No. 08-1266

In the Supreme Court of the United States

ISABEL GUERRA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that petitioner was barred from challenging the forfeiture order entered against her in her second appeal, because the order was final as to her at the time of her first appeal, and she failed to challenge the order at that time.

2. Whether the health care money judgment portion of the forfeiture order violates the Excessive Fines Clause of the Eighth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 117a-127a) is not published in the Federal Reporter but is reprinted in 307 Fed. Appx. 283. A prior relevant opinion of the court of appeals (Pet. App. 76a-99a) is reported at 485 F.3d 1291.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 2009. A petition for rehearing was denied on March 16, 2009 (Pet. App. 128a). The petition for a writ of certiorari was filed on April 8, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner

was convicted on 15 counts of health care fraud, in violation of 18 U.S.C. 1347; one count of conspiracy to defraud the United States, commit health care fraud, and pay kickbacks, in violation of 18 U.S.C. 371; one count of conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h); and 11 counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i). She was sentenced to 99 months of imprisonment and ordered to forfeit all right, title, and interest in certain property and to pay a money judgment in excess of $9.4 million dollars. The court of appeals vacated three of petitioner's health care fraud convictions, affirmed the remaining convictions, and vacated and remanded for resentencing. Pet. App. 76a-99a. On remand, the district court sentenced petitioner to 70 months of imprisonment and reduced the health care money judgment component of the forfeiture order to $7.6 million. *Id.* at 100a-108a. The court of appeals affirmed. *Id.* at 117a-127a.

1. This case concerns a multi-defendant conspiracy to obtain Medicare payments through kickbacks and fraud. Petitioner was a Medicare provider who owned 50% stakes in two companies—Ocean Medical Supply (Ocean), a medical equipment supplier, and United Pharmacy (United), a pharmacy. Through Ocean and United, petitioner engaged in an elaborate scheme to pay kickbacks to entice patients to submit their Medicare claims through Ocean and United. Pet. App. 78a-79a.

Before petitioner became a Medicare provider through Ocean and United, she had worked as a patient recruiter, bringing patients to a certain pharmacy in exchange for illegal kickbacks. Once she received her own Medicare provider number, she began directing

patients to her own businesses, Ocean and United. Pet. App. 78a.

When she became a Medicare provider, petitioner signed various documents, including a certification that she would abide by all relevant Medicare regulations. Those regulations included 42 C.F.R. 424.57(c)(1), which specifies that the provider must comply with all applicable federal and state licensure and regulatory requirements. One of those requirements is to refrain from paying doctors and patients kickbacks in violation of federal law. Pet. App. 79a, 85a.

As part of the conspiracy, petitioner paid kickbacks to a variety of patients, doctors, patient recruiters, and businesses so that they would use her companies as their Medicare providers. Petitioner also used an advertising company owned by Mauricio Abanto to launder money obtained through the conspiracy. Petitioner or her secretary would provide Abanto with personal checks signed by petitioner, and he would supply cash in return, less a substantial processing fee. Pet. App. 79a-80a.

2. A federal grand jury in the Southern District of Florida returned a 33-count indictment charging petitioner and two co-conspirators with conspiring to defraud the United States, commit health care fraud, and pay kickbacks, in violation of 18 U.S.C. 371; conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h); money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i); and health care fraud, in violation of 18 U.S.C. 1347. Pet. App. 1a-11a. The indictment also sought forfeiture of certain property traceable to the conspiracy, health care fraud, and money-laundering offenses. *Id.* at 11a-24a. Following a lengthy trial, a

jury found petitioner and her co-defendants guilty on all charges submitted to them. *Id.* at 81a.[1]

Pursuant to Federal Rule of Criminal Procedure 32.2(b)(4), petitioner requested a separate trial on the issue of forfeiture. The jury returned a verdict of forfeitability. As relevant here, the jury's special verdict found that $9,405,114.90 constitutes or was derived, directly or indirectly, from gross proceeds traceable to petitioner's health care fraud. Pet. App. 110a. The $9.4 million amount was the total amount that United and Ocean were paid from Medicare for fraudulent claims during the conspiracy. Presentence Investigation Report para. 45 (PSR).

The district court then calculated the amount of loss for purposes of determining petitioner's advisory Sentencing Guidelines range. The court determined that all of the claims submitted by Ocean and United to Medicare were fraudulent, and it therefore calculated the amount of loss as the $9.4 million in fraudulent Medicare claims. Pet. App. 81a. That loss amount resulted in a 20-level increase in her base offense level and resulted in an advisory Guidelines range of 121 to 151 months of imprisonment. The district court sentenced petitioner to 99 months of imprisonment. *Ibid.*

In addition, the district court ordered petitioner to forfeit her right, title, and interest in certain specific property, and imposed a $9.4 million money judgment against her. Pet. App. 33a (forfeiture portion of the judgment).[2]

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[1] During the trial, the district court entered a judgment of acquittal on four of the 19 health care fraud counts and on one conspiracy count. Pet. App. 81a n.2.

[2] The court also imposed two other money judgments—one for money laundering as to Ocean and one for money laundering as to United.

3. Petitioner filed a notice of appeal from the judgment of conviction. While her appeal was pending, third-party claims were filed against the assets that were the subject of the order of forfeiture. The filing of these claims required the district court to conduct an ancillary proceeding to resolve them. See Fed. R. Crim. P. 32.2(c)(1). Before resolving the third-party claims, the district court had entered a final order of forfeiture. Pet. App. 35a-40a. The district court then *sua sponte* vacated its final order, recognizing that the order had been prematurely entered because the court had not yet resolved the third-party claims. *Id.* at 41a-42a.

On appeal, petitioner argued that the evidence was not sufficient to support her convictions and that the district court incorrectly calculated the loss amount for purposes of the advisory Sentencing Guidelines range and improperly enhanced her sentence based on that loss amount because it was not proved to the jury. Pet. App. 43a-44a (statement of issues); *id.* at 67a-68a (summary of the arguments); 05-14864 Pet. C.A. Br. 43-47 (argument section of petitioner's brief). Although petitioner's brief included some passing references, in the statement of the facts, to the circumstances that culminated in the order of forfeiture, petitioner raised no legal challenge to the forfeiture order.

4. The court of appeals affirmed all but three of petitioner's convictions, vacated her sentence, and remanded for resentencing. Pet. App. 76a-99a. The court first rejected petitioner's argument that she could not be found guilty of Medicare fraud under 18 U.S.C. 1347 unless the government proved that all of the goods and

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See Pet. App. 113a. Petitioner has not challenged those components of the forfeiture order, and they are not at issue here.

services obtained by patients were not medically necessary. Pet. App. 82a-89a. The court explained that, although "paying kickbacks alone is not sufficient to establish health care fraud," petitioner was guilty of health care fraud because she "ma[de] * * * knowing false or fraudulent representation[s] to Medicare" by signing various documents promising to follow all pertinent rules and regulations while planning to continue paying illegal kickbacks. *Id.* at 84a-85a. The court therefore affirmed all of petitioner's convictions for health-care fraud (12 of 15 counts) that were based on events that took place after she signed the Medicare provider certifications. *Id.* at 86a, 89a. The court also upheld petitioner's convictions for conspiracy to commit money laundering, money laundering, and conspiracy to pay kickbacks, finding that ample evidence supported the jury's verdict. *Id.* at 89a-93a.

The court of appeals then vacated petitioner's sentence and remanded for resentencing. Pet. App. 95a-99a. The court recognized that "[t]he district court needs only t[o] make a reasonable estimate of the loss amount," but noted that "the district court made no factual findings as to the amount of the loss," so that the court could not "determine what factual basis was used to reach the conclusion that every claim submitted to Medicare constituted loss." *Id.* at 97a, 98a. Without further explanation by the district court, the court of appeals determined that it could only affirm a loss amount of $11,820, which is the amount of claims covered by the 12 convictions for health care fraud upheld by the district court. *Id.* at 98a; see *id.* at 7a-8a.

5. On remand, the district court calculated an advisory Sentencing Guidelines range of 63 to 78 months of imprisonment and sentenced petitioner to 70 months of

imprisonment. Pet. App. 103a, 119a-120a. In arriving at the advisory Guidelines range, the court used the Guideline for money laundering and used a loss amount of $698,551, which corresponded to the amount of money petitioner laundered. *Id.* at 119a; see 2/13/2008 Resentencing Tr. 17-22. The court also specifically stated that even if a lower Guidelines range applied, it would sentence petitioner to 70 months of imprisonment because she had perpetrated "[o]ne of the most extensive frauds that [it had] dealt with," which involved "a large number of medical beneficiaries" and a "large amount of money," and she showed "a complete disregard for the rules of [M]edicare, which is set up to help people that need help an[d] not to line her own pockets." Pet. App. 120 (quoting district court; brackets in original).

The court also incorporated its earlier forfeiture order into the amended judgment and reduced the health care money judgment component of that order to $7,641,968.98. Pet. App. 108a; see 2/13/2008 Resentencing Tr. 29-34. The court acknowledged that petitioner likely waived any challenge to the forfeiture order "since it was not raised in the first instance." *Id.* at 30; see *id.* at 32 (agreeing that the forfeiture order probably "should stand in place because it was not a point of contention on the appeal"). But the district court decided, in an abundance of caution, to reduce the money judgment amount to account for the court of appeals' vacatur of three of petitioner's convictions. Pet. App. 108a, 120a-121a; 2/13/2008 Resentencing Tr. 30-32. The court therefore reduced the health care money judgment amount to $7.6 million, which is the amount of fraudulent claims petitioner submitted to Medicare after petitioner signed the Medicare provider certifications until the conspiracy ended. *Id.* at 30-32. When the $7.6 mil-

lion figure was suggested to the court by the government at resentencing, petitioner's counsel stated that he "had no way to prove or disprove that proffer." Pet. App. 121a.

Petitioner appealed, arguing that the evidence was insufficient to support her convictions, that the forfeiture order was excessive, and that the district court incorrectly calculated her base offense level and erred in imposing a leadership role enhancement. 08-10873 Pet. C.A. Br. 29-54; see Pet. App. 118a.

6. The court of appeals affirmed. Pet. App. 117a-127a. The court first held that petitioner "is barred from re-litigating the question of whether she committed health care fraud" under the law of the case doctrine, because the court of appeals had affirmed her convictions in her first appeal. *Id.* at 122a.

The court then held that petitioner "also is barred from challenging the forfeiture order." Pet. App. 122a-123a. By "fail[ing] to pursue the issue of forfeiture on first appeal," petitioner "waived the right to challenge the order" in her second appeal. *Id.* at 122a. The court acknowledged that the district court had modified the order upon resentencing, but also noted that "the new order of forfeiture is less than that previously issued" and that "it does not appear that [petitioner] first declined to pursue the matter on appeal because she was satisfied with the amount ordered and now wishes to pursue the matter because she is unsatisfied." *Id.* at 122a-123a. The court also stated that petitioner had not suggested that any exceptions to normal waiver principles apply. *Id.* at 123a.

Finally, the court affirmed petitioner's sentence. Pet. App. 123a-127a. It upheld the district court's imposition of a leadership role enhancement, *id.* at 126a-127a,

but determined that the district court used an incorrect base offense level, *id.* at 123a-124a. The court of appeals determined that that error as harmless, however, because the district court made clear that it would sentence petitioner to 70 months of imprisonment regardless of her advisory Guidelines range and because the sentence imposed was reasonable in light of the factors contained in 18 U.S.C. 3553(a). Pet. App. 124a-126a.

ARGUMENT

Petitioner contends (Pet. 22-28) that the court of appeals erred in determining that she waived any challenge to the forfeiture order and that the health care money judgment portion of the forfeiture order is excessive. Petitioner does not contend that the court of appeals' decision conflicts with any decision of this Court or any other court of appeals. The petition raises only fact-bound, case-specific challenges to the forfeiture order, and those challenges do not merit this Court's review. See, *e.g.*, *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

1. Petitioner contends (Pet. 22-26) that the court of appeals erred in holding that she could not challenge her petition for review, for two reasons. First, she argues (Pet. 22-23) that she could not have appealed the forfeiture order earlier because it was not final until after she filed her appellate brief. Second, she argues (Pet. 24-26) that she was entitled to challenge the forfeiture order in her second appeal because the district court reduced the money judgment portion of the order. Neither argument warrants this Court's review.

a. An order of criminal forfeiture is part of the criminal punishment. See *Libretti* v. *United States*, 516 U.S.

29, 39-41 (1995). Accordingly, "the order of forfeiture * * * must be made a part of the sentence and be included in the judgment." Fed. R. Crim. P. 32.2(b)(3).

Federal Rule of Criminal Procedure 32.2 provides a process for imposing an order of forfeiture. After a guilty verdict or guilty plea on a count in which forfeiture is sought, the district court must determine what property is subject to forfeiture. Fed. R. Crim. P. 32.2(b)(1). That determination "may be based on evidence already in the record," or "if the forfeiture is contested, on evidence or information presented by the parties at a hearing after the verdict or finding of guilt." *Ibid.* If the district court finds that property is subject to forfeiture, it "must promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment or directing the forfeiture of specific property without regard to any third party's interest in all or part of it." Fed. R. Crim. P. 32.2(b)(2). At that point, the Attorney General is authorized to seize the property subject to forfeiture. Fed. R. Crim. P. 32.2(b)(3). The order of forfeiture is then made part of the defendant's sentence and "becomes final as to the defendant." *Ibid.*; see *United States* v. *Petrie*, 302 F.3d 1280, 1284 (11th Cir. 2002) (Rule 32.2(b)(3) procedure "contemplates final disposition of forfeiture issues, as regards a defendant, at the time of sentencing"), cert. denied, 538 U.S. 971 (2003).

If a third party later asserts an interest in the property to be forfeited, the district court conducts an ancillary proceeding to adjudicate the third party's rights in the property. Fed. R. Crim. P. 32.2(c). The ancillary proceeding, however, "is not part of [the defendant's] sentencing." Fed. R. Crim. P. 32.2(c)(4); see 21 U.S.C. 853(n)(2) (barring the defendant from contesting the

forfeiture in the ancillary proceeding). Following the completion of the ancillary proceedings, the district court enters a "final order of forfeiture" by amending the preliminary order of forfeiture, as necessary, to account for any third-party rights. See Fed. R. Crim. P. 32.2(c)(2).

Applying those settled rules to this case, petitioner's forfeiture order became final and appealable at the time of the original judgment. The jury found petitioner guilty on June 9, 2005. Pet. App. 110a. The jury also returned a verdict of forfeitability. *Ibid.* On June 17, 2005, the district court entered a preliminary order of forfeiture. *Id.* at 35a; see Fed. R. Crim. P. 32.2(b)(1)-(2) (directing entry of a "preliminary order of forfeiture"). At sentencing, the court pronounced forfeiture as to various items, including the $9.4 million and incorporated that ruling in the judgment. Pet. App. 33a, 81a. At that point, the preliminary order of forfeiture constituted a final, appealable judgment concerning *petitioner*'s rights to the forfeited property. See Fed. R. Crim. P. 32.2(b)(3) ("At sentencing * * * the order of forfeiture becomes final as to the defendant.").

The forfeiture order's "preliminary" character meant only that the order was subject to modification if and when a third-party claimant filed a petition asserting an interest in the property. See Fed. R. Crim. P. 32.2(c). Although such an order of forfeiture is preliminary as to third parties, it is final as to the defendant at the time of sentencing. Fed. R. Crim. P. 32.2(b)(2); see, *e.g.*, *United States* v. *De Los Santos*, 260 F.3d 446, 448 (5th Cir. 2001).[3]

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[3] Petitioner's reliance (Pet. 22-23) on the district court's November 2005 order vacating its final order of forfeiture is misplaced. The dis-

Because the preliminary order of forfeiture was final as to petitioner once the judgment was entered, if she wished to appeal that order, she was required to do so at the same time that she appealed the judgment of conviction. Fed. R. Crim. P. 32.2(b)(3), advisory comm. notes (2000) ("Because the order of forfeiture becomes final as to the defendant at the time of sentencing, [the defendant's] right to appeal from that order begins to run at that time."); see, *e.g.*, *De Los Santos*, 260 F.3d at 448; *United States* v. *Christunas*, 126 F.3d 765, 768 (6th Cir. 1997). But petitioner did not appeal at that time. Her briefs made passing reference to the imposition of the forfeiture order, but they did not argue that the forfeiture order was entered in error. See Pet. App. 82a (listing arguments petitioner presented on appeal); *id.* at 43a-44a, 67a-68a (statement of issues and summary of argument in petitioner's brief). Petitioner therefore abandoned any challenge to the forfeiture order in her first appeal. See, *e.g.*, *Rowe* v. *Schreiber*, 139 F.3d 1381, 1382 n.1 (11th Cir. 1998) (collecting cases holding that an appellant's failure to present argument and authorities in support of an issue results in abandonment of the issue); see also Fed. R. App. P. 28(a)(9)(A) (requiring a party to include, in the "argument" section, her "conten-

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trict court vacated its prior order because third-party claimants had alerted the district court that it would need to conduct ancillary proceedings to resolve their claims to the forfeited property. Pet. App. 41a-42a. Those ancillary proceedings have no bearing on the finality of the preliminary order of forfeiture as to the defendant, because they concern only the rights of third parties to property in which the defendant no longer has any rights. Fed. R. Crim. P. 32.2(c); see 21 U.S.C. 853(n)(2) (defendant may not contest the forfeiture in the ancillary proceeding); Fed. R. Crim. P. 32.2(c)(4) (ancillary proceeding "is not part of [the defendant's] sentencing").

tions and the reasons for them, with citations to the authorities and part of the record").

b. Petitioner next contends (Pet. 24-26) that, even if she failed to challenge the initial forfeiture order, she was entitled to contest the amended forfeiture order entered following the remand. Because the forfeiture order was final at the time of the initial judgment, and petitioner did not challenge it, the court of appeals determined that she waived any challenge to the order. Pet. App. 122a. The court also noted that petitioner failed to explain why any exception to normal waiver principles would apply. *Id.* at 123a. The court of appeals' fact-specific holding does not warrant this Court's review.

2. Petitioner also argues (Pet. 26-28) that the amount of the money judgment in the forfeiture order is so excessive that it violates the Excessive Fines Clause of the Eighth Amendment. The court of appeals did not consider that argument because it determined that petitioner waived the issue in her first appeal and she failed to explain why an exception to traditional waiver principles applied in her second appeal. Pet. App. 122a-123a. This Court ordinarily does not address issues that were not passed upon by the courts below. See, *e.g.*, *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999).

In any event, the forfeiture order does not impose an unconstitutionally excessive fine. The money judgment amount corresponds to the gross proceeds of petitioner's conspiracy. As petitioner recognizes (Pet. 27), a "punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *United States* v. *Bajakajian*, 524 U.S. 321, 335 (1998). Here, the district court ordered forfeiture of the proceeds of petitioner's health care fraud, and the forfei-

ture of proceeds is never grossly disproportionate to the gravity of the offense, because it "simply parts the owner from the fruits of the criminal activity." *United States* v. *Alexander*, 32 F.3d 1231, 1236 (8th Cir. 1994); cf. *United States* v. *Ursery*, 518 U.S. 267, 298 (1996) (Stevens, J., concurring in the judgment in part and dissenting in part) ("forfeiture of * * * proceeds, like the confiscation of money stolen from a bank, does not punish" a defendant for double jeopardy purposes).

The $7.6 million figure represents the proceeds of petitioner's conspiracy to commit health care fraud. As the court of appeals explained, petitioner committed 12 counts of health care fraud by signing various documents promising to follow all pertinent rules and regulations while planning to continue paying illegal kickbacks. Pet. App. 84a-85a. The amount of Medicare claims submitted by petitioner (and paid by the government) from the time petitioner knowingly signed the Medicare provider certifications until the conspiracy ended is $7.6 million. 2/13/2008 Resentencing Tr. 30-32. The money judgment amount therefore directly reflects the gravity of petitioner's conspiracy offense.

Petitioner contends (Pet. 28) that the $7.6 million figure is inappropriate because the government did not show that the goods and services obtained were not medically necessary, *i.e.*, that petitioner caused a loss to Medicare. But whether or not petitioner caused a loss to Medicare, she did obtain money fraudulently. See, *e.g.*, *United States* v. *Foley*, 508 F.3d 627, 633 (11th Cir. 2007) (explaining that "forfeiture and loss * * * need not be calculated identically" because "[f]orfeiture is a penalty imposed on a criminal independent of any loss to the crime victim") (internal quotation marks omitted), cert. denied, 128 S. Ct. 1912 (2008). The gravamen of

petitioner's offense was conspiring to obtain Medicare payments through fraud, not conspiring to obtain payments for services that were medically unnecessary. See Pet. App. 84a-85a. The $7.6 million amount corresponded to the proceeds fraudulently obtained during the course of the conspiracy. As the district court explained, "[e]ven though 7.6 million dollars was not a loss in the sense that the Government paid claims that may not have been medically necessary, it certainly was fraudulent and [the claims] would not have been paid" if the government knew that petitioner was paying kickbacks. 2/13/2008 Resentencing Tr. 36.

Petitioner also suggests (Pet. 21, 28) that the money judgment amount should have been limited to $11,280. She is mistaken. The $11,280 figure relates only to the 12 substantive health-care fraud counts sustained on appeal by the court of appeals; it does not account for the conspiracy charge, and that charge supports the $7.6 million amount.

Further, the court of appeals did not hold in the first appeal that the money judgment amount must be limited to $11,280. Instead, it stated—in the context of a challenge to the calculation of the advisory Sentencing Guidelines range, not a challenge to the forfeiture order—that "the district court made no factual findings as to the amount of loss" and that the court could therefore only affirm a loss amount of $11,280 (the amount of claims paid for the 12 convictions for health care fraud) without further explanation from the district court. Pet. App. 96a, 98a. On remand, the district court provided an explanation for the $7.6 million money judgment amount, 2/13/2008 Resentencing Tr. 30-36, and that amount clearly relates to the gravity of petitioner's offense, because it is the amount of fraudulent claims sub-

mitted to Medicare during the course of the conspiracy. And, when asked about the $7.6 million figure, petitioner's counsel stated that he "had no way to prove or disprove that proffer." Pet. App. 121a. The money judgment portion of the district court's forfeiture order therefore does not violate the Eighth Amendment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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