

Case No. 20-_____

SUPREME COURT OF THE UNITED STATES

John S. Mobasseri,

Petitioner,

VS.

United States of America,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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I. Question Presented

Whether it violates due process to retroactively apply the 2018 amendments to 18 U.S.C. § 2259 to offense conduct occurring prior to the effective date of those amendments when making restitution awards in child pornography offense cases?

II. TABLE OF CONTENTS

I. Question Presented	ii
II. Table of Contents	iii
III. Table of Authorities	iv
IV. Petition for Writ of Certiorari	1
V. Opinions Below	1
VI. Jurisdiction	1
VII. Constitutional Provisions Involved	1
VIII. Statement of the Case	2
1. Mobasseri's Offense Conduct	2
2. Direct Appeals	2
IX. REASONS FOR GRANTING THE WRIT	3
A. In order to avoid serious deprivations of due process, this court should make clear to the lower courts their responsibility to fashion and interpret restitution orders in child pornography cases solely by reference to the law in effect at the time of the offender's conduct.	
X. Conclusion	6
XI. Appendix	7
Clerk Letter and Decision, <i>United States v. Mobasseri</i> , No. 19-3792 (6 th Cir. 2020).....	1 – 6

III. TABLE OF AUTHORITIES

<i>Cases</i>	<i>Page</i>
<i>Phillip Morris USA v. Williams</i> , 549 U.S. 346 (2007).....	5
<i>Rosenberg v. United States</i> , 346 U.S. 273 (1953).....	2
<i>United States v. Gamble</i> , 709 F.3d 541 (6 th Cir. 2013).....	3
<i>United States v. Howard</i> , 784 F.3d 745 (10 th Cir. 2015).....	4
<i>United States v. Kilpatrick</i> , 798 F.3d 365 (6 th Cir. 2015).....	4
<i>United States v. Mobasseri</i> , 764 F. App'x 549 (6 th Cir. 2019).....	3
<i>United States v. Paroline</i> , 575 U.S. 434 (2014).....	4, 5
 <i>Statutes</i>	
18 U.S.C. § 2259	<i>passim</i>
18 U.S.C. § 3663A	3
18 U.S.C. § 3664	3
28 U.S.C. § 1254	1
 <i>Guidelines</i>	
U.S.S.G. § 2G2.2	6
 <i>Constitutional Provisions</i>	
United States Constitution, Amendment V	1 – 2

IV. Petition for Writ of Certiorari

John S. Mobasser, an inmate in the Federal Bureau of Prisons, by and through counsel appointed under the terms of the Criminal Justice Act, respectfully petitions this court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

V. Opinion Below

The decision from which this appeal is being taken was entered September 28, 2020, by the United States Court of Appeals for the Sixth Circuit in *United States v. John S. Mobasser*, case No. 19-3792, unreported. Said order is attached at Appendix pp. 1 – 6.

VI. Jurisdiction

The decision denying Mr. Mobasser's direct appeal was entered on September 28, 2020. Mr. Mobasser invokes this court's jurisdiction under 28 U.S.C. § 1254, having timely filed this petition for a writ of certiorari within ninety days of the judgment of the court of appeals.

VII. Constitutional Provision Involved

United States Constitution, Amendment V:

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.

VIII. Statement of the Case

“[O]bviously no criminal statute can have retroactive application.”

Rosenberg v. United States, 346 U.S. 273 (1953), Douglass, J., dissenting at 311.

This case presents the question of whether it violates due process for a district court to look to a sentencing statute that was not in effect at the time of a criminal defendant’s offense conduct when ordering restitution as part of the defendant’s sentence.

1. Mobasseri’s Offense Conduct.

Mobasseri engaged in the downloading of child pornography from the internet from July 13, 2009, until January 4, 2017, in northwest Ohio. He was indicted, prosecuted, and sentenced to prison for this conduct. He was also ordered to pay restitution as part of his sentence.

2. Direct Appeals.

Mobasseri appealed the district court’s restitution award. The United States

Court of Appeals for the Sixth Circuit reversed the judgment of the district court and remanded the matter for further proceedings on the subject. *United States v. Mobasseri*, 764 F. App'x 549 (6th Cir. 2019). On remand, the district court, following a hearing, issued an opinion and order again requiring restitution, but in a lesser amount. In fashioning its order, the district court looked to the 2018 amendments to 18 U.S.C. § 2259, amendments which became effective after Mobasseri's offense conduct and prosecution. Mobasseri appealed the district court's second restitution order, but the court of appeals affirmed. *United States v. John S. Mobasseri*, United States Sixth Circuit case No. 19-3792, unreported.

IX. Reasons for Granting the Writ

A. In order to avoid serious deprivations of due process, this court should make clear to the lower courts their responsibility to fashion and interpret restitution orders in child pornography cases solely by reference to the law in effect at the time of the offender's conduct.

Courts are required by 18 U.S.C. § 2259(b)(2) to issue and enforce restitution orders under § 2259 in accordance with 18 U.S.C. § 3664 in the same manner as an order under the Mandatory Victim Restitution Act, 18 U.S.C. §§ 3663A, 3613A, *see United States v. Gamble*, 709 F.3d 541, 549 (6th Cir. 2013), and "[t]he government bears the burden of proving a victim's actual loss by a

preponderance of the evidence," *United States v. Kilpatrick*, 798 F.3d 365, 388 (6th Cir. 2015) (citing 18 U.S.C. § 3664(e)). "Restitution is . . . proper under § 2259 *only to the extent the defendant's offense proximately caused the victim's losses.*" *United States v. Paroline*, 575 U.S. 434, 446 (2014) (emphasis added). A restitution determination "cannot be a precise mathematical inquiry," but "involves the use of discretion and sound judgment." *Id.* at 459. But even mandatory restitution is not properly awarded in the absence of competent proof; *see, e.g., United States v. Howard*, 784 F.3d 745 (10th Cir. 2015), considering the MVRA.

The version of 18 U.S.C. § 2259 in effect at the time of Mobasseri's offense conduct required district courts to award restitution in child-pornography cases such as this one, but only to the extent that the government can prove that an offender's offense of conviction is the proximate result of the victim's losses. *Id.*; *Paroline, supra*. The statute did not provide for any "default" amounts of restitution, as does the current version. Proximate cause requires a showing of "some direct relation between the injury asserted and injurious conduct alleged." *Id.* at 444 (citations omitted). "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 449. "[R]estitution may not be imposed for losses caused by any other crime or any other defendant." *Id.* at 465 – 466, (Roberts, C.J., dissenting). "Restitution orders should represent 'an application of law,'" not "'a decisionmaker's caprice.'" *Phillip Morris USA v. Williams*, 549 U.S. 346, 352 (2007).

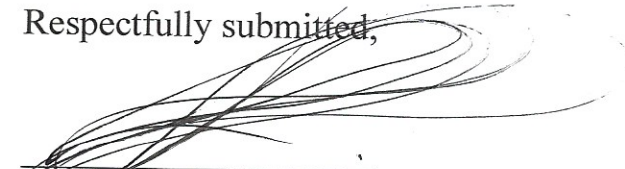
Its original restitution award having been vacated, the district court, in its desire to award the victims something in the way of restitution, tried to cure the government's lack of proof as to how Mobasseri's offense conduct contributed to each victim's loss by resort to a rather creative formula. The district court looked to the 2018 amendments to 18 U.S.C. § 2259, wherein Congress mandates that in cases such as this, a "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." 18 U.S.C. § 2259(b)(2)(B). Using the baseline of \$3,000 as a given, the district court looked to the total estimated losses of each victim and the number of images and/or videos Mobasseri possessed, and used a graduated scale of increases in restitution amounts fashioned loosely after

U.S.S.G. § 2G2.2(b)(7)'s level-enhancement structure. The figures adopted by the court to track the guideline's increases were purely arbitrary, with \$1000 appearing to be the default amount for every "level enhancement." While original and clever, the application of this concocted formula results in a retroactive application of the 2018 amendments to 18 U.S.C. § 2259 to punish Mobasseri for conduct occurring prior to those amendments. The Sixth Circuit has approved of this process. Without this court's intervention, this practice is likely to continue.

X. Conclusion

Wherefore, John S. Mobasseri respectfully requests this court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,



Jeffrey P. Nunnari
Counsel for Petitioner

Dated: December 16, 2020.

XI. Appendix

Clerk Letter and Decision, *United States v. Mobasseri*, No. 19-3792
(6th Cir. 2020)

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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Filed: September 28, 2020

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Re: Case No. 19-3792, *USA v. John Mobasseri*
Originating Case No. : 1:17-cr-00138-1

Dear Counsel,

The Court issued the enclosed opinion today in this case.

Sincerely yours,

s/Cathryn Lovely
Opinions Deputy

cc: Ms. Sandy Opacich

Enclosure

Mandate to issue

NOT RECOMMENDED FOR PUBLICATION

File Name: 20a0554n.06

No. 19-3792

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN S. MOBASSERI,

Defendant-Appellant.

ON APPEAL FROM THE
UNITED STATES DISTRICT
COURT FOR THE
NORTHERN DISTRICT OF
OHIO**BEFORE: SUHRHEINRICH, LARSEN, and READLER, Circuit Judges.**

CHAD A. READLER, Circuit Judge. John Mobasseri pleaded guilty to one count of receipt and distribution of child pornography, in violation of 18 U.S.C. § 2252(a)(2), and one count of possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B). The district court sentenced Mobasseri to a 136-month prison term and ordered him to pay restitution to four victims totaling \$30,000. We later vacated the restitution order because it was entered “without any explanation at all of the particular amounts it ordered.” *United States v. Mobasseri*, 764 F. App’x 549, 550 (6th Cir. 2019). On remand, the district court, following a hearing, issued an opinion ordering restitution totaling \$20,500. We now affirm.

Background. Our initial opinion recounts much of the relevant history underlying today’s appeal, and we recount just some that history here. *See generally Mobasseri*, 764 F. App’x at 549–50. As part of his guilty plea, Mobasseri admitted to using his computer to search for and download images and videos depicting minors engaged in sexually explicit conduct. He also utilized peer-

No. 19-3792, *United States v. Mobasseri*

to-peer software that enabled third parties to download the material he possessed. Utilizing this software, the government downloaded from Mobasseri's computer roughly 1,600 files, many of which contained child pornography. During a subsequent search of Mobasseri's home, the government seized 24,104 images and 924 videos of child pornography saved on Mobasseri's laptop and external drives.

Prior to Mobasseri's sentencing, four victims—Vicky, Chelsea, Pia, and Cindy—sought restitution totaling \$33,000. In addition to sentencing Mobasseri to 136-months imprisonment, the district court also imposed a total restitution amount of \$30,000. We later vacated the restitution award. On remand, the district court conducted a restitution hearing. Applying 18 U.S.C. § 2259 (mandatory restitution) as well as the factors articulated in *Paroline v. United States*, 572 U.S. 434, 460 (2014), the court lowered the total restitution amount to \$20,500, payable to the victims as follows:

- Vicky, \$5,000: Base amount \$3,000; number of images \$1,000; attorneys' fees \$1,000.
- Chelsea, \$7,000: Base amount \$3,000; number of images \$1,000; attorneys' fees \$3,000.
- Pia, \$4,500: Base amount \$3,000; age of victim in images \$1,000; attorneys' fees \$500.
- Cindy, \$4,000: Base amount \$3,000; attorneys' fees \$1,000.

Legal standard. As instructed by § 2259(a), the district court “shall order” restitution for any offense involving the sexual exploitation of children and child pornography. *See also Paroline*, 572 U.S. at 443 (explaining that § 2259(a) requires a district court to order restitution for all offenses under Chapter 110 of Title 18, which includes distribution and possession of child pornography under §§ 2252(a)(2) and 2252A(5)(B)). The restitution order should equal “an amount that comports with the defendant's relative role in the causal process that underlies the

No. 19-3792, *United States v. Mobasseri*

victim's general losses." *Id.* at 458. Because the award is tied to the government's ability to prove the defendant's offense is the proximate cause of the victim's losses, a restitution award is limited to the harms reasonably foreseeable to result from the defendant's conduct. *United States v. Hargrove*, 714 F.3d 371, 375 (6th Cir. 2013) (explaining that where a victim's injury is the type the statute was designed to prohibit, it is more likely the injury was proximately caused by the defendant) (citing *United States v. Gamble*, 709 F.3d 541, 549 (6th Cir. 2013)).

Paroline sets forth factors relevant to that determination. Of those factors, critical here are whether the defendant reproduced or distributed images of the victim; whether the defendant had any connection to the initial production of the images; how many images of the victim the defendant possessed; and reasonable predictions of the number of future offenders likely to be convicted for crimes contributing to the victim's general losses. *Paroline*, 572 U.S. at 460. Those factors act as "rough guideposts" in determining § 2259 restitution amounts, with the district court free to exercise its independent judgment and discretion. *Id.*

With those standards in mind, we review a restitution award for an abuse of discretion. *United States v. Evers*, 669 F.3d 645, 654 (6th Cir. 2012). That is, we will reverse a restitution award only when we are left with a "definite and firm conviction that the [district] court committed a clear error of judgment." *United States v. Batti*, 631 F.3d 371, 379 (6th Cir. 2011) (quoting *United States v. Hunt*, 521 F.3d 636, 648 (6th Cir. 2008)). While the district court's discretion is ample, the district court cannot, as we previously explained, fail to provide any explanation whatsoever as to its restitution order. *Mobasseri*, 764 F. App'x at 550.

Restitution award. The district court did not err in ordering Mobasseri to pay restitution totaling \$20,500. Recognizing the difficulty in this setting in tracing a particular amount of a victim's losses to a defendant's conduct, the district court set out a consistent framework,

No. 19-3792, *United States v. Mobasseri*

applicable for each victim, to accomplish the restitution goals reflected in § 2259 and *Paroline*. The court first determined the “full amount” of each “victim’s losses” proximately caused by the offense, as required by § 2259(b)(1), which can include any costs incurred or reasonably projected to be incurred in the future. 18 U.S.C. § 2259(c)(2); *see also Hargrove*, 714 F.3d at 375 (explaining “the harm endured by the subject of child pornography upon realizing that others are viewing her image is part of what the child pornography prohibitions are designed to deter,” making “attendant costs, to the extent factually caused by the viewing,” as ones “proximately caused” by the defendant’s conduct) (internal quotations and citations omitted).

Second, the district court established a baseline restitution amount for each victim. *See United States v. Reynolds*, 626 F. App’x 610, 620 (6th Cir. 2015) (affirming the district court’s per-victim baseline amount). In arriving at that baseline amount, the court cited statutory indicators demonstrating Congress’s approval of a \$3,000 per victim floor restitution amount. *See, e.g.*, 18 U.S.C. § 2259(b)(2)(B). The court thus set the baseline for each victim at \$3,000.

Next, the district court analyzed the *Paroline* factors, emphasizing the one it found particularly relevant here: the number of images Mobasseri possessed of each victim. *Paroline*, 572 U.S. at 460. The court increased the restitution amount for each victim based on the number of images Mobasseri possessed following the graduated scale found in USSG § 2G2.2(b)(7).

Finally, the district court considered a host of additional factors also considered by other courts, including the frequency of views and shares of images, the means by which the images were acquired, Mobasseri’s individual contribution to the market, and the nature of the victim’s images. *See, e.g., United States v. Lloyd*, No. 5:18CR336, 2020 WL 4038241, at *3 (N.D. Ohio July 17, 2020); *United States v. Monzel*, 930 F.3d 470, 481 (D.C. Cir. 2019); *United States v. Gamble*, No. 1:10-CR-137, 2015 WL 4162924, at *3 (E.D. Tenn. July 9, 2015); *Reynolds*, 626 F.

No. 19-3792, *United States v. Mobasseri*

App'x at 620. Taking all of these considerations together, the court ordered Mobasseri to pay restitution totaling \$20,500. The four victims each received the baseline amount and attorneys' fees; two received \$1,000 increases based on the number of images Mobasseri possessed; and one received a \$1,000 increase due to her age in the images.

Mobasseri contends that this framework failed to limit the respective awards to losses proximately caused by his conduct. We disagree. To be sure, harms that do not stem from the type of injury the statute is designed to prohibit or are too attenuated fail to satisfy proximate cause. *See, e.g., Evers*, 669 F.3d at 660 (declining to award restitution for child care expenses because the loss of a sex offender as a babysitter is not the sort of harm contemplated by the statute). But here, the district court carefully applied the *Paroline* factors and explained how it calculated each victim's restitution amount, demonstrating why each victim's losses resulted from the type of injury child pornography laws are designed to prevent.

As this methodology was based on sufficient evidence and sound reasoning, we **AFFIRM**.