

FILED

FOR PUBLICATION

MAR 18 2013

UNITED STATES COURT OF APPEALS

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: AMY & VICKY, Child Pornography
Victims.

No. 13-70858

D.C. No. 2:11-cr-00542-GEB-1

AMY & VICKY, Child Pornography
Victims,

OPINION

Petitioners,

v.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
CALIFORNIA, SACRAMENTO,

Respondent,

JOSEPH CANTRELLE,

Real Party in Interest.

Petition for Writ of Mandamus to the United States District Court
for the Eastern District of California

Submitted March 8, 2013*
Filed March 18, 2013

Before: PREGERSON, GRABER, and BEA, Circuit Judges.

PER CURIAM:

This is a petition for a writ of mandamus filed pursuant to 18 U.S.C. § 3771, the Crime Victims' Rights Act ("CVRA").¹

In reviewing CVRA mandamus petitions, this court "must issue the writ whenever we find that the district court's order reflects an abuse of discretion or legal error," and we need not balance the factors outlined in *Bauman v. U.S. Dist. Court*, 557 F.2d 650 (9th Cir. 1977), in deciding these petitions. *Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1017 (9th Cir. 2006).

On February 22, 2013, the district court denied restitution to petitioners "Amy" and "Vicky." Petitioners challenge this denial. Petitioners contend the district court erred in applying *United States v. Kennedy*, 643 F.3d 1251 (9th Cir. 2011). In *Kennedy*, this court required a proximate causation between the

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

¹ Respondent's ex parte motion to file its appendix under seal is granted. The Clerk shall file the appendix under seal and it shall not be available to any other parties to this petition.

defendant's offense conduct and the victim's losses. *See id.* at 1263. Petitioners also claim that the district court erred in not awarding them any restitution.

Petitioners urge us to overrule *Kennedy* on the ground that 18 U.S.C. § 2259 does not impose a general proximate cause requirement. Petitioners note that the Fifth Circuit, sitting en banc, recently held:

[A] plain reading of § 2259 leads us to the following conclusion: Once a district court determines that a person is a victim, . . . § 2259 requires the district court to order restitution for that victim.

In re Unknown, 701 F.3d 749, 762 (5th Cir. 2012) (en banc), *petitions for cert. filed*, _ U.S.L.W. _ (U.S. Jan. 31, 2013) (Nos. 12-8505, 12-8561).

While we acknowledge that the Fifth Circuit adopted a different interpretation of 18 U.S.C. § 2259, *Kennedy* remains binding on us in the absence of “intervening higher authority” that is “clearly irreconcilable” with our circuit precedent. *Miller v. Gammie*, 335 F.3d 889, 893, 900 (9th Cir. 2003) (en banc). A decision from the Fifth Circuit, our sister circuit, is not “intervening higher authority” and does not authorize us to abandon a prior panel opinion. *See Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1019 (9th Cir. 2006) (noting that intervening higher authority includes decisions of the Supreme Court and of this court sitting en banc). Accordingly, the district court did not err in imposing a proximate cause

requirement when applying 18 U.S.C. § 2259(b)(3) and, in this respect, the petition is denied.

However, the district court abused its discretion in refusing to order any restitution. During the sentencing hearing, with respect to restitution, the district court adopted the presentence report's ("PSR") recommendation. The PSR did not recommend restitution under *Kennedy* only because the writer of the report concluded that he lacked sufficient information to show that the Government had met its burden of establishing a causal connection. Our review of the record demonstrates that petitioners provided sufficient evidence to establish a causal connection between defendant's offense and petitioners' losses. Accordingly, the petition is granted in part.

The district court shall vacate the judgment with respect to restitution and shall conduct such further proceedings as may be appropriate to determine an amount of restitution to be paid to Amy and Vicky.

DENIED in part; GRANTED in part, and REMANDED with instructions.

Counsel Listing

Paul Cassell, Appellate Clinic, S.J. Quinney College of Law at the University of Utah, Salt Lake City, Utah, for Petitioners.

Camil Skipper, Assistant U.S. Attorney, Office of the U.S. Attorney, Sacramento, California, for Respondent.

Kresta Nora Daly, Barth Tozer & Daly, LLP, Sacramento, California, for Real Party in Interest Joseph Cantrelle.