legal Precedents:**

The Fifth Circuit and the Northern District Court of Texas, Dallas have held that coram nobis relief can be granted to correct fundamental errors. In *Santos-Sanchez v. United States*, the Fifth Circuit recognized the availability of coram nobis relief for correcting fundamental errors. The petitioner has presented a compelling argument for coram nobis relief based on newly discovered evidence and an intervening change in controlling law. The evidence suggests that the referral orders complied with CMS guidelines and that the consulted podiatrist followed these orders appropriately. Therefore, the conviction of the podiatrist may constitute a plain error, and a review of the evidence is necessary to prevent a miscarriage of justice. The jurisdictional basis under 28 U.S.C. § 1332 also appears to be satisfied, allowing the court to review the case.

## **Fifth, Relief to Prevent a Complete Miscarriage of Justice**

### **A. Burden of Proof and Fundamental Error**

#### **1. Miscarriage of Justice Standard:**

The Petitioner has met the burden of proof to show that unless relief is granted, there will be a complete miscarriage of justice. There is no error more fundamental than the conviction of an innocent person, as recognized by the Supreme Court in *Schlup v. Delo*, 513 U.S. 298, 321 (1995).

#### **2. Coram Nobis Relief:**

The United States Supreme Court should recognize that coram nobis relief is available to a petitioner who has made a compelling showing of actual innocence.

The Supreme Court has acknowledged that the conviction of an innocent person is a fundamental miscarriage of justice (*Schlup*, 513 U.S. at 321).

### **B. Precedent and Legal Support**

#### **1. Coram Nobis Relief:**

In *Jimenez v. Trominski*, the court held that coram nobis will be issued only to correct errors resulting in a complete miscarriage of justice. A writ of error coram nobis is available only to correct errors that result in a complete miscarriage of justice or under circumstances compelling such action to achieve justice.

#### **2. Supreme Court Recognition:**

*Korematsu v. U.S.* The U.S. Supreme Court has held, federal courts may review procedurally defaulted, abusive, or successive claims absent a showing of cause and prejudice if the failure to do so would thwart the ends of justice; *Kuhlmann v. Wilson* or work a fundamental miscarriage of justice. *Murray v. Carrier*; *Smith v. Murray*; *Dugger v. Adams*; *McCleskey v. Zant*.

#### **Korematsu v. United States:**

This case serves as a historical example where the Supreme Court has addressed issues of fundamental miscarriages of justice.

### **C. Argument for Coram Nobis Relief**

#### **1. Compelling Innocence:**

The Court should take this opportunity to confirm that coram nobis can be used to grant relief from a conviction for a petitioner who can make a compelling showing of innocence based on new evidence.

Petitioner's newly discovered evidence presented in Appendix I exhibit 80-142, if proven, establishes by clear and convincing evidence that no reasonable factfinder would have found her guilty of the offense.

#### **D. Legal Basis for Relief**

##### **42 U.S.C.A. § 1983 Claims:**

Petitioner's suit against the Respondent that can be reviewed for constitutional error based upon 42 U.S.C.A. § 1983, which allows for action at law or equity against those who deprive individuals of rights and privileges protected by the Constitution. Relevant cases include *Keko v. Hingle* and *Dennis v. Sparks*, where individuals were held liable for such deprivations.

##### **1. Supplemental Jurisdiction:**

Federal jurisdiction is governed by 28 U.S.C. § 1367, which provides that district courts shall have supplemental jurisdiction over all claims related to the original jurisdiction claims and form part of the same case or controversy under Article III of the U.S. Constitution.

#### **Call for Relief:**

1. Petitioner argues that without relief, there will be a complete miscarriage of justice.
2. The conviction of an innocent person is a fundamental error that warrants the application of coram nobis relief.
3. Given the compelling new evidence of innocence and the established legal standards, the Court should grant the requested relief to prevent a fundamental miscarriage of justice and uphold the integrity of the judicial process.

#### **IV. New Evidence and New Intervening Change In Controlling Law for CMS Appendix I Exhibits 82-142**

The question revolves around whether new evidence and controlling law presented in CMS Appendix I exhibits 82-142 can demonstrate that there is insufficient evidence to support civil or criminal charges for healthcare fraud. Additionally, it questions the effectiveness of Petitioner's counsel and the interpretation of CMS laws regarding referrals for podiatry services.

##### **Effectiveness of Counsel:**

The Petitioner argues that the District Court Judge erred in holding that the Petitioner's counsel was constitutionally effective. New evidence in Appendix I exhibits 80-81 is presented to support this claim.

##### **Misinterpretation of CMS Laws:**

The Petitioner claims that the court misinterpreted CMS laws, particularly regarding the role of medical doctors in writing referrals for podiatry services. The argument is that medical doctors are the gatekeepers and should be held liable for non-compliant referrals.

##### **Compliance with CMS Guidelines:**

Appendix H Exhibit 26-A is cited as an example of a referral order that complies with CMS guidelines. The referral includes necessary details such as the patient's systemic diagnosis codes (1). CVA (2). CVD (3). Osteoarthritis (4). Depressive Disorder (5) HTN (6) Anemia; order for treat niacin 12 for anemia treatment, the specific service requested (podiatry), and the physician's signature.

##### **New Evidence Supporting Compliance:**

Exhibit 140; 142 are presented as new evidence showing that Dr. Martin documented in her order presented in exhibit 26 -A the patient's systemic diagnosis codes and right toe complaint, which should meet CMS guidelines for routine foot care coverage.

##### **Legal and Evidentiary Considerations**

###### **Sufficiency of Evidence:**

1. The sufficiency of evidence to support a conviction is a critical aspect. According to legal standards, evidence is sufficient if, after viewing it in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. United States v. Hasan, 84 M.J. 181 October 2023.

###### **Admissibility of New Evidence:**

2. The admissibility of new evidence is subject to the court's discretion. A judge may exclude evidence if it is deemed inadmissible or irrelevant. The new evidence must demonstrate a clear error or fundamental error in the original trial to warrant reconsideration.

###### **Role of Medical Doctors in Referrals:**

CMS guidelines specify that medical doctors can write medically necessary certified orders and referrals for podiatry patients if they meet certain criteria, including enrollment in CMS, having an NPI number, and documenting the patient's condition and the requested service. (Appendix I Exhibit 82-142)

**Appendix I Exhibit 141 PRN Orders Medicare Benefit Policy Manual (CMS Pub. 100-02, Ch. 7 §30.2.2) 7/31/2015 -2021**  
CMS Rules, PRN Orders [https://www.cms.gov/medicare/coverage/hh\\_coverage\\_guidelines/2c.html](https://www.cms.gov/medicare/coverage/hh_coverage_guidelines/2c.html) Medicare Benefit Policy Manual (CMS Pub. 100-02, Ch. 7 §30.2.2) Orders for services as needed (PRN) must be accompanied by a description of the patient's medical signs and symptoms that would initiate a visit and a specific limit on the number of those visits to be made before an additional physician order would need to be obtained. When a PRN visit is made, the date and reason for the visit should be documented in the medical record. When an extra visit is billed and the plan of care contains open ended and/or unqualified PRN orders, an additional physician order must be obtained for the visit. If the agency does not have a signed interim order for the visit, the visit may be denied. Example 1: A beneficiary with a Foley catheter requires monthly catheter changes. The physician orders "Two (2) PRN visits per month for problems with the Foley catheter including blockage and/or leakage around the catheter." Visits are allowed because the physician specifically quantified the specific number of visits and qualified the visits to a specific need. Example 2: A beneficiary with a Foley catheter requires monthly catheter changes. The physician orders include "PRN visits." The orders are not quantified as to the number of visits or qualified as to a specific potential need of the beneficiary; no PRN visits are allowed. Example 3: "Skilled nurse 1-2x/week for 2 weeks PRN for pain rated greater than 8 on the 0 to 10 pain scale." This order is for as needed visits 1 to 2 times per week for 2 weeks for a specific symptom with a specific period of time. If the signs and symptoms indicate a need for more visits, a new physician order would need to be obtained.

##### **Exhibit 133 Ordering & Certifying 9/6/2023**

Ordering providers can order non-physician services for patients. Referring providers can request items or services which Medicare may reimburse on behalf of Medicare beneficiaries.

To qualify as an ordering and certifying provider, you must:

Have an individual National Provider Identifier (NPI)  
Be enrolled in Medicare in either an "approved" or an "opt-out" status  
Be of an eligible specialty type  
If you're currently enrolled as a Medicare Part B provider, you can already order and certify. You don't need to re-enroll in Medicare.

**Appendix I EXHIBIT 90 F385 §483.40 Physician Services F386 §483.40(b) Physician Visits** The physician must—  
(1) Review the resident's total program of care, including medications and treatments, at each visit required by paragraph (c) of this section; (2) Write, sign, and date progress notes at each visit; and (3) Sign and date all orders.

Interpretive Guidelines §483.40(b) The physician need not review the total plan of care at each visit but must review the total plan of care at visits required by §483.40(c).

**There is no requirement for physician renewal of orders.**

**F387 §483.40(c) Frequency of Physician Visits**

(1) The residents must be seen by a physician at least once every 30 days for the first 90 days after admission, and at least once every 60 thereafter. (2) A physician visit is considered timely if it occurs not later than 10 days after the date the visit was required.

**Appendix I Exhibit 82 and Exhibit 83** document the Final Rule for referral orders below that show what is required for payment is as follows:

Dr. Karen Tucker has a valid UPIN NUMBER U52317, NPI NUMBER 1992052930

Dr. Kathleen Martin has a valid UPIN NUMBER F55595 EXHIBIT 85

NPI NUMBER 1568462463 EXHIBIT 84

EXHIBIT 82, 83: The Part B items, and services must have been ordered or referred

EXHIBIT 82 -83 Medicare and Medicaid Programs; Changes in Provider and Supplier Enrollment, Ordering and Referring, and Documentation Requirements; and Changes in Provider Agreements AGENCY: CMS, ACTION: Final rule.

### **3. Judicial Errors and Miscarriage of Justice:**

The Petitioner argues that the Northern District Court of Texas and the Court of Appeals for the Fifth Circuit made plain errors in their rulings, leading to a wrongful conviction. A miscarriage of justice occurs when a conviction is based on a fundamental error that affects the fairness of the trial.

The new evidence and controlling law presented in CMS exhibits 82-142 aim to show that there was insufficient evidence to support the charges of healthcare fraud and that the Petitioner's counsel was not constitutionally effective. Additionally, the evidence suggests that the referral order in exhibit 26-A complied with CMS guidelines, potentially invalidating the conviction. The court must carefully review this new evidence to determine if it indeed constitutes a fundamental error that warrants overturning the conviction to prevent manifest injustice to achieve justice.

### **Court's Decision on Medical Doctor and Podiatrist Liability**

The question addresses whether the court erred in finding the referring medical doctor not guilty while convicting the consulted podiatrist of healthcare fraud. It also examines whether the consulted podiatrist, who followed the referral orders and provided medically necessary care, was wrongfully convicted due to the court's misinterpretation of CMS laws.

#### **Role and Responsibility of Referring Physicians:**

Referring physicians, such as medical doctors, are responsible for writing medically necessary certified orders and referrals for podiatry patients. These orders must comply with CMS guidelines, including documenting the patient's condition and the requested service. *United States v. Ayala*, 81 M.J. 25 (October 2020) (the proponent of evidence has the burden of demonstrating that the evidence is admissible).

#### **Consulted Podiatrist's Compliance:**

The consulted podiatrist is expected to follow the directions written in the referral orders and the patient's medical charts. The podiatrist's role is to provide care based on these orders and document the consultation and treatment provided.

#### **CMS Guidelines and Specific Orders:**

CMS guidelines require that referral orders include specific details such as the patient's diagnosis, the type of service requested, and the physician's signature. The argument is that the consulted podiatrist cannot be held liable for healthcare fraud if the referral order meets these requirements.

**Judicial Misinterpretation and New Evidence:**

The Petitioner argues that the court misinterpreted CMS laws, leading to a wrongful conviction. New evidence presented in Exhibits 82-142 suggests that the referral orders complied with CMS guidelines, and the consulted podiatrist followed these orders appropriately.

**Legal and Evidentiary Considerations****Sufficiency of Evidence for Conviction:**

Referring physicians have a fiduciary obligation to promote the patient's best interests and provide accurate and necessary referrals.

**For a conviction of healthcare fraud, there must be sufficient evidence showing that the consulted podiatrist willfully engaged in fraudulent activities. If the podiatrist followed the referral orders and provided medically necessary care, this may not constitute fraud. US v. Nora, \_\_\_, F.3d \_\_\_, No. 18-31078, 2021 WL 716628, at \*2 (5th Cir. Feb. 24, 2021).**

**Consultation and Documentation:**

The consulted podiatrist must document the consultation and treatment provided in the patient's medical record. This documentation should align with CMS guidelines. Petitioner presented progress note, overall care plan and outcomes

**Judicial Errors and Miscarriage of Justice:**

The Petitioner argues that the court's decision resulted in a miscarriage of justice due to a misinterpretation of CMS laws. The new evidence suggests that the referral orders were compliant, and the consulted podiatrist's actions were appropriate, warranting a review of the conviction to prevent manifest injustice.

The court's decision to find the referring medical doctor not guilty while convicting the consulted podiatrist of healthcare fraud may be based on a misinterpretation of CMS laws. The new evidence presented in exhibits 82-142 indicates that the referral orders present in exhibit 26-A complied with CMS guidelines and that the consulted podiatrist followed these orders appropriately. Therefore, the conviction of the podiatrist may constitute a plain error, and a review of the evidence is necessary to prevent a miscarriage of justice and ensure that healthcare providers are not wrongfully convicted.

Petitioner in the light of newly discovered exculpatory material evidence dated 2019-2024 that was not available before the Northern District Court of Texas, Dallas May 14-15, 2001 28 U.S.C 2255 hearing discovered due to due diligence and excusable neglect Rule 60 (b) (1) (6) presents new controlling (CMS) Laws, Rules and Regulations evidence presented in exhibits 82-142 to support a meritorious claim on its own for actual innocence, factual innocence, wrongful conviction, ineffective assistance of counsel (exhibits 80-81) and miscarriage of justice.

Petitioner in the light of newly discovered exculpatory material evidence dated 2010-2024 that was not available before the Northern District Court of Texas, Dallas May 14-15, 2001 28 U.S.C 2255 hearing discovered due to due diligence and excusable neglect Rule 60 (b) (1) (6) presents new controlling (CMS) Laws, Rules and Regulations evidence presented in exhibits 82-142 severely undermines Petitioner's December 18, 1998 confession that can show the Court made plain errors, error of facts, fundamental error that as a continued collateral consequence of the 1 count on 16 conviction Petitioner presently continues to suffer loss of civil disabilities that the US Supreme Court can grant an order for extraordinary relief pursuant All Writs Act, 28 U.S.C. § 1651(a) to correct errors and prevent manifest injustice.

Petitioner can show the Courts made plain errors and errors of facts in its erred clearly erroneous judgments overlooking in the light of newly discovered evidence and new controlling law presented in exhibits 82-142 that can establish CMS guidelines for routine foot care that Medicare will cover were met shows the Northern District Court of Texas, Dallas and Court of Appeals for the Fifth Circuit made a constitutional error, jurisdictional error, procedural error and statutory error that was the proximate cause of wrongful conviction against Petitioner for 1 count on 16 shows a total miscarriage of justice that can invalidate conviction shows a need to be corrected to prevent manifest injustice to achieve justice pursuant coram nobis.

Petitioner presents new evidence and new controlling laws presented in Appendix H, I exhibits 82-142 to support All Writs Coram nobis relief that can show Dr. Karen Tucker, DPM was compliant documenting evaluation, diagnosis and treatment provided prior to 10/21/1996 and 1/ 21/1997 receiving Dr. Kathleen Martin, MD written, signed and dated October 1996; follow up 12/20/1997 order referring her patient Zala Farley exhibit 26-A for may see podiatrist of choice; the order documented Zala Faley's right toe complaint and systemic condition that qualified the referral for covered routine foot care shows exhibit 26-A order was specific to meet exhibit 140 CMS Medicare Part B Standards to provide podiatry services and bill claim for \$75 dollars:

The blister right foot 4th toe is a recurring heloma durum secondary to hammer toe deformity when the hyperkeratotic tissue is not debrided it can form a digital ulcer that can become infected diagnosed with cellulitis that has re-occurred with this patient. The wound heals and re-occurs when the patient is not treated by podiatrist.

The order documents Foot Treatment: Blister 4th toe RT. Foot, Do not pop, clean with NS, apply A&D ointment and cover with Tegaderm Q3D is supported by progress notes, medical diagnosis systemic codes that support medical necessity for foot care are written:

(1) CVA (2) CVD (3) Osteoarthritis (4) Depressive Disorder (5) HTN (6) Anemia; order for treat niacin 12 for anemia treatment. The order documents consult for: May see Podiatrist of choice meets the standard that qualify for Petitioner to provide podiatric foot care to count 16 patient Zala Farley on October 21, 1996, and qualifies for \$75.00 billing claim to be submitted to Medicare Part B for payment has been established to invalidate wrongful conviction.

The Centers for Medicare and Medicaid Services (CMS) has guidelines for routine foot care that Medicare will cover:

Frequency: Medicare will cover routine foot care once every 60 days or more often if medically necessary. Plaintiff presents in new exhibit 82-142 that can show Dr. Kathleen Martin, MD complied with certified order requirements that she evaluated patient within 60 days

Medical necessity: Each service reported must be medically necessary and clearly documented in the patient's medical records.

Dr. Martin documented that the patient had a right toe injury that Dr. Karen Tucker evaluated and treated October 1996 for difficulty walking, onychogryphosis, onychomycosis and right toe and foot cellulitis in January 1997.

Billing: Medicare foot care services that are covered must use the appropriate modifier

Systemic conditions: Claims for routine foot care based on a systemic condition should include a billing indicator of Q7, Q8, or Q9 to be considered for payment. Claims without a systemic diagnosis will be denied.

Debridement: Services for debridement of more than five nails in a single day may be subject to special review.

**Exhibit 140 Billing and Coding: Routine Foot Care and Debridement of Nails A57759 Rules and Regulations URLs CMS Manual Explanations URLs 08/04/2022 effective date**

Zala Farley Count 16 May See Podiatrist of Choice Foot Care ex. 26-A show Exception Medical Diagnosis Meet Medicare Rules Under: Group 1 Medical Necessity ICD-10-CM Codes Asterisk Explanation

\* For these diagnoses, patient Zala Farley was under the active care of Dr. Martin, MD a Doctor of Medicine or osteopathy (MD or DO) for the treatment and/or evaluation of the complicating disease process

(1). CVA, (2). CVD, (3). Osteoarthritis, (4). Depressive Disorder, (5). HTN (6). Anemia: order for treat niacin 12 for anemia treatment during the six (6) month period prior to the rendition of the routine-type service.

D51.0 Vitamin B12 deficiency anemia due to intrinsic factor deficiency E52\* Niacin deficiency [pellagra]

Group 2 Paragraph

Dr. Tucker, DPM documented in her Zala Farley progress note and overall care plan: Appendix H

Refer to Group 3 for the secondary ICD-10-CM codes required for coverage for codes 11719, 11720, 11721 and G0127.

L60.2 Onychogryphosis L60.3 Nail dystrophy

R26.2 Difficulty in walking, not elsewhere classified R26.81 Unsteadiness on feet

Group 4 (98 Codes) Group 4 Paragraph Codes 11055, 11056, 11057, 11719, 11720, 11721 and G0127

The ICD-10-CM codes below represent those diagnoses where the patient has evidence of neuropathy, but no vascular impairment, for which class findings modifiers are not required.

E52\* Niacin deficiency [pellagra]

APPENDIX H EXHIBIT 26-A DR. KATHLEN MARTIN, MD REFERRAL ORDER FOR PATIENT ZALA FARLEY COUNT 16

CANCELL ALL PREVIOUS ORDERS		HOUR	CO NO.	CANCELL ALL PREVIOUS ORDERS	
NURSING ORDERS				NURSING ORDERS	
MAY CRUSH MEDS PRN				I HEREBY CERTIFY THAT THIS RESIDENT REQUIRES/CONTINUES TO REQUIRE ONE/NONE FOR DAYS. RESIDENT IS FREE OF REPORTABLE COMMUNICABLE DISEASE. MAY USE GENERIC EQUIVALENT UNLESS OTHERWISE SPECIFIED. MAY GO ON THERAPEUTIC VISITS UNLESS OTHERWISE SPECIFIED.	
Dr. Martin				RESIDENT HAS BEEN INFORMED OF MEDICAL CONDITION & IS CAPABLE OF UNDERSTANDING/EXERCISING RIGHTS. RESIDENT IS NOT AWARE OF CONDITION. IS NOT CAPABLE OF UNDERSTANDING/EXERCISING RIGHTS DUE TO DIAGNOSIS LISTED. R/P INFORMED & CAN ACT FOR RES.	
MULTIVITAMIN TAB 1 PO QD		0800		DIAGNOSIS:	
NIFEDIPINE XL 30MG (PROCARDIA XL 30MG) TAB 1 PO QAM		0800		1) CVA. 2) CVD. 3) DEPRESSIVE DISORDER. 4) HTN. 5) OSTEOARTHRITIS. 6) ANEMIA.	
HYDROCHLORIDE 325MG (TYLENOL 325MG) TAB 2 PO QID		1300		DIET:	
MARTIN, K.		1700		REGULAR C NO SALT PACKET ON TRAY. 2. WHOLE MILK AT EVERY MEAL. HEALTH SHAKE OR ENSURE BETWEEN MEALS.	
NIFEDIPINE XL 30MG (PROCARDIA XL 30MG) TAB 1 PO QHS		2100		TREATMENTS:	
VITAMIN B-12 INJ 1000mcg		2100		SB/FLEET'S ENEMA QD PRN CONSTIPATION; CK FOR & REMOVE FECAL IMPACTION PRN PER LICENSED NURSE; AID GINT TO FACE - NKAB; KNEE HIGH BOCKS - ENCOURAGE HER TO WEAR; HYDROXY CREAM PRN - NKAB; VASELINE ON LIPS PRN CHAPPING; BUSTER KEY TOE AT TOOTH DO NOT POP. CLEAN C NUB; APPLY TAD & COVER C TEBADERM Q3D & PRN TAD; CLEAN AROUND PINS AT WAIST BID C HEO2 & PHTSOL-EX 50/50;	
Foot Complaint				LABS:	
				TB SKIN TEST QYR; CBC Q3D;	
				NOTATIONS:	
				MAY HAVE THERAPEUTIC VISITS C MEDS. ACTIVITIES AS TOLERATED. V/S MONTHLY. WEIGHT MONTHLY. RENAL POTENTIAL: MINIMAL. MAY SEE PODIATRIST OF CHOICE.	
No PRN				PRN MEDICATIONS:	
No Standing Order for Podiatry				1) APAP 325MG TAB (TYLENOL ES) 2 PO QAM PRN PAIN/TEND; 2) MILK OF MAGNESIA 300cc PO PRN CONSTIPATION; 3) PROPOXY-N/APAP 100/650 (DARVOCEIN-N 100) TAB 1 PO QAM PRN PAIN; 4) CEPACOL MOUTHWASH PRN SORE MOUTH OR THROAT; 5) PYRIDOXINE 100MG TAB 1 PO QAM PRN BLINDNESS DISCOMFORT.	
PRN Standing medication Order				PHYSICIAN'S SIGNATURE	
				DATE 10/25/23	
				R.N. REVIEW	
				DATE 10/22	
				ABOVE ORDER NOTED BY	
				DATE 10/25	
				PHONE NO.	
				Level of Care: NF	
				Sec. Security No. 10-25-9676 12-23	
PATIENT		ROOM/BD	ADMISSION NUMBER/DATE	BOX	DATE OF BIRTH
FARLEY, ZALA	5B				11/07/25
					CURRENT MONTH/YEAR
					OCTOBER 199

Exhibit 140 Billing and Coding: Routine Foot Care and Debridement of Nails A57759 Rules and Regulations URLs CMS Manual Explanations URLs 08/04/2022 effective date

CMS Final Review Controlling Rules and Regulations for Nursing Home Orders Frequency of Physician Visits 4/16/2014 -2019 retroactive under Statutes and Rules that define requirement standards for How Orders are Written. Appellant can show the Trial Court clearly erroneous 6/20/2023, February 7, 2024 and March 19, 2024 judgement in clear harmful error of law, error of facts, procedural due process error and substantive due process error based on vague law not heard before jury trial demand heard on the merits overlooked newly discovered exhibit 90 shows what must be written to qualify under Medicare standards for Dr. Martin referral orders for Dr. Tucker to provide podiatry care and submit billing claim for payment:

**Systemic Conditions**

Foot care services are covered in the presence of a systemic condition. Refer to the Medicare Benefit Policy Publication 100-02, Chapter 15, Section 290.4 D Systemic Conditions That Might Justify Coverage for a list of systemic conditions. For diagnosis codes designated by an asterisk (\*), it is required the patient be under the active care of Doctor of Osteopathic Medicine (D.O.) or Doctor of Medicine (M.D.) The active care requirement would be considered met if the claim indicates that the patient has seen an M.D. or D.O. for treatment and/or evaluation of the complicating disease process during the 6-month period prior to the service. A list of diagnosis codes can be found in Group 1 Paragraph under ICD-10 Codes that Support Medical Necessity.



### **Presumption of Coverage**

Refer to the Medicare Benefit Policy Publication 100-02, Chapter 15, Section 290.4 D. for a list of conditions with a presumption of coverage for routine services.

In addition to a valid billing modifier, these services must include a systemic condition diagnosis listed in IOM 100-02, Chapter 15, Section 290 and in Group 1 of the diagnosis codes. All claims for routine foot care based on the presence of a systemic condition must have a billing modifier of Q7, Q8, or Q9 to be considered for payment.

### **Mycotic Nails See Appendix H For Zala Farley Report**

Mycotic nail debridement may be a covered service:

- In the presence of a systemic disease with the class findings and appropriate Q modifier.
- In the absence of systemic disease if the patient has mycotic nails and marked limitation of ambulation, pain, or secondary infection resulting from the thickening and dystrophy of infected toenail plate.
- In the absence of systemic disease when a non-ambulatory patient has mycotic nails and suffers from pain or secondary infection resulting from the thickening and dystrophy of infected toenail plate.

For services without systemic disease and class findings, the diagnosis in Group 2 and Group 3 of the diagnosis codes below must be documented in the medical record and submitted on the claim.

The nail debridement procedure codes are considered non-covered routine foot care when these services do not meet the guidelines outlined above for mycotic nail services.

### **Limitations**

1. Covered exceptions to routine foot care services are considered medically necessary once (1) in 60 days. More frequent services will be denied as not reasonable and necessary.
2. The exclusion of foot care is determined by the nature of the service, regardless of the clinician who performs the service.
3. Medicare allows payment for routine foot care only if the conditions under indications are met. These conditions describe the systemic diseases and their peripheral complications that increase the danger for infection and injury if a non-professional provides these services.
4. Services not meeting the criteria in this statement of national coverage will be denied as statutory non-covered services. For diagnosis codes designated by an asterisk (\*), we will require the date the patient was last seen (DPLS) and the NPI of the Doctor of Medicine or Doctor of Osteopathic Medicine actively managing the patient's systemic condition.
5. Nail debridement procedures are considered non-covered routine foot care when these services do not meet the guidelines outlined above for mycotic nail services or are not based on the presence of a systemic condition. If the nail debridement procedures are performed in the absence of mycotic nails and as part of foot care, they must meet the same criteria as all other routine foot care services to be considered for payment.
6. Foot care services that do not require a professional would be considered routine and not a Medicare benefit. Professional
7. in this situation is defined as an M.D., D.O., D.P.M., Nurse Practitioner, Clinical Nurse Specialist, or Physician Assistant.
8. A Registered Nurse that holds foot care certification (CFCN®) may perform covered foot care services when all the following requirements are met:
  - Services are performed under direct supervision of a physician or other practitioner
  - All requirements of the "incident to" provision are met per the CMS Medicare Benefit Policy Manual
  - Proof of accredited Foot Care Nurse certification must be included in the documentation
  - All other coverage provisions outlined in this Billing and Coding Article are met

Petitioner can argue she has met her burden of proof to prove her actual innocence, factual innocence that can show the US Supreme Court can grant an order for All Writs Act, 28 U.S.C. § 1651(a) extraordinary relief that is available to correct plain errors, errors of facts that were unknown at the time of trial; of a fundamentally unjust character which probably would have altered the outcome of the challenged proceeding if it had been known; error of law and fundamental errors that can invalidate and reverse 1 count on 16 Zala Farley wrongful conviction criminal case from the Northern District Court of Texas, that issued the criminal judgment. Phillips, 614 F. App'x at 586 (Sinclair v. Louisiana, 679 F.2d 513, 514 (5th Cir. 1982). U.S. v. Delhorno, 915 F.3d 449, 453 (7th Cir. 2019) (U.S. v. Wilkozek, 822 F.3d 364, 368 (7th Cir. 2016). A fundamental error that invalidates a criminal proceeding is one that undermines our confidence that the defendant is actually guilty. Wilkozek, 822 F. 3d at 368.

**Petitioner in the light of newly discovered exculpatory material evidence presented in exhibits 80-142 dated from 2019-2024 can show: (1) an intervening change in controlling CMS law under United States v. Nora, \_\_\_, F.3d \_\_\_, No. 18-31078, 2021 WL 716628, at \*2 (5th Cir. Feb. 24, 2021); (2) the availability of new evidence; or (3) the need to correct clear error of law or prevent manifest injustice." Lazaridis v. Wehmer, 591 F.3d 666, 669 (3d Cir. 2010).**

Petitioner can show in the light of newly discovered undisputed factual exculpatory material evidence Rule 60 (b) (1) (6) from CMS New Exhibits 133; 82--142 are new facts and controlling laws undermine the validity of count 16 conviction that are relevant

to the verdict; (2) Petitioner can show some errors occurred despite the presumption of regularity; (3) Karen Tucker, Petitioner is suffering from or facing significant collateral consequences from 1 count on 16 Zala Farley prior criminal conviction; (4) the allegation has not been waived; and (5) no other common law remedy is available to petitioner. *Kandiel v. U.S.*, 964 F.2d 794, 797 n.1 (8th Cir. 1992). *U.S. v. Johnson*, 237 F.3d 751, 755 (6th Cir. 2001) *Azzone v. U.S.*, 341 F.2d 417, 419 (8th Cir. 1965) (considering petitioner's claim that he has newly discovered evidence which proves that he did not violate 18 U.S.C.A. § 1073).

**V. The District Court Erred In Finding Dr. Tucker's Counsel Was Constitutionally Effective And in Holding That Dr. Tucker Was Guilty on Count 16 Zala Farley Appendix H Exhibit 26-A Referral Certified Ordered, Written By Dr. Kathleen Martin, MD for Treating Without Verbally Consulting Referring Physician; Treating Without a Specific Referral; Treating With a Referral that Was a "PRN" Standing Order for May See Podiatrist of Choice Shows Petitioner's Plea, Charge and Conviction Was Not Made Intelligently, Knowingly, or Voluntarily.**

**Relief to Prevent a Complete Miscarriage of Justice**

**A. Ineffective Assistance of Counsel**

**1. Counsel's Erroneous Advice:**

- Petitioner, Karen Tucker, was wrongly advised by her counsel to enter a guilty plea to an act that was not a crime based on the mistaken belief that Tucker was guilty of not consulting with the referring attending physician, Dr. Kathleen Martin, MD, to confirm her October 1996 order (exhibit 26-A).
- This erroneous advice violated Tucker's right to effective assistance of counsel as guaranteed by the Sixth Amendment.

**2. Conflict of Interest:**

- Petitioner argues that Mr. F. Lee Bailey's conflict of interest violated her Sixth Amendment right to conflict-free counsel. The Supreme Court has explained that one of the safeguards making trials fair is the right to counsel (*Strickland v. Washington*, 466 U.S. 668, 686 (1984)); *Strickland*, 466 U.S. at 686; *McMann v. Richardson*
- Effective assistance of counsel requires the presence of competence and the absence of conflicts (*McMann v. Richardson*, 397 U.S. 759, 771 (1970)).
- Mr. Bailey's representation was infected with a conflict of interest, breaching the duty of loyalty to his client, which resulted in representation falling below the objective standard of reasonableness required by the Constitution. This is subject to a limited presumption of prejudice (*Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980)).

**3. Impact on Plea Validity:**

- Petitioner's guilty plea was unknowing because she did not understand the actual charge on count 16, whether it was
- treating without a referral, treating without verbally consulting the referring physician, treating with a standing order,
- treating without a specific order or the validity of the referral order under Medicare standards.
- A guilty plea must be made voluntarily, knowingly, and intelligently, with sufficient awareness of the relevant circumstances and likely consequences (*U.S. v. Ruiz*, 536 U.S. 622, 629 (2002); *Henderson v. Morgan*, 426 U.S. 637, 645 (1976); *Boykin v. Alabama*, 395 U.S. 238, 244 (1969)); *Bradshaw v. Stumpf*; *Boykin*. If the Court finds Petitioner's guilty plea is not voluntary and knowing, it has been obtained in violation of due process and is therefore void. *McCarthy v. U.S.*

**B. Government Misconduct and Wrongful Conviction**

**1. Fabrication of Evidence:**

- Petitioner alleges government misconduct, claiming that prosecutor Senerote fabricated false testimony from Dr. Martin and Mr. Bailey, offering them better legal deals or reduced sentences in another criminal matter.
- Mr. Bailey became one of the Respondent(s) star witnesses during ineffective assistance trial court hearing on May 14-15, 2001, before the Trial Court against Petitioner to win favorable US Attorney Assistance in a lower court for lesser sentence in criminal cases against him that he was guilty and convicted on 6/1/2001 Appendix I new exhibit 80.
- Mr. Bailey was found guilty of 7 counts of attorney misconduct by the Florida Supreme Court, and on 11/21/2001 he was disbarred Appendix I exhibit 81. *In re F. Lee Bailey* 439 Mass. 134 (Mass. 2003) 786 N.E.2d 337; *U.S. v. Bailey*, 419 F.3d 1208. *U.S. v. McCorkle*, 321 F.3d 1292 (11th Cir. 2003). *Florida Bar v. Bailey*, 803 So.2d 683, 694 (Fla. 2001)
- Massachusetts disbarred Bailey two years later. In early 2003, a judge ordered Bailey to pay \$5 million in taxes and penalties on income connected with the Duboc case. That is, in exchange for Mr. Bailey having provided Respondent(s) with substantial assistance in the investigation or prosecution of another person like Karen Tucker, Petitioner who has allegedly committed an offense, the Government agreed to permit Mr. Bailey to receive a reduced sentence. U.S. Sent'g Guidelines Manual § 5K1.1.
- Petitioner retained new counsel, was convicted on May 14-15, 2001, and now appeals on various grounds related to her attorney's conflict of interest. The petitioner argues that Assistance of Counsel necessarily means effective assistance, and effective assistance demands conflict-free representation. This is certainly no less true during the pretrial phase, *Anaya v.*

Lumpkin. The Sixth Amendment right to counsel extends to the plea-bargaining process, where defendants are entitled to the effective assistance of competent counsel. *Lafler v. Cooper*

- Government officials do not get absolute immunity for fabricating evidence concerning a crime (*Rehberg v. Paulk*, 566 U.S. 356, 367 (2012); *Buckley v. Fitzsimmons*, 509 U.S. 259, 276 (1993)).

## **2. Prosecutorial Immunity Limits:**

- Prosecutors are not entitled to absolute immunity when they step outside their role as advocates and fabricate evidence (*Wearry v. Cain*, 577 U.S. \_\_\_ (2016); *Wearry v. Foster*, 33 F.4th 260 (5th Cir. 2022)).
- The facts alleged show that Senerote and Winn's activities were fundamentally investigatory in nature, not part of traditional official functions, thus not protected by absolute immunity (*Burns v. Reed*, 500 U.S. 478, 495 (1991)).

## **C. Due Process and Actual Innocence**

### **Actual Innocence:**

- Petitioner presents new evidence (Appendix I exhibits 80--142) proving actual innocence, demonstrating that no reasonable factfinder would have found her guilty of the offense.
- This evidence directly contradicts the allegations of healthcare fraud and proves compliance with Medicare standards.

### **Miscarriage of Justice:**

- The Supreme Court has recognized that convicting an innocent person is a fundamental miscarriage of justice (*Schlup v. Delo*, 513 U.S. 298, 321 (1995)).
- Coram nobis relief is appropriate to correct errors resulting in a complete miscarriage of justice (*Jimenez v. Trominski*, 91 F.3d 767, 770 (5th Cir. 1996)).

## **D. Judicial Error and Need for Correction**

### **Plain Error and Legal Misinterpretation:**

- The District Court and the Fifth Circuit made plain errors and misinterpreted the law regarding healthcare fraud, leading to wrongful conviction.
- The new evidence (Appendix I exhibits 82-142) demonstrates compliance with CMS guidelines, showing the necessity to correct these errors to prevent manifest injustice.

### **Implications for Health Care Providers:**

- The misinterpretation of CMS guidelines by the courts creates a significant risk of wrongful convictions for healthcare providers, adversely affecting public interest and the integrity of the healthcare system.

### **Reversal of Conviction:**

- Given the compelling new evidence and the significant legal errors, the conviction must be reversed to prevent a complete miscarriage of justice.
- The Petitioner's case should be reviewed de novo, considering the newly discovered evidence and correcting the plain errors made by the lower courts.

## **Petitioner's Argument for Reversal of Conviction Based on New Evidence and Ineffective Assistance of Counsel**

**Introduction:** Karen Tucker, the petitioner, argues that new evidence and controlling law presented in exhibits 82-142 from the Centers for Medicare and Medicaid Services (CMS) demonstrate that her counsel wrongly advised her to plead guilty to an act that was not a crime. The advice was based on a mistaken belief that she was guilty of not consulting with the referring attending physician, Dr. Kathleen Martin, MD, to confirm her October 1996 order presented in Appendix H Exhibit 26-A.

**Sixth Amendment Violation:** The Petitioner asserts that her Sixth Amendment right to conflict-free counsel was violated.

According to the Supreme Court in *Strickland v. Washington*, effective assistance of counsel is a safeguard that makes trials fair. The Sixth Amendment guarantees the accused the right to have the Assistance of Counsel for his defense. Effective assistance of counsel requires competence and absence of conflicts. *Strickland*, 466 U.S. at 686; *McMann v. Richardson*.

The Petitioner contends that Mr. F. Lee Bailey's representation was compromised by an actual conflict of interest, breaching his duty of loyalty to her. This conflict of interest adversely affected his performance at trial, as outlined in *Cuyler v. Sullivan*. Consequently, the petitioner's case is subject to a limited presumption of prejudice. *U.S. v. Alvarez* holds that an accused is deprived of effective assistance of counsel when their attorney operates under an actual conflict of interest, even without showing prejudice.

**Unknowning and Involuntary Guilty Plea:** The Petitioner argues that her guilty plea for health care fraud was unknowing because she did not understand the actual charge on count 16. The confusion lies in whether the charge was for treating without a referral, treating without verbally consulting the referring physician to confirm the order, treating with a "PRN" standing order or if the referral order was not valid under Medicare standards. The guilty plea was not made voluntarily, and the appellant did not make related waivers knowingly, intelligently, and with sufficient awareness of the relevant circumstances and likely consequences. *U.S. v. Ruiz* and *Henderson v. Morgan* support the notion that a guilty plea must be made with real notice of the true nature of the charge.

This confusion rendered her guilty plea involuntary, as she did not make related waivers knowingly, intelligently, and with sufficient awareness of the relevant circumstances and likely consequences (*U.S. v. Ruiz*; *Henderson v. Morgan*; *Bradshaw v. Stumpf*; *Boykin v. Alabama*).

If the court finds that the petitioner's guilty plea was not voluntary and knowing, it has been obtained in violation of due process and is therefore void (*McCarthy v. U.S.*).

**Government Misconduct and Wrongful Conviction:** The petitioner alleges government misconduct and asserts actual, factual, and legal innocence. The prosecution failed to furnish exculpatory evidence proving every element of the charged offense beyond a reasonable doubt, resulting in a miscarriage of justice. *U.S. v. White* emphasizes that a complete miscarriage of justice can invalidate a conviction.

**Conflict Between CMS Guidelines and Court Interpretation:** The petitioner presents new evidence and controlling law (CMS Appendix I exhibits 82-142) showing that there is insufficient evidence to support civil or criminal charges for healthcare fraud. The District Court Judge erred in holding that the petitioner's counsel was constitutionally effective and that the petitioner was guilty of treating without a specific referral based on a misinterpretation of CMS laws.

The Petitioner can argue that medical doctors, like Dr. Kathleen Martin, MD, who wrote the orders, are the gatekeepers and should be held liable if their orders are not in compliance with CMS standards. Exhibit 26-A was in compliance with CMS guidelines for routine foot care, and the referral order was valid. The Northern District Court of Texas and the Court of Appeals for the Fifth Circuit made a plain error, resulting in wrongful conviction.

**Prosecutorial Misconduct and Fabrication of Evidence:** The Petitioner argues that the prosecutors, Senerote and Winn, along with Mr. Bailey and Jim Alexander, fabricated evidence and coerced Dr. Martin to testify against the Petitioner. Prosecutors do not get absolute immunity for fabricating evidence concerning a crime (*Rehberg v. Paulk*). The misconduct was investigatory in nature, thus not protected by absolute immunity. *Weary v. Cain* and *Fields v. Wharrie* support this argument.

**The Petitioner has met her burden of proof to establish actual innocence and colorable constitutional Due Process Clause of the Fourteenth Amendment deprivation of her civil rights.** The trial court's judgment should be reversed based on new evidence, and the misinterpretation of CMS guidelines, which resulted in a wrongful conviction. The Petitioner seeks reversal of her conviction to prevent a manifest injustice to achieve justice and to uphold the integrity of the judicial process.

**Standard of Review:** The standard for summary judgment in the 5th Circuit, as stated in *Omnitech Intern., Inc. v. Clorox Co.*, is proper when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. This court reviews the grant of Rule 12(b)(6) and Rule 12(c) motions de novo (*Gentilello v. Rege*). When Appellees assert qualified immunity, the burden is on the appellant to plead facts that show why immunity is inapplicable (*Waganfeald v. Gusman*). In deciding a 12(b)(6) motion, the court accepts all well-pleaded allegations as true and views them in the light most favorable to the appellant (*Davis v. Blockbuster, Inc.*; *Fernandez-Montes v. Allied Pilots Ass'n*).

**Burden of Proof and Immunity:** The Petitioner has met her burden of proof to show fabrication of evidence and has alleged how it was material and harmful to her case. Prosecutors do not get absolute immunity for fabricating evidence (*Rehberg v. Paulk*; *Buckley v. Fitzsimmons*), and fabrications are not immunized merely because the fabricator later presents the false evidence in testimony (*Castellano v. Fragozo*; *Thompson v. Clark*; *Jones v. York*). The official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question (*Burns v. Reed*).

**Conspiracy and Misconduct:** The Petitioner has met her burden to establish the existence of a conspiracy involving government misconduct and a deprivation of her civil rights in furtherance of the conspiracy (*Pfannstiel v. City of Marion*). Proof of a conspiracy may be made by direct or circumstantial evidence (*Crowe v. Lucas*). The facts and inferences in this matter do not strongly and overwhelmingly point in favor of the appellees. Therefore, the trial court's judgment should be reversed (*U.S. v. Classic*; *Hale v. Townley*).

The Petitioner seeks a reversal of her conviction based on new evidence, actual innocence, factual innocence, wrongful conviction, ineffective assistance of counsel, and the misinterpretation of CMS laws, which resulted in a total miscarriage of justice. The judgment of conviction must be reversed to prevent a manifest injustice and to uphold the integrity of the judicial process.

## **STATEMENT OF THE LEGAL ISSUES**

### **1. Newly Discovered Evidence and Legal Innocence:**

#### **Issue:**

- Whether newly discovered evidence, facts, and controlling law can prove Dr. Kathleen Martin's October 1996 certified written, signed, and dated referral order (Exhibit 26-A) did not state "PRN" (as needed) for a standing order, demonstrating Dr. Karen Tucker's actual, factual, and legal innocence. This includes claims of ineffective assistance of counsel, government misconduct, and the wrongful conviction of the petitioner for health care fraud under 18 U.S. Code § 1347 for submitting a \$75.00 billing claim for medically necessary podiatry services provided to patient Zala Farley on 10/21/1996.
- Whether newly discovered evidence, facts, and controlling law presented in Appendix I exhibits 82-142 can prove Dr. Kathleen Martin's October 1996 certified written, signed, and dated referral order (Appendix H Exhibit 26-A) stating "May See Podiatrist of Choice" was not a standing order and thus demonstrates Dr. Karen Tucker's actual, factual, and legal innocence.

**Relevant Facts:** The Petitioner can argue that exhibit 26-A referral order from Dr. Martin was legitimate and in compliance with CMS guidelines, contradicting the charges of health care fraud. The newly discovered factual exculpatory material evidence includes CMS regulations and guidelines (Exhibits 82-142) indicating that the referral order was valid under Medicare standards.

The Petitioner can argue that Dr. Martin's exhibit 26-A referral order was valid and complied with CMS guidelines, thereby invalidating the basis for the health care fraud conviction. The newly discovered evidence includes the CMS regulations and guidelines (Appendix I Exhibits 133, 140-141; 82-142) that support the validity of the referral order.

**Legal Basis:** Rule 60(b)(1) and (6) for relief from a judgment based on newly discovered evidence or any other reason justifying relief. This includes the exculpatory material evidence from CMS) and the controlling CMS Rules, Regulations, and Final Review Laws for Ordering & Certifying (Appendix I Exhibits 133; 82-142).

### **2. Ineffective Assistance of Counsel and Conflict of Interest:**

**Issue:** Whether Mr. F. Lee Bailey's conflict of interest and failure to research the applicable count 16 plea agreement charge constituted ineffective assistance of counsel, violating the petitioner's Sixth Amendment rights. This includes whether Bailey's conflict of interest influenced his representation and the fairness of the plea-bargaining process.

**Relevant Facts:** Mr. Bailey failed to investigate the legal basis for the plea agreement charge, relying on statements from prosecutors rather than conducting his own research. This breach of duty of loyalty is evident from his testimony (Ex. 3, Tr. P. 262-266; May 14-15, 2001, P. 275-277; P. 121, P. 131, 134) and subsequent actions, including his disbarment (Exhibit. 80-81).

**Legal Basis:** *Strickland v. Washington* (466 U.S. 668) for ineffective assistance of counsel claims, *Cuyler v. Sullivan* (446 U.S. 335) for conflict of interest claims, and *Lafer v. Cooper* (566 U.S. 156) for the right to effective assistance during plea-bargaining.

### **3. Coram Nobis Relief:**

**Issue:** Whether the petitioner has met the burden of proof to warrant the extraordinary relief of Coram Nobis to dismiss, vacate, or set aside the wrongful conviction on count 16 for health care fraud.

**Relevant Facts:** The petitioner presents new evidence and legal arguments demonstrating that the referral order was valid under CMS guidelines, contradicting the basis for the conviction. The Coram Nobis petition seeks to correct a fundamental error and miscarriage of justice.

**Legal Basis:** The writ of error Coram Nobis (Penal Code § 1265(a)) allows for reconsideration of decisions in light of newly discovered evidence. [*People v. Shipman* and *People v. Vasilyan*] provide precedent for granting relief when new evidence proves innocence or when procedural errors affected the outcome of the case.

The Petitioner argues that the newly discovered evidence, combined with the claims of actual innocence, factual innocence, wrongful conviction, and ineffective assistance of counsel, justifies the extraordinary relief of Coram Nobis. This relief would restore the Petitioner to pre-trial conditions, dismissing, vacating, or setting aside the wrongful conviction on count 16. The Petitioner's petition for Writ of Certiorari to the United States Supreme Court is based on demonstrating actual innocence, factual innocence, wrongful conviction and the denial of effective assistance of counsel, thereby implicating a fundamental miscarriage of justice.

## **STATEMENT OF THE LEGAL ISSUES**

### **1. Newly Discovered Evidence and Legal Innocence:**

**Issue:** Whether newly discovered evidence, facts, and controlling law can prove Dr. Kathleen Martin's October 1996 certified written, signed, and dated referral order (Exhibit 26-A) stating "May See Podiatrist of Choice" was not a standing order and thus demonstrates Dr. Karen Tucker's actual, factual, and legal innocence.

**Relevant Facts:** The petitioner argues that Dr. Martin's referral order was valid and complied with CMS guidelines, thereby invalidating the basis for the health care fraud conviction. The newly discovered evidence includes the CMS regulations and guidelines (Exhibits 133, 140-141; 82-142) that support the validity of the referral order.

**Legal Basis:** Relief under Rule 60(b)(1) (6) for newly discovered evidence or any other reason justifying relief. This includes the exculpatory material evidence from CMS and controlling CMS Rules, Regulations, and Final Review Laws for Ordering & Certifying (Exhibits 82, 83, 84, 85, 90, 133; 140; 82-142).

### **2. Validity of Referral Order under CMS Guidelines:**

**Issue:** Whether new evidence and controlling law presented in CMS exhibits 82-142 show that there is insufficient evidence to support civil or criminal charges for healthcare fraud.

**Relevant Facts:** CMS requirements state that medical doctors can write medically necessary certified orders for podiatry patients if they meet certain criteria, which Dr. Martin's referral order (Exhibit 26-A) allegedly did. The Petitioner can argue that the referral order complied with CMS guidelines, and thus, the Northern District Court of Texas and the Court of Appeals for the Fifth Circuit made a plain error in convicting her.

**Legal Basis:** CMS guidelines and the exculpatory material evidence presented in Exhibit 140, 141, 42, 133, 90, showing compliance with Medicare standards for routine foot care. This evidence supports the Petitioner's claim of wrongful conviction and a need for the conviction to be vacated to prevent manifest injustice.

The Petitioner can argue that the newly discovered evidence, combined with the claims of ineffective assistance of counsel and prosecutorial misconduct, justifies the extraordinary relief of Coram Nobis. This relief would restore the Petitioner to pre-trial conditions, dismissing, vacating, or setting aside the wrongful conviction on count 16. The Petitioner's appeal is based on demonstrating actual innocence, factual innocence, wrongful conviction and the denial of effective assistance of counsel, thereby implicating a fundamental miscarriage of justice.

The Petitioner's case presents compelling arguments regarding the violation of her Sixth Amendment right to effective assistance of counsel due to Mr. Bailey's conflict of interest and failure to adequately represent her interests during the pretrial phase. Mr. Bailey's testimony, along with his subsequent disbarment and legal troubles, underscores the severity of his misconduct and the potential impact on the Petitioner's case.

Petitioner can show a reasonable probability that, but for counsel's errors and conflict of interest, the petitioner would not have plead guilty and would have insisted on going to trial. The Supreme Court did not, however, alter or address the prejudice requirement for obtaining relief, which continues to demand a showing that there was a reasonable probability that, but for counsel's errors, the petitioner would not have pleaded guilty and would have insisted on going to trial. See *id.* at 130 S.Ct. at 1478, 1483-84; *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

### **Fundamental Errors Inherently Prejudicial:**

Fundamental errors are presumed to be prejudicial, meaning there is no need for the affected party to demonstrate specific harm resulting from the error.

#### **Denial of the Right to Counsel:**

If a defendant is denied the assistance of legal counsel during a critical stage of the trial, it is considered a fundamental error. *Gideon v. Wainwright*, where the Supreme Court held that the Sixth Amendment guarantees the right to effective assistance of counsel.

#### **Legal Principles and Case Law**

##### **Chapman v. California (1967):**

This case established the principle that some constitutional errors, termed "structural errors," require automatic reversal because they affect the framework within which the trial proceeds.

##### **Arizona v. Fulminante (1991):**

The Supreme Court distinguished between "trial errors," which can be reviewed for harmlessness, and "structural errors," which require automatic reversal.

**Review Standards:**

- Fundamental errors are not subject to harmless error analysis, meaning appellate courts do not consider whether the error might have been harmless beyond a reasonable doubt.
- Fundamental errors are grave mistakes in legal proceedings that undermine the trial's foundational fairness and integrity. These errors demand automatic correction, often resulting in reversal or remand of the case, to ensure that justice is properly served. The legal system treats such errors with the utmost seriousness, reflecting their critical impact on the rights of individuals and the overall integrity of judicial processes.

The Petitioner rightly asserts that the Sixth Amendment guarantees not just any counsel, but effective and conflict-free representation. This principle extends to all stages of the criminal proceedings, including pretrial negotiations and plea bargaining. The failure of counsel to adequately research and advise the Petitioner on the charges against her, coupled with his personal and professional issues, raise serious concerns about the fairness and accuracy of the Petitioner's conviction.

The Petitioner's invocation of Coram Nobis relief is also justified, given the gravity of the alleged errors and the potential miscarriage of justice. The purpose of Coram Nobis is precisely to address situations where new evidence or legal developments come to light after a judgment has been rendered, which, if known at the time, could have influenced the outcome of the case. In this instance, the Petitioner presents compelling arguments and evidence suggesting that her conviction may have been obtained unjustly and that the court should reconsider its decision in the light of these new developments. Overall, the Petitioner's petition raises significant legal issues related to ineffective assistance of counsel and the need for corrective action to ensure fairness and accuracy in the criminal justice system.

The US Supreme Court should carefully consider these arguments and afford the Petitioner the opportunity to present her case fully and fairly.

The Petitioner's argument for granting the writ of error coram nobis is grounded in the principle that this extraordinary remedy is designed to correct errors or injustices that occurred during the original trial proceedings. The Petitioner contends that there were numerous errors and violations of due process during the trial and plea process, including constitutional errors, jurisdictional errors, fundamental errors, procedural due process errors, and substantive due process errors.

These alleged errors, if proven, would constitute grounds for the US Supreme Court to vacate the trial court decision and the plea agreement.

The Petitioner correctly points out that coram nobis may be invoked to challenge a prior conviction, especially if that conviction was obtained through misstatements, duress, or fraud. In this case, the Petitioner can argue that new evidence and legal developments have come to light, which, if known at the time of the original trial, could have influenced the outcome of the case and potentially prevented the conviction. Furthermore, the Petitioner asserts that the US Supreme Court should consider the previous adjudication of a petition for a writ of coram nobis, as it demonstrates a pattern of errors and injustices that have likely resulted in the wrongful conviction of the Petitioner. This argument suggests that there is a systemic issue that needs to be addressed, and granting the writ of error coram nobis would be a step toward rectifying this miscarriage of justice.

In summary, the Petitioner's argument for the grant of the writ of error coram nobis is based on the existence of significant errors and injustices during the original trial proceedings, as well as new evidence that has come to light since the judgment was rendered. The Petitioner presents a compelling case for the US Supreme Court to reconsider the conviction and grant relief in the interest of justice. The Petitioner raises several critical legal issues regarding the sufficiency of evidence to support civil or criminal charges for healthcare fraud, as well as the interpretation of CMS regulations and their impact on medical practitioners' liability. These issues are complex and warrant careful consideration by the court.

Firstly, the Petitioner questions whether the new evidence presented in CMS exhibits 82-142, along with the CMS controlling law for health care fraud under U.S. v. Nora, \_\_\_, F.3d \_\_\_, No. 18-31078, 2021 WL 716628, at \*2 (5th Cir. Feb. 24, 2021), demonstrates that there was insufficient evidence to support the charges of healthcare fraud. The petitioner argues that the district court judge erred in holding that the petitioner's counsel was constitutionally effective and in finding the petitioner guilty based on a misinterpretation of CMS laws.

The Petitioner contends that as "gatekeeper" medical doctors, such as Dr. Kathleen Martin, should be held solely responsible for healthcare fraud if their referral orders were in compliance with CMS guidelines, as demonstrated by exhibit 26-A and the Court finds that the orders were not specific for podiatrist to provide services and bill for covered foot care under Medicare Standards.

Secondly, the Petitioner challenges the court's decision to find the referring physician not guilty while holding the consulted podiatrist guilty for not consulting and advising the referring physician on how to write referral orders. The Petitioner argues that this decision overlooks the fact that consulted podiatrists provide medically necessary care based on the referral orders and patient charts, which may contain the "more specific" language required by CMS.

Furthermore, the Petitioner asserts that there is prejudice, conflict and controversy between the CMS Judicial Final Law and Rules; the Northern District of Texas, Dallas and the Court of Appeals for the Fifth Circuit court's interpretation of the law.

The Petitioner contends that greater scrutiny of the evidence presented in exhibits 82-142 is necessary to correct any plain errors and prevent further miscarriages of justice that adversely affect healthcare providers and the public interest.

In summary, the Petitioner's legal issues encompass the sufficiency of evidence, the interpretation of CMS regulations, and the allocation of liability between medical practitioners. These issues raise important questions about the fairness and accuracy of the original trial proceedings and warrant careful review by the US Supreme Court.

The Petitioner raises significant concerns regarding the sufficiency of evidence to support the charges of healthcare fraud, as well as the interpretation of CMS regulations and their implications for medical practitioners' liability.

In summary, the Petitioner's arguments highlight the need for a careful review of the evidence and legal principles involved in the case. The issues raised touch upon fundamental aspects of healthcare regulation and criminal justice, and their resolution will have significant implications for both healthcare providers and the administration of justice.

The Northern District Court of Texas and the Court of Appeals for the Fifth Circuit Court did err in its clearly erroneous in error judgments and abused its discretion in denying Petitioner coram nobis relief that show she has established factual errors or legal error of constitutional, jurisdictional, procedural, statutory or fundamental character. Clearly, the District Court in 1996 had no jurisdiction to enter the judgment of conviction following petitioner's guilty plea.

The petitioner has directed the court to review constitutional errors. And Petitioner has directed the Court to review in the light of newly discovered evidence presented in exhibits 80-142 and intervening change in controlling CMS laws U.S. v. Nora, \_\_\_, F.3d \_\_\_, No. 18-31078, 2021 WL 716628, at \*2 (5th Cir. Feb. 24, 2021) that undermines the validity of conviction that can show:

The Northern District Court of Texas, Dallas made **plain error of law that were not raised by the parties during trial**. It allows the US Supreme Court to correct clear errors that are obvious and affect the fairness, integrity, or public reputation of judicial proceedings, even if those errors were not brought to the trial court's attention at the time.

The petitioner has established that plain error mistake was made by the trial court. The error is plain: The error is clear or obvious under current law. The error affected Petitioner's substantial rights and plain error mistakes in fundamental error that have affected the outcome of the trial court proceedings. The errors seriously affect the fairness, integrity, or public reputation of judicial proceedings to determine that the error warrants correction to prevent manifest injustice to achieve justice.

The Courts made errors of law in clear harmful error shows mistakes made by a judge or a court during May 14-15, 2001 trial that can significantly influence the outcome of a case. These errors are related to the misinterpretation or incorrect application of CMS law presented in exhibit 82-142. A ruling grounded on an incorrect understanding or application of CMS law constitutes a legal error, which can compromise the fairness of the trial.

The Petitioner can argue the Court of Appeals for the Fifth Circuit failed to review the case for errors of law, de novo, failed to look at Petitioner's issue anew, without deference to the lower court's decision. The Appellate court erred and failed to perform its judicial duty to determine that an error of law was made, and it significantly influenced the outcome, the Court failed to perform its constitutional duty to overturn the original decision or order a new trial deprived Petitioner from colorable due process clause right of the 14<sup>th</sup> Amendment and Fourteenth Amendment.

The Courts made errors of facts in clear harmful error, overlooking in the light of newly discovered evidence presented in exhibits 82-142 and new intervening change in controlling CMS law U.S. v. Nora, \_\_\_, F.3d \_\_\_, No. 18-31078, 2021 WL 716628, at \*2 (5th Cir. Feb. 24, 2021) that can establish and prove Dr. Martin referral order presented in exhibit 26-A shows Dr. Tucker was not guilty of treating count 16 without a specific referral of fact occurred when Judge Stickney made a mistake regarding the factual aspects of health care fraud case based on the misinterpretation of evidence presented leading to an incorrect factual finding.



## A. Legal Background

Coram nobis has a long history as a remedy of last resort to correct errors and achieve justice, “tracing its roots to sixteenth-century English common law” (**United States v. George**, 676 F.3d 249, 253 (1st Cir. 2012)). Although its precise contours in American jurisprudence have not been well defined, its purpose was originally to foster respect for judicial rulings by enabling the same court that rendered the judgment to correct technical errors and avoid the rigid strictures of judgment finality (**U.S. v. Denedo**, 556 U.S. 904, 910 (2009)). “In its modern iteration, coram nobis is broader than its common-law predecessor” (**Denedo**, 556 U.S. at 911). Like habeas corpus, the writ of error coram nobis was originally confined to cases where the tribunal lacked jurisdiction or where other errors rendered the proceeding invalid (**U.S. v. Sawyer**, 239 F.3d 31, 37 (1st Cir. 2001)). Historically, coram nobis was available to correct “errors in matters of fact which \* \* \* were material to the validity and regularity of the legal proceeding itself” (**U.S. v. Mayer**, 235 U.S. 55, 68 (1914)); **Carlisle v. United States**, 517 U.S. 416, 429 (1996).

However, the scope of coram nobis—like that of habeas corpus—has been expanded to provide a remedy for a variety of constitutional errors or otherwise unjust verdicts (**United States v. Morgan**, 346 U.S. 502, 507-508 (1954)). Today, coram nobis can be used to remedy “fundamental errors” in addition to “technical” ones (**Denedo**, 556 U.S. at 911).

Unlike a writ of habeas corpus, which is available only to individuals currently in custody, a writ of coram nobis is issued once the petitioner is no longer in custody (**Sawyer**, 239 F.3d at 37). Coram nobis fills a narrow gap in federal criminal procedure: while a convicted defendant “in custody” has a statutory right to petition to have a sentence or conviction vacated, set aside, or corrected under 28 U.S.C. § 2255, there is no statutory basis to remedy an unlawful conviction if the defendant has already served their sentence (**Chaidez v. United States**, 568 U.S. 342, 345 n.1 (2013)). Recognizing this statutory gap, the Supreme Court held in **U.S. v. Morgan** that the common law writ of error coram nobis is available in such situations (**Morgan**, 346 U.S. at 506-507).

This historical and legal background underscores the importance of coram nobis as a vital remedy for addressing injustices that arise post-incarceration, particularly in cases where new evidence emerges that calls into question the validity of a conviction. The defendant in **Morgan** had previously pleaded guilty to a federal charge and was sentenced to a term of four years, which he served. 346 U.S. at 503-504. After his release from federal custody, he was convicted on a state charge and given an enhanced sentence as a second offender. *Id.* at 504. He then petitioned for a writ of error coram nobis to set aside the federal conviction on the ground that he had not been given access to a lawyer, in violation of his constitutional rights. *Id.* This Court held that the district court had the power, pursuant to the All Writs Act, 28 U.S.C. § 1651(a), to consider and (if appropriate) grant the petition. **Morgan**, 346 U.S. at 506-07; see also *id.* at 512 (“As the power to remedy an invalid sentence exists, we think, respondent is entitled to an opportunity to attempt to show that her conviction was invalid.”).

**Morgan** thus confirmed that, even after a defendant’s sentence has been fully served, “federal courts should act in doing justice if the record makes plain a right to relief.” *Id.* at 505. As the Court explained: “Although the term has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected.” *Id.* at 512. “Continuation of litigation after final judgment” therefore “should be allowed through this extraordinary remedy,” where “circumstances compel[] such action to achieve justice.” *Id.* at 511.

## VI. The First, Second, Sixth, And Seventh Circuits Hold That A Coram Nobis Petitioner Must Show She Suffers From A Civil Disability To Prevail.

Four circuits hold that a court may not grant a writ of error coram nobis unless the petitioner can show that she suffers from a civil disability. **United States v. Castano**, 906 F.3d 458, 463 (6th Cir. 2018); **Williams v. United States**, 858 F.3d 708, 715 (1st Cir. 2017); **Kovacs v. United States**, 744 F.3d 44, 49 (2d Cir. 2014); **United States v. Sloan**, 505 F.3d 685, 697 (7th Cir. 2007).

In these circuits, more than the mere fact of a conviction is required” to meet the civil disability test. **George**, 676 F.3d at 256 n.2. Once the sentence has been served out, the fact of the conviction amounts to an injury to reputation. **US v. Waters**, 770 F.3d 1146, 1147 (6th Cir. 2014). And reputational harm—a black mark—is not a civil disability. **Keane**, 852 F.2d at 204; **U.S. v. Nat’l Plastikwear Fashions, Inc.**, 368 F.2d 845, 846 (2d Cir. 1966) (The “desire to be rid of the stigma” of conviction is not enough). Instead, a civil disability is a collateral consequence of conviction that caus[es] a present harm that is “more than incidental, **Craig**, 907 F.2d 658, is unique to criminal convictions, **Keane**, 852 F.2d at 203, and arises solely as a result of the challenged conviction, so that a judicial declaration that the challenged conviction was erroneous will redress the injury, **Bush**, 888 F.2d 1150

The Seventh Circuit traces this requirement back to **Morgan**, recalling that “**Morgan** himself was in prison, serving a sentence that had been augmented as a result of the earlier conviction,” **Bush**, 888 F.2d at 1148. In describing the importance of the writ of coram nobis, the **Morgan** Court had stated that “[a]lthough the term has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected.” 346 U.S. at 512-513. “Combining this observation with the systemic interests supporting the finality of judgments” and the belief that § 2255’s “custody” requirement

“must be given force” in the coram nobis context, the Seventh Circuit reasons that “coram nobis is unavailable unless” a defendant is suffering from the specific type of burden that that court named a “civil disability.” *Bush*, 888 F.2d at 1148.

The First, Second, and Sixth Circuits have each adopted the Seventh Circuit’s formulation of the civil disability test. *Castano*, 906 F.3d at 463 (6<sup>TH</sup> Circuit quoting the Seventh Circuit’s description of a qualifying civil disability and holding that petitioners in the 6<sup>TH</sup> Circuit must meet [that] test); *George*, 676 F.3d at 256 & n.3 (1<sup>ST</sup> Circuit expressing doubt about the precise contours of the civil disability requirement, but citing and adopting the 7<sup>TH</sup> Circuit’s views that a conviction alone is not enough, the disability must be an ongoing loss and it must be shown that the court’s decree will eliminate the claimed collateral consequence and bring about the relief sought); *U.S. v. Scanio*, No. 97-1584, 1998 WL 802060, at 1 (2d Cir. 11/12/1998) (2<sup>ND</sup> Circuit citing the 7<sup>TH</sup> Circuit’s *Bush* decision and denying coram nobis on the basis of the requirement that the petitioner demonstrate continuing legal consequences from his conviction that are more than mere desire to be rid of the stigma of conviction are not purely speculative).

And where a petitioner challenges only some of his prior convictions through a coram nobis petition, courts applying the civil disability requirement will deny the petition because “a single felony conviction supports any civil disabilities and reputational injury [the defendant] may have to endure.” *Keane*, 852 F.2d at 205; *United States v. Atkin*, 106 A.F.T.R.2d (RIA) (6th Cir. 2010)

#### **VII. The Fourth, Ninth, And Eleventh Circuits Hold That The Government Must Rebut A Presumption Of Continuing Consequences To Prevent The Court From Reaching The Merits Of A Coram Nobis Petition.**

Three circuits, by contrast, hold that a court may instead presume that any conviction has collateral consequences that provide adequate standing to seek relief. *United States v. Lesane*, 40 F.4th 191, 203-204 (4th Cir. 2022); *United States v. Kroytor*, 977 F.3d 957, 961 (9th Cir. 2020); *United States v. Peter*, 310 F.3d 709, 715-716 (11th Cir. 2002)

**The Fifth Circuit** is at times considered to be aligned with the Ninth and Fourth. It appears that the Fifth Circuit requires collateral consequences but, like the Ninth Circuit, takes a lenient approach. *U.S., v. Marcello* (noting collateral-consequences requirement and granting writ but not identifying particular consequences suffered). Because the minority approach recognizes that reputational harm from a conviction is damaging enough for federal relief, coram nobis is available under this approach even if the petitioner has other convictions that would remain intact. *U.S. v. Walgren*.

**The Ninth Circuit** has repeatedly reaffirmed the presumption that collateral consequences flow from any criminal conviction” based on the mootness principles developed in *Sibron v. New York*, 392 U.S. 40 (1968). *Hirabayashi v. United States*, 828 F.2d 591, 606 (9th Cir. 1987). In *Sibron*, this Court held that an appeal in a criminal case was not moot even though the petitioner had completely served his sentence, because the government could not show that there was “no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction.” 392 U.S. at 57. The Ninth Circuit applies the *Sibron* “no possibility” test in coram nobis cases, and requires the government rebut a presumption that civil disabilities exist. *Hirabayashi*, 828 F.2d at 606; *United States v. Walgren*, 885 F.2d 1417, 1421 (9th Cir. 1989). Thus, unless the government comes forward with its own evidence of the lack of adverse consequences, the coram nobis petitioner need only show those “adverse consequences from the conviction sufficient to satisfy Article III’s case-and-controversy requirement.” *Kroytor*, 977 F.3d at 961; *United States v. Riedl*, 496 F.3d 1003, 1006 (9th Cir. 2007) (collecting Ninth Circuit cases applying this test).

**The Fourth Circuit** The Court explained: “We emphasize that an essential purpose of the coram nobis remedy ... is to ‘achieve justice.’ In order to achieve justice in this situation —where it is clear that the coram nobis petitioner is actually innocent, yet spent several years in custody for an offense he did not commit— we are obligated to set the record straight.” Accordingly, the Court reversed the judgment of the District Court and remanded for an award of coram nobis relief. *United States v. Lesane*, 40 F.4th 191 (4th Cir. 2022).

The Court takes the same approach, reasoning that [c]onviction of a felony imposes a status upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities. *Mandel*, 862 F.2d at 1075 n.12 (*Parker v. Ellis*, 362 U.S. 574, 593-594 (1960) (Warren, C.J., dissenting)); *id.* at 1075 (granting coram nobis relief and noting that, without it, petitioners would face the remainder of their lives branded as criminals). These risks, which are sufficiently adverse to satisfy Article III’s case or controversy requirement, are the only consequences flowing to the petitioner from his convictions necessary for a court to reach an ultimate decision on coram nobis relief. *Bereano v. United States*, 706 F.3d 568, 576 (4th Cir. 2013).

The same Article III-based test applies in **the Eleventh Circuit**. *Gonzalez v. U.S.*, 981 F.3d 845, 852 (11th Cir. 2020) (The risk of removal is an adverse consequence of conviction sufficient to create an actual or imminent injury for a case or controversy under

Article III.). Like the Ninth and Fourth Circuits, the Eleventh Circuit acknowledges that "it is an obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences. *Peter*, 310 F.3d at 715-716 (*Spencer v. Kemna*, 523 U.S. 1, 12 (1998)).

Because these courts recognize that the reputational harm from a conviction is damaging enough for federal relief, *coram nobis* is available in these circuits even if the petitioner has other convictions that would remain intact. *Lesane*, 40 F.4th at 204 (refusing to "endorse" the "government[s] suggest[ion]" that "because Lesane has a criminal record, it should not make any difference that one of his convictions is for a crime he did not commit"); *Walgren*, 885 F.2d at 1421-22 (assuming that conviction on one count is valid and granting *coram nobis* relief on two other counts). This entrenched split warrants this Court's review.

#### VIII. THE SEVENTH CIRCUIT RESOLVED THE QUESTION INCORRECTLY.

The Seventh Circuit has transformed the statement in *Morgan* that "[s]ubsequent convictions may carry heavier penalties, civil rights may be affected" into a binding and narrow threshold "civil disability" requirement that few—if any—collateral consequences satisfy. That single line in that single opinion cannot bear the weight that the Seventh Circuit would place on it.

##### A. This Court Presumes The Existence Of Collateral Consequences That Justify The Court's Consideration Of A Collateral Attack On A Conviction.

Although this Court did not explicitly set out a standard in *Morgan* for standing to receive *coram nobis* relief, where, as here, "the defendant challenges his underlying conviction, this Court's cases have long presumed the existence of collateral consequences" that justify intervention. *United States v. Juvenile Male*, 564 U.S. 932, 936 (2011).

That principle dates back at least to *Carafas v. LaVallee*, 391 U.S. 234 (1968), which this Court heard after a state prisoner, who had petitioned for a writ of habeas corpus, had completed his term of incarceration and been discharged from parole. The state argued the Court lacked jurisdiction to hear the petition because it was moot; the petitioner's release from custody and his subsequent completion of parole alleviated any injury caused by his unlawful confinement. *Id.* at 236-237. The Court rejected that argument, explaining that as a "consequence of his conviction, [the petitioner] cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified period of time; he cannot vote in any election held in New York State; [and] he cannot serve as a juror. *Id.* at 237. Because of these disabilities or burdens," the Court held that the petitioner maintained a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him." *Id.*

In *Sibron v. New York*, 392 U.S. 40 (1968), a decision issued shortly after *Carafas*, this Court further explained that courts should presume a petitioner for collateral relief suffers from collateral consequences even where the petitioner does not challenge all of his previous convictions. The Court saw "no relevance in the fact that *Sibron* [was] a multiple offender" because it is "impossible" \* \* to say at what point the number of convictions on a man's record renders his reputation irredeemable." 392 U.S. at 56. It would be similarly "impossible for us to say that he had no interest in beginning the process of redemption with the particular case sought to be adjudicated." *Id.* Moreover, courts "cannot foretell what opportunities might present themselves in the future for the removal of other convictions from an individual's record," and should therefore err on the side of "eliminat[ing] the source of a potential legal disability" when a conviction is challenged. *Id.* at 56-57.

The Court has affirmed and re-affirmed the lesson of *Carafas* and *Sibron* that courts should decline "all inquiry into the actual existence of specific collateral consequences" and "presum[e]" that there are collateral consequences associated with each conviction in a criminal judgment that permit courts to reach the merits of petitions for collateral relief. *Sibron*, 392 U.S. at 55. In *Evitts v. Lucey*, 469 U.S. 387 (1985), this Court held that a habeas corpus action was not moot even though the petitioner had been released from custody and Kentucky had restored his civil rights, because "some collateral consequences of his conviction remain, including the possibility that the conviction would be used to impeach testimony \* \* \* in a future proceeding and the possibility that it would be used to subject him to persistent felony offender prosecution if he should go to trial \* \* \* in the future." *Id.* at 391 n.4. And in *Juvenile Male*, this Court again explained that the "case or controversy" requirement "[i]n criminal cases \* \* means that a defendant wishing to continue his appeals after the expiration of his sentence must suffer some 'continuing injury' or 'collateral consequence'" and "[w]hen the defendant challenges his underlying conviction, this Court's cases have long presumed the existence of collateral consequences." 564 U.S. at 936.

*Morgan*—the case in which this Court confirmed that the writ of *coram nobis* is available under the All Writs Act—is of a piece with those decisions. Indeed, the *Sibron* court cited and discussed *Morgan* in explaining why the completion of a sentence does not moot a criminal case. In the *Sibron* Court's view, "there was no indication that the recidivist increment would be removed from [Morgan's] state sentence upon invalidation of the federal conviction," and the *Morgan* Court did not "canvass[] the possible

**B. The Courts Of Appeals Have Repeatedly Asked For This Court's Guidance On This Question Presented.**

Over the 30 years that the split has persisted, multiple courts of appeals have acknowledged the split and asked for this Court's intervention. As the Seventh Circuit said in 1989, the Seventh Circuit's earlier decision in "Keane recognized that the courts of appeals disagreed about several aspects of coram nobis practice," and "[s]ince then the courts' paths have diverged farther." Bush, 888 F.2d 1148. "Eventually these disputes must be put to rest." *Id.* at 1149.

Other courts have joined the chorus of confusion, including those who have not yet taken a side in the split. *U.S. v. Newman*, 805 F.3d 1143, 1146 (D.C. Cir. 2015) (D.C. Circuit noting only that courts have articulated several factors that may bear on the propriety of granting such relief); *Blanton*, 94 F.3d at 232 (Sixth Circuit, prior to joining the long side of the split, stating that "the Supreme Court has not spoken on the issue of whether proof of an ongoing civil disability is required in coram nobis cases, and courts that have considered the issue are divided"); *U.S. v. Osser*, 864 F.2d 1056, 1060 (3d Cir. 1988) (3<sup>RD</sup> Circuit "admit[ting] to some uncertainty" about when a petitioner can make the requisite showing of collateral consequences"); *Stewart v. U.S.*, 446 F.2d 42, 43-44 (8th Cir. 1971) (8<sup>TH</sup> Circuit holding that "Stewart must demonstrate that he is suffering from present adverse consequences in order to be entitled to that remedy," without explaining what consequences would meet that test); compare *U.S. v. Dyer*, 136 F.3d 417, 429-30 & n. 33 (5th Cir. 1998) (5<sup>TH</sup> Circuit stating that "collateral consequences almost inevitably flow from criminal convictions, but th[is] fact alone is not enough to justify issuance of an extraordinary writ of coram nobis.") with *U.S. v. Marcello*, 876 F.2d 1147 (5th Cir. 1989) granting the writ without identifying any collateral consequences suffered by the petitioner.

**C. The Question Presented Is Important.**

In the meantime, the circuit split continues to inflict real world harm. As explained above, *supra* at 4-6, coram nobis has been used to remedy a wide range of errors in criminal proceedings "under circumstances compelling such action to achieve justice." *Morgan*, 346 U.S. at 511. Thus, the Court has "found that a writ of coram nobis can issue to redress a fundamental error." *Denedo*, 556 U.S. at 911. In *Morgan*, for example, the Court held that coram nobis was available to review a claim of deprivation of counsel in violation of the Sixth Amendment. 346 U.S. at 512-513. Coram nobis has also been used to examine claims of insanity, *id.* at 510, that the government coerced witnesses to commit perjury, *id.*, ineffective assistance of counsel, *Denedo*, 556 U.S. at 907, and actual innocence, see, e.g., *Lesane*, 40 F.4th 198.

Karen Tucker, petitioner who has served her sentence maintains a strong interest in avoiding the collateral consequences of a wrongful conviction. Subsequent convictions may carry harsher penalties, *Morgan*, 346 U.S. at 512-513; a non-citizen may face deportation, *Denedo*, 556 U.S. at 907-908; and the petitioner may be deprived of her civil rights, such as the ability to serve on a jury, vote, or hold office, *Fiswick v. U.S.*, 329 U.S. 211, 222 n.10 (1946). A criminal record may also prohibit the petitioner from obtaining employment, occupational or professional licensing, or housing. There is no legitimate reason to impose these serious burdens on a person who was wrongly convicted. Indeed, doing so only undermines public confidence in the judicial system.

**X. THIS CASE IS A GOOD VEHICLE TO RESOLVE THE QUESTION PRESENTED.**

There is a clear, deep, and longstanding circuit split acknowledged by the court below. And that split is determinative here: the Seventh Circuit declined to reach the merits of Kimberlin's coram nobis petition because his unchallenged convictions are an independent cause of his civil disabilities. See *Pet. App.* 6a-7a. A court on the other side of the split, in contrast, would have followed this Court's instructions in *Sibron* and reached the merits of Kimberlin's claim is like Karen Tucker's claim. *Lesane*, 40 F.4th 191, 203-204; *Walgren*, 885 F.2d at 1421-22. Whether a petitioner has the opportunity to obtain adjudication of his or her claim that he or she was wrongfully convicted should not be a matter of geography.

The Seventh Circuit, moreover, has developed the most clearly defined version of the civil disability requirement. And although other circuits have indicated some confusion about the precise contours of their court's precedents. *Murray*, 704 F.3d at 29 n.6; *Osser*, 864 F.2d at 1060; the Seventh Circuit has expressed no such doubt. That is not surprising, given that Judge Easterbrook has authored the court's opinion in nearly every decision concerning coram nobis—and served on the panel in the decision below—and has offered lengthy explanations of his reasoning. *Keane*, 852 F.2d at 203; *Bush*, 888 F.2d at 1148-51.

The fundamental errors in Tucker's prosecution warrant review. Karen Tucker, Petitioner cannot recover the roughly 26 years that she spent convicted for crimes that she did not commit, but she should have the right to recover her good name and restored to pre-trial conditions.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,  
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