No. 19-5384

IN THE SUPREME COURT OF THE UNITED STATES

DAVID ROTHENBERG, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court, in exercising its discretion to determine the appropriate amount of restitution to order for eight child-pornography victims, was required to make an explicit finding in which it disaggregated losses caused by the sexual abuse of the victim from losses caused by the traffic in child pornography depicting the victim's abuse before determining the losses proximately caused by petitioner's conduct.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals (11th Cir.):

United States v. Rothenberg, No. 17-12349 (May 8, 2019)

United States District Court (S.D. Fl.):

United States v. Rothenberg, No. 16-cr-60054 (May 9, 2017)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-67a) is reported at 923 F.3d 1309. The order of the district court (Pet. App. 68a-83a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 2019. The petition for a writ of certiorari was filed on July 26, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Florida, petitioner was convicted possessing child pornography, in violation of 18 U.S.C. 2252(a)(4)(b). Amended Judgment 1. The district court sentenced petitioner to 210 months of imprisonment, to be followed by lifetime supervised release, and ordered $142,600 in restitution. Id. at 2-5. The court of appeals affirmed in part, and vacated and remanded in part. Pet. App. 1a-67a.

1. Petitioner was a lawyer who entered an internet chatroom called "daddaughtersex" and began chatting with an undercover officer with the Vermont Attorney General's Office portraying himself as Liz, a divorced mother of a 13-year-old daughter. Pet App. 2a-3a; Presentence Investigation Report (PSR) ¶ 8. Petitioner asked Liz whether she would allow the daughter to be "sexually explored and cultivated by a more strong man in her life." PSR ¶ 8. Over the course of the next month, petitioner continued communicating with the undercover officer through various electronic means, including by sending the undercover officer child pornography and bragging that he had been sexually exploiting a young girl in his house. Pet. App. 2a-3a; PSR ¶¶ 8-23.

Petitioner eventually emailed the undercover officer that the girl was presently in his house and that he was sexually assaulting her. PSR ¶¶ 22-23. Law enforcement responded by visiting petitioner's house under the ruse of a welfare check. PSR ¶ 24.

Once inside the house, officers found the young girl, who confirmed that petitioner had sexually assaulted her earlier that morning. PSR ¶ 25. Officers arrested petitioner, and seized various digital devices from his residence. PSR ¶ 27. More than 1000 images and videos depicting sexual exploitation were subsequently recovered from petitioner's laptop computer, most of which showed prepubescent minors, including infants and toddlers. PSR ¶ 28.

2. A federal grand jury in the Southern District of Florida returned a six-count indictment charging petitioner with four counts of distribution of child pornography, in violation of 18 U.S.C. 2252(a)(2) and (b)(1); one count of receipt of child pornography, in violation of 18 U.S.C. 2252(a)(2) and (b)(1); and one count of possession of child pornography depicting a minor under the age of 12, in violation of 18 U.S.C. 2252(a)(4)(B) and (b)(2). Pet. App. 3a. Petitioner pleaded guilty to the possession charge pursuant to a written plea agreement, and the government dismissed the remaining counts. Ibid. The district court sentenced petitioner to 210 months of imprisonment, to be followed by lifetime supervised release. Amended Judgment 2-4.

The parties subsequently submitted restitution memoranda, and the district court held a restitution hearing. See Pet. App. 5a-22a. Initially, ten victims, whose images were possessed by petitioner, requested restitution under the mandatory-restitution provisions of 18 U.S.C. 2259 (2012). See Gov't Restitution Mem. 2. By the time of the restitution hearing, one of the victims had

withdrawn her request for restitution, which left nine victims, who were identified as Sierra, Jane, Pia, Mya, Sarah, Vicky, Amy, Jenny, and Casseaopeia. Ibid.; Restitution Hr'g Tr. 5. For each victim, the government introduced evidence of the total amount of the victim's losses, the number of other defendants who had been ordered to pay restitution to the victim, the number of images or videos of the victim that petitioner possessed, the amount of restitution awarded to the victim in other cases, reports and letters from treating medical professionals about the victim's mental condition, and the victim's attorney fees and costs. See Gov't Restitution Mem. 9-17; Pet. App. 6a-21a. Most of the victims also provided victim-impact statements and psychological evaluations. Ibid.

With the exception of Jenny, the government introduced evidence that each victim suffered losses as a result of not only the initial abuse, but also the continued distribution and receipt of their images by persons like petitioner. Pet. App. 6a-21a.[1] For example, Sierra's forensic pediatrician explained that the "'ongoing presence of trafficking in images [of Sierra] on the Internet constitutes a significant aspect of psychological maltreatment that will add on to the initial adversities' caused by the original abuse." Id. at 7a. In Jane's victim-impact statement, she explained that "[k]nowing people are watching what

[1] Jenny's claim for restitution contained significantly less documentation of her psychological and medical expenses than the other victims. Gov't Restitution Mem. 16; see Pet. App. 19a.

happened gives me a mix of anxiety, sadness, anger and it disgusts me . . . If it wasn't out there, I wouldn't be as fearful as I am now." Id. at 8a. Other victims explained that they feared that viewers of their images might stalk them or victimize them in other ways. As Amy explained, "the crime has never really stopped and will never really stop." Id. at 17a.

c. The district court issued a restitution order for a total amount of $142,600. Pet. App. 68a-83a.

The district court first reviewed the factors discussed in Paroline v. United States, 572 U.S. 434 (2014), for setting the appropriate amount of mandatory restitution for a possessor of child pornography and noted its broad discretion in this context. Pet. App. 69a-74a. The court observed that petitioner, like all possessors of child pornography, was "a significant link in the exploitation chain," because he helped "perpetuate the harm of the initial abuse and provide a market for distributors." Id. at 73a. The court noted that, although no evidence showed that petitioner had reproduced the images of the victims, the victims "have commented specifically about the continuing harm of the presence of their images on the internet." Id. at 74a-75a. And the court explained that, "with respect to each of the victims," it had "assigned restitution to [petitioner] in a manner that comports with his relative role and has awarded no more damages than the [c]ourt deems him to have proximately caused to each of" the victims. Ibid. After discussing the specific facts relevant to

each victim, including the number of images petitioner possessed, the general number of defendants who had already paid restitution, the total losses, and the specific impact that the distribution of images had caused each victim, the court ordered restitution in the amounts of $10,000 to Sierra, $3000 to Jane, $5000 to Pia, $5000 to Mya, $20,000 to Sarah, $9000 to Vicky, $23,000 to Amy, $42,600 to Jenny, and $25,000 to Casseaopeia. Id. at 75a-83a.

3. The court of appeals affirmed in part, and vacated and remanded in part. Pet. App. 1a-67a.

The court of appeals rejected petitioner's contention that the district court erred by not explicitly disaggregating the harm caused to the victims by the initial abuse before determining the harm caused by petitioner's possession of child pornography. Pet. App. 40a-56a. The court of appeals recognized that, under Paroline, a district court is required to "hold a defendant accountable only for his own individual conduct and set a restitution 'amount that comports with the defendant's relative role' in causing the victim's general losses." Id. at 51a (quoting Paroline, 572 U.S. at 458-459). It then explained that "[h]ow a district court arrives at that figure is largely up to the district court, so long as the number is a 'reasonable and circumscribed award' that is 'suited to the relative size' of the defendant's causal role in the entire chain of events that caused the victim's loss." Id. at 51a-52a (quoting Paroline, 572 U.S. at 459). The court observed that Paroline "repeatedly stresses the flexibility

and broad discretion district courts have in arriving at such a reasonable restitution amount," and declined to attach the same weight as the Ninth Circuit to a parenthetical reference to disaggregation. Id. at 52a; see id. at 54a n.7. The court explained that it would be inconsistent with that "flexible, discretionary framework to require district courts to perform an initial, formal step of calculating and then separately assigning a total loss amount to the initial abuser, then one to the distributors and possessors generally, and only then one to the particular defendant possessor." Id. at 53a.

Petitioner separately challenged the sufficiency of the evidence supporting the restitution award to Mya and Jenny. Pet. App. 60a. The court of appeals affirmed the restitution award to Mya, but found insufficient evidence to support the $42,600 award to Jenny. Id. at 60a-66a. The court thus vacated the restitution award as to Jenny and remanded for further proceedings. Id. at 66a. The court of appeals instructed the district court to allow Jenny to supplement her restitution request on remand with additional evidence and then to "determine, in light of all the available evidence and the Paroline factors, the portion of Jenny's losses for which [petitioner] is responsible." Ibid.

ARGUMENT

Petitioner contends (Pet. 8-21) that the district court erred by ordering him to pay restitution to his victims, who were sexually abused in child pornography that petitioner possessed,

without formally and explicitly disaggregating the harm that the victims suffered as a result of the dissemination of that pornography from the harm they suffered as a result of the initial abuse itself. This Court has recently denied review of a substantially identical issue, Bordman v. United States, 139 S. Ct. 1618 (2019) (No. 18-6758), and the same result is warranted here. The district court did not abuse its discretion in making the restitution award. And although some tension exists in the case law regarding disaggregation following Paroline v. United States, 572 U.S. 434 (2014), this Court's review of that question is not warranted at this time. Even if it were, this case would be a poor vehicle for addressing any disagreement. The petition for a writ of certiorari should be denied.

1. As an initial matter, this Court's review is unwarranted at this time because the case is in an interlocutory posture. The court of appeals vacated petitioner's restitution order in part and remanded for additional proceedings concerning the restitution order. Pet. App. 66a-67a. The district court has not yet addressed the remaining restitution issue on remand. That posture "alone furnishe[s] sufficient ground for the denial of" the petition. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see Virginia Military Inst. v. United States, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for writ of certiorari); Eugene Gressman et al., Supreme Court Practice 281 n.63 (9th ed. 2007). Petitioner will have the

opportunity to raise his current claim, together with any other claims that may arise from the resentencing, in a single petition for a writ of certiorari. See Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam) (stating that this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment). Petitioner provides no sound reason to depart in this case from the Court's usual practice of awaiting final judgment. Thus, even if further review were otherwise warranted, it would be premature.

2. In any event, further review is warranted because petitioner's claim lacks merit.

a. The Mandatory Restitution for Sexual Exploitation of Children Act, 18 U.S.C. 2259 (2017), "states a broad restitutionary purpose." Paroline, 572 U.S. at 443. It requires district courts to order restitution to the victims of "a number of offenses involving the sexual exploitation of children and child pornography in particular." Ibid. The amount of restitution should equal "the full amount of the victim's losses," including "costs incurred by the victim for," among other things, medical or psychological care, lost income, attorneys' fees, and "any other losses suffered by the victim as a proximate result of the offense." 18 U.S.C. 2259(b)(1) and (3)(2012).

In Paroline, this Court addressed the application of Section 2259 to child pornography offenders like petitioner, who possess

images of child pornography but did not create the images or personally abuse the victims. Paroline held that "[r]estitution is * * * proper under § 2259 only to the extent the defendant's offense proximately caused a victim's losses." 572 U.S. at 448. The Court stated that it was "perhaps simple enough for the victim to prove the aggregate losses, including the costs of psychiatric treatment and lost income," id. at 449, but that determining the losses attributable to individual possessors of child pornography was more difficult, id. at 448-462. But it reasoned that in the case at hand, it could "set aside" the "[c]omplications" that "may arise in disaggregating losses sustained as a result of the initial physical abuse." Id. at 449. Earlier in its opinion, the Court had noted that the victim had appeared to be "'back to normal'" after participating in therapy following the initial abuse but suffered "a major blow to her recovery * * * when, at the age of 17, she learned that images of her abuse were being trafficked on the Internet." Id. at 440 (citation omitted).

The Court explained that in the context of child pornography offenses, "where it can be shown both that a defendant possessed a victim's images and that a victim has outstanding losses caused by the continuing traffic in those images but where it is impossible to trace a particular amount of those losses to the individual defendant by recourse to a more traditional causal inquiry," a court "should order restitution in an amount that comports with the defendant's relative role in the causal process

that underlies the victim's general losses." Paroline, 572 U.S. at 458. "This cannot be a precise mathematical inquiry," but instead requires district courts to exercise "discretion and sound judgment" to evaluate "the significance of the individual defendant's conduct in light of the broader causal process that produced the victim's losses." Id. at 459.

The Court noted "a variety of factors district courts might consider in determining a proper amount of restitution." Paroline, 572 U.S. at 459. It stated that such factors "could include the number of past criminal defendants found to have contributed to the victim's general losses; reasonable predictions of the number of future offenders likely to be caught and convicted for crimes contributing to the victim's general losses; any available and reasonably reliable estimate of the broader number of offenders involved * * * whether the defendant reproduced or distributed images of the victim; whether the defendant had any connection to the initial production of the images; how many images of the victim the defendant possessed; and other facts relevant to the defendant's relative causal role." Id. at 460. It also stated that the government "could also inform district courts of restitution sought and ordered in other cases." Id. at 462. The court emphasized, however, that the factors it set out "need not be converted into a rigid formula, especially if doing so would result in trivial restitution orders." Id. at 460. Instead, the Court explained that the factors should "serve as rough guideposts

for determining an amount that fits the offense," ibid., and stressed that the district court's ultimate restitution determination would involve "discretion and estimation," id. at 462.

b. The district court did not abuse that discretion in the aspect of the restitution award affirmed by the court of appeals, in which petitioner was ordered to pay $100,000 in restitution to eight victims. The district court identified and discussed several of the factors suggested in Paroline for each individual victim -- such as the number of images of the victim that petitioner possessed, the general number of defendants who had already paid restitution, and the total losses the number of past defendants found to have contributed to the victim's losses. Compare Pet. App. 75a-83a, with 572 U.S. at 460. It also recognized that "there [wa]s no evidence with respect to any victim that [petitioner] reproduced or distributed images of the victim or that he had connection to the initial production of the images," and took that "into consideration in assigning him a relative role as the proximate cause of the[] victims' losses." Pet. App. 75a. And with the exception of the restitution award to Jenny (which the court of appeals vacated), the restitution awards are in line with the prior restitution awards of which the government is aware that have been granted to the same victims. See Paroline 572 U.S. at 462 (stating that the government "could also inform district courts of restitution sought and ordered in other cases").

Petitioner asserts (Pet. 17-21) that the district court erred by not formally disaggregating the harm that the victims suffered as a result of the proliferation of images of their sexual abuse from the harms the victims suffered as a result of the abuse itself. But this Court emphasized in Paroline that it would be inappropriate "to prescribe a precise algorithm" for restitution, because "[d]oing so would unduly constrain the decisionmakers closest to the facts of any given case." 572 U.S. at 459-460; see id. at 462 (restitution determinations will involve "discretion and estimation"). Moreover, while this Court did not find occasion in Paroline to directly address disaggregation of the harms from sexual abuse from the harms of child pornography in the case before it, as the court of appeals recognized, the Court included a factor pertaining to disaggregation in the explicitly discretionary and non-exhaustive list of factors that district courts might consider. Pet. App. 52a; see Paroline, 572 U.S. at 60 (describing "whether the defendant had any connection to the initial production of the images" as a relevant factor); United States v. Bordman, 895 F.3d 1048, 1059 (8th Cir. 2018) (declining "to transform one of the Paroline factors -- the disaggregation factor -- from a 'rough guidepost' into a 'rigid formula'") (quoting 572 U.S. at 460), cert. denied, 139 S. Ct. 1618 (2019).

Petitioner's argument that disaggregation is an invariable prerequisite for restitution is also inconsistent with Paroline more generally. This Court acknowledged in Paroline that it would

often not be possible to disaggregate the harms caused by particular possessors of child pornography. See 572 U.S. at 458. But it concluded that rather than ordering no restitution "where it is impossible to trace a particular amount of those losses [suffered by a child-pornography victim] to the individual defendant," courts should "order restitution in an amount that comports with the defendant's relative role in the causal process that underlies the victim's general losses." Ibid. This Court's reasoning regarding the apportionment of losses caused by multiple child-pornography defendants strongly suggests that courts may order restitution in those cases in which it is not possible to ascertain what portion of the harms suffered by child victims stems from the underlying abuse and what portion stems from the proliferation of pornography depicting that abuse.

3. As petitioner observes (Pet. 8-11), two other courts of appeals have vacated restitution awards in child-pornography cases in which the district courts did not make an explicit finding with respect to disaggregation. In United States v. Dunn, 777 F.3d 1171 (10th Cir. 2015), the parties agreed that a pre-Paroline award of $583,955 in restitution required vacatur under Paroline. Id. at 1179. And the Tenth Circuit concluded that a loss report that failed to "clearly distinguish the primary harms associated with [the victim's] original abuse from those secondary harms flowing from the dissemination of images of her online" had been a flawed starting point for the district court's analysis, where the result

was to hold the defendant "accountable for those harms initially caused by [the victim's] abuser." Id. at 1181 (citation omitted).

The Ninth Circuit has similarly vacated a restitution award in which the district court used as the starting point a loss calculation that included "future lost earnings, medical expenses incurred after the date of the earliest crimes for which [the defendant] was convicted[,] * * * vocational rehabilitation, and the cost of an economic report," when "no attempt was made to disaggregate the losses resulting from the original abuse from the losses resulting from [the child-pornography defendant's] own activities." United States v. Galan, 804 F.3d 1287, 1289 (2015). The court agreed with the Tenth Circuit that the defendant "should not be required to pay for losses caused by the original abuser's actions." Id. at 1290. It stated that "the losses * * * caused by the original abuse of the victim should be disaggregated from the losses caused by the ongoing distribution and possession of images of that original abuse, to the extent possible," and remanded for further proceedings. Id. at 1291 (emphasis added); see United States v. Grovo, 826 F.3d 1207, 1221 (9th Cir. 2016) (vacating a restitution award where, as in Galan, the district court relied on a report that "showed only that [the victim's] ongoing costs were 'at least in part related to' -- not caused by -- 'the continuing traffic in her image'"), cert denied, 137 S. Ct. 1112 (2017).

This case, however, would not be a suitable vehicle for addressing any tension in the courts of appeals' approaches. As in Paroline, evidence here showed that the eight victims each experienced distinct harm from the circulation of their images, and the district court's focus on that distinct harm would not necessarily be deficient under any circuit's approach. As Sophia's doctor explained, "the pre-existing dysfunction caused by the initial abuse is typically worsened" by the distribution of their images. Pet. App. 7a. For Sophia, the "ongoing presence of trafficking in images [of her] on the Internet constitute[d] a significant aspect of [her] psychological maltreatment that will add on to the initial adversities." Ibid. Similarly, Jane "wouldn't be as fearful as" she is now if her images were not being circulated on the Internet. Id. at 8a. With respect to Pia, although separating the harm caused by the abuse and the harm caused by the distribution "is not entirely possible," the distribution of her images caused her to experience higher levels of suspicions. Id. at 11a. Mya and Sarah both feared that they might be victims of stalking and victimization as a result of the distribution. Id. at 12a-14a. The ongoing distribution of Vicky's images cause her "fear and paranoia, nightmares, and panic attacks." Id. at 15a. For Amy, "the crime has never really stopped and will never really stop" because she lives in fear that someone will recognize her from the images. Id. at 17a. And Casseaopeia's fear that "people viewing her images would seek her

out and harm her" causes her such anxiety that it makes it difficult for her to work or go into the public. Id. at 19a-20a.

The district court took all of that into account. It expressly acknowledged the lack of any evidence that petitioner was involved in the original abuse of any victim. Pet. App. 75a. The court specifically accounted for that fact in determining what portion of each victim's losses he "proximate[ly] cause[d]," and it "unequivocally state[d] that with respect to each of the victims," it "awarded no more damages than the Court deems him to have proximately caused to each of these individuals." Id. at 74a-75a. Because it is not clear that any court would require more in these circumstances, this case would not be an appropriate vehicle for review of the nascent law concerning disaggregation following Paroline. See Grovo, 826 F.3d at 1221 (emphasizing that district courts are only required to disaggregate losses caused by the original abuser "to the extent possible") (citation omitted); Galan, 804 F.3d at 1291 ("If the ultimate apportionment is not scientifically precise, we can only say that precision is neither expected nor required.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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