

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

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DOYLE RANDALL PAROLINE,

*Petitioner,*

v.

UNITED STATES OF AMERICA, ET AL.,

*Respondents.*

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

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**PETITIONER'S BRIEF ON THE MERITS**

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**QUESTION PRESENTED**

What, if any, causal relationship or nexus between the defendant's conduct and the victim's harm or damages must the government or the victim establish in order to recover restitution under 18 U.S.C. §2259?

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## OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit issued four opinions, two *en banc* and two panel. They are (in reverse chronological order):

1. *In re Amy Unknown*, 701 F.3d 749 (5th Cir.2012) (*en banc*) (opinion on rehearing). J.A. 425.

2. *In re Amy Unknown*, 697 F.3d 596 (5th Cir.2012) (*en banc*), the initial opinion on rehearing *en banc*. J.A. 349.

3. *In re Amy Unknown*, 636 F.3d 190 (5th Cir.2011) (opinion on panel rehearing). J.A. 325.

4. *In re Amy Unknown*, 591 F.3d 792 (5th Cir.2009) (initial panel opinion). J.A. 298.

The District Court issued a memorandum and opinion. *United States v. Paroline*, 672 F.Supp.2d 781 (E.D. Tex. 2009). J.A. 271.



## JURISDICTION

The District Court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. §3231. The Court of Appeals had jurisdiction over the appeal pursuant to 28 U.S.C. §1291 and 18 U.S.C. §3771(d)(3). The Court of Appeals issued an opinion on rehearing from its earlier *en banc* opinion on November 19, 2012. On January 31, 2013, Mr. Paroline filed his petition for a writ of certiorari,

which this Court granted on June 27, 2013. This Court has jurisdiction pursuant to 28 U.S.C. §1254.



## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

1. 18 U.S.C. §2259 captioned “Mandatory Restitution” reads in full:

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

(b) Scope and nature of order. –

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

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

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

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

(4) Order mandatory. –

- (A) The issuance of a restitution order under this section is mandatory.
- (B) A court may not decline to issue an order under this section because of –
  - (i) the economic circumstances of the defendant; or
  - (ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

(c) Definition. – For purposes of this section, the term “victim” means the individual harmed as a result of a commission of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim’s estate, another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named as such representative or guardian.

All other Constitutional and statutory provisions are included in the Appendix as follows:

1. Appendix A. U.S. CONST. amend. VIII.
2. Appendix B. 18 U.S.C. §1593.
3. Appendix C. 18 U.S.C. §2248.
4. Appendix D. 18 U.S.C. §2264.
5. Appendix E. 18 U.S.C. §2327.
6. Appendix F. 18 U.S.C. §3553.
7. Appendix G. 18 U.S.C. §3663.
8. Appendix H. 18 U.S.C. §3663A.
9. Appendix I. 18 U.S.C. §3664.



## STATEMENT OF THE CASE

In 1997, Eugene Zebroski started sexually abusing Amy<sup>1</sup> his 8 year old niece. Zebroski photographed the horrific acts he perpetrated against Amy, including vaginal rape, digital penetration, attempted sodomy, cunnilingus and fellatio. Zebroski's abuse was ultimately discovered by law enforcement after he started sharing these over the internet. He was prosecuted in late 1998, was sentenced to prison for his crimes and ordered to pay just over \$6,300.00 in restitution to Amy as part of his federal sentence in the United States District Court for the Eastern District of Pennsylvania. J.A. 170. Paroline did not participate in, and indeed, had no knowledge of Zebroski's criminal activity.

On January 9, 2009, Paroline was arrested and entered a guilty plea in the Eastern District of Texas to one count of possessing material involving the sexual exploitation of minors in violation of 18 U.S.C. §§2252(a)(4)(B) and 2252(b)(2). J.A. 1. Specifically, Paroline had downloaded approximately 300 images of minors engaged in sexually explicit conduct. J.A. 146. Amy was identified as the minor in two of the images possessed by Paroline. J.A. 146. The Government found no evidence that Paroline had distributed any images in his possession, including those of Amy. J.A. 146. On April 17, 2009, the Department of Justice notified Amy's attorney of Paroline's guilty plea

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<sup>1</sup> Amy's actual identity is unknown.

and that his sentencing hearing was set for May 27, 2009. J.A. 22.

On May 1, 2009, Amy's attorney filed a request for restitution with the United States Attorney for the Eastern District of Texas seeking \$3.4 million from Paroline. J.A. 27. The request included a legal brief from Amy's attorney<sup>2</sup> and a victim impact statement from Amy.<sup>3</sup> J.A. 59. The damage model Amy's attorney submitted was supported by two expert reports that were prepared prior to Paroline's arrest and conviction: a November 21, 2008 psychological report from Dr. Joyanna Silberg, J.A. 67, and a September 8, 2008 report on projected economic losses from Dr. Stan V. Smith, Ph.D. J.A. 88.

On June 10, 2009, the District Court severed the restitution issue and, after a contested hearing, sentenced Paroline to 24 months imprisonment and ten years supervised released. J.A. 3. The District Court requested all of the parties, including Amy as a Victim/Party, as well as any other interested individuals, file briefs addressing the issue of restitution in

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<sup>2</sup> Amy argued that Paroline had "contributed to Amy's psychiatric 'death by a thousand cuts'" by distributing her images and trading them for other images, even though the Government stated as a matter of fact that there was no evidence that Paroline distributed child pornography. J.A. 146.

<sup>3</sup> Although titled "Victim Impact Statement of Amy – the Victim in the Misty Series," the statement was actually written by Dr. Joyanna Silberg in September of 2008 as part of Amy's request for restitution in an unrelated case. J.A. 154.

child exploitation cases, including whether there was a proximate cause requirement between the victim's losses and the particular defendant's conduct.<sup>4</sup> J.A. 2-3.

The District Court held two restitution hearings and, for the first time in any case where Amy submitted a request for restitution, the defense submitted expert reports challenging Amy's damage model and her experts' conclusions supporting the model. During the first hearing, Amy's attorney stated that he withdrew requests for restitution in 80% of cases in which Amy received notice of prosecutions involving her image. J.A. 158. The District Court noted Amy's restitution request included losses associated with the costs for future psychological care, future lost income, and attorney's fees. According to Dr. Silberg's report, Amy's request for restitution stems primarily from the sexual abuse that she suffered as a child by her uncle and her perception that individuals are viewing her abuse on the internet. In her report, Dr. Silberg notes:

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

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<sup>4</sup> The Administrative Office of the United States Courts answered the District Court's inquiry by filing a letter dated August 17, 2009 wherein the opinion was expressed that an award of restitution pursuant to §2259 required a showing that a defendant's conduct of conviction proximately caused a victim's losses or damages. J.A. 137-142.

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 post traumatic stress, and impeded her ability to move on with her life.

J.A. 71.

Dr. Silberg stated that with each new discovery<sup>5</sup> of another defendant trading her image re-traumatized Amy.<sup>6</sup> J.A. 73. Other than this generalized fear that people were viewing her image, Amy offered no alternate theory of restitution for the portion of her damages that she was seeking to recover from Paroline. The Government presented no evidence of any damages or losses that were actually incurred by Amy after the preparation of Dr. Silberg's report or as a direct result of Paroline's offense conduct.

To controvert Amy's request for restitution, Paroline submitted a report (J.A. 213) from Dr. Timothy J. Proctor, a Board Certified Forensic Psychologist,

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<sup>5</sup> Congress requires that all victims of child pornography be given the choice of being informed when the child's images are discovered in possession of a specific individual. At her request, Amy has requested that she be notified through her attorney when NCMEC identifies her image in an individual's collection. In this case, Amy has stipulated that she not been personally informed of Paroline's possession of her image and none of her damages flow from that possession.

<sup>6</sup> This conflicts with Amy's acknowledgment that she was never informed of Paroline's conduct or his arrest and prosecution.

who reviewed all of the data underlying Dr. Silberg's report<sup>7</sup> wherein he states:

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

J.A. 216.

Dr. Proctor expressed five major concerns in the claim for damages by Amy:

1. From the information reviewed and analyzed, concern appears warranted regarding the extent to which, in this case, Dr. Silberg successfully served the role of an objective forensic psychological evaluator,

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<sup>7</sup> In preparation of his report, Dr. Proctor reviewed Dr. Silberg's report dated 11/21/08, her handwritten notes as well as the raw test data from the psychological tests she administered to Amy, as well as her victim impact statement. Also reviewed were other documents that were reportedly relied upon by Dr. Silberg and/or Dr. Smith. Included within these documents were criminal records regarding the prosecution of Amy's uncle for his abuse of her as well as records from the mental health evaluation and treatment services Amy received after her abuse by her uncle came to light as well as the transcript of the initial hearing in this cause. J.A. 216.

which appears to have been her expressed intention. J.A. 216.

2. Although consideration of objective sources of data is the hallmark of a forensic psychological evaluation, it appears, based in the materials reviewed, that Dr. Silberg relied very heavily on Amy's subjective self-report. J.A. 219.

3. As was already demonstrated to some extent in the previous section, it appears that Dr. Silberg inadequately considered alternative hypothesis (sic) and overly attributed problematic behavior (e.g., academic problems, vocational problems, alcohol abuse) to Amy's sexual abuse history, without fully exploring alternative hypotheses and considering that the cause of behavior is often multifaceted. J.A. 224.

4. 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 (i.e., two) that were inadequate due to the absence of well-established validity scales and because the tests were overly specific in nature. J.A. 225.

5. Finally, it is my opinion that Dr. Silberg's conclusions regarding the impact of Amy's abuse history on her 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.<sup>8</sup> J.A. 227.

In addition to the expert reports<sup>9</sup> submitted by Paroline and Amy, the District Court also considered the stipulation entered on October 14, 2009:

It is stipulated by and between the Government and Doyle Randall Paroline who are the parties in this case and, also, by James R. Marsh who is, pursuant to 18 U.S.C. § 3771, Amy's representative that:

Any and all notices required to be sent by to the Government to Amy were received by Mr. James R. Marsh, Amy's representative.

Mr. Marsh did not pass on any of these notices to Amy or inform her that he had received them, Amy does not know who Doyle Randall Paroline is.

**None of the damages for which Amy is now seeking restitution flow from anyone telling her specifically about Mr. Paroline or telling her about his**

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<sup>8</sup> As an example, Dr. Proctor noted the treatment notes of Ruby Salazer, LSW, BCD who treated Amy from October, 1998 through the end of 1999. Her treatment notes indicate that Amy was back to normal. The treatment of Amy was apparently successful.

<sup>9</sup> Paroline also submitted a report challenging Amy's projected lost earnings prepared by Dr. Kenneth Galbreath. J.A. 172.

**conduct which was the basis of the prosecution in this case.**

J.A. 230. (Emphasis added).

In the District Court, Amy's attorney conceded that a nexus is required between a request for damages and the offense of conviction:

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.

J.A. 224. (Emphasis added).

In its opinion<sup>10</sup> the District Court noted that in order to substantiate her claim for restitution, Amy submitted: (1) a victim impact statement; (2) a psychological report dated November 21, 2008; (3) an economic report by Dr. Stan Smith dated September 15, 2008; and (4) numerous excerpts from articles discussing the harms associated with child pornography. The District Court found that the losses described by Amy's experts "were generalized and caused by her initial abuse as well as the general existence and dissemination of her pornographic images." The District Court found that "[n]o effort has been made to show the portion of these losses specifically caused by Paroline's possession of Amy's image." *United States v. Paroline*, 672 F.Supp.2d at 792. The District Court also noted that the report by Dr. Proctor enumerated his concerns as to the reliability of Dr. Silberg's report upon the identifiable discrepancies between Amy's victim impact statement and Dr. Silberg's report. *Id.* at 792. The District Court concluded that the Government had not met its burden of proving "what losses, if any, were proximately caused by Paroline's possession of Amy's two pornographic images." *Id.* at 793.



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<sup>10</sup> On the same day that the District Court issued its opinion in Paroline's case, the court applied 18 U.S.C. §2259 in *United States v. Baker*, 672 F.Supp.2d 771 (E.D.Tex. 2009) to award restitution of \$462,000.00 to three victims after finding their losses were proximately caused by that defendant's offense conduct.

## SUMMARY OF ARGUMENT

The plain text of 18 U.S.C. §2259, its relationship to other statutes, and longstanding principles of criminal law, all require the Government to prove a causal relationship or nexus between a defendant's offense conduct and a victim's losses in order for a district court to order restitution. All of the courts of appeals, except the Fifth Circuit, require proximate cause between a defendant's crime and the losses or damages a victim suffered.<sup>11</sup> Any other result would undermine the sentencing scheme envisioned by Congress as set out in 18 U.S.C. §3553(a) and would turn criminal restitution for child exploitation into strict liability proceedings where a defendant's financial punishment is limitless. Under a strict liability standard, a defendant would be liable for all losses or damages identified by a victim, irrespective of when the losses or damages occurred and irrespective of who was actually responsible for those specific losses or damages.

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<sup>11</sup> *United States v. Kearney*, 672 F.3d 81 (1st Cir.2012); *United States v. Aumais*, 656 F.3d 147 (2d Cir.2011); *United States v. Crandon*, 173 F.3d 122 (3d Cir.1999) (*dicta*); *United States v. Burgess*, 684 F.3d 445 (4th Cir.2012); *United States v. Evers*, 669 F.3d 645 (6th Cir.2012); *United States v. Laraneta*, 700 F.3d 983 (7th Cir.2012); *United States v. Fast*, 709 F.3d 712 (8th Cir.2013); *United States v. Kennedy*, 643 F.3d 1251 (9th Cir.2011), *In re Amy*, 698 F.3d 1151 (9th Cir.2012), *pet. for cert. filed*; *United States v. Benoit*, 713 F.3d 1 (10th Cir.2013); *United States v. McDaniel*, 631 F.3d 1024 (11th Cir.2011); *United States v. Monzel*, 641 F.3d 528 (D.C. Cir.), *cert. denied sub nom. Amy v. Monzel*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 756 (2011).

The *en banc* Fifth Circuit’s construction of §2259 ignored its plain language, context and its relationship with other sentencing and restitution statutes and traditional concepts of tort and criminal law. The *en banc* Fifth Circuit decision is not limited to Chapter 110 offenses but would also apply to every other offense for which restitution is mandatory. See 18 U.S.C. §§1593,<sup>12</sup> 2248 & 2264. Each of the foregoing statutes have categories of compensable losses nearly identical to those of §2259 with the identical “result of offense” language. §§2248(b)(3)(E); 2264(b)(3)(E). Neither the language of §§2248, 2264 or 2259, nor their context or legislative history supports the conclusion that Congress intended to wholly eliminate the application of proximate cause to restitution in a criminal case or that restitution is punitive.

The definition of “victim” in §2259(c) also supports the requirement of a nexus between the defendant’s offense conduct, a victim’s losses or damages and the amount of restitution. In that subsection, Congress defined “victim” as “the individual harmed as the result of a commission of a crime” under that chapter. The plain language of the restitution statute links the status of “victim” to losses or damages “caused as a result of” the “commission of a crime.”

The *en banc* Fifth Circuit failed to read §2259 as a whole when it designed its joint and several liability

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<sup>12</sup> Section 1593 does not provide a category of losses but rather cross references §2259(b)(3).

rule. It created an administrative and judicial nightmare by holding every defendant liable for all of the losses or damages of a victim even though the victim has not sought restitution in 80% of the cases for which she has received notice.

By authorizing restitution without a proximate cause requirement, the *en banc* Fifth Circuit's interpretation of §2259 results in a grossly disproportionate award of restitution, such as \$3.4 million, as part of a sentence for possession of two images of a victim and violates the Excessive Fines Clause of the Eighth Amendment of the United States Constitution.

The Court should reverse the *en banc* Fifth Circuit and overrule the issuance of the writ of mandamus because Amy has not demonstrated a right to the issuance of a writ that is "clear and indisputable." Despite the Government's contrary position to the District Court's ultimate factual finding on proximate causation, the District Court did not "so clearly and indisputably abuse its discretion in its decision." The opinion of the District Court should be upheld.



## ARGUMENT

### **18 U.S.C. §2259 Requires That a Victim's Losses Be Proximately Caused By a Defendant's Conduct Before a District Court Can Order Restitution.**

It is a bedrock principle of criminal law that criminal sentences should be rationally related and

proportionate to a defendant's criminal conduct.<sup>13</sup> Because an order of restitution is a part of a criminal sentence, it too should be subject to the same requirement. *Kelly v. Robinson*, 479 U.S. 36, 52-53 (1986). Thus, in a case in which 18 U.S.C. §2259 mandates restitution, there must be a causal relationship or nexus between the defendant's conduct and the victim's losses before a district court can order restitution.

Section 2259 is a mandatory criminal restitution statute that requires, upon application by a "victim" as that term is defined, a district court order a defendant to pay the full amount of any losses resulting from the defendant's offense conduct.

If the *en banc* Fifth Circuit is correct, then restitution in criminal sentencing will become a strict liability proposition where a defendant's offense conduct is irrelevant – not just for child exploitation offenses, but for every criminal offense with similar categories of compensable losses where restitution is mandatory. (18 U.S.C. §§1593, 2248 & 2264, all mandatory restitution statutes, that have categories of compensable losses nearly identical to those of §2259 with the identical "result of offense" language. §§2248(b)(3)(E); 2264(b)(3)(E)). Additionally, upholding

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<sup>13</sup> See Cicero's *De Legibus*, 106 BC; see also Ronen Perry, *The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory*, 73 TENN. L. REV. 177 (2006); Ronen Perry, *The Third Form of Justice*, 23 CANADIAN JOURNAL OF LAW AND JURISPRUDENCE (2010).

the *en banc* Fifth Circuit’s opinion would effectively ignore the fundamental sentencing concepts that a court view the totality of a defendant’s conduct in assessing punishment. 18 U.S.C. §3353(a); *United States v. Booker*, 543 U.S. 220 (2005).

**I. The Purpose Of §2259, Like Any Other Criminal Restitution Statute, Is To Hold A Defendant Accountable For Specific Harms Caused By His Specific Conduct And To Restore A Victim To A Prior State Of Well Being.**

Restitution is an integral part of virtually every formal system of criminal justice.<sup>14</sup> It is a criminal penalty that forces the defendant to confront, in concrete terms, the precise harm his actions have caused. *Kelly*, 479 U.S. at 52-53 (restitution orders imposed as part of a “criminal judgment” were not dischargeable in the same manner as personal debts in a Chapter 7 bankruptcy proceeding). Unlike traditional fines, which are payable to the Government and bear no necessary relationship to the harm caused, restitution has a more precise deterrent effect precisely because of its direct relationship between a victim’s losses or damages and a defendant’s punishment. *Id.* at n.10 (1986) (referencing

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<sup>14</sup> *United States v. Webb*, 30 F.3d 687, 689 (6th Cir.1994) (citing legislative history of the VWPA, S. Rep. No. 532, 97th Cong., 2nd Sess. 1, 30 (1982), reprinted in 1982 U.S.C.C.A.N. 2515, 2536).

*Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931, 937-941 (1984). The legislative history of every criminal restitution statute, from the Victim and Witness Protection Act of 1982 (VWPA), to the Mandatory Victims Restitution Act (MVRA), and each amendment thereafter, Congress has increased the number of offenses subject to restitution and categories of compensable losses. Clearly, it is Congress' desire and intent to impose restitution in criminal sentences that are both punitive and compensatory in nature.<sup>15</sup>

Section 2259 should be interpreted as an essential part of the larger criminal sentencing scheme embodied in 18 U.S.C §3553(a). In determining restitution, a sentencing court should first look to U.S.S.G. §5E1.1 which authorizes restitution for the full amount of the victim's losses if authorized under 18 U.S.C. §§1593, 2248, 2259, 2264 and other statutes. After the passage of the MVRA which includes §§2248, 2259 and 2264, the Administrative Office of the United States Courts instructed probation officers to employ a five-step analysis to determining restitution, which required the officer to: (1) identify the statutory offense of conviction; (2) identify the victims of the offense of conviction; (3) identify the harms to the victims caused by the offense of conviction; (4)

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<sup>15</sup> Brian Kleinhaus, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA Through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment*, 73 FORDHAM L. REV. 2711, 2715 (2005).

identify which harms or costs are compensable as restitution; and (5) consider the effect of plea agreements on restitution amounts. Catherine M. Goodwin, *The Imposition of Restitution in Federal Criminal Cases*, FEDERAL PROBATION, p. 5 (June 2001). A district court must recognize that, central to restitution, is the idea of restoring a victim, to the extent money can do so, to the position occupied before a defendant's offense conduct and any resulting injury. *Hughey v. United States*, 495 U.S. 411, 416 (1990); *United States v. Pescatore*, 637 F.3d 128 (2d Cir.2011).

## **II. An Accurate Application Of The Canons Of Statutory Construction Require A Causal Relationship Or Nexus Between A Defendant's Conduct And A Victim's Losses Before Restitution Can Be Awarded.**

### **A. The Plain Language of the Statute Clearly Suggests That the Government Establish a Causal Connection Between a Defendant's Offense Conduct and a Victim's Losses or Damages.**

The starting point in interpreting the construction, meaning and application of a statute is the language itself. *Kelly*, 479 U.S. at 43 (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975)). Courts must not be guided ““by a single sentence or member of a sentence, but should look to the provisions of the whole law, and to its object and policy.”” *Id.* (quoting *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222 (1986)). See *Bailey v.*

*United States*, 516 U.S. 137, 145 (1995); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (citing *Shell Oil Co. v. Iowa Dept. of Revenue*, 488 U.S. 19, 26 (1988)). “Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used.” *King*, 502 U.S. at 221 (quoting *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir.1941) (L. Hand, J.)).

When general words follow, or are surrounded by, specific words, the general words are to be understood in light of the specific terms. See *Hughey*, 495 U.S. at 419. If the aforementioned rules of construction are applied to §2259, the phrase “any other losses suffered by the victim as a proximate result of the offense” in §2259(b)(3)(F) must mean that the other enumerated losses in (b)(3)(A-E) must also be suffered as a proximate result of the offense.

The Court must assume the legislative purpose is expressed by the ordinary meaning of the words used. Absent a clearly expressed legislative intent to the contrary, the statutory language must be regarded as conclusive. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982).

Perhaps no interceptive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and

logical relation of its many parts. Sir Edward Coke explained the canon in 1628:

“[I]t is the most natural and genuine exposition of a statute to construe one part of the statute by another part of the same statute, for that best expressed the meaning of the makers.” Coke added: “If any sections, and finding out the sense of one clause by the words or obvious intent of the other.” In more modern terms, the California Civil Code states, with regard to private documents: “The whole of a contract is to be taken together, as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.”

Context is a primary determinant of meaning. A legal instrument typically contains many interrelated parts that make up the whole. The entirety of the document thus provides the context for each of its parts. When construing the United States Constitution in *McCulloch v. Maryland*, Chief Justice John Marshall rightly called for a “fair construction of the whole instrument.” More than a century later, Justice Benjamin Cardozo echoed the point in the context of legislation: “[T]he meaning of a statute is to be looked for not in any single section, but in all the parts together and in their relation to the end in view.”

ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS*, 167-68 (2012) (internal citations omitted).

**1. The statutory definition of “victim” in §2259 plainly suggests a finding of causation before restitution can be ordered.**

Under §2259, “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 victims’s losses. . . .” 18 U.S.C. §2259(b)(1). “Victim” is defined as “. . . the individual harmed as a result of a commission of a crime under this chapter.” 18 U.S.C. §2259(c). Both 18 U.S.C. §2248 (Sexual Abuse) and 18 U.S.C. §2264 (Domestic Violence and Stalking) employ the same definition of “victim.” Other restitution statutes, by contrast, define victim more broadly, as “. . . a person directly and proximately harmed as a result of the commission of an offense” for which restitution can be ordered. 18 U.S.C. §3663(a)(2) (emphasis added); *see also id.* §3663A(a)(2); *id.* §2327(c). Significantly, Congress has repeatedly used the “result of” language in defining a victim’s relationship to an offense for the purposes of restitution. This Court has explained that the meaning of “results of” “is naturally read simply to impose the requirement of causal connection.” *Brown v. Gardner*, 513 U.S. 115, 119 (1994) (assuming that proximate causation applies to veterans’ compensation statute). Numerous courts

have likewise held that similar language requires causation.<sup>16</sup>

The fact that the list of examples of what can form the basis of restitution awards is prefaced by an announcement that these examples are meant to illustrate the term “full amount of the victim’s losses” further links them to this causation requirement. 18 U.S.C. §2259(b)(3). Restitution awards under 18 U.S.C. §2259(b)(2) must be made in accordance with 18 U.S.C. §3664, through which the awards are enforced. Section 3664 contains references to “the loss sustained by a victim as a result of the offense.” 18 U.S.C. §3664(e).

In criminal statutes, the phrase “results from” requires both “but for” and proximate causation. As Professor LaFave explains, when crimes are defined “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.” 1 Wayne R. LaFave, *Substantive Criminal Law* §6.4 at 464 (2d ed. 2003) (emphasis added). In other words, “it must

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<sup>16</sup> See also *CNG Transmission Mgmt. VEBA v. United States*, 588 F.3d 1376, 1379 (Fed. Cir.2009) (“The plain meaning of the term ‘result in’ is causes.”); *Black Hills Aviation, Inc. v. United States*, 34 F.3d 968, 975 (10th Cir.1994) (holding that “use of the plain language – ‘as a result of – is logically interpreted to mean “caused by” . . . not connected with’”); *Am. Ins. Co. of City of Newark, N.J. v. Keane*, 233 F.2d 354, 360 (D.C. Cir.1956) (defining the verb “result” as “[t]o proceed, spring, or arise as a consequence, effect, or conclusion”) (quoting MERRIAM-WEBSTER NEW INTERNATIONAL DICTIONARY (2d ed. 1953)).

be determined that the defendant's conduct was the cause in fact of the result, which usually . . . means that but for the conduct the result would not have occurred." *Id.* And, "[i]n addition, even when cause in fact is established, it must be determined that any variation between the result intended . . . or hazarded . . . and the result actually achieved is not so extraordinary that it would be unfair to hold the defendant responsible for the actual result." *Id.*

As the Second Circuit stated:

[P]roximate cause is a deeply rooted principle in both tort and criminal law that Congress did not abrogate when it drafted § 2259. *See Monzel*, 641 F.3d at 535-36; *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978) ("Congress [is] presumed to have legislated against the background of our traditional legal concepts which render [proximate cause] a critical factor, and absence of contrary direction" here "[is] taken as satisfaction [of] widely accepted definitions, not as a departure from them." (*quoting Morissette v. United States*, 342 U.S. 246, 263 (1952))).

*Aumais*, 656 F.3d at 153.

The Second Circuit found little reason to conclude that Congress intended to eliminate a proximate cause requirement from §2259.

The Ninth Circuit applied the "whole text cannon" in finding a proximate cause requirement between

the restitution order and the defendant's crime in its reading of §2259. In *United States v. Laney*, 189 F.3d 954, 965 (9th Cir.1999), the court stated that the definition of "victim" in §2259(c), i.e., "the individual harmed as a result of a commission of a crime under this chapter," created a requirement for a nexus between the harm to the victim and the defendant's crime. *Id.* at 965. The court therefore applied the proximate cause requirement to all classes of injury in §2259(b)(3) based on that definition. The *Laney* Court did not find it necessary to parse commas versus semicolons or debate grammar.

*Laney's* interpretation that a victim is an individual harmed by a commission of a specific crime is consistent with the traditional forms of restitution and a fair reading of the entire statute. Under a fair reading of §2259(c), Amy is the victim of a crime and is entitled to restitution from Paroline for harm caused by *his* crime, not some other person's crime or crimes.<sup>17</sup>

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<sup>17</sup> In the instant case, Amy's uncle who sexually abused her and created the child pornography to distribute on the internet was ordered to pay \$6,000 in restitution. It is incongruous that persons who simply possessed two of the images he created would be ordered to pay \$3.4 million in restitution.

**2. When read within the context of other mandatory criminal restitution statutes, §2259 must be interpreted to have a causation requirement.**

The MVRA enacted sweeping changes to the restitution process, amending the permissive restitution statute, §3663, adding the general mandatory restitution statute, §3663A, and amending the existing mandatory restitution statutes, §§2248, 2259 & 2264, to reflect a cohesive scheme to assist victims of sexual abuse, child exploitation and domestic violence. S. Rep. No. 104-179 (1995).<sup>18</sup> At the same time that §103 of the MVRA added §3663A and amended §3663, §104 amended the mandatory restitution provisions of §§2248, 2259 & 2264 to conform with one another. Congress stated that “this section is intended by the committee to conform the mandatory and permissive restitution provisions in current law to the provisions of this act.” *Id.* at 30. Section 105 of the MVRA made all restitution provisions under §§103 and 104 subject to the consolidated procedural requirements, including enforcement, of 18 U.S.C. §3664. *Id.* Congress clearly intended the MVRA to

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<sup>18</sup> The “directly and proximately” language was added to §3663(a)(2) at the same time Congress amended §2259 with respect to its procedural provisions, *see* Antiterrorism and Effective Death Penalty Act, §205, 110 Stat. at 1229-31, but Congress expressly declined to alter the definition of victim under §2259; *see* S. Rep. No. 104-179 at 14 (1995) (“No change is made to the scope of restitution required under the Violence Against Women Act provisions. . .”).

create a uniform scheme for ordering restitution in criminal cases. The intent was to bring the permissive and mandatory restitution statutes into conformity with one another and to ensure that the mandatory restitution provisions apply only where the named, identifiable victim suffers a physical injury or pecuniary loss directly and proximately caused by a defendant's offense conduct. *See United States v. Perry*, 360 F.3d 519, 524 (6th Cir.2004).

The *en banc* Fifth Circuit did not consider that two restitution statutes enacted in the same bill as §2259 – 18 U.S.C. §2248 and §2264 – have categories of compensable losses nearly identical to those of §2259, but also include “any costs incurred in obtaining a civil protection order.” *Id.* §2248(b)(3)(E); §2264(b)(3)(E). The language used by Congress in §§2248(a)(3)(F) and 2264(a)(3)(F) use the same “proximate result of the offense” language found in §2259(a)(3)(F).

Similarly, 18 U.S.C. §1593, which provides restitution for peonage, slavery, and human trafficking offenses, expressly incorporates the definition of “full amount of the victim's losses” used in §2259, but includes “in addition . . . the greater of the gross income or value to the defendant of the victim's services or labor or the value of the victim's labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act.” §1593(b)(3).

Because these statutes have the same categories of compensable losses and use the same catchall proximate result language as §2259, then they too must be interpreted in the same manner. If the *en banc* Fifth Circuit is correct, then defendants convicted under each of these statutes will be strictly liable for mandatory restitution, irrespective of their offense conduct.

### **3. Congress is presumed to understand the common meaning of terms used.**

By adopting a mandatory restitution statute, Congress is presumed to have understood the context of the meaning of the terms used, their common law meaning and the application of those terms. *Morissette*, 342 U.S. at 263; *Neder v. United States*, 527 U.S. 1, 23 (1999) (“It is a settled principle of interpretation that, absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses.”). The specific language of §2259 requires a determination that all losses or damages suffered by a victim, as the statute defines that term, must have been proximately caused by the defendant’s offense conduct. The relationship between restitution and a defendant’s conviction was addressed in *Hughey*, 495 U.S. at 419. The Court interpreted the restitution provisions of the VWPA, 18 U.S.C. §§3579, 3580 (1982 ed. and Supp. IV). The Court held that the language and structure of the Act makes plain Congress’ intent to authorize an award of restitution for the loss caused by the specific

offense conduct. When the Court attempted to limit restitution stemming from the crime of conviction, Congress responded by amending the VWPA to authorize restitution for all of a defendant's offense conduct. This amendment is consistent with the concept of criminal sentencing for all of a defendant's relevant conduct as required by U.S.S.G. §1B1.3.

**B. The Fifth Circuit Erred When It Applied *Barnhart v. Thomas*, 540 U.S. 20 (2003), Because It Failed to First Employ the Primary Tools of Statutory Construction.**

In this case, the *en banc* Fifth Circuit failed to consider the full language of §2259 and construed the plain language of §2259(b)(1) as requiring a restitution order for all losses enumerated in §2259(b)(1)(A-E) without regard to the existence of proximate cause between the defendant's actions and the losses incurred by the victim. The *en banc* Fifth Circuit determined that once a person was determined to be a victim as defined by §2259(c), any proximate cause requirement applies only to §2259(b)(1)(F) "any other losses suffered by the victim as a proximate result of the offense." *In re Amy*, 701 F.3d at 762.

In doing so, the *en banc* Fifth Circuit relied on this Court's holding in *Barnhart*, 540 U.S. at 26, holding that a limiting clause or phrase should be read as modifying only the noun or phrase it immediately follows. The Fifth Circuit misapplied *Barnhart*

which must be limited in its application to a federal agency's "reasonable" interpretation of the agency's application of a statute. *Barnhart* should not apply to the interpretation and application of §2259.

In this case, the *en banc* Fifth Circuit ignored the plain language of all of §2259 and its relationship to other restitution statutes. Applying the rule of the last antecedent to §2259(b)(3)(F) to exclude proximate cause from §2259(b)(3)(A-E) would require the Court to accept the unlikely premise that Congress intended to jettison decades of jurisprudence requiring that proximate cause be established before a criminal defendant can be ordered to pay restitution to a crime victim. It is more likely that Congress structured §2259(b)(3) to broadly define the types of losses for which a victim of a Chapter 110 offense can receive restitution. *See United States v. Hayes*, 555 U.S. 415, 423 (2009). The *en banc* Fifth Circuit ignored the entirety of the statute and ignored *Barnhart's* specific acknowledgment that the "rule of last antecedent" does not apply when a contrary interpretation of the statute appears. *Id.* at 26. "Where no contrary intention appears, refer solely to the last antecedent. While this rule is not an absolute and can assuredly be overcome by other indicia of meaning, the Court has stated that construing a statute in accord with the rule is quite sensible as a matter of grammar." *Nobelman v. American Savings Bank*, 508 U.S. 324, 330 (1993); *Barnhart*, 540 U.S. at 26. The rationale of *Barnhart* is inapplicable to any statutory interpretation of §2259 because the entire text of §2259 includes

a causation requirement from its definition of victim as well as its cross reference to §§3663, 3663a and 3664. Moreover, the issue of proximate cause in criminal restitution is a bedrock principle that is found in all restitution statutes.

**C. The Court's Holding in *Porto Rico Railway, Light & Power Co. v. Mor*, 253 U.S. 345 (1920) Requires a Determination of a Victim's Losses Enumerated in §2259(b)(3)(A-F) Be Based on Proximate Cause.**

In *Porto Rico Railway, Light & Power Co. v. Mor*, the Court construed a jurisdictional statute<sup>19</sup> similar in structure to §2259. The Court held the phrase “not domiciled in Porto Rico” applied to all of the categories of persons included in the phrase “citizens of a foreign State or States, or citizens of a State, Territory or Districts of the United States.” *Id.* at 348. The Court explained that when several words are followed by a clause which is applicable as much to

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<sup>19</sup> The provision contained in §41 of the so-called Jones Act of March 2, 1917, c. 145, 39 Stat. 951, 965, interpreted in *Porto Rico Railway, Light & Power Co.*, 253 U.S. at 346, is as follows:

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, wherein the matter in dispute exceeds, exclusive of interest or cost, the sum or value of \$ 3,000. . . .

the first and other words as to the last, the natural construction is to read the clause as applicable to all. *Id.*; see *United States v. Bass*, 404 U.S. 336 (1971).

In *Bass*, the Court interpreted 18 U.S.C. App. §1202(a). In pertinent part, that statute reads:

Any person who – “(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony . . . and who receives, possesses, or transports in commerce or affecting commerce . . . any firearm shall be fined not more than \$ 10,000 or imprisoned for not more than two years, or both.”

The Court noted that while the statute does not read well, “the natural construction of the language” suggests that the clause “in commerce or affecting commerce” qualifies all three antecedents in the list based on *Porto Rico Railway, Light & Power Co.* See *Bass*, 404 U.S. at 340. The Court held that because the phrase “in commerce or affecting commerce” undeniably applies to at least one antecedent, and since it makes sense with all three, the more plausible construction here is that it in fact applies to all three. It is far more likely that the phrase was meant to apply to “possesses” and “receives” as well as “transports.” As the court below noted, the inclusion of such a phrase “mirror[s] the approach to federal criminal jurisdiction reflected in many other federal statutes.” *Id.* 404 U.S. at 346.

The *en banc* Fifth Circuit rejected the Court’s holding in *Porto Rico Railway* based on the structure

of §2259(b)(3). Section 2259(b)(3) consists of six subsections containing a numbered clause with the subsections separated by semicolons rather than a single long sentence as in *Porto Rico Railway*.<sup>20</sup> The *en banc* Fifth Circuit held the proximate cause requirement applied only to the last subsection, a catchall for all other injuries not listed in the other subsections. *In re Amy*, 701 F.3d at 763. Judge Davis in his dissent would hold the court was bound by *Porto Rico Railway* and he wrote that the use of semicolons rather than commas was irrelevant because either could be used grammatically. *Id.* at 777 n.3 (Davis, J, dissenting).

The *en banc* Fifth Circuit's erred by ignoring *Porto Rico Railway* while focusing on whether commas or semicolons were used to separate subsections in §2259(b)(3). Unlike the Ninth Circuit in *Laney*, the *en banc* Fifth Circuit erred in focusing on only a part of the statute rather than reading the statute as a whole. The *en banc* Fifth Circuit failed to interpret §2259 as requiring restitution only for the defendant's criminal acts.

In *McDaniel*, 631 F.3d at 1209, the Eleventh Circuit stated that the application of *Porto Rico*

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<sup>20</sup> Section 2259(b)(4)(b)(ii) forbids district courts to decline issuing restitution orders because of “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*.” (emphasis added). “Any other source” would include other restitution orders.

*Railway* to its interpretation of §2259(b)(3) is further supported by the procedures for issuing and enforcing restitution orders. Section 2259(b)(2) expressly incorporates the procedures of 18 U.S.C. §3664, stating that “[a]n order of restitution under this section shall be issued and enforced in accordance with § 3664 in same manner as an order under section 3663A.” Section 3664(e) states unequivocally 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.” 18 U.S.C. §3664(e) (emphasis added). The Eleventh Circuit recognized that “[I]t is . . . a familiar canon of statutory construction that [catchall] clauses are to be read as bringing within a statute categories similar in type to those specifically enumerated.” *McDaniel*, 631 F.3d at 1208-09; *see also Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973).

The fact that §2259 enumerates those losses “bears emphasis because at the same time Congress enacted § 2259, it enacted another restitution statute that did not enumerate categories of losses.” *Kearney*, 672 F.3d at 97 n.13. Instead, that statute “stated that ‘the term “full amount of the victims losses” means all losses suffered by the victim as a proximate result of the offense.’” *Id.* (footnote omitted) (*quoting* Pub. L. 103-322, §250002, 108 Stat. 2082, 2083) (codified at 18 U.S.C. §2327(b)(3)). And all of the restitution statutes enacted by Congress in 1996 provide “losses suffered by the victim as a proximate result of the offense.” 18 U.S.C. §§2248, 2264.

The Second Circuit in *United States v. Hayes*, 135 F.3d 133, 137-38 (2d Cir. 1998), applied *Porto Rico Railway* to 18 U.S.C. §2264(b)(3), which is identical to §2259(b)(3), except that its subsection (E) reads: “attorneys’ fees, plus any costs incurred in obtaining a civil protection order.” The Second Circuit held, “Reading [sub]section 2264(b)(3)(E) together with [sub]section 2264(b)(3)(F), attorneys’ fees and costs of obtaining a protection order are among the ‘losses suffered by the victim as a proximate result of the offense.’” *Id.* at 138. The Second Circuit stated that §2264(b)(3) “authorizes restitution” for the specific losses in subsections 2264(b)(3)(A-E). *See id.* The “proximate result” clause in the last subsection 2264(b)(3)(F) shows that Congress considered the costs in subsections 2264(b)(3)(A-E) “among the losses that are proximately caused by the offense,” but that causation still must be proved in each case. *Id. Accord, Kearney*, 672 F.3d at 97 (the “express inclusion [of the specific losses in subsections 2259(b)(3)(A-E)] . . . indicates that Congress believed such damages were sufficiently foreseeable to warrant their enumeration in the statute.”); *see also United States v. Gamble*, 709 F.3d 541, 553 (6th Cir.2013) ([T]he list of recoverable losses that the statute provides confirms the breadth of what is a foreseeable consequence of defendants’ actions.).

Variations among these restitution statutes “demonstrate that Congress viewed particular offenses as causing foreseeable risks of certain losses [meriting enumeration] in the[se] [restitution] statutes.”

*Kearney*, 672 F.3d at 97 n.13. The First Circuit concluded that, although Congress determined that restitution offenses foreseeably cause the losses in subsections (A) through (E), the defendant – to be liable – still must proximately cause the victim’s losses. *Id.* at 95-97, 99-100.

**D. If This Court Finds §2259 Is Ambiguous After Applying These Canons of Statutory Construction, the Legislative History Clearly Reveals Congress’ Intent That Orders of Restitution Be Predicated on a Finding of Proximate Causation.**

Through the MVRA, Congress intended to create a streamlined process that only awarded restitution to all identifiable victims suffering any actual losses. Section 103 of the MVRA added the mandatory restitution statute, §3663A, and amended §3663, so that both sections defined “victim” as “(2) . . . a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered[.]” 18 U.S.C. §§3663, 3663A.

As noted by the Fourth Circuit:

To the extent that Congress has addressed the matter of causation in the restitution statute, Congress has suggested that proximate causation is a feature of the legislation. A Senate committee report on the bill setting forth the language of the restitution statute contained the following comment:

**“Mandatory restitution: This section requires sex offenders to pay costs incurred by victims as a proximate result of a sex crime.”** S. Rep. No. 103-138, at 56 (1993); see *Kearney*, 672 F.3d at 96 n.11 (noting same).

*Burgess*, 684 F.3d at 458. (emphasis added)

In enacting the MVRA, Congress expressed its intent to require proximate causation for mandatory restitution:

[T]he committee amendment requires that there be an identifiable victim who suffers a physical injury or pecuniary loss before mandatory restitution provisions would apply. The committee intends this provision to mean . . . **that mandatory restitution provisions apply only in those instances where a named, identifiable victim suffers a physical injury or pecuniary loss directly and proximately caused by the course of conduct under the count or counts for which the offender is convicted.**

S. Rep. No. 104-179 at 29-30 (emphasis added).

In *United States v. Pescatore*, 637 F.3d 128 (2d Cir.2011), the Court noted that the MVRA mandates that restitution be ordered to crime victims for the “full amount” of losses caused by a defendant’s criminal conduct. See 18 U.S.C. §3664(f)(1)(A); *United States v. Boccagna*, 450 F.3d 107, 115 (2d Cir.2006);

*United States v. Reifler*, 446 F.3d 65, 137 (2d Cir.2006).

There is nothing in the legislative history of §§2248, 2259 or 2263 to suggest that Congress intended to eviscerate the long-standing principle that restitution ordered for a defendant is to be based on harm proximately caused by the conduct of conviction.

**E. The Application of the Rule of Lenity to §2259 Requires That the Government Establish Proximate Cause Between the Defendant's Conduct Underlying a Conviction and a Victim's Losses or Damages Before a Restitution Order Can Be Entered.**

If the wording of the statute, its context and its legislative history are not sufficiently clear to properly construe §2259, the Court should apply the Rule of Lenity, that is, when there is ambiguity concerning the ambit of criminal statutes, they are resolved in favor of lenity. *Bass* at 347 (citing *Rewis v. United States*, 401 U.S. 808, 812 (1971)). The *Bass* Court described the Rule of Lenity as requiring that when there is a choice between two statutory constructions, it is appropriate for the Court before choosing the harsher construction to require “that Congress should have spoken in language that is *clear and definite*.” *Id.* (Emphasis added).

In their interpretation of §2259, a plurality of courts have employed an overlay of traditional tort principles to the statutory language to resolve the ambiguity of the restitution statute. *Burgess*, 684 F.3d at 457. As noted by the Seventh Circuit in *Laraneta*, 700 F.3d at 989,

either the “last antecedent” canon as defined by *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) or the “series-qualifier” canon defined by *Porto Rico Railway, Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920) could be the basis for interpreting the meaning of §2259. When applying both canons, the statute obtains two distinct conflicting meanings.

The language of §2259 regarding a causal requirement is ambiguous when read in view of *Barnhart* and *Porto Rico Railways*. Therefore, the Rule of Lenity must apply. Further, the discretionary restitution statutes, 18 U.S.C. §3663, and 18 U.S.C. §3663A, unlike §2259, specify that proximate cause must be found for a sentencing court to award restitution by defining “victim” as follows:

For purposes of this section, the term “victim” means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered[.] 18 U.S.C. §§ 3663, 3663A (emphasis added).

This clarity does not exist in §2259. Instead, §2259 defines “victim”:

(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.

The possible ambiguity within the statute revolves around the meaning of “the result of the offense” contained in 18 U.S.C. §2259(3)(F) and the definition of “victim”. In context, the phrases “as a result of” and “as a proximate result of” are unclear. *See United States v. Hardy*, 707 F.Supp.2d 597, 607 (W.D. Pa. 2010).

To the extent that any ambiguity remains in statutory construction, the Court in *Bass*, *Rewis* and *Hughey* applied the Rule of Lenity. If there are two possible constructions of a statute, the one most favorable to the defendant should be chosen. As the Court held in *United States v. Santos*, 553 U.S. 507, 515 (2008):

When interpreting a criminal statute, we do not play the part of a mindreader. In our seminal rule-of-lenity decision, Chief Justice Marshall rejected the impulse to speculate regarding a dubious congressional intent. “[P]robability is not a guide which a court, in construing a penal statute, can safely take.” *United States v. Wiltberger*, 18 U.S. 76, 5 Wheat. 76, 105, 5 L. Ed. 37 (1820). And Justice Frankfurter, writing for the Court in another case, said the following: “When

Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.” *Bell v. United States*, 349 U.S. 81, 83, 75 S. Ct. 620, 99 L. Ed. 905 (1955).

When the Court construed a restitution statute in *Hughey*, it applied the rule of lenity:

Even were the statutory language regarding the scope of a court’s authority to order restitution ambiguous, longstanding principles of lenity, which demand resolution of ambiguities in criminal statutes in favor of the defendant, *Simpson v. United States*, 435 U.S. 6, 14-15, 98 S. Ct. 909, 913-14, 55 L. Ed.2d 70 (1978) (applying rule of lenity to federal statute that would enhance penalty), preclude our resolution of the ambiguity against petitioner on the basis of general declarations of policy in the statute and legislative history. *See Crandon v. United States*, 494 U.S. 152, 160, 110 S. Ct. 997, 1002, 108 L.Ed.2d 132 (1990) (“Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text.”)

495 U.S. at 422.

The text of §2259 does not clearly warrant discarding the proximate cause requirement found in all other restitution statutes. The “touchstone of the rule of lenity is statutory ambiguity.” *Bifulco v.*

*United States*, 447 U.S. 381, 387 (1980). The rule is applied only when, after consulting traditional canons of statutory construction, a court is left with an ambiguous statute. *United States v. Shabani*, 513 U.S. 10, 17 (1994). See also *United States v. Fisher*, 2 Cranch 358, 386 (1805) (Marshall, C.J.); *Bass*, 404 U.S. at 347.

Lenity in construing statutes gives effect to two bedrock principles. First, there should be clear warnings as to what the law will do when certain lines are crossed. To make the warnings fair, so far as possible the line should be clear. Second, legislatures and not courts should define criminal activity. The latter embodies the “instinctive distaste against men languishing in prison unless the lawmakers have clearly said they should.” Thus doubts are resolved in favor of the defendants. *Bass*, 404 U.S. at 348. The application of the rule of lenity to §2259 requires a proximate cause requirement between the conduct of conviction and any order for restitution for damages arising from the conduct underlying the offense of conviction.

### **III. Proximate Causation Is The Only Appropriate Causal Relationship Or Nexus Required To Be Proven By The Government Under §2259.**

#### **A. Proximate Cause Is an Indispensable Element of Criminal Restitution.**

It is apparent from the plain language, context, and legislative history of §2259 that, although it 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.” *Monzel*, 641 F.3d at 535 n.5. Section 2259’s intent is to make a victim of sexual exploitation whole for losses or damages that *result* from the commission of a specific offense. In interpreting §2259, the D.C. Circuit reasoned:

It is a bedrock rule of both tort and criminal law that a defendant is only liable for harms he proximately caused. *See* Restatement (Third) of Torts: Liability For Physical and Emotional Harm § 26 cmt. a (2010) (calling proximate cause a “requirement[] for liability in [548] tort”); W. Page Keeton et al., *Prosser and Keeton on The Law of Torts* § 41, at 263 (5th ed. 1984) (“An essential element of the plaintiff’s cause of action for negligence, or . . . any other tort, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered. This connection usually is dealt with by the courts in terms of what is called ‘proximate cause’ . . .”); Wayne R. Lafave, *Substantive Criminal Law* § 6.4, at 464 (2d ed. 2003) (“[For] crimes so defined as to require not merely conduct but also a specified result of conduct, the defendant’s conduct must be the ‘legal’ or ‘proximate’ cause of the result.”); *see also id.* § 6.4(c), at 471 (“The problems of [proximate] causation arise in both tort and criminal settings, and the one situation is closely analogous to the other. . . . [T]he

courts have generally treated [proximate] causation in criminal law as in tort law. . . .”). The purpose of this rule is clear: “legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability.” KEETON ET AL., *supra*, § 41, at 264.

The D.C. Circuit concluded that §2259 as a restitution statute incorporates the traditional requirement of proximate cause unless there is good reason to think Congress intended the requirement not to apply. *See Sherwood Bros. v. District of Columbia*, 113 F.2d 162, 163 (D.C. Cir.1940) (finding it “reasonable . . . to assume” that where a common law rule “has become embedded in the habits and customs of the community, . . . Congress had the common-law rule in mind when it legislated”). *Monzel*, 641 F.3d at 536. *See also U.S. Gypsum Co.*, 438 U.S. at 437 (Congress is presumed to have legislated against the background of our traditional legal concepts and, absent language signaling a departure, those concepts ought to be employed.).

Proximate cause in the criminal context means after “but for” cause is established, that criminal defendants should only be held liable for the foreseeable results of their actions. Foreseeability is generally defined as “whether any ordinarily prudent man would have foreseen that damage would probably result from *this act*.” *Consol. Aluminum Corp. v. C.F. Bean Corp.*, 833 F.2d 65, 67 (5th Cir.1987) (*quoting*

F. James & R. Perry, *Legal Cause*, 60 YALE L.J. 761, 786 (1951)) (detailing definitions of foreseeability and their origin). “The purpose of this rule is clear: ‘legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability.’” *Monzel*, 641 F.3d at 535-36 (quoting W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON LAW OF TORTS at 264 (5th ed. 1984)). Throughout these proceedings, the Government has agreed that §2259 requires a showing of proximate cause. The conflict between Paroline and the Government has been over the quantum of proof necessary to establish the necessary link between his conduct and the proven losses or damages presented in this case.

In the context of §2259, the determination of individual foreseeability should be based on the application of a substantial factor test. As Professor LaFave points out, the substantial factor test only applies to situations where “two causes, each alone sufficient to bring about the harmful result, operate together to cause it.” LaFave, §6.4(b) at 468. *Monzel*, 641 F.3d at 536-37. “[A] ‘general’ causation requirement without a subsidiary proximate causation requirement is hardly a requirement at all,” because “[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.” *Monzel*, 641 F.3d at 536-37 n.8 (citing *Amy Unknown*, 636 F.3d at 200).

“[E]valuated in light of its common-law foundations[,] proximate cause . . . requires ‘some direct relationship between the injury asserted and the injurious conduct alleged.’” *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 8-9 (2010) (quoting *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992)). “A link that is ‘too remote,’ ‘purely contingent,’ or ‘indirec[t]’ is insufficient.” *Id.* (quoting *Holmes*, 503 U.S. at 271, 274). Without the limitation such a link provides, liability would attach to all sorts of injuries a defendant might indirectly cause, no matter how “remote” or tenuous the causal connection. *Id.*; see also KEETON, §41, at 266 (explaining that “the mere fact of causation, as distinguished from the nature and degree of the causal connection, can provide no clue of any kind to singling out those [who] are to be held legally responsible,” for “once events are set in motion, there is, in terms of causation alone, no place to stop” (emphasis added)). See also *Pac. Operators Offshore, LLP v. Valladolid*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 680, 692 (2012) (Scalia, J. concurring) (The term “proximate cause” is shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability. Citing to W. KEETON, D. DOBBS, R. KEETON & D. Owen, PROSSER AND KEETON ON LAW OF TORTS §42, p. 243 (5th ed. 1984)). *CSX Transp., Inc. v. McBride*, 564 U.S. \_\_\_, 131 S. Ct. 2630, 2637 (2011). As the Court has repeatedly stated

Life is too short to pursue every event to its most remote, “but-for,” consequences, and the doctrine of proximate cause provides a

rough guide for courts in cutting off otherwise endless chains of cause-and-effect.

*Holmes*, 503 U.S. at 287.

It is conceivable that Congress would intend that those who violate child sex exploitation laws should pay restitution for such attenuated harms, but it seems unlikely it did so here – particularly when Congress employed the same language in 18 U.S.C. §§2248 and 2264 as it did in §2259. However, “[i]f Congress really had wished [courts to award restitution for losses defendants did not proximately cause], it could have provided that. It would, however, take a very clear provision to convince anyone of anything so odd.” *Field v. Mans*, 516 U.S. 59, 68 (1995).

### **B. Restitution Pursuant to §2259 Must Be Limited to Harms a Defendant Proximately Caused.**

Interpretation and application of the concept of proximate cause must be consistent with the congressional purpose of §2259 of ensuring full compensation of losses for the victims of child pornography distribution and possession. This is a timeless principle of statutory interpretation. *Dolan v. United States*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 2533, 2539, 177 L.Ed.2d 108 (2010) (interpreting the 90-day requirement of 18 U.S.C. §3664(d)(5) in light of the fact that “the statute seeks primarily to assure that victims of a crime receive full restitution”).

In calculating the dollar figure owed in restitution, the district court need only make a “reasonable determination of appropriate restitution.” *United States v. Innarelli*, 524 F.3d 286, 294 (1st Cir.2008) (quoting *United States v. Vaknin*, 112 F.3d 579, 587 (1st Cir.1997)) (internal quotation marks omitted). “Absolute precision” is not required. *Id.* (quoting *United States v. Burdi*, 414 F.3d 216, 221 (1st Cir.2005)) (internal quotation marks omitted). Moreover, the district court has leeway to “resolve uncertainties ‘with a view towards achieving fairness to the victim.’” *Id.* (quoting *Vaknin*, 112 F.3d at 587). And, in terms of §2259, the courts of appeals have recognized that “some degree of approximation” is acceptable and that “mathematical precision” is not required. *Monzel*, 641 F.3d at 540 (quoting *United States v. Doe*, 488 F.3d 1154, 1160 (9th Cir.2007)).

Because restitution awards under §2259 are limited to harms the defendant proximately caused, some evidence must be presented that shows that “but for” a defendant’s conduct, the losses or damages would not have occurred. In the instant case, the Government and Amy have presented evidence that Amy suffered losses stemming from her sexual exploitation as a child and argued persuasively that possession of child pornography causes harm to the minors depicted (see *New York v. Ferber*, 458 U.S. 747, 758-60 (1982)).

However, there has been no showing that any of Amy’s losses that are traceable to Paroline’s conduct. Amy has argued at length that the causes of her

injuries cannot reasonably be divided among the unknown number of possessors and distributors of her images and that Paroline is therefore jointly and severally liable with other possessors and distributors for the full amount of her losses. *See* RESTATEMENT (THIRD) OF TORTS §12 (2000) (“Each person who commits [an intentional tort] is jointly and severally liable for any indivisible injury legally caused by the tortious conduct.”); KEETON, §52, at 347 (“[E]ntire liability rests upon the obvious fact that each has contributed to the single result, and that no reasonable division can be made.”). But the very sources upon which Amy relies undermine her argument. Prosser, whom she quotes at length, states that “[s]uch entire liability is imposed” where two or more causes produce a single “result” and “either cause would have been sufficient in itself” to produce the result or each was “essential to the injury.” KEETON, §52, at 347.

Amy’s profound suffering is due in large part to her knowledge that each day, untold numbers of people across the world are viewing and distributing images of her sexual abuse. J.A. 71. Yet, based on her stipulation, none of her losses or damages result from her knowledge of Paroline’s conduct. J.A. 230. Paroline’s possession of two images of Amy was neither a necessary nor a sufficient cause of all of her losses. She has suffered tremendously from her uncle’s abuse regardless of what Paroline did. *See also* KEETON, §52, at 346 (“entire liability” is generally not imposed “where there is [a] factual basis for

holding that [the] wrongdoer's conduct was not a cause in fact of part of the harm").

Amy's claim for restitution is undermined by her withdrawing restitution claims in 80% of the cases for which she received notice. J.A. 158. And the expert reports and victim impact statement submitted as the supporting documentation underlying her claim for restitution were complete by November 18, 2008 (J.A. 67) nearly two months prior to Paroline's arrest on January 9, 2009. J.A. 1. The District Court's opinion 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 position to the court's ultimate factual finding on proximate causation, the district court did not so clearly and indisputably abuse its discretion by determining that the Government failed to establish Amy's losses or damages that were proximately caused by Paroline's conduct of conviction.

#### **IV. The Fifth Circuit's Decision Creates An Absurd Result.**

##### **A. The Fifth Circuit's Joint and Several Liability Rule Conflicts with §2259(b)(4)(B)(ii).**

The *en banc* Fifth Circuit and Amy would make all defendants jointly and severally liable for the restitution and cutting off Amy's recovery when the full amount of the restitution had been paid. This is inconsistent with the plain language of

§2259(b)(4)(B)(ii).<sup>21</sup> This is a misapplication of the whole text canon of statutory interpretation.

The plain reading of §2259(b)(4)(B)(ii) shows a congressional intent that victims be allowed multiple recoveries, either from insurance companies or other sources. The plain text of the statute abrogates the provision of 18 U.S.C. §3664(h) allowing district courts to either apportion restitution among multiple defendants or making each defendant liable for the full amount of restitution. Section 2259(b)(2) – dealing with the enforcement of the restitution order – cross references §3664. Section 3664(h) implies that joint and several liability may be imposed only when a single district judge is dealing with multiple defendants in a single case (or indictment); the law does not contemplate apportionment of liability among defendants in different cases, before different judges, in different jurisdictions around the country. In fact, two circuits have observed, in unpublished opinions, that joint and several liability is not permissible under §3664(h) regarding defendants in separate cases. *See Monzel*, 641 F.3d at 539 (*citing United States v. McGlown*, 380 F. App'x 487, 490-91 (6th

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<sup>21</sup> Section 2259(b)(4)(B)(ii) forbids district courts to decline issuing restitution orders because of “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*.” (emphasis added). “Any other source” would include other restitution orders.

Cir.2010) and *United States v. Channita*, 9 F. App'x 274, 274-75 (4th Cir.2001)).

The *en banc* Fifth Circuit's joint and several liability rule also ignores the abrogation of 18 U.S.C. §3664(j) restitution adjustments for crimes subject to §2259 restitution under the plain language of §2259(b)(4)(B)(ii). Section 3664(j) requires that restitution be paid to insurance companies or others obligated to pay for some or all of the victim's losses and reduces the amount of restitution by any amount recovered as compensatory damages in a state or federal civil proceeding. However, §2259(b)(4)(B)(ii) when read in conjunction with the Fifth Circuit's interpretation of §2259(b)(3) would not allow reduction of restitution to prevent a double recovery or to make third party payers whole. It specifically contemplates and allows multiple recoveries.<sup>22</sup>

When applied in conjunction with the Fifth Circuit's holding on proximate cause, §2259(b)(4)(B)(ii) requires restitution for all the victim's losses from *every* defendant because restitution paid by Defendant A would not be credited to restitution ordered by Defendant B. It would be compensation "from any other source." Thus, every defendant would be liable for all losses suffered by the victim regardless of whether his acts caused those losses and regardless of

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<sup>22</sup> Insurance companies might have a contractual right of subrogation.

whether the victim had already received the full amount of restitution.

### **B. Joint and Several Liability Rule Creates a Procedural Nightmare.**

The *en banc* Fifth Circuit's holdings creates an absurd result.

If §2259 were construed to allow joint and several liability with contribution from multiple defendants, the result would create a procedural nightmare for the courts. The *en banc* Fifth Circuit attempts to minimize the burden on the courts and the Government by stating that the Government and probation departments have access to payment information and can easily determine if full restitution has been paid. 701 F.3d at 771 n.17. This specific conclusion is not supported by the record in this cause. Specifically, the Administrative Office of the United States Courts informed the District Court that it would be “highly impractical if not impossible for a clerk to track debt payments in multiple jurisdictions over an extended period of time. . . . Clerks would be unaware of . . . subsequent convictions that result in new joint and several orders.” J.A. 131.

However, this ignores other factors including obtaining a restitution order in the cases in which Amy chooses not to participate. J.A. 230. Under the Fifth Circuit's joint and several liability theory, the burden on any single defendant such as Petitioner is limited by making other defendants jointly and

severally liable for the total restitution award. The Circuit failed to consider how this “protection” would work.

Assessing restitution among co-defendants – even different amounts assessed against different defendants – is both relatively easy and constitutional when the criminal activity involves a single scheme before a single district court. *See, e.g., United States v. Vineyard*, 699 F.Supp. 103 (E.D. Tex. 1998), *affirmed*, 860 F.2d 435 (5th Cir.1988) (Table), *cert. denied sub nom. Ryan v. United States*, 489 U.S. 1019 (1989). However, the type of joint and several liability in *Vineyard* is unlike the joint and several liability contemplated by the *en banc* Fifth Circuit in the instant case. *Vineyard* involved a discrete group of defendants involved in a related scheme tried before a single district court. The harm caused by each defendant is subject to reasonable determination.

In cases in which Amy chooses not to seek a restitution order, would the Government or defendants such as Paroline have the right to intervene in order to ensure that defendant was ordered to pay restitution? How are Paroline and others similarly situated to learn of those other cases? If the Government fails for whatever reason to seek a restitution order in a specific case, would Paroline and others under a joint and several restitution order have the right to mandamus the United States Attorney or the Attorney General to require the Government to seek a restitution order or contribution from that defendant? Would defendants subject to a restitution order

be able to file civil actions against others for contribution, including those in which Amy chose not to seek restitution?

**C. Registered Sex Offenders Cannot and Should Not Be Given the Opportunity to Relieve Their Crimes Under the Auspices of Pursuing “Joint and Several” Liability.**

The Fifth Circuit’s rationale would create an impossibility of enforcement based on often imposed prohibitions by district court that registered sex offenders not have contact with each other. *Gamble*, 709 F.3d at 553. In order to bring some semblance of order out of the chaos inherent in the *en banc* Circuit’s decision, it would be necessary to create some sort of nationwide system or court having jurisdiction over all restitution orders and possibly claims for contribution against defendants in cases where neither Amy nor the Government sought restitution. The alternative would be to allow some defendants to escape any restitution obligation while others shoulder the full burden. This would be contrary to the Fifth Circuit’s intent in imposing joint and several liability with the restitution to end when Amy received the entire amount of restitution.

The Court decided a similar but simpler method of assessing payments among various defendants.

The case, *McDermott, Inc. v. Amclyde*, 511 U.S. 202 (1994), involved admiralty litigation. The Court was faced with allocating payments in tort among settling and non-settling tortfeasors. It looked at three possible methods of allocation in RESTATEMENT (SECOND) OF TORTS §886A (1977) and held the fairest and most efficient manner of allocation was to require the non-settling tortfeasor to pay based on its proportionate share of the fault decided by the finder of fact. 511 U.S. at 217. This Court also considered the possibility that the approach could overcompensate the victim but was willing to accept that possibility. It wrote, “Several doctrines, such as the collateral benefits rule, recognize that making tortfeasors pay for the damages they cause can be more important than preventing overcompensation.” *Id.* at 219.

Applying a standard similar to *McDermott* would solve many of the procedural problems caused by the *en banc* Fifth Circuit’s joint and several liability theory. It would require judges to determine each defendant’s proportional share of the harm. It also would limit any defendant’s share of the total restitution to his proportionate share based on the harm he caused.

The result would be the requirement for a nexus between the defendant’s specific conduct and the degree of harm caused to the victim by his actions must be determined – that is, a finding of proximate cause.

**V. The *En Banc* Fifth Circuit's Decision, Imposing Strict Liability For All Losses And Damages Of A Victim For Those Individuals Who Possess Child Pornography, Would Result In Awards Of Restitution That Would Violate The Eighth Amendment Of The United States Constitution.**

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The Court has never actually applied the Excessive Fines Clause to criminal restitution. However, the Court has held that the Excessive Fines Clause "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *Austin v. United States*, 509 U.S. 602, 609-10 (1993). *See also United States v. Bajakajian*, 524 U.S. 321, 328 (1998).

In *Bajakajian*, the Court held that the forfeiture of \$357,144 that the Defendant failed to declare upon leaving the United States would violate the Excessive Fines Clause of the Eighth Amendment because full forfeiture would be grossly disproportional to the gravity of his offense. 524 U.S. at 328. The Court concluded that forfeitures can constitute a punishment for an offense. *Id.* The Court reasoned that the forfeiture of currency ordered by 18 U.S.C. §982(a)(1) was punishment because the statute orders the forfeiture of currency as an additional sanction when imposing a sentence on a person convicted of violating 18 U.S.C. §5316's reporting requirement. In

*Bajakajian*, the forfeiture could only be imposed at the culmination of a criminal proceeding which requires a conviction of an underlying felony, and it cannot be imposed upon an innocent owner of unreported currency, but only upon a person who has been convicted of a reporting violation. *Id.*

Likewise, for a court to order restitution pursuant to §2259, a person must be convicted of a Chapter 110 criminal sentence. Additionally, the restitution order can only be included as part of a sentence after the court considers 18 U.S.C. §3553(a) which authorizes the sentencing court to consider the need to provide “restitution to any victims of the offense.” 18 U.S.C. §3553(a)(7). Furthermore, to assist the sentencing court, a presentence report is prepared incident to FED. R. CRIM. P. 32(c)(1)(B) which is required to include any requests for restitution that must be addressed by the sentencing court. Finally, the presentence report applies the instruction set out by the sentencing guidelines which incorporates §2259 in U.S.S.G. §5E1.1.

Understandably, criminal restitution orders are both rehabilitative and punishment. *Kelly*, 479 U.S. at 53. Restitution is in the interest of the state, not for compensation of the victim<sup>23</sup> but rather is an

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<sup>23</sup> *Accord, United States v. Brown*, 744 F.2d 905, 909 (2d Cir.1984), discussing the penal purpose of restitution and noting that the value of restitution is not in paying victims but as an “instrument to make the offender more conscious of his debt to the victim.”

effective rehabilitative penalty that forces a defendant to confront, in concrete terms, the harm his actions caused. Such a penalty affects a defendant differently than a traditional fine, paid to the Government, and often calculated without regard to the harm the defendant causes. Similarly, the direct relationship between the harm and the punishment gives restitution a more precise deterrent effect than a traditional fine. *Kelly*, 479 U.S. at 49 n.10.

In *United States v. Dubose*, 146 F.3d 1141, 1145 (9th Cir.1998), the Court stated that restitution under the MVRA is punishment because the MVRA has not only remedial, but also deterrent, rehabilitative, and retributive purposes. *See Austin*, 509 U.S. at 610 ([I]f a sanction has a remedial purpose, but it also has a retributive or deterrent purpose, the Eighth Amendment is invoked). The Ninth Circuit in discussing the MURA, recognized that:

The legislative history of the Act makes this clear. *See, e.g.*, H. R. Rep. No. 104-16, at 5 (1995), reprinted in 1995 WL 43586 (stating [1145] that the law both “strives to provide [victims] with some means of recoupment” and “requires the offender to face the harm suffered by his victims and to others harmed by his unlawful actions.”); S. Rep. No. 104-179, at 18 (1995), reprinted in 1996 U.S.C.C.A.N. 924, 931 (emphasizing “the benefits that even nominal restitution payments have for the victim of crime, as well as the potential penological [sic] benefits of

requiring the offender to be accountable for the harm caused to the victim”).

Moreover, that restitution is tied to the culpability of the defendant “makes [it] look more like punishment.” *Austin*, 509 U.S. at 619.

*Dubose*, 146 F.3d at 1145. *Accord*, *Wright v. Riveland*, 219 F.3d 905, 916 (9th Cir.2000).

However, the Court held that when a restitution order is geared directly to the amount of a victim’s loss caused by a defendant’s criminal conduct, proportionality is built into the restitution order. *Id.*; see *United States v. Price*, 65 F.3d 903, 908 n.7 (11th Cir.1995). Applying this rationale to Paroline, no evidence was presented by the Government or Amy that Paroline’s conduct directly caused her losses or damages. When considering Amy’s stipulation “that none of the damages” flow from her knowledge of Paroline or his conduct” (J.A. 230), the *en banc* Fifth Circuit has held Paroline liable for \$3.4 million for someone else’s criminal conduct that caused Amy’s losses or damages.

For Excessive Fine consideration, the Court has held some penalties such as civil fines, taxes on drugs and forfeitures can constitute “punishment” even though not denominated as criminal punishment when the amount is “grossly disproportionate” to the defendant’s conduct or the circumstances are clearly punitive. In *United States v. Halper*, 490 U.S. 435 (1989), the Court held civil penalties for Medicare

fraud constituted punishment when the penalties bore no relationship to the costs to the Government. The *Halper* Court found that civil penalties 220 times the measurable loss to the Government were grossly disproportionate and constituted punishment for purposes of the Double Jeopardy Clause. Likewise, in *Department of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994), the Court found that a “tax” on marijuana eight times the value of the drug was so disproportionate that it constituted punishment rather than a tax. And, in *Austin*, the Court held forfeitures serve both a punitive and remedial process and are subject to an Excessive Fines Clause analysis.

*Halper*, *Kurth Ranch*, *Austin* and *Bajakajian* require a proportionality analysis between the penalty or sanction assessed and the harm caused by the criminal conduct. It is irrelevant whether the penalty is called a civil fine, a tax, or a forfeiture, the result is the same. To be constitutional under the Excessive Fines Clause,<sup>24</sup> there must be a reasonable relationship between the crime of conviction and the losses or damages a defendant’s conduct caused. The same constitutional requirement should apply to any mandatory restitution that requires the assessment of a \$3.4 million restitution order without regard to the harm caused by a defendant’s criminal acts.

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<sup>24</sup> Since restitution is part of the criminal trial proceeding, the Double Jeopardy Clause is not directly implicated.

More specifically, in contrast to drug taxes, fines or forfeitures, a request for restitution under §2259 depends not on the Government but rather a private citizen who is not a party to the prosecution. And, like in this case, a victim has discretionary power to hand select the defendant against whom restitution will be sought, the venue in which the matter will be litigated and, ultimately, the dollar amount of restitution ordered.<sup>25</sup> The Government's role is to simply present the evidence submitted by a private party and process any payments.

Contrary to the Court's jurisprudence, long-standing common law principles and Congressional intent in crafting criminal restitution statutes, the *en banc* Fifth Circuit held that the purpose of restitution is remedial, not punitive. So that restitution is not a punishment for Eighth Amendment purposes because it is not punitive. The court held restitution simply seeks to restore the victim instead of punishing the defendant. The *en banc* Fifth Circuit wrote off Paroline's and the Government's Eighth Amendment concerns that restitution award for \$3.4 million would violate the Excessive Fines Clause unless a victim's losses or damages were proximately caused

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<sup>25</sup> Of all the defendants convicted of offenses involving images of Amy, Amy has withdrawn her requests for restitution in 80% of the cases. In essence, Amy has commanded the Government's selective prosecution of otherwise similarly situated defendants in violation of the Equal Protection Clause of the Fifth Amendment.

by a defendant's offense conduct. 701 F.2d at 771-72. The *en banc* Fifth Circuit suggested that assessing restitution without a showing of proximate cause between the defendant's crime and the victim's loss "may appear harsh, it is not grossly disproportionate to the crime of receiving and possessing child pornography." *Id.* at 772.

Both of the *en banc* Fifth Circuit's holdings are incorrect.

The *en banc* Fifth Circuit's construction of §2259(b)(1)(A-E) breaks the connection between the defendant's crime and the losses or damages caused by the defendant's criminal acts. It would hold Paroline and all others who possessed images of Amy liable for \$3.4 million in restitution without consideration of how their crime related to Amy's losses. The *en banc* Fifth Circuit's position that while assessment of restitution without a showing of a nexus "may appear harsh" and not "grossly disproportionate to the crime of receiving and possessing child pornography," 701 F.3d at 772, directly conflicts with *Halper* and *Bajakajian*. For Eighth Amendment consideration, the Court has judged the constitutionality of the civil fines and forfeiture based on the harm the criminal acts cause in relation to an individual's conduct. The same rationale must be applied to restitution which is punitive.

Restitution awards such as those sought by Amy and approved by the *en banc* Fifth Circuit are punitive for another reason: They impose a restitution

obligation on defendants for harm caused before their criminal acts. As a logical matter, a defendant cannot cause harm prior to the date of his offense. *United States v. Fast*, 709 F.3d 712, 722 (8th Cir.2013), *citing Kearney*, 672 F.3d at 97.

As the Government has noted throughout these proceedings the imposition of multimillion dollar restitution awards in the absence of a showing of proximate cause raises significant Eighth Amendment concerns. Section 2259 must be interpreted to avoid “grave and doubtful constitutional questions.” *Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (*citing United States ex rel. Attorney Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909)). In *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289, 299-300 (2001), the Court relied upon the canon of statutory construction that if an otherwise acceptable statutory interpretation would raise serious constitutional problems and an alternative interpretation is fairly possible, “we are obligated to construe the statute to avoid such problems.” *See also United States v. Booker*, 543 U.S. 220, 286 (2005) (“where a statute is susceptible of two constructions, one of which grave and doubtful constitutional questions arise and the other of which such questions are avoided, our duty is to adopt the latter.”). Thus, §2259 must be interpreted to require that the Government prove that a victim’s losses as enumerated in §2259(b)(3)(A-F) must be proximately caused by a defendant’s conduct of conviction.

An award of \$3.4 million against an individual for possessing two images of child pornography is punitive and grossly disproportionate to the offense conduct. Especially when considering the fact that Amy stipulated that she could not attribute any of her losses or damages directly to Paroline's conduct. J.A. 230. Thus, based on the evidence presented in this case, it was the opinion of the District Court that the Eighth Amendment is violated when a restitution order is not limited to losses proximately caused by the defendant's conduct. *Paroline*, 672 F.Supp. at 789.

The Court should follow *Halper*, *Austin*, *Kurth Ranch*, and *Bajakajian* and construe §2259 in a manner that is consistent with the prohibition against Excessive Fines. The Court can only do so by requiring that proximate cause exists between a defendant's possession of child pornography and the losses or damages sustained by a victim in setting the amount of restitution. Any other result would undermine the legislative scheme embraced by §2259 and would require that a defendant pay restitution for losses or damages caused by the criminal conduct of others.



**CONCLUSION**

For all of the foregoing reasons, the decision of the Fifth Circuit granting mandamus should be reversed and the opinion of the District Court should be upheld.

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### **Amendment VIII**

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

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#### **18 U.S.C. § 1593. Mandatory restitution**

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

(b)(1) 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 under paragraph (3) of this subsection.

(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.

(3) As used in this subsection, the term "full amount of the victim's losses" has the same meaning as provided in section 2259(b)(3) and shall in addition include the greater of the gross income or value to the defendant of the victim's services or labor or the value of the victim's labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act (29 U.S.C. 201 et seq.).

(4) The forfeiture of property under this subsection shall be governed by the provisions of section 413 (other than subsection (d) of such section) of the Controlled Substances Act (21 U.S.C. 853).

(c) As used in this section, the term “victim” means the individual harmed as a result 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 a representative of the victim’s estate, or another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named such representative or guardian.

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### **18 U.S.C. § 2248. Mandatory restitution**

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

(b) **Scope and Nature of Order.** –

(1) **Directions.** – The order of restitution under this section shall direct the defendant to pay to 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

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accordance with section 3664 in the same manner as an order under section 3663A.

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

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

**(B)** physical and occupational therapy or rehabilitation;

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

**(D)** lost income;

**(E)** attorneys’ fees, plus any costs incurred in obtaining a civil protection order; 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.

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## **18 U.S.C. § 2264. Restitution**

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

**(b) Scope and Nature of Order.** –

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

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

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

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

**(B)** physical and occupational therapy or rehabilitation;

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

**(D)** lost income;

**(E)** attorneys’ fees, plus any costs incurred in obtaining a civil protection order; 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) **Victim Defined.** – 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.

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### **18 U.S.C. § 2327. Mandatory restitution**

(a) **In General.** – Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution to all victims of any offense for which an enhanced penalty is provided under section 2326.

(b) **Scope and Nature of Order.** –

(1) **Directions.** – The order of restitution under this section shall direct the defendant to pay to 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” means all 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) Victim Defined.** – In this section, the term “victim” has the meaning given that term in section 3663A(a)(2).

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## **18 U.S.C. § 3553. Imposition of a sentence**

**(a) Factors To Be Considered in Imposing a Sentence.** – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

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(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

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**(ii)** that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

**(B)** in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

**(5)** any pertinent policy statement –

**(A)** issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

**(B)** that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

**(6)** the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

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**18 U.S.C. § 3663. Order of restitution**

(a)(1)(A) The court, when sentencing a defendant convicted of an offense under this title, section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863) (but in no case shall a participant in an offense under such sections be considered a victim of such offense under this section), or section 5124, 46312, 46502, or 46504 of title 49, other than an offense described in section 3663A(c), may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense, or if the victim is deceased, to the victim's estate. The court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(B)(i) The court, in determining whether to order restitution under this section, shall consider –

(I) the amount of the loss sustained by each victim as a result of the offense; and

(II) the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

**(ii)** To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.

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

**(3)** The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.

**(b)** The order may require that such defendant –

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

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

**(B)** if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of –

**(i)** the value of the property on the date of the damage, loss, or destruction, or

**(ii)** the value of the property on the date of sentencing, less the value (as of the date the property is returned) of any part of the property that is returned;

**(2)** in the case of an offense resulting in bodily injury to a victim including an offense under chapter 109A or chapter 110 –

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

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

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

**(3)** in the case of an offense resulting in bodily injury also results in the death of a victim, pay an amount equal to the cost of necessary funeral and related services;

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

**(5)** in any case, if the victim (or if the victim is deceased, the victim's estate) consents, make restitution in services in lieu of money, or make restitution to a person or organization designated by the victim or the estate; and

**(6)** in the case of an offense under sections 1028(a)(7) or 1028A(a) of this title, pay an amount equal to the value of the time reasonably spent by the victim in an attempt to remediate the intended or actual harm incurred by the victim from the offense.

**(c)(1)** Notwithstanding any other provision of law (but subject to the provisions of subsections (a)(1)(B)(i)(II) and (ii), when sentencing a defendant convicted of an offense described in section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863), in which there is no identifiable victim, the court may order that the defendant make restitution in accordance with this subsection.

**(2)(A)** An order of restitution under this subsection shall be based on the amount of public harm caused by the offense, as determined by the court in accordance with guidelines promulgated by the United States Sentencing Commission.

**(B)** In no case shall the amount of restitution ordered under this subsection exceed the amount of the fine which may be ordered for the offense charged in the case.

**(3)** Restitution under this subsection shall be distributed as follows:

**(A)** 65 percent of the total amount of restitution shall be paid to the State entity designated to administer crime victim assistance in the State in which the crime occurred.

**(B)** 35 percent of the total amount of restitution shall be paid to the State entity designated to receive Federal substance abuse block grant funds.

**(4)** The court shall not make an award under this subsection if it appears likely that such award would interfere with a forfeiture under chapter 46 or chapter 96 of this title or under the Controlled Substances Act (21 U.S.C. 801 et seq.).

**(5)** Notwithstanding section 3612(c) or any other provision of law, a penalty assessment under section 3013 or a fine under subchapter C of chapter 227 shall take precedence over an order of restitution under this subsection.

(6) Requests for community restitution under this subsection may be considered in all plea agreements negotiated by the United States.

(7)(A) The United States Sentencing Commission shall promulgate guidelines to assist courts in determining the amount of restitution that may be ordered under this subsection.

(B) No restitution shall be ordered under this subsection until such time as the Sentencing Commission promulgates guidelines pursuant to this paragraph.

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

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

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

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for

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

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

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

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

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

**(B)** if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to –

(i) the greater of –

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

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

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

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

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

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

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

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

**(A)** that is –

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

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

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

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

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

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

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

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

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

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

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

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

requirement clearly impracticable, the probation officer shall so inform the court.

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

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

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

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

**(A)** provide notice to all identified victims of –

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

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

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

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

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

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

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

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

(4) After reviewing the report of the probation officer, the court may require additional documentation or hear testimony. The privacy of any records filed, or testimony heard, pursuant to this section shall be maintained to the greatest extent possible,

and such records may be filed or testimony heard in camera.

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

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

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

matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

**(f)(1)(A)** In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.

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

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

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

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

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

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

**(B)** A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

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

**(A)** return of property;

**(B)** replacement of property; or

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

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

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

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

**(i)** If the court finds that more than 1 victim has sustained a loss requiring restitution by a defendant, the court may provide for a different payment schedule for each victim based on the type and amount of each victim's loss and accounting for the economic circumstances of each victim. In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution.

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

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

**(A)** any Federal civil proceeding; and

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

**(k)** A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also

accept notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

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

**(m)(1)(A)(i)** An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title; or

**(ii)** by all other available and reasonable means.

**(B)** At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a

lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.

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

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

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

**(1)** such a sentence can subsequently be –

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

**(B)** appealed and modified under section 3742;

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

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

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

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

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