**SUPREME COURT OF THE UNITED STATES**
**October Term, 2022**

| | | |
|---|---|---|
| **CHRISTOPHER OCHOA,** | ) | |
| | ) | |
| **Petitioner,** | ) | |
| | ) | **NO.** |
| **vs.** | ) | |
| | ) | |
| **STATE OF MAINE,** | ) | |
| | ) | |
| **Respondent.** | ) | |

**MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

NOW COMES the Petitioner/Defendant, Christoper Ochoa, by counsel, pursuant to Supreme Court Rule 39, and requests leave to proceed *in forma pauperis*. In support this motion, Petitioner provides the following:

1. Petitioner stands convicted, following a plea agreement, of Conspiracy to Commit Bank Fraud in Violation of 18 U.S.C. § 1343 and 1349. A timely appeal was filed with the First Circuit Court of Appeals, which appeal was denied.

2. Petitioner is petitioning the Supreme Court for a Writ of Certiorari.

3. Petition has been found indigent on April 30, 2019 and undersigned counsel, Robert C. Andrews, Esq., was appointed in the Untied States District Court for the District of Maine under the CJA Act on that same day and remained counsel of record through the appeal in the United States Court of Appeals for the First Circuit. Attorney Andrews remains Mr. Ochoa's appointed counsel of record.

WHEREFORE, it is requested that Petitioner's motion for leave to proceed *in forma pauperis* be granted.

Dated at Portland, Maine on this 20th day of June 2023.

`

/s/ Robert C. Andrews
Robert C. Andrews, Esq.
Attorney for Chistoper Ochoa, Petitioner
Robert C. Andrews
91 Auburn Street Suite J PMB 1155
Portland, Maine 04103
(207) 879-9850

CERTIFICATE OF SERVICE

I, Robert C. Andrews, attorney for Petitioner Christoper Ochoa, hereby certify that I have caused, pursuant to Supreme Court Rule 39.2, one original of Petitioner's Motion for Leave to Proceed *In Forma Pauperis* to be served upon the following:

Clerk United States Supreme Court
1 First Street, NE
Washington, DC 20543

and one copy upon:

Mr. Benjamin Block, AUSA
United States Attorney's Office
100 Middle Street 6Th Floor
Portland Maine 04101

and

Solicitor General of the United States
United States Department of Justice
950 Pennsylvania Ave, NW
Washington D.C. 20530

Said Motion having been sent to the above addresses by first class mail, postage prepaid, this 20th day of June, 2023.

Robert C. Andrews, Esq.
Attorney for Christoper Ochoa,
Petitioner

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Portland, Maine 04103
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# Docket No:

UNITED STATES SUPREME COURT

United States,
Plaintiff-Respondent,

v.

CHRISTOPHER OCHOA,
Defendant-Petitioner.

On Petition for Writ of Certiorari
TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## STATEMENT OF THE QUESTIONS PRESENTED

1. Is the discretion to order joint and several liability in restitution orders under 18 U.S.C. § 3664(h) limited by each defendant casual role in the casual process that underlies the victim's losses, as articulated by the Court's holding in *Proline v United States*, 572 U.S. 434 (2014), when the amount of restitution so large it is unlikely to be paid by any single defendant?

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United States v. Christopher Ochoa No. 2:19-cr-00077-JAW, 2022 Docket Entry 219; and *United States v. Christpher Ochoa*, 58 F.4th 556 (1st Cir. 2023).

## JURISDICTIONAL STATEMENT

Review on Petition for Writ of Certiorari. The Petitioner makes this petition based on the jurisdiction conferred by Article III, Section 1 of the United States Constitution and Rule 10of the Supreme Court Rules. The Decision in the United States Court of Appeals for the First Circuit deals with an important federal question which conflicts with other decisions of the Supreme Court of the United States. This petition has been timely filed within 150 days from January 26, 2023.

Appellate Jurisdiction. The Petitioner takes this appeal as of right in a criminal prosecution under 28 U.S.C. § 1291 and the jurisdiction established by Federal Rule of Appellate Procedure 4. Pursuant to Fed. R. App. P. 4(b), the notice of appeal must be filed in the district court within 14 days after entry of the order or judgment appealed. The notice of appeal in this matter was timely filed on April 28, 2022.

Original Jurisdiction. The indictment in this matter resulted in a single conviction of the Defendant/Appellant with one count in violation of 18 U.S.C. § 1349. District Courts of the United States have original jurisdiction of all offenses against the laws of the United States. See 18 U.S.C. § 3231.

## PROVISIONS OF LAW

18 U.S.C. § 3664A(a)(1)

(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

18 U.S.C. § 3664(h) (West 2022)

(h) If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.

## STATEMENT OF FACTS

On February 11, 2022, Judge John A. Woodcock Jr. sentenced Christoper Ochoa to twenty-nine months to the Bureau of Prisons followed by three years of supervised release. Appendix *hereinafter* A at 19. At the sentencing, Judge Woodcock Deferred the restitution order until Mr. Ochoa could be heard. After briefing, Judge Woodcock issued an order on restitution requiring Mr. Ochoa to pay $3,473,701 in restitution to be joint and several with his co-defendants. Mr. Ochoa appealed.

## THE FACTS PRESENTED TO THE COURT OF APPEALS BY MR. OCHOA.

### The Offense Conduct

Christoper Ochoa, Herbert Caswell, Arthur Merson, and Russell Hearld formed a conspiracy to use standby letters of credit to defraud a series of investors who were promised large returns for their investments. Sealed Appendix *hereinafter* SA at 1-2. From no later than March 2017, until at least March 2018, Mr. Ochoa participated in a scheme to defraud involving investments in Standby Letters of Credit (SBLCs). Investors were promised that they could receive a portion of the value of an SBLC, worth millions of dollars, for a much smaller initial investment. Investors were promised returns equal to many times the amounts of their initial investments in a matter of weeks. They were also promised that their money would remain in the attorney trust account of Mr. Ochoa—who at the time was a licensed attorney in Florida— until confirmation was received that the SBLC had been issued. Appendix *hereinafter* A at 32.

Mr. Ochoa was involved in the creation of agreements governing the SBLC transactions that were provided to investors and was therefore aware of the representations that were made to investors regarding how their funds were to be handled. Contrary to these representations, Mr. Ochoa routinely withdrew investor funds as soon as they were deposited into his trust account, at the direction of a co-conspirator. For example, on March 29, 2017, an investor, identified in the Indictment as Victim B, wired $500,000 from his bank account in Maine to Ochoa's trust account in Florida. On the previous day, a co-conspirator had sent Ochoa an email, directing Ochoa to disburse Victim B's funds. At the co-conspirator's direction, Ochoa wired $200,000 to the co-conspirator's bank account; $150,000 to the account of Ochoa's law firm; $100,000 to the account of another co-conspirator; and $40,000 to Ochoa's personal account. A at 32-33.

Several other investors were similarly defrauded. For example, another investor, identified in the Indictment as Victim E, agreed to invest $1.25 million, and on May 8, 2017, wired the money to Ochoa's trust account. Later the same day, at a co-conspirator's direction Ochoa withdrew $900,000 from the trust account and wired the money to the co-conspirator. Ochoa relayed a variety of excuses from other members of the conspiracy for why the transactions described in the investor agreements had not occurred. Ochoa never told investors that their money was no longer in his trust account. None of the investors ever received repayment of any of their investment funds. A at 33.

**The Scheme Leader**

Herbert Caswell was an experienced and sophisticated criminal who used financial investment schemes to defraud victims out of millions of dollars long before he was referred to Mr. Ochoa. The summary of the Complaint in the United States District Court for the Eastern District of California Sacramento Division with Docket Number 20-cv-1184 TLN AC, which

names Mr. Caswell as a defendant, details what is described as an investment scheme that made Ponzi payments and issued false financial statements to cover up the fraud committed against 53 residents of the United States and 38 non-residents who were defrauded out of 14 million dollars. Counsel has attached the Docket Sheets and a Recommended Decision in that case as Exhibits A and B respectively. This scheme also used a lawyer, John P. Glenn, to facilitate the scheme and was entirely separate from the scheme resulting in this case. A at 36.

**The Relevant Conduct**

Mr. Ochoa, at the instruction and guidance of Mr. Hearld and Mr. Caswell, drafted agreements governing the SBLC transactions. Ochoa signed the agreements on behalf of the Caswell Group. Under the agreements, investors were to send their investment funds to the client trust account for the benefit of Caswell Group. The conspiracy made, and the written agreements contained, numerous representations. Specifically, investors were promised that their funds would remain in the Client Trust Account until receipt of documents associated with the SBLC had been confirmed. If Mr. Ochoa did not receive confirmation of the transmission of the documents, investors would be refunded the full amount of their initial investment. SA at 6.

Mr. Merson, who acted as an intermediary, would tell investors that they might lose out on future investment opportunities if they raised concerns or sought to have their funds returned. Merson also falsely claimed that he was merely an independent consultant, acting only to place clients with the principals involved in the SBLC transactions, that he only received a small finder's fee, and did not know the details of the transaction or the payouts clients could expect. In reality, Merson had agreements with Hearld/Ochoa and others to receive large payouts under the transactions and had detailed information about the expected proceeds. This information was confirmed via email correspondence amongst one another. Ochoa asserted he knew nothing

about Mr. Merson's and Mr. Hearld's agreement for proceeds and he did not have conversations about expected proceeds with Mr. Hearld. Mr. Ochoa did follow Mr. Hearld's directions about disbursement. SA at 7.

In reality, Mr. Ochoa did not maintain investors' funds in the client trust account, but used most of the money for his own and the remaining Fraud Organization's personal benefit. Ochoa transferred portions of the money to Mr. Caswell and Mr. Hearld. Mr. Hearld provided Mr. Merson with a portion of his funds. Investors never received any investment funds and lost all of their original investment monies. The Ochoa Fraud Organization provided investors with a variety of excuses for why the transactions described in the investor agreements had not occurred and claimed that the transactions would be completed imminently. Additional victims of the Ochoa Fraud Organization are identified in the chart below. All victims reported much the same communication with "investors" as reported by Wheaton. The details of their disbursement of funds are outlined via victim. Ochoa asserted he received $230,000 in total proceeds from the frauds. SA at 7.

**The District Court's Order**

Because the Court finds the imposition of joint and several liability is consistent with the Mandatory Victim Restitution Act's objective of making victims whole, the Court denies the defendant's request and orders the defendant jointly and severally liable for the full amount of the restitution along with the co-defendants who participated in the fraudulent scheme. The Court ordered Mr. Christoper Ochoa to pay restitution in the amount of $3,473,701, first to the five victims in the amounts of their losses, and then to the third party that partially compensated Victim B. Addendum at 19.

**THE FACTS FROM THE COURT OF APPEALS OPINION**

Beginning in March of 2017, the defendant — a lawyer formerly licensed in the state of Florida — and his co-conspirators orchestrated a scheme designed to defraud investors of millions of dollars. To execute the scheme, the conspirators (or intermediaries acting to their behoof) contacted prospective victims and induced them to invest in standby letters of credit. The conspirators pitched the investments as a win-win opportunity.

On the one hand, if the standby letters of credit were issued, the investors would reap huge returns within days or weeks (or so they were promised). On the other hand, if the standby letters of credit were not issued, the investors would not lose a dime (or so they were promised); each investor would simply receive a full refund of his initial investment.

Over the course of a few months, the conspirators convinced at least five people to invest substantial sums of money in the scheme. The defendant played a significant role in bilking the investors. At the direction of two of his co-conspirators (Russell Hearld and Herbert Caswell), he drafted agreements to memorialize the investments, delineate the handling of the investors' funds, and limn the terms of the transactions. Among other things, the agreements represented that investor funds would be held in escrow in the client trust account of the defendant's law firm unless and until the defendant received confirmation that a standby letter of credit had been issued.

Trusting that the drafted agreements said what they meant and meant what they said, each of the five investors wired funds to the defendant to be held in escrow. The defendant, though, did not retain the investors' money in his trust account. Instead, he quickly withdrew some funds for his personal use and disbursed other funds to his co-conspirators.

A few examples help to illustrate the defendant's role. On April 10, 2017, two investors wired a total of $1,500,000 to the defendant's trust account. That same day, the defendant

transferred $50,000 from the trust account to his personal account and $50,000 to his business account. In addition, he wired $750,000 to Hearld and $300,000 to Caswell's company. The next day, the defendant transferred another $10,000 to his personal account and transferred $200,000 to Hearld.

Essentially the same pattern was repeated a few weeks later after a different investor wired $1,250,000 to the trust account. Within hours, the defendant transferred $50,000 to his personal account and $10,000 to his business account. He also wired $900,000 to Hearld and $250,000 to Caswell.

The five victims of the fraudulent scheme invested a total of $3,550,000. Individual investments ranged from $50,000 to $1,500,000. After sending their money to the defendant, the investors were kept in the dark: no investor was informed by any of the conspirators (including the defendant) that any of his funds had been withdrawn from the trust account.

In point of fact, not a red cent of the investors' money was ever used to obtain standby letters of credit. Nor was any of that money ever refunded to any investor. The conspirators bought time by playing on the investors' fears. For instance, one of the conspirators (Arthur Merson) threatened the investors that they could be precluded from future investment opportunities if they sought the return of their funds.

## ARGUMENT

### I. The First Circuit failed to recognize the broader applicability of the rule in *Proline v United States*, 572 U.S. 434 (2014) when it declined to impose limits on joint and several liability for restitution in the amount of $3,473,701 in a fraud conspiracy instead of apportioning the amount to be paid based on Mr. Ochoa's role in the offense.

The Mandatory Victims Restitution Act requires the District Court to order the amount of

restitution to be paid to a victim of certain enumerated offenses. The fraud scheme in Mr. Ochoa's case is one of those enumerated offenses:

> The restitution order in this case is grounded upon the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663A. The MVRA requires a district court to order a defendant convicted of "an offense against property ... including any offense committed by fraud or deceit," 18 U.S.C. § 3663A(c)(1)(A)(ii), "to 'make restitution to the victim of the offense,' " United States v. Soto, 799 F.3d 68, 97 (1st Cir. 2015) (quoting 18 U.S.C. § 3663A(a)(1)). What is more, the MVRA requires the court to "order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant." United States v. Morán-Calderón, 780 F.3d 50, 51 (1st Cir. 2015) (quoting 18 U.S.C. § 3664(f)(1)(A)). This mandate is easy to apply when a defendant, acting alone, caused all of a victim's losses: in that event, the defendant must be ordered to pay the entire amount of the losses. See United States v. Yalincak, 30 F.4th 115, 121 (2d Cir. 2022). The situation is more nuanced, however, when — as in this case — more than one miscreant has contributed to the victims' losses. In that event, the MVRA gives the court a choice between two options. See United States v. Salas-Fernández, 620 F.3d 45, 49 (1st Cir. 2010). The court may "apportion liability among defendants according to culpability or capacity to pay, or, in the alternative, [may] make each defendant liable for the full amount of restitution by imposing joint and several liability." United States v. Wall, 349 F.3d 18, 26 (1st Cir. 2003); see 18 U.S.C. § 3664(h). In making this choice, a sentencing court enjoys broad discretion. See Morán-Calderón, 780 F.3d at 52; Salas-Fernández, 620 F.3d at 48-49.

*United States v. Christpher Ochoa*, 58 F.4th 556, 561 (1st Cir. 2023). The First Circuit fully understood the statutory landscape. The problem is the lack of any identified limit on the District Court's discretion to impose the full amount on an individual through joint several liability. While there is sound policy behind the idea that some amounts of restitution should be paid to victims as soon as possible without regard to who can pay. The policy behind joint and several diminishes once those amounts become impossible to pay in any reasonable amount of time if ever. Once the amount is so large that it is over the threshold of possibility, the Court should be looking to the rehabilitative effect of the amount and the need to make it possible to provide not just meaningful restitution but also meaningful rehabilitation.

Neither the District Court nor the Court of Appeals has been willing to find any limitation on the imposition of joint and several liability. The First Circuit articulated the breadth of the District Court's discretion:

> The short of it is that the court may weigh an individual defendant's role in the offense when deciding whether to apportion restitution — but it is generally free to decide the issue either way. See Salas-Fernández, 620 F.3d at 49-50. This freedom of choice is especially appropriate in conspiracy prosecutions. In that context, "it is well established that defendants can be required to pay restitution for the reasonably foreseeable offenses of their co-conspirators." United States v. Newell, 658 F.3d 1, 32 (1st Cir. 2011); see United States v. Collins, 209 F.3d 1, 4 (1st Cir. 1999). Put another way, under the MVRA, members of a conspiracy may be "held jointly and severally liable for all foreseeable losses within the scope of their conspiracy regardless of whether a specific loss is attributable to a particular conspirator." United States v. Moeser, 758 F.3d 793, 797 (7th Cir. 2014).

*Id*. The First Circuit's conclusion that the District Court was generally free to decide the issue either way ignores the very clear limits placed on the award of restitution to the victims of child pornography. Proline specifically adopted the very kind of limits that ought to be imposed in cases where the repayment of the total amount of restitution is very remote if not an impossibility. The more than three million in restitution ordered here is an amount that should qualify for a limitation.

The facts of each case are not a sound basis for imposing a limitation because ultimately the act is both mandatory and not based on the ability to pay. As the First Circuit held, there is nothing in this case that causes any concern of the amount:

> The court supportably found that the defendant played an instrumental part in the conspiracy: he took advantage of his position as a lawyer to entice investors to entrust him with their money; he drafted the agreements used to facilitate the scheme; he served as a de facto intake valve for the bilked funds; he falsely promised to hold those funds in escrow; and he siphoned off the money and disbursed it — in varying amounts — to himself and to his co-conspirators. And as the district court astutely noted, the defendant's actions created a facade of legitimacy that formed an essential part of the conspiracy. To be sure, the defendant received a smaller share of the booty than some of his co-conspirators. But his able counsel made that argument to the district court, which rejected it. Nothing in the record fairly suggests that we should second-guess the district court and disturb that quintessential exercise of its discretion.

*Id*., at 561-62. Categorical rejection of the argument seems premature. Especially, when this Court has articulated the value of restitution in the context of child pornography victims. While child pornography presents unique problems for imposing restitution, the solution has broader applicability in determining the amount to be paid amongst members of a conspiracy. The amounts imposed should retain the ability

to impress upon the defendant both the consequences of his actions and the impact of crime on real people.

The First Circuit was simply unwilling to consider this limitation in its review of the restitution order in this case. The First Circuit saw the limitations of Proline as too remote in the context of this case:

> The case at hand is at a far remove from Paroline. This case involves a fraud scheme in which there is nothing either atypical or difficult to trace about the causal nexus between the offense conduct and the investors' losses. Nor is there anything about the context that can fairly be described as "special": the defendant took part in a garden-variety fraud scheme in which he and his co-conspirators obtained millions of dollars from five individuals by hoodwinking them into pursuing a bogus investment opportunity. Apples should be compared with apples and — given the starkly different factual settings — we decline to transplant the reasoning of Paroline into the inhospitable soil of this case.

*Id*., at 562-63. The First Circuit joined the Third Circuit and the Fifth Circuit in refusing to apply Proline to orders of restitution that are not to victims of child pornography offenses. While the First Circuit recognized the principle it was asked to impose, it was unwilling to apply it generally to other restitution requirements. Mr. Ochoa asks this Court to apply the principle from Proline that fosters the rehabilitative qualities of restitution.

## II. The First Circuit's holding conflicts with this Court's decision in *Proline* because it disregarded the statutory requirement in 18 U.S.C. § 3664(h) that the restitution amount reflect the level of contribution to the victim's losses.

The Mandatory Victims Restitution Act provides the District Court with authority to order restitution for most crimes in violation of title 18 including the conspiracy to commit wire fraud in Mr. Ochoa's case. This authority does not require the Court to make Mr. Ochoa joint and severally liable for the total amount of loss:

> (h) If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each

defendant.

18 U.S.C. § 3664(h) (West 2022). In this case, there are four defendants, including Herbert Caswell, that will be required to pay restitution, and the District Court could have chosen to apportion the amounts that each of them is required to pay under the act. Because the victims cannot receive more than the total amount of loss, joint and several liability for the total amount would unfairly relieve some defendants from the obligation to pay restitution while requiring those who may be able to pay the substantial amounts of restitution to bear the burden without regard to their role or culpability. Mr. Ochoa asks the Court to apportion his restitution requirement to the amount of money he personally received from the proceeds of the fraud or $230,000.00.

Historically, the First Circuit has addressed apportionment only in the context of causation. While the First Circuit clearly established the discretion under 3664(h), it does so by having full joint and several liability follow causation:

> The uncontroverted evidence in the record does indeed suggest that Parisi may have been set up by Newell to take the fall for the Tribe's corrupt financial practices. Unfortunately for Parisi, however, it is well established that defendants can be required to pay restitution for the reasonably foreseeable offenses of their co-conspirators. *Collins,* 209 F.3d at 4. As we noted above, even if Parisi's role was as limited as he suggests—carrying out or transmitting Newell's orders—that is sufficient to support his conviction for conspiring with Newell to misapply federal funds. Since at some point the financial impropriety must have been glaringly obvious, and since there is no question that Parisi's co-conspirator, Newell, caused the transfers, Parisi's challenge to the inclusion of these amounts must be denied.

*United States v. Newell*, 658 F.3d 1, 32-33 (2011). The suggestion in *Newell*, that the challenged amounts must be denied favors the conclusion that the full amount-- joint and several restitution--requirement, was the product of foreseeability and but for causation. Since *Newell*, the law has changed, and restitution awards are no longer tethered to causation. While limited to its context,

*Proline v United States*, 572 U.S. 434 (2014) no longer required an award of restitution be based solely on causation. Mr. Ochoa asserts that this change significantly erodes the premise of *Newell*.

Without considering the implications of Newell, at least one Panel has suggested that there is no limitation on the District Court's discretion to choose between apportioned liability or Joint and several liability. Again, causation played a central role in the Panel's rejection of some limit on the choice:

> The premise on which this argument rests is patently incorrect. A sentencing court is not required to consider an individual's role in the offense when awarding restitution. *See United States v. Scott,* 270 F.3d 30, 52 (1st Cir.2001); *see also Tilcon Capaldi, Inc. v. Feldman,* 249 F.3d 54, 62 (1st Cir.2001). The court's objective should be to make the victim whole. *See Scott,* 270 F.3d at 53; *see also* 18 U.S.C. § 3664(f)(1)(A) ("In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court...."). Where, as here, more than one offender has contributed to the victim's loss, "the court may make each defendant liable for payment of the full amount of restitution." 18 U.S.C. § 3664(h).

*United States v. Salas-Fernandez*, 620 F.3d 45, 48-49 (2010). This pronouncement is at odds with The Supreme Court's adopted approach in *Proline v. United States*, 572 U.S. 434 (2014). The causation problem proved formidable in contexts where causation ceased to be traceable through a but for standard. *Proline's* solution was to adopt a standard that placed some restriction on the discretion to award restitution specifically limited to offenses involving the possession of child pornography. Mr. Ochoa asserts that this limitation has general application and should be adopted here.

Mr. Ochoa asserts that his requested restriction on the District Court's discretion has its basis on the definition of victim under the act. The act defines a victim as a "person directly and proximately harmed as a result of the commission of an offense for which restitution may be

ordered." 18 U.S.C. § 3663A(a)(2) (West 2022). Mr. Ochoa also asserts that the Court has weakened the force of any assertion that there is no restriction on the District Court's choice in *United States v. Alphas*:

> Mindful of this definition, we have held that, under the MVRA, a court may only order restitution for losses that have an adequate causal link to the defendant's criminal conduct. Importantly, we have made it pellucid that restitution should not be ordered if the loss would have occurred regardless of the defendant's misconduct. This means that the government must establish a but-for connection between the defendant's fraud and the victim's loss.

785 F.3d 775, 786 (2015) (Internal citations omitted and superseded on other grounds). When separated from the conviction, the conduct should drive the choice and not the foreseeability of the loss. Alphas weakens unfettered discretion in the choice just enough for this Court to consider the implications of *Proline* and its preference for apportioned restitution.

The problem with causation in conspiracies is that the loss is not caused by a single person or a single event. The Supreme Court has described this problem in the context of but for causation:

> This but-for requirement is part of the common understanding of cause. Consider a baseball game in which the visiting team's leadoff batter hits a home run in the top of the first inning. If the visiting team goes on to win by a score of 1 to 0, every person competent in the English language and familiar with the American pastime would agree that the victory resulted from the home run. This is so because it is natural to say that one event is the outcome or consequence of another when the former would not have occurred but for the latter. It is beside the point that the victory also resulted from a host of *other* necessary causes, such as skillful pitching, the coach's decision to put the leadoff batter in the lineup, and the league's decision to schedule the game. By contrast, it makes little sense to say that an event resulted from or was the outcome of some earlier action if the action merely played a nonessential contributing role in producing the event. If the visiting team wound up winning 5 to 2 rather than 1 to 0, one would be surprised to read in the sports page that the victory resulted from the leadoff batter's early, non-dispositive home run.

*Burrage v. United States*, 571 U.S. 204, 211-12 (2014). Like the 5 to 2 baseball game, the loss in

this case was not caused by anyone defendant. Herbert Caswell had been developing schemes for some time and not just with these defendants and received the largest portion of the fraud proceeds. Significant larger amounts of money went to Russell Herald when compared to Mr. Ochoa even if his role in the conspiracy has never been clearly articulated. Arthur Merson is responsible for recruiting victims. The point here is not that Mr. Ochoa's culpability was less significant, but rather that joint and several liability for the entire amount might relieve some of the burden of restitution even though their role is as significant if not more significant.

The Supreme Court has addressed this causation problem in the context of possession of child pornographic images by end users by removing the need for causation. While Proline was limited to end user child pornography cases, its reasoning should still be applied to 3664(h) apportionment cases:

> These alternative causal standards, though salutary when applied in a judicious manner, also can be taken too far. That is illustrated by the victim's suggested approach to applying § 2259 in cases like this. The victim says that under the strict logic of these alternative causal tests, each possessor of her images is a part of a causal set sufficient to produce her ongoing trauma, so each possessor should be treated as a cause in fact of all the trauma and all the attendant losses incurred as a result of the entire ongoing traffic in her images. *Id.,* at 43. And she argues that if this premise is accepted the further requirement of proximate causation poses no barrier, for she seeks restitution only for those losses that are the direct and foreseeable result of child-pornography offenses. Because the statute requires restitution for the "full amount of the victim's losses," including "any ... losses suffered by the victim as a proximate result of the offense," § 2259(b), she argues that restitution is required for the entire aggregately caused amount. The striking outcome of this reasoning—that each possessor of the victim's images would bear the consequences of the acts of the many thousands who possessed those images—illustrates why the Court has been reluctant to adopt aggregate causation logic in an incautious manner, especially in interpreting criminal statutes where there is no language expressly suggesting Congress intended that approach. See *Burrage,* 571 U.S., at ——, 134 S.Ct., at 890–891. Even if one were to refer just to the law of torts, it would be a major step to say there is a sufficient causal link between the injury and the wrong so that all the victim's general losses were "suffered ... as a proximate result of [Paroline's] offense," § 2259(b)(3)(F).

*Proline at* 452-53. The need to step away from traditional notions of causation is more apparent in cases of end user child pornography possession than it is in wire fraud cases involving direct participant defendants. That one defendant may end up being responsible for more of the burden then others without regard to role, ability to pay, or other notions of culpability is simply not resolved by joint and severable liability for the full amount of loss. Apportionment, on the other hand, does solve this problem and recognizes the rehabilitation policy that also justifies restitution.

By adopting the very language from 3664(h), Proline also recognized the rehabilitative policy behind restitution in criminal proceedings. This Court should implement a similar policy in this case with these defendants:

> In this special context, where it can be shown both that a defendant possessed a victim's images and that a victim has outstanding losses caused by the continuing traffic in those images but where it is impossible to trace a particular amount of those losses to the individual defendant by recourse to a more traditional causal inquiry, 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. The amount would not be severe in a case like this, given the nature of the causal connection between the conduct of a possessor like Paroline and the entirety of the victim's general losses from the trade in her images, which are the product of the acts of thousands of offenders. It would not, however, be a token or nominal amount. The required restitution would be a reasonable and circumscribed award imposed in recognition of the indisputable role of the offender in the causal process underlying the victim's losses and suited to the relative size of that causal role. This would serve the twin goals of helping the victim achieve eventual restitution for all her child-pornography losses and impressing upon offenders the fact that child-pornography crimes, even simple possession, affect real victims.

*Proline*, at 458-59. Apportionment in this case would implement restitution's rehabilitative policy that is simply not accomplished by the joint and several liability for the entire amount. For instance, Mr. Caswell may well have assets sufficient to cover the entire loss and collection of the loss and none of the other defendants would incur the rehabilitation behind restitution.

Unless the Court apportions the restitution amounts, the Court will have no way of ensuring that each defendant understands that his criminal conduct has a real effect on real victims.

Most recently, the First Circuit has reiterated the standard for determining restitution that among other requirements includes a nexus between conduct and loss that is neither too remote factually nor temporally. Apportionment better implements this nexus requirement:

> For the purpose of calculating restitution, actual loss is the beacon by which federal courts must steer. See id. In this context, actual loss is "limited to [the] pecuniary harm that would not have occurred but for the defendant's criminal activity." Id. (quoting United States v. Alphas, 785 F.3d 775, 786 (1st Cir. 2015)). This standard obligates the government to show both that the particular loss would not have occurred but for the conduct undergirding the offense of conviction and that a casual nexus exists between the loss and the conduct — a nexus that is neither too remote factually nor too remote temporally. See United States v. Cutter, 313 F.3d 1, 7 (1st Cir. 2002).

*United States v. Simon*, 12 F4th 1, 64 (2021). In this case, the strongest causal nexus that is neither too remote factual nor remote temporally is the direct loss caused by Mr. Ochoa's receipt of $230,000.00. Moreover, Mr. Ochoa has a restitution order from The Florida Bar proceeding requiring him to pay $1,250,000.00 to Mr. Wheaton and his companies. Apportionment is the only way to ensure that all the defendants understand their actions caused real harm.

## III. The United States Supreme Court should grant the Petition for a Writ of Certiorari to resolve the applicability of *Proline's* limitation on the discretion in imposing restitution

The Court should take this opportunity to clarify the applicability of the limitation on the of restitution for child pornography victims on the apportionment of restitution in the ordinary case. While the casual chain in child pornography cases makes restitution in such cases unique, that limitation as principle could have broad applicability in fostering the rehabilitative policy

behind restitution orders. Particularly in a case like this, where the losses are so high, that its rehabilitative effect is lost in such an overwhelming amount.

Moreover, this issue continues to cause challenges to the process in awarding restitution. As the Court of Appeals for the First Circuit pointed out both the third and Fifth Circuit have declines to apply the limitation from *Proline* outside of the child pornography context. While *Proline* is limited by its express terms, the principle ought not be so constrained. *Proline* also recognizes that restitution has rehabilitative goals and those should not be forgotten in the award of restitution in more straight forward and ordinary cases when the losses are as high as they are here.

## CONCLUSION

The Supreme Court Should review the conclusion of the United States Court of Appealsfor the First Circuit and Grant this petition for writ of certiorari.

Dated at Portland, Maine this 20th day of June 2023.

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