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1 P R O C E E D I N G S

2 (10:16 a.m.)

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

6 ORAL ARGUMENT OF JEFFREY T. GREEN

7 ON BEHALF OF THE PETITIONER

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

10 With respect to property crimes, Section
11 3663A of the Mandatory Victims Restitution Act requires
12 an offset against a restitution order when any part of
13 the property is returned to the victim. This case
14 concerns secured loans for the purchase of real estate.
15 Pursuant to those loans, the lenders took a property
16 interest in the subject real estate, namely, the right
17 to foreclose and take title in the event of default.
18 When the lenders foreclosed and took title, that
19 represented a fully realized return of their preexisting
20 property right.

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

25 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?

14 If we're letting them recoup the expenses of
15 sale, why don't we just simply recognize the value on
16 that date? And if an investor who takes property
17 inadequately decides to hold on to it or -- or with no
18 reasonableness holds on to it or gives it away to their
19 mother or sells it to somebody for a nominal fee, then
20 it should be the date at which they got rid of it or the
21 day -- or the value of the date -- on the date of return
22 or something like that, or the date that they should
23 have done something with the 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, that 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 that 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.

8 And it's -- why isn't the nature of the
9 fraud precisely the mortgage? This is not as good a
10 mortgage as the bank anticipated it was getting. And
11 therefore, you don't have to -- it is indeed the very
12 same property. They -- they gave them back the -- the
13 real estate, but it was not as much as -- as they had
14 expected.

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

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

25 MR. GREEN: Then two things might happen.

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

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

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

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

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

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

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

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

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

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

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

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

15 MR. GREEN: Okay. If she accepted the bat,
16 then the value of the bat is set off against the
17 \$100,000.

18 JUSTICE BREYER: Perfect. And it comes
19 under A, not B?

20 MR. GREEN: I would --

21 JUSTICE BREYER: Wouldn't you say it comes
22 under A, because, after all --

23 MR. GREEN: But the --

24 JUSTICE BREYER: -- if -- if he doesn't have
25 the 100,000, does he? So if you're going to say that

1 means the fact that he doesn't have it, that he can't
2 return it, and we're under B, what B says to do is pay
3 \$100,000. So you'd end up not being able to read B. It
4 would be incoherent, I think. So it must come under A,
5 not B. I mean, I would have thought so.

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

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

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

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

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

21 MR. GREEN: Right.

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

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

3 JUSTICE BREYER: I guess it would be up to
4 the judge.

5 MR. GREEN: Right.

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

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

20 JUSTICE SOTOMAYOR: That's my whole point.
21 That may not make the seller whole. What makes the
22 seller whole is on the day that he or she sold the item
23 and received money. That's the Government's point.

24 MR. GREEN: Right.

25 JUSTICE SOTOMAYOR: But -- well, that's not

1 the Government's point, because the Government wants to
2 value it as of the date of the sentencing. But the --
3 but whatever the seller received on the day he or she
4 sold the bat, that's the value that it -- that the
5 seller has put on that item.

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

8 JUSTICE SOTOMAYOR: Then that's -- that's
9 the question. That --

10 MR. GREEN: And then we're in the exact
11 conundrum here that the Government creates because it --

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

16 MR. GREEN: One of the properties was sold
17 quite late, Your Honor.

18 JUSTICE SOTOMAYOR: Yes.

19 MR. GREEN: 33 -- 33 months after the
20 foreclosure took place.

21 JUSTICE SOTOMAYOR: Well, that was my
22 question earlier, which -- was it reasonable for that
23 seller to hold on to the property that long?

24 MR. GREEN: We would say potentially not,
25 Your Honor. The point is we don't know, and the point

1 is Mr. Robers can't foresee it. But before we go there
2 to causation issues, I wanted to address Justice
3 Breyer's point about the bat, because the Government's
4 theory of the interpretation of 3663A doesn't allow for
5 that. Their theory is it has to be strict identity.
6 Money is money is money. That's what they -- that's
7 what they keep repeating. They do not allow for a
8 situation in which a defendant, prior to sentencing,
9 offers up some good or property --

10 JUSTICE BREYER: No, it doesn't, you just
11 say -- look, "in the case of an offense resulting in the
12 loss of property." My poor victim lost \$100,000. So
13 that's this case. Return the property, i.e., return the
14 \$100,000, okay? That's simple. That's A. But -- so
15 the judge says, defendant, return 100.

16 Now, let's try -- take B. If return of the
17 100 is impossible, say because he's broke, then what are
18 you supposed to do? Then pay the greater of the value
19 of the property, which is 100,000 on the date of loss or
20 pay the 100,000 on the date of sentencing. Now, wait.
21 I'm sorry. That makes no sense. If you can't pay the
22 100,000, then what you have to do is pay the 100,000 or
23 pay the 100,000. I'm sorry.

24 That's why I say that reading it that way to
25 me doesn't make much sense, and therefore, I think this

1 is a case of A; it is a case where he's simply ordered
2 return the 100,000, and there is implicit in that you
3 don't have to return more than she -- than you took, and
4 you already gave her the bat. I mean, the bat counts as
5 some kind of a return. We have to value the bat. It
6 doesn't tell us what to do. It's up to the judge.

7 MR. GREEN: Well, the bat -- the bat doesn't
8 count as a return on the Government's theory because
9 it's not a return of the same property.

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

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

22 JUSTICE GINSBURG: And who's -- who has the
23 burden of proof? If we -- we know the proceeds when
24 it's sold. It's not sold. But you say it has to be
25 valued as of the time of foreclosure. And I think you

1 said someplace in your brief that it's the Government's
2 burden to show the value at the time of foreclosure.

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

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

5 JUSTICE GINSBURG: Well, the Government's
6 interest, I think, would be to show a low value, right?

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

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

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

20 JUSTICE KENNEDY: Well, I'm not sure a
21 sentencing court is well equipped to do it. A
22 sentencing court has to call appraisers?

23 MR. GREEN: Yes, Your Honor, if -- if
24 they're going to challenge what the foreclosure amount
25 would be.

1 JUSTICE ALITO: Well, Mr. Green, here's one
2 way of looking at this case. Maybe you'll tell me this
3 is the wrong way of looking at it. But let's assume
4 that the bank sells the -- the property within a
5 reasonable period of time or as quickly as one could
6 reasonably expect. So one way of looking at this is
7 which party bears the risk that there is going to be a
8 significant deterioration in the real estate market
9 between the time of foreclosure and the time of sale?

10 Now, your answer to that is that the -- that
11 the victim should bear that risk? Why should that be?
12 Why would Congress want that?

13 MR. GREEN: Because the victim had complete
14 control and dominion over the property once the victim
15 foreclosed on the property.

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

22 MR. GREEN: Because the victim has complete
23 dominion and control, Your Honor. And -- and we
24 wouldn't say, for example, even under the Government's
25 theory, if it were a baseball card collection and

1 somebody had returned part of the baseball card
2 collection, we wouldn't say that the -- that the
3 defendant is responsible for what the -- the owner of
4 the baseball card collection does with it after it gets
5 returned by the victim -- or by the defendant.

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

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

20 JUSTICE SOTOMAYOR: That wasn't the
21 hypothetical.

22 JUSTICE SCALIA: You're really confusing me.
23 I -- I -- both the baseball bat and the truckload of
24 tomatoes --

25 (Laughter.)

1 JUSTICE SCALIA: -- do not come under B. I
2 thought that was your case. Under B, you can deduct the
3 value as of -- as of the date the property is returned,
4 of any part of the property that is returned.

5 MR. GREEN: That's correct.

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

8 MR. GREEN: Right.

9 JUSTICE SCALIA: Nor is the cartload of
10 rotten tomatoes.

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

12 JUSTICE SCALIA: So what are we talking
13 about here?

14 (Laughter.)

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

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

21 MR. GREEN: Well, in part, because the
22 question about -- about who bears the risk is a -- is a
23 legitimate question. But because there is not --

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

1 MR. GREEN: Well, frequently, the -- the
2 issue is, why should a fraudfeasor actually get the
3 benefit of -- of a decline in the real estate market,
4 and the answer is because it's not -- the fraudfeasor
5 doesn't proximately cause what third parties do with a
6 part of the property that the fraudfeasor returns once
7 the fraudfeasor has returned that property.

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

13 MR. GREEN: Yes, we do.

14 JUSTICE KENNEDY: Then we are under B and
15 then we are talking about money and not the mortgaged
16 property.

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

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

24 MR. GREEN: Well, it would work, Your Honor,
25 because we do have to put a monetary value on the

1 property as of the date of foreclosure.

2 JUSTICE KENNEDY: The victim is entitled to
3 the difference in the value of the property and the
4 amount of money stolen based, on your view, on the value
5 of the property at the time that it's returned, correct?

6 MR. GREEN: That's correct.

7 JUSTICE KENNEDY: Then we are under B,
8 correct?

9 MR. GREEN: That's correct. We believe we
10 are, yes.

11 JUSTICE KENNEDY: Thank you.

12 MR. GREEN: Yes.

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

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

1 between the foreclosure date and -- and the value of the
2 loans as they -- as they were lent. So we're not
3 standing on any --

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

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

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

25 MR. GREEN: But this Court said in RadLAX

1 that a credit bid is the same as cash, and that's what
2 lenders do when they foreclose on real estate. They
3 credit bid, and that's the same thing.

4 JUSTICE SCALIA: It's the same with the
5 baseball bat, right?

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

10 I'd like to reserve the remainder of my time
11 for rebuttal.

12 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
13 Ms. Harrington.

14 ORAL ARGUMENT OF SARAH E. HARRINGTON
15 ON BEHALF OF THE RESPONDENT

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

18 I'd like to start with what I think at least
19 is some common ground between the Government and
20 Mr. Robers. And that is that if a defendant
21 fraudulently deprives a victim of a car and then gives
22 the victim a crate of pineapples or tomatoes or an
23 elephant, he's not entitled to an offset, because what
24 the victim lost was a car and the car is not the same as
25 pineapples or an elephant. We think that's exactly what

1 happened here. What the victims lost in this case was
2 money. What they got back was houses, which is not the
3 same.

4 Now, Petitioner says it is the same.

5 JUSTICE SOTOMAYOR: What happens if they
6 decide to give the house to -- the banker, to his mother
7 or grandmother?

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

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

14 MS. HARRINGTON: They --

15 JUSTICE SOTOMAYOR: -- perhaps through the
16 entire period. What date does the judge use to
17 determine the value of that house?

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

1 than to sell it.

2 And so in that case, the district court
3 would have to use its discretion to value what had come
4 back to the lenders. And -- and probably the best way
5 to do it would be to value it at the time that they
6 disposed of it.

7 JUSTICE SOTOMAYOR: So you --

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

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

14 MS. HARRINGTON: But --

15 JUSTICE SOTOMAYOR: Not when they received
16 it, not when the sentencing happened, not after the
17 sentencing.

18 MS. HARRINGTON: Right.

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

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

25 JUSTICE SCALIA: Yes, it's under --

1 JUSTICE SOTOMAYOR: Exactly.

2 JUSTICE SCALIA: -- 3664, which is quite a
3 different thing.

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

7 JUSTICE SOTOMAYOR: That's -- that's my
8 point exactly.

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

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

23 MS. HARRINGTON: Yes.

24 JUSTICE KAGAN: And one of the questions
25 that came up in the last half hour is, is that the right

1 section of the statute. Now, in your view, which is
2 that the only thing involved here is money, that's all
3 that's involved here, why aren't we under A, rather than
4 B?

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

7 JUSTICE KAGAN: Right. But usually when you
8 don't have money, I mean, say -- let's just say I'm a
9 fraud victim, and I get an order of restitution for
10 \$100,000, and the fraudster doesn't have the \$100,000.
11 He only has \$50,000.

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

16 MS. HARRINGTON: Yes.

17 JUSTICE KAGAN: Would you think that that's
18 under B?

19 MS. HARRINGTON: So our view is that 3663A
20 governs the calculation of the loss to the victims, and
21 3664 governs how the defendant pays back a restitution
22 award. And so in your hypothetical, what would happen
23 is that the court would order the defendant to return
24 the part of the property he took that he still has, the
25 \$50,000, and then under 3664A, he would put him on a

1 payment schedule to pay back the rest.

2 JUSTICE KAGAN: So you think that my
3 hypothetical -- let me -- I'm just -- I'm sorry for --
4 is under B, not under A?

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

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

10 MS. HARRINGTON: Yes. And you would get an
11 offset for the amount of the money that you returned to
12 the lender.

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

21 MS. HARRINGTON: It -- well, it does make
22 sense if you -- if you remember that 3663A is about the
23 calculation of the loss at the time of sentencing. And
24 so it's not about, you know, how -- how much of a loss
25 you are going to have once the restitution order has

1 been paid off, because at that point, the victim will
2 have no loss. They will have been paid.

3 What you are trying to calculate is what was
4 the loss that we're -- that we're going to order the
5 restitution for. And so if victim -- excuse me. If the
6 defendant -- defendant still has part of the property
7 that he took, then the court says: Give it back and
8 then we calculate the net loss that the victim has,
9 \$100,000 --

10 JUSTICE BREYER: Does it make any
11 difference? I mean, you know, it's odd to read B as
12 applying because it says if you can't pay back the
13 100,000, you're -- now we're in B, and what B tells you
14 to do is pay 100,000. Unless --

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

16 JUSTICE BREYER: You know, I mean, that's
17 what it says. And then -- and then you have to subtract
18 the amount you already gave, which of course you would
19 have to do anyway.

20 MS. HARRINGTON: Right. But -- but B says
21 return the property.

22 JUSTICE BREYER: Return the 100,000.

23 MS. HARRINGTON: But if the property is a
24 bat, you return the bat. If you don't have the bat, you
25 can't return the bat. If the property is 100,000 --

1 JUSTICE BREYER: No, no, forget the bats.
2 It's just \$100,000.
3 MS. HARRINGTON: I know. No, but --
4 JUSTICE SCALIA: You brought this in.
5 JUSTICE BREYER. I brought in a certain --
6 MS. HARRINGTON: You brought it up.
7 JUSTICE BREYER: -- quality to this
8 discussion which may not have contributed as much as I
9 hoped.
10 MS. HARRINGTON: But it --
11 JUSTICE BREYER: But the -- the -- the point
12 is imagine it's all money.
13 MS. HARRINGTON: No, I --
14 JUSTICE BREYER: I mean, if it's all money,
15 A applies, that should be the end of it. If you want to
16 apply B, do, but it's a wash.
17 MS. HARRINGTON: What I'm saying is that the
18 property that was lost is the property that was lost.
19 If the property that was lost is a crate of tomatoes and
20 you don't have it, and you can't give it back, something
21 else has to happen.
22 JUSTICE KAGAN: No, but you see if the -- it
23 would make a difference as to whether A or B applies
24 because your whole argument is premised on the language
25 of B. So if we're not in B, if we're in A, your

1 statutory argument goes away, and then we just try to
2 figure out what offset rules make sense. I mean,
3 there's got to be an offset in A, too, right? Suppose
4 we were under A. It's got to be. You don't think that
5 there is an offset under A?

6 MS. HARRINGTON: I don't see an offset under
7 A. A just says return the property. If you have the
8 property, you return the property.

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

11 JUSTICE KAGAN: Yes, but suppose -- suppose
12 another case.

13 Just say the second half to Justice Breyer.
14 Sorry.

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

24 JUSTICE KAGAN: Well, what do you think
25 happens in an A case where let's -- let's -- in a

1 mortgage case, so there's a home, but this -- this
2 person also has cash and repays the full amount in cash.
3 And now the bank has the full amount in cash, but also
4 has this home. And then the bank sells the home. Is --
5 is the defendant entitled to an offset?

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

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

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

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

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

1 can't return the money, B says return the money. But is
2 that accurate? What A says is if you don't -- if it's
3 impossible to return the money, assuming that's the
4 thing at issue, B says return the value.

5 MS. HARRINGTON: Well, B --

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

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

16 JUSTICE BREYER: All right.

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

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

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

23 JUSTICE BREYER: The same problem is there.
24 You go to 3664, and what happened was it says in 3664:
25 Enter a restitution order, judge. And when you do that,

1 provide for a lump-sum payment or partial payments or at
2 specified intervals, in-kind payments, a combination of
3 payments. It gives a judge a lot of discretion.

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

7 MS. HARRINGTON: Yes.

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

12 MS. HARRINGTON: Right.

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

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

24 MS. HARRINGTON: Right.

25 JUSTICE BREYER: -- or you -- or let it

1 befall on you what help befalls. And then what you have
2 to do is value the house if she still won't sell it.

3 MS. HARRINGTON: Yes, he would --

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

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

10 JUSTICE BREYER: It was not a return.

11 MS. HARRINGTON: Right, because it's not the
12 property --

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

15 MS. HARRINGTON: Right, but --

16 JUSTICE BREYER: I see.

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

23 JUSTICE SOTOMAYOR: But it also goes back to
24 how do you measure and when do you measure this. It's
25 easy if the property is returned on the date of

1 sentencing or 90 days after, or not returned then.

2 Because then the judge could basically figure out what's
3 a reasonable time, the date of sentence or within the 90
4 days, the day they sold the property.

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

7 JUSTICE SOTOMAYOR: Right.

8 MS. HARRINGTON: -- which is part of the
9 property they lost.

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

14 MS. HARRINGTON: So the next thing --

15 JUSTICE SOTOMAYOR: And that -- and that's
16 why I don't think any of these provisions really answer
17 that question.

18 MS. HARRINGTON: But --

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

1 MS. HARRINGTON: The victim should not.

2 JUSTICE SOTOMAYOR: All right.

3 MS. HARRINGTON: The MVRA --

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

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

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

22 MS. HARRINGTON: So then --

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

25 MS. HARRINGTON: No, because that's a case

1 -- I mean, yes, in the sense that they should be made
2 whole for the part of the loss that's attributable to
3 the actions of the defendant. But that's a situation
4 where part of the victim's net losses would be
5 attributable to independent decisions that are
6 commercially unreasonable made by the victim; and so
7 that's where proximate cause come in. That's not this
8 case. In this case, there's no indication that the
9 lenders held on to the houses for longer than was
10 reasonable.

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

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

23 JUSTICE GINSBURG: There wasn't -- there
24 wasn't anything at all in the record to suggest that
25 there was undue -- that that 33 months was an undue

1 delay.

2 MS. HARRINGTON: There certainly was not.

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

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

15 JUSTICE GINSBURG: So that -- but did
16 they -- were they ordered to pay restitution for these
17 two houses?

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

1 out of the case. But that is an option under the MVRA.

2 JUSTICE BREYER: I think I understand now
3 better than I did what his argument is. I see now why
4 you want to go from A, because there are all kinds of
5 property that could be taken, not just money.

6 MS. HARRINGTON: Right.

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

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

1 right?

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

3 JUSTICE BREYER: Thank you.

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

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

13 MS. HARRINGTON: When they get --

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

16 MS. HARRINGTON: They've gotten different
17 property.

18 JUSTICE BREYER: That's true.

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

24 And, again, if I can just say that in these
25 mortgage fraud cases, the banks have foreclosed and sold

1 the houses generally long before sentencing; in this
2 case, even before the defendant was charged with any
3 crime. And banks -- so banks aren't thinking about
4 restitution when they're taking title to the houses and
5 selling them. What they're thinking is, we want to turn
6 these houses into money, because that's what we lost,
7 and we want to maximize our return on the houses.

8 And they're not thinking of restitution as
9 some sort of insurance against their needing to be
10 responsible in selling the houses, because as in this
11 case, most defendants don't have the resources to pay a
12 restitution award.

13 JUSTICE BREYER: And when they sell and they
14 get much more money than they otherwise thought from the
15 house, that extra amount also counts, then, in the
16 defendant's favor?

17 MS. HARRINGTON: Absolutely. Under our
18 view, the defendant gets the benefit of that, and the
19 victim would not be overcompensated. Under his view, he
20 wouldn't get any benefit of that and the victim would
21 get double recovery.

22 JUSTICE KAGAN: Well, how does the defendant
23 get the benefit of that? What would the defendants do
24 to go get the excess?

25 MS. HARRINGTON: Well, again, usually the

1 house has sold long before sentencing. And so if the
2 value of the property has gone up between the time of
3 foreclosure and the time of the subsequent sale, then
4 the offset amount is, again, the amount that the bank
5 gets when they sell the house. And so that's -- that's
6 an amount larger than the value of the house at the
7 foreclosure and the defendant gets a larger offset.

8 CHIEF JUSTICE ROBERTS: You would agree
9 that --

10 JUSTICE KAGAN: Over the -- the total amount
11 lost?

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

19 CHIEF JUSTICE ROBERTS: You would -- you
20 would -- you would agree that a different rule applies
21 if there is some unreasonable delay in disposing of the
22 property?

23 MS. HARRINGTON: Yes. And in our view,
24 that's a proximate cause question, because then the
25 victim's net losses wouldn't be caused by the

1 defendant's fraud.

2 CHIEF JUSTICE ROBERTS: And what do you do
3 in the case of some dramatic development between the
4 return of the house as opposed to the -- the property
5 and its -- and its sale?

6 MS. HARRINGTON: It depends what sort of
7 dramatic development you mean.

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

14 MS. HARRINGTON: The bank got it.

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

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

1 CHIEF JUSTICE ROBERTS: Well, no. But my
2 point is, is it the value you could sell it for before
3 this discovery of an extraordinary condition, or is it
4 the value afterward?

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

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

22 What he's saying is that just the fact that
23 the -- that the housing market went down is an
24 intervening nonforeseeable event that breaks the chain
25 of causation. Under our view, that's absolutely not

1 correct. The very nature of the defendant's scheme
2 injected the health of the housing market into the
3 ultimate determination of the victim's net losses. He
4 -- his design was that he would take money from the
5 banks and promise to pay it back. He had no intention
6 to pay it back, in fact never made a single payment.
7 That necessarily and foreseeably triggered the
8 foreclosure, which caused the banks to own the houses
9 and then caused them to put them on the market and sell.

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

17 And the MVRA allocates any risk from a
18 change in property to a defendant, not to the victim.
19 And that's consistent with our view.

20 If there are no further questions, I can
21 rest -- I guess I would just like to end by reiterating
22 our main point, which is that the text of the statute is
23 very clear in this case, and what it focuses on is how
24 much of the property that was lost has been returned to
25 the victim before sentencing.

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

10 The district court knew 100 percent for sure
11 because the houses were sold before Mr. Robers was even
12 charged with a crime.

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

23 MS. HARRINGTON: I mean, as long as what the
24 bank -- what the bank did was commercially reasonable.
25 If the bank --

1 CHIEF JUSTICE ROBERTS: I know banks like to
2 get rid of property as soon as possible, but, you know,
3 they make decisions at some point, let's wait before we
4 sell this. Is that commercially reasonable?

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

12 JUSTICE SCALIA: Well, why should the
13 defendant here subsidize the banks playing the market?
14 That's what you are saying.

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

16 JUSTICE SCALIA: The bank is playing the
17 market. It says, yeah, we could sell it for so much
18 now, but, yeah, it may go up. And you're saying that,
19 you know, he's paying for the bank's roll of the dice.

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

1 And again, the banks don't have in their
2 mind that they're going to get a restitution payment
3 when they take the houses. What they have in mind is
4 that they're going to take a loss. If they've had to
5 foreclose on a house, it's a bad mortgage, generally
6 they are going to get back less for the house than what
7 they got for the mortgage, and if that happens they
8 consider it a loss, and I think any business person
9 would consider that a loss.

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

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

22 MS. HARRINGTON: Yes.

23 JUSTICE KAGAN: And it's not the sale price
24 if the lender has done something commercially
25 unreasonable?

1 MS. HARRINGTON: Yes.

2 JUSTICE KAGAN: Is that right?

3 MS. HARRINGTON: Yes.

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

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

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

20 MS. HARRINGTON: Yes.

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

25 MS. HARRINGTON: Well, we're saying it's

1 relevant when the bank sells the house because then part
2 of the property is returned.

3 JUSTICE BREYER: Well, right. What they
4 have is the house.

5 MS. HARRINGTON: They have the house until
6 they sell it and then they have cash.

7 JUSTICE BREYER: Oh, I see.

8 MS. HARRINGTON: And so it's the cash they
9 get when they sell the house --

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

12 MS. HARRINGTON: Right. Which happens in
13 most every case. Not every case, but --

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

17 MS. HARRINGTON: Right.

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

22 MS. HARRINGTON: Right.

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

25 MS. HARRINGTON: It wouldn't be considered

1 an offset under Section 3663A(b)(1)(B)(ii).

2 JUSTICE BREYER: You're saying because
3 (3)(ii) applies, that when it's transformed into cash
4 prior to the sentencing, then they have received --

5 MS. HARRINGTON: Some part of the property.

6 JUSTICE BREYER: -- some part of the money
7 back --

8 MS. HARRINGTON: Yes.

9 JUSTICE BREYER: -- and often that will work
10 in favor of the defendant.

11 MS. HARRINGTON: It will because --

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

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

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

1 MS. HARRINGTON: Well, I think in those
2 unusual circumstances, it would be as you suggested
3 earlier, which is that you would value it as of the date
4 it would have been reasonable to dispose of the property
5 in a fair market, arm's-length transaction.

6 JUSTICE SOTOMAYOR: So --

7 MS. HARRINGTON: -- and that's usually
8 not --

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

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

1 JUSTICE SCALIA: Well, it's not just more
2 complicated. It's a question of, I guess, who has the
3 burden. As I understood, what you are proposing is you
4 get the sale price, but it's -- it's available to the
5 defendant to show that the sale price was unreasonably
6 low because of gamesmanship on the part of the bank or
7 some other reason, right?

8 MS. HARRINGTON: I think that would
9 be available to the defendant.

10 JUSTICE SCALIA: Yes.

11 MS. HARRINGTON: I think --

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

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

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

25 MS. HARRINGTON: So as Justice Breyer

1 suggested, under our view, the court -- the district
2 court's first resort would be to say -- to push off the
3 determination of the restitution amount for 90 days
4 under 3664(d)(5), and give the -- give the bank a little
5 more time to sell the house, because in that case, a
6 determination -- you wouldn't be able to ascertain the
7 net losses of the victim.

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

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

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

24 MS. HARRINGTON: Then you --

25 JUSTICE SOTOMAYOR: If the bank does a

1 nominal sale and only gets \$100?

2 MS. HARRINGTON: So then I think the
3 district court would have retained jurisdiction to fill
4 in an amount related, blank, for the amount of money the
5 bank got back, and there could be proceedings about what
6 that amount should be.

7 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
8 Mr. Green, you have 5 minutes remaining.

9 REBUTTAL ARGUMENT OF JEFFREY T. GREEN
10 ON BEHALF OF THE PETITIONER

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

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

22 And here, Benjamin Robers sits with a
23 \$219,000 restitution order for which he is jointly and
24 severally liable, as my colleague said 182 years it
25 takes to pay off, and there is no way for his attorney,

1 us, to get behind the transactions at issue and
2 challenge them.

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

9 MR. GREEN: It's --

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

16 Would you say that?

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

18 JUSTICE BREYER: Why?

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

25 But much more sophisticated things are going

1 on here, Justice Breyer. This is a situation where if
2 we take a look at the Inlet Shore Drive property, it
3 sells for \$166,000, which appears to be quite a bit
4 lower than its value when the bank got ahold of that
5 property for nothing -- for no reason that Mr. Roberts
6 had control over.

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

12 So in a situation where --

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

17 MR. GREEN: Right.

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

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

24 JUSTICE GINSBURG: There was no -- there was
25 no --

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

2 JUSTICE GINSBURG: -- evidence of that in
3 this case, that the bank held on too long.

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

7 JUSTICE GINSBURG: The answer that
8 Ms. Harrington gave was that there were no bids.

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

10 JUSTICE GINSBURG: I think she said there
11 were no bids.

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

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

21 The other point --

22 JUSTICE ALITO: Is there any reason why
23 the -- why the sentencing judge, where there's an -- an
24 allegation and maybe a -- a suggestion that there was
25 unreasonable delay or something unreasonable was going

1 on require the Government to provide some substantiation
2 for -- for what happened?

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

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

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

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

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

1 The lender said, Benjamin Robers, here is
2 \$330,000 in your name so that you can buy this
3 particular piece of property, subject to our interest.

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

7 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

8 The case is submitted.

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

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