

No. _____

In the
Supreme Court of the United States

APRIL CASTRO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Where a person is convicted of fraud offenses arising from conduct consisting of two similar, yet distinct types of fraudulent activities that resulted in substantially different loss amounts, is it unreasonable for a court to ignore available information showing that the different activities resulted in dissimilar typical loss amounts and use a single figure, calculated by combining the losses caused by both types of activities, when estimating the amount of intended loss for calculating enhancements under Section 2B1.1(b) of the United States Sentencing Guidelines?

PARTIES TO THE PROCEEDING

Petitioner is April Castro, who was the Defendant-Appellant in a court of appeals below. Respondent, the United States of America, was the Plaintiff-Appellee in a court of appeals below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner April Castro seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is *United States v. Castro*, 788 F. App'x 272 (5th Cir. 2019).

The court of appeals also denied petition for rehearing in *United States v. Castro*, No. 19-10292 (5th Cir. Jan. 15, 2020) (order denying petition for rehearing).

The district court did not issue a written opinion.

JURISDICTION

The opinion and judgment of the Fifth Circuit were entered on December 16, 2019. Ms. Castro filed a timely petition for rehearing, which the Fifth Circuit denied on January 15, 2020. On March 19, 2020, the Court extended the 90-day deadline to file a petition for certiorari to 150 days.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PROVISIONS OF THE UNITED STATES SENTENCING GUIDELINES

This Petition concerns Section 2B1.1 of the United States Sentencing Guidelines, which states in part:

2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offense Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States.

...

(b) Specific Offense Characteristics

(1) If the loss exceeded \$6,500, increase the offense level as follows:

...

Loss (Apply the Greatest)	Increase in Level
---------------------------	-------------------

...

(F) More than \$150,000	add
(G) More than \$250,000	add 12
(H) More than \$550,000	add 14
(I) More than \$1,500,000	add 16

Additionally, the commentary to Section 2B1.1 contains application notes that state, in part:

3. Loss Under Subsection (b)(1).—This application note applies to the determination of loss under subsection (b)(1).

(A) General Rule.—Subject to the exclusions of subdivision (D), loss is the greater of actual or intended loss.

(i) Actual Loss.—“Actual loss” means the reasonably foreseeable pecuniary harm that resulted from the offense.

(ii) Intended Loss.—“Intended loss” (I) means the pecuniary harm that the defendant purposely sought to inflict; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

...
(B) 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).

The estimate of that loss shall be based on available information, taking into account, as appropriate and practicable under the circumstances, factors such as the following:

...
(iv) The approximate number of victims multiplied by the average loss to each victim.
...
(vi) More general factors, such as the scope and duration of the offense and revenues generated by similar operations.

LIST OF PROCEEDINGS BELOW

1. *United States v. April Castro*, 5:18-CR-00064-C(01), United States District Court for the Northern District of Texas. Judgment and sentence entered on March 1, 2019. (Appendix C).
2. *United States v. April Castro*, 788 F. App'x 272 (5th Cir. 2019), CA No. 19-10292, Court of Appeals for the Fifth Circuit. Judgment affirmed on December 16, 2019. (Appendix A). Order denying Petition for Rehearing entered on January 15, 2020. (Appendix B).

STATEMENT OF THE CASE

Castro was charged in a three count indictment with Uttering and Possessing Forged and Counterfeit Substances of an Organization, in violation of 18 U.S.C. § 513(a) (Counts One and Two) and Possession of Stolen Mail, in violation of 18 U.S.C. § 1708 (Count Three). Pursuant to a plea agreement, Castro pled guilty to Counts One and Three.

Castro's PSR showed that she had negotiated a total of 25 checks, causing total actual losses of \$26,047.65, as represented by the following chart:

<u>Victim</u>	<u>Type</u>	<u>Amount</u>
Doris Rives	Debit	\$80
Brian West	Check	\$5,575.65
Texas Body and Frame	Check	\$7,319.82
Texas Body and Frame	Check	\$7,002.19
Texas Body and Frame	Check	\$273.30
Sharkey Custom Homes	Check	\$500
Sharkey Custom Homes	Check	\$700
Linda Deuvall	Debit	\$166.72
Rebecca Leal	Check	\$1,600
Cell Energy	Check	\$27
Cell Energy	Check	\$50.63
Cell Energy	Check	\$33.40
Cell Energy	Check	\$240
Jessica Rocha	Check	\$51.14
Collision King	Check	\$262.56
Jessica Rocha	Check	\$137.54
Cell Energy	Check	\$38.65
Cell Energy	Check	\$66.25
Jessica Rocha	Check	\$66.95
Jessica Rocha	Check	\$1,053.94
Jessica Rocha	Check	\$84.03
Jessica Rocha	Check	\$141.96
Salon Magic	Check	\$48.32
Salon Magic	Check	\$36.96
1st National Bank of Texas	Check	\$490.64
Total		\$26,047.65

The PSR calculated the average loss for these 25 checks to be approximately \$1,075, and it used that average to estimate Castro's intended loss to be \$605,832.69. Of that total intended loss figure, \$514,928 was ascribed to 479 stolen blank checks seized from Castro, each ascribed an estimated intended loss of \$1,075.

In written objections to the PSR, Castro argued that the PSR improperly estimated the intended loss amounts by treating all the

“negotiated checks” alike. Castro argued that the three largest checks she had negotiated—a check for \$5,575.65 to Brian West, a check for \$7,319.82 written on the account of Texas Body and Frame, and a check for \$7[,]002.19, also written on the account of Texas Body and Frame”—were already inscribed with amounts and signatures before she changed only the payees’ names. Castro showed that, without these three pre-prepared checks, the average loss caused per blank check on which Castro forged the amounts was less than \$300.

Castro argued her fraud “consisted of at least two distinct types of offense[s].” First, “[s]he negotiated stolen checks that already had an amount written upon them.” Second, “she negotiated blank checks, where she or her confederates wrote in the amount.”

Castro argued that the PSR’s application of the \$1,075 average to the seized blank checks resulted in an unreasonable inflation of the estimated loss figure because its “average” of \$1,075 treated the two types of transactions in the same manner. Castro contended that the stolen blank checks had been negotiated for small amounts because cashing them in this way was likely to be completed “without heightened scrutiny.” Instead, Castro argued that an average amount of \$300 should

be applied to the seized blank checks, as this was just slightly greater than the average amount of the blank checks onto which Castro inscribed amounts before negotiation. Castro wrote:

[I]n determining the intended loss for the blank checks, the Court should look to the average amount that was actually negotiated with blank checks. In other words, if you want to estimate how much CASTRO would have written onto the blanks, you should look to how much she previously wrote on other blanks.

If the court were to have used Castro's suggested \$300 figure to estimate intended losses for the blank checks, she would have been held accountable for \$143,700 of intended losses on the blank checks and a total intended loss of \$234,624.69. She would have been subject to a 10-level enhancement for a loss amount over \$150,000.00, rather than the 14-level enhancement for a loss amount over \$550,000.00. Thus, with total offense level of 19 and her criminal history category of I, her guideline range would have been 30 to 37 months, rather than 46 to 57 months.

In the PSR addendum, Probation did not dispute Castro's assertion that she did not change any amounts on the three disputed checks. In fact, the Probation office confirmed Castro's key assertion, "defendant did

not forge a check in a large amount as pointed out.” Nonetheless, the addendum stood by the calculations from the original PSR.

Castro reiterated her objection at sentencing. The government did not dispute Castro’s assertions but merely responded by stating that, “the addendum to the presentence report adequately addresses the defendant’s objections.”

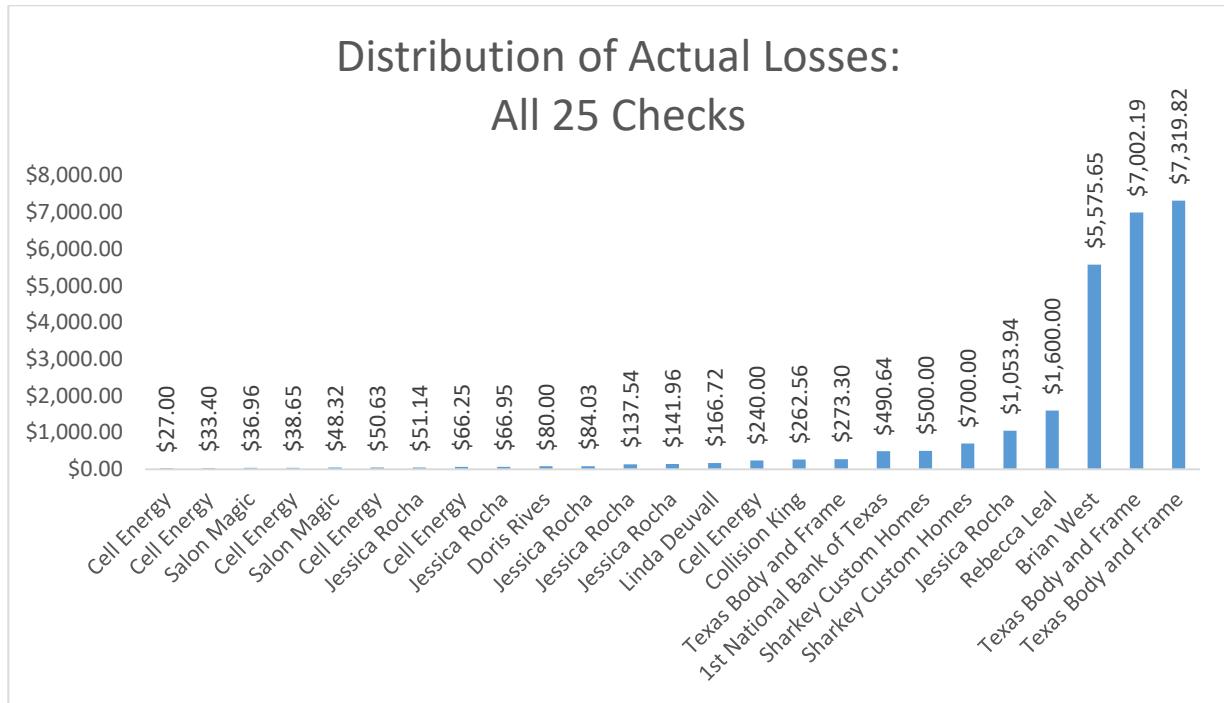
Instead, the district court overruled Castro’s objection and applied the PSR’s suggested average of \$1,075 to each of the recovered blank checks and sentencing her to a sentence of 57 months, which was within the guideline range calculated using the objected-to calculations.

Castro appealed, arguing in part:

The district court’s application of the average derived from all 25 transactions ignored the significant differences between stolen, pre-prepared checks and the forged blank checks. Moreover, this average figure ignored the mathematical reality that the three stolen, pre-prepared checks constituted statistical outliers that skewed the set’s average in such a way that it was an unrealistic representation of Castro’s typical blank-check transaction.

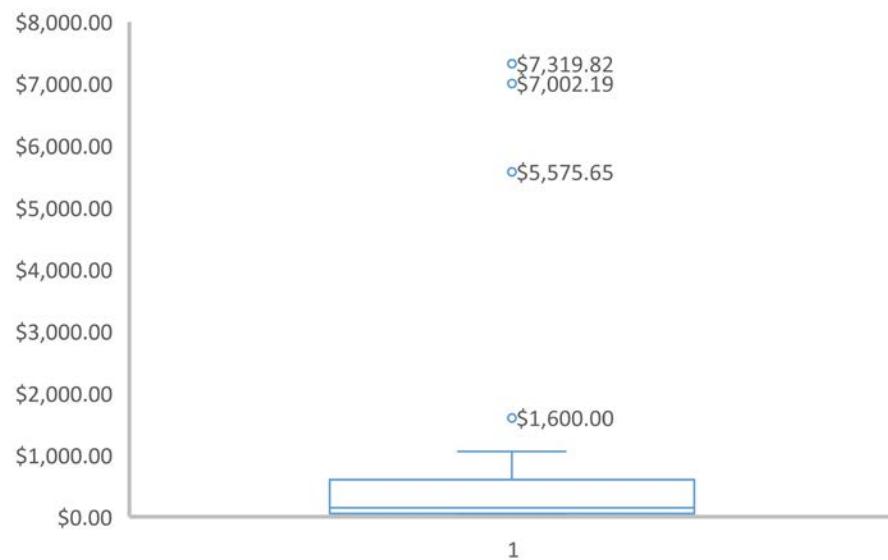
Castro showed several charts and graphs to demonstrate how skewed the three largest checks—which happened to correspond to the only the three checks she had stolen with amounts already inscribed on them—stood as statistical outliers from the set of data from all 25

negotiated check amounts. For illustration, Castro provided the appeals court the following graph showing the amounts of all 25 checks, in increasing order of value:

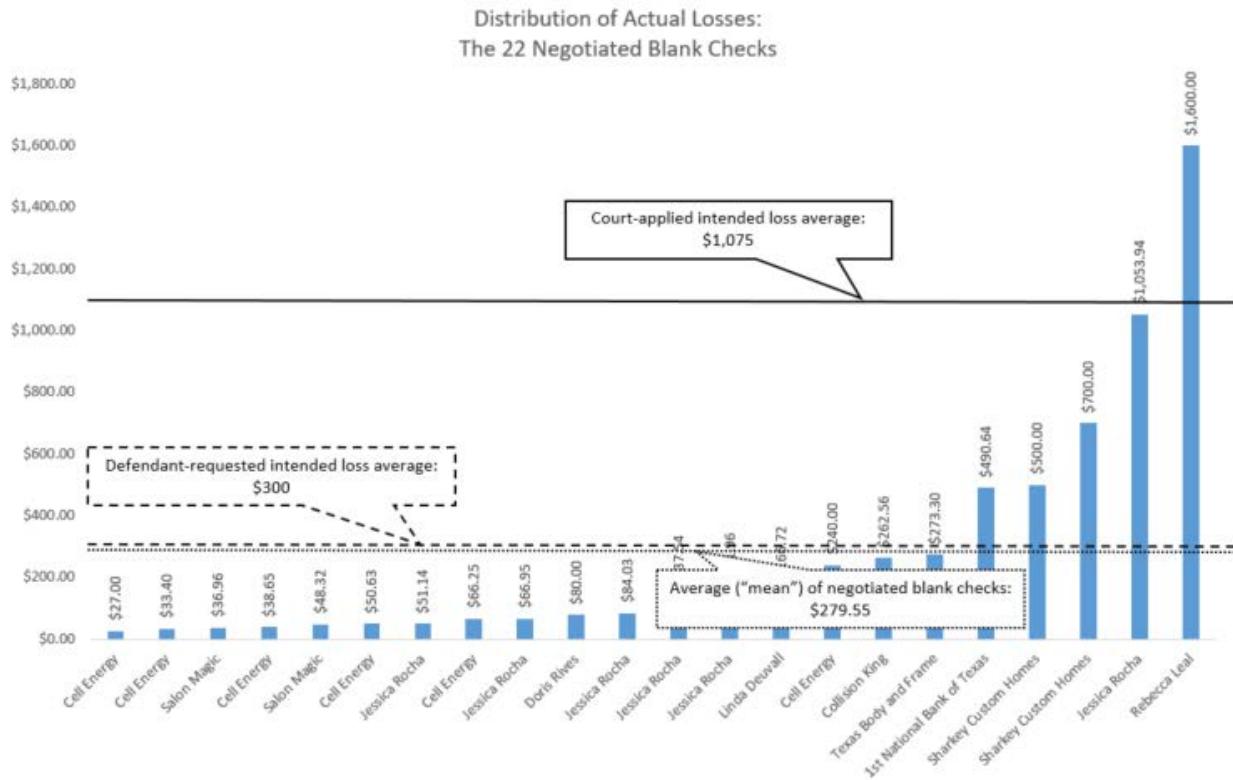


Similarly, Castro provided and explained for the Fifth Circuit court the following box-and-whisker plot showing four data points (including the three that were not stolen blank checks) to be statistical outliers from the entire set:

BOX-AND-WHISKER PLOT ALL 25 CASHED CHECKS



Additionally, Castro argued that the district court's application of the \$1,075 figure had an unreasonable inflationary effect when applied to the blank checks. For demonstrative purposes, Castro showed the appellate court the following graph:



Castro used this graph to argue that the district court's applied figure of \$1,075—which was larger than all but one of the blank checks that Castro wrote and negotiated—was not a reasonable estimate of the loss intended by this type of fraudulent activity.

In her reply argument, Castro added, “The district court’s method of estimating loss ignored available information regarding the differences between Castro’s two distinct types of forged check-cashing schemes.”

The Fifth Circuit, however, affirmed the district court’s decision in a two-paragraph, unpublished opinion. Stating that the Fifth Circuit had

“previously approved the use of averages in estimating intended loss,” the court concluded “Castro has not shown that the district court erred in the methodology used to calculate the intended loss.” *United States v. Castro*, 788 F. App’x 272, 272–73 (5th Cir. 2019) (citations omitted).

Castro petitioned for rehearing, arguing:

The panel opinion does not address whether the district court’s method of calculating loss failed to consider an essential aspect of the available information—that Castro’s fraudulent check cashing activities involved two types of transactions that resulted in two very different average losses. In its attention to the district court’s use of an average, the panel may have thus overlooked the district court’s failure to consider “available information”

The Fifth Circuit denied Castro’s petition for rehearing without comment. *United States v. Castro*, No. 19-10292 (5th Cir. Jan. 15, 2020) (order denying petition for rehearing).

REASONS FOR GRANTING THIS PETITION

- I. **There is a split of authority between the Fifth and Ninth Circuit Courts of Appeals over the question of whether a district court may treat two similar but distinct types of fraudulent schemes—each of which result in different characteristic loss amounts—the same when calculating intended losses under § 2B1.1 of the United States Sentencing Guidelines.**

The United States Sentencing Guidelines “do not present a single universal method for loss calculation under § 2B1.1—nor could they, given the fact intensive and individualized nature of the inquiry.” *United States v. Zolp*, 479 F.3d 715, 718 (9th Cir. 2007). In determining an intended loss, the guidelines do not require a court to “make its loss calculation with absolute precision.” *Id.* at 719. Although among the factors the court should take into consideration when calculating intended losses is “the approximate number of victims multiplied by the average loss to each victim,” the guidelines nonetheless require that a court “make a reasonable estimate of the loss” based on “available information.” U.S. Sentencing Guidelines Manual § 2B1.1 cmt. n. 3(C), and (3)(C)(iv).

This case reveals a split of authority between the Fifth and Ninth Circuits regarding how courts may determine intended losses arising from two distinct, although similar, fraudulent schemes. According to the

approach taken by the district court and affirmed by the Fifth Circuit, a district court may calculate intended losses without giving consideration to the available evidence regarding the different types of harm caused by two similar but different schemes to defraud. The Ninth Circuit, however, has required a district court to distinguish between similar schemes before appropriating loss calculations from one type onto the other.

Here, district court and the Fifth Circuit applied a single loss figure—derived from an average indiscriminately derived from all 25 fraudulently negotiated checks—to determine intended losses for the hundreds of recovered blank checks. The district court did so over Castro’s objection, and the Fifth Circuit affirmed the district court’s decision because it had “previously approved the use of averages in estimating intended loss.” *United States v. Castro*, 788 F. App’x 272, 273 (5th Cir. 2019) (citing *United States v. Chappell*, 6 F.3d 1095, 1101 (5th Cir. 1993)).

This analysis, however, fell far short of the guideline commentary’s mandate for intended loss calculations to be made after consideration of available information. These courts focused exclusively on the fact that

probation had not erred by using an average figure. In doing so, the courts ignored available evidence showing that the calculated average loss, which was used to apply to hundreds of blank checks, constituted a figure more than three times the loss typically resulting from Castro's prior fraudulent actions involving blank checks.

This application of the overall, indiscriminate average created an unreasonable estimate of the losses intended for the stolen blank checks. With the court's average of \$1,075, the amount of intended loss for the blank checks amounted to \$514,928; the court's applied estimate resulted in total losses of \$605,832.69, which resulted in a 14-point enhancement to Castro's guideline calculations and a guideline imprisonment range of 46 to 57 months.

Had the court considered the information presented regarding the different types of transactions, it should have applied Castro's suggested intended loss amount of \$300. In such a scenario, the intended losses attributed to the blank checks would have been \$143,700; her total loss amount of \$234,624.69 would have resulted in a 10-point enhancement and a guideline imprisonment range of 30 to 37 months.

The Fifth Circuit’s approach, which bluntly commingled the losses that resulted from both types of Castro’s fraudulent check negotiation activities, stands in contrast to the nuanced approach taken by the Ninth Circuit in *United States v. Zolp*, 479 F.3d 715 (9th Cir. 2007), where the Ninth Circuit required different methods for calculating the intended losses arising from similar but different fraudulent activities involving stocks: “pump-and-dump” schemes and those involving “sham” companies. *Id.* at 719.

Mr. Zolp was convicted of federal securities fraud arising from his participation in a pump-and-dump scheme. *Id.* at 716–17. In a pump-and-dump scheme, fraudsters tout a company’s stock “through false and misleading statements to the marketplace,” then make huge profits by selling their own cheap stock into the market. *Id.* at 717 n. 1.

At sentencing, the district court faced competing theories of how the § 2B1.1 enhancement for intended losses should be calculated for this type of scheme. *Id.* at 718–20. The government proposed that the court use the same type of calculation it would use in a scheme involving a sham company, where the court would take the average price of stock during the scheme and compare that to an ending value of \$0 after the

pump-and-dump scheme became public. *Id.* at 720. The defendants, however, argued for a lesser figure by pointing out that the shares still had some value even after the fraud. *Id.* The district court adopted the government's approach and assumed that the stocks were worthless after the fraud was revealed. *Id.*

The Ninth Circuit, however, held that the district court erred by wrongly calculating the post-fraud value of the manipulated stocks to be zero. *Id.* at 720–21. Contrasting frauds involving sham companies, which have no underlying equity, with the types of stocks involved in pump-and-dump schemes, the Ninth Circuit held that the district court improperly treated the manipulated stocks as if they were for worthless sham companies, rather than as having some retained, post-fraud value. *Id.* Because the district court's mischaracterization of the underlying transactions resulted in an inflated financial loss figure, the Ninth Circuit reversed and remanded for resentencing. *Id.* at 721–22.

The approach of the Fifth Circuit requires no such nuance.

Certainly, this Court has previously said that it disfavors the resolution of Guideline issues in its *certiorari* docket, especially in light of the Commission's power to resolve questions of Guideline application.

See Braxton v. United States, 500 U.S. 344, 348 (1991). However, given that the United States Sentencing Commission currently has an insufficient number of commissioners to make a quorum capable of amending the Guidelines, the Court's usual deference to that body's congressionally-intended power to resolve conflicts regarding the guidelines, *see Buford v. United States*, 532 U.S. 59, 66 (2001), is not warranted at this time.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 15th day of June 2020.

Respectfully submitted,

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