No. 20-_____

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IN THE SUPREME COURT OF THE UNITED STATES

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DEVON E. SANDERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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Petition for Writ of Certiorari
To the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Petitioner pleaded guilty to two counts under federal statutes relating to possession of child pornography. One count charged knowing receipt of three particular illicit "visual depictions" in December 2015. The other charged possession of computer hard drives in May 2016 that he knew to contain numerous prohibited images, including those received six months earlier. At sentencing, petitioner argued unsuccessfully under the Double Jeopardy Clause that the two counts could support only one punishment. The court of appeals affirmed on the ground that the possession count encompassed more images than the three identified in the receipt count, even though the number of images is legally immaterial. The question is:

> For purposes of determining whether two offenses are the "same," does the Double Jeopardy Clause take into account only those facts that are essential for establishing the elements of the two offenses?

2. As part of his sentence for receiving and possessing child pornography in 2015–2016, petitioner was ordered to pay an average of more than $4100 in restitution under 18 U.S.C. § 2259 to each of 22 individuals depicted in those images. The court of appeals affirmed, over petitioner's argument that the district court's determination of these amounts disregarded the first, critical step of the methodology articulated by this Court in *Paroline v. United States*, 572 U.S. 434, 449 (2014), that is, "disaggregation" of harm caused by the original acts of child abuse depicted in the images, with which petitioner had no involvement. The question, on which the Circuits are divided, is:

> In assessing restitution under 18 U.S.C. § 2259 for a pre-12/7/2018 offense of possessing child pornography, must the court first ensure that the defendant is not being required to pay for losses his offense did not cause?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties to this petition (petitioner Sanders and respondent United States). There were no co-defendants in the trial court, nor any co-appellants.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

CASES

CONSTITUTION, STATUTES and RULES

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

Devon E. Sanders respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit upholding his conviction and sentence.

OPINIONS BELOW

The Third Circuit's November 13, 2020, non-precedential opinion (per McKee, J., with Ambro and Roth, JJ.), is available at 834 Fed.Appx. 742. A copy is Appendix A. The opinion of the United States District Court for the Eastern District of Pennsylvania (Stengel, J.) on the restitution issue, Appx. B, is not published.

JURISDICTION

On November 13, 2020, the United States Court of Appeals for the Third Circuit filed its opinion affirming petitioner's convictions and sentence. Appx. A. On December 11, 2020, the Third Circuit denied petitioner's timely application for rehearing. Appx. C. Pursuant to Rules 13.1 and 13.3, and this Court's Order filed March 19, 2020, this petition for certiorari is timely filed within 150 days thereafter, that is, not later than May 10, 2021. Petitioner invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, and STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part, "… nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb …."

Chapter 110 of Title 18, United States Code, as of the date of commission of the offenses at issue here, provided, in pertinent part:

§ 2252 - Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who—

* * * *

(2) knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or through the mails, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

* * * *

(4) either—

* * * *; or

(B) knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if—

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

* * * *

(b) (1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), or (3) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, * * *.

(2) Whoever violates, or attempts or conspires to violate, paragraph (4) of subsection (a) shall be fined under this title or imprisoned not more than 10 years, or both, but if any visual depiction involved in the offense involved a prepubescent minor or a minor who had not attained 12 years of age, such person shall be fined under this title and imprisoned for not more than 20 years, ….

18 U.S.C. § 2252.

§ 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. § 2259, *as amended*, Pub. L. 104–132, title II, §205(c), Apr. 24, 1996, 110 Stat. 1231.[1]

STATEMENT OF THE CASE

Petitioner rose from modest circumstances in inner-city Philadelphia to a supervisory position as a career civil legal services lawyer for the poor. As a victim of undisclosed child sexual abuse, he suffered secretly from a compulsion to collect and hoard images classified as child pornography. In 2018, he was sentenced to serve seven years' imprisonment and to pay more than $91,000 in restitution after pleading guilty to a two-count indictment. Count One charged him under 18 U.S.C. § 2252(a)(2) with knowingly receiving three images of child pornography on December 21, 2015. Count Two charged him under *id*. § 2252(a)(4)(B) with knowing possession of "matter" (*i.e.*, computer hard drives) containing such images.[2] The district court rejected his pre-sentence motion under the Double Jeopardy Clause for merger of the "receipt" and "possession" counts. At sentencing, it was undisputed that that petitioner never

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[1] Section 2259 was substantially revised effective December 7, 2018, more than two years after the commission of the offenses at issue here. Pub. L. 115–299, §§ 3(a), (b), 4, 132 Stat. 4384, 4385.

[2] *See* Statutes Involved, *ante*. The statute uses the terms "visual depiction," "minor," and "sexually explicit conduct," which are defined at 18 U.S.C. § 2256(5),(1), and (2)(A), respectively. No question about the scope of those definitions is at issue here.

molested a child or engaged in any other improper conduct, and never bought, sold, shared or traded the illicit images he obsessively downloaded. He was a loving husband, a devoted father to his special-needs teenaged daughter, and was doing well in therapy. From the judgment of conviction and sentence, petitioner appealed to the Third Circuit, which stayed the appeal pending resolution of restitution issues.

At the restitution hearing, the government relied on submissions from private lawyers for certain "known victims" rather than on any live testimony. *See* Fed.R. Evid. 1101(d)(3) (hearsay rule does not apply at sentencing); 18 U.S.C. § 3661 (broad scope of information admissible at sentencing). None of those submissions included any information specific to petitioner's case or suggested a way of measuring how his conduct (or the conduct of other defendants similarly situated) had contributed to their clients' damages. The government also submitted a spreadsheet identifying all the images of any of the restitution-claimants found on petitioner's computer equipment with the dates and times of saving those depictions, which showed that petitioner had not viewed most of the images for more than a second or two. The prosecutor also submitted statistical evidence about sums ordered and paid to the same victims in other cases nationally.

The restitution issues were decided by memorandum and order. Appx. B, at App. 5a. The district court ordered petitioner to pay a total of $91,049 under 18 U.S.C. § 2259 to 22 distinct minors (or former minors) who were depicted in 12 "series" of images found on his hard drives. App. 26a-28a. The court acknowledged that this Court's precedent, that is, *Paroline v. United States*, 572 U.S. 434 (2014), requires that in determining under the governing statute what losses were caused by and thus attributable to the crime of possession of child pornography, all harm done to any victim by the original perpetrator of child abuse – who typically also photographed or

videorecorded those criminal acts and then initially shared or published the images – first be "disaggregated" from damages caused by any later possessors of the images. *Id*. 449; App. 11a. The district court declined to do so in petitioner's case, however, on the stated basis that the government, which had the burden of proof, had not provided an evidentiary basis for measuring what was to be excluded. App. 12a-13a, 19a.[3]

The court then proceeded to assess the factors suggested in *Paroline* for measuring a defendant's fair share of any damages due to victims on account of the subsequent distribution, sharing and viewing of the illicit images. After reviewing those factors, the district court discounted by exactly 2/3 the amounts requested by the private lawyers for the victims. App. 22a. The court granted this arbitrary 1/3 of their demands even though it acknowledged that once again the government (in relaying the lawyers' requests) had not provided any logical or compliant basis for weighing and then placing a dollar value on the factors identified as relevant by this Court. The court opined that its 2/3 reduction accounted, *inter alia*, for the fact that petitioner played no role in abusing the children depicted in the images, thus excusing, it held, the failure to begin by disaggregating losses caused by crimes that petitioner never committed. App. 19a.

On appeal, the Third Circuit affirmed. Appx. A. The court upheld petitioner's two convictions despite his showing that the charges in the indictment's two counts constituted, in fact as well as in law, the "same offence" under the Double Jeopardy Clause of the Fifth Amendment. The totality of the panel's discussion of this issue states, "Here, Sanders' receipt count was based on three images, and the possession count covered thousands of images found later for which the government could not charge receipt. Therefore, the district court correctly declined to merge the charges for

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[3] Petitioner argued that on this basis alone restitution should simply have been denied.

sentencing." App. 2a. The court did not discuss the decisions of multiple circuits acknowledging that "receiving" always includes "possessing," and on that basis addressing the relationship of "receiving" and "possession" offenses under 18 U.S.C. § 2252(a).

Reaching a decision in conflict with opinions of the Ninth and Tenth Circuits, the court of appeals also upheld the restitution order. The panel essentially accused this Court of double-counting the key consideration, asserting that "*Paroline* accounted for disaggregation in the factor that asked 'whether the defendant had any connection to the initial production of the images'." App. 4a & n.13, quoting *Paroline* and referencing an Eighth Circuit opinion. The approach of the court below necessarily holds defendants such as petitioner responsible for losses that were not caused by their possessory offenses of conviction.

The court of appeals refused petitioner's request for rehearing, either by the panel or *en banc*. Appx. C.

Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii). The United States District Court had subject matter jurisdiction of this case under 18 U.S.C. § 3231; the indictment alleged federal offenses committed in the district. The court of appeals had jurisdiction under 28 U.S.C. § 1291. As required by this Court's precedent, petitioner filed separate notices of appeal from the principal judgment of conviction and sentence, and later from the final restitution order. See *Manrique v. United States*, 581 U.S. —, 137 S.Ct. 1266 (2017).

REASONS FOR GRANTING THE WRIT

1. The Circuits are in disarray on the question of how to apply the "same offence" focus of the Double Jeopardy Clause where neither count is exactly a lesser included offense of the other, as is true of the frequently prosecuted federal offenses of receiving and possessing child pornography.

Petitioner Devon Sanders pleaded guilty to a two-count indictment charging him with receipt of images of child pornography, 18 U.S.C. § 2252(a)(2), as well as possession of "matter" (*i.e.*, computer hard drives) containing such images, *id.* § 2252(a)(4)(B). The district court rejected his pre-sentence motion for merger of the counts. The court then imposed concurrent seven-year terms of imprisonment. The courts below wrongly rejected petitioner's arguments that the indictment's two counts constituted, in fact as well as in law, the "same offence" under the Double Jeopardy Clause of the Fifth Amendment. App. 2a–3a. The disposition of this issue by the court of appeals highlights the need for this Court to address an issue which has vexed the Circuits, because these two charges can be the "same" as a matter of constitutional law, without one being literally a lesser included offense in relation to the other.

Where an offense – such as "possession" of any sort of contraband – is by law a continuing one (see *Harris v. United States*, 331 U.S. 145, 155 (1946)[4]), dividing the charges into smaller units in the indictment, to the defendant's disadvantage, is disallowed. *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952). The reason for that protection is precisely to prevent unconstitutional multiplication of punishment. Possession of child pornography, under the charged statute, is a continuing offense, as long as those images are possessed by the same person on the same

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[4] Overruled, in part, on other grounds, *Chimel v. United States*, 395 U.S. 752 (1969).

media. Moreover, by the plain language of subsection (a)(4)(B) a single possession count encompasses all of the "matter" (here, several computer drives) *containing* any and all illicit images *and for the entire period of time* that the "matter" containing such images is in fact knowingly possessed. *United States v. Polouizzi*, 564 F.3d 142, 153–56 (2d Cir. 2009). That additional depictions may be added to that "matter" during the period of possession does not multiply the offense, as written.

The statute focuses on the "matter," not on the particular depictions. As stated in 18 U.S.C. § 2252(a)(4)(B):

> Any person who ... knowingly possesses ... 1 or more books, magazines, ... or other *matter which contain* any visual depiction ... if (i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (ii) such visual depiction is of such conduct; shall be punished ....

(emphasis added).[5]

A person cannot knowingly "receive" something (be it a visual image or anything else) without thereby knowingly "possessing" it. The act of possession is thus always included within the act of receipt. *Ball v. United States*, 470 U.S. 856, 859–60, 865 (1985) (convictions for receipt and possession of same firearm can support only a single sentence); see *Polouizzi*, 564 F.3d at 158–59; *United States v. Schales*, 546 F.3d 965, 977–78 (9th Cir. 2008); *United States v. Miller*, 527 F.3d 54, 70–72 (3d Cir. 2008) (Pollak, J.) (all discussing receipt and possession of child pornography as constituting the "same offense").

The offense of possession under § 2252(a)(4)(B) may not literally be a "lesser included offense" of "receipt" under § 2252(a)(2), as defined in *Blockburger v. United States*, 284 U.S. 299, 304 (1932), because each arguably has an element the other

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[5] *See* Statutes Involved for full text.

does not. The (a)(4) offense requires possession of "matter" that "contains" one or more illicit images ("contained," that is, in the way that such depictions are "contained" within "books, magazines, periodicals, films, video tapes," etc.). Bare possession of a photograph depicting sexual activity involving a child, or even a collection of such photographs, for example, is apparently not covered. It is continuing possession of the "matter" *containing* "any" images (and thus, *all* the images contained therein) that defines the unit of prosecution for any such count. And the (a)(2) offense requires the act of knowing receipt, in addition to possession.

Offenses that are "lesser" and "greater" in relation to one another under *Blockburger* are deemed ordinarily to be the "same offense" as a matter of constitutional law. *United States v. Dixon*, 509 U.S. 688, 696 (1992); *Harris v. Oklahoma*, 433 U.S. 682 (1977).[6] But that is not a *sine qua non* for being the "same offense" for Double Jeopardy purposes. See, *e.g.*, *Gamble v. United States*, 587 U.S. —, 139 S.Ct. 1960 (2019) (two offenses not the "same," despite identity of elements, if prosecuted by separate sovereigns); *Puerto Rico v. Sánchez Valle*, 579 U.S. —, 136 S. Ct. 1863 (2016) ("analogous" or "equivalent" offenses under federal and local Puerto Rican law are the "same"); *Illinois v. Vitale*, 447 U.S. 410 (1980) (robbery and felony murder); *Whalen v. United States*, 445 U.S. 684 (1980) (rape and felony murder under D.C. law).

For this reason, the government quite properly conceded in the court below that the two offenses are, by their nature, the "same" for Double Jeopardy purposes, at least if they are predicated on the same facts. U.S. Br. (CA3), at 23–24. See also *United States v. Schnittker*, 807 F.3d 77, 81–82 (4th Cir. 2015) (all Circuits appear to

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[6] If the legislature has expressly provided otherwise, the two crimes will not be the "same offence," thus allowing two sentences. *Missouri v. Hunter*, 459 U.S. 359 (1983); *Albernaz v. United States*, 450 U.S. 333 (1981). After all, the legislature could just have specified a longer maximum sentence for one of them.

agree). The only difference the government relied on – and on which it prevailed – was chronological, based on the dates alleged in the indictment and the existence of additional but legally immaterial factual circumstances. But alleging that a continuing offense was committed on a certain date rather than over the period of time established by the evidence is bootless. That way of evading the protections of the Double Jeopardy Clause has been rejected repeatedly by this Court. See *Brown v. Ohio*, 432 U.S. 161 (1977) (auto theft and use of stolen car); *In re Nielson*, 131 U.S. 176 (1889) (adultery); *In re Snow*, 120 U.S. 274 (1887) (cohabitation).

An exclusive focus on whether the "receipt" count addressed acquisition and thus possession of the "same images," as held below, misses the mark. Under section 2252(a), the possession offense focuses not on particular images, or even on the images as such, but on the entire hard drive (or other "matter"), so long as the defendant knows it contains *any* illicit images. Some of the depictions which render possession of the "matter" illegal may be those that were charged as being "knowingly received," as in this case. In that event, the Double Jeopardy question arises. Here, the three images received on the earlier date described in Count One[7] were in fact among those contained on the "matter" (the computer drives) that the defendant possessed on a later date, as the prosecutor admitted. CA3 Appx87. Moreover, the defendant had possessed those drives (as acknowledged within the factual basis when he pleaded guilty, and accepted as true by the district court) continuously from the date of receipt of the three itemized images (and before) to the date of execution of the search warrant (which was the date charged in the possession count). CA3 Appx90–

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[7] The government has not disputed that the receipt of multiple images on a single occasion (such as by computer download) constitutes a single offense under § 2252(a)(2). See *Polouizzi*, 564 F.3d at 158. And in any event, that is how Count One was drafted.

91. That those drives in fact contained many additional images as well as those received was legally immaterial to guilt on the possession count. See *Schales*, 546 F.3d at 979–80.[8] Only legally material facts should be considered pertinent to whether two offenses are the "same" "in fact" for constitutional purposes. Otherwise, no two offenses would ever be the "same."[9] After all, no two situations in the real world are exactly the same, if one broadens the horizon sufficiently.

The government has discretion how to draft the indictment, including charging multiple counts arising out of the same conduct, but only up to a point: the limitation on artful prosecutorial drafting is the Double Jeopardy Clause. The government protested in its brief below that the indictment had been deliberately drafted to exclude (that is, to appear to exclude) the images *received in December* from the scope of the alleged possession the following March. But those images were "possessed," as a matter of law, from the moment of their receipt on the very "matter" (computer drives[10]) as the indictment later identified in the possession count. And they were

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[8] The Second Circuit made the same mistake as the court below on this point (discussing possession as if the statutory offense were possession of particular images) in *Polouizzi*, 564 F.3d at 158–59. See also *Schnittker*, 807 F.3d at 81 (4th Cir. 2015) (no double jeopardy violation where defendant voluntarily pleaded guilty to possession and elected trial for receipt, knowing that government relied on images found on different drive, albeit seized at the same time, as basis for receipt charge); *United States v. Dudeck*, 657 F.3d 424, 431 (6th Cir. 2011) (on plain error review: "If Dudeck was charged with receipt of any images for which he was not also charged with possession—and vice-versa—the two can be punished as separate offenses."). All of these cases overlook that the prohibited "possession" is not of certain images but of all of the "matter" containing any and all images. Thus, *Dudeck*'s "vice versa" (but not the rest of that dictum) is mistaken.

[9] Conversely, of course, Double Jeopardy does not protect a person from being prosecuted twice for the same statutory offense if, as a matter of fact, he commits that offense twice. See *United States v. Broce*, 488 U.S. 563 (1989) (whether second antitrust conspiracy charge was for "same offence" was question of fact, waived by second guilty plea).

[10] See *United States v. Chiaradio*, 684 F.3d 265, 275 n.3 (1st Cir. 2012) (simultaneous possession of multiple computers or drives supports only a single count), clarifying *Schales*, 546 F.3d at 978–79.

still there at the time the search warrant was executed (the date alleged in the possession count). CA3 Appx87. On all the material facts of this case, as established in the plea colloquy, and as a matter of constitutional law, the two counts of this indictment charged a single offense for sentencing purposes. The conclusion of the court below to the contrary, which finds support in similar decisions in other Circuits, disregards basic Double Jeopardy principles under the different subsections of § 2252(a), as drafted.

The Constitution does not offer such frail protection against government overreaching that it can be circumvented by prosecutorial draftsmanship. *Brown v. Ohio*, 432 U.S. 161, 169 (1977) ("The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units."). Leaving this evasion of constitutional protections uncorrected permitted the government to usurp the sentencing function by requiring mandatory minimum sentencing under § 2252(a)(2), where this Court's precedent would instead have granted the district court discretion to sentence for the possession offense. See *Ball*, 470 U.S. at 864; accord *Rutledge v. United States*, 517 U.S. 292, 307 (1996**).**[11] To resolve this

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[11] Under those cases, it is not required for the sentencing court to vacate the "lesser" offense and sentence on the "greater." Indeed, in a case such as petitioner's, the conventional categories of "greater" and "lesser" are both debatable and inapplicable. Count Two, charging the ostensibly included conduct of possession, actually involves a *larger number* of images, possessed for a *longer period* of time. The Count Two possession charge is not only broader and more inclusive in scope, but is also more appropriate for sentencing purposes as a matter of fact, since "possession" of the illicit material is the essence of petitioner's conduct. This case involved "receiving" only in the sense of downloading for personal and private possession; it does not involve any conduct which is more blameworthy, more harmful, or more dangerous. The sentencing court on remand might very reasonably have chosen Count Two (which does not require a mandatory minimum) rather than Count One for imposition of sentence.

important aspect of Double Jeopardy law, in the context of the frequently prosecuted child pornography statute, the petition should be granted.

2. The Circuits are divided on whether implementation of this Court's *Paroline* decision requires a first step of "disaggregating" losses suffered by persons depicted in child pornography as a result of the initial acts of child abuse, prior to determining a possession defendant's share of any further harm caused by the later dissemination and viewing of those images.

In *Paroline v. United States*, 572 U.S. 434 (2014), this Court interpreted 18 U.S.C. § 2259 as requiring that restitution imposed as part of the punishment for possession of child pornography be limited to losses proximately caused to those depicted in the illicit images by the defendant's crime of conviction, that is, by the possession itself. These would be "the victim's costs of treatment and lost income resulting from the trauma of knowing that images of her abuse are being viewed over and over." *Id.* 449. This Court rejected by vote of 8–1 the government's construction of § 2259, under which every possessor of child pornography would be held jointly and severally responsible, if his conduct had contributed in any way, for all the harm and losses done to any child pictured in images he possessed. The heart of *Paroline*'s holding is that each defendant is responsible under the statute for any damages the government can prove were *proximately caused* to a particular victim *by his own conviction conduct* in possessing the illicit images, to be determined by a multi-factor estimate of the defendant's fair share of the total "general losses." *Id.* 448.[12] Most

[12] Three dissenters (the Chief Justice, along with Justices Scalia and Thomas) would have held that under the statute as written, victims could recover nothing. 572 U.S. at 463–72. The fourth dissenter, Justice Sotomayor, would largely have sustained the government's and victim-intervenors' position mandating full joint-and-several liability for all harm of whatever sort done to the victim by any perpetrator. *Id.* 472–88.

important, these are not to be confused with the losses caused by the original acts of child molestation, or by the photographing and publication of the depictions of that abuse. "Restitution is [only] proper under § 2259 to the extent *the defendant's offense* proximately caused [some share of] a victim's losses." *Id*. 448 (emphasis added). Despite the apparent clarity of this holding, the Circuits are deeply divided on the question whether the sentencing court may pretermit the first and most critical step of this analysis, that is, disaggregation of a victim's losses due to the antecedent child abuse – which are often much more serious than any due to the later dissemination – and proceed directly to apportionment among possession defendants.

Although § 2259 as construed in *Paroline* has since been substantially amended, effective in late 2018, to eliminate the disaggregation step and in other ways,[13] the problem highlighted in this petition persists. In light of the Ex Post Facto Clause (U.S. Const., art. I, § 9, cl. 3), the 2018 amendment cannot be applied retroactively. Pre-2018 offenses, given the prevalence of computerized records and storage media, continue to be uncovered and prosecuted. And such prosecutions will continue into the indefinite future, because there is no statute of limitations for this category of offense. *See* 18 U.S.C. § 3299 ("Notwithstanding any other law, an indictment may be found or an information instituted at any time without limitation for … any felony under chapter … 110 (except for section 2257 and 2257A) …."). Accordingly, the Circuit split must be resolved. This petition should therefore be granted.

Most children depicted in pornographic images that a defendant may be prosecuted for receiving or possessing have also – concurrently with the creation of

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[13] Act of Dec. 7, 2018, Pub. L. 115–299, 132 Stat. 4383.

the illegal images – been a victim of a prior sexual offense in the nature of molestation or rape.[14] Restitution is a mandatory part of the sentence in such possession cases, 28 U.S.C. § 2259(a), but as under most federal restitution statutes, this penalty is limited to compensation for harm done by a particular offense of which the defendant has been convicted. *Paroline*, 572 U.S. at 445–48. Indeed, restitution can be imposed only for a victim's losses the government proves were proximately caused by an offense of conviction. *Id.* 448. For this reason, losses suffered by the same victim but resulting from anyone's commission of *different* offenses must be "disaggregated" *before* the remaining harm caused by the defendant's offense, *along with* any others' commission of the same offense, is fairly apportioned. The acceptance by the court below of the district court's pretermission of the first step in this process defies this Court's controlling precedent. Moreover, the other Circuits are divided on the proper reading of *Paroline*.

It follows, as this Court recognized in *Paroline*, that a person convicted only for possessory offenses (like petitioner) may *not* be required to pay for harm done to a depicted victim by the original perpetrators of the antecedent child abuse (or the recording and distribution of that abuse, in which he also played no part). A defendant simply cannot be required – at least not absent a clear statutory directive – to pay restitution for losses that resulted from any offense for which he was not convicted and is therefore not being sentenced. *Id.* 462. Accordingly, a defendant like petitioner Sanders can be held responsible solely for any of "the victim's costs of treatment and lost income *resulting from the trauma of knowing that images of her abuse are being viewed* over and over ...." *Id.* 449 (emphasis added). In *Paroline*, this

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[14] The possible exception to this observation is images of child pornography in the nature of "lascivious exhibition" that depicts no actual sexual contact. *See* 18 U.S.C. § 2256(2)(A), (8).

Court recognized that "Complications may arise in disaggregating losses sustained as a result of the initial physical abuse ...." *Id.* But those "complications," the majority made clear, do not justify disregarding the need to disaggregate any more than they would justify imposing no restitution at all.

In *Paroline* itself, while noting the logical priority of disaggregation, the Court was able to avoid any detailed discussion of the point, because the record showed that the victim in that case, "Amy," had completed a course of therapy and was "back to normal" *before* learning that her pictures were being widely shared on the Internet. 572 U.S. at 440. Not so as to any victim here, so far as the record shows. The disaggregation step therefore could not be skipped over.

The total amount of harm done by possession alone is referred to, in the *Paroline* paradigm, as the victim's "general losses." *Id.* 448–49. Once that number has been determined (even if by estimation, as permitted), the present defendant's share is chosen. At this point, discretion and judgment come into play. Since a great many individuals are likely to have possessed copies of the same images, the sentencing court must estimate a fair share to attribute to any particular defendant. The *Paroline* Court did not prescribe one methodology, much less any "precise algorithm," 572 U.S. at 459–60, for determining a given defendant's share of any victim's "general losses." On the other hand, this Court did articulate a logical framework that requires "disaggregation" as a first step, and a suggestion of half a dozen factors to be considered thereafter in settling on an individual's share of the remaining "general losses." The Court did not authorize district courts to adopt a methodology that fails altogether, in possession cases, to estimate and deduct the dollar value of prior harm suffered by victims from other causes, including the original molestation or rape, and

instead to go straight to the *Paroline* estimation-of-a-share process. Yet that is what the lower courts did here, and which certain other Circuits have endorsed.

The court below conflated disaggregation under *Paroline* – the process of ensuring that the defendant is required to make restitution only for the offense of conviction – with one of the discretionary factors that go into determining a fair share of the "general losses" resulting from possession of the images by all those who acquire them later (which can be measured only *after* disaggregation has been accomplished). The factor that the court below, following the Eighth Circuit, treated as justifying disregard for the initial disaggregation requirement is the question whether a defendant *convicted* only for possession, like petitioner, *in fact* had any role in abusing the child or creating the original images. *See* 472 U.S. at 460 ("whether the defendant had any connection to the initial production of the images").

In reaching its decision, the court below relied on the Eighth Circuit's decision in *United States v. Bordman*, 895 F.3d 1048 (8th Cir. 2018). In doing so, the Third Circuit quoted with approval the mistaken assertion that "*Paroline* accounted for disaggregation in the factor that asked 'whether the defendant had any connection to the initial production of the images'." App. 4a & n.13, *quoting* 895 F.3d at 1059. That approach does not respect the fundamental principle that underlies the *Paroline* decision. Instead, it risks, as here – since most of any of the victims' damages very likely resulted from the impact of the initial acts of abuse – the imposition of far too high a level of restitution in a simple possession case.[15] In short, the Eighth Circuit's

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[15] The district court asserted, as noted by the court below, "that harm by subsequent defendants must be considered separately from harm inflicted by the original abuser. A failure to account for this division of responsibility would mean holding Mr. Sanders responsible for more than his share of the victims' losses." App. 4a, *referring to* CA3 Appx31. But in fact it never did so, other than by applying the *Paroline* factors.

approach, endorsed by the court below – and by at least one other Circuit[16] – necessarily holds the defendant responsible for losses that were not caused by the possessory offenses of conviction.

Two other Circuits, by contrast, have recognized the centrality of initial disaggregation to the *Paroline* process for ensuring that a defendant not be required to pay for losses attributable to crimes he did not commit. In *United States v. Galan*, 804 F.3d 1287 (9th Cir. 2015), the court reversed and remanded after finding that the district court had failed in any way to disaggregate the victim's losses flowing from the original acts of child abuse perpetrated upon her. The court noted that this omission encompassed both harms which might predate the defendant's possession offense, and losses caused by the prior abuse which might continue and thus be commingled with those for which the defendant could be held partly accountable. The same error, *inter alia*, resulted in a restitution award being vacated and remanded by the Tenth Circuit in *United States v. Dunn*, 777 F.3d 1171, 1179–82 (10th Cir. 2015).

The Ninth and Tenth Circuit decisions faithfully implement *Paroline*, while those of the Eighth and Eleventh Circuits, along with the decision of the court below, do not. The latter cases treat the question of whether the defendant was personally involved in the original abuse (one of the factors to be considered in deciding a fair share of possession-related losses) as substituting for the required initial disaggregation. They allow an imprecise discounting as a mere "rough guidepost," 572 U.S. at 460, like the other *Paroline* factors. But skipping the first step of the analysis cannot and does not ensure that the defendant will be ordered to pay restitu-

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[16] See *United States v. Rothenberg*, 923 F.3d 1309, 1328–35 (11th Cir. 2019); *cf. United States v. Halverson*, 897 F.3d 645, 654–55 n.4 (5th Cir. 2018) (cursory plain error rejection); *United States v. Dillard*, 891 F.3d 151 (4th Cir. 2018) (extensive discussion of related issues, not including disaggregation of prior harms); *United States v. Sainz*, 827 F.3d 602 (7th Cir. 2016) (not addressing disaggregation).

tion only for harms caused by the offense of conviction, which was the focus of this Court's holding. To the contrary, the "involvement" factor comes into play only where the possession defendant *was* involved in production of the images. In such cases, the defendant's share of the restitution for the harm caused by awareness of the later distribution should accordingly be *increased*. But in the ordinary case, like petitioner's, where the defendant convicted of possession had no role in abusing the child or producing the images, the involvement factor will result in neither an increase nor a decrease in his reasonable share.

In more than seven years since *Paroline* was decided, this Court has not revisited this important and frequently recurring problem, on which the other Circuits are now deeply divided. The issue was properly raised in the present case at sentencing. The district court held a hearing and then addressed it in a written decision. The issue was thoroughly briefed by the parties in the court below, and was explored in depth at oral argument. For whatever reason, after having the matter under advisement for more than a year, the panel issued a non-precedential decision that casually dismissed the point, ignoring the fundamental principle of sentencing law (and due process) at stake – that no defendant be sentenced for an offense for which he was not convicted. The result thus not only satisfies this Court's criteria for granting writs of certiorari, but it is also deeply unfair.[17]

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[17] The arbitrary amount imposed below (1/3 of whatever unjustified amount was lawlessly sought by the victims' personal lawyers, with minimal vetting by the district court and none by government counsel; App. 19a), averaging $4100 per victim, is presumptively excessive. It exceeds by more than 35% the $3000 base amount later suggested by Congress in its post-*Paroline* legislation (which is inapplicable here under the Ex Post Facto Clause). *See* 18 U.S.C. § 2259(b)(2)(B) (as amended, 2018). This was particularly true in light of the undisputed evidence that petitioner was himself a child victim of sexual abuse, never touched or molested a child, and (according to the electronic records derived from his computer by the government's expert) had downloaded and hoarded the images in bulk without, in most cases, even looking at them for more than a couple of seconds each.

CONCLUSION

This petition should be granted.

Respectfully submitted,

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