No. ______________

IN THE SUPREME COURT OF THE UNITED STATES

GARY TODD SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

When determining the United States Sentencing Guidelines loss amount attributable to a defendant in a case involving a fraudulent investment scheme, should the sentencing court employ the "loss to losing victims" method that accounts for the aggregate total losses of individual victims?

LIST OF PARTIES

The parties to the judgment from which review is sought are the Petitioner and appellant in the lower court, Gary Todd Smith, and the Respondent and appellee in the lower court, the United States of America.

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OPINION BELOW

The United States Court of Appeals for the Eleventh Circuit affirmed the judgment of the district court in an unpublished opinion, *United States v. Smith*, --- Fed.Appx. ----, 2021 WL 1662557, No. 18-15106 (11th Cir. Apr. 28, 2021), which is attached hereto as Appendix A.

GROUNDS FOR JURISDICTION

The United States Court of Appeals for the Eleventh Circuit issued its panel opinion on April 28, 2021. *See* Appendix A. Petitioner now seeks the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1) through the filing of the instant petition for a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S.S.G. § 2B1.1

Attached hereto as Appendix B.

STATEMENT OF THE CASE

Appellant Gary Todd Smith is a 50 year-old father of two who has no prior criminal history. (PSR at 3, ¶67, 68, 74, 83.) Mr. Smith was the Chief Operating Officer of Smith Advertising and Associates, Inc. ("Smith Advertising"). (Doc. 18:1; 51:3.) Mr. Smith's father, Gary Truman Smith, was the CEO and had controlling interest of the company. (Doc. 209:112.) The company was headquartered in Fayetteville, North Carolina and had been in business for approximately 40 years. (Doc. 51:3.) Throughout that time, Smith Advertising was a legitimate business that was creating revenue outside of the frauds alleged in this case. (Doc. 208:29-30, 179.)

In 2007, Smith Advertising entered into a factoring arrangement with CapitalPlus Equity, LLC, wherein CapitalPlus would loan funds to Smith Advertising on outstanding invoices to customers of Smith Advertising. (Doc. 18:3; 51:4.) Sometime later, to temporarily raise capital to keep the business going following the recession that had ensued, Smith Advertising began submitting to CapitalPlus fake invoices that purported to have been submitted to clients of Smith Advertising. (Doc. 51:4.)

CapitalPlus later learned of the fraudulent invoicing that was taking place. (Doc. 51:5.) On May 13, 2009, CapitalPlus notified Smith Advertising that it was in default under the terms of the factoring agreement and demanded payment of all of Smith Advertising's outstanding obligations, $4,542,302.66. (Doc. 51:5.) It provided, however, that it would not report the scheme to law enforcement if CapitalPlus was made whole. The factoring agreement with CapitalPlus ceased shortly thereafter. (Doc. 51:5-7.)

The Smiths then contacted Charles Larry Starr, an individual in Sarasota, Florida with whom Smith Advertising had a prior relationship. (Doc. 51:5.) He and two other principals – Matthew Schulz and Walter Schultz – created a company, RMF, in 2009 with the purpose of creating a line of credit for Smith Advertising. (Doc. 208:20.) RMF was to take over the factoring arrangement that CapitalPlus had had with Smith Advertising. (Doc. 51:5-6.) Early on, contributions to the company were made by the principals and a few other individuals close to them made. (Doc. 208:22-26.) RMF would later sell "units" or shares to other investors. (Doc. 208:21, 28-29.) RMF would, in turn, receive 20% of any profits. (Doc. 208:45-46.) Throughout that time, Smith Advertising was a legitimate business that was creating revenue. (Doc. 208:29-30, 179.) On December 24, 2009, RMF made a final buyout payment to CapitalPlus, thereby cancelling the arrangement between CapitalPlus and Smith Advertising. (Doc. 51:7.) RMF continued in the factoring arrangement with Smith Advertising until March 2012, when Smith Advertising folded. (Doc. 51:7.)

During the time RMF was working with Smith Advertising, individuals also lent money directly to Smith Advertising in the form of bridge loans. (Doc. 51:8-9.) Bridge loans were short term loans made to Smith Advertising for the advance purchase of advertising space. (Doc. 51:8.) The bridge loans were typically supported with false or altered invoices showing that Smith Advertising had made an advance purchase of advertising space for a discount. (Doc. 51:8-9.) The bridge loans typically paid the lender a fee of approximately 10% of the loan for a loan duration of approximately 30 days. (Doc. 51:11; 208:13, 49-50.) At least 129 individuals had invested in Smith Advertising through bridge loans or as members of RMF. (Doc. 51:15.)

When the principal would become due on the bridge loans, the loans were often "renewed" or "rolled over" into a new loan. (Doc. 51:12; 209:127-128, 197-202.) When that occurred, in some instances, investors would instruct Smith Advertising to directly reinvest their funds into a new loan, while, in other instances, investors would receive their repayments from Smith Advertising and would then later invest in a new bridge loan. (Doc. 204:6-8, 13-22; 208:137-145; 209:127-128, 197-202.) As set forth above, Smith Advertising folded in 2012, leaving losses to those investors who had outstanding bridge loans at that time.

A. District Court Proceedings

On March 16, 2016, Petitioner Smith was indicted on one count of conspiracy to commit mail and wire fraud in violation of 18 U.S.C. § 1349 and one count of wire fraud affecting a financial institution in violation of 18 U.S.C. § 1343. (Doc. 18.) Alleged co-conspirators Gary Truman Smith, Amber Mathias, Marcia Caulder, and Tanisha Melvin were charged in other cases with conspiracy to commit mail and wire fraud pursuant to 18 U.S.C. § 371. (Doc. 162:2.) While Mr. Smith faced maximum statutory sentences of 30 years imprisonment on each count, the other defendants faced maximum statutory sentences of five years, to include Mr. Smith's father – the CEO and controlling owner of Smith Advertising. (Doc. 51:3; 210:84.)

On June 7, 2017, Mr. Smith entered a guilty plea to the two charges set out in the indictment. (Doc. 59, 61, 62.)

When the Presentence Report was issued, it alleged a total loss attributable under the Guidelines of $57,797,575.90. (PSR ¶55.) It reached that figure by calculating actual losses – investments less money returned – of each investor based on victim impact statements the victims had submitted. (PSR ¶46; Doc. 209:99-100.) The loss amounts it relied on had been provided by the victims themselves. (Doc. 209:73.) With the proposed loss amount, the Guidelines would have called for a 22-level enhancement above the base offense level of 7. (PSR ¶53-54.)

B. The Loss Amount Calculation

Both the Government and Mr. Smith objected to the PSR's proposed loss amount at sentencing.

1. The Government's Position

The Government would essentially advocate for the court to base the loss amount on the net value of Smith Advertising at the time it folded. With regard to the loss amounts provided by the various individual victims, a case agent who the Government presented at sentencing testified that he did not conduct an independent investigation into all of the loss amounts provided by the victims. (Doc. 209:71-72.) He testified that "some" of the victim impact statements provided by the victims had supporting documentation. (Doc. 209:72.) He would go on to testify that, with respect to loss amounts, he "just went off what the victims told" him. (Doc. 209:73.) He explained that he did not attempt to corroborate every victim's account of loss because he reasoned that the victims would have no reason to lie to him. (Doc. 209:73-74.) When asked to provide examples of victims from whom he corroborated proffered loss amounts, he provided only one example. (Doc. 209:74.) He specifically testified that he did not attempt or corroborate the loss amounts proffered by larger investors to include Matthew Schulz, Walter Schulz, Charles Larry Starr, and at least two other larger investors. (Doc. 209:74-75.)

A civil investigator with the United States Attorney's Office testified that the financial records of Smith Advertising showed the value of the company to be -$103 million as of February 12, 2012, at the approximate time the offense had ended. (Doc. 209:86, 90-92.) He would later testify that the net value of the company – the reduction that resulted from the fraud scheme in the value of equity securities or other corporate assets – was some unspecified amount of more than $70 million. (Doc. 209:103.) The investigator also testified that the loss amount compilation listed in the PSR did not include losses from victims who did not submit victim impact statements. (Doc. 209:100.) He went on to testify that he believed the inclusion of proffered losses from those victims would increase the actual loss amount to $63,491,769.08. (Doc. 209:101.)

On cross-examination, the investigator clarified that the accuracy of the figures he testified to on direct would be dependent on the assumption that the financial records he analyzed were true and correct. (Doc. 209:106-07.) He further testified that if mistakes were made in the underlying financial documents, he would not have been able to detect any such mistakes. (Doc. 209:107.) More specifically, he testified that he could not attest to the accuracy of the numbers in the underlying financial documents. (Doc. 209:112.) He would also go on to testify that his computations of the amounts that Smith Advertising owed to various individuals and entities at the end of the fraud would not account for any potential payments the various individuals had received as profits prior to the time the fraud ended. (Doc. 209:107-09.)

Relying on a district court bankruptcy case, *In re Pearlman*, 440 B.R. 569 (M.D. Fla. 2010), the Government alleged that the instant case was not a "Ponzi scheme," but was instead, a loan-fraud scheme. (Doc. 209:161-68.) It went on to argue that the loss amount should be based on intended losses. (Doc. 209:161-68.) The Government, nevertheless, recognized that "the fraud scheme had features of a Ponzi scheme." Doc. 209:163.) It proposed the loss amount to be "the 63 million or the greater than 65 million as reflected in the Defendant's true books." (Doc. 209:168.) It would later propose, however, that the loss amount should be intended losses of more than $70 million, alleging "...that's the loss attributable to the equity and the entire value of the company and those are the losses that are going back to all of the victims. That's the harm that this Defendant sought to impose and that's why in this case the loss should be the intended loss of at least $70 million." (Doc. 209:210.)

2. Mr. Smith's Position

In contrast to the position of the Government, Mr. Smith asserted that the loss amount should be the actual loss amounts sustained by the victims. (Doc. 209:168-94; 210:16-27.) Relying on *United States v. Orton*, 73 F.3d 331 (11th Cir. 1996), Mr.

Smith set out that any amounts individual victims received back during the course of the fraud should offset the loss amount that those particular victims sustained. (Doc. 209:198-99.) More specifically, Mr. Smith argued that whenever a victim rolled over a payment back into the investment, the amount of the roll over should be included in the loss amount. (Doc. 209:202.) On the other hand, whenever a victim received a payment back and deposited it, the amount of any such payment should be offset against the loss amount. (Doc. 209:202-03.)

In support of his loss amount calculations, Mr. Smith offered into evidence 101 exhibits that reflected audits showing the amounts paid in and received back by each individual victim during the course of the offense. (Doc. 209:169; Def. Ex.1A-28B.) The exhibits showed dates and details of each payment to and from the victims, including whether the payments were made via wire or check and the bank from which the payments originated or were received. (Doc. 180; 209:169; Def. Ex.1A-28B.) Mr. Smith noted to the court, nevertheless, that some payments were unable to be located. (Doc. 209:169-70.) Those various payments were noted in the exhibits. (Doc. 209:169-70.) Mr. Smith went on to list the actual amounts that various victims lost or gained during the course of the offense. (Doc. 180 - Ex.1A-28A.) In many instances, the calculations showed victims to have earned profits from the scheme even though they had claimed losses. (Doc. 180-1, 180-3, 180-14, 180-18, 180-20, 180-33, 180-35, 180-37, 180-39, 180-47, 180-56, 180-63, 180-90, 180-94, 180-96, 180-98 180-115.)

With regard to the Government's proposal for relying on Smith Advertising's final balance sheet in determining loss amounts, Mr. Smith asserted that that proposed method would be unreliable because it would not take into consideration prior balance sheets and other prior financial statements leading up to the end of business. (Doc. 209:168-69.) He further argued that, without comparing prior financial records, the position of the company at the time of the final balance sheet would not show whether the company's position had improved or declined since the previous financial statements. (Doc. 209:168-69.) In support of that argument, Mr. Smith pointed out that Smith Advertising was a legitimate corporation that was conducting legal business throughout the time of the fraud. (Doc. 209:168-69.)

Based on the foregoing, Mr. Smith set forth that the total loss amount was below $25 million. (Doc. 209:206.) The District Court would overrule Mr. Smith's objection and sustain the Government's objection to the loss amount calculation. (Doc. 210:53-54.) The court would later state that it was approximating an intended loss amount of $70 million. (Doc. 210:58, 67-68.)

The district court ultimately imposed a total sentence of 480 months imprisonment to be followed by three years of supervised release. (Doc. 210:117-118, 123-24.)

C. <u>The Eleventh Circuit's Opinion</u>

Mr. Smith then took a timely direct appeal in the United States Court of Appeals for the Eleventh Circuit. He raised six issues, including the question of whether the district court erred in determining the loss amount applicable to him under the Sentencing Guidelines. In that issue, Mr. Smith argued that the district court departed from *United States v. Orton*, 73 F.3d 331, 332 (11th Cir. 1996) and employed a loss calculation method that was contrary to the "loss to losing victims" method that was set out in *Orton* and endorsed in U.S.S.G. § 2B1.1.

On April 28, 2021, the Eleventh Circuit issued a panel opinion affirming Mr. Smith's conviction and sentence. With respect to the loss amount calculation, the court held that "...the district court did not clearly err by using the intended loss method to calculate the loss amount, nor did it clearly err by calculating the intended loss to be in excess of $70 million." App. A at 12. The Eleventh Circuit did not reference *Orton* in its opinion.

This petition follows.

REASONS FOR GRANTING THE PETITION

I.

THE QUESTION OF WHETHER A SENTENCING COURT SHOULD EMPLOY THE "LOSS TO LOSING VICTIMS" METHOD OF DETERMINING THE SENTENCING GUIDELINES LOSS AMOUNT IN FRAUDULENT INVESTMENT SCHEME CASES

The lower courts are currently employing various differing methods for determining Sentencing Guidelines loss amounts in cases involving fraudulent investment schemes. The lower courts continue to do so despite an attempt by the United States Sentencing Commission in 2001 to provide for a uniform method of determining loss amounts in such cases. Petitioner Smith will establish below that the lower courts have long been split on the instant question and continue to be so today. The Eleventh Circuit alone has now departed from prior precedent that the Sentencing Commission endorsed when it promulgated its 2001 amendment to the applicable sentencing guidelines. Moreover, the Eleventh Circuit, in affirming the district court's method of calculating loss in the instant case, entered a decision in conflict with the decisions of at least three other United States court of appeals on the question of how to determine loss amounts in fraudulent investment scheme cases. While those three court of appeals have adhered to the plain text of the current U.S.S.G. § 2B1.1 and its application notes, at least three other court of appeals, in addition to the Eleventh Circuit, have endorsed the use of methods of calculating loss that the Sentencing Commission rejected when it implemented the aforementioned

2001 amendment. Given the vast discrepancy in the methods of determining loss amounts in fraudulent investment scheme cases, the lower courts are in need of guidance from this Court on that critical issue. Mr. Smith therefore asks this Court to review the instant question to ensure uniformity among the lower courts.

A. <u>The Loss Amount Calculation</u>

Section 2B1.1 calls for the determination of the loss amount under the Sentencing Guidelines to be "the greater of actual loss or intended loss" subject to certain exclusions set forth in subsection 3(D) of the commentary. U.S.S.G. § 2B1.1, cmt., n. 3(A). The Section goes on to define "actual loss" as "the reasonably foreseeable pecuniary harm that resulted from the offense." *Id.* at n. 3(A)(i). It then defines "intended loss" as "the pecuniary harm that the defendant purposely sought to inflict; and () 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)." *Id* at 3A(ii). Among the exemptions set forth in Subsection 3(D), which are to be excluded from both actual and intended loss calculations, are "[i]nterest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs." *Id.* at Subsection 3(D)(i). The Section 2B1.1 commentary goes on to provide:

> (E) Credits Against Loss.--Loss shall be reduced by the following:
> (i) The money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected. The time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or government agency; or (II) the time the defendant knew or reasonably should have known that the

> offense was detected or about to be detected by a victim or government agency.

U.S.S.G. § 2B1.1, cmt., n. 3(D).

Prior to 2001, the circuit courts used various differing methods to calculate Guidelines loss amounts in fraudulent investment scheme cases. In 2001, in an attempt to provide a uniform method for determining loss, the Sentencing Commission revised the applicable Guideline and provided commentary specifically directed to such cases. As will be discussed below and as the instant case illustrates, however, the lower courts continue to employ differing methods of determining loss amounts in such cases. Given the splits that exist among the circuits on this question, the lower courts are still in need of guidance from this Court in answering the question of how to calculate loss amounts in fraud and theft cases that involve fraudulent investment schemes.

1. <u>The 2001 Amendments Attempted to Resolve a Circuit Split</u>

When the Sentencing Commission implemented the 2001 revisions, it provided that "[t]he amendment resolves the conflict to provide that intended loss includes unlikely or impossible losses that are intended, because their inclusion better reflects the culpability of the offender." It went on provide that "concepts such as 'economic reality' or 'amounts put at risk' will no longer be considerations in the determination of intended loss." U.S.S.G. Supplement to Appendix C, amendment 617.

The commentary further states that "[t]he amendment adopts 'time of detection' as the most appropriate and least burdensome time for measuring the value of the transferred benefits. The Commission determined that valuing such benefits at the time of transfer would be especially problematic in cases in which the offender misrepresented the value of an item that is difficult to value." With particular importance to the question presented herein, the Commission noted that the amended Guideline was resolving, or attempting to resolve, the circuit split:

> Regarding investment schemes, the amendment resolves a circuit conflict regarding whether and how to credit payments made to victims. Compare *United States v. Mucciante*, 21 F.3d 1228 (2nd Cir. 1994) (under the Guidelines, loss includes the value of all property taken, even though all or part of it was returned.); *United States v. Deavours*, 219 F.3d 400 (5th Cir. 2000) (intended loss is not reduced by any sums returned to investors); and *United States v. Loayza*, 107 F.3d 257 (4th Cir. 1997) (declining to follow the approach of net loss and holding defendants responsible for the value of all property taken, even though all or a part is returned), with *United States v. Holiusa*, 13 F.3d 1043 (7th Cir. 1994) (holding that only the net loss should be included in loss, thus allowing a credit for returned interest), and *United States v. Orton*, 73 F.3d 331 (11th Cir. 1996) (only payments made to losing investors should be credited, not payments to investors who made a profit).
>
> This amendment adopts the approach of the Eleventh Circuit that excludes the gain to any individual investor in the scheme from being used to offset the loss to other individual investors because any gain realized by an individual investor is designed to lure others into the fraudulent scheme. *See United States v. Orton*, supra.

Id. The Sentencing Commission thereby specifically chose to adopt the method that the Eleventh Circuit termed in *Orton* as the "loss to losing victims" method of determining loss.

2. <u>The "Loss to Losing Victims" Method that the Sentencing Commission Attempted to Implement</u>

In *United States v. Orton*, 73 F.3d 331, 332 (11th Cir. 1996), the Eleventh Circuit considered a scenario in which the defendant, a BP Oil employee, had concocted a Ponzi scheme to repay debts he had incurred on a company credit card.

Id. The defendant had told various acquaintances that he could invest in an incentive based BP Oil investment that paid high returns. *Id.* He gradually sold investment "units" to 44 individuals and would pay "interest" to earlier investors with buy-ins from later investors. *Id.* Five years later, an FBI investigation uncovered the fraud. *Id.* at 333. During the life of the fraud, the defendant took in a total of $525,865.66 and returned $242,513.65 to victims, leaving a net gain to the defendant of $283,352.01. *Id.* Only 12 of the 44 victims earned a net profit from the scheme. *Id.* Of the remaining victims who incurred net losses, the total of the individual net losses was $391,540.01. *Id.* In determining the applicable loss amount under the Sentencing Guidelines, the district court employed what the Eleventh Circuit termed the "loss to losing victims" method. *Id.* at 334. The defendant, on the other hand, had proposed that he only be held accountable for the net loss of the victims as a whole, a proposed method termed the "net loss" method. *Id.*

When reviewing the appropriate measure of loss on appeal in *Orton*, the Eleventh Circuit provided "[f]raudulent schemes... come in various forms, and we must consider the nature of the scheme in determining what method is to be used to calculate the harm caused or intended." *Id.* at 333. The Court went on to reason:

> If one were to set out the different types of fraud, at one end of the scale would be theft-like fraud where the perpetrator intends to keep the entire amount fraudulently obtained. On the other end of the scale would be contract fraud where the perpetrator, while fraudulently obtaining the contract, intends to perform the contract and to cause no loss to the victim.

Id. at 334 *citing United States v. Kopp*, 951 F.2d 521, 529 (3d Cir. 1991). It then found that a Ponzi scheme fell somewhere in the middle of that spectrum. In analyzing the nature of Ponzi schemes, the court found that:

> The individuals who receive a 'return' or break even on their 'investments' are not victims for purposes of § 2F1.1. At most, they are unwilling pawns in the Ponzi scheme. These individuals may be exposed to a risk of harm by the Ponzi scheme, but the risk of harm should not be considered in estimating the loss under § 2F1.1.

Id. The court went on to hold that the "loss to losing victims" method thereby properly focused on the harm to the victims. *Id.* The court consequently rejected the "net loss" method, reasoning that it would focus on the gain to the defendant. *Id.* In reaching that holding, the court also rejected what other courts had termed the "risk" method. *Id.* Under the "risk" method, the defendant would be held accountable for the total amount of money placed at risk by the fraudulent scheme, even if victims did not suffer any losses. *Id. see also United States v. Alfonso*, 479 F.3d 570, 573 (8th Cir. 2007).

The commentary to Section 2B1.1 now specifically provides that "in a case involving a fraudulent investment scheme, such as a Ponzi scheme, loss shall not be reduced by the money or the value of the property transferred to any individual investor in the scheme in access of that investor's principal investment. (i.e., the gain to an individual investor in the scheme shall not be used to offset the loss to another individual investor in the scheme)." U.S.S.G. § 2B1.1, cmt., n. 3(F)(iv). On the other side of the coin, the Guidelines also require district courts "to grant a credit for any "'money returned' or 'the fair market value of ... services rendered'" in such fraud cases. *United States v. Campbell*, 765 F.3d 1291, 1302 (11th Cir. 2014) *quoting* U.S.S.G. § 2B1.1 cmt. n.3(E)(i). The reason for that rule is that that credits against loss for property returned to a victim "accounts for the fact that 'value may be rendered even amid fraudulent conduct.'" *Id. quoting United States v. Sayakhom,* 186 F.3d 928, 946 (9th Cir. 1999). The *Orton* loss to losing victims method of determining loss thereby ensures that such losses to individual victims are all accounted for without unjustly punishing a defendant for value that is returned to other victims during the course of the fraud.

3. <u>The Circuits Remain Split on the Question of How to Determine Loss Amounts in "Ponzi and Other Fraudulent Investment Schemes."</u>

Despite the 2001 amendment and the clear guidance it provided, the Circuits continue to employ differing methods of determining loss amounts in cases involving fraudulent investment schemes. In the instant case, the Eleventh Circuit indeed departed from its own holding in *Orton* when it affirmed the district court's method of calculating loss. The Eleventh Circuit's position on the question presented herein is therefore unclear. Among the other circuits, at least three have approved the use of the "risk" method, while at least three others have adhered to the "loss to losing victims" method that section 2B1.1 endorses.

In the wake of the 2001 amendment, the Eighth Circuit reasoned that while the amended guideline "prohibits gains to one investor from being used to offset losses to another investor, it does not explicitly address whether gains from an individual's earlier investments should be used to offset losses from that same person's later investments." *United States v. Alfonso*, 479 F.3d 570, 572 (8th Cir. 2007). The appellant in the Eighth Circuit case at issue, *Alfonso*, had urged the court to follow *Orton* and offset individual victims' losses by the gains those individual victims had received from the fraud. The Eighth Circuit reasoned, on the contrary, that "although the Sentencing Commission adopted *Orton's* rejection of the "net loss" method, it is not clear that it adopted any other aspect of the opinion. *Id.* at 573 *citing* U.S.S.G. Supplement to Appendix C, amendment 617 at p. 189 (Nov. 1, 2001). The Eighth Circuit went on to hold that "the district court properly declined to offset victims' gains on one investment against their losses on subsequent investments." *Id.* The court, nonetheless, then left open the possibility that the full "loss to losing victims" method could still be used in other cases when it stated in the very next sentence: "[w]hether the offsetting urged by Alfonso might in some cases be appropriate is a question that we need not address here." *Id.* The Eighth Circuit thereby seemingly left its lower district courts open to arbitrarily utilize multiple different methods of calculating loss in similarly-situated cases. *But see United States v. Nichols*, 416 F.3d 811, 820 n. 6 (8th Cir. 2005) (finding that despite the application notes to section 2B1.1, loss amounts in Ponzi scheme cases should not be offset by funds returned to investors during the course of the scheme).

In *United States v. Hsu*, 669 F.3d 112, 120-21 (2d Cir. 2012), the Second Circuit took a similar, though slightly broader, position from that of the Eighth Circuit. It, like the Eighth Circuit, also left district courts open to arbitrarily employ different methods for calculating loss in fraudulent investment scheme cases. In *Hsu*, the Second Circuit held that the intended loss calculation in Ponzi scheme cases may include any payments to investors that were reinvested in the scheme even if the payments to investors were not part of their initial investment. *Id.* at 120-21. The court noted, in reaching that holding, that such a calculation could result in a loss amount that exceeds the actual amount that investors invested in the Ponzi scheme. *Id.* The Second Circuit further recognized, however, that other methods of calculating loss might be more appropriate in some *Ponzi* schemes:

> We do not say that the method chosen by the district court was the only way to measure loss in a Ponzi scheme case. Since, under the guidelines, the district court is required only to make "a reasonable estimate of loss," *see, e.g., United States v. Rigas*, 583 F.3d 108, 120 (2d Cir. 2009), other methodologies might have been appropriate in this case, and might even be preferable in other cases depending on the particular facts of the case.

Id. Like the Eighth Circuit, the Second Circuit therefore left its district courts with considerable uncertainly in deciding the question of how to calculate loss amounts in investment fraud cases.

In addition to the Second and Eighth Circuits, the Seventh Circuit has endorsed the broader "risk method" for calculating loss in investment fraud cases. In *United States v. Durham*, 766 F.3d 672 (7th Cir. 2014), the court affirmed a district court's calculation of loss by relying on "the amount placed at risk by the scheme." *Id.* at 687. In so holding, the Seventh Circuit cited to its pre-2001 case *United States v. Lauer*, 148 F.3d 766 (7th Cir. 1998) and went on to reason that "the placed-at-risk standard [is not] necessarily inconsistent with this court's general position that '[i]n determining the intended loss amount, the district court must consider the defendant's subjective intent.'" *Id.* at 587-88 *quoting United States v. Middlebrook*, 553 F.3d 572, 578 (7th Cir. 2009).

In contrast to the aforementioned circuits, the Fifth, Sixth, and Ninth Circuits have adhered to the plain text of the 2001 amendments in determining loss amounts in cases involving fraudulent investment schemes. The Fifth Circuit has held that loss amounts in such cases should be offset by funds that were returned to investors during the scheme with the exception of any returned funds that were reinvested into the scheme. *Setser v. United States*, 568 F.3d 482, 497 (5th Cir. 2009). In reaching that holding, the court reasoned that the 2001 amendments to section 2B1.1 superseded its holding in *United States v. Deavours*, 219 F.3d 400, 403 (5th Cir. 2000), wherein the court had held that loss amounts in Ponzi cases should not be offset by *any* amounts that were returned to investors. To be sure, Petitioner Smith, while not citing to *Setser* at sentencing in the instant case, argued for the court to employ the same method that the Fifth Circuit endorsed in *Setser*.

Like the Fifth Circuit, the Ninth Circuit has also found that the 2001 amendment overruled prior precedent that called for the use of any other methods of calculating loss in Ponzi scheme cases aside from the "loss to losing victims" method. In *United States v. Van Alstyne*, 584 F.3d 803 (9th Cir. 2009), the Ninth Circuit vacated a defendant's sentence after finding that the district court erroneously relied on the "risk theory of loss" method that the court had endorsed in in its pre-2001 case *United States v. Munoz*, 233 F.3d 1117 (9th Cir. 2000). *Van Alstyne*, 584 F.3d at 817. The Ninth Circuit found that "[t]he language of the [2001] amendment appears designed to differentiate *Orton* from *Holiusa*, which permitted Investor X's net gain to offset Investor Y's net loss, and so to rest on the *Orton* principle that payments to losing investors up to the amount of their investment do not count as losses. *Id.* at 818 *citing Setser*, 568 F.3d at 497.

Just the same, the Sixth Circuit has strictly adhered to language of the current section 2B1.1 application notes. In *United States v. Snelling*, 768 F.3d 509 (6th Cir. 2014), the Sixth Circuit held that a district court erred in overruling a defendant's objection to the calculation of the loss amount that was based on the total amount of money that the Ponzi scheme took in from investors. The Sixth Circuit, relying on the plain text of the guidelines commentary, reasoned that the proper method of calculating the loss amount in that case was to deduct from the total amount taken in by the scheme the total amount that was returned to investors over the life of the fraudulent scheme. *Id.* at 512-15. The court agreed with the defendant that Application Note 3(F)(iv) "implies that courts are expected to reduce loss figures by the sums returned to investor victims, and that the note seeks to limit such reduction to *no more* than the principal invested." *Id.* at 513. In reaching that conclusion, the court noted "[t]he fact that the Application Notes limit deductions from loss figures to no more than the sums originally invested implies, quite strongly, that the loss figures are to be reduced in the first place." *Id.* The court further reasoned that the Sentencing Commission's "complete overhaul" of section 2B1.1 in 2001 likewise evidenced the Commission's intent that the loss amount in Ponzi-type cases be reduced by the payments made to investors during the life of the scheme. *Id.* It then went on to distinguish the Eighth Circuit's contrary holding in *Nichols*, pointing out that *Nichols* ignored "§ 2B1.1's clearly-worded Application Notes" and relied on pre-2001 cases. *Id.* at 514 *citing Nichols*, 416 F.3d at 820 n. 6.

B. The Need to Ensure Uniformity in the Lower Courts

The Application Notes to Section 2B1.1 appear to clearly dictate that the proper measure of loss in fraudulent investment scheme cases is the sum of the actual losses incurred by each individual victim in this case. Nonetheless, as discussed above, several circuits continue to endorse the use of other methods for determining loss in investment fraud cases. Likewise, as the instant case illustrates, the Eleventh Circuit, which devised the "loss to losing victims" method set out in *Orton*, has now receded from its own holding. By affirming the district court's method of determining loss in the instant case, the Eleventh Circuit seemingly endorsed the "risk" method.

A court's decision to use of the "loss to losing victims," "net loss," or "risk" method of calculating loss is a critically decisive factor in fraudulent investment scheme cases. The use of the three differing methods can result in vastly different sentences in similarly-situated cases. Under the risk method, the Guidelines loss amount can be greater than even the total amount of the investments in the fraudulent scheme. On the other end of the spectrum, under the "net loss" method, all payments made to investors are used to offset losses. Falling in the middle, the "loss to losing victims" method focuses on the losses to individual victims while ensuring that it accounts for all individual victims. The differences in the loss amounts reached under each of the three methods can be staggering, particularly in a case such as the instant case that involved a scheme that went on for many years and involved many individual investors. Whichever method this Court might find to be appropriate, it is imperative that the lower courts begin to employ one uniform method for determining loss in fraudulent investment scheme cases to ensure that unjust and unwarranted sentencing disparities do not ensue across the different circuits and district courts.

For the reasons set forth above, Petitioner Smith respectfully submits that the question presented herein is one of great importance that has not yet been decided by this Court and one which will arise frequently in the lower courts in the future. SUP. CT. R. 10(c). Moreover, as set forth above, the lower court opinion is in conflict with the decisions of at least three other United States court of appeals on the same important matter. SUP. CT. R. 10(a). For that additional reason, Mr. Smith again respectfully requests this Honorable Court to review the instant question to ensure uniformity among the lower courts.

CONCLUSION

Based on the foregoing, the Petitioner respectfully requests that this Honorable Court grant this petition for a writ of certiorari.

Respectfully Submitted on this 26th day of July 2021,

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