

No. _____

In the
Supreme Court of the United States

George John Maslovar,
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

Whether a defendant's criminal history, the nature of images typically trafficked of a child pornography victim, or the amount of restitution collected by the victim inform the "proximate cause" analysis under *Paroline v. United States*, 572 U.S. 434 (2014).

PARTIES TO THE PROCEEDING

Petitioner is George John Maslovar, 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 George John Maslovar seeks a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals was not published but is available online at *United States v. Maslovar*, No. 22-10194, 2023 WL 2583430 (5th Cir. Mar. 21, 2023), and attached as Appendix A. The district court's judgment is attached as Appendix B.

JURISDICTION

The Fifth Circuit entered judgment on March 21, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. § 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.--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.

(3) 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.

(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) Definitions.--

(1) Child pornography production.--For purposes of this section and section 2259A, the term "child pornography production" means conduct proscribed by subsections (a)

through (c) of section 2251, section 2251A, section 2252A(g) (in cases in which the series of felony violations involves at least 1 of the violations listed in this subsection), section 2260(a), or any offense under chapter 109A or chapter 117 that involved the production of child pornography (as such term is defined in section 2256).

(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.

(3) Trafficking in child pornography.--For purposes of this section and section 2259A, the term "trafficking in child pornography" means conduct proscribed by section 2251(d), 2252, 2252A(a)(1) through (5), 2252A(g) (in cases in which the series of felony violations exclusively involves violations of section 2251(d), 2252, 2252A(a)(1) through (5), or 2260(b)), or 2260(b).

(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

Petitioner George John Maslovar pleaded guilty to possessing child pornography, in violation 18 U.S.C. §§ 2252A(a)(5)(B) & (b)(2). During its presentence investigation, probation found that Maslovar possessed one gif, one video, and 50 images depicting child pornography. The National Center for Exploited and Missing Children (NCMEC) identified one image of “Sarah” out of the 50 Maslovar possessed. The record contains no other details about this image of “Sarah.” The parties agree, however, that Maslovar played no role in the child pornography’s production.

Probation concluded that mandatory restitution under 18 U.S.C. § 2259(b)(2) applied. Through her attorney Carol L. Hepburn, “Sarah” submitted a victim impact letter requesting \$10,000 in restitution. Hepburn bolstered the request by citing three factors (among others): (1) of the 900 restitution awards of which “Sarah” received notice, only 562 offenders made any payments, some as little as four dollars; “Sarah’s” images were typically very graphic and sadistic; and Maslovar had a prior child sex abuse imagery conviction. As requested, probation recommended awarding the \$10,000 as restitution.

After Maslovar objected, the government advocated for the \$10,000 award by adopting Hepburn’s rationale in full. The district court ultimately reduced the \$10,000 recommended award to \$7,000. Even so, the court relied on Hepburn’s and the government’s reasoning to support the \$7,000. It specifically cited that: (1) only 562 of the 900 restitution orders resulted in payment so far, with some payments

totaling as little as four dollars; (2) “Sarah”’s images typically depicted graphic and sadistic abuse; and (3) Maslovar had a prior sexual abuse imagery conviction. The district court sentenced Maslovar to 136 months imprisonment and a lifetime term of supervised release. The court’s conditions of supervised release include making restitution payments of at least \$50 per month until paid in full.

Maslovar appealed and challenged the district court’s reliance on these factors as contrary to *Paroline* and irrelevant to proximate cause. Reviewing de novo, the Fifth Circuit found no error.

REASONS FOR GRANTING THIS PETITION

The Fifth Circuit decided an important federal question — the factors a district court may use to determine proximate cause for awarding mandatory restitution under 18 U.S.C. § 2259 — in a way that conflicts with *Paroline v. United States*, 572 U.S. 434 (2014).

Paroline rejected joint and several liability under 18 U.S.C. § 2259 for all harm done to a victim pictured in an image the defendant possessed. *Id.* 442–43, 460–61, 467–68 (Roberts, C.J., dissenting). Instead, courts must limit restitution to losses proximately caused by the defendant. *Id.* at 445. As for the amount to award, *Paroline* disclaimed a need for “a precise algorithm...at this point in the law’s development.” *Id.* at 459–60. Even so, the Court suggested fixing “the amount of the victim’s losses caused by the continuing traffic in the victim’s images” “as a starting point.” *Id.* at 460. “[F]actors that bear on the relative causal significance of the defendant’s conduct in producing” that victim’s “losses” could guide the sentencing court from there. *Id.*

Indeed, the Court specifically outlined six such factors, including “whether the defendant had any connection to the initial production of the images.” *Id.* But it reiterated that “facts relevant to the defendant’s relative causal role” remained the lodestar for the inquiry. *Id.* It also cautioned that “losses sustained as a result of the initial physical abuse” depicted in the pornographic images may give rise to “[c]omplexions” when determining “the aggregate losses...that stem from the ongoing traffic in [a victim’s] images as a whole.” *Id.* at 449.

The Ninth Circuit seized on this language to conclude that a court first just disaggregate harms from the initial abuse from harms resulting from the trafficking of images. *United States v. Galan*, 804 F.3d 1287, 1291 (9th Cir. 2015). The Eighth Circuit disagreed. *United States v. Bordman*, 895 F.3d 1048, 1059 (8th Cir. 2018) (“We note that one of the *Paroline* factors already accounts for disaggregation.”). Recently, the Eighth Circuit even questioned whether Congress resolved the interpretive dispute when it codified *Paroline*’s holding and added a \$3,000 restitution award minimum in 2018. *United States v. Clemens*, 990 F.3d 1127, 1130 n.1 (8th Cir. 2021); Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299, § 3, 132 Stat 4383. Still, there remains “no doubt” that “[t]he *Paroline* factors” still guide “whether a defendant’s ‘relative role in the causal process’ supports an award of more than \$3,000 under amended § 2259(b)(2)(B).” *Clemens*, 990 F.3d at 1130.

Yet the Fifth Circuit affirmed reliance on factors that depart from *Paroline* in fundamental ways. Consider first the attention paid to the fact that only some offenders ordered to pay restitution made payments towards their obligations, some as little as four dollars. These considerations do not inform the defendant's causal role, but rather the amount still owed to the victim — a variety of the joint and severally liability that *Paroline* rejected. 572 U.S. at 455–56. The Fifth Circuit also blessed considering the nature of the typically trafficked image of the victim. But the record here contained no evidence on the nature of the image that Maslovar possessed, and it is undisputed that he did not contribute to the production of “Sarah”’s images. “[D]efendants should be made liable for the consequences and gravity of their own conduct, not the conduct of others.” *Paroline*, 572 U.S. at 462. Indeed, the Ninth Circuit considered this tenet so fundamental to the decision that it held that *Paroline* required disaggregation of the losses caused by the initial abuse from those caused by the continued trafficking in the first instance. Yet the Fifth Circuit found no error even though the district court assessed restitution based on the general nature of the child pornography without tying the general nature back to Maslovar’s conduct. Finally, Maslovar’s criminal history has no relevance to Maslovar’s relative causal role for similar reasons — it is not tied to how his conduct harmed “Sarah.”

Admittedly, Maslovar presses a narrow issue for review. But the implications of a mandatory restitution award that effectively holds criminal defendants accountable for others’ conduct or increases the amount owed for purely punitive reasons

elevates the importance of the issue. This Court already recognized that since restitution “serves punitive purposes,” it implicates constitutional guarantees owed to criminal defendants. *Paroline*, 572 U.S. at 455–56; *see also Hughey v. United States*, 495 U.S. 411, 421 n.5 (1990) (“To order a defendant to make restitution to a victim of an offense for which the defendant was not convicted would be to deprive the defendant of property without due process of law” (quoting H.R. Rep. No. 98–1017, p. 83, n. 43 (1984))). But it still allows for the imposition of restitution obligations without the same constitutional safeguards as other forms of criminal punishment. *See, e.g., Hester v. United States*, 139 S. Ct. 509, 509–11 (2019) (Gorsuch, J., dissenting from the denial of certiorari); *United States v. Garza*, 429 F.3d 165, 170 (5th Cir. 2005) (“We agree with our sister Circuits, who have uniformly held that judicial fact-finding supporting restitution orders does not violate the Sixth Amendment.”); *United States v. Read*, 710 F.3d 219, 231 (5th Cir. 2012) (“*Apprendi* is inapposite because no statutory maximum applies to restitution” under 18 U.S.C. § 3663A). And sentencing courts exercise this authority. In fiscal year 2021, the “total amount of restitution ordered in individual cases was \$8,466,655,419.” U.S. Sentencing Comm’n, *Fiscal Year 2021 Overview of Federal Criminal Cases* 10 (Apr. 2022).

But according to recent data, \$26,129,231,438.80 in federal restitution remains outstanding. Exec. Office for U.S. Attorneys, *United States Attorneys’ Annual Statistical Report Fiscal Year 2022* 44. Indeed, “less than a tenth of the restitution awarded in federal criminal cases will ever be collected because of the defendants’ inability to pay.” Charles Doyle, *Restitution in Federal Criminal Cases: A Sketch* 1, Cong. Rsch.

Serv. No. RS22708 (Oct. 2019). Restitution debts nonetheless erect barriers to the exercise of fundamental rights. *See Johnson v. Bredesen*, 624 F.3d 742, 745, 747 (6th Cir. 2010) (upholding constitutionality of state re-enfranchisement statute disqualifying felons who have not paid all restitution owed). And if a court finds the failure to pay “willful,” outstanding restitution balances could lead to further imprisonment. *See Bearden v. Georgia*, 461 U.S. 660, 667–68 (1983); *United States v. Montgomery*, 532 F.3d 811, 814 (8th Cir. 2008) (finding no clear error in district court’s finding that Montgomery willfully failed to pay restitution even if she repeatedly attempted “to obtain employment” and “mental illnesses and physical problems” impacted “her ability to find and keep a job.”); Br. for Amicus Curiae Roderick & Solange MacArthur Justice Ctr. at 2–3, *United States v. Sensing*, 2023 WL 167201 (5th Cir. Jan. 12, 2023) (No. 21-60662), 2022 WL 717290, at *2-3 (describing federal district judge’s practice of ordering *sua sponte* hearings to discuss criminal restitution obligations during which the judge has ordered persons owing restitution “to raise money toward their restitution by failing to pay rent, selling their homes, liquidating retirement accounts—and sometimes even emptying their wallets right there in the courtroom”). The gravity of the possible consequences of a restitution award, the lack of constitutional protections applicable at its imposition, and its mandatory nature in certain cases (including this case) warrant this Court diligently enforcing the proximate cause limit in 18 U.S.C. § 2259.

CONCLUSION

For the reasons above, George John Maslovar respectfully submits that this Court should grant certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 20th day of June, 2023.

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