

No. _____

In the Supreme Court of the United States

NITA PATEL, ET VIR,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth Amendment protects the right to assistance of counsel regarding a collateral consequence of a guilty plea, when the consequence is both sufficiently intertwined with the conviction and sufficiently severe.

PARTIES TO THE PROCEEDINGS

Petitioners Nita and Kirtish Patel were petitioners in the district court proceedings and appellants in the court of appeals proceedings.

Respondent United States of America was the respondent in the district court proceedings and appellee in the court of appeals proceedings.

RELATED PROCEEDINGS

United States District Court (DNJ):

Nita Patel v. United States of America, No. 2:17-cv-07485-SDW (Dec. 22, 2022) (judgment entered)

Kirtish Patel v. United States of America, No. 2:18-cv-14628-SDW (Jan. 23, 2023) (judgment entered)

United States v. Nita Patel, United States v. Kirtish Patel, No. 2:15-cr-00592, (August 16, 2016) (judgment entered)

United States v. Kirtish Patel, No. 2:15-cr-00593 (August 16, 2016) (judgment entered)

United States ex rel. Jane Doe v. Heart Solution, et al., No. 2:14-cv-03644 (July 8, 2016) (judgment entered)

United States Court of Appeals (CA3):

Nita Patel v. United States of America, Kirtish Patel v. United States of America, No. 23-2418, No. 23-2795 (district court affirmed) (October 17, 2025)

Nita Patel v. United States of America, Kirtish Patel v. United States of America, No. 23-2418, No. 23-2795 (rehearing denied) (January 16, 2026)

United States of America v. Kirtish Patel, No. 16-3498 (Dec. 27, 2016) (dispositive order and judgment entered)

United States ex rel. Jane Doe v. Heart Solution, et al., No. 17-2019 (May 3, 2019) (judgment entered)

Supreme Court of the United States:

Nita Patel, et vir v. United States, No. 25A1098 (Apr. 7, 2026) (time to petition for certiorari extended)

Kirtish Patel v. United States, No. 16-1301 (Oct. 2, 2017) (certiorari denied)

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PETITION FOR WRIT OF CERTIORARI

Nita and Kirtish Patel (Patels) respectfully petition for writ of certiorari to review the Third Circuit’s judgment below.

OPINIONS BELOW

The Third Circuit’s opinion is reported at 156 F.4th 342 and reproduced in the Appendix at App. 1–16. The Third Circuit’s order denying the Patels’ request for rehearing is reproduced in the Appendix at App. 21–22. The opinion and order of the District of New Jersey denying Nita’s claim for relief under 28 U. S. C. § 2255 is unpublished but reproduced at App. 23–78. The opinion and order of the District of New Jersey denying Kirtish’s claim for relief under 28 U.S.C. § 2255 is unpublished but reproduced in the Appendix at App. 80–126.

The opinion of the District of New Jersey entering judgment of liability against the Patels under the False Claims Act is unpublished but reproduced at App. 170-188. The opinion of the Third Circuit affirming in part the judgment of liability under the False Claims Act is reported at 923 F.3d 308 and reproduced at App. 149–169.

JURISDICTION

The Third Circuit’s judgments were entered on October 17, 2025. The Third Circuit denied rehearing on January 16, 2026. Justice Alito extended the time to petition for writ of certiorari to May 16, 2026. This Court has jurisdiction under 28 U. S. C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides, in relevant part: “In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence.”

STATEMENT OF THE CASE

The Third Circuit has decided an exceptionally important question of federal law that has not been, but should be, settled by this Court regarding the circumstances under which a criminal defendant is entitled to constitutionally effective advice of counsel concerning the collateral consequence of a conviction. Confronted with a matter of first impression, the Third Circuit held that “the Sixth Amendment requires criminal defense lawyers to advise their clients only of a guilty plea’s direct consequences, not its collateral consequences.” App. 13. On that basis, it concluded that plea counsel’s failure to advise the Patels about “the collateral consequence of civil liability under the False Claims Act does not violate the Sixth Amendment.” *Ibid.*¹

The Third Circuit’s opinion rests on an impermissibly narrow interpretation of this Court’s decision in *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010) and would drastically diminish, beyond what the Constitution tolerates, the duties a criminal defense attorney owes his client under the Sixth Amendment.

In *Padilla*, a majority of the Court announced that a criminal defense attorney’s Sixth Amendment duty

¹ The district court properly exercised jurisdiction under 28 U.S.C. § 1331 and the court of appeals properly exercised jurisdiction under 28 U.S.C. §§ 1291 and 2253(a).

to provide reasonable assistance to his client extends beyond the pending charges in an indictment. 559 U.S. at 373-74. In observing that the Court has “never applied a distinction between direct and collateral consequences to define the scope of constitutionally reasonable professional assistance required under [*Strickland v. Washington*, 466 U.S. 668 (1984)],” the *Padilla* majority expressly opined that advice regarding a “collateral consequence” of a conviction is not “categorically removed” from the scope of the Sixth Amendment right to counsel. *Id.* at 365-66. Additionally, the Court instructed it has never distinguished between civil and criminal sanctions in determining whether a potential penalty is so severe as to be subject to Sixth Amendment scrutiny. See *id.* at 365. Although the collateral consequence at issue in *Padilla* was deportation, the holding rested on the majority’s determination that the law has “enmeshed criminal convictions and the penalty of deportation,” *id.* at 365-66, and the penalty of deportation is “particularly severe,” *id.* at 365.

In this case, a panel of the Third Circuit held in a precedential opinion that “the Sixth Amendment requires criminal defense lawyers to advise their clients only of a guilty plea’s direct consequences, not its collateral consequences.” App. 13. In holding that the Patels’ “ineffective assistance of counsel claim is not governed by [*Padilla*],” the Panel observed that “[n]either our Court nor the Supreme Court has directly addressed whether it is appropriate for courts to categorically distinguish between direct and collateral consequences for purposes of defense counsel’s Sixth Amendment obligations.” App. 11. The Panel reasoned that “*Padilla*’s holding was limited to requiring

‘counsel [to] inform her client whether his plea carries a risk of deportation,’ and it did not apply generally to collateral consequences.” App. 12. The Third Circuit sitting en banc denied the Patels’ motion for rehearing.

This case presents an able and opportune vehicle for the Court to expound on its holding in *Padilla* to (1) clarify that the direct/collateral distinction is not dispositive in determining whether an allegation of ineffective assistance of counsel implicates Sixth Amendment protections, and (2) elucidate when and under what circumstances the Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel regarding collateral consequences of a guilty plea. The Court should grant certiorari and reverse.

A. Factual and Legal Background

1. This petition concerns three related groups of proceedings: the criminal cases; the action under the False Claims Act (FCA), 31 U.S.C. §§ 3729–3733; and the habeas corpus petitions that gave rise to the Third Circuit’s opinion below. The habeas claim grew from defense counsel’s failure to inform the Patels (1) that the FCA action was pending at the time he advised them on pleading guilty to healthcare fraud *and* (2) of the collateral estoppel effect on the FCA action of pleading guilty to healthcare fraud and stipulating to loss suffered by federal agencies.

2. The Patels pled guilty to health care fraud in violation of 18 U.S.C. § 1347, which makes it a crime to knowingly and willfully defraud a health care benefit program, such as Medicare.² App. 4.

² The Patels were also convicted under 18 U.S.C. § 2.

For the same conduct, the Patels were also found liable under the FCA for \$7,756,864.85 (an amount more than triple the amount of loss to federal agencies as determined in the criminal proceedings). App. 5. The FCA creates liability for anyone who knowingly submits a false claim to the government or causes another to submit a false claim to the government or knowingly makes a false record or statement to get a false claim paid by the government. 31 U.S.C. §§ 3729(a)(1)(A) and (B). An FCA violation has four elements: falsity, causation, knowledge, and materiality. App. 163. At the time relevant to this matter, liability under the FCA triggered a civil penalty ranging between \$5,500 and \$11,000 for each false claim, an award representing treble the government’s damages, and the government’s litigation costs. 31 U.S.C. §§ 3729(a)(1), (3).³

Without question, a defendant in an FCA suit may not contest the presence of any elements of any violation that has been established or conceded against him in parallel criminal proceedings. App. 177–178 (citing 31 U. S. C. § 3731(e)).

³ The FCA allows private persons to file suit for violations of the statute on behalf of the government. Such persons are known as “relators” and such suits are known as “Qui Tam” actions. Depending on whether the government intervenes in a Qui Tam action, the relator is entitled to receive between 15 and 30 percent of the amount the government recovers through the litigation. If the Qui Tam action is successful, the relator is entitled to legal fees and other expenses of the action, paid for by the defendant. 31 U. S. C. § 3730(d). “This incentivizes people to come forward from the private sector with evidence of fraud perpetrated on the government.” *United States v. Couch*, 906 F. 3d 1223, 1225 (CA11 2018) (citation omitted).

The Sixth Amendment right to effective assistance of counsel requires counsel for a criminal defendant to provide advice regarding “the advantages and disadvantages of a plea agreement.” *Libretti v. United States*, 516 U. S. 29, 50–51 (1995). An obvious disadvantage of pleading guilty to health care fraud where victims include government providers is the risk that the government will bring an FCA case premised on the very conduct underlying the guilty plea; or, as happened here, the government will intervene in an FCA case that a relator had already initiated.

3. On November 17, 2015, the Patels were separately charged by Information with one count of defrauding Medicare and private insurers through their companies, Biosound Medical Services, Inc. (Biosound) and Heart Solution, PC (Heart Solution), from in or about September 2006 through in or about June 2014, in Morris County, New Jersey, in violation of 18 U. S. C. §§ 1347 and 2. App. 26–27; App. 82–83.

Biosound and Heart Solution offered mobile diagnostic testing services that were conducted on-site at a physician’s office. App. 27. Both businesses were Medicare-approved providers. *Ibid.* Biosound offered diagnostic testing administration and interpretation services at a primary care physician’s office. Kirtish traveled to the physician’s office to administer the diagnostic test, then sent the test results to an appropriate specialist physician, whom Biosound paid to interpret the results. *Ibid.* The Information charged that beginning as early as October 2008, the Patels stopped transmitting diagnostic test results to a specialist physician. Instead, Kirtish interpreted the results and wrote the diagnostic reports and Nita

affixed a doctor's signature to the report. The Patels were not licensed physicians. App. 27–28.

In September 2006, Kirtish represented to Medicare that Biosound would begin performing neurological diagnostic tests, which would be supervised by a physician as required by Medicare. App. 28. Biosound thereafter became a Medicare-approved provider of neurological diagnostic testing. To receive reimbursement for these services, Medicare required that a licensed subspecialist physician supervise and interpret any test performed in a particular subspecialty. The Information charged that Biosound never retained a supervising physician and that from September 2006 through June 2014, none of the neurological testing performed by Biosound was supervised by the neurologist whom Kirtish had indicated to Medicare would be supervising Biosound's neurological testing. App. 28.

The Information charged that the Patels were paid more than \$4,386,183.75 as a result of their scheme to defraud Medicare and private insurance companies. App. 28. The Information also sought forfeiture of all property derived from gross proceeds traceable to the commission of the offense, for which the Patels were found jointly and severally liable. *Ibid.* The Patels retained Anthony Fusco, Esq. to represent Kirtish and Frank Arleo, Esq., to represent Nita.

On or about August 20, 2015, the Patels entered into identical written plea agreements, App. 2; App. 85; and the district court accepted both pleas of guilty on November 17, 2015, App. 30; App. 86.

4. Previously, a relator had filed a Qui Tam action under seal based on the same allegations of misconduct as charged in the Information (Qui Tam Action).

App. 171-172. On November 18, 2015, the day after the Patels pleaded guilty to the Informations, the government elected to intervene in the Qui Tam Action. App. 173.

5. Although the Qui Tam pleadings were not publicly available until the day after the Patels entered their pleas, their counsel, and certainly Mr. Arleo, was aware of the Qui Tam Action well before the court unsealed the pleadings, as confirmed by various communications in which Mr. Arleo was involved. For example, in a September 21, 2015 email to Assistant United States Attorney Danielle Walsman, on which Mr. Fusco was copied, Mr. Arleo wrote: “Attached is the executed fact stip plea agreement. We are still discussing a global resolution with the clients and will advise.” App. 192. The reference to a “global resolution” included the Qui Tam Action, as confirmed by Mr. Arleo’s letter addressed to Nita, dated April 15, 2016: “Regarding the civil claims, we were not able to reach a global resolution of those claims. As a result, the Government filed a civil action asserting claims under the False Claims Act.” App. 69. A printed copy of an email containing plea agreement terms, authored by AUSA Walsman and dated August 11, 2015, contains handwritten notes and arithmetic reflecting what appears to be a negotiation of the penalties anticipated in the Qui Tam Action: “5500 per claim penalty waived”; substantial discount of the treble damages; and waiver of an additional \$417,000 in additional restitution. App. 189–190.

These various communications, the earliest of which predates the Patels’ guilty pleas by three months, demonstrate that counsel for the Patels knew of the impending Qui Tam Action. The Qui Tam

Action in fact is the only civil action related to the criminal proceeding and the only matter that could have remained pending (and thus subject to a “global resolution”) after the Patels had signed their plea agreements. The government unsealed its notice to intervene in the Qui Tam Action one day after the Patels pleaded guilty; therefore, any effort to “reach a global resolution of those claims,” occurred prior to the Patels’ plea. Mr. Arleo plainly knew about the Qui Tam Action in advance of the guilty plea and failed to discuss the Action, and the attendant penalties, with his clients. In fact, Mr. Arleo failed to discuss the global resolution with the Patels at any time prior to April 15, 2016, some six months after they pled guilty.

6. Prior to sentencing, the government objected to a 3-point reduction for acceptance of responsibility, based on the position the Patels had taken in the Qui Tam Action challenging liability. In arguing for the reduction to the sentencing court, Mr. Arleo stated: “Looking back, hindsight being 20/20, had we known that the civil case was going to come down the road, we would have insisted on this trial that the word ‘proper’ should be in there.” App. 148. But Mr. Arleo did know the Qui Tam Action was coming “down the road”—only the Patels were none the wiser. And Mr. Arleo failed to advise the Patels that in pleading guilty to Medicare fraud and stipulating to a loss amount of approximately \$4.8 million, they exposed themselves to a collateral estoppel judgment in the related Qui Tam Action.

7. The district court sustained Nita’s objection to withholding credit for acceptance of responsibility and sentenced her to 78 months’ imprisonment and ordered restitution in the amount of \$4,803,875.40. App.

47. The court overruled Kirtish's objection on acceptance of responsibility and sentenced him to 100 months' imprisonment and ordered restitution in the amount of \$4,803,875.40. App. 98-99. The court ordered the Patels to pay restitution and to forfeit a sum of money equal to \$4,803,875.40. App. 47.

8. The Qui Tam Action concluded in the entry of summary judgment in favor of the government and the relator. The district court presiding over the Qui Tam Action entered summary judgment by applying the doctrine of collateral estoppel based on the Patels' guilty pleas. App. 178; 179; and 184. Accounting for treble damages under the FCA, the district court entered a judgment against the Patels and their co-defendants in the amount of \$7,756,864.85. App. 185; App. 187-188. The judgment represented the sum of \$5,006,864.85 in damages plus civil monetary penalties of \$2,750,000. App. 185. Nita and Heart Solution appealed the judgment, which the Third Circuit affirmed in relevant part in a precedential opinion. App. 149.

9. The Patels, alleging ineffective assistance of counsel, filed separate *pro se* petitions for relief under 28 U. S. C. § 2255. Pertinent to the issue raised in this petition, Nita asserted Mr. Arleo rendered constitutionally deficient counsel when he failed to advise her that in pleading guilty to Medicare fraud and stipulating to a loss amount of approximately \$4.8 million, she exposed herself to a collateral estoppel judgment in the pending Qui Tam Action. App. 48-49. Kirtish asserted he would not have pled guilty if his lawyer had advised him that the stipulation in his plea agreement would preclude him from challenging the

amount of damages in the Qui Tam Action. App. 99–100.

The district court denied the Patels’ requests for an evidentiary hearing and denied the § 2255 motions on the merits, determining that Mr. Arleo had not furnished deficient counsel. App. 76; App. 123. The court denied the issuance of a certificate of appealability in each case.

10. The Third Circuit granted a certificate of appealability to the Patels on the limited issue of whether counsel provided ineffective assistance by failing to advise them that their guilty pleas could have collateral estoppel consequences in the Qui Tam Action. App. 7. The Third Circuit answered in the negative. In a precedential opinion, the Third Circuit held, contrary to the language in *Padilla* and in contrast to the reasoning utilized by the Second and Eleventh Circuits, the right to advice on collateral consequences of a guilty plea is categorically removed from the ambit of the Sixth Amendment right to counsel. App. 12–13 (“*Padilla* ... did not disturb the lower courts’ rules about whether the Sixth Amendment requires attorneys to inform their clients of a conviction’s collateral consequences. Instead, it announced that those courts’ rules are inapplicable to one specific consequence: deportation”).

REASONS FOR GRANTING THE PETITION

I. The lower courts require guidance on whether and when collateral consequences of a conviction trigger Sixth Amendment protections.

In *Padilla*, the Supreme Court of Kentucky held that collateral consequences are outside the scope of

representation required by the Sixth Amendment and, therefore, the failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel. *Padilla*, 559 U. S. at 364–65. In reversing the state court, this Court reaffirmed that it had never relied on a distinction between direct and collateral consequences “to define the scope of constitutionally ‘reasonable professional assistance,’” required under *Strickland*. *Id.* at 365. Further, the Court expressly set aside determining whether that distinction is appropriate, given the “unique nature of deportation.” *Id.* at 365.

In the intervening years since *Padilla* was decided, most United States courts of appeals have had occasion to ponder *Padilla*’s holding and have arrived at varying interpretations. As this petition explains, several courts espouse allegiance to a strict distinction between direct and collateral consequences, unless the consequence is deportation. Several other courts have narrowly interpreted *Padilla* while limiting the holding to the facts of the case. Two courts appear to read *Padilla* as relying on reasoning that extends beyond the context of deportation. The uncertainty created by these varying interpretations necessitates the Court’s clarifying guidance.

A. The United States courts of appeals are divided on the scope of the Sixth Amendment’s guarantee of effective representation post-*Padilla*.

Since this Court decided *Padilla*, the courts of appeals that have considered the issue of whether counsel owes a constitutional duty to his client to advise on

collateral consequences of a guilty plea have in most instances limited the ruling to the facts of the case. In those instances, the facts reflect a collateral consequence that was either insufficiently severe or insufficiently associated with the criminal process to trigger a second look under *Padilla*. The Third Circuit, however, has now joined the Seventh Circuit to assert allegiance to a strict direct/collateral distinction for the purpose of evaluating whether counsel provided effective representation. By contrast, the Eleventh Circuit and the Second Circuit properly read *Padilla* to signal the Court’s repudiation of a categorical approach.

In *United States v. Reeves*, on which the Third Circuit expressly relied below, the Seventh Circuit considered whether counsel rendered ineffective assistance in failing to advise his client of the possibility of an enhanced sentence should the client engage in criminal conduct in the future. 695 F.3d 637 (CA7 2012). The Seventh Circuit focused on the fact that “[a]ny risk present at the time Reeves pleaded guilty in state court in 2004 was entirely contingent on his deciding to commit more crime in the future.” *Id.* at 640 (citation omitted). The court pointedly “pause[d]” to “consider the absurd ramifications of the rule that Reeves ask[ed] [it] to create,” explaining that under the argument Reeves advanced, the court “would be forced to hold that counsel has a constitutional duty to advise the client as to how he might best continue his criminal activity while minimizing his risk of future punishment.” *Ibid.* It was under these circumstances that the Seventh Circuit declared, “[t]he Supreme Court created a rule in *Padilla* specific to the risk of deportation, and we see no justification for

extending that to the realm of future criminal sentence enhancements.” *Ibid.*

In *Bauder v. Department of Corrections State of Florida*, the Eleventh Circuit applied *Padilla* within the realm of civil commitment, holding that defense counsel performed deficiently when he affirmatively misrepresented to the defendant that in pleading guilty he would not be exposing himself to further detention in the form of civil commitment. 619 F.3d 1272 (CA11 2010). Discussing *Padilla*, the Eleventh Circuit instructed that this Court “has noted that when the law is unclear[,] a criminal defense attorney must advise his client that the ‘pending criminal charges may carry a risk of adverse [collateral] consequences.’” *Bauder*, 619 F.3d at 1275 (second alteration in original) (quoting *Padilla*, 559 U.S. at 369).⁴

Most recently, in *Farhane v. United States*, the Second Circuit sitting en banc applied *Padilla* and *Chaidez v. United States*, 568 U.S. 342, 349 (2013) to disavow strict allegiance to the direct/collateral

⁴ In *Sims v. United States*, the Eleventh Circuit relied on *Bauder* to affirm the district court’s finding that defense counsel had rendered ineffective assistance of counsel when he misinformed the petitioner that the government would not terminate retirement pay following a plea of guilty to violating 18 U. S. C. § 793(e). 785 Fed. Appx. 632, 633 (CA11 2019) (per curiam). Citing *Chaidez v. United States*, 568 U.S. 342, 356 (2013), the Eleventh Circuit stated, “an attorney’s failure to advise his client of collateral consequences of pleading guilty, other than deportation, is not a Sixth Amendment violation.” 785 Fed. Appx. 634. “However,” the Eleventh Circuit explained, “affirmative misadvice about the collateral consequences of a guilty plea may constitute ineffective assistance of counsel because ‘certain considerations are so important that misinformation from counsel may render the guilty plea constitutionally uninformed.’” *Ibid.*

distinction. There, the court considered the claim of ineffective assistance of counsel for failure to warn of potential civil denaturalization as a consequence of a criminal conviction. A majority of the Second Circuit held that “criminal defense attorneys have a Sixth Amendment obligation to inquire into and advise a naturalized citizen client of any risk of deportation following denaturalization proceedings that accompany the client’s guilty plea, just as they do for a deportation risk facing a noncitizen client.” 121 F.4th 353, 358 (CA2 2024). The majority reasoned first that “the risk of denaturalization necessarily exposes [a defendant] to the risk of deportation,” and therefore “a straightforward application of *Padilla* . . . resolves the question.” *Id.* at 363. The majority then reasoned in the alternative that “because denaturalization is a ‘particularly severe’ consequence, and ‘nearly an automatic result’ of a guilty plea to certain offenses, advice regarding denaturalization, like advice regarding deportation, ‘is not categorically removed from the ambit of the Sixth Amendment right to counsel.’” *Ibid.* Thus,

whether viewed as a direct application of *Padilla*’s holding or a *necessary result of its core reasoning*, the constitutional bottom line is clear: criminal defense counsel has a Sixth Amendment duty to advise a naturalized citizen client that entering a guilty plea exposes him to a risk of denaturalization and deportation.

Ibid. (emphasis added). See *id.* at 367-71 (rejecting government’s attempts to limit *Padilla*’s application). In rendering this ruling, the Second Circuit sitting en banc vacated the decision reached in *Farhane v.*

United States, 77 F.4th 123 (CA2 2023), which expressly “reaffirm[ed] the direct/collateral distinction . . . in the post-*Padilla* context,” and held “the distinction remains valid, [] it applies to civil denaturalization, and [] such denaturalization is a collateral consequence of conviction and so is not covered by the Sixth Amendment’s right to effective assistance of counsel.” 77 F.4th at 127.⁵

The other circuits to render opinions on the matter provide limited discussion of their reasoning and/or confine the holding to the facts of the case. In *Plunk v. Hobbs*, the Eighth Circuit offered but a sentence:

Although some courts subsequently have extended the reasoning of the Supreme Court’s decision in [*Padilla*—concerning

⁵ A district judge in the District of Pennsylvania recently relied on *Farhane* and *Singh v. Att’y Gen.*, 12 F.4th 262 (CA3 2021) to find plea counsel violated his client’s Sixth Amendment right to effective assistance of counsel by not advising him of the possibility of denaturalization (and subsequent deportation) arising from pleading guilty to sexual assault. *Vincent v. Terra*, No. 24-cv-01037, 2024 WL 5008499, at *10-12 (EDPA Dec. 6, 2024). In *Singh*, an Indian national petitioned for review of a final order of removal based on felony convictions that were entered while petitioner was a naturalized US citizen. The Third Circuit noted that *Padilla* did not “expressly apply” to the facts before it, but found nonetheless that “Singh’s case raise[d] a constitutional concern in the spirit of *Padilla*,” namely, that he was facing removal for his conviction from a guilty plea, which he made without notice of the immigration consequences that could flow from the plea. *Singh*, 12 F.4th at 278 n.15. Presently, the Sixth Circuit is considering a claim of ineffective assistance nearly identical to the one raised in *Vincent*. See *United States v. Karnail Singh*, No. 25-1523, ECF No. 6 (CA6 Feb. 24, 2026) (notifying parties that case is submitted to the court on the briefs and the record).

advice about deportation consequences—to require advice about parole eligibility, *e.g.*, *Commonwealth v. Pridham*, 394 S.W.3d 867, 878 (Ky. 2012); *Ex Parte Moussazadeh*, 361 S.W.3d 684, 690–91 (Tex. Crim. App. 2012), any such extension of the Sixth Amendment would be a new rule of constitutional law, inapplicable on collateral review.

766 F.3d 760, 769 (CA8 2014).

In *Parrino v. United States*, the Sixth Circuit declined to apply *Padilla* where the collateral consequence at issue was a five-year exclusion from federal health-care programs. 655 Fed. Appx. 399 (CA6 2016). The defendant (a pharmacist) argued that his attorney’s failure to advise him that a misdemeanor conviction for health care fraud would likely subject him to mandatory exclusion amounted to ineffective assistance of counsel, and that his guilty plea was therefore defective. The district court first held a hearing on the claim (which process the Patels requested and were denied) and then denied the petition on several grounds, including a finding that defendant’s attorney was more credible than defendant. *Id.* at 403. The court of appeals briefly addressed the fact that *Padilla* concerned deportation as the collateral consequence then, “for the sake of argument” considered the merits of the claim and determined that the attorney had “fulfilled that duty here by thoroughly discussing with Parrino the potential collateral consequences of a guilty plea.” *Id.* at 403-04. The court of appeals concluded by observing the attorney had warned the

defendant that “there was still a real risk of exclusion: ‘I couldn’t guarantee that they wouldn’t exclude him,’” and by holding that such “advice met the standard for effective assistance of counsel articulated in *Padilla*.” *Id.* at 404.

In *United States v. Tuakalau*, the defendant agreed to plead guilty to Hobbs Act robbery and a violation of 18 U. S. C. § 924(c)(1)(A) in exchange for a guaranteed 30-year sentence (instead of facing a minimum mandatory sentence of 185 years). The government also agreed to dismiss the other charges against him. 562 Fed. Appx. 604 (CA10 2014). Two years later, the government charged the defendant with RICO conspiracy based, in part, on some of the facts underlying the robbery and § 924(a) conviction. The defendant sought to invalidate his plea and argued his attorney provided constitutionally defective advice in failing to warn of the possibility of the RICO charge. In a summary opinion, the Tenth Circuit denied the issuance of a certificate of appealability due largely to the collateral nature of the consequence at issue, discussing *Padilla* only briefly and in a footnote, and also on the basis that the defendant could not show prejudice. *Id.* at 608-09 & n. 4.

In *Santiago v. Laclair*, decided ten years prior to *Farhane*, the Second Circuit affirmed the district court’s decision denying an ineffectiveness claim where the defendant alleged his attorney had failed to warn that he would “automatically be sentenced to a consecutive term of any discharged portion of his sentence on [a prior conviction].” 588 Fed. Appx. 1, 3

(CA2 2014) (summary order). The en banc majority in *Farhane* did not reference *Santiago*.⁶

In *United States v. Crain*, the Fifth Circuit came close to passing on but ultimately declined to reach the issue of whether defense counsel was obligated to warn of a possible lifetime computer ban and, if so, whether counsel was deficient in failing to so warn. 877 F.3d 637, 648–49 (CA5 2017). The Fifth Circuit noted the Eleventh Circuit’s conclusion in *Bauder* and the Seventh Circuit’s conclusion in *Reeves*, and further observed that “neither [*Parrino* or *Santiago*] discussed how widely *Padilla*’s holding might apply, and both compared the consequences at issue with *Padilla*’s emphasis on the severity of deportation.” 877 F.3d at 648-49. The Fifth Circuit weighed the severity of a lifetime computer ban as compared to the penalty of deportation and considered that such a ban does not automatically result from a conviction, and ultimately concluded it need not wade into the post-*Padilla* fray because the defendant had shown no prejudice as a result of the failure to warn. *Crain*, 877 F.3d at 648-49.

In *United States v. Ayala*, decided a month after *Padilla*, the Fourth Circuit considered a claim of ineffective assistance of counsel based on an attorney’s failure to inform his client that a state court plea of guilty might be used as evidence against him in a future federal prosecution. 601 F.3d 256, 269-70 (CA4 2010). The Fourth Circuit mused, “for a guilty plea to be

⁶ The fact that *Parrino*, *Tuakalau*, and *Santiago* were issued in the Federal Appendix reflects the respective courts of appeal intended to narrowly confine the applicability of the holdings to the facts presented in each case.

constitutionally valid, a defendant must be informed of the ‘direct’ but not the ‘collateral’ consequences of the plea,” which distinction “turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant’s punishment.” *Id.* at 270 (citations omitted). The Fourth Circuit consequently held, “[w]hether a guilty plea in state court might be used in a subsequent federal prosecution is plainly a collateral consequence.” *Ibid.* (citations omitted). Seven years later, a court in the District of Maryland observed that “the bright-line distinction between direct and collateral consequences of a guilty plea has, at least arguably, been called into doubt recently by the Supreme Court” in *Padilla*. *United States v. Johnson*, 272 F.Supp.3d 728, 731 (DMD 2017). Toeing the line between *Ayala* and *Padilla*, the court in *Johnson* concluded:

Padilla and *Chaidez* establish that certain consequences, even though technically “collateral”—i.e., not “definite, immediate, and largely automatic,” *Cuthrell v. Dir., Patuxent Inst.*, 475 F.2d 1364, 1366 (4th Cir. 1973)—may be so inextricably intertwined with the underlying criminal process, so severe, and so likely to result that notice of them must be included within the protective umbrella of the Sixth Amendment right to effective assistance of counsel. To date, only one such consequence—deportation—has been identified. And while other unique collateral consequences may yet reveal themselves as within the scope of the

Sixth Amendment, the possibility of a subsequent federal conviction based on the same conduct underlying a state guilty plea is not such a consequence.

272 F. Supp. 3d at 732.

The Ninth Circuit does not appear to have weighed in on the issue directly, though it observed that *Padilla* answered “whether the Sixth Amendment cover[s] so-called ‘collateral consequence[s]’ of a conviction,” and answered the question “by rejecting the direct/collateral consequence distinction, declining to label deportation as either and, instead, identifying it as ‘unique.’” *United States v. Chan*, 792 F.3d 1151, 1155 (CA9 2015) (“*Padilla* fundamentally altered Sixth Amendment jurisprudence in at least partially breaking down the distinction between direct and collateral consequences”) (citing *Chaidez*, 568 U.S. at 352-53; *Padilla*, 559 U.S. at 365).

In sum, post-*Padilla*, the scope of constitutionally-guaranteed protection for a criminal defendant varies considerably depending on where he pleads guilty. In the Seventh and (now) Third Circuit, the right to be warned of a collateral consequence other than deportation is categorically removed from the Sixth Amendment umbrella. The Sixth, Eighth, and Tenth Circuits appear to lean in the same direction but have not yet engaged in a robust discussion of the breadth of *Padilla*’s holding. In the Fourth and Fifth Circuits, there is suggestion that a collateral consequence other than deportation could be severe enough and sufficiently intertwined with the conviction as to fit under the Sixth Amendment umbrella. In the Eleventh Circuit, that suggestion is stronger. Finally, the Second

Circuit has expressly rejected the notion that collateral consequences are categorically removed from the Sixth Amendment umbrella. The harm to criminal defendants and the system as a whole caused by this uncertainty is clear. An individual's constitutional right to competent counsel should not depend upon location.

Respectfully, *Padilla* is properly read to “establish that certain consequences, even though technically ‘collateral’ . . . may be so inextricably intertwined with the underlying criminal process, so severe, and so likely to result that notice of them must be included within the protective umbrella of the Sixth Amendment right to effective assistance of counsel.” *Johnson*, 272 F.Supp.3d at 732. The Third Circuit’s pronouncement that the Sixth Amendment requires criminal defense lawyers to advise their clients only of the direct consequences of a guilty plea reflects an unsupported extrapolation of *Padilla* that drastically narrows counsel’s constitutional duties to his client. Further guidance is necessary on when and under what circumstances collateral consequences of a guilty plea trigger the Sixth Amendment.

B. The state courts to consider the issue diverge on whether and under what circumstances a criminal defense attorney owes a constitutional duty to advise of collateral consequences.

State courts across the country are divided on whether and how to extend *Padilla*. The Supreme Court of Illinois extended the *Padilla* rationale to counsel’s duty to advise a defendant of the possibility of involuntary commitment pursuant to the Illinois

Sexually Violent Persons Commitment Act. *People v. Hughes*, 983 N. E. 2d 439, 456-57 (Ill. 2012). See *People v. Dodds*, 7 N. E. 3d 83 (Ill. Appx 2014) (applying *Hughes* and *People v. Presley*, 969 N. E. 2d 952 (Ill. Appx 2012) to hold that counsel’s performance is deficient whenever he or she fails to advise a defendant of the appropriate SORA registration requirements in the context of a plea agreement).

The Supreme Court of Georgia extended the *Padilla* rationale to counsel’s duty to inform defendant prior to guilty plea that he would be ineligible for parole as a recidivist. *Alexander v. State*, 772 S. E. 2d 655 (Ga. 2015). See *Com. v. Pridham*, 394 S. W. 3d 867, 878 (Ky. 2012) (rejecting the contention that *Padilla* affects the collateral consequences rule only in the deportation context and finding misadvice regarding parole eligibility “sufficiently analogous to the misadvice at issue in *Padilla* to require the same result”).

Other state courts have declined to extend *Padilla* to collateral consequences. See, e.g., *State v. LeMere*, 879 N. W. 2d 580 (Wis. 2016) (concerning civil commitment); *People v. La Pointe*, 40 N. E. 3d 72 (Ill. App. 2d Dist. 2015) (concerning sentence enhancement); *Cranford v. State*, 575 S. W. 3d 791 (Mo. App. W. Dist. 2019) (concerning parole eligibility); and *Taylor v. State*, 887 N. W. 2d 821 (Minn. 2016) (concerning sex offender registration).

As with the federal cases cited above, none of the state cases that decline to find a constitutional duty to advise as to collateral consequences involves a collateral consequence that is both sufficiently intertwined with the conviction and sufficiently severe.

II. The decision below is wrong.

Certiorari is also warranted because the Third Circuit erroneously relied on *Padilla* to hold that the Sixth Amendment requires criminal defense lawyers to advise their clients “only of a guilty plea’s direct consequences, not its collateral consequences.” App. 13.

In *Padilla*, this Court instructed that (1) “advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel,” and (2) the ineffective assistance of counsel analysis set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) applied to Padilla’s habeas claim. 559 U.S. 356, 366 (2010). Critical to the Court’s holding was the determination that the law has “enmeshed criminal convictions and the penalty of deportation,” *Padilla*, 559 U.S. at 365-66, and the penalty of deportation is “particularly severe,” *id.* at 365. See *id.* at 366 (“Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill suited to evaluating a *Strickland* claim concerning the specific risk of deportation”).

Deportation is indisputably unique in its severity. But in underlining that uniqueness the *Padilla* Court did not discount the possibility that other consequences could be severe enough and sufficiently intertwined in the criminal process as to implicate the Sixth Amendment. Just as the distinction between direct and collateral consequence was ill suited to evaluating a *Strickland* claim concerning the specific risk of deportation, the distinction is ill suited to

determining defense counsel’s duty to advise the Patels of the Qui Tam Action and the attendant consequences of pleading guilty to health care fraud. The consequence of draconian financial penalties under the FCA is pointedly severe and the specific risk of FCA liability and imposition of statutory penalties bears a similarly “close connection to the criminal process.” *Padilla*, 559 U.S. at 365-66. And defense counsel knew that the Qui Tam Action was pending at the time he advised the Patels on their guilty plea.

The defining question should not be, as the Third Circuit concluded, whether the collateral consequence involves the risk of deportation. As deportation is decidedly unique, no such similar consequence exists. Rare is the law that addresses one specific and discrete issue and serves no further purpose. Yet, this would be *Padilla*’s function and fate if no collateral consequence other than deportation triggers the Sixth Amendment. The question instead should be comprised of two components: how severe is the consequence; and is imposition of the consequence a virtual certainty as a result of the conviction.

The collateral consequence the Patels endured satisfies this test. First, FCA liability can constitute a severe penalty, see *Yates v. Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1288, 1308 (CA11 2021) (joining the Ninth, Eighth, and Fourth Circuits in holding that “FCA monetary awards constitute fines for the purpose of the Excessive Fines Clause”); and did in fact result in a severe penalty for the Patels. Nita was found liable for restitution in the amount of \$4,803,875.41, App. 47; Kirtish was found liable for restitution in the amount of \$4,803,875.41, App. 98–99; and the Patels were subject to orders of forfeiture

in the amount of \$4,803,875.41. App. 5; App. 47. The sum of \$1,668,954.95 was attributed, pursuant to stipulation, to fraud committed on Medicare. App. 26. The court in the Qui Tam Action relied on these figures to both estop the Patels from arguing the fraud caused less loss and to award damages in the amount of \$5,006,864.85—three times the amount of stipulated loss caused to federal agencies—plus civil penalties of \$2,750,000, which the court premised on the total loss amount of \$4,803,875.41. App. 185; App. 187–188.

Second, in light of their guilty plea admissions, liability under the FCA was a *fait accompli* for the Patels. The Qui Tam Action was pending when the Patels signed and entered their guilty pleas; and 31 U. S. C. § 3731(e) ensured that once the Patels entered their guilty pleas, they would be estopped from contesting either liability or loss amount in the Qui Tam Action. App. 179; App. 187–188. Cf. *Farhane*, 121 F.4th at 365 (“[a]s the government conceded at oral argument in these en banc proceedings, the collateral estoppel effect of Farhane’s plea therefore makes it ‘provably easier’ for the government to establish the facts necessary to denaturalize him”). With the guilty pleas a matter of record, the FCA court had “no discretion to excuse the conduct.” *Fedorenko v. United States*, 449 U. S. 490, 517 (1981).

The Patels asked the Third Circuit to hold that (1) advice regarding potential FCA liability in deciding whether to plead guilty to federal health care fraud is not categorically removed from the Sixth Amendment right to competent counsel, and (2) *Strickland* applies to the Patels’ habeas claims. The Third Circuit’s conclusion that failure to provide such advice can never

give rise to a claim for ineffective assistance of counsel is not supported by *Padilla*, the Constitution, or prevailing practice standards.

III. The reach of the Sixth Amendment’s protection is a profoundly important matter and this case presents the right set of circumstances for clarifying *Padilla*’s implications beyond the deportation context.

In the federal system, guilty pleas account for nearly 90 percent of all criminal convictions. See Dept. of Justice, Bureau of Justice Statistics, Federal Justice Statistics 2022, *11 (January 2024) (Table 6), <https://bjs.ojp.gov/document/fjs22.pdf>. Considering the gross disparity between defendants convicted as a result of a plea and those convicted following trial, “perhaps the most important service criminal defense lawyers perform is advising their clients whether to plead guilty and on what terms.” Chin & Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 Cornell L. Rev. 697, 713–718 (2002).

Because a guilty plea is a waiver of trial, including “a waiver of the right to contest the admissibility of any evidence the [prosecution] might have offered against the defendant[,] it must be an intelligent act ‘done with sufficient awareness of the relevant circumstances and likely consequences.’” *McMann v. Richardson*, 397 U.S. 759, 766 (1970) (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)). When a collateral consequence is both severe and “truly clear . . . the duty to give correct advice is equally clear.” *Padilla*, 559 U.S. at 369 (referring to deportation). “... [I]f the right to counsel guaranteed by the

Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and [] judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.” 397 U. S. at 771. *Accord Tollett v. Henderson*, 411 U. S. 258, 267 (1973) (instructing that a criminal defendant “may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*”).

In *Strickland*, the Court articulated the well-known test for assessing claims of ineffective assistance of counsel. 466 U. S. at 690–93. The initial question asks whether counsel’s representation “fell below an objective standard of reasonableness.” *Strickland*, 466 U. S. at 688. The follow-up question asks whether “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. Specific to challenges to guilty pleas, the defendant must show there is a reasonable probability that, but for counsel’s errors, she would not have pleaded guilty and would have pursued an alternative course of action. *Hill v. Lockhart*, 474 U. S. 52, 59 (1985).

A. Defense counsel’s advice fell short of prevailing standards.

Constitutional deficiency is “necessarily linked to the practice and expectations of the legal community[.]” *Padilla*, 559 U. S. at 366. So that counsel can “play[] a role that is critical to the ability of the adversarial system to produce just results,” constitutionally adequate representation requires counsel to

adhere to “prevailing professional norms.” *Strickland*, 466 U. S. at 685, 688 (“The proper measure of attorney performance remains simply reasonableness under prevailing professional norms”). Thus, counsel’s representation is constitutionally deficient if it falls “below an objective standard of reasonableness.” *Hill*, 474 U. S. at 57; *Strickland*, 466 U. S. at 687–88.

“Prevailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable” *Paddilla*, 559 U.S. at 366-67 (citations omitted). See Roberts, Effective Plea Bargaining Counsel, Yale Law Review, 122 YLJ 2650, 2666 (2013) (citing “dynamic interactions between constitutional norms and everyday practice” to demonstrate “the relevance of prevailing professional norms of plea bargaining in determining whether and how to define constitutionally effective plea bargaining counsel”).

For nearly a quarter of a century the American Bar Association has instructed that “[t]o the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.” ABA Standards for Criminal Justice, Responsibilities of Defense Counsel, 14-3.2(f) (3d ed. 1999). See *id.* 14-3.2(f) cmt. (“An increasing burden must fall to defense counsel by virtue of the growing number and range of consequences of conviction,” as “only defense counsel is in a position to ensure that the defendant is aware of the full range of consequences that may apply in his or her case”). And, as a corollary to Standard 14-3.2(f), the American Bar Association instructs:

[t]he rules of procedure should require a court to ensure, before accepting a plea of guilty, that the defendant has been informed of collateral sanctions made applicable to the offense or offenses of conviction under the law of the state or territory where the prosecution is pending, and under federal law. Except where notification by the court itself is otherwise required by law or rules of procedure, this requirement may be satisfied by confirming on the record that defense counsel's duty of advisement under Standard 14-3.2(f) has been discharged.

ABA Standards for Criminal Justice, Notification of Collateral Sanctions Before Plea of Guilty, 19-2.3(a) (3d ed. 1999).

The prevailing professional norms do not require expertise in another field of law nor insight into future applications of existing law. They instruct simply that the attorney inform himself sufficiently of the facts of the case and the circumstances of his client such that he can consider whether collateral consequences are potentially at issue and advise accordingly. See *Padilla*, 559 U.S. at 369 n.10 (“[l]ack of clarity in the law [] does not obviate the need for counsel to say something about the possibility of deportation, even though it will affect the scope and nature of counsel’s advice”).

Thus, under prevailing professional norms, Mr. Arleo needed to consider what he already knew as the facts of the case: the Patels were charged with federal health care fraud; the federal government was a

victim of the fraud; and at issue was a significant amount of loss. Next, under prevailing professional norms, Mr. Arleo needed to consider if under these facts a conviction might trigger a collateral consequence. Here, the collateral consequence was easily identifiable in the fundamental principle of collateral estoppel and under the statutory framework of the FCA.

B. The Patels suffered prejudice as a result of defense counsel’s failure to adequately advise them.

To show prejudice, a habeas petitioner “must demonstrate a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (internal quotation marks and citation omitted). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Ibid.*

Specific to this claim, the Patels must show they would have made a different decision with respect to the plea and that such decision would have been rational under the circumstances. See *Roe v. Flores-Ortega*, 528 U.S. 470, 481–82 (2000); *Hill*, 474 U.S. at 59; *Boye v. United States*, 810 Fed.Appx. 118, 121 (CA3 2020) (showing that “but for his counsel’s purported errors, he would have gone to trial, received a more favorable plea deal, or have been better off pleading guilty without the benefit of a plea agreement”). “The decision whether to plead guilty [] involves assessing the respective consequences of a conviction after trial and by plea.” *Lee v. United States*, 582 U.S. 357, 367 (2017). “When those consequences

are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive." *Ibid.*

The prejudice to the Patels caused by Mr. Arleo's failure to counsel them on the collateral estoppel effects of their guilty pleas and the stipulated loss amount is plain. Under his advice, they stipulated to defrauding Medicare in the amount of \$1,668,954.95. App. 26; 186. They stipulated to a total loss amount of \$4,803,875.40. App. 47. In the Qui Tam Action, the court determined on summary judgment that the Patels were "estopped from denying the essential elements of offenses in this civil action that involve the same transactions in the informations to which the Patels pled guilty." App. 179. The court also determined that "the Patels admitted in their pleas that Medicare paid them \$1,668,954.95 due to their fraudulent acts, so any dispute as to the number of false claims is moot." App. 186. The court awarded damages in the amount of \$5,006,864.85. App. 185. This represents "three times the \$1,668,954.95 that Defendants admitted Medicare paid them for their fraudulent acts in their plea allocutions," plus civil penalties of \$2,750,000, based on the total loss amount of \$4,803,875.40. *Ibid.* In awarding this amount to the plaintiffs, the court observed:

The Patels have admitted the exact amount of damages that their FCA violations caused. Their arguments related to facts asserted in [their] certifications are without merit. Since Defendants are estopped from denying the facts in their plea allocutions related to damages, the

Court will grant summary judgment in favor of Plaintiffs for all requested damages.

App. 187–188.

As a result of the Patels' stipulations, the government was not put to its burden at sentencing to prove the loss amount. Had the Patels understood that stipulating to the loss amount in connection with a guilty plea would have resulted in civil liability and related damages of more than three times what they were criminally liable to pay, they would have pursued a different option. They could have pushed Mr. Arleo to negotiate a different plea agreement, pleaded guilty outside of any agreement, or elected to go to trial. Their election to pursue any or all of these alternative options would have been exceedingly rational considering the circumstances.⁷

⁷ The Patels were resolute during the criminal case that the loss amount was inflated and inaccurate. Nita asked Mr. Arleo to investigate the overstated loss figures, and he demurred. Instead, he challenged the loss amount under the unsupported theory that the calculation conflated Nita's conduct with that of her husband, and Nita did not own Biosound and thus any loss associated with Biosound should not be attributed to Nita. Additionally, despite clear Guideline guidance to the contrary, Mr. Arleo sought credit for Nita for the services Biosound and Heart Solution in fact provided to Medicare and the private insurance companies, arguing that the customary fee for a specialist physician was \$25.00 per report and that the total fees for each report resulted in a total loss of less than \$100,000. App. 42.

C. This case presents an excellent vehicle for clarifying defense counsel's duty to warn of collateral consequences of a conviction.

Constitutional considerations and long-prevailing practice standards instruct that defense attorneys owe a duty to advise clients on the collateral consequence of a conviction where the collateral consequence is both sufficiently severe and directly relates to and flows from the conviction.

The predominance of consequences attendant to criminal convictions will not trigger *Strickland* review because the consequence will rarely be both sufficiently intertwined with the conviction and sufficiently severe. Furthermore, few criminal defendants can demonstrate the requisite prejudice necessary for the requested relief. But where the consequence satisfies the criteria set forth in *Padilla*, as is the case here, defense counsel must be held to account for failing to provide constitutionally competent advice.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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Appendix A

[CA3 ECF No. 75]

[Filed: Oct. 17, 2025]

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-2418

NITA PATEL,
Appellant

v.

UNITED STATES OF AMERICA

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 2:17-cv-07485)
District Judge: Honorable Susan D. Wigenton

No. 23-2795

KIRTISH N. PATEL,
Appellant

v.

UNITED STATES OF AMERICA

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On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 2:18-cv-14628)
District Judge: Honorable Susan D. Wigenton

Submitted Under Third Circuit L.A.R. 34.1(a)
September 8, 2025

Before: HARDIMAN, KRAUSE, and FREEMAN,
Circuit Judges.

(Filed: October 17, 2025)

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OPINION OF THE COURT

HARDIMAN, *Circuit Judge*.

In *Padilla v. Kentucky*, the Supreme Court held that the Sixth Amendment requires criminal defense lawyers to advise non-citizen clients of the immigration consequences of their guilty pleas. 559 U.S. 356, 374 (2010). In these habeas appeals, Nita Patel and her husband, Kirtish Patel, ask us to extend *Padilla* from the immigration context to civil liability under the False Claims Act. We decline to do so. And even if we were to hold otherwise, retroactive relief would be unavailable to the Patels. See *Edwards v. Vannoy*, 593 U.S. 255, 276 (2021). We will affirm the District Court’s judgment.

I

A

Nita and Kirtish Patel operated Biosound Medical Services Inc. and Heart Solution P.C. Both companies offered mobile diagnostic test services, such as

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echocardiograms, ultrasounds, and nerve conduction studies to diagnose serious health conditions at a physician's office. To receive reimbursement for those services, Medicare required the companies to have a licensed subspecialist physician on staff to supervise and interpret tests performed in a particular subspecialty.

In 2006, the companies applied to Medicare for approval to do neurological diagnostic testing. Kirtish falsely represented to Medicare that a licensed neurologist would supervise the diagnostic tests. Relying on that falsehood, Medicare approved both companies as providers of neurological diagnostic testing. Starting in 2008, Kirtish—who did not have a medical license or degree—wrote the diagnostic reports, and Nita affixed a forged signature of a physician. This scheme was profitable, earning the Patels at least \$4,386,133.75 (of which \$1,668,954.95 came from Medicare).

B

In 2014, “Jane Doe,” a former employee of the companies, filed a sealed qui tam action in the United States District Court for the District of New Jersey. Doe alleged that the Patels had perpetrated a healthcare fraud scheme and asserted a claim under the False Claims Act, 31 U.S.C. § 3729 *et seq.*

Soon after Doe filed the qui tam action, the Patels were arrested on a criminal complaint charging them with conspiring to commit healthcare fraud. The Patels retained separate defense counsel, and each of them agreed to plead guilty to one count of healthcare fraud. *See* 18 U.S.C. § 1347. In exchange, the Government agreed not to file more criminal charges

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based on the scheme against the couple. Although the parties disputed the exact amount of money the scheme generated, the Patels agreed that it was at least \$4,386,133.75. And they acknowledged that they were subject to restitution and criminal forfeiture. Of particular importance to these appeals, the plea agreements were “reached without regard to any civil or administrative matters that may be pending or commenced in the future against” the Patels. App. 175, 184. Nor did the agreements “prohibit the United States . . . or any third party from initiating or prosecuting any civil or administrative proceeding against” them. *Id.*

In November 2015, the Patels pleaded guilty. Nita and Kirtish were later sentenced to 78 months’ and 100 months’ imprisonment, respectively, followed by three years of supervised release. The District Court also imposed identical restitution obligations and forfeiture judgments against the Patels in the amount of \$4,803,875.40.

The day after the Patels pleaded guilty, the Government intervened in Doe’s *qui tam* action and filed a complaint asserting, among other things, claims under the False Claims Act. The Government later moved for summary judgment, arguing that the Patels were collaterally estopped from denying liability because of the stipulations in their plea agreements and the admissions they made in their guilty plea colloquies. The District Court agreed and granted the Government summary judgment on its claims under the False Claims Act. The District Court trebled the Medicare loss of \$1,688,954.95 to \$5,006,864.85 in damages, plus civil monetary penalties of \$2,750,000, for a total of \$7,756,864.85. Nita appealed, and we

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affirmed that judgment as it pertained to her liability under the False Claims Act. *See United States ex rel. Doe v. Heart Sol.*, PC, 923 F.3d 308, 319–20 (3d Cir. 2019). The parties agreed to stay all efforts to enforce the False Claims Act judgment during the pendency of this litigation.

C

In 2017, Nita moved to vacate her criminal sentence under 28 U.S.C. § 2255. Nita claimed she was unaware of the *qui tam* action before pleading guilty and her attorney never advised her of the possibility of such civil liability. Nita contended that had she known that her guilty plea could collaterally estop a challenge to her liability in the *qui tam* action, she would not have pleaded guilty under the agreement.

The District Court denied Nita’s § 2255 motion. The Court reasoned that even if defense counsel erred by failing to advise Nita about her potential civil liability, her guilty plea was still knowing and voluntary. In fact, Nita acknowledged during her change of plea hearing that the plea agreement did not preclude the Government from initiating and prosecuting a civil action against her. Referencing defense counsel’s preplea correspondence with the Patels, the District Court noted that “there [was] evidence the Patels were considering a global resolution during plea negotiations.” *Patel v. United States*, 2022 WL 17850147, at *18 (D.N.J. Dec. 22, 2022) (citation modified). The Court held that Nita’s § 2255 motion failed “because counsel’s performance was not objectively unreasonable under the circumstances as they existed before the plea hearing.” *Id.* at *19.

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Kirtish also moved to vacate his sentence under 28 U.S.C. § 2255. Like his wife, Kirtish alleged that his lawyer did not advise him that his guilty plea admissions “would have the collateral consequence of estopping him from contesting any claims against him” in the qui tam action. App. 391. Kirtish asserted that had he known about this potential civil liability, he would not have pleaded guilty under the agreement.

The District Court denied Kirtish’s § 2255 motion, reasoning that he was told that the plea agreement did not preclude the Government from initiating a civil action based on the same criminal conduct against him. The District Court then held that defense counsel’s alleged failure to advise Kirtish of his potential civil liability was not ineffective assistance of counsel.

In 2023, Nita moved to alter or amend the judgment on her § 2255 motion. She argued that she was entitled to an evidentiary hearing because defense counsel rendered ineffective assistance of counsel by failing to advise her of the potential civil liability. Kirtish raised the same arguments in a pro se motion. The District Court denied both motions.

The Patels timely appealed. A panel of this Court granted the Patels a certificate of appealability limited to the claim that counsel provided ineffective assistance by failing to advise them that their guilty pleas could have collateral estoppel consequences in the qui tam action. Nita completed her term of supervised release in January 2025, and Kirtish will complete his term of supervised release in November.

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II¹

To begin, we consider whether Nita’s appeal is moot because she has completed her term of supervised release.

Article III of the Constitution limits the “judicial Power” to “Cases” or “Controversies.” U.S. Const. art. III, § 2. “For a case or controversy to exist, a petitioner, throughout each stage of the litigation, must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.” *Abreu v. Superintendent Smithfield SCI*, 971 F.3d 403, 406 (3d Cir. 2020) (citation modified). So “a habeas corpus petition generally becomes moot when a prisoner is released from custody because the petitioner has received the relief sought.” *Id.* “Once the convict’s sentence has expired, however, some concrete and continuing injury other than the now-ended incarceration or parole—some ‘collateral consequence’ of the conviction—must exist if the suit is to be maintained.” *Spencer v. Kemna*, 523 U.S. 1, 7 (1998). “We must address the issue of collateral consequences in terms of the likelihood that a favorable decision would redress the injury or wrong.” *Abreu*, 971 F.3d at 406 (citation modified).

Nita argues that this appeal is not moot because the judgment from the *qui tam* action is a continuing collateral consequence of her conviction. We agree. The District Court relied on the collateral estoppel

¹ The District Court had jurisdiction under 28 U.S.C. §§ 2255 and 2241(a). We review the District Court’s legal conclusions *de novo* and its factual findings for clear error. *United States v. Hill*, 98 F.4th 473, 478 n.1 (3d Cir. 2024).

effects of the Patels’ guilty pleas to enter judgment in the qui tam action. And a favorable decision here would permit Nita to reopen that civil judgment. See Fed. R. Civ. P. 60(b)(5) (providing that “the court may relieve a party or its legal representative from a final judgment” when “it is based on an earlier judgment that has been reversed or vacated”). So Nita’s appeal is not moot because the civil judgment is a continuing collateral consequence from her conviction that could be redressed if she were to prevail. We therefore exercise jurisdiction under 28 U.S.C. §§ 1291 and 2253(a).

III

Turning to the merits, the Patels argue that their attorneys provided ineffective assistance of counsel by failing to advise them that liability under the False Claims Act could follow from their guilty pleas for healthcare fraud. We disagree.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI. The right to counsel extends to all “critical stages of a criminal proceeding, including when [the defendant] enters a guilty plea.” *Lee v. United States*, 582 U.S. 357, 363 (2017) (citation modified). So defense counsel must “inform a defendant of the advantages and disadvantages of a plea agreement and the attendant statutory and constitutional rights that a guilty plea would forgo.” *Libretti v. United States*, 516 U.S. 29, 50–51 (1995).

The “right to counsel is the right to the effective assistance of counsel.” *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (emphasis added). To show

ineffective assistance of counsel in the context of a guilty plea, a petitioner must demonstrate (1) the lawyer's performance was unreasonable under prevailing professional norms; and (2) "there is a reasonable probability that, but for counsel's errors, [the petitioner] would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); see also *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Before 2010, state courts and the lower federal courts overwhelmingly had held that the Sixth Amendment required that criminal defense lawyers advise their clients only of a guilty plea's direct, rather than collateral consequences. See *Chaidez v. United States*, 568 U.S. 342, 350 & n.7 (2013) (collecting cases). Direct consequences "relate[] to the length or nature of [a] sentence," *Kincade v. United States*, 559 F.2d 906, 909 (3d Cir. 1977), namely, the maximum prison term and any fines for a charged offense. *United States v. Salmon*, 944 F.2d 1106, 1130 (3d Cir. 1991). Collateral consequences have been described as results of a plea that are not "automatic," *Cuthrell v. Dir., Patuxent Inst.*, 475 F.2d 1364, 1366 (4th Cir. 1973), or are beyond the sentencing court's control, "contingent upon action taken by an individual or individuals ... such as another governmental agency or the defendant himself." *United States v. Littlejohn*, 224 F.3d 960, 965 (9th Cir. 2000). Thus, we have held collateral consequences to include a conviction's effect on parole eligibility, *Meyers v. Gillis*, 93 F.3d 1147, 1153-54 (3d Cir. 1996), on sentencing for a later offense, *United States v. Rengifo*, 832 F.3d 220, 223 (3d Cir. 2016), and on voting rights, *United States v. Cariola*, 323 F.2d 180, 186 (3d Cir. 1963). See also

United States v. Nicholson, 676 F.3d 376, 382 (4th Cir. 2012) (employment benefits); *Moore v. Hinton*, 513 F.2d 781, 782 (5th Cir. 1975) (loss of driver’s license); *United States v. King*, 618 F.2d 550, 552-53 (9th Cir. 1980) (civil tax liability). As of 2010, all ten federal appellate courts to explicitly consider the question had concluded that counsel’s failure to advise a client about a guilty plea’s collateral consequences was “never [considered] a violation of the Sixth Amendment.” *Chaidez*, 568 U.S. at 350 (citation modified).

Neither our Court nor the Supreme Court has directly addressed whether it is appropriate for courts to categorically distinguish between direct and collateral consequences for purposes of defense counsel’s Sixth Amendment obligations. Instead, in *Padilla v. Kentucky*, the Supreme Court addressed a more specific question and announced a new rule: that the Sixth Amendment requires “that counsel must inform her client whether his plea carries a risk of deportation.” 559 U.S. at 374. Prior to *Padilla*, many lower courts had classified deportation as a collateral consequence. See, e.g., *Broomes v. Ashcroft*, 358 F.3d 1251 (10th Cir. 2004); *United States v. Fry*, 322 F.3d 1198 (9th Cir. 2003); *United States v. Gonzalez*, 202 F.3d 20 (1st Cir. 2000). But in *Padilla*, the Supreme Court explained that it need not address whether the “distinction between direct and collateral consequences [should] define the scope of constitutionally ‘reasonable professional assistance’ required under *Strickland*,” *id.* at 365, because the “collateral versus direct distinction [was] ill suited to evaluating a *Strickland* claim concerning the specific risk of deportation,” *id.* at 366. That was because deportation is “a particularly severe penalty” and “intimately related to the

criminal process.” *Id.* at 365 (citation modified). According to the Court, the law had “enmeshed criminal convictions and the penalty of deportation for nearly a century.” *Id.* at 365–66. “[I]mportantly, recent changes in . . . immigration law ha[d] made removal nearly an automatic result for a broad class of noncitizen offenders.” *Id.* at 366. Because of these developments, it was “uniquely difficult to classify [deportation] as either a direct or a collateral consequence.” *Id.* The Supreme Court therefore held “that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel,” and *Strickland* applied. *Id.*

The Patels do not argue that civil liability under the False Claims Act is somehow a direct consequence of pleading guilty. Instead, they read *Padilla* to establish a broader proposition about collateral consequences. In their view, *Padilla* held “that the constitutional necessity of advising a criminal defendant on the potential consequences of the plea turns on (1) the degree to which the conviction and potential penalty are intertwined, and (2) the severity of the penalty.” Patel Br. 21. Not so. In fact, *Padilla*’s holding was limited to requiring “counsel [to] inform her client whether his plea carries a risk of deportation,” and it did not apply generally to collateral consequences. 559 U.S. at 374. As one of our sister courts aptly stated: “*Padilla* is rife with indications that the Supreme Court meant to limit its scope to the context of deportation only.” *United States v. Reeves*, 695 F.3d 637, 640 (7th Cir. 2012). We read *Padilla* the same way. It did not disturb the lower courts’ rules about whether the Sixth Amendment requires attorneys to inform their clients of a conviction’s collateral

consequences. Instead, it announced that those courts' rules are inapplicable to one specific consequence: deportation. Thus, the Patels' ineffective assistance of counsel claim is not governed by *Padilla*.²

We join our sister circuits in holding that the Sixth Amendment requires criminal defense lawyers to advise their clients only of a guilty plea's direct consequences, not its collateral consequences. Therefore, we hold that defense counsel's failure to advise a client about the collateral consequence of civil liability under the False Claims Act does not violate the Sixth Amendment.³

IV

² The Patels argue that the Second Circuit's decision in *Farhane v. United States*, 121 F.4th 353 (2d Cir. 2024) (en banc), supports their argument. That decision held that "defense counsel has a Sixth Amendment duty to advise a naturalized citizen client that entering a guilty plea exposes him to a risk of denaturalization and deportation" under *Padilla*. *Id.* at 363. Like *Padilla*, *Farhane* hinged on the fact that "the risk of denaturalization" could lead to "deportation." *Id.* at 366. So it does not help the Patels' cases, which have nothing to do with immigration or citizenship.

³ Even if we were to adopt the Patels' expansive interpretation of *Padilla*, we would hold that *Padilla* does not extend to civil liability arising under the False Claims Act. Unlike civil liability, deportation is "a drastic measure" that is "at times the equivalent of banishment or exile." *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948). The Supreme Court opined in *Padilla* that deportation "is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." 559 U.S. at 364 (footnote omitted). So even under the Patels' own reading of *Padilla*, they have not shown that defense counsel had to advise them of their potential civil liability.

The Government argues in the alternative that even if the Patels' Sixth Amendment argument is correct, the non-retroactivity doctrine of *Teague v. Lane* precludes their requested relief.⁴ 489 U.S. 288 (1989). We agree.

Ordinarily, when we “announce a ‘new rule,’ a person whose conviction is already final may not benefit from the decision in a habeas or similar proceeding.” *Chaidez*, 568 U.S. at 347. Only a new substantive rule that “alter[s] the range of conduct or the class of persons that the law punishes” applies “retroactively on federal collateral review.” *Edwards*, 593 U.S. at 276 (citation modified). “A case announces a new rule . . . when it breaks new ground or imposes a new obligation on the government” because “the result was not dictated by precedent existing at the time the defendant’s conviction became final.” *Chaidez*, 568 U.S. at 347 (citation modified). And a holding is not dictated by precedent “unless it would have been apparent to all reasonable jurists.” *Id.* (citation modified). By contrast, “a case does not announce a new rule[] when it is merely an application of the principle that governed a prior decision to a different set of facts.” *Id.* at 347–48 (citation modified).

The Supreme Court’s decision in *Chaidez v. United States* is illustrative. There, the Court held that *Padilla* recognized a new rule of constitutional law. *Id.* at 354. Before *Padilla* was decided, many courts “had excluded advice about collateral matters from

⁴ The Patels argue that the Government forfeited this argument by failing to raise it until now. Because “we may affirm the District Court for any reason supported by the record,” the Government’s argument is properly before us. *United States v. Rivera*, 74 F.4th 134, 141 n.37 (3d Cir. 2023) (citation modified).

the Sixth Amendment’s ambit.” *Id.* at 352. *Padilla* “rejected that categorical approach,” making “the *Strickland* test operative” “when a criminal lawyer gives (or fails to give) advice about immigration consequences.” *Id.* at 353. So the *Chaidez* Court held that “*Padilla*’s holding that the failure to advise about [the] non-criminal consequence [of deportation] could violate the Sixth Amendment” was not “apparent to all reasonable jurists prior to” *Padilla*. *Id.* at 354 (citation modified). As a result, habeas petitioners cannot obtain retroactive relief under *Padilla*. *Id.* at 358.

According to the Patels, the non-retroactivity doctrine does not apply because *Padilla* “already answered the question of whether the Sixth Amendment has relevance to a lawyer’s advice about matters not part of a criminal proceeding.” Reply Br. 17. But as we have explained, the Patels misread *Padilla*’s holding. Because *Padilla*’s holding was limited to deportation, if we were to hold that the Sixth Amendment requires defense counsel to advise a client about potential civil liability under the False Claims Act, we would be recognizing a new rule of constitutional law. Such a holding is not “dictated by precedent existing at the time the” Patels’ “conviction[s] became final,” so the non-retroactivity doctrine bars their requested relief. *Chaidez*, 568 U.S. at 347 (citation modified); accord *Plunk v. Hobbs*, 766 F.3d 760, 769 (8th Cir. 2014) (en banc) (holding that an extension of *Strickland* to advice about parole eligibility would create “a new rule of constitutional law, inapplicable on collateral review”).⁵

⁵ Because we have held that the Patels failed to “state[] a colorable claim for relief under *Strickland*,” we do not reach their

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* * *

For these reasons, we will affirm the District Court's judgment.

argument that the District Court was required to hold an evidentiary hearing. *United States v. Arrington*, 13 F.4th 331, 334 (3d Cir. 2021).

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Appendix B

[CA3 ECF No. 76-1]

[Filed: Oct. 17, 2025]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-2418

NITA PATEL,
Appellant

v.

UNITED STATES OF AMERICA

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 2:17-cv-07485)
District Judge: Honorable Susan D. Wigenton

Submitted Under Third Circuit L.A.R. 31.4(a)
September 8, 2025

Before: HARDIMAN, KRAUSE, and FREEMAN,
Circuit Judges.

JUDGMENT

This cause came to be considered on the record from
the United States District Court for the District of

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New Jersey and was submitted pursuant to Third Circuit L.A.R. 34.1(a) on September 8, 2025.

On consideration whereof, it is now hereby ORDERED and ADJUDGED that the judgment of the District Court entered on December 22, 2022, and its order entered June 7, 2023, are hereby AFFIRMED. All of the above in accordance with the Opinion of this Court.

Costs shall not be taxed.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: October 17, 2025

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Appendix C

[CA3 ECF No. 63-1]

[Filed: Oct. 17, 2025]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-2795

KIRTISH N. PATEL,
Appellant

v.

UNITED STATES OF AMERICA

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 2:18-cv-14628)
District Judge: Honorable Susan D. Wigenton

Submitted Under Third Circuit L.A.R. 31.4(a)
September 8, 2025

Before: HARDIMAN, KRAUSE, and FREEMAN,
Circuit Judges.

JUDGMENT

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This cause came to be considered on the record from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit L.A.R. 34.1(a) on September 8, 2025.

On consideration whereof, it is now hereby ORDERED and ADJUDGED that the judgment of the District Court entered January 24, 2023, and its order entered September 27, 2023, are hereby AFFIRMED. All of the above in accordance with the Opinion of this Court.

Costs shall not be taxed.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: October 17, 2025

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Appendix D

[CA3 ECF No. 80]

[Filed: Jan. 16, 2026]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 23-2418 & 23-2795

NITA PATEL, Appellant in No. 23-2418
KIRTISH N. PATEL, Appellant in No. 23-2795

v.

UNITED STATES OF AMERICA

D. N.J. Nos. 2:17-cv-07485 & 2:18-cv-14628

SUR PETITION FOR REHEARING

Present: CHAGARES, *Chief Judge*, HARDIMAN, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, CHUNG, BOVE, and MASCOTT, *Circuit Judges*.

The petitions for rehearing filed by the Appellants in the above-entitled cases having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

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BY THE COURT,

s/ *Thomas M. Hardiman*

Circuit Judge

Dated: January 16, 2026

ARR/cc: Counsel of Record; Mr. Kirtish N. Patel

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Appendix E

[D. N.J. ECF No. 55]

[Filed: Dec. 22, 2022]

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NITA PATEL,	:	Civil Action
Petitioner,	:	No. 17-7485
	:	(SDW)
v.	:	
UNITED STATES OF AMERICA,	:	OPINION
Respondent.	:	

APPEARANCES:

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On behalf of Respondent

WIGENTON, District Judge

Presently before the Court is Petitioner Nita Patel’s (“Ms. Patel”) amended motion to vacate sentence under 28 U.S.C. § 2255, challenging her criminal conviction and sentence upon her guilty plea to health care fraud in violation of 18 U.S.C. §§ 1347 and 2, in Criminal Action No. 15-592.¹ (ECF No. 4). Ms. Patel alleges her counsel provided ineffective assistance from pre-plea investigation throughout sentencing. The Government filed an answer to the amended § 2255 motion (ECF No. 27), and Ms. Patel filed a reply brief (ECF No. 53). Subsequently, Ms. Patel filed a supplemental motion for hearing (ECF No. 54), and the Government did not respond. For the reasons set forth below, this Court will deny the amended § 2255 motion on the briefs pursuant to Federal Rule of Civil Procedure 78(b), and deny the supplemental motion for an evidentiary hearing.

I. BACKGROUND

Ms. Patel and her husband, Kirtish Patel (“Kirtish” or “Mr. Patel”), pled guilty to federal health care fraud involving Medicare and private insurers, through a scheme in which they forged physician signatures to create false diagnostic reports purportedly written by physicians who had read and interpreted the results, and by false pretenses claiming neurological diagnostic tests were supervised by a physician.² (Crim.

¹ Docket Entries in Criminal Action No. 15-592 are cited herein as (“Crim. ECF No.”), and docket entries in this Civil Action, No. 17-7485, are cited herein as (“Civ. ECF No.”)

² “Medicare regulations require all diagnostic testing to be ‘reasonable and necessary,’ as defined under Medicare Part B. In order for diagnostic neurological testing to be ‘reasonable and

ECF No. 30 at 1). According to the stipulation in the plea agreement, as a result of the health care offense,

necessary,' it must be performed under the proper level of physician supervision." *United States ex rel. Doe v. Heart Sol., PC*, 923 F.3d 308, 311 (3d Cir. 2019) (citing 42 U.S.C. § 1395y(a)(1)(A), 42 C.F.R. § 410.32(b)(1); 42 C.F.R. § 411.15(k).) In her reply brief, Ms. Patel maintains that her counsel failed to advise her that private insurance companies are not governed by the Medicare regulation requiring supervision by a neurologist. Although this is not addressed in the record, this Court notes that medical diagnostic testing is also governed by New Jersey law:

medical screening or medical diagnostic testing (other than clinical laboratory testing), conducted primarily for persons not receiving medical treatment from the testing entity, is nevertheless deemed to be a medical service. Such a practice shall be owned and under the responsibility of one or more physicians each of whom holds a plenary license from the State Board of Medical Examiners. All such testing, irrespective of the stationary or mobile nature of the facility, shall be performed under the authority of a designated responsible physician who shall establish a protocol and a quality assurance program for the specific type of screening or study. Results of all such procedures shall be interpreted by a physician holding a plenary license in this State, and documented in a written report which is preserved by the physician as required by N.J.A.C. 13:35–6.5.

Allstate Ins. Co. v. Northfield Med. Ctr., P.C., No. MRS-L-3228-99, 2001 WL 34779104, at *15–16 (N.J. Super. Ct. Law Div. Apr. 27, 2001); *see, e.g., Allstate Ins. Co. v. Schick*, 328 N.J. Super. 611, 628, 746 A.2d 546, 556 (Law. Div. 1999) (denying summary judgment where evidence suggested physician agreements were a sham that falsely represented compliance with state regulations). Thus, private insurance companies in New Jersey have an expectation that diagnostic testing was performed in accordance with the law. Notwithstanding, Ms. Patel knowingly and voluntarily pled to the factual basis, as outlined on the record and under oath.

the Patels, through their companies, Biosound Medical Services, Inc. (“Biosound”) and Heart Solution, PC (“Heart Solution”), were paid more than \$4,386,133.75, with payments from Medicare accounting for \$1,668,954.95 of the total amount. (Crim ECF No. 30 at 9).

A. The Information

On November 17, 2015, Ms. Patel was charged by Information with defrauding Medicare and private insurers from in or about September 2006 through in or about June 2014, in Morris County, New Jersey, in violation of 18 U.S.C. §§ 1347 and 2.³ (Crim. ECF No.

³ 18 U.S.C. § 1347(a), (b) provides:

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.

(b) With respect to violations of this section, a person need not have actual knowledge of this section or specific intent to commit a violation of this section.

26). The factual allegations in the Information are summarized as follows. Ms. Patel owned the business Heart Solution, and her husband owned Biosound. The Patels jointly operated both businesses and neither of them was a physician. Both businesses offered mobile diagnostic testing services that were conducted on-site at a physician's office. Biosound was a Medicare-approved provider since 1999, and Heart Solution was a Medicare-approved provider since 2011.

Private insurance companies and Medicare reimbursed Biosound for the performance and interpretation of tests ordered by a patient's primary care physician for diagnosis and treatment including: 1) echocardiograms to diagnose heart conditions; 2) chest, abdominal and lower leg ultrasounds to detect blood clots and abdominal aortic aneurysms; and 3) carotid ultrasounds to detect the risk of stroke. To receive reimbursement for these services, Medicare required Biosound to have a licensed subspecialist physician on staff to supervise and interpret any test performed in a particular subspecialty. Biosound purported to comply by Kirtish Patel travelling with the testing equipment to the referring physician's office to perform the tests, and then he would send the results to a specialist physician (the "Reading Doctor") to interpret the results and author and sign a diagnostic report.

Beginning at least as early as October 2008, the Patels stopped transmitting the test results to a Reading

18 U.S.C. § 2(a) states, "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

Doctor. Instead, Mr. Patel, with no medical license, wrote the diagnostic reports, and Ms. Patel copied and pasted physicians' signatures on the diagnostic reports from Biosound's office. The diagnostic reports were returned to the referring physicians, who made treatment decisions for their patients. The Patels forged Reading Doctors' signatures on more than half of the diagnostic reports produced by Biosound in the relevant period, without the knowledge of those doctors whose names were misappropriated. Biosound employees became aware of this scheme.

Beginning in or around September 2006, Mr. Patel represented to Medicare that Biosound would begin performing neurological diagnostic tests, which would be supervised by a physician as required by Medicare. Based on this false representation, Biosound became a Medicare-approved provider of neurological diagnostic testing. "From in or around September 2006 through June 2014, none of the neurological testing performed by Biosound was supervised by the neurologist that Kirtish N. Patel indicated to Medicare was supervising Biosound's neurological testing." (Crim. ECF No. 26 at 6).

By way of this scheme to defraud, the Patels were paid more than \$4,386,183.75 by Medicare and private insurance companies. The Information also called for forfeiture, pursuant to 18 U.S.C. § 982(a)(7), of all property derived from gross proceeds traceable to the commission of the offense, for which the Patels are jointly and severally liable.

B. The Plea Agreement

On August 20, 2015, Ms. Patel entered into a written plea agreement with the Government. (Crim.

ECF No. 30). Pursuant to the plea agreement, Ms. Patel pleaded guilty to the Information described above. In exchange for Ms. Patel's guilty plea, the Government agreed not to initiate any further criminal charges against her for forging physician signatures or obtaining health care benefits under false pretenses for the period from September 2006 through June 2014. The plea agreement stated that: (1) the statutory maximum term of imprisonment was ten years; (2) the statutory maximum fine was the greatest of \$250,000, or twice the gross amount of any pecuniary gain that any persons derived from the offense, or twice the gross amount of any pecuniary loss sustained by any victims of the offense; (3) in addition to any fine, the sentencing court must order forfeiture pursuant to 18 U.S.C. § 981(a)(1)(c) and 28 U.S.C. § 2461; and (4) may order restitution. The Government did not make any promise as to the Sentencing Guidelines range or the ultimate sentence. As to forfeiture and restitution, the parties agreed it would be equivalent to the amount of the loss involved in the criminal conduct pursuant to U.S.S.G. § 2B1.1(b)(1), as determined by the sentencing judge.

Ms. Patel agreed with the Government, but reserved argument before the sentencing judge as to the loss amount, that the Patels were paid more than \$4,386,133.75 by Medicare and the insurance company victims of the scheme to defraud. This stipulation did not bind the sentencing judge, and it did not bind the Government to the extent that the Government obtained, prior to sentencing, any conflicting credible, material information on losses. Ms. Patel acknowledged in writing that she discussed the plea agreement with her attorney. She further

acknowledged that she read the plea agreement and wanted to plead guilty. The written plea agreement precluded Ms. Patel from obtaining the benefits of the agreement in the event that:

a guilty plea in this matter is not entered for any reason or the judgment of conviction entered as a result of this guilty plea does not remain in full force and effect, NITA PATEL agrees that any dismissed charges that are not time-barred by the applicable statute of limitations on the date this agreement is signed by NITA PATEL may be commenced against her, notwithstanding the expiration of the limitations period after NITA PATEL signs the agreement.

C. The Plea Hearing

On November 17, 2015, Ms. Patel entered a guilty plea before the late Honorable William H. Walls, U.S. District Judge. (Crim. ECF No. 31). At her plea hearing, Ms. Patel was accompanied by her attorney, Frank Arleo, Esq. (“Arleo”), and an interpreter. (*Id.* at 3). Judge Walls stated, “if I say anything that does not accord with your understanding, please let me know.” (*Id.* at 10). Ms. Patel confirmed that (1) she had no obligation to plead guilty; (2) she understood her right to have the matter referred to a grand jury, and, if indicted, she had the right to a jury trial, with a presumption of innocence; (3) her attorney had negotiated the plea agreement with her knowledge and consent; (4) she understood she could receive up to a 10-year prison sentence; (5) she waived her right to a jury trial and retained only a limited right to appeal the sentence; and (6) she would be required to pay

restitution and was exposed to a forfeiture order. (*Id.* at 5-6, 8-10). Judge Walls explained the sentencing procedure:

Whatever sentence that you will get, Mrs. Patel, will be up to me, and it will be my exercise of my discretion to give you a reasonable sentence. To do so, I'll listen to what Mr. Arleo, your attorney, may say on your behalf. I'll listen to whatever you may wish to say. I'll listen to whatever the Assistant United States Attorney may wish to say. I shall read a presentence investigation report by the Probation Department....

(Crim. ECF No. 31 at 10-11).

Ms. Patel agreed to have a forfeiture money judgment entered against her, equal to all property and money that she obtained directly or indirectly from gross proceeds traceable to the crimes to which she pleaded guilty, equal to the loss amount involved with the criminal conduct. (Crim. ECF No. 31 at 12). If Ms. Patel and the Government could not agree as to that amount, it would be determined by the sentencing judge. (*Id.*) Judge Walls further advised Ms. Patel, and she confirmed that:

This agreement is only between you and this United States Attorney for this District of New Jersey. It is not binding on any Federal, local, or state law enforcement agency, nor is it binding upon any civil authorities or any third party from bringing any administrative or civil actions against you.

(*Id.* at 17). She understood that she had a right to bring a collateral attack based on ineffective assistance of counsel, but she was satisfied with Mr. Arleo's representation up to that point. (*Id.*) No one had threatened her or made any promises to induce her to accept the guilty plea. (*Id.* at 18).

Judge Walls went over the stipulations in the plea agreement with Ms. Patel to determine that she understood. Ms. Patel understood that she stipulated to receiving more than \$4,386,133.75 from Medicare and private insurance companies for false diagnostic reports that were purportedly written by actual physicians, and neurological diagnostic reports for which there was no supervising physician. (*Id.* at 18-19). The amount the Patels received from other unnamed payors would be calculated later in the same manner. (*Id.* at 19).

To provide a factual basis for the plea, Ms. Patel answered as follows:

THE COURT: . . . We are talking about the period of 2006 to 2014, Mrs. Patel. At that time, and during that time, did you and your husband own and operate mobile diagnostic companies known as Biosound Medical Services and Heart Solution PC?

THE DEFENDANT: Yes.

THE COURT: Where were they located?

THE DEFENDANT: (In English) Parsippany.

THE COURT: And during that time in Parsippany, did those two companies provide

diagnostic testing services to Medicare patients?

THE DEFENDANT: (In English) Yes.

THE COURT: And did you bill Medicare for those testing services that you claimed to have provided?

THE DEFENDANT: (In English) Yes.

THE COURT: And did part of that diagnostic work that you purported to provide include having licensed specialist physicians review and interpret the diagnostic values that were recorded by a diagnostic technician such as yourself and your husband?

THE DEFENDANT: Yes.

THE COURT: And during that time, did you know that the doctors who ordered the diagnostic services relied upon those reports, which they believed were prepared by licensed specialist physicians, in order to make important treatment decisions for their patients?

THE DEFENDANT: Yes.

THE COURT: And during this period of between October 2008 to June 2014, did you and your husband decide without his having any medical license that he would write many of the diagnostic reports that were supposed to be written by a licensed specialist physician?

THE DEFENDANT: (In English) Yes.

THE COURT: And when your husband so fraudulently interpreted and wrote a diagnostic report, did you then attach a forged specialist physician's signature to that report to make it appear that an actual physician had authored the report?

THE DEFENDANT: (In English) Yes.

THE COURT: And were these forged diagnostic reports intended to assess a person's or patient's risk of serious medical condition, such as blood clots, health defects, abdominal aortic aneurysms, and stroke?

THE DEFENDANT: Yes.

THE COURT: Did you know what you were doing at this time?

THE DEFENDANT: (In English) Yes.

THE COURT: And did you do so willingly and knowingly? (Off the record discussion between the Defendant and defense counsel)

THE DEFENDANT: Yes.

THE COURT: All right. Now, during this period of 2006 through 2008, did you and your husband falsely --

MS. WALSMAN: You just said the wrong year, Your Honor. 2006 through 2014.

THE COURT: Did you and your husband falsely represent to Medicare that the neurological testing being performed at Biosound Medical Services was being supervised by a licensed neurologist, when, in fact, it was not?

THE DEFENDANT: Yes.

THE COURT: Were your companies, Biosound Medical Services and Heart Solution, PC, paid more than \$4,386,133.75 by Medicare and private insurance companies for claims submitted for diagnostic testing and reports that were never interpreted by a licensed physician and for neurological diagnostic testing that was never supervised by a licensed neurologist?

THE DEFENDANT: Yes.

THE COURT: And were your companies, Biosound Medical Services and Heart Solution, PC, paid at least \$1,668,954.95 by Medicare for claims submitted for diagnostic testing and reports that were never interpreted by a licensed physician and diagnostic neurological testing that was never supervised by a licensed neurologist?

THE DEFENDANT: Yes.

THE COURT: And did you know that what you and your husband were doing by submitting these claims to Medicare was illegal?

THE DEFENDANT: (In English) Yes.

THE COURT: And are you pleading today to this charge because, in fact, you are guilty of the charge?

THE DEFENDANT: (In English) Yes.

THE COURT: Are you satisfied, Mr. Arleo?

MR. ARLEO: I am, Your Honor.

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THE COURT: Ms. Walsman?

MS. WALSMAN: Yes, Your Honor.

THE COURT: Have you signed the application to enter a plea of guilt and waiver of indictment in this matter, Mrs. Patel?

THE DEFENDANT: Yes.

THE COURT: Before you signed these documents, did you read them?

THE DEFENDANT: Yes.

THE COURT: Do you understand them?

THE DEFENDANT: Yes.

THE COURT: Do you have any questions that you wanted answered by Mr. Arleo that he has not answered?

THE DEFENDANT: (In English) No.

THE COURT: Do you have any questions of anything that you want to ask me?

THE DEFENDANT: (In English) No.

THE COURT: All right. I'll accept your plea. . . .

(Crim. ECF No. 31 at 22-26).

D. The PSR

The U.S. Probation Department prepared Ms. Patel's presentence report ("PSR"). According to the PSR, pursuant to 18 U.S.C. § 3664(d)(1), the government consulted with all identified victims and provided the Probation Office with a listing of the amounts subject to restitution. (PSR, ¶ 39). In this

regard, the PSR contained a list of insurance company victims including “Payor Group A” reporting a total loss of \$4,386,175.75 (*Id.*, ¶ 32), and “Payor Group B” reporting a total loss of \$417,741.65. (*Id.*, ¶ 33). Each of the 23 insurance companies, including Medicare, confirmed their losses and provided contact information. (*Id.*, ¶¶ 40, 41).

Regarding the cardiology reports (exclusive of echocardiograms), the Government learned that not all of the reports were false. (*Id.*, ¶ 32). The Government subpoenaed Biosound’s 2012-2014 cardiology reports from the referring doctors, and then compared them against records from the Reading Doctors, who had identified the reports they had actually reviewed and authored. (*Id.*) From this review by the Government, it was reasonably determined that 75% of the records reviewed were false reports with forged doctor signatures. (*Id.*) The Probation Office adopted this calculation and added 75% of the insurance companies’ payments for cardiology tests to the payments for the neurological tests, arriving at the total loss for each victim. (*Id.*)

The Probation Office calculated the offense level using the November 1, 2015 Guidelines Manual.⁴ (PSR, ¶ 28). U.S.S.G. § 2B1.1 is the relevant Guideline for loss calculations under 18 U.S.C. § 1347. Under Application Note 1 to § 2B1.1, “Federal health care offense” includes offenses against private insurance plans and “Government health care program” includes Medicare.

⁴ Available at <https://www.ussc.gov/guidelines/guidelines-archive/2015-guidelines-manual>.

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Application Note 3 governs “Loss Under Subsection (b)(1),” and provides, in relevant part:

(A) General Rule.—Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.

(i) Actual Loss.—”Actual loss” means the reasonably foreseeable pecuniary harm that resulted from the offense.

. . .

(C) Estimation of Loss.—The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court’s loss determination is entitled to appropriate deference. *See* 18 U.S.C. § 3742(e) and (f).

The estimate of the loss shall be based on available information....

(E) Credits Against Loss.—Loss shall be reduced by the following:

(i) . . . the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected.

. . .

(F) Special Rules.—Notwithstanding subdivision (A), the following special rules shall be used to assist in determining loss in the cases indicated: . . .

(v) Certain Other Unlawful Misrepresentation Schemes.—In a case involving a scheme in which services were fraudulently rendered to the victim by persons falsely posing as licensed professionals; . . . loss shall include the amount paid for the property, services or goods transferred, rendered, or misrepresented, with no credit provided for the value of those items or services.

With this background, the Probation Office started with a base offense level of 6, pursuant to § 2B1.1. (PSR, ¶ 50). The base offense level was increased by 18 points because the loss was at least \$4,386,133.75. (PSR, ¶ 50). Two points were added, pursuant to § 2B1.1(b)(2)(A) for 10 or more victims. (*Id.*, ¶ 51). Two points were added pursuant to § 2B1.1(b)(7)(A)(B)(i), because the offense was against Medicare, and the loss to Medicare was more than \$1,000,000. (*Id.*, ¶ 53). Two more points were added pursuant to § 2B1.1(b)(15)(A), because the offense involved the conscious or reckless risk of death or serious bodily injury. (*Id.*, ¶ 54). This resulted in an offense level of 30. (*Id.*, ¶ 58). Three points were deducted for acceptance of responsibility, pursuant to § 3E1.1(a), (b). (*Id.*, ¶¶ 60, 61). This brought the total offense level to 27. (*Id.*, ¶ 62).

In determining the loss amount of \$4,386,133.75, the Probation Office applied Application Note 3(F)(v) to § 2B1.1, because the Patels represented to the insurance companies that the diagnostic reports were reviewed and authored by appropriately licensed physicians, but Kirtish Patel reviewed and authored the

reports himself, and he was not a physician. (*Id.*, ¶ 32.) Application Note 3(F)(v) does not permit credit against the loss amount for the value of the services provided by defendants who falsely pose as licensed professionals. (*Id.*)

Ms. Patel was interviewed by the Probation Office, and the PSR describes her employment record, without specifying the dates:

Nita Patel had been employed as the manager of Biosound Medical Services and owned Heart Solution[], both collectively located in Parsippany, New Jersey, and performing the same services. She reported earning a gross monthly salary of \$3,750.

(*Id.*, ¶ 87).

E. Ms. Patel's Sentencing Memorandum

In Ms. Patel's sentencing memorandum, Mr. Arleo challenged the Government's position that she should not receive the three offense level reduction for acceptance of responsibility. (Civ. ECF No. 27 at 189-92). He explained that in a related civil action under the False Claims Act, Ms. Patel had argued that in 2006-2007, her husband paid Brad Tinkelman M.D. to serve as a neurological supervisor for Biosound. (Civ. ECF No. 27 at 191.) Admittedly, Dr. Tinkelman received no money after 2007, and her husband hired a new neurological supervisor in 2012. (*Id.*) Mr. Arleo argued this was not inconsistent with Ms. Patel's guilty plea because she admitted that Biosound did not have neurological supervision for some time between 2008 and 2014. (*Id.*)

Further, Mr. Arleo asserted that Ms. Patel was not the owner of Biosound. (*Id.*) Thus, she had no legal obligation to comply with Medicare regulations that required Biosound to have a neurological supervisor. (*Id.*) She was merely an employee of Biosound, who had returned to employment after her children were grown. (*Id.*) Mr. Arleo posited that Ms. Patel should not be punished for the Government's sloppy drafting of factual basis questions for her plea hearing, where she was "lumped together with Kirtish" and held responsible for fraud by Biosound from 2006 through 2014. (*Id.* at 192). He submitted that Ms. Patel never wavered from taking responsibility for forging signatures on diagnostic tests without having a Reading Doctor interpret the results. (*Id.*) Throughout the plea negotiations, the defense had always asserted that Biosound paid Dr. Tinkelman as a neurological supervisor for some period of time. (*Id.*) Ms. Patel only agreed to provide the factual basis for her plea because her attorney advised her that the neurological supervision they allegedly provided for Biosound's performance of diagnostic neurological tests probably did not satisfy Medicare's requirements. (*Id.*)

Mr. Arleo challenged the loss calculation submitted by the Government and Probation Office, arguing they had conflated the conduct of Ms. Patel with her husband, instead of making individual determinations of responsibility. (*Id.* at 193-95). Kirtish Patel owned Biosound, while Nita Patel owned Heart Solution. (*Id.* at 195). The facilities operated as separate entities and were situated in different locations. (Civ. ECF No. 27 at 195). As the owner and operator of Biosound, Kirtish Patel was responsible for

ensuring that the tests performed at his facility were conducted with the appropriate level of supervision. (*Id.*) This case did not involve any unsupervised diagnostic testing at Heart Solution, owned by Ms. Patel. (*Id.*) Even assuming Ms. Patel was aware of the lack of supervision over the neurological testing by Biosound, she played no role in the management of that facility. (*Id.*) The loss attributable to the unsupervised neurological testing at Biosound, \$2,265,196.00, should be subtracted from the loss figure used to calculate Ms. Patel's offense level. (*Id.*)

Mr. Arleo sought further reduction from Ms. Patel's total loss amount by way of credit for the services Biosound and Heart Solution provided to Medicare and the private insurance companies. (*Id.* at 196). He explained that the companies provided the diagnostic tests and preliminary reports, but they failed to have physicians read the results and interpret the results. (*Id.*) The customary fee for a "Reading Doctor" was \$25.00 per report. (*Id.*) Adding these fees for each report resulted in a total loss under \$100,000. (*Id.*) This would reduce the offense level by 10 points. (*Id.*)

In addition to challenging the Government's and Probation Office's loss calculations, Mr. Arleo also sought a downward departure based on: (1) Ms. Patel's lack of a management role in the administration of Biosound's services, (2) the lack of any actual or intended physical harm resulting from her criminal conduct; (3) the unlikelihood she would recidivate; and (4) due to her serious health issue. (*Id.* at 196-98). Under the 18 U.S.C. § 3553 sentencing factors, Mr. Arleo argued that Ms. Patel was otherwise a good, charitable person, and none of the patients were harmed by the scheme to defraud. (*Id.* at 199-204).

F. Ms. Patel's Sentencing Hearing

At Ms. Patel's sentencing hearing on August 16, 2016, Mr. Arleo challenged the recommended offense level of 27 in the PSR. (Civ. ECF No. 27 at 66-69). The parties disputed whether there should be an 18 point increase based on the loss amount. (*Id.* at 67-69). Although Ms. Patel had stipulated with the Government that Biosound and Heart Solution received \$1,668,954.95 from Medicare as a result of the scheme to defraud, this was not a binding stipulation of the loss amount at sentencing. (*Id.* at 69).

Mr. Arleo explained that the roughly \$4.3 million loss stipulation was split more or less evenly between two types of conduct, the Reading Doctor forgeries and the lack of appropriate supervision of neurological diagnostic tests by Biosound. (*Id.* at 70). Mr. Arleo contended Ms. Patel was not responsible for a neurologist's supervision over Biosound's neurological testing because she was not the owner. (*Id.*) If the Court accepted this argument, it would cut in half the roughly \$4.3 million loss stipulated by the parties in the plea agreement, and reduce the offense level by two points. (*Id.* at 70-71.) The Government's position was that Ms. Patel was nonetheless responsible because the Patels were husband and wife, and she was an employee of Biosound. (*Id.*) Mr. Arleo contended this was not relevant—and she had no legal obligation to assure proper supervision over diagnostic testing. (*Id.* at 71-73).

Mr. Arleo also challenged the forgery portion of the total loss amount. (*Id.* at 73). All diagnostic tests were performed and preliminary reports were prepared. (*Id.* at 74). What was lacking was review

and interpretation by appropriately licensed physicians. (*Id.*) Biosound and Heart Solution typically paid \$25 per test to the Reading Doctors. (*Id.*) Thus, the loss to the insurance companies was the portion that would have been paid to the Reading Doctors. (*Id.*) Judge Walls, however, responded:

I could care less whether the work was physically done. The result was fraudulent. Fraudulently induced. And here you take a test which involves serious matters, such as ultrasounds and other tests which determine whether people are suffering from serious illnesses, not just a cough, and it's sent supposedly to a reading physician but, in fact, it's not.... are you saying you are going to try to apportion this?

(Civ. ECF No. 27 at 76). Mr. Arleo stood firm, noting that no one suffered death or injury. (*Id.*) Judge Walls corrected him by adding “that we know of.” (*Id.*) Mr. Arleo explained that when Ms. Patel was interviewed by the FBI, she indicated that approximately 5,000 tests were performed over the relevant period of time. (*Id.* at 78-79.) The Patels cooperated in mitigating any potential harm by providing the Government with a list of all the patients affected by the reports, so that the patients could be alerted and seek retesting. (*Id.*) No harm was discovered.

Next, Mr. Arleo addressed the Government's objection to a three offense level deduction for acceptance of responsibility, based on Ms. Patel's attempt, in a related civil case, to contest her liability for conduct to which she had pleaded guilty. (*Id.* at 79). Mr. Arleo explained that in Mr. Patel's proffer statement to the

FBI, he claimed to have hired Dr. Brad Tinkelman, through an intermediary, Rob Lavin, as Biosound's neurological supervisor. (*Id.* at 81-82). Mr. Patel sent Lavin a check to pay Dr. Tinkelman. (*Id.* at 82). One year later, the defense was unable to obtain a copy of the check from the bank. (*Id.*) The Government had questioned Dr. Tinkelman, who denied knowing anything about the Patels. (*Id.* at 82-83). The defense was unable to find Dr. Tinkelman. (*Id.*) Nonetheless, prior to the plea hearings, Mr. Arleo told the Government that the Patels would not agree that they had never hired a neurological supervisor for Biosound. (*Id.* at 83). Thus, the Government changed the factual basis question to allow the Patels to plead consistent with their claim that they hired Dr. Tinkelman as a neurological supervisor, but that Dr. Tinkelman did not provide the supervision required by Medicare regulations. (Civ. ECF No. 27 at 83-84). The Patels accepted the revised question for the plea hearing on the advice of their attorneys. (*Id.* at 86-87).

Mr. Arleo also sought a downward departure at the sentencing hearing. He submitted that Ms. Patel took responsibility for her role in the forgeries. (*Id.* at 92). However, her offense level overrepresented her role in Biosound because she was only a "worker bee," who was not responsible for hiring a supervisor. (*Id.* at 93-96). Mr. Arleo also sought a downward departure based on Ms. Patel's illness and the Bureau of Prison's inability to provide adequate medical care. (*Id.* at 96-100). He further addressed the sentencing factors under 18 U.S.C. § 3553, arguing that no one died or was injured as a result of the fraud. (*Id.* at 100). However, Judge Walls expressed his view that the Patels deliberately and callously risked

misdiagnosing patients, which could have resulted in death. (*Id.* at 101). Mr. Arleo contended the Patels had already accepted responsibility for the risk of death or injury by stipulating to a 2-point increase in the offense level. (*Id.* at 102.) Ms. Patel was a good person who made a mistake and deserved leniency. (*Id.* at 102-3). Judge Walls disagreed because the fraudulent scheme lasted for years. (*Id.* at 103).

The Government contested Mr. Arleo's claim that \$2.2 million of the total loss was based solely on having no supervision for neurological testing because there were forged Reading Doctor signatures on neurological reports as well. (*Id.* at 106). The Government did not go through the neurological tests one by one to determine which contained forged physician signatures because none of the neurological tests were supervised by a neurologist, thus all were part of the scheme to defraud. (*Id.* at 106-7). For the cardiology tests, which were not subject to the supervising neurologist regulation, the Government subpoenaed the referring physicians for all cardiology diagnostic reports from Biosound in 2012 through June 2014. (*Id.* at 107). The Government asked each physician whose name was forged to identify which reports they had actually reviewed for Biosound and Heart Solution, and compared the difference from the total tests and those that were properly read by a physician. (Crim. ECF No. 27 at 107). This is how the Government determined that 75% of the cardiology reports, exclusive of the echocardiograms, were forged. (*Id.* at 107-8).

The Government, however, also spoke with neurologists whose signatures appeared on the neurology reports. (*Id.* at 108). Several neurologists confirmed

they had stopped reading reports for Biosound, but their names continued to appear on scores of reports. (*Id.* at 108). On the day of her arrest, Ms. Patel estimated there were approximately 5,000 fraudulent tests at issue, but when the Government subpoenaed the referring doctors they received 14,000 tests. (*Id.* at 114-15). Holding Ms. Patel responsible for losses from only 10,500 tests was a conservative estimate, the Government claimed, because they did not subpoena every doctor whose name was forged by the Patels after the doctor stopped reading tests for them. (*Id.* at 115).

In opposition to the departure motion, the Government argued that patients who potentially had serious illnesses were put at risk, and therefore, the offense level could not overrepresent the conduct. (*Id.* at 113-15). The Government asked for an upper Guidelines range sentence, without a deduction for acceptance of responsibility. (*Id.* at 118).

Judge Walls adopted the offense level calculation from the PSR and awarded the three level reduction for acceptance of responsibility. (*Id.* at 121-23). He determined the loss amount was the stipulated amount in the plea agreement, and added \$417,000, which the Government subsequently discovered was paid by another group of insurance companies. (*Id.* at 124-25). Per the plea agreement, the loss amount would also dictate the forfeiture and restitution. (*Id.*) Judge Walls found a total loss of \$4,803.875.40, and the same amount for restitution, and he waived a fine. (Civ. ECF No. 27 at 110-13, 121-28). Judgment was entered on August 16, 2016. (Crim. ECF No. 39). Ms. Patel was (1) sentenced to a 78-month term of imprisonment; (2) ordered to pay a \$100 special

assessment; (3) ordered to surrender to the Bureau of Prisons on October 17, 2016; (4) ordered to serve a three-year term of supervised release; (5) ordered to make restitution in the total amount of \$4,803,875.40; and (6) subjected to an order of forfeiture for a sum of money equal to \$4,803,875.40. (Crim. ECF No. 39). An Amended Judgment, which corrected a clerical error in the restitution amount by adding one cent, for a total of \$4,803,875.41, was entered on the docket on September 13, 2016. (Crim. ECF No. 41). Ms. Patel filed her § 2255 motion on September 26, 2017, and later amended. She was subsequently released to home confinement under the First Step Act. (ECF No. 27 at 9).

G. The § 2255 Motion

In her pro se memorandum in support of her amended § 2255 motion, Ms. Patel asserts her counsel provided constitutionally ineffective assistance in virtually every respect; and she would have been better off if she had gone to trial or pleaded open and reserved all rights to appeal. (Civ. ECF No. 4-1). Her dissatisfaction with counsel, after accepting the plea agreement, arose out of two unexpected outcomes. The Government intervened in a qui tam civil action under the False Claims Act, which was based, in part, on the same misconduct to which she had pleaded guilty. (*Id.*, ¶¶ 66-69, 104). The civil trial judge held that she was estopped from arguing positions that were contrary to the factual stipulations in her guilty plea. (*Id.*) Thus, she could not argue for a lower damage amount in the civil action, and with treble damages under the False Claims Act, she was found liable for more than \$7,000,000. (*Id.*) Second,

her counsel failed to convince the sentencing judge to impose a lower loss amount than recommended in the PSR, and she alleges that her counsel conflated the loss amount with restitution/forfeiture. (*Id.*, ¶¶ 100, 101, 130).

Ms. Patel asserts that her counsel: 1) failed to conduct a proper pre-plea investigation and secure a more favorable plea deal; 2) failed to explain the pitfalls of joint representation; 3) made misstatements of fact regarding the provisions of the plea agreement; 4) failed to object at the plea hearing; 5) performed deficiently at sentencing; and 6) allowed the Government to violate the terms of the plea agreement. More specifically, Ms. Patel claims her counsel failed to establish that

- she was not responsible for any losses based on her husband's failure to have proper supervision over Biosound's neurological tests; her husband told her that Biosound was in compliance with Medicare regulations from 2007-2012, with Dr. Tinkelman as the supervisor (Civ. ECF No. 4-1, ¶ 36(e))
- she was not employed by Biosound from 1999-2010, she was a stay at home mom (*Id.*, ¶¶ 23-24)
- the plea agreement does not contain a stipulation that she engaged in the charged conduct between the years 2006-2014 (*Id.*, ¶ 106)
- She only became involved in the charged scheme in 2012, when she received a phone call from a referring physician (*Id.*, ¶¶ 29, 30, 48)
- The only heart tests done were echocardiograms, and all were read by a physician. (*Id.*, ¶ 38)

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- Every vascular test that showed an abnormality was sent to be read by a licensed physician (*Id.*, ¶¶ 40, 41)
- Every neurological balance test was sent to a Reading Doctor (*Id.*, ¶ 43)
- The Government's conclusion that 75% of the diagnostic reports contained forged physician signatures was incorrect because all echocardiograms and neurological balance tests were sent to Reading Doctors (*Id.*, ¶¶ 128, 133)
- Mr. Arleo conflated the restitution and loss Guideline and made her believe a lower loss would be assigned at sentencing (*Id.*, ¶ 130)
- Her loss amount should have been calculated under U.S.S.G. ¶¶ 1B1.3 and 2F1.1 (*Id.*, ¶ 93)⁵
- Mr. Arleo failed to seek a downward departure or lower sentence based on health and other factors (*Id.*, ¶¶ 158-75)
- The Government breached the plea agreement by obtaining second forfeiture order (*Id.*, ¶¶ 148-49)
- Her plea was involuntary because she did not know the Government could seek a second forfeiture (*Id.*, ¶¶ 153-55)

⁵ This allegation is meritless. U.S.S.G. § 2B1.1 governs losses for federal health care fraud. *United States v. Opitz*, 704 F. App'x 66, 69 n.7 (3d Cir. 2017).

- She would not have accepted the plea offer if she had known the civil action would be filed the next day (*Id.*, ¶ 157)

H. The Answer

The Government contends that Ms. Patel's § 2255 motion is barred by the one-year statute of limitations because it was filed more than one year after the judgment was entered. (Civ. ECF No. 27 at 10). According to the Government, Ms. Patel's filing within one-year of entry of the amended judgment, which was amended due to a clerical mistake, was untimely. (*Id.*)

In opposition to Ms. Patel's ineffective assistance of counsel claims, the Government presented the affidavit of Frank P. Arleo, Esq. and attached exhibits. Mr. Arleo states that: 1) he and Attorney Fusco, Mr. Patel's attorney, met with the Patels on June 12, 2014 to discuss joint representation; 2) he explained the joint representation agreement to Ms. Patel; 3) she expressly waived the right to assert conflict of interest; and 4) she never asked to withdraw from joint representation. (Civ. ECF No. 27 at 136-37, ¶ 5). To investigate Ms. Patel's defense, Mr. Arleo unsuccessfully attempted to find Dr. Tinkelman. Based on Mr. Arleo's research, Dr. Tinkelman's testimony would not have mitigated the criminal offense because his involvement, as described by the Patels, did not qualify him as a supervising physician under the Medicare guidelines. (*Id.* at 137, ¶ 6(a)). Mr. Arleo and his law clerk spent forty hours researching the loss amount and other issues. (*Id.* at 137, ¶ 6(c)). Mr. Arleo reviewed the Government's back-up data for its

loss calculation, and the Government did not include echocardiogram tests in the losses. (*Id.* at 138, ¶6(c)).

Mr. Arleo engaged in plea negotiations over the course of eighteen months. (Civ. ECF No. 27 at 138, ¶ 7). The Government did not agree that Ms. Patel was less culpable than her husband and would only offer Mr. and Ms. Patel the same plea agreement. (*Id.*, ¶ 7(a)). During plea negotiations, in July 2015, the Government informally stated that it would accept a guilty plea to conspiracy to commit health care fraud, but if the case went to trial, it would pursue other criminal charges, including money laundering. (*Id.* at 139, ¶ 10). Mr. Arleo discussed the informal plea with Ms. Patel. (*Id.*) He described the strengths and weaknesses of the Government's case, and Ms. Patel's sentencing exposure with the plea or without a plea. (*Id.*) He advised her of her absolute right to go to trial. (*Id.*)

During plea negotiations, Mr. Arleo challenged the Government's loss calculation and proposed an alternative, but it was rejected. (*Id.* at 138, ¶ 7(b)). In August 2015, Ms. Patel rejected a proposed plea agreement that included a binding stipulated loss amount. (*Id.*, ¶ 7(c), (d)). Then, Mr. Arleo secured a plea offer that allowed the sentencing judge to determine the loss amount after hearing the parties' arguments. (*Id.* at 139, ¶ 7(e)). The Government made only two formal plea offers, and Mr. Arleo explained both to Ms. Patel and made sure that she understood. (*Id.*, ¶¶ 8, 9). He was satisfied that Ms. Patel understood the plea agreement that she ultimately accepted. (*Id.* at 140, ¶ 11, 12). He met with Ms. Patel to go over the factual basis questions proposed by the Government in advance of the plea hearing. (*Id.*, ¶ 13).

After the Court accepted Ms. Patel's guilty plea, Mr. Arleo met with her twice to discuss the presentence report and to prepare for sentencing. (*Id.*, ¶ 14). He advised Ms. Patel that the Government was going to argue that she should not get a three-point reduction in the base offense level for acceptance of responsibility, because she had taken an inconsistent position in a related civil case. (*Id.*) Mr. Arleo advised Ms. Patel of the pros and cons of the legal position she took in the civil case, and its effect on her criminal case. (Civ. ECF No. 27 at 140, ¶ 14). He confirmed in writing that Ms. Patel had chosen to accept responsibility for her wrongful conduct in the criminal case, despite any consequences to her civil action. (*Id.*, ¶ 15). Ms. Patel never requested an interpreter for any of their consultations. (*Id.* at 141, ¶ 17).

I. Reply Brief

In her reply brief, Ms. Patel contends that her § 2255 petition was timely, and that even if it was not, she should be entitled to equitable tolling based on her serious medical condition, and her need to rely on her children as English interpreters. (Civ. ECF No. 53 at 2-7). She described the gravamen of her petition was that Mr. Arleo erred in advising her to stipulate to the gross amount the Patels received under the scheme to defraud, without investigating, verifying or challenging that amount before she signed the plea agreement, and that he incorrectly advised her she could challenge the loss amount later. (*Id.* at 7-8). She also contends that Mr. Arleo made no effort to distinguish between Medicare's requirement for a neurologist to supervise neurological testing, and the requirements of private insurance companies. (*Id.* at 8). Further,

she argues that once Mr. Arleo had the PSR and the documents supporting the Government's loss calculation, he should have used those records to challenge the loss amount. (*Id.*) Finally, she asserts that Mr. Arleo failed to support the loss theory at sentencing by establishing there were legitimate services provided by Biosound and Heart Solution. (*Id.* at 9). But for these errors by counsel, Ms. Patel submits that she would have gone to trial or pleaded open to preserve her appellate rights and retain her ability to challenge damages in a civil action. Ms. Patel also requests a hearing to determine whether the Government withheld or destroyed a document identified as "Proper Loss Calculation Memo" in response to Mr. Patel's FOIA request. This Court will deny the request for an evidentiary hearing on this issue because the Government described to the U.S. Probation Office how it calculated the loss amount, as reflected in the PSR ¶¶ 28-42, and provided the backup data for the loss calculation to the defense before sentencing.

J. Request to supplement the reply brief

In her reply brief to the Government's answer, Ms. Patel requested an extension of time to supplement her brief in further support of her § 2255 motion. (Civ. ECF No. 53 at 12). She submits that her serious health condition precluded her from assisting counsel in preparing a timely declaration and supporting evidence. (*Id.* at 12-13). The Government did not respond, and Ms. Patel submitted a supplemental motion for an evidentiary hearing (Civ. ECF No. 54), together with her declaration in support of her reply brief, and the declaration of an investigator

whom she hired to interview witnesses and obtain information about the Government's loss calculation.

Ms. Patel's request for yet another extension of time for briefing is not supported by good cause. Ms. Patel filed her original § 2255 motion in September 2017. She was given an extension of time to submit a second amended § 2255 motion on or before May 30, 2018, but ultimately did not do so. (Civ. ECF Nos. 9, 10). The Government did not file its full answer to her amended § 2255 motion until June 15, 2020. (Civ. ECF No. 16). At that point, Ms. Patel had three years to provide a declaration in support of her § 2555 motion, including her claim that the Government's loss amount was grossly inflated. Nonetheless, this Court granted a stay of approximately fifteen months while the Patels pursued documents regarding the Government's loss calculation through a FOIA request. (Civ. ECF Nos. 29, 38, 40). This Court granted Ms. Patel two extensions of time to file her reply brief, which was ultimately filed on May 16, 2022, without a declaration in support of her loss argument. (Civ. ECF Nos. 50, 52, 53). Ms. Patel had five years to discover support for her claim that counsel was ineffective for failing to establish the Government's loss calculation was grossly inflated, and expanding the record at this time is unwarranted. This Court denies her supplemental motion for hearing (Civ. ECF No. 54) and her request for an evidentiary hearing, because the record conclusively shows that she is not entitled to relief on her ineffective assistance of counsel claims. 28 U.S.C. § 2255(b).

II. Statute of Limitations and Equitable Tolling

When a federal defendant elects not to file a direct appeal, she must file a motion under 28 U.S.C. § 2255 within one year and fourteen days after the judgment of conviction was entered. *See* Fed. R. App. P. 4(b)(1); *Kapral v. United States*, 166 F.3d 565, 577 (3d Cir. 1999). Judgment was initially entered on August 16, 2016, and Ms. Patel did not file a notice of appeal. According to the Government, Ms. Patel's motion is time-barred because she filed her original § 2255 motion one year after the amended judgment was filed, more than one year after judgment was initially entered. (Civ. ECF No. 27 at 10). In her reply brief, Ms. Patel claims that the statute of limitations restarted on September 13, 2016, the date an amended judgment was entered to correct a clerical error in the amount of restitution. (Civ. ECF No. 53 at 3). If the amended judgment restarted the limitations period, she submits that her filing was timely. (*Id.*)

The Third Circuit has not addressed the question of whether an amended judgment that merely corrects a clerical error in the original judgment restarts the one-year statute of limitations for a motion under 28 U.S.C. § 2255. The Tenth and Eleventh Circuits have held that when an amended judgment is ministerial in nature, it does not restart the one-year statute of limitations period. *United States v. Prado-Diaz*, 434 F. App'x 763, 765 (10th Cir. 2011); *Borgesano v. United States*, No. 20-11453, 2021 WL 2879696, at *4 (11th Cir. July 9, 2021); *see also Marmolejos v. U.S.*, 789 F.3d 66, (2nd Cir. 2015) (amended judgment correcting clerical errors is not a new judgment for purposes of second or successive

requirements under 28 U.S.C. § 2255(h)). This Court agrees with the Tenth and Eleventh Circuits, and therefore, turns to the question of equitable tolling.

The one-year statute of limitations under § 2255 is not jurisdictional, and is, therefore, subject to equitable tolling. *Miller v. N.J. State Dep't of Corr.*, 145 F.3d 616, 617–18 (3d Cir. 1998). For equitable tolling to apply, the petitioner “bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently; and (2) that some extraordinary circumstance stood in his way.” *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Therefore, Ms. Patel must explain how she was prevented from asserting her rights, and that she pursued her rights diligently. *LaCava v. Kyler*, 398 F.3d 271, 276 (3d Cir. 2005).

Ms. Patel surrendered to federal prison on October 27, 2016, just days after having major surgery. (Civ. ECF No. 53 at 6). Almost immediately, she began to suffer progressive symptoms that affected her ability to complete her pro se § 2255 motion. (Civ. ECF No. 53-1, ¶¶ 5-7). Further, Ms. Patel speaks limited English. (*Id.*, ¶ 3). She prepared her § 2255 motion with translation assistance from her children. (*Id.*, ¶ 4).

The Third Circuit has held “that inability to read or understand English, combined with denial of access to translation or legal assistance, can constitute extraordinary circumstances that trigger equitable tolling... the relevant inquiry is... how severe an obstacle it creates with respect to meeting” the one-year statute of limitations. *Pabon v. Mahanoy*, 654 F.3d 385, 400–01 (3d Cir. 2011). Ms. Patel’s serious medical condition during the one-year statute of limitations period, combined with her need to obtain outside translation

services from her children to prepare the motion while incarcerated, are extraordinary circumstances that trigger equitable tolling.

Ms. Patel must also show that she nonetheless “exercised reasonable diligence in... bringing [the] claims.” Miller, 145 F.3d at 618–19 (quoting *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1126 (3d Cir. 1997); see also *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990)). While due diligence “does not require ‘the maximum feasible diligence,’... it does require reasonable diligence in the circumstances.” *Schlueter v. Varner*, 384 F.3d 69, 74 (3d Cir. 2004) (citations omitted). Determining whether Ms. Patel has exercised “reasonable diligence... depends on the circumstances faced by the particular petitioner.” *Munchinski v. Wilson*, 694 F.3d 308, 331 (3d Cir. 2012); see also *Wilson v. Beard*, 426 F.3d 653, 661 (3d Cir. 2005) (“The fact that we require a petitioner in one situation to undertake certain actions does not necessitate that we impose the same burden on all petitioners” because “whether a habeas petitioner has exercised due diligence is context-specific.”)

Ms. Patel’s *pro se* § 2255 motion was filed only 20 days late. This short delay, considering her ill-health and need for translation services, establishes the reasonable diligence required for equitable tolling of the statute of limitations. Therefore, this Court will address the merits of Ms. Patel’s amended § 2255 motion.

III. DISCUSSION

A. Legal Standard

A prisoner in federal custody may file a motion under 28 U.S.C. § 2255 to challenge the validity of his or her conviction and sentence. Section 2255 provides, in relevant part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such a sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255.

The Third Circuit has summarized the legal standard for bringing a Sixth Amendment ineffective assistance of counsel claim, first announced by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984):

a criminal defendant may demonstrate that his representation was constitutionally inadequate by proving: (1) that his attorney's performance was deficient, i.e., unreasonable under prevailing professional standards; and (2) that he was prejudiced by the attorney's performance. Under the first prong, judicial scrutiny is highly deferential, and courts

must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. In order to establish prejudice, the defendant must prove that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. We have endorsed the practical suggestion in *Strickland* to consider the prejudice prong before examining the performance of counsel prong because this course of action is less burdensome to defense counsel.

United States v. Booth, 432 F.3d 542, 546 (3d Cir. 2005) (internal quotations, alterations and citations omitted). The same test applies to advice given by counsel in the context of guilty plea discussions. *Id.* (citing *Hill v. Lockhart*, 474 U.S. 52, 58 (1985)). In such cases, the petitioner must establish "that but for his trial attorney's alleged ineffectiveness, he would likely have received a lower sentence." *Id.* at 547. Alternately, a petitioner may establish prejudice by showing "that but for his counsel's purported errors, he would have gone to trial, received a more favorable plea deal, or have been better off pleading guilty without the benefit of a plea agreement." *Boye v. United States*, 810 F. App'x 118, 121 (3d Cir. 2020).

B. Whether counsel was ineffective by engaging in joint representation

Ms. Patel claims that her counsel provided constitutionally ineffective assistance because he failed to advise her of possible conflicts of interest arising from joint representation with her husband and his counsel.

(Civ. ECF No. 4-1, ¶¶ 55–56.) In every meeting with her counsel, her husband was present. (*Id.*, ¶ 54). Her counsel never advised her of the pitfalls of entering into a joint defense with her husband. (*Id.*, ¶ 47). He failed to advise her of safety valve provisions and the possibility of a cooperation agreement. (Civ. ECF No. 4-1, ¶ 54). On January 25, 2014, her husband appeared at a proffer session with Attorney Anthony Fusco (“Fusco”) and representatives for the Government. (*Id.*, ¶ 50). Ms. Patel was not advised of the conflict of interest this created when her husband’s proffer statement incriminated her and was used against her at sentencing. (*Id.*, ¶¶ 51-53). The plea agreement contained a stipulated loss figure that included losses prior to the date of her knowledge or involvement in the criminal conduct. (*Id.*, ¶ 57).

In opposition, the Government submitted the affidavit of Ms. Patel’s counsel, Frank Arleo, Esq. (“Arleo Aff.”). (Civ. ECF No. 27 at 136-41). Mr. Arleo represented that he and co-counsel Anthony Fusco met with the Patels for the first time on June 12, 2014. (*Id.* at 136-37, ¶ 5). They discussed the possibility of joint representation and explained the contents of the joint defense agreement. (*Id.*) The joint defense agreement provides that “[b]y entering into the Agreement, each party knowingly and expressly waives the right to raise a conflict of interest based on the terms of the Agreement” and “[e]ach party is free to withdraw at any time, with or without reason, from the Agreement upon giving express prior written notification to each of the parties....” (*Id.* at 144). Ms. Patel never expressed a desire to withdraw from joint representation. (*Id.* at 136-37, ¶ 5). In reply, Ms. Patel contends that Mr. Arleo did not make

any effort to distinguish her responsibility for losses from her husband's, even though his criminal conduct predated hers, and she could not be held responsible for any losses prior to 2012. (Civ. ECF No. 53 at 7, n. 2).

“The Sixth Amendment requires counsel to avoid conflicts of interest in order to fulfill the duty of loyalty owed to the client.” *United States v. Santarelli*, 604 F. App'x 164, 166 (3d Cir. 2015) (citing *Strickland*, 466 U.S. at 688). To establish ineffective assistance of counsel, a defendant must establish an actual conflict of interest. *Id.* “An actual conflict of interest ‘is evidenced if, during the course of the representation, the defendants’ interests diverge with respect to a material factual or legal issue or to a course of action.’” *United States v. Gambino*, 864 F.2d 1064, 1070 (3d Cir. 1988) (quoting *Sullivan v. Cuyler*, 723 F.2d 1077, 1086 (3d Cir. 1983)). “Accordingly, [a petitioner] must prove that ‘some plausible alternative defense strategy or tactic might have been pursued’ and that ‘the alternative defense was inherently in conflict with or not undertaken due to the attorney’s other loyalties or interests.’” *Id.* (quoting *United States v. Fahey*, 769 F.2d 829, 836 (1st Cir. 1985)). “[A]n actual conflict of interest is more likely to be found where ‘an attorney takes positive steps on behalf of one client prejudicial to another[.]’” *Santarelli*, 604 F. App'x at 167.

Based on Mr. Arleo’s affidavit and submission of the joint representation agreement, the record establishes that Ms. Patel was advised of the potential for conflict arising from joint representation, and that she was free to change her mind at any time and withdraw. Significantly, Mr. Arleo wrote in a memorandum dated January 20, 2015, that the Government,

believing both defendants were equally culpable, was not willing to enter into a plea agreement unless both defendants accepted equal responsibility for the scheme to defraud, and that they would receive the same plea agreement. (Civ. ECF No. 27, ¶¶ 150, 178). To secure the identical plea agreements, Mr. Patel made a proffer statement to the Government. At the plea hearing, Ms. Patel was advised that she could refuse to plead guilty and retain all her rights, but she did not choose to do so.

The Patels obtained a benefit from the plea agreement because the Government agreed not to pursue any other charges arising out of the conduct described in the Information. Ms. Patel suffered no prejudice arising from joint representation because her interests were aligned with her husband, and the Government had a strong case for holding both equally responsible, based in part on her confession to forging physician signatures, and because she shared in the lavish lifestyle from the proceeds of the fraudulent scheme. *Santarelli*, 604 F. App'x at 167–68 (where husband and wife presented uniform defense theory and did not deter from it, conflict of interest claim was implausible). Therefore, this ineffective assistance of counsel claim fails.

C. Whether counsel was ineffective by not obtaining services of an interpreter for consultations with Ms. Patel

Ms. Patel, who speaks Gujarati and limited English, claims that her counsel provided ineffective assistance because he did not provide her with an interpreter for any of their consultations, although she used the services of an interpreter at the plea hearing

and sentencing hearing. The Government submitted Mr. Arleo's sworn affidavit that Ms. Patel never requested an interpreter, and Mr. Patel was available to interpret during all consultations. (Civ. ECF No. 27, ¶¶ 17, 22-24). Ms. Patel did not address this in her reply brief. (Civ. ECF No. 53).

The records shows that Ms. Patel had many opportunities to voice any questions or misunderstandings during her plea colloquy, with assistance of an interpreter, and she did not voice any concerns. (Crim. ECF No. 31). Instead, she fully affirmed her understanding and desire to plead guilty to the terms that were described and translated for her at the plea hearing. An interpreter was available at her sentencing as well. (Crim. ECF No. 27 at 67). Ms. Patel has failed to establish that she suffered any prejudice from counsel's failure to provide an interpreter during her attorney consultations. *United States v. Mendez*, 282 F. App'x 153, 156 (3d Cir. 2008) (holding that a court's use of an interpreter at a sentencing hearing did not alter the fact that the defendant confirmed his understanding in English and never demonstrated any difficulty in comprehension). Therefore, this ineffective assistance of counsel claim fails on both prongs of the Strickland test.

D. Whether counsel was ineffective in pre-plea investigation and plea negotiations

Ms. Patel contends that her counsel was ineffective in his pre-plea investigation and plea negotiations. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Shotts v. Wetzel*, 724 F.3d 364, 375 (3d Cir. 2013) (quoting *Strickland*,

466 U.S. at 690–91)). Deference to counsel’s judgment is particularly important in the plea context. *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993).

In the case of an early plea, neither the prosecution nor the defense may know with much certainty what course the case may take. It follows that each side, of necessity, risks consequences that may arise from contingencies or circumstances yet unperceived. The absence of a developed or an extensive record and the circumstance that neither the prosecution nor the defense case has been well defined create a particular risk that an after-the-fact assessment will run counter to the deference that must be accorded counsel’s judgment and perspective when the plea was negotiated, offered, and entered.

Premo v. Moore, 562 U.S. 115, 126 (2011).

According to the PSR, Ms. Patel was arrested on June 4, 2014, and confessed to health care fraud after a search of Biosound’s office in Parsippany, New Jersey uncovered materials she used to forge physician signatures on Biosound’s and Heart Solution’s diagnostic reports. The Government had interviewed Biosound employees who were aware of the fraud. Ms. Patel asserts that her counsel failed to argue she was a stay at home mom with limited involvement in the scheme to defraud. However, based on her confession, there was risk that a jury would not credit Ms. Patel’s testimony of limited involvement and knowledge of the fraud, particularly because she enjoyed the lavish lifestyle that resulted from the fraudulent scheme. Time was of the essence in obtaining

a plea deal because the more time and effort the Government spent in prosecuting the case, the less reason it had to accept a plea. There was no guarantee that the Government would not bring additional charges for money laundering, as suggested in early plea negotiations. Thus, it was objectively reasonable for counsel to forego a time-consuming pre-plea investigation of the loss amount, which would require review of thousands of diagnostic reports against Reading Doctors' records, which the Government had already undertaken to obtain a reasonable estimate of losses. Without a plea, conviction was likely, and the Court was required to determine only a reasonable estimate of the losses under Application Note 3(C) to U.S.S.G. § 2B1.1.

Without further explanation, Ms. Patel claims that she learned of a better plea offer that her counsel never disclosed to her. The Government denies this, and Mr. Arleo submitted that he conveyed the two formal plea offers made by the Government, and also discussed an informal offer with Ms. Patel. Mr. Arleo's records of the plea negotiations support his denial of her claim.

Additionally, Mr. Arleo did not blindly accept the Government's \$4.3 million loss calculation during plea negotiations. He proposed an alternative loss amount under \$100,000. His loss theory was supported by Application Note 3(E)(i) to U.S.S.G. § 2B1.1, which provides:

Loss shall be reduced by the following:

- (i) The money returned, and the fair market value of the property returned **and the services rendered, by the defendant or**

other persons acting jointly with the defendant, to the victim before the offense was detected.

(emphasis added). Ultimately, the U.S. Probation Office recommended that Ms. Patel not receive such credit for services provided, pursuant to Application Note 3(F)(v), which states:

In a case involving a scheme in which (I) services were fraudulently rendered to the victim **by persons falsely posing as licensed professionals; . . . loss shall include the amount paid** for the property, services or goods transferred, rendered, or misrepresented, **with no credit provided for the value of those items or services.**

(emphasis added). Whether Ms. Patel's role in the forgeries of physician signatures and her failure to have a neurological supervisor for Biosound equated to falsely posing as a licensed professional was subject to reasonable dispute, and the Guidelines are advisory in nature. Therefore, it was objectively reasonable for Mr. Arleo to argue for a lower loss amount based on the value of performing the diagnostic tests. When Mr. Arleo could not obtain a more favorable plea agreement from the Government and the offer was about to expire, Mr. Arleo recommended that Ms. Patel stipulate to the gross proceeds received from the scheme to defraud but retain the right to argue for a lower loss amount at sentencing.

Ms. Patel now believes she may have been better off going to trial or pleading open because Mr. Arleo failed to convince the sentencing judge to adopt a lower loss amount. The *Strickland* standard,

however, precludes viewing counsel's performance in hindsight. Mr. Arleo's preservation of the right to argue for a lower loss amount at sentencing, while retaining the possibility of a reduction for acceptance of responsibility and a guarantee of no additional charges, was objectively reasonable. Ms. Patel has not presented an alternative loss theory available to Mr. Arleo at that time, which was more likely to result in a lower loss amount. The Government had obtained the loss amount directly from the insurers and compared this against records from most of the Reading Doctors whose signatures were forged. The losses did not include diagnostic reports for echocardiograms because the Government was aware that all echocardiograms were sent to Reading Doctors. The payments for all neurological tests were included in the losses because the tests were not supervised by a neurologist. Therefore, this claim of ineffective assistance of counsel in pre-plea investigation and plea negotiations fails both prongs of the *Strickland* test.

E. Whether ineffective assistance of counsel resulted in an unknowing and involuntary plea

Ms. Patel contends that her counsel misstated the terms of the plea agreement by telling her that she could challenge the loss amount at sentencing, and that the forfeiture order would be limited to the loss amount determined by the sentencing judge. This was not a misstatement, the plea agreement permitted Ms. Patel to challenge the loss amount, and limited the forfeiture to the loss amount determined by the sentencing judge. Next, she contends that counsel failed to inform her that the plea agreement

permitted the Government to seek additional forfeiture in another proceeding, referring to the False Claims Act litigation.

To satisfy due process, a guilty plea must be voluntary, knowing, and intelligent. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Jamison v. Klem*, 544 F.3d 266, 274 (3d Cir. 2008). Here, the plea agreement contained a provision advising Ms. Patel that the Government was not precluded from initiating and prosecuting a civil action, and she affirmed her understanding of this provision in the plea hearing. This cured any error in failing to advise Ms. Patel of the consequences of her guilty plea on civil litigation. *See, e.g., United States v. Fazio*, 795 F.3d 421, 428 (3d Cir. 2015) (any error in failing to advise defendant that guilty plea would subject him to automatic immigration removal was cured by in-depth colloquy and language of the plea agreement). Ms. Patel accepted the risk that she could be found liable for any damages permitted in a civil action. Moreover, there is evidence the Patels were considering “a global resolution” during plea negotiations. (Civ. ECF No. 27 at 181). Mr. Arleo memorialized this in a letter dated April 15, 2016,

Regarding the civil claims, we were not able to reach a global resolution of those claims. As a result, the Government filed a civil action asserting claims under the False Claims Act. After we filed our Answer denying the allegations of the Complaint, the Government filed a Motion for Summary Judgment. In that Motion, the Government argues that it is entitled to judgment since you previously

admitted in the criminal action that there was no neurological supervision. The Government also argues that you are not permitted to argue the contrary position that we asserted in our papers in opposition to the Government's Motion, which claimed supervision for at least some of the years.

(Civ. ECF No. 27 at 184). Mr. Arleo advised that if Ms. Patel pleaded guilty because they did not have a "valid" neurological supervisor for Biosound during the relevant time period, this could result in losing the motion for summary judgment in the civil action and being exposed to treble damages, but she would retain the argument for a three-point reduction in her base offense level for acceptance of responsibility. (Civ. ECF No. 27 at 184). Mr. Arleo stated,

After discussing all of the above in great detail at our April 5, 2016 meeting, it is my understanding that you do not wish to alter your position in the civil case that there was a valid neurological supervisor during at least some portion of the relevant time period. You have indicated that you feel strongly that you are correct in your position on this issue and that you fully understand the risks of proceeding in this fashion. Accordingly, I will advise the Government that you do not wish to change the legal position asserted in our opposition to the Government's Summary Judgment Motion. In addition, if the Government argues that you are not entitled to a 3 point reduction for acceptance of

responsibility in the criminal action we will intend to fight that as well.

(Civ. ECF No. 27 at 184-85). Mr. Arleo's letter to Ms. Patel establishes her knowing, intelligent and voluntary entry of her guilty plea at the hearing before the Court, while she still had the opportunity to go to trial instead. This claim of ineffective assistance of counsel fails because counsel's performance was not objectively unreasonable under the circumstances as they existed before the plea hearing.

F. Whether counsel provided ineffective assistance at the plea hearing

Ms. Patel asserts that her counsel provided ineffective assistance at the plea hearing by allowing her to answer "yes" to ambiguous factual basis questions, which caused her to falsely admit to her involvement in the fraudulent scheme from 2006 to 2014, and to the amount of money received from Medicare and private insurance companies. Solemn declarations in open court, such as those made in a plea hearing, "carry a strong presumption of verity[.]" and constitute a "formidable barrier" in collateral proceedings. *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977).

To begin, Ms. Patel had the services of an interpreter at the plea hearing. Therefore, language was not a barrier to her understanding. The factual basis questions for the plea colloquy, quoted in Section I.C *supra*, were not ambiguous. The questions were designed to satisfy the sentencing judge of Ms. Patel's guilt of the one count charged in the Information, as she had agreed in the written plea agreement. The time period of the fraudulent scheme, 2006 to 2014, was clearly stated in the Information, the plea

agreement, and in the factual basis questions at the plea hearing. Judge Walls advised Ms. Patel:

you should know that you are under no obligation to plead guilty to the charge. You have a right to have the matter referred to the grand jury. A grand jury will hear the evidence presented to it by the Government and decide whether you should be formally charged with a crime.

(Crim. ECF No. 31 at 5-6). Ms. Patel verbally acknowledged that she understood. Judge Walls told Ms. Patel, “if I say anything that does not accord with your understanding, please let me know.” After advising Ms. Patel of her rights, Judge Walls asked whether she still wanted to plead guilty, and she affirmed. If Ms. Patel was not involved in the scheme for the time period alleged, she had every opportunity to interject.

Moreover, Mr. Arleo went over the factual basis questions with Ms. Patel in advance of the plea hearing. They discussed the issue of whether Biosound had a supervising neurologist during the relevant period, and the factual basis question was revised because the Patels said they had hired Dr. Tinkelman as a neurological supervisor. After having this discussion, Mr. Arleo confirmed in a letter to Ms. Patel that she agreed to answer “yes” to the revised question at the plea hearing because Dr. Tinkelman did not provide the proper supervision that Medicare required. She made this decision because she wanted to receive a reduction in offense level for acceptance of responsibility and still defend the False Claims Act litigation. The record establishes that counsel’s performance in

advising Ms. Patel concerning the factual basis questions was objectively reasonable, and any misunderstandings by Ms. Patel were cured by the plea colloquy. Therefore, this ineffective assistance of counsel claim fails.

G. Whether counsel provided ineffective assistance at sentencing

Ms. Patel maintains that her counsel's performance at the sentencing hearing was deficient because he relied on a meritless loss theory rather than arguing that she was not individually responsible for most of the losses, and that the Government inflated the loss calculation. The record does not support this allegation. First, the Government did not include payments by insurers for any echocardiograms in the loss calculation, as Ms. Patel suggests. (*see* Civ. ECF No. 4-1 at 10, ¶ 38 and PSR, ¶ 32). The Government recognized that not all of the diagnostic reports were forged and undertook a laborious review of thousands of records to obtain a reasonable estimate of losses from the scheme to defraud. With this background, Mr. Arleo strenuously advocated that Ms. Patel was less culpable than her husband, and she should not be responsible for any losses from neurological diagnostic tests because she was not an owner or manager of Biosound, and for much of the time, she was a stay at home mom. This argument, if successful, would have reduced Ms. Patel's loss amount by approximately half. The restitution and forfeiture amounts, per the plea agreement, would be equal to the loss amount.

Significantly, however, the Government explained that many of the neurological diagnostic reports also contained forged physician signatures. Thus,

liability was not premised solely on failing to have proper supervision by a neurologist. The sentencing judge was persuaded by the Government's argument that the Patels jointly operated Heart Solution and Biosound, and jointly profited from their wrongdoing. He referred to Biosound and Heart Solution as a "mom and pop shop."

Contrary to Ms. Patel's allegations, Mr. Arleo submitted that Biosound and Heart Solution provided legitimate services to the patients involved by performing the diagnostic testing and preparing preliminary reports. The only missing element was having a Reading Doctor review and interpret the reports that had been prepared. Mr. Arleo justified this argument by stressing that the Patels had cooperated with the Government in identifying all patients who were affected, which allowed those at risk to follow up with their medical providers. It was determined that no one had been injured by the scheme to defraud. Although rejected by the sentencing judge, the argument had support in the advisory Sentencing Guidelines, and in precedent cited by Mr. Arleo in the sentencing memorandum. Further, it was only part of the loss argument he presented. The assistance of counsel guaranteed by the Sixth Amendment requires no more.

Ms. Patel's claim that her counsel failed to seek a downward departure based on her poor health and other factors is inaccurate. Mr. Arleo argued that her offense level should be reduced based on her serious medical condition, which required treatment that could not be provided in prison. He further argued she was otherwise a good, charitable person, who simply made a mistake. The sentencing judge

disagreed, but this does not make counsel's performance constitutionally deficient.

To establish ineffective assistance of counsel at sentencing, the petitioner must also establish the reasonable probability of a shorter sentence but for counsel's errors. *United States v. Smack*, 347 F.3d 533, 540 (3d Cir. 2003) (citing *Glover v. U.S.*, 531 U.S. 198, 204 (2001) (holding that any reduction in sentence constitutes substantial prejudice for purposes of the *Strickland* analysis)). Even if this Court were to assume counsel's performance was constitutionally deficient, Ms. Patel has not shown that a more in depth review of the payments by the insurers would have resulted in a successful claim for a lower offense level. The sentencing judge added 18 points to her base offense level based on a loss of \$4,803,875.40. The relevant Guideline called for an increase of 18 points to the base offense level for losses between \$3,500,000 and \$9,000,000. U.S.S.G. § 2B1.1(b)(1)(J, K); (PSR ¶ 51). To reduce the offense level by one point, the loss amount had to be under \$3,500,000. Ms. Patel fell far short of her burden to establish prejudice from counsel's failure to make this showing. *See Boye v. United States*, 810 F. App'x 118, 121 (3d Cir. 2020) (holding the petitioner failed to set forth a lower loss calculation "to show that his sentence would have been materially impacted, or that he would have been on stronger plea bargaining grounds.") Therefore, this ineffective assistance of counsel claim fails on both prongs.

IV. CONCLUSION

Based on the record as a whole, Ms. Patels' ineffective assistance of counsel claims amount to nothing

more than her belief that, in hindsight, she would have been better off if her counsel had pursued a different strategy from the beginning. “[I]t is critical that courts be ‘highly deferential’ to counsel’s reasonable strategic decisions and guard against the temptation to engage in hindsight.” *Marshall v. Hendricks*, 307 F.3d 36, 85 (3d Cir. 2002) (quoting *Strickland*, 466 U.S. at 689–90)). As discussed above, counsel’s strategic choices throughout his representation of Ms. Patel were objectively reasonable under the circumstances, her plea was knowing, intelligent and voluntary, and she failed to establish prejudice from counsel’s performance at any stage.

V. CERTIFICATE OF APPEALABILITY

Pursuant to 28 U.S.C. § 2253(c), the petitioner in a § 2255 proceeding may not appeal from the final order in that proceeding unless he makes “a substantial showing of the denial of a constitutional right.” “A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude that the issues presented here are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Because jurists of reason could not disagree with this Court’s conclusion that Ms. Patel’s Sixth Amendment ineffective assistance of counsel claims are without merit, she has failed to make a substantial showing of the denial of a constitutional right, and no certificate of appealability shall issue.

An appropriate order follows.

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Date: December 22, 2022

/s/ Susan D. Wigenton
Hon. Susan D. Wigenton,
United States District Judge

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Appendix F

[D. N.J. ECF No. 56]

[Filed: Dec. 22, 2022]

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NITA PATEL,		Civil Action
	Petitioner,	No. 17-7485
		(SDW)
v.		
UNITED STATES OF AMERICA,		ORDER
Respondent.		

This matter having come before the Court on the pro se amended motion to vacate sentence by Petitioner Nita Patel, brought pursuant to 28 U.S.C. § 2255 (ECF No. 4); the Court having considered the amended motion, the records of proceedings in this matter, the answer of the United States (ECF No. 27), Petitioner's counseled reply brief (ECF No. 53), and supplemental motion for hearing (ECF No. 54), and for the reasons expressed in the accompanying opinion,

IT is on this 22nd day of December 2022;

ORDERED that Petitioner's amended motion to vacate sentence under 28 U.S.C. § 2255 (ECF No. 4) is **DENIED**; and it is further

ORDERED that Petitioner's supplemental motion for hearing (ECF No. 54) is **DENIED**; and it is further

ORDERED that a certificate of appealability is **DENIED**; and it is finally

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ORDERED that the Clerk of the Court shall serve this Order and the accompanying Opinion upon Respondent electronically and upon Petitioner by regular mail, and shall CLOSE the file.

/s/ Susan D. Wigenton
Hon. Susan D. Wigenton,
United States District Judge

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Appendix G

[D. N.J. ECF No. 60]

[Filed: Jan. 23, 2023]

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

KIRTISH PATEL,	:	Civil Action
Petitioner,	:	No. 18-14628
	:	(SDW)
v.	:	
	:	
UNITED STATES OF AMERICA,	:	OPINION
Respondent.	:	

APPEARANCES:

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Assistant United States Attorney Newark, NJ 07102
On behalf of Respondent

WIGENTON, District Judge

Presently before the Court is Petitioner Kirtish Patel's ("Mr. Patel") amended motion to vacate sentence under 28 U.S.C. § 2255, challenging his criminal conviction and sentence in Criminal Action No. 15-593 (D.N.J.).¹ (ECF No. 10). Mr. Patel pled guilty to one count of health care fraud in violation of 18 U.S.C. § 1347. The Government filed an answer to the amended § 2255 motion (Civ. ECF No. 16), and Mr. Patel filed a reply brief. (ECF No. 20). This Court granted Mr. Patel's motion to stay while he pursued a related FOIA request. (Civ. ECF Nos. 21, 22). This action was reopened on January 3, 2022, upon completion of the FOIA proceeding. (Civ. ECF No. 28). This Court granted Mr. Patel's motion to file a supplement to his amended motion to vacate under § 2255 (Civ. ECF No. 36), based on information he obtained in the FOIA proceedings. On June 10, 2022, the Government filed a brief opposing Mr. Patel's supplement to his amended § 2255 motion. (Civ. ECF No. 43). This Court granted Mr. Patel's request to file a reply brief, without deciding his request for an evidentiary hearing on the merits of his ineffective assistance of counsel claims. (Civ. ECF No. 58). On November 11, 2022, Mr. Patel filed a motion for leave to file a declaration in support of his amended § 2255 motion. (Civ. ECF No. 59). The Government did not respond. For the reasons set forth below, pursuant to Federal Rule of Civil Procedure 78, based on the pleadings and briefs, this Court will deny the amended § 2255

¹ Docket Entries in Criminal Action No. 15-592 are cited herein as ("Crim. ECF No."), and docket entries in this Civil Action, No. 18-14628, are cited herein as ("Civ. ECF No.")

motion and the remaining motions without oral argument.

I. BACKGROUND

Kirtish Patel (“Kirtish” or “Mr. Patel”) pled guilty to federal health care fraud involving Medicare and private insurers, through a scheme in which he used forged physician signatures to create false diagnostic reports purportedly written by physicians who had read and interpreted the results, and by false pretenses claiming neurological diagnostic tests were supervised by a physician.² (Crim. ECF No. 29 at 1). According to a stipulation in the plea agreement, although not binding on the sentencing judge, Mr. Patel and his wife Nita Patel were paid more than \$4,386,133.75, with payments from Medicare accounting for \$1,668,954.95 of the total amount, as a result of their scheme to defraud. (*Id.* at 9).

A. The Information

On November 17, 2015, Mr. Patel was charged by Information with defrauding Medicare and private insurers from in or about September 2006 through in or about June 2014, in Morris County, New Jersey, in violation of 18 U.S.C. § 1347.³ (Crim. ECF No. 25).

² “Medicare regulations require all diagnostic testing to be ‘reasonable and necessary,’ as defined under Medicare Part B. In order for diagnostic neurological testing to be ‘reasonable and necessary,’ it must be performed under the proper level of physician supervision.” *United States ex rel. Doe v. Heart Sol., PC*, 923 F.3d 308, 311 (3d Cir. 2019) (citing 42 U.S.C. § 1395y(a)(1)(A), 42 C.F.R. § 410.32(b)(1); 42 C.F.R. § 411.15(k).)

³ 18 U.S.C. § 1347(a, b) provides:

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The factual allegations are summarized as follows. Mr. Patel was the owner of Biosound Medical Services Inc., (“Biosound”) and his wife, Nita Patel, owned Heart Solution PC (“Heart Solution”), and both corporations offered mobile diagnostic testing, including echocardiograms, ultrasounds and nerve conduction studies, that were performed on-site at a physician’s office. The Patels, who were not physicians, operated Biosound and Heart Solution. Biosound was a Medicare-approved provider since 1999, and Heart Solution was a Medicare-approved provider since 2011. Private insurance companies and Medicare reimbursed Biosound and Heart Solution for performing and interpreting diagnostic tests including: 1) echocardiograms to diagnose heart conditions; 2)

(a) Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice—

(1) to defraud any health care benefit program; or

(2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program, in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 10 years, or both. If the violation results in serious bodily injury (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.

(b) With respect to violations of this section, a person need not have actual knowledge of this section or specific intent to commit a violation of this section.

ultrasounds to detect blood clots and abdominal aortic aneurysms; and 3) carotid ultrasounds to detect risk of stroke. Medicare required independent diagnostic companies like Biosound to have a licensed subspecialist physician on staff to supervise and interpret tests performed in a particular subspecialty.

The scheme began with a referring doctor's request for a diagnostic test. In response, an employee of Biosound, often Kirtish Patel, went to the referring physician's office to administer the diagnostic test. Biosound then transmitted a diagnostic report to the referring doctor, which had purportedly been reviewed and interpreted by a physician ("Reading Doctor"). At least as early as October 2008, the Patels stopped sending Biosound diagnostic reports to a Reading Doctor. Mr. Patel, who was not a physician, authored the reports himself. His wife, Nita Patel, affixed a doctor's signature to the reports and sent them back to the referring doctors. The referring doctors, believing the reports to have been interpreted by licensed specialist physicians, relied on the reports in making treatment decisions for patients. The Patels forged Reading Doctors' signatures on more than half of the thousands of diagnostic reports performed by Biosound. Biosound employees became concerned that the Patels were not sending the reports to a licensed specialist physician for interpretation, and Mr. Patel responded to them by saying "why should I pay these doctors when I can read them?"

Beginning around September 2006, Mr. Patel represented to Medicare that Biosound would begin performing neurological diagnostic testing, and that Biosound had a supervising physician. The physician, however, never agreed to supervise Biosound's testing.

Thus, from September 2006 through June 2014, the neurological testing done by Biosound was not supervised by the physician Mr. Patel claimed to have on staff. But for this fraudulent representation, Medicare would not have approved Biosound as a provider or paid for the neurological testing performed for Medicare beneficiaries. The Patels were paid more than \$4,386,133.74 by Medicare and private insurance companies for diagnostic tests and reports that were not interpreted by a licensed physician, and neurological diagnostic tests that were not supervised by a licensed neurologist. The Government sought forfeiture of all property and gross proceeds derived from the commission of the offense, pursuant to 18 U.S.C. § 982(a)(7).

B. The Plea Agreement

On November 17, 2015, Mr. Patel executed a written plea agreement with the Government, pleading guilty to the Information. (Crim. ECF No. 29). In exchange for Mr. Patel's guilty plea, the Government agreed not to initiate any further criminal charges against him for forging physician signatures or obtaining health care benefits from Medicare or Medicaid under false pretenses for the period from September 2006 through June 2014. The plea agreement stated that: (1) the statutory maximum term of imprisonment was ten years; (2) the statutory maximum fine was the greatest of \$250,000, or twice the gross amount of any pecuniary gain that any persons derived from the offense, or twice the gross amount of any pecuniary loss sustained by any victims of the offense; (3) in addition to any fine, the sentencing court must order forfeiture pursuant to 18 U.S.C. §

981(a)(1)(c) and 28 U.S.C. § 2461; and (4) the sentencing court may order restitution.

The Government did not make any promises about the sentencing guidelines range or the ultimate sentence to be imposed by the sentencing court. As to forfeiture, the parties agreed the amount of money judgment imposed by the Court “shall be equivalent to the amount of the loss involved in the criminal conduct pursuant to U.S.S.G. § 2B1.1(b)(1)”. Further, Mr. Patel agreed to make full restitution for all losses resulting from the offense of conviction, as determined by the Court at sentencing.

Pursuant to the plea agreement, Mr. Patel stipulated that the Patels were paid more than \$4,386,133.75 by the victims. This stipulation did not bind the sentencing judge. The stipulation did not bind the Government to the extent that the Government obtained, prior to sentencing, any conflicting credible, material information on losses. Mr. Patel acknowledged in writing that he had discussed the plea agreement with his attorney. Further, he acknowledged that he read the plea agreement and wanted to plead guilty.

C. The Plea Hearing

On November 17, 2015, Mr. Patel entered a guilty plea before the late Honorable William H. Walls, U.S. District Judge. (Crim. ECF No. 30). Mr. Patel was represented by Attorney Anthony Fusco, Jr. (*Id.* at 3). Judge Walls explained that Mr. Patel had no obligation to plead guilty, and he retained the right to have the case presented to a grand jury. If indicted, he had the right to a jury trial with the presumption of innocence and other attendant rights. (*Id.* at 10-

12). By pleading guilty, Mr. Patel was waiving those rights. (Crim. ECF No. 30 at 12). Judge Walls informed Mr. Patel that his sentencing exposure was ten years in prison with a period of supervised release, and a potential fine of \$250,000, or twice the gross loss of the victims, or twice the gross gain resulting from the scheme to defraud. (*Id.* at 13). Mr. Patel acknowledged that he would be required to pay restitution and that he wanted to plead guilty. (*Id.* at 13-16). He understood that in exchange for his guilty plea, the Government would not bring any further criminal charges based on his charged conduct for the period of September 2006 through June 2014. (*Id.* at 16). Mr. Patel also understood that his sentence would be imposed at the sentencing court's discretion, after hearing arguments from the attorneys and reading the presentence report ("PSR") from the United States Probation Office. (*Id.* at 16-17).

Judge Walls reviewed with Mr. Patel the stipulations contained in the plea agreement. (*Id.* at 18-20). Mr. Patel stipulated that he and his wife received \$4,386,133.75 from Medicare and private insurance companies, labeled Payor Group A in the PSR:

for false diagnostic reports that purported to be written by actual physicians but, in fact, were never reviewed or authored by any physicians, and, two, neurological diagnostic reports for which there was no supervisory physician of the neurological testing being performed.

(*Id.* at 18-19). He further stipulated there were other insurance companies who suffered losses from the fraud, Payor Group B, who had not yet been identified,

and their losses would be calculated in the same manner as Payor Group A. (*Id.* at 19). He stipulated that the offense involved ten or more victims; one of the victims was a federal health care plan, which paid the Patels \$1,668,954.95; and the offense involved the conscious or reckless risk of death or serious bodily harm. (*Id.* at 20). Mr. Patel agreed to waive his right to appeal or collaterally attack the sentence, unless the sentence fell outside the statutory maximum term or fine, but he reserved the right to challenge his criminal history category. (Crim. ECF No. 30 at 21-22). Mr. Patel further agreed to forfeiture of money equal to all property derived directly or indirectly from the gross proceeds traceable to the fraud. (*Id.* at 22-23). The plea agreement called for the Court to determine the amount of loss involved in the criminal conduct, and for the forfeiture to equal that amount. (*Id.* at 23).

Judge Walls advised Mr. Patel of the following provision in the plea agreement:

This agreement is only between you and this United States Attorney for this District of New Jersey, Mr. Patel. It's not binding upon any other Federal, state, or local law enforcement agencies, nor is it binding upon any civil authorities, such as the Internal Revenue Service. It's not binding on any third parties who might wish to bring administrative or civil litigation against you.

(*Id.* at 28-29). Mr. Patel indicated that he had not been threatened or coerced into accepting the plea offer, he had enough time to think about it and discuss

it with his attorney, and he was satisfied with his attorney's representation. (*Id.* at 29).

Judge Walls then asked Mr. Patel to affirm the following, prior to the Court's acceptance of his plea:

THE COURT: ... Mr. Patel, let's turn now to the period of 2006 through 2014. Did you and your wife, who I understand is in court, whose name is Ni[t]a, did you and your wife own and operate a mobile or own a mobile diagnostic company, Biosound Medical Services and Heart Solution, PC?

THE DEFENDANT: Yes.

THE COURT: Where were they located?

THE DEFENDANT: In Parsippany.

THE COURT: In Parsippany?

THE DEFENDANT: Yes.

THE COURT: Now, did Biosound Medical Services and Heart Solution PC provide diagnostic testing services to Medicare patients?

THE DEFENDANT: Yes.

THE COURT: And did they bill Medicare programs for those testing services that you claimed you had provided?

THE DEFENDANT: Yes.

THE COURT: And as part of that diagnostic work that you claim you provided, did that include having a licensed specialist physician review and interpret the diagnostic values

recorded by diagnostic technicians such as yourself?

THE DEFENDANT: Yes.

THE COURT: And did you know that the doctors who ordered the diagnostic services relied upon those diagnostic reports that they believed had been prepared by licensed specialist physicians in order to make important treatment decisions for their patients?

THE DEFENDANT: Yes.

THE COURT: And during this time period or during the time period of October 2008 to June of 2014, did you decide to write many of the diagnostic reports that were supposed to have been written by a licensed specialist physician?

THE DEFENDANT: Can I get a minute?

THE COURT: You certainly may.

(Off the record discussion between the Defendant and defense counsel)

THE DEFENDANT: Yes.

THE COURT: And did you at this time have any medical license of any kind?

THE DEFENDANT: Diagnostic testing facility.

THE COURT: I'm talking about, were you licensed as a physician --

THE DEFENDANT: No.

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THE COURT: -- or medical doctor?

THE DEFENDANT: No.

THE COURT: So when you fraudulently interpreted and wrote a diagnostic report, that is to say, you wrote it as though you were an appropriately trained physician, did you or your wife then attach a forged specialist physician signature to that report to make it look like an actual physician had actually authored the report?

THE DEFENDANT: Yes.

THE COURT: Did you author and forge specialist physician signatures on diagnostic reports intended to assess a physician's risk of serious medical conditions such as heart defects, blood clots, abdominal or aortic aneurysms, and stroke?

MR. FUSCO: Just one second, Judge.

THE COURT: Yes.

(Off the record discussion between the Defendant and defense counsel)

THE DEFENDANT: Okay.

MR. FUSCO: Yes. The answer is yes to seven.

THE COURT: Okay. You said yes?

THE DEFENDANT: Yes.

THE COURT: Now, during the time period of 2006 through 2014, did you falsely represent to Medicare that the neurological testing

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being performed at Biosound Medical Services was being supervised by licensed neurologists when, in fact, it was not?

THE DEFENDANT: Yes.

THE COURT: And did you make this false representation -- well, false representation to Medicare knowing that it was false?

THE DEFENDANT: Yes.

THE COURT: Did anyone put a gun to your head, literally or figuratively, to make you do that?

THE DEFENDANT: No.

THE COURT: H'm?

THE DEFENDANT: No.

THE COURT: You did that of your own free will; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: Is it so that both Biosound Medical Services and Heart Solution PC were paid more than \$4,386,133.75 by Medicare and five insurance companies for claims submitted by diagnostic testing and reports that were never interpreted by any licensed physician, and as well as for neurological diagnostic testing that were never licensed -- or strike that -- were never supervised by a licensed neurologist?

THE DEFENDANT: Yes.

THE COURT: Is that so? And were your company, that is, Biosound Medical Services and Heart Solution PC, paid at least \$1,668,954.95 by Medicare for claims submitted for diagnostic testing and reports that had never been interpreted by either a licensed physician or neurologist?

THE DEFENDANT: Yes.

THE COURT: Is that true?

MS. WALSMAN: Your Honor, --

THE COURT: I'm sorry?

MS. WALSMAN: -- you modified the question slightly in your reading of it. There were diagnostic tests that were never interpreted by a licensed physician and then neurological diagnostic testing.

THE COURT: It's the same thing.

MS. WALSMAN: It's a little different, Your Honor.

THE COURT: In other words, you got at least more than \$1 million for claims made for diagnostic testing and reports that had never been interpreted by a licensed physician and for neurological diagnostic testing that had never been supervised by a licensed neurologist; is that correct?

THE DEFENDANT: Yes.

THE COURT: You did all of this of your own free will?

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THE DEFENDANT: Yes.

THE COURT: And at the time that you submitted these claims to a Medicare program for diagnostic reports that were not authored by actual doctors or neurological testing that was not supervised by a licensed neurologist who happens to be a doctor, did you know that doing so was illegal and against our law?

THE DEFENDANT: Yes.

THE COURT: Are you pleading guilty to this because you are, in fact, guilty?

THE DEFENDANT: Yes.

(Crim. ECF No. 30 at 31-37). Judge Walls accepted Mr. Patel's guilty plea after confirming that he read the plea agreement and the waiver of indictment and had no further questions. (*Id.* at 37-38).

D. The PSR

In Mr. Patel's presentence report ("PSR"), the U.S. Probation Department calculated the sentencing offense level using the November 1, 2015 Guidelines Manual.⁴ (PSR ¶ 28). U.S.S.G. § 2B1.1 is the relevant guideline for loss calculations under 18 U.S.C. § 1347. Application Note 1 to § 2B1.1 defines "Federal health care offense" as it is defined in 18 U.S.C. § 24(b):

any public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity

⁴ Available at <https://www.ussc.gov/guidelines/guidelines-archived/2015-guidelines-manual>. (last visited January 12, 2023).

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who is providing a medical benefit, item, or service for which payment may be made under the plan or contract.

Application Note 1 defines “Government health care program” as:

any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by federal or state government. Examples of such programs are the Medicare program....

Application Note 3 governs “Loss Under Subsection (b)(1),” and provides, in relevant part:

(A) General Rule.—Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.

(i) Actual Loss.—“Actual loss” means the reasonably foreseeable pecuniary harm that resulted from the offense.

...

(C) Estimation of Loss.—The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court’s loss determination is entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f).

The estimate of the loss shall be based on available information....

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(E) Credits Against Loss.—Loss shall be reduced by the following:

(i) The money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected.

...

(F) Special Rules.—Notwithstanding subdivision (A), the following special rules shall be used to assist in determining loss in the cases indicated:

...

(v) Certain Other Unlawful Misrepresentation Schemes.—In a case involving a scheme in which (I) services were fraudulently rendered to the victim by persons falsely posing as licensed professionals; . . . loss shall include the amount paid for the property, services or goods transferred, rendered, or misrepresented, with no credit provided for the value of those items or services.

With this background, the Probation Office started with a base offense level of six, pursuant to § 2B1.1. (PSR, ¶ 50). The base offense level was increased by 18 levels because the loss was at least \$4,386,133.75. (*Id.*, ¶ 51). Two levels were added, pursuant to § 2B1.1(b)(2)(A), for ten or more victims. (*Id.*, ¶ 52). Two levels were added, pursuant to §

2B1.1(b)(7)(A)(B)(i), because the offense was against Medicare, and the loss to Medicare was more than one million dollars. (*Id.*, ¶ 53). Two more levels were added, pursuant to § 2B1.1(b)(15)(A), because the offense involved the conscious or reckless risk of death or serious bodily injury. (*Id.*, ¶ 54). This resulted in an offense level of 30. (*Id.*, ¶ 58). Three levels were deducted for acceptance of responsibility, pursuant to U.S.S.G. § 3E1.1(a, b). (*Id.*, ¶¶ 60, 61). The total offense level was 27. (*Id.*, ¶ 62).

The total loss, including Payor Groups A and B, was \$4,803, 875.40. (*Id.*, ¶ 33). In determining the loss amount, the Probation Office applied Application Note 3(F)(v) to § 2B1.1. Thus, it was recommended that Mr. Patel, who falsely represented that the test reports were written by licensed physicians, was not entitled to a deduction for the value of performing the diagnostic tests. (PSR, ¶ 31).

E. Sentencing Hearing

This Court takes judicial notice under Federal Rule of Evidence 201(b),⁵ that in sentencing Ms. Patel immediately before Mr. Patel, Judge Walls adopted the recommended Guidelines range of 30 and the loss amount of \$4,803,875.40 from Ms. Patel's PSR, and granted an adjustment for acceptance of responsibility, over the Government's opposition, which reduced the base offense level to 27. *United States v. Patel*, 17cv7485 (WHW) (D.N.J.) (ECF No. 27 at 65-134).

⁵ See *S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Grp. Ltd.*, 181 F.3d 410, 426 (3d Cir. 1999) (courts may “may take judicial notice of another court’s opinion—not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity.”)

Attorney Shay Desphande represented Mr. Patel at the sentencing hearing on August 16, 2016. (Crim. ECF No. 42 at 1). Mr. Desphande focused his argument on Mr. Patel's acceptance of responsibility for his conduct. (*Id.* at 3, 5-7). Mr. Desphande also attempted to convince Judge Walls that there was value to the performance of the diagnostic tests, despite his rejection of the same argument in Ms. Patel's sentencing hearing. (*Id.*) Judge Walls again rejected this argument. (*Id.* at 5). Mr. Desphande then requested a downward departure to allow Mr. Patel to care for his wife while she recovered from illness. (*Id.* at 7).

The Government objected to Mr. Patel receiving a three offense level deduction for acceptance of responsibility because, after he pled guilty, he claimed that not all of the neurological tests were unsupervised, and that he was not responsible for the fraud associated with his wife's company, Heart Solution. (*Id.* at 13). He also attempted to minimize the risk his conduct posed to the patients. (*Id.* at 14-15). The Government submitted that when the Patels were arrested and agreed to provide the Government with a list of patients whose tests were not read by a physician, the list they produced fell woefully short of the actual number of fraudulent tests. (Crim. ECF No. 42 at 17-18). Thus, the Government sought a top of the Guidelines range sentence. (*Id.* at 15-16).

Judge Walls found that Mr. Patel was responsible for restitution in the amount of \$4,803,875.40. (*Id.* at 18). He also found that Mr. Patel had not accepted responsibility for his actions because he had minimized the risk of harm from his conduct. (*Id.* at 24-25). Judge Walls found an offense level of 30, with a

Guidelines range of 97 to 121 months imprisonment. (*Id.* at 26). He imposed a prison term of 100 months and waived the fine. (*Id.* at 26-28).

II. Proceedings Under 28 U.S.C. § 2255

On October 2, 2018, Mr. Patel filed his original § 2255 motion. (Civ. ECF No. 1). He filed the operative amended § 2255 motion on June 8, 2019. (ECF No. 10). This matter was stayed on April 22, 2020, while Mr. Patel pursued a FOIA request for documents related to the loss calculation by the Government. (ECF Nos. 21, 22, 28). Upon reopening the case on January 3, 2022, Mr. Patel filed several subsequent motions, adding new claims and requesting an evidentiary hearing. The Government opposed the motions. Finally, Mr. Patel filed a motion to submit a declaration in support of his amended § 2255 motion, and the Government did not respond.

A. The Amended § 2255 Motion

Mr. Patel raises the following claims of ineffective assistance of counsel in his amended § 2255 motion. First, his attorney failed to explain the difference between pleading guilty with an agreement versus pleading open. Mr. Patel claims he was prejudiced because he did not get a three offense level deduction for pleading guilty with an agreement, and he did not preserve his appellate rights.

Second, Mr. Patel contends he had no reason to know that the sentencing court would adopt the stipulated loss amount. At sentencing, he expected his attorney to present evidence for a lower loss amount, but he was represented by last minute substitute counsel, who made only feeble attempts to argue for a

lower loss amount. Mr. Patel would not have pled guilty if he had known that by attempting to argue for a lower loss amount, he would lose credit for acceptance of responsibility. Further, Mr. Patel would not have pled guilty if his lawyer had advised him that the stipulation in his plea agreement would preclude him from challenging the amount of damages in a related civil case. Once counsel became aware of the civil action, he should have advised Mr. Patel to withdraw from his plea agreement.

Third, at his sentencing hearing, Mr. Patel attempted to explain what led him to commit the health care fraud offense. He unwittingly caused the Court to believe he was not accepting responsibility for his actions by minimizing the risk to the patients. His counsel failed to convince the Court otherwise.

B. The Answer

The Government responded to each of Mr. Patel's claims of ineffective assistance of counsel. Regarding the alleged failure of counsel to explain the difference between pleading guilty and pleading open, there was no distinction in the sentencing exposure. (Civ. ECF No. 16 at 9-10). Therefore, Mr. Patel was not prejudiced by choosing to plead guilty. (*Id.*) He understood and accepted the waiver of his appellate rights in the plea agreement, as evidenced by the colloquy before Judge Walls. (*Id.*) In the absence of extraordinary circumstances, a petitioner may not contradict his earlier sworn statements in a plea colloquy. (*Id.*, citing *United States v. Lemaster*, 403 F.3d 216, 221-22 (4th Cir. 2005)). Furthermore, Mr. Patel has not identified a meritorious appellate issue that he would have raised if he had pleaded open and

preserved his appellate rights. (Civ. ECF No. 16 at 11).

Next, the Government addressed the ineffective assistance claims based on the loss amount. Mr. Patel's counsel argued for a reduction in loss amount based on Mr. Patel performing the diagnostic reports. The Government contends that defense counsel is not ineffective by failing to prevail on that argument. (*Id.* at 13).

Further, defense counsel was not ineffective, the Government submits, for failing to advise Mr. Patel of the collateral consequences of his plea agreement on a subsequent civil action under the False Claims Act. (*Id.*) Moreover, Mr. Patel acknowledged during the plea colloquy before Judge Walls that the plea agreement did not bind any civil authorities or third parties from bringing administrative or civil actions against him. (*Id.*)

Finally, the Government argues that defense counsel was not ineffective, nor was Mr. Patel prejudiced by counsel's performance, simply because Judge Walls did not award a three point reduction in offense level for acceptance of responsibility. (*Id.* at 15-16). Mr. Patel's own remarks caused Judge Walls to determine he had not accepted responsibility, and defense counsel had urged the court to find otherwise. (*Id.*)

C. Reply Brief

In reply to the Government's answer, Mr. Patel asserts that he was prejudiced by his counsel's advice to sign a plea agreement that did not provide any consideration. Prejudice resulted because Mr. Patel waived his appellate rights and was unable to appeal the district court's denial of acceptance of

responsibility under U.S.S.G. § 3E1.1, which potentially would have reduced his base offense level by three. (Civ. ECF No. 20 at 2). Mr. Patel states that he met the criteria for a downward adjustment based on acceptance of responsibility, and the district court erred by focusing on Petitioner's financial motive to save his company. (*Id.* at 2-10). Mr. Patel had a basis to appeal on the grounds that the district court abused its discretion in denying a three level adjustment for acceptance of responsibility. (*Id.* at 10).

Mr. Patel replied to the Government's claim that his counsel was not obligated to advise him of the collateral consequences of his plea agreement on subsequent civil litigation under the False Claims Act. (*Id.* at 11). He contends there is no categorical rule that counsel is not required to advise a client of collateral consequences of a guilty plea, and all cases cited by the Government are distinguishable. (*Id.* at 11-16). Mr. Patel relies on the American Bar Association Standard 4-5.4, which provides, in pertinent part:

(a) [d]efense counsel should identify, and advise the client of, collateral consequences which may arise from charge, plea or conviction.... (b) When defense counsel knows that a consequence is particularly important to the client, counsel should advise the client as to whether there are procedures for avoiding, mitigating, or later removing the consequence....

(*Id.* at 15).

Mr. Patel claims he did not fully understand that the plea agreement did not bind civil authorities or any third parties from bringing administrative or civil

litigation against him. (*Id.* at 16). In sum, Mr. Patel maintains that he made a sufficient showing to entitle him to an evidentiary hearing on his ineffective assistance of counsel claims. (*Id.* at 16-17).

D. Supplement to Amended § 2255 Motion

After Mr. Patel completed his related FOIA proceeding, this Court permitted him to file a supplement to his amended § 2255 motion, based on his claim that he had “a good faith basis for this request on the grounds that the documents he obtained under the Freedom of Information Act contain information that is relevant and critical to his claim of ineffective assistance of counsel.” (Civ. ECF No. 35). In his supplement, Mr. Patel explained that he filed a FOIA request with the U.S. Department of Justice to obtain documents regarding the Government’s loss calculation. (*Id.* at 1, ¶ 2). The Executive Office for United States Attorneys (“Executive Office”) responded to the FOIA request and disclosed that a document called “Proper Loss Calculation Memo” was missing after an extensive search. (*Id.* at 2-3, ¶¶ 4-6). The Executive Office maintained that it likely would have withheld the document anyway, based on privileges of attorney work product and deliberative processes. (*Id.* at 3, ¶ 7).

Mr. Patel also stated that the FOIA request did not yield any evidence of his plea counsel requesting documentation to support the Government’s loss calculation, nor that plea counsel independently investigated the loss amount. In advance of sentencing, although Mr. Patel’s plea counsel refuted the Government’s loss amount, he offered no competent evidence in the alternative. (*Id.* at 4, ¶ 10). As a result of counsel’s

deficient performance, the sentencing court relied on the stipulated loss amount, and when Mr. Patel tried to explain why the loss was inflated, his statements were used against him by denying his acceptance of responsibility. (*Id.* at 5, ¶¶ 11, 12). If Mr. Patel had been advised that the stipulated loss amount would be the loss amount adopted by the district court, he would have pleaded open or gone to trial. (*Id.* at 5-6, ¶ 13). Finally, Mr. Patel requested a hearing on the timing and reason for the missing “Proper Loss Calculation Memo.” (*Id.* at 6, ¶ 14).

E. Response in Opposition to the Supplement

The Government filed a brief in opposition to Mr. Patel’s supplement to his amended § 2255 motion. (ECF No. 43). Because Mr. Patel did not rely on any documents obtained in the FOIA litigation, the Government argues that he should not be permitted to raise new claims. (*Id.* at 1). The Government also opposes a hearing on the missing “Proper Loss Calculation Memo.” According to the Government, the memo in question was attorney work product. Therefore, it would not have been produced if found. (*Id.* at 2). Moreover, there was never any question about how the Government calculated the loss. (*Id.*) The Government added the total amount of money that Mr. Patel and his wife received for producing unsupervised neurological diagnostic reports during the relevant time period, to the total amount of money they received for producing false cardiac diagnostic reports, excluding echocardiograms, that were not reviewed or authored by a physician. (*Id.*)

Finally, the Government asserts Mr. Patel’s new claims do not arise out of the same conduct,

transaction or occurrence alleged in the amended § 2255 motion, and are barred by the one-year statute of limitations. The new claims are: 1) plea counsel took no steps to investigate and verify the loss amount; 2) there was no evidence that plea counsel requested documentation supporting the Government's loss calculation; 3) plea counsel produced no competent evidence of an alternative loss amount; and 4) the Patels had a neurologist properly supervising the process for a period of time. (*Id.* at 4). In addition to these claims being barred by the statute of limitations, the Government argues the claims are meritless. (*Id.* at 5-10).

F. Reply to Government's Opposition to the Supplement

In his reply brief, Mr. Patel contends that his new claims relate back to his amended § 2255 motion, and the results obtained through his FOIA request are relevant and critical to his ineffective assistance of counsel claim. (ECF No. 58).

G. Motion for Leave to File Declaration

On November 11, 2022, Mr. Patel filed a motion for leave to file a declaration in support of his amended § 2255 motion. (ECF No. 59). Mr. Patel and his wife prepared declarations in support of his claim that "counsel failed to investigate the obvious deficiencies in the Government's loss calculation, and, thus, provided Mr. Patel with ineffective assistance of counsel by advising him to stipulate to a demonstrably overstated Guidelines loss adjustment." (*Id.*) Mr. Patel explained that preparation of the declarations were

delayed by Ms. Patel's ill health. (*Id.*) The Government did not respond to this motion.

III. DISCUSSION

A. The Supplement to the Amended § 2255 Motion

Federal Rule of Civil Procedure 15(d) governs supplemental pleadings, and it provides:

[o]n motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

Mr. Patel instituted FOIA proceedings on the Government's loss calculation after he filed his amended § 2255 motion. In those proceedings, he learned there was a missing document entitled "Proper Loss Calculation." Mr. Patel believes the document may have been intentionally lost or destroyed, and that it may contain evidence to support his ineffective assistance of counsel claims. This Court agrees with the Government on two points in opposition to the supplemental pleading: 1) an internal memorandum by the U.S. Attorneys involved in his criminal case on calculation of the loss for sentencing purposes was likely to be withheld under the attorney work product

privilege;⁶ and 2) the contents of the missing memorandum are immaterial because the PSR explains how the Government calculated the loss amount.

The Government was required, pursuant to 18 U.S.C. § 3664(d)(1), to consult with all identified victims and provide the Probation Office with a listing of the amounts subject to restitution. (PSR at ¶ 39). The Government provided such a list, broken into Payor Groups A and B, identifying each insurance company and its contact information, together with the loss amount for each victim. (PSR at ¶¶ 40, 41). Upon learning that not all cardiology reports were false, and excluding echocardiograms from the losses, the Government estimated the percentage of cardiology tests that were fraudulent. (PSR at ¶ 32). This was accomplished by sending subpoenas to Biosound's referring doctors for Biosound diagnostic reports. (*Id.*) The Government then compared the Biosound diagnostic reports received from the referring doctors, for the years 2012-2014, with the Reading Doctors' records of reports they had actually authored/reviewed. (*Id.*) This resulted in the conclusion that 75% were false reports with forged signatures. (*Id.*) Therefore, the Government included only 75% of the

⁶ FOIA's Exemption 5, "allows the government to withhold records from FOIA disclosure under ... the attorney work-product privilege." *Nat'l Ass'n of Crim. Def. Laws. v. Dep't of Just. Exec. Off. for United States Att'ys*, 844 F.3d 246, 249 (D.C. Cir. 2016) (citing *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980)). The privilege applies when "the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *Id.* at 251 (quoting *United States v. Deloitte LLP*, 610 F.3d 129, 137 (D.C. Cir. 2010) (quoting *Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998))).

loss amounts from the total paid by insurance companies for cardiology tests other than echocardiograms. (*Id.*) The Government made no deductions to the losses reported for neurological diagnostic tests because none of the tests were supervised by a neurologist. (*Id.*) Therefore, there is no need for an evidentiary hearing on the missing “Proper Loss Memo.”

Mr. Patel also suggests that another new development arose from his FOIA proceeding, he failed to uncover evidence that his plea counsel requested documentation from the Government on its loss calculation or that his counsel did his own independent investigation of the loss amount. Mr. Patel could have raised an ineffective assistance of counsel claim for failure to independently investigate the loss amount when he filed his original or his amended § 2255 motion.⁷ This was not a new development that provides a basis to supplement the pleading. Therefore, this Court will not further address the claims raised in the supplement to the amended § 2255 motion.

B. Motion for Leave to File Declaration

Rule 7(a) of the Rules Governing Section 2255 Motions for the United States District Courts provides that “the judge may direct the parties to expand the record by submitting additional materials relating to the motion. The judge may require that these materials be authenticated.” The types of materials that

⁷ This Court takes judicial notice under Federal Rule of Evidence 201(b), that Ms. Patel, who shared joint representation with Mr. Patel in their criminal defense, raised these claims in her amended § 2255 motion, filed on December 12, 2017. *Patel v. United States*, 17cv7485 (SDW) (D.N.J. Dec. 12, 2017, ECF No. 4).

may expand the record include documents, exhibits and affidavits. SECT 2255, Rule 7(b).

Mr. Patel seeks to submit into the record, long after the one-year statute of limitations expired, and well after briefing on the amended § 2255 motion concluded, declarations from himself and his wife that raise new factual allegations and new legal theories. Mr. Patel had the opportunity to prepare and file a declaration in support of his § 2255 motion, or to seek an extension of time to file such a declaration, at least from the time he initiated this proceeding on October 2, 2018, through September 6, 2019, when he filed his reply brief in response to the Government's answer. He was also given the opportunity to supplement the record with any new, relevant evidence discovered in his FOIA proceeding, but he did not obtain such evidence. Mr. Patel seeks to inject new claims that were available to him when he filed his original or amended § 2255 motion. Therefore, this Court will deny Mr. Patel's motion for leave to file declaration at this late stage in the proceeding. *See generally* Rule 2, Rules Governing Section 2255 Cases for the United States District Courts (a § 2255 motion "must specify all the grounds for relief available to the moving party" and "state the facts supporting each ground.")

C. Legal Standards for § 2255 Claims

A prisoner in federal custody may file a motion under 28 U.S.C. § 2255 to challenge the validity of his or her conviction and sentence. Section 2255 provides, in relevant part:

A prisoner in custody under sentence of a court established by Act of Congress claiming

the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such a sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255.

The Third Circuit summarized the legal standard for bringing a Sixth Amendment ineffective assistance of counsel claim:

a criminal defendant may demonstrate that his representation was constitutionally inadequate by proving: (1) that his attorney's performance was deficient, i.e., unreasonable under prevailing professional standards; and (2) that he was prejudiced by the attorney's performance. [*Government of Virgin Islands v. Forte*, 865 F.2d [59], 62 [3d. Cir. 1989) (citing *Strickland*, 466 U.S. at 687, 694, 104 S.Ct. 2052). Under the first prong, "[j]udicial scrutiny ... is highly deferential," and courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 688–89, 104 S.Ct. 2052. In order to establish prejudice, the defendant must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different.” *Id.* at 694, 104 S.Ct. 2052. We have endorsed the practical suggestion in *Strickland* to consider the prejudice prong before examining the performance of counsel prong “because this course of action is less burdensome to defense counsel.” *McCoy*, 410 F.3d at 132 n. 6; *see Strickland*, 466 U.S. at 694, 104 S.Ct. 2052 (stating that, “[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so,” the prejudice prong should be examined before the performance prong “to ensure that ineffectiveness claims do not become so burdensome to defense counsel that the entire criminal justice system suffers as a result”).

United States v. Booth, 432 F.3d 542, 546 (3d Cir. 2005). The same test applies to advice given by counsel in the context of guilty plea discussions. *Id.* at 546 (citing *Hill v. Lockhart*, 474 U.S. 52, 58 (1985)). In such cases, the petitioner must establish “that but for his trial attorney’s alleged ineffectiveness, he would likely have received a lower sentence.” *Id.* at 547. Alternately, a petitioner may establish prejudice by showing “that but for his counsel’s purported errors, he would have gone to trial, received a more favorable plea deal, or have been better off pleading guilty without the benefit of a plea agreement.” *Boye v. United States*, 810 F. App’x 118, 121 (3d Cir. 2020).

D. An Evidentiary Hearing is Not Required

An evidentiary hearing should be granted in a § 2255 proceeding, “[u]nless the motion and the files and records of the case conclusively show that the

prisoner is entitled to no relief.” 28 U.S.C.A. § 2255(b). In making the determination whether to hold an evidentiary hearing, “the court must accept the truth of the movant’s factual allegations unless they are clearly frivolous on the basis of the existing record.” Booth, 432 F.3d at 545 (quoting *Government of the Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir. 1989)). For the reasons discussed below, the records in this matter conclusively show that Mr. Patel is not entitled to relief, and an evidentiary hearing will not be held.

E. Ground One: “Ineffective Assistance of Counsel Regarding the Options Involved in Pleading Guilty Pursuant to an Agreement that Surrendered Appellate Rights or Pleading Open to Preserve Appellate Rights”

Accepting as true Mr. Patel’s claim that his counsel failed to explain the option of an open plea, he must establish prejudice to prevail on his ineffective assistance of counsel claim. “An ‘open’ guilty plea is a plea made by the defendant without entering into a plea agreement with the Government. *Booth*, 432 F.3d at 543 (citing. *e.g.*, *United States v. Casiano*, 113 F.3d 420, 423 (3d Cir. 1997)). Mr. Patel argues he was prejudiced by not pleading open because if he had preserved his appellate rights, he would have succeeded on appealing the sentencing court’s denial of an adjustment for acceptance of responsibility. For the reasons discussed in Section III.H. below, Mr. Patel has not established a reasonable probability that he would have succeeded in appealing the sentencing court’s denial of an adjustment for acceptance of responsibility.

More importantly, Mr. Patel ignores the fact that he received consideration for pleading guilty, which he would not have received if he pleaded open. “To allow an otherwise valid plea agreement to be undone because the defendant did not obtain ‘enough’ of a benefit would undermine the efficacy of such agreements by permitting the defendant to obtain the benefit of the bargain without suffering the detriment.” *United States v. Williams*, 184 F.3d 666, 670 (7th Cir. 1999). The Government agreed not to initiate any further criminal charges against Mr. Patel for forging physician signatures or obtaining health care benefits from Medicare or Medicaid under false pretenses for the period from September 2006 through June 2014. Continued investigation of the scheme to defraud might have led to additional charges brought in an Indictment. *See, e.g., United States v. Fabian*, 798 F. Supp. 2d 647, 672 (D. Md. 2011) (holding advice to accept plea offer and agree to statement of facts was objectively reasonable in consideration for not presenting additional charges in Indictment). Additional charges would have increased Mr. Patel’s sentencing exposure and potentially nullified any benefit he may have received for accepting responsibility for the one count charged in the Information. Mr. Patel received consideration for his guilty plea and has not established prejudice for not being advised of the option to plead open to preserve his appellate rights on the issue of acceptance of responsibility.

F. Ground Two: “Ineffective Assistance of Counsel Regarding the Loss Amount”

Mr. Patel asserts that he had no reason to believe his stipulated loss amount would be adopted at

sentencing. His counsel advised him that he would have the opportunity to argue why the loss amount was overinclusive. He was represented by last minute substitute counsel at the sentencing hearing, who made only feeble attempts to argue for a lower loss amount. Mr. Patel asserts he would not have pled guilty if his counsel had advised him that the stipulated loss amount would not be subject to challenge, or that by attempting to dispute the loss amount, he would risk losing an award for acceptance of responsibility.

The first part of this claim, that Mr. Patel did not have the opportunity to challenge the loss amount at sentencing, is factually incorrect. The plea agreement set forth that the stipulated loss amount would not govern sentencing, which would be determined by the sentencing judge. (Crim. ECF No. 29). At the plea hearing, Mr. Patel acknowledged that he had sufficient time to discuss the plea agreement with his attorney, and that he understood the terms of the plea agreement, which Judge Walls extensively reviewed with him. (Crim. ECF No. 30). Specifically, Judge Walls explained that he would determine the sentence after considering the arguments from both parties and reading the PSR from the Probation Office. Even if Mr. Patel's counsel told him the sentencing judge would not impose the stipulated loss amount, such improper advice was cured by the plea colloquy. *U.S. v. Fazio*, 795 F.3d at 428. The plea agreement did not guarantee Mr. Patel would be successful in arguing for a lower loss amount. "[D]efense counsel's conjectures to his client about sentencing are irrelevant where the written plea agreement and in-court guilty plea colloquy clearly establish the defendant's

maximum potential exposure and the sentencing court's discretion." *United States v. Shedrick*, 493 F.3d 292, 299 (3d Cir. 2007).

The second part of this ineffective assistance of counsel claim is that Mr. Patel would not have pled guilty with a nonbinding stipulation of the loss amount if his counsel had advised him that challenging the loss amount would jeopardize an adjustment for acceptance of responsibility. In other words, Mr. Patel is claiming he would have been better off pleading open because he could have challenged the loss amount without raising an argument that was inconsistent with the plea agreement and, thus, potentially received an adjustment for acceptance of responsibility.

Under U.S.S.G. § 2B1.1(b)(1)(j, k), a loss amount between \$3,500,000 and \$9,000,000 calls for an eighteen level increase in the base offense level. To reduce his offense level, Mr. Patel was required to establish the Government's estimated loss amount of \$4,803,875.40 was overstated by more than one million dollars. The Government obtained the loss amount from thousands of diagnostic tests directly from the insurance companies who paid Biosound and Heart Solution for those tests during period of the scheme to defraud, and reasonably estimated the percentage of cardiology tests that were actually read by a Reading Doctor. (PSR ¶¶ 32, 39-41). Mr. Patel has not established a reasonable probability that the Government's calculation was off by more than one million dollars.

Moreover, if Mr. Patel had pled open, he would not have received the Government's promise not to initiate additional charges against him based on his scheme to defraud. Additional charges would have

exposed him to a longer term of imprisonment and potential criminal fines. Mr. Patel has not established a reasonable probability that his sentence would have been more favorable if he pled open without a stipulated loss amount. Therefore, this ineffective assistance of counsel claim fails.

G. Ground Three: “Ineffective Assistance of Counsel Regarding the Failure to Advise Mr. Patel of the Collateral Consequences of His Plea Agreement and Stipulation of Fraud Amount”

After Mr. Patel pled guilty, a civil action was brought against him under the False Claims Act, and he was collaterally estopped by his guilty plea from challenging the amount of damages stipulated in his plea agreement. *See United States ex rel. Doe v. Heart Sol., PC*, 923 F.3d 308, 311 (3d Cir. 2019). Mr. Patel submits that he would not have pled guilty if he had been advised of the collateral consequence on subsequent civil litigation.

First and foremost, Mr. Patel was advised by the terms of the plea agreement, and again during the plea colloquy, that his guilty plea did not preclude the Government or a third party from initiating a civil action against him based on the same criminal conduct. *See U.S. v. Fazio*, 795 F.3d 421, 428-29 (3d Cir. 2015) (“any possible error in plea counsel’s advice was cured by the ... plea colloquy”). Based on his affirmance in the plea colloquy that he understood this provision, this Court rejects Mr. Patel’s subsequent claim that he did not understand. *See, e.g., U.S. v. Padillo-Castro*, 426 F. Appx 60, 63 (3d Cir. 2011) (holding that contrary to the defendant’s assertions, the record

showed he was properly informed of the mandatory minimum sentence upon his guilty plea). Having determined that Mr. Patel was aware of the possibility of civil litigation, this Court turns to whether his counsel was ineffective for failing to advise him that his guilty plea would collaterally estop him from taking an inconsistent position in subsequent civil litigation.

In *Padilla v. Kentucky*, the Supreme Court held that *Strickland's* ineffective assistance of counsel standard applied to a criminal defense attorney's failure to advise a defendant of the risk of deportation as a collateral consequence of pleading guilty. 559 U.S. 356 (2010). This was a new rule of constitutional law. *Chaidez v. U.S.*, 568 U.S. 342, 349 (2013). Until *Padilla*, the Supreme Court had not addressed the threshold question of whether advice about deportation was a collateral rather than direct consequence of a criminal conviction, and whether collateral consequences were 'categorically removed' from the scope of the Sixth Amendment right to counsel. 568 U.S. 342, 349 (2013) (quoting *Padilla*, 130 S.Ct. at 1482). Prior to *Padilla*, all ten federal appellate courts that had addressed the question, and 30 state appellate courts, held that counsel in criminal prosecutions were not required to give advice on noncriminal matters. *Id.* at 350. In *Padilla*, the Court did not answer whether the distinction between direct and collateral consequences was a generally appropriate question for courts to consider, but rather the Court "relied on the special 'nature of deportation'—the severity of the penalty and the 'automatic' way it follows from conviction—to show that '[t]he collateral versus direct distinction [was] ill-suited' to dispose of *Padilla's* claim."

Chaidez, 568 U.S. at 355 (quoting *Padilla*, 130 S.Ct. at 1482)).

Similar to deportation, there are other “automatic” consequences that flow from pleading guilty. 31 U.S.C. § 3731(e), which governs False Claims Act litigation, provides:

(e) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

This legislation has been in effect since the 1980s. Nonetheless, there does not appear to be any precedent, before or after the *Padilla* decision, which requires criminal defense counsel to advise clients who are charged with fraud or false statements of the collateral estoppel effect on civil claims for damages. In *Padilla*, the Supreme Court explained that deportation cases are different because the severity of the penalty, exile from the United States, is so severe that a defendant must be allowed to weigh the benefit derived from the guilty plea against the full consequences of the plea. A civil judgment for money damages, even trebled damages under the False Claims Act, does not approach the severity of deportation.

Therefore, there is good reason to treat the consequence of deportation differently than the consequence of civil liability for Sixth Amendment purposes. *See Parrino v. United States*, 655 Fed. Appx. 399, 403 (6th Cir. 2016) (“[t]he penalty of complete banishment from the United States is different in kind from the burden of five years’ exclusion from federal health-care programs.”) This Court concludes that counsel was not ineffective for failing to advise Mr. Patel of the collateral consequences of his guilty plea.

H. Ground Four: “Ineffective Assistance of Counsel Regarding the Acceptance of Responsibility and Sentencing Hearing”

Mr. Patel alleges that his counsel’s argument for acceptance of responsibility at the sentencing hearing was constitutionally deficient. The sentencing guideline for acceptance of responsibility, U.S.S.G. § 3E1.1 (effective Nov. 1, 2015), provides:

- (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.
- (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to

allocate their resources efficiently, decrease the offense level by 1 additional level.

Both of these elements were likely satisfied at the time of entry of Mr. Patel's guilty plea. However, the comments to U.S.S.G. § 3E1.1 Acceptance of Responsibility, state that "[a] guilty plea does not entitle a criminal defendant to a three-level adjustment for acceptance of responsibility under the Sentencing Guidelines as a matter of right." U.S.S.G. § 3E1.1 Cmt. n. 3 (2015). Mr. Patel's acceptance of the plea agreement, and his acknowledgment of the terms of the plea agreement in the plea colloquy, establish that he was advised of the discretionary nature of receiving credit for acceptance of responsibility.

The Government ultimately opposed an award for acceptance of responsibility because it contended that Mr. Patel attempted to mitigate the scope and seriousness of his conduct, first in the False Claims Act litigation, then in his sentencing memorandum.⁸ Thus, at the sentencing hearing, Mr. Patel's counsel focused on obtaining an award for acceptance of responsibility, stating that the earlier arguments for mitigating the loss amount were "technical" arguments by the lawyers, and were not intended to take away from the fact that Mr. Patel understood the risk his conduct posed to the patients. (Crim. ECF No. 42 at 2-8). Judge Walls seemed to accept counsel's explanation that the arguments for mitigating the loss amount were counsel's arguments, not Mr. Patel's true feelings about

⁸ Mr. Patel's sentencing memorandum was not docketed in the criminal docket, but is attached, under seal, as an exhibit to the Government's Brief in Opposition to Supplement to Amended Petition. (Civ. ECF No. 47).

the seriousness of his conduct. Judge Walls encouraged counsel to “stand your ground and say what you believe is appropriate legally for the benefit of your client. Always remember that.” (*Id.* at 8-9).

Judge Walls then gave Mr. Patel an opportunity to be heard. (*Id.* at 9). Mr. Patel said that he was deeply sorry, and he did not mean to harm anyone. (*Id.* at 10). Judge Walls was troubled by Mr. Patel’s statement that he did not mean to harm anyone because interpreting diagnostic reports without a medical license risked lives. (*Id.*) Judge Walls asked Mr. Patel why he committed this fraudulent scheme. (Crim. ECF No. 42 at 11). Mr. Patel responded that he was trying to save his business because Reading Doctors were not returning the reports in time. He explained that he only performed screening tests. (*Id.*) Judge Walls called Mr. Patel a “greedy fool,” and asked whether he had anything else to say. (*Id.* at 12). He did not.

The Government then urged Judge Walls not to award an adjustment for acceptance of responsibility because Mr. Patel had defended the False Claims Act litigation by arguing that not all of the neurological tests were unsupervised, which he repeated in his sentencing memorandum. (Crim. ECF No. 42 at 13). The Government argued that Mr. Patel had not accepted responsibility because he minimized his conduct by noting these were only screening tests, and in his written submissions, he stated that if a patient had a risk factor, the referring doctor would have sent him/her to a hospital. (*Id.* at 15). The Government suggested that Mr. Patel had shown a complete lack of contrition, and recommended a top of the Guidelines sentence. (*Id.* at 16).

Judge Walls invited defense counsel to respond to the Government's contention that Mr. Patel had not accepted responsibility based on "his later own words." (*Id.* at 19). Defense counsel urged Judge Walls that Mr. Patel's explanation of his conduct was not intended to detract from his acceptance that his conduct was wrong. (*Id.*) Counsel said he knew that Mr. Patel, in his heart, was not denying the risk his conduct posed. (*Id.*) He was only trying to explain that his performance of the diagnostic tests, his life's work, had some value. (*Id.*) In the end, Judge Walls was not satisfied that Mr. Patel showed contrition for his crime, and he denied an adjustment for acceptance of responsibility. (Crim. ECF No. 42 at 25).

Because "[c]redibility and demeanor play a crucial role in determining whether a person is genuinely contrite," and "[b]ecause the sentencing judge has the unique opportunity of observing the defendant ... and evaluating acceptance of responsibility in a live context," the finding of the sentencing court is entitled to great respect.

United States v. Burns, 925 F.2d 18, 20 (1st Cir. 1991) (quoting *United States v. Royer*, 895 F.2d 28, 29 (1st Cir. 1990)). The record supports the conclusion that it was Mr. Patel's own statements and demeanor that failed to convince Judge Walls of his acceptance of responsibility. Thus, Mr. Patel has failed to establish that but for his counsel's ineffective argument at sentencing, he would have received the three level adjustment to his base offense level under § 3E1.1. Therefore, this ineffective assistance of counsel claim fails.

IV. CONCLUSION

Defense counsel performed within the prevailing professional standards, and Mr. Patel's ineffective assistance of counsel claims are based on speculation that he might have been better off with a different strategy. "Judicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight...." *Strickland*, 466 U.S. 668, 669 (1984). Therefore, the amended § 2255 motion is denied.

V. CERTIFICATE OF APPEALABILITY

Pursuant to 28 U.S.C. § 2253(c), the petitioner in a § 2255 proceeding may not appeal from the final order in that proceeding unless he makes "a substantial showing of the denial of a constitutional right." "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude that the issues presented here are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Because jurists of reason could not disagree with this Court's conclusion that Mr. Patel's ineffective assistance of counsel claims are without merit, Mr. Patel has failed to make a substantial showing of the denial of a constitutional right, and no certificate of appealability shall issue.

An appropriate order follows.

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/s/ Susan D. Wigenton
Hon. Susan D. Wigenton,
United States District Judge
Dated: January 23, 2023

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Appendix H

[D. N.J. ECF No. 61]

[Filed: Jan. 23, 2023]

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

KIRTISH N. PATEL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Civil Action
No. 18-14628
(SDW)

ORDER

This matter having come before the Court on the amended motion to vacate sentence by Petitioner Kirtish N. Patel (“Petitioner”), brought pursuant to 28 U.S.C. § 2255 (ECF No. 10); the Court having considered the amended motion, the records of proceedings in this matter, the answer of the United States (ECF No. 16), Petitioner’s reply brief (ECF No. 20), Petitioner’s supplement to the amended § 2255 motion (ECF No. 36), the Government’s opposition to the supplement to the amended § 2255 motion (ECF No. 43), Petitioner’s reply brief to the supplement and motion for evidentiary hearing (ECF No 58), and Petitioner’s motion for leave to file declaration (ECF No. 59); for the reasons expressed in the accompanying opinion,

IT is on this 23rd day of January 2023;

ORDERED that Petitioner’s amended motion to vacate sentence under 28 U.S.C. § 2255 (ECF No. 10) is **DENIED**; and it is further

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ORDERED that the Clerk shall strike Petitioner's supplement to the amended § 2255 motion (ECF No. 36); and it is further

ORDERED that Petitioner's motion for an evidentiary hearing (ECF No. 58) is **DENIED**; and it is further

ORDERED that Petitioner's motion for leave to file declaration (ECF No. 59) is **DENIED**; and it is further

ORDERED that a certificate of appealability is **DENIED**; and it is finally

ORDERED that the Clerk of the Court shall serve this Order and the accompanying Opinion upon Respondent electronically and upon Petitioner by regular mail, and shall CLOSE the file.

/s/ Susan D. Wigenton

Hon. Susan D. Wigenton,
United States District Judge

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Appendix I

[D. N.J. ECF No. 67]

[Filed: Jun. 7, 2023]

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NITA PATEL,	:	Civil Action
Petitioner,	:	No. 17-7485
	:	(SDW)
v.	:	
UNITED STATES OF AMERICA,	:	OPINION
Respondent.	:	

APPEARANCES:

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On behalf of Petitioner

BARRY PATRICK O'CONNOLL, Assistant United
States Attorney

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United States Attorney's Office
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NEWARK, NJ 07102

On behalf of Respondent

WIGENTON, District Judge

Presently before the Court is Petitioner Nita Patel's ("Petitioner") Rule 59(e) Motion to Alter or Amend Judgment in this matter (ECF No. 57), Brief in Support of Petitioner's Rule 59(e) Motion to Alter or Amend Judgment (Docket No. 58), Declaration of Kirtish Patel (ECF No. 59), Respondent's Opposition Brief (ECF No. 62), and Petitioner's Reply to Government's Response in Opposition to Petitioner's Motion to Alter Judgment. (ECF No. 66). For the reasons set forth below, this Court will deny Petitioner's motion to alter or amend judgment.

I. PROCEDURAL HISTORY

On September 26, 2017, Petitioner filed a Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255, challenging her conviction and sentence for healthcare fraud in violation of 18 U.S.C. § 1347, in *USA v. Patel*, Crim. Action No. 15-592 (ES) (D.N.J) (ECF No. 1). Petitioner filed an amended § 2255 motion on December 12, 2017, alleging ineffective assistance of counsel from pre-plea investigation through sentencing. (ECF No. 4.) This case was stayed on September 29, 2020, while Petitioner awaited a response from a Freedom of Information Act request; and the case was reopened on December 13, 2021. (ECF Nos. 38, 40.) On December 22, 2022, this Court denied Petitioner's amended § 2255 motion and supplemental motion for a hearing, and closed the case.

(ECF Nos. 55, 56.) Petitioner now moves, pursuant to Federal Rule of Civil Procedure 59(e), for this Court to reconsider the denial of her amended § 2255 motion.

II. FEDERAL RULE OF CIVIL PROCEDURE 59(e)

A. Legal Standard

Federal Rule of Civil Procedure 59(e) governs motions to alter or amend a judgment. “The scope of a motion for reconsideration [under Rule 59(e)]... is extremely limited.” *Blystone v. Horn*, 664 F.3d 397, 415 (3d Cir. 2011). Such a motion may be granted only on “one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice.” *Id.* (quotation marks omitted) (quoting *Howard Hess Dental Labs., Inc. v. Dentsply Int’l Inc.*, 602 F.3d 237, 251 (3d Cir. 2010)). Only evidence that was not previously available is “new evidence” for Rule 59(e) review. *Id.* at 415-16. “Rule 59(e) motions cannot be used to present new arguments that could have been raised prior to judgment.” *Id.* at 416 (quoting *Howard*, 533 F.3d at 475). Reconsideration of a judgment is an extraordinary remedy. Therefore,

such requests are to be granted “sparingly,” *Maldonado v. Lucca*, 636 F.Supp. 621 (D.N.J. 1986); Charles A. Wright, Arthur R. Miller & Mary Kay Kane, [*Federal Practice and Procedure: Civil 2d*] § 2810.1, and only when “dispositive factual matters or controlling

decisions of law” were brought to the court’s attention but not considered. *Pelham v. United States*, 661 F.Supp. 1063, 1065 (D.N.J.1987).

P. Schoenfeld Asset Mgmt. LLC v. Cendant Corp., 161 F. Supp. 2d 349, 352–53 (D.N.J. 2001).

B. Discussion

Petitioner raises the following five claims in her motion:

1. The Court Committed Clear Error by Failing to Consider and Adhere to Controlling United States Supreme Court Precedent Cited by Petitioner in Her § 2255 Motion, and Reviewed Petitioner’s Entire § 2255 Motion Through an Inappropriate and Constitutionally Deficient Lens.
2. As Petitioner Pled in Her Initial 2255, a More Beneficial Plea Offer Existed that Defense Counsel Never Conveyed, Requiring the Court to Vacate the Dismissal Order and Conduct an Evidentiary Hearing.
3. The Plea Colloquy was Constitutionally Deficient, and Attorney Arleo Failed to Adhere to Padilla Protections.
4. The Court Misunderstood the Record as to Loss Calculation.
5. The Court Quite Improperly Left the Record and Raised Issues and Defense on the Government’s Behalf Relying on Non-Precedential New Jersey State Court Law While

Denying Petitioner Her Constitutional Right
to Investigate and Rebut.

This Court will address each contention in turn.

**1. Controlling Supreme Court Precedent and
Failure to Convey Plea Offer**

In her first two arguments in support of reconsideration, Petitioner contends that this Court ignored three controlling Supreme Court cases, which held that the Sixth Amendment protections described in *Strickland v. Washington*, 466 U.S. 668 (1984), apply with equal force to the plea bargaining process: *Missouri v. Frye*, 566 U.S. 134 (2012); *Lafler v. Cooper*, 132 S. Ct. 1376 (2012); *Padilla v. Kentucky*, 559 U.S. 356 (2010).¹ In *Frye*, the Court held “defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.” *Frye*, 566 U.S. at 145. In *Lafler*, the Court held that where counsel’s advice to reject a plea offer was constitutionally deficient, there was a full and fair trial by jury, and the defendant received a harsher sentence than offered in the plea bargain, the court has discretion to fashion an appropriate remedy. 566 U.S. at 171. Finally, in *Padilla*, the Court held “counsel must inform her client whether his plea carries a risk of deportation.” 559 U.S. at 374.

In response, the Government asserts an evidentiary hearing is not required where Petitioner’s claim of an

¹ Petitioner’s additional citations to noncontrolling precedent do not establish that this Court overlooked controlling decisions of law, as would entitle Petitioner to relief under Fed. R. Civ. P. 59(e).

uncommunicated plea offer was belied by the Government's assertion that no such offer existed, and by defense counsel's affidavit that he communicated all formal plea offers and discussed an informal plea offer with Petitioner. (ECF No. 62 at 5). In her reply brief, Petitioner submits that Mr. Arleo's handwritten notes contain a plea offered by the Government but not delivered to her. (ECF No. 66 at 1). As proof, Petitioner submitted a copy of an email dated August 11, 2015, with the heading "Patel Plea Agreements." (*Id.* at 2).

To begin, this Court did not ignore the holdings in *Frye*, *Lafler* and *Padilla*. This Court applied the *Strickland* standard to each of Petitioner's ineffective assistance of counsel claims, including those related to the plea process, citing both to *Strickland* and Third Circuit precedent, *United States v. Booth*, 432 F.3d 542, 546 (3d Cir. 2005) (citing *Hill v. Lockhart*, 474 U.S. 52 (1985)). (ECF No. 55 at 30-31). Petitioner further contends this Court was required to hold an evidentiary hearing on the alleged uncommunicated formal plea offer, citing *United States v. Day*, 969 F.2d 39, 41-42 (3d Cir. 1992). (ECF No. 58 at 9). Petitioner's reliance on *Day* is misplaced. In *Day*, a district court rejected the petitioner's ineffective assistance of counsel claim, without requiring a response from the Government, finding that no prejudice could inure from pleading not guilty. Unlike *Day*, this Court directed a response from the Government on Petitioner's claim of an uncommunicated plea offer. The Government provided the affidavit of defense counsel, Frank Arleo, Esq. In his affidavit, Mr. Arleo explained that he had rejected the Government's August 5, 2015 plea offer at Ms. Patel's direction because

she would not stipulate to a loss exceeding \$4,358,902. (ECF No. 27 at 138, ¶ 7(c); Exhibit E, ECF No. 27 at 156, 159). Instead, Petitioner agreed to plead to factual stipulations that allowed her to disagree with the loss amount at sentencing. (ECF No. 27 at 18-19; Exhibit G, ECF No. 168-81.)

In her reply brief, Petitioner suggests there was an intervening uncommunicated plea offer from the Government between the offer she rejected and the offer she accepted. (ECF No. 66 at 2.) Petitioner refers to Mr. Arleo's handwritten notes on an email dated August 11, 2015, mentioning waiver of a \$5,500 per claim penalty, a freeze in the restitution number, and a limit on treble damages to one million dollars. (*Id.*) Treble damages and per claim penalties are features of a False Claims Act civil action, not the loss amount in a criminal action for healthcare fraud. *See, Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 769 (2000) (citing 31 U.S.C. § 3729(a)). Defense counsel's handwritten notes include the phrase "Qui Tam Action" and "if close to settle civil case then reach out to attys in Qui Tam." (ECF No. 59-2.) The notes refer to an attempt to negotiate a settlement in a civil qui tam action prior to the deadline for Petitioner to accept the plea offer extended by the Government in the criminal action. The record conclusively establishes that there were only two formal plea offers made by the Government in the criminal action, and both offers were communicated to Petitioner. (ECF No. 27 at 137-38, ¶¶ 7-13; Exhibits E, F, G, H, I, ECF Nos. 156-181). There is no basis for an evidentiary hearing on an alleged undisclosed plea offer in this case. Therefore, this Court denies Petitioner's motion to alter or amend the judgment based

on her claim that counsel failed to communicate a plea offer in her criminal case.

Relatedly, Petitioner challenges this Court's denial of her supplemental motion for an evidentiary hearing, noting there is no requirement to show good cause for not presenting her arguments sooner. (ECF No. 58 at 9-10.) "[D]istrict courts have the inherent authority to manage their dockets and courtrooms with a view toward the efficient and expedient resolution of cases" as long as the exercise of authority is "a reasonable response to the problems and needs" confronting the court, and is not contrary to a limitation on the court's authority by rule or statute. *Dietz v. Bouldin*, 579 U.S. 40, 45-47 (2016) (citations omitted). Consistent with this inherent authority, this Court explained why it would not entertain Petitioner's motion and supporting documents, filed well after the deadline in the briefing schedule, which had been extended several times. (ECF No. 55 at 26-27.) Therefore, this Court denies Petitioner's motion for reconsideration of her supplemental motion for an evidentiary hearing.

2. The Plea Colloquy and *Padilla*

Petitioner seeks reconsideration of her claim that the Supreme Court's decision in *Padilla v. Kentucky* requires defense counsel to advise a client of the collateral consequences of a guilty plea on a related qui tam action. (ECF No. 58 at 13-14). The Government opposes reconsideration, not only because Petitioner was aware of the qui tam action when she pled guilty, but because defense counsel are not required to inform defendants of collateral consequences of a plea agreement outside the immigration context.

(ECF No. 62 at 6). The holding in *Padilla* is limited to defense counsel's duty to advise a criminal defendant of the immigration consequences of a guilty plea. *Padilla*, 559 U.S. at 369. Therefore, this Court denies Petitioner's motion for reconsideration of this issue.

3. The Record Concerning the Loss Calculation

Petitioner contends this Court failed to address her claim that the Government never disclosed its actual back-up data for its loss calculation to her counsel, and then destroyed the backup data, as evidenced by its response to Kirtish Patel's Freedom of Information Act request. (ECF No. 58 at 15). In opposition to Petitioner's spoliation claim, the Government points to Petitioner's PSR, which disclosed the specific loss information, where the Government obtained the loss information, and described the basis for its loss calculation. (ECF No. 62 at 7). This Court, in rejecting Petitioner's attack on the Government's loss calculation, relied on the disclosure contained in the PSR. (ECF No. 55 at 12-14, 36-37). Even if the Government's back-up data was somehow lost or even destroyed, Petitioner failed to establish that she was prejudiced. Her PSR contained the contact information from each insurance company that reported losses, and the loss amounts reported. She had the ability to review and challenge these reported losses prior to sentencing. Thus, this Court denies Petitioner's motion for reconsideration of this issue.

4. Claim of Innocence Regarding False Representations to Private Medical Insurers

Petitioner asserts that the Government failed to address her claim that she did not make misrepresentations to private insurers regarding compliance with Medicare regulations, and this Court, therefore, erred in responding to her claim without the Government's response. (ECF No. 58 at 16-17). Petitioner refers to footnote 2 of this Court's Opinion. (*Id.*) In opposition to Petitioner's motion for reconsideration, the Government quotes Petitioner's plea colloquy, "Bio-sound Medical Services and Heart Solution, PC, [were] paid more than \$4,386,133.75 by Medicare and private insurance companies for claims submitted for diagnostic testing and reports that were never interpreted by a licensed physician and for neurological diagnostic testing that was never supervised by a licensed neurologist[.]" (ECF No. 62 at 7-8). The Government suggests that damages from the private insurers were included because the diagnostic tests at issue were not authorized by any physician, let alone the type of supervisory physician required by Medicare. (*Id.* at 8). In her reply brief, Petitioner asserts that the Government did not charge Petitioner with a 'nonphysician ownership theory' and Judge Walls did not conduct a colloquy on "the non-physician ownership theory this Court sua sponte raised for the first time..." (ECF No. 66 at 13).

Petitioner claims to have raised this issue as a ground for relief in her amended § 2255 motion. In paragraph 132 of her amended § 2255 motion, Petitioner asserted: "[f]urthermore, as the private insurers did not have the same restrictions as Medicare,

and a substantial number of tests were read by a physician (even assuming a supervising physician was not on staff) applying the same non-read rate to the private insurance companies is not supportable.” (ECF No. 4-1, ¶ 132). This Court did not view this as an allegation that counsel failed to advise Petitioner that private insurance companies did not require a supervising neurologist for neurological diagnostic tests. In her reply brief, Petitioner more specifically alleged,

Mr. Arleo made no effort to distinguish between revenue received through Medicaid reimbursements and that received from private insurance. Consequently, Mr. Arleo failed to challenge the government’s loss calculation on the basis that private insurance payments, as opposed to payments from Medicaid, did not require a supervising neurologist as a condition precedent for payment for service.

(ECF No. 53 at 8). The Government was not required to respond to Petitioner’s reply brief.

This Court’s footnote 2, under the heading of “Background” in its Opinion, is dictum describing New Jersey state law requirements for medical diagnostic testing. (ECF No. 55 at 2). This Court’s ruling on Petitioner’s ineffective assistance of counsel claims based on the Government’s loss calculation is found in Section III.G. of this Court’s Opinion: “[s]ignificantly, however, the Government explained that many of the neurological diagnostic reports also contained forged physician signatures. Thus, liability was not premised solely on failing to have proper supervision by a neurologist.” This Court did not rely on the dictum

in footnote 2 of its Opinion. (ECF No. 55 at 40-42). Therefore, this Court denies Petitioner's motion for reconsideration based on Petitioner's assertion that this Court interjected a defense not raised by the Government.

III. CERTIFICATE OF APPEALABILITY

Pursuant to 28 U.S.C. § 2253(c), the petitioner in a § 2255 proceeding may not appeal from the final order in that proceeding unless he makes "a substantial showing of the denial of a constitutional right." "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude that the issues presented here are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Because jurists of reason could not disagree with this Court's conclusion that Petitioner is not entitled to reconsideration of this Court's denial of her amended § 2255 motion, no certificate of appealability shall issue.

IV. CONCLUSION

For the reasons discussed above, this Court will deny Petitioner's motion to alter or amend judgment, and deny a certificate of appealability.

An appropriate order follows.

Date: June 7, 2023 /s/ Susan D. Wigenton
Hon. Susan D. Wigenton,
United States District Judge

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Appendix J

[D. N.J. ECF No. 68]

[Filed: Jun. 7, 2023]

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NITA PATEL,	:	Civil Action
Petitioner,	:	No. 17-7485
	:	(SDW)
v.	:	
	:	
UNITED STATES OF AMERICA,	:	ORDER
Respondent.	:	

This matter comes before the Court on Petitioner Nita Patel's ("Petitioner") Rule 59(e) Motion to Alter or Amend Judgment in this matter (ECF No. 57), Brief in Support of Petitioner's Rule 59(e) Motion to Alter or Amend Judgment (Docket No. 58), Declaration of Kirtish Patel (ECF No. 59), Respondent's Opposition Brief (ECF No. 62), and Petitioner's Reply to Government's Response in Opposition to Petitioner's Motion to Alter Judgment. (ECF No. 66).

For the reasons set forth in the accompanying Opinion:

IT IS THEREFORE on this **7th day of June 2023,**

ORDERED that Petitioner's Rule 59(e) Motion to Alter or Amend Judgment (ECF No. 57) is **DENIED**; and a certificate of appealability under 28 U.S.C. § 2253(c)(2) shall not issue; and it is further

ORDERED that the Clerk of the Court shall serve this Order and accompanying Opinion upon the parties electronically, and on Petitioner by regular U.S. mail, and shall close this matter.

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/s/ Susan D. Wigenton
Hon. Susan D. Wigenton,
United States District Judge

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Appendix K

[D. N.J. ECF No. 74]

[Filed: Sep. 27, 2023]

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

KIRTISH N. PATEL, Petitioner, v. UNITED STATES OF AMERICA, Respondent.
--

Civil Action
No. 18-14628
(SDW)

OPINION

APPEARANCES:

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On Behalf of Respondent

WIGENTON, District Judge

Presently before the Court is Petitioner Kirtish Patel's ("Petitioner") motion to alter or amend judgment, under Federal Rule of Civil Procedure 59(e), of this Court's opinion and order denying his amended

motion to vacate sentence under 28 U.S.C. § 2255 (ECF No. 64), the Government’s letter brief in opposition to Petitioner’s motion to alter or amend judgment (ECF No. 69), and Petitioner’s reply brief (ECF No. 73). For the reasons set forth below, this Court will deny Petitioner’s motion to alter or amend judgment.

I. FEDERAL RULE OF CIVIL PROCEDURE 59(e)

A. Legal Standard

Federal Rule of Civil Procedure 59(e) governs motions to alter or amend a judgment. “The scope of a motion for reconsideration [under Rule 59(e)]... is extremely limited.” *Blystone v. Horn*, 664 F.3d 397, 415 (3d Cir. 2011). Such a motion may be granted only on “one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice.” *Id.* (quotation marks omitted) (quoting *Howard Hess Dental Labs., Inc. v. Dentsply Int’l Inc.*, 602 F.3d 237, 251 (3d Cir. 2010)). Only evidence that was not previously available is “new evidence” for Rule 59(e) review. *Id.* at 415-16. “Rule 59(e) motions cannot be used to present new arguments that could have been raised prior to judgment.” *Id.* at 416 (quoting *Howard*, 533 F.3d at 475). Reconsideration of a judgment is an extraordinary remedy. Therefore,

such requests are to be granted “sparingly,” *Maldonado v. Lucca*, 636 F.Supp. 621 (D.N.J. 1986); Charles A. Wright, Arthur R. Miller &

Mary Kay Kane, [*Federal Practice and Procedure: Civil 2d*] § 2810.1, and only when “dispositive factual matters or controlling decisions of law” were brought to the court’s attention but not considered. *Pelham v. United States*, 661 F.Supp. 1063, 1065 (D.N.J.1987).

P. Schoenfeld Asset Mgmt. LLC v. Cendant Corp., 161 F. Supp. 2d 349, 352–53 (D.N.J. 2001).

B. Discussion

In his motion to alter or amend judgment, Petitioner incorporates by reference his co-defendant Nita Patel’s motion to alter or amend judgment and supporting documents filed in her motion to vacate sentence under 28 U.S.C. § 2255, Civil Action No. 17-7485. (ECF No. 64-1 at 2-3.) This Court addressed the issues raised in Ms. Patel’s motion to alter or amend judgment, and therefore, incorporates by reference the opinion denying Ms. Patel’s motion in Civil Action No. 17-7485. *Patel v. United States*, Civil Action No. 17-7485(SDW) (D.N.J. Opinion, ECF No. 67).

Petitioner does not allege an intervening change in controlling law or present new evidence that was not available when this Court denied his amended § 2255 motion. Thus, to alter or amend judgment, Petitioner must show a clear error of law or fact or the need to prevent manifest injustice. This Court addressed all issues raised in Petitioner’s counseled amended § 2255 motion and his supplement thereto, and explained why Petitioner would not be permitted to file a second declaration raising new factual and legal issues, five months after Petitioner filed his reply brief. Petitioner also contends that this Court erred

by failing to require Petitioner's trial counsel to submit an affidavit in opposition to Petitioner's allegations of ineffective assistance of counsel. An affidavit of defense counsel was not necessary to determine Petitioner's ineffective assistance of counsel claims on the record. Finally, this Court addressed Petitioner's claim regarding the "Proper Loss Calculation" document that the Government was unable to produce in Petitioner's FOIA litigation. Petitioner's motion to alter or amend judgment is an attempt to relitigate issues decided by this Court. Because Petitioner has failed to state a cognizable basis for reconsideration of this Court's opinion and order denying his amended § 2255 motion, this Court need not address the Government's brief filed in opposition to the motion or Petitioner's reply brief. Therefore, the motion to alter or amend judgment will be denied.

II. CERTIFICATE OF APPEALABILITY

Pursuant to 28 U.S.C. § 2253(c), the petitioner in a § 2255 proceeding may not appeal from the final order in that proceeding unless he makes "a substantial showing of the denial of a constitutional right." "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude that the issues presented here are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Because jurists of reason could not disagree with this Court's conclusion that Petitioner is not entitled to alter or amend judgment upon entry of this Court's

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opinion and order denying his amended § 2255 motion, no certificate of appealability shall issue.

III. CONCLUSION

For the reasons discussed above, this Court will deny Petitioner's motion to alter or amend judgment, and deny a certificate of appealability.

An appropriate order follows.

Date: September 27 , 2023

/s/ Susan D. Wigenton
Hon. Susan D. Wigenton,
United States District Judge

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Appendix L

[D. N.J. ECF No. 75]

[Filed: Sep. 27, 2023]

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

KIRTISH N. PATEL, Petitioner, v. UNITED STATES OF AMERICA, Respondent.
--

Civil Action
No. 18-14628
(SDW)

ORDER

This matter comes before the Court on Petitioner Kirtish N. Patel's ("Petitioner") motion to alter or amend judgment, under Federal Rule of Civil Procedure 59(e), of this Court's opinion and order denying his amended motion to vacate sentence under 28 U.S.C. § 2255 (ECF No. 64), the Government's letter brief in opposition to Petitioner's motion to alter or amend judgment (ECF No. 69), and Petitioner's reply brief (ECF No. 73).

For the reasons set forth in the accompanying Opinion:

IT IS THEREFORE on this **27th day of September 2023,**

ORDERED that the Clerk shall reopen this matter; and it is further

ORDERED that Petitioner's motion to alter or amend judgment under Federal Rule of Civil Procedure 59(e) (ECF No. 64) is **DENIED**; and a certificate

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of appealability under 28 U.S.C. § 2253(c)(2) shall not issue; and it is further

ORDERED that the Clerk of the Court shall serve this Order and accompanying Opinion upon the parties electronically, and on Petitioner by regular U.S. mail, and shall close this matter.

/s/ Susan D. Wigenton
Hon. Susan D. Wigenton,
United States District Judge

Appendix M

having a supervisor. Looking back, hindsight being 20/20, had we known that the civil case was going to come down the road, we would have insisted on this trial that the word “proper” should be in there. That yes, they agree.

Judge, if you are thinking of crediting the government’s argument and taking away the three points, which I think they are entitled to and earned, then I think we should have a hearing where we can bring Rob Lavin in and we can bring Brad Tinkleman in and let’s put them under oath and say did you ever meet these people? How did this happen?

Because they have insisted from day one that we attempted to bring this Tinkleman person on board.

THE COURT: You are a little late on that because you are foreclosed by what your client said before me at the time of allocution.

MR. ARLEO: They are not walking away from it.

THE COURT: We did not determine at that time that she was incompetent by any means of saying what she said to me, right?

MR. ARLEO: Correct.

THE COURT: Then this idea of now having a hearing is superfluous, irrelevant.

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Appendix N

[Filed: May 3, 2019]

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-2019

UNITED STATES OF AMERICA ex rel.
JANE DOE

v.

HEART SOLUTION, PC; BIOSOUND MEDICAL
SERVICES; KIRTISH N. PATEL; NIMESH PATEL;
NITA K. PATEL

Heart Solution PC
and Nita K. Patel,
Appellants

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 2-14-cv-03644)
District Judge: Honorable Stanley R. Chesler

Argued on October 1, 2018

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Before: JORDAN, ROTH, Circuit Judges and
STEARNS*, District Judge

(Opinion filed May 3, 2019)

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* The Honorable Richard G. Stearns, United States District
Judge for the District of Massachusetts, sitting by designation.

OPINION

ROTH, Circuit Judge

Nita K. Patel and her husband, Kirtish N. Patel, were convicted of defrauding Medicare in a prior criminal proceeding. The United States then brought this civil action for the same fraudulent schemes against Ms. Patel, Ms. Patel's healthcare company (Heart Solution P.C.), Mr. Patel, and Mr. Patel's healthcare company (Biosound Medical Services). The United States prevailed in the District Court and only Ms. Patel and Heart Solution appealed.

In granting summary judgment to the United States, the District Court relied on the Patels' convictions and plea colloquies in the criminal case, essentially concluding that Ms. Patel had already admitted to all elements and issues relevant to her civil liability. However, the District Court failed to dissect the issues that were determined in the criminal case from those that were not. It lumped together Ms. Patel and Heart Solution, even though Heart Solution was not involved in the criminal case. It also failed to disaggregate claims Medicare paid to Ms. Patel and Heart Solution from those paid to Mr. Patel and Biosound. As such, it erred in finding that Ms. Patel and Heart Solution conceded all of the essential elements to every claim in this appeal. Thus, we will affirm the judgment of the District Court in part and vacate in part and remand for further proceedings consistent with this opinion.

I.

In November 2015, the Patels pled guilty to separate, but nearly identical, criminal information charges under 18 U.S.C. § 1347 for defrauding Medicare.¹ They conducted this fraud through two separate schemes. First, the Patels submitted diagnostic reports to Medicare that should have been written by a specialist physician—but were not—and contained forged physician signatures. Ms. Patel and Heart Solution do not dispute liability with respect to the claims involving this scheme. The second scheme involved diagnostic neurological testing. Medicare regulations require all diagnostic testing to be “reasonable and necessary,” as defined under Medicare Part B.² In order for diagnostic neurological testing to be “reasonable and necessary,” it must be performed under the proper level of physician supervision.³ The Patels did not comply with these regulations. Instead of employing a supervising neurologist for these tests, the Patels falsely represented to Medicare that the neurological testing was being supervised by a licensed neurologist.

Much of this appeal centers on Ms. Patel’s plea colloquy for her criminal conviction. The relevant parts of the colloquy follow. First, the sentencing judge asked Ms. Patel whether she and her husband “own and operate mobile diagnostic companies known as Biosound Medical Services and Heart Solution PC,”

¹ Ms. Patel was sentenced to 78 months in prison and is currently serving her sentence.

² 42 U.S.C. § 1395y(a)(1)(A).

³ 42 C.F.R. § 410.32(b)(1); 42 C.F.R. § 411.15(k).

and she responded, “yes.”⁴ Neither the court, the government, nor Ms. Patel clarified whether she had ownership interests in both companies or just Heart Solution.⁵ Next, the judge asked whether between 2006 and 2014, Ms. Patel and her husband “falsely represent[ed] to Medicare that the neurological testing being performed at Biosound Medical Services was being supervised by a licensed neurologist, when, in fact, it was not.”⁶ Again, she responded “yes.”⁷ Neither the court nor the parties addressed whether Heart Solution—as opposed to the Patels or Biosound—made any such misrepresentations. Finally, the judge asked whether, “Biosound Medical Services and Heart Solution, PC, [were] paid at least [\$ 1.18 million] by Medicare . . . for diagnostic neurological testing that was never supervised by a licensed neurologist.” Ms. Patel answered, “yes.”⁸ Neither the parties nor the court sought to clarify whether one company was paid the entire amount or whether the payments were divided between the companies.

In June 2014, relator Jane Doe brought a qui tam suit under the False Claims Act (FCA) against Ms. Patel, Mr. Patel, Biosound, and Heart Solution. The United States filed a complaint in intervention on

⁴ A41.

⁵ Ms. Patel does not contest that she owns Heart Solution. The parties disagree on whether Ms. Patel had any ownership interest in Biosound. But as discussed in III.A, whether Ms. Patel had an ownership interest in Biosound is irrelevant; thus, we do not make any determinations as to this issue.

⁶ A43.

⁷ A43.

⁸ A44. Medicare paid a total of \$1,668,954.95. \$1.18 million was for the neurological testing, and the remainder was for the scheme not at issue here.

November 18, 2015. The plaintiffs sought to hold the Patels and the two companies civilly liable for defrauding Medicare through the two schemes described above. Specifically, they claimed the defendants violated two provisions of the FCA by (1) “knowingly present[ing] or caus[ing] to be presented a false or fraudulent claim,”⁹ and (2) “knowingly mak[ing], us[ing], or caus[ing] to be made or used a false record or statement material to a false or fraudulent claim.”¹⁰ They also brought common law claims including fraud, unjust enrichment, disgorgement of profits, and payment by mistake of fact.

In March 2016, the plaintiffs moved for partial summary judgment on the two FCA counts, arguing that Ms. Patel’s admissions during her plea colloquy established all the elements of the FCA claims and that therefore Heart Solution and Ms. Patel were collaterally estopped from contesting FCA liability. In their opposition brief, the defendants relied on a statement submitted by Mr. Patel in a pleading entitled “Certification of Kirtish N. Patel.” In it, Mr. Patel claimed that Biosound employed a supervising neurologist from 2006 to 2007 and from 2012 to 2014. The defendants argued that the statement raised an issue of fact as to the time frame during which Biosound lacked a supervising neurologist. The statement was not sworn and was not made under the penalty of perjury.

The District Court granted summary judgment to plaintiffs on July 8, 2016, finding that the guilty pleas and accompanying colloquies established all elements of the FCA claims and collaterally estopped the

⁹ 31 U.S.C. § 3729(a)(1)(A).

¹⁰ 31 U.S.C. § 3729(a)(1)(B).

defendants from contesting liability. It also struck the section of Mr. Patel's statement regarding the time frame during which Biosound had a supervising neurologist because it was "self-serving" and conflicted with testimony from the plea colloquy regarding the time frame without any "reasonable explanation." On December 23, 2016, the government moved for summary judgment on the remaining common law claims under the same theory—that the defendants had admitted to all the elements of the claims. The District Court agreed and granted the motion on April 3, 2017.

On May 3, 2017, Ms. Patel and Heart Solution appealed both summary judgment orders.¹¹ They submit two primary arguments. First, they contend that Ms. Patel cannot be liable for any unsupervised neurological testing at Biosound because she did not own or operate Biosound, and thus had no legal duty to ensure Biosound employed a neurological testing supervisor. Second, they argue that even if we find them liable for the neurological testing issues at Biosound, Mr. Patel's statement created an issue of material fact as to the time frame during which the unsupervised testing occurred. We reject both of these arguments.

Moreover, we will affirm the District Court with regard to Ms. Patel's liability on the FCA and common law fraud claims. However, we will vacate the District Court's findings that (1) Heart Solution is estopped from contesting liability and damages for all claims, and (2) Ms. Patel is estopped from contesting liability and damages for the remaining common law claims.

¹¹ Kirtish Patel and Biosound did not appeal.

II.

The District Court had jurisdiction under 31 U.S.C. § 3732(a) and 28 U.S.C. §§ 1331, 1367. We have jurisdiction of this appeal under 28 U.S.C. § 1291. We exercise plenary review over a district court's grant of summary judgment, applying the same standard as the district court.¹² Under this standard, a court will “grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”¹³

III.

We first address Ms. Patel's and Heart Solution's two main arguments on why the District Court erred in granting summary judgment. First, they contend that Ms. Patel cannot be liable for Biosound's unsupervised testing because she did not possess an ownership interest in Biosound and merely worked as an employee. We reject this argument and hold that ownership interest is irrelevant to FCA liability. Second, they argue that even if Ms. Patel is liable for Biosound's fraud, Mr. Patel's statement created a triable issue of fact as to the years during which Biosound lacked a supervising neurologist. We conclude that Mr. Patel's statement cannot create a disputed issue of fact on summary judgment because it was not sworn or made under penalty of perjury.

¹² *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 265 (3d Cir. 2014).

¹³ Fed. R. Civ. P. 56(a).

A.

We address the issue of ownership first. Ms. Patel argues that because she did not have any ownership interest in Biosound, she had no duty to ensure that Biosound employed a supervising neurologist and was not in charge of ensuring Biosound's compliance with Medicare regulations. However, whether Ms. Patel had an ownership interest in Biosound is irrelevant to her liability under the FCA.¹⁴ There are four elements to the two FCA claims brought here: "falsity, causation, knowledge, and materiality."¹⁵ Ownership is not one of them. Although corporations and individuals with ownership interests—such as board members and executives—are typically the parties investigated and sued for FCA violations, individuals at all levels of a company have been found liable under the FCA.¹⁶ We conclude that individual employees

¹⁴ Ms. Patel also makes this argument in her brief with respect to common law fraud, stating that "there is no evidence that Nita Patel made material misrepresentations to Medicare regarding supervision of the neurological testing that was performed at Biosound," supposedly because she did not own Biosound. This argument fails on its face because she plainly admitted in her plea colloquy that she made such misrepresentations.

¹⁵ *United States ex rel. Petratos v. Genentech Inc.*, 855 F.3d 481, 487 (3d Cir. 2017) (citations omitted).

¹⁶ See, e.g., *United States v. Krizek*, 111 F.3d 934, 942 (D.C. Cir. 1997) (wife of psychiatrist who worked as an employee in his practice was liable under FCA); *United States v. Menominee Tribal Enterprises*, 601 F. Supp. 2d 1061, 1071 (E.D. Wis. 2009) (employees of a tribe are "persons" under the FCA); *U.S. ex rel. Burlbaw v. Regents of N.M. State Univ.*, 324 F. Supp. 2d 1209, 1215 (D.N.M. 2004) ("[U]nder the FCA, state employees are 'persons' who may be sued if they are sufficiently involved in the submission of a false claim to the United States.").

with no ownership interest in a company can be liable under Sections 3729(a)(1)(A) and 3729(a)(1)(B) of the FCA.

This conclusion, that an ownership interest is not required for FCA liability, is consistent with the language of the FCA. Section 3729 establishes civil penalties for “[a]ny person” in violation of its provisions.¹⁷ The FCA does not define the term “person,” but the Supreme Court has found that the meaning of the word has not changed since 1863, when Congress passed the original FCA.¹⁸ There is no doubt that Congress intended the term “person” to include natural persons. There is no suggestion in the FCA that an ownership interest is necessary to the definition of “person.”¹⁹

Recent Department of Justice (DOJ) guidance regarding the FCA is consistent with our holding that ownership is not required for FCA liability. In 2015, then–Deputy Attorney General Sally Yates issued a memo regarding corporate fraud and wrongdoing,

¹⁷ 31 U.S.C. § 3729(a)(1).

¹⁸ See *Cook County, Ill. v. U.S. ex rel. Chandler*, 538 U.S. 119, 125 (2003).

¹⁹ *Id.* at 125 (“[T]he Court . . . recognized the presumption that the statutory term ‘person’ ‘extends as well to persons politic and incorporate, as to natural persons whatsoever.’”) (quoting *United States v. Amedy*, 412, 6 L.Ed. 502 (1826)). Even if the term’s meaning was not clear, the Dictionary Act resolves the question. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2793 (2014) (“The Dictionary Act’s definition [of the term person], however, controls only where context does not indicate otherwise.”) (citations omitted). The Dictionary Act’s definition of the term “person” includes “individuals” and does not indicate any necessity for ownership interests. See 1 U.S.C. § 1.

including FCA enforcement.²⁰ The memo explicitly states that the DOJ should focus on “seeking accountability from the individuals who perpetrated the wrongdoing.”²¹ The memo states that the DOJ should “fully leverage its resources to identify culpable individuals at all levels in corporate cases”²² and that DOJ “lawyers should not agree to a corporate resolution that includes an agreement to dismiss charges against, or provide immunity for, individual officers or employees.”²³ It is clear from the language of the memo that, in the eyes of the DOJ, liability does not depend on ownership and employees are subject to suit.

Because ownership is irrelevant to FCA liability, the first argument fails.

B.

Ms. Patel and Heart Solution also argue that there remains a triable issue of fact regarding the years during which Biosound employed a supervising neurologist. In support of this argument, they rely on Mr. Patel’s statement, which claims that Biosound employed a supervising neurologist during 2006-2007 and 2012-2014. We conclude that because Mr. Patel’s statement was both unsworn and not given under the penalty of perjury, it was insufficient to create an issue of fact on summary judgment.

²⁰ See Memorandum from Sally Q. Yates on Individual Accountability for Corporate Wrongdoing to the DOJ, at 4 (Sept. 9, 2015) (mentioning liability under 31 U.S.C. § 3729 explicitly).

²¹ *Id.* at 1.

²² *Id.* at 2 (emphasis added).

²³ *Id.* at 5 (emphasis added).

This holding is consistent with the Federal Rules of Civil Procedure, authority from our sister circuits, and our own precedent. A 2010 amendment to the Advisory Committee Notes on Federal Rule 56(c)(4), which governs evidence submitted on summary judgment, states “that while ‘a formal affidavit is no longer required’ on summary judgment, a certification submitted as a substitute for an affidavit must be subscribed in proper form as true under penalty of perjury.” This amendment incorporates a statutory exception to the general rule that affidavits must be sworn to be considered on summary judgment. The statute, 28 U.S.C. § 1746, provides that when a matter is required to be supported by a sworn affidavit, the matter can instead be supported by an unsworn “declaration, certificate, verification, or statement,” as long as the statement is made under penalty of perjury and dated. Thus, while an unsworn statement may be considered on summary judgment, an unsworn statement that has not been made under penalty of perjury cannot.

The Fifth Circuit Court of Appeals reached the same conclusion when presented with this issue. In *Nissho-Iwai American Corp. v. Kline*,²⁴ the only evidence the nonmoving party submitted on summary judgment was an statement that was “neither sworn nor its contents stated to be true and correct nor stated under penalty of perjury.”²⁵ The court held that unsworn statements, on their own, generally cannot raise an issue of fact as to preclude summary judgment unless the statement falls within the statutory

²⁴ 845 F.2d 1300 (1988).

²⁵ *Id.* at 1305-06.

exception to this rule under Section 1746.²⁶ The Second and Seventh Circuit Courts of Appeals have come to similar conclusions.²⁷

Although we have not directly addressed this issue in a precedential opinion, today's holding is in line with our prior rulings. In *Woloszyn v. County of Lawrence*,²⁸ we held that a district court did not err in refusing to consider an unsworn statement on summary judgment because it did not comply with Rule 56.²⁹

Accordingly, Mr. Patel's statement is incompetent summary judgment evidence. His statement is the only evidence Ms. Patel and Heart Solution submitted on the issue of the whether Biosound had a supervising neurologist at any point between 2006 and 2014.³⁰

²⁶ *Id.* at 1306-07; *see also Ion v. Chevron USA, Inc.*, 731 F.3d 379, 382 n.2 (5th Cir. 2013) ("Although unsworn documents usually cannot raise fact issues precluding summary judgment, [the] declaration can be considered pursuant to the statutory exception found in 28 U.S.C. § 1746.").

²⁷ *See In re World Trade Center Disaster Site Litig.*, 722 F.3d 483, 488 (2d Cir. 2013) (unsworn statements can be considered on summary judgment as long as they comply with 28 U.S.C. § 1746); *Pfeil v. Rogers*, 757 F.2d 850, 859 (7th Cir. 1985) ("Affidavits are admissible in summary judgment proceedings if they are made under penalties of perjury; only unsworn documents purporting to be affidavits may be rejected").

²⁸ 396 F.3d 314 (3d Cir. 2005).

²⁹ *Id.* at 322-23. *Woloszyn* was decided before the 2010 amendments to the Advisory Notes, and thus, did not consider whether the statement complied with the 28 U.S.C. § 1746 exception.

³⁰ Ms. Patel and Heart Solution also argue that the words "supervision" and "the" in the sentencing judge's questioning are ambiguous and create an issue of material fact as to the time frame during which Biosound employed a supervising neurologist. This argument fails. Even if these words were

Therefore, there is no genuine dispute of material fact as to whether Biosound had a supervising neurologist.

IV.

We now turn to collateral estoppel as applied to Heart Solution and conclude that Heart Solution is not collaterally estopped from contesting liability or damages for the claims against it. Under federal common law, collateral estoppel applies when “(1) the issue sought to be precluded is the same as that involved in the prior action; (2) that issue was actually litigated; (3) it was determined by a final and valid judgment; and (4) the determination was essential to the prior judgment.”³¹ Moreover, “collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a full and fair opportunity to litigate that issue in the earlier case.”³² In situations involving the collateral estoppel effects of a prior criminal judgment, “the court must examine the record of the criminal proceeding,” including the plea colloquy, “to determine specifically what issues were decided.”³³ “[R]easonable doubt as to which issues were decided by a prior judgment should be resolved against using such judgment as an estoppel.”³⁴

ambiguous in the context of the plea colloquy, the Appellants have put forth no evidence supporting Ms. Patel’s understanding of such terms. Thus, these arguments are insufficient to create an issue of fact at the summary judgment stage.

³¹ *In re Graham*, 973 F.2d 1089, 1097 (3d Cir. 1992) (citations omitted).

³² *Allen v. McCurry*, 449 U.S. 90, 95 (1980) (citations omitted).

³³ *Chisholm v. Def. Logistics Agency*, 656 F.2d 42, 48 (3d Cir. 1981).

³⁴ *Id.* at 50 (citing *Kauffman v. Moss*, 420 F.2d 1270, 1274 (3d Cir. 1970)).

Heart Solution cannot be estopped based on Ms. Patel's criminal conviction and plea colloquy. The United States charged and convicted only Mr. and Ms. Patel of healthcare fraud under 18 U.S.C. § 1347—not Heart Solution.³⁵ As such, Heart Solution did not have any opportunity, much less a “full and fair opportunity,”³⁶ to litigate any issue involved in this appeal. Moreover, whether Heart Solution defrauded Medicare by submitting false reports about neurological testing was not actually litigated or determined by a final judgment in the criminal proceeding. Ms. Patel's plea testimony and conviction certainly speak to her role in Biosound's schemes to defraud Medicare, but they do not establish that Heart Solution had any role in this scheme.

Thus, we will vacate the District Court's holding that Heart Solution is estopped.

V.

Next, we address Ms. Patel's liability for FCA violations and common law fraud and conclude that (1) the District Court properly found that she was estopped from contesting the falsity and knowledge elements of these claims; and (2) the Government met its burden to show materiality and causation.

An FCA violation has four elements: “falsity, causation, knowledge, and materiality.”³⁷ Ms. Patel admitted that: (1) she “falsely represented to Medicare that the neurological testing being performed at

³⁵ See Criminal Complaint, *United States v. Patel*, No. 15-cr-592 (D.N.J. June 9, 2014), ECF No. 1.

³⁶ *Allen*, 449 U.S. at 95.

³⁷ *United States ex rel. Petratos v. Genentech Inc.*, 855 F.3d 481, 487 (3d Cir. 2017) (citations omitted).

Biosound Medical Services was being supervised by a licensed neurologist when, in fact, it was not;” and (2) she “knowingly made these false representations to Medicare.” As a result, she is collaterally estopped from denying the falsity and knowledge elements of the FCA claims.

We also conclude that the materiality element has been satisfied³⁸ even though the District Court did not apply Supreme Court precedent. In June 2016, the Supreme Court decided *Universal Health Services, Inc. v. United States ex rel. Escobar*,³⁹ where it held that materiality is an element of all FCA claims, regardless of whether the specific statutory provision lists materiality as an element.⁴⁰ The Court then provided guidance on how the materiality requirement should be applied. It explained that a misrepresentation is not material merely because the government designates compliance with a particular regulatory requirement as a condition of payment or because “the Government would have the option to decline to pay if it knew of the defendant’s

³⁸ Because we find that the materiality element of the FCA claims has been satisfied, we need not reach the question of whether Ms. Patel is collaterally estopped from contesting materiality. Therefore, we make no determinations as to whether materiality under 18 U.S.C. § 1347—the criminal statute under which Ms. Patel was convicted—and materiality under the FCA are the same “essential element.”

³⁹ 136 S. Ct. 1989 (2016).

⁴⁰ *Id.* at 2002-03; *see also* *United States ex rel. Spay v. CVS Caremark Corp.*, 875 F.3d 746, 763 (3d Cir. 2017) (“Despite the lack of a materiality requirement, the Supreme Court had no trouble finding that the FCA’s materiality requirement also applied to this section.”).

noncompliance [with the regulation].”⁴¹ In fact, it is “very strong evidence” that a requirement is not material “if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated.”⁴² Thus, materiality “cannot be found where noncompliance is minor or insubstantial.”⁴³ On the other hand, materiality may be found where “the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement.”⁴⁴

The District Court did not apply *Escobar* in its analysis. It relied exclusively on the provision labeling supervision of diagnostic testing a condition of payment rather than looking to the record for other factors, as provided in *Escobar*, bearing on the materiality analysis.⁴⁵ However, when we examine the record, we conclude that there is no issue of fact as to materiality under *Escobar*.

The initial burden was on the government to show materiality, and it met its burden when it submitted that, pursuant to the regulation, Medicare would not pay the claims in the absence of a certification from a supervising neurologist. Neither Ms. Patel nor any other defendant put forth any evidence indicating otherwise. She made no showing that noncompliance with the supervision requirement was “minor or

⁴¹ *Escobar*, 136 S. Ct. at 2003.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Escobar* specifically states that whether a “provision is labeled a condition of payment is relevant to but *not dispositive* of the materiality inquiry.” *Id.* at 2001 (emphasis added).

insubstantial”⁴⁶ or that Medicare generally pays this type of claim “in full despite its actual knowledge that certain requirements were violated.”⁴⁷ Because the Government met its burden to show materiality and Ms. Patel put forth no evidence in rebuttal, the element of materiality was properly established, and there is no need to remand this case to the District Court to determine materiality under *Escobar*.

This conclusion as to materiality also means that there was causation—the final FCA element. Because these misrepresentations were material, they caused damage to Medicare. In other words, but for the misrepresentations, Medicare would never have paid the claims.

Next, we address the District Court’s holding that Ms. Patel’s conviction also estops her from contesting liability as to common law fraud. The elements of fraud under New Jersey law are (1) knowingly making a material misrepresentation; (2) an intention that the other person rely on the misrepresentation; (3) reasonable reliance by the other person; and (4) resulting damages.⁴⁸ We agree with the District Court that Ms. Patel is estopped from denying that she knowingly made misrepresentations to Medicare regarding the neurological testing being performed at Biosound. Moreover, for the same reasons as in the FCA claim, we find that the materiality and causation/reliance elements of common law fraud have been met. Therefore, we will affirm the District Court’s determination as to common law fraud.

⁴⁶ *Id.* at 2003.

⁴⁷ *Id.*

⁴⁸ *Banco Popular N. Am. v. Gandi*, 184 N.J. 161, 172-73 (2005).

VI.

Turning to the remaining common law claims—unjust enrichment, disgorgement of profits, and payment by mistake of fact—we hold that Ms. Patel is not collaterally estopped from denying liability or damages as to these claims.

An essential element of all three of these claims is that the defendant retained funds—payments from Medicare in this case. Unjust enrichment requires a showing “that defendant received a benefit and that retention of that benefit without payment would be unjust.”⁴⁹ A disgorgement of profits claim requires that the defendant have profit or revenue to disgorge.⁵⁰ And payment by mistake of fact allows the United States to recover money from a defendant that “its agents have wrongfully, erroneously, or illegally paid.”⁵¹

Whether Ms. Patel or Heart Solution specifically—as opposed to Mr. Patel and Biosound—retained any from funds from Medicare was not determined in the criminal case so as to estop Ms. Patel from contesting liability for these claims. In order to find that Ms. Patel is collaterally estopped, we must find that the issue of whether she retained funds was (1) involved and litigated in the prior action, (2) actually determined by a final judgment, and (3) essential to the conviction.⁵² Ms. Patel’s conviction and plea colloquy

⁴⁹ *VRG Corp. v. GKN Realty Corp.*, 135 N.J. 539, 554 (1994) (emphasis added).

⁵⁰ *See Commodity Futures Trading Comm’n v. Am. Metals Exch. Corp.*, 991 F.2d 71, 76 (3d Cir. 1993).

⁵¹ *United States v. Wurts*, 303 U.S. 414, 415 (1938).

⁵² *See In re Graham*, 973 F.2d 1089, 1097 (3d Cir. 1992).

do not permit such findings. First, 18 U.S.C. § 1347 criminalizes knowingly “defraud[ing] any health care benefit program” or “obtain[ing] . . . money . . . owned by . . . any health care benefit program.” Thus, Ms. Patel need not have obtained money from Medicare to be liable under Section 1347; she could have just defrauded Medicare.

Her plea colloquy does not establish that she obtained funds from Medicare. Ms. Patel admitted that she submitted false claims to Medicare about the neurological testing at her husband’s company, Biosound. She also admitted that Biosound and Heart Solution were paid approximately \$ 1.18 million from Medicare for unsupervised neurological testing. These admissions may suggest that Ms. Patel and/or Heart Solution retained at least part of the \$ 1.18 million, but they are not sufficient to estop Ms. Patel from arguing and submitting evidence to show otherwise. It is possible that Mr. Patel and Biosound retained the entire benefit and Ms. Patel and Heart Solution retained nothing. The criminal proceedings do not speak to this question, much less resolve it. Where there is “reasonable doubt as to which issues were decided by a prior judgment” we cannot conclude that collateral estoppel applies.⁵³

This same reasoning applies to the question of damages. Ms. Patel is not estopped from contesting damages because neither her conviction nor colloquy conclusively establish she was ever paid by Medicare for unsupervised neurological testing.

⁵³ *Chisholm v. Def. Logistics Agency*, 656 F.2d 42, 50 (3d Cir. 1981).

As such, we will reverse the District Court's grant of summary judgment on the unjust enrichment, disgorgement of profits, and payment by mistake of fact claims. We will also reverse the District Court's finding as to damages assessed against Ms. Patel with regard to these claims.

VII.

For the foregoing reasons, we will affirm the District Court's judgment on the issue of Ms. Patel's liability and damages under the FCA for false claims submitted to Medicare for unsupervised neurological tests and on the issue of Ms. Patel's common law fraud. We will reverse the portions of the District Court's summary judgment orders with respect to Heart Solution and with respect to Nita Patel's liability and damages for the remaining common law claims and remand this case to the District Court for further proceedings consistent with this opinion.

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Appendix O

[D. N.J. ECF No. 46]

[Filed: Jul. 8, 2016]

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF	:	
AMERICA, <i>ex rel</i>	:	
JANE DOE,	:	Civil Action
Plaintiffs,	:	No. 14-3644
v.	:	(SRC)(CLW)
HEART SOLUTION PC,	:	
BIOSOUND MEDICAL	:	OPINION
SERVICES, KIRTISH N.	:	
PATEL, NITA K. PATEL,	:	
Defendants.	:	

CHESLER, District Judge

This matter comes before the Court upon two motions: (1) Plaintiff United States of America’s (“the Government”) motion for partial summary judgment for liability and damages on Counts I and II of its intervenor Complaint, as well as damages [Docket Entry 30]; and Plaintiff/Relator Jane Doe’s (“Relator”) motion for summary judgment on the Relator’s Complaint [Docket Entry 34]. Defendants Heart Solution P.C., Nita K. Patel, Biosound Medical Services, and Kirtish N. Patel (collectively, “Defendants”) have opposed the motions [Docket Entries 36-37]. The Court has considered the parties’ submissions and proceeds

to rule without oral argument, pursuant to Federal Rule of Civil Procedure 78. For the reasons set forth below, the Court will grant Plaintiffs' motions.

I. BACKGROUND

On November 17, 2015, Defendants Kirtish and Nita Patel pled guilty to separate one-count criminal informations for health care fraud in violation of 18 U.S.C. § 1347. (United States Rule 56.1 Statement ¶ 1 [hereinafter PSF].) As part of their plea allocutions, the Patels made the following admissions that are relevant to the motions before the Court.

Kirtish and Nita Patel both admitted that they both owned and operated Biosound Medical Services and Heart Solution P.C. from 2006 to 2014. (K. Patel Tr. at 32:1-5; N. Patel Tr. at 22:12-17.) Both Patels admitted that Defendants Biosound Medical Services and Heart Solution PC billed Medicare for diagnostic testing services that the Patels claimed had been provided. (K. Patel Tr. at 32:10-23; N. Patel Tr. at 22:20-23:1.) Furthermore, both Patels admitted that they claimed that licensed specialist physicians has reviewed and interpreted the diagnostic values recorded by diagnostic technicians as part of the Patels' services. (K. Patel Tr. at 32:18-23; N. Patel Tr. at 23:2-7.) During this time period, the Patels knew that doctors who ordered diagnostic services from Defendants relied on the reports they allegedly provided from specialist physicians to make important treatment decisions for their patients with serious conditions. (K. Patel Tr. at 32:24-33:4, 34:5-9, 34:14-17; N. Patel Tr. at 23:8-13, 24:1-5.) Both Patels admitted that Kirtish Patel wrote many of the diagnostic reports that were supposed to have been written by a

specialist physician, despite the fact that Kirtish Patel did not have a medical license. (K. Patel Tr. at 33:5-9, 33:14-22; N. Patel Tr. at 23:14-19.) The Patels further admitted that both Kirtish Patel and Nita Patel attached forged specialist physician signatures to reports that Kirtish Patel forged. (K. Patel Tr. at 33:23-34:4; N. Patel Tr. at 23:20-25.) In addition, the Patels admitted that, from 2006 to 2014, that they falsely represented to Medicare that the neurological testing performed at Biosound Medical Services was supervised by licensed neurologists, when it in fact was not. (K. Patel Tr. at 34:4; N. Patel Tr. at 23:8-13.) The Patels admitted that they made these false representations knowingly. (K. Patel Tr. at 34:24-35:10; N. Patel Tr. at 24:23-25:1.) The Patels also admitted that Medicare paid Biosound Medical Services and Heart Solution P.C. at least \$1,668,954.95 for claims submitted for diagnostic testing and reports that were never interpreted by a licensed physician, and diagnostic neurological testing that was never supervised by a licensed neurologist. (K. Patel Tr. at 35:11-36:17; N. Patel Tr. at 25:2-16.) The Patels both acknowledged that they knew that submission of these false claims to Medicare was illegal. (K. Patel Tr. at 36:21-37:2; N. Patel Tr. at 25:17-20.) Medicare paid \$487,244.95 for diagnostic testing and reports that were not interpreted by a licensed physician, and \$1,181,710 for neurological diagnostic testing that was not supervised by a licensed neurologist. (PSF ¶ 11.) Furthermore, the Patels' conduct involved making claims to Medicare for diagnostic testing for at least 200 patients. (*Id.*)

Relator filed the original Complaint in this civil action against Defendants on June 6, 2014 [Docket

Entry 1]. The Government filed a notice of election to intervene on November 18, 2015 [Docket Entry 9], along with an intervenor Complaint [Docket Entry 10]. Relator and the Government have filed separate motions for summary judgment [Docket Entries 30, 34] that are now before this Court.¹

II. LEGAL STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate under Fed. R. Civ. P. 56(c) when the moving party demonstrates that there is no genuine issue of material fact and the evidence establishes the moving party's entitlement to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A factual dispute is genuine if a reasonable jury could return a verdict for the non-movant, and it is material if, under the substantive law, it would affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "In considering a motion for summary judgment, a district court may not make credibility determinations or engage in any weighing of the evidence; instead, the non-moving party's evidence 'is to be believed and all justifiable inferences are to be drawn in his favor.'" *Marino v. Indus. Crating Co.*, 358 F.3d 241, 247 (3d Cir. 2004) (quoting *Anderson*, 477 U.S. at 255).

"When the moving party has the burden of proof at trial, that party must show affirmatively the absence of a genuine issue of material fact: it must show that, on all the essential elements of its case on which it

¹ The Government has not moved for summary judgment on the common law counts it raises in the intervenor Complaint, and thus styles its motion as one for partial summary judgment.

bears the burden of proof at trial, no reasonable jury could find for the non-moving party.” *In re Bressman*, 327 F.3d 229, 238 (3d Cir. 2003) (quoting *United States v. Four Parcels of Real Prop.*, 941 F.2d 1428, 1438 (11th Cir. 1991)). “[W]ith respect to an issue on which the nonmoving party bears the burden of proof . . . the burden on the moving party may be discharged by ‘showing’—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party’s case.” *Celotex*, 477 U.S. at 325.

Once the moving party has satisfied its initial burden, the party opposing the motion must establish that a genuine issue as to a material fact exists. *Jersey Cent. Power & Light Co. v. Lacey Twp.*, 772 F.2d 1103, 1109 (3d Cir. 1985). The party opposing the motion for summary judgment cannot rest on mere allegations and instead must present actual evidence that creates a genuine issue as to a material fact for trial. *Anderson*, 477 U.S. at 248; *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1130-31 (3d Cir. 1995). “[U]nsupported allegations . . . and pleadings are insufficient to repel summary judgment.” *Schoch v. First Fid. Bancorporation*, 912 F.2d 654, 657 (3d Cir. 1990); *see also* Fed. R. Civ. P. 56(e) (requiring the nonmoving party to “set out specific facts showing a genuine issue for trial”). “A nonmoving party has created a genuine issue of material fact if it has provided sufficient evidence to allow a jury to find in its favor at trial.” *Gleason v. Norwest Mortg., Inc.*, 243 F.3d 130, 138 (3d Cir. 2001).

If the nonmoving party has failed “to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party

will bear the burden of proof at trial . . . there can be ‘no genuine issue of material fact,’ since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Katz v. Aetna Cas. & Sur. Co.*, 972 F.2d 53, 55 (3d Cir. 1992) (quoting *Celotex*, 477 U.S. at 322-23).

III. DISCUSSION

Relator moves for summary judgment on her Complaint [Docket Entry 34]. The Government also moves for partial summary judgment on two False Claims Act (“FCA”) claims (Counts I and II of the intervenor Complaint), and seeks the damages requested in the intervenor Complaint. The Court will address each claim in turn.

A. MOTIONS FOR SUMMARY JUDGMENT ON LIABILITY FOR FALSE CLAIMS

a. RELEVANT LEGAL BACKGROUND

i. THE FCA AND MEDICARE

This case arises under the qui tam provisions of the FCA, permitting a private person to “bring a civil action for a violation of [S]ection 3729 . . . in the name of the Government.” 31 U.S.C. § 3730(b). Plaintiffs assert claims under two provisions of the FCA: § 3729(a)(1)(A), “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval”; and § 3729(a)(1)(B), “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.” 31 U.S.C. § 3729(a)(1)(A)-(B).

Medicare Part B covers the costs of physician services, tests, and supplies, but will only cover such costs where the tests are “reasonable and necessary” to treat or diagnose an injury or illness, or to improve the functioning of a malformed body part. 42 U.S.C. § 1395y(a)(1)(A); 42 C.F.R. § 411.15. To be “reasonable and necessary,” diagnostic tests must be performed under adequate supervision, whether personal, direct, or general. Most unsupervised tests that the Government has listed in its intervenor Complaint require general supervision:

the procedure is furnished under the physician’s overall direction and control, but the physician’s presence is not required during the performance of the procedure. Under general supervision, the training of the non-physician personnel who actually perform the diagnostic procedure and the maintenance of the necessary equipment and supplies are the continuing responsibility of the physician.

42 C.F.R. 410.32(b)(3)(i).

ii. False Claims

False claims can be factually or legally false under the FCA. “A claim is factually false when the claimant misrepresents what goods or services that it provided to the Government and a claim is legally false when the claimant knowingly falsely certifies that it has complied with a statute or regulation the compliance with which is a condition for Government payment.” *United States ex rel Wilkins v. United Health*

Care Grp., Inc., 659 F.3d 295, 305 (3d Cir. 2011) (citations omitted).

Plaintiffs only allege legally false claims in this action, as Plaintiffs do not allege that Defendants failed to deliver the services for which they sought reimbursement from Medicare. Legally false claims occur either when a claimant (1) certifies falsely that it has complied with payment prerequisites (an “express false certification”), or (2) seeks payment without disclosing that it has violated payment prerequisites, while acting as if it has complied (an “implied false certification”). *Id.* at 305-06. Prerequisites for payment may be based on regulatory requirements, contractual terms, or statutes. *See, e.g., United States ex rel Quinn v. Omnicare Inc.*, 382 F.3d 432, 441 (3d Cir. 2004).

iii. Collateral Estoppel

In addition, the FCA specifically addresses the application of collateral estoppel to cases such as this one, where the defendants have testified in a related criminal action:

Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which

is brought under subsection (a) or (b) of section 3730.

31 U.S.C. § 3731(e) (2012). In addition, under the common law doctrine of collateral estoppel, a defendant may not contest an issue in a civil suit that has been resolved in the Government's favor in a criminal prosecution, whether the defendant pled guilty or was convicted after a trial. *United States v. Killough*, 848 F.2d 1523, 1528 (11th Cir. 1988) (citation omitted).

iv. Sham Affidavits

Finally, the Government asserts that the Patels have attempted to create genuine issues of material fact with respect to liability through the use of affidavits filed for the purpose of defeating summary judgment. When a party's affidavit conflicts with prior testimony, the district court may disregard the affidavit so as to prevent the party from "creat[ing] a material issue of fact to defeat summary judgment by filing an affidavit disputing his or her own sworn testimony without demonstrating a plausible explanation for the conflict." *Baer v. Chase*, 392 F.3d 609, 625 (3d Cir. 2004) (citation omitted); *see also EBC, Inc. v. Clark Bldg. Sys., Inc.*, 618 F.3d 253, 269-70 (3d Cir. 2010); *Jiminez v. All Am. Rathskeller, Inc.*, 503 F.3d 247, 253 (3d Cir. 2007). In deciding whether to strike a "sham affidavit," district courts may consider the timing of the affidavit, whether there is a plausible explanation for the contradiction, and whether there is independent record evidence to support the affidavit. *See EBC, Inc.*, 618 F.3d at 268-69.

b. ANALYSIS

As a threshold matter, this civil qui tam action arises from the same set of transactions that underlie the Patels' guilty pleas in their criminal cases. More specifically, the Patels pled guilty to defrauding Medicare in several ways: by creating fake medical reports in conjunction with diagnostic tests; by forging specialist physician signatures on reports that accompanied diagnostic tests; and by sending these faked reports to physicians who had ordered the tests from the Patels' companies, Biosound Medical Services and Heart Solution PC. Therefore, the Patels are estopped from denying the essential elements of offenses in this civil action that involve the same transactions in the informations to which the Patels pled guilty.

Plaintiffs assert that Defendants have violated § 3729(a)(1)(A) (submitting false claims), and § 3729(a)(1)(B) (using false records or statements), both based on (1) the creation of fraudulent diagnostic test reports and tests and (2) the submission of claims for unsupervised diagnostic tests. The Court will review each alleged violation below.

i. Submitting False Claims under § 3729(a)(1)(A)

To prove a violation of § 3729(a)(1)(A), Plaintiffs must show that “(1) the defendant presented or caused to be presented to an agent of the United States a claim for payment; (2) the claim was false or fraudulent; and (3) the defendant knew the claim was false or fraudulent.” *Wilkins*, 659 F.3d at 305 (internal quotation marks and citation omitted). Plaintiffs allege that Defendants submitted false claims for both

(1) fraudulent diagnostic test reports and tests and (2) unsupervised diagnostic tests.

Given that Defendants are estopped from denying the essential elements of the offenses since they have pled guilty in a criminal action involving the same transactions, Plaintiffs assert that Defendants have admitted to the elements of a § 3729(a)(1)(A) violation with respect to their submission of false claims for fraudulent diagnostic test reports and tests in their plea allocutions. The Government's argument is as follows. The Patels admitted that their companies, Biosound Medical Services and Heart Solution P.C., submitted claims to Medicare for diagnostic testing services the Patels claimed they provided. These claims were false or fraudulent, because the Patels forged the test reports and physician signatures that accompanied the diagnostic results—in effect, they claimed they had provided services that they did not actually provide. The Patels have admitted, on the record, that they knew their claims were fraudulent and that they knew their conduct was illegal at the time they submitted false claims.

Plaintiffs also assert that they have met their burden to show that Defendants committed violations of § 3729(a)(1)(A) with respect to their submission of false claims for unsupervised neurological tests. The Patels admitted that they submitted claims to Medicare for neurological diagnostic testing based on tests performed at Biosound Medical Services. Furthermore, the Patels falsely represented and implicitly certified to Medicare that they had complied with a condition for payment of claims (the requirement of supervision), but did not actually do so. Therefore, the Patels have admitted that they falsely

represented to Medicare that the neurological testing conducted at Biosound was supervised by a licensed neurologist, when in fact it was not. Finally, the Patels have admitted that they knew that the claims they had submitted were false or fraudulent, and that this conduct was illegal.

Kirtish Patel seeks to create a genuine issue of material fact by stating in his certification that he employed Dr. Brad Tinkelman as a supervising neurologist at Biosound Medical Services from 2006 to 2007, and furthermore that Dr. Fawaz Mian served as Biosound's neurological testing supervisor from 2012 to 2014. (K. Patel Cert. at ¶¶ 4-8.) Both Kirtish and Nita Patel's plea allocutions conflict with this assertion, as both admitted that between 2006 and 2014, they "falsely represent[ed] to Medicare that the neurological testing being performed at Biosound Medical Services was being supervised by a licensed neurologist, when, in fact, it was not?" (K. Patel Tr. at 34:18-22; N. Patel Tr. at 24:14-22.) Defendants assert that the plea colloquy was not sufficiently specific on whether all neurological testing conducted at Biosound was not supervised by a licensed neurologist, and furthermore that Judge Walls did not specify the level of supervision that Defendants failed to provide at Biosound during the time period in question. Despite the Patels' arguments to the contrary, there is nothing ambiguous about the question posed by Judge Walls. Defendants have not explained why they did not assert at the plea allocutions that some testing at Biosound had been conducted under the supervision of a licensed neurologist, at the proper level of supervision, if in fact this was the case. Seeing as Kirtish Patel's certification on this issue is self-serving and as

the Patels did not offer a reasonable explanation for the contradiction in facts, the Court will strike the portions of Kirtish Patel's certification addressing these issues.

Furthermore, Nita Patel claims that she should not be held liable for any unsupervised testing that occurred at Biosound Medical Services, because she did not own or operate the company and therefore she did not "present[] or cause to be presented" any of the claims for neurological testing completed at Biosound. (N. Patel Opp. at 2, 3, 6.) Her affidavit on this point [Docket Entry 45-1] directly contradicts her sworn testimony that she was an owner and operator of Biosound Medical Services from 2006 to 2014, and that she and her husband knowingly falsely represent[ed] to Medicare that the neurological testing being performed at Biosound Medical Services was being supervised by a licensed neurologist. (N. Patel Tr. at 22:12-17; 24:18-26.) Again, Judge Walls' questioning on the issue of ownership of Biosound and the false representations made to Medicare was clear. Nita Patel had the opportunity to explain that she did not own Biosound during her plea allocution. Her briefing fails to explain the conflict between her testimony and her submissions to this Court in any reasonable way, and the Court cannot justify ignoring the admissions made in the plea allocution based on this self-serving affidavit and briefing. Therefore, the Court will strike the portions of Nita Patel's affidavit that address her ownership and operation of Biosound, as well as her filing of false claims with Medicare based on her operation of Biosound.

**ii. Using False Records or Statements
under § 3729(a)(1)(B)**

To establish liability under § 3729(a)(1)(B), Plaintiffs must prove that the Defendants (1) made, used, or caused to be made or used, a false record or statement; (2) the Defendants knew the statement to be false; and (3) the statement was material to a false or fraudulent claim. *United States ex rel Zwirn v. ADT Sec. Servs., Inc.*, No. 10-2639, 2014 WL 2932846, at *5 (D.N.J. June 30, 2014) (citing *Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037, 1048 (9th Cir. 2012)). Plaintiffs allege that Defendants used false records or statements to obtain payment for their false claims for both (1) fraudulent diagnostic test reports and tests and (2) unsupervised diagnostic tests.

Plaintiffs argue that they have met their burden to show that Defendants committed violations of § 3729(a)(1)(B), with respect to their use of false records or statements to obtain payment for false claims for fraudulent diagnostic test reports and tests. Plaintiffs argue as follows. For Medicare to pay a claim for the interpretation of a diagnostic procedure, a written report must be drafted. The Patels have admitted that they created false records—Defendant Kirtish Patel wrote false diagnostic test reports, and the Patels both added fake physician signatures to the reports. The Patels knew these records were false. Furthermore, these false test reports satisfy the requirement of being “material” to the Defendants’ false Medicare claims. The FCA defines “material” as “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.” 31 U.S.C. § 3729(b)(4). Even though

Medicare may not have reviewed the fraudulent test reports the Patels created, the reports were necessary to make the false claims appear legitimate, given the requirement of a written report for these claims.

Finally, Plaintiffs assert that they have met their burden to show that Defendants committed violations of § 3729(a)(1)(B) with respect to their submission of false claims for unsupervised neurological tests. The Patels admitted that they knowingly and falsely represented that, from 2006-2014, neurological testing performed at Biosound Medical Services was supervised by a licensed neurologist. These representations were material to their false claims, since supervision of diagnostic testing is a condition that must be satisfied before Medicare will pay claims. *See* 42 C.F.R. § 410.32(b)(1).

So far as the Patels argue that Nita Patel should not be liable under § 3729(a)(1)(B) for fraudulent activities that occurred at Biosound, and furthermore that the Patels should not be liable for some of the fraudulent claims submitted by Biosound, the Court rejects these arguments for the reasons explained above.

Based on the analysis above, the Court finds that no genuine issue of material fact exists with respect to Counts I or II of the Government's intervenor Complaint. The certifications submitted by Defendants do not defeat these summary judgment motions, because Defendants have not offered reasonable explanations for why the facts in the certifications differ from those admitted in the plea allocutions. For these reasons, the Court will enter judgment in favor of Plaintiffs on these claims.

B. DAMAGES

Plaintiffs also ask the Court to grant statutory and civil penalty damages, based on Defendants' violation of various provisions of the FCA. For their actual damages, Plaintiffs have requested \$5,006,864.85 (three times the \$1,668,954.95 that Defendants admitted Medicare paid them for their fraudulent acts in their plea allocutions). (K. Patel Tr. at 35:11-36:17; N. Patel Tr. at 25:2-16.) Furthermore, Plaintiffs claim that Defendants are also liable for civil penalties of \$2,750,000, given that Defendants made at least 500 fraudulent claims to Medicare, and should be penalized at least \$5,500 per fraudulent claim, pursuant to 31 U.S.C. § 3729(a)(1).

On the issue of damages, § 3729(a)(1) states that:

any person who knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval; [or] knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim . . . is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000 . . . plus 3 times the amount of damages which the Government sustains because of the act of that person.

Id. The civil penalty is mandatory. *See, e.g., United States ex rel Drakeford v. Tuomey*, 792 F.3d 364, 388 (4th Cir. 2015) (citation omitted) ("Congress provided for treble damages and an automatic civil monetary penalty per false claim).

Defendants request that the Court reduce the damages Plaintiffs seek for several reasons. First,

Defendants attack the number of false claims at issue in this action. To the extent that the Patels seek to reduce damages based on the statements in Kirtish Patel's certification that Biosound employed a supervising neurologist for part of the time period in question (2006-2014) and that some of the tests were in fact supervised, the Court will not grant this request. The Court has struck the portions of Kirtish Patel's certification addressing these issues, for the reasons stated above, and Defendants have offered no other support for the requested reduction of fees on this issue. The Patels admitted in their pleas that neurological testing at Biosound was not supervised for the time period at issue, and are estopped from denying these admissions. Moreover, the Patels admitted in their pleas that Medicare paid them \$1,668,954.95 due to their fraudulent acts, so any dispute as to the number of false claims is moot.

In addition, Defendants assert that damages from false claims based on fraudulent diagnostic reports (\$487,244.95) should be reduced by 60 percent. The Patels argue that their tests had some value despite the forged reports accompanying the test results, because the Patels completed the technical component of the test, and thus a physician who had ordered the test could have, theoretically, examined the test results themselves. Defendants support this statement with Kirtish Patel's certification, which asserts that 60 percent of the value of a claim came from the performance test itself (the "technical component" of the test), and 40 percent of the value of a claim arose from the specialist physician interpretation of the claim (the "professional component" of the test). (K. Patel Cert. ¶ 10.) Defendants offer no evidence to

show that any physician, in fact, interpreted the diagnostic test themselves. And furthermore, Medicare requires that the services for which it reimburses must be medically “reasonable and necessary,” which requires adequate supervision. 42 U.S.C. § 1395y(a)(1)(A). Medicare is not required to reimburse for tests simply because they may have some “value.” Medicare requires that the “interpretation of a diagnostic procedure includes a written report.” Medicare Claims Processing Manual Ch. 13 at 20.1 (Professional Component). The Patels have admitted that they performed the diagnostic tests, and that they are liable for creating forged test reports. Specifically, Defendants represented to Medicare that they had provided a service that they, in fact, did not provide. Therefore, the forged test reports render the claims worthless under Medicare’s requirements. For these reasons, the Court will not reduce the damages based on this theory of apportionment of the claim’s value.

Finally, based on the affidavits submitted with their oppositions, the Patels also assert that Defendants should not be required to reimburse the funds they received from Medicare that they subsequently paid in taxes to the Government. The Patels offer no case cites for the proposition that the taxes they paid on the money paid by Medicare for their false claims should be subtracted from the amount they owe to the Government, or indeed that any court has offset damages to a government program like Medicare based on tax payments to the general treasury.

The Patels have admitted the exact amount of damages that their FCA violations caused. Their arguments related to facts asserted in the Patels’

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certifications are without merit. Since Defendants are estopped from denying the facts in their plea allocations related to damages, the Court will grant summary judgment in favor of Plaintiffs for all requested damages.

IV. CONCLUSION

For the foregoing reasons, the Court will grant Plaintiffs' motions. An appropriate Order will be filed herewith.

s/ Stanley R. Chesler
STANLEY R. CHESLER
United States District Judge

Dated: July 8, 2016

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Appendix P

Frank Arleo

From: Waisman, Danielle (USANJ)
<Danielle.Walsman@usdoj.gov>
Sent: Tuesday, August 11, 2015 4:10 PM
To: Frank Arleo; Anthony J Fusco Jr
Subject: RE: Patel plea agreements
Attachments: Kirtish Patel Plea Agreement Aug
5.pdf; Nita Patel Plea Agreement
August 5.pdf

Here are the plea agreements with our signatures and the updated government payor figure. Please note that, like the total loss number, that number will also rise as we contact the balance of the victim group.

I left you both messages to call me so please reach out at your earliest convenience so I know if we are getting close to signatures or if you think you will not be meeting the plea agreement deadline. Thanks.

Danielle Alfonzo Waisman
Assistant United States Attorney
United States Attorney's Office
970 Broad Street
Newark, NJ 07102
(973) 645-2724
(973)-645-2045 (fax)

5500 per claim penalty waived
 $3 \times 1.688 = 5m$

App-190

+ 1m
⇒ 1m under 4m instead of 6m
= +4.34m = 8.3

From: Waisman, Danielle (USANJ)
Sent: Thursday, August 06, 2015 2:01 PM
To: Frank Arleo; Anthony J Fusco Jr
Subject: Patel plea agreements

Frank and Tony,

In accordance with our conversations about your clients' desire to plead to fact stipulations as opposed to guideline stipulations, we are able to offer you the attached proposed plea agreements. Please note that these are in draft form because I am traveling and need to just double check and finalize the government payor figure on Monday.

As you will notice and as you requested, these agreements allow your clients to argue for a lesser loss amount based on that professional fee theory you had described in our meetings. It also makes clear that the loss figure will rise when the balance of the victims (Payor Group B) are contacted regarding their losses. As you will remember, we have already contacted the largest payors to Biosound and calculated their losses but there is a significant number of (much) smaller payor victims for whom we still need to ascertain that same information.

These agreements need to be signed by next Friday because, as I mentioned previously, we are otherwise going to begin to prepare them for indictment.

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Please let me know if you have any questions regarding the attached or would like to discuss them by phone. Also, if you plan to have your clients in this weekend to review the agreements, just let me know and I will work to get you finalized versions before the weekend.

Thank you

App-192

Appendix Q

From: Frank Arleo
To: Walsman, Danielle (USANJ)
Cc: ajfuscojr@aol.com
Subject: U.S. v. Nita Patel
Date: Monday, September 21, 2015
1:53:00 PM
Attachments: SKMBT_C55215092113460.pdf

Attached is the executed fact stip plea agreement.
We are still discussing a global resolution with the clients and will advise.