NO. 09-41238

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NEW ORLEANS, LOUISIANA

IN RE: AMY UNKNOWN
Consolidated with
No. 09-41254

THE UNITED STATES	§	**PLAINTIFF - APPELLEE**
	§	
VS.	§	
	§	
DOYLE RANDALL PAROLINE	§	**DEFENDANT - APPELLEE**
	§	
VS.	§	
	§	
AMY UNKNOWN	§	**MOVANT - APPELLANT**

DEFENDANT-APPELLEE'S BRIEF ON REHEARING EN BANC

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

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

COMES NOW DOYLE RANDALL PAROLINE, Defendant-Appellee herein, by and through his attorneys, **F.R. "BUCK" FILES and STANLEY G. SCHNEIDER** and, pursuant to this Court's order, files this appellate brief and would show the Court as follows:

Procedural History

On July 11, 2008, Paroline's computer was seized and during the resulting search images of child pornography were discovered including at least one image of Amy. On January 9, 2009, Paroline pled guilty to a one count information charging him with possession of child pornography, a violation of 18 U.S.C. § 2252(a)(4)(B) and 2252(b)(2).[1] On June 30, 2009, Paroline was sentenced to 24 months imprisonment and 120 months supervised release. During sentencing, the district court severed the restitution issue and ordered any interested party to submit briefing on the issue.

On December 7, 2009, the district court issued a memorandum opinion and order denying the government's request for restitution. On December 17, 2009, Amy's counsel filed her notice of appeal in the district court and filed her Petition for

[1]Paroline was not arrested until the day that the information was filed and he entered his plea of guilty.

Writ of Mandamus in this Court.

A majority of a panel consisting of Judges Davis, Smith and Dennis issued a published opinion denying the mandamus on December 22, 2009. Amy filed a petition for rehearing, suggestion for rehearing en banc, and a motion to consolidate the appeal of the District Court's denial of her request for restitution and her mandamus. On March 22, 2011, a panel consisting of Chief Judge Jones and Judges Jolly and Garza issued an opinion granting rehearing and granting Amy's mandamus and dismissing Amy's appeal.

On April 15, 2011, Paroline filed his Petition for Rehearing En Banc which was granted on January 25, 2012.[2]

Issues Presented

1. **What if any casual relationship or nexus between the Defendant's conduct and the victim's harm or damages must the Government or the victim establish in order to recover restitution under § 2259.**

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[2] In his petition for rehearing en banc, Paroline asserted that the panel that heard arguments in this case violated FRAP 40 and Fifth Circuit Local Rule 40 that prohibits one panel of this Court to overrule another panel's decision absent an intervening Supreme Court or en banc decision or a change in the statutory law. Paroline believed that one panel is bound by the prior panel's decision. *See Umphlet v. Connick*, 815 F.2d 1061, 1063 (5th Cir.1987); *Washington v. Watkins*, 655 F.2d 1346, 1354 n. 10 (5th Cir. 1981), *cert. denied*, 456 U.S. 949, 102 S. Ct. 2021, 72 L. Ed. 2d 474 (1982). Prior to arguments, Paroline raised the issue concerning the composition of the panel for oral argument in his request for clarification of the issues filed prior to arguments. Immediately after arguments, Paroline filed a FRAP Rule 28j letter specifically objecting to the panel's considering rehearing of the December 22, 2009 panel of opinion. By this Court granting en banc review, that issue is now moot.

2. Whether the Rule of Lenity requires that a casual relationship exist between the Defendant's conduct and the victim's harm before an order may be entered to recover restitution under § 2259.

3. Whether mandamus, as defined by 18 U.S.C. 3771A. is the only appellate remedy for a victim to seek review of a district court's denial of a request for restitution.

Summary of Arguments

1. Amy, as a victim of child pornography, does not have a constitutional right to individually prosecute a claim for restitution during a criminal prosecution. Any request for a defendant to pay restitution must be made by a victim through the Government. And, the procedures followed for collection of any claimed restitution for damages resulting from specific criminal conduct has been created by Congress to allow the Government present to a district court a victim's restitution claim. The Supreme Court in *Roberts v. Sea-Island Services, Inc. Et Al.*, 566 U.S. _____, 10-1399 (March 20, 2012) stated that:

> Statutory language, however, "cannot be construed in a vacuum. It is fundamental cannon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. Of Treasury*, 489 U.S. 803, 909 (1989).

(Slip opinion at page 6-7)

Thus, the issue of restitution must be viewed through the prism of the

substantial rights of an accused that are pertinent to a sentencing proceeding. In order to comport with the requirements of the Constitution, an order of restitution must be based on the individual's offense conduct and attributable to the harm caused by the offense of conviction. Clearly, "[w]hen a defendant is ordered to pay restitution in an amount greater than the loss caused, the error affects substantial rights as well as the fairness and integrity of the judicial proceeding." *United States v. Austin*, 479 F.3d 363, 373 (5th Cir. 2007).

Throughout these proceedings, Amy has attempted to isolate her claim for restitution without concern that her request for restitution was made incident to Paroline's sentencing incident to his conviction for possession of child pornography. Further, in this case, Amy has stipulated that

> *"[N]one of the damages for which 'Amy' is now seeking restitution flow from anyone telling her specifically about Mr. Paroline or telling her about his conduct which was the basis of the prosecution in this case."*

(Hearing October 28, 2009, p. 16) (Emphasis added).

And, she conceded in the District Court that there had to be a nexus between Paroline's conduct and the harm that he caused.[3]

---

[3] Mr. Marsh: **Your Honor, it would be folly for me to argue that we did not have to show harm caused by the commission of this crime.** Clearly, it is not a strict liability, ... We clearly have to show harm by the commission of the crime. And I think that

Most of the damages requested by Amy's stem from her uncle's abuse and her perception and sense of hopelessness associated with her pictures being on the internet and her inability to stop people from viewing her picture. While Paroline may have violated her privacy by viewing or possessing her image, nonetheless, that was not the act that caused most of her damages, rather it was the victimization by her uncle. As the Second Circuit in *United States v. Aumais* , 656 F.3d 147, 155 (2nd Cir. 2011) stated:

> We have no basis for rejecting Dr. Silberg's findings that Amy has suffered greatly and will require counseling well into the future. ***But where the Victim Impact Statement and the psychological evaluation were drafted before the defendant was even arrested – or might as well have been– we hold as a matter of law that the victim's loss was not proximately caused by a defendant's possession of the victim's image.***

(Emphasis added)

The District Court's finding of fact that the Government had not proven by a preponderance of the evidence that Paroline caused Amy's damages is clearly supported by the record including Paroline's controverting expert evidence and requires this Court to affirm the District Court's decision and deny Amy mandamus request.

> we have established harm by the commission of this crime.

(Hearing October 28, 2009, page 31) (emphasis added)

2. Every circuit that has interpreted 18 U.S.C. § 2259 have found for one reason or another that the plain meaning of the statute required that Amy's damages be measured as a result of the offense of conviction. If the panel on rehearing's decision is correct in its interpretation of §2259 then there is a clear ambiguity in the statute that would implicate the Rule of Lenity. As the Supreme Court in *Hughey v. United States*, 495 U.S. 411, 110 S. Ct. 1979, 109 L. Ed. 2d 408 (1990) noted that:

> [E]ven were the statutory language regarding the scope of a court's authority to order restitution ambiguous, longstanding principles of lenity, which demand resolution of ambiguities in criminal statutes in favor of the defendant, *Simpson v. United States*, 435 U.S. 6, 14-15 (1978) (applying rule of lenity to federal statute that would enhance penalty), preclude our resolution of the ambiguity against petitioner on the basis of general declarations of policy in the statute and legislative history. See *Crandon v. United States*, 494 U.S. 152, 160 (1990). ("Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text").

Id., 495 U.S. at 422.

Application of the Rule of Lenity mandates affirmance of the District Court's decision.

3. Paroline agrees with the Government that Amy has no right to appeal from the District Court's holding on restitution. Amy's ability to request that the Government seek restitution on her behalf was created by Congress. Congress also created the vehicle by which she could seek appellate review of any denial of a

request for restitution by a District Court. In enacting § 3771, Congress differentiated between the Government's right of appeal, the issue of restitution, and a victim's ability to seek mandamus. Her remedy is limited to mandamus, a remedy she pursued. To allow Amy – or any other victim – to appeal from a judgment or other order in a criminal case would interfere with the President's authority under Article II, § 3 to see that the laws are faithfully enforced and interfere with the Attorney General's prosecutorial discretion guaranteed in § 3771(d)(6). The clear intent of Congress when it adopted §3771 was to create a mechanism to afford appellate review to victims of crimes.

Statement of Facts

On January 9, 2009, Paroline pled guilty to one count of possession of material involving the sexual exploitation of children in violation of 18 U.S.C. §§ 2252(a)(4)(B) and 2252(b)(2). Paroline admitted to knowingly possessing on his computers between 150 and 300 images of minors engaged in sexually explicit conduct (Docket No. 6). The National Center for Missing and Exploited Children ("NCMEC") identified Amy as at least one of the minors depicted in the pornographic images. Amy is depicted in at most two of the pornographic images Paroline possessed. The record affirmatively reflected that Amy was sexually exploited by her uncle when she was no more than nine. At the time of Paroline's sentencing, she was

20 years of age. As pointed out throughout these proceedings, images of Amy continue to be traded and distributed on the Internet.

On June 10, 2009, Paroline was sentenced to 24 months custody in the Bureau of Prisons and 120 months of supervised release. During sentencing, the District Court reviewed Amy's Victim Impact Statement and her Request for Restitution under 18 U.S.C. § 2259. Her Victim Impact Statement detailed not only the harm she has suffered from the abuse by her uncle when she was a child, but the harm she continues to endure ten years later by **knowing** that pornographic images of her are circulating against her will on the Internet and there is nothing she can do to stop it. In her Request for Restitution, Amy seeks approximately $3,367,854 from Paroline. This amount reflects the total amount of Amy's losses and includes costs for future psychological care, future lost income, and attorney's fees. Amy's request for restitution stems primarily from the sexual abuse that she suffered as a child by her uncle. In the District Court, Amy offered no alternate theory of restitution for the portion of her total losses proximately caused by any single defendant's possession of her images. Amy's restitution request was made by the Government on her behalf. Amy's personal attorney, James R. Marsh, also participated in presenting Amy's restitution request in this case. The psychological reports and analysis of Amy's

future loss earnings were compiled in 2008 and predate his arrest on January 9, 2009[4].

The District Court severed the restitution issue from the sentencing proceeding and ordered all interested parties to submit briefing on the issue (Docket No. 13). The Court received briefing from the Government, Amy, Paroline, and other interested parties including NCMEC. On August 20, 2009, the Court conducted a hearing pursuant to 18 U.S.C. § 3664(d)(5) to determine restitution. At the hearing, Paroline requested additional time to obtain the data underlying Amy's restitution request and further brief the restitution issue. In her report, Dr. Silberg notes the following:

> Most significantly, at the age of 17, Amy was informed through legal notifications about the widespread presence of her picture on the internet illustrating to her that in some ways the sexual abuse of her has never really ended. This knowledge further exacerbated her symptoms, interfered with her ability to overcome the increasing symptoms of post traumatic stress, and impeded her ability to move on with her life. This is described in the history below.

[Silberg's report; p 3]

She described that every discovery[5] of another defendant that has traded her image

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[4]The documentary evidence submitted to Paroline supporting Dr. Silberg's report indicates that she saw Amy on June 14, 2008, July 29, 2008 and November 10, 2008.

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

re-traumatizes her again. [Silberg's report; p 9][6]

Paroline submitted the discovery materials underlying Amy's requests for restitution to an expert to controvert her claim of damages. Paroline's request to have an independent psychological examination was denied. No evidence was presented of any damages that actually were incurred by Amy after the preparation of Dr. Silberg's report.[7] During the restitution hearings, Paroline questioned the damage model submitted by Dr. Silberg and submitted the report by Dr. Timothy J. Proctor, a Board Certified Forensic Psychologist wherein he states:

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

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

> 1. From the information reviewed and analyzed, concern appears warranted regarding the extent to which, in this case, Dr. Silberg successfully served the role of an objective forensic psychological evaluator, which appears to have been her expressed intention.
>
> 2. Although consideration of objective sources of data is the hallmark of a forensic psychological evaluation, it appears, based in the materials

[6]This conflicts with Amy's acknowledgment that she was never informed of Paroline's conduct or his arrest and prosecution.

[7]The record reflects that Amy was in therapy in 1999 and she saw Dr. Silberg three times in 2008. No other therapy records have ever been produced.

> reviewed, that Dr. Silberg relied very heavily on "Amy's" subjective self-report.
>
> 3. As was already demonstrated to some extent in the previous section, it appears that Dr. Silberg inadequately considered alternative hypothesis and overly attributed problematic behavior (e.g., academic problems, vocational problems, alcohol abuse) to "Amy's" sexual abuse history, without fully exploring alternative hypotheses and considering that the cause of behavior is often multifaceted.
>
> 4. Psychological testing is typically of great value in forensic evaluations. Unfortunately, however, in this case Dr. Silberg administered only a very small battery of tests (i.e., two) that were inadequate due to the absence of well-established validity scales and because the tests were overly specific in nature.
>
> 5. Finally, it is my opinion that Dr. Silberg's conclusions regarding the impact of "Amy's" abuse history on her over the course of her lifetime, and regarding the amount of treatment she will require in the future, is highly speculative and seems inconsistent with the results of her prior period of treatment.[8]

(Paroline's Exhibits in Response to Mandamaus No. 000195 - 000200, filed 12/21/2009).

On October 14, 2009, Amy's attorney entered into the following stipulation:

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

[8] As an example, Dr. Proctor noted the treatment notes of Ruby Salazer, LSW, BCD who treated "Amy from October, 1998 through the end of 1999. Her treatment notes indicate that "Amy" was back to normal. The treatment of "Amy" was apparently successful. (Paroline exhibits p. 000200).

were received by Mr. James R. Marsh, "Amy's" representative.

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

None of the damages for which "Amy" is now seeking restitution flow from anyone telling her specifically about Mr. Paroline or telling her about his conduct which was the basis of the prosecution in this case.

(Hearing October 28, 2009, p. 16) (Emphasis added)

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

The Court: So, Mr. Marsh. Are you -do you-are you saying that other than paragraph F, the statute does have a causation requirement? And, if so, what type of requirement? Or that it does not have any causation requirement at all?

Mr. Marsh: **Your Honor, it would be folly for me to argue that we did not have to show harm caused by the commission of *this crime.*** Clearly, it is not a strict liability, if you will, that, you know, if X then Y or you automatically are entitled to damages because of some, you know, statutory violation. We clearly have to establish harm. We clearly have to show harm by the commission of the crime. And I think that we have established harm by the commission of this crime.

(Hearing October 28, 2009, page 31) (emphasis added)

Arguments and Authorities

Amy's position before this Court is significantly different than the position that she took in the District Court. Amy, through her attorney, stipulated:

> [N]one *of the damages for which "Amy" is now seeking restitution flow from anyone telling her specifically about Mr. Paroline or telling her about his conduct which was the basis of the prosecution in this case.*

(Hearing October 28, 2009, p. 16).

And, Amy further conceded that she had to show harm caused by the commission of this crime. (Hearing October 28, 2009, page 31). To date, Amy has not addressed these concessions which support Paroline's assertion that §2259 requires a factual presentation that a claim for restitution flow from the conduct of the accused.

In light of her concession, this Court must be mindful that Amy does not have a constitutional right to restitution for the harm caused to her by anyone including her uncle who so terribly abused her. Her right to restitution or damages paid by a defendant was created by Congress. And Congress also implemented the manner and means in which the Government is responsible for prosecution of her claim for restitution within the meaning of the policy considerations that created the United States Sentencing Commission and the authority of district courts to impose a punishment and restitution to a person convicted of violating the law[9].

The fallacy of Amy's request for restitution from Paroline is that she wants this Court to hold that Paroline is jointly liable for all of the damages or harm that she has

[9]The Senate Report accompanying S. 11, S.Rep. No 103-138, 1993 WL 355617, at 61 explains Congressional intent in enacting § 2259 to require "sex offenders to pay costs incurred by victims as a proximate result of a sex crime."

sustained during her lifetime that is attributable to her uncle or the individuals who have profited from the distribution of her images or any other individual who possessed her image without any showing that she has been actually harm or damaged by Paroline's conduct.[10] Amy also wants every district court to view the conduct of other individuals in various other jurisdictions charged with similar offenses without knowledge of their conduct to determine whether a person accused of possession of child pornography is required to pay restitution or acted through the same scheme or conspiracy to harm Amy, a victim of child pornography.

And, she wants this Court to authorize restitution for her future losses even though her future losses have not been incurred but simply anticipated without any showing of any incurred losses from November, 2008, when she was last seen by Dr. Silberg, through any of the restitution hearings held by the District Court in this case during the fall of 2009. Amy also wants this Court to authorize restitution for losses or damages that she incurred years before Paroline was arrested or committed the offense for which he was convicted.

The Victim Impact Statement submitted to the District Court and the psychological report submitted suggest that Amy has been harmed by her perception

[10]Amy clearly stated in the District Court that she must show harms caused by Paroline's commission of the offense.(Hearing October 28, 2009, page 31)

that others are viewing her image on the internet. The model for damages presented in this case demands damages not based on harm or damages actually caused by Paroline's conduct but rather on the speculative assertion that Amy would be harmed if she knew that Paroline viewed her image or the perception that someone was viewing her being abused. Yet, Amy's attorney stipulated in the District Court that she has no knowledge that Paroline ever viewed her image and that none of her claimed damages arose from Paroline's conduct.

And, unlike most of the other reported cases, Paroline presented expert evidence controverting Amy's speculative assertion of damages.

This Court must be mindful of the fact that the question of restitution as herein presented is part of a sentencing proceedings resulting from specific conduct engaged in by Paroline. In this regard the Supreme Court recently in *Roberts v. Sea-Island Services, Inc. Et Al.*, 566 U.S. _____, 10-1399 (March 20, 2012) reiterated that:

> Statutory language, however, "cannot be construed in a vacuum. It is fundamental cannon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. Of Treasury*, 489 U.S. 803, 909 (1989).

(Slip opinion at page 6-7)

In the context of a sentencing proceeding, the Government must prove that Paroline's conduct caused the harm which is the basis of Amy's claim for restitution.

And, that claim must be viewed in light of traditional sentencing considerations which include the substantial rights of the accused, the Congressional intent in formulating the sentencing guidelines and all of the restitutional remedial statutes adopted by Congress that give the right of restitution to victims of crimes.

Paroline possessed either one or two images of Amy among a larger number of images of child pornography. Normally all issues of sentencing, as required by Congress and the United States Sentencing Commission, are dependent on a determination of relevant conduct as defined by U.S.S.G. §1B1.3 which is defined as "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." § 1B1.3(a). For example, see *United States v. Fowler*, 216 F.3d 459 (5th Cir. 2000); *United States v. Boudreau*. 250 F.3d 279 (5th Cir 2001).

In this context, §1B1.3(b) specifically references Chapter Four and Chapter Five considerations which shall be determined on the *basis of the conduct* and information provided in the respective guidelines. And, the Guidelines provide for the application of 18 U.S.C. §2259 and 18 U.S.C. §3664 as part of the restitution scheme set out in § 5E1.1.

Paroline maintains that any award of restitution must either be based on his relevant conduct associated with his offense of conviction or caused by the conduct arising from the offense of conviction. In this case, that conduct is the same. Paroline possessed child pornography that he obtained via the internet. He was not charged as part of a conspiracy or that he committed the offense of conviction jointly with others in a scheme. Paroline was not charged with distribution of child pornography. He was one of the end users - a viewer of child pornography.

If Amy is correct and there is no causation requirement associated with §2259 that requires imposition of restitution resulting from the offense of conviction, then the award of restitution must be based on Paroline's relevant conduct since her claim for restitution arises during a sentencing proceeding. This Court can determine congressional intent from a thorough review of other statutory schemes where Congress created rights of restitution for victims.

Paroline believes that consistent with the intent of Congress, all decisions by a sentencing court must be viewed in light of the offense of conviction and the conduct of the accused and not the conduct of any other person. The guidelines use relevant conduct because they seek to punish for "actual conduct" and not merely "charged conduct." For instance, a drug defendant is held responsible for all drug quantities related to his course of conduct, not just those indicted. Therefore, with

regard to restitution, relevant conduct means compensation for acts the defendant actually committed, and not those that are neither foreseeable, nor jointly committed with others. *See United States v. Masseratti*, 1 F.3d 330 (5th Cir. 1993) The clear application of all sentencing consideration, including § 2259 and § 3664, requires that any restitution ordered as part of individual's sentence be based specifically on the individual's offense of conviction or in this case, his specific conduct as it applies to the damages caused to a victim of the offense of conviction.

Under the Mandatory Victims Restitution Act of 1996 (the "MVRA"), the statute provides in relevant part that in sentencing a defendant convicted of certain offenses, the court "shall order . . . that the defendant make restitution to the victim of the offense..." 18 U.S.C. § 3663A(a)(1). The MVRA's focus on the offense of conviction, as opposed to relevant conduct, requires that the restitution order be limited to the "losses to the victim caused by the offense." *United v. Llamas*, 599 F.3d 381, 390-91 (4th Cir. 2010) (citation omitted) (concluding that "...in the context of a conspiracy, a restitution award under the MVRA is limited to the losses attributable to the specific conspiracy offenses for which the defendant was convicted.") Clearly, restitution must be awarded with respect to all crimes of which a person is convicted, but it may not be awarded with respect to other losses ("relevant conduct" in the Sentencing Guidelines' parlance) unless the defendant consents to this additional

award. See 18 U.S.C. § 3663A(a)(2),(3); *Hughey v. United States*, 495 U.S. 411, 110 S. Ct. 1979, 109 L. Ed. 2d 408 (1990).

Paroline believes that any attempt to assess restitution, jointly and severally or otherwise, for crimes other than Paroline's crime of conviction, the restitution order would constitute both an excessive fine and cruel and unusual punishment forbidden by the Eighth Amendment of the United States Constitution. In *United States v. Arledge,* 553 F.3d 881 (5th Cir. 2008), *cert. denied,* __ U.S. __, 129 S. Ct. 2028 (2009) and *United States v. Butler,* 137 F.3d 1371 (5th Cir. 1998), *cert. denied,* 525 U.S. 882 (1998), this Court held that restitution does not violate the Eighth Amendment bans on excessive fines and cruel and unusual punishments as long as it is...geared to the victim's loss caused by the defendant's criminal activity..." *Alredge,* 553 F.3d, at 899, *citing United States v. Dean,* 949 F. Supp. 782, 786 (D. Or. 1996). The key is that the amount of restitution be geared to the loss caused by the defendant's criminal activity and his crime of conviction. However, this does not justify requiring a defendant to pay restitution for harm caused by criminal activity that is not part of the offense of conviction. Thus, Paroline asserts that an award of restitution, either singularly or jointly and severally, for anything approaching $3.7 million or for criminal conduct not part of his offense of conviction would constitute an unconstitutional excessive fine and/or cruel and unusual punishment. It would be

so disproportionate that it would be an unconstitutional. *United States v. Bajakajian,* 524 U.S. 321, 118 S. Ct. 2028, 141, L. Ed. 2d 314 (1998). *See also* District Court's Memorandum and Order, at 10.

Clearly, Paroline would be imposed an unconstitutional excessive fine or cruel and unusual punishment to the extent that any order for joint and several liability included restitution for conduct outside of the defendant's offenses of conviction. That is why a person is liable for restitution to victims for all losses caused by the offense of conviction and may be held jointly and severally liable with others convicted in the offense of conviction. However, restitution for losses to victims not caused by the defendant's offense of conviction are not subject to a restitution order.

Thereby, restitution for conduct beyond those specified in the offense for which a defendant is convicted is prohibited where the victim of that offense also suffers other losses as a result of the defendant's related course of conduct. See *United States v. Berrios,* 869 F. 2d 25, 32 (2nd Cir. 1989); *United States v. Duncan*, 870 F. 2d 1532, 1537 (10th Cir.1989) (permitting court to order restitution for "...other criminal acts that had a significant connection to the act for which conviction was had..."). The Sixth Circuit has held that a court may only require a defendant to make restitution "...to victims of the offense for which he was convicted." *United States v. Durham,* 755 F. 2d 511, 512 (6th Cir. 1985). The Eleventh Circuit has held

that "[t]he amount of restitution [under VWPA] may not exceed the actual losses flowing from the offense for which the defendant has been convicted." *United States v. Barnette,* 800 F. 2d 1558, 1571 (11th Cir. 1986) (citing *United States v. Johnson*, 700 F. 2d 699, 701 (11th Cir. 1983) (construing Federal Probation Act, 18 U.S.C. § 3651 (1982 ed.)). The Ninth Circuit has ruled that "in cases which involve a continuing scheme to defraud, 'it is within the power of the court to require restitution of any amount up to the entire illicit gain from such a scheme, even if only some specific incidents are the basis of the guilty plea.'" *United States v. Pomazi*, 851 F. 2d 244, 250 (9th Cir.1988) (quoting *United States v. Davies*, 683 F. 2d 1052, 1055 (7th Cir. 1982)).

Any discussion of restitution in this case must be limited to damages or restitution for harm directly arising from Paroline's possession of one or two images of Amy and not attributable to harm caused by another person or for any other person's conduct , especially the harm caused by Amy's uncle.

Paroline believes whether a "victim" of child pornography can recover damages under 18 U.S.C. §2259 depends on whether the Government can establish the sustained damages to the "victim" directly resulted from the defendant's offense of conviction. § 2259 mandates a district court to order a defendant to pay a "victim", defined as an "individual harmed as a result of a commission of a crime under this

chapter." § 2259(b)(3)(A)-(F). §2259(b)(2) provides that an order of restitution under §2259 shall be issued and enforced in accordance with § 3664 in the same manner as an order under §3663A. And, under 18 U.S.C. § 3664(e), "[t]he burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on . . . the Government."

§ 2259 and § 3664 must be read together as this Court attempts to interpret congressional intent. The Supreme Court has 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." *Porto Rico Ry., Light & Power Co. v. Mor.*, 253 U.S. 345, 348, 40 S. Ct. 516, 64 L. Ed. 944 (1920); *see also Fed. Mar. Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 734, 93 S. Ct. 1773, 36 L. Ed. 2d 620 (1973) (holding that a "catchall provision" was "to be read as bringing within a statute categories similar in type to those specifically enumerated"). Based on this rule of construction, the phrase "as a proximate result of the offense" would apply equally to all the loss categories in *§ 2259(b)(3)*. This construction of § 2259 was first applied in *United States v. Berk*, 666 F. Supp. 2d, 182, 188 (D. Me. 2009) wherein the Court held that "the natural construction of *[section 2259*] demands that the proximate cause requirement be read as applicable to every class of loss set forth in the statue."

Historically, 18 U.S.C. § 2259 was enacted as a portion of Title IV, "Violence Against Women," of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40113, 108 Stat. 1796, 1907, and amended (with respect to its procedural provisions) by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 205, 110 Stat. 1214, 1231. In the statute, the term "victim" is defined as the individual harmed as a result of a commission of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named as such representative or guardian. 18 U.S.C. § 2259(c).

As previously stated, there are other statutes, such as the Mandatory Victims Restitution Act of 1996 (MVRA), id. § 3663A, and the Victim and Witness Protection Act of 1982 (VWPA), id. § 3663, governing restitution for other types of crimes. While some language in these statutory restitution schemes are the same as §2259, there are differences and those differences must be given weight. In the statute involved here, Congress was careful to specify some definitions of recoverable losses where it had not done so in other restitution statutes. Compare 18 U.S.C. § 2259(b)(3) (defining compensable losses), with id. § 3663(b) (defining compensable

losses), and id. § 3663A(b) (same). Congress also gave a different definition of "victim". Several features of this statutory scheme are relevant here. Like the MVRA, but unlike the VWPA, restitution under § 2259 is mandatory, ***if*** the requirements of the section are satisfied. Id. § 2259(b)(4)(A); see also id. § 3663A(a)(1) (under the MVRA, the court "shall order" restitution); id. § 3663(a)(1)(A) (under the VWPA, the court "may" order restitution); see also S. Rep. No. 103-138, at 56 (1993) (explaining that § 2259 was designed to "requir[e] the court to order the defendant to pay the victim's expenses"). Restitution orders under this section may only be issued for offenses "under this chapter." 18 U.S.C. § 2259(a). Chapter 110 of Title 18 covers several categories of offenses, including possession, transportation, and distribution of child pornography. Id. § 2252. Restitution may only be issued to a "victim," id. § 2259(b)(1), which is defined as "the individual harmed as a result of a commission of a crime under this chapter," id. § 2259(c). This definition of "victim" is broader than that of the MVRA and VWPA, which defines victim as "a person directly and proximately harmed as a result" of a specified offense. Id. § 3663(a)(2); id. § 3663A(a)(2) (same).

Restitution is for the "costs incurred by the victim," which are illuminated in six enumerated categories of losses. Id. § 2259(b)(3). The section defines what is meant by restitution as being "the full amount of the victim's losses," id. § 2259(b)(1),

which includes any costs incurred by the victims for specified items, id. § 2259(b)(3). These losses include "medical services relating to physical, psychiatric, or psychological care," id. § 2259(b)(3)(A), and other items. Thus, the "full amount" includes such losses and Congress determined that the victims of crimes under this statute were likely to suffer losses in these categories. The specified loss categories expanded the usual categories of "restitutionary" losses. The loss definition for the crimes under this chapter also contains a general catch-all provision for "any other losses suffered by the victim as a proximate result of the offense." Id. § 2259(b)(3)(F).

The analysis raised by the restitution scheme is three steps: (1) the requirements for an individual to be considered a "victim" within the meaning of § 2259(c); (2) the causation requirement applicable to determining which "costs incurred by the victim," id. § 2259(b)(3), are compensable; and (3) assuming that a victim has identified compensable costs that satisfy the causation requirement, whether the district court made a reasonable determination of a dollar figure. See *United States v. Kennedy*, 643 F.3d 1251 (9th Cir. 2011); see also *United States v. McGarity*, 2012 U.S. App. LEXIS 2383, 2012 WL 370104, at *34.

Consequently, Paroline maintains, within the meaning of the guidelines and the plain reading of the statute, the Government must prove that any award of restitution to Amy must be directly resulting from his conduct or that resulted from

the conduct that lead to his conviction.[11] The intent of Congress in enacting §2259 and §3664 and the intent of the sentencing guidelines, U.S.S.G. §1B1.3 and § 5E1.1 require that courts impose punishment only based on the individual offense conduct or conduct that is relevant to the offense of conviction. The following circuits have all concluded that §2259 requires proof that any damages that can result in an order of restitution be proximately caused by the conduct underlying the accused's offense of conviction. See *United States v. Kearney*, 10-2434, 2012 U.S. App. Lexis 4146, 2012 WL 639168 (1st Cir. 2012); *United States v. Evers*, No. 08-5774, 2012 U.S. App. LEXIS 2641, 2012 WL 413810 (6th Cir. Feb. 10, 2012) (to be published in F.3d); *McGarity*, No. 09-12070, 2012 U.S. App. LEXIS 2383, 2012 WL 370104 (11th Cir. Feb. 6, 2012) (to be published in F.3d); *Aumais*, 656 F.3d 147 (2nd Cir. 2011); *Kennedy*, *supra*.; *United States v. Monzel*, 641 F.3d 528, 395 U.S. App. D.C. 162 (D.C. Cir. 2011), cert. denied, 132 S. Ct. 756, 181 L. Ed. 2d 508 (2011); *United States v. Laney*, 189 F.3d 954 (9th Cir. 1999) and *United States v. Crandon*, 173 F.3d 122 (3rd Cir. 1999). In fact, by their decisions, the First, Second, Third, Sixth, Ninth and District of Columbia Courts of Appeals have relied on the Eleventh Circuit's

[11] The Government agrees that section 2259 does have a causation requirement. "A victim is only entitled to recover restitution for losses that are proximately caused by the conduct in question" because "[i]t would be nonsensical for the statute to include differing burdens of proof and different causal requirements for different types of losses." Government's Opening Brief, Docket No. 29, at 3 & n.13.

decision in *United States v. McDaniel*, 631 F.3d 1204 (11th Cir. 2011) which adopted the analysis of Judge Davis in his original mandamus opinion in this case. In *McDaniel*, supra. at 1209, the Court stated that:

> Three other circuits agree. *See United States v. Crandon*, 173 F.3d 122, 126 (3d Cir. 1999) (determining the defendant engaged in "conduct [that] was the proximate cause of the victim's losses" and therefore was liable to pay restitution under section 2259); *United States v. Laney*, 189 F.3d 954, 965 (9th Cir. 1999) (explaining that *section 2259* "incorporates a requirement of proximate causation" and therefore "a causal connection between the offense of conviction and the victim's harm"); *In re Amy*, 591 F.3d 792, 794 (5th Cir. 2009) ("Section 2259(b)(3) therefore arguably requires the government to establish that recoverable damages must proximately result from the 'offense.'").
>
> Because "proximate result" is included in only the last of the enumerated types of losses in § 2259(b)(3), the Government argues that proximate cause is not required for the first five categories of loss, which the Government argues require only a generalized showing of "harm." But the Government's argument fails because it is contrary to the plain language of section 2259, which covers, inter alia, "losses suffered by the victim as a proximate result of the offense." § 2259(b)(3)(F).

In reaching their conclusions, most circuits courts have recognized that the distribution of child pornography is "intrinsically related to the sexual abuse of children" because, inter alia, "the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation." *New York v. Ferber*, 458 U.S. 747, 759, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982); see also *McDaniel*, 631 F.3d at 1208. "Because the child's actions are reduced to a recording, the pornography may haunt [the child] in future years, long after the

original misdeed took place." *Ferber*, 458 U.S. at 759 n.10

Within the circuits that recognized the Government must show that a victim's losses (identified in 18 U.S.C. § 2259(b)(3)(A)-(F)) were proximately caused by the defendant's actions, or show causation more generally, the Courts rely either on the text of the statute or on general rules of criminal and tort law. Of the circuits that have reached the causation issue, most have held that the text of § 2259 requires a showing of proximate cause. See *McDaniel*, 631 F.3d, at 1209; *Laney*, 189 F.3d, at 965; *Crandon*, 173 F.3d, at 125. These circuits have read the last phrase of § 2259(b)(3)(F) (see supra at 13)--"suffered by the victim as a proximate result of the offense"--to apply to all the types of loss in § 2259(b)(3). As the Eleventh Circuit, in *McDaniel*, applied the Supreme Court's decision in *Porto Rico Ry., Light & Power Co. v. Mor*, observed:

> 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." *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348, 40 S. Ct. 516, 64 L. Ed. 944 (1920). 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." Because the language of the statute is plain, our inquiry ends here.

(631 F.3d, at 1209).

In *McGarity, supra.*, the Eleventh Circuit held that based on the Second Circuit's decision in *Aumais, supra.*, a request for restitution in a child pornography

case require two findings. First, that the end-user defendants may proximately cause injuries to the victims of sexual child abuse. Second, for proximate cause to exist, there must be a causal connection between the actions of the end-user and the harm suffered by the victim. The Eleventh Circuit stated:

> The first finding has by now been adequately discussed. As to the second finding, any other result would undermine the express wording of § 2259. Proximate cause is required by the specific language of the Statute. Since the role fo the judiciary is to "apply the text, not to improve upon it, *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126, 110 S.Ct. 456, 107 L.Ed. 2d 438 (1989), we apply the statue as written, with its requirement of proximate cause. Any other result would tu;rn restitution for possession of child pornography into strict liability.

McGarity, No. 09-12070, 2012 U.S. App. LEXIS 2383, 2012 WL 370104 , p. 31.

The D.C. Circuit, likewise has held that § 2259 requires a finding of proximate cause, but based its ruling on "traditional principles of tort and criminal law and on § 2259(c)'s definition of 'victim' as an individual harmed 'as a result' of the defendant's offense." *Monzel*, 641 F.3d at 535. After reciting the "...bedrock rule of both tort and criminal law that a defendant is only liable for harms he proximately caused," the *Monzel* court concluded that "...nothing in the text or structure of § 2259 leads us to conclude that Congress intended to negate the ordinary requirement of proximate cause." *Id.*, at 535-36 (footnote omitted).

The Supreme Court has made it clear that restitution ordered in criminal cases

is generally tied to the losses caused by the specific offense of conviction. *See Hughey*, 495 U.S., at 412-13; *United States v. Maturin*, 488 F.3d 657, 660-61 (5th Cir. 2007); *United States v. Wright*, 496 F.3d 371, 381 (5th Cir. 2007). In *United States v. Hughey,* the Supreme Court held that the Victim and Witness Protection Act of 1982 ("VWPA") authorized restitution "...only for the loss caused by the specific conduct that is the basis of the offense of conviction." 495 U.S., at 412-13. This Court has applied *Hughey* noting that a "district court can award restitution to victims of the offense, but the restitution award can encompass only those losses that resulted directly from the offense for which the defendant was convicted." *Maturin*, 488 F.3d at 660-61, 661 n.2 (noting that *Hughey*, 495 U.S. at 413, also applies to cases arising under the Mandatory Victims Restitution Act of 1996 ("MVRA") and, although *Hughey* predated the enactment of the MVPA, the "[C]ourt's holding that restitution must be limited to losses caused by the offense of conviction remains good law"); *see also Arledge*, 553 F.3d at 898. Furthermore, "[w]hen a defendant is ordered to pay restitution in an amount greater than the loss caused, the error affects substantial rights as well as the fairness and integrity of the judicial proceeding." *Austin*, 479 F.3d at 373. This Court has referred to the causation requirement as the "*Hughey* limitation." *See United States v. Ortiz*, 252 Fed. Appx. 664, 666, 2007 WL 3208806 (5th Cir. 2007).

Only the panel decision on rehearing in this court read the phrase "as a proximate result of the offense" in § 2259(b)(3)(F) to apply only to that "catchall" provision, as opposed to all of the loss provisions set forth in § 2259(b)(3):

> The structure and language of § 2259(b)(3) impose a proximate causation requirement only on miscellaneous "other losses" for which a victim seeks restitution. As a general proposition, it makes sense that Congress would impose an additional restriction on the catchall category of "other losses" that does not apply to the defined categories. By construction, Congress knew the kinds of expenses necessary for restitution under subsections A through E; equally definitionally, it could not anticipate what victims would propose under the open-ended subsection F.

In re Amy Unknown, 636 F.3d 190, 198 (5th Cir. 2011)(rehearing en banc granted).

The rehearing panel in this court also relied on the manifestation of a "congressional purpose to award broad restitution" to justify its limitation of proximate cause only to the loss identified in subsection F. *Id., at 199.* The application of the panel on rehearing's opinion is that it authorizes a result that could not possibly be the intent of Congress. For once someone is a victim of child pornography, any medical, psychiatric, legal or job related loss incurred would be subject to restitution without regard to whether the loss was related to the accused offense of conviction or even related to her status as a victim.

Clearly, under § 2259, a victim's losses must be proximately caused by the defendant's offense. As the D.C. Circuit's reasoned in *Monzel*: proximate cause is a

deeply rooted principle in both tort and criminal law that Congress did not abrogate when it drafted *§ 2259*. See *Monzel*, 641 F.3d at 535-36; *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978) ("Congress [is] presumed to have legislated against the background of our traditional legal concepts which render [proximate cause] a critical factor, and absence of contrary direction" here "[is] taken as satisfaction [of] widely accepted definitions, not as a departure from them." (quoting *Morissette v. United States*, 342 U.S. 246, 263, 72 S. Ct. 240, 96 L. Ed. 288 (1952)) (internal quotation marks omitted)); see also *Hemi Group, LLC v. City of New York, ___ U.S. ___* , 130 S. Ct. 983, 989, 175 L. Ed. 2d 943 (2010). ("[P]roximate cause thus requires 'some direct relation between the injury asserted and the injurious conduct alleged.'" (quoting *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992))). Further, the text of § 2259 cross-references the Victim and Witness Protection Act of 1982, 18 U.S.C. §§ 1512-1515, 3663-3664, and the Mandatory Victims Restitution Act of 1996 ("MVRA"), 18 U.S.C. §§ 3663A, 3613A, both of which define "victim" as "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered," §§ 3663(a)(2), 3663A(a)(2).

"Proximate cause" labels "generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts. The notion of

proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.'" *Holmes,* 503 U.S. at 268 (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 41, at 264 (5th ed. 1984)). Proximate cause demands "...some direct relation between the injury asserted and the injurious conduct alleged." *Id.*

In *CSX Transportation, Inc. v. McBride*, 10-235, 131 S. Ct. 2630, 180 L. Ed. 2d 637 (June 23, 2011), the Supreme Court recognized that the issue of causation and liability is dependent upon the statutory terms included within the statute being scrutinized. The Court recognized under FELA the railroad's liability is determined on whether the railroad, its employees or agents; is responsible in whole or in part for the negligence that caused the injury. Under § 2259, Congress authorizes the recovery of damages to "victims" for an individual harmed as a result of the commission of a crime define by that chapter. Thus, Congress, under § 2259, requires a direct correlation between the offense conduct and the determination of liability and responsibility for harm before an individual can recover damages.

More importantly, the Supreme Court did not rule that Congress could dispense with the requirement of proximate causation but rather sought to define its meaning in terms of litigation brought under the FELA statute. In fact, the Court stated that "...*Rogers* describes the test for proximate causation applicable in FELA suits." *CSX*

Transportation, Inc., 131 S. Ct. at 2641. As Justice Ginsberg, concluded:

> FELA's language is straightforward: railroads are made answerable in damages for an employee's "injury or death resulting in whole or in part from [carrier] negligence." 45 U.S.C. § 51. The argument for importing into FELA's text "previous judicial definitions or *dicta*" originating in nonstatutory common-law actions, see Smith, Legal Cause in Actions of Tort (Continued), *supra*, at 235, misapprehends how foreseeability figures in FELA cases.
>
> "**[R]easonable foreseeability of harm," we clarified in *Gallick*, is indeed "an essential ingredient of [FELA] *negligence*.**"

CSX Transportation, Inc., 131 S. Ct. at 2643 (emphasis added).(slip opinion p. 16)

Paroline believes that the Supreme Court's decision in *CSX* is consistent with the Government's suggestion that § 2259 requires a proximate causation determination for a restitution claim under § 2259. Also, the Supreme Court's opinion is consistent with the District Court's original decision in this case which required that the Government prove Paroline's liability for "harms that result from the risks that made the actor's conduct tortious." The District Court's conclusion that the Government failed to present any evidence that Paroline's offense conduct contributed in whole or in part to the victim's injuries should not be disturbed.

As the Ninth Circuit held in rejecting another of Amy's claims:

> [T]he government's evidence showed only that [the defendant] participated in the audience of persons who viewed the images of Amy . . . . While this may be sufficient to establish that [the defendant's] actions were one cause of the generalized harm Amy . . . suffered due to the circulation of [her] images on the internet, it is not sufficient to show that they were a proximate cause of any

particular losses.

Kennedy, 643 F.3d at 1264.

A restitution award to Amy in this case would raise issues as to joint and several liability. Amy has sought restitution in over 250 cases around the country. *Aumais I*, 2010 U.S. Dist. LEXIS 78407, 2010 WL 3033821, at *5. In one such case, *United States v. Faxon*, 689 F. Supp. 2d 1344, 1353 (S.D. Fla. 2010), Amy's lawyer estimated that as of January 2010, Amy had received approximately $107,000 from restitution orders and settlements. It is impossible for any individual defendant to keep track of the amounts paid to Amy or seek reimbursement or contribution from any other defendant similarly situated. In *United States v. Nucci*, 364 F.3d 419 (2nd Cir. 2004), the Second Circuit held that a victim may not recover more than his or her actual loss. There, the Court observed that "the relevant sections of the MVRA," *Id.* at 423, do not in themselves prevent double-recovery in the criminal context. In *Nucci*, *supra.*, the Court stated:

> Section 3664(f)(1)(A) requires the district court to order restitution in the full amount of the victim's losses and does not mention what the order should provide when multiple defendants are responsible for the same loss. Section 3664(h) provides that, where there are multiple defendants, the district court may order each defendant to pay the full amount or order that liability be apportioned to reflect each defendant's contribution to the loss. Section 3664(j)(2) does limit restitution that would result in an overpayment to the victim, but only where compensatory damages are later recovered by the victim in a "civil" proceeding.

Id. (footnote omitted).

Section 2259(b)(4)(B) provides that "[a] court may not decline to issue an order under this section because of--(i) the economic circumstances of the defendant; or (ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source."

§ 2259(b)(2)– dealing with the enforcement of the restitution order--cross references § 3664. Section 3664(h) implies that joint and several liability may be imposed only when a single district judge is dealing with multiple defendants in a single case (or indictment); so it would seem that the law does not contemplate apportionment of liability among defendants in different cases, before different judges, in different jurisdictions around the country. In fact, two other circuits have observed, in unpublished opinions, that joint and several liability is not permissible under § 3664(h) regarding defendants in separate cases. See *Monzel*, 641 F.3d at 539 (citing *United States v. McGlown*, 380 F. App'x 487, 490-91 (6th Cir. 2010); *United States v. Channita*, 9 F. App'x 274, 274-75 (4th Cir. 2001)).

In this case, Amy is conflating the proximate cause requirement with the requirement that the victim be harmed as a result of Paroline's conduct. Given the evidence presented, even though Amy has never been informed of Paroline's conduct, she was harmed, in principle, by Paroline's possession of Amy's pornographic images,

how much of her harm, or what amount of her losses, are proximately caused by Paroline's conduct. A victim is not necessarily entitled to restitution for all of her losses simply because the victim was harmed and sustained some lesser loss as a result of a defendant's specific conduct.

In this case, Dr. Silberg began her evaluation of Amy's damages during the summer of 2008 when she was 19 years old. Her uncle abused her over a decade earlier when she was 7. Paroline's computer was seized on July 11, 2008, contemporaneous with Dr. Silberg's evaluation. According to her stipulation, Paroline's conduct did not impact Dr. Silberg's damage evaluation. Paroline was arrested on January 9, 2009, the day that he waived indictment and the information was filed. The Second Circuit in *Aumais, supra.* stated that:

> We have no basis for rejecting Dr. Silberg's findings that Amy has suffered greatly and will require counseling well into the future. ***But where the Victim Impact Statement and the psychological evaluation were drafted before the defendant was even arrested – or might as well have been– we hold as a matter of law that the victim's loss was not proximately caused by a defendant's possession of the victim's image.***

656 F.3d at 155.(emphasis added)

Thus, the proper inquiry for this Court is whether the Government has met its burden of proving by a preponderance of the evidence the amount of Amy's losses which were proximately caused by Paroline's conduct. The Government must prove

the amount of Amy's losses directly produced by Paroline would not have occurred without his possession of her images. The District Court correctly viewed all of the evidence presented when it noted that:

> "The determination of an appropriate restitution amount is by nature an inexact science," *United States v. Teehee*, 893 F.2d 271, 274 (10th Cir.1990), and "[a] sentencing court may resolve restitution uncertainties 'with a view towards achieving fairness to the victim,' so long as it still makes a 'reasonable determination of appropriate restitution' rooted in a calculation of actual loss." *United States v. Fallah*, No. H-07-155, 2008 U.S. Dist. LEXIS 97102, 2008 WL 5102281, at *2 (S.D. Tex. December 1, 2008) (quoting *United States v. Vaknin*, 112 F.3d 579, 587 (1st Cir.1997) (internal quotation omitted)).

Notwithstanding some latitude in making its decision, a District Court must be guided by the premise that "[a]n order of restitution must be limited to losses caused by the specific conduct underlying the offense of conviction." *United States v. Tencer,* 107 F.3d 1120, 1135, (5th Cir. 1997) (citing *United States v. Chaney*, 964 F. 2d 437, 452 (5th Cir. 1992)). In this case, the District Court held two hearings regarding the issue of restitution and reviewed the parties' submissions. To substantiate her claim for approximately $3,367,854 in restitution, Amy submitted: (1) a Victim Impact Statement; (2) a psychological evaluation by Dr. Joyanna Silberg dated November 21, 2008; (3) an economic report by Dr. Stan V. Smith dated September 15, 2008; and (4) numerous excerpts from articles discussing the harms associated with child pornography. The losses described in Amy's reports are

generalized and caused by her initial abuse as well as the general existence and dissemination of her pornographic images. No evidence was presented to show that any of the losses were caused by Paroline's conduct.

After reviewing the data underlying Amy's experts' reports, Paroline submitted a supplemental brief that identifies certain discrepancies between Amy's Victim Impact Statement and Dr. Silberg's notes. Paroline's supplemental briefing also includes a report by Dr. Timothy J. Proctor enumerating his concerns as to the reliability of Dr. Silberg's report and an economic report prepared by Dr. Kent Gilbreath that sets forth estimates of Amy's future potential earning capacity to illustrate the discrepancy between his sums and those of Dr. Smith. Additionally, the Government, Amy, and Paroline entered into a Stipulation establishing that Amy does not know who Paroline is and none of the losses for which she seeks restitution flow from her knowledge about Paroline or his conduct (Docket No. 47).

It is clear from the evidence presented to the District Court that a large portion of Amy's total losses were caused by her original abuse by her uncle. It is equally clear that significant losses are attributed to the widespread dissemination and availability of her images and the possession of those images by many individuals such as Paroline. And her losses are premised on her real perception that people like Paroline might view her image and recognize her in public. There is no doubt that

everyone involved with child pornography--from the abusers and producers to the end-users and possessors--contribute to Amy's ongoing harm. However, the District Court found that the Government failed to satisfy its burden of proving the amount of Amy's losses proximately caused by Paroline's possession of her image. Since Amy has no knowledge of Paroline's existence or that Paroline possessed her image on his computer or that Paroline's conduct in fact caused her any damages at all, the Government failed to meets its burden of proof. As Amy's attorney's stipulated during the restitution hearing in this case:

> ***None of the damages for which "Amy" is now seeking restitution flow from anyone telling her specifically about Mr. Paroline or telling her about his conduct which was the basis of the prosecution in this case.***

(Hearing October 28, 2009, p. 16)(emphasis added)

While Amy is a "victim" for purposes of § 2259 as a result of Paroline's conduct, a restitution award under § 2259 requires that the Government prove by a preponderance of the evidence the amount of the victim's losses proximately caused by the defendant's conduct. In this case, the Government presented no proof that satisfied its burden. The District Court's opinion most be upheld.

Issue Two Restated

> **Whether the Rule of Lenity requires that a casual relationship exist between the Defendant's conduct and the victim's harm before an order may be entered to recover restitution under § 2259.**

As previously stated, the rehearing panel in this case determined that the phrase "as a proximate result of the offense" in § 2259(b)(3)(F) apply only to that "catchall" provision, as opposed to all of the loss provisions set forth in § 2259(b)(3):

> The structure and language of § 2259(b)(3) impose a proximate causation requirement only on miscellaneous "other losses" for which a victim seeks restitution. As a general proposition, it makes sense that Congress would impose an additional restriction on the catchall category of "other losses" that does not apply to the defined categories. By construction, Congress knew the kinds of expenses necessary for restitution under subsections A through E; equally definitionally, it could not anticipate what victims would propose under the open-ended subsection F.

In re Amy, 636 F.3d at 198.

Thus, the panel on rehearing's opinion would allow for a district court to impose a restitution order for a victim's damages that were not caused by or result from the offense of conviction. In *Hughey* 495 U.S. at 421, the Supreme Court interpreted whether in the creation of the Victim Witness Protection Act, Congress authorized a defendant to pay restitution for conduct that was not related to the offense of conviction. In addressing, the Government's argument to the contrary, the Supreme Court stated that:

> The Government also emphasizes policy considerations that purportedly support court-ordered restitution for acts outside the offense of conviction. Without such authority, the Government insists, in many cases courts cannot compensate victims for the full losses they suffered as a result of a defendant's conduct. The potential for under compensation is heightened by prosecutorial

discretion in charging a defendant, the argument goes, because prosecutors often frame their indictments with a view to success at trial rather than to a victim's interest in full compensation. See, e.g., *United States v. Hill,* 798 F. 2d 402, 405 (CA10 1986). Finally, the Government maintains that the extensive practice of plea bargaining would, as a practical matter, wholly undermine victims' ability to recover fully for their losses because prosecutors often drop charges of which a defendant may be guilty in exchange for a plea to one or more of the other charges. See, e.g., *United States v. Berrios,* 869 F. 2d 25, 30 (CA2 1989).

These concerns are not insignificant ones, but neither are they unique to the issue of victim compensation. If a prosecutor chooses to charge fewer than the maximum possible number of crimes, the potential recovery of victims of crime is undoubtedly limited, but so too is the potential sentence that may be imposed on a defendant. And although a plea agreement does operate to limit the acts for which a court may order the defendant to pay restitution, it also ensures that restitution will be ordered as to the count or counts to which the defendant pleads guilty pursuant to the agreement. The essence of a plea agreement is that both the prosecution and the defense make concessions to avoid potential losses. Nothing in the statute suggests that Congress intended to exempt victims of crime from the effects of such a bargaining process.

In any event, we need not resolve the policy questions surrounding VWPA's offense- of-conviction limitation on restitution orders. Even were the statutory language regarding the scope of a court's authority to order restitution ambiguous, longstanding principles of lenity, which demand resolution of ambiguities in criminal statutes in favor of the defendant, *Simpson v. United States,* 435 U.S. 6, 14-15 (1978) (applying rule of lenity to federal statute that would enhance penalty), preclude our resolution of the ambiguity against petitioner on the basis of general declarations of policy in the statute and legislative history. See *Crandon v. United States,* 494 U.S. 152, 160 (1990) ("Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text").

Id., 495 U.S. at 421.

Since there may be a conflict between the manner in which §2259 is interpreted as to Congressional intent, Paroline believes that the Rule of Lenity would apply to require that any ambiguity in the interpretation of § 2259 be read in such a way as to require a nexus or casual connection between the conduct underlying the offense of conviction and any claim for restitution. The application of the panel on rehearing interpretation of § 2259 would authorize a determination of restitution to Amy for damages that she incurred that predated the commission of the offense for which Paroline was convicted and for damages caused by other persons similarly situated to Paroline.

The Rule of Lenity applies when a statute's language is not unambiguous on its face but is ambiguous in its application. Courts must look to the legislative history and the statutory scheme to determine its manner of application. *See Moskal v. United States*, 498 U.S. 103, 109-13, 111 S. Ct. 461, 466-68, 112 L. Ed. 2d 449 (1990); *United States v. Bass*, 404 U.S. 336, 343-47, 92 S. Ct. 515, 520-22, 30 L. Ed. 2d 488 (1971). When a criminal statute is ambiguous in its application to certain conduct, the rule of lenity requires it to be construed narrowly. *Id.*, 404 U.S. at 347, 92 S. Ct. at 522. "Where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *Id.* at 348, 92 S. Ct. at 523

In *United States v. Dean*, 556 U.S. 568, 129 S.Ct. 1849, 1856 (2009), the

Supreme Court stated that:

> The simple existence of some statutory ambiguity, however, is not sufficient to warrant application of that rule, for most statutes are ambiguous to some degree."*Muscarello* v. *United States*, 524 U.S. 125, 138, 118 S. Ct. 1911, 141 L. Ed. 2d 111 (1998); see also *Smith, supra*, at 239, 113 S. Ct. 2050, 124 L. Ed. 2d 138 ("The mere possibility of articulating a narrower construction, however, does not by itself make the rule of lenity applicable"). "To invoke the rule, we must conclude that there is a grievous ambiguity or uncertainty in the statute." *Muscarello, supra*, at 138-139, 118 S. Ct. 1911, 141 L. Ed. 2d 111 (internal quotation marks omitted). In this case, the statutory text and structure convince us that the discharge provision does not contain an intent requirement. Dean's contrary arguments are not enough to render the statute grievously ambiguous.

The "touchstone of the rule of lenity is statutory ambiguity." *Bifulco* v. *United States*, 447 U.S. 381, 387, 100 S. Ct. 2247, 65 L. Ed. 2d 205 (1980). The rule is applied only when, after consulting traditional canons of statutory construction, a court is left with an ambiguous statute. *United States* v. *Shabani,* 513 U.S. 10, 17, 115 S. Ct. 382, 130 L. Ed. 2d 225 (1994). In this context, every circuit interpreting §2259 have ruled that §2259 requires a proximate cause or causation requirement before restitution can be order in a case involving an individual who possesses child pornography. And, all other restitution statutes created by Congress for application in criminal cases require a proximate cause or nexus between the offense of conviction and the claim of restitution. If the panel on rehearing's interpretation of the statute is correct, based on the apparent conflict in the interpretation of the statute by reasonable people, Paroline suggests that the statute has not been clearly written

and is subject to multiple interpretations. Thus, the application of the Rule of Lenity as suggested by the Supreme Court in *Hughey* would require a nexus or proximate cause requirement between the conduct of conviction and any order for restitution for damages arising from the conduct underlying the offense of conviction.

Issue Three Restated

Whether mandamus, as defined by 18 U.S.C. 3771A. is the only appellate remedy for a victim to seek review of a district court's denial of a request for restitution.

Paroline agrees with the Government that Amy has no right to appeal from the District Court's holding on restitution. Her remedy is limited to mandamus, a remedy she pursued. To allow Amy – or any other victim – to appeal from a judgment or other order in a criminal case would interfere with the President's authority under Article II, § 3 to see that the laws are faithfully enforced and interfere with the Attorney General's prosecutorial discretion guaranteed in § 3771(d)(6).

This Court, like all federal courts, is a court of limited jurisdiction. Congress has not vested this Court with jurisdiction to hear appeals from victims in criminal cases, therefore, this Court should dismiss her appeal.

Paroline joins the Government in maintaining that victims in criminal cases are not parties to the proceedings and have no right to either intervene in the district court or on appeal. In this case, Amy is simply a person entitled to a collateral benefit of

restitution as a victim. The parties to this case are the Government and Paroline. Only a party to a lawsuit may appeal a final judgment . To hold otherwise would be to allow anyone with some sort of purported stake in the outcome of criminal cases to not only appeal but appear and argue before the district court.

Allowing non parties, even purported victims, to appeal in criminal cases would infringe on the President's duty to "take care that the laws be faithfully executed." U.S. CONST. art. III, § 3. Enforcement of the criminal laws of the United States is vested in the Executive Branch. Allowing private citizens to appeal from criminal convictions would deprive the Executive Branch of its authority.

One of the core duties of the President and of the Executive Branch is to "take care that the Laws be faithfully executed."U.S. CONST. art. III, § 3. At the heart of this executive power is the enforcement of the nation's criminal laws. And, there is a strong presumption that the President and his designees such as the Attorney General and the United States Attorneys have properly discharged their official duties. *United States v. Armstrong,* 517 U.S. 456, 464, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996).

In cases in which the President's exclusive power to enforce the laws is vested in an entity outside the Executive Branch, for instance in cases involving a special counsel or special prosecutor, *Morrison v. Olson,* 487 U.S. 654, 108 S. Ct. 2597, 101

L. Ed. 2d 569 (1988), normally there is a specific grant of authority by Congress. In other instances, the courts, acting under their inherent Article III power to enforce orders by contempt, may appoint private lawyers to prosecute criminal contempt. However, those attorneys must be disinterested and neutral because they are enforcing the criminal laws of the United States. *See Young v. United States ex rel.Vuitton et Fils SA,* 481 U.S. 787, 107 S. Ct. 2124, 95 L. Ed. 2d 740 (1987). *See also United States v. Providence Journal Co.,* 485 U.S. 693, 108 S. Ct. 1502, 99 L. Ed. 2d 785 (1988) (special prosecutor in contempt case represents the United States and cannot file petition for writ of certiorari without consent of Solicitor General or Attorney General). Both *Young* and *Providence Journal* are based on the premise that the criminal laws protect the public and should be enforced in the public interest by a neutral, disinterested prosecutor who has the discretion to ensure that the laws are faithfully executed in the public interest.

Congressional intent concerning the rights of victims to prosecute claims for restitution is also evidence by the provisions of 18 U.S.C. § 3664 which requires that the Government present a victim's claim for restitution resulting from the accused offense of conviction. § 3664 does not allow for a victim to intervene in the proceedings. It is only if a claim for restitution is denied does Congress allow for a victim to seek specific relief independent of the Government.

In the instant case and similar cases, Congress gave aggrieved crime victims a statutory remedy – mandamus. The clear intent of Congress is best evinced by the Congressional Record involving the presentation of the Innocence Protection Act of 2004 in which 18 U.S.C. § 3771 was adopted. Senator Kyl in presenting the bill stated:

> I now want to turn to another critical aspect of enforcement of victims' rights.(d)(3) This subsection provides that a crime victim who is denied any of his or her rights as a crime victim has standing to seek appellate review of that denial. Specifically, the provision allows a crime victim to apply for a writ of mandamus to the appropriate appellate court. The provision provides that court shall take the writ and shall order the relief necessary to protect the crime victim's right. This provision is critical for a couple of reasons. First, it gives the victim standing to appear before the appellate courts of this country and ask for review of a possible error below. Second, while mandamus is generally discretionary, this provision means that courts must review these cases. Appellate review of denials of victims' right 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.
>
> ....For a victim's right to truly be honored, a victim must be able to assert the right in trial courts, to then be able to have denials of those rights reviewed by the appellate level, and to have the appellate court take the appeal and order relief. By providing for all of this, this bill ensures that victims' rights will have meaning. It is the clear intent and expectation of Congress that the district and appellate courts will establish procedures that will allow for a prompt adjudication of any issues regarding the assertion of a victim right, while giving meaning to the rights we establish.

150 Congressional Record, 22,953 (2004)

Clearly. Amy exercised this remedy, albeit with results which she did not like.

She lost. This remedy was sufficient for her to protect her interests. Her claim of a right to intervene and file a direct appeal of a district court's final judgment goes far beyond any remedy allowed by Congress.

To hold otherwise would unconstitutionally infringe on the prerogatives of the President and his subordinates in the Executive Branch. Thus, while Paroline does not believe that Amy has any statutory right to seek review of the District Court's order other than by mandamus, to the extent that either 18 U.S.C. § 3771 or some other federal statute vests her with the right to appeal, that statute is unconstitutional in that it is a violation of the separation of powers doctrine and invades the President's Article II, § 3 power to see that the laws are faithfully executed.

Further, in civil cases, there are provisions for persons to intervene if they have a stake in the outcome of the suit and standing. FED. R. CIV. P. 24. No such right exists in criminal cases. There is one possible exception. If, for some reason the constitutionality of a state statute is called into question, the state attorney general must be informed and presumably can intervene to defend the constitutionality of the statute. *See e.g.* FED. R. APP. 44.

The reason is simple. In a criminal case, the plaintiff is the sovereign, either the United States or a state. The sovereign is the aggrieved entity, not an individual including a victim. No third party has constitutional standing to intervene. There is

an Article III (U.S. CONST. art. III, § 2) case or controversy only as to the sovereign and the defendant.

It is well settled that federal courts have only the authority endowed by the Constitution and that conferred by Congress. *Halmekangas v. State Farm Fire & Cas. Co.*, 603 F.3d 290 (5th Cir. 2010); *United States v. Hazlewood*, 526 F.3d 862 (5th Cir. 2008). Neither the Constitution nor any federal statute gives a crime victim the right to appeal a district court's judgment.

Victims and purported victims such as Amy have statutory rights under 18 U.S.C. § 3771(a). Congress also set out a method for those victims and purported victims to protect their rights. First, they can file a motion with the district court though the Government. And it is the Government that must prove the victim's restitution claim. Second, if they are unsatisfied with the district court's actions, they have the statutory right to seek mandamus relief in the courts of appeals. 18 U.S.C. § 3771(d)(3). However, only the Government is given the authority to *appeal* from the district court's denial of a crime victim's rights. 18 U.S.C. § 3771(d)(4).

By necessary implication, when Congress gave victims the right to seek mandamus relief and only the Government the right to assert as error on direct appeal denial of rights under § 3771(a), it knew the difference between mandamus and direct appeal. Thus, Congress in devising the system to protect victims' rights – including

the right to restitution – provided one avenue for the victims to complain of error in the district courts and another for the Government. More important, Congress specifically provided that nothing in 18 U.S.C., Chapter 237 "shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." 18 U.S.C. § 3771(d)(6). In the instant case, the Government exercised its prosecutorial discretion *not* to file a direct appeal on any issue. To construe § 3771 in a way giving Amy the right of appeal (as opposed to her statutory right of mandamus) would impair the prosecutorial discretion of the Attorney General and his subordinates in the United States Attorney's Office. A clear example of the need for this neutral and detached application of prosecutorial discretion would be the determination to seek *certiorari*. While the *Providence Journal* Court wrote in terms of the Government speaking to the Supreme Court with one voice, that of the Solicitor General or the Attorney General, the public prosecutor also may exercise discretion and decide not to seek review if it believes that the facts of a particular case will make bad law for the public. A private person such as Amy has no such incentive to avoid what could result in precedent which, arguably, would be bad for the public interest. Therefore, the public interest is served by limiting the right of appeal to the parties in a case – in criminal cases the defendant and the Government.

Thus, Congress has not given the federal courts jurisdiction to entertain appeals

(as opposed to requests for mandamus relief) from victims complaining of trial court error in setting restitution orders. Since neither the Constitution nor Congress has vested this subject matter jurisdiction in the courts of appeals, this Court is without jurisdiction and should dismiss Amy's appeal.

Congress created a mechanism for victims such as Amy to seek redress through mandamus, not appeal. Amy has availed herself of that remedy and is unhappy with the outcome based on the opinion entered by this Court on December 22, 2009. This is not a reason for this Court to exercise appellate jurisdiction not granted by Congress or to interfere with the legitimate prosecutorial discretion of the Executive Branch.

In viewing the role of mandamus in these proceedings, Congress granted victims of crimes certain rights in criminal litigation, such as the right to be informed of actions taken by the court or the prosecution. *See e.g.* 18 U.S.C. § 3771(b). Nevertheless, Congress has limited the relief available to victims if they are not afforded their rights under § 3771(b). *See e.g.*, 18 U.S.C. § 3771(d)(6) (no cause of action against the United States or its officers for violation of § 3771).

While this is a case of first impression in this Circuit construing § 3771 in conjunction with § 2259, this Court should require the same close connection between the offense of conviction and the victim which this Court and the United

States Courts of Appeal for the Tenth and Eleventh Circuits have applied in giving victims the right to intervene by way of mandamus. In *In re Dean*, 527 F.3d 391 (5th Cir. 2008), this Court held that family members of persons killed in a refinery explosion were § 3771(e) victims with the right to seek mandamus relief. In *In re Stewart*, 552 F.3d 1285 (11th Cir. 2008), the court held that persons purchasing property subject to a bank fraud scheme were § 3771(e) victims even though they had no direct dealings with the bank officer demanding bribes. However, in *In re Antrobus*, 519 F.3d 1123 (10th Cir. 2008), the court held that persons killed and wounded in a mass shooting were not § 3771(e) victims in a case involving the person who sold a pistol to a juvenile, the juvenile who later used that pistol in the attacks.

The key factor in *Dean*, *Stewart*, and *Antrobus* is the close connection between the crime of conviction and the individuals seeking mandamus relief. The persons seeking mandamus could point to the defendant and could show that the *defendant's* actions and crime of conviction were closely connected in time and space to the offense of conviction. For example, in *Antrobus*, the Tenth Circuit recognized that while the defendant's actions were too attenuated in time and space to vest the victims' families with standing to file the mandamus action. 519 F.3d, at 1125 (appellate court could not say that the district court was clearly wrong in making that

determination).

Conversely, this Court in *Dean,* while denying mandamus relief to relatives of persons killed in a refinery explosion, considered their complaints on the merits based on the close connection between the harm caused by the offense and the persons seeking mandamus relief. *Dean*, 527 F. 3d, at 394. Likewise, in *Stewart*, the Eleventh Circuit found § 3771(e) mandamus standing because the victims seeking mandamus relief could point directly to acts of the defendants and damage to them. *Stewart*, 552 F.3d, at 1288.

Giving a broad reading of standing to seek mandamus could open the floodgates to litigation in this Court by victims of crimes whose losses were caused by those who committed crimes but who were not closely connected with the defendants. A broad reading of § 3771(e) standing would open the doors of this Court to all of those victims. For this reason, this Court should construe the § 3771(e) right to seek mandamus relief narrowly. A broad reading would give standing to persons such as the victims in *Antrobus*. Rather, it should be limited to those closely connected to the crime of conviction such as *Dean* and *Stewart.* In cases such as the instant case, those who were harmed by the defendant's actions but whose harm is attenuated in time and distance from the defendant's actions should be required to rely on the Government's right to seek review guaranteed by §

3771(d)(4).

Conclusion

In the instant case, the District Court conducted extensive hearing concerning Amy's claim for damages. The District Court carefully considered the victim impact statement of Amy and the expert reports submitted by her representative concerning the impact that Amy's perception individuals were looking at her image on the internet. The District Court also considered the expert reports submitted by Paroline to controvert Amy's submission. The District Court considered Amy's stipulation that Amy had never been informed of Paroline's existence and that *none of the damages for which "Amy" sought restitution flows from anyone telling her specifically about Mr. Paroline or telling her about his conduct which was the basis of the prosecution in this case.* Thus, the District Court correctly entered the finding of fact that the Government had not met its burden of proof in establishing that Paroline had to pay restitution to Amy as a result of his conviction. So long as an award of restitution is predicated on a showing that Amy's damages were caused by paroline's conduct that resulted in his conviction, she is not entitled to any award of restitution. Restitution in a criminal proceedings is limited to the conduct and the offense of conviction. Since this is a criminal proceeding involving a single individual, the award of restitution must relate to the conduct resulting in the

conviction and not on the conduct of any other person especially Amy's uncle.

Further, § 3771 provides the only vehicle for appellate review for a victim who's request for restitution was denied by a district court. The original majority decision considering Amy's decision was correctly decided.

Prayer

Wherefore premises considered, Paroline prays that this Court reverse the opinion of the panel on rehearing and affirm the decision of the District Court.

Respectively submitted,

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CERTIFICATE OF SERVICE

I certify that the above document was served on the below named parties by sending copies by United States mail and/or e-mail to the persons listed below on this 26th day of March, 2012.

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