No. 16-1200

In the Supreme Court of the United States

HODA SAMUEL, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's mail fraud convictions.

2. Whether the district court erred in applying the enhancement for abuse of a position of trust under Sentencing Guidelines § 3B1.3.

3. Whether petitioner's due process rights were violated when she appeared at a post-trial hearing on restitution by videoconference.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-11) is not published in the Federal Reporter but is reprinted at 663 Fed. Appx. 508.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 2016. A petition for rehearing was denied on November 3, 2016 (Pet. App. 19). On January 5, 2017, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including April 2, 2017. The petition for a writ of certiorari was filed on April 3, 2017 (a Monday), and is considered timely under Rule 30.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of California, petitioner

was convicted on one count of conspiracy to commit mail fraud and to make false statements in mortgage applications, in violation of 18 U.S.C. 371, 1341, and 1014; and 30 counts of mail fraud, in violation of 18 U.S.C. 1341. 13-10449 Gov't C.A. E.R. (C.A. E.R.) 2. The district court imposed a sentence of 120 months of imprisonment, to be followed by three years of supervised release. *Id.* at 3-4. The court of appeals affirmed. Pet. App. 1-11.

1. Petitioner was a licensed real estate broker who owned a real estate agency and a brokerage firm. Pet. App. 1. In that capacity, petitioner engineered 30 fraudulent real estate transactions. *Id.* at 2. Petitioner and her companies submitted mortgage loan applications to lending institutions that listed false information about the employment status, income, and financial assets of the client-buyers. *Ibid.*; 13-10449 Gov't C.A. Br. 8. The loan applications also inflated the purchase prices by up to $60,000, prompting the lending institutions to issue loans in amounts greater than the value of the real estate. 13-10449 Gov't C.A. Br. 8. Finally, nearly every transaction involved undisclosed cash payments of loan proceeds to the client-buyers, ranging from $15,000 to $45,000. Pet. App. 2; 13-10449 Gov't C.A. Br. 9, 11-12.[1] Petitioner and her companies received substantial commissions from each transaction. Pet. App. 2; 13-10449 Gov't C.A. Br. 9.

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[1] An employee testified that petitioner set the inflated purchase prices in the loan applications, determined the amount of the cash payments, and strategized about withholding this information from lenders. 13-10449 Gov't C.A. Br. 11-12. Two real estate agents testified that petitioner instructed them to raise the list price on their properties in advance of the sale "to make things easier for the appraiser." *Id.* at 10-11 & n.6.

2. A grand jury in the Eastern District of California issued an indictment charging petitioner with one count of conspiracy to commit mail fraud and to make false statements in mortgage applications, in violation of 18 U.S.C. 371, 1341, and 1014; and 30 counts of mail fraud, in violation of 18 U.S.C. 1341. Following a jury trial, petitioner was convicted on all counts. Pet. App. 1.

3. The Probation Office calculated petitioner's advisory Sentencing Guidelines range to be 168 to 210 months of imprisonment, reflecting a total offense level of 35 and a criminal history category of I. Presentence Investigation Report (PSR) ¶ 87. This calculation included a recommendation that petitioner receive a two-level enhancement under Sentencing Guidelines § 3B1.3 because she "abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense." PSR ¶ 44 (quoting Sentencing Guidelines § 3B1.3). In recommending this enhancement, the Probation Office cited petitioner's status as the owner and operator of her businesses, her managerial discretion, and the fact that she trained lower level employees to perpetuate the fraud. *Ibid.*; see also PSR Resp. to Obj. 3.

Petitioner objected to the abuse-of-trust enhancement. The district court overruled that objection and calculated petitioner's Guidelines range at 168 to 210 months of imprisonment. C.A. E.R. 16-17, 21. The court found that the lending institutions relied on petitioner's mortgage company to submit accurate information about the buyers' financial conditions and the terms of the real estate transactions. *Id.* at 17. The court further found that petitioner abused that trust by failing to inform lenders about the inflated purchase

prices or the arrangement where petitioner would funnel a portion of the loan proceeds back to her client-buyers in cash. *Ibid.*

After considering the factors in 18 U.S.C. 3553(a), including petitioner's lack of prior criminal history and concerns about her physical and mental health, the district court imposed a 120-month sentence. C.A. E.R. 49-51.

4. On February 27, 2014, after entering custody, petitioner filed an application for an order directing the Federal Medical Center at Carswell in Fort Worth, Texas to transport her to Sacramento, California for a March 2014 restitution hearing. 14-10340 Gov't C.A. Br. 11. On March 5, 2014, the government and petitioner filed a stipulation noting petitioner's "desire to participate in the restitution hearing" and seeking "additional time * * * to arrange access for [petitioner] to participate in the hearing via video teleconferencing from Texas." *Id.* at 12 (citations omitted). The district court entered an order directing the Federal Medical Center to make such arrangements for an April 29, 2014 hearing. *Ibid.*

Three days before the restitution hearing, petitioner sought an additional continuance, asserting that her participation by videoconference was interfering with her preparations and violated Rule 43 of the Federal Rules of Criminal Procedure. 14-10340 Gov't C.A. Br. 13. The government did not oppose the request and offered to assist in arranging petitioner's transportation. *Ibid.* The district court granted petitioner's motion for a continuance and rescheduled the restitution hearing for June 27, 2014. *Ibid.*

Petitioner sought another continuance several weeks later, informing the district court that her health had

"further deteriorated" and that the Federal Medical Center had determined that she would "be unable to travel." 14-10340 Gov't C.A. Br. 13-14 (citations omitted). The court denied the motion and proceeded with the restitution hearing. Petitioner appeared and testified by videoconference. *Id.* at 14. At the conclusion of the hearing, the court ordered petitioner to pay $3,029,412.64 in restitution. *Id.* at 22-23, 25.

5. The court of appeals affirmed in an unpublished memorandum opinion. Pet. App. 1-11.

a. The court of appeals found sufficient evidence that petitioner had used the mails for the purpose of executing her scheme to defraud, thereby violating 18 U.S.C. 1341. Pet. App. 4-6. The court catalogued evidence showing that, after each real estate transaction closed, the county recorder mailed the deed of trust to the lending institution that had financed the transaction. *Id.* at 5. The court held that these mailings were "incident to an essential part of [the] fraudulent scheme." *Id.* at 6. The court explained that a jury could reasonably conclude that the mailings "serve[d] to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of [petitioner] less likely by assuring that the conveyance of the property had gone forward in accordance with the usual procedures." *Ibid.* (ellipses and internal quotation marks omitted) (quoting *United States* v. *Lo*, 231 F.3d 471, 479 (9th Cir. 2000)).

b. The court of appeals found no error in the district court's decision to apply the abuse-of-trust enhancement under Sentencing Guidelines § 3B1.3. Pet. App. 7-8. Because petitioner "held a managerial role as the owner of both a real estate firm and mortgage brokerage, and used that position of authority to perpetrate

the scheme," the court held that the enhancement was appropriate. *Ibid.*

c. The court of appeals rejected petitioner's claim that the district court's denial of her request to order her transportation to Sacramento to appear at the restitution hearing violated due process. Pet. App. 9-11. The court observed that "a defendant's absence only violates due process 'to the extent that a fair and just hearing would be thwarted by this absence, and to that extent only.'" *Id.* at 9 (quoting *United States* v. *Gagnon*, 470 U.S. 522, 526 (1985) (per curiam) (brackets omitted)). In this case, petitioner "was able to present her case to the court: she testified in her defense, and made an additional statement after the court heard argument from her counsel and the Government." *Id.* at 10. Because "[t]here is no indication that [petitioner] was prejudiced in any way by not being physically present at the hearing," the court discerned "no reason to believe that a fair and just hearing was thwarted by [petitioner's] physical absence." *Ibid.* (citation and internal quotation marks omitted).[2]

The court of appeals noted petitioner's "vague" statements in her reply brief that she had been "denied her right to review the records of the case and thus could not adequately confer with her attorney." Pet. App. 10 n.3. The court observed, however, that (1) petitioner "failed to argue this point in her opening brief"; and (2) petitioner had not "explain[ed] how this supposed denial of her right to review records had anything

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[2] The court of appeals also rejected petitioner's contention that her physical absence violated Rule 43 of the Federal Rules of Criminal Procedure. Pet. App. 9-11. Petitioner does not renew her arguments with respect to that issue.

to do with her physical absence at the restitution hearing, or how any lack of access to records or her attorney prevented her from making any argument or otherwise rendered the hearing unjust in any way." *Ibid.*

ARGUMENT

Petitioner renews her claims that (1) the evidence was insufficient to sustain her convictions for mail fraud (Pet. 7-10); (2) her involvement in the scheme did not merit an abuse-of-trust enhancement under Sentencing Guidelines § 3B1.3 (Pet. 10-12); and (3) the district court's failure to arrange for her physical presence at the restitution hearing violated due process (Pet. 12-14). Those claims do not warrant further review.

1. Petitioner first contends (Pet. 7-10) that the mailings in this case could not support the mail fraud charges because they occurred after the scheme to defraud was complete. The court of appeals correctly rejected that contention.

a. Conviction for mail fraud requires proof of mailings "for the purpose" of executing a fraudulent scheme. 18 U.S.C. 1341. "To be part of the execution of the fraud, * * * the use of the mails need not be an essential element of the scheme. It is sufficient for the mailing to be incident to an essential part of the scheme or a step in the plot." *Schmuck* v. *United States*, 489 U.S. 705, 710-711 (1989) (brackets, citations, and internal quotation marks omitted). Accordingly, "[m]ailings occurring after receipt of the goods obtained by fraud are within the statute if they 'were designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place.'" *United States* v. *Lane*, 474 U.S. 438, 451-452 (1986) (quoting *United States* v.

Maze, 414 U.S. 395, 403 (1974), superseded by statute on other grounds as stated in *Loughrin* v. *United States*, 134 S. Ct. 2384, 2391-2392 (2014)).

In *Schmuck*, for example, the defendant had engaged in a long-running scheme to buy used cars, roll back their odometers, and sell the cars to dealers at inflated prices. 489 U.S. at 707. The government secured mail fraud convictions based on dealers' mailings of title applications to state authorities after selling the vehicles to retail customers. *Id.* at 708. This Court rejected the defendant's argument that those mailings could not support mail-fraud charges because they followed the achievement of the fraudulent sale. *Id.* at 710-715. The Court reasoned that the evidence supported finding a scheme that extended beyond the sale of a single car, "the success of [which] depended upon [the defendant's] continued harmonious relations with, and good reputation among, retail dealers." *Id.* at 711-712. Each mailing —even if unnecessary to the fraudulent sale—was essential to the scheme's "long-term success" because it cemented the passage of title from the defendant to the dealers to the retail purchasers. *Id.* at 714. "Moreover, a failure of this passage of title would have jeopardized Schmuck's relationship of trust and goodwill with the retail dealers upon whose unwitting cooperation his scheme depended." *Ibid.*

The use of the mails in this case played a similar, if not more prominent, role by directly indicating to the victims of the fraud (the lenders) that the transactions in which they had been induced to participate on fraudulent terms had concluded in a manner that protected their interests. After petitioner executed the real estate transaction on behalf of a client-buyer, the county

recorder mailed the deed of trust to the lending institution that had financed the purchase. Pet. App. 5. This mailing evidenced the recording of the deed and, accordingly, supplied the lender with a "security instrument" over the mortgaged property. 13-10449 Gov't C.A. Br. 43 (citation omitted). As the court of appeals observed, the mailing assured the lender "that the conveyance of the property had gone forward in accordance with the usual procedures." Pet. App. 6 (quoting *United States* v. *Lo*, 231 F.3d 471, 479 (9th Cir. 2000)). That misimpression, in turn, allowed petitioner to continue her scheme for a considerable period and, significantly, to return to the same lenders with additional applications for the financing of other fraudulent transactions. See 13-10449 Gov't C.A. Br. 46-47 (petitioner used 11 lending entities to finance the 30 transactions in this case). The jury thus could reasonably infer on this record that the mailings were incident to the fraud scheme because they lulled the lending institutions into a "false sense of security" that the real estate transactions were legitimate, and "postpon[ed] their ultimate complaint to the authorities." Pet. App. 6 (quoting *Lo*, 231 F.3d at 479).

b. Petitioner incorrectly contends (Pet. 9) that "the courts of appeals are divided on whether mailings of deeds or titles post-fraud are sufficient to be considered incident to an essential element of the fraud." No such division exists.

Schmuck resolved that issue. This Court held that the victim's mailing of a title application to a state agency occurring after a fraudulent sale was sufficient to sustain a mail fraud charge. 489 U.S. at 712. The courts of appeals have similarly affirmed convictions

where the post-transaction "mailings achieved an important purpose" of "preserv[ing] the appearance of propriety, even if they did not actively cause the loss of money." *United States* v. *Mankarious*, 151 F.3d 694, 705 (7th Cir.), cert. denied, 525 U.S. 1056 (1998); see, *e.g.*, *United States* v. *Hill*, 643 F.3d 807, 858-859 (11th Cir. 2011) (mailing of deeds and lien documents to closing attorneys), cert. denied, 132 S. Ct. 1988 (2012); *United States* v. *Fiorito*, 640 F.3d 338, 348 (8th Cir. 2011) (mailing of HUD settlement statement to lender), cert. denied, 565 U.S. 1246 (2012); *United States* v. *Weiss*, 630 F.3d 1263, 1270 (10th Cir. 2010) (mailing of deeds of trust to lenders); *United States* v. *Manges*, 110 F.3d 1162, 1169-1170 (5th Cir. 1997) (mailing of letter confirming title to mineral resources under tract of land), cert. denied, 523 U.S. 1106 (1998); *United States* v. *Ashman*, 979 F.2d 469, 482-483 (7th Cir. 1992) (per curiam) (mailing of trade confirmation statements to customers), cert. denied, 510 U.S. 814 (1993).

The decisions cited by petitioner involve fact-specific scenarios where the post-transaction mailings did not contribute to the successful continuation of the fraudulent scheme. They do not show that any other court of appeals would have reached a different conclusion than the court below on this particular record.

In *United States* v. *Strong*, 371 F.3d 225 (5th Cir. 2004), the defendant took physical possession of, but not title over, cars at an auction, and subsequently refused to pay the auction house. *Id.* at 226. Before the auction house could reclaim the cars, the defendant obtained certified copies of the original title in person from a state agency and then resold the cars to innocent purchasers. *Ibid.* The state agency mailed the title applications to another agency office where the applications

were microfilmed and destroyed. *Id.* at 227. The Fifth Circuit found those facts insufficient to support a mail fraud conviction because the mailings were "not directly related to the passage of title," *id.* at 230, and because "the record contain[ed] no evidence that they * * * lull[ed] the victims of the fraud," *id.* at 231.

In this case, by contrast, the trial testimony established that the recorded deeds of trust established the lenders' rights in the titles to the mortgaged properties and were of central importance to their participation in the transactions. See 13-10449 Gov't C.A. Br. 43-44. Because "the mailings of the original deeds of trust bolstered the legitimacy of these transactions from the lenders' perspective," the jury reasonably could determine that "each mailing was essential to the continuation of the scheme," *Weiss*, 630 F.3d at 1271, "rather than post-fruition surplusage," *id.* at 1270. See Pet. App. 5-6.

United States v. *Kwiat*, 817 F.2d 440 (7th Cir.), cert. denied, 484 U.S. 924 (1987), was decided before *Schmuck* and is in any event inapposite. There, bank directors hatched a fraudulent scheme to cause the bank to make loans to investors to purchase condominiums in which the directors had an interest. When the loans defaulted, the bank lost more than $600,000. *Id.* at 442. The directors were charged with mail fraud that deprived the bank of their honest services. The mailings alleged to be in furtherance of the fraud occurred when the recorder of deeds mailed each mortgage instrument back to the bank after recording the mortgage. *Id.* at 443. The Seventh Circuit set aside their mail fraud convictions on the ground that those mailings "did not make the fraud possible or facilitate it." *Ibid.* The court explained that "[g]etting each mortgage recorded was

unrelated to the directors' defrauding the Bank," observing that the mailings did not assist in concealing or continuing the fraud. *Id.* at 444.

In this case, by contrast, getting each mortgage recorded was critical to the victim-lenders and, therefore, directly related to the fraud scheme's continued success. See 13-10449 Gov't C.A. Br. 43-44. As the court of appeals found, the mailing of deeds of trust to the victim-lenders "was incidental to an essential aspect of this overall sham sale scheme" because it lulled the lenders into believing that "the conveyance of the property had gone forward in accordance with the usual procedures." Pet. App. 6 (quoting *Lo*, 231 F.3d at 479); see also *Hill*, 643 F.3d at 859 ("Because the scheme depended on the observance of normal filing procedures, it was not 'fully consummated' before the mailings were sent, even though the loans had already been processed.").

2. Petitioner next contends (Pet. 10-12) that the district court erred in applying a two-level enhancement for abuse of a position of trust, pursuant to Sentencing Guidelines § 3B1.3. Further review is unwarranted because, although the court of appeals' unpublished memorandum opinion affirming the use of that enhancement conflicts with a decision from another circuit, the Sentencing Commission can resolve the disagreement.

The district court found that the two-level enhancement applied because petitioner abused the trust of the lending institutions. Those institutions had relied on petitioner—a licensed mortgage broker—to submit truthful information about buyers' financial conditions and the terms of the real estate transactions. C.A. E.R. 16-17. In affirming that decision, the court of appeals followed the approach of at least two other circuits. See *United States* v. *Wright*, 496 F.3d 371, 377 (5th Cir.

2007) (mortgage broker occupied a position of trust "that flows from the structure of the mortgage industry itself, which sets a patterned process for loan application[s] that over time cultivates trust between brokers and lenders"); *United States* v. *Septon*, 557 F.3d 934, 938 (8th Cir. 2009); see also *United States* v. *O'Malley*, 495 Fed. Appx. 239, 245 (3d Cir. 2012).[3]

Petitioner notes the Seventh Circuit's contrary conclusion in *United States* v. *Fuchs*, 635 F.3d 929 (2011).[4] There, the court concluded that the mortgage broker maintained "an ordinary, commercial relationship" with the lending institutions that was not "enough to warrant an upward adjustment under [Sentencing Guidelines] § 3B1.3." *Id.* at 934. Although the court refused to "say that a mortgage broker can *never* occupy a position of trust with respect to his lenders," it declined to auto-

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[3] Two other circuits addressing similar fraud schemes have affirmed the use of this enhancement on the alternative ground that the mortgage broker defendant "used a special skill[] in a manner that significantly facilitated the commission or concealment of the offense." Sentencing Guidelines § 3B1.3; see *United States* v. *Calabrese*, 660 Fed. Appx. 97, 99-101 (2d Cir. 2016); *United States* v. *Grant*, 479 Fed. Appx. 904, 906-907 (11th Cir.), cert. denied, 133 S. Ct. 491 (2012).

[4] The other decisions cited by petitioner (Pet. 11-12) address significantly different professional relationships. *United States* v. *Thorn*, 446 F.3d 378 (2d Cir. 2006) (owner of asbestos abatement company charged with violating the Clean Air Act); *United States* v. *Ebersole*, 411 F.3d 517 (4th Cir. 2005) (government contractor, who was a bomb-sniffing canine team handler, charged with wire fraud and presentment of false claims), cert. denied, 546 U.S. 1136 (2006); *United States* v. *Liss*, 265 F.3d 1220 (11th Cir. 2001) (physicians charged with Medicare fraud); *United States* v. *Haber*, 251 F.3d 881 (10th Cir.) (investment manager charged with mail and wire fraud), cert. denied, 534 U.S. 915 (2001).

matically infer such a position from "the general 'structure' of the commercial relationship between mortgage broker and lender." *Id.* at 936.

Further review of the issue is unwarranted. As an initial matter, the unpublished decision below establishes no precedent, see *Pedroza* v. *BRB*, 624 F.3d 926, 931 (9th Cir. 2010); 9th Cir. R. 36-3 ("Unpublished dispositions and orders of this [c]ourt are not precedent."), and thus cannot create a conflict warranting this Court's review. In any event, this Court ordinarily does not review decisions interpreting the Sentencing Guidelines. The Sentencing Commission can amend the Guidelines to eliminate a conflict between the circuits or to correct an error. See *Braxton* v. *United States*, 500 U.S. 344, 347-349 (1991). The Commission is charged by Congress with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Id.* at 348; see *United States* v. *Booker*, 543 U.S. 220, 245 (2005). Particularly because the Guidelines are now advisory, see 543 U.S. at 245, and petitioner received a sentence well below the Guidelines range, see C.A. E.R. 49-51, this Court's intervention is not warranted.

3. Finally, petitioner contends (Pet. 12-14) that her due process rights were violated because she could not be physically present at the restitution hearing. That fact-bound claim does not warrant further review. "The presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *United States* v. *Gagnon*, 470 U.S. 522, 526 (1985) (per curiam) (brackets omitted) (quoting *Snyder* v. *Massachusetts*, 291 U.S. 97, 107-108 (1934)). Petitioner had a

full and adequate opportunity to be heard at the restitution hearing. She appeared by videoconference, testified in her defense, and provided additional argument to the court. Pet. App. 10. Because the record contains "no indication that [petitioner] was prejudiced in any way by not being physically present at the hearing," *ibid.*, the court of appeals correctly rejected petitioner's due process claim.

Petitioner states (Pet. 12) that she was unable to review the exhibits submitted by the government at the hearing, confer with her attorney during the hearing, or submit a document purportedly showing that the FDIC suffered no losses from her fraud. Because petitioner failed properly to raise those allegations to the court of appeals, see 14-10340 Pet. C.A. Br. 6-10; 14-10340 Pet. C.A. Reply Br. 2-3, certiorari on those claims is not warranted. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (this Court sits as "a court of review, not of first view"). Petitioner also fails to demonstrate that those allegations, even if credited, rendered her restitution hearing unjust.[5]

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[5] Although the government submitted two exhibits at the restitution hearing, petitioner makes no allegation that those exhibits were withheld from the defense in advance of the hearing. Nor could she, as evidenced by the fact that defense counsel cross-examined the government's witness about those exhibits. See C.A. E.R. 43-50. Furthermore, the district court afforded petitioner ample opportunities to consult with her attorney before the hearing, and petitioner has not identified additional information or argument that would have been conveyed had she been permitted to consult with counsel mid hearing. Finally, petitioner has not explained how her appearance by videoconference precluded her from submitting documentary evidence at the hearing through counsel.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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