

10-3160-cr
United States v. Aumais

1 **UNITED STATES COURT OF APPEALS**

2
3 **FOR THE SECOND CIRCUIT**

4
5 August Term, 2010

6
7
8 (Argued: June 15, 2011 Decided: September 8, 2011)

9
10 Docket No. 10-3160-cr

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12 - - - - -X

13
14 UNITED STATES OF AMERICA,

15
16 Appellee,

17
18 -v.-

19
20 GERALD AUMAIS,

21
22 Defendant-Appellant.

23
24 - - - - -X

25
26 Before: JACOBS, Chief Judge, WINTER and
27 McLAUGHLIN, Circuit Judges.

28
29 Defendant-Appellant Gerald Aumais appeals from an
30 Amended Judgment of Conviction entered on August 3, 2010 in
31 the United States District Court for the Northern District
32 of New York (Sharpe, J.). Aumais pleaded guilty to
33 transporting and possessing child pornography in violation
34 of 18 U.S.C. §§ 2252A(a)(1), and (a)(5)(B). The district
35 court sentenced Aumais to 121 months' imprisonment and

1 ordered him, pursuant to 18 U.S.C. § 2259, to pay \$48,483 in
2 restitution to finance future counseling costs of "Amy," one
3 of the victims depicted in the images and videos. On
4 appeal, Aumais challenges the restitution order on the
5 ground that his possession was not a proximate cause of her
6 loss. Aumais also argues that the district court committed
7 procedural and substantive error in sentencing him to 121
8 months' imprisonment. We conclude that: based on the facts
9 in this case, Aumais' possession of Amy's images was not a
10 substantial factor in causing her loss; and that the
11 district court committed no procedural or substantive error
12 in imposing the sentence of imprisonment. Affirmed in part
13 and reversed in part.

14 GENE V. PRIMOMO, Assistant Federal Public
15 Defender (Molly Corbett, on the brief), for
16 Lisa Peebles, Federal Public Defender, Albany,
17 New York, for Defendant-Appellant.
18

19 PAUL D. SILVER, Assistant United States
20 Attorney (Elizabeth Horsman, Assistant United
21 States Attorney, on the brief), for Richard S.
22 Hartunian, United States Attorney for the
23 Northern District of New York, for Appellee.

24 DENNIS JACOBS, Chief Judge:

25 Gerald Aumais ("Aumais") appeals from an Amended
26 Judgment of Conviction entered on August 3, 2010 in the
27 United States District Court for the Northern District of

1 New York (Sharpe, J.). Aumais pleaded guilty to
2 transporting and possessing child pornography in violation
3 of 18 U.S.C. §§ 2252A(a)(1), and (a)(5)(B). The district
4 court sentenced Aumais to 121 months' imprisonment and
5 ordered him, pursuant to 18 U.S.C. § 2259, to pay \$48,483 in
6 restitution to finance future counseling costs of "Amy" (a
7 pseudonym), one of the victims depicted in the images and
8 videos. Aumais challenges the restitution order on the
9 ground that his possession was not a proximate cause of
10 Amy's loss. Aumais also argues that the district court
11 committed procedural and substantive error in sentencing him
12 to 121 months' imprisonment. We conclude that: based on the
13 facts in this case, Aumais' possession of Amy's images was
14 not a substantial factor in causing her loss; and that the
15 district court committed no procedural or substantive error
16 in imposing the sentence of imprisonment. Affirmed in part
17 and reversed in part.

18 19 **Background**

20 Aumais attempted to enter the United States from Canada
21 at the Fort Covington, New York Port of Entry in November
22 2008, where he was referred for secondary inspection. A

1 search of his car revealed a cache of DVDs and other
2 electronic devices that stored thousands of still images of
3 child pornography and over one hundred such videos. Aumais
4 told border agents that he owned all of the electronic media
5 located in the car and admitted to downloading the child
6 pornography from a peer-to-peer network.

7 He was charged with: (1) transporting child pornography
8 in foreign commerce, in violation of 18 U.S.C.
9 § 2252A(a)(1); and (2) possessing child pornography that had
10 been transported in foreign commerce, in violation of 18
11 U.S.C. § 2252A(a)(5)(B). On February 4, 2009, Aumais
12 entered a plea of guilty, without a written plea agreement,
13 to both counts of the indictment.

14 **A.**

15 Aumais' Presentence Investigation Report ("PSR")
16 reflected a base offense level of 22.¹ The offense level

¹ Aumais sought a two-level reduction, pursuant to U.S.S.G. § 2G2.2(b)(1), on the ground that his conduct was limited to the receipt or solicitation of child pornography. The PSR had scored an additional two levels based upon a statement Aumais allegedly made at the time of his arrest that he traded in child pornography. The district court held a brief evidentiary hearing to resolve the factual dispute. The Government called Immigration and Customs Enforcement Officer Tim Losito, who testified that, at the time of his arrest, Aumais stated that he traded in child pornography. Based on this testimony and on the volume of pornographic images in Aumais' possession while he was

1 was increased two levels because some of the images were of
2 pre-pubescent minors, see U.S.S.G. § 2G2.2(b)(2); four
3 levels because the material contained sadistic images, see
4 U.S.S.G. § 2G2.2(b)(4); two levels because the offense
5 involved use of a computer, see U.S.S.G. § 2G2.2(b)(6); and
6 five levels based upon the number of images in Aumais'
7 possession, see U.S.S.G. § 2G2.2(b)(7)(D). Aumais' offense
8 level was reduced three levels for his early acceptance of
9 responsibility, see U.S.S.G. § 3E1.1(a)-(b). With a total
10 offense level of thirty-two and a Criminal History Category
11 of I, the recommended Guidelines range was 121 to 151
12 months' imprisonment.

13 The PSR identified a victim known as "Amy," who sought
14 \$3.3 million in restitution pursuant to 18 U.S.C. § 2259.
15 Her Victim Impact Statement explained that she was unable to
16 forget the abuse she suffered at the hands of the uncle (who
17 took the pictures) because the "disgusting images of what he
18 did to [her] are still out there on the internet." She said
19 she lives in fear that she will be recognized in the
20 pictures that remain on the internet and will be "humiliated

ostensibly on a one-week business trip, the district court found that Aumais had traded in some materials and denied Aumais' request for a two-point reduction.

1 all over again."

2 The district court found that Aumais was a pedophile,
3 that he presented a danger to children (although the court
4 credited a polygraph result indicating that he had never
5 gone beyond viewing images), and that he was responsible for
6 harm caused to the children in the images. The district
7 court found that a sentence of 121-months' imprisonment (the
8 low-end of the Guidelines range) was appropriate in view of
9 all the 18 U.S.C. § 3553(a) factors. Accordingly, the
10 district court imposed a sentence of 121 months'
11 imprisonment on Count 1 and 120-months' imprisonment on
12 Count 2, to run concurrently, and a five-year term of
13 supervised release. The district court bifurcated the issue
14 of restitution and referred the matter to a magistrate judge
15 for consideration.

16 **B.**

17 On December 22, 2009, Magistrate Judge David Homer
18 conducted an evidentiary hearing on restitution. The only
19 witness to testify, Government witness Dr. Joyanna Silberg,
20 had evaluated Amy at the request of Amy's attorney, James
21 Marsh, on June 11-12, 2008, July 29, 2008, and November 10,
22 2008. Dr. Silberg recounted that Amy had been sexually

1 abused by her uncle between the ages of 4 and about 7 or 8,
2 that Amy underwent treatment after suffering the abuse, and
3 that the treatment allowed Amy to "function[] pretty well
4 normally" until she learned that her image was being traded
5 on the internet, after which she experienced a fear "of
6 being at parties, fear of being in public gatherings," and
7 had difficulty coping "with her life because of her sense of
8 pervasive helplessness" about the fact that people were
9 viewing her image. Government Appendix 30-31.

10 Amy discovered that her images were on the internet
11 when she received victim notifications from The National
12 Center for Missing and Exploited Children ("NCMEC"), which
13 compares images of child pornography, identifies those
14 depicted within, and then notifies the victim every time
15 someone is arrested who is found to possess that victim's
16 image. Knowledge that her images were still being viewed
17 caused emotional and psychological problems: she bit her
18 nails to the point of bleeding, took to alcohol, and could
19 not finish college. Dr. Silberg concluded that Amy was a
20 direct victim of Aumais' conduct and that "Mr. Aumais
21 represent[ed] one component of the damages, because Mr.
22 Aumais is one of the individuals arrested for having looked

1 at her picture and possessing it." See Government Appendix
2 41-43.

3 Finally, although Dr. Silberg's contact with Amy was
4 evaluative rather than therapeutic, she recommended that Amy
5 receive therapy once a week from a professional trained in
6 the effects of sexual abuse and trauma on people in Amy's
7 age group. Dr. Silberg opined that Amy might need three
8 courses of inpatient treatment throughout her life to deal
9 with her alcoholism.

10 On January 13, 2010, the magistrate judge issued a
11 Report and Recommendation that Aumais should be ordered to
12 pay Amy \$48,483 in restitution. United States v. Aumais,
13 No. 08-CR-711, 2010 WL 3033821, at *9 (N.D.N.Y. Jan. 13,
14 2010) ("Aumais I"). The court determined that in order to
15 recover restitution, Amy must show that Aumais' possession
16 of her images proximately caused her harm. Id. at *2. If
17 so, Amy could be entitled to payments for future medical
18 costs "if those expenses can be reasonably estimated." Id.
19 at *3 (citing United States v. Pearson, 570 F.3d 480, 486-87
20 (2d Cir. 2009) (per curiam)). The magistrate judge
21 observed, however, that the issue of "whether a defendant
22 convicted only as a consumer of child pornography may be

1 liable for restitution under § 2259 to a child victim"

2 remained "unaddressed by the Second Circuit." Id.

3 According to the Report and Recommendation, "[t]here is
4 no question that consumers, such as Aumais, contribute to
5 the exploitation of child victims, such as Amy, depicted in
6 the child pornography they possess." Id. at *4. The court
7 recognized that "the uncle's horrific acts of sexual abuse,
8 production of the images, and distribution of those images
9 to others unquestionably constituted the principal cause of
10 the losses identified by Amy." Id. at *5. At the same time
11 (it was concluded), "if the harm caused by Aumais'
12 possession of Amy's images caused substantial harm to Amy,
13 proximate cause has been demonstrated even if the conduct of
14 others similar to that of Aumais caused equal or greater
15 harm." Id.

16 Based on Amy's Victim Impact Statement and Dr.
17 Silberg's testimony, the magistrate judge found that,
18 although Amy had neither contact with Aumais nor knowledge
19 of his existence, his possession of her images exacerbated
20 the harm (originally caused by her uncle) by creating a
21 market for distribution, and by inflicting the humiliation
22 of knowing that the images are out there being exploited by

1 a group of consumers, of whom Aumais was one. Id. at *6.
2 Although Aumais may be among hundreds or thousands of such
3 others, it was found that Amy's harm was not thereby
4 obviated or diminished; rather, "it exacerbate[d] the harm
5 by confirming how expansive has become the number of
6 individuals exploiting Amy's images." Id.

7 The findings as to damages are thorough and
8 discriminating, as follows. Where "a party is responsible
9 for exacerbating a pre-existing condition, damages are
10 generally limited to that attributable to the exacerbation
11 and not the original injury." Id. at *7. The Government
12 failed to prove by a preponderance of evidence that Aumais
13 proximately caused harm that resulted in Amy's difficulties
14 maintaining employment. Id. But the Government did prove
15 by a preponderance of evidence that Aumais caused the need
16 for weekly counseling sessions in the next five years and
17 monthly counseling sessions for five years thereafter. Id.
18 at *8-9. Discounting future counseling costs to present
19 value, the magistrate judge found that the Government proved
20 by a preponderance of evidence that Amy is entitled to
21 \$48,483. Id. at *9.

22 As to joint and several liability, the magistrate judge

1 found that Aumais should be liable for the full amount and
2 that it was "a matter for administration by the government"
3 to prevent excess recovery. Id.

4 The district court adopted Magistrate Judge Homer's
5 Report and Recommendation, and entered judgment on August 3,
6 2010. United States v. Aumais, No. 08-CR-711, 2010 WL
7 3034730 (N.D.N.Y. Aug. 3, 2010) ("Aumais II").

8 9 **Discussion**

10 "We review an order of restitution 'deferentially, and
11 we will reverse only for abuse of discretion. To identify
12 such abuse, we must conclude that a challenged ruling rests
13 on an error of law, a clearly erroneous finding of fact, or
14 otherwise cannot be located within the range of permissible
15 decisions.'" Pearson, 570 F.3d at 486 (quoting United
16 States v. Boccagna, 450 F.3d 107, 113 (2d Cir. 2006)).

17 We review a district court's sentencing decision for
18 reasonableness. See United States v. Booker, 543 U.S. 220,
19 260-62 (2005). We review the sentence for substantive
20 reasonableness under a "deferential abuse-of-discretion
21 standard." United States v. Cavera, 550 F.3d 180, 189 (2d
22 Cir. 2008) (en banc). The Court "will not substitute [its]

own judgment for the district court's"; rather, a district court's sentence may be set aside "only in exceptional cases where [its] decision cannot be located within the range of permissible decisions." Id. (internal quotation marks omitted).

I.

As Magistrate Judge Homer observed, this Circuit has yet to address the issue of "whether a defendant convicted only as a consumer of child pornography may be liable for restitution under [18 U.S.C.] § 2259 to a child victim."² Aumais I, 2010 WL 3033821, at *3.

Section 2259 mandates a district court to order a defendant to pay a "victim," defined as an "individual harmed as a result of a commission of a crime under this chapter," 18 U.S.C. § 2259(c), "the full amount of the victim's losses," id. § 2259(b)(1). The victim's losses include:

any costs incurred by the victim for--

² In United States v. Pearson, we considered whether a restitution order pursuant to 18 U.S.C. § 2259 may include an amount for estimated future medical expenses; but the defendant had produced child pornography and had had direct contact with the two child victims. 570 F.3d at 482, 486-87.

1 (A) medical services relating to physical,
2 psychiatric, or psychological care;

3
4 (B) physical and occupational therapy or
5 rehabilitation;

6
7 (C) necessary transportation, temporary
8 housing, and child care expenses;

9
10 (D) lost income;

11
12 (E) attorneys' fees, as well as other costs
13 incurred; and

14
15 (F) any other losses suffered by the victim as
16 a proximate result of the offense.

17
18 Id. § 2259(b)(3)(A)-(F). "An order of restitution under
19 [§ 2259] shall be issued and enforced in accordance with
20 section 3664 in the same manner as an order under section
21 3663A." Id. § 2259(b)(2). Under 18 U.S.C. § 3664(e),
22 "[t]he burden of demonstrating the amount of the loss
23 sustained by a victim as a result of the offense shall be on
24 . . . the Government." So it was for the Government to
25 establish that Amy is a victim who was harmed as a result of
26 Aumais' possession of her images.

27 **A.**

28 The United States Supreme Court has recognized that the
29 distribution of child pornography is "intrinsically related
30 to the sexual abuse of children" because, inter alia, "the
31 materials produced are a permanent record of the children's

1 participation and the harm to the child is exacerbated by
2 their circulation.” New York v. Ferber, 458 U.S. 747, 759
3 (1982); see also United States v. McDaniel, 631 F.3d 1204,
4 1208 (11th Cir. 2011). “Because the child’s actions are
5 reduced to a recording, the pornography may haunt [the
6 child] in future years, long after the original misdeed took
7 place.” Ferber, 458 U.S. at 759 n.10 (internal quotation
8 marks omitted).

9 We conclude that Amy is a victim as defined by
10 § 2259(c).

11 **B.**

12 A circuit split has opened as to whether the Government
13 must show that a victim’s losses (identified in 18 U.S.C.
14 § 2259(b)(3)(A)-(F)) were proximately caused by the
15 defendant’s actions, or whether it is enough to show
16 causation more generally. And within those circuits holding
17 that a showing of proximate cause is required, some rely on
18 the text of the statute and others on general rules of
19 criminal and tort law.

20 Of the circuits that have reached the causation issue,
21 most have held that the text of § 2259 requires a showing of
22 proximate cause. See McDaniel, 631 F.3d at 1209; United

1 States v. Laney, 189 F.3d 954, 965 (9th Cir. 1999); United
2 States v. Crandon, 173 F.3d 122, 125 (3d Cir. 1999). These
3 circuits have read the last phrase of § 2259(b)(3)(F) (see
4 supra at 13)--"suffered by the victim as a proximate result
5 of the offense"--to apply to all the types of loss in
6 § 2259(b)(3). As the court in McDaniel observed:

7 "When several words are followed by a clause
8 which is applicable as much to the first and other
9 words as to the last, the natural construction of
10 the language demands that the clause be read as
11 applicable to all." Porto Rico Ry., Light & Power
12 Co. v. Mor, 253 U.S. 345, 348 (1920). The phrase
13 "as a proximate result of the offense" is equally
14 applicable to medical costs, lost income, and
15 attorneys' fees as it is to "any other losses."
16 Because the language of the statute is plain, our
17 inquiry ends here.

18
19 631 F.3d at 1209 (internal citation omitted). The D.C.
20 Circuit, likewise holding that § 2259 requires a finding of
21 proximate cause, based its ruling on "traditional principles
22 of tort and criminal law and on § 2259(c)'s definition of
23 'victim' as an individual harmed 'as a result' of the
24 defendant's offense." United States v. Monzel, 641 F.3d
25 528, 535 (D.C. Cir. 2011). After reciting the "bedrock rule
26 of both tort and criminal law that a defendant is only
27 liable for harms he proximately caused," the court concluded
28 that "nothing in the text or structure of § 2259 leads us to

1 conclude that Congress intended to negate the ordinary
2 requirement of proximate cause." Id. at 535-36 (footnote
3 omitted).

4 The only circuit to hold that a finding of proximate
5 cause is not required, the Fifth Circuit, read the phrase
6 "as a proximate result of the offense" in § 2259(b)(3)(F) to
7 apply only to that "catchall" provision, as opposed to all
8 of the loss provisions set forth in § 2259(b)(3):

9 The structure and language of § 2259(b)(3)
10 impose a proximate causation requirement only on
11 miscellaneous "other losses" for which a victim
12 seeks restitution. As a general proposition, it
13 makes sense that Congress would impose an
14 additional restriction on the catchall category of
15 "other losses" that does not apply to the defined
16 categories. By construction, Congress knew the
17 kinds of expenses necessary for restitution under
18 subsections A through E; equally definitionally,
19 it could not anticipate what victims would propose
20 under the open-ended subsection F.

21 In re Amy Unknown, 636 F.3d 190, 198 (5th Cir. 2011). The
22 Fifth Circuit also relied on the manifestation of a
23 "congressional purpose to award broad restitution" to
24 justify its limitation of proximate cause only to the loss
25 identified in subsection F. Id. at 199.

26 We agree with the majority of circuits and hold that
27 under § 2259, a victim's losses must be proximately caused
28 by the defendant's offense. We endorse the D.C. Circuit's

1 reasoning in Monzel: proximate cause is a deeply rooted
2 principle in both tort and criminal law that Congress did
3 not abrogate when it drafted § 2259. See Monzel, 641 F.3d
4 at 535-36; United States v. U.S. Gypsum Co., 438 U.S. 422,
5 437 (1978) (“Congress [is] presumed to have legislated
6 against the background of our traditional legal concepts
7 which render [proximate cause] a critical factor, and
8 absence of contrary direction” here “[is] taken as
9 satisfaction [of] widely accepted definitions, not as a
10 departure from them.” (quoting Morissette v. United States,
11 342 U.S. 246, 263 (1952)) (internal quotation marks
12 omitted)); see also Hemi Group, LLC v. City of New York, ---
13 U.S. ---, 130 S. Ct. 983, 989 (2010) (“[P]roximate cause
14 thus requires ‘some direct relation between the injury
15 asserted and the injurious conduct alleged.’” (quoting
16 Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268
17 (1992))). The text of § 2259 cross-references the Victim
18 and Witness Protection Act of 1982, 18 U.S.C. §§ 1512–1515,
19 3663–3664, and the Mandatory Victims Restitution Act of 1996
20 (“MVRA”), 18 U.S.C. §§ 3663A, 3613A, both of which define
21 “victim” as “a person directly and proximately harmed as a
22 result of the commission of an offense for which restitution

1 may be ordered," §§ 3663(a)(2), 3663A(a)(2).

2 "Proximate cause" labels "generically the judicial
3 tools used to limit a person's responsibility for the
4 consequences of that person's own acts. At bottom, the
5 notion of proximate cause reflects 'ideas of what justice
6 demands, or of what is administratively possible and
7 convenient.'" Holmes, 503 U.S. at 268 (quoting W. Keeton,
8 D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of
9 Torts § 41, at 264 (5th ed. 1984)). Proximate cause demands
10 "some direct relation between the injury asserted and the
11 injurious conduct alleged." Id.

12 The magistrate judge based his finding of proximate
13 cause on the following facts, taken from Amy's Victim Impact
14 Statement and Dr. Silberg's testimony: Amy "suffered
15 understandable trauma from the abuse of her uncle . . . [and
16 t]he fact that the images of that abuse exist and remain in
17 circulation exacerbates the harm"; the viewers of Amy's
18 images contribute to the "humiliation and degradation" that
19 Amy suffers and "constitute an independent component of harm
20 which exacerbates the trauma initiated by the uncle and
21 generates a need for continuing therapy"; Amy's abuse was
22 memorialized in pictures that continue to be circulated, so

1 that she “can never regard [her] victimization as terminated
2 or as a past event to which [she] must adjust”; and Aumais’
3 viewing of Amy’s images “leaves Amy and similar victims with
4 feelings that they will never be safe, of helplessness, and
5 of constant fear that they will be recognized from those
6 images by friends and strangers.” Aumais I, 2010 WL
7 3033821, at *6. Moreover, the magistrate judge found that
8 “even though there may be hundreds or thousands of others
9 who, like Aumais, have possessed and used Amy’s images and
10 thereby contributed to her harm, Aumais’ conduct remains a
11 substantial cause of that harm” because it “exacerbates the
12 harm by confirming how expansive has become the number of
13 individuals exploiting Amy’s images.” Id.

14 We review a district court’s findings of fact for clear
15 error, but we review de novo a “district court’s application
16 of th[e] facts to draw conclusions of law, including a
17 finding of liability.” Travellers Int’l, A.G. v. Trans
18 World Airlines, 41 F.3d 1570, 1575 (2d Cir. 1994). So
19 called mixed questions of law and fact are also reviewed de
20 novo. Id. While the magistrate judge’s findings of fact
21 are supported by evidence, we disagree that those facts
22 establish a causal connection between Aumais’ possession of

1 Amy's images and Amy's losses.

2 The magistrate judge found that "Amy had no direct
3 contact with Aumais nor even knew of his existence." Aumais
4 I, 2010 WL 3033821, at *6. Amy's Victim Impact Statement
5 makes no mention of Aumais (or any other possessor of her
6 images for that matter). Moreover, Dr. Silberg's evaluation
7 of Amy, upon which the doctor's testimony was based, took
8 place on June 11-12, 2008, July 29, 2008, and November 10,
9 2008, whereas Aumais was not arrested at the border until
10 November 16, 2008. While Dr. Silberg may describe generally
11 what Amy suffers from knowing that people possess her
12 images, Dr. Silberg cannot speak to the impact on Amy caused
13 by *this defendant*. As the Ninth Circuit held in rejecting
14 another of Amy's claims:

15 [T]he government's evidence showed only that [the
16 defendant] participated in the audience of persons
17 who viewed the images of Amy While this
18 may be sufficient to establish that [the
19 defendant's] actions were one cause of the
20 generalized harm Amy . . . suffered due to the
21 circulation of [her] images on the internet, it is
22 not sufficient to show that they were a proximate
23 cause of any particular losses.

24 United States v. Kennedy, 643 F.3d 1251, 1264 (9th Cir.
25 2011). Here, in the absence of evidence linking Aumais'
26 possession to any loss suffered by Amy, we cannot agree with

1 the magistrate judge's conclusion that "Aumais' conduct
2 remains a substantial cause of [Amy's] harm." Aumais I,
3 2010 WL 3033821, at *6.

4 This opinion does not categorically foreclose payment
5 of restitution to victims of child pornography from a
6 defendant who possesses their pornographic images. We have
7 no basis for rejecting Dr. Silberg's findings that Amy has
8 suffered greatly and will require counseling well into the
9 future. But where the Victim Impact Statement and the
10 psychological evaluation were drafted before the defendant
11 was even arrested--or might as well have been--we hold as a
12 matter of law that the victim's loss was not proximately
13 caused by a defendant's possession of the victim's image.

14 **C.**

15 A proximate cause of injury can be expected to lend
16 itself more easily to assessment and allocation than a cause
17 that is generalized or inchoate. Our conclusion--that
18 Aumais' conduct was not a proximate cause of Amy's injury--
19 is thus confirmed by the baffling and intractable issue that
20 this case would otherwise present in terms of damages and
21 joint and several liability.³

³ We note one additional issue (on top of the issues discussed in this section). In Aumais II, 2010 WL 3034730,

1 With respect to the amount of restitution, the district
2 court ordered Aumais to pay \$48,483 to cover Amy's future
3 counseling costs. Aumais I, 2010 WL 3033821, at *8-9. But,
4 as the magistrate judge determined, "[t]he harm from the
5 uncle's abuse and that from possession of the images of the
6 abuse by others are closely related for purposes of
7 counseling and cannot be separate[d] to allocate costs
8 between them as it appears that Amy will require counseling
9 for both." Id. at *8. If Amy's future counseling costs are
10 thus partly caused by her uncle's abuse, then Aumais cannot
11 be responsible for all of those losses--a problem under the
12 wording of § 2259, which mandates that Aumais make
13 restitution for the full amount of Amy's losses caused as a
14 result of Aumais' possession. This difficulty is
15 illustrated by the disparate amounts of restitution ordered
16 throughout the country, ranging from \$3,000, see United

at *1, the district court adopted the magistrate judge's Report and Recommendation and ordered that an Amended Judgment be issued. However, in the Amended Judgment, the district court did not check the box indicating that Aumais' liability was joint and several with other defendants. See Government Appendix 64-65. While it is settled that "where there is a direct conflict between an unambiguous oral pronouncement of sentence and the written judgment . . . the oral pronouncement, as correctly reported, must control," United States v. Marquez, 506 F.2d 620, 622 (2d Cir. 1974) (internal quotation marks omitted), it is unclear whether this is true with respect to restitution orders.

1 States v. Mather, 1:09-CR-412, 2010 WL 5173029, at *5-6
2 (E.D. Cal. Dec. 13, 2010), to \$3,680,153, see United States
3 v. Staples, 09-14017-CR, 2009 WL 2827204, at *1 (S.D. Fla.
4 Sept. 2, 2009).

5 A restitution award to Amy in this case would raise
6 issues as to joint and several liability. As of the date of
7 the restitution hearing, Amy had sought restitution in over
8 250 cases around the country. Aumais I, 2010 WL 3033821, at
9 *5. In one such case, United States v. Faxon, 689 F. Supp.
10 2d 1344, 1346, 1353 (S.D. Fla. 2010), Amy's lawyer estimated
11 that as of January 2010, Amy had received approximately
12 \$170,000 from restitution orders and settlements.

13 In United States v. Nucci, 364 F.3d 419 (2d Cir. 2004),
14 we held that a victim may not recover more than his or her
15 actual loss. There, we observed that "the relevant sections
16 of the MVRA," id. at 423, do not in themselves prevent
17 double-recovery in the criminal context.⁴ However,

⁴ In Nucci, we observed

Section 3664(f)(1)(A) requires the district court to order restitution in the full amount of the victim's losses and does not mention what the order should provide when multiple defendants are responsible for the same loss. Section 3664(h) provides that, where there are multiple defendants, the district court may order each defendant to pay the full amount or order that

1 recognizing that “[a]t common law, joint and several
2 liability does not permit double recovery,” we declined to
3 “read[] the statute to provide recovery in excess of the
4 amount of the loss,” and accordingly applied the common law
5 rule. Id.

6 Section 2259(b)(4)(B) provides that “[a] court may not
7 decline to issue an order under this section because of--(i)
8 the economic circumstances of the defendant; or (ii) the
9 fact that a victim has, or is entitled to, receive
10 compensation for his or her injuries from the proceeds of
11 insurance or any other source.” Our holding in Nucci
12 indicates that because Amy may already have been fully
13 compensated by others for the loss found in this case, there
14 would be “no legal basis to permit an award that allows a
15 victim to recover more than his due.” Nucci, 364 F.3d at
16 424. It is in any event likely that the collection of a
17 restitution award would need to be carefully monitored to
18 ensure that total payments by all defendants did not exceed

liability be apportioned to reflect each
defendant’s contribution to the loss. Section
3664(j)(2) does limit restitution that would
result in an overpayment to the victim, but only
where compensatory damages are later recovered by
the victim in a “civil” proceeding.

Id. (footnote omitted).

1 what Amy has been awarded for future counseling costs. The
2 need for such monitoring would pose significant practical
3 difficulties. As an initial matter, it is not entirely
4 clear what government body, if any, is responsible for
5 tracking payments that may involve defendants in numerous
6 jurisdictions across the country. In addition, determining
7 what amount Amy has received would entail collecting data
8 about hundreds of cases, ascertaining what money has
9 actually been paid, and determining what losses that money
10 was intended to cover.

11 Finally, as discussed above, § 2259(b)(2)--dealing with
12 the enforcement of the restitution order--cross references
13 § 3664. Section 3664(h) implies that joint and several
14 liability may be imposed only when a single district judge
15 is dealing with multiple defendants in a single case (or
16 indictment); so it would seem that the law does not
17 contemplate apportionment of liability among defendants in
18 different cases, before different judges, in different
19 jurisdictions around the country.⁵

⁵ In fact, two other circuits have observed, in unpublished opinions, that joint and several liability is not permissible under § 3664(h) regarding defendants in separate cases. See Monzel, 641 F.3d at 539 (citing United States v. McGlown, 380 F. App'x 487, 490-91 (6th Cir. 2010); United States v. Channita, 9 F. App'x 274, 274-75 (4th Cir.

1
2 **II.**

3 Aumais argues that the district court committed
4 procedural and substantive errors in sentencing Aumais to
5 121 months' imprisonment--the bottom of the Guidelines
6 range. As to procedural reasonableness, Aumais contends
7 that the district court treated the Sentencing Guidelines as
8 mandatory and presumptively reasonable. This argument is
9 refuted by the record. The district court conducted an
10 "individualized assessment" of the sentence warranted by
11 § 3553(a) "based on the facts presented," Gall v. United
12 States, 552 U.S. 38, 50 (2007), and concluded that "nothing
13 below the minimum of the advisory guideline [and] nothing
14 above the minimum of the advisory guideline range is
15 necessary in light of the various factors that are at play
16 here." Government Appendix at 22-23.

17 As to substantive reasonableness, Aumais principally
18 relies on our recent decision in United States v. Dorvee,
19 616 F.3d 174 (2d Cir. 2010), to support his argument that
20 the sentence was greater than necessary to serve the
21 purposes of sentencing. This argument, too, is without

2001)).

1 merit.

2 Dorvee observed that U.S.S.G. § 2G2.2, the Guideline at
3 issue here, can, “unless applied with great care, . . . lead
4 to unreasonable sentences that are inconsistent with what
5 § 3553 requires” because the enhancements in that Guideline
6 “routinely result in Guidelines projections near or
7 exceeding the statutory maximum, even in run-of-the-mill
8 cases.” 616 F.3d at 184, 186. The various child
9 pornography enhancements applied in Dorvee resulted in a
10 Guidelines range that, at the low end, was twenty-two months
11 longer than the statutory maximum. Id. at 180. The
12 Guidelines range calculated in this case (121-151 months)
13 was well short of the statutory maximum, which was thirty
14 years (had the district court chosen to impose consecutive
15 sentences). Moreover, the district court found that 121
16 months imprisonment was “sufficient, but not greater than
17 necessary” to comply with the purposes of § 3553(a), id. at
18 182 (quoting United States v. Samas, 561 F.3d 108, 110 (2d
19 Cir. 2009), given the violent nature of the images, the
20 number of them, and other considerations. The sentence is
21 substantively reasonable.

1

CONCLUSION

2

For the foregoing reasons, the amended judgment of

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conviction is affirmed in part and reversed in part.