

No. 21-762

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**In the Supreme Court of the United States**

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LENA LASHER, PETITIONER

*v.*

UNITED STATES OF AMERICA

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

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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**QUESTION PRESENTED**

Whether the court of appeals properly dismissed, for lack of jurisdiction, petitioner's appeal of the district court's order denying a certificate of appealability.

**ADDITIONAL RELATED PROCEEDINGS**

United States District Court (S.D.N.Y.):

*United States v. Lasher*, No. 12-cr-868 (Sept. 10, 2015)

*Lasher v. United States*, No. 17-cv-5925 (Aug. 20, 2018)

United States Court of Appeals (2d Cir.):

*United States v. Lasher*, No. 15-2915 (Sept. 2, 2016)

*Lasher v. United States*, No. 18-2693 (Jan. 15, 2020)

*Lasher v. United States*, No. 19-1343 (Jan. 15, 2020)

*Lasher v. United States*, No. 19-3914 (Jan. 15, 2020)

*Lasher v. United States*, No. 20-221 (Aug. 11, 2020)

United States Supreme Court:

*Lasher v. United States*, No. 16-9127 (June 12, 2017)

*Lasher v. United States*, No. 20-7831 (May 24, 2021)

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## **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. A) is reported at 970 F.3d 129. The order of the district court (Pet. App. Ex. A) is not reported.

## **JURISDICTION**

The judgment of the court of appeals was entered on August 11, 2020. A petition for rehearing was denied on October 29, 2020 (Pet. App. B). The petition for a writ of certiorari was filed on December 28, 2020, and docketed on November 22, 2021. See Pet. App. C1. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## **STATEMENT**

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of conspiring to introduce

misbranded prescription drugs into interstate commerce and to misbrand prescription drugs while held for sale, with intent to defraud or mislead, in violation of 18 U.S.C. 371; one count of introducing misbranded prescription drugs into interstate commerce with intent to defraud or mislead, in violation of 21 U.S.C. 331(a) and 333(a)(2); one count of conspiring to commit mail and wire fraud, in violation of 18 U.S.C. 1349; one count of mail fraud, in violation of 18 U.S.C. 1341; and one count of wire fraud, in violation of 18 U.S.C. 1343. Judgment 1-2. The district court sentenced petitioner to 36 months of imprisonment, to be followed by two years of supervised release. Judgment 3-4. The court of appeals affirmed, 661 Fed. Appx. 25, and this Court denied a writ of certiorari, 137 S. Ct. 2254 (No. 16-9127), petition for reh'g denied, 138 S. Ct. 39.

Petitioner later filed a motion under 28 U.S.C. 2255 to vacate, set aside, or correct her sentence. 17-cv-5925 D. Ct. Doc. 2 (Aug. 4, 2017). The district court denied the motion. 17-cv-5925 D. Ct. Doc. 9, at 30 (Aug. 20, 2018). Petitioner thereafter filed multiple motions requesting evidence, an evidentiary hearing, a new trial, and the alteration of the judgment, which the district court denied. See 17-cv-5925 D. Ct. Doc. 12 (Apr. 8, 2019); 17-cv-5925 D. Ct. Doc. 15 (Oct. 22, 2019). The court denied a certificate of appealability (COA) in connection with those orders. Pet. App. Ex. A. Petitioner appealed the denial of a COA, and the court of appeals dismissed that appeal for lack of jurisdiction. *Id.* at A.

1. From 2008 through 2012, petitioner, a licensed pharmacist, engaged in a scheme to dispense prescription drugs online, in which she filled prescriptions issued over the internet by doctors who had never met or consulted with their supposed patients. Presentence

Investigation Report (PSR) ¶¶ 23, 27, 33-35. Petitioner also directed employees to reuse and re-dispense pills that had been returned by customers or delivery services without informing the new customers, and directed employees to store pills without required information, including the lot number and expiration date. PSR ¶ 24. And petitioner sought to cover up her crimes by making false representations to multiple state boards of pharmacy, instructing her employees to use code when talking about the internet-pharmacy scheme, and directing an employee to draft and sign a letter to regulators containing false information. PSR ¶ 52.

A grand jury in the Southern District of New York returned a superseding indictment charging petitioner with one count of conspiring to introduce misbranded prescription drugs into interstate commerce and to misbrand prescription drugs while held for sale with intent to defraud or mislead, in violation of 18 U.S.C. 371; one count of introducing misbranded prescription drugs into interstate commerce, with intent to defraud or mislead, in violation of 21 U.S.C. 331(a) and 333(a)(2); one count of conspiring to commit mail and wire fraud, in violation of 18 U.S.C. 1349; one count of mail fraud, in violation of 18 U.S.C. 1341; one count of wire fraud, in violation of 18 U.S.C. 1343; and one count of witness tampering, in violation of 18 U.S.C. 1512(b)(1) and (i). Superseding Indictment 1-10. The jury found petitioner guilty on all counts except for the witness-tampering count. Judgment 1-2. The district court sentenced petitioner to 36 months of imprisonment, to be followed by two years of supervised release. Judgment 3-4. The court of appeals affirmed, 661 Fed. Appx. 25, and this Court declined to review that decision, 137 S. Ct.



2254 (No. 16-9127), petition for reh'g denied, 138 S. Ct. 39.

2. a. Petitioner subsequently filed a motion to vacate, set aside, or correct her sentence under 28 U.S.C. 2255. 17-cv-5925 D. Ct. Doc. 2. Petitioner asserted (*inter alia*) that her conviction was based on insufficient evidence; that the government had violated its disclosure obligations under *Brady v. Maryland*, 373 U.S. 83 (1963); that her counsel was constitutionally ineffective; and that her forfeiture order should be vacated or stayed pursuant to this Court's decision in *Honeycutt v. United States*, 137 S. Ct. 1626 (2017). See 17-cv-5925 D. Ct. Doc. 2, at 3; 12-cr-868 D. Ct. Doc. 354 (Aug. 28, 2017); 12-cr-868 D. Ct. Doc. 402 (Aug. 3, 2018).

The district court denied petitioner's Section 2255 motion. 17-cv-5925 D. Ct. Doc. 9. The court explained that the evidence was sufficient to support petitioner's conviction and that, in any event, petitioner's insufficient-evidence argument was foreclosed because it had already been rejected on direct appeal. *Id.* at 9-12. The court also determined that the government did not violate *Brady* because the evidence that petitioner asserted had not been turned over was not material. *Id.* at 12-13. The court also rejected petitioner's claim of ineffective assistance of counsel, observing that "counsel's representation never fell below an objective standard of reasonableness," and that "given the overwhelming evidence of [petitioner's] guilt presented at trial, the challenged actions by her counsel, even if unreasonable (which they were not), would not have detracted from the ample evidence supporting guilt." *Id.* at 15. Finally, the court explained that petitioner could not challenge her forfeiture order under *Honeycutt* because motions

under Section 2255 may not be used to challenge non-custodial punishments. *Id.* at 26-27.

The district court also denied a COA, finding that petitioner had failed to make a substantial showing of the denial of a constitutional right. 17-cv-5925 D. Ct. Doc. 9, at 30; see 28 U.S.C. 2253(c). Notwithstanding the denial of a COA, petitioner filed a notice of appeal from the denial of her Section 2255 petition. 17-cv-5925 D. Ct. Doc. 10 (Sept. 11, 2018).

b. After the district court had denied petitioner's Section 2255 motion, petitioner filed several additional motions, which requested an evidentiary hearing, sought documents from the government, sought a new trial, and asked the district court to alter or amend the judgment. 12-cr-868 D. Ct. Docs. 408, 409 (Aug. 31, 2018); 12-cr-868 D. Ct. Doc. 410 (Sept. 5, 2018); 12-cr-868 D. Ct. Doc. 411 (Sept. 17, 2018). The court denied those motions in a single order. 17-cv-5925 D. Ct. Doc. 12. Petitioner filed a notice of appeal from that order. 17-cv-5925 D. Ct. Doc. 13 (May 3, 2019).

Petitioner thereafter filed another motion seeking an evidentiary hearing. 12-cr-868 D. Ct. Doc. 475 (Aug. 29, 2019). The district court denied that motion as well. 17-cv-5925 D. Ct. Doc. 15. Petitioner then filed an additional notice of appeal from the order denying that latest motion. 17-cv-5925 D. Ct. Doc. 16 (Nov. 18, 2019).

In each of petitioner's three appeals, petitioner moved in the court of appeals for a COA. 18-2693 C.A. Mot. (Oct. 11, 2018); 19-1343 C.A. Mot. (Oct. 30, 2019); 19-3914 C.A. Mot. (Jan. 7, 2020). The court of appeals consolidated petitioner's earlier appeal of the denial of her Section 2255 motion with her two appeals of the orders denying her subsequent motions; denied

petitioner's requests for COAs; and dismissed her appeals. 2020 WL 1170713, at \*1.

c. Petitioner filed a petition for writ of certiorari in this Court. *Lasher v. United States*, No. 20-7831 (filed Sept. 12, 2020). This Court denied petitioner leave to proceed in forma pauperis and dismissed the petition for a writ of certiorari. 141 S. Ct. 2692, 2692-2693; see Sup. Ct. R. 39.8. Because "petitioner has repeatedly abused this Court's process," the Court directed the Clerk "not to accept any further petition in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and [the] petition [is] submitted in compliance with Rule 33.1." 141 S. Ct. at 2693 (citing *Martin v. District of Columbia Court of Appeals*, 506 U.S. 1 (1992) (per curiam)).

3. While those appellate proceedings were ongoing, the district court issued its own order denying a COA for the two orders that it had entered denying the motions that petitioner had filed following the court's denial of Section 2255 relief. Pet. App. Ex. A. Petitioner filed another notice of appeal from that order. 17-cv-5925 D. Ct. Doc. 18 (Jan. 13, 2020).

The court of appeals dismissed that appeal for lack of jurisdiction. See Pet. App. A. The court explained that it lacked jurisdiction over petitioner's appeal because the district court's order denying a COA is not an appealable final order under 28 U.S.C. 2253. Pet. App. A4. The court of appeals observed that under Section 2253, an order is final when it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment," *id.* at A5 (quoting *Bridgeport Guardians, Inc. v. Delmonte*, 537 F.3d 214, 221 (2d Cir. 2008)), and that an order denying a COA does not end the litigation on the merits, *id.* at A5-A6. The court's

jurisdictional dismissal did not address the merits of petitioner's underlying claims. *Id.* at A7-A8.

#### ARGUMENT

Although the court of appeals dismissed petitioner's appeal for lack of jurisdiction, petitioner does not address the court of appeals' jurisdiction in her petition for a writ of certiorari. Instead, petitioner addresses her arguments (Pet. 13-28) only to the validity of her underlying convictions. The court of appeals properly did not reach the merits of those arguments, however, because it determined that it lacked jurisdiction over the appeal. Further review is therefore not warranted.

The court of appeals correctly determined, in accord with other circuits that have directly addressed the question, that it lacked jurisdiction over petitioner's appeal because an order denying a COA is not a final order under Section 2253. Pet. App. A4-A7; see, *e.g.*, *United States v. Futch*, 518 F.3d 887, 891 (11th Cir.), cert. denied, 555 U.S. 943 (2008); *Sims v. United States*, 244 F.3d 509, 509 (6th Cir. 2001). Instead of reviewing the denial of a COA in an appellate posture, a court of appeals (or a judge thereof) has authority of its own to issue a COA on the same standard applied by the district court. See 28 U.S.C. 2253(c)(1)(B). Petitioner sought and requested COAs from the court of appeals as to all of the relevant district-court orders, and the court of appeals declined to issue a COA. 2020 WL 1170713, at \*1. A Section 2255 movant is not authorized to reraise the same question through an appeal of the district court's COA denial, and even if she could, the court of appeals could—and presumably would—arrive at the same answer.

Petitioner does not meaningfully engage with that jurisdictional barrier to her appeals. Although she

makes a single passing assertion in the “Facts” section of her brief, Pet. 8 (capitalization and emphasis omitted), that “the Second Circuit Court was incorrect” about the appealability of an order denying a COA, Pet. 11, petitioner does not provide any argument that a district court’s order denying a COA is an appealable final order under Section 2253 or that any other statutory provision provides the courts of appeals with jurisdiction to hear an appeal from an order denying a COA. Any such argument is therefore forfeited. See Sup. Ct. R. 14.2 (requiring that all contentions in support of granting a petition for a writ of certiorari be set forth as provided in Sup. Ct. R. 14.1(h), requiring a “direct and concise argument amplifying the reasons relied on for allowance of the writ”).

The questions presented as framed in the petition address only the merits of petitioner’s convictions, see Pet. i,\* not the court of appeals’ jurisdictional holding. Under Rule 14.1(a) of the Rules of this Court, however, “only the questions set forth in the petition, or fairly included therein, will be considered by the Court.” *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (brackets omitted). Because petitioner does not ask this Court to review the single, jurisdictional issue on which the court of appeals’ decision rested, and because petitioner has forfeited any argument that the court resolved that issue incorrectly, plenary review in this Court is not warranted. Nor, even if the issue had been preserved, would review be warranted based on any outlier understanding of the predecessor to Section 2253 by the Fifth

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\* The pages of the petition for a writ of certiorari preceding the Opinions Below section are not paginated. This brief refers to those pages as if they were consecutively paginated with the first page following the cover page as page i.

Circuit in a 38-year-old case in which the potentially relevant view was not outcome-determinative. See Pet. App. A4 & n.1, A6-A7; *Flores v. Procunier*, 745 F.2d 338, 339 (1984), cert. denied, 470 U.S. 1086 (1985).

Finally, it would be unwarranted to hold the petition pending the disposition of *Ruan v. United States*, No. 20-1410 (oral argument scheduled for Mar. 1, 2022) and *Kahn v. United States*, No. 21-5261 (oral argument scheduled for Mar. 1, 2022), because the court below did not reach the merits of any issue presented in those cases.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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