CASENOTES

CRIMINAL LAW—CHILD PORNOGRAPHY—RESTITUTION UNDER 18 U.S.C. § 2259 LIMITED TO THE INJURY PROXIMATELY CAUSED BY THE INDIVIDUAL POSSESSOR'S CRIME.

Paroline v. United States, 134 S. Ct. 1710 (2014).

J.D. MARSH

In *Paroline v. United States*, the United States Supreme Court analyzed the causal relationship that must exist for a victim of child pornography to establish her right to and amount of restitution under 18 U.S.C. § 2259 from a defendant convicted for possessing pornographic images of the victim.[1] In *Paroline*, the unnamed victim was sexually abused by her uncle when she was eight and nine years old "in order to produce child pornography."[2] Thereafter, the victim experienced significant fear and trauma as a result of her knowledge that such images were being circulated on the internet.[3]

Doyle Paroline was one of a number of individuals who came into possession of images of the victim.[4] In 2009, Paroline admitted that he possessed between 150 and 300 images depicting

---

[1] Paroline v. United States (*Paroline I*), 134 S. Ct. 1710, 1716 (2014). The statute permits victims to recover restitution under six categories of loss—medical services; physical and occupational therapy; transportation, temporary housing, and child care; lost income; attorney's fees and costs; and "any other losses suffered by the victim as a proximate result of the offense." *Id.* at 1720 (citing 18 U.S.C. § 2259(b)(3)(A)–(F)).

[2] *Id.* at 1717.

[3] *See id.* The Court explained that:

> The full extent of this victim's suffering is hard to grasp. Her abuser took away her childhood, her self-conception of her innocence, and her freedom from the kind of nightmares and memories that most others will never know. These crimes were compounded by the distribution of images of her abuser's horrific acts, which meant the wrongs inflicted upon her were in effect repeated; for she knew her humiliation and hurt were and would be renewed into the future as an ever-increasing number of wrongdoers witnessed the crimes committed against her.

Id.

[4] *Id.*

child pornography, including two images of the victim.[5] Accordingly, Paroline pleaded guilty to possession of material involving the sexual exploitation of children.[6]

Following Paroline's conviction, the United States District Court for the Eastern District of Texas reviewed the victim's request for approximately $3.4 million in restitution from Paroline under § 2259.[7] The district court denied recovery, finding that child pornography victims must prove that their injuries were proximately caused by a defendant's offense in order to recover under § 2259 and that such a burden was unmet in this case.[8] Subsequently, the victim sought a writ of mandamus ordering Paroline to pay the mentioned restitution from the Court of Appeals for the Fifth Circuit.[9] Much like the district court, the Fifth Circuit denied restitution.[10]

After the Fifth Circuit denied relief, the victim sought rehearing.[11] The victim's case involving Paroline was reheard by the Fifth Circuit en banc.[12] The Fifth Circuit held that § 2259 does not limit a victim's recovery for restitution to injuries proximately caused by the defendant.[13] On the contrary, the court held that each defendant found to possess pornographic images of a victim should be liable for the entire loss suffered by a child victim resulting from the trade of the victim's images, despite the fact that other offenders played a role in causing the victim's

---

[5] *Paroline I*, at 1717–18.

[6] *Id.* at 1717.

[7] United States v. Paroline (*Paroline II*), 672 F. Supp. 2d 781, 783 (E.D. Tex. 2009), *vacated sub nom*. United States v. Amy Unknown (*In re* Amy Unknown), 701 F.3d 749 (5th Cir. 2012), *vacated sub nom*. Paroline v. United States, 134 S. Ct. 1710 (2014).

[8] *Id.* at 792–93.

[9] *In re* Amy, 591 F.3d 792, 793 (5th Cir. 2009), *on reh'g*, 636 F.3d 190 (5th Cir. 2011), *on reh'g en banc*, 697 F.3d 306 (5th Cir. 2012), *withdrawn and superseded on reh'g en banc*, 701 F.3d 749 (5th Cir. 2012), *vacated sub nom.* Wright v. United States, 134 S. Ct. 1933 (2014), *and* Paroline v. United States, 134 S. Ct. 1710 (2014).

[10] *Id.* at 795.

[11] United States v. Amy Unknown (*In re* Amy Unknown), 636 F.3d 190, 192–93 (5th Cir. 2011), *on reh'g en banc*, 697 F.3d 306 (5th Cir. 2012), *withdrawn and superseded on reh'g en banc*, 701 F.3d 749 (5th Cir. 2012), *vacated sub nom*. Wright v. United States, 134 S. Ct. 1933 (2014), *and* Paroline v. United States, 134 S. Ct. 1710 (2014).

[12] *See* United States v. Amy Unknown (*In re* Amy Unknown), 701 F.3d 749, 751–54 (5th Cir. 2012) (en banc), *vacated sub nom.* Wright v. United States, 134 S. Ct. 1933 (2014), *and* Paroline v. United States, 134 S. Ct. 1710 (2014).

[13] *See id.* at 774.

losses.[14]

Following the Fifth Circuit's decision, the victim once again appealed, and the United States Supreme Court granted certiorari to address the issue of whether the doctrine of proximate cause limits the extent to which a victim of child pornography is entitled to restitution under § 2259.[15] The Court held that a victim's restitution under § 2259 is proper "only to the extent the defendant's offense proximately caused a victim's losses."[16] In doing so, the Court noted that despite the fact that the first five sections of § 2259 do not expressly require a showing of proximate causation, the catch-all category contained in § 2259(b)(3)(F) that allows for restitution "for 'any other losses suffered by the victim as a proximate result of the offense'" applies to all of the enumerated sections of § 2259 and imposes a proximate cause requirement to any recovery.[17]

The Court explained that while a victim's injuries "resulting from the trauma of knowing that images of her abuse are being viewed over and over are direct and foreseeable results of child-pornography crimes," a hindrance to recovery for such victims is presented by the proximate cause requirement of actual or but-for causation.[18] In addressing actual cause, the Court determined that § 2259 does not require a strict showing of traditional actual or but-for causation.[19] Specifically, the Court stated:

> [W]here 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

---

[14] *Id.* at 772–73.

[15] *Paroline I*, 134 S. Ct. 1710, 1716, 1718 (2014). The Court explained that "[a]s a general matter, to say one event proximately caused another is a way of making two separate but related assertions. First, it means the former event caused the latter. This is known as actual cause . . . ." *Id.* at 1719. The Court went on to note that "[t]he traditional way to prove that one event was [an actual cause] of another is to show that the latter would not have occurred 'but-for' the former." *Id.* at 1722. Second, "the idea of proximate cause, as distinct from actual cause or cause in fact, defies easy summary" and generally requires some direct relation between the dangerous conduct alleged and the injury that occurred. *Id.* at 1719.

[16] *Id.* at 1722.

[17] *Id.* at 1720–22 (quoting 18 U.S.C. § 2259 (b)(3)(F)).

[18] *Paroline I*, 134 S. Ct. at 1722.

[19] *Id.* at 1727.

underlies the victim's general losses.[20]

The Court provided factors to guide district courts in calculating the appropriate amount of restitution in a given case,[21] but explained that the amount awarded should be "the [full] amount of the victim's general losses that were the 'proximate result of the offense.'"[22]

At the time *Paroline* was decided, interpreting the causal nexus required for a victim of child pornography to recover restitution under § 2259 from a possessor of the pornographic material was an issue of first impression in the majority of federal courts.[23] That said, the Court's holding in *Paroline* set forth above stems from three concepts previously developed by the Court: the canon of construction stating that a clause contained at the end of a statute can be applied to limit the entire statute;[24]

---

[20] *Id.*

[21] *Id.* at 1728. The district courts can consider:

> [T]he number of past criminal defendants found to have contributed to the victim's general losses; reasonable predictions of the number of future offenders likely to be caught and convicted for crimes contributing to the victim's general losses; any available and reasonably reliable estimate of the broader number of offenders involved (most of whom will, of course, never be caught or convicted); whether the defendant reproduced or distributed images of the victim; whether the defendant had any connection to the initial production of the images; how many images of the victim the defendant possessed; and other facts relevant to the defendant's relative causal role.

Id.

[22] *Id.*

[23] *See Paroline II*, 672 F. Supp. 2d 781, 784 (E.D. Tex. 2009), *vacated sub nom.* United States v. Amy Unknown (*In re* Amy Unknown), 701 F.3d 749 (5th Cir. 2012), *vacated sub nom.* Paroline v. United States, 134 S. Ct. 1710 (2014) (stating that the issue of restitution in child pornography cases is one of first impression in the district court); *see also* Michael A. Kaplan, Note, *Mandatory Restitution: Ensuring that Possessors of Child Pornography Pay for Their Crimes*, 61 SYRACUSE L. REV. 531, 544 (2011) (noting that requests for restitution in child pornography cases are a fairly new phenomenon); Warren Richey, *Texas Judge Refuses Bid to Make Child Porn Users Pay Damages*, CHRISTIAN SCI. MONITOR, Dec. 10, 2009, *available at* http:/ /csmonitor.com/USA/Justice/2009/1210/p02s13-usju.html (discussing Congress's general intent to carve out tough restitution laws in child pornography cases and noting that the issue of restitution is one of first impression in many district courts). *See generally Paroline I*, 134 S. Ct. 1710, 1716–17 (2014) (stating that "[t]he question [presented in this case] is what causal relationship must be established between the defendant's conduct and a victim's losses for purposes of determining the right to, and the amount of, restitution under § 2259" and noting changes in child pornography sharing techniques since the Court released its *New York v. Ferber* opinion three decades ago).

[24] *See* Porto Rico Ry., Light & Power Co. v. Mor, 253 U.S. 345, 348 (1920); *see also*

a compelling interest in preventing the production and promotion of child pornography and the resulting exploitation of children;[25] and a less established "line of authority, under which an act or omission is considered a cause-in-fact if it was a 'substantial' or 'contributing' factor in producing a given result."[26]

The Court's opinion decades ago in *Porto Rico Railway, Light & Power Co. v. Mor* illustrates the canon of construction previously mentioned. In *Mor*, the plaintiff, a citizen of Spain domiciled in Puerto Rico, brought an action in the United States District Court for Puerto Rico against the defendant, a corporation with its principal place of business in Puerto Rico.[27] Under § 41 of the Jones Act of March 2, 1917, a United States district court only maintained jurisdiction over controversies "where all of the parties on either side of the controversy are citizens or subjects of a foreign state or states, or citizens of a state, territory, or district of the United States *not domiciled in Porto Rico*."[28] At the time that the plaintiff filed the action, there were two distinct court systems in Puerto Rico: the United States system and a Spanish court system that was governed by civil law.[29] The defendant in *Mor* objected to the United States District Court's jurisdiction over the case, but was overruled.[30] The case next came to the Court of Appeals for the First Circuit on writ of error, and the First Circuit certified the jurisdictional question to the United States Supreme Court.[31]

The United States Supreme Court noted that in interpreting the jurisdictional requirements of the Jones Act, "[t]he precise question . . . is whether the restriction of jurisdiction to cases where all the parties on either side of the controversy are 'not domiciled in Porto Rico' applies to aliens as well as to American

United States v. Standard Brewery, Inc., 251 U.S. 210, 218 (1920); Johnson v. S. Pac. Co., 196 U.S. 1, 18–19 (1920).

[25] *See* New York v. Ferber (*Ferber I*), 458 U.S. 747, 756–57, 761 (1982) (noting that states have a compelling interest in protecting the physical and psychological well-being of children and prosecuting those who produce child pornography).

[26] *See* Burrage v. United States (*Burrage I*), 134 S. Ct. 881, 890 (2014) (discussing adoption of the "substantial" or "contributing" factor test in several states).

[27] *Mor*, 253 U.S. at 345–46.

[28] *Id.* at 346 (emphasis added).

[29] *Id.* at 346–47.

[30] *Id.*

[31] *Id.* at 346.

citizens."[32] The Court then examined whether the phrase limiting the district court's jurisdiction to parties "*not domiciled in Porto Rico*" applied to the entire statute, including "citizens or subjects of a foreign state or states," or whether jurisdiction was appropriate in the district court because the clause "*not domiciled in Porto Rico*" only invalidated the district court's jurisdiction when "citizens of a state, territory, or district of the United States" domiciled in Puerto Rico are a party to an action.[33]

The Court ultimately found that the phrase "not domiciled in Porto Rico" applied to the entirety of § 41, including "citizens or subjects of a foreign state or states," and thus answered the certified-jurisdictional question in the negative.[34] In so finding, the Court developed and stated the canon of statutory construction that "[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all."[35] Further, in support of its finding, the Court noted that the general purpose of the statute was to limit the district court's jurisdiction, and the application of the clause was to be construed to effectuate the general purpose of Congress.[36]

Many years after *Mor*, in *New York v. Ferber*, the Court recognized a compelling interest in preventing production and promotion of child pornography and the injuries that such activities cause its victims.[37] In *Ferber*, the defendant, who owned a bookstore specializing in the distribution of sexually oriented products, sold two films depicting child pornography to two undercover police officers.[38] As a result, the defendant was arrested and charged with promoting an obscene sexual performance and promoting a sexual performance by a child.[39] New York Penal Law § 263.15, which required no proof that the relevant films be obscene, classified promoting sexual performance by a

[32] *Id.*

[33] *Mor*, 253 U.S. at 346 (emphasis added).

[34] *Id.* at 348–49.

[35] *Id.* at 348 (citing United States v. Standard Brewery, 251 U.S. 210, 218 (1920); Johnson v. S. Pac. Co., 196 U.S. 1, 18–19 (1904)).

[36] *Mor*, 253 U.S. at 348.

[37] *Ferber I*, 458 U.S. 747, 756–57, 761 (1982); *see also* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982) (stating that safeguarding the physical and psychological well-being of a minor is a compelling interest).

[38] *Ferber I*, 458 U.S. at 751–52.

[39] *See id.* at 752.

child as a class D felony.[40] At the trial court level, the defendant was convicted of two counts of promoting sexual performance by a child,[41] and the Appellate Division of the New York State Supreme Court affirmed.[42] On appeal, the New York Court of Appeals reversed the convictions, reasoning that § 263.15 violated the First Amendment on two grounds. First, the statute was underinclusive "because it discriminated against visual portrayals of children engaged in sexual activity by not also prohibiting the distribution of films of other dangerous activity;" and second, the statute was overly broad "because it prohibited the distribution of materials produced outside the State, as well as materials, such as medical books and educational sources, which deal with adolescent sex in a realistic but nonobscene manner.'"[43]

The Supreme Court granted certiorari to determine if the New York statute was unconstitutional when conviction under the statute did not require that the sexual film or images depicting children be obscene.[44] The Court held that the statute was not overbroad as applied to Ferber and others who distribute similar material, nor was the statute under-inclusive.[45] Further, the Court found that states have a compelling interest in preventing and combating child pornography.[46] The Court explained that "[i]n recent years, the exploitive use of children in the production of pornography has become a serious national problem,"[47] and determined that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance."[48] As such, the Court found that "States are entitled to greater leeway in the regulation of pornographic depictions of children," and noted that "[w]hen a definable class of material, such as that covered by § 263.15, bears so heavily and pervasively on the welfare of children engaged in its

[40] *Id.* at 751–52 (citing N.Y. PENAL LAW § 263.15 (McKinney 1980)).

[41] *Id.* at 752 (finding Ferber guilty under § 263.15).

[42] *Id.*; *see also* People v. Ferber (*Ferber II*), 74 A.D.2d 558, 558 (N.Y. App. Div. 1980).

[43] *Ferber I*, 458 U.S. at 752–53 (quoting People v. Ferber, 422 N.E.2d 523, 526 (N.Y. 1981)); *see also* People v. Ferber, 422 N.E.2d at 525 ("[T]he statute would . . . prohibit the promotion of materials which are traditionally entitled to constitutional protection from government interference under the First Amendment.").

[44] *Ferber I*, 458 U.S. at 753.

[45] *Id.* at 764–66, 773–74.

[46] *Id.* at 756–61.

[47] *Id.* at 749.

[48] *Id.* at 757.

production . . . it is permissible to consider these materials as without the protection of the First Amendment."[49]

Following the Supreme Court's development of the canon of construction expressed in *Mor* and its recognition of a compelling interest in protecting victims of child pornography in *Ferber*, the Court discussed criminal proximate cause requirements in *Burrage v. United States*, specifically relating to actual or but-for causation.[50] In *Burrage*, the defendant sold heroin to an individual who subsequently died of a drug overdose.[51] At the time of his death, the deceased individual had a plethora of other drugs in his system.[52] The defendant was charged with unlawful distribution of heroin under the Controlled Substance Act, which imposed a twenty-year mandatory minimum sentence "when 'death or serious bodily injury results from the use of such substance.'"[53] At the district court level, multiple experts testified that the heroin provided to the deceased individual by the defendant was a contributing factor to his death; however, the experts could not say whether the individual would have lived if he had not taken the heroin.[54] As a result, the defendant moved for summary judgment of acquittal because there was no evidence that heroin was the but-for cause of the individual's death.[55] The district court denied the defendant's motion, and the defendant was subsequently convicted of the crime charged.[56] Prior to the conviction, the district court gave a jury instruction to explain that the Government was only required to prove "'that the heroin . . . was a contributing cause of [the individual's] death'" to establish actual causation.[57] The defendant appealed, and the Court of Appeals for the Eighth Circuit affirmed the defendant's conviction,[58] stating that the district court's actual cause instruction was consistent with previous decisions and applicable to the case.[59]

---

[49] *See id.* at 756, 764.

[50] *Burrage I*, 134 S. Ct. 881, 886 (2014).

[51] *Id.* at 885.

[52] *Id.*

[53] *Id.* (quoting 21 U.S.C. § 841(a)(1), (b)(1)(A)–(C) (2012)).

[54] *Id.* at 885–86; United States v. Burrage (*Burrage II*), 687 F.3d 1015, 1018–19 (8th Cir. 2012).

[55] *Burrage I*, 134 S. Ct. at 886.

[56] *Id.* at 886.

[57] *Id.*

[58] *Burrage II*, 687 F.3d at 1018.

[59] *Id.* at 1021.

The defendant once again appealed, and the United States Supreme Court granted certiorari to address the issue of whether actual causation under the relevant statute is satisfied when use of a controlled substance is only a "contributing cause" of an individual's death.[60] The Court rejected the "contributing cause" standard presented by the lower courts[61] and held that the Controlled Substance Act requires traditional but-for causation.[62] However, during its analysis, the Court stated that a strict showing of actual or but-for causation is not always required in criminal law cases.[63] The Court noted that the most common case in which a strict showing of but-for causation is not required is in "instance[s] . . . when multiple sufficient causes independently, but concurrently, produce a result."[64] Further, the Court noted that when a supporting textual or contextual indication exists, a "contributing cause" or other actual cause standard might be appropriate.[65] Although the Court did not adopt an alternative actual causation test in *Burrage*, it did set the stage to do so in a subsequent case.

Just months later in *Paroline*, building off the precedent established in *Burrage*, the Court took the stage and established an alternative "contributive" actual causation standard for § 2259.[66] The Court found that constraining § 2259 to a strict but-for causation requirement would be inconsistent with the textual and contextual circumstances surrounding the passage of § 2259[67] when "[i]t is common ground that the victim suffers continuing and grievous harm as a result of her knowledge that a large, indeterminate number of individuals have viewed and will in the future view images of the sexual abuse she endured."[68] The Court was clear that such a limitation "would undermine [Congress's] intent . . . in a way that would render it a dead letter in child-pornography prosecutions of this type."[69] The aforementioned Congressional intent in establishing restitution under § 2259 and the court's holding in *Paroline* "that victims of child

[60] *Burrage I*, 134 S. Ct. at 886.
[61] *Id.* at 892.
[62] *See id.*
[63] *See id.* at 890.
[64] *Id.*
[65] *See id.* at 888.
[66] *Paroline I*, 134 S. Ct. 1710, 1726–27 (2014).
[67] *Id.*
[68] *Id.* at 1726.
[69] *Id.* at 1727.

pornography be compensated by the perpetrators who contributed to their anguish"[70] clearly developed from the concept first expressed many years ago in *Ferber*—that there is a compelling interest to protect child-victims from injuries resulting from the production and promotion of pornography.[71]

That being said, the *Paroline* Court was careful not to impute such an intent into § 2259 without limitations.[72] The Court limited a victim's restitution from a defendant possessing child pornography to that particular defendant's contribution to the victim's injuries or, more precisely, the victim's injuries that the defendant "proximately caused."[73] The *Paroline* Court did so by relying on the canon of construction set forth in *Mor*, holding that the proximate cause phrase contained in § 2259(b)(3)(F) applied to all of the enumerated sections contained in § 2259.[74] These things considered, the Court's prior holdings in *Mor*, *Ferber*, and *Burrage* were all instrumental to the law established in *Paroline*: under § 2259, a victim of child pornography can and will continue to be able to collect restitution from a criminal defendant convicted for possessing images of the victim to the extent that the defendant's possession proximately caused his or her injuries.[75]

[70] *Id.* at 1726–27.

[71] *See Ferber I*, 458 U.S. 747, 756–57, 761 (1982).

[72] *See Paroline I*, 134 S. Ct. 1710, 1725–26 (2014). The court recognized that "holding a single possessor liable for millions of dollars in losses collectively caused by thousands of independent actors might be excessive and disproportionate in these circumstances. These concerns offer further reason not to interpret the statute the way the victim suggests" and might invalidate such an award under the Excessive Fines Clause. *Id.* at 1726.

[73] *Id.* at 1722.

[74] *Id.* at 1721–22.

[75] *Id.* at 1722, 1728–29.