No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JONATHONE J. JOHNSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

QUESTION PRESENTED

This case raises two question of criminal law and procedure which have yet to be addressed by this Court. The first of which is whether a defendant is entitled to the presumption of a *de novo* resentencing hearing upon remand by a circuit court. This question has caused a split of authority among the circuit courts. A majority of circuits, including the Sixth, Eighth, Ninth, and Tenth, follow a basic rule that a district court can review sentencing matters *de novo* unless the remand specifically limits the lower court's inquiry. *United States v. Moore*, 131 F.3d 595 (6th Cir. 1997); *United States v. Caterino*, 29 F.3d 1390 (9th Cir. 1994); *United States v. Cornelius*, 968 F.2d 703 (8th Cir. 1992); *United States v. Smith*, 930 F.2d 1450 (10th Cir.), *cert. denied*, 502 U.S. 879 (1991); *United States v. Sanchez Solis*, 882 F.2d 693 (2d Cir. 1989). A minority of circuits, including the First, Fifth, Seventh, and D.C. Circuits, disagree with the presumption of *de novo* consideration on resentencing and hold generally that every remand by its nature limits the district court to review only those issues which led the appellate court to order the remand. *United States v. Ticchiarelli*, 171 F.3d 24 (1st Cir. 1999); *United States v. Marmolejo*, 139 F.3d 528, 531 (5th Cir.), *cert. denied*, 525 U.S. 1056 (1998); *United States v. Parker*, 101 F.3d 527 (7th Cir. 1996); *United States v. Whren*, 111 F.3d 956 (D.C. Cir. 1997). Thus, the question of first impression now presented to this Court is:

I. Whether Petitioner was entitled to a *de novo* resentencing hearing relative to his challenges to the restitution order following remand from the Sixth Circuit.

The second question presented involves the proper interpretation and application of the Mandatory Victims Restitution Act ("MVRA"). In the context of cases involving mortgage fraud, a bank issues mortgages as collateral against real estate. Often times, the victim-banks seek only partial claims of restitution for select properties while foregoing claims of restitution

on other properties. This matter raises the question of how the lower courts should calculate and order restitution in such instances involving partial claims for restitution. Specifically, the question presented herein is:

II. Whether Petitioner was denied the effective assistance of counsel during sentencing where his counsel failed to challenge the Government's claim for partial restitution which resulted in the imposition of a greater amount of restitution than what was otherwise appropriate under the MVRA.

This Court has yet to consider either of the questions presented herein.

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Petitioner Jonathone J. Johnson petitions this Court for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The United States District Court for the Eastern District of Michigan initially denied Petitioner's Motion to Vacate his conviction filed pursuant to 28 U.S.C. § 2255 in a written Opinion dated July 30, 2015, which is attached to this Petition as Appendix Exhibit A. In an unpublished Order dated March 24, 2016, the Sixth Circuit granted Petitioner's motion for a certificate of appealability which Order is attached hereto as Appendix Exhibit B.

Following the Sixth Circuit's Order Granting a Certificate of Appealability, the Sixth Circuit issued its unpublished Order on March 16, 2017 vacating the district court's decision denying Petitioner's Motion to Vacate Conviction and remanded the matter to the district court for further proceedings. A copy of the Sixth Circuit's Order vacating and remanding is attached hereto as Appendix Exhibit C.

On remand from the Sixth Circuit, the district court again denied Petitioner's Motion to Vacate in a written Order on Restitution Issue On Remand from the Sixth Circuit dated March 16, 2018, which is attached hereto as Appendix Exhibit D. The district court denied issuing a certificate of Appealabilty. Petitioner then sought from the Sixth Circuit a certificate of appealability.

The United States Court of Appeals for the Sixth Circuit resolved this case in an unpublished Order issued on August 22, 2018, denying Petitioner's Motion for a Certificate of Appealability which is attached to this Petition as Appendix Exhibit E.

JURISDICTION

The Sixth Circuit issued its Order in this matter on August 22, 2018. This Petition is filed within ninety days of that date, as required by Rule 13.3 of the Supreme Court Rules. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

In October 2011, Petitioner Jonathone J. Johnson pled guilty to wire fraud in violation of 18 U.S.C. § 1343 relating to mortgages. He was sentenced by the district court to 87 months imprisonment, 3 years supervised release, and was ordered to pay $90,100 in restitution to Bank of America. The district court later granted the Government's motion to impose an additional restitution amount of $678,000 to the FDIC as the receiver of mortgages loaned by NetBank. The Sixth Circuit affirmed Defendant's sentence and restitution in an unpublished opinion. *United States v. Johnson*, 530 Fed. Appx. 406 (6th Cir. 2013).

On December 24, 2014, Johnson filed a Motion to Vacate his Conviction under 28 U.S.C. § 2255 alleging, *inter alia*, that his counsel was ineffective for failing to raise certain challenges to the calculation of his loss amounts and restitution order. In a written opinion dated July 30, 2015, the district court issued its Order denying Petitioner's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255, and on March 24, 2016 the Sixth Circuit granted Johnson a Certificate of Appealablity as to whether his counsel was ineffective for failing to raise a "payments-made" argument in response to the Government's motion to increase Johnson's restitution.

On March 16, 2017, following briefing by the parties, a unanimous panel of the Sixth Circuit issued an Order remanding the matter back to the district court relative to the calculation of Johnson's restitution Order. In particular, the panel's Order provided as follows:

> The government acknowledges the above errors, conceding that it did not have time to obtain the loan payment histories and that it is unclear whether Johnson was credited for pre-default loan payments. Nonetheless, the government contends that Johnson was not prejudiced by counsel's allegedly deficient performance because, after correcting the amount of victim loss to $847,930 and the potential recovery to $144,820, the remaining victim loss of $703,110 exceeds the $678,000 of restitution imposed by the

> district court. However, because the district court was unaware of the errors contained in the government's worksheets and the government concedes that it is unclear whether Johnson was credited for pre-default loan payments the case will be remanded to the district court to consider these issues in the first instance.
>
> Accordingly, we **VACATE** the district court's order and **REMAND** the case for further proceedings on that issue.

Jonathone Johnson v. United States, 2017 WL 3895063 (6th Cir. March 16, 2017)(unpublished).

Following the Sixth Circuit's Order of remand, the district court conducted a hearing on March 13, 2018 during which the parties disagreed as to the scope of the Sixth Circuit's remand Order; that is, whether it was general or limited in nature. Defendant had asserted that the Order of remand didn't expressly include limiting instructions such that the district court should have conducted a *de novo* hearing relative to the restitution and that, under a *de novo* standard, Johnson was prejudiced by his counsel's ineffective assistance.

The district court disagreed with Defendant, sided with the Government, and concluded that, under the limited scope of the Sixth Circuit's Order of remand, Johnson didn't suffer any prejudice by his counsel's alleged failures and re-imposed the previous restitution order. The district court also denied the issuance of a Certificate of Appealability. On March 16, 2018, the district court issued its written Order on Restitution Issue on Remand from the Sixth Circuit.

Defendant filed with the Sixth Circuit a timely Notice of Appeal, the Sixth Circuit extended the undersigned counsel's CJA appointment and counsel then filed with the Sixth Circuit a Motion for a Certificate of Appealability.

1. The Sixth Circuit's Order denying Petitioner's Motion for a Certificate of Appealability.

In an unpublished Order, a panel of the Sixth Circuit denied the issuance of a certificate of appealability thus leaving intact the district court's Order on Restitution Issue on Remand

from the Sixth Circuit. In denying a certificate of appealability, the Sixth Circuit noted the following standard:

> When the district court's denial is on the merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When the district court's denial is based on procedural ruling, the petitioner must demonstrate that "jurists of reason would find it debatable whether the [motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

Appendix Ex. E, *Johnson v. United States*, Order, pg. 4 (6th Cir. August 22, 2018). The Sixth Circuit then found that Petitioner couldn't show either that the district court's merits or procedural ruling was wrong or debatable among jurists.

In finding that Petitioner couldn't show the denial of a constitutional right to the effective assistance of counsel, the Sixth Circuit reasoned as follows:

> [T]he district court determined that counsel's performance did not prejudice Johnson because the government's corrected restitution amount of $751,430 was still higher than the $678,000 restitution imposed. In making this determination, the district court considered the government's explanation for the newly calculated net loss amount. First, the government argued that the "net loss" figure should be corrected from $678,000 to $847,930 because of mathematical errors and the improper use of the loan contract price instead of the loan advance amounts. [] The government then conceded that Johnson was entitled to the requested credit for $96,500 in pre-default loan principal payments. This results in a corrected restitution amount of $751,430. Reasonable jurists would not debate the district court's ruling that counsel's performance did not prejudice Johnson because the corrected restitution amount is still higher than the $678,000 restitution amount imposed.

Appendix Ex. E, Order, pg. 4-5.

The Sixth Circuit also agreed with the district court's procedural ruling that Petitioner's arguments were beyond the scope of Sixth Circuit's prior remand. On this point, the Sixth Circuit ruled as follows:

> Reasonable jurists would not debate the district court's procedural ruling that Johnson's arguments concerning additional NetBank properties and his challenge to the restitution amount imposed in favor of Bank of America were beyond the scope of this court's remand. The district court noted that this court did not grant a COA with respect to the issue of whether all thirteen NetBank properties should have been considered in the net loss calculation. Furthermore, the case was not remanded for resentencing purposes. Rather, the case was remanded for the district court to consider whether the government's acknowledged errors in calculating the amount of restitution and failure to grant Johnson credit for pre-default loan payments-made argument had prejudiced his defense. Johnson's attempt to amend his claim to include new arguments concerning additional NetBank properties and the restitution amount imposed in favor of Bank of America is improper because those issues were not asserted in his § 2255 motion or on appeal. [] Under these circumstances, reasonable jurists would not debate the district court's decision not to address his new arguments.

Appendix Ex. E, Order, pg. 5.

REASONS TO GRANT THE WRIT

I. The Mandatory Victims Restitution Act, 18 U.S.C. § 3663A ("MVRA"), provides that an order of restitution shall require the defendant to pay an amount equal to "(I) the value of the property on the date of the damage, loss, or destruction; or (II) the value of the property on the date of sentencing, less (ii) the value (as of the date the property is returned) of any part of the property that is returned[.]" 18 U.S.C. § 3663A.

In many instances of mortgage fraud, the victim-banks seek only partial claims of restitution which raises the question of how should the lower courts calculate and order restitution in such instances involving partial claims for restitution. In most instances, such as here, the lower courts are ignoring the express language of the MVRA which may result in the victim-banks seeking profit on their claims of restitution. Without a more definitive ruling from this Court, the lower courts are ignoring the letter and spirit of the MVRA. This Court has yet to consider the proper application of the MVRA to claims for partial restitution. The instant petition presents a significant question of statutory interpretation of the MVRA such that the Court should grant certiorari.

II. In this case, the district court refused to consider Petitioner's substantive challenge to the calculation of restitution under the MVRA. In refusing to do so, the district court applied what is commonly referred to as the "mandate rule" and held that Petitioner's claims were beyond the scope of the Sixth Circuit's Order of Remand. There is a split of authority among the circuit courts as to the proper application of the mandate rule for purposed of resentencing.

A majority of circuits, including the Sixth, Eighth, Ninth, and Tenth, follow a basic rule that a district court can review sentencing matters *de novo* unless the remand specifically limits the lower court's inquiry. *United States v. Moore*, 131 F.3d 595 (6th Cir. 1997); *United States v. Caterino*, 29 F.3d 1390 (9th Cir. 1994); *United States v. Cornelius*, 968 F.2d 703 (8th Cir. 1992); *United States v. Smith*, 930 F.2d 1450 (10th Cir.), *cert. denied*, 502 U.S. 879 (1991); *United States v. Sanchez Solis*, 882 F.2d 693 (2d Cir. 1989). A minority of circuits, including the First, Fifth, Seventh, and D.C. Circuits, disagree with the presumption of *de novo* consideration on resentencing and hold generally that every remand by its nature limits the district court to review only those issues which led the appellate court to order the remand. *United States v. Ticchiarelli*, 171 F.3d 24 (1st Cir. 1999); *United States v. Marmolejo*, 139 F.3d 528, 531 (5th Cir.), *cert. denied*, 525 U.S. 1056 (1998); *United States v. Parker*, 101 F.3d 527 (7th Cir. 1996); *United States v. Whren*, 111 F.3d 956 (D.C. Cir. 1997).

This case presents the question of whether Petitioner was entitled to a *de novo* resentencing hearing relative to his challenges to the restitution order following remand from the Sixth Circuit.

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This case presents the Court with two important question of criminal law and procedure that have never been squarely addressed by this Court. Specifically, how to calculate claims for *partial* restitution under the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A, in cases involving mortgage fraud where money was lent to buy properties that were later secured by collateral (i.e., mortgages). Additionally, this case presents a circuit split as to whether Petitioner was entitled to *de novo* resentencing following remand by the Sixth Circuit.

This Court should grant certiorari in the instant case pursuant to Supreme Court Rule 10(c) which provides for review on certiorari if "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court[.]"

Given the exceptional importance and nearly universal application of the legal question presented, this Court should grant the instant petition.

This Court has yet to consider such arguments in the context of claims for partial restitution in mortgage fraud cases. Of the circuits that have faced the issue, none address, let alone provide a convincing answer, to the issue raised herein. As such, this case presents ideal facts to address the significant legal issue of how to calculate and order restitution under the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A in cases involving mortgage fraud and the where the victim seeks only partial claims of restitution.

The facts of this case illustrate the potential for abusing the provisions of the MVRA. In his Motion to Vacate Conviction under 28 U.S.C. § 2255, Petitioner asserted that he was denied his constitutional right to effective assistance of counsel in that his counsel failed to challenge the calculation of his restitution obligations under the MVRA. Although the district court initially rejected Petitioner's arguments and denied his Motion to Vacate, a panel of the Sixth Circuit found errors sufficient to warrant a remand of the matter.

Upon remand, the Government asserted that, even if Petitioner's counsel was deficient during the initial sentencing and restitution phase, Petitioner couldn't show prejudice such that Petitioner's Motion to Vacate should be denied and the district court should simply re-impose its prior restitution order. In particular, the Government alleged that, because of mathematical errors, Defendant's restitution should have been *higher* than the amount previously ordered by the court, and because these mathematical errors favored Defendant, there was no need to labor the court with additional proceedings.

Ultimately, the district court agreed with the Government and concluded that Petitioner wasn't denied the effective assistance of counsel because, the errors in the calculation of

Petitioner's restitution favored Petitioner. The district court's conclusion, however, wholly ignores the statutory language of the MVRA and how to properly calculate partial claims of restitution.

Generally, both parties agree that the proper analysis to be undertaken relative to Defendant's restitution requires the court to (1) subtract from the "original loan amounts" the sum of (i) "potential recovery amounts" for each property; plus (ii) payments-made to the victim. The parties disagree, however, on the amounts to be included in this calculation.

In particular, Petitioner asserts that, under the plain language of the MVRA, the district court should have subtracted *any and all* payments made toward each and all of the properties against which the bank held mortgages as collateral. The Government, on the other hand, contends that the lower court should only subtract the payments made on certain selected properties for which it was claiming restitution. If the district court would have taken into account the "payments made" on all loans in question (not just the handful of selected properties claimed by the victim-bank), Petitioner's amount of restitution would have been substantially less than the amount ordered by the district court.

A. The district court's refusal to credit Petitioner for all payments made violates the express language of the MVRA.

To the extent that Petitioner asserts that he should receive credit for **all payments made for all of the subject properties**, Petitioner's argument is in accord with both the statute and this Court's decision in *Robers v. United States*, 134 S. Ct. 1854 (2014). In *Robers*, this Court interpreted the relevant provision of the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A, in a case involving mortgage fraud. In *Robers*, the dispute centered on the proper calculation of restitution where the bank foreclosed on mortgages and later sold the properties for less than the amount of the original loans.

Relevant to the instant case, the *Robers* Court parsed the language of 18 U.S.C. § 3663A(b)(1)(B) which provides that an order of restitution shall require the defendant to pay an amount equal to "(I) the value of the property on the date of the damage, loss, or destruction; or (II) the value of the property on the date of sentencing, less (ii) the value (as of the date the property is returned) of any part of the property that is returned[.]" 18 U.S.C. § 3663A. This Court held that the phrase "any part of the property . . . returned" refers to the property the banks lost, namely, the money they lent to Robers, and not to the collateral the banks received, namely, the [] houses." *Robers,* 134 S. Ct. at 1857.

Applying *Robers* to the case at bar compels the conclusion that the district court should have considered all the payments made on all of the properties because such amounts reduced Netbank's loss. *Robers* makes clear that the phrase "any part of the property returned" refers to the money that was lent and/or lost. The physical real estate itself simply serves as collateral, but the question of collateral and how it is disposed of is not the ultimate question to be asked. Rather, the court must focus on the victim's out-of-pocket losses of *money* because, as Justice Breyer noted in *Robers*, *money* is what was lent by Netbank. Thus, in order to make an accurate accounting of Netbank's losses, the lower courts must, as *Robers* instructs, take the value of the money "on the date of the damage, loss, or destruction" less the value "of any part of the [money] that is returned.

By faithful application of *Robers*, it is clear that, in calculating Petitioner's restitution, the lower court should have taken into account the amount of money lent, minus the total sum of all mortgage payments made, not just those payments specific to the properties claimed by Netbank. Failing to do so results in an analysis that may provide a windfall to the victim by allowing a victim to seek economic profit on certain loans, which it could ignore for purposes of restitution,

in favor of claiming restitution for only those properties that may present the worst cases of loss. The statute, however, is not designed to act as a vehicle to ensure economic profits but rather to compensate a victim only for its out-of-pocket losses.

The only fair method by which the statute can be applied in cases involving mortgage fraud is to deduct the total of all payments made on all properties. Such a calculation ensures the proper application of that part of the statute that compels the district court to deduct "the value . . . of any part of the [money] that is returned[.]" § 3663A.

Application of *Robers* may seem awkward here because the victims are making only *partial* claims for restitution based on only *selected* properties. But to the extent that the victims have chosen to do so should not operate to the detriment of Petitioner. Nor should the government be allowed to manipulate the application of the statute so as to overlook the victims' total recovery including the total amount of payments made on all of the properties.

In addressing this conundrum, Justice Breyer made the point that the "awkwardness" of the statute stems from "having a single statutory provision that covers property of many different kinds." But in its application, the court must simply determine first the total value of the lost property (money in this case), and deduct from it the total amount of recovery including monies recovered by the victim. *Robers* formula shouldn't become convoluted by reference to certain properties claimed or unclaimed.

As Justice Breyer highlighted relative to § 3663A(b)(1)(B):

> The provision is not awkward as applied to, say, a swindler who obtains jewelry, is unable to return all of the jewelry, and must then instead pay an amount equal to the value of all of the jewelry obtained less the value (as of the date of the return) of any of the jewelry that he did return. [The statute] directs the court to value the returned jewelry as of the date it was returned and subtract that amount from the value of all of the jewelry the swindler obtained.

> As applied to money, the provision is in part unnecessary but reading the statute similarly does no harm.

Robers, 134 S. Ct. at 1858. Under *Robers*, the lower courts are duty bound to subtract from the value of the money lent "any part of the [money] that is returned." In the instant context, this directive from *Robers* supports Petitioner's position that all of the payments made on all of the properties must be deducted from the victim's claimed loss amounts.

Applying the statute as written, and as commanded by *Robers*, also avoids a host of factual disputes relative to calculating restitution. For instance, given the secondary mortgage market, many of the properties at issue are bundled and sold together (perhaps some at a profit and others at a loss) to subsequent investment holding companies. Without additional discovery as to how the properties were sold and/or transferred, it would be impossible to appropriately value the individual properties in order to accurately impose restitution.

Speaking rather directly to these facts, Justice Breyer noted:

> Many victims who lose money but subsequently receive other property (e.g., collateral securing a loan) will sell that other property and receive money from the sale. And often that sale will take place fairly soon after the victim receives the property. Valuing the money from the sale is easy. But valuing other property as of the time it was received may provoke argument, requiring time, expense, and expert testimony to resolve.

Robers, 134 S. Ct. at 1858. Such is the case here, and Petitioner asserts that, to the extent that the district court refused to credit all of the payments made on all of the properties (as the statute dictates), Petitioner's request for discovery should have been granted so as to have allowed Petitioner to obtain the loan and escrow files on the properties in question. Such discovery was essential and necessary to resolve the factual disputes over the valuations of the selected properties.

Accepting the government's formula, as the district court did, also allows for the possibility that the victims may collect profits rather than just out-of-pocket losses. *Robers* seeks to avoid these uncertainties by simply looking at the money lent, and the money received. The statute is clear in its application here, and *Robers* offers arguable support that Petitioner was denied the effective assistance of counsel.

In *Miller-El. v. Cockrell*, 537 U.S. 322, 331 (2003), Justice Kennedy stressed that the Certificate of Appealability is a gateway process that was never intended to be a "ruling on the merits of petitioner's claim." Under the prevailing standard, a petitioner must "show that reasonable jurists could debate whether (or for that matter agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Id.* at 336 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

The *Miller-El* Court went on to note that "the threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims." *Id*. at 336. To the contrary, the Court affirmatively noticed that § 2253 forbids it. "When a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifies its denial of a Certificate of Appealability based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction. *Id*. at 336-37.

Based on the express language of the MVRA and this Court's opinion in *Robers*, Petitioner made a substantial showing of the denial of his constitutional rights, 28 U.S.C. § 2253(c)(2), such that a certificate of appealability should have been granted by the lower courts. This Court should grant the instant Petition for Certiorari, vacate the lower courts' opinions, and remand this matter to the lower court for further proceedings consistent with the terms of the MVRA.

B. The district court's procedural ruling regarding the scope of remand was also debatable.

Turning to the issue regarding the scope of the remand, Petitioner asserts that the district court's procedural ruling was debatable. In refusing to consider Petitioner's challenge to application and calculation of the government's partial claims for restitution under the MVRA, the district court concluded that Petitioner's arguments were beyond the scope of the Sixth Circuit's Order of Remand. Petitioner's challenge to district court's procedural ruling was twofold: (1) that he was entitled to a presumption of a *de novo* resentencing hearing; and (2) that the government's partial claim for restitution was contrary to the express terms of the MVRA as interpreted by this Court in *Robers*.

In essence, the district court applied the "mandate rule" under which a district court is generally bound to proceed within the scope of the remand by the circuit court. On this issue, there is a split of authority within the circuits. A majority of circuits, including the Sixth, Eighth, Ninth, and Tenth, follow a basic rule that a district court can review sentencing matters *de novo* unless the remand specifically limits the lower court's inquiry. *United States v. Moore*, 131 F.3d 595 (6th Cir. 1997); *United States v. Caterino*, 29 F.3d 1390 (9th Cir. 1994); *United States v. Cornelius*, 968 F.2d 703 (8th Cir. 1992); *United States v. Smith*, 930 F.2d 1450 (10th Cir.), *cert. denied*, 502 U.S. 879 (1991); *United States v. Sanchez Solis*, 882 F.2d 693 (2d Cir. 1989).

A minority of circuits, including the First, Fifth, Seventh, and D.C. Circuits, disagree with the presumption of *de novo* consideration on resentencing and hold generally that every remand by its nature limits the district court to review only those issues which led the appellate court to order the remand. *United States v. Ticchiarelli*, 171 F.3d 24 (1st Cir. 1999); *United States v. Marmolejo*, 139 F.3d 528, 531 (5th Cir.), *cert. denied*, 525 U.S. 1056 (1998); *United*

States v. Parker, 101 F.3d 527 (7th Cir. 1996); *United States v. Whren*, 111 F.3d 956 (D.C. Cir. 1997).

This Court should grant certiorari in this matter so as to clarify the proper scope of a resentencing hearing following a remand by the circuit court. Guided by this Court's decision in *Pepper v. United States*, 562 U.S. 476 (2011), this Court should adopt the rule that resentencing upon remand, including claims for restitution, should be subject to *de novo* hearing.

Pepper raised two questions: (1) whether a district court, after a defendant's sentence has been set aside on appeal, may consider evidence of a defendant's post-sentencing rehabilitation to support a downward variance when resentencing the defendant, and (2) whether a resentencing court was required, under the law of the case doctrine [i.e., the mandate rule], to apply the same percentage departure from the Guidelines range for substantial assistance that had been applied at Pepper's prior sentencing.

Having answered the first question in the affirmative, the *Pepper* Court turned its attention to the second question relating to the law of the case doctrine also known as the "mandate rule." In addressing this question, the *Pepper* Court noted that the "law of the case [doctrine] is an amorphous concept" that "directs a court's discretion [but] does not limit the tribunal's power." *Pepper*, 562 U.S. at 506. The *Pepper* Court further noted that the law of the case doctrine [or mandate rule] "does not apply if the court is 'convinced that [its] prior decision] is clearly erroneous and would work a manifest injustice.'" *Id.* at 506-07 (quoting *Agostini v. Felton*, 521 U.S. 203, 236 (1997)).

In this instance, the lower courts applied an overly prophylactic procedural rule that wholly prevented the court from giving any consideration to the debatable issue regarding partial claims for restitution under the MVRA. It is at least debatable that the lower courts procedural

rule should have yielded in order to properly apply the provisions of the MVRA. In this regard, Petitioner asserts that he satisfied the standard set forth in *Slack v. McDaniel*, 529 U.S. 473 (2000)("When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.").

Moreover, to the extent that the Sixth Circuit attempted to create a two-tiered analysis for resentencing matters, the panel's decision further conflicts with this Court's decision in *Pepper*. In particular, the Sixth Circuit held that:

> Petitioner's [case was not remanded for resentencing purposes[] [but] [r]ather, the case was remanded for the district court to consider whether the government's acknowledged errors in calculating the amount of restitution and failure to grant [Petitioner] credit for pre-default loan payments made on the six NetBank loans established that counsel's failure to asset a payments-made argument had prejudiced his defense."

Exhibit E, Order, pg. 5.

Despite the Sixth Circuit's purported attempt to distinguish between remands for restitution and remands for other purposes (i.e., the imposition of a custodial sentence), there is no basis in law to make such a distinction. To the contrary, as Justice Sotomayor made clear in *Pepper*:

> 'A criminal sentence is a package of sanctions that the district court utilizes to effectuate its sentencing intent.' *United States v. Stinson*, 97 F.3d 466, 469 (11th Cir. 1996)(*per curiam*). Because a district court's 'original sentencing intent may be undermined by altering one portion of the calculus,' *United States v. White*, 406 F.3d 827, 832 (7th Cir. 2005), an appellate court when reversing one part of a defendant's sentence 'may vacate the entire sentence . . . so that, on remand, the trial court can reconfigure the sentencing plan . . . to satisfy the sentencing factors in 18 U.S.C. § 3553(a). *Greenlaw v. United States*, 554 U.S. 237, 253 (2008).

Pepper, 562 U.S. at 507; *see also Manrique v. United States*, 137 S. Ct. 1266, 1270 (2017)("Sentencing courts are required to impose **restitution** as **part of** the sentence for specified crimes.")(emphasis added). Accordingly, the Sixth Circuit's attempt to carve out remands for restitution matters does not comport with this Court's prior precedent.

Separate from the issue of whether remands for resentencing are presumed to be *de novo*, it is also debatable whether the Sixth Circuit's order of remand in this matter was limited or general in nature. "Limited remands explicitly outline the issues to be addressed by the district court and create a narrow framework within which the district court must operate." *United States v. Campbell*, 168 F.3d 263, 265 (6th Cir. 1999). By contrast, "[a] general remand permits the district court to redo the entire sentencing process, including considering new evidence and issues." In other words, a general remand "wipes the slate clean." *United States v. McFalls*, 675 F.3d 599, 604, 606 (6th Cir. 2012).

If a court of appeals wishes to limit the scope of the remand and resentencing, it "must convey clearly th[at] intent," by "outlin[ing] the procedure the district court is to follow." *Campbell*, 168 F.3d at 267-68; *see also McFalls*, 675 F.3d at 604 ("The language used to limit the remand should be unmistakable."). Even if the court of appeals addressed a single sentencing issue, that fact alone "does not automatically lead to the conclusion that the remand is limited." *McFalls*, 675 F.3d at 604.

Here, the Sixth Circuit's remand, while referring generally to the issue of whether Defendant received credit for pre-default loan payments, the Order did not provide any explicitly limiting language such that the remand should have been deemed general by the district court.

For example, in *United States v. O'Dell*, 320 F.3d 674, 678 (6th Cir. 2003), the following remand was deemed to be limited: "[W]e VACATE the judgment of the sentence entered by

[the] district court and REMAND for re-sentencing without application of the safety valve." There, the Sixth Circuit concluded that such a remand was limited because the mandate "specifically instructed the court to resentence without application of the safety valve." *Id.* at 680-81.

By contrast, the Order of Remand in this matter lacks specific instructions about how the district court should have proceeded. The panel did not "outline[] in detail the intended scope of the district court's inquiry" relative to recalculating Defendant's restitution. *Campbell*, 168 F.3d at 268-69. Nor were there any discernable limitations on what the district court could or could not consider. While the district court may have found the order of remand to be limited, it is far from clear and debatable in the least.

In *Miller-El*, this Court overruled the Fifth Circuit's refusal to grant a Certificate of Appealability. "We do not require petitioner to prove, before the issuance of a Certificate of Appealability, that some jurists would grant the petition for habeas corpus." *Id*. at 338. In fact the Court stated that in some cases, the law required the issuance of a Certificate of Appealability even though "every jurist of reason might agree" after plenary consideration that the petitioner will not prevail. In this instance, reasonable jurists could disagree as to whether Petitioner's counsel was ineffective by failing to challenge the government's restitution claims, and whether the district court's procedural ruling as to the scope of the remand was proper.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Honorable Court grant his Writ of Certiorari and hear the merits of the question presented herein. Alternatively, this Court should grant the petition, vacate the judgment of the lower court, and remand for further proceedings.

Respectfully submitted,

Dated: November 14, 2018

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APPENDIX

Exhibit A	Order Denying Petitioner's Motion to Vacate Sentence under 28 U.S.C. § 2255, dated July 30, 2015
Exhibit B	Sixth Circuit Order dated March 24, 2016 Granting Certificate of Appealability
Exhibit C	Sixth Circuit Order dated March 16, 2017, vacating district court's Order Denying Petition to Vacate Sentence and remanding to district court
Exhibit D	District Court's Order on Restitution Issue on Remand from the Sixth Circuit, dated March 16, 2018
Exhibit E	Sixth Circuit Order dated August 22, 2018, Denying Certificate of Appealability