

**In The
Supreme Court of the United States**

AMY, THE VICTIM IN THE “MISTY”
CHILD PORNOGRAPHY SERIES,

Petitioner,

v.

MICHAEL M. MONZEL, ET AL.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Child pornography victims are guaranteed restitution in 18 U.S.C. § 2259, which requires that the district court “shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim’s losses. . . .” 18 U.S.C. § 2259(b)(1). The statute outlines six categories that are included in these losses:

(3) Definition. – For purposes of this subsection, the term “full amount of the victim’s losses” includes any costs incurred by the victim for –

(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) attorneys’ fees, as well as other costs incurred; and

(F) any other losses suffered by the victim *as a proximate result* of the offense.

18 U.S.C. § 2259(b)(3) (emphasis added). Does the “proximate result” requirement apply only to the losses described in subsection (F) or to losses in subsections (A) through (E) as well?

QUESTIONS PRESENTED – Continued

2. Under an appellate review provision found in the Crime Victim's Rights Act, 18 U.S.C. § 3771(d)(3), a crime victim whose asserted right has been denied in the district court "may petition the court of appeals for a writ of mandamus. . . . The court of appeals shall take up and decide such application forthwith. . . ." Also, under the general statute establishing jurisdiction for the court of appeals, 28 U.S.C. § 1291, a court of appeals has "jurisdiction [over] appeals from all final decisions of the district courts." Do either of these provisions give a crime victim ordinary appellate review of a claim that a district court violated her rights under the Crime Victim's Rights Act?

PARTIES TO THE PROCEEDINGS BELOW

This case arises from a criminal prosecution in the U.S. District Court for the District of Columbia. Petitioner “Amy” is a victim of child pornography crimes, who proceeds here (as she did in the courts below) under a pseudonym.

The first respondent is Michael M. Monzel, the convicted criminal defendant from whom Amy sought restitution in the courts below.

The United States is also a respondent to this action and prosecuted the criminal case below.

Because this petition involves a Crime Victim’s Rights Act mandamus action, the United States District Court for the District of Columbia is a nominal respondent.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Amy respectfully petitions for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

◆

OPINIONS AND ORDERS

The D.C. Circuit's opinion for which review is sought is reported at 641 F.3d 528 (D.C. Cir. 2011) and is reprinted in App. 1-36.

The district court's opinion on restitution is reported at 746 F.Supp.2d 76 (D.D.C. 2010) and is reprinted in App. 45-76. The ultimate restitution order of the district court is not reported and is reprinted in App. 37-44.

◆

JURISDICTION

The decision of the D.C. Circuit was entered on April 19, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

◆

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are reprinted in the appendix.

◆

STATEMENT OF THE CASE

On December 10, 2009, Michael M. Monzel pled guilty to one count of distribution of child pornography, in violation of 18 U.S.C. § 2252(a)(2), and one count of possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B). The National Center for Missing and Exploited Children then identified petitioner Amy as one of the minors depicted in the child sex abuse images Monzel illegally possessed.

After being notified of Monzel's plea, Amy filed a timely victim impact statement requesting extensive restitution. In her statement, Amy explained that when she was 8 and 9 years old, she was repeatedly raped in order to produce child sex abuse images "on demand" for a pedophile. The primary reason Amy was forced to endure fellatio, digital penetration, and other horrific acts of sex abuse was to provide child pornography for an end user; thus, the demand for child sex abuse images directly led to her exploitation. Amy further explained that the worldwide distribution of her images (in the so-called "Misty" child pornography series) has continued in an unbroken chain to this day since her images went "viral" on the internet. Because countless pedophiles are actively seeking, distributing, and possessing her child sex abuse images, Amy felt "like I am being abused over and over again." Accordingly, Amy requested that the district court order Monzel to pay significant restitution for psychiatric counseling expenses, lost income, and other losses. App. 62.

On May 19, 2010, the district court sentenced Monzel to 120 months in prison, setting a later hearing to decide restitution issues arising under 18 U.S.C. § 2259 – the “child pornography restitution statute.”

On October 22, 2010, the district court entered an order finding specifically that under § 2259 Amy was a “victim” of the defendant’s crimes: “Thus, it is clear that Amy . . . [was] harmed as a result of [Monzel’s] possession of images exhibiting [her] abuse.” App. 61. The district court further found that Monzel’s conduct was both the “factual cause” and “proximate cause” of Amy’s losses.

With regard to factual cause, the district court found that “[a]lthough [Amy] may have been suffering from such fear and anxiety prior to an individual defendant’s conduct, each notification of a defendant’s conduct perpetuates the trauma, thereby prolonging recovery, and increasing harm to the victim.” App. 67. With regard to proximate cause, the district court relied on numerous authorities to conclude that the appropriate approach is to ask “whether there is an intuitive relationship between the act(s) alleged and the damages at issue (that is, whether the conduct was wrongful *because* that type of damage might result).” App. 69 (*citing* RESTATEMENT (THIRD) OF TORTS § 29 at 113, 115 (2009)). Under this approach, the district court held that Amy’s losses “clearly fall within the scope of th[e] risk” that led to possession of child pornography being criminalized. App. 71. The district court finally ordered further briefing on the

issue of whether Monzel should pay Amy's entire losses or only a part.

The Government then submitted an additional brief requesting that the Court award Amy full restitution in the amount of \$3,134,332.¹ Monzel replied asking for just nominal restitution to be awarded. On January 11, 2011, the district court agreed with Monzel and ordered him to pay Amy just \$5,000. Since Amy could not show what share of her damages was attributable to Monzel's crime, she was entitled to receive only "nominal" restitution. App. 41. The district court conceded that it had "no doubt that this level of restitution is less than the actual harm this particular Defendant caused [Amy]." App. 42.

Amy then promptly sought review of the district court's decision in the D.C. Circuit. She did so through two vehicles: first, a Crime Victims' Rights Act (CVRA) mandamus petition under 18 U.S.C. § 3771(d)(3) (D.C. Cir. case no. 11-3009); and, second, a parallel appeal of the district court's order under 28 U.S.C. § 1291 (D.C. Cir. case no. 11-3008).

¹ The Government explained that this amount was supported by various reports and included: (1) \$512,681 for Amy's treatment and counseling; (2) \$2,855,173 for lost income; (3) \$17,063 for expert witness fees; and (4) \$3,500 in attorney's fees; all reduced by the \$245,084 in restitution Amy had already received in other cases.

After oral argument, on April 19, 2011, the D.C. Circuit rejected Amy’s attempt to protect her right to “full” restitution under the CVRA, 18 U.S.C. § 3771(a)(6). The D.C. Circuit began by determining what standard of review to apply to Amy’s CVRA petition. The Circuit acknowledged “[t]here is a circuit split on the standard of review for mandamus petitions brought under the CVRA.” App. 9. While four Circuits have ruled that crime victims are entitled to ordinary appellate review of their claims, the D.C. Circuit elected to side with three other Circuits that have forced crime victims to show a “clear and indisputable error” to obtain relief. App. 9.

Turning to the merits of Amy’s restitution claim, the D.C. Circuit held that Amy did not have a clear and indisputable right to full restitution, but only to restitution for “the harm Monzel proximately caused.” App. 27. The D.C. Circuit recognized that 18 U.S.C. § 2259 provides that for child pornography offenses the district court “*shall* direct the defendant to pay the victim (through the appropriate court mechanism) the *full amount* of the victim’s losses. . . .” 18 U.S.C. § 2259(b)(1) (emphases added). The statute also provides six categories of damages that form these “full losses,” including losses from psychiatric expenses, lost income, and a final category for “any other losses suffered by the victim as a *proximate result* of the offense.” 18 U.S.C. § 2259(b)(3)(F) (emphasis added). While the “proximate result” language appears in only the last “catch-all” provision of § 2259, the D.C. Circuit observed that “there is a

circuit split over whether the proximate cause requirement in the catch-all category also applies to the preceding categories.” App. 15. The Fifth Circuit had ruled that it does not in *In re Amy Unknown*, 636 F.3d 190 (5th Cir. 2011). Other Circuits had concluded that requirement should be read backwards through the preceding subsections. App. 15 (citing *United States v. McDaniel*, 631 F.3d 1204, 1208-09 (11th Cir. 2011); *United States v. Laney*, 189 F.3d 954, 965 (9th Cir. 1999); *United States v. Crandon*, 173 F.3d 122, 125 (3d Cir. 1999)). The D.C. Circuit decided to join these Circuits, but for different reasons: “Unlike those circuits, however, our reasoning rests not on the catch-all provision of § 2259(b)(3)(F), but rather on traditional principles of tort and criminal law. . . .” App. 15. The D.C. Circuit also rejected Amy’s argument that Monzel should be held jointly and severally liable with other offenders who were causing her harm. App. 21-22.

The D.C. Circuit further declined to impose joint and several restitution liability under the general restitution procedures statute – 18 U.S.C. § 3664(h). The D.C. Circuit noted that two Circuits (the Fourth and Sixth) have held, in unpublished opinions, that § 3664(h) does not apply to single-defendant prosecutions. App. 24 (citing *United States v. McGlown*, No. 08-3903, 2010 WL 2294527 at *3 (6th Cir. June 8, 2010); *United States v. Channita*, No. 01-4060, 2001 WL 578140 at *1 (4th Cir. May 30, 2001)). In contrast, the Fifth Circuit has held “a district court could order joint and several liability for a lone defendant

such as Monzel under [18 U.S.C.] § 3664(m)(1)(A).” App. 24 (*citing In re Amy Unknown*, 636 F.3d at 201).

The D.C. Circuit finally concluded that the district court had erred in awarding only \$5,000 in restitution. The Circuit ruled that it was “clear and indisputable error” to award restitution in an amount that the district court itself had “said it had ‘no doubt’ . . . was ‘less than the actual harm’ Monzel had caused Amy.” App. 26.

The D.C. Circuit also noted that to obtain traditional mandamus relief a petitioner must show that mandamus “is her only adequate remedy.” App. 27. The D.C. Circuit concluded that mandamus relief was appropriate because Amy could not obtain any relief from her parallel appeal.

In reaching this conclusion, the D.C. Circuit acknowledged that a Circuit split exists on the issue of whether crime victims can appeal restitution issues. App. 33 (*contrasting United States v. Perry*, 360 F.3d 519, 524-33 (6th Cir. 2004) (crime victim’s appeal of restitution issue allowed); and *United States v. Kones*, 77 F.3d 66, 68 (3d Cir. 1996) (same); *with United States v. Mindel*, 80 F.3d 394 (9th Cir. 1996) (crime victim’s appeal of restitution issue dismissed); *United States v. Kelley*, 997 F.2d 806, 807 (10th Cir. 1993) (same); *United States v. Johnson*, 983 F.2d 216, 217 (11th Cir. 1993) (same); *United States v. Grundhoefer*, 916 F.2d 788, 793 (2d Cir. 1990) (same)). The D.C. Circuit further noted that since enactment of the CVRA in 2004, several Circuits

have held that mandamus is a crime victim's only recourse for challenging a restitution order. App. 27 (citing *United States v. Aguirre-González*, 597 F.3d 46, 52-55 (1st Cir. 2010); *United States v. Hunter*, 548 F.3d 1308, 1317 (10th Cir. 2008)). On the other hand, one Circuit allowed a crime victim to take a direct appeal in a CVRA case, but in a later decision barred a victim from taking a direct appeal in a CVRA case in light of a simultaneously filed mandamus petition raising "identical issues." App. 28 n. 12 (contrasting *In re Acker*, 596 F.3d 370, 373 (6th Cir. 2010) with *In re Siler*, 571 F.3d 604, 607-09 (6th Cir. 2009)). One other Circuit indicated that it is "likely" that a victim cannot appeal a restitution ruling. App. 28 (citing *In re Amy Unknown*, 636 F.3d at 198).

The D.C. Circuit also recognized that extensive authority in criminal cases permits appeals by non-parties, including crime victims. App. 29-30 (citing, *inter alia*, *Doe v. United States*, 666 F.2d 43 (4th Cir. 1981) (rape victim allowed to appeal adverse rape shield ruling)). The D.C. Circuit, however, ultimately dismissed Amy's appeal, holding that crime victims cannot appeal where the ultimate effect might be to alter a defendant's sentence. App. 36.

Amy now files this timely petition seeking a writ of certiorari.



REASONS FOR GRANTING THE PETITION

I. The Lower Courts Are Badly Divided on How to Apply the Child Pornography Restitution Statute.

This Court should decide whether the child pornography restitution statute contains a general proximate cause requirement, an issue on which lower courts have reached multiple conflicting conclusions. The statute allows crime victims to obtain restitution for six specified categories of losses:

- (A) medical services relating to physical, psychiatric, or psychological care;
- (B) physical and occupational therapy or rehabilitation;
- (C) necessary transportation, temporary housing, and child care expenses;
- (D) lost income;
- (E) attorneys' fees, as well as other costs incurred; and
- (F) any other losses suffered by the victim as a *proximate result* of the offense.

18 U.S.C. § 2259(b)(1) (emphasis added). Whether the “proximate result” language applies only to the catch-all subsection (F) or should be read backwards through subsections (A) through (E) as well is a question producing disagreement throughout the country. See Note, Dina McLeod, *Section 2259 Restitution Claims and Child Pornography Possession*, 109 MICH. L. REV. 1327, 1333 (2011) (disagreement on

how to interpret § 2259 is “widespread”). This Court should resolve this divisive issue.

A. The Circuits Have Reached Differing Conclusions on Whether the Child Pornography Statute Imposes a General Proximate Cause Requirement.

As the D.C. Circuit acknowledged below, “[t]here is a circuit split over whether the proximate cause requirement in the catch-all category also applies to” the various categories of losses for which a judge can award restitution in a child pornography case. App. 15. It is now the law of the Fifth Circuit that § 2259(b)(1) requires a child pornography victim seeking restitution to establish that her losses were the “proximate result” of the defendant’s crime only for the catch-all category of losses, but not for the other categories. Even within the Fifth Circuit, however, three different panels have reached three different conclusions as to how to interpret the provision.

In *In re Amy*, 591 F.3d 792 (5th Cir. 2009), *rev’d*, 636 F.3d 190 (5th Cir. 2011), the Fifth Circuit initially ruled that § 2259 contains a general proximate cause requirement. Relying on the district court’s opinion to that effect (*United States v. Paroline*, 672 F.Supp.2d 781 (E.D. Tex. 2009)), the Fifth Circuit rejected Amy’s mandamus petition seeking to overturn that conclusion: “[I]f the Court were to adopt Amy’s reading of section 2259 and find that there is

no proximate cause requirement in the statute, a restitution order could hold an individual liable for a greater amount of losses than those caused by his particular offense of conviction.” 591 F.3d at 794. Judge Dennis dissented, emphasizing that “Congress intended to afford child victims ample and generous protection and restitution, not to invite judge-made limitations patently at odds with the purpose of the legislation.” *Id.* at 797 (Dennis, J., dissenting). To require some sort of precise attribution of losses to a particular defendant’s crimes would result in “the intent and purposes of § 2259 . . . be[ing] impermissibly nullified because the problem of allocating restitution . . . will be found in virtually *every* case where a child depicted in electronically disseminated pornography seeks restitution from those who unlawfully possess those images.” *Id.* (emphasis in original).

Amy then filed a petition for rehearing, and the Fifth Circuit reversed itself. In *In re Amy Unknown*, 636 F.3d 190 (5th Cir. 2011), the Court explained that “[g]iven more time to ponder and research, we have reconsidered this question.” *Id.* at 198. The Fifth Circuit then concluded that Congress drafted § 2259 differently than other restitution statutes, which specifically require proof of proximate causation. For example, the general restitution statute defines “victim” as an individual “*directly and proximately* harmed as the result of the commission of an offense.” *Id.* at 198-99 (*citing* 18 U.S.C. § 3663A(a)(2) (emphasis in original)). In contrast, § 2259 defines a “victim”

as an individual “harmed as *a result of* a commission of a [child pornography] crime.” 636 F.3d at 199 (*citing* 18 U.S.C. § 2259(c) (emphasis in original)). The Fifth Circuit found that the difference in language was no accident, particularly given the fact that the child pornography statute “is phrased in generous terms, in order to compensate the victims of sexual abuse for the care required to address the long term effects of their abuse.” 636 F.3d at 200 (*quoting United States v. Laney*, 189 F.3d 954, 966 (9th Cir. 1999)).

The Fifth Circuit also rejected the argument that restricting the proximate cause requirement to the catch-all provision would somehow “open the door to limitless restitution.” 636 F.3d at 200. The Fifth Circuit noted that “[t]he statute itself includes a general causation requirement in its definition of victim” that prevents unbounded restitution awards. *Id.*

The Fifth Circuit finally rejected the claim that allowing Amy to collect the full measure of her losses from the defendant constituted excessive punishment. Under the general restitution statute, district courts are authorized to hold offenders jointly and severally liable for losses they cause. *Id.* (*citing* 18 U.S.C. § 3664(m)(1)(A)(ii)). As a result, if the defendant wanted to seek contribution from other defendants, he was able to do so. But Amy, the “innocent recipient” of harm, was relieved of the burden of tracking down defendants around the country. *Id.*

In April of this year, just one month later, three other judges on the Fifth Circuit were presented with the same issue of how to interpret § 2259 – an issue “raised in a large number of federal district and circuit courts in recent years.” *United States v. Wright*, 639 F.3d 679, 682 (5th Cir. 2011). This Fifth Circuit panel followed the earlier (and thus binding) *In re Amy* decision. But all three judges on the panel joined a “special concurrence.” They wrote “separately to express [their] disagreement with the recent holding by the *In re Amy* panel that § 2259 does not limit the victim’s recoverable losses to those proximately caused by the defendant’s offense and to urge the court to grant *en banc* review of that decision.” *Id.* at 686 (Davis, King, and Southwick, concurring). These judges noted that other courts of appeals and district courts have read a general proximate causation requirement into § 2259, but have nonetheless “come to different conclusions regarding the amount of restitution owed in light of § 2259’s proximate causation requirement.” *Id.* at 690 & n. 6 (Davis, King, and Southwick, concurring) (*citing* numerous conflicting opinions).

The D.C. Circuit, in its widely-discussed ruling in this case below,² specifically disagreed with the Fifth

² For example, Ohio State University law professor Douglas Berman wrote on his popular Sentencing Law and Policy Blog: “I have now had a chance to read closely yesterday’s very important . . . D.C. Circuit child porn[ography] restitution opinion in *In re: Amy*. . . . The initial comments in my first post on the case spotlight how many dynamic (and Circuit splitting)

(Continued on following page)

Circuit (as well as with other Circuits) on how to interpret the child pornography statute. The D.C. Circuit decided to join the plurality of Circuits that have imposed a general proximate cause requirement. But “[u]nlike those [other] circuits, . . . our reasoning rests not on the catch-all provision of § 2259(b)(3)(F), but rather on traditional principles of tort and criminal law and on § 2259(c)’s definition of ‘victim’ as an individual harmed ‘as a result of’ the defendant’s offense.” App. 15.

The D.C. Circuit thought it could begin by “presum[ing] that a restitution statute incorporates the traditional requirement of proximate cause unless there is good reason to think Congress intended the requirement not to apply.” App. 17. The D.C. Circuit then went on to specifically reject the Fifth Circuit’s contrary analysis: “We find the Fifth Circuit’s argument to the contrary unpersuasive.” App. 17. The Fifth Circuit had highlighted the fact that, unlike § 2259, other restitution statutes specifically contain a definition of “victim” that includes a proximate harm requirement. The D.C. Circuit thought this revealed “nothing” about congressional intent because these general restitution statutes were enacted after § 2259. App. 18.

issues are addressed in the ruling. . . .” *Can Courts Really Develop ‘Some Principled Method’ for Child Porn Downloading Restitution?*, http://sentencing.typepad.com/sentencing_law_and_policy/2011/04/can-courts-really-develop-some-principled-method-for-child-porn-downloading-restitution.html (Apr. 20, 2011).

The D.C. Circuit also disagreed with the Fifth Circuit's analysis about the need for a "proximate cause" requirement to avoid limitless liability. The D.C. Circuit agreed that § 2259 contains a general causation requirement. "But a 'general' causation requirement without a subsidiary proximate causation requirement is hardly a requirement at all." App. 19.

The D.C. Circuit recognized that other Circuits had concluded that § 2259 contains a general proximate cause requirement based on the language in the catch-all provision. The D.C. Circuit did not rely on the catch-all provision, App. 15, presumably because it found the Fifth Circuit analysis on this particular issue to be persuasive. But several other Circuits have extrapolated from the "proximate result" language in the catch-all provision to a general "proximate cause" requirement in other provisions.

One of the most recent of these decisions is *United States v. McDaniel*, 631 F.3d 1204 (11th Cir. 2011). In that case, Government prosecutors took the position that "[b]ecause 'proximate result' is included in only the last of the enumerated types of losses in § 2259(b)(3)(F), . . . proximate cause is not required for the first five categories of loss." *Id.* at 1208. The Eleventh Circuit, however, rejected the prosecutors' position, holding instead that the proximate cause requirement found in the catch-all provision should be read back through the other five previous provisions under general principles of statutory construction. *Id.* at 1208-09.

The Ninth Circuit has also read a general proximate cause requirement into the statute. In *United States v. Laney*, 189 F.3d 954 (9th Cir. 1999), the Circuit held that the child pornography restitution statute “incorporates a requirement of proximate causation.” *Id.* at 965. The Ninth Circuit relied on the definition of a child pornography “victim” as a person “harmed *as a result* of a commission of a crime,” 18 U.S.C. § 2259(c) (emphasis added), as well as the “proximate result” language in the catch-all provision. *Id.* at 965.

The Ninth Circuit very recently followed *Laney* in *United States v. Kennedy*, No. 10-30065, ___ F.3d ___, 2011 WL 2675918 (9th Cir. July 11, 2011). The Ninth Circuit explained that the issue of what kind of connection is required between a child pornography defendant’s crimes and the victim’s losses is a “difficult issue of statutory interpretation [that] has been considered, but not satisfactorily resolved, by several of our sister circuits.” *Id.* at *5. The Ninth Circuit recognized that “a circuit split has developed as to whether § 2259 requires proximate cause as to all the types of losses described in § 2259(b)(3)(F), or only as to ‘any other losses suffered by the victim as a proximate result of the offense,’ § 2259(b)(3)(F).” *Id.* at *7 n. 13. The Ninth Circuit acknowledged, however, that *Laney* was controlling Circuit precedent and therefore it had “no occasion to revisit this question.” *Id.* The Ninth Circuit went on to recognize that “[a]lthough our sister circuits have also struggled” with the issue

of calculating what losses are proximately caused in a child pornography case, “no court has yet developed a method for calculating a restitutionary award under § 2259 that comports with the statutory language.” *Id.* at *11.

Finally, the Third Circuit has likewise stated that proximate cause is a prerequisite to a child pornography restitution award. *United States v. Crandon*, 173 F.3d 122 (3d Cir. 1999), concluded that “once proximate cause is established, the statute requires the court to order restitution for the ‘full amount of the victim’s losses.’” *Id.* at 126 n. 2.

In sum, the Circuits are plainly split on the frequently recurring and “difficult” question of how to interpret the child pornography restitution statute.

B. District Courts Around the Country Have Repeatedly Had to Interpret the Child Pornography Restitution Statute and Have Reached Widely Varying Results.

The district courts are likewise severely divided on how to interpret the child pornography restitution statute. The numerous differing district court opinions applying the statute to essentially identical facts make clear not only that they are facing a tidal wave of litigation on child pornography restitution but also that the lower courts are unlikely to coalesce around any common approach without guidance from this Court.

Some district courts have held that victims seeking restitution under § 2259 need not establish proximate cause. For example, *United States v. Staples*, 2009 WL 2827204 (S.D. Fla. 2009), awarded \$3,680,153 in restitution to a child pornography victim. The court explained that § 2259 is a mandatory statute requiring an award for the “full amount of the victim’s losses.” *Id.* at *2-*4.³ Similarly, *United States v. Freeman*, No. 08-CR-00022, amended judgment at 8 (N.D. Fla. July 9, 2009), awarded \$3,263,758 in restitution to a child pornography victim. Other district courts have given substantial restitution awards without looking to a proximate cause requirement. *See, e.g., United States v. Burgess*, No. 09-CR-17, judgment at 5a (W.D.N.C. Aug. 27, 2010) (awarding \$305,219.85 in restitution jointly and severally to the victim); *United States v. Wright*, No. 09-CR-103, judgment at 7 (E.D. La. Dec. 16, 2009) (awarding \$529,661), *vacated and remanded*, *United States v. Wright*, 639 F.3d 679, 686 (5th Cir. 2011) (district court needs to explain calculation); *United States v. Trantham*, No. 09-CR-027, judgment at 5 (N.D. Tex. Jan. 26, 2010) (holding defendant jointly and severally liable for \$219,546.10 in restitution).

In contrast, other district courts have read a general proximate cause requirement into the statute from the catch-all provision and then concluded that

³ A petition for certiorari is currently pending in this Court. *Staples v. United States*, No. 10-1132 (filed Mar. 11, 2011).

proximate cause was not established. All of these decisions deny child pornography victims any restitution. *See, e.g., United States v. Berk*, 666 F.Supp.2d 182, 193 (D. Maine 2009) (“natural construction” of catch-all provision creates general proximate cause requirement); *United States v. Chow*, 760 F.Supp.2d 335, 342 (S.D.N.Y. 2010) (“The Court respectfully disagrees with the district courts that have found proximate cause to exist in cases such as this one, involving only possession of widely distributed materials.”); *United States v. Covert*, 2011 WL 134060, at *6, *9 (W.D. Pa. Jan. 14, 2011) (expressing desire not to turn § 2259 into a strict liability statute, but noting victim’s counsel’s position on § 2259 is “not unreasonable”); *United States v. Faxon*, 689 F.Supp.2d 1344, 1360-61 (S.D. Fla. 2010) (court has no conceivable idea as to how many defendants may be involved, so there is no way to apportion restitution to one defendant); *United States v. Patton*, 2010 WL 1006521 at *2 (D. Minn. March 16, 2010) (without specific evidence of proximate cause, any award would be an “arbitrary calculation”); *United States v. Rhodes*, 2011 WL 108951 at *3 (D. Mont. Jan. 12, 2011) (because catch-all provision written in the conjunctive, proximate cause requirement applies generally); *United States v. Solsbury*, 727 F.Supp.2d 789, 796-97 (D.N.D. 2010) (the child pornography restitution scheme “is currently unworkable in the criminal arena”. . . . [T]hese troublesome cases cry out for an appropriate restitution remedy, but the subject is “one best determined by Congress – not by a variety of conflicting and inconsistent awards and

decisions as have evolved over the past year.”); *United States v. Van Brackle*, 2009 WL 4928050 at *3-*4 (N.D. Ga. Dec. 17, 2009) (despite Government argument that restitution can be awarded without proof of proximate cause, restitution without such proof would be pure speculation and risk violating the Eighth Amendment); *United States v. Woods*, 689 F.Supp.2d 1102, 1112 (N.D. Iowa 2010) (proximate cause required for restitution award and “[u]nfortunately” the court is unable to find proximate cause).

Still other district courts read a general proximate cause (or, in some courts, simply a “causation”) requirement into the statute, but then find that the victim has provided sufficient proof to satisfy the requirement and obtain at least some restitution. The approaches are often arbitrary and have led to widely differing outcomes. For example, a number of district courts have mechanically applied a scheme that apportions damages based upon a percentage of the victim’s losses proximately caused by the defendant. *See, e.g., United States v. Ontiveros*, 2011 WL 2447721 (N.D. Ind. June 15, 2011) (noting split of authority between the D.C. Circuit in *Monzel* and the Fifth Circuit in *In re Amy* and siding with the D.C. Circuit; awarding 1% of losses or \$4,500 in restitution); *United States v. Lindauer*, 2011 WL 1225992 at *3 (W.D. Va. 2011) (“Although the Fifth Circuit’s analysis of the language of the [child pornography] restitution statute may ultimately be adopted as correct and appropriate, my present view . . . is that proximate causation is required”; awarding 5% of

total losses or \$5,448 in restitution); *United States v. Mather*, 2010 WL 5173029 at *6 (E.D. Cal. Dec. 13, 2010) (relying on presumptive \$150,000 minimum damages award for child pornography civil actions found in 18 U.S.C. § 2252, and concluding that 2% is the appropriate award; awarding \$3,000 in restitution); *United States v. Hicks*, 2009 WL 4110260 at *5-*6 (E.D. Va. Nov. 24, 2009) (estimating the minimum number of defendants likely to be successfully prosecuted, then awarded restitution based on the defendant's "share" of the total damages proximately caused from the predicted population; awarding restitution for roughly one fiftieth of the total proven damages, or \$3,000); *United States v. McDaniel*, No. 08-CR-026, Restitution Order at 30-32 (N.D. Ga. Dec. 22, 2009) (apportioning \$12,740 in restitution from total damages proximately caused, by estimating twenty likely successful prosecutions), *aff'd*, 631 F.3d 1204 (11th Cir. 2011).

Other district courts determine the losses "proximately caused" by looking to the quantity of child pornography possessed by the defendant. *See United States v. Elhert*, No. 09-CR-05203, judgment at 7-11 (W.D. Wash. Oct. 19, 2009) (\$1,000 and \$5,000 to victims respectively for the number of images in defendant's possession per Government's recommendation); *United States v. Kennedy*, No. 08-CR-354, judgment at 5-6 (W.D. Wash. Apr. 21, 2010) (awarding \$65,000 in restitution, \$1,000 for each image possessed), *rev'd*, *United States v. Kennedy*, No. 10-30065, ___ F.3d ___, 2011 WL 2675918 (9th Cir. July

11, 2011); *United States v. McCadden*, No. 09-CR-60085, judgment at 6 (D. Ore. May 26, 2011) (awarding \$126,000 in total restitution; \$56,000, \$12,000, and \$36,000 respectively to the victims as well as a \$20,000 contribution to NCMEC).

Still other district courts make a qualitative assessment of the defendant's role in causing harm. *See, e.g., United States v. Brunner*, No. 08-CR-16, Restitution Order at 7-10 (W.D.N.C. Jan. 12, 2009) (apportioning \$6,000 and \$1,500 in restitution based on the "minor nature" of the defendant's contribution to each victim's proximately caused losses).

In view of all these uncertainties in interpreting the restitution statute, in many cases the Government and defendant (and sometimes the victims as well) negotiate and stipulate to the appropriate restitution award. *See, e.g., United States v. Traynor*, No. 09-CR-00273 (D.N.J. Oct. 7, 2009) (\$15,000 stipulated restitution agreed to by parties); *United States v. Bruce*, No. 08-CR-026, order at 2 (E.D. Tex. Dec. 22, 2009) (stipulation for \$3,000 restitution, parties encouraged to include stipulations in future pleas to efficiently utilize judicial resources).

Finally, a few district courts – including the district court in this case – award "nominal" restitution in an arbitrary amount. *See App. 42* (awarding "nominal" damages of \$5,000); *United States v. Church*, 701 F.Supp.2d 814, 834-35 (W.D. Va. 2010) (in light of lack of evidence of losses proximately caused, \$100 nominal damages appropriate).

In short, it is clear that the district courts have reached a variety of different conclusions on how to interpret the child pornography restitution statute in cases involving essentially identical facts.

C. This Case Presents the Right Opportunity for Resolving the Often-Recurring Issue of How to Interpret the Child Pornography Restitution Statute.

As the preceding discussion of numerous courts of appeals and district court cases suggests, the issue of how to interpret § 2259 is a frequently recurring one. This is hardly surprising given recent increases in both the number of child pornography offenses and the federal prosecutions of this serious crime. *See, e.g.*, U.S. Justice Dept., Project Safe Childhood, <http://www.projectsafechildhood.gov/docs/factsheet.pdf> (since Oct. 1, 2006, 8464 prosecutions for sexual exploitation of minors; number has increased each year); <http://www.projectsafechildhood.gov/about.htm> (“disturbing” increases in number of child pornography offenses being committed). In the last fiscal year alone, federal district court judges imposed 1,886 sentences in child pornography cases. U.S. SENTENCING COMMISSION, [2010] SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 13 (15th ed. 2011). In those cases, victims of child pornography offenses are increasingly seeking restitution. *See Note*, Michael A. Kaplan, *Mandatory Restitution: Ensuring that Possessors of Child Pornography Pay for Their Crimes*, 61 SYRACUSE L. REV. 531, 552 (2011) (noting hundreds of child

pornography restitution requests filed in the district courts recently). For example, Amy alone has filed 684 restitution requests since April 22, 2009, in (essentially) every judicial district in the country. And when victims like Amy file restitution requests, district courts must always confront the issue of how to interpret § 2259 because Congress has directed that “[t]he issuance of a restitution order under [§ 2259] is mandatory.” 18 U.S.C. § 2259(b)(4).

In view of the clear division of opinion on how to interpret the child pornography restitution statute, this Court will need to step in sooner or later to resolve the question. *See, e.g.*, Professor Douglas Berman, *Fifth Circuit Rules in Child Porn Case That No Proximate Causation Needed to Get Restitution Under CVRA*, http://sentencing.typepad.com/sentencing_law_and_policy/2011/03/fifth-circuit-rules-in-child-porn-case-that-no-proximate-causation-needed-to-get-restitution-under-c.html (Mar. 23, 2011) (in view of the definite Circuit split, “it is now even clearer that the U.S. Supreme Court will have to take up this issue before too long.”); Robert William Jacques, *Amy and Vicky’s Cause: Perils of the Federal Restitution Framework for Child Pornography Victims*, 45 GA. L. REV. 1167, 1188 (2011) (as victims of child pornography “continue to petition courts and appeals are brought, there is likely to be a continued split among courts that must be resolved.”). This case presents the right opportunity to determine how § 2259 should be applied. The D.C. Circuit has clearly split from the Fifth Circuit’s position and held that § 2259 contains

a general proximate cause requirement. The proximate cause issue also makes an important difference to the outcome of this case, as potentially millions of dollars in a restitution award to Amy are at stake.

Perhaps even more significant, most of the other child pornography cases pending in the lower courts are not good vehicles to review the proximate cause issue. In the great majority of the other cases pending in the lower courts, only the Government and the defendant are litigating the restitution issue. In a typical child pornography case, a child pornography victim will file her own victim impact statement in the district court seeking restitution; but she will not have legal counsel appear to present legal arguments and will not be a formal party to the action. Given that the Justice Department's current position is apparently that § 2259 contains a general proximate cause requirement,⁴ many of the lower court cases thus do not stand in an adversarial posture – i.e., the Government and the defendant are *both* agreeing that § 2259 requires proof of proximate cause. In this case, in contrast, the victim seeking restitution – Amy – has obtained appellate legal counsel to press the opposite position. Amy was undeniably a proper party in the court of appeals below and is the petitioner now seeking certiorari from this Court. Accordingly,

⁴ Until recently, many career federal prosecutors took the opposite position that § 2259 did not contain such a requirement. *See, e.g., United States v. Van Brackle*, 2009 WL 4928050 at *3 (N.D. Ga. Dec. 17, 2009).

this Court should grant Amy’s petition because this is one of the few cases in which the Court can receive the adversarial briefing and argument necessary to sharply present the important proximate cause issue that is bedeviling the lower courts.

D. The D.C. Circuit Misinterpreted the Child Pornography Restitution Statute.

The D.C. Circuit’s conclusion below that the child pornography restitution statute contains a general proximate harm requirement is badly flawed and, if left uncorrected, will deprive many child pornography victims of the mandatory “full” restitution that Congress has ordered courts to award. Indeed, as the Fifth Circuit concluded, it is “clearly and indisputably” wrong to read into the statute words of limitation that Congress chose not to impose. *In re Amy Unknown*, 636 F.3d at 198. In drafting § 2259, Congress referred to losses that were the “proximate result” of the defendant’s crime only in the catch-all provision, not for other provisions involving more precisely defined kinds of losses (e.g., medical expenses, lost income). “As a general proposition, it makes sense that Congress would impose an additional restriction on the catch-all category of ‘other losses’ that does not apply to the defined categories. By construction, Congress knew the kinds of expenses necessary for restitution under subsection A through E; equally definitionally, it could not anticipate what victims

would propose under the open-ended subsection F.” *Id.*⁵

In § 2259, Congress sought to address the serious, life-long injuries that child pornography victims suffer. As this Court has explained, “A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography. . . . It is the fear of exposure and the tension of keeping the act secret that seem to have the most profound emotional repercussions.” *New York v. Ferber*, 458 U.S. 747, 759 n. 10 (1982). In adopting § 2259, Congress intended “to make whole . . . [these] victims of sexual exploitation.” *United States v. Danser*, 270 F.3d 451, 455 (7th Cir. 2001). The generous remedial purposes were well reviewed in *United States v. Julian*, 242 F.3d 1245 (10th Cir. 2001), which explained that Congress generally sought through mandatory restitution “to ensure that ‘the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well being.’” *Id.* at 1247 (*quoting* SEN. REP. 104-179, at 42-44 (1995)).

⁵ The child pornography statute is not the only example of Congress eschewing broad proximate cause requirements. For example, last month in *CSX Transportation, Inc. v. McBride*, ___ U.S. ___, 2011 WL 2472795 (June 23, 2011), this Court held that the Federal Employers’ Liability Act (FELA) does not incorporate “proximate cause” standards developed in nonstatutory common-law tort actions. This Court explained that historically “[c]ommon-law ‘proximate cause’ formulations varied, and were often both constricted and difficult to comprehend.” Slip op. at 6.

Yet in spite of these broad purposes, the D.C. Circuit took this generous statute and converted it into a parsimonious regime that is “largely unworkable.” *United States v. Paroline*, 672 F.Supp.2d 781, 793 n. 12 (E.D. Tex. 2009), *rev’d*, 636 F.3d 190 (5th Cir. 2011). As the plethora of different attempts at calculating restitution demonstrate, it is almost impossible for a child pornography victim to trace precisely how her losses were “proximately” caused.

Indeed, in a case involving essentially identical facts to this one, the Ninth Circuit recently held that Amy was entitled to *no* restitution at all. Operating under a proximate cause regime like that created by the D.C. Circuit’s opinion below, the Ninth Circuit stated that “we suspect that § 2259’s proximate cause and reasonable calculation requirements will continue to present serious obstacles for victims seeking restitution in these sorts of cases. Nevertheless, the responsibility lies with Congress, not the courts, to develop a scheme to ensure that defendants . . . are held liable for the harms they cause through their participation in the market for child pornography.” *United States v. Kennedy*, No. 10-30065, ___ F.3d ___, 2011 WL 2675918 at *12 (9th Cir. July 11, 2011). The Ninth Circuit did not pause to consider whether it was responsible for creating these “serious obstacles” in the first instance by reading into the statute its own “judge-made limitations patently at odds with the purpose of [§ 2259].” *In re Amy*, 591 F.3d at 797 (Dennis, J., dissenting).

If the D.C. Circuit's opinion is left in place (along with those in the Third, Ninth, and Eleventh Circuits), then Amy and countless other child pornography victims will have to try and prove what percentage of their losses link to a particular defendant in a particular case – as opposed to losses caused by defendants in other jurisdictions, other criminals who have not yet been apprehended and prosecuted, and others who will illegally view these images in years to come. Congress cannot have intended for child pornography victims to bear such a practically impossible burden under which “the intent and purposes of § 2259 would be impermissibly nullified . . . in virtually *every* case. . . .” *In re Amy*, 591 F.3d at 797 (Dennis, J., dissenting) (emphasis in original). Instead, Congress broadly commanded that district courts must award restitution in every single case for “the full amount of the victim’s losses.” 18 U.S.C. § 2259(b)(1). This Court should review and reverse the D.C. Circuit’s ill-conceived decision.

II. The Lower Courts are Intractably Divided on the Appellate Remedies Available to Crime Victims.

This Court should also grant the petition to review the important question of the appellate remedies available to crime victims. In its decision below, the D.C. Circuit acknowledged clear Circuit splits regarding whether crime victims can receive ordinary appellate review of their claims through a CVRA mandamus petition or through a direct appeal. The

Court should review this fundamental issue and hold that crime victims, no less than other litigants, receive ordinary appellate review of their claims in the nation's appellate courts.

A. The Circuits Are Deeply Split On the Proper Standard of Review for Reviewing CVRA Mandamus Petitions Filed by Crime Victims.

Like many other crime victims seeking to protect their rights, Amy proceeded below by way of a CVRA mandamus petition. The provision authorizing this petition, 18 U.S.C. § 3771(d)(3), specifically alters ordinary discretionary mandamus standards by requiring the court of appeals to “take up and decide” the crime victim’s petition. *See* 150 CONG. REC. 7295, 7304 (Apr. 22, 2004) (statement of Sen. Feinstein) (“[W]hile mandamus is generally discretionary, this provision means that courts must review these cases.”).

Despite this clear statutory language and fully supportive legislative history, the Circuits have split on whether crime victims are entitled to ordinary appellate review of their claims in CVRA petitions or merely deferential mandamus review. The Second, Ninth, and Eleventh Circuits have all afforded crime victims ordinary appellate review in published opinions, and the Third Circuit has done the same in an unpublished opinion. *See In re W.R. Huff Asset Management Co., LLC*, 409 F.3d 555, 562 (2d Cir. 2005)

(In light of Congress' recognition that crime victims would routinely be seeking such review, "[i]t is clear, therefore, that a [crime victim] seeking relief pursuant to the mandamus provision set forth in § 3771(d)(3) need not overcome the hurdles typically faced by a petitioner seeking review of a district court determination through a writ of mandamus."); *Kenna v. U.S. District Court for the Central District of California*, 435 F.3d 1011, 1017 (9th Cir. 2006) ("The CVRA creates a unique regime that does, in fact, contemplate routine interlocutory review of district court decisions denying rights asserted under the statute."); *In re Stewart*, 552 F.3d 1285, 1288 (11th Cir. 2008) (reviewing crime victims' petition without applying deferential mandamus review); *In re Walsh*, 229 Fed. Appx. 58, 61, 2007 WL 1156999 at *2 (3d Cir. 2007) ("mandamus relief is available under a different, less demanding, standard under 18 U.S.C. § 3771").

In contrast, four other Circuits (including the D.C. Circuit below) have held that crime victims proceeding by way of a CVRA mandamus petition receive only deferential mandamus review. *See* App. 9-10 (acknowledging that four Circuits have given crime victims ordinary appellate review, but "[w]e think the best reading of the statute favors applying the traditional mandamus standard."); *In re Antrobus*, 519 F.3d 1123, 1124 (10th Cir. 2008) (applying traditional mandamus standards because where "Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of

practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word.”); *In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008) (applying traditional mandamus standards “for the reasons stated in” *Antrobus*); *In re Acker*, 596 F.3d 370, 372 (6th Cir. 2010) (finding *Antrobus* to be more “persuasive” than alternative Circuit rulings).

This acknowledged Circuit split⁶ means that crime victims in different parts of the country are receiving different protection of their congressionally-promised rights. This issue is one that recurs often, as the foundational question appellate courts must address whenever they receive a crime victim’s CVRA petition is the standard of review they will give to that petition.

The issue is ripe for this Court’s review.⁷ The Circuit courts have distilled two clearly competing interpretations of the CVRA. In those Circuits that give victims regular appellate review, victims receive the normal appellate protections that other litigants receive. See *In re Rendon Galvis*, 564 F.3d 170, 174 (2d Cir. 2009) (discussing CVRA standard review). In contrast, in those Circuits that provide victims only

⁶ Two other Circuits have acknowledged the Circuit split without taking a position on it. *United States v. Aguirre-González*, 597 F.3d 46, 56 (1st Cir. 2010); *In re Brock*, 262 Fed. Appx. 510, 512 (4th Cir. 2008).

⁷ The Court currently has before it another petition for certiorari raising the same issue. *In re James R. Fisher*, No. 10-1518 (filed June 13, 2011).

traditional mandamus review, crime victims must prove that the lower court committed “clear and indisputable” error. App. 13. All that remains is for this Court to decide which of the two views is correct.

On the merits of the question, this Court should affirm the view of those Circuits that have extended crime victims ordinary appellate protection of their rights. The D.C. Circuit erroneously thought that the fact that Congress used the term “mandamus” in the CVRA meant that “it wanted mandamus” as that term is conventionally understood. App. 19. But Congress obviously sought to change the ordinary discretionary mandamus remedy into a vigorous tool for protecting crime victims’ rights. Congress thus instructed courts of appeals that they must “take up and decide” such applications. 18 U.S.C. § 3771(d)(3). In doing so, as the co-sponsor of the Act explained, the CVRA put in place “*a new use of a very old procedure, the writ of mandamus. This provision will establish a procedure where a crime victim can, in essence, immediately appeal a denial of their rights by a trial court to the court of appeals.*” 150 CONG. REC. 7295 (statement of Sen. Feinstein) (emphases added). See generally Paul G. Cassell, *Protecting Crime Victims in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims’ Rights Act’s Mandamus Provision*, 87 DENV. U.L. REV. 599, 621-25 (2010).

Congress reinforced its command for non-discretionary appellate protection by very clearly directing all courts that they “shall ensure that the

crime victim is afforded the rights described in [the CVRA].” 18 U.S.C. § 3771(b)(1) (emphasis added). Of course, appellate courts would not be following that command if they turned the appellate protections for crime victims into a “mere formality.” *In re Amy Unknown*, 636 F.3d at 197 (Jones, J., concurring). As the CVRA’s Senate co-sponsor recently noted in a letter to the Justice Department, the CVRA was “intended to allow crime victims to take accelerated appeals from district court decisions denying their rights and have their appeals reviewed under ordinary appellate standards.” 157 CONG. REC. S3608 (June 8, 2011) (statement of Sen. Kyl). The D.C. Circuit (and three other Circuits) are not providing crime victims the appellate protections Congress wants.

B. The Courts of Appeals are Also Starkly Divided on Whether Crime Victims Can Protect Their Rights By Taking a Direct Appeal Under 28 U.S.C. § 1291.

The Courts of Appeals are also badly divided on whether crime victims who are denied their rights in the district court can take a direct appeal to the courts of appeals. Title 28 U.S.C. § 1291, the general appeals statute, confers on courts of appeals “jurisdiction [over] appeals from all final decisions of the district courts.” This far-reaching statute is generally understood as ensuring that “[t]he courts of appeals have jurisdiction to review virtually every action taken by the district court. . . .” 15A WRIGHT, MILLER

& COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 3903 at 132 (1992 and 2009 Supp.). But contrary to the general sweep of the statute, the D.C. Circuit below (joining several other Circuits) held that “mandamus is a crime victim’s only recourse for challenging a restitution order” that denies a victim restitution. App. 27-36. Other Circuits, however, have allowed crime victims to directly appeal both restitution and other issues. This issue has been recently described as a “jurisdictional conundrum” of considerable “difficulty.” See *In re Amy Unknown*, 636 F.3d 190, 197 n. 9, 194 (5th Cir. 2011) (Jones, J., concurring).

In its decision below, the D.C. Circuit thought that there was an implicit exception to § 1291’s broad language that bars crime victims from appealing issues touching on a defendant’s sentence. App. 29. In reaching this conclusion, the D.C. Circuit recognized that considerable Circuit precedent allows appeals in criminal cases by non-parties. App. 29-30 (*citing* six court of appeals decisions). Indeed, the D.C. Circuit acknowledged that crime victims have been allowed to directly appeal in criminal cases when their rights are at stake. App. 30 (*citing Doe v. United States*, 666 F.2d 43, 45 (4th Cir. 1981) (rape victim allowed to appeal adverse “rape shield statute” ruling)). The D.C. Circuit, however, thought that there was a judicially-created “rule” (not found in the plain language of § 1291) precluding crime victims from appealing restitution orders or other orders affecting a defendant’s sentence. App. 29.

In reaching this conclusion, the D.C. Circuit relied on a plurality of Circuits that had ruled that victims lacked sufficient standing in obtaining a favorable restitution order to be able to appeal. App. 33 (citing *United States v. Mindel*, 80 F.3d 394, 398 (9th Cir. 1996); *United States v. Kelley*, 997 F.2d 806, 807 (10th Cir. 1993); *United States v. Johnson*, 983 F.2d 216, 217 (11th Cir. 1993); *United States v. Grundhoefer*, 916 F.2d 788, 793 (2d Cir. 1990)). In staking out this position, the D.C. Circuit was forced to acknowledge, however, that at least two Circuits had allowed crime victims to appeal restitution issues. App. 33-34 (citing *United States v. Perry*, 360 F.3d 519, 524-33 (6th Cir. 2004) (crime victim allowed to appeal an adverse ruling on restitution lien); *United States v. Kones*, 77 F.3d 66, 68 (3d Cir. 1996) (crime victim allowed to appeal adverse restitution decision)). And, as explained in *Perry* – the most recent of these decisions – the earlier decisions were all decided under a discretionary restitution regime. They thus rested on the propositions that “the victim had no right to receive anything at all” and that restitution “does not turn on the victim’s injury, but on the penal goals of the State.” 360 F.3d at 530. Under the new mandatory restitution provisions, however, “[n]one of this is true anymore.” *Id.* After *Perry*, the Circuits became even more badly divided, as the Eighth Circuit in *United States v. United Security Savings Bank*, 394 F.3d 564 (8th Cir. 2004) (per curiam), held without lengthy explanation that a crime victim could not appeal a restitution order under even a mandatory restitution statute. *Id.* at

567 (acknowledging that *Perry* had reached a different conclusion, but deciding that victim could not appeal adverse restitution ruling).⁸

The D.C. Circuit also thought it significant that the CVRA gives the Government the right to raise crime victims' issues in an appeal filed by a defendant. App. 32 (*citing* 18 U.S.C. § 3663(d)(4)). But as the Senate co-sponsor of the CVRA has explained, this provision was not "intended to bar crime victims from taking an ordinary appeal from an adverse decision affecting their rights (such as a decision denying restitution) under 28 U.S.C. § 1291." 157 CONG. REC. S3609 (June 8, 2011) (statement of Sen. Kyl).

Finally, the D.C. Circuit noted several Circuits had denied crime victims the right to appeal adverse CVRA rulings. App. 23 (*citing* *United States v. Hunter*, 548 F.3d 1308, 1317 (10th Cir. 2008); *United States v. Aguirre-González*, 597 F.3d 46, 52-55 (1st Cir. 2010)). But the D.C. Circuit conceded that the Circuits were split on this question as well. App. 23 (*citing* *In re Siler*, 571 F.3d 604 (6th Cir. 2009) (permitting victims to appeal district court's denial of their CVRA motion to obtain access to defendant's

⁸ Reviewing these conflicting cases, one judge recently commented that "[r]esolution" of the issue of whether victims can appeal a restitution ruling is "difficult" because the cases employ "conflicting reasoning" and often "ignore their predecessors"). *In re Amy Unknown*, 636 F.3d at 196 (Jones, J., concurring).

pre-sentence report)); *cf. In re Acker*, 596 F.3d 370 (6th Cir. 2010) (crime victim had no right to appeal a district court decision denying restitution where victim had filed a mandamus petition raising “identical issues”).

In short, there is considerable disagreement among the Circuits on whether a crime victim can appeal an adverse district court decision. This Court should resolve the fundamental issue of great importance to crime victims seeking to protect their rights in the courts of appeals.

C. This Case Presents a Good Opportunity to Review the Appellate Remedies Available to Crime Victims.

While it is not necessary that the Court grant the petition on the second question presented,⁹ this case presents a good opportunity for the Court to decide the fundamental question of what appellate remedies are available to crime victims. In the court below, Amy availed herself of both possible appellate remedies – a CVRA mandamus petition and a direct appeal. Ultimately, while the D.C. Circuit granted her mandamus petition in part, it denied her full restitution by relying on the high burden imposed on

⁹ In its decision below, the D.C. Circuit clearly decided the legal question of the proper construction of § 2259 – i.e., whether § 2259 contains a general “proximate cause” requirement. That issue is not intertwined with any jurisdictional issue and thus can be reviewed separately.

mandamus petitioners. *See* App. 20-21 (district court “did not clearly and indisputably err” by declining to award full restitution). And it simply dismissed her appeal. App. 30. Thus, the D.C. Circuit never gave Amy the ordinary appellate review of her claims that other litigants receive. The issue of whether crime victims can receive appellate protection of their rights is an important and recurring one that this Court should review.

◆

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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App. 1

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 7, 2011 Decided April 19, 2011

No. 11-3008

UNITED STATES OF AMERICA,
APPELLEE

v.

MICHAEL M. MONZEL,
APPELLEE

AMY,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:09-cr-00243).

No. 11-3009.

IN RE: AMY, THE VICTIM IN THE
MISTY CHILD PORNOGRAPHY SERIES,
PETITIONER

On Petition for Writ of Mandamus.

Paul Cassell argued the cause for and filed the
petition for writ of mandamus for appellant/petitioner
Amy.

Nicholas P. Coleman argued the cause for and filed the response for appellee/respondent United States of America. Roy W. McLeese III, Assistant U.S. Attorney, entered an appearance.

David W. Bos, Assistant Federal Public Defender, argued the cause and filed the response for appellee/respondent Michael M. Monzel. With him on the response were A.J. Kramer, Federal Public Defender, and Neil H. Jaffee, Assistant Federal Public Defender.

Before: GINSBURG, ROGERS, and GRIFFITH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GRIFFITH.

GRIFFITH, *Circuit Judge*: In December 2009, respondent Michael Monzel pled guilty to possession of child pornography. One of the images he possessed depicted the petitioner, who proceeds in this matter under the pseudonym “Amy.” Amy subsequently sought \$3,263,758 in restitution from Monzel. The district court, however, awarded what it called “nominal” restitution of \$5000, an amount it acknowledged was less than the harm Monzel caused her. Amy challenges the award in a petition for mandamus and by direct appeal. We grant her petition in part because the district court admitted the restitution award was smaller than the amount of harm she suffered as a result of Monzel’s offense, and we dismiss her direct appeal because it is not authorized by statute.

I

A

This case involves the interplay of three statutes. 18 U.S.C. § 3771, also known as the Crime Victims' Rights Act (CVRA), grants crime victims "[t]he right to full and timely restitution as provided in law." *Id.* § 3771(a)(6). If a district court denies the relief sought, the Act provides that the victim or the government "may petition the court of appeals for a writ of mandamus." *Id.* § 3771(d)(3). The court of appeals is then required to "take up and decide such application forthwith within 72 hours after the petition has been filed." *Id.*

18 U.S.C. § 2259 governs restitution awards for victims of child sexual exploitation and directs courts to award "the full amount of the victim's losses," *id.* § 2259(b)(1), defined as costs incurred for medical services; physical and occupational therapy or rehabilitation; necessary transportation, temporary housing, and child care expenses; lost income; attorneys' fees and other litigation costs; and "any other losses suffered by the victim as a proximate result of the offense," *id.* § 2259(b)(3). Neither the defendant's economic circumstances nor the victim's entitlement to compensation from another source may diminish the amount of the victim's award. *See id.* § 2259(b)(4)(B).

Finally, 18 U.S.C. § 3664 sets forth rules for issuing and enforcing restitution awards. As relevant here, the statute provides that "[a]ny dispute as to

the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence.” *Id.* § 3664(e). “The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense” rests with the government. *Id.*

B

On December 10, 2009, respondent Michael Monzel pled guilty to one count of distributing child pornography in violation of 18 U.S.C. § 2252(a)(2) and one count of possessing child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). The National Center for Missing and Exploited Children identified petitioner Amy as the minor depicted in one of the pornographic images Monzel possessed but did not distribute. Amy filed a victim impact statement seeking \$3,263,758 in restitution from Monzel, an amount she claims reflects her total losses from the creation and distribution of pornographic images of her as a child – including images of her being sexually abused. Monzel argued that the district court should award Amy no more than \$100 because the government had failed to show what portion of Amy’s losses he had caused.

In an order entered on January 11, 2011, the district court awarded Amy \$5000 in what it called “nominal” restitution. Even though the court had “no doubt” that this amount was “less than the actual harm” Monzel caused Amy, Restitution Order at 5, it declined to award more because neither the

government nor Amy had submitted evidence “as to what losses were caused by Defendant’s possession of [the victim’s] images,” *id.* at 3 (alteration in original) (quoting *United States v. Church*, 701 F. Supp. 2d 814, 832 (W.D. Va. 2010)) (internal quotation marks omitted). The court also declined to hold Monzel jointly and severally liable for the entirety of the harm Amy has suffered as a result of the distribution and possession of her image by others, given “the substantial logistical difficulties in tracking awards made and money actually recovered” from such persons. *Id.* at 5.

Amy now petitions for a writ of mandamus under 18 U.S.C. § 3771(d)(3) directing the district court to order Monzel to pay her \$3,263,758 in restitution. She has also challenged the award in a direct appeal and moves to consolidate her mandamus petition with the appeal. The government moves to dismiss Amy’s appeal on the ground that crime victims may not directly appeal restitution orders. We have jurisdiction over her mandamus petition under § 3771(d)(3) but dismiss her direct appeal because it is not authorized by statute.

II

As a preliminary matter, Amy has filed a motion to waive the 72-hour statutory deadline for deciding her mandamus petition. Monzel and the government both oppose her motion on the ground that the time limit cannot be waived at the sole discretion of the

App. 6

crime victim. We think Monzel and the government are right: Amy may not unilaterally waive the statutory deadline, but the passing of that deadline does not defeat our jurisdiction to decide her petition.

Amy asserts that the CVRA gives a crime victim a personal, waivable right to a decision on a petition for mandamus within 72 hours, but nothing in the language of the statute supports that view. No such right is mentioned among the enumerated protections afforded to crime victims, *see* 18 U.S.C. § 3771(a),¹

¹ The CVRA states that “[a] crime victim has the following rights”:

- (1) The right to be reasonably protected from the accused.
- (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
- (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
- (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
- (5) The reasonable right to confer with the attorney for the Government in the case.
- (6) The right to full and timely restitution as provided in law.
- (7) The right to proceedings free from unreasonable delay.

(Continued on following page)

and the Act directs that the court of appeals “shall” decide the petition within the time limit. As we have previously recognized, “[s]hall’ is a term of legal significance, in that it is mandatory or imperative, not merely precatory.”² *Exportal Ltda. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990) (internal quotation marks omitted). Although the statute leaves us no room to set aside the 72-hour deadline, the multiple issues of first impression this case raises, involving several statutes and conflicting views among the circuits, called for oral argument and a published opinion that is being issued past the deadline.

Missing the deadline, however, does not deprive us of jurisdiction. In *Dolan v. United States*, 130 S. Ct. 2533 (2010), the Supreme Court held that missing § 3664’s 90-day deadline for determining a victim’s losses does not deprive a sentencing court of power to order restitution, *id.* at 2539; *see* 18 U.S.C.

-
- (8) The right to be treated with fairness and with respect for the victim’s dignity and privacy.

18 U.S.C. § 3771(a).

² Amy directs our attention to an unpublished order from the Eleventh Circuit that granted a victim’s motion to waive the 72-hour deadline. *See* Order, *In re Stewart*, No. 10-12344 (May 21, 2010). Even were we inclined to give an unpublished decision from another circuit weight that we do not give our own, *see* D.C. Cir. R. 36(e)(2) (“[A] panel’s decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition.”), the Eleventh Circuit’s order would not qualify for such consideration because it lacked any analysis of the merits of the motion.

§ 3664(d)(5) (“If the victim’s losses are not ascertainable . . . 10 days prior to sentencing, . . . the court shall set a date for the final determination of the victim’s losses, not to exceed 90 days after sentencing.”). We think the Supreme Court’s reasons for concluding that the 90-day deadline in *Dolan* was not jurisdictional apply with equal force to the 72-hour deadline here.

To begin with, like § 3664, the CVRA “does not specify a consequence for noncompliance with its timing provisions.” *Dolan*, 130 S. Ct. at 2539 (internal quotation marks omitted). And just as § 3664 emphasizes “the importance of[] imposing restitution upon those convicted of certain federal crimes,” *Dolan*, 130 S. Ct. at 2539, the CVRA stresses the need to “ensure that the crime victim is afforded the rights described in [§ 3771(a)],” 18 U.S.C. § 3771(b)(1). Moreover, as with the 90-day deadline for determining a victim’s losses, “to read [the 72-hour deadline for deciding a mandamus petition] as depriving the . . . court of the power to order [relief] would harm those – the victims of crime – who likely bear no responsibility for the deadline’s being missed and whom the statute also seeks to benefit.” *Dolan*, 130 S. Ct. at 2540. Finally, “neither the language nor the structure of [either] statute requires denying the victim [relief] in order to remedy [the] missed . . . deadline,” and “doing so would defeat the basic purpose of the [statute].” *Id.* at 2541. We thus conclude that the CVRA’s 72-hour time limit for deciding mandamus petitions

is not jurisdictional and exercise our authority to decide Amy's petition outside the deadline.

III

We must first decide the standard of review that applies to petitions for mandamus filed under the CVRA. This is an open question in our circuit. Monzel and the government both urge us to apply the traditional standard for mandamus, under which Amy must show that: (1) she has a clear and indisputable right to relief; (2) the district court has a clear duty to act; and (3) no other adequate remedy is available to her. *See Power v. Barnhart*, 292 F.3d 781, 784 (D.C. Cir. 2002). Amy argues that even though Congress called the procedure it created under the CVRA “mandamus,” 18 U.S.C. § 3771(d)(3), it intended to grant victims the ability to obtain ordinary appellate review, which in this case would mean *de novo* review of what it means to award “the full amount of the victim’s losses.” *See id.* § 2259(b)(1), (3).

There is a circuit split on the standard of review for mandamus petitions brought under the CVRA. Three circuits apply the traditional mandamus standard urged by Monzel and the government. *See In re Acker*, 596 F.3d 370, 372 (6th Cir. 2010); *In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008); *In re Antrobus*, 519 F.3d 1123, 1125 (10th Cir. 2008). Four do not. *See Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1017-18 (9th Cir. 2006) (reviewing petition under the more generous “abuse of discretion or legal error”

standard); *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 563-64 (2d Cir. 2005) (reviewing petition for “abuse of discretion”); *see also In re Stewart*, 552 F.3d 1285, 1288-89 (11th Cir. 2008) (granting petition without asking whether victim had a clear and indisputable right to relief); *In re Walsh*, No. 06-4792, 2007 WL 1156999, at *2 (3d Cir. Apr. 19, 2007) (unpublished) (stating in dicta that “mandamus relief is available under a different, and less demanding, standard under 18 U.S.C. § 3771”).

We think the best reading of the statute favors applying the traditional mandamus standard. To begin with, there is no indication that Congress intended to invoke any other standard. That Congress called for “mandamus” strongly suggests it wanted “mandamus.” *See Morissette v. United States*, 342 U.S. 246, 263 (1952) (“[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.”). Furthermore, the paragraph that follows the mandamus provision states that the government may obtain ordinary appellate review of an order denying relief to a crime victim: “In any appeal in a criminal case, the Government may assert as error the district court’s denial of any crime victim’s right in the proceeding to which the appeal relates.” 18 U.S.C. § 3771(d)(4). That Congress

expressly provided for “mandamus” in § 3771(d)(3) but ordinary appellate review in § 3771(d)(4) invokes “the usual rule that when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (internal quotation marks omitted). If the government can obtain ordinary appellate review via mandamus, as Amy asserts, it is unclear what purpose § 3771(d)(4) serves by providing the government the same thing on direct appeal.

Finally, the abbreviated 72-hour deadline suggests that Congress understood it was providing the traditional “extraordinary remedy” of mandamus. *In re Brooks*, 383 F.3d 1036, 1041 (D.C. Cir. 2004). Courts will often be able to meet the compressed timeline under the traditional standard, because determining whether the lower court committed a “clear and indisputable” error will not normally require extensive briefing or prolonged deliberation. By contrast, full briefing and plenary appellate review within the 72-hour deadline will almost always be impossible. *Cf. Antrobus*, 519 F.3d at 1130 (“It seems unlikely that Congress would have intended *de novo* review in 72 hours of novel and complex legal questions. . .”).

Amy’s arguments that Congress provided ordinary appellate review but called it “mandamus” are not persuasive. Instructing courts to “ensure” that a crime victim is afforded certain rights, 18 U.S.C.

§ 3771(b)(1) (directing court to “ensure that the crime victim is afforded the rights described in [§ 3771(a)]”), says nothing about the standard of review. Neither does the fact that the court of appeals must “take up and decide” a petition within 72 hours. *Id.* § 3771(d)(3). A court that denies relief under the traditional mandamus standard has most certainly “take[n] up and decide[d]” the petition.³

Amy’s resort to legislative history fares no better. She points particularly to a comment by Senator Feinstein, one of the CVRA co-sponsors, that § 3771(d)(3) makes “a new use of a very old procedure, the writ of mandamus.” 150 CONG. REC. 7295 (2004). Even assuming that the words of a single lawmaker could determine the meaning of the CVRA, the Senator’s statement says nothing about the standard of review for mandamus. More plausibly, her comment refers to the fact that prior to the CVRA most courts denied crime victims any opportunity to challenge lower court decisions impairing their rights as victims, whether through mandamus or otherwise. *See, e.g., United States v. McVeigh*, 106 F.3d 325, 336 (10th Cir. 1997) (dismissing for lack of standing victims’ mandamus petition and appeal of district

³ Senator Feinstein’s remark that “while mandamus is generally discretionary, [§ 3771(d)(3)] means that courts *must* review these cases,” 150 CONG. REC. 7304 (2004) (emphasis added), is of no help to Amy, either. A court applying the traditional mandamus standard to a CVRA petition still “reviews” the petition.

court order prohibiting victims from attending trial); *United States v. Mindel*, 80 F.3d 394, 398 (9th Cir. 1996) (dismissing for lack of standing victim’s appeal of restitution order and related mandamus petition); *see also United States v. Aguirre-González*, 597 F.3d 46, 54 (1st Cir. 2010) (“[T]he default rule [is] that crime victims have no right to directly appeal a defendant’s criminal sentence.”). By providing victims the opportunity to challenge such decisions through mandamus, Congress did indeed make a “new use of a very old procedure.”⁴

IV

To prevail on the merits of her petition for mandamus, Amy must show that she has a clear and indisputable right to relief, that the district court has a clear duty to act, and that she has no other

⁴ Similarly, there is no reason to read Senator Feinstein’s statement that § 3771(d)(3) permits crime victims to “in essence, immediately appeal a denial of their rights by a trial court,” 150 CONG. REC. 7295, or Senator Kyl’s comment that “appellate courts are designed to remedy errors of lower courts,” *id.* at 7304, to suggest that either senator intended ordinary appellate review to apply. A crime victim’s ability to “immediately appeal” a denial of her rights does not turn on the applicable standard of review, and a court applying the traditional mandamus standard can still remedy errors of law, provided the errors were clear and the petitioner has a right to relief. Here again, that Congress specifically provided for mandamus review suggests it intended appellate courts to remedy district court errors dealing with victims’ rights only when such errors were clear and indisputable.

adequate remedy. *See Power*, 292 F.3d at 784. Amy’s petition satisfies each of these conditions.

A

As a crime victim Amy has a “right to full and timely restitution as provided in law,” 18 U.S.C. § 3771(a)(6), and the district court has a corresponding duty to “direct” Monzel to pay “the full amount of [her] losses as determined by the court,” *id.* § 2259(b)(1). Because the record does not establish that Monzel’s possession of her image caused *all* of her losses, Amy does not have a right to the full \$3,263,758 she seeks. She is, however, entitled to the amount of her losses that Monzel proximately caused. Because the \$5000 the court awarded was, by its own acknowledgement, less than the amount of harm Monzel caused Amy, we grant her petition in part.

1

Section 2259 directs the district court to order the defendant to pay restitution to the “victim” of a crime of child sexual exploitation. *See id.* § 2259(a)-(b). “Victim” is defined as “the individual harmed as a result of a commission of a crime under this chapter.” *Id.* § 2259(c). Read together, these provisions tie restitution awards to harms caused “as a result” of a defendant’s crime.

Section 2259 further instructs the court to award “the full amount of the victim’s losses,” *id.*

§ 2259(b)(1), defined as “any costs incurred by the victim for” six categories: (A) medical services; (B) physical and occupational therapy or rehabilitation; (C) necessary transportation, temporary housing, and child care expenses; (D) lost income; (E) attorneys’ fees and other litigation costs; and (F) a catch-all category of “any other losses suffered by the victim as a proximate result of the offense,” *id.* § 2259(b)(3)(A)-(F). There is a circuit split over whether the proximate cause requirement in the catch-all category also applies to the preceding categories. Most circuits to consider the issue have held that it does. *See United States v. McDaniel*, 631 F.3d 1204, 1208-09 (11th Cir. 2011); *United States v. Laney*, 189 F.3d 954, 965 (9th Cir. 1999); *United States v. Crandon*, 173 F.3d 122, 125 (3d Cir. 1999). The Fifth Circuit alone has held it does not. *In re Amy Unknown*, No. 09-41238, slip op. at 12 (Mar. 22, 2011). We join the plurality in concluding that all of the categories require proximate cause. Unlike those circuits, however, our reasoning rests not on the catch-all provision of § 2259(b)(3)(F), but rather on traditional principles of tort and criminal law and on § 2259(c)’s definition of “victim” as an individual harmed “as a result” of the defendant’s offense.

It is a bedrock rule of both tort⁵ and criminal law that a defendant is only liable for harms he proximately

⁵ Although § 2259 is a criminal statute, it functions much like a tort statute by directing the court to make a victim whole for losses caused by the responsible party. *Cf. United States v. Bach*, 172 F.3d 520, 523 (7th Cir. 1999) (“Functionally, the
(Continued on following page)

caused. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 26 cmt. a (2010) (calling proximate cause a “requirement[] for liability in tort”);⁶ W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 263 (5th ed. 1984) (“An essential element of the plaintiff’s cause of action for negligence, or . . . any other tort, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered. This connection usually is dealt with by the courts in terms of what is called ‘proximate cause’ . . .”); WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.4, at 464 (2d ed. 2003) (“[For] crimes so defined as to require not merely conduct but also a specified result of conduct, the defendant’s conduct must be the ‘legal’ or ‘proximate’ cause of the result.”); see also *id.* § 6.4(c), at 471 (“The problems of [proximate] causation arise in both tort and criminal settings, and the one situation is closely analogous to the other. . . . [T]he courts have generally treated [proximate] causation in criminal law as in tort law. . .”). The purpose of this rule is clear: “legal responsibility must be limited to those causes which are so closely connected with the result and of such

Mandatory Victims Restitution Act is a tort statute, though one that casts back to a much earlier era of Anglo-American law, when criminal and tort proceedings were not clearly distinguished.”). Thus, tort doctrine informs our thinking here.

⁶ The *Restatement (Third) of Torts* uses the term “scope of liability” in favor of “proximate cause.” See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 26 cmt. a.

significance that the law is justified in imposing liability.” KEETON ET AL., *supra*, § 41, at 264. Thus, we will presume that a restitution statute incorporates the traditional requirement of proximate cause unless there is good reason to think Congress intended the requirement not to apply. See *Sherwood Bros. v. District of Columbia*, 113 F.2d 162, 163 (D.C. Cir. 1940) (finding it “reasonable . . . to assume” that where a common law rule “has become embedded in the habits and customs of the community, . . . Congress had the common-law rule in mind when it legislated”).

Here, nothing in the text or structure of § 2259 leads us to conclude that Congress intended to negate the ordinary requirement of proximate cause. By defining “victim” as a person harmed “as a result of” the defendant’s offense, the statute invokes the standard rule that a defendant is liable only for harms that he proximately caused. That the definition does not include an express requirement of proximate cause makes no difference. “Congress [is] presumed to have legislated against the background of our traditional legal concepts which render [proximate cause] a critical factor, and absence of contrary direction” here “[is] taken as satisfaction [of] widely accepted definitions, not as a departure from them.” *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978) (quoting *Morissette*, 342 U.S. at 263) (internal quotation marks omitted).

We find the Fifth Circuit’s argument to the contrary unpersuasive. In its recent decision, that

court emphasized that other restitution statutes define “victim” as a person “*directly and proximately* harmed as a result of” the defendant’s offense, *e.g.*, 18 U.S.C. § 3663(a)(2); *id.* § 3663A(a)(2); *id.* § 3771(e), whereas § 2259(c) defines “victim” as a person harmed merely “as a result” of the defendant’s offense. But this difference in language tells us nothing about Congress’s intent in passing § 2259, because the definitions in those other statutes were all enacted *after* § 2259. Compare Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, sec. 205(a)(1)(F), § (a)(2), 110 Stat. 1214, 1230 (codified at 18 U.S.C. § 3663(a)(2)), *id.* sec. 204(a), § (a)(2), 110 Stat. 1228 (codified at 18 U.S.C. § 3663A(a)(2)), and Justice for All Act of 2004, Pub. L. No. 108-405, sec. 102(a), § (e), 118 Stat. 2260, 2263 (codified at 18 U.S.C. § 3771(e)), *with* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, sec. 40113(b)(1), § (f), 108 Stat. 1796, 1910 (codified at 18 U.S.C. § 2259(c)). “[L]ater laws that ‘do not seek to clarify an earlier enacted general term’ and ‘do not depend for their effectiveness upon clarification, or a change in the meaning of an earlier statute,’ are ‘beside the point’ in reading the first enactment.” *Gutierrez v. Ada*, 528 U.S. 250, 257-58 (2000) (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998)). At most, the later statutes show that § 2259(c)’s use of the phrase “as a result of” is not the *only* way to impose a proximate cause requirement. They do not prove that the phrase abrogates the requirement.

We similarly find little reason to conclude that Congress intended to eliminate the requirement of proximate cause for the categories of loss in § 2259(b)(3)(A)-(E) by including an express requirement in paragraph (F)'s catch-all provision. *Compare* 18 U.S.C. § 2259(b)(3)(A)-(E), *with id.* § 2259(b)(3)(F) (instructing court to award restitution for “any other losses suffered by the victim as a proximate result of the offense”). Had Congress meant to abrogate the traditional requirement for everything *but* the catch-all, surely it would have found a clearer way of doing so. Proximate cause ensures “some direct relation between the injury asserted and the injurious conduct alleged.” *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983, 989 (2010) (quoting *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992)) (internal quotation marks omitted). Without the limitation such a link provides, liability would attach to all sorts of injuries a defendant might indirectly cause, no matter how “remote” or tenuous the causal connection.⁷

⁷ For example, without the requirement of proximate cause, if a victim who needed counseling as a result of Monzel's crime were to suffer injuries in a car accident on the way to her therapist, she would be entitled to restitution from Monzel for any medical expenses relating to the accident, *see* 18 U.S.C. § 2259(b)(3)(A) (providing restitution for “medical services relating to physical, psychiatric, or psychological care”), because those expenses would not have occurred but for his crime. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 26 (“Conduct is a factual cause of harm when the harm would not have occurred absent the conduct.”). An “intervening act” (or “superseding cause”) disrupts proximate causation, but not causation in fact. *See id.* § 34 cmt. b.

Id.; see also KEETON ET AL., *supra*, § 41, at 266 (explaining that “the mere *fact* of causation, as distinguished from the nature and degree of the causal connection, can provide no clue of any kind to singling out those [who] are to be held *legally* responsible,” for “once events are set in motion, there is, in terms of causation alone, no place to stop” (emphasis added)). It is conceivable that Congress could intend that those who violate laws against child sexual exploitation should pay restitution for such attenuated harms, but it seems unlikely it did so here. “If Congress really had wished [courts to award restitution for losses defendants did not proximately cause], it could have provided that. It would, however, take a very clear provision to convince anyone of anything so odd.”⁸ *Field v. Mans*, 516 U.S. 59, 68 (1995).

⁸ The Fifth Circuit suggests that restricting the proximate cause requirement to § 2259(b)(3)(F)’s catch-all category would not “open the door to limitless restitution.” *Amy Unknown*, No. 09-41238, slip op. at 16. This is so, that court says, because § 2259 “includes a *general* causation requirement in its definition of a victim.” *Id.* (emphasis added) (citing 18 U.S.C. § 2259(c) (“For purposes of this section, the term ‘victim’ means the individual harmed as a result of a commission of a crime under this chapter. . . .”). But a “general” causation requirement without a subsidiary proximate causation requirement is hardly a requirement at all. So long as the victim’s injury would not have occurred but for the defendant’s offense, the defendant would be liable for the injury.

Because restitution awards under § 2259 are limited to harms the defendant proximately caused, we cannot say that Amy is clearly and indisputably entitled to the full \$3,263,758 she seeks. Although the government submitted evidence that Amy suffered losses stemming from her sexual exploitation as a child, *see* Mot. for Restitution at 6-7; Gov't's Mem. of Law Regarding the Victims' Losses at 6-15, and argued persuasively that possession of child pornography causes harm to the minors depicted, Mot. for Restitution at 9-12; *see also New York v. Ferber*, 458 U.S. 747, 758-60 (1982), it made no showing as to the amount of Amy's losses traceable to Monzel. Whatever else may be said of his crime, the record before us does not establish that Monzel caused *all* of Amy's losses.

Nor can we say that Amy is clearly and indisputably entitled to the full \$3,263,758 from Monzel on the ground that her injuries are "indivisible." Amy argues at length that the causes of her injuries cannot reasonably be divided among the unknown number of possessors and distributors of her images and that Monzel is therefore jointly and severally liable with other possessors and distributors for the full amount of her losses. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 12 (2000) ("Each person who commits [an intentional tort] is jointly and severally liable for any indivisible injury legally caused by the tortious conduct."); KEETON ET AL., *supra*, § 52, at 347 ("[E]ntire liability rests upon

the obvious fact that each has contributed to the single result, and that no reasonable division can be made.”).

But the very sources upon which Amy relies undermine her argument. Prosser, whom she quotes at length, states that “[s]uch entire liability is imposed” where two or more causes produce a single “result” and “either cause would have been sufficient in itself” to produce the result or each was “essential to the injury.” KEETON ET AL., *supra*, § 52, at 347. Here, Monzel’s possession of Amy’s image, which the district court found added to her injuries, was not “sufficient in itself” to produce all of them, nor was it “essential” to all of them. Amy’s profound suffering is due in large part to her knowledge that each day, untold numbers of people across the world are viewing and distributing images of her sexual abuse. *See* Mot. for Restitution at 6 (“The truth is, I am being exploited and used every day and every night somewhere in the world by someone.”); Gov’t’s Mem. of Law Regarding the Victims’ Losses at 8 (“Every day of my life I live in constant fear that someone will see my pictures and recognize me and that I will be humiliated all over again.”). Monzel’s possession of a single image of Amy was neither a necessary nor a sufficient cause of all of her losses. She would have suffered tremendously from her sexual abuse regardless of what Monzel did. *See also* KEETON ET AL., *supra*, § 52, at 346 (stating that “entire liability” is generally not imposed “where there is [a] factual basis for holding that [the] wrongdoer’s conduct was

not a cause in fact of part of the harm”). Similarly, the *Restatement (Third) of Torts*, upon which Amy also relies, instructs that an “indivisible injury” is “one in which the *entire* damages were caused by every legally culpable act of each person.” RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26 reporters’ note cmt. g (emphasis added). As before, the government has not shown that Monzel caused the *entirety* of Amy’s losses.

Joint and several liability may also be appropriate under § 3664(h) where there is more than one defendant and each has contributed to the victim’s injury. *See* 18 U.S.C. § 3664(h) (“If the court finds that more than [one] 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.”);⁹ *see also United States v. Wall*, 349 F.3d 18, 26 (1st Cir. 2003) (“Under 18 U.S.C. § 3664(h), a court issuing a restitution order is permitted to . . . make each defendant liable for the full amount of restitution by imposing joint and several liability.”); *accord United*

⁹ The government agrees with Amy that the best reading of § 2259 calls for joint and several liability in the full amount of Amy’s losses from her sexual exploitation as a child, but, pointing to § 3664(h), maintains that the statute affords the district court discretion on whether to order joint and several liability. *See* Resp. of the United States to Pet. for Writ of Mandamus at 15-16; Oral Arg. Tr. at 42, 49.

States v. Squirrel, 588 F.3d 207, 212 (4th Cir. 2009); *United States v. Moten*, 551 F.3d 763, 768 (8th Cir. 2008); *United States v. Hunt*, 521 F.3d 636, 649 (6th Cir. 2008); *United States v. Nucci*, 364 F.3d 419, 422 (2d Cir. 2004); *United States v. Booth*, 309 F.3d 566, 576 (9th Cir. 2002); *United States v. Diaz*, 245 F.3d 294, 312 (3d Cir. 2001). It is unclear, however, whether joint and several liability may be imposed upon defendants in separate cases. The Fourth and Sixth Circuits have held, in unpublished opinions, that § 3664(h) does not apply to prosecutions where there is only one defendant. *See United States v. McGlown*, No. 08-3903, 2010 WL 2294527, at *3 (6th Cir. June 8, 2010); *United States v. Channita*, No. 01-4060, 2001 WL 578140, at *1 (4th Cir. May 30, 2001). The Fifth Circuit, by contrast – without addressing § 3664(h)’s applicability – said a district court could order joint and several liability for a lone defendant such as Monzel under § 3664(m)(1)(A), which provides that a district court may “enforce[]” a restitution order “by all other available and reasonable means.” *See Amy Unknown*, No. 09-41238, slip op. at 17. We need not resolve this issue, because so long as the requirement of proximate cause applies, as it does here, a defendant can be jointly and severally liable only for injuries that meet that requirement. *See* RESTATEMENT (SECOND) OF TORTS § 879 cmt. b (1979). Because the record does not show that Monzel proximately caused all of Amy’s injuries, the district court

did not clearly and indisputably err by declining to impose joint and several liability on him for the full \$3,263,758 she seeks.¹⁰

The district court did, however, clearly err by awarding an amount of restitution it acknowledged was less than the harm Monzel had caused. Under § 3664(e), the government bears the burden of demonstrating the amount of loss the victim suffered “as a result of the [defendant’s] offense.” In this case, because the government failed to submit “any evidence whatsoever” regarding the amount of Amy’s losses attributable to Monzel,¹¹ Restitution Order at 3, the district court said it had no basis upon which to calculate the amount of harm Monzel had proximately

¹⁰ Amy’s effort to analogize Monzel’s possession to participation in a “joint enterprise” with “mutual agency, so that the act of one is the act of all,” Pet. for Writ of Mandamus at 24 (quoting WILLIAM L. PROSSER, *THE LAW OF TORTS* § 52, at 315 (4th ed. 1971)), also fails. There is no evidence at all in the record that Monzel acted “in concert” with others to distribute and possess Amy’s image, as is required for such enterprise liability to apply. *KEETON ET AL.*, *supra*, § 52, at 346.

¹¹ In an opinion issued several months prior to the restitution order, the district court concluded that Amy’s “alleged losses were proximately caused by Monzel’s possession of [her] image[.]” *United States v. Monzel*, 746 F. Supp. 2d 76, 88 (D.D.C. 2010). The court made clear, however, that it was *not* deciding at that point the amount of Amy’s losses that Monzel had caused. Rather, the court was “only identif[ying] the losses alleged for the purposes of considering the causal connection between them and [Monzel’s] conduct.” *Id.* at 84 n.12. Whether “the Government ha[d] met its burden to prove the losses or the amount to be apportioned to Monzel” were issues to be decided later. *Id.*

caused her and so decided to award “nominal” restitution of \$5000, *id.* at 5.

But in the very next sentence the court said it had “no doubt” that this award was “less than the actual harm” Monzel had caused Amy. *Id.* at 5. This was clear and indisputable error. A district court cannot avoid awarding the “full amount of the victim’s losses,” 18 U.S.C. § 2259(b)(1), simply because the attribution analysis is difficult or the government provides less-than-ideal information. The court must order restitution equal to the amount of harm the government proves the defendant caused the victim. *See id.* § 3664(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.”). Certainly the court cannot award *less* restitution than it determines the victim is entitled to.

We recognize, of course, that determining the dollar amount of a victim’s losses attributable to the defendant will often be difficult. In a case such as this one, where the harm is ongoing and the number of offenders impossible to pinpoint, such a determination will inevitably involve some degree of approximation. But this is not fatal. Section 2259 does “not impose[] a requirement of causation approaching mathematical precision.” *United States v. Doe*, 488 F.3d 1154, 1160 (9th Cir. 2007). Rather, the district court’s charge is “to estimate, based upon facts in the

record, the amount of [the] victim's loss with some reasonable certainty." *Id.*

On remand, the district court should consider anew the amount of Amy's losses attributable to Monzel's offense and order restitution equal to that amount. Although there is relatively little in the present record to guide its decisionmaking on this, the district court is free to order the government to submit evidence regarding what losses were caused by Monzel's possession of Amy's image or to order the government to suggest a formula for determining the proper amount of restitution. The burden is on the government to prove the amount of Amy's losses Monzel caused. We expect the government will do more this time around to aid the district court. We express no view as to the appropriate level of restitution, but emphasize that in fixing the amount the district court must rely upon some principled method for determining the harm Monzel proximately caused.

B

To prevail on her petition, Amy must also show that mandamus is her only adequate remedy. *See Power*, 292 F.3d at 784. Since the enactment of the CVRA, every circuit to consider the question has held that mandamus is a crime victim's only recourse for challenging a restitution order. *See Aguirre-González*, 597 F.3d at 52-55 (1st Cir.); *United States v. Hunter*, 548 F.3d 1308, 1317 (10th Cir. 2008) ("We hold that individuals claiming to be victims under the CVRA

may not appeal from the alleged denial of their rights under that statute except through a petition for a writ of mandamus as set forth by 18 U.S.C. § 3771(d)(3).”); *cf. Amy Unknown*, No. 09-41238, slip op. at 11 (5th Cir.) (“affirm[ing]” that “[a crime victim] likely has no other means for obtaining review of the district court’s decision not to order restitution” besides mandamus (quoting *In re Amy*, 591 F.3d 792, 793 (5th Cir. 2009)) (internal quotation marks omitted)).¹² We agree.

Although we “have jurisdiction of appeals from all final decisions of the district courts,” 28 U.S.C. § 1291, the general rule is that “one who is not a party or has not been treated as a party to a judgment has no right to appeal therefrom.” *Karcher v. May*, 484 U.S. 72, 77 (1987). However, “[t]he Supreme Court has ‘never . . . restricted the right to appeal to named parties to [a] litigation,’” *In re Sealed Case*

¹² The Sixth Circuit’s position on the issue is unclear. In *In re Acker*, 596 F.3d 370 (2010), the Sixth Circuit held that a putative victim has no right to directly appeal a district court decision not to award restitution where the victim simultaneously files a mandamus petition raising “identical issues” as the appeal, *see id.* at 373. *Acker* distinguished an earlier Sixth Circuit decision, *In re Siler*, 571 F.3d 604 (2009), that permitted victims to directly appeal a district court’s denial of their motion under the CVRA to obtain the defendants’ presentence reports, *id.* at 607-09, on the ground that the *Siler* victims had “been effectively treated as intervening parties” by the district court and did not assert their rights under the CVRA until “eighteen months after the criminal proceedings had concluded,” *Acker*, 596 F.3d at 373.

(*Med. Records*), 381 F.3d 1205, 1211 n.4 (D.C. Cir. 2004) (omission and second alteration in original) (quoting *Devlin v. Scardelletti*, 536 U.S. 1, 7, (2002)), and “if [a] decree affects [a third party’s] interests, he is often allowed to appeal,” *id.* (second alteration in original) (quoting *Castillo v. Cameron Cnty.*, 238 F.3d 339, 349 (5th Cir. 2001)).

Amy argues that even though she was not a party below, she has a direct interest in the district court’s restitution order and should therefore be allowed to appeal. Her argument, however, overlooks that she is seeking to appeal part of Monzel’s *sentence*. Regardless of the rules that govern nonparty appeals in other contexts, “the default rule [is] that crime victims have no right to directly appeal a defendant’s criminal sentence.” *Aguirre-González*, 597 F.3d at 54; *see also Hunter*, 548 F.3d at 1312 (“[W]e are aware of no precedent for allowing a non-party appeal that would reopen a criminal case following sentencing.”).

Amy claims that several cases from this and other circuits reflect “well-recognized authority . . . permitting non-parties to appeal decisions in criminal cases which directly harm their rights.” Pet’r’s Mot. to Consolidate Appeal with Mandamus Pet. at 8. But none of the cases she cites involved a request by a victim to alter a defendant’s sentence. Rather, all of them concerned disclosure of information in which the non-party had some interest. *See id.* at 8-9 n.4 (citing *United States v. Antar*, 38 F.3d 1348 (3d Cir. 1994); *In re Subpoena to Testify Before Grand Jury*

Directed to Custodian of Records, 864 F.2d 1559 (11th Cir. 1989); *Anthony v. United States*, 667 F.2d 870 (10th Cir. 1981); *In re Smith*, 656 F.2d 1101 (5th Cir. 1981); *United States v. Hubbard*, 650 F.2d 293 (D.C. Cir. 1980); *United States v. Briggs*, 514 F.2d 794 (5th Cir. 1974)); see also Amy's Resp. to Gov't Mot. to Dismiss at 17 (citing *Doe v. United States*, 666 F.2d 43 (4th Cir. 1981)); *Hubbard*, 650 F.2d at 311 n.67 ("Federal courts have frequently permitted third parties to assert their interests in preventing disclosure of material sought in criminal proceedings or in preventing further access to materials already so disclosed."). Here, by contrast, Amy is asking the court to revisit her restitution award, which is part of Monzel's sentence.¹³ See, e.g., 18 U.S.C. § 3663A(a)(1) ("[W]hen sentencing a defendant convicted of an

¹³ The only case Amy points us to where a court has allowed a crime victim to appeal part of a defendant's sentence is *United States v. Kones*, 77 F.3d 66 (3d Cir. 1996), in which the Third Circuit heard a victim's appeal of a district court order denying restitution, see *id.* at 68. *Kones*'s persuasive value on this point is negligible, however, given that the government did not contest the court's jurisdiction to hear the victim's appeal, see Def.-Appellee's Br. at 1, *Kones*, No. 95-1434 (3d Cir. Aug. 16, 1995), and the court's statement of its jurisdiction was one sentence long and devoid of discussion, see 77 F.3d at 68; see also *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) (stating that "drive-by jurisdictional rulings" where jurisdiction is "assumed by the parties[] and . . . assumed without discussion by the Court" have "no precedential effect"); *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996) ("[W]e have repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect.").

offense described in subsection (c), the court shall order . . . that the defendant make restitution to the victim of the offense. . . .”); *id.* § 3664(o) (“A sentence that imposes an order of restitution is a final judgment. . . .”); *United States v. Cohen*, 459 F.3d 490, 496 (4th Cir. 2006) (“[R]estitution is . . . part of the criminal defendant’s sentence.”); *United States v. Acosta*, 303 F.3d 78, 87 (1st Cir. 2002) (“It is undisputed that restitution is part of a sentence.”); *United States v. Syme*, 276 F.3d 131, 159 (3d Cir. 2002) (“Restitution orders have long been treated as part of the sentence for the offense of conviction. . . .”). Amy thus runs headlong into the rule against direct appeals of sentences by crime victims.

The CVRA does not alter this rule. To begin with, “where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.” *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979). That the CVRA expressly provides for mandamus review makes us reluctant to read into it an implied right to direct appeal. Moreover, the CVRA’s “carefully crafted and detailed enforcement scheme provides ‘strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.’” *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254 (1993) (quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985)). Not only does the CVRA provide for mandamus review, but it also expressly authorizes the government to assert crime victims’ rights on direct appeal, *see* 18 U.S.C. § 3771(d)(4),

and sets forth specific rules for when crime victims may move to reopen sentences, *see id.* § 3771(d)(5). That Congress included these provisions but did *not* provide for direct appeals by crime victims is strong evidence that it did not intend to authorize such appeals.

It is also significant that while Congress expressly authorized the government to assert victims' rights on direct appeal under § 3771(d)(4), it made no such provision for victims themselves. *See id.* § 3771(d)(4) ("In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates."). This contrasts with § 3771(d)(3), which authorizes both the government *and* victims to bring mandamus petitions. *See id.* § 3771(d)(3) (stating that any "movant" who has asserted a crime victim's rights before the district court may petition for mandamus); *id.* § 3771(d)(1) (providing that the crime victim, the crime victim's representative, and the government may assert a victim's rights before the district court). Had Congress intended to allow victims to directly appeal, it seems likely it would have provided them that right under § 3771(d)(4) just as it provided them mandamus petitions under § 3771(d)(3). *Cf. Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Amy also argues that she is entitled to a direct appeal because two other circuits permitted crime victims to appeal restitution orders prior to the enactment of the CVRA, a statute that was intended to broaden, not narrow, available remedies. *See United States v. Perry*, 360 F.3d 519, 524-33 (6th Cir. 2004) (permitting crime victim to appeal vacatur of lien enforcing victim's restitution award under the Mandatory Victims Restitution Act, 18 U.S.C. §§ 3663A, 3664); *United States v. Kones*, 77 F.3d 66, 68 (3d Cir. 1996) (hearing crime victim's appeal of district court order denying restitution under the Victim and Witness Protection Act, 18 U.S.C. § 3663); *see also* 150 CONG. REC. 7301 (statement of Sen. Kyl) ("It is not the intent of [the CVRA] to limit any laws in favor of crime victims that may currently exist, whether these laws are statutory, regulatory, or found in case law."); *id.* (statement of Sen. Feinstein) ("[I]t is not our intent to restrict victims' rights or accommodations found in other laws."). But even if two circuits allowed crime victims to appeal restitution orders prior to the enactment of the CVRA, a plurality of circuits did not. *See Mindel*, 80 F.3d at 398 (9th Cir.); *United States v. Kelley*, 997 F.2d 806, 807 (10th Cir. 1993); *United States v. Johnson*, 983 F.2d 216, 217 (11th Cir. 1993); *United States v. Grundhoefer*, 916 F.2d 788, 793 (2d Cir. 1990). There was no settled right of appeal for the CVRA to narrow.¹⁴

¹⁴ Moreover, only one circuit had ever allowed a victim to appeal the *amount* of restitution. *See Kones*, 77 F.3d at 68 (3d Cir. 1996) (Continued on following page)

Amy responds that the cases preventing victims from appealing restitution orders are irrelevant because they were decided under the Victim and Witness Protection Act (VWPA), which, unlike § 2259, makes restitution discretionary rather than mandatory, takes into account the defendant's financial circumstances, and does not provide victims much opportunity to influence sentencing proceedings. See 18 U.S.C. § 3663(a). We should look instead, she argues, to *United States v. Perry*, 360 F.3d 519, a 2004 Sixth Circuit decision that permitted a crime victim to appeal an adverse restitution order under the Mandatory Victims Restitution Act (MVRA), a statute more analogous to § 2259, *id.* at 524-33. *Perry* expressly declined to follow the VWPA cases on the ground that the MVRA is “dramatically more ‘pro-victim’” than the VWPA, *id.* at 524: the MVRA makes restitution mandatory, not discretionary, see 18 U.S.C. § 3663A(a)(1); requires the court to award full restitution regardless of the defendant's financial circumstances, see *id.* § 3664(f)(1)(A); and gives victims a role in the sentencing process, see *id.* § 3664(d)(2).

But the victim in *Perry* was not appealing an order *awarding* restitution; rather, she was appealing an order affecting her ability to *enforce* an order

Cir.). Another circuit had allowed a victim to appeal an order impairing her ability to *collect* restitution, see *Perry*, 360 F.3d at 522, 524-33 (6th Cir.), but did not consider whether the victim could appeal the actual amount of the award.

awarding restitution. *See Perry*, 360 F.3d at 522 (describing victim’s appeal of order vacating judgment lien she had obtained to enforce her restitution award). Granting the victim relief would not have altered the defendant’s sentence. Here, by contrast, Amy is appealing the order awarding her restitution and is seeking a higher award. Granting her relief *would* alter the defendant’s sentence.¹⁵

Moreover, the CVRA and the MVRA differ significantly in the extent to which they provide remedies for challenging restitution orders. The MVRA may provide victims an opportunity to submit affidavits detailing their losses, *see* 18 U.S.C. § 3664(d)(2), but it does not provide a right to petition the court of appeals for mandamus, grant the government express power to assert crime victims’ rights on appeal, or set forth procedures by which victims may move to reopen sentences. Thus, the Supreme Court’s teaching that a “statute’s carefully crafted and detailed enforcement scheme provides ‘strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly,’” *Mertens*, 508 U.S. at 254 (quoting *Russell*, 473 U.S. at

¹⁵ In any event, *Perry* is not the only case to consider a victim’s right to appeal an MVRA restitution order. In *United States v. United Security Savings Bank*, 394 F.3d 564 (8th Cir. 2004) (per curiam), the Eighth Circuit said that a crime victim may *not* appeal a restitution order made under the MVRA, *id.* at 567. Thus, a victim’s right to appeal under the MVRA is far from settled.

146-47), applies with much greater force here than in *Perry*.

For these reasons, we hold that Amy may not directly appeal her restitution award and we grant the government's motion to dismiss her appeal.¹⁶ Mandamus is Amy's only recourse to challenge the award.

V

We grant Amy's petition for mandamus in part and instruct the district court to consider anew the amount of her losses attributable to Monzel and to order restitution equal to that amount. We further dismiss Amy's direct appeal of her restitution award and dismiss as moot her motion to consolidate her mandamus petition with her direct appeal.

So ordered.

¹⁶ Amy also argues that she is entitled to appeal the district court's restitution order under the collateral order doctrine. Because she cannot directly appeal her restitution award in any event, the collateral order doctrine is of no help to her.

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES :
OF AMERICA, :
 :
v. : **Criminal Case**
 : **No. 09-243 (GK)**
MICHAEL M. MONZEL, :
 :
Defendant. :

RESTITUTION ORDER

(Filed Jan. 11, 2011)

I. PROCEDURAL BACKGROUND

1. On October 22, 2010, this Court issued an Opinion in which it held (1) that the Government was not procedurally barred under 18 U.S.C. §§ 3664(d)(1) and (d)(5) of the Mandatory Victims Restitution Act of 1996 (“MVRA”) from seeking a restitution order, (2) that the three victims in this case are “victims” within the meaning of that term as it is used in 18 U.S.C. § 2259, and (3) that Defendant’s conduct is a proximate cause of the losses alleged by the victims because of the Defendant’s possession of the pornographic materials.

2. The Court noted, at p. 27 of that Opinion, that the final issue which remains is what, if any, amounts claimed as losses by the victims Defendant should be held liable for and/or whether the Defendant should be liable for all of those losses or only the portion attributable to him.

3. The Court is well aware that the legal and practical issues raised in determining restitution under the MVRA have spawned a huge amount of District Court litigation throughout the country – probably well over 50 opinions have been issued, all detailed and thoughtful.¹ It is telling that the legal analyses and the final conclusions reached vary significantly in these cases. The Court has read a great many of them and certainly all of those cited by the parties. In reaching its conclusion in this case, the Court has relied on those District Court opinions which it has found most persuasive. Consequently, in the interest of economy of judicial resources – and perhaps saving a tree – this Court sees no need to write yet another lengthy Opinion examining the issues and will be incorporating the relevant language and rationales used in those cases with which it agrees.

II. RELEVANT FACTS

1. “Misty” has requested \$3,134,332 in restitution.² “Vicky” has requested \$228,903.60 in restitution. “Tara” is not requesting any amount of restitution because she has been paid in full by other defendants. “Vicky” has reduced her claim from \$312,953.60 and now seeks \$228,903.60. Both “Vicky”

¹ Interestingly, despite all this litigation, there is very little appellate law on the issue and none whatsoever in this Circuit.

² “Misty” is also known as victim “Amy.”

and “Misty” submitted numerous reports and assessments documenting the particular losses for which they claim restitution. In particular, each victim requests restitution for future counseling expenses, vocational losses, out-of-pocket expenses for expert evaluations, support requests, travel, attorneys’ fees, loss of present and future income, and expert witness fees.

III. ANALYSIS

1. The Government seeks restitution for the two victims pursuant to 18 U.S.C. § 2259 mandating the payment of restitution for medical services relating to physical, psychiatric, or psychological care; physical and occupational therapy; loss of income, past and future; attorneys’ fees; and any other loss suffered by the victims as a proximate result of the offenses.

2. The Government bears the burden of demonstrating the amount of a victim’s losses by a preponderance of the evidence, pursuant to 18 U.S.C. § 3664(e). The Government need not prove the victim’s losses with mathematical precision, but rather with reasonable certainty. *United States v. Doe*, 488 F.3d 1154, 1159-60 (9th Cir. 2007).

3. As the Court indicated in its October 22, 2010 Opinion, the *amount* of the victim’s loss is a separate and distinct issue from whether a defendant proximately caused harm to them. Before ordering any restitution amount, the Court “must be able to ascertain with reasonable certainty from the evidence

presented what proportion of the total harm was proximately caused by *this* defendant and *this* offense.” *United States v. Van Brackle*, No. 2:08-CR-042-WCO, 2009 WL 4928050, at *4 (N.D. Ga. Dec. 17, 2009) (emphasis in original).³ As the Court stated in *United States v. Berk*, 666 F. Supp. 2d 182, 191 (D. Me. 2009), “[t]he difficulty lies in determining what portion of the [v]ictims’ loss, if any, was proximately caused by the specific acts of this particular [d]efendant.” See also *United States v. Paroline*, 672 F. Supp. 2d 781, 791 (E.D. Tex. 2009) (“[A]n award of restitution under section 2259 is appropriate only for the amount of the victim’s losses proximately caused by the defendant’s conduct.”).

4. The Government has submitted a great deal of evidence, including expert witness reports, establishing the terrible psychological and emotional trauma suffered by the victims, the need for further counseling and treatment both now and in the future, the loss of income, and their attorneys’ fees. What the Government has failed to submit is any evidence whatsoever “‘as to what losses were caused by Defendant’s possession of [the victim’s] images.’” *United States v. Church*, 701 F.Supp.2d 814, 832 (W.D. Va. 2010) (citation omitted).

5. As Judge Moon noted in his very thoughtful and well-reasoned Opinion in *Church*, where “harm is

³ Under § 3664(h), the Court may apportion liability among defendants to reflect the amount of loss to the individual victim.

done to the victim, some part of which was caused by the Defendant and some part of which was not, the burden is on the party seeking damages to prove, within a reasonable degree of certainty, the share of the harm for which the Defendant is responsible.” *Id.* at 833 n.8. Here, too, as in *Church*, the Government has not even suggested any rational, evidence-based procedure for ascertaining the dollar value of the harms suffered by each of these victims as a result of this particular Defendant’s possession of the pornographic images. Consequently, here, as in *Church*, on the record presented to this Court, “there is no evidence upon which the Court could reasonably calculate the measure of harm done to the victim[s] proximately caused by the Defendant’s conduct.” *Id.* at 832.

6. As noted earlier, § 2259 of the statute makes an award of restitution mandatory. In this situation, the courts have often concluded that, when a specific amount of loss cannot be established by a preponderance of the evidence, the award of a nominal amount is appropriate. “Where a party ‘establishes a wrong for actual losses therefrom, he or she is entitled to nominal damages at least . . . where the evidence fails to show the extent of the resulting damages.” *Id.* at 834 (quoting 25 C.J.S. *Damages*, § 14 (2010)). See also *Carey v. Piphus*, 435 U.S. 247, 266 (1978).

7. In determining an appropriate nominal amount, Congress has provided some guidance. Section 2255(a) provides that any victim “shall be deemed to have sustained damages of not less than

\$150,000 in value.” The nominal amounts ordered by district courts throughout the country have varied greatly. *See United States v. Woods*, 689 F. Supp. 2d 1102, 1110 (N.D. Iowa 2010).

8. Based upon the practice of many other district courts around the country, this Court concludes that, given the nature and severity of the original sexual abuse depicted in the pornographic images of the victims, given the fact that these victims have explained most eloquently in their victim impact statements how they are still deeply affected by the present, and probably future, viewing of those images, each victim is entitled, at a very minimum, to a restitution award of \$5,000 because of this Defendant’s possession and viewing of their images. The Court has no doubt that this level of restitution is less than the actual harm this particular Defendant caused each victim. *See United States v. Zane*, No. 1:08-CR-0369-AWI, 2009 WL 2567832, *19 (E.D. Cal. Aug. 18, 2009). Consequently, the Defendant shall be ordered to pay a specific amount of \$5,000 in restitution to “Vicky” and “Misty.”

9. The Court is not ordering joint and several liability because of the substantial logistical difficulties in tracking awards made and money actually recovered.⁴ *See United States v. Hicks*, No. 1:09-cr-150,

⁴ The Court is aware that these victims have filed many requests for restitution in different criminal cases and have collected at least some of the amounts awarded.

2009 WL 4110260, at 6 (E.D. Va. Nov. 24, 2009) (“[c]oordination of any potential future awards to avoid unjustly enriching [the victims] is unworkable, and there is no mechanism of which the Court is aware – in the U.S. Probation Service or otherwise – which is capable of managing such a scenario.”).⁵

WHEREFORE, it is this 11th day of January, 2011, hereby

ORDERED, that Defendant Michael Monzel shall pay nominal restitution in the amount of \$5,000 to the victim “Amy” and to the victim “Vicky”; and it is further

ORDERED, that during the period of incarceration: (1) if the Defendant Michael Monzel earns wages in a Federal Prison Industries (UNICOR) job, then the Defendant must pay 50 percent of wages earned toward the financial obligations imposed by this Restitution Order; or (2) if the Defendant does not work in a UNICOR job, then the Defendant must pay a minimum of \$25 per quarter toward the financial obligations in this Order; and it is further

ORDERED, that upon release from incarceration, the Defendant shall pay restitution at the rate of 10 percent of monthly gross earnings, until such time as the Court may alter that payment schedule. These

⁵ At oral argument, the Government conceded that there was no formal tracking system in place to monitor payments to victims and avoid overpayments.

payments do not preclude the Government from using other assets or income of the Defendant to satisfy his restitution obligations.

/s/ Gladys Kessler

Gladys Kessler
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES)
OF AMERICA,)

v.)

MICHAEL MONZEL,)

Defendant.)

No. 09-cr-243 (GK)

MEMORANDUM OPINION

(Filed Oct. 22, 2010)

On December 10, 2009, Defendant Michael Monzel pled guilty to one count of distribution of child pornography in violation of 18 U.S.C. §§ 2252(a)(2) and one count of possession of child pornography in violation of 18 U.S.C. §§ 2252(a)(4)(B). This matter is before the Court on the Government’s Motion for an Order of Restitution pursuant to 18 U.S.C. § 2259 [Dkt. No. 34]. On September 16, 2010, the parties filed supplemental briefing on the issue of whether the Government’s failure to meet the time limitations in the Mandatory Victims Restitution Act of 1996 (“MVRA”), 18 U.S.C. §§ 3664(d)(1) and (d)(5), bars its Motion for an Order of Restitution. On September 27, 2010, Defendant submitted a Reply to the Government’s Memorandum [Dkt. No. 42].

On September 30, 2010, a status conference was held in this case in which oral argument was heard on the time limitations in the MVRA. Defendant also

requested discovery on the Government's Motion. On October 5, 2010, a motion hearing was held in which the parties presented oral argument on the Government's Motion.

Upon consideration of the parties' motions, oppositions, and replies, the oral argument presented by the parties at the September 30, 2010 status conference and the October 5, 2010 motion hearing, and the entire record herein, and for the reasons set forth below, the Court concludes that (1) the Government's Motion for an Order of Restitution **is not time-barred**; and (2) the Government has met its burden to prove proximate cause in support of its Motion for an Order of Restitution. In addition, Defendant's discovery request is **denied**. Consequently, the Government's Motion for an Order of Restitution is **granted**. The parties shall file additional briefing on damages by **December 20, 2010**.

I. Background¹

On December 10, 2009, Defendant pled guilty to one count of distribution of child pornography² and one count of possession of child pornography, in

¹ The parties do not dispute the facts set forth herein.

² Monzel did not distribute any images which depicted the three victims seeking restitution in this case, although such images were in his possession. Consequently, the victims' claims for restitution are based only on Defendant's conviction of possession of child pornography. Govt.'s Mot. at 8 n.5.

violation of 18 U.S.C. §§ 2252(a)(2) and (a)(4)(B). 18 U.S.C. § 2259, which was enacted in 1994 as part of the Violence Against Women Act, Publ. L. No. 103-322, 108 Stat. 1976, makes restitution mandatory for offenses under § 2252 involving the sexual exploitation and other abuse of children. *See* 18 U.S.C. § 2259.

As a part of his plea, Monzel signed a plea agreement which stated that he:

[U]nderstands that in addition to the other penalties provided by law, pursuant to 18 U.S.C. § 2259 and 3664, it is mandatory that the Court order [Defendant] to make restitution for the full amount of any victim(s)' compensable losses. . . . [Defendant] understands that the government will request that the Court order restitution for any identified victim for the full amount of his/her losses that were caused by [Defendant's] crime that is the subject of this plea agreement.

Plea Agreement at ¶ 20 [Dkt. No. 11].³ In addition, the Court made clear to both parties at the plea hearing that restitution was mandatory under § 2259. Tr. at 27-28 (Dec. 10, 2009). At the end of that hearing, the Court ordered the parties to submit sentencing

³ Defendant suggests that he was blindsided by the Government's decision to seek restitution. *See, e.g.*, Def.'s Reply to Govt.'s Memo. at 2 [Dkt. No. 42]. As the facts discussed here make clear, Defendant had ample notice that the Government would seek restitution and that it is mandatory in this case.

memoranda by March 30, 2010 and continued the sentencing until April 15, 2010.

On February 17, 2010, the Federal Bureau of Investigation (“FBI”) received the first of two reports from the National Center for Missing and Exploited Children (“NCMEC”) containing its analysis of a series of pornographic items recovered from Defendant. The FBI prepared a report based on NCMEC’s submission which identified the known victims of the materials and provided the report to counsel for the Government on or about March 1, 2010. Within five business days, the Government sent requests for victim impact statements, including the need for restitution, to those victims who had indicated their wish to receive such requests.⁴ Thus, the Government did not have the information it needed to ascertain the victims’ losses 60 days prior to the scheduled sentencing date of April 15, 2010, as required by 18 U.S.C. § 3664(d)(1).

On March 25, 2010, the United States Probation Office submitted a Final Presentence Investigation

⁴ As the Government pointed out at the September 30, 2010 Status Conference, the process for seeking restitution is quite complicated in cases involving child pornography. The Government, acting through NCMEC, must identify victims based on the pornographic materials seized, contact those victims who have indicated that they wish to receive notice of cases involving them, and receive detailed information from them regarding the amount of restitution sought. In this case, the Government undertook this process with regard to approximately 800 images seized from Defendant. Govt.’s Mot. at 2.

Report [Dkt. No. 16] which indicated that restitution was mandatory, but did not specify the amounts sought. On March 30, 2010, the Government asked to continue the sentencing because the second NCMEC report had not yet been completed. Defendant raised no objection, and the Court granted the request, continuing the sentencing to May 19, 2010. On May 10, 2010, the Government submitted a Sentencing Memorandum [Dkt. No. 23] which requested restitution but did not specify any amounts claimed by the victims.

On May 19, 2010, Monzel was sentenced on each count to 120 months of incarceration followed by 10 years of supervised release, to run concurrently, and was ordered to pay a \$200.00 special assessment. At the sentencing, the Government raised the issue of restitution and asked for a briefing schedule so that it could obtain more information from the victims as to the amounts requested. The Court raised the procedural issue of whether the sentence could be entered without a determination of the restitution issue, to which the Government responded that the Court “can defer the decision on the restitution for a period of up to 90 days, and have the sentence proceed. . . .” Tr. at 5-7 (May 19, 2010).⁵

⁵ This characterization of 18 U.S.C. § 3664(d)(5)’s procedures was somewhat in error. Section 3664(d)(5) states that the Government must inform the Court at least 10 days prior to the sentencing if the victims’ losses are unascertainable, and that the Court should set a date for a final determination of losses

(Continued on following page)

Defense counsel agreed with the Government on this procedural point. *Id.* However, defense counsel argued that the Government's delay in requesting restitution had resulted in waiver of its Motion for an Order of Restitution at the sentencing.⁶ The Court declined to rule on the issue without briefing from the parties, which it ordered to be submitted within 35 days.

Around this same time,⁷ the Government received requests for restitution from three of the thirty identified victims. The three victims are identified by

not to exceed 90 days after sentencing. The Government failed to provide advance notice that the victims' losses were unascertainable. Defendant argues that § 3664(d)(5) also requires the Court to set the date for a final determination of the victims' losses prior to the original sentencing hearing. Def.'s Reply to Govt.'s Memo. at 4. However, the statute does not specify when the Court must set the date; it only specifies that the date must not exceed 90 days after sentencing: "[i]f 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." 18 U.S.C. § 3664(d)(5).

⁶ The Government argues that Defendant waived his argument under 18 U.S.C. § 3664(d)(1) because he did not raise it at the May 19, 2010 sentencing. The Court disagrees. As stated, Defendant made the argument, which he termed a "waiver argument," at the sentencing that the Government should have submitted its request for restitution in advance of that date. Tr. at 37 (May 19, 2010). Given this, the Court is satisfied that Defendant did not waive any arguments under § 3664(d)(1).

⁷ The record does not indicate the exact dates.

the pseudonyms “Amy,” “Tara,” and “Vicky” in the Government’s Motion and in this Opinion to protect their privacy. Of the files and videos recovered from Monzel’s memory devices, five were part of the “Vicky” series, one was part of the “Misty” series (in which Amy appeared), and two were part of the “Tara” series. Govt.’s Mot. at 3. The Government provided the victims’ requests for restitution to defense counsel on, respectively, March 5, 2010, May 17, 2010, and May 29, 2010.

On June 8, 2010, the Government submitted a Consent Motion for an extension of time to file its Motion for Order of Restitution by two days, to June 10, 2010, which the Court granted [Dkt. No. 33]. On June 24, 2010, Defendant submitted a Consent Motion for a 60-day extension of time to file his response to the Government’s Motion and to vacate the status hearing scheduled for July 9, 2010 [Dkt. No. 35]. Defense counsel explained that he was requesting a new status hearing “so that the Defendant can 1) on the record, waive the 90 day time limit in 18 U.S.C. § 3664(d)(5), and 2) update the Court on the status of discussions regarding informally resolving the restitution issue in this case.” Def.’s Consent Mot. at 2 [Dkt. No. 35].

Defendant’s Consent Motion was granted, although the status conference was continued beyond

the 90-day time limit, to September 2, 2010.⁸ Neither party objected to this continuation. After Defendant filed his response to the Government's Motion on August 25, 2010, the Government filed yet another Consent Motion, which the Court granted, for an extension of time until September 27, 2010 to file its Reply.

On September 2, 2010, before the Government's Motion for an Order of Restitution had been fully briefed, a further status conference was held in this case. Monzel formally raised his argument that the Government had failed to comply with the 60-day time limitation in § 3664(d)(1). He did not waive the 90-day time limit in 18 U.S.C. § 3664(d)(5), which had by that point expired. The Court ordered additional briefing on these time limitation issues to be filed by September 16, 2010, with any responses due September 27, 2010.

By September 27, 2010, both the Government's Motion for an Order of Restitution and the §§ 3664(d)(1) and (d)(5) time limitation issues were fully briefed. A status conference was held on September 30, 2010 at which the parties argued the legal merits of the time limitation issues. A motion hearing on the Government's Motion for Order of Restitution was then held on October 5, 2010, at which the parties requested that the Court rule on proximate cause

⁸ The 90-day period, which began to run from the May 19, 2010 sentencing, ended on August 17, 2010.

before hearing argument on the amount and apportionment of any damages.

II. Analysis

Three issues arising out of the Government's Motion for an Order of Restitution will be addressed in this Opinion. First, Defendant's argument that the Government is procedurally barred under 18 U.S.C. §§ 3664(d)(1) and (d)(5) of the MVRA from seeking restitution will be considered. Second, the Court will consider whether the Government established proximate cause at the October 5, 2010, motion hearing on its Motion for an Order of Restitution. Finally, Defendant's request for discovery on the Government's Motion will be addressed.

A. Time Limitations in 18 U.S.C. § 3664

As noted above, 18 U.S.C. § 2259 makes restitution mandatory for convictions under 18 U.S.C. § 2252. In 1996, the MVRA amended § 2259 to provide that the procedures for ordering and enforcing this mandatory restitution are set forth in 18 U.S.C. § 3664 of the MVRA.⁹ 18 U.S.C. § 2259(b)(2). The

⁹ The MVRA was passed as part of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 206, 110 Stat. 1232 (1996), to supplement the Victim and Witness Protection Act of 1982, 18 U.S.C. § 3663. *United States v. Moreland*, No. 05-30541, 2010 WL 3607189, at *19 (9th Cir. Sept. 17, 2010).

MVRA’s “primary and overarching goal . . . [is] to make victims of crime whole, to fully compensate these victims for their losses and to restore these victims to their original state of well-being.” *Id.* (citations and internal quotations omitted).

Section 3664(d)(1) of the MVRA provides that “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.” 18 U.S.C. § 3664(d)(1).

Section 3664(d)(5) provides that:

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.

18 U.S.C. § 3664(d)(5).

Defendant raises two arguments under the MVRA. First, he argues that the Government’s Motion should

be denied because the Government failed to give notice of the amounts subject to restitution 60 days prior to the sentencing, as required by § 3664(d)(1). Second, Monzel argues that the Motion should be denied because the Government failed to inform the Court within 10 days of the sentencing that the victim's losses were not ascertainable at that point. As a result of this failure, 90 days have elapsed since Defendant's sentencing without a final determination of the victims' losses, as required by § 3664(d)(5). In response, the Government argues that the time limitations set forth in the MVRA are not jurisdictional in nature, and therefore do not bar its Motion for an Order of Restitution.

The Supreme Court recently considered the deadline set forth in § 3664(d)(5) of the MVRA in *Dolan v. United States*, 130 S.Ct. 2533, 177 L.Ed.2d 108 (2010). The district court judge in *Dolan* had indicated at the defendant's sentencing hearing that he would order restitution, but did not make a final determination as to the amount of such restitution until months after the 90-day limitation had expired. *Id.* at 2537. The question before the Court, then, was whether the restitution ordered was procedurally barred by § 3664(d)(5).

The Court in *Dolan* concluded that it was not. The Court distinguished between statutory time limits which are (1) jurisdictional, meaning that the expiration of the deadline absolutely deprives the court of authority; (2) "more ordinary 'claims-processing rules,' [which are] rules that do not limit a court's

jurisdiction, but rather regulate the timing of motions or claims,” and (3) a “time-related directive that is legally enforceable but does not deprive a judge or other public official of the power to take the action to which the deadline applies if the deadline is missed.” *Dolan*, at 2538 (citation omitted). The Court held that the deadlines in § 3664(d)(5) were of the third kind. *Id.* at 2539.

Dolan thus clearly held that the time limitations in § 3664(d)(5) do not deprive district courts of the power to order restitution.¹⁰ Given this controlling precedent, Defendant’s argument that § 3664(d)(5) is a procedural bar to the Government’s Motion for an Order of Restitution is rejected.

Although the Court in *Dolan* did not consider the time limitations set forth in § 3664(d)(1), its reasoning regarding the time limitations in § 3664(d)(5) is

¹⁰ Defendant argues that *Dolan* is distinguishable because the district court judge ordered restitution prior to the expiration of the time limit, leaving only the amount of restitution undetermined after the deadline had passed. In this case, for the reasons given above, the Court did not make its decision prior to expiration of the 90-day deadline as to whether an order of restitution would be entered. Although the Court in *Dolan* recognized this factual distinction, *id.* at 2537, it ultimately concluded that the 90-day time limit in the MVRA is not jurisdictional, but is a “time-related directive.” Defendant’s argument that the facts of this case require a different conclusion is therefore unpersuasive. The MVRA’s time limits are either jurisdictional or they are not; a conclusion that a deadline is not jurisdictional under the facts presented in *Dolan*, but is jurisdictional under the facts presented here would be both illogical and inconsistent.

instructive. First, the Court stated that, because the MVRA does not specify a consequence for noncompliance with its timing provisions, “federal courts will not in the ordinary course impose their own coercive sanction.” *Id.* at 2539 (internal quotation and citations omitted).

Second, the Court strongly emphasized the MVRA’s intent to ensure that “victims of a crime receive full restitution.”¹¹ *Id.* Third, the Court found that the statute’s procedural provisions “seek [] speed primarily to help the victims of crime and only secondarily to help the defendant.” *Id.* at 2539-40; *see also Moreland*, 2010 WL 3607180, at *20-21 (“The legislative history reveals Congress’s intent that the time limits in § 3664 not be relied upon for protection by defendants.”) (collecting Circuit cases).

Fourth, “to read the statute as depriving the sentencing court of the power to order restitution would harm those – the victims of crime – who likely bear no responsibility for the deadline’s being missed

¹¹ In interpreting provisions of the MVRA, courts have uniformly emphasized the statute’s focus on protection of victims. For example, in reliance on the statute’s purpose of protecting victims, the First, Second, Fourth, and Seventh Circuits held, prior to *Dolan*, that district courts may enter restitution orders more than ninety days after sentencing so long as the defendant’s substantial rights are not prejudiced. *See United States v. Johnson*, 400 F.3d 187 (4th Cir. 2005); *United States v. Cheal*, 389 F.3d 35, 49-59 (1st Cir. 2004); *United States v. Pawlinski*, 374 F.3d 536, 539 (7th Cir. 2004); *United States v. Zakhary*, 357 F.3d 186, 191 (2d Cir. 2004).

and whom the statute also seeks to benefit.” *Id.* at 2540. Fifth, the Court noted that it has “previously interpreted similar statutes similarly.” *Id.* Sixth, and finally, the Court noted that the defendant, as is true in this case, normally can mitigate any harm that a missed deadline might cause so long as he obtains the relevant information before the 90-day deadline expires. *Id.* at 2541.

All of these reasons are fully applicable to Defendant’s argument regarding the import of § 3664(d)(1) of the MVRA. Thus, the Court concludes that § 3664(d)(1), like § 3664(d)(5), is also a time-related directive that is not jurisdictional in nature. *See Moreland*, 2010 WL 3607189, at *21 (concluding that the timing requirements in both § 3664(d)(1) and (d)(5) are not jurisdictional).

In addition, Monzel can demonstrate no prejudice which would result from the decision to proceed with consideration of the Motion for an Order of Restitution. As discussed above, Defendant was put on notice of the possibility of a restitution order by the written plea agreement and the Rule 11 inquiry in December of 2009. *See United States v. Cienfuegos*, 462 F.3d 1160, 1163 (9th Cir. 2006) (when defendant signed plea agreement in which he acknowledged restitution was mandatory, he received functional equivalent of notice required under § 3664(d)(5) of the MVRA). Moreover, at the September 30, 2010 status conference the Court directly asked Defendant what prejudice would result from this Court’s consideration of the Government’s Motion. He could identify none

apart from potentially being forced to comply with an order of restitution.

In the absence of actual prejudice to Defendant, and for the reasons set forth by the Supreme Court in *Dalton*, the Government's failure to comply with the deadlines in § 3664 will not result in denial of its Motion for an Order of Restitution. *See id.* at 1162-63 (holding that failure to comply with MVRA deadlines in § 3664 was harmless error absent actual prejudice to defendant and collecting cases). Defendant's argument that the Government's Motion for an Order of Restitution is procedurally barred by the MVRA is therefore rejected.

B. Motion for an Order of Restitution

Next, Defendant argues that the Government cannot carry its burden under § 2259 to prove restitution. To do so, the Government must establish by a preponderance of the evidence that Amy, Tara, and Vicky are "victims" under § 2259, that a causal connection exists between Defendant's possession of child pornography and the victims' alleged losses, and, that if a causal connection does exist, how liability should be apportioned. *See United States v. Bras*, 483 F.3d 103, 106-07 (D.C. Cir. 2007); *United States v. Hardy*, 707 F.Supp.2d 597, 597 (W.D. Pa. 2010).

1. Amy, Tara, and Vicky Are Victims Under § 2259

At the October 5, 2010, hearing, Defendant withdrew his argument that the Government has failed to show that the claimants here are in fact the individuals depicted in the images in his possession. Therefore, the Court will turn to examine whether these young women are “victims” as that term is defined in § 2259.

Section 2259 defines a “victim” as “the individual harmed as a result of a commission of a crime under this chapter.” 18 U.S.C. § 2259(c). The MVRA similarly defines a victim as a person “directly and proximately harmed” as a result of the offense. 18 U.S.C. §§ 3663(a)(2) and 3663A(a)(2).

It is beyond dispute that child pornography victims suffer from trauma as a result of their sexual abuse, and that the knowledge that anonymous individuals continue to view and distribute images of their abuse exacerbates the victims’ feelings of fear, anxiety, and powerlessness. *See United States v. Ferber*, 458 U.S. 747, 758-61 (1982); *Hardy*, 707 F.Supp.2d 597; Govt. Ex. 2 (Psychological Status Report of Vicky Submitted by Dr. Randall L. Greene, Clinical Psychologist (July 5, 2010)) (discussing victim’s recurring anxiety attacks, dissociative symptoms, and posttraumatic stress disorder).

In *Ferber*, the Supreme Court described the various harms suffered by children whose sexual exploitation is recorded in pornographic materials.

First, the production of such pornographic materials establishes a “permanent record of the children’s participation,” the circulation of which exacerbates the harm to the child. Second, the demand for child pornography by end consumers like Monzel creates incentives for the continued abuse and exploitation of children, as well as for the continued distribution of their images. *Ferber*, 458 U.S. at 759-60; *see also Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 249, 122 S.Ct. 1389 (2002) (stating, in discussion of relationship between child pornography and sexual abuse, that “[l]ike a defamatory statement, each new publication of the speech would cause new injury to the child’s reputation and emotional well-being”). The Third Circuit has specifically addressed the harm caused by possession of child pornography, as opposed to distribution, concluding that the defendant’s consumption of such images “directly contribute[s] to this continuing victimization.” *United States v. Goff*, 501 F.3d 250, 259 (3d Cir. 2007).

Thus, it is clear that Amy, Tara, and Vicky were harmed as a result of Defendant’s possession of images exhibiting their abuse. Indeed, Monzel acknowledged as much at his sentencing when he submitted a statement that “every time I looked at a picture or video I was victimizing that child.” Tr. at 43 (May 19, 2010). The Court therefore concludes that Amy, Tara, and Vicky are victims within the meaning of the term as it is used in § 2259.

2. Defendant's Conduct Is a Proximate Cause of the Victims' Losses

The main issue argued by the parties at the October 5, 2010 hearing was whether the victims' losses were caused by Defendant's possession of images depicting their abuse. As an initial matter, it is necessary to identify the losses which the Government alleges Amy, Tara, and Vicky have suffered.¹² Amy seeks restitution in the amount of \$3,263,758 for medical services relating to physical, psychiatric, or psychological care, physical and occupational therapy or rehabilitation, transportation, temporary housing, child care expenses, lost income, and attorney's fees and other costs. Tara seeks restitution in the amount of \$2,851.20 for travel to and from her therapy sessions. Vicky seeks restitution in the amount of \$312,953.60 for future mental health counseling, the costs of an initial forensic evaluation, an updated evaluation, vocational/educational costs, out-of-pocket expenses, and attorney's fees.

Restitution is generally available only for losses "caused by" the conduct underlying the offense of conviction. *Hughey v. United States*, 495 U.S. 411, 416 (1979). Section 2259 states that victims of child

¹² The Court only identifies the losses alleged for the purposes of considering the causal connection between them and Defendant's conduct. The Court is not deciding that the Government has met its burden to prove the losses or the amount to be apportioned to Monzel. Those issues will be decided after additional briefing, evidence, and argument from the parties.

sexual abuse and exploitation – defined as the individual harmed “as a result of” the crime – are entitled to restitution for “any [] losses suffered . . . as a proximate result of the offense.” 18 U.S.C. § 2259. This language has led virtually every court which has considered the issue to conclude that the Government must establish a causal connection between the defendant’s criminal conduct and the victim’s alleged losses. *See Hardy*, 2010 WL 1543844 at *7 (collecting cases).

In this case, the parties agree that the Government must prove proximate causation.¹³ Proximate causation is a “generic label” for “the judicial tools used to limit a person’s responsibility for the consequences of that person’s own acts. At bottom, the notion of proximate cause reflects ‘ideas of what justice demands, or of what is administratively possible and convenient.’” *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268, 112 S.Ct. 1311, 1318, 117 L.Ed.2d 532 (U.S. 1992) (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 41, p. 264 (5th ed. 1984)). However, the parties disagree as to whether proximate causation under § 2259 encompasses conduct

¹³ Although counsel for the Government suggested at various points during the October 5, 2010 hearing that § 2259 “assumes” causation, the United States’ formal, written position is that proximate cause must be proven to justify issuance of an order of restitution under § 2259. *See Govt.’s Mot.* at 12; *see also* *Def.’s Opp’n* at 2 (agreeing that proximate cause must be proven under § 2259).

such as Monzel's within the scope of liability for restitution.

Both the state and federal systems uniformly employ the concept of proximate causation as a means to limit the scope of liability.¹⁴ However, there is no single approach to proximate causation in either the federal or state courts, with some focusing on the foreseeability of the harm and others asking whether the harm is factually or temporally remote from the defendant's conduct. *See* Restatement (Third) of Torts § 29 cmts. (2010) (discussing various approaches to proximate causation in federal and state courts). Many courts have incorporated the "substantial factor" test, which asks whether the defendant's conduct was a substantial factor in producing the harm. *See, e.g., id.* Reporters' Note cmt. a (2010) (collecting cases that "have understood or used substantial factor" as standard for proximate cause); *United States v. Crandon*, 173 F.3d 122, 125 (3d Cir. 1999) (interpreting "proximate cause" under § 2259 to include a "substantial factor" requirement). In recent years, however, the substantial factor test has fallen into disfavor because its lack of concreteness has

¹⁴ Although restitution under § 2259 is imposed as part of a criminal defendant's sentence, restitution "is essentially a civil remedy created by Congress and incorporated into criminal proceedings. . . ." *United States v. Carruth*, 418 F.3d 900, 904 (8th Cir. 2005). Consequently, in its analysis of proximate causation the Court draws on the well developed discussion in civil cases involving tortious conduct.

caused considerable confusion.¹⁵ See *Owens v. Republic of Sudan*, 412 F.Supp.2d 99, 110 (D.D.C. 2006); Restatement (Third) of Torts § 29 (2010).

In part because of confusion over the precise definition of proximate cause, the American Law Institute (“ALI”) very recently adopted a two-pronged approach to causation. This approach asks (1) whether the actor’s conduct was a necessary condition of the harm (but-for or factual cause) and (2) whether the harm was the product of the risks that made the actor’s conduct unlawful (scope of liability or proximate cause).¹⁶ Restatement (Third) of Torts §§ 27, 29 (2010). Although § 29 was only recently adopted, many state and federal courts have similarly distinguished between factual cause and proximate cause.¹⁷

¹⁵ In addition to the substantial factor test, the larger term “proximate causation” also has fallen into disfavor among scholars because “it is an especially poor [term] to describe the idea to which it is connected,” which is the limitation of the scope of liability. Restatement (Third) of Torts, Special Note on Proximate Cause (2010).

¹⁶ Despite the well-established reputation of the ALI, the Court has strong concerns about whether the second prong of its causation analysis, which addresses the scope of liability, is going to be any easier or clearer for judges, who must write appropriate instructions on causation, or for jurors, who must apply them.

¹⁷ Legal scholars have also largely adopted the ALI’s distinction between factual and proximate causation. “The only remotely modern casebook that the [Restatement] Reporters found that did not contain separate treatment of factual cause and proximate cause is now 20 years old and no longer in print.”

(Continued on following page)

See id. cmt. g (collecting over two dozen cases from state and federal courts which distinguish between factual causation and proximate causation). The Court will thus consider each issue of causation in turn.

Under the first prong, but-for or factual causation asks whether the actor's conduct was a necessary condition to cause the victims' harm. *See* Restatement (Third) of Torts § 27 (2010) (discussing factual causation). Monzel argues that the losses alleged "[are] incurred whether or not the Defendant possessed, received or distributed those images," which is in essence a challenge to the Government's evidence that his conduct was a but-for cause of the victims' losses. Def.'s Opp'n at 7.

As has already been discussed, see *supra* Section II.B.1, the possession of images depicting child sexual abuse causes harm to the child victim which is independent of the separate acts of initial abuse and subsequent distribution. When a victim of child pornography receives notice that yet another individual is in possession of their images, that notice results in heightening the victims' long-term fear and anxiety that people are watching their most painful childhood moments, that they will be recognized by strangers on the street, or even friends and acquaintances, or that individuals in possession of their images will

Restatement (Third) of Torts cmt. g (2010) (citing Richard A. Posner, *Tort Law: Cases and Economic Analysis* 543 (1982)).

attempt to contact them, as has happened in the past. *Ferber*, 458 U.S. at 759 n.10 (“It is the fear of exposure and the tension of keeping the act secret that seem to have the most profound emotional repercussions. . .”). Although the victims may have been suffering from such fear and anxiety prior to an individual defendant’s conduct, each notification of a defendant’s conduct perpetuates the trauma, thereby prolonging recovery, and increasing harm to the victim. *Ashcroft*, 535 U.S. at 249. For these reasons, the Court concludes that, Monzel’s conduct is a factual cause of the harm suffered by Amy, Tara, and Vicky.

Defendant’s argument, however, is that the same harm would have been caused by the possession of the victims’ images by countless other individuals even if he had never possessed the images. However, even if the same anxiety and fear which the victims now suffer would have been caused by others in any event, that is no reason to ignore Defendant’s responsibility for the harm that he has caused. In cases such as these where there are “multiple sufficient causes” of the injury, courts generally regard but-for or factual causation as inappropriate. *See, e.g., Kilburn v. Socialist People’s Libyan Arab Jamahiriya*, 376 F.3d 1123, 1129 (D.C. Cir. 2004) (noting that when “application of a ‘but for’ standard to joint tortfeasors could absolve them all, . . . courts generally regard ‘but for’ causation as inappropriate”); Restatement (Third) of Torts § 27 (2010) (“[C]ourts have long imposed liability when a tortfeasor’s conduct, while not necessary for the outcome,

would have been a factual cause if the other competing cause had not been operating.”).

Consequently, the first prong of causation – factual causation – is no obstacle to the Government’s Motion. The critical causation issue in dispute is thus the second prong, or proximate causation. In other words, the parties disagree as to whether the Government’s evidence has sufficiently demonstrated that the losses alleged fall within the scope of Defendant’s liability for his conduct.

Our Court of Appeals has not yet considered the “harm within the risk” approach to proximate causation adopted in the Third Restatement, although at least one district court in this Circuit has adopted it. *Owens*, 412 F.Supp.2d 99. In *Kilburn*, upon which *Owens* relied heavily, our Court of Appeals considered the standard for jurisdictional causation under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(7) (“FSIA”) in a civil tort action brought by the estate of a murdered American citizen against Libya. 376 F.3d at 1127-30. Section 1605(a)(7) provides an exception to sovereign immunity in cases in which money damages are sought for injury or death “caused by” certain acts.

Kilburn relied on a Supreme Court case in which the words “caused by” were interpreted in a federal admiralty statute to require only a showing of “proximate cause,” and not but-for or factual cause. *See id.* (relying on *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 536-38, 115 S.Ct.

1043, 1045-51, 130 L.Ed.2d 1024 (1995)). The Court in *Kilburn* concluded that the same showing of proximate cause, but not but-for causation, was required under the FSIA. *Id.* However, because the Court did not elaborate on the proper standard for proximate cause, *Kilburn* did not address in any detail the issues presented in this case.

In *Owens*, a later case involving the FSIA, the district court concluded that § 1605(a)(7)'s proximate cause requirement does not incorporate the substantial factor test proposed by defendants, in part because it is now disfavored. *Owens*, 412 F.Supp.2d at 111. Instead, the district court adopted the “harm within the risk” approach to proximate cause found in § 29 of the Restatement (Third) of Torts, which asks “whether there is an intuitive relationship between the act(s) alleged and the damages at issue (that is, whether the conduct was wrongful *because* that type of damage might result).” *Id.* at 113, 115.

As this discussion reveals, there is no definitive standard in our Circuit for proximate causation, either in general or more specifically under § 2259. In the absence of such a clear standard, and in recognition of the fact that courts are moving away from the substantial factor test, the Court concludes, as did *Owens*, that it is appropriate to rely upon the “harm within the risk” approach adopted in of § 29 of the Restatement (Third) of Torts.

Other factors counsel this conclusion as well. First, this approach comports with the traditional

understanding of proximate causation as a judicially crafted tool which “eliminates the bizarre” by requiring a “reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered.” *Kilburn*, 276 F.3d at 1128 (citing *Grubart*, 513 U.S. at 536). Second, this approach comports with the clear intent of Congress to extend the scope of liability for restitution to include those convicted under 18 U.S.C. §§ 2252(a)(4)(B). See S. Rep. No. 104-179, at 12 (1996), as reprinted in 1996 U.S.C.C.A.N. 924, 925 (describing purpose of § 2259 as “to ensure that the loss to crime victims is recognized, and that they receive the restitution that they are due” and “to ensure that the offender realizes the damage caused by the offense and pays the debt owed to the victim as well as to society”).

The legislative history of 18 U.S.C. §§ 2252 makes clear that it criminalizes the possession of child pornography for the purpose of protecting the nation’s children, both from the original traumatic acts of sexual abuse and from the additional harm resulting from the victims’ knowledge of the circulation of images depicting their abuse. See Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, 26-28 (1996) (listing congressional findings, which include concern that “child pornography permanently records the victim’s abuse, and its continued existence causes the child victims of sexual abuse continuing harm by haunting those children in future years”). The “risk” inherent in Monzel’s participation in the child pornography market by receiving

and possessing such images therefore includes the risk that the children whose abuse is depicted will suffer as a result.

The losses alleged by the Government clearly fall within the scope of this risk: all of the victims' alleged losses arise out of the need for ongoing psychological treatment and their inability to maintain normal, emotionally healthy lives as a result of the knowledge that Monzel and others continue to possess images of their abuse. The Court therefore concludes that the Government has demonstrated that the victims' alleged losses were proximately caused by Monzel's possession of these images.¹⁸

¹⁸ The Court notes that the approach taken by other district courts presented with the same issue of proximate causation have differed widely. Some district courts which have employed the "substantial factor" test for proximate cause have concluded that the test was met in child pornography cases involving facts similar to this case. See *United States v. Aumais*, No. 08-cr-711, 2010 WL 3033821, at *5 (N.D.N.Y. Jan. 13, 2010); *Hardy*, 707 F.Supp.2d 597 (involving conviction of possession and distribution); *United States v. Brunner*, No. 5:08-cr-16, 2010 WL 148433 (W.D. N.C. Jan. 12, 2010) (involving conviction of possession). However, other district courts requiring a direct connection between the victim's knowledge of the defendant's conduct and "additional loss above and beyond what they had already experienced" have denied restitution. *United States v. Woods*, 689 F.Supp.2d 1102, 1110 (N.D. Iowa 2010); see also *United States v. Faxon*, 689 F.Supp.2d 1344, 1357-60 (S.D. Fl. 2010); *United States v. Paroline*, 672 F.Supp.2d 781, 791-93 (E.D. Tex. 2009); *United States v. Berk*, 666 F.Supp.2d 182, 189-93 (D. Maine 2009).

One final issue remains: whether Defendant is to be held liable for the entire amounts claimed as losses by the victims or whether such losses should be apportioned in an appropriate manner. *See Woods*, 689 F.Supp.2d at 1110-12; *Paroline*, 672 F.Supp.2d at 791-92. That issue, which the Government need not prove with “mathematical precision,” but rather “with reasonable certainty,” *United States v. Doe*, 488 F.3d 1154, 1159-60 (9th Cir. 2007), will not be decided until after an evidentiary hearing and full briefing by the parties.

C. Defendant’s Discovery Request

In his Response to the Government’s Request for Restitution [Dkt. No. 36], Monzel argues that his Sixth Amendment rights to due process and to effective assistance of counsel entitle him to a certain amount of discovery regarding damages. Specifically, Monzel seeks an Order from the Court directing the Government to provide “information regarding: (1) the victim notification process and any opt in/opt out procedures; (2) the number of prior and pending criminal prosecutions in which pornographic images of Amy, Vicky and Tara have been identified as known images; (3) depositions of Mr. Marsh [Amy’s attorney] and the experts retained by him; (4) disclosure and production of the materials relied upon by Joyanna Silberg, Ph.D. [Amy’s psychologist]; (5) disclosure and production of the materials and data relied upon by the Smith Economics Group, Ltd., in their calculation of the value of certain losses; and (6) disclosure and

production of the materials relied upon by Randall L. Green, Ph.D. [Vicky's psychologist]" Def.'s Response at 15. Monzel also seeks discovery "including at a minimum, access to [one of the victim's] financial data, family members' educational background and earnings data and other information requested by the expert. . . ." *Id.*

Monzel cites no precedent in support of his argument that he is entitled to such discovery. On the contrary, it is well settled that "[t]here is no general constitutional right to discovery in a criminal case. . . ." *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837, 846, 51 L.Ed.2d 30 (1977). Moreover, the legislative history of the MVRA makes clear that Congress did not intend to establish any such due process protections for defendants facing claims for restitution: "the 'sole due process interest of the defendant being protected during the sentencing phase is the right not to be sentenced on the basis of invalid premises or inaccurate information.'" *Moreland*, 2010 WL 3607180, at *20 (citing S. Rep. No. 104-179, at 18 (1995), as reprinted in 1996 U.S.C.C.A.N. 924, 930).

Finally, § 3664(g)(1) of the MVRA specifically bars victims from participating "in any phase of a restitution order." 18 U.S.C. § 3664(g)(1). Thus, to the extent that Defendant seeks discovery directly from the victims, it is squarely banned by § 3664(g)(1). Due process and fairness do require "that a defendant be afforded a meaningful opportunity to rebut any information presented to the court for consideration

on sentencing,” which Monzel will have. *United States v. Fogel*, 829 F.2d 77, 91 (D.C. Cir. 1987). Because Defendant has failed to establish that it would be appropriate to grant him discovery of the information he seeks, his request is **denied**.

CONCLUSION

For the reasons set forth above, the Court concludes that (1) the Government’s Motion for an Order of Restitution **is not time-barred**; (2) the Government has met its burden to prove proximate cause in support of its Motion for an Order of Restitution; and (3) Defendant’s discovery request is **denied**. The parties shall submit additional briefing on the issue of damages no later than **December 20, 2010 at 5:00 p.m.** A motion hearing will be held on damages on **January 11, 2011, at 10:00 a.m.**

October 22, 2010

/s/ Gladys Kessler

Gladys Kessler

United States District Judge

**Copies via ECF to
all counsel of record**

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES)
OF AMERICA,)

v.)

MICHAEL MONZEL,)
Defendant.)

No. 09-cr-243 (GK)

ORDER

(Filed Oct. 22, 2010)

On December 10, 2009, Defendant Michael Monzel pled guilty to one count of distribution of child pornography in violation of 18 U.S.C. §§ 2252(a)(2) and one count of possession of child pornography in violation of 18 U.S.C. §§ 2252(a)(4)(B). This matter is before the Court on the Government's Motion for an Order of Restitution pursuant to 18 U.S.C. § 2259 [Dkt. No. 34]. Upon consideration of the motion, opposition, and reply, the oral argument presented by the parties at the September 30, 2010 status conference and the October 5, 2010 motion hearing, and the entire record herein, and for the reasons set forth in the accompanying Memorandum Opinion, it is hereby

ORDERED, that the Government's Motion for an Order of Restitution [Dkt. No. 34] is **granted**; and it is hereby

ORDERED, that Defendant's discovery request in his Opposition to the Government's Motion is **denied**; and it is hereby

ORDERED, that the parties shall file additional briefing on damages by **December 20, 2010**. A motion hearing will be held on damages on **January 11, 2011, at 10:00 a.m.**

October 22, 2010 /s/ Gladys Kessler
Gladys Kessler
United States District Judge

Copies via ECF to all counsel of record

**United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 11-3008

September Term 2010

1: 09-cr-00243-GK-1

Filed On: April 19, 2011 [1303881]

United States of America,

Appellee

v.

Michael M. Monzel,

Appellee

Amy,

Appellant

ORDER

It is **ORDERED**, on the court's own motion, that the Clerk withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41. This instruction to the Clerk is without prejudice to the right of any party to move for expedited issuance of the mandate for good cause shown.

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Jennifer M. Clark

Deputy Clerk

UNITED STATES DISTRICT COURT
for the District of Columbia

UNITED STATES
OF AMERICA

**JUDGMENT IN A
CRIMINAL CASE**

V.

(Filed May 25, 2010)

MICHAEL M. MONZEL Case Number: 09-243

USM Number: 06940-090
and 29974-016

David Bos, Esq.
Defendant's Attorney

THE DEFENDANT:

- pleaded guilty to count(s) 1 and 2 of the Super-
seding Information
- pleaded nolo contendere to count(s) _____
which was accepted by the court.
- was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 USC 2252(a)(2) and 2256(8)	Distribution of Visual Depiction of Minor Engag- ing in Sexual Explicit Conduct	September 16, 2009	1

The defendant is sentenced as provided in pages
2 through 11 of this judgment. The sentence is
imposed pursuant to the Sentencing Reform Act of
1984.

- The defendant has been found not guilty on count(s) _____
- Count(s) _____ is/are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

May 18, 2010
Date of Imposition of Judgment

Gladys Kessler
Signature of Judge

Gladys Kessler,
U.S. District Judge
Name of Judge and Title of Judge

May 25, 2010
Date

ADDITIONAL COUNTS OF CONVICTION

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 USC 2252(a)(4)(B) and 2256(8)	Possessing Material Constituting or Containing Child Pornography	September 30, 2010	2

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

one hundred twenty (120) months on count 1, one hundred twenty (120) months on count 2; counts to run concurrently.

- The court makes the following recommendations to the Bureau of Prisons:
- The defendant is remanded to the custody of the United States Marshal.
- The defendant shall surrender to the United States Marshal for this district:
 - at _____ a.m. p.m. on _____ .
 - as notified by the United States Marshal.
- The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
 - before 2 p.m. on _____ .
 - as notified by the United States Marshal.
 - as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.
ment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

ten (10) years on count 1, ten (10) years on count 2; counts to run concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two

periodic drug tests thereafter, as determined by the court.

- The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony

unless granted permission to do so by the probation officer;

- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The Court imposes the following additional conditions: a) periodic unannounced examinations of his computer by the probation office; b) the defendant shall not possess, or use, any data encryption technique or program and shall refrain from accessing, via computer, any material that relates to the activity in which the defendant was engaged when committing the instant offense; c) the defendant shall maintain a daily log of all addresses accessed by way of

any computer, other than those authorized for employment, and he shall make the log available to the probation office for review; d) the defendant shall consent to third party disclosure to any employer or potential employer, concerning any computer related restrictions that are imposed; f) he shall cooperatively participate in a mental health program specifically related to sexual offender therapy, as approved by the probation office, and abide by all program rules, requirements and conditions, which may include, but is not limited to, submission to periodic and random polygraph testing, plethysmograph examinations, and ABEL Assessment, as directed by the probation office; g) he shall not associate with any known sex offender; h) the defendant shall not possess or use a computer that has access to any "on-line computer service" at any location, including his place of employment, without the prior written approval of the probation office. "On-line computer service" includes, but is not limited to, any Internet service provider, bulletin board system, or any other public or private computer network; i) he shall have no direct, or indirect, contact with children, age 18 or younger, and shall refrain from loitering in any place where children congregate, including but not limited to residences, arcades, parks, playgrounds, and schools; j) the defendant shall not reside with a child or children under the age of 18 without the expressed and written approval of the minor's legal guardian and the written permission of the Court; k) he shall not be employed in any capacity or participate in any volunteer activity that involves contact with minors

except under circumstances approved in advance and in writing by the Court; l) he shall not possess any pornographic, sexually oriented, or sexually stimulating materials, including visual, auditory, telephonic, or electronic media, and/or computer programs or services that are relevant to your offense conduct or behavioral pattern relating to child pornography and he shall not patronize any place where pornography or erotica can be accessed, obtained, or viewed, including establishments where sexual entertainment is available; m) the defendant shall comply with the Sex Offender Registration requirements for convicted sex offenders for a term of years to be determined by the registration authority, in any state or jurisdiction where he resides, is employed, carries on a vocation, or is a student; n) the defendant shall not utilize “900” adult telephone numbers or any other sexually related telephone numbers and shall confirm compliance through submission of personal/business telephone records; o) the defendant may not own or possess any type of camera or video recording device without the approval of the probation office; and p) drug and alcohol treatment.

CRIMINAL MONETARY PENALTIES

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 200.00	\$	\$ To Be Determined

- The determination of restitution is deferred until July 8, 2010. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such a determination.

- The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
TOTALS	\$_____ 0.00	\$_____ 0.00	

- Restitution amount ordered pursuant to plea agreement \$ _____
- The defendant must pay interest on restitution and a fine or more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
 - the interest requirement is waived for fine restitution.
 - the interest requirement for fine restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A** Lump sum payment of \$ _____ due immediately, balance due
 - not later than _____, or
 - in accordance C, D, E, or F below; or
- B** Payment to begin immediately (may be combined with C, D or, F below); or
- C** Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D** Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

The \$200.00 Special Assessment shall be paid from prison earnings.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

The defendant shall pay the cost of prosecution.

The defendant shall pay the following court cost(s):

- The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

RELEVANT STATUTORY PROVISIONS

18 U.S.C. § 2259. Mandatory restitution

(a) In general. – Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter.

(b) Scope and nature of order. –

(1) Directions. – The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim’s losses as determined by the court pursuant to paragraph (2).

(2) Enforcement. – An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

(3) Definition. – For purposes of this subsection, the term “full amount of the victim’s losses” includes any costs incurred by the victim for –

(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) attorneys' fees, as well as other costs incurred; and

(F) any other losses suffered by the victim as a proximate result of the offense.

(4) Order mandatory. – (A) The issuance of a restitution order under this section is mandatory.

(B) A court may not decline to issue an order under this section because of –

(i) the economic circumstances of the defendant; or

(ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

(c) Definition. – For purposes of this section, the term “victim” means the individual harmed as a result of a commission of a crime under this chapter, including, 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, but in no event shall the defendant be named as such representative or guardian.

18 U.S.C. § 3771. Crime victims' rights

(a) Rights of crime victims. – A crime victim has the following rights:

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.

(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

(5) The reasonable right to confer with the attorney for the Government in the case.

(6) The right to full and timely restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

(b) Rights afforded. –

(1) In general. – In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights

described in subsection (a). Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

(2) Habeas corpus proceedings. –

(A) In general. – In a Federal habeas corpus proceeding arising out of a State conviction, the court shall ensure that a crime victim is afforded the rights described in paragraphs (3), (4), (7), and (8) of subsection (a).

(B) Enforcement. –

(i) In general. – These rights may be enforced by the crime victim or the crime victim’s lawful representative in the manner described in paragraphs (1) and (3) of subsection (d).

(ii) Multiple victims. – In a case involving multiple victims, subsection (d)(2) shall also apply.

(C) Limitation. – This paragraph relates to the duties of a court in relation to the rights of a crime victim in Federal habeas corpus proceedings arising out of a State conviction, and does not give rise to any obligation or requirement applicable to personnel of any agency of the Executive Branch of the Federal Government.

(D) Definition. – For purposes of this paragraph, the term “crime victim” means the person against whom the State offense is committed or, if that person is killed or incapacitated, that person’s family member or other lawful representative.

(c) Best efforts to accord rights. –

(1) Government. – Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).

(2) Advice of attorney. – The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).

(3) Notice. – Notice of release otherwise required pursuant to this chapter shall not be given if such notice may endanger the safety of any person.

(d) Enforcement and limitations. –

(1) Rights. – The crime victim or the crime victim’s lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter.

(2) Multiple crime victims. – In a case where the court finds that the number of crime victims makes it

impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.

(3) Motion for relief and writ of mandamus. – The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim’s right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

(4) Error. – In any appeal in a criminal case, the Government may assert as error the district court’s denial of any crime victim’s right in the proceeding to which the appeal relates.

(5) Limitation on relief. – In no case shall a failure to afford a right under this chapter provide grounds for a new trial. A victim may make a motion to reopen a plea or sentence only if –

(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;

(B) the victim petitions the court of appeals for a writ of mandamus within 14 days; and

(C) in the case of a plea, the accused has not pled to the highest offense charged. This paragraph does not affect the victim’s right to restitution as provided in title 18, United States Code.

(6) No cause of action. – Nothing in this chapter shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages. Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.

(e) Definitions. – For the purposes of this chapter, the term “crime victim” means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or

the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative.

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.
