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IN THE SUPREME COURT OF THE UNITED STATES

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 BENJAMIN ROBERS, :  
 Petitioner, : No. 12-9012  
 v. :  
 UNITED STATES. :  
 - - - - - x

Washington, D.C.  
 Tuesday, February 25, 2014

The above-entitled matter came on for oral  
 argument before the Supreme Court of the United States  
 at 10:16 a.m.

APPEARANCES:

JEFFREY T. GREEN, ESQ., Washington, D.C.; on behalf of  
 Petitioner.  
 SARAH E. HARRINGTON, ESQ., Assistant to the Solicitor  
 General, Department of Justice, Washington, D.C.; on  
 behalf of Respondent.

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P R O C E E D I N G S

(10:16 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 12-9012, Robers v. United States.

Mr. Green.

ORAL ARGUMENT OF JEFFREY T. GREEN

ON BEHALF OF THE PETITIONER

MR. GREEN: Mr. Chief Justice, and may it please the Court:

With respect to property crimes, Section 3663A of the Mandatory Victims Restitution Act requires an offset against a restitution order when any part of the property is returned to the victim. This case concerns secured loans for the purchase of real estate. Pursuant to those loans, the lenders took a property interest in the subject real estate, namely, the right to foreclose and take title in the event of default. When the lenders foreclosed and took title, that represented a fully realized return of their preexisting property right.

Section 3663A further requires that that property be valued as of the date of its return and not at some later date when the lender sells to a third party.

JUSTICE GINSBURG: When you said fully

1 returned, it wouldn't be fully returned if the debt was  
2 greater than the value of the property.

3 MR. GREEN: The property would be fully  
4 returned and the property right that -- that is the --  
5 the right to foreclose is returned upon the default,  
6 Your Honor.

7 JUSTICE KENNEDY: Well, let me just make it  
8 clear. If -- if the loan is for \$300,000, fraudulent  
9 loan -- fraudulently obtained loan, and the property is  
10 foreclosed upon and it's worth at the time \$200,000, is  
11 it your position that the property's been fully returned  
12 and that there is no liability for the difference?

13 MR. GREEN: No. No, Justice Kennedy, that's  
14 not our position.

15 JUSTICE KENNEDY: Okay.

16 MR. GREEN: Our position is only that the  
17 property has to be valued at the time that the  
18 foreclosure or sheriff's auction takes place because  
19 that --

20 JUSTICE KENNEDY: And one more -- one more  
21 question.

22 Under Wisconsin law, when there's a  
23 foreclosure, is there some automatic valuation ordered  
24 by the court or is there an appraiser that automatically  
25 is -- is appointed or do we just decide value based on

1 the bids at the ultimate sheriff's sale?

2 MR. GREEN: There is -- there is not any  
3 required appraisal, Your Honor.

4 JUSTICE KENNEDY: Okay.

5 MR. GREEN: But frequently, our  
6 understanding is that lenders who credit bid for those  
7 properties will, in fact, conduct an appraisal because  
8 they want to know how much they should credit bid for  
9 the property. Whether it's --

10 JUSTICE SOTOMAYOR: Counsel, I have two  
11 related questions.

12 The first is, what your client got was  
13 money, and I don't know why it's impossible, impractical  
14 or inadequate to measure the loss by the amount he got  
15 and order him or her to pay it. He can pay it on a  
16 payment schedule, on any -- in any way that the court  
17 wants him to pay it. So I don't know why we're in  
18 (b)(1) or (b)(2) at all because I don't see where the  
19 impracticality comes in. Answer that.

20 But then, secondly, it's not clear to me  
21 that we're thinking about this right. There seems to be  
22 no dispute that a loss to the victim is the amount that  
23 the victim is spending to sell the property and recoup  
24 the money, and you don't seem to be taking issue with  
25 that.

1 MR. GREEN: No.

2 JUSTICE SOTOMAYOR: And 36 -- 3663(2)  
3 appears to be the return of the property at sentencing  
4 or sometime thereafter.

5 MR. GREEN: That's right.

6 JUSTICE SOTOMAYOR: So it doesn't seem to be  
7 controlling earlier return of property, and yet we're  
8 sort of stuck in that model that somehow it has to be an  
9 either/or. The earlier date of return or on the date of  
10 sentencing. But shouldn't it be -- and this follows up  
11 on Justice Kennedy's question -- shouldn't it be at the  
12 time the investor can reasonably secure something from  
13 the return of that property, the date of sale? If we're  
14 letting them recoup the expenses of sale, why don't we  
15 just simply recognize the value on that date? And if an  
16 investor who takes property inadequately decides to hold  
17 on to it or -- or with no reasonableness holds on to it  
18 or gives it away to their mother or sells it to somebody  
19 for a nominal fee, then it should be the date at which  
20 they got rid of it or the day -- or the value of the  
21 date -- on the date of return or something like that or  
22 the date that they should have done something with the  
23 property.

24 Why are we stuck on these -- isn't the whole  
25 idea is to make the victim whole? Don't you make the

1 victim whole on the day a reasonable investor would have  
2 gotten rid of the property?

3 MR. GREEN: The whole idea is to make the  
4 victim whole. And -- and as reflected in my answer to  
5 Justice Kennedy's question, the restitution order would  
6 be for the difference between the amount of the loan and  
7 the value of the property as of the date the -- the  
8 property was returned.

9 Your Honor first asked about  
10 impracticability. And, in fact, it is impracticable for  
11 Mr. Robers to return the loan proceeds. He can't do  
12 that. Those loans were wired to an account for the  
13 benefit of the sellers. So we submit --

14 JUSTICE SOTOMAYOR: But money is fungible.

15 MR. GREEN: Money is - money is fungible,  
16 but so are property and money fungible, and in exactly  
17 the way that -- that my friend on the other side of the  
18 podium suggests here. That's because ultimately, the  
19 property gets sold and the proceeds come back according  
20 to their theory. Their theory is one of strict identity  
21 with respect to the application of B. But as Your Honor  
22 points out, B doesn't really apply here because all  
23 we're talking about is money. This is a situation --

24 JUSTICE SCALIA: Is that all we're talking  
25 -- you know, if I were arguing your side of the case, I

1 would -- I would not say that the bank got defrauded of  
2 money. Your client never got the money. The money had  
3 to be spent in order to buy the property. What the  
4 fraud here consisted of is that the bank got a -- a  
5 loan, a mortgage, an interest in property, assured by a  
6 less-than-solvent debtor when it expected to get an  
7 interest in property assured by a solvent debtor. And  
8 it's -- why isn't the nature of the fraud precisely the  
9 mortgage? This is not as good a mortgage as the bank  
10 anticipated it was getting. And therefore, you don't  
11 have to -- it is indeed the very same property. They --  
12 they gave them back the -- the real estate, but it was  
13 not as much as -- as they had expected.

14 MR. GREEN: That's -- that's correct,  
15 Justice Scalia. When I said we're only talking about  
16 money, I was attributing that to the argument of the  
17 solicitor general. Our argument is exactly the one that  
18 you've articulated. The property, the res here, the  
19 thing that was given back, was the property interest  
20 that the lenders originally took in the secured loans.

21 JUSTICE GINSBURG: What would happen if it  
22 turned out that the property was worth more on the date  
23 of sentencing than it was on the date of foreclosure?

24 MR. GREEN: Then two things might happen.  
25 One is the -- the lender at foreclosure, Your Honor,

1 takes -- takes full title, and they can do with the  
2 property what they will. If it turns out that the  
3 property is worth more at the date of sentencing, then  
4 that's because of the risks and -- and maybe the  
5 conservatism of the particular lender and -- and that is  
6 their benefit. That's -- that's our position. Our  
7 position is not a one-way ratchet, Your Honor.

8           However, if it turns out to be worth a whole  
9 lot more on the date of sentencing, then defense counsel  
10 might be able to come in and say to -- to the court,  
11 look, the foreclosure amount was X. Shortly thereafter,  
12 the property got sold for twice X. That indicates, Your  
13 Honor, that the value as of the date of foreclosure  
14 might actually have been higher and Your Honor should  
15 use, instead of the credit bid amount that the debtor  
16 paid for the property, a higher amount.

17           JUSTICE GINSBURG: Well, how do you arrive  
18 at the foreclosure amount? I mean, the one virtue or a  
19 virtue of the government's approach is you get the money  
20 and you know exactly how much the house sold for. How  
21 do you -- at the time of foreclosure, there's been no  
22 sale. How do you determine the value? You said in  
23 Wisconsin there are often appraisals, but there wasn't  
24 any in this case, was there?

25           MR. GREEN: Not that -- not that we know of,

1 but we don't know exactly what the lender did. However,  
2 I would point to Joint Appendix page 77. And there, one  
3 of the victims, which was the Mortgage Guaranty  
4 Insurance Corporation, testified, Mr. Farmer testified  
5 at the sentencing, that they -- they use a computer  
6 model. They decided that they would pay the claim that  
7 was made by the lender and take title to the property  
8 because their model told them that the expenses of the  
9 property and the -- the value of the property would  
10 ultimately be worth more than -- than the particular  
11 amount that they would pay in the claim.

12 So that's a situation where the -- in this  
13 case, where -- where the victim has gone ahead and --  
14 and valued the property using their computer model,  
15 and -- and accepted the property with an intent.

16 JUSTICE BREYER: Can you answer this --  
17 could you answer it just happens, not this case, an  
18 ordinary case. Defendants -- defendant goes to  
19 Mrs. Smith: Mrs. Smith, I have a bridge I'd like to  
20 sell you. Wonderful. Let's go to the account, your  
21 account, take out \$100,000 and give it to me.

22 She does. Now, it turns out he didn't own  
23 the bridge. So he owes her \$100,000. Judge: Pay her  
24 \$100,000. Your Honor, I don't have the money with me.  
25 In fact, I don't have it at all. But I also gave her my

1 valuable Babe Ruth bat. And I don't have to give her  
2 100,000. After all, she has the bat. Okay? Now, what  
3 happens? I mean, variations on that theme come up every  
4 day of the week, I imagine. What happens?

5 MR. GREEN: In -- in that instance, Your  
6 Honor, under our theory --

7 JUSTICE BREYER: Not under your theory. You  
8 practice in this area. I want to know what normally  
9 happens. This is a variation, I imagine, of a very  
10 common theory.

11 MR. GREEN: If she accepted the bat --

12 JUSTICE BREYER: Yes, she did. The bat is  
13 on her mantel.

14 MR. GREEN: Okay. If she accepted the bat,  
15 then the value of the bat is set off against \$100,000.

16 JUSTICE BREYER: Perfect. And it comes  
17 under A, not B?

18 MR. GREEN: I would --

19 JUSTICE BREYER: You say it comes under A,  
20 because, after all --

21 MR. GREEN: But the --

22 JUSTICE BREYER: -- if -- if -- he doesn't  
23 have the 100,000, does he? So if you're going to say  
24 that means the fact that he doesn't have it, that he  
25 can't return it, and we're under B, what B says to do is

1 pay \$100,000. So you'd end up not being able to read B.  
2 It would be incoherent, I think. So it must come under  
3 A, not B. I mean, I would have thought so.

4 MR. GREEN: Well, you have to --

5 JUSTICE BREYER: They'll read it while --  
6 while I make these criticisms, and then they'll show me  
7 on the government's side I haven't read it correctly.  
8 All right.

9 But in any case, whatever it comes under, we  
10 subtract the value of the bat. So why don't we do here  
11 just what they do there.

12 MR. GREEN: But -- but what B tells us to do  
13 is when to value the bat, and that's why B actually  
14 applies, because --

15 JUSTICE BREYER: And is that -- is that how  
16 the courts have run this? I mean, you know, it strikes  
17 me as so common that they're supposed to return some  
18 money.

19 MR. GREEN: Right.

20 JUSTICE BREYER: And, in fact, they will  
21 return the money, but it has to be less the value of  
22 something that's already been given.

23 MR. GREEN: Right. But when it -- again,  
24 when are we going to -- when are we going to value?

25 JUSTICE BREYER: I guess it would be up to

1 the judge.

2 MR. GREEN: Right.

3 JUSTICE BREYER: The judge is not -- there  
4 for something, and the judge would, in fact, normally,  
5 if she sold the bat, take the -- take the value at the  
6 time she sold it. And there is 90 days he can ask her  
7 to sell it. Your Honor, I don't want to sell it. I  
8 don't want to sell it. It's a Babe Ruth bat. Very  
9 well, madam. I will value it for you. We'll call in an  
10 assessor. That's at least one way I would expect it to  
11 work, and I don't understand why it doesn't work that  
12 very same way here.

13 MR. GREEN: Well, it may work that very same  
14 way in that -- in that B tells us value it at the  
15 greater of the date of loss or at the date of  
16 sentencing. So B --

17 JUSTICE SOTOMAYOR: That's my whole point.  
18 That may not make the seller whole. What makes the  
19 seller whole is on the day that he or she sold the item  
20 and received money. That's the government's point.

21 MR. GREEN: Right.

22 JUSTICE SOTOMAYOR: But -- well, that's not  
23 the government's point, because the government wants to  
24 value it as of the date of the sentencing. But the --  
25 but whatever the seller received on the day he or she

1 sold the bat, that's the value that it -- that the  
2 seller has put on that item.

3 MR. GREEN: But what if she doesn't sell the  
4 bat is our point.

5 JUSTICE SOTOMAYOR: Then that's -- that's  
6 the question. That --

7 MR. GREEN: And then we're in the exact  
8 conundrum here that the government creates because it --

9 JUSTICE SOTOMAYOR: Well, not really. Not  
10 in -- not in this case. Because in this case, the  
11 property was sold. It was sold late. But it was not --  
12 it was not -- it was sold before the sentencing.

13 MR. GREEN: One of the properties was sold  
14 quite late, Your Honor.

15 JUSTICE SOTOMAYOR: Yes.

16 MR. GREEN: 33 -- 33 months after the  
17 foreclosure took place.

18 JUSTICE SOTOMAYOR: Well, that was my  
19 question earlier, which -- was it reasonable for that  
20 seller to hold on to the property that long?

21 MR. GREEN: We would say potentially not,  
22 Your Honor. The point is we don't know, and the point  
23 is Mr. Roberts can't foresee it. But before we go there  
24 to causation issues, I wanted to address Justice  
25 Breyer's point about the bat, because the government's

1 theory of the interpretation of 3663A doesn't allow for  
2 that. Their theory is it has to be strict identity.  
3 Money is money is money. That's what they -- that's  
4 what they keep repeating. They do not allow for a  
5 situation in which a defendant, prior to sentencing,  
6 offers up some good or property --

7 JUSTICE BREYER: No, it doesn't. Look, "in  
8 the case of an offense resulting in the loss of  
9 property." My poor victim lost \$100,000. So that's  
10 this case. Return the property, i.e., return the  
11 \$100,000, okay? That's simple. That's A. But -- so  
12 the judge says, defendant, return the 100.

13 Now, let's try -- take B. If return of the  
14 100 is impossible, say because he's broke, then what are  
15 you supposed to do? Then pay the greater of the value  
16 of the property, which is 100,000 on the date of loss or  
17 pay the 100,000 on the date of sentencing. Now, wait.  
18 I'm sorry. That makes no sense. If you can't pay the  
19 100,000, then what you have to do is pay the 100,000 or  
20 pay the 100,000. I'm sorry.

21 That's why I say that reading it that way to  
22 me doesn't make much sense, and therefore, I think this  
23 is a case of A; it is a case where he's simply ordered  
24 return the 100,000, and there is implicit in that you  
25 don't have to return more than she -- than you took, and

1 you already gave her the bat. I mean, the bat counts as  
2 some kind of a return. We have to value the bat. It  
3 doesn't tell us what to do. It's up to the judge.

4 MR. GREEN: Well, the bat -- the bat doesn't  
5 count as a return on the government's theory because  
6 it's not a return of the same property.

7 JUSTICE BREYER: Oh, yes, yes, yes. It's --  
8 you have to give her 100,000. It doesn't say anything  
9 about what form it has to take. Our problem is some of  
10 it takes the form that isn't cash.

11 MR. GREEN: And then as Justice Sotomayor  
12 points out, Section 3664 contemplates what the judge can  
13 order turned over at sentencing. So our theory allows  
14 for a valuation of the bat. Whether the -- the -- the  
15 value of the bat is greater at the time it's turned over  
16 or at the time the loss occurred or at the time of  
17 sentencing, the judge gets to decide that under B. But  
18 what they --

19 JUSTICE GINSBURG: And who's -- who has the  
20 burden of proof? If you -- we know the proceeds when  
21 it's sold. It's not sold. But you say it has to be  
22 valued as of the time of foreclosure. And I think you  
23 said someplace in your brief that it's the government's  
24 burden to show the value at the time of foreclosure.

25 MR. GREEN: That's correct, Your Honor.

1 Actually, the statute says that at 3664E, Your Honor.

2 JUSTICE GINSBURG: Well, the government's  
3 interest, I think, would be to show a low value, right?

4 MR. GREEN: That's correct. It would be the  
5 defendant's burden of production --

6 JUSTICE KENNEDY: But you say the sentencing  
7 judge has to call appraisers? I mean, valuation of  
8 property is the standard stuff of -- of civil  
9 proceedings in -- in condemnation and many other cases.  
10 You call -- each side calls appraisers. The appraisers  
11 give their -- their judgment and then either the jury or  
12 the judge decide. You want that to happen in every --  
13 in every restitution case like this?

14 MR. GREEN: Not in every restitution case,  
15 Your Honor. But as you say, courts are well equipped to  
16 do it. We're not arguing --

17 JUSTICE KENNEDY: I'm not sure a sentencing  
18 court is well equipped to do it. A sentencing court has  
19 to call appraisers?

20 MR. GREEN: Yes, Your Honor, if -- if  
21 they're going to challenge what the foreclosure amount  
22 would be.

23 JUSTICE ALITO: Mr. Green, here's one way of  
24 looking at this case. Maybe you'll tell me this is the  
25 wrong way of looking at it. But let's assume that the

1 bank sells the -- the property within a reasonable  
2 period of time or as quickly as one could reasonably  
3 expect. So one way of looking at this is which party  
4 bears the risk that there is going to be a significant  
5 deterioration in the real estate market between the time  
6 of foreclosure and the time of sale?

7 Now, your answer to that is that the -- that  
8 the victim should bear that risk? Why should that be?  
9 Why would Congress want that?

10 MR. GREEN: Because the victim had complete  
11 control and dominion over the property once the victim  
12 foreclosed on the property.

13 JUSTICE ALITO: But real estate isn't  
14 completely liquid and so it takes some time to sell it.  
15 So between the time when the foreclosure occurs and the  
16 time when the victim is able to sell the property and  
17 get money, there -- there is a deterioration in the real  
18 estate market. Why should the victim bear that risk?

19 MR. GREEN: Because the victim has complete  
20 dominion and control, Your Honor. And -- and we  
21 wouldn't say, for example, even under the government's  
22 theory, if it were a baseball card collection and  
23 somebody had returned part of the baseball card  
24 collection, we wouldn't say that the -- that the  
25 defendant is responsible for what the -- the owner of

1 the baseball card collection does with it after it gets  
2 returned by the victim -- or by the defendant.

3 JUSTICE ALITO: That's a completely  
4 formalistic answer. Suppose that the -- what the --  
5 what the person who perpetrated the fraud returns is a  
6 truckload of tomatoes. Very valuable. It's worth  
7 exactly the value of the -- of the original loan. But  
8 very perishable. And by the time the -- the tomatoes  
9 can be sold they're all rotten. So they're worth  
10 nothing. And you would say, well, they had dominion and  
11 control over the truckload of tomatoes. What is the  
12 difference?

13 MR. GREEN: Well, if they accepted the  
14 truckload of tomatoes and they decided not to do  
15 anything with them, just like if the lender takes the  
16 property back and lets it --

17 JUSTICE SOTOMAYOR: That wasn't the  
18 hypothetical.

19 JUSTICE SCALIA: You're really confusing me.  
20 I -- I -- both the baseball bat and the truckload of  
21 tomatoes --

22 (Laughter.)

23 JUSTICE SCALIA: -- do not come under B. I  
24 thought that was your case. Under B, you can deduct the  
25 value as of -- as of the date the property is returned,

1 of any part of the property that is returned.

2 MR. GREEN: That's correct.

3 JUSTICE SCALIA: The baseball bat is not a  
4 return of part of the property that was stolen.

5 MR. GREEN: Right.

6 JUSTICE SCALIA: Nor is the cartload of  
7 rotten tomatoes.

8 MR. GREEN: And that's the --

9 JUSTICE SCALIA: So what are we talking  
10 about here?

11 (Laughter.)

12 MR. GREEN: That's precisely the point I'm  
13 trying to make. It's -- it's not a return because it's  
14 not the same -- it's not a part of the property.

15 JUSTICE SCALIA: Why didn't you say that?  
16 You were quibbling about when it should be valued. You  
17 should have said it doesn't come under B at all.

18 MR. GREEN: Well, in part because the  
19 question about -- about who bears the risk is a -- is a  
20 legitimate question. But because there is not --

21 JUSTICE SCALIA: Not if it doesn't come into  
22 the statute at all.

23 MR. GREEN: Well, frequently, the -- the  
24 issue is well, why should a fraudfeasor actually get the  
25 benefit of -- of a decline in the real estate market,

1 and the answer is because it's not -- the fraudfeasor  
2 doesn't proximately cause what third parties do with a  
3 part of the property that the fraudfeasor returns once  
4 the fraudfeasor has returned that property.

5 JUSTICE KENNEDY: Do you agree that if the  
6 real property is returned and that everybody agrees that  
7 on the day the property is returned, the value is less  
8 than the loan amount, that the victim is entitled to the  
9 difference between that value and the loan amount?

10 MR. GREEN: Yes, we do.

11 JUSTICE KENNEDY: Then we are under B and  
12 then we are talking about money and not the mortgaged  
13 property.

14 MR. GREEN: Well, we're still talking about  
15 property, because as I said at the outset --

16 JUSTICE KENNEDY: Money is property. We're  
17 still talking about the value of the loan valued in  
18 terms of money and not of the real property, right?  
19 Otherwise, your concession that the victim is entitled  
20 to the difference can't work.

21 MR. GREEN: Well, it would work, Your Honor,  
22 because we do have to put a monetary value on the  
23 property as of the date of foreclosure.

24 JUSTICE KENNEDY: The victim is entitled to  
25 the difference in the value of the property and the

1 amount of money stolen based, on your view, on the value  
2 of the property at the time that it's returned, correct?

3 MR. GREEN: That's correct.

4 JUSTICE KENNEDY: Then we are under B,  
5 correct?

6 MR. GREEN: That's correct. Believe we are,  
7 yes.

8 JUSTICE KENNEDY: Thank you.

9 MR. GREEN: Yes.

10 JUSTICE GINSBURG: You made a point about  
11 under Wisconsin law, there would be -- and the  
12 foreclosure -- suppose there were a foreclosure, there  
13 could be no deficiency judgment. Were you trying to  
14 suggest from that that you get the property and -- and  
15 no restitution for the rest?

16 MR. GREEN: No, Your Honor, we weren't  
17 trying to suggest that. We would -- and we're not  
18 standing on the deficiency judgment. What we are --  
19 what we are suggesting is that in determining what the  
20 appropriate restitution is, in determining the value of  
21 the -- of the property that was returned at the time the  
22 lenders took default, we're looking at the difference  
23 between the foreclosure date and -- and the value of the  
24 loans as they -- as they were lent. So we're not  
25 standing on any --

1 JUSTICE SCALIA: What if I don't think that  
2 the -- that the mortgage has anything to do with  
3 returning property, that a mortgage -- the real estate  
4 is not cash. Okay? What if I think it doesn't come  
5 under B at all? How would it be treated if it doesn't  
6 come under B?

7 MR. GREEN: It would be treated at -- still  
8 in a similar fashion. And even if the government's  
9 theory were to prevail here, we think we still win  
10 because a credit bid at foreclosure for a piece of  
11 property is treated as cash. That's a cash transaction,  
12 Your Honor. It's considered to be a cash transaction.  
13 And that means cash has been paid for cash. The lender  
14 has -- and it stands to reason.

15 JUSTICE SCALIA: Cash hasn't been returned.  
16 I mean, you could say the same thing about the baseball  
17 bat. He gives him a baseball bat. It had nothing to do  
18 with the cash that he got, and -- and you would say,  
19 well, when he sells the baseball bat, he gets cash,  
20 therefore cash has been returned. That's surely not  
21 right, is it?

22 MR. GREEN: But this Court said in RadLAX  
23 that a credit bid is the same as cash, and that's what  
24 lenders do when they foreclose on real estate. They  
25 credit bid, and that's the same thing.

1 JUSTICE SCALIA: It's the same with the  
2 baseball bat, right?

3 MR. GREEN: No, I don't -- I don't think it  
4 is, because that's a -- that's a -- that is a different  
5 transaction. Legally that credit bid is treated as  
6 cash.

7 I'd like to reserve the remainder of my time  
8 for rebuttal.

9 CHIEF JUSTICE ROBERTS: Thank you, Counsel.  
10 Ms. Harrington.

11 ORAL ARGUMENT OF SARAH E. HARRINGTON  
12 ON BEHALF OF THE RESPONDENT

13 MS. HARRINGTON: Thank you, Mr. Chief  
14 Justice, and may it please the Court:

15 I'd like to start with what I think at least  
16 is some common ground between the government and  
17 Mr. Robers. And that is that if a defendant  
18 fraudulently deprives a victim of a car and then gives  
19 the victim a crate of pineapples or tomatoes or an  
20 elephant, he's not entitled to an offset, because what  
21 the victim lost was a car and the car is not the same as  
22 pineapples or an elephant. We think that's exactly what  
23 happened here. What the victims lost in this case was  
24 money. What they got back was houses, which is not the  
25 same.

1                   Now, Petitioner says it is the same.

2                   JUSTICE SOTOMAYOR: What happens if they  
3 decide to give the house to the banker, to his mother or  
4 grandmother?

5                   MS. HARRINGTON: Well, then that would --  
6 that would bring in the principles of proximate cause  
7 under the MVRA. So if I can just say --

8                   JUSTICE SOTOMAYOR: No, no, it doesn't bring  
9 into principles. You -- you have to give -- they took a  
10 property that had a value at some point --

11                   MS. HARRINGTON: They --

12                   JUSTICE SOTOMAYOR: -- perhaps through the  
13 entire period. What date does the judge use to  
14 determine the value of that house?

15                   MS. HARRINGTON: Well, so, in that case,  
16 Justice Sotomayor, no part of the property that was lost  
17 by the lenders would have been returned to the lenders.  
18 And so instead there would be some other property that  
19 was returned, which is the houses, and then they would  
20 have made an independent choice, which is not the choice  
21 that the vast, vast majority of banks make, to do  
22 something other -- to do something with the house other  
23 than to sell it.

24                   And so in that case, the district court  
25 would have to use its discretion to value what had come

1 back to the lenders. And -- and probably the best way  
2 to do it would be to value it at the time that they  
3 disposed of it.

4 JUSTICE SOTOMAYOR: So you --

5 MS. HARRINGTON: But that's not --

6 JUSTICE SOTOMAYOR: You're -- you're -- yes,  
7 the judge would use his or her discretion and decide  
8 what would have been a reasonable value at that -- of  
9 that house at a time when the lender should have sold  
10 it.

11 MS. HARRINGTON: But --

12 JUSTICE SOTOMAYOR: Not when they received  
13 it, not when the sentencing happened, not after the  
14 sentencing.

15 MS. HARRINGTON: Right.

16 JUSTICE SOTOMAYOR: But on the day the court  
17 decides whether a reasonable investor who's taken back  
18 the property should have converted it to cash.

19 MS. HARRINGTON: But I think it's very  
20 important to note that that situation would not fall  
21 under 3663A(b)(1)(B)(ii).

22 JUSTICE ALITO: Yes, it's under --

23 JUSTICE SOTOMAYOR: Exactly.

24 JUSTICE ALITO: -- 3664, which is quite a  
25 different thing.

1 MS. HARRINGTON: Right. That's a different  
2 thing, because no part of the property that was lost in  
3 that situation was returned.

4 JUSTICE SOTOMAYOR: That's -- that's my  
5 point exactly.

6 MS. HARRINGTON: Right. But what we're  
7 talking about here is that -- is a situation in which  
8 some part of the property that was lost was returned to  
9 the victim. And the question is: Well, what was the  
10 property that was returned to the victim? We say it was  
11 part of the money that they lost. Mr. Robers says it  
12 was the house. But the victims didn't ever own the  
13 houses. They never intended to own the houses. They --  
14 they had -- they had no interest in having the houses.  
15 And so when they got the houses back, no part of the  
16 property was returned to them. No part of the property  
17 was returned to --

18 JUSTICE KAGAN: Ms. Harrington, your whole  
19 argument really rests on that statutory language.

20 MS. HARRINGTON: Yes.

21 JUSTICE KAGAN: And one of the questions  
22 that came up in the last half hour is, is that the right  
23 section of the statute. Now, in your view, which is  
24 that the only thing involved here is money, that's all  
25 that's involved here, why aren't we under A rather than

1 B?

2 MS. HARRINGTON: Because Mr. Robers doesn't  
3 have the money that he took from the victim, and so --

4 JUSTICE KAGAN: Right. But usually when you  
5 don't have money, I mean, say -- let's just say I'm a  
6 fraud victim, and I get an order of restitution for  
7 \$100,000, and the fraudster doesn't have the \$100,000.  
8 He only has \$50,000.

9 So the court says: Well, now you have to  
10 pay the \$50,000 and we're going to put you on a schedule  
11 of payments, and you are going to pay the other 50 over  
12 the next year or 2 years, whatever.

13 MS. HARRINGTON: Yes.

14 JUSTICE KAGAN: Would you think that that's  
15 under B?

16 MS. HARRINGTON: So our view is that 3663A  
17 governs the calculation of the loss to the victims, and  
18 3664 governs how the defendant pays back a restitution  
19 award. And so in your hypothetical, what would happen  
20 is that the court would order the defendant to return  
21 the part of the property he took that he still has, the  
22 \$50,000, and then under 3664A, he would put him on a  
23 payment schedule to pay back the rest.

24 JUSTICE KAGAN: So you think that my  
25 hypothetical -- let me -- I'm just -- I'm sorry for --

1 is under B, not under A?

2 MS. HARRINGTON: I do think it's under B,  
3 yes. I don't mean to --

4 JUSTICE KAGAN: So any time I don't have  
5 enough money to make the victim whole, it's under B, not  
6 A?

7 MS. HARRINGTON: Yes. And you would get an  
8 offset for the amount of the money that you returned to  
9 the lender.

10 JUSTICE KAGAN: Well, I don't -- I guess --  
11 gosh, I don't know. But I would have just thought that  
12 it was under A for pretty much the same reason that  
13 Justice Breyer said. It just doesn't make sense for it  
14 to be under B. I mean, essentially you are saying, you  
15 know, if -- if -- if return of the cash is impossible,  
16 pay the cash under B. That -- that just doesn't --  
17 that's not a sensible statutory command.

18 MS. HARRINGTON: It -- well, it does make  
19 sense if you -- if you remember that 3663A is about the  
20 calculation of the loss at the time of sentencing. And  
21 so it's not about, you know, how -- how much of a loss  
22 you are going to have once the restitution order has  
23 been paid off, because at that point the victim will  
24 have no loss. They will have been paid.

25 What you are trying to calculate is what was

1 the lose that we're -- that we're going to order the  
2 restitution for. And so if victim -- excuse me. If the  
3 defendant -- defendant still has part of the property  
4 that he took, then the court says: Give it back and  
5 then we calculate the net loss that the victim has,  
6 \$100,000 --

7 JUSTICE BREYER: Does it make any  
8 difference? I mean, you know, it's odd to read B is  
9 applying because it says if you can't pay back the  
10 100,000, you're -- now we're in B and what B tells you  
11 to do is pay 100,000. Unless --

12 MS. HARRINGTON: But unless it's --

13 JUSTICE BREYER: You know, I mean, that's  
14 what it says. And then -- and then you have to subtract  
15 the amount you already gave, which of course you would  
16 have to do any way.

17 MS. HARRINGTON: Right. But -- but B says  
18 return the property.

19 JUSTICE BREYER: Return the 100,000.

20 MS. HARRINGTON: But if the property is a  
21 bat, you return the bat. If you don't have the bat, you  
22 can't return the bat. If the property is 100,000 --

23 JUSTICE BREYER: No, no, forget their bats.  
24 It's just \$100,000.

25 MS. HARRINGTON: I know. No, but --

1 JUSTICE ALITO: You brought this in.

2 JUSTICE BREYER. I brought in a certain --

3 MS. HARRINGTON: You brought it up.

4 JUSTICE BREYER: -- quality to this  
5 discussion which may not have contributed as much as I  
6 hoped.

7 MS. HARRINGTON: But it --

8 JUSTICE BREYER: But the -- the -- the point  
9 is imagine it's all money.

10 MS. HARRINGTON: No, I --

11 JUSTICE BREYER: I mean, if it's all money,  
12 A applies, that should be the end of it. If you want to  
13 apply B, do, but it's a wash.

14 MS. HARRINGTON: What I'm saying is that the  
15 property that was lost is the property that was lost.  
16 If the property that was lost is a crate of tomatoes and  
17 you don't have it and you can't give it back, something  
18 else has to happen.

19 JUSTICE KAGAN: No, but you see if the -- it  
20 would make a difference as to whether A or B applies  
21 because your whole argument is premised on the language  
22 of B. So if we're not in B, if we're in A, your  
23 statutory argument goes away, and then we just try to  
24 figure out what offset rules make sense. I mean,  
25 there's got to be an offset in A, too, right? Suppose

1 we were under A. It's got to be. You don't think that  
2 there is an offset under A?

3 MS. HARRINGTON: I don't see an offset under  
4 A. A just says return the property. If you have the  
5 property, return the property.

6 If I could just give the second half of what  
7 I was going to say to Justice Breyer --

8 JUSTICE KAGAN: Yes, but suppose -- suppose  
9 another case.

10 Just say the second half to Justice Breyer.  
11 Sorry.

12 MS. HARRINGTON: What I'm saying is if  
13 you -- if you have the bat, you give the bat back. If  
14 you -- if you took \$100,000 and you don't have \$100,000,  
15 you can't return the property. It doesn't matter  
16 that -- once under 3664, the district court structures  
17 the way you pay a restitution order, that ultimately you  
18 will be paying \$100 a month for 182 years, which is what  
19 this guy is going to be doing, which is to say that  
20 money is never going to get back to the lenders.

21 JUSTICE KAGAN: Well, what do you think  
22 happens in an A case where let's -- let's -- in a  
23 mortgage case, so there's a home, but this -- this  
24 person also has cash and repays the full amount in cash.  
25 And now the bank has the full amount in cash, but also

1 has this home. And then the bank sells the home. Is --  
2 is the defendant entitled to an offset?

3 MS. HARRINGTON: The defendant is  
4 entitled -- I'm sorry. If the -- if the defendant pays  
5 back the full amount of the cash that it took and the  
6 lenders have taken title to the house, then the lenders  
7 have no loss because the full amount of the property has  
8 been returned to the defendant.

9 Under our view -- and let me just say, this  
10 situation really never arises.

11 JUSTICE KAGAN: I know. But if it did  
12 arise, because I'm trying to figure out -- it seems to  
13 me that there has to be an implicit offset in A as well.

14 MS. HARRINGTON: So, no, I think the way  
15 that would -- I think it would come in under 3664. And  
16 under 3664, district courts have discretion to fashion a  
17 restitution order that fits the circumstances of the  
18 case.

19 JUSTICE ALITO: Well, Ms. Harrington, is it  
20 correct this argument that it's all under A? It has  
21 been said that the -- getting to B is based on this  
22 idea. A says if you can't return the property -- if you  
23 can't return the money, B says return the money. But is  
24 that accurate? What A says is if you don't -- if it's  
25 impossible to return the money, assuming that's the

1 thing at issue, B says return the value.

2 MS. HARRINGTON: Well, B --

3 JUSTICE ALITO: And under 3664, it is  
4 possible for the Court to order not A, not restitution  
5 of money, but restitution of in-kind services. So there  
6 can be -- value can be conveyed in a form other than  
7 money, so it isn't circular, is it, in the way that's  
8 been suggested?

9 MS. HARRINGTON: No, I don't think it is.  
10 And A actually does not govern situations in which  
11 return of the property is not possible. That's all  
12 under B. And we really think that that is this case.

13 JUSTICE ALITO: All right.

14 MS. HARRINGTON: He didn't have the money --

15 JUSTICE BREYER: If you want to read it that  
16 way, it's the same problem. It seemed redundant, not  
17 circular. But you don't think it's redundant, okay.  
18 Fine.

19 MS. HARRINGTON: I don't -- I don't --

20 JUSTICE BREYER: The same problem is there.  
21 You go to 3664, and what happened was it says in 3664:  
22 Enter a restitution order, judge. And when you do that,  
23 provide for a lump-sum payment or partial payments or at  
24 specified intervals, in-kind payments, a combination of  
25 payments. It gives a judge a lot of discretion.

1                   So I imagine the judge, if he'd already  
2 given her back 20,000, would say: Now, defendant, pay  
3 her \$80,000 more.

4                   MS. HARRINGTON: Yes.

5                   JUSTICE BREYER: Now, the problem here is,  
6 instead of giving her the \$20,000, he gave her an  
7 in-kind payment. You see, he gave her a baseball bat or  
8 in this case a house.

9                   MS. HARRINGTON: Right.

10                  JUSTICE BREYER: And so now our question is  
11 how do we value the house, and the statute doesn't tell  
12 us. Since that's so, I would have thought -- you have a  
13 very good point -- if, as here, the victim has sold the  
14 house already, well, what he got for it? That's the end  
15 of that. Unless, of course, it was an unreasonable,  
16 fraudulent, or hooked-up sale, which the defendant can  
17 point out, and the judge could -- what happens if she  
18 won't sell the house? She says: I love the bat, I love  
19 the house, I'm not selling.

20                  Then you say you have 90 days to do it --

21                  MS. HARRINGTON: Right.

22                  JUSTICE BREYER: -- or you -- or let it  
23 befall on you what hell befalls. And then what you have  
24 to do is value the house if she still won't sell it.

25                  MS. HARRINGTON: Yes, he would --

1 JUSTICE BREYER: And you have to value the  
2 bat if she still won't sell it. Do I have that right?

3 MS. HARRINGTON: Yes, but you would value  
4 the bat or the house as a replacement of property under  
5 Subsection 3664(f)(4), not as a return of the property  
6 that was lost.

7 JUSTICE BREYER: It was not a return.

8 MS. HARRINGTON: Right, because it's not the  
9 property --

10 JUSTICE BREYER: It's in-kind property  
11 they're try to get rid of.

12 MS. HARRINGTON: Right, but --

13 JUSTICE BREYER: I see.

14 MS. HARRINGTON: But under Section 3664, you  
15 are allowed to make an in-kind payment with return of  
16 property or replacement of property. Return of property  
17 is return of the property that was lost; replacement is  
18 giving some other kind of property different from what  
19 was lost. But under Section --

20 JUSTICE SOTOMAYOR: But it also goes back to  
21 how do you measure and when do you measure this. It's  
22 easy if the property is returned on the date of  
23 sentencing or 90 days after, or not returned then.  
24 Because then the judge could basically figure out what's  
25 a reasonable time, the date of sentence or within the 90

1 days the day they sold the property.

2 MS. HARRINGTON: It's easy when they sell  
3 the house because they've gotten back the money --

4 JUSTICE SOTOMAYOR: Right.

5 MS. HARRINGTON: -- which is part of the  
6 property they lost.

7 JUSTICE SOTOMAYOR: But -- but the question  
8 becomes what happens when the house is done before --  
9 given over not as a part of sentencing, but  
10 independently.

11 MS. HARRINGTON: So the next thing --

12 JUSTICE SOTOMAYOR: And that -- and that's  
13 why I don't think any of these provisions really answer  
14 that question.

15 MS. HARRINGTON: But --

16 JUSTICE SOTOMAYOR: And so why don't we go  
17 back to the basics? Why should the victim -- I think  
18 you agree with this -- why should the victim suffer the  
19 loss attendant to selling property that decreases in  
20 value because during the time that they were teeing it  
21 up for sale, the market dropped, and you say the victim  
22 shouldn't.

23 MS. HARRINGTON: The victim should not.

24 JUSTICE SOTOMAYOR: All right.

25 MS. HARRINGTON: The MVRA --

1 JUSTICE SOTOMAYOR: But let's assume that  
2 the market dropped and they sold it. What's the value  
3 you give to the -- to the victim? It's the date that  
4 the victim sold the property, no?

5 MS. HARRINGTON: It's -- right; but that's  
6 because that's when they got back part of the property  
7 they lost, because the property they lost was money.  
8 When they got the house, no part of the property that  
9 they lost was returned to them until they got the money  
10 back.

11 JUSTICE SOTOMAYOR: Now, Justice Breyer  
12 asked you what happens if on some day they did something  
13 unreasonable. They just kept the property. They gave  
14 it to a grandmother. They sold it to someone for a  
15 nominal amount. A sham transaction. What does a judge  
16 do then? They kept the property because they just  
17 didn't want to sell it. They just let it die because  
18 they were lazy.

19 MS. HARRINGTON: So then --

20 JUSTICE SOTOMAYOR: Is that a case the  
21 victim should be made whole for their loss?

22 MS. HARRINGTON: No, because that's a case  
23 -- I mean, yes, in the sense that they should be made  
24 whole for the part of the loss that's attributable to  
25 the actions of the defendant. But that's a situation

1 where part of the victim's net losses would be  
2 attributable to independent decisions that are  
3 commercially unreasonable made by the victim; and so  
4 that's where proximate cause come in. That's not this  
5 case. In this case, there's no indication that the  
6 lenders held on to the houses for longer than was  
7 reasonable.

8 JUSTICE KENNEDY: Do you agree that the  
9 victim, in this case the bank, may not hold on to the  
10 property for an unreasonable period of time?

11 MS. HARRINGTON: Yes. But it -- so, in this  
12 case, one of the houses it took 33 months to sell, as  
13 the Petitioner's counsel pointed out. But that was a  
14 house where at the sheriff's sale, there were a total of  
15 zero bidders on the house, and so nobody wanted to buy  
16 the house. And so if you were going to value the house  
17 at the point of foreclosure, maybe you would value it  
18 zero, which really wouldn't be good for anybody. It  
19 certainly wouldn't be good for the defendant.

20 JUSTICE GINSBURG: There wasn't -- there  
21 wasn't anything at all in the record to suggest that  
22 there was undue -- that that 33 months was an undue  
23 delay.

24 MS. HARRINGTON: There certainly was not.

25 JUSTICE GINSBURG: And there's a question

1 about this case that I would like you to answer before  
2 you finish. And this is a case of a young man, 19 years  
3 old, he gets hooked into this scheme. He gets \$500 for  
4 each parcel, \$1,000; and then he's ordered to make  
5 restitution of \$219,000. He was a bit player in the  
6 scheme. What happened to the people who dreamed up this  
7 scheme, Lytle and Valadez?

8 MS. HARRINGTON: They were ordered to pay a  
9 much larger amount of restitution because they were  
10 involved in the fraudulent acquisition of -- of many,  
11 many more houses than these two houses.

12 JUSTICE GINSBURG: So that -- but did  
13 they -- were they ordered to pay restitution for these  
14 two houses?

15 MS. HARRINGTON: They were. And the  
16 district court held Mr. Robers and his co-conspirators  
17 jointly and severally liable for the losses from these  
18 two houses. Now, the Section 3664(h) allows a district  
19 court to apportion losses if it wants to. It was --  
20 Mr. Robers asked the court to do that; the court decided  
21 not to do that; he hasn't appealed that part of the  
22 decision to this Court and so that's sort of dropped out  
23 of the case. But that is an option under the MVRA.

24 JUSTICE BREYER: I think I understand now  
25 better than I did what his argument is. I see now why

1 you want to go from A, because there are all kinds of  
2 property that could be taken, not just money.

3 MS. HARRINGTON: Right.

4 JUSTICE BREYER: And they say now A is out  
5 of it because he wasn't able to return it, so we're in  
6 B. And I assume well, B requires the same thing; and  
7 you say that's right. So what's the point? Well, you  
8 say but that's how it works for other property, anyway.

9 Now, when we get to B, we get that last  
10 phrase, and they want to make like doubly sure that --  
11 that if in fact some of the property had already been  
12 gone back, it's going to count; and he's saying well, it  
13 did go back. It was in-kind, the baseball bat or the  
14 house, and he's saying now, how do we value that? And  
15 you say well, let's value it the same way as we would  
16 value in-kind property were there a list -- is that  
17 right -- of 3664? And -- and you then go on to say, the  
18 simplest thing to do is if they -- they should sell it.  
19 And then I say, okay, maybe they should, but they don't  
20 want to. And then what do we do? And the answer is  
21 call in experts like he wants. Now, have I got that  
22 right?

23 MS. HARRINGTON: You've gotten that right.

24 JUSTICE BREYER: Thank you.

25 MS. HARRINGTON: And I just want to add the

1 element that the reason that you do that is when the  
2 house goes back to the victim, no part of the property  
3 they lost has been returned to them. And I think it's  
4 important to recognize that in almost all of these  
5 mortgage fraud cases, the bank forecloses on the  
6 property long before sentencing. In this case --

7 JUSTICE BREYER: Oh, I'm not sure you'd say  
8 no part of the property they lost has been returned.

9 MS. HARRINGTON: When they get --

10 JUSTICE BREYER: What's been happening is  
11 they've got some in-kind return.

12 MS. HARRINGTON: They've gotten different  
13 property.

14 JUSTICE BREYER: That's true.

15 MS. HARRINGTON: But under Section 3663, it  
16 uses the phrase "the property" after it has declared  
17 that the property is the property that was lost. And so  
18 when you get a house back and you've lost money, no part  
19 of the property lost has been returned.

20 And, again, if I can just say that in these  
21 mortgage fraud cases, the banks have foreclosed and sold  
22 the houses generally long before sentencing; in this  
23 case, even before the defendant was charged with any  
24 crime. And banks -- so banks aren't thinking about  
25 restitution when they're taking title to the houses and

1 selling them. What they're thinking is, we want to turn  
2 these houses into money, because that's what we lost,  
3 and we want to maximize our return on the houses. And  
4 they're not thinking of restitution as some sort of  
5 insurance against their needing to be responsible in  
6 selling the houses, because as in this case, most  
7 defendants don't have the resources to pay a  
8 restitution award.

9 JUSTICE BREYER: And when they sell and they  
10 get much more money than they otherwise thought from the  
11 house, that extra amount also counts, then, in the  
12 defendant's favor?

13 MS. HARRINGTON: Absolutely. Under our  
14 view, the defendant gets the benefit of that, and the  
15 victim would not be overcompensated. Under his view, he  
16 wouldn't get any benefit of that and the victim would  
17 get double recovery.

18 JUSTICE KAGAN: Well, how does the defendant  
19 get the benefit of that? What would the defendants do  
20 to go get the excess?

21 MS. HARRINGTON: Well, again, usually the  
22 house has sold long before sentencing. And so if the  
23 value of the property has gone up between the time of  
24 foreclosure and the time of the subsequent sale, then  
25 the offset amount is, again, the amount that the bank

1 gets when they sell the house. And so that's -- that's  
2 an amount larger than the value of the house at the  
3 foreclosure and the defendant gets a larger offset.

4 CHIEF JUSTICE ROBERTS: You would agree  
5 that --

6 JUSTICE KAGAN: Over the -- the total amount  
7 lost?

8 MS. HARRINGTON: If it's over the total  
9 amount lost, then the victim's loss is zero as a result  
10 of the defendant's fraud, and so he doesn't have to pay  
11 any restitution award. Now, the victim would get to  
12 keep the extra amount of the money in the same way that  
13 happens in any foreclosure proceeding when there's no  
14 fraud involved. If a bank forecloses --

15 CHIEF JUSTICE ROBERTS: You would -- you  
16 would -- you would agree that a different rule applies  
17 if there is some unreasonable delay in disposing of the  
18 property?

19 MS. HARRINGTON: Yes. And in our view,  
20 that's a proximate cause question, because then the  
21 victim's net losses wouldn't be caused by the  
22 defendant's fraud.

23 CHIEF JUSTICE ROBERTS: And what do you do  
24 in the case of some dramatic development between the  
25 return of the house as opposed to the -- the property

1 and its -- and its sale?

2 MS. HARRINGTON: It depends what sort of  
3 dramatic development you mean.

4 CHIEF JUSTICE ROBERTS: Well, you know,  
5 something is discovered with respect to the property  
6 that nobody knew about. It's -- suddenly, it's a  
7 hazardous chemical zone and the property is -- is  
8 worthless. While when it was returned -- not returned;  
9 I don't mean to prejudge the case.

10 MS. HARRINGTON: The bank got it.

11 CHIEF JUSTICE ROBERTS: When the bank got  
12 it, it was worth \$200,000, but all of a sudden it's, you  
13 know, Love Canal or something, and it's worth nothing.

14 MS. HARRINGTON: Well, it's not our view --  
15 you know, the house is only worth what someone is  
16 willing to pay for it in an arm's-length transaction.  
17 And so if there's something about the house that you  
18 just didn't know when the bank got the house, then that  
19 really wouldn't be the value of the house. The value of  
20 the house is what you can sell it for, and if there's  
21 something that's --

22 CHIEF JUSTICE ROBERTS: Well, no. But my  
23 point is, is it the value you could sell it for before  
24 this discovery of an extraordinary condition, or is it  
25 the value afterward?

1 MS. HARRINGTON: I think in that case, it  
2 would probably be whatever the money that the bank can  
3 get for the house. But if there's some other type of --  
4 of event, like if -- you know, if there's an earthquake  
5 in the middle of the country that destroys the house,  
6 then I think that would be -- that would be sort of a  
7 classic example of something that would break the chain  
8 of proximate cause.

9 And so what would happen in that case really  
10 is the bank would get paid by its insurance company,  
11 compensated for the loss of the house, and you would  
12 sort of value the house at the time that it was -- it  
13 was destroyed after the bank acquired it. And then the  
14 insurance company in that case wouldn't be entitled to  
15 any restitution from the defendant, because it wouldn't  
16 be the defendant's actions that caused the destruction  
17 of the house.

18 What he's saying is that just the fact that  
19 the -- that the housing market went down is an  
20 intervening nonforeseeable event that breaks the chain  
21 of causation. Under our view, that's absolutely not  
22 correct. The very nature of the defendant's scheme  
23 injected the health of the housing market into the  
24 ultimate determination of the victim's net losses. He  
25 -- his design was that he would take money from the

1 banks and promise to pay it back. He had no intention  
2 to pay it back, In fact never made a single payment.  
3 That necessarily and foreseeably triggered the  
4 foreclosure, which caused the banks to own the houses  
5 and then caused them to put them on the market and sell.

6 It's absolutely foreseeable that it takes  
7 banks a certain amount of time to sell the houses,  
8 absolutely foreseeable that the value of the houses will  
9 fluctuate over time. No one has to be able to predict  
10 what the houses would have been worth on a particular  
11 date in the future to be able to say that it was  
12 foreseeable that the value would change.

13 The MVRA allocates any risk from a change in  
14 property to a defendant, not to the victim. And that's  
15 consistent with our view.

16 If there are no further questions, I can  
17 rest --

18 I guess I would just like to end by  
19 reiterating our main point, which is that the text of  
20 the statute is very clear in this case, and what it  
21 focuses on is how much of the property that was lost has  
22 been returned to the victim before sentencing. When the  
23 property that was lost was a car, you don't get an  
24 offset for returning pineapples. When the property that  
25 was lost was money, you don't get an offset for

1 returning the house. But in this case, as in almost all  
2 mortgage fraud cases, the banks were able to get back  
3 some of the property they lost when they sold the  
4 houses, and so there's no valuation question here. It's  
5 not a question of how much of the property that was lost  
6 did the banks get back.

7 The district court knew 100 percent for sure  
8 because the houses were sold before Mr. Robers was even  
9 charged with a crime.

10 CHIEF JUSTICE ROBERTS: Well, what if they  
11 get -- they get the house and as soon as they get it,  
12 there are ten offers at \$500,000 or more, and the amount  
13 of the restitution is, you know, \$300,000 or whatever.  
14 But the bank says, you know, I think the market is going  
15 to go even higher, so I'm not going to sell it right  
16 away, I'm going to wait, not an unreasonable length of  
17 time, but I'm going to wait. And then the market  
18 craters. I mean, is it the same rule then, that they  
19 only get what they were able to sell it for?

20 MS. HARRINGTON: I mean, as long as what the  
21 bank -- what the bank did was commercially reasonable.  
22 If the bank --

23 CHIEF JUSTICE ROBERTS: I know banks like to  
24 get rid of property as soon as possible, but, you know,  
25 they make decisions at some point, let's wait before we

1 sell this. Is that commercially reasonable?

2 MS. HARRINGTON: I mean, it's hard to know.  
3 You know, you wouldn't want to --we wouldn't want to  
4 judge that with 100 percent perfect hindsight, right?  
5 You'd want to say -- if you were in the bank's shoes at  
6 the time it made the decision, was that a commercially  
7 reasonable decision, and that's a decision that would  
8 have to be made in those kind of cases.

9 JUSTICE SCALIA: Well, why should the  
10 defendant here subsidize the banks playing the market?  
11 That's what you are saying.

12 MS. HARRINGTON: No, what I'm saying is --

13 JUSTICE SCALIA: The bank is playing the  
14 market. It says, yeah, we could sell it for so much  
15 now, but, yeah, it may go up. And you are, you know,  
16 he's paying for the bank's roll of the dice.

17 MS. HARRINGTON: So if there really -- if  
18 there really is evidence that the bank is sort of really  
19 rolling the dice, then that might be a harder question.  
20 Generally, what the bank wants is to turn the house into  
21 money because the bank is not in the business of owning  
22 houses. It's in the business of having money.

23 And again, the banks don't have in their  
24 mind that they're going to get a restitution payment  
25 when they take the houses. What they have in mind is

1 that they're going to take a loss. If they've had to  
2 foreclose on a house, it's a bad mortgage, generally  
3 they are going to get back less for the house than what  
4 they got for the mortgage, and if that happens they  
5 consider it a loss and I think any business person would  
6 consider that a loss.

7 And it's perfectly foreseeable that it's  
8 going to take the bank a certain amount of time to turn  
9 the house into cash. But when that's happened before  
10 sentencing, it's really an easy case to apply Section  
11 3663A because you absolutely know for sure how much of  
12 the lost property has been returned to the victim and  
13 it's the amount of the money they got for the sale or  
14 for the property.

15 JUSTICE KAGAN: But if I could just be clear  
16 about what you're saying, you're saying it's not the  
17 sale price when the sale is for a nominal amount; is  
18 that right?

19 MS. HARRINGTON: Yes.

20 JUSTICE KAGAN: And it's not the sale price  
21 if the lender has done something commercially  
22 unreasonable?

23 MS. HARRINGTON: Yes.

24 JUSTICE KAGAN: Is that right?

25 MS. HARRINGTON: Yes.

1 JUSTICE KAGAN: And so if that's right and  
2 both of those things sound right, but why doesn't that  
3 kind of explode your statutory argument, because then  
4 it's not any part of the property that's returned.

5 MS. HARRINGTON: Because the other parts of  
6 the statute require -- have a proximate cause  
7 requirement, and so you are only -- the victim is only  
8 entitled to get restitution for the amount of its losses  
9 that are attributable to the defendant's criminal  
10 conduct. And so if part of the bank's losses, i.e., the  
11 smaller amount of the return it gets for selling the  
12 houses, is because of the bank's independent action,  
13 then that part of the loss is not attributable to the  
14 defendant.

15 JUSTICE BREYER: I followed you up through  
16 here, I think. You're into B.

17 MS. HARRINGTON: Yes.

18 JUSTICE BREYER: He is pointing to little  
19 (ii) and you're saying that really is not relevant here  
20 because it's cash. None of the property was returned;  
21 they gave him a house, not the cash.

22 MS. HARRINGTON: Well, we're saying it's  
23 relevant when the bank sells the house because then part  
24 of the property is returned.

25 JUSTICE BREYER: Well, wait. What they have

1 is the house.

2 MS. HARRINGTON: They have the house until  
3 they sell it and then they have cash.

4 JUSTICE BREYER: Oh, I see.

5 MS. HARRINGTON: So it's the cash they get  
6 when they sell the house --

7 JUSTICE BREYER: And that is if they've sold  
8 it before the sentencing.

9 MS. HARRINGTON: Right. Which happens in  
10 most every case. Not every case, but --

11 JUSTICE BREYER: Well, let's suppose it  
12 doesn't and they still have it as of the time of  
13 sentencing, then we're over into 3(a). It's an -- 3664.

14 MS. HARRINGTON: Right.

15 JUSTICE BREYER: It's an in-kind payment.  
16 The judge has discretion as to how to value it. He  
17 could say, sell it within 90 days, and we will take  
18 that.

19 MS. HARRINGTON: Right.

20 JUSTICE BREYER: Or he could say if you  
21 don't want to do that we call in the assessors.

22 MS. HARRINGTON: It wouldn't be considered  
23 an offset under Section 3663A(b)(1)(B)(ii).

24 JUSTICE BREYER: You're saying because  
25 (3) -- little (ii) applies, that when it's transformed

1 into cash prior to the sentencing, then they have  
2 received --

3 MS. HARRINGTON: Some part of the property.

4 JUSTICE BREYER: -- some part of the money  
5 back --

6 MS. HARRINGTON: Yes.

7 JUSTICE BREYER: -- and often that will work  
8 in favor of the defendant.

9 MS. HARRINGTON: It will because --

10 JUSTICE BREYER: Sometimes, as in this case,  
11 it won't if the housing market collapses.

12 MS. HARRINGTON: Sometimes it goes down, but  
13 other times it goes up. And the trend over time is that  
14 the housing market goes up, and so more often than not  
15 in the larger picture it will inure to the benefit of  
16 the defendant.

17 JUSTICE SOTOMAYOR: So where do you value  
18 for the person who -- the -- the creditor, the secured  
19 creditor who acts unreasonably? Let's assume an  
20 unreasonable act, and you said it might have been  
21 commercially unreasonable to hold on to the property  
22 after somebody offered them twice the amount of their  
23 mortgage.

24 MS. HARRINGTON: Well, I think in those  
25 unusual circumstances it would be as you suggested

1 earlier, which is that you would value it as of the date  
2 it would have been reasonable to dispose of the property  
3 in a fair market, arm's-length transaction.

4 JUSTICE SOTOMAYOR: So --

5 MS. HARRINGTON: -- and that's usually  
6 not --

7 JUSTICE SOTOMAYOR: -- what do you think of  
8 this test? In calculating a creditor's loss resulting  
9 from a secure transaction, the restitution order --  
10 award should be offset by the amount that a reasonably  
11 diligent creditor, under the same or similar  
12 circumstances, could or would -- or did -- could, would  
13 or did obtain for the collateral?

14 MS. HARRINGTON: I think generally that's  
15 fine. I think in the -- really, in the mine run of  
16 cases, the lion's share of cases, you are going to be  
17 sort of overly complicating the district court's  
18 inquiry, because in almost all of the cases the houses  
19 have been sold, and so you know you can look at the  
20 dollar figure that the banks got, and that's the amount  
21 you can use. And it -- and that fits into what you  
22 described, but just sort of describes it in a more  
23 complicated way, I think, in more --

24 JUSTICE SCALIA: Well, it's not just more  
25 complicated. It's a question of I guess who has the

1 burden. As I understand, what you are proposing is that  
2 you get the sale price, but it's -- it's available to  
3 the defendant to show that the sale price was  
4 unreasonably low because of gamesmanship on the part of  
5 the bank or some other reason, right?

6 MS. HARRINGTON: I think that would  
7 be available to the defendant.

8 JUSTICE SCALIA: Yes.

9 MS. HARRINGTON: I think --

10 JUSTICE SCALIA: You would prefer that to  
11 the other formulation, wouldn't you?

12 MS. HARRINGTON: Yes, and I think there is a  
13 presumption that banks are going to act in a  
14 commercially reasonable way because they have no  
15 expectation of getting any money back through the  
16 restitution process.

17 JUSTICE GINSBURG: If the sale -- if at the  
18 time of sentencing, the house has not yet been sold, but  
19 there's no -- there's good reason for the delay, because  
20 for example, there are no bids at an earlier time, could  
21 the judge defer the restitution order until the house is  
22 sold?

23 MS. HARRINGTON: So as Justice Breyer  
24 suggested, under our view the court -- the district  
25 court's first resort would be to say -- to push off the

1 determination of the restitution amount for 90 days  
2 under 3664(d)(5), and give the -- give the bank a little  
3 more time to sell the house, because in that case, a  
4 determination -- you wouldn't be able to ascertain the  
5 net losses of the victim.

6           If -- if a bank still couldn't sell the  
7 house, then I think under this Court's decision in Dolan  
8 what the court could do say is: Yes, I'm going to order  
9 restitution; the restitution will be for the full amount  
10 of the mortgages, the money that was lost minus whatever  
11 amount of money the banks get back when they sell the  
12 houses.

13           And if the bank has not been able to sell  
14 the house at that point, it's really to everyone's  
15 benefit to give them the chance to do it, because if no  
16 one wants to buy the house and you force the district  
17 court to value the house at that point, it's going to  
18 give it a really low value and that doesn't help the  
19 defendant, it doesn't really help the bank --

20           JUSTICE SOTOMAYOR: What does the defendant  
21 do if they act unreasonably after that order?

22           MS. HARRINGTON: Then you --

23           JUSTICE SOTOMAYOR: If the bank does a  
24 nominal sale and only gets \$100?

25           MS. HARRINGTON: So then I think the

1 district court would have retained jurisdiction to fill  
2 in an amount related, blank, for the amount of money the  
3 bank got back, and there could be proceedings about what  
4 that amount should be.

5 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

6 Mr. Green, you have 5 minutes remaining.

7 REBUTTAL ARGUMENT OF JEFFREY T. GREEN

8 ON BEHALF OF THE PETITIONER

9 MR. GREEN: It's important, Justice  
10 Sotomayor and Justice Kennedy, to understand that  
11 defendants have no compulsory process in this  
12 restitution-ordering scheme.

13 So that if there is a delay, Justice  
14 Ginsburg, in the ultimate sale of the property or maybe  
15 it's for a nominal amount or maybe it's for a discounted  
16 amount, the defendant has no way to try and look behind  
17 that transaction. They can't issue a subpoena. They  
18 can't -- they could call a witness, but it would only be  
19 if it was a friendly witness.

20 And here, Benjamin Robers sits with a  
21 \$219,000 restitution order for which he is jointly and  
22 severally liable, as my colleague said 182 years it  
23 takes to pay off, and there is no way for his attorney,  
24 us, to get behind the transactions at issue and  
25 challenge them.

1 JUSTICE BREYER: Why not? Why not just say,  
2 hey, I'll tell you what happened here. They -- we gave  
3 him a house worth 100,000, and they sold it for a  
4 dollar, and they only want to subtract a dollar, the  
5 government. But I will tell you something. I would  
6 count that house as an in-kind payment --

7 MR. GREEN: It's --

8 JUSTICE BREYER: -- an in-kind payment, and  
9 they were wrong to sell it. And it was worth 100,000,  
10 that was totally crooked, their selling it. And  
11 therefore, I want you to say, fine, perfectly right  
12 subtract \$1 under(ii), little (ii), but subtract 99,000  
13 more because of the in-kind payment that was made.

14 Would you say that?

15 MR. GREEN: No. And a -- and a --

16 JUSTICE BREYER: Why?

17 MR. GREEN: Because, Your Honor, in an  
18 obvious case like, the defendant would have the ability  
19 to -- to point to the facts and circumstances and say,  
20 you know, that -- that, it doesn't appear, to be an  
21 arm's-length transaction, Your Honor, and that would be  
22 obvious evidence.

23 But much more sophisticated things are going  
24 on here, Justice Breyer. This is a situation where if  
25 we take a look at the Inlet Shore Drive property, it

1 sells for \$166,000, which appears to be quite a bit  
2 lower than its value when the bank got ahold of that  
3 property for nothing -- for no reason that Mr. Roberts  
4 had control over.

5 If that property had been burning down,  
6 Justice Alito, he would not have been able to go in and  
7 throw a bucket of water on it because that would have  
8 been trespassing. He had no dominion or control over  
9 that property.

10 So in a situation where --

11 CHIEF JUSTICE ROBERTS: Well, but the only  
12 reason he would have been trespassing is because, in  
13 fact, he did not live in the house as he promised the  
14 bank he would when the bank gave him the money.

15 MR. GREEN: Right.

16 CHIEF JUSTICE ROBERTS: So why shouldn't he  
17 bear the responsibility for that consequence?

18 MR. GREEN: Because of the bank's dominion,  
19 because of the situations we've been talking about here  
20 where the bank holds on to the property unreasonably too  
21 long, right into the teeth of a great recession --

22 JUSTICE GINSBURG: There was no -- there was  
23 no --

24 MR. GREEN: -- that he's not --

25 JUSTICE GINSBURG: -- evidence of that in

1 this case, that the bank held on too long.

2 MR. GREEN: Well, it was 33 months after  
3 foreclosure. The foreclosure on Inlet Shore Drive took  
4 place on -- in February 2006. The sale --

5 JUSTICE GINSBURG: The answer that  
6 Ms. Harrington gave was that there were no bids.

7 MR. GREEN: I'm sorry, Your Honor?

8 JUSTICE GINSBURG: I think she said there  
9 were no bids.

10 MR. GREEN: There were no bids at the -- at  
11 the foreclosure sale, but that frequently happens that  
12 there's no bids at the foreclosure sale, Your Honor.

13 We don't know -- and this is another point  
14 about the defendant's discovery. We don't know what  
15 happens after -- after the -- after the lender takes  
16 control of the property. We don't know whether it's  
17 taking unreasonable risks or not unreasonable risks.  
18 And, again, the defendant doesn't have the capacity.

19 The other point --

20 JUSTICE ALITO: Is there any reason why  
21 the -- why the sentencing judge, where there's an -- an  
22 allegation and maybe a -- a suggestion that there was  
23 unreasonable delay or something unreasonable was going  
24 on require the government to provide some substantiation  
25 for -- for what happened?

1 MR. GREEN: There -- there could be, Your  
2 Honor. The -- the judge -- yeah, the defense could ask  
3 the judge, Your Honor, please, could we get some  
4 discovery here? And it would be completely up to the  
5 court whether the court would want to do that or not.

6 But the point is that it's opaque to the  
7 defendant. And unless the defendant can come up with  
8 something obvious, the defendant would have absolutely  
9 no opportunity to produce evidence.

10 The other point I want to make here is a  
11 fundamental one. And respectfully, I think we're --  
12 we're -- in talking about baseball bats and pineapples  
13 and tomatoes, we're getting lost about what's actually  
14 at issue here.

15 This is a secured transaction. This is  
16 something that the -- that the victim lender agreed to  
17 take back in the event of a default. They took a  
18 property interest. That's a property interest. This  
19 Court said that in Pasquantino. That's a property  
20 interest that they took in that particular piece of  
21 property.

22 Benjamin Robers did not take \$330,000 and  
23 say, I'm going to go buy the best house I can with that.

24 The lender said, Benjamin Robers, here is  
25 \$330,000 in your name so that you can buy this

1 particular piece of property, subject to our interest.

2 And so when the default took place, there  
3 needed to be a -- there needed to be a return of that  
4 property interest, and it happened.

5 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

6 The case is submitted.

7 (Whereupon, at 11:16 a.m., the case in the  
8 above-entitled matter was submitted.)

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