No. 12-1302

In the United States Court of Appeals for the Seventh Circuit

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

CHRISTOPHER LARANETA,
DEFENDANT-APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
2:10-CR-0013 (LOZANO, J.)

BRIEF FOR THE UNITED STATES

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STATEMENT REGARDING ORAL ARGUMENT

On August 9, 2012, this Court set oral argument for October 1, 2012.

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UNITED STATES OF AMERICA,
APPELLEE

v.

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BRIEF FOR THE UNITED STATES

JURISDICTIONAL STATEMENT

The jurisdictional statement of the appellant is complete and correct.

STATEMENT OF THE ISSUES

1. Whether the district court's application of the sentencing enhancement for engaging in a pattern of sexual abuse and imposition of consecutive terms of imprisonment are constitutional and proper.
2. Whether the district court committed any procedural error in imposing defendant's sentence when it fully considered all defendant's arguments.
3. Whether the district court properly ordered defendant to pay restitution to two victims whose pictures were found on defendant's computer.

STATEMENT OF THE CASE

In April 2010, a federal grand jury in the Northern District of Indiana charged defendant Christopher Laraneta with eight counts of violating federal child pornography laws, 18 U.S.C. §§ 2251, 2252, and one count of criminal forfeiture pursuant to 18 U.S.C. § 2253. Specifically, those charges were advertising child pornography (count one); distributing child pornography (counts two and three); receiving child pornography (counts four, five, and six), transporting child pornography (count seven), and possessing child pornography (count eight). R. 15. [1] On September 3, 2010, defendant pleaded guilty without a plea agreement to counts two through eight. R. 35. The government subsequently dismissed count one. R. 37, 38.[2] Following three days of evidentiary hearings and additional argument on sentencing, the district court sentenced defendant to 360 months' imprisonment (240 months' concurrent on counts two through seven and 120 months' consecutive on count eight), to be followed by a lifetime period of supervised release. R. 95. The district court order defendant to pay restitution to two victims whose images he possessed, "Amy" and "Vicky," in the amount of $3,367,854 and $965,827.64, respectively. R 102. This appeal followed.

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[1] "R." refers to the docket of the district court case, No. 2:10-Cr-13 (N.D. Ind.). "PSR" refers to the Presentence Investigation Report prepared by the Probation Office on November 1, 2011, and docketed as R. 81. "Tr." refers to the transcript of the five hearings held in the district court, which are consecutively numbered.

[2] Defendant later consented to the forfeiture of his computer, resolving count nine. Tr. 526.

STATEMENT OF FACTS

A. Defendant Amassed a Sizeable Collection of Child Pornography by Individual Exchanges on The Internet Over a Period of Eight Years

Starting in around 2001 or 2002, defendant began viewing child pornography on the Internet. PSR ¶ 25. Over time, he began trading it with other users via the chat feature on Yahoo!. *Id.* In December 2009, after receiving a tip from Yahoo! that defendant was sending child pornography over its servers, investigators seized defendant's computer and six CD-ROMs, pursuant to a search warrant. PSR ¶¶ 24, 28. In approximately 16 of the chat logs, portions of which were read into the record at sentencing, the defendant expresses sexual arousal at watching and touching children in their sleep, he asks whether his interlocutors have engaged in that conduct with children, and he encourages them to do so in the future. *See* Tr. 366-68.

Defendant's computer contained many logs of his Yahoo! chat sessions, which were entered into evidence at his sentencing hearing. Tr. 126. Those logs show defendant, screen name "play_daddy_of_3," repeatedly claiming to have "played" with (i.e., sexually molested) children. Tr. 129, 130, 131, 133, 136, 138, 139, 145, 146, 147, 151.

A forensic review of his computer revealed over 1100 images and 40 videos of child pornography. PSR ¶ 26. An additional 600 images and 24 videos were found on the other media. PSR ¶ 31. Some of these videos depicted bondage and sadomasochism. PSR ¶ 26. In his guilty plea, defendant admitted receiving child

pornography via chat on August 21, August 27, and October 31, 2009. PSR ¶¶ 20(b), 26. He also admitted to distributing child pornography via chat on September 10 and October 10, 2009. PSR ¶¶ 20(a), 27.

B. Witnesses Testified About Defendant's Prior Sexual Abuse of Children

On August 18, 22, and 24, 2011, the district court held evidentiary hearings at which several witnesses testified. Tr. 1–2, 91–92, 219–20. Witnesses 1, 2, and 3, whose names have been excluded from the public record to protect their privacy, were prior victims of sexual abuse or attempted sexual abuse by defendant. Witness 3, the son of defendant's ex-wife's cousin, recounted a weekend visit he had with defendant when he was about seven years old. Tr. 95. At one point, Witness 3 had to go to the bathroom, and defendant asked if he needed help. Tr. 97. The boy said, "no," and defendant said, "Well, I'm going to help you anyway." *Id.* Defendant then held the boy's penis while he urinated. Tr. 98.

Later that evening, Witness 3 was having trouble sleeping; defendant gave him a pill that made him sleepy. *Id.* Defendant then laid down next to Witness 3 on the floor and began touching the boy "in the genital area," first above and then under his clothes. Tr. 99. Witness 3 did not tell anyone for years because he had blocked out the incidents. Tr. 100. Then he saw defendant's picture on the television news after his arrest and was retraumatized; he told his wife and his mother. Tr. 101.

Witness 1, defendant's former sister-in-law, told of an incident that occurred when she was four or five and living with defendant and his ex-wife, her sister. Tr. 20.

Defendant came into her bedroom while she was sleeping, picked her up, and carried her out into the living room. *Id.* He laid her on the floor on her back, bent her knees, and spread her legs. *Id.* Defendant then pulled her underwear down below her knees. *Id.* She heard "the click of a cigarette lighter" and then "felt heat on [her] vagina." *Id.* She never opened her eyes during the incident and pretended to be asleep; she awoke in the living room. *Id.*

Throughout her later childhood, after she moved to Indiana with her mother, she received phone calls from defendant, whose voice she recognized, repeating, "I want to suck your pussy. I want to lick your pussy." Tr. 21. Whenever defendant would visit, she would stack "pillow, [her] desk chair, bags, whatever was around" in front of her bedroom door to keep him out. Tr. 22. Witness 1 started therapy at age 18 and told her therapist what had happened; together they phoned Child Protective Services in Indiana and California to report the abuse, but nothing ever came of the reports. Tr. 23, 45.[3]

Witness 2, defendant's former step-daughter, testified that when she was in eighth grade and her mother and defendant were separated, she got into a fight with her mother and spent two nights at defendant's house. Tr. 61–62. The second morning, she "woke up to him looking under [her] shirt." Tr. 62. She told her mother

[3] The PSR includes a written statement prepared in advance by this witness; she read the same statement from the stand under oath. *See* PSR ¶¶ 32–44; Tr. 19–24.

about this incident after hearing her aunt's (Witness 1's) story. Tr. 63. On cross-examination, she recalled prior instances of him doing the same thing. Tr. 70–71.

Finally, Witness 5, defendant's ex-wife, explained that Witness 1 had first told her about defendant's inappropriate conduct in 2003. Tr. 256–66. To verify that, Witness 5 provided correspondence between her and Witness 1's counselor that she had forwarded to her then-attorney in 2003 addressing whether defendant posed a danger to their then-teenage son. *Id.* Witness 6, Witness 3's mother, explained that when she picked up Witness 3 from the weekend with defendant, the boy was covered in hives and she took him to the emergency room and that after this incident, he began to act sexually inappropriately and received counseling. Tr. 273–82, 287–88. He first told her about defendant's sexual abuse in January 2011. Tr. 288.

C. The Sentencing Guidelines Recommended Life Imprisonment

Following these evidentiary hearings, the Probation Office prepared a PSR, calculating defendant's Guideline offense level at 43 and his criminal history category at I. *See* PSR ¶¶ 69, 73. Pursuant to Guideline 3D1.2(c), all seven counts of conviction were first grouped together, and then the offense-level calculation was computed under Guideline 2G2.2. PSR ¶¶ 56–57. That Guideline provided for the following calculation: a base offense level of 22; a two-level enhancement for material depicting pre-pubescent minors (§ 2G2.2(b)(2)); a five-level enhancement for exchanging child pornography for something of value, including other images (§ 2G2.2(b)(3)(B)); a four-level enhancement for images portraying sadistic conduct (§ 2G2.2(b)(4)); a five-

level enhancement for engaging in a pattern of activity involving sexual abuse or exploitation of minors (§ 2G2.2(b)(5)); a two-level enhancement for use of a computer (§ 2G2.2(b)(6)); and a five-level enhancement for possessing more than 600 images (§ 2G2.2(b)(7)(D)). PSR ¶¶ 57–63. Defendant received a two-level reduction for acceptance of responsibility under Guideline 3E1.1(a). PSR ¶ 68. Based on these calculations, defendant's Guidelines' sentencing range was life in prison. PSR ¶ 111. Counts two through seven also each carried a non-consecutive mandatory minimum of five years' imprisonment and a statutory maximum of 20 years; count eight had no mandatory minimum and a maximum of 10 years. PSR ¶¶ 107–10.

Defendant objected to the pattern-of-activity enhancement under Guideline 2G2.2(b)(5). R. 85, 19–21.[4] Guideline 2G2.2(b)(5) requires a five-level increase when a defendant has engaged in two or more separate instances of the sexual abuse or sexual exploitation of a minor, regardless of whether that conduct occurred during the offense of conviction, involved the same child, or resulted in conviction. U.S.S.G. § 2G2.2 n.1. Sexual abuse or exploitation, in turn, includes "the intentional touching, not through the clothing, of the genitalia of [a minor under age 12] with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." *See id.*; 18 U.S.C. §§ 2241(c), 2246(2)(D). Defendant first challenged the propriety of

[4] Defendant also objected to the denial of the third-point of reduction for acceptance of responsibility under § 3E1.1(b), R. 85, 21–22, ostensibly to preserve the issue, which is foreclosed by circuit precedent, for appellate review. Tr. 352. He does not, however, renew that objection on appeal.

considering any enhancement that would "punish a defendant beyond the statutory maximum for any single count of conviction," especially without applying a heightened standard of proof. R. 85, 19. He then took issue with the government's evidence, criticizing both the witnesses' credibility and the inference that he possessed the requisite intent when he held Witness 3's penis while the boy urinated. *Id.* at 20–21.

The court determined that the appropriate standard was preponderance of the evidence. Tr. 330, 442. It noted that Guideline 2G2.2(b)(5) "is more expansive than" relevant conduct considered by the Guidelines generally. Tr. 446. It then recounted all three witnesses' testimony and found their testimony "extremely persuasive and credible." Tr. 443–46. The court found "unpersuasive" defendant's contention that he was only attempting to assist Witness 3 in using the restroom and found that defendant had the requisite intent. Tr. 444; *see also* Tr. 399–404 (discussing this argument with defense counsel).

The court ultimately accepted the PSR's calculations as the Guidelines' range. Tr. 512.

D. The District Court Imposed a Below-Guidelines Sentence of 360 Months

Defendant argued below that the court should impose a drastically below-Guidelines sentence of 82 months, the national median sentence in child pornography cases in 2010. R. 85, 1. He contended that this median sentence was below the median Guidelines' range and argued that this reflected the fact that judges routinely rejected

the Guidelines as irrational. *Id.* at 5–7. Accordingly, he asserted that sentencing him to the Guidelines sentence of life would create unwarranted disparities with other similarly situated defendants. *Id.* at 2.

Defendant separately argued that the record did not establish that he had a sexual interest in children or posed a danger to children. *Id.* at 13–19. As part of this argument, he asserted that the extensive chat logs demonstrated only "the type of conversation" necessary to induce others to turn over child pornography and that his statements therein "do not depict reality" and reference "non-existent children." *Id.* at 13–14. He also attacked the credibility of the pattern-of-activity witnesses. *Id.* at 15–18. Finally, defendant contended that scientific research is inconclusive on whether viewing child pornography is an accurate predictor of child sexual abuse. *Id.* at 18–19.

The court said it "agree[d] with the guidelines generally as related to child pornography offenses and f[ou]nd that there needs to be severe penalties imposed on those who harm society's most innocent and vulnerable victims." Tr. 519–20. It also explained why it believed each enhancement applied to defendant and appropriately stated the seriousness of his conduct. The court found any disparities "overridden by the seriousness of the offense," which it described at length. Tr. 518.

Finally, the court concluded that defendant had a sexual interest in children. It stated that amassing a collection such as defendant's is not "what normal people do." Tr. 420. And it reviewed the chat logs, in which defendant "encourages other[s] to molest children and/or take child pornography," and found them "beyond horrific."

Tr. 516–17. As noted above, the court also credited the testimony of the victims of defendant's prior abuse and determined that this conduct "add[ed] to the severity of the defendant's offenses." Tr. 517.

The court concluded that defendant "was not a typical first-time offender" and did not merit a major departure from the Guidelines. Tr. 518. But the court did "not believe that a full life sentence is warranted" and thought instead that a 360-month sentence "allows [defendant] to see the light at the end of the tunnel." Tr. 520.

E. The Government Requested and The Court Imposed $4.3 Million in Restitution

Defendant possessed images of at least two identified victims of child sexual abuse, "Vicky" and "Amy."[5] Tr. 435. Both of these victims submitted requests for restitution. *See* R. 52. The government filed a motion for restitution, seeking the full amounts of the victims' losses. *Id.*

Vicky sought $965,827.64, which constitutes a total of $1,224,697.04 in losses ($108,975 in future counseling expenses, $147,830 in educational and vocational counseling needs, $722,511 in lost earnings, and $42,241.04 in evaluation and records expenses and $203,140 in attorney's fees) less $258,869.40 in restitution received from other defendants. R. 52, Ex. 1. She supported this request with her own statement, statements by her mother and step-father, psychological evaluations (dated May 22, 2009, December 2, 2009, and July 5, 2010), a vocational assessment (completed March

[5] "Amy" is the victim in the "Misty" series of child pornography. These are not the victims' real names; pseudonyms are used to protect their privacy.

10, 2010), and actuarial analysis of her lost earnings (from November 10, 2010). *Id.* Vicky explains that some of the men who have viewed her images have attempted to contact her via the Internet and that knowing images of her abuse are circulating on the Internet makes her paranoid and prone to panic attacks when surrounded by people. *Id.* She says that "as long as these images are out there, [she] never will" "feel completely safe" and that each time the images are viewed, she is "exploited again, [her] privacy is breached." *Id.* Vicky suffers from post-traumatic stress disorder, depression, anxiety, and insomnia. *Id.* Dr. Green's psychological report notes that Vicky's knowledge that "images of her as a child enduring her most nightmarish of realities are continuing to be viewed" is an "on-going, substantial stressor[]" in her life. *Id.* The December 2009 report explains that after she appeared in court to read her victim impact statement at several defendants' sentencing hearing, she was "retraumatiz[ed]" and her condition "significantly deteriorated." *Id.*

Amy requested $512,681 for future counseling and treatment, $2,855,173 for lost wages and benefits, and $17,063 in expert witness fees and approximately $3,500 in attorney's fees for a total of $3,367,854. R.52-2, 25, 36. She supported this request with her own statement of how possession of images of her abuse affects her, three reports by a trained child psychologist (dated November 21, 2008, October 21, 2010, and January 23, 2011), and an actuarial evaluation outlining Amy's losses year by year (completed September 15, 2008). Amy writes that "every day [she] live[s] in fear that someone will see [her] pictures and recognize [her] and that [she] will be humiliated all

over again." R.52-2, 37. Everyday events trigger memories of her abuse, making it difficult for her to work and forcing her to drop out of college. R. 52-2, 38–39. The psychological reports diagnose her with post-traumatic stress disorder and conclude that the "ongoing awareness that the pictures are out there interferes significantly with the therapeutic resolution of [her psychological] problems." R. 52-2, 45, 49.

Defendant resisted imposition of restitution. R. 85. He argued that he did not proximately cause any of the victims' losses, which were primarily attributable to their original abuse. R. 85, 5–6. Because there would be no way to determine how much, if any, of the victims' losses were attributable to him, he continued, any restitution order would be arbitrary and speculative. R. 85, 7–8.

The district court determined that the victims' losses were foreseeable consequences of defendant's offense conduct, which it determined was the appropriate measure of proximate cause. Tr. 437. The court imposed the full amount of restitution requested and ordered defendant jointly and severally liable with other convicted possessors. Tr. 439–40.

SUMMARY OF ARGUMENT

1. Guideline 2G2.2(b)(5), the pattern-of-activity enhancement, was properly applied here. The court's reference to the Guideline did not unconstitutionally increase defendant's sentence above the statutory maximum, which was 130 years for his multiple crimes of conviction. Accordingly, cases prohibiting sentencing enhancements without a jury's input are inapplicable. Also, although "pattern of

activity" includes more conduct than "relevant conduct" under the Guidelines, it is nonetheless consistent with the statutory command that no limitation be placed on the information available to the sentencing court. *See* 18 U.S.C. § 3661. This aspect of the Guidelines in general, as well as this application of it, produces no constitutional problems. The district court, by following the Guidelines' prescription for imposing the total appropriate sentence by means of consecutive sentences, committed no error.

2. The district court considered all of defendant's sentencing arguments and explained why it found those arguments unpersuasive. The court rejected the notion that a near-Guidelines sentence here would produce unwarranted disparities because it found defendant's conduct far outside the norm. The court also relied on the record evidence and common sense to conclude that defendant possessed a sexual interest in children and thus posed a danger to the community. The court therefore committed no procedural error in sentencing.

3. Section 2259, the restitution statute applicable here, requires a showing of proximate cause between defendant's conduct and the victims' compensable losses. Proximate cause means that the losses were foreseeable consequences of defendant's actions. That the total losses were caused by the aggregate actions of many people and thus defendant's actions were not a necessary predicate of those losses is of no moment. Traditional tort law principles would nonetheless hold defendant liable for at least part of the loss because contrary logic would let all defendants off the hook and

leave the victims uncompensated, an untenable situation. Congress intended § 2259 to embody this traditional principle.

The district court therefore committed no error in concluded that defendant's viewing of the victims' images contributed to their losses. The district court did, however, err in ordering joint and several liability. The statute, § 3664(h), only makes joint and several liability available for restitution in single cases involving multiple defendants. This Court should vacate the restitution award and remand to allow the district court to determine the appropriate amount of restitution.

ARGUMENT

I. Guideline 2G2.2(b)(5) Is Constitutional and The District Court Properly Applied It Here

Defendant argues (Br. 17–31) that the application of Guideline 2G2.2(b)(5), the "pattern-of-activity" enhancement, violated his constitutional rights because (1) his total sentence was greater than the statutory maximum for any single count of conviction and (2) he was actually being punished for crimes of which no jury convicted him. Although he continues to question the witnesses' credibility (Br. 6–10), defendant does not argue that the district court clearly erred in finding the requisite facts to support Guideline 2G2.2(b)(5)'s application. The district court followed all relevant Supreme Court law and properly applied the Guidelines in this case.

A. Standard of Review

This Court reviews a district court's interpretation of the Guidelines de novo. *United States v. Eubanks*, 593 F.3d 645, 649 (7th Cir. 2010). The court's factual findings underpinning application of a particular Guideline are reviewed for clear error. *Id.*

B. Guideline 2G2.2(b)(5) Is Constitutional

i. Statutory maxima for multiple counts of conviction

All of defendant's constitutional arguments rest on the claim that he was sentenced above the statutory maxima for his convictions. *See* Br. 20–22. Indeed, the cases he cites all deal with instances where guidelines increased the maximum sentence permissible under the statute based on facts found by judges rather than juries. *See, e.g.*, *Blakely v. Washington*, 542 U.S. 296, 305–06 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 484–85 (2000). Here, defendant pleaded guilty to seven counts. PSR ¶ 20. The total statutory maximum for his convictions is 130 years. *See* 18 U.S.C. § 2252(b) (providing statutory maxima of 20 years each for convictions of transporting, receiving, and distributing child pornography and 10 years for possessing it); *see also United States v. Veysey*, 334 F.3d 600, 601–02 (7th Cir. 2003) (affirming against an *Apprendi* challenge a sentence of 110 years when defendant was convicted on 16 counts of mail fraud (5 year maximum) and one count each of arson (20 years) and use of fire in a felony (10 years)). His sentence of 30 years is well below that maximum; *Apprendi* and its kin have no application here. *Veysey*, 334 F.3d at 602.

Defendant complains (Br. 28) that the court faced "virtually no ceiling" in sentencing because the prosecutor opted to charge his separate instances of receipt and distribution as separate crimes. The statute allows such charging, *see* 18 U.S.C. § 2252(a) (referring to "any visual depiction," in the singular), which defendant acknowledges by not arguing that his conduct does not constitute multiple violations of the statute: defendant has never filed a motion seeking to dismiss any counts as multiplicitous. Here, the indictment charged, and defendant pleaded guilty to, distinct offenses identified by different dates, not just different images. R 15. The option to bring all the available charges against a defendant rests solely with the prosecutor. *See United States v. Rietzke*, 279 F.3d 541, 545–46 (7th Cir. 2002) (holding it "well-established" that the prosecutor may, in exercise of her discretion, determine under which section(s) to charge a defendant) (citing *United States v. Batchelder*, 442 U.S. 114, 125 (1979)).[6]

Congress's inclusion of an affirmative defense for possession of less than three images, 18 U.S.C. § 2252(c), does nothing to change this analysis. That defense only applies to § 2252(a)(4), the possession offense, under which defendant was charged with only a single count. That Congress specifically opted not to make that defense available for the receipt and distribution offenses in fact indicates that it believed

[6] The Double Jeopardy Clause of the Constitution, of course, limits this discretion, but defendant raises no such challenge here (and no such violation occurred).

receipt or distribution of a single image constituted a complete crime fully worthy of punishment.

ii. The crimes of conviction and other conduct

Defendant also argues (Br. 22–24) that the district court, in imposing the additional 10-year consecutive sentence, punished him for the "separate offenses" of molesting Witness 3 and that the use of "abridged procedures" to determine his guilt thereof violates his constitutional trial rights. The Guidelines often take into account conduct that could be considered a "separate offense" to the offense of conviction. *E.g.*, U.S.S.G. § 2D1.1(b)(1) (providing an enhancement for the use of a firearm in a drug trafficking crime, conduct which is separately criminalized by 18 U.S.C. § 924(c)); *id.* § 2G2.2(b)(3)(E) (providing an enhancement if child pornography was distributed to a minor with the intention of persuading, inducing, enticing, coercing, or facilitating the travel of the minor to engage in prohibited sexual conduct, which is also criminalized by 18 U.S.C. § 2422(b)); *see also id.* § 1B1.3 (instructing courts to consider all "relevant conduct"). So long as such considerations do not produce a sentence above the statutory maximum for the offense of conviction, they are consistent with the constitutional principles outlined in *Apprendi*. *Thomas v. United States*, 328 F.3d 305, 309 (7th Cir. 2003). Indeed, the court may even consider conduct that was in fact charged as a separate crime and of which the jury acquitted defendant. *United States v. Watts*, 519 U.S. 148, 154 (1997) (per curiam); *United States v. Horne*, 474 F.3d 1004, 1006 (7th Cir. 2007).

The pattern-of-activity enhancement is broader than the relevant-conduct rule because the former requires no finding that the other conduct was "part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(2); *compare id.* § 2G2.2 n.1 (explaining that the pattern-of-activity enhancement applies "whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same minor; or (C) resulted in a conviction"); *accord United States v. Lovaas*, 241 F.3d 900, 904 (7th Cir. 2001). This is, however, a distinction without a difference: the pattern-of-activity enhancement simply sets forth a specific rule of relevance, which is not foreign to the law, especially with regard to the treatment of child sexual abuse. *E.g.*, Fed. R. Evid. 414 (declaring relevant any prior instance of child molestation by a defendant in a criminal trial for child molestation charges, which includes possession of child pornography, even though such evidence might otherwise be prohibited by Rule 404). This Court therefore held that "the Sentencing Commission acted well within its authority in promulgating" the pattern-of-activity enhancement's scope and accordingly affirmed its application. *Lovaas*, 241 F.3d at 904. That decision controls.

Furthermore, the pattern-of-activity enhancement is fully consistent with the statutory sentencing regime, which prohibits restrictions on the "information concerning the [defendant's] background, character, and conduct" the court may consider in deciding the appropriate sentence. 18 U.S.C. § 3661. The district court

properly punished defendant for conduct that, while separately criminal, was relevant to evaluating his culpability for and the danger posed by his crimes of conviction.

iii. Rationale for consecutive sentences

Finally, defendant takes issue (Br. 27, 30) with the imposition of a consecutive sentence because the district court made no explicit finding that his separate offenses "caused greater or quantitatively different loss[es]." (internal quotation marks omitted). This argument rests on *Oregon v. Ice*, 555 U.S. 160 (2009), in which the Supreme Court upheld a state statute that granted sentencing judges the option of imposing consecutive sentences if they found any of three factual conditions satisfied. *Id.* at 172. Those three situations were: (1) if the counts of conviction arose from different courses of conduct (i.e., independent crimes); (2) if the offenses showed "defendant's willingness to commit" multiple crimes; and (3) if the offenses caused "greater or qualitatively different loss, injury, or harm" or involved different victims. *Id.* at 165 (quoting Ore. Rev. Stat. § 137.123(2)). Defendant asserts (Br. 27) that it was the statute's inclusion of this final category that drove the Court's analysis. The trial judge there, however, based his decision to impose consecutive sentences, in part, on the first provision. *Ice*, 555 U.S. at 165–66. Moreover, the Court's determination that judges may find facts that open the possibility of consecutive sentences was based, almost entirely, on its review of history and conclusion that juries had never played any role in the determination of concurrent or consecutive sentencing. *Id.* at 168–70.

More importantly, federal law places no similar restrictions on a judge's authority to run sentences consecutively. It requires only a clear statement by the sentencing judge. 18 U.S.C. § 3584(a) (stating that terms of imprisonment run "concurrently unless the court orders or the statute mandates that the term are to run consecutively"). There is no doubt that the judge here satisfied that requirement. *See* R. 96. *Ice*, whatever its interpretation of the specific Oregon statute at issue there, is simply inapposite to this case.

The court here did exactly what the Guidelines instruct—and what this Court has consequently endorsed. *See Veysey*, 344 F.3d at 602. Guideline 5G1.2(d) explicitly directs a sentencing court to first calculate the total punishment for all relevant conduct and then to impose that sentence partially consecutively, if necessary due to the statutory maxima of individual counts, to achieve that total. In *Veysey*, where like here the Guidelines recommended life, the district court followed that rule and imposed the statutory maximum sentence for each count of conviction, totaling 110 years. 344 F.3d at 601–02. This Court, citing the Guidelines approvingly, affirmed. *Id.* Even though the Guidelines are now advisory, Guideline 5G1.2(d) is, like all other Guidelines, entitled to a "presumption of reasonableness," and this Court continues to approve its application. *United States v. Reyes-Medina*, 683 F.3d 837 (7th Cir. 2012).

C. The District Court Properly Applied Guideline 2G2.2(b)(5) Here

The pattern-of-activity enhancement requires a finding of two incidents of sexual abuse or exploitation, which include touching a child's genitals under the

clothes with the "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." *See* U.S.S.G. § 2G2.2(b)(5) & n.1; 18 U.S.C. §§ 2241(c), 2246(2)(D). The district court credited the witnesses' testimony, determined that the two incidents with Witness 3 qualified under this standard, and that the government had thus met its burden of showing that the enhancement applied by a preponderance of the evidence.[7] Tr. 442–46. Defendant does not challenge those findings on appeal, and they are not clearly erroneous. Accordingly, the district court committed no error in applying this enhancement in calculating defendant's Guidelines' sentencing range.

II. The District Court Fully Considered Defendant's Sentencing Arguments and Committed No Procedural Error

Defendant contends that the district court erred by not addressing two of his key arguments: (1) that a Guidelines sentence would result in unwarranted disparities with other defendants (Br. 38–40) and (2) that viewing child pornography does not establish that one has a sexual interest in minors (Br. 41–43). The district court discussed and rejected each of defendant's arguments; its sound decision should be upheld.

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[7] Defendant makes much of the contention that this enhancement increased his sentence by 10 years to argue that the procedures employed, especially the standard for the burden of proof, were deficient. *E.g.*, Br. 17. This Court has previously upheld the use of the preponderance of the evidence standard to impose larger offense-level increases under the Guidelines. *United States v. Anderson*, 259 F.3d 853, 858 (7th Cir. 2001) (affirming application of a six-level enhancement on findings by a preponderance and citing approvingly a case that imposed a nine-level enhancement under the same standard).

A. Standard of Review

This Court reviews a claim of procedural sentencing error, including that the court failed to address defendant's key arguments, de novo. *United States v. Vallar*, 635 F.3d 271, 277–78 (7th Cir. 2011).

B. Argument

A district court must address the "majority and strongest of [defendant]'s arguments" but need not explicitly discuss each of his weaker ones. *Id.* at 278. "A district court is never required to accept a defendant's arguments for a lower sentence" and "is never required to deviate from the Guidelines." *United States v. Moreno-Padilla*, 602 F.3d 802, 812 (7th Cir. 2010). The court goes "far enough" when it demonstrates its consideration of defendant's arguments by mentioning them and explaining why it finds them unpersuasive. *Id.* The district court here did just that.

i. Unwarranted disparities

Defendant argues that the district court failed to address his argument that most child pornography defendants receive sentences well below the Guidelines and that giving him a Guidelines sentence would thus create unwarranted disparities. But the court said it "agree[d] with the [G]uidelines generally as related to child pornography offenses and f[ou]nd that there needs to be severe penalties imposed on those who harm society's most innocent and vulnerable victims." Tr. 519–20. It also explained why it believed each enhancement applied to defendant—issues that, with the exception of the pattern-of-activity enhancement discussed above, defendant has

never disputed—and appropriately stated the seriousness of his conduct. The court explicitly addressed defendant's argument about unwarranted disparities, finding any disparities "overridden by the seriousness of the offense," which it described at length. Tr. 518. The court found "extremely disturbing" the high number of images involved and defendant's efforts to back-up his collection by duplicating the images "even more disturbing." Tr. 514–15. The court noted that there were 18 images and two videos that were "extraordinarily violent" and rejected the argument that defendant did not intend to have these images, a factor that "added to the seriousness of the defendant's offense." Tr. 515. Defendant's method of trading images, in one-on-one chats was "insidious, sneaky and designed to stay under the radar of law enforcement" and so counted as an aggravating rather than mitigating factor. Tr. 516. Also, defendant had been collecting child pornography, by his own admission, for eight or nine years by the time he was arrested. *Id.* Finally, the chat logs, in which defendant "encourages other[s] to molest children and/or take child pornography" were "beyond horrific." Tr. 516–17. And testimony of the victims of defendant's prior abuse "add[ed] to the severity of the defendant's offenses." Tr. 517. The court concluded that defendant "was not a typical first-time offender" and did not merit a major departure from the Guidelines. Tr. 518.[8]

[8] The remainder of defendant's argument amounts to quibbling with the Guidelines rather than with the district court's reasoning. For example, he complains that the district court "offered no explanation" for why "a sentence of 10 years greater than the statutory maximum for individual receipt and distribution offenses

Defendant also argues that the Guidelines irrationally punish child pornography offenses more harshly than violent crimes. Br. 40. Congress set the base offense level for child pornography offenses with full knowledge of the Guidelines for violent crimes. *See, e.g.*, U.S.S.G. Amd. 664 (Nov. 1, 2004) (discussing the congressionally mandated increase in base offense levels for all child exploitation offenses required by the PROTECT Act of 2003, Pub. L. No. 108-21). It is not irrational for a court to respect this legislative judgment of relative severity. *United States v. Mantanes*, 632 F.3d 372, 377 (7th Cir. 2011) (stating that "it is ultimately for Congress and the Commission to consider" whether the child pornography Guidelines are too harsh and that Guideline 2G2.2, like all other Guidelines, is presumptively reasonable in the Seventh Circuit).

In short, the district court adequately—and correctly—rejected defendant's claim that a below-Guidelines sentence would result in unwarranted disparities by finding any disparities fully warranted. *See also United States v. Pape*, 601 F.3d 743, (7th Cir. 2010) (holding that a "district court judge necessarily considers unwarranted

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appropriately addressed the nature of his offense." Br. 38. But Guideline 5G1.2(d) explicitly directs a sentencing court to first calculate the total punishment for all relevant conduct and then to impose that sentence partially consecutively, if necessary due to the statutory maxima of individual counts, to achieve that total. Defendant also faults the court for not accounting for "differences in prosecutors' charging decisions that do not uniformly charge a single course of conduct as multiple offenses." Br. 38. But again, the Guidelines fully account for charging decisions by incorporating all "relevant conduct" in calculating a sentence for a defendant convicted of one count, U.S.S.G. § 1B1.3, and by grouping counts of conviction for those convicted of multiple counts, *id.* § 3D1.2(d).

disparities among defendants when it decides to impose a within-Guidelines sentence").

ii. Sexual interest in children

Defendant also argues that the court failed to consider his argument that viewing child pornography does not establish a sexual interest in minors. The court, therefore, in defendant's opinion, applied an inappropriate presumption that he had a sexual interest in minors, which led it to analyze the pattern-of-activity witnesses' testimony less harshly and to overstate his future dangerousness. Br. 41–42. The record belies this contention. In determining whether the pattern-of-activity witnesses were credible, the court relied on its observations of their testimony and the fact that their stories and the chat logs all corroborated defendant's sexual interest in children. Tr. 443 ("The Court closely observed witness 3 while he was testifying . . . ."), 445 (finding that the "credible testimony" from witness 1 "tends to support the testimony of witness No. 3"), 446 (finding that witness 2's testimony "shows defendant's sexual interest in minors"). Indeed, at the evidentiary hearing, the government submitted 16 logs of chat conversations defendant had with other Yahoo! users in which defendant repeatedly expressed an explicit sexual interest in children of exactly the type the witnesses described: being sexually aroused watching and touching children in their sleep. *See* Tr. 366–68. The record shows that the court considered all of this evidence. *E.g.*, Tr. 407 ("I looked and read the entire chats. I looked, albeit I did not want to look, at probably all of the images because I wanted to make sure that I knew what

the evidence was going to be in this case."). Together, the chat logs and the witnesses' testimony amply demonstrate the danger defendant posed to the community.

As an alternative theory, defendant hypothesized that his viewing of child pornography was caused by his back injury, which left him isolated and depressed. *See, e.g.*, Tr. 416–17. The court considered this argument and rejected it because the record contained no psychological evaluation of the defendant that would allow it to conclude that his medical condition caused him to collect child pornography. Tr. 418–21. When deciding between defendant's theory, which rested on no record evidence, and the government's, which was backed by the testimony of three witnesses and defendant's own words in the chat logs and to investigators, the court was entitled to adopt the theory supported by evidence. The court also concluded that even if defendant's injury contributed to his viewing of child pornography, that fact would not be mitigating because his injury and depression "did not give the defendant the right to violate the most vulnerable members of our society." Tr. 518.

Finally, defendant contends that the court made no response to his argument that "scientific studies are not conclusive that viewing child pornography has a direct connection with child abuse." Br. 41. But defendant misses two obvious logical flaws in his leap between that plausibly accurate statement of the scientific literature (i.e., that not everyone who views child pornography will abuse a child) and his contention that viewing child pornography does not demonstrate a sexual interest in children. First, the fact that the literature is inconclusive in unremarkable as psychological

research rarely yields conclusive results, and it also means that the literature does not demonstrate an absence of a connection between viewing child pornography and having a sexual interest in children. Second, one might have a sexual interest in children and fail to act on it by abusing children for any number of reasons, including fear of being caught, lack of access, and self-control.[9] Defendant's argument is akin to one that because not every person who possesses drugs is an addict, it would be irrational to assume that finding a person in possession of drugs makes it much more likely that that person has an addiction. Common sense, of course, says otherwise, which the court explicitly acknowledged here. Tr. 420 ("I don't believe that's [collecting child pornography] what normal people do."). In any event, the fact that "anyone acquainted with the facts would have known without being told why the judge had not accepted the argument" because common sense makes the answer obvious, means that this argument was "so weak as not to merit discussion." *United States v. Cunningham*, 429 F.3d 673, 679 (7th Cir. 2005). Accordingly, even if the district court ignored this argument, it would have committed no error.

III. The District Court Accurately Found Proximate Cause Justifying Restitution But Erred in Ordering Joint And Several Liability

A. Standard of Review

This Court reviews de novo "questions of law involving the district court's authority to order restitution." *United States v. Hassebrock*, 663 F.3d 906, 923 (7th Cir.

[9] Studies, of course, might also conclude that subjects have not molested children merely because they have not been caught or confessed to such behavior.

2011). The district court's calculation of the restitution amount, including the procedures it used to make that calculation, receives abuse of discretion review. *Id.* at 925. The district court's factual findings are reviewed for clear error. *United States v. Ali*, 619 F.3d 713, 720 (7th Cir. 2010).

B. The District Court Accurately Found That Defendant's Conduct Proximately Caused The Victim's Harms

The parties here did not dispute that § 2259 requires a finding of proximate cause linking defendant's offense conduct to the victim's injuries. There is, however, a dispute regarding what "proximate cause" requires. Defendant contends (Br. 32–35) that proximate cause requires a showing that his conduct caused a particular loss to the victim. The government maintains that, at least in situations of multiple offenders such as possession of child pornography, proximate cause requires only that the harm have been foreseeable to the defendant. The district court adopted the government's position, Tr. 437, and found that Vicky's and Amy's losses—the need for ongoing therapy, their attorney's fees, and their lost earnings—were foreseeable consequences of possession of their images, Tr. 434, 438. The court's legal conclusion is correct, and its factual findings are not clearly erroneous.

i. Section 2259 requires proximate cause

A restitution order under § 2259 must direct the defendant to pay the victim the "full amount of the victim's losses as determined by the court." 18 U.S.C. § 2259(b)(1). The term "full amount of the victim's losses" includes five specifically

enumerated categories of compensable losses, 18 U.S.C. § 2259(b)(3)(A)–(E), and a sixth catchall category applicable to "any other losses suffered by the victim as a proximate result of the offense," *id.* § 2259(b)(3)(F). Eight circuits have already considered whether the five categories of enumerated losses also require a showing of proximate cause, and they all agree that it does. *See United States v. Burgess*, 684 F.3d 445, 457 (4th Cir. 2012); *United States v. Kearney*, 672 F.3d 81, 96 (1st Cir. 2012); *United States* v. *Evers*, 669 F.3d 645, 659 (6th Cir. 2012); *United States v. Aumais*, 656 F.3d 147, 153 (2d Cir. 2011); *United States* v. *Monzel*, 641 F.3d 528, 536–37 (D.C. Cir. 2011); *United States v. McDaniel*, 631 F.3d 1204, 1208 (11th Cir. 2011); *United States v. Laney*, 189 F.3d 954, 965 (9th Cir. 1999); *United States* v. *Crandon*, 173 F.3d 122, 125–26 (3d Cir. 1999)).[10] This Court should reach the same conclusion.

These courts have adopted two rationales for finding a proximate cause requirement in § 2259(b)(3): (1) background principles of tort law generally require proximate cause and the statute does not explicitly negate those principles; and (2) the proximate cause language in subsection (F) applies to the preceding sections as well. This Court, like the Sixth Circuit, "need not choose between the rationales . . . as they are complementary." *Evers*, 669 F.3d at 659.[11]

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[10] The Fifth Circuit originally held that restitution under § 2259 required no showing of proximate cause. *In re Amy Unknown*, 636 F.3d 190, 201 (5th Cir. 2011). The court has since vacated that opinion, *In re Amy Unknown*, 668 F.3d 776 (5th Cir. 2012); it reheard the case en banc on May 3, 2012.

[11] The requirement of proximate cause was not disputed in *United States* v. *Crandon*, 173 F.3d 122, 125–26 (3d Cir. 1999), and the Third Circuit simply applied a

The First, Second, Fourth, and D.C. Circuits have concluded that § 2259 incorporates a proximate cause requirement because Congress "legislated against the background of our traditional legal concepts[,] which render proximate cause a critical factor." *Monzel*, 641 F.3d at 536 (internal quotation marks and alteration omitted); *accord Burgess*, 684 F.3d at 457; *Kearney*, 672 F.3d at 96; *Aumais*, 656 F.3d at 153. Indeed, it is a "bedrock rule of both tort and criminal law that a defendant is only liable for the harms he proximately caused." *Monzel*, 641 F.3d at 535. And if Congress had meant to eliminate this requirement from § 2259, "it would have found a clearer way of doing so." *Id.* at 537. Furthermore, § 2259's legislative history indicates that Congress intended a proximate cause requirement to apply. S. Rep. No. 103-138, at 56 (1993) ("Mandatory restitution: This section requires sex offenders to pay costs incurred by victims as a proximate result of a sex crime.").

The Ninth and Eleventh Circuits, in contrast, have relied on the inclusion in subsection (F) of "other" losses proximately resulting from the offense, which implies that Congress understood that the preceding allowable categories of compensable losses must be shown to have proximately resulted from the offense as well. *See McDaniel*, 631 F.3d at 1208–09; *Laney*, 189 F.3d at 965 (deriving a proximate cause requirement for all of § 2259 from its inclusion in subsection (F) without much discussion). It is a well-settled canon of statutory construction that "'[w]hen several

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proximate cause requirement without discussing whence it derived. As noted above, the Sixth Circuit endorsed both rationales. *Evers*, 669 F.3d at 659.

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.'" *McDaniel*, 631 F.3d at 1209 (quoting *Porto Rico Railway, Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920) (Brandeis, J.)). This interpretive canon applies to the statutory list of compensable losses in § 2259(b)(3) and confirms that the modifying phrase "as a proximate result of the offense" in subsection (F) is "equally applicable to medical costs, lost income, and attorney's fees as it is to 'any other losses.'" *Id.* at 1208.

If there were any doubts about the proper construction of this statutory list, moreover, those doubts should be resolved by construing the statute to "effectuate the general purpose of Congress." *Porto Rico*, 253 U.S. at 348. Here, although Section 2259 reflects a clear legislative purpose to impose a broad restitution remedy in favor of exploited child victims, it should not be understood to have bestowed a remedy unbounded by any limiting principle. That is especially so because this statute authorizes the imposition of liability as a result of a criminal conviction, and thus is unlike the jurisdiction-conferring statute at issue in *Porto Rico*, 253 U.S. at 346. As a result, the better view is to presume that Congress adhered to the usual balance in the law of remedies: to hold defendants fully accountable for the losses associated with their conduct but in a manner that respects the deeply-rooted principle of proximate causation. Nor is there anything absurd about the conclusion that Congress would have intended for this limiting principle to apply to all categories of losses because the

very purpose of a proximate-cause limitation is to "prevent 'infinite liability.'" *CSX Transp., Inc.* v. *McBride*, 131 S. Ct. 2630, 2642 (2011) (quoting Prosser § 41, at 264).

ii. Proximate cause requires only foreseeability and not direct causation

As the district court noted, Tr. 437, the courts of appeals have split on the question of what, exactly, "proximate cause" requires under § 2259. One set of courts has adopted the government's position that proximate cause means the foreseeable result of the offense conduct. *See Burgess*, 684 F.3d at 459; *Kearney*, 672 F.3d at 96; *Evers*, 669 F.3d at 659. The other set has defined proximate cause as either a "substantial cause" of the victim's losses or as a but-for cause. *Aumais*, 656 F.3d at 155; *United States v. Kennedy*, 643 F.3d 1251, 1261 (9th Cir. 2011).[12] This Court should join the former group.

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[12] Several other courts have not yet addressed this issue. Because of the posture of *Monzel*, the D.C. Circuit had no opportunity to define proximate cause, and its opinion includes language that can be read either way. For example, it found that Amy was not entitled to recover the full amount of her losses from Monzel because his "possession of a single image of Amy was neither a necessary nor a sufficient cause of all of her losses." 641 F.3d at 538. But it also recognized that the imprecision inherently involved in estimating the degree of Monzel's contribution to Amy's losses "is not fatal" to a restitution order. *Id.* at 540. The court noted that the district court must rely on "some principled method" but did not prohibit, for example, dividing her losses by the number of defendants. *Id.* The Eleventh Circuit has made contrary holdings on the issue. In *McDaniel*, it affirmed a restitution order after finding sufficient proximate cause from testimony that Vicky's receipt of notifications that defendants possessed her images, in general, caused harm. 631 F.3d at 109. In *United States v. McGarity*, 669 F.3d 1218, 1269 (11th Cir. 2012), however, it reversed a restitution order because the record contained no evidence that the defendant's specific possession of Amy's images harmed her. Finally, the Third Circuit upheld a restitution order where the defendant's conduct was a "significant contributing

In tort law, proximate cause stands in contrast to but-for causation and generally requires only "reasonably foreseeable risks of harm." *Kearney*, 672 F.3d at 96 (internal quotation marks omitted); *see also Evers*, 669 F.3d at 659 (affirming restitution for losses that were "reasonably foreseeable" results of defendant's conduct). And tort law has long understood how to deal with multiple actors whose "combined conduct, viewed as a whole, is a but-for cause of the [harm]": when "application of the but-for rule to each of them individually would absolve all of them [of liability], the conduct of each is a cause in fact of the [harm]." Keeton, et al., Prosser and Keeton on Torts § 41 at 268 (5th ed. 1984) (hereinafter "Keeton").

Congress understood the mechanism by which possession harms victims, exacerbating their psychological injuries, and that multiple individuals in the marketplace would often possess any one victim's images. *See Kearney*, 672 F.3d at 97 (discussing the "body of Supreme Court case law explaining the type of harm caused by distribution and possession of child pornography, including psychological harm" that formed the backdrop of Congress's consideration of § 2259); *Burgess*, 684 F.3d at 459 (noting that *New York v. Ferber*, 458 U.S. 747, 759 (1982) and *Osborne v. Ohio*, 495 U.S. 103, 111 (1990), the cases providing this backdrop, identified the "nature of the harm inflicted"). And Congress intended victims of child pornography possession to recover restitution for their losses because § 2259 does not limit recovery to

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factor" to the victim's injuries, but what constitutes proximate causation was not disputed or discussed. *Crandon*, 173 F.3d at 126.

production offenses, or even trafficking and distribution, but mandates restitution for "any offense under this chapter." *Id.* Thus, the only tenable conclusion is that Congress intended § 2259 to incorporate this traditional tort view of proximate cause. Accordingly, as the First Circuit explained, when "[p]roximate cause exists on the aggregate level, . . . there is no reason to find it lacking on the individual level." *Kearney*, 672 F.3d at 98; *accord Burgess*, 684 F.3d at 459.

The contrary views of the Second and Ninth Circuits create a "strict in theory, fatal in fact" rule that essentially rewrites the statute to exclude possession offenses, thereby obviating congressional intent. Those courts require a "direct relation," *Aumais*, 656 F.3d at 154, or a "causal chain between [the defendant's] conduct and the specific losses," *Kennedy*, 643 F.3d at 1263. Essentially, unless the victim is able to identify one specific therapy session she incurred or one particular day of work she missed because this individual defendant viewed her images, she cannot recover anything. *See Aumais*, 656 F.3d at 155 (faulting Amy's expert witness for not being able to "speak to the impact on Amy caused by *this defendant*"); *Kennedy*, 643 F.3d at 1263 (denying restitution because the government could not show that Amy and Vicky "could have avoided certain losses had Kennedy not transported the images"). This rule ignores the reality of how the modern child pornography market harms its victims above and beyond the abuse they endured when the images were created: the harms are great precisely because the images are widely distributed and so many

people have seen them that the victims live in constant fear of being recognized, harassed, humiliated, degraded, or abused again.

"The 'logic' of [these courts'] argument is that there would be no remedy for the harm suffered by Vicky [and Amy] as a result of the redistribution and possession of [their] images." *Kearney*, 672 F.3d at 99. Even if it is true that defendant's possession of the victims' images in not a necessary or but-for cause of their injuries, the fact remains that "had none of [the defendants who have viewed their images] acted improperly the [victims] would not have suffered the harm." Keeton, § 41 at 268–69. As the Ninth Circuit itself realized, "it is likely to be a rare case where the government can directly link one defendant's viewing of an image to a particular cost incurred by the victim." *Kennedy*, 643 F.3d at 1266. This observation speaks the obvious; that is why it is implausible to believe Congress intended § 2259 to embody such a strict requirement. By reading one into the statute, these courts have rewritten it. This Court should follow Congress's intent to provide victims with full recovery by following traditional tort principles regarding proximate cause, which has always stood in contrast to but-for causation.

Finding that proximate cause requires only a showing of foreseeability is consistent with this Court's restitution precedents as well.[13] For example, in *United*

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[13] Defendant relies heavily on *United States v. Neal*, 36 F.3d 1190, 1199–1200 (1st Cir. 1994), in which the First Circuit vacated a restitution order against a defendant convicted of being an accessory after the fact of a bank robbery and laundering some of the proceeds. Neal's co-defendants robbed the bank of $266,500; Neal

States v. Rhodes, 330 F.3d 949 (7th Cir. 2003), cited by defendant, this Court affirmed a restitution order for the full amount of losses, including consequential damages, incurred by the defendant's former employer in compensating victims of his fraud, their investment customers. *Id.* at 953–54. In upholding the consequential damages, which the Court defined as "those damages that do not flow directly from a party's action, but only from some of the consequences or results of such action," *id.* at 953 n.1, the Court relied on foreseeability principles: defendant should have known when he placed these risky investments that they might fail, thereby costing his employer more to make his clients whole. *Id.* In considering restitution under § 2259, this Court has focused on Congress's intent that victims fully recover without creating a "cumbersome procedure." *United States v. Danser*, 270 F.3d 451, 455 (7th Cir. 2001) (upholding restitution for future therapy costs even though such losses have not yet been incurred).

iii. The district court's finding of proximate cause is not clearly erroneous

The district court found that Vicky and Amy are victims within the meaning of § 2259, that is, that they were "harmed as a result of" defendant's possession of their

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subsequently laundered $14,000 of that by purchasing a getaway car and received $5,000 for his troubles. *Id.* at 1199. Notably, the *Neal* court did not hold that "no possible basis" existed for holding Neal accountable for the full amount of loss from the robbery. *Id.* at 1201 n.10. The court only remanded the case for further development of the record for the determination as to how much of the total loss was attributable to Neal's conduct. Defendant misattributes this case to the Seventh Circuit. Br. 34.

images. Tr. 435. It determined that "proximate cause is best defined as a flexible concept and does not equate to but/for cause." Tr. 437. Accordingly, it determined that "there is no doubt that" the victim's claimed losses were "reasonably foreseeable consequence[s] of defendant's action." Tr. 438.

Defendant has never disputed that the types of losses Amy and Vicky have incurred are foreseeable consequences of his offense conduct: viewing images of their child sexual abuse. *See* Br. 33–35 (claiming only that proximate cause requires a direct link between defendant's conduct and a particular loss). Indeed, he could not. Section 2259 itself makes clear that "psychiatric[] or psychological care," "occupational therapy or rehabilitation," "transportation," "lost income," and "attorneys' fees [and] other costs incurred" are costs associated with sexual offenses against children, including possessing child pornography. 18 U.S.C. § 2259(b)(3). As the Supreme Court recognized 30 years ago, child pornography serves as a "permanent record of the children's participation [in their sexual abuse] and the harm to the child is exacerbated by [its] circulation," which includes its possession. *New York v. Ferber*, 458 U.S. 747, 759 (1982); *see also Ashcroft v. Free Speech Coalition*, 535 U.S. 324, 249 (2002) ("[E]ach new publication of the [images of child pornography] would cause new injury to the child's reputation and emotional well-being."). Congress agrees: the "possession of child pornography . . . is harmful to the physiological, emotional, and mental health of the children depicted" and "[e]very instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and

repetition of the abuse." Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 510, 120 Stat. 587, 623, 624.

The psychological reports and victim statements the government submitted on behalf of the victims outlines this causation in detail. For example, Vicky explained that some of the men who have viewed her images have attempted to contact her via the Internet and that knowing images of her abuse are circulating on the Internet makes her paranoid and prone to panic attacks when surrounded by people. R.52, Ex. 1. She says that "as long as these images are out there, [she] never will" "feel completely safe" and that each time the images are viewed, she is "exploited again, [her] privacy is breached." *Id.* Her psychological evaluation notes that Vicky's knowledge that "images of her as a child enduring her most nightmarish of realities are continuing to be viewed" is an "on-going, substantial stressor[]" in her life. *Id.* Amy, too, explained that "every day [she] live[s] in fear that someone will see [her] pictures and recognize [her] and that [she] will be humiliated all over again." R.52-2, 37. The viewing of her images by people like defendant "interferes significantly with the therapeutic resolution of [her psychological] problems." R. 52-2, 45, 49.

Once accepted that when proximate cause "exists on the aggregate level, . . . there is no reason to find it lacking on the individual level," the record here more than supports the district court's finding that defendant proximately caused the victims' losses. *Kearney*, 672 F.3d at 98. Accordingly, the district court's finding of proximate cause constitutes neither legal error nor clear factual error.

C. The District Court Erred in Ordering Joint and Several Liability

In the court below, the government requested that the court order restitution in the full amount the victims sought jointly and severally with all other defendants who had been or would be subject to similar orders. R. 52, 6–7. Defendant contended that joint and several liability is unavailable under § 2259 in a single-defendant case. R. 84, 8–9. The district court considered formulas and calculations employed by other courts to apportion restitution and deemed them "arbitrary." Tr. 441. It, thus, accepted the government's position and ordered restitution in the full amounts shown by the victims, "jointly and severally with other defendants responsible for Vicky['s] and Amy's claimed losses." Tr. 440–42. On further reflection, the government now believes the district court erred in using joint and several liability to calculate the restitution order.[14] This Court should remand for the district court to reconsider the amount of restitution to award.

i. Section 2259 does not provide for joint and several liability here

Section 3664(h), which applies to the implementation of restitution orders under § 2259, provides: "If the court finds that more than 1 defendant has contributed to the loss of a victim, 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

[14] The Department of Justice adopted a position against the use of joint and several liability in this context after the district court issued the restitution order in this case.

circumstances of each defendant." 18 U.S.C. § 3664(h). "Section 3664(h) implies that joint and several liability may be imposed only when a single district judge is dealing with multiple defendants in a single case." *Aumais*, 656 F.3d at 156.

The term "joint and several liability" is traditionally used to describe the liability of multiple defendants in the same case who are each found liable for the same harms to the plaintiff. In that setting, the plaintiff is entitled to enforce the judgment in full against any one of the defendants. *See McDermott, Inc.* v. *AmClyde*, 511 U.S. 202, 221 (1994) ("Joint and several liability applies when there has been a judgment against multiple defendants."). Some courts have described the restitutionary liability of a defendant convicted of possessing child pornography as "joint and several" with the liability of other defendants subject to restitution orders involving the same losses to the same victim. *See Aumais*, 656 F.3d at 155; *Kennedy*, 643 F.3d at 1265; *Monzel*, 641 F.3d at 538–39. But federal criminal statutes governing restitution adhere to the traditional view of joint and several liability, and do not authorize its use in this context.

Section 3664(h) does not authorize joint and several liability with respect to defendants who are not before the court that is ordering restitution. The statute's reference to the court's authority to "make each defendant liable" indicates that the subsection is only applicable when there are multiple defendants before the same sentencing court over whom the court has power. Likewise, the provision's use of the definite article "the" in relation to "the court" further indicates that it was intended to

allow multiple defendants before a single judge to be held jointly and severally liable by that judge, and not to allow such liability to be imposed "in different cases, before different judges, in different jurisdictions around the country." *Aumais*, 656 F.3d at 156; *see also id.* ("Section 3664(h) implies that joint and several liability may be imposed only when a single district judge is dealing with multiple defendants in a single case."); *United States v. Hunt*, 521 F.3d 636, 649 (6th Cir. 2008) ("In cases involving multiple defendants, § 3664(h) explicitly gives district courts discretion as to whether they should apply joint and several liability or whether liability should be apportioned among the defendants based on their economic circumstances and their respective contributions to the victims' losses."); *Monzel*, 641 F.3d at 538–39 (The words "more than 1 defendant" and "each defendant" strongly imply "that Section 3664(h) does not apply to prosecutions where there is only one defendant."). That is not the circumstance in the typical child pornography case, and it is not the circumstance here.

Under § 2259, each defendant must be ordered to pay the full amount of the losses he has proximately caused by his offense—no more, no less. It is possible, however, that the total amount all defendants are found to have proximately caused will be greater than a victim's actual losses, even without joint and several liability. Defendant contends (Br. 36) that such a situation would allow the victim to recover more than her actual losses, which would make his restitution award in violation of § 2259. In reality, due to some defendants' indigency, these restitution awards will not

always be paid in full, but should defendant feel that the victims have recovered all their losses, he may petition the district court for a reprieve from his restitution obligations and that court can determine how to proceed with such a motion. The government is also tracking restitution payments, via reports from the various courts that collect them, and will notify the courts if and when the aggregate amount of losses has been recovered.

ii. The district court should determine how much of the aggregate losses are attributable to defendant's offense

The district court's determination of the appropriate amount of restitution here was likely influenced by its conclusion that joint and several liability was an available option. Tr. 439. Accordingly, this Court should vacate the restitution order and instruct the district court impose an appropriate restitution order without reliance on joint and several liability. *See Hassebrock*, 663 F.3d at 926 (vacating a restitution order and remanding for further proceedings when the district court failed to explicitly state the statutory basis for imposing restitution).

There are a variety of permissible methods the district court could use in determining the appropriate amount of restitution to award. *See, e.g.*, *Kearney*, 672 F.3d at 100–01 (affirming the district court's calculation of the average of prior restitution awards, resulting in a restitution order of $3,800 to Vicky); *United States* v. *Brannon*, 2011 WL 2912862, *9 (N.D. Ga. May 26, 2011) (unpublished) (considering the number of prosecuted defendants, average restitution awards, and the likelihood of

future offenders to order $3,500 in restitution to Vicky), aff'd by 2012 WL 1758998 (11th Cir. May 17, 2012).

That appropriate amount is not, however, divorced from the question of proximate cause. The statute requires that the court order restitution for the "full amount of the victim's losses" proximately caused by defendant's offense conduct. 18 U.S.C. § 2259(b)(1). Accordingly, the government suggests that the best method in a situation like this where multiple defendants harmed the victims and thereby contributed to their losses is to begin by calculating the total amount of loss. Such a calculation would take into account the fact that losses incurred before defendant's offense could not be proximately caused by his offense; any losses predating defendant's offense should be deducted from the total amount of loss. *See United States* v. *Carreon*, 11 F.3d 1225, 1235 (5th Cir. 1993) (defining foreseeability as forward looking).

Then the court must determine how much of that amount is attributable to defendant's offense conduct.[15] We recognize that there is a lack of consensus among

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[15] We suggest—and will suggest to the district court on remand—that dividing that amount by the number of proven possessors of each victim's image is one valid method the court might employ. **Error! Main Document Only.**At present, that number for Vicky is approximately 300 and for Amy approximately 175. This approach has many virtues among the various approaches that have been used. It reflects the reality that many individuals have contributed to the victims' harms and losses, and seeks to distribute responsibility for the total amount of proven losses they have incurred and will incur in treating those harms among the most culpable and readily-definable population of offenders—those for whom we have the highest degree of certainty as to their guilt because of their convictions and, hence, their

courts on this difficult issue, owing to both the complexity of the issue and the broad discretion accorded district courts in determining the amount of restitution. In recognition of this discretion, and the complexity of this issue, the courts of appeals have tolerated various approaches as long as the amount ordered reflected a "reasonable estimate" of the victim's losses and was not based on an "arbitrary calculation." *See, e.g.*, *United States v. Boring*, 557 F.3d 707, 713 (6th Cir. 2009) (applying abuse of discretion review to the calculation of an award). The district court "need only make a 'reasonable determination of appropriate restitution.'" *Kearney*, 672 F.3d at 100 (quoting *United States v. Innarelli*, 524 F.3d 286, 294 (1st Cir. 2008)); *see also Danser*, 270 F.3d at 455 n.5 (affirming restitution award for a lifetime of therapy despite the "inherent uncertainties attendant upon an award of prospective damages"). "Absolute precision is not required." *Kearney*, 672 F.3d at 100 (quotation omitted). "Moreover, the district court has leeway to resolve uncertainties with a view towards achieving fairness to the victim." *Id.* (quotation omitted). "'[S]ome degree of approximation" is acceptable under § 2259, and . . . 'mathematical precision' is not required." *Id.* (quoting *Monzel*, 641 F.3d at 540); *cf. United States v. Jones*, 641 F.3d 706, 712 (6th Cir. 2011) ("A statistical estimate may provide a sufficient basis for calculating the amount of loss caused by a defendant.").

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concrete contribution to the victims' losses. This approach recognizes that no single possessor caused all of the victims' harms. The object of restitution is of course to make the victim whole, and this approach is a sensible way to achieve that objective.

As is true with respect to any exercise of judicial discretion, different courts may permissibly reach different results in different cases involving the same evidence. *See McCleskey* v. *Kemp*, 753 F.2d 877, 898 (11th Cir. 1985) ("The very exercise of discretion means that persons exercising discretion may reach different results from exact duplicates. Assuming each result is within the range of discretion, all are correct in the eyes of the law."); *cf. United States* v. *Anonymous Defendant*, 629 F.3d 68, 78 (1st Cir. 2010) ("There is normally no single appropriate [substantively reasonable] sentence but, rather, a range of reasonable sentencing options."). Thus, other courts of appeals have affirmed a range of awards in favor of both Vicky and Amy using different approaches, and, in the eyes of the law, each of these results is correct. In the end, this is a choice for the district court to make in the first instance on remand.

CONCLUSION

For the foregoing reasons, this Court should affirm defendant's sentence, vacate the restitution order, and remand the case for further proceedings in the district court.

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), the undersigned counsel of record certifies that the foregoing Brief for the United States was this day served upon Viniyanka Prasad, counsel for appellant, by notice of electronic filing with the Seventh Circuit CM/ECF system.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 11,862 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Garamond 14-point font in text and Garamond 14-point font in footnotes.
3. This brief was filed electronically, in native Portable Document File (PDF) format, via the Seventh Circuit's CM/ECF system.

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CERTIFICATE OF DIGITAL SUBMISSION

The undersigned counsel certifies that:

1. The foregoing Brief for the United States complies with the privacy redactions ordered by the district court in this case regarding the witnesses' and victims' names;
2. The digital form version electronically filed with the Court on this day is an exact copy of the written document to be sent to the Clerk; and
3. The digital form version electronically filed with the Court on this day has been scanned for viruses with McAfee VirusScan Enterprise, version 8.7.0*i*, which is continuously updated, and according to that program is free of viruses.

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