

No. _____

In the
Supreme Court of the United States

Michael Dewayne Alfred,

Petitioner,

v.

United States of America,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When imposing restitution under 18 U.S.C. § 2259(b)(2), does the district court's restitution order exceed the statutory maximum when that court fails to consider the measure of losses caused to the victim based on "the defendant's relevant causal role" in comparison to other offenders?

PARTIES TO THE PROCEEDING

Petitioner is Michael Dewayne Alfred, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Dewayne Alfred seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The district court's judgement and sentence is attached as Appendix B. The opinion of the court of appeals was published as *United States v. Alfred*, 60 F.4th 979 (5th Cir. 2023) and is attached as Appendix A to this Petition.

JURISDICTION

The judgment dismissing the appeal was entered on February 27, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

18 U.S.C. §2259 reads in part:

(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.—

Except as provided in paragraph (2), 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.

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

(A) Determining the full amount of a victim's losses.—

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

(B) Determining a restitution amount.—

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

(C) Termination of payment.—

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

(c)

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

(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

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

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

(4) Victim.—

For purposes of this section, the term "victim" means the individual harmed as a result of a commission of a crime under this chapter. In the case of a victim who is under 18 years of age, incompetent,

incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the crime victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

STATEMENT OF THE CASE

I. Facts and Proceedings Below

The Basic Facts. In June of 2020, the government charged Michael Dewayne Alfred, Petitioner, with one count of Transportation of Child Pornography, in violation of 18 U.S.C. § 2252A(a)(1). (ROA.27-29). On September 21, 2020, Petitioner pleaded guilty to the one-count indictment. (ROA.129). His plea was pursuant to a plea agreement that contained a waiver of appeal except in certain circumstances, including “a sentence exceeding the statutory maximum punishment.” (ROA.204-11). On June 17, 2021, the district court sentenced Petitioner to 240 months’ imprisonment, which was the statutory maximum. (ROA.168). The court then ordered him to pay a \$5,000 assessment under the JVTa and a total of \$61,500 in restitution to seven victims depicted in images he possessed, under 18 U.S.C. § 2259. (ROA.168-72).

The PSR and Restitution. The initial PSR, issued on November 16, 2020, stated that restitution was not applicable because “the victim is not requesting restitution” and that the assessment under § 3014 was “also not applicable” “due to the defendant being indigent.” (ROA.234). The government did not object to this conclusion; on the contrary, it adopted the presentence report. (ROA.241).

On December 17, 2020, U.S. Probation issued an addendum to the PSR, accepting two of Petitioner’s clarifications, rejecting a third, and amending the initial report with a statement from Petitioner that he possessed a credit union account in Amarillo “with a zero balance.” (ROA.246-47). No other changes were made.

On April 12, 2021, U.S. Probation issued a second addendum to the PSR, which added a new suggested condition of supervised release and restated that “no requests for restitution have been made.” (ROA.249).

On June 3, 2021—fourteen days before sentencing—U.S. Probation issued a third addendum to the PSR, advising the district court that, “subsequent to the disclosure of the PSR and Addenda,” U.S. Probation had received “requests for restitution of the child pornography the defendant possessed.” (ROA.252). The third addendum listed six victims, the amount they were requesting, and stated that “restitution in the amount of \$51,500, is due and owing.” (ROA.252-53). That number, \$51,500, reflected the full amount requested. (ROA.252-53). Attached to the third addendum were a series of victim impact statements, from both victims and parents of victims, ranging from recent to over ten years old. (ROA.256-330).

On June 7, 2021—ten days before sentencing—U.S. Probation issued a fourth addendum to the PSR, advising the district court that it had received a restitution request from an additional victim. (ROA.332). This victim requested \$10,000, which brought the total restitution sought to \$61,500. (ROA.332-33). The victim impact statements, including the newest one, were all attached to the fourth addendum. (ROA.337-412).

In neither the PSR addenda nor the victim impact statements was there any semblance of the causation analysis contemplated by § 2259 or *Paroline*. Nor was there the information needed to conduct such an analysis. Only one victim included an itemized list of costs, (ROA.301), but still did not include anything that could be

used to determine how much of those costs could be proximately attributed to Petitioner. Another victim, by contrast, stated that her images had been found 22,000 times (in other cases) but did not include any costs. (ROA.344).

In her argument, defense counsel argued that, although Petitioner had some responsibility for the losses incurred by the victims listed in the PSR's accounting, the evidence before the court made it unreasonable to conclude that Petitioner bore the full causal connection to their losses. *See* (ROA.163–65).

When imposing sentence, the district court explained its restitution decision with the following:

Regarding restitution — and in response to Defendant's argument regarding mandatory restitution under Section 2259(a), the Court will note that the \$3,000 amount referenced there is not an upward limit. It says only that — and this is 2259(b)(2)(B). It states only that the amount should be no less than \$3,000, and then also in the very next paragraph, in section — subsection (c), it makes clear that a victim's total aggregate recovery pursuant to this section shall not exceed the full amount of the victim's demonstrated losses.

The Court construes that as a potential limit on the absolute amount of victim loss recovered, but the Court at all times is guided by its prior determination that defendant does have a capacity to pay restitution, although not to the extent of a fine five or fifty times greater than any restitution awarded.

The Court would also reference PSR Paragraph 25 and 26, and incorporate those by reference as modified by the addendum as a basis for the Court's determination that the victim impact in this case has been adequately proven beyond a preponderance of the evidence as reflected in the voluminous materials submitted to the Court.

Here, pursuant to 18 U.S.C. Section 2259(c)(3), this is a child pornography trafficking offense, and thus restitution is mandatory as required by 2259(b)(2), and the Court finds that restitution is appropriate.

The defendant is hereby ordered to make restitution in the amount of \$61,500.

(ROA.169-70). Then, after ordering specific amounts to each victim, the district court stated:

In response to Defendant's argument that he did not participate in the production of the child pornography reflected in those victim impact statements and those restitution amounts, the Court does agree with Defense Counsel that there's no evidence that he participated in the production,

The Court does acknowledge Defendant's second point that defendant did not engage in, quote, "initial distribution," but he did however participate in additional distribution.

The Supreme Court and multiple circuits have spoken in unbroken form to this point of continuing harm. Victims of child pornography are victimized each and every time images are downloaded and consumed. These are reflected in multiple opinions from the Fifth Circuit and other circuits as well as the Supreme court.

(ROA.171-72).

Later, after defense counsel objected to the restitution order, the district court responded:

The Court overrules Defendant's objections for reasons previously stated, and these additional reasons:

So, here, in addition to the reasons previously stated for awarding restitution in this case and ordering restitution to impacted victims, the Court would highlight PSR Paragraphs 13 through 21, which reflects not mere passive consumption of child pornography, but instead interaction

with programs and groups titled “Wonderland” and “LiveMe,” which involved videos depicting sexual abuse and exploitation of prepubescent children and defendant’s interaction with the further distribution of that information.

There’s also, within those PSR paragraphs, another group entitled “Lil’ Ones!,” “LoveCP,” and “Gurls Share Stuff” where defendant actively participated in groups and message boards that encouraged further distribution of the material harming victims.

Additionally, PSR Paragraph 21 specifically reflects that defendant, in addition to passively consuming and actively distributing, and stimulating himself with child pornography, which included infants and prepubescent youth, he later acted on those impulses and, quote, “admitted to fondling his stepdaughter’s breasts when she was 13 years old on one occasion and to sexually assaulting a 14-year-old female minor on a separate occasion.

For these reasons and the reasons previously stated in the Court’s tentative determination reduced to final finding, the Court overrules Defendant’s objections to the addition. In response to Defendant’s argument that he did not participate in the production of the child pornography reflected in those victim impact statements and those restitution amounts, the Court does agree with Defense Counsel that there’s no evidence that he participated in the production,

The Court does acknowledge Defendant’s second point that defendant did not engage in, quote, “initial distribution,” but he did however participate in additional distribution.

The Supreme Court and multiple circuits have spoken in unbroken form to this point of continuing harm. Victims of child pornography are victimized each and every time images are downloaded and consumed. These are reflected in multiple opinions from the Fifth Circuit and other circuits as well as the Supreme court.

(ROA.171–72).

B. Appellate Proceedings

On appeal, Petitioner maintained that the district court erred in its award of restitution and that the award therefore exceeded its statutory authority. Specifically, Petitioner argued that the district court conducted no proximate cause analysis to consider the “amount of restitution proportionate to his share of the victim’s harm.” Appellant’s Initial Br., *United States v. Alfred*, at 9, No. 21-10658 (5th Cir. Oct. 19, 2021) (“Initial Br.”). Thus, the district court failed to conduct the type of analysis required by *Paroline v. United States*, 572 U.S. 434, 458–60 (2014), and codified in 18 U.S.C. § 2259(b)(2).

Petitioner first argued that, on the face of the record, the district court failed to conduct any proximate cause analysis, whether visible or implied. Initial Br. at 6–9. Rather than assessing “the defendant’s relative . . . role,” *Paroline*, 572 U.S. at 460, in causing the victim’s losses, the district court took no pause to consider the limitations on restitution imposed by § 2259.

Next, Petitioner argued that the district court was incapable of conducting the required proximate-cause analysis because it lacked the information necessary to do so. Initial Br. at 10–13. Petitioner showed that his PSR only provided information showing: “(1) seven victims were seeking restitution; (2) the amounts of their ‘restitution requests,’ and (3) in some instances, what they would use the money for.” *Id.* at 12. Petitioner argued that such paltry information failed to provide the district court with sufficiently detailed and timely data for the court to be capable to assess

Petitioner’s relative role, in comparison to other defendants, in the causal process leading cause of the general losses incurred by the victims. *Id.* at 13.

Finally, Petitioner argued that, because the victim of the offense of conviction is unidentified and, therefore, not included in the victims to which restitution was ordered, restitution was altogether improper without a proximate-cause analysis. *Id.* at 13–14 (citing *United States v. Winchel*, 896 F.3d 387, 390 (5th Cir. 2018); *United States v. Overby*, 838 F. App’x 966, 971–72 (6th Cir. 2021)).

The court of appeals, however, agreed with the Government, which had argued that Petitioner’s appeal was foreclosed by the terms of his plea agreement’s appeal waiver. *See* [App. A, at *3–5]. Without explanation of how the district court considered Petitioner’s relative role in causing the victims’ losses vis-à-vis the actions of other offenders, the circuit court concluded that the district court had “explained its *Paroline* analysis.” *Id.* at 5. The circuit court concluded that this case was different from *United States v. Winchel*, 896 F.3d 387 (5th Cir. 2018), and *United States v. Leal*, 933 F.3d 426 (5th Cir. 2021)—cases in which that court had “held that appellants’ appeal waivers did not apply to *Paroline*-based challenges to their restitution orders because such appeals fall within the statutory exception”—because in those cases “the district courts failed to conduct the requisite analysis altogether.” [App. A, at *4–5]. As a result, Petitioner’s appeal was dismissed by the court of appeals. *Id.* at *5.

REASONS FOR GRANTING THE PETITION

The courts of appeals have divided as to whether a defendant may avoid a waiver of appeal on the grounds that its enforcement would work a miscarriage of justice.

In *Paroline v. United States*, this Court concluded that restitution under 18 U.S.C. § 2259 is limited “to the extent the defendant’s offense proximately caused a victim’s losses.” 572 U.S. 434, 448 (2014). In applying this standard to cases involving child pornography, in which losses are “caused by the continuing traffic in those images,” the court concluded “it is impossible to trace a particular amount of those losses to the individual defendant by recourse to a more traditional causal inquiry.” *Id.* at 458. Thus, *Paroline* requires that a restitution order in these cases must be “in an amount that comports with the defendant’s relative role in the causal process that underlies the general losses.” *Id.*

This court has not prescribed a “precise algorithm for determining the proper restitution amount” in these cases; instead, it has described a set of “guideposts for determining an amount that fits the offense.” *Id.* at 459–60. These “guidepost” factors include:

- (1) The number of past criminal defendants found to have contributed to the victim’s general losses;
- (2) Reasonable predictions of the number of future offenders likely to be caught and convicted for crimes contributing to the victim’s general losses;
- (3) Any available and reasonably reliable estimate of the broader number of offenders involved . . . ;
- (4) Whether the defendant reproduced or distributed images of the victim;
- (5) Whether the defendant had any connection to the initial production of the images;
- (6) How many images of the victim the defendant possessed; and

(7) Other fact relevant to the defendant’s relative causal role.

Id. at 460. Although “[t]his approach is not without difficulties,” this process is essential to ensure that “[r]estitution orders . . . represent an ‘application of law,’ not ‘a decisionmaker’s caprice.’” *Id.* at 462.

Several of the Courts of Appeals have wrestled with what formal process of disaggregating victims’ losses between various offenders a district court must undergo before awarding restitution. *See United States v. Rothenberg*, 923 F.3d 1309, 1329–35 (11th Cir. 2019). The Fifth, Eighth, and Eleventh Circuits require the district court to conduct no formal disaggregation of loss before ordering restitution. *Id.* at 1133; *United States v. Halverson*, 897 F.3d 645, 654–55 n.4 (5th Cir. 2018); *United States v. Bordman*, 895 F.3d 1048, 1058–59 (8th Cir. 2018). Meanwhile, the Ninth and Tenth Circuits require district courts to formally disaggregate victim losses before awarding restitution against a particular defendant. *United States v. Galan*, 804 F.3d 1287 (5th Cir. 2015); *United States v. Dunn*, 777 F.3d 1171 (10th Cir. 2015).

Certainly, the question of whether disaggregation of losses prior to the restitution order is an open question among the sister circuits. This case presents a question within that issue—even *if* a district court is not required to formally disaggregate the victim’s losses between various offenders, does 18 U.S.C. § 2259 *at least* require that a district court to consider the magnitude of a defendant’s proximate cause of the defendant’s losses vis-à-vis those caused by other offenders.

Paroline answers that question in the affirmative, as the opinion repeatedly requires that a restitution order reflect not just that defendant’s actions but, rather,

the defendant's *relative* role in the causal process. "[A] court applying § 2259 should order restitution in an amount that comports with the *defendant's relative role* in the causal process that underlies the victim's general losses." *Paroline*, 572 U.S. at 458 (emphasis added). "A court must assess as best it can from available evidence the significance of the *individual defendant's conduct in light of the broader causal process* that produced the victim's losses." *Id.* at 459 (emphasis added). The court must "set an award of restitution in consideration of factors that bear on the *relative causal significance* of the defendant's conduct in producing those losses." *Id.* at 460 (emphasis added).

Probably because *Paroline* mandates so clearly that the defendant's *relative* role in causing the victim's losses, the courts below have only infrequently considered cases such as this, where the district court gave no consideration to defendant's role in causing victim losses in comparison to the actions of other offenders. However, when presented with the question, the courts of appeal seem agree that a district court disregards *Paroline* and §2259 when it orders restitution without consideration of the defendant's "relative role" in causing their losses. *See, e.g., United States v. Mobasseri*, 764 F. App'x 549, 550 (6th Cir. 2019) ("Under 18 U.S.C. § 2259, district courts must consider a number of factors before ordering restitution—including the defendant's 'relative role' in causing the victim's losses. Here, the district court ordered restitution without any explanation at all of the particular amounts it ordered. That was clear error."; *see also United States v. Goodin*, 815 F. App'x 860, 866 (6th Cir. 2020) "[T]his might be a different case had the district court completely

disregarded the core holding of *Paroline*, say, by ordering restitution equal to the entire amount of all the victims’ claimed losses”).

However, in the instant case, the court of appeals required no such consideration of Petitioner’s relative role in causing the victims’ losses. Instead, relying on a single statement in the sentencing hearing describing Petitioner’s “participat[ion] in live act distribution of child pornography that was over and above passive consumption,” [App. A, at *3], the court of appeals concluded that the district court “use[d] . . . discretion and sound judgment’ in fashioning a restitution order that it determined reflected Alfred’s causal role in the victim’s losses.” *Id.* at 5 (citing *Paroline*, 572 U.S. at 459). As a result, the circuit court concluded that the district court’s restitution order satisfied the statutory requirements of § 2259 as articulated in *Paroline* and, thus, was not subject to appellate review under the terms of Petitioner’s written appeal waiver.

Thus, the present case well presents a simple question underlying an issue that has divided the courts of appeals.

Alternatively, the opinion of the court of appeals runs afoul of the *Paroline*’s requirement that a district court’s restitution order reflect the defendant’s “relative causal role” in comparison to other offenders; Therefore, this petition should be granted, the opinion of the court of appeals be vacated, and the case be remanded for further consideration in light of *Paroline*.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit. Alternatively, Petitioner requests that the Court grant *certiorari*, vacate the decision of the court of appeals, and remand for further consideration of the issue in light of *Paroline*.

Respectfully submitted this 30th day of May, 2023.

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