No. 12-8561

In The Supreme Court of the United States

DOYLE RANDALL PAROLINE,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX VOLUME II

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

UNITED STATES OF AMERICA	)	DOCKET NO.
	)	6:08cr61
-vs-	)	
	)	Tyler, Texas
DOYLE RANDALL PAROLINE	)	9:30 a.m.
	)	October 28, 2009

TRANSCRIPT OF RESTITUTION HEARING
BEFORE THE HONORABLE LEONARD DAVIS,
UNITED STATES DISTRICT JUDGE

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Proceedings taken by Machine Stenotype; transcript was produced by a Computer.

[18] MR. FILES: Even though the Government has conceded that a proximate cause, proximate result requirement in the cases which they have set forth in their brief, they continue to urge the Court to rely on Ferber and Ashcroft and Norris in support of their request for an order of restitution. And our reply briefly noted these cases were not concerned with restitution issues, yet the Government has produced no authority in these cases.

The Government and Mr. Marsh seek an order from this Court requiring Mr. Paroline to pay restitution to an individual who knew nothing about him or his conduct and who can show no harm suffered by her attributable to Mr. Paroline. In Hughey v. United States, the Supreme Court set the standard for an order of restitution. It must be for a loss caused by the specific conduct that is the basis of the offense of conviction.

The Government keeps talking in terms of Mr. Paroline stepping into the room. The problem is that their stepping-into-the-room argument suggests that Mr. Paroline make restitution for someone else's offense of conviction.

Now, I learned long ago that one should never challenge a Court and one should never step on the Court's robe. The Court has asked a broad question – or a specific [19] question, which I will reply to or attempt to reply before going on. I don't want to get away from this. The 3rd, 6th, and 9th Circuits are consistent. You have got opinions which we have cited

and which the Government has cited. The statute is clear.

If the Court chooses to follow the established law, to follow the statute that is before the Court, then we, I believe, are in good shape and we walk away with no order of restitution. If the Court is so repulsed by pornography and by those who deal in pornography and is so sympathetic to victims of pornography, which we are all sympathetic to them, and chooses to ignore what appears to me to be the settled law and ignore the specific provisions of Section 2259, then this Court is going to order restitution, and I guess another court will have to make a decision on whether or not that is appropriate.

If you strictly construe Hughey and 2259, you can't get to a restitution award in this case because you don't have offense of conviction, harm, proximate cause, proximate result, there is no link, Amy can't show any problem; and the only way you get to a restitution order is if you ignore the settled case law and apply strict liability.

* * *

[22] THE COURT: I understand that. But before you go into that, which is what I thought I said you were going to go into, I would like to hear a response to your causation argument so that I can consider those one at a time.

MR. BALDWIN: Yes, Your Honor.

THE COURT: Mr. Baldwin.

MR. BALDWIN: I will confess that at the beginning of this process a number of lawyers got together in our office, and we attempted as best we could to work through the case law and interpret the statute within the requirement that we have in pursuing restitution on behalf of the victim. At the – we filed our brief, and then at the previous hearing, I indicated that even up to that point our understanding of the statute and the crime and how this whole thing operates was evolving, and I confess that it continues to evolve all the way up through last night and this morning in the sense that I struggle with this issue of attempting to place causation at the point of the conduct itself because if we try to do that or if we do that, it makes it almost impossible to address the issue.

I'd like to start off with one simple thing. Amy knows the crime occurred because the crime is represented in [23] the photographs that went out through the Internet. The crime was her sexual abuse that occurred at a very young age. Mr. Paroline possessed the evidence of the crime and in effect possessed the crime itself. He possessed that for his enjoyment. So that is a given. We are not arguing that whatsoever.

Now, Amy was very young when she was sexually abused, and these photographs were taken. Now, as we have seen and briefed and talked about at length is the fact that the damages themselves really don't present themselves completely at such a young age. In fact, I know that this Court and I and many others are struggling with the issue of production right now

of very young children and how do we assess their damages at that point in time.

Well, we have the benefit here of at least looking back in the past and having experts and having Amy represented by Counsel to explain what those damages are. And we can say for sure that that conduct that she experienced damaged her. There is no question about that.

THE COURT: Which conduct?

MR. BALDWIN: The original – I don't want to use the word "original" because it exists. The conduct of her sexual abuse which began and was documented at an early age and continues through this very day. It exists. It is there. And it is there for all of those to – who want to [24] participate in it, to participate in it. It exists on the Internet, which is unique in its characteristics and it is there. And for those – I will get to this point but let me make it now.

For those who want to go there and participate in that, then they should be held accountable. I really think – we cited the three cases of Norris, Ashcroft, and Ferber, and basically those cases explain what this whole thing is about, child pornography, how it is viewed and how we address this conduct.

But really maybe the statute is very simple, and we as lawyers are trying to read too much into it and analyze. And when you really look at 2259, it seems to say this simply – maybe it is not – maybe it is well written. At first we had a big debate, maybe it is not

well-written and it doesn't seem right. But it didn't seem to fit in our lawyer minds. But maybe it is fairly simple because it seems to say, and it doesn't distinguish between production, receipt, or distribution, or possession. It says all of those crimes are lumped together. And if anyone violates those statutes, then they are to be held accountable for the restitution to the victim. And it lists certain areas of restitution that are required to be paid.

Now, that seems fairly straightforward. So if at some point in time an individual possesses photographs of [25] sexual abuse, that person is going to be held accountable for all unpaid restitution that relate to those items listed in 2259. Now, the Legislature added in one final assessment of restitution. It said, oh, and by the way if the victim can also show damages that resulted directly from the conduct that we are talking about, you can add those in as well.

So in looking at the statute again this morning for I don't know how many times, it seemed to say to me given everything I have read, it is simple. If you want to involve yourself in this crime, you are going to pay restitution. And if your conduct resulted in additional damage to the defendant – or to the victim, you are also responsible for that.

THE COURT: Are you saying there is or is not a proximate cause requirement as to the items, other than subparagraph F.

MR. BALDWIN: Well, herein is my limitation on the understanding of proximate cause after

having read all of these statutes and cases, of course, the original conduct has to cause damages. But I don't believe that causation – once that is established, I believe that is the necessary causation.

Obviously, she could not come in – Amy could not come in and say without proof, I was damaged. She would have to establish that she was damaged as a young child.

[26] THE COURT: I don't think – and, Mr. Files, you don't disagree she was damaged by the original abuse, do you?

MR. FILES: No, Your Honor. The original abuse was horrible, she was horribly damaged.

THE COURT: All right. So we all agree on that. Now, what we are talking about is the photographing of that abuse and the sharing of that abuse over the Internet among various participants, including Mr. Paroline, right?

MR. BALDWIN: Yes, Your Honor. And my answer to the Court would be then once the original causation is established, then, no, I don't believe there is any requirement of causation as it relates to Mr. Paroline.

THE COURT: Okay.

MR. BALDWIN: And, again, it simply appears that from the 2259 if he participates in that event, which was documented and I have used the

term "frozen in time," he is responsible for any unpaid restitution.

Now, I would submit that he would have a good argument if all of the restitution or damages that had been – that are proven I think sufficiently before this Court had been paid. He wouldn't have to do that unless Amy could show that his specific conduct, as set forth in that final part of the statute, created additional damage resulting from his conduct. But in this particular situation, we don't have that –

[27] THE COURT: So you are saying that you are not buying Mr. Files' argument that you have to show specific causation that Amy knew that Mr. Paroline was viewing her photographs and relate the damages to that viewing?

MR. BALDWIN: I agree, yes, Your Honor, that is what I am saying.

THE COURT: And you disagree with that, Mr. Files?

MR. FILES: Yes, Your Honor. And I go back to the statute. I agree with Mr. Baldwin that different readings may come to different conclusions, perhaps. But I don't know how the Court gets around and I don't know how the Government gets around the definition for the purposes of this section. The term "victim" means "the individual harmed as a result of the admission of a crime under this chapter, and you read that in light of Hughey as the offense of conviction.

Now, clearly she was harmed in the past by God knows how many different people. Mr. Paroline is on the end of the chain. He is that guy that got the two pictures. He is sitting there looking at the two pictures. He may not have even have looked at them. He possessed the two pictures. That is his offense of conviction. She cannot under the state of the record be a victim under Hughey as defined in this statute. You have proximate cause plus you have the definition of "victim" plus you have Hughey.

THE COURT: Mr. Baldwin.

[28] MR. BALDWIN: Your Honor, I respect his position. Perhaps, Mr. Marsh could add to this particular –

THE COURT: Mr. Marsh, would you care to comment?

MR. MARSH: Your Honor, I apologize by appearing by – remotely today, and I thank the Court for allowing me to be heard. I have listened to both of these arguments, Your Honor, and I realize that in this case especially that established case law is going to be instructive, but it is not going to be dispositive. Because I think the Court realizes that we are somewhat on new territory with this kind of a crime and with this kind of a request for restitution for this kind of crime.

I think what is clear, however, is that, you know, there are victims of child pornography, possession, clearly the intent was to include that crime as a crime

subject to restitution. So however you want to make the argument, that crime qualifies as a crime for restitution. That is, in fact, what we are dealing with here is a case of possession.

Mr. Files said something very interesting, and much of my submission to the Court yesterday deals with this issue. And Mr. Files said that the defendant in this case was the last link on the chain. I agree with that. He is on the chain. Being on the chain is part and parcel of what we are trying to make out in terms of the very nature of this crime. Our supplementary material goes to that.

[29] I also want to say, without belaboring the point, there is a great deal of evidence that the sexual abuse, the activity that was engaged in, that everyone agrees is egregious and harmful, was in order to produce child pornography for willing consumers.

Again, our material that we filed goes to that argument and the research, all of it, is either Government research or peer review research, shows that this material is often created for the purposes of trading it for other child pornography. (The telephone cut out.) There is no reason not to believe that simple causation, in fact, is an appropriate standard, as Mr. Baldwin has made out, as we made out in our papers. There is an additional proximate cause provision in there for damages that are above and beyond simple causation in fact.

This is a recognized legal standard and actually I got this language from Texas state law where

apparently the legislature eliminated proximate cause in a lot of torts and relied simply on simple causation and fact for proving of damages.

Something that I am going to add here, Your Honor, is a case that I will put on ECF today, which is aptly called Snakenberg v. Hartford Casualty Insurance Co. It is state court out of South Carolina. You know, as the courts have recognized in these cases, all of the cases that we cite the [30] essential nature of this crime is a crime of privacy invasion of the children depicted. Snakenberg talks about wrongful intrusion into private affairs and the elements required to prove a wrongful intrusion, if you will, a privacy violation into personal affairs, which is just what this kind of crime is, and it is what Congress is trying to prevent in regulating it criminally.

But the most interesting part of this case, which I will, again, submit to the Court on ECF, is that the conclusion in the case, if the plaintiff proves the four elements needed, the cause of action, the fact of damages if established as a matter of law – in other words, if you prove that your privacy was invaded and you prove the elements of invasion of privacy, then damages are established as a matter of law. And in that, Your Honor, is what we are dealing with here, simple causation of fact, damages established as a matter of law, and then it is up to the Court, as they take about in Snakenberg, which I will provide, the amount of damages is to be assessed by the trier of fact.

In assessing the damages, the trier of fact may consider the same humiliation, emotional distress suffered by the plaintiff as a compensable elements of damage. I think this is very analogous to our current situation. Obviously we are bound by the criminal limitations. We are bound by the statutory language. But clearly all of the case law [31] recognizes this is one of privacy. And so we are not dealing with broken legs or car accidents or death, funeral expenses. We are dealing with in some ways intangible damages. When you are looking at these kinds of damages, you are looking for these kinds of privacy damages, I think they are directly relevant to this kind of pain.

THE COURT: So, Mr. Marsh, are you – do you – are you saying that other than paragraph F, the statute does have a causation requirement? And, if so, what type of requirement? Or that it does not have any causation requirement at all?

MR. MARSH: Your Honor, it would be folly for me to argue that we did not have to show harm caused by the commission of this crime. Clearly, it is not a strict liability, if you will, that, you know, if X then Y or you automatically are entitled to damages because of some, you know, statutory violation. We clearly have to establish harm. We clearly have to show harm by the commission of the crime. And I think that we have established harm by the commission of this crime.

Clearly this statute is different from the other statutes. I'm not going to belabor the point. The

MVRA talks about direct and proximate harm in its definition of "victim." The Victim Witness Protection Act, I believe it is called, talks about proximate and direct harm in order to be a [32] victim. That phrase, which is often referred to as the Hughey language is missing from this statute. This statute was passed after Hughey. Clearly, Congress knew about Hughey. It was a big issue back in the early '90s, and Congress passed this statute with some very specific language in light of Hughey. So clearly we have to show harm, and clearly I believe we have shown harm by the trading of child pornography, the possession of child pornography, the distribution issue of child pornography; and as Mr. Baldwin so aptly pointed out, the production of child pornography because if as Mr. Files admits, the defendant is on the chain, then he is on the chain. And the chain stretches all the way back into the place where these events first occurred for the purposes of supplying this material.

THE COURT: When you say does require harm caused by the commission of this crime, by this crime you are referring to his possession of two photographs?

MR. MARSH: Yes, Your Honor, I am.

THE COURT: And you are saying then – what harm was caused by his possession of the two photographs?

MR. MARSH: Well, harm as Dr. Silberg points out is analogous to an invasion of privacy. It is, in effect, the shame, the humiliation, the fear, and

paranoia that comes with this kind of knowledge that others known and unknown are interested in this kind of activity within the community. It [33] is not a broken arm. It is not, you know, something that you are going to need to be in traction or a cast for. It is like they talk about in Snakenberg, a crime of shame, humiliation, emotional distress; damages that are related to the knowledge that the victim can never overcome the original act which damaged them.

They are constantly being reminded, and they are constantly aware that these things are happening. I don't think you need to know – in fact, Mr. Files would probably argue that I have caused damage to the victim by telling her that the defendant engaged in this material; and that what she doesn't know can't hurt her. Clearly, that is, you know, a copout to say she didn't know – what she doesn't know can't hurt her. The reality is, as Dr. Silberg pointed out, she does know.

She doesn't know – and it is impossible to know all of the specific individuals and all of the specific individual acts they are engaging in, but she knows and she has known from a very young age – (telephone cutting out) – that they were being distributed on the Internet even as she was engaging in the act and that this is going to go on forever. So that is the nature of the harm, Your Honor, and that clearly is the harm of possession and receipt and distribution, and the supplementary materials that we submitted reviewed the academic and professional literature in

[34] this area. I think it is undisputed this causes harm.

THE COURT: Are you saying then that the totality of the harm that she has suffered from the entire abuse and the trading of the pornography, that an individual defendant such as Mr. Paroline who possessed two photographs should be held jointly and severally liable for that entire harm?

MR. MARSH: Well, Your Honor, I do think that. I think to create issues for the Court – I don't think it is easier for the Court to disaggregate and try to proportionalize it because the reality in proportionalization is, and others have pointed this out as a reason, why should we pay any damages because it is going on forever, and there is a million different defendants in the future and the past; and so, therefore, their proportional amounts should be very small, when the reality is I think Arledge really helps in this regard; and, yes, it is not a case under 2259; but clearly that Court was grappling with these same issues that you had if you were a bit player in the scheme and clearly was not the leader.

But what is his responsibility for the crime? The reality is a simplification is that when you seek to engage in this activity, which is illegal – for a very good reason. They all know it is illegal when they are engaging in it. When you join Al-Qaeda, when you join in these sorts of activities, then you are going to be held responsible and you [35] are going down a very dangerous path by engaging in the activity. And

one of the dangers of the activity is joint and several liability with all of the other individuals out there.

The additional – I will show the Court we are happy and we have made this available to the defendant, Mr. Files' attorney, to share the details of all of the other individuals engaged in this activity. We have the ability to generate a list, which we did, to Mr. Files last week with all of the names and all of the district courts and all of the case numbers of all of the individuals –

(Mr. Marsh is no longer on the phone.)

THE COURT: We lost you. Are you there?

All right. I was going to take a recess anyway for about ten minutes. We are going to take a ten-minute recess. We are going to see if we can get Mr. Marsh reconnected. I would like to hear just a couple more comments on this issue of the statute and causation. And then I would like to move to the issue of proof of restitution.

Be in recess.

(Recess was taken.)

THE COURT: Please be seated.

All right. Mr. Marsh, I believe we lost you mid-sentence. So if you still have your thought and would like to finish it, you may. If not, I have a couple of questions.

MR. MARSH: Your Honor, my thought was pretty much [36] finished when we got disconnected. Again, my supplementary material addressed most of the substance of my argument.

THE COURT: Let me clarify something in talking about you believe that a possessing defendant such as Mr. Paroline who has participated in the possession and exchange of child pornography involving Amy should be jointly and severally liable for the full amount of the harm that she has suffered as a result of the abuse and the publication of the abuse.

I want to be clear, and I think you have said this before that you are not seeking to have her made whole more than once; is that correct?

MR. MARSH: That is correct, Your Honor.

THE COURT: So whatever amount of harm she has suffered and will suffer in the future, once that amount is determined and once that is satisfied through various criminal cases and/or civil proceedings, then any criminal defendant would no longer be liable unless there was new harm caused?

MR. MARSH: That's correct. The way we explained it we are limiting our request to the numbers currently before the Court. I think the restitution statute is clear that we cannot, as you know, double-dip and get the same sorts of damages, if you will, in a civil case that we received in restitution. So we are in effect limited to our request before the Court.

[37] THE COURT: Okay. Before we move to the amount of restitution, Mr. Baldwin or Mr. Files, do you have anything further you would like to argue in response to what has been said regarding the causation issue or anything related to that part of the arguments?

MR. FILES: Yes, Your Honor we do. There is this talk about things evolving as though where we were today is something new and different, and it is different from where we were several years ago. I don't believe that is right. If the Court looks at the cases which the Government has cited in its brief and the cases we have cited in our brief: Crandon from 1999; Croxford, 2004; Danser, 2001; Doe, 2007; Dubose, 1998; Estep, 2005; Hughey, 1990; Julian, 2001; Laney, which is probably the one most cited, 1999.

This isn't an area where the courts have flooded us with opinions that are different from the 3rd, 6th, and 9th Circuit opinions which we have been talking about and which both of us have cited.

Additionally, one of the sections in my original brief was talking about the Fifth Circuit opinions following Hughey and Maturin, which is a 2007 case talking in terms that although the Supreme Court's decision in Hughey I predicated the enactment of the victim's rights and victim's protection, its holding – the holding that restitution must be limited to losses caused by the offense of conviction remains good law.

[38] So Hughey may be 19 years old, but it is still the law of the land and the law in this Circuit, and the cases that follow Hughey in this Circuit.

Lastly, at the risk of giving opposing Counsel even though he is only a representative the opportunity to talk more, Mr. Marsh is acknowledging that causation is required. If causation is required, an offense of conviction controls restitution, what is the specific harm she has suffered in this case and he cannot answer that question because there is nothing that he can tie to Mr. Paroline's conduct in this case.

He can talk globally about a victim in a child pornography case suffering forever, but that is not what we are about. We are about 2259 and Hughey and this case and the facts, and he cannot come under 2259 and put her in the posture of a victim as a victim is defined in that statute if the Court is going to strictly construe the law. That is a problem for Mr. Marsh, for the Government, and I would respectfully respect for the Court.

THE COURT: Mr. Marsh, do you care to respond?

MR. MARSH: The facts are before Your Honor, and you are going to have to make that call. I think we have shown cause. I don't think proximate cause is required. We have been over this ground before. Clearly Congress knew what this was talking about; that victims of child pornography are [39] entitled to restitution. The goal of restitution is not about the defendant. It is about the victim whole,

restoring the victim to the place she would have been if the crime had not occurred, and clearly the defendant engaged in this crime, and the crime of conviction is possession; and that is what we are here about.

All of the talk about Hughey is nice, but we agree, it is the crime of conviction, and the crime of conviction is possession, possession of child pornography. We need to show causation. Possession of child pornography by this defendant caused the victim's harm. I believe that we have done that. And that is going to be a call for the Court in reviewing all of the evidence.

* * *

[41] THE COURT: Let's move to what I would consider the second issue which the Court may or may not get to, depending on what it does with the first issue. But if the Court does find that the victim is entitled to restitution from Mr. Paroline, the question becomes, what is the amount of harm that she has suffered?

So, Mr. Files, you were about to get into that earlier as far as your response after receiving these materials. I will allow you to go first again if you would like to.

MR. FILES: Your Honor, if I had understood what the Court was suggesting earlier, I would have started off with that; but I just always just sort of start with the law and go to the facts, so I apologize

if I didn't cover what the Court wanted in the order the Court wanted it.

THE COURT: I think discussing the statute and law first was appropriate. Now, let's talk about the facts.

MR. FILES: It's going to take a little while, Your Honor, if you will bear with me. We have gone through a bunch of stuff which we like to talk to the Court about. When I say [42] a bunch of stuff, I am referring to the pertinently underlying data which we were furnished and which we have filed with the Court.

Again, we have filed everything under seal because of the protective order. We didn't want there to be any issue as to whether or not we had disseminated under the protective order to anyone other than the Court and Clerk and Counsel.

Since we last came together, we have received the underlying data from Mr. Marsh and are now in a position to intelligently argue – we hope it is intelligent, the restitution issue. Without that data we were like a blind man trying to find a ghost in the dark. With the data, it is though a light has been turned on.

To begin with, we look at the contract entered into between Mr. Marsh and Dr. Silberg. The first paragraph reads this way – and we will fill in the blank where there was a redaction with the word "Amy." "You are contracted with me to provide forensic services which will involve my expert psychological

opinion regarding your client Amy. My purpose will be to educate you, the Court, and the client regarding psychological issues. I will receive no funds based on the outcome of the cases that you are working on. One of my primary tasks will be to assist you and Amy in developing a victim impact statement which can be used in Court. I will also assist you and Amy" –

[43] THE COURT: Mr. Files, this is – for my clarification – this is written by Dr. Silberg to Mr. Marsh?

MR. FILES: That's correct. It is at the beginning of the appendix. It is the contract, and it is the first paragraph of the contract. And it is something that Dr. Proctor speaks to in his report, if the Court has had the opportunity to read that yet.

"I will also assist you in developing a treatment plan to provide long-term psychotherapy and treatment for Amy."

The breadth of the contract to educate you and educate the Court developing the statement which can be used in Court is somewhat different from what Mr. Marsh stated at the August 20th hearing. In 2007 he says, "When Amy turned 18 at that point in time she contacted my office directly to discuss again the notices and what the notices meant, and again providing legal advice concerning these notices. One of our first and primary goals from our work with federal law enforcement was to provide a victim impact for use at sentencing. I was not familiar at

that point in time with restitution and wasn't even thinking about restitution." This was 2007 and 2008.

"At that point we wanted to find a forensic psychologist to assist us not only in evaluating our client but also for the creation of a victim impact statement." He [44] left out that he was hiring her to educate the Court. He was hiring her to be an advocate. He was hiring her to develop a psychological plan before she made a determination as to whether or not Amy had any problems. She goes into this with a pre-conceived notion.

Interestingly, there is either a typographical error or she got into the case earlier than we thought. The date on the contract reflects it was signed on June 9th, 2007. We already knew that Dr. Silberg had spent some seven-and-a-half hours talking with Amy. What we did not know was her methodology. What we do not know was the contents of the meetings, and they are still difficult to ascertain.

Dr. Silberg's notes are 69 pages in length. They are handwritten. They are difficult to read on a good day. It is impossible to tell what questions were asked of Amy. Rather, there are notes as to what her answers are. Some of the notes are sentences. Others are phrases. Sometimes she uses her own shorthand and will only have two words or so which make little sense.

There was a misleading aspect of what she wrote in her statement, which is in her report which accompanied Mr. Marsh's request for restitution. Since the

Court – since trustworthiness is part of the restitution issue when we are looking at something from a Presentence Report, we want to go into five statements she makes.

[45] "Most significantly at the age of 17, Amy was informed through legal notifications about the widespread presence of her picture on the Internet illustrating to her that in some ways the sexual abuse of her has never really ended. This knowledge further exacerbated her symptoms, interfered with her ability to overcome the increasing symptoms of overcoming post-traumatic stress, and impeded her ability to move on with her life."

"She described that each new discovery of a new defendant retraumatizes her again. Despite some resolution of Amy's post-traumatic symptoms, when she was younger, Amy continues to have the hallmark features of post-traumatic stress disorder which include intrusive images, attempts at avoidance and denial and hyper-arousal. These post-traumatic symptoms and effects of sexual abuse are more resistant to treatment than those who would normally follow a time-limited trauma. As her awareness of the continued existence of these pictures and their criminal use in a widespread way leads to an activation of these symptoms."

And, lastly, "Secondly, treatment for post-traumatic stress involves protection from the triggers that stimulate memories of her abuse. In the case of victims of child pornography such protection from

triggers is not completely possible as the existence of the pictures themselves remain triggers, specifically Amy's awareness of these pictures, [46] knowledge of new defendants being arrested become ongoing triggers to her.

Now, these statements of Dr. Silberg, together with Mr. Marsh's statement that the defendant undeniably contributed to Amy's psychiatric death by a thousand cuts when he received and/or distributed her child pornography image with impunity until apprehended by law enforcement, in the language of the victim impact statement, certainly led Mr. Baldwin and me to believe that Amy knew of Mr. Paroline and his conduct before Mr. Marsh submitted his request for restitution.

Her victim impact statement talks about this defendant. Now, maybe the light should have gone off and we should have realized that this defendant maybe wasn't Mr. Paroline, but it was submitted in this case and this defendant or this person could only refer to Mr. Paroline. At the August 20th hearing, Mr. Marsh advised the Court in response to the Court's question that Dr. Silberg had written Amy's victim impact section which she had adopted after Mr. Marsh had deleted something, and we don't know exactly what it was, from her draft of the statement.

Mr. Marsh told the Court that Dr. Silberg had completed the statement after four interviews with Amy. That wasn't totally accurate as we learned from the underlying data. Mr. Marsh had sent a copy of the

victim's impact [47] statement to Assistant United States Attorney Slater on September 22nd in the Hesketh case. Dr. Silberg's report was completed on November 21st, 2008 after her fourth session with Amy.

Having read the underlying data in Amy's victim impact statement, I have concluded that it is difficult to reconcile the two. There is no doubt that Amy was sexually abused. There is no doubt that she suffered from this abuse. And there is no doubt that she suffered from this abuse, and there is no doubt that Dr. Silberg's underlying data reflects this.

However, there are enough inaccuracies as to some of the sentences into the victim's impact statement that it raises questions as to the other sentences, or stated in a different manner, there are enough problems with some of the statements to create concerns about the balance of the statements and the victim's impact statements and the validity and trustworthiness of this victim impact statement and of Dr. Silberg's report in support of Mr. Marsh's request for restitution.

Here are some specific examples from the victim impact statement: "Sometimes things remind me of the abuse, and I don't even realize it until it is too late. For example, I failed anatomy in high school. I simply could not think about the body because of what happened to me. The same [48] thing happened in college. I went to a psychology class where we watched a video about child abuse. Without even

realizing it, I just stopped going to class. I failed my freshman year of college and moved back home."

From the underlying data, unnumbered Page 28, "I was good in high school. I did papers the night before. Waited until the last day. Passed everything except anatomy. Goofing off. One girl named Brittany, we would goof off. Graduated general. College don't look at anything else. Didn't want to go. Wasn't ready. Ready for college yet? Not responsible enough to get up and go to class."

Continuing from the underlying data. "Dropped out after two months. Moved in with my boyfriend and didn't tell my parents." She didn't go home. Later came home – "A letter came home and said I had no credits. College for the semester, just wasn't ready. Lived there and didn't like it. Wasn't responsible enough. Slept in and missed."

From the victim's impact statement, "It is easy for me to block out my feelings and avoid things that make me uncomfortable. I don't know when I will be ready to go to college because I have huge problems with avoiding anything that makes me uncomfortable or reminds me of abuse."

From the underlying data, "100 or so perps, settlement of $100,000 per picture. Have to go back in 14 days or sue in court. Letter went out to 16 people. Not [49] about money, but hitting them where it hurts." Talks in terms of buying a car, going to college, giving money to charity.

From the victim impact statement, "I feel I am unworthy of anything and a failure. What have I been good for except to be used by others over and over. That is one of the reasons I haven't been able to get a job or stay in school." From the underlying data, "Difficult getting job! Picky about my job. I want to work with kids. I don't want to food serve." From the victim's impact statement, specifically she has experienced significant effects in the following areas: "Mood regulation, cognitive distortion, feeling of shame, blame, guilt, self-esteem, alcohol abuse."

From the underlying data, "I don't drink anymore." What Dr. Silberg's report doesn't contain is this: Many victims of sexual abuse are unable to ever have a meaningful relationship with a member of the opposite sex. Dr. Silberg fails to note that Amy is still in a long-term relationship with her boyfriend; that she is in love with her boyfriend. Apparently, she has a healthy sexual relationship with him because she believes she might be pregnant, but wasn't.

Dr. Silberg's report contains nothing which would support a conclusion that Amy's daily functioning is highly impaired or that she can work on a part-time basis only or that she is only able to do part-time, lower level work if she is able to work at all. It is not there. Why is it [50] important? Because Dr. Smith who was hired as the economist begins with that assumption.

Mr. Marsh talks about hiring Dr. Smith. Page 73, Lines 13 through 20. "Yes, and so what Dr. Smith – I

sort of said I needed some sort of – I don't know – things popped in my head. I need a forensic economist, and I Googled him, and he came up and I said I needed someone to break down all of the damages because I want to present the Court with – it's not me talking or adding – I want somebody else to add up these things and put some basis on them so we can present them to the Court in an expert way." And that is what Dr. Smith did.

Now, Dr. Smith indicates that he had an interview with Joyanna Silberg, and apparently it was only a telephone interview, and he had a case information form which we have filed with the Court. Mr. Marsh, as we have discussed, says he has given me everything, and I take his word for that. As the case information form reflects basic facts of the case and he goes into her being raped.

Thousands of people who have been convicted and sent to prison for possession or distributing her images. Her victimization is expected to last during and beyond her lifetime. Amy dropped out of college – it says "AM" – dropped out of college – when she discovered the extent of her victimization. She is unemployed and lives at home. She [51] is with her boyfriend. Her daily functioning is highly impaired. She will need lifetime therapy and economic support. She also smokes and has a drinking problem.

Now, this is in '77, '78. This was from '78 when Mr. Marsh was not thinking about restitution. I will attach the relevant restitution statute and 18 USC,

Section 2259. If there is a federal action specify – 18 USC 2255.

THE COURT: What are you reading from now?

MR. FILES: I am reading from a form entitled Case Information Form. It is an exhibit to what we have filed. It is what Dr. Smith furnished to Mr. Marsh, Mr. Marsh filled out and returned to him. And it is the foundation or assumptions which he was relying on when he wrote – when he began the report.

In contrast, we have furnished everything we had to Dr. Proctor, the whole ball of wax, what we got from Mr. Marsh to begin with, Dr. Silberg's reports, the underlying data, everything we could possibly have, and Dr. Proctor prepared a report, we furnished it to the Government, we filed it.

Dr. Proctor begins, "For reasons that are outlined below, it is my opinion that the amount of weight that can be placed on Dr. Silberg's opinion and conclusions in this case is very limited. Given that the loss analysis conducted by Dr. Smith was based largely on the opinions and assumptions put forth by Dr. Silberg, it is my opinion that the extent to [52] which his findings can be relied upon in this case appears to be very limited.

He then sets out five reasons, five major concerns over five-and-a-half pages. I don't want to read everything. I just want to hit the highlights on the first of each of these concerns. From the information

reviewed and analyzed, concern appears warranted regarding the extent to which in this case Dr. Silberg successfully served as an objective forensic psychological evaluator which appears to have been her express intention.

Second, although consideration of objective sources of data is the hallmark of a forensic psychological evaluation, it appears based on the materials reviewed, that Dr. Silberg relied very heavily on Amy's suggestive self-report.

Third, as was already demonstrated to some extent in the previous section, it appears that Dr. Silberg inadequately considered alternative hypotheses and overly attributed problematic behavior; for example, academic problems, vocational problems, alcohol abuse, to Amy's sexual abuse history, without fully exploring alternative hypotheses and considering the cause of behavior is often multi-faceted.

And in that, Your Honor, if you will look specifically at Dr. Proctor's report, he talks about her early childhood grades, her fidgeting things which occurred before [53] she would have been the victim of the sex offense in this case.

Fourth, psychological testing is typically of great value in forensic evaluations. Unfortunately, however, in this case, Dr. Silberg administered only a very small battery of tests, that is two, that were inadequate due to the absence of well-established validity scales and because the tests were overly specific in nature.

Finally, it is my opinion that Dr. Silberg's conclusions regarding the impact of Amy's abuse history over the course of her lifetime and regarding the amount of treatment she will require in the future is highly speculative and seems inconsistent with the results of her prior period of treatment. And continuing with that, given that Amy has no history that I am aware of of having received such services in the past, I am unaware of what the basis is for the speculation that such services will be needed in the future. Indeed, given her history, including her prior treatment history, it appears unlikely that such services will be necessary in the future.

In Mr. Marsh's supplemental filing, it is interesting he is asking for money for various persons that he doesn't have anything in there for someone who is counseling Amy at this time. It is inconceivable to me that a lawyer of Mr. Marsh's ability would not have had something in the papers [54] about – that he has furnished – about where she is doing counseling, who is doing it, what her progress is; and then Dr. Silberg did not make any notations of that. She is apparently someone that is so horribly messed up, and yet she has been put on a shelf and nothing is being done; or if it has been, nothing has been provided to the Court or to us.

We gave Dr. Gilbreath the protective order from the Court, the victim impact statement, the childhood recovery resources report of Dr. Silberg, the order for evidentiary materials furnished by the Court, Dr. Smith's letter which contained his intake form and

his report. Dr. Gilbreath, if the Court has noticed, came to totally different conclusions, assuming that all of the speculation was accurate about her – that she would normally have gone to college; that she could only do part-time work and the value of a high school education. He determined that her future potential as a college graduate would have been a little over a million, $1,008,944.00.

As a high school graduate she would have $582,000 worth of earning capacity. Potential loss if she had no mitigating income would be the full million eight thousand. If she worked half time, that her loss would be 717,000, and if she worked as a high school graduate she is going to make $425,000 in her life. Basically, he is so far off from what –

[55] THE COURT: Well, let me ask you – are you conceding the lower figures that Dr. Gilbreath has arrived at as being loss of earnings, harm that Amy has suffered?

MR. FILES: I'm saying that those are statistical, showing what someone would have. No, I am not saying she has suffered those. I am saying that is a statistic for someone whose net pecuniary loss with full-time work as a high school graduate would be 425.

We furnish these in comparison to what Dr. Smith said. We are not suggesting that Mr. Paroline should be required to pay any of those figures. We come back to –

THE COURT: Are you arguing that there is no loss of earnings shown, or –

MR. FILES: I am arguing that there is no loss of earnings shown in this case as a result of Mr. Paroline's offense of conviction.

THE COURT: Okay. Are you arguing – you are back to your causation argument. My question is, from an actual damages standpoint, are you arguing that Amy has not suffered any loss of earnings as a result of her abuse and the publication of that abuse?

MR. FILES: Of her original abuse and the publication of her abuse, no. We acknowledge that she has the potential to suffer loss, but we don't know what the amount is. We suggest that this is at least probably more accurate [56] than what has been submitted by the Government.

THE COURT: All right.

MR. FILES: In our first hearing we had filed an affidavit of Dr. French, which Mr. Marsh poo-pooed; that is to say, viewed with derision. Looking back now at that, it dovetails amazingly with the findings which Dr. Proctor has. Dr. Silberg presents a detailed description of her assessment and evaluation of Amy. Some of the conclusions that she draws are questionable.

The most striking observation that I was able to see was that Dr. Silberg attributed every difficulty this young lady has to the emotional trauma which she experienced as a result of her sexual abuse as a

child. Interestingly enough, the child responded well to her earlier therapy, as would be expected; however, the decline in her functioning seems to be precipitated by her being notified by the Government that she was an identified victim.

Second, it is not possible to predict specific long-term course and outcome of treatment for post-traumatic stress disorder. These cases appear to have a waxing and waning history and sometimes seem to simply remit over time with little or no treatment. To make the statement that this individual will require ongoing treatment for the rest of her life probably exceeds a clinician's ability to make such a statement.

[57] Nothing in Dr. Silberg's report supports a conclusion that Mr. Paroline's conduct has caused Amy any emotional trauma or that it has impacted her in any way. Ironically – and here Dr. French has the same belief that Mr. Baldwin and I did when we started off. Ironically, if the Government had not notified Amy of Mr. Paroline's conduct, Amy would have suffered no emotional trauma. Should Dr. Silberg's line of reasoning be accepted, then each and every time in the future that Amy is notified by the Government of a new case, she can be expected to be retraumatized and run the risk of a continuing deterioration of her present condition, but that didn't happen because she wasn't notified.

THE COURT: Mr. Files, let me – I'm having a little trouble following that argument because

Amy obviously knows that the photographs of her abuse are traded on the Internet, correct?

MR. FILES: Yes, Your Honor, we agree with that.

THE COURT: All right. And are you saying that in order for her to be harmed by – and I take it you would agree that she is harmed by having her photographs traded on the Internet?

MR. FILES: She is harmed by her knowledge that her photographs have been traded on the Internet?

THE COURT: And are being traded.

MR. FILES: No, we agree with the Court as far as –

[58] THE COURT: So your complaint or your position is that because she did not know all of the people that were trading it, and specifically Mr. Paroline, then she has, therefore, not suffered any harm as a result of his conduct?

MR. FILES: Yes, Your Honor. I may be taking a simplistic approach to this, but the statute in Hughey appeared to require offense of conviction and showing of harm. I can't find anything on strict liability, and I cannot conceive of a restitution order in this case on anything other than a strict liability basis.

Congress had the opportunity to legislate in that area, and they have chosen not to. If this Court

chooses to find that Mr. Paroline is liable because of his possession of these photographs and nothing more, then I can't imagine what the basis is other than strict liability. It can't possibly come under 2259. It is not there.

THE COURT: Okay. Thank you. You may proceed.

MR. FILES: Okay. Now, the conundrum that I have is that Mr. Marsh concedes that you have to have causation. The Government in its brief concedes causation. The stipulation which we have all signed; Mr. Baldwin, Mr. Marsh, and I, have taken causation off the table. It is not there.

THE COURT: Well, I think their argument is that the causation is there in fact by his possession, as opposed to proximate causation. Would you care to comment on that?

[59] MR. FILES: Well, Mr. Baldwin's argument about he burglarizes and he gives it to me; and in Texas I am a party and I get charged with exactly the same thing and it is offense of conviction and I get prosecuted and I have to make restitution. It is a stepping into the room. It is not provided for by statute. I am not sure I am answering the Court's question. If I am not, if the Court will tell me.

THE COURT: I am struggling with it myself. I am just looking for some clarification. Mr. Marsh or Mr. Baldwin –

MR. FILES: Would you –

THE COURT: Just a moment.

Would you care to weigh in at this point?

MR. BALDWIN: Your Honor –

THE COURT: – or have we exhausted this?

MR. BALDWIN: Perhaps, Mr. Marsh would have some comments. I believe that we have addressed this pretty well. It is a difficult thing to understand.

THE COURT: I think we are getting back into the causation issue pretty deeply rather than the actual damages.

But, Mr. Marsh, do you have anything you wish –

MR. MARSH: No, Your Honor, not to the causation issue. We have been over it, and I don't think there is anything to add in that regard. All of the parties have sufficiently addressed the issues for the Court.

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672 F.Supp.2d 781

UNITED STATES of America

v.

Doyle Randall PAROLINE.

No. 6:08-CR-61.

United States District Court,
E.D. Texas, Tyler Division.

December 7, 2009

F.R. Buck Files, Jr., Bain Files Jarrett & Bain PC, Tyler, TX, for Defendant.

James R. Marsh, The Marsh Law Firm PLLC, White Plains, NY, for Movant.

Paul Cassell, National Crime Victims Law Institute, Salt Lake City, UT, for Amicus, National Crime Victim Law Institute, Victim Rights Center.

Yiota G. Souras, The National Center for Missing and Exploited Children, Alexandria, VA, for Amicus, The National Center for Missing, and Exploited Children.

William D. Baldwin, U.S. Attorney's Office, Tyler, TX, for Plaintiff.

MEMORANDUM OPINION AND ORDER

LEONARD DAVIS, District Judge.

Before the Court is a Request for Restitution by Amy,[1] who is a victim in the "Misty" child pornography series.[2] Defendant Doyle Randall Paroline ("Paroline") unlawfully possessed two pornographic images of Amy he obtained over the Internet. Having considered the parties' oral arguments and written submissions, and for the reasons explained below, the Government has not met its burden of proving what losses, if any, were proximately caused by Paroline's possession of Amy's two pornographic images and thus, the Request for Restitution is **DENIED**.

BACKGROUND

On January 9, 2009, Paroline pled guilty to one count of possession of material involving the sexual exploitation of children in violation of 18 U.S.C. §§ 2252(a)(4)(B) and 2252(b)(2). Paroline admitted to knowingly possessing on his computers between 150 and 300 images of minors engaged in sexually explicit conduct (Docket No. 6). The National Center for Missing and Exploited Children ("NCMEC") identified

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[1] "Amy" is a pseudonym used to protect the privacy of the victim in the "Misty" child pornography series.

[2] A series is a collection of images and/or video files taken over a period of time, typically containing both pornographic and non-pornographic images of a child or children. NCMEC's Brief, Docket No. 30, at 5.

Amy as at least one of the minors depicted in the pornographic images. Amy is depicted in two of the pornographic images Paroline possessed.[3]

On June 10, 2009, Paroline was sentenced to 24 months custody in the Bureau of Prisons and 120 months of supervised release. During sentencing, the Court reviewed Amy's Victim Impact Statement and her Request for Restitution under 18 U.S.C. § 2259.[4] Her Victim Impact Statement detailed not only the harm she has suffered from the abuse by her uncle when she was eight and nine years of age, but the harm she continues to endure ten years later by knowing that pornographic images of her are circulating against her will on the Internet and there is nothing she can do to stop it. In her Request for Restitution, Amy seeks approximately $3,367,854 from Paroline. This amount reflects the total amount of Amy's losses and includes costs for future psychological care, future lost income, and attorney's fees. Amy's Latest Request for Restitution, Docket No. 54-2, at 18. Amy offers no alternate theory of restitution

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[3] 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. Amy's Latest Request for Restitution, Docket No. 54-2, at 3.

[4] This is only one of approximately 250 restitution requests Amy has filed against different defendants across the country who have been charged with possession of child pornography involving the "Misty" series.

for the portion of her total losses proximately caused by any single defendant's possession of her images. Amy's restitution request is being made by the Government on her behalf. Amy's personal attorney, Mr. James R. Marsh, has also participated in presenting Amy's restitution request in this case.

Because the issue of restitution in child pornography possession cases is one of first impression in this Court, the Court severed the restitution issue from the sentencing proceeding and ordered all interested parties to submit briefing on the issue (Docket No. 13). The Court received briefing from the Government, Amy, Paroline, and other interested parties including NCMEC. On August 20, 2009, the Court conducted a hearing pursuant to 18 U.S.C. § 3664(d)(5) to determine restitution. At the hearing, Paroline requested additional time to obtain the data underlying Amy's restitution request and further brief the restitution issue. In addition, Paroline and his counsel waived the statutory requirement that a final determination concerning restitution be held within 90 days of sentencing (Docket No. 36). Following the August 20 hearing, Paroline filed a motion for certain discovery materials, which the Court granted in part and denied in part (Docket No. 46).[5] The Court

[5] In his discovery motion, Paroline requested the data underlying Amy's experts' reports and requested that he be allowed to depose Amy's experts. The Court granted these requests. The Court also granted Paroline's request for an accounting of all cases in which Amy had filed a similar restitution request and the amount of restitution ordered and collected in each case.

(Continued on following page)

received supplemental briefing from Paroline, the Government, and Amy, and held a second restitution hearing on October 28, 2009 where Paroline presented additional evidence and arguments against Amy's restitution request.

APPLICABLE LAW

The victim in this case seeks restitution under 18 U.S.C. § 2259,[6] which governs restitution for all

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Paroline further requested that Amy be produced for a forensic psychological or psychiatric examination. The Court denied this request. Paroline also requested expert funds to assist him in rebutting the data underlying Amy's Request for Restitution. The Court denied this request without prejudice to re-urging at a later date.

[6] Section 2259 provides:

(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 –

(Continued on following page)

offenses involving the sexual exploitation and other abuse of children. 18 U.S.C. § 2259(a). Section 2259 clearly mandates that the sentencing court order a defendant convicted of such an offense to pay restitution

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(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.

to the victim of the crime. 18 U.S.C. § 2259(b)(4)(A). The statute provides that restitution is available for "the full amount of the victim's losses." 18 U.S.C. § 2259(b)(1). Compensable losses under section 2259 include, among other things, any costs incurred by the victim for "medical services relating to physical, psychiatric, or psychological care," "physical and occupational therapy or rehabilitation," and "attorneys' fees, as well as other costs incurred." 18 U.S.C. § 2259(b)(3). Further, section 2259 specifically prohibits the Court from declining to order restitution because of the defendant's economic circumstances or because the victim receives compensation for his or her injuries from another source. 18 U.S.C. § 2259(b)(4)(B). The Government must prove the amount of the victim's losses by a "preponderance of the evidence," and that Court shall resolve any dispute as to the proper amount of restitution by the same standard. 18 U.S.C. § 3664(e).

ANALYSIS

Victim Status Under § 2259

The Court's first task is to determine whether Amy is a "victim" of Paroline's offense. Section 2259 defines a "victim" as any "individual harmed as a result of a commission of a crime under [the Sexual Exploitation and Other Abuse of Children Chapter of Title 18]." 18 U.S.C. § 2259(c). It is undisputed that Paroline was convicted of a crime under this chapter and that Amy was depicted in two of the pornographic

images Paroline possessed. Thus, Amy is a victim for purposes of section 2259 if she was harmed as a result of Paroline's possession of her images.

Child pornography fosters the exploitation of innocent and vulnerable children all over the world. It causes irreparable harm to some of the weakest members of our society. Child pornography is a permanent photographic record of the victim's sexual abuse, and the distribution and circulation of the pornographic images forever exacerbates the harm to these child victims. *New York v. Ferber*, 458 U.S. 747, 759, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) (finding that "[t]he distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children"). In the Supreme Court's landmark decision in *New York v. Ferber*, the Court extensively discussed the issue of child pornography and the long-term physiological, emotional, and mental harms associated with the sexual exploitation of children. 458 U.S. at 758, 102 S.Ct. 3348. The Court cited to various authorities in the field of child exploitation, noting that:

> The use of children as . . . subjects of pornographic materials is very harmful to both the children and the society as a whole. It has been found that sexually exploited children are unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults.
>
> . . . .

> Pornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. 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.

Id. at 758-60, nn. 9 & 10, 102 S.Ct. 3348 (internal quotations and citations omitted).

The Fifth Circuit has also addressed the issue of child pornography. In *United States. v. Norris*, the Fifth Circuit held that "children depicted in child pornography may be considered to be the victims of the crime of receiving child pornography." 159 F.3d 926, 929 (5th Cir.1998). The court determined that "the 'victimization' of the children involved does not end when the photographer's camera is put away." *Id.* The end-user or possessor of pornographic materials may be considered to be causing the children depicted in those materials to suffer as a result of his actions in at least three ways: (1) because the dissemination of the images perpetuates the abuse initiated by the producer of the materials, a consumer who merely receives or possesses child pornography directly contributes to the child's continued victimization; (2) because the mere existence of the child pornography invades the privacy of the child depicted, the recipient of the child pornography directly victimizes the child by perpetuating the invasion of the child's

privacy; and (3) because the consumer of child pornography instigates, enables, and supports the production of child pornography, the consumer continuously and directly abuses and victimizes the child subject. *Id.* at 929-30. Thus, "the victimization of a child depicted in pornographic materials flows just as directly from the crime of knowingly receiving child pornography as it does from the arguably more culpable offenses of producing or distributing child pornography." *Id.* at 930.

Congress has also long recognized the harm inflicted on victims of child pornography. In the legislative history of the Child Pornography Prevention Act of 1996, Congress specifically cited and broadly quoted from the landmark *New York v. Ferber* decision finding that "[t]he use of children as subjects of pornographic materials is harmful to the physiological, emotional and mental health of a child." S.Rep. No. 104-358, at 14 (1996) (citing *New York v. Ferber*, 458 U.S. 747, 759, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982)). Congress further observed that "it has been found that sexually exploited children are unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults." *Id.* More recently, Congress again addressed the impact of child pornography in the legislative history behind the Adam Walsh Child Protection and Safety Act of 2006, Pub.L. No. 109-248, § 501, 120 Stat. 587, 623 (2006). Congress found that "[t]he illegal production, transportation, distribution, receipt, advertising[,] and possession

of child pornography . . . is harmful to the physiological, emotional, and mental health of the children depicted in child pornography and has a substantial and detrimental effect on society as a whole." *Id.* Congress further observed that "[e]very instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and repetition of their abuse." *Id.* at 624.

In addition to the courts' and Congress's recognition of the long-term harms associated with child pornography, NCMEC data indicates that incidents of online child pornography are increasing. *See* NCMEC's Brief, Docket No. 30. NCMEC was established in 1984 as a private, nonprofit organization to assist families, law enforcement, and other professionals in preventing the abduction, endangerment, and sexual exploitation of children. *Id.* at 2. NCMEC works with both federal and state governments and law enforcement agencies to prevent and combat the growing problem of child sexual exploitation. *Id.* Using two central programs, the CyberTipline and the Child Victim Identification Program ("CVIP"), NCMEC serves as the central repository for information relating to child pornography cases across the country. *Id.* at 2-5. In 2000, NCMEC sponsored a study that profiled arrested offenders who possessed child pornography and surveyed participating state and local law enforcement agencies. *See* Janis Wolak, et al., *Child Pornography Possessors Arrested in Internet Related Crimes: Findings from the National Online Juvenile Victimization Study* (2005). The

study revealed that the dissemination of child pornography may increase the trauma experienced by the victims because the victims know "their pictures are circulating globally on the Internet with no hope of permanent removal." *Id.* at 27.

In addition to NCMEC's study, various other studies document the harm caused to a child by the possession and distribution of child pornography. One study demonstrates that a child's psychological harm after the actual sexual exploitation continues into adulthood and affects his ability to develop healthy relationships. John E.B. Myers, et al., *The APSAC Handbook on Child Maltreatment* 55-69 (2d ed. 2002). The child victims develop a number of psychological disorders, including depression, withdrawal, and anger, and experience feelings of guilt, betrayal, powerlessness, worthlessness, and low self-esteem. *Id.* Another study suggests that the continual online distribution and possession of the child pornography images re-victimizes these child victims, stripping them of any control over the disclosure of their abuse and exposing them to further shame and humiliation. *See* Ethell Quayle, et al., *Child Pornography and Sexual Exploitation of Children Online* 59-60 (2008).

Based on the Supreme Court's analysis in *Ferber*, the Fifth Circuit's reasoning in *Norris*, and the overwhelming amount of literature and briefing regarding the harm caused to children depicted in child pornography, the Court finds that the Government has met its burden of establishing that Amy was "harmed as a result of" Paroline's possession of pornographic

images depicting Amy's sexual abuse. Accordingly, Amy is a victim of Paroline's offense for purposes of section 2259. The Court now turns to the issue of causation between Paroline's conduct and his victim's alleged losses.

Causation Under § 2259

Amy contends that, as a matter of statutory construction, there is simply no proximate cause requirement for the losses specifically enumerated in the statute.[7] On the other hand, both the Government and Paroline are of the view that section 2259 requires a showing of proximate cause between the victim's losses and the defendant's conduct. The Government, however, argues that it has met its burden of proving by a preponderance of the evidence that the total amount of Amy's losses ($3,367,854) were indeed proximately caused by Paroline's conduct. Thus, the Court must determine first whether there is a proximate cause requirement in section 2259, and if so, whether the Government has met its burden of proving that the total amount of Amy's losses were

[7] Thus, Amy seeks restitution for the full amount ($3,367,854) of her losses stemming from the abuse itself and the dissemination of her pornographic images. Amy's theory of restitution is not limited to those losses proximately caused by any single defendant's possession of her images. She embraces the view that every defendant is jointly and severally liable for the total amount of her losses, although she points out that she is not seeking any windfall beyond her total losses, i.e. no double recovery.

proximately caused by Paroline's possession of Amy's two pornographic images.

Is There a Proximate Cause Requirement?

Section 2259 provides that restitution is available for "the full amount of the victim's losses." 18 U.S.C. § 2259(b)(1). The statute specifies that these losses include, among other things, any costs incurred by the victim for "medical services relating to physical, psychiatric, or psychological care," "physical and occupational therapy or rehabilitation," and "attorneys' fees, as well as other costs incurred." 18 U.S.C. § 2259(b)(3). The statute provides six categories of losses, but only the last subsection, which provides for "any other losses suffered by the victim" expressly contains a "proximate result" requirement. 18 U.S.C. § 2259(b)(3)(F).

Amy contends that proximate cause is simply not a factor in a restitution determination under section 2259. Specifically, Amy argues that, as a matter of statutory construction, the "proximate result" language in the statute modifies only the "catchall" category of losses, not the other loss categories enumerated in section 2259, and the other categories of loss are mandatory without regard to causation. However, the Supreme Court has held that "[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to

all." *Porto Rico Ry., Light & Power Co. v. Mor.*, 253 U.S. 345, 348, 40 S.Ct. 516, 64 L.Ed. 944 (1920); *see also Fed. Mar. Comm'n v. Seatrain Line, Inc.*, 411 U.S. 726, 734, 93 S.Ct. 1773, 36 L.Ed.2d 620 (1973) (holding that a "catchall provision" was "to be read as bringing within a statute categories similar in type to those specifically enumerated"). Based on this rule of construction, the phrase "as a proximate result of the offense" would apply equally to all the loss categories in section 2259(b)(3). This construction has been applied in a very well reasoned opinion of the District Court of Maine, holding that "the natural construction of [section 2259] demands that the proximate cause requirement be read as applicable to every class of loss set forth in the statute." *United States v. Berk*, 666 F.Supp.2d 182, 188 (D.Me.2009).[8]

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[8] In further support of her argument against reading a proximate cause requirement into the statute, Amy argues that other federal restitution statutes require either "proximate harm" or "direct harm" in the definition of "victim" while section 2259 requires a more generalized "harm." Amy's Latest Request for Restitution, Docket No. 54-2, at 25. Amy suggests that by omitting the terms "directly" or "proximately" in section 2259's definition of "victim," "Congress . . . explicitly recognized the causal link between the criminal conduct . . . and the harm experienced by the victims." *Id.* However, this argument is unpersuasive because the Court has already concluded that Amy has been harmed by Paroline's conduct. The relevant inquiry at this stage of the analysis is not whether Amy has been harmed by Paroline's conduct, but whether the statute requires that the Government prove the amount of Amy's losses proximately caused by Paroline's conduct.

Furthermore, construing the statute as Amy suggests could render section 2259 unconstitutional. Paroline argues that a restitution award not tied to those losses proximately caused by his conduct would "clearly be excessive" in violation of the Eighth Amendment.[9] Defendant's Opening Brief, Docket No. 26, at 15. "[A]n Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." *Rust v. Sullivan*, 500 U.S. 173, 190, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991); *see also United States v. Valencia*, 394 F.3d 352, 355 (5th Cir.2004) ("In [construing a statute], we give effect to the intent of Congress, and as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.") (internal citation omitted). This Court is of the opinion that a restitution order under section 2259 that is not limited to losses proximately caused

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[9] The Eighth Amendment provides: "Excessive bail shall not be required, no excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST., amend. VIII. Paroline cites to *United States v. Bajakajian*, where the Supreme Court held a criminal forfeiture invalid under the Eighth Amendment reasoning "[i]f the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional." 524 U.S. 321, 337, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998). The Third and Ninth Circuits have reviewed restitution issues under the same Eight Amendment analysis. *See United States v. Dubose*, 146 F.3d 1141, 1144-45 (9th Cir.1998); *United States v. Lessner*, 498 F.3d 185, 205 (3d Cir.2007).

by the defendant's conduct would under most facts, including these, violate the Eighth Amendment.

The Government agrees that section 2259 does have a causation requirement. "A victim is only entitled to recover restitution for losses that are proximately caused by the conduct in question" because "[i]t would be nonsensical for the statute to include differing burdens of proof and different causal requirements for different types of losses." Government's Opening Brief, Docket No. 29, at 3 & n. 13. However, the Government argues that it has met its burden of proving that Amy's total losses were proximately caused by Paroline's conduct. Paroline disagrees with both Amy and the Government.

Paroline contends that section 2259 requires that the Government prove by a preponderance of the evidence the amount of Amy's specific losses proximately caused by Paroline's possession of her two images. Paroline urges the Court to apply general restitution and causation principles in its analysis of section 2259. Defendant's Opening Brief, Docket No. 26, at 4-5. Indeed, restitution ordered in criminal cases is generally tied to the losses caused by the specific offense of conviction. *See Hughey v. United States*, 495 U.S. 411, 412-13, 110 S.Ct. 1979, 109 L.Ed.2d 408 (1990); *United States v. Maturin*, 488 F.3d 657, 660-61 (5th Cir.2007); *United States v. Wright*, 496 F.3d 371, 381 (5th Cir.2007).

For example, in *Hughey v. United States*, the Supreme Court held that the Victim and Witness

Protection Act of 1982 ("VWPA") authorized restitution "only for the loss caused by the specific conduct that is the basis of the offense of conviction." 495 U.S. at 412-13, 110 S.Ct. 1979. The Fifth Circuit has applied *Hughey* noting that a "district court can award restitution to victims of the offense, but the restitution award can encompass only those losses that resulted directly from the offense for which the defendant was convicted." *Maturin*, 488 F.3d at 660-61, 661 n. 2 (noting that *Hughey*, 495 U.S. at 413, 110 S.Ct. 1979, also applies to cases arising under the Mandatory Victims Restitution Act of 1996 ("MVRA") and, although *Hughey* predated the enactment of the MVPA, the "[C]ourt's holding that restitution must be limited to losses caused by the offense of conviction remains good law"); *see also United States v. Arledge*, 553 F.3d 881, 898 (5th Cir.2008). Furthermore, "[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). The Fifth Circuit has referred to the causation requirement as the "*Hughey* limitation." *See United States v. Ortiz*, 252 Fed.Appx. 664, 666 (5th Cir.2007).

However, the Fifth Circuit has also held that, although "[a] defendant sentenced under the [MVRA] is only responsible for paying restitution for the conduct underlying the offense for which he was convicted," "where a fraudulent scheme is an element of the conviction, the court may award restitution for

actions pursuant to that scheme." *United States v. Inman*, 411 F.3d 591, 595 (5th Cir.2005) (internal citation omitted). Amy argues that "[t]he illicit trade in child pornography is a joint enterprise" and "[e]ach possession and each distribution of each image all combine to . . . a 'single indivisible result.'" Amy's Latest Request for Restitution, Docket No. 54-2, at 14. *See United States. v. Norris*, 159 F.3d 926, 929-30 (5th Cir.1998). However, the offense of conviction in this case – possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B) and 2252(b)(2) – does not have a fraudulent scheme or conspiracy as an element of the offense. If 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. This interpretation would be plainly inconsistent with how the principles of restitution and causation have historically been applied.

Although the Fifth Circuit has yet to construe section 2259, other circuits that have considered restitution awards under section 2259 have interpreted the statute to require a causal connection between the victim's losses and the offense of conviction. *United States v. Crandon*, 173 F.3d 122, 125 (3d Cir.1999) ("[Section 2259] requires awarding the full amount of the victim's losses suffered as a proximate result of the offense."); *United States v. Laney,* 189 F.3d 954, 965 (9th Cir.1999) ("Section 2259 . . .

incorporates a requirement of proximate causation . . . requir[ing] a causal connection between the offense of conviction and the victim's harm."); *United States v. Searle*, 65 Fed.Appx. 343, 346 (2d Cir.2009) (assuming that section 2259 includes a requirement that the victim's losses be suffered by the victim as a proximate result of the offense). However, the Court is not aware of any circuit court that has considered a restitution award under section 2259 where the defendant was an end-user or possessor of child pornography. Restitution in possession cases is an issue of first impression in district courts around the nation as the Government has only recently begun seeking restitution from possessors of child pornography on behalf of victims.

Restitution orders entered in possession cases have varied among the various district courts addressing the issue. On July 9, 2009, a district court in the Northern District of Florida entered a restitution order against a possessor criminal defendant in favor of Amy in the amount of $3,263,758. *United States v. Freeman*, No. 3:08-cr-22 (N.D.Fla. filed July 9, 2009). Similarly, a district court in the Southern District of Florida ordered a possessor criminal defendant to pay $3,680,153 in restitution to Amy without addressing the proximate causation issue. *United States v. Staples*, No. 09-14017-CR, 2009 WL 2827204, at *3-4 (S.D.Fla. Sept. 2, 2009). On the other hand, a district court in the Northern District of California declined to order restitution because restitution was precluded under the defendant's plea agreement, but noted that

"a restitution order in [an end-user possession] case must be based upon the identification of a specific injury to the victim that was caused by the specific conduct of the defendant." *United States v. Simon*, 2009 WL 2424673, at *7 (N.D.Cal. August 7, 2009). The Central and Eastern Districts of California have taken a different approach, seemingly adopting a set amount of restitution per defendant convicted of possession of child pornography. *See United States v. Brown*, No. 2:08-cr-1435 (C.D.Cal. filed Oct. 5, 2009) (awarding restitution in the amount of $5,000 to each victim); *United States v. Ferenci*, No. 1:08-cr-0414, 2009 WL 2579102, at *6 (E.D.Cal. Aug. 19, 2009) (awarding restitution in the amount of $3,000 to the victim). In another case, the Government and the defendant stipulated to the amount of restitution because it was "in the best interest of justice, judicial expedience[,] and economy in resolving this novel legal issue." *United States v. Granato*, No. 2:08-cr-198 (D. Nev. filed August 28, 2009). Most recently, a district court in Maine declined to order restitution finding that the Government "failed to present sufficient evidence showing a particular loss proximately caused by the offense of conviction." *United States v. Berk*, 666 F.Supp.2d 182, 193 (D.Me.2009).

After considering all of the arguments, authority before it, and principles of statutory construction, the Court finds that section 2259 requires that a victim's losses be proximately caused by the defendant's conduct to be recoverable in restitution. General restitution and causation principles applied by the Supreme

Court and the Fifth Circuit support this interpretation of the statute. Moreover, this interpretation is consistent with the various circuit courts that have interpreted section 2259 to require that the victim's losses be proximately caused by the defendant's conduct. Thus, an award of restitution under section 2259 is appropriate only for the amount of the victim's losses proximately caused by the defendant's conduct.

Were Amy's Total Losses Proximately Caused By Paroline's Possession?[10]

The Government argues that the proximate cause requirement is satisfied because Amy was obviously "harmed" by Paroline's conduct. However, the Government is conflating the proximate cause requirement with the requirement that the victim be harmed as a result of Paroline's conduct. Certainly, Amy was harmed by Paroline's possession of Amy's two pornographic images, but this does little to show

[10] This type of "possession case" differs from a "production case," where the defendant is the actual abuser and producer of the child pornography. In a "production case" there is no question of causation because all of the victim's losses are proximately caused by the defendant. *See United States v. Baker*, 666 F.Supp.2d 182 (E.D.Tex.2009) ("[R]estitution in [a 'production case'] is payment for the harm caused to the victim by the production and dissemination of the child pornography. . . . The entirety of losses these images cause these children, now and in the future, is a direct and proximate result of the crimes to which [the defendant] pled guilty.")

how much of her harm, or what amount of her losses, was proximately caused by Paroline's offense. A victim is not necessarily entitled to restitution for all of her losses simply because the victim was harmed and sustained some lesser loss as a result of a defendant's specific conduct. The proper inquiry is whether the Government has met its burden of proving by a preponderance of the evidence the amount of Amy's losses proximately caused by Paroline's conduct.

Proximate cause is defined as "[a] cause that directly produces an event and without which the event would not have occurred." BLACK'S LAW DICTIONARY 234 (8th ed. 2004). Thus, the Government has the burden of proving the amount of Amy's losses directly produced by Paroline that would not have occurred without his possession of her images. The Court is guided by certain principals in making this determination. "The determination of an appropriate restitution amount is by nature an inexact science," *United States v. Teehee*, 893 F.2d 271, 274 (10th Cir.1990), and "[a] sentencing court may resolve restitution uncertainties 'with a view towards achieving fairness to the victim,' so long as it still makes a 'reasonable determination of appropriate restitution' rooted in a calculation of actual loss." *United States v. Fallah*, No. H-07-155, 2008 WL 5102281, at *2 (S.D.Tex. December 1, 2008) (quoting *United States v. Vaknin*, 112 F.3d 579, 587 (1st Cir.1997) (internal quotation omitted)). Notwithstanding some latitude in making this determination, the Court must be guided by the premise that "[a]n order of restitution

must be limited to losses caused by the specific conduct underlying the offense of conviction." *United States v. Tencer*, 107 F.3d 1120, 1135 (5th Cir.1997).

The Court has held two hearings regarding the issue of restitution in this case and has reviewed the parties' initial and supplemental briefs. To substantiate her claim for approximately $3,367,854 in restitution, Amy has submitted: (1) a Victim Impact Statement; (2) a psychological evaluation by Dr. Joyanna Silberg dated November 21, 2008; (3) an economic report by Dr. Stan V. Smith dated September 15, 2008; and (4) numerous excerpts from articles discussing the harms associated with child pornography. The losses described in Amy's reports are generalized and caused by her initial abuse as well as the general existence and dissemination of her pornographic images. No effort has been made to show the portion of these losses specifically caused by Paroline's possession of Amy's two images. After reviewing the data underlying Amy's experts' reports, Paroline submitted a supplemental brief that identifies certain discrepancies between Amy's Victim Impact Statement and Dr. Silberg's notes. Paroline's supplemental briefing also includes a report by Dr. Timothy J. Proctor enumerating his concerns as to the reliability of Dr. Silberg's report and an economic report prepared by Dr. Kent Gilbreath that sets forth estimates of Amy's future potential earning capacity

to illustrate the discrepancy between his sums and those of Dr. Smith.[11]

It is clear from the evidence before the Court that a large portion of Amy's total losses were caused by her original abuse by her uncle. It is equally clear that significant losses are attributed to the widespread dissemination and availability of her images and the possession of those images by many individuals such as Paroline. There is no doubt that everyone involved with child pornography – from the abusers and producers to the end-users and possessors – contribute to Amy's ongoing harm. The Court is sympathetic to Amy and the harm that she has undoubtedly experienced and will continue to experience for the rest of her life. The Court also realizes that it is incredibly difficult to establish the amount of a victim's losses proximately caused by any one defendant convicted of possession. However, the Court's sympathy does not dispense with the requirement that the Government satisfy its burden of proving

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[11] In addition, the Government, Amy, and Paroline entered into a Stipulation establishing that Amy does not know who Paroline is and none of the losses for which she seeks restitution flow from her knowledge about Paroline or his conduct (Docket No. 47). Paroline argues that this "effectively precludes a finding by the Court that any of Amy's injuries or damages were the proximate result of [his] conduct." Defendant's Supplemental Brief, Docket No. 48, at 15. However, section 2259 does not require that Amy have knowledge of each individual possessor and his conduct in order to establish proximate cause, it simply requires that restitution be tied to the victim's losses proximately caused by a defendant's possession of Amy's images.

the amount of Amy's losses proximately caused by Paroline's possession of her two images. Although this may seem like an impossible burden for the Government, the Court is nevertheless bound by the requirements of the statute.[12]

Having reviewed all of the evidence, the Court finds that the Government has failed to meet its burden of proving any specific losses proximately caused by Paroline's conduct. Thus, an award of restitution is not appropriate in this case. *See Berk*, 2009 WL 3451085, at *5. *But cf. United States v. Baker*, 666 F.Supp.2d 182 (E.D.Tex.2009) (awarding $150,000 in restitution to each minor victim).[13]

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[12] While Congress was obviously well intended in attempting to create a statutory framework to help compensate victims of child pornography, it has unfortunately created one that is largely unworkable in the context of criminal restitution. 18 U.S.C. § 2255, however, does provide a civil remedy for those victims able to obtain counsel to pursue it. There is a great need for counseling and medical care for victims of child pornography. Perhaps a statutory provision requiring that fines for child pornography be paid to a national center that would act as a trustee to disburse funds for counseling of victims of child pornography would do more to help these victims than the seemingly unworkable criminal restitution provisions in 18 U.S.C. § 2259.

[13] In *Baker*, the Court relied on Congress's mandated minimum damage amount of $150,000 set forth in 18 U.S.C. § 2255(a) to award the minor victims $150,000 each in restitution. The Court found the victims' expert's estimate of losses inadequate to cover the full amount of the victims' losses, reasoning that any award of restitution below the statutorily mandated minimum of $150,000 would fall short of making the minor victims whole. This case differs from *Baker* in two respects.

(Continued on following page)

CONCLUSION

Accordingly, the Court finds that Amy was harmed as a result of Paroline's conduct and thus, is a "victim" for purposes of section 2259. However, a restitution award under section 2259 requires that the Government prove by a preponderance of the evidence the amount of the victim's losses proximately caused by the defendant's conduct. Having considered the parties' oral arguments and written submissions, the Government has not met its burden of proving what losses, if any, were proximately caused by Paroline's possession of Amy's two pornographic images and thus, the Request for Restitution is **DENIED**.

First, the defendant in *Baker* was the actual producer and distributor of the child pornography and thus, causation was not an issue. Therefore, the Court's only task in *Baker* was to determine the proper amount of restitution. In contrast, as a case of first impression, this "possession case" required an exhaustive causation analysis to determine whether an award of restitution was even appropriate. Because the Court has concluded that the Government did not establish any specific losses proximately caused by Paroline's possession of Amy's images, the amount of restitution in this case was not subject to calculation. Second, unlike *Baker*, where the Court was confident $150,000 was far below the minor victims' actual losses, the Court is concerned that a restitution award of $150,000 in this case may exceed any specific losses proximately caused by Paroline's possession of Amy's images. *See United States v. Austin*, 479 F.3d 363, 373 (5th Cir.2007) (holding that when a restitution award is greater than the losses caused by the defendant's conduct, the error affects the defendant's substantial rights and the fairness and integrity of the judicial proceeding).

591 F.3d 792

In re: AMY, the Victim in the Misty Child Pornography Series, Petitioner.

No. 09-41238.

United States Court of Appeals, Fifth Circuit.

December 21, 2009

As Revised Dec. 22, 2009.

James R. Marsh, Marsh Law Firm, White Plains, NY, for Amy.

Fred Rimes Files, Jr., Bain, Files, Jarrett, Bain & Harrison, Tyler, TX, for Paroline.

William D. Baldwin, Amanda Louise Griffith, Traci Lynne Kenner, Asst. U.S. Attys., Tyler, TX, for U.S.

Petition for Writ of Mandamus to the United States District Court for the Eastern District of Texas.

Before DAVIS, SMITH and DENNIS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Petitioner, proceeding under the pseudonym "Amy," seeks a writ of mandamus directing the district court to enter an order requiring defendant Doyle Randall Paroline ("Paroline") to pay victim restitution to her in the amount of $3,367,854. Alternatively, petitioner asks us to remand this case to the district court for reconsideration of its order declining to impose

restitution against Paroline. Because the district court's conclusion[1] that the government failed to establish that any of the defendant's conduct related to this offense proximately caused Amy's damages is not indisputably wrong, we DENY the writ of mandamus.

The standard of review is the usual standard for mandamus petitions, as set forth in *In re Dean*, 527 F.3d 391 (5th Cir.2008). "A writ of mandamus may issue only if (1) the petitioner has 'no other adequate means' to attain the desired relief; (2) the petitioner has demonstrated a right to the issuance of a writ that is 'clear and indisputable;' and (3) the issuing court, in the exercise of its discretion, is satisfied that the writ is 'appropriate under the circumstances.'" *Id.* at 394 (quoting *In Re United States*, 397 F.3d 274, 282 (5th Cir.2005)).

In this case, the first requirement is fulfilled because the petitioner likely has no other means for obtaining review of the district court's decision not to order restitution. *See United States v. Hunter*, 548 F.3d 1308, 1311-16 (10th Cir.2008) (holding that a victim may not bring an appeal from a final judgment in a criminal case asserting that her rights under § 3771 were violated). However, we are not persuaded that the second requirement is met.

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[1] *See* 2009 WL 4572786.

Approximately a decade ago, when petitioner was 8 or 9 years old, her uncle took a series of photographs depicting her in sexually abusive poses. Her uncle distributed the sexually abusive images to third parties and, over the ensuing decade, those images were distributed widely via the internet and other electronic means. Defendant Doyle Randall Paroline ("Paroline") pleaded guilty to a single count of possessing material involving the sexual exploitation of children in violation 18 U.S.C. §§ 2252(a)(4)(B) & 2252(b)(2), stemming from the large number of images of children engaged in sexually explicit conduct that were found on Paroline's computer. Two of the sexually abusive images were those made of Petitioner when she was 8 or 9 years old.

The Government moved in the district court on petitioner's behalf, and petitioner moved through her own counsel, for restitution pursuant to 18 U.S.C. § 2259. The statute provides that the district court "shall order restitution for any offense under this chapter," which includes the offenses for which Paroline was convicted. 18 U.S.C. § 2259(a). "The order of restitution under this chapter shall direct the defendant to pay the victim . . . the full amount of the victim's losses as determined by the court." *Id.* § 2259(b)(1). A "victim" for purposes of the statute "means the individual harmed as a result of a commission of a crime under this chapter." *Id.* § 2259(c). "The full amount of the victim's losses," for purposes of the statute, "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."

Id. § 2259(b)(3).

Section 2259(b)(3) therefore arguably requires the government to establish that recoverable damages must proximately result from the "offense".

We agree with the district court that

> [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. This interpretation would be plainly inconsistent with how the principles of restitution and causation have historically been applied.

The crux of Amy's petition is the legal argument that 18 U.S.C. § 2259 permits a victim to receive mandatory restitution irrespective of whether the

victim's harm was proximately cause by the defendant. The government agreed with the district court that Section 2259 requires a showing of proximate cause between the victim's losses and the defendant's conduct. Courts across the country have followed and applied the proximate-cause requirement in imposing restitution under Section 2259. *United States v. Crandon*, 173 F.3d 122, 126 (3d Cir.1999); *United States v. Searle*, 65 Fed.Appx. 343, 346 (2d Cir.2003); *United States v. Doe*, 488 F.3d 1154, 1160 (9th Cir.2007); *United States v. Estep*, 378 F.Supp.2d 763, 770-72 (E.D.Ky.2005); *United States v. Raplinger*, No. 05-CR-49-LRR, 2007 WL 3285802, *2, *6 (N.D.Iowa Oct. 9, 2007). Although this circuit has not yet construed the proximate cause requirement under Section 2259, it is neither clear nor indisputable that Amy's contentions regarding the statute are correct.[2]

The district court permitted extensive briefing and conducted two evidentiary hearings on the issue of restitution, giving Amy a full opportunity to be heard through her able representative. The court's Memorandum Opinion and Order reflects careful and thoughtful consideration of the law and the facts, as well as sensitivity to Amy and other victims of child pornography. Despite the government's contrary

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[2] The district court has wide discretion and flexibility in determining the victim's damages for purposes of entering its restitution order. Denial of relief under this mandamus standard, of course, does not prejudice Amy's right to seek relief in a civil action.

position to the court's ultimate factual finding on proximate causation, the district court did not "so clearly and indisputably abuse[ ] its discretion as to compel prompt intervention by the appellate court." *In re United States*, 397 F.3d 274, 282 (5th Cir.2005).

We, therefore, DENY the petition for writ of mandamus.

DENNIS, Circuit Judge, dissenting:

I respectfully dissent. Congress emphasized in 18 U.S.C. § 2259 that it is mandatory for a court to issue a restitution order in favor of a victim who was caused harm by child pornography. The district court's decision not to order restitution contravenes the text of § 2259 and congressional intent; it amounts to a clear and indisputable error that should be corrected by a writ of mandamus.

The standard of review in this case is stated in *In re Dean*, 527 F.3d 391 (5th Cir.2008). "A writ of mandamus may issue only if (1) the petitioner has 'no other adequate means' to attain the desired relief; 2) the petitioner has demonstrated a right to the issuance of a writ that is 'clear and indisputable;' and (3) the issuing court, in the exercise of its discretion, is satisfied that the writ is 'appropriate under the circumstances.'" *Id.* at 394 (quoting *In Re United States*, 397 F.3d 274, 282 (5th Cir.2005)).

The first requirement is fulfilled for the reasons stated in the majority opinion. The third requirement

is fulfilled because a mandamus petition is the means Congress has provided to enable crime victims to defend their rights in criminal proceedings, *see* 18 U.S.C. § 3771(d)(3), and because there are no prudential reasons for denying the petition under the current circumstances, as there were in *In re Dean*. And, for the reasons set forth below, the second requirement is fulfilled because it is clear and indisputable that the district court's decision contravened 18 U.S.C. § 2259.

Congress provided in § 2259(a) that the district court "shall order restitution for any offense under this chapter," including Paroline's offenses. "The order of restitution under this chapter shall direct the defendant to pay the victim . . . the full amount of the victim's losses as determined by the court." *Id.* § 2259(b)(1). A "victim" is defined as "the individual harmed as a result of a commission of a crime under this chapter." *Id.* § 2259(c). "The full amount of the victim's losses," for purposes of the statute, "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."

Id. § 2259(b)(3). In enacting § 2259, "Congress mandated broad restitution for a minor victim following an offender's conviction of federal child sexual exploitation and abuse offenses." *United States v. Crandon*, 173 F.3d 122 (3d Cir.1999). "Section 2259 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." *United States v. Laney*, 189 F.3d 954, 966 (9th Cir.1999).

In the district court, the Government and petitioner presented evidence that she is a "victim" of Paroline's offense because she suffered an invasion of privacy and emotional and psychological harm as a result of Paroline's acquisition and possession of her sexually abusive childhood images. The district court found that she and the Government had satisfactorily proved these facts and that petitioner was therefore a "victim" for purposes of § 2259. This finding was consistent with the Supreme Court's view of the harm caused by child pornography. In *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), the Supreme Court held that the distribution of child pornography is not entitled to protection under the First Amendment. *Id.* at 764, 102 S.Ct. 3348. In so holding, the Supreme Court concluded that "[t]he use of children as subjects of pornographic materials is

very harmful to both children and the society as a whole," and "the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation." *Id.* at 759, 102 S.Ct. 3348. We have extended the reasoning of *Ferber* to the possession of child pornography, concluding for sentencing purposes that "children depicted in child pornography may be considered victims of the crime of receiving child pornography." *United States v. Norris*, 159 F.3d 926, 929 (5th Cir.1998).[1] As we explained in *Norris*, those who possess child pornography harm the children depicted because doing so: (1) "perpetuates the abuse initiated by the producer of the materials"; (2) "represents an invasion of the privacy of the child depicted"; and (3) "instigates the original production of child pornography by providing an economic motive for creating and distributing the materials." *Id.* at 929-30.

The district court therefore found that "significant losses are attributable to the widespread dissemination and availability of [petitioner's] images and the possession of those images by many individuals *such as Paroline*." Slip op. at 16 (emphasis added). The district court further found, "[t]here is no doubt that everyone involved with child pornography – from the abusers and producers to the end-users and

[1] Specifically at issue in *Norris* was whether the child depicted in a pornographic image may be considered a "victim" for purposes of applying the Sentencing Guidelines' offense grouping provisions. *See Norris*, 159 F.3d at 928-29.

possessors – contribute to [petitioner's] ongoing harm." *Id.* These findings necessarily require the conclusion that the Government and petitioner established that she has suffered losses proximately caused by Paroline's wrongful conduct.

But the district court nonetheless concluded that petitioner and the government had failed to prove that her losses were proximately caused by Paroline's crime because her losses were also contributed to by innumerable other persons who had acquired and possessed the same abusive child pornography of her. This was clear error. Petitioner, as the district court's findings establish, is entitled to restitution under § 2259: petitioner has suffered losses attributable, at least in part, to the defendant's possession of pornographic images. Based on these findings, the statute required the district court to calculate a dollar amount and impose restitution. Her right to restitution is not barred merely because the precise amount she is owed by Paroline is difficult to determine. Congress enacted § 2259 to provide broad restitution rights for victims who, like petitioner, have been harmed by the commission of child exploitation offenses, including possession of these sexually abusive images. 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. Under the district court's analysis, the intent and purposes of § 2259 would be impermissibility nullified because the problem of allocating restitution present here will be

found in virtually *every* case where a child depicted in electronically disseminated pornography seeks restitution from those who unlawfully possess those images.

Section 2259 does "not impose[ ] a requirement of causation approaching mathematical precision." *United States v. Doe*, 488 F.3d 1154, 1160 (9th Cir.2007). Thus, a district court does not abuse its discretion in ordering restitution under § 2259 so long as its award is a reasonable estimate and is not based on an "arbitrary calculation." *See United States v. Laney*, 189 F.3d 954, 967 n. 14 (9th Cir.1999). The Seventh Circuit has noted that the strong congressional intent underlying § 2259 may justify a relaxation of the usual bar against speculative future losses, depending on the type of loss claimed by the victim of child exploitation crimes. *See United States v. Danser*, 270 F.3d 451, 455-56 & n. 5 (7th Cir.2001). Accordingly, in light of the strong Congressional intent and purposes of § 2259, and its unequivocal language, an appellate court should affirm the district court's restitution award "under Section 2259 if the district court is able to estimate, based upon facts in the record, the amount of the victim's loss with some reasonable certainty." *Doe*, 488 F.3d at 1160.

It is also worth noting two statutory provisions that could have aided the district court in calculating restitution. Congress, recognizing the difficulty that victims such as petitioner face in showing the amount of their losses, has assigned a conclusive damages award in civil suits brought under the same Act

creating the right to mandatory restitution for this offense. *See* 18 U.S.C. § 2255(a) ("Any person who, while a minor, was a victim of a violation of section . . . 2252 . . . and who suffers personal injury as a result of such violation may sue in any appropriate United States District Court and shall recover the actual damages such person sustains and the cost of the suit, including a reasonable attorney's fee. Any person as described in the preceding sentence shall be deemed to have sustained damages of no less than $150,000 in value."). In addition, § 2259(d)(2) provides:

> 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.

18 U.S.C. § 2259(d)(2). Although this subsection literally applies only to cases involving multiple crime victims, it also analogically expresses legislative intent as to how the district court should proceed to fashion a reasonable procedure to effectuate the chapter when the number of offenders involved in the violation of the victim's rights makes it impracticable to accord her all of those rights.

For these reasons, I would vacate the district court's order denying the request for restitution and remand the case to the district court with

instructions to reopen and reconsider the petitioner's request consistently with § 2259's broad and generous provisions mandating restitution for all victims harmed by child pornography.

United States District Court
EASTERN DISTRICT OF TEXAS
Tyler

UNITED STATES OF AMERICA	**AMENDED JUDGMENT IN A CRIMINAL CASE**
V.	Case Number: 6:08CR00061-001
DOYLE RANDALL PAROLINE	USM Number: 15100-078
Date of Original Judgment: 6/10/2009	F.R. "BUCK" FILES/ J. BRETT HARRISON
(Or Date of Last Amended Judgment)	Defendant's Attorney

Reason for Amendment:

☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))	☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))	☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reason (18 U.S.C. § 3582(c)(1))
☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))	☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))

☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

☐ Direct Motion to District Court Pursuant ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)

☑ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

☑ pleaded guilty to count(s) 1 OF THE 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:

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
18 USC § 2252(a)(4)(B)	Possession of Material Involving the Sexual Exploitation of Children	07/11/2008	1

The defendant is sentenced as provided in pages 2 through 6 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 shall 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 any material changes in economic circumstances.

12/7/2009
Date of Imposition of Judgment

/s/ Leonard Davis
Signature of Judge

Leonard Davis

United States District Judge
Name and Title of Judge

3/11/10
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 24 Months

☑ The court makes the following recommendations to the Bureau of Prisons:

Defendant participate in the Sex Offender Treatment Program and be designated to an FCI that offers the Sex Offender Treatment Program as near to Athens, Texas, preferably Seagoville, if eligible.

☑ 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.

_____
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 10 Years.

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 comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. (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, 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.

ADDITIONAL SUPERVISED RELEASE TERMS

The defendant shall provide the probation officer with access to any requested financial information for purposes of monitoring his efforts to obtain and maintain lawful employment.

The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et. seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense.

Under the guidance and direction of the U.S. Probation Office, the defendant shall participate in a sex offender treatment program which may include the application of physiological testing instruments. The defendant shall pay any cost associated with treatment and testing.

The defendant shall not have contact of any kind with children under the age of 18 unless supervised by an adult approved by the probation officer.

The defendant shall not possess or view any images in any form of media or in any live venue that depicts sexually explicit conduct as defined in 18 U.S.C. § 2256(2).

The defendant shall submit to a search of his person, property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects at any time, with or without a

warrant, by any law enforcement or probation officer with reasonable suspicion concerning unlawful conduct or a violation of supervised release.

The defendant shall allow the U.S. Probation Office to install software designed to monitor computer activities on any computer the defendant is authorized to use. This may include, but is not limited to, software that may record any and all activity on the computers the defendant may use, including the capture of keystrokes, application information, Internet use history, e-mail correspondence, and chat conversations. The defendant will pay any costs related to the monitoring of his/her computer usage.

The defendant shall advise anyone in his/her household that any computer in the household may be subject to computer monitoring.

The defendant shall not attempt to remove, tamper with, or in any way circumvent the monitoring software.

The defendant shall disclose all on-line account information, including user names and passwords, to the U.S. Probation Office. The defendant shall also, if requested, provide a list of all software/hardware on his computer, as well as telephone, cable, or Internet service provider billing records, and any other information deemed necessary by the probation office to monitor the defendant's computer usage.

The defendant shall provide the probation officer with access to any requested financial information

for purposes of monitoring his compliance with the imposed computer access/monitoring conditions.

The defendant shall not purchase, possess, have contact with, or use devices to include cellular telephones with photographic capability; cellular telephones with internet capability; laptop computers (other than a computer approved by the probation office which may be subject to monitoring); iPods; Personal Digital Assistants (PDAs); portable data storage devices such as thumb drives and Flash memory; or any other type of portable electronic device that is capable of communicating data via modem, wireless, or dedicated connection. The defendant shall also refrain from the purchase, possession, or use of digital cameras; digital recorders; or any other type of recording and/or photographic equipment.

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	**$** 100.00	**$** 0.00	**$** 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such 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 proportioned 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.

Name of Payee	**Total Loss***	**Restitution Ordered**	**Priority or Percentage**
"AMY" C/O THE MARSH LAW FIRM		$0.00	0%
TOTALS	$	$ **0.00**	

☐ Restitution amount ordered pursuant to plea agreement
$ _____

☐ The defendant must pay interest on restitution and a fine of 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 the ☐ 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 shall be due as follows:

A ☑ Lump sum payment of $ 100.00 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:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to: the U.S. District Court, Fine & Restitution Section. P.O. Box 570, Tyler, TX 75710.

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), 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.

636 F.3d 190 (5th Cir. 2011)

In re: AMY UNKNOWN, Petitioner.

United States of America, Plaintiff-Appellee,

Doyle Randall Paroline, Defendant-Appellee,

v.

Amy Unknown, Movant-Appellant.

Nos. 09-41238, 09-41254.

United States Court of Appeals, Fifth Circuit.

March 22, 2011

James R. Marsh, Marsh Law Firm, White Plains, NY, Paul G. Cassell (argued), Salt Lake City, UT, for Amy Unknown.

Stanley G. Schneider, Schneider & McKinney, P.C., Houston, TX, Fred Rimes Files, Jr. (argued), Bain, Files, Jarrett, Bain & Harrison, Tyler, TX, for Paroline.

Amanda Louise Griffith, Asst. U.S. Atty., U.S. Attorney's Office, Eastern District of Texas, Plano, TX, William D. Baldwin, Traci Lynne Kenner (argued), Asst. U.S. Attorneys, U.S. Attorney's Office, Eastern District of Texas, Tyler, TX, for U.S.

Appeals from the United States District Court for the Eastern District of Texas.

Before JONES, Chief Judge, and JOLLY and GARZA, Circuit Judges.

EDITH H. JONES, Chief Judge:[1]

"Amy," the victim of childhood sexual abuse and of a widely broadcast set of photos depicting her abuse, has pursued restitution under the Crime Victims Rights' Act ("CVRA"), 18 U.S.C. § 3771(a)(6), against defendants who viewed her photos on the internet. Her appeal from the district court's denial of relief arrives in an unusual posture. She filed both a direct appeal under 28 U.S.C. § 1291 and a petition for a writ of mandamus under 18 U.S.C. § 3771(d)(3). A panel of this court denied mandamus. *In re Amy,* 591 F.3d 792 (5th Cir.2009). This panel was assigned, for ease of administration, both the direct appeal and Amy's motion for panel rehearing of her mandamus petition. We need not reach the issue whether a crime victim has a right to a direct appeal, because the district court clearly and indisputably erred in grafting a proximate causation requirement onto the CVRA. Consequently, Appellant's petition for panel rehearing is granted; her petition for a writ of mandamus is likewise granted, and the case is remanded to the district court to determine the amount of restitution owed by Doyle Randall Paroline.

I. Background

The National Center for Missing and Exploited Children ("NCMEC"), which filed a brief in the

[1] Judges JOLLY and GARZA concur, except in Part II, which they consider advisory.

district court, reports that its analysts have identified over 35,000 images of Amy's abuse among the evidence in over 3,200 child pornography cases since 1998. NCMEC describes the content of these images as "extremely graphic."

Images of Amy were among the hundreds of images of child sexual abuse that defendant Doyle Randall Paroline possessed. Paroline pled guilty to possession of child pornography in January 2009. At sentencing, Amy filed a victim impact statement and request for restitution.[2] *See* 18 U.S.C. § 2259(a). The latter sought $3,367,854, the cumulative cost of her lost income, attorney's fees, and ongoing psychological care. The government initially supported (and formally presented) Amy's request for restitution. NCMEC also filed a brief that detailed the lasting impact of sexual assault and the victim's additional suffering from the knowledge that people continue to view and circulate images of her abuse. Additional evidence before the district court included an expert evaluation of Amy's psychological condition, economic report

[2] Although the present lawsuit focuses on restitution, the CVRA guarantees a number of other rights as well. Among these are (1) reasonable protection from the accused, (2) notice of any court or parole proceedings involving the accused, (3) attendance at such proceedings, (4) an opportunity to be heard at proceedings involving release, plea, sentencing or parole, (5) communication with the government's attorney in the case involving the victim, (6) avoidance of delay, and (7) "[t]he right to be treated with fairness and with respect for the victim's dignity and privacy." 18 U.S.C. § 3771(a).

estimating her lost earnings, and scholarly articles regarding the general effects of child pornography. *United States v. Paroline,* 672 F.Supp.2d 781, 792 (E.D.Tex.2009).

Notwithstanding the heartrending evidence, the district court denied Amy's request for restitution. The court held that the CVRA required Amy and the government to prove that Paroline's possession of Amy's images – as distinct from the thousands of other individuals who continue to possess and view the images – proximately caused the injuries for which she sought restitution. *Id.* at 791-92. The government, in advancing Amy's restitution claim, now accepts the court's premise that proximate causation is required for all types of injury listed in § 2259.

Amy immediately appealed the district court's decision. She filed both a direct appeal of the court's final order and a petition for writ of mandamus authorized by the CVRA, 18 U.S.C. § 3771(d)(3). A divided panel of this court refused the mandamus request, upholding the district court's conclusion that proximate causation permeates § 2259. *In re Amy,* 591 F.3d 792, 794-95 (5th Cir.2009) ("Although this circuit has not yet construed the proximate cause requirement under Section 2259, it is neither clear nor indisputable that Amy's contentions regarding the statute are correct."). In response, Amy has sought both panel and en banc rehearing of her mandamus petition. Because her direct appeal was

assigned to this panel, this panel was also assigned for purposes of rehearing the petition for mandamus.[3]

II. Jurisdiction

The first question before this court is what sort of jurisdiction we have to review the district court's order. Given our conclusion that the writ of mandamus should be granted, we need not resolve the problem, posed by divided sister circuit opinions, whether the CVRA allows a victim to bring a direct appeal. The difficulty of this issue ought to be explained, however, for the benefit of future panels.

The CVRA provides that: "If the district court denies the relief sought, the movant [victim] may petition the court of appeals for a writ of mandamus." 18 U.S.C. § 3771(d)(3). As to the government, "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). The CVRA does not state that victims' sole avenue for review is the writ of mandamus, nor does it authorize the government

[3] This court heard oral arguments in Amy's direct appeal on November 4, 2010. The decision to hear arguments did not commit the court to a conclusion on the availability of direct appeal. We remain the rehearing panel for purposes of Amy's mandamus petition. *See United States v. Jackson,* 559 F.3d 368 (5th Cir.2009) (conducting panel rehearing of the decision issued by a differently composed prior panel in *United States v. Jackson,* 285 Fed.Appx. 149 (5th Cir.2008)).

alone to bring a direct appeal.[4] In any event, 28 U.S.C. § 1291 generally authorizes direct appeal by parties aggrieved by final district court judgments.

The government moved to dismiss Amy's direct appeal filed under § 1291, contending that mandamus is her exclusive appellate vehicle. The CVRA's express provisions confirm this proposition, according to the government and Paroline, abetted by the interpretive presumption that Congress has "legislated against the background of our traditional legal concepts. . . ." *United States v. United States Gypsum Co.,* 438 U.S. 422, 437, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978). Prominent among the relevant legal traditions is that nonparties may not file appeals. The Supreme Court has long recognized "[t]he rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment. . . ." *Marino v. Ortiz,* 484 U.S. 301, 304, 108 S.Ct. 586, 98 L.Ed.2d 629 (1988) (citing *United States ex rel. Louisiana v. Jack,* 244 U.S. 397, 402, 37 S.Ct. 605, 61 L.Ed. 1222 (1917)). Crime victims have not been recognized as parties,

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[4] A related argument concerns the collateral order doctrine. The Supreme Court has recently reiterated the doctrine's rare applicability. *Mohawk Indus., Inc. v. Carpenter,* ___ U.S. ___, 130 S.Ct. 599, 175 L.Ed.2d 458 (2009). A condition for the collateral order doctrine is that the order at issue be "effectively unreviewable on appeal." *Id.* at 604. In the present case, the government argues that its ability to appeal a restitution order defeats this condition; Amy contends that such an order remains effectively unreviewable *as to her.* We present this controversy but need not resolve it.

and the Federal Rules of Criminal Procedure do not allow them to intervene as parties to a prosecution. Circuit courts have applied this rule in the context of restitution. Under the Victim and Witness Protection Act (VWPA), the CVRA's predecessor that made restitution an option rather than mandatory, the Ninth Circuit held that "[n]owhere in the statute does Congress suggest that the VWPA was intended to provide victims with a private remedy to sue or appeal restitution decisions. . . ." *United States v. Mindel,* 80 F.3d 394, 397 (9th Cir.1996).[5] The government contends that decades of experience, a general prohibition on non-party appeals, and its application in the context of victims' rights stand against Amy's hope to invoke § 1291 to appeal the denial of restitution.

Moreover, a pair of recent decisions expressly denies direct appeals under the CVRA. *See United States v. Hunter,* 548 F.3d 1308 (10th Cir.2008),

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[5] The Ninth Circuit was not alone in its interpretation of the VWPA. *See United States v. Palma,* 760 F.2d 475, 479 (3d Cir.1985) ("the victim . . . is not made a party to the sentencing proceeding"), *United States v. Brown,* 744 F.2d 905, 909-10 (2d Cir.1984) ("the victim is not a party to the sentencing hearing. . . . Neither can he appeal a determination he deems inadequate."), *United States v. Franklin,* 792 F.2d 998, 999-1000 (11th Cir.1986) ("no statute . . . give[s] us the authority to entertain an appeal by a victim, such as appellant, who was not a party to the sentencing proceeding in the district court."), *United States v. Kelley,* 997 F.2d 806, 807 (10th Cir.1993) ("We . . . hold that [the victim] has no standing to prosecute this appeal.").

United States v. Aguirre-Gonzalez, 597 F.3d 46 (1st Cir.2010). *Hunter* anchored its statutory interpretation in three provisions of the CVRA: the authorization of mandamus review for victims, the government's ability to bring a direct appeal on a victim's behalf, and the statement that "[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." *Id.* at 1315-16 (quoting 18 U.S.C. § 3771(d)(5)). The first two provisions support *Hunter*'s conclusion by simple negative implication. The last of them, according to the court, implies that affording victims full appellate rights could compromise the government's ability to enter plea agreements because a victim's appeal could re-open the negotiated judgment, removing the certainty that motivates defendants to settle. *Id. Hunter* also suggests that precedent from other circuits supports its conclusion. It cites two decisions that applied traditional abuse-of-discretion standards while professing to conduct mandamus review. *Id.* at 1315 n. 5 (citing *Kenna v. U.S. Dist. Court,* 435 F.3d 1011, 1017 (9th Cir.2006), *In re W.R. Huff Asset Management Co., LLC,* 409 F.3d 555, 562-63 (2d Cir.2005)). By "disguising" ordinary appellate review as mandamus review in § 3771(d)(3) petitions, these decisions support the conclusion that victims have no right to a direct appeal: "To hold otherwise would effectively grant victims two opportunities to appeal, both of which

would be subject to identical appellate standards of review – a clearly inefficient and illogical scheme." *Id.*[6]

Amy asserts that the propriety of her direct appeal is not expressly foreclosed by the CVRA and actually finds support in pre-CVRA authorities – as Congress is presumed to have been aware – as well as recent caselaw. Before the passage of the CVRA, this court heard appeals from non-parties with a direct interest in aspects of criminal prosecutions. *United States v. Briggs,* 514 F.2d 794 (5th Cir.1975) (holding that unindicted co-conspirators had standing to challenge passages in an indictment); *United States v. Chagra,* 701 F.2d 354 (5th Cir.1983) (allowing newspaper to appeal order restricting access to court hearing). A rape victim was authorized in *Doe v. United States,* 666 F.2d 43, 46 (4th Cir.1981), to appeal the trial court's ruling on a rape shield law.

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[6] If *Hunter* is correct that courts are cloaking their ordinary review in mandamus language, that fact suggests unease with denying victims a direct appeal, the very conclusion *Hunter* advances. As discussed below, this circuit insists on a single mandamus standard. As a corollary, this court can neither follow nor condone the shrouded direct review in *Huff* and *Kenna. See infra* Part III. The *Hunter* opinion also overlooks precedent that favors direct appeal. Neither *Hunter* nor its successor, *In re Antrobus,* 519 F.3d 1123 (10th Cir.2008), discusses the Sixth Circuit's decision in *United States v. Perry,* 360 F.3d 519 (6th Cir.2004). *Perry* distinguished the entire corpus of VWPA precedent for the fact that restitution was not mandatory under that statute, but *Hunter* cites no fewer than three such cases in support of its holding.

Most important, the Third Circuit held, albeit perfunctorily, that "We have appellate jurisdiction pursuant to 28 U.S.C. § 1291" to hear the appeal of a purported victim seeking restitution under the VWPA. *United States v. Kones,* 77 F.3d 66, 68 (3rd Cir.1996). Based on the conflicting pre-CVRA cases cited by Amy and the government, one may legitimately wonder *which* legal landscape Congress is presumed to have been viewing when it crafted the CVRA.

The Third Circuit also ruled, in a split panel decision issued while the CVRA was under consideration in Congress, that a crime victim could appeal pursuant to § 1291 the district court's method of enforcing the restitution order. *United States v. Perry,* 360 F.3d 519 (6th Cir.2004).[7]

Finally, post-CVRA, the Sixth Circuit offered indirect support for Amy's position when it allowed a direct appeal under the CVRA. *See In re Siler,* 571 F.3d 604 (6th Cir.2009). Although the events in *Siler* began with a criminal investigation, the lawsuit at

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[7] Amy argues that statutory developments between the VWPA and the CVRA have nullified pre-CVRA holdings that victims have no independent rights in criminal prosecutions. This interpretation of the shift from "may," 18 U.S.C. § 3663(a)(1)(A), to "shall," 18 U.S.C. § 3663A(a)(1), has persuaded at least one court. *Perry,* 360 F.3d at 531 ("under the VWPA, a court did not have to award restitution. . . . Thus, particular features of the VWPA scheme – features absent from the [CVRA] – explain the decisions that deny standing to appeal a VWPA restitution order.").

issue was a civil action against the police for violations of 42 U.S.C. § 1983. The plaintiffs hoped to use a provision of the CVRA to gain access to the defendants' Presentence Reports (PSRs), which they believed contained evidence that would support their case. *Id.* at 607-08. In accepting the appeal, however, the Sixth Circuit noted that "the issue now before us is unrelated to the [criminal] case against the defendants."[8] *Id.* at 606-07.

To summarize briefly the arguments and authorities cited by the "parties" is not to resolve whether a § 1291 appeal is available to a victim seeking relief for any of her rights, including restitution, under the CVRA. Resolution is difficult because the cases employ conflicting reasoning. *Perry,* which involved a dispute among victims who were to share an award, focused on the victims' property rights in their restitution. 360 F.3d at 530-31. *Kones* and *Hunter*

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[8] The Tenth Circuit has attempted to substantiate the distinction between victims' rights in civil and criminal contexts. *Hunter,* 548 F.3d at 1312. "Civil cases," that court reasoned, "often implicate the pecuniary rights of non-parties. . . . Criminal trials, of the other hand, place an individual citizen against the United States government." *Id.* To be fair, although *Hunter* was a CVRA case, it addressed the entire panoply of victims' rights contained in the statute. In the specific context of restitution, *Hunter*'s distinction could not be less accurate. A restitution order implicates only the pecuniary interests of a criminal defendant, and the dispute over how much restitution is due occurs between a criminal and his victim – in fact, the victim's ability to pursue this dispute without government involvement is precisely the issue in this case.

concerned denials of restitution, but the former permitted appeal under the optional-restitution VWPA, while the latter denied appeal under the mandatory-restitution CVRA. The cases also ignore their predecessors: *Perry* fails to acknowledge *Kones,* while *Hunter* does not cite either *Perry* or *Kones.* Federal victim rights legislation has steadily evolved toward expanding the formal rights and role of victims in the prosecutorial process. Nevertheless, when Congress as recently as the 1980s failed to offer any appellate rights to review restitution orders, which path did it more likely take when creating appellate redress in the CVRA? Did it *add* the mandamus vehicle to a victim's pre-existing right to appeal under § 1291? Or did it craft "mandamus" in lieu of a non-existent direct appeal right for non-parties? If the latter course was chosen, did Congress render to victims a mere formality, given the traditionally narrow scope of mandamus relief, or did it apply that term to a more substantial vehicle for redress of victims' grievances? We need not resolve the uncertainties, because our analysis leads to the conclusion that, even under the narrow standard of traditional mandamus review, the district court's judgment cannot stand. This conclusion would perforce favor Amy if a § 1291 de novo appellate standard applied.

III. Standard of Review

When a panel rehearing is granted, the standard of review is the same one that applied at the original hearing. *See, e.g., Chicago Bridge & Iron Co. N.V. v.*

FTC, 534 F.3d 410, 422 (5th Cir.2008). This court evaluates a petition for writ of mandamus under the CVRA according to the standard announced in *In re Dean,* 527 F.3d 391 (5th Cir.2008). *Dean* held that mandamus is appropriate "only if (1) the petitioner has no other adequate means to attain the desired relief; (2) the petitioner has demonstrated a right to the issuance of a writ that is clear and indisputable; and (3) the issuing court . . . is satisfied that the writ is appropriate under the circumstances." *Id.* at 394 (internal quotations omitted). In announcing the test for mandamus under the CVRA, the *Dean* decision refers to this court's holding in *In re United States,* 397 F.3d 274 (5th Cir.2005), as well as the Supreme Court's decision in *Cheney v. United States District Court,* 542 U.S. 367, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004), neither of which concerns the CVRA or restitution. By relying on general mandamus precedent, *In re Dean* confirms that a single mandamus standard reigns in the Fifth Circuit, regardless of the context in which the petition arises.[9]

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[9] We pause to note, as part of the jurisdictional conundrum, that our sister circuits are far from united in the standard to be applied. At least two circuits have applied lower standards of review when faced with a mandamus petition under the CVRA. *See Kenna v. U.S. Dist. Court,* 435 F.3d 1011, 1017 (9th Cir.2006) ("we must issue the writ whenever we find that the district court's order reflects an abuse of discretion or legal error"), *In re W.R. Huff Asset Management Co., LLC,* 409 F.3d 555, 562-63 (2d Cir.2005) (invoking § 3771(d)(3), the mandamus review provision, but concluding that "the district court's determination under the CVRA should be reviewed for abuse of discretion.").

(Continued on following page)

IV. Discussion

As the Supreme Court has noted, the "hurdles" limiting use of mandamus, "however demanding, are not insuperable." *Cheney,* 542 U.S. at 381, 124 S.Ct. 2576. This court's initial denial of Amy's petition for a writ of mandamus focused on the second of the three *Cheney* factors – *i.e.,* whether Amy's right to restitution is "clear and indisputable." The other two factors played no part in the denial. As to the first factor, the court cited the Tenth Circuit's *Hunter* decision in holding that "the petitioner likely has no other means for obtaining review of the district court's decision not to order restitution." *In re Amy,* 591 F.3d at 793. Based on the preceding discussion, we can affirm this conclusion without endorsing *Hunter*'s holding that a victim has no right to direct appeal.

These standards appear to be more amenable to reversing the district court than the general mandamus standard. *Cf. In re The City of New York,* 607 F.3d 923, 928-29 (2d Cir.2010) (applying *Cheney*'s three-part test), *Perry v. Schwarzenegger,* 591 F.3d 1147, 1156 (9th Cir.2010) (citing *Cheney* and applying an equivalent five-part test from Ninth Circuit precedent). The Tenth Circuit, however, preceded this court in applying the traditional mandamus standard to a victim's appeal under the CVRA. *See In re Antrobus,* 519 F.3d 1123 (10th Cir.2008). As the Tenth Circuit explained, "[m]andamus is a well worn term of art in our common law tradition." *Id.* at 1127. Moreover, "[i]t is a well-established rule of construction that where Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Neder v. United States,* 527 U.S. 1, 21, 119 S.Ct. 1827, 1840, 144 L.Ed.2d 35 (1999).

Likewise, the third factor in *Cheney* – whether the writ is appropriate under the circumstances – favors Amy's petition. Whatever Congress envisioned regarding a victim's right to direct appeal, the CVRA expressly authorizes mandamus under these circumstances. 18 U.S.C. § 3771(d)(3).

The remaining question is whether Amy has a "clear and indisputable" right to restitution. Given more time to ponder and research, we have reconsidered this question. Courts are required to award victims of child sex abuse "the full amount of the victim's losses." 18 U.S.C. § 2259(b)(1). In this context,

> "full amount of the victim's losses" includes any costs incurred by the victim for –
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> (A) medical services relating to physical, psychiatric, or psychological care;
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> (B) physical and occupational therapy or rehabilitation;
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> (C) necessary transportation, temporary housing, and child care expenses;
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> (D) lost income;
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> (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).

The district court denied Amy's request for restitution because the government failed to prove "what losses, if any, were proximately caused by *Paroline's possession* of Amy's two pornographic images. . . ." *United States v. Paroline,* 672 F.Supp.2d 781, 783 (E.D.Tex.2009) (emphasis added). It reasoned that the statute, precedent, and compliance with the Eighth Amendment compel the conclusion that each category of loss in § 2259(b)(3) includes the element of proximate causation, even though the statute confines that requirement to the "catchall" provision, subsection F. This conclusion is clearly and indisputably wrong.

The structure and language of § 2259(b)(3) impose a proximate causation requirement only on miscellaneous "other losses" for which a victim seeks restitution. As a general proposition, it makes sense that Congress would impose an additional restriction on the catchall category of "other losses" that does not apply to the defined categories. By construction, Congress knew the kinds of expenses necessary for restitution under subsections A through E; equally definitionally, it could not anticipate what victims would propose under the open-ended subsection F.

Comparing the language of § 2259 with other restitution statutes affirms the conclusion that proximate causation applies only to the catchall category of harms. Under the VWPA, a victim is "a person *directly and proximately* harmed as a result of the commission of an offense. . . ." 18 U.S.C. § 3663A(a)(2) (emphasis added). In contrast, § 2259, enacted 14 years later as part of the MVRA, defines a victim as

"the individual harmed as *a result of* a commission of a crime. . . ." 18 U.S.C. § 2259(c) (emphasis added).[10] Comparing these statutes reveals that Congress abandoned the proximate causation language that would have reached all categories of harm via the definition of a victim. This change is consistent with the reasons for enacting a second generation of restitution statutes. *See, e.g., Unites States v. Ekanem,* 383 F.3d 40, 44 (2d Cir.2004) (noting "the intent and purpose of the MVRA to expand, rather than limit, the restitution remedy."), *United States v. Perry,* 360 F.3d 519, 524 (6th Cir.2004) ("The new law unquestionably reflects a dramatically more 'pro-victim' congressional attitude. . . ."). The evolution in victims' rights statutes demonstrates Congress's choice to abandon a global requirement of proximate causation.

In applying proximate causation beyond the catchall, the district court cited two Supreme Court cases interpreting statutory lists. *Paroline,* 672

[10] The CVRA contains a definition of "crime victim" that parallels the VWPA and incorporates proximate causation: "a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia." 18 U.S.C. § 3771(e). We focus on the MVRA definition, however, because Amy's claim to restitution rests on that statute. The district court appreciated this fact and therefore turned to a provision of the MVRA to find a proximate causation requirement, *viz.* § 2259(b)(3). To evaluate the district court's interpretation, we look to other sections of the same statute for guidance. The parties do not challenge whether Amy is a victim. Nevertheless, the MVRA's internal definition of victim is probative of the meaning of § 2259(b)(3).

F.Supp.2d at 788 (citing *Porto Rico Railway, Light & Power Co. v. Mor,* 253 U.S. 345, 40 S.Ct. 516, 64 L.Ed. 944 (1920), *Fed. Mar. Comm'n v. Seatrain Lines, Inc.,* 411 U.S. 726, 93 S.Ct. 1773, 36 L.Ed.2d 620 (1973)). In *Porto Rico Railway,* the Supreme Court stated that "When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Id.* at 348, 40 S.Ct. 516.

But there are lists, and then there are other lists. Here, the statute does not present the types of recoverable costs in a series, separated by commas. Instead, it begins a sentence ("'full amount of the victim's losses' includes any costs incurred by the victim for – ") and then lists six different endings for that sentence. From the double-dash that opens the list to the semicolons that separate each of its elements, the grammatical structure of § 2259(b)(3) is unlike the statute in *Porto Rico Railway.* The latter was a blurry composite of lists, separated by commas and without any numbering or introductory punctuation.[11] Grammar alone counsels against applying the rule of *Porto Rico Railway* to the current statute.

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[11] The relevant provision stated: "Said District Court shall have jurisdiction of all controversies where all of the parties on either side of the controversy are citizens or subjects of a foreign state or states, or citizens of a state, territory, or district of the United States not domiciled in Porto Rico. . . ." *Porto Rico Ry.,* 253 U.S. at 346, 40 S.Ct. 516.

Even if the interpretive approach of *Porto Rico Railway* applied here, so would the Court's comment that the statute in question "manifests a general purpose . . . [and i]f the application of the cause were doubtful, we should so construe the provision as to effectuate the general purpose of Congress." *Id.* In the case of § 2259, the statute manifests a congressional purpose to award broad restitution. *See United States v. Crandon,* 173 F.3d 122, 126 (3d Cir.1999) ("Congress [in § 2259] mandated broad restitution for a minor victim. . . ."), *United States v. Laney,* 189 F.3d 954, 966 (9th Cir.1999) ("Section 2259 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."). In light of the recognized purpose for which Congress crafted the list in § 2259(b)(3), a more faithful application of *Porto Rico Railway* would confine the proximate causation requirement to the catchall category of subsection F.

The district court relied on another Supreme Court case addressing an interpretive question that is the inverse of the one here. *Fed. Mar. Comm'n v. Seatrain Lines, Inc.,* 411 U.S. 726, 93 S.Ct. 1773, 36 L.Ed.2d 620 (1973). The statute in *Seatrain* included a seven-category list like the one in § 2259(b)(3). All but one of the categories referred to business relationships that were ongoing. The remaining category was ambiguous, and the Federal Maritime Commission sought to use it to regulate a one-time event. *Id.* at 732-33, 93 S.Ct. 1773. The question before the Court, therefore, was unlike the present case:

whether to apply a condition present in all but one category to the sole outlier (as opposed to applying a restriction present in only one category to all of the others, as the district court did here). The Supreme Court resolved this question by looking to all six of the other categories and following their example: "of the seven categories, six are expressly limited to ongoing arrangements. . . ." *Id.* at 733-34, 93 S.Ct. 1773. The Court found it especially significant that the catchall category shared the restriction. *Id.* at 734, 93 S.Ct. 1773.

Here, the district court seizes on *Seatrain*'s comments about catchall categories to justify a proximate causation requirement, which appears in the catchall, subsection F. *Paroline,* 672 F.Supp.2d at 788. This is a misapplication of *Seatrain.* In *Seatrain,* the special role of a catchall category was not determinative because the catchall imposed the same condition as the other uncontested categories. It is just as likely that the Court's other rationale – majority rule among the categories – controlled the outcome. Moreover, the treatise from which the Court drew its interpretation of catchalls includes the following restriction: "But this is so, only if the result is consistent with the legislative intent. . . . The rule will not be applied where there is 'no ambiguity,' or to thwart the legislative intent. . . ." 2 J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 4908 (3d ed.1943). The Supreme Court understood this restriction. As in *Porto Rico Railway,* the Court in *Seatrain* took its cues from "the

statutory scheme" and what it says about congressional intent. 411 U.S. at 734, 93 S.Ct. 1773. As illustrated in the citations above, congressional intent is no mystery in the context of § 2259. Had the district court adhered more closely to the precedent it cited, it would have reached the opposite conclusion.

Restricting the "proximate result" language to the catchall category in which it appears does not open the door to limitless restitution. The statute itself includes a general causation requirement in its definition of a victim: "For purposes of this section, the term 'victim' means the individual harmed *as a result* of a commission of a crime under this chapter. . . ." 18 U.S.C. § 2259(c) (emphasis added). The district court displayed due care in analyzing whether Amy is a victim of Paroline's crime of possessing – but not creating – images of her sexual assault. *Paroline,* 672 F.Supp.2d at 785-87. The finding that Amy is a victim under § 2259(c) rests on the Supreme Court's reasoning in *New York v. Ferber,* 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) as well as this court's holding in *United States v. Norris,* 159 F.3d 926 (5th Cir.1998).[12] In *Norris* this court rejected the

[12] The causation reasoning in *Norris* bears extended reproduction:

> The consumer, or end recipient, of pornographic materials may be considered to be causing the children depicted in those materials to suffer as a result of his actions in at least three ways.

(Continued on following page)

argument that possessors of child pornography are only an "indirect or secondary" cause of the victim's harm. 159 F.3d at 928-29. Given the statute's built-in causation requirement and the volume of causation evidence in the context of child pornography, fears over excessive punishment are misplaced. We therefore do not share the district court's concern that rejecting a proximate causation requirement would place § 2259 in danger of offending the Eighth Amendment. *See Paroline,* 672 F.Supp.2d at 788 n. 9.

A second reason to doubt that Paroline will pay an unconstitutional price for his crime is the possibility that he can seek contribution from other persons who possess Amy's images. Although the statute

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> First, the simple fact that the images have been disseminated perpetuates the abuse initiated by the producer of the materials. . . .
>
> Second, the mere existence of child pornography represents an invasion of the privacy of the child depicted. Both the Supreme Court and Congress have explicitly acknowledged that the child victims of child pornography are directly harmed by this despicable intrusion on the lives of the young. . . .
>
> Third, the consumer of child pornography instigates the original production of child pornography by providing an economic motive for creating and distributing the materials. . . .
>
> Any of these effects, stemming directly from a consumer's receipt of or willingness to receive child pornography, would amply justify the conclusion that a child depicted in the pornographic images was a "victim" of that crime.

159 F.3d at 929-30.

holds a criminal responsible for "the full amount of the victim's losses," 18 U.S.C. § 2259(b)(1), it instructs the court to enforce the restitution award "in accordance with section 3664," 18 U.S.C. § 2259(b)(2). Section 3664 states that the court may enforce a restitution order "by all other available and reasonable means." 18 U.S.C. § 3664(m)(1)(A)(ii). Among these is joint and several liability. Holding wrongdoers jointly and severally liable is no innovation. *See, e.g.,* 42 U.S.C. § 9607(a) (CERCLA). It will, however, enable Paroline to distribute "the full amount of the victim's losses" across other possessors of Amy's images. Among its virtues, joint and several liability shifts the chore of seeking contribution to the person who perpetrated the harm rather than its innocent recipient.

This court offers no opinion on the amount of restitution due in Amy's particular circumstances. The district court has conducted two evidentiary hearings already. It is best qualified to determine Amy's total harm and the fraction due to Paroline's crime.

V. Conclusion

Incorporating a proximate causation requirement where none exists is a clear and indisputable error. Amy is entitled to receive restitution under the CVRA. We therefore GRANT Amy's petition for panel rehearing and likewise GRANT her petition for a writ of mandamus. Because the district court did not

quantify the amount of restitution to which Amy is entitled or the fraction attributable to Paroline, the case is REMANDED for resolution of that issue.

697 F.3d 306 (5th Cir. 2012)

In re Amy UNKNOWN, Petitioner.

United States of America, Plaintiff-Appellee,

Doyle Randall Paroline, Defendant-Appellee,

v.

Amy Unknown, Movant-Appellant.

United States of America, Plaintiff-Appellee,

v.

Michael Wright, Defendant-Appellant.

Nos. 09-41238, 09-41254, 09-31215.

United States Court of Appeals, Fifth Circuit.

October 1, 2012

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Appeals from the United States District Courts for the Eastern District of Texas and the Eastern District of Louisiana.

Before STEWART, Chief Judge, and KING, JOLLY, DAVIS, JONES, SMITH, GARZA, DENNIS, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK, HAYNES and GRAVES, Circuit Judges.[1]

EMILIO M. GARZA, Circuit Judge, joined by CARL E. STEWART, Chief Judge, and E. GRADY JOLLY, EDITH H. JONES, EDITH BROWN CLEMENT, PRADO, OWEN, JENNIFER WALKER ELROD and HAYNES, Circuit Judges:

OPINION

EMILIO M. GARZA, Circuit Judge

The issue presented to the en banc court is whether 18 U.S.C. § 2259 requires a district court to find that a defendant's criminal acts proximately caused a crime victim's losses before the district court may order restitution, even though that statute only

[1] Judge Higginson is recused and did not participate in any aspect of this en banc rehearing.

contains a "proximate result" requirement in § 2259(b)(3)(F). All our sister circuits that have addressed this question have expanded the meaning of § 2259(b)(3)(F) to apply to all losses under § 2259(b)(3), thereby restricting the district court's award of restitution to a victim's losses that were proximately caused by a defendant's criminal acts. A panel of this court rejected that reading, and instead focused on § 2259's plain language to hold that § 2259 does not limit a victim's total recoverable losses to those proximately resulting from a defendant's conduct. A subsequent panel applied that holding to another appeal, yet simultaneously questioned it in a special concurrence that mirrored the reasoning of our sister circuits. To address the discrepancy between the holdings of this and other circuits, and to respond to the concerns of our court's special concurrence, we granted rehearing en banc and vacated the panel opinions.

This en banc court holds that § 2259 only imposes a proximate result requirement in § 2259(b)(3)(F); it does not require the Government to show proximate cause to trigger a defendant's restitution obligations for the categories of losses in § 2259(b)(3)(A)-(E). Instead, with respect to those categories, the plain language of the statute dictates that a district court must award restitution for the full amount of those losses. We VACATE the district courts' judgments in both of the cases below and REMAND for further proceedings consistent with this opinion.

I

We review a set of appeals arising from two separate criminal judgments issued by different district courts within this circuit. Both appeals involve restitution requests by Amy, a young adult whose uncle sexually abused her as a child, captured his acts on film, and then distributed them for others to see. The National Center for Missing and Exploited Children, which reports that it has found at least 35,000 images of Amy's abuse among the evidence in over 3,200 child pornography cases since 1998, describes the content of these images as "extremely graphic." The Government reports that restitution has been ordered for Amy in at least 174 child pornography cases across the United States in amounts ranging from $100 to $3,543,471.

A

In the consolidated cases *In re Amy,* 591 F.3d 792 (5th Cir.2009), and *In re Amy Unknown,* 636 F.3d 190 (5th Cir.2011), a panel of this court reviewed Amy's mandamus petition and appeal, both of which challenged the district court's order denying Amy restitution in connection with a criminal defendant's sentence.

In the case underlying Amy's mandamus petition and appeal, Doyle Paroline ("Paroline") pled guilty to 18 U.S.C. § 2252 for possessing 150 to 300 images of minors engaged in sexually explicit conduct. At least two images were of Amy. Pursuant to Amy's right to

restitution under the Crime Victims' Rights Act, 18 U.S.C. § 3771, the Government and Amy moved the district court to order restitution under § 2259. Amy supported this request with her psychiatrist's report, which itemized her future damages for specific categories of treatment and estimated total damages nearing $3.4 million.[2]

The district court denied Amy restitution. *United States v. Paroline,* 672 F.Supp.2d 781, 782 (E.D.Tex.2009). The district court held that § 2259 required the Government to prove that by possessing images depicting Amy's sexual abuse, Paroline proximately caused the injuries for which she sought restitution. *Id.* at 791. Concluding that the Government failed to show this causal link, the district court denied Amy restitution. *Id.* at 793. Amy petitioned for mandamus, asking this court to direct the district court to order Paroline to pay her the full amount of the restitution she had requested.

Over one dissent, that panel denied her relief because it was not clear or indisputable that § 2259 mandates restitution irrespective of proximate cause. *In re Amy,* 591 F.3d at 794-95. Amy sought rehearing and filed a separate notice of appeal from the district court's restitution order; her mandamus petition and

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[2] Amy attested that this amount reflects the total amount of her losses from the production, distribution, and possession of the images of her abuse and primarily comprises costs for future psychological care and future lost income.

appeal were consolidated. *See In re Amy Unknown,* 636 F.3d at 192-93. The panel assigned to hear Amy's appeal granted her rehearing request. *Id.* at 193. That panel then granted mandamus and rejected a requirement of proof of proximate cause in § 2259 because "[i]ncorporating a proximate causation requirement where none exists is a clear and indisputable error," but declined to reach the question of whether crime victims such as Amy have a right to an appeal. *Id.* at 193, 201. The panel remanded for the district court's entry of a restitution order. *Id.* at 201.

B

In *United States v. Wright,* 639 F.3d 679 (5th Cir.2011), a separate panel of this court heard the appeal of Michael Wright ("Wright"). Like Paroline, Wright pled guilty to 18 U.S.C. § 2252 for possession of over 30,000 images of child pornography, which included images of Amy's abuse.[3]

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[3] Wright pled guilty pursuant to a plea agreement in which he generally waived his right to appeal but reserved his right to appeal "any punishment in excess of the statutory maximum." Wright's plea agreement stated that "the restitution provisions of Sections 3663 and 3663A of Title 18, United States Code will apply" and made no reference to § 2259. During the guilty plea colloquy, the district court restated the terms of the plea agreement regarding Wright's appeal waiver. The district court asked Wright if he understood all the rights he was waiving, and he responded that he did. The district court also asked Wright if he understood that he "also may be required to reimburse any victim for the amount of his or her loss under the Victim

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The Government sought restitution for Amy under § 2259, supporting its request with the same psychiatric report Amy provided in Paroline's case. The district court awarded Amy $529,661 in restitution, explaining that "[t]his amount was reached by adding the estimated costs of the victim's future treatment and counseling at $512,681.00 and the costs of the victim's expert witness fees at $16,980.00." Judgment at 6-7, *United States v. Wright,* No. 09-CR-103 (E.D.La. Dec. 16, 2009). The district court did not explain why it awarded no restitution for the other amounts that Amy had requested and made no reference to a proximate cause requirement. *See id.* Observing that Amy had

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Restitution Law, if that term is applicable." Wright again said he understood.

The Government seeks to assert the appeal waiver Wright signed only if we hold that restitution is limited by proximate cause in all respects. It concedes, however, that Wright's appeal waiver would not be valid if the en banc court holds that § 2259 lacks a proximate cause requirement that covers all categories of losses because Wright did not waive his right to appeal a sentence unbounded by a proximate cause limitation. Because we hold today that § 2259's isolated "proximate result" language does not cloak all categories of losses with a proximate cause requirement, we need not further address the appeal waiver issue. We have repeatedly held that appeal waivers the Government does not seek to enforce are not self-enforcing and that the Government can effectively "waive the waiver." *See United States v. Acquaye,* 452 F.3d 380, 381 (5th Cir.2006). Given the Government's concession and our holding on the substance of § 2259, we conclude that the Government is not seeking to enforce the appeal waiver in this case. Accordingly, we conclude that the appeal waiver does not bar Wright's appeal. *See id.*

been awarded restitution in another district court, the district court further explained that "[t]he restitution ordered herein is concurrent with any other restitution order either already imposed or to be imposed in the future payable to this victim." USCA5 R. 111-12. Wright appealed to contest the restitution order.

The *Wright* panel first found that the appeal waiver in Wright's plea agreement did not foreclose his right to appeal the restitution order. *Wright,* 639 F.3d at 683. Then, applying *Amy*'s holding, the Wright panel concluded that Amy was entitled to restitution but that the district court had given inadequate reasons for the award it assessed. *Id.* at 685-86. The panel remanded for further findings regarding the amount of the award. *Id.* at 686. The three members on the *Wright* panel, however, joined a special concurrence that questioned *Amy*'s holding and suggested that the court rehear both cases en banc, in part because this court was the first circuit to hold that a proximate cause requirement does not attach to the "full amount of . . . losses" under § 2259(b)(3). *See id.* at 689-90, 692 (Davis, J., specially concurring).

This court held the mandates in both *Amy* and *Wright.* A majority of this court's members voted to rehear these opinions en banc to resolve the question of how to award restitution under § 2259 and to address other related questions raised by these appeals. *See In re Amy Unknown* & *United States v. Wright,* 668 F.3d 776 (5th Cir.2012) (granting rehearing en banc).

II

In rehearing *Amy* and *Wright* en banc, we address the following issues: (1) whether the Crime Victims' Rights Act ("CVRA") grants crime victims a right to an appeal or, if not, whether this court should review Amy's mandamus petition under the standard this court has applied to supervisory writs; (2) whether 18 U.S.C. § 2259 requires the Government to show a defendant's criminal acts proximately caused a victim's injuries before a district court may award restitution; and (3) whether, in light of our holding with respect to § 2259, the district courts in *Amy* and *Wright* erred.

A

Amy petitioned for mandamus and, after this court initially denied her relief, appealed from the district court's restitution order. In the panel opinion in *Amy*, this court granted her mandamus on rehearing under our traditional mandamus inquiry, which this court held in *In re Dean,* 527 F.3d 391, 394 (5th Cir.2008) (per curiam), applies to appeals under the CVRA. *See Amy,* 636 F.3d at 197-98. In *Amy*, the panel declined to decide whether the CVRA entitled her to bring a direct appeal, *see id.* at 194-97, even though *Dean* seemingly foreclosed that argument. *See Dean,* 527 F.3d at 394 (rejecting victims' assertion that the standards governing an appeal apply on CVRA review). Amy asks the en banc court to construe the CVRA to guarantee crime victims the right

of appeal and alternatively asks the court to hear her mandamus petition under our supervisory mandamus power, which would hold her mandamus petition to a less onerous standard of review than *Dean* requires.

1

The CVRA grants crime victims, including Amy, "[t]he right to full and timely restitution as provided in law," 18 U.S.C. § 3771(a)(6), and makes explicit that crime victims, their representatives, and the Government may move the district court to enforce that right. *Id.* § 3771(d)(1); *see id.* § 3771(e) (defining "crime victim" as "a person directly and proximately harmed as a result of the commission of a Federal offense."). The CVRA further commands that "[i]n any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded [this right]." *Id.* § 3771(b)(1). Where a district court denies a victim relief, the CVRA provides that

> [T]he 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.

Id. § 3771(d)(3); *see id.* § 3771(d)(5)(B) (requiring the victim to petition for mandamus within fourteen days). The CVRA further grants the Government,

"[i]n any appeal in a criminal case," the authority to "assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates," *id.* § 3771(d)(4), and makes clear that "[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." *Id.* § 3771(d)(6).

Amy's argument effectively requires us to address two questions: first, whether the CVRA entitles crime victims to an appeal; and second, whether the CVRA entitles crime victims' mandamus petitions through the review standards governing an appeal. First, we observe that the plain text of the CVRA expressly grants crime victims only a right to mandamus relief and makes no mention of any right of crime victims to an appeal. *See* 18 U.S.C. § 3771(d)(3); *Dean,* 527 F.3d at 394. In contrast, the CVRA grants the Government the right to mandamus while also retaining the Government's right to a direct appeal. *Id.* § 3771(d)(4) (allowing only the Government to "assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates."). In interpreting the statute, absent contrary indication, we presume that Congress "legislated against the background of our traditional legal concepts," *United States v. U.S. Gypsum Co.,* 438 U.S. 422, 437, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978), including that crime victims have no right to appeal. *See Marino v. Ortiz,* 484 U.S. 301, 304, 108 S.Ct. 586, 98 L.Ed.2d 629 (1988) (citing *United States ex rel. Louisiana v. Jack,* 244 U.S. 397, 402, 37 S.Ct. 605, 61

L.Ed. 1222 (1917)) (explaining that "[t]he rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment.").

Amy fails to show any language in the statute that reflects Congress' intent to depart from this principle. Instead, she protests that before the CVRA's enactment, this court heard appeals from nonparties with a direct interest in aspects of criminal prosecutions and contends that this suggests that the crime victims retain a similar right to appeal under the CVRA. *See Amy,* 636 F.3d at 195-96 (discussing *United States v. Briggs,* 514 F.2d 794 (5th Cir.1975); *United States v. Chagra,* 701 F.2d 354 (5th Cir.1983)). The cases Amy cites, however, are unconvincing. They allowed non-parties to appeal discrete pre-trial issues with constitutional implications, which were unrelated to the merits of the criminal cases from which they arose. *See Briggs,* 514 F.2d at 799 (holding that persons named as unindicted co-conspirators in an indictment had standing to challenge the power of a grand jury to charge them with criminal conduct without indicting them); *Chagra,* 701 F.2d at 360 (allowing newspapers and a reporter to appeal an order restricting their access to a pretrial bail reduction hearing). These cases do not stand for the proposition that this court has allowed victims any post-judgment right of appeal and, moreover, do not support the inference that Congress drafted the CVRA with the understanding that crime victims had any right to an appeal. Because nothing in the CVRA suggests that Congress intended to grant crime

victims the right to an appeal or otherwise vary the historical rule that crime victims do not have the right of appeal, we conclude that the CVRA grants crime victims only mandamus review.[4]

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[4] Six of our sister circuits generally favor a reading of the statute that allows no appeal, and no circuit has expressly granted victims the right to an appeal under the CVRA. *See United States v. Alcatel-Lucent France, SA,* 688 F.3d 1301, 1307 (11th Cir.2012); *United States v. Monzel,* 641 F.3d 528, 533 (D.C.Cir.), *cert. denied, Amy, Victim in Misty Child Pornography Series v. Monzel,* ___ U.S. ___, 132 S.Ct. 756, 181 L.Ed.2d 508 (2011); *United States v. Aguirre-Gonzalez,* 597 F.3d 46, 53-56 (1st Cir.2010); *In re Antrobus,* 519 F.3d 1123, 1128-30 (10th Cir.2008); *Kenna v. U.S. Dist. Court,* 435 F.3d 1011, 1017 (9th Cir.2006); *In re W.R. Huff Asset Mgmt. Co.,* 409 F.3d 555, 562-63 (2d Cir.2005); *see also In re Acker,* 596 F.3d 370, 373 (6th Cir.2010) ("[W]here the [purported victim's] direct appeal was filed at the same time as the [CVRA] mandamus petition and raises the identical issues, there is no additional right of appeal.").

Further supporting this conclusion is that under the Victim and Witness Protection Act ("VWPA"), the CVRA's predecessor in which restitution was optional rather than mandatory, at least one circuit court denied victims a right to any relief because "[n]owhere in the statute does Congress suggest that the VWPA was intended to provide victims with a private remedy to sue or appeal restitution decisions." *United States v. Mindel,* 80 F.3d 394, 397 (9th Cir.1996). This same logic extends to limit the right of crime victims under the CVRA to only the mandamus relief that the statute clearly expresses. *See id.*

The cases Amy relies on, moreover, further disfavor allowing a § 1291 appeal. Any persuasive force that *In re Siler,* 571 F.3d 604, 608 (6th Cir.2009) (allowing crime victims to appeal under § 1291 when they sought the use of a presentencing report in a subsequent civil suit), may have is undercut by the Sixth's Circuit later decision not to extend a right of appeal to a crime

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Next, we consider whether the CVRA nonetheless requires appellate courts to apply the standard of review governing a direct criminal appeal to mandamus petitions, and conclude it does not. When assessing the meaning of the term "mandamus" in the CVRA, we presume that this "statutory term . . . ha[s] its common-law meaning," absent contrary indication. *Taylor v. United States,* 495 U.S. 575, 592, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990). The Supreme Court has explained that "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. U.S. Dist. Court,* 426 U.S. 394, 402, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976); *accord Cheney v. U.S. Dist. Court,* 542 U.S. 367, 380, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004). "[T]he writ has traditionally been used in the federal courts only . . . to compel it to exercise its authority when it is its duty to do so." *Kerr,* 426 U.S. at 402, 96 S.Ct. 2119 (quotation marks omitted). "[O]nly exceptional circumstances amounting to a judicial usurpation of power will justify the invocation of this extraordinary remedy." *Id.* (quotation marks omitted). Mandamus traditionally "is not to be used as a substitute for an appeal, or to control the decision of the trial court in discretionary matters." *Plekowski v. Ralston-Purina*

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victim who simultaneously petitioned for mandamus relief. *See In re Acker,* 596 F.3d 370, 373 (6th Cir.2010). Likewise, the Third Circuit's decision allowing a crime victim a § 1291 appeal, without any analysis, in *United States v. Kones,* 77 F.3d 66, 68 (3d Cir.1996), also fails to convince us that allowing crime victims a § 1291 appeal is proper.

Co., 557 F.2d 1218, 1220 (5th Cir.1977). Issuance of the writ is largely a matter of discretion with the court to which the petition is addressed. *See Schlagenhauf v. Holder,* 379 U.S. 104, 112 n. 8, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964).

Certain aspects of the CVRA convince us that Congress intended mandamus in its traditional sense when it selected the word "mandamus." *See Taylor,* 495 U.S. at 592, 110 S.Ct. 2143. Reading the statute's provisions together, the CVRA seems to intentionally limit victims' right to review as an extraordinary remedy because it authorizes review only where a district court fails to fulfill a statutory duty; the statute does not extend victims' right to review to situations where a district court acts on a discretionary matter. *See Kerr,* 426 U.S. at 402, 96 S.Ct. 2119. To explain, the CVRA lists eight rights that it ensures crime victims, including the right to restitution. 18 U.S.C. § 3771(a)(1)-(8). The restrictive statement, "A crime victim has the following rights," precedes the list of those rights and supports the conclusion that the CVRA's grant of rights is exclusive. *Id.* § 3771(a). And only where the district court denies a motion seeking to assert one of those rights does the CVRA allow a victim to seek the review of an appellate court. *See id.* § 3771(d)(3). This limitation suggests that in granting relief, the district court retains discretion to select the appropriate means to ensure victims' rights, and that victims may only properly seek appellate intervention where the district court clearly fails to "exercise its authority when it is its

duty to do so." *See Kerr,* 426 U.S. at 402, 96 S.Ct. 2119; *see also Plekowski,* 557 F.2d at 1220 ("The remedy of mandamus . . . is not to be used . . . to control the decision of the trial court in discretionary matters."). Under this reading, only the Government would retain a right to appeal even seemingly discretionary actions, *see* 18 U.S.C. § 3771(d)(4), and could elect to appeal the district court's order to the extent it exercises its own prosecutorial discretion to do so. *See id.* § 3771(d)(6). If we were to instead read the CVRA as extending a right of appeal to victims, we would expand the rights granted to crime victims and simultaneously erode the CVRA's attempt to preserve the Government's discretion. *See id.* A reading of the statute that limits victims' appellate review to the traditional mandamus inquiry thus respects both the CVRA's preservation of the Government's and the district court's traditional discretion while safeguarding the limited rights the CVRA grants.

The very short timeline in which appellate courts must act, and the fact that a single circuit judge may rule on a petition, confirm the conclusion that Congress intended to limit crime victims' appellate relief under the CVRA to traditional mandamus review. *See* 18 U.S.C. § 3771(d)(3). These requirements reflect that appellate courts must grant relief quickly, but rarely, as "a drastic remedy generally reserved for really 'extraordinary' cases." *In re E.E.O.C.,* 709 F.2d 392, 394 (5th Cir.1983) (citing *Kerr,* 426 U.S. at 402, 96 S.Ct. 2119).

Amy has failed to show that Congress intended to grant crime victims anything other than traditional mandamus relief under the CVRA.[5] While, as Amy

[5] Amy nevertheless insists that the CVRA's requirements that the courts of appeals "take up and decide" a petition and "ensure that the crime victim is afforded" all his or her rights in a court proceeding support recognizing victims' right to an appeal and disfavor an interpretation that would provide for traditional mandamus review, which is typically discretionary. *See* 18 U.S.C. § 3771(b)(1), (d)(3). The requirement that appellate courts "take up and decide" a petition, however, relates directly to the short time period in which Congress directs appellate courts to act; this short time period, as we have already explained, favors, rather than opposes, the use of mandamus. *See supra.* Similarly, Amy fails to note that the command that federal courts "ensure that the crime victim is afforded" certain rights falls within a section labeled "In general." *See id.* § 3771(b)(1). Placed in context, this language merely reflects Congress' intention to make plain that federal courts must guard the specific, but necessarily limited, rights spelled out in the CVRA through the processes prescribed in its other subsections. This language does not suggest that the grant of mandamus in this context is not discretionary. Amy's arguments are unavailing.

Only two circuits support Amy's position that she is entitled to something more closely resembling direct appellate standards of review. With little analysis, the Second Circuit has concluded an abuse of discretion standard should govern CVRA mandamus petitions. *See In re W.R. Huff,* 409 F.3d at 562-63. That court divined a relaxed standard from the express terms of the statute and reasoned only that "[i]t is clear . . . that a petitioner 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." *Id.* at 562-63. The lack of reasoning accompanying the Second Circuit's use of a relaxed standard of review fails

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insists, it may be more difficult for a crime victim to enforce rights through mandamus than appeal, this limitation reflects the express language of the statute and honors the common law tradition in place when the CVRA was drafted.

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to convince us that anything other than traditional mandamus standards should govern our review of CVRA petitions.

The Ninth Circuit also has provided for relaxed review, focusing on legal error in reviewing a crime victim's mandamus petition under the CVRA. To justify this relaxed review, the Ninth Circuit emphasized that "[t]he CVRA explicitly gives victims aggrieved by a district court's order the right to petition for review by writ of mandamus, provides for expedited review of such a petition, allows a single judge to make a decision thereon, and requires a reasoned decision in case the writ is denied." *Kenna,* 435 F.3d at 1017. But a later decision suggests that the Ninth Circuit's interpretation in *Kenna* was influenced by the facts of that case and a desire to reach a question of law that its traditional mandamus inquiry would not have allowed; in that later case, the Ninth Circuit explained that it applies its normal test to CVRA mandamus petitions, and merely emphasizes the question of legal error in assessing a crime victim's right to relief. *See In re Andrich,* 668 F.3d 1050, 1051 (9th Cir.2011) (per curiam).

While Amy asserts that two additional circuits favor her position, those courts have not clearly accepted her position, and it is unclear that they would do so if presented with the opportunity to fully analyze the legal issues this question presents. *See In re Stewart,* 552 F.3d 1285 (11th Cir.2008) (granting mandamus on question of whether a person was a crime victim who could participate in district court proceedings without reviewing traditional mandamus factors); *In re Walsh,* 229 Fed.Appx. 58, 60-61 (3d Cir.2007) (in dicta, agreeing with the Second and Ninth Circuits that "mandamus relief is available under a different, and less demanding, standard under 18 U.S.C. § 3771 in the appropriate circumstances.").

2

Our conclusion that the CVRA does not provide crime victims with appellate review does not foreclose Amy's somewhat different request that we apply our supervisory mandamus power of review to her mandamus petition, which would lower the hurdles to relief under mandamus. *See In re McBryde,* 117 F.3d 208, 223 (5th Cir.1997) (acknowledging that "courts of appeals have possessed the power to issue supervisory writs of mandamus in order to prevent practices posing severe threats to the proper functioning of the judicial process"); *In re E.E.O.C.,* 709 F.2d at 395 (in allowing a supervisory writ to proceed as a one-time-only device, this court advised it would only grant the writ if "there is 'usurpation of judicial power' or a clear abuse of discretion" and the movant showed it had a clear and indisputable right to a writ) (quoting *Schlagenhauf,* 379 U.S. at 110, 85 S.Ct. 234). Even so, we need not resolve this question. Our traditional inquiry suffices to afford Amy the relief she requests. *See* IV-A *infra. Cf. Aguirre-Gonzalez,* 597 F.3d at 53-56 (declining to settle question of standard of review because neither the traditional mandamus standard nor a more relaxed standard would afford relief in the circumstances of that case).

Because we hold that the CVRA entitles Amy to only mandamus relief, we dismiss her appeal. Under our traditional mandamus inquiry, we will grant Amy's requested mandamus only if (1) she has no other adequate means to attain the desired relief; (2) she has demonstrated a clear and indisputable right

to the issuance of a writ; and (3) in the exercise of our discretion, we are satisfied that the writ is appropriate. *See Dean,* 527 F.3d at 394.

B

Wright appeals from the district court's restitution order. This court reviews the legality of the restitution order de novo. *United States v. Arledge,* 553 F.3d 881, 897 (5th Cir.2008). If the restitution order is legally permitted, we then review the amount of the order for an abuse of discretion. *Id.; United States v. Ollison,* 555 F.3d 152, 164 (5th Cir.2009).

III

To resolve Amy's mandamus petition and Wright's appeal, we must first ascertain the level of proof required to award restitution to Amy and crime victims like her under 18 U.S.C. § 2259. The parties' dispute turns on the interpretation and effect of the words "proximate result" in § 2259(b)(3)(F).

A

Our analysis again begins with the text of the statute. *See Watt,* 451 U.S. at 265, 101 S.Ct. 1673; *In re Rogers,* 513 F.3d 212, 225 (5th Cir.2008). If § 2259's language is plain, our "sole function" is to "enforce it according to its terms" so long as "the disposition required by the text is not absurd." *Lamie v. U.S. Trustee,* 540 U.S. 526, 534, 124 S.Ct. 1023, 157

L.Ed.2d 1024 (2004) (internal quotation marks omitted); *see also Bates v. United States,* 522 U.S. 23, 29, 118 S.Ct. 285, 139 L.Ed.2d 215 (1997) (holding that courts "ordinarily" should "resist reading words or elements into a statute that do not appear on its face."). The Supreme Court has explained that "[s]tatutory construction 'is a holistic endeavor.'" *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.,* 508 U.S. 439, 455, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993) (quoting *United Savings Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.,* 484 U.S. 365, 371, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988)). "This Court naturally does not review congressional enactments as a panel of grammarians; but neither do we regard ordinary principles of English prose as irrelevant to a construction of those enactments." *Flora v. United States,* 362 U.S. 145, 150, 80 S.Ct. 630, 4 L.Ed.2d 623 (1960). Although "the meaning of a statute will typically heed the commands of its punctuation[,] . . . a purported plain-meaning analysis based only on punctuation is necessarily incomplete." *Bank of Or.,* 508 U.S. at 454, 113 S.Ct. 2173. "[A]t a minimum," our analysis "must account for a statute's full text, language as well as punctuation, structure, and subject matter." *Id.* at 455, 113 S.Ct. 2173.

Only after we apply principles of statutory construction, including the canons of construction, and conclude that the statute is ambiguous, may we consult legislative history. *Carrieri v. Jobs.com, Inc.,* 393 F.3d 508, 518-19 (5th Cir.2004). For statutory language to be ambiguous, however, it must be

susceptible to more than one reasonable interpretation or more than one accepted meaning. *Id.* at 519. Where "the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 254, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) (quoting *Rubin v. United States,* 449 U.S. 424, 430, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981)).

The language of 18 U.S.C. § 2259 reflects a broad restitutionary purpose. *See United States v. Laney,* 189 F.3d 954, 966 (9th Cir.1999) ("Section 2259 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."); *United States v. Crandon,* 173 F.3d 122, 126 (3d Cir.1999) ("Congress [in § 2259] mandated broad restitution for a minor victim."). Section 2259(a) mandates that district courts "shall order restitution for any offense under this chapter," including the offense to which Paroline and Wright pled guilty, 18 U.S.C. § 2252. Section 2259(b)(1) specifies that a restitution order "shall direct the defendant to pay the victim . . . the full amount of the victim's losses."[6]

Section 2259(b)(3) defines the term "the full amount of the victim's losses," contained in § 2259(b)(1), as

[6] A "victim" is an "individual harmed as a result of a commission of a crime under this chapter." *Id.* § 2259(c).

> [A]ny 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.

Section 2259(b)(4) reinforces that "[t]he issuance of a restitution order under this section is mandatory," *id.* § 2259(b)(4)(A), and instructs that "[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." *Id.* § 2259(b)(4)(B). To guide the district courts in awarding restitution, § 2259(b)(2) instructs courts to issue and enforce restitution orders "in accordance with section 3664 and in the same manner as an order under 3663A."

B

The district court in *Paroline* rejected Amy's argument that § 2259 requires an award of "the full

amount of [her] losses." Instead, resorting to the Supreme Court's decision in *Porto Rico Railway, Light & Power Co. v. Mor,* 253 U.S. 345, 348, 40 S.Ct. 516, 64 L.Ed. 944 (1920), which explained that "[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all," the district court extended the "proximate result" language contained in § 2259(b)(3)(F) to apply to the losses described in subsections (A) through (E). *See Paroline,* 672 F.Supp.2d at 788 (also citing *Fed. Mar. Comm'n v. Seatrain Lines, Inc.,* 411 U.S. 726, 734, 93 S.Ct. 1773, 36 L.Ed.2d 620 (1973)). In construing the statute, the district court expressed its concern that "a restitution order under section 2259 that is not limited to losses proximately caused by the defendant's conduct would under most facts, including these, violate the Eighth Amendment," *id.* at 789, and that an alternative "interpretation would be plainly inconsistent with how the principles of restitution and causation have historically been applied." *Id.* at 790. In reversing the district court's holding, the *Amy* panel rejected a generalized proximate cause requirement and stressed that the causation requirement in the definition of "victim," together with § 3664's mechanism for joint and several liability, surmounts any Eighth Amendment concerns. *See Amy,* 636 F.3d at 200-01.

Unlike the district court in *Paroline,* the *Wright* district court seemed to accept Amy's argument to a

limited degree, as it awarded all of the restitution she requested for her future treatment and counseling, and the costs of her expert witness fees. Although the *Wright* panel accepted *Amy*'s holding as binding precedent in reviewing the district court's restitution award, *Wright*'s special concurrence, tracing the reasoning of the district court in *Amy* and challenging the panel's decision not to limit § 2259 to damages proximately caused by a defendant's criminal actions, presaged this en banc rehearing. *See Wright,* 639 F.3d at 686-89 (Davis, J., specially concurring).

In this en banc rehearing, Amy maintains that § 2259 is a mandatory statute requiring district courts to award full restitution to victims of child pornography. In her view, the plain language of the statute dictates that the proximate result language in § 2259(b)(3)(F) is limited to that category of losses and does not apply to the categories of losses described in § 2259(b)(3)(A)-(E).

The Government contends that § 2259(b)(3) conditions all of a victim's recoverable losses on a showing that those losses proximately resulted from the offense. Drawing on *Porto Rico Railway,* the Government asserts that the statutory text reflects Congress' intent to condition all recoverable losses on a showing of proximate cause. Without citing to precedent, the Government urges us "to presume that Congress adhered to the usual balance in the law of remedies: to hold defendants fully accountable for the losses associated with their conduct but in a manner that respects the deeply-rooted principle of proximate

causation." The Government further asserts that there is nothing absurd in the conclusion that Congress intended this limiting principle to apply to all categories of losses. Invoking a recent Supreme Court case analyzing civil tort liability under the Federal Employers' Liability Act in support of this proposition, the Government reasons that "the very purpose of a proximate-cause limitation is to prevent infinite liability." *See CSX Transp., Inc. v. McBride,* ___ U.S. ___, 131 S.Ct. 2630, 2642, 180 L.Ed.2d 637 (2011). The Government advises the court not to delve into legislative materials and also stresses that seven circuits have rejected Amy's reading of the statute.

Paroline similarly construes the "proximate result" language in the statute and relies on the construction of other restitution statutes to support his position. Both Paroline and Wright draw on legislative materials to assert that in drafting § 2259, Congress intended to incorporate a proximate cause requirement.[7]

C

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Our plain reading of § 2259 leads us to the following conclusion: Once a district court determines

[7] Of course, we cannot consult these materials unless we conclude that § 2259's text is ambiguous. *See Carrieri,* 393 F.3d at 518-19. Even if we were to consult these materials, they are inconclusive at best.

that a person is a victim, that is, an "individual harmed as a result of a commission of a crime" under the chapter that relates to the sexual exploitation and abuse of children, § 2259 requires the district court to order restitution for that victim. *See* 18 U.S.C. § 2259(a), (b)(4)(A), (c). The restitution order that follows must encompass "the full amount of the victim's losses." *Id.* § 2259(b)(1). Those losses include five categories of specific losses – medical services related to physical, psychiatric, or psychological care; physical and occupational therapy or rehabilitation; necessary transportation, temporary housing, and childcare expenses; lost income; and attorney's fees and costs – and one category of "other losses suffered by the victim as a proximate result of the offense." *Id.* § 2259(b)(3). The rule of the last antecedent, recently applied by the Supreme Court in *Barnhart v. Thomas,* 540 U.S. 20, 26, 124 S.Ct. 376, 157 L.Ed.2d 333 (2003), instructs that "a limiting clause or phrase," such as the "proximate result" phrase in § 2259(b)(3)(F), "should ordinarily be read as modifying only the noun or phrase that it immediately follows." "[T]his rule is not an absolute and can assuredly be overcome by other indicia of meaning," but "construing a statute in accord with the rule is 'quite sensible as a matter of grammar.'" *Id.* (quoting *Nobelman v. Am. Sav. Bank,* 508 U.S. 324, 330, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993)); *accord* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 144 (2012) ("This rule is the legal expression of a commonsense principle of grammar").

The structure and language of § 2259(b)(3) limit the phrase "suffered by the victim as a proximate result of the offense" in § 2259(b)(3)(F) to the miscellaneous "other losses" contained in that subsection. We see no "other indicia of meaning" in the statute to suggest that the rule of the last antecedent does not apply here. *See id.* Despite the clear terms of the statute, other courts and the parties before us raise arguments in favor of a generalized proximate cause requirement based on (a) canons of statutory construction, (b) traditional causation principles, and (c) possible absurd results. We address – and dismiss – each in turn.

a

First, the Government, Paroline, Wright, and Judge Davis's dissenting opinion press the importance of *Porto Rico Railway* and other caselaw relied on by the district court. As did the *Amy* panel, however, we doubt *Porto Rico Railway*'s applicability here. *Porto Rico Railway* concerned the following statute: "Said District Court shall have jurisdiction of all controversies where all of the parties on either side of the controversy are citizens or subjects of a foreign state or states, or citizens of a state, territory, or district of the United States not domiciled in Porto Rico. . . ." *Porto Rico Ry.,* 253 U.S. at 346, 40 S.Ct. 516. The Supreme Court read the words, "not domiciled in Porto Rico," to apply equally to "citizens or subjects of a foreign state or states" and "citizens of a state, territory, or district of the United States." *Id.* at

348, 40 S.Ct. 516. The Supreme Court explained, "When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Id.* at 348, 40 S.Ct. 516.

Deprived of its context, *Porto Rico Railway*'s rule can be contorted to support the statutory interpretation urged by the Government and apply the "proximate result" language in § 2259(b)(3)(F) to the five categories of loss that precede it. But applying that rule here to require generalized proximate cause would disregard that the list in *Porto Rico Railway*'s statute is significantly different than the one central to this appeal. The statute analyzed in *Porto Rico Railway* featured a long sentence, unbroken by numbers, letters, or bullets, with two complex noun phrases sandwiching the conjunction "or," with the modifier "domiciled in Porto Rico" following the conjoined phrases. The structure of the sentence required the reading the Supreme Court gave it; the phrase "domiciled in Porto Rico" modified the nouns at the head of the two phrases, "citizens or subjects" and "citizens." The Supreme Court expressed its concern that a different construction would have left the reader with a fragmented phrase, which would be overly broad in application, and which, in turn, would have failed to satisfy the statute's overarching purpose to curtail federal courts' jurisdiction. *See Porto Rico Ry.,* 253 U.S. at 348, 40 S.Ct. 516.

Section 2259, in contrast, begins 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 limiting 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 separations. Of course, we do not sit "as a panel of grammarians," *Flora,* 362 U.S. at 150, 80 S.Ct. 630, but we cannot ignore that "the meaning of a statute will typically heed the commands of its punctuation." *Bank of Or.,* 508 U.S. at 454, 113 S.Ct. 2173. The structural and grammatical differences between § 2259 and the statute in *Porto Rico Railway* forcefully counsel against applying *Porto Rico Railway* to the current statute to reach the *Paroline* district court's reading.[8]

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[8] Further, *Porto Rico Railway* also commands that where the statute in question "manifests a general purpose . . . [and] the application of the clause were doubtful, we should so construe the provision as to effectuate the general purpose of Congress." 253 U.S. at 348, 40 S.Ct. 516. The grammar of § 2259, viewed in light of § 2259's broad restitutionary purpose as expressed by its plain terms, confirms that our reading is correct. *See Crandon,* 173 F.3d at 126 ("Congress [in § 2259] mandated broad restitution for a minor victim."); *Laney,* 189 F.3d at 966 ("Section 2259 is phrased in generous terms, in order

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Seatrain, the other case relied on by the district court, is similarly inapplicable. *See Seatrain,* 411 U.S. at 726, 93 S.Ct. 1773. *Seatrain* analyzed a federal antitrust statute that included a seven-category list. *Id.* at 732, 93 S.Ct. 1773. All items on the list but the third referred to ongoing activity; the seventh category was a catchall category phrased as "or in any manner providing for an exclusive, preferential, or cooperative working arrangement." *Id.* at 732-33, 93 S.Ct. 1773. The Government urged the Supreme Court to construe this third category as concerning a one-time activity. *Id.* at 732, 93 S.Ct. 1773. The Court rejected that argument because a broad reading of the statute would conflict with the legal principle that antitrust laws are strictly construed. *Id.* at 733, 93 S.Ct. 1773. To aid in a narrow construction of the statute, the Court applied the rule of statutory construction that "[catchall] clauses are to be read as bringing within a statute categories similar in type to those specifically enumerated" and concluded that the last catchall phrase indicated that Congress intended all the activities to penalize only ongoing antitrust activities. *Id.* at 734, 93 S.Ct. 1773 (citing 2 J. SUTHERLAND, STATUTES & STATUTORY CONSTRUCTION § 4908 *et seq.* (3d ed.1943)). Here, we do not face a statutory scheme that requires narrow construction. *See Crandon,* 173 F.3d at 126; *Laney,*

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to compensate the victims of sexual abuse for the care required to address the long term effects of their abuse.").

189 F.3d at 966. *Seatrain*'s weight in interpreting § 2259 is questionable at best.

Seatrain's rule is at odds with the rule of last antecedent on which we rely; the rule of last antecedent, moreover, provides a reading faithful to § 2259's broad restitutionary purpose. To illustrate, in *Barnhart v. Thomas,* the Supreme Court reviewed an agency's interpretation of a statute that states

> An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do *his previous work* but cannot, considering his age, education, and work experience, engage in *any other kind of substantial gainful work* which exists in the national economy.

Barnhart, 540 U.S. at 23, 124 S.Ct. 376 (emphases added). Applying the rule of the last antecedent, the Supreme Court held that the words "which exists in the national economy" referred only to the noun "any other kind of substantial gainful work" and not to the noun "his previous work." *Id.* at 24-27, 124 S.Ct. 376. In support of this holding, the Supreme Court reasoned that the words "any other" in the second phrase did not show the "contrary intention" necessary to overcome the rule of the last antecedent to apply that phrase to the first. *Id.* at 27-28, 124 S.Ct. 376.

The Supreme Court also applied the rule of last antecedent in *Jama v. Immigration & Customs Enforcement,* 543 U.S. 335, 125 S.Ct. 694, 160

L.Ed.2d 708 (2005) to a statute that included a complete sentence that fed into a seven-category list. Each category on the list was punctuated with a period; only the last category on the list contained a limiting clause. *Id.* at 340, 125 S.Ct. 694. Drawing on the grammatical structure of the list, the Supreme Court concluded that applying the limiting clause to the other items in the list "stretches the modifier too far."[9] *Id.* at 343, 125 S.Ct. 694.

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[9] In *Barnhart,* Justice Scalia provided an example of application of this rule in ordinary life that reveals the commonsensical aspect of the error in applying the proximate result language of § 2259(b)(3)(F) to the five categories of losses that precede it:

> Consider, for example, the case of parents who, before leaving their teenage son alone in the house for the weekend, warn him, "You will be punished if you throw a party or engage in any other activity that damages the house." If the son nevertheless throws a party and is caught, he should hardly be able to avoid punishment by arguing that the house was not damaged. The parents proscribed (1) a party, and (2) any other activity that damages the house. As far as appears from what they said, their reasons for prohibiting the home-alone party may have had nothing to do with damage to the house – for instance, the risk that underage drinking or sexual activity would occur. And even if their only concern was to prevent damage, it does not follow from the fact that the same interest underlay both the specific and the general prohibition that proof of impairment of that interest is required for both. The parents, foreseeing that assessment of whether an activity had in fact "damaged" the house could be disputed by their son, might have wished to preclude all argument by specifying and categorically

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As we have already explained, the grammatical structure of § 2259(b)(3) reflects the intent to read each category of loss separate from the one that preceded it and limit the application of the "proximate result" language in § 2259(b)(3)(F). Comparing the Supreme Court's more recent articulations of the rule of the last antecedent in *Barnhart* and *Jama* to the older rules of statutory construction expressed in *Porto Rico Railway* and *Seatrain* confirms that application of the rule of the last antecedent to limit the proximate result language to the subsection in which it is contained makes more sense here. *See id.* at 26, 124 S.Ct. 376. Applying the proximate result language of § 2259(b)(3)(F) to the categories that precede it would "stretch [] the modifier too far" and disregard the structure of § 2259(b)(3) as written. *Jama,* 543 U.S. at 343, 125 S.Ct. 694.

At least three circuits agree that under rules of statutory construction, we cannot read the "proximate result" language in § 2259(b)(3)(F) as applying to the categories of losses in § 2259(b)(3)(A)-(E).[10] *See United States v. Burgess,* 684 F.3d 445, 456-57 (4th

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> prohibiting the one activity – hosting a party – that was most likely to cause damage and most likely to occur.

540 U.S. at 27-28, 124 S.Ct. 376.

[10] These circuits, whose approach we discuss later in this opinion, nevertheless inject the statute with a proximate cause requirement through alternative means. *See Monzel,* 641 F.3d at 535; *Aumais,* 656 F.3d at 153.

Cir.2012); *United States v. Aumais,* 656 F.3d 147, 153 (2d Cir.2011); *United States v. Monzel,* 641 F.3d 528, 535 (D.C.Cir.), *cert. denied, Amy, Victim in Misty Child Pornography Series v. Monzel,* ___ U.S. ___, 132 S.Ct. 756, 181 L.Ed.2d 508 (2011). But we do not ignore that other circuits have used tools of statutory construction to conclude that the proximate result language in § 2259(b)(3)(F) applies to the five categories of loss that preceded it.[11] *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). These circuits, however, reached this

[11] This disagreement does not mean that our plain-meaning analysis is fraught with any ambiguity. This court considers a statute ambiguous when a statute is subject to more than one reasonable interpretation or more than one accepted meaning. *See Carrieri,* 393 F.3d at 518-19. Even though we choose a course that differs from that of our sister circuits, a division of judicial authority is not enough to render a statute ambiguous. *See Reno v. Koray,* 515 U.S. 50, 64-65, 115 S.Ct. 2021, 132 L.Ed.2d 46 (1995) (discussing this principle in context of rule of lenity). Any "seeming agreement on a standard [in our sister circuits] suggests more harmony than there is." *United States v. Kearney,* 672 F.3d 81, 96 (1st Cir.2012). The First Circuit has correctly observed that the various circuits have applied a proximate cause test to similar, if not identical facts, yet reached differing outcomes that "cannot be entirely explained by differences in the facts of record." *See id. Compare Monzel,* 641 F.3d at 537-40 (concluding that proximate cause shown but remanding to determine the amount of harm so caused) and *McDaniel,* 631 F.3d at 1209 (holding that the district court did not clearly err in finding proximate cause) *with McGarity,* 669 F.3d at 1267-70 (concluding that proximate cause was not established), *Aumais,* 656 F.3d at 154-55 (same), and *Kennedy,* 643 F.3d at 1263-65 (same).

conclusion for reasons we do not find compelling. The Eleventh Circuit, for example, applied *Porto Rico Railway*'s rule without accounting for the Supreme Court's application of it. *See* § IV-C-1-a *supra* (exposing the fault in relying on the rule of *Porto Rico Railway*). The Ninth Circuit, moreover, read the "as a result of" language in § 2259's definition of victim together with the "proximate result" language in § 2259(b)(3)(F) to infuse all of § 2259(b)(3) with a proximate cause requirement. *See Laney,* 189 F.3d at 965. Without more in the statute to support that analysis, we cannot accept the Ninth Circuit's conclusion. To do so would contradict the statute's plain terms and be tantamount to judicial redrafting. *See United States v. Naftalin,* 441 U.S. 768, 773, 99 S.Ct. 2077, 60 L.Ed.2d 624 (1979) ("The short answer is that Congress did not write the statute that way."). The rules of statutory construction, properly applied, cannot be used to extend the proximate result language contained in § 2259(b)(3)(F) to the categories of losses preceding it.[12]

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[12] The dissenting opinion authored by Judge Davis criticizes the majority analysis's inconsistency with *Porto Rico Railway.* Like the Eleventh Circuit, however, Judge Davis's dissent fails to properly account for the statute in that opinion and § 2259's significantly differing contexts. Like the Ninth Circuit, this dissenting opinion attempts to cloak the entire statute with a proximate causation requirement with only scant and scattered causal language as support; the dissenting opinion also resorts to language that applies to the procedures with which restitution is issued and enforced within § 3664 to improperly bolster its position. While making the same errors as our sister circuits,

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Next, we consider the Government's assertion that principles of tort liability limit the award of

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the dissenting opinion does not explain why the rule of last antecedent does not apply. Its position is ultimately unpersuasive.

Judge Southwick's dissenting opinion does not agree with Judge Davis's analysis, but it would similarly resort to the language of § 3664 and § 3663A to require proximate causation. The dissenting opinions are correct that § 2259 directs that "[a]n 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." Judge Southwick's dissenting opinion construes this language to require application of § 3663A's definition of victim as "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered." Congress' directive to rely on the procedures guiding issuance and enforcement of a restitution order, however, does not require us to rely on the substantive definition of "victim" contained in a separate statute when § 2259 has already supplied courts with a different, broader definition of victim.

Lastly, Judge Davis's dissenting opinion claims that under our holding, "if Amy were injured in an automobile accident on the way to a counseling session, those damages would be included in a restitution award." This is not what the majority opinion suggests. Rather, the majority refuses to artificially divide responsibility for a crime victim's losses in circumstances like these here, where multiple defendants are realistically responsible for the victim's indivisible injury. While the dissent attempts to correct this error by adopting a collective causation theory, in doing so, it resorts to an unnecessary source in order to graft upon the clearly-worded statute a causation requirement. Ultimately the dissenting opinion's errors arises from its confusion of the "victim" inquiry which is antecedent to the calculation of "total losses."

restitution under § 2259 to losses proximately caused by a defendant's criminal actions. At least three of our sister circuits have accepted this view and derived a proximate cause requirement not from "the catch-all provision of § 2259(b)(3)(F), but rather [from] traditional principles of tort and criminal law and [from] § 2259(c)'s definition of 'victim' as an individual harmed 'as a result' of the defendant's offense." *Monzel,* 641 F.3d at 535; *accord Burgess,* 684 F.3d at 457-58; *Aumais,* 656 F.3d at 153; *see Kearney,* 672 F.3d at 96-97 ("It is clear to us that Congress intended some causal link between the losses and the offense to support the mandated restitution."); *United States v. Evers,* 669 F.3d 645, 659 (6th Cir.2012) (adopting a proximate cause requirement but declining to decide between the two approaches of our sister circuits).

In *United States v. Monzel,* a case that has served as a springboard for other circuits evaluating § 2259, the D.C. Circuit explained that "[i]t is a bedrock rule of both tort and criminal law that a defendant is only liable for harms he proximately caused," and "a restitution statute [presumably] incorporates the traditional requirement of proximate cause unless there is good reason to think Congress intended the requirement not to apply." *Monzel,* 641 F.3d at 535-36 (footnote omitted) (citing WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.4, at 464, 471 (2d ed.2003)). The D.C. court posited that "[a]lthough § 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," *see id.* at 536 n. 5, and found nothing in the text of § 2259 indicating Congress' intent to eliminate "the ordinary requirement of proximate cause." *Id.* at 536. Rather, "[b]y defining 'victim' as a person harmed 'as a result of' the defendant's offense,'" the court inferred that "the statute invokes the standard rule that a defendant is liable only for harms that he proximately caused." *Id.* The D.C. Circuit worried that without such a limitation, "liability would attach to all sorts of injuries a defendant might indirectly cause, no matter how 'remote' or tenuous the causal connection." *Id.* at 537.

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 of doing so." *Id.* at 536-37. The D.C. Circuit criticized this court's decision in *Amy* because "a 'general' causation requirement without a 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." *Id.* at 537 n. 8. 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 liability.

The Supreme Court has explained that we "ordinarily" should "resist reading words or elements into a statute that do not appear on its face." *Bates,* 522 U.S. at 29, 118 S.Ct. 285. But the Supreme Court has also explained that the absence of certain language in a statute does not necessarily mean that Congress intended courts to disregard traditional background principles. *See U.S. Gypsum Co.,* 438 U.S. at 437, 98 S.Ct. 2864. To illustrate, with respect to the question of intent in the criminal provisions of the Sherman Act, the Supreme Court has explained that

> "[M]ere omission . . . of intent [in the statute] will not be construed as eliminating that element from the crimes denounced"; instead Congress will be presumed to have legislated against the background of our traditional legal concepts which render intent a critical factor, and "absence of contrary direction [will] be taken as satisfaction with widely accepted definitions, not as a departure from them."

Id. at 437, 98 S.Ct. 2864 (quoting *Morissette v. United States,* 342 U.S. 246, 263, 72 S.Ct. 240, 96 L.Ed. 288 (1952)). In interpreting the omission of intent in a different statute, the Supreme Court cautioned that "far more than the simple omission of the appropriate phrase from the statutory definition [of the offense] is necessary to justify dispensing with" a mens rea requirement. *Liparota v. United States,* 471 U.S. 419, 426, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985) (quoting *U.S. Gypsum,* 438 U.S. at 438, 98 S.Ct. 2864); *see id.* ("[T]he failure of Congress explicitly and

unambiguously to indicate whether mens rea is required does not signal a departure from this background assumption of our criminal law.").

With these principles in mind, the D.C. Circuit's analysis, which infuses § 2259 with a generalized proximate cause requirement, *see Monzel,* 641 F.3d at 535, could comport with the Supreme Court's interpretative guidance – only if § 2259 were naked of causal limitations. *See U.S. Gypsum Co.,* 438 U.S. at 437, 98 S.Ct. 2864. 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* a commission of a crime," and the limitation of "any other losses" to those that are the "*proximate result* of the offense." *See* 18 U.S.C. § 2259(b), (c) (emphases added). Had Congress omitted all causal language and not required award of the full amount of losses, or positioned the proximate result language so that it would apply to all categories of losses, we could consider the possibility that Congress intended to bind all categories of losses with a proximate cause requirement. Instead, Congress resisted using the phrase "proximate cause" anywhere in § 2259, including § 2259(b)(3)(F) and further required the court to order the "full amount of the victim's losses."[13] *See id.* The selective inclusion and

[13] In stark contrast, other restitution statutes contain more forceful causation requirements that are lacking in § 2259.
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omission of causal requirements in § 2259's subsections, together with language pointing away from ordinary causation, suggest that Congress intended to depart from, rather than incorporate, a tradition of generalized proximate cause.

This interpretation does not render the statute unworkable. The problem seeming to animate the cases in other circuits interpreting § 2259 to require proximate cause is how to allocate responsibility for a victim's harm to any single defendant. *See Burgess,* 684 F.3d at 459-61; *Aumais,* 656 F.3d at 153-54; *Kennedy,* 643 F.3d at 1265-66; *Monzel,* 641 F.3d at 537-40. These courts ignore, however, that deciding that a defendant "must pay restitution for the losses he caused (whether proximately or not)," does not resolve how the court "determines how those losses should be allocated in cases where more than one offender caused them" – injecting the statute with traditional proximate causation limitations takes courts no closer to determining what each defendant must pay or to supplying crime victims with the "full amount of [their] losses." *Burgess,* 684 F.3d at 462 (Gregory, J., concurring in part, dissenting in part, and concurring in judgment) ("The question of whether a defendant proximately caused some injury is entirely

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Compare 18 U.S.C. § 3663A(a)(2) (explaining that a victim is "a person directly and proximately harmed as a result of the commission of an offense") *with id.* § 2259(c) (defining a victim as "the individual harmed as a result of a commission of a crime").

separate from the question of how those proximately caused losses should be allocated among several offenders."). By focusing on the question of proximate cause, our sister circuits have not made § 2259 any easier to apply and seemingly have ignored that § 2259 has armed courts with tools to award restitution because it instructs courts to refer to the standards under § 3664.[14] *See id.* § 2259(b)(2) ("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.").

Section 3664 instructs that courts may enforce a restitution order "by all other available and reasonable

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[14] Any possible difficulty in ordering restitution in these cases arises not from the statutory construction, but from the type of crime underlying these appeals. It is quite possible that no other crime is like the crime of distribution, receipt, and possession of child pornography punishable under § 2252: No other crime involves single victims harmed jointly by defendants acting independently in the country. *See Burgess,* 684 F.3d at 461 (Gregory, J., concurring in part, dissenting in part, and concurring in judgment) (discussing the indivisibility of the injury to victims of child pornography crimes). Yet, the unique factual scenario that undergirds the application of this restitution statute need not muddle our analysis. We cannot interpret this statute to reach a result unsupported by its plain terms. *See Germain,* 503 U.S. at 254, 112 S.Ct. 1146 (quoting *Rubin,* 449 U.S. at 430, 101 S.Ct. 698) (explaining that where "the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.' "); *see also In re Amy,* 591 F.3d at 797 (Dennis, J., dissenting) ("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.").

means," *id.* § 3664(m)(1)(A)(ii), and offers a "means" to aid courts in awarding restitution in a way that would ensure that Amy receives the full amount of her losses, to the extent possible, while also ensuring that no defendant bears more responsibility than is required for full restitution: joint and several liability. Where "the court finds more than 1 defendant has contributed to the loss of a victim," § 3664(h) instructs that "the court may make each defendant liable for payment of the full amount of restitution."[15]

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[15] As Judge Davis's dissenting opinion points out, § 3664(h) fully reads:

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

(emphasis added).

Judge Davis's dissenting opinion would read the italicized portion of 3664(h) to allow district courts the discretion to circumvent § 2259's command to award a crime victim the full amount of his or her losses. Thus, § 2259 dictates that the circumstances underlying child pornography convictions under § 2252 do not permit division of liability for reasons this opinion has already explained; the injury victims like Amy suffer does not produce a loss capable of division. *See* note 14 *supra.* We echo the criticism of this approach embodied in Judge Southwick's dissenting opinion:

> In light of the unique nature of prosecutions of child pornography and the clear congressional intent to maximize awards, any doubts about the proper amount of restitution should be resolved in favor of the child. . . . I am concerned that [Judge Davis's]

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The joint and several liability mechanism applies well in these circumstances, where victims like Amy are harmed by defendants acting separately who have caused her a single harm.[16] *See Burgess,* 684 F.3d at 461 (Gregory, J., concurring in part, dissenting in part, and concurring in judgment) (explaining that the joint and several liability described in § 3664 "'has long been available . . . in which two negligent actors, acting independently of one another, caused by a single indivisible harm to the plaintiff.'") (quoting TORT LAW: RESPONSIBILITIES AND REDRESS 517 (John C.P. Goldberg et al. eds., 2008)). And although the D.C. Circuit has expressed that it is "unclear . . . whether joint and several liability may

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> emphasis on the discretion of a district court . . . tends towards accepting inappropriately low, even nominal awards. I would not accept that a forward-looking estimate of the number of future defendants and awards should be used to estimate a percentage of overall liability to be given a particular defendant. That puts too much weight on the interests of the defendants. Overcompensation is an unlikely eventuality.

[16] Writing separately in the Fourth Circuit's recent opinion analyzing § 2259, Judge Gregory explained the indivisibility of pornography victims' harms:

> If [a defendant] proximately caused [a victim like Amy]'s psychological injury, this injury is indivisible from the psychological injuries proximately caused by the other offenders. I do not believe a fact finder could meaningfully say precisely *x* amount of [the victim]'s psychological injuries were caused by [the defendant]'s watching the same video.

Burgess, 684 F.3d at 461 (Gregory, J., concurring in part, dissenting in part, and concurring in judgment).

be imposed upon defendants in separate cases," *Monzel,* 641 F.3d at 539, nothing in § 3664 forbids it, either expressly or through implication; the fact that it conforms well to this context supports its application.

Any fears that Amy and victims like her might be overcompensated through the use of joint and several liability, as expressed under § 3664(h), are unwarranted. *See, e.g., Burgess,* 684 F.3d at 458 ("While full compensation would be unlikely from any individual defendant, [the victim's] proposed interpretation of the restitution statute places no cap on her ultimate recovery, and would allow her to recover the amount of her losses many times over."). The use of joint and several liability does not mean that Amy may "recover more than her total loss: [rather,] once she collects the full amount of her losses from one defendant, she can no longer recover from any other." *Id.* at 462 (Gregory, J., concurring in part, dissenting in part, & concurring in judgment) (quoting TORT LAW, *supra,* at 517).

Section 3664 provides "reasonable means" to defend against any theoretical overcompensation that could result. *See* 18 U.S.C. § 3664(m)(1)(A)(ii). First, if Amy recovers the full amount of her losses from defendants, the Government and defendant may use this information to ensure that Amy does not seek further awards of restitution. *See id.* § 3664(e) (explaining that the court may resolve "[a]ny dispute as to the proper amount or type of restitution . . . by the preponderance of the evidence."). Second, § 3664(k)

suggests a means for ending defendants' existing joint and several restitution obligations once Amy receives the full amount of her losses; it allows for a district court, "on its own motion, or the motion of any party, including the victim, [to] adjust the payment schedule, or require immediate payment in full, as the interests of justice require." This broadly phrased subsection seems to enable courts to apply joint and several liability across jurisdictions because it permits those courts to adjust restitution orders as victims receive the full amount of their losses.[17] More concretely, if Amy one day receives the full amount of restitution representing the "full amount of [her] losses" under § 2259, district courts across the nation may amend the judgments of defendants to reflect this fact under § 3664(k) by terminating further restitution obligations.[18]

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[17] Use of this mechanism does not violate § 3664(f)(1)(B)'s command that courts may not consider a victim's receipt of compensation from other sources "in determining the amount of restitution" because § 2259 limits a victim's recovery to the full amount of his or her losses. Section 2259(b)(4)(B)'s similar instruction that a court may not decline to issue a restitution order "because of . . . the fact that a victim has, or is entitled to, receive compensation for his or her injuries from . . . any other source" reinforces this conclusion. Section 2259(b)(4)(B), read together with § 3664(b), (f)(1)(B), reinforces the mandatory nature of § 2259 by disallowing district courts from declining to issue restitution to crime victims while simultaneously honoring the cap § 2259 places on victims' recovery: the full amount of a victim's losses.

[18] Of course, even while Amy may not collect more than to which she is entitled, she may certainly obtain judgments in

(Continued on following page)

In either circumstance, district courts must be in possession of evidence to support entry of restitution or amendment of the defendants' judgments. There are several potential sources of this information. Victims, of course, are in the best position to know what restitution they have recovered and what restitution they have yet to receive. In addition to information obtained from victims, the Government may rely on information maintained by the probation office and other arms of the U.S. Department of Justice to ensure that amounts reported by a victim are accurate.[19] Defendants may dispute any amounts in these requests, and, under § 3664(e), the court may resolve "[a]ny dispute as to the proper amount or type of restitution . . . by the preponderance of the evidence."[20]

c

Next, the Government asserts that not restricting the recovery of losses by proximate cause produces an absurd result – constitutional implications that

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excess of that amount. Indeed, Amy has already obtained judgments exceeding $3.4 million.

[19] The comprehensive information the Government has provided in this case regarding the restitution ordered in other cases involving Amy confirms the Government's access to this type of information.

[20] Nothing in § 2259, § 3664, or in this opinion is intended to restrict the district court's ability to use any other mechanisms available under § 3664 to order restitution in a manner that effects § 2259's purposes.

could be avoided if we were to read § 2259 as requiring proximate causation with respect to all categories of losses. *See Lamie,* 540 U.S. at 534, 124 S.Ct. 1023 (instructing that courts must enforce a statute's terms so long as "the disposition required by the text is not absurd."). Specifically, the Government is concerned that without a proximate cause limitation, § 2259 could be challenged on the ground that it subjects a defendant to excessive punishment under the Eighth Amendment.

The Eighth Amendment prescribes that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The Government posits that by giving effect to the statute's plain text, this court could cause Eighth Amendment problems similar to that expressed by a recent Supreme Court case involving criminal forfeiture: Where criminal forfeiture "would be grossly disproportional to the gravity of [an] offense," the Supreme Court held that it would violate the Excessive Fines Clause of the Eighth Amendment. *United States v. Bajakajian,* 524 U.S. 321, 324, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998).

First, we are not persuaded that restitution is a punishment subject to the same Eighth Amendment limits as criminal forfeiture. Its purpose is remedial, not punitive. *See United States v. Webber,* 536 F.3d 584, 602-03 (7th Cir.2008) ("Forfeiture and restitution are distinct remedies. Restitution is remedial in nature, and its goal is to restore the victim's loss.

Forfeiture, in contrast, is punitive; it seeks to disgorge any profits that the offender realized from his illegal activity.") (citations omitted); *see also United States v. Taylor,* 582 F.3d 558, 566 (5th Cir.2009) ("Restitution operates to make the victim of the crime whole."). Even so, restricting the "proximate result" language to the catchall category in which it appears does not open the door to grossly disproportionate restitution in a way that would violate the Eighth Amendment. Section 2259 contains discrete causal limitations that precede the restitutionary right; restitution thus is limited to losses arising out of a victim's injury. *See* 18 U.S.C. § 2259(c) (imposing general causation requirement on definition of victim). Furthermore, the mechanisms under § 3664, which have already been described, further allay any concerns as to over-punishment. Fears over excessive punishment are misplaced.

Any concern that individual defendants may bear a greater restitutionary burden than others convicted of possessing the same victim's images, moreover, does not implicate the Eighth Amendment or threaten to create an absurd result. *See Arledge,* 553 F.3d at 899. Restitution is not tied to the defendant's gain; rather "so long as the government proved that the victim suffered the actual loss that the defendant has been ordered to pay, the restitution is proportional." *Id.* Even where a district court selectively imposed restitution on one co-defendant and not another, this court has treated this seeming inequality as being "of no consequence." *See id.* (citing *United States v.*

Ingles, 445 F.3d 830, 839 (5th Cir.2006)) (explaining that "a district court may consider the relative degrees of responsibility of co-defendants in imposing restitution obligations and therefore, the simple fact that like punishment was not imposed on [the co-defendants] does not offend the constitution" (internal quotation marks and citations omitted)). Thus, the fact that some defendants, like Paroline and Wright, will be held jointly and severally liable for the full amount of Amy's losses, while other defendants convicted of possessing Amy's images may not be (because, for example, the Government or Amy does not seek restitution from them) does not offend the Eighth Amendment. *See id.*

The court, moreover, can ameliorate the impact of joint and several liability on an individual defendant by establishing a payment schedule that corresponds to the defendant's ability to pay. *See, e.g.,* Judgment at 7, *United States v. Wright,* No. 09-CR-103 (E.D.La. Dec. 16, 2009) (explaining the payment of restitution "shall begin while the defendant is incarcerated [and u]pon release, any unpaid balance shall be paid at a rate of $200.00 per month" and further explaining that "[t]he payment is subject to increase or decrease, depending on the defendant's ability to pay."); *see also* 18 U.S.C. § 3664(e) ("The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant.").

Ultimately, while the imposition of full restitution may appear harsh, it is not grossly disproportionate

to the crime of receiving and possessing child pornography. *Cf. id.* at 899-900 (rejecting Eighth Amendment challenge to the imposition of full restitution, pursuant to joint and several liability, under Mandatory Victims Restitution Act, in context of mail fraud case). In light of restitution's remedial nature, § 2259's built-in causal requirements, and the mechanisms described under § 3664, we do not see any Eighth Amendment concerns here or any other absurd results that our plain reading produces.

2

Accordingly, we hold that § 2259 requires a district court to engage in a two-step inquiry to award restitution where it determines that § 2259 applies. First, the district court must determine whether a person seeking restitution is a crime victim under § 2259 – that is, "the individual harmed as a result of a commission of a crime under this chapter." 18 U.S.C. § 2259(c). The Supreme Court has acknowledged that "[t]he distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children," *New York v. Ferber,* 458 U.S. 747, 759, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), and this court has elaborated that "children depicted in child pornography may be considered to be the victims of the crime of receiving child pornography." *United States v. Norris,* 159 F.3d 926, 929 (5th Cir.1998). This logic applies with equal force to defendants who possess child pornography: By possessing, receiving, and distributing child

pornography, defendants collectively create the demand that fuels the creation of the abusive images. Thus, where a defendant is convicted of possessing, receiving, or distributing child pornography, a person is a victim under this definition if the images the defendant possesses, receives, or distributes include those of that individual.

Second, the district court must ascertain the full amount of the victim's losses as defined under § 2259(b)(3)(A)-(F), limiting only § 2259(b)(3)(F) by the proximate result language contained in that subsection, and craft an order guided by the mechanisms described in § 3664, with a particular focus on its mechanism for joint and several liability.

IV

Having resolved this important issue of statutory interpretation, we apply our holding to Amy's mandamus and Wright's appeal.

A

Under our traditional mandamus inquiry, we will grant Amy's petition for mandamus if (1) she has no other adequate means to attain the desired relief; (2) she has demonstrated a clear and indisputable right to the issuance of a writ; and (3) in the exercise of our discretion, we are satisfied that the writ is appropriate in these circumstances. *See Dean,* 527 F.3d at 394. As the Supreme Court has noted, the "hurdles"

limiting use of mandamus, "however demanding, are not insuperable." *Cheney v. U.S. Dist. Court,* 542 U.S. 367, 381, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004).

We easily conclude that the first prong is met. Because we have held that the CVRA limits crime victims' relief to the mandamus remedy, Amy has no other means for obtaining review of the district court's decision not to order restitution. *See supra* § II-A. We are also satisfied that a writ is appropriate in these circumstances: The CVRA expressly authorizes mandamus, 18 U.S.C. § 3771(d)(3), and awarding restitution would satisfy § 2259's broad restitutionary purpose. Next, we conclude that Amy has a "clear and indisputable" right to restitution in light of our holding today. First, Amy is a "victim" under § 2259(c). Paroline possessed at least two of her images, and his possession of those images partly formed the basis of his conviction. *See Ferber,* 458 U.S. at 759, 102 S.Ct. 3348; *Norris,* 159 F.3d at 929. Amy, as an "individual harmed as a result of [Paroline's] commission of a crime" falling within § 2259's scope, is thus a victim under § 2259. *See Kearney,* 672 F.3d at 94 ("Any argument that [Amy] has not suffered harm as a result of [Paroline's] crimes defies both fact and law."). Because Amy is a victim, § 2259 required the district court to award her restitution for the "full amount of [her] losses" as defined under § 2259(b)(3). Because the district court awarded Amy nothing, it therefore clearly and indisputably erred. No matter what discretion the district court possessed and no

matter how confounding the district court found § 2259, it was not free to leave Amy with nothing.

On remand, the district court must enter a restitution order reflecting the "full amount of [Amy's] losses" in light of our holdings today.

B

Turning to Wright's appeal, Amy is eligible for restitution as a "victim" of Wright's crime of possessing images of her abuse for the same reasons she is eligible as a victim of Paroline's crime. *See supra* § IV-A. It was therefore legal for the district court to order restitution to Amy. *See Arledge,* 553 F.3d at 897 (reviewing the legality of the restitution order de novo). Wright's appeal therefore necessarily focuses on the amount of the district court's restitution award, which we review for an abuse of discretion. *Id.* The district court awarded Amy $529,661 by adding Amy's estimated future counseling costs to the value of her expert witness fees. The district court did not explain why Wright should not be required to pay for any of the other losses Amy requested, and the record does not otherwise disclose why the district court reduced the Government's full request on Amy's behalf. Because the district court's order of restitution is seemingly at odds with § 2259's requirement that it award Amy the full amount of her losses, we vacate the district court's order and remand for reconsideration of restitution in light of this opinion.

V

For the reasons above, we reject the approach of our sister circuits and hold that § 2259 imposes no generalized proximate cause requirement before a child pornography victim may recover restitution from a defendant possessing images of her abuse. We VACATE the district courts' judgments below and REMAND for proceedings consistent with this opinion.[21]

DENNIS, Circuit Judge, concurring in part in the judgment:

I respectfully concur in the majority opinion's decision that the CVRA does not grant crime victims a right to a direct appeal from a district court's rejection of her claim for restitution under 18 U.S.C. § 2259; that the CVRA grants crime victims only a right to seek traditional mandamus review; and that the CVRA grants the government the right to seek mandamus and to retain its right to a direct appeal.

I further agree with the majority that neither the Government nor the victim is required to prove that the victim's losses defined by 18 U.S.C. § 2259(b)(3)(A)-(E) were a proximate result of the defendant's crime; it is only "any other loss suffered by the victim" that must be proved to be "a proximate result of the offense." *Id.* § 2259(b)(3)(F). Section

[21] Amy's motion to strike portions of the Government's brief is DENIED.

2259(c) defines "victim" as an "individual harmed as a result of a commission of a crime under this chapter," but it does not require a showing that the victim's losses included in § 2259(b)(3)(A)-(E) be a "proximate result of the offense." From this, I infer that the statute places only a slight burden on the victim or the government to show that the victim's losses or harms enumerated in those subsections plausibly resulted from the offense. Once that showing has been made, in my view, a presumption arises that those enumerated losses were the proximate result of the offense, which the defendant may rebut with sufficient relevant and admissible evidence.

Finally, I agree with the majority's conclusion that where a defendant is convicted of possessing child pornography, a person is a victim under the statute if the images include those of that individual. In these cases, I agree that the government and the victim have made a sufficient showing, unrebutted by the defendant, that the victim is entitled to restitution of losses falling under 18 U.S.C. § 2259(b)(3)(A)-(E). Therefore, I concur in that part of the majority's judgment that vacates the district courts' judgments and remands the cases to them for further proceedings.

In remanding, however, I would simply direct the district courts to proceed to issue and enforce the restitution orders in accordance with 18 U.S.C. § 3664 and 3663A, as required by § 2259(b)(2). Going forward, I believe it best to permit district courts to craft procedural and substantive devices for ordering

restitution that would take into account both the mandatory nature of full restitution for crime victims under section 2259 and the mechanical difficulties of crafting orders given the possibility of multiplicitous liability among hundreds of defendants under circumstances that may change over time. While I admire the majority's effort to provide guidance to the district courts in their extremely difficult task of molding and merging these federal statutes, §§ 2259, 3663A, and 3664, into a legal, just, and predictable system, I believe that effort is premature in this court at this time on the present record. Rather, I would leave the decision as to how to proceed under these statutes to the district courts, which may decide to take additional evidence and require study and briefing by the parties to assist them in these difficult cases.

W. EUGENE DAVIS, Circuit Judge, concurring in part and dissenting in part, joined by KING, JERRY E. SMITH and GRAVES, Circuit Judges:

I agree with my colleagues in the majority that we should grant mandamus in *In re Amy* and remand for entry of a restitution award.[1] I also agree that we should vacate the award entered in *Wright* and remand for further consideration on the amount of

[1] Section 2259 directs courts to "order restitution for any offense under this chapter." District courts do not have discretion to make no award.

the award. The devil is in the details, however, and I disagree with most of the majority's analysis.

I disagree with my colleagues in the majority in two major respects:

1. Although I conclude that the proximate cause proof required by the restitution statutes can be satisfied in these cases, I disagree with the majority that the statute authorizes restitution without any proof that the violation proximately caused the victim's losses.

2. I agree with the majority that the district court must enter a restitution award against every offender convicted of possession of the victim's pornographic image; but I disagree with the majority that in cases such as these two, where the offenses of multiple violators contribute to the victim's damages, the district court must enter an award against each offender for the full amount of the victim's losses. No other circuit that has addressed this issue has adopted such a one size fits all rule for the restitution feature of the sentence of an offender. Other circuits have given the district courts discretion to assess the amount of the restitution the offender is ordered to pay. *See, e.g., United States v. Burgess,* 684 F.3d 445, 460 (4th Cir.2012); *United States v. Kearney,* 672 F.3d 81, 100-01 (1st Cir.2012); *United States v. McGarity,* 669 F.3d 1218, 1270 (11th Cir.2012); *United States v. Laney,* 189 F.3d 954, 967 (9th Cir.1999).

I.

THE STATUTES

At bottom, this is a statutory interpretation case, and I begin with a consideration of the structure and language of the statutes at issue that facially belie the majority's position that victims may be awarded restitution for losses not proximately caused by offense conduct. Section 2259 specifically governs mandatory restitution awards for crimes related to the sexual exploitation and abuse of children. A number of provisions in the statute make it clear that proof of a causal connection is required between the offenses and the victim's losses.

Section 2259(b)(2) expressly incorporates the general restitution procedures of 18 U.S.C. § 3664 and states that "[a]n 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." Section 3664(e) states that "[t]he 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." (emphasis added).

This language requiring proof of causation from § 3664(e) is consistent with the language defining "victim" found in § 2259(c), who is defined as "the individual harmed *as a result of* a commission of crime under this chapter. . . ." (emphasis added).

Section 2259(a) states that the court "shall order restitution for any offense under this chapter." Section 2259(b)(3) states that the victim's losses are defined as those suffered by the victim "as a proximate result of the offense." The full text of § 2259(b)(3) is as follows:

> [T]he 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).

In interpreting this provision we should follow the fundamental canon of statutory construction established by the Supreme Court in *Porto Rico Railway, Light & Power Co. v. Mor,* 253 U.S. 345, 40 S.Ct. 516, 64 L.Ed. 944 (1920). In that case, the Court held that "[w]hen several words are followed by a clause which is applicable as much to the first and

other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Id.* at 348, 40 S.Ct. 516. Applying this cardinal rule of statutory interpretation, I conclude that subsection (F)'s "as a proximate result of the offense" language applies equally to the previous five subcategories of losses, (A) through (E). This interpretation was accepted by the Eleventh Circuit in *United States v. McDaniel,* 631 F.3d 1204, 1209 (11th Cir.2011) ("The phrase 'as a proximate result of the offense' is equally applicable to medical costs, lost income, and attorneys' fees as it is to 'any other losses.'" (citing *Porto Rico Ry.,* 253 U.S. at 348, 40 S.Ct. 516)); *see also Laney,* 189 F.3d at 965 (reading the "as a result of" language in § 2259's definition of victim together with the "proximate result" language in § 2259(b)(3)(F) to infuse all of 2259(b)(3) with a proximate cause requirement).

In contrast, the majority concludes that once the district court determines that a person is a victim (an individual harmed as a result of an offense under § 2259) the district court must order restitution without further proof of causation.[2]

The majority's reading of § 2259(b)(3) is patently inconsistent with the rule of statutory interpretation

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[2] The majority would apparently hold that if Amy were injured in an automobile accident on the way to a counseling session, those damages would be included in a restitution award.

announced in *Porto Rico Railway,* which makes it clear that the clause should be read to apply to all categories of loss.[3] My conclusion that *Porto Rico Railway*'s rule of interpretation applies in this case is made even clearer when we consider the multiple references in the statutes discussed above expressly reflecting Congressional intent to require proof of causation.

The D.C. Circuit and other circuits have reached the same conclusion – that is, that § 2259 requires proof of proximate cause – albeit by a slightly different reasoning. *See United States v. Monzel,* 641 F.3d 528, 535-37 (D.C.Cir.2011); *United States v. Aumais,* 656 F.3d 147, 153 (2d Cir.2011); *Burgess,* 684 F.3d at 459. The D.C. Circuit explained that it is

> a bedrock rule of both tort and criminal law that a defendant is only liable for harms he proximately caused. ("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

[3] I am not persuaded by *In re Amy*'s attempt to distinguish the statute in *Porto Rico Railway* on the basis that the subcategories of § 2259(b)(3) are separated by semicolons rather than commas. *See In re Amy Unknown,* 636 F.3d 190, 199 (5th Cir.2011). Either punctuation device is an acceptable method of separating clauses. *See* BRYAN A. GARNER, THE REDBOOK: A MANUAL ON LEGAL STYLE 1-15 (2d. ed.2006).

> terms of what is called 'proximate cause'. . . .").

(footnote omitted) (citation omitted) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 263 (5th ed.1984)); *see also* 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."). "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." *Monzel,* 641 F.3d at 536. The court found that "nothing in the text or structure of § 2259 leads us to conclude that Congress intended to negate the ordinary requirement of proximate cause." *Id.*

Other circuits have used different analyses but all circuits to confront this issue have interpreted the statute as using a proximate causation standard connecting the offense to the losses. *See United States v. Evers,* 669 F.3d 645, 658-59 (6th Cir.2012) (finding a proximate cause requirement but declining to choose whether to adopt the *McDaniel* or *Monzel* rationale as they are "complementary"); *Kearney,* 672 F.3d at 96, 99 (adopting a proximate cause standard but not specifying under what analysis); *United States v. Crandon,* 173 F.3d 122, 125-26 (3d Cir.1999) (stating, without analysis, that § 2259 requires damages for losses suffered "as a proximate result of

the offense"). This circuit is the only circuit that has interpreted § 2259 and concluded that proximate cause is not required by the statute.

For the above reasons, I conclude that the statutes at issue require proof that the defendant's offense conduct proximately caused the victim's losses before a restitution award can be entered as part of the defendant's sentence.

II.

CAUSATION

In cases such as the two cases before this court where the conduct of multiple offenders collectively causes the victim's damages, I would follow the position advocated by the Government and adopted by the First Circuit and the Fourth Circuit to establish the proximate cause element required by § 2259. *Kearney,* 672 F.3d at 98-99; *Burgess,* 684 F.3d at 459-60. Under this "collective causation" theory, it is not necessary to measure the precise damages each of the over 100 offenders caused. As the First Circuit in *Kearney* stated: "Proximate cause exists where the tortious conduct of multiple actors has combined to bring about harm, even if the harm suffered by the plaintiff might be the same if one of the numerous tortfeasors had not committed the tort." 672 F.3d at 98. The court relied on the following statement of the rule from Prosser and Keeton:

> When the conduct of two or more actors is so related to an event that their combined

> conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to each of them individually would absolve all of them, the conduct of each is a cause in fact of the event.

KEETON ET AL., *supra,* § 41, at 268.

The court explained further:

> Proximate cause therefore exists on the aggregate level, and there is no reason to find it lacking on the individual level. The Restatement (Third) of Torts has recognized this: causation exits even where "none of the alternative causes is sufficient by itself, but together they are sufficient" to cause the harm.

Kearney, 672 F.3d at 98 (quoting RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 27 reporters' n. cmt. g. (2010); *id.* § 36 cmt. a ("[E]ven an insufficient condition . . . can be a factual cause of harm when it combines with other acts to constitute a sufficient set to cause the harm.")).

I agree with the Government and the First and Fourth Circuits that this definition of proximate cause is appropriate in this context and under this standard the causation requirement in both cases before us is satisfied.

III.

AMOUNT OF THE AWARD

The most difficult issue in these cases – where multiple violators combine to cause horrendous damage to a young victim – is establishing some standards to guide the district court in setting an appropriate restitution award for the single offender before the court.

I agree that Amy is a victim in both cases before us. Defendant Paroline (in *In re Amy*) and defendant Wright possessed Amy's pornographic images and the statute requires the court to enter an award against them.

I agree that Amy is entitled to a restitution award from all of her offenders in a sum that is equal to the amount of her total losses. But in cases such as these where multiple violators have contributed to the victim's losses and only one of those violators is before the court, I disagree that the court must always enter an award against that single violator for the full amount of the victim's losses. I agree that § 3664(h) gives the court the option in the appropriate case of entering an award against a single defendant for the full amount of the victim's losses even though other offenders contributed to these losses. I also agree that in that circumstance the defendant can seek contribution from other offenders jointly liable

for the losses.[4] We have allowed such contribution claims in analogous non-sex offender cases. *E.g., United States v. Arledge,* 553 F.3d 881, 899 (5th Cir.2008) (finding that defendant could "seek contribution from his co-conspirators to pay off the restitution award and reduce the amount he personally owe[d]" in the context of a fraud scheme with multiple participants); *accord United States v. Martinez,* 610 F.3d 1216, 1234 (10th Cir.2010); *United States v. Newsome,* 322 F.3d 328, 340-41 (4th Cir.2003).

In concluding that an award for the full amount of the victim's losses is required the majority relies on § 3664(h) which provides:

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

(emphasis added). The majority simply ignores the second clause in § 3664(h) emphasized above. That subsection plainly gives the court the option of either (1) assessing a restitution award against the single

[4] The Government argued that contribution would not apply in this context because the statute did not authorize it and, in any event, it would not apply among defendants convicted in different courts; but their authority on this point is very thin and does not directly and strongly support this view.

defendant in an amount that is equal to the victim's total losses or (2) apportioning liability among the defendants to reflect each defendant's level of contribution to the victim's loss taking into consideration a number of factors including the economic circumstances of each defendant. *Accord McGarity,* 669 F.3d at 1270. It would be surprising if Congress had not given courts this option. After all, restitution is part of the defendant's criminal sentence and § 3664(h), consistent with sentencing principles generally, gives the sentencing judge discretion to fix the sentence based on the facts and circumstances surrounding the defendant's circumstances, background, and nature of his conduct. *See, e.g., Burgess,* 684 F.3d at 460; *Kearney,* 672 F.3d at 100-01; *McGarity,* 669 F.3d at 1270; *Laney,* 189 F.3d at 967. One size does not fit all in this context any more than the length of a prison sentence or any other feature of a criminal sentence.

I agree with the majority that the defendants in both cases before us having been convicted of violating 18 U.S.C. § 2252 must be ordered to pay restitution to Amy. We should leave the calculation of the appropriate award against each defendant to the district court in the first instance. I would give the district court the following general guidelines:

> The court must recognize that Amy's losses are an aggregation of the acts of the person who abused and filmed her assault, those who distributed and redistributed her images, and those who possessed those images. The culpability and liability for restitution of

> any one defendant regarding Amy's loss is dependent at least in part on the role that defendant played with respect to her exploitation. *See, e.g., Burgess,* 684 F.3d at 460.

The court should first compute the victim's probable future losses based on evidence of the damages she will likely incur from the date of the defendant's offense conduct into the foreseeable future. The court should consider all items of damage listed in § 2259(b)(3) as well as any other losses suffered by the defendant related to the conduct of the violators of this chapter.

In a case such as this where multiple individuals have been convicted of contributing to her abuse, the district court has the 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 the other surrounding circumstances.

The district court is not required to justify any award with absolute precision, but the amount of the award must have a factual predicate. In determining whether it should cast the single defendant before it for the total amount of the victim's losses or in fixing the amount of a smaller award the court should consider all relevant facts including without limitation the following:

> 1. The egregiousness of the defendant's conduct including whether he was involved in the physical abuse of this victim or other

victims, and whether he attempted to make personal contact with victims whose images he viewed or possessed.

2. For defendants who possessed images of the victim, consider the number of images he possessed and viewed, and whether the defendant circulated or re-circulated those images to others.

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

4. The court may consider using 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 the award.

5. The court may also consider as a guide awards made in similar cases in this circuit and other circuits.

6. Any other facts relevant to the defendant's level of contribution to the victim's loss and economic circumstances of the defendant.

IV.

CONCLUSION

In summary, I would grant mandamus and vacate the judgment in *In re Amy* and remand that case to the district court to enter an award consistent with the principles outlined above. I would also

vacate the judgment in *Wright* and remand for entry of judgment consistent with the above guidelines.

LESLIE H. SOUTHWICK, Circuit Judge, dissenting:

We are confronted with a statute that does not provide clear answers. I join others in suggesting it would be useful for Congress "to reconsider whether § 2259 is the best system for compensating the victims of child pornography offenses." *United States v. Kennedy,* 643 F.3d 1251, 1266 (9th Cir.2011); *see also United States v. Burgess,* 684 F.3d 445, 460 (4th Cir.2012). The goal is clear: providing meaningful restitution to victims of these crimes. How to order restitution in individual cases in light of that goal is a difficult question.

Our task today is to effectuate the scheme according to the congressional design as best as we can discern it. Both of the other opinions have ably undertaken this difficult task. I agree with Judge Davis that this circuit should not chart a solitary course that rejects a causation requirement. The reasons why I believe the statute requires causation are different than he expresses, though. I agree with the majority, relying on the last-antecedent rule, that the phrase "as a proximate result of the offense" that is in Section 2259(b)(3)(F) only modifies the category of loss described in (F). *See, e.g., Jama v. Immigration*

and Customs Enforcement, 543 U.S. 335, 343, 125 S.Ct. 694, 160 L.Ed.2d 708 (2005).

Though I agree with the majority in that respect, I find persuasive the reasoning of the Second, Fourth, and D.C. Circuits that causation "is a deeply rooted principle in both tort and criminal law that Congress did not abrogate when it drafted § 2259." *United States v. Aumais,* 656 F.3d 147, 153 (2d Cir.2011); *Burgess,* 684 F.3d at 457; *United States v. Monzel,* 641 F.3d 528, 535-36 (D.C.Cir.2011). In a similar vein, the Supreme Court stated that absent "some indication of congressional intent, express or implied," courts will decline to read federal statutory crimes that fail to mention it, as eliminating the *mens rea* requirement that has been a hallmark of crimes since the common law. *Staples v. United States,* 511 U.S. 600, 605-06, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994).

True, the positioning of the phrase "proximate result" solely within subsection (F) could be a sign that Congress meant to eliminate causation for damages falling under subsections (A)-(E). Any such implication is thoroughly defeated, though, by other provisions of the statute. First, as the D.C. Circuit has recognized, Section 2259 calls for restitution to go to a "victim" of these crimes, a term defined as "the individual harmed *as a result* of a commission of a crime under this chapter." *Monzel,* 641 F.3d at 535 (emphasis added). Second, the statute directs that an order of restitution should be issued and enforced "in the same manner as an order under section 3663A." § 2259(b)(2). Under Section 3663A "'victim' means a

person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered." § 3663A(2). The "as a result" language from Section 2259 as well as the more explicit mention of proximate harm in Section 3663A convince me that "nothing in the text or structure of the restitution statute affirmatively indicates that Congress intended to negate the ordinary requirement of proximate causation for an award of compensatory damages." *Burgess,* 684 F.3d at 457; *Monzel,* 641 F.3d at 536.

I understand the contours of this proximate-cause requirement in much the same manner as does Judge Davis, including his analysis of "collective causation." *See also United States v. Kearney,* 672 F.3d 81, 96-98 (1st Cir.2012). I also agree that the option of "apportion[ing] liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant" belies the majority's notion that each case calls for an award equal to the total loss incurred by a victim. § 3664(h). Yet by making restitution "mandatory" for all these crimes of exploitation, including possession and distribution of child pornography, Congress made its "goal of ensuring that victims receive full compensation" plain. *Kearney,* 672 F.3d at 99.

Awards must therefore reflect the need to make whole the victims of these offenses. As Amy's suffering illustrates, the "distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children." *New*

York v. Ferber, 458 U.S. 747, 759, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). They constitute an indelible "record of the children's participation and the harm to the child is exacerbated by their circulation." *Id.*

In light of the unique nature of prosecutions for child pornography and the clear congressional intent to maximize awards, any doubts about the proper amount of restitution should be resolved in favor of the child. This concern is largely a matter of a difference of emphasis from the views expressed by Judge Davis. I am concerned that his emphasis on the discretion of a district court, though clearly that discretion exists and can be exercised under the terms of Section 3664, tends towards accepting inappropriately low, even nominal awards. I would not accept that a forward-looking estimate of the number of future defendants and awards should be used to estimate a percentage of overall liability to be assigned a particular defendant. That puts too much weight on the interests of the defendants. Overcompensation is an unlikely eventuality. Were it to occur, then at that point district courts might be able to shift to evening up contributions among past and future defendants.

In summary, proximate cause must be shown and the principle of aggregate causation is the method for proving its existence. By statute, district courts can award all damages to each defendant but also have discretion to make lesser awards if properly explained. This means that I agree with requiring additional proceedings as to both defendants, but

disagree that each district court is *required* to impose a restitution award of the full amount of damages.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-41238

In re: AMY UNKNOWN,

Petitioner

Consolidated with 09-41254

UNITED STATES OF AMERICA,

Plaintiff-Appellee

DOYLE RANDALL PAROLINE

Defendant-Appellee

v.

AMY UNKNOWN,

Movant-Appellant

No. 09-31215

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

MICHAEL WRIGHT

Defendant-Appellant

Nos. 09-41238 c/w No. 09-41254
No. 09-31215

Appeals from the United States District Courts
for the Eastern District of Texas
and the Eastern District of Louisiana

(Filed Nov. 19, 2012)

Before STEWART, Chief Judge, and KING, JOLLY, DAVIS, JONES, SMITH, GARZA, DENNIS, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK, HAYNES and GRAVES, Circuit Judges.[1]

GARZA, Circuit Judge, joined by STEWART, Chief Judge, JOLLY, JONES, CLEMENT, PRADO, OWEN, ELROD, and HAYNES, Circuit Judges:

The original opinion in this matter was issued by the en banc court on October 1, 2012. *In re Unknown*, No. 09-41238, 2012 WL 4477444 (5th Cir. Oct. 1, 2012) (en banc). A petition for rehearing en banc is currently pending before the en banc court. The petition for rehearing en banc is granted in part. Accordingly, we WITHDRAW our previous opinion and replace it with the following opinion.[2]

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[1] Judge Higginson is recused and did not participate in any aspect of this en banc rehearing.

[2] In Wright's case, because the Government did not appeal and Amy did not seek mandamus review, we revised our opinion

(Continued on following page)

The issue presented to the en banc court is whether 18 U.S.C. § 2259 requires a district court to find that a defendant's criminal acts proximately caused a crime victim's losses before the district court may order restitution, even though that statute only contains a "proximate result" requirement in § 2259(b)(3)(F). All our sister circuits that have addressed this question have expanded the meaning of § 2259(b)(3)(F) to apply to all losses under § 2259(b)(3), thereby restricting the district court's award of restitution to a victim's losses that were proximately caused by a defendant's criminal acts. A panel of this court rejected that reading, and instead focused on § 2259's plain language to hold that § 2259 does not limit a victim's total recoverable losses to those proximately resulting from a defendant's conduct. A subsequent panel applied that holding to another appeal, yet simultaneously questioned it in a special concurrence that mirrored the reasoning of our sister circuits. To address the discrepancy between the holdings of this and other circuits, and to respond to the concerns of our court's special concurrence, we granted rehearing en banc and vacated the panel opinions.

This en banc court holds that § 2259 only imposes a proximate result requirement in § 2259(b)(3)(F); it does not require the Government to show proximate cause to trigger a defendant's restitution

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to affirm Wright's sentence, in compliance with *Greenlaw v. United States,* 554 U.S. 237 (2008).

obligations for the categories of losses in § 2259(b)(3)(A)-(E). Instead, with respect to those categories, the plain language of the statute dictates that a district court must award restitution for the full amount of those losses. We VACATE the district court's judgment in *United States v. Paroline,* 672 F. Supp. 2d 781 (E.D. Tex. 2009), and REMAND for further proceedings consistent with this opinion. We AFFIRM the district court's judgment in *United States v. Wright,* No. 09-CR-103 (E.D. La. Dec. 16, 2009).

I

We review a set of appeals arising from two separate criminal judgments issued by different district courts within this circuit. Both appeals involve restitution requests by Amy, a young adult whose uncle sexually abused her as a child, captured his acts on film, and then distributed them for others to see. The National Center for Missing and Exploited Children, which reports that it has found at least 35,000 images of Amy's abuse among the evidence in over 3,200 child pornography cases since 1998, describes the content of these images as "extremely graphic." The Government reports that restitution has been ordered for Amy in at least 174 child pornography cases across the United States in amounts ranging from $100 to $3,543,471.

A

In the consolidated cases *In re Amy,* 591 F.3d 792 (5th Cir. 2009), and *In re Amy Unknown,* 636 F.3d 190 (5th Cir. 2011), a panel of this court reviewed Amy's mandamus petition and appeal, both of which challenged the district court's order denying Amy restitution in connection with a criminal defendant's sentence.

In the case underlying Amy's mandamus petition and appeal, Doyle Paroline ("Paroline") pled guilty to 18 U.S.C. § 2252 for possessing 150 to 300 images of minors engaged in sexually explicit conduct. At least two images were of Amy. Pursuant to Amy's right to restitution under the Crime Victims' Rights Act, 18 U.S.C. § 3771, the Government and Amy moved the district court to order restitution under § 2259. Amy supported this request with her psychiatrist's report, which itemized her future damages for specific categories of treatment and estimated total damages nearing $3.4 million.[3]

The district court denied Amy restitution. *Paroline,* 672 F. Supp. 2d at 782. The district court held that § 2259 required the Government to prove that by possessing images depicting Amy's sexual abuse, Paroline proximately caused the injuries for

[3] Amy attested that this amount reflects the total amount of her losses from the production, distribution, and possession of the images of her abuse and primarily comprises costs for future psychological care and future lost income.

which she sought restitution. *Id.* at 791. Concluding that the Government failed to show this causal link, the district court denied Amy restitution. *Id.* at 793. Amy petitioned for mandamus, asking this court to direct the district court to order Paroline to pay her the full amount of the restitution she had requested.

Over one dissent, that panel denied her relief because it was not clear or indisputable that § 2259 mandates restitution irrespective of proximate cause. *In re Amy,* 591 F.3d at 794-95. Amy sought rehearing and filed a separate notice of appeal from the district court's restitution order; her mandamus petition and appeal were consolidated. *See In re Amy Unknown,* 636 F.3d at 192-93. The panel assigned to hear Amy's appeal granted her rehearing request. *Id.* at 193. That panel then granted mandamus and rejected a requirement of proof of proximate cause in § 2259 because "[i]ncorporating a proximate causation requirement where none exists is a clear and indisputable error," but declined to reach the question of whether crime victims such as Amy have a right to an appeal. *Id.* at 193, 201. The panel remanded for the district court's entry of a restitution order. *Id.* at 201.

B

In *United States v. Wright,* 639 F.3d 679 (5th Cir. 2011), a separate panel of this court heard the appeal of Michael Wright ("Wright"). Like Paroline, Wright pled guilty to 18 U.S.C. § 2252 for possession of over 30,000 images of child pornography, which included

images of Amy's abuse.[4] The Government sought restitution for Amy under § 2259, supporting its request with the same psychiatric report Amy provided in Paroline's case. The district court awarded Amy $529,661 in restitution, explaining that "[t]his

[4] Wright pled guilty pursuant to a plea agreement in which he generally waived his right to appeal but reserved his right to appeal "any punishment in excess of the statutory maximum." Wright's plea agreement stated that "the restitution provisions of Sections 3663 and 3663A of Title 18, United States Code will apply" and made no reference to § 2259. During the guilty plea colloquy, the district court restated the terms of the plea agreement regarding Wright's appeal waiver. The district court asked Wright if he understood all the rights he was waiving, and he responded that he did. The district court also asked Wright if he understood that he "also may be required to reimburse any victim for the amount of his or her loss under the Victim Restitution Law, if that term is applicable." Wright again said he understood.

The Government seeks to assert the appeal waiver Wright signed only if we hold that restitution is limited by proximate cause in all respects. It concedes, however, that Wright's appeal waiver would not be valid if the en banc court holds that § 2259 lacks a proximate cause requirement that covers all categories of losses because Wright did not waive his right to appeal a sentence unbounded by a proximate cause limitation. Because we hold today that § 2259's isolated "proximate result" language does not cloak all categories of losses with a proximate cause requirement, we need not further address the appeal waiver issue. We have repeatedly held that appeal waivers the Government does not seek to enforce are not self-enforcing and that the Government can effectively "waive the waiver." *See United States v. Acquaye,* 452 F.3d 380, 381 (5th Cir. 2006). Given the Government's concession and our holding on the substance of § 2259, we conclude that the Government is not seeking to enforce the appeal waiver in this case. Accordingly, we conclude that the appeal waiver does not bar Wright's appeal. *See id.*

amount was reached by adding the estimated costs of the victim's future treatment and counseling at $512,681.00 and the costs of the victim's expert witness fees at $16,980.00." *United States v. Wright,* No. 09-CR-103, at 5 (E.D. La. Dec. 16, 2009). The district court did not explain why it awarded no restitution for the other amounts that Amy had requested and made no reference to a proximate cause requirement. *See id.* Observing that Amy had been awarded restitution in another district court, the district court further explained that "[t]he restitution ordered herein is concurrent with any other restitution order either already imposed or to be imposed in the future payable to this victim." USCA5 R. 111-12. Wright appealed to contest the restitution order.

The *Wright* panel first found that the appeal waiver in Wright's plea agreement did not foreclose his right to appeal the restitution order. *Wright,* 639 F.3d at 683. Then, applying *Amy*'s holding, the Wright panel concluded that Amy was entitled to restitution but that the district court had given inadequate reasons for the award it assessed. *Id.* at 685-86. The panel remanded for further findings regarding the amount of the award. *Id.* at 686. The three members on the *Wright* panel, however, joined a special concurrence that questioned *Amy*'s holding and suggested that the court rehear both cases en banc, in part because this court was the first circuit to hold that a proximate cause requirement does not attach to the

"full amount of . . . losses" under § 2259(b)(3). *See id.* at 689-90, 692 (Davis, J., specially concurring).

This court held the mandates in both *Amy* and *Wright*. A majority of this court's members voted to rehear these opinions en banc to resolve the question of how to award restitution under § 2259 and to address other related questions raised by these appeals. *See In re Amy Unknown & United States v. Wright,* 668 F.3d 776 (5th Cir. 2012) (granting rehearing en banc).

II

In rehearing *Amy* and *Wright* en banc, we address the following issues: (1) whether the Crime Victims' Rights Act ("CVRA") grants crime victims a right to an appeal or, if not, whether this court should review Amy's mandamus petition under the standard this court has applied to supervisory writs; (2) whether 18 U.S.C. § 2259 requires the Government to show a defendant's criminal acts proximately caused a victim's injuries before a district court may award restitution; and (3) whether, in light of our holding with respect to § 2259, the district courts in *Amy* and *Wright* erred.

A

Amy petitioned for mandamus and, after this court initially denied her relief, appealed from the district court's restitution order. In the panel opinion

in *Amy,* this court granted her mandamus on rehearing under our traditional mandamus inquiry, which this court held in *In re Dean,* 527 F.3d 391, 394 (5th Cir. 2008) (per curiam), applies to appeals under the CVRA. *See Amy,* 636 F.3d at 197-98. In *Amy,* the panel declined to decide whether the CVRA entitled her to bring a direct appeal, *see id.* at 194-97, even though *Dean* seemingly foreclosed that argument. *See Dean,* 527 F.3d at 394 (rejecting victims' assertion that the standards governing an appeal apply on CVRA review). Amy asks the en banc court to construe the CVRA to guarantee crime victims the right of appeal and alternatively asks the court to hear her mandamus petition under our supervisory mandamus power, which would hold her mandamus petition to a less onerous standard of review than *Dean* requires.

1

The CVRA grants crime victims, including Amy, "[t]he right to full and timely restitution as provided in law," 18 U.S.C. § 3771(a)(6), and makes explicit that crime victims, their representatives, and the Government may move the district court to enforce that right. *Id.* § 3771(d)(1); *see id.* § 3771(e) (defining "crime victim" as "a person directly and proximately harmed as a result of the commission of a Federal offense."). The CVRA further commands that "[i]n any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded [this right]." *Id.* § 3771(b)(1). Where a

district court denies a victim relief, the CVRA provides that

> [T]he 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.

Id. § 3771(d)(3); *see id.* § 3771(d)(5)(B) (requiring the victim to petition for mandamus within fourteen days). The CVRA further grants the Government, "[i]n any appeal in a criminal case," the authority to "assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates," *id.* § 3771(d)(4), and makes clear that "[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." *Id.* § 3771(d)(6).

Amy's argument effectively requires us to address two questions: first, whether the CVRA entitles crime victims to an appeal; and second, whether the CVRA entitles crime victims' mandamus petitions through the review standards governing an appeal. First, we observe that the plain text of the CVRA expressly grants crime victims only a right to mandamus relief and makes no mention of any right of crime victims to an appeal. *See* 18 U.S.C. § 3771(d)(3); *Dean,* 527 F.3d at 394. In contrast, the CVRA grants the Government the right to mandamus while also

retaining the Government's right to a direct appeal. *Id.* § 3771(d)(4) (allowing only the Government to "assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates."). In interpreting the statute, absent contrary indication, we presume that Congress "legislated against the background of our traditional legal concepts," *United States v. U.S. Gypsum Co.,* 438 U.S. 422, 437 (1978), including that crime victims have no right to appeal. *See Marino v. Ortiz,* 484 U.S. 301, 304 (1988) (citing *United States ex rel. Louisiana v. Jack,* 244 U.S. 397, 402 (1917)) (explaining that "[t]he rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment.").

Amy fails to show any language in the statute that reflects Congress' intent to depart from this principle. Instead, she protests that before the CVRA's enactment, this court heard appeals from nonparties with a direct interest in aspects of criminal prosecutions and contends that this suggests that the crime victims retain a similar right to appeal under the CVRA. *See Amy,* 636 F.3d at 195-96 (discussing *United States v. Briggs,* 514 F.2d 794 (5th Cir. 1975); *United States v. Chagra,* 701 F.2d 354 (5th Cir. 1983)). The cases Amy cites, however, are unconvincing. They allowed non-parties to appeal discrete pre-trial issues with constitutional implications, which were unrelated to the merits of the criminal cases from which they arose. *See Briggs,* 514 F.2d at 799 (holding that persons named as unindicted co-conspirators in an indictment had standing to

challenge the power of a grand jury to charge them with criminal conduct without indicting them); *Chagra,* 701 F.2d at 360 (allowing newspapers and a reporter to appeal an order restricting their access to a pretrial bail reduction hearing). These cases do not stand for the proposition that this court has allowed victims any post-judgment right of appeal and, moreover, do not support the inference that Congress drafted the CVRA with the understanding that crime victims had any right to an appeal. Because nothing in the CVRA suggests that Congress intended to grant crime victims the right to an appeal or otherwise vary the historical rule that crime victims do not have the right of appeal, we conclude that the CVRA grants crime victims only mandamus review.[5]

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[5] Six of our sister circuits generally favor a reading of the statute that allows no appeal, and no circuit has expressly granted victims the right to an appeal under the CVRA. *See United States v. Alcatel-Lucent France, SA*, Nos. 11-12716, 11-12802, 2012 WL 3139014, at *5 (11th Cir. Aug. 3, 2012); *United States v. Monzel,* 641 F.3d 528, 533 (D.C. Cir.), *cert. denied, Amy, Victim in Misty Child Pornography Series v. Monzel,* 132 S. Ct. 756 (2011); *United States v. Aguirre-Gonzalez,* 597 F.3d 46, 53-56 (1st Cir. 2010); *In re Antrobus,* 519 F.3d 1123, 1128-30 (10th Cir. 2008); *Kenna v. U.S. Dist. Court,* 435 F.3d 1011, 1017 (9th Cir. 2006); *In re W.R. Huff Asset Mgmt. Co.,* 409 F.3d 555, 562-63 (2d Cir. 2005); *see also In re Acker,* 596 F.3d 370, 373 (6th Cir. 2010) ("[W]here the [purported victim's] direct appeal was filed at the same time as the [CVRA] mandamus petition and raises the identical issues, there is no additional right of appeal.").

Further supporting this conclusion is that under the Victim and Witness Protection Act ("VWPA"), the CVRA's predecessor in which restitution was optional rather than mandatory, at least

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Next, we consider whether the CVRA nonetheless requires appellate courts to apply the standard of review governing a direct criminal appeal to mandamus petitions, and conclude it does not. When assessing the meaning of the term "mandamus" in the CVRA, we presume that this "statutory term . . . ha[s] its common-law meaning," absent contrary indication. *Taylor v. United States,* 495 U.S. 575, 592 (1990). The Supreme Court has explained that "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. U.S. Dist. Court,* 426 U.S. 394, 402 (1976); *accord Cheney v. U.S. Dist. Court,* 542 U.S. 367, 380 (2004). "[T]he writ has traditionally been used in the federal courts only . . . to compel it to exercise its authority when it is its

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one circuit court denied victims a right to any relief because "[n]owhere in the statute does Congress suggest that the VWPA was intended to provide victims with a private remedy to sue or appeal restitution decisions." *United States v. Mindel,* 80 F.3d 394, 397 (9th Cir. 1996). This same logic extends to limit the right of crime victims under the CVRA to only the mandamus relief that the statute clearly expresses. *See id.*

The cases Amy relies on, moreover, further disfavor allowing a § 1291 appeal. Any persuasive force that *In re Siler,* 571 F.3d 604, 608 (6th Cir. 2009) (allowing crime victims to appeal under § 1291 when they sought the use of a presentencing report in a subsequent civil suit), may have is undercut by the Sixth's Circuit later decision not to extend a right of appeal to a crime victim who simultaneously petitioned for mandamus relief. *See In re Acker,* 596 F.3d 370, 373 (6th Cir. 2010). Likewise, the Third Circuit's decision allowing a crime victim a § 1291 appeal, without any analysis, in *United States v. Kones,* 77 F.3d 66, 68 (3d Cir. 1996), also fails to convince us that allowing crime victims a § 1291 appeal is proper.

duty to do so." *Kerr,* 426 U.S. at 402 (quotation marks omitted). "[O]nly exceptional circumstances amounting to a judicial usurpation of power will justify the invocation of this extraordinary remedy." *Id.* (quotation marks omitted). Mandamus traditionally "is not to be used as a substitute for an appeal, or to control the decision of the trial court in discretionary matters." *Plekowski v. Ralston-Purina Co.,* 557 F.2d 1218, 1220 (5th Cir. 1977). Issuance of the writ is largely a matter of discretion with the court to which the petition is addressed. *See Schlagenhauf v. Holder,* 379 U.S. 104, 112 n.8 (1964).

Certain aspects of the CVRA convince us that Congress intended mandamus in its traditional sense when it selected the word "mandamus." *See Taylor,* 495 U.S. at 592. Reading the statute's provisions together, the CVRA seems to intentionally limit victims' right to review as an extraordinary remedy because it authorizes review only where a district court fails to fulfill a statutory duty; the statute does not extend victims' right to review to situations where a district court acts on a discretionary matter. *See Kerr,* 426 U.S. at 402. To explain, the CVRA lists eight rights that it ensures crime victims, including the right to restitution. 18 U.S.C. § 3771(a)(1)-(8). The restrictive statement, "A crime victim has the following rights," precedes the list of those rights and supports the conclusion that the CVRA's grant of rights is exclusive. *Id.* § 3771(a). And only where the district court denies a motion seeking to assert one of those rights does the CVRA allow a victim to seek the

review of an appellate court. *See id.* § 3771(d)(3). This limitation suggests that in granting relief, the district court retains discretion to select the appropriate means to ensure victims' rights, and that victims may only properly seek appellate intervention where the district court clearly fails to "exercise its authority when it is its duty to do so." *See Kerr,* 426 U.S. at 402; *see also Plekowski,* 557 F.2d at 1220 ("The remedy of mandamus . . . is not to be used . . . to control the decision of the trial court in discretionary matters."). Under this reading, only the Government would retain a right to appeal even seemingly discretionary actions, *see* 18 U.S.C. § 3771(d)(4), and could elect to appeal the district court's order to the extent it exercises its own prosecutorial discretion to do so. *See id.* § 3771(d)(6). If we were to instead read the CVRA as extending a right of appeal to victims, we would expand the rights granted to crime victims and simultaneously erode the CVRA's attempt to preserve the Government's discretion. *See id.* A reading of the statute that limits victims' appellate review to the traditional mandamus inquiry thus respects both the CVRA's preservation of the Government's and the district court's traditional discretion while safeguarding the limited rights the CVRA grants.

The very short timeline in which appellate courts must act, and the fact that a single circuit judge may rule on a petition, confirm the conclusion that Congress intended to limit crime victims' appellate relief under the CVRA to traditional mandamus review. *See* 18 U.S.C. § 3771(d)(3). These requirements reflect

that appellate courts must grant relief quickly, but rarely, as "a drastic remedy generally reserved for really 'extraordinary' cases." *In re E.E.O.C.,* 709 F.2d 392, 394 (5th Cir. 1983) (citing *Kerr,* 426 U.S. at 402).

Amy has failed to show that Congress intended to grant crime victims anything other than traditional mandamus relief under the CVRA.[6] While, as Amy

[6] Amy nevertheless insists that the CVRA's requirements that the courts of appeals "take up and decide" a petition and "ensure that the crime victim is afforded" all his or her rights in a court proceeding support recognizing victims' right to an appeal and disfavor an interpretation that would provide for traditional mandamus review, which is typically discretionary. *See* 18 U.S.C. § 3771(b)(1), (d)(3). The requirement that appellate courts "take up and decide" a petition, however, relates directly to the short time period in which Congress directs appellate courts to act; this short time period, as we have already explained, favors, rather than opposes, the use of mandamus. *See supra.* Similarly, Amy fails to note that the command that federal courts "ensure that the crime victim is afforded" certain rights falls within a section labeled "In general." *See id.* § 3771(b)(1). Placed in context, this language merely reflects Congress' intention to make plain that federal courts must guard the specific, but necessarily limited, rights spelled out in the CVRA through the processes prescribed in its other subsections. This language does not suggest that the grant of mandamus in this context is not discretionary. Amy's arguments are unavailing.

Only two circuits support Amy's position that she is entitled to something more closely resembling direct appellate standards of review. With little analysis, the Second Circuit has concluded an abuse of discretion standard should govern CVRA mandamus petitions. *See In re W.R. Huff,* 409 F.3d at 562-63. That court divined a relaxed standard from the express terms of the statute and reasoned only that "[i]t is clear . . . that a petitioner seeking relief pursuant to the mandamus provision set forth in

(Continued on following page)

insists, it may be more difficult for a crime victim to enforce rights through mandamus than appeal, this

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§ 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." *Id.* at 562-63. The lack of reasoning accompanying the Second Circuit's use of a relaxed standard of review fails to convince us that anything other than traditional mandamus standards should govern our review of CVRA petitions.

The Ninth Circuit also has provided for relaxed review, focusing on legal error in reviewing a crime victim's mandamus petition under the CVRA. To justify this relaxed review, the Ninth Circuit emphasized that "[t]he CVRA explicitly gives victims aggrieved by a district court's order the right to petition for review by writ of mandamus, provides for expedited review of such a petition, allows a single judge to make a decision thereon, and requires a reasoned decision in case the writ is denied." *Kenna,* 435 F.3d at 1017. But a later decision suggests that the Ninth Circuit's interpretation in *Kenna* was influenced by the facts of that case and a desire to reach a question of law that its traditional mandamus inquiry would not have allowed; in that later case, the Ninth Circuit explained that it applies its normal test to CVRA mandamus petitions, and merely emphasizes the question of legal error in assessing a crime victim's right to relief. *See In re Andrich,* 668 F.3d 1050, 1051 (9th Cir. 2011) (per curiam).

While Amy asserts that two additional circuits favor her position, those courts have not clearly accepted her position, and it is unclear that they would do so if presented with the opportunity to fully analyze the legal issues this question presents. *See In re Stewart,* 552 F.3d 1285 (11th Cir. 2008) (granting mandamus on question of whether a person was a crime victim who could participate in district court proceedings without reviewing traditional mandamus factors); *In re Walsh,* 229 F. App'x 58, 60-61 (3d Cir. 2007) (in dicta, agreeing with the Second and Ninth Circuits that "mandamus relief is available under a different, and less demanding, standard under 18 U.S.C. § 3771 in the appropriate circumstances.").

limitation reflects the express language of the statute and honors the common law tradition in place when the CVRA was drafted.

2

Our conclusion that the CVRA does not provide crime victims with appellate review does not foreclose Amy's somewhat different request that we apply our supervisory mandamus power of review to her mandamus petition, which would lower the hurdles to relief under mandamus. *See In re McBryde,* 117 F.3d 208, 223 (5th Cir. 1997) (acknowledging that "courts of appeals have possessed the power to issue supervisory writs of mandamus in order to prevent practices posing severe threats to the proper functioning of the judicial process"); *In re E.E.O.C.,* 709 F.2d at 395 (in allowing a supervisory writ to proceed as a one-time-only device, this court advised it would only grant the writ if "there is 'usurpation of judicial power' or a clear abuse of discretion" and the movant showed it had a clear and indisputable right to a writ) (quoting *Schlagenhauf,* 379 U.S. at 110). Even so, we need not resolve this question. Our traditional inquiry suffices to afford Amy the relief she requests. *See* IV-A *infra. Cf. Aguirre-Gonzalez,* 597 F.3d at 53-56 (declining to settle question of standard of review because neither the traditional mandamus standard nor a more relaxed standard would afford relief in the circumstances of that case).

Because we hold that the CVRA entitles Amy to only mandamus relief, we dismiss her appeal. Under our traditional mandamus inquiry, we will grant Amy's requested mandamus only if (1) she has no other adequate means to attain the desired relief; (2) she has demonstrated a clear and indisputable right to the issuance of a writ; and (3) in the exercise of our discretion, we are satisfied that the writ is appropriate. *See Dean,* 527 F.3d at 394.

B

Wright appeals from the district court's restitution order. This court reviews the legality of the restitution order de novo. *United States v. Arledge,* 553 F.3d 881, 897 (5th Cir. 2008). If the restitution order is legally permitted, we then review the amount of the order for an abuse of discretion. *Id.*; *United States v. Ollison,* 555 F.3d 152, 164 (5th Cir. 2009).

III

To resolve Amy's mandamus petition and Wright's appeal, we must first ascertain the level of proof required to award restitution to Amy and crime victims like her under 18 U.S.C. § 2259. The parties' dispute turns on the interpretation and effect of the words "proximate result" in § 2259(b)(3)(F).

A

Our analysis again begins with the text of the statute. *See Watt,* 451 U.S. at 265; *In re Rogers,* 513 F.3d 212, 225 (5th Cir. 2008). If § 2259's language is plain, our "sole function" is to "enforce it according to its terms" so long as "the disposition required by the text is not absurd." *Lamie v. U.S. Trustee,* 540 U.S. 526, 534 (2004) (internal quotation marks omitted); *see also Bates v. United States,* 522 U.S. 23, 29 (1997) (holding that courts "ordinarily" should "resist reading words or elements into a statute that do not appear on its face."). The Supreme Court has explained that "[s]tatutory construction 'is a holistic endeavor.'" *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.,* 508 U.S. 439, 455 (1993) (quoting *United Savings Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.,* 484 U.S. 365, 371 (1988)). "This Court naturally does not review congressional enactments as a panel of grammarians; but neither do we regard ordinary principles of English prose as irrelevant to a construction of those enactments." *Flora v. United States,* 362 U.S. 145, 150 (1960). Although "the meaning of a statute will typically heed the commands of its punctuation[,] . . . a purported plain-meaning analysis based only on punctuation is necessarily incomplete." *Bank of Or.,* 508 U.S. at 454. "[A]t a minimum," our analysis "must account for a statute's full text, language as well as punctuation, structure, and subject matter." *Id.* at 455.

Only after we apply principles of statutory construction, including the canons of construction, and

conclude that the statute is ambiguous, may we consult legislative history. *Carrieri v. Jobs.com, Inc.,* 393 F.3d 508, 518-19 (5th Cir. 2004). For statutory language to be ambiguous, however, it must be susceptible to more than one reasonable interpretation or more than one accepted meaning. *Id.* at 519. Where "the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 254 (1992) (quoting *Rubin v. United States,* 449 U.S. 424, 430 (1981)).

The language of 18 U.S.C. § 2259 reflects a broad restitutionary purpose. *See United States v. Laney,* 189 F.3d 954, 966 (9th Cir. 1999) ("Section 2259 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."); *United States v. Crandon,* 173 F.3d 122, 126 (3d Cir. 1999) ("Congress [in § 2259] mandated broad restitution for a minor victim."). Section 2259(a) mandates that district courts "shall order restitution for any offense under this chapter," including the offense to which Paroline and Wright pled guilty, 18 U.S.C. § 2252. Section 2259(b)(1) specifies that a restitution order "shall direct the defendant to pay the victim . . . the full amount of the victim's losses."[7]

[7] A "victim" is an "individual harmed as a result of a commission of a crime under this chapter." *Id.* § 2259(c).

Section 2259(b)(3) defines the term "the full amount of the victim's losses," contained in § 2259(b)(1), as

> [A]ny 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.

Section 2259(b)(4) reinforces that "[t]he issuance of a restitution order under this section is mandatory," *id.* § 2259(b)(4)(A), and instructs that "[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." *Id.* § 2259(b)(4)(B). To guide the district courts in awarding restitution, § 2259(b)(2) instructs courts to issue and enforce restitution orders "in accordance with section 3664 and in the same manner as an order under 3663A."

B

The district court in *Paroline* rejected Amy's argument that § 2259 requires an award of "the full amount of [her] losses." Instead, resorting to the Supreme Court's decision in *Porto Rico Railway, Light & Power Co. v. Mor,* 253 U.S. 345, 348 (1920), which explained that "[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all," the district court extended the "proximate result" language contained in § 2259(b)(3)(F) to apply to the losses described in subsections (A) through (E). *See Paroline,* 672 F. Supp. 2d at 788 (also citing *Fed. Mar. Comm'n v. Seatrain Lines, Inc.,* 411 U.S. 726, 734 (1973)). In construing the statute, the district court expressed its concern that "a restitution order under section 2259 that is not limited to losses proximately caused by the defendant's conduct would under most facts, including these, violate the Eighth Amendment," *id.* at 789, and that an alternative "interpretation would be plainly inconsistent with how the principles of restitution and causation have historically been applied." *Id.* at 790. In reversing the district court's holding, the *Amy* panel rejected a generalized proximate cause requirement and stressed that the causation requirement in the definition of "victim," together with § 3664's mechanism for joint and several liability, surmounts any Eighth Amendment concerns. *See Amy,* 636 F.3d at 200-01.

Unlike the district court in *Paroline,* the *Wright* district court seemed to accept Amy's argument to a limited degree, as it awarded all of the restitution she requested for her future treatment and counseling, and the costs of her expert witness fees. Although the *Wright* panel accepted *Amy*'s holding as binding precedent in reviewing the district court's restitution award, *Wright*'s special concurrence, tracing the reasoning of the district court in *Amy* and challenging the panel's decision not to limit § 2259 to damages proximately caused by a defendant's criminal actions, presaged this en banc rehearing. *See Wright,* 639 F.3d at 686-89 (Davis, J., specially concurring).

In this en banc rehearing, Amy maintains that § 2259 is a mandatory statute requiring district courts to award full restitution to victims of child pornography. In her view, the plain language of the statute dictates that the proximate result language in § 2259(b)(3)(F) is limited to that category of losses and does not apply to the categories of losses described in § 2259(b)(3)(A)-(E).

The Government contends that § 2259(b)(3) conditions all of a victim's recoverable losses on a showing that those losses proximately resulted from the offense. Drawing on *Porto Rico Railway,* the Government asserts that the statutory text reflects Congress' intent to condition all recoverable losses on a showing of proximate cause. Without citing to precedent, the Government urges us "to presume that Congress adhered to the usual balance in the law of remedies: to hold defendants fully accountable for the

losses associated with their conduct but in a manner that respects the deeply-rooted principle of proximate causation." The Government further asserts that there is nothing absurd in the conclusion that Congress intended this limiting principle to apply to all categories of losses. Invoking a recent Supreme Court case analyzing civil tort liability under the Federal Employers' Liability Act in support of this proposition, the Government reasons that "the very purpose of a proximate-cause limitation is to prevent infinite liability." *See CSX Transp., Inc., v. McBride,* 131 S. Ct. 2630, 2642 (2011). The Government advises the court not to delve into legislative materials and also stresses that seven circuits have rejected Amy's reading of the statute.

Paroline similarly construes the "proximate result" language in the statute and relies on the construction of other restitution statutes to support his position. Both Paroline and Wright draw on legislative materials to assert that in drafting § 2259, Congress intended to incorporate a proximate cause requirement.[8]

[8] Of course, we cannot consult these materials unless we conclude that § 2259's text is ambiguous. *See Carrieri,* 393 F.3d at 518-19. Even if we were to consult these materials, they are inconclusive at best.

C

1

Our plain reading of § 2259 leads us to the following conclusion: Once a district court determines that a person is a victim, that is, an "individual harmed as a result of a commission of a crime" under the chapter that relates to the sexual exploitation and abuse of children, § 2259 requires the district court to order restitution for that victim. *See* 18 U.S.C. § 2259(a), (b)(4)(A), (c). The restitution order that follows must encompass "the full amount of the victim's losses." *Id.* § 2259(b)(1). Those losses include five categories of specific losses – medical services related to physical, psychiatric, or psychological care; physical and occupational therapy or rehabilitation; necessary transportation, temporary housing, and childcare expenses; lost income; and attorney's fees and costs – and one category of "other losses suffered by the victim as a proximate result of the offense." *Id.* § 2259(b)(3). The rule of the last antecedent, recently applied by the Supreme Court in *Barnhart v. Thomas,* 540 U.S. 20, 26 (2003), instructs that "a limiting clause or phrase," such as the "proximate result" phrase in § 2259(b)(3)(F), "should ordinarily be read as modifying only the noun or phrase that it immediately follows." "[T]his rule is not an absolute and can assuredly be overcome by other indicia of meaning," but "construing a statute in accord with the rule is 'quite sensible as a matter of grammar.'" *Id.* (quoting *Nobelman v. Am. Sav. Bank,* 508 U.S. 324, 330 (1993)); *accord* ANTONIN SCALIA & BRYAN A. GARNER,

READING LAW: THE INTERPRETATION OF LEGAL TEXTS 144 (2012) ("This rule is the legal expression of a commonsense principle of grammar").

The structure and language of § 2259(b)(3) limit the phrase "suffered by the victim as a proximate result of the offense" in § 2259(b)(3)(F) to the miscellaneous "other losses" contained in that subsection. We see no "other indicia of meaning" in the statute to suggest that the rule of the last antecedent does not apply here. *See id.* Despite the clear terms of the statute, other courts and the parties before us raise arguments in favor of a generalized proximate cause requirement based on (a) canons of statutory construction, (b) traditional causation principles, and (c) possible absurd results. We address – and dismiss – each in turn.

a

First, the Government, Paroline, Wright, and Judge Davis's dissenting opinion press the importance of *Porto Rico Railway* and other caselaw relied on by the district court. As did the *Amy* panel, however, we doubt *Porto Rico Railway*'s applicability here. *Porto Rico Railway* concerned the following statute: "Said District Court shall have jurisdiction of all controversies where all of the parties on either side of the controversy are citizens or subjects of a foreign state or states, or citizens of a state, territory, or district of the United States not domiciled in Porto Rico. . . ." *Porto Rico Ry.,* 253 U.S. at 346. The

Supreme Court read the words, "not domiciled in Porto Rico," to apply equally to "citizens or subjects of a foreign state or states" and "citizens of a state, territory, or district of the United States." *Id.* at 348. The Supreme Court explained, "When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Id.* at 348.

Deprived of its context, *Porto Rico Railway*'s rule can be contorted to support the statutory interpretation urged by the Government and apply the "proximate result" language in § 2259(b)(3)(F) to the five categories of loss that precede it. But applying that rule here to require generalized proximate cause would disregard that the list in *Porto Rico Railway*'s statute is significantly different than the one central to this appeal. The statute analyzed in *Porto Rico Railway* featured a long sentence, unbroken by numbers, letters, or bullets, with two complex noun phrases sandwiching the conjunction "or," with the modifier "domiciled in Porto Rico" following the conjoined phrases. The structure of the sentence required the reading the Supreme Court gave it; the phrase "domiciled in Porto Rico" modified the nouns at the head of the two phrases, "citizens or subjects" and "citizens." The Supreme Court expressed its concern that a different construction would have left the reader with a fragmented phrase, which would be overly broad in application, and which, in turn, would have failed to satisfy the statute's overarching

purpose to curtail federal courts' jurisdiction. *See Porto Rico Ry.,* 253 U.S. at 348.

Section 2259, in contrast, begins 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 limiting 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 separations. Of course, we do not sit "as a panel of grammarians," *Flora,* 362 U.S. at 150, but we cannot ignore that "the meaning of a statute will typically heed the commands of its punctuation." *Bank of Or.,* 508 U.S. at 454. The structural and grammatical differences between § 2259 and the statute in *Porto Rico Railway* forcefully counsel against applying *Porto Rico Railway* to the current statute to reach the *Paroline* district court's reading.[9]

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[9] Further, *Porto Rico Railway* also commands that where the statute in question "manifests a general purpose . . . [and] the application of the clause were doubtful, we should so construe the provision as to effectuate the general purpose of Congress." 253 U.S. at 348. The grammar of § 2259, viewed in light of § 2259's broad restitutionary purpose as expressed by its plain terms, confirms that our reading is correct. *See Crandon,* 173 F.3d at 126 ("Congress [in § 2259] mandated

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Seatrain, the other case relied on by the district court, is similarly inapplicable. *See Seatrain,* 411 U.S. at 726. *Seatrain* analyzed a federal antitrust statute that included a seven-category list. *Id.* at 732. All items on the list but the third referred to ongoing activity; the seventh category was a catchall category phrased as "or in any manner providing for an exclusive, preferential, or cooperative working arrangement." *Id.* at 732-33. The Government urged the Supreme Court to construe this third category as concerning a one-time activity. *Id.* at 732. The Court rejected that argument because a broad reading of the statute would conflict with the legal principle that antitrust laws are strictly construed. *Id.* at 733. To aid in a narrow construction of the statute, the Court applied the rule of statutory construction that "[catchall] clauses are to be read as bringing within a statute categories similar in type to those specifically enumerated" and concluded that the last catchall phrase indicated that Congress intended all the activities to penalize only ongoing antitrust activities. *Id.* at 734 (citing 2 J. SUTHERLAND, STATUTES & STATUTORY CONSTRUCTION § 4908 *et seq.* (3d ed. 1943)). Here, we do not face a statutory scheme that requires narrow construction. *See Crandon,* 173 F.3d at 126;

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broad restitution for a minor victim."); *Laney,* 189 F.3d at 966 ("Section 2259 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.").

Laney, 189 F.3d at 966. *Seatrain*'s weight in interpreting § 2259 is questionable at best.

Seatrain's rule is at odds with the rule of last antecedent on which we rely; the rule of last antecedent, moreover, provides a reading faithful to § 2259's broad restitutionary purpose. To illustrate, in *Barnhart v. Thomas,* the Supreme Court reviewed an agency's interpretation of a statute that states

> An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do *his previous work* but cannot, considering his age, education, and work experience, engage in *any other kind of substantial gainful work* which exists in the national economy.

Barnhart, 540 U.S. at 23 (emphases added). Applying the rule of the last antecedent, the Supreme Court held that the words "which exists in the national economy" referred only to the noun "any other kind of substantial gainful work" and not to the noun "his previous work." *Id.* at 24-27. In support of this holding, the Supreme Court reasoned that the words "any other" in the second phrase did not show the "contrary intention" necessary to overcome the rule of the last antecedent to apply that phrase to the first. *Id.* at 27-28.

The Supreme Court also applied the rule of last antecedent in *Jama v. Immigration & Customs Enforcement,* 543 U.S. 335 (2005) to a statute that

included a complete sentence that fed into a seven-category list. Each category on the list was punctuated with a period; only the last category on the list contained a limiting clause. *Id.* at 340. Drawing on the grammatical structure of the list, the Supreme Court concluded that applying the limiting clause to the other items in the list "stretches the modifier too far."[10] *Id.* at 343.

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[10] In *Barnhart,* Justice Scalia provided an example of application of this rule in ordinary life that reveals the commonsensical aspect of the error in applying the proximate result language of § 2259(b)(3)(F) to the five categories of losses that precede it:

> Consider, for example, the case of parents who, before leaving their teenage son alone in the house for the weekend, warn him, "You will be punished if you throw a party or engage in any other activity that damages the house." If the son nevertheless throws a party and is caught, he should hardly be able to avoid punishment by arguing that the house was not damaged. The parents proscribed (1) a party, and (2) any other activity that damages the house. As far as appears from what they said, their reasons for prohibiting the home-alone party may have had nothing to do with damage to the house-for instance, the risk that underage drinking or sexual activity would occur. And even if their only concern was to prevent damage, it does not follow from the fact that the same interest underlay both the specific and the general prohibition that proof of impairment of that interest is required for both. The parents, foreseeing that assessment of whether an activity had in fact "damaged" the house could be disputed by their son, might have wished to preclude all argument by specifying and categorically

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As we have already explained, the grammatical structure of § 2259(b)(3) reflects the intent to read each category of loss separate from the one that preceded it and limit the application of the "proximate result" language in § 2259(b)(3)(F). Comparing the Supreme Court's more recent articulations of the rule of the last antecedent in *Barnhart* and *Jama* to the older rules of statutory construction expressed in *Porto Rico Railway* and *Seatrain* confirms that application of the rule of the last antecedent to limit the proximate result language to the subsection in which it is contained makes more sense here. *See id.* at 26. Applying the proximate result language of § 2259(b)(3)(F) to the categories that precede it would "stretch[ ] the modifier too far" and disregard the structure of § 2259(b)(3) as written. *Jama,* 543 U.S. at 343.

At least three circuits agree that under rules of statutory construction, we cannot read the "proximate result" language in § 2259(b)(3)(F) as applying to the categories of losses in § 2259(b)(3)(A)-(E).[11] *See United States v. Burgess,* 684 F.3d 445, 456-57 (4th Cir. 2012); *United States v. Aumais,* 656 F.3d 147, 153

> prohibiting the one activity-hosting a party-that was most likely to cause damage and most likely to occur.

450 U.S. at 27-28.

[11] These circuits, whose approach we discuss later in this opinion, nevertheless inject the statute with a proximate cause requirement through alternative means. *See Monzel,* 641 F.3d at 535; *Aumais,* 656 F.3d at 153.

(2d Cir. 2011); *United States v. Monzel,* 641 F.3d 528, 535 (D.C. Cir.), *cert. denied, Amy, Victim in Misty Child Pornography Series v. Monzel,* 132 S.Ct. 756 (2011). But we do not ignore that other circuits have used tools of statutory construction to conclude that the proximate result language in § 2259(b)(3)(F) applies to the five categories of loss that preceded it.[12] *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). These circuits, however, reached this conclusion for reasons we do not find compelling. The Eleventh Circuit, for example, applied *Porto Rico Railway*'s rule without accounting for

[12] This disagreement does not mean that our plain-meaning analysis is fraught with any ambiguity. This court considers a statute ambiguous when a statute is subject to more than one reasonable interpretation or more than one accepted meaning. *See Carrieri,* 393 F.3d at 518-19. Even though we choose a course that differs from that of our sister circuits, a division of judicial authority is not enough to render a statute ambiguous. *See Reno v. Koray,* 515 U.S. 50, 64-65 (1995) (discussing this principle in context of rule of lenity). Any "seeming agreement on a standard [in our sister circuits] suggests more harmony than there is." *United States v. Kearney,* 672 F.3d 81, 96 (1st Cir. 2012). The First Circuit has correctly observed that the various circuits have applied a proximate cause test to similar, if not identical facts, yet reached differing outcomes that "cannot be entirely explained by differences in the facts of record." *See id. Compare Monzel,* 641 F.3d at 537-40 (concluding that proximate cause shown but remanding to determine the amount of harm so caused) and *McDaniel,* 631 F.3d at 1209 (holding that the district court did not clearly err in finding proximate cause) *with McGarity,* 669 F.3d at 1267-70 (concluding that proximate cause was not established), *Aumais,* 656 F.3d at 154-55 (same), and *Kennedy,* 643 F.3d at 1263-65 (same).

the Supreme Court's application of it. *See* § IV-C-1-a *supra* (exposing the fault in relying on the rule of *Porto Rico Railway*). The Ninth Circuit, moreover, read the "as a result of" language in § 2259's definition of victim together with the "proximate result" language in § 2259(b)(3)(F) to infuse all of § 2259(b)(3) with a proximate cause requirement. *See Laney,* 189 F.3d at 965. Without more in the statute to support that analysis, we cannot accept the Ninth Circuit's conclusion. To do so would contradict the statute's plain terms and be tantamount to judicial redrafting. *See United States v. Naftalin,* 441 U.S. 768, 773 (1979) ("The short answer is that Congress did not write the statute that way."). The rules of statutory construction, properly applied, cannot be used to extend the proximate result language contained in § 2259(b)(3)(F) to the categories of losses preceding it.[13]

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[13] The dissenting opinion authored by Judge Davis criticizes the majority analysis's inconsistency with *Porto Rico Railway.* Like the Eleventh Circuit, however, Judge Davis's dissent fails to properly account for the statute in that opinion and § 2259's significantly differing contexts. Like the Ninth Circuit, this dissenting opinion attempts to cloak the entire statute with a proximate causation requirement with only scant and scattered causal language as support; the dissenting opinion also resorts to language that applies to the procedures with which restitution is issued and enforced within § 3664 to improperly bolster its position. While making the same errors as our sister circuits, the dissenting opinion does not explain why the rule of last antecedent does not apply. Its position is ultimately unpersuasive.

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Next, we consider the Government's assertion that principles of tort liability limit the award of restitution under § 2259 to losses proximately caused by a defendant's criminal actions. At least three of our sister circuits have accepted this view and derived a

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Judge Southwick's dissenting opinion does not agree with Judge Davis's analysis, but it would similarly resort to the language of § 3664 and § 3663A to require proximate causation. The dissenting opinions are correct that § 2259 directs that "[a]n 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." Judge Southwick's dissenting opinion construes this language to require application of § 3663A's definition of victim as "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered." Congress' directive to rely on the procedures guiding issuance and enforcement of a restitution order, however, does not require us to rely on the substantive definition of "victim" contained in a separate statute when § 2259 has already supplied courts with a different, broader definition of victim.

Lastly, Judge Davis's dissenting opinion claims that under our holding, "if Amy were injured in an automobile accident on the way to a counseling session, those damages would be included in a restitution award." This is not what the majority opinion suggests. Rather, the majority refuses to artificially divide responsibility for a crime victim's losses in circumstances like these here, where multiple defendants are realistically responsible for the victim's indivisible injury. While the dissent attempts to correct this error by adopting a collective causation theory, in doing so, it resorts to an unnecessary source in order to graft upon the clearly-worded statute a causation requirement. Ultimately the dissenting opinion's errors arises from its confusion of the "victim" inquiry which is antecedent to the calculation of "total losses."

proximate cause requirement not from "the catch-all provision of § 2259(b)(3)(F), but rather [from] traditional principles of tort and criminal law and [from] § 2259(c)'s definition of 'victim' as an individual harmed 'as a result' of the defendant's offense." *Monzel,* 641 F.3d at 535; *accord Burgess,* 2012 WL 2821069, at *10; *Aumais,* 656 F.3d at 153; *see Kearney,* 672 F.3d at 96-97 ("It is clear to us that Congress intended some causal link between the losses and the offense to support the mandated restitution."); *United States v. Evers,* 669 F.3d 645, 659 (6th Cir. 2012) (adopting a proximate cause requirement but declining to decide between the two approaches of our sister circuits).

In *United States v. Monzel,* a case that has served as a springboard for other circuits evaluating § 2259, the D.C. Circuit explained that "[i]t is a bedrock rule of both tort and criminal law that a defendant is only liable for harms he proximately caused," and "a restitution statute [presumably] incorporates the traditional requirement of proximate cause unless there is good reason to think Congress intended the requirement not to apply." *Monzel,* 641 F.3d at 535-36 (footnote omitted) (citing WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.4, at 464, 471 (2d ed. 2003)). The D.C. court posited that "[a]lthough § 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," *see id.* at 536 n.5, and found nothing in the text of § 2259 indicating Congress' intent to eliminate "the ordinary

requirement of proximate cause." *Id.* at 536. Rather, "[b]y defining 'victim' as a person harmed 'as a result of' the defendant's offense,'" the court inferred that "the statute invokes the standard rule that a defendant is liable only for harms that he proximately caused." *Id.* The D.C. Circuit worried that without such a limitation, "liability would attach to all sorts of injuries a defendant might indirectly cause, no matter how 'remote' or tenuous the causal connection." *Id.* at 537.

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 of doing so." *Id.* at 536-37. The D.C. Circuit criticized this court's decision in *Amy* because "a 'general' causation requirement without a 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." *Id.* at 537 n.8. 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 liability.

The Supreme Court has explained that we "ordinarily" should "resist reading words or elements into a statute that do not appear on its face." *Bates,* 522 U.S. at 29. But the Supreme Court has also explained

that the absence of certain language in a statute does not necessarily mean that Congress intended courts to disregard traditional background principles. *See U.S. Gypsum Co.,* 438 U.S. at 437. To illustrate, with respect to the question of intent in the criminal provisions of the Sherman Act, the Supreme Court has explained that

> "[M]ere omission . . . of intent [in the statute] will not be construed as eliminating that element from the crimes denounced"; instead Congress will be presumed to have legislated against the background of our traditional legal concepts which render intent a critical factor, and "absence of contrary direction [will] be taken as satisfaction with widely accepted definitions, not as a departure from them."

Id. at 437 (quoting *Morissette v. United States,* 342 U.S. 246, 263 (1952)). In interpreting the omission of intent in a different statute, the Supreme Court cautioned that "far more than the simple omission of the appropriate phrase from the statutory definition [of the offense] is necessary to justify dispensing with" a mens rea requirement. *Liparota v. United States,* 471 U.S. 419, 426 (1985) (quoting *U.S. Gypsum,* 438 U.S. at 438); *see id.* ("[T]he failure of Congress explicitly and unambiguously to indicate whether mens rea is required does not signal a departure from this background assumption of our criminal law.").

With these principles in mind, the D.C. Circuit's analysis, which infuses § 2259 with a generalized proximate cause requirement, *see Monzel,* 641 F.3d at 535, could comport with the Supreme Court's interpretative guidance – only if § 2259 were naked of causal limitations. *See U.S. Gypsum Co.,* 438 U.S. at 437. 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* a commission of a crime," and the limitation of "any other losses" to those that are the "*proximate result* of the offense." *See* 18 U.S.C. § 2259(b), (c) (emphases added). Had Congress omitted all causal language and not required award of the full amount of losses, or positioned the proximate result language so that it would apply to all categories of losses, we could consider the possibility that Congress intended to bind all categories of losses with a proximate cause requirement. Instead, Congress resisted using the phrase "proximate cause" anywhere in § 2259, including § 2259(b)(3)(F) and further required the court to order the "full amount of the victim's losses."[14] *See id.*

[14] In stark contrast, other restitution statutes contain more forceful causation requirements that are lacking in § 2259. *Compare* 18 U.S.C. § 3663A(a)(2) (explaining that a victim is "a person directly and proximately harmed as a result of the commission of an offense") *with id.* § 2259(c) (defining a victim as "the individual harmed as a result of a commission of a crime").

The selective inclusion and omission of causal requirements in § 2259's subsections, together with language pointing away from ordinary causation, suggest that Congress intended to depart from, rather than incorporate, a tradition of generalized proximate cause.

This interpretation does not render the statute unworkable. The problem seeming to animate the cases in other circuits interpreting § 2259 to require proximate cause is how to allocate responsibility for a victim's harm to any single defendant. *See Burgess,* 2012 WL 2821069, at *12; *Aumais,* 656 F.3d at 153-54; *Kennedy,* 643 F.3d at 1265-66; *Monzel,* 641 F.3d at 537-40. These courts ignore, however, that deciding that a defendant "must pay restitution for the losses he caused (whether proximately or not)," does not resolve how the court "determines how those losses should be allocated in cases where more than one offender caused them" – injecting the statute with traditional proximate causation limitations takes courts no closer to determining what each defendant must pay or to supplying crime victims with the "full amount of [their] losses." *Burgess,* 2012 WL 2821069, at *14 (Gregory, J., concurring in part, dissenting in part, and concurring in judgment) ("The question of whether a defendant proximately caused some injury is entirely separate from the question of how those proximately caused losses should be allocated among several offenders."). By focusing on the question of proximate cause, our sister circuits have not made § 2259 any easier to apply and seemingly have

ignored that § 2259 has armed courts with tools to award restitution because it instructs courts to refer to the standards under § 3664.[15] *See id.* § 2259(b)(2) ("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.").

Section 3664 instructs that courts may enforce a restitution order "by all other available and reasonable means," *id.* § 3664(m)(1)(A)(ii), and offers a "means" to aid courts in awarding restitution in a way that would ensure that Amy receives the full amount of her losses, to the extent possible, while

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[15] Any possible difficulty in ordering restitution in these cases arises not from the statutory construction, but from the type of crime underlying these appeals. It is quite possible that no other crime is like the crime of distribution, receipt, and possession of child pornography punishable under § 2252: No other crime involves single victims harmed jointly by defendants acting independently in the country. *See Burgess,* 2012 WL 2821069, at *13 (Gregory, J., concurring in part, dissenting in part, and concurring in judgment) (discussing the indivisibility of the injury to victims of child pornography crimes). Yet, the unique factual scenario that undergirds the application of this restitution statute need not muddle our analysis. We cannot interpret this statute to reach a result unsupported by its plain terms. *See Germain,* 503 U.S. at 254 (quoting *Rubin,* 449 U.S. at 430) (explaining that where "the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.' "); *see also In re Amy,* 591 F.3d at 797 (Dennis, J., dissenting) ("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.").

also ensuring that no defendant bears more responsibility than is required for full restitution: joint and several liability. Where "the court finds more than 1 defendant has contributed to the loss of a victim," § 3664(h) instructs that "the court may make each defendant liable for payment of the full amount of restitution."[16] The joint and several liability mechanism

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[16] As Judge Davis's dissenting opinion points out, § 3664(h) fully reads:

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

(emphasis added).

Judge Davis's dissenting opinion would read the italicized portion of 3664(h) to allow district courts the discretion to circumvent § 2259's command to award a crime victim the full amount of his or her losses. Thus, § 2259 dictates that the circumstances underlying child pornography convictions under § 2252 do not permit division of liability for reasons this opinion has already explained; the injury victims like Amy suffer does not produce a loss capable of division. *See* note 14 *supra.* We echo the criticism of this approach embodied in Judge Southwick's dissenting opinion:

> In light of the unique nature of prosecutions of child pornography and the clear congressional intent to maximize awards, any doubts about the proper amount of restitution should be resolved in favor of the child. . . . I am concerned that [Judge Davis's] emphasis on the discretion of a district court . . . tends towards accepting inappropriately low, even nominal awards. I would not accept that a forward-looking estimate of the number of future defendants and awards

(Continued on following page)

applies well in these circumstances, where victims like Amy are harmed by defendants acting separately who have caused her a single harm.[17] *See Burgess,* 2012 WL 2821069, at *13 (Gregory, J., concurring in part, dissenting in part, and concurring in judgment) (explaining that the joint and several liability described in § 3664 "'has long been available . . . in which two negligent actors, acting independently of one another, caused by a single indivisible harm to the plaintiff.'" (quoting TORT LAW: RESPONSIBILITIES AND REDRESS 517 (John C.P. Goldberg et al. eds., 2008)). And although the D.C. Circuit has expressed that it is "unclear . . . whether joint and several liability may be imposed upon defendants in separate cases," *Monzel,* 641 F.3d at 539, nothing in § 3664 forbids it, either expressly or through implication; the

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> should be used to estimate a percentage of overall liability to be given a particular defendant. That puts too much weight on the interests of the defendants. Overcompensation is an unlikely eventuality.

[17] Writing separately in the Fourth Circuit's recent opinion analyzing § 2259, Judge Gregory explained the indivisibility of pornography victims' harms:

> If [a defendant] proximately caused [a victim like Amy]'s psychological injury, this injury is indivisible from the psychological injuries proximately caused by the other offenders. I do not believe a fact finder could meaningfully say precisely *x* amount of [the victim]'s psychological injuries were caused by [the defendant]'s watching the same video.

Burgess, 2012 WL 2821069, at *13 (Gregory, J., concurring in part, dissenting in part, and concurring in judgment).

fact that it conforms well to this context supports its application.

Any fears that Amy and victims like her might be overcompensated through the use of joint and several liability, as expressed under § 3664(h), are unwarranted. *See, e.g., Burgess,* 2012 WL 2821069, at * 11 ("While full compensation would be unlikely from any individual defendant, [the victim's] proposed interpretation of the restitution statute places no cap on her ultimate recovery, and would allow her to recover the amount of her losses many times over."). The use of joint and several liability does not mean that Amy may "recover more than her total loss: [rather,] once she collects the full amount of her losses from one defendant, she can no longer recover from any other." *Id.* at *14 (Gregory, J., concurring in part, dissenting in part, & concurring in judgment) (quoting TORT LAW, *supra,* at 517).

Section 3664 provides "reasonable means" to defend against any theoretical overcompensation that could result. *See* 18 U.S.C. § 3664(m)(1)(A)(ii). First, if Amy recovers the full amount of her losses from defendants, the Government and defendant may use this information to ensure that Amy does not seek further awards of restitution. *See id.* § 3664(e) (explaining that the court may resolve "[a]ny dispute as to the proper amount or type of restitution . . . by the preponderance of the evidence."). Second, § 3664(k) suggests a means for ending defendants' existing joint and several restitution obligations once Amy receives the full amount of her losses; it allows for a district

court, "on its own motion, or the motion of any party, including the victim, [to] adjust the payment schedule, or require immediate payment in full, as the interests of justice require." This broadly phrased subsection seems to enable courts to apply joint and several liability across jurisdictions because it permits those courts to adjust restitution orders as victims receive the full amount of their losses.[18] More concretely, if Amy one day receives the full amount of restitution representing the "full amount of [her] losses" under § 2259, district courts across the nation may amend the judgments of defendants to reflect this fact under § 3664(k) by terminating further restitution obligations.[19]

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[18] Use of this mechanism does not violate § 3664(f)(1)(B)'s command that courts may not consider a victim's receipt of compensation from other sources "in determining the amount of restitution" because § 2259 limits a victim's recovery to the full amount of his or her losses. Section 2259(b)(4)(B)'s similar instruction that a court may not decline to issue a restitution order "because of . . . the fact that a victim has, or is entitled to, receive compensation for his or her injuries from . . . any other source" reinforces this conclusion. Section 2259(b)(4)(B), read together with § 3664(b)(f)(1)(B), reinforces the mandatory nature of § 2259 by disallowing district courts from declining to issue restitution to crime victims while simultaneously honoring the cap § 2259 places on victims' recovery: the full amount of a victim's losses.

[19] Of course, even while Amy may not collect more than to which she is entitled, she may certainly obtain judgments in excess of that amount. Indeed, Amy has already obtained judgments exceeding $3.4 million.

In either circumstance, district courts must be in possession of evidence to support entry of restitution or amendment of the defendants' judgments. There are several potential sources of this information. Victims, of course, are in the best position to know what restitution they have recovered and what restitution they have yet to receive. In addition to information obtained from victims, the Government may rely on information maintained by the probation office and other arms of the U.S. Department of Justice to ensure that amounts reported by a victim are accurate.[20] Defendants may dispute any amounts in these requests, and, under § 3664(e), the court may resolve "[a]ny dispute as to the proper amount or type of restitution . . . by the preponderance of the evidence."[21]

c

Next, the Government asserts that not restricting the recovery of losses by proximate cause produces an absurd result – constitutional implications that could be avoided if we were to read § 2259 as

[20] The comprehensive information the Government has provided in this case regarding the restitution ordered in other cases involving Amy confirms the Government's access to this type of information.

[21] Nothing in § 2259, § 3664, or in this opinion is intended to restrict the district court's ability to use any other mechanisms available under § 3664 to order restitution in a manner that effects § 2259's purposes.

requiring proximate causation with respect to all categories of losses. *See Lamie,* 540 U.S. at 534 (instructing that courts must enforce a statute's terms so long as "the disposition required by the text is not absurd."). Specifically, the Government is concerned that without a proximate cause limitation, § 2259 could be challenged on the ground that it subjects a defendant to excessive punishment under the Eighth Amendment.

The Eighth Amendment prescribes that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The Government posits that by giving effect to the statute's plain text, this court could cause Eighth Amendment problems similar to that expressed by a recent Supreme Court case involving criminal forfeiture: Where criminal forfeiture "would be grossly disproportional to the gravity of [an] offense," the Supreme Court held that it would violate the Excessive Fines Clause of the Eighth Amendment. *United States v. Bajakajian,* 524 U.S. 321, 324 (1998).

First, we are not persuaded that restitution is a punishment subject to the same Eighth Amendment limits as criminal forfeiture. Its purpose is remedial, not punitive. *See United States v. Webber,* 536 F.3d 584, 602-03 (7th Cir. 2008) ("Forfeiture and restitution are distinct remedies. Restitution is remedial in nature, and its goal is to restore the victim's loss. Forfeiture, in contrast, is punitive; it seeks to disgorge any profits that the offender realized from his

illegal activity.") (citations omitted); *see also United States v. Taylor,* 582 F.3d 558, 566 (5th Cir. 2009) ("Restitution operates to make the victim of the crime whole."). Even so, restricting the "proximate result" language to the catchall category in which it appears does not open the door to grossly disproportionate restitution in a way that would violate the Eighth Amendment. Section 2259 contains discrete causal limitations that precede the restitutionary right; restitution thus is limited to losses arising out of a victim's injury. *See* 18 U.S.C. § 2259(c) (imposing general causation requirement on definition of victim). Furthermore, the mechanisms under § 3664, which have already been described, further allay any concerns as to over-punishment. Fears over excessive punishment are misplaced.

Any concern that individual defendants may bear a greater restitutionary burden than others convicted of possessing the same victim's images, moreover, does not implicate the Eighth Amendment or threaten to create an absurd result. *See Arledge,* 553 F.3d at 899. Restitution is not tied to the defendant's gain; rather "so long as the government proved that the victim suffered the actual loss that the defendant has been ordered to pay, the restitution is proportional." *Id.* Even where a district court selectively imposed restitution on one co-defendant and not another, this court has treated this seeming inequality as being "of no consequence." *See id.* (citing *United States v. Ingles,* 445 F.3d 830, 839 (5th Cir. 2006) (explaining that "a district court may consider the relative

degrees of responsibility of co-defendants in imposing restitution obligations and therefore, the simple fact that like punishment was not imposed on [the co-defendants] does not offend the constitution") (internal quotation marks and citations omitted)). Thus, the fact that some defendants will be held jointly and severally liable for the full amount of Amy's losses, while other defendants convicted of possessing Amy's images may not be (because, for example, the Government or Amy does not seek restitution from them) does not offend the Eighth Amendment. *See id.*

The court, moreover, can ameliorate the impact of joint and several liability on an individual defendant by establishing a payment schedule that corresponds to the defendant's ability to pay. *See, e.g., United States v. Wright,* No. 09-CR-103, at 5 (E.D. La. Dec. 16, 2009) (explaining the payment of restitution "shall begin while the defendant is incarcerated [and u]pon release, any unpaid balance shall be paid at a rate of $200.00 per month" and further explaining that "[t]he payment is subject to increase or decrease, depending on the defendant's ability to pay."); *see also* 18 U.S.C. § 3664(e) ("The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant.").

Ultimately, while the imposition of full restitution may appear harsh, it is not grossly disproportionate to the crime of receiving and possessing child pornography. *Cf. id.* at 899-900 (rejecting Eighth Amendment challenge to the imposition of full

restitution, pursuant to joint and several liability, under Mandatory Victims Restitution Act, in context of mail fraud case). In light of restitution's remedial nature, § 2259's built-in causal requirements, and the mechanisms described under § 3664, we do not see any Eighth Amendment concerns here or any other absurd results that our plain reading produces.

2

Accordingly, we hold that § 2259 requires a district court to engage in a two-step inquiry to award restitution where it determines that § 2259 applies. First, the district court must determine whether a person seeking restitution is a crime victim under § 2259 – that is, "the individual harmed as a result of a commission of a crime under this chapter." 18 U.S.C. § 2259(c). The Supreme Court has acknowledged that "[t]he distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children," *New York v. Ferber,* 458 U.S. 747, 759 (1982), and this court has elaborated that "children depicted in child pornography may be considered to be the victims of the crime of receiving child pornography." *United States v. Norris,* 159 F.3d 926, 929 (5th Cir. 1998). This logic applies with equal force to defendants who possess child pornography: By possessing, receiving, and distributing child pornography, defendants collectively create the demand that fuels the creation of the abusive images. Thus, where a defendant is convicted of possessing, receiving, or distributing

child pornography, a person is a victim under this definition if the images the defendant possesses, receives, or distributes include those of that individual.

Second, the district court must ascertain the full amount of the victim's losses as defined under § 2259(b)(3)(A)-(F), limiting only § 2259(b)(3)(F) by the proximate result language contained in that subsection, and craft an order guided by the mechanisms described in § 3664, with a particular focus on its mechanism for joint and several liability.

IV

Having resolved this important issue of statutory interpretation, we apply our holding to Amy's mandamus and Wright's appeal.

A

Under our traditional mandamus inquiry, we will grant Amy's petition for mandamus if (1) she has no other adequate means to attain the desired relief; (2) she has demonstrated a clear and indisputable right to the issuance of a writ; and (3) in the exercise of our discretion, we are satisfied that the writ is appropriate in these circumstances. *See Dean,* 527 F.3d at 394. As the Supreme Court has noted, the "hurdles" limiting use of mandamus, "however demanding, are not insuperable." *Cheney v. U.S. Dist. Court,* 542 U.S. 367, 381 (2004).

We easily conclude that the first prong is met. Because we have held that the CVRA limits crime victims' relief to the mandamus remedy, Amy has no other means for obtaining review of the district court's decision not to order restitution. *See supra* § II-A. We are also satisfied that a writ is appropriate in these circumstances: The CVRA expressly authorizes mandamus, 18 U.S.C. § 3771(d)(3), and awarding restitution would satisfy § 2259's broad restitutionary purpose. Next, we conclude that Amy has a "clear and indisputable" right to restitution in light of our holding today. First, Amy is a "victim" under § 2259(c). Paroline possessed at least two of her images, and his possession of those images partly formed the basis of his conviction. *See Ferber,* 458 U.S. at 759; *Norris,* 159 F.3d at 929. Amy, as an "individual harmed as a result of [Paroline's] commission of a crime" falling within § 2259's scope, is thus a victim under § 2259. *See Kearney,* 672 F.3d at 94 ("Any argument that [Amy] has not suffered harm as a result of [Paroline's] crimes defies both fact and law."). Because Amy is a victim, § 2259 required the district court to award her restitution for the "full amount of [her] losses" as defined under § 2259(b)(3). Because the district court awarded Amy nothing, it therefore clearly and indisputably erred. No matter what discretion the district court possessed and no matter how confounding the district court found § 2259, it was not free to leave Amy with nothing.

On remand, the district court must enter a restitution order reflecting the "full amount of [Amy's] losses" in light of our holdings today.

B

Turning to Wright's appeal, Amy is eligible for restitution as a "victim" of Wright's crime of possessing images of her abuse for the same reasons she is eligible as a victim of Paroline's crime. *See supra* § IV-A. It was therefore legal for the district court to order restitution to Amy. *See Arledge,* 553 F.3d at 897 (reviewing the legality of the restitution order de novo). As such, Wright's appeal necessarily focuses on the amount of the district court's restitution award, which we review for an abuse of discretion. *Id.* The district court awarded Amy $529,661 by adding Amy's estimated future counseling costs to the value of her expert witness fees. The district court did not explain why Wright should not be required to pay for any of the other losses Amy requested, and the record does not otherwise disclose why the district court reduced the Government's full request on Amy's behalf. While the district court erred in failing to award Amy the full amount of her losses, because the Government did not appeal Wright's sentence and Amy did not seek mandamus review, under *Greenlaw v. United States,* we must affirm Wright's sentence. 554 U.S. 237, 246 (2008) (holding appellate court may not increase sentence of defendant where Government did not appeal sentence directly or on cross-appeal).

V

For the reasons above, we reject the approach of our sister circuits and hold that § 2259 imposes no generalized proximate cause requirement before a child pornography victim may recover restitution from a defendant possessing images of her abuse. We AFFIRM the district court in *United States v. Wright,* No. 09-CR-103 (E.D. La. Dec. 16, 2009). We VACATE the district court's judgment in *United States v. Paroline,* 672 F. Supp. 2d 781 (E.D. Tex. 2009), and REMAND for proceedings consistent with this opinion.[22]

DENNIS, Circuit Judge, concurring in part in the judgment.

I respectfully concur in the majority opinion's decision that the CVRA does not grant crime victims a right to a direct appeal from a district court's rejection of her claim for restitution under 18 U.S.C. § 2259; that the CVRA grants crime victims only a right to seek traditional mandamus review; and that the CVRA grants the government the right to seek mandamus and to retain its right to a direct appeal.

I further agree with the majority that neither the Government nor the victim is required to prove that the victim's losses defined by 18 U.S.C.

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[22] Amy's motion to strike portions of the Government's brief is DENIED.

§ 2259(b)(3)(A)-(E) were a proximate result of the defendant's crime; it is only "any other loss suffered by the victim" that must be proved to be "a proximate result of the offense." *Id.* § 2259(b)(3)(F). Section 2259(c) defines "victim" as an "individual harmed as a result of a commission of a crime under this chapter," but it does not require a showing that the victim's losses included in § 2259(b)(3)(A)-(E) be a "proximate result of the offense." From this, I infer that the statute places only a slight burden on the victim or the government to show that the victim's losses or harms enumerated in those subsections plausibly resulted from the offense. Once that showing has been made, in my view, a presumption arises that those enumerated losses were the proximate result of the offense, which the defendant may rebut with sufficient relevant and admissible evidence.

Finally, I agree with the majority's conclusion that where a defendant is convicted of possessing child pornography, a person is a victim under the statute if the images include those of that individual. In these cases, I agree that the government and the victim have made a sufficient showing, unrebutted by the defendant, that the victim is entitled to restitution of losses falling under 18 U.S.C. § 2259(b)(3)(A)-(E). Therefore, I concur in that part of the majority's judgment that vacates the district courts' judgments and remands the cases to them for further proceedings.

In remanding, however, I would simply direct the district courts to proceed to issue and enforce the

restitution orders in accordance with 18 U.S.C. § 3664 and 3663A, as required by § 2259(b)(2). Going forward, I believe it best to permit district courts to craft procedural and substantive devices for ordering restitution that would take into account both the mandatory nature of full restitution for crime victims under section 2259 and the mechanical difficulties of crafting orders given the possibility of multiplicitous liability among hundreds of defendants under circumstances that may change over time. While I admire the majority's effort to provide guidance to the district courts in their extremely difficult task of molding and merging these federal statutes, §§ 2259, 3663A, and 3664, into a legal, just, and predictable system, I believe that effort is premature in this court at this time on the present record. Rather, I would leave the decision as to how to proceed under these statutes to the district courts, which may decide to take additional evidence and require study and briefing by the parties to assist them in these difficult cases.

W. EUGENE DAVIS, Circuit Judge, concurring in part and dissenting in part, joined by KING, SMITH, and GRAVES, Circuit Judges.

I agree with my colleagues in the majority that we should grant mandamus in *In re Amy* and remand

for entry of a restitution award.[1] I also agree that we should vacate the award entered in *Wright* and remand for further consideration on the amount of the award. The devil is in the details, however, and I disagree with most of the majority's analysis.

I disagree with my colleagues in the majority in two major respects:

1. Although I conclude that the proximate cause proof required by the restitution statutes can be satisfied in these cases, I disagree with the majority that the statute authorizes restitution without any proof that the violation proximately caused the victim's losses.

2. I agree with the majority that the district court must enter a restitution award against every offender convicted of possession of the victim's pornographic image; but I disagree with the majority that in cases such as these two, where the offenses of multiple violators contribute to the victim's damages, the district court must enter an award against each offender for the full amount of the victim's losses. No other circuit that has addressed this issue has adopted such a one size fits all rule for the restitution feature of the sentence of an offender. Other circuits have given the district courts discretion to assess the

[1] Section 2259 directs courts to "order restitution for any offense under this chapter." District courts do not have discretion to make no award.

amount of the restitution the offender is ordered to pay. *See, e.g., United States v. Burgess,* 684 F.3d 445, 460 (4th Cir. 2012); *United States v. Kearney,* 672 F.3d 81, 100-01 (1st Cir. 2012); *United States v. McGarity,* 669 F.3d 1218, 1270 (11th Cir. 2012); *United States v. Laney,* 189 F.3d 954, 967 (9th Cir. 1999).

I.

THE STATUTES

At bottom, this is a statutory interpretation case, and I begin with a consideration of the structure and language of the statutes at issue that facially belie the majority's position that victims may be awarded restitution for losses not proximately caused by offense conduct. Section 2259 specifically governs mandatory restitution awards for crimes related to the sexual exploitation and abuse of children. A number of provisions in the statute make it clear that proof of a causal connection is required between the offenses and the victim's losses.

Section 2259(b)(2) expressly incorporates the general restitution procedures of 18 U.S.C. § 3664 and states that "[a]n 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." Section 3664(e) states that "[t]he 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." (emphasis added).

This language requiring proof of causation from § 3664(e) is consistent with the language defining "victim" found in § 2259(c), who is defined as "the individual harmed *as a result of* a commission of crime under this chapter. . . ." (emphasis added).

Section 2259(a) states that the court "shall order restitution for any offense under this chapter." Section 2259(b)(3) states that the victim's losses are defined as those suffered by the victim "as a proximate result of the offense." The full text of § 2259(b)(3) is as follows:

> [T]he 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).

In interpreting this provision we should follow the fundamental canon of statutory construction established by the Supreme Court in *Porto Rico Railway, Light & Power Co. v. Mor,* 253 U.S. 345 (1920). In that case, the Court held that "[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Id.* at 348. Applying this cardinal rule of statutory interpretation, I conclude that subsection (F)'s "as a proximate result of the offense" language applies equally to the previous five subcategories of losses, (A) through (E). This interpretation was accepted by the Eleventh Circuit in *United States v. McDaniel,* 631 F.3d 1204, 1209 (11th Cir. 2011) ("The phrase 'as a proximate result of the offense' is equally applicable to medical costs, lost income, and attorneys' fees as it is to 'any other losses.'" (citing *Porto Rico Ry.,* 253 U.S. at 348)); *see also Laney,* 189 F.3d at 965 (reading the "as a result of" language in § 2259's definition of victim together with the "proximate result" language in § 2259(b)(3)(F) to infuse all of 2259(b)(3) with a proximate cause requirement).

In contrast, the majority concludes that once the district court determines that a person is a victim (an individual harmed as a result of an offense under

§ 2259) the district court must order restitution without further proof of causation.[2]

The majority's reading of § 2259(b)(3) is patently inconsistent with the rule of statutory interpretation announced in *Porto Rico Railway,* which makes it clear that the clause should be read to apply to all categories of loss.[3] My conclusion that *Porto Rico Railway*'s rule of interpretation applies in this case is made even clearer when we consider the multiple references in the statutes discussed above expressly reflecting Congressional intent to require proof of causation.

The D.C. Circuit and other circuits have reached the same conclusion – that is, that § 2259 requires proof of proximate cause – albeit by a slightly different reasoning. *See United States v. Monzel,* 641 F.3d 528, 535-37 (D.C. Cir. 2011); *United States v. Aumais,* 656 F.3d 147, 153 (2d Cir. 2011); *Burgess,* 684 F.3d at 459. The D.C. Circuit explained that it is

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[2] The majority would apparently hold that if Amy were injured in an automobile accident on the way to a counseling session, those damages would be included in a restitution award.

[3] I am not persuaded by *In re Amy*'s attempt to distinguish the statute in *Porto Rico Railway* on the basis that the subcategories of § 2259(b)(3) are separated by semicolons rather than commas. *See In re Amy,* 636 F.3d 190, 199 (5th Cir. 2011). Either punctuation device is an acceptable method of separating clauses. *See* BRYAN A. GARNER, THE REDBOOK: A MANUAL ON LEGAL STYLE 1-15 (2d. ed. 2006).

> a bedrock rule of both tort and criminal law that a defendant is only liable for harms he proximately caused. ("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'. . . .").

(footnote omitted) (citation omitted) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 263 (5th ed. 1984)); *see also* 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."). "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." *Monzel,* 641 F.3d at 536. The court found that "nothing in the text or structure of § 2259 leads us to conclude that Congress intended to negate the ordinary requirement of proximate cause." *Id.*

Other circuits have used different analyses but all circuits to confront this issue have interpreted the statute as using a proximate causation standard connecting the offense to the losses. *See United States v. Evers,* 669 F.3d 645, 658-59 (6th Cir. 2012) (finding a proximate cause requirement but declining to

choose whether to adopt the *McDaniel* or *Monzel* rationale as they are "complementary"); *Kearney,* 672 F.3d at 96, 99 (adopting a proximate cause standard but not specifying under what analysis); *United States v. Crandon,* 173 F.3d 122, 125-26 (3d Cir. 1999) (stating, without analysis, that § 2259 requires damages for losses suffered "as a proximate result of the offense"). This circuit is the only circuit that has interpreted § 2259 and concluded that proximate cause is not required by the statute.

For the above reasons, I conclude that the statutes at issue require proof that the defendant's offense conduct proximately caused the victim's losses before a restitution award can be entered as part of the defendant's sentence.

II.

CAUSATION

In cases such as the two cases before this court where the conduct of multiple offenders collectively causes the victim's damages, I would follow the position advocated by the Government and adopted by the First Circuit and the Fourth Circuit to establish the proximate cause element required by § 2259. *Kearney,* 672 F.3d at 98-99; *Burgess,* 684 F.3d at 459-60. Under this "collective causation" theory, it is not necessary to measure the precise damages each of the over 100 offenders caused. As the First Circuit in *Kearney* stated: "Proximate cause exists where the tortious conduct of multiple actors has combined to

bring about harm, even if the harm suffered by the plaintiff might be the same if one of the numerous tortfeasors had not committed the tort." 672 F.3d at 98. The court relied on the following statement of the rule from Prosser and Keeton:

> When the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to each of them individually would absolve all of them, the conduct of each is a cause in fact of the event.

KEETON ET AL., *supra,* § 41, at 268.

The court explained further:

> Proximate cause therefore exists on the aggregate level, and there is no reason to find it lacking on the individual level. The Restatement (Third) of Torts has recognized this: causation exits even where "none of the alternative causes is sufficient by itself, but together they are sufficient" to cause the harm.

Kearney, 672 F.3d at 98 (quoting RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 27 reporters' n. cmt. g. (2010); *id.* § 36 cmt. a ("[E]ven an insufficient condition . . . can be a factual cause of harm when it combines with other acts to constitute a sufficient set to cause the harm.")).

I agree with the Government and the First and Fourth Circuits that this definition of proximate

cause is appropriate in this context and under this standard the causation requirement in both cases before us is satisfied.

III.

AMOUNT OF THE AWARD

The most difficult issue in these cases – where multiple violators combine to cause horrendous damage to a young victim – is establishing some standards to guide the district court in setting an appropriate restitution award for the single offender before the court.

I agree that Amy is a victim in both cases before us. Defendant Paroline (in *In re Amy*) and defendant Wright possessed Amy's pornographic images and the statute requires the court to enter an award against them.

I agree that Amy is entitled to a restitution award from all of her offenders in a sum that is equal to the amount of her total losses. But in cases such as these where multiple violators have contributed to the victim's losses and only one of those violators is before the court, I disagree that the court must always enter an award against that single violator for the full amount of the victim's losses. I agree that § 3664(h) gives the court the option in the appropriate case of entering an award against a single defendant for the full amount of the victim's losses even though other offenders contributed to these losses. I also

agree that in that circumstance the defendant can seek contribution from other offenders jointly liable for the losses.[4] We have allowed such contribution claims in analogous non-sex offender cases. *E.g., United States v. Arledge,* 553 F.3d 881, 899 (5th Cir. 2008) (finding that defendant could "seek contribution from his co-conspirators to pay off the restitution award and reduce the amount he personally owe[d]" in the context of a fraud scheme with multiple participants); *accord United States v. Martinez,* 610 F.3d 1216, 1234 (10th Cir. 2010); *United States v. Newsome,* 322 F.3d 328, 340-41 (4th Cir. 2003).

In concluding that an award for the full amount of the victim's losses is required the majority relies on § 3664(h) which provides:

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

(emphasis added). The majority simply ignores the second clause in § 3664(h) emphasized above. That

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[4] The Government argued that contribution would not apply in this context because the statute did not authorize it and, in any event, it would not apply among defendants convicted in different courts; but their authority on this point is very thin and does not directly and strongly support this view.

subsection plainly gives the court the option of either (1) assessing a restitution award against the single defendant in an amount that is equal to the victim's total losses or (2) apportioning liability among the defendants to reflect each defendant's level of contribution to the victim's loss taking into consideration a number of factors including the economic circumstances of each defendant. *Accord McGarity,* 669 F.3d at 1270. It would be surprising if Congress had not given courts this option. After all, restitution is part of the defendant's criminal sentence and § 3664(h), consistent with sentencing principles generally, gives the sentencing judge discretion to fix the sentence based on the facts and circumstances surrounding the defendant's circumstances, background, and nature of his conduct. *See, e.g., Burgess,* 684 F.3d at 460; *Kearney,* 672 F.3d at 100-01; *McGarity,* 669 F.3d at 1270; *Laney,* 189 F.3d at 967. One size does not fit all in this context any more than the length of a prison sentence or any other feature of a criminal sentence.

I agree with the majority that the defendants in both cases before us having been convicted of violating 18 U.S.C. § 2252 must be ordered to pay restitution to Amy. We should leave the calculation of the appropriate award against each defendant to the district court in the first instance. I would give the district court the following general guidelines:

The court must recognize that Amy's losses are an aggregation of the acts of the person who abused and filmed her assault, those who distributed and redistributed her images, and those who possessed

those images. The culpability and liability for restitution of any one defendant regarding Amy's loss is dependent at least in part on the role that defendant played with respect to her exploitation. *See, e.g., Burgess,* 684 F.3d at 460.

The court should first compute the victim's probable future losses based on evidence of the damages she will likely incur from the date of the defendant's offense conduct into the foreseeable future. The court should consider all items of damage listed in § 2259(b)(3) as well as any other losses suffered by the defendant related to the conduct of the violators of this chapter.

In a case such as this where multiple individuals have been convicted of contributing to her abuse, the district court has the 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 the other surrounding circumstances.

The district court is not required to justify any award with absolute precision, but the amount of the award must have a factual predicate. In determining whether it should cast the single defendant before it for the total amount of the victim's losses or in fixing the amount of a smaller award the court should consider all relevant facts including without limitation the following:

1. The egregiousness of the defendant's conduct including whether he was involved in the physical

abuse of this victim or other victims, and whether he attempted to make personal contact with victims whose images he viewed or possessed.

2. For defendants who possessed images of the victim, consider the number of images he possessed and viewed, and whether the defendant circulated or re-circulated those images to others.

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

4. The court may consider using 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 the award.

5. The court may also consider as a guide awards made in similar cases in this circuit and other circuits.

6. Any other facts relevant to the defendant's level of contribution to the victim's loss and economic circumstances of the defendant.

IV.

CONCLUSION

In summary, I would grant mandamus and vacate the judgment in *In re Amy* and remand that case to the district court to enter an award consistent with the principles outlined above. I would also vacate the judgment in *Wright* and remand for entry of judgment consistent with the above guidelines.

LESLIE H. SOUTHWICK, Circuit Judge, dissenting:

We are confronted with a statute that does not provide clear answers. I join others in suggesting it would be useful for Congress "to reconsider whether § 2259 is the best system for compensating the victims of child pornography offenses." *United States v. Kennedy,* 643 F.3d 1251, 1266 (9th Cir. 2011); *see also United States v. Burgess,* 684 F.3d 445, 460 (4th Cir. 2012). The goal is clear: providing meaningful restitution to victims of these crimes. How to order restitution in individual cases in light of that goal is a difficult question.

Our task today is to effectuate the scheme according to the congressional design as best as we can discern it. Both of the other opinions have ably undertaken this difficult task. I agree with Judge Davis that this circuit should not chart a solitary course that rejects a causation requirement. The reasons why I believe the statute requires causation are different than he expresses, though. I agree with the majority, relying on the last-antecedent rule, that the phrase "as a proximate result of the offense" that is in Section 2259(b)(3)(F) only modifies the category of loss described in (F). *See, e.g., Jama v. Immigration and Customs Enforcement,* 543 U.S. 335, 343 (2005).

Though I agree with the majority in that respect, I find persuasive the reasoning of the Second, Fourth, and D.C. Circuits that causation "is a deeply rooted principle in both tort and criminal law that Congress did not abrogate when it drafted § 2259." *United*

States v. Aumais, 656 F.3d 147, 153 (2d Cir. 2011); *Burgess,* 684 F.3d at 457; *United States v. Monzel,* 641 F.3d 528, 535-36 (D.C. Cir. 2011). In a similar vein, the Supreme Court stated that absent "some indication of congressional intent, express or implied," courts will decline to read federal statutory crimes that fail to mention it, as eliminating the *mens rea* requirement that has been a hallmark of crimes since the common law. *Staples v. United States,* 511 U.S. 600, 605-06 (1994).

True, the positioning of the phrase "proximate result" solely within subsection (F) could be a sign that Congress meant to eliminate causation for damages falling under subsections (A)-(E). Any such implication is thoroughly defeated, though, by other provisions of the statute. First, as the D.C. Circuit has recognized, Section 2259 calls for restitution to go to a "victim" of these crimes, a term defined as "the individual harmed *as a result* of a commission of a crime under this chapter." *Monzel,* 641 F.3d at 535 (emphasis added). Second, the statute directs that an order of restitution should be issued and enforced "in the same manner as an order under section 3663A." § 2259(b)(2). Under Section 3663A "'victim' means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered." § 3663A(2). The "as a result" language from Section 2259 as well as the more explicit mention of proximate harm in Section 3663A convince me that "nothing in the text or structure of the restitution statute affirmatively indicates that Congress

intended to negate the ordinary requirement of proximate causation for an award of compensatory damages." *Burgess,* 684 F.3d at 457; *Monzel,* 641 F.3d at 536.

I understand the contours of this proximate-cause requirement in much the same manner as does Judge Davis, including his analysis of "collective causation." *See also United States v. Kearney,* 672 F.3d 81, 96-98 (1st Cir. 2012). I also agree that the option of "apportion[ing] liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant" belies the majority's notion that each case calls for an award equal to the total loss incurred by a victim. § 3664(h). Yet by making restitution "mandatory" for all these crimes of exploitation, including possession and distribution of child pornography, Congress made its "goal of ensuring that victims receive full compensation" plain. *Kearney,* 672 F.3d at 99.

Awards must therefore reflect the need to make whole the victims of these offenses. As Amy's suffering illustrates, the "distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children." *New York v. Ferber,* 458 U.S. 747, 759 (1982). They constitute an indelible "record of the children's participation and the harm to the child is exacerbated by their circulation." *Id.*

In light of the unique nature of prosecutions for child pornography and the clear congressional intent to maximize awards, any doubts about the proper amount of restitution should be resolved in favor of the child. This concern is largely a matter of a difference of emphasis from the views expressed by Judge Davis. I am concerned that his emphasis on the discretion of a district court, though clearly that discretion exists and can be exercised under the terms of Section 3664, tends towards accepting inappropriately low, even nominal awards. I would not accept that a forward-looking estimate of the number of future defendants and awards should be used to estimate a percentage of overall liability to be assigned a particular defendant. That puts too much weight on the interests of the defendants. Overcompensation is an unlikely eventuality. Were it to occur, then at that point district courts might be able to shift to evening up contributions among past and future defendants.

In summary, proximate cause must be shown and the principle of aggregate causation is the method for proving its existence. By statute, district courts can award all damages to each defendant but also have discretion to make lesser awards if properly explained. This means that I agree with requiring additional proceedings as to both defendants, but disagree that each district court is *required* to impose a restitution award of the full amount of damages.