No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JAMIE MATSUBA and
TAKAHARO THOMAS MATSUBA,

Petitioners,

- v -

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTION PRESENTED

Whether a loss calculation determined using "rents gained" in a mortgage fraud case violates due process when it is based on a single 27-year-old opinion that refers to a sentencing guideline (and related application notes) that are no longer valid law?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

LIST OF DIRECTLY RELATED PROCEEDINGS

1. United States District Court for the Central District of California, *United States v. Matsuba,* 16cr538-RGK. The district court entered the judgment on July 16, 2018 and July 18, 2018. *See* Appendix A.

2. United States Court of Appeals for the Ninth Circuit, *United States v. Matsuba,* No. 18-50232, 18-50229 . *See* Appendix B. The Ninth Circuit entered judgment on June 12, 2020.

3. United States District Court for the Central District of California, *United States v. Matsuba,* 16cr538-RGK. The district court entered the judgment on September 22, 2020. *See* Appendix C.

4. United States Court of Appeals for the Ninth Circuit, *United States v. Matsuba,* No. 20-50256, 20-50258. *See* Appendix D. The Ninth Circuit entered judgment on September 9, 2021.

5. United States Sentencing Guideline § 2B1.1 and commentary. *See* Appendix E.

6. No other proceedings in state or federal trial or appellate courts, or in this Court, are directly related to this case.

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IN THE SUPREME COURT OF THE UNITED STATES

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

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Petitioners, Jamie Matsuba and Takaharo Thomas Matsuba, ask for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered September 9, 2021.

OPINION BELOW

The September 9, 2021 memorandum decision of the court of appeals, *United States v. Matsuba*, No. 20-50256, 20-50258, 858 Fed.Appx. 215 (9th Cir. 2021), appears at Appendix D to this petition and is unpublished.

JURISDICTION

The Ninth Circuit entered judgment on September 9, 2021. This petition is being filed within the 90-day time limit. The Court has jurisdiction under 28 U.S.C. § 1254(1).

UNITED STATES SENTENCING GUIDELINE INVOLVED

Section 3B1.1 of the United States Sentencing Guidelines, and its commentary, are reprinted in Appendix E.

STATEMENT OF THE CASE

A. The District Court Proceedings.

1. The Trial

Between 2003 and 2014, Dorothy Matsuba managed and directed an enterprise that offered services to distressed homeowners who sought to either sell their properties back to their lender(s) (hereafter called a "short sale"), get relief from paying mortgage payments, or prevent a pending or prospective foreclosure. Many of these "homeowners" had issues of their own related to

acquisition of their properties, including false or misleading statements in their mortgage applications, mortgage fraud, and identity theft.

Dorothy Matsuba and various companies under her control or supervision eventually gained control of approximately 300 residential properties. These properties were, for the most part, adequately maintained. Mortgage loans were paid, as were property taxes, homeowner's associations, and utilities.
Early on, the generally positive Southern California real estate market provided an adequate business model for Dorothy and those working with her. However, around 2007, the real estate market suffered a series of severe setbacks. Housing prices plummeted. Investors fled the market. Traditional sources of funding evaporated. In the wake of this unprecedented collapse, Dorothy was overwhelmed with distressed homeowners wishing to rid themselves of underperforming assets. The homeowners were caught in a vice grip of the inability to make mortgage payments, a negative equity position, and unresponsive mortgage lenders, unwilling or unable to help them.

In order to get control of the various properties and negotiate short sales with the lenders thereto, the distressed homeowners executed a series of documents; such as deeding the property into an inter vivos trust, in which the trustee was a company controlled and managed by the defendant. The result was that the trustor and beneficiary of the trust remained the distressed homeowner.

The distressed homeowner also executed a home equity purchase agreement, thereby conveying any equity in the home to Dorothy's company. The executed documents gave Dorothy and her employees the right to negotiate directly with note holders in order to reduce the amount of indebtedness, negotiate a short sale, or otherwise dispose of the property.

The homes that were acquired and managed by Dorothy and her companies were rented out, sometimes to the actual distressed homeowners. These rents were collected by the Matsubas and deposited into various accounts controlled by them. The proceeds of these rents were then used, in many instances, to maintain the properties, pay outstanding indebtedness, pay property taxes, pay insurance, and pay homeowner's association dues. In many instances, the mortgages were not paid, or payments were infrequent.

The company would then take measures to stall any foreclosure, like attempting a short sale of the property, creating and filing fake liens, making some mortgage payments, and later in the scheme, declaring bankruptcy. Many of the homes were lost to foreclosure. Jamie, Dorothy's daughter, was primarily a property manager of the homes, over-seeing repairs, dealing with homeowners' associations and the like. [ER 310, 776.][11] Over time, Jamie's role changed, but in

[1]"CR" refers to the Clerk's Record, "ER" refers to the Excerpts of Record from the first appeal, and "ERII" refers to the Excerpts of Record from the second appeal, all of which were filed with the Court of Appeals.

the main, she remained the primary property manager. Thomas, Dorothy's husband, kept track of the rent collected. [ER 413-414, 972, 991.]

After seven days of trial, the jury convicted Jamie of Count 1, 18 U.S.C. § 371, Conspiracy and Count 9, 18 U.S.C. § 1014 and 18 U.S.C. § 2, False Statement to a Financial Institution. [CR 161, 170.] The jury convicted Thomas of Count 1, 18 U.S.C. § 371, Conspiracy and Count 12, 18 U.S.C. § 1014 and 18 U.S.C. § 2, False Statement to a Financial Institution. [CR 161, 170.]

2. The Sentencing Hearing

On July 16, 2018, the district court sentenced Jamie and Thomas. [ER 31, 37, 43.] The main driver of each sentence was the district court's determination of loss. Indeed, the sentencing memoranda submitted by the parties focused almost exclusively on the "loss" calculation. [CR 205, 222, 223.] Expert reports and declarations were submitted by appellants and the government; the parties were also ready to present testimony to the court to support their positions. [CR 235, 248, 250.]

The government was seeking a 20-level increase in the guideline based upon the theory that the conspiracy and crimes of appellants produced a loss in excess of $20 million. [ER 77.] The Matsuba's contended it was the government's responsibility to convince the court of the amount of loss, or in the alternative, that

if loss could not be readily determined, then "gain" could be used in its place. The district court concluded:

> Under the standard of clear and convincing, I don't know, it probably still is over 9 million, but is certainly is over $3.5 million on it. Therefore, the Court is going to set the guideline level under that particular section as far as enhancement goes at being 18 rather than 20, being over 3.5 million, although I think it probably is over 9 million, and I think by preponderance of the evidence is over that 9.5, probably close to 15. I'm going to give the defendant a break on that particular matter.

[ER 77-78.]

As to Jamie, the district court imposed an 18 level loss enhancement for a total offense level of 33 and a guidelines range of 135 to 168 months. [ER 100.] The court sentenced Jamie to 60 months custody on count 1 concurrent to 135 months on count 9, for a total sentence of 135 months. [ER 101.] As to Thomas, the court calculated a total offense level of 35 and a guidelines range of 168 to 210 months. [ER 120-121.] The court sentenced Thomas to 60 months custody on count 1 concurrent to 168 months on count 12, for a total sentence of 168 months. [ER 121.]

B. The Appeal and Resentencing

Jamie and Thomas appealed their convictions and sentences to the Ninth Circuit Court of Appeals. On June 12, 2020, the court issued a memorandum decision affirming the convictions, but reversing and remanding for resentencing.

United States v. Matsuba, 809 Fed.Appx. 390, 391 (9th Cir. 2020). The court found the district court expressly failed to resolve the parties' loss versus gain dispute. *Matusba*, 809 Fed.Appx. at 392.

On September 22, 2020 the district court held the resentencing hearing. [CR 452, 454.] Jamie and Thomas argued the district court was first required to determine whether there was a loss, if so, whether the loss amount could be reasonably determined, and if not, whether the use of gain was appropriate. [CR 439, 440; 2 ERII 76, 68.] Specifically, Jamie and Thomas contended loss could easily be determined if the government merely contacted the financial institutions regarding the loss on each property related to the fraud. Jamie and Thomas also argued the government's use of gain was inappropriate and was based on the incorrect assumption that the homeowners owned the property in question and were therefore entitled to the rents. [CR 439, 440; 2 ERII 76, 77, 68, 70.]

The district court first sentenced Jamie. Counsel for Jamie emphasized to the court that the victims in this case were the financial institutions, not the homeowners. [1 ERII 23.] Furthermore, counsel noted it was still unclear why the government never simply contacted the financial institutions to determine the amount of loss. [1 ERII 23.] The government abandoned its original position that rental income was "gain" and on resentencing characterized the rental income as

"loss." [1 ERII 24.] The government requested the court merely make an express finding that the rental income was loss. [1 ERII 26.]

Defense counsel attempted to illustrate the government's illogical argument. [1 ERII 27.] Under the government's argument, the homeowners were able to rent their property at a price substantially less than their mortgage, continue to live in their homes, and then receive the rent back in the form of restitution. [1 ERII 27.] The district court then found:

> As far as the loss or ill appropriate gains go, again, in looking at this, we have an asset here that was not appropriately the Matsubas' asset. It was somebody else's asset. Whether or not it was the -- I'm not going to get into that at this time. Whether it's the -- the homeowners had the right to that asset or the bank had the right to have the asset, I think it's probably -- it's the homeowners that have the right to have the asset. But one way or the other, that asset is generating income. And that income should go to the person that owns the asset.
>
> And how do you find out what that is? We know what it is. Because we know what the gains were on it. So one way or the other, the Court's going to make the following findings. The Court has considered the documents submitted by both the Government and the Defense, and finds as follows: That while the exact amount of the intended loss is by a preponderance of the evidence greater than -- easily greater than $9 million, $9.5 million, the Court finds by clear and convincing evidence, no question, that the loss is less -- excuse me, is -- that the loss is more than 3.5 million. This figure is based on the rents that flowed from the assets that rightfully belonged to the homeowners in this case, but which were wrongfully collected by the defendant.
>
> It is therefore -- that's a loss to the homeowners. It is therefore -- it represents both the intended and the actual loss to the victim

> homeowners as well as the equivalent gain to the Matsubas and the co-conspirators. The Court is finding the 3.5 -- more than 3.5, because it's a conservative finding. Probably should be more than 9.5 million. But I'm making that finding, because it's the most conservative and most beneficial to the defendant in this case.

[1 ERII 28-29.]

The district court again sentenced Jamie to 60 months on count 1 and 135 months on count 9, to be served concurrently for a total of 135 months in custody. [1 ERII 30-31.] The court again sentenced Thomas to a term of 60 months on count 1 and 168 months on count 12, to be served concurrently. [1 ERII 9-10.]

C. The Second Appeal

Jamie and Thomas again appealed their convictions and sentences to the Ninth Circuit Court of Appeals. The panel affirmed the Matsuba's sentences in an unpublished opinion (See Appendix D.) The panel held that "the rents at issues were a "loss" under § 2B1.1(b)(1)." *United States v. Matsuba*, 858 Fed.Appx. 215 (9th Cir. 2021). Relying on *United States v. Harper*, 32 F.3d 1387 (9th Cir. 1994), the panel reasoned that the rental income reflected "actual loss, intended loss, and even the offender's gain." *Harper*, 32 F.3d at 1392 (applying U.S.S.G. § 2F1.1 (1994).

This Petition for Writ of Certiorari follows.

REASONS TO GRANT THE WRIT

In this mortgage fraud scheme, the government never explained why it ignored a traditional loss analysis related to the purchase and sale of real estate. At sentencing, the government admitted the banks had suffered a loss, but instead chose to focus on the rents received as a method of determining "loss." Yet, the amount of rental income was not a loss, but rather a gain. Moreover, the government failed to prove that loss could not be reasonably determined and gain was an appropriate substitute. This Court should grant certiorari to resolve whether a "loss" calculation determined using rents gained in a mortgage fraud case violates due process when it is based on a single 27-year-old opinion that referred to a sentencing guideline (and related application notes) that are no longer valid law.

I. The issue is important as the "loss" calculation is the primary driving force behind the length of a sentence and this case is an ideal vehicle for resolving it.

Petitioners' sentences were dramatically increased based upon the district court's erroneous determination of "loss." The main driver of each sentence was the determination that "loss," as defined in U.S.S.G. § 2B1.1(b)(1), was between $3.5 million and $9.5 million, resulting in an 18-level increase in petitioners' offense level. The district court did so based upon conclusory statements as to the

"loss" and reliance on a 27 year old opinion that referred to a sentencing guideline (and related application notes) that is no longer valid law.

U.S.S.G. § 2B1.1(b)(1) specifies how to determine loss. A court cannot consider gain unless there is a loss, and that loss cannot reasonably be determined. Pursuant to the application note to the relevant guideline provision, the sentencing guidelines instruct the sentencing court to "use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined." U.S.S.G. § 2B1.1, n. 3(B) (emphasis added). However, that provision is a very narrow "carve out" and allows the substitute use of gain in an extremely limited manner, and only when the proponent of its use has shown, by clear and convincing evidence, that use of loss is not possible.

Here, the government acknowledged the existence of a loss from the inception of this case. The indictment specifically identified four financial institutions that were victims of the offense: Wells Fargo Bank, Citibank, American Home Mortgaging Service, and Washington Mutual. [3 ER 408-09.] The indictment alleged that as a result of the conspiracy, the financial institutions "were intentionally exposed to new and increased risk of loss." [3 ER 414.] Furthermore, the overt acts alleged as part of the conspiracy repeatedly reference false loan applications, fraudulent short sale offers, fraudulent loan modification

requests, and false hardship documents that were submitted to the respective victim financial institutions which resulted in the loss. [3 ER 414-19.] Even at sentencing, despite contending the loss was too complex to calculate, the government identified the victim financial institution associated with each of the 274 properties associated with the Matsubas. [CR 250, Schedule 2.]

II. The Ninth Circuit's decision is incorrect.

The government argued it was allowed to use "total rental income obtained by the defendants" as a substitute for loss, under U.S.S.G. § 2B1.1(b), pursuant to the 27 year old case of *United States v. Harper,* 32 F.3d 1387 (9th Cir. 1994). The Ninth Circuit agreed with the government's proposed calculation and reliance on *Harper*. However, *Harper* concerned the use of guideline provisions and application notes long ago abandoned.

In *Harper*, the defendant compelled owners of over-encumbered properties to give over their homes on the promise they would be relieved of their mortgage obligations. But in reality, the defendant merely leased the homes to other tenants, collecting rents until the lender foreclosed on the original mortgage loan. The Ninth Circuit opined on the record before it that the government had not proven any loss to the victims; "[t]he owner-victims knew that the cash value of what they had, at least as far as they were concerned, was little or nothing" because the homes were worth less than the mortgage loans, and "the renter-victims cannot be

said to have lost all of the rental money they paid" because they did, in fact, get to live in the properties they leased from the defendant. *Harper,* 32 F.3d at 1392.

The Ninth Circuit in *Harper* relied on U.S.S.G. § 2F1.1, and Application Note 8 thereto, both of which are no longer applicable law and both of which have been abrogated and altered by numerous subsequent amendments to the Sentencing Guidelines. Previously, there was no prohibition, as there is today, of a court using "gain" as a substitute for "loss" when calculating a guideline enhancement. Back then, courts disagreed over whether a defendant's gain may serve as an alternative estimate of the actual or intended loss only if that loss cannot be determined. See *United States v. Haddock*, 12 F.3d 950, 960 (10th Cir. 1993) (defendant's gain may be used as alternative estimate of loss even if actual or intended loss can be determined) with *United States v. Dickler*, 64 F.3d 818, 826 (3d Cir. 1995) ("The defendant's gain may be used only when it is not feasible to estimate the victim's loss and where there is some logical relationship between the victim's loss and the defendant's gain so that the latter can reasonably serve as a surrogate for the former."); *United States v. Andersen*, 45 F.3d 217, 221 (7th Cir. 1995) (suggesting that gain is proper alternative measure only when loss cannot be determined); *United States v. Kopp*, 951 F.2d 521, 530 (3d Cir. 1991) (superseded by statute on other grounds) (defendant's gain may be considered only if actual and intended loss cannot be determined).

All this confusion was resolved, and *Harper* was effectively overruled by Congress in ratifying changes in the United States Sentencing Guidelines, doing away with U.S.S.G. § 2F1.1, and its application notes, and advising courts and litigants to look to § 2B1.1(b)(1) in how to determine loss. The state of the law is now clear: a court cannot consider gain unless there is a loss, and that loss cannot reasonably be determined.

Just as the government initially alleged in the Matsuba's indictment, here the victim in this case was the financial institution. The Ninth Circuit in *United States v. Hymas,* 780 F.3d 1285, 1293 (9th Cir. 2015) recognized the lender as the victim in a real estate transaction. There, the court stated "[w]e conclude that the district court correctly calculated the losses by taking the principal amount of the loan and subtracting any credits from the subsequent sale of the property." 780 F.3d at 1293.

In *United States v. Morris,* 744 F.3d 1373 (9th Cir. 2014), the Ninth Circuit made clear the correct calculation with mortgage/real property losses:

> The difficulty with Morris's argument is that the Sentencing Guidelines explicitly dictate how to measure loss in mortgage fraud cases that involve collateral. In such cases, the "credits against loss" provision mandates that the initial measure of loss (actual or intended loss) be reduced by "the amount the victim has recovered at the time of sentencing from disposition of the collateral" or, if the

> collateral has not been disposed of at that time, the fair market value of the collateral as of the date of conviction.

Morris, 744 F.3d at 1374-75.

The government never explained why it ignored a traditional loss analysis related to the purchase and sale of real estate. Specifically, under U.S.S.G. § 2B1.1 loss is the difference between the unpaid principle balance and the subsequent sale price of the property. *Hymas*, 780 F.3d at 1293. The government ignored that loss to the actual victim, such as Bank of America and Wells Fargo, could be easily established by records and testimony from the mortgage company. The government's failure to contact the banks remains unexplained. The government wholly failed to explain the basis for its analysis or accounting behind its theory.

The government claimed in its original sentencing position that the case was just too complex and it was too hard to determine loss. [CR 218; 219.] The criminal activity concluded at least four to six years prior to sentencing and the government's investigation was long and extensive. During the course of its investigation the government certainly obtained information about all the potential victims. Yet, the government never provided anyone – the court, probation, the defense – any expert report or summary detailing why or how it was so difficult to determine loss, or whether the government even tried. Instead, all the government did was tell the Matsubas, the court, and Probation, that loss

could not be reasonably determined, without telling anyone why, or explaining the process.

The government was required to provide reliable evidence of gain. The government failed to meet its burden. At the resentencing hearing, the government merely requested that the district court adopt the presentence report. [1 ER 34.] However, the PSR did not support the government's position, it merely parroted what the government said. The PSR noted the government did not provide any loss figures to the Probation Officer. [Jamie PSR 11, Thomas PSR 10.] Rather, the government provided the gain from the rental incomes totaling $24,651,052 as an alternate measure of loss. [Jamie PSR 11, Thomas PSR 10.] Probation noted it was deferring to the district court to determine whether loss or gain applied, and what was the correct amount. [Jamie PSR 11, Thomas PSR 10.]

However, probation emphasized it applied the gain figure provided by the government as the alternative loss amount, consistent with Application Note 3(B), in the absence of any loss calculations which could be reasonably be determined. [Jamie PSR 11, Thomas PSR 10.] Probation noted the government had not "provided any loss figures to the Probation Officer, rather, the Government has provided the gain from the rental incomes totaling $24,651,052 as an alternate measure of loss." [Addendum PSR Jamie 3; Addendum PSR Thomas 3.] Furthermore, probation noted the gain figure provided by the government was

applied as the alternative loss amount, provided the loss calculation could not be reasonably determined in accordance with Application Note 3(B). [Addendum PSR Jamie 3; Addendum PSR Thomas 3.]

Here, probation did not possess any evidence from the government demonstrating loss could not be reasonably calculated. Nor did probation possess any evidence in support of the gain proposed by the government. Instead, probation deferred to the district court as to the correct calculations. However, no evidence of gain or loss was ever presented by the government during the trial of the Matsubas, as the court excluded any testimony of "loss or gain" as irrelevant to culpability.

There was simply no reliable evidence ever presented to the district court. Probation's 20-level increase was not based upon any independent analysis of whether the amount was supported by reliable evidence, or that gain could be used at all. Rather, the "gain" enhancement applied by probation was nothing more than a placeholder for the court to determine to its satisfaction whether an adjustment applied. Because probation department deferred to the court, its placeholder of a 20 level enhancement could not be adopted by the court absent clear and convincing proof. Where the sentencing enhancement "has an extremely disproportionate effect on the sentence relative to the offense of conviction," *United States v. Mezas de Jesus*, 217 F.3d 638, 642 (9th Cir. 2000)—and

particularly where the enhancement is based on uncharged conduct—"due process may require clear and convincing evidence of that conduct." *Hymas*, 780 F.3d at 1289 (quoting *United States v. Treadwell*, 593 F.3d 990 (9th Cir. 2010).

Furthermore, the district court failed to explain the basis for the number it chose. The district court articulated no specific reason why the amount was "most probably over 9.9" or why the amount was "definitely over 3.5." [1 ER 8-9.] The Ninth Circuit found the range adopted by the district court was consistent with the government's gain/loss calculation. *Matsuba*, 858 Fed.Appx. at 216.

There must be evidence to support the loss (or alternative gain figure). Here, the district court simply assigned a number arbitrarily without any findings or justification. This Court should grant certiorari to resolve whether a "loss" calculation determined using rents gained in a mortgage fraud case violates due process when it is based on a single 27-year-old opinion that referred to a sentencing guideline (and related application notes) that are no longer valid law. *See* Sup. Ct. R. 10(c).

CONCLUSION

A writ of certiorari is warranted to resolve this important question of law.

Dated: December 7, 2021

Respectfully submitted,

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