No. 12-651

In The Supreme Court of the United States

AMY AND VICKY, CHILD PORNOGRAPHY VICTIMS,

Petitioners,

v.

JOSHUA OSMUN KENNEDY, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JAMES R. MARSH
MARSH LAW FIRM PLLC
151 East Post Road, Suite 102
White Plains, NY 10601-5210
(212) 372-3030

CAROL L. HEPBURN
CAROL L. HEPBURN PS
2722 Eastlake Avenue East, Suite 200
Seattle, WA 98102-3143
(206) 957-7272

PAUL G. CASSELL
Counsel of Record
APPELLATE LEGAL CLINIC
S. J. QUINNEY COLLEGE OF LAW AT THE UNIVERSITY OF UTAH
332 S. 1400 E., Room 101
Salt Lake City, UT 84112-0730
(801) 585-5202
cassellp@law.utah.edu

Counsel for Petitioners Amy and Vicky

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

REPLY BRIEF OF PETITIONERS AMY AND VICKY

This Court should review a mature, acknowledged, and intractable circuit split that affects millions of dollars in restitution awards in hundreds of federal sex offense prosecutions every year. This case is a good vehicle for reviewing this issue.

I. The Circuit Split Is A Fundamental One With Significant Practical Importance

The legal issue presented by this petition arises frequently. Every year, district court judges sentence more than 2,000 federally convicted sex offenders. Pet. at 20. At sentencing, these judges must decide restitution under a "mandatory" statute. 18 U.S.C. § 2259(b)(4). A recurring issue is what type of causation victims must establish in order to receive restitution: do they have to show that one specific part of their losses are the "proximate result" (i.e., the "proximate cause") of an individual defendant's crime or can they simply recover the "full amount" of their losses from each individual defendant. 18 U.S.C. § 2252(b)(1).

A well-developed circuit split exists among the Courts of Appeals on this question. The Government concedes that the Fifth Circuit en banc disagreed with the rulings of ten other circuits. Gov't BIO at 8. In a well-reasoned decision, ten judges of the Fifth Circuit "reject[ed] the approach of our sister circuits" and concluded there is no general proximate cause

requirement in the statute. *In re Amy Unknown*, 701 F.3d 749, 774 (5th Cir. 2013) (en banc).

The Government claims, however, that the circuit split does not warrant further review because the split is "narrow." Gov't BIO at 10. But the Government never explains how the split will ever be resolved. In other situations, a single circuit might move into alignment with the others, but in this case, the Fifth Circuit en banc specifically rejected the rulings of the other circuits. The only possible resolution, therefore, is through action by this Court.

Leaving the circuit split unresolved – even for a short time – will result in extensive, unnecessary litigation. Given the competing circuit court authorities, defense attorneys handling federal sex offense cases in the Fifth Circuit must raise challenges to a full restitution award in that Circuit's district courts, even though controlling circuit precedent holds that the district courts must award victims full restitution. Defense counsel must then seek to overturn those rulings by appealing to the Fifth Circuit and then filing certiorari petitions in this Court. Such litigation is already occurring. *See, e.g., United States v. Gammon,* No. 11-20902 at 3-5 (5th Cir. Apr. 29, 2013) (rejecting defense challenge to *In re Amy Unknown*).

Conversely, counsel for crime victims[1] must undertake the same protective actions for their clients in the other circuits, challenging any circuit precedent that contradicts the Fifth Circuit's pro-victim position. Similarly, such litigation is already under way in the district courts and the Courts of Appeals. *See, e.g., In re Amy and Vicky*, ___ F.3d ___, 2013 WL 1847557 (9th Cir. May 3, 2013).

The Government's main argument against review is the assertion that the circuit split has "little practical importance." Gov't BIO 10. The Government contends that the circuit split is "better understood as an issue of 'cause in fact,' rather than proximate cause." *Id.* at 12. The Government apparently agrees with Amy and Vicky that the courts of appeals have reached "wildly disparate results in factually identical cases." *Id.* at 11 (*quoting* Pet. 22-24). The Government attributes these disparities, however, not to a proximate cause requirement but to what it calls a "causation" requirement, i.e., the need to sort out losses "where a large number of individuals each contributed in some degree to an overall harm." Gov't BIO 12. The Government then suggests that Amy and Vicky "do not ask this Court to review" this causation question. *Id.* at 11.

The Government is wrong to think that the "widely disparate results" have nothing to do with the

[1] Unfortunately, many crime victims are indigent and lack legal counsel.

statute's proximate cause conundrum. If the Fifth Circuit en banc interpreted Section 2259 correctly, then victims like Amy and Vicky do not need to show what part of their losses an individual defendant caused. Instead, child pornography victims simply receive the "full amount" of their total losses from child pornography crimes from each individual defendant convicted of such crimes. In contrast, if the other circuits correctly interpreted Section 2259, difficult issues arise as to what amount of losses any one defendant (among hundreds or thousands of criminals) proximately caused an individual victim.

This different approach to the statute's proximate cause requirement results in vastly different outcomes for both victims and criminal defendants which is best illustrated by comparing the Ninth Circuit case that is the subject of this petition with the Fifth Circuit case that is the subject of several currently-pending petitions. In the case below, the district court awarded Amy no restitution at all based on Ninth Circuit precedent which imposes a strict proximate cause requirement. *See, e.g.,* Dist. Ct. Doc. #183 at 34 (not awarding restitution because the "submissions on behalf of Amy do not meet the requirements of *proximate cause*, as they do not support a finding that the defendant's conduct caused any

specific loss." (emphasis added)).[2] The Ninth Circuit later affirmed that ruling. App. 3-4.

In contrast, based on a substantively indistinguishable facts (Amy was the victim in both cases), the Fifth Circuit remanded, directing an award of restitution of more than $3 million from defendant Paroline. *See* 701 F.3d at 773-74 (holding that Amy is entitled to restitution for the "full amount" of her losses without regard to proximate cause).

In identical cases, the existence of a proximate cause limitation in the Ninth Circuit and the absence of such a limitation in the Fifth Circuit resulted in a $3 million variation in the size of the restitution award a defendant must pay to the same victim for committing the same crime. Allowing such disparate results contradicts the commitment to fair and equal treatment of criminal defendants – and crime victims[3] – which is a fundamental principle of the federal sentencing system. *See* 18 U.S.C. § 3553(a)(6) (requiring courts to consider "the need to avoid unwarranted

---

[2] The district court also awarded Vicky just $4545.08 in restitution based on the same proximate cause limitation. Dist. Ct. Doc. #183 at 36-37.

[3] While petitioners Amy and Vicky are some of the crime victims most actively seeking restitution, many other victims have claims as well. *See* Emily Bazelon, *The Price of a Stolen Childhood*, N.Y. TIMES MAG., Jan. 24, 2013 (noting that figures from the National Center for Missing and Exploited Children indicate that "hundreds of young people, in their teens and early 20s, could have potential claims for [child pornography] restitution").

sentence disparities among defendants . . . who have been found guilty of similar conduct"); *see also* Br. of Amicus Curiae National Crime Victim Law Institute in Support of Petitioners 11-14 (discussing importance of full restitution for victims).

The Government also wrongly suggests that the so-called "causation" question is missing from Amy and Vicky's petition. This Court has explained that "[q]uestions not explicitly mentioned but essential to analysis of the decisions below or to the correct disposition of the other issues have been treated as subsidiary issues fairly comprised by the question presented." *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 214 n.8 (2006) (internal quotation omitted). The Court below considered the "causation question" incorporated in the proximate cause question. *See* App. 48-52. The Government is raising a purely semantic contention in suggesting that the two issues are not bound together as part of petitioners' question presented regarding *proximate cause* – which includes the issues of both what is "proximate" and what is "cause." It is a distinction without a difference.

If this Court believes that Amy and Vicky's statement of the question presented is somehow too narrow to fairly include the Government's "causation question," the Court can simply rephrase the question or add an additional question specifically about causation. *See, e.g., Unitherm Food Sys., Inc. v. Swift-Eckrich*, *Inc.*, 543 U.S. 1186 (2005) (rephrasing question presented); *Powerex Corp. v. Reliant Energy*

Services, Inc., 544 U.S. 1060 (2007) (adding additional question presented). That will eliminate any conceivable doubt about the scope of the causation question before the Court (although petitioners note that all the briefs in this case already discuss the "causation" question at some length).

Finally, even if the Government is somehow correct that the widely differing restitution results stem in part from a second and entirely separate circuit split on the causation question (Gov't BIO 11), this Court's review is still appropriate in this case. According to the Government, the proximate cause requirement is a "threshold question" to reaching the causation issue. Gov't BIO 11. Accordingly, this Court can never reach the causation issue without first deciding whether Section 2259 contains a general proximate cause requirement. This Court should grant certiorari here (or in the parallel *Paroline* case) and answer the question of whether such a requirement even exists in the statute. If it agrees with petitioners and the Fifth Circuit en banc, then this Court's ruling will completely obviate any need to resolve the split in authority about how to apply the proximate cause requirement. Conversely, if the Court agrees with the Government and the other circuits, then its explanatory decision will help resolve the issue of causation under the proximate cause standard.

II. This Case is a Good Vehicle to Review the Legal Issue Decided Below

This case is an excellent vehicle to review the split among the Courts of Appeals. This petition comes to the Court on a properly-filed crime victims' mandamus petition under the Crime Victims' Rights Act (CVRA). *See* 18 U.S.C. § 3771(d)(3) (allowing crime victims' petitions). While a circuit split exists concerning whether such petitions have to satisfy the heightened requirements for mandamus review, the Ninth Circuit below applied ordinary appellate review. *See* App. 3 (*citing Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1017 (9th Cir. 2006)). Since neither the Government nor Kennedy raised the standard of review issue below, that issue is absent from this case. Accordingly, unlike future petitions from some other circuits which are decided on a heightened standard of review, this petition comes after being decided, straightforwardly, under ordinary appellate standards.

Even if the absent standard of review question is somehow "implicated" by this petition (Gov't BIO 13), the Court does not need to consider the standard of review when considering the purely legal question of statutory interpretation decided below. Amy and Vicky asked the Ninth Circuit to overturn its earlier ruling that Section 2259 contains a general proximate cause requirement. The court below denied that request, noting – as petitioners conceded – that "[t]o change the law of this circuit, petitioners must raise this issue in . . . a petition for writ of certiorari at the

United States Supreme Court." App. 4. By filing their petition for a writ of certiorari in this Court, Amy and Vicky simply followed the Ninth Circuit's instructions.

Another reason the standard of review is not implicated by this petition is that a decision on the issue will make no conceivable difference to the outcome of this petition. Even under heightened mandamus review for clear and indisputable error, a district court commits error if it misinterprets the law. *See, e.g., United States v. Palmer,* 871 F.2d 1202, 1209 (3d Cir. 1989) ("The 'clear and indisputable' test [must be] applied *after* the statute has been construed by the court entertaining the petition."). If Amy and Vicky are correct that the district court and the Court below misconstrued Section 2259 by reading a general proximate cause requirement into the statute, then the decision below should be reversed for that legal error. Conversely, if Amy and Vicky are incorrect, the decision below should be affirmed for properly applying the law. In either event, there is no need to consider the standard of review before the Courts of Appeals.

The Government finally suggests that the Court can only definitively resolve the question of how to interpret Section 2259 by reviewing an ordinary appeal instead of a CVRA mandamus petition. Gov't BIO at 14. But as the Government surely must recognize, waiting for a case in such a posture would make adversarial review of this legal question all but impossible. In ten circuits (such as the Ninth Circuit

below), no such appeal will be brought by either criminal defendants or the Government because the proximate cause issue is resolved in their favor. In the Fifth Circuit, appeals by defendants and the Government are possible, but when such an appeal reaches this Court it will almost certainly stand in a non-adversarial posture. Crime victims are not parties to the underlying criminal case and the Government has repeatedly fought efforts by crime victims to intervene in criminal cases to protect their right to restitution. *See, e.g., U.S. v. Monzel*, No. 12-3100 (D.C. Cir. argued May 10, 2013) (Government opposes motion by crime victim to intervene to seek full restitution). The ultimate result is that cases on direct appeal from the Fifth Circuit will almost always stand in a non-adversarial posture with no party defending the judgment of "full restitution" below. *See, e.g., United States v. Wright*, No. 12-8505.[4] To wait for a good, direct appeal to resolve this issue will effectively mean waiting forever.

[4] The certiorari petition in *United States v. Paroline*, No. 12-8561 is in an adversarial posture because it comes to this Court after a *successful* petition filed in the Court of Appeals by a crime victim (Amy), rather than an appeal to the Court of Appeals by a defendant. Now that the law of the Fifth Circuit is resolved in the victim's favor, however, no further certiorari petitions from victims will be possible from that circuit.

III. Amy and Vicky's Petition Is Timely and Raises Issues They Presented Below

Respondent Kennedy raises two procedural arguments against review. Kennedy BIO 7-11. The Government does not join in these arguments presumably because they are meritless.

Kennedy first contends that Amy and Vicky's petition is somehow "untimely." Kennedy BIO 7. Kennedy apparently is not arguing that Amy and Vicky missed the 90-day deadline for filing a certiorari petition; the Ninth Circuit below ruled on October 24, 2012, and Amy and Vicky filed less than a month later. Instead, Kennedy is arguing that Amy and Vicky should have filed a certiorari petition back in 2011 when the Ninth Circuit first ruled that the statute contains a proximate cause requirement. Kennedy BIO 7-11.

If Amy and Vicky had sought review of the Ninth Circuit's first ruling in 2011, they would have likely encountered the objection that they were premature because the case was in an "interlocutory" posture. *See, e.g.,* Gov't BIO, *United States v. Monzel*, No. 11-85 (arguing against review of a crime victim's "interlocutory" certiorari petition concerning Section 2259 where the D.C. Circuit remanded the matter for further proceedings calculating restitution).

Amy and Vicky were entitled to wait until the district court resolved the restitution matters in this case before seeking appellate review. After the district court's final order denying them full restitution, Amy

and Vicky promptly sought review in the Ninth Circuit within fourteen days. *See* 18 U.S.C. § 3771(d)(5).[5] The Ninth Circuit then reached the merits of their legal claim, ruling against them and reiterating its earlier 2011 decision. App. 4. This Court can now review all aspects of the earlier proceedings below. *See, e.g., Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam).

Kennedy also claims that Vicky did not present her full restitution claim below because she ultimately obtained a partial restitution award. Kennedy does not deny that Amy always presented a claim for full restitution below, both in her initial restitution request in 2010 and in her supplemental papers filed in 2012. *See* Dist. Ct. Doc. #183 at 34 (noting "legal analysis" provided by Amy's attorney).[6] It is undisputed that Amy properly brings the proximate cause issue before this Court. Concerning Vicky, Kennedy does not deny that Vicky sought full restitution in 2010. Kennedy, however, confuses Vicky's alternative fallback position on remand as a concession that she was not entitled to full restitution.

---

[5] Kennedy never explains how the fourteen-day time deadline even applies to this case. The limit is simply inapplicable because Congress specifically exempted a crime victim's right to restitution from that deadline. *See* 18 U.S.C. § 3771(d)(5).

[6] Amy's legal analysis is found in Amy's restitution request (which is part of the sealed record in this case) and spans more than a dozen pages attacking the Ninth Circuit's general proximate cause construction of Section 2259.

Although Vicky preferred to get some small restitution award rather than no award at all, on remand she made it quite clear that she was continuing to assert her original position that she was entitled to full restitution. *See, e.g.,* Dist. Ct. Doc. #186 at 1; Dist. Ct. Doc. #188 at 1.

Following the district court's denial on remand of full restitution based on the proximate cause requirement, Amy and Vicky properly sought review in the Ninth Circuit of that fundamental legal question. The Ninth Circuit reached – and rejected – their argument (App. 4), squarely placing the issue before this Court for further review. 28 U.S.C. § 1251(1).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES R. MARSH
MARSH LAW FIRM PLLC
151 East Post Road, Suite 102
White Plains, NY 10601-5210
(212) 372-3030

CAROL L. HEPBURN
CAROL L. HEPBURN PS
2722 Eastlake Avenue East,
Suite 200
Seattle, WA 98102-3143
(206) 957-7272

PAUL G. CASSELL
Counsel of Record
APPELLATE LEGAL CLINIC
S. J. QUINNEY COLLEGE
OF LAW AT THE
UNIVERSITY OF UTAH
332 S. 1400 E., Room 101
Salt Lake City, UT
84112-0730
(801) 585-5202
cassellp@law.utah.edu

Counsel for Petitioners
Amy and Vicky