

STATE OF LOUISIANA
PARISH OF ORLEANS

CERTIFICATE OF MAILING

The undersigned hereby certifies that she is a member of the Bar of the Supreme Court of the United States, and that she caused the Supplemental Brief of Petitioner Michael Wright In Reply to Amy Unknown's Response to Paroline's Petition for a Writ of Certiorari in Docket Nos. 12-8505 and 12-8561 (related) to be placed in the United States Post Office, with First Class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court on the 8th day of May, 2013, which is within the time allowed for filing.


ROBIN E. SCHULBERG

IN THE
SUPREME COURT OF THE UNITED STATES

No. 12-8505

MICHAEL WRIGHT,
Petitioner,
versus

UNITED STATES OF AMERICA,
Respondent.

No. 12-8561

DOYLE RANDALL PAROLINE,
Petitioner,
versus

AMY UNKNOWN and UNITED STATES,
Respondents.

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

SUPPLEMENTAL BRIEF OF PETITIONER MICHAEL WRIGHT
IN REPLY TO AMY UNKNOWN'S RESPONSE TO
PAROLINE'S PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

By a filing in Docket No. 12-8561, respondent Amy Unknown opposed Michael Wright's petition for a writ of certiorari in Docket 12-8505. Since Mr. Paroline's and Mr. Wright's petitions are related in that they both seek review of the same circuit court decision, petitioner Wright files this response in both dockets. Unlike Amy, petitioner Wright urges the Court to grant certiorari in both cases and consolidate them.

Wright's case raises a question that Paroline's case does not. In Paroline's case, the Fifth Circuit reversed the district court's denial of restitution to Amy. In Wright's case, the Fifth Circuit affirmed the district court's order that Wright pay Amy over a half million dollars in restitution for all of Amy's mental health damages: those incurred as a result of the actual abuse, those incurred as a result of the original uploading of Amy's images on the internet, those incurred as a result of the distribution of those images and those incurred as a result of all instances of receipt and possession, no matter who committed the offense. Wright and Paroline, notably, were convicted of possession only. Both petitions present the question whether there is a sufficient causal connection between the defendant's possession of the victim's images and the victim's loss to trigger restitution under 18 U.S.C. § 2259. Wright's petition raises the additional question whether § 2259 authorizes a district court to

order one defendant to pay restitution for another person's unrelated conduct, in other words, whether the principle recognized by this Court in *Hughey v. United States*, 495 U.S. 411 (1990), applies to § 2259. This too is the subject of disagreement among the circuits in that the Fifth Circuit, standing alone, interprets "the full amount of the victim's losses," 18 U.S.C. § 2559(b)(1), to encompass all losses, regardless of who caused them. If the Court were to decide that a possessor of child pornography causes losses for which § 2259 mandates restitution, then it also should set the outer limits of such restitution awards by deciding this additional issue. Therefore, both petitions for certiorari should be granted.

Amy raises three objections to granting certiorari in Wright's case. None withstands scrutiny.

1. Amy argues that the Court would need to appoint counsel to argue her position should the Court grant Wright's certiorari petition because Amy was not a party in the district court. Amy's Response, pp. 32-33. Wright, however, urges the Court to grant both his petition and Paroline's and to consolidate the two dockets. Amy then would be a party in the consolidated cases.

2. Although the Fifth Circuit twice refused to enforce the appeal waiver in Wright's plea agreement, Amy resurrects this defunct issue. Amy's Response, p. 32. Contrary to her representation, the issue was not "unresolved." Wright's plea

agreement stated that “the restitution provisions of Sections 3663 and 3663A of Title 18, United States Code, will apply.”¹ The only explanation provided by the district court at arraignment was, “You also may be required to reimburse any victim for the amount of his or her loss under The Victim Restitution Law, if that term is applicable.”² Since §§ 3663 and 3663A are both limited to restitution for losses proximately caused by the defendant’s offense conduct, the Fifth Circuit panel held that “Wright did not knowingly waive his right to appeal a restitution order that is unlimited by the principle of proximate causation.” 639 F.3d 679, 683-84 (5th Cir. 2011). Furthermore, Wright’s claim on appeal is that the restitution award exceeds the losses caused by his offense conduct. This is a claim that the restitution award exceeds the statutory maximum, which is an explicit exception to the appeal waiver contained in his plea agreement.³ See *United States v. Chemical & Metal Industries, Inc.*, 677 F.3d 750, 752 (5th Cir. 2012).

The *en banc* Court held that the Government had waived enforcement of the appeal waiver by its curious argument that the appeal waiver barred Wright’s appeal only if the Fifth Circuit held that § 2259 restitution was limited to losses proximately

¹R. USCA5 p. 52.

²R. USCA5 p. 157.

³R. USCA5 p.52 (“The defendant . . . reserves the right to appeal any punishment imposed in excess of the statutory maximum.”).

caused by the defendant's offense conduct, that is, only if Wright prevailed. Slip op., p.5 n.4. The issue, however, is whether the amount of restitution ordered by the district court exceeded the scope of the restitution available under §§ 3663 and 3663A. Since it did, the appeal waiver did not bar Wright from appealing.

3) Lastly, Amy contends that Wright's case is moot because her lawyer, James Marsh, withdrew Amy's request for restitution by a letter to the District Court Clerk when this case was pending on appeal. Amy's Response, p. 34. In fact, Mr. Marsh's attempted withdrawal of Amy's request was a cynical and ineffective litigation ploy. The June 3, 2011, letter was filed *after* the district court had ordered \$529,661 in restitution at Amy's request,⁴ *after* a Fifth Circuit panel had held in Paroline's case that § 2259 did not require a showing of proximate causation (except for the catch-all clause in subsection (b)(3)),⁵ and *after* the Fifth Circuit panel in Wright's case had called for rehearing *en banc*.⁶ It was in Amy's interest to avoid *en banc* review because the panel opinion in *Paroline* bound all other panels in the Fifth Circuit. See, e.g., *United States v. Turner*, 674 F.3d 420, 444 (5th Cir.), cert. denied, 133 S. Ct. 312 (2012). The *en banc* Court, however, was fully aware of Amy's mootness argument

⁴The district court ordered Wright to pay \$529,661 in restitution on December 16, 2009. R. USCA5 p. 93.

⁵See *In re Amy*, 636 F.3d 190, 201 (5th Cir. Mar. 22, 2011).

⁶*United States v. Wright*, 639 F.3d 679, 692 (Apr. 20, 2011) (Davis, J., concurring, joined by King and Southwick, JJ).

and disregarded it. See Letter to Clerk of U.S. Court of Appeals for Fifth Circuit from Assistant Federal Public Defender Robin E. Schulberg (June 9, 2011). As the Government argued, the district court lacked jurisdiction to address Amy's letter because the case was pending on appeal. See United States' Petition for Panel Rehearing (June 3, 2011), p. 8 n.4, citing *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam) (stating, "The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.").

Of equal importance to Wright, the circuits are divided on the issue whether a court may order restitution if a victim declines an award. Compare *United States v. Johnson*, 378 F.3d 230, 244-46 (2nd Cir. 2004) (district court must order restitution and obligation survives even if identified victim declines without assigning award), with *United States v. Speakman*, 594 F.3d 1165, 1175-77 (10th Cir. 2010) (restitution may be awarded to victim or victim's estate only); *United States v. Pawlinksi*, 374 F.3d 536, 539-41 (7th Cir. 2004) (district court erred in directing restitution unclaimed by victims to go to Crime Victims Fund). With the law unsettled, Wright could not risk abandoning his appeal.

CONCLUSION

The best way for this Court to provide guidance to the circuits about how to interpret § 2259 is to grant both Paroline and Wright's petitions for certiorari. There are no procedural obstacles in Wright's case that would prevent the Court from so doing.

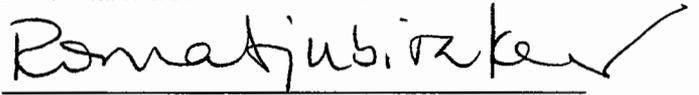
Respectfully submitted this 8th day of May, 2013,

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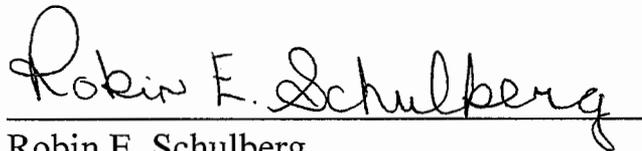


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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of May, 2013, a copy of the foregoing has been served on Brian Klebba and Diane Hollenshead Copes, Assistant United States Attorneys, 650 Poydras Street, 16th Floor, New Orleans, Louisiana, 70130, via hand delivery, and on Donald B. Verrilli, Jr., Solicitor General of the United States, Department of Justice, 950 Pennsylvania Avenue N.W., Washington, D.C. 20530, Paul G. Cassell, University of Utah School of Law, Room 101, 332 S. 1400 East, Salt Lake City, Utah 84112 and Stanley George Schneider, Schneider & McKinney, 440 Louisiana, Suite 2110, Houston, Texas 77002 by placing same in the United States mail, properly addressed and postage prepaid.



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