No. _____

In the

Supreme Court of the United States

ALEXANDER ROSENBLATT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a district court's failure to determine the total loss to the victims and its failure to conduct a *Paroline* analysis before entering an order of restitution result in plain error?

PARTIES

Alexander Rosenblatt, is the petitioner, who was the defendant-appellant below. The United States of America is the respondent, and was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Alexander Rosenblatt seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion is unpublished but is reprinted in the appendix. *See United States v. Alexander Rosenblatt*, 788 Fed. Appx. 960 (5th Cir. December 26, 2019)

JURISDICTION

The Fifth Circuit issued its written judgment on December 26, 2019. (Appendix A). The 90-day deadline for filing a petition for writ of certiorari provided for in Supreme Court Rule 13 has been extended to 150 days from the date of the lower court judgment by order of this Court on March 19, 2020. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides the following:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 3663A. Mandatory restitution to victims of certain crimes provides the following:

> (a)(1)Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall

order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2)For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. 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, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3)The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b)The order of restitution shall require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

> (A) return the property to the owner of the property or someone designated by the owner; or
>
> (B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to—
>
> (i)the greater of—
>
> (I) the value of the property on the date of the damage, loss, or destruction; or
>
> (II) the value of the property on the date of sentencing, less
>
> (ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

(c)(1)This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense—

(A) that is—

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit;

(iii) an offense described in section 1365 (relating to tampering with consumer products); or

(iv)an offense under section 670 (relating to theft of medical products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea

specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that—

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

The relevant portions of 18 U.S.C. § 2259, mandatory restitution in sex exploitation of children offenses provides the following:

(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)(2)Restitution for trafficking in child pornography.—If the defendant was convicted of trafficking in child pornography, the court shall order restitution under this section in an amount to be determined by the court as follows:

(A)Determining the full amount of a victim's losses.—
The court shall determine the full amount of the victim's losses that were incurred or are reasonably projected to be incurred by the victim as a result of the trafficking in child pornography depicting the victim.

(B)Determining a restitution amount.—
After completing the determination required under subparagraph (A), the court shall order restitution in an amount that reflects the defendant's relative role in the causal process that underlies the victim's losses, but which is no less than $3,000.

(C)Termination of payment.—

A victim's total aggregate recovery pursuant to this section shall not exceed the full amount of the victim's demonstrated losses. After the victim has received restitution in the full amount of the victim's losses as measured by the greatest amount of such losses found in any case involving that victim that has resulted in a final restitution order under this section, the liability of each defendant who is or has been ordered to pay restitution for such losses to that victim shall be terminated. The court may require the victim to provide information concerning the amount of restitution the victim has been paid in other cases for the same losses.

. . .

(c) Definitions –

. . .

(2)Full amount of the victim's losses.—For purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred, or that are reasonably projected to be incurred in the future, by the victim, as a proximate result of the offenses involving the victim, and in the case of trafficking in child pornography offenses, as a proximate result of all trafficking in child pornography offenses involving the same victim, including—

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

(F)any other relevant losses incurred by the victim.

LIST OF PROCEEDINGS BELOW

1. *United States v. Alexander Rosenblatt*, 3:17-CR-00202-M-1, United States District Court for the Northern District of Texas. Judgement and sentence entered on July 11, 2018.

2. *United States v. Alexander Rosenblatt*, CA No.19-10973, Court of Appeals for the Fifth Circuit. Judgment affirmed on December 26, 2019.

STATEMENT OF THE CASE

I. Facts and Proceedings in District Court

The defendant entered a written plea agreement to two counts, both with a 20 years statutory maximum. (ROA.1309).[1] The defendant waived his right to appeal, but preserved his right to appeal a sentence in excess of the statutory maximum. (ROA.1311).

On April 4, 2017, Alexander Rosenblatt (Rosenblatt) was charged in a two count indictment, Count One charging receipt of child pornography, in violation of 18 U.S.C. § 2252(a)(2)(A) and Count Two charging a violation of possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B). (ROA.12-14). On November 21, 2017, Rosenblatt was charged in a three-count superseding indictment with two counts of receipt of child pornography, in violation of 18 U.S.C. § 2252A(a)(2)(A) and one count of possession of child pornography involving a prepubescent minor, in violation of 18 U.S.C. § 2256(a). (ROA.935-936).

Rosenblatt entered a guilty plea to Counts One and Two of the superseding indictment on February 27, 2018. (ROA.975-980,1226-1244). As a part of the guilty plea, Rosenblatt signed a factual resume in which he admitted, from at least February 2015 through June 2015, he downloaded child pornography from the internet. He also admitted facts that showed he committed all the elements of receiving child pornography, as alleged in Counts One and Two of the superseding

[1] For the convenience of the Court and the parties, the Petitioner has cited to the page number of the record on appeal.

indictment. He also admitted facts showing he had encouraged minor girls to produce child pornography by video recording themselves engaging in sexually explicit conduct and sending the video images to Rosenblatt via the computer and the internet. (ROA.975-978). Rosenblatt also entered in to a written plea agreement in which the government agreed to dismiss the remaining pending charges, and in which Rosenblatt agreed to waive his right to appeal, with certain reserved exceptions. (ROA.1238,1314). He preserved his right to appeal a sentence in excess of the statutory maximum. (ROA.1311).

The Pre-sentence report (PSR) set the combined adjusted offense level, including a two-level upward adjustment for multiple counts, at a level 42. (ROA.1331).The PSR granted a two-level adjustment for acceptance of responsibility, but denied the third point for timely acceptance, resulting in a total offense level of 40. (ROA.1332).Rosenblatt had no criminal history points and thus was in criminal history category I. (ROA.1332). At a total offense level 40 and a criminal history category I, his advisory imprisonment range was 292-365 months. The government filed objections to the PSR in which it argued, in addition to some clarifying objections, that the offense level for one of the counts should have been increased four levels for the type of images involved, and argued that restitution should be ordered. (ROA.1363-1368). The defense had no objections to the PSR.

The probation officer prepared an addendum to the PSR, accepting the government's objections to the PSR. (ROA.1371-1376). The amendment to the PSR offense level calculations resulted in a combined adjusted offense level of 44 and a

total offense level of 42 after the adjustment for acceptance of responsibility. (ROA.1376). At a total offense level 42, and a criminal history category I, Rosenblatt's advisory imprisonment range was 360-Life, however, the statutory cap resulting from the plea agreement was 480 months. (ROA.1378). The PSR addendum also added restitution in the amount of $25,000, and attached the claim for restitution prepared by the victim's attorney. (ROA.1378- 1395).

At the sentencing hearing, the district court imposed a total aggregate sentence of 360 months imprisonment, two 15 year terms of supervised release to run concurrently, $25,000.00 restitution, forfeiture of the defendant's computer and hard drive and a $200.00 mandatory special assessment. (ROA.997-10005).

On Appeal

On Appeal, Petitioner argued that the district court committed plain error by failing to conduct a proximate cause analysis required by *United States v. Paroline*, 134 S. Ct. 1710 (2014). Although the pre-sentence report addendum contains two letters requesting a restitution award for four victims, a close review of the letters reveals that there is actually no monetary loss figure contained in one of the letters, and neither of the two letters actually contains a proper proximate cause analysis as required by *Paroline*. Therefore, although the $5000 figure for three victims and $10,000 figure for the fourth victim may seem like a reasonable apportionment of the actual losses proximately caused by Rosenblatt's conduct, there actually is nothing in the record that indicates what the total actual losses were for three of the victims and nothing in the record indicating a proper proximate cause analysis of any of the four

victims. Accordingly, the district court's adopting the PSR and PSR addendum without further discussion or analysis about the actual losses proximately caused by Mr. Rosenblatt was plain error. This error resulted in a sentence that exceeds the statutory maximum for restitution and falls within one of the express exceptions to the waiver of appeal provision. Under the case law in this circuit, the case must be remanded for a proper *Paroline* analysis.

The Court of Appeals held that there was no requirement under *Paroline* for the district court to find a total loss amount before conducting a proximate cause analysis. *United States v. Rosenblatt*, 788 Fed. Appx. 960, 961 (5th Cir. 2019). The Court of Appeals also stated, "To the extent Rosenblatt argues *Paroline* required the district court to engage in additional analysis and discussion at sentencing, that issue is subject to reasonable dispute and, thus, is not clear or obvious error." *Id.*

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER THE DISTRICT COURT COMMITTED PLAIN ERROR BY FAILING TO DETERMINE THE VICTIMS TOTAL LOSS BEFORE DETERMINING THE AMOUNT OF LOSS PROXIMATELY CAUSED BY THE PETITIONER AND BY FAILING TO CONDUCT A PROPER PROXIMATE CAUSE ANALYSIS.

Standard of Review

"In reviewing an order of restitution, if the restitution was imposed in violation of the MVR Act, it is illegal, and the proper standard of review is *de novo*." *United States v. Sheets*, 814 F.3d 256, 259 (5th Cir. 2016).

However, "where the defendant has failed to object to either the amount of restitution recommended in the pre-sentence investigation report or the district court's restitution order, thereby denying the court the opportunity to identify and correct any errors, we review for plain error." *Id, citing United States v. Maturin*, 488 F.3d 657, 659 (5th Cir. 2007). Under the plain error standard, an error in the district court proceeding should be corrected if there was error that was (1) clear or obvious, and (2) affected the substantial rights of the defendant." *See Id.* In the present case, the Petitioner specifically stated on the record that he had no objection to the restitution amount set forth in the PSR addendum. *See* (ROA.1254). The plain error standard of review applies in this case.

Applicable Law

This issue implicates three sources of law: (1) the Mandatory Victim Restitution Act (18 U.S.C. § 3663A); Mandatory Restitution in cases involving sexual exploitation and other abuse of children (18 U.S.C. § 2259); and (3) this Court's decision in *United States v. Paroline*, 134 S. Ct. 1710 (2014).

In *Paroline*, this Court held that in child pornography cases the amount of restitution awarded a victim, applying 18 U.S.C. § 2259, must relate to those injuries proximately caused by the defendant's conduct in the particular case. *See id*. at 1727-28.

> It is perhaps simple enough for the victim to prove the aggregate loss, including costs of psychiatric treatment and lost income, that stem from the ongoing traffic in her images as a whole. . . . The difficulty is in determining the "full amount" of those general losses, if any, that are the proximate result of the offense conduct of a particular defendant who is one of thousands who have possessed and will in the future possess the victim's images but who has no other connection to the victim.

Id. at 1722.

Regarding the question of how district courts should go about determining the proper amount of restitution, this Court noted that "[t]his cannot be a precise mathematical inquiry and involves the use of discretion and sound judgment." *Id*. at 1728.

This Court noted further that "[t]here are a variety of factors district courts might consider in determining a proper amount of restitution, and it is neither necessary nor appropriate to prescribe a precise algorithm for determining a proper restitution amount at this point in the law's development." *Id.* This Court also advised

that "district courts might, as a starting point, determine the amount of the victim's losses caused by the continuing traffic in the victims images . . . then set an award of restitution in consideration of factors that bear on the relative causal significance of the defendant's conduct in producing those losses." *Id*.

This Court then went on to list seven factors the district courts *could* consider: 1) the number of past criminal defendants found to have contributed to the victim's general losses; 2) reasonable predictions of the number of future offenders likely to be caught and convicted for crimes contributing to the victim's general losses; 3) any available and reasonably reliable estimate of the broader number of offenders involved; 4) whether the defendant reproduced or distributed images of the victim; 5) whether the defendant had any connection to the initial production of the images, 6) how many images of the victim the defendant possessed; and 7) other facts relevant to the defendant's relative causal role. *See id*.

The Fifth Circuit has made it clear in prior decisions that failure to conduct any *Paroline* analysis is plain error. *See United States v. Winchell*, 896 F.3d 387,389 (2018). "Although the Supreme Court was clear that its *Paroline* decision did not prescribe a rigid formula, it was equally clear that at least some analysis must be done to determine the extent that the defendant's offense proximately caused the victim's losses . . ." *United States v. Jimenez*, 692 Fed. Appx. 192, 202 (5th Cir. 2017).

There is also no question in the Fifth Circuit that a "*Paroline*-based appeal of the district court's restitution order falls within the meaning of "a direct appeal of a

sentence exceeding the statutory maximum.'" *United States v. Winchell*, 896 F.3d at 389.

"[I]f a court orders a defendant to pay restitution under § 2259 without determining that the defendant's conduct proximately caused the victim's claimed losses, the amount of restitution necessarily exceeds the statutory maximum." *Id.*

Discussion

In Petitioner's case, the PSR Addendum attached two letters for four victims in which the attorney representing the victims asked for $5,000 in restitution for three victims -- Pia, Ava and Maya -- and $10,000 in restitution for a fourth victim -- Maureen. (ROA1376-1395). The letters for Pia, Ava, and Mia fail to establish, as a threshold matter, what the losses were for these victims. Accordingly there was simply no analysis whatsoever to determine what portion of the losses were proximately cause by the Petitioner's conduct. With regard to the fourth letter, the total loss of $440,000 was established. However, there was no, or at least an inadequate, proximate cause analysis regarding tat victim's loss.

Letter requesting $5,000 each for Pia, Ava, Maya

Regarding the letter requesting $5,000 restitution each for Pia, Ava, and Mia, the letter never sets out what the total actual losses are for these three victims. The letter merely asks for an order of restitution of $5,000 for the three victims. *See* (ROA.1376-1387). The letter refers to forensic evaluations for the three children (ROA.1379) and refers to "losses detailed in Dr. Hedrick's report." (ROA.1380).

However, the only actual loss set forth in the letter is the statement "We currently have documented $10,187.13 in out of pocket expense for these children." (ROA.1381).

The letter also sets forth that "Pia has received $46,691.44 in restitution payments from state and federal courts, to date; Maya has received $9300.22 and Ava has received $10,564.94. I have been informed that the children have each received additional awards of restitution in courts in various federal jurisdictions, however, those funds have not been received to date, and we do not know if they will be paid." Id.

From undersigned counsel's review, the record fails to indicate that the district court was ever informed about what the actual losses are for these three victims. There simply is no question that for restitution ordered under 18 U.S.C. § 2259, the district court must determine the "aggregate loss" and the "full amount" of those general losses proximately caused by the defendant. *United States v. Paroline*, 134 S. Ct. at 1722 and 1728.

Had the probation officer attached to the addendum a copy of the forensic report that sets forth the total general losses suffered by Pia, Ava, and Maya, then there might be enough in the record to support a finding that the district court conducted an adequate proximate cause and apportionment analysis. However, as is argued below with regard to the second letter, even if the forensic report enumerating and quantifying actual losses for these three victims were attached to the PSR Addendum, there still does not appear to be any discussion or analysis of the seven factors set forth in *Paroline*.

In any event, because there is no indication in the record that the district court ever determined and considered what the total actual losses are for these three children, and therefore no proximate cause analysis was conducted, the order of restitution must be vacated and remanded for re-sentencing. *See United States v. Paroline*, 134 S. Ct. at 1722; and *United States v. Winchell*, 896 F.3d at 389.

Letter requesting $10,000 restitution for Maureen

Regarding the letter requesting $10,000 for restitution for the single victim, Maureen, the letter states that the "total loss proximately caused by the ongoing circulation of her images" over the next five years is in excess of $440,000. (ROA.1391). The attorney's letter than requests that Mr. Rosenblatt be ordered to pay $10,000 of that restitution. (ROA.1392). However, the letter does not appear to specifically address the seven factors set forth in *Paroline*. *See* (ROA.1388-1395). Again, the letter refers to a forensic examination and report, but from the record, it does not appear that the report was a part of the district court's determination to order restitution. *See* (ROA.1389-1391).

Although this letter actually sets out the total losses suffered so far by Maureen, and does apportion only a part of those losses to Mr. Rosenblatt, there does not appear to be any analysis or discussion that comports with proximate cause analysis required by *Paroline*. Again, the order of restitution for this victim must be vacated and remanded to the district court for a proper *Paroline* analysis. *See United States v. Paroline*, 134 S. Ct. at 1722; and *United States v. Winchell*, 896 F.3d at 389.

Plain error

In order to establish plain error, Mr Rosenblatt must show (1) error, (2) that is plain, (3) that affected his substantial rights, and (4) that seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *United States v. Mondragon-Santiago*, 564 F.3d 357, 361 (5th Cir. 2009).

"A restitution order that fails to comply with the statutory requirements, such as failure to properly apply the restitution provisions of the MVRA, may constitute plain error." *United States v. Sheets*, 814 F.3d 260, *citing United States v. Ollison*, 555 F.3d 152, 164 (5th Cir. 2009); *United States v. Trigg*, 119 F.3d 493, 501, n. 7 (7th Cir. 1997).

As the court below recognized, the district court entirely failed to determine a total loss amount with regard to the victims Pia, Ava, and Mya. *See United States v. Rosenblatt*, 788 Fed. Appx. at 961. Moreover, the court stated, "Although it did not contain a calculation of total losses, *Paroline* does not stand for the proposition that a district court must calculate a victim's total losses before conducting a proximate cause analysis." *Id*. This is simply incorrect. The district court must determine the total loss, and this is clear from both *Paroline* and 18 U.S.C. 2259. *See United States v. Paroline*, 134 S. Ct. at 1722; 18 U.S.C. § 2259(b)(2)(A). Moreover, the district court, after determining the total loss, must the conduct a proximate cause analysis. *See id.*

CONCLUSION

For all the foregoing reasons, the Petition for a writ of certiorari should be granted.

Respectfully submitted this 26th day of May, 2020.

Respectfully submitted,

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