No. 12-10638

IN THE

Supreme Court of the United States

CEDRIC LIPSEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF OF PETITIONER

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September 20, 2013

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ARGUMENT

This case presents an especially strong vehicle for resolution of an important and frequently recurring question. The Solicitor General's arguments to the contrary are illusory. In light of the recognized and undisputed circuit split, district courts are experiencing practical difficulties in determining how to calculate the proper offset at sentencing in cases involving mortgage fraud. The Court should grant this petition and decline the Solicitor General's invitation to allow this issue to percolate further.

I. AT LEAST EIGHT CIRCUITS DISAGREE ON THE QUESTION PRESENTED.

Mr. Lipsey demonstrated that there is a clear split between the Second, Fifth, and Ninth Circuits, which have held that defendants return a "part" of the lenders' property when the lenders acquire title to the real property or collateral that secures a loan, and the First, Third, Seventh, Eighth, and Tenth Circuits, which disagree. See Pet. at 8–11. The Solicitor General concedes that "division exists." Opp. 8; see also Opp. 14 ("courts of appeals are not in full accord"). His attempt to downplay the divide by suggesting that the split is virtually non-existent and unimportant, Opp. 14–18, is unavailing.

1. The Solicitor General argues that only the Ninth Circuit has squarely held that defendants return "part" of the victims' property by surrendering the collateral that secures the loan. Opp. 21–22; see also *United States* v. *Yeung*, 672 F.3d 594, 604 (9th Cir. 2012) (citing *United States* v. *Smith*, 944 F.2d 618, 625 (9th Cir. 1991)). But that is incorrect because the Solicitor General misreads decisions from the Fifth and Second Circuits.

The Solicitor General disputes that the Fifth Circuit joined the split in *United States* v. *Holley*, 23 F.3d 902, 915 (5th Cir. 1994). Opp. 20–21. There, the court remanded the case for recalculation of the amount of restitution because it concluded "that when the real property that secures . . . a loan is deeded back to the financial institution, the value of such property should constitute a partial return of the cash loan proceeds." *Holley*, 23 F.3d at 915 (quoting *United States* v. *Reese*, 998 F.2d 1275, 1284 (5th Cir. 1993)) (internal quotation marks omitted).

The Solicitor General offers three reasons why that conclusion is not the Fifth Circuit's position on the question presented here, but none are persuasive. First, a different restitution statute controlled in that case, 18 U.S.C. § 3663, even though the Solicitor General acknowledges that the statute's relevant text is the same as the text that controls here. Opp. 18 at n.6. In fact, the statute at issue here supplements the statute at issue in *Holley*. *United States* v. *Grice*, 319 F.3d 1174, 1177 (9th Cir. 2003) ("The Mandatory Victims Restitution Act was enacted on April 24, 1996 as a supplement to the VWPA . . . ."). The sole difference between the statutes is that restitution under the VWPA is discretionary whereas restitution under the statute at issue here is mandatory. See *United States* v. *Amato*, 540 F.3d 153, 159 (2d Cir. 2008). While the Solicitor General highlights this distinction, Opp. 18 n.6, 20–21, it has no effect on the Fifth Circuit's analysis or holding.

Second, according to the Solicitor General, the *Holley* court purportedly explained its conclusion inadequately. Opp. 21. This argument is belied by the fact that the court nonetheless decided the issue, and that is, after all, what really matters to district courts in that circuit. *E.g.*, *United States* v. *Phillips*, No.

3:08CV51TSL-FKB, 2011 WL 2457863, at *5–6 (S.D. Miss. June 16, 2011) (citing *Holley* and *Reese* as requiring "consideration [of] the appraised value of collateral which was returned to the victim in a settlement in lieu of foreclosure" sale price). The Solicitor General, moreover, ignores the plain language of the court's opinion in *Holley* because the Fifth Circuit expressly adopted the "directly analogous" reasoning of the Ninth Circuit, which undisputedly decided the question presented. *Holley*, 23 F.3d at 915 (citing *Smith*, 944 F.2d 618).

Third, the Solicitor General notes that a later panel in the same case did not follow the original panel's holding. Opp. 21 (citing *United States* v. *Holley*, No. 96-11160, 1998 WL 414260, at *1 (5th Cir. July 9, 1998) (per curiam)). That is wholly irrelevant because the later decision was an unpublished, summary opinion by three judges not on the original panel. *Holley*, 1998 WL 414260. Under the Fifth Circuit's own rules, the later panel's failure to follow the original *Holley* decision was error. *Young* v. *Merrill Lynch & Co.*, 658 F.3d 436, 443 (5th Cir. 2011) ("'[T]he rule of orderliness forbids one of our panels from overruling a prior panel.'") (quoting *Teague* v. *City of Flower Mound*, 179 F.3d 377, 383 (5th Cir. 1999)). The original *Holley* decision is thus Fifth Circuit law, and that circuit has joined the split.

The Solicitor General also disputes that the Second Circuit deepened the split in *United States* v. *Boccagna*, 450 F.3d 107 (2d Cir. 2006). Opp. 19–20. It dismisses as dicta the court's conclusion that the defendant "partial[ly] return[ed]" the victim's money by surrendering collateral that secured the loans. *Boccagna*, 450 F.3d at 112 n.2; Opp. 19. The Solicitor General fails to recognize that the conclusion was one reason the court held that § 3663A(b)(1)(B)(ii) *re-*

quired the district court to reduce the restitution award by the collateral's value on the surrender date. *Boccagna*, 450 F.3d at 118. The purported "dicta" thus was very much a part of the holding. See *Richmond Screw Anchor Co.* v. *United States*, 275 U.S. 331, 340 (1928) ("It does not make a reason given for a conclusion in a case obiter dictum, because it is only one of two reasons for the same conclusion.").

The Solicitor General similarly fails to distinguish *Boccagna* on its facts. He notes, for example, that the Department of Housing and Urban Development (HUD) did not dispose of the recovered properties through arm's-length transactions on the open market, but instead relied on a redevelopment agency. Opp. 20. But the Solicitor General then ignores the Second Circuit's recognition that HUD *chose* to dispose of the properties at nominal prices despite the fact that the appraised value of the properties was much higher and that the appraised or fair market value was the better measure in these circumstances. *Boccagna,* 450 F.3d at 116–17 ("We recognize that, in some circumstances . . . where collateral is subject to foreclosure proceedings, a sentencing court may consider whether a 'forced-sale' price most accurately represents its fair market value on the date of acquisition."). It was on this basis that the *Boccagna* court concluded, "it can fairly be said that the 'primary and overarching' purpose of the MVRA 'is to make victims of crime whole' . . . in most circumstances, fair market value will be the measure most apt to serve this statutory purpose." *Id.* at 115 (quoting *United States* v. *Simmonds*, 235 F.3d 826, 831 (3d Cir. 2000)).

Three circuits have therefore adopted Mr. Lipsey's position on the question presented.

2. The Solicitor General contends that the Seventh Circuit alone has held the opposite: that courts must reduce restitution awards by the value of the collateral on the resale date, because only then does a defendant partially return the victims' money. Opp. 14–15 (discussing *United States* v. *Robers*, 698 F.3d 937 (7th Cir. 2012), *petition for cert. filed*, (U.S. Feb. 26, 2013) (No. 12-9012)). Were that the case, the important question presented by the petition would still merit review. Again, however, the Solicitor General reads the relevant decisions too narrowly.

The Solicitor General dismisses three decisions that—based on the same facts as those here—also chose the resale date. Opp. 15–18 (discussing *United States* v. *Innarelli*, 524 F.3d 286 (1st Cir. 2008); *United States* v. *Himler*, 355 F.3d 735 (3d Cir. 2004); *United States* v. *Statman*, 604 F.3d 529 (8th Cir. 2010)). According to the Solicitor General, those decisions did not address explicitly when the defendants partially returned the victims' money. The Solicitor General cannot dispute, however, that the results in those cases plainly indicate that the courts must have used the resale date for calculating the amount of restitution. See *Innarelli*, 524 F.3d at 293–95; *Himler*, 355 F.3d at 739, 745; *Statman*, 604 F.3d at 537–38. Cf. *United States* v. *Russell*, 461 F.2d 605, 608 (10th Cir. 1972) (a higher court's decision is precedential even if that court overlooked an argument that might have changed the result).[1]

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[1] The Solicitor General argues that the Eighth Circuit did not consider the question in *Statman*. Opp. 16–17. Even if that were true, the Eighth Circuit recently held, in a mortgage fraud case challenging the district court's restitution calculation, that "the district court did not clearly err in basing its actual loss calculation on the difference between the unpaid loan balances and the prices obtained for the properties at sheriff's sales or short

Because that is the same rule adopted by the Seventh and Tenth Circuits, these courts have joined the split.

II. THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

Contrary to the Solicitor General's argument, the court below did reach the question as to whether "the proceeds from a sale subsequent to foreclosure represent[], in all cases, the only measure of an offset to restitution in mortgage fraud cases." Opp. 17. The Tenth Circuit rejected Mr. Lipsey's method of calculation and concluded that the district court correctly followed *United States* v. *Washington*, 634 F.3d 1180 (10th Cir. 2011), *cert. denied*, 132 S. Ct. 300 (2011). Pet. App. 8a–9a. The Solicitor General ignores that the court "found no error" in the district court's methodology or calculations, which relied on the holding in *Washington*: "'[w]here a lender has foreclosed and sold the collateral, the net loss should be determined by subtracting the sales price from the outstanding balance on the loan.'" Pet. App. 9a (citing *Washington*, 634 F.3d at 1184). The Tenth Circuit reached the question presented here when it expressly endorsed the method of calculation prescribed in *Washington*.

Furthermore, the question presented is recurring. Contrary to the Solicitor General's suggestion, courts are "experiencing . . . practical difficulties" in calculating restitution under the MVRA. Opp. 23. For example, in *United States* v. *Jordan*, the court postponed the restitution hearing for supplemental briefs on the question presented here. No. 1:12-CR-2, 2013

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sales." *United States* v. *Engelmann*, 720 F.3d 1005, 1013–14 (8th Cir. 2013).

WL 1333506, at *5 (M.D. Ga. Mar. 29, 2013). The court explained that the question was "complicated," the subject of a "Circuit split," and "critical" to deciding the restitution amount. *Id.* Failure to resolve this question forces courts to engage in more fact finding, or alternatively, to forgo awarding restitution to victims if restitution calculations appear to pose an unnecessary complication. See, *e.g.*, *United States* v. *Fair*, 699 F.3d 508, 516 (D.C. Cir. 2012) ("[I]n the event the actual-loss calculation is in fact too complex to permit a timely calculation of reasonable restitution, the MVRA envisions the appropriate path for a district court is to hold additional proceedings or to decline to order restitution at all . . . .").

III. THE TENTH CIRCUIT IS INCORRECT.

The Tenth Circuit incorrectly concluded that Mr. Lipsey did not return any portion of the lenders' money when he surrendered the properties. Pet. 5–8, 10–11. The plain language of the statute dictates that a restitution award is appropriately reduced by subtracting the value of the returned property, as of the date the property was returned, from the total amount owed to the lender. Pet. App. 39a–40a. Furthermore, as the Solicitor General acknowledges in his brief, "[t]he only purpose of gaining ownership of collateral real property [is] to resell it in order to recoup the funds lost as a result of . . . fraud . . . ." Opp. 10. The Solicitor General fails in his attempt to divorce the time of turnover from the time at which property is partially returned to the victim lender under the statute.

First, the text of the Mandatory Victims Restitution Act states that "in the case of an offense resulting in . . . loss . . . [the court may order the] return [of] the property . . . [or] the value of the property on the date of the . . . loss . . . [or] the value of the property

on the date of sentencing, less . . . the value (*as of the date the property is returned) of any part of the property that is returned* . . . ." Pet. App. 39a–40a (emphasis added). The statute nowhere states or even implicitly suggests that property returned to the victim of fraud is appropriately valued only when the property is *sold*, a reality that the courts of appeals have acknowledged. *E.g.*, *Boccagna,* 450 F.3d at 113 ("The MVRA plainly states that offset value must be determined as of the date property is recouped by [the lender]"); *Holley,* 23 F.3d at 915 ("[T]he defendant 'should receive credit against the restitution amount for the value of the collateral property as of the date title to the property was transferred . . . .'") (quoting *Smith*, 944 F.2d at 625). The Solicitor General's and the Tenth Circuit's interpretation is fundamentally inconsistent with the plain text of the statute.

Second, Mr. Lipsey returned a portion of the lenders' money when he transferred the title of the properties used to secure the loans. The Solicitor General makes a false distinction between the "loan proceeds" and the "collateral real estate used as security for the loan." Opp. 9. In principle, however, transfer of an illiquid asset from one party to another is no different than the transfer of a liquid asset. See *United States* v. *Shepard*, 269 F.3d 884, 888 (7th Cir. 2001) (finding that money was returned to a victim by way of improvements made to a property that increased the value of the property though the value would not have been realized until after the property was sold). The moment the lender received the properties, the lender "'had the power to dispose of the property and receive compensation'" for the partial value of the loans. *United States* v. *Davoudi*,

172 F.3d 1130, 1134 (9th Cir. 1999) (quoting *Smith*, 944 F.2d at 624–25).

The Solicitor General suggests that the "[u]se of 'value' returned upon the foreclosure rather than what the victim actually recovers . . . necessarily shortchanges the victim," Opp. 12 (citing *Robers*, 698 F.3d at 955), and argues that a defendant has an incentive to argue in favor of this rule "[o]nly in a sharply declining market . . . ." *Id.* at 11. But the Solicitor General fails to account for a practical reality: lenders' resale of collateral properties may take years and the timing of such a resale could be based on a host of reasons unrelated to maximizing value, *i.e.*, distressed sales, holding and selling based upon bad market bets and subsequent loss cutting, tax consequences, portfolio risk, etc. Because courts may only delay restitution hearings in the rare instance that they timely and expressly reserve the power to do so, *United States* v. *Pileggi*, 703 F.3d 675, 682–83 (4th Cir. 2013), it is therefore possible that a defendant would pay the full balance of the loans as restitution while the lenders could resell the properties for a windfall years later. Thus, the Solicitor General's argument "would produce statutory anomalies." Opp. 11.

These anomalies, however, are related to the subsequent acts of the victims (or, even more remotely, their successors and assigns) and not to the underlying acts of the defendants. As the Solicitor General acknowledges, the purpose of the Mandatory Victims Restitution Act is not to punish defendants but to make victims whole. Opp. 12–13. A court's order of restitution should "be based upon the loss directly and proximately caused by the defendant's offense conduct," *United States* v. *Squirrel*, 588 F.3d 207, 215 (4th Cir. 2009), and not upon an expedient calcu-

lation from a later foreclosure sale. The Solicitor General's and the Tenth Circuit's reading conflicts with the purpose and plain language of the statute. This Court's review is warranted and necessary to prevent the further spread of this error.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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