EASTERN DISTRICT OF TEXAS
TYLER DIVISION

UNITED STATES OF AMERICA	§	
	§	
vs.	§	CASE NO. 6:08-CR-61
	§	
DOYLE RANDALL PAROLINE	§	

BRIEF OF THE NATIONAL CRIME VICTIM LAW INSTITUTE, THE NATIONAL CENTER FOR VICTIMS OF CRIME, AND THE VICTIM RIGHTS LAW CENTER IN SUPPORT OF RESTITUTION FOR AMY AND OTHER VICTIMS OF CHILD PORNOGRAPHY

COMES NOW the National Crime Victim Law Institute, the National Center for Victims of Crime, and the Victim Rights Law Center by invitation of the Court's order on June 10, 2009, to file this brief in support of restitution for Amy and other victims of child pornography.

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STATEMENT OF INTEREST

The National Crime Victim Law Institute (NCVLI) is a nonprofit educational organization located at Lewis & Clark Law School, in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training; technical assistance to attorneys; promotion of the National Alliance of Victims' Rights Attorneys; research and analysis of developments in crime victim law; and provision of information on crime victim law to crime victims and other members of the public. In addition, NCVLI actively participates as amicus curiae in cases involving crime victims' rights nationwide. This case involves important national issues regarding whether victims of federal child pornography crimes will receive full restitution for their losses.

The National Center for Victims of Crime (National Center), a nonprofit organization based in Washington, DC, is the nation's leading resource and advocacy organization for all victims of crime. The mission of the National Center is to forge a national commitment to help victims of crime rebuild their lives. Dedicated to serving individuals, families, and communities harmed by crime, the National Center, among other efforts, advocates laws and public policies that create resources and secure rights and protections for crime victims. The National

Center is particularly interested in this brief because of its commitment to victims of childhood sexual abuse and child pornography.

The Victim Rights Law Center (VRLC) is a nonprofit organization based in Boston, Massachusetts, with a satellite office in Portland, Oregon. The mission of the VRLC is to provide legal representation to victims of rape and sexual assault to help rebuild their lives; and to promote a national movement committed to seeking justice for every rape and sexual assault victim. The VRLC meets its mission through direct representation of victims in Massachusetts (in education, immigration, privacy, employment, housing, physical safety, and other civil and administrative matters) and national legal advocacy, training and education regarding civil remedies for victims of sexual assault. The VRLC has a particular focus on meeting the needs of victims of non-intimate partner sexual assault. The VRLC provides legal counsel to over five hundred clients each year in Massachusetts, and trains and provides technical assistance to hundreds of legal professionals across the United States and US Territories each year. The breadth of VRLC's work reflects the deep and reverberating impact of sexual assault throughout all aspects of a victim's life, as well as the importance of holding offenders accountable for the consequences of their actions.

INTRODUCTION

In its order inviting interested entities to submit briefs, this Court recognized

the importance of providing restitution to victims of child pornography – something that Congress mandated in the Mandatory Restitution for Sex Crimes Provision, found in 18 U.S.C. § 2259 (2009). Concerned about the ways to award restitution in these cases efficiently and without wasting scarce judicial resources, this Court posed a series of questions regarding how restitution issues should be handled in child pornography cases.

Amici respectfully submit that the answers to many of these questions can be discerned from the substantive provisions in Section 2259 and the procedural provisions in 18 U.S.C. § 3364 (the Restitution Procedures Statute). A close reading of these provisions makes clear that Congress intended victims of child pornography to receive extremely broad restitution from those who victimize them – including the "full amount of the victim's losses" for such things as medical services, physical and occupational therapy, lost income, and attorney's fees and costs. 18 U.S.C. § 2259(b)(3). Congress also carefully crafted procedures that do not unduly burden the courts when determining these broad restitution awards. To the extent that there are some record-keeping burdens associated with multi-district situations, the United States Department of Justice, the Clerk's Offices in the respective judicial districts, and defendants themselves, are capable of effectively coordinating the payment of restitution.

For all these reasons, Amici respectfully submit that the Court should award

Amy, and the other victims of child pornography who will, sadly, be before the Court in future child pornography cases, broad restitution awards from their offenders. An answer to each of the Court's specific questions follows.

1. How shall it be determined whether the restitution-claimant is a victim entitled to restitution under 18 U.S.C. § 2259?

A. Who is a victim under Section 2259?

The determination of whether an individual is a "victim" in most child pornography cases will be readily and easily ascertainable. Section 2259 employs an extraordinarily broad definition of victim, providing that a "victim" is an "*individual harmed* as a result of a commission of a crime under [the statutes regarding child pornography] . . . ." 18 U.S.C. § 2259(c) (emphasis added). Notably, in many other crime victim statutes, Congress has used a narrower formulation of the "victim" definition, requiring in the general restitution statutes, for example, that the "victim" be 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(a)(2) (emphasis added); *accord* 18 U.S.C. § 3663A(a)(2) (using identical language). Significantly, the words "directly and proximately" do not appear in Section 2259, meaning that the harm a person must suffer to be a victim of a child pornography offense need be neither "direct" nor "proximate" in order to confer victim status. *Any* kind of "harm" is sufficient to create victim status for purposes of the child pornography statute.

In addition to the statute's plain language, this liberal definition of harm is supported by the Congressional intent to protect children from child pornography laws. Senator Biden expressed Congress' desire to enact legislation to protect children victimized by child pornography. "Protecting our children from abuse and exploitation at the hands of a stranger or a neighbor or a trusted adult, or in some cases a family member, is one of the most important duties of our criminal justice system." Bill to Amend Certain Provisions of Law Relating to Child Pornography and For Other Purposes: Hearing on S. 1237 Before the S. Comm. on the Judiciary, 104th Cong. (1996) (Statement of Sen. Biden, Member, S. Comm. On the Judiciary). In fulfilling this legislative goal to protect children, Congress has enacted several laws aimed at remedying the harm caused by child pornography, including 18 U.S.C. § 2259. As remedial legislation, Section 2259 "should be liberally construed to effectuate Congressional intent . . . ." *Lifecare Hospitals, Inc. v. Health Plus of Louisiana, Inc.*, 418 F.3d 436, 441 (5th Cir. 2005). To effectuate Congressional intent requires that *any* child harmed by pornography be afforded the protections in Section 2259.

The Fifth Circuit has carefully considered the issue of harm from possession of child pornography and concluded that "[u]nfortunately, the 'victimization' of the children involved [in child pornography] does not end when the pornographer's camera is put away." *United States v. Norris*, 159 F.3d 926, 929 (5th Cir. 1998).

The Circuit explained that "[t]he consumer, or end recipient, of pornographic materials may be considered to be causing the children depicted in those materials to suffer as a result of his actions" in various ways. *Id.* at 929. Of particular relevance here, the Circuit noted that "the mere existence of child pornography represents an invasion of the privacy of the child depicted. Both the Supreme Court and Congress have explicitly acknowledged that the child victims of child pornography are *directly harmed* by this despicable intrusion on the lives of the young and the innocent." *Id.* at 930 (emphasis added). The Fifth Circuit was recognizing what the Supreme Court noted in *New York v. Ferber*, 458 U.S. 747 (1982), that pornographic images of children in sexual activities "are a permanent record of the children's participation and *the harm* to the child is exacerbated by their circulation." *Ferber*, 458 U.S. at 759 (emphasis added). The Fifth Circuit further recognized the Congressional finding, that "where children are used in its production, child pornography permanently records the victim's abuse, and its continued existence causes the child victims of sexual abuse continuing *harm* by haunting those children in future years." *Norris*, 159 F.3d at 930 (emphasis added) citing congressional findings of Child Pornography Prevent Act of 1996).

Thus, in determining who is a victim under Section 2259, it is of course of no moment that an individual is not specifically listed in the criminal information filed in the case. *See In re Stewart*, 552 F.3d 1285, 1289 (11th Cir. 2008) ("The

CVRA . . . does not limit the class of crime victims to those whose identity constitutes an element of the offense or who happen to be identified in the charging document."). The key question is whether the individual seeking to be recognized as a victim is depicted in any of the sexually-explicit images that the defendant knowingly possessed. If an individual is so-depicted, he or she has been harmed by the defendant's offense, and is a victim.

The only remaining question that a Court might have to consider in resolving this issue is the very narrow factual one of whether the individual asserting victim status is, in fact, the child-victim depicted in the images that underlie the defendant's conviction. The National Center for Missing and Exploited Children (NCMEC), the organization that maintains the national identification database for children, identifies victims in pornographic material defendants possess. As the national expert in the field, NCMEC has great expertise in this area, and there is no reason to doubt their conclusions. *See United States v. Clark*, N. 08-1808, 2009 WL 1931172 at *3 (3rd Cir. July 7, 2009) (holding that NCMEC's identification of individuals who were the subjects of pornographic images contained sufficient indicia of reliability to qualify the individuals as victims for sentencing purposes under the CVRA). Amici understand that NCMEC will be filing its own amicus brief in this case, and therefore do not address the specific identification issue further.

B. What is the procedure for determining victim status?

Procedurally, the probation office makes an initial determination of "victim" status, after reviewing materials from the prosecution, the defense, and the victim. The probation office then includes this initial determination in the presentence report (PSR). The probation office's determination of who is a victim should be provided to the defendant, the Government, and the individual asserting victim status. *See* Fed. R. Crim. Proc. 32(e)(2) (The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period.) This early notice will enable all participants to review and correct any inaccuracies. *See* Fed. R. Crim. Proc. 32(e)(2) (parties must state in writing any objections to information contained in or omitted from the report). This also assists the court by giving it advance notice of any dispute over the probation office's determination that will need to be resolved before sentencing can occur.

Since it is the court that will make the final determination of whether an individual has been harmed by the defendant's offense, the question then becomes, what should happen if the parties or the victim objects to the probation officer's determination of who is a victim. *See* Fed. R. Crim. Proc. 32(g) (probation officer must submit any unresolved objections to the court and parties at least 7 days

before sentencing). If this were to happen, the factual dispute will be resolved in the ordinary way that other factual disputes are resolved: after receiving submissions from the prosecution, the defense, and the victim, the Court makes a finding of fact. Here again, there is no reason to anticipate that a great deal of court time will be consumed in making such findings. It is clear that hearsay evidence can be used at sentencing. *See, e.g., United States v. Beydoun*, 469 F.3d 102, 108 (5th Cir. 2006). Therefore, NCMEC could submit an affidavit to the Court regarding the process by which it has reached its conclusions; the parties and the victim could submit any counter-affidavits; and the court would issue a ruling on this disputed issue of fact.

2. How will the amount of restitution to which an identified victim is entitled be determined? Who has the burden of proof and by what standard?

Once an individual qualifies as a "victim" under Section 2259(c) she is entitled to restitution in the full amount of her loss caused by the defendant's criminal conduct. 18 U.S.C. § 2259(b)(1) ("The order of restitution under this section shall direct the defendant to pay the victim . . . the full amount of the victim's losses as determined by the court . . . ."); 18 U.S.C. § 2259(b)(4)(A) ("The issuance of a restitution order under this section is mandatory."). In calculating the full amount of a victim's losses, the statute encompasses a broad range of compensable loss. Section 2259 mandates that the full amount of the victim's

losses includes:

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

18 U.S.C. §§ 2259(3)(A)-(F).

Four Circuits have considered the statute's language and found that subsections (A) (medical services) and (D) (lost income) encompass future losses if estimated with reasonable certainty. *See, e.g., United States v. Pearson*, No. 07-0142-cr, 2009 WL 1886055 (2d Cir. July 2, 2009) (holding that mandatory restitution under 18 U.S.C. § 2259 authorized compensation for future, as well as previously incurred, counseling expenses that may be estimated with reasonable certainty); *United States v. Doe*, 488 F.3d 1154, 161 (9th Cir. 2007) (finding future counseling costs are compensable); *United States v. Danser*, 270 F.3d 451, 455 (7th Cir. 2001) (finding section 2259 allows for restitution for the future costs of therapy); *United States v. Julian*, 242 F.3d 1245, 1248 (10th Cir. 2001) (concluding victim's future counseling costs are authorized under section 2259).

A. Whose burden is it and what is the burden necessary to prove a restitution claim?

After identifying the victim's compensable losses under Section 2259, the burden falls to the Government, in the first instance, to determine and prove the

amount of loss sustained by the victim by a preponderance of the evidence. 18 U.S.C. § 3664(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 Federal Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, provides that "[o]fficers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their *best efforts* to see that crime victims are notified of, and accorded, the rights described in [the Crime Victims Rights Act]." 18 U.S.C. § 3771(c)(1) (emphasis added). Among the rights described in the Act is "[t]he right to full and timely restitution as provided in law." 18 U.S.C. § 3771(a)(6). Accordingly, for a victim who desires restitution, the Justice Department is obligated to make its "best efforts" to see that the court awards full restitution.

In addition to the Government's "best efforts" obligation to pursue restitution for the victim, the victim is entitled to personally pursue restitution under the CVRA. While the matter may have been subject to dispute before 2004, the victim's right to pursue restitution is now undeniable. The CVRA commands that "[a] crime victim has the following *rights*," 18 U.S.C. § 3771(a) (emphasis added), listing among those rights the "*right* to full and timely restitution." 18

U.S.C. § 3771(a)(6) (emphasis added). The CVRA further affords victims "standing" to appear before district courts to vindicate their rights. 18 U.S.C. § 3771(d)(1) ("[t]he crime victim or the crime victim's law representative . . . may assert the rights described in [the CVRA]."). Thus, in those rare cases where the Government is not seeking restitution for the victim of child pornography, the amount sought by the Government is insufficient to make the victim whole, or the victim desires to submit her own restitution demand, the victim can seek the order for herself and the court is obligated to award it if the victim proves the amount by a preponderance of the evidence. *See* 18 U.S.C. § 3664(e) ("Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence."); *United States v. Danford*, 435 F.3d 682, 689 (7th Cir. 2006) (finding restitution is determined by the judge using the lower preponderance of the evidence standard).

The court also has an independent obligation to ensure that victims receive restitution. *See* 18 U.S.C. § 3771(b)(1) ("In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in [the CVRA]."). Indeed, if there were any doubt, it is resolved (at least for victims of child pornography) by the fact that Section 2259 is known as the *Mandatory* Restitution for Sex Crimes provision, with a direction to the court that "[n]otwithstanding section 3663 or 3663A [which provide some

exceptions to restitution obligations], and in addition to any other civil or criminal penalty authorized by law, the court *shall* order restitution for any offense under this chapter [i.e., any child pornography offense]." 18 U.S.C. § 2259(a) (emphasis added).

B. What is the procedure for determining final restitution?

The procedure for effectuating a victim's right to restitution is similar to the procedure for determining victim status, and need not be burdensome on the sentencing courts or the Government. The Restitution Procedures Statute, 18 U.S.C. § 3664, is referenced in the Mandatory Restitution for Sex Crimes Provision. *See* 18 U.S.C. § 2259(b)(2) ("An order of restitution under this section shall be issued . . . in accordance with section 3664 . . . ."). Section 3664 provides that the court "shall order the probation officer to obtain and include in its presentence report . . . information sufficient for the court to exercise its discretion in fashioning a restitution order." 18 U.S.C. § 3664(a); Fed. R. Crim. Pro. 32(c)(1)(B) (probation shall submit a report that contains sufficient information for the court to order restitution).

Section 3664(d)(2) requires the probation officer, prior to submitting the presentence report, to the extent practicable, provide notice to all identified victims of "the schedule date, time, and place of the sentencing hearing" and "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 . . . ." 18 U.S.C. §§ 3664(d)(2)(iv), (vi). These provisions afford victims an opportunity to inform the probation office of their losses and, to the extent necessary, appear at the "sentencing hearing" to ensure that the court properly determines those losses.

The probation office's job in preparing the report is simplified by the Government's role under the Restitution Procedures Statute. The Government has an electronic database that is designed to provide electronic notice to all victims of child pornography offenses, so the Government's task of consulting with these victims is relatively straightforward. Sixty days before sentencing, the government attorney "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." 18 U.S.C. § 3664(d)(1); *see also* 18 U.S.C. § 3771(a)(5) (providing victims with the reasonable right to confer with the attorney for the Government in the case). Using its automated system, the Government can contact victims who wish to be involved in the restitution process and ask them to provide listing of their requested restitution amounts.[1]

The Government's fulfillment of this task need not be difficult, as the probation officer's restitution report in the PSR need only contain sufficient information for the court to order restitution. Fed. R. Crim. Pro. 32(c)(1)(B). *See*

[1] Under 18 U.S.C. § 3664(g)(1) ("No victim shall be required to participate in any phase of a restitution order.").

Clark, 2009 WL 1931172 (holding that the sentencing court could properly consider victim impact statements submitted to probation office that were redacted and contained hearsay, because at sentencing a court may consider any relevant information that has sufficient indicia of reliability to support its probable accuracy).

As with the PSR's victim status determination, the prosecution, the defense and victim, can then object to the restitution amount determined. The Restitution Procedures Statute provides: "Any dispute as to the property amount or type of restitution shall be resolved by the court by the preponderance of the evidence." 18 U.S.C. § 3663(e); *Danford*, 435 F.3d at 689 (7th Cir. 2006) (finding restitution is determined by the judge using the lower preponderance of the evidence standard). This is consistent with the way other sentencing determinations are made. *See, e.g., United States v. Mauskar*, 557 F.3d 219, 235(5th Cir. 2009) (noting preponderance of the evidence standard of Sentencing Guidelines determinations).

Thus, the Court need only follow its ordinary procedures for determining other disputed sentencing issues to resolve any restitution issue.

3. Who is going to make the restitution determination? Will it be made in every court or only once? What avenues are available to streamline this procedure to reduce victim expense and conserve judicial resources?

It is clear from the restitution statutes that restitution determinations will

have to be made in each case. While this may not be the most efficient way to proceed, a defendant's due process rights arguably dictate this result. A decision, for example, in this case that Amy is entitled to a certain amount of restitution from defendant Doyle Randall Paroline in 2009 conceivably could not be binding on a future defendant who might plead guilty in 2010. Any future defendant would have a due process right to challenge any restitution determinations before being ordered to pay money to a victim. *See* U.S. Const. amend. XIV (promising due process before any person is deprived of "property"). To avoid such arguments, the Court should put in place procedures to give each defendant an opportunity to contest restitution amounts, while at the same time streamlining those procedures to avoid unnecessary expense or burden.

A. Streamlining the procedure to reduce victim expense and conserve judicial resources.

While each court must consider and issue a restitution order, there are certain procedures that can be used to streamline the process for victims, prosecutors, defendants, and courts. The various databases that are currently used to identify and notify child pornography victims could also store information regarding a victim's prior restitution awards. This would enable restitution orders to "follow" a victim from case to case, alerting the probation office, defendant and Government of prior court orders. While a restitution order from district courts are not binding on other district courts, they can have persuasive value. If, for

example, this Court publishes its decision (or otherwise generates a written order available on PACER), then any other courts considering similar issues will have the benefit of this Court's reasoning. There would, then, be no need to "reinvent the wheel" in future cases. Along these lines, NCVLI would direct this Court's attention to a recent restitution order entered in *United States v. Freeman*, 3:08-CR-22-002/LAC (N.D. Fla. July 9, 2009), which appears to have resolved many of the issues that the Court is concerned about in favor of the victim in that case. Specifically, the court ordered $3,263,758 in restitution to a victim of child pornography.

Moreover, in cases such as this one, where a crime victim is represented by legal counsel, victims will be able to promptly provide restitution information to the probation office. Presumably victim's counsel can provide the same information to other probation offices at relatively little expense in future cases. Prosecutors, too, can retain the information from this case and pass it along to other probation offices as needed.

4. Is each defendant liable for payment of the full amount of restitution or may the court apportion liability among defendants to reflect the level of contribution to the victim's loss and/or economic circumstances of each defendant?

The Court's question appears to be drawn, in part, from the Restitution Procedures Statute, which authorizes apportionment of liability in a particular case

when more than one defendant has contributed to the loss of a victim. The statute provides:

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

18 U.S.C. § 3664(h) (emphasis added).

This dictates that when there is more than one "defendant" before the court may the court may "apportion liability." Significantly, because the viewing of child pornography is often a solitary activity, most child pornography cases will involve a single defendant. Therefore, the issue of apportioning losses among multiple defendants in a single case will rarely arise. When the issue does arise, the plain language of the statute grants the sentencing court discretion to order each defendant to pay full restitution OR to apportion the amount among the defendants. However, a court's discretion is fettered by the nature of the crime and the strong public policy against allowing any defendant to escape his obligation to make the victim whole.

The crime of child pornography is a collaborative victimization of such a type that it is impossible to assign a proportion of the victim's loss to an individual defendant. Thus a court cannot validly apportion the restitution amount with any accuracy or relation to a defendant's liability. Moreover, such an allocation would

be contrary to the Congressional intent that victims receive awards for "the *full amount* of the victim's losses . . . ." 18 U.S.C. § 2259(b)(3) (emphasis added). Section 3364(h)'s authorization to "make each defendant liable for the full payment amount" reflects Congress' intent to make each defendant "jointly and severally liable" to the victim. *United States v. Scott*, 270 F.3d 30, 52 (1st Cir. 2001) (citing S.Rep. No. 104-179, at 15 (1996)). The straightforward rationale for joint and several liability from the tort context – that it is better that the tortfeasor or wrongdoer should bear the burden of any harm, rather than the innocent victim – bearing any burden equally applies to criminal cases. *See Command Oil Corp. v. Barlo Equipment Corp.*, 215 F.3d 321, 330 (2nd Cir. 2000) (stating rationale for joint and several liability). In fact, the rationales borrowed from civil cases apply with far more power in the criminal setting, where the choice is between an innocent child who has been victimized and a *criminal* who has caused the victimization by committing a federal felony offense. Surely, in such a situation, in exercising discretion, the court should give the benefit to the victim, not her victimizer, and order each defendant to pay the full restitution amount.

While it will be rare that there are multiple defendants in a single child pornography case, sadly, it is very likely that a victim of child pornography will be identified as a victim in multiple criminal prosecutions. In the event that this Court's question goes to whether a court has authority to apportion restitution

among the defendants in these unrelated cases, there are several reasons why a court lacks the authority to do so. First, as a practical matter, it is impossible for a court to apportion liability among multiple defendants unless it has jurisdiction over each defendant. This Court (sitting in the Eastern District of Texas) lacks jurisdiction over defendants in, for example, the Eastern District of New York or the Eastern District of California. Therefore, it does not possess the power to apportion liability among various defendants from outside the jurisdiction. Second, even if multiple defendants are within a single jurisdiction, cases might be assigned to multiple judges, or a prior judgment imposed on one defendant may be final and thus cannot be reduced to reflect the new defendant's contribution to the victim's loss. Finally, because the crime of child pornography is a collaborative victimization that is on-going, it is impossible to make a proportionate division of the restitution amount among an unknown number of unidentified future defendants that have and will contribute to the victim's loss.

Thus, in the context of multiple defendants across jurisdictions, a court cannot validly or meaningfully apportion restitution when it does not know, nor could ever know, what each defendant's share should be. As such, a court would abuse its discretion if it orders any one defendant to pay anything less than the full amount of restitution. *United States v. Boccagna*, 450 F.3d 107, 113 (2nd Cir. 2006) (noting it is an abuse of discretion for a court to exercise its discretion in

favor of an impossibility). Therefore, read in context, the Restitution Procedures Statute necessarily only authorizes apportionment among the multiple defendants who are currently before the court for sentencing.

5. Is there any proximate cause requirement between the victim's losses and the particular defendant's conduct?

For five of the six categories of losses recognized in Section 2259, there is no proximate cause requirement. For the sixth "catchall" category, a proximate cause requirement exists. Section 2259 promises victims of child pornography offenses that the court "shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim's losses . . . ." 18 U.S.C. § 2259(b)(1). The statute goes on to provide six categories of damages, only one of which contains a proximate cause requirement:

> (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*.

18 U.S.C. § 2259(b)(3) (emphasis added). As is readily apparent from the statutory language, a victim need only show that various losses were the

"proximate result" of the offense when seeking restitution under subsection (F). There simply is no language regarding any sort of "proximate" connection requirement under subsections (A) through (E). It is a common canon of statutory construction that where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acted intentionally and purposely in the disparate inclusion or exclusion. *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 300 (1983).

As a presumed intentional omission of "proximate result" in five of the subsections, it can be inferred that Congress did not want to impose a burden on pornography victims to show a proximate cause for these losses. Moreover, as remedial legislation, the Act "should be liberally construed to effectuate Congressional intent . . . ." *Lifecare Hospitals, Inc. v. Health Plus of Louisiana, Inc.*, 418 F.3d 436, 441 (5th Cir. 2005). Other parts of the restitution statute fully confirm this conclusion. The Restitution Procedures Statute states that "the court *may make each defendant liable* for payment of the *full amount* of restitution or may apportion liability among the defendants . . . ." 18 U.S.C. § 3664(h) (emphasis added). Clearly Congress wanted sentencing courts to side with the victims of child pornography – not their victimizers. Accordingly, rather than read into the statute additional hurdles that a victim of child pornography has to clear, the Court must simply apply the statute as Congress wrote it -- without any

proximate result requirement other than for "other losses." *But see*, *United States v. Laney*, 189 F.3d 954 (9th Cir. 1999) (holding that section 2259 incorporates a requirement of proximate causation).[2]

Even assuming, contrary to both the plain language and congressional intent, that the statute imposes a general proximate cause requirement on anything other than the final subsection category of claims, a victim could easily meet the proximate cause requirement in both child pornography production and possession cases. As the Fifth Circuit has explained, "the consumer of child pornography instigates the original production of child pornography by providing an economic motive for creating and distributing the materials." *United States v. Norris*, 159 F.3d 926, 930 (5th Cir. 1998). Similarly, Congress explained: "The existence of and traffic in child pornographic images . . . inflames the desires of child molester, pedophiles, and child pornographers, thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children who are victimized as result of the existence and use of these materials." *Id*. (*quoting* 1996 Act, § 121, 110 Stat. at 3009-27). Thus, as the Fifth Circuit concluded in *Norris*: "The consumers of child pornography therefore victimize the

[2] Significantly, in *Laney*, the Government's position apparently conceded that Section 2259 contained some sort of proximate cause requirement. *See* 189 F.3d at 964 ("In response, the Government suggests that conduct that is reasonably foreseeable enough to constitute relevant conduct under U.S.S.G. § 1B1.3 will make a defendant liable to pay restitution under section 2259."). Such a concession stands in opposition to the plain text of the statute.

children depicted in child pornography by enabling and supporting the continued production of child pornography, which entails continuous abuse and victimization of child subjects." *Id*. at 930.

Under general tort law, there is universal agreement that "what is required to be foreseeable is only the general character or general type of the event or harm and not its precise nature, details, or above all manner of occurrence. *See Prosser and Keeton on the Law of Torts* § 43, at 299 (5th ed. 1984); 4 *Harper, James and Gray on Torts* § 20.5(6), at 203 (3d ed. 2007) ("Foreseeability does not mean that the precise hazard or the exact consequences that were encountered should have been foreseen."). Thus, the applicable test of foreseeability "is whether the defendant reasonably should have anticipated *any* injury" resulting from his crime. *Elliot v. Turner Const. Co.*, 381 F.3d 995, 1006 (10th Cir. 2004). For the reasons explained by the Fifth Circuit in *Norris*, a defendant's crime should be viewed as the "proximate cause" of a victim's harm because other viewings of pornographic images is foreseeable – thereby making him liable to pay restitution for all her losses even under the final subsection.

6. How should restitution orders and payments be managed when multiple defendants in multiple judicial districts are responsible for restitution to the same victim, or to multiple victims? How is the potential for double recovery to be avoided and what safeguards are available?

As explained above in the answer to Question No. 4, each defendant is

jointly and severally liable for the full amount of restitution owed to his or her victim. To the extent that a restitution order covers the same losses, double recovery is easily avoided, and the burden of preventing double recovery should fall on the individual defendants.

At the outset, when considering what sorts of "safeguards" are needed against double recovery, the Court should bear in mind there is the more likely problem of *inadequate* recovery. While it is possible in theory that a victim could collect more than the full amount of restitution she is owed, the reality is that most victims fail to recover anything close to an amount that makes them whole. Many child pornographers lack the ability to pay more than modest amounts of restitution, and their ability to pay while serving a lengthy prison sentence is diminished even further. Thus it is critical that this Court not impose safeguards against "double recovery" that in fact erect barriers to the far more likely problem -- lack of *adequate* recovery.

The Court should also not impose any additional burden on the victims of child pornography to maintain a record keeping system to monitor repayments. While some victims may by represented by experienced and capable legal counsel, in many cases crime victims will lack representation. *See generally* John W. Gillis & Douglas E. Beloof, *The Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victim Rights in the Courts*, 33 MCGEORGE L. REV. 689, 691-93

(2002). It is simply unfair to impose the burden of keeping track of restitution payments on the victim of the offense. *See* 18 U.S.C. § 3771(a)(8) (Victims have the right "to be treated with fairness and with respect for the victim's dignity and privacy.").

The burden should lie on the person who caused the victimization: the defendant.[3]

The defendant in a criminal case has, of course, a financial interest in avoiding any sort of double payment. The defendant in a criminal case will also have legal counsel, appointed or retained, or will have chosen to decline such representation. Therefore, the defendant has both the motive and the means to monitor restitution payments.

Thus, the only real issue is the how to alert the defendant to the fact that restitution payments are being made in another judicial district, enabling him to monitor the situation. The fact that another judicial district may involve a criminal prosecution concerning the same victim is not something that a defendant could determine from searching available public records. It is something, however, the

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[3] NCVLI notes that the Court previously ordered Amy's counsel in this case to file copies of the Court's order in every other case in which she was a victim seeking restitution. Order of June 10, 2009. NCVLI respectfully submits that, rather than burden a crime victim with any sort of reporting obligation~~,~~ that the burden could be more effectively satisfied by the Justice Department. Indeed, given the fact that in some cases there may be multiple victims seeking restitution, it would be far more efficient to have one entity – the United States Department of Justice – provide such notices rather than multiple crime victims, who may or may not have legal counsel or experience in filing court pleadings.

Department of Justice can determine.

This potential problem can be solved using the procedure put forth in the answers to Questions Nos. 1 and 2. In each prosecution the Government must notify the victim of the criminal case. The Government maintains a computerized database for such victim notification. This database could, presumably, also be used to alert defense counsel when restitution payments are being made to the same victim in another judicial district. An example of the notice that the Government might send to a defendant:

> You are advised that your client, defendant [*insert name of defendant*], may be making restitution payments to a victim who is also receiving restitution payments in another criminal case, [*insert case caption, case number, and judicial district*]. If you believe that the restitution may be paid off in its entirety as a result of payments being made in that case and in your client's case, you should contact the clerk's office in the other district to alert them to the fact that restitution payments are being made in this case as well.

If a defendant was then concerned about the possibility of double payment, he could contact the clerk's office in the other district. Once alerted, the clerk's offices in the judicial districts affected could coordinate the accounting task of determining when a restitution obligation had been fully discharged.

7. Is Amy a victim entitled to restitution?

We will leave this issue to be argued directly by Amy's own capable legal counsel. From the information known to Amici, it appears that she clearly fits within the very broad definition of "victim" found in 18 U.S.C. §2259. *See*

Answer to Question No. 1, *supra*.

8. What is the amount of Amy's loss in any given case?

Amy's loss in any given case is, as the statute indicates, the "full amount of the victim's losses . . . ." 18 U.S.C. § 2259(b)(3). There is no basis for apportioning the loss among various offenders, *see* Answer to Question No. 4, *supra*, or among various offenses, *see* Answer to Question No. 5, *supra*.

9. What amount of total restitution should any individual defendant be ordered to pay? How should restitution payments, if any, be structured?

As explained in the answer to Question No. 4 above, each defendant should be ordered to pay the "full amount of the victim's losses." 18 U.S.C. § 2259(b)(1). That order should be imposed in full and made with the explicit requirement that it be due immediately. That way, if defendant has, or acquires, substantial assets, then an order is in place that can serve to ensure that those funds go to the victim. *See United States v. Miller*, 406 F.3d 323, 328 (5th Cir. 2005) (finding no plain error in court ordering restitution to be paid in full even though it knew that defendant did not have the financial ability to do so). At the same time, assuming that the court awards substantial restitution, it will need to establish a payment schedule. *See United States v.* Crandon, 173 F.3d 122, 126-27 (3rd Cir. 1999). The procedures for setting up payments schedules are well-known to the Court and provided in the Restitution Procedures Statute. 18 U.S.C. § 3664(f)(2)

(mandating procedure for courts to follow when establishing payment schedule). The Court should simply follow its normal procedures in establishing the appropriate payment schedule for any individual defendant in light of his ability to pay. Also, as explained in the answer to Question No. 4 above, the Court should not consider restitution payment schedules for other defendants, but should order a schedule appropriate to this individual defendant and allow the defendant to monitor restitution payments made by other defendants to know when his obligation under the schedule ceases.

THE COURT SHOULD PUBLISH ITS OPINION ON THIS ISSUE

As the Court recognized in inviting briefing from groups around the country, this case is among the first in the country to consider and analyze the important issues surrounding the recurring issue of restitution in child pornography cases. Moreover, this is one of the few cases in which a victim of crime has been represented by skilled legal counsel. All parties have fully briefed the issue and Amici with expertise in crime victim law and policy have also provided this Court with an in-depth analysis of the issues. Accordingly, this Court should write a published opinion for the benefit of future litigants.

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CONCLUSION

For all these reasons, the Court should order defendant to pay full restitution to Amy without consideration of any previous restitution awards.

DATED this 20th day of July, 2009.

RESPECTFULLY SUBMITTED,

Attorneys for Amicus National Crime Victim Law Institute

/s/ Paul Cassell (by permission T.C.)

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CERTIFICATES OF SERVICE

I hereby certify that on July 20, 2009, I electronically filed the foregoing brief and attachment with the Clerk of the Court for the United States District Court for the Eastern District of Texas by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Jeff Hanson

From: Becky Smith
To: Victim Notification System
Subject: US Department of Justice Victim Notification System
Date: Friday, April 17, 2009 11:38:19 AM

DO NOT REPLY TO THIS EMAIL.

U.S. Department of Justice
United States Attorney's Office
Eastern District of Texas in Tyler
110 N. College
Ste. 700
Tyler, TX 75702
Phone: 18008043547
Fax: (903) 590-1439

April 17, 2009

James Marsh
14525 S.W. Millikan Way
Beaverton, OR 97005

RE: United States v. Defendant(s) Doyle Randall Paroline
Case Number 2008R00609 and Court Docket Number 6:08CR61

Dear James Marsh:

The United States Department of Justice believes it is important to keep victims of federal crime informed of court proceedings. You have been identified to receive notifications for [redacted]
This notice provides information about the above-referenced criminal case.

Charges have been filed against defendant(s) Doyle Randall Paroline. The lead prosecutor for this case is Bill Baldwin. The main charge is categorized as Project Safe Childhood.

The Crime Victims' Rights Act gives victims of criminal offenses in Federal court the following rights: (1) The right to be reasonably protected from the accused; (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime, or of any release or escape of the accused; (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding; (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding; (5) The reasonable right to confer with the attorney for the Government in the case; (6) The right to full and timely restitution as provided in law; (7) The right to proceedings free from unreasonable delay; and (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

We will make our best efforts to ensure you are provided the rights described above. It is important to keep in mind that the defendant(s) are presumed innocent until proven guilty and that presumption requires both the Court and our office to take certain steps to ensure that justice is served. While our office cannot act as your attorney or provide you with legal advice, you can seek the advice of an attorney with respect to these rights or other related legal matters.

On January 12, 2009, defendant Doyle Randall Paroline pled guilty to the charges listed below. Any remaining counts will be disposed of at the time of sentencing. As a result of the guilty plea, there will

be no trial involving this defendant.

Number of Charges	Description of Charges	Disposition
1	Material involving sexual exploitation of minors	Guilty

The sentencing hearing for defendant(s), Doyle Randall Paroline, has been set for May 27, 2009, 11:00 AM at U.S. Federal Courthouse, 211 W. Ferguson, Tyler, TX before Judge Leonard E. Davis. You are welcome to attend this proceeding; however, unless you have received a subpoena, your attendance is not required by the Court. If you plan on attending, please check with the VNS Call Center to verify the sentencing date and time. Should you wish to speak at the sentencing or want to check for the most current information on the date/time of this event please call our office a day or two before the scheduled hearing.

A United States Probation Officer prepares a report for the Court and may contact you to discuss the impact the crime had on you financially, physically, and/or emotionally. If you are contacted, please make every effort to provide accurate and detailed information.

The Victim Notification System (VNS) is designed to provide you with information regarding the case as it proceeds through the criminal justice system. You may obtain current information about this case on the VNS Web site at https://www.notify.usdoj.gov or from the VNS Call Center at 1-866-DOJ-4YOU (1-866-365-4968) (TDD/TTY: 1-866-228-4619) (International: 1-502-213-2767). In addition, you may use the Call Center or Internet to update your contact information and/or change your decision about participation in the notification program. If you update your information to include a current email address, VNS will send information to that address. In order to continue to receive notifications, it is your responsibility to keep your contact information current.

You will use your Victim Identification Number (VIN) [redacted] and Personal Identification Number (PIN) [redacted] anytime you contact the Call Center and the first time you log on to the VNS web site. In addition, the first time you access the VNS Internet site, you will be prompted to enter your last name (or business name) as currently contained in VNS. The name you should enter is [redacted]

Remember, VNS is an automated system and cannot answer questions. If you have other questions which involve this matter, please contact this office at the number listed above.

Sincerely,
Rebecca A. Gregory
United States Attorney

Becky Smith
Victim Witness Coordinator

If you do not want to receive email notifications from the Victim Notification System (VNS) or wish to no longer participate in the Department of Justice victim notification program, please log into the VNS Web site at https://www.notify.usdoj.gov. To stop receiving email notifications or change your email address select My Information and either remove your email address or provide a new address and click the "update" button. If you no longer wish to receive notifications in your case or access the VNS Web site and toll free telephone service, select Stop Receiving Notifications and follow the instructions on the screen.

If you believe you have received this email in error, please contact the office listed at top of the email message.

Please note, if this is the first notification you have received from VNS you will need to wait 4-8 hours from receipt of this email before you can login to the VNS Internet site (http://www.notify.usdoj.gov). In addition, it will also be 4-8 hours before any documents which may have been uploaded to VNS as part of this notification will available under the "Documents/Links" section on the Web page.

From: Larisa Mitcham
To: Victim Notification System
Subject: US Department of Justice Victim Notification System
Date: Monday, June 22, 2009 4:26:21 PM

DO NOT REPLY TO THIS EMAIL.

U.S. Department of Justice
United States Attorney's Office
Eastern District of Texas in Tyler
110 N. College
Ste. 700
Tyler, TX 75702
Phone: 18008043547
Fax: (903) 590-1439

June 22, 2009

James Marsh, Attorney
14525 S.W. Millikan Way
Suite 100
Beaverton, OR 97005

RE: United States v. Defendant(s) Doyle Randall Paroline
Case Number 2008R00609 and Court Docket Number 08-CR-00061-6

Dear James Marsh, Attorney:

The United States Department of Justice believes it is important to keep victims of federal crime informed of court proceedings. You have been identified to receive notifications for [redacted]
This notice provides information about the above-referenced criminal case.

Defendant Doyle Randall Paroline was sentenced by the Court. Court ordered the defendant to the following:

Incarceration of 24 month(s)
Followed by Supervised Release of 10 year(s)
Special Assessment of $100.00.
Fine of $0.00.

The Court further ordered the following special condition(s): Sex Offender Treatment.

The Victim Notification System (VNS) is designed to provide you with information regarding the case as it proceeds through the criminal justice system. You may obtain current information about this case on the VNS Web site at https://www.notify.usdoj.gov or from the VNS Call Center at 1-866-DOJ-4YOU (1-866-365-4968) (TDD/TTY: 1-866-228-4619) (International: 1-502-213-2767). In addition, you may use the Call Center or Internet to update your contact information and/or change your decision about participation in the notification program. If you update your information to include a current email address, VNS will send information to that address. In order to continue to receive notifications, it is your responsibility to keep your contact information current.

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(or business name) as currently contained in VNS. The name you should enter is [redacted]

Remember, VNS is an automated system and cannot answer questions. If you have other questions which involve this matter, please contact this office at the number listed above.

Sincerely,
JOHN M. BALES
United States Attorney

Becky Smith
Victim Witness Coordinator

If you do not want to receive email notifications from the Victim Notification System (VNS) or wish to no longer participate in the Department of Justice victim notification program, please log into the VNS Web site at https://www.notify.usdoj.gov. To stop receiving email notifications or change your email address select My Information and either remove your email address or provide a new address and click the "update" button. If you no longer wish to receive notifications in your case or access the VNS Web site and toll free telephone service, select Stop Receiving Notifications and follow the instructions on the screen.

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