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August 17, 2009

Mr. David J. Maland
Clerk
United States District Court
106 William M. Steger Federal Building
  and United States Courthouse
211 West Ferguson Street
Tyler, TX 75702

Dear Mr. Maland:

I am responding to your inquiry concerning a restitution request under 18 U.S.C. § 2259 by James Marsh, an attorney for an alleged victim depicted in child pornography that was distributed approximately ten years ago. Mr. Marsh has filed restitution requests similar to this one in approximately thirty judicial districts. He made each request after he identified defendants who were potentially liable to pay restitution because they had downloaded his client's image and were thereafter convicted of pornography possession offenses. While Mr. Marsh has advanced on his client's behalf restitution requests seeking to have all defendants convicted of possessing the pornography to be declared jointly and severally liable with the original pornography distributor, the government has declined to endorse Mr. Marsh's position. If Mr. Marsh prevails, an attempt to frame the type of order he seeks would involve duplicative fact-finding in multiple districts involving the same victim and similar crimes. Managing such restitution awards would prove onerous. In light of these obstacles, you ask whether (1) joint and several liability may be imposed against offenders in multiple districts as Mr. Marsh proposed; (2) there are measures that could assist clerks in administering multiple joint and several liability in diverse districts; (3) transfer to one venue for coordinated fact-finding is possible in order to minimize duplicative effort; and (4) 18 U.S.C. § 2259 precludes the sort of global open-ended restitution awards that Mr. Marsh requests on behalf of his client.[1]

1. Joint and Several Liability Under 18 U.S.C. § 2259

Section 2259 does not expressly authorize apportionment and joint and several liability, but it does incorporate all general restitution provisions in 18 U.S.C. § 3664.[2]

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[1]On June 10, 2009, District Judge Leonard Davis ordered all parties to submit briefs concerning a variety of issues involving the restitution request addressed to defendant Doyle Randall Paroline. The court also invited any other party, including the Administrative Office of the United States Courts ("AO"), to file briefs in the case. 28 U.S.C. § 607 provides that "[a]n officer or employee of the Administrative Office shall not engage directly or indirectly in the practice of law in any court of the United States." This precludes me from filing a brief, but I may provide you with legal advice that may coincidentally be beneficial to the court. My legal advice simply represents my judgment concerning statutory and case law authority. This letter hereafter refers to the arguments of the victim advocacy groups that have filed briefs in this matter as "the victim's advocates."

[2]Section 2259 states:

> **(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;

Section 3664(h) of the Mandatory Victim Restitution Act[3] ("MVRA") provides that "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). This subsection does not directly refer to "joint and several liability,"[4] but integrates that

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> **(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.

18 U.S.C. § 2259 (emphasis added).

[3]Title II, subtitle A of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1227 (April 24, 1996).

[4]The concept of "joint and several liability" is a common law doctrine that,

> refers to the liability of multiple wrongdoers (typically, for torts). It means that damages are a single sum specified in the judgment, that each wrongdoer is liable for the full amount, but the wronged party cannot collect under the judgment *more* than the single sum. *Restatement (Third) of Torts* § 20 & cmt. b (Proposed Final Draft (Revised) 1999).

doctrine by giving courts the option of making each defendant who inflicted compensable harm liable for the full amount of restitution.

The legislative history of § 3664(h) also notes that Congress intended to "give[] the court[s] the discretion either to make multiple defendants jointly and severally liable . . . or to apportion the restitution order among the various defendants." S. Rep. No. 104-179, at 15 (1996). This reference to joint and several liability in the Senate Report was not expressly incorporated into the MVRA, but the "joint and several" objective is implicit in the statute – § 3664(h) simply requires that the court make each defendant liable for the full amount of the restitution debt or apportion the debt among the defendants. Thus, making each defendant liable for the full amount of the victims' losses in the judgment for the same or related cases is the functional equivalent to invoking the common law "joint and several" language.

In sum, § 2259's incorporation of § 3664 by reference authorizes the imposition of joint and several liability.

2. Practical Problems and Solutions Concerning Joint and Several Liability

Form AO245B, the criminal judgment form, contemplates that a court will have complete information concerning all defendant debtors and victims at sentencing. However, restitution obligations are not always apparent at a single point in time. For example, defendants convicted in separate cases who participated in related offenses are responsible for the same foreseeable loss to the victim. A judge conducting the initial sentencing of one defendant may be unaware of the identity or existence of the other potential debtors who will be sentenced later. The judge therefore would not appreciate the need to enter a "joint and several" order that would account for all debtors who would be bound in future judgments. Likewise, the government may be unaware when the first offender is convicted that others are equally culpable and responsible for the same restitution debt. One way to address this problem is to include language in each restitution order that ensures that separate orders considered together have the same legal effect as a consolidated joint and several order.

To enhance the likelihood that related restitution orders in different cases could support an interpretation that they may have the same effect as a single restitution order consolidating all debtors in a joint and several obligation, courts could include language in the restitution order stating that "the victim['s] recovery is limited to the amount of

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Tilcon Capaldi, Inc. v. Feldman, 249 F.3d 54, 62-63 (1st Cir. 2001).

[her] loss and the defendant's liability for restitution ceases if and when the victim[] receive[s] full restitution." *See United States v. Nucci*, 364 F.3d 419, 422 n.3 (2d Cir. 2004) (proposing this express limitation precluding recovery by victim that exceeds loss when joint and several liability is imposed); *see also United States v. Scott*, 270 F.3d 30, 52-53 (1st Cir. 2001) ("If the defendants are each made liable for the full amount, but the victim may recover no more than the total loss, the implication is that each defendant's liability ends when the victim is made whole, regardless of the actual contributions of individual defendants."). Such language would allow the court to obligate each defendant to pay the full amount of the debt notwithstanding that the identity of all debtors might be unknown when the first restitution order is entered. It would also allow in different cases for relatively easy implementation of seemingly contradictory restitution orders that apportion different obligations to different defendants. For example, assume a court enters a restitution order in 2008 against defendant A for the entire victim loss of $200,000. In 2009, two more defendants, B and C, are indicted and ordered to pay $80,000 and $40,000, respectively, towards the same loss. The statutory language requiring the first defendant to pay the full amount of the $200,000 restitution debt, combined with the language that the Second Circuit suggested in *Nucci*, would allow an interpretation of the orders that would make all the defendants jointly and severally liable for the $200,000. Defendant B would have to pay until he contributed his $80,000 or defendant A and/or defendant C (up to his $40,000 obligation) satisfied the $200,000. Defendant C would be obliged up to $40,000, but he would pay only a portion of that amount (or nothing) if defendant A and/or defendant B (up to his $80,000 obligation) paid off the entire debt before defendant C contributed. *See Scott*, 270 F.3d at 52-53; *see also United States v. Trigg*, 119 F.3d 500-01 & n.6 (7th Cir. 1997) (interpreting a pre-MVRA version of the restitution statute; noting that the MVRA had made the authority to impose joint and several liability broader than the pre-MVRA statute).

In addition to allowing enforcement as one joint and several order, the suggested language avoids the sort of ambiguity that could lead to recovery by a victim that exceeds her loss or payment by a debtor after other debtors have satisfied the total restitution amount. Given that full recovery on restitution orders is rarely achieved, the chance that a victim will realize a windfall double recovery is small. Nonetheless, it is a theoretical risk when multiple defendants in different cases are ordered to pay full restitution, as opposed to a single "joint and several" order accounting for the entire debt and all debtors. Careful drafting of restitution orders is required because the MVRA does not explicitly prevent double-recovery in the criminal context, nor does it terminate a defendant's restitution obligation upon payment of the victim's losses by other defendants responsible for the same loss. *Nucci*, 364 F.3d at 423. Rather, it simply prevents overpayment when a victim is later compensated in a "civil" proceeding. *See* 18 U.S.C. § 3664(j)(2).

Despite the absence of an explicit statutory bar against orders that could result in restitution windfalls, courts generally abide by common law constraints against double recovery when joint and several liability is imposed. The Second Circuit noted in *Nucci* that it based its holding,

> on the common law background against which Congress is presumed to legislate. At common law, joint and several liability does not permit double recovery. As we have held, "[t]he effect of joint liability in a tort context is to excuse one defendant from paying any portion of the judgment if the plaintiff collects the full amount from the other." Because reading the statute to provide recovery in excess of the amount of the loss would be in derogation of the common law, Congress would have to speak clearly and unequivocally to authorize it. Congress has not done so here; accordingly, we apply the common law rule.
>
> The situation presented in this case, where one defendant was ordered to pay the full loss from five burglaries after his co-defendants had been ordered to pay restitution for some but not all of the burglaries, is but a variation on the same general theme of no double recovery upon orders of joint and several liability. While the district judge could have made it clearer in her restitution order that a given victim would not be allowed to receive compensation in excess of his loss, and probably should have in order to remove the question from all doubt, we will not find error for any failure to do so because, in any event, absent a statutory command, there is no legal basis to permit an award that allows a victim to recover more than his due. We read the First Circuit's decision in *United States v. Scott* as following essentially the same reasoning.
>
> The district court's decision to hold Nucci accountable for the entire $34,476 is in accordance with the MVRA' rules regarding apportionment of liability. Accordingly, we . . . hold that a district court does not commit error by failing to state explicitly that a victim's recovery shall be limited to the amount of its loss.

Nucci, 364 F.3d at 423-24 (citations omitted).

Applying the approach that the Second Circuit discussed in *Nucci* would simplify the implementation of separate, but related, restitution orders. This procedure, however, does not diminish the administrative burden on the Clerk's Office to insure that all debt payments are accurately accounted for to prevent overpayment. The most practical way for clerks to simplify their responsibilities would be to confer with the U.S. Attorney's Office, which has the investigative resources to identify all those responsible for the loss and all victims, and the U.S. Probation Office, which is responsible for a complete accounting of the losses to each victim, identification of plea agreement provisions concerning restitution, and provision of notice to all identified victims. 18 U.S.C. § 3664(a), (d)(1) & (2). Both the Probation Office and the U.S. Attorney's Office are responsible for maximizing debt collection, so each has a stake in cooperating in your administration of the debts.

To my knowledge, however, it would be highly impractical if not impossible for a clerk to track debt payments in multiple jurisdictions over an extended period of time to insure that a § 2259 victim does not receive windfall restitution payments. Clerks would be unaware of subsequent convictions that result in new joint and several orders. One way of addressing this uncertainty would be for the court to shift the burden of insuring against double recovery to one of the parties. Section 3664(e) imposes the burden of demonstrating the amount of loss on the government, but it also provides that "[t]he burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires." 18 U.S.C. § 3664(e). If the government proposes joint and several restitution in cases of this sort, it seems that justice may require that the government demonstrate how it will ensure that windfall recoveries will not ensue.[5]

Of course, this discussion is in all likelihood academic. To my knowledge, the government has never promoted § 2259 restitution orders in pornography possession cases of this type. Courts may be unlikely to enter such orders because it may be impossible to establish a causal relationship between the crime of possession and the victim's loss.

3. Coordinated Restitution Fact Finding in One Venue

Because the victim's counsel has made restitution requests on behalf of the same victim in multiple jurisdictions, fact-finding in each case will involve common issues and

[5]The Crime Victims' Rights statute, 18 U.S.C. § 3771, requires the government to use its best efforts to see that victims are accorded their rights, including the "right to full and timely restitution as provided in law." The government's reluctance to advance Mr. Marsh's and the victim's advocates' position suggests that it believes that alleged victims depicted in pornography possession cases have no legal right to restitution under present law.

the potential of inconsistent resolutions. To avoid an apparent inefficient duplication of effort, you ask whether courts in different districts could transfer the restitution component of the criminal sentences to a single venue that would resolve factual and legal issues common to all cases. The example you have in mind is the Judicial Panel on Multidistrict Litigation's ("JPML") authority to transfer pretrial proceedings in civil actions. Such transfers in civil cases under 28 U.S.C. § 1407 place all similar actions before a single judge who develops a pretrial plan that allows discovery regarding any noncommon issues to proceed concurrently with discovery on common issues.[6] This procedure enhances the likelihood that pretrial proceedings will lead to just and expeditious resolution of all actions that will generally benefit all parties. *See In re Vioxx Products Liability Litigation,* 360 F. Supp. 2d 1352 (J.P.M.L. 2005).

Notwithstanding its efficiency, such consolidated factual and legal determinations are precluded by the Constitution and Rule 18 of the Federal Rules of Criminal Procedure. Rule 18's restrictive venue requirement would preclude transfer and consolidation of related restitution proceedings to a single district. Rule 18 states:

> Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice.

Fed. R. Crim. P. 18. While no court has definitively held that Rule 18 governs the venue for sentencings or the restitution component of a criminal sentence, no other rule or statute could conceivably apply, and the U.S. Supreme Court observed, in *Bradley v. United States*, 410 U.S. 605, 609-11 (1973), that "sentencing is part of the prosecution." *See also United States v. Avants*, 367 F.3d 433, 451-52 (5th Cir. 2004) (recognizing that Rule 18 likely applies in this context; holding that the Rule 52(a) harmless error rule, however, precluded reversal of a district judge's decision to conduct sentencing in the Northern District of Texas rather than the Southern District of Mississippi, which was the appropriate venue). Rule 18 authorizes a change of venue if a statute or the Federal Rules of Criminal Procedure permit, but no rule or statute authorizes such a change under these

[6] 28 U.S.C. § 1407 authorizes the JPML to transfer and consolidate pretrial proceedings and the plaintiff's choice of forum when (1) one or more common questions of fact are pending in different districts, (2) a transfer would serve the convenience of parties and witnesses, and (3) a transfer would promote the just and efficient conduct of the actions.

circumstances. The only authorization for a sentencing hearing venue change is contained in Rule 20 ("Transfer for Plea and Sentence"), which authorizes a plea and sentencing to occur in a district other than the one in which the defendant was indicted. This rule applies, however, only when *both* the plea and sentencing occur in a district other than the one where the indictment or information is pending. *See Cook v. United States,* 171 F.2d 567, 569 (1st Cir. 1948) (resentencing of a defendant who was tried, found guilty, and sentenced in the District of Massachusetts must be done by a court in that district; a defendant imprisoned in California could not consent to transfer of his case to the Northern District of California for resentencing).

Rule 18's bar against venue changes to a district other than the one where the offense occurred reiterates a constitutional venue right in criminal cases that appears in two places in the Constitution. Article III, section 2, clause 3 states that, "[t]he Trial of all Crimes . . . shall be by Jury; *and such Trial shall be held in the State where the said Crimes shall have been committed*." U.S. Const. art. III, § 2, cl. 3 (emphasis added). The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State *and district wherein the crime shall have been committed*, which district shall have been previously ascertained by law." U.S. Const. amend. VI (emphasis added). The Constitution does not provide a similar constitutional right to venue in civil cases, thus the JPML may transfer venue and consolidate pretrial proceedings against a plaintiff's wishes. Criminal defendants may waive the constitutional right to venue, but few defendants would deem that course of action to be in their interest. In sum, changing venue for a component of criminal sentencing is unauthorized based on the constitutional guarantee to trial in the district where the offense was committed.

While consolidation of related matters in one venue is not possible, the 1996 MVRA amendment to 18 U.S.C. § 3664 authorized district judges to refer criminal restitution matters to a magistrate judge or special master. Section 3664(d)(6) states:

> The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court.

18 U.S.C. § 3664(d)(6). Unfortunately, Congress neglected to provide statutory or regulatory authority for payment of special masters appointed under § 3664(d)(6). In this regard, § 3664(d)(6) referrals differ from referrals to special masters in civil cases under Federal Rule of Civil Procedure 53 or for remedial proceedings in prison conditions cases, *see* 18 U.S.C. § 3626(f)(4) (setting hourly rate not to exceed that for appointed

counsel to be "paid with funds appropriated to the Judiciary"). Rule 53 and § 3626(f)(4) provide explicit payment instructions and identify the source of funding for special masters; § 3664(d)(6) is silent on payment matters. The absence of payment authority for § 3664(d)(6) special master referrals explains why most restitution referrals are made to magistrate judges rather than to special masters. Nonetheless, the authority to refer restitution matters to a magistrate judge or a special master compensated by one or more parties may alleviate some of the workload imposed on district judges by complex § 2259 fact finding.

4. Victim Status and Causation Requirement

Whether children who are victims in a general sense by virtue of their depiction in pornography are also entitled to restitution under § 2259 when the offense of conviction is possession of pornography (as opposed to its production and distribution) is an issue about which the government, the victims's advocates, and Mr. Marsh disagree. Section 2259 requires that a court order a defendant convicted of any sex offense in chapter 110 of Title 18 of the U.S. Code to pay restitution to the victim. "Victim" is defined as "the individual harmed as a result of a commission of a crime under . . . chapter [110]." The government and the victim's advocates disagree about whether the possession offense must be the cause of the loss, and if so, whether "proximate cause" is the appropriate causation standard. The government and the victim's advocates seem to agree that causation of some type is required, but they part ways when attempting to resolve the difficult question of whether the causal connection between crime and harm must be "proximate cause" or merely a more generalized and perhaps broader causal link, such as "but for" cause.

The government and courts applying the statute have interpreted § 2259 to require proof that the crime proximately caused the harm before restitution may be awarded. The victim's advocates accurately counter that there is no proximate cause requirement to be found in § 2259 except for the § 2259(3)(F) catch-all concerning "other losses suffered by the victim as a proximate result of the offense." Given the apparent absence of an unambiguous proximate cause requirement for the specific categories of losses, the victim's advocates suggest that Congress intended that courts assume that possession offenses satisfy the § 2259 "cause" requirement because possession offenses fall within chapter 110 and the victims are indisputably injured.

The phrase "proximate cause" first entered the restitution idiom in 1996 when the MVRA added a definition of "victims" into 18 U.S.C. §3663 and created 18 U.S.C. § 3663A, a new mandatory restitution statute. The predecessor restitution statute, 18 U.S.C. § 3579(a)(1) (1982), simply authorized a court to order "a defendant convicted of an offense" to "make restitution to any victim of such offense." The absence of a statutory causation standard caused a circuit split over whether a court could order restitution for losses beyond those related to the offense of conviction. In *Hughey v, United States*, 495 U.S. 411 (1990), the Supreme Court resolved this split by carefully analyzing the statute as a whole:

> As the Government concedes, . . . a straight-forward reading of the provisions indicates that the referent of "such offense" and "an offense" is the offense of conviction. Given that the ordinary meaning of "restitution" is restoring someone to a position he occupied before a particular event, *see, e.g.,* Webster's Third New International Dictionary 1936 (1986); Black's Law Dictionary 1180 (5th ed.1979), the repeated focus in § 3579 on the offense of which the defendant was convicted suggests strongly that restitution as authorized by the statute is intended to compensate victims only for losses caused by the conduct underlying the offense of conviction.

Id. at 416. The Court thereby confined losses compensable by restitution under the VWPA to those caused by the offense of conviction.[7]

Reading § 2259 with the same rigor that the Supreme Court applied in *Hughey* yields the conclusion that offenders who commit a chapter 110 offense are subject to the mandatory restitution provision only if the losses are "a proximate result of the offense" of conviction. 18 U.S.C. § 2259(b)(3)(F). Section 2259(b)(1) requires that the "order of restitution under this section [] direct the defendant to pay the victim . . . the full amount of the victim's losses." Section 2259(b)(3)(F) defines the phrase "full amount of the victim's losses" as including several specific categories of loss such as attorney's fees and psychological care. The list of specific items concludes by requiring compensation for

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[7]The pre-*Hughey* and pre-MVRA "scheme" provision in 18 U.S.C. § 3663(a)(2) was unchanged by the MVRA and continued to provide for broader restitution exposure with respect to offenders convicted of any type of scheme offense: "in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, [the court may order the defendant to pay restitution to] any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." Attempts by the victim's counsel to rely upon § 3663(a)(2) "scheme" cases as support for expansive awards under § 2259 should be rejected. Uncharged crimes committed in furtherance of a scheme offense of conviction are a component of the scheme causing compensable harm. The offense of possessing pornography in 2008 is not a component of someone else's unrelated scheme to distribute it in 1998.

"any other losses *suffered by the victim as a proximate result of the offense.*" *Id.* § 2259(b)(3)(F) (emphasis added). The subsection (b)(3)(F) catch-all category of loss is expressed as conjunctive with the preceding specific items of loss, and it contains the only reference to a standard of causation in § 2259 – "proximate cause of the offense."

The victim's advocates contend that the subsection (b)(3)(F) proximate cause requirement was designed to apply only to "any other losses." They allege that Congress intended that the wide variety of specific losses mentioned in subsections (b)(3)(A) through (E) should be viewed as lacking a proximate cause requirement. Under this anomalous interpretation, restitution would be required whenever an offender committed a chapter 110 possession offense, notwithstanding that the victim's injury might have been caused exclusively by the offender who originally exploited the victim and distributed her image. The conjunctive structure of § 2259(b)(3) and the interpretive requirement of reading the statute in its entirety that the Court imposed in *Hughey*, however, reveals that the § 2259(b)(3)(F) phrase "suffered by the victim as a proximate result of the offense" should apply to all the specific items of recovery in § 2259(b)(3)(A) through (E) as well as the catch-all "any other losses" mentioned in § 2259(b)(3)(F). As the government noted at page 4 of its brief, courts generally recognize that § 2259 requires a causal connection between the offense of conviction and the victim's harm, and that causal standard is almost always characterized as "proximate cause." *See United States v. Doe*, 488 F.3d 1154, 1160 (9th Cir. 2007) (invoking proximate cause standard recognized in *United States v. Laney*, 189 F.3d 954 (9th Cir. 1999), but holding that §2259 losses do not have to be established with "mathematical precision"); *Laney*, 189 F.3d at 965 ("Section 2259 . . . incorporates a requirement of proximate causation."); *United States v. Crandon*, 173 F.3d 122, 126 (3d Cir. 1999) (affirming award of restitution under a proximate cause standard); *United States v. Searle*, No. 02-1271, 2003 WL 21025, *2 (2d Cir. May 2, 2003) ("Because the children's father ceased to care for them shortly after discovering the pornographic videotape involving his son . . . , the district court reasonably concluded that the defendant's actions proximately caused the children's loss of their home and father."); *United States v. Raplinger*, No. 05-CR-49, 2007 WL 3285802 (N.D. Iowa Oct. 9, 2007) ("The statute is broadly worded: any loss suffered by a crime victim as a proximate result of the offenses of conviction qualifies.").

The victim's advocates respond to this uniform adverse case law construing a relatively lucid statutory proximate cause requirement with an emotional appeal: "Clearly Congress wanted sentencing courts to side with the victims of child pornography – not their victimizers." Brief of National Crime Victim Law Institute, The National Center for Victims of Crime, and the Victim Rights Law Center, at 22. A fair reading of § 2259, however, establishes that it, like other restitution statutes, contains a proximate cause requirement. Section 2259 is more favorable to victims of chapter 110 offenses than other restitution statutes in that it authorizes compensation for a broader array of losses in § 2259(b)(3) than is usually allowed. Nonetheless, the statute's causation requirement likely precludes its application to possession offenses. This conclusion is borne out by the government's refusal to endorse Mr. Marsh's restitution requests in cases involving mere possession. Restitution under § 2259 would be possible in possession cases that also include conviction on a distribution count, because the *redistribution* of pornography could cause additional harm. There is no indication in the statute or its legislative history, however, that Congress intended that sentencing judges do more than dispense justice impartially by ordering restitution to the extent authorized by statute. Repugnant as child pornography possession offenses are, the only appropriate judicial role is to apply § 2259 evenhandedly.

I hope this discussion responds to your concerns. Please contact me if you have any further questions.

Sincerely,

Joe Gergits

Joe Gergits
Assistant General Counsel