



Crime Victim Law Update

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I. SPECIFIC VICTIMS' RIGHTS

A. Right to Access Information and Documents

Jane Does #1 and #2 v. United States, 817 F. Supp. 2d 1337 (S.D. Fla. 2011). Two child-victim-plaintiffs sued the federal government, claiming violations of their rights under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, arising out of the government's handling of the investigation and prosecution of Jeffrey Epstein. Plaintiffs filed motions with the district court seeking, *inter alia*, a finding of violations of their CVRA rights and an order directing the U.S. Attorney's Office not to withhold relevant evidence. Plaintiffs argued that their CVRA rights to confer, to be treated with fairness, and to accurate and timely notice of court proceedings were violated by the government when it failed to notify them of a plea agreement with Epstein, pursuant to which Epstein would plead guilty to two state felony offenses for solicitation of prostitution and procurement of minors for prostitution, and the U.S. Attorney's Office would agree not to prosecute Epstein for federal offenses. As a remedy for these violations of their rights, plaintiffs argued that the court should invalidate the non-prosecution agreement. The government argued in response that because a federal indictment had never been returned against Epstein, the CVRA did not attach, and that, even if it did, the government had used its best efforts to comply with the CVRA. The court rejected the government's arguments, holding that the CVRA attaches before the government brings formal charges against a defendant "because the statutory language clearly contemplates pre-charge

proceedings." The court offered by way of example, subsections (a)(2) and (a)(3) of the CVRA, which provide rights that attach to "any court proceeding . . . involving the crime." The court also pointed to subsection (b), which requires courts to ensure CVRA rights in "any court proceedings involving an offense against a crime victim." As the court explained, "[c]ourt proceedings involving the crime are not limited to post-complaint or post-indictment proceedings, but can also include initial appearances and bond hearings, both of which can take place before a formal charge." After discussing other provisions of the CVRA that similarly support the pre-charging attachment of CVRA rights, the court rejected the government's argument that this interpretation of the CVRA would impair prosecutorial discretion and decision-making, noting that "any encroachment into the prosecutors' discretion is expressly limited by the CVRA itself" Because the court found that some factual development was necessary to resolve whether plaintiffs' CVRA rights were violated by the government, it deferred ruling on this issue until plaintiffs conducted discovery in the form of document requests and requests for admissions from the U.S. Attorney's Office.

B. Right to Courtroom Accommodations

1. Alternative Means of Testifying

Coronado v. State, 351 S.W.3d 315 (Tex. Ct. App. 2011). Defendant was convicted of the sexual assault of a child-victim (the victim was 3 at the time of the assault, 5 at the time of trial). Defendant appealed, arguing that his right to

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confrontation was violated by the use of procedures set out in the Texas Code of Criminal Procedure. Namely, after a finding that the child-victim would be traumatized by giving in-court testimony, the child-victim was permitted to be interviewed by a forensic interviewer. Defense counsel could submit written interrogatories to the forensic interviewer, who would ask those questions in a recorded interview. Defense counsel delegated to the interviewer the opportunity to ask any follow up questions.

The child-victim did not testify at trial, but the video of the forensic interview – along with a video taken shortly after the assault (15 months earlier) – were admitted at trial. The court found the procedure used violated the confrontation clause. The court stated that under Supreme Court precedent, the right to confrontation requires that when a witness makes testimonial statements: (1) the witness give the statement under oath, (2) the witness be required to submit to cross-examination, and (3) the jury be able to observe the demeanor of the witness in making the statement. In this case, it was undisputed that the statements were testimonial. The primary question was whether defendant had a prior opportunity to cross-examine the child-victim. The court found he did not, stating that “[c]ross-examination means personal, live, adversarial questioning in a formal setting,” and that these requirements were not satisfied by the procedure used in this case. Although the court recognized the importance of protecting “fragile witnesses,” such as child-victims, “[t]here is no ‘balancing’ the defendant’s constitutional right of confrontation and cross-examination against other social policies, even compelling ones.” Accordingly, the judgment below was reversed and the case remanded.

2. Closed Courtroom

State v. Savoie, 262 P.3d 535 (Wash. Ct. App. 2011). Defendant was convicted in adult court of first degree murder for the homicide of a child-victim that occurred when defendant was twelve years old. Defendant appealed his conviction, arguing, *inter alia*, that the court violated his right to a public trial and erred in appointing counsel to represent the parents of the deceased child-victim. Early in the trial process, defense counsel requested mental health and Child Protective Service records relating to the family of the child-victim. Following an *in camera* review of the materials, the court permitted a portion of the records to be released to defense counsel; however,

the prosecutor's office mistakenly provided all of the records to the defense. The state subsequently moved the court to appoint counsel to protect the child-victim's parents' rights, and the court appointed counsel to act on behalf of the child-victims' parents. Although the court initially indicated that the attorney appointed to represent the child-victim's family members would not be heard in the criminal matter, the attorney filed documents on behalf of the family in the criminal case and appeared in the criminal case several times to stop further distribution and demand the return of the erroneously released records. The court-appointed attorney also sought exemption from any rule prohibiting the family from attending the trial until they had completed their testimony. At one hearing regarding the records, the court-appointed attorney successfully sought closure of the courtroom to the general public while the participants provided argument to the court relating to the records. The court ultimately prevented further distribution of the records and sealed certain records and portions of the court file. On appeal, the court noted that both the Sixth Amendment and the Washington Constitution require a public trial. This right is not absolute, but is "strictly guarded to assure proceedings occur outside the public courtroom in the most unusual circumstances." The Washington Supreme Court has mandated that certain procedures must be followed before closing a courtroom to the public; if the required analysis is not undertaken prior to the closure, prejudice is presumed and automatic reversal is mandatory. The court found that the required analysis had not been undertaken and a narrow exception did not apply, holding that the closure violated defendant's right to a public trial. The court also held that it was "error for the trial court to appoint private counsel at public expense and allow intervention in this criminal case." The court of appeals reversed for a new trial.

C. Right to Confer

Jane Does #1 and #2 v. United States, 817 F. Supp. 2d 1337 (S.D. Fla. 2011). *For full case summary, see "Specific Victims' Rights – Right to Access Information and Documents."

D. Right to Due Process, Fairness, Dignity, and Respect

Jane Does #1 and #2 v. United States, 817 F. Supp. 2d 1337 (S.D. Fla. 2011). *For full case summary, see "Specific Victims' Rights – Right to Access Information and Documents."

E. Right to be Heard

United States v. Grigg, No. 09-6017, 2011 WL 4056317 (6th Cir. Sept. 14, 2011). Defendant pled guilty to wire and mail fraud charges and received a sentence of 120 months of imprisonment, which was above the stipulated advisory guideline range. On appeal, Defendant argued, *inter alia*, that the trial court erred in relying on the victim impact statements to influence its sentencing decision because the victims had not sworn to tell the truth. The court rejected this argument, concluding that the trial court's consideration of the unsworn statements was not "plain error." In reaching its decision, the court found that the right to be heard under the Crime Victims' Rights Act, 18 U.S.C. § 3771(a)(4), does not contain an oath requirement. The court also observed that trial courts generally have discretion to consider a broad range of information when determining a criminal sentence. In addition, the court noted that every court to have examined this issue has reached the same conclusion. For this and other reasons, the court affirmed the judgment.

United States v. Warwick, Criminal No. WDQ-11-0167, 2011 WL 4527285 (D. Md. Sept. 26, 2011). Defendant pled guilty to making a false statement in a matter within the jurisdiction of the executive department and moved the district court to exclude testimony from her employer's vice president and chief financial officer at her sentencing. Defendant's conviction related to overbilling the government for hours she worked for the National Security Agency through a contractor, SAIC. Defendant's employer, BCT, was a subcontractor of SAIC, and defendant submitted her timesheets to BCT, which then billed SAIC, which, in turn, billed the NSA for her time. Defendant argued that BCT should not testify at sentencing because it was not a victim under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, and, even if it were, defendant did not receive sufficient notice of the witnesses' intended sentencing

testimony to comport with due process. Defendant argued that BCT was not a crime victim because BCT's harm did not result from "conduct underlying an element of the offense of conviction." The court disagreed, observing that when defendant submitted false timesheets to BCT, she knew that BCT, SAIC, and the NSA would rely on her misrepresentations for calculating her payment. Consequently, her false statements to BCT were conduct underlying an element of the crime. Defendant also argued that BCT only suffered indirect harm. The court rejected this argument as well, noting that BCT reimbursed the United States Treasury for the overpayments, and it was foreseeable that defendant's employer would be held responsible for the theft. Therefore, the court concluded, BCT was a victim under the CVRA. Defendant then argued that the court should exclude the BCT witnesses' testimony at sentencing because she did not receive advance notice of the witnesses' statements, as required by due process and the Federal Rules of Criminal Procedure. The court noted that the CVRA does not require that a defendant receive advance notice of a victim's testimony. The court also rejected defendant's contention that because the federal rules require the pre-sentence report to include information assessing any impact on any victim, a defendant has a right to know the substance of the victim's testimony in advance to challenge its legitimacy. The court found defendant's objection to be premature, as the Federal Rules of Procedure provide for disclosure of a prior witness's statement only after a witness has testified on direct examination. For these reasons, the district court denied defendant's motion to exclude the victims' testimony at sentencing.

United States v. Hays, No. 09-91(1)(DWF), 2011 WL 4583822 (D. Minn. Sept. 30, 2011). One of the 115 victims of a Ponzi scheme moved post-sentencing, under the Crime Victim's Rights Act (CVRA), 18 U.S.C. § 3771(d)(3), for leave to submit a proposed plan for the distribution of restitution funds and to stay distribution of funds pending the court's consideration of that plan. Over the government's objection that the motion was untimely, in "the interests of justice, the public interest, and the interests of all of the victims in this case," the court ruled on the merits of the motion. The victim-movant had emailed his plan to the court before sentencing but, as there was no discussion of the plan at the time of sentencing, the court decided on a boilerplate pro rata distribution plan. The court

determined that the victim's proposed plan would require evaluation of the economic circumstances of each of the 115 victims over a period of eight years, concluding that "it would not be practical, fair, or equitable to do so." Instead, the court denied the victim's motions and ordered that the restitution be distributed proportionately as it is collected. The court encouraged the government to "maximize liquidation of assets for forfeitures," as most Ponzi schemes leave victims "no substantial likelihood of recovering" their losses.

People v. Smith, 129 Cal. Rptr. 3d 910 (Cal. Ct. App. 2011). Defendant was convicted of one count of committing a lewd act on a child under the age of fourteen and one count of continuous sexual abuse, relating to the sexual abuse of his step-daughter when she was between the ages of eight and fifteen. The trial court sentenced defendant to 18 years in state prison and ordered him to pay restitution, which included \$750,000 in noneconomic losses for psychological harm pursuant to state statute. Defendant appealed from the trial court's restitution order, arguing, *inter alia*, that: (1) the participation of the child-victim's counsel in the restitution hearing was improper; (2) the order violated his jury trial rights because civil jury trials require a jury determination on the issue of noneconomic damages, and this requirement should apply in the criminal restitution context; (3) the order violated his equal protection rights because the differential treatment of child molesters under the statute allowing for noneconomic damages is not rationally related to a legitimate public purpose; and (4) the court abused its discretion in setting the amount of restitution. The court rejected these arguments, first holding that state constitutional victims' rights provisions guaranteed the child-victim "the right to have her attorney participate in the restitution hearing." The court explained that victims in California have a number of rights, including the right to be notified of, present at, and heard regarding restitution matters, and that victims are also "entitle[d] to have counsel represent [them] in being heard." Consequently, "neither defendant nor the trial court could have lawfully prevented the participation of [the child-victim's] attorney in the restitution hearing." The court also rejected defendant's argument that his jury trial rights were violated, finding that restitution orders are part of criminal sentencing, with protections and requirements distinct from those that apply to civil trials. The court similarly held that defendant's

equal protection rights were not violated because the differential treatment accorded to those convicted of felony sexual abuse of a child is rationally related to protecting child-victims of sexual abuse and that differentiating between child-victims and other victims is rational, in light of the vulnerability of children in general and society's interest in protecting them. Lastly, the court held that the trial court did not abuse its discretion in setting the amount of restitution, because a restitution order that includes \$750,000 in noneconomic damages for years of sexual abuse does not shock the conscience or suggest passion, prejudice or corruption on the part of the trial court. The court then affirmed the trial court's restitution order, subject to a correction to the writ of execution to reflect defendant's partial satisfaction of the order.

State v. Hess, 23 A.3d 373 (N.J. 2011). After reaching a negotiated plea agreement with the state, defendant pled guilty to aggravated manslaughter for the shooting death of her husband, and the court sentenced her to 30 years in prison. Defendant did not file a direct appeal, but later filed a post-conviction-relief petition (PCR) seeking a new sentencing hearing on the basis that she was denied effective assistance of counsel where defense counsel: 1) failed to offer mitigating evidence that she suffered from Battered Wife Syndrome; 2) failed to argue for a lesser sentence; and 3) failed to object to victim impact statements, including a professionally produced seventeen-minute video that contained a montage of sixty still photographs, including photographs of the victim's tombstone, four separate home video clips, and a television segment that covered the victim's funeral. The entire video was set to music. The PCR court denied defendant's petition, and the appellate court upheld the dismissal. New Jersey's Supreme Court granted certification and reversed. The court agreed with defendant that counsel was ineffective for not introducing mitigating evidence. In addition, the court held that defense counsel should have objected to the video. The court stated that while it did not intend to limit the right of family members to present photographs and videos taken within a reasonable period of time before the death of the victim or to express themselves in the ways they see fit, there were limits to the type of video that can be displayed at sentencing. The court found that the musical accompaniment, photographs of the victim's childhood and tombstone, and the television segment of his funeral did not project

anything meaningful about the victim's life as it related to his family and others at the time of his death yet had great capacity to unduly arouse or inflame emotions. The court concluded that an overly lengthy video, baby photographs of an adult victim, and a video scored to religious and pop music do not advance a legitimate objective, even in light of the broad contours of the Victims' Bill of Rights, and should not be played at resentencing.

F. Right to Notice

Jane Does #1 and #2 v. United States, 817 F. Supp. 2d 1337 (S.D. Fla. 2011). *For full case summary, see "Specific Victims' Rights – Right to Access Information and Documents."

People v. Smith, 129 Cal. Rptr. 3d 910 (Cal. Ct. App. 2011). *For full case summary, see "Specific Victims' Rights – Right to be Heard."

G. Right to be Present

People v. Smith, 129 Cal. Rptr. 3d 910 (Cal. Ct. App. 2011). *For full case summary, see "Specific Victims' Rights – Right to be Heard."

H. Right to Privacy

1. Medical and Psychological Examinations

People v. Ring, No. 298074, 2011 WL 4104959 (Mich. Ct. App. Sept. 15, 2011) (per curiam). A jury convicted defendant of criminal sexual conduct in the first degree. Following sentencing, defendant subpoenaed the victim's disability insurance company and personal psychologist to obtain her medical and psychological records for a restitution hearing and a motion for a new trial. The victim's psychologist provided defendant with the psychological records and during the restitution hearing, the trial court ordered defendant to return the records. Defendant then filed a motion for a new trial and a release of the records or, alternatively, for an *in camera* review of the records. The trial court denied the motion, sanctioned defense counsel by ordering the records returned to the victim for violating HIPAA and court rules, and concluded that defendant's rights to confrontation were not implicated because confrontation is not a post-trial right. Defendant

appealed, and the appellate court affirmed. The court found that the victim's psychological records fell within the state's psychologist-patient privilege, which precludes defendants from having any access to privileged communications, and that HIPAA prohibited disclosure of the records as well. For these reasons, the court concluded that defendant had no right to discover the records and that the records were not available for use as evidence. The court noted that for defendant to have obtained the records, he would have had to either get the victim to waive the privilege or request an *in camera* inspection of the records after showing a good faith belief, grounded in articulable fact, that there was a reasonable probability that the records were likely to contain material information necessary to his defense. Instead, the court found, defense counsel obtained the records in clear violation of state law. Given the violation, the trial court had discretion to enter appropriate sanctions. The defendant also argued that he needed the records during the restitution hearing and that the court's denial violated his federal constitutional rights to confrontation and due process. Relying on precedent from the United States Supreme Court and other jurisdictions, the appellate court found that the trial court did not violate defendant's confrontation right, as the right does not apply at sentencing. In addition, the Michigan's Crime Victims' Rights Act, which requires a defendant to make full restitution, is silent as to whether defendant may conduct the discovery he was seeking; however, the court noted that the state supreme court has held that the Act provides criminal defendants with adequate process. Accordingly, the appellate court found that the trial court's order did not violate due process. For these reasons, the court of appeals held that the trial court did not abuse its discretion or violate defendant's constitutional rights when it limited his ability to use the victims' psychological records.

2. Victim Records

People v. Ring, No. 298074, 2011 WL 4104959 (Mich. Ct. App. Sept. 15, 2011). *For full case summary, see "Specific Victims' Rights – Right to Notice – Medical and Psychological Examinations."

State v. Savoie, 262 P.3d 535 (Wash. Ct. App. 2011). *For full case summary, see "Specific Victims' Rights – Right to Courtroom Accommodations."

3. Other

United States v. Ellerbrock, 70 M.J. 314 (C.A.A.F. 2011). Defendant was found guilty of rape and sodomy by force in a military tribunal. He appealed, arguing that the military judge erred in applying Military Rule of Evidence 412, the military's rape shield law, to exclude evidence of the victim's prior extra-marital affair. He argued that this evidence was necessary because it showed a motive to fabricate the allegations against defendant. The military judge found the evidence to be inadmissible under 412, as well as only marginally relevant to show motive to lie, and found that the probative nature of the evidence did not outweigh the dangers to the victim's privacy interests. On appeal, the appellate court found that any error was harmless, because defense argued that the victim had a motive to fabricate about the consensual nature of the sex even without evidence of the prior affair. The court reversed, finding that the evidence should have been admitted under an exception to the rape shield law that allows for the admission of evidence if its exclusion would violate the constitutional rights of the accused, including defendant's Sixth Amendment confrontation rights and the right to impeach witnesses. It interpreted this exception as requiring that evidence be admitted when the evidence is relevant, material, and the probative value outweighs the dangers of unfair prejudice. Here, the court found the evidence to be relevant and material because the victim did not want her marriage to end, which tends to show that she had a motive to fabricate about whether the sexual intercourse was consensual. It found the evidence to be probative because the witnesses' testimony was conflicting, thus placing greater weight on the victim's testimony. Finally, the court found that the probative nature outweighed the prejudicial nature of the evidence because "with proper instructions from the military judge on how the members could use this evidence, there is little concern that the members would have been misled." The court then found that exclusion of the evidence was not harmless error based on the importance of the victim's testimony, the presence of contradicting testimony, and the extent of cross-examination allowed, among other factors. Two judges wrote separately in dissent, both focusing on the low probative value of the evidence.

People v. Ring, No. 298074, 2011 WL 4104959 (Mich. Ct. App. Sept. 15, 2011). *For full case summary, see “Specific Victims’ Rights – Right to Notice – Medical and Psychological Examinations.”

I. Right to Protection

State v. Ryan, 261 P.3d 1189 (Or. 2011) (en banc). Defendant was convicted of two counts of violating a stalking protective order. The trial court denied defendant’s motion for judgment of acquittal on the two counts. On review, the Oregon Court of Appeals reversed defendant’s convictions, reasoning that the state’s constitutional free speech provision required that the statute be narrowed to withstand an overbreadth challenge to require “an unequivocal threat of the sort that makes it objectively reasonable for the victim to believe that he or she is being threatened with imminent and serious physical harm,” and that the state had failed to meet its burden of proof on both counts. The state appealed, and defendant argued in support of the decision of the Court of Appeals that the crime of violating a stalking protective order by communicative acts, which requires that defendant’s conduct create a reasonable apprehension regarding the personal safety of the victim, was insufficient to withstand an overbreadth challenge under the free speech provision of Oregon’s Constitution. Rather, defendant argued, the court should employ the standard used for the issuance of a protective order — that is, the statute at issue must be judicially narrowed to require “an unequivocal threat of the sort that makes it objectively reasonable for the victim to believe that he or she is being threatened with imminent and serious physical harm.” Defendant did not attack the validity of the underlying stalking protective order and conceded that he could be held in criminal contempt for violating the terms of the order. The Oregon Supreme Court rejected defendant’s arguments, holding that because defendant’s communications with the victim were already prohibited by the stalking protective order, the state was not required by the state’s constitutional free speech provision to prove under the statute that defendant had communicated an unequivocal threat to the victim. The court further held that defendant’s concession that the underlying stalking protective order was valid prohibited defendant from attacking the order on free speech grounds: “The restriction on defendant’s speech rights occurred (if at all) when the trial court entered a stalking protective order that barred defendant from

communicating with the victim in any way. . . . [The statute] does not reach any speech not otherwise prohibited by the concededly lawful order. Therefore, a defendant who seeks to challenge a conviction under [the statute] on free speech grounds first must successfully attack the underlying stalking protective order. Because defendant conceded the validity of the stalking protective order . . . , his communications to the victim in violation of the order were not protected by [Oregon’s Constitution].” The court then held that the trial court correctly denied defendant’s motion for judgment of acquittal, affirmed that decision, and reversed the decision of the Court of Appeals. One justice concurred and separately wrote to express the view that the statute itself was constitutional as it “does not punish only those contacts that convey a particular message or advocate a specific viewpoint. Rather, [the statute] distinguishes among prohibited contacts based on whether the contact ‘created reasonable apprehension regarding the personal safety of a person protected by the [stalking protective] order.’ That distinction is, in my view, a permissible one.”

J. Right to Restitution

1. Ability to Pay

United States v. Palmer, 643 F.3d 1060 (8th Cir. 2011). Defendants operated an illicit bondage domination sadism masochism (BDSM) business. Defendants, who lived in the same home as the child-victim trained the child-victim to become a dominatrix. For two years, defendants sold the child-victim’s BDSM services online and in-person. Defendants pled guilty to commercial sex trafficking of a child and were sentenced to 15- and 25-year terms of imprisonment and ordered to pay restitution to the child-victim. During the restitution hearing, a clinical child psychologist, who had not interviewed the child-victim out of a concern that such an interview would re-traumatize her, estimated that the child-victim would incur more than \$1 million in treatment costs over the course of her lifetime as a result of defendants’ actions, with roughly \$200,000 of that amount allocated to psychotherapy and \$800,000 for psychiatry and medication. The child-victim — a young adult at the time of the hearing — testified that she wanted to attend counseling but that she had exhausted her state assistance and could not afford additional sessions on her own, as she lost her job and suffers

from a number of conditions as a result of defendants' criminal conduct. The trial court ordered defendants jointly and severally to pay \$200,000 in restitution. The court ordered special conditions on the payment of restitution, including minimal payments during the period of incarceration and the creation of a special fund from which the child-victim can seek reimbursement for her treatment-related expenses. In response to the government's objection to the special conditions during one of the defendants' hearings, the court imposed alternative restitution orders that no restitution be paid if the original orders were found to be insufficient or erroneous. Defendants and the government appealed, with defendants challenging the amount of restitution and the government challenging the special conditions imposed by the trial court on the payment of restitution and the alternative orders. The court of appeals held that the special conditions imposed by the trial court on the payment of restitution lacked the "specified interval" requirement imposed by the Mandatory Victims Restitution Act of 1996 (MVRA). Because defendants' payments were tied to a future contingency and were not set at predetermined moments in time, the practical effect was to avoid the MVRA's requirement that restitution be mandatory. Further, because the special conditions required the child-victim to incur out-of-pocket expenses and then seek reimbursement, this could improperly "deter or discourage her from receiving help." The appellate court held that the special condition manifestly violated the law and also ruled that the district court's alternative orders were unenforceable attempts to impinge on the government's right to appeal, as a denial of restitution to the child-victim would be contrary to law. Finally, the Eighth Circuit held that the trial court did not clearly err in fixing the amount of restitution at \$200,000, in light of the expert's opinion and defendants' objections relating to the lack of a formal interview and resiliency variances. In conclusion, the Eighth Circuit noted that the "harm to the victim here is undeniable and considerable, and she leaves little doubt that she will seek all the psychological treatment she can afford. If the eloquence of her statements to the district court at the defendants' sentencing hearings is any indication, she possesses the determination to clear the regrettably high hurdles of her life." The \$200,000 restitution award was affirmed, the special conditions were vacated, the alternative orders were vacated, and the case was remanded to the district court.

United States v. Dann, 652 F.3d 1160 (9th Cir. 2011). Defendant, convicted of visa fraud, forced labor, and other charges arising out of conduct involving her former live-in nanny and housekeeper, was sentenced to a term of imprisonment and ordered to pay \$123,740 as restitution to the victim. As part of the restitution order, the trial court ordered that any accrued child support payments that are payable to defendant while she is incarcerated shall be paid directly to the victim. On appeal, defendant argued, *inter alia*, that the trial court erred when it assigned accrued child support payments to the victim. The court of appeals agreed. The Ninth Circuit held that the trial court erred in ordering the redistribution of child support that is intended to benefit defendant's minor children. In reaching this holding, the court explained that under California law, the child is the real party of interest in child support arrearages until the child reaches the age of majority. Therefore, defendant, as the custodial parent, merely acts as "a conduit" for the disbursement of that support. Because accrued child support that is owed to defendant is not defendant's property, the court concluded that it cannot be assigned to the victim in a restitution order. Accordingly, the court reversed the trial court's order directing that accrued child support be paid directly to the victim.

2. Attorney's Fees

United States v. Thompson, No. 5:08CR53-RLV, 2011 WL 3438864 (W.D.N.C. Aug. 5, 2011) (slip copy). Defendant pled guilty to two counts of possessing child pornography, including at least one image from the "Vicky" series of child sexual abuse images. "Vicky," the child-victim pictured in these images, who is now an adult, sought restitution from defendant. The district court ordered defendant to pay restitution at defendant's sentencing hearing, but reserved determination of the amount for a later date, at which point the district court retained jurisdiction to order restitution. The Mandatory Restitution for Sexual Exploitation of Children Act, 18 U.S.C. § 2259, requires that defendants must pay restitution to compensate the child-victim for "the full amount of the victim's losses." After making the initial determinations that Vicky is a victim of defendant's crime and that defendant was not entitled to discovery, the district court observed that while proximate causation is not explicitly required in the act, most courts require such a showing. The court found that defendant's participation in the

“ongoing cycle of abuse” by possessing images of child sexual abuse was a proximate cause of Vicky’s emotional trauma, as the nature of the dissemination of the images of Vicky’s child sexual abuse and the continued proliferation of the images of her abuse “exponentially added to the types of triggers that can reactivate trauma-related thoughts or feelings . . . and can bring her trauma immediately into the present.” Addressing the amounts sought by Vicky for therapy and counseling costs, lost income, and attorney’s fees and costs, the court apportioned the amount of loss attributable to defendant’s actions — as distinct from the actions of the initial perpetrator of the abuse and the actions of other possessors of the images — in awarding Vicky a total of \$3,800 in restitution. In deference to Vicky’s privacy, the court requested that the Bureau of Prisons and the U.S. Probation office arrange for defendant to make restitution payments to a trust account overseen by the victim’s attorney.

People v. Taylor, 128 Cal.Rptr.3d 399 (Cal. Ct. App. 2011). Defendant pled no contest to a hit and run causing injury. The trial court ordered defendant to pay restitution in an amount that included the \$8,333 contingency fee that the victim paid his civil attorney after his settlement with the insurance company. On appeal, defendant challenged the restitution award on the ground that the trial court failed to apply the lodestar method for calculating attorney fees, which requires a court to multiply the number of hours reasonably expended by a reasonable hourly rate. The court held that the trial court did not abuse its discretion in awarding the contingency fee amount without applying the lodestar method. In reaching its holding, the court declined to follow an earlier California Court of Appeals decision that reached a contrary conclusion. The court explained that the lodestar method is a fee-shifting mechanism applied to encourage civil litigation that benefits the public and discourage litigation contrary to the public interest. Victim restitution, on the other hand, is not intended to encourage or discourage litigation; rather, victim restitution for attorney fees is intended to make the crime victim whole. Because victims typically have to pay a contingency fee in any personal injury action filed as a result of a crime, and the contingency fee is likely to be higher than an hourly fee for equivalent work, the court concluded that applying the lodestar method of calculation would overlook victim restitution’s primary purpose of awarding “full restitution” to the victims.

3. Calculation Method

United States v. Bryant, 655 F.3d 232 (3d Cir. 2011). Defendants were formerly the Dean of the School of Osteopathic Medicine (SOM) at the University of Medicine and Dentistry of New Jersey (UMDNJ) and a New Jersey State Senator. Both defendants were convicted of honest services fraud, mail fraud, and bribery in connection with a quid pro quo scheme involving the SOM, and one defendant was also convicted of engaging in a second scheme having to do with the fraudulent inflation of his state pension benefits. In exchange for compensation as a “Program Support Coordinator,” the State Senator was to funnel state funding to the SOM. During the former Dean’s tenure at the SOM, the school gained an additional \$10 million in funding over a three-year period. Both defendants were sentenced to a term of incarceration and held jointly liable for restitution in the amount of \$113,167 to UMDNJ. Defendants appealed, arguing, *inter alia*, that the UMDNJ was not a victim entitled to restitution. The Court of Appeals disagreed, holding that the “definition of victim includes public institutions that receive government funding, such as UMDNJ.” The Court of Appeals also rejected defendants’ position that because the school obtained money as a result of the scheme, the restitution order did not compensate the victim for “actual losses.” As the Court of Appeals pointed out, defendants improperly conflated the benefits reaped by the SOM with the financial carve-out that was granted to the SOM by the UMDNJ as a result of defendants’ scheme. The substantial carve-out of funds granted to the SOM by the UMDNJ came as a direct consequence of defendants’ actions and caused UMDNJ to “suffer[] financially” and incur actual losses; therefore, the restitution order — representing the salary and bonus amounts paid in connection with the “Program Support Coordinator” position — was justified. Because defendants were unable to provide proof of any offsets to the restitution amount for “legitimate services” rendered, the district court did not err in ordering the full amount to be paid by defendants in restitution. The court affirmed the lower court’s decision in all respects.

United States v. Palmer, 643 F.3d 1060 (8th Cir. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Ability to Pay.”

United States v. Hays, No. 09-91(1)(DWF), 2011 WL 4583822 (D. Minn. Sept. 30, 2011). *For full case summary, see “Specific Victims’ Rights – Right to be Heard.”

United States v. Stowers, No. CR-10-74-JHP, 2011 WL 3022188 (E.D. Okla. July 22, 2011) (slip copy). Defendant pled guilty to one count of possession of child pornography. “Amy,” one of the child-victims depicted in the child sexual abuse images possessed by defendant, petitioned the court for restitution. The court joined the “majority of circuits that have interpreted § 2259” in holding that defendant’s crime must be a “proximate cause of the harm suffered by the victim in order for restitution to be granted.” The court applied a three-prong test for awarding restitution under § 2259: 1) the individual seeking restitution must be a victim of defendant’s offense, 2) defendant’s offense must be a proximate cause of the victim’s losses, and 3) the losses must be calculable with “some reasonable certainty.” After ruling that Amy was a victim of defendant’s offense, the court held that “Amy’s restitution request in this case demonstrates that she knows [defendant] possessed images of her childhood abuse. [Defendant’s] crime directly harmed Amy, and therefore he is a proximate cause of her losses. While there is no doubt that thousands of others have committed the same crime, and thereby have also proximately caused Amy’s harm, that cannot negate [defendant’s] known criminal conduct.” With respect to the third prong of the test, however, the court held that the government failed to produce sufficient evidence to allow the court to calculate the amount of losses proximately caused by defendant. The court held that this evidence was a necessary prerequisite to ordering restitution because the proximate cause limitation on restitution requires the court to “order no more restitution than proximately caused by the defendant’s criminal conduct.” The court brought to the government’s attention various means of valuation suggested in case law, including: 1) developing a reasonable estimate of the number of defendants that will be prosecuted for similar offenses over the course of the victim’s lifetime and dividing the total restitution sought by this number, 2) providing direct evidence of additional therapy sessions or days of work missed after the victim received notice of the defendant’s offense, and 3) referencing the \$150,000 minimum amount of damages awarded in federal civil cases involving child pornography. Without expressing any opinion regarding the propriety of the

various methods, the court ordered the government to present evidence upon which the court can base its mandatory order of restitution and granted the government leave to amend the restitution request to incorporate requests from additional victims.

United States v. Thompson, No. 5:08CR53-RLV, 2011 WL 3438864 (W.D.N.C. Aug. 5, 2011) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Attorney Fees.”

People v. Smith, 129 Cal. Rptr. 3d 910 (Cal. Ct. App. 2011). *For full case summary, see “Specific Victims’ Rights – Right to be Heard.”

People v. Taylor, 128 Cal. Rptr.3d 399 (Cal. Ct. App. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Attorney Fees.”

4. Causation

United States v. Aumais, 656 F.3d 147 (2d Cir. 2011). Defendant pled guilty to transporting child pornography and was sentenced to a 121-month term of imprisonment and ordered to pay \$48,483 in restitution to “Amy,” one of the child-victims depicted in the images of child sexual abuse in his possession. Defendant appealed, arguing, *inter alia*, that his possession of the images of child sexual abuse was not a proximate cause of Amy’s future counseling costs. In support of her claim for \$3.3 million in restitution from defendant, Amy submitted a victim impact statement and, during the evidentiary hearing on restitution, an expert testified about the continuing effect Amy’s knowledge of the dissemination of her image has had. The lower court held defendant jointly and severally liable for the future counseling cost expenses and determined that it was “a matter for administration by the government’ to prevent excess recovery.” The court of appeals reviewed the order entered by the lower court for abuse of discretion, affirming first the lower court’s conclusion that Amy is a victim under the relevant law. Addressing the question of causation for this first time in this circuit, the court of appeals endorsed the reasoning of a sister circuit in finding that “proximate cause is a deeply rooted principle in both tort and criminal law that Congress did not abrogate when it drafted § 2259” and requiring that a victim’s losses be proximately caused by the defendant’s offense. Although the court of appeals noted that the “magistrate judge’s findings of fact are supported by

the evidence,” it disagreed “that those facts establish a causal connection between [defendant’s] possession of Amy’s images and Amy’s losses.” The court of appeals emphasized the magistrate’s finding that “Amy had no direct contact with [defendant] nor even knew of his existence” and noted that “Amy’s Victim Impact Statement makes no mention of [defendant].” In addition, the court of appeals emphasized that “[w]hile [the expert] may describe generally what Amy suffers from knowing that people possess her images, [the expert] cannot speak to the impact on Amy caused by this defendant.” Although the Second Circuit found an absence of evidence connecting defendant’s actions with Amy’s losses in this case, it clarified that its opinion “does not categorically foreclose payment of restitution to victims of child pornography from a defendant who possesses their pornographic images. We have no basis for rejecting [the expert’s] findings that Amy has suffered greatly and will require counseling well into the future. But where the Victim Impact Statement and the psychological evaluation were drafted before the defendant was even arrested – or might as well have been – we hold as a matter of law that the victim’s loss was not proximately caused by a defendant’s possession of the victim’s image.” Commenting on the issue of joint and several liability, the court of appeals observed that “it would seem that the law does not contemplate apportionment of liability among defendants in different cases, before different judges, in different jurisdictions around the country.” The court of appeals affirmed in part and reversed in part defendant’s amended judgment of conviction.

In re Fisher, 640 F.3d 645 (5th Cir. 2011).

Defendants were convicted of conspiracy in a public corruption prosecution involving city council members who awarded defendants an affordable housing contract in exchange for gifts. The petitioner-victim, a developer whose own affordable housing projects — on which he spent \$1.8 million — never received approval or financing from the city, sought restitution from defendants, arguing that their conduct had rendered his investment worthless. The district court declined to order restitution, and the petitioner sought a writ of mandamus directing the district court to recognize that he was a crime victim within the meaning of the Crime Victims’ Rights Act (CVRA), 18 U.S.C. § 3771, and the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663A. The petitioner advanced two arguments as to why defendants’ criminal conduct was the but-for

cause of his financial losses: (1) had he been aware of the criminal conduct, he would not have made his investment in competing housing developments; and (2) but for the conspiracy, his investment would not have been futile. The appellate court denied the petition, holding that the district court’s finding that the petitioner had not established that defendants’ crime was a but-for cause of his losses was not so clearly and indisputably wrong as to warrant the extraordinary relief of mandamus. The court found that petitioner’s arguments failed because they depended on the too-speculative assumption that the City Council would have approved his competing development, had the criminal conspiracy not taken place. Because this finding was an alternative and sufficient ground for upholding the trial court’s findings, the court concluded that it need not analyze whether the petitioner may establish but-for causation on the basis that defendants’ criminal conspiracy denied him a level playing field in having his projects fairly considered by the City Council, which is a sufficiently concrete and cognizable injury to support standing under the Racketeer Influenced and Corrupt Organizations Act. Lastly, the court denied the petitioner’s motion to consolidate the mandamus petition with his direct appeal raising identical issues “without prejudice to any right of appeal [the petitioner] may enjoy[,]” and noted that nothing in the court’s opinion “should be read to imply any view on the proper answer to the question of whether the CVRA gives a putative victim the right to file a direct appeal.” In a decision issued a few months later, *In re Fisher*, 649 F.3d 401 (5th Cir. 2011), the court denied petitioner’s motion to reconsider. As the court explained: “A crime is a but-for cause of an injury only if the injury would not have occurred in the absence of the crime. In the absence of the entirety of [defendants’] crime, both the bribery and the concealment, [petitioner’s] expenditure of \$1.9 million still would have occurred. As a result, we decline to reconsider our prior determination that [petitioner] has not shown that the district court clearly and indisputably erred by concluding that he was not directly harmed by [defendants’] criminal conduct.”

United States v. Kennedy, 643 F.3d 1251 (9th Cir. 2011). Defendant was convicted by a jury of possessing and transporting child pornography and appealed his conviction and sentence, as well as the restitution order mandating payments to child-victims “Amy” and “Vicky.” In support of her

claim for restitution, Amy submitted a victim impact statement, a psychological evaluation, and a report from the Smith Economics Group calculating the value of her lost income, the present value of future treatment and counseling costs, and the value of her loss of enjoyment in life. In support of her claim for restitution, Vicky submitted a forensic psychological examination, which included an estimate of the future cost of therapy, as well as a printout from an online message board documenting users discussing the images of her sexual abuse as a child. None of the materials submitted by the victims mentioned defendant. The district court found that the information submitted by Amy and Vicky sufficiently established the causal connection between their losses and defendant's conduct and ordered defendant to pay restitution in the amounts of \$17,000 to Amy (\$1,000 for each of the 17 images of her in defendant's possession) and \$48,000 to Vicky (\$1,000 for each of the 48 images of her in defendant's possession). On appeal, defendant argued, *inter alia*, that the restitution order was invalid because the evidence did not support a finding that defendant proximately caused the victims' losses. The court of appeals held that "for purposes of determining proximate cause, a court must identify a causal connection between the defendant's offense conduct and the victim's specific losses." Because the government did not introduce "any evidence establishing a causal chain between [defendant's] conduct and the specific losses incurred by Amy and Vicky," the government failed to meet its burden. The court of appeals observed that the government did not submit evidence 1) demonstrating that defendant's actions caused the claimed lost income, loss of enjoyment of life, or future counseling costs; 2) establishing that the victims were aware of defendant's conduct; or 3) indicating that the victims could have avoided certain losses if defendant had not engaged in the transportation of the images of child sexual abuse. The court of appeals acknowledged that although direct evidence of loss caused by defendant's actions (such as evidence that defendant's conduct resulted in the victims' need for additional therapy sessions or caused them to miss days at work) would be sufficient to establish proximate cause, "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." The underlying cause of this result is "the structure established by § 2259: it is a poor fit for these types of offenses." Consequently, absent a legislative fix, the statute will "continue

to present serious obstacles for victims seeking restitution in these sorts of cases." Because the court of appeals found that the government failed to prove that the victims' losses were proximately caused by defendant, it vacated the restitution order.

United States v. Stowers, No. CR-10-74-JHP, 2011 WL 3022188 (E.D. Okla. July 22, 2011) (slip copy).

*For full case summary, see "Specific Victims' Rights – Right to Restitution – Calculation Method."

United States v. Thompson, No. 5:08CR53-RLV, 2011 WL 3438864 (W.D.N.C. Aug. 5, 2011) (slip copy).

*For full case summary, see "Specific Victims' Rights – Right to Restitution – Attorney Fees."

People v. Verni, 127 Cal. Rptr. 3d 878 (Cal. Ct. App. 2011). Following an argument with the victim, defendant's girlfriend, defendant entered her apartment, poured gasoline on her and lit her on fire. Pursuant to a plea agreement, defendant pled guilty to aggravated mayhem in exchange for dismissal of the remaining charges, including arson. At sentencing, defendant was ordered to pay restitution to the victim for her injuries and to the business entity that owned the apartment building (apartment owner) for the damage caused by the fire. Defendant appealed from his restitution order, arguing that because he pled guilty to aggravated mayhem in exchange for dismissal of the arson charge, and because the elements of aggravated mayhem do not involve property damage, the victim was the "immediate object" of his crime, not the apartment owner. Defendant argued that because the apartment owner was not the immediate object of his crime, it could not be considered a "direct victim" entitled to restitution under state law. The appellate court disagreed and affirmed. Acknowledging that an entity such as the apartment owner is entitled to crime victim restitution only if it is a "direct victim" of a crime, the court found that, as applied, an entity meets the underlying requirement of being the "immediate object" of a crime if it "incurs economic loss as a direct and immediate result of the criminal conduct for which defendant is convicted." The court held that the fact that defendant poured gasoline on the victim and ignited the fuel "in circumstances where it was substantially certain that the apartment would burn" was sufficient to establish the apartment owner as a direct victim entitled to restitution. Accordingly, the court held that the trial court did not err in ordering defendant to pay restitution for the

apartment damage.

State v. Maxwell, 802 N.W.2d 849 (Minn. Ct. App. 2011). Defendant was convicted of identity theft, forgery, and other counts arising out of a fraudulent real-estate scheme. The trial court ordered defendant to pay over \$200,000 in restitution to the identity theft victim. Defendant appealed the restitution order on two grounds. First, relying on United States Supreme Court precedent, defendant argued that he was entitled to a jury trial to determine the amount of restitution. The court rejected defendant's argument, holding that the precedent cited was inapplicable to restitution orders because Minnesota does not provide a statutory maximum for restitution amounts. Second, defendant argued that the trial court erred by ordering him to pay an amount that compensates the victim for his inability to refinance his home mortgage, in addition to costs associated with credit-rehabilitation services. The court concluded that the trial court did not err by ordering restitution for these expenses because they were a reasonably foreseeable result of, and were directly caused by, defendant's theft of the victim's identity. Accordingly, the court affirmed the restitution award.

5. Future Lost Income

United States v. Kennedy, 643 F.3d 1251 (9th Cir. 2011). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Causation."

United States v. Thompson, No. 5:08CR53-RLV, 2011 WL 3438864 (W.D.N.C. Aug. 5, 2011) (slip copy). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Attorney Fees."

6. Joint and Several Liability

United States v. Aumais, 656 F.3d 147 (2d Cir. 2011). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Causation."

United States v. Palmer, 643 F.3d 1060 (8th Cir. 2011). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Ability to Pay."

7. Jurisdiction

United States v. Thompson, No. 5:08CR53-RLV, 2011 WL 3438864 (W.D.N.C. Aug. 5, 2011) (slip copy). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Attorney Fees."

8. Other

United States v. Bryant, 655 F.3d 232 (3d Cir. 2011). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Calculation Method."

United States v. Palmer, 643 F.3d 1060 (8th Cir. 2011). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Ability to Pay."

United States v. Dann, 652 F.3d 1160 (9th Cir. 2011). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Ability to Pay."

United States v. Thompson, No. 5:08CR53-RLV, 2011 WL 3438864 (W.D.N.C. Aug. 5, 2011) (slip copy). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Attorney Fees."

People v. Smith, 129 Cal. Rptr. 3d 910 (Cal. Ct. App. 2011). *For full case summary, see "Specific Victims' Rights – Right to be Heard."

State v. Maxwell, 802 N.W.2d 849 (Minn. Ct. App. 2011). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Causation."

II. STANDING

A. Definition of "Victim"

United States v. Aumais, 656 F.3d 147 (2d Cir. 2011). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Causation."

United States v. Bryant, 655 F.3d 232 (3d Cir. 2011). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Calculation Method."

In re Fisher, 640 F.3d 645 (5th Cir. 2011). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Causation."

United States v. Warwick, Criminal No. WDQ-11-0167, 2011 WL 4527285 (D. Md. Sept. 26, 2011). *For full case summary, see “Specific Victims’ Rights – Right to be Heard.”

United States v. Thompson, No. 5:08CR53-RLV, 2011 WL 3438864 (W.D.N.C. Aug. 5, 2011) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Attorney Fees.”

United States v. Stowers, No. CR-10-74-JHP, 2011 WL 3022188 (E.D. Okla. July 22, 2011) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Calculation Method.”

People v. Verni, 127 Cal. Rptr. 3d 878 (Cal. Ct. App. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Causation.”

State v. Mullen, 263 P.3d 1146 (Or. Ct. App. 2011). Defendant appealed his conviction of several counts of identity theft, arguing that the trial court improperly failed to merge three of his identity theft convictions, which were based on his possession of personal identifications belonging to three different victims. Defendant argued that, under the state identity theft statute, the victim of identity theft is not the person whose identification is misappropriated but, rather, the person whom a defendant intends to deceive or defraud by using the identification. The court noted that where a statute defining a crime does not expressly identify the person who qualifies as a “victim,” the court must examine the statute to identify the gravamen of the crime and determine the class of persons whom the legislature intended to directly protect. The court concluded that the identity theft statute’s targeted harm is the potential misuse of personal identification for deceptive or fraudulent purposes. As such, the court held that “the victims of identity theft include persons who suffer a risk of loss from the exposure of their identification to misuse.” This, the court noted, reflected the legislature’s determination that the risk of loss is itself a harm. The court further reasoned that earlier laws already protected the deceived party, and the current law was intended as a supplement to address situations where it cannot be proven that the person actually stole, forged, or used the identification. The court concluded that the three victims were separate and, accordingly, upheld the trial court’s refusal to merge the defendant’s convictions.

B. Victim Standing – Ripeness and Mootness

Jane Does #1 and #2 v. United States, 817 F. Supp. 2d 1337 (S.D. Fla. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Access Information and Documents.”

III. ENFORCEMENT

A. General Obligation to Afford Rights

1. Of Courts

Jane Does #1 and #2 v. United States, 817 F. Supp. 2d 1337 (S.D. Fla. 2011). *For full case summary, see “Summary Victims’ Rights – Right to Access Information and Documents.”

2. Of Government

Jane Does #1 and #2 v. United States, 817 F. Supp. 2d 1337 (S.D. Fla. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Access Information and Documents.”

B. Participation of Victim’s Attorney

People v. Smith, 129 Cal. Rptr. 3d 910 (Cal. Ct. App. 2011). *For full case summary, see “Specific Victims’ Rights – Right to be Heard.”

State v. Savoie, 262 P.3d 535 (Wash. Ct. App. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Privacy – Closed Courtroom.”

C. Multiple Victim Cases

State v. Mullen, 263 P.3d 1146 (Or. Ct. App. 2011). *For full case summary, see “Standing – Definition of Victim.”

D. Remedies for Rights Violation

Jane Does #1 and #2 v. United States, 817 F. Supp. 2d 1337 (S.D. Fla. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Access Information and Documents.”

E. Writs

In re Fisher, 640 F.3d 645 (5th Cir. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Causation.”

IV. CONSTITUTIONAL ISSUES RELATED TO VICTIMS’ RIGHTS

A. Right of Access – Public and Media

State v. Savoie, 262 P.3d 535 (Wash. Ct. App. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Courtroom Accommodations – Closed Courtroom.”

B. Defendant’s Right to Confrontation

United States v. Ellerbrock, 70 M.J. 314 (C.A.A.F. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Privacy - Other.”

People v. Ring, No. 298074, 2011 WL 4104959 (Mich. Ct. App. Sept. 15, 2011). *For full case summary, see “Specific Victims’ Rights – Right to Notice – Medical and Psychological Examinations.”

State v. Supanchick, 263 P.3d 378 (Or. Ct. App. 2011). Defendant, convicted of murdering his wife, appealed the trial court’s admission of several out-of-court statements made by the victim under the state’s statutory “forfeiture by wrongdoing” exception to the hearsay rule (the “forfeiture doctrine”). Defendant raised several arguments, including, *inter alia*, that (1) the statements did not qualify for admission under the forfeiture doctrine because the government failed to prove that preventing the victim from testifying was “the sole or primary purpose” for the murder, and (2) the admission of this evidence violated defendant’s confrontation right under the state constitution. The court rejected both arguments. First, the court concluded that the forfeiture doctrine does not require that the government establish a sole or primary purpose. The doctrine applies so long as the government shows that defendant engaged in wrongful conduct with the intent to make the declarant unavailable to testify, and the conduct actually prevented such testimony. Second, the court concluded that defendant’s right to confront witnesses under the state constitution was not violated. The

court found the victim’s statements met the test for admissibility under the state confrontation clause because they fell within a “firmly rooted hearsay exception.” For this and other reasons, the court affirmed the judgment.

State v. Hill, 715 S.E.2d 368 (S.C. Ct. App. 2011). Defendant was convicted of two counts of criminal sexual conduct with a minor in the first degree and two counts of lewd acts upon a child. Defendant appealed, arguing that the trial judge erred in, *inter alia*, admitting into evidence a DVD of the child-victim’s forensic interview in violation of defendant’s rights to due process and to confront and cross-examine the child-victim, as the DVD was admitted into evidence after the child-victim had testified and left the stand. The trial court admitted the DVD after determining that it met the statutory requirements governing the admission of out-of-court statements made by certain child-victims. On appeal, the court noted that “the Confrontation Clause ‘guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.’” Because defendant was given the opportunity to cross-examine the child-victim while the child-victim was on the stand, and because defendant knew of and presumably had access to the DVD before the time of the child-victim’s testimony at trial, defendant’s right to confront and cross-examine the child-victim regarding the forensic interview was not violated. The court observed that defendant’s attorney was not prohibited from cross-examining the child-victim on the subject of the DVD and instead made strategic decisions not to cross-examine the child-victim on this subject when he was on the stand and not to recall the child-victim for further questioning after the introduction of the DVD. The court of appeals rejected defendant’s arguments and affirmed defendant’s convictions.

Coronado v. State, 351 S.W.3d 315 (Tex. Ct. App. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Courtroom Accommodations – Alternative Means of Testifying.”

C. Defendant's Right to Due Process

United States v. Warwick, Criminal No. WDQ-11-0167, 2011 WL 4527285 (D. Md. Sept. 26, 2011).

*For full case summary, see "Specific Victims' Rights – Right to be Heard."

People v. Ring, No. 298074, 2011 WL 4104959 (Mich. Ct. App. Sept. 15, 2011). *For full case summary, see "Specific Victims' Rights – Right to Privacy – Medical and Psychological Examinations."

State v. Hill, 715 S.E.2d 368 (S.C. Ct. App. 2011). *For full case summary, see "Constitutional Issues Related To Victims' Rights – Defendant's Right to Confrontation."

D. Defendant's Right to Equal Protection

People v. Smith, 129 Cal. Rptr. 3d 910 (Cal. Ct. App. 2011). *For full case summary, see "Specific Victims' Rights – Right to be Heard."

E. Defendant's Right to Fair Trial

United States v. Ellerbrock, 70 M.J. 314 (C.A.A.F. 2011). *For full case summary, see "Specific Victims' Rights – Right to Privacy – Other."

People v. Smith, 129 Cal. Rptr. 3d 910 (Cal. Ct. App. 2011). *For full case summary, see "Specific Victims' Rights – Right to be Heard."

State v. Maxwell, 802 N.W.2d 849 (Minn. Ct. App. 2011). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Causation."

State v. Hess, 23 A.3d 373 (N.J. 2011). *For full case summary, see "Specific Victims' Rights – Right to be Heard."

V. EVIDENTIARY ISSUES RELATED TO VICTIMS' RIGHTS

A. Consent

1. Intoxication

State v. Jones, 804 N.W.2d 409 (S.D. 2011). Defendant was convicted of two counts of third degree rape after having sex with a victim who was

too intoxicated to be able to consent. Defendant argued that the court erred in interpreting the law as not requiring that defendant know that the person was unable to exercise reasonable judgment as a result of the intoxication, in essence making it a strict liability crime. The court agreed, reversing the conviction and remanding for further proceedings. The court stated that the vast majority of crimes require mens rea, or knowledge, on the part of defendants. Here, because of the seriousness of the crime and the legislature's failure to indicate its clear intent to dispense with mens rea, the court read in an element of knowledge. The court found compelling that if it were to hold otherwise, it would "hold that even when a man accused of rape convinces a jury that he reasonably and in good faith believed he had engaged in consensual adult sex, the jury must disregard his innocent state of mind if the woman he had sex with later establishes that she drank too much to have given her consent." Two justices separately dissented, finding that the legislative history and case law both support interpreting the statute as not requiring that the defendant subjectively knew the victim was incapable of consent.

2. Sexual Assault

State v. Jones, 804 N.W.2d 409 (S.D. 2011). *For full case summary, see "Evidentiary Issues Related to Victims' Rights – Consent – Intoxication."

B. Discovery

1. Pretrial Interviews/Depositions

Trainor v. Robles, 2 CA-SA 2011-0054, 2011 Ariz. App. Unpub. LEXIS 1131 (Ariz. Ct. App. Aug. 31, 2011). Defendant was charged with two counts of sexual conduct with and molestation of a minor, his former wife's daughter. In an interlocutory special action, defendant challenged the respondent-judge's denial of his motion to depose the child-victim's 11-year-old sister under Arizona Rule of Criminal Procedure 15.3(a)(2) as a violation of due process. Under Rule 15.3(a)(2), the trial court may, in its discretion, order a person to submit to a deposition if the party seeking the deposition "shows that the person's testimony is material to the case or necessary adequately to prepare a defense or investigate the offense . . ." The trial judge denied the motion, upon finding that the child-victim's sibling's testimony was

not material to the defense, reasoning that the sibling was not on the witness list, was an infant when the sexual abuse began and 2 or 3 when it ended, and had no direct knowledge of the offense. The appellate court reversed, finding the trial court erroneously focused only on the first aspect of Rule 15.3(a)(2), the materiality aspect, and ignored that a deposition may also be ordered if “necessary adequately to prepare a defense or investigate the offense.” The court stated that, although defendant had not yet established whether the sibling’s testimony would be material to the case, “Rule 15.3(a)(2) was not designed only to give a party the opportunity to question an indisputably material witness.” The sibling, although likely too young at the time of the offense to offer material evidence, could have information that may be relevant and admissible at trial based on conduct, events, or observations after the offense was committed because she lived in the same house with defendant and the child-victim through the time the allegations first surfaced. The appellate court also rejected the trial court’s reasoning that the sibling could be shielded from the deposition because of her mother’s desire to protect her. Noting that a judge could limit the scope of the deposition or decide its location to protect a witness, the court remarked that “nothing in the text of the rule, nor any other authority provided to this court, suggests that a parent’s right to shield a non-victim child from the inconvenience and emotional discomfort of a deposition outweighs the defendant’s right to conduct such discovery when necessary to ‘prepare a defense’ or investigate the charged offense.” Accordingly, the order was reversed and the judge was ordered to conduct further proceedings consistent with the decision.

2. Victim Impact Statement

United States v. Aumais, 656 F.3d 147 (2d Cir. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Causation.”

United States v. Warwick, Criminal No. WDQ–11–0167, 2011 WL 4527285 (D. Md. Sept. 26, 2011). *For full case summary, see “Specific Victims’ Rights – Right to be Heard.”

3. Other

Jane Does #1 and #2 v. United States, 817 F. Supp. 2d 1337 (S.D. Fla. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Access Information and Documents.”

United States v. Thompson, No. 5:08CR53-RLV, 2011 WL 3438864 (W.D.N.C. Aug. 5, 2011) (slip copy). *For full case summary, see “Specific Victims’ Rights — Right to Restitution — Attorney’s Fees.”

C. Expert Testimony

United States v. Aumais, 656 F.3d 147 (2d Cir. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Causation.”

D. Hearsay

State v. Supanchick, 263 P.3d 378 (Or. Ct. App. 2011). *For full case summary, see “Constitutional Issues Related To Victims’ Rights — Defendant’s Right to Confrontation.”

State v. Hill, 715 S.E.2d 368 (S.C. Ct. App. 2011). *For full case summary, see “Constitutional Issues Related To Victims’ Rights – Defendant’s Right to Confrontation.”

E. Privilege

People v. Ring, No. 298074, 2011 WL 4104959 (Mich. Ct. App. Sept. 15, 2011). *For full case summary, see “Specific Victims’ Rights – Right to Notice - Medical and Psychological Examinations.”

F. Rape Shield

United States v. Ellerbrock, 70 M.J. 314 (C.A.A.F. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Privacy - Other.”

State v. Stoffer, 2011 Ohio 5133 (Ohio Ct. App. 2011). Defendant was convicted of five counts of gross sexual imposition against a minor and the illegal use of a minor in nudity-oriented material or performance after sexually assaulting and photographing the 7-year-old victim. On appeal he raised a number of issues, including that the

trial court erred in granting the state's motion to prevent defendant from calling a witness to testify as to the victim's prior allegation of sexual abuse. Under Ohio's rape shield law, "Evidence of specific instances of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section" unless certain exceptions apply. The court interpreted Ohio's rape shield law as having no application to instances of prior sexual abuse suffered by a child. It stated that the statute's reference to "specific instances of the victim's sexual activity" "connotes volitional activity by the victim with another and not involuntary activity such as that which would stem from being subjected to sexual abuse." It based this interpretation on its interpretation of legislative intent. The court opined that the statute prohibits opinion and reputation evidence of the victim's sexual activity, which are methods of proving character. However, "[c]haracter is generally thought to include qualities, like honesty and integrity, over which that person has control. Therefore, when the General Assembly sought to protect a victim from opinion and reputation evidence, it was contemplating evidence of a victim's sexual history over which they had control." It further found the goal of guarding the victim's sexual privacy so as to protect her from undue harassment and encourage the reporting of rape not applicable: "While sexual abuse victims may very understandably be reluctant to disclose past instances of sexual abuse, that discomfort is different from the undue harassment that rape shield statutes were enacted to protect against – undue harassment that may be caused by the revelation of one's own history of questionable voluntary or consensual sexual activity." Accordingly, the court concluded, "we construe that the legislative intent of Ohio's rape shield law was to address only past consensual sexual activity of the victim and not prior sexual abuse suffered by the victim. Therefore, the rape shield statute has no application in this case and the trial court erred in applying it." However, the court ultimately held that the error was harmless because evidence of the prior sexual abuse was not relevant. The evidence of prior sexual abuse may have been relevant if it were used as an alternative source for explaining the victim's inappropriate sexual knowledge. However, the prosecution presented evidence that the victim's sexual knowledge was age-appropriate. Additionally, there was independent, physical evidence in the form of photographs indicating that inappropriate contact had occurred.

Accordingly, defendant's conviction was affirmed.

Commonwealth v. Ruggiano, 14 A.3d 844 (Pa. Super. Ct. 2010). Defendant was convicted of indecent assault and indecent exposure arising out of interactions with two child-victims, his two younger cousins. On appeal, he argued that the trial court erred in excluding evidence relating to one of the child-victims' juvenile adjudication of delinquency for sexual misconduct. As to both victims, he argued that there was an "atmosphere of promiscuity" in the home, and evidence about it should have been admitted. Defendant argued this atmosphere provided a motive to fabricate the claims against defendant for two reasons: first, because the child-victims may have wanted to protect their siblings and themselves at the expense of defendant; and second because the child-victims may have been confused as to who assaulted them. The appellate court agreed. It stated that the purpose of the rape shield law is to prevent a trial from concentrating on the virtue and chastity of the victim rather than on the culpability of the accused. Here, the court stated, the rape shield statute was not applicable because the evidence that was excluded did not relate to chastity but to the child-victims' motives to fabricate charges of sexual assault. Additionally, the rape shield statute could not be used to exclude relevant evidence. Here, relevant evidence relating to bias or motive to fabricate was excluded, which is relevant for impeachment purposes. Finally, the court found that the rape shield law would only bar evidence if its probative value was outweighed by its prejudicial effect. Because the evidence was not being introduced to attack the child-victims' chastity, it was not unduly prejudicial. The court concluded excluding the evidence would compromise the truth-determining process, as well as defendant's right to confront and cross examine witnesses against him. Accordingly, the underlying conviction was reversed and the matter was remanded for a new trial.

Update, August 2011: In *Commonwealth v. Ruggiano*, 26 A.3d 473 (Pa. 2011) (per curiam), the Pennsylvania Supreme Court vacated the Superior Court's decision and remanded to the trial court for hearings. The court found that the prior juvenile adjudication of one of the child-victims could be used to show bias or motive, an exception under the rape shield law, and that the trial court should determine the admissibility of this evidence in an in camera hearing, in accordance with rape shield law procedures. The court found that rape shield did not

apply to evidence relating to the other child-victim, because his past sexual conduct was not at issue, and remanded to the trial court to determine whether the evidence sought to be admitted is admissible under the traditional rules of evidence.

McIntyre v. State, 311 Ga. App. 173 (2011).

Defendants were found guilty on numerous counts associated with the sexual abuse of the 15-year-old child-victim. On appeal, defendants argued in relevant part that the trial court erred in restricting the cross-examination of the child-victim regarding her past sexual history under Georgia's rape shield law. Specifically, defendants argued that they should have been allowed to present evidence that the child-victim fabricated her claims in retaliation for one of the defendants disclosing to the child-victim's mother that the child-victim was sexually active. The appellate court rejected this contention, citing in support several cases in which a similar argument was made and rejected. In so ruling, it favorably cited one case, which stated that allowing this sort of "fabrication" evidence "would be to permit defendants to circumvent the Rape Shield Statute and thwart the intent of the legislature in enacting the statute. We cannot allow such a result." The judgments were affirmed.

G. Relevance

Trainor v. Robles, 2 CA-SA 2011-0054, 2011 Ariz. App. Unpub. LEXIS 1131 (Ariz. Ct. App. Aug. 31, 2011). *For full case summary, see "Evidentiary Issues Related to Victims' Rights – Discovery – Pretrial Interviews/Depositions."

United States v. Ellerbrock, 70 M.J. 314 (C.A.A.F. 2011). *For full case summary, see "Specific Victims' Rights – Right to Privacy - Other."

Commonwealth v. Ruggiano, 26 A.3d 473 (Pa. 2011). *For full case summary, see "Evidentiary Issues Related to Victims' Rights – Rape Shield."

VI. VICTIM IMPACT STATEMENTS

United States v. Grigg, No. 09-6017, 2011 WL 4056317 (6th Cir. Sept. 14, 2011). *For full case summary, see "Specific Victims' Rights – Right to be Heard."

United States v. Warwick, Criminal No. WDQ-11-0167, 2011 WL 4527285 (D. Md. Sept. 26, 2011).

*For full case summary, see "Specific Victims' Rights – Right to be Heard."

State v. Hess, 23 A.3d 373 (N.J. 2011). *For full case summary, see "Specific Victims' Rights – Right to be Heard."

VII. CHILD VICTIMS

United States v. Aumais, 656 F.3d 147 (2d Cir. 2011).

*For full case summary, see "Specific Victims' Rights – Right to Restitution – Causation."

United States v. Kennedy, 643 F.3d 1251 (9th Cir. 2011). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Causation."

United States v. Palmer, 643 F.3d 1060 (8th Cir. 2011). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Ability to Pay."

Jane Does #1 and #2 v. United States, 817 F. Supp. 2d 1337 (S.D. Fla. 2011). *For full case summary, see "Specific Victims' Rights – Right to Access Information and Documents."

United States v. Stowers, No. CR-10-74-JHP, 2011 WL 3022188 (E.D. Okla. July 22, 2011) (slip copy).

*For full case summary, see "Specific Victims' Rights – Right to Restitution – Calculation Method."

United States v. Thompson, No. 5:08CR53-RLV, 2011 WL 3438864 (W.D.N.C. Aug. 5, 2011) (slip copy).

*For full case summary, see "Specific Victims' Rights – Right to Restitution – Attorney's Fees."

Trainor v. Robles, 2 CA-SA 2011-0054, 2011 Ariz. App. Unpub. LEXIS 1131 (Ariz. Ct. App. Aug. 31, 2011). *For full case summary, see "Evidentiary Issues Related to Victims' Rights – Discovery – Pretrial Interviews/Depositions."

People v. Smith, 129 Cal. Rptr. 3d 910 (Cal. Ct. App. 2011). *For full case summary, see "Specific Victims' Rights – Right to be Heard."

McIntyre v. State, 311 Ga. App. 173 (2011). *For full case summary, see "Evidentiary Issues Related to Victims' Rights – Rape Shield."

State v. Stoffer, 2011 Ohio 5133 (Ohio Ct. App. 2011). *For full case summary, see “Evidentiary Issues Related to Victims’ Rights – Rape Shield.”

Commonwealth v. Ruggiano, 26 A.3d 473 (Pa. 2011). *For full case summary, see “Evidentiary Issues Related to Victims’ Rights – Rape Shield.”

State v. Hill, 715 S.E.2d 368 (S.C. Ct. App. 2011). *For full case summary, see “Constitutional Issues Related To Victims’ Rights – Defendant’s Right to Confrontation.”

Coronado v. State, 351 S.W.3d 315 (Tex. Ct. App. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Courtroom Accommodations – Alternative Means of Testifying.”

State v. Savoie, 262 P.3d 535 (Wash. Ct. App. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Courtroom Accommodation – Closed Courtroom.”

VIII. MISCELLANEOUS ISSUES RELATED TO VICTIMS’ RIGHTS

A. Parallel Criminal and Civil Proceedings

People v. Taylor, 128 Cal.Rptr.3d 399 (Cal. Ct. App. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Attorney’s Fees.”

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