# Federal Criminal Restitution:

## Basic Steps and New S. Ct. Guidance

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# Overview: basic principles

- Statutory authority & criteria
- Most R orders are:
  - a separate, 20+ yr sentence
  - mandatory
- Criteria for victims and harms different than for GL economic loss or civil damages

# Main Statutory Provisions in Title 18

- ***§ 3663A(a)(2)***: Mandatory R; victims "directly and proximately" harmed; specified offenses (violence; property crime in title 18).

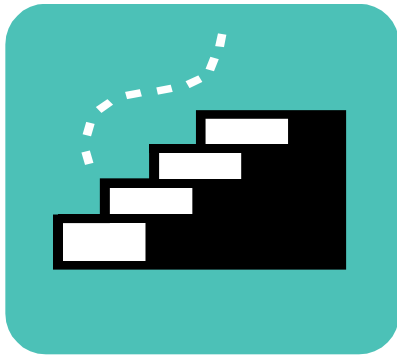
- ***§ 3663:*** "Discretionary" R (consider D's $ whether to impose; presumption for full R if impose; victims "directly & proximately" harmed; other title 18 offenses or drug offenses.

- ***§ 3664(f)(1):*** "In each order of restitution, the court *shall* order restitution to each victim in the *full amount of each victim's losses*" (w/o regard to defendant's $). **Applies to all R orders (§3556).**

# 4-STEPS in determining restitution:

- **Step 1** – ID the *offense of conviction* (OC)
- **Step 2** – ID the *victims* of the OC
- **Step 3** – ID the harms *caused* to the victims by the OC (that are *compensable)*
- **Step 4** – *Quantify* (measure) the harms

# Step 1: ID the Statutory Offense of Conviction (OC)

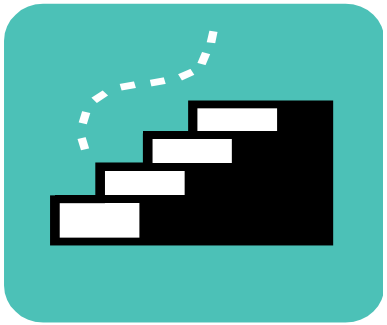


- The OC determines –
  1. IF the restitution is a separate *Sentence*

     [Yes, so long as the OC is covered by a restitution statute]
  2. IF the restitution is *Mandatory* or *Discretionary*

     [Depends on which statute the OC is covered by]
  3. The outer limits (scope) of the OC conduct for the remaining Steps 2-4

# Step 2: ID the Victims of the Offense of Conviction (OC)



Must be victims of the Defendant's offense of conviction -- not of related conduct, or acts by others.

"The loss caused by the conduct underlying the [OC] establishes the *outer limits* of a restitution order." Hughey v. U.S., 495 U.S. 411, 413 (1990) -- reaffirmed in 2014 in 3 cases.

Courts must specifically ID victims and their losses. Restitution authorized for offense "in which an *identifiable* victim or victims suffered a *physical injury or a pecuniary loss*." § 3663A(c)(1)(B).

# "Victim" defined:

**§ 3663, 3663A:**

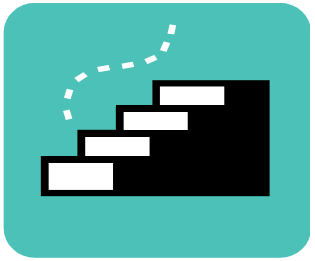
- Pre-MVRA: a "victim of the offense;" the offense "*resulted in*" damaged property of, or bodily injury to, the victim.
- MVRA (1996): A person "*directly and proximately harmed*" by the commission of the offense.

**§ 2259:**

- A person "harmed *as a result of* a commission of a crime under this chapter (sex crimes)" [1994: not changed by MVRA]

[In 2014 the Supreme Court held that all require the same standard of causation]

# Step 3: ID the *compensable* harms *caused* by the OC



## First Part of Step 3 – Causation

### A. Harm must be caused by the defendant's Offense Conduct

The victims were "*directly and proximately*" harmed by the offense (3663 and 3663A); "*harmed as a result of the commission*" of the offense (2259).

"The loss *caused* by the conduct underlying the [OC] establishes the outer limits of a restitution order." Hughey v. U.S., 495 U.S. 411, 413 (1990).

# Supreme Court on Causation

- Court rejected victim view that D should be responsible for the entire "aggregately caused" harm:
  - No indication Congress intended that approach;
  - Contrary to "bedrock principle that R should reflect the consequences of the D's own conduct (citing Hughey, 495 U.S. at 416 (1990);
  - Would not produce a proportionate result;
  - Ds responsible for the "consequences and gravity of their own conduct."
  - Court found statute requires **proximate cause**.

*Paroline v. U.S., 134 S.Ct. 1710 (2014).*

# Proximate Causation Analysis:

"Proximately caused" harms must meet 2 criteria:

a) factual causation: would not exist "but for" the defendant's offense conduct; AND

b) legal causation: was reasonably foreseeable to the defendant.

# Proximate Cause Affirmed by S. Ct.

- "When a crime requires not merely conduct but also a specified result of conduct, a defendant generally may not be convicted unless his conduct is both 1) the actual cause, and 2) the "legal" cause (often called the 'proximate cause') of the result."

- Statutory language that triggers proximate cause includes: "caused by," "resulting from," "as a result of," "incurred by," and similar terms.

*Burrage v. U.S., 134 S.Ct. 881, 887 (2014).*
(Also *Paroline v. US, 134 S.Ct. 1710 (2014)* (child porn), and *Robers v. US, 134 S.Ct. 1854 (2014)* (mortgage fraud)).

## SECOND PART OF STEP 3: COMPENSABILITY

**B. THE (CAUSED) HARM MUST ALSO BE *COMPENSABLE* AS RESTITUTION:**

**IT CAN EITHER BE:**

**-- listed** specifically in the statute, such as for bodily injury, or property loss, *or*

**-- unlisted** -- so long as it was proximately caused by the defendant's offense (reasonably foreseeable), such as victims' attorneys fees; clean-up costs, etc.

**AND**

## IT MUST BE A COMPENSABLE TYPE OF HARM:

**Restitution is only compensable for *ACTUAL LOSS to the victim.***

**Restitution is *Not* compensable for:**

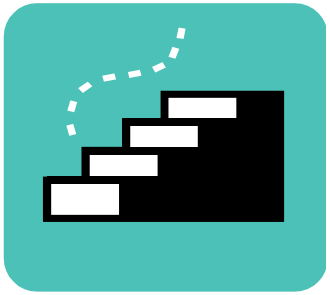
**intended loss, pain & suffering,**
**invasion of privacy, emotional distress, or**
**defendant's gain.**

**[Some exceptions apply where specified, such as use of defendant's gain for human trafficking, or the value of the victim's time for ID theft.]**

# 2014 Case: compensable costs of remedying intangible harms:

- D introduced counterfeit version of victim-company's drug into market;
- R upheld for costs to victim for remedying harm to its product & reputation, & for preventing harm to the public;
- Still tied to actual out-of-pocket costs; was not an estimation of intangible harm.
- *U.S. v. Shengyang Zhou, 717 F.3d 1139 (10th Cir. 2013).*

# Step 4: Quantifying the Harms



- Court must specify harms specifically;
- Must be supported by facts in the record;
- Cannot be based on generalized, speculative or "market harm" (e.g. copyright infringement cases);
- Statute has rules for *When* harms are measured, but not as clear on *How* to measure them (e.g. replacement; fair market value);
- General rule: restore the victim to pre-offense condition.

# S. Ct. Case on Mortgage Fraud: How to measure value of returned property

- The **value** of real estate collateral "returned" to the victim on a fraudulent mortgage loan =
- the **sale price** of the property at the ultimate foreclosure sale, not its fair market value at the time of the initial forfeiture.
- *Robers v. U.S., 134 S.Ct. 1710 (2014).*
- (Resolved circuit split on issue, but did not comment on other issues discussed in cases below.)

# Amount Resulting from the STEP-Analysis:

Restitution amount represents the "full amount of each victim's losses" § 3664(f)(1).

- Imposed in all mandatory restitution cases (§ 3663A and specific statutes);
- Presumptively imposed for "discretionary" restitution cases (§ 3663 or as a condition).

# Supreme Court describing the final restitution determination:

- "The resulting amount is the 'proximate result of the offense' … and thus the 'full amount' of such losses that should be awarded."
- The court should then set an appropriate payment schedule based on the defendant's financial resources.
- *Paroline v. U.S., 134 S.Ct. 1710, 1728 (2014).*

# The plea agreement may sometimes permit more restitution than otherwise authorized:

- § 3663(a)(3) - "to any extent;"
- § § 3663A(a)(3) & 3663(a)(1)(A) – to "other than the victim" of the offense.

► *Must be very specific.*

# Victims Rights Under the 2004 CVRA (18 U.S.C. § 3771):

- A "crime victim" is a person "directly and proximately harmed" as a result of the offense.
- Victims have the Right to:
  - Notice; To be present;
  - To be "*reasonably heard at any public proceeding*" regarding the case;
  - To *"full and timely restitution as provided by law;"*

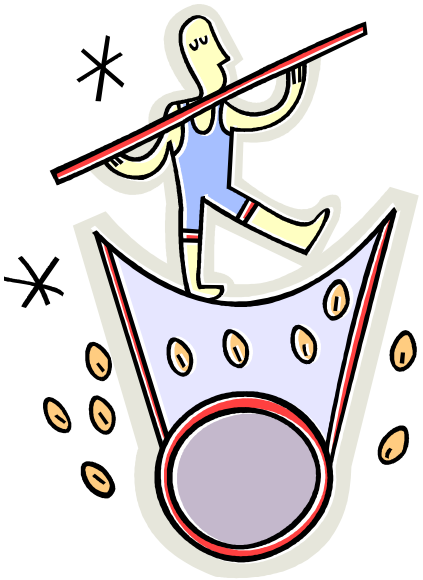
## *Victims' CVRA Rights (continued):*

- To *"reasonably confer"* with the prosecutor;
- To be free from *"unreasonable delay"* in proceedings;
- To file a 72-hour mandamus appeal if the court denies any of these rights (at any time in the case).

# Restitution in Cases Involving the Possession of Child Pornography:

- 100's of cases; awards range from 0 - $3+ million; mean = $15,000; median = $3,000;
- June 2009 - Dec 31, 2013, one victim (Amy) obtained 182 R orders (161 were between $1,000 and $530,000)
- Issue: Does §2259 *"as a result of"* (rather than *"directly and proximately harmed*") require proximate cause? Or is it a lower standard requiring each D to be liable for total aggregated harm to the victim by the (larger) child porn offense?
- 5th Cir – No prox cause; total aggregated harm possible; all other circuits – Prox cause; some R, some zero R.

# Restitution and CP Possession Cases: the 4 - Steps (Mis)Applied:



1. They omit step 1 (which would narrow scope of conduct to D's OC)
2. They begin with victims (step 2), against very broad OC background
3. Ultimately they have to narrow to D's conduct at: a) causation, or b) quantification, stages.

# *Summary of Paroline v. US, 134 S.Ct. 1710 (2014):*

- S. Ct. decided circuit split against the 5th Circuit.
- Result of 5-Justice majority = middle ground between all or nothing R; statute requires proximate cause and some restitution.
- Aggregated harm approach of victim/govt too extreme and inappropriate for criminal law.
- Court offers own "relative" aggregated harm approach with guiding "factors."

# Paroline case continued:

- Proximate cause required in 2259;
- More difficult issue: factual causation ("but for") – is it possible to determine what harm was caused by the D's viewing of the victim's images?
- Court rejects no R result;
- But also rejects "aggregate cause" theory as substitute for "but for;"
- Suggests courts use this rule: order R amount that "comports with the D's *relative role* in the *causal process* that underlies the *victim's general losses*."
- Suggests "factors" to determine specific amount.

# The Paroline "Factors"

- "# of past criminal defendants;
- Prediction of # of future defendants;
- Reasonable estimate of broader # involved;
- Whether D reproduced or distributed images;
- Whether D had any connection to the initial production of the images;
- # of images of victim D possessed;
- Other facts relevant to defendant's relative causal role."

** *Are these helpful? Specific enough? Problems?*

# Paroline shortcomings

- **Vague factors** & reliance on court "discretion" =
  - Limited guidance on specifics
  - Possible (probable?) trivial/nominal results
  - Generate much further litigation on applying the "factors"
- No guidance re **quantity** to start with or to assign per defendant, person, or image;
- Is greater # people involved good or bad for D?
- Suggests better if harms **tied to D's case** and suggests comparison to R awards in other cases;
- Limited precedence of rule and factors to other cases b/c of "**atypical causal process"** of the cases.

# Paroline benefits

- Settles **Proximate Cause** issue;
- All Justices agree there should be **no nominal or token R** amounts imposed;
- Reaffirms **basic restitution principles** in Hughey v. US, e.g. R is only authorized for harms caused by D's conduct;
- Affirms **compensatory and punitive** "twin goals" of restitution;
- Rejects imposing R beyond D's conduct;
- Warns if R extreme, could be subject to 8th Amendment Excessive Fines challenge;
- All Justices see problems with statute – could lead to legislative amendment esp if the results are nominal awards and/or prolific litigation.

# Other considerations:

- Safest award: harm done to the victim by her knowledge of the case, such as post-offense counseling (e.g. U.S. v. McDaniel, 631 F.3d 1204 (11th Cir. 2011).
- Not yet addressed: victim participation expenses as an additional form of R: no causation criteria, are specifically listed in §§ 3663(b)(4) and 3663A(b)(4). *See, e.g., U.S. v. Amato, 540 F.3d 153 (2d Cir. 2008).*
- Court might also impose a Fine.
- Victims: Tie to D's conduct; seek participation expenses; seek statutory minimum.

# Congressional Help Still Needed

- All 9 Justices in Paroline see problems with current statute
- 3 Dissenters: “The statute as written allows no recovery. We ought to say so, & give Congress a chance to fix it.”
- Ideas offered by some courts:
  - Specific restitution criteria in the statute, such as for human trafficking, drug labs, ID theft;
  - Statutory damages (e.g. civil damages in 2252);
  - Fines diverted to special fund for CP victims;
  - Directives to Commission to establish a restitution schedule; establish restitution range.

# Apprendi issue re-ignited?

- In 2012 Supreme Court held fines are subject to the Apprendi doctrine requiring jury finding:

  *Southern Union v. U.S., 132 S.Ct. 2344 (2012).*

- Being litigated re restitution now.
- So far, courts still hold restitution not subject to Apprendi because: a) it is primarily compensatory rather than punitive, and b) it has no statutory maximum.
- ??? Stay tuned.

# Important Cases:

- Burrage v. US, 134 S.Ct. 881 (2014) (causation)
- Paroline v. US, 134 S.Ct. 1710 (2014) (child porn)
- Robers v. US, 134 S.Ct. 1854 (2014) (mortgage fraud)
- Southern Union v. US, 132 S.Ct. 2344 (2012)
  (fines subject to Apprendi)
- US v. Lundquist, 731 F.3d 124 (2d Cir. 2013)
  (victim's claims tied to D's child porn offense)
- US v. Shengyxang Zhou, 717 F.3d 1139 (10th Cir. 2013)
  (R OK for remedying harm to reputation and to protect public)