

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 09-31215

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MICHAEL WRIGHT,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

ON REHEARING EN BANC

BRIEF FOR APPELLANT MICHAEL WRIGHT

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FEBRUARY, 2012

CERTIFICATE OF INTERESTED PERSONS
United States v. Michael Wright
No. 09-31215

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STATEMENT OF JURISDICTION

This is an appeal from a final judgment in a criminal proceeding. The district court had jurisdiction under 18 U.S.C. § 3231. This Court has appellate jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

STATEMENT OF THE ISSUES

I.

Is the restitution authorized by 18 U.S.C. § 2259 limited to victim losses proximately caused by the defendant's offense conduct?

II.

If so, how should the proximate causation requirement be applied in the instant case?

STATEMENT OF THE CASE

(i) Course of Proceedings

Appellant Michael Wright pleaded guilty to a one-count bill of information charging possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B).¹ At least one of the images found on his computer was of a child, now a young adult, who has been seeking restitution in cases similar to Wright's under the pseudonym "Amy."²

Before sentencing, Amy requested \$3,367,854 in restitution from Wright through a submission to the U.S. Attorney's Victim Witness Coordinator, who transmitted it to the Probation Office.³ Although the submission did not mention Wright's specific conduct, much less explain how his conduct had contributed to Amy's losses, the Presentence Investigation Report recommended an award of the full amount requested.⁴ Wright objected on the ground that his conduct was too far removed from Amy's harm to justify restitution, and noted the proximate-cause

¹Panel opinion in United States v. Michael Wright, No. 09-31215 (Apr. 20, 2011) (attached hereto as Appendix A), slip op. at 1.

²Government's Memorandum of Law Regarding Restitution in Child Exploitation Matters (Dec. 14, 2009), at 2 (under seal).

³Letter to Ms. Donna Duplantier, Victim Witness Coordinator, from James R. Marsh (July 15, 2009), p. 17, attached as Exhibit 1 to Government Memorandum of Law, supra.

⁴Presentence Investigation Report ("PSR"), ¶ 83.

limitation on § 2259 restitution recognized by the district court⁵ in *United States v. Paroline*, 672 F. Supp. 2d 781 (E.D. Tex. 2009). In response, the government filed a memorandum attaching Amy’s submission and concluding that “the decision to order restitution is within this Honorable Court’s discretion.”⁶ Amy’s lawyers did not make an appearance.

The district court sentenced Wright to 96 months’ imprisonment and ordered him to pay \$529,661 restitution to Amy.⁷ Overruling Wright’s objection, the court stated, “After considering the memorandum provided by the government in response to [Wright’s] argument and the attachment to that memorandum [Amy’s submission], the Court concludes that some award of restitution is appropriate. . . .”⁸ The court selected the half-million dollar figure “by adding the estimated cost of the victim’s future mental health treatment and counseling at \$512,681, and the cost of the victim’s expert witness fees at \$16,980. Those calculations can be found in the attachment to the government’s response to the defendant’s sentencing

⁵672 F. Supp. 2d, 781 (E.D. Tex. 2009).

⁶Government’s Memorandum of Law Regarding Restitution in Child Exploitation Matters (Dec. 14, 2009), *supra*, pp. 8-9, 12.

⁷Transcript of Sentencing Hearing (Dec. 16, 2009), p. 12 (under seal).

⁸Sentencing Transcript, p. 5

memorandum.”⁹ The district court said nothing about the causal connection between Wright’s conduct and Amy’s professed need for mental health treatment for the remainder of her life. However, it recognized that at least one other court previously had ordered restitution to Amy and therefore made its own restitution order “concurrent with any other restitution order either already imposed or to be imposed in the future payable to this victim.”¹⁰ Wright timely appealed.¹¹

On appeal to the panel, Wright contended that restitution under § 2259 was limited to losses factually and proximately caused by the defendant’s offense conduct. Neither type of causation, he argued, was proven here. However, before Wright’s appeal was decided, the panel assigned to rehear the denial of mandamus in *In re Amy* issued its opinion.¹² Disagreeing with the original panel’s decision, the successor panel held that Amy had a “clear and indisputable” right to restitution without regard to whether her losses were proximately caused by the defendant’s possession of two of her images. Accordingly, it granted mandamus. 636 F.3d 190, 201 (5th Cir. 2011).

The panel deciding Wright’s appeal was bound by the decision on panel

⁹Sentencing Transcript, p. 12.

¹⁰Sentencing Transcript, pp. 12-13.

¹¹Rec. Doc. 33.

¹²The petition for panel rehearing of the denial of mandamus went to the same panel that was assigned the direct appeal of the defendant’s conviction and sentence and the two appeals were consolidated. See *In re Amy*, 636 F.3d at 193-94.

rehearing in *In re Amy*. App. A, slip op. at 7, 8. Nevertheless, it could not discern how the district court arrived at the \$529,661 figure. The *per curiam* opinion stated:

[T]he district court gave no reasons why Wright should be required to pay this amount [future counseling costs] but not, for instance, also be required to pay for all or part of Amy's projected lost income, \$2,855,173. The record does not indicate why the court reduced the government's requested award of \$3,367,854 or how the court settled on the amount it chose to award.

App. A, slip op. at 8. Accordingly, the panel vacated the restitution award and remanded for reconsideration.

In a special concurrence joined by the other members of the panel, Judge Davis disagreed with *In re Amy* and urged the Court to rehear it *en banc*. App. A, slip op. at 12. Wright filed a petition for rehearing *en banc* on June 6, 2011, which the Court granted on January 25, 2012.

(ii) Statement of Facts

According to the Factual Basis of the guilty plea, Wright searched for, downloaded and saved images of child pornography on his computer. Federal agents found 30,000 such images (including two video clips) when they seized and searched his computer.¹³ There were no allegations or admissions that Wright disseminated any images, much less produced them. His offense conduct was limited to possession.

The presentence report stated that 21 of the children in the images were identifiable from an FBI data base.¹⁴ One of the children was Amy. The record does not reflect how many images of Amy were found on Wright's computer. However, in oral argument the government acknowledged that Amy was not personally notified that Wright possessed her image. The notification went to her lawyers.¹⁵

¹³Rec. Doc. 22, Factual Basis, p. 2; see also App. A, slip op. at 2.

¹⁴PSR ¶ 19; see also App. A., slip op. at 2.

¹⁵Oral argument recording (Feb. 28, 2011), approximately minute 27, available at www.ca5.uscourts.gov.

SUMMARY OF THE ARGUMENT

18 U.S.C. § 2259 contains a proximate cause requirement. The Senate Report accompanying the section of the bill which became law explicitly so states. Hence, the legislative history supports the presumption that Congress intended to incorporate this venerable common law requirement. A proximate cause requirement is a limitation on the scope of liability based on prudential concerns. In the context of restitution orders against individuals convicted of possessing child pornography, that limitation means the government must prove a causal connection between the defendant's own offense conduct and the particular losses for which compensation is sought.

ARGUMENT

I.

The Senate report accompanying the bill containing the statutory language enacted as § 2259 reinforces the presumption that Congress intended to incorporate the common law requirement of proximate causation.

All the circuits to have addressed the issue to date have decided that restitution awarded under 18 U.S.C. § 2259 is limited to losses proximately caused by the defendant's offense conduct. *See United States v. McGarity*, No. 09-12070, ___ F.3d ___, 2012 WL 370104 (11th Cir. Feb. 6, 2012); *United States v. Aumais*, 656 F.3d 147 (2nd Cir. 2011); *United States v. Kennedy*, 643 F.3d 1251 (9th Cir. 2011); *United States v. Monzel*, 641 F.3d 528 (D.C. Cir.), cert. denied, 132 S. Ct. 756 (2011); *United States v. McDaniel*, 631 F.3d 1204 (11th Cir. 2011); *United States v. Laney*, 189 F.3d 954 (9th Cir. 1999); *United States v. Crandon*, 173 F.3d 122 (3rd Cir. 1999). Some of these courts rely on the "bedrock rule of both tort and criminal law that a defendant is only liable for harms he proximately caused." *United States v. Monzel*, 641 F.3d 528, 535 (D.C. Cir. 2011), citing (Third) of Torts: Liability for Physical and Emotional Harm § 26 cmt. a (2010); W. Page Keeton *et al*, *Prosser and Keeton on the Law of Torts*, § 41, at 263 (5th ed. 1984); see also *CSX Transportation, Inc. v. McBride*, ___ U.S. ___, 131 S. Ct. 2630, 2644 (2011) (Roberts, C.J., dissenting). Others, including the

original panel opinion in *In re Amy*, rely on the “proximate result” language in subsection (b)(2)(F) of the statute . See 591 F.3d 792,794 (5th Cir. 2009); *McDaniel*, 631 F.3d at 1209.

18 U.S.C. § 2259 originated as § 113 of the Violence Against Women Act, Senate Bill 11, introduced in the First Session of the 103rd Congress on January 21, 1993 and ultimately incorporated into the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Title IV, as § 40113. Section 113 of S. 11 contained the same language as the current statute. Subsection (b)(1) required that the defendant pay the victim “the full amount of the victim’s losses.” Subsection (b)(2)¹⁶ provided that “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, expert witness and investigators’ fees, interpretive services, and court costs; and

¹⁶This subsection is now codified at (b)(3).

(F) any other losses suffered by the victim as a proximate result of the offense.

Subsection (d)¹⁷ defined “victim” to include “the individual harmed as a result of a commission of a crime under this chapter. . . .” This is the same language on which Amy has relied to argue that § 2259 does not have a proximate cause limitation. But the Senate Report accompanying S. 11, S. Rep. No. 103-138, 1993 WL 355617, at * 54, explains that § 113 “requires sex offenders to pay costs incurred by victims as a **proximate** result of a sex crime.” (emphasis added) Legislative intent could not be clearer: Congress intended a proximate cause limitation on the restitution available under § 2259.

The Senate Report reinforces the presumption that Congress meant “proximate result” when it used “result” in § 2259 because proximate causation is a traditional common law requirement. See *Monzel*, 641 F.3d at 536. “Congress is understood to legislate against a background of common-law principles, and when a statute covers an issue previously governed by the common law, [courts] interpret the statute with the presumption that Congress intended to retain the substance of the common law.” *Samantar v. Yousuf*, ___ U.S. ___, 130 S. Ct. 2278, 2289 n.13 (2010) (internal quotations omitted). Under the common law, the plaintiff first must show factual

¹⁷This subsection is now codified as (e).

cause; the defendant is not liable unless his conduct was a “but for” cause of the victim’s losses or “a substantial factor” in bringing those losses about. A causal chain, however, can be endless. Accordingly, common law courts developed a limitation on the scope of liability: proximate causation. “Judgments about proximate cause . . . reflect the ideas of justice as well as practicality. In particular, the rules of proximate cause or scope of liability attempt to limit liability to the reasons for imposing liability in the first place.” 1 Dan B. Dobbs *et al.*, The Law of Torts (2nd ed.), § 199 at 684. “No serious question exists that some limit on the scope of liability for tortious conduct that causes harm is required.” Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 29 cmt. a (2010). Otherwise, a defendant could be held responsible for injuries sustained in a car accident by a plaintiff on her way to a therapy session for emotional distress caused by the defendant’s offending conduct. See Monzel, 641 F.3d at 171 n.7. The Senate Report accompanying S. 11 indicates that Congress intended to incorporate this common law limitation in § 2259.

The definition of “full amount of victim losses” at § 2259(b)(3) does not warrant a different result. For each specific category of loss listed, Congress did not state that the loss must result, much less proximately result from the offense. The catch-all category, however, includes the phrase, “any other loss suffered by the

victim as a proximate result of the offense.” The omission of “suffered by the victim as a proximate result of the offense” from the items of specific loss will not bear the weight that the second panel opinion in *In re Amy* assigns it. 636 F.3d at 198-99. The likely reason for the omission is that Congress did not envision that a victim would claim restitution for medical services, physical therapy, transportation, lost income or attorney fees that did not proximately result from the offense. Such a claim would be fanciful. Hence, there was no need to specify the need for a causal connection with respect to the particular items of loss. By contrast, the breadth of the catch-all category – “any other losses suffered by the victim” – invited confusion unless it was explicitly narrowed. Moreover, as the concurrence in the panel opinion noted, it is a “fundamental canon of statutory construction established by the Supreme Court in *Porto Rico Railway, Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920), in which the Court held that “when several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.” App. A, p. 12.

Recently a divided Supreme Court held that proximate causation is satisfied for purposes of the Federal Employee Liability Act (“FELA”), 45 U.S.C. §§ 51 et seq., by a showing that negligence played a part, “no matter how slight,” in bringing about the injury. See *CSX Transportation, Inc. v. McBride*, ___ U.S. ___, 113 S. Ct. 2630,

2644 (2011). *CSX* has no bearing on the scope of § 2259 restitution. The purpose of FELA was to eliminate the common law defenses to claims for on-the-job injury by railroad employees. *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 62 (1943). To that end, the “Act, in its principal features, abolished the fellow servant rule, substituted comparative negligence for the strict rule of contributory negligence, and allowed survivors’ actions for tort liability.” *Id.* at 62. Employer, however, resorted to the common law defense of assumption of risk, which Congress in turn abolished by amendment in 1939. *Id.* at 63-64. “The report of the Senate Judiciary Committee struck at the basic reasons advanced by common law courts for the existence of the doctrine, declared it unsuited to present day activities, and described them as out of harmony with the equitable principles which should govern determinations of employer-employee responsibilities.” *Id.* at 64-65. Congress’s intent to remove common law barriers to recovery was the context in which the Supreme Court by 5-4 vote approved a minimal standard of proximate cause in *CSX*.

By contrast here, efforts to address the very serious problem of sexual abuse of children have not focused on loosening the common law standards for monetary recovery by victims. Rather, Congress created crimes with long prison terms and extended periods of supervised release, as well as a registration requirement for those with prior convictions. Restitution is one remedy among others, but Congress gave

no signal (as it did in enacting and amending FELA) that the obstacle in addressing child sex abuse was common law rules protecting perpetrators. Therefore, CSX is inapposite. Restitution under § 2259 incorporates a traditional proximate cause limitation.

II.

Only those particular losses attributable to the individual defendant are proximately caused by his offense conduct for purposes of § 2259 restitution.

In three recent cases, sister circuits have vacated restitution awards because the government failed to prove that a causal connection between the individual defendant's offense conduct and a specific loss to Amy. *United States v. McGarity*, No. 09-12070, ___ F.3d ___, 2012 WL 370104 (11th Cir. Feb. 6, 2012); *United States v. Aumais*, 656 F.3d 147 (2nd Cir. 2011); *United States v. Kennedy*, 643 F.3d 1251 (9th Cir. 2011). Freeman, a defendant in *McGarity*, was convicted of conspiracy to possess child pornography. 2012 WL 370104, at *35. Aumais and Kennedy were convicted of possessing and transporting prohibited images. *Aumais*, 656 F.3d at 148; *Kennedy*, 643 F.3d at 1253-54. Each defendant possessed at least one image of Amy. The defendants, however, had not been arrested until after Dr. Silberg performed her psychological evaluation, and Amy did not know of their existence, much less the fact that they had viewed her image. Under these circumstances, the

courts held that the government failed to prove that Amy suffered any particular loss as a result of the defendants' conduct. *McGarity*, 2012 WL 370104, at *38; *Aumais*, 656 F.3d at 154-55; *Kennedy*, 643 F.3d at 1263-64. As the *Kennedy* court explained:

Rather than proving a causal relationship between Kennedy's actions and the victims' losses, the government's evidence showed only that Kennedy participated in the audience of persons who viewed the images of Amy and Vicky. While this may be sufficient to establish that Kennedy's actions were one cause of the generalized harm Amy and Vicky suffered due to the circulation of their images on the internet, it is not sufficient to show that they were a proximate cause of any particular losses.

643 F.3d at 1263-64. Similarly, the *McGarity* court stated:

[P]ossessors of child pornography can constitute a "slow acid drip" of trauma, which may be exacerbated each time an individual views an image depicting her abuse. This slow drip result[s] from the extraordinarily distressing and emotionally painful reaction suffered by the victim each time an individual views an image depicting her abuse. Therefore, . . . a § 2259 restitution order is only appropriate where the Government can demonstrate t Pub. L. 103-322, Title IV, § 40113(b)(1) (1994) he "slow drip" a *particular* defendant's actions had upon the victim.

2012 WL 370104, at *37 (internal citations omitted) (emphasis in original).

Wright's case is similar. The only evidence presented by the government was Amy's standardized packet of materials. The materials did not mention Wright. Indeed, Dr. Silberg's psychological evaluation was completed before Wright was

arrested.¹⁸ There was no evidence that Amy knew Wright or knew he had seen her image. To the contrary, during oral argument before the panel, the government acknowledged that Amy did not know. Hence, as in *McGarity*, *Aumais* and *Kennedy*, the government failed to prove a specific loss suffered by Amy as a proximate result of Wright's possession of her image. There is no evidence that Amy incurred an incremental loss by virtue of Wright viewing her image, or conversely, that she would have suffered a smaller loss had Wright not done so. See *Kennedy*, 643 F.3d at 1263.

The district court attempted to avoid the need for proof of the particular loss caused by Wright by imposing what it termed "concurrent" liability. Concurrent (or joint and several) liability is only appropriate, however, for indivisible injuries. See Restatement (Third) of Torts: Apportionment of Liability, §§ 26, A18 (2000).¹⁹

¹⁸Wright was arrested on March 26, 2009. Rec. Doc. 2; see also Presentence Investigation Report, p. 1. Dr. Silberg interviewed Amy on June 11 and 12, and July 29, 2008. She wrote her report on November 21, 2008.

¹⁹Section 26 of the Restatement (Third) of Torts: Apportionment of Liability states:

(a) When damages for an injury can be divided by causation, the factfinder first divides them into their indivisible component parts and separately apportions liability for each indivisible component part under Topics 1 through 4.

(b) Damages can be divided by causation when the evidence provides a reasonable basis for the factfinder to determine:

- (1) that any legally culpable conduct of a party or other relevant person to whom the factfinder assigns a percentage of responsibility was a legal cause of less than the entire damages for which plaintiffs seeks recovery and
- (2) the amount of damages separate caused by that conduct.

Regardless of whether the harm to Amy’s dignitary interests is indivisible, the losses for which restitution was ordered – her emotional distress and the resultant need for therapy – are not. Dr. Silberg states in her evaluation that Amy was recovering from the trauma of the sexual abuse when she discovered at age 17 that her images had been posted on the internet. Silberg evaluation, p. 3. This discovery caused a discrete injury which “exacerbated her symptoms, interfered with her ability to overcome the increasing symptoms of post-traumatic stress, and impeded her ability to move on with her life.” *Id.* Wright was not responsible for posting Amy’s image on the internet. Therefore, he did not cause Amy’s fear that people *would* see her image on-line.

Beyond the original posting of the images, Amy told Dr. Silberg that “each discovery of another defendant that has traded her image re-traumatizes her again.” *Id.* This is the “slow-acid drip” to which the Eleventh Circuit referred in *McDaniel*, 631 F.3d at 1209, and *McGarity*, 2012 WL 370104, at *37. Each discovery causes a discrete injury in the form of the renewal of emotional distress. The incremental

Otherwise, the damages are indivisible and thus the injury is indivisible. Liability for an indivisible injury is apportioned under Topics 1 through 4.

Section A18 states:

If the independent tortious conduct of two or more persons is a legal cause of an indivisible injury, each person is jointly and severally liable for the recoverable damages caused by the tortious conduct.

emotional distress can be quantified by the additional therapy needed to address it. Hence, Amy's emotional distress is a divisible injury so liability must be apportioned by causation. See Restatement (Third) of Torts: Apportionment of Liability § 26. Neither Amy nor the government made any such effort in the instant case. Indeed, such an effort would have yielded no monetary damages because Amy did not know that Wright saw her image and accordingly was not re-traumatized.

The government, on the other hand, would support the half-million dollar award because the type of injuries Amy claims were reasonably foreseeable. What is not foreseeable to an individual possessor, however, is that Amy would ever learn that he downloaded her image from the internet. Hence, he could not reasonably foresee that his conduct would cause her emotional distress. Moreover, this Court has defined foreseeability as forward-looking concept. See *United States v. Carreon*, 11 F.3d 1225, 1235 (5th Cir. 1993). Injuries that Amy sustained before Wright's conduct were not reasonably foreseeable to him. Finally, an individual possessor could not possibly foresee that he would be held responsible for *all* of Amy's losses when he was only one of what likely are thousands of people who have viewed or will view her image.

Limiting a defendant's obligation to pay restitution to losses caused by his own offense conduct (and not by the conduct of those who acted independently of

him) comports with the purposes of criminal restitution. “Restitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused.” *Kelly v. Robinson*, 479 U.S. 36, 49 n.10 (1986). This impact is dulled when the relation between restitution and conduct is attenuated. The Court should follow *McGarity*, *Aumais* and *Kennedy* and hold that Wright is not liable in restitution to Amy because the government failed to prove that his possession of her image, unbeknownst to her, proximately caused the losses for which compensation was ordered.

CONCLUSION

For the foregoing reasons, appellant Michael Wright asks the *en banc* Court to vacate the \$529,661 restitution order on the ground that is not authorized by 18 U.S.C. § 2259 or any other criminal restitution statute.

Respectfully submitted this 24th day of February, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2012, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing to the following: Brian Klebba, James Mann and Diane H. Copes, Assistant United States Attorneys, 650 Poydras Street, 16th Floor, New Orleans, Louisiana 70130, Michael A. Rotker, Attorney, Appellate Section, U.S. Dept. of Justice, Criminal Division, 950 Pennsylvania Avenue NW, Suite 1264, Washington, D.C. 20530.

I further certify the foregoing document meets with the required privacy redactions; that it is an exact copy of the paper document; and the document has been scanned with the most recent version of a commercial virus scanning program and is virus free.

/s/Robin E. Schulberg
ROBIN E. SCHULBERG
Assistant Federal Public Defender

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. Rules 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of Fed.R.App.P. 32(a)(7).

1. EXCLUSIVE OF THE EXEMPTED PORTIONS IN 5TH CIR. RULE 32.2, THE BRIEF CONTAINS (select one):

- A. 3951 words, OR
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Respectfully submitted this 24th day of February, 2012.

/s/Robin E. Schulberg
ROBIN E. SCHULBERG
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APPENDIX A

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

April 20, 2011

Lyle W. Cayce
Clerk

No. 09-31215

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MICHAEL WRIGHT,

Defendant-Appellant

Appeal from the United States District Court
for the Eastern District of Louisiana

Before KING, DAVIS, and SOUTHWICK, Circuit Judges.

PER CURIAM:

Michael Wright pleaded guilty to one count of possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). Pursuant to 18 U.S.C. § 2259, the district court ordered Wright to pay \$529,661 in restitution to one of the children, "Amy," portrayed in some of the images Wright possessed. Wright appeals this restitution order, arguing that § 2259 includes a proximate causation requirement and that the restitution order exceeds the amount of Amy's losses that his offense caused. Because we cannot discern from the record any supportable rationale for the district court's order of \$529,661, we vacate the restitution order and remand for proceedings consistent with this opinion.

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I.

Wright pleaded guilty to a one-count bill of information charging possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). Wright entered into a plea agreement in which he waived his right to appeal but preserved his right to appeal “any punishment in excess of the statutory maximum.” The plea agreement stated that “the restitution provisions of Sections 3663 and 3663A of Title 18, United States Code will apply” The plea agreement did not make reference to the distinct provisions regarding mandatory restitution for crimes of sexual exploitation against children, 18 U.S.C. § 2259.

During the guilty plea colloquy, the district court restated the terms of the plea agreement regarding Wright’s waiver of appeal, noting the exception for punishment in excess of the statutory maximum, and asked if Wright understood all of the rights he was waiving. Wright answered in the affirmative. The district court also asked Wright if he understood that “You also may be required to reimburse any victim for the amount of his or her loss under the Victim Restitution Law, if that term is applicable,” and Wright again answered affirmatively.

The Factual Basis of the guilty plea indicates that law enforcement agents found 30,000 images and videos on Wright’s computer showing sexually explicit images of children under 18 years of age, some less than 12 years of age. Some of the images were of identifiable children. According to the Pre-Sentence Report (“PSR”), the government was able to identify 21 children in the images, one of whom is called “Amy.” The PSR attached a victim impact statement by Amy.

Amy’s victim impact statement attests that Amy’s uncle began sexually abusing her when Amy was four years old. Her uncle distributed explicit images of the abuse to other people and such images have somehow been traded or have

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otherwise become available on the internet. Wright is one of hundreds, if not thousands, of individuals possessing Amy's images. Amy is now a teenager. Thousands of images of Amy's abuse have emerged in numerous child pornography cases since 1998.

Amy testifies in her statement that "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 me to know someone is looking at them It is hard to describe what it feels like to know that at any moment, anywhere, someone is looking at pictures of me as a little girl being abused by my uncle" Amy's psychologist, Dr. Silberg, submitted a report regarding the psychological trauma Amy experiences because of the images of her abuse being traded and viewed on the internet. Dr. Silberg determined that each discovery that another defendant viewed her images "re-traumatizes her again."

Upon request of Amy's law firm and based in part on Dr. Silberg's report, the PSR recommended restitution to Amy in the amount of \$3,367,854. This figure is based on Amy's total losses. These losses include the total costs of her future psychological counseling, \$512,681, based on an estimate that Amy will need counseling once weekly for the rest of her life, and Amy's estimated lost future income of \$2,855,173.

Wright filed a motion opposing restitution for lack of evidence that Amy's losses were caused by his offense. Wright argued that § 2259 requires a showing of proximate causation and that no evidence indicated that Wright's individual offense caused Amy's psychological distress. Wright pointed out that he did not come into possession of the images until many years after the abuse occurred, and that no evidence suggests that Amy was ever aware that he personally possessed or viewed the images.

The government responded, attaching Amy's firm's supplemental memoranda and expert reports. The government asserted various legal theories

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regarding a broad view of causation under § 2259. The government argued that it was within the court's discretion to award restitution for Amy's entire set of damages.

The district court overruled Wright's objection to restitution based on lack of causation, but did not elaborate on its reasoning, simply stating that upon consideration of the issue "the court concludes that some award of restitution is appropriate" The court ordered Wright to pay Amy \$529,661 in restitution, basing this amount on the total value of Amy's anticipated future counseling expenses and expert services in tabulating the expenses as indicated in the PSR and attached reports. The district court stipulated that Wright's duty to pay restitution would be "concurrent" with any other restitution orders of other defendants payable to this victim. The district court ordered that Wright's obligation to pay begin immediately, but assuming that the obligation has not been satisfied upon his release from prison (after his 96-month sentence), ordered that Wright should pay \$200 per month thereafter.

II.

The legality of a restitution order is reviewed de novo. *United States v. Arledge*, 553 F.3d 881, 897 (5th Cir. 2008). If a restitution order is legally permitted, the amount of the order is reviewed for abuse of discretion. *Id.*; *United States v. Ollison*, 555 F.3d 152, 164 (5th Cir. 2009). The validity of an appeal waiver is reviewed de novo. *United States v. Burns*, 433 F.3d 442, 445 (5th Cir. 2005).

III.

This appeal presents issues related to the amount of restitution that a district court may order a defendant convicted of possessing child pornography to pay to one of the children depicted in the images. Similar issues have been raised in a large number of federal district and circuit courts in recent years. Many of these cases involve Amy, the same victim in this case. A panel decision

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of this court was very recently issued in a case raising similar, overlapping questions with regard to a different defendant convicted of possessing images of Amy. *In re Amy*, No. 09-41238, slip op. (5th Cir. Mar. 22, 2011).

Like the defendant in *In re Amy* and those in other similar cases, Wright argues that § 2259 requires a causal connection between his offense and the victim's damages or recoverable losses. He asserts that his offense conduct did not cause Amy's losses at all, much less in the amount of \$529,661. In response, the government concedes on appeal that § 2259 does contain some kind of causation requirement. The government contends generally, however, that this requirement of § 2259 is to be liberally construed in favor of victim restitution and that the district court has wide discretion to order restitution.

As explained further below, the recent *In re Amy* panel opinion rejected the causation arguments made by Wright, holding that § 2259 does not limit Amy's recoverable losses to those proximately caused by a defendant's offense. See *In re Amy*, No. 09-41238, slip op. at 12. We evaluate Wright's appeal under this precedent.

A.

We first consider the government's argument that Wright's appeal is barred by his appeal waiver. "A defendant may waive his statutory right to appeal his sentence if the waiver is knowing and voluntary." *United States v. Bond*, 414 F.3d 542, 544 (5th Cir. 2005). Wright's waiver does not meet this standard because the record suggests that at the time he entered into the plea agreement, Wright was not aware that he might be ordered to pay a large restitution payment that possibly exceeds the losses to Amy proximately caused by his conduct. Wright's plea agreement referred to the general restitution provisions of 18 U.S.C. §§ 3663 and 3663A, which both indisputably include

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proximate causation as a condition of restitution.¹ Additionally, Wright's plea agreement reserved the right to appeal "any punishment in excess of the statutory maximum." Generally, a restitution order under § 3663 that exceeds the losses caused by the defendant's offense exceeds the statutory maximum. See *United States v. Norris*, 217 F.3d 262, 271-72 (5th Cir. 2000) (vacating a § 3663 restitution award for lack of evidence of causation); see also *United States v. Broughton-Jones*, 71 F.3d 1143, 1146 (4th Cir. 1995) (vacating a § 3663 restitution order, despite an appeal waiver, because the order was not limited to losses caused by the defendant and thus exceeded the statutory maximum). In contrast, the *In re Amy* panel only recently interpreted § 2259 as not including the same proximate causation requirement of §§ 3663 and 3663A, long after Wright entered into the plea agreement. Thus, Wright did not knowingly waive his right to appeal a restitution order that is unlimited by the principle of proximate causation.

This conclusion is further supported by the fact that neither Wright's plea agreement nor any plea-related documents refer to § 2259. The district judge's reference during the guilty plea colloquy to "the Victim Restitution Law" is vague and could have been understood as a reference to § 3663 or § 3663A as cited in the plea agreement, both of which incorporate a proximate causation standard. We are persuaded by these facts that Wright was unaware of the potential scope of the district court's restitution order. Under these circumstances, we conclude that Wright's waiver of appeal regarding this restitution order was not knowing or voluntary.

B.

We next turn to the language of § 2259 and to Wright's argument that this language requires a causal connection between his offense conduct and Amy's

¹ Section 3663 governs discretionary restitution and § 3663A governs mandatory restitution for certain crimes. These statutes are discussed further in Part IV. of this opinion.

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recoverable losses. Section 2259(a) states that the court “shall order restitution for any offense under this chapter.” Section 2259(b)(1) states that the order of restitution shall direct the defendant to pay “the full amount of the victim’s losses. . .” and § 2259(b)(3) defines these losses as follows:

“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) attorney’s fees, as well as other costs incurred; and
- (F) any other losses suffered by the victim *as a proximate result of the offense.*”

(emphasis added).

Wright argues that this statutory language requires a finding of proximate causation between his offense conduct and the amount of Amy’s losses that he is ordered to pay. In the recent *In re Amy* decision, however, the court rejected this very same argument. *In re Amy*, No. 09-41238, slip op. at 12-13. The *In re Amy* panel reasoned that Amy was a “victim” of the defendant’s crime of possessing her images pursuant to the definition of “victim” in § 2259(c): “For purposes of this section, the term ‘victim’ means that the individual harmed as a result of a commission of a crime under this chapter” *Id.* at 16.

Thus, based on this definition of “victim,” the *In re Amy* panel read § 2259 as having a “built-in” causation requirement and held that no further proximate causation requirement may be inferred from the remainder of § 2259’s language. *Id.* The opinion specifically rejected the argument that the “as a proximate result of the offense” language in § 2259(b)(3)(F) modifies the previous five sub-categories of losses in subsections (A) through (E). *Id.* at 12. The court limited the effect of that clause to the “catchall” provision of subsection (F) itself. *Id.*

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(“The structure and language of § 2259(b)(3) impose a proximate causation requirement only on miscellaneous “other losses” for which a victim seeks restitution.”). Therefore, the court held that the district court erred when it failed to order any restitution against the defendant on the grounds that “the government failed to prove ‘what losses, if any, were proximately caused by Paroline’s possession of Amy’s two pornographic images.’” *Id.* (quoting *United States v. Paroline*, 672 F. Supp. 2d 781, 783 (E.D. Tex. 2009)).²

C.

Applying the authority of *In re Amy* to Wright’s appeal, we conclude that Amy is eligible for restitution as a “victim” of Wright’s crime of possessing images of her abuse pursuant to § 2259(c) and that the other provisions of § 2259, including § 2259(b)(3)(F), do not require additional proof of a causal connection between Wright’s offense conduct and Amy’s recoverable losses. With this understanding, we review the district court’s award for abuse of discretion and for any legal error.

The district court stated that it arrived at the amount of \$529,661 by adding the PSR’s estimate of Amy’s future counseling costs for the rest of her life, \$512,681, to the value of Amy’s expert witness fees. However, the district court gave no reasons why Wright should be required to pay this amount but not, for instance, also be required to pay for all or part of Amy’s projected lost income, \$2,855,173. The record does not indicate why the court reduced the government’s requested award of \$3,367,854 or how the court settled on the amount it chose to award. In sum, the district court did not explain its

² We note that other circuit courts have not adopted the view of § 2259 articulated by *In re Amy*. See *United States v. Monzel*, No. 11-2008, slip op. at 12-17 (D.C. Cir. April 19, 2011); *United States v. McDaniel*, 631 F.3d 1204, 1209 (11th Cir. 2011); *United States v. Laney*, 189 F.3d 954, 965 (9th Cir. 1999); *United States v. Crandon*, 173 F.3d 122, 126 (3d Cir. 1999). This is discussed more thoroughly in the special concurrence to this opinion.

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reasoning and the parties as well as this court are completely in the dark on why the district court settled on the amount of \$529,661.

The government urged at oral argument (but not in its brief) that we should affirm this award based on the theory of joint and several liability. The *In re Amy* opinion approved basing an award on joint and several liability under the general restitution enforcement provisions of 18 U.S.C. § 3664, incorporated by § 2259(b)(2).³ Nevertheless, we cannot affirm the district court's \$529,661 restitution order on this basis because it is unclear if the district court intended the order to be joint and several.⁴ Even if we assume that the district court intended the order to be joint and several, the district court articulated no reason for holding Wright jointly and severally liable for Amy's future psychological costs. Also, the district court's award of restitution for the victim's counseling costs and not for other losses belies the government's argument that the district court intended to hold Wright jointly and severally liable under §§ 2259 and 3664 for all of Amy's losses. Therefore, on this record, we decline to affirm the restitution order on the basis of joint and several liability.

We also cannot affirm the order on the basis that it represents the "fraction" of Amy's losses "attributable" to Wright.⁵ The district court did not explain why it attributed the full amount of Amy's future counseling costs (to the

³ See *In re Amy*, No. 09-41238, slip op. at 17 (citing § 3664(m)(1)(A)(ii) for the proposition that a district court may enforce a restitution order "by all other available and reasonable means" and, thus, by joint and several liability).

⁴ The district court stated that the order shall be "concurrent" with orders against other defendants payable to the same victim. The court did not use the words "joint and several" or cite § 3664. Although the government asserted at oral argument that the word "concurrent" referred to joint and several liability, in briefing the government disputed this interpretation of the court's order.

⁵ See *In re Amy*, No. 09-41238, slip op. at 18 (stating that the district court may "quantify the amount of restitution to which Amy is entitled or the *fraction attributable* to [the defendant] Paroline . . .") (emphasis added).

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exclusion of other losses) to Wright, who was but one of hundreds if not thousands of individuals possessing Amy's images. This is not a principled method of determining the fraction of losses attributable to Wright in a manner that is subject to meaningful review. The court must give some rationale for its order.⁶

In sum, although we agree with the government that the district court has wide discretion in fashioning restitution orders, this discretion is not unlimited and must be reviewed for abuse. Moreover, if there is "[a]ny dispute as to the proper amount or type of restitution" the court is obligated to resolve that dispute "by the preponderance of the evidence." 18 U.S.C. § 3664(e). We conclude, therefore, that the district court's failure to give a reasoned analysis of how it arrived at its award in a manner that allows for effective appellate review requires that we vacate the order and remand for reconsideration.⁷

On remand, the district court has two basic options under §§ 2259 and 3364, as well as the *In re Amy* decision. The district court may attempt to craft a joint and several restitution order that conforms to the generally recognized requirements of joint and several liability, as held by *In re Amy*. Alternatively, the district court may attempt to determine the "fraction" of Amy's losses "attributable" to Wright, consistent with the *In re Amy* decision. Under any circumstances, the district court must set forth its reasoning, as supported by

⁶ The district court's lack of reasoning for attributing this amount of Amy's losses to Wright is illustrated by looking to other cases. The Eleventh and Ninth Circuits have affirmed restitution orders against similar defendants in the amounts of \$12,700 and \$3,000, respectively. See *McDaniel*, 631 F.3d at 1209; *United States v. Baxter*, 394 F. App'x 377, 378-79 (9th Cir. Sept. 1, 2010).

⁷ See generally *United States v. Hai Waknine*, 543 F.3d 546, 556 (9th Cir. 2008) ("We conclude that § 3664 recognizes that specific findings of fact are necessary at times and contemplates that the district court will set forth an explanation of its reasoning, supported by the record, when a dispute arises as to the proper amount of restitution.").

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the record and the applicable authorities, so that the order may be subject to effective appellate review.

The restitution order is VACATED and the case REMANDED.

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W. EUGENE DAVIS, Circuit Judge, specially concurring:

I write separately to express my disagreement with the recent holding by the *In re Amy* panel that § 2259 does not limit the victim's recoverable losses to those proximately caused by the defendant's offense and to urge the court to grant *en banc* review of that decision.

I.

At bottom, this is a statutory interpretation case and I begin with a consideration of the structure and language of the statutes at issue. Section 2259 specifically governs mandatory restitution awards for crimes related to the sexual exploitation and other abuse of children. Section 2259(a) states that the court "shall order restitution for any offense under this chapter." Section 2259(b)(3) states that the victim's losses are defined as those suffered by the victim "as a proximate result of the offense." Again, the full text of § 2259(b)(3) is as follows:

"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) attorney's fees, as well as other costs incurred; and
(F) any other losses suffered by the victim *as a proximate result of the offense.*"

(emphasis added).

I interpret this statutory list according to the fundamental canon of statutory construction established by the Supreme Court in *Porto Rico Railway, Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920), in which the Court held that "[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." Applying this cardinal

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rule of statutory interpretation, I conclude that the clause “as a proximate result of the offense” applies equally to the previous five subcategories of losses, (A) through (E), as to the “other losses” described in subsection (F).¹

This interpretation of § 2259(b)(3) is further supported by the procedures for issuing and enforcing restitution orders. Section 2259(b)(2) expressly incorporates the procedures of 18 U.S.C. § 3664, stating that “[a]n order of restitution under this section shall be issued and enforced in accordance with section 3664 in same manner as an order under section 3663A.”² Section 3664(e) states unequivocally that “[t]he burden of demonstrating the *amount of the loss* sustained by a victim *as a result of the offense* shall be on the attorney for the Government.” (emphasis added).

This language from § 2259(b)(3) and § 3664(e) is consistent with the definition of “victim” in § 2259(c), which is defined to mean “the individual harmed *as a result* of a commission of crime under this chapter . . .” (emphasis added). The definition of “victim” reinforces the proximate causation requirement of §§ 2259(b)(3) and 3664(e).

In contrast, the *In re Amy* panel determined that the definition of victim in § 2259(c) is the statute’s *only* “built-in causation requirement.” *See In re Amy*, No. 09-41238, slip op. at 16. The panel concluded that the clause “as a proximate result of the offense” in § 2259(b)(3) modifies only the “catchall” provision of subsection (F) and not the previous five sub-categories of losses. *Id.* at 12.

¹ As explained further below, every circuit court and virtually every district court construing § 2259(b)(3) agrees with this reading of the statute in accordance with the rule of *Porto Rico Railway*. *See, e.g., McDaniel*, 631 F.3d at 1209 (“The phrase ‘as a proximate result of the offense’ is equally applicable to medical costs, lost income, and attorneys’ fees as it is to ‘any other losses.’”) (citing *Porto Rico Railway*, 253 U.S. at 348).

² Section 3663A is a more general mandatory restitution statute that was enacted by the Mandatory Victim Restitution Act. *See infra* n. 4.

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In re Amy's reading of § 2259(b)(3) is patently inconsistent with the rule of statutory interpretation announced in *Porto Rico Railway* which makes it clear that the clause is equally applicable to all categories of loss.³ Furthermore, this interpretation of § 2259(b)(3) is directly contrary to the enforcement procedures of § 3664(e) placing the burden of demonstrating the “amount of the loss” sustained by a victim “as a result of the offense” on the government. *In re Amy* is inexplicably silent about § 3664(e) and its role of supporting § 2259(b)(3)'s requirement of proximate causation.

Thus, the *In re Amy* panel erred in concluding that §2259's *only* causation requirement is found in the statute's definition of “victim.” *In re Amy* supports this conclusion by comparing § 2259(c)'s definition of victim with the definition in the more general mandatory restitution statute, 18 U.S.C. §3663A, which defines a victim “a person *directly and proximately harmed* as a result of a commission of an offense” 18 U.S.C. § 3663A(a)(2) (emphasis added). It does not follow, however, from this different definition of “victim” that Congress “abandoned” the proximate causation requirement in § 2259. *See In re Amy*, No. 09-41238, slip op. at 13 (“Comparing these statutes reveals that Congress abandoned the proximate causation language”). The procedures of § 3664(e)—which apply equally to restitution orders under both §§ 2259 and 3663A—clearly contemplate a proximate causation requirement, which is consistent with the express language in both §§ 2259 and 3663A. Thus, Congress did not abandon the causation requirement in § 2259.

Additionally, *In re Amy* is simply incorrect in its assertion that “the evolution in victims' rights statutes demonstrates Congress's choice to abandon

³ I am not persuaded by *In re Amy's* attempt to distinguish the statute in *Porto Rico Railway* on the basis that the sub-categories of § 2259(b)(3) are separated by semi-colons rather than commas. *See In re Amy*, No. 09-41238, slip op. at 14. Either punctuation device is an acceptable method of separating clauses. *See* Bryan A. Garner, *THE REDBOOK: A MANUAL ON LEGAL STYLE*, 1-15 (2d. ed. 2006).

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a global requirement of proximate causation.” *In re Amy*, No. 09-41238, slip op. at 13. The panel based this conclusion on the erroneous determination that comparing §3663A’s definition of “victim” to § 2259’s definition of the same word “enacted 14 years later” reveals Congress’s evolution toward abandoning proximate causation. *Id.* at 12-13. In fact, § 2259’s definition of “victim” was enacted two years *before* § 3663A’s definition of that term, not 14 years after.⁴ Therefore, if anything, the definition of “victim” in § 3363A evolved toward (and not away from) a firm stance of requiring a showing of proximate causation.⁵

I completely agree with the *In re Amy* panel that Amy is a “victim” of the crime of possessing images of her abuse pursuant to the definition of “victim” in § 2259(c) under the reasoning of *New York v. Ferber*, 458 U.S. 747, 759, 102 S. Ct. 3348, 3355 (1982) and *United States v. Norris*, 159 F.3d 926, 929 (5th Cir. 1998), which recognized the serious harm a child suffers by the distribution and possession of images depicting her abuse. Every other federal court addressing this issue has followed the reasoning of *Ferber* and *Norris* in holding that Amy and similar children are “victims.” *See, e.g., McDaniel*, 631 F.3d at 1208 (“Like

⁴ A timeline of federal restitution statutes follows: (1) Congress passed the Victim and Witness Protection Act of 1982 (“VWPA”), Pub. L. 97-291, 1982 S. 2420. The VWPA enacted the discretionary restitution provisions currently codified in § 3663, but did not contain §3663’s current definition of “victim” or the mandatory restitution provisions currently codified in § 3663A; (2) Congress passed the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 1907-1910, which enacted § 2259, including the current definition of “victim” in § 2259(c); (3) Congress passed the Mandatory Victim Restitution Act (“MVRA”) as part of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, which amended existing federal restitution laws and procedures. The MVRA added § 3663A to the United States Code and established the current definition of “victim” in §§ 3663A(a)(2) and 3663(a)(2) as “a person directly and proximately harmed as a result of a commission of an offense” 110 Stat. 1228, 1230.

⁵ This conclusion is further supported by the Crime Victims’ Rights Act (“CVRA”), part of the Justice for All Act of 2004, Pub. L. 108-405, 118 Stat. 2260, which reiterates that crime victims have “[t]he right to full and timely restitution as provided in law.” 18 U.S.C. § 3771 (a)(6). The CVRA provides victims with the mandamus remedy that *In re Amy* granted. *Id.* § 3771(d). Like §§ 3663 and 3663A, the CVRA defines a victim as “a person directly and proximately harmed as a result of the commission of a Federal offense” *Id.* § 3771(e).

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the producers and distributors of child pornography, the possessors of child pornography victimize the children depicted within.”) (citing *Ferber*, 458 U.S. at 759). As explained further below, all of the circuit and district court cases that have dealt with this issue have started from the premise that these children are victims. This is usually not a seriously contested issue and is a given. The difficult issue in all of these cases is determining the amount of the restitution award that should properly be assessed against the single defendant before the court when multiple images—sometimes thousands—have been possessed and distributed to many individuals. This is when the statute’s plain language requiring a showing of proximate cause between the defendant’s conduct and the award is important.

II.

In re Amy’s holding that § 2259 does not limit the victim’s recoverable losses to those proximately caused by defendant’s offense is at odds with the conclusion of every other circuit court considering this issue. In a very similar case involving restitution ordered against a defendant convicted of possessing child pornography, the Eleventh Circuit recently rejected the interpretation of § 2259(b)(3) adopted by *In re Amy*. *McDaniel*, 631 F.3d at 1209. The Eleventh Circuit held that “[t]he phrase ‘as a proximate result of the offense’ is equally applicable to medical costs, lost income, and attorneys’ fees as it is to ‘any other losses.’” *Id.* Accordingly, although the court held that the child, “Vicky,” was a “victim” of the defendant’s crime, the court proceeded to evaluate the district court’s restitution order under § 2259(b)(3)’s requirement limiting the victim’s recoverable losses to those proximately caused by the defendant’s offense. *Id.* Thus, the Eleventh Circuit’s reading of § 2259 is entirely consistent with my reading and is contrary to *In re Amy*’s interpretation.

The Eleventh Circuit affirmed the district court’s restitution order of \$12,700, which constituted only part of Vicky’s overall losses, in light of §

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2259(b)(3)'s proximate causation requirement. *Id.* The court affirmed the award on the basis that the government notified Vicky each time a defendant possessing her images was arrested and that according to the testimony of Vicky's psychologist, each of these notifications added to the "slow acid drip" of Vicky's ongoing emotional distress. *McDaniel*, 631 F.3d at 1209. Thus, the court held that the district court "did not clearly err in finding that McDaniel's possession *proximately caused* Vicky's losses." *Id.* (emphasis added).

The Eleventh Circuit cited the Ninth Circuit's holding in *United States v. Laney*, 189 F.3d 954, 965 (9th Cir. 1999), a case involving a defendant convicted of conspiring to engage in the sexual exploitation of children. The Ninth Circuit held that § 2259 requires "a causal connection between the offense of conviction and the victim's harm." *Id.* at 965. The Ninth Circuit also recently affirmed a restitution order in the amount of \$3,000 against a defendant convicted of possessing images of Vicky on the basis that "[t]he United States met its burden of establishing *proximate cause* by showing how Vicky's harm was generally foreseeable to casual users of child pornography like Baxter." *United v. Baxter*, 394 F. App'x 377, 378-79 (9th Cir. Sept. 1, 2010) (emphasis added). *Baxter* affirmed the district court's grant of the government's request for a \$3,000 award based on the government's estimate that this amount would cover 18 sessions, or one and one-half years of therapy for Vicky, at one session per month. *Id.* The court determined that this amount represented a fair and reasonable estimate of the amount of Vicky's harm caused by the defendant. *Id.*

These opinions are consistent with the Third Circuit's opinion in *United States v. Crandon*, 173 F.3d 122, 126 (3d Cir. 1999), in which the court affirmed a restitution order against a defendant convicted of receiving child pornography. *Id.* at 126. The district court had concluded "by a preponderance of the evidence that Crandon's conduct was the proximate cause of the victim's losses." *Id.* Based on the defendant's conduct, which the evidence showed had exacerbated

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the victim's harm and constituted a "substantial factor in causing the ultimate loss," the Third Circuit concluded that "the district court did not abuse its discretion in concluding that Crandon's conduct was the *proximate cause* of the victim's losses." *Id.* (emphasis added).

The *In re Amy* opinion does not discuss this substantial circuit authority interpreting § 2259 to require a showing of proximate causation between the defendant's conduct and the victim's recoverable losses. Additionally, the *In re Amy* opinion fails to mention the large number of district court cases that have recently addressed this issue in the context of child pornography possession convictions. Almost all of these cases involve Amy or Vicky. These courts all agree that Amy and Vicky are "victims" of the crime of possessing images portraying their abuse under the definition of "victim" in § 2259 and reasoning of *Ferber*, 458 U.S. at 759, 102 S. Ct. at 335, and *Norris*, 159 F.3d at 929. However, these courts also recognize that "almost every court to have considered causation under § 2259 has found the 'proximate result' language in the catchall provision to apply equally to the other enumerated categories of loss, and therefore has held that § 2259 requires a showing of proximate cause." *United States v. Chow*, No. 09-CR-165, 2010 U.S. Dist. LEXIS 140506 (S.D.N.Y. Nov. 22, 2010). Thus, virtually every district court addressing the topic has concluded that § 2259 includes a distinct requirement that the victim's recoverable losses are limited to those proximately caused by the defendant's offense. *See, e.g., United States v. Hardy*, 707 F. Supp. 2d 597, 610 (W.D. Pa. 2010) ("Given the unanimity of the Circuits that have addressed the question, the language of the statute, and the legislative history of its amendments, this Court finds that 18 U.S.C. § 2259 does require that a victim's losses be proximately caused by the criminal acts of the defendant for restitution to be awarded.").⁶

⁶ A representative list of additional cases follows: *United States v. Church*, 701 F. Supp. 2d 814, 825-26 (W.D. Va. April 5, 2010); *United States v. Berk*, 666 F. Supp. 2d 182 (D. Me.

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These district courts have come to different conclusions regarding the amount of restitution owed in light of § 2259's proximate causation requirement. Some of these courts have ordered no restitution, some have ordered joint and several liability for the total amount of the victim's losses, and some courts have ordered smaller awards in the general range of \$3,000 to \$5,000.⁷ The one point that all of these numerous opinions agree on is that the restitution order must be based on evidence of a causal connection between the defendant's offense and the victim's losses. These opinions do not rely solely on § 2259(c)'s definition of "victim" to establish the causal requirements of § 2259. I can identify no opinion of a district or circuit court other than *In re Amy* expressly holding that § 2259 does not limit the victim's recoverable losses to those proximately caused by the defendant's offense.

III.

In this case, we should direct the district court to make findings regarding the causal connection between Wright's offense and any of Amy's losses that the

2009); *United States v. Rowe*, No. 1:09-CR-80, 2010 U.S. Dist. LEXIS 98458 (W.D.N.C. Sept. 7, 2010); *United States v. Aumais*, No. 08-CR-711, 2010 U.S. Dist. LEXIS 78407 (N.D.N.Y. Jan. 13, 2010); *United States v. Brunner*, No. 5:08-CR-16, 2010 U.S. Dist. LEXIS 8285 (W.D.N.C. Jan. 12, 2010); *United States v. Hicks*, No. 1:09-CR-150, 2009 U.S. Dist. LEXIS 110253 (E.D. Va. Nov. 24, 2009); *United States v. Ferenci*, No. 1:08-cr-0414 AWI, 2009 U.S. Dist. LEXIS 80339 (E.D. Cal. Aug. 19, 2009); *United States v. Renga*, 2009 U.S. Dist. LEXIS 78144 (E.C. Cal. Aug. 18, 2009). I am aware of only one district court that has ordered restitution against a defendant possessing Amy's or Vicky's images without discussing proximate causation. *United States v. Staples*, No. 09-CR-14017, 2009 U.S. Dist. LEXIS 81648 (S.D. Fla. Sept. 2, 2009) (ordering joint and several restitution for the full amount of Amy's losses).

⁷ One of these courts relied on 18 U.S.C. § 3664(h) as authority for ordering joint and several restitution against a defendant possessing and distributing Amy's images. *See Hardy*, 707 F. Supp. 2d at 614-15. A number of these courts have relied on the apportionment provisions of § 3664(h) as authority for issuing smaller or partial awards. The full text of § 3664(h) is as follows: "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."

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court orders Wright to pay pursuant to the requirements of § 2259. If the court finds evidence that Wright's possession of the images was a proximate cause of Amy's losses, the court has wide discretion to craft a reasonable restitution order reflecting the losses caused by Wright. The district court's order need not approach "mathematical precision." See *United States v. Doe*, 488 F.3d 1154, 1160 (9th Cir. 2007). The district court could apportion Wright's share of Amy's total losses or render judgment under the joint and several liability provisions of § 3664(h) utilized in some of the above-cited cases. Whatever approach the district court chooses, the court should explain the basis of its award and the order should be constrained by the principle of proximate causation.⁸

IV.

Finally, I note that the District of Columbia Circuit very recently issued a thorough, well-reasoned opinion that is consistent with this special

⁸ *In re Amy* cited the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607(a) ("CERCLA") as an example of joint and several liability. *In re Amy*, No. 09-41238, slip op. at 17. The Supreme Court has recognized that the scope of joint and several liability under CERCLA is to be determined by the "principles of common law." *Burlington Northern & Santa Fe Railway Co. v. United States*, 129 S. Ct. 1870, 1880-81 (2009). Thus, the Court has held that CERCLA joint and several liability is limited by the following general causation principles:

[W]hen two or more persons acting independently cause a distinct or single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he has himself caused. Restatement (Second) of Torts §§ 433, 881; Prosser, *Law of Torts*, pp 313-314 (4th ed. 1971). But where two or more persons cause a single, indivisible harm, each is subject to liability for the entire harm. Restatement (Second) of Torts, § 875; Prosser, at 315-16. In other words, apportionment is proper when there is a reasonable basis for determining the contribution of each cause to a single harm. Restatement (Second of Torts) § 433A(1)(b), p. 434 (1963-64).

Burlington Northern, 129 S. Ct. at 1881 (internal citation omitted). These same general causation principles should apply to joint and several restitution orders under § 2259.

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concurrence. See *United States v. Monzel*, No. 11-3008, slip op. (D.C. Cir. April 19, 2011).

For all of the foregoing reasons, this court should follow every other circuit court and virtually every district court considering this issue in holding that § 2259 limits recoverable losses to those proximately caused by the defendant's offense of conviction. Thus, I recommend that this case be consolidated with *In re Amy* and reheard *en banc*.

I have been authorized to state that Judges KING and SOUTHWICK join in this special concurrence.

APPENDIX B

Westlaw.

S. REP. 103-138

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S. REP. 103-138, S. Rep. No. 138, 103RD Cong., 1ST Sess. 1993, 1993 WL 355617 (Leg.Hist.)

THE VIOLENCE AGAINST WOMEN ACT OF 1993
 P.L. 103-322, VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994
 DATES OF CONSIDERATION AND PASSAGE

House: November 3, 1993; March 23, April 14, 19, 20, 21, May 5, August 19, 21, 1994
 Senate: November 3, 4, 5, 8, 9, 10, 11, 16, 17, 18, 19, 1993; May 19, August 22, 23, 24, 25, 1994
 Cong. Record Vol. 139 (1993)
 Cong. Record Vol. 140 (1994)

House Report (Judiciary Committee) No. 103-324,
 Nov. 3, 1993 (To accompany H.R. 3355)
 House Report (Judiciary Committee) No. 103-489,
 May 2, 1994 (To accompany H.R. 4296)
 House Conference Report No. 103-694,
 Aug. 10, 1994 (To accompany H.R. 3355)
 House Conference Report No. 103-711,
 Aug. 21, 1994 (To accompany H.R. 3355)

SENATE REPORT NO. 103-138

September 10, 1993

[To accompany S. 11, as amended]

The Committee on the Judiciary, to which was referred the bill (S. 11), having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Violence Against Women Act of 1993”.

SEC. 2. TABLE OF CONTENTS.

- Sec. 1. Short title.
- Sec. 2. Table of contents.

TITLE I—SAFE STREETS FOR WOMEN

- Sec. 101. Short title.

Subtitle A—Federal Penalties for Sex Crimes

- Sec. 111. Repeat offenders.
- Sec. 112. Federal penalties.

Sec. 113. Mandatory restitution for sex crimes.
Sec. 114. Authorization for Federal victim's counselors.

Subtitle B—Law Enforcement and Prosecution Grants to Reduce Violent Crimes Against Women

Sec. 121. Grants to combat violent crimes against women.

Subtitle C—Safety for Women in Public Transit and Public Parks

Sec. 131. Grants for capital improvements to prevent crime in public transportation.
Sec. 132. Grants for capital improvements to prevent crime in national parks.
Sec. 133. Grants for capital improvements to prevent crime in public parks.

Subtitle D—Justice Department Task Force on Violence Against Women

Sec. 141. Establishment.
Sec. 142. General purposes of task force.
Sec. 143. Membership.
Sec. 144. Task Force operations.
Sec. 145. Executive director and staff.
Sec. 146. Powers of Task Force.
Sec. 147. Authorization of appropriations.
Sec. 148. Termination.

Subtitle E—New Evidentiary Rules.

Sec. 151. Sexual history in all criminal cases.
Sec. 152. Sexual history in civil cases.
Sec. 153. Amendments to rape shield law.
Sec. 154. Evidence of clothing.

- (1) comparative Federal sentences for cases in which the rape victim is known to the defendant and cases in which the defendant is not known to the defendant;
- (2) comparative Federal sentences for cases on Federal territory and sentences in surrounding States; and
- (3) an analysis of the effect of rape sentences on populations residing primarily on Federal territory relative to the impact of other Federal offenses in which the existence of Federal jurisdiction depends upon the offense's being committed on Federal territory.

SEC. 113. MANDATORY RESTITUTION FOR SEX CRIMES.

(a) Sexual Abuse.—(1) Chapter 109A of title 18, United States Code, is amended by adding at the end thereof the following:

“S 2248. Mandatory restitution

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

“(b) Scope and Nature of Order.—(1) The order of restitution under this section shall direct that—

“(A) the defendant pay to the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court, pursuant to paragraph (2); and

“(B) the United States Attorney enforce the restitution order by all available and reasonable means.

“(2) 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, expert witness and investigators' fees, interpretive services, and court costs; and

“(F) any other losses suffered by the victim as a proximate result of the offense.

“(3) Restitution orders under this section are mandatory. A court may not decline to issue an order under this section because of—

“(A) the economic circumstances of the defendant; or

“(B) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

“(4)(A) Notwithstanding the terms of paragraph (3), the court may take into account the economic circumstances of the defendant in determining the manner in which and the schedule according to which the restitution is to be paid.

“(B) For purposes of this paragraph, the term ‘economic circumstances’ includes—

“(i) the financial resources and other assets of the defendant;

“(ii) projected earnings, earning capacity, and other income of the defendant; and

“(iii) any financial obligations of the defendant, including obligations to dependents.

“(C) An order under this section may direct the defendant to make a single lump-sum payment or partial payments at specified intervals. The order shall also provide that the defendant's restitutionary obligation takes priority over any criminal fine ordered.

“(D) In the event that the victim has recovered for any amount of loss through the proceeds of insurance or any other source, the order of restitution shall provide that restitution be paid to the person who provided the compensation, but that restitution shall be paid to the victim for the victim's other losses before any restitution is paid to any other provider of compensation.

“(5) Any amount paid to a victim under this section shall be set off against any amount later recovered as compensatory damages by the victim from the defendant in—

“(A) any Federal civil proceeding; and

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

“(c) Proof of Claim.—(1) Within 60 days after conviction and, in any event, no later than 10 days prior to sentencing, the United States Attorney (or the United States Attorney's delegee), after consulting with the victim, shall prepare and file an affidavit with the court listing the amounts subject to restitution under this section. The affidavit shall be signed by the United States Attorney (or the United States Attorney's delegee) and the victim. Should the victim object to any of the information included in the affidavit, the United States Attorney (or the United States Attorney's delegee) shall advise the victim that the victim may file a separate affidavit and shall provide the victim with an affidavit form which may be used to do so.

“(2) If no objection is raised by the defendant, the amounts attested to in the affidavit filed pursuant to subsection (1) shall be entered in the court's restitution order. If objection is raised, the court may require the victim or the United States Attorney (or the United States Attorney's delegee) to submit further affidavits or other supporting documents, demonstrating the victim's losses.

“(3) If the court concludes, after reviewing the supporting documentation and considering the defendant's objections, that there is a substantial reason for doubting the authenticity or veracity of the records submitted, the court may require additional documentation or hear testimony on those questions. Any records filed, or testimony heard, pursuant to this section, shall be in camera in the judge's chambers.

“(4) In the event that the victim's losses are not ascertainable 10 days prior to sentencing as provided in subsection (c)(1), the United States Attorney (or the United States Attorney's delegee) shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

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

(2) Table of Sections.—The table of sections for chapter 109A of title 18, United States Code, is amended by adding at the end thereof the following:

“2248. Mandatory restitution.”

(b) Sexual Exploitation and Other Abuse of Children.—Chapter 110 of title 18, United States Code, is amended by adding at the end thereof the following:

“S 2259. Mandatory restitution

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

“(b) Scope and Nature of Order.—(1) The order of restitution under this section shall direct that—

“(A) the defendant pay to the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court, pursuant to paragraph (2); and

“(B) the United States Attorney enforce the restitution order by all available and reasonable means.

“(2) For purposes of this subsection, the term ‘full amount of the victim's losses’ includes any costs incurred by the vic-

tim 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, expert witness and investigators' fees, interpretive services, and court costs; and

“(F) any other losses suffered by the victim as a proximate result of the offense.

“(3) Restitution orders under this section are mandatory. A court may not decline to issue an order under this section because of—

“(A) the economic circumstances of the defendant; or

“(B) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

“(4)(A) Notwithstanding the terms of paragraph (3), the court may take into account the economic circumstances of the defendant in determining the manner in which and the schedule according to which the restitution is to be paid.

“(B) For purposes of this paragraph, the term ‘economic circumstances’ includes—

“(i) the financial resources and other assets of the defendant;

“(ii) projected earnings, earning capacity, and other income of the defendant; and

“(iii) any financial obligations of the defendant, including obligations to dependents.

“(C) An order under this section may direct the defendant to make a single lump-sum payment or partial payments at specified intervals. The order shall also provide that the defendant's restitutionary obligation takes priority over any criminal fine ordered.

“(D) In the event that the victim has recovered for any amount of loss through the proceeds of insurance or any other source, the order of restitution shall provide that restitution be paid to the person who provided the compensation, but that restitution shall be paid to the victim for the victim's other losses before any restitution is paid to any other provider of compensation.

“(5) Any amount paid to a victim under this section shall be set off against any amount later recovered as compensatory damages by the victim from the defendant in—

“(A) any Federal civil proceeding; and

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

“(c) Proof of Claim.—(1) Within 60 days after conviction and, in any event, no later than 10 days prior to sentencing, the United States Attorney (or the United States Attorney's delegee), after consulting with the victim, shall prepare and file an affidavit with the court listing the amounts subject to restitution under this section. The affidavit shall be signed by the United States Attorney (or the United States Attorney's delegee) and the victim. Should the victim object to any of the information included in the affidavit, the United States Attorney (or the United States Attorney's delegee) shall advise the victim that the victim may file a separate affidavit and shall provide the victim with an affidavit form which may be used to do so.

“(2) If no objection is raised by the defendant, the amounts attested to in the affidavit filed pursuant to subsection (1) shall be entered in the court's restitution order. If objection is raised, the court may require the victim or the United States Attorney (or the United States Attorney's delegee) to submit further affidavits or other supporting documents, demonstrating the victim's losses.

“(3) If the court concludes, after reviewing the supporting documentation and considering the defendant's objections, that there is a substantial reason for doubting the authenticity or veracity of the records submitted, the court may require additional documentation or hear testimony on those questions. Any records filed, or testimony heard, pursuant to this section, shall be in camera in the judge's chambers.

“(4) In the event that the victim's losses are not ascertainable 10 days prior to sentencing as provided in subsection

(c)(1), the United States Attorney (or the United States Attorney's delegee) shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

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

(2) The table of sections for chapter 110 of title 18, United States Code, is amended by adding at the end thereof the following:

“2259. Mandatory restitution.”.

SEC. 114. AUTHORIZATION FOR FEDERAL VICTIM'S COUNSELORS.

There is authorized to be appropriated for fiscal year 1994, \$1,500,000 for the United States Attorneys for the purpose of appointing Victim/Witness Counselors for the prosecution of sex crimes and domestic violence crimes where applicable (such as the District of Columbia).

Subtitle B—Law Enforcement and Prosecution Grants to Reduce Violent Crimes Against Women

SEC. 121. GRANTS TO COMBAT VIOLENT CRIMES AGAINST WOMEN.

(a) In General.—Title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3711 et seq.), as amended by section 4 of Public Law 102-521 (106 Stat. 3404), is amended by—

- (1) redesignating part Q as part R;
- (2) redesignating section 1701 as section 1801; and
- (3) adding after part P the following new part:

“PART Q—GRANTS TO COMBAT VIOLENT CRIMES AGAINST WOMEN

“SEC. 1701. PURPOSE OF THE PROGRAM AND GRANTS.

“(a) General Program Purpose.—The purpose of this part is to assist States, Indian tribes, cities, and other localities to develop effective law enforcement and prosecution strategies to combat violent crimes against women and, in particular, to focus efforts on those areas with the highest rates of violent crime against women.

“(b) Purposes For Which Grants May Be Used.—Grants under this part shall provide additional personnel, training, technical assistance, data collection and other equipment for the more widespread apprehension, prosecution, and adjudication of persons committing violent crimes against women and specifically, for the purposes of—

- “(1) training law enforcement officers and prosecutors to more effectively identify and respond to violent crimes against women, including the crimes of sexual assault and domestic violence;
- “(2) developing, training, or expanding units of law enforcement officers and prosecutors specifically targeting violent crimes against women, including the crimes of sexual assault and domestic violence;
- “(3) developing and implementing police and prosecution policies, protocols, or orders specifically devoted to identifying and responding to violent crimes against women, including the crimes of sexual assault and domestic violence;
- “(4) developing, installing, or expanding data collection systems, including computerized systems, linking police, pro-

the laws of women in the classic sense.”⁷³ For example, as discussed supra at 8–9, in many States rape survivors must overcome barriers of proof and local prejudice that other crime victims need not hurdle: they bear the burden of painful and prejudicial attacks on their credibility that other crime victims do not shoulder; they may be forced to expose their private lives and intimate conduct to win a damage award; and finally, in some cases, they may be barred from suit altogether by tort immunity doctrines or marital exemptions.

IV. VOTE OF THE COMMITTEE

On May 27, 1993, the committee on the Judiciary, by voice vote, approved an amendment in the nature of a substitute by Senators Biden and Hatch. The committee ordered the Violence Against Women Act of 1993, as amended, favorably reported.

V. SECTION-BY-SECTION ANALYSIS

TITLE I—SAFE STREETS FOR WOMEN ACT

Subtitle A—Federal penalties for sex crimes

This subtitle provides that Federal penalties for Federal sex crimes may be increased.

Section 101. Short title: This section provides the short title of title I, the “Safe Streets for Women Act of 1993.”

Section 111. Repeat offenders: This section authorizes judges to increase sentences for repeat offenders up to twice the term of punishment otherwise authorized by statute. Rape is one of the most highly recidivist crimes, and repeat offenses must be treated extremely seriously. This section has been amended since the 1991 act to require the Federal Sentencing Commission to implement this change by recommending to the Congress amendments to the Federal Sentencing Guidelines, if appropriate.

Section 112. Federal penalties: This section directs the Sentencing Commission to review and enhance sentences for sex offenders, if appropriate: if more than one offender is involved in the offense; to reduce the disparities between the sentences for sex offenders who are known to the victim and the sentences for those sex offenders who are strangers to the victim; to render Federal penalties on Federal territory commensurate with penalties for similar offenses in the States; and to recommend amendments to the guidelines to account for the problem of recidivism in sex offenses, the severity of the offense, and the devastating effect of such attacks on survivors.

This section also requires that, within 180 days after the enactment of this act, the Sentencing Commission provide to the relevant committees of Congress an analysis of Federal rape sentencing showing the comparative sentences for cases in which the victim is known to the defendant and cases in which the defendant is a stranger to the victim; the comparative Federal sentences for cases on Federal territory and sentences in surrounding States; and of the effect of rape sentences on both victims and offenders in populations residing primarily on Federal territory, relative to other Federal offenses committed on Federal territory.

Section 113. Mandatory restitution: This section requires sex offenders to pay costs incurred by victims as a proximate result of a sex crime. Under current law, a court may, but is not required, to order “restitution” or the payment of costs incurred. Often, it is simply assumed that the defendant does not, and will never, have the resources to pay the victim's costs. This section reverses those assumptions, requiring the court to order the defendant to pay the victim's expenses. The entitlement to a restitution award or the amount of the award, but only the method and schedule of payment. In determining the method of payment, the judge may take into account other obligations of the defendant, including obligations to financial dependents.

Section 114. Federal victim's counselors: This section, authored by Senator DeConcini, authorizes the expenditure of \$1.5 million to the Executive Office of the United States' Attorneys for the purpose of providing additional rape crisis