IN THE SUPREME COURT OF THE UNITED STATES

Nos. 12-8505 and 8561

MICHAEL WRIGHT,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

DOYLE RANDALL PAROLINE,
Petitioner,

versus

AMY UNKNOWN and UNITED STATES,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER WRIGHT'S REPLY TO UNITED STATES' BRIEF IN OPPOSITION

ROBIN E. SCHULBERG
Attorney of Record
Robin E. Schulberg, LLC
18522 Louisiana Tung Road
Covington, Louisiana 70435
Telephone: (985) 871-8213
Email: reschul@bellsouth.net

VIRGINIA LAUGHLIN SCHLUETER
Federal Public Defender
ROMA AJUBITA KENT
Assistant Federal Public Defender
500 Poydras Street, Hale Boggs Building
New Orleans, Louisiana 70119
Telephone: (504) 589-7930
Email: Virginia_Schlueter@fd.org
Roma_Kent@fd.org

ATTORNEYS FOR PETITIONER MICHAEL WRIGHT

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ARGUMENT ON REPLY

The Government agrees with petitioner Wright that the Fifth Circuit erred: (a) in holding that § 2259 does not require a showing of proximate causation for all types of losses, and (b) in holding that each defendant convicted of possessing a victim's image is jointly and severally liable for all of the victim's losses resulting from internet circulation of her image. The Government also acknowledges a circuit split on both issues. Nevertheless, the Government urges this Court to deny review. This position turns out to be as curious after scrutiny as it appears at first blush.

1. A grant of certiorari is necessary to establish uniformity in applying § 2255.

The Government asks the Court to deny review because the Fifth Circuit stands alone in rejecting a proximate-causation requirement for all compensable losses. This is not a reason to deny review.[1] Government Opposition ("Govt. Opp.") at 18. Giving an issue time to "percolate" in the lower courts, Govt. Opp. at 14, makes sense when positions are in flux. That is not the case on the issue of proximate causation. Nearly all the circuits had weighed in when the Fifth Circuit rendered its *en banc* decision. The Fifth Circuit considered and rejected the position of the other circuits. See slip op. at 26-31. The only way to achieve uniformity at this point is for this

[1]Since Wright filed his petition, two more circuits have joined the nine which require proximate causation. See *United States v. Fast*, 709 F.3d 712, 721-22 (8th Cir. 2013); *United States v. Benoit*, 713 F.3d 1, 20 (10th Cir. 2013).

Court to decide the issue. Until then, every defendant convicted of possessing Amy's image in the Fifth Circuit will be ordered to pay $3.4 million in restitution under established circuit law, see slip op. at 39,[2] while similarly situated defendants in other circuits will pay a minute fraction of that amount, if anything. The largest award affirmed by a circuit court other than the Fifth is, to counsels' knowledge, $17,304.44. See *In re Amy and Vicky*, ___ F.3d ___, 2013 WL 1847557, at *1-2 (9th Cir. May 3, 2013). More than one in ten federal child pornography cases – 210 out of 1855 nationally in FY 2011 – are from the Fifth Circuit. U.S. Sentencing Comm'n, *Statistical Information Packet, Fiscal Year 2011, Fifth Circuit* 3 tbl.1 (2012), at http://tinyurl.com/CPstat5. The Court should not let this disparity fester.

2. A proximate-cause requirement would substantially limit compensable harm.

Despite the huge difference between the amount of restitution required in the Fifth Circuit and elsewhere, the Government asserts that a proximate-cause requirement will make little difference in practice because the losses Amy claims are reasonably foreseeable. Govt. Opp. at 18. The Government, however, addresses only the *types* of losses that Amy seeks. The type of loss is not the only consideration. It

[2]The only reason that the *en banc* Court affirmed the district court's order that Wright pay only a half-million dollars – the entirety of Amy's emotional distress damages – was that the Government did not appeal and Amy did not seek mandamus. Slip op. at 41. It still characterized the award as an error because it was less than $3.4 million. *Id.* ("While the district court erred in failing to award Amy the full amount of her losses . . .").

most certainly was not reasonably foreseeable to Wright that his personal conduct downloading Amy's images would cause her $3.4 million in damages. See *United States v. Wright*, 639 F.3d 679, 683 (5th Cir. 2011) (panel op.) (finding that Wright was unaware "of the potential scope"of the restitution he would be ordered to pay when entering into the plea agreement). Indeed, an individual looking at an image on his computer likely would think the person depicted would never know he had done so. Nor, as a matter of logic, could Wright have foreseen at the time of his offense conduct damages inflicted previously by others See *United States v. Carreon*, 11 F.3d 1225, 1235 (5th Cir. 1994) ("Applying foreseeability only prospectively comports with the plain meaning of the term 'foreseeable.'"). A proximate cause requirement would substantially limit the amount of restitution that could be ordered.

3. Certiorari should also be granted to decide whether restitution under § 2259 is limited to conduct factually caused by the individual defendant.

The real difficulty in applying § 2259, according to the Government, is how to decide the amount of harm a particular defendant caused. This, the Government says, is a question of cause-in-fact, not proximate causation. Govt. Opp. at 19-20; see also *United States v. Laraneta*, 700 F.3d 983, 991 (7th Cir. 2012). The problem which the Government identifies, however, does not arise unless courts hold that restitution is

limited to harm which the particular defendant in fact caused. This Court must decide that question – whether restitution under § 2259 is limited to the harm factually caused by the particular defendant's offense – before it can address the Government's question of how to quantify the harm. That is why Wright posed his second question to the Court in his petition: "is restitution under § 2259 limited to those losses caused by the conduct underlying the offense of conviction, as required by *Hughey v. United States*, 495 U.S. 411 (1990)?" Petition at ii.

The Fifth Circuit does not limit § 2259 restitution to losses caused in fact by the particular defendant. Rather, it holds that every defendant who caused any portion of Amy's harm, no matter how small, is liable for the entire amount. In petitioner's case, the *en banc* court held that "the district court erred in failing to award Amy the full amount of her losses," that is, the entire $3.4 million that she claimed. Slip op. at 41. The only reason that the court affirmed Wright's $529,661 restitution order was that Wright's case came to the court solely on Wright's appeal; neither the Government appealed nor did Amy seek mandamus. *Id.* (citing *Greenlaw v. United States*, 554 U.S. 237, 246 (2008)).

Nevertheless, the $529,661 restitution award was not limited to losses caused by Wright. It was comprised mainly of the projected $512,681 cost of the mental health treatment that Amy would need as a result of "the sexual assault perpetrated

against [her]" by her uncle "and its continued memorialization in pictures which continue to be traded and used" by all sorts of people, not just Wright. See Sentencing Transcript, p. 12; Letter of Stan E. Smith, Ph.D., to James R. Marsh (Sept. 15, 2008), pp. 3-4; Report of Psychological Consultation by Joyanna L. Silberg (Nov. 21, 2008), p. 8.[3] Wright, however, did not cause the entirety of Amy's emotional distress losses. Amy's restitution request, on its face, seeks compensation for the aggregate losses caused by *all* the people who distributed, traded, received or possessed her images on the internet. As the Seventh Circuit observed in *United States v. Laraneta*, "it is beyond implausible that victims would have suffered the harm they did had [the individual defendant] been the only person in the world to view pornographic images of them." 700 F.3d at 981. Hence, contrary to the Government's assertion (Govt. Opp. at 25), Wright *was* ordered to pay restitution for

[3]At sentencing, the district court stated that the restitution amount of $529,551 "was reached by adding the estimated cost of the victim's future treatment and counseling at $512,681, and the cost of the victim's expert witness fees at $16,980." Sentencing Tr., p. 12. The $512,681 figure was derived by the Smith Economics Group, based on a psychological evaluation which concluded that Amy would require weekly counseling for the remainder of her life and three institutionalizations. See Letter of Stan E. Smith, Ph.D., to James R. Marsh (Sept. 15, 2008), pp. 3- 4. The evaluator, psychologist Joyanna L. Silberg, Ph.D., based her prognosis on her conclusion that, "The sexual assault perpetrated against Amy, and its continued memorialization in pictures which continue to be traded and used affect her in a variety of ways, and has had long lasting and life changing impact on her." Report of Psychological Consultation (Nov. 21, 2008), p. 8. (The Smith letter and the Silberg report were included in the materials submitted by Amy to the Government and introduced into the record by the Government at sentencing and by Amy during the appeal.) The difference between the $3.4 million that Amy requested and the $529,611 awarded consisted largely of expected loss of income. The district court did not explain why it awarded nothing for expected lost income in Wright's case.

harm caused by conduct which he did not commit.

The other circuits refuse to order restitution for losses which the defendant did not cause. The Sixth Circuit recently explained in *United States v. Gamble*, 709 F.3d 541, 552 (6th Cir. 2013), that § 2259 "is . . . meant to hold the defendant responsible for the damage he caused, but not for the damage he did not cause, as evidenced by the causation requirement." See also *Larnaneta*, 700 F.3d at 991; *United Sates v. Burgess*, 684 F.3d 445, 460 (4th Cir.), cert. denied, 133 S. Ct. 490 (2012); *United States v. Monzel*, 641 F.3d 528, 538 (D.C. Cir.), cert. denied, 132 S. Ct. 756 (2011). Wright's case squarely presents the question of which side of the circuit split is correct.

This issue is a reason that certiorari should be granted not only in Paroline's case but in Wright's case as well. In Paroline's case, the district court denied *any* restitution for lack of proof of proximate causation. It found that the Government had failed to prove any proximately-caused harm. In Wright's case, the Fifth Circuit affirmed an award of restitution for harm caused by offenders other than Wright. Hence, while Paroline's case highlights the question whether an individual possessor causes any compensable harm, Wright's case presents the additional question whether a defendant can be ordered to pay for harm caused by others.

4. The principles of *Hughey* apply to § 2259 restitution.

It is hard to see why the Government would argue that *Hughey v. United States*, 495 U.S. 411 (1990), does not apply to a restitution order which, like Wright's, requires a defendant to pay for harm he did not cause. Govt. Opp. at pp. 24-25. The animating principle in *Hughey* is that restitution "is intended to compensate victims only for losses caused by the conduct underlying the offense of conviction" when the authorizing statute is couched in terms of "the offense." *Id.* at 416. The statute interpreted in *Hughey* was the Victim and Witness Protection Act of 1982, but circuit courts subsequently extended its holding to the Mandatory Victim Restitution Act on the basis of similar language. See, e.g., *United States v. Mancillas*, 172 F.3d 341, 343 (5th Cir. 1999). Section 2259(a) contains offense-centric language similar to that on which the *Hughey* Court relied: "[T]he court shall order restitution for any *offense* under this chapter." (emphasis added). Therefore, as in *Hughey*, § 2259 restitution should be limited to harms caused by the offense of which the particular defendant was convicted.[4]

It turns out that the Government's real objection is that *Hughey*, with its limitation of restitution to conduct caused by the defendant's offense conduct, does

[4]While the Fifth Circuit did not cite *Hughey*, it necessarily rejected Wright's argument that restitution can be ordered only for losses caused by his own offense conduct. See Brief for Appellant Wright on rehearing *en banc* (Feb. 24, 2012), pp. 13-18; see also Brief for Appellant Wright to panel (July 13, 2010), pp.10-19; Defendant Wright's Sentencing Memorandum (Dec. 11, 2009).

not comport with the Government's proposal to aggregate the conduct of all defendants convicted of distributing, receiving or possessing the victim's images and to find the requisite causal connection in the aggregated conduct. Govt. Opp. at 25. The merits of the aggregation approach aside, the Fifth Circuit's approach was different. The Fifth Circuit held that a person who qualified as a "victim" in a criminal case was entitled to recover from the individual defendant losses caused by everyone who had victimized her, while the Government would apportion those losses. The Fifth Circuit's decision is the position which Wright asks this Court to review. That decision is inconsistent with *Hughey*.

5. Where circuits require a causal connection to the conduct of the individual defendant, restitution awards are a small fraction of the amount the Fifth Circuit requires.

The Government argues that even those circuits most insistent on a clear causal connection between the defendant's conduct and the victim's specific loss have affirmed restitution awards under § 2259. Govt. Opp. at 21-23. Those awards, however, are only a small fraction of the restitution required by the Fifth Circuit. *United States v. Hagerman*, 827 F. Supp. 2d 102 (N.D.N.Y. 2011), rev'd in part, No. 11-3421-cr, 2012 WL 6621311 (2nd Cir. 2012), highlights the difference. In *Hagerman*, the district court ordered $975,914 in restitution, jointly and severally with others convicted of viewing Vicky's images. The $975,914 figure was the

amount of Vicky's total losses which remained unpaid. The Second Circuit reversed the award because Hagerman could not be required to pay more than the amount of loss that he had caused. The district court estimated that amount as .68% or 1/146 of the total loss. The Second Circuit found this latter approach reasonable and applied it to limit Hagerman's liability to $8,388,31. *Hagerman*, 2012 WL 6621311, at *4.

Likewise in *In re Amy and Vicky*, ___F.3d ___, 2013 WL 1847557, at *1-2 (9th Cir. May 3, 2013), the Ninth Circuit affirmed restitution awards consisting of 1/171 of the total losses sustained by Amy and 1/309 of the total losses sustained by Vicky. See *United States v. Cantrelle,* No. 11-cr-542, 2013 WL 1624824, at *7-10 (E.D. Cal. May 3, 2013). The resultant awards were $17,307.44 and $2,881.95, respectively. (Of note, the pool of losses did not include losses incurred before the date of the defendant's offense or attorney and expert witness fees that could not be traced to the specific case.) To Wright's knowledge, the $17,307.44 award to Amy is the largest amount of restitution affirmed on appeal elsewhere than the Fifth Circuit.

Far from counseling against the grant of certiorari, these cases illustrate why this Court should address the Fifth Circuit's interpretation of § 2259: the disparity in outcome is too great.

6. The Government's method for apportioning losses does not reduce the need for this Court to review the Fifth Circuit's decision.

Lest this Court believe that certiorari is not necessary because the Government's aggregation approach will prevail once it "percolates" through the circuits,[5] petitioner asks the Court to note *United States v. Benoit*, 713 F.3d 1(10th Cir. 2013). There, the Tenth Circuit joined the ranks of circuits requiring proximate-causation but also rejected an $11,466 restitution award calculated by the Government's method of dividing aggregate loss by the number of restitution judgments for the victim. *Id.* at 22. "This implicit calculation does not meet the proximate cause standard we have announced on the record before us," the court

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[5]Contrary to the Government's representation, Govt. Opp. at 21, an aggregation model is used in only limited types of tort cases. Under the aggregation model,

> the conduct of all defendants as a group is aggregated and considered as a whole. The but-for test is then applied to their conduct taken as a unit or set. If the combined conduct is a but-for cause of the plaintiff's harm, then cause is established.

Dan B. Dobbs et al., THE LAW OF TORTS § 189 at 634-35 (2nd ed.). The decision whether to aggregate is a policy decision, "which may generate further legal issues, this time over the criteria for the policy decisions." *Id.* Furthermore,

> [a]ggregation is routinely performed in cases of tortfeasors who act in concert and with tortfeasors who, through acting independently, create a single indivisible injury. *The question is whether aggregation represents a useful tool beyond those situations.*

Id. at 635 n.19 (emphasis added). The prototypical use is in asbestos litigation, where the plaintiff has contracted cancer as a result of prolonged exposure to asbestos manufactured by various companies. See, e.g., *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W. 2d 854, 857 (Iowa 1994). By contrast, Amy is allegedly injured each time someone views her image. Unlike asbestos cases, her injuries are discrete rather than indivisible.

stated. *Id.* "[T]he district court did not make factual findings as to whether the number of judgments was approximately equal to the number of end-users or whether [the defendant] caused approximately the same amount of damages as other end-users." *Id.* at 22 n.8. Distributors, for example, would cause more harm than a possessor like Wright, yet there is no way to estimate how much more. See *Cantrelle*, 2013 WL 1624824, at *6 (rejecting Government's threefold enhancement for distribution as "precisely the kind of arbitrary calculation prohibited by [*United States v.*] *Kennedy*[6]. . . ."). In sum, aggregation with apportionment is not a panacea that would cause the Fifth Circuit to change its position without intervention by this Court.

7. The fact that the amount petitioner pays in restitution will be reduced by the amount other defendants pay to Amy does not lessen the need for certiorari.

Finally, the Government argues that certiorari is unnecessary because Wright will not have to pay the full $522,681 ordered by the district court since the award was joint and several. Govt. Opp. at 26-27. Half of Amy's losses already have been recovered, the Government continues, and Wright's periodic payments are relatively low because he is indigent. This same argument would apply to the vast majority of defendants who follow in Wright's footsteps; most will not have deep pockets. As

[6]643 F.3d 1251 (9th Cir. 2011).

a result, under the Government's line of reasoning review of the Fifth Circuit's application of § 2259 would never be appropriate. At the same time, however, the Government contends that joint and several liability is improper in cases with only one defendant. Govt. Opp. at 23-24. Hence, the Government's anomalous position would insulate from review a sentencing practice that it believes is wrong.

The problems with an award of restitution subject to joint and several liability go beyond the colossal amount that the defendant is ordered to pay. First, the amount the defendant will actually be required to pay is indeterminate. From the defendant's perspective, he will be required to continue paying whatever amount the Government (be it the Bureau of Prisons or the Probation Office) tells him he must pay until it tells him he does not have to pay any more. Second, the amount which the defendant ultimately pays will not be related to his culpability. Instead, the determinant factors are the defendant's wealth and the fortuity of how much money the victim already has recovered. This Court has stated that "[r]estitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused." *Kelly v. Robinson*, 479 U.S. 36, 49 n.10 (1986). A huge restitution award with joint and several liability breaks the link between conduct and consequences. Accordingly, it is not an appropriate punishment.

8. Other considerations

Petitioner relies on and incorporates his Supplemental Brief in Reply to Amy Unknown's Response to Paroline's Petition (May 8, 2013), to respond to the Government's arguments about the suitability of his case as a vehicle for the grant of certiorari.

CONCLUSION

Petitioner Michael Wright asks the Court to grant a writ of certiorari to the Fifth Circuit Court of Appeals. The Fifth Circuit's application of § 2259 is incorrect because it requires restitution for losses which were neither factually nor proximately caused by the defendant's offense. With the Fifth Circuit's position entrenched, this Court's intervention is necessary to obtain uniformity.[7]

Respectfully submitted this 20th day of May, 2013,

ROBIN E. SCHULBERG
Attorney of Record

VIRGINIA LAUGHLIN SCHLUETER
Federal Public Defender

ROBIN E. SCHULBERG
Robin E. Schulberg, LLC
18522 Louisiana Tung Road
Covington, Louisiana 70435
Telephone: (985) 871-8213
Email: reschul@bellsouth.net

ROMA AJUBITA KENT
Assistant Federal Public Defender
500 Poydras Street
Hale Boggs Building, Suite 318
New Orleans, Louisiana 70130
Telephone: (504) 589-7930
Email: Virginia_Schluter@fd.org
Roma_Kent@fd.org

[7]In the event the Court grants certiorari on the proper application of § 2259 in a case other than Wright's, petitioner asks the Court to hold his case until the other case is decided.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of May, 2013, a copy of the foregoing has been served on Brian Klebba and Diane Hollenshead Copes, Assistant United States Attorneys, 650 Poydras Street, 16th Floor, New Orleans, Louisiana, 70130, via hand delivery, and on Donald B. Verrilli, Jr., Solicitor General of the United States, Mythili Raman, Acting Assistant Attorney General, and Michael A. Rotker, Attorney, Department of Justice, 950 Pennsylvania Avenue N.W., Washington, D.C. 20530, Paul G. Cassell, University of Utah School of Law, Room 101, 332 S. 1400 East, Salt Lake City, Utah 84112, and Stanley George Schneider, Schneider & McKinney, 440 Louisiana, Suite 2110, Houston, Texas 77002, by placing same in the United States mail, properly addressed and postage prepaid.

Robin E. Schulberg
Attorney of Record