No. _____

In the

Supreme Court of the United States

ASHOT MINASYAN, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Ninth Circuit

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

Whether Minasyan's waiver of appeal is unenforceable for the following reasons: because it was not knowing, intelligent and voluntary, and because Minasyan's sentence violated the law; because the government breached the plea agreement and committed prosecutorial misconduct; and because Minasyan's guilty plea was not voluntary, knowing and intelligent for the reason that Minasyan was misinformed about the elements of the offense

Statement of Related Proceedings

- *United States v. Ashot Minasyan*,
  2:14-cr-329-ODW-3 (C.D. Cal. July 10, 2019)

- *United States v. Ashot Minasyan*,
  19-50185 (9th Cir. July 9, 2021)

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In the

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ASHOT MINASYAN, Petitioner

v.

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Petition for Writ of Certiorari

Petitioner Ashot Minasyan respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals of the Ninth Circuit in this case.

OPINION BELOW

The Ninth Circuit's July 9, 2021 Opinion affirming the judgment of the district court in *United States v. Ashot Minasyan*, Ninth Circuit Case No. 19-50185, is published at 4 F.4th 770 (9th Cir. 2021). (See Appendix A, "Opinion") No written opinions (other than a minute order) were issued by the district court when it issued the rulings which are the subject of this Petition.

JURISDICTION

The Ninth Circuit entered its judgment on July 9, 2021. The Ninth Circuit denied Minasyan's timely petition for rehearing on September 16, 2021. This petition is filed within 90 days of the Ninth Circuit's denial of Minasyan's petition for rehearing. (See Appendix B, "Order")

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The district court had jurisdiction pursuant to 18 U.S.C. §3231, and the Ninth Circuit had jurisdiction pursuant to 28 U.S.C. §1291 and 18 U.S.C. §3742.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

A. June 12, 2015 Second Superseding Indictment ("Indictment")

Count One of the indictment alleged that defendants Dr. Robert Glazer, Angela Avetisyan and Minasyan engaged in a conspiracy to commit healthcare fraud in violation of 18 U.S.C. §1349 from January 2006 to May 2014. According to the indictment, Glazer was a doctor who operated the Glazer Clinic. Avetisyan was the office manager of the Glazer Clinic. Avetisyan and Minasyan were co-owners of Fifth Avenue Home Health.

The indictment alleged that marketers brought Medicare beneficiaries to the Glazer Clinic so that Glazer could write prescriptions for, inter alia, home healthcare. Avetisyan and Minasyan paid the marketers kickbacks. In exchange for kickbacks, Glazer provided certifications to Avetisyan and

Minasyan to be used by Fifth Avenue to submit false claims for home healthcare services.

B. October 9, 2018 Guilty Plea

In Minasyan's plea agreement, he admitted that he and Avetisyan paid marketers kickbacks for Medicare beneficiaries brought to the Glazer Clinic and referred for home healthcare services.

Minasyan agreed in his plea agreement that he understood that in determining his sentence, the district court was required to calculate the applicable Sentencing Guidelines range and to consider that range and other sentencing factors. The parties agreed that the loss amount was more than $250,000 but less than $9,500,000. The parties therefore agreed that the intended loss amount under §2B1.1(b)(1) was between +12 and +18. The government agreed to recommend a low-end sentence.

The agreement provided for a limited waiver of appeal if the court imposed a sentence less than 78 months.

C. Sentencing

1. March 29, 2019 PSR and Sentencing Recommendation Letter

The PSR stated that from March 26, 2010, to May 9, 2014, Medicare paid $4,283,674.03 to Fifth Avenue for home healthcare services. The PSR claimed that "As there is no evidence that First Health [sic] provided any

legitimately necessary home health services, this amount is considered to be the loss suffered by Medicare …."

The PSR reported that when the search warrant was executed at Fifth Avenue on May 13, 2014, Minasyan was interviewed by case agents. Minasyan stated that he co-owned Fifth Avenue with Avetisyan. Fifth Avenue initiated licensing and certification in 2007 and started operation in March 2011. Minasyan learned about the operation of a home healthcare agency from Avetisyan, who was a customer at his grocery store. She told him about the opportunity to open a home healthcare agency and they decided to open one together.

Minasyan's role was to collect, organize, fax and transport forms to doctors and nurses. He gave out the leads for patient visits to the nurses when they dropped off notes and charts for patient visits. Avetisyan handled the admissions from the clinics. She was familiar with Medicare rules and regulations. She assembled the medical charts for the patients. They shared the responsibility for paying bills and payroll. The Medicare billing was handled by Emil Martisovyan. Irene Akopian was the director of nursing at Fifth Avenue. She was in the office nearly every day and handled some of the admissions and discharges of the patients. Fifth Avenue used a consultant named Sue Poolsawat/Pulsivat. She came into the office about twice a month and checked the medical charts. She dealt with some of the

claims and the appeals to Medicare. Dr. Ludvik Artinyan, the medical director, came into the business about once a week.

Fifth Avenue had its own nurses on staff. Minasyan provided names of 13 Fifth Avenue employees, including six licensed vocational nurses, three registered nurses, one physical therapist, one social worker, one associate clinical social worker, and a certified home health aide.

The PSR calculated a base offense level of 6 under §2B1.1(a)(2). The PSR used the total amount of Medicare payments to Fifth Avenue as the amount of loss, and imposed an 18-level increase under §2B1.1

Since the loss was over $1 million, the PSR assessed an additional two-level increase under §2B1.1(b)(7). The PSR imposed an additional two-level increase for abuse of trust under §3B1.3 because Fifth Avenue was a Medicare provider. The PSR deducted three levels for acceptance of responsibility.

Minasyan had two criminal history points, establishing criminal history category II. The criminal history points consisted of two tobacco-related offenses resulting from Minasyan's ownership of a grocery store, and had been dismissed under Penal Code §1203.4.

The PSR reported that under Minasyan's calculation in the plea agreement, his offense level would be 17 and his Sentencing Guidelines range would be 27-33 months.

However, the PSR calculated Minasyan's Guidelines range as 63-78 months, based upon offense level 25 and criminal history category II.

2. April 29, 2019 Government's Sentencing Memorandum

The government agreed with the calculations in the PSR and, consistent with the plea agreement, recommended a low-end sentence of 63 months.

With respect to the loss amount, the government contended that an 18-level increase for $4,283,674 of intended loss was appropriate, as the "total amount paid by Medicare during the conspiracy to defendant's own home health agency."

The government argued that in 2015, Medicare's contractor Safeguard Services ("SGS") performed a post-payment review of Fifth Avenue billings to Medicare. SGS selected a statistically valid random sample of 55 beneficiaries, representing 240 claims. SGS claimed that documentation did not support a reasonable and necessary need for home healthcare services. SGS found that "[a]ll 240 claims were denied 100%" because Fifth Avenue's own records failed to establish beneficiaries' eligibility for home healthcare services.

The government told the court that Minasyan wrongfully obtained money for himself that could have been used to provide valuable healthcare

benefits to the elderly and disabled, and that his scheme posed a clear danger to the viability of the Medicare program.

3. May 24, 2019 Avetisyan's Sentencing Position

Avetisyan told the court that Fifth Avenue had over 400 patients. At times the company had as many as 40-45 employees, part and full-time. The company spent at least $1 million in employee salaries over a 3-4 year period. Over half of the $4.2 million received from Medicare did not go to either of the co-owners. $2,522,119 was paid for rent, expenses, employees, taxes and everything needed to run a legitimate home healthcare business.

The evidence of the legitimacy of Fifth Avenue came from the patients themselves. The defense hired a private investigator who interviewed a number of patients. They were provided the services needed and were treated with the utmost respect and care. The patients stated that Avetisyan would personally call them on a regular basis to check up and see how they were doing.

The government relied upon an investigation by SGS, but SGS worked on a contract that incentivized SGS to find bases for reimbursement.

Also, Fifth Avenue was put on prepayment or eligibility determination review ("EDR"), meaning that all paperwork and documentation had to be approved before Fifth Avenue received payment. Thus Fifth Avenue was actually getting approval from Medicare that everything was in order before

they were paid. Despite the fact that Medicare preapproved payments to Fifth Avenue as legitimate, the government still contended that all claims were fraudulent.

The defense disagreed with the PSR's calculation of intended loss. The PSR had adopted the government's position that intended loss was the total amount paid by Medicare on the purported ground that there was no indication of any legitimately necessary healthcare services. However, there was a wealth of evidence, including some of the government's own evidence, indicating that a large number of the billings were for necessary healthcare services. The government's own chart showed that Fifth Avenue paid over $2.2 million toward providing home healthcare, including nurses, physical therapists, equipment and staff. The evidence of legitimate services was overwhelming. The government had the burden to show by clear and convincing evidence how much was from fraudulent activity as opposed to legitimate services. Avetisyan contended that at best the government could show between $150-250,000 of loss, which would warrant only a 10-point enhancement.

Avetisyan submitted letters from Fifth Avenue patients and their family members attesting to the excellent quality of Fifth Avenue services.

4. May 27, 2019 Minasyan's Sentencing Position

Minasyan objected to the PSR and the probation officer's letter. There was no evidence to support the assumption that all the claims submitted to Medicare were fraudulent. The government's own medical contractor SGS contradicted this assumption. Accordingly, the defense requested a low-end sentence of 27 months.

The defense submitted letters from Fifth Avenue patients and their family members praising Fifth Avenue services.

5. June 10, 2019 Avetisyan's Sentencing Hearing

After Avetisyan's counsel presented arguments that Fifth Avenue provided legitimate services and had actual cashed checks to support its legitimate expenses, the court responded:

> "I have never had a situation quite like this where someone says, 'I don't want to go to trial, I'm going to admit my guilt,' and then on the day of sentencing, forget what I said in my plea agreement, and says, 'I want you to consider all of these facts,' facts that I would literally have to start a new trial, which I'm not willing to do."

Avetisyan's counsel told the court that Fifth Avenue paid over $2 million for taxes, employees, business expenses, rent, insurance, nurses, and legitimate business expenses. The expenditures proved that Fifth Avenue was an organization that was genuinely providing healthcare and genuinely doing a good job with a lot of patients. They admitted they did pay kickbacks, but only for a small part of it.

The court reiterated that because she pled guilty, Avetisyan could not challenge the loss:

> "Because I have to tell you this is a first, and I think this is going to be the last time I will engage in something like this where someone makes an election to plead guilty, and then right before the sentencing essentially changes their mind and wants to go to trial but they want to do it in such a way that only they put on evidence and not evidence that would be presented at trial, you know, under oath, and subject to cross-examination, just argument actually."

Avetisyan's counsel stated that the defense was prepared to put on an evidentiary hearing where the government could cross-examine its witnesses.

The court sentenced Avetisyan to 120 months in custody.

6. June 10, 2019 Minasyan's Sentencing Hearing

Defense counsel argued that there was not clear and convincing evidence to show a loss of $4.2 million as to Minasyan. SGS was not neutral, and there was a giant leap of faith from the SGS sample to saying that everything at Fifth Avenue was fraudulent.

Given the lack of evidence under any standard to show the actual or intended loss, defense counsel would submit that the appropriate level would be twelve. Defense counsel requested a low-end sentence of 27 months.

The court stated that the court was having a tough time believing that Fifth Avenue had any legitimate claims, because a light box was on the premises during the execution of the search warrant. The court stated "that box was used to trace patient's signatures all over the place and on

everything."[1] Dr. Artinyan also left signed blank prescription pads at the location. The court was troubled by the fact that as of the execution of the search warrant, evidence of the fraudulent scheme was still there.

The prosecutor observed that the court had noted the light box that was found at Fifth Avenue, which was a hallmark of fraud.

Minasyan's counsel responded that had they had an evidentiary hearing, the defense was prepared to present expert testimony that SGS benefited when they alleged fraud. The defense did not dispute the factual basis in the plea agreement. What was in dispute in the plea agreement was the amount of loss. Minasyan did not know that everything submitted by Glazer was fraudulent. His contact with Glazer was minimal at best.

> "THE COURT: Okay. I don't know how far to take this because I remember -- I remember some time ago, your client was very distressed about this loss amount thing and he wanted to make sure that he was only going to be held accountable for a loss that he was responsible for….
>
> But, in any event, if the loss is something that has been hotly disputed from Day 1 and efforts to sit down with, you know, the prosecutors and try to reach some sort of an agreement, if that fails, and it would seem to me that pleading guilty is just exactly the wrong thing to do, that what you need to be able to do is put on a case or at least be able to cross-examine the government's case and contest this loss amount.

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[1] At Glazer's trial ten days earlier, the government's case agent had testified that she had carefully examined all the Fifth Avenue files for evidence of tracing. She repeatedly testified that she could find no evidence of tracing at Fifth Avenue.

But to plead guilty, you are pretty much admitting these allegations.

Now is a strange time to try to then contest it after you have admitted to all of this wrongdoing.

What I'm troubled about is that I know that your client was really, really, really distressed about this issue."

The court said: "Okay. I'm going to leave this alone before I get in trouble."

The court sentenced Minasyan to 78 months in prison.

7. July 9, 2021 Ninth Circuit Opinion

On July 9, 2021, the Ninth Circuit issued a published Opinion in *United States v. Minasyan*, 4 F.4th 770 (9th Cir. 2021), stating in pertinent part as follows:

> "Minasyan contends that his plea was involuntary because the district court did not give him a full and fair opportunity to contest the loss amount at his sentencing hearing…. First, we conclude that the district court permissibly denied Minasyan's motions, and therefore the denials do not support his voluntariness claim…. Second, while the district court's comments at sentencing—namely, that Minasyan should not have pleaded guilty if he wanted to contest the amount of loss—may have been casual or imprudent, the statements did not render his guilty plea involuntary." Id. at 778-79.

> "The district court gave Minasyan a fair opportunity to contest the government's loss calculation even if it was not the full evidentiary hearing that Minasyan wanted—but to which he was not entitled. We conclude that Minasyan's plea was not involuntary due to the district court's sentencing procedure and comments, nor did Minasyan's sentence, in the context of Minasyan's opportunities to be heard, violate his due process rights." Id. at 780.

"Minasyan contends that the appellate waiver is unenforceable because the government breached the plea agreement…. To support this claim of implicit breach, Minasyan asserts that the government included in its sentencing memorandum 'negative information already set forth in the PSR,' details related to the dismissed money laundering offense, and 'prejudicial details regarding offenses with which Minasyan was not involved.' He also contends that the government made self-serving and contradictory use of the 'light box' evidence at the sentencing hearing. At the hearing, the government agreed with the district court that the light box was a 'hallmark of fraud,' even though the government had presented a witness in Glazer's trial, ten days prior, who testified that the light box displayed no signs of tracing." Id. at 780-81.

"Minasyan contends that the government's statements still breached the plea agreement because they were impermissibly inconsistent with its position at trial—that Glazer knew about the fraud and his signatures had not been traced without his knowledge using the light box. We disagree. First, the government's statement was not necessarily inconsistent with its position at trial. At Minasyan's sentencing hearing, the government acknowledged only that a light box is a hallmark of fraud; it did not state that the light box in this case was used to trace Glazer's or anyone else's signature." Id. at 781-782.

"But even if the government's light box statement was inconsistent with its theory of the light box at Glazer's trial, any error would not be plain." Id. at 782.

"Minasyan next contends that his plea was involuntary because—in light of our recent decision in *United States v. Miller*, 953 F.3d 1095 (9th Cir. 2020)—the plea agreement improperly stated the elements of the offense. Specifically, the agreement stated that the requisite intent for Minasyan's offense was 'to deceive or cheat,' instead of 'to deceive and cheat.' In *Miller*, we held that the wire fraud statute requires 'not mere deception, but a scheme or artifice to defraud or obtain money or property, i.e., in every day parlance, to cheat someone out of something valuable.'" Id. at 780.

"[Minasyan] can make no argument that his scheme was 'mere deception' because it was a scheme 'to cheat someone'—in this case, Medicare—'out of' money, which is unquestionably 'something valuable.' See *Miller*, 953 F.3d at 1101. Accordingly, the improperly stated

elements in the plea agreement did not render Minasyan's plea involuntary." Id. at 780.

REASONS FOR GRANTING THE WRIT

A. Minasyan's Waiver Is Unenforceable Because it Was Not Knowing, Intelligent and Voluntary, and Because Minasyan's Sentence Violated the Law

To evaluate whether the waiver was knowing and voluntary, the court must determine what the defendant personally understood to be the terms of the agreement when he pleaded guilty. *United States v. Charles*, 581 F.3d 927, 931 (9th Cir. 2009).

Here, the plea agreement establishes that Minasyan reasonably understood that he would be sentenced under the Rules and Sentencing Guidelines, including a constitutionally valid hearing on the disputed amount of loss.

The Rules and the Sentencing Guidelines contemplate full adversary testing of the issues relevant to a Guidelines sentence and mandate that the parties be given an opportunity comment on matters relating to the appropriate sentence. *Burns v. United States*, 501 U.S. 129, 135 (1991); §6A1.3. The sentencing process must satisfy the requirements of the Due Process Clause. *Gardner v. Florida*, 430 U.S. 349, 358 (1977).

However, at the sentencing hearings in this case, the court repeatedly stated that defendants should not have pleaded guilty if they intended to challenge the amount of loss. The district court then assessed Minasyan with the entire amount of loss.

In refusing to entertain the defense evidence, and in taking the position that the defendants were not entitled to challenge the amount of loss at sentencing, the district court failed to comply with the Constitutional Due Process requirements. Both the Rules and the Sentencing Guidelines contemplate that the sentencing court must subject the defendant's sentence to the thorough adversarial testing contemplated by federal sentencing procedure. *Rita v. United States*, 551 U.S. 338, 351 (2007).

The Opinion stated that the court's comments at sentencing were "casual or imprudent, but did not render his guilty plea involuntary." The Opinion stated that Minasyan had a "fair opportunity to contest the government's loss calculation." But the Opinion erred, because the district court's repeated comments established that the district court believed that Minasyan had waived the right to contest loss when he pleading guilty. Minasyan contended that he was denied due process because the district court stated that if loss is disputed, "pleading guilty is just exactly the wrong thing to do"; instead, the defendant must go to trial to contest the loss amount. The district court further stated that by pleading guilty, the

defendants pretty much admitted the amount of loss. The district court's statements established that the district court did not give Minasyan a full and fair sentencing hearing because the district court erroneously believed that having pleaded guilty, the defendants were precluded from challenging the loss amount at sentencing.

B. The Government Breached The Plea Agreement and Committed Prosecutorial Misconduct

Where the government agrees to a sentence, any "attempt by the prosecutor to influence the court to give a higher sentence" is a breach. *United States v. Johnson*, 187 F.3d 1129, 1135 (9th Cir. 1999); see also *United States v. Morales Heredia*, 768 F.3d 1220, 1231 (9th Cir. 2014) (the government "may not superficially abide by its promise to recommend a particular sentence while also making statements that serve no practical purpose but to advocate for a harsher one"). In such situations, the government has "implicitly" breached the plea agreement. Id. That is what happened here.

The government's sentencing position, while stating that it recommended a low-end sentence, for 17 pages reiterated the negative information already set forth in the PSR, added details on a dismissed offense, and added prejudicial details regarding offenses with which Minasyan was not involved. The government also made the untrue and

inflammatory claims that Minasyan had deprived the elderly and disabled of Medicare benefits and had endangered the viability of the entire Medicare program.

At the sentencing hearing, while stating that it recommended a low-end sentence, the government continued to implicitly seek a higher sentence. Prior to Minasyan's sentencing, the probation officer had recommended a high-end sentence of 78 months for Minasyan, which was 14 months above the low-end sentence that the government had promised to recommend. And the district court had earlier that same day imposed a statutory maximum sentence of 120 months on Minasyan's codefendant (for whom the probation officer had recommended a 71-month sentence). At that point it was clear that Minasyan was on track to receive a sentence much higher than the low-end sentence that the government had agreed to recommend. Therefore, to meet its obligations under the plea agreement, the government could not continue to make untrue and inflammatory claims. But the government nonetheless continued to do just that.

The district court told defense counsel that the district court rejected the defense arguments that Fifth Avenue was legitimate, because of the existence of a "doggone light box" at Fifth Avenue. According to the district court, the light box was evidence of fraud because it was used to trace patients' signatures all over the place, and on everything.

Rather than correcting the court's error, the prosecutor expressed agreement, stating that as the court already noted, the light box was a hallmark of fraud. But the government knew that Fifth Avenue had not engaged in tracing because the government had presented its own case agent to testify ten days earlier in Glazer's trial that the case agent had scrutinized all Fifth Avenue files and documents for evidence of tracing and found none.

Thus, at the trial of codefendant Glazer on May 31, 2019, the government elicited testimony from FBI SA Janine Li that although she found a light box at Fifth Avenue, she found no obvious signs of tracing at Fifth Avenue. SA Li testified she looked at all of the patient files and all of the other documents at Fifth Avenue, and did not find any indicators of duplicate signatures. She testified that her opinion, based on her experience, was that there were no indicators of a signature being traced. She testified that she could identify tracing: in her experience, traced signatures are not fluid but stop and start. She found no evidence of that at Fifth Avenue. She reiterated that she found no indicators of traced signatures in her observation of the documents and review of the files at Fifth Avenue. SA Li further testified that there were different uses for a light box, including as a cheap version of an X-ray viewer.

Minasyan's Constitutional rights were thus additionally violated by prosecutorial misconduct, because the prosecutor endorsed the district court's

belief that the light box at Fifth Avenue was a hallmark of fraud. Just ten days earlier, at Glazer's trial, the government elicited evidence from its case agent that she had scrutinized Fifth Avenue files and there was no evidence of tracing at Fifth Avenue.[2]

Similarly, the probation officer recommended a high-end sentence and the court imposed a high-end sentence expressly in part on the claim that losses were much greater than the $4.2 million set forth in the plea agreement. The government knew that fact to be untrue; the government knew that the amount of loss the government advocated in the plea agreement comprised the entirety of the Fifth Avenue receipts from Medicare. And given that the government had committed to recommending

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2 It is a fundamental principle of the American criminal justice system that "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with [the] rudimentary demands of justice." *Giglio v. United States*, 405 U.S. 150, 153 (1972). "When the government obtains a criminal conviction and deprives an individual of his life or liberty on the basis of evidence that it knows to be false, it subverts its fundamental obligation, embodied in the Due Process Clauses of the Fifth and Fourteenth Amendments, to provide every criminal defendant with a fair and impartial trial." *Phillips v. Ornoski*, 673 F.3d 1168, 1181 (9th Cir. 2012).

The government has an obligation to be truthful. It is also a violation of the government's obligations to take contradictory, inconsistent and incompatible positions. The prosecutor's use of fundamentally inconsistent theories against different defendants constitutes a due process violation requiring reversal. *Thompson v. Calderon*, 120 F.3d 1045, 1053-54 (9th Cir. 1997) (en banc), rev'd on other grounds, 523 U.S. 538 (1998). See also In re Sakarias, 35 Cal. 4th 140, 156 (2005) (use of inconsistent and irreconcilable theories impermissibly undermines the reliability of the convictions or sentences thereby obtained).

a low-end sentence, the government had an obligation to correct that clearly erroneous assumption.

Accordingly, even knowing that the court was likely to impose a high-end or even above-Guidelines sentence, the prosecutor still advocated erroneous inflammatory assumptions, and failed to correct erroneous inflammatory assumptions that the government knew to be untrue. Consequently, the government breached the plea agreement and committed misconduct.

The Opinion stated that the government's statements at Minasyan's sentencing were not impermissibly inconsistent with its position at trial because the government only acknowledged that a light box is a hallmark of fraud. However, the Opinion misconstrued the statements made at sentencing. The district court rejected defense counsel's statement that Fifth Avenue had any legitimacy because of the light box. The court claimed that the light box was used to trace patients' signatures all over the place and on everything. The government then expressly validated the district court's baseless statements by commenting that "The Court also already noted the light box that was found there, Dr. Artinyan's blank signed prescription pad, these are all the hallmarks of fraud." The government knew that the comments were baseless because the government had earlier presented its

own case agent to testify at Dr. Glazer's trial that there was no evidence of tracing at Fifth Avenue.

C. Minasyan's Guilty Plea Was Not Voluntary, Knowing And Intelligent Because Minasyan Was Misinformed About the Elements Of the Offense

In Minasyan's guilty plea, he stated that he understood that to commit the crime of healthcare fraud, he must act with the "intent to deceive or cheat." However, the Ninth Circuit has since held that the elements of a fraud claim require that the "defendant must intend to deceive and cheat." *United States v. Miller*, 953 F.3d 1095, 1101 (9th Cir. 2020). Here, Minasyan admitted that he paid kickbacks, which was deceptive. But he did not believe that he cheated Medicare, because he maintained that Fifth Avenue provided necessary and appropriate services to its patients. The fact that Minasyan was misinformed about the elements of the offense requires reversal. See *Bousley v. United States*, 523 U.S. 614 (1998) (plea invalid when defendant unaware his conduct failed to satisfy element of offense).

The Opinion acknowledged that the plea agreement improperly stated the elements of the offense. But the Opinion rejected Minasyan's argument that his guilty plea was not voluntary, knowing and intelligent on the ground that Minasyan "can make no argument that his scheme was 'mere deception' because it was a scheme 'to cheat someone'—in this case, Medicare—'out of' money, which is unquestionably 'something valuable.'"

However, the Opinion erred because Minasyan established that he acknowledged deception but denied cheating. Although kickbacks were deceptive, Minasyan did not believe that he cheated Medicare out of money, because he maintained that Fifth Avenue provided necessary and appropriate services to its patients.

CONCLUSION

For all the foregoing reasons, Petitioner Ashot Minasyan submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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DATED: December 13, 2021

By: _____
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