19-8807 ORIGINAL

No.

IN THE

Supreme Court of the United States

Cassandra Cean,

Petitioner,

v.

United States of America

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Even after Robers v. United States, 134 S.Ct. 1854 (2014), the circuits remain dangerously divided over what method to apply when determining proximate cause and what is a sufficient intervening factor breaking the causal chain of proximate cause pursuant to the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663A. This Court and ten other circuits -- the Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and D.C. Circuits – apply a "created circumstance approach" holding that, "The basic question that a proximate cause requirement presents is whether the harm alleged has a sufficient close connection to the conduct at issue." Robers v. United States, 134 S.Ct 1854 (2014). Nevertheless, the Second Circuit to determine a defendant's liability under the MVRA has repeatedly applied the "middle road approach" holding that, "[A] defendant is liable under the Mandatory Victims Restitution Act to a victim if any subsequent action contributing to the victim's loss is related to the defendant's conduct." United States v. Vaknin, 112 F.d 579, 590(1st Cir. 1997). This has resulted in a conflict with this Court's precedents and conflicts with ten other circuits, in addition to illegal restitution orders.

The Question Presented is:

Whether proximate causation under the MVRA must be analyzed by the use of the "middle road approach," as adopted by the First and Second Circuit or by the "created circumstance approach," as consistently followed by this Court and ten other circuits and as argued by Petitioner Cassandra Cean?

Whether the Sixth Amendment forbids restitution against a criminal defendant who has not been afforded the opportunity to completely present the defense of intervening cause when victims' fail to produce ordered documentary evidence?

PARTIES TO THE PROCEEDING

Petitioner Cassandra Cean was a defendant in the district court and an appellant in the Second Circuit. The respondent is the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Cassandra Cean, an inmate transferred from Danbury Federal Prison Camp to home detention pursuant to the Federal Bureau of Prison's COVID-19 Home Confinement Program, respectfully requests that the Court issue a writ of certiorari to review the opinion of the United States Court of Appeals for the Second Circuit, that upheld a restitution award that would allow bondholders to recoup losses not attributable or closely connected to the conduct resulting in petitioner's conviction, because of its disregard of the Court's longstanding adoption of the "created circumstance approach." And, its failure to follow this Court's additional guidance pronounced in Robers stating, "[d]efendants are not responsible for everything that reduces the amount of money a victim receives for collateral" and that the "Robers decision," "apply only in cases where a victim intends to sell collateral but encounters a reasonable delay in doing so."

OPINIONS BELOW

The Second Circuit's opinion is reported at 771 Fed. Appx.81; 2019 U.S. App. Lexis 18692 and reproduced Pet.App. A1-A4 to the petition.

JURISDICTION

The Second Circuit issued its opinion on June 29, 2019. A timely petition for rehearing en banc was denied by the Second Circuit on August 29, 2019, and a copy of the order denying the rehearing en banc appears at Pet. App. A27. An extension of time to file for a writ of certiorari was granted to January 26, 2020 on December 11, 2019 in application No. 19A651. After which a timely filing of the Petition of Writ of Certiorari was received and returned twice to Petitioner for correction and resubmission previously by or on April 6, 2020 and now by or on June 19, 2020.

The Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The Mandatory Victims Restitution Act of 1996 ("MVRA"), Pub. L. No. 104-132, Tit.II, Subtit. A Section 204(a), 110 Stat. 1227, codified at 18 U.S.C. 3663A and the relevant portions of the wire fraud statute codified at 18 U.S.C. 1343. The statutes are reproduced in full at Pet.App. 30-31.

CONSTITUTIONAL PROVISIONS INVOVLED

The Sixth and Eighth Amendments to the United States Constitution are both reproduced in full at Pet.App. 28-29.

STATEMENT OF THE CASE

This case presents the increase in lifelong sentences due to exorbitant restitution judgments that are regularly imposed in violation of the constitutional rights of criminal defendants. This case is ideal in resolving this issue for three reasons. First it involves a split among the circuits regarding what approach (created circumstance approach or middle road approach) must be used to determine if a criminal defendant is the proximate cause of a victim's loss. Secondly this Court is given the opportunity to convey further indispensable guidance in determining what intervening causes are sufficient to break the causal chain of proximate cause, because of the unscrupulous practices of the Wall Street mortgage industry that occasioned this case and the financial collapse of 2008. And lastly because of the undisputed facts germane to this case which have been cleanly and properly preserved for this Court's review, as detailed below.

A. BACKGROUND OF THE MORTGAGE INDUSTRY

Statistically, "[i]n 2001, mortgage brokers were originating more than $1 trillion in loans annually. This is equivalent to roughly 55 percent of all mortgages originated in the United States." The Gale Group, Inc. Gale Encyclopedia of American Industries. *U.S. Industry Profile: Loan Brokers* 2005. As the world would soon find out during the financial crisis of 2008, "mortgage brokers and non-depository lenders ... were negotiating and making loans without direct accountability to any regulatory agency." *Id.* This was all precipitated by a change in the 1980's tax laws and banking laws. *Id.* The new laws allowed for massive fraud by non-depository lenders and mortgage brokers who emerged "as regular players in the mortgage lending business" and secondary market. *Id.*

Analysis Group reported that:

> Prior to 1980, the majority of mortgage lending business was done by traditional banks who did not sell the loan and used depositors funds to finance its mortgage loans. To facilitate the monetary needs for these non-depository lenders and mortgage brokers who did not have depositor funds available a new way of securitizing loans was created. This became known as Real Estate Mortgage Backed Securities (RMBS). The RMBS process is complex involving a chain of transactions and multiple players, including loans originators, securities issuers and underwriters, due-diligence service providers, credit-rating agencies and insures.

Adam Decter & Mark Howrey, *Common Threads in Mortgage-Backed Securities Cases*, Forum (Fall/Winter Issue (2011).

Here, Impac Funding Corporation to facilitate its lending, sold the loans it originated to trusts, (such as the Impac Secured Asset Series 2007-2 Trust and Impac Secured Asset Series 2007-3 Trust herein) to be securitized. (HT 16)[1] The trusts purchased the loans for their face value and then sold the bonds to investors. (HT 23-26). Once the process was completed the trust owned the loans and the trust's investors held bonds associated with specific pools of assets within the trust. (HT 16). This enabled Impac Funding Corporation to repay its creditors and borrow more funds. This process is known as RMBS Securitization and at the end resulted in the formation of RMBS Trust such as Impac Secured Asset Series 2007-2 Trust and Impac Secured Asset Series 2007-3 Trust that are mainly at issue herein. This process of selling loans to Wall Street and private investors is a method with many issues, most of them were considered by the lower courts herein.

As here and generally, the methodology of securitizing RMBS packages followed these steps:

> i) A Wall Street firm [or investor] would approach other entities about issuing a "series of bonds" for sale to investors and would come to an agreement. In other words, the Wall Street firm "pre-sold" the bonds.
> ii) The Wall Street [or investor] firm would approach a lender

[1] Numerical references preceded by the letters "HT" refers to the transcript pages of the Mandatory Victims Restitution Act hearing conducted on November 16, 2015 and on December 8, 2015 located in Appellant's Excerpts of Record filed in the Second Circuit under case number 14-2282.

and usually offer them a warehouse line of credit. The warehouse credit line would be used to fund the loan. The warehouse line would be covered by restrictions resulting from the initial pooling and servicing agreement guidelines and mortgage loan purchase agreement. These documents outlined the procedures for the creation of the loans and the administrating of the loans prior to, and after, the sale of the loans to Wall Street.

iii) The Lenders, with the guidelines, essentially went out and found "buyers" for the loans, people who fit the general characteristics of the Purchase Agreement. The lender would execute the loan and fund it, collecting payments until there were enough loans funded to sell to Wall Street firm who could then issue the bonds.

iv) Once the necessary loans were funded, the lender would then sell the loans to the "Sponsor," usually either as a subsidiary of the Wall Street firm, of a specially created corporation of the lender. At this point, the loans are separated into "tranches" of loans where they will be eventually turned into bonds. And rated by credit reporting agencies.

v) Next, the loans were "sold" to the "Depositor." This was a "Special Purpose Vehicle" designed with one purpose in mind. That was to create a "banking remote vehicle" where the lender or the other entities are protected from what might happen to the loans, and/or the loans are "Protected" from the lender. The Depositor" would be, once again, created by the Wall Street firm or the lender.

vi) Then the "Depositor" would place the loans into the Issuing Entity, which is another entity created solely for the purpose of selling the bonds, and during the real estate boom by the loan originator.

v) Finally, the bonds would be sold, with a Trustee appointed to ensure that the bondholders received their monthly payment.

Michael Carrington, Property Securitization Analysis Report by Certified Forensic Loan Auditors (September 22, 2015). (ER 129-130)[2].

B. PROCEDURAL HISTORY

At trial the government argued that petitioner, Ms. Cean (a former nurse and the then newly admitted-inexperienced attorney in real estate), along with her co-defendants perpetrated a mortgage fraud scheme on alleged victims American Broker's Conduit ("ABC"), WMC and

[2] Numerical references preceded by the letters "ER" refers to the Appendix in the Second Circuit.

Impac Funding Corporation. On appeal, after Ms. Cean was found guilty[3] at trial and sentenced to 87 months in prison and restitution in the amount of $1,205,355, the government conceded that ABC, WMC and Impac Funding Corporation were not victims based on petitioner's convicted conduct. In fact, post appeal on remand, the government changed the identity of the alleged victims and loss amounts on multiple occasions over the course of several years:

> First, on September 10, 2015, a year after Ms. Cean's sentencing and two years after Ms. Cean's trial, the government alleged the victims were Franklin Credit Management Corporation, Impac Funding Corporation, and Ocwen Loan Servicing, the requested restitution amounts respectively were $198,019, $392,404 and $65,787 for a total restitution and loss amount of $656,210; (ER 69-72)
>
> Again, on September 23, 2015, the government changed the identity of the alleged victims to Santander Bank, Franklin Credit Management Corporation, Impac Funding Corporation, Ocwen Loan Servicing, and PennyMac Loan Servicing Services, the requested restitution amounts were respectively $176,419.70; $198,019; $243 148.51; $63,972 and $455,000 for a total restitution and loss amountof $1 ,136,631.21; (ER 73-77)
>
> Again, on Friday, November 13, 2015, two days prior to the MVRA hearings scheduled to commence the following Monday morning (on November 16, 2015) the government advised that the alleged victims and victim representatives would be James Malloy from Impac Funding Corporation, seeking restitution as servicer to and on behalf of Impac Secured Assets Corp; J. Schwegel for PennyMac Loan Services, LLC; Nathan Musick for Mortgage Resolution Associate; and Donald Knight for Franklin Credit Management Corp.; (ER 78-79)
>
> Then again for a fourth time, on February 5, 2016, after the MVRA hearings the government changed the identity of the alleged victims to Impac Secured Asset Series 2007-2 Trust; PennyMac Trust and Santander, the requested restitutionand loss amount respectively were

[3] Appellant was found guilty by jury verdict of one count of conspiracy to commit wire fraud and four counts of wire fraud, respectively, in violation of 18 U.S.C. Sections 1343 and 1349.

$243,148.50, $100,515.22 and $72, 726.89 for a total restitution and loss amount of $416,390.65; (ECF DE 268)[4]

And now, on January 11, 2018 (almost five years after Ms. Cean's trial and sentencing), the lower court determined, based on the testimony and evidence deduced at the Mandatory Victims Restitution Act hearings that the identity of the alleged victims are Impac Secured Asset Series 2007-2 Trust; PennyMac Trust and Santander, and restitution is owed only to Impac Secured Asset Series 2007-2 Trust in the amount of $243,148.51 plus interest. (ECF DE 318).

C. MANDATORY VICTIM RESTITUTION ACT ("MVRA") HEARING

I. Alleged Victim Impac Secured Asset Series 2007-2 Trust

1. James Malloy, 113 Chauncey Street Mortgage

James Malloy, a senior vice president and manager of capital market activities at Impac Mortgage Holdings of California, testified that Impac Funding Corporation originates residential mortgage loans and that securitization is a means of funding Impac Funding Corporation which originates residential mortgage loans and that securitization is a means of funding for Impac Funding Corporation that enables them to originate these loans. (HT 15). As part of the process, funds needed to create the mortgage loans to borrowers, where obtained by securitizing the loans and selling the loans to third party investors. (HT 16).

After securitization, Malloy testified, investors purchased the loans, and the proceeds from the sale passed through from the trusts to Impac Funding Corporation. Impac Funding Corporation then repaid the funds it borrowed through its lines of credit for the funding of the mortgages. (HT 16-23). In addition to monetary compensation the transactions consisted of various representations and warranties made by Impac Funding Corporation to the trust investors purchasing the securitized mortgages. (HT 16-23). See Government's Exhibit A[5], Impac Secured Asset Series 2007-2 Trust Representations and Warranties made by Impac Funding

[4] Numerical references preceded by the letters "ECF DE" refers to the District Court Clerk's record and is followed by the controlling docket entry number.

[5] Reference to "Government's Exhibit" refers to exhibits introduced at the MVRA hearings by the Government.

Coporation to Impac Secured Asset Series 2007-2 Trust. Malloy testified that he was familiar with the loan history on the particular property known as 113 Chauncey Street in Brooklyn, New York and had reviewed the mortgages for the property.

According to Malloy, the Trust's responsibility was to make sure investors in a trust of pooled mortgages received compensation that they were entitled to according to their investment portfolio. (HT 23). According to Malloy, the trust paid to Impac Funding Corporation $427,500, for the mortgage, and Impac Funding Coporation satisfied its lines of credit with the money it received from the sale of the mortgages to the trusts. It paid back its lenders with this money when it sold the mortgage to the trust and the unidentified investors in the trust. (HT 16).

Malloy did not testify about the amount Impac repaid to its lender in satisfaction of its line of credit and was unclear whether Impac made any profit in connection with the loan. (HT 358-359). Malloy stated explicitly that he did not recall testifying that Impac Funding Corporation lost any money in connection with the Chauncey Street loan. (HT 358). No documentary evidence was produced establishing the monetary consideration and specific term of the initial transaction of line of credit, transfer of the mortgage to a "depositor," or its sale to the trust, and payment to Impac Funding Coporation by subsequent downstream investors. Moreover no information regarding Impac Secured Asset Series 2007-2 Trust or its bondholders was produced despite Ms. Cean's repeated demands for discovery. See Cean's Motion for Discovery, ECF DE 257. In addition, Impac Funding Corporation and Impac Secured Asset Series 2007-2 Trust did not respond to the PSR inquiries concerning its victim status or to the request for a victim impact statement. See Cean's PSI; See also (HT 358-359).

Malloy, after testifying that he did not know whether Impac Funding Corporation made a profit because of the loan's origination and subsequent sale, Malloy questioned the relevance of questions directed to whether Impac made a profit because of the origination and sale of the mortgage in question. (HT 358-359). Malloy did not offer any documentary evidence of the cost of the funds that it procured through its line of credit to generate the loan, or documentary evidence of what the individual trust paid to Impac to purchase the mortgage or the shares in the mortgage. See Motion for Preclusion, ECF DE 257.

According to the Impac Secured Asset Series 2007-2 Trust's Pooling and Servicing Agreement, the Impac Secured Asset Series 2007-2 Trust must authorize

action taken on its behalf and has several options to choose from including demanding that Impac Funding Corporation buy back defaulted loans conveyed to Impac Secured Asset Series 2007-2 Trust in breach of the Pooling and Servicing Agreement's Representations and Warranties for their full purchase price. See (HT 358-359); see also Calva's Report in Evidence, Exhibit D, ECF DE 259 and Calva Supplemental Report dated 11/18/2015, ECF DE 260.

At Defendants' trial, Attorney Ron Morrison, a General Counsel, former Vice President and President for Impac Funding Corporation testified that Impac Funding Corporation when first underwriting the loan, reviewed the debt to income ratio of Godfrey Camacho as an applicant when deciding to issue a mortgage. Morrison also states that Impac Funding Corporation conducted due diligence for the first and second mortgage[6] on the Chauncey Street property without explaining what that due diligence was or what its results were (T: 400)[7]. Morrison also testified he did not simply rely on the broker's information but conducted its own due diligence. (T: 409, 410).

James Malloy testified that after the loan was originated and securitized, Impac, as master servicer, serviced the mortgage pursuant to the Pooling and Servicing Agreement which was initially introduced into evidence by the Government missing exhibits and provisions. (HT 24, 26). This agreement according to Malloy, governed the mechanics for the securitization process. (HT 27). The full agreement was ordered introduced into evidence upon cross-examination of Malloy (HT 55,56), and upon Expert Witness Calva's testimony that a certain schedule, Schedule I, and later corrected as Exhibit I, relevant to the consideration underlying the sale of the mortgages to the trust was missing from the Government's production. Exhibit I included the representations and warranties made by the Sponsor, Impac Funding Corporation. Upon realizing that the Government had produced an incomplete agreement, the court ordered that it be produced in its entirety. (HT 55, 56, line 12); (HT 176-178).

Malloy testified that Impac Funding Corporation had an obligation to notify the trustee and other parties of a defaulted loan or a defective loan pursuant to Pooling

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[6] The first mortgage was one of many mortgage loans pooled in Impac Secured Asset Series 2007-2 Trust and the second mortgage was one of many mortgage loans pooled in Impac Secured Asset Series 2007-3 Trust.

[7] Numerical references preceded by the letter "T" refers to the transcript pages of petitioner's trial conducted October 1, 2013 until October 9, 2013.

and Servicing Agreement. (HT 57). Because Exhibit[8] I which represented that the loan was not in default was omitted during Malloy's initial cross examination, Malloy then testified that according to Section 2.02 of the Pooling and Servicing Agreement, it was the Trustee that had the duty to notify of defects or missing files. (HT 57). Expert Witness Calva would later clarify that Exhibit I imposed upon Impac Funding Corporation the duty to notify the trust of a mortgage default or underwriting breach and that under Section 2.03 and 2.04 of the Pooling and Servicing Agreement and the Exhibit omitted from the Agreement produced by the Government. HT 176-178).

Malloy testified that the mortgage was funded on January 31, 2007, and the dollar amount extended to the borrower, Godfrey Comacho, was $427,5000. (HT 18). There was a secondary mortgage extended to the borrower of $142,500[9], however, Malloy testified, because Impac no longer held an interest in that loan, he would focus on the primary loan of $427,500 despite no longer holding an interest in that loan either. (HT 20). Both loans were originated and underwritten by Impac on the same date, and the underwriting was conducted by Impac on both mortgages. (T 401); see also Calva's Report in Evidence, Exhibit D-3, ECF DE 259-3 and Calva Supplemental Report dated 11/18/2015, ECF DE 260-3.

Malloy did not know whether Impac made a profit because of its origination and subsequent sale of the loan to the trust. (HT 394). A HUD report introduced into evidence in defendants' trial indicated that Impac charged several fee at the real estate closing by Malloy could not say whether Impac made a profit in connection with the mortgage. (T 394, Trial Exhibit 28). Malloy indicated that the Master Servicer for the loan, Impac Funding Corporation had a relationship with the Impac Secured Asset Series 2007-2 Trust. (HT 49), and that as the Master Servicer for the loan Impac Funding Corporation had a relationship with Impac Secured Asset Series 2007-2 Trust. (HT 21).

On direct examination Malloy testified that the borrower never made any payments and the loan went into default. (HT 29). On cross examination Malloy testified that the loan was in default prior to the closing date of the securitizations, and stated that it 'was delinquent on the date of securitization...." (HT 61, line 21).

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[8] References to "Exhibit "refers to exhibits introduced at the MVRA hearings by the Petitioner.

[9] This is the mortgage that was placed in Impac Secured Asset Series 2007-3 Trust and was the subject of Citigroup's lawsuit against Impac Secured Assets Corp. et al.

According to Malloy, a short sale of the Chauncey property was better for Impac Secured Asset Series 2007-2 Trust. (HT 66, line 11).

When the loan continued in default status for many months and years, Impac, as Master Servicer, pursued a short sale on October 22, 2010, a sale for less than the outstanding principal balance of the loan itself. (HT 29, 32). Because of the short sale Malloy testified, Impac Secured Asset Series 2007-2 Trust would suffer a loss of $392,390.10. (HT 29). Malloy testified it was a reasonable conclusion that the property was sold for a dollar amount less than the market would have demanded for it. It was sold for a discounted price. Malloy testified as it was a brownstone in Brooklyn. (HT 72, line 21; HT 73, line 9). Malloy testified there was no financial benefit to the trust to sell the property at a shortsale for less than property could earn and "that is what occurred" which resulted in the loss of $397,000. (HT 75, line 5). Impac Funding Corporation approved the short sale of the valuable Brooklyn brownstone for $225,000 which was 250% below the then 2010 property tax assessment[10] value of $563,000. (ER 48-49). Shortly after the short sale the property tax assessment valued the property at $1,328,000. (ER 139-143). According to Calva, there was no evidence of direction from the bondholders to pursue restitution as opposed to the repurchase option allowed under the PSA (HT 190).

Impac never advised Impac Secured Asset Series 2007-2 Trust that the loan was in default as required per the representation and warranties in the previously omitted Exhibit I to the Pooling and Servicing Agreement. See Calva's Report in Evidence, Exhibit D-1, ECF DE 259 and Calva Supplemental Report dated 11/18/2015, ECF DE 260. In his rebuttal testimony, despite his previous testimony that the loan was "delinquent" on the date of the securitization (HT 61), Malloy testified that the loan was not delinquent on that date and the purchasers, including the trust and bondholder, were taking loans on the closing date March 29 disclosed as not delinquent as of the Cut-Off date March 1st, and Impac Funding Corporation was making no representations concerning any delinquency after 30 days past March 1. (HT 339-344). According to Malloy, there was a widespread "broad assumption" that the borrowers were making first of the month payments. (HT 348). According to Malloy, a borrower would be considered delinquent 30 days

[10] It is well-known that the property tax assessor's office value properties lower than the market value to reduce grievances of property taxes by homeowner's, since property tax bills are calculated by the value of the property tax assessment and not the higher market value of the property. This is why the United States Sentencing Commission has determined that the property tax assessment value is the "rebuttable presumption" of the market value of the property.

or more only on April 1, 30 days after the cut-off date of March 1, after the March 29 closing date. (HT 340-341).

Malloy admitted that the loans were in default but sought to equate delinquency with default in the securitization context and explain that there were no representations made about delinquency past the cut-off date of March 1 according to the OTS (Office of Thrift Supervision) methodology. (HT 347, 348). In response to the Court's inquiry of whether because the loan was in default on the Cut-Off date, Impac Funding Corporation could have kept the loan out as well as other loans out whose first payment was due as of the Cut-Off date, Malloy responded in the affirmative. (HT 347-348). Malloy then testified that you are making the "broad assumption" that the borrower is making the first of the month payment. (HT 348). Fifty-five of the loans which were sold by Impac Funding Corporation to Impac Secured Asset Series 2007-2 Trust were in default on the Closing Date. (HT 388). See also Calva's report in Evidence, Exhibit D, ECF DE 259 and Calva's Supplemental Report dated 11/18/2015, ECF DE 260-3; see also ECF DE 253.

Impac Funding Corporation as the originator ignored the original underwriting breaches. Impac Funding Corporation as the Sponsor ignored the default status of this loan along with at least 51 additional loans which were also in breach of the default provision. Finally Impac Funding Corporation as the Master Servicer ignored the detection of the underwriting breach during the assessment of the short sales as well as not reviewing the default statutes of the loan on the Closing Date, both of which would have required breach notices to be submitted to the trustee for the repurchase and full principle repayment to the Impac Secured Asset Series 2007-2 Trust, including accrued interest. The Sponsor's obligation to notice such breaches is outlined in Section 2.04 of the Pooling and Servicing Agreement. The Master Servicer's obligation to notice such breaches is outlined in Section 2.03 of the Pooling and Servicing Agreement.

Had Impac Funding Corporation followed the required obligation to submit the repurchase demand for the breaching loans, Impac Funding Corporation would have been submitting their repurchase obligation essentially to themselves as the same legal entity which originated the loan. While Malloy indicated the Master Servicer represented the interests of Impac Secured Asset Series 2007-2 Trust for the restitution recovery, he failed to address the Master Servicer, Sponsor and Originator breaches which caused the very loss to the Impac Secured Asset Series 2007-2 Trust. See Calva's Report in Evidence, Exhibit D, ECF DE 259 and Calva Supplemental Report dates 11/18/2015, ECF DE 260-3; see also ECF DE 253. Ms.

Cean thus cannot be correctly identified as the proximate cause of the Impac Secured Asset Series 2007-2 Trust's loss. Also as a result of the Impac Secured Asset Series 2007-2 Trust 's representatives repeated failure to produce discovery demands, at the very least demonstrates willful non-disclosure of the requested documents. This should therefore have precluded Impac Secured Asset Series 2007-2 Trust from being deemed a victim or receiving restitution.

a. Other related Law Suits

i. Citigroup and Global Markets v. Impac Secured Asset Series 2007-3 Trust

Impac Secured Asset Series 2007-2 Trust sister trust, the Impac Secured Asset Series 2007-3 Trust was purchased by Citigroup and Global Markets Inc. ("CGMI"). The purchase of Impac Secured Asset Series 2007-3 Trust by CGMI resulted in a lawsuit filed on May 2011, against defendants Impac Secured Assets Corp., Impac Funding Corp. and Impac Mortgage Holdings Inc. by Citigroup and Global Markets Inc. alleging that: "Plaintiff CGMI lost millions of dollars because the Impac defendants made false and misleading statements, permitted investors to rely on those misstatements for almost three years, and then suddenly and inexplicably revealed their misconduct to the public, causing the value of securities that CGMI had purchased in reliance on defendant's misrepresentations to plummet." (ER 86-87).

The court granted CGMI's request for summary judgment against Impac for CGMI's claims under section 18 and 20 (a) of the Securities Exchange Act. The Impac defendant's entered into a confidential settlement with CGMI for $3.1 million settling its allegation against the Impac defendants that CGMI was tricked into sinking more than $7 million into mortgage-backed securities trust...". as a result of its reliance on an incorrect Pooling and Servicing Agreement that was prepared, published and filed by the Impac defendants. CGMI argued in the lawsuit that the governing instrument between Impac Secured Asset Series 2007-3 Trust and Impac Funding Corporation was the Pooling and Servicing Agreement (not the loan documents). (ER 86-87);(ER 144-159).

ii. Post- Remand Qui Tam Lawsuit: United States of America v. Impac et al.

On November 1, 2016, Expert Witness Calva "brought a False Claims Act lawsuit on behalf of the United States of America and various state and local governments alleging that Impac Securities Assets Corp., Impac Funding Corp. and Impac Mortgage Holdings, Inc. ("Impac") systematically and continually underreported loan delinquency rates and defaults in multiple residential mortgage-backed securities ("RMBS") trusts and falsely represented the health of the mortgage collateral that back the investments to investors. (ER 178-274).

In Calva's complaint he states that Impac Funding Corporation and its subsidiaries made specific representations regarding the sine qua non or RMBS investment due diligence, defaults, repayment rates, and loan delinquencies to the Government Plaintiffs. In the complaint Calva stressed, "Specifically, the false delinquency and default calculations deliberately obfuscated loans that were likely subject to repurchase and would have been subject to the notice process by investors, including the Government Plaintiffs, had Impac not shielded the reality regarding the diminishing value of the loan collateral from investors' eyes. (ER 178-274). See complaint paragraphs 4b, 10, 30, 44, 132, 134-135.

The complaint also revealed that the source of the Calva's information was from his role as an Expert Witness in Ms. Cean's case:

> Defendants (Impac defendants) description of realtors role as an expert witness strengthens Realtor's arguments regarding public disclosure. As defendants describes it, the Government viewed defendant [Impac Funding Corporation and its subsidiaries] as the victims of mortgage fraud. (See Impac's Mem. at 23-25. Case 8:16-cv-01983-JVS-JCG). What realtor discovered - contrary to the Government's belief in Browne [the underlying criminal case, United States v. Browne (Cean) index no. 11-cr-449,] - is that even if Defendants are victims of the type of fraud alleged by FHLBB and for which [Cean] Realtor's clients were convicted (poor quality loans) Defendants [Impac Funding Corporation and its subsidiaries] are perpetrators of another type of fraud involving misrepresenting delinquencies and defaults. These were facts unknown to the Government. Indeed, had the government been aware of Defendants' scheme, the SEC would have issued a cease and desist order. See e.g., In the Matter of Morgan Stanley ABS Capital I Inc., and Morgan Stanley Mortgage Capital Holdings LLC.File No. 3-15982.

See Index No 8:16-cv-01983-JVS-JCG Expert Calva's Objections to Impac defendant's motion to dismiss compalint.

II. Alleged Victim Santander

2. Nathan Musick, 55 Stillwell Place, Brooklyn, NY

Nathan Musick, testified that he services mortgages and works on a portfolio of defaulted loans for Bank of America Association. (HT 104,105). Music testified that he was familiar with the property located at 55 Stillwell Place. Musick testified that Santander does not hold an interest in the collateral property known as 55 Stillwell P.lace. The property was foreclosed upon but Santander does not hold an interest because of a long drawn out story involving recording issues with regard to transfer of title (HT 120). According to Musick, there was a judgment of

foreclosure as evidenced by the Government's Exhibit 10. The Judgment of foreclosure was dated the 26th of November 2010. The property was deeded to Countrywide Home loans, Inc. pursuant to the foreclosure judgment because it was the plaintiff in the action so the judgment of foreclosure and sale reflects that Countrywide received the deed (HT 123).

Santander provided no evidence as to how much the current owner of the loan paid for this loan, or that they owned the mortgage and note. Musick testified that the loan was in default in 2013 and, in fact, was in default since February 2007, more than six years before Sovereign Bank assigned the mortgage to Santander on October 1, 2013. See Exhibit F and Calva Supplemental Report dated 11/18/2015. All the payments were reversed since 2007, that is, all the checks bounced (HT 133), making it known that the loan was a non-performing asset since 2007. The judgment of foreclosure was ordered on November 26, 2010. When asked who purchased the property on the sale date in 2015, Musick testified that Santander made the purchase. Musick did not know what it was purchased for and did not know what the winning bid was. Musick did not know if there was a public notice for this sale. (HT 134). On July 14, 2015 according to Musick, there was no higher bid than $500. (HT 136).

Santander turned over no documents concerning how much was actually paid at this foreclosure sale despite Ms. Cean's repeated discovery demand no documents concerning the assignment of the mortgage or note to Santander in exchange for what consideration, if anything was paid for the mortgage and note concerning the 55 Stillwell Place, Brooklyn, NY . See Cean Motion for Discovery, ECF DE 255, Motion for Preclusion ECF DE 253 p. 7, Motion for Preclusion, ECF DE 257 (HT 137). The Broker's Price Opinion, an opinion issued with regard to the valuation of the property of 55 Stillwell Place, was $380,000. (HT 127)[11]. See Calva's Report in Evidence, Exhibit D, ECF DE 259 and Calva Supplemental Report dates 11/18/2015, ECF DE 260-3; see also ECF DE 253. Santander thus cannot be correctly identified as victim. Also as a result of Santander's repeated failure to produce discovery demands, at the very least that Santander does not have any of the requested documents in its possession or this demonstrates willful non-disclosure of the requested documents. This should therefore have precluded Santander from testifying against petitioner and being deemed a victim.

[11] Important because for the intended loss amount the government and court adopted the reported loss amount from the county clerk records valuing the property as $225,000. by the probation offer

REASONS FOR GRANTING THE WRIT

The Supreme Court has continuously applied a "created circumstance approach" (not the "middle road approach") holding that, "The basic question that a proximate cause requirement presents is whether the harm alleged has a sufficiently close connection to the conduct at issue." *Robers v. United States*, 134 S.Ct. 1854 (2014). See also, e.g. *Lexmark International, Inc. v. Static Control Components, Inc.*, 133 S.Ct. 2766 (2013); *Associated General Contractors of Cal. Inc. v. Carpenters*, 534 103 S.Ct. 897 (2013); *Hemi Group, LLC v. City of New York*, 130 S.Ct. 983 (2009); *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct 1991 (2006); *Holmes v. Securities Investors Protection Corporation*, 112 S.Ct. 1311 (1992). *Hughey v. United States*, 495 U.S. 411, 413 (1990).[12] In doing so, this Court has for years repeatedly and quietly rejected the Second Circuit's "middle road approach" to determine proximate causation.

The Court ruled "proximate cause is a flexible concept that does not lend itself to a black-letter rule that will dictate the result in every case. Instead proximate cause is used to label generically the judicial tools used to limit a person's responsibility for the consequences of the person's own acts, with a particular emphasis on the demand for some direct relation between the injury asserted and the injurious conduct alleged." *Basic Incorporated v. Levinson*, et al., 108 S.Ct. 978(1988). "Put differently, the proximate-cause requirement generally bars suits for alleged harm that is "too remote" from the defendant's unlawful conduct. That is ordinarily the case if the harm is purely derivative of 'misfortunes visited upon a third person by the defendant's acts.'" *Lexmark v. Static, Holmes*, 133 S.Ct 2766, quoting Holmes at 268-269. As the Court reiterated in *Holmes*, "[t]he general rule tendency of the law, in regard to damages at least, is not to go beyond the first step." *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983 (2010).

Notwithstanding, this Court's longstanding and repeated teaching, the Second Circuit has applied the middle road approach for determining the existence of

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[12]" § 3663A(a)(2). The Supreme Court had previously held that under the VWPA, restitution could only be ordered for the "loss caused by the specific conduct that is the basis of the offense of conviction." Hughey v. United States, 495 U.S. 411, 413 (1990)." Hill, Dietrich T., *THE ARITHMETIC OF JUSTICE: CALCULATING RESTITUTION FOR MORTGAGE FRAUD* , 113 Col. L. Rev. 1939 (2014).

proximate cause. Under the Second Circuit's "middle road approach," a defendant is liable under the Mandatory Victims Restitution Act to a victim if any subsequent action contributing to the victim's loss is related to the defendant's conduct. See e.g. United States v. Cean, 771 Fed. App. 81. On numerous occasions, however, and recently in *Robers*, Justices Sotomayor and Ginsburg concurred that, "If a victim chooses to hold collateral rather than reduce it to cash within a reasonable time, than the victim must bear the risk of any subsequent decline in the value of the collateral because the defendant is not the proximate cause of that decline." *Robers v. United States*, 134 S.Ct. 1854 (2014).

However, ill-fatedly for Ms. Cean, in Robers "the [C]ourt essentially brushed off the proximate cause argument by responding that first, the fraud was undoubtedly an actual (i.e., but-for) cause of the properties' diminished value, and moreover, given the statutory purpose, the focus of the calculation was on the actual loss of the victim-lender." Hill, Dietrich T., *THE ARITHMETIC OF JUSTICE: CALCULATING RESTITUTION FOR MORTGAGE FRAUD*, 113 Col. L. Rev. 1939 (2014).

Now more than ever, without a fully settled analysis of proximate cause by this Court, the circuits will continue to be conflicted about: 1)which approach to use to determine proximate cause; and 2) confused between but-for causation and proximate causation.[13] Leaving criminal defendants in the Second Circuit, like Ms. Cean, bearing the burden of the lifelong possibility of an illegal restitution.

The Court in Basic foretold of the judicial perils with the Second Circuit's analysis based on the middle road approach, "Confusion and contradiction in court rulings are inevitable when traditional legal analysis is replaced with economic theorization by the federal courts." *Basic v. Levinson*, 108 S.Ct. 978(1988). With the middle road approach not even the Second Circuit has decided its cases with

[13] The Robers court seemed to have no problem ignoring the "directly and proximately" language of § 3663A(a)(2) and holding but-for causation sufficient for the recovery of any loss. 151. 698 F.3d at 943 ("Robers then posits that the victims' losses in this case were caused by the collapse of the real estate market and not his fraud."). 152. Id. at 943–44. Perhaps the Seventh Circuit's insistence that Robers was responsible even for losses arguably caused by the housing market is analogous to the "'thin skull' . . . rule of the common law . . . so well established in tort law." *Id.* Col. L. Rev. (2014).

accuracy. *United States v. Cean*, 771 Fed. Appx. 81. ("Our cases on this issue are not entirely consistent.").[14]

This case also presents the Court with the opportunity to address the imposition of improper restitution awards in violation of the Sixth and Eighth Amendments' of criminal defendants. Although this Court has ruled that proximate cause requirement is satisfied if either there are no intervening cause (United States v. Speakman, 594 F.3d at 1172 (10th Cir. 2010), the constitutional rights of criminal defendants to defend against such a finding has not been upheld.

ARGUMENT

I. Whether proximate causation under the MVRA must be analyzed by the use of the "middle road approach," as adopted by the First and Second Circuit or by the "created circumstance approach," as consistently followed by this Court and ten other circuits and as argued by Petitioner Cassandra Cean?

A. This Court has already demonstrated why the middle road approach should not be utilized by the circuits.

Under the MVRA, 18 U.S.C. § 3663A(a)(2), a "victim" must be "directly and proximately harmed" by the defendant's conduct. Courts agree that this means that the government must prove that losses were proximately caused by the defendant's conduct.

The middle road approach searches to stream together liability, whereas the Court's created circumstance approach easily reconciles the criminal liability of a defendant. As the Court reiterated in Holmes, "[t]he general rule tendency of the law, in regard to damages at least, is not to go beyond the first step. In Holmes and Lexmark Int'l, this Court stressed, "the proximate cause requirement generally bars suits for alleged harm that is "too remote" from the defendant's unlawful conduct. That is ordinarily the case if the harm is purely derivative of "misfortunes visited

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[14] "Analogously, in today's real estate market prices may fluctuate dramatically. See supra notes 53–61 and accompanying text (noting volatility in market). 237. But cf. Paul, 634 F.3d at 677–78 (rejecting defendant's argument that loss was caused by decline in value of stock rather than fraudulent conduct). In Paul, the defendant had fraudulently secured loans with stock as collateral; the Second Circuit ruled that the decline in the value of the stock was not an intervening cause and that the defendant was fully responsible for the losses. Id. In general, courts seem to relax the requirements of proximate causation in the restitution context, see, e.g., United States v. Marino, 654 F.3d 310, 319 (2d Cir. 2011) (warning against "rigid 'direct' causation standard"), while still requiring something more than but-for causation, see United States v. Vaknin, 112 F.3d 579, 589 (1st Cir. 1997)." *Id.*

upon a third person by the defendant's acts." *Lexmark International v. Static Control Components*, 133S.Ct 2766 (2013).

The Second Circuit's middle road approach disregarded this Court's ruling in *Bank of America Corporation v. City of Miami*. In Bank of America, the Court ruled that "[t]he Eleventh Circuit erred in holding that foreseeability is sufficient to establish proximate cause under the FHA. As we have explained proximate cause "generally bars suits for alleged harm that is too remote from the defendant's unlawful conduct." *Lexmark*, 134 S.Ct. 1377, 1390. In the context of FHA, foreseeability alone does not ensure the close connection that proximate cause requires. *Bank of America v. City of Miami*, 137 S.Ct. 1296 (2017). Nevertheless, here, the Second Circuit using the middle road approach held that, "[a]lthough Impac Trust's status as a successor lender" marginally complicates the proximate cause inquiry, its purchase of the fraudulently obtained mortgage was foreseeable in light of the common industry practice of selling loans on the secondary market. In other words, it was foreseeable both that the mortgage originator would rely on the fraudulent mortgage application, and that a mortgage issued on the basis of such application could be sold to a "successor lender" unaware of the fraud." *Cean* at 81.

B. Ten Circuits reject the use of the middle road approach for determination of proximate cause.

The Second Circuit's middle road approach is also at odds with ten other circuits. Two circuits, the First and the Second apply the middle road approach, when this Court and ten other circuits -- the Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and D.C. Circuits – apply a "created circumstance approach" when determining (proximate cause) if the harm alleged has a sufficiently close connection to the conduct at issue. The District of Columbia Circuit expressed that district court's must rely upon some principled method for determining the harm a defendant proximately caused. *United States v. Monzel*, 641 F.3d 528 (D.C. Cir. 2011). The guidance under the MVRA found in 18 U.S.C.S. Section 3664(h) instructs the courts on the necessary findings that ought to be determined by a principled method. *United States v. Church*, 731 F.3d 530 (6th Cir. 2013)(Courts must find that the defendant contributed to the loss, that the defendant's criminal conduct directly and proximately caused the loss).

C. THE DECISION BELOW IS INCORRECT

The Second Circuit's middle road approach is not only rejected by this Court and other circuits, but it is also in conflict with Congress's intent when enacting the middle road approach. The District of Columbia Circuit held that, "If Congress really had wished courts to award restitution for losses that defendants did not proximately cause, it could have provided that. It would, however, take a very clear provision to convince anyone anything so odd. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct. *U.S. v. Monzel.* However, "Congress's intent to expand restitution as a remedial measure cautions against a rigid 'direct' causation standard that would foreclose restitution where even the slightest intervening event severs factually or temporally the link between defendant's crime and victim's loss at the same time, however, Congress's preference for expeditious determinations suggest that the factual and temporal link between crime and loss cannot be so tenuous as to require a "prolonged and complicated trial on the issue of causation. S. Rep. No. 97-532 at 31, Supra, 1982 U.S.C.C.A.N. at 2537. "The causal chain may not extend so far, in terms of facts or the time span, as to become unreasonable." Id at 993 (quoting *United States v. Gamma Tech Indus. Inc.* 265 F.3d 917, 928 (9th Cir. 2001)).

D. THE COURT ALSO ERRED BY DETERMINING THAT THERE WAS NO INTERVENING CAUSE.

The Second Circuit upheld the lower court's ruling that Ms. Cean's criminal conduct directly and proximately caused Impac Secured Asset Series 2007-2 Trust's loss; that the causal chain between the petitioner's conduct and Impac Secured Asset Series 2007-2 Trust loss was not severed by improprieties, breaches of duty by its representative Impac Funding Corporation and the delays in liquidation of the property; and that the district court properly conferred victim status to Impac Secured Asset Series 2007-2 Trust and Santander Bank without proof of actual reliance of the misrepresentations in petitioner's case -- despite the lower court's acknowledgment that "[t]here is some support for this [Petitioner's] argument," established in *Robers v. United States,* 134 S.Ct 1854 (2014).

Even if this Court determines that the Second Circuit's middle road approach is valid and that it properly ruled that petitioner is the proximate cause of the victim's loss, Ms. Cean avers that petitioner remains not liable for the claimed losses by Impac Secured Asset Series 2007-2 Trust because of intervening causes that broke proximate causation here. Robers v. United States. ("a defendant is liable under the Mandatory Victim Restitution Act to a victim if any subsequent action contributing to the victim's loss is related to the defendant's conduct). *Robers, 134 S.Ct.* at 1854,

Although an intervening cause that is "directly related to the defendant's offense" does not break the chain, the court in Speakman reasoned that the proximate cause requirement is satisfied "if either there are no intervening cause, or, if there are any such causes, if those causes are directly related to the offense conduct. *Speakman*, 594 F.3d at 1172.

The Tenth Circuit, where other causes have contributed to the harm, the inquiry focuses on "whether the defendant bears the risk of all the harm" or whether the chain of causation was in effect broken by the intervening cause, resulting in less harm for which the defendant would be held liable in restitution. *United States v. Anthony*, 942 F.3d 955 (10th Cir. 2019). In the opinion by Honorable Judge Gregory A. Phillips, the Tenth Circuit correctly recognized that, "Where other causes have contributed to the harm, the inquiry focuses on "Whether the defendant bears the risk of all the harm" or "Whether the chain of causation was in effect broken by the intervening cause, resulting in less harm for which the defendant would be held liable in restitution." Id.

This is why the Justices, in *Robers*, directed the lower court's to note that an offender is not responsible for everything that reduces the amount of money a victim receives for collateral. The circuits, however, have laid down different tests for the determination of proximate causation and an intervening cause. The Second and Ninth Circuit reached polar opposite conclusions about what constitutes an intervening cause breaking the causal chain. *United States v. Tyler*, 767 F.2d 1350 (1985). In both this case and in Tyler the main inquiry was identical: Whether there was an intervening cause and, if so, whether this intervening cause was directly related to the offense conduct. The decision by the two courts however could not have been more at odds with each others. As seen in Tyler, even before this Court's decision in *Robers* the Ninth Circuit rejected the Second Circuits middle road approach and intervening cause approach.

The defendant in *Tyler* was arrested for cutting down timber from a national forest. Id. The government took possession of the timber that same day, but retained it for evidentiary purposes. The Ninth Circuit reversed the restitution order and found that *Tyler* did not cause the loss. The court observed: "Any reduction in [the timber's] value stems from the government's decision to hold the timber during a period of declining prices[15], not from *Tyler's* criminal acts." *Tyler*,

[15] "This seems to place the burden of the loss on the defendant without any showing of proximate cause." *Id.*

767 F.2d at 1352. The Ninth Circuit reasoned that "restitution is not only proper for losses directly resulting from the defendant's offenses," (Id at 1351) but that an intervening cause, if any, must also be directly related to the offense. In other words here Tyler, as with a majority of courts, use a "created circumstance approach," as intended by Congress, which is that even if conduct is a factual cause of harm, it may still not be the proximate cause if there is an intervening cause not directly related to the offense.

III. Whether the Second Circuit violated defendant's Sixth Amendment Right to present a complete defense, guaranteed even to convicted criminals, by adopting the middle road approach to determine criminal liability under the MVRA and not adhering to this Court's holdings in Robers?

A. The Second Circuits use of the middle road approach violated Ms. Cean's Sixth Amendment right.

The Sixth Amendment affords defendants the right to defend themselves in all criminal proceedings. U.S. Const. amend. VI. Restitution does not fall beyond the reach of the Sixth Amendment's protection in criminal prosecution. *Hester v. United States*, 139 S.Ct. 509 (2019). In fact, the Third Circuit Court of Appeals, *United States v. Leahy*, determined that an order of restitution is criminal, not civil, in nature, and does not violate the Sixth Amendment when judicial fact-finding supports an order of restitution. *United States v. Leahy*, 438 F. 3d 328 (3d Cir. 2006). However, the lower court

Here, the Second Circuit's imposition of restitution is consistent with a form of criminal punishment without the constitutional protections of the Sixth Amendment, because petitioner was not offered the ability to a complete defense against alleged-victims Impac Secured Asset Series 2007-2 Trust and Santander claim for restitution. Although victim's are the intended beneficiaries of the MVRA's procedural mechanisms the lower courts still must protect the rights of criminal defendants to defend themselves. Ms. Cean's repeated request for subpoenaed documents was not complied with, but the alleged victims testified against Ms. Cean at the MVRA hearing. Without the subpoenaed document Ms. Cean was denied the opportunity to properly cross-examine these witness. Nonetheless, the Honorable Magistrate Magistrate Reyes denied Ms. Cean's right to preclude the witness-victim's testimony.

B. Criminal restitution findings should be afforded the Eighth Amendment limits that financial penalties can be imposed on defendant as punishment in a criminal case.

Restitution which exceeds[16] a criminal defendant's liability is a violation of their Eighth Amendment rights. The Eighth Amendment limits the financial penalties that can be imposed on a defendant as punishment in a criminal case. U.S. Const. amend. VIII. Generally, these rights have not been, but should be, afforded to criminal restitution findings as well. Cean's revised restitution order cannot stand under this court's modern approach of intervening cause. The Third Circuit, shares the majority circuits "created circumstance approach by adopting the following two prong test: "First, restitution should not be ordered in respect to a loss which would have occurred regardless of the defendant's conduct. Second, even if but for causation is acceptable in theory, limitless but for causation is not. *United States v. Fallon*, 470 F.3d 542 (3rd Cir. 2005).

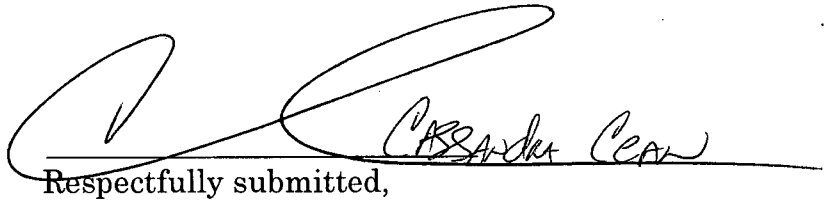
C. This issue is vitally important.

"Attempting to determine restitution owed in mortgage fraud cases provides fertile ground for such disagreements. To begin with, more than a billion dollars a year may be at stake." Supra Col. L. Rev (2014). The impact of restitution for many criminal defendants will have farther reaching complications than incarceration. "When the criminal defendant completes his prison term and all other court-ordered obligations but is unable to earn the money to pay the restitution. Because of the unpaid restitution, the state deems the criminal sentence incomplete and continues to prohibit the defendant from voting." Attorney Northern District of Georgia *https://www.justice.gov/usao-ndga/victim-witness-assistance/understanding-restitution* (Retrieved June 9, 2020). This means that, "federal prosecutors recover roughly $1 billion a year for the victims of federal crimes. Yet less than a tenth of the restitution awarded in federal criminal cases will ever be collected because of the defendants' inability to pay.

CONCLUSION

[16]" This seems to place the burden of the loss on the defendant without any showing of proximate cause. Similarly, the Second Circuit has rejected the argument that the market, not the defendant, caused part of the loss in a mortgage fraud case; it held that the market only diminished the value of the collateral, but did not decrease the "loss" due to the unpaid loan. Where a similar question of causation is at issue in a criminal case, there is "no reason why the securities fraud analysis can guide courts in dealing with mortgage fraud." *Id.*

This Court should grant certiorari and the judgment of the Second Circuit should be vacated. Ms. Cean further urges the Court to remand this case for further consideration or complete resentencing. Ms. Cean has not been resentenced based on the new restitution amount that was revised two years ago and lowered from $1,205,355 to $243, 148.50. Although I have served over four years in custody free of incidents or infractions, I will continue to experience difficulties gaining opportunities and programming assessable to inmates with lower restitution. The Department of Justice's judgment of $1,205,355 remains active against me in the courts, as well as in the Bureau of Prisons' records.



Respectfully submitted,

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