No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

TOMMY LEE JONES, PETITIONER

-vs-

UNITED STATES OF AMERICA

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

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QUESTIONS PRESENTED

I.

Can the government utilize an unreliable nearly thirty (30) year old police report to satisfy its burden the sentencing guideline five (5) level enhancement of § 2G2.2 (b) (5) is applicable contrary to this Court's decision in *Shepard* v *United States*, 544 US 13 (2005)?

II.

Is an award of restitution appropriate when mathematically calculated without consideration of Petitioner's offense conduct contrary to this Court's decision in *Paroline* v *United States*, 572 US 434 (2014)?

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SECONDARY AUTHORITIES

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NOW COMES the Petitioner, TOMMY LEE JONES, by his attorney, ARTHUR JAY WEISS, and respectfully Petitions this Honorable Court for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Sixth Circuit in this cause.

OPINION BELOW

The Opinion of the Court of Appeals is attached (Appendix 1a) as is the Order Denying Petition for Rehearing En Banc (Appendix 28a).

JURISDICTION

The Opinion of the Court of Appeals was entered on or about May 29, 2020, and a timely filed Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on or about July 6, 2020. This Petition for Writ of Certiorari is being filed within ninety (90) days of said date as required by Rule 13.1 of the Supreme Court Rules. The Jurisdiction of this Court is invoked pursuant to 28 USC § 1254 (1).

SENTENCING GUIDELINES/STATUTORY PROVISIONS INVOLVED

I.

USSG § 2G2.2 (b) (5) provides for an enhancement of "five levels . . . [if] the defendant . . . engaged in a pattern of activity involving the sexual abuse or exploitation of a minor."

II.

Restitution in child pornography prosecutions is governed by 18 USC § 2259.

STATEMENT

1. After a trial by jury before the Honorable John Corbett O'Meara, United States District Court for the Eastern District of Michigan, the Petitioner "Tommy Lee Jones was convicted of advertising, distribution, and receipt of child pornography in violation of 18 USC §§ 2251 (d) and 2252A (a) (2), and he was sentenced to 660 months' imprisonment," *United States* v *Jones*, 747 Fed Appx 348, 350 (6th Cir 2018).

2. The Sixth Circuit, on or about August 24, 2018, filed an Opinion affirming the convictions but vacating the "sentence . . . and . . . remand[ing] for resentencing . . . ," *Id* at 361.

3. On remand, the Honorable Mark A Goldsmith sentenced Mr Jones, *inter alia*, to "a total term" of "imprison[ment] for . . . 360 months . . . ." (R 172 Judgment in a Criminal Case[1] Pg ID 2458; R 176 Sentencing Transcript[2] Pg ID 2518) and entered a restitution award in the amount of "$7,436.00" (R 172 Judgment Pg ID 2462; R 176 ST Pg ID 2521).

4. The *original* "presentence report recommended an enhancement under

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[1]"Judgment in a Criminal Case" will hereafter be referred to as "Judgment."

[2]"Sentencing Transcript" will hereafter be referred to as "ST."

§ 2G2.2 (b) (5) . . . and the district court explicitly adopted the presentence report's recommendations without further consideration or fact finding," *United States* v *Jones*, *supra*, 747 Fed Appx at 359. This Court "vacated," *Id* at 361.

5. On remand, a *revised* Presentence Report[3] similarly assessed "five levels . . . as the defendant . . . engaged in a pattern of activity involving the sexual abuse or exploitation of a minor" pursuant to § 2G2.2 (b) (5) (¶ 26). Over objection (R 176 ST Pg ID 2479-2486, 2487-2488, 2522-2523)[4] the Court opined, due to the contents of a twenty-nine (29) year old police report (R 176 ST Pg ID 2486), it was "going to score 2G2.2 (b) (5)" (R 176 ST Pg ID 2486).

6. *Originally*, "the district court . . . . adopted the government's proposed restitution figure" of "$10,000," *United States* v *Jones*, *supra*, 747 Fed Appx 359-360. However, the Sixth Circuit opined due to "[t]he district court's lack of any explanation for adopting the government's proposal necessitates remand," *Id* at 360.

7. Judge Goldsmith, utilizing a pure mathematical formula—dividing the total "loss claimed" by the approximate number of "restitution claims" (R 176 ST Pg ID 2521)—awarded "7,436 dollars" as "restitution . . . for the victim Vicki" (R

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[3]"Presentence Report" will hereafter be referred to as "PSR."

[4]Petitioner submitted a Sentencing Memorandum *under seal* which specifically proffered our objections to the § 2G2.2 (b) (5) enhancement.

176 ST Pg ID 2521-2522; R 172 Judgment Pg ID 2462). We objected to this determination (R 176 ST Pg ID 2502-2506, 2522-2523).[5]

8. The panel, over a strident dissent, upheld "the district court's enhancement of Tommy Lee Jones's sentence based on a few lines of text from a thirty-year-old, uncorroborated police report that investigated an alleged rape for which Jones was not ultimately convicted" (*Slip Op* at 22) (Moore, J, dissenting).

9. Because the majority decision transcends over a quarter century of consistent precedent by the Sixth Circuit, as well as this Court's decision in *Shepard* v *United States*, 544 US 13, 125 S Ct 1254, 161 L Ed 2d 205 (2005), we requested Rehearing and/or Rehearing *En Banc*, which was subsequently denied.

[5]Petitioner also submitted a Sentencing Memorandum *under seal* which specifically proffered our objections to the imposition of a restitution award.

REASONS FOR GRANTING THE PETITION

I. THE GOVERNMENT CANNOT UTILIZE UNRELIABLE EVIDENCE TO SATISFY ITS BURDEN A SENTENCING GUIDELINE ENHANCEMENT IS APPLICABLE

A.

1. "'The government bears the burden of proving that [an] enhancement applies by a preponderance of the evidence.' *United States* v *Vandeberg*, 201 F 3d 805, 811 (6th Cir 2000) (*citing United States* v *Martinez*, 181 F 3d 794, 797 (6th Cir 1999)." *United States* v *Sexton*, 894 F 3d 787, 795 (6th Cir 2018).

2. Substantiation for an enhancement "must be based on '*reliable* evidence, not speculation or unfounded allegations,' *United States* v *Bradley*, 628 F 3d 394, 400 (7th Cir 2010)," *United States* v *Redman*, 887 F 3d 789, 795 (7th Cir 2018) (emphasis added).

> The district court is permitted to find facts supporting the pattern-of-activity enhancement by a preponderance of the evidence. *See United States* v *Davis*, 751 F 3d 769, 778 (6th Cir 2014) (citing *United States* v *Denson*, 728 F 3d 603, 614 (6th Cir 2013)). "Accordingly, the district court is not limited to *Shepard*-approved documents in making this determination" (as it would be in the case of determining a mandatory minimum sentence) "*so long as the information it relies on is reliable.*" *Id. United States* v *Hammond*, 637 Fed Appx 897, 901 (6th Cir 2016) (emphasis added).

B.

1. The District Court "score[d] 2G2.2 (b) (5)" (R 176 ST Pg ID 2486) on the basis of a "police report that describes sexual acts . . . having the minor victim touch the defendant's penis and then fondling the victim while the victim touched him" (R 176 ST Pg ID 2486). We respectfully object.[6]

C.

1. In reviewing the pertinent police report, which—at the time of sentencing—was nearly twenty-nine (29) years old[7], the same is void of *independent* law enforcement investigation. With due respect, the report simply "contained hearsay information, not facts observed by the preparer of the police report," thus rendering "the underlying information . . . untrustworthy." *Miller* v *Field*, 35 F 3d 1088, 1091 (6th Cir 1994).

> [A statement of a third party] is plainly not admissible merely because contained in a police report. "It is well established that entries in a police report which result from the officer's own observations and knowledge may be admitted *but that statements made by third persons under no business duty to report may not.*" *United States* v *Pazsint*, 703 F 2d 420, 424 (9[th] Cir 1983) (emphasis added). *Id* at 1091.

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[6]The complained of assessment was occasioned over our objection (R 176 ST Pg ID 2479-2486, 2487-2488, 2522-2523).

[7]It appears the complainant is deceased (PSR ¶ 44).

2. This fundamental precept of *untrustworthiness* renders such reports inadmissible, regardless of whether proffered pursuant to FRE 803 (6), *see, e g, United States* v *Orellana-Blanco*, 249 F 3d 1143, 1149-1150 (9th Cir 2001); *United States* v *Pazsint*, 703 F 2d 420, 424-425 (9th Cir 1983), or FRE 803 (8), *see, e g, United States* v *Mackey*, 117 F 3d 24, 28-29 (1st Cir 1997); *United States* v *Shoupe*, 548 F 2d 636, 642 (6th Cir 1977); *see also, United States* v *Pena-Gutierrez*, 222 F 3d 1080, 1086-1087 (9th Cir 2000); *United States* v *Orozco*, 590 F 2d 789, 793 (9th Cir 1979).

3. Accordingly, the pertinent report does not possess the requisite minimum indicia of reliability[8] to support the complained of enhancement, *see generally, United States* v *Yagar*, 404 F 3d 967, 972 (6th Cir 2005); *United States* v *Lewis*, 88 Fed Appx 898, 902 (6th Cir 2004).

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[8]Admittedly, the District Court noted "law enforcement officers are charged with the responsibility of accurately transmitting statements and that this is also a factor that the Court takes into account in crediting this statement" (R 176 ST Pg ID 2488). Yet, we respectfully respond applicable jurisprudence does not question the reliability of law enforcement but the lack of duty of the declarant to accurately recite what transpired, *Miller* v *Field, supra*, 35 F 3d at 1091; *see also, United States* v *Diaz-Calderone*, 716 F 3d 1345, 1350 (11th Cir 2013) ("Witnesses may be mistaken or may lie to the police, police may misunderstand what upset people are trying to tell them, and police reports may only tell part of the story"); *accord: Shepard* v *United States*, 544 US 13, 16, 125 S Ct 1254, 161 L Ed 2d 205 (2005); *United States* v *Thigpen*, 546 F 3d 766, 770 (7th Cir 2006). If Judge Goldsmith's observation was sufficient to carry-the-day, the pertinent evidentiary maxim would be eviscerated.

D.

1. The unreliability of the complained of police report is exacerbated because the purported declarant is a seven (7) or eight (8) year old child. The government never illuminated the procedures and protocols employed when questioning the child and whether the same were not unduly and impermissibly suggestive.

> While we recognize that there is no absolute unanimity among scholars, "a sufficient consensus exists within the academic, professional, and law enforcement communities, confirmed in varying degrees by courts, to warrant the conclusion that the use of coercive or highly suggestive interrogation techniques can create a significant risk that the interrogation itself will distort the child's recollection of events, thereby undermining the reliability of the statements and subsequent testimony concerning such events." *State* v *Michaels*, 136 NJ 299, 642 A 2d 1372, 1379 (NJ 1994) (surveying the authorities). An emerging consensus in the case law relies upon scientific studies to conclude that suggestibility and improper interviewing techniques are serious issues with child witnesses, *see, e g, Idaho* v *Wright*, 497 US 805, 826-827, 110 S Ct 3139, 111 L Ed 2d 638 (1990); *Maryland* v *Craig*, 497 US 836, 868, 110 S Ct 3157, 111 L Ed 2d 666 (1990) (Scalia, J, dissenting); *Swan* v *Peterson*, 6 F 3d 1373, 1382 & n 9 (9th Cir 1993), *cert denied*, 513 US 985, 115 S Ct 479, 130 L Ed 2d 393 (1994); *People* v *Michael M*, 162 Misc 2d 803, 618 NYS 2d 171, 177 (NY Sup Ct 1994); *In re RM Children*, 165 Misc 2d 441, 627 NYS 2d 869, 873 (NY Fam Ct 1995), and that expert testimony on these subjects is admissible, *see, e g, United States* v *Rouse*, 111 F 3d 561, 571-572 (8th Cir), *cert denied*, 522 US 905, 118 S Ct 261, 139 L Ed 2d 188 (1997) (approving of the admission of expert testimony on suggestive interviewing techniques and the influence they can have on children's memories); *Guam* v *McGravey*, 14 F 3d 1344, 1348-1349 (9th Cir 1994) (noting that the defendant could have presented expert testimony on "the susceptibility of children to suggestion"); *see also, e g, State* v *Malarney*, 617 So 2d 739, 740-741 (Fla Dist Ct App 1993); *State* v *Sloan*, 912 SW 2d 592, 596-597 (Mo Ct App 1995); *State* v *Sargent*,

144 NH 103, 738 A 2d 351, 353-354 (NH 1999); *People* v *Alvarez*, 159 Misc 2d 963, 607 NYS 2d 573, 574 (NY Sup Ct 1993); *State* v *Gersin*, 76 Ohio St 3d 491, 668 NE 2d 486, 487-488 (Ohio 1996); *State* v *Kirschbaum*, 195 Wis 2d 11, 535 NW 2d 462, 466-467 (Wis Ct App 1995). *Washington* v *Schriver*, 255 F 3d 45, 57 (2d Cir 2001).

2. It is evident, therefore, "research has demonstrated that children can be misled and confused by improper interviewing techniques and that the guidelines for interviewing children should be followed to prevent false memory," *United States* v *Granbois*, 119 Fed Appx 35, 38 (9th Cir 2004). In fact, "[w]hen a child witness has been subjected to coercive or suggestive questioning by police or civilians, his testimony may have been rendered so unreliable that it must be suppressed at trial," *Jelinek* v *Costello*, 247 F Supp 2d 212, 279 (SD NY 2003) (citation omitted).

3. *Query* whether the report upon which the Court relied (R 176 ST Pg ID 2486-2488) was impermissibly tainted. For example, while it purportedly described a declarant of seven (7) or eight (8) years old advising law enforcement of a "penis," the available literature demonstrates a child of such a tender age is usually not familiar with such a term, *see generally*, M VanClay, *How to talk to your child about sex (ages 6 to 8)*, December 21, 2018, https://www.babycenter.com/0_how-to-talk-to-your-child-about-sex-ages-6-to-8_67908.bc; C Hakanson, *My Kid Needs to Know What? An Age By Age Guide to*

Sex Education – And What to Do!, https://www.heysigmund.com/kid-needs-know-age-age-guide-sex-education/.[9]

4. The instant record is void of any governmental attempt to satisfy its burden[10] and demonstrate the report's reliability.[11] Given the circumstances attendant hereto, the Court erroneously relied upon same in imposing the complained of enhancement[12], *see, e g, United States* v *Sterling*, 942 F 3d 439, 442-444 (8th Cir 2019); *United States* v *Gentry*, 941 F 3d, 767, 788-789 (5th Cir 2019).[13]

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[9]*See also*, A Anger, *Unjust, Coercive Police Interviews Are Traumatizing Children of Color* (September 12, 2019) https://truthout.org/articles/unjust-coercive-police-interviews-are-traumatizing-children-of-color/.

[10]Mr Jones respectfully maintains the government did not fulfill its evidentiary burden of proof on the basis of our *silent* record, *cf, Boykin* v *Alabama*, 395 US 238, 242, 89 S Ct 1709, 23 L Ed 2d 274 (1969); *United States* v *Mulloy*, 3 F 3d 1337, 1339-1340 (9th Cir 1993).

[11]We are cognizant the Court "believe[d] that it can credit this statement" because "it's very specific. Second, it refers not to one, but multiple occasions and the number of times is fairly specific as well" (R 176 ST Pg ID 2487). However, this begs the question of whether the purported specificity was the product of the inappropriate conduct of law enforcement.

[12]Although the Probation Department "scored" this assessment (PSR ¶ 26), it proffered no *factual* basis in support of its position. The "mere inclusion in the PSR does not convert facts lacking an adequate evidentiary basis with sufficient indicia of reliability into facts a district court may rely upon at sentencing," *United States* v *Gentry, supra*, 941 F 3d at 788 (citations omitted).

[13]The PSR calculated "a criminal history category of I" (¶¶ 38-41). Inclusion of the § 2G2.2 (b) (5) (PSR ¶ 26) resulted in a "offense level . . . 43"

E.

1. In *Shepard* v *United States*, 544 US 13, 21-23, 125 S Ct 1254, 161 L Ed 2d 205 (2005), this Court rebuffed the government's request to premise a sentencing enhancement upon the contents of a police report. However, the panel majority would have this determination *limited* to the Armed Career Criminal Act (*Slip Op* at page 11 footnote 2).

2. *Query* whether this Court truly intended to provide a greater level of protection for defendants confronting an Armed Career Criminal enhancement while relegating those being sentenced for child pornography to a *watered-down* version of due process of law when construing the appropriateness of various guideline assessments.

3. With due respect, this writer could ascertain no decision which allows a guideline enhancement to be predicated upon a *watered-down* version of due process[14], *see, e g, United States* v *Silverman*, 976 F 2d 1502, 1504-1506 (6th Cir

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(PSR ¶ 35). Chapter 5 Part A indicates a sentencing range of "life." Without the complained of enhancement, the sentencing range would have been "262-327." *Id.*

[14]Significantly, this Court in *United States* v *McGrattan*, 504 F 3d 608, 611-612 (6th Cir 2007), rejected the government's contention *Shepard* does "not apply to the enhancement provision in 18 USC § 2252A" ("in view of the constitutional underpinning of *Shepard*, we are not persuaded that we should depart from its holding").

en banc 1992). In fact, the Commentary to USSG § 6A1.3 mandates if information is to be considered, it must contain "sufficient indicia of reliability to support its . . . accuracy" (citations omitted).

F.

1. The District Court noted TOMMY LEE JONES "was not convicted of the[] acts [referenced in the police report but] . . . did . . . end up pleading guilty to . . . *conduct* that was sexually related *in some kind*" [R 176 ST Pg ID 2487 (emphasis added)]. In absence of any definitional structure as to what the *offense* of conviction encompassed (R 176 ST Pg ID 2484, 2487), the Court "nonetheless [believed the conviction] reflect[ed] the Defendant's acknowledgement that he engaged in sexually inappropriate *conduct of some kind* involving this minor" (R 176 ST Pg ID 2487).

2. With due respect, "*conduct of some kind*" does not satisfy the prerequisite for § 2G2.2 (b) (5); *to wit*: Application Note 1 defines "Sexual abuse or exploitation" by identifying certain specified statutory enactments; "[t]o constitute an offense under 18 USC §§ 2241, 2242, and 2243, the conduct must include a 'sexual *act*' instead of mere 'sexual *conduct*.'" *United States* v *Hammond, supra*, 637 Fed Appx at 901 (emphasis added); yet, the federal definition of "sexual *act*," 18 USC § 2246 (2), is significantly circumscribed in

comparison to the State of Ohio's definition of "sexual *conduct*," RC § 2907.01 (A).

3. TOMMY LEE JONES respectfully asserts the District Court and the panel majority erroneously conflated "*act*" with "*conduct*," *United States* v *Hammond, supra*, 637 Fed Appx at 901 (emphasis added). Similarly, the optimism of "*conduct of some kind*" being sufficient to satisfy the prerequisites of a § 2G2.2 (b) (5) enhancement is, in our estimation, impermissible "speculation," *United States* v *Redman, supra*, 887 F 3d at 795 (citation omitted).

4. Consequently, the requisite "pattern of activity," *United States* v *Hammond, supra*, 637 Fed Appx at 903 [*citing* § 2G2.2 (b) (5)], has not been sufficiently demonstrated, *see, e g, United States* v *Pirosko*, 787 F 3d 358, 373 (6th Cir 2015); *United States* v *Miller*, 755 Fed Appx 440, 443 (6th Cir 2018).

G.

1. It is evident, therefore, the government has not sustained *its* burden, *see, United States* v *Sexton, supra*, 894 F 3d at 795; *United States* v *Vandeberg*, 201 F 3d 805, 811 (6th Cir 2000), TOMMY LEE JONES "engaged in a *pattern* of

activity involving the sexual abuse or exploitation of a minor," § 2G2.2 (b) (5) (emphasis added).[15]

II. AN AWARD OF RESTITUTION IS APPROPRIATE ONLY WHEN AND TO THE EXTENT AUTHORIZED BY STATUTE

A.

1. Our federal judiciary has "no inherent power to order restitution . . . ." *United States* v *Serawop*, 565 F 3d 1112, 1117 (10th Cir 2007) (citation omitted). *Accord*: *United States* v *Snider*, 957 F 2d 703, 706 (9th Cir 1997).

> "Because federal courts have no inherent power to award restitution," restitution orders are proper "only when and to the extent authorized by statute." *United States* v *Evers*, 669 F 3d 645, 655-656 (6th Cir 2012) (internal quotation marks omitted). *United States* v *Church*, 731 F 3d 530, 535 (6th Cir 2013); *see also*, *United States* v *Ciccolini*, 491 Fed Appx 529, 533 (6th Cir 2012).

2. While cognizant 18 USC § 2259 provides for restitution in child pornography prosecutions, the Court must nonetheless engage in an analysis to determine if the purported "losses were *caused* by [the accused's] offense," *see generally*, *United States* v *Archer*, 671 F 3d 149, 169-170 (2d Cir 2011) (emphasis added); *see also*, *United States* v *Benns*, 740 F 3d 370, 377-378 (5th Cir 2014).

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[15] "A district court may not rely on facts about the crime of conviction from other sources when making an enhancement determination, and it *may not rely on police reports*." *United States* v *Black*, 636 F 3d 893, 898 (7th Cir 2011) (citations omitted) (emphasis added); *see also*, *United States* v *Rosales-Bruno*, 676 F 3d 1017, 1022-1023 (11th Cir 2012).

3. In construing the appropriate parameters of *causation*, a "but for" rubric "is insufficient," *see generally*, *United States* v *Swor*, 728 F 3d 971, 974-975 (9th Cir 2013) (citations omitted).

> For example, supposed the traumatized victim of a[n] . . . offender needed therapy and had a car accident on the way to her therapist's office. The resulting medical costs, in a literal sense, would be a factual result of the offense. But it would be strange indeed to make a defendant pay restitution for these costs. *Paroline* v *United States*, 572 US 434, 448, 134 S Ct 1710, 188 L Ed 2d 714 (2014).

4. Accordingly, while "the ultimate question is how much of [the] losses were the "proximate result" . . . of that individual's offense . . . . the most difficult aspect of this inquiry concerns the threshold requirement of causation of fact." *Id* at 449 (citations omitted).

> Every event has many causes; however, . . . and only some of them are proximate, as the law uses that term. So to say that one event was a proximate cause of another means that it was not just any cause, but one with sufficient connection to the result . . . . A requirement of proximate cause . . . serves . . . to preclude liability in situations where the casual link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity. *Id* at 444 (citations omitted).

5. Therefore, "a straightforward reading of [the restitution statute] indicates that the term "a crime" refers to the offense of conviction. *Cf Hughey* v *United States*, 495 US 411, 416, 110 S Ct 1979, 109 L Ed 3d 408 (1990). So, if the defendant's *offense* conduct did not cause harm to an individual, that individual is by definition not a 'victim' entitled to restitution . . . ." *Id* at 445 (emphasis added).

B.

1. Counsel for "*Vicky*" proffered a request for ten thousand dollars ($10,000.00) in restitution. This amount was not predicated upon Mr Jones' level of culpability—as the attorney admittedly possessed no *specific* information on Petitioner's purported transgressions (R 176 ST Pg ID 2502-2503)—but appeared to be consistent with the attorney's *boilerplate* requests (R 176 ST Pg ID 2502), *see, e g, United States* v *Clemens*, 2018 WL 4794166 *2 (ED Cal 2018); *United States* v *Romero-Medrano*, 2017 WL 5177647 *3 (SD Tex 2017); *see also, United States* v *Block*, 2019 WL 31600 *1 (D SD 2019); *United States* v *Miltier*, 2016 WL 6821087 *4 (ED Va 2016).

> When "Vicky" was ten and eleven years old (she is now a young adult), she was subjected to sexual abuse by her biological father, who produced video and still images of that abuse, and then distributed the movies and pictures on the Internet. Her father also prepared videos and still images of sexual abuse to "Vicky" as requested by others. He scripted videos and made her re-do a movie if he was not satisfied with the depiction. In these movies and still images, he engaged in vaginal and anal intercourse and oral sex with her. He subjected her to bondage—for example, tying ropes to various parts of her body, including her breasts, and tying her to furniture. These child pornography images and videos of "Vicky" are "widely circulated across the internet." *United States* v *Hicks*, 2009 WL 4110260, *1 (ED Va November 24, 2009). *United States* v *Lindauer*, 2011 WL 1225992 *2 (WD Va 2011) (footnote omitted).

2. "The Vicky series of images has unfortunately been very prolific." *United States* v *Hanlon*, 2015 WL 310542 *3 (SD Ga 2015). As of 2015, "[t]he

government reports that there have been convictions in 530 federal cases in which restitution orders have been entered for Vicky. The amounts of restitution ordered vary wildly, ranging from $200.00 to $1,330,015.75. The total restitution ordered for Vicky is $9,113,100.90; the average restitution per case is $17,194.53; and the median restitution is $2,881.50." *Id* at *3.

> It is reasonably predictable that the Vicky Series will continue to be a staple of the internet among those interested in child pornography. Predicting the number of future convictions and/or restitution orders for crimes contributing to Vicky's general loses is virtually impossible, other to say that if past history is any indication the number will be fairly substantial. *Id* at *4. *See also*, *United States* v *Reynolds*, 2014 WL 4187936 *6 (ED Mich 2014), *aff'd*, 626 Fed Appx 610 (6th Cir 2015) (attempting to calculate the amount of loss caused by "continuing trafficking" is "incredibly speculative").

C.

1. TOMMY LEE JONES was not involved in the *initial* creation of the pertinent pornography. With due respect, Mr Jones "should not be required to pay for losses caused by the original abuser's actions." *United States* v *Galan*, 804 F 3d 1287, 1290 (9th Cir 2015).[16]

[16]"We recognize the difficulty in setting a restitution amount in cases like this one, where the victim's asserted losses overlap with similar harms that occurred before the events at issue. But a district court cannot "simply 'rubber stamp' a victim's claim of loss" because it is difficult to distinguish past and present harms. *See Ferdman*, 779 F 3d at 1133. The court need not calculate the harms with " 'exact' precision," but it must set a restitution amount that is "*rooted in a calculation of actual loss*." *Id*. (emphasis in original) (citations omitted). By ignoring this imperative and ordering restitution for losses that Anthony did not

> We think it inconsistent with "the bedrock principle that restitution should reflect the consequences of the defendant's own conduct" to hold [a defendant] accountable for those harms initially caused by [the victim's] abuser. Thus, to the extent that the district court relied on an expert report that did not disaggregate these harms, the district court's adoption of $1.3 million as the total measure of damages cannot stand. *United States* v *Dunn*, 777 F 3d 1171, 1181-82 (10th Cir 2015) (citation omitted); *see also*, *United States* v *Rogers*, 758 F 3d 37, 39-40 (1st Cir 2014) (*per curiam*). *Id* at 1291.

2. Nor has it been established Mr Jones engaged in *active*—as opposed to the *fiction* of peer-to-peer *passive*—distribution (R 176 ST Pg ID 2509-2512). We submit his alleged *possession* of three (3) pertinent videos—which apparently neither the victim nor her counsel were aware of until notified by the government (R 176 ST Pg ID 2502-2503)[17]—does not warrant the imposition of restitution in the amount awarded by the District Court (R 176 ST Pg ID 2521-2522; R 172 Judgment Pg ID 2462), *see, e g*, *United States* v *Church*, 701 F Supp 2d 814, 832 (WD Va 2010); *United States* v *Faxon*, 689 F Supp 2d 1344, 1357-1358 (SD Fla 2010); *United States* v *Scheidt*, 2010 WL 144837 *4 (ED Cal 2010).

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cause, the district court abused its discretion. *See United States* v *Parker*, 553 F 3d 1309, 1324 (10th Cir 2009); *United States* v *Quarrell*, 310 F 3d 664, 678 (10th Cir 2002). As a result, we will vacate the restitution order and remand for a recalculation limited to actual losses resulting from Anthony's offenses of conviction." *United States* v *Anthony*, 942 F 3d 955, 969-970 (10th Cir 2019).

[17]Upon information and belief, "analysts from the National Center for Missing and Exploited Children's (NCMEC) Child Victim Identification Program (CVIP) [identifies] images . . . . [and b]ased on this alleged identification, [claimant's counsel] receive[s] notice[] from the United States Department of Justice's Victim Notification System (VNS) informing [her] . . . of [Jones'] criminal conduct . . . ." *Amy* v *Anderson*, 2018 WL 2768876 *2 (MD Ga 2018).

> In *Paroline* v *United States*, 134 S Ct 1710, 1716 (2014), the Supreme Court considered "how to determine the amount of restitution a possessor of child pornography must pay to the victim whose childhood abuse appears in [the] pornographic materials possessed." The Court held that restitution is "proper under § 2259 only to the extent the defendant's offense *proximately caused* a victim's losses." *Id* at 1722 (emphasis added). *United States* v *Miltier*, *supra*, 2016 WL 6821087 at *2.

3. Consistent with this analysis, TOMMY LEE JONES respectfully submits "the government has not established by a preponderance of the evidence that [*his* purported] possession . . . was the *proximate cause of her harm*." *United States* v *Hanlon*, *supra*, 2015 WL 310542 at *4.

> No witnesses testified, and the record is far less substantial than that found insufficient in *McGarity*, 669 F 3d at 1269-70. To paraphrase that case: "We do not seek to minimize the harm suffered by [Vicky]. However, [] 18 USC § 2259 was intended to compensate the victims of child pornography for harms caused by individual defendants and not to serve as strict liability against any defendant possessing such admittedly repugnant images or videos." *Id* at 1270. The government's request for restitution as to Vicky is denied. *Id* at *4. *Accord*: *United States* v *Tallent*, 872 F Supp 2d 679, 694 (ED Tenn 2012); *United States* v *Chow*, 760 F Supp 2d 335, 340-345 (SD NY 2010); *United States* v *Rowe*, 2010 WL 3522257 *6 (WD NC 2010).

4. This position should not be construed as insensitive to the plight of "*Vicky*."

> The Court is very sympathetic to Vicky and acknowledges the profound and detrimental harm suffered by her and all children who have been sexually abused, and whose victimization has been recorded and disseminated worldwide on the Internet. The Court also recognizes the difficult task the Government has in establishing the amount of a victim's losses proximately caused by a particular defendant convicted of a possession charge in federal court. The legal briefs and arguments submitted by counsel for the Government in support of a restitution

> award are excellent and the effort laudable. However, the Government has the burden of proof and the Government has failed to meet its burden to prove what losses sustained by Vicky were *a proximate cause and result of [defendant's] criminal conduct.* *United States* v *Solsbury*, 727 F Supp 2d 789, 796 (D ND 2010) (emphasis added).

D.

1. The government "bears the burden of proving the amount of the victim's losses," *United States* v *Bordman*, 895 F 3d 1048, 1057 (8th Cir 2018) (citation omitted); *accord*: *United States* v *Sawyer*, 825 F 2d 287, 294 (6th Cir 2016), cognizant "defendants should [only] be held to account for the impact of *their* conduct on [the] victims." *United States* v *Crisostomi*, 31 F Supp 3d 361, 364 (D RI 2014) (citation omitted), thus avoiding the condemned concept of "strict liability against any defendant possessing" such materials, *see*, *United States* v *McGarity*, 669 F 3d 1218, 1270 (11th Cir 2012), *abrogated on other grounds*, *United States* v *Rothenberg*, 923 F 3d 1309, 1336 (11th Cir 2019); *see also*, *United States* v *Evers*, 669 F 3d 645, 658-659 (6th Cir 2012).

2. We recognize some jurists opine " 'restitution' in child pornography cases is a minefield." *United States* v *Darbasie*, 164 F Supp 3d 400, 406 (ED NY 2016). The methodologies for calculating restitution in such matters are numerous, *see*, *e g*, *United States* v *Romero-Medrano*, *supra*, 2017 WL 5177647 at *2. The government's advocacy the "ethos of *Paroline*" is "everyone must pay," *United*

States v *Darbasie*, *supra*, 164 F Supp 3d at 406, cannot be supported by the rubric established in *Paroline* v *United States*, *supra*, 572 US at 444-448.

E.

1. The Presentence Report indicated " 'Vicky' has a total loss amount of $3,266,093.00" (PSR ¶ 18). In a dialogue with the government, the Court queried "taking this 3.2 million loss . . . and divide it by the *600* claims and coming up with an average of 5,443"[18] (R 176 ST Pg ID 2508) (emphasis added).

2. However, when awarding restitution, the Court utilized a "total amount of loss . . . is *4,462,040* dollars" (R 176 ST Pg ID 2521) (emphasis added). *Query* where the additional $1,195,947 came from.

3. Nonetheless, we respectfully submit predicating restitution purely upon arithmetic—total loss divided by number of claims (R 176 ST Pg ID 2508, 2521)—without regard to Petitioner's culpability[19] and *causation* of injury renders an award which is "too remote," *see generally*, *United States* v *Evers*, *supra*, 669 F 3d at 659 (citations omitted).

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[18]Mr Jones is uncertain as to the origin and accuracy of the Court's recitation of "600 claims" (R 176 ST Pg ID 2508).

[19]*E g*, quantity of images possessed, active *versus* passive trafficking/distribution and relationship, if any, to the victim.

The majority of the circuits that have addressed this issue have held that a showing of *proximate cause* is a necessary element of all claims for restitution sought under § 2259 (b) (3).

* * *

We further agree with the DC Circuit's critique of the *Amy Unknown* decision: "[A] 'general' causation requirement without a subsidiary proximate causation requirement is hardly a requirement at all," because "[s]o long as the victim's injury would not have occurred but for the defendant's offense, the defendant would be liable for the injury." *Id* at 537 n 8 (citing *Amy Unknown*, 636 F 3d at 200).

* * *

"[E]valuated in light of its common-law foundations[,] proximate cause . . . requires '*some direct relationship between the injury asserted and the injurious conduct alleged.*' *Hemi Group, LLC*, v *City of New York*, 559 US 1, 130 S Ct 983, 989, 175 L Ed 2d 943 (2010) (quoting *Holmes* v *Sec Investor Prot Corp*, 503 US 258, 268, 112 S Ct 1311, 117 L Ed 2d 532 (1992)). "A link that is 'too remote,' 'purely contingent,' or 'indirec[t]' is insufficient." *Id* (quoting *Holmes*, 503 US at 271, 274, 112 S Ct 1311). Guided by case law interpreting the VWPA and the MVRA, which are cross-referenced in § 2259 (b) (2), the Ninth Circuit in *Kennedy* has determined that

> for purposes of determining proximate cause [under § 2259], a court must identify a *causal connection* between the defendant's offense conduct and the victim's specific losses. There may be multiple links in the causal chain, but the chain may not extend so far, in terms of the facts or the time span, as to become unreasonable[.] Although the [d]efendant's conduct need not be the sole cause of the loss, *it must be a material and proximate cause*, and any subsequent action that contributes to the loss, such as an intervening cause, must be directly related to the defendant's conduct[.]

Kennedy, 643 F 3d at 1262-63 (citations and internal quotation marks omitted). This framework is consistent with our own interpretation of *proximate cause* in this context. *See In re McNulty*, 597 F 3d 344, 350, 352 (6th Cir 2010) (holding that "[t]he requirement that the victim be 'directly and proximately harmed' [under the Crime Victims' Rights Act,

18 USC § 3771] encompasses the traditional 'but for' and proximate cause analyses," and "requires that the harm to the victim be closely related to the conduct inherent to the offense, rather than merely tangentially linked.") (citations and internal quotation marks omitted). *Id* at 659 (emphasis added).

CONCLUSION

The Petition for Writ of Certiorari should be Granted.

Respectfully submitted,

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