

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI

Appendix A
Opinion of the Third Circuit Court of Appeals

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1602

UNITED STATES OF AMERICA

v.

ROCCO AMERICO MALANGA,

Appellant

Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 2-22-cr-00438-001)
District Judge: Honorable Julien X. Neals

Submitted under Third Circuit L.A.R. 34.1(a)
on May 9, 2024

Before: MATEY, MONTGOMERY-REEVES and ROTH, Circuit Judges

(Opinion filed: September 3, 2024)

OPINION*

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

ROTH, Circuit Judge

Rocco Malanga pleaded guilty to bank fraud and money laundering in connection with his application for loans through the Paycheck Protection Program (PPP). On appeal, he argues the District Court erred in its loss calculation and in failing to properly consider certain factors under § 3553(a). We will affirm the District Court's judgment of sentence.

I. Background

Malanga applied for and received over \$1.8 million in loans through the PPP.¹ In order to secure those loans, he represented to lenders that three companies under his control employed 118 people over the previous year.² In reality, only one of those companies had employed anyone over that time, and it had only four employees on its payroll.³ Altogether, Malanga's companies were eligible to receive roughly \$22,000 through the PPP based on their actual employee headcounts. Thus, Malanga falsified tax documents to show wages for 114 employees who did not exist.

Malanga maintains that he spent the entirety of the PPP loans on business-related expenses, including nearly \$1.6 million in payments to independent truckers. However, he also admits that those truckers were not W-2 employees or 1099 contractors of any of his

¹ Congress established the PPP under the Coronavirus Aid, Relief, and Economic Security (CARES) Act. Pub. L. No. 116-136 § 1102 (2020). The PPP authorized lenders to make up to \$649 billion of SBA-backed loans to small businesses to maintain existing payrolls and meet mortgage, rent, and utilities payments.

² The companies included Cloud Accounting LLC, which received \$564,632; Cedar Grove Transportation, Inc, which received \$441,260; and Pixie Hollow, LLC, which received \$810,294. Malanga changed the name of Cloud Accounting LLC to Cedar Grove Ventures LLC and consolidated various loans in its bank accounts.

³ Florida Department of Revenue and IRS records identified Cedar Grove Transportation, Inc and Pixie Hollow, LLC as inactive during that year.

companies that applied for the loans.⁴ Moreover, upon receipt of each loan, Malanga used the companies to pay salaries to his wife and children, even though they had minimal involvement with the businesses. He also used the companies' bank accounts to purchase groceries, luxury goods, firearms, and electronics for himself and his family.

Malanga pleaded guilty to one count of bank fraud in violation of 18 U.S.C. § 1344 and one count of money laundering in violation of 18 U.S.C. § 1957. As part of his plea, Malanga waived his right to appeal except as to the final determination of the loss amount under U.S.S.G. § 2B1.1(b)(1). The Probation Office calculated a loss amount of more than \$1.8 million, a total offense level of 23, and a guidelines range of 46–57 months. The District Court subsequently adopted the loss amount over Malanga's objections. After considering the § 3553(a) factors, the District Court departed downwards from the guidelines range and sentenced Malanga to 36 months' imprisonment. Malanga appealed.

II. Jurisdiction and Standard of Review

The District Court had jurisdiction under 18 U.S.C. § 3231, and we have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). We review *de novo* the District Court's calculation of the loss amount⁵ and the validity of an appellate waiver.⁶

⁴ By Malanga's own description, his constellation of companies acted as a "bridge" between customers and independent truckers who needed payment on a faster timeline than provided for in traditional trucking contracts. Specifically, they offered logistical support and immediate payment to the truckers, and in exchange received the payments that the customers would have made to the truckers.

⁵ *United States v. Kousisis*, 82 F.4th 230, 244 (3d Cir. 2023) ("When the calculation of the correct Guidelines range turns on an interpretation of what constitutes loss under the Guidelines, we exercise plenary review." (internal quotations omitted)).

⁶ *United States v. Khattak*, 273 F.3d 557, 560 (3d Cir. 2001).

III. Discussion

Malanga argues that the District Court erred when it calculated a loss of more than \$1.8 million, based on the amount of loans he received through the PPP. He also argues that we should invalidate his appellate waiver because the District Court failed to properly weigh certain factors under 18 U.S.C. § 3553(a). Neither claim has merit.

First, our decision in *United States v. Banks*⁷ disproves Malanga's argument that he did not cause a loss under U.S.S.G. § 2B1.1(b). In *Banks*, we held that "loss" as used in that section unambiguously refers to the "loss the victim actually suffered," rather than the loss intended by the defendant.⁸ The actual loss Malanga caused was the amount of loans his companies fraudulently received under the PPP. Had Malanga not submitted falsified loan applications, his lenders would have had over \$1.8 million more to lend to legitimately qualified borrowers or to use for other purposes.⁹ *Banks* also precludes Malanga's claim that he did not cause any loss because he intended to repay his loans in full.¹⁰

⁷ 55 F.4th 246 (3d Cir. 2022).

⁸ *Id.* at 258; *see also id.* at 256–58 (collecting definitions of "loss," including the "decrease in amount, magnitude, or degree" and "[d]iminution of one's possessions or advantages"). Because we have held that the guideline is unambiguous, we need not take up the parties' arguments based on the commentary to the guidelines. *See United States v. Nasir*, 17 F.4th 459, 471 (3d Cir. 2021) (en banc).

⁹ Malanga argues that the court failed to make any findings of causation between his conduct and that loss, but his fraudulent loan applications unquestionably resulted in the diminution of the banks' funds.

¹⁰ We are likewise unmoved by Malanga's argument that he did not cause any loss because he tried to repay the loans after his arrest. *Cf. United States v. Shaffer*, 35 F.3d 110, 114–15 (3d Cir. 1994) (calculating the actual loss caused by bank fraud at the time the fraud was detected rather than at the time of sentencing).

We reject Malanga's argument that he did not cause any loss because his use of the loans broadly aligned with the purpose of the PPP. Malanga relies on cases in which the defendants won government contracts through fraud, and the courts deducted the value of the services the defendants rendered under the contracts from the final loss amounts. He urges us to adopt a similar approach here, but we have distinguished government contracts from government loans. In procurement contracts, the government receives services in exchange for payment by the other party, whereas government benefits such as loans are essentially unilateral.¹¹ The precedent he cites is thus inapposite, and we will not extend it to the facts of his case.¹²

Second, Malanga's appellate waiver is valid and therefore bars his claim regarding the court's application of § 3553(a). We enforce a knowing and voluntary appellate waiver if doing so would not work a miscarriage of justice.¹³ Here, the record proves that Malanga understood he was waiving his appellate rights: his plea agreement acknowledged that he had discussed the waiver with counsel, and he confirmed the same at his plea hearing.

Nor would enforcing his appellate waiver work a miscarriage of justice. Malanga argues that it would because the District Court failed to properly consider, under §§ 3553(a)(1) and (6), the need to avoid unwarranted sentencing disparities and his family

¹¹ See *Kousisis*, 82 F.4th at 248.

¹² Even if we assume that a defendant can mitigate the losses that result from fraudulent loan applications by fulfilling the loan program's policy objectives, Malanga did not do so. As Malanga concedes, he did not use the loans to retain employees or cover the kinds of costs contemplated by the PPP, but rather paid independent truckers who were neither W-2 employees nor 1099 contractors of the companies that applied for the funds. He also diverted a portion of the loans to underwrite an expansion of his business.

¹³ *United States v. Khattak*, 273 F.3d 557, 562 (3d Cir. 2001).

members' medical conditions. The court did consider those factors, and Malanga's argument concerns the weight they were afforded. For that reason, we construe his claim as a substantive rather than a procedural challenge to his sentence.¹⁴ However, "it will be a rare and unusual situation when claims of an unreasonable sentence, standing alone, will be sufficient to invalidate a waiver because of a miscarriage of justice."¹⁵ Malanga offers no basis for us to conclude that his case presents such a miscarriage.

Indeed, Malanga fails to show that his sentence is substantively unreasonable. His sentence falls ten months below the lower bound of the guidelines range. We may presume it is reasonable.¹⁶ Malanga neither rebuts that presumption nor explains why "no reasonable sentencing court would have imposed the same sentence."¹⁷ He merely asserts that the District Court improperly weighed §§ 3553(a)(1) and (6). However, mere "failure to give mitigating factors the weight a defendant contends they deserve does not make a sentence substantively unreasonable."¹⁸ Thus, we will enforce his waiver.

¹⁴ *United States v. Seibert*, 971 F.3d 396, 401 n.4 (3d Cir. 2020). At times, Malanga seems to argue that the District Court did not consider factors under § 3553(a), but the record belies that argument. Otherwise, he alleges no procedural errors for our review.

¹⁵ *United States v. Jackson*, 523 F.3d 234, 244 (3d Cir. 2008).

¹⁶ *United States v. Handerhan*, 739 F.3d 114, 124 (3d Cir. 2014).

¹⁷ *United States v. Lacerda*, 958 F.3d 196, 215 (3d Cir. 2020).

¹⁸ *Seibert*, 971 F.3d at 402 (cleaned up).

IV. Conclusion

For these reasons, we will affirm the District Court's judgment of sentence.¹⁹

¹⁹ Judge Matey would vacate and remand for the District Court to reconsider its loss calculation under U.S.S.G. § 2B1.1(b). The United States argued before the District Court that Malanga's lenders suffered losses as the victim of his actions. And to Judge Matey, *United States v. Kopp*, 951 F.2d 521 (3d Cir. 1991) requires the United States to offer facts sufficient to calculate the loss to those lenders. Although Application Note 3(F)(ii) to U.S.S.G. § 2B1.1 provides that "[i]n a case involving government benefits (e.g., grants, loans, entitlement program payments), loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses, as the case may be," resort to the commentary appended to § 2B1.1 is impermissible. *See United States v. Banks*, 55 F.4th 246, 258 (3d Cir. 2022).

Appendix B
Judgment – USDC-NJ

UNITED STATES DISTRICT COURT
District of New Jersey

UNITED STATES OF AMERICA

v.

CASE NUMBER 2:22-CR-00438-JXN-1

ROCCO AMERIGO MALANGA

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, ROCCO AMERIGO MALANGA, was represented by EDWARD J. DAUBER.

The defendant pleaded guilty to counts 1 and 2 of the INFORMATION on 6/28/2022. Accordingly, the court has adjudicated that the defendant is guilty of the following offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Date of Offense</u>	<u>Count Numbers</u>
18:1344	BANK FRAUD	4/2020 to 8/2020	1
18:1957	MONEY LAUNDERING	8/21/2020	2

As pronounced on March 22, 2023, the defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must pay to the United States a special assessment of \$200.00 for counts 1 and 2, which shall be due immediately. Said special assessment shall be made payable to the Clerk, U.S. District Court.

It is further ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material change in economic circumstances.

Signed this 22 day of March, 2023.


Julien Xavier Neals
J.S. District Judge

Defendant: ROCCO AMERICO MALANGA
Case Number: 2:22-CR-00438-JXN-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 36 months on each count, all counts to run concurrently..

The Court makes the following recommendations to the Bureau of Prisons: The Court recommends that the Bureau of Prisons designate a facility for service of this sentence as near as possible to your home address.

The defendant will surrender for service of sentence at the institution designated by the Bureau of Prisons .

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ To _____
At _____, with a certified copy of this Judgment.

United States Marshal

By _____
Deputy Marshal

Defendant: ROCCO AMERICO MALANGA
Case Number: 2:22-CR-00438-JXN-1

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of 3 years on each count, all counts to run concurrently.

Within 72 hours of release from custody of the Bureau of Prisons, you must report in person to the Probation Office in the district to which you are released.

While on supervised release, you must not commit another federal, state, or local crime, must refrain from any unlawful use of a controlled substance and must comply with the mandatory and standard conditions that have been adopted by this court as set forth below.

Based on information presented, you are excused from the mandatory drug testing provision, however, you may be requested to submit to drug testing during the period of supervision if the probation officer determines a risk of substance abuse.

You must cooperate in the collection of DNA as directed by the probation officer

If this judgment imposes a fine, special assessment, costs, or restitution obligation, it is a condition of supervised release that you pay any such fine, assessments, costs, and restitution that remains unpaid at the commencement of the term of supervised release.

You must comply with the following special conditions:

FINANCIAL DISCLOSURE

Upon request, you must provide the U.S. Probation Office with full disclosure of your financial records, including co-mingled income, expenses, assets and liabilities, to include yearly income tax returns. With the exception of the financial accounts reported and noted within the presentence report, you are prohibited from maintaining and/or opening any additional individual and/or joint checking, savings, or other financial accounts, for either personal or business purposes, without the knowledge and approval of the U.S. Probation Office. You must cooperate with the U.S. Probation Officer in the investigation of your financial dealings and must provide truthful monthly statements of your income. You must cooperate in the signing of any authorization to release information forms permitting the U.S. Probation Office access to your financial records.

MENTAL HEALTH TREATMENT

You must undergo treatment in a mental health program approved by the U.S. Probation Office until discharged by the Court. As necessary, said treatment may also encompass treatment for gambling, domestic violence and/or anger management, or sex offense-specific treatment, as approved by the U.S. Probation Office, until discharged by the Court. The U.S. Probation Office will supervise your compliance with this condition.

NEW DEBT RESTRICTIONS

You are prohibited from incurring any new credit charges, opening additional lines of credit, or incurring any new monetary loan, obligation, or debt, by whatever name known, without the approval of the U.S. Probation Office. You must not encumber *or* liquidate interest in any assets unless it is in direct service of the fine and/or restitution obligation or otherwise has the expressed approval of the Court.

SELF-EMPLOYMENT/BUSINESS DISCLOSURE

You must cooperate with the U.S. Probation Office in the investigation and approval of any position of self-employment, including any independent, entrepreneurial, or freelance employment or business activity. If approved for self-employment, you must provide the U.S. Probation Office with full disclosure of your self-employment and other business records, including, but not limited to, all of the records identified in the Probation Form 48F (Request for Self Employment Records), or as otherwise requested by the U.S. Probation Office.

Defendant: ROCCO AMERIGO MALANGA
Case Number: 2:22-CR-00438-JXN-1

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

- 1) You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
- 2) After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
- 3) You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
- 4) You must answer truthfully the questions asked by your probation officer.
- 5) You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- 6) You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
- 7) You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have fulltime employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- 8) You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
- 9) If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
- 10) You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
- 11) You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
- 12) If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

Defendant: ROCCO AMERIGO MALANGA
Case Number: 2:22-CR-00438-JXN-1

STANDARD CONDITIONS OF SUPERVISION

13) You must follow the instructions of the probation officer related to the conditions of supervision.

¹ For Official Use Only --- U.S. Probation Office :

Upon a finding of a violation of probation or supervised release, I understand that the Court may (1) revoke supervision or (2) extend the term of supervision and/or modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions, and have been provided a copy of them.

You shall carry out all rules, in addition to the above, as prescribed by the Chief U.S. Probation Officer, or any of his associate Probation Officers.

(Signed) _____
Defendant Date

U.S. Probation Officer/Designated Witness Date

Defendant: ROCCO AMERIGO MALANGA
Case Number: 2:22-CR-00438-JXN-1

RESTITUTION AND FORFEITURE

RESTITUTION

The defendant shall make restitution in the amount of \$1,816,186.00. Payments should be made payable to the **U.S. Treasury** and mailed to Clerk, U.S.D.C., 402 East State Street, Rm 2020, Trenton, New Jersey 08608, for proportionate distribution to the following victims in the following amounts:

<u>Name of Payee (Victim)</u>	<u>Amount of Restitution</u>
Mariners Bank 2 Pembroke Place Edgewater, NJ 07020 Attn: Grace Dibi, VP Compliance Officer	\$810,294.00
Celtic Bank 268 S. State Street Suite 300 Salt Lake City, UT 84111 Attn: Justin Masterman, Compliance Manager - BSA Officer	\$564,632.00
WebBank 215 S. State Street Salt Lake City, UT 84111 Attn: Alan Garrett, Financial Crimes Compliance	\$441,260.00

The restitution is due immediately and shall be paid in full within 30 days of sentencing.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

Defendant: ROCCO AMERIGO MALANGA
Case Number: 2:22-CR-00438-JXN-1

RESTITUTION AND FORFEITURE

FORFEITURE

The defendant is ordered to forfeit the following property to the United States:

As a result of committing the offense charged in Count 1 of the Information, Malanga shall forfeit to the United States \$1,816,096. The following property is also subject to forfeiture:

a. The contents of an account at JP Morgan Chase [REDACTED] 9759 in the name of Cloud Accounting, LLC; Cloud Accounting, LLC, d/b/a Cedar Grove Transportation; as well as Cedar Grove Ventures LLC, d/b/a Cedar Grove Group;

b. The contents of an account at Mariner's Bank [REDACTED] 7427 in the name of Pixie Hollow LLC;

c. The contents of an account at JP Morgan Chase [REDACTED] 2515 in the name of Cedar Grove Ventures LLC, d/b/a Cedar Grove Group;

d. The contents of an account at JP Morgan Chase [REDACTED] 6860 in the name of Cedar Grove Ventures, LLC, d/b/a Cedar Grove Group;

e. The contents of an account up to the amount of \$42,500 at JP Morgan Chase [REDACTED] 7680 in the name of Cedar Grove Trees LLC;

f. The contents of an account at Mariner's Bank [REDACTED] 7435 in the name of Pixie Hollow LLC;

g. The contents of an account at JP Morgan Chase [REDACTED] 0036 in the name of Rocco and Jennifer Malanga;

h. The contents of an account at JP Morgan Chase [REDACTED] 9951 in the name of Rocco and Jennifer Malanga;

i. The contents of an account at JP Morgan Chase [REDACTED] 8935 in name of Jennifer Malanga;

j. The contents of an account at Mariner's Bank [REDACTED] 8581 in the name of Jennifer Malanga;

k. The contents of an account at Mariner's Bank [7443] in the name of Rocco A. Malanga;

l. The contents of an account up to the amount of \$26,400 at JP Morgan Chase [REDACTED] 8668 in the name of N.M., by Jennifer Malanga NJUTMA; and,

Defendant: ROCCO AMERIGO MALANGA
Case Number: 2:22-CR-00438-JXN-1

m. The contents of an account up to the amount of \$25,450 at JP Morgan Chase [REDACTED] 8650 in the name of AM., by Jennifer Malanga NJUTMA.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVT A assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 23-1602

UNITED STATES OF AMERICA

v.

ROCCO AMERICO MALANGA,

Appellant

(D.C. No. 2-22-cr-00438-001)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, JORDAN, HARDIMAN, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, CHUNG and ¹ROTH, Circuit Judges

The petition for rehearing filed by **Appellant** in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is ²**DENIED**.

¹ The vote of the Honorable Jane R. Roth is limited to panel rehearing only.

BY THE COURT,

s/ JANE R. ROTH
Circuit Judge

Dated: November 4, 2024
JK/cc: All Counsel of Record

² Judge Matey voted to grant panel rehearing only.

**Additional material
from this filing is
available in the
Clerk's Office.**