No. 08-118

In the Supreme Court of the United States

EDUARDO A. MASFERRER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court plainly erred in finding facts by a preponderance of evidence in calculating petitioner's advisory Sentencing Guidelines range.

2. Whether the district court clearly erred in calculating the loss caused by petitioner's fraud under the Sentencing Guidelines.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 514 F.3d 1158. The judgment of the district court (Pet. App. 12a-15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 2008. A petition for rehearing was denied on March 28, 2008. On June 2, 2008, Justice Thomas extended the time within which to file a petition for writ of certiorari to and including July 26, 2008, and the petition was filed on July 28, 2008 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted in the United States District Court for the Southern District

of Florida of one count of conspiracy, in violation of 18 U.S.C. 371; three counts of wire fraud, in violation of 18 U.S.C. 1343 and 2; eight counts of bank fraud, in violation of 18 U.S.C. 1344; and one count each of securities fraud, in violation of 15 U.S.C. 78j(b) and 78ff(a), obstruction of examination of a financial institution, in violation of 18 U.S.C. 1517, making a false statement, in violation of 18 U.S.C. 1001, and obstruction of agency proceedings, in violation of 18 U.S.C. 1505. Pet. App. 12a-14a. He was sentenced to 360 months of imprisonment, to be followed by five years of supervised release. He also was ordered to make restitution of almost $32 million. *Id.* at 15a. The court of appeals affirmed. *Id.* at 1a-15a.

1. Petitioner was the Chairman, Chief Executive Officer, and principal shareholder of both Hamilton Bank (HB), a federally-chartered financial institution regulated by the Office of the Comptroller of Currency (OCC), and Hamilton Bancorp, a publicly-traded holding company for HB regulated by the Securities Exchange Commission (SEC). Gov't C.A. Br. 2-3. In 1997, HB invested in approximately $22 million worth of Russian debt instruments, which lost most of their value during the summer of 1998. Pet. App. 2a; see Gov't C.A. Br. 4-6.

In an effort to conceal the losses, petitioner and two co-conspirators who were fellow executives at HB, Juan Carlos Bernace and John Jacobs, devised a scheme to liquidate HB's Russian assets through "ratio swaps," wherein the Russian assets were exchanged for other assets with a similar disparity between their face value and fair market value. Pet. App. 2a; Gov't C.A. Br. 8. While the exchanges were not themselves fraudulent, petitioner and his co-conspirators recorded the sale of

the Russian assets and the purchase of new assets as separate, unrelated transactions, contrary to applicable accounting rules. Pet. App. 2a.

Petitioner's scheme resulted in HB's avoiding the recognition of the loss derived from the Russian assets. Gov't C.A. Br. 8-13. It also resulted in material misrepresentations to HB's internal and independent auditors, to federal regulators, and to the investing public. *Id.* at 20-22. Those misrepresentations, in turn, sustained an artificially inflated share price for HB. *Id.* at 22. Petitioner personally benefitted from that artificial inflation because his bonus was tied to the bank's earnings and the market price of its common stock. *Ibid.*

Subsequently in 1999, federal regulators began investigating HB and its sale of the Russian loans. Gov't C.A. Br. 23. Petitioner and co-conspirators agreed to misrepresent that the asset exchanges were unrelated. *Ibid.* In September and November 1999, all three executives made false statements to the OCC examination team. *Ibid.* In April and May of 2002, co-conspirators also persisted in making false statements about the transactions to the SEC. *Id.* at 26; Pet. App. 3a, 9a.

2. On September 6, 2005, a federal grand jury in the Southern District of Florida returned a superseding indictment charging petitioner with one count of conspiracy, in violation of 18 U.S.C. 371 (Count 1); three counts of wire fraud, in violation of 18 U.S.C. 1343 and 2 (Counts 2-4); eight counts of bank fraud, in violation of 18 U.S.C. 1344 and 2 (Counts 5-12); one count of securities fraud, in violation of 15 U.S.C. 78j(b), 78ff(a), 18 U.S.C. 2 and 17 C.F.R. 240.10b-5 (Count 13); two counts of making false statements to the SEC, in violation of 15 U.S.C. 78m(a), 78ff(a), 18 U.S.C. 2, and 17 C.F.R. 240.12b-20, 240.13a-1, 240.13a-13 (Counts 14-

15); one count of obstruction of examination of a financial institution, in violation of 18 U.S.C. 1517 and 2 (Count 16); one count of making a materially false statement to a government agency, in violation of 18 U.S.C. 1001(a)(2) and 2 (Count 17); and one count of obstruction of agency proceedings, in violation of 18 U.S.C. 1505 (Count 18). Gov't C.A. Br. 1-2.

Petitioner's first trial resulted in a hung jury. Gov't C.A. Br. 2. Before his second trial, the district court ismissed on the government's motion the two counts (Counts 14-15) that charged petitioner with submittting false filings to the SEC in 1999. Pet. App. 14a. The jury then returned a guilty verdict on the remaining 16 counts. Gov't C.A. Br. 2.

3. Following the guilty verdict, the Probation Office prepared a Presentence Report (PSR) using the 2001 Sentencing Guidelines Manual, because the conspiracy charged in Count 1 continued into 2002 when petitioner's co-conspirators made false statements to the SEC. PSR Add. 2-4. Pursuant to Sentencing Guidelines § 2B1.1(b)(1)(L), the PSR increased petitioner's offense level by 22 because the total amount of loss was between $20 and $50 million. PSR para. 73. That loss had at least two different components: the bank reported losses totaling approximately $22.3 million, and investors reported losses totaling an additional $20.1 million. PSR paras. 48, 63; PSR Add. 9. With petitioner's adjusted offense level of 42 and criminal history category of I, the PSR calculated a Sentencing Guidelines range of 360 months to life imprisonment.[1] *Id.* para. 133. Pur-

[1] In addition to the increase based on the size of the loss, the PSR imposed a four-level increase for petitioner's role as an organizer or leader of extensive criminal activity, pursuant to Sentencing Guidelines § 3B1.1(a); a two-level increase for obstruction of justice, pursuant to

suant to 18 U.S.C. 3663A(a)(1), the PSR also determined that petitioner was required to make restitution of $11,665,703.40 to the Federal Deposit Insurance Corporation and of $20,091,979.62 to at least 111 victims. PSR paras. 140-143.

At sentencing, petitioner made several objections to the PSR. As relevant here, petitioner claimed that use of the 2001 Sentencing Guidelines Manual would violate the Ex Post Facto Clause and this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), "because the jury verdict did not include a specific finding that [petitioner's] conduct continued past November 1, 2001, the effective date of the 2001 Manual." 04-CR-20404-KMM Docket entry No. 506, at 3-4 (July 19, 2006) (Entry No.); see 7/26/06 Sent. Tr. 6-19 (Tr.). According to petitioner, the jury had found him guilty "of conspiring to obstruct the OCC investigation, *not* the SEC investigation." Entry No. 506, at 4. Petitioner did not argue that such a fact would disproportionately increase his sentence, nor did he address the standard of proof applicable to sentencing facts that would have such a disproportionate impact.

Petitioner also objected to the PSR's loss calculation on three grounds. Entry No. 506, at 8-13; Tr. 19-29. First, he argued that his conduct "did not cause [the] loss to the bank," because the Russian loans had declined in value before the swaps were orchestrated. Entry No. 506, at 9. Second, he argued that the losses to the bank "[were] almost entirely offset" by other par-

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Section 3C1.1; a four-level increase for injuring 50 or more victims, pursuant to Section 2B1.1(b)(2)(B); a two-level increase for use of sophisticated means, pursuant to Section 2B1.1(b)(8)(C); and a two-level increase for abuse of a position of trust, pursuant to Section 3B1.3. PSR paras. 74-75, 77-79.

ties' payments to the bank for the Russian loans. *Ibid.* Third, he argued that the government had not shown "that the decline in the price of [HB] stock was caused by the failure to recognize the loss associated with the alleged swap transactions" rather than "a general decline in all bank stocks." Entry No. 506, at 10.

The district court rejected petitioner's objections, and adopted the factual findings in the PSR. Tr. 19, 22, 23-25.[2] The district court then sentenced petitioner to concurrent terms of 60 months of imprisonment for conspiracy, obstruction, and false statements (Counts 1, 16, 17 and 18); 360 months of imprisonment for wire fraud and bank fraud (Counts 2-12); and 120 months of imprisonment for securities fraud (Count 13). Tr. 71; Entry No. 511, at 3 (July 26, 2006). The district court also ordered a total of five years of supervised release. Tr. 72; Entry No. 511, at 4. Following an evidentiary hearing on restitution, the district court ordered petitioner to make restitution in the total amount of $31,780,004.22, which reflected $17,233,435.10 for bank fraud and $14,546,569.12 for securities fraud.[3] Pet. App. 15a.

4. The court of appeals affirmed. Pet. App. 1a-15a. As relevant here, it rejected petitioner's renewed contention that using the 2001 Sentencing Guidelines Manual violated the Ex Post Facto Clause and his Sixth Amendment right to jury trial. The court of appeals held that because Count 1 charged a conspiracy "to 'commit one crime in two ways,' (i.e., conspiracy to defraud

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[2] In addition to rejecting the 2001 Sentencing Guidelines Manual and loss calculation objections, the district court also rejected petitioner's other objections, as well as his motion for a downward departure based on his health conditions.

[3] The district court's order miscalculates the total amount of restitution as $31,779,914.22 rather than $31,780,004.22. Pet. App. 15a.

the United States by obstructing the OCC or SEC)," Pet. App. 8a, the district court could find by a preponderance of the evidence that petitioner had conspired to obstruct the SEC in 2002. *Id.* at 8a-9a (citing *United States* v. *Riley*, 142 F.3d 1254 (11th Cir. 1998) (per curiam); *United States* v. *Edwards*, 105 F.3d 1179 (7th Cir. 1997), aff'd, 523 U.S. 511 (1998)). The court of appeals further noted that "[t]here was sufficient evidence presented at trial that obstruction of the SEC, perpetrated by [petitioner's] co-conspirators, was part of the conspiracy to defraud the United States." *Id.* at 9a n.4. Under the Sentencing Guidelines, "[i]n the case of a criminal conspiracy, the guidelines sentence shall be based on, inter alia, 'all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity.'" *Ibid.* (quoting Sentencing Guidelines § 1B1.3(a)(1)(B)).

The court of appeals also affirmed the district court's loss calculation. Pet. App. 9a-11a. With respect to investors' total loss, the court of appeals observed that, under the Sentencing Guidelines, the district court needed only to make "a reasonable estimate of the loss." *Id.* at 10a. The court noted that the district court had carefully estimated the loss by limiting the class of claimants to those investors who had purchased after petitioner's fraudulent representations. *Ibid.* With respect to HB's total loss, the court of appeals concluded that "calculation of total loss between $20 and $40 million was not clearly erroneous." *Id.* at 11a. Although petitioner "may not have caused the Russian assets to decline in value, * * * his criminal activity did cause them to be sold when they were in fact worthless, and consequently, caused the $22 million loss to be realized by the bank." *Ibid.*

ARGUMENT

Petitioner contends that this Court should grant certiorari to determine (1) whether due process requires that facts with a disproportionate impact on sentencing be held to a heightened standard of proof (Pet. 10-20) and (2) whether the principles of loss causation articulated by this Court in *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336 (2005), apply in the criminal sentencing context (Pet. 20-27). The first claim is raised for the first time before this Court, and the second claim was raised obliquely at best before the court of appeals and is not squarely presented on the facts of this case. Neither claim merits further review.

1. Petitioner contends (Pet. 10-20) that the circuits are split on whether due process requires a district court to apply a heightened standard of proof to determine a fact at sentencing "where the fact at issue would make a dramatic difference in the ultimate sentence." Pet. 10. Petitioner did not raise any such due process claim in either the district court or the court of appeals. Before those courts, petitioner argued only for different facts (*i.e.*, that he had not conspired in 2002 and had not caused more than $20 million in losses), not a different standard of proof. For that reason, petitioner's briefs before the court of appeals do not discuss due process, nor cite any of the cases on which he now relies (Pet. 11-17). See Pet. C.A. Br. 55-59; Pet. C.A. Reply Br. 25-27.

This Court's "traditional rule * * * precludes a grant of certiorari" when "the question presented was not pressed or passed upon below," *United States* v. *Williams*, 504 U.S. 36, 41 (1992); see, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970), and every reason exists to adhere to that rule here. If

petitioner had raised that claim in the district court, that court might have made an alternative finding under a heightened standard of proof; at the least, the district court and the court of appeals could have addressed the legal issue. Furthermore, because petitioner did not raise this claim below, the claim would be reviewed for plain error. See Fed. R. Crim. P. 52(b); *United States* v. *Olano*, 507 U.S. 725, 731-732 (1993). An error constitutes reversible plain error only if the defendant can show that (1) there was an error, (2) the error was obvious, (3) the error affected substantial rights, and (4) the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *United States* v. *Cotton*, 535 U.S. 625, 631-632 (2002). A case such as this, requiring those additional showings, would be an unsuitable vehicle for addressing the underlying legal question that petitioner has belatedly raised.

Since *Booker*, the courts of appeals have uniformly held that a sentencing judge may generally find facts relevant to determination of the advisory Sentencing Guidelines range by a preponderance of the evidence. See, *e.g.*, *United States* v. *Sanchez-Badillo*, 540 F.3d 24, 34 (1st Cir. 2008); *United States* v. *Grier*, 475 F.3d 556, 561 (3d Cir.) (en banc), cert. denied, 128 S. Ct. 106 (2007); *United States* v. *Kilby*, 443 F.3d 1135, 1140 (9th Cir. 2006); *United States* v. *Garcia*, 439 F.3d 363, 369 (7th Cir. 2006); *United States* v. *Vaughn*, 430 F.3d 518, 525 (2d Cir. 2005), cert. denied, 547 U.S. 1060 (2006); *United States* v. *Morris*, 429 F.3d 65, 72 (4th Cir. 2005), cert. denied, 549 U.S. 852 (2006); *United States* v. *Magallanez*, 408 F.3d 672, 685 (10th Cir.), cert. denied, 546 U.S. 955 (2005); *United States* v. *Pirani*, 406 F.3d 543, 551 n.4 (8th Cir.) (en banc), cert. denied, 546 U.S. 909 (2005); *United States* v. *Yagar*, 404 F.3d 967, 972

(6th Cir. 2005); *United States* v. *Mares*, 402 F.3d 511, 519 & n.6 (5th Cir.), cert. denied, 546 U.S. 828 (2005); *United States* v. *Duncan*, 400 F.3d 1297, 1304-1305 (11th Cir.), cert. denied, 546 U.S. 940 (2005).

As petitioner notes (Pet. 11-15), however, both before and after *Booker*, the Ninth Circuit has taken the position that a sentencing factor that has "an extremely disproportionate effect on the sentence relative to the conviction" may require a district court to find that factor by clear and convincing evidence rather than by a preponderance of the evidence. Pet. 14; see *United States* v. *Staten*, 466 F.3d 708, 717 (2006). Because petitioner did not advocate that position in the courts below, this case is not an appropriate vehicle for the Court to decide whether the Ninth Circuit's position is correct.

Moreover, it is not clear that the Ninth Circuit would apply its standard for "extremely disproportionate" sentencing factors in this case. Thus far, the Ninth Circuit has limited the application of its standard to Sentencing Guidelines enhancements. See, *e.g.*, *United States* v. *Gonzalez*, 492 F.3d 1031, 1038-1039 (2007) (applying heightened standard to enhancement under Sentencing Guidelines § 2A5.2(a)(2)), cert. denied, 128 S. Ct. 1093 (2008); *Staten*, 466 F.3d at 717-720 (applying heightened standard to enhancement under Sentencing Guidelines § 2D1.1(b)(5)(B)); *United States* v. *Lynch*, 437 F.3d 902, 915-916 (en banc) (per curiam) (applying heightened standard to enhancement under Sentencing Guidelines § 2A1.1), cert. denied, 549 U.S. 836 (2006); see also *United States* v. *Dare*, 425 F.3d 634, 642 (2005) (declining to apply heightened standard to statutory mandatory minimum sentence), cert. denied, 548 U.S. 915 (2006); *United States* v. *Rosacker*, 314 F.3d 422, 430 (2002) (declining to apply heightened standard to drug

quantity approximation). The Ninth Circuit has not addressed whether its disproportionate impact test applies to facts that determine which Sentencing Guidelines Manual governs sentencing.

Likewise, the Eighth Circuit cases upon which petitioner relies (Pet. 14-15) do not militate in favor of further review. Although the Eighth Circuit has found that a due process challenge could survive Booker in theory, see *United States* v. *Archuleta*, 412 F.3d 1003, 1007 (2005), it has not sustained any such challenge in practice. As with the Ninth Circuit, it is not clear whether the Eighth Circuit would apply a heightened standard of proof to facts that determine which Sentencing Guidelines Manual governs sentencing.[4]

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[4] There is, in addition, a threshold question whether the district court's factual finding in this case was necessary to determine the applicable Sentencing Guidelines Manual. Congress has provided generally for use of the current version of the Sentencing Guidelines in effect on the day of sentencing. 18 U.S.C. 3553(a)(4). When the federal Sentencing Guidelines were considered mandatory, the courts of appeals uniformly held that ex post facto principles applied to determine which version of the Guidelines to apply. See, *e.g.*, *United States* v. *Seacott*, 15 F.3d 1380, 1386 (7th Cir. 1994) ("We thus join all of our sister circuits in holding that a guideline amendment which occurs after the commission of the defendant's crime which works to the defendant's detriment is inapplicable because it is a violation of the Ex Post Facto Clause."). Since *Booker*, the Seventh Circuit has held that the Ex Post Facto Clause does not apply to changes in the Sentencing Guidelines now that they are advisory, *United States* v. *Demaree*, 459 F.3d 791 (2006), cert. denied, 127 S. Ct. 3055 (2007), while the District of Columbia Circuit has reached the opposite conclusion, see *United States* v. *Turner*, No. 07-3107 (Dec. 5, 2008). If, as the government now believes and as the Seventh Circuit has held, the Ex Post Facto Clause does not apply to advisory Sentencing Guidelines, petitioner would not have been entitled to use of the 2000 version of the Sentencing Guidelines Manual regardless of the district court's factual finding.

Even if there were a clear conflict, this case would not necessarily provide an occasion to resolve it, in light of the plain-error standard of review. As petitioner points out (Pet. 12-13), several circuits have concluded that the disproportionate impact test is no longer viable after *Booker*.[5] Given the division among the circuits, petitioner could not possibly show that the district court's selection of the 2001 Sentencing Guidelines Manual based on a preponderance of the evidence was plain error. See, *e.g.*, *United States* v. *Williams*, 469 F.3d 963, 966 (11th Cir. 2006) (no plain error where there is no controlling case law and circuits are split); *United States* v. *Teague*, 443 F.3d 1310, 1319 (10th Cir.) (same), cert. denied, 549 U.S. 911 (2006).

2. Petitioner contends (Pet. 20-27) that the circuits are split on whether the principles of loss causation articulated by this Court in *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. at 336, apply when calculating shareholder losses during criminal sentencing. Petitioner did not cite *Dura* in either the district court or the court of

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[5] See, *e.g.*, *United States* v. *Fisher*, 502 F.3d 293, 307 (3d Cir. 2007) ("After *Booker*, the offense of conviction is defined by the United States Code; thus, a reasonable sentence which does not exceed the maximum prescribed by the Code cannot possibly be disproportionate to the offense of conviction.") (internal quotation marks and citation omitted), cert. denied, 128 S. Ct. 1689 (2008); *United States* v. *Brika*, 487 F.3d 450, 460-462 (6th Cir.) (challenges to "large enhancement * * * should be viewed through the lens of *Booker* reasonableness rather than that of due process"), cert. denied, 128 S. Ct. 341 (2007); *United States* v. *Reuter*, 463 F.3d 792, 793 (7th Cir. 2006) (debate over disproportionate impact test has been "rendered academic" by *Booker*), cert. denied, 127 S. Ct. 1163 (2007); *Vaughn*, 430 F.3d at 525 ("[A]fter *Booker*, district courts' authority to determine sentencing factors by a preponderance of the evidence endures and does not violate the Due Process Clause of the Fifth Amendment.").

appeals. Before both courts, petitioner argued (without ever citing *Dura*) that the government's evidence did not establish proximate causation. In petitioner's view, the evidence showed that the decline in HB's stock price was tied to a general market decline, not his criminal conduct. Pet. C.A. Br. 62; Docket entry No. 506 at 10. While in the court of appeals, petitioner did cite, *inter alia*, *United States* v. *Olis*, 429 F.3d 540, 545-546 (5th Cir. 2005), see Pet. C.A. Br. 60, which did cite *Dura*, 429 F.3d at 546, petitioner did not specifically develop an argument based on *Dura*. The court of appeals, in turn, did not discuss *Dura* or petitioner's current argument in favor of borrowing its loss causation principles in the Sentencing Guidelines context.

Even assuming that petitioner did adequately present the issue below, the issue would not merit review. Apart from the district court's calculation of *shareholders'* losses, the court separately found that *Hamilton Bank's* losses from the ratio swaps and the inflated bonuses paid to the conspirators exceeded $22 million. As the court of appeals explained, petitioner's criminal activity in trying to hide the Russian loans "cause[d] them to be sold when they were in fact worthless, and consequently, caused the $22 million loss to be realized by the bank." Pet. App. 11a. While petitioner did not cause the loans to decline in value, he sold them before their value could rebound; he overpaid for the assets acquired in return; and he pocketed an annual bonus as a result of the entire scheme. Gov't C.A. Br. 63-64. The combined total of those losses was at least $20 million, thus triggering the 22-level sentencing enhancement under Sentencing Guidelines § 2B1.1(b)(1)(L). Accordingly, petitioner's arguments relating to calculation of shareholder losses under *Dura* have no bearing on petitioner's sen-

tence, making this case an inappropriate vehicle for resolving any alleged split among the circuits on the applicability of *Dura* when calculating shareholder losses for purposes of criminal sentencing.

Petitioner asserts (Pet. 26) that "the court's refusal to consider *Dura* likewise impaired its assessment of loss to the bank," because "loss causation is a specific application of the more general principle of *proximate cause*." Petitioner's assertion misses the mark as both a factual and a legal matter. As a factual matter, the court of appeals did not set aside the requirement of proximate causation. It simply found that the government had adduced sufficient evidence to show that petitioner's criminal conduct caused HB losses of over $22 million. Review of that factual finding for clear error is not warranted. As a legal matter, the cases petitioner cites in support of his claim address only shareholder losses and not any "more general principle." See *United States* v. *Rutkoske*, 506 F.3d 170, 173-174 (2d Cir. 2007), cert. denied, 128 S. Ct. 2488 (2008); *United States* v. *Zolp*, 479 F.3d 715, 719-721 (9th Cir. 2007); *Olis*, 429 F.3d at 548-549. Petitioner therefore identifies no circuit split on this issue.

Finally, even if the courts of appeals were in conflict over the application of loss-calculation principles under Guidelines § 2B1.1, this Court's intervention would not be warranted. *Dura* was a statutory case involving a private civil securities fraud action, and it has no direct application to determination of loss under the Sentencing Guidelines. In any event, because petitioner's challenge concerns only a question of the proper application of a Sentencing Guidelines provision, the Sentencing Commission could eliminate any conflict. Congress has charged the Sentencing Commission with "periodically

review[ing] the work of the courts, and * * * mak[ing] whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Braxton* v. *United States*, 500 U.S. 344, 348 (1991). Because the Sentencing Commission can amend the Sentencing Guidelines to eliminate a conflict or correct an error in their construction, this Court ordinarily will not review decisions interpreting and applying the Sentencing Guidelines. See *id.* at 347-349. That practice is particularly appropriate now that the Guidelines are only advisory. See *United States* v. *Booker*, 543 U.S. 220 (2005).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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