No. 12-1312

In the Supreme Court of the United States

ARUN SHARMA AND KIRAN SHARMA, PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that, in light of the government's evidence indicating that petitioners provided services that were not medically necessary, the burden shifted to petitioners to introduce evidence supporting their claim of entitlement to an offset from the amount of restitution they were ordered to pay to insurers they defrauded, where the claimed offset is for medical services petitioners contend would have been covered by the insurers notwithstanding the fraud.

2. Whether the government argued for the first time on appeal that injections administered by petitioners to their patients were not medically necessary.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 703 F.3d 318.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 2012. A petition for rehearing was denied on January 30, 2013 (Pet. App. 44-45). The petition for a writ of certiorari was filed on April 30, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following guilty pleas in the United States District Court for the Southern District of Texas, petitioners were convicted on one count of conspiring to commit health-care and mail fraud, in violation of 18 U.S.C. 371; and one count of health-care fraud, in violation of 18 U.S.C. 1347 and 2. Pet. App. 19, 32. Petitioner Arun

Sharma was sentenced to 180 months of imprisonment, to be followed by three years of supervised release. *Id.* at 21-22. Petitioner Kiran Sharma was sentenced to 96 months of imprisonment, to be followed by three years of supervised release. *Id.* at 34-35. The district court ordered restitution in the amount of $43,318,170.93, for which petitioners would be jointly and severally liable, and forfeiture of petitioners' assets in the same amount. *Id.* at 26-30, 39-43. The court of appeals vacated the restitution and forfeiture orders and remanded for recalculation of the amount. *Id.* at 1-18.

1. Petitioners, a married couple, are physicians who operated two pain-management, arthritis, and allergy clinics in Houston, Texas. From 1998 to 2009, petitioners conspired to defraud Medicare, Medicaid, and more than 30 private insurers out of millions of dollars by billing them for paravertebral facet-point injections that they never administered to patients. Petitioner submitted two types of fraudulent billings. In some instances, petitioners administered a cheaper trigger-point injection and then "upcoded" the procedure by billing insurers for the more expensive facet-point injection. Pet. App. 2. In other instances, petitioners submitted "phantom" bills for injections or patient visits that never occurred. *Ibid.*

Arun Sharma "was known as an easy touch for prescribing Hydrocodone, Soma and Xanax." 4:09-cr-409 Docket entry No. (Docket entry No.) 178, at 9 (S.D. Tex. Apr. 26, 2010) (Arun Sharma plea agreement); Docket entry No. 181, at 9 (Apr. 26, 2010) (Kiran Sharma plea agreement). His standard routine for treating patients was to have a medical assistant ask patients where they hurt and what medications they wanted, then write a prescription for Arun Sharma to sign. Docket entry No.

178, at 10; Docket entry No. 181, at 10 (Apr. 26, 2010). Arun Sharma would then enter the examination room "carrying a plastic tray of pre-filled syringes," and he would ask the patient where it hurt and then inject the patient in those places. Docket entry No. 178, at 10; Docket entry No. 181, at 10. "Nearly every patient was * * * put on a regimen of shots every two weeks." Docket entry No. 178, at 11; Docket entry No. 181, at 11. Arun Sharma "tried to convince all patient[s] to have shots at every visit," and patients who did not want shots were required to sign forms saying they had received them. *Ibid.* Arun Sharma also had certain patients sign blank forms and then used those forms to generate false bills for injections on days the patients were not in the clinic. *Ibid.* Petitioners hired several foreign medical graduates to assist with fabricating paperwork for the phantom patient visits. Docket entry No. 178, at 12; Docket entry No. 181, at 12.

2. A federal grand jury in the Southern District of Texas returned a second superseding indictment charging petitioners with one count of conspiracy to commit health-care and mail fraud, in violation of 18 U.S.C. 371; 21 counts of health-care fraud, in violation of 18 U.S.C. 1347; one count of conspiracy to distribute controlled substances, in violation of 21 U.S.C. 841(a)(1) and 846; 13 counts of unlawful distribution of controlled substances, in violation of 21 U.S.C. 841(a)(1); nine counts of mail fraud, in violation of 18 U.S.C. 1341; one count of conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h); two counts of money laundering concealment, in violation of 18 U.S.C. 1956(a)(1)(B)(i); and 16 counts of engaging in monetary transactions in property derived from specified unlawful activity, in violation of 18 U.S.C. 1957. Docket entry No. 64 (Nov. 4, 2009).

Each petitioner pleaded guilty to one count of conspiracy to commit health-care and mail fraud and one substantive count of health-care fraud. Pet. App. 19, 32.

The Presentence Investigation Report (PSR) for each petitioner calculated that the actual loss to Medicare, Medicaid, and 30 private insurers totaled $43,318,170.93 and recommended restitution in that amount. Pet. App. 3. Petitioners argued that the restitution amount should be offset by the amount the insurance companies would have paid for the cheaper trigger-point injections that petitioners had administered in some cases. Petitioners further argued that the PSRs improperly included restitution for some treatments unrelated to the specific counts of conviction, such as Kiran Sharma's legitimate allergy practice and treatments other than by injection. *Ibid.*

Petitioners submitted an alternative restitution calculation. To calculate the alternative amount, petitioners' forensic accountant subtracted from the insurers' claimed losses payments for procedures other than injections, reducing the total to $37,670,826.32. Pet. App. 4. The accountant next assumed that all patients had received two legitimate trigger-point injections per month and that any further injections had been fabricated, and that insurers would have covered the trigger-point injections at a lower amount. *Ibid.*; Docket entry No. 298, at 18 (Mar. 14, 2011). Applying a credit for those injections, the accountant concluded that the actual loss to the insurers was $21,028,963.61. Pet. App. 4.

The government opposed such an offset. In its sentencing memorandum, the government argued that the treatments administered by petitioners at their clinic were not based on the exercise of "medical judgment" but were simply a means "for [petitioners] to fraudulent-

ly enrich themselves," Gov't Sentencing Mem. 10-12; that if some patients benefitted from a treatment, that result was "accidental," *id.* at 11; and that patients who left petitioners after their indictment "universally reported that their new doctors discontinued the shots as medically unnecessary," *ibid.*

At sentencing, the government stated with respect to petitioners' offset argument that there was "no concession" that any trigger-point injections that were actually administered were not fraudulent. Docket entry No. 298, at 33. The government explained that "more than a majority of [Arun Sharma's] patient base [was] drug addicts and drug seekers" who only wanted prescription drugs but were placed on a shot regimen after Arun Sharma "falsely diagnosed them as having rheumatoid arthritis." *Ibid.* The government explained that Arun Sharma "added the shots because he saw the economic potential * * * of billing insurance." *Id.* at 45.

The district court rejected petitioners' objections to the PSRs and ordered restitution in the amount of $43,318,170.93. Pet. App. 3-4.

3. The court of appeals vacated the restitution and forfeiture orders and remanded for recalculation of the amount. Pet. App. 1-18.

a. The court of appeals rejected petitioners' argument that the restitution amount should have been offset by the cost of any trigger-point injections that were actually administered. Pet. App. 11-16. The court acknowledged that, in health-care-fraud cases, an insurer's actual loss for restitution purposes may not include any amount that the insurer would have paid had the defendant not committed the fraud. *Id.* at 11. The court explained, however, that although the Mandatory Victim Restitution Act of 1996 (MVRA), 18 U.S.C. 3664(e),

places the burden on the government to demonstrate the amount of the victim's loss, a sentencing court may shift "the burden of demonstrating such other matters as the court deems appropriate . . . [to] the party designated by the court as justice requires." Pet. App. 13 (quoting 18 U.S.C. 3664(e)). The court noted that, in prior cases, it had transferred the burden of proof to the defendant to show that he was entitled to a restitution credit. *Id.* at 13-14 (citing *United States* v. *Loe*, 248 F.3d 449, 470 (5th Cir.), cert. denied, 534 U.S. 974 (2001); *United States* v. *Sheinbaum*, 136 F.3d 443, 449 (5th Cir. 1998), cert. denied, 526 U.S. 1133 (1999); and *United States* v. *Edet*, No. 08-10287, 2009 WL 552123, at *3 (5th Cir. Mar. 5, 2009)).

The court of appeals concluded that the government had satisfied its burden to prove loss by demonstrating that "the trigger-point injections were merely a revenue stream for [petitioners] and not legitimate, medically necessary treatments for which the insurers would have paid in the absence of the fraud." Pet. App. 15-16. The court explained that the government had presented "unrebutted evidence" that Arun Sharma:

> (1) deliberately misdiagnosed patients as having rheumatoid arthritis and put them on an injection regimen, (2) tried to convince all of his patients to have trigger-point injections at every visit, (3) required patients who declined injections to sign mendacious acknowledgements that they had received the treatments before he would prescribe pain medication, and (4) administered injections in an assembly-line fashion without taking routine sanitary precautions.

Id. at 14. The court further noted that, according to the government's sentencing memorandum, patients who

later went to different physicians "were 'universally' taken off trigger-point injections." *Id.* at 14-15. The court emphasized that its "decision is limited to these facts" and that in other cases the government's burden might encompass "expert testimony regarding medical necessity or billing standards." *Id.* at 14 n.35.

Against that background showing by the government, the court of appeals concluded that petitioners had failed to produce sufficient evidence to rebut that conclusion and that "the district court did not abuse its discretion in declining to apply a restitution credit." Pet. App. 15-16. Although their plea agreements stated that they administered some injections, the agreements did not state that those injections were medically necessary or that the insurers would have covered the cost of the injections absent the fraudulent upcoding. *Ibid.* The court stated that although "anecdotal statements" from some patients claimed "some degree of pain relief" from the trigger-point injections, petitioners did not present evidence suggesting that "even one injection to even one patient was medically necessary and met the insurers' reimbursement standards." *Ibid.* Rather, petitioners' forensic accountant "assumed without explanation" that medically necessary injections were administered in some percentage of cases and would have been covered by the insurers. *Ibid.* (emphasis omitted).

b. The court of appeals further concluded, however, that the restitution order must be vacated because it erroneously included compensation for some losses caused by conduct that was not covered by the plea agreements or conduct that was outside the temporal scope of the charged conspiracy. Pet. App. 7-11. Because the parties stipulated in the plea agreement to a

forfeiture money judgment in the same amount as the restitution award, the court of appeals also vacated the forfeiture order. *Id.* at 18.

4. On remand, the district court amended the restitution and forfeiture orders to reflect the amount of $37,636,436.39. Docket entry No. 449, at 7 (June 6, 2013); Docket entry No. 451, at 5 (June 11, 2013).

ARGUMENT

1. Petitioners contend (Pet. 8-11) that, in determining the amount of restitution they must pay to insurers they defrauded, the court of appeals improperly imposed on petitioners the burden of proving that the trigger-point injections they actually administered in some cases were medically necessary and thus would have been covered by the insurers in the absence of petitioners' fraud. Petitioners further contend (Pet. 12-13) that the government's argument that the trigger-point injections were not medically necessary was raised for the first time on appeal and therefore should not have been considered. Petitioners' claims lack merit. Further review is unwarranted.

a. The MVRA authorizes restitution "in the full amount of each victim's losses" to any victim "directly and proximately harmed" by a defendant's offense of conviction. 18 U.S.C. 3664(f)(1)(A), 3663(a)(2). Under the MVRA, "[t]he burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government," and "[t]he burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant." 18 U.S.C. 3664(e). On these matters, the MVRA allocates the burden of proof to the party that is in the best position to satisfy the burden and has the strongest incentive to

litigate the issue. See *United States* v. *Scheinbaum*, 136 F.3d 443, 449 (5th Cir. 1998), cert. denied, 526 U.S. 1133 (1999).

The MVRA further provides that "[t]he burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires." 18 U.S.C. 3664(e). Although the MVRA specifically allocates to the government the burden of proving the amount of a victim's loss, it does not specifically allocate to either party the burden of proving an offset to the restitution amount. As the Fifth Circuit has stated, "[l]ogically, the burden of proving an offset should lie with the defendant." *Scheinbaum*, 136 F.3d at 449. The defendant is in the best position to know whether he has provided any legitimate services or compensation to his victim that might qualify as an offset, and his interest in reducing the amount of restitution gives him the incentive to litigate the issue. See *ibid.*

In various contexts, the courts of appeals have allocated to the defendant the burden of proving an offset to a restitution award. See, *e.g.*, *United States* v. *Bryant*, 655 F.3d 232, 254 (3d Cir. 2011) (defendant has burden to prove the value of services he provided to his employer in a "low-show" job that he received in exchange for his assistance in funneling state funds to a university); *United States* v. *Elson*, 577 F.3d 713, 734 (6th Cir. 2009) (defendant has burden to prove that he compensated the victim for a specific loss through a civil settlement); *United States* v. *Ruff*, 420 F.3d 772, 775-776 (8th Cir. 2005) (defendant has burden to prove that victim was compensated in administrative forfeiture proceeding); *United States* v. *Loe*, 248 F.3d 449, 470 (5th Cir.) (defendant has burden to prove that some of its insurance

claims were not fraudulent), cert. denied, 534 U.S. 974 (2001); *United States* v. *Karam*, 201 F.3d 320, 327 (4th Cir. 2000) (defendant has burden to prove that promissory notes fully compensated victims for their loss).

In this case, the court of appeals *placed the burden of proof on the government* to show that the injections were not medically necessary and concluded that the government had met its burden. See Pet. App. 15-16 (concluding that "the government provided sufficient evidence that the trigger-point injections were merely a revenue stream for [petitioners] and not legitimate, medically necessary treatments for which the insurers would have paid in the absence of the fraud"). Only then did the court conclude that petitioners had failed to *rebut* that showing with evidence of medical necessity that would justify an offset. See *id.* at 15 (petitioners did not present evidence showing that "even one injection to even one patient was medically necessary and met the insurer's reimbursement standards"). To the extent the court imposed a burden of producing evidence on petitioners, its narrow conclusion was entirely reasonable on the facts of this case. The government's evidence raised at least a strong inference that petitioners gave injections without any medical necessity. See *id.* at 14-15 (discussing proof of misdiagnosis, pressuring all patients to have injections at every visit, administering assembly-line injections, and universal discontinuance of trigger-point injections by other physicians). It was only logical that if petitioners had contrary evidence, they should provide it. The court of appeals' limited holding that, on these facts, the district court did not abuse its discretion in declining to provide an offset does not warrant this Court's review. The broader and

general burden-of-proof issue that petitioners raise is not squarely presented in this case.

b. Petitioners further contend (Pet. 8-11) that the Seventh, Ninth, and Eleventh Circuits have held that the government must deduct any value the victim received from the defendant's fraudulent scheme as part of its burden to prove loss. The cases on which petitioners rely do not demonstrate a conflict warranting this Court's review.

In *United States* v. *Swanson*, 483 F.3d 509 (7th Cir.), cert. denied, 552 U.S. 981 (2007), the court merely asserted, without elaboration, that "as part of its burden to prove a restitution amount, the government must deduct any value that a defendant's fraudulent scheme imparted to the victims." *Id.* at 515. In *United States* v. *Huff*, 609 F.3d 1240 (11th Cir. 2010), the court made the same unelaborated assertion, citing *Swanson* for support. *Id.* at 1247. Neither opinion indicated that the burden-of-proof issue was contested or that the decision turned on the court's allocation of the burden, and neither court demonstrated awareness that other courts had allocated the burden differently. And because neither court confronted the factual scenario here, in which the government established lack of medical necessity clearly enough to justify such a conclusion absent contrary evidence, no conflict exists.

In *United States* v. *Rutgard*, 116 F.3d 1270 (9th Cir. 1997), the defendant challenged the district court's refusal to credit him with an offset for legitimate medical services in calculating the loss amount for purposes of a sentencing enhancement, not for purposes of restitution. The court stated that the burden was on the government to prove what services provided by the defendant were not medically necessary. *Id.* at 1294. But Section

3664(e), on which the court below relied in allocating the burden of proof, applies only in the restitution context and has no bearing on the calculation of loss for purposes of a sentence enhancement. Furthermore, as explained above, p. 10, *supra*, the court of appeals placed the burden on the government in this case to prove lack of medical necessity and concluded that the government had met its burden. Accordingly, *Rutgard* does not conflict with the decision below.

2. Petitioners contend (Pet. 12-13) that the government's argument that the trigger-point injections were not medically necessary was raised for the first time on appeal and therefore should not have been considered. That fact-bound claim does not warrant further review and, in any event, is incorrect.

a. Petitioners' position at sentencing was that some portion of the fraudulently claimed facet-point injections reflected trigger-point injections that were admittedly upcoded but that were actually administered to patients and were medically necessary. Docket entry No. 298, at 18-26. Petitioners contended that because the insurers would have paid for the trigger-point injections, the restitution amount should be reduced by the cost of those injections. *Ibid.*

The government vigorously opposed that position. In its sentencing memorandum, the government argued that the treatments administered by petitioners at their clinic were not based on the exercise of "medical judgment" but were simply a means "for [petitioners] to fraudulently enrich themselves," Gov't Sentencing Mem. 10-12; that any benefit patients received was "accidental," *id.* at 11; and that patients who left petitioners after their indictment "universally reported that their new doctors discontinued the shots as medically unnec-

essary," *ibid.* At the sentencing hearing, the government explained that it was not conceding the trigger-point injections that were actually administered were not fraudulent, Docket entry No. 298, at 33; that Arun Sharma's patients were prescription drug addicts who were only placed on a shot regimen after he "falsely diagnosed them as having rheumatoid arthritis," *ibid.*; and that Arun Sharma only administered the shots "because he saw the economic potential * * * of billing insurance," *id.* at 45.

That position was fully consistent with the factual basis for the pleas set forth in petitioners' plea agreements, which stated that Arun Sharma's typical routine for treating patients was to walk into the examination rooms "carrying a plastic tray of pre-filled syringes," that "[n]early every patient was * * * put on a regimen of shots every two weeks," that Arun Sharma "tried to convince all patient[s] to have shots at every visit," and that he required patients who did not want shots to sign forms saying they had received them. Docket entry No. 178, at 10-11; Docket entry No. 181, at 10-11. The government argued throughout the proceedings below that petitioners' clinics were "pill mills" where injections were administered in an assembly-line fashion without regard for medical need.

b. In support of their contention that the government did not argue in the district court that the trigger-point injections were not medically necessary, petitioners cite two instances in which the government stated "that the case was not a medical necessity case." Pet. 12 (emphasis omitted). In the first instance, the prosecutor asserted, at a pre-plea hearing, that the government was not required, under *Brady* v. *Maryland*, 373 U.S. 83 (1963), to produce information relating to the standard

of medical care in Texas because "this is not a medical necessity case. It is a fraud case." Docket entry No. 149, at 128 (Apr. 19, 2010). In correctly asserting that the government would not have to show that the trigger-point injections were medically unnecessary in order to prove that petitioners engaged in fraudulent "upcoding," the prosecutor did not suggest that the issue of medical necessity would have no bearing on the calculation of the restitution award at sentencing. In the second instance, the prosecutor stated at Arun Sharma's sentencing that "[w]e're not talking about medical necessity here." Docket entry No. 298, at 29. But that statement was made with reference to petitioners' conduct of charging the insurers for patient visits that never occurred; the statement did not suggest that the medical-necessity issue would be irrelevant in determining whether petitioners were entitled to an offset for the trigger-point injections. The prosecutor made clear at the same hearing that the government viewed the entire injection operation as a fraudulent scheme to steal money from insurers. *Id.* at 33, 42-45.

In short, the government *did* argue in the district court that the trigger-point injections were not medically necessary, and the case-specific issue of whether or not it did so does not warrant the Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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