Nos. 09-41238 & 09-41254

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 09-41238

IN RE: AMY UNKNOWN,
Petitioner.

On Petition for a Writ of Mandamus to the
United States District Court for the Eastern District of Texas

Consolidated with

No. 09-41254

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

DOYLE RANDALL PAROLINE,
Defendant-Appellee.

v.

AMY UNKNOWN,
Movant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Texas

SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON REHEARING EN BANC

LANNY A. BREUER
Assistant Attorney General

JOHN M. BALES
United States Attorney

JOHN D. BURETTA
Acting Deputy Assistant Attorney General

TRACI L. KENNER
AMANDA L. GRIFFITH
Assistant United States Attorneys
Eastern District of Texas

MICHAEL A. ROTKER
Attorney, Appellate Section
United States Department of Justice
Criminal Division
950 Pennsylvania Avenue NW, Suite 1264
Washington, DC 20530
(202) 514-3308

STATEMENT REGARDING ORAL ARGUMENT

On January 25, 2012, the Court entered an order granting defendant Doyle Randall Paroline's petition for rehearing en banc "with oral argument on a date hereafter to be fixed." 668 F.3d 776, 776 (per curiam). The Clerk's Office scheduled the case for reargument on May 3, 2012. In a letter dated February 6, 2012, the Clerk's Office advised counsel that the Court had consolidated the reargument in these two cases with the reargument in *United States* v. *Wright*, No. 09-31215 (5th Cir.).

TABLE OF CONTENTS

Pages

STATEMENT REGARDING ORAL ARGUMENT i

TABLE OF AUTHORITIES iv

STATEMENT OF JURISDICTION 2

STATEMENT OF THE ISSUES 5

STATEMENT OF THE CASE 6

STATEMENT OF THE FACTS 9

1. The Offense Conduct 9

2. "Amy" 9

3. The Restitution Litigation 16

4. Amy Seeks Review Of The Restitution Ruling 22

a. The Mandamus Petition 22

b. The Appeal 24

SUMMARY OF ARGUMENT 27

ARGUMENT 31

I. A CVRA PETITION FOR A WRIT OF MANDAMUS IS AMY'S EXCLUSIVE REMEDY 31

Pages

A. The Relevant Statutes 31

B. The CVRA Authorizes Victims To Seek Mandamus Review, And Traditional Standards Of Mandamus Review Govern The Review Of Such Petitions 36

II. CRIME VICTIMS MAY NOT INDEPENDENTLY APPEAL FROM THE FINAL JUDGMENT IN A CRIMINAL CASE TO WHICH THEY ARE NOT A PARTY 51

A. The Common Law Rule Barring Nonparty Appeals 52

1. Crime Victims May Not Appeal Because They Are Not Parties, And May Not Properly Become Parties, To A Criminal Prosecution 53

2. Nonparty Crime Victims May Not Appeal An Adverse Restitution Decision Under 28 U.S.C. § 1291 58

B. The CVRA Reaffirms The Common Law Rule Barring Nonparty Appeals 65

III. THE DISTRICT COURT CLEARLY AND INDISPUTABLY ERRED BY DENYING AMY ANY RESTITUTION, AND AMY IS THEREFORE ENTITLED TO A WRIT OF MANDAMUS 70

CONCLUSION 78

CERTIFICATES OF SERVICE AND COMPLIANCE

TABLE OF AUTHORITIES

Pages

Cases

Admiral Ins. Co. v. *Abshire*,
574 F.3d 267 (5th Cir. 2009) 39

Allied Chem. Corp. v. *Diaflon, Inc.*,
449 U.S. 33 (1980) (per curiam) 42

Aref v. *United States*,
452 F.3d 202 (2d Cir. 2006) 36

Astoria Fed. Sav. & Loan Ass'n v. *Solimino*,
501 U.S. 104 (1991) 60

Barnhart v. *Sigmon Coal Co., Inc.*,
534 U.S. 438 (2002) 44

Bayard v. *Lombard*,
50 U.S. (9 How.) 530 (1850) 52

Brandt v. *Gooding*,
636 F.3d 124 (4th Cir. 2011) 66

Carroll v. *United States*,
354 U.S. 394 (1957) 52

Cheney v. *U.S. District Court*,
542 U.S. 367 (2004) 42, 49, 70

Chong v. *District Director, INS*,
264 F.3d 378 (3d Cir. 2001) 63

City of Winter Haven v. *Gillespie*,
84 F.2d 285 (5th Cir. 1936) 58

Pages

Comacho v. *Texas Workforce Comm'n*,
408 F.3d 229 (5th Cir. 2005) 59

Connecticut Nat. Bank v. *Germain*,
503 U.S. 249 (1992) 39

Consumer Product Safety Comm'n v. *GTE Sylvania, Inc.*,
447 U.S. 102 (1980) 44

Diamond v. *Chakrabarty*,
447 U.S. 303 (1980) 39

Ex parte Cockroft,
104 U.S. (14 Otto) 578 (1881) 52

Ex parte Cutting,
94 U.S. (4 Otto) 14 (1876) 52

Grant v. *United States*,
227 U.S. 74 (1913) 52

Guilzon v. *C.I.R.*,
985 F.2d 819 (5th Cir. 1993) 43

Illinois v. *Lidster*,
540 U.S. 419 (2004) 57

In re: Acker,
596 F.3d 370 (6th Cir. 2010) 37, 41, 64

In re: Amy,
591 F.3d 792 (5th Cir. 2009), vacated on reh'g,
636 F.3d 190 (5th Cir. 2011), vacated on reh'g en banc,
668 F.3d 776 (5th Cir. 2012) (en banc) (per curiam) . . . . . *passim*

Pages

In re: Andrich,
668 F.3d 1050 (9th Cir. 2011) (per curiam) 46

In re: Antrobus,
519 F.3d 1123 (10th Cir. 2008) (opinion on rehearing) . . . . . *passim*

In re: Arizona,
528 F.3d 652 (9th Cir. 2008) 47

In re: Corrugated Container Antitrust Litigation,
614 F.2d 958 (5th Cir. 1980) 42

In re: Dean,
527 F.3d 391 (5th Cir. 2008) . . . . . *passim*

In re: Fisher,
640 F.3d 645 (5th Cir. 2011),
reconsideration denied, 649 F.3d 401,
cert. denied, 132 S. Ct. 1075 (2012) 71

In re: Grand Jury Subpoenas,
561 F.3d 408 (5th Cir. 2009) 55

In re: Leaf Tobacco Board of Trade of New York,
222 U.S. 578 (1911) (per curiam) 52

In re: Local No. 46 Metallic Letherers' Union,
568 F.3d 81 (2d Cir. 2009) (per curiam) 46

In re: McBryde,
117 F.3d 208 (5th Cir. 1997) 49

In re: Occidental Petroleum Corp.,
217 F.3d 293 (5th Cir. 2000) 73

Pages

In re: Rendón Galvis,
564 F.3d 170 (2d Cir. 2009) (per curiam) 46

In re: Siler,
571 F.3d 604 (6th Cir. 2009) 63, 64

In re: Simons,
567 F.3d 800 (6th Cir. 2009) 49

In re: Stewart,
552 F.3d 1285 (11th Cir. 2008) (per curiam) 47, 49

In re: Stewart,
641 F.3d 1271 (11th Cir. 2011) (per curiam) 47

In re: Supreme Beef Processors, Inc.,
468 F.3d 248 (5th Cir. 2006) (en banc) 40

In re: United States,
397 F.3d 274 (5th Cir. 2005) 49

In re: W.R. Huff Asset Mgmt. Co.,
409 F.3d 555 (2d Cir. 2005) 45

Kenna v. *United States Dist. Ct.*,
435 F.3d 1011 (9th Cir. 2006) 46, 49

Koons Buick Pontiac GMC, Inc. v. *Nigh*,
543 U.S. 50 (2004) 38

Laborers Health and Welfare Trust Fund v. *Advanced Lightweight Concrete Co., Inc.*,
484 U.S. 539 (1988) 50

Pages

Linda R.S. v. *Richard D.*,
410 U.S. 610 (1973) 56

Marino v. *Ortiz*,
484 U.S. 301 (1988) (per curiam) 4, 29, 52

McClure v. *Ashcroft*,
335 F.3d 404 (5th Cir. 2003) 57

Milner v. *Department of Navy*,
131 S. Ct. 1259 (2011) 43

Moore v. *INS*,
171 F.3d 994 (5th Cir. 1999) 50

Morissette v. *United States*,
342 U.S. 246 (1952) 42

Moskal v. *United States*,
498 U.S. 103 (1990) 42

Moten v. *Bricklayers, Masons & Plasterers, Int'l Union of America*,
543 F.2d 224 (D.C. Cir 1976) 58

Nichols v. *Mobile Bd. of Realtors, Inc.*,
675 F.2d 671 (5th Cir. 1982) 54

North Star Steel Co. v. *Thomas*,
515 U.S. 29 (1995) 60

Pavelic & LeFlore v. *Marvel Entertainment Group*,
493 U.S. 120 (1989) 39

Payne v. *Niles*,
61 U.S. (20 How.) 219 (1857) 52

Pages

Perlman v. *United States*,
247 U.S. 7 (1918) 55

Rhorer v. *Raytheon Engineers*,
181 F.3d 634 (5th Cir. 1999) 59

Richmond Newspapers, Inc. v. *Virginia*,
448 U.S. 555 (1980) 55

Roschen v. *Ward*,
279 U.S. 337 (1929) 38

Russello v. *United States*,
464 U.S. 16 (1983) 40

SEC v. *Forex Asset Mgmt., LLC*,
242 F.3d 325 (5th Cir. 2001) 56

Steel Co. v. *Citizens for a Better Environment*,
523 U.S. 83 (1998) 63

Stringfellow v. *Concerned Neighbors in Action*,
480 U.S. 370 (1987) 54

TVA v. *Hill*,
437 U.S. 153 (1978) 50

United States v. *Adams*,
363 F.3d 363 (5th Cir. 2004) 31

United States v. *Aguirre*,
448 Fed. Appx. 670 (9th Cir. 2011) (unpub.) 77

United States v. *Aguirre-Gonzalez*,
597 F.3d 46 (1st Cir. 2010) . . . . . *passim*

Pages

United States v. *Armstrong*,
517 U.S. 456 (1996) 53

United States v. *Aumais*,
656 F.3d 147 (2d Cir. 2011) 73, 76, 77

United States v. *Bestfoods*,
524 U.S. 51 (1998) 61

United States v. *Briggs*,
514 F.2d 794 (5th Cir. 1975) . . . . . *passim*

United States v. *Cuellar*,
478 F.3d 282 (5th Cir. 2007), rev'd,
553 U.S. 550 (2008) 44

United States v. *Doe*,
666 F.2d 43 (4th Cir. 1981) 62

United States ex rel. Eisenstein v. *City of New York*,
556 U.S. 928 (2009) 53

United States v. *Evers*,
669 F.3d 645 (6th Cir. 2012) 73

United States v. *Follett*,
269 F.3d 996 (9th Cir. 2001) 31

United States v. *Franklin*,
792 F.2d 998 (11th Cir. 1986) 4, 34

United States v. *Grundhoefer*,
916 F.2d 788 (2d Cir. 1990) 57

Pages

United States v. *Hairston*,
888 F.2d 1349 (11th Cir. 1989) 33

United States v. *Helmsley*,
941 F.2d 71 (2d Cir. 1991) 31

United States v. *Hunter*,
548 F.3d 1308 (10th Cir. 2008) . . . . . *passim*

United States v. *Kearney*,
— F.3d —, 2012 WL 639168 (1st Cir. Feb. 23, 2012) 73, 75, 77

United States v. *Kelley*,
997 F.2d 806 (10th Cir. 1993) 57

United States v. *Kollintzas*,
501 F.3d 796 (7th Cir. 2007) 54

United States v. *Kones*,
77 F.3d 66 (3d Cir. 1996) 62, 63, 65

United States ex rel. Louisiana v. *Boarman*,
244 U.S. 397 (1917),
aff'g, 217 F. 757 (5th Cir. 1914) 52

United States v. *Mancillas*,
172 F.3d 341 (5th Cir. 1999) 34

United States v. *McGarity*,
669 F.3d 1218 (11th Cir. 2012) 73, 76, 77

United States v. *McVeigh*,
106 F.3d 325 (10th Cir. 1997) 34, 36, 48

Pages

United States v. *Menasche*,
348 U.S. 528 (1955) 40

United States v. *Mindel*,
80 F.3d 394 (9th Cir. 1996) 36, 48, 57

United States v. *Monzel*,
641 F.3d 528 (D.C. Cir.),
cert. denied, 132 S. Ct. 756 (2011) . . . . . *passim*

United States v. *Mounts*,
793 F.2d 125 (6th Cir. 1986) 33

United States v. *Palma*,
760 F.2d 475 (3d Cir. 1985) 57

United States v. *Perry*,
360 F.3d 519 (6th Cir. 2004) 64, 65

United States v. *Reano*,
298 F.3d 1208 (10th Cir. 2002) 59

United States v. *Rubin*,
558 F. Supp. 2d 411 (E.D.N.Y. 2008) 66

United States v. *Ron Pair Enterprises, Inc.*,
489 U.S. 235 (1989) 38

United States v. *Texas*,
507 U.S. 529 (1993) 60, 72

United States v. *Thomas*,
709 F.2d 968 (5th Cir. 1983) 23

Pages

United States v. *Wright*,
639 F.3d 679 (5th Cir. 2011), vacated,
668 F.3d 776 (2012) (en banc) (per curiam) 8, 26

Warth v. *Seldin*,
425 U.S. 490 (1975) 36-37

Will v. *United States*,
369 U.S. 90 (1967) 39

Statutes and Rules

Antiterrorism and Effective Death Penalty Act of 1996,
Pub. L. No. 104-132, Title II, § 205, 110 Stat. 1214 (1996) 33

Criminal Law and Procedure Technical Amendments Act of 1986,
Pub. L. No. 99-646, 100 Stat. 3619 (1986) 32

Federal Probation Act of 1925,
ch. 521, 43 Stat. 1259 (1925) 31

Sentencing Reform Act of 1984,
Pub. L. No. 98-473, 98 Stat. 1987 (1984) 32

Victim and Witness Protection Act of 1982,
Pub. L. No. 97-291, 96 Stat. 1248 (1982) 31

Violent Crime Control and Law Enforcement Act,
Pub. L. No. 103-322, 108 Stat. 1796 (1994) 32, 33

18 U.S.C. § 1593 33

18 U.S.C. § 2248 33

Pages

18 U.S.C. § 2264 33

18 U.S.C. § 2327 33

18 U.S.C. § 2252(a)(4)(B) 6, 9

18 U.S.C. § 2255 23

18 U.S.C. § 2259 . . . . . *passim*

18 U.S.C. § 2259(b)(3) . . . . . *passim*

18 U.S.C. § 2259(b)(3)(F) 25

18 U.S.C. § 2259(b)(4)(B)(i) 16

18 U.S.C. § 2259(c) 20, 33

18 U.S.C. § 3231 2

18 U.S.C. § 3579(a)(1) 32

18 U.S.C. § 3663 . . . . . 15, 32

18 U.S.C. § 3663(a)(2) 25, 33

18 U.S.C. § 3663A 33

18 U.S.C. § 3663A(a)(2) 33

18 U.S.C. § 3664(d)(5) 18

18 U.S.C. § 3730(c)(1) 63

18 U.S.C. § 3742 . . . . . 4, 57, 58, 67

Pages

18 U.S.C. § 3742(a)-(b) 58

18 U.S.C. § 3771 . . . . . *passim*

18 U.S.C. § 3771(a)(2) 11

18 U.S.C. § 3771(a)(4) 12, 46

18 U.S.C. § 3771(a)(6) 34

18 U.S.C. § 3771(b)(1) 43

18 U.S.C. § 3771(d)(1) 35, 55

18 U.S.C. § 3771(d)(3) . . . . . *passim*

18 U.S.C. § 3771(d)(5)(A) 66

18 U.S.C. § 3771(e) 34

26 U.S.C. § 6110(d)(3) 64

28 U.S.C. § 516 66

28 U.S.C. § 1291 . . . . . 3, 4, 57, 58, 59, 61

28 C.F.R. § 0.20(b) 66

Fed. R. App. P. 3(c)(1) 3

Fed. R. App. P. 4(b)(1)(A)-(B) 4

Fed. R. Civ. P. 1 53

Fed. R. Civ. P. 24 53

Pages

Miscellaneous

Black's Law Dictionary 1122 (6th ed. 1990) 54

Erin C. Blondel, *Victims' Rights In An Adversary System*, 58 Duke L.J. 237 (2008) 67

Catharine M. Goodwin et al., *Federal Criminal Restitution* (2011) . . . . . *passim*

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 09-41238

IN RE: AMY UNKNOWN,

Petitioner.

On Petition for a Writ of Mandamus to the
United States District Court for the Eastern District of Texas

---

Consolidated with

No. 09-41254

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

DOYLE RANDALL PAROLINE,

Defendant-Appellee.

v.

AMY UNKNOWN,

Movant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Texas

SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON REHEARING EN BANC

STATEMENT OF JURISDICTION

In these consolidated proceedings, "Amy," a nonparty victim in the criminal case of *United States* v. *Paroline*, No. 6:08-cr-61 (E.D. Tex.), seeks mandamus review and appellate review of an order of the district court denying her request for more than $3 million in restitution.

1. On June 15, 2009, defendant Doyle Randall Paroline was sentenced to a term of imprisonment following his guilty plea to the crime of possession of images of child pornography. The district court entered judgment but deferred the issue of restitution. On December 7, 2009, the district court denied the government's request, on behalf of Amy, for an order of restitution under 18 U.S.C. § 2259. Dkt. 59. On March 11, 2010, the district court entered a final amended judgment against Paroline reflecting its denial of restitution. Dkt. 70. The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

2. On December 17, 2009, Amy filed a petition for a writ of mandamus under the Crime Victims' Rights Act of 2004, 18 U.S.C. § 3771 (CVRA), challenging the denial of restitution. See *In re: Amy Unknown*, No. 09-41238 (5th Cir.). This Court has jurisdiction over this petition pursuant to 18 U.S.C. § 3771(d)(3). See *United States* v. *Monzel*, 641 F.3d 528, 531

(D.C. Cir.), cert. denied, 132 S. Ct. 756 (2011).

3. On December 17, 2009, Amy filed a notice of appeal from the December 7, 2009, order denying restitution as well as the June 15, 2009 judgment declining to order Paroline to pay restitution. See *United States* v. *Paroline*; *Appeal of Amy Unknown*, No. 09-41254 (5th Cir.). The notice of appeal was filed within the time for the parties to file a notice of appeal from the final judgment in a criminal case, see Fed. R. App. P. 4(b)(1)(A)-(B),[1/] but neither Rule 4 nor any other rule sets a time period within which a nonparty may file a notice of appeal from the final judgment in a criminal case. Nor do the Federal Rules of Appellate Procedure contemplate that a nonparty may file a notice of appeal. See Fed. R. App. P. 3(c)(1) ("The notice of appeal must * * * specify the party or parties taking the appeal.").

[1/] To the extent Amy's notice of appeal was an appeal from the court's failure to include an order of restitution in the judgment against Paroline, her notice was premature because it was filed on December 17, 2009, which was prior to the court's entry of the final amended judgment denying restitution on March 11, 2010. By rule, however, a premature notice of appeal is deemed to have been filed on the date the final amended judgment was entered. See Fed. R. App. P. 4(b)(2).

Amy asserts that this Court has jurisdiction over her appeal in No. 09-41254 pursuant to 28 U.S.C. § 1291. Br. 1.[2/] She is mistaken. As we discuss *infra*, Amy's appeal concerns an aspect of Paroline's sentence in a criminal case, and no provision of 18 U.S.C. § 3742, the statute conferring appellate jurisdiction over sentencing appeals, authorizes a nonparty to appeal the sentence in a criminal case. In any event, Amy's nonparty status deprives her of the capacity to file a valid, jurisdiction-conferring notice of appeal from the final judgment in a criminal case under Section 1291 (were it relevant) or Section 3742. See *Marino* v. *Ortiz*, 484 U.S. 301, 304 (1988) (per curiam) ("The rule that only parties to a lawsuit * * * may appeal an adverse judgment is well settled."); see also *United States* v. *Franklin*, 792 F.2d 998, 999-1000 (11th Cir. 1986) (dismissing, for "want of jurisdiction," an appeal by a nonparty crime victim challenging the amount of restitution).

[2/] "Br." refers to "Amy's Opening Brief on the Merits," filed on February 24, 2012.

STATEMENT OF THE ISSUES

On February 6, 2012, following the grant of rehearing en banc, the Clerk's Office sent a letter to counsel indicating that some members of the Court were interested in briefing on three specific issues "[w]ithout foreclosing briefing" on other issues.[3/] Consistent with the issues identified in this letter and Amy's opening brief, these consolidated proceedings present the following issues:

1. Whether *In re: Dean*, 527 F.3d 391 (5th Cir. 2008), correctly held that a CVRA "petition * * * for a writ of mandamus" is reviewed under the same traditional standards that govern the issuance of any other petition for a writ of mandamus.

2. Whether Amy's status as a nonparty deprives her of the capacity to file a valid, jurisdiction-conferring notice of appeal from the final

---

[3/] The issues set forth in the letter were as follows:

> 1. What, if any, causal 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 [18 U.S.C. § 2259];
>
> 2. How would the nexus standard you urge be applied to the facts in each of the above cases, irrespective of the standard of appellate review; and
>
> 3. Is mandamus an appropriate vehicle for this Court to decide *In re: Amy Unknown* (No. 09-41238)?

judgment in the criminal case against Paroline.

3. Whether the district court clearly and indisputably erred by denying Amy any restitution under 18 U.S.C. § 2259 after it found that she was a victim of Paroline's offense who had suffered identifiable losses.

STATEMENT OF THE CASE

Following his guilty plea in the United States District Court for the Eastern District of Texas, defendant Doyle Randall Paroline was convicted of possession of images of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B). He was sentenced to 24 months of imprisonment to be followed by 10 years of supervised release. The district court declined to order Paroline to pay restitution to "Amy," an identified victim of Paroline's offense.

Amy initiated two proceedings seeking review of the order denying restitution. Initially, she filed a petition for a writ of mandamus under the CVRA. See *In re: Amy*, No. 09-41238 (5th Cir.). This Court declined to issue the writ, finding that the district court did not clearly and indisputably err in interpreting Section 2259 to condition Amy's recovery on a showing that all of her claimed losses were the proximate result of Paroline's offense. See *In re: Amy,* 591 F.3d 792, 794 (5th Cir. 2009) (*Amy I*). Amy sought

panel and en banc rehearing.

Amy also sought review by filing a notice of appeal from the order denying restitution and the judgment against Paroline declining to order restitution. See *United States* v. *Paroline*; *Appeal of In re: Amy Unknown*, No. 09-41254 (5th Cir.). She then successfully moved to consolidate further proceedings in the mandamus action with her pending appeal, and to treat her mandamus petition as her opening brief on appeal. The government filed a motion to dismiss Amy's appeal on the ground that her nonparty status deprived her of the capacity to appeal, and that her exclusive remedy was by way of a petition for a writ of mandamus.

This Court then granted Amy's petition for panel rehearing of *Amy I*, and, on rehearing, concluded that the district court had clearly and indisputably erred in interpreting Section 2259 to require proof that all of Amy's losses proximately resulted from Paroline's offense. The Court granted Amy's petition for a writ of mandamus and remanded the case to the district court with instructions to enter an appropriate restitution award. See *In re: Amy Unknown*, 636 F.3d 190, 201 (5th Cir. 2011) (*Amy II*). As a result of its ruling, the Court had no occasion to decide whether Amy's nonparty status barred her from appealing. *Id*. Paroline sought rehearing

en banc of the decision in *Amy II*.

On January 25, 2012, this Court granted Paroline's petition and vacated the judgment in *Amy II*. 668 F.3d 776 (5th Cir. 2012) (en banc) (per curiam); 5th Cir. R. 41.3. The same day, the Court granted rehearing en banc in *United States* v. *Wright*, 639 F.3d 679 (5th Cir. 2011), vacated, 668 F.3d 776 (5th Cir. 2012) (en banc) (per curiam), which presents similar issues concerning Amy's right to restitution under Section 2259 in the context of a defendant's appeal of a restitution award.

Following the grants of rehearing en banc in these cases, the Court directed the parties (and Amy in these two consolidated proceedings) to file supplemental briefs, and set these two cases and *Wright* for a single, consolidated en banc reargument.

STATEMENT OF THE FACTS

1. *The Offense Conduct*. On July 11, 2008, FBI agents in Tyler, Texas, met with Doyle Randall Paroline after an employee of a computer company that Paroline's wife had hired to repair Paroline's laptop computer discovered numerous images of children, ranging from age five to their early teens, posing nude and engaging in various types of sexual activity with adults and animals. PSR ¶ 10. During the meeting, Paroline admitted that he had downloaded these images and that he had been downloading and viewing child pornography for the last two years. PSR ¶ 11. On July 24, 2008, a forensic analysis of Paroline's laptop uncovered 280 such images. PSR ¶ 12. On January 12, 2009, Paroline waived indictment and pleaded guilty, pursuant to a plea agreement, to an information charging him with possession of images of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B). USCA5 17-19.

2. *"Amy."* The FBI sent copies of the images found on Paroline's computer to the National Center for Missing and Exploited Children (NCMEC) for further analysis. USCA5 227. A private non-profit organization established in 1984, NCMEC provides services to families, law enforcement, and other professionals to help prevent the abduction,

endangerment, and sexual exploitation of children. USCA5 150. In an *amicus brief* submitted to the district court, NCMEC described its Child Victim Identification Program (CVIP), which "assists federal and state law enforcement agencies and prosecutors with child pornography investigations." USCA5 152. CVIP analysts "review[] seized collections of child pornography to determine which images contain child victims who previously have been identified by law enforcement." *Id.*; see also USCA5 227-228. By 2009, CVIP analysts had conducted over 19,000 evidence reviews comprising more than 24 million images at the request of law enforcement, and had collected information regarding approximately 2,300 child victims depicted in sexually exploitative images. USCA5 152-153.

Following their evidence review in this case, NCMEC analysts concluded that two of the still images on Paroline's laptop were of a pre-pubescent girl known by the pseudonym "Amy," a child sex abuse victim depicted in the so-called "Misty" series of child pornography. USCA5

209.[4/] In the 1990s, when Amy was eight and nine years old, a pedophile in Seattle contacted Amy's uncle and asked him to sexually abuse Amy and visually record her abuse. USCA5 261. Amy's uncle complied by engaging in sexual acts with Amy that included rape, cunnilingus, fellatio, and digital penetration, and taking still photographs memorializing these acts. *Id.* These images have been actively traded over the Internet and viewed by numerous consumers of child pornography since their creation in 1998. USCA5 153.

In 2004, Amy's parents began receiving hundreds of notices, pursuant to the then-recently enacted Crime Victims' Rights Act of 2004, advising them that prosecutors had initiated criminal proceedings against individuals found in possession of Amy's images. USCA5 227-229; see 18 U.S.C. § 3771(a)(2) (crime victims have the right to notice of public proceedings). In 2007, after Amy reached the age of majority, she was referred by the attorney her parents had retained to Dr. Joyanna L. Silberg, Ph.D., for a

---

[4/] A "series" is a collection of pornographic images or video files of a child taken over time, which may include non-pornographic images with the pornography. USCA5 153. Traders and collectors of child pornography often name the series. *Id.* According to NCMEC, its analysts "have encountered the 'Misty' series in over 3,227 evidence reviews submitted by law enforcement," *id.*, and "[i]n conducting these evidence reviews, CVIP analysts have viewed over 35,570 images that appear to be associated with the 'Misty' series." *Id.* "[I]n 2009 alone, NCMEC analysts have viewed images associated with the 'Misty' series 8,860 times." *Id.*

psychological evaluation. During this time period, Amy, through her counsel, began submitting a three-page victim-impact statement in federal prosecutions across the country on Amy's behalf in which Amy implored the courts to "think about [her] and think about [her] life" when sentencing defendants who were involved with her images. VIS, at 3;[5/] see also 18 U.S.C. § 3771(a)(4) (crime victims have the right to "be reasonably heard" at sentencing).

In her victim impact statement, Amy describes how "[e]very 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 – at me – when I was just a little girl being abused for the camera. * * * I want it all erased. I want it all stopped. But I am powerless to stop it just like I was powerless to stop my uncle." VIS, at 1; see also *id*. at 2 ("I know those disgusting pictures of me are stuck in time and are there forever for everyone to see."). She explains her inability to describe the feeling that, "at any moment, anywhere, someone is looking at pictures of me as a little girl being abused by my uncle and is

[5/] Amy's victim impact statement was submitted to the Probation Office in this case for use in preparing the presentence investigation report. Her statement, however, is not officially a part of the court record in this case; it is, however, a part of the record.

getting some kind of sick enjoyment from it." VIS, at 1; see also *id*. at 2 ("Thinking and knowing that the pictures of all this are still out there just makes it worse. It's like I can't escape from the abuse, now or ever."). She describes the pain associated with the fact that her "privacy has been invaded," the feeling that she is "being exploited and used every day and every night," and the realization that her abuse "is a public fact." VIS, at 2. She has come to understand that she is "a real victim of child pornography," VIS, at 3, and that "the crime has never really stopped and will never really stop." VIS, at 2.

Following her evaluations of Amy during the summer of 2008, Dr. Silberg issued a report on November 21, 2008, in which she sought "to determine the psychological effects of [Amy's] continuous re-victimization in the form of internet pornographic photographs of her being exchanged and viewed," and "document the current effects on Amy of this re-victimization and describe the potential for long-standing future effects as a result of this victimization." Silberg Rep., at 1. Dr. Silberg opined that the initial assault against Amy, "and its continued memorialization in pictures which continue to be traded and used affect her in a variety of ways, and ha[ve] had long lasting and life changing impact on her." *Id*. at

8. According to Dr. Silberg, "each discovery of another defendant that has traded [Amy's] image re-traumatizes her again," *id*. at 3, and this knowledge, from the CVRA notices of pending prosecutions, has "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*.; see also *id*. at 4 ("Amy is clear that there has been a resurgence of trauma with her ongoing realization that her image is being traded on the internet."); *id*. at 8 (Amy's "awareness of the continued existence of the pictures and their criminal use in a widespread way leads to an activation" in her symptoms); *id*. at 9 ("Amy's awareness of these pictures, knowledge of new defendants being arrested[,] become ongoing triggers to her."). Dr. Silberg also describes Amy's "feel[ing] that her privacy has been invaded on a fundamental level as these pictured acts in which she was an unwilling participant are there for other people to find against her will." *Id*. at 4. Dr. Silberg concludes that "the re-victimization of Amy through the trading of her image on the internet is the source of enduring trauma that will have lasting effects on her and the symptoms she displays." *Id*. at 10.

Following Dr. Silberg's report, Amy, though her counsel, began asking federal prosecutors to seek restitution under 18 U.S.C. § 2259 on her behalf from defendants convicted of federal crimes involving the distribution, advertising, or possession of her images.[6/] By August 2009,

---

[6/] Title 18 of the United States Code, Section 2259, provides as follows:

(a) In general.– Notwithstanding section 3663 or 3663A, 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) Directions.– The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court pursuant to paragraph (2).

(2) Enforcement.– An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

(3) Definition.– For purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred by the victim for –

(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) attorneys' fees, as well as other costs incurred; and

(continued...)

Amy had submitted claims for restitution in over 250 such cases across the country. USCA5 242.[7/]

3. *The Restitution Litigation*. In April 2009, shortly after NCMEC confirmed that Paroline's computer included identifiable images depicting Amy's abuse, federal prosecutors sent a CVRA notice to Amy's counsel indicating that Paroline was the subject of a federal criminal prosecution in

---

[6/](...continued)

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

(4) Order mandatory.–

(A) The issuance of a restitution order under this section is mandatory.

(B) 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.

(c) Definition.– For purposes of this section, the term "victim" means 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.

[7/] Although Section 2259 prohibits the district court from refusing to order restitution because of the "economic circumstances of the defendant," 18 U.S.C. § 2259(b)(4)(B)(i), Amy's attorney stated that he withdrew approximately eighty percent of these requests because the defendants were indigent. USCA5 242, 245.

the Eastern District of Texas for the possession of Amy's images. USCA5 87-88. In subsequent proceedings in this case, the government, Paroline, and Amy stipulated that this notice was received by Amy's counsel; that counsel did not give the notice to Amy or inform her that he had received it; that "'Amy' does not know who Doyle Randall Paroline is"; and that "[n]one of the damages for which [she] 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." USCA5 325.

On May 1, 2009, Amy's counsel submitted a written request to the Victim Witness Coordinator in the United States Attorney's Office requesting that the government seek an order directing Paroline to pay Amy approximately $3.4 million in mandatory restitution under Section 2259 – an amount that reflected (1) the present value of her expected costs of counseling from 2009 to 2070 ($512,681.00); (2) the present discounted value of her expected lost wages from 2011 to 2070 ($2,855,173.00); and (3) expert witness costs ($16,980). USCA5 29, 349. Attached to the request were copies of Amy's victim impact statement, Dr. Silberg's November 21, 2008, report evaluating Amy, and a September 15, 2008, economic analysis prepared by the Smith Economics Group, Ltd., estimating the present value

of Amy's claims. USCA5 337.

On June 10, 2009, the district court entered an order severing the issue of restitution from the other aspects of Paroline's sentence, as permitted by 18 U.S.C. § 3664(d)(5), and scheduling an evidentiary hearing for August 4, 2009 (which was later rescheduled to August 20, 2009). USCA5 31. The order also solicited briefing from the government, Paroline, the Probation Office, Amy, NCMEC and any other interested groups on issues of specific interest to the court concerning restitution. USCA5 29-32. Over the next six months, the district court received extensive briefing and held two hearings. The briefing and hearings made clear that even though Amy was, by all accounts, a "victim" of Paroline's possessory offense, the parties and Amy disagreed about the meaning of the restitution statute – whether it required the government to prove that Amy's claimed losses proximately resulted from Paroline's conduct – and, if so, the evidentiary showing necessary to satisfy this causation standard.[8/]

[8/] The statute uses the term "proximate result," not "proximate cause," in describing the required relationship between the defendant's offense and the victim's losses, but these phrases describe the same causal relationship from opposite directions. Proximate "cause" is a forward-looking description (*i.e.*, the offense was the "proximate cause" of the victim's losses), whereas proximate "result" is a backwards-looking description of the same causal chain (*i.e.*, the victim's losses were the "proximate result" of the offense). We use these phrases interchangeably.

The government filed a brief in response to the court's invitation, which relied on decisions from the Third and Ninth Circuits to conclude that Section 2259(b)(3) conditioned a victim's recovery on a showing that all categories of losses proximately resulted from the offense. USCA5 130-132 (citing *United States* v. *Laney*, 189 F.3d 954, 965 (9th Cir. 1999) and *United States* v. *Crandon*, 173 F.3d 122, 126 (3d Cir. 1999)). Paroline agreed with this construction, USCA5 1318-1324, but Amy disagreed with it. In her view, Section 2259 conditioned the availability of restitution on a proximate-result showing only for losses arising under the catchall category of losses, and not for the enumerated categories of losses that she was seeking. USCA5 359-360, 1339-1349.

Despite the government's and Paroline's agreement that Section 2259 included a proximate cause requirement, the parties disagreed about the showing necessary to satisfy that standard. In the government's view, proximate cause, understood in light of Congress's overarching intent to provide a broad compensatory restitution remedy to exploited child victims, did not require a specific showing of causation "as it relates to Mr. Paroline," USCA5 1337, 1338, but was instead satisfied by a showing that Paroline was a member of the class of persons who possessed Amy's

images,USCA5 1333-1337. Paroline argued that the proximate-cause standard required the government to identify the extent to which his particular conduct contributed to Amy's overall harms and losses, and that there was no evidence in this case that Amy "learned of Mr. Paroline's conduct" or that she "suffered something as a result of her having learned of the conduct." USCA5 1325; see also USCA5 1350-1351 (no evidence Paroline's conduct "caused specific harm"). Indeed, in Paroline's view, Amy's stipulation that she did not know the identity of the person who committed this offense "effectively [took] the possibility of a proximate cause * * * finding off the table in this case." USCA5 1327.

On December 7, 2009, the district court entered a memorandum opinion and order denying restitution. USCA5 1279-1296. The court's analysis consisted of three rulings. First, the court agreed with Amy and the government that Amy was a "victim" of Paroline's crime within the meaning of Section 2259(c) because she had been "harmed as a result of" Paroline's possession of her images. USCA5 1282-1286 (citing *New York* v. *Ferber*, 458 U.S. 747, 758-760 & nn. 9-10 (1982) and *United States* v. *Norris*, 159 F.3d 926, 929-931 (5th Cir. 1998)). Second, the court ruled that Section 2259(b)(3)'s proximate-cause requirement applied to all categories

of losses, and was not limited, as Amy argued, to the catch-all category. USCA5 1286-1292 (citing *Porto Rico Railway* v. *Mor*, 253 U.S. 345, 348 (1920)). In reaching this conclusion, the court relied on the statutory text, the Third and Ninth Circuit decisions cited by the government, and the court's concern that Amy's proffered construction to authorize restitution unbounded by a proximate-result limitation could "render [the statute] unconstitutional" by exposing Paroline to excessive punishment. USCA5 1288 & n.9.

Third, the court, though acknowledging that a large portion of Amy's total losses were caused by the original abuse inflicted by her uncle, also concluded that "significant losses are attribut[able] to the widespread dissemination and availability of [Amy's] images and the possession of those images by many individuals such as Paroline." USCA5 1294. The court determined that Amy was not entitled to restitution, however, because neither Amy's victim-impact statement nor Dr. Silberg's report established any "specific losses proximately caused by Paroline's conduct," USCA5 1295, as distinguished from the conduct of others who had also harmed Amy; see also USCA5 1293 (evidence fails to "show the portion of [Amy's] losses specifically caused by Paroline's possession of Amy's two

images").[9/] The court lamented the "incredibl[e] difficult[y]" of this "seem[ingly] * * * impossible burden" of proving which specific losses were attributable to the conduct of a particular possessor-defendant, USCA5 1294-1295, but concluded that it was "bound by the requirements of the statute." USCA5 1294-1295.

4. *Amy Seeks Review Of The Restitution Ruling*. Amy challenged the order denying restitution by filing a CVRA petition for a writ of mandamus (No. 09-41238) and a notice of appeal from the judgment against Paroline (No. 09-41254). Her requests centered on the district court's second ruling, and argued that "Section 2259 permits a victim to receive mandatory restitution irrespective of whether the victim's harm was proximately cause[d] by the defendant." *Amy I*, 591 F.3d at 794.

a. *The Mandamus Petition*. On December 21, 2009, a divided panel of this Court denied Amy's mandamus petition.

The majority began by reaffirming the holding of *In re: Dean*, 527 F.3d 391 (5th Cir. 2008), that "[t]he standard of review [of a CVRA mandamus petition] is the usual standard for mandamus petitions," which meant that

---

[9/] The court was not persuaded by Paroline's argument that the stipulation in this case effectively precluded a finding of causation, reasoning that "section 2259 does not require that Amy have knowledge of each individual possessor and his conduct in order to establish proximate cause." USCA5 1294 n.11.

Amy, as the petitioner, had to show that the district court committed "clear and indisputable" error in adopting a proximate-cause requirement for all categories of losses. *Id.* at 793. The majority recognized that this Circuit had not yet interpreted Section 2259, but noted that "[c]ourts across the country have followed and applied the proximate-cause requirement in imposing restitution under Section 2259," *id.* at 794, and concluded that "it is neither clear nor indisputable that Amy's contentions regarding the statute are correct." *Id.* at 795. The majority was quick to note that the "[d]enial of relief under this mandamus standard, of course, does not prejudice Amy's right to seek relief in a civil action," *id.* at 795 n.2.[10/]

Judge Dennis dissented. In his view, "the district court's decision not to order restitution contravenes the text of Section 2259 and congressional intent [and] amounts to a clear and indisputable error that should be corrected by a writ of mandamus." *Amy I*, 591 F.3d at 795 (Dennis, J.,

---

[10/] In addition to any rights Amy may have under state law, we note that federal law provides a private right of action for damages for a minor victim of a child exploitation offense, including a possessory offense, and mandates an award of liquidated damages of not less than $150,000. See 18 U.S.C. § 2255. In the event that a defendant, such as Paroline, is sued under this provision following a conviction, the existence of the conviction would preclude the defendant from relitigating his liability to the victim. See *United States* v. *Thomas*, 709 F.2d 968, 972 (5th Cir. 1983) ("Because of the existence of a higher standard of proof and greater procedural protection in a criminal prosecution, a conviction is conclusive as to an issue arising against the criminal defendant in a subsequent civil action.").

dissenting). On January 11, 2010, Amy filed petitions for panel and en banc rehearing. The same day, Amy filed motions to consolidate further proceedings in the mandamus case with the pending appeal, and to treat her mandamus petition as her opening brief in the appeal. The Court granted her motions.

b. *The Appeal*. On January 27, 2010, the government filed a motion to dismiss Amy's appeal, arguing that her nonparty status barred her from appealing the final judgment against Paroline. The Court carried the motion with the case.

On March 22, 2011, after receiving additional briefing from the government, Paroline, and Amy, a panel of this Court granted Amy's petition for rehearing of the decision in *Amy I* and, on rehearing, held that the district court committed "clear and indisputable error" by "incorporating a proximate causation requirement [onto Section 2259] where none exists." *Amy II*, 636 F.3d at 201; see also *id*. at 192-193. The panel concluded that Section 2259(b)(3) conditioned a victim's right to restitution on a showing of proximate cause only for the miscellaneous catch-all category of "other losses" under Section 2259(b)(3)(F); according to the Court, Congress did not impose any corresponding proximate cause

requirement for the enumerated categories of losses in Section 2259(b)(3)(A)-(E). *Id*. at 198-199. Rather, the only showing of causation necessary for those categories of losses is the "general causation" showing required for a claimant to qualify as a "victim" under Section 2259(c), *i.e.*, a showing that the claimant suffered harm "as a result of" the offense. *Id*. The panel bolstered its interpretation by stating that "the evolution in victims' rights statutes demonstrates Congress's choice to abandon a global requirement of proximate causation." *Id*. at 200. In the panel's view, the fact that another restitution statute defined a victim as "a person directly and proximately harmed as a result of a commission of an offense," 18 U.S.C. § 3663(a)(2), whereas Section 2259, which was "enacted 14 years later," omits the "proximate harm" language, supported this conclusion. *Id*. Applying Section 2259's "general causation" standard, the panel concluded that Amy was a "victim" entitled to restitution. The panel therefore issued a writ of mandamus and remanded the case to the district

court with instructions to calculate an appropriate award of restitution. *Id.* at 201-202.[11/]

On April 15, 2011, Paroline filed a petition for rehearing en banc, urging the Court to reconsider *Amy II*'s conclusion that Section 2259 does not include a proximate-cause requirement for the enumerated categories of losses. On January 25, 2012, the Court granted Paroline's petition. 668 F.3d 776, 776 (en banc) (per curiam). The same day, the Court granted the petition for rehearing en banc filed by Michael Wright in *United States* v. *Wright*, No. 09-31215, a case that presents similar issues. See *United States* v. *Wright*, 639 F.3d 679 (5th Cir. 2011), vacated, 668 F.3d 776, 776 (2012) (en banc) (per curiam).

[11/] As a result of its ruling that Amy was entitled to a writ of mandamus, the *Amy II* Court did not decide whether Amy's nonparty status barred her from appealing. Part II of the opinion in *Amy II* nonetheless discusses the government's arguments why a victim may not appeal the final judgment in a criminal case as well as Amy's arguments to the contrary. *Amy II*, 636 F.3d at 194-197 (Jones, C.J.). But Part II of opinion represents only the views of the opinion's author; the two other members of the panel respectfully declined to join that portion of the decision. *Id.* at 192 n.1.

SUMMARY OF ARGUMENT

These consolidated proceedings, along with the related *Wright* case, raise two different sets of questions of statutory construction. The first set concerns the meaning of the Crime Victims' Rights Act of 2004 and, more specifically, the remedies available to nonparty crime victims who wish to contest a ruling of the district court affecting their interests (here, an order denying restitution). The second set relates to the meaning of Section 2259, the mandatory restitution statute applicable to victims of child exploitation offenses, and, more specifically, the pertinent causal showings required to permit an exploited child victim to receive an award of restitution.

In granting further review, the Court did not consolidate the *Paroline* and *Wright* cases for purposes of briefing, and therefore, the government has filed two supplemental en banc briefs. To avoid repetition, we have divided our discussion of these two sets of interpretive questions along the following lines. This brief, which arises in connection with a victim's requests for review, addresses the first set of issues relating to the statutory remedies available to crime victims, while our concurrently-filed brief in the *W*the judgment in his own case, focuses on the second set of issues regarding Section 2259's interpretation and application.

I. A petition for a writ of mandamus under the CVRA is a crime victim's exclusive remedy for obtaining review of a decision of the district court affecting the victim's rights.

A. The CVRA gives crime victims the ability to file a motion in the district court asserting certain enumerated rights, and, in a repudiation of pre-CVRA case law, expressly authorizes a victim to challenge an adverse ruling by "petition[ing] the court of appeals for a writ of mandamus." 18 U.S.C. § 3771(d)(3). In *In re: Dean*, 527 F.3d 391 (5th Cir. 2008), this Court held that Congress's decision to authorize victims to seek review by way of a "petition * * * for a writ of mandamus" signaled its intent that the courts of appeals apply the same traditional standards of review that would govern review of any other mandamus petition. In so holding, the Court rejected the victim's countertextual argument that a CVRA mandamus petition was subject to ordinary standards of appellate review. *Dean*'s textually-grounded conclusion is correct as a matter of law and common sense, and is shared by the majority of circuits, and it should be reaffirmed.

B. Amy lacks the capacity to appeal from the final judgment in a criminal case to which she is not a party. The CVRA clearly repudiated the preexisting rule barring victims from seeking mandamus review, but it just as clearly left undisturbed the longstanding common-law rule that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino* v. *Ortiz*, 484 U.S. 301, 304 (1988) (per curiam). Crime victims are not parties to a criminal prosecution and they may not properly become parties to a prosecution because there is no mechanism by which a nonparty may intervene in a criminal case to litigate its merits. See *United States* v. *Briggs*, 514 F.2d 794, 804 (5th Cir. 1975). All three circuits to consider this issue to date have held, correctly and without any dissent, that victims may not appeal and that mandamus is their exclusive remedy.

II. Amy is entitled to a writ of mandamus because she has satisfied *Dean*'s three-part standard governing the issuance of the writ. Her inability to appeal establishes that she has no other means of seeking review, and there are no countervailing factors that would render the writ's issuance inappropriate in this case assuming its issuance is otherwise warranted. The determinative issue, then, is whether the district court clearly and indisputably erred.

As set forth at length in our supplemental *en banc* brief in *Wright*, the district court correctly interpreted Section 2259(b)(3) to condition all the categories of a victim's recoverable losses on a showing that those losses proximately resulted from the defendant's offense. All seven circuits to consider the issue have so held, and Amy has not shown that this ruling is erroneous at all, much less indisputably so. But the district court did indisputably err by applying an incorrect standard of proximate causation that denied Amy any restitution even though Amy was correctly found to be a victim of Paroline's offense with identifiable losses. Those findings necessarily establish that Amy was entitled to an order requiring Paroline to pay her restitution, and therefore, the district court's decision to award Amy no restitution at all was indisputably erroneous. On remand, the district court must calculate an appropriate amount of restitution to award Amy after applying the correct standard of proximate causation.

ARGUMENT

I. A CVRA PETITION FOR A WRIT OF MANDAMUS IS AMY'S EXCLUSIVE REMEDY.

A. The Relevant Statutes.

"[R]estitution is a criminal penalty and a component of the defendant's sentence," *United States* v. *Adams*, 363 F.3d 363, 365 (5th Cir. 2004), and therefore, a federal court may order a defendant to pay restitution "only pursuant to statutory authority." *United States* v. *Follett*, 269 F.3d 996, 998 (9th Cir. 2001).

1. Prior to 1925, "there was no statutory basis for a federal court to impose restitution at sentencing in a criminal case." Catharine M. Goodwin et al., *Federal Criminal Restitution* § 2:6, at 23 (2011). In 1925, Congress enacted the Federal Probation Act of 1925, ch. 521, 43 Stat. 1259 (formerly codified at 18 U.S.C. § 3561; now repealed), which provided that, "[w]hile on probation and among the conditions thereof, the defendant *** [m]ay be required to make restitution." In practice, this statute had little utility because it permitted courts to impose restitution "only as a condition of probation," *United States* v. *Helmsley*, 941 F.2d 71, 101 (2d Cir. 1991), and, in those rare cases where restitution was imposed, the defendant's obligation lapsed when his probationary term ended. See Goodwin § 2:6,

at 23. Over the last three decades, Congress has enacted a number of statutes broadly permitting (and in some cases requiring) sentencing courts to order convicted defendants to pay restitution to their victims as part of their punishment for their offense.

a. The first comprehensive federal restitution statute was enacted in 1982 as part of the Victim and Witness Protection Act, Pub. L. No. 97-291, 96 Stat. 1248 (1982) (VWPA). The VWPA's restitution provisions gave sentencing courts discretion to order, "in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of the offense." 18 U.S.C. § 3579(a)(1) (1982 ed., Supp. IV).[12/]

b. In 1994, Congress passed the Violence Against Woman Act as part of the Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (VCCLEA). The Act included a "[m]andatory restitution" provision applicable to defendants convicted of any of the child exploitation offenses codified in Chapter 110 of Title 18 of the United States Code, which includes the offense of possessing child

---

[12/] The VWPA was recodified, effective November 1, 1987, pursuant to the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987; as a result, 18 U.S.C. § 3579 became 18 U.S.C. § 3663. In 1986, Congress amended the language of Section 3579(a), replacing the term "victim of the offense" with "victim of such offense." Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, 100 Stat. 3619.

pornography in 18 U.S.C. § 2252. See 18 U.S.C. § 2259. This statute mandates an award of restitution to the "victim" of such an offense; and unlike the VWPA, which did not define that term, see, *e.g.*, *United States* v. *Hairston*, 888 F.2d 1349, 1355 (11th Cir. 1989); *United States* v. *Mounts*, 793 F.2d 125, 127 (6th Cir. 1986), Section 2259 defined a "victim," "[f]or purposes of this section," as "the individual harmed as a result of a commission of a crime under this chapter." 18 U.S.C. § 2259(c).[13/]

c. In 1996, Congress passed the Mandatory Victims' Restitution Act as part of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, Title II, § 205, 110 Stat. 1214 (1996) (MVRA), codified at 18 U.S.C. § 3663A. The MVRA makes restitution mandatory for certain types of offenses and defines a "victim" "[f]or purposes of this section" as "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered." 18 U.S.C. § 3663A(a)(2). This legislation also amended the VWPA to incorporate the same definition

---

[13/] The VCCLEA also amended other provisions of Title 18 to mandate restitution for victims of certain other crimes. Se 18 U.S.C. § 2248 (sexual abuse); 18 U.S.C. § 2264 (domestic violence and stalking); 18 U.S.C. § 2327 (telemarketing fraud). See generally *United States* v. *Julian*, 248 F.3d 1245, 1247 (10th Cir. 2001) (noting that Sections 2248, 2259 and 2264 "were adopted at the same time"). In 2000, Congress passed a similar mandatory restitution statute for victims of sex trafficking crimes. See 18 U.S.C. § 1593.

of a "victim" into its restitutionary provisions. 18 U.S.C. § 3663(a)(2); see also *United States* v. *Mancillas*, 172 F.3d 341, 342-343 (5th Cir. 1999) (noting that the VWPA and MVRA define a "victim" as a person "directly and proximately harmed as a result of" the commission of an offense). Finally, the 1996 legislation replaced the existing statutory procedures in 18 U.S.C. § 3664 that governed the issuance of restitution orders with a more detailed set of procedures governing the issuance of such orders as well as their enforcement by the United States on behalf of victims. See *United States* v. *Witham*, 640 F.3d 40, 45 (1st Cir. 2011).

2. Although these statutes gave crime victims a substantive right to receive restitution, none provided crime victims with the ancillary power to enforce this right in court, or to otherwise challenge an order denying a request for restitution "through mandamus or otherwise." *Monzel*, 641 F.3d at 534; see *United States* v. *Franklin*, 792 F.3d 998, 999-1000 (11th Cir. 1986) (dismissing, for "want of jurisdiction," an appeal by a crime victim challenging the amount of restitution); cf. *United States* v. *McVeigh*, 106 F.3d 325, 328-329 (10th Cir. 1997) (dismissing crime victims' mandamus petition and related appeal from non-restitution-related ruling).

The Crime Victims' Rights Act of 2004 partially altered this landscape. The CVRA gives federal "crime victims" – *i.e.*, defined as "person[s] directly and proximately harmed as a result of the commission of a Federal offense," 18 U.S.C. § 3771(e) – eight enumerated rights, one of which is "[t]he right to full and timely restitution as provided in law." 18 U.S.C. § 3771(a)(6).[14/] And the statute allows crime victims to enforce these rights in court, in their own name, despite their nonparty status. The statute permits the victim's rights to be asserted by the victim or their authorized representative, or the prosecutor (on the victim's behalf), by filing a "motion," typically in the district of prosecution, 18 U.S.C. § 3771(d)(1), which the district court must "take up and decide * * * forthwith." 18 U.S.C. § 3771(d)(3). "If the district court denies the relief sought," then "the movant" may seek judicial review by "petition[ing] the court of appeals for a writ of mandamus," *id*. Cognizant that victims may sometimes seek mandamus relief in the midst of an ongoing criminal proceeding, the statute aims to minimize the disruptive effect of any such

---

[14/] The "as provided in law" clause indicates that the CVRA does not create an independent right to restitution, but instead provides a mechanism by which crime victims may seek to enforce a substantive right to restitution that has been "provided in" some other source of positive "law," such as the VWPA, the MVRA, or Section 2259. See, *e.g.*, Goodwin § 12:11, at 484 ("Courts have specifically concluded that the CVRA reference to restitution 'as provided by in law' refers to the restitution statutes.").

petitions by requiring the courts of appeals to "take up and decide" a mandamus petition "within 72 hours after [it] has been filed," subject to certain limited exceptions, *id*. "In any appeal in a criminal case," however, "the Government may assert as error the district court's denial of any crime victim's right." 18 U.S.C. § 3771(d)(4).

B. The CVRA Authorizes Victims To Seek Mandamus Review, And Traditional Standards Of Mandamus Review Govern The Review Of Such Petitions.

Prior to the CVRA's passage, the few courts of appeals to consider the question – including, most famously, the Tenth Circuit in the case of Oklahoma City bomber Timothy McVeigh – concluded that nonparty crime victims lacked standing under the All Writs Act to petition the courts of appeals for a writ mandamus in a criminal case. See *McVeigh*, 106 F.3d at 328-329; see also *United States* v. *Mindel*, 80 F.3d 394, 398 (9th Cir. 1996); cf. *Aref* v. *United States*, 452 F.3d 202, 207 (2d Cir. 2006) ("We are aware of no authority authorizing a non-party to petition the Court of Appeals for a writ of mandamus in a criminal case."). The CVRA eliminated this barrier by explicitly giving crime victims the right to "petition the court of appeals for a writ of mandamus" in a criminal case. 18 U.S.C. § 3771(d)(3); cf. *Warth* v. *Seldin*, 425 U.S. 490, 513 (1975) ("Congress may create a

statutory right * * * the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute.").

Section 3771(d)(3) authorizes victims to seek a writ of mandamus, but it does not specifically address the substantive standards courts are to apply in considering such petitions. In *In re: Dean*, 527 F.3d 391 (5th Cir. 2008), this Court followed the Tenth Circuit's decision in *In re: Antrobus*, 519 F.3d 1123 (2008) (opinion on rehearing), in holding that Section 3771(d)(3) required courts of appeals to review CVRA mandamus petitions using the traditional mandamus standards that apply to review of other mandamus petitions. See *id*.; accord *Monzel*, 641 F.3d at 533 (following *Dean* and *Antrobus*); *In re: Acker*, 596 F.3d 370, 372 (6th Cir. 2010) ("The use of th[e] specific term [mandamus] in the statute * * * convinces us that those usual standards apply here."). Like *Antrobus* before it, *Dean* rejected the victims' argument that courts of appeals should review CVRA mandamus petitions under ordinary standards of appellate review. 527 F.3d at 393.

Amy invites the Court to take this opportunity to reconsider and "overrule" *Dean*. Br. 13. This Court should decline her invitation, however, because her arguments "that Congress provided ordinary

appellate review but called it 'mandamus' are not persuasive." *Monzel*, 641 F.3d at 533. "'[T]here is no canon against using common sense in construing laws as saying what they obviously mean,'" *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 543 U.S. 50, 63 (2004) (quoting *Roschen* v. *Ward*, 279 U.S. 337, 339 (1929) (Holmes, J.)), and here, Congress "obviously mean[t]" to authorize "mandamus" review, not appellate review.

1. The interpretation of the CVRA's mandamus-review provision "begins where all such inquiries must begin: with the language of the statute itself." *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). In this case, "it is also where the inquiry should end, for where, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *Id.*

The statutory phrase "writ of mandamus" is plain and admits of no ambiguity; indeed, it is hard to imagine how Congress could have expressed its intent more clearly than it did when it authorized victims, not to "appeal," but to file a "petition * * * for a writ of mandamus." As the Tenth Circuit has explained, "Congress could have drafted the CVRA to provide for 'immediate appellate review' or 'interlocutory appellate review,' something it has done many times. Instead, it authorized and made use of

the term 'mandamus.'" *Antrobus*, 519 F.3d at 1124. And Amy's arguments notwithstanding, Congress's choice of words matters. "Time and again," the Supreme Court has said, courts must "presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). For this "cardinal canon" to have any vitality, the word "mandamus" cannot be construed to mean "appeal." Cf. *Will* v. *United States*, 369 U.S. 90, 97 (1967) ("Mandamus * * * may never be employed as a substitute for appeal."); see also *In re: Chesson*, 897 F.2d 156, 159 (5th Cir. 1990) (same). At the end of the day, Amy's countertextual view – that mandamus review really means appellate review – is less a plea for how the Court should interpret the statute than it is a plea for the Court to revise the statute. But this Court's role "is to apply the text" as written, "not to improve upon it," *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U.S. 120, 126 (1989), and that role does not permit the Court to "rewrite the statute to mean exactly the opposite of its text." *Admiral Ins. Co.* v. *Abshire*, 574 F.3d 267, 272 n.4 (5th Cir. 2009); see also *Diamond* v. *Chakrabarty*, 447 U.S. 303, 315 (1980) ("[O]ur obligation is to take statutes as we find them.").

Adjacent provisions of the statute provide further confirmation (if any were necessary) that mandamus means mandamus. See *In re: Supreme Beef Processors, Inc.*, 468 F.3d 248, 253 (5th Cir. 2006) (en banc) ("[I]t is a cardinal rule that a statute is to be read as a whole."). The next subsection of the statute permits the government to raise a denial of a victim's rights in "any appeal." 18 U.S.C. § 3771(d)(4). The juxtaposition of the words "mandamus" and "appeal" in back-to-back provisions of the same statute reinforces the conclusion that mandamus does not mean appeal. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). Indeed, if Amy were correct that mandamus review under Section 3771(d)(3) is appellate review, then Section 3771(d)(4)'s authorization for government appellate review would appear to be superfluous. See *Monzel*, 641 F.3d at 533. The better view, therefore, is to give the words "mandamus" and "appeal" independent meaning. See, *e.g.*, *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute.").

In addition, "the truncated [72-hour] period in which the court of appeals is to review such a petition and act upon it," *Acker*, 596 F.3d at 372, further supports the conclusion that "Congress understood it was providing the traditional extraordinary remedy of mandamus." *Monzel*, 641 F.3d at 533. The traditional mandamus standard fits better with this accelerated-review provision "because determining whether the lower court committed a 'clear and indisputable' error will not normally require extensive briefing or prolonged deliberation." *Id.* "[F]ull briefing and plenary appellate review within the 72-hour deadline," however, "will almost always be impossible." *Id.*; see also *Antrobus*, 519 F.3d at 1130 ("It seems unlikely that Congress would have intended de novo review in 72 hours of novel and complex legal questions.").

2. The conclusion that Congress authorized victims to seek review mandamus review reflects Congress's intent that the courts of appeals apply the same traditional standards of review that have long governed the issuance of the writ of mandamus.

a. When Congress enacts a statute that "borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were

attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Morissette* v. *United States*, 342 U.S. 246, 263 (1952); see also *Moskal* v. *United States*, 498 U.S. 103, 121 (1990) ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings its soil with it."). The primary idea embedded in the common-law soil of "mandamus" is that it is a "drastic" remedy "to be invoked only in extraordinary situations," *Allied Chem. Corp*. v. *Diaflon, Inc.*, 449 U.S. 33, 34 (1980) (per curiam), to remedy "clear and indisputable" errors, *Cheney* v. *U.S. District Court*, 542 U.S. 367, 380 (2004); see also *In re: Corrugated Container Antitrust Litigation*, 614 F.2d 958, 962 (5th Cir. 1980) ("clear and indisputable" error standard not satisfied by showing that the claimed error is "merely debatable").

Amy acknowledges this interpretive principle, but contends that it has been displaced by provisions of the CVRA that "point[] another way." Br. 14-17. The provisions on which she relies do not support her conclusion, however. The statutory directive that courts "ensure" that crime victims are afforded their rights in the first instance, 18 U.S.C. § 3771(b)(1), "says nothing about the standard of review" that reviewing courts must apply

when a victim asserts that they were not afforded those rights. *Monzel*, 641 F.3d at 533. The statute's "take up and decide" language is equally agnostic about the substantive standards to be applied when a court considers ("take[s] up") and rules upon ("decide[s]") a mandamus petition. And, contrary to Amy, Br. 15-16, a court that declines to issue a writ of mandamus when the victim has not satisfied the traditional mandamus standard "has most certainly 'take[n] up and decide[d]' the petition," *id.*, by rendering a judgment that the victim is not entitled to extraordinary relief.

b. Unable to muster a persuasive plain-language argument in support of her countertextual reading of the statute, Amy falls back on the CVRA's legislative history, which consists of a floor colloquy between the CVRA's two senatorial co-sponsors. Br. 18-20. This reliance is misplaced: "Fifth Circuit law is crystal clear that when, as here, the language of a statute is unambiguous, this Court has no need to and will not defer to * * * legislative history." *Guilzon* v. *C.I.R.*, 985 F.2d 819, 823 n.11 (5th Cir. 1993). Legislative history may be consulted to clarify a statutory ambiguity, but it may not be used to create one. See *Milner* v. *Department of Navy*, 131 S. Ct. 1259, 1267 (2011). Try as she might, Amy has not shown that the meaning of the term "writ of mandamus" is in any way

ambiguous so as to justify resort to the statute's legislative history. The "[f]loor statements from two Senators" Amy cites, therefore, simply "cannot amend the clear and unambiguous language of [the] statute." *Barnhart* v. *Sigmon Coal Co., Inc.*, 534 U.S. 438, 457 (2002).[15/]

The legislative history Amy cites does not assist her in any event. See *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980) ("[O]rdinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history."). Senator Feinstein's statement that Section 3771(d)(3) makes "a new use of a very old procedure, the writ of mandamus," 150 Cong. Rec. S7295 (2004); Br. 19, says nothing about the standard of review for mandamus. Rather, her statement more plausibly refers to the fact that victims previously lacked the ability to seek mandamus review. See *Monzel*, 641 F.3d at 534. And "[b]y providing victims the opportunity to challenge

---

[15/] Amy cites *United States* v. *Cuellar*, 478 F.3d 282, 299 (5th Cir. 2007), with a parenthetical stating "looking to floor statement of bill's sponsors to determine congressional intent." Br. 20. This discussion appears in the dissenting opinion, however; and, although that opinion was vindicated when the Supreme Court reversed this Court's judgment, see *Cuellar* v. *United States*, 553 U.S. 550, 568 (2008), the Supreme Court had no occasion to rely on the statute's legislative history. In any case, the dissent considered the legislative history only after it found that the text could "bear more than one meaning," *id*. at 298, which is not the case here; and, even then, the dissent acknowledged the "peril[s]" of considering legislative history "because it is seductively easy to find a small, but misrepresentative, piece of legislative history that appears to support a given position." *Id*. at 299 (Smith, J., dissenting).

such decisions through mandamus, Congress did indeed make a 'new use of a very old procedure.'" *Id.* Nor is there any reason to read Senator Feinstein's statement that Section 3771(d)(3) permits crime victims to "in essence, immediately appeal a denial of their rights by a trial court," 150 Cong. Rec. S7295; Br. 19, or Senator Kyl's comment that "appellate courts are designed to remedy errors of lower courts," *id.* at S7304; Br. 19, to suggest that either senator intended ordinary appellate review to apply. "A crime victim's ability to 'immediately appeal' a denial of her rights does not turn on the applicable standard of review, and a court applying the traditional mandamus standard can still remedy errors of law, provided the errors were clear and the petitioner has a right to relief." *Monzel*, 641 F.3d at 534 n.4.

c. Nor, contrary to Amy (Br. 17-19), do decisions from other circuits justify a departure from *Dean.* Soon after the CVRA's passage, the Second Circuit held that "a district court's determination under the CVRA should be reviewed for abuse of discretion," *In re: W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 563 (2005), and the Ninth Circuit held that the writ should issue whenever "the district court's order reflects an abuse of discretion or legal error." *Kenna* v. *United States Dist. Ct.*, 435 F.3d 1011, 1017 (2006). In

declining to follow these decisions, the Tenth Circuit observed that neither court analyzed the text or explained "why Congress chose to use the word mandamus rather than the word appeal." *Antrobus,* 519 F.3d at 1128. Every court of appeals to consider the issue in a published opinion since *Kenna*, moreover, agrees that traditional mandamus standards of review apply. The Ninth Circuit recently denied a CVRA mandamus petition after stating that "[t]he trial judge did not clearly err as a matter of law, nor did he abuse his discretion," *In re: Andrich*, 668 F.3d 1050, 1051 (9th Cir. 2011) (per curiam), but the court cited *Kenna* for the proposition that a CVRA petitioner must show that the court's order "is clearly erroneous as a matter of law." *Id*. The Second Circuit, for its part, has cited *Huff*'s "abuse of discretion" standard in two more recent cases, but it has never discussed the subsequent competing case law. See *In re: Local No. 46 Metallic Leatherers' Union*, 568 F.3d 81, 85 (2009) (per curiam); *In re: Rendón Galvis*, 564 F.3d 170, 174 (2009) (per curiam).[16/]

[16/] Nor does the standard of review appear to have been outcome-determinative in these cases. In all three of the Second Circuit cases, the court denied the writ. Cf. *Antrobus*, 519 F.3d at 1131 (finding it far from "obvious * * * that the outcome would change" under the ordinary appellate standard of review). The Ninth Circuit did grant the writ in *Kenna*, but that case involved the district court's refusal to allow recognized crime victims to speak at sentencing, despite the fact that the CVRA guarantees victims that very right, 18 U.S.C. § 3771(a)(4). This type of stark deviation from a clear statutory directive almost certainly constitutes the kind of clear error that would be (continued...)

Amy further contends that two other circuits have "afforded crime victims ordinary appellate review." Br. 18. The unpublished (and nonprecedential) Third Circuit decision she cites, *In re: Walsh*, 229 Fed. Appx. 58, 60 (2007) (per curiam), suggested that CVRA mandamus relief is available under a "less demanding" standard (*id.*), but that language was "dicta." *Monzel*, 641 F.3d at 533. And a more recent Third Circuit case concluded that a CVRA mandamus petitioner "must establish that he has a 'clear and indisputable' right to issuance of the writ." *In re: Dawalibi*, 338 Fed. Appx. 112, 114 (3d Cir. 2009) (per curiam) (unpub.). *In re: Stewart*, 552 F.3d 1285 (11th Cir. 2008) (per curiam), did not address the standard of review, let alone endorse appellate review. Indeed, in denying a second, later-filed petition for a writ of mandamus in the same case, the Eleventh Circuit stated that it "did not explicitly state the standard [it] used" in the earlier case that Amy cites. *In re: Stewart*, 641 F.3d 1271, 1273-1275 (11th Cir. 2011) (per curiam) (declining to decide the issue).

[16/](...continued)
redressable under the traditional mandamus standard. Cf. *In re: Arizona*, 528 F.3d 652, 656 (9th Cir. 2008) (mandamus is appropriate to remedy a court's failure to follow a clear "statutory mandate").

d. Amy contends that *Dean*'s interpretation of the mandamus-review provision renders it superfluous because "[e]ven before the CVRA, a crime victim could (like anyone else) seek mandamus under the All Writs Act." Br. 18. Amy does not cite any pre-CVRA decisions so holding, and as noted above, the two pre-CVRA cases of which we are aware that decided the issue – *McVeigh* and *Mindel* – held that victims lacked standing to seek mandamus review under the All Writs Act. Citing these two cases, the D.C. Circuit suggested that Congress likely included a specific mandamus-review provision in the CVRA precisely because pre-CVRA precedent foreclosed All Writs Act mandamus review. See *Monzel*, 641 F.3d at 534; see also Goodwin § 12:9, at 478 (describing the *McVeigh* decision as an "impetus" for the CVRA's "codification of victims' procedural rights"). Thus, *Dean*'s construction of the mandamus-review provision, far from rendering it "utterly superfluous," Br. 18, gives that statute the precise scope and coverage Congress intended.[17/]

[17/] Amy claims (Br. 20-22) that even if this Court adheres to *Dean*, she still does not need to satisfy the traditional clear-and-indisputable error standard it adopted because she is instead entitled to a writ of "supervisory" mandamus, which, she says, does not require a showing of clear and indisputable error. Reduced to its essence, *Amy* contends that even if *Dean* remains the law on the meaning of the CVRA, the Court need not follow *Dean* in a CVRA case that would otherwise be controlled by it. There is no warrant for such an end-run around *Dean*, however: the CVRA permits traditional mandamus review for clear and indisputable error. Nor is this case analogous to the (continued...)

e. Finally, Amy ominously warns that continued adherence to *Dean* would "sound[] a death knell for meaningful protection of crime victims" due to the difficulty of satisfying the traditional mandamus standard. Br. 13. Amy's dire predictions are exaggerated. The traditional mandamus standard, though "demanding," is "not insuperable," *Cheney*, 542 U.S. at 381; accord *In re: United States*, 397 F.3d 274, 282 (5th Cir. 2005), and the courts of appeals have not hesitated to issue the writ to remedy egregious errors of law adversely affecting victims' rights. See, *e.g.*, *In re: Simons*, 567 F.3d 800, 801 (6th Cir. 2009) (excessive delay in ruling on a victim's motion to unseal certain court records); *In re: Stewart*, 552 F.3d 1285, 1289 (11th Cir. 2008) (denial of crime victim status); *Kenna*, 435 F.3d at 1018 (denial of a victim's right to speak at sentencing). In fact, the D.C. Circuit granted mandamus relief to Amy when she challenged the amount of restitution awarded to her in *Monzel*, see 641 F.3d at 544, and the government agrees that Amy is entitled to mandamus relief in this case on

---

[17/](...continued)
only decision she cites (Br. 21) that granted supervisory mandamus, *In re: McBryde*, 117 F.3d 208 (5th Cir. 1997), to block the purported transfer of cases from a federal district court because the "reassignment of cases in response to disagreement with substantive rulings pertaining to those cases threatens the very structure of the federal court system." *Id*. at 223. The meaning of Section 2259 is an important issue, but it is not, qualitatively speaking, analogous to the weighty issues presented in *McBryde*.

the ground that the district court clearly and indisputably erred in failing to award her any restitution. See pp. 70-77, *infra*. These cases belie Amy's claim that the application of traditional mandamus standards is somehow compatible with meaningful protection of victim's rights.

* * *

Amy's objection to the application of traditional mandamus standards is ultimately rooted in a philosophical disagreement with the carefully-calibrated regime of judicial review embodied in the CVRA. Of course, the Judiciary's "appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute." *TVA* v. *Hill*, 437 U.S. 153, 194 (1978). Amy is free to disagree with legitimate "policy choices properly made by the legislative branch," but this Court cannot "second-guess" those policy choices, *Moore* v. *INS*, 171 F.3d 994, 1009 (5th Cir. 1999). Instead, Amy's disagreements should be "addressed to the body that has the authority to amend the legislation, rather than one whose authority is limited to interpreting it." *Laborers Health and Welfare Trust Fund* v. *Advanced Lightweight Concrete Co., Inc.*, 484 U.S. 539, 550 (1988); see also, *e.g.*, Brief for Amy Unknown as *Amicus Curiae*, *United States* v. *Wright*, No. 09-31215,

at 12 ("This Court does not second-guess Congress's policy decisions."). There is, therefore, no reason for this Court to reexamine *Dean*'s textually-grounded, commonsense conclusion that mandamus review means mandamus review.

II. CRIME VICTIMS MAY NOT INDEPENDENTLY APPEAL FROM THE FINAL JUDGMENT IN A CRIMINAL CASE TO WHICH THEY ARE NOT A PARTY.

Amy contends that even if this Court adheres to *Dean*, she is entitled to ordinary appellate review in her appeal of the judgment against Paroline. Br. 24-33. The problem with this argument is that Amy may not appeal: her status as a nonparty deprives her of the capacity to file a valid, jurisdiction-conferring notice of appeal from the final judgment in a criminal case. When Congress passed the CVRA, it clearly abrogated the traditional rule barring nonparty crime victims from seeking mandamus review, but, as all three circuits to consider the issue have held, Congress equally clearly adhered to the longstanding rule barring nonparties from appealing. See *Monzel*, 641 F.3d at 541; *United States* v. *Aguirre-Gonzalez*, 597 F.3d 46, 52-55 (1st Cir. 2010); *United States* v. *Hunter*, 548 F.3d 1308, 1317 (10th Cir. 2008). Amy's appeal in No. 09-41254 must therefore be

dismissed.[18/]

A. The Common Law Rule Barring Nonparty Appeals.

The "well settled" rule in federal court is that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam); see also *United States ex rel. Louisiana* v. *Boarman*, 244 U.S. 397, 402 (1917) (rule barring nonparty appeals is "no longer open to discussion"), aff'g, 217 F. 757, 757 (5th Cir. 1914).[19/] This rule bars nonparty crime victims from appealing the final judgment in a criminal case because "[c]rime victims

---

[18/] This Court granted Amy's motion to take judicial notice of the briefs filed in *United States* v. *Slovacek*, No. 11-10444 (5th Cir.), in which a nonparty crime victim, like Amy, who unsuccessfully sought CVRA mandamus review filed an independent appeal from the final judgment in a criminal case denying restitution. The government has opted to re-brief the issue, rather than relying on its response brief in that case.

[19/] In *Bayard* v. *Lombard,* 50 U.S. (9 How.) 530 (1850), the Supreme Court first endorsed the common-law rule that "strangers to the judgment and proceedings" below were not "proper parties" to seek a writ of error under the statutes then in force "and the principles of the common law." *Id*. at 551-552; see also *Payne* v. *Niles*, 61 U.S. (20 How.) 219, 221 (1857) (*Bayard* declared it "very well settled in all common-law courts, that no one can bring up, as plaintiff in a writ of error, the judgment of an inferior court to a superior one, unless he was a party to the judgment in the court below"); accord *In re: Leaf Tobacco Board of Trade of New York*, 222 U.S. 578, 581 (1911) (per curiam); *Ex parte Cutting*, 94 U.S. (4 Otto) 14, 21 (1876); *Ex parte Cockroft*, 104 U.S. (14 Otto) 578, 578-579 (1881). To be sure, *Bayard* and its progeny involved nonparty appeals from final judgments in civil cases, owing to the fact that Congress did not authorize appeals in criminal cases until the end of the nineteenth century, see *Carroll* v. *United States*, 354 U.S. 394, 400 (1957). In *Grant* v. *United States*, 227 U.S. 74 (1913), however, the Court cited *Bayard* approvingly to dismiss a writ of error brought by a nonparty to a criminal case. *Id*. at 78-79.

have not been recognized as parties, and the Federal Rules of Criminal Procedure do not allow them to intervene in" – and hence properly become parties – "to a prosecution." *Amy II*, 636 F.3d at 195.[20/]

1. Crime Victims May Not Appeal Because They Are Not Parties, And May Not Properly Become Parties, To A Criminal Prosecution.

"A 'party' to litigation is one by or against whom a lawsuit is brought." *United States ex rel. Eisenstein* v. *City of New York*, 556 U.S. 928, —, 129 S. Ct. 2230, 2234 (2009). Under this definition, there are only two parties to a federal criminal case: the government, who initiates the case, see *United States* v. *Armstrong*, 517 U.S. 456, 467 (1996) ("power to prosecute" is "one of the core powers of the Executive Branch"), and the defendant, the person against whom the charges are brought. Crime victims have psychological, emotional, and financial interests in a criminal prosecution, but they are not "parties" to it. See Goodwin § 12:2, at 472 ("[T]he victim is not a party to a criminal case. The parties are the

[20/] Amy's claim that she is appealing from the order denying her restitution request, as distinct from the judgment, Br. 30-31, is beside the point: her appeal concerns an aspect of the judgment imposed against Paroline and necessarily seeks to revise that judgment. Because Amy cannot appeal the judgment, she should not be permitted to "accomplish indirectly the result [she] is prohibited from accomplishing directly," *Cushman* v. *Resolution Trust Co.*, 954 F.2d 317, 326 (5th Cir. 1992), by the simple expedient of recasting her claim as an appeal from the order denying restitution.

defendant and the government."); see also Black's Law Dictionary 1122 (6th ed. 1990) (distinguishing between "interested persons" and "parties").

Nor may crime victims "properly become parties" to a criminal prosecution. In civil cases, interested nonparties may become a party by intervening, see Fed. R. Civ. P. 24; *Eisenstein*, 129 S. Ct. at 2234, and a nonparty who intervenes in a civil case acquires the same panoply of rights as an original named party, including "the right to appeal an adverse final judgment by a trial court." *Stringfellow* v. *Concerned Neighbors in Action*, 480 U.S. 370, 375-376 (1987); see *Nichols* v. *Mobile Bd. of Realtors, Inc.*, 675 F.2d 671, 673 (5th Cir. 1982) (same). Like all of the civil rules, however, Civil Rule 24 applies only in "civil actions and proceedings," Fed. R. Civ. P. 1, and "does not apply in a criminal case." *United States* v. *Kollintzas*, 501 F.3d 796, 800 (7th Cir. 2007). As this Court long ago explained, the absence of a criminal-rule analogue to Civil Rule 24 underscores that a nonparty "has no right under the Federal Rules of Criminal Procedure to intervene" in, and hence may not properly become a party to, a criminal prosecution. See *United States* v. *Briggs*, 514 F.2d 794, 804 (5th Cir. 1975).[21/]

[21/] The lack of any rule-based authority to intervene in the Criminal Rules is hardly surprising given the representative nature of such proceedings and the fact that allowing any nonparty, especially a crime victim, to intervene would create an (continued...)

The absence of a mechanism for nonparty intervention in criminal cases reflects an "important distinction between civil and criminal cases." *Hunter*, 548 F.3d at 1315; accord *Aguirre-Gonzalez*, 597 F.3d at 53-54 (endorsing *Hunter*'s civil-criminal distinction for nonparty appeals). Although civil cases often implicate the private, pecuniary interests of third parties, criminal prosecutions are a means of vindicating the public interest by pitting the individual against the sovereign. Nonparties, including crime victims, may have interests in aspects of the case, but "they do not have * * * a comparable unique interest in the outcome." *Id*. at 1312-1313;

[21/](...continued)
unacceptable risk of interference with a prosecutor's ability to carry out his or her constitutional responsibilities. And, even though Amy did not seek to intervene below, we note that the limited body of case law recognizing a common-law right of intervention in criminal cases has been recognized only where the nonparty seeks to assert a unique interest unrelated to the merits of the underlying controversy. Thus, courts have permitted the media to "'intervene[]' in the underlying action for the purpose of challenging [a] closure order" implicating First Amendment rights, see *Chagra*, 701 F.2d at 359; see generally *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980) (recognizing a First Amendment right of access to criminal trials), and they have allowed a third-party privilege holder to intervene to seek to quash a subpoena, see *Perlman* v. *United States*, 247 U.S. 7, 12 (1918); *In re: Grand Jury Subpoenas*, 561 F.3d 408, 412 (5th Cir. 2009). These narrow exceptions pose no threat to the integrity of the criminal proceeding because the press and the third-party privilege holder are asserting a specific interest that only they possess and that only they can assert. Their intervention thus poses no risk of encroaching on a prosecutor's exercise constitutional prerogatives because, unlike crime victims, these nonparties are not seeking to shape or influence the outcome of that proceeding: they are not intervening, in other words, because they want to influence the sentence that the defendant should receive, but instead are intervening to vindicate a specific right that is collateral to, and distinct from, the merits of the criminal case itself.

cf. *Linda R.S.* v. *Richard D.*, 410 U.S. 610, 619 (1973) (recognizing that a private citizen lacks standing to contest the government's refusal to prosecute, even when the refusal affected the citizen's ability to secure child support payments).

Although Amy "agrees with the Government that crime victims and other non-parties should not have an unconstrained right to take appeals in criminal cases," Br. 27, she contends that decisions such as *SEC* v. *Forex Asset Mgmt., LLC*, 242 F.3d 325 (5th Cir. 2001), provide a "sensible framework" for analyzing the rights of "non-parties" to appeal in criminal cases. Br. 28. But *Forex* and other cases Amy cites do not provide a helpful framework here because they addressed the appellate rights of nonparties to civil cases, and, as the First and Tenth Circuits have persuasively explained in rejecting similar arguments by victims, the distinction between civil and criminal cases with respect to nonparty appellate review is anything but an "artificial" one. Br. 29 n.9. The better approach, therefore, is to read the general language in the civil cases Amy cites as courts "often read general language in judicial opinions – as referring in context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then

considering." *Illinois* v. *Lidster*, 540 U.S. 419, 424 (2004). As a nonparty, therefore, Amy may not appeal.

This conclusion also accords with a string of post-VWPA decisions in which courts of appeals refused to entertain post-judgment victim appeals of restitution awards. As those courts reasoned, the VWPA did not make the victim "a party to the sentencing proceeding," *United States* v. *Palma*, 760 F.2d 475, 479 (3d Cir. 1985), and therefore, a nonparty victim could not file a valid notice of appeal from the final judgment in a criminal case. See, *e.g.*, *United States* v. *Grundhoefer*, 916 F.2d 788, 793 (2d Cir. 1990); *United States* v. *Mindel*, 80 F.3d 394, 397 (9th Cir. 1996); *United States* v. *Kelley*, 997 F.2d 806, 807 (10th Cir. 1993). This Court has cited these decisions to support its conclusion that nonparty crime victims "lack standing to challenge a criminal sentence," *McClure* v. *Ashcroft*, 335 F.3d 404, 412 (5th Cir. 2003), and that a "third-party collateral attack on a final criminal judgment is nonjusticiable." *Id*. at 414. In short, victims who are dissatisfied with a ruling in a criminal case affecting their interests, including a restitution order, have the right to challenge that ruling through a mandamus petition, but they have no right to challenge that ruling in a

post-judgment appeal.[22/]

2. Nonparty Crime Victims May Not Appeal An Adverse Restitution Decision Under 28 U.S.C. § 1291.

Amy contends that pre-CVRA precedents recognize the rights of nonparty crime victims to appeal from the final judgment against a criminal defendant pursuant to 28 U.S.C. § 1291. Br. 24-29. She is mistaken.

a. As an initial matter, Section 1291 is irrelevant to this case. Amy's appeal concerns the denial of a request for restitution, which is part of Paroline's sentence. Jurisdiction over sentencing appeals, in turn, does not

---

[22/] To decide the appealability issue, the Court need only conclude that Amy is not a party and may not become a party to a criminal prosecution. The legal status of a crime victim in relation to a criminal case may fluctuate depending on the forum in which they are proceeding and the relief they are seeking. For example, a victim is entitled by the CVRA to file a motion in the district court despite their nonparty status, and they are considered a "movant." 18 U.S.C. § 3771(d)(1). If the victim is dissatisfied with the court's ruling, the victim may seek mandamus review, in which case the victim would be a party to their own mandamus petition. See Fed. R. App. P. 21(a)(1). But once the district court proceedings conclude with the entry of final judgment, a victim who is dissatisfied with the result lacks the capacity to notice an appeal even if the victim previously participated in the case. Cf. *City of Winter Haven* v. *Gillespie*, 84 F.2d 285, 287 (5th Cir. 1936) (nonparties could not appeal the entry of a decree despite their participation in the district court proceedings leading to its entry); *Moten* v. *Bricklayers, Masons & Plasterers, International Union of America*, 543 F.2d 224, 227 (D.C. Cir 1976) (dismissing "for want of jurisdiction," a notice of appeal filed by nonparties who participated in the district court proceedings). If, however, the government or a defendant notices an appeal in a criminal case, a victim may participate in the appeal, if they so desire, in the traditional way in which nonparties participate in appeals: by filing a brief as an *amicus curiae* under Fed. R. App. P. 29, just as Amy has done in the related *Wright* appeal. See also, *e.g.*, *United States* v. *Chiaradio*, No. 11-1290 (1st Cir.) (*amicus* brief filed by a nonparty crime victim in support of the government's defense of a restitution award the victim's favor).

emanate from the general grant of general authority in Section 1291, but instead comes from the more specific grant of authority in 18 U.S.C. § 3742. See *United States* v. *Reano*, 298 F.3d 1208, 1209 (10th Cir. 2002) (exercising jurisdiction over an appeal of a restitution award under Section 3742); cf. *Comacho* v. *Texas Workforce Comm'n*, 408 F.3d 229, 236 (5th Cir. 2005) (noting the "fundamental rule of statutory interpretation" that "specific provisions trump general provisions"). By its terms, Section 3742 authorizes only the parties to a criminal case – "the defendant" and "the Government," 18 U.S.C. § 3742(a), (b) – to appeal the defendant's sentence. The absence of any mention of nonparty crime victims among the persons who may appeal a sentence indicates that Congress did not envision that nonparties may initiate independent sentencing appeals. See *Rhorer* v. *Raytheon Engineers*, 181 F.3d 634, 642 n.11 (5th Cir. 1999) ("the express mention of one thing implies the exclusion of others").[23/]

Section 1291 would not permit victim sentencing appeals even if it applied. Section 1291 expressly addresses *what* may be appealed – "all final decisions of the district courts of the United States," 28 U.S.C. § 1291 –

[23/] If Congress wanted to authorize nonparty sentencing appeals, it could have amended Section 3742 to permit such appeals when it enacted the CVRA, and its failure to do so confirms that it did not contemplate such appeals.

rather than *who* may appeal, but that merely begins the inquiry because in determining the statute's scope, the Court must account for the century's worth of Supreme Court precedent barring appeals that existed in 1948 at the time Section 1291 was enacted. Due respect for Congress demands no less, as it is "not only appropriate but also realistic to presume that Congress was thoroughly familiar with [the relevant] precedents * * * and that it expected its enactment to be interpreted in conformity with them." *North Star Steel Co.* v. *Thomas*, 515 U.S. 29, 34 (1995). That presumption carries even greater force in this case because the background precedents at issue concern a "well established * * * common-law principle." *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991). These rules do not require Congress to adhere to precedent and relevant common-law principles when it legislates; instead, they create a working presumption that Congress intended to adhere to precedent and the common law and leave it to Congress to displace that presumotion, when it so desires, by "speak[ing] directly to the question addressed by the common law." *United States* v. *Texas*, 507 U.S. 529, 534 (1993). Section 1291 is silent on the issue addressed by the common law – who may appeal – and such silence operates to leave those default rules in effect. See, *e.g.*, *United States* v.

Bestfoods, 524 U.S. 51, 63-64 (1998) ("failure of the statute to speak" to a pre-existing common law rule prevents the conclusion that Congress abrogates that rule). Properly construed, therefore, Section 1291 does not contemplate nonparty appeals in a criminal case. Contrary to Amy, an interpretation of Section 1291 that takes into account these governing interpretive rules does not "invent[] new restrictions absent from the plain language of Section 1291," Br. 27, but simply applies a well-settled mode of statutory analysis to determine the statute's intended scope.

b. The small handful of decisions Amy cites are not to the contrary. In *Briggs* and *Chagra*, for example, this Court entertained nonparty appeals from pretrial rulings involving discrete legal issues unrelated to the merits of the case. *Briggs* was an appeal by nonparties from an order denying their pre-trial motion to expunge references to their names from the indictment, where they had been identified as unindicted coconspirators, 514 F.2d at 797, and *Chagra* involved a newspaper's appeal from a pretrial order restricting its access to a bail reduction hearing. 701 F.2d at 360. Amy is not pursuing an appeal of a pretrial order unrelated to the merits, however; rather, she is attempting to pursue a post-judgment appeal from the final judgment in a criminal case to which she is not a party, and the relief she

seeks bears directly on the merits of the case because it would "require[] the court to disturb the sentence imposed." *Aguirre-Gonzalez*, 597 F.3d at 54. Indeed, when the Tenth Circuit was confronted with this precise argument, it declined the victim's invitation to extend *Briggs*, *Chagra*, and similar decisions, including *United States* v. *Doe*, 666 F.2d 43 (4th Cir. 1981) (nonparty rape victim appealed a pretrial rape-shield ruling), beyond the pre-trial setting in which they arose, explaining that "[t]o our knowledge, there is no precedent – nor any compelling justification – for allowing a non-party, post-judgment appeal that would reopen a defendant's sentence and affect the defendant's rights." *Hunter*, 548 F.3d at 1315; *Aguirre-Gonzalez*, 597 F.3d at 54 (same).

The remaining out-of-circuit decisions Amy cites are equally unavailing. *United States* v. *Kones*, 77 F.3d 66 (3d Cir. 1996), entertained an appeal by a victim whose request for restitution had been denied, but in doing so, the court simply stated that it had jurisdiction over the appeal pursuant to Section 1291, *id*. at 68. In declining to follow *Kones*, the D.C. Circuit explained that its "persuasive value on this point is negligible" because the government did not dispute the court's jurisdiction and the court's discussion of the issue "was one sentence long and devoid of

discussion." *Monzel*, 641 F.3d at 541 n.13; see also *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 91 (1998) ("drive-by jurisdictional rulings" where jurisdiction is "assumed by the parties[] and * * * assumed without discussion by the Court" have "no precedential effect"). It is doubtful that even the Third Circuit would follow *Kones*' fleeting reference to Section 1291 in a subsequent case where the court's appellate jurisdiction was disputed. Cf. *Chong* v. *District Director, INS*, 264 F.3d 378, 383 (3d Cir. 2001) (declining to entertain an appeal simply because the court had exercised jurisdiction over a similar issue in a prior case where the jurisdictional issue was not contested).

In re: Siler, 571 F.3d 604 (6th Cir. 2009), entertained appeals from an order denying two crime victims' requests for access to the defendant's presentence report for use in a subsequent civil suit. The court recognized that the victims were not "technically parties below," and noted the general rule against nonparty appeals, *id*. at 608, but concluded that the victims were "effectively treated * * * like intervening parties" who could appeal, *id*.; but see *Briggs*, 514 F.2d at 804 (concluding that nonparties may not intervene in a criminal case). *Siler*, however, did not involve a challenge to a restitution order that would have interfered with the defendant's final

judgment, see *Aguirre-Gonzalez*, 597 F.3d at 54, and in any event, the Sixth Circuit has more recently held that *Siler* does not permit a putative victim to appeal a decision declining to award restitution when (as here) the victim also filed a mandamus petition raising "identical issues." *In re: Acker*, 596 F.3d 370, 373 (6th Cir. 2010). Amy's reliance on *Siler* overlooks *Acker*'s rejection of that decision's analysis on facts comparable to this case.

Amy's reliance on the divided opinion in *United States* v. *Perry*, 360 F.3d 519 (6th Cir. 2004), is even further afield because that case allowed a victim to appeal an order adversely affecting the victim's ability to *enforce* an order of restitution – not, as here, an order *denying* restitution. 360 F.3d at 522; see also *Amy II*, 636 F.3d at 196 (describing *Perry* as involving an appeal of a decision relating to the "district court's method of enforcing the restitution order"). The victim's appeal in that case thus posed no threat to the judgment against the defendant because the validity of the restitution order was not at issue. *Id*. Here, by contrast, an order granting Amy the relief she seeks would require the reopening of the final judgment against Paroline, see, *e.g.*, Fed. R. Crim. P. 32(k)(1) (judgment of conviction must set forth, inter alia, "the sentence"), an unprecedented form of relief, see

Hunter, 548 F.3d at 1315.[24/]

B. The CVRA Reaffirms The Common Law Rule Barring Nonparty Appeals.

Contrary to Amy, the CVRA does not disturb the pre-CVRA rule barring nonparty appeals; in fact, the statute reaffirms it by allowing the government, and only the government, to raise the denial of a victim's rights in "any appeal." 18 U.S.C. § 3771(d)(4).

1. Congress had a wide range of options available to it when it adopted the CVRA. For instance, Congress could have altered the legal status of crime victims by making them co-parties with the government to a criminal prosecution, as Congress has done in certain *qui tam* cases, see 18 U.S.C. § 3730(c)(1) (*qui tam* relators may "continue as a party" to a False Claims Act case after the government intervenes), or given victims the capacity to intervene at their option and thereby become a party, cf. 26 U.S.C. § 6110(d)(3) (allowing nonparty intervention in certain tax

---

[24/] Amy contends that she is entitled to appeal because the Third and Sixth Circuits, in their pre-CVRA decisions in *Kones* and *Perry*, permitted crime victims to appeal, and that the CVRA, as remedial legislation favoring victims, should not be read to narrow the preexisting remedies which, she contends, were available to crime victims prior to its passage. Br. 29-33. The most obvious flaw with this argument is that, even assuming these courts allowed crime victims to appeal restitution orders, but see pp. 63-64, *supra*, "a plurality of circuits did not," and therefore, "[t]here was no settled right of appeal for the CVRA to narrow." *Monzel*, 641 F.3d at 543; see also pp. 57-58, *supra* (discussing post-VWPA, pre-CVRA cases dismissing victim appeals of restitution orders).

proceedings). But Congress chose neither of these options: the CVRA does not accord victims "formal party status," *United States* v. *Rubin*, 558 F. Supp. 2d 411, 417 (E.D.N.Y. 2008), and it does not require (or even permit) intervention, see *Brandt* v. *Gooding*, 636 F.3d 124, 136 (4th Cir. 2011) ("[T]he CVRA's plain language makes no reference to intervention; the Act therefore grants no privilege, much less an unconditional right, to intervene."). Or, more radically, Congress (in theory) could have given crime victims the power to initiate criminal prosecutions, or required prosecutors to act as representatives of crime victims rather than society as a whole. Once again, Congress did not do so. See 18 U.S.C. § 3771(d)(6) (CVRA should not be construed "to impair the prosecutorial discretion of the Attorney General or any officer under his direction").

Instead, Congress took a more balanced approach: it gave nonparty crime victims an array of rights, along with the unprecedented power to enforce those rights in the district court (and, if necessary, in an appellate court, by way of a mandamus petition). But Congress made the choice to make crime victims "an active participant in the [criminal justice] process," Goodwin § 12:12, at 488, within the existing framework of a two-party public prosecution model of criminal prosecutions in which federal

prosecutors exercise their traditional prosecutorial discretion. See Erin C. Blondel, *Victims' Rights In An Adversary System*, 58 Duke L.J. 237, 259-260 (2008) (explaining that the CVRA accommodates the interests of victims but "reaffirms prosecutorial discretion," and thereby reflects "Congress['s] * * * preference that the executive, not victims, prosecute criminal cases").

2. The D.C., First, and Tenth Circuits – the only three circuits to decide the issue – all agree that victims may not appeal and that mandamus is their exclusive remedy. As these courts have explained, various provisions of the CVRA support this conclusion. Subsection (d)(3) permits victims to seek mandamus review, but not appellate review, which implies Congress did not contemplate victim appeals. *Hunter*, 548 F.3d at 1315 ("Given that the CVRA contains this express remedy [of mandamus], we are reluctant to read additional remedies – including the right to a direct appeal – into it."). Similarly, subsection (d)(4) states that, in "any appeal" in the criminal case, "the Government" may assert as error the denial of a crime victim's rights. See 18 U.S.C. § 3771(d)(4). By referencing "the Government" as the lone actor who may "appeal," Congress excluded nonparty victims from appealing. *Aguirre-Gonzalez*, 597 F.3d at 55 ("The government alone may bring a direct appeal of a defendant's sentence on

behalf of a victim denied his rights under the CVRA."). Subsection (d)(5) sets forth the limited circumstances under which a crime victim may seek to reopen a guilty plea or sentence, one of which is that the victim must have successfully petitioned the court of appeals "for a writ of mandamus." 18 U.S.C. § 3771(d)(5)(A). Congress's failure to provide for reopening of a sentence following a successful victim "appeal" confirms yet again that it did not contemplate such appeals. *Hunter*, 548 F.3d at 1316.

Finally, any doubts whether the CVRA should be construed to permit such appeals should be resolved against that reading in light of subsection (d)(6) of the statute, which expressly states that the statute should not be construed to "impair the [government's] prosecutorial discretion." 18 U.S.C. § 3771(d)(6). The conduct of litigation in which the United States is a party is "reserved to officers of the Department of Justice, under the direction of the Attorney General," 28 U.S.C. § 516, and the Attorney General has delegated to the Solicitor General the responsibility for "[d]etermining whether, and to what extent, appeals will be taken by the Government to all appellate courts." 28 C.F.R. § 0.20(b). Congress has permitted the government to appeal certain sentences in a criminal case subject to "the personal approval of the Attorney General, the Solicitor

General, or a deputy solicitor general designated by the Solicitor General." 18 U.S.C. § 3742(b). This provision accords "top representatives of the United States in litigation the prerogative to seek or forgo appellate correction of sentencing errors," and it "should garner the Judiciary's full respect." *Greenlaw* v. *United States*, 554 U.S. 237, 246 (2008). Allowing nonparty crime victims to appeal when the government has decided to "forgo appellate correction" would not accord "full respect" to the legislative judgment embodied in Section 3742(b). As the Tenth Circuit explained in *Hunter*, "[i]f individuals were allowed to re-open criminal sentences after all issues have been resolved – including any mandamus petitions by victims – then the government's prosecutorial discretion would be limited. A successful appeal by the [victims] would require a new sentencing hearing that could lead to a new sentence. * * * Section 3771(d)(6) shows that Congress did not intend to allow non-party appeals that could disturb th[e government's] judgment." 548 F.3d at 1316.

III. THE DISTRICT COURT CLEARLY AND INDISPUTABLY ERRED BY DENYING AMY ANY RESTITUTION, AND AMY IS THEREFORE ENTITLED TO A WRIT OF MANDAMUS.

Because the CVRA makes a petition for a writ of mandamus a crime victim's exclusive remedy, the remaining question is whether Amy is entitled to mandamus relief – *i.e.*, whether she has satisfied the traditional mandamus standard adopted in *Dean*. In the government's view, Amy has met that demanding standard: the district court indisputably erred in denying her any restitution once it found that she was a victim of Paroline's offense with identifiable losses.

The writ of mandamus is "one of the most potent weapons in the judicial arsenal," and accordingly, three conditions "must be satisfied" before the writ will issue, *Cheney*, 542 U.S. at 380 (internal quotation marks and citation omitted): "[f]irst, the party seeking issuance of the writ must have no other adequate means to attain the relief he desires – a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process. Second, the petitioner must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable. Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate

under the circumstances." *Id*. at 380-381 (internal quotation marks and citations omitted; alterations deleted); see *Dean*, 527 F.3d at 394 (applying the same standard to CVRA mandamus petitions); accord *In re: Fisher*, 640 F.3d 645, 647 (5th Cir. 2011) (reaffirming *Dean*), reconsideration denied, 649 F.3d 401, cert. denied, 132 S. Ct. 1075 (2012).

Two of these conditions can be disposed of summarily. Amy's nonparty status deprives her of the capacity to appeal, which suffices to show that she has no other remedy. See *Monzel*, 641 F.3d at 540 (so holding with respect to Amy); see also *Amy I*, 591 F.3d at 793 ("the first [mandamus] requirement is fulfilled because [Amy] likely has no other means for obtaining review of the district court's decision not to order restitution"). And, assuming Amy would otherwise be entitled to the writ, there are no countervailing factors rendering its issuance inappropriate in this case. Compare *Dean*, 527 F.3d at 395-396 (declining to issue mandamus to remedy the denial of a crime victim's pre-plea right to confer with the government because the record showed that the victims were given

"substantial and meaningful participation" at a subsequent hearing).[25/]

The determinative question, therefore, is whether the district court committed clear and indisputable error. For the reasons set forth at greater length in our concurrently-filed supplemental en banc brief in *United States* v. *Wright*, No. 09-31215, the district court committed clear and indisputable error by finding that Amy was a victim with identifiable losses but denying her any restitution. The district court found that the government had "met its burden" of showing that Amy was a "victim" of Paroline's offense because she suffered emotional and psychological harm as a result of Paroline's possession of her images. USCA5 1286. The court recognized that Section 2259 reflects Congress's intent to "clearly mandate[]" an award of restitution for exploited child victims, such as Amy, USCA5 1282, who are harmed as a result of an offense, including the possession of the victim's

---

[25/] Amy concedes that "[u]nder conventional mandamus standards, issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed." Br. 14. She contends, however, that the statutory requirement that courts of appeals "take up and decide" a victim's mandamus petition serves as "a clear statement that Congress meant to overrule discretionary mandamus standards." *Id.*; see also *id*. at 15-18. She is mistaken. The requirement that courts of appeals take up and decide" a mandamus petition says nothing about the substantive standards that govern review of a mandamus petition, much less compel the conclusion that Congress intended to eliminate the traditionally discretionary nature of mandamus relief. See *Monzel*, 641 F.3d at 537 (rejecting this argument); cf. *Texas*, 507 U.S. at 534 (statutes will not be construed to abrogate a background principle of the common law unless they "speak directly to the question addressed by the common law").

images, *id*., and it found that it was "undisputed" that Paroline's offense involved the possession of two images of Amy, *id*. The district court then found that Amy had suffered losses, and that her entitlement to restitution depended on a showing that her losses proximately resulted from Paroline's offense, *id*.[26/] And, though the court noted that many of Amy's losses were clearly attributable to the abuse inflicted by her uncle, it found it "equally clear" that "significant losses are attribut[able] to the widespread dissemination and availability of [Amy's] images and the possession of those images by many individuals *such as Paroline*." USCA5 1294 (emphasis added); see *id*. (expressing "no doubt" that "everyone involved with child pornography – from the abusers and producers to the end-users and

---

[26/] Insofar as Amy contends that the district court committed indisputable error in concluding that Section 2259 conditions the victim's recovery on a showing that all categories of compensable losses proximately resulted from the offense, she has not shown that the district court erred, much less "clearly and indisputably erred." *In re: Occidental Petroleum Corp.*, 217 F.3d 293, 295 (5th Cir. 2000). In its initial decision in December 2009 denying Amy's mandamus petition, this Court rejected Amy's argument in this regard, noting that "[c]ourts across the country ha[d] followed and applied the proximate-cause requirement in imposing restitution under Section 2259." *Amy I*, 591 F.3d at 794 (citing decisions from the Third and Ninth Circuits, and several district courts). Since that time, five more circuits have held that Section 2259(b)(3) requires proof of proximate cause for all categories of losses. See *United States* v. *Kearney*, — F.3d —, 2012 WL 639168, at *13 (1st Cir. Feb. 23, 2012); *United States* v. *Evers*, 669 F.3d 645, —, 2012 WL 413810, at *10-11 (6th Cir. Feb. 10, 2012); *United States* v. *McGarity*, 669 F.3d 1218, —, 2012 WL 370104, at *38 (11th Cir. Feb. 6, 2012); *United States* v. *Aumais*, 656 F.3d 147, 153 (2d Cir. 2011); *United States* v. *Monzel*, 641 F.3d 528, 536-537 (D.C. Cir. 2011). Amy has shown no error in the district court's recognition of a proximate-cause requirement.

possessors – contribute to Amy's ongoing harm"). Taken together, these undisputed findings "necessarily require the conclusion that the Government and [Amy] established that [Amy] has suffered losses proximately caused by Paroline's wrongful conduct." *Amy I*, 591 F.3d at 796 (Dennis, J., dissenting). As a consequence, the district court's failure to award Amy any "mandatory" restitution, 18 U.S.C. § 2259(b)(4), was indisputably erroneous.

The only remaining issue relates to the determination of how much of Amy's overall losses are attributable to Paroline's conduct. That is an issue that must be decided on remand. See *Amy II*, 636 F.3d at 201 (granting mandamus but "offer[ing] no opinion on the amount of restitution due" because the district court "is best qualified" to decide that issue in the first instance). As we explain in our *Wright* brief, federal district courts and courts of appeals are continuing to grapple with this admittedly difficult issue, and there is no consensus approach. But one thing is clear: the fact that it may be "difficult to determine * * * the precise amount [Amy] is owed by Paroline" does not provide a basis for refusing to award her any restitution. *Amy I*, 591 F.3d at 797 (Dennis, J., dissenting). To conclude otherwise, as the district court did, would "impermissibly nullif[y] * * * the

intent and purposes of Section 2259," *id.*, which are "to compensate the victims of sexual abuse for the care required to address the long-term effects of their abuse." *United States* v. *Laney*, 189 F.3d 954, 966 (9th Cir. 1999); see also *United States* v. *Kearney*, — F.3d —, 2012 WL 639168, at * 14 (1st Cir. Feb. 29, 2012) (declining to construe Section 2259 in a manner that "would functionally preclude any award of restitution * * * for possession and distribution offenses" because it would undermine "congressional intent"). Indeed, the D.C. Circuit concluded that Amy was entitled to a writ of mandamus when she challenged a restitution award from a possessor of her images, see *Monzel*, 641 F.3d at 544, and two other circuits have affirmed restitution awards in favor of Vicky, another exploited child victim depicted in images of child pornography. See *Kearney*, 2012 WL 639168, at *17 (upholding $3,800 counseling award against a possessor/distributor); *United States* v. *McDaniel*, 631 F.3d 1204, 1209 (11th Cir. 2011) (upholding a $12,700 counseling award against a possessor).

The fact that three courts of appeals have defined proximate cause in a manner that is so restrictive that it denied Amy any restitution does not negate Amy's entitlement to mandamus. These opinions expressly disclaim any intent to "categorically foreclose payment of restitution to victims of

child pornography from a defendant who possesses their pornographic images." *United States* v. *Aumais*, 656 F.3d 147, 155 (2d Cir. 2011). Nor would their faulty reasoning apply to the particular facts of Paroline's case anyway. The Second Circuit emphasized that Amy's losses could not have been proximately caused by Aumais' conduct "as a matter of law" because Aumais committed his offense *after* Dr. Silberg prepared her report (in November 2008) addressing Amy's psychological injuries and need for counseling. See *id.*; see also *United States* v. *McGarity,* 669 F.3d 1218, —, 2012 WL 370104, at *38 (11th Cir. Feb. 6, 2012) (agreeing with *Aumais*' "relatively straightforward determination" that proximate cause cannot exist when the defendant was arrested after Dr. Silberg prepared her report). Paroline, in contrast, pleaded guilty to an information charging him with possessing Amy's images "[o]n or about July 11, 2008," USCA5 14, several months *before* Dr. Silberg completed her report. It is unclear how these circuits would rule in a case such as this.

In *United States* v. *Kennedy*, 643 F.3d 1251 (9th Cir. 2011), the court of appeals vacated a restitution award in Amy's favor based on a lack of evidence, rather than a categorical legal determination, *id.* at 1263-1264, and, in any case, the *Kennedy* decision was swiftly and roundly criticized by

a subsequent panel for "set[ting] too narrow of a causation standard" and ignoring "Congress's intent to fully compensate victims of child pornography." *United States* v. *Aguirre*, 448 Fed. Appx. 670,at *2-*3 (9th Cir. 2011) (unpub.) (Callahan, J., concurring specially, joined by Tallman and N.R. Smith, JJ.). *Aguirre* provides no reason to believe that *Kennedy* is that circuit's last word on the topic.

In any event, as we explain in our brief in *Wright*, the First Circuit in *Kearney* has very recently exposed the deep analytical flaws with *Kennedy*, *Aumais*, and *McGarity*. This Court should follow the First Circuit's lead and reject these decisions' embrace of a rigorous proximate-cause standard that focuses on the absence of proof of the specific harms caused by an individual defendant, rather than the aggregate harms caused by possessors. Applying that framework, Amy is entitled to a writ of mandamus, and this Court should therefore grant her mandamus petition and remand the case to the district court with instructions to calculate an appropriate restitution award using the proper causation standard.

CONCLUSION

In No. 09-41238, the Court should grant Amy's petition for a writ of mandamus and remand the case to the district court with instructions to the court to determine the extent to which Amy's claimed losses proximately resulted from Paroline's offense, and to calculate an appropriate award of restitution for Amy.

In No. 09-41254, the Court should dismiss Amy's appeal for lack of jurisdiction.

Respectfully submitted,

LANNY A. BREUER
Assistant Attorney General

JOHN M. BALES
United States Attorney

JOHN D. BURETTA
Acting Deputy Assistant Attorney General

TRACI L. KENNER
AMANDA L. GRIFFITH
Assistant United States Attorneys
Eastern District of Texas

By: *Michael A. Rotker*

MICHAEL A. ROTKER
Attorney, Appellate Section

United States Department of Justice
Criminal Division
950 Pennsylvania Ave, NW, Suite 1264
Washington, D.C. 20530
(202) 514-3308

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Fed. R. App. P. 32(a)(7)(C), that the foregoing Brief for the United States is set in a proportionally spaced typeface (Calisto MT, 14-point type in the body and 12-point in the footnotes) and that it contains 17,741 words, as determined by WordPerfect 12 software, which does not exceed the 18,000 word-limit authorized for this brief permitted by this Court's March 16, 2012, order in this case.

Michael A. Rotker

MICHAEL A. ROTKER
Counsel for the United States

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a true and correct copy of the foregoing Brief for the United States to be served this 26th day of March 2012, by the Court's ECF system, on Paul G. Cassell, Esq. and James R. Marsh, Esq., counsel for Amy, and F.R. "Buck" Files, Jr., counsel for Paroline; and that (1) required privacy redactions have been made; (2) the electronic submission is an exact copy of the paper document; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

Michael A. Rotker

MICHAEL A. ROTKER
Counsel for the United States