

THE PROBLEM OF PROXIMATE CAUSE: ASSIGNING  
RESTITUTION UNDER 18 U.S.C. § 2259:  
*IN RE AMY*, 591 F.3D 792 (5TH CIR. DEC. 29, 2009).

Highlight

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In *In re Amy*, at age eight or nine, “Amy,” (Petitioner) was photographed by an uncle in a series of sexually abusive poses that were later distributed to third parties.<sup>1</sup> One of those third parties was Doyle Randall Paroline (Defendant) who pled guilty to a single count of possessing material involving the sexual exploitation of children in violation of 18 U.S.C. §§ 2252(a)(4)(B) and 2252(b)(2).<sup>2</sup> In district court, Petitioner, and the Government on her behalf, moved for restitution from the defendant under 18 U.S.C. § 2259(a).<sup>3</sup> After briefing and two evidentiary hearings on restitution, the district court denied Petitioner’s motion for restitution because of a lack of proximate cause between the defendant’s actions and petitioner’s injury.<sup>4</sup> Petitioner then sought a writ of mandamus to direct the district court to order the defendant to pay restitution in the amount of \$3,367,854.<sup>5</sup> In the alternative, Petitioner asked the Fifth Circuit to remand the case to the district court for reconsideration of the district court’s order, which declined to impose restitution against Defendant.<sup>6</sup>

Petitioner was seeking restitution as a victim under § 2259, which states that the district court “shall order restitution for any offense under this chapter,” which covered the offense to which Defendant pled guilty.<sup>7</sup> The statute further states that the court “shall direct the defendant to pay the victim . . . the full amount of the victim’s losses as determined by the court.”<sup>8</sup> Under the statute, the victim’s losses include

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<sup>1</sup> *In re Amy*, 591 F.3d 792, 794 (5th Cir. 2009).

<sup>2</sup> *Id.* Defendant had a large number of sexually explicit images of children on his personal computer, and two of those images were of plaintiff when she was around age nine. *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 795.

<sup>5</sup> *Id.* at 793.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 794 (quoting 18 U.S.C. § 2259(a) (2006)).

<sup>8</sup> *Id.* (quoting 18 U.S.C. § 2259(b)(1) (2006)). The statute defines a “victim” as a person who is harmed as a result of any crime under the

any costs incurred by the victim for a laundry-list of therapies, medical expenses, housing expenses, attorneys' fees, and "any other losses suffered by the victim as a *proximate result of the offense*."<sup>9</sup>

In reviewing the petition for writ of mandamus, the Fifth Circuit applied the standard of review that was set forth in *In re Dean*.<sup>10</sup> Under the *Dean* standard of review, a writ of mandamus can only be issued when: "(1) the petitioner has 'no other adequate means' to attain the desired relief; (2) the petitioner has demonstrated a right to the issuance of a writ that is 'clear and indisputable;' and (3) the issuing court, in the exercise of its discretion, is satisfied that the writ is 'appropriate under the circumstances.'"<sup>11</sup> The majority and the dissent in the instant opinion both focused primarily on two issues: (1) whether the petition for mandamus satisfied the second element of the *Dean* standard; and (2) whether defendant's actions were a proximate cause of the petitioner's injury.<sup>12</sup>

The majority opinion of the Fifth Circuit affirmed the district court's ruling, and denied the petitioner's writ of mandamus.<sup>13</sup> The circuit court agreed with both the government and district court that § 2259 "requires a showing of proximate cause between the victim's losses and the defendant's conduct."<sup>14</sup> Therefore, the court held that Petitioner's arguments concerning the interpretation of § 2259 could not be regarded as clear or indisputable as required under the standard for review of mandamus under *Dean*.<sup>15</sup> Further, the it held that the district court's finding of a lack of proximate cause between Defendant's possession of the child pornography and the Petitioner's specific injuries was not an abuse of discretion that required intervention by an appellate court.<sup>16</sup>

Circuit Judge Dennis dissented from the majority opinion, and argued that it was Congress's intention to require courts to issue restitution orders to a victim under § 2259.<sup>17</sup> The dissent further argued that the district court committed a clear and reversible error by denying

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chapter, such as the crimes of the defendant. *Id.* (citing 18 U.S.C. § 2259(c) (2006)).

<sup>9</sup> 18 U.S.C. § 2259(b)(3) (2006) (emphasis added).

<sup>10</sup> *Amy*, 591 F.3d at 793; *see In re Dean*, 527 F.3d 391 (5th Cir. 2008).

<sup>11</sup> *Amy*, 591 F.3d at 793 (quoting *Dean*, 527 F.3d at 394).

<sup>12</sup> *See id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 794-95.

<sup>16</sup> *Id.* at 795.

<sup>17</sup> *Id.* (Dennis, J., dissenting).

the Petitioner's motion for restitution.<sup>18</sup> The dissent focused on the language of the of § 2259(b)(1) which states that a court “shall direct the defendant to pay . . . the full amount of the victim's losses as determined by the court.”<sup>19</sup> The dissent also pointed out that Congress intended § 2259 to be an avenue for “broad restitution”<sup>20</sup> that was phrased in such “generous terms, in order to compensate victims of sexual abuse.”<sup>21</sup> As Petitioner met the definition of a victim under the statute, which was in keeping with the Supreme Court's holding in *New York v. Ferber*, the dissent argued that she had been harmed by Defendant's possession of child pornography that depicted petitioner.<sup>22</sup> The dissent did not take issue with the proximate cause requirement as construed by the majority, but, in essence, argued that because Petitioner was a “victim” under § 2259, her injuries must logically be proximately caused by the crime committed by the defendant, entitling her to restitution.

*In re Amy* will prove important to practitioners as it likely serves as a guidepost for how the Fifth Circuit will construe 18 U.S.C. § 2259 for purposes of restitution from end-users of child pornography to the victims depicted in the offending materials. It has been long-standing judicial practice to award restitution in cases involving the defendant who actual committed the abuse of a child or who actually produced the images of the child, but it is only recently that victims and the government have begun to seek restitution from possessors of the child pornography as well.<sup>23</sup> The *Amy* court specifically states that the Fifth Circuit “has not yet construed the proximate cause requirement under Section 2259,” but in denying mandamus to the petitioner, the court clearly indicates that the Fifth Circuit is headed towards requiring a finding of proximate cause before ordering restitution to victims.<sup>24</sup> It is also likely that by extension of this requirement, the Fifth Circuit will find that possession by end-users of child pornography does not result in liability for the full losses of the victims.

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* (quoting 18 U.S.C. § 2259(b)(1)) (emphasis added).

<sup>20</sup> *Id.* (quoting *United States v. Crandon*, 173 F.3d 122, 122 (3d. Cir. 1999)).

<sup>21</sup> *Id.* (quoting *United States v. Laney*, 189 F.3d 954, 966 (9th Cir. 1999)).

<sup>22</sup> *Id.* at 796 (citing *New York v. Ferber*, 458 U.S. 747 (1982)).

<sup>23</sup> *See United States v. Berk*, No. 08-CR-212-P-S, 2009 WL 3451085, \*5 (D. Me. Oct. 26, 2009).

<sup>24</sup> *Amy*, 591 F.3d at 794.

It may very well be, as was suggested by the *Berk* court, that if a practitioner is representing an individual seeking restitution from a defendant convicted of only possession of child pornography, they must show specific evidence of harm caused by the conviction of the individual defendant.<sup>25</sup> The individual cannot rely on their status as a “victim” and assert generalized harms, such as anxiety or distress, but could show specific and proximate injuries, such as an increase in visits to a therapist or days missed from work, upon learning that the specific defendant was being charged.<sup>26</sup> Such specific and proximately caused injuries would make restitution under § 2259 appropriate.

While every court should and will be sympathetic to the nature of such crimes and their effects on the victims involved, courts must apply the statutory provisions of 18 U.S.C. § 2259 in keeping with Congressional intent and the principles of restitution. The unfortunate truth is that before the defendant in *In re Amy* obtained or viewed the images of the petitioner, all the harms that Petitioner relied on to prove her injuries for purposes of restitution had occurred. And while the dissent passionately argues its point in the instant case, the majority holding by the court is the correct construction of Congressional intent under 18 U.S.C. § 2259, and is in keeping with the majority of the other circuit and district courts who have faced the same issue.<sup>27</sup>

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<sup>25</sup> *Berk*, 2009 WL 3451085, at \*7.

<sup>26</sup> *Id.* at \*8.

<sup>27</sup> See *United States v. Doe*, 488 F.3d 1154, 1160 (9th Cir. 2007); *United States v. Searle*, 65 Fed. App'x 343, 346 (2d Cir. 2003); *United States v. Crandon*, 173 F.3d 122, 126 (3d Cir. 1999); *United States v. Laney*, 189 F.3d 954, 965 (9th Cir. 1999); *United States v. Pearson*, No. 1:04-cr-340, 2009 WL 2383025, at \*5-6 (N.D.N.Y. July 30, 2009); *United States v. Raplinger*, No. 05-CR-49-LRR, 2007 WL 3285802, \*2, \*6 (N.D. Iowa Oct. 9, 2007); *United States v. Estep*, 378 F. Supp. 2d 763, 770-72 (E.D. Ky. 2005); *but see United States v. Staples*, No. 09-14017-CR-, 2009 WL 2827204, at \*4 (S.D. Fla. Sept. 2, 2009) (ordering restitution to a petitioner, again going by “Amy,” of \$3,680,153.00 with no analysis of proximate causation).