No. 17-685

In the Supreme Court of the United States

JHARILDAN VICO, 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 correctly determined that a witness's unexpectedly disparaging response to a question asking why petitioner's conspiracy offense recruited members of the Cuban community did not require reversal of petitioner's convictions.

2. Whether the district court correctly determined the scope and duration of petitioner's fraud for purposes of sentencing and the court's order of forfeiture.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not published in the Federal Reporter but is reprinted at 691 Fed. Appx. 594.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 2017. A petition for rehearing was denied on August 7, 2017 (Pet. App. 13). The petition for a writ of certiorari was filed on November 6, 2017. 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 of conspiracy to commit mail fraud, in violation of 18 U.S.C. 1349; twelve counts of mail fraud, in violation of 18 U.S.C. 1341; conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h); and two

counts of money laundering, in violation of 18 U.S.C. 1957. Pet. App. 3. He was sentenced to 108 months of imprisonment, to be followed by three years of supervised release. *Id.* at 4-5. The court of appeals affirmed. *Id.* at 1-2.

1. Petitioner and his co-defendant, his brother Janio Vico, owned and operated a chiropractic clinic in Lake Worth, Florida. Gov't C.A. Br. 5-6. The Vicos were not licensed chiropractors, so they opened the clinic in the name of Jennifer Adams, who was a licensed chiropractor. *Id.* at 5. But Adams did not contribute money to the clinic and she worked there only about five hours per week, receiving a salary from the Vicos, until they asked her to leave. *Id.* at 5-6.

Petitioner and his brother regularly obtained payments from insurance companies for services that were never provided to patients or that were unnecessary. Gov't C.A. Br. 6-10. Janio Vico paid a recruiter, Joel Simon-Ramirez, to provide the clinic with "patients" who staged auto accidents. *Id.* at 6. These patients reported the staged accidents to the police and falsely claimed to be injured. *Id.* at 3, 6-7, 9-10. The patients then went to the clinic and, in exchange for payments from the Vicos, obtained treatment they did not need or filled out paperwork indicating they received treatment that in fact they never received. *Ibid.* At Janio Vico's insistence, Adams—the licensed chiropractor who worked at the clinic about five hours per week and whose name was used to open the clinic—provided billing forms for client examinations that she never performed. *Id.* at 8. Most of the patients she did examine were not injured, but she nonetheless filled out paperwork supporting their false complaints and—in coordination with the Vicos—prescribed treatment that the

patients did not need. *Id.* at 8-9. Massage therapists employed by the Vicos similarly provided treatment to patients who did not need treatment because they were not experiencing pain, and they also filled out paperwork indicating that they provided treatment to patients when in fact they did not. *Id.* at 8-10. Between December 2009 and October 2011, the clinic received approximately $1.9 million in payments from insurance companies. *Id.* at 10.

2. A federal grand jury returned an indictment charging petitioner and Janio Vico with conspiracy to commit mail fraud, in violation of 18 U.S.C. 1349; twelve counts of mail fraud, in violation of 18 U.S.C. 1341; conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h); and two counts of money laundering, in violation of 18 U.S.C. 1957. Gov't C.A. Br. 2.

At trial, the government informed the jury during its opening statement that the evidence would show that, for many of the patients that petitioner and his brother paid to visit their clinic, Spanish was their "first language and primary language," and the patients "generally d[id] not read and write English, and did not really understand the forms they were filling out." Gov't C.A. Br. 21. Consistent with that theory of the case, the government elicited testimony from a number of the patients that they were members of the Cuban community who had come to the United States relatively recently and had limited fluency in English. *Id.* at 21-22. Petitioner did not object to this questioning. *Ibid.*

On direct examination of Joel Simon-Ramirez, the individual who participated in the scam by recruiting patients to fake vehicle accidents, the government asked where he "f[ound] these people that are going to be accident participants." D. Ct. Doc. 226, at 129 (Mar. 12,

2016) (Trial Tr.). Simon-Ramirez responded, in relevant part, that "[y]ou go to one person and from that person you get the referral from another person." *Ibid.* The government asked Simon-Ramirez if he found "people from a specific part of the community to participate in these crimes," and in particular "a specific ethnic group." *Ibid.* After petitioner's counsel objected that the government was "implicating an entire ethnic group," the government clarified that it was "not implicating anybody" and rephrased the question. *Id.* at 130. The government then elicited testimony that 98% of Simon-Ramirez's clients were from the Cuban community in West Palm Beach, Florida. *Ibid.* Consistent with the government's opening statement and its theory that petitioner's conspiracy had deliberately recruited persons with a limited fluency in English, the government asked why 98% of Simon-Ramirez's clients were from the Cuban community. *Id.* at 130-131; Gov't C.A. Br. 23. Unexpectedly, however, Simon-Ramirez responded that the reason was "[b]ecause Cubans are always looking for money, they are looking for the easiest way to get money." D. Ct. Doc. 226, at 131; see *id.* at 132; see also Gov't C.A. Br. 23 (explaining that Simon-Ramirez's answer "was clearly not what the government intended to elicit").

At a sidebar, defense counsel objected that "the entire community is being accused here." D. Ct. Doc. 226, at 131. The government responded that the line of questioning concerned "where" the conspirators found the persons they had recruited for their scam and "why" they selected those persons. *Id.* at 132. The government made clear it "[was] not casting any aspersions nor [was it] suggesting the entire community is doing this." *Ibid.* The government then immediately moved

on to another line of questioning, *ibid.*, and the government did not comment on this testimony by Simon-Ramirez in its closing argument, Gov't C.A. Br. at 23-24. At the same sidebar, the court denied a motion by defense counsel for a mistrial, and it received confirmation from defense counsel that the defense did not request any relief short of mistrial. D. Ct. Doc. 226, at 142-145.

3. A jury found petitioner and his brother guilty on all counts. Gov't C.A. Br. 2.

At sentencing, in order to determine petitioner's advisory range under the Sentencing Guidelines, the district court was required to calculate the amount of "loss" that had been caused by petitioner's offense, as well as the number of victims. The applicable Guidelines define "actual loss" as "the reasonably foreseeable pecuniary harm that resulted from the offense." Sentencing Guidelines § 2B1.1, comment. (n.3(A)(i)) (emphasis omitted). The Guidelines also instruct that "[i]n 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 * * * services * * * , with no credit provided for the value of those * * * services." *Id.* comment. (n.3(F)(v)). Consistent with Application Note 3(F)(v), the district court determined that the actual loss was the total amount billed by the clinic and received from insurance companies, which was approximately $1.9 million. Gov't C.A. Br. 13. That increased petitioner's offense level by 16 levels. *Ibid.* In addition, because at least 15 insurance companies suffered losses as a result of petitioner's fraud, petitioner's offense level was increased by two levels. *Ibid.*

With a criminal history category of II, petitioner's advisory Guidelines range was 121 to 151 months of

imprisonment. Gov't C.A. Br. 14. The district court departed downward and sentenced petitioner to 108 months of imprisonment, to be followed by three years of supervised release. *Ibid.*; Pet. App. 4-5. The court also ordered petitioner to pay approximately $1.9 million in restitution. Pet. App. 9-12. And the court entered a separate order of forfeiture against petitioner for property that was connected to the fraud. D. Ct. Doc. 171, at 1-5 (Jan. 21, 2016); Gov't C.A. Br. 11-12.

4. The court of appeals affirmed in a per curiam, unpublished opinion. Pet. App. 1-2. As relevant here, the court stated that it had considered petitioner's claim that "the district court abused its discretion by allowing testimony regarding Cuban ethnicity, in violation of [his] due process and equal protection rights." *Id.* at 2. The court also considered petitioner's claims that "the district court erred in its calculation[ ] regarding the loss amount and number of victims," as well as "whether the district court erred in its forfeiture determinations." *Ibid.* The court stated, however, that upon "careful review of the briefs and the record, and having the benefit of oral argument," it "f[ound] no reversible error." *Ibid.*

ARGUMENT

Petitioner renews his claim (Pet. 11-27) that the government appealed to racial and ethnic prejudice against people of Cuban heritage and violated his equal protection rights. He also contends (Pet. 27-39)—for the first time in this litigation—that his sentence and the district court's order of forfeiture against him were problematic in light of *Cleveland* v. *United States*, 531 U.S. 15 (2000). Both of petitioner's claims lack merit, and petitioner's second question presented is also forfeited because he never raised that argument below. The court of appeals'

unpublished decision does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

1. "The Constitution prohibits racially biased prosecutorial arguments." *McCleskey* v. *Kemp*, 481 U.S. 279, 309 n.30 (1987). Appeals to prejudice based on ethnicity and national origin are similarly prohibited. See, *e.g.*, *United States* v. *Nobari*, 574 F.3d 1065, 1073 (9th Cir. 2009), cert. denied, 562 U.S. 1066 (2010). Contrary to petitioner's argument, however, the government never appealed to prejudice in this case, against petitioner or anyone else. Although one witness made an unexpected and unfortunate statement disparaging people of Cuban descent, that statement does not require reversal of petitioner's convictions.

a. Evidence of race, ethnicity, or nationality may be admissible at a criminal trial if it is legally relevant and is not used to obtain a conviction on the basis of improper bias or prejudice. See, *e.g.*, *United States* v. *Doe*, 903 F.2d 16, 25 (D.C. Cir. 1990) (only "racial comments beyond the pale of legally acceptable modes of proof" are constitutionally impermissible, as "[a]n unembellished reference to evidence of race simply as a factor bolstering an eyewitness identification of a culprit, for example, poses no threat to purity of the trial"); see also *United States* v. *Runyon*, 707 F.3d 475, 494 (4th Cir. 2013) (statements or evidence "capable of inflaming jurors' racial or ethnic prejudices" may "violate a defendant's rights to due process and equal protection of the laws" when they are "legally irrelevant"), cert. denied, 135 S. Ct. 46 (2014); *United States* v. *Cabrera*, 222 F.3d 590, 597 (9th Cir. 2000) ("in some instances, such as eyewitness identification, a defendant's race or ethnicity is relevant and not prejudicial").

In this case, the government did not appeal to racial prejudice at any time. Instead, as indicated by the government's opening statement, the government sought to establish that petitioner and his co-conspirators deliberately recruited members of the Cuban community for purposes of their scam in order to take advantage of the fact that members of that community often spoke little or no English and thus could not understand the fraudulent medical forms that petitioner paid them to sign. The evidence that petitioner's conspiracy intentionally involved persons of one ethnic group was thus relevant and probative to establish the nature of his offense. At no time did the government itself make disparaging comments about members of the Cuban community. And neither the government, nor any of its witnesses, nor anyone else at the trial made any comments at all about *petitioner's* ethnicity, which also happens to be Cuban. Petitioner's ethnicity was not the subject of any testimony or argument at trial.

The government sought to prove its case in part by obtaining testimony from Simon-Ramirez about why the conspirators' scheme predominantly involved members of the Cuban community. Unfortunately, Simon-Ramirez answered the government's question by making a disparaging comment about persons of Cuban descent. The government did not intend to elicit this answer; it twice made clear that it was not attempting to disparage persons of Cuban descent; it immediately moved on to a different line of questioning; and it did not reference Simon-Ramirez's statement during closing argument or at any other time during the trial. See Gov't C.A. Br. 23-24. In light of the trial record as a whole, Simon-Ramirez's single statement would not have inflamed prejudice on the jury. See *United States* v. *Soto*, 988 F.2d

1548, 1559-1560 (10th Cir. 1993) (reviewing trial record as a whole and concluding that, despite references to the defendant's ethnicity, the prosecutor did not use ethnicity or nationality "in an attempt to manipulate the jury"); *United States* v. *Abello-Silva*, 948 F.2d 1168, 1182 (10th Cir. 1991) (same), cert. denied, 506 U.S. 835 (1992).

The district court did not abuse its discretion in concluding that Simon-Ramirez's single statement did not warrant the sweeping remedy of a mistrial. See *Illinois* v. *Somerville*, 410 U.S. 458, 461-462 (1973) (emphasizing the "broad discretion" reserved to the trial court in determining whether to grant a mistrial). And defense counsel confirmed with the district court that no other remedy was requested. D. Ct. Doc. 226, at 142-145 (Trial Tr.). Furthermore, even if it were possible for Simon-Ramirez's testimony to have had any tendency to stoke prejudice against petitioner, the court instructed the jury that its decision "must not be influenced in any way by sympathy for or prejudice against the Defendant." D. Ct. Doc. 234, at 9 (Mar. 12, 2016) (Trial Tr.). The jury is presumed to have followed that instruction. See *Richardson* v. *Marsh*, 481 U.S. 200, 211 (1987).

This Court's review is not warranted to determine whether the court of appeals correctly applied established law to these unique facts. Petitioner's argument is heavily dependent on the particular and unusual circumstances of this case—a witness who unexpectedly made a single disparaging remark during a permissible line of questioning. Moreover, the evidence of petitioner's fraudulent scheme was overwhelming. See Gov't C.A. Br. 3-11 (describing the evidence introduced against petitioner at trial). Even if error occurred, that error was harmless beyond a reasonable doubt.

b. Contrary to petitioner's contention (Pet. 21-27), the court of appeals' unpublished, per curiam decision affirming petitioner's conviction does not conflict with any decision of this Court or any other court of appeals.

This case is not analogous to *Buck* v. *Davis*, 137 S. Ct. 759 (2017). In *Buck*, defense counsel in a capital case introduced testimony from an expert who testified that the defendant was statistically more likely to commit acts of violence in the future because he is black. *Id.* at 767. Neither party disputed that the jury should not have been presented with that evidence, and this Court determined that the defendant received ineffective assistance of counsel. *Id.* at 775-776. In concluding that "[n]o competent defense attorney would introduce such evidence about his own client," the Court referenced clear precedent establishing that "[i]t would be patently unconstitutional for a state to argue that a defendant is liable to be a future danger because of his race." *Id.* at 775. The Court also concluded that the defendant was prejudiced by his counsel's deficient performance, because the defense presented "hard statistical evidence —from an expert—to guide an otherwise speculative inquiry" about future dangerousness, and the "testimony appealed to a powerful racial stereotype—that of black men as 'violence prone.'" *Id.* at 776 (quoting *Turner* v. *Murray*, 476 U.S. 28, 35 (1986) (plurality opinion)). This "created something of a perfect storm," and the effect was "to provide support for making a decision on life or death on the basis of race." *Ibid.*

This case, by contrast, involved a single, unexpected comment from a witness that was directed not at petitioner, but at the ethnicity of the persons who were recruited for petitioner's conspiracy in order to carry out his scam. The trial record also shows that Simon-

Ramirez's single comment at issue here did not feature nearly as prominently in petitioner's trial as did the testimony at issue in *Buck*. No reason exists to believe that Simon-Ramirez's comment had a meaningful impact on the jury's evaluation of petitioner's guilt.

Petitioner's reliance on *Peña-Rodriguez* v. *Colorado*, 137 S. Ct. 855 (2017), is similarly misplaced. In that case, after the jurors in a criminal case were discharged upon finding the defendant guilty, two jurors provided affidavits "with compelling evidence that another juror made clear and explicit statements indicating that racial animus was a significant motivating factor" in his vote in favor of a guilty verdict. *Id.* at 861; see *id.* at 861-863. This Court held that "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that" the general rule against post-trial impeachment of a jury verdict "give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." *Id.* at 869.

Here, no evidence exists that any of the jurors relied on racial or ethnic stereotypes or animus to find petitioner guilty, let alone a "clear statement" by a juror indicating reliance on racial or ethnic stereotypes or animus. As mentioned, neither the government nor anyone else made comments in front of the jury regarding petitioner's ethnicity; Simon-Ramirez's unfortunate comment was directed at the persons who were recruited for petitioner's conspiracy. The exception to the no-impeachment rule recognized in *Peña-Rodriguez* does not support petitioner's claim that his equal protection and due process rights were violated here.

Petitioner further contends (Pet. 21-24) that the court of appeals' decision affirming his conviction conflicts with decisions from other courts of appeals. That contention is without merit. Petitioner identifies no conflict in authority, let alone a conflict that warrants this Court's review. The courts agree that "[a]ppeals to racial, ethnic, or religious prejudice during the course of a trial violate a defendant's Fifth Amendment right to a fair trial." *Cabrera*, 222 F.3d at 594. The courts also uniformly review that type of error under the harmless-error standard. Compare *Doe*, 903 F.2d at 27-28 (reversing conviction because error was not harmless beyond a reasonable doubt), with *United States* v. *Garcia-Lagunas*, 835 F.3d 479, 487-492 (4th Cir. 2016), cert. denied, 137 S. Ct. 713 (2017) (affirming conviction because error was harmless beyond a reasonable doubt).

In each case, the courts have applied established law to the particular facts presented to determine whether a constitutional error occurred, and if so, whether the error was harmless beyond a reasonable doubt. See *Doe*, 903 F.3d at 17-28 (reversing conviction where prosecutor deliberately and repeatedly injected the defendant's Jamaican ancestry into the trial even though that evidence was not relevant and highly prejudicial); *Cudjo* v. *Ayers*, 698 F.3d 752, 769-770 (9th Cir. 2012) (reversing denial of petition for a writ of habeas corpus where prosecutor improperly argued at closing that the victim would not have intercourse with "a black man," a racial statement that had "no compelling justification") (citations, emphasis, and quotation marks omitted), cert. denied, 569 U.S. 1013 (2013); *Cabrera*, 222 F.3d at 596 (reversing convictions because "repeated references to [the defendants'] Cuban origin and * * * generaliza-

tions about the Cuban community prejudiced [the defendants] in the eyes of the jury"); *United States* v. *Vue*, 13 F.3d 1206, 1211-1213 (8th Cir. 1994) (reversing convictions where witness improperly testified regarding the likely involvement in opium smuggling of persons (such as the defendants) of Hmong descent, and the court could not conclude the error was harmless beyond a reasonable doubt); *United States* v. *Cruz*, 981 F.2d 659, 663-664 (2d Cir. 1992) (reversing conviction where prosecution witness improperly alleged that an area "inundated with drug dealing" had a "very high Hispanic population" in a trial where the defendants were Hispanic); *United States* v. *Rodriguez Cortes*, 949 F.2d 532, 541-542 (1st Cir. 1991) (reversing conviction where the prosecution introduced evidence of the defendant's Colombian ethnicity to suggest he was likely associated with other Colombian members of the conspiracy); *United States* v. *Grey*, 422 F.2d 1043, 1045 (6th Cir.) (reversing conviction based on a "gratuitous reference to the race [of the defendant]" that "may be read as a deliberate attempt to employ racial prejudice"), cert. denied, 400 U.S. 967 (1970).

The court of appeals' summary opinion here does not conflict with any decision cited by petitioner, none of which involved facts analogous to those here—a single, unexpected comment stereotyping persons who were recruited for the defendant's criminal conduct. The government agreed that "[t]he law is clear that attempts to prove a defendant's guilt using evidence of the defendant's race or ethnicity [are] improper," Gov't C.A. Br. 19, and explained why its questions to Simon-Ramirez in this case were not an attempt to appeal to racial prejudice, *id.* at 23-24. The government also argued that "any error was harmless." *Id.* at 25. The court

of appeals neither erred nor reached a result inconsistent with other courts by "find[ing] no reversible error" in these circumstances. Pet. App. 2.

2. Petitioner also contends (Pet. 27-39) that the district court erroneously calculated his loss amount, number of victims, and restitution for purposes of sentencing, and erroneously determined the property subject to forfeiture. He cites *Cleveland*, *supra*, in which this Court reversed a conviction under the federal mail-fraud statute of a defendant who had obtained a video-poker license by making false statements on his license application, on the ground that the statute requires a scheme to deprive another of money or property and a State's interest in an unissued video poker license was not "property." 531 U.S. at 22-23. Petitioner argues that his case involved conduct that violated the terms of a Florida chiropractor's license, and that *Cleveland* precluded the district court from considering some of his conduct in determining the scope of his crimes for sentencing and forfeiture purposes. Petitioner contends, in particular, that the error led the district court to erroneously determine the amount of fraudulent billings to include in petitioner's loss calculation under the Sentencing Guidelines, the number of victims of petitioner's offense, the amount of restitution, and whether petitioner's property was subject to forfeiture. No further review of this claim is warranted.

a. Petitioner forfeited this argument by never raising it below. Although petitioner argued to the court of appeals that the district court had incorrectly calculated his sentence under the Guidelines, and that the court should not have ordered forfeiture, he never raised the argument that he now presents based on *Cleveland*. See Pet. C.A. Br. 60-66. This Court should deny review

of this claim for that reason alone. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992) ("Our traditional rule * * * precludes a grant of certiorari * * * when the question presented was not pressed or passed upon below.") (citation and internal quotation marks omitted).

b. Even if petitioner's claim based on *Cleveland* had been preserved, it is meritless. *Cleveland* did not address loss calculation at sentencing, the determination of the number of victims, the amount of restitution, or forfeiture; the case instead defined the scope of the mail-fraud statute by describing what constitutes the "property" that must be taken in order for a defendant to commit mail fraud. *Cleveland* does not suggest that petitioner's conviction or sentence was defective.

Unlike in *Cleveland*, no serious dispute exists that petitioner took the property of another through his scheme: he defrauded insurance companies of their money and property by deceptively obtaining payment for services that his clinic did not provide or were provided but the patient did not need. Petitioner's clinic also provided services in violation of applicable licensing regulations. Contrary to petitioner's contention (Pet. 36-37), however, he was convicted of mail fraud not for submitting a false license application, but for submitting charges to insurance companies for payments that he was not entitled to receive. Although part of that fraud involved billing insurers as if he was properly licensed and performing services as if he were complying with applicable medical licensing standards, *Cleveland* does not hold that the mail-fraud statute does not reach deprivations of actual money or property that are accomplished by fraud simply because the fraud involves, in part, a defendant's violation of licensing regulations.

To the extent the other cases cited by petitioner are relevant here, none is analogous to this case because none concerns a defendant who used the mail to take actual money or property of another by fraudulent means. See *Loughrin* v. *United States*, 134 S. Ct. 2384, 2387 (2014) (holding that the federal bank fraud statute does not require the government to prove that the defendant intended to defraud a bank); *McNally* v. *United States*, 483 U.S. 350, 352 (1987) (mail fraud statute did not reach allegations that the defendant defrauded citizens and the government of Kentucky of an "intangible right[ ] * * * to have the Commonwealth's affairs conducted honestly); *Parr* v. *United States*, 363 U.S. 370, 391 (1960) (defendant's legally compelled mailings were, in the particular circumstances of that case, not made for the purpose of executing defendants' scheme); *Kann* v. *United States*, 323 U.S. 88, 89-90, 93-95 (1944) (conviction for mail fraud could not be based solely on the fact that defendants used checks to effectuate their scheme); *United States* v. *Berroa*, 856 F.3d 141, 148 (1st Cir.), cert. denied, 138 S. Ct. 488 (2017) (applying *Cleveland* and finding that defendants' fraudulently obtained medical licenses—obtained years prior—were not the cause of the payments made to defendants for medical services); *United States* v. *Borrero*, 771 F.3d 973, 976 (7th Cir. 2014) (applying *Cleveland* to conclude that prosecution erred in obtaining conviction for mail fraud by treating state vehicle titles as lost property); *United States* v. *LeVeque*, 283 F.3d 1098, 1102-1103 (9th Cir. 2002) (applying *Cleveland* and invalidating defendants' convictions for mail-fraud that were based on false statements in application for a hunting license).

Petitioner emphasizes (Pet. 34-35, 37) that the court of appeals in *Berroa* vacated the defendants' convictions

for mail fraud that were based on receipt of medical payments. But the crucial fact for purposes of culpability in *Berroa* was that the defendants had made the relevant false statements several years prior in order to obtain medical licenses. 856 F.3d at 148-150. In this case, by contrast, petitioner made false statements to insurance companies claiming that he was entitled to receive payments that he was not actually entitled to receive. Those false statements directly resulted in petitioner's fraudulent receipt of the insurers' property.

c. Moreover, almost none of the cases cited by petitioner concerned sentencing issues or forfeiture. In *United States* v. *Cacho-Bonilla*, 404 F.3d 84, 92-95 (1st Cir.), cert. denied, 546 U.S. 956 (2005), the court *rejected* the defendants' various arguments that the district court had improperly determined the loss amount and forfeiture. Petitioner here has not identified any specific error in his sentence or the district court's forfeiture order, and the court correctly determined the scope and duration of petitioner's criminal conspiracy.

The district court's calculation of the Guidelines was correct because the applicable Guidelines instruct that "[i]n a case involving a scheme in which * * * services were fraudulently rendered to the victim by persons falsely posing as licensed professionals," the amount of the "loss shall include the amount paid for * * * services * * * , with no credit provided for the value of those * * * services." Sentencing Guidelines § 2B1.1, comment. (n.3(F)(v)). Petitioner does not identify any disagreement in the courts of appeals about the loss-calculation provision of the Guidelines, and even if such disagreement existed, this Court does not ordinarily review decisions interpreting the Sentencing Guidelines because the United States Sentencing Commission can

amend the Guidelines and accompanying commentary to eliminate a conflict or correct an error. See *Braxton* v. *United States*, 500 U.S. 344, 347-349 (1991).

Relatedly, the district court's restitution order was correct because petitioner's licensing violations meant that he was not eligible to receive *any* payments from insurance companies. As a result, the courts of appeals agree that victims of a scheme like petitioner's should receive restitution for the entire amounts that they paid to him, without offset. See, *e.g.*, *United States* v. *Sharma*, 703 F.3d 318, 325 (5th Cir. 2012), cert. denied, 134 S. Ct. 78 (2013) (restitution should not include "any credit for the value of the physical therapy that was actually provided"); Catharine M. Goodwin, *Federal Criminal Restitution* § 7:16, at 334 (2017 ed.) ("Any potential benefit to patients is not credited against the restitution.").

The district court's calculation of the number of victims was similarly correct because the government established that petitioner submitted fraudulent claims to at least 15 insurance companies. See Gov't C.A. Br. 13. Finally, the district court's order of forfeiture was correct because the government established that the property to be forfeited was traceable to petitioner's fraud. See *id.* at 11-12.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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