No. 11-85

IN THE
Supreme Court of the United States

AMY, THE VICTIM IN THE "MISTY" CHILD PORNOGRAPHY SERIES ,
Petitioner,

v.

MICHAEL M. MONZEL, ET AL.,
Respondent.

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

BRIEF IN OPPOSITION

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October 17, 2011 * Counsel of Record

QUESTIONS PRESENTED

1. Under 18 U.S.C. § 2259, district courts "shall direct the defendant to pay the victim . . . the full amount of the victim's losses," which losses are defined by the statute by six different categories of costs incurred by the victim. 18 U.S.C. § 2259(b)(3). Does the "proximate result" language contained in §2259(b)(3)(F) apply only to that subsection, or to all six categories of costs?

2. Under 18 U.S.C. § 3771(d)(3), aggrieved crime victims must petition for a writ of mandamus when they wish to contest a district court's restitution order in a criminal case. What standard of review should courts apply to §3771(d)(3) mandamus petitions, and is direct appellate review available under 28 U.S.C. § 1291 to crime victims who wish to appeal a restitution order?

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REASONS FOR DENYING THE WRIT

Neither of the questions presented by the petition warrant the Court's review.[1] The petition makes three separate arguments, and this brief will respond to each.

1. Petitioner contends that the circuits are divided on the question whether all restitution ordered under 18 U.S.C. § 3771(d)(3) must be the "proximate result" of the offense. That is not the case. The opinion of the D.C. Circuit here comports with that of four other circuits to have reached the question and one special concurrence by a panel of the Fifth Circuit. Only one other panel in the Fifth Circuit reasons differently.

The Second, Third, Ninth and Eleventh Circuits have all read § 2259 as containing a general proximate cause requirement. See *United States* v. *Aumais*, No. 10-3160-cr, 2011 WL 3926922 (2d Cir. Sept. 8, 2011); *United States* v. *McDaniel*, 631 F.3d 1204 (11th Cir. 2011); *United States* v. *Laney*, 189 F.3d 954 (9th Cir. 1999); *United States* v. *Crandon*, 173 F.3d 122 (3d Cir. 1999). One panel of the Fifth Circuit has held to the contrary in another case brought by this Petitioner. See *In re Amy*, 636 F.3d 190 (5th Cir. 2011).

In that case, Fifth Circuit held that the availability of restitution under § 2259 was not limited by a general proximate cause requirement, but rather that

[1] The second question presented by Petitioner actually conflates two separate questions: 1.) the standard of review governing mandamus petitions filed by crime victims; and, 2.) whether review by direct appeal is available to crime victims.

defendants could be liable for all the costs imposed on a crime victim.[2] *In re Amy*, 636 F.3d at 200–01.

Shortly thereafter, a different Fifth Circuit panel was presented with the same question. That panel followed the earlier Circuit precedent and applied *In re Amy*. See *United States* v. *Wright*, 639 F.3d 679, 683 (5th Cir. 2011) (per curiam) (reh'g petition pending). However, all three judges of the *Wright* panel concurred specially to express their disagreement with the holding from *In re Amy*. See *id.* at 686, 692 (Davis, J., specially concurring) ("I write separately to express my disagreement with the recent holding by the *In re Amy* panel . . . Judges King and Southwick join in this special concurrence."). The special concurrence in *Wright* argued that the Fifth Circuit "should follow every other circuit court . . . considering this issue," and recommended that the case be consolidated with *In re Amy* for rehearing *en banc*. *Id.* at 692. A petition for rehearing *en banc* is currently pending.[3]

In light of its own internal division, the special concurrence's call for *en banc* consideration and the Fifth Circuit's disagreement with the other courts of appeals that have considered the question, rehearing is likely, in spite of Petitioner's

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[2] A Fifth Circuit panel initially held that Petitioner was only entitled to restitution for costs incurred as a proximate result of the defendant's conduct. *See In re Amy*, 591 F.3d 792 (5th Cir. 2009), *rev'd*, 636 F.3d 190 (5th Cir. 2011). The later *In re Amy* decision granted Amy's petition for rehearing and her mandamus petition.

[3] Petitioner Amy was the victim to whom restitution was awarded in *United States* v. *Wright*. In a transparent effort to prevent the Fifth Circuit from rehearing the case and to preserve the contrary ruling, Amy's counsel has sought to withdraw her requests for restitution in *Wright* and *In re Amy*. Letter from Appellant Mr. Michael Wright, *Wright*, 639 F.3d 679. However, because restitution under § 2259 is mandatory, any purported withdrawal of a request ought not to affect the pending rehearing petition in *Wright*.

attempt to avoid that result.[4] Thus, the division of authority that Petitioner contends exists as to the proximate cause requirement is exceedingly lopsided and highly tenuous. There is no reason for this Court to review the question presented in this case or at this time.[5]

2. Petitioner further contends that the circuits are in disagreement over the standard of review applicable to mandamus petitions filed under the Crime Victims' Rights Act (CVRA). Pet. 30–34. While Petitioner points to the use of differing language among the circuits - traditional mandamus versus abuse of discretion – such differences are of no consequence analytically or practically.[6] Indeed, Petitioner here obtained relief under the (ostensibly less favorable) traditional mandamus standard of review.

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[4] *See, e.g., Reliable Consultants, Inc.* v. *Earle*, 538 F.3d 355, 356 (5th Cir. 2008) (Jones, C.J., dissenting from denial of rehearing en banc) (dissenting because, among other reasons, the panel decision created a conflict with the decisions of other circuits); *United States* v. *Chapa-Garza*, 262 F.3d 479, 480 n.1 (5th Cir. 2001) (Barksdale, J., dissenting from denial of rehearing en banc) ("Edith H. Jones, Circuit Judge, concurs in this dissent to the extent that the difficulty of statutory construction in this case and the far-reaching significance of the panel decision should have motivated our court to rehear this case en banc.").

[5] Petitioner contends that the instant case is a strong vehicle given counsel's participation. Amy is represented by counsel in every case where she has made a claim, however, including the *Wright* case in which rehearing is pending in the Fifth Circuit. *See United States* v. *Wright*, 639 F.3d 679 (5th Cir. 2011) (per curiam) (reh'g petition pending); *see also United States* v. *Aumais*, No. 10-3160-cr, 2011 WL 3926922; *United States* v. *Kennedy*, 643 F.3d 1251 (9th Cir. 2011).

[6] Petitioner also overstates the extent of the split. She claims that four circuits have decided that the standard of review for CVRA mandamus petitions is not traditional mandamus review (though she acknowledges that one such circuit—the Third Circuit—did so in an unpublished opinion). Pet. 30–31. However, the Eleventh Circuit, which Petitioner claims affords crime victims "ordinary appellate review," *id.* (citing *In re Stewart*, 552 F.3d 1285, 1288 (11th Cir. 2008)) has not actually resolved this question—in considering a subsequent mandamus petition in the same case, the Eleventh Circuit acknowledged that the standard of review it applied in *In re Stewart* was ambiguous, but declined to clarify because it "ma[de] no difference." *In re Stewart*, 641 F.3d 1271, 1274 (11th Cir. 2011) (per curiam).

Four circuits, including the D.C. Circuit in this case, currently apply traditional mandamus review to CVRA mandamus petitions. See Pet. App. 9–10; *In re Acker*, 596 F.3d 370 (6th Cir. 2010); *In re Dean*, 527 F.3d 391 (5th Cir. 2008); *In re Antrobus*, 519 F.3d 1123 (10th Cir. 2008). Under this standard, a petitioner must show "(1) she has a clear and indisputable right to relief; (2) the district court has a clear duty to act; and (3) no other adequate remedy is available to her." Pet. App. 9 (citing *Power* v. *Barnhart*, 292 F.3d 781, 784 (D.C. Cir. 2002)).

In contrast, the Ninth Circuit applies an "abuse of discretion or legal error" standard. *Kenna* v. *U.S. Dist. Ct. for C.D. Cal.*, 435 F.3d 1011, 1017 (9th Cir. 2006). Similarly, the Second Circuit reviews restitution orders challenged by CVRA mandamus petitions for "abuse of discretion." *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 563 (2d Cir. 2005).

As the D.C. Circuit recognized below, CVRA mandamus petitions will, practically speaking, only require courts to consider the first prong of the traditional mandamus test Pet. App. 11, for the reason that there is no doubt that the CVRA, which requires that restitution "shall" be awarded, imposes a duty on the district court to act. 18 U.S.C. § 2259(a). Further, since direct appellate review is unavailable to crime victims wishing to contest a restitution order, Pet. App. 27–28, the CVRA mandamus petition will always be the only adequate remedy available. The functional test for CVRA mandamus petitions is thus whether petitioner has a clear and indisputable right to relief.

That test, however, is not analytically different from an "abuse of discretion" in any significant respect. Numerous courts have explained that a "clear and indisputable" error *is* an abuse of discretion. See*, e.g., RZS Holdings AVV* v. *PDVSA Petroleo S.A.*, 506 F.3d 350, 356 (4th Cir. 2007) ("By definition, a district court abuses its discretion when it makes an error of law." (citation omitted)); *United States* v. *McDaniel*, 398 F.3d 540, 544 (6th Cir. 2005) ("[I]t is an abuse of discretion to make errors of law or clear errors of factual determination." (citation omitted)); *Woodard* v. *Fanboy, L.L.C.*, 298 F.3d 1261, 1268 n.14 (11th Cir. 2002) ("Legal error is an abuse of discretion" (citations omitted)); see also *S.E.C.* v. *Rajaratnam*, 622 F.3d 159, 171 (2d Cir. 2010) ("We will issue the writ [of mandamus] only if a district court committed a 'clear and indisputable' abuse of its discretion." (citation omitted)).

Nor does Petitioner demonstrate that the difference between a mandamus standard and an abuse of discretion standard has practical affect. Many courts of appeals have declined to characterize the "proper" standard of review, explaining that the choice of one or the other standard would not be outcome determinative. See*, e.g.*, *In re Stewart*, 641 F.3d 1271, 1274 (11th Cir. 2010) (per curiam) (mandamus petitioner was not entitled to relief regardless of standard of review); *United States* v. *Aguirre-Gonzalez*, 597 F.3d 46, 56 (1st Cir. 2011) (same). Even the circuits that apply the theoretically more lenient standard provide evidence that the standard of review does not make a difference. All three of the Second Circuit cases applying the "abuse of discretion" standard have nevertheless denied relief to CVRA

mandamus petitioners. See *In re Local No. 46 Metallic Lathers Union*, 568 F.3d 81 (2d Cir. 2009); *In re Rendon Galvis*, 564 F.3d 170 (2d Cir. 2009); *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555 (2d Cir. 2005). Indeed, the Ninth Circuit acknowledged in *Kenna* that the case before it might have "merit[ed] review even under the strict standard" typically applied to mandamus petitions. *Kenna*, 435 F.3d at 1017.

Even if this circuit split caused divergent outcomes sufficient to merit the Court's review, this case is not a good vehicle. The D.C. Circuit applied the traditional mandamus review that the Petitioner complains is improper, but it nevertheless granted Petitioner relief (by remanding to the district court for the calculation of additional restitution). Pet. App. 36. Petitioner's case therefore bears out the argument above that the standard of review is not outcome determinative—despite a less favorable standard of review, Petitioner obtained relief from the court of appeals. Petitioner therefore was not harmed by the D.C. Circuit's application of the traditional mandamus standard of review.

3. Petitioner argues that the court of appeals erred in dismissing her direct appeal for lack of jurisdiction. The D.C. Circuit's decision, however, was demonstrably correct. Petitioner's dispute is with Congress, which made an unequivocal selection of mandamus as the sole method of seeking review. Further. Petitioner overstates the extent to which the courts of appeals are divided on the availability of direct appellate review of restitution awards. There is not a genuine circuit split on this issue.

As the D.C. Circuit pointedly observed, "[s]ince the enactment of the CVRA, every circuit to consider the question has held that mandamus is a crime victim's only recourse for challenging a restitution order." Pet. App. 27 (citing *United States* v. *Aguirre-Gonzalez*, 597 F.3d 46, 52–55 (1st Cir. 2011); *United States* v. *Hunter*, 548 F.3d 1308, 1317 (10th Cir. 2008)). The D.C. Circuit was merely applying the longstanding rule that crime victims cannot directly appeal a defendant's sentence. Pet. App. 29–31.

The cases the Petitioner cites in support of her claim that "[o]ther circuits . . . have allowed crime victims to directly appeal both restitution and other issues" Pet. 35 are unavailing. Petitioner only identifies two cases in which courts of appeals permitted restitution-related appeals. *Id.* at 36. Specifically, Petitioner cites *United States* v. *Perry*, 360 F.3d 519 (6th Cir. 2004), and *United States* v. *Kones*, 77 F.3d 66 (3d Cir. 1996). Neither case, however, dealt with restitution awarded under the CVRA – in fact, both cases were decided before CVRA was even enacted. Neither case therefore holds that a direct appeal is an alternative avenue of relief in the CVRA and thus neither challenges the unanimous holdingss of the courts of appeals that have construed the CVRA on this question. There is good reason for that unanimity. As the DC Circuit recognized, there is a "rule against direct appeals of sentences by crime victims," and "[t]he CVRA does not alter this rule."[7] Pet. App. 31. Thus, there is no circuit split here for the Court to resolve. In

[7] Moreover, the very fact that the CVRA provides mandamus review forecloses the possibility of direct appellate review, because as the D.C. Circuit stated, mandamus is only available where there

addition, the CVRA made mandamus relief available to victims as a substitute for a direct appeal.

4. The court of appeals vacated the restitution order and remanded the case to the district court for further, necessary factual findings and a determination of an appropriate amount of restitution. The decision is therefore interlocutory, a posture that "of itself alone furnishe[s] sufficient ground for the denial" of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); accord *Bhd of Locomotive Firemen & Enginement* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967); *Am. Constr. Co.* v. *Jacksonville T. & K. W. Ry.*, 148 U.S. 372, 384 (1893); *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., concurring) (where court of appeals "vacated the judgment" and "remanded the case to the District Court for determination of an appropriate remedy," the Court should "await final judgment in the lower courts before exercising our certiorari jurisdiction").

The court of appeals noted that the government had presented "relatively little" evidence in the district court regarding restitution, but that it was expected on remand to "do more this time around to aid the district court." Pet. App. 27. The court of appeals also stated that the district court on remand was "free to order the government to submit evidence regarding what losses were caused by Monzel's possession or to order the government to suggest a formula for determining the proper amount of restitution." *Id.* Thus, were this Court to grant certiorari now, the issues would not be sufficiently developed as they will be after remand, when

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is no other adequate remedy. Pet. App. 27 (citing *Power* v. *Barnhart*, 292 F.3d 781, 784 (D.C. Cir. 2002)).

the government can be expected to submit more evidence and/or to propose a formula for determining the proper amount of restitution.

It is no answer to say that the district court cannot develop a more detailed evidentiary record without guidance from the Court as to the proper causation standard under §2259. While the D.C. Circuit recognized that the record did not establish that Respondent owes Petitioner the entire $3,263,758 she seeks, Pet. App. 25, it also noted that there was "little in the [ ] record" to reveal what amount of losses might be attributable to the Mr. Monzel's offense. Pet. App. 27. In the absence of a more detailed record, and in light of the fact that Petitioner has already received at least some of the total damages figure she seeks from other offenders, it is impossible to determine what restitution amount may be appropriate under any standard.

On remand, Petitioner could receive all the relief she seeks, or a satisfactory amount, and decide not to pursue the case further. Even if she does not, she can pursue the writ of mandamus again to the court of appeals and file a writ of certiorari after final judgment has been rendered.

Additionally, as discussed in the context of the applicable standard of review, this case does not present the Court with an proper vehicle to decide this issue. The Petitioner was not denied relief despite the unavailability of direct appellate review, and given the D.C. Circuit's holding on the "proximate result" issue, the Petitioner could not have obtained more favorable relief had direct appellate review been available instead of, or in addition to, the CVRA mandamus petition.

CONCLUSION

For the foregoing reasons, the petition for the writ of certiorari should be denied.

Respectfully submitted,

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