

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JESSYCA HOSKINS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,

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QUESTIONS PRESENTED FOR REVIEW

- I. Does this Court's decision in *Paroline v. United States*, 134 S. Ct. 1710 (2014), allow a court to abandon the traditional "but-for" causal analysis when determining the issue of proximate causation in child pornography cases that fall outside of the "special context" described therein?
- II. Did the *Paroline* decision affect the requirement that the amount of a victim's losses, including expenses for future counseling and psychological treatment, must be estimated with reasonable certainty to support an award of restitution?

LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

On November 29, 2017, the court of appeals entered its opinion and judgment affirming the district court's award of restitution in the amount of \$7,500 pursuant to 18 U.S.C. § 2259. *United States v. Hoskins*, 876 F.3d 942 (8th Cir. 2017). A copy of the opinion is attached at Appendix ("App.") A. Petitioner Jessyca Hoskins pleaded guilty to one count of distribution of child pornography in violation of 18 U.S.C. §§ 2252(a)(2) & (b)(1), and was sentenced on May 23, 2016 to 72 months imprisonment, 5 years of supervised release, a \$2,400 fine, and a \$100 special assessment. On August 10, 2016, a hearing was held on the issue of restitution, and on August 16, 2016, the district court entered its order imposing on Ms. Hoskins a restitution obligation in the amount of \$7,500. The district court's restitution order can be found at *United States v. Hoskins*, No. 5:15-CR-50045, 2016 WL 4408828 (W.D. Ark. Aug. 16, 2016), and it is attached at App. B.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 2017. On December 11, 2017, an order was entered granting Ms. Hoskins until December 27, 2017 to file a petition for rehearing. A petition for en banc and panel rehearing was timely filed on December 27, 2017. On January 19, 2018, an order was entered denying the petition for rehearing. This petition is timely submitted. Jurisdiction to review the judgment of the court of appeals is conferred upon this Court by 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The Petitioner refers this Honorable Court to the following statutory provisions:

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.**—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 as determined by the court pursuant to paragraph (2).

(2) **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.

(3) **Definition.**—For purposes of this subsection, the term “full amount of the victim's losses includes any costs incurred by the victim for—

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

(F) any other losses suffered by the victim as a proximate result of the offense.

(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) **Definition.**—For purposes of this section, the term “victim” means the individual harmed as a result of a commission of a crime under this chapter, including, 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, but in no event shall the defendant be named as such representative or guardian.

STATEMENT OF THE CASE

1. Jessyca Hoskins was named in a two-count indictment and forfeiture allegation filed in the Western District of Arkansas on July 22, 2015. The United States District Court for the Western District of Arkansas had subject-matter jurisdiction pursuant to 18 U.S.C. § 3231. Ms. Hoskins was charged in Count One with sexual exploitation of a minor in violation of 18 U.S.C. §§ 2251(a) & (e), and in Count Two with distribution of images of child pornography in violation of 18 U.S.C. §§ 2252(a)(2) & (b)(1). On September 29, 2015, Ms. Hoskins pleaded guilty to Count Two.

2. Through Ms. Hoskins, the 14-year-old minor victim in this case met a man named Jason Henry who engaged in sexual intercourse with her and prostituted her to multiple other adult men over the course of the weekend of March 20-22, 2015. Ms. Hoskins admitted that she took a 3-minute video of the victim while she engaged in sexual intercourse with one of these adult men, LaQuentin Jones, and that she then forwarded the video to another minor via private Facebook message. Based on this conduct, she pleaded guilty to the distribution count as referenced above. Ms. Hoskins did not participate in any hands-on physical abuse of the victim, and did not in any way profit from the prostitution of the victim or the distribution of the video.

3. On May 23, 2016, Ms. Hoskins was sentenced to 72 months imprisonment, 5 years of supervised release, a \$2,400 fine, and a \$100 special assessment, but the issue of victim restitution was deferred. On August 10, 2016, a hearing was held on the matter of restitution. On August 16, 2016, the court entered

its opinion and order awarding restitution to the victim in the amount of \$7,500. (App. B).

4. At sentencing, the victim's mother made a victim impact statement and was questioned by the court. The court inquired as to whether the victim's mother could parse out the harm to her daughter that resulted from the sexual assaults as opposed to the harm that resulted from the video being sent by Ms. Hoskins over a messaging service. The victim's mother responded that she "has nightmares of and really dislikes being videoed now." She also expressed concern about the possibility of the video having made its way onto "the dark web" and stated that there was "wide knowledge of the event at [the victim's] school," but indicated a lack of any specific knowledge of the video having been disseminated to anyone beyond the initial recipient who received it from Ms. Hoskins. She also stated of the existence of the video, "Basically it's kind of like having a memento of the event. I don't see it as being worse or better. To me it's just, it's all crap."

5. At the restitution hearing, certain documentation was presented and considered by the court which included invoices for counseling, clinical services, and in-patient treatment received by the victim. A written victim impact statement was submitted by the victim's mother which estimated \$28,700 in expenses and \$10,000 in future projected therapy costs. A letter was also submitted from a clinical social worker at a facility where the victim received treatment. This letter purported to estimate the cost of future treatment that would be necessary based on the victim

having been “lured into sex trafficking and forced to perform unspeakable acts.” The letter concluded that such treatment could cost over \$100,000 per year.

6. At the restitution hearing, the government indicated that existing case law provided no definite guidance as to how to address proximate cause or apportionment of responsibility under the particular facts of this case, and stated that the only authority that was “somewhat close” to addressing the issue was *Paroline v. United States*, 134 S. Ct. 1710 (2014), which involved the determination of restitution to be paid by a single individual who possessed images of child pornography which had been widely distributed. The government pointed to the expenses already incurred on behalf of the victim, and to the expected expense of future counseling to support its request for restitution in the amount of \$10,000. Counsel for the government explained that “[e]ssentially I did pick an arbitrary number, \$10,000, but it’s arbitrary and low.” Counsel further stated, “It’s hard to come up with an exact effect that this abuse had versus all the other abuse that this minor endured. So that is the best estimate that the government can provide as far as providing proximate cause.”

7. Counsel for Ms. Hopkins pointed to the arbitrariness of the requested amount of \$10,000 as an indication that the court could not make a reasoned, rational order of restitution in this case based on the evidence before it. Counsel argued that, based on the existing documentation, there was simply no way to be able to even calculate the total loss, much less to apportion it among those responsible to varying degrees for the harm. Counsel further discussed the lack of evidence in the record as

to the harm that was proximately caused by Ms. Hoskins's conduct in distributing the video, as contrasted with the clear evidence that the sex trafficking and sexual assault of the victim proximately caused her harm and loss.

8. In the district court's order awarding restitution, it acknowledged that the case before it was "not perfectly analogous" to *Paroline*, but found that it involved similar "questions of causation and allocation of responsibility between the defendant and several non-defendants." (App. 8a). The court found that "[t]he nature of the harm suffered by [the victim] is also similar to that of a victim in a typical *Paroline* case" because "everyone at [the victim]'s school knew about the incident, and knew that there was a video recording of it." (App. 8a-9a). Even though there was no evidence that the video had been distributed beyond the initial recipient, the court noted that the victim's mother "testified that she heard about some details of the video from people who had seen it" and concluded that "[t]he psychological effect on [the victim] is, no doubt, similar to that of victims whose images are widely reproduced." (App. 9a, 11a). Because of these similarities, the court found *Paroline* to be "highly instructive to [its] restitution analysis." (App. 9a).

9. The court set about estimating the victim's "full damages," which it found to include both past expenses and costs of future psychological treatment. (App. 9a-10a). The court found, "based in large part on [the victim]'s mother's victim impact statement and her in-court testimony, that [the victim] will require psychological treatment into the indefinite future." (App. 10a). In order to project the costs of such treatment, the court declined to rely on the letter from the social

worker after finding that the letter provided little information about the author's qualifications and did not reveal what sources the author used to estimate the costs of treatment. (*Id.*). The court noted that the records of medical expenses already incurred by the victim reflected a lower cost of treatment and found that these would provide a more accurate basis for estimating future costs. (*Id.*). The court estimated that the victim would incur at least \$40,000 in future psychological and related expenses, but stated that it considered this to be an extremely low estimate, noting that "15 years of outpatient therapy at a modest average of \$50 per week, for example, is \$39,000 alone." (*Id.*). Adding this figure to the amount of expenses the court found had already been incurred brought the victim's total damages to an estimated \$54,895. (*Id.*).

10. The court next applied *Paroline* to "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.*, quoting *Paroline*, 134 S. Ct. at 1727-28). The court recognized that "most of [the victim]'s damages were not proximately caused by Hoskins" but instead by the multiple men who had sexually exploited and assaulted her. (App. 10a). The court nonetheless found that Ms. Hoskins's conduct proximately caused some of the victim's loss and assessed restitution in the amount of \$7,500, noting that this amount "represents less than 15% of the \$54,895 in damages estimated by the Court." (App. 10a-11a). The court reiterated that it did not view the "less than 15%" and "\$54,895" figures "as exact inputs into a mathematical formula; rather, they are approximated benchmarks that

the Court has used in exercising its discretion to fashion a reasonable award of restitution.” (App. 11a).

11. Ms. Hoskins appealed the district court’s restitution order to the United States Court of Appeals for the Eighth Circuit. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, which gives it jurisdiction over all final decisions of the district courts of the United States.

12. Ms. Hoskins argued on appeal that the district court erred in relying on *Paroline* in its restitution analysis because her case was outside the “special context” in which the Court there allowed for the use of an alternative causal analysis. She argued that the traditional causal analysis should have been applied, under which she could not have been found to have proximately caused the losses that had been shown. Ms. Hoskins further argued that insufficient evidence had been presented to the district court to allow it to ascertain the amount of loss with reasonable certainty, noting especially the complete lack of expert medical testimony as to the amount of future psychological treatment that the victim would require. Ms Hoskins asserted that the court improperly downplayed the need for mathematical precision in determining the total loss amount based on a misinterpretation of *Paroline*. While *Paroline* calls for an initial determination of the total loss amount with reasonable certainty and then sets forth the factors which can be used as “rough guideposts” in determining what portion of the total amount to assess as restitution against a particular defendant, *see Paroline*, 134 S. Ct. at 1728, the district court viewed the

estimated amount of loss itself as a “rough guidepost” to assist it in determining the amount of restitution to be awarded.

13. The court of appeals affirmed the district court’s restitution award. (App. 6a). The appellate court found that the district court did not err in relying on the testimony of the victim’s mother and on its own basic knowledge of medical expenses to determine the amount of future medical expenses likely to be incurred, despite the lack of any reliable expert medical testimony as to how much and what kind of treatment the victim was likely to require. (App. 4a-5a). The Eighth Circuit also held that the evidence before the district court was sufficient to allow it to conclude that Ms. Hoskins’s offense conduct proximately caused some of the victim’s losses. (App. 5a-6a). The court of appeals approved the district court’s use of *Paroline* to assess the significance of Ms. Hoskins’s conduct “in light of the broader causal process that produced the victim’s losses.” (App. 6a, quoting *Paroline*, 134 S. Ct. at 1727-28). Ms. Hoskins filed a timely petition for rehearing which was denied on January 19, 2018. (App. 12a).

This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

In this case, the district court made an award of restitution in reliance on this Court’s decision in *Paroline v. United States*, 134 S. Ct. 1710 (2014), and the court of appeals affirmed. However, this case clearly falls outside the “special context” described in *Paroline*, and does not warrant application of the alternative causal test this Court authorized within that context. *Id.* at 1727. Certiorari is warranted to clarify that the default, “but for” test for factual and proximate causation should still be used by the district courts in child pornography cases that do not fit within the special parameters defined by the *Paroline* case, and that the *Paroline* decision did not relax the requirement that the amount of a victim’s losses be established with reasonable certainty.

A. Proximate Causation

In *Paroline*, this Court addressed the unique problem of how to properly determine restitution in a child pornography case involving possession of a victim’s images by a single defendant when the victim was experiencing ongoing loss and harm resulting from the wide distribution and continuing circulation of the images among thousands or tens of thousands of other non-defendants. The Court found that the applicable restitution statute, 18 U.S.C. § 2259, required a showing that the defendant’s conduct proximately caused the victim’s loss to support an award of restitution, but noted that “the somewhat atypical causal process underlying the [victim’s] losses” complicated the application of this causation requirement. *Id.* at 1722. In such a case, the Court identified a victim’s “general losses” as those “that

stem from the ongoing traffic in her images as a whole.” *Id.* “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” *Id.* In other words, the Court determined that proximate cause is required to support a restitution award under § 2259, but that in a case in which loss to the victim was caused by the aggregated actions of a great number of largely anonymous individuals, the traditional notion of proximate causation is problematic as applied to a single individual defendant who contributed to the loss.

The Court recognized that proximate causation requires factual causation (i.e., the defendant’s actions must have actually caused a certain result—in this case, loss to the victim). *Paroline*, 134 S. Ct. at 1719. The Court further recognized that “[t]he traditional way to prove that one event was a factual cause of another is to show that the latter would not have occurred ‘but for’ the former.” *Id.* at 1722. The Court conceded, however, that a showing of but-for causation could not be made in the case before it, because it could not be shown that the victim’s “trauma and attendant losses would have been any different but for Paroline’s offense.” *Id.* at 1722-23. However, because the possession of the images by all of the various actors in the aggregate was clearly the factual cause of the victim’s losses, the Court ultimately excused the lack of a showing of but-for causation as to each individual defendant. Rather than imposing liability on each individual defendant for the full amount of the victim’s

losses, though, the Court essentially settled on a sort of apportionment method of awarding restitution:

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.

Id. at 1727. The court went on to describe the various factors a court may wish to consider as “rough guideposts” in assessing the role an individual defendant played in the overall causal process and in determining the appropriate amount of an award of restitution. *Id.* at 1728.

Under the circumstances presented by *Paroline*, the requirement that the government prove but-for causation as to each individual possessor of the victim's images would have absolved all such possessors of responsibility for payment of restitution. Any individual possessor would have been able to assert the lack of but-for causation as a defense, and no one could be held responsible to pay restitution for the undisputed losses the victim suffered as the result of the ongoing circulation of her images. The Court recognized this as one of the circumstances justifying a resort to one of the “handful of less demanding causation tests” it discussed in *Paroline*. *See id.* at 1723 (“One prominent treatise suggests that ‘[w]hen the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, *and application of the but-for rule to them individually would absolve all of them*, the conduct of each is a cause in fact of the event.’”) (quoting

W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on the Law of Torts*, § 41, at 268 (5th ed. 1984)) (emphasis added). Although acknowledging “the availability of alternative causal standards where circumstances warrant,” the Court also recognized “the but-for test itself as a default,” and gave no indication of any intention to limit the general applicability of this default causal test in other cases. *Id.* at 1727. In other words, *Paroline* did not set forth a new approach to be employed any time a court encounters difficulty in determining the amount of loss caused by a particular defendant in every single child pornography case.

Before deciding to excuse a traditional showing of but-for causation within “this special context,” the Court warned that “[t]hese alternative causal tests are a kind of legal fiction or construct,” and that they, “though salutary when applied in a judicious manner, also can be taken too far.” *Paroline*, 134 S. Ct. at 1724. The Court also noted that “[c]omplications may arise in disaggregating losses sustained as a result of the initial physical abuse,” but that those questions were not implicated by the facts of the case before it. *Id.* at 1722. The Court likely did not anticipate that a lower court might use one of these “aggregate causation” theories it discussed to circumvent the complications presented by a case in which it was necessary to disaggregate losses sustained as a result of the initial physical abuse from losses caused by the distribution of images of that abuse.

That is, however, what happened in the instant case. Ms. Hoskins’s offense conduct was not shown to be the but-for cause of any of the victim’s losses. The victim still would have suffered the same loss (i.e., would have required the same past and

future psychological treatment) regardless of Ms. Hoskins's offense conduct. The evidence indicated only that the victim sought treatment related to the trauma resulting from the sexual exploitation and assault she suffered, and she would have required the same treatment even if the distribution of the video taken by Ms. Hoskins had never occurred. The evidence presented in this case provided no basis upon which to conclude that the victim would require treatment specifically relating to the distribution of the video. However, instead of applying the standard but-for causal test, the district court here found that proximate cause had been established because Ms. Hoskins's conduct had caused the victim some amount of harm in combination with the men who sexually exploited and assaulted her. The court made no attempt to disaggregate the loss sustained by the victim as the result of the physical abuse she suffered from any loss caused by the distribution of the video to another individual. Instead, the district court believed that *Paroline* justified simply accepting that proximate cause existed and turning to an analysis of Ms. Hoskins's relative role in the causal process. The Eighth Circuit affirmed this failure to disaggregate losses, putting it in conflict with a recent decision of the Ninth Circuit in which that court held that it was necessary to disaggregate losses caused by the original abuse of the victim from the losses caused by the ongoing distribution and possession of images of that original abuse in calculating an award of restitution. *See United States v. Galan*, 804 F.3d 1287, 1291 (9th Cir. 2015). To resolve this conflict, and to prevent such misuse of the *Paroline* decision by other courts in the future, this Court should grant certiorari.

B. Reasonable Certainty of Amount of Loss

Under the applicable restitution statutes, the government bears the burden of proving the amount of loss suffered by the victim. *See* 18 U.S.C. § 3664(e); 18 U.S.C. § 2259(b)(2) (citing § 3664). To meet its burden, “the government must provide the court with enough evidence to allow the court to estimate the ‘full amount of the victim’s losses’ with ‘some reasonable certainty.’” *United States v. Kennedy*, 643 F.3d 1251, 1261 (9th Cir. 2011) (quoting *United States v. Doe*, 488 F.3d 1154, 1159-60 (9th Cir. 2007)). While mathematical precision is not required, an award of restitution under § 2259 “will be improper if the district court must ‘engage in . . . arbitrary calculations’ to determine the amount of the victim’s losses.” *Id.* (quoting *United States v. Laney*, 189 F.3d 954, 967 n.14 (9th Cir. 1999)). Ms. Hoskins argued to the lower courts that the government failed to meet this burden.

The Eighth Circuit’s affirmance of the district court’s award of restitution in this case essentially rests on the conclusion that *Paroline* relaxed this requirement that losses be proved with reasonable certainty based on competent evidence. While several other circuits have affirmed restitution awards that included amounts for future psychological treatment, the instant case appears to be the first to do so without the benefit of any expert testimony. *See, e.g., Laney*, 189 F.3d at 966 (affirming an award of restitution for costs of future counseling services based in part on testimony from the victim’s psychiatrist that the necessary treatment would last six years); *Doe*, 488 F.3d at 1160-61 (affirming restitution for future counseling costs based on expert testimony from mental health professionals who determined that the

victims would require two years of psychological treatment); *United States v. Osman*, 853 F.3d 1184, 1190-92 (11th Cir. 2017) (affirming restitution for future counseling expenses based on expert testimony from a licensed counselor who specialized in work with child victims of sexual abuse and domestic violence as to the types and costs of treatment that the victim would likely require); *United States v. McDaniel*, 631 F.3d 1204, 1206-07 (11th Cir. 2011) (affirming restitution for costs of future therapy based on an evaluating psychologist who estimated that the victim would need future counseling costing between \$166,000 and \$188,000); *United States v. Palmer*, 643 F.3d 1060, 1063, 1068 (8th Cir. 2011) (affirming restitution award based on a clinical child psychologist's estimate as to the psychological treatment the victim would require over the course of her lifetime); *United States v. Danser*, 270 F.3d 451, 456 (7th Cir. 2001) (affirming restitution based on figures proffered by the victim's treating psychologist). Rather than require any expert testimony in this case, the court of appeals affirmed a restitution award based on the testimony of the victim's mother and the district court's own general familiarity with the costs of treatment. (App. 5a). The district court's decision to rely on its own estimation as to the amount and cost of treatment the victim might require was based on its reading of *Paroline* as requiring that it only needed to establish a "rough guidepost" to guide its analysis. This Court's decision in *Paroline* should not be used as a basis for this departure from the approach taken by other circuits on such an important matter.

Victim restitution in child pornography cases is an important issue that recently merited this Court's attention in *Paroline*. Now that the nation's courts have

begun applying the guidance of *Paroline*, it is incumbent upon this Court to ensure that the lower courts do not misapply and misuse that decision to relieve the government of its obligation to prove that a victim's losses actually resulted from the offense conduct of a particular defendant and to provide evidence adequate to support a reasonable estimation of losses. In cases in which the aggregated actions of a large number of unconnected individuals has been shown to be the cause in fact of ongoing loss to a victim, *Paroline* excuses the showing of factual causation as to each particular defendant in order to better effectuate the purposes of the restitution statute. That decision should not, however, be applied to justify awards of restitution in cases outside of this limited context in which the government has failed to meet its burden to produce sufficient competent evidence of the amount of loss suffered by the victim. This Court should accordingly grant certiorari in this case to provide needed direction to the lower courts as they continue to apply *Paroline*.

CONCLUSION

For all of the foregoing reasons, Petitioner Jessyca Hoskins respectfully requests that this Court grant the petition for a writ of certiorari, and accept this case for review.

DATED: this 19th day of April, 2018.

Respectfully submitted,

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