

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

BRIEF OF *AMICUS CURIAE*
THE NATIONAL ASSOCIATION TO PROTECT
CHILDREN SUPPORTING PETITIONER

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INTEREST OF *AMICUS CURIAE*¹

The National Association to Protect Children (NAPC) is a national, non-profit pro-child, anti-crime membership association located in Knoxville, Tennessee with members in all 50 states.² The Association is founded on the belief that our first and most sacred obligation as parents, citizens, and members of the human species is the protection of children from harm. The NAPC has worked in numerous state legislatures and in Congress on legislation regarding child exploitation sentencing and policy and has testified before the United States House of Representatives and Senate on the nature and magnitude of child pornography trafficking. This case involves interests of all crime victims, but especially those who face a lifetime of exploitation from pedophiles, because the case concerns the appeal rights and appellate review of violation of the victims rights.

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¹ No such counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and have been given at least 10 days notice of the *amicus*' intention to file it.

² You can learn more about the National Association to Protect Children by visiting www.protect.org.

SUMMARY OF THE ARGUMENT

There is a circuit split among the interpretation by Federal Circuits regarding how to determine the amount of restitution due to victims of child sexual abuse images. Some Circuits, such as the Second, Ninth, Tenth and Eleventh Circuits, have denied mandatory restitution. Other courts make qualitative determinations regarding the defendant's involvement in causing harm, possessing sexual abuse images or other standards to determine how much restitution, if any, or if more than nominal damages, is due to the victim. Child sexual abuse image related crimes and prosecutions are increasing but the courts continue to issue fragmented rulings regarding restitution to victims. Therefore, the outcomes of these cases will continue to be disparate depending upon where they are prosecuted. The Court should grant certiorari to resolve this split. Sup. Ct. Rule 10(a). It should also grant certiorari because the petition raises "an important question of federal law that has not been, but should be, settled by this Court. . . ." Sup. Ct. Rule 10(c). This issue is important because the law is currently wanting, leaving victims with different expectations of damages based solely on where the crime against them is being prosecuted. It is important that this Court take up and decide the petition so that it can promulgate a clear standard in this emerging field of law, and thus allow for consistent enforcement of victims' rights.

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ARGUMENT

I. VICTIMS OF CHILD SEXUAL ABUSE IMAGES DESERVE CONSISTENT APPLICATION OF RESTITUTION STATUTES IN THE UNITED STATES

At the outset, a quick note on terminology is appropriate. At issue in this case is not really so-called “child pornography,” but rather “child sexual abuse images.” Child sexual abuse images are a recording of an original crime scene. These child sexual abuse images linger on the internet for years after the initial abuse. These child sexual abuse images depict torture, rape and steal the innocence of children. Almost every image is a deliberate attempt to enlist and involve others in the crime. Whether the recording of the original crime is then sold or offered freely as part of a barter system makes little difference. This system of exploitation validates the pedophiles crime and causes a lifetime of exploitation to the victim. As Andrew Vachss said in his article in Parade magazine “No child is capable, emotionally or legally, of consenting to being photographed for sexual purposes. Thus, every image of a sexually displayed child—be it a photograph, a tape or a DVD—records both the rape of the child and an act against humanity.” (available at <http://www.protect.org/tools/articles/8-articles/1045-raising-the-stakes-for-child-pornography--protects-exclusive-interview-with-andrew-vachss>). This brief will address the impact of this abuse on the victims while reviewing the inconsistency in the various circuits in application of restitution across the country.

Throughout our history, participation of victims in criminal prosecutions has changed. In the

early days of our country, victims regularly prosecuted criminal cases. *Steel C. v. Citizens for a Better Env't*, 523 U.S. 83, 127-28 (1998) (Stevens J., concurring). As our country shifted to government based prosecutions, victims maintained little involvement in the case. After years without providing input or receiving input on prosecutions, Congress took action. In the Victim Witness Protection Act of 1982, Congress recognized how victims had been ignored and the importance of victims to the success of our criminal justice system. Victim and Witness Protection Act of 1982 (VWPA), Pub. L. No. 97-291 § 2(a)(1), 96 Stat. 1248, 1248 (1982).

For the next 20 years, Congress and the states passed laws to increase protection for the rights of victims. Some of these measures include the VWPA in 1982; Victims of Crime Act of 1984 (Pub. L. No. 98-473, 98 Stat. 2170) (creating victim compensation funds); the Victims' Rights and Restitution Act of 1990 (42 U.S.C. § 10606) (model rights for crime victims) (partly superseded by Crime Victims' Rights Act (CVRA)); the Violent Crimes Control and Law Enforcement Act of 1994; (Pub. L. No. 103-322, 108 Stat. 2097) (mandating restitution for certain crimes and including the Violence Against Women Act of 1994); and the Mandatory Victims Restitution Act of 1996 (18 U.S.C. § 3663A) (expanding offenses for mandatory restitution).

Congress further took an additional step to ensure victims of sexual exploitation received broad restitution. 18 U.S.C.S. § 2259 defines the full amount of the victim's 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.

(emphasis added). The only section of this statute that requires proximate result is subsection (F.)

Clearly Congress passed these laws to further protect children who were victims of serious sexual crimes. A perfect illustration of the kind of victim that Congress intended to help is the petitioner in this case -- Amy-- who reports her abuse in her victim impact statement. Amy's uncle started sexually abusing her when she was four years old, and he took graphic photos of the abuse. He created the images for an end-user and those images were distributed around the world. Amy will never be able to let the abuse escape her mind because of the demand created by possessors of child sexual abuse images over the internet. Amy lives in constant fear that someone will see these graphic images, recognize her and humiliate her all over again. She

constantly feels that she is “being exploited and used every day and every night somewhere in the world by someone.” See *United States v. Kennedy*, 643 F.3d 1251, 1255 (9th Cir. 2011). Amy remembers the abuse periodically and the memories prevent her from focusing on her surroundings.

Amy has attended therapy but her feelings are worse today because the crime has never gone away and she is forced to relive it on an almost daily basis. Amy indicated in her victim impact statement that it is “hard to describe what it feels like to know at any moment, anywhere, someone is looking at pictures of me as a little girl being abused by my uncle and is getting some kind of sick enjoyment from it. It is like being abused over and over and over again.”

Amy is unable to obtain a driver’s license and perform basic functions like most teenagers. She was unable to participate in certain classes because of the emotional impact of the subject and she has difficulty with work force interviews. She consistently worries that her friends will find the abuse pictures on the internet. The perpetual trading and sale of the criminal sexual abuse images of Amy’s abuse over the internet exacerbates her fear, shame and anxiety, “[w]hat happened to me hasn’t gone away. It will never go away” *United States v. Kennedy*, 643 F.3d at 1255.

As most courts have agreed, child sexual abuse and related child abuse image crimes result in a lifetime of suffering and treatment, for which extensive restitution is appropriate to achieve Congress’ goal of restoring to victims the “full amount” of their losses. 18 U.S.C. § 2259(b)(1). The courts have divided, however, both on the question of

how victims can obtain appellate review of their restitution claims and on the size of appropriate restitution awards. Amy has explained at length the split of authority on the appellate review issue. *See* Pet. for Writ of Certiorari at 29-39. Certiorari is appropriate on this question for the reasons Amy explains there. NAPC's brief here will focus on the issue of the size of restitution awards – another issue on which certiorari is appropriate.

As Amy has persuasively explained in her petition, federal trial and appellate courts are all over the board on how restitution should be calculated for victims of sexual abuse images. Indeed, the confusion is so great now that some courts are simply inventing their own unique approach to granting restitution. For example, some district courts have applied a system that apportions damages based on a percentage of the victim's losses proximately caused by the defendant. (*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 abuse image] restitution statute may ultimately be adopted as correct and appropriate, my present view . . . is that proximate causation is required”; awarding 5% of 21 total losses or \$5,448 in restitution).

Adding to this growing divide, other courts have determined the losses “proximately caused” by looking to the quantity of child sexual abuse images possessed by the defendant. *See 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*, 643 F.3d 1251 (9th Cir. 2011). Furthermore, district courts have made

qualitative assessments 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), while other courts (including the district court in this case) have awarded nominal restitution in a capricious amount. *See 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 were found to be appropriate).

While some courts have summarily denied restitution even though the provisions are mandatory, others held hearings to determine the appropriate level of restitution. The statute that allows crime victims to obtain restitution breaks up the restitution in six categories:

- (A) medical services relating to physical psychiatric, or psychological case;
- (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).

After hearing evidence and arguments, courts have ruled (on essentially identical fact patterns) that the appropriate restitution ranges from \$0 to \$3000 to \$219,546.10 to \$3,680,153.00. *Compare United States v. Woods*, 689 F.Supp.2d 1102, 1112 (N.D. Iowa 2010) (\$0); *with United States v. Hicks*, 2009 WL 4110260 at *506 (E.D. Va. Nov. 24, 2009) (\$3000); *with United States v. Tranthan*, No. 09-CR-027, judgment at 5 (N.D. Tex. Jan. 26, 2010) (restitution awarded for \$219,546.10); *with United States v. Staples*, 2009 WL 2827204 (S.D. Fla. 2009) (restitution awarded for \$3,680,153). How can our criminal justice system award full restitution in some jurisdictions and none in others? This is one of the reasons why this Court needs to resolve this issue quickly. Many of the victims who are being denied restitution lack legal counsel and may not have any other opportunity to later obtain compensation for their losses.

Competent courts have determined that there is significant restitution owed to the victims, but whether possessors of child sexual abuse images should assist in payment varies by which circuit handles the victim's case. The fragmented rulings of the courts result in inconsistent application of restitution amounts across the country. Some courts even fail to award mandatory restitution in prosecutions of possessors of child sexual abuse images. The clearest example of this failure comes from the Ninth Circuit, which has recently ruled (after the filing of Amy's certiorari petition) that it will no longer award restitution for these kinds of cases. In *United States v. Kennedy*, 643 F.3d 1251 (9th Cir. 2011), the Circuit struck down a restitution award and stated that "the responsibility lies with

Congress, not the courts, to develop a scheme to ensure that defendants such as Kennedy are held liable for the harms they cause through their participation in the market for child pornography.” *Id.* at 1266. The Ninth Circuit called on Congress to revise its currently existing statute -- § 2259 – and come up with another scheme for restitution. *Id.* Certainly before Congress is called into the fray, this Court should give a definitive interpretation of what the statute means.

The failure of some courts to award restitution against possessors of child sexual abuse images sends the message that possessors are in no way responsible for the victimization. This perverse logic is clearly contrary to intention of Congress in drafting § 2259, which makes “full” restitution “mandatory.” 18 U.S.C. § 2259(b)(4). Producers of the child sexual abuse images are motivated by the demand of the possessors. Specifically, in Amy’s case, her abuser sexually violated her to produce child sexual abuse images for an end user. Then those images were traded or sold over the internet to countless pedophiles. Many times, images and videos are used to gain access to exclusive groups that require fresh/new content for admittance. Congress sought to respond to the harms imposed on victims in mandating broad restitution in § 2259.

An example of the horrendous problem Congress was confronting comes from a recent case, in which federal agents uncovered and took down an online child sexual abuse image ring known as ‘Dreamboard.’ On Dreamboard, there was a four-tiered hierarchy of users culminating with “Super VIPs.” Super VIPs were producers and distributors of child sexual abuse images who were considered to

be the trusted, upper echelon members. These members were encouraged to produce highly offensive, degrading and torturous images of abused children.³ According to the Justice Department, “the international group prized and encouraged the creation of new images and videos of child sexual abuse – numerous Dreamboard members sexually abused children, produced images and videos of the abuse, and shared the images and videos with other members of Dreamboard.”⁴ (available at <http://www.justice.gov/opa/pr/2011/August/11-ag-1001.html>). Thus, the demand for child sexual abuse images consistently and directly leads to victims’ sexual abuse.

The behavior of those who engage in the production and possession of child sexual abuse images is what directly causes the emotional

³ Dreamboard had warnings posted to members that stated, “if you haven’t UPLOADED in 50 days, & login doesn’t work, re-apply, because you have been DELETED,” and, “Uploaders remain, TALKERS AND LURKERS who DONT upload are deleted [sic]”.

⁴ Equally disturbing were the rules of the website for the members. Among the rules (that which were printed in English, Russian, Japanese, and Spanish) were statements requiring that members “keep the girls under 13, in fact, I really need to see 12 or younger to know your [sic] a brother.” Furthermore, in a section of the website entitled ‘Super Hardcore,’ there were rules warning members to only upload the most heinous pictures and videos: “Its very young kids, getting fucked, and preteens in distress, and or crying ect... Getting hit hard on the ass, with a belt and so on . . I can’t believe some of you guys can’t work it out for yourselves? And ‘pretend’ bondage, ‘Pretend light whipping’ is not super hardcore. If the girl looks totally comfortable, she’s not in distress, it does NOT belong [in] this section :-)”

challenges for victims like Amy. Why should victims not receive restitution? Why should any defendant not be held jointly and severally liable? The courts routinely hold that joint and several liability is the appropriate way for defendants to pay restitution. Thus, all victims are entitled to full restitution authorized under the law. Congress certainly did not want victims of sexual exploitation treated any differently, which is why it passed an extremely broad restitution statute in § 2259. This Court should accordingly review this important issue and ensure that victims like Amy receive the full restitution to which they are entitled.

II. CONSISTENT INTERPRETATION OF THE CVRA'S MANDATORY RESTITUTION PROVISION IS AN IMPORTANT ISSUE RECURRING IN THOUSANDS OF CASES THAT SHOULD BE RESOLVED BY THIS COURT.

This Court should also grant the petition because the issue of how to interpret § 2259 is an important one that courts throughout the country must repeatedly address. District courts are repeatedly being called upon to address restitution issues in these cases. Child sexual abuse image crimes are the most rapidly growing crime in the United States over the last ten years, with increases over 2,500 percent according to the FBI. *See* FBI, Online Child Pornography/Child Sexual Exploitation Investigations, available at <http://www.fbi.gov/stats-services/publications/innocent-images-1/innocent-images-national-initiative> (accessed August 4, 2011).

With the rapid increase of people distributing and downloading this illicit media, a vicious, cyclical effect of supply and demand has developed itself into a multi-billion dollar per-year industry. The United States is the biggest market for child sexual abuse images, where it is estimated as a multi billion dollar industry. *See 575 Annals 147, 152.* This exponential surge in child sexual abuse images is directly attributed to the monetary and lascivious satisfaction that the victimizers achieve – leaving innocent children to put back together the pieces of their lives long after the physical victimization has ended.

With the advent of new technologies, finding and prosecuting the victimizers of child sexual abuse images has become increasingly easier and more successful. Likewise, with new technologies comes ever increasing ease for victimizers to commit their crimes. Thus, the exponential, year-to-year increase of child sexual abuse image cases is likely a trend that will continue to rise for years to come. According to the FY 2010, Internet Crimes Against Children Task Forces program summary their investigations led to more than 5,400 arrests that identified over 2,100 real children who were victims of abuse or neglect. (available at <http://www.ojjdp.gov/programs/progsummary.asp?pi=3>). These statistics prove we are not simply talking about images. While the increase in arrests and prosecutions of these criminals have been undeniable steps forward for police agencies and prosecutors, many judges have been left to interpret the CVRA's mandamus provision regarding restitution on their own. As a result, Circuits across the country are split in the way that they allocate restitution to victims.

This proliferation of cases has collided with a relatively new field to produce substantial uncertainty in numerous cases around the country. The CVRA was enacted in 2004, giving crime victims (including Amy) a clear right “to full timely restitution as provided in law.” 18 U.S.C. § 3771(a)(5). Yet under § 2259, neither district court nor circuit court judges been able to consistently and clearly protect that right. Since the advent of the CVRA, district court judges have varied widely in their application of the mandatory restitution provision. For example, some district courts have developed a system by which damages are apportioned based upon a percentage of the victim’s losses that are “proximately caused” by the defendant. *See, e.g., United States v. Ontiveros*, 2011 WL 2447721 (N.D. Ind. June 15, 2011) (noting a 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 only a percent of losses (\$4500 in restitution)). On the other hand, some district courts have determined the amount of losses that were “proximately caused” by the defendant by the quantity of child sexual abuse images actually possessed. *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 for the number of images in the defendant’s possession). Some district courts have gone so far as to award only nominal restitution in arbitrary amounts. *See United States v. Church*, 701 F.Supp.2d 814, 834-35 (W.D. Va. 2010) (due to a lack of evidence of losses proximately caused, \$100 nominal damages were found to be appropriate). Further still, some district courts have all together denied restitution. *See United States v.*

Woods, 689 F. Supp. 2d 1102, 1110 (N.D. Iowa 2010). Clearly, victims are being treated substantially different depending on where they are geographically located in the United States.

Thus, the multitude of different ways that courts have applied the statute to cases involving essentially the same facts makes clear that not only will lower courts continue to fragment around this issue without direction from this Court but that courts are taking on an onslaught of child sexual abuse image cases. This issue will occur in thousands of cases each year around the country. The Court should step into this important area of law and provide clear guidance on how to apply the restitution statute.

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CONCLUSION

Currently the Circuits treat victims exceedingly unequally. Allowing this existing split to continue will gravely affect the ability of countless victims to assert their statutorily mandated rights. Rather than allowing continued disparity in the application of an emerging field of law, the Court should take up and decide this important issue.

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