NO. 20-_____

In the Supreme Court of the United States

ROY SHERIDAN,

Petitioner,

v.

DLJ MORTGAGE CAPITAL, INC.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

NAMOSHA BOYKIN
COUNSEL OF RECORD
THE BOYKIN LAW FIRM
3004 ALTONA AND WELGUNST
ST. THOMAS, VI 00802
(340) 228-0799
NAMOSHA.BOYKIN@BOYKINLAWFIRM.COM

MARCH 19, 2021 *COUNSEL FOR PETITIONER*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTION PRESENTED

Following the close of the Plaintiff's case in chief, the District Judge granted judgment on partial findings in favor of Plaintiff-Respondent DLJ Mortgage Capital, Inc., and denied Defendant-Petitioner Roy Sheridan the opportunity to present his case in defense.

THE QUESTION PRESENTED IS:

Does Federal Rule of Civil Procedure 52(c) violate the Due Process clauses of the Fifth and Fourteenth Amendments to the United States Constitution, as this Court articulated in *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), if it permits judgment to be entered in favor of the plaintiff after it rests, but before the defense presents its case, as a judgment against a party that was "fully heard"?

LIST OF PROCEEDINGS

United States Court of Appeals for the Third Circuit

No. 18-3187

DLJ Mortgage Capital, Inc., v. Ana Sheridan, Roy Sheridan, Department of Treasury Internal Revenue Service, *Appellant*

Date of Final Opinion: September 22, 2020

Date of Rehearing Denial: October 20, 2020

District Court of Virgin Islands

Civil No. 2016-85

DLJ Mortgage Capital, Inc., *Plaintiff*, v.
Ana Sheridan, Roy Sheridan, Department of Treasury – Internal Revenue Service, *Defendants*

Date of Judgment: August 10, 2018

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PETITION FOR A WRIT OF CERTIORARI

Roy Sheridan, a homeowner who was deprived of his real property in a foreclosure trial without being allowed to present his case in chief, by and through Namosha Boykin of The Boykin Law Firm, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The September 22, 2020 opinion of the United States Court of Appeals for the Third Circuit is reported as *DLJ Mortgage Capital, Inc. v. Ana Sheridan, Roy Sheridan, Department of Treasury Internal Revenue Service*, Case No. 18-3187 (3d Cir. 2020). That precedential opinion upheld the District Court's decision granting a judgment on partial findings to the mortgage holder at the close of its case in chief without allowing the mortgagee to present his case at the foreclosure trial. On October 20, 2020, rehearing and rehearing *en banc* was denied.

The August 10, 2018 opinion of the District Court of the Virgin Islands is reported as *DLJ Mortgage Capital, Inc. v. Ana Sheridan, Roy Sheridan, Department of Treasury – Internal Revenue Service*, Civil No. 2016-85 (D.V.I. 2018).

JURISDICTION

On September 22, 2020, the Judgment of the Court of Appeals for the Third Circuit was entered (App.1a), affirming the decision of the District Court. On October 6, 2020, Roy Sheridan filed a Petition for Rehearing and Rehearing *En Banc.* On October 20, 2020, the Third Circuit denied the Petition for Rehearing and Rehearing *En Banc*. (App.47a).

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1), having timely filed this Petition for a Writ of Certiorari within one hundred fifty days of the Third Circuit's denial of the Petition for Rehearing and Rehearing *En Banc*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private

property be taken for public use, without just compensation.

U.S. Const., amend. XIV § 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Virgin Islands Revised Organic Act of 1954, § 3

The Revised Organic Act of 1954, § 3, reprinted in V.I. CODE ANN., Historical Documents, Organic Acts, and U.S. Constitution at 86 (1995) (preceding V.I. CODE ANN. Tit. 1) ("The following provisions of and amendments to the Constitution of the United States are hereby extended to the Virgin Islands to the extent that they have not been previously extended to that territory and shall have the same force and effect there as in the United States or in any State of the United States: . . . the first to ninth amendments inclusive; . . . the second sentence of section 1 of the fourteenth amendment;").

STATEMENT OF THE CASE

A. Factual Background

Plaintiff DLJ Mortgage Capital, Inc., initiated a debt and foreclosure action against Defendants Roy Sheridan ("Sheridan"), Ana Sheridan ("Ana") and the Department of the Treasury – Internal Revenue Service ("IRS"), concerning Sheridan's primary residence and another piece of real property owned by the Sheridans. (App.1a). This action emanated from loans that the Sheridans had originally procured from non-party FirstBank of Puerto Rico, which loans were secured by the above-mentioned real property. (App.2a).

Specifically, on August 17, 2007, FirstBank issued the Sheridans a loan for $725,000.00. (*Id.*) That loan is secured by a Promissory Note and a Mortgage of even date. (*Id.*) On August 22, 2007, the Mortgage was recorded. (App.33a).

FIRST AMENDMENT: On September 14, 2009, an Amended Promissory Note was executed, reflecting the principal sum as $751,660.11. (*See* App.3a). That same date an Amended Mortgage was also executed, reflecting the increased principal amount of the loan. On October 1, 2009, the modification was recorded. (App.34a).

SECOND AMENDMENT: On December 12, 2011, an Amended Promissory Note was executed, reflecting the principal sum of $768,654.77. (*Id.*) On December 13, 2011, an Amended Mortgage was also executed, reflecting the increased principal in the second Amended

Promissory Note. (*Id.*) On August 31, 2012, the second modification was recorded. (*Id.*)

SECURITY: The loan issued to the Sheridans is secured by what was then their shared primary residence plus another piece of real property they jointly owned. Those real properties are described as follows:

> Parcel No. 14-117
> Estate Frenchman's Bay
> No. 4 Frenchman's Bay Quarter
> St. Thomas, U.S. Virgin Islands
> As shown on P.W.D. No. A9-176-T172

AND

> Parcel No. 13B Norre Gade
> Queens Quarter
> St. Thomas, U.S. Virgin Islands
> As shown on Measure Brief
> date October 10, 1844

(App.33a). During their divorce Ana divested her interest in the Frenchman's Bay property and Sheridan divested his interest in the Norre Gade property. The Frenchman's Bay property remains Sheridan's primary residence.

FIRST ASSIGNMENT: An assignment was made to Federal Home Loan Bank of N.Y. (App.15a-16a).

SECOND ASSIGNMENT: Subsequently, on June 20, 2013, the 2007 Promissory Note and Mortgage were partially assigned to DLJ. (App.34a). The June 20, 2013, Assignment of Mortgage assigns:

> . . . unto DLJ MORTGAGE CAPITAL, INC . . . a certain Mortgage dated 8/17/2007, made and executed by ROY SHERIDAN to, and in favor of FIRSTBANK PUERTO RICO. . .

That partial assignment was recorded on July 10, 2013. (*Id.*)

TAX LIEN: The IRS holds a tax lien on the properties in the amount of $18,924.77. The tax lien was recorded on January 12, 2012. (App.35a).

DEFAULT: DLJ issued a May 13, 2015, written notice demanding payment of overdue monthly installments. (*Id.*) DLJ initiated the underlying foreclosure action on October 20, 2016.

FRAUD: Because Sheridan was prevented from presenting his case at trial, he was unable to formulate an evidentiary basis for his claims that DLJ violated the Truth in Lending Act, that certain payments made by the Sheridans likely were not credited to their account and that DLJ has unclean hands. Accordingly, this means that Sheridan was also prevented from rebutting DLJ's evidence concerning the third element of the foreclosure allegation, to wit: that DLJ is authorized to foreclose on the property mortgaged as security for the note.

B. Procedural Background

The parties were all in agreement to postpone the trial and investigate the details of a proposed settlement agreement brokered by the Magistrate Judge. Instead, the District Court denied the parties' Motions to Continue and compelled them to trial on June 18, 2018. At trial DLJ presented its case in

chief. At the close of DLJ's case in chief DLJ moved for judgment as a matter of law. While no rule was explicitly cited by DLJ, Rule 52 of the Federal Rules of Civil Procedure necessarily governs that oral motion. The District Court granted DLJ's oral motion, resolving disputed issues of material fact and law, without allowing Sheridan to present his case in chief. On August 10, 2018, the District Court entered its Judgment and Order. (App.32a).

Sheridan filed a Motion for Reconsideration, which Motion is fully briefed by the parties and remains pending before the District Court to this day. On October 1, 2018, Sheridan filed a timely Notice of Appeal, appealing from the District Court's Judgment and Order. On September 22, 2020, the Third Circuit rendered its Opinion affirming the District Court. (App.1a). On October 20, 2020, the Third Circuit entered its Order denying the Petition for Rehearing and Rehearing *En Banc*. (App.47a).

C. Background on Fed. R. Proc. 52(c)

The Due Process clauses of the Fifth and Fourteenth Amendment to the Constitution of the United States bestow upon persons the right to be heard before being deprived of life, liberty or property. Accordingly, in an unbroken line of precedents the Court has established what, exactly, it means to "be heard" as contemplated by Due Process. Deprivations must "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). The hearing is "not fixed in form[.]" *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971). But it must

be held at a meaningful time and in a meaningful manner. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972).

Paramount, the hearing must be fair. "[I]t is axiomatic that the hearing must provide a real test. [It must be] 'aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property . . . ' *Sniadach v. Family Finance Corp., supra*, at 343 (Harlan, J., concurring). *See Bell v. Burson, supra,* at 540; *Goldberg v. Kelly, supra*, at 267." *Fuentes, supra,* at 97. Therefore, it is logical that in *Matthews v. Eldridge*, 424 U.S. 319 (1976), the Court concluded that written submissions, standing alone, are inadequate. *Id.* at 345. Rather, "a full and final adjudication" must occur before due process permits deprivation. *Comm'r v. Shapiro*, 424 U.S. 614, 631 (1976). In *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 546 (1985), the Court clarified that a pre-deprivation opportunity "to present reasons . . . why proposed action should not be taken is a fundamental due process requirement." Then, in *United States v. James Daniel Good Real Property*, 510 U.S. 43, 61 (1993) (*Good*), the Court granted certiorari and extended this protection to the realm of civil forfeitures of personal property, which proceedings by their very nature and design place great value on expediency. This Court has made clear that expediency does not trump Due Process.

In 1991, Rule 52(c) was added to the Federal Rules of Civil Procedure, allowing entry of judgment at any time, in furtherance of efforts to make trials more expedient. In 1993, the same year *Good* was decided, Rule 52(c) was amended to clarify that "judgments as a matter of law in nonjury trials may

be entered against both plaintiffs and defendants and with respect to issues or defenses that may not be wholly dispositive of a claim or defense." Fed. R. Civ. P. 52, Notes of Advisory Committee on Rules – 1993 Amendment. This amendment is at odds with the pre-deprivation requirements of Due Process embedded in the Constitution.

REASONS FOR GRANTING THE PETITION

The Petition for a Writ of Certiorari should be granted because the Third Circuit and the District Court's radical departure from the norms of due process merits the exercise of the Court's supervisory power, decides an important federal question in a way that conflicts with relevant decisions of this Court and conflicts with authoritative decisions of other United States Courts of Appeals that have addressed the issue.

I. THE DISTRICT COURT AND THIRD CIRCUIT HAVE SO FAR DEPARTED FROM THE NORMS OF DUE PROCESS AS TO MERIT THE EXERCISE OF THE COURT'S SUPERVISORY POWER.

"If a party has been fully heard on an issue . . . " Fed. R. Civ. P. 52(c). These are the opening words of Rule 52(c) and its Constitutional safeguard. Nonetheless, the Rule's 1993 amendment and the Third Circuit's precedential interpretation of the phrase "fully heard" are so far at odds with the Fifth and Fourteenth Amendment so as to render the phrase meaningless and make Rule 52(c) unconstitutional, both as written and as applied. The Third Circuit and District Court have so drastically departed from the norms of Due Process so as to merit the exercise of this Court's supervisory power. The Third Circuit amplified the District Court's error by converting the local, lower court's erroneous judgment into a precedential circuit-wide rule. Now, litigants lack the assurance that the Government cannot deprive them of life, liberty and property

without due process of law, notably characterized by adequate, advanced notice and a fair hearing. Instead, litigants must anticipate that certain Constitutional provisions may give way to expediency and divine how they may seek to be heard.

The Third Circuit set a dangerous precedent. In fact, in rendering its opinion the Third Circuit actually "caution[s] against the practice of granting judgment for the plaintiff before the defendant has presented a case." (App.22a). It opined that Sheridan was fully heard because he "was given the opportunity to contest the evidence submitted in support of DLJ's" arguments. (App.15a). This wholly disregards the fact that cross-examination and any other testimony or evidence presented by a defendant during the plaintiff's case in chief is, at that time, necessarily constrained to the four corners of the case as framed by the plaintiff. *See* Fed. R. Evid. 611(b). Further, the defendant's presentation at that time is necessarily conducted with the expectation that his opportunity to offer testimony and other evidence as framed by his theory of the case is forthcoming. Instead, the Third Circuit, recognizing that Sheridan "was quite possibly unaware that the District Court would render judgment at the conclusion of DLJ's case-in-chief" ruled that the defendant must *sua sponte* divine the mind of the trial court and seek permission to present matters outside the scope of direct examination. (App.16a-17a). Rule 52(c) is unconstitutional on its face and as applied to the extent it supports such an outrageous, unconstitutional precedent.

The error of denying Sheridan the opportunity to present his case and, thus, denying his right to procedural due process is compounded by placing the

burden on him to anticipate the actions of the trial court. Due Process is destroyed by making its availability contingent upon a request by the nonmoving party pursuant to Rule 611(b) of the Federal Rules of Evidence to testify to matters beyond the scope of cross-examination, or "asking the District Court to testify again" even where the nonmoving party was certainly "unaware that the District Court would render judgment at the conclusion of DLJ's case-in-chief[.]" (App.16a-17a). This wholesale destruction of procedural due process shocks the conscience.

In analyzing the identical language or Rule 50 of the Federal Rules of Civil Procedure, the Court held that "[u]nder Rule 50, a court should render judgment as a matter of law when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for the party on that issue." *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133 (2000). Rule 50, similar to Rule 52, requires that a party be "fully heard" and the Supreme Court's analysis in that case is clear: being heard is strictly limited to the presentation of evidence.

This is the rule for good reason:

> . . . an offer of proof is insufficient because "it is essential that the nonmoving party be permitted to present all of its evidence [on the disputed "issue"]." *Id.* at 612. *See also Francis v. Clark Equip. Co.*, 993 F.2d 545, 555 (6th Cir. 1993) ("Rule 50(a) contemplates that a ruling will be made on the basis of the testimony and documents submitted into evidence.").

Summers v. Delta Air Lines, Inc., 508 F.3d 923 (9th Cir. 2007) (citing *Echeverria v. Chevron USA Inc.*, 391 F.3d 607, 612 (5th Cir. 2004)). Arguments of counsel and offers of proof are not evidence. This Court has held in no uncertain terms that "[t]he right to present evidence is, of course, essential to the fair hearing required by the Due Process Clause. *See, e.g., Morgan v. United States, supra,* at 18; *Baltimore & Ohio R. Co. v. United States*, 298 U.S. 349, 368-369 (1936)." *Jenkins v. McKeithen*, 395 U.S. 411, 429 (1969). Sheridan was denied the right to present evidence and, consequently, a fair hearing.

"This Court has supervisory authority over the federal courts, and . . . may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals." *Dickerson v. United States*, 530 U.S. 428, 437 (2000) (citing *Carlisle v. United States*, 517 U.S. 416, 426 (1996)). "'Guided by considerations of justice,' . . . federal courts . . . [may use] supervisory powers . . . to implement a remedy for violation of recognized rights, *McNabb, supra,* at 340; *Rea v. United States*, 350 U.S. 214, 217 (1956)[.]" *United States v. Hasting*, 461 U.S. 499, 505 (1983). Where the Federal Rules of Civil Procedure are incompatible with the Due Process protections of the Fifth and Fourteenth Amendments, it is within the supervisory powers of this Court to remedy those violations. The Petition should be granted to allow the Court to fashion an appropriate remedy.

II. THE THIRD CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

This Court has been unequivocal and unwavering in the minimum guarantees of the Constitution's Due Process provisions. It has held that "[t]he right to present evidence is, of course, essential to the fair hearing required by the Due Process Clause. *See, e.g., Morgan v. United States, supra,* at 18; *Baltimore & Ohio R. Co. v. United States*, 298 U.S. 349, 368-369 (1936)." *Jenkins v. McKeithen*, 395 U.S. 411, 429 (1969). Even where judicial economy is an important factor the Court has maintained that "the Due Process Clause requires . . . notice and a meaningful opportunity to be heard before seizing real property . . . " *James Daniel Good Real Prop.*, 510 U.S. at 62. A pre-deprivation opportunity "to present reasons . . . why proposed action should not be taken is a fundamental due process requirement." *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 546 (1985). When the defendant is not permitted to present his case, and not told that he would be deprived of the opportunity to present his case, the defendant is necessarily constrained to rebutting the plaintiff's case and presenting evidence within the context of that case. A trial convened in this manner is as far as one could imagine from the "full and fair" hearing contemplated by the precedents of this Court. Yet that exact procedure was deemed satisfactory in awarding a judgment of foreclosure against Sheridan, which judgment deprived him of the home in which he lives.

Compounding the insult and injury to the Constitution, the outcome below was reached by relying upon erroneous rationale that further conflicts with

this Court's precedent. The lower courts held that disallowing Sheridan the opportunity to present his case in chief was harmless because he would not have been able to present additional evidence of substance. Apart from the speculative nature of this determination, the rational is directly opposed to well-established case law. This Court has clearly held that "[t]he right to be heard does not depend on an advance showing that one will surely prevail at the hearing. 'To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits.' *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424." *Fuentes*, 407 U.S. at 87. The Petition should be granted because the decisions below are diametrically opposed to this Court's well-established precedent.

III. THE THIRD CIRCUIT'S OPINION CONFLICTS WITH AUTHORITATIVE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS THAT HAVE ADDRESSED THE ISSUE.

The Petition for Writ of Certiorari should be granted because the Third Circuit's Opinion conflicts with the authoritative decisions of the District of Columbia and the Fifth, Sixth and Ninth Circuits. Those four circuit courts are all in agreement with each other.

The Fifth Circuit states that "[i]n practice, a party has been fully heard when he rests his case." *Echeverria v. Chevron USA Inc.*, 391 F.3d 607 (5th Cir. 2004). The Sixth Circuit holds that "it is impossible for [reviewing courts to perform their function] if [the

nonmoving party] is precluded from presenting the evidence he considers relevant." *Jackson v. Quanex Corp.*, 191 F.3d 647, 657 (6th Cir. 1999) (*quoting Francis v. Clark Equip. Co.*, 993 F.2d 545, 555 (6th Cir. 1993)). The Ninth Circuit makes clear that a party who has not had the opportunity to present any evidence has certainly not been fully heard. *McSherry v. City of Long Beach*, 423 F.3d 1015, 1021 (9th Cir. 2005).

Sheridan never rested his case as he was never permitted to open his case. Instead, he was "sand-bagged by a decision not properly noticed" and "denied the opportunity to present further evidence on the dispositive facts" before judgment was entered. *Summers*, 508 F.3d at 927. The District Court then heard the parties' arguments, which is analogous to an offer of proof, and rendered its decision on that record alone. The Third Circuit affirmed the District Court's course of conduct and decision. This course of proceedings creates a circuit split, conflicting with 0 and the Fifth, Sixth and Ninth Circuits, each of which have held that a party is "fully heard" when he has had the opportunity to present the evidence that he feels is relevant, to wit: his case. Here, the Third Circuit held that Sheridan was fully heard even though he was never permitted to present his case. The Petition should be granted to resolve this circuit split.

CONCLUSION

For the foregoing reasons the Supreme Court of the United States should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

NAMOSHA BOYKIN
COUNSEL OF RECORD
THE BOYKIN LAW FIRM
3004 ALTONA AND WELGUNST
ST. THOMAS, VI 00802
(340) 228-0799
NAMOSHA.BOYKIN@BOYKINLAWFIRM.COM

COUNSEL FOR PETITIONER

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