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In The
Supreme Court of the United States
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ARTHUR W. STAPLES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether restitution is part of a criminal sentence such that waiver of the right to appeal “any sentence” bars a defendant from appealing the amount of restitution imposed pursuant to Title 18 United States Code § 2559.

2. If restitution is part of a criminal sentence, whether the petitioner’s waiver of his right to appeal sentence nevertheless barred the Court of Appeals from reviewing the legality of an award of over \$3.68 million for medical expenses and lost wages to a woman whose uncle had sexually abused and photographed her and placed her image on the internet where years later it was downloaded by the petitioner and likely thousands of others, the victim had no contact with the petitioner and was unaware of his existence, and the government claimed that no proximate cause between the petitioner’s acts and the victim’s damages need be shown.

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IN THE SUPREME COURT OF THE UNITED
STATES

No. ____

ARTHUR W. STAPLES, PETITIONER,

-vs-

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

Arthur W. Staples respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The order of the court of appeals (App. A, *infra*) dismissing the petitioner's appeal is unreported. The memorandum opinion of the district court awarding restitution (App. B, *infra*) is reported at 2009 U.S. Dist. LEXIS 81648 (S.D. Fla. Sept. 2, 2009).

JURISDICTION

The order of the court of appeals was entered on December 20, 2010. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced in an appendix to this petition (App. C, *infra*.)

STATEMENT

This case raises the question of whether restitution is part of a criminal sentence so that waiver of the right to appeal "any sentence" includes waiver of a potentially unbounded amount of restitution. The courts of appeal are divided on this question. As recently noted:

The use of restitution as a tool in the arsenal of federal judges when sentencing a defendant has led to a contentious debate over the exact purpose of a restitution order. This discussion has centered around whether restitution imposed during a sentencing is considered criminal punishment, a civil sanction designed exclusively to compensate victims without regard for the punitive functions of restitution, or some amalgam of these two goals. The explicit function of restitution has not been defined by the U.S. Supreme Court in the context of [the various restitution statutes]. And yet the answer to the civil-criminal question has direct ramifications for convicted defendants facing sentences that include restitution orders.

* * *

The granting of a petition for certiorari by the Supreme Court on an appropriate case to decide the character of restitution authorized by [restitution statutes] would go a long way towards resolving this tension and creating uniformity in this facet of the sentencing of criminal defendants in the federal court system.

Brian Kleinhaus, Note, *Serving Two Masters: Evaluating The Criminal Or Civil Nature Of The*

VWPA And MVRA Through The Lens Of The Ex Post Facto Clause, The Abatement Doctrine, And The Sixth Amendment, 73 Fordham L. Rev. 2711, 2712-2715 (2005) (footnotes omitted).

The petitioner was indicted in both the Southern District of Florida and the Eastern District of Virginia for child pornography offenses. In Florida, he was charged with transmission of an image of child pornography, a violation of 18 U.S.C. § 2252(a)(1). In Virginia, he was charged with both distribution of and possession of child pornography, violations of 18 U.S.C. §§ 2252A(A)(2) and 2252A(a)(5)(B). The Virginia case was transferred to the Southern District of Florida pursuant to Fed. R. Crim. Pro. 20, where the petitioner entered guilty pleas to all charges. Both plea agreements required that petitioner waive his right to appeal his sentence, though the Florida agreement specifically included a waiver of the right to appeal restitution while the Virginia agreement did not. Two months after imposing a combined sentence of 210 months incarceration, the district court held a hearing on restitution. Over objection, the court awarded restitution in the Virginia case in the amount of \$3.68 million to the single victim. App. B, *infra*, at b1. The court of appeals dismissed petitioner's appeal of the restitution award, concluding that he had waived all appellate rights including his right to appeal the amount of restitution. App. A, *infra*, at a3.

1. 18 U.S.C. § 2559 (the "Violence Against Women Act," referred to herein as the "VAWA"), mandates that, "in addition to any other civil or

criminal penalty authorized by law, the court shall order restitution for any offense under this chapter.” The procedure for determining restitution is found at 18 U.S.C. § 3664. That section provides that “if the victim’s losses are not ascertainable by the date that is 10 days prior to sentencing,” a date for the final determination of the victim’s losses can be set as long as “90 days after sentencing.” Further, the law provides that “[i]f the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order.”

2. Arthur W. Staples III, 65, was a two-tour veteran of Vietnam, a Bronze Star recipient, a deputy sheriff, a husband to his high school sweetheart, and a father. He had no prior arrests. On December 5, 2008, he responded to an undercover police officer who had entered an Internet “chat” room called “parenting one.” The two discussed their interest in young children, and the officer sent Mr. Staples a photograph of an 11-year-old girl. Staples responded by sending the officer a single image of child pornography.¹ He said he had other images as well. The two spoke further that evening, on the computer and by telephone, and agreed to speak again.

Staples had identified himself by his true middle name, Wes, and had truthfully told the officer that he lived in Northern Virginia. Several days later, the officer was able to confirm that Wes’

¹ This image was not an image of “Amy,” the victim in this case.

telephone number belonged to Arthur Weston Staples, who lived with his wife in Manassas, Virginia. He also learned that Staples was a deputy sheriff in Prince William County, Virginia.

Armed with that information, a local search warrant was obtained for Staples' home and computers. Staples was home at the time of the search. He acknowledged sending the single image to the undercover officer and acknowledged as well having more images on his computer. He told the officers where they could find a thumb drive which contained those images. He told the officers when he began viewing child pornography and gave other details of his actions. Eventually, numerous images of child pornography were found on Staples' electronic media.

3. Two charges were eventually brought against Staples in the United States District Court for the Eastern District of Virginia – distribution of child pornography (the image he had sent to Florida), and possession of child pornography – and a single charge of transmission of child pornography was brought against him in the United States District Court for the Southern District of Florida (based upon the same image which formed the Virginia charge). By agreement, the Virginia charges were transferred to Florida. Staples pleaded guilty to all three charges. On June 8, 2009, he was sentenced to 210 months in prison followed by Supervised Release for life, along with other conditions of Supervised Release.

Four days before the sentencing hearing, the government filed a motion to continue, stating that it

had just become aware that a victim desired restitution. The United States wanted time to investigate and present evidence concerning restitution (the probation officer specifically found that there was no information regarding restitution at the time of preparation of the Pre-Sentence Report). The court denied the government's motion to continue the sentencing date, but set a separate restitution hearing for August 10th.

On that day, the government presented three witnesses including James Marsh, the attorney for "Amy." Marsh testified that pornographic pictures of "Amy" were created by her uncle when "Amy" was eight years old, and had been distributed over the Internet since that time. "Amy" is now 20. Marsh identified a report containing seven detailed tables which, he testified, was prepared by Dr. Smith, an economist he had hired, detailing the lost earnings and health costs projected for "Amy" through age 81. Marsh testified that there were currently 730 cases in the courts in which people had been charged with criminal offenses in which images of "Amy" were involved since 2005, and that he had filed claims for restitution in 211 of them.

Clinical psychologist Jovanna Silberg then testified that she had conducted an evaluation of "Amy" in 2008. She recounted "Amy's" description of the abuse she suffered as a child at the hands of her uncle. He had routinely sexually abused her, attempting vaginal intercourse and digital penetration with her, and had made numerous photographs of her which he distributed to others on the Internet. She had been sworn to secrecy by him

but revealed the abuse after the pictures' existence became known.

Silberg testified that "Amy" had received therapy for the abuse between the ages of nine and eleven. At the conclusion of that therapy, she was "back to normal." She did well in school and was outgoing. However, according to Dr. Silberg, she began failing in high school and abusing alcohol, something Dr. Silberg concluded coincided with her awareness that her pictures were being circulated on the Internet. Dr. Silberg described the impact of that knowledge on "Amy," and predicted that she would need life-long weekly therapy, perhaps several times weekly if her stress level increased, perhaps institutionalization, alcohol rehabilitation services and an opportunity for rehabilitative services. She provided all this information to Dr. Smith, the economist, who then prepared actuarial tables predicting the future cost of these services. Smith did not testify at the hearing. His report had been submitted by Marsh in every case considering his claim for restitution for "Amy."

There was no evidence that "Amy" was aware of Staples or his possession of her image on his computer. The absence of such knowledge would not have affected Dr. Silberg's conclusions. She testified that her findings were based on the effect of a "class of individuals who invaded ["Amy's"] privacy." Indeed, at the time Dr. Silberg did her evaluation of Amy, Staples had not been charged with any offense and was unknown to the government.

Along with many other arguments, defense counsel argued that Staples had merely possessed images of "Amy," did not know her, had never met

her, and that “Amy’s” damages, to the extent they were proven, were not proximately caused by Staples’ act (the government argued that no proof of causation was required). He argued that tying her injury to his act was speculative. He argued that there had been no proof to the required degree of scientific certainty concerning the damages she claimed. The government never alleged any distribution of “Amy’s” photo by Staples and the court specifically found that its award of restitution was predicated on Staples’ mere possession of “Amy’s” image.

The court found that “Amy” was a victim and, without discussion, that she was harmed by the defendant’s act of being the possessor of her image. The court awarded restitution in the amount of \$3,204,353 for lost future wages and benefits through age 67, and \$475,800 for future treatment and counseling through age 81, for a total of \$3,680,153.

4. Staples appealed the amount of restitution claiming that his Virginia plea agreement – unlike the Florida agreement signed by the same prosecutor – specifically omitted reference to waiving issues surrounding restitution. He also argued that the amount of restitution was so extraordinary, and ordered without proof of any causation by him, that the court could review it notwithstanding the waiver. The court of appeals dismissed the appeal: “Because we conclude restitution is included as part of the phrase “any sentence” in the Virginia plea agreement, the waiver applies.” App. A, *infra*, at a3.

REASONS FOR GRANTING THE PETITION

There is a deep split in the circuits on the issue of whether restitution is part of a criminal sentence or rather compensation to an injured victim. Neither the plain text of the relevant statutes, nor the history of what is understood to be a criminal sentence supports the notion that restitution is included. Indeed, the procedures concerning how restitution may be ordered (for example, allowing restitution to be ordered years after a sentence of incarceration is imposed), defeat any contrary notion. As the press of claims illustrated by this case grows, the importance of this issue grows with it.

Just as important is the issue of whether, despite an appeal waiver, the propriety of an order of restitution can *never* be reviewed even where the award is extraordinary and its nexus to the defendant's acts is scant. This is particularly so because the open-ended nature of restitution (unlike a criminal sentence which has an upper limit) gives no notice to a defendant of what he may face after waiving his right to appeal.

In any event, the court of appeals erred here in finding that there was a waiver of the right to appeal restitution. That aside, the restitution ordered here lacked any nexus to the defendant's act, and was so excessive that review was proper.

**A. The Courts Of Appeal Are Split On
Whether Restitution Is Part Of A
Criminal Sentence.**

The courts of appeal disagree whether restitution is a criminal sanction or a remedy for victims. The split extends beyond the issue of the scope of a defendant's waiver of appeal rights, and includes, for example, whether restitution is a criminal penalty under *ex post facto* analysis, compare *United States v. Siegel*, 153 F.3d 1256, 1259-1261 (11th Cir. 1998) (retrospective application of the MVRA violates the Ex Post Facto Clause), with *United States v. Newman*, 144 F.3d 531 (7th Cir. 1998) (retroactive imposition of restitution under the Mandatory Victims Restitution Act of 1996, 18 U.S.C. § 3663A ("MVRA"), does not violate the Ex Post Facto Clause).

**1. Courts Adopting The View That
Restitution Is Not A Criminal
Sanction**

The Seventh Circuit has given the most in-depth explanation of why restitution is not a criminal sanction. In *United States v. Newman*, *supra*, the court held that restitution ordered pursuant to the Mandatory Victims Restitution Act of 1996 (MVRA), 18 U.S.C. § 3663A was not a criminal punishment subject to an *ex post facto* prohibition even though the MRVA was not in effect at the time of the underlying crime. "[W]e do not believe that restitution qualifies as a criminal punishment. Restitution has traditionally been

viewed as an equitable device for restoring victims to the position they had occupied prior to a wrongdoer's actions," citing the *Restatement of Restitution*. 144 F.3d 531, 538. The court reached that conclusion after employing the seven point analysis used in *Hudson v. United States*, 522 U.S. 93 (1997), in which this Court determined that a civil commitment statute did not impose punishment, thus did not violate the *ex post facto* clause.

Both the Eighth and Tenth Circuits share this view. See *United States v. Carruth*, 418 F.3d 900, 903 (8th Cir. 2005) ("Restitution is designed to make victims whole, not to punish perpetrators [citation omitted]. It is essentially a civil remedy created by Congress and incorporated into criminal proceedings for reasons of economy and practicality."); *United States v. Serawop*, 505 F.3d 1112, 1123-24 (10th Cir. 2007) ("In the Tenth Circuit, restitution is not criminal punishment [citation omitted]," noting split in the circuits).²

² The Ninth Circuit, though holding that restitution is an aspect of criminal punishment, has noted nevertheless that, "[t]he purpose of restitution is to make the victims whole while the Sentencing Guidelines serve a punitive purpose." *United States v. Crandall*, 525 F.3d 907, 916 (9th Cir. 2008). The Fifth Circuit as well, though holding restitution to be punitive, has said that "[t]here are strong arguments to be made that the goal of the [Victim and Witness Protection Act] is compensatory. . . . Indeed, the very title of the VWPA -- "The Victim and Witness Protection Act" -- might lead one to believe that the point behind the VWPA is compensation, not

2. Courts Adopting The View That Restitution Is A Criminal Sanction

The view of these three circuits has been rejected by the First, Second, Third, Fourth, Sixth, Ninth and Eleventh Circuits. *United States v. Ziskind*, 471 F.3d 266, 270 (1st Cir. 2006) (“Restitution ordered as part of a criminal sentence is a criminal penalty, not a civil remedy.”); *United States v. Olidimeji*, 463 F.3d 152, 156 (2d Cir. 2006) (“Without a doubt, a restitution order is part of the sentence.”)³; *United States v. Sleight*, 808 F.2d 1012, 1020 (3d Cir. 1987) (restitution “remains inherently a criminal penalty”); *United States v. Bruchey*, 810 F.2d 456, 461 (4th Cir. 1987) (noting “the as yet uncharted waters of criminal restitution law” . . . “which rests with one foot in the world of criminal procedure and sentencing and the other in civil procedure and remedy,” but holding that “because it is part of the sentencing process it is fundamentally ‘penal’ in nature.”); *United States v. Rico Industries, Inc.*, 854 F.2d 710, 714 (5th Cir. 1988) (“Restitution is a criminal penalty.”); *United States v. Vandenberg*, 201 F.3d 805, 814 (6th Cir. 2000) (“Restitution is part of one’s sentence”); *United States v. Ramilo*, 986 F.2d 333, 336 (9th Cir. 1993) (“Under the [VWPA], restitution is part of the criminal sentence.”); *United States v. Satterfield*, 743 F.2d

retribution or the like.” *United States v. Sheinbaum*, 136 F.3d 443, 447 (5th Cir. 1998).

³ But see *United States v. Bocagna*, 450 F.3d 107, 115 (2d Cir. 2006) (“[P]urpose of restitution is essentially compensatory. . . .”).

827, 837 (11th Cir. 1984) (“There can be little doubt that Congress intended the restitution penalties of the VWPA to be incorporated into the traditional criminal structure.”).

3. Courts Refusing To Decide If Waivers Of The Right To Appeal A Criminal Sentence Include Waiver Of The Right To Appeal Restitution

Adding to the discord, the First, Fifth and the Tenth Circuits have refused to decide whether waivers of the right to appeal a sentence include waiver of the right to appeal a restitution award, see *United States v. Salas-Fernandez*, 620 F.3d 45, 47 (1st Cir. 2010) (“We see no need to plunge into these murky waters today. Courts should not decide unsettled issues, especially where a division of actual authority exists.”); *United States v. Smith*, 528 F.3d 423, 424 (5th Cir. 2008) (“We decline to address the issue of whether general appeal waivers bars review of restitution orders when the plea agreement does not discuss restitution.”); *United States v. Cooper*, 498 F.3d 1156, 1159 (10th Cir. 2007) (“We have yet to determine whether a general waiver of the right to appeal a ‘sentence’ necessarily includes a waiver of the right to appeal all restitution awards.”).

4. Courts Allowing Appeals Of Restitution Despite Waiver Of Sentence Appeal

The Second, Seventh, Eighth and Ninth Circuits have specifically allowed appeals of restitution orders despite waiver of the right to appeal sentence. See *United States v. Oladimeji*, 463 F.3d 152, 156 (2d Cir. 2006) (waiver of right to appeal sentence did not include waiver of right to appeal restitution); *United States v. Behrman*, 235 F.3d 1049, 1052 (7th Cir. 2000) (waiver of right to appeal “any sentence within the maximum provided in the statute[s] of conviction” does not bar restitution appeal); *United States v. Sistrunk*, 432 F.3d 917 (8th Cir. 2006) (right to appeal restitution not included in waiver of “all rights conferred by Title 18 Sec. 3742 to appeal his sentence. . . .”); *United States v. Zink*, 107 F.3d 716, 717-18 (9th Cir. 1997) (general waiver does not bar review of restitution order).

5. Courts Finding Waiver Of Restitution Appeal Based On Sentence Waiver

Finally, the Third, Fourth, Sixth and Eleventh Circuits have held that a general waiver includes waiver of the right to appeal restitution, see *United States v. Montani*, 313 Fed. Appx. 550, 551 (3d Cir. 2009); *United States v. Cohen*, 459 F.3d 490, 497 (4th Cir. 2006); *United States v. Gibney*, 519 F.3d 301, 306 (6th Cir. 2008); *United States v. Staples*, *supra*.

Given the widely divergent views of the courts of appeal, guidance from this Court is appropriate.

B. The Decision Of The Court Of Appeals Is Incorrect.

1. The court of appeals was simply wrong in finding that Staples waived his right to appeal restitution. Courts have long held the government to a heightened level of fairness in plea agreements, mandated by constitutional considerations, and strictly construe the language of such agreements against the government. See, for example, *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986). This is particularly so where waivers of rights are at issue. See *United States v. Gustama*, 156 Fed. Appx. 214 (11th Cir. 2005).

Here, the United States drafted two agreements, one in the Florida case, and one in the Virginia case. The Florida agreement was specific concerning the right to appeal restitution (“[the defendant] hereby waives all rights conferred by Section 3742 to appeal any sentence imposed, including any restitution order”) The Virginia agreement, on the other hand, made no mention of such a waiver (“[the defendant] waives the right to appeal the conviction and any sentence within the statutory maximum. . . .”) Restitution was ordered in the Virginia case, not the Florida case. Staples was not on notice that he was waiving the right to complain about restitution in that case, and given the Florida language, his belief was a reasonable one.

2. That aside, the court of appeals was wrong to characterize restitution as part of the criminal sentence, thus barred from review on appeal, because the restitution statute makes clear that its goal is to make victims whole, not to punish defendants. The Act provides that a convicted defendant shall “pay the victim . . . the full amount of the victim’s losses as determined by the court . . .”

Most notably, Title 18 U.S.C. § 3664, which provides the procedure for the issuance and enforcement of restitution, provides that determination of the amount of restitution may take place well after “sentencing,” and, the ability of the court to order further restitution is not bounded by any time limit. Subpart (d)(5) provides:

If the victim’s losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim’s losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

Thus, restitution might be ordered well after a defendant has been sentenced and the judgment has become final. If restitution is truly part of sentence, this raises issues concerning a defendant's ability to appeal, as well as a defendant's right to know his sentence and to have sentence imposed without unreasonable delay.⁴

3. Beyond all that, the amount of restitution in this case was so shocking that the court of appeals had a duty to review it even if its finding of waiver was correct. This Court has approved waivers in many contexts while noting that some may be so broad as to bring disrespect to the judicial system if condoned. See, for example, *Wheat v. United States*, 486 U.S. 153, 162 (1988) (court may decline a defendant's waiver of his right to conflict-free counsel); *United States v. Mezzanatto*, 513 U.S. 196, 204 (upholding waiver of rights under Fed. R. Crim. Pro. 11(e)(6) and Fed. R. Evid. 410, but quoting *United States v. Josefik*, 753 F.2d 585, 588 (7th Cir. 1985) ("No doubt there are limits to waiver; if the parties stipulated to trial by 12 orangutans the defendant's conviction would be invalid notwithstanding his consent, because some minimum of civilized procedure is required by

⁴ "The court must impose sentence without unnecessary delay." Fed. R. Crim. Pro. 32(b)(1). Delay in imposition of sentence may violate the due process clause of the Fifth Amendment as well as the speedy trial guaranty of the Sixth Amendment. See, for example, *United States v. Lovasco*, 431 U.S. 783 (1977).

community feeling regardless of what the defendant wants or is willing to accept").

An unreviewable award of \$3.68 million may be as shocking as trial by orangutans. That the vast array of courts considering "Amy's" identical claims for restitution against other mere possessors of her image have all rejected it outright, or awarded only nominal restitution, is some evidence of how extreme the district court's order in *Staples* was. See *United States v. Berk*, 666 F. Supp. 2d 182, 188 (D. Me. 2009) (Order on Restitution) (rejecting Amy's claim for restitution, court noting that the district court in *Staples* offered no discussion of the required proximate cause); *United States v. Paroline*, 672 F. Supp. 2d 78 (E.D. Tex. 2009) (rejecting Amy's claim for restitution); *United States v. Van Brackle*, No. 2:08-CR-042-WCO, 2009 U.S. Dist. LEXIS 117655 (N.D. Ga. Dec. 17, 2009) (restitution claim rejected); *United States v. Faxon*, 689 F. Supp. 2d 1344 (S.D. Fla. 2010) (Amy's restitution claim rejected by United States Magistrate Judge who accepted Staples' guilty plea, court finding that no sufficient proof was offered to establish that the defendant, a possessor of Amy's images, was responsible for her damages, noting nevertheless the ruling by the district court in *Staples*); *United States v. Woods*, 689 F. Supp. 2d 1102 (N.D. Iowa 2010) (refusing restitution); *United States v. Aumais*, No. 08-CR-711 (GLS), 2010 U.S. Dist. LEXIS 78407 (N.D.N.Y. Jan. 13, 2010) (awarding \$48,483 in transportation case); *United States v. Mather*, No. 1:09-CR-00412 AWI, 2010 U.S. Dist. LEXIS 136783 (E.D. Cal. Dec. 10, 2010) (awarding \$3,000); *United States v. Chow*, No. 09-CR-165 (KMK), 2010 U.S. Dist. LEXIS 140506

(S.D.N.Y. 2010) (refusing restitution); *United States v. Church*, 701 F. Supp. 2d 814 (W.D. Va. 2010) (awarding \$100); *United States v. Aguirre*, No. 1:08-CR-00434-AWI, 2010 U.S. Dist. LEXIS 43144 (ED Cal. Apr. 1, 2010) (awarding \$3,000); *United States v. Scheidt*, No. 1: 07-CR-00293 AWI, 2010 U.S. Dist. LEXIS 6683 (E.D. Cal. Jan. 8, 2010) (awarding \$3,000); *United States v. Zane*, No. 1:08-CR-0369 AWI, 2009 U.S. Dist. LEXIS 80347 (E.D. Cal. Aug. 14, 2009) (awarding \$3,000); *United States v. Monk*, No. 1:08-CR- 0365 AWI, 2009 U.S. Dist. LEXIS 80344 (ED Cal. Aug. 18, 2009) (awarding \$3,000); *United States v. Covert*, No. 09-332, 2011 U.S. Dist. LEXIS 3992 (W.D. Pa. 2011) (refusing restitution). See also, *In Re Amy*, 591 F.3d 792 (5th Cir. 2009) (denying mandamus to Amy from refusal of district court to grant restitution).^{5, 6}

⁵ A second victim, “Vicky,” has also widely sought restitution against possessors of her image. Her claims have likewise been rejected or resulted in nominal awards. See, for example, *United States v. Rowe*, No. 1:09cr80, 2010 U.S. Dist. LEXIS 98458 (W.D.N.C. Sept. 7, 2010) (restitution refused); *United States v. Solsbury*, 727 F.Supp. 2d 789 (D. N.D. 2010) (restitution refused); *United States v. Strayer*, No. 8:08CR482, 2010 U.S. Dist. LEXIS 62719 (D. Neb. June 24, 2010) (restitution refused); *United States v. Patton*, No. 09-43 (PAM/JSM), 2010 U.S. Dist. LEXIS 24232 (D. Minn. Mar. 16, 2010) (restitution refused).

⁶ Compare these cases with *United States v. Baker*, 672 F. Supp. 2d 771 (E.D. Tex. 2009), the court there

4. Assuming that restitution is part of a criminal sentence, the award of over \$3.6 million in restitution in this case, where the petitioner merely possessed the victim's picture years after it was taken by another and placed on the internet, and had no involvement in her sexual abuse, was also unconstitutional under the "excessive fines" cause of the Eighth amendment. A fine is excessive if it is grossly disproportional to the nature of the offense. *United States v. Bajakajian*, 524 U.S. 321, 337 (1998). Counsel can find no ruling from this Court concerning the application of the excessive fines clause to restitution as opposed to fines, and it appears that only one circuit has resolved that issue. See *United States v. Dubose*, 146 F.3d 1141, 1144 (9th Cir. 1998) (restitution subject to excessive fines prohibition). Assuming the Eighth Amendment does apply, the award here was clearly excessive: "[W]here a district court awards over \$3 million in restitution for the offense of possessing six depictions of a victim, it seems hard to suggest the payment extracted is not vastly disproportionate to the gravity of the act of possession." Dennis F. DiBari, Note, *Restoring Restitution: The Role of Proximate Causation In Child Pornography*

ordering restitution in a pornography *production* case in the amount of \$150,000, making reference to the statutory amount established by 18 U.S.C. § 2255; *United States v. Ferenci*, No. 1:08-CR-0414 AWI, 2009 U.S. Dist. LEXIS 80339 (E.D. Cal. Aug. 18, 2009) (same).

Possession Cases Where Restitution Is Sought, 33 Cardozo L. Rev. at 21 (forthcoming 2011-2012), available at <http://ssrn.com/abstract=1761501>.

5. Most fundamentally, the circuit court had a duty to review the district court's restitution order because it completely ignored the bedrock requirement that causation be proved between the defendant's acts and the victim's harm. See *Berk, supra*, 666 F. Supp. 2d 182, 188 ("without an individualized inquiry into the amount of losses proximately caused by the defendant's conduct, there would be no proportionality. The court is concerned that a restitution order of this kind could run afoul of the Eighth Amendment."); *Paroline, supra*, 672 F. Supp. 2d 781, 789 ("a restitution order under section 2259 that is not limited to losses proximately caused by the defendant's conduct would under most facts . . . violate the Eighth Amendment.") Indeed, several courts have noted the absence of any discussion of causation by the *Staples* district court, and, the government argued in the district court that causation *was not required to be proven* under § 2259.⁷ Given that position – a position rejected by every court to consider the issue, *see supra* – the court of appeals had a duty to decide the issue.

⁷ In the Eleventh Circuit, the government conceded that causation was required, but of course, the court never reached the issue of whether it had been proven.

**C. The Question Presented Is Of Substantial
And Recurring Importance.**

The importance of this case goes beyond the \$3.68 million award of restitution against Arthur Staples. Evidence at the restitution hearing in this case established that there were, at that time, 730 cases in the courts since 2005 in which people had been charged with criminal offenses in which images of “Amy” were involved. Amy had filed for restitution in 211 of those. Needless to say, the courts have been busy with the issues raised in this petition.

Given the number of cases in which defendants have sought to appeal restitution awards after waiving the right to appeal their “sentence,” the issue about the nature of restitution under the VAWA is clearly a recurring one and one which may continue to consume judicial resources as victims come to understand the remedy Congress has made available to them. The issues raised here also touch broader concerns, including whether, if a criminal sanction, restitution is subject to *ex post facto* analysis; if speedy trial considerations apply when restitution awards are made or changed years after sentence is final; whether the excessive fines clause of the Eighth Amendment applies to restitution; and of course, the correct formulation of the causation requirement:

The issue of causation is the central reason why possession cases are so problematic for many district courts. . . .
The only link defendants have to their

victims, is, of course, the physical possession of their image. It is difficult for courts to even begin to quantify the amount of harm done to the victim by the defendant's possession of their depiction. In addition, most victims have experienced the trauma of multiple crimes and therefore have different layers of victimization; isolating the damage done by the original abuse, the production, the distribution and the end-use possession has been described as an "evidentiary nightmare." Simply put, courts are stumbling over causation before they award restitution in possession cases because they have great difficulty linking the defendant's act to the victim's harm. * * * Awarding restitution for the offense of possession runs the risk of holding defendants liable for harm they did not actually cause. The unique causation issues involved in possession cases should raise the judicial eyebrow [W]ithout heightened scrutiny in this area, a court's passivity can threaten the integrity of criminal restitution and the maintenance of rational limits on criminal liability.

Dennis F. DiBari, Note, *Restoring Restitution: The Role of Proximate Causation in Child Pornography Possession Cases Where Restitution is Sought*, 33

Cardozo L. Rev. (forthcoming 2011-2012)
(manuscript at 2).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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March 11, 2011

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