In the

United States Court of Appeals

for the

District of Columbia Circuit

In Re: AMY, the Victim in the Misty Child Pornography Series,

Petitioner.

PETITION FOR A WRIT OF MANDAMUS PURSUANT TO THE CRIME VICTIMS' RIGHTS ACT, 18 U.S.C. § 3771(d)(3)

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The Honorable Gladys Kessler
United States District Judge

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STATEMENT OF THE RELIEF SOUGHT

Amy hereby petitions this Court, pursuant to the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771(d)(3), the All Writs Act, 28 U.S.C. § 1651, and Fed. R. App. P. 21, for a writ of mandamus directing the United States District Court for the District of Columbia to issue a restitution order requiring the defendant to pay her the "full amount" of her losses as required by 18 U.S.C. § 2259(a)(4). Specifically, Amy requests that the Court order the district court to award restitution of $3,263,758—the full amount of her losses—rather than the "nominal" award of $5000 ordered by the district court.

STATEMENT OF THE ISSUES PRESENTED

Did the district court properly refuse to award the "full amount" of Amy's losses as required by 18 U.S.C. § 2259(a)(4) after finding that Amy was a victim of the defendant's commission of a crime under Title 18, Chapter 110 of the United States Code and that the defendant's criminal conduct was both the "factual cause" and "proximate cause" of Amy's losses.

STATEMENT OF FACTS AND PROCEEDINGS BELOW

On December 10, 2009, the defendant Michael M. Monzel pleaded guilty to one count of distribution of child pornography in violation of 18 U.S.C. § 2252(a)(2) and one count of possession of child pornography in violation of

18 U.S.C. § 2252(a)(4)(B). Pet. Ex. pp. 39-48.[1] The National Center for Missing and Exploited Children ("NCMEC") identified Amy as one of the minors depicted in pornographic images Monzel illegally possessed. Pet. Ex. p. 181.[2]

Amy timely filed a victim impact statement along with a detailed request for restitution with extensive documentation supporting her claim.[3] In her request for restitution, which was supported by the Government, Amy sought approximately $3,680,153 from Monzel. Pet. Ex. p. 185. This amount reflects the total amount of Amy's losses and includes costs for future psychological care, future lost income, and attorney's fees. *Id.*

As Amy explained in her request for restitution, when she was 8 and 9 years old she was raped and sexually exploited in order to produce child sex abuse images for consumers of child pornography. Pet. Ex. p. 184. The primary reason Amy was raped and forced to endure cunnilingus, fellatio and digital penetration was to provide child pornography for an end user/possessor whose demand for

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[1] A set of numbered exhibits is filed with this petition and are cited here as "Pet. Ex."

[2] The legal term child "pornography" is neither the best nor the most accurate term to describe the materials which record Amy being raped when she was eight year old girl. "In the context of children . . . there can be no question of consent, and use of the word 'pornography' may effectively allow us to distance ourselves from the material's true nature. A preferred term is 'abuse images' and this term is increasingly gaining acceptance among professionals working in this area. Using the term abuse images accurately describes the process and product of taking indecent and sexualized pictures of children, and its use is, on the whole, to be supported." SHARON W. COOPER ET. AL., MEDICAL, LEGAL, & SOCIAL SCIENCE ASPECT OF CHILD SEXUAL EXPLOITATION 258 (2005) (quotation marks added).

[3] Amy is the victim in the "Misty series" of child pornography. Amy is the victim's initials.

child sex abuse images directly led to her physical and psychological abuse and exploitation. The worldwide distribution of Amy's images has continued in an unbroken chain to this day.

Amy wrote in her victim impact statement:

> The truth is, I am being exploited and used every day and every night somewhere in the world by someone. How can I ever get over this when the crime that is happening to me will never end? How can I get over this when the shameful abuse I suffered is out there forever and being enjoyed by sick people?" "I am horrified by the thought that other children will probably be abused because of my pictures

Pet. Ex. pp. 184-185. Amy still does not know, nor can she ever know, the countless pedophiles that actively seek, receive, distribute and possess her child sex abuse images, secretly trading them in a nefarious underground world of fellow "hobbyists." These degenerates might be living across the street or a thousand miles away. Due to the anonymity of the Internet, tens of thousands of pedophiles intimately know Amy, but she does not and cannot know their hidden identities unless or until they are apprehended by law enforcement.

As Amy explained in her victim impact statement:

> Every day of my life I live in constant fear that someone will see my pictures and recognize me and that I will be humiliated all over again. It hurts to know someone is looking at them–at me–when I was just a little girl being abused for the camera. I did not choose to be there, but now I am there forever in pictures that people are using to do sick things. I want it all erased. I want it all stopped. But I am powerless to stop it just like I was powerless to stop [the abuse].

Pet. Ex. p. 456.

On May 18, 2010, the district court sentenced Monzel to 120 months in prison on both counts followed by ten years of supervised release. Pet. Ex. pp. 146-152. The district court then set a later hearing to determine issue of restitution.

On October 22, 2010, after reviewing Amy's victim impact statement and briefs from the government and defendant, the district court entered a memorandum opinion finding specifically that Amy was a "victim" of the defendant's crimes:

> Thus, it is clear that Amy . . . [was] harmed as a result of Defendant's possession of images exhibiting [her] abuse. Indeed, Monzel acknowledged as much at his sentencing when he submitted a statement that 'every time I looked at a picture or video I was victimizing that child.'"

Pet. Ex. pp. 434-435.

The district court further found that the defendant's conduct was both the "factual cause" and "proximate cause" of Amy's losses. Pet. Ex. pp. 440, 444. Concerning factual cause, the district court found that "[a]lthough [Amy] may have been suffering from such fear and anxiety prior to an individual defendant's conduct, each notification of a defendant's conduct perpetuates the trauma, thereby prolonging recovery, and increasing harm to the victim." Pet. Ex. p. 440.

The district court also rejected the defendant's argument that he should be absolved from responsibility because many other pedophiles had viewed Amy's images: "[E]ven if the same anxiety and fear which [Amy] now suffer[s] would have been caused by others in any event, that is no reason to ignore Defendant's responsibility for the harm that he has caused." *Id.*

Concerning proximate cause, the district court concluded that this Circuit has yet to adopt a definitive standard. Relying on numerous authorities, the district court concluded that the appropriate approach was to ask "whether there is an intuitive relationship between the act(s) alleged and the damages at issue (that is, whether the conduct was wrongful *because* that type of damage might result)." Pet. Ex. p. 442. (*citing* RESTATEMENT (THIRD) OF TORTS § 29 at 113, 115)).

Utilizing this approach, the district court ruled that Amy's losses "clearly fall within the scope of this risk [which the defendant assumed when he engaged in criminal behavior]: all of [these victims] alleged losses arise out of the need for ongoing psychological treatment and [their] inability to maintain normal, emotionally healthy lives as a result of the knowledge that Monzel and others continue to possess images of their abuse." Pet. Ex. p. 444.

The district court then ordered one further round of briefing on the issue of whether the defendant should pay Amy's entire losses or whether the losses could be apportioned so that the defendant would only have to pay a portion of them.

The government then submitted an additional brief, requesting that the Court award Amy restitution in the amount of $3,134,332, primarily for counseling expenses and lost income.[4] The defendant replied, asking that only nominal restitution to be awarded. Pet. Ex. pp. 472-478.

On January 11, 2011, the district court agreed with the defendant and ordered the defendant to pay "nominal" restitution of $5000. The district court reasoned that "where harm is done to the victim, some part of which was caused by the Defendant and some part of which was not, the burden is on the party seeking damages to prove, within a reasonable degree of certainty, the share of the harm for which the Defendant is responsible." (internal quotation omitted) Pet. Ex. pp. 481-482. Since Amy could not show what share of her damages was attributable to the defendant's crime, she was entitled to receive only "nominal"

[4] The government clarified that this amount included: (1) $512,681 for Amy's treatment and counseling; (2) $2,855,173 for lost income; (3) $17,063 for expert witness fees; and (4) $3,500 in attorney's fees. The government also explained that the figures were supported by a letter from Amy's counsel, Amy's victim impact statement, and expert psychological report prepared by Dr. Joyanna Silberg of Child Recovery Resources, and an expert economic report prepared by Dr. Stan Smith of Smith Economics Group, Ltd. Pet. Ex. p. 451. The government noted that the restitution figure it was seeking was reduced by the $245,084 in restitution Amy had already received in other cases.

damages. Pet. Ex. p. 483. The district court conceded that it had "no doubt that this level of restitution is less than the actual harm this particular Defendant caused [Amy]." *Id.*

Amy then promptly filed this timely petition for review, as specifically authorized by the CVRA. *See* 18 U.S.C. § 3771(d)(3) (crime victims authorized to file for review of adverse decisions); 18 U.S.C. § 3771(D)(5)(B) (appellate court may "make a motion to re-open sentence . . . [if] the victim petitions the court of appeals for a writ of mandamus within 14 days").

STANDARD OF REVIEW

Amy petitions this court under a provision in the CVRA specifically providing that "[i]f the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus." 18 U.S.C. § 3771(d)(3). Ordinarily, "whether mandamus relief should issue is discretionary." *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005). The plain language of the CVRA, however, specifically and clearly overrules the conventional mandamus standards by directing that "[t]he court of appeals *shall take up and decide such application*

forthwith . . . ." 18 U.S.C. § 3771(d)(3) (emphasis added).[5] As one of the CVRA's co-sponsors, Senator Jon Kyl stated:

> [W]hile mandamus is generally discretionary, this provision [18 U.S.C. § 3771(d)(3)] means that courts *must* review these cases. Appellate review of denials of victims' rights is just as important as the initial assertion of a victim's right. This provision ensures review and encourages courts to *broadly defend* the victims' rights.

150 CONG. REC. at S10912 (April 24, 2004) (statement of Sen. Kyl) (emphases added). In short, Congress has provided non-discretionary appellate review through mandamus:

> the problem in review of victims' rights is not the unavailability of writ review, but rather the discretionary nature of writs. The solution to the review problem is to provide for nondiscretionary review of victims' rights violations. . . . The solution of Congress in [the CVRA] is excellent, providing for a nondiscretionary writ of mandamus.

Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 BYU L. REV. 255, 347; *see also* MOORE'S FED. PRAC. 3D § 321.14[1] (2007) ("because Congress has chosen mandamus as the mechanism for review under the CVRA, the victim need not make the usual threshold showing of extraordinary circumstances to obtain mandamus relief"); Paul G. Cassell, *Protecting Crime Victims in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims' Rights Act's Mandamus Provision*, 87 DENV. U.L. REV. 599, 621

[5] The CVRA also directs a decision within 72 hours. In a separate motion filed with this petition, the victim waives that right.

("[Through the CVRA] Congress intended to give crime victims the same sort of access to the nation's appellate courts as other litigants obtain.").

Another provision in the CVRA also indicates that the statute provides ordinary appellate review. The CVRA directs that "[i]n *any* court proceeding"—presumably including appellate court proceedings—"the court shall *ensure* that the crime victim is afforded the rights described in [the CVRA]." 18 U.S.C. § 3771(b)(1). The congressional requirement that appellate courts "ensure" that crime victims are "afforded" their rights would be fatally compromised if those courts could only examine lower court proceedings for clear and indisputable errors.[6]

The majority of circuits that have reached the question have concluded that the CVRA gives victims ordinary appellate review. For example, the Ninth Circuit so held in *Kenna v. United States District Court for the Central District of California*, 435 F.3d 1011, 1017 (9th Cir. 2006):

> [T]he CVRA contemplates active review of orders denying victims' rights claims even in routine cases. The CVRA explicitly gives victims aggrieved

[6] To further guarantee appellate review of the denial of crime victims' rights, the CVRA also provides that in "any appeal in a criminal case, the government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates." 18 U.S.C. § 3771(d)(5). This provision further demonstrates that crime victims can obtain ordinary appellate review by filing their own mandamus petition. Otherwise they would be penalized for relying on their legal counsel rather than seeking to convince the government, in its discretion, to seek appellate review. It is absurd to impute to Congress the intent that crime victims would have less ability to protect their own rights than the government.

> by a district court's order the right to petition for review by writ of mandamus, provides for expedited review of such a petition, allows a single judge to make a decision thereon, and requires a reasoned decision in case the writ is denied. The CVRA creates a unique regime that does, in fact, contemplate routine interlocutory review of district court decisions denying rights asserted under the statute.

Likewise, the Second Circuit has held that "[u]nder the plain language of the CVRA . . . Congress has chosen a petition for mandamus as a mechanism by which a crime victim may *appeal* a district court's decision denying relief" under the CVRA, *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 563 (2d Cir. 2005), and therefore "a petition seeking relief pursuant to the mandamus provision set forth in § 3771(d)(3) need not overcome the hurdles typically faced by a petitioner seeking review of a district court determination through a writ of mandamus." *Id.* at 562. The Eleventh Circuit also has granted crime victims petitioning under the CVRA mandamus provision ordinary appellate review. *See In re Stewart*, 552 F.3d 1285 (11th Cir. 2008). The Third Circuit takes this position as well, albeit in an unpublished decision. *In re Walsh*, 229 Fed.Appx. 58 at * 2 (3rd Cir. 2007).

In contrast to the Second, Third, Ninth, and Eleventh Circuits, three circuits have taken the position that the CVRA gives victims only deferential review for clear and indisputable errors. These cases stem from the Tenth Circuit's decision that CVRA mandamus petitions are subject to review only for "clear and indisputable" error. *In re Antrobus*, 563 F.3d 1092, 1097 (10th Cir. 2009).

The Fifth Circuit simply followed the Tenth Circuit without elaboration in *In re Dean,* 527 F.3d 391, 394 (5th Cir. 2008) (*citing In re Antrobus*, 519 F.3d 1123, 1124 (10th Cir. 2008)). The Sixth Circuit also has reached a similar conclusion. *In re McNulty*, 597 F.3d 344, 348-49 (6th Cir. 2010).

Interestingly, despite this clear and acknowledged "circuit split," the courts that have refused to grant crime victims ordinary appellate review have never reviewed the legislative history of the CVRA. In this Circuit, legislative history is frequently used to resolve statutory ambiguities. *See, e.g., United States v. Villanueva*-Sotelo, 515 F.3d 1234, 1243 (D.C. Cir. 2008) ("Having found [the statute] ambiguous, we seek guidance in the . . . relevant legislative history . . . ."). Given that four circuits have ruled in favor of broad appellate review for crime victims, any perceived ambiguity should be resolved by analyzing the statute's legislative history.

The relevant legislative history unequivocally demonstrates that Congress intended crime victims to receive regular appellate review. One of the CVRA's co-sponsors, Senator Jon Kyl stated:

> [W]hile mandamus is generally discretionary, this provision [18 U.S.C. § 3771(d)(3)] means that courts *must* review these cases. Appellate review of denials of victims' rights is just as important as the initial assertion of a victim's right. This provision ensures review and encourages courts to *broadly defend* the victims' rights.

> Without the right to seek appellate review and a guarantee that the appellate court will hear *the appeal* and order relief, a victim is left to the mercy of the very trial court that may have erred. This country's appellate courts are designed to *remedy errors of lower courts* and this provision *requires them to do so* for victim's rights.

150 CONG. REC. at S10912 (April 24, 2004) (statement of Sen. Kyl) (emphases added). Directly contradicting the conclusion that the CVRA simply codifies a "common law tradition," 527 F.3d at 393, Senator Feinstein emphasized that the Act creates "*a new use* of a very old procedure, the writ of mandamus. This provision will establish a procedure where a crime victim can, in essence, immediately *appeal* a denial of their rights by a trial court to the court of appeals." 150 CONG. REC. S4262 (statement of Sen. Feinstein) (emphases added); *see also Id.* (statement of Sen. Kyl) (crime victims must "be able to have . . . the appellate courts *take the appeal and order relief.*").[7]

This Court should adopt the majority position among the Courts of Appeals and grant crime victims ordinary appellate review of their claims when they file a CVRA mandamus petition.[8]

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[7] It is well settled that statements made by the sponsors of legislation "deserve to be accorded substantial weight in interpreting the statute." *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976); *accord Kenna*, 435 F.3d at 1015-16 (giving substantial weight to remarks of Senators Feinstein and Kyl to interpret the CVRA).

[8] Since the standard of review for CVRA mandamus petitions is an issue of first impression in this Circuit, Amy has also filed a notice of appeal seeking review of the same restitution order. As further explained in her motion to consolidate the appeal with this mandamus petition,

STATEMENT OF THE REASONS WHY THE WRIT SHOULD ISSUE

The substantive issues presented in this petition involve the proper construction of the applicable restitution statute. Appellate review here is accordingly *de novo*. *See Bennett v. Islamic Republic of Iran*, 618 F.3d 19, 20 (D.C. Cir. 2010).

The controlling restitution statute, 18 U.S.C. § 2259, unequivocally states 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) (emphasis added).

In this case, the district court found that Amy was a "victim" entitled to restitution under § 2259. Pet. Ex. p. 479. It also found that the defendant's conduct was the factual and proximate cause of Amy's losses. *Id.* The district court nonetheless concluded that Amy only was entitled to "nominal" damages that were "less than the actual harm" the defendant caused Amy. Pet. Ex. p. 483.

The district court clearly and indisputably erred when it decided that full restitution could not be awarded because Amy failed to provide specific evidence linking the defendant's viewing of her images to a precise amount of damages.

Amy is also entitled to obtain ordinary appellate review of the restitution order through a traditional appeal.

This improper reading of the statute clearly contradicts Congress' mandate that the district court "shall" enter a restitution award for "*the full amount* of the victim's losses." 18 U.S.C. § 2259(b)(1).

The district court's approach essentially bars all victims of child pornography from collecting anything other than nominal restitution. Congress did not intend that child pornography victims be so limited in obtaining full restitution for established losses. Accordingly, the writ should issue and the district court should be instructed to award Amy restitution in the full amount of her losses as plainly provided by the statute.[9]

I. Section 2259 Broadly Mandates that District Courts Expansively Award Full Restitution to Victims of Child Pornography

Amy petitions this Court seeking protection of her right to restitution. In the Crime Victims' Rights Act, Congress promised crime victims like Amy that they will have a set of enforceable "rights" in the criminal justice system. *See Kenna v. U.S. District Court*, 435 F.3d 1011, 1013 (9th Cir. 2006) (the CVRA was designed to make "victims independent participants in the criminal justice process"). Among the rights Congress guaranteed is the right to "full and timely restitution as provided in law." 18 U.S.C. § 3771(a)(6).

[9] Amy is only appealing the restitution portion of Monzel's sentence.

The law providing restitution in this case—18 U.S.C. § 2259—is remedial legislation designed to fully compensate victims of child pornography. As such, the Act should be "liberally construed to effectuate its remedial purposes." *United States v. Day*, 524 F.3d 1361, 1378 (D.C. Cir. 2008).

The remedial purpose behind § 2259 is readily apparent: In adopting this law, Congress intended "to make whole . . . victims of sexual exploitation." *United States v. Danser*, 270 F.3d 451, 455 (7th Cir. 2001). This remedial purpose is extensively reviewed in *United States v. Julian*, 242 F.3d 1245 (10th Cir. 2001), which noted that Congress generally sought "to ensure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well being." *Id.* at 1247 (quoting Sen. Rep. 104-179, at 42-44 (1995)). The relevant congressional reports quote extensively from the seminal case of *New York v. Ferber*, 458 U.S. 747 (1982), which found long-term serious physiological, emotional, and mental difficulties of victims who were sexually exploited through the production, distribution, and possession of child pornography:

> The use of children as subjects of pornographic materials is very harmful to both the children and the society as a whole. It has been found that sexually exploited children are unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults.
>
> Pornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a

> recording, the pornography may haunt him in future years, long after the original misdeed took place.

Ferber, 458 U.S. at 758-60 nn. 9 & 10, *discussed in Julian*, 242 F.3d at 1247 (collecting legislative history relying on this passage).

To address these serious harms, § 2259 makes restitution for child pornography victims mandatory. The section broadly provides that "in addition to any other civil or criminal penalty authorized by law, the court *shall* order restitution for any offense under this chapter." 18 U.S.C. 2259(a) (emphasis added). To underscore the mandatory nature of restitution under the statute, Congress repeated later in the statute: "Order mandatory. The issuance of a restitution order under this section is mandatory." 18 U.S.C. § 2259(b)(4)(a).

It is important to understand that § 2259's provisions are broader than other restitution statutes. Section 2259 extends it protections to any "victim" who is simply "harmed" by a crime of child pornography, requiring neither "proximate harm" nor "direct harm." *See* 18 U.S.C. § 2259(c) ("For purposes of this section, the term 'victim' means the individual *harmed* as a result of a commission of a crime under this chapter . . . . ") By purposely omitting the narrowing qualifiers "directly" and "proximately" found in other general restitution statutes, *cf.* 18 U.S.C. § 3663(a)(2), the reasonable inference is that Congress did not want to burden child pornography victims with some sort of obligation to demonstrate a "direct"

or proximate" harm as prerequisite to receiving restitution. In this sense, § 2259 fits into a pattern of statutes addressing "a tide of depravity that Congress, expressing the will of our nation, has condemned in the strongest terms." *United States v. Goff*, 501 F.3d 250, 259 (3rd Cir. 2007) (*citing* Child Pornography Prevention Act of 1996, Pub. L. 104-208, § 121, 110 Stat. 3009-26 ("Congress finds that . . . where children are used in its production, child pornography permanent 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 . . . .")).

Congress also expanded the categories of losses for which child pornography victims are entitled to restitution. *United States v. Julian*, 242 F.3d 1245 (10th Cir. 2001), compared § 2259 with the other general restitution statutes, finding a striking contrast:

> We note that § 2259 and the other two mandatory restitution statutes associated with violence against women and children which were adopted at the same time, *see* 18 U.S.C. §§ 2248 & 2264, *are much broader* than § 3663A [the Mandatory Victim Restitution Act]. . . . [T]hese three statutes use the terms "full amount of the victim's losses" for "any costs incurred" for physical, psychiatric, or psychological care, and also include restitution for "any other losses suffered by the victim as a proximate result of the offense."

Id. at p. 1247 (emphasis added). In adopting § 2259, Congress clearly wanted child pornography victims to have an "expansive remedy" for recovering all their losses, rather than a "cumbersome procedure" that would make recovery difficult. *See*

United States v. Danser, 270 F.3d 451, 455 (7th Cir. 2001) (rejecting defense argument that under § 2259 child pornography victims have to file claims for future counseling costs as they arise; "[w]e do not believe that Congress sought to create such a cumbersome procedure for victims to receive restitution.").

II. The District Court Clearly And Indisputably Erred In Refusing to Award Amy The "Full Amount of Her Losses

A. Congress Did Not Intend For Child Pornography Victims Like Amy To Undertake The Infeasible Task Of Directly Linking Her Harms To A Particular Defendant's Crime

The district court concluded that in order for Amy to obtain more than nominal restitution, she is required to undertake the infeasible task of directly linking her harms to a particular defendant's crime. Nothing in § 2259 can reasonably be read as imposing such a burden—a burden which would effectively make it impossible for any child pornography victim to obtain full restitution.

Section 2259 requires that the district 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) (emphases added). The statute goes on to list six categories of damages that form these losses.[10]

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[10] (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;

The district court found that Amy was a "victim" protected by this statute. Pet. Ex. p. 479. It further found that Amy had been proximately harmed by the defendant's crime. *Id.* The defendant did not appeal these conclusions and accordingly this case does not present any issues surrounding Amy's "victim" status or whether she has satisfied any "proximate" harm requirement.[11]

The district court nonetheless refused to award Amy the full amount of her losses because it seemingly lacked a "rational, evidence-based procedure for ascertaining the dollar value of the harms suffered by each of these victims as a result of this particular Defendant's possession of the pornographic images." Pet. Ex. p. 482. This conclusion was clear and indisputable error. The statute's plain language does not impose any requirement on child pornography victims to quantify the exact "dollar value" for each harm stemming from the defendant's crime.

(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).

[11] To be clear, Amy does not believe that § 2259 imposes any general requirement of "proximate" harm as a condition to obtaining restitution. Instead, according to the plain language of the statue, a victim need only demonstrate a "proximate" harm when seeking damages under the open-ended category of "other losses." Compare 18 U.S.C. § 2259(b)(3)(A)-(E) (listing five categories of restitution losses without any "proximate" limitation) with § 2259(b)(3)(F) (victims entitled to restitution for "any other losses suffered by the victim as a proximate result of the offense"). Since the district court expressly found that Amy's losses were proximately caused by Monzel's crimes, this Court need not address this issue to resolve this case.

Judge Dennis of the Fifth Circuit provided an instructive opinion on this very question in a case in which Amy sought the same restitution that she seeks here. Judge Dennis explained that "Congress emphasized in 18 U.S.C. § 2259 that it is mandatory for a court to issue a restitution order in favor of a victim who was caused harm by child pornography." *In re Amy*, 591 F.3d 792, 797 (5th Cir. 2009) (Dennis, J., dissenting). Accordingly, once a victim establishes that she was harmed by a defendant's child pornography crime:

> the statute require[s] the district court to calculate a dollar amount and impose restitution. [Amy's] right to restitution is not barred merely because the precise amount she is owed by [the defendant] is difficult to determine. Congress enacted § 2259 to provide broad restitution rights for victims who, like [Amy], have been harmed by the commission of child exploitation offenses, including possession of these sexually abusive images.

Id. (Dennis, J., dissenting). Judge Dennis explained that Congress could not have possibly intended that child pornography victims precisely quantify the exact harm inflicted from a particular viewing of their images. Instead, "Congress intended to afford child victims ample and generous protection and restitution, not to invite judge-made limitations patently at odds with the purpose of the legislation." *Id.* (Dennis, J., dissenting). To require some sort of precise linkage to a particular defendant's crimes will result in "the intent and purposes of § 2259 . . . be[ing] impermissibility nullified because the problem of allocating restitution . . . will be found in virtually *every* case where a child depicted in electronically

disseminated pornography seeks restitution from those who unlawfully possess those images." *Id.* (emphasis in original).

Judge Dennis' analysis is persuasive and should be followed here.[12] Rather than read into the statute additional hurdles that a victim of child pornography has to overcome to obtain, for example, restitution for necessary psychological counseling, the Court should simply apply the statute as Congress wrote it. As Judge Dennis explained, "Section 2259 does 'not impose a requirement of causation approaching mathematical precision.'" *In re Amy*, 591 F.3d at 797 (Dennis, J., dissenting) (*quoting United States v. Doe*, 488 F.3d 1154, 1160 (9th Cir. 2007)). Instead, the statute can simply be read as requiring the district court to make a "reasonable estimate " that is "not based on an arbitrary calculation." 591 F.3d at 797 (Dennis, J., dissenting) (internal quotation omitted).

Moreover, Congress has simplified calculation of damages in many cases that will be prosecuted under § 2259 by specifying a conclusively presumed minimum damages award of $150,000. *Id.* (*citing* 18 U.S.C. § 2255). "Masha's

[12] The two other judges on the panel did not dispute his statutory analysis. Rather, they believed that Amy did not meet the Fifth Circuit's high standard for mandamus relief by showing "clear and indisputable" error in the district court's restitution order. *See* 591 F.3d at 794 ("the district court did not so clearly and indisputably abuse its discretion as to compel prompt intervention by the appellate court" (internal quotation omitted)). Amy promptly filed a petition for panel rehearing and for rehearing *en banc* on her mandamus petition, as well as a traditional appeal. *See In re Amy*, No. 09-41238, No. 09-41254 (5th Cir. 2009). The Fifth Circuit held oral argument on Amy's traditional appeal on November 4, 2010. A decision from the Fifth Circuit is pending.

Law"—18 U.S.C. § 2255—provides that any child who is the victim of a violation of various laws (including the crimes at issue here) can bring a civil action and is deemed to have suffered losses of at least $150,000. *See United States v. Estep*, 378 F.Supp.2d 763 n. 4 (E.D.Ky. 2005).[13]

Remarkably, the district court in this case inexplicably refused to award Amy even the congressionally directed *minimum* damage amount. The district court instead awarded only "*nominal"* restitution, even while acknowledging that it had "no doubt" that merely awarding $5000 in restitution "is less than the actual harm this particular Defendant caused each victim." Pet. Ex. pp. 482-483.

According to the plain language of § 2259, Amy is entitled to restitution for the "full amount of the victim's losses." 18 U.S.C. § 2259(b)(1). As the Third Circuit previously held, "[t]here is nothing in [§ 2259] that provides for a proportionality analysis." *United States v. Crandon*, 173 F.3d 122, 126 n.2 (3rd Cir. 1999). Moreover,

[13] Masha's Law is a civil remedy which is an integral part of the statutory scheme established in Title 18, Chapter 110. The relationship between criminal restitution and civil tort actions was discussed by the Seventh Circuit in *U.S. v. Bach*, 172 F.3d 520, 523 (7th Cir. 1999): "The [MVRA] requires the court to identify the defendant's victims and to order restitution to them in the amount of their loss. In other words, definite persons are to be compensated for definite losses just as if the persons were successful tort plaintiffs. . . . Functionally, the Mandatory Victims Restitution Act is a tort statute, though one that casts back to a much earlier era of Anglo-American law, when criminal and tort proceedings were not clearly distinguished. The Act enables the tort victim to recover his damages in a summary proceeding ancillary to a criminal prosecution. . . ." *Accord U.S. v. Duncan*, 870 F.2d 1532 (10th Cir. 1989) (where a civil suit covered the same alleged acts of wrongdoing as the restitution order, and the amount of compensatory damages sought in the civil suit was no greater than the amount alleged by the Government in connection with the criminal offense, there was no abuse of discretion in the district court's deferral to judgment in the civil suit in determining the proper amount of restitution).

in § 2259 Congress intended "to make whole . . . victims of sexual exploitation." *United States v. Danser*, 270 F.3d 451, 455 (7th Cir. 2001). Once the defendant was convicted of possessing Amy's child sex abuse images, the overriding concern at sentencing should have been insuring that *she* was made whole. The district court clearly and indisputably failed to discharge its obligation to award the restitution required by Congress in § 2259.

B. In Mandating That Defendants Pay Full Restitution, Congress Followed A Long-Recognized Tort Principle That Multiple Wrongdoers Are All Jointly Responsible For Losses Caused To An Innocent Victim

Section 2259 does not require Amy to disaggregate harms by individual defendants not only because of the statute's plain language and clear congressional intent, but also because this is the common law approach. This Court has been reluctant to construe statutes as derogating the common law, *see, e.g., Picker v. Searcher's Detective Agency, Inc.*, 515 F.2d 1316, 1319 (D.C. Cir. 1975), finding that it is reasonable to assume that "Congress had the common law rule in mind when it legislated." *Sherwood Bros v. District of Columbia*, 113 F.2d 162, 163 (D.C. Cir. 1940). The Court widely recognizes in tort and other contexts that the wrongdoer—not the innocent victim—must bear the loss when the issue is disentangling a harm stemming from multiple causes. In passing § 2259, Congress legislated in that long established Anglo-American tradition.

In mandating restitution in child pornography cases for the "full amount" of a victim's losses, Congress was doing nothing more than applying conventional tort principles. As William L. Prosser recognized in his singular *Handbook of the Law of Torts*, when "there is a joint enterprise, and a mutual agency, so that the act of one is the act of all . . . liability for all that is done must be visited upon each. It follows that there is no logical basis upon which the jury may be permitted to apportion the damages." WILLIAM L. PROSSER, TORTS 315 (4th ed. 1971).

Congress followed Prosser's approach in § 2259. It refused to allow district courts to apportion restitution in child pornography, requiring instead the district court to—in Prosser's words—"visit upon each" offender the full damage the victim suffered. Congress also recognized that the illicit trade in child pornography is a joint enterprise, albeit a large and amorphous one. Although the defendant may not have produced Amy's child pornography images, he was part of—in Prosser's words—the "joint enterprise and mutual agency" which received, possessed and distributed her images to ever more willing and eager consumers.

It is the scale of this publication of Amy's abuse images on the internet and the resulting invasion of her privacy interests which has caused—and will continue to cause—the greatest on-going harm during her lifetime. As the Supreme Court has explained, "[a] child who has posed for a camera must go

through life knowing that the recording is circulating within the mass distribution system for child pornography. . . . It is the fear of exposure and the tension of keeping the act secret that seem to have the most profound emotional repercussions." *Ferber,* 458 U.S. at 759 n. 10.

Each possession and each distribution of an image of Amy being raped all combine to produce what Prosser calls a "single indivisible result:"

> Certain results, by their very nature, are obviously incapable of any logical, reasonable, or practical division. Death is such a result, and so is a broken leg or any single wound, the destruction of a house by fire, or the sinking of a barge. No ingenuity can suggest anything more than a purely arbitrary apportionment of such harm. Where two or more causes combine to produce such a single result, incapable of any logical division, each may be a substantial factor in bringing about the loss, and if so, each must be charged with all of it.
>
> .....
>
> Such entire liability . . . is imposed where either cause would have been sufficient in itself to bring about a result and also where both were essential to the injury. It is not necessary that the misconduct of two defendants be simultaneous. One defendant may create a situation upon which the other may act later to cause the damage. . . . Liability in such case is not a matter of causation, but of the effect of the intervening agency upon culpability. *If a defendant is liable at all, he will be liable for all the damage caused.*

WILLIAM L. PROSSER, TORTS 315-17 (4th ed. 1971) (emphasis added).

In this case, it is equally impossible to apportion Amy's harm among the numerous past, present, and future defendants, all of whom have caused Amy's images to go "viral" on the internet. The district court specifically found that Monzel's viewing of the images was a "factual cause of the harm suffered by Amy."

Pet. Ex. p. 440. He thus undeniably contributed to Amy's psychiatric "death by a thousand cuts." Monzel, as "the consumer of [Amy's] child pornography 'create[d] a market' for [her] abuse by providing an economic motive for creating and distributing the materials." *United States v. Goff*, 501 F.3d 250, 260 (3rd Cir. 2007) (*citing Osborne*, 495 U.S. 103, 109-12 (1990); *Ferber*, 458 U.S. at 755-56). To be sure, many other criminals viewed Amy's images as well. But is at odds with common law principles—and, indeed, utterly perverse—to allow this defendant to escape paying full restitution to Amy because he was one criminal among many. Congress clearly did not intend to give child pornographers a defense to paying restitution by arguing that "everyone is doing it."

C. The Eighth Amendment's "Excessive Fines" Clause Is Not Violated By A Full Restitution Award

A full restitution award does not violate the Eighth Amendment's prohibition of "excessive fines" (as the defendant seems to argue below, Pet. Ex. p. 474). U.S. CONST. amend. VIII. Restitution is simply not a criminal "fine" subject to Eighth Amendment review. A "fine" is a "pecuniary criminal punishment or civil penalty payable to the public treasury." BLACK'S LAW DICTIONARY 664 (8th ed. 2004). A restitution award is payable to the crime victim and thus is not a criminal penalty to which the Eighth Amendment applies.

As the Seventh Circuit explained in concluding that restitution awards are not subject to *Ex Post Facto* scrutiny:

> We do not believe that restitution qualifies as a criminal punishment. Restitution has traditionally been viewed as an equitable device for restoring victims to the position they had occupied prior to a wrongdoer's actions. *See* RESTATEMENT OF RESTITUTION (introductory note) (1937) (tracing the history of restitution throughout the common law). It is separate and distinct from any punishment visited upon the wrongdoer and operates to ensure that a wrongdoer does not procure any benefit through his conduct at others' expense. *See* 1 GEORGE E. PALMER, THE LAW OF RESTITUTION § 1.1, at 5 (1978) (noting that prevention of unjust enrichment is the central idea of restitution); *United States v. Gifford,* 90 F.3d 160, 163 (6th Cir.1996) (recognizing that the "primary purpose of restitution is to compensate the innocent victim of a crime"). The criminal law may impose punishments on behalf of all of society, but the equitable payments of restitution in this context inure only to the specific victims of a defendant's criminal conduct and do not possess a similarly punitive character.

United State v. Newman, 144 F.3d 531, 538 (7th Cir.1998).

While some courts have disagreed with the Seventh Circuit and concluded that the Eighth Amendment does govern restitution awards,[14] it makes no sense to say that the defendant is "punished" or "fined" when he is ordered to make the victim whole by paying restitution. Rather, the very concept of restitution "is logically and intuitively non-punitive." *United States v. Visinaiz*, 344 F.Supp.2d 1310, 1320 (D. Utah 2004) (explaining why restitution orders are not covered by

[14] *See, e.g., United States v. Sheinbaum*, 136 F.3d 443, 448-49 (5th Cir. 1998), *cert. denied*, 526 U.S. 1133 (1999); *United States v. Williams*, 128 F.3d 1239, 1241 (8th Cir. 1997) ("an order of restitution under the MVRA is punishment"); *United States v. Dubose*, 146 F.3d 1141 (9th Cir.), *cert. denied*, 525 U.S. 975 (1998) (same).

the Sixth Amendment jury trial provision).[15] The Excessive Fines Clause only "limits the government's power to extract payments, whether in cash or in kind, as *punishment* for some offense." *United States v. Bajakajian*, 524 U.S. 321, 328 (1998) (emphasis added) (internal quotation omitted). There simply is no "punishment" when a defendant is ordered to pay restitution directly to a crime victim for losses suffered due to the defendant's criminal activity.

Even if the Constitution's prohibition of excessive fines did apply to this situation, a full restitution award to Amy is in no way unconstitutionally excessive. A penalty is only excessive if "it is grossly disproportional to the gravity of a defendant's offense." *Bajakajian*, 524 U.S. at 334. "[J]udgments about the appropriate punishment for an offense belong in the first instance to the legislature." *Bajakajian*, 524 U.S. at 336.

Monzel committed two extremely serious felony offenses for which he was sentenced to ten years in prison followed by ten years of supervised release. His

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[15] The *Visinaiz* gave this helpful illustration:

> If a burglar is caught running out of a house with the homeowner's television, we would not say he was "punished" if the police officer took the television and gave it back to its owner. If a bank robber is caught on the bank's front steps, we would not say it is a "penalty" to give the loot bag back to the tellers. Requiring return of the property instead works to prevent a criminal from receiving a windfall by forcing him to disgorge an unjustly obtained benefit. Variations on these fact patterns are simply matters of degree. Thus, even if the burglar or the bank robber have escaped with their stolen property and have even converted it in some way, the return of equivalent value to the homeowner or the bank is better described as compensation to the victim rather than punishment of the criminal.

344 F.Supp.2d at 1320.

crimes directly contributed to Amy's severe and ongoing psychological harm, to the point where she feels "like I am being [sexually] abused over and over again." Pet. Ex. p. 189. Against this backdrop of serious crimes and serious harms, a multi-million dollar restitution award for the full amount of Amy's losses is simply not excessive.

Regardless, Monzel is not being asked to bear the entire award alone. The defendant is free to pursue contribution litigation against other convicted criminals who also contributed to Amy's losses. These individuals are readily identifiable in numerous federal cases. An updated list of such defendants is provided by Amy to defendants when requested.

The real issue in this case is not whether a multi-million dollar restitution award is excessive, but who bears the burden of pursing those responsible for the loss in order to obtain appropriate contribution: Amy, an innocent victim of crime? Or the defendant, who criminally contributed to her harms along with countless others? The Constitution surely does not prohibit Congress from shifting the burden from innocent victims to convicted criminals. Any Eighth Amendment challenge is accordingly meritless.

CONCLUSION

The district court improperly awarded Amy nominal restitution. It also erred by refusing to award the minimum statutorily presumed damages of $150,000. The district court ignored Congress' mandate that district courts "shall direct the defendant to pay the victim . . . the full amount of the victim's losses . . ." 18 U.S.C. § 2259.

This Court should accordingly direct that the writ issue requiring the district court to enter a restitution award in favor of Amy granting her the full amount of her losses.

The record is also clear that $3,263,758 is the full amount of her losses.[16] This Court should accordingly direct restitution in that amount. Alternatively, if this Court believes that there are factual questions requiring further development, it should remand to the district court for further proceedings.

Respectfully submitted,

/s/
Paul G. Cassell
Attorney for Vitim-Petitioner

[16] Other district courts have given Amy comparable restitution awards. In 2009, Senior United States District Court Judge Lacey A. Collier in the Northern District of Florida entered the first-ever restitution order against a criminal defendant who possessed child pornography depicting the victim. Judge Collier's order, which is being appealed, imposed restitution in the amount of $3,263,758. Judge K. Michael Moore in the Southern District of Florida awarded $3,680,153 in restitution to Amy in a case where the defendant also possessed her child pornography images. *United States v. Staples*, 2009 WL 2827204 (S.D.Fla. 09-02-09), per curiam *United States v. Staples*, No. 09-14156 (11th Cir. 12-20-10) (restitution order upheld on procedural grounds).

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

AFFIDAVIT OF SERVICE BY OVERNIGHT FEDERAL EXPRESS NEXT DAY AIR

I, **Omar Sierra**
911 Walton Ave.,
Apt. 6D
Bronx, N.Y. 10452 , being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On January 24, 2011

deponent served the within: **Petition for Writ of Mandamus Pursuant to The Crime Victims' Rights Act, 18 U.S.C. § 3771 (d) (3)**

Upon:

David Bos
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Judge Gladys Kessler
U.S. District Court for the District of Columbia
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Washington, DC 20001

the address(es) designated by said attorney(s) for that purpose by depositing **2** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on January 24, 2011

MARIA MAISONET
Notary Public State of New York
No. 01MA6204360
Qualified in Bronx County
Commission Expires Apr. 20, 2013

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