CHALLENGING CHILD PORNOGRAPHY RESTITUTION CLAIMS THAT EXCEED THE STATUTORILY REQUIRED $3,000

The typical possession or receipt of child pornography case in which a victim requests restitution in excess of the $3,000 required by the statute, 18 U.S.C. § 2259(b)(2)(B), involves a well-known and widely distributed series. Usually, the claim is made on behalf of the victim by one of a small group of lawyers around the country. The lawyer accompanies the claim with reports from a psychologist, an economist who addresses lost wages, and, maybe, a physician. Those reports and related documents can total as much as two or three hundred pages. Given existing precedent, few if any of these claims, should support an award in excess of the required $3,000.

I. Legal Reasoning

The key case is *Paroline v. United States*, 572 U.S. 434, 437 (2014). Here in the Eleventh Circuit, you'll need to be aware of *United States v. Rothenberg*, 923 F.3d 1309 (11th Cir. 2019), though given what follows, *Rothenberg* shouldn't be an obstacle.

The overriding principal is that defendants should have to pay restitution only "in an amount that comports with the defendant's relative role in the causal process that underlies the victim's general

losses." *Paroline*, 572 U.S. at 437. The "central concern of the causal inquiry must be the conduct of the particular defendant from whom restitution is sought," *id.* at 445, which incorporates "the bedrock principle that restitution should reflect the consequences of the defendant's own conduct, not the conduct of thousands of geographically and temporally distant offenders acting independently, and with whom the defendant had no contact." *Id.* at 455.

If you read the list of factors the Court suggests using in making this determination, you'll see the three that should determine the outcome: "the 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)];" *Id.* at 460.

Though not the scheme approved in *Paroline, c*ases such as *Rothenberg* tend to take the total claimed loss amount, which may amount to millions of dollars, and divide it by the number of restitution orders, be they from state or federal cases. *Rothenberg*, for example, gives

lip service to *Paroline* and rejects the idea of dividing the loss amount by the number of restitution orders, the "1/n method." But in affirming eight of the nine restitution orders before it, the court seemingly abandoned the *Paroline* guardrails in favor of a result closer to the 1/n method. The underpinning is what other cases have stated explicitly, that "the *Paroline* framework is very difficult—if not impossible—to apply in practice." *United States v. Erickson*, 388 F.Supp.3d 1086, 1088-1089 (D. Minn. 2019). But it's not.

II. Victim Notification System

The United States Justice Department, through its Victim Notification System (VNS), sends notices to the victims of child pornography when someone is arrested and prosecuted in federal court. There is an initial notice and additional notices as the case proceeds, and they've been sending the notices for years. The number of initial notices will exceed the number of restitution orders. In the three series I dealt with, one had 291 restitution orders, but 2,433 initial VNS notices; the second, 849 restitution orders and 4,688 initial VNS notices; and the third, 1,456 restitution orders and 9,339 initial VNS notices. In each

instance, dividing the loss amount by the number of initial VNS notices brought the restitution amount below $3,000.

But remember, the Justice Department sends VNS notices only in federal cases. Factor in the much larger number of state cases and even international cases, and the restitution obligation of any one defendant will be far below the $3,000 minimum.

III. Getting the Data

You can ask the United States Attorney's Office to get the number of initial notices from the Justice Department. Surprisingly, there's an unresolved question of whether Rule 16's discovery provisions apply to sentencing hearings. *See United States v. Cordero-Perez*, 2015 WL 403231, *6, n. 1 (M.D. Fla. Jan. 28, 2015); *but also United States v. Randall*, 2020 WL 4194003, *5-6 (D. Nev. July 20, 2020). Still, local practice seems to treat the rule as if it applies.

Whether or not it does, the timely production of the information depends upon the speed the Justice Department is willing and able to act. In my case, it made more sense to subpoena the information. The subpoena gives you a set deadline and provides a ready path to resolution should the Justice Department challenge the request.

If you send a subpoena, send a subpoena duces tecum (Fed.R.Crim.P 17(c)) to: Jeff Alabaso, Program Manager, United States Department of Justice, 950 Pennsylvania Avenue, Washington, D.C. 20530, requiring him to produce the initial VNS notices for the victim portrayed in the particular series. When I sent mine, we were still in the pandemic, much of the Justice Department was working from home, and they were accepting subpoenas through the mail. You'll have to check to see if they still are.

A. The Touhy Regulations

Because you are sending a subpoena to an employee of the Justice Department, you must comply with the "Touhy regulations," found at 28 C.F.R. §§ 16.21-16.26. You'll need to read the provisions, but it amounts to providing the "originating component" with a summary of the expected testimony, an explanation as to why it is relevant, and a request for authorization for the employee to appear. Copies of the letter need to go to your District's U.S. Attorney and the Assistant U.S. Attorney prosecuting the case. In criminal cases the "originating component" is the Assistant Attorney General in charge of the Criminal Division. My letter went to: Kenneth A. Polite, Jr., Assistant Attorney General, Criminal

Division, Executive Office of the United States Attorneys, United States Department of Justice, 950 Pennsylvania Avenue, NW, Room 2242, Washington, D.C. 20530-0001.

Once the subpoena is delivered, you can, of course, agree to forego Mr. Alabaso's appearance in exchange for the data, which I did, though I didn't get the data until we walked into court for the restitution hearing.

B. State Data

In all likelihood, the VNS information will get you below the $3,000. But you can do more. You can provide an estimate of the number of state defendants who have viewed the images. Call Paul Flemming, the State Courts Administrator's Public Information Officer. He's in Tallahassee at: 500 S. Duval Street, Tallahassee, FL 32399-1900. You can reach him by phone at: (850) 922-1187 or (850) 631-0913. You want the number of prosecutions/arrests for a violation of Florida's possession of child pornography statute, Fla. Stat. § 827.071(5). I made the mistake of picking a year during the pandemic and ended up with a lot of arrests but few sentencings. My advice would be to ask for the data in 2019. After an exchange of emails, he'll get you, within a couple of weeks, a "delimited file of data." Unless you have more technology abilities than most of us,

you will need some tech help in pulling out what you need – the number of defendants sentenced that year for the offense. It's not that complicated if you know what you're doing, but you have to know what you're doing.

C. Extrapolation

Florida's population represents about 1/15th of the nation's, so if you'll multiply the Florida number by 15, you'll have a rough estimate of the number of individuals sentenced nationwide for possession of child pornography in a given year. If, for example, Florida state judges sentenced 10,000 defendants, it's reasonable to assume state judges from around the country sentenced 150,000 defendants.

The United States Sentencing Commission's Sourcebook provides the number of defendants sentenced under §2G2.2 of the Sentencing Guidelines, the section applicable primarily to possession of child pornography. From 2015 to 2020, the number ranges from 415 to 521. Pick an average or the number from the year corresponding to the state data, and, if you divide that into the number of state cases, you'll have the ratio of state to federal cases (the multiplier). Then, if there are X number of federal defendants who have viewed the images, i.e., been the

subject of the VNS notice, you can use the multiplier to estimate the number of individuals in the United States who, over the years, have viewed the images.[1] The number should be big enough to drive the restitution amount far below the $3,000 threshold.

III. Challenging the Reports

If you want to go farther and spend the time and money, you can hire experts and challenge the accuracy of the medical and psychological claims used to arrive at the loss amount. Most defendants don't, however, as most are indigent, will never be able to pay the restitution, and the cost of the experts may well exceed the restitution request. But the result is that the content of the reports submitted by the lawyers representing the victims are rarely litigated and, therefore, untested. My experts were critical of the conclusions reached by the psychologist and physician retained by the victims' lawyer.

[1] If you use the 150,000 suggested above and divide by a representative number of federal defendants sentenced in a given year, say 500, the result is 300, meaning that for every one federal defendant, there are 300 state defendants. And if over the years, 2,000 federal defendants have viewed the particular series, it's reasonable to assume the number of state defendants would equal 2,000 x 300 or 600,000

IV. The Paroline Factors

Your estimate as to the number of those who have viewed the series, be it just the federal number or that number plus an estimate about state defendants, will give you one of the *Paroline* factors—"the number of past criminal defendants found to have contributed to the victim's general losses." *Paroline*, 572 U.S. at 460. That number should be high enough, but you can multiply it by almost any number to arrive at the other factors: "reasonable predictions of the number of future offenders likely to be caught and convicted for crimes contributing to the victim's general losses; [and] any available and reasonably reliable estimate of [the broader number of offenders involved (most of whom will, of course, never be caught or convicted.)" *Id.* Surely a factor of 10 would be a conservative number in either instance. And, again, these images are viewed by individuals around the world, so the numbers have to be extraordinarily high.

Bear in mind, *Paroline* suggests other factors: "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.* The Government can, of course, rely on these factors, but absent a role in the production of the images or a role in widespread distribution, it's hard to see how they can offset the mathematical diminishment of any one defendant's contribution to the harm.

You're sure to hear, too, that the *Paroline* factors are "rough guideposts," *id.* at 460, and that the decision does not require a "precise mathematical inquiry." *Id.* at 459. Still, the numbers should be big enough to carry the day.

RPM
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