No. 12-9012

IN THE

Supreme Court of the United States

BENJAMIN ROBERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE PETITIONER

JEFFREY T. GREEN
JACQUELINE G. COOPER
DAVID R. KUNEY
JOSH C. HESS
JEFFREY S. BEELAERT
ADAM N. HALLOWELL
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIV.
SUPREME COURT
PRACTICUM
375 East Chicago Ave.
Chicago, IL 60611

CHRISTOPHER DONOVAN*
PRUHS & DONOVAN, S.C.
757 N. Broadway
Milwaukee, WI 53202
Donovanc34@hotmail.com
(414) 221-1950

JONATHAN E. HAWLEY
Chief Federal Public Defender
DANIEL T. HANSMEIER
Assistant Federal Public Defender
FEDERAL PUBLIC DEFENDER'S OFFICE
CENTRAL DISTRICT OF ILLINOIS
600 E. Adams Street, 2d Floor
Springfield, IL 62701

Counsel for Petitioner

* Counsel of Record

December 13, 2013

QUESTION PRESENTED

Whether a defendant—who has fraudulently obtained a loan and thus owes restitution for the loan under 18 U.S.C. § 3663A(b)(1)(B)—returns "any part" of the loan money by giving the lenders the collateral that secures the money?

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OPINION AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming in part and vacating in part the order of the United States District Court for the Eastern District of Wisconsin, is reported at 698 F.3d 937 and reprinted in the Joint Appendix (J.A.) at 144. The court of appeals' order denying the petition for rehearing en banc is unreported and reprinted at J.A. 182. The district court's order is unreported and reprinted at J.A. 132.

JURISDICTION

The court of appeals entered its judgment on September 14, 2012. J.A. 143. Mr. Robers filed a petition for rehearing, which the court denied on November 28, 2012. J.A. 182. The petition for a writ of certiorari was timely filed on February 26, 2013. This Court granted certiorari on October 21, 2013 and has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 3663A and 3664 of Title 18 of the United States Code are reproduced in the appendix.

INTRODUCTION

Under its erroneous interpretation of the Mandatory Victims Restitution Act ("MVRA"), the sentencing court entered a ruinous order of restitution for Mr. Robers' mortgage fraud that would make his lenders whole for the consequences of the great recession, even though the properties involved were foreclosed upon before that recession began. While the MVRA requires a defendant to pay restitution for property that victims have lost as a consequence of the defendant's fraud, it also includes

an offset provision that requires courts to reduce that restitution award by 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)(ii).

For $500 per transaction, Mr. Robers played the role of a straw buyer for two properties in a fraud scheme that took advantage of the real-estate price bubble in the middle part of the last decade. Because Mr. Robers defaulted, the lenders foreclosed. The lenders' seizure of the collateral for the loans constitutes a "return" of at least part of the property to those lenders: as collateral, the houses were an agreed-upon and legally recognized substitute for the loan money. Moreover, the lenders recouped at least part of the lost loan money when they purchased the houses during the sheriff's sales as part of the foreclosure process and thus took title to the assets in which Mr. Robers had invested the loan money. The offset provision, § 3663A(b)(1)(B)(ii), therefore required the district court to reduce the restitution amount by the houses' values on the transfer dates.

The Seventh Circuit, however, concluded that Mr. Robers did not return any part of the lenders' property at the time he transferred the houses to the lenders because that property was not the same thing as the funds that the lenders advanced. Thus, it reasoned, Mr. Robers was not entitled to any offset under § 3663A(b)(1)(B)(ii) until the lenders recouped funds in later third-party sales of the property that occurred only after the recession had done substantial damage to the value of the properties. The court of appeals left in place the order for Mr. Robers to pay the difference between the loan amounts and the proceeds of the much later third-party sales of the property during the recession.

Section 3663A(b)(1)(B)(ii) cannot be read so narrowly. The provision requires an offset once a defendant gives the victim substitute property, such as mortgage collateral, that compensates the victim for the loss. The provision's language is broad in that it expressly applies when "any part" of the property "is returned." Further, the offset provision itself appears in a subsection of the statute that applies only to situations, like this one, where return of the original property is impracticable, impossible, or inadequate, and a related provision expressly allows for the return of "in-kind" property, including "replacement" property. Moreover, unless the Court reads the statute to require an offset once a mortgage fraud defendant returns collateral, the statute will require such defendants to pay for losses their crimes did not proximately cause.

STATEMENT OF THE CASE

A. Statutory Background

A federal court has no inherent power to order restitution in criminal cases. *United States* v. *Zangari*, 677 F.3d 86, 91 (2d Cir. 2012). It may do so only as expressly authorized by statute. *United States* v. *Papagno*, 639 F.3d 1093, 1096 (D.C. Cir. 2011). In 1996, Congress enacted the MVRA, 18 U.S.C. § 3663A; Antiterrorism & Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1227, as a supplement to an earlier statute, the Victim and Witness Protection Act ("VWPA"), 18 U.S.C. §§ 3663 and 3664; Act of Oct. 12, 1982, Pub. L. No. 97-291, 96 Stat. 1248, 1253.[1]

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[1] The VWPA was originally codified at 18 U.S.C. §§ 3579 and 3580, but was recodified, effective November 1, 1987, by the

The MVRA substantially tracks the language of the VWPA. *United States* v. *Gordon*, 393 F.3d 1044, 1048 (9th Cir. 2004). The primary difference between the VWPA and the MVRA is that the MVRA provides for "mandatory" restitution in certain cases, including, *inter alia*, offenses against property committed by fraud or deceit. § 3663A(c)(1)(A)(ii). This case involves mortgage fraud, thus triggering § 3663A.

The specific provision this Court must interpret is 18 U.S.C. § 3663A(b)(1), which requires that a defendant do one of two things "in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense." First, "return the property to the owner." § 3663A(b)(1)(A). Second, where the return of the property is "impossible, impracticable, or inadequate," 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;

§ 3663A(b)(1)(B). This latter provision—the "offset provision"—is at the heart of this case. J.A. 145.

Section 3663A(d) expressly incorporates § 3664, which provides procedures for ordering restitution. Section 3664(f)(3)(A) allows courts to fashion restitution orders to include "a single, lump-sum

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Sentencing Reform Act of 1984, 98 Stat. 1987. *Hughey* v. *United States*, 495 U.S. 411, 413 n.1 (1990).

payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments." § 3664(f)(3)(A). In-kind payments "may be in the form of—(A) return of property; (B) replacement of property; or (C) if the victim agrees, services rendered to the victim or a person or organization other than the victim." § 3664(f)(4). And so, Congress provided courts with flexibility to fashion restitution awards that provide victims "the full amount of [their] losses," § 3664(f)(1)(A).

Although the MVRA generally requires restitution, it is not an inexorable command. Instead, there are a number of limitations on restitution awards. For instance, federal courts need not order restitution if "the number of identifiable victims is so large as to make restitution impracticable," § 3663A(c)(3)(A), or if "determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process." § 3663A(c)(3)(B).

Restitution orders under the MVRA are also limited to a "victim" of the offense, defined as "a person directly and proximately harmed as a result of the commission of an offense," including "any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." § 3663A(a)(2). In other words, there is a proximate causation component to restitution, and it is the prosecution's burden to prove causation, *United States* v. *Speakman*, 594 F.3d 1165, 1171 (10th Cir. 2010), as it is the prosecution's burden "of demonstrating the amount of the loss sustained by a victim as a result of the offense . . . ." § 3664(e).

This proximate causation requirement extends to the amount of restitution that may be ordered because Congress has not authorized federal courts "'to order restitution to victims in excess of their losses.'" *United States* v. *Gonzalez*, 647 F.3d 41, 66 (2d Cir. 2011) (quoting *United States* v. *Pescatore*, 637 F.3d 128, 139 (2d Cir. 2011)). Such an order would constitute an illegal sentence; "'the amount causally linked to the offense of conviction'" establishes the statutory maximum amount for purposes of restitution. *United States* v. *Freeman*, 640 F.3d 180, 193 (6th Cir. 2011) (quoting *United States* v. *Gordon*, 480 F.3d 1205, 1210 (10th Cir. 2007)).

Congress sought to make the statute balanced in other ways. It requires the probation officer to inform the district court of "the economic circumstances of each defendant," § 3664(a), and it permits district courts to fashion restitution orders in light of those circumstances, § 3664(f)(2), (3)(B). As here, if multiple defendants cause a victim's loss, a district court may "apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant," rather than impose restitution in the full amount on all defendants. § 3664(h). Again, while the MVRA undoubtedly aims to provide victims "the full amount of [their] losses," § 3664(f)(1)(A), it does so pragmatically, not rigidly, and with the interests of all parties (including the courts) in mind.

B. Factual Background

In the early 2000s, rising home prices and a mortgage-industry drive "to hasten the mortgage loan process" led to an "easing" of mortgage-lending

standards nationwide.[2] The relaxed standards prompted a nationwide wave of mortgage fraud.[3]

In 2004, James Lytle and Martin Valadez created the scheme that ultimately involved Mr. Robers. Presentence Investigation Report at 3, *United States* v. *Robers*, No. 10-00095 (E.D. Wis. Oct. 12, 2010) [hereinafter PSR]. Lytle and Valadez approached homeowners as putative "consultants" who could maximize the value of the homes. They also prepared false loan applications for individuals they recruited as "straw buyers." The straw buyers then submitted the false applications in order to qualify for a loan under the relaxed standards. PSR at 3 Once the lenders approved the loans and the straw buyers purchased the properties at the agreed-upon prices, Lytle and Valadez collected up to $20,000 in "consulting fees" from the original homeowners as part of the deal. PSR at 3; Plea Agreement at 3, *United States* v. *Lytle*, No. 07-00113 (E.D. Wis. May. 15, 2007). The straw buyers eventually defaulted on the loans.

When Lytle and Valadez initially approached Mr. Robers, he was 19 years old, held only a GED, and earned $7.25 an hour on a family farm and as a ski-lift operator. PSR at 8, 10. He hoped to start a landscaping business but needed money to buy a lawnmower. PSR at 8. Thus, when a conspirator who worked with Mr. Robers painting houses offered him $500 per house to be a straw buyer, Mr. Robers accepted the offer. PSR at 4. Mr. Robers served as a straw buyer for two homes.

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[2] *2007 FBI Mortgage Fraud Report*, Federal Bureau of Investigations (April 2008), http://www.fbi.gov/stats-services/publications/mortgage-fraud-2007.

[3] Id.

911 Grant Street. Mr. Robers applied to Paragon Home Lending for a loan to buy a house at 911 Grant Street, Lake Geneva, Wisconsin. Mr. Robers submitted a loan application that misreported his income and job. PSR at 4, 10. Paragon thereafter approved the application and loaned Mr. Robers $141,000, secured by a mortgage on the Grant Street house. PSR at 4; J.A. 38. The mortgage instrument expressly stated that the lender would waive any deficiency claim if Mr. Robers waived his right of redemption, as required by Wis. Stat. § 846.101. Complaint – Mortgage at 12, *Mortg. Elec. Reg. Sys., Inc. as nominee for Paragon Home Lending, LLC* v. *Robers*, No. 05-01072 (Wis. Cir. Ct., Walworth Cnty., Dec. 6, 2005) [hereinafter *Paragon* Action]. In March 2005, Mr. Robers purchased the house. PSR at 2.

Mr. Robers defaulted on the loan. In December 2005, Paragon (acting through a nominee) filed a judicial-foreclosure action in state court. Complaint, *Paragon* Action (Dec. 6, 2005). Paragon "elect[ed] to waive judgment for any deficiency which may remain due the plaintiff after the sale of the mortgage premises." *Id.* ¶ 9.

In March 2006, the state court entered judgment against Mr. Robers and ordered a sheriff's sale of the property. Findings of Fact, Conclusions of Law and Judgment at ¶ 5, *Paragon* Action (March 10, 2006). The state court judgment expressly prohibited Paragon or its successors from seeking damages beyond the return of the collateral. *Id.* at ¶ 10. Paragon thereafter assigned to Fannie Mae both the judgment and Paragon's bid at the upcoming foreclosure sale. See Assignment of Bid, *Paragon* Action (Sept. 11, 2006); J.A. 60.

In September 2006, the Walworth County sheriff conducted a foreclosure sale for the Grant Street

property. Sherriff's Report of Sale on Foreclosure, *Paragon* Action (Sept. 18, 2006). Fannie Mae successfully bid $158,184.02 (a "credit bid," in foreclosure-law parlance), which included the total amount then due on the mortgage and additional fees and costs. *Id.*; Affidavit to Confirm and for Additions to Judgment, *Paragon* Action (Sept. 15, 2006). Fannie Mae then had title, control and possession of the collateral. Fannie Mae thereafter transferred the house's title to its loan insurer, Mortgage Guarantee Insurance Corporation ("MGIC"), in exchange for $159,214.91. J.A. 65.

900 Inlet Shores. Mr. Robers applied for a loan to buy a house at 900 Inlet Shores Drive, Delavan, Wisconsin. PSR at 3. The application falsely reported, *inter alia*, his income. J.A. 14. A lender approved the application and loaned Mr. Robers approximately $330,000, secured by a mortgage on the Inlet Shores property. PSR at 3; J.A. 38, 91. This mortgage also contained a contractual waiver of the right to assert a deficiency claim, such that the lender did not anticipate a "return of cash" in the event of foreclosure. Complaint – Mortgage at 13, *Mortg. Elec. Reg. Sys., Inc., as Mortgagee of Record and as nominee of the Serv. GMAC Mortg. Co.* v. *Robers*, No. 05-01040 (Wis. Cir. Ct., Walworth Cnty., Nov. 30, 2005) [hereinafter *GMAC* Action]. Mr. Robers purchased the house in June 2005. J.A. 85, 88.

Mr. Robers defaulted on the loan. In November 2005, the mortgage holder for the Inlet Shores property filed a foreclosure action in Wisconsin state court. See Complaint, *GMAC* Action (Nov. 30, 2005). The mortgage holder "waiv[ed] judgment for any deficiency." *Id.* at ¶6. The prosecution introduced testimony at sentencing that, on December 29, 2005, the mortgage holder sold the note to American Portfolio

for $330,000. J.A. 102. According to the prosecution, American Portfolio (or its predecessor in interest) later purchased the Inlet Shores property at a February 2006 sheriff's sale, after which Mr. Robers no longer held title. J.A. 87-89, 95, 97-98.[4]

Eventual Resales. After the sheriff's sales in September and February 2006, the lenders initially chose to hold the properties. In late 2006 and 2007, the real estate market collapsed nationwide.[5] Then, in August 2007, MGIC sold the Grant Street property for $118,000. J.A. 65-66.[6] According to the prosecution, American Portfolio waited until October 2008 to sell the Inlet Shores property at a price of $164,000. J.A. 89-90.

C. District Court Proceedings

In May 2010, the prosecution filed an Information charging Mr. Robers with conspiracy to commit wire fraud. See generally 18 U.S.C. §§ 371, 1343. The Information alleged that Mr. Robers, as part of the conspiracy, submitted a fraudulent loan application in order to buy the Inlet Shores house. Information,

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[4] The record is unclear on these points. There is some indication that the records introduced by the prosecution at sentencing may pertain to a prior, senior mortgage on the Inlet Shores property.

[5] Press Release, Standard & Poor's, Broadbased, Record Declines in Home Prices in October According to the S&P/Case-Shiller Home Price Indices 1 (Dec. 26, 2007), *available at* http://online.wsj.com/public/resources/documents/CSHomePrice_Release_20071226.pdf; Steven Gjerstad & Vernon L. Smith, *From Bubble to Depression?*, Wall St. J., Apr. 6, 2009, *available at* http://online.wsj.com/article/SB123897612802791281.html.

[6] Landshark, Walworth Cnty., Wis., Doc. No. 717620, https://rodapps.co.walworth.wi.us/LandShark, (last visited Feb. 20, 2013) (subscription required).

United States v. *Robers*, No. 10-00095 (E.D. Wis. May 18, 2010), ECF No. 1. Pursuant to a written plea agreement, Mr. Robers waived indictment and agreed to plead guilty to the Information. J.A. 13. The prosecution agreed that Mr. Robers was a minimal participant in the conspiracy and that a non-custodial sentence was sufficient. J.A. 19-20. In the plea agreement, Mr. Robers acknowledged that the prosecution had identified MGIC and American Portfolio as victims of the conspiracy for restitution purposes in his case. J.A. 21-22.

The prosecution sought restitution under the MVRA. As noted, that statute requires a defendant like Mr. Robers, who commits fraud that "result[s] in . . . loss . . . of property," to repay the property-owner victims for the lost property. § 3663A(b)(1)(B). The victims here, the prosecution asserted, were MGIC and American Portfolio—the original lenders' successors in interest. J.A. 38-39, 48. And the property lost was the "money that was advanced to [Mr. Robers] for the purpose of purchasing" the houses. J.A. 49. The prosecution therefore argued that Mr. Robers must pay MGIC and American Portfolio for the outstanding balance on the home loans, plus interest and other expenses: $500,952.18. J.A. 49, 64-66, 85-87; see also Gov't Sent. Ex. 1, *United States* v. *Robers*, No. 10-00095 (E.D. Wis. Nov. 22, 2010), ECF 13-1.

The prosecution acknowledged, however, that the MVRA also required the district court to reduce the restitution judgment by "the value (as of the date the property is returned) of any part of the property that is returned . . . ." § 3663A(b)(1)(B)(ii). J.A. 51. The prosecution therefore recommended reducing the restitution award by the amounts that, by its calculation, MGIC and American Portfolio recouped by even-

tually reselling the houses: $118,000 and $164,000, respectively. See J.A. 49-50, 65-66, 87. Thus, the prosecution proposed that Mr. Robers pay $218,952.18 in restitution. J.A. 50, 117.

Mr. Robers objected to the prosecution's calculation. Among other things, he argued that the district court should reduce the restitution award by the houses' values in 2006, when the lenders acquired title through state foreclosure proceedings, rather than in 2007 or 2008, when the lenders resold the houses. J.A. 35-36, 97, 113-14. He explained that the real-estate bubble had burst between those dates, so the later resale prices were too low. J.A. 96-97.

Mr. Robers also argued that the district court should apportion the restitution award among the conspirators and order him to pay $4800. J.A. 31. He noted that other conspirators planned the scheme and were involved in "nearly 20 fraudulent transactions." J.A. 30. Mr. Robers, on the other hand, knew little about the conspiracy and was involved in only two transactions. J.A. 30.

But the district court rejected both arguments and adopted the prosecution's restitution recommendation. J.A. 117-21.

D. Seventh Circuit Proceedings

The Seventh Circuit reviewed the restitution issue de novo. J.A. 150. The court affirmed the district court and held that "the restitution amount is reduced by the eventual cash proceeds recouped once any collateral securing the debt is sold," not by the value of the houses once the defendant transfers them to the victims. J.A. 152. The court based this conclusion on its view of "the plain language of the MVRA." J.A. 152 Specifically, the court reasoned that "the property" in the offset provision must mean

the property originally taken from the victim. J.A. 152. Only this interpretation, the court stated, "gives the phrase 'the property' a consistent meaning throughout the statute: It always means 'the property stolen.'" J.A. 153. The court then explained that the property stolen from the lenders was cash, not the houses that served as collateral, and that "the cash was returned to the victims only when the collateral houses securing the loans were eventually resold." J.A. 153.

The court also rejected the argument that "conceptually, obtaining title to real estate is the same as receiving cash." J.A. 170. The court explained that "real estate is not liquid; it is not what was stolen; [and] it is not what the victim wants." J.A. 170. Additionally, the court added, the real estate "does not benefit the victim in any way until it is turned back into cash upon resale." J.A. 170.

Finally, the court of appeals held that its interpretation was consistent with the statute's "goals." J.A. 154-55. First, the court said that its interpretation ensured that restitution awards would make victims whole. Unless the "offset amount . . . is the cash recouped following" resale of the houses, "the victims would not be made whole again because eventual sale proceeds could be . . . woefully inadequate." J.A. 154-55. Second, the court said that its interpretation would only hold defendants responsible for losses their crimes proximately cause. J.A. 155. The court seemed to acknowledge that its interpretation requires mortgage-fraud defendants to pay for market-driven declines in home prices between foreclosure and eventual resale of the houses. J.A. 155. But the court held that the defendant's crime proximately caused those declines because the victim lenders "would not have loaned

the money in the first place" absent the defendant's fraud. J.A. 155.

SUMMARY OF THE ARGUMENT

The court below incorrectly held that real estate collateral returned to a lender at foreclosure does not offset the restitution amount of a mortgage-fraud defendant.

The text and structure of the MVRA demonstrate that a defendant must receive an offset for the value of collateral property at the time the lender takes title. The statute allows the defendant to return substitute property—that is, property that compensates the victim for the loss, such as mortgage collateral. The offset provision's use of the word "returned" allows a defendant to convey substitute property, especially because Congress could have used a more specific phrase such as "property reclaimed by the victim," but did not. Further, § 3663A(b)(1)(B), which contains the offset provision, applies only when the return of the property originally lost is "impossible, impracticable, or inadequate." To prevent this limitation from narrowing subparagraph (B) to an improbably small range of situations, the offset provision must cover cases in which the defendant has returned substitute property. This reading is confirmed by § 3664, in which Congress allows "replacement of property" to serve as an "in-kind payment" under the MVRA, showing its understanding that a defendant need not return the original lost property to make a victim whole. And reading the offset provision as Mr. Robers does ensures that defendants pay only for losses their crimes proximately cause.

Reading § 3663A(b)(1)(B)(ii) to exclude any offset for the return of mortgage collateral would create

unwarranted tensions with state mortgage law. Federal statutes such as the MVRA are interpreted with deference to well-understood state-law principles, especially those dealing with real property. Mortgage laws in Wisconsin, as elsewhere, permit a lender to foreclose on collateral in an effort to take title to it as repayment. In a judicial foreclosure, the proceeds of a sheriff's sale of the property are applied to the debt owed to the lender—especially when, as here, a lender "credit-bids" for the collateral property (which is legally the same as the return of cash) and takes title itself. Indeed, in states such as Wisconsin, when (as here) the borrower has waived his redemption rights, lenders agree to look only to the return of the collateral, and not to any cash in the form of a deficiency claim.

Alternatively, if § 3663A(b)(1)(B)(ii) does require defendants to return the property originally lost (*i.e.*, the loan money), the Court should still reverse. The provision requires courts to reduce restitution awards once "any part" of the original property is returned. § 3663A(b)(1)(B)(ii). At least a "part" of the loan money is returned once the victim lenders foreclose on the houses that the defendant purchased with the loans. The victims recover the economic value that the loan money stored temporarily and that was transferred to the houses when the defendant bought them. The defendant is therefore entitled to offset the restitution amount by the houses' values as of that date.

The Seventh Circuit nonetheless read the offset provision to require the return of the exact property taken from the victim, and ignored the transfer of the loan proceeds' value into the houses. But that reading cannot be squared with the text and structure of the surrounding statute. Moreover, the

court's suggestion that mortgage lenders "do not want" the collateral as repayment was contrary to the lenders' explicit statutory and contractual undertaking to look only to the collateral for the return of the loan.

The Seventh Circuit's interpretation also defeats the statute's dual purpose of making victims whole without granting them windfalls. Under that interpretation, a court may reduce the restitution award only once the victims resell the houses—which might occur years after sentencing. That possible delay means the sentencing court must either refuse to order restitution at all or instead order restitution for the full outstanding loan amount. The first option leaves the victim uncompensated; the second could allow the victims to both collect all of the lost loan money from the defendant and later resell the houses for a windfall.

Lastly, even if the statute's text, structure, and purpose did not make plain its meaning, the rule of lenity would require the rejection of the Seventh Circuit's position. This Court should reverse and hold that courts must reduce restitution awards in the circumstances here once the defendant transfers the houses' titles to the victims.

ARGUMENT

I. SECTION 3663A'S TEXT, STRUCTURE, AND PURPOSE ENTITLE A DEFENDANT TO AN OFFSET FOR A MORTGAGE-FRAUD RESTITUTION AWARD ONCE THE DEFENDANT RETURNS COLLATERAL TO THE LENDER.

In 18 U.S.C. § 3663A(b)(1)(B)(ii), Congress required offsets to restitution awards for the value of property

"that is returned." This provision, the structure of § 3663A, and the rest of the federal restitution scheme require that when a defendant owes restitution for a fraudulently obtained mortgage loan, the amount of the restitution award must be offset by the value of the collateral on the date that the collateral is returned to the lender through state foreclosure proceedings. This reading of the statute comports with established principles of state foreclosure law and avoids the anomalous results that will occur under the Seventh Circuit's contrary reading.

A. Section 3663A(b)(1)(B)(ii) Provides That Courts Must Offset Restitution Orders For "Property That Is Returned."

The plain text of the offset provision under 18 U.S.C. § 3663A(b)(1)(B)(ii) is the starting point. *E.g.*, *Caraco Pharm. Labs., Ltd.* v. *Novo Nordisk*, 132 S. Ct. 1670, 1680 (2012). That text requires a sentencing court to offset "the value (as of the date the property is returned) of any part of the property that is returned." § 3663A(b)(1)(B)(ii). For three reasons, the provision's text requires courts to grant an offset once the defendant returns substitute property—such as collateral—that compensates the victim for the loss. First, the word "returned" denotes repayment of a debt, but not necessarily a conveyance of the same property. Second, Congress' use of the word "any"—as in "any part of the property that is returned"—means, according to this Court, that Congress intended to remove limitations of the sort that the Seventh Circuit imposed here. Third, Congress drafted the offset provision in passive language when it provided for offset of "property that is returned," and a foreclosure represents a return,

via sheriff's auction, of the very collateral used to secure the loan that was the subject of the fraud.

1. The word "return" has a broad reach. To "return" means "to repay or pay back in some way, esp[ecially] with something similar." 12 *Oxford English Dictionary* 806 (2d ed. 1989); see also, *e.g.*, *Webster's Third New International Dictionary* 1941 (1993) ("to give or perform (something) in return: repay"). The word is not limited to the return of items formerly in another person's possession, but can include the giving of property to replace property previously received from that person. Examples of this usage abound.[7] This broad meaning is no surprise, because the word "returned" is often used in a context other than giving back the same property. When an indictment "is returned," for instance, the grand jury does not give the indictment back to its former owner. See, *e.g.*, *United States* v. *Hills*, 618 F.3d 619, 629 (7th Cir. 2010) ("The constitutional right to a speedy trial is triggered when an indictment is returned against a defendant."); Fed. R. Crim. P. 31(a) ("The jury must return its verdict to a judge in open court.").

Because the word "returned" implies a completed action, Congress also made clear that a victim must actually accept the property; it is not enough to offset restitution for a defendant simply to offer property that the victim has no desire to take. Cf. *United States* v. *Oren*, 893 F.2d 1057, 1066 (9th Cir. 1990) (granting offset credit for replacement property only

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[7] *See, e.g.*, *United States* v. *Bennett*, 708 F.3d 879, 890 (7th Cir. 2013) (discussion about "returning" money to codefendant drug dealers where these dealers never had the money in the first place); *United States* v. *Vadnais*, 667 F.3d 1206, 1209 (11th Cir. 2012) (discussion of what a defendant expected "in return" for images of child pornography).

if victim chooses to accept it). But when a victim does accept replacement property, and the property "is returned," the value of the property—such as collateral secured by a mortgage loan—offsets the restitution award as of the date of the property's return. As explained below, a narrower reading of the provision would contravene the purposes of restitution to compensate victims, but not overcompensate them. See *infra* Section I.H.

2. The word "any" in the phrase "any part of the property that is returned" confirms that a sentencing court must grant offset credit for all of the "returned" substitute property. The word "any" "'has an expansive meaning, that is, one or some indiscriminately of whatever kind.'" *Dep't Hous. & Urban Dev.* v. *Rucker*, 535 U.S. 125, 131 (2002) (internal quotation marks omitted) (quoting *United States* v. *Gonzalez*, 520 U.S. 1, 5 (1997)). Congress' "use of 'any' to modify" "part of the property that is returned" easily accommodates the inclusion of collateral secured by a loan as offset on the date the collateral "is returned." See, *e.g.*, *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1332 (2011) (interpreting the phrase "any complaint" broadly to include an oral complaint); *Hui* v. *Castaneda*, 559 U.S. 799, 806 (2010) (discussing the broad reach of the word "any"); *Worth Bros. Co.* v. *Lederer*, 251 U.S. 507, 509 (1920) (defining the phrase "any part" to include all components "necessary to constitute a thing . . . .").

3. Real-estate collateral in a mortgage-fraud case fits comfortably within these broad definitions—particularly taking into account the expectations of the parties to a mortgage transaction. Each lender in this case treated the collateral as a return of its loan proceeds during foreclosure. The mortgage documents in each transaction gave the lender a right

to foreclose on the home in full or partial repayment of its loan. Complaint – Mortgage at 3, *GMAC* Action (Nov. 30, 2005); Complaint – Mortgage at 3, *Paragon* Action (Dec. 6, 2005). When the loan went into default, each lender brought a foreclosure action against Mr. Robers and acquired title to the collateral property via judicial foreclosure. In each case, the lender waived its right to seek a deficiency judgment against Mr. Robers, because Wisconsin law permits an accelerated foreclosure process if deficiency is waived.[8] See Wis. Stat. § 846.101. Finally, at the foreclosure auction, each lender purchased the property itself at the sheriff's sale by credit-bidding, a transaction which is the "'same as if the secured creditor has paid cash and then immediately reclaimed that cash . . . .'" *In re Spillman Dev. Grp., Ltd.*, 401 B.R. 240, 253 (Bankr. W.D. Tex. 2009) (quoting *In re HNRC Dissolution Co.*, 340 B.R. 818, 824-25 (E.D. Ky. 2006)), *aff'd*, 710 F.3d 299 (5th Cir. 2013). Thus, the credit bid represented a return of the property in the very real-world form of an offset of the sale price against the loan amount on the lenders' books, *at the time of the foreclosure sale.* Further, state mortgage laws, including Wisconsin's, also dictate that when a lender forecloses and takes title to the property, foreclosure law values the property as of the date the lenders take title, not as of

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[8] Under Wisconsin law, this waiver meant that the lenders accepted the houses as full satisfaction of their claims: they could not receive, and did not expect to receive, any further recovery against Mr. Robers beyond the foreclosed houses. See Wis. Stat. § 846.101(2) ("When plaintiff so elects [to waive a deficiency judgment], judgment shall be entered as provided in this chapter, except that no judgment for deficiency may be ordered therein nor separately rendered against any party who is personally liable for the debt secured by the mortgage . . . .").

the later date the property is sold to a third party. See *infra* Section I.E.

Given the function of collateral under mortgage agreements and state mortgage laws, the Seventh Circuit's translation of "is returned" to "is recouped" is untenable. See J.A. 152 ("[T]he restitution amount [would be] reduced by the eventual cash proceeds *recouped* once any collateral securing the debt is sold.") (emphasis added). Congress could have narrowed the qualifying forms of offset by using the more precise language suggested by the Seventh Circuit, in the form of "recouped" or "reclaimed." Congress also could have achieved that result by using active language such as "property that the defendant returns" or "property that the victim reclaims or recoups." But it did neither. See, *e.g.*, *Credit Suisse Sec. LLC* v. *Simmonds*, 132 S. Ct. 1414, 1420 (2012) ("Had Congress intended this result, it most certainly would have said so."). Instead, Congress' passive and much broader language, enacted against a backdrop of mortgage law and practice, indicates that a foreclosure sale is the point at which some part of the mortgage loan "is returned" to the victim lenders.

B. The Offset Provision Applies To The Return Of Substitute Property Because It Applies Only When Return Of The Original Property Is "Impossible, Impracticable, Or Inadequate."

The text and structure of § 3663A(b)(1) demonstrate that Congress intended to compensate victims for losses via the return of substitute property, including collateral secured by a loan, as of the date that property is returned. *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997) (statutory interpretation requires examination of "the specific

context in which that language is used, and the broader context of the statute as a whole"); see also *United Sav. Ass'n of Tex.* v. *Timbers of Inwood Forest Assocs., LTD*, 484 U.S. 365, 371 (1988) ("Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . ."). The structure makes clear that restitution can be awarded even if the return of the property originally lost is "impossible, impracticable, or inadequate." The statute thus contemplates that substitute property that compensates the victim offsets a restitution award.

The offset provision, § 3663A(b)(1)(B)(ii), applies only in particular situations, a limitation which suggests that the provision allows return of substitute property. If a crime covered by the MVRA "result[s] in damage to or loss or destruction of property of a victim," § 3663A(b)(1), the district court can order the defendant to "return the property to the owner . . . or someone designated by the owner . . . ." § 3663A(b)(1)(A). However, if "return of the property under subparagraph (A) is *impossible, impracticable, or inadequate*," § 3663A(b)(1)(B) (emphasis added), subparagraph (B) applies. Under subparagraph (B), a defendant must "pay an amount equal to" "the value of the property" on the applicable date, § 3663A(b)(1)(B)(i), minus "the value (as of the date the property is returned) of any part of the property that is returned . . . ." § 3663A(b)(1)(B)(ii).

Only if return of the property originally lost is "impossible, impracticable, or inadequate" will the offset provision of § 3663A(b)(1)(B)(ii) apply. If "property" in that provision referred only to the property originally lost, as the Seventh Circuit held, then the offset provision would apply only in rare

cases, such as those in which the defendant has disposed of some of the original property but has kept some other divisible part of it. There is no indication that Congress meant § 3663A(b)(1)(B)(ii) to have such a narrow range of application. Rather, Congress meant clause (B) to allow replacement compensation that equates to the "value" of the original property.

The restitution in this case was awarded under clause (B) because it was undisputed that the actual funds extended to Mr. Robers by the lenders could not be recovered—as the lenders fully expected, because they contractually obligated Mr. Robers to use the money to buy houses.[9] The very purpose of clause (B) is to address situations like this one, in which the actual property lost or stolen *cannot* be returned to the victim. Because of the clause's role in the structure of § 3663A(b)(1), an interpretation of the offset provision that requires a return of the actual "property originally taken from the victim," J.A. 152, is a non sequitur.

The Seventh Circuit thought this construction untenable because, in its view, the phrase "the property"

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[9] As a result, the Seventh Circuit's statement that "the property taken from the victims was cash," J.A. 153, was not strictly true: the money could not be used for any purpose Mr. Robers chose, but was earmarked for the purchase of the homes. In a typical purchase-money mortgage, the borrower never sees any of the loan proceeds, and of course is never given "cash" in the sense of dollar bills; the mortgage lender sends the funds directly to the sellers or its agents. See Grant S. Nelson & Dale A. Whitman, *Real Estate Finance Law* § 9.1, at 781-83 (4th ed. 2001). The prosecution's Information stated that purchase of the Inlet Shores property involved a wire transfer directly from the lender to a title service company, Information at 1, *United States* v. *Robers*, No. 10-00095 (E.D. Wis. May 17, 2010), and there has been no suggestion that the Grant Street transaction occurred differently.

must have "a consistent meaning throughout the statute." J.A. 153. On that view, the word "property," when used earlier in the statute, refers to the specific property lost by the victim. See § 3663A(b)(1)(A) (requiring defendant to "return the property to the owner of the property or someone designated by the owner . . . ."). But even if that were so, the word "property" necessarily takes a broader meaning in subparagraph (B)(ii) than it does when used in clause (A)—precisely because clause (B) applies only when compliance with clause (A)'s provisions is "impossible, impracticable, or inadequate."

The Seventh Circuit applied the "presumption that identical words used in different parts of the same act are intended to have the same meaning." *Atl. Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932); see J.A. 153. But that "presumption is not rigid" and "readily yields" where, as here, the structure of the statute compels another reading. *Atl. Cleaners*, 286 U.S. at 433. "Most words have different shades of meaning, and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section." *Id.*; see also *Robinson*, 519 U.S. at 342-43 (holding that term "employees" includes former employees in some sections of Title VII of Civil Rights Act, but excludes former employees in other sections). Here, the Seventh Circuit improperly treated the same-meaning presumption as an ironclad rule and strove to give "the property" an identical meaning throughout the statute even in the face of contrary evidence concerning the structure of § 3663A(b)(1)—and, as shown below, the broad statutory language

construing "replacement" property as an in-kind restitution "payment."

The implausibility of the Seventh Circuit's statutory construction is confirmed by the fact that it did not actually adhere to it. The court stated that the offset provision is strictly limited to returns of "the property originally taken from the victim." J.A. 152. It is undisputed, however that the "original" property that was at issue in the case—the money loaned to Mr. Robers in 2005—was not returnable and was not returned. The money that the lenders eventually received in 2007 and 2008 from the sales of the collateral properties was the *same type* of property that they lost, but it was not a return of the original loan proceeds. To contend otherwise is to ignore that: (1) the original loan proceeds were invested in the houses; and (2) the money that the lenders eventually received was the result of wholly different transactions with third parties. Therefore, in order to find the offset provision applicable at all in this case under its own "plain language" construction, the Seventh Circuit construed the offset provision as requiring return of the same *type* of property originally taken from the victim, not solely return of *the* property originally taken. The Seventh Circuit's departure from its own purported interpretation underscores the unsoundness of that reading.

C. Section 3664 Confirms That Congress Understood "Replacement" Property, Such As Mortgage Collateral, To Be An Acceptable "In-Kind" Return Of The Property.

Other provisions of the MVRA confirm that Congress viewed payment of "replacement" property to be an acceptable "in-kind" return of property. While § 3664, the procedural companion statute to

§ 3663A, demonstrates Congress' intent to adopt a pragmatic, workable restitution scheme aimed at awarding "the full amount of each victim's losses," § 3664(f)(1)(A), that section also expressly contemplates and approves of the payment of substitute property that compensates the victim for the loss, such as mortgage collateral at sentencing. This indicates that previously returned collateral should also qualify as an offset under § 3663A.

Section 3663A(d) requires courts to enforce the MVRA "in accordance with" 18 U.S.C. § 3664. Section 3664(f)(3) provides that a restitution order may require "a single, lump-sum payment, partial payments at specified intervals, *in-kind payments*, or a combination of" types of payments. § 3664(f)(3)(A) (emphasis added). Section 3664(f)(4), in turn, states that:

> An in-kind payment described in paragraph (3) may be in the form of—
>
> (A) return of property;
>
> (B) replacement of property; or
>
> (C) if the victim agrees, services rendered to the victim or a person or organization other than the victim.

Section 3664(f)'s approval of "replacement of property" and "return of property" as a means of restitution shows that Congress did not intend to require defendants to return the exact property, or even the exact form of property, that the victim lost. See *United States* v. *Simmonds*, 235 F.3d 826, 832 (3d Cir. 2000) (citing, *inter alia*, § 3664(f)(4)(B) in approving a restitution order including "replacement value" of new furniture to replace used furniture destroyed in arson); *Black's Law Dictionary* 802 (8th

ed. 2004) (defining "in kind" as "In goods or services rather than money . . . .").

To be sure, § 3664's definition of "in-kind payment" for purposes of fashioning a defendant's future obligations does not directly control § 3663A(b)(1)(B)(ii), which values property a defendant has returned before or at sentencing. But the provision for "in-kind payments" makes clear that, *at* sentencing, a payment in a form other than the victim's original loss can constitute adequate return of the victim's property. It would be bizarre for § 3663A(b)(1)(B)(ii) to forbid offset credit for a similar payment merely because it was made *before* sentencing. Furthermore, the detailed definition of "in-kind *payment*" in § 3664(f) parallels the language in § 3663A(b)(1)(B), which requires that the defendant "*pay* an amount" calculated by using the offset provision. In sum, reading § 3663A and § 3664 together confirms that Congress intended for previous "replacement of property" payments to be offset from restitution awards.

Reading § 3663A(b)(1)(B)(ii) to allow offsets for "different-form" payments, as § 3664(f)(4) does, would further the MVRA's goal of granting district courts flexibility in crafting restitution orders. Such flexibility is important because many criminal defendants are impoverished, threatening victims' ability to recoup their losses in any form. If a criminal defendant has little cash but can provide replacement property or services, such forms of restitution will benefit victims. And an award of "replacement" property, unlike an award of services, does not require the victim's consent, see § 3664(f)(4)(B), (C), increasing the court's ability to tailor the restitution order to the defendant's specific financial circumstances. Given the importance of

replacement property payments to the § 3664 scheme, it is unlikely that Congress meant to exclude them from offset credit in § 3663A.

D. The MVRA Constrains Restitution To Damages That Criminal Activity "Directly And Proximately" Causes.

The MVRA defines a "victim" as "a person directly and proximately harmed as a result of the commission of" the crime. § 3663A(a)(2); see also *United States* v. *Squirrel*, 588 F.3d 207, 215 (4th Cir. 2009) (citing *Hughey*, 495 U.S. at 413); *United States* v. *Peterson*, 538 F.3d 1064, 1075 (9th Cir. 2008); cf. *Hemi Grp., LLC* v. *City of New York*, 559 U.S. 1, 8-9 (2010). The legislative history, in the form of the Senate Report, underscores this textual limitation—the MVRA only would apply where a victim suffers a loss "directly and proximately caused by the course of conduct under the count or counts for which the offender is convicted." S. Rep. No. 104-179, at 19 (1995). Put differently, the MVRA would require restitution only for losses "clearly causally linked to the offense." *Id.*

Congress had good reason to limit restitution to directly and proximately caused harms because "[i]njuries have countless causes, and not all should give rise to legal liability." *CSX Transp., Inc.* v. *McBride*, 131 S. Ct. 2630, 2637 (2011); *Pac. Operators Offshore, LLP* v. *Valladolid*, 132 S. Ct. 680, 691-92 (2012) (Scalia, J., concurring) (same). It is a "fundamental principle of criminal law" that criminal defendants are held responsible only for the injuries that they proximately caused. *United States* v. *Hayes*, 589 F.2d 811, 821 (5th Cir. 1979); see also *United States* v. *Monzel*, 641 F.3d. 528, 535 (D.C. Cir. 2011) ("It is a bedrock rule of both tort and criminal law that a defendant is only liable for harms he

proximately caused."); Wayne R. LaFave, *Substantive Criminal Law* § 6.4, at 464 (2d ed. 2003).

The Seventh Circuit's interpretation defeats Congress' design in the circumstances here. That interpretation requires courts to reduce the restitution award only by the houses' values at resale, rather than at foreclosure. This means that the defendant must pay for any decline in the houses' values between the time the lenders foreclose and the time the lenders resell. *United States* v. *Smith*, 944 F.2d 618, 625 (9th Cir. 1991). But a defendant's false loan application is rarely the "direct," "unbroken" cause of those losses. *Hemi Grp.*, 559 U.S. at 8-9. Other "independent," "intervening" causes are. *Milwaukee & St. Paul Ry. Co.* v. *Kellogg*, 94 U.S. 469, 475 (1877); *Gordon*, 393 F.3d at 1055.

Here, for example, the houses' values dropped between foreclosure and resale because the real-estate market collapsed in the interim. J.A. 96-97.[10] Since that intervening collapse was unforeseeable, it was a "superseding" cause of the losses. See *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 838 (1996). Mortgage fraud was therefore not the proximate cause. *Id.* at 838-39; see *Smith*, 944 F.2d at 625.

Likewise, the lenders could have disposed of the property long before the resale dates and thus avoided the declines. See *Smith*, 944 F.2d at 625. They could have allowed a third party to purchase the property at the sheriff's sales. Alternatively, they could have purchased the properties at the sheriff's sales but then promptly resold the properties thereafter. The lenders themselves are therefore "directly" responsible for losses resulting from the

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[10] *See* Press Release, Standard & Poor's, *supra* note 5, at 1; Gjerstad & Smith, *supra* at note 5.

decline in house values between foreclosure and resale. *Id.*; *Hemi Grp.*, 559 U.S. at 8-9 (defining proximate cause).

The Seventh Circuit nonetheless insisted that mortgage-fraud defendants cause such losses. Without the defendant's fraud, the court explained, there would have been no loan, no house, and no need to worry about the decline in the value of the properties. See J.A. 155 ("Absent his fraudulent loan applications, the victim lenders would not have loaned the money in the first place."); J.A. 156 ("The declining market only became an issue because of Robers' fraud."). That the defendant's fraud is *a* cause of the loss, however, does not mean that the fraud is the *proximate* cause. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 266 (5th ed. 1984). Proximate cause "requires 'some direct relation between the injury asserted and the injurious conduct alleged.'" *Hemi Grp.*, 559 U.S. at 9 (quoting *Holmes* v. *Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992)). There is no such connection in the circumstances here.

E. The Return Of Mortgage Collateral Should Trigger An Offset In Light Of Established Principles Of Mortgage Law.

The Seventh Circuit failed to undertake any analysis of well-established principles of state mortgage law in dismissing Mr. Robers' argument that the collateral served as replacement property for the lost loan proceeds. Those principles confirm that the return of mortgage collateral compensates a lender for its losses. See *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 543 (1994) (without a plain statutory directive requiring federal interference with "foreclosure law," this Court is loath to "presume [] a radical departure"); see generally *Pasquantino* v.

United States, 544 U.S. 349, 356 (2005) (relying on common law to confirm the Court's interpretation of a federal statute). Accordingly, the return of mortgage collateral is a clear instance—indeed, one of the strongest possible cases—where the offset provision should apply.

In Wisconsin and elsewhere, a judicial foreclosure action, such as the ones filed against Mr. Robers, is the predominant means of enforcing a mortgage after default, and is by definition the method by which the lender acquires title to the collateral as full or partial repayment of the loan. Nelson & Whitman, *supra* note 9, § 7.11, at 558-60; see also Wis. Stat. § 846.10(3). The "purpose of foreclosure" is "to give the foreclosure sale purchaser essentially the same title to the land as that possessed by the mortgagor when the foreclosed mortgage was executed." Nelson & Whitman, *supra*, § 7.12, at 560. A lender who has chosen to foreclose may not thereafter sue the mortgagee for the entire amount due; it must accept any amount that it receives from the foreclosure toward the repayment of the debt. *Id.* § 8.1, at 652-53.

If the lender receives a foreclosure judgment, the local sheriff presides over a sale of the property and the proceeds are "applied to the discharge of the debt adjudged to be due . . . ." Wis. Stat. § 846.10(3); see also, *e.g.*, U.C.C. § 9-608(a) (requiring that a secured party "shall apply . . . the cash proceeds of collection" of sale of security to "the satisfaction of obligations secured by the security interest . . . ."). Only after "applying the proceeds" of a sheriff's sale "to the amount due" may a lender obtain "judgment for any deficiency that may remain due . . . ." Wis. Stat. § 846.04(1). And this requirement applies "irrespective of whether the foreclosure purchaser is the mortgagee," which may purchase the property

itself by credit-bidding, "or a third party." Restatement (Third) of Prop.: Mortgages § 8.4 cmt. b (1997); see also *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2069 (2012) (describing credit-bidding as the lender's ability to "bid for the property using the debt it is owed to offset the purchase price . . . ."). A lender appraises property before extending a loan for this very reason—because it anticipates that it may eventually take title as repayment of the loan. In short, the lender has committed to accepting the real estate collateral as a replacement for the loan proceeds.

Mortgage law also dictates that when a lender forecloses and takes title to the property, foreclosure law values the property as of the date the lender takes title, not as of the date the property is sold. After foreclosure, mortgage law allows a lender to pursue the borrower for the remaining debt.[11] In Wisconsin, as in all states, this deficiency judgment is calculated by subtracting the value of the home at the time of foreclosure, and not the value of the home at the time the property is eventually sold by the lender. See, *e.g.*, *Drach* v. *Hornig*, 267 N.W. 291, 292 (Wis. 1936) (holding that trial court, "having confirmed" a sheriff's sale, "could only render judgment [against the debtor] for the deficiency appearing in the report of sale"); Wis. Stat. § 846.04(1); U.C.C. § 9-608(a).[12]

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[11] As noted above, however, both MGIC and American Portfolio waived their rights to pursue deficiency judgments against Mr. Robers.

[12] Note that this distinction only arises if the lender is the high bidder at the sheriff's sale; if a third party is the high bidder, the lender gets its cash immediately, without ever taking title to the property. While states differ on whether the collateral's value is determined by the winning bid at the sheriff's sale or an independent analysis of fair market value, all

The recognition is that the collateral is the equivalent of the loan proceeds. See also *infra* Section I.F. That uniform rule of mortgage law supports the implication of the text and structure of § 3663A(b)(1): that a lender's lost property is "returned" when the lender or its successor takes title to foreclosed real estate.

A mortgage granted to a lender is a security interest in a particular piece of real estate; in a purchase-money mortgage, such as those in this case, the borrower explicitly agrees to use the proceeds of the underlying loan to buy that real estate. Nelson & Whitman, *supra*, § 1.1, at 1. The sole purpose of that security interest is to protect the lender: since there is a significant risk that *any* homebuyer, even an honest one, will default on the loan, the lender values the right to dispose of the real property in that scenario as a means of protecting its loan. This feature of secured transactions makes a lender more willing to lend in the first place: unlike in an unsecured transaction, the lender has a built-in mechanism to recoup its money. See, *e.g.*, *Harvest Sav. Bank* v. *ROI Invs.*, 563 N.W.2d 579, 584 (Wis. Ct. App. 1997) ("Payment of the mortgage is only one way to extinguish a mortgage . . . [A] mortgage is also extinguished upon confirmation of the foreclosure sale."). Taking title to the property is thus a common means of getting a "return" of the loan proceeds.

The Seventh Circuit's belief that lenders care only about "the cash recouped following the disposition of the collateral," J.A. 154-55, therefore turns the con-

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states base a deficiency judgment on the collateral's value at the time of the sheriff's sale, and not at the time the property is eventually sold by the lender. See George E. Osborne, *Handbook on the Law of Mortgages* § 333, at 698-99 (2d ed. 1970).

cept of collateral on its head. In stating that lenders do "not want the houses" and "do not, in any way, benefit from possessing title" until the real estate is sold, J.A. 153, the court misunderstood the nature of the mortgage market. As discussed above, both lenders in this case, like many other foreclosing lenders, elected to waive their rights to a deficiency judgment. This meant that the lenders accepted the collateral as *full satisfaction* of their claims: they could not receive, and did not expect to receive, any further recovery against Mr. Robers beyond the foreclosed houses. Wis. Stat. § 846.101(2). This fact negates the Seventh Circuit's suggestion that victim-lenders do not want the collateral that secures a mortgage loan. As this case demonstrates, lenders often want nothing but the collateral—and contractually bind themselves to seek only the collateral. This Court should presume that Congress did not mean to establish a regime at complete odds with the common law and state law practices of awarding compensatory damages in such situations.

F. A Defendant Like Mr. Robers Actually Returns The Original Lost Property By Transferring The Houses.

Even if, as the Seventh Circuit held, § 3663A(b)(1)(B)(ii) does require a defendant to return the identical property that the victim originally lost, the statute still requires reversal.

At foreclosure, a defendant like Mr. Robers returns the value of the loan money that the victims originally lost. Since the defendant invested the money in the houses, the houses hold the money's value. See John B. Taylor, *Economics* 822 (1995) ("Store of Value"); *United States* v. *Shepard*, 269 F.3d 884, 887-88 (7th Cir. 2001). When the lenders thereafter foreclose and take control of those houses, they

recoup that value. *Shepard*, 269 F.3d at 887-88. To borrow an analogy Judge Easterbrook used in a similar scenario, the transfer is "no different in principle from taking the money from one of [the lenders'] bank accounts and [later] depositing it in another" account during foreclosure. *Id.* at 887-88. Under § 3663A(b)(1)(B)(ii), therefore, a mortgage-fraud defendant returns "part" of the lenders' money—the money's value—when the lenders foreclose and take title to the houses. § 3663A(b)(1)(B)(ii) (requiring an offset once a defendant returns "any part" of the property); *United States* v. *Holley*, 23 F.3d 902, 915 (5th Cir. 1994); *United States* v. *Boccagna*, 450 F.3d 107, 112 n.2 (2d Cir. 2006); see also *Smith*, 944 F.2d at 625-26.

The Seventh Circuit reasoned that, unless the defendant returns property in the same form, the victim might lose the original form's advantages, such as liquidity. But the statute says nothing about the property's form. Rather, the statute directs courts to grant an offset once a defendant returns "any part" of the lost property. § 3663A(b)(1)(B)(ii); cf. *Worth Bros. Co.*, 251 U.S. at 509 (reading the statutory phrase "any part" broadly). That the lost property's form has advantages over the returned property's form might be relevant in calculating the latter's *value* under § 3663A(b)(1)(B), but not in deciding whether a defendant has returned "any part" of the lost property at all. In any event, the Seventh Circuit overstates those advantages in cases like this one. The lost property's form, money, has no "intrinsic" value. 2 Martin Shubik, *Fiat Money*, *in The New Palgrave: A Dictionary of Economics* 316 (1987). It exists only to store value temporarily and then transfer that value from the lender's bank account to the house. See *id.*; Taylor, *supra*, at 822.

Although the returned property's form, a house, might not be perfectly liquid, neither is home-loan money: Borrowers use purchase-money loans only for their agreed purpose of buying particular houses. See Nelson & Whitman, *supra*, § 1.1, at 1 ("A purchase money mortgage arises where the mortgagor's acquisition of the mortgaged real estate is financed by the mortgagee-lender.").

Further, as noted above, a lender recoups cash through foreclosure. When the lender purchases (or "credit bids") the foreclosed property at the sheriff's sale, the transaction is the "same as if the [lender] has paid cash and then immediately reclaimed that cash in payment of the [mortgage] debt." *In re HNRC Dissolution Co.*, 340 B.R. at 824-25 (interpreting 11 U.S.C. § 363(k)); see also *In re Spillman Dev. Grp., Ltd*, 710 F.3d 299, 307-08 (5th Cir. 2013); *United States* v. *Petty Motor Co.*, 767 F.2d 712, 715-16 (10th Cir. 1985). Thus, the property originally lost is returned during the sheriff's sale, rather than when the victims later resell the property.

G. The Statute Should Be Read To Avoid The Anomalous Results Created By The Seventh Circuit's Interpretation.

Beyond its divergence from basic tenets of mortgage law, the Seventh Circuit's interpretation leads to anomalous results that Congress could not have intended.

Victims take title to property in the course of nearly every fraud scheme, and that property is rarely in the same form as their loss (usually money). Consider an auto dealer who rolls back odometers so that a car with Blue Book value of, say, $16,000 appears to be worth $20,000. A victim who buys the altered car pays $20,000, but because he gains the use of the car

the true loss caused by the dealer's fraud is easily computed: only $4,000. Yet under the Seventh Circuit's interpretation, the value of the car for restitution purposes would be its price when resold by the victim, and the defendant would be responsible for later fluctuations in its value (which could be much greater than $4,000). Among other anomalies, the Seventh Circuit's reading would create inconsistencies between defendants: the restitution amounts for identical crimes would vary based on later market movements outside of the defendants' control. It is hard to see why Congress would have chosen this scheme over the certainty provided by Mr. Robers' preferred interpretation.

The Seventh Circuit's reading would also cause anomalies in non-fraud cases. For example, in the case of arson the defendant cannot "return" a destroyed building in its original form,[13] and so the Seventh Circuit's reading would require a sentencing court to ignore a cash payment to a victim by a remorse-stricken arsonist. Counting the defendant's court-ordered payment, the victim would receive more than the amount of her loss—perhaps twice as much. That would contradict the well-understood purpose of criminal restitution "to compensate victims only for losses caused by the conduct underlying the offense of conviction." *Hughey*, 495 U.S. at 416. Congress could not have intended such double recoveries, and neither the statutory text nor the legislative history contain any indication that it did. Even if the plain text of the statute did not

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[13] Indeed, on the Seventh Circuit's reading, it is hard to see how clause (B)(ii) could have any application at all when a defendant has caused "damage to" or "destruction of" property, § 3663A(b)(1), in which case return of the identical property by the defendant would be impossible.

compel Mr. Robers' reading, the Court would need more evidence that Congress meant to create such a counterintuitive restitution scheme. See *Pub. Citizen* v. *Dep't of Justice*, 491 U.S. 440, 454 (1989) ("Where the literal reading of a statutory term would 'compel an odd result,' . . . we must search for other evidence of congressional intent to lend the term its proper scope." (internal citation omitted)).

H. The Seventh Circuit's Interpretation Undermines The Statute's Purpose.

The MVRA's purpose is to make victims whole without granting them windfalls. *United States* v. *Louper-Morris*, 672 F.3d 539, 566 (8th Cir. 2012); *United States* v. *Parker*, 553 F.3d 1309, 1323 (10th Cir. 2009). As this Court has noted, the purpose of restitution statutes is to restore the victim "to a position he occupied before" the crime but not to punish the defendant. *Hughey*, 495 U.S. at 416; see also *Parker*, 553 F.3d at 1323. The design also appears in the statutory text: On the one hand, § 3663A and § 3664(f)(1)(A) require compensation for the "full amount" of the victims' losses proximately caused by the defendant's crime. On the other hand, § 3663A(b)(1)(B)(ii) directs courts to reduce victims' restitution awards by the value of property the defendant returns (as of the date of its return). Likewise, § 3664(j)(2) requires courts to reduce the restitution award by the "amount later recovered as compensatory damages for the same loss" in civil proceedings. See S. Rep. 104-179, at 21 (1995) (explaining that the provision's purpose is to ensure that victims would not be "compensated twice for the same loss"). The Court should therefore evaluate the Seventh Circuit's interpretation in light of that design. See generally *Kasten*, 131 S. Ct. at 1330-31.

The Seventh Circuit's interpretation creates the real risk of both undercompensating victims and granting them windfalls. Under that interpretation, a court may reduce the restitution award only once the victims resell the houses. In some cases, however, the victims will not have done so before sentencing; indeed, they might wait years. *Holley*, 23 F.3d at 914 (almost six years); *United States* v. *Hutchison*, 22 F.3d 846, 856 (9th Cir. 1993) (two years), *abrogated by United States* v. *Wells*, 519 U.S. 482 (1997). This creates a dilemma for the sentencing court because it must choose between two undesirable options. First, the court may refuse to order restitution at all, since calculating the correct amount of restitution will unduly "prolong the sentencing process." § 3663A(c)(3)(B). That leaves the victims uncompensated. Second, the court may order restitution for the *full* outstanding loan amount. See J.A. 157 n.7. But that grants the victims a potential windfall, because they may later resell the houses for a profit.

The Seventh Circuit disputed that its reading might grant windfalls in cases where the court orders restitution before the victims resell the houses. The court of appeals asserted—without citation—that courts in such scenarios may order restitution for the "total loss to the victims" and, "once the real estate is sold," later modify the restitution award. See J.A. 157 n.7. But neither § 3663A nor § 3664 allow a later modification for that purpose. Catherine M. Goodwin, *Federal Criminal Restitution* § 13:2 (2013). That omission was intentional: Congress wanted courts to order restitution expeditiously. § 3663A(c)(3)(B). And Congress specifically identified the sole circumstance in which a court could later adjust an award: when a victim requests an

adjustment for a newly discovered loss and shows good cause for the delay in presenting the loss to the court. § 3664(d)(5); see also S. Rep. No. 104-179, at 20 (1995). Thus, the Seventh Circuit's interpretation will permit some victims to collect full restitution and later resell the houses for a windfall. For this reason and the others above, the Court should reject that interpretation.

I. Even Were The Restitution Statutes Ambiguous, The Rule Of Lenity Would Require That Substitute Property Triggers The Offset Provision.

If this Court does not agree that the text and structure of § 3663A plainly require offsets to restitution for the return of collateral, it would need to apply the rule of lenity. The rule of lenity "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose," *Albernaz* v. *United States*, 450 U.S. 333, 342 (1981), including restitution orders. *Hughey*, 495 U.S. at 422.

"[T]he rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a 'grievous ambiguity or uncertainty in the statute . . . .'" *Barber* v. *Thomas*, 130 S. Ct. 2499, 2508 (2010); see also *United States* v. *Granderson*, 511 U.S. 39, 54 (1994) (applying rule of lenity because "text, structure, and history fail to establish that the Government's position is unambiguously correct . . . ."). But the Court must conclude at least as much. The statute's broad terms do not "unambiguously" support the Seventh Circuit's reading. The word "returned" may refer either to repaying a debt in any form or to giving back the same property taken. Congress' use of passive voice fails to clarify how or in what form "the property"

must be "returned." And the statute's repeated use of the definite article "the" in the phrase "the property" even in circumstances in which "return of the property" is impossible creates further uncertainty about whether the phrase always takes the same meaning. If the statute's structure, the influence of state mortgage law, and the other "considerable interpretive tools" available, *Staples* v. *United States*, 511 U.S. 600, 619 n.17 (1994), fail to clarify these terms, the statute is grievously ambiguous and this Court should apply the rule of lenity.

That rule requires that § 3663A be interpreted to grant offset credit for mortgage collateral returned to a victim. Nearly all defendants who make pre-sentencing in-kind returns of collateral or other property to their victims would receive a lower offset value under the Seventh Circuit's reading. And even if a victim did convert the returned property into cash, which the Seventh Circuit would require for the property to have any offset value, that value would depend on market conditions and the victim's investment decisions, variables wholly beyond the control of a defendant like Mr. Robers. Such uncertain and unforeseeable punishments are precisely what the rule of lenity is meant to avoid.

The rule of lenity would thus compel the rejection of the Seventh Circuit's position—but this Court need not resort to it. The unambiguous text of § 3663A and its companion statute, § 3664, demonstrates that a defendant is entitled to offset credit for returning mortgage collateral. Such a reading comports with settled mortgage law and with the expectations of mortgage lenders, who understand that they may take title to the mortgage collateral (as the lenders in this case actively sought to do); and, unlike the Seventh Circuit's reading, it leads to logical restitution

amounts for fraud and other crimes. The Court should rule that § 3663A grants offset credit for the return of mortgage collateral, as of the date the collateral is returned.

CONCLUSION

Mr. Robers respectfully requests that the Court vacate the judgment of the court of appeals and remand for a redetermination of the restitution amount.

Respectfully submitted,

JEFFREY T. GREEN
JACQUELINE G. COOPER
DAVID R. KUNEY
JOSH C. HESS
JEFFREY S. BEELAERT
ADAM N. HALLOWELL
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIV.
SUPREME COURT
PRACTICUM
375 East Chicago Ave.
Chicago, IL 60611

CHRISTOPHER DONOVAN*
PRUHS & DONOVAN, S.C.
757 N. Broadway
Milwaukee, WI 53202
Donovanc34@hotmail.com
(414) 221-1950

JONATHAN E. HAWLEY
Chief Federal Public
Defender
DANIEL T. HANSMEIER
Assistant Federal
Public Defender
FEDERAL PUBLIC
DEFENDER'S OFFICE
CENTRAL DISTRICT OF
ILLINOIS
600 E. Adams Street,
2d Floor
Springfield, IL 62701

Counsel for Petitioner

December 13, 2013

* Counsel of Record

APPENDIX

APPENDIX

18 U.S.C. § 3663A - Mandatory restitution to victims of certain crimes

(a)

(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, 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;

(2) in the case of an offense resulting in bodily injury to a victim—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an

amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

(c)

(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense—

(A) that is—

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit;

(iii) an offense described in section 1365 (relating to tampering with consumer products); or

(iv) an offense under section 670 (relating to theft of medical products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that—

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

18 U.S.C. § 3664 - Procedure for issuance and enforcement of order of restitution

(a) For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.

(b) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(c) The provisions of this chapter, chapter 227, and Rule 32(c) of the Federal Rules of Criminal Procedure shall be the only rules applicable to proceedings under this section.

(d)

(1) Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.

(2) The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable—

(A) provide notice to all identified victims of—

(i) the offense or offenses of which the defendant was convicted;

(ii) the amounts subject to restitution submitted to the probation officer;

(iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;

(iv) the scheduled date, time, and place of the sentencing hearing;

(v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and

(vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and

(B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi).

(3) Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate.

(4) After reviewing the report of the probation officer, the court may require additional documenta-

tion or hear testimony. The privacy of any records filed, or testimony heard, pursuant to this section shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera.

(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

(6) The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court.

(e) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

(f)

(1)

(A) In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.

(B) In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution.

(2) Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to section 3572, specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of—

(A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;

(B) projected earnings and other income of the defendant; and

(C) any financial obligations of the defendant; including obligations to dependents.

(3)

(A) A restitution order may direct the defendant to make a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments.

(B) A restitution order may direct the defendant to make nominal periodic payments if the court finds

from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

(4) An in-kind payment described in paragraph (3) may be in the form of—

(A) return of property;

(B) replacement of property; or

(C) if the victim agrees, services rendered to the victim or a person or organization other than the victim.

(g)

(1) No victim shall be required to participate in any phase of a restitution order.

(2) A victim may at any time assign the victim's interest in restitution payments to the Crime Victims Fund in the Treasury without in any way impairing the obligation of the defendant to make such payments.

(h) If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.

(i) If the court finds that more than 1 victim has sustained a loss requiring restitution by a defendant, the court may provide for a different payment schedule for each victim based on the type and amount of each victim's loss and accounting for the economic circum-

stances of each victim. In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution.

(j)

(1) If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.

(2) Any amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in—

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of the State.

(k) A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also accept notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or

require immediate payment in full, as the interests of justice require.

(l) A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

(m)

(1)

(A)

(i) An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title; or

(ii) by all other available and reasonable means.

(B) At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.

(2) An order of in-kind restitution in the form of services shall be enforced by the probation officer.

(n) If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

(o) A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that—

(1) such a sentence can subsequently be—

(A) corrected under Rule 35 of the Federal Rules of Criminal Procedure and section 3742 of chapter 235 of this title;

(B) appealed and modified under section 3742;

(C) amended under subsection (d)(5); or

(D) adjusted under section 3664(k), 3572, or 3613A; or

(2) the defendant may be resentenced under section 3565 or 3614.

(p) Nothing in this section or sections 2248, 2259, 2264, 2327, 3663, and 3663A and arising out of the application of such sections, shall be construed to create a cause of action not otherwise authorized in favor of any person against the United States or any officer or employee of the United States.