NO. 12-8561

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

DOYLE RANDALL PAROLINE	§	**PETITIONER**
	§	
VS.	§	
	§	
THE UNITED STATES OF AMERICA	§	**RESPONDENTS**
and	§	
AMY UNKNOWN	§	

DOYLE RANDALL PAROLINE'S REPLY TO THE GOVERNMENT'S FILING OPPOSING GRANTING OF CERTIORARI

APPEAL CAUSE NO. 09-41238
IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CAUSE NOS. 09-41238 AND 09-41254
IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF TEXAS

F.R. "BUCK" FILES
Bain, Files, Jarrett, Bain & Harrison, P.C.
Texas Bar No. 00000087
109 W. Ferguson St.
Tyler, Texas 75702
(903) 595-3573
Telecopier: (903) 597-7322

Schneider & McKinney, P.C.
STANLEY G. SCHNEIDER*
Texas Bar No. 17790500

TOM MORAN
Texas Bar No. 14422200
440 Louisiana, Suite 800
Houston, Texas 77002
(713) 951-9995
Telecopier: (713) 224-6008

***Attorney in Charge**

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TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

COMES NOW DOYLE RANDALL PAROLINE, Petitioner herein, by and through his attorneys, **STANLEY G. SCHNEIDER, F.R. "BUCK" FILES and TOM MORAN,** and file this reply to the Government's brief opposing grant of certiorari and would show the Court as follows:

I. SUMMARY OF THE ARGUMENTS

This petition centers on whether persons convicted of possession of child pornography can be held jointly and severally liable for *all* damages caused to the child victim regardless of whether the defendant's crime of conviction was the proximate cause of the damages. Paroline finds himself in the unusual situation of agreeing with some of what the Government says. He disagrees, however, with the Government's opposition to granting review in a case in which the Fifth Circuit is the sole outlier among all of the courts of appeals.

Conflicts among the circuits is one of the most important considerations in the grant of certiorari. *See* SUP. CT. R. 10(a) (a United States court of appeals has entered a decision in conflict with another United States court of appeals on the same important matter). Unlike the Government, Paroline believes further discussion among the lower federal courts as to the application of 18 U.S.C. § 2259 would be of little help to this Court since all of the circuit courts of appeals have spoken.[1]

Requiring defendants in the Fifth Circuit *only* to be jointly and severally for multi-million

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[1]The circuit court cases conflicting with the instant case are: *United States v. Kearney,* 672 F.3d 81 (1st Cir. 2012); *United States v. Aumais,* 656 F.3d 147 (2nd Cir. 2011); *United States v. Crandon,* 173 F.3d 122 (3rd Cir. 1999) (in *dicta*); *United States v. Burgess,* 684 F.3d 445 (4th Cir. 2012); *United States v. Evers,* 669 F.3d 645 (6th Cir. 2012); *United States v. Laraneta,* 700 F.3d 983 (7th Cir. 2012); *United States v. Fast,* 709 F.3d 712 (8th Cir. 2013); *United States v. Kennedy,* 643 F.3d 1251 (9th Cir. 2011), *pet for cert. filed; United States v. Benoit,* No. 12-5103 (10th Cir. April 2, 2013) (not yet reported); *United States v. McDaniel,* 631 F.3d 1024 (11th Cir. 2011); *United States v. Monzel,* 641 F.3d 528 (D.C. Cir.), *cert. denied sub nom. Amy v. Monzel,* _ U.S. _, 132 S. Ct. 756 (2011).

dollar restitution awards defeats the Fifth Circuit's expressed intent to 1) limit victims to recovery of their full losses and 2) spread the restitution among all of those who possessed copies of the child's image. *In re Amy,* 701 F.3d 749, 768-71 (5th Cir. 2012) (*en banc*). If this Court denies review to resolve this conflict, defendants in Texas, Louisiana and Mississippi will be jointly liable for multimillion dollar restitution awards while those in 47 other states and the District of Columbia will be liable only for restitution for losses they proximately cause.

This would be an unjust and absurd result.

II. AREA OF AGREEMENT WITH THE GOVERNMENT

1. Paroline agrees with the Government that the majority of the courts of appeals are correct in requiring a showing of proximate cause in setting amounts of restitution pursuant to § 2259. Government's Brief at 15-17.

2. Paroline also agrees with the Government that the law does not provide for holding defendants such as him jointly and severally liable for all of the victim's losses in different cases before different judges all across the county. Government's Brief at 23-24.

3. Paroline further agrees with the Government that requiring a showing of proximate cause would avoid implicating the Eighth Amendment Excessive Fines Clause.

In this regard, the Fifth Circuit specifically found the Eighth Amendment was not implicated, 701 F.3d., at 772-73, an issue squarely presented to this Court in Paroline's second question for review.[2] Paroline asserts that assessing $3.4 million in restitution for possession of two images of

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[2] 2. Whether the Government is correct in its argument that authorizing $3.4 million in restitution against a defendant to a victim of child pornography who has never had contact with the defendant violates the Eighth Amendment ban on excessive fines in the absence

(continued...)

Amy is clearly excessive, especially when it is not coupled with a requirement that he proximately caused that loss.

III. AREAS OF DISAGREEMENT WITH THE GOVERNMENT

1. Paroline disagrees with the Government that proximate cause requirement makes a difference only if the damages are not foreseeable, such as medical expenses for injuries suffered in an accident on the way to her therapist's office. Government's Brief at 18.

2. Paroline also disagrees with the Government's broad view of the concept of proximate cause which exceeds any definition of the term used by this Court or courts in general. Government's Brief at 18-19.

3. Paroline disagrees that the conflict between the Fifth Circuit and the other circuits is narrow and should have little bearing on the outcome of the cases. Government's Brief at 19.

4. Paroline disagrees that review is improper because he is appealing what the Government styles as an interlocutory order. It asserts that after remand to the District Court he can raise the same issues on appeal of a new district court order.

A. Proximate Cause Is More Than Foreseeability of Loss

The Government relies on *CSX Transportation, Inc. v. McBride,* __ U.S. __, __, 131 S. Ct. 2630, 2637 (2011), for the proposition that proximate cause looks only to foreseeability of injury. Government's Brief at 18. This not only relies solely on *dicta,* but ignores the Court's holdings in *CSX Transportation.* That case involved a suit under the Federal Employers' Liability Act, 45

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[2](...continued)
of a proximate cause requirement in the setting of the amount of restitution assessed against that defendant.

U.S.C. § 51 *et. seq.* CSX Transportation complained that proximate cause is an element of liability under FELA and the Court rejected the argument and held FELA eliminated the concept of proximate cause in those cases. Thus, the Court did not apply or define proximate cause in *CSX Transportation.*

In its discussion of proximate cause, the *CSX Transportation* Court looked to the classic case of *Palsgraf v. Long Island R.R. Co.,* 248 N.Y. 339, 162 N.E. 99 (1928), and specifically, Judge Andrews dissent. He described the proximate cause requirement this way: "Because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point." 248 N.Y., at 352, 162 N.E., at 103.

In *Holmes v. Securities Investor Protection Corp.,* 503 U.S. 258 (1992), the Court directly dealt with the concept of proximate cause. There, the Court described the doctrine in these words:

> Here we use "proximate cause" to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts. At bottom, the notion of proximate cause reflects "ideas of what justice demands, or of what is administratively possible and convenient." Accordingly, among the many shapes this concept took at common law, was a demand for some direct relation between the injury asserted and the injurious conduct alleged.

503 U.S., at 268 (citations omitted).

As Justice Scalia wrote in another case,

> The term "proximate cause" is "shorthand for a concept: Injuries have countless causes and not all should give rise to legal liability. Life is too short to pursue every event to its most remote, "but for," consequences, and the doctrine of proximate cause provides a rough guide for courts in cutting off otherwise endless chains of cause and effect.

Pacific Operators Offshore, LLP v. Valladolid, _ U.S., _, _, 132 S. Ct. 680, 691-92 (2012) (Scalia, J., concurring) (internal citations omitted).

In the instant case, Paroline's act of possessing two pornographic images of Amy was not a

cause in fact, let alone proximate cause, of Amy's injuries. To the contrary, in the District Court, the parties stipulated that "None of the damages for which Amy is now seeking restitution flow from anyone telling her specifically about Mr. Paroline or telling her about his conduct which was the basis of the prosecution in this cause." Transcript of Hearing, October 28, 2009, at 18. It follows directly that there is no direct relation between the injuries asserted and Paroline's conduct as required by *Holmes* to establish proximate cause.

The Government's argument requiring only foreseeability of a type of injury to establish proximate cause flies in the face of this Court's holdings and the seminal case proximate cause , *Palsgraf.* For these reasons, this Court should reject the Government's arguments that the circuit conflict is minor.

B. The Government's View of Proximate Cause Is Fatally Flawed

The Government's view of proximate cause would remove the requirement of cause in fact and limit the proximate cause inquiry to whether it is foreseeable that actions of a specific type – possession of child pornography – could cause the type of injuries complained of *even if there is no evidence linking the actions to the injury*. This goes far beyond the concept of proximate cause used by this Court in *CSX Transportation*, *Pacific Operators* and *Holmes.* What proximate cause does is remove legal liability for remote causes of injuries. The Government would impose liability for restitution simply if there is a loss caused by someone (not necessarily the individual held liable) and the type of loss is foreseeable.

The Government's position that the split among the circuits is small flies directly in the face of a decision of the Second Circuit, holding that a victim impact statement and psychological evaluation prepared before a defendant was arrested cannot as a matter of law be proximately caused

by the defendant's acts. *United States v. Aumais,* 656 F.3d 147, 155 (2nd Cir. 2011). If Paroline was prosecuted in the Second Circuit he would have no restitution liability.

In the instant case, the District Court refused to order restitution to Amy because she was unable to establish what losses were the proximate result of Paroline's crimes. The distinction between the Fifth Circuit's holdings in the instant case and the Second Circuit's holdings in *Aumais* are not narrow. The differences have a result wider than the Grand Canyon.

C. The Effect of the Split Is Significant for those in the Fifth Circuit

The Government incorrectly asserts that the conflict among the circuits will have "little bearing on the outcome of these cases or any other cases implicated by the circuit split, as all circuits agree that the statute places limits on the losses a victim may recover." Government's Brief at 19. The practical effect of the split is the Fifth Circuit's holding Paroline would be liable for as much as $3.4 million in restitution without contribution or significant contribution from other defendants in other circuits.

While the Fifth Circuit in the instant case would make all other defendants convicted of possessing pornographic images of Amy jointly and severally liable with Paroline for restitution, it is unlikely that those in circuits with a proximate cause requirement for restitution would have significant restitution requirements, let alone joint and several liability for $3.4 million. Instead of being liable for restitution for *all* of Amy's injuries, they would be liable for restitution only for the injuries they as individuals caused. Therefore, the circuit split places those convicted in the Fifth Circuit at significant disadvantage compared to those convicted in the other 11 geographical circuits. Paroline and other Fifth Circuit defendants could be jointly and severally liable for restitution payments stemming from losses they did not proximately cause. And, they would be deprived of

credit for restitution paid by defendants in 47 other states and the District of Columbia.

While that might not seem significant to the Government, it has great practical significance to defendants – and victims. If this Court grants review and finds the majority of the circuits are correct in interpreting the statute, defendants would be liable for restitution only for losses caused by their crimes of conviction. If, on the other hand, it grants review and holds the Fifth Circuit is correct, victims conceivably will be entitled to greater total restitution awards and more pockets from which to collect them.

D. The Fifth Circuit Reviewed a Judgment, Not an Interlocutory Order

The Government's assertion that Paroline's petition is not ripe and is from an interlocutory holding from the Fifth Circuit would deprive Paroline forever from obtaining this Court's review of the central issue: whether proximate cause of losses is a requirement for determination of the amount of restitution. The Government's arguments flies in the face of the law of the case doctrine and effectively would prevent review by this Court of any circuit court decision vacating a judgment and remanding for a new trial.

The Fifth Circuit has held that the law of the case doctrine requires that when an appellate court decides on a rule of law, that decision continues to govern the same issues in subsequent stages of the same case. *United States v. Castillo,* 179 F.3d 321 (5th Cir. 1999), citing *Arizona v. California,* 460 U.S. 605, 618 (1983). An issue decided on appeal cannot be re-examined by the district court on remand or by the court of appeals on a subsequent appeal. *United States v. Lee,* 358 F.3d 315 (5th Cir. 2004).

The Fifth Circuit decided the issue of proximate cause and restitution in its revised *en banc* decision which is the subject of this petition. If the Court denies certiorari, the *en banc* Fifth

Circuit's decision becomes final and subject to the law of the case doctrine. Contrary to the Government's assertion, it would be unreviewable on a subsequent appeal.

Besides eviscerating the law of the case doctrine, the Government's position would result in denial of review by this Court of any case in which the lower courts vacated a judgment and remanded the cause for a new trial. Finally, in cases in which the Government takes an interlocutory appeal from, for example, granting of a motion to suppress evidence, under the Government's argument would be unable to seek review in this Court if the appellate court affirmed the trial court.

The Government's argument on page 30 of its brief – that on remand the District Court will enter an appropriate judgment setting restitution – would allow Paroline to assert his current contentions as well as any others that arise in a single petition for certiorari apply with equal force to all cases remanded for new trials. When a case is reversed and remanded for trial, judgments are vacated and cases are remanded for further proceedings presumably resulting in the entry of a new judgment.

E. Excessive Fines Clause: $3.4 Million Restitution, Possession of Two Images

This Court must also address the second question presented for review concerning the application of the Eighth Amendment to any order requiring payment of $3.4 million by a person who possessed two images of pornography. Paroline, in his petition clearly states that the *en banc* Fifth Circuit opinion conflicts with this Court's holding in *United States v. Bajakian,* 524 U.S. 321 (1998). 701 F.3d, at 771. In *Bajakian,* this Court held that a forfeiture of property grossly disproportionate to the crime violates the Eighth Amendment. The Fifth Circuit rejected the Government's argument that construing § 2259 without a proximate cause requirement could result in an Excessive Fines Clause violation. 701 F.3d., at 771-72.

In her response, Amy supports Paroline's position, detailing a very clear and mature circuit split on this issue – among both the federal courts of appeals and state courts. Amy agrees that the Court below squarely held that "we are not persuaded that restitution is a punishment subject to the same Eighth Amendment limits as criminal forfeiture. Its purpose is remedial, not punitive." That holding is squarely presented for this Court's review by a decision below that requires a convicted defendant to pay approximately $3.4 million in restitution. This is more than the average lifetime earnings of an American citizen.

To be sure, the Court below also noted that payments for a $3.4 million restitution award could be spread out via a payment schedule. But that does not deny the harshness of the award itself. Moreover, the Government bizarrely states that "Amy does not suggest that this alternative holding is incorrect, or that it conflicts with the decision of any other court of appeals." Of course, Amy wouldn't challenge this ruling. It is Paroline who both argues that this holding is incorrect and that it conflicts not only with the decision of this Court in *Bajakian* (a sufficient ground for review by itself)[3] as well as other Courts of Appeals that would scrutinize such an award for compliance with the Eighth Amendment. *See, e.g., United States v. Dubose*, 146 F.3d 1141 (9th Cir. 1998), *cert. denied*, 525 U.S. 975 (1998) (restitution is punishment under the 8th Amendment); *United States v. Siegel*, 153 F.3d 1256, 1259 (11th Cir. 1998) (same); *see also United States v. Lessner*, 498 F.3d 185, 205 (3d Cir. 2007), *cert. denied*, 552 U.S. 1260 (2008); *United States v. Bollin*, 264 F.3d 391, 419 (4th Cir.), *cert. denied*, 534 U.S. 935 (2001).

Of course, the legal issue for this Court is not (as the Government tries to imply) whether a

[3] Of course, a decision of a Court of Appeals in conflict with a decision of this Court is reason standing alone to grant certiorari. *See, e.g., Army & Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 733 (1982).

particular dollar amount in restitution would or would not comply with the Eighth Amendment. Instead, the issue is whether Eighth Amendment scrutiny is in play at all in restitution awards. To Paroline, it seems obvious that a $3.4 million restitution award for a defendant who never met Amy and whose only crime was possessing two pornographic images would be "excessive" under the Eighth Amendment. But this Court should grant certiorari to resolve the legal issue of the applicability of the Eighth Amendment in such settings and then, after reversing the decision below that it is inapplicable, reverse for further proceedings to finally resolve the question.

IV. CONCLUSION

The Government would have this Court deny review of a decision by the *en banc* Fifth Circuit which conflicts with the holdings of every other circuit which has considered the issue. The Government, which agrees with many of Paroline's legal contentions, would have this Court do so based on misapplication of the law of proximate cause, by stating incorrectly that the circuit split is of little or no moment and by ignoring the law of the case doctrine. Paroline asserts the circuit split is significant and could cause massive differences in treatment of defendants in the Fifth Circuit and every other circuit which has considered the issue.

Eleven circuits have held that a victim must show that all her losses were the proximate result of an individual defendant's crime in order to obtain full restitution.. *See* n. 1, *supra.*

The Fifth Circuit reviewed some of these decisions and specifically rejected them. Paroline App. 41 ("we reject the approach of our sister circuits and hold that § 2259 imposes no generalized proximate cause requirement"). The Fifth Circuit noted that these decisions are fractured in their views and reasoning. In surveying the other decisions, the Fifth Circuit en banc quoted the First Circuit's description of the landscape: "[a]ny 'seeming agreement on a standard [in the circuits]

suggests more harmony than there is.'" 701 F.3d., n. 12 at 765 (quoting *Kearney*, 672 F.3d at 96); *accord Kennedy*, 643 F.3d at 1260 (noting that construing Section 2259 presents "[a] difficult issue of statutory interpretation [which] has been considered, but not satisfactorily resolved, by several of our sister circuits.").

Among the 11 circuits holding that § 2259 contains a general proximate result requirement, the rationales have varied widely. The Ninth Circuit and the Eleventh Circuit rely on statutory interpretation to find a general proximate cause limitation. *See Kennedy*, 643 F.3d at 1261-62 and *McDaniel*, 631 F.3d at 1208-09 (same). Four other circuits have rejected the Ninth and Eleventh Circuits' reasoning, holding instead that "traditional principles of tort and criminal law" require a general proximate cause limitation. *Monzel*, 641 F.3d at 535 ("Unlike those circuits, however, our reasoning rests not on the catch-all provision of § 2259(b)(3)(F), but rather on traditional principles of tort and criminal law. . . ."); *see also Burgess*, 684 F.3d at 456-57("declin[ing] to adopt this line of reasoning [relying on statutory language]."); *Aumais,* 656 F.3d at 153 (recognizing competing lines of reasoning and "endors[ing] the D.C. Circuit's reasoning."); *see also Benoit*, 2013 WL 1298154 at *15 (agreeing with *Monzel* and *Burgess*). The Sixth Circuit noted these diverging principles, but concluded "[w]e need not choose between the rationales." *Evers*, 669 F.3d, at 659. The First Circuit acknowledged the disagreement, but it developed its own resolution by imposing a general proximate result requirement, while concluding that the requirement could be shown in the "aggregate" rather than at the "individual" level. *Kearney*, 672 F.3d, at 98. The Eight Circuit has followed the First Circuit. *Fast*, 709 F.3d at 721. The Seventh Circuit held that a proximate result requirement exists, but that it results in full liability (i.e., joint and several liability) for any offender who has *distributed* child pornography but not an offender who has *possessed* that pornography.

United States v. Laraneta, 700 F.3d, at 990-92.

This is an issue which is both significant and, considering the number of child pornography cases being filed in federal courts, of widespread importance to many persons, defendants and victims alike.

The Government's argument that the issue should percolate further among the lower courts, Government's Brief at 14, is clearly without merit. Eleven of the twelve circuits have decided the issue. Only the Fifth Circuit has held differently. Further percolation among the lower federal courts will not clarify the issues for this Court. And, since the cases involve construction of a federal statute, it is highly unlikely that a state court will opine on the issue.

The issue is ripe for this Court's review. The circuit courts have set out their views and it is time for this Court to consider the issue and give the lower courts a principled structure for setting restitution amounts and reviewing § 2259 restitution orders.

Paroline's petition presents straightforward issues of law – legal positions which the Government has agreed with in the lower courts and in this Court. In considering whether to grant review, the Court should bear in mind SUP. CT. R. 16(a)(1), allowing it to grant certiorari along with a summary disposition.

This Court should reject the Government's arguments and grant certiorari.

Respectfully submitted,

Schneider & McKinney, P.C.

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Stanley G. Schneider*
Texas Bar No. 17790500
E-mail: stans3112@aol.com

Tom Moran
Texas Bar No. 14422200
E-mail: tom6294@aol.com

440 Louisiana, Suite 800
Houston, Texas 77002
(713) 951-9994
Telecopier: (713) 224-6008

F.R. "Buck" Files
Bain, Files, Jarrett, Bain, & Harrison P.C.
Texas Bar No. 00000087
109 W. Ferguson St.
Tyler, Texas 75702
(903) 595-3573
Telecopier: (903) 597-7322
Email: bfiles@bainfiles.com

ATTORNEYS FOR PETITIONER

*Attorney in charge

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above document and its appendix was served on the following persons by mailing them copies, postage paid, on this 20th day of May, 2013.

_____
Stanley G. Schneider

Donald B. Verrilli, Jr.
Solicitor General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C.

James R. Marsh
The Marsh Law firm PLC
151 East Post Road, Suite 102
White Plains, New York 10601-5210

Paul G. Cassell
Appellate Clinic
S.J. Quinney College of Law
at the University of Utah
332 South, 1400 East, Room 101
Salt Lake City, Utah 84112