UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8544
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDWARD J. PETRUS, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas
(A-92-CA-182(A-84-CR-114))

(December 27, 1994)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Defendant-appellant Dr. Edward J. Petrus, Jr. (Petrus) appeals the district court's dismissal of his second motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. We affirm.

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Facts and Proceedings Below

On October 19, 1984, a federal grand jury handed down a thirty-six count indictment charging Petrus with eighteen counts of submitting false Medicare claims, ten counts of submitting false Medicaid claims, and eight counts of obstruction of justice. On May 2, 1985, pursuant to a plea agreement, Petrus pleaded guilty to one count of submitting a false Medicare claim in violation of 42 U.S.C. § 1395nn(a)(2) (Count 10), one count of submitting a false Medicaid claim in violation of 42 U.S.C. § 1396(h)(a)(2) (Count 24), and one count of obstruction of justice in attempting to suborn perjury of a grand jury witness in violation of 42 U.S.C. § 1503 (Count 31). In accordance with the plea agreement, the remaining thirty-three counts were dismissed.[1] The district court sentenced Petrus to consecutive three-year prison terms on each of the three counts and assessed a $55,000 fine.[2] Petrus did not appeal his conviction. He did, however, file a motion to reduce his sentence under FEDERAL RULE OF CRIMINAL PROCEDURE 35(b). The district court denied this motion, and this Court affirmed the judgment of the district court on appeal. *United States v. Petrus*, No. 85-1772 (5th Cir. July 23, 1986) (unpublished) (*Petrus I*).

The facts surrounding Petrus's convictions stem from his

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[1] In exchange for Petrus's plea, the government also agreed not to make any recommendation at sentencing and not to "criminally prosecute" Petrus for federal offenses relating to "other" Medicare and Medicaid claims submitted by the Eye Center of Austin between May 12, 1985, and May 2, 1985 (the date of the agreement). The record indicates that the government complied with this agreement.

[2] Petrus was sentenced before the effective date of the United States Sentencing Guidelines.

Austin, Texas, ophthalmology practice. In January 1980, Petrus formed the Eye Center of Austin. In June 1982, Medicare notified Petrus that he would be suspended from Medicare and Medicaid as a result of certain events in 1979 related to the submission of Medicaid claims. After filing for an injunction to prevent his suspension, Petrus entered a settlement in which he agreed to a six-month suspension from Medicare and Medicaid beginning May 12, 1983.[3]

Because a significant number of Petrus's patients at the Eye Center of Austin were covered by either Medicare or Medicaid, Petrus hired Dr. Paul Malsky, a Killeen, Texas, ophthalmologist, to see all his Medicare and Medicaid patients during his suspension. Petrus's staff applied for and received Medicare and Medicaid provider numbers for Dr. Malsky. In Count 10 of the indictment to which Petrus pleaded guilty, the government alleged that Petrus provided medical services to a Medicare patient and billed Medicare for these services using Dr. Malsky's provider number. After confronting Petrus about the use of his Medicare provider number, Dr. Malsky disassociated himself from the Eye Center of Austin on October 12, 1983, citing Petrus's continuous lies and evasiveness about the treatment and billing of Medicare and Medicaid patients.

Around October 1, 1983, Petrus advertised for a physician to replace Dr. Malsky. Dr. Gregory Baer of San Antonio responded to the advertisement and agreed to start working at the Eye Center of Austin on a part-time basis. Again, Petrus's staff acquired

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[3] Petrus asserts that he was not informed of the effective date of this suspension until some time in June 1983.

Medicare and Medicaid provider numbers for Dr. Baer. In Count 24 of the indictment, to which Petrus pleaded guilty, the government alleged that Petrus provided medical services to a Medicaid patient and billed Medicaid for these services using Dr. Baer's provider number. After learning of Petrus's suspension from Medicare and Medicaid and that Petrus had used his provider number, Dr. Baer disassociated himself from Petrus and the Eye Center of Austin on January 24, 1984.

A federal grand jury began investigating Petrus for submitting false Medicare and Medicaid claims and subpoenaed Dr. Baer and the staff of the Eye Center of Austin. Petrus had asked Dr. Baer to keep him abreast of any further contacts he had with government investigators in the case. When Dr. Baer called Petrus to inform him that he would be testifying before the grand jury, Petrus repeatedly told Dr. Baer that if asked about specific patients and whether he had treated them, Baer should testify that he could not remember. As part of his cooperation with government investigators, Dr. Baer recorded this telephone conversation. This recorded conversation formed the basis for the government's allegations in Count 31 of the indictment, to which Petrus pleaded guilty. In another conversation on the same day, Petrus told Dr. Baer that he should testify that he could not remember the facts whenever he was asked about anything that would require giving testimony which was damaging to Petrus.

On July 18, 1986, Petrus filed his first 28 U.S.C. § 2255 petition, challenging the district court's acceptance of his guilty plea and the effectiveness of his counsel. Following an

evidentiary hearing before a magistrate judge, the district court denied Petrus's petition. This Court affirmed the district court's judgment in an unpublished opinion. *United States v. Petrus*, No. 87-1932 (5th Cir. Dec. 1, 1988) (unpublished) (*Petrus II*).

On April 1, 1992, Petrus filed a second 28 U.S.C. § 2255 petition.[4] In this petition, Petrus raised four issues:

> (1) his conviction for obstruction of justice was improper because attempting to persuade the testimony of a witness is not a violation of 18 U.S.C. § 1503;
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> (2) his convictions for Medicare and Medicaid fraud were improper because his actions did not constitute criminal violations, but were solely civil violations;
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> (3) his 1983 suspension from Medicare and Medicaid violated the due process clause and the double jeopardy clause;
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> (4) his plea of guilty was involuntary.

In a June 15, 1993, supplemental response to Petrus's second section 2255 motion, the government argued that the motion should be denied pursuant to Rule 9(b) of the Rules Governing Section 2255 Proceedings. In an order dated June 29, 1993, the district court denied Petrus's motion under Rule 9(b) as relitigating the same issues as his first section 2255 petition and for abuse of the writ by raising new grounds in a successive motion. Petrus now appeals the district court's denial of his second section 2255 motion.

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[4] On July 14, 1988, Petrus was released on parole after serving thirty-six months in prison. When he filed his second section 2255 motion, Petrus remained on parole. A person on parole is deemed "in custody" for purposes of section 2255. *United States v. Drobny*, 955 F.2d 990, 995-996 (5th Cir. 1992). The district court stated that Petrus's parole was scheduled to expire in July 1993.

Discussion

I. Rule 9(b) Dismissal

Under Rule 9(b), the district court may dismiss a second or successive section 2255 petition if it finds that (1) the petition fails to allege any new grounds for relief or, (2) if new grounds are alleged, failure to assert those grounds in a prior petition renders the present petition an abuse of the writ. We review a district court's dismissal of a habeas petition as abusive or successive for abuse of discretion. *McGrary v. Scott*, 27 F.3d 181, 183 (5th Cir. 1994).

Absent a showing of cause and prejudice by the habeas petitioner, a court will ordinarily not reach the merits of: (1) successive claims that raise the same grounds as those heard and decided on the merits in a prior petition; or (2) new claims not raised in a prior petition that constitute an abuse of the writ. *Sawyer v. Whitley*, 112 S.Ct. 2514, 2518 (1992). For new or different claims raised for the first time in a successive petition, the cause prong of the standard requires the habeas petitioner to show a legitimate excuse for failing to include the new claim in a previous section 2255 petition. *McCleskey v. Zant*, 111 S.Ct. 1454, 1472 (1991). To satisfy the cause standard in the abuse of the writ context, the habeas petitioner must demonstrate that some "external impediment, whether it be government interference or the reasonable unavailability of the factual basis for the claim, must have prevented [the] petitioner from raising the claim." *Id.* Once the petitioner has established cause, he must show "`actual prejudice' resulting from the errors of which he

complains." *United States v. Frady*, 102 S.Ct. 1584, 1594 (1982).

Even if a habeas petitioner cannot meet the cause and prejudice standard, a federal court may hear the merits of a successive petition if the failure to hear the claims would constitute a fundamental miscarriage of justice. *Sawyer*, 112 S.Ct. at 2518. In order to show a fundamental miscarriage of justice, a habeas petitioner must "'establish that under the probative evidence he has a colorable claim of factual innocence.'" *Id*. at 2519 (quoting *Kuhlmann v. Wilson*, 106 S.Ct. 2616, 2627 (1986)); *see Jones v. Whitley*, 938 F.2d 536, 541 (5th Cir.), *cert. denied*, 112 S.Ct. 8 (1991) (explaining that a "`fundamental miscarriage' implies that a constitutional violation probably caused the conviction of an innocent person").

This Court has held that a district court should not summarily dismiss a habeas petition under Rule 9(b) without giving the petitioner an opportunity to respond to the allegations of repetition or abuse. *Brown v. Butler*, 815 F.2d 1054, 1057 (5th Cir. 1987). "At a minimum . . . the petitioner must be given specific notice that the court is considering dismissal and given at least 10 days in which to explain the failure to raise the new grounds in a prior petition." *Urdy v. McCotter*, 773 F.2d 652, 656 (5th Cir. 1985). We have strictly construed this notice requirement. *Johnson v. McCotter*, 803 F.2d 830, 832 (5th Cir. 1986). This notice must inform the petitioner that dismissal is being considered, that dismissal will be automatic if petitioner fails to respond, and that the response should present facts rather than conclusions or opinions. *Id.* We have previously noted that

the model Rule 9 form is the preferred practice for providing notice. *Urdy*, 773 F.2d at 657.

Although Petrus does not raise the issue on appeal, our review of the record reveals that the district court did not furnish Petrus with the requisite notice and opportunity to respond. This Court has previously observed that a district court's failure to provide the petitioner with the required notice before dismissal under Rule 9(b) may be harmless error in certain circumstances. *Williams v. Whitley*, 994 F.2d 226, 230 n.2 (5th Cir.), *cert. denied*, 114 S.Ct. 608 (1993). *See, e.g., Matthews v. Butler*, 833 F.2d 1165, 1170 n.8 (5th Cir. 1987) ("Failure to notify the petitioner may be harmless error in cases where there are no facts that the petitioner could allege to prevent his claim from being dismissed under Rule 9(b).").

Despite the district court's failure to fully abide by the mandates of the notice requirement, our review of the record convinces us that there are no facts Petrus could have alleged to avoid dismissal under Rule 9(b). Accordingly, the district court's failure to notify Petrus of its intention to dismiss his second petition under Rule 9(b) was harmless error (and certainly not the character of unassigned error for which we should reverse on our own motion).

On appeal, Petrus asserts that the facts of his case satisfy the cause and prejudice standard and that failure to consider the merits of his second section 2255 petition would constitute a fundamental miscarriage of justice. Petrus relies on what he labels "newly discovered evidence in the form of sworn testimony

from the civil hearing, documents from the FOIA/PA suit, admissions from the agency, amendments from congress [sic], and recent decisions from this and other Circuits."

Initially, we note that two of Petrus's claims were also raised in his first section 2255 petition, the applicability of 18 U.S.C. § 1503 to witnesses and the voluntariness of his guilty plea. In his petition, Petrus's ineffective assistance of counsel claim assailed his attorney for not attacking his conviction under 18 U.S.C. § 1503 on the grounds that it does not apply to witnesses. This Court rejected this argument and held that 18 U.S.C. § 1503 applies to witnesses. *Petrus II* at 16. Likewise, this Court rejected Petrus's argument in his first section 2255 petition challenging the validity of his guilty plea. *Id.* at 8-12. Petrus's references to recent court decisions and his rehashing of the very arguments already rejected by this Court in his first section 2255 petition do not amount to cause.

Petrus next contends that his actions were not criminal violations but solely civil violations. Petrus argues that it is only a felony offense to make false statements as part of a scheme to charge for services not rendered or to bill for more extensive services than provided. We note that this argument is essentially identical to Petrus's claim in his first petition that he did not commit Medicare/Medicaid fraud because the services for which he billed were actually performed and necessary. In an effort to establish cause for raising this claim in a successive petition, Petrus proffers a statement by the Inspector General in a subsequent administrative proceeding as a binding interpretation of

the law governing Medicare/Medicaid fraud. Regardless of the merits of this argument, we find that Petrus cannot establish cause and thus may not raise this argument in a successive petition. *United States v. Flores*, 981 F.2d 231, 236 (5th Cir. 1993) (holding that ignorance of the facts and legal theories underlying a habeas petitioner's claim does not constitute cause unless some external force such as government interference prevented raising the claim in a previous petition).

Raising the argument for the first time in his second petition, Petrus asserts that he never treated the patients in question and that he never used another doctor's provider number for the patients he did treat; rather, he asserts that his office staff used the provider number of the doctor whom they saw treat the patient. Petrus entered a plea of guilty to two counts of Medicare/Medicaid fraud after the government's lengthy recitation of the factual basis supporting the charges. In summarizing the factual basis for Counts 10 and 24, the government alleged that the evidence would show that Petrus provided medical services to Medicare and Medicaid patients using the provider numbers assigned to Drs. Malsky and Baer. Plainly, Petrus knew whether he provided the medical services in question at the time. Therefore, Petrus cannot rely on any alleged inconsistencies in various witnesses' testimony at a subsequent civil hearing as newly discovered evidence of facts of which he had personal knowledge at the time he entered his plea of guilty. Accordingly, Petrus cannot establish cause for failing to raise this argument in his first section 2255 petition.

Petrus also raises double jeopardy and due process arguments for the first time in his second petition. Petrus has also failed to establish cause for failing to raise these claims in his first section 2255 petition. Having determined that Petrus cannot establish cause, we need not reach the prejudice prong of the analysis. Finally, we do not find that a fundamental miscarriage of justice would result from a failure to entertain Petrus's second petition. Our review of the record supports our conclusion that Petrus has failed to establish a colorable claim that constitutional error resulted in the conviction of one who was actually innocent.

Based on our review of the record, we find that even if the district court had given Petrus an opportunity to respond to allegations of repetition and delay, he would not have been able to allege any facts to avert dismissal under Rule 9(b). Accordingly, we are unable to say that the district court abused its discretion in dismissing Petrus's second section 2255 petition under Rule 9(b).

II. Merits of Petrus's Claims

Even if the district court's failure to adhere to the notice requirement were not harmless, we would still affirm the judgment of the district court because all of Petrus's claims fail on the merits.

A. Section 1503 Issue

Petrus challenges his obstruction of justice conviction on the ground that attempting to persuade the testimony of a witness is not a violation of 18 U.S.C. § 1503. As Petrus correctly observes,

1982 congressional amendments to section 1503 deleted all references to witnesses and at the same time enacted 18 U.S.C. § 1512, expressly addressing threats, force, or intimidation directed at witnesses.[5] This Court, however, has held that Congress did not intend that urging or advising a witness to testify falsely be exempt from prosecution under the omnibus clause of section 1503. *United States v. Branch*, 850 F.2d 1080, 1082 (5th Cir. 1988), *cert. denied*, 109 S.Ct. 816 (1989); *United States v. Wesley*, 748 F.2d 962, 964 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 2664 (1985). When we rejected this identical claim in Petrus's first section 2255 petition, we stated "the face of the language of § 1503 still applies to witnesses even though the statute does not specifically refer to witnesses." *Petrus II* at 16. The Court's holding regarding the applicability of section 1503 to witnesses has not changed in the intervening time between Petrus's first and second section 2255 petitions. *See United States v. Williams*, 874 F.2d 968, 977 n.25 (5th Cir. 1989) (reaffirming this Circuit's interpretation that section 1503 still applies to witnesses). Accordingly, Petrus's claim that his conduct was not covered by the

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[5] Section 1503 currently reads:

> "Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, . . . or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both." 18 U.S.C. § 1503.

statute under which he was convicted is without merit.[6]

B. Medicare and Medicaid Fraud Convictions

Petrus next argues that his submission of claims to Medicare and Medicaid when he was a suspended provider is not a criminal violation. In his first section 2255 petition challenging the voluntariness of his guilty plea, Petrus asserted that he did not commit Medicare/Medicaid fraud because the services for which he submitted bills were actually performed and necessary. In essence, Petrus argued that the submission of false statements or misrepresentations was only a crime under the fraud statutes when they were submitted in connection with services that were either unnecessary or unperformed. Rejecting Petrus's argument in his first petition, this Court held that "Petrus's conduct falls squarely within the conduct plainly prohibited by the Medicare/Medicaid fraud statutes." *Petrus II* at 11.

Petrus now attempts to resurrect this argument in his second petition. He relies on an excerpt from the Inspector General's Response To Respondents' Exceptions in the civil proceeding against him and the Eye Center of Austin, *Inspector General v. Edward J. Petrus, Jr., M.D., and the Eye Center of Austin*, DAB No. C-147:

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[6] Petrus's misplaced reliance on Second Circuit decisions such as *United States v. Masterpol*, 940 F.2d 760, 763 (2d Cir. 1991), does not bolster his argument. Indeed, in *Wesley*, this Court explicitly rejected the Second Circuit's contrary interpretation of the 1982 congressional amendments. *Wesley*, 748 F.2d at 964.

Moreover, Petrus's reliance on this Court's citation, in *United States v. Pofahl*, 990 F.2d 1456, 1482 (5th Cir. 1993), to the *Masterpol* holding in a discussion of sentence enhancement under the Sentencing Guidelines is equally misplaced. Despite Petrus's valiant efforts to elevate this passing reference to a holding, the law of the Fifth Circuit remains that section 1503 applies to witnesses.

"The submission of claims to the Medicare or Medicaid programs for services provided by a suspended provider is not a violation of the criminal law. It is solely a CMPL [Civil Monetary Penalties law] violation." Petrus, however, was not convicted of submitting claims to Medicare and Medicaid while suspended. Rather, he was convicted of submitting false Medicare and Medicaid claims. Undaunted, Petrus asserts that "[i]t is only a felony offense to make a false statement in order to charge for services not rendered, and billing for more extensive services than actually provided, while the provider is in the program." Petrus apparently derives this conclusion from the Inspector General's statement.

Aside from the fact that he was never convicted of submitting claims while suspended, Petrus misconstrues the Inspector General's statement and ignores its context. Contrary to Petrus's interpretation, the Inspector General's statement did not specifically characterize the conduct underlying the two relevant counts of conviction (Counts 10 and 24) as noncriminal. Moreover, the statement in no way questions the propriety of Petrus's two convictions for submitting false statements.

Indeed, in its Response to Respondents' Exceptions, the Inspector General argued that the criminal sanctions imposed against Petrus did not warrant a significant reduction in the civil penalty to be assessed against Petrus and the Eye Center of Austin for some 271 violations of law. The Inspector General stressed that more than a third of the 271 items or services included in the civil case "do not specifically relate to the type of conduct for which respondent Petrus was convicted i.e., false statements." As

an example, the Inspector General observed that submission of Medicare/Medicaid claims for services provided by a suspended provider is not a criminal violation. Taken in this context, the Inspector General's statement does not advance Petrus's novel theory that the submission of false statements is only a felony if it involves billing Medicare or Medicaid for services that were never rendered or for more extensive services than actually necessary. This Court has already rejected another similar theory espoused by Petrus in his first petition: "Nothing in the plain language of the statutes, their legislative histories, or the pertinent case law even remotely evinces that these statutes apply *only* in those instances where the services are either not performed or are not necessary." *Petrus II* at 11 (emphasis in original). Thus, Petrus's argument that his conduct did not constitute criminal violations is without merit.[7]

In his argument attacking his Medicare and Medicaid fraud convictions, Petrus also asserts that he never treated the patients in question and never used another doctor's provider number. He maintains that his staff used the provider number of the physician

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[7] Petrus also alleges that the prosecution withheld exculpatory evidence from him in violation of *United States v. Bagley*, 105 S.Ct. 3375 (1985). Here, Petrus again argues that his actions did not amount to criminal violations and goes on to chastise the prosecution for not informing the grand jury that his actions amounted to solely civil violations. To the extent that this argument repeats his argument that his actions were civil and not criminal violations, we reject it.

In this argument, Petrus also raises several alleged inconsistencies in testimony at the administrative proceeding. Based on these inconsistencies, Petrus surmises that the prosecution withheld exculpatory evidence from him. Based on our review of the record, we find these allegations completely without merit.

whom they saw treat the patient. Petrus raises this argument for the first time in his second section 2255 petition. It is evident that Petrus knew whether he saw these patients when he entered his plea of guilty in 1985. Petrus's belated denials raised for the first time in his second section 2255 petition, some seven years after he entered his guilty plea, must fall on deaf ears. Because Petrus clearly knew whether he provided the medical services in question at the time of his plea agreement, we can find no reason to upset a plea of guilty that this Court has already upheld as knowing and voluntary. *Petrus II* at 8-12. Furthermore, Petrus has failed to provide any justifications for us to depart from this holding. Accordingly, we must reject Petrus's claim that his conduct did not amount to a violation of the criminal law.

C. Guilty Plea

Petrus also argues that his guilty plea was involuntary because it was based on the erroneous advice of his attorney. Petrus claims that his attorney did not understand what conduct was prohibited by the Medicare/Medicaid fraud statutes. In his first section 2255 petition, Petrus challenged the voluntariness of his guilty plea on grounds that the district court did not properly inform him of the nature and elements of the charges against him and that the factual basis of the charges failed to establish the commission of a crime. Affirming the denial of Petrus's first petition, this Court held: "Petrus's plea was truly voluntary. He was properly and adequately advised of the nature and elements of the charges against him, and he freely admitted doing what he was charged with in both the indictment and the factual basis." *Petrus*

II at 12.

Petrus bases his present attack on his guilty plea on his above stated contention that his conduct did not violate any criminal statutes. Because we reject his argument that his conduct was not covered by the statutes under which he was convicted, we must reject his claim that his plea of guilty was not voluntary and knowing.[8]

D. Double Jeopardy and Due Process Claims

Petrus next argues that his 1983 suspension from Medicare and Medicaid violated both double jeopardy and due process. Petrus maintains that his 1983 suspension violated the Double Jeopardy Clause because it was based on a withdrawn 1979 state conviction, thereby punishing him twice for the same offense. Petrus then asserts that his federal conviction should be overturned because it was based on conduct that occurred during the invalid 1983 suspension.

Petrus's second section 2255 petition challenges his 1985 federal criminal convictions of two counts of submitting false Medicare/Medicaid claims and one count of obstruction of justice. Petrus's double jeopardy argument, however, attacks his two suspensions for the same conduct. Petrus is not claiming that his 1985 conviction constituted double jeopardy; rather, he claims that the 1983 suspension was double jeopardy. Because Petrus's 1985

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[8] In his motion for summary judgment in his second section 2255 petition, Petrus argued that the government breached the plea agreement. However, Petrus appears to have abandoned this argument on appeal because he does not raise it in his brief filed with this Court. Regardless, we find this argument without merit.

conviction involved the submission of false claims to Medicare and Medicaid and is independent of his 1983 suspension, we hold that Petrus's double jeopardy claim is not cognizable in a section 2255 petition attacking his 1985 conviction.

Petrus also complains that the 1983 suspension violated his due process rights. Apparently, Petrus treats the 1983 settlement in which he agreed to a six-month suspension from Medicare and Medicaid as a contract between himself and the Department of Health and Human Services. Petrus then alleges that the government anticipatorily breached the contract by indicating its intent to prosecute him before the end of the suspension period. Because Petrus sees the so-called contract as property, he contends that the government's alleged breach constitutes a taking of his property without due process.

Relief under 28 U.S.C. § 2255 is reserved for violations of constitutional rights and for a narrow range of injuries in federal criminal cases that could not have been raised on direct appeal and would result in a fundamental miscarriage of justice. *United States v. Vaughn*, 955 F.2d 367, 368 (5th Cir. 1992); *see Davis v. United States*, 94 S.Ct. 2298, 2305 (1974). Because Petrus casts his due process argument as a breach of contract claim, we hold that it is not cognizable in a section 2255 petition.

Conclusion

For the foregoing reasons, the judgment of the district court is

AFFIRMED.