

NO. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

DOYLE RANDALL PAROLINE	§	PETITIONER
	§	
VS.	§	
	§	
THE UNITED STATES OF AMERICA	§	RESPONDENTS
and	§	
AMY UNKNOWN	§	

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

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APPEAL CAUSE NO. 09-41238  
IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CAUSE NOS. 09-41238 AND 09-41254  
IN THE UNITED STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF TEXAS

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## QUESTIONS PRESENTED

The Fifth Circuit held, contrary to the holdings of every other circuit considering the question, that there was no requirement that restitution be limited to losses proximately caused by the defendant's criminal acts and that the defendant is responsible for restitution for all losses suffered by the victim regardless of whether the Defendant's criminal acts proximately caused the loss and the victim's losses occurred prior to the Defendant's indictment and arrest.

1. In determining restitution in child pornography cases pursuant to 18 U.S.C. § 2259(b)(3), is the award of restitution limited to losses proximately caused by the defendant's criminal actions or may a defendant be required to pay restitution for *all* losses, regardless of whether his criminal acts proximately caused the loss?
2. Whether the Government is correct in its argument that authorizing \$3.4 million in restitution against a defendant to a victim of child pornography who has never had contact with the defendant may violate the Eighth Amendment ban on excessive fines in the absence of a proximate cause requirement in the setting of the amount of restitution assessed against that defendant.<sup>1</sup>

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<sup>1</sup>Paroline also argued in the District Court and the Fifth Circuit that an award of restitution without a showing of proximate cause would violate the Eighth Amendment of the United States Constitution. The majority en banc opinion of the Fifth Circuit did not address Paroline's Eighth Amendments concerns.

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**TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:**

**COMES NOW DOYLE RANDALL PAROLINE**, Petitioner herein, by and through his attorneys, **STANLEY G. SCHNEIDER, F.R. “BUCK” FILES and TOM MORAN**, and pursuant to SUP. CT. R. 14 files this petition for writ of certiorari and in support thereof, would show the Court as follows:

**I. STATEMENT OF JURISDICTION**

This is an appeal from the *en banc* Court of Appeals for the Fifth Circuit. The Court of Appeals issued an opinion on rehearing from its earlier opinion on rehearing *en banc* on November 119, 2012.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3771(d)(3). The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

**II. CITATION TO LOWER COURT OPINIONS**

The Fifth Circuit issued four opinions, two *en banc* and two panel. They are (in reverse chronological order):

1. *In re Amy Unknown*, No. 09-41238 (5<sup>th</sup> Circuit November 19, 2012) (*en banc*) (opinion on rehearing) (not yet reported), included in the Appendix as Appendix A.

2. *In re Amy Unknown*, 697 F. 3d 306 (5<sup>th</sup> Cir. 2012) (*en banc*), the initial opinion on rehearing *en banc*. A copy of the opinion is included as Appendix B.

3. *In re Amy Unknown*, 636 F. 3d 190 (5<sup>th</sup> Cir. 2011) (opinion on panel rehearing). A copy is included in the Appendix as Appendix C.

4. *In re Amy Unknown*, 591 F. 3d 792 (5<sup>th</sup> Cir. 2009) (initial panel opinion). A copy is

included in the Appendix as Appendix D.

The District Court issued a memorandum and opinion. *United States v. Paroline*, 672 F. Supp. 2 781 (W.D. Tex. 2009). A copy is included in the Appendix as Appendix E.

### III. STATUTORY PROVISION INVOLVED

#### A. U.S. CONST. amend. VIII

Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishment inflicted.

#### B. 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 the 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 the 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) attorney's 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 sources.

(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

#### IV. STATEMENT OF THE CASE

It is undisputed that Amy was terribly sexually abused by a relative who placed pictures of the abuse on the internet. It is undisputed that Paroline possessed two of those photographs on his computer.

The issues presented boil down to a simple question: When a person commits the crime of possession of child pornography, is restitution for that crime limited to the harm committed by the crime of conviction or does § 2259 require restitution for all related crimes – including harm caused

by the original sexual abuse?

This case presents an unusual circumstance in which Petitioner and the Government take nearly identical positions that § 2259 has a proximate cause requirement for calculation of restitution while Amy and the *en banc* Fifth Circuit rejects those positions.

In its *en banc* opinion, the Fifth Circuit held § 2259 requires a restitution order for the full amount of the victim's losses regardless of whether the defendant's actions were the proximate cause of the losses. This includes losses caused by the original sexual abuse. The dissent would have held that while restitution was mandatory, it should be only for the losses proximately caused by the defendant's criminal acts.

This Court should grant review pursuant to SUP. CT. R. 10(a) in that the decision of the court of appeals conflicts with

1. *United States v. Aumais*, 656 F.3d 147 (2<sup>nd</sup> Cir. 2011);
2. *United States v. Monzel*, 641 F.3d 528 (D.C. Cir.), *cert denied sub. nom. Amy, Victim in Child Pornography Series v. Monzel*, \_\_ U.S. \_\_, 132 S. Ct. 756 (2011);
3. *United States v. Evers*, 669 F.3d 645 (6<sup>th</sup> Cir. 2012);
4. *United States v. Burgess*, 684 F.3d 445 (4<sup>th</sup> Cir. 2012);
5. *United States v. Kearney*, 672 F.3d 81 (1<sup>st</sup> Cir. 2012);
6. *United States v. McGarity*, 669 F.3d 1218 (11<sup>th</sup> Cir. 2012);
7. *United States v. McDaniel*, 631 F.3d 1204 (11<sup>th</sup> Cir. 2011);
8. And, *United States v. Laney*, 189 F.3d 954 (9<sup>th</sup> Cir. 1999).

The Court also should grant review pursuant to SUP. CT. R. 10(c) in that the court of appeals decided an important question of federal law which has not been, but should be, settled by this Court.

### A. Overview of the Case

Paroline pled guilty to possession of child pornography and admitted to possessing 150-300 images of child pornography. Of those images, two were identified as images of Amy Unknown which he obtained over the internet. Paroline was sentenced to 24 months incarceration followed by supervised release. Respondent Amy Unknown filed a victim impact statement and sought restitution of approximately \$3,367,854. Amy was sexually exploited by her uncle when she was eight and nine years of age. She is now 19 years of age. The pornographic images of her abuse depict rape, cunnilingus, fellatio, and digital penetration. These images have been, and continue to be, traded and distributed on the Internet. 672 F.Supp. 2d., at 783 and n. 3.

The district court found § 2259 contains a proximate cause requirement for all restitution and held that neither Amy nor the Government provided proof of the amount of the injury caused by Paroline.<sup>2</sup> It therefore denied restitution. *Id.*, at 791-93.

Amy filed both a notice of appeal and a petition for writ of mandamus with the court of appeals. The court of appeals issued two panel opinions: *In re Amy*, 591 F.3d 792 (5<sup>th</sup> Cir. 2009) (denying mandamus relief), and *In re Amy Unknown*, 636 F.2d 190 (5<sup>th</sup> Cir. 2011), on rehearing granting mandamus relief. Paroline filed a timely motion for rehearing *en banc* which was granted.

### B. The *en banc* Court of Appeals Opinion

The *en banc* court of appeals issued two opinions, one in initial *en banc* review and the second on rehearing. In its latest opinion, it conducted a statutory interpretation analysis of § 2259. The court held that § 2259 “reflects a broad restitutionary purpose” and requires district courts to

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<sup>2</sup>Paroline filed affidavits from experts that were considered by the District Court that contested the amount of Amy’s losses.

award restitution. Slip op., at 17. The court recognized that the district court relied on this Court's holding in *Porto Rico Railway, Light & Power Co. v. Mor*, 253 U.S. 345 (1920) to apply the proximate cause requirement in 18 U.S.C. § 2259(b)(3)(F) to all of the items of restitution in § 2259(b)(3). It also recognized the Government's argument along the same lines requiring a showing of proximate cause to sustain a restitution grant. Slip op., at 19-20. It recognized the Government's argument that seven circuits had rejected Amy's reading of the statute. *Id* at 20.

The *en banc* court construed the statute and held there is a proximate cause requirement only for costs incurred by the victim under the catchall provision of § 2259(b)(3)(F). Slip op., at 20-21. The majority held that § 2259(b)(3)

[B]egins with an introductory phrase composed of a noun and verb ("full amount of the victim's losses' includes any costs incurred by the victim for –") that feeds into a list of six items, each of which are independent objects that complete the phrase. Only the last of these items contains the language "proximate result." A double dash opens the list, and semi-colons separate each of its elements, leaving § 2259(b)(3) with a divided grammatical structure that does not resemble the statute in *Porto Rico Railway*, with its flowing sentence that lacks any distinct separation.

Slip op., at 22-23.

The *en banc* Fifth Circuit recognized that three other circuits had similarly applied the rules of statutory construction to come to the same conclusion even though all three have "injected the statute with a proximate cause requirement through alternative means," citing *United States v. Burgess*, 684 F.3d 445 (4<sup>th</sup> Cir. 2012); *United States v. Aumais*, 656 F.3d 147 (2<sup>nd</sup> Cir. 2011); and *United States v. Monzel*, 641 F.3d 528 (D.C. Cir.), *cert. denied sub nom. Amy, Victim in Misty Child Pornography Series v. Monzel*, \_\_ U.S. \_\_, 132 S. Ct. 756 (2011). Slip op., at 26 and n. 11.

Those circuits used traditional principles of "bedrock" tort and criminal law liability to find

a proximate cause requirement for restitution under § 2259.<sup>3</sup> The *en banc* Fifth Circuit held those three Circuits based their reasoning on *Monzel* and flatly rejected it. It refused to “interject the statute with a proximate cause requirement based on traditional principles of liability.” Slip op., at 29. It went on to hold that the injection of § 2259 with traditional proximate cause requirements could comport with this Court’s holdings only if § 2259 “were naked of causal limitations. But it is not.” Slip op., at 30 (citation omitted). The Fifth Circuit held that the “selective inclusion and omission of causal requirements in § 2259 together with language pointing away from ordinary causation, suggest that Congress intended to depart from, rather than incorporate, a tradition of generalized proximate cause.” Slip op., at 31.

The *en banc* court also reviewed other circuits which had found the proximate cause requirement in § 2259(b)(3)(F) applied to the five categories preceding it but found the other circuits not compelling. Slip op., 26-27, citing *United States v. McDaniel*, 631 F.3d 1204 (11<sup>th</sup> Cir. 2011); *United States v. Laney*, 189 F.3d 954 (9<sup>th</sup> Cir. 1999).

The court then considered the Government’s argument that principles of tort and criminal law liability limit the award of restitution to losses proximately caused by the defendant’s actions. The *en banc* Fifth Circuit recognized that at least three circuits have accepted that view and derived a proximate cause require from traditional tort and criminal law along with the definition of victim in § 2259(c). Slip op., at 28, citing *Monzel*, 641 F.3d., at 535; *Burgess, Aumais, Kearney* and *United States v. Evers*, 669 F.3d 645 (6<sup>th</sup> Cir. 2012). The court wrote:

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<sup>3</sup>For sentencing guideline purposes, relevant conduct under U.S.S.G. § 1B1.3 and restitution under U.S.S.G. § 5E1.1 are inexorably intertwined. It is undisputed that Amy’s actual sexual abuse can not be considered as relevant conduct under §1B1.3. Section 2259 is enumerated as part of §5E1.1.

The D.C. Circuit rejected the view expressed by the *In re Amy Unknown* panel, explaining that “[h]ad Congress meant to abrogate the traditional requirement for everything but the catch-all, surely it would have found a clearer way to do so.” The D.C. Circuit criticized this court’s decision in *Amy* because “a ‘general’ causation requirement without any subsidiary proximate causation requirement is hardly a requirement at all”; “[s]o long as the victim’s injury would not have occurred but for the defendant’s offense, the defendant would be liable for the injury.” The circuits that have adopted the D.C. Circuit’s view have pursued a similar line of reasoning. *We do not accept this reasoning, however, and refuse to inject the statute with a proximate cause requirement based on traditional principles of tort.*

Slip op., at 29. (citations omitted) (emphasis added).

The *en banc* court held the D.C. Circuit’s analysis comports with this Court’s statutory interpretation guidance

[O]nly if § 2259 were naked of causal limitations. But it is not. In assessing whether Congress intended a broad proximate cause limitation, we cannot ignore that § 2259 expresses causal requirements, yet isolates them to two discrete points: the definition of victim as an “individual harmed *as a result of* the commission of a crime,” and the limitation of “any other losses” to those that are the “*proximate result* of the offense.

Slip op., at 30. (citations omitted, emphasis in original).

It therefore held it was Congress’ intent to depart from, rather than to incorporate, the tradition of generalized proximate cause. Slip op., at 31.

The *en banc* court also rejected the Government’s argument that its interpretation would result in an absurd result and constitutional implications could be avoided by reading § 2259 as requiring proximate causation for all categories of losses. The court rejected the Government’s position that the amount of restitution could be grossly disproportionate to the gravity of the offense. *See generally* Slip op., at 36-37 rejecting the argument that restitution is punishment similar to forfeiture and subject to Eighth Amendment limitations as found by this Court in *United States v. Bajakjian*, 524 U.S. 321 (1998).

## B. Judge Davis's Dissent

In his dissenting opinion, Judge Davis<sup>4</sup> rejected what he called the majority's "one size fits all rule" requiring district courts to assess restitution for the full amount of damages against each defendant when multiple violators contribute to the victim's damages. Judge Davis would construe § 2259(b)(2) as expressly incorporating the general restitution requirements of 18 U.S.C. § 3664 – including the requirement that restitution be based on "the *amount of the loss* sustained by a victim *as a result of the offense...*" The dissent further argues that its interpretation is consistent with the § 2259(c), defining "victim" as the "individual harmed *as a result* of a commission of crime under this chapter." Slip op., at 46. (emphasis in original).

The dissent relied in this Court's opinion in *Porto Rico Railway* to find that the proximate cause requirement in § 2259(b)(3)(F) applies equally to the previous five subcategories of losses. The dissent notes this is consistent with the Eleventh Circuit in *McDaniel* and the Ninth Circuit in *Laney* Slip op., at 47.<sup>5</sup>

The dissent, relying on *Burgess* and *Kearney* would have found that restitution was available only for harm proximately caused by the defendant's criminal acts. Slip op., at 50-51. In determining the amount of restitution, the dissent agreed that Amy is entitled to a restitution from all offenders equal to the total amount of her losses. But it argues the majority ignored the second clause in 18 U.S.C. § 3664(h), which allows district courts to apportion liability among defendants

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<sup>4</sup>Joined by Judges King, Smith and Graves.

<sup>5</sup>The dissent also rejected the attempt in *In re Amy* to distinguish § 2259 from *Porto Rico Railway* on the basis that the subsections in § 2259(b)(3) are separated by semicolons rather than commas. Slip op., 48, n. 3. See also *Ex parte Rodriguez*, 39 Tex. 705 (1873), where the Texas Supreme Court earned the nickname "the semicolon court" by voiding the election of a candidate for governor over the incumbent based on the placement of a semicolon.

“to reflect the level of contribution to the victim’s loss and economic circumstances of each defendant.” Slip op., at 52. (emphasis in original). The dissent notes that its interpretation is consistent with *McGarity*.

In assessing the amount of restitution to be paid by each defendant, the dissent would set the following guidelines for district courts:

1. The district court must recognize Amy’s losses are an aggregation of the acts of the person who abused and filmed her assault, those who distributed the images and those who possessed the images. The culpability of any one defendant regarding Amy’s loss is dependent at least in part in the role the individual defendant played with respect to her exploitation, citing *Burgess*.

2. The district court should compute the victim’s probable future losses based on evidence of the damages she likely will incur from the date of the defendant’s conduct to the foreseeable future including all items in § 2259(b)(3).

3. In cases such as this where multiple individuals have been convicted of contributing to her abuse, the district court has discretion under § 3664(h) either to enter an award for the total amount of her provable losses or some portion of those losses to reflect the defendant’s role in causing the damage as well as other circumstances. Slip op., at 53.

Without limiting the district court’s discretion, the dissent also would allow district courts to consider the following factors:

1. The egregiousness of the defendant’s conduct, including whether he was involved in the physical abuse of this or other victims or attempted to make personal contact with victims whose images he viewed or possessed.

2. For defendants who possessed images of the victim, the number of images he possessed



or viewed and whether he redistributed those images to others.

3. The financial means of the defendant and his ability to satisfy the award.

4. The \$150,000 liquidated civil damage award authorized by 18 U.S.C. § 2255 or a percentage thereof as a guide in fixing the amount of restitution.

5. As guides, awards made in similar cases.

6. Any other facts relevant to the defendant's level of contribution to the victim's loss and economic circumstances of the defendant. Slip op., at 54.

## V. REASONS FOR REVIEW

### A. The Circuit Split

In the instant case, the *en banc* Court of Appeals considered and rejected the holdings of seven other circuits in eight cases. Its holding is not a narrow conflict or a conflict with minimal practical effect. It is a flat rejection of the reasoning of *every* other circuit which has considered the issue. The conflict has immense implications for both defendants and victims in child pornography cases.<sup>6</sup>

The *en banc* Fifth Circuit's position as the sole circuit rejecting a proximate cause requirement to determine restitution essentially destroys the court's attempt to ameliorate the harshness of its holding – joint and several liability with others. Persons who possess child pornography in every other circuit which has considered the issue would have contribute little if any to the restitution pool. Persons convicted in the Fifth Circuit would be left to carry the restitution

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<sup>6</sup>The Fifth Circuit's holding in the instant case also puts it in conflict with another decision by that court, albeit construing a related but different restitution statute, 18 U.S.C. § 3663A. *United States v. Sharma*, No. 11-20102 (5<sup>th</sup> Cir. December 20, 2012) (not yet reported) (limiting restitution awards to the offenses of conviction).

burden while those residing in other circuits would not be subject to multi-million dollar restitution orders.

In addition, the *en banc* Fifth Circuit effectively requires defendants convicted of possession of child pornography to pay restitution for a crime they did not commit – the physical abuse of the child. In the instant case, Amy was sexually abused by a relative. Some significant portion of the \$3.4 million in claimed restitution was caused by his abuse of the child.

The *en banc* Fifth Circuit's position as the sole circuit rejecting a proximate cause requirement to determine restitution essentially destroys the court's attempt to ameliorate the harshness of its holding – joint and several liability with others. Persons who possess child pornography in every other circuit which has considered the issue would have contribute little if any to the restitution pool. Persons convicted in the Fifth Circuit would be left to carry the restitution burden while those residing in other circuits would not be subject to multi-million dollar restitution orders.

In addition, the *en banc* Fifth Circuit effectively requires defendants convicted of possession of child pornography to pay restitution for a crime they did not commit – the physical abuse of the child or perhaps the distribution of child pornography. In the instant case, Amy was sexually abused by a relative. Some significant portion of the \$3 million in claimed restitution was caused by his abuse of the child. Especially since Paroline would be responsible for restitution for harm caused and identified before his arrest in this case.

Paroline believes that the issue of restitution must be viewed through the prism of the substantial rights of an accused that are pertinent to a sentencing proceeding. In order to comport with the requirements of the Constitution, an order of restitution must be based on the individual's

offense conduct and attributable to the harm caused by the offense of conviction. Clearly, "[w]hen a defendant is ordered to pay restitution in an amount greater than the loss caused, the error affects substantial rights as well as the fairness and integrity of the judicial proceeding." *United States v. Austin*, 479 F.3d 363, 373 (5th Cir. 2007).

Throughout these proceedings, Amy has attempted to isolate her claim for restitution without concern that her request for restitution was made incident to Paroline's sentencing incident to his conviction for possession of child pornography. Further, in this case, Amy has stipulated that

“[N]one of the damages for which ‘Amy’ is now seeking restitution flow from anyone telling her specifically about Mr. Paroline or telling her about his conduct which was the basis of the prosecution in this case.”

(Hearing October 28, 2009, p. 16) (Emphasis added).

Thus, either through traditional concept of tort liability or criminal responsibility or through statutory construction, 2259 must be read to include a proximate cause element. Otherwise, courts will be instructed that traditional concepts of individual sentencing be restricted to the offense of conviction. As this Court stated in *Roberts v. Sea-Island Services, Inc. Et Al.*, \_\_ U.S. \_\_, 132 S. Ct. 1350 (2012) stated that:

Statutory language, however, “cannot be construed in a vacuum. It is fundamental cannon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *Davis v. Michigan Dept. Of Treasury*, 489 U.S. 803, 909 (1989).

The split among the circuits is especially cogent in the instant case in that three of the eight cases in which the Fifth Circuit is in conflict involved claims made by Amy.<sup>7</sup> Not only is the result

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<sup>7</sup>The cases are *Aumais*, *Monzel* and *McGarity*. This raises a question which was not ripe for review by the lower courts and which is not presented to this Court for that reason: Is Amy collaterally estopped from claiming a right to restitution without a showing of proximate cause since she litigated and lost that issue in three other cases?

different in the circuits for defendants, it also is different for Amy personally. In those three cases, she litigated the issue decided by the Fifth Circuit and lost. Both defendants and victims of child pornography should have a uniform national rule as to whether restitution ordered pursuant to § 2259 includes losses caused by sexual abuse by a third party or whether it is limited to restitution for losses proximately caused by the defendant.

### **B. The Excessive Fines Clause**

The *en banc* Fifth Circuit also conflicts with this Court's holding in *United States v. Bajakian*, 524 U.S. 321 (1998). See Slip op. 36-38. In *Bajakian*, this Court held that a forfeiture of property grossly disproportionate to the crime violates the Eighth Amendment, U.S. CONST. amend. VIII. The Fifth Circuit rejected the Government's argument that construing § 2259 without a proximate cause requirement could result in an Excessive Fines Clause violation. Slip op., at 36.

The Circuit held "ultimately, while the imposition of full restitution may appear harsh, it is not grossly disproportionate to the crime of receiving and possessing child pornography." Slip op., at 38. This ignores the effects of the crime of sexual abuse of the child, a separate offense for which those who receive the pornography are not guilty.

In *Bajakian*, the Court held a forfeiture under 18 U.S.C. § 982(a)(1) was a fine and forfeiture of \$357,144 for failure to declare the cash when leaving the country was excessive and disproportionate to the harm caused by the offense. In the instant case, Paroline was guilty of possessing two images of Amy. The Circuit would require that he be responsible for more than \$3 million in restitution – including losses to Amy caused not by the possession of the images or even the existence of the images but losses caused by the sexual abuse she suffered at the hands of her uncle.

Restitution, like forfeiture in the context of *Bajakian*, is part of the criminal sentence, *United States v. Satterfield*, 743 F.2d 827, 836-37 (11<sup>th</sup> Cir. 1984). It is part of the rehabilitation of the offender and should be tailored to the offender's situation, *id.* See also *Kelly v. Robinson*, 479 U.S. 36 (1986) (holding that restitution is part of the criminal sentence related to the defendant's rehabilitation, not a debt owed the victim). In the instant case, \$3.4 million in restitution is clearly disproportionate to Paroline's criminal conduct related to Amy. He possessed two of her images among hundreds of images of child pornography. While not minimizing the effects of child pornography on its victims, Paroline's criminal acts related to Amy constituted at most a small part of the injury done to her by her uncle's acts including both the physical sexual abuse and distributing the pictures on the internet.

If the amount of restitution assessed as part of the criminal sentence does not include a proximate cause requirement, the result can be like that in the instant case, disproportionate to the defendant's criminal acts. It would run afoul of the Eighth Amendment. In cases such as the instant case, it results in persons who possess child pornography being held financially responsible for the losses caused by the sexual abuser without a showing that the defendant's possession was directly connected with the sexual abuse.<sup>8</sup>

## VI. CONCLUSION

The *en banc* Fifth Circuit's holding conflicts with the holdings of every other circuit which has considered the issue – including three involving Amy, the victim in the instant case. The Fifth Circuit requires neither proximate cause nor cause in fact to justify a multimillion dollar restitution

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<sup>8</sup>There is a difference between a person who sexually abuses a child for the purpose of creating pornography and the person who engages in sexual abuse of children for his enjoyment and creates pictures as trophies to collect and trade.

order, a position uniformly rejected by other circuits. It requires a restitution award for injuries caused by offenses other than the offense of conviction. The Fifth Circuit even imposed on Paroline a restitution requirement for harm caused the victim by the sexual abuse of her uncle, harm not caused by Paroline's criminal acts of possessing child pornography.

This Court should grant certiorari to resolve the circuit conflicts. It also should grant certiorari to determine whether restitution which is grossly disproportionate to the defendant's criminal acts is an excessive fine for purposes of the Eighth Amendment.

**WHEREFORE, PREMISES CONSIDERED,** Paroline prays that this Court grant his petition for writ of certiorari, order full briefs and oral arguments, and reverse the en banc opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above document and its appendix was served on the following persons by mailing them copies, postage paid, on this 29<sup>th</sup> day of January, 2013.

  
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