No. 12-9012

IN THE SUPREME COURT OF THE UNITED STATES

BENJAMIN ROBERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

When the victim of a crime is entitled to restitution for the loss of property and return of the property is "impossible, impracticable, or inadequate," 18 U.S.C. 3663A(b)(1)(B) provides that a defendant shall pay "an amount equal to (i) the greater of * * * (I) the value of the property on the date of the damage, loss, or destruction; or (II) the value of the property on the date of sentencing, less (ii) the value (as of the date the property is returned) of any part of the property that is returned." The question presented is:

Whether the district court plainly erred in calculating a restitution award for victims who lost cash because of the defendant's loan fraud when the court reduced the victims' losses by the amount they recouped from the sale of the collateral securing the loans.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 698 F.3d 937.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 2012. A petition for rehearing was denied on November 28, 2012 (Pet. App. 46a). The petition for a writ of certiorari was filed on February 26, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Wisconsin, petitioner was convicted of conspiracy to commit wire fraud, in violation of 18 U.S.C. 371. He was sentenced to three years of probation and ordered to pay $218,952.18 in restitution. The court of appeals vacated the portion of the restitution award reflecting attorneys' fees and certain "expenses" but otherwise affirmed the sentence. Pet. App. 1a-44a.

1. Petitioner participated in a mortgage-fraud scheme in which a number of co-conspirators obtained "consulting fees" by arranging for "straw buyers" to obtain loans. Pet. App. 4a-5a; PSR para. 8. Petitioner was one of those straw buyers. He signed fraudulent loan applications for two properties in Walworth County, Wisconsin: 900 Inlet Shores and 911 Grant Street. Pet. App. 5a; PSR para. 10. Petitioner "falsely stated that he would use the houses as his primary residence and that he would pay the notes secured by the mortgages on the houses; he also provided false and inflated information concerning his income and assets." Pet. App. 5a. Based on the false information, lenders approved the mortgages and wired funds to settlement companies that closed the loans. Ibid. When petitioner defaulted, the lenders (or their successors

in interest) foreclosed on the loans and ultimately resold the houses that had served as collateral. Ibid.

2. Petitioner pleaded guilty to an information charging him with conspiracy to commit wire fraud, in violation of 18 U.S.C. 371. Pet. App. 5a. The district court imposed a below-guidelines sentence of three years of probation. Id. at 7a. The court also ordered payment of $218,952.18 in restitution -- $166,000 to American Portfolio and $52,952.18 to Mortgage Guaranty Insurance Corporation (MGIC) -- pursuant to the Mandatory Victims Restitution Act of 1996 (MVRA or Act), 18 U.S.C. 3663A. Pet. App. 7a; see ibid. (noting that petitioner and the other conspirators involved in the fraudulent scheme were jointly and severally liable for payment of that amount).[1]

The MVRA provides that "the court shall order" defendants guilty of certain crimes to "make restitution to the victim of the offense." 18 U.S.C. 3663A(a) and (c). It also provides that if the offense results in "loss * * * of property of a victim" then "[t]he order of restitution shall require that such defendant * * * return the property to the owner of the property" -- unless return "is impossible, impracticable, or

[1] In the plea agreement, petitioner agreed "to pay restitution as ordered by the court" and "to cooperate in efforts to collect the restitution obligation." 2:10-cr-00095 Docket entry No. (Docket entry No.) 2, at 9-10 (E.D. Wis.).

inadequate." 18 U.S.C. 3663A(b). In that circumstance, the defendant must instead be ordered to "pay an amount equal to":

> (i) the greater of--
> (I) the value of the property on the date of the damage, loss, or destruction; or
> (II) the value of the property on the date of sentencing, less
> (ii) the value (as of the date the property is returned) of any part of the property that is returned.

18 U.S.C. 3663A(b)(1)(B).

To support a restitution award, the government presented evidence about the amount of money lost by victims as a result of petitioner's fraud. With respect to the Inlet Shores loan, an FBI agent testified that before petitioner's default American Portfolio bought the mortgage note for $330,000 (the original amount of the loan) and eventually was able to sell the collateral for $164,000, resulting in a loss of $166,000. Pet. App. 7a. With respect to the Grant Street loan, a representative of MGIC testified that the mortgage was owned by Fannie Mae (which had acquired it from the original lender) and insured by MGIC, and that MGIC had faced a choice between paying a percentage of a $159,214.91 claim by Fannie Mae or paying the full amount of the claim and acquiring the property. Id. at 6a. MGIC chose to pay the full amount; ultimately, it reduced its loss to $52,952.18 by selling the property. Ibid.; see ibid. (explaining that MGIC's loss was "lower

than the amount it would have had to pay had it paid a percentage of Fannie Mae's claim"); Gov't C.A. Br. 6-7.

Having considered that evidence, the district court concluded that the victims should receive restitution under the MVRA for the full amount of their losses. Petitioner argued that the court should not order him to reimburse the full amount because he played only a minor role in the offense and could not afford to pay more than a few thousand dollars. Objection to PSR 2-3; Docket entry No. 11, at 1-4. He also argued generally that he should not be held responsible for changes in the value of the houses, suggesting that the victims' losses may have been due to their "rush" to sell the properties or to "the housing market itself." Docket entry No. 11, at 7. The district court ruled, however, that petitioner was fully responsible for the losses (on a joint and several basis), since "[w]ithout [petitioner's] participation, these properties wouldn't have been sold to these victims in the fashion that they were." Pet. App. 123a-124a.

2. The court of appeals affirmed the district court's ruling on the proper method for calculating the restitution award (and, in large part, affirmed the award itself).[2] The court rejected

[2] The court vacated two "line-item[s]" in the restitution award -- for attorneys' fees and "other expenses" -- because it lacked "sufficient detail to know" whether they were "recoverable." Pet. App. 39a.

petitioner's argument -- raised for the first time on appeal -- that Section 3663A(b)(1)(B)(ii) required the district court to offset the victims' losses by the value of the collateral at the time the victims took title to the houses rather than by the amount of money the victims recouped when they later sold those houses. Pet. App. 10a ("[W]e hold that in calculating a restitution award where, as in this case, cash is the property taken, the restitution amount is reduced by the eventual cash proceeds recouped once any collateral securing the debt is sold.").

In so interpreting the MVRA, the court focused on the consistent use of "the property" in Section 3663A(b)(1) -- including in the subsection permitting offset if "any part of the property * * * is returned," 18 U.S.C. 3663A(b)(1)(B)(ii) -- to mean "the property stolen." Pet. App. 10a-12a. The court explained that possession of the collateral did not matter for purposes of determining the offset: "[i]n this case, since the property taken from the victims was cash, the two houses purchased with the cash were not the property taken from the lenders, but rather were collateral that secured the cash loans." Id. at 11a. Because cash is liquid and real estate is not, "[t]he two cannot be equated." Ibid.

The court of appeals also rejected petitioner's argument that the district court's ruling "makes him the insurer of real estate

values and improperly holds him responsible for declines in the real estate market." Pet. App. 13a. As the court of appeals explained, petitioner's fraud "actually" caused the losses because, "[a]bsent [petitioner's] fraudulent loan applications, the victim lenders would not have loaned the money in the first place," the mortgage notes "would not have been extended, not paid, and then defaulted upon," and "the banks would not have had to foreclose on and then resell the real estate in a declining market at a greatly reduced value." Id. at 13a-14a. If petitioner were allowed an offset greater than the amount the victims realized at the resales, the court concluded, the victims would not be fully compensated for the losses that petitioner caused. Id. at 10a-12a.

The court of appeals noted that the circuits were divided and that some other decisions had reached a different conclusion about how to apply Section 3663A(b)(1)(B) in the case of a fraudulent loan secured by collateral. Pet. App. 20a-37a. But the court explained that those decisions did not consider the meaning of the statutory references to "the property" and "ignored the fact that" the collateral "was not the property stolen." Id. at 23a.

ARGUMENT

Petitioner contends (Pet. 11-14) that the district court erred by failing to offset the victims' losses by the value of the collateral securing the loans at the time the victims took control

of it. The court of appeals correctly held that the district court's valuation method was proper under the MVRA. Although some division exists in the courts of appeals on whether "property is returned" under Section 3663A(b)(1)(B)(ii) when title to collateral is transferred to the victim, that division does not warrant this Court's review at this time, and this petition would in any event be an inappropriate vehicle to resolve it given petitioner's inability to make a showing of reversible plain error.

1. Congress enacted the MVRA to make restitution mandatory for all victims of specified crimes, without regard to the defendant's ability to pay. See S. Rep. No. 179, 104th Cong., 1st Sess. 18-21 (1995). Under the MVRA, the district court "shall order * * * that the defendant make restitution to the victim of [a specified] offense" in "the full amount of each victim's losses." 18 U.S.C. 3663A(a)(1) and (c)(1)(A)(ii), 3664(f)(1)(A). Thus, if a victim has suffered the "loss * * * of property," then the defendant must return "the property" to its owner -- and when "return of the property" is not possible or adequately compensatory, the defendant must pay "the value of the property" less "the value * * * of any part of the property that is returned." 18 U.S.C. 3663A(b)(1)(B); see ibid. (stating that the value of the offset should be calculated "as of the date the property is returned").

As the court of appeals explained, in the case of a fraudulent loan, "the property" that has been stolen from the victim is cash, not the collateral used as security for the loan. Pet. App. 10a-12a. Thus, when the victim takes title to the collateral, "the property" that was stolen has not been "returned" to the victim. 18 U.S.C. 3663A(b)(1)(B). Rather, the victim has received something else altogether – an illiquid asset that takes time and effort to convert into liquid funds. Thus, while the collateral may possess have monetary value, it is only when the collateral is sold for cash that "return[]" of any "part of the property" the victim lost has been effectively accomplished. Ibid.; see Pet. App. 12a (explaining that "[a] house is not part of the cash" and therefore is not "part of the property").

Petitioner's contrary interpretation (Pet. 11-14) is inconsistent with the plain text of the statute. Section 3663A(b)(1) first states that it covers offenses "resulting in * * * loss or destruction of property of a victim of the offense," and then repeatedly uses the phrase "the property" to refer back to the property that the victim has lost. 18 U.S.C. 3663A(b)(1); see Pet. App. 11a (explaining that "the property" as used in the relevant provision always "means 'the property stolen'"); cf. Work v. McAlester-Edwards Co., 262 U.S. 200, 208 (1923) (stating that if a statute did not mean to refer to a

specific appraisement, "the language would not have been 'the' appraisement but 'an' appraisement") (emphases removed). Under petitioner's preferred approach, however, "the property" would suddenly take on a different meaning in the subsection on offset, becoming a reference to the collateral that secured the lost property. No reason exists why Congress would have intended "identical words used in different parts of the same act" to have such different meanings. Sorenson v. Secretary of Treasury, 475 U.S. 851, 860 (1986) (citation omitted).[3]

Petitioner's approach is also inconsistent with the clear purpose of the MVRA to compensate victims for the "full amount" of their loss. 18 U.S.C. 3664(f)(1)(A); see Dolan v. United States, 130 S. Ct. 2533, 2539 (2010) (stating that the purpose of the MVRA is "to assure that victims of a crime receive full restitution"); Hughey v. United States, 495 U.S. 411, 416 (1990) (the "meaning of 'restitution' is restoring someone to a position he occupied before a particular event"); United States v. Gordon, 393 F.3d 1044, 1053 (9th Cir. 2004) (explaining that the purpose of the MVRA is "to make victims of crime whole, to fully compensate these victims for

[3] That conclusion is reinforced by the specific reference to "in-kind payments" in other sections of the MVRA, see 18 U.S.C. 3664(f)(3)(A), 3664(f)(4), which demonstrates that Congress knew how to provide for restitution involving property different from the property stolen. See Russello v. United States, 464 U.S. 16, 23 (1983).

their losses and to restore these victims to their original state of well-being") (citation omitted), cert. denied, 546 U.S. 957 (2005); 18 U.S.C. 3663A(b)(1)(B) (specifying that in determining the value of the property stolen the "greater of" two possible values should be used). As the court of appeals observed, title to the collateral is not equivalent to the return of cash. Pet. App. 10a-12a. The corporate entities who were victims in this case could not live in the residential real estate to which they took title when petitioner defaulted; the only purpose of gaining ownership of that real property was to sell it to try to recoup the cash they lost as a result of petitioner's fraud. But "real property is not liquid and, absent a huge price discount, cannot be sold immediately." Id. at 24a; see United States v. Boccagna, 450 F.3d 107, 116 (2d Cir. 2006) (recognizing that "in some circumstances, the 'market' for recouped property may be poorly developed or non-existent"). Accordingly, if a restitution award is subject to an offset based on a valuation of the real property as of the date of title transfer, then the victims quite possibly "would not be made whole again," because "the eventual sales proceeds could be, as they were in this case, woefully inadequate to fully compensate the victims for their loss and to put them in

the position they would have been absent the fraud." Pet. App. 13a.[4]

Petitioner contends (Pet. 13) that assessing the value of the collateral as of the date of the sale holds him responsible for a decline in value that he did not proximately cause. The court of appeals correctly rejected that argument. See Pet. App. 13a-16a. As the court explained, "[t]he declining market only became an issue because of [petitioner's] fraud," and the causal connection between the fraud and the victims' loss was therefore a tight one. Id. at 14a; see id. at 40a ("The victim is owed * * * direct expenses that flow from the fraud that would not have existed or * * * never would have been there."); id. at 44a ("[R]eduction in value of the real estate is a risk that falls on [petitioner], the one who defrauded the victims. The loss * * * [was] directly caused by [petitioner's] fraud."); United States v. Yeung, 672 F.3d 594, 603 n.5 (9th Cir. 2012) ("Yeung created the circumstances under which the harm or loss

[4] In addition, a valuation is just an estimate, and it may well fail to reflect a property's true worth. See Pet. App. 126a (accepting that a valuation may be compromised if the value of other properties in the area has been affected by the fraudulent scheme giving rise to the restitution obligation); United States v. James, 564 F.3d 1237, 1246 (10th Cir. 2009) (explaining that basing value on an assessment would be "an approximate value of the property" and would not "as closely represent[] the calculation of actual loss").

occurred through her use of false information that induced the Long Beach Trust to purchase the loan. Because the Long Beach Trust's loss is directly related to Yeung's offense, the declining value of the real estate collateral, even if attributable to general financial conditions, does not disrupt the causal chain, and the victims of the fraud are entitled to restitution.") (citation omitted).

Petitioner's approach would create serious anomalies. If the value of collateral increases between the time the victim takes title to it and the time the victim sells it, then the defendant should be entitled to an offset based on the higher sale value. Pet. App. 15a. Otherwise, the victim would be awarded restitution in an amount greater than the actual loss resulting from the defendant's crime, which is impermissible. Ibid. (citing, e.g., United States v. Smith, 156 F.3d 1046, 1057 (10th Cir. 1998) ("[A] district court may not order restitution in an amount that exceeds the loss caused by the defendant's conduct. Such a restitution order would amount to an illegal sentence.") (citations and internal quotation marks omitted), cert. denied, 525 U.S. 1090 (1999)). But petitioner's preferred interpretation of the MVRA, under which the statute would mandate use of the collateral's value as of the title-transfer date, would dictate the opposite result. See id. at 15a-16a (explaining that the MVRA cannot be interpreted

as "a one-way ratchet" pursuant to which the "victimizer[]," and not the "victim," would always have the advantage) (citation omitted).

In contrast, the court of appeals' interpretation of the MVRA does not create any potential for a "windfall" for the victim. Although petitioner speculates (Pet. 13-14) that some victims will purposefully delay the sale of collateral in order to obtain a larger restitution award, victims are unlikely to forgo an opportunity to minimize their losses in the hope of some day receiving restitution payments from a convicted defendant. In any event, however, if the victim has not yet sold the collateral by the time of sentencing, the district court can postpone entering its restitution order until the sale takes place. See, e.g., Dolan, 130 S. Ct. at 2539-2540; see also United States v. Himler, 355 F.3d 735, 745 (3d Cir. 2004).

2. The courts of appeals are not in full accord on the issue of whether return of collateral counts as return of property lost due to a fraudulent loan. Petitioner overstates the extent of the disagreement, however, and the issue does not warrant this Court's review.

a. Petitioner identifies the First, Third, Eighth, and Tenth Circuits as having taken the same view as the court below, although he states that they have done so only "implicitly." Pet. 10. But

all of the decisions he cites are distinguishable or non-precedential.[5]

In United States v. Innarelli, 524 F.3d 286 (1st Cir.), cert. denied, 555 U.S. 879 (2008), the First Circuit did not construe Section 3663A(b)(1)(B)(ii) or decide whether taking title to collateral constituted return of "the property." See id. at 295. The court of appeals merely held that the record was insufficiently detailed to determine whether the district court's restitution calculation was correct, and it remanded the case with the general statement that "the amount lost as a result of Innarelli's crimes" should "be offset by any amount recouped by the victim in question, including through resale of the property." Ibid.

The Third Circuit's decision in United States v. Himler, 355 F.3d 735 (3d Cir. 2004), also did not rule on whether the MVRA's

[5] Petitioner acknowledges (Pet. 9-10) that the two Tenth Circuit decisions on which he relies do not constitute precedent in that court, and they contain little or no analysis of the relevant statutory provision. See United States v. Lipsey, No. 11-1536, 2013 WL 386529, at *5 (Feb. 1, 2013) (stating without elaboration that the district court acted within its discretion in rejecting the argument that "the restitution amount should be calculated based on the amount that the lender successfully bid on the properties at the foreclosure sale"); United States v. Bizzell, Nos. 92-6008, 92-6166, 1993 WL 411470, at *11 n.23 (Aug. 17, 1993) (rejecting defendant's claim that district court "should have credited him with either the value of the property as of the date the property was returned or as of the date of the loss"); see also 10th Cir. R. 32.1(a); Pet. 10 n.2 (distinguishing United States v. James, 564 F.3d 1237 (10th Cir. 2009)).

offset provision refers to collateral or to the cash from its sale, since the defendant in that case argued that the restitution award should have been offset by the value of real property on the date of sentencing. See id. at 744-745; see also id. at 739 (explaining that the defendant, who gave the victim bad checks, "deeded the property back" to the victim well before sentencing took place). The court of appeals rejected that argument and approved the district court's decision to "order restitution in the amount of [the victim's loss] minus the amount that would eventually be recouped from the future sale" of the real property, concluding that this approach "was not a postponement of the order of restitution but simply a way to ensure that [the defendant] would not be stuck with a larger bill than was necessary." Id. at 745; see ibid. (explaining that because the ultimate sale value of the real property was higher than its value as of sentencing, the defendant's restitution obligation was lower than it would have been "had the District Court placed a fixed price * * * at the sentencing hearing").

Finally, the parties in United States v. Statman, 604 F.3d 529 (8th Cir. 2010), disputed whether the "foreclosure sale price" or "the appraised value of the foreclosed property" provided a more appropriate measure of value in a case involving a loan obtained through fraud. Id. at 538. Emphasizing the district court's

general discretion to decide the proper approach, the court of appeals ruled that "[u]nder the circumstances of this case, the district court's use of the foreclosure sale price provided a fair and adequate representation of [the victim's] loss." Ibid. But the court took no position on the meaning of "the property" in Section 3663A(b)(1)(B)(ii), and did not consider whether the amount obtained by a victim in a sale conducted after the foreclosure would be a relevant measure of value. See ibid.

b. Petitioner contends (Pet. 9) that decisions from the Second, Fifth, and Ninth Circuits conflict with the decision below. That, too, is an overstatement.

The Second Circuit's discussion of the issue in United States v. Boccagna, 450 F.3d 107 (2d Cir. 2006), is mere dicta. See id. at 112-113. In a footnote, the court explained that the government had not argued "that the MVRA offset provision, by providing for loss to be reduced by 'the value . . . of any part of the property that is returned,' applies only to the actual cash expended by [the victim] in making the fraudulently obtained loans and not to any property that [the victim] obtained after default." Id. at 112 n.2 (quoting 18 U.S.C. § 3663A(b)(1)(B)(ii)). The court also stated that such an argument "would not be convincing." Ibid. But that stray observation -- which relied in part on a Seventh Circuit decision -- played no role in the court's analysis. Were the issue

squarely presented in a future case, the Second Circuit might well agree with the decision below instead.

The Fifth Circuit's decision in United States v. Holley, 23 F.3d 902 (5th Cir. 1994), cert. denied, 513 U.S. 1043 (1994) and 513 U.S. 1083 (1995), construed the Victim and Witness Protection Act of 1982 (VWPA), see 18 U.S.C. 3664(a), rather than the MVRA.[6] The court concluded that a victim who had extended a loan to the defendant had its lost property returned within the meaning of the VWPA when the victim purchased the collateral at a trustee's sale. See 23 F.3d at 914-915. But the court did not explain the justification for treating the return of collateral as equivalent to the return of cash. See ibid. In addition, in a subsequent appeal in the same case, the Fifth Circuit upheld the district court's decision on remand to calculate the offset using the proceeds of the victim's sale of the collateral six years after obtaining it, on the ground that the price paid for the property at foreclosure "had nothing to do with the actual value" and "there [was] no evidence that anyone was willing to purchase the property

[6] Although the language of the VWPA provision discussing offset is the same as the language in Section 3663A(b)(1)(B), the VWPA has a different purpose, and different requirements, than the statute at issue in this case. For instance, an award of restitution under the VWPA is not mandatory, and the VWPA gives the court leeway to reduce or avoid a restitution order based on the defendant's financial circumstances. See, e.g., United States v. Leftwich, 628 F.3d 665, 668 (4th Cir. 2010).

for any amount of money[] prior to its sale" by the victim. United States v. Holley, No. 96-11160, 1998 WL 414260, at *1 (5th Cir. July 9, 1998).

The Ninth Circuit has squarely ruled that the collateral associated with a fraudulent loan counts as "property * * * returned" to a lender under Section 3663A(b)(1)(B)(ii). See, e.g., Yeung, 672 F.3d at 601 (citing, inter alia, United States v. Smith, 944 F.2d 618, 625 (9th Cir. 1991), cert. denied, 503 U.S. 951 (1992)). As the court below explained, the relevant cases in the Ninth Circuit depend on the "keystone" decision in Smith, Pet. App. 20a, 32a, which considered the offset provision of the VWPA and held that the district court "used incorrect dates" when it offset a victim's loss by the value of the collateral at the time of its ultimate sale. 944 F.2d at 625. Smith, in turn, relied on United States v. Tyler, 767 F.2d 1350 (9th Cir. 1985), a case involving the theft of timber in which the court held that the offset should have been calculated using the value of the timber on the date it was returned to the victim. The Smith court concluded that "[t]he same reasoning [in Tyler] should apply in determining the value of the collateral property in this case," which "should * * * be measured by what the financial institution would have received in a sale" as of the date it obtained title to the collateral. 944 F.2d at 625. Subsequent

Ninth Circuit cases that have applied Smith to interpret the MVRA have not addressed how a case involving stolen and returned timber has any bearing on whether collateral qualifies as "the property" lost by victims who gave a defendant cash. 18 U.S.C. 3663A(b)(1)(B).

c. The narrow conflict on the question presented does not merit this Court's review. The decision below is the first appellate case to consider in depth whether the transfer of title to the collateral securing a fraudulent loan constitutes return of "the property" under the MVRA's offset provision. The Seventh Circuit's analysis of the flaws in an interpretation of Section 3663A(b)(1)(B)(ii) that treats collateral as "the property," including the problems inherent in the Smith decision that supports later Ninth Circuit precedent, may convince the other courts of appeals to reject that interpretation going forward -- particularly those that have never previously analyzed the language of Section 3663A(b)(1)(B)(ii). Accordingly, the issue should be permitted to percolate further, and this Court's review would be premature at this juncture.

In addition, petitioner has not established (Pet. 11) that district courts are experiencing any real problem in deciding how to calculate the proper offset in cases like this one. Petitioner has identified only a handful of court of appeals decisions

addressing the issue, several of them approximately a decade old, and many of them emphasizing the discretion that district courts possess to determine "value" under the MVRA. See, e.g., Statman, 604 F.3d at 538. While prosecutions involving fraudulent loans will unquestionably continue to take place, in many cases the difference between the value of the collateral at the time the victim takes title to it and the value of the collateral at the time of a later sale will be negligible or nonexistent. See, e.g., Holley, 1998 WL 414260, at *1. In other cases, the value will actually increase over time -- a benefit that defendants in petitioner's position will undoubtedly welcome. The overall dollar value of loans obtained using fraudulent data, see Pet. 11, is therefore beside the point. As a practical matter, the question presented in this case is unlikely to arise with "regular[ity]." Ibid.

3. In any event, this case is an unsuitable vehicle to consider the question presented because petitioner failed to preserve the issue in the district court and cannot establish plain error.

Contrary to petitioner's contention (Pet. 14), he did not argue to the district court that Section 3663A(b)(1)(B)(ii) requires the offset to be based on the value of the houses on the date that the victims took title. The two pages of transcript that

petitioner cites (ibid.) in an attempt to show that he preserved the issue are part of the cross-examination of a witness, and consist of nothing more than a few questions about whether there was an appraisal of the property at the time of foreclosure or a subsequent change in value. See Pet. App. 99a-100a. Such questions are hardly sufficient to present a legal argument to the district court -- particularly in a case in which petitioner's written objection to the PSR, legal memorandum on restitution, and oral argument before the court never mentioned Section 3663A(b)(1)(B)(ii) or indicated that the date when title transferred was key to the analysis. See Docket entry No. 11, at 7; Objection to PSR 1-2. Indeed, that memorandum actually suggested that the relevant date could be sometime after the victims sold the properties, criticizing what petitioner described as a "rush" to sell the collateral "regardless of whether the sale price reflected the fair market value of the property at the time." Docket entry No. 11, at 7.

Because petitioner did not give the district court an opportunity to rule on the issue, review is for plain error only. See, e.g., Johnson v. United States, 520 U.S. 461, 465-466 (1997); United States v. Blair-Torbett, 230 Fed. Appx. 483, 490 (6th Cir. 2007) ("Because [defendant's] objection to the order of restitution made at sentencing was different from that raised on appeal, the

issue will be reviewed for plain error."). To establish reversible plain error, petitioner would have to show (1) that there was an error, (2) that was obvious, (3) that affected his substantial rights, and (4) that seriously affected the fairness, integrity or public reputation of judicial proceedings. Johnson, 520 U.S. at 466-467.[7]

Petitioner cannot make that showing. For the reasons given above, the district court did not commit a clear or obvious error in calculating the offset amount. See pp. 8-14, supra. But even if petitioner could establish that element of the plain-error test, he could not show that any error affected his substantial rights or seriously affected the fairness, integrity, or public reputation of judicial proceedings. See Puckett v. United States, 556 U.S. 129, 135 (2009) (explaining that an error ordinarily does not affect substantial rights unless it "affected the outcome of the district court proceedings").

[7] The court of appeals reviewed the district court's restitution award de novo in the course of determining whether any legal error existed. See Pet. App. 8a. Use of that standard of review is appropriate in addressing the first prong of the plain-error analysis, see United States v. Olano, 507 U.S. 725, 732 (1993), and does not indicate -- as petitioner contends (Pet. 14) -- that the court rejected the government's argument that petitioner failed to raise the Section 3663A(b)(1)(B)(ii) issue adequately at sentencing. The court simply did not reach that argument.

In particular, petitioner cannot show that the offset amount would have been meaningfully different under the approach he now proposes. See Puckett, 556 U.S. at 135. Given petitioner's failure to mention in the district court the possible relevance of the date that title to the collateral transferred, the record contains no evidence that establishes the value of the properties on the transfer dates. And to the extent the record speaks to the issue at all, it shows that when foreclosure occurred no ready market for the properties existed, which suggests that their transfer-date value was not significantly higher than the price that the victims later received. See Gov't C.A. Br. 22 (explaining that victims assumed title to the properties only after they failed to sell at sheriff's auctions); Pet. App. 70a (testimony from MGIC witness that MGIC neither "fire sale[s]" its properties nor "hold[s] property" in an effort to sell it at a higher price). Accordingly, petitioner could not benefit from a ruling adopting his position on which value to use for the offset portion of the restitution calculation. See Puckett, 556 U.S. at 135.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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