From: "[redacted] (USAFLS)" <[redacted]>
To: "[redacted]. (USAFLS)" <[redacted]>
Subject: RE: CA5 Child Pornography Restitution Decisions
Date: Mon, 01 Oct 2012 21:31:26 +0000
Importance: Normal

Not sure how best to notify the court. I don't remember being moved very much by the prior case, but this one come from the court that decided *In re Dean* and may impact the judge's thinking about that case's implications.

As to Elroy, I think the decision was to continue the discussion after hearing from Zelman.

From: [redacted]. (USAFLS)
Sent: Monday, October 01, 2012 5:09 PM
To: [redacted] (USAFLS)
Subject: RE: CA5 Child Pornography Restitution Decisions

I will read this tonight, but maybe this and the one from the 11th that I forwarded to you earlier? Just a "notice of supplemental authority"?

How were things left re Elroy?

[redacted]
Assistant U.S. Attorney
[redacted]

From: [redacted] (USAFLS)
Sent: Monday, October 01, 2012 5:01 PM
To: [redacted]. (USAFLS); [redacted] (USAFLS)
Subject: FW: CA5 Child Pornography Restitution Decisions

Do you think it's worth filing something in the Epstein case? There is some interesting language in some of the footnotes about how the CVRA's different subsections work.

From: [redacted]. (USAFLS)
Sent: Monday, October 01, 2012 2:39 PM
To: A[redacted]

[redacted]
Subject: FW: CA5 Child Pornography Restitution Decisions

From: [redacted] (USAFLS)
Sent: Monday, October 01, 2012 2:31 PM
To: [redacted]. (USAFLS)
Subject: FW: CA5 Child Pornography Restitution Decisions

[redacted],

Would you please forward this to your attorneys? I'll send it to the appellate attorneys.

Thanks,

[redacted]

Subject: FW: CA5 Child Pornography Restitution Decisions

Mike Rotker summarized the decision:

Earlier today, the en banc Fifth Circuit issued its decisions in *In re: Amy Unknown*, No. 09-41238 & *United States* [redacted] *Paroline,* No. 09-41254, consolidated with *United States* [redacted] *Wright*, No. 09-31215, which collectively addressed a number of procedural and substantive issues governing restitution in child pornography possession cases. Specifically, No. 09-41238 is Amy's petition for a writ of mandamus under the Crime Victims' Rights Act of 2004, 18 U.S.C. 3771(d)(3), challenging the denial of restitution, and No. 09-41254 was Amy's related "appeal" from the final judgment against the defendant, Doyle Paroline, also challenging the denial of restitution. No. 09-31215 was an appeal by the defendant, Michael Wright, from the order requiring him to pay $529,000 in restitution. The en banc court issued several important rulings, as follows.

First, the en banc court, with no dissent, dismissed No. 09-41254, agreeing with the United States that Congress has not authorized nonparty crime victims to appeal from the final judgment in a criminal case.

Second, in No. 09-41238, the court of appeals granted Amy's petition for a writ of mandamus, vacated the judgment and remanded for further proceedings. As an initial matter, the en banc court, again without dissent, agreed with the government that a CVRA mandamus petition is governed by traditional mandamus standards of review, and not (as Amy argued) by ordinary standards of appellate review. The Court's decision to grant Amy's mandamus petition was consistent with the position expressed by the United States that she had shown clear and indisputable error in that the district court ordered no restitution. The court's rationale on proximate cause, however, was one that we did not endorse. Specifically, the government took the position (which, prior to these decisions, had been embraced by seven other circuits) that the "proximate cause" limitation in subsection (F) of the mandatory restitution statute, 18 U.S.C. 2259(b)(3), applied to all of the categories of losses in the preceding five subsections. We further asserted that, although proximate cause applied to all categories of losses, the proximate cause standard could be met by a showing that the defendant was one of the members of the class of individuals who, in the aggregate, caused the victim's emotional harms. The nine-judge majority of the en banc court rejected our threshold argument, agreeing with Amy that the proximate-cause language in subsection (F) is limited to that subsection, and does not apply to the preceding subsections. In so holding, the court relied on various canons of statutory

construction, primarily the rule-of-the-last-antecedent, which states that words within a single clause are generally presumed to modify only the words that immediately precede them. (Judges Dennis and Southwick wrote separate opinions, but each agreed with this aspect of the decision. Judge Davis, joined by Judges King, Smith & Graves, dissented on this point and agreed with our position and that of every other circuit).

Third, the Court rejected our concern that a construction of Section 2259(b)(3) that dispensed with proximate cause could expose defendants to a risk of excessive punishment, finding that restitution's purpose was remedial, not punitive, and that concerns for excessive payment could be mitigated by allowing district courts to impose restitution jointly and severally with other defendants. In so ruling, the Court rejected the government's argument (endorsed by two other circuits) that the relevant statutes did not authorize the imposition of "joint and several liability" among different defendants in different cases but was instead limited to multi-defendant cases before the same court.

No. 09-31215 was an appeal by defendant Michael Wright from the final judgment ordering him to pay $528,000 in restitution to Amy, which was less than the $3.3 million Amy requested. The en banc court vacated the judgment and remanded for further proceedings in light of the foregoing analysis, and in doing so, declined to enforce the appeal waiver in Wright's plea agreement. In doing so, the Court noted that the record in Wright's case did not disclose "why the district court reduced the Government's full request on Amy's behalf," and stated that the court's order was "seemingly at odds with Section 2259's requirement that it award Amy the full amount of her losses." (Insofar as the Court was implying that the district court on remand could, or should, impose an amount of restitution that was greater than the amount initially awarded, the Court was wrong. This was a defendant's appeal; we urged the court to dismiss the appeal or remand for further proceedings, and Amy urged the court to affirm. Wright, therefore, cannot lawfully be exposed to an amount of restitution on remand that exceeds the amount initially imposed.)

Judge Dennis concurred in the judgments, but he opined that the majority had gone further than necessary to decide these cases and would have allowed the district courts to decide how best to proceed first.

Judges Davis, King, Smith and Graves dissented. They agreed with the position of the United States that proximate cause is required for all categories of losses, and that proximate cause should be analyzed by focusing (as the First Circuit had in a case we endorsed, *United States v. Kearney,* on the aggregated harms caused by possessors generally).

Judge Southwick dissented, agreeing largely with Judge Davis's analysis but differing in part as to his reasoning.

~~~~~~~~~~~~~~~~~~~~~

[redacted]
United States Department of Justice
Criminal Division, Appellate Section
[redacted]
~~~~~~~~~~~~~~~~~~~~~