No. 13-_____

In The
Supreme Court of the United States

VICKY, CHILD PORNOGRAPHY VICTIM,

Petitioner,

v.

ROBERT M. FAST, et al.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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

CAROL L. HEPBURN
CAROL L. HEPBURN PS
2722 Eastlake Avenue E.,
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) 201-8271
cassellp@law.utah.edu

Counsel for Petitioner Vicky

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. What, if any, causal relationship or nexus between the defendant's conduct and the victim's harm or damages must the government or the victim establish in order to recover restitution under 18 U.S.C. § 2259? (Note: An identical question presented has been ordered briefed and argued by the Court in *Paroline v. United States*, No. 12-8561 (certiorari granted June 27, 2013)).

2. Under 18 U.S.C. § 3771(d)(3), a crime victim seeking to enforce a right under the Crime Victims' Rights Act (CVRA), including the right to restitution, "may petition the court of appeals for a writ of mandamus." Section 3771(d)(3) then alters mandamus by requiring that "[t]he court of appeals shall take up and decide such application forthwith. . . ." Does Section 3771(d)(3) entitle crime victims to ordinary appellate review of their claims (as the Second, Third, Ninth, and Eleventh Circuits have held) or only limited mandamus review for "clear and indisputable error" (as the Eighth Circuit held below, joining the Fifth, Sixth, Tenth, and D.C. Circuits)?

PARTIES TO THE PROCEEDINGS BELOW

This case arises from a criminal prosecution in the United States District Court for the District of Nebraska. Petitioner "Vicky" is the victim of child sexual exploitation and child pornography crimes. As such, she proceeds here (as she has in the lower courts) under a pseudonym to protect her privacy.

The first respondent is Robert M. Fast, a convicted criminal defendant from whom Vicky sought restitution in the courts below.

The United States is also a respondent to this action and prosecuted the criminal case below.

Since this petition involves a Crime Victims' Rights Act mandamus action, *see* 18 U.S.C. § 3771(d)(3), the United States District Court for the District of Nebraska is a pro forma respondent.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

STATUTES

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

PETITION FOR A WRIT OF CERTIORARI

Vicky respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS AND ORDERS

The Eighth Circuit's decision for which review is sought is reported at 709 F.3d 712 (8th Cir. 2013), and reprinted at App. 1-35.

The district court's opinion on restitution is reported at 876 F.Supp.2d 1087 (D. Neb. 2012), and reprinted at App. 52-62. The district court's judgment is reprinted at App. 36-51.

JURISDICTION

The decision of the Eighth Circuit was entered on March 11, 2013. On May 30, 2013, Justice Alito extended the time for filing this petition to and including July 10, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are reprinted in the appendix.

INTRODUCTION

Petitioner Vicky is a victim of child pornography crimes who seeks restitution for the "full amount" of her losses under 18 U.S.C. § 2259. Because the court below refused to grant her full restitution, she now petitions this Court, raising the same restitution issue that this Court already granted certiorari to review in *Paroline v. United States*, No. 12-8561. Vicky argues that the decision of the Eighth Circuit below should be reversed because it did not follow the approach of the Fifth Circuit in the *Paroline* case. This Court should accordingly hold her petition pending its decision in *Paroline*.

The Court's ruling in *Paroline* will either affirm the Fifth Circuit's decision that child pornography victims must receive the full amount of their losses in restitution or reverse the Fifth Circuit's decision and require that the losses be apportioned among multiple defendants. If the Court affirms the Fifth Circuit, then the Court should grant Vicky's petition here, vacate the decision below, and remand for further proceedings consistent with this Court's opinion in *Paroline*. On the other hand, if the Court reverses the Fifth Circuit, then the second question in this petition will become ripe for consideration by this Court: What is the appellate standard of review for a crime victim challenging a district court ruling denying an assertion of right under the Crime Victim's Rights Act (CVRA)? The Court should grant certiorari to review this question, which is fundamental to the proper operation of the CVRA.

The CVRA promises crime victims a series of rights including "[t]he right to full and timely restitution as provided in law." 18 U.S.C. § 3771(a)(6). If a district court denies a victim's assertion of such a right, the CVRA's appellate review provision – 18 U.S.C. § 3771(d)(3) – permits a crime victim to "petition the court of appeals for a writ of mandamus." *Id.* § 3771(d)(3). However, Congress significantly altered the writ of mandamus available to crime victims by mandating that when the crime victim seeks review, "[t]he court of appeals shall take up and decide such application forthwith. . . ." *Id.*

In this case, the district court denied Vicky's claim for full restitution. She then invoked the CVRA's appellate review provision, asking for ordinary appellate review of the district court's ruling. The circuit court concluded, however, that this provision only gives crime victims limited review for district court errors that were "clear and indisputable." Specifically relying on this narrow standard of review, the court then affirmed the district court's decision to give Vicky only partial restitution. In doing so, the court below followed four other courts of appeals, which have held that the CVRA's appellate provision does not afford crime victims the ordinary appellate protections that other litigants receive. But the court below acknowledged that four other circuits have reached the opposite conclusion and have held that the "CVRA creates a unique regime that does, in fact, contemplate routine interlocutory review of district

court decisions denying rights asserted under the statute."

If this Court is not going to vacate the decision below after *Paroline*, then it should review the clear and acknowledged circuit split on this central question concerning the ability of crime victims to protect their rights under the CVRA through ordinary appellate court review. This Court's review is warranted, and the Eighth Circuit's circumscribed interpretation of the CVRA's appellate review provision should be reversed.

STATEMENT OF THE CASE

1. Petitioner Vicky was ten years old when her father raped her. Vicky's father then distributed videos of the rape on the internet for others to collect. Since then, an untold number of people worldwide have collected, viewed, and distributed the images and videos of Vicky being sexually exploited.

One of the criminals who collected and distributed Vicky's images is Robert M. Fast. His crimes came to light on November 17, 2010, when the Lincoln Police Department executed a search warrant at his residence. A later forensic examination of Fast's computer revealed it contained 26 digital images and 23 videos of child pornography. Among the images of child pornography in Fast's collection were images from the "Vicky series."

2. Fast was charged with, and pled guilty to, receipt and distribution of child pornography in violation of 18 U.S.C. § 2252A(a)(2). The Government provided notice to Vicky through her legal counsel that she was identified as a victim in Fast's case. Vicky then provided a victim impact statement to the district court seeking restitution. In her victim impact statement, Vicky explained the terrible harms inflicted by defendants like Fast: "I am 19 years old and I am living every day with the horrible knowledge that someone somewhere is watching the most terrifying moments of my life and taking grotesque pleasure in them. . . ."

Vicky's victim impact statement requested restitution for lost income, psychological counseling expenses, and other losses, as specifically provided in 18 U.S.C. § 2259. Her full documented losses were $1,224,697.[1] This figure included $722,511 for lost income, $108,975 for future counseling expenses, $147,830 for educational and vocational counseling, $42,241 in expenses for preparing the victim impact statement (i.e., forensic evaluations and supporting records), and $203,140 attorney's fees. Because Vicky had previously collected some restitution, she sought restitution for the net remaining full amount of her losses: $952,759. App. 3.

[1] For convenience, all figures in this petition have been rounded off to dollar amounts only, omitting any cents.

3. After the sentencing hearing, on October 20, 2011, the district court issued an order granting part of Vicky's restitution request. The district court concluded that Vicky did not need to prove that the defendant's actions were the "proximate cause" of her losses: "[F]or those items of loss described in 18 U.S.C. § 2259(b)(3)(A)-(E) there is no 'proximate cause' requirement because those portions of the statute do not contain one. . . ." The district court found that "by downloading the 'Vicky series' and also by having the capacity to make that bilge available to others over the Internet, Fast personally and actually harmed 'Vicky' as her evidence graphically proves."

The district court then awarded Vicky $10,000 in restitution for medical and psychiatric care, occupational therapy, and lost income. The district court also awarded Vicky $700 in attorney's fees and $9,163 for expenses reasonably incurred in pursuing restitution. The court accordingly ordered restitution in the amount of $19,863.

4. Defendant Fast appealed to the Eighth Circuit, challenging the restitution award because the district court did not require a "proximate cause" connection between Vicky's losses and the defendant's crime. Vicky and the Government defended the award. On May 10, 2012, the Government filed a letter with the court disavowing its position that Section 2259 contains no general "proximate cause" requirement. The Government then joined with Fast in moving the Eighth Circuit to remand the case to the district

court. On May 15, 2012, the Eighth Circuit granted the motion to remand.

5. On remand in the district court, the Government asserted that it now believed that the restitution statute implicitly contains a general proximate cause requirement. It nonetheless argued that Fast had proximately caused at least $19,863 in losses to Vicky and that the district court should accordingly award Vicky the same amount of restitution that she had received before.

After a hearing, the district court entered an order reducing Vicky's restitution award to just $3,333. The district court stated that it now believed that the restitution statute did contain a general proximate cause requirement. The district court further found that "Vicky's total aggregate actual damages caused by the numerous individuals who have reveled in her molestation exceed one million dollars." The district court, however, declined to order Fast to pay all her losses because he "played only a small, albeit direct, part in her victimization." The district court acknowledged that "by downloading the 'Vicky series' and by having the capacity to make that bilge available to others over the Internet, Fast personally and actually harmed Vicky, as the evidence graphically proves. Essentially, Fast directly contributed to Vicky's continuing and well founded terror." However, the district court believed that giving her more restitution would be "gilding the lily":

> While quantifying the harm Fast caused Vicky is not easy, and requires some reasonable estimation, there is no doubt – and certainly no reasonable doubt – that Fast harmed Vicky in a direct, concrete, and compensable way. In other words, I find and conclude beyond a reasonable doubt that Fast proximately caused harm to Vicky that directly resulted in compensable injury and damage to her in the sum of $3,333. Finding no reason to "gild the lily," [restitution is ordered as indicated].

App. 56-57. The district court then entered an amended judgment reflecting restitution of only $3,333 for Vicky. App. 47.

6. Vicky then filed a petition for review in the Eighth Circuit, as specifically authorized by the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771(d)(3). Following briefing and argument, the Eighth Circuit rejected Vicky's petition.[2] The Eighth Circuit first turned to the standard of review for such petitions. The Circuit noted that 18 U.S.C. § 3771(d)(3) states that the appellate court must "take up and decide" a CVRA petition within 72 hours. The Circuit concluded, however, that the use of the term "mandamus" in § 3771(d)(3) "strongly suggest[s] [Congress] wanted 'mandamus.'" App. 12. The Eighth Circuit

[2] Vicky also took a direct appeal from the district court's decision. The Eighth Circuit ruled that a petition under the CVRA was Vicky's sole mechanism for relief. App. 4-11.

then discussed four courts of appeals that supported Vicky's position that CVRA petitions are to be treated under ordinary standards of appellate review. The Eighth Circuit, however, dismissed these rulings as "unpersuasive." App. 14. Accordingly, the Circuit applied the "traditional standard for mandamus" to Vicky's petition, under which "[o]nly exceptional circumstances amounting to a judicial usurpation of power will justify the invocation of this extraordinary remedy." *Id.* (*quoting Kerr v. U.S. Dist. Court for N. Dist. of Cal.*, 426 U.S. 394, 402 (1976)).

The Eighth Circuit then turned to the merits of Vicky's petition. The Circuit noted that a circuit split existed between the First, Second, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits arrayed against the Fifth Circuit en banc. The majority of the circuits had concluded that a victim of a child pornography crime had to show that all of her losses were the "proximate result" of a defendant's crime in order to obtain restitution. App. 15-16. The Fifth Circuit en banc, however, had limited the proximate result requirement to the catch-all phrase at the end of the restitution statute where the words appear. App. 16. The Eighth Circuit decided to side with the majority of the other circuits, concluding that proximate causation between a defendant's crime and a victim's loss had to be established for each category of loss for which a victim seeks restitution. App. 18.

The Eighth Circuit then turned to Vicky's challenge to the district court's restitution award. It concluded that "all $952,759 of Vicky's losses are not

clearly and indisputably traceable to Fast's crime." App. 22. Specifically relying on the mandamus standard of review, the Circuit held that the district court "did not clearly and indisputably err in not awarding Vicky $952,759 [in] restitution." App. 23.

Judge Shepherd dissented. While he agreed with the majority's analysis on the standard of review, he sided with the Fifth Circuit's interpretation of the restitution statute. He explained that "Congress likely chose not to impose a proximate cause requirement for these types of losses because proving proximate causation would be virtually impossible in many situations, thus leaving child victims without redress." App. 27. Allowing victims to collect full restitution "not only reflects the plain language of the statute, but also embraces the sensible policy choice that the responsibility for potentially burdensome [apportionment] litigation should fall on people who commit crimes against children, rather than on those children." App. 33.

This timely petition follows.

REASONS FOR GRANTING THE PETITION

This Court has already granted certiorari to review the circuit split on whether victims of child pornography crimes can recover the full amount of their losses as restitution from defendants convicted of those crimes. *Paroline v. United States*, 12-8561. Vicky raises the same question presented from

Paroline as her first question here. The Court should accordingly hold her petition until it rules in *Paroline*. Regardless of which way this Court rules in *Paroline*, it should then grant Vicky's petition.

In *Paroline*, the Court should affirm the Fifth Circuit's en banc decision that properly held that crime victims can recover the full amount of their losses. Following an affirmance, this Court should then grant Vicky's petition, vacate the decision below, and remand for further proceedings so that Vicky can receive the full amount of her losses.

On the other hand, if the Court in *Paroline* reverses the Fifth Circuit's decision, then this Court should grant Vicky's petition to review the second question she presents. Vicky's second question concerns an acknowledged circuit split on the standard of review that applies to a crime victim petition filed in the appellate courts under the CVRA. The plain language of the provision changes conventional, discretionary mandamus standards by requiring that an appellate court must "take up and decide" a CVRA petition. 18 U.S.C. § 3771(d)(3). Yet the Court below (joined by four other circuits) have eviscerated that command by concluding crime victims are entitled to have district court decisions denying assertions of their rights reviewed only for "clear and indisputable errors." App. 11-15.

Here again, the practical effect of this circuit split is quite harmful for crime victims. In the Eighth Circuit and four other circuits, crime victims can

obtain appellate relief only by proving an overwhelming case for relief. Not surprisingly, in these circuits crime victims have great difficulty enforcing their CVRA rights, as appellate courts can often say (as the Eighth Circuit did below) that any error is not "clear and indisputable." Before it would send Vicky's restitution issue back to the Eighth Circuit, this Court should review and reserve the Eighth Circuit's demanding standard of review and give crime victims the ordinary appellate protections that Congress clearly intended.

I. This Court Should Affirm the Fifth Circuit's Decision in *Paroline*, Grant Vicky's Petition Here, Vacate the Decision Below, and Remand for Further Proceedings.

As the Fifth Circuit has held, section 2259 requires district courts to award full restitution to child pornography victims, without regard to any general proximate cause requirement. That statute requires district courts sentencing a defendant convicted of a child pornography crime "shall direct the defendant to pay the victim . . . the *full amount* of the victim's losses. . . ." 18 U.S.C. § 3771(b)(1) (emphasis added). The statute then defines the phrase "full amount of the victim's losses" as "includ[ing] any costs incurred by the victim for –

> (A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) attorneys' fees, as well as other costs incurred; and

(F) any other losses suffered by the victim as a *proximate result* of the offense."

18 U.S.C. § 2259(b)(3) (emphasis added). As the plain language of the statute makes clear, a "proximate result" language applies only to the catch-all subsection (F) where Congress has specifically added such language.

Despite the plain language of the statute, ten circuits (including the court of appeals in this case) 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, e.g.*, App. 1-35; *United States v. Kennedy*, 643 F.3d 1251, 1260-66 (9th Cir. 2011), *petn. for cert. filed*, No. 12-651. Based on this imported proximate cause limitation, these circuits have then denied the victim the right to recover the full amount of her losses from any one defendant.

The Fifth Circuit reviewed the analysis in these decisions and – acting en banc – properly rejected them. *In re Amy Unknown*, 701 F.3d 749, 774 (5th Cir. 2012) (en banc), *petn. for cert. granted*,

No. 12-8561 (June 27, 2013). The Fifth Circuit explained that Section 2259's plain language is dispositive. As the Fifth Circuit concluded, to add a "proximate result" limitation into the other parts of the statute "would contradict the statute's plain terms and be tantamount to judicial redrafting." 701 F.3d at 766.

This Court has now granted certiorari to review the Fifth Circuit's ruling. *United States v. Paroline*, No. 12-8561. In ruling in *Paroline* next Term, this Court should affirm the Fifth Circuit's en banc reasoning and construe the Mandatory Restitution for Sexual Exploitation of Children Statute, 18 U.S.C. § 2259, to guarantee that child pornography victims will receive the full restitution Congress intended. Because the Eighth Circuit did not construe the statute that way, the Court should then grant Vicky's petition here, vacate the Eighth Circuit's decision below, and remand for further proceedings.

II. If This Court Reverses the Fifth Circuit's Decision in *Paroline*, then It Should Grant Certiorari to Resolve the Circuit Split on Whether Crime Victims Are Entitled to Ordinary Standards of Appellate Review When Challenging District Court Denials of Their Rights.

For all the reasons just explained, this Court in *Paroline* should affirm the Fifth Circuit's decision and then grant Vicky's petition, vacate the decision below, and remand for an award of full restitution. If,

however, the Court in *Paroline* reverses the Fifth Circuit's decision, then it should grant Vicky's petition here to review her second question presented concerning the standard of review for crime victims' petitions under the Crime Victims Rights Act. The Court below rejected Vicky's challenge to the district court's restitution decision based on a demanding, standard of review. Because the circuits are increasingly divided over what standard of review applies to petitions filed by victims under the CVRA, the Court should grant review to settle this important, separate issue. The Court should then hold that crime victims are entitled to the ordinary standards of appellate review that other litigants receive.

A. The Courts of Appeals Are Deeply and Intractably Divided Over the Proper Standard of Review for Crime Victims' Petitions Under the Crime Victims' Rights Act.

The issue concerning the Crime Victims' Rights Act standard of review arises under an important federal statute that this Court has yet to interpret. The CVRA gives crime victims a series of enforceable "rights" in the federal criminal justice process. 18 U.S.C. § 3771(a). It has been described as "the most sweeping federal victims' rights law in the history of the nation." *See* Hon. Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581, 582

(2005). Among the rights that the Act extends to crime victims is the right that Vicky asserted below: "the right to full and timely restitution as provided in law." 18 U.S.C. § 3771(a)(6).

Congress placed a series of enforcement mechanisms into the CVRA, explaining that "[t]his part of the bill is what makes this legislation so important, and different from earlier legislation: It provides mechanisms to enforce the set of rights provided to victims of crime." 150 CONG. REC. S4261 (Apr. 24, 2004) (statement of Sen. Feinstein). Congress acted against a backdrop of earlier crime victims' rights statutes that had failed to fully protect crime victims, particularly in the appellate courts. The drafters of the CVRA specifically criticized appellate court rulings, 150 CONG. REC. S4269 (Apr. 24, 2004) (statement of Sen. Feinstein), and observed that "[w]ithout the right to seek appellate review and a guarantee that the appellate court will hear the appeal and order relief, a victim is left to the mercy of the very trial court that may have erred." 150 CONG. REC. S4270 (Apr. 24, 2004) (statement of Sen. Kyl).

To remedy this problem, the CVRA's enforcement mechanisms begin with a provision that the "crime victim . . . may assert the rights described in. . . . [the CVRA]." 18 U.S.C. § 3771(d)(1). Once a victim asserts her rights, "the court shall ensure that the crime victims is afforded the rights described in . . . [the CVRA]." 18 U.S.C. § 3771(b)(1). And the CVRA further provides that if the district court denies an asserted right of a victim, then the victim can seek

review in the courts of appeals: "If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. . . . The court of appeals *shall take up and decide* such application forthwith within 72 hours after the petition has been filed." 18 U.S.C. § 3771(d)(3) (emphasis added).

Congress enacted the CVRA's appellate review provision because "[a]ppellate review of denials of victims' rights is just as important as the initial assertion of a victim's right. The provision ensures review and encourages courts to *broadly defend* the victims' rights." 150 CONG. REC. S4270 (Apr. 24, 2004) (statement of Sen. Feinstein) (emphasis added). Yet despite these clear statements – both in the statutory language that courts of appeals shall "take up and decide" crime victims' petitions and in the authoritative legislative history that appellate courts should "broadly" defend victims' rights – the Courts of Appeals are fractured over the proper construction of the CVRA. The net effect has been that in four circuits, crime victims are receiving the broad appellate review that Congress intended, while in five other circuits (including the court below) victims are being denied meaningful review.

1. Four Courts of Appeals Have Held that Crime Victims Receive Ordinary Appellate Review of CVRA Petitions.

Four courts of appeals have properly given crime victims broad protection by extending ordinary appellate review to victims' CVRA petitions. Three courts of appeals have so held in published, precedential decisions. *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 562-63 (2d Cir. 2005); *Kenna v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 435 F.3d 1011, 1017 (9th Cir. 2006); *In re Stewart*, 552 F.3d 1285, 1288 (11th Cir. 2008).[3] A fourth court of appeal has also done so, albeit in an unpublished decision. *In re Walsh*, 229 Fed. Appx. 58, 61, 2007 WL 1156999, at *2 (3d Cir. 2007) (*citing* Second and Ninth Circuit opinions).

The rationale underlying these decisions is straightforward: Congress wanted to allow crime victims regular access to appellate courts to protect

[3] While the Eleventh Circuit did not explicitly set out its standard of review, it treated the CVRA petition in *In re Stewart* quite differently than an ordinary mandamus petition. In that case, both the crime victims and defendant briefed the standard of review question, advancing the competing positions on which the circuits are currently split. In siding with the victims, the Circuit specifically proceeded to review the district court's determination without deference, concluding that the district court had simply drawn the wrong conclusion. *Id.* at 1288-89. As the D.C. Circuit recognized in discussing the Eleventh Circuit's decision, *Stewart* granted relief "without asking whether [the] victim[s] had a clear and indisputable right to relief" as is ordinarily required for mandamus. *United States v. Monzel*, 641 F.3d 528, 533 (D.C. Cir. 2011).

their rights. As the Second Circuit has explained, under "the plain language" of the CVRA, "Congress has chosen a petition for mandamus as a mechanism by which a crime victim may appeal a district court's decision denying relief sought under the provisions of the CVRA." *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d at 562. The Circuit noted that ordinarily a writ of mandamus is an "extraordinary remedy," and accordingly, "mere error, even gross error in a particular case . . . does not suffice to support issuance of the writ." *Id.* at 562 (internal quotations omitted). In contrast to this standard, however, the Second Circuit observed that a provision in the CVRA, 18 U.S.C. § 3771(d)(5), allows a victim to "make a motion to reopen a plea or sentence . . . if . . . the victim petitions the court of appeals for a writ of mandamus within 14 days." In light of Congress' recognition that crime victims would routinely be seeking such review, "[i]t is clear, therefore, that a [crime victim] seeking relief pursuant to the mandamus provision set forth in § 3771(d)(3) need not overcome the hurdles typically faced by a petitioner seeking review of a district court determination through a writ of mandamus." 409 F.3d at 562.

Similarly, in *Kenna*, the Ninth Circuit noted that "[w]e normally apply strict standards in reviewing petitions for a writ of mandamus, in large part to ensure that they not become vehicles for interlocutory review in routine cases." 435 F.3d at 1017. The Ninth Circuit in *Kenna*, however chose not to "balance the usual [mandamus] factors because the

CVRA contemplates active review of orders denying victims' rights claims even in routine cases." *Id.* The Circuit explained:

> The CVRA explicitly gives victims aggrieved by a district court's order the right to petition for review by writ of mandamus, provides for expedited review of such a petition, . . . and requires a reasoned decision in case the writ is denied. The CVRA creates a unique regime that does, in fact, contemplate routine interlocutory review of district court decisions denying rights asserted under the statute.

Id.

Even though other circuits have reached a different conclusion, the Second, Third, Ninth, and Eleventh circuits have not retreated from their rulings. For example, the Ninth Circuit has followed its *Kenna* precedent and reviewed CVRA cases under ordinary standards of appellate review in at least seven subsequent published decisions, including at least four published decisions in the last year. *See In re Stake Ctr. Locating, Inc.*, ___ F.3d ___, No. 13-72062, 2013 WL 3064819, at *1 (9th Cir. June 20, 2013); *In re Amy & Vicky*, 714 F.3d 1165, 1167 (9th Cir. May 3, 2013); *In re Morning Star Packing Co., LP*, 711 F.3d 1142, 1143 (9th Cir. 2013); *In re Amy*, 710 F.3d 985, 986 (9th Cir. 2013); *In re Amy*, 698 F.3d 1151, 1152 (9th Cir. 2012), *petn. for cert. filed*, No. 12-651; *In re Andrich*, 668 F.3d 1050, 1051 (9th Cir. 2011); *In re Mikhel*, 453 F.3d 1137, 1140 (9th Cir. 2006); *In re Kenna*, 453 F.3d 1136, 1137 (9th Cir.

2006). The Second Circuit has also reiterated its holding in at least two subsequent decisions. *See, e.g.*, *In re Local #46 Metallic Lathers Union*, 568 F.3d 81, 85 (2d Cir. 2009); *In re Rendon Galvis*, 564 F.3d 170, 174 (2d Cir. 2009). The Eleventh Circuit has refused to revisit its earlier standard of review ruling, finding it unnecessary to address the issue. *In re Stewart*, 641 F.3d 1271, 1274 (11th Cir. 2011). And the Third Circuit has likewise refused to revisit the issue, finding it unnecessary to resolution of that case. *In re Zackey*, No. 10-3772, 2010 WL 3766474, at *1 (3d Cir. 2010).

2. Five Courts of Appeals Have Held that Crime Victims Receive Only Limited Mandamus Review of a CVRA Petition.

In conflict with the Second, Ninth, and Eleventh Circuits' repeated and recently published decisions (and the Third Circuit's unpublished decision), the Eighth Circuit below joined the Fifth, Sixth, Tenth, and D.C. Circuits in holding that crime victims are not entitled to broad appellate protection of their rights, but instead receive only deferential review of district court decisions for "clear and indisputable" error. The fountainhead case for these decisions is *In re Antrobus*, 519 F.3d 1123 (10th Cir. 2008), in which two putative crime victims filed a petition for review of a district court decision that they were not "victims" covered by the CVRA. The two petitioners cited the Second and Ninth Circuit decisions discussed above as precedents for giving them ordinary

appellate review of their claims. The Tenth Circuit rejected those decisions: "We respectfully disagree, however, with the decisions of our sister circuit courts." *Id.* at 1124 (disagreeing with *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d at 562-63, and *Kenna*, 435 F.3d at 1017).

Instead of following the Second and Ninth Circuits, the Tenth Circuit focused on the term "mandamus" in the CVRA. That Circuit believed that where "Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word. . . ." *Antrobus*, 519 F.3d at 1124 (internal quotation omitted). The Tenth Circuit accordingly proceeded to review the parents' claim "under traditional mandamus standards." *Id.*

The heightened standard of review was outcome-determinative. The Tenth Circuit then acknowledged that, even under that demanding standard, "[t]his is a difficult case. . . . [B]ut we cannot say that the district court was clearly wrong in its conclusion." *Id.*[4] The Tenth Circuit has since applied the strict mandamus standard of review in other CVRA cases. *See,*

[4] The saga of the *Antrobus* case is reviewed in Paul G. Cassell, *Protecting Crime Victims in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims' Rights Act's Mandamus Provision*, 87 DENV. U.L. REV. 599, 601-14 (2010).

e.g., *In re Antrobus*, 563 F.3d 1092, 1097 (10th Cir. 2009).

The Tenth Circuit's interpretation has been adopted by four other circuits, including the Court in this case. Shortly after the Tenth Circuit's initial ruling in *Antrobus*, the Fifth Circuit addressed the same issue. In *In re Dean*, 527 F.3d 391 (5th Cir. 2008), crime victims petitioned under the CVRA for review of an adverse ruling, arguing for ordinary appellate review. While the Fifth Circuit acknowledged "[t]wo circuits agree with the victims," *id.* at 394 (citing *Kenna*, 435 F.3d at 1017 and *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d at 563 (2d Cir. 2005)), it sided with the Tenth Circuit's opposite ruling. The Fifth Circuit held "[w]e are in accord with the Tenth Circuit [rather than the Second and Ninth Circuits] for the reasons stated in [the Tenth Circuit's] opinion." 409 F.3d at 394. Here again, the standard of review controlled the outcome. While the Fifth Circuit agreed with the victims' legal argument, it noted that it could withhold discretionary mandamus relief if a writ is not "appropriate under the circumstances." *Id.* at 395. The Circuit decided to simply withhold relief and remand the case to the district court for further proceedings. *Id.* The Fifth Circuit has since applied this restrictive standard of review in several additional cases. *See, e.g.*, *In re Amy*, 591 F.3d 792 (5th Cir. 2009), *rev'd*, 397 F.3d 306 (5th Cir. 2011), *aff'd*, 701 F.3d 749 (5th Cir. 2012) (en banc), *petn. for cert. granted*, No. 12-8561 (June 27, 2013); *In re Fisher*,

640 F.3d 645 (5th Cir. 2011), *petn. for cert. denied*, No. 11-589, 132 S.Ct. 1075 (2012).

The Sixth Circuit acknowledged the circuit split and followed the Tenth Circuit's approach, finding it "persuasive." *In re Acker*, 596 F.3d 370, 372 (6th Cir. 2010).

The D.C. Circuit also acknowledged the circuit split. *United States v. Monzel*, 641 F.3d 528 (D.C. Cir. 2011), observed that "[t]here is a circuit split on the standard of review for mandamus petitions brought under the CVRA. Three circuits apply the traditional mandamus standard urged by Monzel and the government. Four do not." *Id.* at 532-33 (citing cases discussed in this petition). The D.C. Circuit decided to make the circuit split four-to-four, siding with those circuits that apply the deferential mandamus standard of review. *See id.* at 533.

The Eighth Circuit's decision below is the ninth court of appeals decision on the subject. It surveyed the eight other decisions that were arrayed on both sides of the issue and sided with the Tenth Circuit's approach. App. 11-13. Citing and discussing the four circuit decisions supporting expansive review, the Eighth Circuit found them to be "unpersuasive" (App. 14), and instead concluded that crime victims are entitled to only narrow review for "clear and indisputable" errors. App. 15.

B. If This Court Reverses in *Paroline*, Then Vicky's Petition Will Be a Good Vehicle to Review the Standard of Review Question.

If this Court reverses in *Paroline*, then this petition becomes a good vehicle for addressing the standard of review question. If the Court reverses in *Paroline* and rejects the argument that child pornography victims are entitled to restitution for the full amount of their losses, then the issue in cases such as this one becomes what fraction of their losses should victims receive as restitution. On that issue, the district court made two different restitution decisions. The district court initially awarded Vicky $10,000, concluding that her losses from the defendant's crime "may in fact be much higher." App. 62. The Eighth Circuit remanded solely because the Government changed its position on how to interpret the statute. Then the district court, without any new factual information, simply chopped Vicky's award to $3,333, one-third of what the district court had earlier found proper, saying only that to give her any more would "gild the lilly." App. 57.

In rejecting Vicky's challenge to that second, smaller award, the Eighth Circuit specifically and repeatedly relied upon the narrow standard of review as the basis for its decision. In the Circuit's discussion of why it was not granting Vicky any relief, it referred to the clear-and-indisputable-error standard four times (including the final sentence of its opinion)

as well as to the limitations on mandamus review (in the penultimate sentence of its opinion). App. 20-23.

Presumably the reason why the Eighth Circuit repeatedly referenced its limited review is because otherwise it would have been quite difficult to affirm the district court's decision. The district court's sense that awarding Vicky more would somehow "gild the lilly" (App. 57) was inappropriate. Congress enacted a statute commanding district courts to award victims "the full amount" of their loses. 18 U.S.C. § 2259(b)(1). And Congress' statute was clearly designed to give innocent victims of child pornography crimes the maximum restitution possible. The Eighth Circuit simply could not have affirmed the district court's decision under ordinary appellate review. Unlike other cases in which the standard of review may not have been squarely implicated, this case hinges on the standard of review.[5]

---

[5] This issue of the proper construction of the CVRA's appellate review provision has been before the Court in a handful of petitions previously. In each instance, however, the United States has argued (apparently successfully) that the petition presenting the issue did not really implicate standard of review issues or suffered other "vehicle" problems. *See, e.g.,* U.S. BIO at 13, *Fisher v. United States Dist. Court for N.D. of Texas*, No. 10-1518 ("the circumstances of this case do not suggest that the choice among competing standards of review was . . . likely to be outcome-determinative"); U.S. BIO at 8, *Amy v. Monzel*, No. 11-85 (review by the Court "is not warranted at this time because the decision of the court of appeals is interlocutory"). Moreover, the United States has previously argued that since the Tenth Circuit's *Antrobus* decision, "every court of appeals to consider

(Continued on following page)

C. The Court Below Erred in Failing to Give Vicky the Ordinary Appellate Review that Other Litigants Receive.

The Eighth Circuit's refusal to give ordinary appellate review to Vicky's CVRA petition violated the CVRA's plain language. The CVRA directly provides that "[t]he court of appeals *shall take up and decide* such application forthwith. . . ." 18 U.S.C. § 3771(d)(3) (emphasis added). The Eighth Circuit did not "take up and decide" Vicky's claim that the district court had incorrectly denied her restitution, holding instead only that the district court had not acted so far outside of its authority as to have clearly and indisputably erred. This violates the CVRA's structure. *See* Paul G. Cassell, *Protecting Crime Victims in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims' Rights Act's Mandamus Provision*, 87 DENV. U.L. REV. 599, 621-25 (2010) (discretionary mandamus review is flatly at odds with the language of the CVRA).

The Court below and other circuits have mistakenly relied on a rule of statutory construction

---

the issue in a published opinion has agreed that the traditional mandamus standard of review should apply" and that the "Ninth Circuit has never applied (or even cited) the [ordinary] standard of review [it] set forth in *Kenna*. . . ." BIO at 11, *Fisher v. United States Dist. Court for N.D. of Texas*, No. 10-1518. This argument against review has now disappeared since the Ninth Circuit reasserted its position that victims receive ordinary appellate review in at least five recent, published decisions. *See supra*, p. 20.

involving "borrow[ed] terms of art." App. 12. The CVRA, however, expressly altered the common law principles that otherwise might apply to review of other mandamus petitions. In the CVRA, Congress chose a "writ of mandamus," 18 U.S.C. § 3771(d)(3), as the procedural tool for crime victims to obtain quick review of trial court actions. But Congress wanted to forge that typically discretionary tool into a powerful new, non-discretionary remedy that would fully protect crime victims. Congress flatly required courts of appeals to "take up and decide" such applications. 18 U.S.C. § 3771(d)(3). In requiring appellate courts to "decide" victims' applications, Congress plainly wanted the courts of appeals to "make a final choice or judgment about" them. Merriam-Webster's Collegiate Dictionary (11th ed. 2006). The Eighth Circuit here never made a final choice or judgment about whether Vicky's claim for restitution was valid.

Another provision in the CVRA also indicates that the statute provides ordinary appellate review. The CVRA directs that "[i]n *any* court proceeding" – including, of course, appellate court proceedings – "the court shall *ensure* that the crime victim is afforded the rights described in [the CVRA]." 18 U.S.C. § 3771(b)(1). The congressional requirement that appellate courts "ensure" that crime victims are "afforded" their rights would be fatally compromised if those courts could only examine lower court proceedings

for clear and indisputable errors.[6] In this case, for example, the Eighth Circuit did not "ensure" that Vicky had received restitution for the "full amount" of her losses, restitution that the district was obligated to award under a mandatory restitution statute.

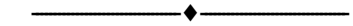
If any doubt remains about the victims' right to relief under the plain language of the CVRA, the CVRA's legislative history unequivocally demonstrates that Congress wanted crime victims generously protected through traditional appellate review. The definitive legislative history states directly that the law "require[s]" appellate courts to "broadly defend" crime victims and "remedy errors of lower courts":

> [W]hile mandamus is generally discretionary, this provision [18 U.S.C. § 3771(d)(3)] means that courts *must* review these cases. Appellate review of denials of victims' rights is just as important as the initial assertion of a victim's right. This provision ensures

[6] To further guarantee appellate review of the denial of crime victims' rights, the CVRA also provides that in "any appeal in a criminal case, the government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates." 18 U.S.C. § 3771(d)(4). This provision further demonstrates that crime victims can obtain ordinary appellate review by filing their own mandamus petition. Otherwise they would be penalized for relying on their legal counsel rather than seeking to convince the government, in its discretion, to seek appellate review. It is absurd to impute to Congress the intent that crime victims would have less ability to protect their own rights than the government.

> review and encourages courts to *broadly defend* the victims' rights. . . . This country's appellate courts are designed to *remedy errors of lower courts and this provision requires them to do so for victim's rights*.

150 CONG. REC. S7304 (statement of Sen. Kyl) (emphases added). Contradicting the conclusion that the CVRA simply imports a "common law tradition," *Dean*, 527 F.3d at 393, Senator Feinstein stated directly that the Act would create "*a new use* of a very old procedure, the writ of mandamus. This provision will establish a procedure where a crime victim can, in essence, immediately *appeal* a denial of their rights by a trial court to the court of appeals." 150 CONG. REC. S7295 (statement of Sen. Feinstein) (emphases added). The Eighth Circuit never gave Vicky her right to full appellate review of her claim. This Court should grant certiorari on the standard of review question and then reverse and remand with instructions to consider Vicky's restitution claims under ordinary standards of appellate review.



CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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

CAROL L. HEPBURN
CAROL L. HEPBURN PS
2722 Eastlake Avenue E.,
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) 201-8271
cassellp@law.utah.edu

Counsel for Petitioner Vicky

United States Court of Appeals
for the Eighth Circuit

No. 12-2752

United States of America

Plaintiff-Appellee

v.

Robert M. Fast

Defendant-Appellee

Vicky, Child Pornography Victim

Interested party-Appellant

No. 12-2769

In re: Vicky, Child Pornography Victim

Petitioner

Appeals from the United States District Court
for the District of Nebraska – Lincoln

Submitted: November 15, 2012
Filed: March 11, 2013

Before MURPHY, BENTON, and SHEPHERD, Circuit Judges.

BENTON, Circuit Judge.

Robert M. Fast pled guilty to one count of receiving and distributing child pornography in violation of 18 U.S.C. § 2252A(a)(2). The district court[1] ordered him to pay $3,333 restitution to Vicky – the pseudonym for the child-pornography victim whose images were on Fast's computer – under 18 U.S.C. § 2259. Vicky challenges the restitution award by direct appeal and in a petition for mandamus.[2] She argues that Fast need not proximately cause the losses defined in subsections 2259(b)(3)(A) through (E) to be liable for them, and that the district court misinterpreted the "full amount of [her] losses" under section 2259(b)(1). Because she lacks standing as a nonparty to bring a direct appeal, this court grants the motions to dismiss by Fast and the government. Having jurisdiction over her mandamus petition under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771(d)(3), this court denies her petition.

---

[1] The Honorable Richard G. Kopf, United States District Judge for the District of Nebraska.

[2] This court granted Vicky's request to waive the 72-hour statutory deadline for deciding her mandamus petition. *See* **18 U.S.C. § 3771(d)(3)**.

I.

The CVRA grants crime victims, including Vicky, the "right to full and timely restitution as provided in law." **18 U.S.C. § 3771(a)(6).** The district court must order restitution. ***Id.*** **§ 2259(a)**, **(b)(4)(A).** "The language of 18 U.S.C. § 2259 reflects a broad restitutionary purpose." ***In re Amy Unknown***, 701 F.3d 749, 760 (5th Cir. 2012) (en banc) (citations omitted); *accord* ***United States v. Julian***, 242 F.3d 1245, 1247 (10th Cir. 2001). "Restitution" is the "full amount of the victim's losses as determined by the court," including the costs enumerated in subsections 2259(b)(3)(A) through (F). **18 U.S.C. § 2259(b)(1), (3).** The district court resolves "[a]ny dispute as to the proper amount or type of restitution . . . by the preponderance of the evidence." ***Id.*** **§ 3664(e).** The government bears the "burden of demonstrating the amount of the loss sustained by a victim as a result of the offense." ***Id.***

Vicky documents $1,224,697.04 in losses from her sexual abuse and the distribution of the pornographic images. Before Fast's sentencing, she sought $952,759.81 restitution (having previously collected $271,937.23 from other defendants). The government initially requested "at least $10,000" restitution. The district court ruled that Fast need not have proximately caused the losses defined in subsections 2259(b)(3)(A) through (E) to be liable for them. ***United States v. Fast***, 820 F. Supp. 2d 1008, 1010 (D. Neb. 2011). The court initially ordered Fast to pay $19,863.84 restitution. ***Id.*** On appeal, the government

agreed with Fast that proximate cause is required. This court remanded to the district court to reconsider Vicky's restitution award (denying her motion to intervene as moot). ***United States v. Fast***, No. 11-3455, at *1 (8th Cir. May 15, 2012).

On remand, the district court determined "that proximate cause is required for each element of restitution under 18 U.S.C. § 2259."[3] ***United States v. Fast***, 876 F. Supp. 2d 1087, 1088 (D. Neb. 2012). It found Fast liable for losses accrued after June 25, 2010 – when he began committing the crime. ***Id.*** at 1089. The district court concluded that Fast "proximately caused harm to 'Vicky' that directly resulted in compensable injury and damage to her in the sum of $3,333." ***Id.*** at 1090. This amount consisted of "$2,500 for medical and psychiatric care, occupational therapy, and lost income under 18 U.S.C. § 2259(b)(3)(A), (B), & (D)," and $833 for "attorney fees and costs under 18 U.S.C. § 2259(b)(3)(E)." ***Id.*** at 1088.

II.

Fast and the government move to dismiss Vicky's direct appeal of the restitution order, arguing that she lacks standing because she is not a party to the case. "Standing is a fundamental element of federal court jurisdiction." ***Curtis v. City of Des Moines***,

[3] On remand, the district court denied as untimely Vicky's motion to intervene. She does not appeal that ruling.

995 F.2d 125, 128 (8th Cir. 1993), *citing* ***Sierra Club v. Morton***, 405 U.S. 727, 732 (1972). Those failing to "intervene or otherwise attain party status may not appeal a district court's judgment." ***Id.*** (citation omitted). "[A]ll Courts of Appeals to have addressed this issue have concluded that nonparties cannot directly appeal a restitution order entered against a criminal defendant." ***United States v. Stoerr***, 695 F.3d 271, 277 (3d Cir. 2012) (citations omitted); *see* ***In re Amy Unknown***, 701 F.3d at 756; ***United States v. Alcatel-Lucent France, SA***, 688 F.3d 1301, 1307 (11th Cir. 2012) (per curiam); ***United States v. Monzel***, 641 F.3d 528, 542 (D.C. Cir.), *cert. denied*, 132 S. Ct. 756 (2011); ***United States v. Aguirre-Gonzalez***, 597 F.3d 46, 53-55 (1st Cir. 2010); ***In re Acker***, 596 F.3d 370, 373 (6th Cir. 2010) (per curiam); ***United States v. Hunter***, 548 F.3d 1308, 1315-16 (10th Cir. 2008); ***United States v. United Sec. Sav. Bank***, 394 F.3d 564, 567 (8th Cir. 2004) (per curiam); ***United States v. Mindel***, 80 F.3d 394, 398 (9th Cir. 1996); ***United States v. Grundhoefer***, 916 F.2d 788, 793 (2d Cir. 1990); *see also* ***United States v. Laraneta***, 700 F.3d 983, 986 (7th Cir. 2012) (finding "no quarrel" with the result that "a crime victim cannot appeal from a denial of restitution in a criminal case because the victim is not a party").

Vicky did not successfully intervene, and the CVRA does not grant her party status. The CVRA grants the *government* the right to assert a victim's rights on direct appeal, **18 U.S.C. § 3771(d)(4)**, and details when a victim may re-open a plea or sentence

through a motion, ***id.*** **§ 3771(d)(5)**; *see* ***Hunter***, 548 F.3d at 1315-16 ("[Section 3771(d)(5)] makes no mention of a direct appeal."). The CVRA grants a victim the right to petition for mandamus. **18 U.S.C. § 3771(d)(3).** "Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." ***Id.*** **§ 3771(d)(6).** Allowing victims to appeal would "erode the CVRA's attempt to preserve the Government's discretion." ***In re Unknown***, 701 F.3d at 757; *accord* ***Hunter***, 548 F.3d at 1316. "That Congress included these provisions but did *not* provide for direct appeals by crime victims is strong evidence that it did not intend to authorize such appeals." ***Monzel***, 641 F.3d at 542 (emphasis in original) ("[T]he CVRA's 'carefully crafted and detailed enforcement scheme provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.'" (emphasis in original), *quoting* ***Mertens v. Hewitt Assocs.***, 508 U.S. 248, 254 (1993) (internal quotation marks omitted)). The CVRA does not allow Vicky to appeal directly.

Vicky invokes 28 U.S.C. § 1291. But "§ 1291's broad jurisdictional grant does not permit us to ignore the requirement that the appellant have standing to appeal." ***Stoerr***, 695 F.3d at 277 n.5 (citation omitted). Vicky cites several cases where courts have heard non-party appeals. None, except *United States v. Kones*, 77 F.3d 66, 68 (3d Cir. 1996), allowed a non-party appeal that would alter a defendant's sentence.

See ***Monzel***, 641 F.3d at 542-43. A criminal restitution order is part of a defendant's sentence. ***Id.*** at 541; *see* ***United Sec. Sav. Bank***, 394 F.3d at 567. "A crime victim does not have standing to appeal a district court's restitution order." ***United Sec. Sav. Bank*** at 567; ***Aguirre-Gonzalez***, 597 F.3d at 54 ("[C]rime victims have no right to directly appeal a defendant's criminal sentence. . . .").

In ***Kones***, "a purported victim sought to appeal the district court's conclusion that she was not entitled to restitution." ***Stoerr***, 695 F.3d at 277 n.5, *citing* ***Kones***, 77 F.3d at 68. "Without addressing the purported victim's standing to appeal, [the Third Circuit] noted in one sentence that [it] had appellate jurisdiction under 28 U.S.C. § 1291." ***Id.***, *citing* ***Kones***, 77 F.3d at 68. The Third Circuit later held that it was not "bound by the bald jurisdictional statement in *Kones*" – a " 'drive-by jurisdictional ruling[ ],' in which jurisdiction 'ha[s] been assumed by the parties, and . . . assumed without discussion by the [c]ourt,' does not create binding precedent." ***Id.*** (alterations in original), *quoting* ***Steel Co. v. Citizens for a Better Env't***, 523 U.S. 83, 91 (1998); *see* ***Monzel***, 641 F.3d at 541 n.13.

In the *Curtis* case, this court allowed nonparties to appeal because they had "an interest in the cause litigated and participated in the proceedings actively enough to make [them] privy to the record . . . [even though] [they] w[ere] not named in the complaint and did not intervene." ***Curtis***, 995 F.2d at 128 (second alteration in original) (omission in original) (citation

and internal quotation marks omitted). *Curtis*, unlike here, was a civil case and did not alter the defendant's sentence.

Vicky argues that because the CVRA grants victims the "right" to restitution, *see* **18 U.S.C. § 3771(a)(6)**, she has an "injury" that gives her standing to appeal. *But see* ***United Sec. Sav. Bank***, 394 F.3d at 567 ("The direct, distinct, and palpable injury in a criminal sentencing proceeding plainly falls only on the defendant who is being sentenced."). But granting victims a right to restitution neither makes them a party to the case, nor gives them a right to appeal. *See*, *e.g.*, ***Aguirre-Gonzalez***, 597 F.3d at 53 ("Notwithstanding the rights reflected in the restitution statutes, crime victims are not parties to a criminal sentencing proceeding . . . [and] may not appeal a defendant's criminal sentence." (internal citations and citations omitted)). "[T]he CVRA expressly identifies the avenues of appellate review of a district court's denial of restitution . . . and neither of those avenues entitles a crime victim to direct appeal." ***Alcatel-Lucent France, SA***, 688 F.3d at 1306; *see also* ***Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis***, 444 U.S. 11, 19 (1979) ("[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it."); *see also* ***Aguirre-Gonzalez***, 597 F.3d at 54 ("The Federal Rules of Civil Procedure allow nonparties to intervene to assert their rights. The Federal Rules of Criminal Procedure contain no comparable provision." (citation omitted)).

Vicky cites additional cases where a non-party crime victim was allowed to appeal.[4] *See* ***United States v. Yielding***, 657 F.3d 722, 726 n.2 (8th Cir. 2011) (holding the nonparty had "standing to appeal" because "it [was] bound or adversely affected by an injunction"); ***In re Siler***, 571 F.3d 604, 608-09 (6th Cir. 2009) (allowing nonparties to appeal the use of a presentencing report in a civil suit); ***United States v. Perry***, 360 F.3d 519, 523-24 (6th Cir. 2004) (allowing a non-party victim to appeal an order vacating a lien securing her restitution award); ***Doe v. United States***, 666 F.2d 43, 45-46 (4th Cir. 1981) (allowing a non-party victim to appeal the use of sexual history evidence). "But none of the cases she cites involved a request by a victim to alter a defendant's sentence." *See* ***Monzel***, 641 F.3d at 543; *accord* ***Aguirre-Gonzalez***, 597 F.3d at 54; ***Hunter***, 548 F.3d at 1314.

Vicky cites several cases that allowed other nonparties to appeal in criminal cases. *See* ***United***

---

[4] Vicky also cites a letter from Senator Jon Kyl to the U.S. Justice Department, stating that the CVRA was "not intended to block crime victims from taking an ordinary appeal from an adverse decision affecting their rights (such as a decision denying restitution) under 28 U.S.C. § 1291." **Letter from Senator Jon Kyl to Attorney Gen. Eric Holder** (June 6, 2011), *reprinted in* **157 Cong. Rec. S3609** (June 8, 2011). Statements made after a statute's enactment are "not a legitimate tool of statutory interpretation." ***Bruesewitz v. Wyeth LLC***, 131 S. Ct. 1068, 1081 (2011); *see* ***Stoerr***, 695 F.3d at 280 n.7 ("[A] statement by an individual senator does not 'amend the clear and unambiguous language of a statute.'" (quoting ***Barnhart v. Sigmon Coal Co.***, 534 U.S. 438, 457 (2002))).

States v. Antar, 38 F.3d 1348,1355-56 (3d Cir. 1994) (permitting the press to appeal a district court order sealing a voir dire transcript); ***In re Subpoena to Testify Before Grand Jury Directed to Custodian of Records***, 864 F.2d 1559, 1561 (11th Cir. 1989) (allowing the press to appeal the scope of a closure order); ***Anthony v. United States***, 667 F.2d 870, 878 (10th Cir. 1982) (allowing appeal of discovery rulings); ***United States v. Hubbard***, 650 F.2d 293, 314 (D.C. Cir. 1980) (allowing appeal of an order unsealing documents found during a search); ***United States v. Briggs***, 514 F.2d 794, 799 (5th Cir. 1975) (exercising jurisdiction over an appeal by unindicted co-conspirators challenging an order refusing to strike their names from the indictment). These "appeals all related to specific trial issues and did not disturb a final judgment." ***Hunter***, 548 F.3d at 1314; *see* ***In re Amy Unknown***, 701 F.3d at 756 ("[These cases] allowed non-parties to appeal discrete pre-trial issues . . . unrelated to the merits of the criminal cases from which they arose." (citations omitted)).

Vicky claims that jurisdiction is nonetheless proper under the collateral order doctrine. *See* ***Mohawk Industries, Inc. v. Carpenter***, 130 S. Ct. 599, 605 (2009). "[U]nder the collateral order doctrine, prejudgment appellate review is allowed in a criminal case for trial court orders which [(1)] conclusively determine the disputed question, [(2)] resolve an important issue completely separate from the merits of the action, and [(3)] are effectively unreviewable on appeal from final judgment." ***United States v. Ivory***,

29 F.3d 1307, 1311 (8th Cir. 1994). She fails the second prong "because the issue of restitution is part and parcel of the criminal sentence." ***Alcatel-Lucent France, AS***, 688 F.3d at 1305 n.1. She also fails the third prong because the CVRA permits the government to appeal (and, as discussed below, allows her to petition for mandamus). *See* **18 U.S.C. § 3771(d)(3)-(4)**. Because Vicky lacks standing, the motions to dismiss her direct appeal are granted. She may proceed only by mandamus. ***Id.*** **§ 3771(d)(3)**.

III.

According to Fast and the government, the traditional standard for mandamus applies, requiring Vicky to show that (1) she lacks "adequate alternative means" to obtain relief, (2) her right to "issuance of the writ is clear and indisputable," and (3) "the writ is appropriate under the circumstances." ***Cheney v. U.S. Dist. Court for Dist. of Columbia***, 542 U.S. 367, 380-81 (2004) (internal citations, citations, and internal quotation marks omitted); ***Kreditverein der Bank Austria Creditanstalt für Niederösterreich und Bergenland v. Nejezchleba***, 477 F.3d 942, 948 (8th Cir. 2007), *citing* ***Mallard v. U.S. Dist. Ct. for the Dist. of Iowa***, 490 U.S. 296, 309 (1989). Vicky urges this court to apply the standard of review for a direct appeal.

The CVRA states:

> If the district court denies the relief sought, the movant may petition the court of appeals

> for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge. . . . The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. . . . If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

18 U.S.C. § 3771(d)(3). That a court must "take up and decide" the petition within 72 hours "says nothing about the standard of review." ***Monzel***, 641 F.3d at 533-34; *accord* ***In re Amy Unknown***, 701 F.3d at 758 n.6. Rather, "[t]he very short timeline in which appellate courts must act, and the fact that a single circuit judge may rule on a petition, confirm the conclusion that Congress intended" the traditional standard for mandamus to apply. ***In re Amy Unknown***, 701 F.3d at 758; ***In re Antrobus***, 519 F.3d 1123, 1130 (10th Cir. 2008) ("It seems unlikely that Congress would have intended *de novo* review in 72 hours of novel and complex legal questions. . . .").

"That Congress called for 'mandamus' strongly suggests it wanted 'mandamus.'" ***Monzel***, 641 F.3d at 533, *citing* ***Morissette v. United States***, 342 U.S. 246, 263 (1952); ***In re Acker***, 596 F.3d at 372. Had Congress intended an ordinary appellate standard of review, it could have given victims a right to direct appeal. *See* ***In re Antrobus***, 519 F.3d at 1129, *citing* **18 U.S.C. § 3771(d)(4)**. "That Congress expressly provided for 'mandamus' in § 3771(d)(3) but ordinary appellate review in § 3771(d)(4) invokes 'the usual

rule that when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.'" ***Monzel***, 641 F.3d at 533, *quoting* ***Sosa v. Alvarez-Machain***, 542 U.S. 692, 711 n.9 (2004).

Vicky argues that applying the traditional standard for mandamus renders superfluous the right to petition for mandamus under the CVRA, because the All Writs Act, 28 U.S.C. § 1651, already grants that right. But the CVRA, unlike the All Writs Act, requires the court to "take up and decide" the petition within 72 hours and to issue a "written opinion" if it denies relief. *See* **18 U.S.C. § 3771(d)(3)**. Thus, the CVRA affords victims "more rights than they would otherwise have." ***In re Antrobus***, 519 F.3d at 1129-30.

Vicky claims four circuits support her position. With little discussion, the Second Circuit opined, "It is clear . . . that a petitioner seeking relief pursuant to the [CVRA's] mandamus provision . . . need not overcome the hurdles typically faced by a petitioner. . . ." ***In re W.R. Huff Asset Mgmt. Co., LLC***, 409 F.3d 555, 562 (2d Cir. 2005). The Ninth Circuit stated, "The CVRA creates a unique regime that does, in fact, contemplate routine interlocutory review of district court decisions denying rights asserted under the statute." ***Kenna v. U.S. Dist. Court for C.D. Cal.***, 435 F.3d 1011, 1017 (9th Cir. 2006). Without needing to reach the issue, the Third Circuit commented that "mandamus relief is available under a different, and less demanding, standard under 18 U.S.C. § 3771 in

the appropriate circumstances." ***In re Walsh***, 229 Fed. Appx. 58, 60 (3d Cir. 2007) (per curiam) (unpublished). The Eleventh Circuit simply granted the writ without discussing any standard. *See* ***In re Stewart***, 552 F.3d 1285, 1288-89 (11th Cir. 2008) (per curiam). *But see* ***In re Stewart***, 641 F.3d 1271, 1274-75 (11th Cir. 2011) (per curiam) (questioning the prior ruling). These decisions, lacking detailed analysis, are unpersuasive. *See* ***In re Amy Unknown***, 701 F.3d at 758 n.6 ("The lack of reasoning . . . fails to convince us that anything other than traditional mandamus standards [apply]."); ***In re Antrobus***, 519 F.3d at 1128 ("With respect to our sister circuits, and aware of the time pressures under which they operated, we see nothing in their opinions explaining why Congress chose to use the word *mandamus* rather than the word *appeal*." (emphases in original)).

This court therefore applies the traditional standard for mandamus. "The issuance of a writ of mandamus is an extraordinary remedy reserved for extraordinary situations." ***In re MidAmerican Energy Co.***, 286 F.3d 483, 486 (8th Cir. 2002) (per curiam), *citing* ***Gulfstream Aerospace Corp. v. Mayacamas Corp.***, 485 U.S. 271, 289 (1988). "'[O]nly exceptional circumstances amounting to a judicial usurpation of power will justify the invocation of this extraordinary remedy.'" ***In re Amy Unknown***, 701 F.3d at 757 (alteration in original), *quoting* ***Kerr v. U.S. Dist. Court for N. Dist. of Cal.***, 426 U.S. 394, 402 (1976). "Issuance of the writ is largely a matter of

discretion. . . ." ***Id.*** at 757, *citing* ***Schlagenhauf v. Holder***, 379 U.S. 104, 112 n.8 (1964).

Vicky meets the first traditional condition for mandamus – no adequate alternative means to obtain relief – because mandamus is her only avenue for relief. *See* ***Cheney***, 542 U.S. at 380-81 ("[The first] condition [is] designed to ensure that the writ will not be used as a substitute for the regular appeals process." (citation omitted)). She must show that the district court clearly and indisputably erred in the restitution amount it awarded her, and, if so, that the writ is appropriate.

IV.

Vicky argues that, to be liable, Fast need not have proximately caused the losses defined in subsections 2259(b)(3)(A) through (E). This court reviews de novo the district court's interpretation of section 2259. ***United States v. Schmidt***, 675 F.3d 1164, 1167 (8th Cir. 2012). All but one circuit court to have addressed the issue read subsections 2259(b)(3)(A) through (E) to require proof of proximate cause. ***Laraneta***, 700 F.3d at 990; ***United States v. Burgess***, 684 F.3d 445, 459 (4th Cir. 2012); ***United States v. Kearney***, 672 F.3d 81, 95-96, 99 (1st Cir. 2012); ***United States v. Evers***, 669 F.3d 645, 659 (6th Cir. 2012); ***United States v. Aumais***, 656 F.3d 147, 153 (2d. Cir. 2011); ***Monzel***, 641 F.3d at 536-37; ***United States v. McDaniel***, 631 F.3d 1204, 1208-09 (11th Cir. 2011); ***United States v. Laney***, 189 F.3d 954,

965 (9th Cir. 1999); ***United States v. Crandon***, 173 F.3d 122, 125-26 (3d Cir. 1999). *Contra*, ***In re Amy Unknown***, 701 F.3d at 762, 773 (interpreting subsections 2259(b)(3)(A) through (E) not to require proof of proximate cause). "The 'clear and indisputable' test is applied after" the court construes the statute. ***Gov't of Virgin Islands v. Douglas***, 812 F.2d 822, 832 n.10 (3d Cir. 1987); *see* ***In re Wickline***, 796 F.2d 1055, 1056-57 (8th Cir. 1986).

Section 2259 defines the "full amount of the victim's losses" as including costs for:

> (A) medical services relating to physical, psychiatric, or psychological care;
>
> (B) physical and occupational therapy or rehabilitation;
>
> (C) necessary transportation, temporary housing, and child care expenses;
>
> (D) lost income;
>
> (E) attorneys' fees, as well as other costs incurred; and
>
> (F) any other losses suffered by the victim *as a proximate result of the offense*.

18 U.S.C. § 2259(b)(3) (emphasis added). Vicky claims that only the losses in the last subsection require proof of proximate cause. She invokes the "rule of the last antecedent" to conclude that the limiting clause – "as a proximate result of the offense" – in the last item of a series modifies only that last item. *See* ***Cincinnati Ins. Co. v. Bluewood, Inc.***,

560 F.3d 798, 803 (8th Cir. 2009), *quoting* ***Barnhart v. Thomas***, 540 U.S. 20, 26 (2003). "The rule of the last antecedent, however, 'is not an absolute and can assuredly be overcome by other indicia of meaning.'" ***United States v. Hayes***, 555 U.S. 416, 425-26 (2009), *quoting* ***Barnhart***, 540 U.S. at 26. Fast and the government counter with the canon: "When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." ***McDaniel***, 631 F.3d at 1209 (internal quotation marks omitted), *quoting* ***Porto Rico Ry., Light & Power Co. v. Mor***, 253 U.S. 345, 348 (1920) (finding "[n]o reason" why the clause at issue "should not be read as applying to" all preceding phrases); *see also* ***Fed. Mar. Comm'n v. Seatrain Lines, Inc.***, 411 U.S. 726, 734 (1973) ("It is . . . a familiar canon of statutory construction that [catchall] clauses are to be read as bringing within a statute categories similar in type to those specifically enumerated." (citation omitted)).

Neither canon is absolute. *See* ***Barnhart***, 540 U.S. at 26, 28-29; ***Porto Rico Ry., Light & Power Co.***, 253 U.S. at 348. More persuasive here is the Second Circuit's reasoning in *United States v. Hayes*, 135 F.3d 133, 137-38 (2d Cir. 1998). There, the statute at issue, section 2264(b)(3), is identical to section 2259(b)(3), except that its subsection (E) reads: "attorneys' fees, plus any costs incurred in obtaining a civil protection order." ***Hayes***, 135 F.3d at 137, *quoting* **18 U.S.C. § 2264(b)(3)**. The Second Circuit held,

"Reading [subs]ection 2264(b)(3)(F) together with [subs]ection 2264(b)(3)(F), attorneys' fees and costs of obtaining a protection order are *among the 'losses suffered by the victim as a proximate result of the offense.'*" ***Id.*** at 138 (emphasis added) (citations omitted). Vicky interprets *Hayes* to mean that "the losses listed in subsections (A)-(E) are automatically . . . proximately caused by the defendant's conduct." Rather, the Second Circuit held that section 2264(b)(3) "*authorizes* restitution" for the specific losses in subsections 2264(b)(3)(A) through (E). *See* ***id.*** (emphasis added). The "proximate result" clause in the last subsection 2264(b)(3)(F) shows that Congress considered the costs in subsections 2264(b)(3)(A) through (E) "among the losses that are proximately caused by the offense," but that causation still must be proved in each case. *See* ***id.***

Similarly, the First Circuit – interpreting section 2259 at issue here – reasoned that the "express inclusion [of the specific losses in subsections 2259(b)(3)(A) through (E)] . . . indicates that Congress believed such damages were sufficiently foreseeable to warrant their enumeration in the statute." ***Kearney***, 672 F.3d at 97; *see* ***United States v. Gamble***, ___ F.3d ___, ___, 2013 WL 692512, at *6 (6th Cir. Feb. 27, 2013) ("[T]he list of recoverable losses that the statute provides confirms the breadth of what is a foreseeable consequence of defendants' actions."). That section 2259 enumerates those losses "bears emphasis because at the same time Congress enacted § 2259, it enacted another restitution statute that did not

enumerate categories of losses." ***Kearney***, 672 F.3d at 97. Instead, that statute "stated that 'the term "full amount of the victims losses" means all losses suffered by the victim as a proximate result of the offense.'" ***Id.*** (footnote omitted), *quoting* **Pub. L. 103-322, § 250002, 108 Stat. 2082, 2083** (codified at **18 U.S.C. § 2327(b)(3)**). Contrary to Vicky's assertion, the variation among these restitution statutes does not mean that Congress eliminated the proximate cause requirement for the specifically enumerated losses in subsections 2259(b)(3)(A) through (E). Rather, variances among these restitution statutes "demonstrate that Congress viewed particular offenses as causing foreseeable risks of certain losses [meriting enumeration] in the[se] [restitution] statutes." ***Id.*** at 97 n.13. The First Circuit concluded that, although Congress determined that restitution offenses foreseeably cause the losses in subsections (A) through (E), the defendant – to be liable – still must proximately cause the victim's losses. *See* ***id.*** at 95-97, 99-100 (holding "that the proximate cause requirement was satisfied . . . because [the defendant's] actions resulted in identifiable losses as outlined in the expert reports and Vicky's victim impact statements" (footnote and citation omitted)).

This court agrees. Congress determined that these restitution offenses *typically* proximately cause the losses enumerated in subsections 2259(b)(3)(A) through (E). Congress did not mean that a *specific* defendant *automatically* proximately causes those losses *in every case*. The government still has to prove that the

defendant proximately caused those losses. *See* **18 U.S.C. § 2259(a), (b)(3)(A)-(F), (c)** ("'[V]ictim' means the individual harmed *as a result of a commission of a crime* under this chapter" (emphasis added)); ***id.*** **§ 3664(e)**; ***Laraneta***, 700 F.3d at 990-92; ***Kearney***, 672 F.3d at 95-97.[5]

V.

Vicky contends that the district court failed to award her the statutorily mandated "full amount of [her] losses." *See* **18 U.S.C. § 2259(b)(1)**. Because issuance of the writ of mandamus is an extraordinary remedy, she must show that the district court clearly and indisputably erred. Restitution is mandatory under section 2259. ***Id.*** **§ 2259(a), (b)(4)(A).** The restitution order "shall be issued and enforced in accordance with section 3664." ***Id.*** **§ 2259(b)(2).** Under that section, "[a]ny dispute as to the proper amount or type of restitution *shall be resolved by the court by the preponderance of the evidence*." ***Id.*** **§ 3664(e)** (emphasis added). The government bears the "burden of demonstrating the amount of the loss sustained by a victim as a result of the offense." ***Id.***

"[I]njury to the child depicted in the child pornography . . . *is a readily foreseeable result* of distribution and possession of child pornography." ***Kearney***, 672

[5] *See also* **S. Rep. No. 103-138**, at 56 (1993) (noting that "section [2259] requires sex offenders to pay costs incurred by victims as a *proximate result* of a sex crime" (emphasis added)).

F.3d at 97 (emphasis added). Proving proximate cause may require nothing more than "expert reports and . . . victim impact statements" about the costs enumerated in subsections (A) through (E) that the victim incurred after the defendant's offense began. *See*, *e.g.*, ***id.*** at 96-100 (discussing proximate cause). Determining the "full amount of the victim's losses" that a defendant's offense caused is best left to the district court in the first instance. *See* **18 U.S.C. § 2259(b)(1)** ("[T]he defendant [shall] pay . . . the full amount of the victim's losses *as determined by the court*. . . ." (emphasis added)); ***Laraneta***, 700 F.3d at 991; ***Burgess***, 684 F.3d at 460; ***United States v. McGarity***, 669 F.3d 1218, 1270 (11th Cir. 2012).

Vicky claims the restitution award should be $952,759.81 – her (net) documented losses to date. Fast did not possess any images of her until June 25, 2010. But she suffered losses before then. *See*, *e.g.*, ***McDaniel***, 631 F.3d at 1206. As the district court found, Fast could not have caused – and thus could not be liable for – losses before that date. *See* ***Gamble***, ___ F.3d at ___, 2013 WL 692512, at *11 ("As a logical matter, a defendant generally cannot cause harm prior to the date of his offense."); ***Kearney***, 672 F.3d at 97 ("Vicky's [harms] . . . were reasonably foreseeable *at the time of [the defendant's] conduct*." (emphasis added)).

Vicky cites *Hayes*, where the defendant was liable for the victim's costs in obtaining civil protection orders even though the offense – violating the protection orders by crossing state lines – occurred

after the victim incurred the costs. ***Hayes***, 135 F.3d at 137-38. Although the triggering offense occurred after the victim incurred the costs, they were "a result of conduct by [the defendant] extending back to the time [the victim] obtained the . . . protection orders." ***Id.*** at 138. Here, Vicky did not incur losses as a result of Fast's conduct before his offense began.

Moreover, all $952,759.81 of Vicky's losses are not clearly and indisputably traceable to Fast's crime.[6] *See* ***Monzel***, 641 F.3d at 538 ("[W]e [cannot] say that [the victim] is clearly and indisputably entitled to the full $3,263,758 from [the defendant] on the ground that her injuries are 'indivisible.'"); *see also* ***Burgess***, 684 F.3d at 460 ("The primary difficulty that will face the district court . . . will be the determination . . . of

[6] Vicky argues that the district court should have held Fast jointly and severally liable for the full amount of her losses. Then, she asserts, he could seek contribution from other defendants liable to her. Section 3664 states, "If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant." **18 U.S.C. § 3664(h).** Because "there is only one defendant in this case," section 3664(h) does not apply. *E.g.*, ***Laraneta***, 700 F.3d at 992-93; ***Aumais***, 656 F.3d at 156 ("Section 3664(h) implies that joint and several liability may be imposed only when a single district judge is dealing with multiple defendants in a single case. . . ."); *see* ***Gamble***, ___ F.3d at ___, 2013 WL 692512, at *6 (rejecting joint-and-several liability and contribution partly because "in this context a contribution system would be 'extraordinarily clumsy'" (quoting ***Laraneta***, 700 F.3d at 993)).

the quantum of loss attributable to [the defendant] for his participation in Vicky's exploitation."). "The government has not shown that [Fast] caused the *entirety* of [Vicky's] losses." ***Monzel***, 641 F.3d at 538 (emphasis in original); *see* **18 U.S.C. § 3664(e)**. The court did not clearly and indisputably err in not awarding Vicky $952,759.81 restitution.

The district court ordered Fast to pay $3,333 restitution. The court explained that this award consists of "$2,500 for medical and psychiatric care, occupational therapy, and lost income under 18 U.S.C. § 2259(b)(3)(A), (B), & (D)," and $833 for "attorney fees and costs under 18 U.S.C. § 2259(b)(3)(E)." It reasoned that $3,333 represents the total amount of loss Fast proximately caused Vicky. The court fulfilled its duty to award Vicky the "full amount of [her] losses." *See* ***id.*** **§ 2259(a), (b)(1)** ("[T]he court shall order restitution . . . [and] the defendant [shall] pay . . . the full amount of the victim's losses as determined by the court."); ***id.*** **§ 2259(c)** ("'[V]ictim' means the individual harmed as a result of a commission of a crime under this chapter."); *see also* ***Kerr***, 426 U.S. at 402 ("[T]he writ [of mandamus] has traditionally been used in the federal courts only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." (citation and internal quotation marks omitted)). The court did not clearly and indisputably err in ordering Fast to pay $3,333 restitution.

* * *

The motions to dismiss Vicky's direct appeal are granted. The petition for mandamus is denied.

SHEPHERD, Circuit Judge, concurring in part and dissenting in part.

I concur with respect to sections I, II, and III of the majority's opinion. I dissent with respect to sections IV and V, and with respect to the judgment, because I would follow the Fifth Circuit's approach and hold that only damages awarded under 18 U.S.C. § 2259(b)(3)(F) are subject to a proximate cause requirement. *See In re Amy Unknown*, 701 F.3d 749, 752 (5th Cir. 2012) (en banc). Consequently, I would grant Vicky's petition for mandamus relief and remand for the district court to recalculate her losses.

I.

As the majority correctly explains, Vicky is entitled to mandamus relief if she can show three things: (1) she has "no adequate alternative means to obtain relief," (2) "the district court clearly and indisputably erred in the restitution amount it awarded her," and (3) "the writ is appropriate." *Supra* at 11 (citing *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 380-81 (2004)). I agree with the majority that the first element is satisfied here because mandamus is the only potential relief available to Vicky. *See supra* at 11. However, the majority goes on to conclude that Vicky is not entitled to a writ

of mandamus because her "losses are not clearly and indisputably traceable to Fast's crime." *Supra* at 16. This is based on the majority's conclusion that all losses under section 2259 are subject to a proximate cause requirement. *See supra* at 15-17. Because I disagree with this interpretation of the statute, I respectfully dissent.

A.

Section 2259 requires courts to order "the defendant to pay the victim . . . the full amount of the victim's losses. . . ." 18 U.S.C. § 2259(b)(1). The statute defines "victim" as "the individual harmed as a result of a commission of a crime under this chapter. . . ." 18 U.S.C. § 2259(c). The statute also provides:

> For purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred by the victim for –
>
> (A) medical services relating to physical, psychiatric, or psychological care;
>
> (B) physical and occupational therapy or rehabilitation;
>
> (C) necessary transportation, temporary housing, and child care expenses;
>
> (D) lost income;
>
> (E) attorneys' fees, as well as other costs incurred; and

> (F) any other losses suffered by the victim as a proximate result of the offense.

18 U.S.C. § 2259(b)(3).

In *In re Amy Unknown*, the Fifth Circuit concluded that the plain language of section 2259 imposes a proximate cause requirement only on losses awarded under subsection (b)(3)(F). 701 F.3d at 762. The court reasoned that the rule of the last antecedent, a well-established rule of statutory construction, "instructs that 'a limiting clause or phrase,' such as the 'proximate result' phrase in § 2259(b)(3)(F), 'should ordinarily be read as modifying only the noun or phrase that it immediately follows.'" *Id.* (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)). Significantly, the Supreme Court applied the rule of the last antecedent in two recent cases. *Id.* at 764 (analyzing *Barnhart*, 540 U.S. 20 and *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335 (2005)). Because "[t]he structure and language of § 2259(b)(3) limit the phrase 'suffered by the victim as a proximate result of the offense' in § 2259(b)(3)(F) to the miscellaneous 'other losses' contained in that subsection," and because there is "no 'other indicia of meaning' in the statute to suggest that the rule of the last antecedent does not apply here," the court found that losses in subsections (A)-(E) are not subject to a proximate cause requirement. *Id.* at 762.

Thus, under the Fifth Circuit's approach, as long as losses in subsections (A)(E) are incurred "as a result of a commission of a crime under this chapter,"

§ 2259(c), a district court must award victims "the full amount" of their losses under section 2259(b)(1), regardless of whether the defendant proximately caused those losses. *See In re Amy Unknown*, 701 F.3d at 762. Only miscellaneous "other losses" are subject to a proximate cause requirement. *Id.*

This, of course, does not mean that the statute imposes no causal requirement at all. As explained above, section 2259 defines "victim" as "the individual harmed as a result of a commission of a crime under this chapter," § 2259(c), and then requires courts to order restitution for "the full amount of the victim's losses," § 2259(b)(1). Thus, before a court can order restitution, it must determine that (1) the defendant committed a qualifying offense and (2) the person seeking restitution suffered harm as a result of that offense. *See* § 2259. To the extent that the harm resulting from the offense involves medical services, therapy or rehabilitation, transportation, temporary housing, child care, lost income, or attorneys' fees and costs under subsections (A)-(E), a defendant must pay restitution for the full amount of those harms, regardless of whether the defendant proximately caused them. Congress likely chose not to impose a proximate cause requirement for these types of losses because proving proximate causation would be virtually impossible in many situations, thus leaving child victims without redress.

The concept of causation in cases under section 2259 admittedly is complicated. A defendant's action is a "cause" of a victim's injury if that action somehow

contributed to the injury. *See* Black's Law Dictionary 250 (9th ed. 2009) (defining "cause"). This general definition of cause is expansive. For example, a victim whose images have been made widely available through posting on the internet may incur significant counseling expenses to address psychological problems stemming from the knowledge that numerous[7] unknown people are viewing the images. Each individual defendant who views those images is a "cause" of that harm because, if no one viewed the images, the victim arguably would not have suffered that particular form of psychological harm. *See In re Amy Unknown*, 701 F.3d at 773 ("By possessing, receiving, and distributing child pornography, defendants collectively create the demand that fuels the creation of the abusive images. Thus, where a defendant is convicted of possessing, receiving, or distributing child pornography, a person is a victim under this definition if the images . . . include those of that individual.").

In contrast, "proximate cause" involves more of a policy judgment about whether a particular defendant's action bears a sufficient causal relationship to an injury such that the law should hold the defendant liable for the injury. *See* Black's Law Dictionary 250 (9th ed. 2009) (defining "proximate cause" and noting

---

[7] According to the Sixth Circuit, approximately 300 defendants already have been convicted of possessing Vicky's images. *United States v. Gamble*, Nos. 11-5394/5544, slip op. at 19 (6th Cir. Feb. 27, 2013).

that "[s]ome boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy" (internal quotation marks omitted)). On one end of the spectrum is the example above, where the victim's psychological problems are "caused" by innumerable unknown defendants. In this situation, the causal link between a specific defendant's conduct and the victim's losses is more tenuous because it would be virtually impossible to show that the victim's psychological trauma and attendant counseling expenses would have been any less had that individual defendant not viewed the images. In other words, it is unclear whether the victim could prove that an individual defendant "proximately caused" his or her losses. *Compare United States v. Aumais*, 656 F.3d 147, 154 (2d Cir. 2011) (finding no proximate cause when evidence showed defendant was one of many who viewed victim's images, but victim "'had no direct contact with [the defendant] nor even knew of his existence'") *and United States v. Kennedy*, 643 F.3d 1251, 1264 (9th Cir. 2011) (holding that while evidence which "showed only that [the defendant] participated in the audience of persons who viewed the images . . . may be sufficient to establish that [the defendant's] actions were one cause of the generalized harm" to the victims, "it is not sufficient to show that [the defendant was] a proximate cause of any particular losses"), *with United States v. Kearney*, 672 F.3d 81, 99 (1st Cir. 2012) ("We reject the theory that the victim of child pornography could only show [proximate] causation if she focused on a specific defendant's viewing

and redistribution of her images and then attributed specific losses to that defendant's actions.") *and United States v. Burgess*, 684 F.3d 445, 459-60 (4th Cir. 2012) (adopting First Circuit's interpretation of proximate cause).

On the other end of the spectrum are losses such as attorney's fees incurred in pursuing a restitution action against that defendant. Those losses bear a much closer causal relationship to the individual defendant's conduct, and thus it would be much more likely that a victim could prove the defendant "proximately caused" those losses. *See Gamble*, Nos. 11-5394/5544, slip op. at 18 (describing "litigation costs in connection with the particular defendant" as "proximately caused harms [that] are clearly traceable to a particular defendant"). Because I would hold that only miscellaneous other losses in subsection (F) are subject to a proximate cause requirement, and because the district court never addressed whether any of Vicky's claimed losses fall under subsection (F), it would be premature for me to attempt to define the precise contours of "proximate cause" at this juncture.

Addressing causation, however, is only the first step that a court must take when crafting a restitution award. Concluding that a defendant caused a victim loss, either as a general "cause" with respect to losses in subsections (A)-(E) or as a "proximate cause" with respect to miscellaneous other losses in subsection (F), merely establishes that a court must enter a restitution order. The next step is for the court to determine the amount of the restitution order.

Section 2259(b)(1) clearly states that the restitution order must be for "the full amount of the victim's losses." Read in tandem with subsection 2259(c), which defines "victim" as "the individual harmed as a result of a commission of a crime under this chapter," the statute's reference to "the full amount of the victim's losses" is best understood as all losses the victim suffered as a result of the defendant's crime under Title 18, Part I, Chapter 110: Sexual Exploitation and Other Abuse of Children. Applying normal common-law principles, where the losses stem from an indivisible injury, the defendant must be held jointly and severally liable for that injury. *See Burgess*, 684 F.3d at 461 (Gregory, J., concurring in part and dissenting in part). For example, if the hypothetical victim above has incurred a total of $500,000 in counseling expenses as a result of knowing that numerous unknown people are viewing his or her pornographic images, and the court makes a factual finding that his or her psychological trauma is an indivisible injury, then the district court must enter a restitution order for $500,000, even though the individual defendant is not the only person responsible for those losses. *See id.* If the court determines that some or all of the victim's injuries are divisible, then the court must apportion liability for those losses and enter a restitution order reflecting only the portion of those losses for which the defendant is individually responsible. *See id.* An example of divisible losses might be attorney's fees incurred in purs[u]ing a restitution action against a specific defendant. *See Gamble*, Nos. 11-5394/5544, slip op. at 18.

In cases where a restitution order reflects joint and several liability, traditional joint and several liability principles would allow a defendant to bring contribution actions against other individuals who contributed to the victim's losses. *See In re Amy Unknown*, 701 F.3d at 769-70 (citing 18 U.S.C. § 3664(h)).[8] These same principles would prevent victims from recouping more than "the full amount" of their losses since a defendant ordered to pay restitution could introduce evidence that the victim had already collected some or all of that restitution from a defendant in a different case. *See id.* In some instances, defendants even may be able to obtain this evidence from the government, as it appears the government keeps track of at least some restitution awards. *See Gamble*, Nos. 11-5394/5544, slip op. at 16 ("The Government . . . has already assembled a database to keep abreast of restitution awards to Vicky all over the country.").

---

[8] The majority concludes that section 3664(h) permits courts to impose joint and several liability only when there are multiple defendants in a single case. *See supra* at 16 n.6. Section 3664(h) provides, "If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant." I agree with the Fifth Circuit that "nothing in § 3664 forbids" imposition of joint and several liability on defendants in separate cases. *See In re Amy Unknown*, 701 F.3d at 770.

But regardless of how defendants can obtain information about other restitution awards, the fact that Congress drafted the statute to require defendants to reimburse victims for "the full amount" of their losses reflects the policy judgment that child victims should be fully compensated for their losses in the most efficient manner possible; defendants, rather than child victims, should bear the responsibility of filing additional lawsuits against other responsible parties in order to apportion responsibility among them. *Cf. In re Amy Unknown*, 701 F.3d at 760 (noting that section 2259 "reflects a broad restitutionary purpose"). Both Congress and the courts are familiar with this approach of shifting responsibility for apportionment to defendants, as this is essentially the same approach used in CERCLA litigation. *See*, *e.g.*, *Burlington N. and Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 614-15 (2009). This interpretation not only reflects the plain language of the statute, but also embraces the sensible policy choice that the responsibility for potentially burdensome litigation should fall on people who commit crimes against children, rather than on those children.

Here, the district court calculated its restitution award based on two erroneous premises: (1) that restitution can be awarded only for losses that the defendant proximately caused and (2) that restitution awards cannot reflect joint and several liability. *United States v. Fast*, 876 F. Supp. 2d 1087, 1088-89 (D. Neb. 2012). Thus, Vicky has satisfied the second element of mandamus: that "the district court clearly

and indisputably erred in the restitution amount it awarded her. . . ." *See supra* at 11.

B.

The third and final element that Vicky must show to entitle her to mandamus relief is that "the writ is appropriate." *See supra* at 11. A writ of mandamus "is an extraordinary remedy that is available only to correct a clear abuse of discretion." In *re Apple, Inc.*, 602 F.3d 909, 911 (8th Cir. 2010) (internal quotation marks omitted). "[A] clear error of law or clear error of judgment leading to a patently erroneous result may constitute a clear abuse of discretion." *Id.* Here, Vicky submitted evidence that she incurred more than $1.2 million in losses as a result of her sexual abuse and the subsequent distribution of her images. The district court, however, awarded only $3,333 in restitution due to its erroneous conclusions that (1) restitution can be awarded only for losses that the defendant proximately caused and (2) restitution awards cannot reflect joint and several liability. *Fast*, 876 F. Supp. 2d at 1088. Because the entire premise of the district court's restitution calculation was erroneous, Vicky has shown "that the writ is appropriate under the circumstances." *See Cheney*, 542 U.S. at 381 (noting that this element is left to appellate court's discretion); *United States v. Frazier*, 651 F.3d 899, 910 (8th Cir. 2011) (remanding for recalculation of restitution amount when original amount was based on erroneous loss valuation method).

II.

Because Vicky has satisfied all three mandamus elements, I would grant her petition for mandamus. Consequently, I would remand for the district court to recalculate Vicky's losses under section 2259(b)(3) and to enter a restitution order reflecting "the full amount" of her losses as required by section 2259(b)(1).

UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA	**Case Number 4:11CR3018-001**
Plaintiff	**USM Number 24071-047**
v.	**MICHAEL J. HANSEN**
ROBERT M. FAST	**Defendant's Attorney**
Defendant	

AMENDED JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Reason for Amendment:
Pursuant to 8th Circuit remand and re-sentence judgment

THE DEFENDANT pleaded guilty to count I of the Indictment on 7/27/11.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense:

Title, Section & Nature of Offense	**Date Offense Concluded**	**Count Number(s)**
18:2252A(a)(2)(A) and (B) RECEIPT & DISTRIBUTION OF CHILD PORNOGRAPHY	November 17, 2010	I

The defendant is sentenced as provided in pages 2 through 9 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Count II of the Indictment is dismissed on the motion of the United States as to this defendant only.

Final order of forfeiture forthcoming.

Following the imposition of sentence, the Court advised the defendant of the right to appeal pursuant to the provisions of Fed. R. Crim. P. 32 and the provisions of 18 U.S.C. § 3742(a) and that such Notice of Appeal must be filed with the Clerk of this Court within fourteen (14) days of this date pursuant to Fed. R. App. P. 4.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence:
October 20, 2011

Richard G. Kopf
United States District Judge

July 16, 2012

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **seventy-two (72) months**.

The Court makes the following recommendations to the Bureau of Prisons:

1. That the defendant be incarcerated **at a federal medical center because of defendant's serious medical condition and defendant's serious mental health problems including the serious effort to take his own life.**

The defendant is remanded to the custody of the United States Marshal.

ACKNOWLEDGMENT OF RECEIPT

I hereby acknowledge receipt of a copy of this judgment this ____ day of _____, _____

_____
Signature of Defendant

RETURN

It is hereby acknowledged that the defendant was delivered on the ____ day of _____, _____ to _____, with a certified copy of this judgment.

_____
UNITED STATES WARDEN

By: _____

NOTE: The following certificate must also be completed if the defendant has not signed the Acknowledgment of Receipt, above.

CERTIFICATE

It is hereby certified that a copy of this judgment was served upon the defendant this ____ day of _____, _____

_____
UNITED STATES WARDEN

By: _____

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **five (5) years**.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15

days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall

permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall cooperate in the collection of DNA as directed by the probation officer, pursuant to the Public Law 108-405 (Revised DNA Collection Requirements Under the Justice for All Act of 2004), if such sample was not collected during imprisonment.

2. The defendant shall participate in a victim awareness program as directed by the probation officer. Based on the defendant's ability to pay, the defendant shall pay for the costs of the program in an amount determined by the probation officer.

3. The defendant shall attend, successfully complete, and pay for any mental health diagnostic evaluations and treatment or counseling programs as directed by the probation officer.

4. The defendant shall provide the probation officer with access to any requested financial information.

5. The requirement of 18 U.S.C. § 3583 (d) regarding drug testing within fifteen (15) days of release on supervised release and at least two (2) periodic drug tests thereafter, is suspended until further order of the Court because the Presentence Investigation Report on the defendant and other reliable sentencing information indicates a

low risk of future substance abuse by the defendant.

6. The defendant shall provide the U.S. Probation Officer with truthful and complete information regarding all computer hardware, software, electronic services, and data storage media to which the defendant has access.

7. The defendant shall cooperate with the U.S. Probation Office's Computer Monitoring Program. Cooperation shall include, but not be limited to, identifying computer systems, Internet capable devices, and/or similar electronic devices the defendant has access to, and allowing the installation of monitoring software/hardware on said devices. The defendant and/or the U.S. Probation Officer shall inform all parties that access a monitored computer, or similar electronic device, that the device is subject to monitoring. The defendant may be limited to possessing only one personal Internet capable device, to facilitate the probation officer's ability to effectively monitor his/her Internet related activities, including, but not limited to, email correspondence, Internet usage history, and chat conversations. The defendant shall not remove, tamper with, reverse engineer, or in any way circumvent installed software. The defendant shall also permit random examinations of said computer systems, Internet capable devices, and similar electronic devices, and related computer peripherals, such as CD's and other media, under his/her control. The defendant shall pay the costs of monitoring.

8. The defendant shall submit his/her person, residence, property, office, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects to a search conducted by a U.S. Probation Officer at any time; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the premises and any shared devices may be subject to searches pursuant to this condition.

9. The defendant shall not use or have installed any programs specifically and solely designed to encrypt data, files, folders, or volumes on any media. Also, the defendant shall not install or use any program for the purpose of "wiping," deleting or cleaning any media device.

10. The defendant shall have no contact, nor reside with children under the age of 18, including their own children, unless approved in advance by the U.S. Probation Officer in consultation with the treatment providers. The defendant must report all incidental contact with children to the U.S. Probation Officer and the treatment provider. Should the defendant have incidental contact with a child, the defendant is required to immediately remove him/herself from the situation and notify his/her U.S. Probation Officer within 24 hours of this contact.

11. The defendant shall not loiter within 500 feet of schools, school yards, parks, arcades, playgrounds, amusement parks, or other places used primarily by children under the age of 18 unless

approved in advance by the U.S. Probation Officer.

12. The defendant shall not associate with or have any contact with convicted sex offenders unless in a therapeutic setting and with the permission of the U.S. Probation Officer.

13. The defendant is restricted from engaging in any occupation, business, or profession, including volunteer work, where he/she has access to children under the age of 18, without prior approval of the U.S. Probation Officer. Acceptable employment shall include a stable verifiable work location and the probation officer must be granted access to your work site.

14. The defendant shall have all residences and employment pre approved by the U.S. Probation Officer ten (10) days prior to moving or changing employment. The defendant must comply with any residency restriction ordinances in the city where he/she resides.

15. The defendant shall consent to third party disclosure to any employer, or potential employer, concerning any computer-related restrictions that are imposed upon him/her unless excused by the U.S. Probation Officer.

16. The defendant shall comply with Sexual Offender Registration and Notification Act (SORNA) requirements for convicted offenders in any state in which the defendant resides, is employed, or is a student, as required by federal and state law. While on supervision with the District of Nebraska, the defendant shall register in person

with local, tribal, or county law enforcement at a location designated by the Nebraska State Patrol within three (3) days of sentencing, or if in custody at the time of sentencing, within three (3) days of release from incarceration. While on supervision any changes to information provided during the initial registration must be made no less than three (3) business days before the change occurs. The defendant shall provide proof of registration and changes to the U.S. Probation Officer.

17. The defendant shall undergo a sex offense-specific evaluation and participate in a sex offender treatment and/or mental health treatment program approved by the U.S. Probation Officer. The defendant shall abide by all rules, requirements, and conditions of the sex offender treatment program(s), including submission to polygraph testing. The defendant shall sign releases of information to allow all professionals involved in their treatment and monitoring to communicate and share documentation. The defendant shall pay for these services as directed by the U.S. Probation Officer.

18. The defendant shall submit to an initial polygraph examination and subsequent maintenance testing, at intervals to be determined by the U.S. Probation Officer, to assist in treatment, planning, and case monitoring. The defendant shall pay for these services as directed by the U.S. Probation Officer.

19. The defendant shall not possess, view, or otherwise use material depicting sexually explicit

conduct as defined in 18 U.S.C. 2256. The defendant shall not possess, view, or otherwise use any material that is sexually stimulating or sexually oriented deemed to be inappropriate by the U.S. Probation Officer in consultation with the treatment provider.

20. The defendant shall report to the Supervision Unit of the U.S. Probation Office for the District of Nebraska between the hours of 8:00 a.m. and 4:30 p.m., 100 Centennial Mall North, 530 U.S. Courthouse, Lincoln, Nebraska, (402) 437-1920, within seventy-two (72) hours of release from confinement and, thereafter, as directed by the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in this judgment.

Total Assessment	Total Fine	Total Restitution
$ 100.00		**$ 3,333.00**

The Court has determined that the defendant does not have the ability to pay interest and it is ordered that: interest requirement is waived.

FINE

No fine imposed.

RESTITUTION

Restitution in the amount of **$3333.00** is hereby ordered. The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee	****Total Amount of Loss**	**Amount of Restitution Ordered**	**Priority Order or Percentage of Payment**
Carol L. Hepburn's Trust Account 2722 East Lake Ave. E, Suite 200 Seattle, WA 98102	$3,333.00	$3,333.00	Priority Order
Totals	$3,333.00	$3,333.00	

**Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

The defendant shall pay the special assessment in the amount of $100.00.

The criminal monetary penalty is due in full on the date of the judgment. The defendant is obligated to pay said sum immediately if he or she has the capacity to do so. The United States of America may institute civil collection proceedings at any time to satisfy all or any portion of the criminal monetary penalty.

Without limiting the foregoing, and during the defendant's term of incarceration, the defendant shall participate in the Bureau of Prisons' Financial Inmate Responsibility Program. Using such Program, the defendant shall pay 50% of the available inmate institutional funds per quarter towards the criminal monetary penalty. Without limiting the foregoing, and following release from prison, the defendant shall make payments to satisfy the criminal monetary penalty in the following manner: (a) monthly installments of $100 or 3% of the defendant's gross income, whichever is greater; (b) the first payment shall commence 30 days following the defendant's discharge from incarceration, and continue until the criminal monetary penalty is paid in full; and (c) the defendant shall be responsible for providing proof of payment to the probation officer as directed.

Any payments made on the outstanding criminal monetary penalty shall be applied in the following order of priority: special assessment; restitution; fine; and other penalties. Unless otherwise specifically

ordered, all criminal monetary penalty payments, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, shall be made to the clerk of the Court. Unless otherwise specifically ordered, interest shall not accrue on the criminal monetary penalty.

All financial penalty payments are to be made to the Clerk of Court for the District of Nebraska, 100 Centennial Mall North, 593 Federal Building, Lincoln, NE 68508.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The defendant shall inform the probation officer of any change in his or her economic circumstances affecting the ability to make monthly installments, or increase the monthly payment amount, as ordered by the court.

The defendant is restrained from transferring any real or personal property, unless it is necessary to liquidate and apply the proceeds of such property as full or partial payment of the criminal monetary penalty.

The defendant shall forfeit the defendant's interest in the following property to the United States:

1. One HP Pavillion A1540N computer, Serial #MXF624011K;
2. One Western Digital WD2500JS Hard Drive, Serial #WCANK3821560;
3. One Western Digital MyBook External Hard Drive, Serial #WDCWTA11951844

CLERK'S OFFICE USE ONLY:

ECF DOCUMENT

I hereby attest and certify this is a printed copy of a document which was electronically filed with the United States District Court for the District of Nebraska.

Date Filed:_____

DENISE M. LUCKS, CLERK

By _____Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff, v. ROBERT M. FAST, Defendant.	)))))))	4:11CR3018 **MEMORANDUM AND ORDER**

Based upon the appellate concession of the government that I erred when awarding restitution in this child pornography case, the Court of Appeals remanded this case for me to determine again whether "Vicky"[1] is entitled to restitution as a result of the defendant's receipt of a video showing her molestation.[2] It appears that the Court of Appeals may have

[1] Today, I denied "Vicky" leave to intervene because her request was untimely. Her motion arrived in Omaha this morning. I only became aware of the motion because counsel for the parties had copies they received earlier today and they brought this matter to my attention. Evidently, a letter addressed to me with a motion and briefs had been mailed to the Omaha courthouse rather than to my chambers in Lincoln or to the Clerk's office in Lincoln. Even had the motion been timely, I doubt whether "Vicky" has the legal right to intervene in a criminal case. That said, "Vicky" and her counsel have been given every reasonable opportunity to be heard and to provide evidence of her damages and they have done so.

[2] Since there is no dispute, I trust that there is no need to recite the horrors suffered by "Vicky." If ever there was a "victim" within the meaning of 18 U.S.C. § 2259(c), "Vicky" is that person.

accepted the proposition that any award of restitution under 18 U.S.C. § 2259 must be based upon a finding of proximate cause. Even if that is not true and the Court of Appeals intended to leave that question for my determination on remand, I now independently conclude, based upon the overwhelming weight of authority, that proximate cause is required for each element of restitution under 18 U.S.C. § 2259. My earlier contrary conclusion was erroneous.

After reading the extensive briefing, hearing the arguments of counsel, and considering the detailed evidence, I find and conclude beyond a reasonable doubt that "Vicky" is entitled to restitution in the sum of $3,333 because Robert M. Fast ("Fast") proximately caused injury to "Vicky" and "Vicky" suffered that amount of damage as a direct and proximate result of Fast's actions.[3] In coming to this decision, I have relied upon and followed *United States v. Burgess*, ___ F.3d ___, 2012 WL 2821069, at *9-13 (4th Cir. July 11, 2012) (holding in a child pornography possession and receipt case involving the "Vicky" series that (1) proximate cause exists when the wrongful conduct of multiple actors has combined to bring about harm, even if the harm suffered by the victim might be the same if one of the wrongdoers had not committed the tort; (2) the amount of loss attributable to "Vicky's" exploitation is dependent at least in part on the role

[3] "Vicky's" total aggregate actual damages caused by the numerous individuals who have reveled in her molestation exceed one million dollars.

that the defendant played in "Vicky's" exploitation; and (3) joint and several liability should not be imposed in the typical "Vicky" case because individual instances of exploitation are separate injuries and the defendant is only responsible for losses sustained by "Vicky" that the defendant proximately caused).

My award of restitution is comprised of (1) $2,500 for medical and psychiatric care, occupational therapy, and lost income under 18 U.S.C. § 2259(b)(3)(A), (B) & (D); and (2) attorney fees and costs under [18] U.S.C. § 2259(b)(3)(E) of $833 (equivalent to one-third of $2,500). The award of restitution will be assessed only against Fast. He will have no liability for the damages caused by other persons who have participated in "Vicky's" exploitation.

I have *not* awarded restitution for damages suffered by "Vicky" prior to June 25, 2010, the earliest date we have that Fast began committing the offense of conviction. Furthermore, "Vicky's" damages for medical and psychiatric care, occupational therapy, lost income, attorney fees, and expenses from and after June 25, 2010, far exceed the amount of restitution that I have ordered. In addition, this award of restitution is well below the Guidelines' fine range ($17,500 to $175,000) and it is also worth noting that I did not impose a fine.

With the foregoing in mind, I briefly elaborate more fully on the issue of proximate cause. Starting with first principles, the determination of whether "proximate cause" exists is ultimately an exercise in

reasoned judgment derived from all the facts and circumstances and viewed from the perspective of the mythical reasonable person.

Using the LimeWire program and the Gnutella network, Fast downloaded child pornography starting as early as June 25, 2010, and law enforcement agents were able to access some of that pornography over the Internet. Some of the pornography on Fast's computer included the "Vicky series." There is no evidence that Fast redistributed the "Vicky series,"[4] but Fast could have easily done so. In short, Fast, like many others who are found guilty of receipt of child pornography, used a computer and a file sharing program to latch on to the "Vicky series" via his interactive path to the Internet.

While Fast directly participated in the further exploitation of "Vicky" by obtaining images of her degradation at a time when he knowingly acquired

---

[4] Fast also asserts that there is no evidence that he even viewed this material. Such an argument is too clever. Sure, no law enforcement officer was looking over his shoulder as he compiled his collection. However, the absence of such evidence hardly establishes that Fast did not view "Vicky's" degradation. Indeed, it is far more realistic to believe that Fast viewed what he collected. But even assuming that Fast did not actually view this material, my decision would be precisely the same. A reasonable person standing in the shoes of the offender would foresee that victims who are pictured in *any* of the offender's pornography collection would be tormented by the offender's participation in the "market" even if the offender did not actually look at a particular image.

the demonstrated capacity to redistribute those images throughout the world, his behavior played only a small, albeit direct, part in her victimization. Indeed, I do not suggest that Fast had the subjective intent to harm "Vicky." But, by downloading the "Vicky series" and by having the capacity to make that bilge available to others over the Internet, Fast personally and actually harmed "Vicky," as the evidence graphically proves. Essentially, Fast directly contributed to "Vicky's" continuing and well founded terror.

"Vicky's" torment at the hands of Fast and those like him is somewhat like enduring torture by a thousand tiny cuts. It matters not to the victim that she cannot see who is inflicting each little wound. It also does not matter to the victim that each cut is exquisitely small. The victim knows she is being cut apart bit by bit. Reasonably, she fears that she will succumb unless the minute slicing stops. Having inflicted one of those tiny cuts and directly caused the resulting fear, Fast must now pay for the terror he condemned "Vicky" to suffer.[5]

While quantifying the harm Fast caused "Vicky" is not easy, and requires some reasonable estimation, there is no doubt – and certainly no reasonable doubt – that Fast harmed "Vicky" in a direct, concrete, and compensable way. In other words, I find and conclude beyond a reasonable doubt that Fast proximately

---

[5] Applying conventional proximate cause principles, Fast takes the victim as he found her.

caused harm to "Vicky" that directly resulted in compensable injury and damage to her in the sum of $3,333. Finding no reason to "gild the lily,"

IT IS ORDERED that an amended judgment shall be issued in accordance with this Memorandum and Order.

July 13, 2012

BY THE COURT:
Richard G. Kopf
Senior United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff, v. ROBERT M. FAST, Defendant.	4:11CR3018 MEMORANDUM AND ORDER

Using the LimeWire program and the Gnutella network, Robert M. Fast (Fast) downloaded child pornography starting as early as June 25, 2010 and law enforcement agents were able to access some of that pornography over the Internet. (Filing no. 31 at CM/ECF pp. 16-19.) Some of the pornography on Fast's computer included the "Vicky series." "Vicky," the person victimized in that pornography, now seeks restitution in the sum $952,759.81.

After careful consideration of the evidence and the briefs, I decide that "Vicky" is entitled to $19,863.84.[1] My explanation for this ruling will be short. The evidence reveals that there are those who have a sick fascination with "Vicky's" victimization and brevity is therefore the prudent course.

[1] While not attaching a great deal of significance to the point, my restitution order falls within the Guideline range for fines ($17,500 to $175,000) and I have not imposed a fine in this case.

First, I must award restitution – it is mandatory. 18 U.S.C. § 2259.

Second, for those items of loss described in 18 U.S.C. § 2259(b)(3)(A)-(E) there is no "proximate cause" requirement because those portions of the statute do not contain one.

Third, for "other" losses described in 18 U.S.C. § 2259(b)(3)(F) there is a proximate cause requirement because the statute says so.

Regarding points two and three above, I agree with Chief Judge Jones' statement that:

> The structure and language of § 2259(b)(3) impose a proximate causation requirement only on miscellaneous "other losses" for which a victim seeks restitution. As a general proposition, it makes sense that Congress would impose an additional restriction on the catchall category of "other losses" that does not apply to the defined categories. By construction, Congress knew the kinds of expenses necessary for restitution under subsections A through E; equally definitionally, it could not anticipate what victims would propose under the open-ended subsection F.
>
> Comparing the language of § 2259 with other restitution statutes affirms the conclusion that proximate causation applies only to the catchall category of harms. Under the VWPA, a victim is "a person directly and proximately harmed as a result of the commission of an offense. . . ." 18 U.S.C. § 3663A(a)(2)

> (emphasis added). In contrast, § 2259, enacted 14 years later as part of the MVRA, defines a victim as "the individual harmed as a result of a commission of a crime. . . ." 18 U.S.C. § 2259(c) (emphasis added). Comparing these statutes reveals that Congress abandoned the proximate causation language that would have reached all categories of harm via the definition of a victim. This change is consistent with the reasons for enacting a second generation of restitution statutes. *See, e.g., United States v. Ekanem*, 383 F.3d 40, 44 (2d Cir.2004) (noting "the intent and purpose of the MVRA to expand, rather than limit, the restitution remedy."), *United States v. Perry*, 360 F.3d 519, 524 (6th Cir.2004) ("The new law unquestionably reflects a dramatically more 'pro-victim' congressional attitude. . . ."). The evolution in victims' rights statutes demonstrates Congress's choice to abandon a global requirement of proximate causation.

In Re Amy Unknown, 636 F.3d 190, 198-199 (5th Cir. 2011).

Fourth, there is a difference between "proximate cause" and "cause." That said, any loss described in 18 U.S.C. § 2259(b)(3)(A)-(E) suffered by "Vicky" must have been "caused" (in whole or in part) by Fast although it need not be the "proximate" cause or the only cause.

Fifth, although I do not suggest that Fast had the intent to harm "Vicky," by downloading the "Vicky

series" and also by having the capacity to make that bilge available to others over the Internet[2], Fast personally and actually harmed "Vicky" as her evidence graphically proves (e.g., filing no. 38-1 at CM/ECF p. 6 and n. 2)).

Sixth, because the statute does not say so and because due process would not allow, Fast cannot be responsible for injury to "Vicky" or loss suffered by her prior to the first date of his criminal offense and that date is June 25, 2010.

Seventh, while "Vicky" suffered some injury and loss on and after June 25, 2010, and except for the question of costs incurred by Vicky's counsel, the nature of that injury and the amount of that loss is neither clear nor precise.

Eighth, for the services of her lawyer, "Vicky" is entitled to (a) $700 as an attorney fee (2 hours at $350 per hour for work limited to this case)[3] (filing no. 38-1 at CM/ECF p. 7) and (b) $9,163.84 for expenses reasonably incurred by counsel from and after June 25, 2010 (filing no. 38-2 at CM/ECF p. 266 (Ex. 11)). 18 U.S.C. §(b)(3)(E)[.]

---

[2] It is irrelevant where Fast stored the "Vicky" series on his computer. The fact that he possessed it, and could have made it available using his computer is all that counts.

[3] I cannot determine what attorney *fees* have been incurred from and after June 25, 2010 save for the amount claimed for counsel's presentation in this case.

Ninth, for medical and psychiatric care, occupational therapy and lost income, "Vicky" is entitled to $10,000. I find as a matter of fact that "Vicky" has actually suffered at least such loss although the precise amount of loss may in fact be much higher. However, without a more targeted evidentiary presentation geared to the condition of "Vicky" on and after June 25, 2010, the award I have made is a reasonable estimate and consistent with the government's request. (Filing no. 40 at CM/ECF p. 10.)

Tenth, while limited to $19,863.84, Fast's restitution obligation is joint and several with all persons who have been convicted and sentenced for possessing, receiving, distributing or producing child pornography and who have been ordered to make restitution to "Vicky."

IT IS SO ORDERED.

DATED this 20th day of October, 2011.

BY THE COURT:

Richard G. Kopf
United States District Judge

18 U.S.C. § 2259 Mandatory Restitution.

(a) **In General.** – Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter.

(b) **Scope and Nature of Order.** –

(1) **Directions.** – The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court pursuant to paragraph (2).

(2) **Enforcement.** – An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

(3) **Definition.** – For purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred by the victim for –

(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) attorneys' fees, as well as other costs incurred; and

(F) any other losses suffered by the victim as a proximate result of the offense.

(4) **Order mandatory.** –

(A) The issuance of a restitution order under this section is mandatory.

(B) A court may not decline to issue an order under this section because of –

(i) the economic circumstances of the defendant; or

(ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

(c) **Definition.** – For purposes of this section, the term "victim" means the individual harmed as a result of a commission of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named as such representative or guardian.

18 U.S.C. § 3771 Crime Victims' Rights.

(a) **Rights of Crime Victims.** – A crime victim has the following rights:

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.

(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

(5) The reasonable right to confer with the attorney for the Government in the case.

(6) The right to full and timely restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

(b) **Rights Afforded.** –

(1) **In general.** – In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable

alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

(2) **Habeas corpus proceedings.** –

(A) **In general.** – In a Federal habeas corpus proceeding arising out of a State conviction, the court shall ensure that a crime victim is afforded the rights described in paragraphs (3), (4), (7), and (8) of subsection (a).

(B) **Enforcement.** –

(i) **In general.** – These rights may be enforced by the crime victim or the crime victim's lawful representative in the manner described in paragraphs (1) and (3) of subsection (d).

(ii) **Multiple victims.** – In a case involving multiple victims, subsection (d)(2) shall also apply.

(C) **Limitation.** – This paragraph relates to the duties of a court in relation to the rights of a crime victim in Federal habeas corpus proceedings arising out of a State conviction, and does not give rise to any obligation or requirement applicable to personnel of any agency of the Executive Branch of the Federal Government.

(D) **Definition.** – For purposes of this paragraph, the term "crime victim" means the person against whom the State offense is committed or, if that person

is killed or incapacitated, that person's family member or other lawful representative.

(c) **Best Efforts To Accord Rights.** –

(1) **Government.** – Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).

(2) **Advice of attorney.** – The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).

(3) **Notice.** – Notice of release otherwise required pursuant to this chapter shall not be given if such notice may endanger the safety of any person.

(d) **Enforcement and Limitations.** –

(1) **Rights.** – The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter.

(2) **Multiple crime victims.** – In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this

chapter that does not unduly complicate or prolong the proceedings.

(3) **Motion for relief and writ of mandamus.** – The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

(4) **Error.** – In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates.

(5) **Limitation on relief.** – In no case shall a failure to afford a right under this chapter provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if –

(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;

(B) the victim petitions the court of appeals for a writ of mandamus within 14 days; and

(C) in the case of a plea, the accused has not pled to the highest offense charged.

This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.

(6) **No cause of action.** – Nothing in this chapter shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages. Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.

(e) **Definitions.** – For the purposes of this chapter, the term "crime victim" means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights

under this chapter, but in no event shall the defendant be named as such guardian or representative.

(f) **Procedures To Promote Compliance.** –

(1) **Regulations.** – Not later than 1 year after the date of enactment of this chapter, the Attorney General of the United States shall promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations described in law respecting crime victims.

(2) **Contents.** – The regulations promulgated under paragraph (1) shall –

(A) designate an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of the rights of a crime victim;

(B) require a course of training for employees and offices of the Department of Justice that fail to comply with provisions of Federal law pertaining to the treatment of crime victims, and otherwise assist such employees and offices in responding more effectively to the needs of crime victims;

(C) contain disciplinary sanctions, including suspension or termination from employment, for employees of the Department of Justice who willfully or wantonly fail to comply with provisions of Federal law pertaining to the treatment of crime victims; and

(D) provide that the Attorney General, or the designee of the Attorney General, shall be the final

arbiter of the complaint, and that there shall be no judicial review of the final decision of the Attorney General by a complainant.