No. _____

In the Supreme Court of the United States

LAWRENCE DURAN & MARIANELLA VALERA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether federal sentencing guidelines providing for a life sentence based on judicial estimations violate fundamental Fifth and Sixth Amendment rights, where:

(A) to make such estimations, the sentencing court must rely on inherently inestimable and speculative concepts such as – in petitioners' case, involving loss due to provision of medical care – medical need, patient condition, and treatment options as to unspecified patients suffering from varying undetermined medical problems; and

(B) the guidelines directive for a life sentence based on estimation, by a preponderance standard subject only to a deferential clear-error appellate review, has such a dramatic effect on sentencing options, severely limiting sentencing discretion as to a first-time offender, that it requires procedural guarantees that are more consistent with those afforded to defendants facing mandatory minimum penalties under *Alleyne v. United States*, __ U.S. __,133 S.Ct. 2151 (2013).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Lawrence Duran and Marianella Valera respectfully petition the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 11-14507 in that court on February 25, 2013, *United States v. Duran* and *United States v. Valera*, which affirmed the judgment and commitment orders of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment orders of the United States District Court for the Southern District of Florida, is contained in the Appendix (1a), along with a copy of the decision denying rehearing (App. 49a).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals was entered on February 25, 2013. This petition is timely filed pursuant to Sup. Ct. R. 13.1. The district court had jurisdiction pursuant to 18 U.S.C. § 3231 because petitioners were charged with violating federal criminal laws.

The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, which provides that courts of appeals shall have jurisdiction for review of all final decisions of United States district courts; and 18 U.S.C. § 3742(a), which provides jurisdiction for review of criminal sentences upon appeal by defendants.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioners intend to rely upon the following Constitutional and other provisions:

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law.

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

U.S.S.G. § 2B1.1, comment. (n. 3(C))

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

STATEMENT OF THE CASE

1. The charges.

In a superseding indictment returned in the Southern District of Florida, petitioners Marianella Valera and Lawrence Duran were charged with multiple counts of conspiracy and substantive offenses relating to their ownership and operation of mental health facilities in the state of Florida. Also named as defendants were American Therapeutic Corporation ("ATC") and Medlink Professional Management Group, Inc. ("Medlink"), as well as two other individual codefendants. ATC, a Miami-based corporation, operated several partial hospitalization programs ("PHPs") at facilities in the South Florida and Orlando areas. A PHP is an intensive mental illness treatment program offering daily care outside of a hospital setting; it is covered by Part B of the Medicare Program, which is administered by the Centers for Medicare and Medicaid Services.

Medlink managed ATC's operations, including hiring and financial matters. Valera was the owner of ATC; Duran was involved in the daily operations of ATC and was Medlink's owner and manager; petitioners and codefendant Judith Negron also owned and operated the American Sleep Institute ("ASI"), a facility which provided sleep study services. Diagnostic sleep studies conducted at sleep disorder clinics are likewise covered by Part B of Medicare.

Petitioners were charged with: conspiracy to commit health care fraud in violation of 18 U.S.C. § 1349 (count 1); health care fraud in violation of 18 U.S.C. §§ 1347 and 2 (counts 2-12); conspiracy to defraud the United States in violation of 18 U.S.C. § 371 (count 13); conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h)(count 14); money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i)(counts 30-31); and structuring to avoid reporting requirements, in violation of 31 U.S.C. § 5324(a)(1) and (d)(2) (counts 33-36, 38). Duran was additionally charged with money laundering in violation of 18 U.S.C. § 1957 (counts 15-27); and money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i)(counts 28-29, 32). The superseding indictment also sought, as to each of the defendants, the forfeiture of assets derived from the alleged offenses, pursuant to 18 U.S.C. § 982.

2. Pre-trial motions.

Petitioners each filed a Motion for Jury Trial

With Respect to the Calculation of Victim's Loss Component of Federal Sentencing Guidelines. The motions asserted that a jury trial was warranted as to whether losses following the government's filing of a False Claims Act suit against the defendants and others, *United States v. ATC, et al.*, No. 07-20205-Civ-Gold, should be attributable to the government – and not to petitioners – based on the government's failure to exercise due care with respect to public funds entrusted to it; and that a jury trial as to the issue of loss was warranted in light of the *de facto* mandatory treatment of the Federal Sentencing Guidelines by the Eleventh Circuit, thereby triggering Fifth and Sixth jury-trial protections with respect to sentencing issues. The motions were denied. On April 13, 2011, the defendants each filed a Motion for Jury Trial on Victim's Loss and Enhancements. The motions mirrored the prior motions, adding as new grounds the need for jury determinations as to petitioners' subjective intent, as well as with regard to any sentencing enhancements. The court denied these motions, as well.

3. Guilty plea proceedings.

At proceedings before a U.S. Magistrate Judge, petitioners' arraignments on the superseding indictment, while scheduled, were not held. The following day, petitioners filed notices of consent to the referral of their respective arraignments on the superseding indictment to the presiding district judge. The consent notices specified that

petitioners intended to file a partial guilty plea reserving their rights under the Fifth and Sixth Amendments to a jury trial as to the calculation of the loss component of § 2B1.1(b)(1) of the Federal Sentencing Guidelines, as set forth in their then-pending Motions for Jury Trial and as explained at the previous-day's proceedings before the magistrate judge. The court subsequently referred the case to a different magistrate judge for a change of plea as to petitioners, as well as their companies, ATC and Medlink, as to which they filed waivers of counsel.

At an ensuing joint change of plea hearing before a magistrate judge, neither the magistrate judge nor the parties set forth the elements of any of the offenses, or any factual basis for the plea. In entering guilty pleas, petitioners specified that they were *not* agreeing to any loss amount.

4. Pre-sentencing motions.

Petitioners thereafter each filed a Motion, and Amended Motion, for Pre-Sentencing Evidentiary Hearing on the issue of intended loss, reiterating their position that the amounts billed were not equivalent to the lesser, intended loss amount. The motion was denied.

5. Presentence Investigation Report ("PSI") and written objections.

The PSI issued for Duran recommended a guidelines offense level of 42 premised on a base level of 6 under U.S.S.G. § 2B1.1(a)(2), increased by: 28 points for a loss amount of greater than

$200 million but less than $400 million (U.S.S.G. § 2B1.1(b)(1)(O), as well as 2 points for sophisticated means (§2B1.1(b)(9)(C)), 2 points for money laundering under 18 U.S.C. § 1956 (§ 2S1.1(b)(2)(B), 2 points for sophisticated laundering, § 2S1.1(B)(3), and 4 points for leadership role (§ 3B1.1(b)), less 2 points for acceptance of responsibility (§ 3E1.1(a)). Valera's PSI recommended a guidelines level of 44 premised on all of the foregoing, in addition to 2 points for abuse of a position of trust (§ 3B1.3).

Petitioners filed written PSI objections. Both petitioners objected, *inter alia*, to the victim loss amount of $87,533,863.46, contending that the actual loss amount was more than $20 and less than $50 million, and, accordingly, their offense levels should be 22, not 28.

In a subsequent sentencing memorandum, the government raised PSI objections seeking, as to both petitioners, an additional 4 points for vulnerable victims (§ 3A1.1(b)(1) and (2)) and, as to Duran, a further 4-point upward departure for significant disruption of a governmental function (§ 5K2.7), resulting in a total offense level of 50 for Duran and 48 for Valera. The government also sought sentences of 600 months, or 50 years, as to Duran, and 480 months, or 40 years, as to Valera; as well as restitution of $87,533,863.46, to be paid jointly and severally. The district court, while acknowledging the government's PSI objections were untimely, nevertheless indicated it would

consider the enhancement and upward departure arguments of the government at sentencing.

6. Sentencing hearings.

Apart from their convictions in the instant case, neither petitioner had any prior criminal history.

A. Duran sentencing.

Duran's sentencing was held over the course of three days. At the sentencing. Duran also sought to admit a letter of supplemental authority to the Fifth Circuit from a government prosecutor in *United States v. Isiwele*, Case No. 10-40347, opining that the amount of loss in a Medicare fraud case could be based on proof of subjective intent of the provider, not simply the amount of billing as argued by the prosecution in Duran's case. The court refused to admit the exhibit, although it remains part of the record as an exhibit to Duran and Valera's respective Amended Motions for a Pre-Sentence Evidentiary Hearing.

Duran testified himself, indicating that his intent in billing Medicare was to receive the known amount that Medicare would pay, based on its approval of 80%, or less, of allowable, published amounts, with 20% left to the provider or client. He testified that he knew exactly what Medicare would pay, based on Medicare's known formula.

The district court granted a 3-point downward adjustment for petitioner Duran's timely acceptance of responsibility. However, the court denied Duran's challenges to the PSI loss amount and sophisticated money laundering enhancement;

and granted the government's request for an enhancement on the basis of vulnerable victims and an upward departure for significant disruption of a government function.

Following the court's guideline rulings, resulting in a total offense level of 49, which corresponded to a sentence of life imprisonment, the court commenced what it termed the second part of the hearing addressing what the appropriate sentence should be. Duran offered the testimony of 3 individuals who have known him for many years. Dr. Michael Romas, a clinical psychologist in charge of training and professional development at the Developmental Disabilities Institute, an agency in New York supporting children and adults with autism, traveled at his own expense to testify on behalf of Duran. Dr. Romas testified that Duran, whom he has known for 22 years, "has been a man of impeccable character, great warmth, and great generosity." Dr. Romas stated that nothing he had heard in court changed his friendship for Duran and his belief in Duran as an individual he could rely on. Dr. Romas further testified, "I have known Larry in so many contexts in an admira[ble] way," and, based on this longstanding knowledge, he asked that the court accord Duran leniency. *Id.* In addition, Kenya Duran Ramirez, the defendant's sister and a salaried employee for a period of time at ASI, testified as to her deep love for Duran and his thoroughgoing devotion to her, her children,

and to their elderly, widowed mother, all of whom are extremely close to Duran; she also attested to the love and trust for Duran on the part of many other non-family members whom Duran has helped through the years, and likewise asked the court to show him leniency. Taylor Duran, the defendant's 17-year-old daughter also testified as to how important her father's presence is to her and her entire, extended family.

Defense counsel requested a sentence of 20-25 years, noting that the offense involved depriving the government of money, unaccompanied by violence or harm to anyone. Counsel pointed out that given the defendant's age, the prosecution's request for a 50-year sentence would constitute an effective death sentence, and further asserted that rather than simply housing Duran endlessly at taxpayer's expense, consideration should be given to his rehabilitation.

The court, in thereafter addressing the parties, failed to acknowledge any of the evidence attesting to Duran's good character and good deeds towards friends, family and others, or his efforts at cooperating with the government. The court subsequently imposed a sentence on Duran of 50 years' imprisonment. The court also imposed restitution of $87,533,863.46, a 3-year term of supervised release, and a special assessment of $3,800.

B. Valera's sentencing.

At Valera's sentencing, the court incorporated

the proceedings in the Duran sentencing. As it had with respect to Duran, the court granted Valera 3 points for timely acceptance of responsibility. The defense restated its objections to the vulnerable victim enhancement and to a loss amount other than more than $20 million and less than $50 million dollars, offering testimony by Valera herself that, regardless of the amounts billed to Medicare, her intent was to collect Medicare's published rates, which constituted the universally recognized limit of possible reimbursement.

Special Agent Ellen Lapp testified that an unspecified number of ATC patients suffered from dementia and substance abuse addictions; she also testified that most of the patients were not paid for their participation. although her testimony failed to provide any specific supporting numbers.

The defense, in presenting its argument with respect to the issue of loss amount, noted the nearly 5-year delay in the government's bringing of charges against Valera, during which the loss amount was unfairly increased due to the government's laxity, and objected that the extraordinary delay was akin to sentencing entrapment and fundamentally unfair. The defense also reiterated its objection to the vulnerable victim enhancement, and further asked the court to consider the defendant's substantial assistance as reflected in sealed submissions, information resulting in the dismissal of charges against two individuals and the identification of

another, culpable individual, and the substantial savings of government expenditures given Valera's willingness to enter into a guilty plea on behalf of ATC without counsel.

The court overruled Valera's objection to a loss amount consisting of the entirety of the $205 million billed to Medicare despite acknowledging that Medicare had incurred losses of only $87,533,863.46 (Medicare "incurred losses totalling $87,533,863.46. This represents all the Medicare payments made on behalf of the fraudulent claims submitted by ATC and ASI."). The court also overruled Valera's objection to a 2-point sophisticated money laundering enhancement and to a 4-point vulnerable victim enhancement despite initially identifying Medicare as the victim, (court noting the defendant's challenge "to the factual basis for the losses to the victim, Medicare in this case..."); (The Court: "[W]e see that the victim in this case is the Centers for Medicare and Medicaid Services, which incurred losses totalling (emphasis added). As a result, Valera's total offense level was 47, corresponding to a guidelines imprisonment range of life.

Valera, in speaking personally to the court, apologized profusely for her actions, stating that she had gone into the field of mental health intending to make a difference and to help people, but that everything had gone wrong. She stated that she hoped to tell others not to engage in the activity she had, that it was wrong, and that she

had advised her counsel that she wished to cooperate in any way with the government. Valera wept throughout her allocution.

The court stated that, having sentenced Duran to 50 years, it wished to take into consideration that Valera, unlike Duran, was not involved in lobbying efforts and also recognized her sympathetic plight, in which she found herself virtually alone in the United States after arriving here from Peru, and became involved with Duran, an older man, who was "basically all she had, or all she's got." The court thereafter imposed a total sentence of 35 years' imprisonment, to be followed by 3 years' supervised release, and restitution in the amount of $87,533,863.46.

7. Appellate proceedings.

The petitioners appealed to the Eleventh Circuit, challenging the propriety of their guilty plea and sentencing proceedings, and the ultimate sentences imposed, on multiple bases, including that the court's fraud loss calculation was factually and legally erroneous. The Court of Appeals affirmed the convictions and sentences under clear error review of whether the district court's estimation derived from "permissible view of the evidence." App. 5a (relying on the court's belief that a finding of clear error "will be rare") (quoting *United States v. Rodriguez DeVaron*, 175 F.3d 930, 945 (11th Cir. 1999) (*en banc*)). Petitioners filed a petition for rehearing, challenging the sentences as based on a legally and factual erroneous theory of

intended loss estimation that the Court of Appeals had failed to subject to full review, and the district court's further reliance on unproved harm to purported victims, resulting in improper sentences. The petition for rehearing was denied. App. 49a.

REASONS FOR GRANTING THE WRIT

Federal sentencing guidelines authorizing the imposition on a first-time offender of a life sentence based on rough estimations subject to only limited review violate fundamental Fifth and Sixth Amendment guarantees.

Certiorari is warranted in this case to address the constitutional infirmity in the Federal Sentencing Guidelines loss estimation calculation, as applied to the instant offense of fraud in the furnishing of unnecessary professional services, which effected a 28-level increase in the applicable Guidelines offense level, resulting in a sentencing range of life imprisonment for both petitioners. The bracketing of judicial discretion in light of this life-sentence parameter, combined with the highly restricted appellate review standard of clear error, does not comport with due process and trial rights guaranteed under the Fifth and Sixth Amendments, where the loss estimation calculation under the Guidelines is inherently speculative in the context of the specific offense

here, given that medical need, patient condition and treatment options were neither established nor are they amenable to being established on an individual, particularized and reliable basis, without which there can be no reasonable estimation of intended loss.

Moreover, given the dramatic impact of the Guidelines' life-sentence calculation, stemming from loss estimation, on the judicial fashioning and imposition of sentence, this calculation is compellingly analogous to a mandatory minimum penalty which this Court has concluded requires being submitted to and found by a jury beyond a reasonable doubt. The Guidelines in this context direct a judge to make an estimate about the inestimable. This impropriety, viewed in light of the restrictive clear-error appellate review standard which fails to require the sentencing court to justify its forced reliance on the inestimable, results in depriving defendants, such as the petitioners here, of the elemental protections of Due Process applicable in all sentencing proceedings.

A. The estimation for fraud loss in billing for unnecessary professional services extends to inherently inestimable concepts such as, in petitioners' case, medical need, patient condition, and treatment options of unspecified patients, contrary to the

demands of Due Process.

The Guidelines loss estimation calculation applied to the petitioners' offense was based on the provision of unnecessary professional services at facilities staffed by concededly qualified, licensed service providers. The government posited that the fraud consisted of billing for procedures that the patients did *not* need. As to this loss calculation, however, there was no specific assessment nor was a specific, reliable assessment possible, as to the actual conditions, needs and appropriate treatment options for the many patients served at these facilities. Instead, the loss estimation was premised on billed amounts alone, without particularized analysis of the actual needs, diagnoses and prognoses of the patients attending the petitioners' facilities.

The inherently ineffable, inestimable concepts relating to each patient's circumstances – where there was no dispute that the patients all suffered from serious mental illnesses and impairments, and no question that licensed and qualified professionals staffed and provided services to the patients at the facilities – preclude a reasonable and reliable loss estimation. What specifically was unnecessary, and what instead was needed, in terms of treatment and care for each of the patients at the facilities was neither identified nor identifiable in this case. Instead, the loss estimation was by nature speculative and premised

improperly on unproved and unprovable harm, and the mere supposition of injury.

Further, while the loss calculation under the Guidelines was based exclusively on the amounts billed by petitioners, it was uncontested in this case that the petitioners expected and understood, based on fixed and published reimbursement rates, that only a lesser specified portion of the billed amounts would ever be paid, and that their daily facility operations were premised exclusively on the lesser amounts, which resulted in an actual reimbursement to them of less than half the billed amount. *See United States v. Singh,* 390 F.2d 168, 193 (2d Cir. 2004)(recognizing distinctions in applicable loss standards between different types of fraud; noting that it is "common knowledge" that both government and private insurance "pay fixed rates" for medical procedures)(quoting *United States v. Nachamie*, 121 F.Supp.2d 285, 293 & n. 6 (S.D.N.Y. 2000), in which, additionally, as in the petitioners' case, evidence revealed defendants knew Medicare "always reimbursed procedures at a fixed or 'capped' rate per procedure," establishing their intent that Medicare reimburse them, at Medicare's capped rate, for the procedures reflected in the submitted bills; rejecting government assertion that billed amount was appropriate measure of loss).

In light of the fact that a reliable loss amount based on the estimation calculation under the

Guidelines was neither made nor possible in this context, where the alleged fraudulent activity consisted of the provision of unnecessary professional services, the Guidelines loss estimation calculation in this case, which called for a life sentence as to the petitioners, failed to comport with essential Due Process requirements and was fundamentally unfair.

B. The effective demand of the Guidelines for a life sentence based on estimation, especially when combined with a restrictive clear-error appellate review standard, has such a dramatic effect on sentencing options and limitations on sentencing discretion as to a first-time offender as to require procedural guarantees more consistent with those afforded to defendants facing mandatory minimum penalties under *Alleyne v. United States*, __ U.S. __,133 S.Ct. 2151 (2013).

The Court's recent pronouncement that the sentencing guidelines are "the lodestone of sentencing," anchoring both the district court's discretion and the appellate review process, *Peugh v. United States*, 133 S.Ct. 2072, 2084 (2013), compellingly highlights the need for guideline calculations rooted in specific, identified harms. Yet, the looseness with which loss attribution and the ensuing guidelines calculation relied on by the

district court was made here (and in more and more of the cases formerly known as white-collar offenses), combined with the court of appeals' failure to accord *de novo* review to such findings, instead deferentially conferring its approval based on a minimal and highly restricted clear-error review, falls far below long-recognized constitutional parameters of sentencing. *See Williams v. New York* 337 U.S. 241 (1949) (recognizing that sentencing is subject to scrutiny under the Due Process Clause). In depriving the petitioners of a jury finding or more rigorous evidentiary testing, including actual witnesses subjected to confrontation, as to the sentencing-dispositive issues (here, loss amount), the district court violated petitioners' rights under the Fifth and Sixth Amendment rights.

The applicable Guideline sentencing ranges in this case, premised on an improper loss estimation and calling for a life sentence as to each of the petitioners, both of whom are first-time offenders, so altered the options and discretion of the sentencing judge as to warrant treatment at least as significant and protective of the rights of the individual as that accorded a mandatory minimum penalty. As this Court recently concluded in *Alleyne v. United States,* __ U.S. __, 133 S.Ct. 2151 (2013), the fact supporting a mandatory penalty of even two additional years of imprisonment may not be determined by the judge, without the protections of the Fifth and Sixth Amendments.

Id. at 2158.

The Court in *Alleyne,* finding that a determination as to the defendant's brandishing of a firearm had to be submitted and found by the jury because that fact increases the mandatory minimum penalty to which a defendant is exposed, rejected any distinction between facts that increase the statutory maximum and those that increase the mandatory minimum penalty:

> We conclude that this distinction is inconsistent with our decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and with the original meaning of the Sixth Amendment. Any fact that, by law, increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt. *See id.*, at 483, n. 10, 490, 120 S.Ct. 2348. Mandatory minimum sentences increase the penalty for a crime. It follows, then, that *any fact that increases the mandatory minimum is an "element" that must be submitted to the jury*.

Alleyne, 133 S.Ct. at 2155 (emphasis added); *see also id.* at 2158 (holding that facts increasing the mandatory minimum sentence "*must be submitted to the jury and found beyond a reasonable doubt*.").

The Court explained further:

> *Apprendi*'s definition of "elements" necessarily includes not only facts that increase the ceiling, but also those that increase the floor. *Both kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment*. 530 U.S., at 483, n. 10, 120 S.Ct. 2348.

Alleyne, 133 S.Ct. at 2158 (emphasis added). *See also id*. at 2159 (discussing case law recognizing that where punishment is increased based on value, such value must be alleged in the indictment).

Petitioners, in pleading guilty, explicitly challenged attributed loss amount and asserted trial rights on loss issues, which was denied. They persisted throughout the ensuing proceedings to challenge loss amount, repeatedly insisting that a jury finding on loss was necessary. Neither indictment nor a jury finding nor even a judicial finding by a standard of more than an estimation preponderance was accorded as to the disputed issues. Because of the intense impact of the Guidelines loss calculation resulting in a recommended life sentence for the petitioners, the impairment of judicial discretion arising from the Guidelines calculation is akin to the mandatory minimum penalties addressed in *Alleyne*.

The life-sentence calculation under the

Guidelines in petitioners' case clearly altered the prescribed range of sentencing, cabining judicial choices and restrictions in fashioning a sentence within a predetermined framework that the court was bound to afford deference. *See, e.g.*, *United States v. McQueen*, __ F.3d __, 2013 WL 4478640, * 13 (11th Cir. Aug. 22, 2013) (reversing downward variance from guidelines where district court varied significantly more that other "courts [that] have at times given sentences below the minimum suggested by the Guidelines"; where other courts have given "more-tempered reductions" from guideline minimum, district court creates impermissible disparity by imposing substantial downward variance). And, indeed, the huge sentences ultimately imposed in this case reflect those restrictions, unaccompanied by Fifth and Sixth Amendment protections as to the contested issue of loss and without ever receiving full independent review by the court of appeals.

The district court, in consideration of the life-sentence Guidelines calculation, imposed prison terms of five decades on petitioner Duran and three-and-a-half decades on petitioner Valera. These sentences, themselves effective life sentences given the approximate ages of the petitioners at the time of sentencing (Duran, age 50; Valera, age 40), were premised on a Guidelines life calculation arising from an estimation of

intended loss. Yet, there was no jury finding as to loss amount – contrary to the express limitations of petitioners' guilty pleas which specifically disputed the amount of intended loss and requested a jury trial on that issue – nor did the court at sentencing determine intended loss amount by a rigorous preponderance standard, but rather by estimation. Neither was the sentence ever subjected to full appellate review, but instead was affirmed on the basis of a restricted clear-error standard.

In *United States v. Gall*, 552 U.S. 38 (2007), Justice Scalia recognized that "[t]he door ... remains open for a defendant to demonstrate that his sentence, whether inside or outside the advisory guidelines range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury." *Id.* at 60 (Scalia, J., concurring). The petitioners here have entered this still-open door, demonstrating the constitutional limits to speculative judicial loss findings that have aggravated their sentences by decades, subjecting them to imprisonment for effectively the remainder of their lives. To impose such sentences here without comparable protections as accorded, for example, to a two-year mandatory minimum penalty for illicit gun possession cannot be deemed consistent with basic principles of Due Process.

Based on conclusory determinations of fraud loss not linked to a comparison of any actual individual patient's medical circumstances and requirements and the treatment provided by medical professionals at petitioners' mental health facilities, the sentencing judge simply attributed all billed amounts as intended loss. This loss amount as determined by the judge was not an element of the offense, and petitioners disputed that amount at every stage of the proceedings, including at the time of their guilty pleas, in written motions submitted to the court requesting a jury trial on the issue of loss, and at sentencing.

Because the impact of the Guidelines life-sentence calculation so intensely affected the sentencing court's limitations and options, the assessment of loss on which the Guidelines calculation rested should have been treated like the firearm brandishing determination in *Alleyne* which likewise altered the range of sentencing options. Certiorari is warranted to address the impact of *Alleyne* on the instant analogous circumstance of a Guidelines sentence calculation effectively prescribing a life sentence and correspondingly restricting sentencing court options based on a loss estimation without other constitutional guarantees.

The sentencing court's reliance on the Guidelines, and the court of appeals' failure to

subject the court's finding to *de novo* review effectively put the "thumb on the scales" in favor of a Guidelines sentence, and impaired the purpose of the Sixth Amendment. *Kimbrough v. United States*, 552 U.S. 85, 113-14 (2007)(Scalia, J., concurring). The Supreme Court should grant certiorari and hold that there is a Fifth and Sixth Amendment violation when judicial findings of fact exponentially aggravate a defendant's sentence beyond that supported by the facts found by the jury or admitted by the defendant.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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August 2013

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 11-14429
Non-Argument Calendar

D.C. Docket No. 1:10-cr-20767-JLK-1
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
LAWRENCE S. DURAN,
Defendant-Appellant.

No. 11-14507
Non-Argument Calendar

D.C. Docket No. 1:10-cr-20767-JLK-2
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
MARIANELLA VALERA,
Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Florida

(February 25, 2013)

Before TJOFLAT, WILSON and PRYOR, Circuit Judges.
PER CURIAM:

Lawrence S. Duran and Marianella Valera appeal their convictions and sentences for conspiracy to commit health care fraud, in violation of 18 U.S.C. § 1349; health care fraud, in violation of 18 U.S.C. § 1347; conspiracy to defraud the United States and participate in a kickback scheme, in violation of 18 U.S.C. § 371; conspiracy 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 structuring to avoid reporting requirements, in violation of 31 U.S.C. §§ 5324(a)(1) and (d)(2). Duran also appeals his convictions and sentences for money laundering, in violation of 18 U.S.C. § 1957.

Duran and Valera pleaded guilty to conspiring to defraud the Medicare health care program from December 2002 until October 2010. Valera, as theincorporator, registered agent, and sole officer of American Therapeutic Corporation (ATC), registered ATC to be eligible to submit claims to Medicare. Appellants did not associate ATC with Duran because he owed Medicare over $2 million in connection with another business.

The fraud scheme involved Appellants' payment of kickbacks to assisted living facilities (ALFs) and halfway houses so that the ALFs and halfway houses would require their Medicare-eligible patients to participate in the ATC's partial hospitalization programs (PHPs), regardless of the patients' needs or medical conditions. Patients were selected based on their conditions or disorders, but they did not receive proper medical treatment or doctor attention.

Duran and Valera submitted over $202 million in false claims, and received payments totaling over $87 million as a result of their scheme. Despite the

higher figure that Appellants billed, they purportedly knew Medicare would only issue payments based on a publicly available schedule of rates, which provided rates lower than the amount billed. Appellants appealed every claim that was denied, and collected co-payments on all of their claims. Duran's stated intent was to get as much money out of Medicare as possible, and he explained that he probably would not have given any money back if he did receive the full billed amount. Duran was also involved in commissioning a study to try and increase the amount of money that PHPs could receive from Medicare.

Appellants used Medlink Professional Management Group (Medlink) as a vehicle to launder Medicare funds into cash for kickbacks and personal monetary gain. They also implemented payment schemes through the use of shell companies and sham transactions.

Throughout the course of the case, both Appellants filed multiple requests for a jury trial on various sentencing issues, including the determination of the amount of loss for which they would be held responsible, but neither defendant requested to withdraw his or her plea. The district court denied these requests on the basis that it had discretion to make findings of fact as to sentencing issues. Duran and Valera were assessed the same guideline calculations, except that Duran received an upward departure for disruption of a government function and Valera received an enhancement for abuse of trust. The district court ultimately sentenced Duran to 50 years' imprisonment, while Valera received a 35-year term. They now attack various aspects of their guilty pleas and sentences. We affirm.

I.

Duran and Valera first argue that the court incorrectly calculated their loss amount by attributing the full amount billed to Medicare—over $202 million—as the amount of loss. They contend that the court applied the wrong standard by determining that the amount billed to Medicare was prima facie evidence of the intended loss amount. They further assert that because they knew in advance that Medicare would only pay 80% of any given claim, their knowledge of the predetermined, allowable amount Medicare would actually pay on a claim is the proper amount of loss. We disagree.

We review the district court's determination regarding the amount of loss under the guidelines for clear error. United States v. Hoffman-Vaile, 568 F.3d 1335, 1340 (11th Cir. 2009). A district court's choice between two permissible views of the evidence is not clearly erroneous. United States v. Rodriguez De Varon, 175 F.3d 930, 945 (11th Cir. 1999) (en banc).

The loss amount is calculated as "the greater of actual loss or intended loss" for purposes of the Sentencing Guidelines. U.S.S.G. § 2B1.1 cmt. n.3. Actual loss is the "reasonably foreseeable pecuniary harm that resulted from the offense," whereas intended loss "means the pecuniary harm that was intended to result from the offense." U.S.S.G. § 2B1.1 cmt. n.3(A)(i)-(ii). Importantly, intended loss includes pecuniary harm that would have been impossible or unlikely to occur. U.S.S.G. § 2B1.1 cmt. n.3(A)(ii). Because "[t]he sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence," the district court is only required to make a reasonable estimate of the loss amount, and

its reasonable estimate will be upheld on appeal. U.S.S.G. § 2B1.1 cmt. n.3(C).

Turning to the instant case, the district court's conclusion that Appellants' intended loss was the total amount billed to Medicare is supported by a permissible view of the evidence. See Rodriguez De Varon, 175 F.3d at 945 ("So long as the basis of the trial court's decision is supported by the record and does not involve a misapplication of a rule of law, we believe that it will be rare for an appellate court to conclude that the sentencing court's determination is clearly erroneous." (emphasis in original)). The evidence shows that Duran and Valera intended to get as much money out of Medicare as possible. And though Appellants argue quite strenuously that they could not have received the full amount billed and that it should therefore not be counted in the amount of loss, intended loss includes pecuniary harm that would have been impossible or unlikely to occur. see U.S.S.G. § 2B1.1 cmt. n.3(A)(ii)(II). "The court need only make a reasonable estimate of the loss." U.S.S.G. § 2B1.1 cmt. n.3(C). We think using the amount billed to Medicare as an estimate for the amount of loss was reasonable, and that the district court's determination of the amount of loss was not clearly erroneous.

II.

Duran and Valera also argue that neither of them should have received a four-level vulnerable victim enhancement under U.S.S.G. § 3A1.1. They contend that the victim impact was already contemplated in their base offense level, and the government did not establish that any of the patients were physically or financially harmed. These arguments fall wide of the mark.

The district court's application of the guidelines to the facts is a question of law that we review de novo. United States v. McGarity, 669 F.3d 1218, 1232 (11th Cir.), cert. denied, 133 S. Ct. 378 (2012). A court's determination of the facts that support the enhancement is a finding of fact reviewed only for clear error. Id. We review allegations of impermissible double counting de novo. United States v. Ramirez, 426 F.3d 1344, 1355 (11th Cir. 2005) (per curiam). Double counting occurs when a district court applies one part of the guidelines to increase a defendant's punishment on account of a kind of harm that was already fully accounted for by the application of another part of the guidelines. United States v. Dudley, 463 F.3d 1221, 1226–27 (11th Cir. 2006) (per curiam). "We presume that the Sentencing Commission intended separate guideline sections to apply cumulatively unless specifically directed otherwise." Id. at 1227 (internal quotation marks omitted).

Under U.S.S.G. § 3A1.1, a two-level increase is applied where the defendant knew, or should have known, that a victim of the offense was a vulnerable victim, and an additional two-level increase is applied if the offense involved a large number of vulnerable victims. U.S.S.G. § 3A1.1(b). A vulnerable victim is "a person (A) who is a victim of the offense of conviction and any conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct); and (B) who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct." U.S.S.G. § 3A1.1 cmt. n.2. The enhancement applies whenever a defendant selected his victim to take advantage of that victim's perceived susceptibility to the offense. United States v. Bradley,

644 F.3d 1213, 1288 (11th Cir. 2011), cert. denied, 132 S. Ct. 2375 (2012). Neither bodily injury nor financial loss is required for an individual to qualify as a victim. Id. at 1288 & n.128.

The patients here were vulnerable victims because they were forced to participate in the scheme on account of their serious illnesses and disorders, and they were not given proper treatment. Many of these patients had limited cognitive ability and were unable to feed themselves, defecated on themselves, or were unresponsive to group therapy. Doctors rarely saw these patients, except to fill out paperwork, and Appellants frequently included false diagnoses in patient files to maximize the amount of money they could extract from the patients' suffering. In other words, these were vulnerable victims of the most basic kind. And though Appellants argue that the application of this enhancement double counts their conduct, they identify no authority that demonstrates that the Sentencing Commission did not intend for the guidelines to be applied in exactly this fashion. See Dudley, 463 F.3d at 1227.

Additionally, we have previously rejected the argument that patients involved in healthcare fraud were not victims because the government—not the patients—was the entity actually harmed by the fraud. See Bradley, 644 F.3d at 1288 & n.128 (holding that patients who received faulty prescription drugs in a Medicaid fraud scheme were victims for purposes of the vulnerable victim enhancement). The damage to these patients—collateral or otherwise—was real. Finally, there was more than sufficient evidence to find that a large number of these particularly vulnerable individuals were the victims of Appellants' scheme.

The district court did not clearly err in applying the four-level vulnerable victim enhancement.

Duran and Valera also contend that the district court erred in applying an enhancement for sophisticated laundering under § 2S1.1(b)(3) because the enhancement was duplicative of the enhancements for money laundering (§ 2S1.1(b)(2)(B)) and sophisticated means (§ 2B1.1(b)(9)(C)), but they are wrong. Section 2S1.1(b)(3) of the guidelines provides for a two-level increase if the money laundering enhancement of subsection (b)(2)(B) applies and the offense involved sophisticated laundering. The commentary to the guidelines explains that sophisticated laundering means complex or intricate offense conduct pertaining to the execution or concealment of a § 1956 offense, and typically involves the use of fictitious entities, shell corporations, or two or more layers of transactions. U.S.S.G. § 2S1.1 cmt. N.5(A).

In contrast, the money laundering enhancement under § 2S1.1(b)(2)(B) only requires that the defendant was convicted under § 1956. see U.S.S.G. § 2S1.1(b)(2)(B). The sophisticated means enhancement under § 2B1.1(b)(9)(C), for its part, provides for a two-level enhancement where the conduct involves especially complex or intricate activity pertaining to the execution or concealment of the offense, but does not limit the offense to money laundering. U.S.S.G. § 2B1.1 cmt. n.8(B). Instead, it is sufficient if the totality of the scheme is sophisticated. United States v. Barrington, 648 F.3d 1178, 1199 (11th Cir. 2011), cert. denied, 132 S. Ct. 1066 (2012).

In this case, Duran and Valera used shell corporations and sham transactions to transfer the

funds involved. see U.S.S.G. § 2S1.1 cmt. n.5(A). Though Appellants contend that the enhancement is duplicative of the enhancements for sophisticated means and money laundering, they identify no authority that demonstrates that the Sentencing Commission did not intend for the guidelines to be applied in this fashion. See Dudley, 463 F.3d at 1227 (explaining that, in the absence of evidence to the contrary, we assume the Sentencing Commission intended for enhancements to apply cumulatively). Further, the enhancements have separate requirements and are based on separate conduct. For example, though the sophisticated laundering enhancement refers only to the act of laundering the proceeds of the fraud, the sophisticated means enhancement of § 2B1.1(b)(9)(C) is directed more globally at the fraudulent scheme itself. Accordingly, it was not clearly erroneous for the district court to apply the sophisticated laundering enhancement on top of the enhancements for money laundering and sophisticated means.

III.

Appellants next argue that the district court committed reversible error by failing to verify whether each of them had personally received and reviewed a copy of the presentence investigation report (PSR) prior to sentencing. They claim that the district court only confirmed with their respective attorneys that the attorneys had received and discussed the PSR with the Appellants, and that this is not enough. We again disagree.

Federal Rule of Criminal Procedure 32 requires a sentencing court to "verify that the defendant and the defendant's attorney have read and discussed the

[PSR] and any addendum to" the PSR prior to sentencing. Fed. R. Crim. P. 32(i)(1)(A). Here, the district court confirmed with the attorneys for Duran and Valera that they had gone over the PSR with their clients. In the absence of some indication to the contrary, a sentencing judge is permitted to rely on an attorney's submission that he has gone over the PSR with his client. The district judge therefore satisfied Rule 32.

Duran next argues that his plea colloquy violated the requirements of Federal Rule of Criminal Procedure 11, which rendered his guilty pleas defective and involuntary. He contends that the magistrate judge erred by failing to: (1) obtain a waiver of his right to enter his plea before a district court; (2) explain the nature of the offenses or ensure that Duran understood them; (3) explain the applicable maximum penalties; (4) enter a factual basis for the plea; and (5) explain that Duran could not enter guilty pleas while reserving the right to have his loss amount determined at a trial. As to the last assertion, Duran specifically states that he entered his guilty plea based on the condition that he would receive a jury trial for the amount of loss issues.

Similarly, Valera argues that all of her sentencing enhancements were improperly imposed because they violated the terms of her guilty plea. To that end, she asserts that, as a condition to her guilty plea, she reserved her right to a jury trial as to any fact used to enhance her sentence. All of Appellants' arguments in this regard lack merit.

Where a defendant did not move to withdraw his plea, we review any issues regarding his plea colloquy for plain error. United States v. Moriarty, 429 F.3d

1012, 1019 & n.2 (11th Cir. 2005) (per curiam). Arguments raised for the first time on appeal in a criminal case are reviewed for plain error. United States v. Rodriguez, 398 F.3d 1291, 1298 (11th Cir. 2005). "We will find plain error only where (1) there is an error in the district court's determination; (2) the error is plain or obvious; (3) the error affects the defendant's substantial rights in that it was prejudicial and not harmless; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." United States v. Clark, 274 F.3d 1325, 1326 (11th Cir. 2001) (per curiam). There can be no plain error where there is no statute, rule, or binding precedent from the Supreme Court or from this Court directly resolving the issue. United States v. Lejarde-Rada, 319 F.3d 1288, 1291 (11th Cir. 2003) (per curiam).

In accepting a defendant's guilty plea, the district court must specifically address the three core principles of Rule 11 by "ensuring that a defendant (1) enters his guilty plea free from coercion, (2) understands the nature of the charges, and (3) understands the consequences of his plea." Moriarty, 429 F.3d at 1019. The Supreme Court has ruled that a defendant who seeks to establish plain error with regard to Rule 11 "must show a reasonable probability that, but for the error, he would not have entered the plea." United States v. Dominguez Benitez, 542 U.S. 74, 83, 124 S. Ct. 2333, 2340 (2004).

Finally, "[w]e have also held that a district court may make additional factual findings under a preponderance of the evidence standard," and "may enhance a sentence based upon judicial fact-finding provided that its findings do not increase the sentence

beyond the statutory maximum authorized by facts determined in a guilty plea or jury verdict." United States v. Dean, 487 F.3d 840, 854 (11th Cir. 2007) (per curiam).

Turning to the facts at hand, Appellants have failed to carry their burden of demonstrating that they would not have entered a guilty plea but for the alleged errors in the court below. see Dominguez Benitez, 542 U.S. at 83, 124 S. Ct. at 2340. Even were that not so, the core requirements of Rule 11 were satisfied and none of the alleged defects in the pleas are supported by the record. The district court acted within its discretion in making factual findings with regard to Duran's and Valera's sentencing issues, and their pleas were entered without any representations regarding a jury trial for sentencing issues. see Dean, 487 F.3d at 854. And even if they could point to some error below, that error would not be plain. see United States v. Monroe, 353 F.3d 1346, 1349 (11th Cir. 2003). Accordingly, the court did not err by accepting Appellants' guilty pleas or by denying their request for a jury trial as to the facts underlying their guidelines calculations.

V.

Appellants next argue that their sentences were substantively unreasonable. Specifically, Duran submits that his sentence is unreasonable because the district court did not consider his individual circumstances, but instead aimed at formulating a sentence to address the overall culture of corruption and fraud in the medical field. He emphasizes his good character and background, age, and the nonviolent nature of his offenses as evidence that the district court's 50-year sentence was unreasonable. Valera, for

her part, avers that her sentence is substantively unreasonable because it did not consider her individual circumstances, including her work ethic, her subordinate personal and professional relationship with Duran, her cooperation with the government, and the nonviolent nature of the offenses.

We review the substantive reasonableness of the sentence imposed by the district court "under [the] deferential abuse-of-discretion standard." Gall v. United States, 552 U.S. 38, 41, 128 S. Ct. 586, 591 (2007). In determining whether a sentence is substantively reasonable, we engage in a "deferential" assessment of whether the sentence imposed is sufficient, but not greater than necessary, to comply with the purposes of sentencing set forth in § 3553(a)(2). United States v. Talley, 431 F.3d 784, 788 (11th Cir. 2005) (per curiam). We measure reasonableness against the factors outlined in § 3553(a). United States v. Pugh, 515 F.3d 1179, 1188 (11th Cir. 2008); see also Talley, 431 F.3d at 788 ("We must evaluate whether the sentence imposed by the district court fails to achieve the purposes of sentencing as stated in [§] 3553(a)."). These factors include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (3) the need to deter criminal conduct; (4) the need to protect the public from further crimes of the defendant; (5) the need to provide the defendant with needed educational or vocational training or medical care; (6) the kinds of sentences available; (7) the guideline range; (8) policy statements of the United States Sentencing

Commission; (9) the need to avoid unintended sentencing disparities; and (10) the need to provide restitution to victims. see 18 U.S.C. § 3553(a).

The party challenging a sentence "bears the burden of establishing that the sentence is unreasonable in the light of both th[e] record and the factors in [§] 3553(a)." Talley, 431 F.3d at 788. "In our evaluation of a sentence for reasonableness, we recognize that there is a range of reasonable sentences from which the district court may choose, and when the district court imposes a sentence within the advisory [g]uidelines range, we ordinarily will expect that choice to be a reasonable one." Id. Thus, we will vacate and remand for a new sentencing "if, but only if, we are left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case." United States v. Irey, 612 F.3d 1160, 1190 (11th Cir. 2010) (en banc) (internal quotation marks omitted); see also Pugh, 515 F.3d at 1194 (observing that "a sentence may be unreasonable if it is grounded solely on one factor, relies on impermissible factors, or ignores relevant factors").

Duran and Valera wholly fail to carry their burdens of demonstrating that the district court committed a clear error of judgment in weighing the § 3553(a) factors. See Irey, 612 F.3d at 1190. The offenses in this case spanned nearly eight years and involved Appellants paying ALFs and halfway houses to exploit thousands of seriously impaired individuals for their Medicare benefits. Appellants submitted over $200 million in bogus Medicare claims, received over $87 million in fraudulent payments, and used shell

corporations and sham transactions to launder their ill-gotten gains. They did so at the expense of the public fisc and thousands of individuals unable to effectively care for themselves. In our view, crimes such as these stem from greed of the worst variety, and evince a parasitism and disregard for societal norms that are anathema to civil society. It is the very aim of sentencing to exorcise individuals such as these from the public square. see 18 U.S.C. § 3553(a)(2) (providing that the purposes of sentencing include providing just punishment for an offense, deterring future criminals, and protecting the public from the defendant). The district court considered the sentencing factors and sought to fashion total sentences that adequately punished the Appellants, provided sufficient deterrence to would-be criminals, and promoted respect for the law. These sentences do just that.

Finally, and though Appellants raise various mitigating factors in their defense, the weight to be given any particular factor is left to the sound discretion of the district court, and we will not disturb the exercise of that discretion absent a clear error in judgment. See Irey, 612 F.3d at 1190. What is more, the sentences imposed actually constitute a significant downward variance from the guideline sentence. Duran's 50-year total sentence, for example, is well below his guideline sentence of life imprisonment and his statutory maximum sentence of 435 years' imprisonment, a fact that augurs strongly in favor of the reasonableness of his sentence in light of the scope and nature of these offenses. See Gonzalez, 550 F.3d at 1324 (noting, in upholding sentence as reasonable, that it was "well below the maximum ten-year sentence"). Same goes for Valera, whose 35-year total sentence is

far shy of her guideline sentence of life imprisonment and her statutory maximum sentence of 235 years.[1] See Id. In sum, we think the sentences imposed on Duran and Valera by the district judge in this case were not only reasonable, but proper.

VI.

Duran next contends that the district court's application of an upward departure for significant disruption of a government function under U.S.S.G. § 5K2.7 was clear error because it was based on the same underlying conduct that led to his convictions and there was no factual support for the court's rationale that the Medicare program was unduly burdened by the sheer volume of Duran's scheme. Like the others, this argument falls flat.

The sentencing guidelines authorize a district court to depart from a defendant's applicable guideline range "[i]f the defendant's conduct resulted in a significant disruption of a governmental function." See U.S.S.G. § 5K2.7. We have previously held that "the significant disruption of a governmental function is not inherent in the offense of large-scale fraud involving an abuse of public trust." United States v. Gunby, 112 F.3d 1493, 1501 (11th Cir. 1997). And in holding that the significant disruption departure was properly applied to a fraudulent billing scheme where Medicare

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[1] Though the guideline range was life imprisonment, the maximum guideline penalty cannot exceed the statutory maximum penalty, see U.S.S.G. § 5G1.1(b), so Duran's guideline sentence was technically 435 years' imprisonment and Valera's guideline sentence was 235 years' imprisonment.

lost $15 million, we explained that "[e]very time [a defendant defrauds] Medicare, the government los[es] funds that it otherwise could have used to provide medical care to eligible Medicare patients." United States v. Regueiro, 240 F.3d 1321, 1324 (11th Cir. 2001) (per curiam). Just so here. It is no great secret that the Medicare program is cash strapped, and that the amount of money left in the pot for the legitimate care of our neediest citizens dwindles with each dollar the program pays out to the criminals such as Duran who seek to defraud it. We find the argument that Duran did not cause a significant disruption to the government's ability to administer the Medicare program when he diverted over $87 million in funds from the program through a concerted scheme of fraudulent billing, appealing every claim denied, and concealment of the fraud to be unpersuasive, if not verging on frivolity. The district court did not clearly err in applying the § 5K2.7 departure.

VII.

Valera additionally argues that the district court deprived her of the right to be present at all stages of sentencing. She states that the district court improperly incorporated the proceedings from Duran's sentencing and the trial of Judith Negron, another codefendant in this case. She argues that it was error to consider the evidence from these proceedings because she did not have an opportunity to be presented with, or make challenges to, the evidence. Because this argument was raised for the first time on appeal, we review it only for plain error. See Rodriguez, 398 F.3d at 1298. We find none.

A defendant has a constitutional right to be present at sentencing. United States v. Portillo, 363

F.3d 1161, 1166 (11th Cir. 2004) (per curiam). However, the defendant need not be afforded the same degree of due process protections at sentencing as he is entitled to at trial. United States v. Satterfield, 743 F.2d 827, 840 (11th Cir. 1984). A district court may take judicial notice of its own records. United States v. Rey, 811 F.2d 1453, 1457 n.5 (11th Cir. 1987).

Valera has failed to establish that the district court was not permitted to incorporate the proceedings of Valera's codefendants. See Id.; see also United States v. Castellanos, 904 F.2d 1490, 1496 (11th Cir. 1990) (explaining that a court may consider evidence adduced at a codefendant's proceeding, even if defendant was not present at that sentencing, so long as the defendant has an opportunity to challenge the evidence at her own sentencing). Where "the explicit language of the statute or rule does not specifically resolve the issue, and there is no precedent from this Court or the Supreme Court directly resolving it, there is no plain error." United States v. Frank, 599 F.3d 1221, 1239 (11th Cir. 2010). Valera points to no rule or statute, nor anything from this Court or the Supreme Court, that would render erroneous the district court's consideration of the related proceedings of her codefendant in this matter. Hence, she cannot show plain error. See Lejarde-Rada, 319 F.3d at 1291.

VIII.

Valera also asserts for the first time on appeal that the district court erred by imposing a general sentence rather than articulating individual sentences for each of the counts she was convicted for. She contends that such a general sentence is per se illegal. We reject Valera's argument on this point, however,

because her sentence was not a general sentence in the first place.

We review the legality of a sentence de novo. Moriarty, 429 F.3d at 1025. A general sentence is per se illegal and requires a remand. Id. "A general sentence is an undivided sentence for more than one count that does not exceed the maximum possible aggregate sentence for all the counts but does exceed the maximum allowable sentence on one of the counts." Id. (internal quotation marks omitted). Even where the sentencing court errs in sentencing a defendant, the court may correct a sentence that resulted from clear error within 14 days after oral pronouncement of the sentence. Fed. R. Crim. P. 35.

In the present case, the district court expressly stated at sentencing that it was announcing the total sentence imposed, but that it would provide a written order with the specific sentence as to each count in a written judgment. True to its word, the court filed a written order the same day the sentence was orally pronounced setting forth the specific breakdown of Valera's sentence. See also Fed. R. Crim. P. 35. There was no error.

IX.

Finally, Valera contends that the district court plainly erred in applying a two-level enhancement under U.S.S.G. § 3B1.3 for abuse of trust because the government was the sole victim of the offenses and Medicare providers do not occupy positions of trust relative to the Medicare program. She also argues that the enhancement is improper as applied to her relationship with the patients because the conduct used to justify the enhancement on that score would be encompassed by her underlying convictions.

A defendant is subject to a two-level enhancement of his offense level if she "abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense." U.S.S.G. § 3B1.3. A position of trust is "characterized by professional or managerial discretion," and a person occupying a position of trust ordinarily receives less supervision than an employee whose responsibilities are non-discretionary in nature. U.S.S.G. § 3B1.3 cmt. n.1. In the fraud context, § 3B1.3 applies "where a fiduciary or personal trust relationship exists with other entities, and the defendant takes advantage of the relationship to perpetrate or conceal the offense." United States v. Garrison, 133 F.3d 831, 838 (11th Cir. 1998) (internal quotation marks omitted); see United States v. Liss, 265 F.3d 1220, 1229–30 (11th Cir. 2001) (holding that a physician who received kickbacks for patient referrals abuses a position of trust for purposes of § 3B1.3 enhancement).

We discern no error here. Based on her position as a licensed mental health counselor who knowingly submitted false claims to Medicare, Valera enjoyed a position of trust and exploited that position of trust in executing her fraud. She has failed to identify any controlling authority that establishes that the district court erred in applying the enhancement in this case, especially in light of the fact that she used her positions as a licensed mental health counselor and the registered agent and sole officer of ATC to perpetuate and conceal her fraud offenses. See Lejarde-Rada, 319 F.3d at 1291 (explaining the stringent requirements of the plain error standard). Even if she had identified an error, she has failed to demonstrate that the "error

affect[ed] [her] substantial rights in that it was prejudicial and not harmless," Clark, 274 F.3d at 1326, so her argument would fail in any event. Had the abuse-of-trust enhancement not been applied, Valera's offense level would have been 45, which would yield the same guideline sentence (life imprisonment) as would an offense level of 47. See U.S.S.G. Sentencing Table (providing for life imprisonment for any offense level of 43 or above). Accordingly, Valera cannot show plain error with respect to application of the abuse-of-trust enhancement.

For the foregoing reasons, we conclude that neither Duran nor Valera points to any error sufficient to disturb the district court's judgment in this case. The sentences are harsh, but the offenses were grave. So goes the world of crime and punishment.

AFFIRMED.

UNITED STATES DISTRICT COURT
Southern District of Florida
Miami Division

Case Number: 10-20767-CR-KING

UNITED STATES OF AMERICA
v.
LAWRENCE S. DURAN,

AMENDED JUDGMENT IN A CRIMINAL CASE

USM Number: 95722-004
Counsel For Defendant: Lawrence R. Metsch, Esq.
Counsel For The United States:
Jennifer L. Saulino
Court Reporter Robin Dispenzieri

The defendant pleaded guilty to Counts One through Thirty-eight of the Superseding Indictment.
The defendant is adjudicated guilty of the following offenses:

TITLE/ SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. § 1349	Conspiracy to commit health care fraud	October 21, 2010	1
18 U.S.C. § 1347	Health Care Fraud	July 25, 2008	2
18 U.S.C. § 1347	Health Care Fraud	August 29, 2008	2

18 U.S.C. § 1347	Health Care Fraud	October 11, 2009	4
18 U.S.C. § 1347	Health Care Fraud	January 9, 2009	5
18 U.S.C. § 1347	Health Care Fraud	February 20, 200	6
18 U.S.C. § 1347	Health Care Fraud	May 22, 2009	7
18 U.S.C. § 1347	Health Care Fraud	July 24, 2009	8
18 U.S.C. § 1347	Health Care Fraud	October 16, 2009	9
18 U.S.C. § 1347	Health Care Fraud	February 12, 2010	10
18 U.S.C. § 1347	Health Care Fraud	May 17, 2010	11
18 U.S.C. § 1347	Health Care Fraud	June 30, 2010	12
18 U.S.C. § 371	Conspiracy to defraud the United States and to receive and pay health car kickbacks	October 21, 2010	13

18 U.S.C. § 1956(h)	Conspiracy to commit money laundering	October 21, 2010	14
18 U.S.C. § 1957	Money laundering	April 13, 2006	15
18 U.S.C. § 1957	Money laundering	May 30, 2006	16
18 U.S.C. § 1957	Money laundering	May 14, 2007	17
18 U.S.C. § 1957	Money laundering	July 24, 2007	18
18 U.S.C. § 1957	Money laundering	March 9, 2009	19
18 U.S.C. § 1957	Money laundering	April 10, 2009	20
18 U.S.C. § 1957	Money laundering	April 24, 2009	21
18 U.S.C. § 1957	Money laundering	April 24, 2009	22
18 U.S.C. § 1957	Money laundering	April 24, 2009	23
18 U.S.C. § 1957	Money laundering	April 24, 2009	24
18 U.S.C. § 1957	Money laundering	April 24, 2009	25

18 U.S.C. § 1957	Money laundering	May 12, 2009	26
18 U.S.C. § 1957	Money laundering	May 15, 2009	27
18 U.S.C. § 1956(a)(1)(B)(I)	Money laundering	January 12, 2007	28
18 U.S.C. § 1956(a)(1)(B)(I)	Money laundering	May 12, 2009	29
18 U.S.C. § 1956(a)(1)(B)(I)	Money laundering	June 19, 2009	30
18 U.S.C. § 1956(a)(1)(B)(I)	Money laundering	July 27, 2009	31
18 U.S.C. § 1956(a)(1)(B)(I)	Money laundering	May 28, 2010	32
31 U.S.C. § 5324(a)(1) and (d)(20)	Structuring to avoid reporting requirements	March 23, 2009	33
31 U.S.C. § 5324(a)(1) and (d)(20)	Structuring to avoid reporting requirements	May 15, 2009	34

31 U.S.C. § 5324(a)(1) and (d)(20)	Structuring to avoid reporting requirements	February 26, 2010	35
31 U.S.C. § 5324(a)(1) and (d)(20)	Structuring to avoid reporting requirements	June 3, 2010	36
31 U.S.C. § 5324(a)(1) and (d)(20)	Structuring to avoid reporting requirements	July 16, 2010	37
31 U.S.C. § 5324(a)(1) and (d)(20)	Structuring to avoid reporting requirements	August 13, 2010	38

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:

9/16/2011

/s/ James Lawrence King

JAMES LAWRENCE KING
United States District Judge

September 16, 2011

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of FIFTY (50) Years to be served as follows: 10 years as to Counts 1 through 12, to be served concurrently with each other; 10 years as to Counts 15 through 27, to be served concurrently with each other and consecutive to Counts 1 through 12; 10 years as to County 33 through 38, to be served concurrently with Counts 33 through 38; and 20 years as to Count 14 to be served concurrently with Counts 28 through 32.

*The Court hereby recommends to the Bureau of Prisons that the defendant be designated to a facility in South Florida.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By:_____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) Years. This term shall run concurrently as to all counts.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any

unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or a restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to

confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

Financial Disclosure Requirement - The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

Health Care Business Restriction - The defendant shall not own, directly or indirectly, or be employed, directly or indirectly, an any health care business or service, which submits claims to any private or government insurance company, without the Court's approval.

Self-Employment Restriction - The defendant shall obtain prior written approval from the Court before entering into any self-employment.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments sheet.

Total Assessment	Total Fine	Total Restitution
$3,800.00		$87,533,863.46

Restitution with Imprisonment-

It is further ordered that the defendant shall pay restitution in the amount $87,533,863.46. During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay $25.00 per quarter toward the financial obligations imposed in this order.

Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the court may alter tat payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the court any material change in the defendant's ability to pay. These payments do not preclude the government from using other assets or income of the defendant to satisfy the restitution obligations.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment unless specified otherwise in the priority order or percentage payment column below. However,

pursuant to 18 U.S.C. § 3664(I), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
CLERK OF COURTS Financial Section 400 N. Miami Avenue Room 8N09 Miami, Florida 33128	$Amount of Loss	$87,533,863.46	

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of $3,800.00 due immediately, balance due

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
301 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers, Total Amount, Joint and Several Amount, and corresponding payee.

Co-defendants in this case: Marianella Valara; Judith Negron; margarita Acevedo; Medlink Professional Management Group, Inc., American Therapeutic Corporation; and the co-defendants in case no. 11-20100-CR-SEITZ

The defendant shall forfeit the defendant's interest in the following property to the United States:

See attached forfeiture order

The defendant's right, title and interest in the property identified in the preliminary order of forfeiture, which has been entered by the Court and is incorporated by reference herein, is hereby forfeited.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
Southern District of Florida
Miami Division

Case Number: 10-20767-CR-KING

UNITED STATES OF AMERICA
v.
MARIANELLA VALERA,

AMENDED JUDGMENT IN A CRIMINAL CASE

USM Number: 95721-004
Counsel For Defendant: Arthur W. Tifford, Esq.
Counsel For The United States:
Jennifer L. Saulino
Court Reporter Carly Horenkamp

The defendant pleaded guilty to Counts One, Two through Fourteen, Thirty, Thirty-one, and Thirty-three through Thirty-eight of the Superseding Indictment.

The defendant is adjudicated guilty of the following offenses:

TITLE/ SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. § 1349	Conspiracy to commit health care fraud	October 21, 2010	1
18 U.S.C. § 1347	Health Care Fraud	July 25, 2008	2
18 U.S.C. § 1347	Health Care Fraud	August 29, 2008	2
18 U.S.C. § 1347	Health Care Fraud	October 11, 2009	4
18 U.S.C. § 1347	Health Care Fraud	January 9, 2009	5
18 U.S.C. § 1347	Health Care Fraud	February 20, 200	6
18 U.S.C. § 1347	Health Care Fraud	May 22, 2009	7
18 U.S.C. § 1347	Health Care Fraud	July 24, 2009	8
18 U.S.C. § 1347	Health Care Fraud	October 16, 2009	9
18 U.S.C. § 1347	Health Care Fraud	February 12, 2010	10

18 U.S.C. § 1347	Health Care Fraud	May 17, 2010	11
18 U.S.C. § 1347	Health Care Fraud	June 30, 2010	12
18 U.S.C. § 371	Conspiracy to defraud the United States and to receive and pay health car kickbacks	October 21, 2010	13
18 U.S.C. § 1956(h)	Conspiracy to commit money laundering	October 21, 2010	14
18 U.S.C. § 1956(a)(1)(B)(I)	Money laundering	June 19, 2009	30
18 U.S.C. § 1956(a)(1)(B)(I)	Money laundering	July 27, 2009	31
31 U.S.C. § 5324(a)(1) and (d)(20)	Structuring to avoid reporting requirements	March 23, 2009	33
31 U.S.C. § 5324(a)(1) and (d)(20)	Structuring to avoid reporting requirements	May 15, 2009	34

31 U.S.C. § 5324(a)(1) and (d)(20)	Structuring to avoid reporting requirements	February 26, 2010	35
31 U.S.C. § 5324(a)(1) and (d)(20)	Structuring to avoid reporting requirements	June 3, 2010	36
31 U.S.C. § 5324(a)(1) and (d)(20)	Structuring to avoid reporting requirements	August 13, 2010	38

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:
9/16/2011

/s/ James Lawrence King

JAMES LAWRENCE KING
United States District Judge

September 16, 2011

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of THIRTY-FIVE (35) Years to be served as follows: 10 years as to Counts 1 through 12, 33 through 36 and 38; to be served concurrently with each other; 5 years as to Count 13 to served consecutively to Counts 1 through 12, 14, 30, 31, 33 through 36 and 38; 20 years as to Count 14 to be seerved concurrently with Counts 30 and 31 and consecutively to Counts 1 through 13, 33 through 36 and 38; and 30 years as to Counts 30 and 31 to be served concurrently with Count 14 and consecutively to Counts 1 through 13, 33 through 36 and 38.

The defendant is remanded to the custody of the United States Marshal.

*The Court hereby recommends to the Bureau of Prisons that the defendant be designated to a facility in South Florida.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) Years. This term shall run concurrently as to all counts.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or a restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use,

distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

Financial Disclosure Requirement - The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

Health Care Business Restriction - The defendant shall not own, directly or indirectly, or be employed, directly or indirectly, an any health care business or service, which submits claims to any private or government insurance company, without the Court's approval.

No New Debt Restriction - The defendant shall not apply for, solicit or incur any further debt, included but not limited to loans, lines of credit or credit card charges, either as a principal or cosigner, as an individual or through any corporate entity, without first obtaining permission from the United States Probation Officer.

Self-Employment Restriction - The defendant shall obtain prior written approval from the Court before entering into any self-employment.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments sheet.

Total Assessment	Total Fine	Total Restitution
$2,100.00		$87,533,863.46

Restitution with Imprisonment-

It is further ordered that the defendant shall pay restitution in the amount $87,533,863.46. During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay $25.00 per quarter toward the financial obligations imposed in this order.

Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the court may alter tat payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the court any material change in the defendant's ability to pay. These payments do not preclude the government from using other assets or income of the defendant to satisfy the restitution obligations.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment unless specified otherwise in the priority order or percentage payment column below. However,

pursuant to 18 U.S.C. § 3664(I), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
CLERK OF COURTS Financial Section 400 N. Miami Avenue Room 8N09 Miami, Florida 33128	$Amount of Loss	$87,533,863.46	

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of $2,100.00 due immediately, balance due

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
301 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers, Total Amount, Joint and Several Amount, and corresponding payee.

Co-defendants in this case: Lawrence S. Duran; Margarita Acevedo; American Therapeutic Corporation; Medlink Professional Management Group, Inc., and the co-defendants in case no. 11-20100-CR-SEITZ

The defendant shall forfeit the defendant's interest in the following property to the United States:

See attached forfeiture order

The defendant's right, title and interest in the property identified in the preliminary order of forfeiture, which has been entered by the Court and is incorporated by reference herein, is hereby forfeited.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution (7) penalties, and (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 11-14429-BB ; 11-14507 -BB

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

LAWRENCE S. DURAN,
MARIANELLA VALERA

Defendants - Appellants.

Appeal from the United States District Court
for the Southern District of Florida

April 30, 2013

BEFORE: TJOFLAT, WILSON and PRYOR, Circuit Judges

PER CURIAM:

The petition(s) for panel rehearing filed by LAWRENCE S. DURAN and MARIANELLA VALERA is DENIED.

ENTERED FOR THE COURT

/S/
UNITED STATES CIRCUIT JUDGE

ORD-41