

Crime Victim Law Update

This is an index of crime victims' rights court opinions issued in the United States during January - December 2012. This index is intended for education purposes only. NCVLI makes no warranty regarding the current status of the cases cited or summarized. Before relying on any case summary, an attorney must independently review and analyze the case, including any subsequent history. To access NCVLI's complete database of crime victims' rights cases—available to paid members of the National Alliance of Victims' Rights Attorneys—please visit www.navra.org.

I. SPECIFIC VICTIMS' RIGHTS

A. Right to Access Information and Documents

1. Plea Agreement Terms

United States v. Daly, Criminal No. 3:11cr121(AWT), 2012 WL 315409 (D. Conn. Feb. 1, 2012) (slip copy). Defendant waived indictment and pleaded guilty to a one-count information charging him with embezzlement by a court officer in connection with his theft of approximately \$11,100 from the bankruptcy estate of Lehman Brothers while he was trustee of the estate. Pursuant to the terms of the plea agreement, the plea satisfied defendant's federal criminal liability with respect to his conduct as a bankruptcy trustee for four additional estates, including the Robert and Michelle DiLieto estate, and defendant agreed he would not seek fees in the United States Bankruptcy Court for work performed on behalf of all the estates except the DiLieto estate. In March 2011, defendant submitted a fee application to the Bankruptcy Court in connection with his work as trustee for the DiLieto estate. After learning of defendant's plea agreement, the DiLietos filed a motion, pursuant to the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, to set aside the plea agreement. The DiLietos argued that despite the fact that allegations made by the DiLieto estate about fraud committed against it by defendant were incorporated into the allegations of the government's investigation into defendant's work as a trustee, and despite the fact that the government entered the DiLietos into the victim notification system, they did not receive advance notice of defendant's plea, were

not given the opportunity to be present, and were not consulted in advance of the plea agreement. As a result, the DiLietos argued that the plea agreement should be set aside or, in the alternative, that the government and defendant should amend the plea agreement to provide that defendant cannot seek fees for work performed as trustee for the DiLieto estate. The trial court denied the motion. The court held that the DiLietos are not "crime victims" within the meaning of the CVRA for two reasons. First, the court concluded that there is "no nexus" between defendant's misconduct with respect to the Lehman Brothers' estate—the embezzlement of funds—and the alleged misconduct with respect to the DiLietos estate—overstating the hours spent working on the estate. Second, the court found that none of the offenses allegedly committed against the DiLietos was the charged offense. The court noted that the "DiLietos should be aware that they have the right," pursuant to the CVRA, "to petition the court of appeals for a writ of mandamus if they object to this ruling."

2. Other

Jimenez v. Waller, No. 12-1884, 2012 WL 6644065 (7th Cir. Nov. 5, 2012) (slip opinion). Plaintiff, a sexual assault victim, appealed the district court's dismissal of her 42 U.S.C. § 1983 civil rights case against two state prosecutors alleged to have deprived her of the rights afforded to crime victims under Illinois state law, including the right to receive information about the prosecution of her offender and the right to present a victim impact statement. The appellate court concluded that the district court correctly dismissed the case. In reaching its

TABLE OF CONTENTS

I. SPECIFIC VICTIMS' RIGHTS.....	1
A. Right to Access Information and Documents.....	1
B. Right to Courtroom Accommodations.....	3
C. Right to Confer.....	5
D. Right to Due Process, Fairness, Dignity, and Respect.....	6
E. Right to be Heard.....	8
F. Right to Notice.....	11
G. Right to be Present.....	11
H. Right to Privacy.....	12
I. Right to Prompt Disposition.....	18
J. Right to Protection.....	18
K. Right to Refuse Discovery Requests.....	21
L. Right to Restitution.....	22
II. STANDING.....	45
A. Definition of "Victim".....	45
B. Victim Standing – Civil Courts.....	47
C. Victim Standing – Criminal Justice System.....	47
D. Victim Standing – Ripeness and Mootness.....	47
III. ENFORCEMENT.....	47
A. General Obligation to Afford Rights.....	47
B. Multiple Victim Cases.....	48
C. Remedies for Rights Violations.....	48
D. Writs.....	48
E. Waiver of Rights.....	48
IV. STANDARD OF REVIEW.....	49
A. Mandamus.....	49
V. CONSTITUTIONAL ISSUES RELATED TO VICTIMS' RIGHTS.....	49
A. Right of Access – Public and Media.....	49
B. Defendant's Right to Confrontation.....	49
C. Defendant's Right to Counsel.....	51
D. Defendant's Right to Due Process.....	51
E. Defendant's Right to Equal Protection.....	52
F. Defendant's Right to Fair Trial.....	52
G. Defendant's Right to be Free from Unlawful Search and Seizure.....	53
H. Defendant's Right to Jury Trial.....	53
I. Defendant's Right to Privacy.....	53
J. Defendant's Rights Related to Punishment.....	53
VI. EVIDENTIARY ISSUES RELATED TO VICTIMS' RIGHTS.....	53
A. Consent – Sexual Assault.....	53
B. Discovery.....	54
C. Expert Testimony.....	54
D. Hearsay.....	55
E. Privilege – Statutory.....	55
F. Rape Shield.....	55
G. Relevance.....	56
VII. PROCEDURAL ISSUES RELATED TO VICTIMS' RIGHTS.....	56
A. Jury Instructions.....	56

B. Venue.....	56
VIII. VICTIM IMPACT STATEMENTS.....	56
IX. CHILD VICTIMS.....	57
X. MISCELLANEOUS ISSUES RELATED TO VICTIMS' RIGHTS.....	58
A. 42 U.S.C. § 1983 Civil Rights Actions.....	58
B. Compensation.....	59
C. Habeas Corpus Petitions.....	59
D. Parallel Criminal and Civil Proceedings.....	59
E. Professional Ethics and Rules of Conduct.....	59
F. Sex Offender Registries.....	59

conclusion, the court declined to reach the merits of plaintiff-crime victim's constitutional arguments. Rather, the court determined that to the extent that she seeks relief to remedy a past wrong, plaintiff-crime victim's claim is barred by the two-year statute of limitations for § 1983 actions. Also, the court concluded that to the extent that the victim seeks declaratory or injunctive relief barring any future denial of an attempt to make a victim impact statement, plaintiff-crime victim lacks standing to sue. The court explained that plaintiff-crime victim has not alleged facts that would establish either an ongoing injury or a likelihood of future harm. For these reasons, the court affirmed the judgment of dismissal.

United States v. Avila, CR 11-126-PHX-JAT, 2012 U.S. Dist. LEXIS 5286 (D. Ariz. Jan. 18, 2012). Defendant Avila and nineteen others were indicted on numerous charges, including, *inter alia*, dealing in firearms without a license; making false statements in connection with the acquisition of firearms; and conspiracy to commit the same. The indictment alleged that defendants illegally purchased military-style firearms in Arizona and distributed the firearms to members of Mexican drug trafficking organizations for use against law enforcement agents and competing drug trafficking organizations. The parents of a border patrol agent who was killed by drug traffickers filed a motion in the district court seeking recognition as "victims" under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771. The parents asserted that they were directly and proximately harmed by defendant's criminal conduct because the firearm used to kill their son was one of the many weapons defendants purchased by making false statements. The government and all defendants opposed the parents' motion. The court tentatively concluded that the parents had failed to establish

that they are “victims” under the CVRA. The court explained that the parents’ proffered evidence is insufficient to establish that “but for” a defendant’s charged false statement, the border patrol agent would not be deceased. Because both the parents and the government requested an opportunity to submit additional evidence on the issue of the parents’ statutory “victim” status, the court reserved final ruling on the issue until (1) the parents filed notice indicating that they do not seek to present any further evidence, or (2) after an evidentiary hearing if the parents submitted additional evidence and established a contested issue of fact. The court also construed the parents’ motion as including two additional requests: (1) a request for an order directing the government to produce information in its possession that is favorable to the motion for “victim” status; and (2) a request to have access to sealed filings and to receive notice of, and participate in, sealed proceedings. The court denied both requests. First, the court concluded that the CVRA does not entitle the parents to any discovery in the case. Second, the court found that the CVRA does not grant victims the right to have access to non-public proceedings and filings; therefore, the court concluded that even if the parents were to be deemed statutory “victims,” they would nevertheless have no right to participate in or have access to sealed proceedings and filings. For these reasons, the court denied the motion in part.

State v. Handy, 44 A.3d 776 (Vt. 2012). Defendant was convicted of lewd or lascivious conduct for having non-consensual sexual intercourse with a victim in a public place. Three years later, the trial court granted the state’s motion for an order requiring defendant to submit to testing for acquired immune deficiency syndrome (AIDS) or other sexually transmitted diseases pursuant to a state statute that authorizes such testing upon the victim’s request. On appeal, defendant challenged the constitutionality of the testing statute on two grounds. First, defendant argued that the statute is unconstitutional because it does not serve “special needs” beyond normal law enforcement such as would justify abandoning the warrant and probable cause requirements under the state constitution. The Vermont Supreme Court rejected this argument, concluding that the testing statute serves a public health interest and that imposing probable cause and warrant requirements to test for sexually transmitted diseases would be impracticable. Second, defendant argued that the statute is unconstitutional because the goals advanced

by the statute do not outweigh his constitutional rights to privacy. The court also rejected this argument. The court found that testing offenders can provide sexual assault victims a psychological benefit by allaying their fears of contracting a life-threatening sexually transmitted disease. The court concluded that this benefit to victims “outweighs the offenders’ significantly diminished interest in preventing the testing of bodily fluids forced upon their unwilling victims,” provided that the trial court imposes restrictions to prevent public dissemination of the test results. For these reasons, the court affirmed the trial court’s order but remanded the case for the trial court to issue an order directing the victim not to disclose the results to anyone other than a medical provider or counselor.

B. Right to Courtroom Accommodations

1. Closed Courtroom

Kovaleski v. State, 103 So. 3d 859 (Fla. 2012). Defendant was convicted of two counts of lewd and lascivious acts on a minor. During defendant’s retrial in 2006, the trial court partially closed the courtroom during the testimony of the child-victim, in accordance with a statutory provision allowing for partial closure upon the request of any testifying victim of a sex offense. Defendant appealed, arguing that the statutory closure provision conflicted with the requirements established by the Supreme Court in *Waller v. Georgia*, 467 U.S. 39 (1984). In *Waller*, the Court held that the presumption of openness may be overcome if the following requirements are met: (1) the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced; (2) the closure must be no broader than necessary to protect that interest; (3) the trial court must consider reasonable alternatives to closing the proceedings; and (4) the court must make findings adequate to support the closure. The statutory closure provision at issue provides that upon request of a victim of a sex offense, the courtroom shall be cleared during the testimony of the victim, with the exception of the “parties to the cause and their immediate families or guardians, attorneys and their secretaries, officers of the court, jurors, newspaper reporters or broadcasters, court reporters, and, at the request of the victim, victim or witness advocates designated by the state attorney.” The Florida Supreme Court rejected defendant’s challenge and held that the statute itself “acceptably embraces the requirements

set forth in *Waller*” for the following reasons: First, closure is not automatic, but occurs only at the request of a testifying victim and “protecting the victim upon his or her request is a compelling interest of the State,” which satisfies the initial *Waller* requirement. Second, the closure is narrow—applying only to the testimony of the victim—and a number of individuals, including members of the press, are allowed to remain in the courtroom, making the closure no broader than necessary. Third, the court found that “allowing the parties [specified in the statute] to remain in the courtroom . . . provides for the most reasonable alternative to closing the courtroom during the trial.” Finally, trial courts were advised to ensure that the statute applies to the case and that it is properly applied, reflecting these findings in the record to allow for appellate review. Defendant’s conviction was affirmed.

2. Support Person Presence - Trial

People v. Spence, 151 Cal. Rptr. 3d 374 (Cal. Ct. App. 2012). Defendant was convicted of various counts arising out of inappropriate sexual contact committed against a daughter of his housemate. Defendant appealed, arguing, *inter alia*, that he was deprived of due process when the trial court allowed a courthouse facility dog to sit by the child-victim’s feet to provide support during her testimony. Defendant believed that allowing the child-victim to have the support of a courthouse facility dog during her testimony, in addition to the support of a victim advocate, was “overkill” and unduly prejudicial. At trial, the court disagreed and found that it had the discretion to control courtroom proceedings in the search for truth, analogizing the courthouse facility dog to a “cute teddy bear” that could be held to provide comfort during testimony. Because the courthouse facility dog is “almost unnoticeable once everybody takes their seat on the stand,” is “well-behaved[,] and does nothing but simply sit there,” the court allowed the presence of the courthouse facility dog to ease and facilitate the child-victim’s testimony. On appeal, the court held that the statutory provision governing “support persons” did not apply to the presence of a courthouse facility dog and found that the trial court properly relied on its discretion to control courtroom proceedings to protect the child-victim. The court of appeals also held that the trial court—in finding that the child-victim was “on the young side,” that the child-victim had been upset when interviewed about her injuries previously,

that the prosecutor was concerned about a potential emotional reaction on the stand, and that the child-victim wanted both the courthouse facility dog and a victim advocate present during her testimony—made implicit and justified findings of necessity. Even assuming that any additional or express findings might have been proper, the court of appeals held that any such error was harmless and affirmed defendant’s conviction.

3. Other

People v. Spence, 151 Cal. Rptr. 3d 374 (Cal. Ct. App. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Courtroom Accommodations – Support Person Presence – Trial.”

Kerdpoka v. State, 724 S.E.2d 419 (Ga. Ct. App. 2012). Defendant was convicted of child molestation and appealed, arguing, *inter alia*, that the trial court interfered with his cross-examination of the child-victim, in violation of his Sixth Amendment right to confrontation. At trial, the court (1) required defense counsel to stand at a podium while cross-examining the twelve-year-old child-victim, (2) asked the child-victim if she needed water or a break, (3) asked defense counsel how much longer the cross-examination would take and commenting that the child-victim would “need some relief,” and (4) called for a break in the child-victim’s testimony out of a concern for the child-victim’s exhaustion and allowed the government to question other witnesses before re-calling the child-victim to continue the cross-examination. In considering defendant’s argument, the court of appeals noted that defendant failed to show how any of the court’s actions constituted an abuse of discretion, as the trial judge “was clearly attempting to ensure that the 12-year-old child was treated fairly.” The court noted that although the Confrontation Clause guarantees an opportunity for defendant to engage in effective cross-examination, this does not equate to an opportunity for “cross-examination that is effective in whatever way and to whatever extent the defense might wish.” Defendant also failed to demonstrate how any of the court’s actions impacted defendant’s cross-examination of the child-victim or his ability to impeach the witness, or that the substance of the cross-examination was limited in any way. Because “no possible harm” was shown, the appellate court concluded that no reversible error was demonstrated. For this reason, and for other reasons, the judgment was affirmed.

State v. Dye, 283 P.3d 1130 (Wash. Ct. App. 2012). Defendant was convicted of residential burglary and appealed, arguing, *inter alia*, that his right to a fair trial was violated when the court allowed Ellie, the prosecutor's office's facility dog, to sit next to the developmentally disabled adult victim during the victim's testimony. Before trial, the state sought permission from the trial court for Ellie to accompany the victim during his testimony, as the victim was "experiencing significant anxiety regarding his upcoming testimony." Defendant objected, arguing that the dog would "distract the jury, aggravate [defendant's] allergies, and cause extreme prejudice." The court granted the motion over defendant's objection, offering to make appropriate accommodations for defendant's allergies. At trial, the court instructed the jury not to "make any assumptions or draw any conclusions based on the presence of this [facility] dog." On appeal, defendant argued that the presence of the facility dog during the victim's testimony violated his right to a fair trial, that there was no proper foundation for the request, and that the court inappropriately failed to make the necessary findings for a disability-related accommodation. The court of appeals rejected defendant's arguments, noting first that the antidiscrimination and disability-related provisions "have no application here." The court of appeals also rejected the argument that Ellie's presence interfered with defendant's ability to cross-examine the victim, as defendant was able to conduct a full cross-examination of the victim, including the opportunity to question the victim about any possible bias or suggestibility relating to the use of the facility dog. Because the court weighed the need for the facility dog to support the victim against the possibility of prejudice, the court of appeals concluded that the trial court did not err in granting the state's motion. Defendant's conviction was affirmed.

C. Right to Confer

United States v. Daly, Criminal No. 3:11cr121(AWT), 2012 WL 315409 (D. Conn. Feb. 1, 2012) (slip copy). *For full case summary, see "Specific Victims' Rights – Right to Access Information and Documents – Plea Agreement Terms."

State v. Munger, No. 2 CA-SA 2012-0034, 2012 WL 2859991 (Ariz. Ct. App., July 12, 2012)

(memorandum decision). Defendant was charged with leaving the scene of an accident causing serious physical injury, tampering with physical evidence, and criminal damage. The state offered defendant a plea agreement, but withdrew the plea after speaking with the victim's father, and after the victim's father contacted the media. Defendant moved to dismiss the indictment or reinstate the plea agreement, arguing the state had violated her due process rights by withdrawing the plea agreement based on the wishes of the victim's family. The trial court concluded that the plea was withdrawn not because of input from the family but because the press got involved. Concluding that withdrawal on that basis "violated the constitution," the trial court ordered the plea offer reinstated. The state petitioned for special action review. Defendant again argued that the state violated her due process rights because the victim's family's wishes were "the deciding factor" in the state's decision to revoke the plea, and that this violated state law providing that the "[t]he right of the victim to confer with the prosecuting attorney does not include the authority to direct the prosecution of the case." Defendant also cited case law for the proposition that the state cannot put "undue weight" on the wishes of a victim's family. The appellate court rejected defendant's arguments. As to the issue of placing "undue weight" on the wishes of a victim's family, the court noted that both cases cited by defendant dealt with the state's decision whether to seek the death penalty, that there was no authority applying either case outside of the death penalty context, and that neither case actually held that the state was prohibited from treating the family's wishes as the dispositive factor. As to defendant's argument that the state's decision to withdraw the plea violated the state statute declaring that the right to confer does not include the right to direct the prosecution, the court stated that "[a]ssuming, without deciding that [the statute] prohibits the state from deciding whether to withdraw a plea offer because of the victim's wishes, the respondent judge's findings preclude a conclusion that occurred here." The court further explained in a footnote that it was just as likely the legislature intended the provision to mean only that a victim had no right to compel the state to prosecute in a certain way, and not that the state "could not give significant, even determinative weight to the victim's wishes." The court then held that defendant's due process rights were not violated, and vacated the respondent judge's order reinstating the state's plea offer.

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

United States v. Shepard, No. CR 10-1032-TUC-CKJ, 2012 WL 113027 (D. Ariz. Jan. 13, 2012) (slip copy). The court decided a number of pending motions leading up to pro se defendant's trial for stalking including, *inter alia*, defendant's motion to compel production of the victim's medical and psychological records and emails, and defendant's motion to dismiss the indictment as being void for vagueness. As to the motion to compel, defendant asserted that, because one element of the stalking crime for which he was indicted required that the state establish that the victim suffered substantial emotional distress, the victim's psychological records needed to be provided to the defense. The government asserted in response that the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771(a)(8), which provides that a crime victim has the right to be treated with fairness and with respect for the victim's dignity and privacy, protects these records from discovery by defendant. Because the state advised the court that the victim did not seek psychological treatment, the request was moot. However, the court noted that it "agrees with the defense that inquiry as to whether treatment was sought is an appropriate area for inquiry at trial." The court also ruled that the victim's emails forwarding emails defendant sent to her, along with any attendant comments or observations, should be disclosed to the defense to the extent that they were in the possession of the state, finding them to be material. The court further found no "legitimate expectation of privacy in the emails." As to the motion to dismiss, defendant argued that the stalking statute was unconstitutionally vague because it did not clearly define the phrase "substantial emotional distress," and that the vague language permitted undue prosecutorial discretion. The court found that not every phrase in a statute need be defined, and that the degree of prosecutorial discretion is not determinative of whether a statute is constitutional. Defendant further argued that the statute was unconstitutionally vague because he had no way of knowing when his conduct actually causes substantial emotional distress. The court found the statute had sufficient protections in place to protect the statute from vagueness on this ground. Namely, the statute contained a specific intent requirement that defendant act with the *intent* to "kill, injure, harass, or place under surveillance with intent to kill, injure, harass, or intimidate, or cause substantial emotional distress" and that the victim must actually

suffer emotional distress. The court further found the statute to be constitutional as applied to defendant. It noted that freedom of speech is not unlimited, and may be circumscribed if the restriction passes intermediate level scrutiny. Here, the court found that the government has a strong and legitimate interest in preventing harassment of individuals and that this interest is unrelated to the suppression of free expression; any incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest. The court further found that speech integral to criminal conduct is not protected by the First Amendment. Accordingly, the motion to dismiss the indictment as void for vagueness was denied.

Outar v. Khahaifa, No. 10-CV-3956 (MKB)(JO), 2012 WL 6698710 (E.D.N.Y. Sept. 25, 2012) (slip copy). Petitioner sought a writ of habeas corpus requesting the federal court to vacate his state court convictions for burglary, assault and other offenses against the victim, his former girlfriend. The magistrate judge rejected petitioner's arguments and recommended that the district court deny the petition. In his report and recommendation, the magistrate judge recognized that courts have an obligation under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, to ensure that the victim is afforded her right to be treated with respect for her dignity and privacy in federal habeas proceedings. Therefore, the report and recommendation refers to the victim by initials rather than her full name.

Carter v. Bigelow, 869 F. Supp. 2d 1322 (D. Utah 2011). Defendant-petitioner was convicted of murder and sentenced to death. Approximately 17 years later, and as part of the long procedural history of this case, defendant-petitioner pursued habeas relief in federal court. The state-respondent filed a motion to dismiss for lack of prosecution, and the victim's representative also sought dismissal to protect the rights established by the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, including his rights to proceedings free from unreasonable delay and his right to be treated with fairness. After the district court denied the requests to dismiss the action, the victim's representative sought a writ of mandamus from the Tenth Circuit Court of Appeals, directing the district court to: reconsider its denial of the state's motion to dismiss the defendant-petitioner's claims; afford the victim his CVRA rights in all future proceedings; and avoid all further unwarranted

delay. Defendant-petitioner opposed the request, and informed the Tenth Circuit that he intended to file a motion with the district court to amend his petition and a renewed motion to stay based on newly alleged claims not included in his current petition. The Tenth Circuit denied the writ of mandamus, but encouraged the district court to “hold firm to the briefing schedule and to decide the case promptly after briefing is completed.” The state-respondent and the victim representative then filed motions to strike defendant-petitioner’s motions to amend and stay the proceedings, which the district court granted. In so holding, the district court acknowledged that defendant-petitioner had a due process right to have his case decided, but that this right must be balanced against the victim’s CVRA rights not to be excluded from court proceedings, to be heard, to proceedings free from unreasonable delay, and to be treated with fairness and respect. Because defendant-petitioner had ignored the specific guidance from the Tenth Circuit on how to correctly amend his petition, and to protect the victim’s right to be free from unreasonable delay and to be treated with fairness, the court held that striking defendant-petitioner’s motions to amend and to stay was appropriate. About nine months later, in *Carter v. Bigelow*, No. 2:02-CV-326 TS, 2012 U.S. Dist. LEXIS 129810 (D. Utah Sept. 11, 2012), the district court held that, after consideration of the briefing by all parties on the merits of defendant-petitioner’s remaining claims, the writ of habeas corpus was denied and ordered that the case be closed.

People v. Spence, 151 Cal. Rptr. 3d 374 (Cal. Ct. App. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Courtroom Accommodations – Support Person Presence – Trial.”

Jack Doe I v. Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 280 P.3d 377 (Or. 2012) (en banc). The plaintiff-victim, a former boy scout, brought a tort action against the Boy Scouts of America (BSA) after being sexually abused by a scout leader. The jury awarded the plaintiff-victim compensatory damages of \$1.4 million and punitive damages of over \$18 million. During the litigation, 1,247 “ineligible volunteer” files belonging to the BSA were admitted into evidence. These files included information about child sexual abuse complaints against BSA volunteers from 1965-1985. A group of media entities collectively referred to as “intervenor”

in this case, including The Associated Press, The Oregonian, Oregon Public Broadcasting, KGW, The New York Times, and the Courthouse News Service, collectively filed a writ of mandamus seeking the release of all 1,247 files in unredacted form. The intervenors claimed that Art. 1 section 10 of the Oregon Constitution, the “open courts” clause, required that all files be released to the press and the public. Rejecting the intervenors’ writ of mandamus, the Oregon Supreme Court highlighted “the need to protect those who have been victims of child sexual abuse and those who have reported suspected child sexual abuse to others with authority to investigate, from embarrassment, retaliation, or other harm.” The court concluded that the trial court’s order publicly releasing the records after redaction of the names of victims and the reporters of suspected abuse did not violate Article I, section 10 of the Oregon Constitution: “The court, in our view, reasonably exercised its discretion to prevent undue injury and embarrassment to innocent persons that likely would result from public disclosure of the names in the exhibits.” The court further concluded that the trial court has discretion to determine whether to allow third parties to inspect exhibits or other evidence, and that there is no absolute public right of access to trial exhibits at the close of trial.

Cauley v. State, No. 09-11-00034-CR, 2012 WL 1448375 (Tex. Crim. App. Apr. 25, 2012) (memorandum opinion). Defendant challenged his aggravated robbery conviction for robbing a bank, arguing that the evidence was legally and factually insufficient to support his conviction. The court affirmed defendant’s conviction. While describing the evidence in the record, the court referred to the victim-bank tellers by their initials. The court explained in a footnote that it was using the victim-tellers’ initials to protect their privacy, citing the state constitutional provision “granting crime victims ‘the right to be treated with fairness and with respect for the victim’s dignity and privacy throughout the criminal justice process.’”

Koenig v. Thurston County, 287 P.3d 523 (Wash. 2012) (en banc). The petitioner in the underlying matter sent a Public Records Act (PRA) request to the prosecutor’s office seeking, *inter alia*, a copy of a victim impact statement (VIS) that was submitted to the court in connection with a criminal defendant’s commission of acts of voyeurism. The trial court ordered that the victim impact statement be sealed

to protect the victim's privacy, and, believing the victim impact statement to be exempt from disclosure because of the sensitive nature of the document and the trial court's sealing order, the prosecutor provided the petitioner with a document package that did not include, *inter alia*, the victim impact statement. The trial court hearing the petitioner's public disclosure complaint ruled, *inter alia*, that the victim impact statement was exempt from disclosure. The court of appeals upheld this portion of the trial court's ruling. On appeal, the Washington State Supreme Court, sitting en banc, held, *inter alia*, that a victim impact statement is not an investigative record that may be exempt from disclosure under the PRA, as it is "properly understood as a communication between a victim and a court" and it is "considered after the charging phase of a case is closed and the investigation is complete." The en banc court declined to interpret the investigatory records exception to "include all documents that may affect sentencing or penalty decisions regardless of whether they further a prosecutor's investigatory function," reversing in part and affirming in part the opinion of the court of appeals. Two justices authored separate dissenting opinions, both of which urge the legislature to amend the PRA to extend the protection of exemptions to clearly apply to sensitive victim impact statements. One of the dissenting opinions argues that the majority's opinion ignores the victims' rights provisions in the Washington State Constitution, which were adopted "to protect victims and ensure their participation in the criminal process," and fails to accord victims their constitutional entitlement to be treated with due dignity and respect when it comes to the sensitive personal details contained in victim impact statements. Further, the dissent observes that the majority decision will likely have a chilling effect on effective victim cooperation with law enforcement and on victim participation in and assistance with the sentencing process: by "requiring disclosure of a complete and unredacted VIS," the court's decision "will impermissibly deter the victim contribution to law enforcement that [the Washington State] constitution deems essential" and "will discourage victims of crime from participating in law enforcement and compel government agencies to commit gross privacy violations."

E. Right to be Heard

In re Allen, 701 F.3d 734 (5th Cir. 2012) (per curiam). A jury convicted corporate defendants

CITGO Petroleum Corporation and CITGO Refining and Chemicals Company, L.P., of illegally operating two large tanks in a Texas refinery without first installing emission control devices as required by the Clean Air Act. The tanks contained chemicals including benzene and other hazardous compounds. As a result of this crime, members of a residential community adjacent to the refinery were exposed to noxious chemical air emissions for nine years. Two months before sentencing, the community members, represented by their own counsel, filed a motion to be recognized as "crime victims" under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, and to exercise their right to be heard at sentencing. The federal district court had previously denied the government's motion to establish the community members as "crime victims" under the CVRA, concluding that the community members were not "crime victims" because the government had not sufficiently shown that they were "harmed." Without reaching the merits of the community members' arguments, the district court denied their motion on the ground that it was untimely. Although acknowledging the community members' right to file the motion, the district court found that they should have filed four years before when the government filed the similar motion. The community members petitioned the United States Court of Appeals for the Fifth Circuit, seeking review of the district court's orders and requesting a writ of mandamus directing the district court to recognize them as crime victims under the CVRA. On review, the appellate court concluded that the CVRA does not contain a time limit within which the community members must file their motion for crime victim status; it found that the CVRA only contains a time limit for requests to reopen a plea or sentence. Accordingly, the court granted the petition, in part, and issued a writ of mandamus directing the district court to hear the arguments raised in the community members' motion for crime victim status.

United States v. Aleo, 681 F.3d 290 (6th Cir. 2012). Defendant, having pleaded guilty to production, possession, and transportation of child pornography, appealed his sentence on various grounds, and defendant's trial attorney appealed a \$2,000 sanction imposed upon him by the district court. Prior to sentencing, defendant had filed a motion with the district court requesting that the court enter an order directing the prosecutor to file a formal motion, with notice to defense counsel, seeking permission for

the child-victim's mother to speak at sentencing. Defendant contended, *inter alia*, that he had a due process right to be able to determine, in advance, whether there would be a legal basis to challenge the introduction of potentially impermissible material by the victim's mother at his sentencing, and that the requested order would serve to compel government compliance with the Crime Victims' Rights Act (CVRA), 18 U.S.C. §3771. The district court denied defendant's motion to compel, holding that 18 U.S.C. §3771(d)(3) "directs the Court to take up and decide any motion" filed by the victim, but that this language "certainly does not compel the victim to file a motion in order to assert its rights under the CVRA." The district court said that a closer reading of the "Rights" section of the CVRA would have put the defendant on notice that "[a] person accused of the crime may not obtain any form of relief under this chapter," and that "[d]efendant may not use the CVRA as either a sword or a shield, and is compelled to refrain from interfering with the victim's rights beyond the brutality of the crime for which he was convicted." The district court admonished defendant for the baseless motion and his assumed intent to "intimidate and harass the victim's mother[,] and imposed the \$2,000 sanction on defense counsel, concluding that the motion was made in bad-faith. On appeal, the court held, *inter alia*, that the lower court abused its discretion in deciding defendant's motion to compel, stating that the motion was in error, but not in bad faith, and reversed the sanctions. The court explained that "[e]ven if [defense counsel's] motion was meritless, and even if [defense counsel] should have known this, the court has not given any evidence to support its position that [defense counsel] filed the motion to harass the victim's mother." Defendant's sentence was reversed on other grounds, and the case was remanded for resentencing.

Jimenez v. Waller, No. 12-1884, 2012 WL 6644065 (7th Cir. Nov. 5, 2012) (slip opinion). *For full case summary, see "Specific Victims' Rights – Right to Access Information and Documents – Other."

United States v. Rizzolo, No. 11-10384, 2012 WL 1095221 (9th Cir. Apr. 3, 2012) (memorandum). Defendant's supervised probation was revoked and a nine-month term of imprisonment imposed after the court found that defendant violated the terms of his probation. The court allowed the attorney of "interested parties" to make statements at the revocation hearing, while recognizing that they did

not qualify as statutorily recognized victims under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771. Defendant appealed the final judgment, claiming that the trial court erred in allowing the interested parties to make statements at sentencing. The court rejected defendant's argument and affirmed the sentence. The court explained that trial courts have great discretion to determine what evidence to admit at the sentencing phase of adjudication; although the trial court was not *required* to allow testimony of interested parties, the court did not abuse its discretion in allowing the statements.

United States v. Avila, CR 11-126-PHX-JAT, 2012 U.S. Dist. LEXIS 5286 (D. Ariz. Jan. 18, 2012). *For full case summary, see "Specific Victims' Rights – Right to Access Information and Documents – Other."

Valdivia v. Brown, No. CIV. S-94-671 LKK/GGH, 2012 WL 219342 (E.D. Cal. Jan. 24, 2012). Plaintiffs, a class of similarly-situated California parolees, challenged the constitutionality of California's parole revocation procedures. In 2004, the district court approved a stipulated judgment and permanent injunction that contained, *inter alia*, provisions addressing the time frame within which probable cause and parole revocation hearings must be held and the use of hearsay evidence at parole revocation hearings. In 2008, California voters passed Proposition 9, Victims' Bill of Rights Act of 2008: Marsy's Law, which added, *inter alia*, provisions addressing parolees' parole revocation rights and procedures. Thereafter, plaintiff-parolees moved to enforce the injunction and invalidate portions of the new law to the extent that they conflict with the injunction. Applying the Supremacy Clause, the district court granted plaintiff-parolees' motion. On appeal, in *Valdivia v. Schwarzenegger*, 599 F.3d 984, 994-95 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1626 (U.S. 2011), the court of appeals held that the district court abused its discretion when it invalidated portions of the statute without (1) making any express determination that any aspect of the California parole revocation procedures, as modified, violated constitutional rights, or (2) finding that the injunction's procedures were necessary to remedy federal constitutional violations. On remand, the district court first concluded that six provisions in the statute are unconstitutional, including section 3044(a)(5), which allows the unconditional use of hearsay evidence in parole revocation hearings.

Citing controlling federal precedent, the district court explained that hearsay evidence may be admissible against parolees only after weighing the parolees' due process right to confront witnesses at a revocation hearing against the state's good cause for denying that right. Because section 3044(a)(5) does not permit consideration of those interests, the court found it violates the federal constitution. Second, the district court concluded that the injunction is necessary to remedy the constitutional violations created by the new statute. For this and other reasons, the district court granted plaintiff-parolees' motion in part.

United States v. Egan, No. 10 Cr. 191(JFK), 2012 WL 3839412 (S.D.N.Y. Sept. 5, 2012) (slip copy). Defendant, convicted of bank fraud and conspiracy to commit bank and wire fraud, filed a motion arguing that the trial court should direct the government to move for a reduction in his sentence under Rule 35(b) of the Federal Rules of Criminal Procedure. One of the victims of defendant's fraudulent scheme wrote a letter to the district court in response to defendant's motion. The court declined to consider the victim's letter, citing the United States Supreme Court case *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973), for the proposition that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." The court explained that a victim does not have a judicially cognizable interest in whether the government files a Rule 35(b) motion to reduce defendant's sentence. The court further noted, however, that the victim's right to be heard under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771(a)(4), would be implicated if defendant was judged eligible for a sentence reduction under Rule 35(b). At that point, the victim would have the right to be heard under the CVRA on the issue of what the appropriate sentence should be. The court then rejected defendant's arguments and denied his motion.

United States v. Citgo Petroleum Corp., --- F. Supp. 2d ---, Crim. Action No. C-06-563, 2012 WL 4068675 (S.D. Tex. Sept. 14, 2012) (slip copy). A jury convicted corporate defendants CITGO Petroleum Corporation and CITGO Refining and Chemicals Company, L.P. (CITGO), of illegally operating two large tanks in a Texas refinery without first installing emission control devices as required by the Clean Air Act. As a result of this crime, members of a residential community adjacent to the refinery were exposed to noxious chemical air emissions,

including more than 300 community members for whom the government sought victim status under the Crime Victims' Rights Act, 18 U.S.C. §3771 (CVRA). The district court held a hearing on the issue, during which it heard testimony from a representative sample of the community-member victims who recited a number of health conditions, including burning eyes, bad taste in the mouth, nose burning, sore throat, skin rashes, shortness of breath, vomiting, dizziness, nausea, fatigue, and headaches. However, the court found it of "key importance that the health symptoms complained of [were] common symptoms" with "many potential causes," some of which are "difficult to prove" in light of a number of the victims' advanced ages, medical conditions, and habits. Because proof of causation on the record was "inconclusive," the court granted defendants' motion to exclude from sentencing the community-member victims identified by the government. Two months before sentencing, the community-member victims, represented by counsel, filed their own motion to be recognized as "crime victims" and to exercise their right to be heard at sentencing. The district court denied the motion as untimely, and the community-member victims successfully sought a writ of mandamus from the United States Court of Appeals for the Fifth Circuit, which directed the district court to hear the arguments raised in the community-member victims' motion for crime victim status. Upon further review, the district court granted the community-member victims' motion for "crime victim" status under the CVRA. The district court explained that it was now "persuaded that it applied the incorrect legal standard when it determined that the Community Members must provide documentary medical evidence . . . in order to qualify as victims under the CVRA[.]" and instead found "that testimony by the Community Members . . . [about the symptoms] is sufficient to constitute 'harm' under the CVRA." The district court also addressed the causation requirement, finding that but for CITGO's failure to use proper emission controls on the tanks, the community-member victims would not have suffered the harm. The court then granted the community member-victims' requests to deliver oral impact statements at sentencing, to amend presentence investigation reports to include additional victim impact statements, and to submit a written sentencing memorandum regarding restitution.

State v. Gault, 39 A.3d 1105 (Conn. 2012). In a case of first impression, the Connecticut Supreme Court

analyzed whether a victim could seek enforcement of the state's constitutional victims' rights by appealing an order issued in a criminal case. Defendant in this case was arrested for kidnapping in the first degree for the purpose of committing a sexual assault. The state's application for the arrest warrant contained an affidavit that recounted statements of the victim and other individuals relating to defendant's crimes. Pursuant to Connecticut's practice book, the state requested that the affidavit supporting the arrest warrant be sealed for fourteen days. Before the expiration of the initial sealing period, the victim filed a motion asking the court to indefinitely extend the sealing based on her state constitutional right "to be treated with fairness and respect throughout the criminal justice process," Ct. Const. art. I, § 8(b)(1), and under Conn. Gen. Stat. § 54-86e, which mandates confidentiality for sexual assault victims. After a hearing on the motion, the trial court determined that there was a presumption of open access to all court filings, however the victim's constitutional right and the statute mandating confidentiality overrode the public's right to view the affidavit in its entirety. In so finding, the trial court denied the victim's motion and ordered a redacted version of the affidavit to be unsealed. According to the trial court, the redaction removed any identifying information that would enable the public to identify or locate the victim. The victim then filed the appeal at issue challenging the trial court's decision. Before addressing the substantive issue, the Connecticut Supreme Court considered whether the victim had standing to bring the appeal and held that she did not. In so holding, the court first looked to the state constitution. The court concluded that the constitution, although establishing many substantive crime victims' rights, did not confer on victims the right to appeal or address the question of victims' party status or standing. Instead, the court noted that the victims' rights amendment explicitly delegated the authority for enacting its enforcement to the General Assembly. In reviewing the general statutes, the court determined that the General Assembly had not enacted legislation providing for party status or otherwise providing victims with a right to appeal adverse decisions relating to their rights. The court noted that appeals are generally authorized under Section 52-263, which by its plain language limits the right to appeal to a "party"—a term that carries with it a technical legal meaning and, in criminal proceedings, does not include the victim. The court also denied the victim's alternative request to treat the appeal as a public interest appeal pursuant to Conn. Gen. Stat.

§ 52-625a. The court reasoned that a public interest appeal only authorizes appeals by "any party to an action," referencing its conclusion that a victim is not a party to a criminal proceeding. For these reasons the court concluded that the victim lacked standing to appeal. Consequently, the court held it lacked subject matter jurisdiction over the case and dismissed the appeal.

F. Right to Notice

United States v. Avila, CR 11-126-PHX-JAT, 2012 U.S. Dist. LEXIS 5286 (D. Ariz. Jan. 18, 2012). *For full case summary, see "Specific Victims' Rights – Right to Access Information and Documents – Other."

United States v. Daly, Criminal No. 3:11cr121(AWT), 2012 WL 315409 (D. Conn. Feb. 1, 2012) (slip copy). *For full case summary, see "Specific Victims' Rights – Right to Access Information and Documents – Plea Agreement Terms."

G. Right to be Present

United States v. Valencia-Riascos, 696 F.3d 938 (9th Cir. 2012). Defendant was convicted of assaulting a federal officer and appealed, arguing that the trial court erred by refusing to exclude the officer-victim from the courtroom, by allowing the officer-victim to sit at the prosecution table, and by declining to require the officer-victim to testify as the first witness at trial. Under the federal exclusionary rule, Federal Rule of Evidence 615, officers or case agents designated on behalf of the prosecution, among others, are exempt from exclusion. The Ninth Circuit held that the trial court did not abuse its discretion by refusing to exclude the officer-victim or by allowing him to sit at the prosecution table. The court also rejected defendant's argument that the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, supplanted Rule 615. The Ninth Circuit clarified that the CVRA "was wholly consonant" with Rule 615's exception to exclusion for persons "authorized by statute to be present" and provided an alternative ground for refusing to exclude the investigating officer where the investigating officer is also a victim. The court also rejected defendant's claim that allowing the officer-victim to sit at the prosecution table constituted a due process violation, as no constitutional principle renders it impermissible

for a case agent who is also a victim to sit at the prosecution's table. Finally, although the Ninth Circuit opined that it "may be a good practice to require case agent witnesses to testify first," it declined to adopt a position that would "deprive the prosecution of the opportunity to present its own case without interference."

United States v. Avila, CR 11-126-PHX-JAT, 2012 U.S. Dist. LEXIS 5286 (D. Ariz. Jan. 18, 2012). *For full case summary, see "Specific Victims' Rights – Right to Access Information and Documents – Other."

United States v. Jahani, No. 1:11-cr-00302-CMA, 2012 WL 6107097 (D. Colo. Dec. 10, 2012) (slip copy). Defendants—doctors who operated urgent care clinics in Montrose, Delta, and Grand Junction, Colorado—were charged with health care fraud, money laundering and drug distribution. The government filed a motion to move the trial and other court proceedings from Denver to Grand Junction on the basis that an untold number of crime victims would be inconvenienced by a Denver trial. The government argued, *inter alia*, that the victims' right not to be excluded from court proceedings under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, should control the court's interpretation of Rule 18 of the Federal Rules of Criminal Procedure, which provides that the location of trial must be set with "due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice." The court rejected the government's argument, concluding that allowing the victims' right not to be excluded from court proceedings to control a Rule 18 analysis would effectively make the victims' convenience the most important factor in determining the trial location, a result that is not supported by the plain language of the CVRA, Rule 18, or case law. The court also concluded that the record establishes that Denver is the more convenient forum under the Rule 18 analysis. In reaching this conclusion, the court found that defendants had shown that Denver is more convenient for all defendants and many defense witnesses whereas the government has failed to specifically identify any victim who would be inconvenienced by a Denver trial. For these and other reasons, the court denied the government's motion.

United States v. Daly, Criminal No. 3:11cr121(AWT), 2012 WL 315409 (D. Conn.

Feb. 1, 2012) (slip copy). *For full case summary, see "Specific Victims' Rights – Right to Access Information and Documents – Plea Agreement Terms."

United States v. Jim, No. CR 10-2653JB, 2012 WL 119599 (D. N.M. Jan. 8, 2012) (slip copy). Defendant, charged with sexual assault, opposed the government's motion to permit the victim to remain in the courtroom after she had finished her testimony during the government's case-in-chief. Invoking Rule 615 of the Federal Rules of Evidence, defendant stated that he intended to call the victim to testify during his case-in-chief and requested that the court exclude the victim until after she had discharged her obligations to testify. The court found that the victim had a right to be present in the courtroom under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, and that defendant failed to establish by clear and convincing evidence that the victim's testimony would be materially altered if she were to remain in the courtroom. For this reason, the court granted the government's motion.

H. Right to Privacy

1. Closed Courtroom

Kovaleski v. State, 103 So. 3d 859 (Fla. 2012). *For full case summary, see "Specific Victims' Rights – Right to Courtroom Accommodations – Closed Courtroom."

2. Identifying Information

United States v. Ramos-Cruz, 667 F.3d 487 (4th Cir. 2012). Defendant was convicted on nine counts, including racketeering and conspiracy to commit murder, connected with his membership in a gang. Defendant appealed his convictions, arguing, *inter alia*, that the district court abused its discretion by allowing two government witnesses to testify against him without revealing their identities or any identifying information. Defendant argued that this violated his right to confrontation under the Sixth Amendment of the United States Constitution by limiting his ability to research the witnesses' veracity. Defendant further reasoned that it was error because he himself was not threatening the witnesses. The appellate court rejected defendant's arguments, noting that although in general, the Confrontation Clause guarantees a defendant the right to question

a witness about his/her identity, such right is not absolute; a trial court may limit cross examination where the information sought could endanger the witness. The court further noted that the government bears the burden of demonstrating the “threat to the witness [is] actual and not a result of conjecture[.]” and that once the burden is met the trial court still has discretion to determine if disclosure is necessary to allow for effective cross-examination. The appellate court reviewed the sealed affidavits from both witnesses explaining the specific threats to them if their identities were revealed and the transcript of an ex parte hearing on the issue and found that the trial court did not abuse its discretion in this case. In reaching this decision, the court emphasized the witnesses’ testimony was limited in focus and did not involve defendant, as the testimony discussed generalized information about the operation of the gang. Additionally, the court agreed with a sister circuit that the appropriateness of using a pseudonym to protect a witness does not depend on whether the threat comes directly from the defendant. Here, the government had shown a heightened level of danger to El Salvadorian citizens who testify against defendant’s gang in American courts. The court found this level of specificity sufficient and affirmed the district court’s judgment. Writing separately, one judge dissented on the issue of whether the district court erred by allowing the witnesses to testify anonymously, but concurred in the judgment because he found the error harmless.

United States v. Gatewood, No. CR. 11-08074-PCT-JAT, 2012 WL 2286999 (D. Ariz. June 18, 2012) (slip copy). During the course of criminal proceedings, the government provided defendant with certain documents from which personal information—including names, addresses, and social security numbers—relating to the victims had been redacted. Defendant filed a motion requesting that the court give him access to unredacted versions of materials in the government’s possession, alleging that the material provided “contains heavy redaction, which renders it essentially incomprehensible.” Defendant also objected to the redaction of the names and addresses of his adult victims. Defendant asserted that he requires the redacted information in order to “research the criminal and public records of the witnesses and victims,” but refused to provide additional information about his need for the information, citing that doing so would reveal defense strategy. The government argued in response that

the victims of defendant’s acts of rape were afraid of defendant and that the friends and family of defendant had contacted several victims and witnesses and had attempted to “intimidate them and keep them from cooperating.” The government noted that it had unredacted specific information when requested by defendant and contacted victims and witnesses on behalf of defendant to convey requests for defense interviews, but the government refused to comply with defendant’s request to provide unredacted copies of the material in the absence of a justified request for specific information. Defendant chose not to specify which of the redacted material he requires because the “process is too cumbersome, time-consuming and costly to continue.”

In deciding defendant’s motion, the court noted, *inter alia*, that Rule 16 of the Federal Rules of Criminal Procedure and *Brady v. Maryland*, 373 U.S. 83 (1963), govern the disclosure of information in the government’s possession and that the Crime Victims’ Rights Act, 18 U.S.C. § 3771 (CVRA), and the Child Victims’ and Child Witnesses’ Rights Act, 18 U.S.C. § 3509, provide victims with the right to privacy. The court then rejected defendant’s argument that the redacted information was favorable to defendant and material to his case and that the government’s refusal to provide this information inappropriately interfered with defendant’s investigation. To the contrary, the court noted that the government “has delivered, on the behalf of the defense, requests to interview the witnesses and victims, requested criminal histories, and has, so far as this Court can ascertain from the record, complied with all specific and justified requests for information.” The court held that “logistical issues” do not entitle defendant to unredacted discovery. The court further observed that “[s]imply because Defendant is unable to convince witnesses and victims to consent to an interview does not imply that the Government is interfering with defense access to witnesses.” In fact, the court noted that defendant located and contacted a child-victim in the case by email, even without access to the child-victim’s redacted information. The court also rejected defendant’s argument that he need not provide justification for his request for the redacted information for strategic reasons. Rule 16 requires that the government disclose information only when it is “material” to defendant’s case, and defendant failed to show that the redacted information was material or favorable; to the contrary, defendant merely asserted that requesting specific material was “too difficult

a process to follow.” Because defendant had no general right to discovery, because the government complied with all discovery rules and all supported, specific requests for redacted information, and in light of the sensitive nature of the case and defendant’s refusal to justify his request, the court denied defendant’s motion.

Outar v. Khahaifa, No. 10-CV-3956 (MKB)(JO), 2012 WL 6698710 (E.D.N.Y. Sept. 25, 2012) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to Due Process, Fairness, Dignity, and Respect.”

State v. Gault, 39 A.3d 1105 (Conn. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Due Process, Fairness, Dignity, and Respect.”

Jack Doe I v. Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 280 P.3d 377 (Or. 2012) (en banc). *For full case summary, see “Specific Victims’ Rights – Right to Due Process, Fairness, Dignity, and Respect.”

Cauley v. State, No. 09-11-00034-CR, 2012 WL 1448375 (Tex. Crim. App. Apr. 25, 2012) (memorandum opinion). *For full case summary, see “Specific Victims’ Rights – Right to Due Process, Fairness, Dignity, and Respect.”

Koenig v. Thurston County, 287 P.3d 523 (Wash. 2012) (en banc). *For full case summary, see “Specific Victims’ Rights – Right to Due Process, Fairness, Dignity, and Respect.”

3. Photographs and Audio/Video Recordings

Marsh v. County of San Diego, 680 F.3d 1148 (9th Cir. 2012). In 1983, the plaintiff-victim’s two-year-old son died as a result of a severe head injury while in the care of her then-boyfriend, Mr. Marsh. Mr. Marsh was charged with the death of the plaintiff-victim’s son and was convicted of second-degree murder. Almost two decades later, the San Diego District Attorney requested that Mr. Marsh’s second habeas petition be granted, the conviction was set aside, and Mr. Marsh was released. After the release of Mr. Marsh, an autopsy photograph and a memorandum written by the former Deputy District Attorney who had prosecuted the murder case were provided to a newspaper and to a television station

by the former Deputy District Attorney. Mrs. Marsh—the plaintiff-victim—sued the County of San Diego and the former Deputy District Attorney under 42 U.S.C. § 1983, alleging that the copying and dissemination of her son’s autopsy photographs violated her Fourteenth Amendment Due Process rights. Following cross-motions by the parties for summary judgment, the district court granted summary judgment in favor of defendants, and Mrs. Marsh appealed. Mrs. Marsh claimed, and the Ninth Circuit agreed, that the right to control the autopsy photographs of her child exists as a matter of substantive due process and as a state-created liberty interest protected by procedural due process.

With respect to the substantive due process right, the Ninth Circuit held that the right to privacy guaranteed by the Due Process Clause protects two types of interests: an individual interest in avoiding the disclosure of personal matters, and an interest in independence in making certain types of important decisions, which encompasses the most basic decisions about family and parenthood. The Ninth Circuit further noted that the United States Supreme Court observed in a case involving the Freedom of Information Act that the “well-established cultural tradition acknowledging a family’s control over the body and death images of the deceased has long been recognized at common law.” This right to “non-interference with a family’s remembrance of a decedent is so ingrained in our traditions that it is constitutionally protected” by substantive due process, as it partakes of both types of privacy guaranteed by the Fourteenth Amendment. As the Ninth Circuit observed, “[f]ew things are more personal than the graphic details of a close family member’s tragic death. [These images] usually reveal a great deal about the manner of death and the decedent’s suffering during his final moments – all matters of private grief not generally shared with the world at large.” Further, the Ninth Circuit held that a “parent’s right to choose how to care for a child in life reasonably extends to decisions dealing with death, such as whether to have an autopsy, how to dispose of the remains, whether to have a memorial service and whether to publish an obituary.” Consequently, the Ninth Circuit held that “the Constitution protects a parent’s right to control the physical remains, memory and images of a deceased child against unwarranted public exploitation by the government.” With respect to the procedural due process right, the Ninth Circuit analyzed the California Code provision

that limits the reproduction of autopsy photographs, and concluded that not only was the law clearly “intended to create a liberty interest in a family members’ death images,” it contained the necessary substantive limits on official discretion and explicit and mandatory language limiting that discretion to create a Constitutionally protected liberty interest. The Ninth Circuit then concluded that the plaintiff had a “constitutionally protected right to privacy over her child’s death images.” But because the former Deputy District Attorney was not acting under color of state law when he sent the autopsy photograph to the media, and because there was no clearly established law to inform him that his earlier conduct was unconstitutional, the Ninth Circuit affirmed the district court’s grant of summary judgment in favor of defendants.

4. Victim Records

United States v. Shepard, No. CR 10-1032-TUC-CKJ, 2012 WL 113027 (D. Ariz. Jan. 13, 2012) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to Due Process, Fairness, Dignity, and Respect.”

N.G. v. Superior Court, 291 P.3d 328 (Alaska Ct. App. 2012). Defendant, charged with sexually assaulting the victim, sought access to the victim’s medical, alcohol treatment, and psychiatric records. The trial court issued an order that required the victim to identify all of her health care providers during the past twenty years. The order also required the victim to sign a release that authorized her health care providers to produce records for in camera review and possible disclosure to the defense. The victim, represented by counsel, appealed. The Alaska Court of Appeals concluded that the trial court had no authority to order the disclosure of the victim’s privileged psychotherapy records in this case and reversed the trial court’s order. In reaching its conclusion, the court determined that the state’s statutory psychotherapist-patient privilege should be broadly construed, and that it protects not only “confidential communications” as defined in the statute, but also “other information generated during the professional relationship as a result of the confidential communications,” *e.g.*, test results, diagnostic perceptions, and theories. The court found that because the statute defines “psychotherapist” to include all licensed counselors, therapists, and any physicians “engaged in the diagnosis or treatment of

a mental or emotional condition, including alcohol or drug addiction,” all or almost all of the information sought by the defense subpoena would fall within the scope of the psychotherapist-patient privilege. The court also found that defendant’s offer of proof that the victim has a history of alcoholism and/or bipolar disorder does not adequately support his assertion that the victim was more likely to fundamentally misperceive events or less likely to be able to discern truth from fiction in her later recounting of events. Therefore, the court concluded that defendant failed to establish that in camera review of the victim’s privileged health care records was warranted. The concurrence wrote separately to emphasize the victim’s state constitutional rights to privacy and to be “treated with dignity, respect, and fairness during all phases of the criminal ... process.” The concurrence further explained that: “We are not required to decide these constitutional questions because the disclosure order in this case unnecessarily infringes on the psychotherapist-patient privilege. But these circumstances serve as a reminder that a healthy construction of this privilege is necessary to avoid infringing privacy interests protected by the constitution.”

People v. Herrera, 272 P.3d 1158 (Colo. App. 2012). Defendant was convicted of two counts of sexual assault on a child and two counts of sexual assault-pattern of abuse. He appealed his conviction on several grounds, including that: (1) the trial court abused its discretion in refusing to allow in camera review of certain records; and (2) the trial court erred in allowing introduction of two photographs of the child-victims depicting how they looked at the approximate time of the commencement of the sexual assaults, six years earlier. As to the first ground, prior to trial, defendant filed a motion under the rape shield statute requesting leave to admit evidence of one of the victim’s prior allegations of sexual assault. The state learned that the victim had made prior allegations of sexual assault, which were likely reported in her social services records. The state retrieved the records from the social services agencies, reviewed them, and tendered them to the court advising that the records may contain information material to the defense and that the court should conduct an in camera review of the records to determine whether they should be disclosed to the defense. The trial court stated that the request and the burden lay with defendant, not the state, and ordered defendant to file a separate motion. Defendant did,

and the trial court denied the motion for failing to present sufficient evidence to trigger review. On appeal, the court held that the trial court abused its discretion in placing the burden on defendant. It concluded: "Where a prosecutor has requested the court's in camera review of confidential social services records based on a reasonable belief that they contain exculpatory, impeaching, or inculpatory information that would materially assist in preparing the defense, we conclude that the defendant's burden to request disclosure has been satisfied." Because of this error, the case was remanded to the trial court with directions that it conduct an in camera review of the records and determine whether a new trial is required. As to the second ground, defendant argued that the admission of communion photographs of the victims amounted to an abuse of discretion because the photographs were irrelevant and highly prejudicial. Citing to decisions reached in other jurisdictions, the court determined the photographs were relevant, stating "the appearance of a sexual assault victim when the alleged sexual abuse began is relevant to illustrate the child's age at that time, a material element of the crime of sexual assault of a child, and to show the jury more clearly . . . how the child appeared at the time of the alleged sexual assaults." The court also determined that the photographs were not unduly inflammatory. Although it noted that photographs of the children praying may have evoked sympathy, they were not so unfairly prejudicial as to amount to an abuse of the trial court's discretion.

5. Other

Gagne v. Booker, 680 F.3d 493 (6th Cir. 2012). Defendant and co-defendant were convicted of criminal sexual misconduct for forcibly and simultaneously engaging in sexual activities with defendant's ex-girlfriend. Defendant filed a petition for habeas corpus, arguing that evidence was improperly excluded under Michigan's rape shield laws. Specifically, defendant argued that the trial court's exclusion of evidence that the victim had previously engaged in group sex with defendant and a third party, and that the victim had solicited defendant's father to engage in group sex with her and defendant, violated his constitutional right to be given a meaningful opportunity to present a complete defense. The court granted defendant's habeas petition, despite noting that "evidentiary rules generally disfavor showing a person's propensity for

certain actions by introducing evidence of past similar acts," and that, in rape cases, "evidence regarding 'unrelated sexual activity' is generally accepted as only minimally relevant to the question of consent." Upon en banc rehearing, a divided majority of the court vacated the earlier panel opinion and denied defendant's petition. In its plurality opinion, the court held that because defendant could not establish that the state appellate court's decision affirming the trial court's exclusion of the proffered evidence was objectively unreasonable, his petition must fail. The court explained that: "Considering the general antipathy for propensity evidence, the State's established interest in rape-shield laws, and the Michigan Supreme Court's repeated rejection of this argument [that the state rape-shield law violates the Constitution when it is applied to exclude evidence central to an accused's defense], we cannot say that the decision in this case was 'beyond any possibility for fair-minded disagreement.'" The case generated five concurring opinions, and two dissenting opinions. One of the concurrences elaborated on the idea that defendant was wrongly attempting to use the excluded testimony to show the victim's propensity to engage in group sex rather than to show her consent to have sex with him and the co-defendant. That opinion also commented favorably upon additional arguments made by the other concurring judges, including that: (1) the excluded evidence was not particularly probative once stripped of the "forbidden" propensity inference; (2) the state's interests in its rape-shield laws remain strong even after a trial judge admits some evidence of the victim's past sexual practices; and (3) the strength of the state's interest in excluding the evidence in this case distinguishes it from the Supreme Court's cases on the right to present a defense.

United States v. Gatewood, No. CR. 11-08074-PCT-JAT, 2012 WL 2286999 (D. Ariz. June 18, 2012) (slip copy). *For full case summary, see "Specific Victims' Rights – Right to Privacy – Identifying Information."

People v. Grissom, 821 N.W.2d 50 (Mich. 2012). Defendant was convicted of rape. After defendant was incarcerated, newly discovered impeachment evidence came forward that revealed that the victim reported two additional rapes a few months after the rape by defendant, and that a friend of the victim had filed a police report stating that the victim was possibly unstable and trying to file false allegations.

Defendant sought a new trial on the basis of this evidence. The court of appeals denied defendant's application for leave to appeal based on Michigan precedent that newly discovered impeachment evidence cannot be the basis for granting a new trial if its sole purpose is to impeach a witness's credibility. On appeal, the court reversed the court of appeals' decision. It articulated the standard as being: "impeachment evidence may be grounds for a new trial . . . when (1) there is an exculpatory connection on a material matter between a witness's testimony at trial and the new evidence and (2) a different result is probable on retrial." It further overruled any Michigan decisions that imposed a per se prohibition against granting a new trial in light of newly discovered impeachment evidence. After articulating the standard, the court found that the lower court abused its discretion in denying defendant's motion for relief from judgment because it was based on the legally incorrect assumption that newly discovered impeachment evidence cannot form the basis for granting a new trial. The court remanded the matter to the trial court for a determination of whether the newly discovered evidence requires a new trial. Four judges wrote a separate concurring opinion stating that they would have resolved whether defendant was entitled to a new trial rather than remanding to the trial court for such a determination. Applying the test set forth, the concurring opinion stated that it would have granted a new trial. In so determining, it noted that the newly discovered evidence would be admissible as being relevant, and would not have been precluded by Michigan's rape shield statute because the statute does not preclude impeaching a complainant with her "prior false accusation." Additionally, the court noted that the evidence might allow defendant access to the victim's medical, counseling, and psychological records, which were denied to him in the original trial. The concurring opinion continued that the newly discovered evidence created a "serious question" about whether any sexual assault occurred in the case, and that a different result was probable on retrial. Another justice wrote a separate opinion, concurring in part and dissenting in part, stating that new impeachment evidence should only result in a new trial if it directly contradicts material trial testimony in a manner that tends to exculpate the defendant.

State v. Bray, 291 P.3d 727 (Or. 2012). *For full case summary, see "Specific Victims' Rights – Right to Refuse Discovery Requests."

State v. Jonathan B., --- S.E.2d ---, No. 11-0282, 2012 WL 5898025 (W. Va. Nov. 20, 2012).

Defendant was convicted of second degree sexual assault and incest, among other charges, for the rape of his half-sister. He appealed on numerous grounds, including: (1) the state erred in admitting pornographic file names obtained during a search of his laptop; and (2) the court erroneously applied the Rape Shield doctrine in refusing to allow him to admit the victim's notebook into evidence. As to the pornographic file names, the evidence was admitted at trial in order to show defendant's "lustful disposition" toward children, an exception to Rule 404(b) (which generally prohibits admission of evidence of other crimes) in West Virginia. Defendant argued that the evidence should not have been admitted because it was more prejudicial than probative and because the evidence was not relevant. The court agreed, finding that the trial court abused its discretion by not following proper procedures, including holding an in camera hearing, describing whether its findings were by a preponderance of the evidence, and giving a limiting instruction regarding the evidence when it was presented to the jury during trial. The court concluded that this amounted to reversible error because of the prejudicial nature of the evidence. As to the notebook, defendant argued that refusing to admit the victim's notebook under the Rape Shield doctrine violated his constitutional rights to due process and a fair trial because the notebook contained potentially exculpatory evidence in that it described the victim's only sexual encounters as being with an individual other than defendant. The court stated that although the rape shield statute has many valid purposes—including protecting victims from fishing expeditions into their sexual conduct and encouraging reporting of sexual assault—these interests must yield in the face of defendant's due process rights. Here, the court found that the lower court abused its discretion in finding the evidence inadmissible because "the State's case relies almost completely on the testimony of [the victim and] the evidence is highly probative for [defendant's] defense" The court continued that the prejudicial impact was "low" because the purpose of admitting the evidence "is not to imply promiscuity, but to attack [the victim's] credibility." Accordingly, the court reversed the lower court's order, which denied defendant's motion for a new trial, and remanded the case to the lower court for proceedings consistent with the opinion.

I. Right to Prompt Disposition

Carter v. Bigelow, 869 F. Supp. 2d 1322 (D. Utah 2011). *For full case summary, see “Specific Victims’ Rights – Right to Due Process, Fairness, Dignity, and Respect.”

J. Right to Protection

1. Protective Orders

Dunno v. Rasmussen, 980 N.E.2d 846 (Ind. Ct. App. 2012). Petitioner, an assault victim whose petition for a civil protection order was dismissed after he failed to appear at a hearing, appealed the trial court’s judgment ordering him to pay \$500 in attorney’s fees to the prevailing respondent. Petitioner argued that neither the Indiana Civil Protection Order Act nor the statutory “General Recovery Rule” supported the trial court’s attorney’s fees award. The Indiana Court of Appeals held that petitioner had made a prima facie showing that the award was improper. In reaching its holding, the court noted that a less stringent standard of review applies to this appeal because respondent did not submit an appellee’s brief; therefore, the court may reverse upon a prima facie showing of error. The court found that the Indiana Civil Protection Order Act only provides trial courts with discretion to order a respondent to pay attorney’s fees; it does not authorize trial courts to order a petitioner to pay attorney’s fees. The court explained that the purpose of the statute is to protect victims of domestic or family violence, and “ordering a petitioner to pay the respondent’s attorney fees may chill the filings of meritorious protective order cases.” The court also determined that assuming, arguendo, that the state’s statutory “General Recovery Rule” applied, it cannot conclude that petitioner’s action was “frivolous, unreasonable, or groundless”—the standard required for an award of attorney’s fees under that rule. For these reasons, the court reversed the trial court’s judgment.

2. Other

United States v. Ramos-Cruz, 667 F.3d 487 (4th Cir. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Privacy – Identifying Information.”

United States v. Kebodeaux, 687 F.3d 232 (5th Cir. 2012) (en banc). Defendant, who had previously

been convicted of federal charges relating to sexual activity with a child-victim, was convicted under the federal Sex Offender Registration and Notification Act (“SORNA”) for failing to update his address when he moved to a different location within the same state. Defendant appealed, arguing that the SORNA registration requirements were unconstitutional when applied to his situation because he had fully served his sentence and was no longer in federal custody, in the military, under any sort of supervised release or parole, or in any other form of special relationship with the federal government when SORNA was enacted. Defendant argued that the government exceeded its constitutional powers under both the Necessary and Proper Clause and the Commerce Clause when requiring him to adhere to the SORNA requirements. The Fifth Circuit agreed, holding that “[a]bsent some jurisdictional hook not present here, Congress has no Article I power to require a former federal sex offender to register an intrastate change of address after he has served his sentence and has already been unconditionally released from prison and the military.” To hold otherwise, observed the Fifth Circuit, would grant Congress “never-ending jurisdiction to regulate anyone who was ever convicted of a federal crime of any sort, no matter how long ago he served his sentence, because he may pose a risk of re-offending.” Concluding that, as applied to defendant, SORNA “is an unlawful expansion of federal power at the expense of the traditional and well-recognized police power of the state,” the Fifth Circuit reversed defendant’s conviction and rendered a judgment of dismissal.

Slater v. Clarke, 700 F.3d 1200 (9th Cir. 2012).

The parents and personal representatives of two murder victims who were killed by a man named Daniel Tavares in Washington State filed a civil suit against a prosecutor and other state officials in Massachusetts, alleging, *inter alia*, violations of their civil rights. Tavares, who served more than fifteen years in prison in Massachusetts for murdering his mother and who had a history of violent behavior in prison, was released from prison. Immediately prior to his release, Tavares was arraigned for two incidents involving violent assaults on prison staff and was released on his own recognizance. Warrants were issued for Tavares’s arrest when he failed to appear at a hearing, and, according to the facts provided by the victim-plaintiffs in the civil suit, Massachusetts officials later learned that Tavares was

living in Washington. Despite the Massachusetts officials' knowledge of Tavares's violent history, the pending assault-related charges, and his location on the West Coast, a limited extradition warrant, authorizing Tavares's extradition only from New England states, was requested. Shortly thereafter, the victims were murdered in their home in Washington by Tavares, which ultimately led to the institution of the civil rights action. The trial court denied the civil defendants absolute immunity, and the Massachusetts officials appealed, arguing that extradition is a prosecutorial function entitled to immunity. The Ninth Circuit agreed with the civil defendants, finding that the "decision whether to extradite [Tavares], like the decision whether to prosecute him, was intimately associated with the judicial phase of the criminal process" and that the Massachusetts officials were "entitled to absolute immunity for their participation in that decision." The decision of the trial court was reversed and the case remanded.

United States v. Shepard, No. CR 10-1032-TUC-CKJ, 2012 WL 113027 (D. Ariz. Jan. 13, 2012) (slip copy). *For full case summary, see "Specific Victims' Rights – Right to Due Process, Fairness, Dignity, and Respect."

In re David, 135 Cal. Rptr. 3d 855 (Cal. Ct. App. 2012). Petitioner was convicted of second degree murder for causing two fatalities while driving under the influence. He was eventually released from prison and placed on parole. A condition of parole, which was imposed at the request of one of the victims, was that he could not live within 35 miles of the sister of one of the victims. Petitioner, who wished to live with and care for his mother (who lived within the 35-mile restricted area), filed a habeas corpus petition challenging the residency restriction. The Superior Court denied habeas corpus relief and petitioner petitioned the court for a writ of habeas corpus. Under the state's criminal code, parolees convicted of certain enumerated felonies are prohibited from living within 35 miles of the victim or witness to the crime if certain criteria are met. Under California's Constitution, art. I, § 28, the term "victim" includes, among others, the victim's spouse, parents, children, and siblings. However, the court found that the constitutional definition of victim did not apply to the parolee code provision. It found the use of "victim" in the parolee provision to refer unambiguously to "the victim or witness and not to anyone else." If the legislature intended to

extend the definition of "victim" to next of kin, the court explained, it would have specifically done so. The court continued that the constitutional definition of "victim" did not apply to the parolee provision because the constitutional definition specifically states "as used in this section." The court further found that the parolee provision was not applicable to this case because the residency restriction requires a finding that the restriction fulfills a "need to protect the life, safety, or well-being of a victim . . ." The court explained that because defendant did not know the victim or intend to kill her, the victim's sister's well-being was not at issue. "If the understandable anguish of a victim's family member satisfied the 'well-being' requirement, every request would involve the 'well-being' of the person making the request." The court finally noted that even if the residency restrictions in the parolee provision did not apply, the parole board could still impose a reasonable residency restriction as a condition of parole. However, the court found that the 35 mile requirement would be unreasonable in this case: "The Board might reasonably prevent petitioner from living near or in the same community of a victim's family member But here petitioner intends to live in an entirely separate area and community, many miles from [the victim's kin]." Finding the risk of contact between defendant and the victim's sister to be remote, the court concluded that the residency restriction "has no relationship to petitioner's crime and will not deter future criminality. It does not bear on the safety of the victim's family. And, because of the distance involved, it does not reasonably affect their well-being." Accordingly, the residency restriction implicated petitioner's due process rights and was found to be invalid. One judge wrote in dissent, stating that the term "victim" in the parolee provision should be given the definition set forth in California's Constitution and that the majority's decision rendered portions of the provision meaningless.

People v. Spence, 151 Cal. Rptr. 3d 374 (Cal. Ct. App. 2012). *For full case summary, see "Specific Victims' Rights – Right to Courtroom Accommodations – Support Person Presence – Trial."

Bunn v. State, 728 S.E.2d 569 (Ga. 2012). Defendant appealed from his convictions of two counts each of child molestation, aggravated child molestation, and first-degree cruelty to children, claiming ineffective assistance of counsel. Defendant argued that his

counsel improperly failed to make a hearsay objection when: (1) the forensic therapist testified about what both of the child-victims said they saw defendant do to the other child-victim; and (2) the recordings of the child-victims' interviews were admitted into evidence. The court of appeals affirmed the convictions, concluding that the child-victims' out-of-court statements about the sexual conduct they witnessed happening to each other were admissible under state law because both of the children were not only witnesses, but also child-victims. The state supreme court granted certiorari to decide whether the court of appeals had improperly limited a prior case holding, in which the court had held that the amended child hearsay statute—which expanded the hearsay exception to include out-of-court statements by children under the age of 14 who *witnessed* sexual contact or physical abuse—violated equal protection. The court held that the amended child hearsay statute, which permitted the admission of hearsay statements of a child who witnessed acts of sexual abuse upon the child-victim but who was not a victim himself or herself, did not violate equal protection, overruling an earlier opinion. The court found that the state has some legitimate interest in protecting child witnesses from the rigors of testifying at a criminal trial (even if that interest was less compelling than protecting child-victims from testifying). Additionally, the court found that the child hearsay statute was rationally limited to child witnesses under the age of 14, and to a subset of particularly traumatic crimes, and the legislature sometimes may address an issue one step at a time, draw lines, and balance rights and interests.

State v. Dykes, 728 S.E.2d 455 (S.C. 2012).

Defendant pleaded guilty to charges of lewd acts on a child under the age of sixteen and was sentenced to fifteen years' imprisonment, suspended upon the service of three years and five years' probation. Because her offense predated the satellite monitoring statute in that state, defendant was not subject to monitoring at the time of her plea; however, at the time of defendant's release from prison on probation, she was notified that she would be placed on monitoring if she were to violate the terms of her probation. After numerous probation violations, a trial court ordered defendant to submit to lifetime satellite monitoring and restricted interstate travel for the remainder of her life. The state's satellite monitoring statute requires lifetime satellite monitoring of individuals convicted of certain serious crimes, without any option to petition for

release. Defendant appealed from the court order arguing, *inter alia*, that requiring her to submit to lifetime satellite monitoring when she poses a low risk of reoffending violates her substantive due process rights under the Fourteenth Amendment to the United States Constitution. The court began by stating that "[i]t is beyond question that 'sex offenders are a serious threat in this Nation[,]'" but nevertheless agreed with defendant, finding that the right defendant asserted was fundamental in nature, despite the relatively recent development of satellite technology. Applying a strict scrutiny analysis, the court determined that the state's asserted interest in protecting the public from sex offenders who pose a low risk of reoffending was not sufficiently compelling so as to outweigh the infringement on defendant's fundamental rights to liberty and privacy. The court did conclude, however, and defendant conceded, that protecting the public from sex offenders who pose a high risk of reoffending is a compelling state interest. The court also made clear that it was not suggesting that satellite monitoring as a whole is unconstitutional, but only the mandatory lifetime monitoring of those who pose a low risk of reoffending, and specified that its holding only applied to offenders who are not under any term of probation, parole, or similar restrictions that justify the state's interest in restricting a defendant's fundamental liberty interest. The court then reversed and remanded to the trial court with instructions to determine whether defendant's risk of reoffending is low, and if the trial court so determines but nevertheless imposes lifetime monitoring, defendant will be able to petition for release from monitoring after ten years.

State v. Nguyen, 293 P.3d 236 (Utah 2012).

Defendant was found guilty of a number of offenses involving the sexual abuse of a child-victim. At trial, following the redaction of some material, a videotape was admitted that depicted an interview of the child-victim that was taken by a detective at the Children's Justice Center shortly after she reported her abuse. In addition to the videotaped interview, the child-victim testified briefly during the trial, and defendant declined to cross-examine the child-victim. The trial court admitted the videotape of the interview only after concluding that the interview met the relevant reliability requirements and making a finding that the admission was in the interest of justice. Defendant appealed his conviction, arguing that the trial court's failure to make a separate finding

of good cause was in error, and asserting that the good cause requirement precludes the admission of recorded statements unless the child-victim is declared unavailable before trial or unless the child-victim attempts to—but proves incapable of—testifying at trial. The Utah Supreme Court rejected defendant’s assertions, holding that good cause is satisfied when “the trial court considers the factors specified in the rule and determines that the recorded statement is accurate, reliable and trustworthy, and that its admission is in the interest of justice.” The court found that the trial court’s determination that a separate need analysis was unnecessary was consistent with the legislative policies promoting the accuracy of testimony and the protection of child-victims from the trauma of testifying in court. The court then affirmed, observing that allowing the admission of videotaped interviews of child-victims when the elements of the rule are met, while ensuring that defendants have the opportunity for cross-examination, strikes the appropriate balance between defendants’ confrontation clause rights and the protection of child-victims.

State v. Handy, 44 A.3d 776 (Vt. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Access Information and Documents – Other.”

K. Right to Refuse Discovery Requests

State v. Bray, 279 P.3d 216 (Or. 2012). Defendant, charged with several sex offenses, sent Google, Inc. a subpoena requesting over a month of the victim’s internet activity, web searches, results, sites viewed, and any e-mails concerning defendant. Google denied defendant’s request asserting that federal law prohibited the release of such information without the victim’s consent or a court order. When the victim refused to consent, the trial court granted defendant’s motion to compel the prosecution to obtain the information from Google and provide defendant with copies. The prosecution filed—on behalf of the victim—a claim asserting a violation of the victim’s constitutional right to refuse defendant’s discovery requests and requesting that the trial court vacate its order. The trial court denied the prosecution’s request from the bench, explaining that its orders were not inconsistent with the victim’s constitutional rights because the court had not ordered the victim to produce anything. The trial court then entered a written order explaining its reasons over a month after its oral pronouncement. In the meantime,

the victim filed an interlocutory appeal to the state supreme court, arguing that the trial court erred in refusing to vacate its order because the order violated her right to refuse discovery requests from defendant. Specifically, the victim argued that the trial court’s order allowed defendant to use the state to obtain discovery that defendant could not obtain directly from the victim because she had exercised her constitutional right not to provide such information. Ultimately, the court did not address the merits of the victim’s appeal because it agreed with defendant that the appeal was untimely, and dismissed the appeal for lack of jurisdiction. The court explained that victims must appeal within seven days after the issuance of the challenged order; here, the victim appealed twenty-one days after the trial court’s oral pronouncement on her claim. The court held that the trial court’s oral pronouncement was sufficient to trigger the deadline because victims’ rights statutes allowed for the issuance of oral orders in open court. Lastly, the court rejected the argument that the trial court’s order did not have effect because the trial court did not provide the victim with a copy of the written order, holding that the issuance, not additional notice of the issuance, triggered the seven-day deadline. A concurrence pointed at the high rate of “fatal jurisdictional defects” in interlocutory appeals of orders involving crime victims’ rights, and emphasized the need for legislative attention to the existing scheme for challenging these trial court orders, stating that “[w]hen constitutional rights are too constrained by procedural limitations, they effectively may become valueless.”

State v. Bray, 291 P.3d 727 (Or. 2012). Defendant was convicted of several charges relating to the sexual assault of the victim. While the criminal case against defendant was still pending, the victim filed a civil action against defendant and, in connection with the civil case, two copies of the hard drive from the victim’s laptop were made and stored in accordance with a protective order that was issued by the civil trial court. While the criminal action was still pending, defendant sought to subpoena the victim’s laptop or one of the copies of the hard drive, and the victim successfully opposed the subpoena by asserting her right to refuse defense-initiated discovery requests. After defendant was convicted, the victim was quoted in the media as saying that she intended to dismiss the civil suit against defendant. In response, defendant filed an emergency motion in the civil case asking that

one of the copies of the hard drive be placed under seal as part of the criminal record, to preserve the information pending an appeal of the trial court's order refusing to enforce defendant's subpoena. The trial court granted defendant's request, ordering that a copy of the hard drive would be held under seal in the court's file and specifying that "its contents would not be disclosed to or examined by anyone – not even the trial court – absent further order by a court." The victim filed a notice of interlocutory appeal, which the Oregon Supreme Court construed as a petition for review, arguing that this order violated the victim's constitutional right to refuse defense-initiated discovery requests. The Oregon Supreme Court affirmed the order of the trial court, finding that requiring the victim to place a copy of the hard drive under seal "does not require the disclosure of any information relating to the litigation to anyone" and "protects the victim's rights while preserving defendant's opportunity to challenge [the trial court's ruling on the subpoena issue] before the appellate courts."

Johnson v. Dep't of Pub. Safety Standards and Training, 293 P.3d 228 (Or. Ct. App. 2012). Petitioner, a private investigator whose license was revoked by the Department of Public Safety Standards and Training (DPSST), sought judicial review of the revocation order, which was based in part on the determination that petitioner—while working for private criminal defense attorneys—interviewed crime victims without disclosing his true identity and role and without informing the victims of their right to refuse defense interviews. The Oregon Constitution grants crime victims the right to refuse an interview request by a criminal defendant or anyone acting on the behalf of the criminal defendant, and statutory provisions mandate that, *inter alia*, if the crime victim is contacted by the defense, the crime victim must be clearly informed in person or in writing of the identity and capacity of the individual contacting the victim. Petitioner was accused of misrepresenting his identity and position as a private investigator for defense counsel, instead telling victims that he was a police officer, someone working for the City of Dallas, or someone working for the State of Oregon. Petitioner appealed the revocation of his license, arguing, *inter alia*, that Oregon's constitutional and statutory victims' rights provisions imposed obligations on defense counsel, but did not impose legal obligations on *agents* of defense counsel, including private investigators.

The court of appeals agreed with petitioner that crime victims' constitutional right to refuse a defense interview "does not incorporate or imply that a person requesting the interview has a duty to inform the victim of that right." The court of appeals also agreed with petitioner that the statute providing for crime victims' right to be informed by defense counsel of, among other things, the identity and capacity of persons contacting the victim, imposes obligations solely on defendant's *attorney*, and not on private investigators or other agents of defendant. Because the DPSST's conclusion that Oregon's statutory and constitutional victims' rights imposed obligations on private defense investigators was in error and may have contributed to the sanction imposed by the agency for petitioner's conduct, the court reversed and remanded for reconsideration.

L. Right to Restitution

1. Ability to Pay

United States v. Rangel, 688 F.3d 972 (9th Cir. 2012). Defendant pleaded guilty to charges of mail fraud and money laundering in connection with his operation of a Ponzi-type scheme whereby investors were offered a guaranteed rate of return supposedly backed by profits earned through the purchase and sale of real estate and through high interest loans to homeowners facing foreclosure. At the sentencing hearing, the district court was informed that defendant was not in a position to pay any restitution toward the victims' losses and, as a result, the victims of his crime would never receive the \$20 million in restitution to which they were entitled. Defendant was then sentenced to a 264-month prison term, which exceeded the sentence proposed by the parties in the plea agreement as well as the range recommended by the sentencing guidelines. Defendant appealed his sentence, arguing, *inter alia*, that the district court erred by considering the unmitigated impact on the victims in its sentencing decision. On appeal the court affirmed the district court's sentencing decision, holding that the district court did not abuse its discretion in considering the serious financial impact defendant's crimes had on his victims, including the fact that they were unlikely to ever receive any compensatory payments from him. The court explained that the district court "did not consider [defendant's] inability to pay restitution itself as an aggravating factor in imposing a longer sentence, but focused instead on the impact on the

victims of [defendant's] crimes. Because [defendant] was not expected to make restitution payments, the impact on the victims stood unmitigated." The court also pointed approvingly to the fact that during the sentencing hearing, the district court had noted that "one of the factors for the Court to consider under [18 U.S.C. §] 3553 is restitution to the victims[.]" and that the district court repeatedly referred to the financial ruin that defendant caused his victims, and the length of time it would take them to recover their losses. Because the district "court's discussion made clear that its concern over restitution was based on the impact defendant's crime had on the victims and was not designed to punish defendant for his inability to pay[.]" consideration of the unmitigated impact on the victims was proper.

Kays v. State, 963 N.E.2d 507 (Ind. 2012). Defendant was found guilty of misdemeanor battery and sentenced to 180 days in jail suspended to one-year probation. As a term of probation, defendant was ordered to pay restitution in the amount of \$1,496.15 to the victim. Defendant appealed the restitution order on the grounds that the trial court did not inquire into her ability to pay as required by statute, and that she lacked the ability to pay because her sole income was social security disability payments. The Indiana Supreme Court agreed with defendant, holding that at least a minimal inquiry into defendant's ability to pay was necessary. The court noted that this inquiry might touch on education, work history, health, assets or other financial information. Additionally, the court went on to hold that a court could take into account social security income when considering a defendant's ability to pay restitution. It reasoned that even though the state may not be able to levy against the income to collect restitution, it does "reflect an important part of the person's total financial picture that a trial court may consider when determining ability to pay." The court reversed the restitution order and remanded with instructions.

McDaniel v. State, 45 A.3d 916 (Md. Ct. Spec. App. 2012). Defendant was convicted of second degree assault, and the trial court ordered him to pay \$4,000 in restitution to the victim for damage caused to the victim's teeth by defendant's criminal conduct. Defendant appealed the restitution order, arguing, *inter alia*, that his sentence was illegal because the restitution statute, Md. Code § 11-603, only allows for actual dental expenses or losses and not for future

expenses. Defendant argued that because the victim had not yet had any dental work done, and only had estimates for future work, restitution was not allowed. In resolving the issue, the appellate court looked to the plain language of the statute. Section 11-603 provides that a court may order a defendant to make restitution if "as a direct result of the crime..., the victim suffered...actual medical, dental, hospital, counseling, funeral, or burial expenses or losses." The court's analysis turned on its interpretation of the wording "or losses." The court reviewed the ordinary, popular meaning of "expense" and "loss" and determined that they had different meanings, with loss not requiring an action on the part of the one who incurs it, while an expense is incurred when a person seeks to remedy or ameliorate that loss. The court then reviewed legislative history and found that it supported the court's interpretation of the statute. In 2005, when the statute had been amended to add "or losses" after expenses, the legislature had also considered striking "actual" from the statute but that amendment was rejected. The court found these facts to be important in that they revealed that: (1) the overall goal of the amendments was to expand circumstances within which restitution could be obtained; (2) the adjective "actual" limits restitution for items to those existing at the time restitution is sought, but adding the term "or losses" to the list showed intention to authorize restitution in situations where victim suffered detriment or harm; and (3) to read otherwise would render "losses" superfluous by making its meaning the same as "expenses." The court then concluded that the restitution statute covers a situation in which an individual has suffered harm and has not yet expended money to remedy that harm, as long as a victim has competent evidence that the expenses are reasonably certain to be incurred. The court also considered and rejected defendant's alternative argument that he did not have the ability to pay restitution by finding that he had waived the issue by not raising it below. Because the victim's estimate was competent evidence, the court affirmed the trial court's order of restitution.

State v. N.R.L., 277 P.3d 564 (Or. Ct. App. 2012). Juvenile admitted to committing acts that, if committed by an adult, would constitute burglary in the second degree and criminal mischief in the first degree, and the juvenile court ordered him to pay \$114,071.13 in restitution. The juvenile appealed the restitution order, arguing that the court erred in denying him a jury trial on the issue of

restitution because Article I, Section 17 of the Oregon Constitution provides that, “[i]n all civil cases the right of Trial by Jury shall remain inviolate.” The juvenile argued that the 2003 amendments to the restitution statute for juvenile proceedings created a quasi-civil recovery device for victims and therefore entitled him to a jury trial pursuant to Article I, Section 17. Specifically, the juvenile argued that the amendments made restitution a civil recovery device because: (1) restitution became mandatory, giving victims an absolute right to receive compensation in the full amount of their losses; and (2) the juvenile court may no longer consider the juvenile offender’s ability to pay when determining whether to order restitution. The appellate court rejected these arguments, concluding that the amendments to the statute did not affect the predominately penal characteristics of the restitution award, and that the juvenile court’s order of restitution remains penal, not civil, in nature. As such, the appellate court affirmed the restitution award.

2. Attorney’s Fees

United States v. Kearney, 672 F.3d 81 (1st Cir. 2012). Defendant pleaded guilty to seventeen counts of transportation, distribution, and possession of child pornography and, on appeal, argued, *inter alia*, that the \$3,800 in restitution he was ordered to pay to “Vicky,” a child-victim depicted in some of the images of child sexual abuse, was calculated and ordered improperly. Several months before defendant’s plea and after “Vicky’s” attorney received notification of defendant’s prosecution, “Vicky’s” attorney submitted expert reports documenting the harm imposed on “Vicky” and requested \$226,546.10 in restitution, which included \$188,705 in future counseling costs, \$27,341.10 in expenses, and \$10,500 in attorneys’ fees. Several days after defendant entered his guilty plea, the government filed a motion seeking “no less than \$3,800” in restitution for “Vicky.” The \$3,800 amount was arrived at by the government by averaging the orders of restitution awarded to “Vicky” in other child pornography cases and by “viewing the amount in relation to her overall documented claims of losses.” In this case of first impression in the First Circuit, the court aligned with all other circuits that have considered the question in holding that the individuals depicted in images of child sexual abuse are “victims” within the meaning of the restitution statute. The First

Circuit continued on to analyze the proximate cause test imposed by the statute. The court found that proximate cause requires that the harm imposed be reasonably foreseeable, noting that “injury to the child depicted in the child pornography . . . is a readily foreseeable result of distribution and possession of child pornography.” The court rejected defendant’s contention that “because so many have seen and distributed the pornography, his contribution cannot be said to have caused any harm absent specific linkage to ‘Vicky’s’ knowledge about him.” Instead, the court held that it was not necessary to find defendant’s specific individual possession or distribution itself increased “Vicky’s” harm, because proximate cause may be extended to the individual where “the tortious conduct of multiple actors has combined to bring about harm.” The First Circuit noted that where “[p]roximate cause . . . exists on the aggregate level,” there “is no reason to find it lacking on the individual level.” Consequently, it was sufficient that “Vicky’s” losses were caused by the viewers and distributors of the images of her child sexual abuse, taken as a whole, and the First Circuit rejected defendant’s argument that because his contribution to “Vicky’s” harm could not be “precisely ascertained with exactitude,” he could not have proximately caused “Vicky” harm, holding instead that the “law rejects such skewed ‘logic’” and that to adopt defendant’s reasoning would be “contrary to the purposes of restitution” and would “frustrate Congress’s goal of ensuring that victims receive full compensation for the losses they have incurred.” The court noted “Vicky’s” knowledge of defendant’s crime, as evidenced by her attorney’s receipt of the victim notification letter and affirmative request for restitution, observing that a victim may not be entitled to restitution in cases where “the victim lacks any knowledge of the defendant’s crime.” Finally, the First Circuit upheld the calculation of the \$3,800 restitution amount, noting that mathematical precision was not required for a reasonable determination of restitution, and finding that there was a reasonable basis for ordering defendant to pay about 1.5% of “Vicky’s” requested losses—an amount that was “small, both in absolute terms and as a proportion of the total amount of the restitution request.” The restitution award and the judgment of the district court were affirmed.

United States v. Skowron, 839 F. Supp. 2d 740 (S.D.N.Y. 2012). Defendant pleaded guilty to conspiring to commit securities fraud and obstruct

justice. Defendant's previous employer, Morgan Stanley, subsequently requested restitution pursuant to the Mandatory Victim Restitution Act (MVRA), 18 U.S.C. § 3663A, for losses incurred as a result of defendant's offense—including the full disgorgement amount it paid to the Securities Exchange Commission (SEC) to settle claims against defendant, legal fees it paid responding to the government's investigation of defendant's offense, and a portion of the compensation it paid to defendant. In response, defendant argued that Morgan Stanley is not a "victim" as the term is defined by the MVRA. The court disagreed, explaining that the MVRA defines "victim" as "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern or activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." The court found that defendant's criminal activity "deprived Morgan Stanley of the honest services of its employee, diverted valuable corporate time and energy . . . and injured Morgan Stanley's reputation." The court also found that the costs incurred by Morgan Stanley were "a necessary, direct, and foreseeable result of [defendant's] offense." As such, Morgan Stanley was a victim entitled to restitution. Accordingly, the court granted Morgan Stanley's request for restitution for its legal fees and a portion of the compensation that it had paid defendant. The court did not, however, find that restitution was appropriate for the disgorgement Morgan Stanley paid the SEC as a consequence of defendant's insider trading, reasoning that the disgorgement did not represent a loss, but an illegal gain which no one was entitled to retain.

People v. Eli, B230731, 2012 WL 1264463 (Cal. Ct. App. Apr. 16, 2012). Defendant pleaded guilty to one count of grand theft in connection with her receipt of over \$200,000 from the victim in exchange for purported psychic services. Pursuant to the terms of the plea agreement, the court suspended imposition of defendant's sentence and placed her on three years' formal probation on the condition that she pay restitution to the victim in the amount of the victim's losses. Approximately a year later, defendant paid the victim the ordered restitution, and the court dismissed the case. The victim filed a motion for reconsideration of the order of dismissal and for supplemental restitution for additional

attorney fees she had incurred since the date the original restitution order was entered and for travel and other costs related to collection in both the criminal and civil matters. The court denied her motion for additional attorney fees resulting from her civil case against defendant, but granted supplemental restitution for the other costs and then dismissed the case. The victim appealed, arguing that the trial court had erred in denying in part her request for supplemental restitution and in dismissing the case. The court held, first, that the victim had standing to appeal from the trial court's order as the California Constitution "grants [the victim] a right to appeal matters concerning restitution, and the judgment of dismissal is surely such an order, even if it only affects the manner in which she may collect the sums ordered." The court then held, however, that the trial court properly denied the victim's request for additional attorney's fees incurred as part of her civil case against defendant. The court noted that although a crime victim is statutorily entitled to collect restitution for actual and reasonable attorney's fees, these fees are limited to those accrued in seeking compensation for economic losses, and do not extend to general damages such as emotional distress and punitive damages—both of which the victim sought as part of her civil suit against defendant. Accordingly, the court affirmed the trial court's judgment of dismissal.

People v. Perez, B236949, 2012 WL 1717161 (Cal. Ct. App. May 16, 2012). Defendant was convicted of an "unspecified offense" arising from his theft of \$20,000 from the victim. The victim had invested the funds with defendant as part of a purported film venture, but defendant had failed to repay the victim as promised and provided counterfeit work invoices. Defendant appealed from the trial court's post-conviction restitution judgment ordering him to pay the attorney's fees incurred by the victim during civil litigation against defendant, arguing that: (1) it was unnecessary for the victim to hire attorneys because defendant had agreed to pay the \$20,000 as part of his plea agreement; (2) it was unreasonable for the victim to spend \$10,000 in legal fees to attempt to recover \$20,000 in losses; and (3) the fees amounted to more than a standard one-quarter contingency fee and thus were unreasonable. The court rejected defendant's arguments and affirmed the trial court's order awarding the victim his attorney's fees, stating: "Courts have rejected claims that a victim was not entitled to attorney fees incurred in civil litigation to

recover their losses because the victim could have simply relied upon the prosecutor to obtain restitution for him or her.” The court held that the method of calculation used by the trial court, which reimbursed the victim for actual legal fees incurred, was a reasonable method to make the victim whole; there was a factual and rational basis for the award, and defendant did not submit evidence that the amount charged by the victim’s attorneys was unreasonable. The court noted in dicta that there exists a split among the state’s “appellate districts as to whether a lodestar calculation is required or even appropriate to determine the reasonableness of attorney’s fees under a contingency fee agreement for purposes of victim restitution[,]” but that it need not reach the issue as it was not raised by defendant. Therefore, the court affirmed the trial court’s order.

In re Chaddah, No. 306978, 2012 WL 5258288 (Mich. Ct. App. Oct. 23, 2012) (per curiam). Juvenile offender pleaded guilty to malicious destruction of property, and the trial court awarded about \$900 in restitution to the victim. The restitution amount represented the difference between the sale price the victim obtained for the damaged car and the car’s blue book value without the damage. The victim appealed, arguing that the trial court erred because: (1) the restitution award should have included additional sums to cover cleanup and repair expenses; and (2) the award should have included over \$5,000 in attorney’s fees that the victim incurred in this case as well as over \$6,000 in attorney’s fees that the victim previously incurred in filing a lawsuit to compel the prosecutor to file criminal charges against this offender. The court of appeals rejected the victim’s arguments. First, the court found that the evidence submitted to support the additional amount did not sufficiently establish that the victim actually sustained additional losses. Second, the court concluded that the victim was not entitled to recover his attorney’s fees in restitution because there was no causal connection between the attorney’s fees and the offense. Specifically, the court found that the state crime victims’ rights statute did not afford the victim a right “to require the prosecutor to immediately file charges” and therefore, the fees incurred in the earlier lawsuit was not caused by the offender’s actions. The court also concluded that the fees incurred in connection with this case were the result of the victim’s “voluntary decision to hire an attorney to represent his rights” and not an expense

“necessarily incurred as a result of the offense.” For these reasons, the court affirmed the restitution order.

3. Calculation Method

United States v. Kearney, 672 F.3d 81 (1st Cir. 2012).

*For full case summary, see “Specific Victims’ Rights – Right to Restitution – Attorney Fees.”

United States v. Zangari, 677 F.3d 86 (2nd Cir. 2012). Defendant stock broker pleaded guilty to conspiring to violate the Travel Act, arising from his involvement in a conspiracy to defraud his employers, Morgan Stanley and Bank of America. Part of defendant’s plea agreement stipulated that restitution was applicable in an amount to be determined by the district court, and defendant’s Presentence Investigation Report (PSR), concluded that due to the difficulty in calculating the actual losses to the victims, it was appropriate to substitute the amount of defendant’s fraudulent gains. Defendant did not object to the PSR or argue to the district court that there was any error in the restitution calculation. The district court then entered judgment including an order of restitution in the amount of \$65,600, based on the calculations included in the PSR. Defendant appealed from the judgment of conviction, arguing for the first time that restitution was improper in this case because the victims of his fraud suffered no loss. The court agreed with defendant, holding that the restitution order was entered in error as defendant’s gain from the kickback scheme could not be used as a proxy for the victims’ actual losses in ordering restitution under the Mandatory Victim Restitution Act (MVRA), even though the victims’ actual losses were difficult to calculate. Nevertheless, the court affirmed the district court’s judgment, declining to notice the unpreserved error. The court held that defendant failed to show that the district court’s error in using defendant’s gain as a proxy for the victims’ actual losses in ordering restitution under the MVRA resulted in prejudice to defendant or undermined fairness, integrity, or public reputation of judicial proceedings, as required to find plain error. The court observed that, to the contrary, the district court’s restitution order may have actually understated the victims’ losses from the kickback scheme, considering that defendant’s actions while employed as a stock broker involved an industry-wide conspiracy. The court affirmed the district court’s judgment.

United States v. Keifer, No. 11-3942 (6th Cir. Nov. 5, 2012) (order), available at <http://law.lclark.edu/live/files/12787-us-v-keiferca6110512>. Defendant created the fictitious McPherson Property Group and induced the victim-investor into purchasing worthless shares of the company. Additionally, defendant opened bank and merchant accounts under 56 different names and received payment from numerous entities for work never performed. The federal government eventually charged defendant with two counts of bank fraud, one count of uttering a forged and counterfeit security, and one count of fraud and related activity in connection with access devices. The government later moved to dismiss the forged security charge, and defendant ultimately pleaded guilty to the bank fraud and fraud with access devices charges. The district court ordered defendant to pay restitution to multiple victims, including the victim-investor. Defendant appealed the restitution order, and the victim-investor moved under the Crime Victims' Rights Act (CVRA), U.S.C. § 3771, to intervene in the appeal. On appeal, defendant argued that the victim-investor was not entitled to restitution because restitution must be based on conduct related to the offense of conviction, and the government had dismissed the count that was most closely associated with the victim-investor's loss. The appellate court rejected defendant's argument, noting that it broadly construes what constitutes conduct involved in the offense of conviction; in so doing, the court will look to the plea agreement, plea colloquy, and other statements made by the parties to determine the scope of the offense of conviction for purposes of restitution. After examining the record in the case, the appellate court found that the victim-investor was directly harmed by defendant's conduct and entitled to restitution. Defendant also argued that the restitution amount should have been offset by the "overly generous" salary he paid to the victim-investor and the other benefits the victim-investor had obtained at the expense of McPherson Property Group. The court rejected this argument as well, stating that "[n]othing in the detailed provisions of the statute [the Mandatory Victim Restitution Act] contemplates that a defendant guilty of criminal fraud can escape mandatory restitution by requiring district courts to conduct mini-trials on the possible contributory negligence of the very persons victimized by the defendant." As such, the court held that the district court did not abuse its discretion in determining the amount of restitution. The court then denied the

victim-investor's motion to intervene in the appeal, noting that the appellate courts have routinely rejected victim entitlement to appellee status under the CVRA.

United States v. Laraneta, 700 F.3d 983 (7th Cir. 2012). Defendant was convicted of violating federal child pornography laws and ordered to pay restitution to two crime victims—identified by the pseudonyms "Amy" and "Vicky"—in the amounts of about \$3 million and \$1 million, respectively. On appeal, defendant challenged the restitution award, arguing, *inter alia*, that the district judge erred in finding him responsible for the full amount of the crime victims' losses. The government, declining to defend the restitution award on appeal, challenged the decision to allow the crime victims to intervene in the appellate proceeding. The United States Court of Appeals for the Seventh Circuit first concluded that permitting the crime victims to intervene in this appeal was proper. In reaching its conclusion, the court reasoned that courts have inherent power to allow intervention in appropriate cases, and intervention in the appellate proceedings is particularly compelling in a case where the crime victims have a direct financial stake in the outcome and the government may not have an interest in defending that stake. Second, the court concluded that the district court erred in awarding restitution without making a determination of what losses defendant actually caused the crime victims to suffer. In reaching its conclusion, the court found that although defendant was convicted of distributing child pornography, the record does not clearly establish whether defendant distributed any of the child-abuse images of "Amy" and "Vicky"—i.e., whether he uploaded any of those particular images to the Internet. The court explained that if defendant did not upload any of the images, then he did not contribute to those images "going viral." In such a case, the court reasoned that defendant would not have caused the crime victims to suffer all of the losses that they attribute to the dissemination of the child abuse imagery on the Internet. The court also found that all categories of losses set forth in the mandatory restitution statute, 18 U.S.C. § 2259, are recoverable restitution only if they were proximately caused by defendant's criminal conduct. The court declined to reach the question of which claimed losses were proximately caused by defendant's conduct when the district court had not yet resolved the issue of whether defendant was a distributor

of the images of “Amy” and “Vicky.” The court also observed that if the district court were to find defendant had been a distributor of the images of “Amy” and “Vicky,” then he may be held jointly liable for the full amount of the crime victims’ losses caused by the dissemination of the images; however, “[o]n the basis of practical considerations and the absence of statutory authorization,” defendant would “not be permitted to seek contribution from other defendants convicted of crimes involving pornographic images of the two girls.” The court further observed that if defendant were not found to have been a distributor, then it would be inappropriate to impose joint liability. For these reasons, the court vacated the restitution order and remanded the case for a redetermination of the amount of restitution owed by defendant. The court also remanded with an instruction that the crime victims should not be allowed to “intervene” in the district court.

United States v. Navarrete, 667 F.3d 886 (7th Cir. 2012). A jury convicted defendant of bank fraud in connection with a scheme to bribe LaSalle Bank’s vice president in charge of security to contract with his company to provide various security services. The district court sentenced defendant to 96 months in prison and ordered him to forfeit \$16,241,202—the total obtained by fraud—and ordered restitution to be paid to the bank in the same amount. In ordering restitution, the district court was persuaded that the bank had suffered a loss, but rejected the government’s loss estimates. After stating it could not reasonably determine exactly how much loss the bank had suffered as a result of the fraud, the trial court ordered defendant to pay restitution equal to the forfeiture amount. On appeal, defendant challenged the restitution order. At the outset, the appellate court noted that it was proper to require defendant to pay both forfeiture and restitution, as they are cumulative punishments and not alternatives. However, the appellate court noted that although forfeiture could be based on the offender’s gain, restitution can only be based on the victim’s actual loss. The government conceded this fact and argued that because the bank would not have contracted with the company if it had known of the bribery, the bank “lost” all the money that was obtained by defendant. The appellate court rejected the government’s argument and explained how calculation of loss in this type of situation requires looking at price, quality and number of services provided compared to services that would have been

provided by a competitor who was edged out as a result of the bribes. The court suggested a method for calculating loss, but noted that the trial court could, in the alternative, decide to decline to order restitution if it finds that determining complex issues of fact related to the amount of the victim’s loss would complicate or prolong the sentencing process, as authorized under 18 U.S.C. § 3663A(c)(3)(B). The court reversed the restitution order and remanded for further proceedings.

United States v. Fair, 699 F.3d 508 (D.C. Cir. 2012). Defendant, convicted of criminal copyright infringement and mail fraud for the sale of pirated copies of outdated software, appealed the district court’s order of almost \$750,000 in restitution to the corporate victim under the Mandatory Victim Restitution Act (MVRA). Defendant argued that the district court abused its discretion when it issued the award based on evidence of defendant’s gain from the unlawful sales as opposed to the victim’s actual loss as a result of the pirated sales. The United States Court of Appeals for the District of Columbia agreed and held that the district court abused its discretion. In reaching its holding, the court examined relevant case law from other federal circuits and concluded that restitution under the MVRA must be based on the victim’s actual, provable loss rather than defendant’s gain. The court found that the government had failed to meet its burden of proving the victim’s actual loss because the only evidence it submitted was a tally of defendant’s sales and “unsubstantiated, generalized assertions of government counsel” regarding the victim’s lost sales. The court also concluded that the government was not entitled to an order reopening the sentencing to offer new evidence of the victim’s actual loss. The court explained that the case presented no special circumstances that justified allowing the government to have “a second bite at the apple” when the government’s burden to prove actual loss under the MVRA was well established before sentencing and it failed to offer such evidence. Accordingly, the court vacated the restitution order and declined to remand for a new sentencing.

United States v. Michelson, Crim. No. 09-748-01 (FLW), 2012 WL 1079626 (D.N.J. Mar. 30, 2012) (slip copy). Defendant, the former CEO of Glikin Brothers (Glikin), pleaded guilty to one charge of bank fraud in connection with a scheme that involved his procurement of a \$4.2 million loan from Provident Bank based on falsified information

and the conversion of some of the loan proceeds for his own personal use, and check kiting. Defendant agreed to pay—and the district court ordered him to pay—about \$4 million in restitution to Provident Bank for the losses it sustained as a victim of the fraud. The shareholders of Glikin sought about \$8.3 million in restitution for losses stemming from 24 thefts by defendant and for funds expended in an attempt to save their company, which is now defunct. The state supported a \$535,836.23 restitution order for the victim-shareholders. In opposition to the state's position, defendant contended that: (1) the victim-shareholders were not "victims" under the Mandatory Victim Restitution Act (MVRA); (2) the victim-shareholders' losses as guarantors of a bond were too attenuated to be included in restitution; and (3) defendant had already paid restitution to Glikin and/or Provident Bank and it would amount to "double-dipping" to order defendant to pay that portion again. The court rejected all of defendant's arguments, holding that: (1) for scheme-based crimes, such as the one defendant was convicted of, the term "victim" should be broadly defined and "a person may be a victim if his or her harm is 'closely related' to the scheme," and that the victim-shareholders met this requirement because they were directly and proximately harmed by the fraud; (2) by a preponderance of the evidence standard, the victim-shareholders' losses as guarantors of the bond stemmed from the criminal activity defendant pled guilty to and the losses were therefore compensable; and (3) even if a part of the restitution award amounts to double-dipping, "the MVRA does not limit restitution awards to amounts charged in an Information or Indictment;" instead, restitution should be provided for the full amount of the victims' losses. On these bases, the court ordered defendant to pay restitution to the victim-shareholders in the amount of the state's request—\$535,836.23. The court rejected the victim-shareholders' request in the amount of \$8,394,000, holding that the portion of their losses that pre-dated the conduct to which defendant pled guilty were not compensable in restitution. Moreover, in *dicta*, the court noted that there was civil litigation pending regarding the victim-shareholders' claim and that the MVRA's sentencing guidelines made it inappropriate to award restitution for some of the losses in this situation because "complex issues of fact related to the cause or amount of the victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the

burden on the sentencing process." Additionally, the court held that the victim-shareholders' other losses were either not sufficiently shown to be directly and proximately caused by defendant's conduct, or were consequential in nature, and thus were not compensable under the MVRA.

United States v. Tallent, 872 F. Supp. 2d 679 (E.D. Tenn. 2012). Defendant pleaded guilty to one count of receiving child pornography. Although the Presentence Investigation Report (PSR) indicated that no victims had come forward, the day after the date of the revised PSR, the government received an email from the attorney representing "Vicky," one of the victims portrayed in the pornographic materials possessed by defendant. The trial court continued the sentencing hearing to discuss the restitution issue with the parties. "Vicky" submitted a request for restitution in the full amount of her economic losses, which totaled \$1,321,226.52. The government and defendant agreed that an appropriate amount of restitution for defendant to pay is \$3,972.86, which represents the net outstanding amount of "Vicky's" losses, divided by the number of defendants convicted of possessing "Vicky's" image, which, according to the government, totals approximately 200. The trial court, concerned about the agreed-upon restitution amount, analyzed the statutory language of 18 U.S.C. § 2259 and the Congressional intent to provide restitution to victims of child pornography. The government conceded that the proximate cause analysis applies to all categories of losses in the statute; however, the court noted that "there is considerable uncertainty over the proper proximate cause analysis a court should apply to a restitution claim made in a child pornography possession/receipt case." Despite this uncertainty, the court concluded that the proximate cause requirement was satisfied here, as there is no question that defendant is one of the multiple actors responsible for the harm and economic losses suffered by "Vicky." But the court concluded that it was not persuaded that the approach advocated by the government and agreed to by defendant is consistent with the statute's clear directive that the restitution order be in the full amount of the victim's losses. Similarly, the court expressed concern that this method of arriving at the restitution amount did not square with the "bedrock principal" that a defendant may only be held liable for the harm he proximately caused. In criticizing the parties' agreed-upon method of calculating restitution, the court noted that

“the fault here lies not with the government, but with the particular language Congress has used in this statute.” The court observed that it “cannot imagine” how the government could ever meet its “burden to provide specific evidence delineating that quantum of damages caused by [this defendant], or any other defendant convicted of a possession or receipt offense.” The court held that the burden imposed on the government is to prove the “unprovable: identifying, among the vast sea of child pornography defendants, how the conduct of a specific defendant occasioned a specific harm on a victim.” Because the government did not—and could not—demonstrate what portion of “Vicky’s” losses were caused by defendant specifically, and relying on speculation was inappropriate, the trial court denied the government’s motion for restitution. The court concluded by recognizing “that the regrettable consequence of [its] analysis is to carve out an exception to the mandatory restitution statute for those defendants that possess, receive, and distribute child pornography.”

People v. Stanley, 279 P.3d 585 (Cal. 2012). Defendant pleaded no contest to felony vandalism of the victim’s pickup truck, and the trial court ordered \$2,812.94 in restitution—the amount an automotive body shop estimated it would cost to repair the extensive damage caused by defendant’s criminal conduct. Defendant appealed, arguing that the trial court should have capped restitution at \$950, the price the victim originally paid for the used truck. The California Supreme Court rejected defendant’s argument and affirmed the trial court’s judgment. The court began its opinion by describing the state’s restitution statute, which provides that the trial court must order defendants to pay full restitution to victims for every economic loss incurred as a result of defendants’ criminal conduct. In the case of damaged or stolen property, the statute provides for restitution in the amount of “the replacement cost of like property, or the actual cost of repairing the property when repair is possible.” The court then noted that the statute does not mandate that the restitution awarded must be the lesser of the two amounts; consequently, the “choice whether to award the property’s replacement cost or cost of repair ‘when repair is possible’ is left to the sound discretion of the trial court.” The court agreed with the lower court’s rejection of defendant’s argument that the victim would receive a “windfall” if restitution were ordered in the amount of the higher repair cost: “The fact that the repairs will cost about three times the

victim’s purchase price does not mean that she will receive a windfall: It means she will have her truck back in the same condition it was before defendant vandalized it.”

People v. Perez, B236949, 2012 WL 1717161 (Cal. Ct. App. May 16, 2012). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Attorney’s Fees.”

Austin v. State, 727 S.E.2d 535 (Ga. Ct. App. 2012). Defendant pleaded guilty to felony theft and was given a probated sentence requiring him to pay \$20,500 in restitution in connection with stolen items—a gun and rare coins—that were not recovered by the victim. Defendant challenged the restitution order, arguing that the state failed to demonstrate the amount of the loss sustained by the victim as a result of the offense. The court agreed with defendant’s argument, finding that the only evidence that the state produced about the value of the stolen items was opinion testimony by the victim, and that this testimony lacked the requisite foundation because there was no showing that it was based on some knowledge, experience, or familiarity with the value of the property at issue. The court then vacated the restitution order and remanded the case for a new restitution hearing.

State v. White, 274 P.3d 313 (Or. Ct. App. 2012). Defendant pleaded guilty to one count of first-degree theft, which arose out of his improper claims for unemployment benefits while he was employed. Defendant was subsequently ordered to pay restitution to the Oregon Employment Department (OED) in the amount of the benefits he had unlawfully received, plus 12 percent interest on the judgment for that amount. The court based its interest calculation on the statute governing civil recovery for unemployment claim misrepresentation. On appeal, defendant challenged the portion of the restitution order requiring him to pay 12 percent interest because that was not part of the economic damages that OED had suffered as a result of his actions. The state conceded the error. The court of appeals noted that although the trial court could consider damages recoverable in a civil action, “such damages and the economic damages recoverable as restitution are not necessarily coextensive.” The court further noted that the economic damages that can be awarded as restitution are limited to “objectively verifiable monetary losses” resulting from defendant’s actions,

and that the interest at issue here was not such a loss. Accordingly, the court held that the trial court erred in ordering defendant to pay 12 percent interest as part of the restitution award and reversed the restitution order and remanded for resentencing.

In re Chaddah, No. 306978, 2012 WL 5258288 (Mich. Ct. App. Oct. 23, 2012) (per curiam). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Attorney Fees.”

4. Causation

United States v. Kearney, 672 F.3d 81 (1st Cir. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Attorney Fees.”

United States v. Burgess, 684 F.3d 445 (4th Cir. 2012). Defendant was convicted of receiving and possessing materials depicting minors engaged in sexually explicit conduct and ordered to pay restitution to “Vicky”—one of the child-victims who was depicted in defendant’s materials—under the Mandatory Restitution for Sexual Exploitation of Children Act, 18 U.S.C. § 2259. Defendant appealed the restitution order, arguing, *inter alia*, that the district court erred in ordering him to pay restitution because it did not find that “Vicky’s” harm was proximately caused by his criminal conduct. The appellate court began by noting that all the circuits that have addressed this issue have concluded that a finding of proximate causation is necessary under the statute, although various rationales have been used. The court then rejected the construction of the statute proposed by the child-victim that the proximate cause requirement be limited to the catch-all section of the statute. The court reasoned that to conclude otherwise would allow for disproportionate restitution awards and that such a construction ignores the general principle, not clearly abrogated by Congress in this statute, of requiring proximate causation in calculations of damages. The court noted, however, that Congress ought to re-evaluate its structuring of the statute in light of challenges posed by the modern reality of crimes committed via the Internet. Ultimately, the court remanded the case to the district court to re-evaluate its restitution award to the victim by determining what amount of harm was proximately caused by defendant’s individual conduct. Judge Gregory dissented from the majority’s opinion, concluding that defendant should be liable both for the harm he proximately caused and

the harm indivisible from that which he proximately caused.

United States v. Oceanpro Indus., Ltd., 674 F.3d 323 (4th Cir. 2012). Defendants were convicted of offenses arising out of their purchase of untagged and oversized striped bass in violation of the Lacey Act. The trial court ordered defendants, jointly and severally, to pay \$300,000 in restitution to the states of Maryland and Virginia, to be divided equally between the states. The trial court also made compliance with the restitution order a condition of defendants’ probation and supervised release. On appeal, defendants argued that the trial court lacked authority to order restitution because the states were not “victims” for purposes of restitution. The court of appeals rejected defendants’ argument. First, the court concluded that the states were “victims” under the Victim Witness Protection Act (VWPA), 18 U.S.C. § 3663. In reaching this conclusion, the court explained that the states possess a legitimate interest in protecting the fish in their waters, and their interests were “directly and proximately harmed” as a result of the illegal harvesting. Second, the court concluded that the states were “victims” under the Mandatory Victim Restitution Act (MVRA), 18 U.S.C. § 3663A. In reaching this conclusion, the court explained that both states’ laws authorized the states to seize and sell illegally harvested striped bass for the states’ benefit. Therefore, the court reasoned that defendants’ offenses were property offenses within the meaning of the MVRA, and the states’ proprietary interests were harmed by defendants’ acts. Further, the court concluded that ordering restitution as a condition of probation and supervised release was proper under the relevant statutes. For these reasons, the court affirmed the restitution award.

In re Amy Unknown, 701 F.3d 749 (5th Cir. 2012) (en banc). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Causation.”

United States v. Espinoza, 677 F.3d 730 (5th Cir. 2012). Defendant pleaded guilty to being a felon in possession of a firearm, in connection with his sale of three stolen firearms to the victim-pawnshop. As part of his sentence, defendant was ordered to pay \$525 in restitution to the pawnshop—the amount the pawnshop had paid defendant—as the guns were later seized and returned to their original owner, depriving the pawnshop of its profit. Defendant appealed from his sentence, arguing, *inter alia*, that

the pawnshop was not a “victim” as defined by the relevant statutes. The court agreed with defendant’s argument. The court began by examining the language of the Victim and Witness Protection Act (VWPA) and the Mandatory Victim Restitution Act (MVRA), both of which define a “victim” as “a person directly and proximately harmed as a result of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant’s criminal conduct in the course of the scheme, conspiracy, or pattern.” The court explained that because a “scheme, conspiracy, or pattern” is not part of the offense of possessing firearms, the pawnshop could only recover restitution if it was directly or proximately harmed by defendant’s possession. The court further explained that although the pawnshop’s harm might be the foreseeable result of stealing or illegally transferring firearms, “there is nothing inherent in the possession of firearms by a felon that would make one foresee that those firearms were stolen and would later be transferred, causing financial harm to the transferee.” As such, the court held that the pawnshop was not directly or proximately harmed by the convicted offense, and therefore was not a “victim” entitled to restitution under the definitions in the VWPA and MVRA. The court vacated the trial court’s judgment and remanded the case for resentencing.

United States v. Slovacek, 699 F.3d 423 (5th Cir. 2012). In a public corruption case involving city government officials’ award of affordable housing contracts, the victims—a low-income housing developer and his business—appealed from the district court’s final written judgment against defendant, which did not include restitution. The court had earlier denied the victims’ petition for writ of mandamus on this issue filed pursuant to their rights under the Crime Victims’ Rights Act (CVRA), 18 U.S.C. § 3771. The court held that precedent that nonparty victims do not have the right of direct appeal under the CVRA similarly “forecloses [the victims’] MVRA claim brought pursuant to the CVRA.” The court further held that 28 U.S.C. § 1291, which provides that the court of appeals shall have jurisdiction of appeals from all final decisions of the district courts, relates to the subject matter of *what* may be appealed from district courts to the court of appeals and does not address *who* may appeal. The court then concluded that it lacked jurisdiction and

dismissed the victims’ direct appeal. *Doe v. Boland*, 698 F.3d 877 (6th Cir. 2012). Defendant, a technology expert and lawyer, represented individuals being tried on child-pornography charges. During the criminal trial, he downloaded images of children from a stock photography website and digitally imposed the children’s faces onto the bodies of adults performing sex acts, with the aim of showing that his clients may not have known that they were viewing child pornography. When the parents of the children involved found out about the images, they sued defendant under the civil remedy provisions of two federal child-pornography statutes, 18 U.S.C. §§ 2252A(f) and 2255. The district court ultimately granted summary judgment to the parents of the child-victims and awarded \$300,000 in damages. The Sixth Circuit Court of Appeals affirmed, holding first that the child-victims met the requirements for obtaining relief under § 2255. Section 2255 allows any person who was a victim of certain sex crimes while a minor, and who suffers personal injury as a result, to recover actual damages of no less than \$150,000. Defendant argued that the child-victims did not suffer personal injury, stating that a victim’s personal injury requires more than showing that he or she was a “victim.” The court disagreed: “A victim by definition is someone who suffers an injury. . . . [The victims] undoubtedly were victims of [defendant’s] conduct. So too they undoubtedly suffered personal injuries by any conventional reading of that phrase.” The court continued that these injuries were also sufficient to establish Article III standing. Defendant further argued that the child-victims failed to show they incurred actual damages. Although most tort plaintiffs are required to show actual damages, no such requirement exists in § 2255, which declares that any victim “shall be deemed to have sustained damages of no less than \$150,000 in value.” Accordingly, the court held that the district court did not err in awarding the victims the statutory minimum without proof of actual damages. Defendant also argued that the damages award ran afoul of the First Amendment’s free speech protections because the images were not of actual child pornography but of morphed images. The court rejected this argument as well. First, it distinguished virtual images—entirely computer-generated child pornography and pornography that appears to depict children—from morphed images. Although the Supreme Court has struck down a ban on virtual images it has not yet resolved the validity of a ban on

morphed images. The court concluded that because morphed images depict real children who suffer real injuries, they are distinguishable from virtual images. Second, the court concluded that morphed images offer relatively weak expressive value. Finally, the court concluded that the child-victims did not need to have seen the images in order to have suffered harm: “Even if [the victims] never see the images, the specter of pornographic images will cause them ‘continuing harm by haunting [them] in years to come. As a result, it is immaterial that [defendant] never displayed these images outside of a courtroom and never transmitted them electronically. The creation and initial publication of the images itself harmed [the victims], and that is enough to remove [defendant’s] actions from the protections of the First Amendment.” Defendant also argued that the district court’s award violated the Sixth Amendment rights of hypothetical future defendants to have a fair trial; he did not allege that his own Sixth Amendment rights had been violated. The court rejected this argument as well, citing to another panel decision that had recently rejected this argument on the ground that future defendants could raise Sixth Amendment claims on their own behalf, and therefore defendant did not have standing to do so here. Accordingly, the district court’s decision was affirmed.

United States v. Evers, 669 F.3d 645 (6th Cir. 2012). Defendant was convicted of two counts of production of child pornography, one count of possession of child pornography, and one forfeiture count arising out of his sexual assault and exploitation of the 13-year-old child-victim. Defendant appealed, arguing, *inter alia*, that the restitution award made to the child-victim’s legal guardian for the cost of lost wages and childcare incurred by the guardian was not permitted by the restitution statute. Defendant first argued that a legal guardian was a third party and, consequently, did not constitute a “victim” within the meaning of the relevant law. The Sixth Circuit rejected defendant’s narrow construction and held that the plain language of Section 2559(c) of the Mandatory Restitution for Sexual Exploitation of Children Act, 18 U.S.C. § 2259, allows legal guardians to recover restitution. Defendant next argued that the guardian’s lost wages were not proximately caused by defendant’s criminal conduct. The court rejected defendant’s argument, holding that because the guardian’s lost wages were directly attributable to his attendance at various stages of the criminal prosecution, defendant’s offense proximately

caused the losses. Further, the court observed that “[i]t is reasonably foreseeable that the parent or guardian of a minor victim of sexual exploitation will attend proceedings related to the prosecution of the case and, as a consequence, miss work.” Finally, defendant argued that his offense did not proximately cause the \$140 in child care expenses incurred by the child-victim’s guardian. Defendant maintained that because he had previously provided free child care services to the child-victim, the link between child care costs and his crimes was too attenuated to support the restitution award, as the child-victim’s legal guardian would otherwise have had to pay for child care costs. In the absence of “additional evidence,” the court agreed that the “link between the child care costs and [defendant’s] crimes is too attenuated to support the restitution award.” The judgment of the district court was affirmed in part and vacated in part, and the case was remanded for further proceedings.

United States v. Keifer, No. 11-3942 (6th Cir. Nov. 5, 2012) (order), available at <http://law.lclark.edu/live/files/12787-us-v-keiferca6110512>. *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Calculation Method.”

United States v. Laraneta, 700 F.3d 983 (7th Cir. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Calculation Method.”

United States v. Schmidt, 675 F.3d 1164 (8th Cir. 2012). Defendant, convicted of assault with a deadly weapon and assault resulting in serious bodily injury, appealed the trial court’s order awarding restitution to the state Medicaid program and the state crime victim compensation program under the Mandatory Victim Restitution Act (MVRA), 18 U.S.C. § 3663A. On appeal, defendant challenged the award on two grounds. First, defendant argued that the district court erred because the state Medicaid and crime victim compensation programs are not “victims” under the MVRA. Second, defendant argued that 18 U.S.C. § 3664, the statute that sets forth procedures for implementing the MVRA, does not require an award of restitution to a government agency that has compensated a victim of a crime of violence. The court of appeals agreed with defendant’s first argument and found that the government agencies did not suffer direct or proximate harm within the meaning of the MVRA’s definition of “victim.” But

the court concluded that the government agencies were nevertheless entitled to restitution. In reaching its conclusion, the court found that 18 U.S.C. § 3664 requires courts to award restitution directly to third parties that have compensated the victim for her loss. The court also found that the victim did suffer a loss even though she did not pay any of her expenses out-of-pocket and she did not incur any obligation to pay for her expenses. Further, the court found that the fact that the third parties were government agencies was irrelevant to the determination. For these reasons, the court affirmed the restitution order.

In re Amy, 698 F.3d 1151 (9th Cir. 2012). Defendant was convicted of possessing and transporting child pornography. Two victims whose child abuse images were among those possessed by defendant challenged, by writ of mandamus, the lower court orders that denied restitution to one victim and awarded approximately \$4500 in restitution to the other victim. In their petition, the victims argued that the language of certain provisions of the Mandatory Restitution for Victims of Sex Crimes Act, 18 U.S.C. § 2259, did not require a showing of proximate cause prior to awarding restitution. The victims urged the court to overrule Ninth Circuit precedent holding otherwise, and to instead employ the approach adopted by the Fifth Circuit, which would require a court to award restitution for the full amount of the victims' losses without employing a proximate cause analysis. The court acknowledged that the Fifth Circuit's interpretation of proximate cause with respect to § 2259 was at odds with the Ninth Circuit's interpretation, however, the court noted that the Ninth Circuit's interpretation was binding absent "intervening higher authority" that is "clearly irreconcilable." Because a decision from the Fifth Circuit is not "intervening higher authority," stare decisis applied. The court then concluded: "To change the law of this circuit, petitioners must raise this issue in a petition for rehearing en banc or in a petition for writ of certiorari at the United States Supreme Court." Accordingly, the petition for a writ of mandamus was denied.

In re Sealed Case, 702 F.3d 59 (D.C. Cir. 2012). Defendant pleaded guilty to four counts of sex trafficking of children. At sentencing, the district court imposed a term of imprisonment and ordered defendant to pay close to \$4 million in restitution to the four victims. Defendant challenged the restitution order, arguing that: (1) he was not the proximate

cause of the victims' losses, as required under the Sex Trafficking of Children Act, 18 U.S.C. § 1593, because the victims already had mental health issues before he prostituted them; (2) the court erred by failing to find that the victims actually wanted to undergo the treatment recommended by the expert; (3) the court improperly calculated similar damages for each victim even though the victims were each prostituted for significantly different lengths of time; and (4) the court's calculation of defendant's ill-gotten gains was improper because the court relied primarily on the victims' grand jury testimony and according to various studies, the testimony of child sexual abuse victims is inherently unreliable. The government argued in response, *inter alia*, that defendant waived his right to appeal from the restitution order when he signed the plea agreement. The court disagreed with the government, stating that although the plea agreement was clear that defendant could not appeal his sentence, it was not clear that defendant could not appeal the restitution award because "sentence," as defined in the agreement, seemed to encompass only a term of imprisonment—not restitution. But the court then proceeded to affirm the restitution order, finding that under § 1593, defendant must pay victims "the full amount of the victim's losses," which includes "ill-gotten gains." The court explained that defendant need not be the sole cause of the harm to the victims, nor must the amount of restitution be proven with exactitude. The court found that, although the minors had been involved in prostitution or other traumatic events before they met defendant, defendant's abuse was the proximate or most significant cause, and that the treatment recommended by the expert would be necessary even if the victims had no previous trauma. The court further found that the victims are entitled to be compensated for their losses whether they ultimately choose to use the money in a particular way or not. With respect to the differing lengths of time the child victims were prostituted by defendant, the court pointed to the expert's testimony, which established that the psychological harm from post-traumatic stress disorder takes only a short time to occur. Lastly, the court held that the district court did not err in relying on grand jury testimony at sentencing, as the court may rely on such testimony as long as it has "sufficient indicia of reliability." The court disagreed with defendant's characterization of the victims' testimony as unreliable or unbelievable, finding instead that the victims' testimony was detailed and each victim's testimony was consistent

with that of the other. Accordingly, the court found that the district court did not abuse its discretion and affirmed the judgment below.

United States v. Fair, 699 F.3d 508 (D.C. Cir. 2012).
*For full case summary, see “Specific Victims’ Rights – Right to Restitution – Calculation Method.”

United States v. Poole, Crim. Action No. 09-355, 2012 WL 4863789 (E.D. La. Oct. 11, 2012) (slip copy). Defendant pleaded guilty to one count of voluntary manslaughter, and as part of that plea recognized his obligation to pay restitution. The court sentenced defendant, and referred the matter to a magistrate judge to determine the amount of restitution pursuant to the Mandatory Victim Restitution Act (MVRA). The government sought restitution for: (1) funeral expenses; (2) costs related to damage to a ship belonging to the victim’s father; and (3) lost future earnings of the victim. The magistrate judge recommended that defendant should only pay restitution for the funeral expenses. The government objected, and the trial court reviewed the magistrate judge’s contested report and recommendation. Defendant did not object to paying restitution for funeral expenses, and the court agreed that the expenses were well documented and properly subject to a restitution order. As to the damage to the victim’s father’s ship, the court noted that: “Under the MVRA, a person may qualify as a victim entitled to restitution even if that person is not the target of the crime, as long as the harm is a reasonably foreseeable consequence of the crime.” The court found, however, that the victim’s father was not entitled to restitution for the damage because there were sufficient intervening causes unrelated to the act of manslaughter, and the damage was not a reasonably foreseeable consequence of the crime. In regard to the requested future lost wages, the magistrate’s original report found that the amount requested by the government was too speculative, and that the victim’s father was not entitled to restitution anyway because he was not dependent on the victim’s income. Upon review, the court noted that under the MVRA the burden is on the government to demonstrate the amount of future lost wages by a preponderance of the evidence. The court found that, although the amount was somewhat speculative, all estimates of future wages are somewhat speculative, and that there was sufficient evidence to support the request. The court found that the \$200,000 proposed by the government was reasonable. The

court also noted that the fact that the victim’s father was not dependent on his son was irrelevant, because under the MVRA the question is “not one of dependency, but rather is one of loss.” When the victim is deceased, “the legal guardian of the victim or representative of the victim’s estate, another family member, or any other person appointed as suitable by the court, may assume the victim’s rights.” The court then ordered that defendant pay restitution for funeral-related expenses and for the victim’s lost future wages, but disallowed restitution for the damage to the victim’s father’s ship.

United States v. Tuma, Crim. No. 11-0031-01, 2012 WL 6087068 (W.D. La. Dec. 5, 2012) (slip copy). Victim CCS Midstream Services sought restitution under the Crime Victims’ Rights Act (CVRA), 18 U.S.C. § 3771, and the Victim Witness Protection Act (VWPA). Although recognizing that these statutes provided statutory bases for restitution, the court declined to order restitution in this case, stating that “the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims” Citing to legislative history, the court continued that victims are entitled to restitution “when liability is clear from the information provided by the government and the defendant and all the sentencing court has to do is calculate damages.” The court determined that the restitution request could not be resolved on the basis of the evidence submitted during the criminal trial, and that issues as to causation and the amount of damages were complex, and would require a “mini trial” to determine. Accordingly, the request for restitution was denied.

United States v. Veazie, No. 2:11-cr-00202-GZS, 2012 WL 1430540 (D. Me. Apr. 25, 2012) (slip copy). Defendant unlawfully possessed images of the child sexual abuse of “Cindy.” The government requested that restitution be paid to “Cindy” (who sought a total of \$71,014.94 in restitution), and the government recommended that the court award “Cindy” \$2,400 in restitution. Defendant objected to restitution, arguing that insufficient evidence of proximate causation was introduced in support of the restitution request because the documentation supporting “Cindy’s” restitution request failed to mention defendant and delineate the impact on “Cindy” that was specifically caused by defendant. The court rejected defendant’s proximate cause

analysis, noting that the First Circuit rejected this argument as being “contrary to Congress’s goal of ensuring that victims receive full compensation for the losses they have incurred” as victims portrayed in images of child sexual abuse. Although the court noted that “a victim who lacks any knowledge of defendant’s crime may be unable to establish proximate cause,” that did not apply in this case, as “Cindy’s” attorney received a victim notification letter, and “Cindy” affirmatively requested restitution. The court noted, however, that although the government established that defendant was one of many who have harmed “Cindy,” no evidence was submitted regarding the amount of harm attributable to defendant. The court further rejected the government’s proposed methodology of awarding “Cindy” \$2,400 in restitution, which represented the average restitution award in twelve other cases involving images of “Cindy.” The court held that it “must order restitution equal to the amount of harm” defendant caused “Cindy,” however—although the government submitted evidence supporting the total amount of damages—“it has provided no evidence delineating any method by which the Court can reasonably determine the portion of those damages proximately caused by [defendant’s] conduct alone.” Because the court cannot speculate about the amount of damages or impose a “random restitution amount,” in the absence of evidence that would allow the court to determine, to a reasonable degree of approximation, the dollar figure representing defendant’s proportionate level of contribution to “Cindy’s” losses, the court denied the government’s request for an order of restitution on behalf of “Cindy.”

United States v. Michelson, Crim. No. 09-748-01 (FLW), 2012 WL 1079626 (D.N.J. Mar. 30, 2012) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Calculation Method.”

United States v. Olivieri, No. 09-743 (WHW), 2012 WL 1118763 (D.N.J. Apr. 3, 2012) (slip copy). Defendant pleaded guilty to possessing and distributing child pornography. Three of defendant’s known victims moved through the government and private counsel for restitution, and detailed victim impact statements and expert estimates of total loss were submitted in support of the restitution sought by the victims. The government also sought restitution for unidentified victims. The court began

by noting that the Third Circuit limits recoverable losses to those proximately caused by defendant’s conduct, observing that proximate cause “requires the defendant’s actions to be a ‘substantial factor in causing the ultimate loss.’” The court concluded that although defendant was only one of many who have downloaded images of the victims’ child sexual abuse, his crime nevertheless was a substantial factor in the harms they suffered, and his actions proximately caused the victims’ losses. The court cited the First Circuit in noting that “[p]roximate cause exists where the tortious conduct of multiple actors has combined to bring about harm, even if the harm suffered by the plaintiff might be the same if one of the numerous tortfeasors had not committed the tort.” The court concluded that holding “an end user of images of child sexual abuse responsible for the damage done by end users collectively is consistent with ‘traditional notions of proximate cause.’” Citing the First Circuit, the court rejected the argument that a victim can only show causation by focusing on a specific defendant’s viewing and redistribution of her images and by attributing specific losses to that defendant’s actions. The court agreed with the Second Circuit that proximate cause “cannot be shown by way of evidence of harm that pre-dates the defendant’s crime,” noting, however, that “there is no reason that the evidence of harm must post-date the defendant’s arrest and prosecution.” Evidence of proximate cause is sufficient when the evidence shows that the victim was still suffering damage each time someone downloaded her image, at the time defendant committed his or her offenses. After analyzing the evidence submitted by each of the three known victims, the court concluded that each victim suffered harm that was proximately caused by defendant’s criminal conduct. The court divided each victim’s total losses by 75 to account for the fact that defendant is not the proximate cause of the total amount of recoverable damages and to prevent the victim from being awarded an amount that is more than the total losses suffered. Because the government was unable to present evidence of loss or causation with respect to unidentified victims, the court concluded that restitution could not be awarded to those victims. Defendant was ordered to pay restitution in the amount of \$22,589.45 to “Amy,” \$7,625.54 to “Vicky,” and \$5,683.33 to a third identified victim. In light of the amount of restitution and defendant’s age at the time of expected release, the court concluded that defendant did not have the ability to pay interest and waived the interest

requirement. The court concluded by recommending that defendant participate in the Inmate Financial Responsibility Program and ordering a payment plan, noting that the payment schedule may be modified in the future, if necessary.

United States v. Skowron, 839 F. Supp. 2d 740 (S.D.N.Y. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Attorney’s Fees.”

United States v. Martin, No. 2:10-CR-95, 2012 WL 3597436 (E.D. Tenn. Aug. 20, 2012) (slip copy). Defendant was found guilty of receiving and distributing child pornography, and the government moved for a restitution order for two child-victims. The issue before the district court was whether the harm suffered by the child-victims was proximately caused by defendant’s receiving and distributing the images of the child-victims’ abuse. The court considered Sixth Circuit case law that requires a direct relationship between the injury and the injurious conduct, meaning there must be a causal connection without so many links in the causal chain as to be unreasonable. Applying this standard, the court found that the evidence the government used to show proximate cause was all based on observations and interviews with the child-victims that occurred before defendant was investigated. In contrast, the court noted an Eleventh Circuit case that upheld a restitution order because the government had presented evidence that the victim had been notified about defendant, and the effect that the notification had on the victim. Ultimately, the court denied the request for restitution because it found there was no evidence presented that established a proximate link between the harm to the child-victims and defendant’s receipt and distribution of the images.

United States v. Tallent, 872 F. Supp. 2d 679 (E.D. Tenn. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Calculation Method.”

People v. Runyan, 279 P.3d 1143 (Cal. 2012). Defendant was convicted of gross vehicular manslaughter and ordered to pay restitution to the victim’s estate. The victim had no surviving family or heirs. Defendant appealed the restitution order, arguing that the victim’s estate was not a “direct victim,” and therefore was not entitled to restitution under the California Penal Code (Code). The

intermediate appellate court rejected defendant’s argument based on the definition of “victim” in the Code, which includes any “estate...when that entity is a direct victim of a crime.” The court’s decision was based on its conclusion that an estate is directly economically affected by the death of the estate holder, as well as the policy reason that the legislature didn’t intend for the victim’s death to absolve the defendant of restitution obligations. The California Supreme Court reversed, holding that an estate is not a “direct victim” of crime. The court held that the mandatory restitution statute in the Code allows a victim’s representative to collect restitution for economic losses caused by the crime and accruing before the victim’s death, but that “*after* the actual victim has died, he or she does not incur, or continue to incur, personal economic loss subject to mandatory restitution.” The court disagreed with the lower court’s interpretation of the term “direct victim,” stating that case law defines “direct victim” as an entity “against which the defendant’s crimes had been committed” or which “are the immediate objects of defendant’s offenses.” Further, defendant’s crimes could not have been committed against the victim’s estate because the estate, by definition, did not exist before victim’s death. The court noted, however, that an estate would be the proper recipient for restitution if such restitution was owed to the decedent for economic losses incurred before death. In response to the lower courts’ concerns that this type of ruling would have the perverse result of a defendant owing less restitution to a deceased victim than one that was merely wounded, the court noted two ameliorating factors. One is that the closely analogous civil remedy for wrongful death is limited to collection of damages for pre-death expenses. The other is that the state constitution and statutes provide remedies for surviving family members to collect restitution on their own behalf. The court emphasized that the holding in this case is narrow because in cases where there are surviving heirs, those heirs may seek restitution for the economic damages they themselves suffer from the diminution of the estate. The court then reversed the decision of the court of appeals.

People v. Patala, F062148, 2012 WL 2854452 (Cal. Ct. App. July 11, 2012). Defendant, convicted of assault upon an officer, receiving a stolen vehicle, and evading a pursuing officer with willful disregard, appealed the trial court’s restitution order to pay \$2,537 in victim restitution to the police department for damage done to a police vehicle while defendant

was attempting to flee in the stolen car. Defendant argued that (1) the police department is not a “victim” under the state restitution statute, and (2) the restitution order is unauthorized because it is not tied to his criminal conduct supporting the crimes for which he was convicted. The court agreed with defendant, holding that because defendant was convicted of evading a police officer and the property damage to the police car did not occur during the commission of that crime, the restitution order was unauthorized and must be stricken. The court explained that the state’s restitution statute allows a government entity to receive restitution if it is the direct victim of a crime, but not for costs incurred generally in investigation and prosecution. The court further explained that the only conviction offense to which the restitution ordered could be tied is to that of evading a police officer, but that offense is defined as evading a “pursuing officer.” The court found that although there was evidence that defendant hit the police car while trying to flee the officer, there was no evidence that the police officer was pursuing defendant at that time and, thus, the police department was not a “direct victim” for purposes of the state’s restitution statute. The concurrence noted that it would have held that the police department was a “victim” and “recognize, under the unique facts of this case involving a course of criminal conduct and undoubted economic loss associated with that conduct, that a victim – whether an individual or a tax-supported governmental agency – should not suffer the loss by virtue of the fortuity of the choice of statute under which the conviction obtains.” The concurrence went on to conclude, however, that due to the “inadequacies in the law of victim restitution[,]” which limits restitution to those losses directly related to the conviction statute, the first point was rendered inconsequential. The concurrence further noted that: “It is up to the legislative branch, if it chooses to do so, to clarify and fulfill the expectations of the public by removing barriers to awarding victims compensation for losses they suffer as the result of criminal activity.”

In re Chaddah, No. 306978, 2012 WL 5258288 (Mich. Ct. App. Oct. 23, 2012) (per curiam). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Attorney Fees.”

People v. Fawaz, --- N.W.2d ---, Docket No. 307214, 2012 WL 6633912 (Mich. Ct. App. Dec. 20, 2012). Defendant was convicted of arson. Two

first responders received injuries requiring medical attention as a result of battling the fire started by defendant, and a neighbor was removed from her home after her house became filled with smoke. At sentencing, the prosecutor requested that the trial court assign ten points for Offense Variable (OV) 3, which addresses physical injury to a victim, and for OV 9, which addresses the number of victims. The trial court disagreed, finding that the first responders and neighbor were not victims. Based on a standard of clear error, the appeals court reversed. As to OV 3, the court explained that the definition of victim includes “any person who is harmed by the defendant’s criminal actions.” The court further explained that the first responders were physically harmed and required medical attention, and there was no indication that the legislature intended to exclude first responders from the population of victims. Accordingly, the court held that they were victims. As to OV 9, a trial court must assign ten points if there are 2 to 9 victims placed in danger of physical injury or death. Here, the court found that the neighbor and the two responders were placed in danger of physical injury or death. Accordingly, the court found that the trial court erred in not assigning ten points for this variable. The prosecutor also argued that the trial court erred when it excluded from the restitution award some costs associated with the investigation of the arson requested by another victim, the insurance company. The court first confirmed that the insurance company was a victim under Michigan’s Crime Victim’s Rights Act, and that a corporate victim is entitled to costs associated with investigating a defendant’s illegal activity—such as reimbursement for the origin and cause investigation, lab analysis, and investigation expenses requested here. However, the court found that the prosecutor failed to meet its burden in showing that certain legal and court reporter fees in connection with defendant’s deposition were investigatory, and thus found that the trial court did not err in denying the restitution award as to these expenses. The court then remanded for resentencing consistent with the opinion.

People v. Wass, No. 302263, 2012 WL 832859 (Mich. Ct. App. Mar. 13, 2012) (per curiam). Defendant, convicted of unlawful removal of an automobile and failure to stop at the scene of a property damage accident, appealed the trial court’s order awarding \$740 in restitution and \$1092 in jury costs. Defendant raised two arguments. First,

defendant challenged the trial court's statutory authority to impose the restitution order, arguing that the fire department is not a "victim" for purposes of restitution. The court of appeals agreed and concluded that the trial court committed plain error in ordering the restitution award. The court found that the restitution award reimbursed the fire department for salary payments and similar expenses that it incurred while responding to the scene, but that such expenses do not fall within the scope of "financial harm" suffered for restitution purposes. Second, defendant argued that the trial court's assessment of jury costs impermissibly interferes with his right to a jury trial. The court agreed and concluded that the trial court committed plain error in assessing this cost. For these reasons, the court reversed and remanded the case for an issuance of an amended judgment.

State v. White, 274 P.3d 313 (Or. Ct. App. 2012).

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

State v. Shepherd, --- A.3d ---, No. 2010-336, 2012 WL 5275420 (Vt. Oct. 26, 2012). Defendant pleaded guilty to aggravated assault, lewd and lascivious conduct with a child, and sexual exploitation of a child, arising out of his sexual assault of a 10-year-old child-victim. Defendant appealed the trial court's order that he pay restitution for the costs of relocating the child-victim's family to Hawaii that were not covered by state victims' compensation program funds. Defendant, who was the live-in nanny for the child-victim's twin, sexually assaulted the child-victim over a period of several months. The child-victim and his family lived in a small, rural town, and after defendant was arrested, the child-victim's identity became known both at school and in the community at large. The child-victim and his family were treated poorly by members of the community and were ostracized. After the child-victim began therapy, his therapist and his mother concluded that it would be necessary for the child-victim to move away from the community. The child-victim and his family moved to Hawaii, as family support was present in the area, and the state offered generous assistance to special-needs children, including the child-victim's twin. On appeal, defendant argued that the relocation expenses ordered in restitution were not "costs caused directly by his crime" and that Hawaii was an unreasonable relocation destination. The court rejected defendant's arguments and affirmed the restitution order, finding that a direct

link between the crime and the relocation expenses was substantiated, as the child-victim's "emotional injury and ostracization in a small town were the natural and probable consequences of the sexual assaults, thereby necessitating relocation." Because of the severity of the crime and the assessment of the child-victim's therapist, the court found that the requisite causal connection between the crime and the losses was established. With respect to the relocation destination, the court found it to be "of no moment" that the family selected Hawaii, as the "secondary decision of where to relocate necessarily took into account the unique needs of the family as a whole." Responding to the dissent's position that relocation expenses are not losses but are instead akin to pain and suffering, the court explained that emotional injury may result in "readily ascertainable costs" that are recoverable losses in restitution and observed that this is routinely the case where counseling expenses for emotional trauma are ordered in restitution.

5. Collection

United States v. Catoggio, 698 F.3d 64 (2nd Cir. 2012) (per curiam). Defendant pleaded guilty in 2001 to one count of racketeering arising from his involvement in a massive securities fraud scheme. As part of his sentence, the district court ordered him to pay \$80 million in restitution pursuant to the Mandatory Victim Restitution Act (MVRA). Defendant appealed the restitution order, arguing, *inter alia*, that the court could not order restitution without first identifying the victims and their losses. The court agreed, and remanded for the limited purpose of resentencing. Due to a variety of factors, eight years elapsed before the district court resentenced defendant. On remand to the sentencing court, the government submitted a report identifying over 9,000 victims and estimating losses of \$190 million. The court incorporated that loss information into its restitution order and sentenced defendant to pay just over \$190 million. At the time of his initial sentencing, defendant had deposited approximately \$536,000 with the clerk of the court for the purpose of paying restitution. Defendant appealed the sentence, arguing that the sentencing court improperly refused to release any of this money, and consequently denied him the right to secure counsel of his choice. The appeals court began by noting that the All Writs Act provides courts significant flexibility in exercising their authority. It was a case of first impression in the Second Circuit

Court of Appeals as to whether the Act enabled a court to restrain a convicted defendant's property in anticipation of a restitution order, but the court explained that many other courts, both in the Second Circuit and in other jurisdictions, have uniformly answered in the affirmative. The court noted that other courts have explained that a sentencing court may use the All Writs Act to prevent defendants from frustrating attempts to collect restitution debt. Based on this rationale, the court concluded that the sentencing court properly exercised its authority. The court further noted that defendant pleaded guilty to a crime for which restitution was mandatory under the MVRA, and that because the plea agreement included a sentencing enhancement for fraud causing losses of \$80 million or more, it was certain that restitution was going to exceed the \$536,000 defendant had deposited. For that, and other reasons, the court affirmed the sentencing court's restitution order.

United States v. Gallion, No. 11-6187, 2012 WL 5374121 (6th Cir. Nov. 2, 2012) (slip copy).

Attorney Ford served as the court-appointed crime victims' representative in a federal criminal prosecution against defendant attorneys who had perpetrated a fraud on their clients to divert settlement proceeds to themselves. Ford also represented the victims in a successful civil proceeding, which resulted in a judgment of \$42 million in favor of the victims. Ford distributed most of the \$42 million, and paid herself the attorney's fees to which she was entitled. Subsequently, the civil case judgment was reversed and the Kentucky Supreme Court granted discretionary review. Upon reversal in the civil case, the government filed a motion in the criminal case asking the district court to order Ford to provide an accounting of all funds she had collected in the civil action but had not distributed to her clients, which included her attorney's fees, arguing that if she were required to return the funds collected to the civil defendants, the government would need to know the amount and location of funds so they could protect the funds as federal restitution under the Mandatory Victim Restitution Act (MVRA). Ford provided the government with a detailed spreadsheet of the funds, but refused to provide her personal financial account information showing the location of her attorney's fees. The district court ordered Ford to disclose the location of any undistributed funds, including attorney's fees. Upon Ford's objection, the court allowed her to provide the information under seal in camera, which she so provided. Ford

contended on appeal that the district court lacked subject matter jurisdiction to order her to provide the accounting. The court noted that the MVRA requires criminal defendants to pay victims restitution in the full amount of their losses, and requires the district court to reduce restitution by any amount the victims recover as compensatory damages for the same loss in a civil suit. The court further noted that the government is responsible for collection of unpaid restitution under the MVRA, and may enforce a restitution order by "all other available and reasonable means." The government's collection methods may be used by the government in federal court in the same criminal case in which the district court ordered the payment of restitution because the United States may always litigate in its own courts. Additionally, U.S. code provisions grant district courts jurisdiction over restitution enforcement proceedings. Accordingly, the district court had jurisdiction to order Ford to provide an accounting, which is an "available and reasonable means" to enforce a federal restitution order.

United States v. King, Criminal No. 08-66-01, 2012 WL 1080297 (E.D. Pa. Apr. 2, 2012) (slip copy).

Defendant was convicted of numerous counts of mail fraud, health care fraud, and making false statements in a health care matter, and sentenced to thirty-six months prison time, followed by three years of supervised release. Defendant was also ordered to pay \$780,151 in restitution, "due immediately," and any unpaid balance when released from custody was to be paid in \$500 monthly installments. Approximately two years after defendant's sentencing, the government filed an application for writ of garnishment against five garnishees—including T. Rowe Price and Fidelity Investments—that the government believed to be in possession, custody, and/or control of retirement accounts belonging to defendant that were not exempt from garnishment. Defendant filed an objection to the garnishment, arguing, *inter alia*, that the Consumer Credit Protection Act (CCPA) protects his retirement accounts from garnishment above a 25 percent cap, and that the accounts are exempt due to the anti-alienation provisions of the Employee Retirement Income Security Act (ERISA). The court rejected defendant's arguments, holding that defendant's retirement accounts are subject to garnishment in partial satisfaction of his outstanding restitution obligation. The court first found defendant's reliance on the CCPA to be improper because the

government sought to garnish the corpus of the retirement accounts, and the CCPA protects weekly earnings only, and because the restitution judgment provided that restitution was due immediately. The court explained that this finding is “consistent with the intent of federal restitution laws and serves to effectively promote the goal of making victims whole in a timely manner.” As the court further explained: “If the Defendant was required, after his release from incarceration, to make restitution exclusive to the scheduling plan, he would only have made payment in the amount of \$120,000 before the twenty year termination of liability would be applied. . . . This result contradicts the clear intention of Congress that victims have a ‘right to full and timely restitution.’” The court also held that the Mandatory Victim Restitution Act (MVRA) supersedes the anti-alienation provisions of ERISA for two reasons: (1) the MVRA’s provision that a judgment imposing a fine may be enforced against all property or rights to property of the person fined “notwithstanding any other Federal law” removes the “general bar” erected by ERISA and the federal tax code; and (2) the MVRA directs that criminal fines should be enforced in the same manner as tax liability, therefore the only property that can be shielded from seizure is that which the government cannot seize to satisfy payment of income taxes, and retirement benefits are not protected property. Lastly, the court held that it declined to deny or limit defendant’s restitution obligation on the basis of hardship, and that the Eighth Amendment did not preclude allowing garnishment to accelerate the payment of his restitution obligations.

United States v. Herrmann, --- F. Supp. 2d ---, No. 1:10cr91, 2012 WL 5879126 (E.D. Va. Nov. 20, 2012) (slip copy). Defendant pleaded guilty to wire fraud and was ordered to pay \$231,035.91 to the victim, which was due and payable immediately and, if not paid immediately, then to be paid at a monthly rate of \$150 after her release from confinement. In addition to the restitution order, defendant consented to the entry of an order of forfeiture and a money judgment in the same amount. When defendant failed to make any restitution payments, the government sought the forfeiture of defendant’s vested interest in an employee retirement plan. Defendant opposed the forfeiture, arguing that the anti-alienation and assignment provision of the Employee Retirement Income Security Act of 1974 (ERISA), bars the forfeiture of her interest in the pension funds. The

court followed the Second Circuit and several other district courts in ruling that ERISA “unambiguously prohibits civil or criminal forfeiture of any ERISA plan, including defendant’s interest in [her pension funds],” until after defendant actually receives the plan funds. The court emphasized that its holding was narrow, applying only to the criminal forfeiture of ERISA-protected employee retirement plans. The court explicitly did not decide whether a different result might have been reached if a writ of garnishment were instead sought pursuant to the Mandatory Victim Restitution Act of 1996 (MVRA), as courts “have held that the MVRA operates as a congressionally created exception to ERISA’s anti-alienation and assignment provision.”

6. Future Lost Income

United States v. Kearney, 672 F.3d 81 (1st Cir. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Attorney Fees.”

United States v. Poole, Crim. Action No. 09-355, 2012 WL 4863789 (E.D. La. Oct. 11, 2012) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Causation.”

7. Joint and Several Liability

United States v. Oceanpro Indus., Ltd., 674 F.3d 323 (4th Cir. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Causation.”

8. Jurisdiction

United States v. Oceanpro Indus., Ltd., 674 F.3d 323 (4th Cir. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Causation.”

United States v. Murray, 700 F.3d 241 (5th Cir. 2012). Defendants, separately convicted of various federal fraud charges arising out of a Ponzi scheme, appealed the district court’s order reopening their sentences and awarding about \$17 million in restitution to the victims under the Mandatory Victim Restitution Act (MVRA), more than six months after final judgments had been entered. Defendants argued that the trial court lacked authority to issue the restitution orders. The United States Court of Appeals for the Fifth Circuit agreed and held that the

district court exceeded its authority. In reaching its holding, the court examined 18 U.S.C. § 3663A(c) (3), the MVRA provision that exempts property offense cases from mandatory restitution where: (A) “the number of identifiable victims is so large as to make restitution impracticable”; or (B) “determining complex issues of fact . . . would complicate or prolong the sentencing process” such that “the need to provide restitution to any victim is outweighed by the burden on the sentencing process.” The court concluded that when a district court finds, as it did here, that § 3663A(c)(3) applies, then restitution was not mandatory under the MVRA and the statute does not authorize the reopening of a final judgment for the purpose of adding an order of restitution. The court distinguished the United States Supreme Court’s decision in *Dolan v. United States*, 130 S. Ct. 2533 (2010), stating that “[t]he Supreme Court did not discuss § 3663A(c)(3) in the *Dolan* case, and for good reason: The defendant in *Dolan* ‘pleaded guilty to a federal charge of assault resulting in serious bodily injury,’ rather than an offense against property.”

United States v. Gallion, No. 11-6187, 2012 WL 5374121 (6th Cir. Nov. 2, 2012) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Collection.”

United States v. Fair, 699 F.3d 508 (D.C. Cir. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Calculation Method.”

United States v. Zagon, No. 2:11-cr-65-GZS, 2012 WL 1253057 (D. Me. Apr. 13, 2012) (slip copy). Defendant was convicted of and sentenced in connection with various charges arising out of his theft of an individual victim’s identity. The victim appeared at sentencing and spoke at length about the impact the crime had on his life. In advance of sentencing, the victim had submitted a “declaration of loss” to the government, and the government admitted it erred in failing to forward this document to the court. No requests for restitution to be paid to the individual victim were submitted to the court and, consequently, restitution was not ordered to be paid to the victim as part of defendant’s sentence. Although restitution was not requested or ordered to be paid to the individual victim, restitution was requested and ordered to be paid to five government entities that were also defrauded as a result of defendant’s conduct. Shortly after sentencing, the individual victim asked whether he was entitled to restitution,

and the government filed a Motion to Amend Restitution Order requesting that the court amend the judgment and order \$6,115.50 in restitution to be paid to the individual victim. Defendant objected, challenging the restitution amount and arguing that he did not have the opportunity to question the victim on the issue of loss. The court found that it did not commit “clear error” in failing to order restitution to the individual victim, in the absence of a documented request. Although acknowledging that some statutory authority allows for post-sentence determination of restitution, the court found that the exceptions did not apply in this case, as the victim’s loss was ascertainable at the time of sentencing and because additional losses were not subsequently discovered. The court “regrettably conclude[d]” that it had no authority to award restitution to the individual victim and denied the government’s motion.

State v. Nuckols, 274 P.3d 536 (Ariz. Ct. App. 2012). Defendant pleaded guilty to multiple felony counts arising from his having fled from and then shot at a Pima County deputy sheriff. Defendant waived his right to a hearing for determining the amount of restitution, and at sentencing the trial court ordered restitution to remain open for 30 days. The state filed its restitution claim over two months later, requesting \$540 in restitution to the victim—Pima County—for its costs in repairing a vehicle that defendant had shot. The trial court initially granted the request for restitution but later sustained defendant’s objection and denied the restitution request as untimely. The state appealed, arguing that it was entitled to restitution despite the untimely filing. The court agreed with defendant, finding that although a victim is constitutionally and statutorily entitled to restitution, requests for restitution must be timely and in accordance with the trial court’s orders, to avoid a waiver of the victim’s right. The court also noted the importance of distinguishing between timeliness and jurisdiction, explaining that “contrary to the state’s suggestion, a request for restitution is not timely simply because the superior court retains jurisdiction to order it.” The court then affirmed the trial court’s denial of the state’s request for restitution.

People v. Wass, No. 302263, 2012 WL 832859 (Mich. Ct. App. Mar. 13, 2012) (per curiam). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Causation.”

9. Other

United States v. Catoggio, 698 F.3d 64 (2nd Cir. 2012) (per curiam). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Collection.”

United States v. Stoerr, 695 F.3d 271 (3rd Cir. 2012). Defendant pleaded guilty to numerous federal charges arising from his participation in an illegal bid rigging and kickback scheme while he was employed by Severson Environmental Services, Inc. (“Severson”). Severson, a non-party to the underlying criminal proceeding, voluntarily compensated one of defendant’s victims, Tierra Solutions, Inc. (“Tierra”). At defendant’s sentencing, Severson sought restitution under the Mandatory Victim Restitution Act (“MVRA”), for reimbursement of the amount that it paid to Tierra. The district court denied Severson’s request for restitution, instead ordering that defendant pay restitution to Tierra. Severson appealed, arguing that the district court erred in refusing its request for restitution because the MVRA requires courts to order restitution for any entity that has compensated a crime victim, and the state moved to dismiss Severson’s appeal. Although Severson acknowledged it is not a party to the criminal proceedings, it asserted that it had a right to appeal the district court’s restitution order as a non-party payer of compensation to a victim under the MVRA. The court dismissed the appeal, holding that a non-party lacks standing to appeal a restitution order, “because a non-party lacks ‘a judicially cognizable interest’ in a criminal defendant’s sentence, and is thus not aggrieved by the defendant’s sentence.” The court explained that “[a]lthough a restitution order may resemble a civil judgment in the sense that it compensates a private party, it remains ‘criminal rather than civil in nature[,]’” and that “regardless of the benefit that a restitution order may bestow on a private entity, restitution is largely ‘for the benefit of the State’ rather than for the benefit of a private party.” Accordingly, the court granted the state’s motion to dismiss.

United States v. Chem. & Metal Indus., Inc. 677 F.3d 750 (5th Cir. 2012). Defendant-corporation appealed from a judgment of conviction and sentence for negligent endangerment that resulted in death, in connection with defendant’s mislabeling of a container of highly toxic industrial waste as non-toxic material. The sentence included a \$1,000,000 fine

and a restitution award of \$2,000,000 to the victim’s estate. On appeal, defendant argued that the relevant statute for restitution does not allow for recovery beyond the victim’s actual losses, and because the prosecution failed to prove the victim’s actual losses before the trial court, restitution would be improper. Defendant also argued that the \$1,000,000 fine was improper because fines are statutorily limited to \$500,000 unless a larger pecuniary gain or loss can be proven, and that no such proof had been offered by the prosecution. The court agreed with defendant’s arguments, finding that the record showed no evidence regarding the amount of pecuniary loss suffered by the victim’s estate. Accordingly, the court modified the fine to \$500,000 and vacated the restitution award.

United States v. Laraneta, 700 F.3d 983 (7th Cir. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Calculation Method.”

United States v. Rangel, 688 F.3d 972 (9th Cir. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Ability to Pay.”

United States v. Tuma, Crim. No. 11-0031-01, 2012 WL 6087068 (W.D. La. Dec. 5, 2012) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Causation.”

United States v. Citgo Petroleum Corp., --- F. Supp. 2d ---, Crim. Action No. C-06-563, 2012 WL 4068675 (S.D. Tex. Sept. 14, 2012) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to be Heard.”

United States v. Herrmann, --- F. Supp. 2d ---, No. 1:10cr91, 2012 WL 5879126 (E.D. Va. Nov. 20, 2012) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Collection.”

State v. Dolan, No. 1 CA-CR 11-0173, 2012 WL 2002763 (Ariz. Ct. App. June 5, 2012) (memorandum decision). Defendant was convicted of manslaughter and ordered, *inter alia*, to pay \$2,900 in restitution to the victim’s mother to cover the cost of transporting the victim’s body. Defendant argued on appeal that the victim’s mother was not entitled to restitution because the victim initiated the altercation that resulted in defendant’s retaliation. Defendant also

argued that the restitution award should be offset by the amount he expended on medical care for treating the injuries inflicted on him by the victim. The court rejected both arguments. First, the court noted that there is no authority “that precludes restitution payable to a victim’s immediate family based on the victim’s purported culpability in the charged offense.” Rather, “[a] determination that restitution is unavailable to [the victim’s] mother would be inconsistent with the jury’s verdict.” Second, the court rejected defendant’s argument that the restitution award should be offset by the cost of his medical care, explaining that the state’s restitution statutes expressly exclude “losses incurred by the convicted person” from the definition of economic loss compensable through restitution. Accordingly, the restitution order was affirmed.

State v. Nuckols, 274 P.3d 536 (Ariz. Ct. App. 2012).

*For full case summary, see “Specific Victims’ Rights – Right to Restitution – Jurisdiction.”

People v. Padilla-Lopez, 279 P.3d 651 (Colo. 2012). Defendant was charged with child abuse for possessing illegal drugs and drug paraphernalia in her home and within reach of her two young children. Defendant subsequently pleaded guilty to two counts of possession, misdemeanor theft, and misdemeanor child abuse, and the state removed defendant’s children from her and placed them in foster care. As part of her plea agreement, defendant agreed to pay lawfully imposed restitution but did not stipulate that the El Paso County Department of Human Services (DHS) was a victim to which she owed restitution. The government argued that DHS is a victim under the law that is entitled to restitution because it was required to provide care to defendant’s children. The trial court agreed, ordering defendant to pay \$19,295.14 for the cost of caring for and providing psychological counseling for defendant’s children while in DHS custody. “Victim” under the relevant statute is defined as “any person aggrieved by the conduct of an offender,” and “restitution” is defined as “any pecuniary loss suffered by a victim . . . proximately caused by an offender’s conduct and that can be reasonably calculated and recompensed in money.” The Colorado Supreme Court accepted certiorari on the issue of whether DHS falls within the statutory definition of “victim.” The court analyzed the statute and relevant case law, concluding that when a “governmental agency seeking cost recovery through the restitution statute does not fall within

the defining scope of the underlying criminal statute as a primary victim, the legislature must specifically enumerate the sought-for agency costs within the restitution statute for them to be eligible for an award of restitution.” The court reviewed the statutes at issue and concluded that DHS was not “aggrieved” by the crime of child abuse; consequently, DHS is not a “victim” of that offense. Put differently, the “child abuse statute does not endow DHS with ‘legal rights’ that can be infringed upon by the crime of child abuse.” Instead, the court held, the costs DHS sought in restitution occurred as a result of “expenditures made in the course of fulfilling its statutorily mandated function to provide ‘necessary shelter, sustenance, and guidance’ to dependent and neglected children.” Contrasting offenses such as welfare fraud, food stamp theft, or vandalism of government buildings—in which DHS would have rights that are infringed upon by criminal conduct—with situations where government agencies “spend money allocated to them in order to fulfill their public function,” the court concluded that DHS was not a victim of defendant’s conduct and was not entitled to restitution. The judgment was affirmed and the case remanded for further proceedings consistent with the opinion. A dissenting opinion was filed in the case, arguing that “the majority essentially eviscerates restitution as a remedy for governmental agencies in Colorado” and would have held that although DHS is not allowed to recover any of its “ordinary” expenses in restitution, it is allowed to recover “only the extraordinary costs of in-home therapy” that were rendered necessary as a result of “the severity of the abuse the children suffered due to defendant’s conduct.”

McDaniel v. State, 45 A.3d 916 (Md. Ct. Spec. App. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Ability to Pay.”

State ex rel. Juvenile Dep’t of Douglas Cnty. v. S.J.P., 271 P.3d 124 (Or. Ct. App. 2012). Youth offender was found to be within the jurisdiction of the juvenile court for committing an act that, if committed by an adult, would constitute assault in the fourth degree. Youth offender appealed a delinquency order requiring him to pay a compensatory fine to the victim in an amount equal to airfare expenses that were incurred to permit the victim to travel to Oregon to testify against the youth offender. Although the state did not serve the victim with a

subpoena, the victim voluntarily purchased an airline ticket and traveled to Oregon to testify. On appeal, youth offender argued that the compensatory fine was improper because the airfare expenses did not constitute economic damages or costs that could be recovered in a civil action. The court of appeals agreed. The court rejected the victim's argument that the airfare expenses constituted economic damages because they are costs that would not be awarded to a prevailing party in a civil action. Moreover, the court further concluded that no theory of civil liability permitted the recovery of the victim's airline expenses as damages because the victim was not "required" to incur the expenses. For these reasons, the court vacated the compensatory fine and remanded for a new dispositional judgment.

State v. N.R.L., 277 P.3d 564 (Or. Ct. App. 2012).
*For full case summary, see "Specific Victims' Rights – Right to Restitution – Ability to Pay."

United States v. Alcatel-Lucent France, 688 F.3d 1301 (11th Cir. 2012). Alcatel-Lucent and three of its subsidiaries were charged with violation of the Foreign Corrupt Practices Act. Alcatel-Lucent reached a deferred prosecution agreement, and each subsidiary agreed to plead guilty to one count of conspiracy, but no restitution was included. Instituto Costarricense de Electricidad (ICE)—a Costa Rican telecommunications company—sought to be declared a victim, but the district court determined that ICE was not a victim because it had also been involved in the illegal activity through a scheme in which ICE officials and board members accepted bribes and kickbacks for awarding contracts to the subsidiaries. ICE appealed the denial of victim status in both cases, and filed a petition for a writ of mandamus in each case under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771(d)(3). A two-judge panel of the court of appeals consolidated the two CVRA petitions and denied relief, and then another two-judge panel declined to reconsider. On appeal, the court of appeals considered two issues: (1) whether ICE may appeal a district court's denial of victim status under the CVRA; and (2) whether jurisdiction exists under 28 U.S.C. § 1291. With regard to whether jurisdiction exists, the court concluded that it did not in either case—in the case against Alcatel-Lucent the district court approved a deferred prosecution agreement, therefore neither conviction nor sentencing took place. In the case against the subsidiaries, there was a conviction and sentencing

order to appeal from, but the court determined that ICE "was a 'collateral entity to the proceeding'"—a nonparty to the criminal action—and as such it lacked standing to appeal the defendants' sentence. The court declined to read an implied right of intervention into the CVRA. The court then concluded that it lacked jurisdiction and dismissed the appeal.

II. STANDING

A. Definition of "Victim"

United States v. Kearney, 672 F.3d 81 (1st Cir. 2012).
*For full case summary, see "Specific Victims' Rights – Right to Restitution – Attorney Fees."

United States v. Oceanpro Indus., Ltd., 674 F.3d 323 (4th Cir. 2012). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Causation."

In re Allen, 701 F.3d 734 (5th Cir. 2012) (per curiam). *For full case summary, see "Specific Victims' Rights – Right to be Heard."

In re Amy Unknown, 701 F.3d 749 (5th Cir. 2012) (en banc). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Causation."

United States v. Espinoza, 677 F.3d 730 (5th Cir. 2012). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Causation."

Doe v. Boland, 698 F.3d 877 (6th Cir. 2012). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Causation."

United States v. Evers, 669 F.3d 645 (6th Cir. 2012). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Causation."

United States v. Schmidt, 675 F.3d 1164 (8th Cir. 2012). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Causation."

United States v. Rizzolo, No. 11-10384, 2012 WL 1095221 (9th Cir. Apr. 3, 2012) (memorandum).
*For full case summary, see "Specific Victims' Rights – Right to be Heard."

United States v. Avila, CR 11-126-PHX-JAT, 2012 U.S. Dist. LEXIS 5286 (D. Ariz. Jan. 18, 2012). *For

full case summary, see “Specific Victims’ Rights – Right to Access Information and Documents – Other.”

United States v. Daly, Criminal No. 3:11cr121(AWT), 2012 WL 315409 (D. Conn. Feb. 1, 2012) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to Access Information and Documents – Plea Agreement Terms.”

United States v. Veazie, No. 2:11-cr-00202-GZS, 2012 WL 1430540 (D. Me. Apr. 25, 2012) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Causation.”

United States v. Michelson, Crim. No. 09-748-01 (FLW), 2012 WL 1079626 (D.N.J. Mar. 30, 2012) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Calculation Method.”

United States v. Olivieri, No. 09-743 (WHW), 2012 WL 1118763 (D.N.J. Apr. 3, 2012) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Causation.”

United States v. Skowron, 839 F. Supp. 2d 740 (S.D.N.Y. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Attorney’s Fees.”

United States v. Citgo Petroleum Corp., --- F. Supp. 2d ---, Crim. Action No. C-06-563, 2012 WL 4068675 (S.D. Tex. Sept. 14, 2012) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to be Heard.”

People v. Runyan, 279 P.3d 1143 (Cal. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Causation.”

In re David, 135 Cal. Rptr. 3d 855 (Cal. Ct. App. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Protection – Other.”

People v. Patala, F062148, 2012 WL 2854452 (Cal. Ct. App. July 11, 2012). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Causation.”

People v. Padilla-Lopez, 279 P.3d 651 (Colo. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Other.”

People v. Fawaz, --- N.W.2d ---, Docket No. 307214, 2012 WL 6633912 (Mich. Ct. App. Dec. 20, 2012). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Causation.”

People v. Wass, No. 302263, 2012 WL 832859 (Mich. Ct. App. Mar. 13, 2012) (per curiam). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Causation.”

State v. Nix, 283 P.3d 442 (Or. Ct. App. 2012). Defendant was convicted of 20 counts of second-degree animal abuse after police entered defendant’s farm and found dozens of emaciated animals and a number of carcasses. The state appealed the trial court’s sentencing ruling that merged defendant’s 20 counts into a single count based on its conclusion that “animals are not ‘victims,’ as defined by statute.” The state argued that for purposes of the second-degree animal neglect statute, an animal is a “victim” because according to the language of the statute “there are as many separate offenses as there are victims.” The court of appeals agreed with the state and remanded the case for the entry of separate convictions on each guilty verdict, holding that for purposes of the state’s animal neglect statute, animals are “victims.” The court of appeals reasoned that the “meaning of ‘victim’ is not fixed; rather, it is context specific.” Therefore, although definitions elsewhere in the state constitution, statutes, and dictionary define “victim” as a “person,” those definitions do not do not control the meaning of “victim” under the animal neglect statute. Instead, the court looked for “affirmative textual evidence of a deliberate choice by the legislature.” The court found no textual evidence of legislative intent that animal neglect was to be treated as a property crime, and noted that if the owner of the animal was assumed to be the victim, it would often lead to the anomalous result of the animal owner being both the defendant and the victim. The court also rejected the argument that the “victim” in animal neglect cases was the “public,” reasoning that, although there might be a broader public interest in preventing animal neglect, because the statute identifies an actual harm and the particular subject who must suffer the harm, the text and context of the statute shows the legislature’s intent to “protect individual animals as sentient beings, rather

than to vindicate a more generalized public interest in welfare.”

State v. Pollock, 284 P.3d 1222 (Or. Ct. App. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Other.”

B. Victim Standing – Civil Courts

Jimenez v. Waller, No. 12-1884, 2012 WL 6644065 (7th Cir. Nov. 5, 2012) (slip opinion). *For full case summary, see “Specific Victims’ Rights – Right to Access Information and Documents – Other.”

C. Victim Standing – Criminal Justice System

1. Trial Court

In re Allen, 701 F.3d 734 (5th Cir. 2012) (per curiam). *For full case summary, see “Specific Victims’ Rights – Right to be Heard.”

United States v. Avila, CR 11-126-PHX-JAT, 2012 U.S. Dist. LEXIS 5286 (D. Ariz. Jan. 18, 2012). *For full case summary, see “Specific Victims’ Rights – Right to Access Information and Documents – Other.”

United States v. Egan, No. 10 Cr. 191(JFK), 2012 WL 3839412 (S.D.N.Y. Sept. 5, 2012) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to be Heard.”

United States v. Citgo Petroleum Corp., --- F. Supp. 2d ---, Crim. Action No. C-06-563, 2012 WL 4068675 (S.D. Tex. Sept. 14, 2012) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to be Heard.”

2. Appellate Court

United States v. Stoerr, 695 F.3d 271 (3rd Cir. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Other.”

United States v. Slovacek, 699 F.3d 423 (5th Cir. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Causation.”

United States v. Keifer, No. 11-3942 (6th Cir. Nov. 5, 2012) (order), available at <http://law.lclark.edu/live/files/12787-us-v-keiferca6110512>. *For full case

summary, see “Specific Victims’ Rights – Right to Restitution – Calculation Method.”

People v. Eli, B230731, 2012 WL 1264463 (Cal. Ct. App. Apr. 16, 2012). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Attorney’s Fees.”

State v. Gault, 39 A.3d 1105 (Conn. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Due Process, Fairness, Dignity, and Respect.”

State v. Pollock, 284 P.3d 1222 (Or. Ct. App. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Other.”

D. Victim Standing – Ripeness and Mootness

1. Pre-Charging

United States v. Daly, Criminal No. 3:11cr121(AWT), 2012 WL 315409 (D. Conn. Feb. 1, 2012) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to Access Information and Documents – Plea Agreement Terms.”

2. Post-Conviction

United States v. Egan, No. 10 Cr. 191(JFK), 2012 WL 3839412 (S.D.N.Y. Sept. 5, 2012) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to be Heard.”

III. ENFORCEMENT

A. General Obligation to Afford Rights

1. Of Courts

Outar v. Khahaifa, No. 10-CV-3956 (MKB)(JO), 2012 WL 6698710 (E.D.N.Y. Sept. 25, 2012) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to Due Process, Fairness, Dignity, and Respect.”

2. Of Government

Jimenez v. Waller, No. 12-1884, 2012 WL 6644065 (7th Cir. Nov. 5, 2012) (slip opinion). *For full case summary, see “Specific Victims’ Rights – Right to Access Information and Documents – Other.”

B. Multiple Victim Cases

United States v. Catoggio, 698 F.3d 64 (2nd Cir. 2012) (per curiam). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Collection.”

United States v. Murray, 700 F.3d 241 (5th Cir. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Jurisdiction.”

C. Remedies for Rights Violations

1. Voiding Plea, Sentence, or Parole Decision

United States v. Daly, Criminal No. 3:11cr121(AWT), 2012 WL 315409 (D. Conn. Feb. 1, 2012) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to Access Information and Documents – Plea Agreement Terms.”

D. Writs

1. Mandamus

In re Allen, 701 F.3d 734 (5th Cir. 2012) (per curiam). *For full case summary, see “Specific Victims’ Rights – Right to be Heard.”

United States v. Slovacek, 699 F.3d 423 (5th Cir. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Causation.”

In re Amy, 698 F.3d 1151 (9th Cir. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Causation.”

United States v. Citgo Petroleum Corp., --- F. Supp. 2d ---, Crim. Action No. C-06-563, 2012 WL 4068675 (S.D. Tex. Sept. 14, 2012) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to be Heard.”

Carter v. Bigelow, 869 F. Supp. 2d 1322 (D. Utah 2011). *For full case summary, see “Specific Victims’ Rights – Right to Due Process, Fairness, Dignity, and Respect.”

Jack Doe 1 v. Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 280 P.3d

377 (Or. 2012) (en banc). *For full case summary, see “Specific Victims’ Rights – Right to Due Process, Fairness, Dignity, and Respect.”

State v. Pollock, 284 P.3d 1222 (Or. Ct. App. 2012).

*For full case summary, see “Specific Victims’ Rights – Right to Restitution – Other.”

2. Other

State v. Bray, 279 P.3d 216 (Or. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Refuse Discovery Requests.”

State v. Bray, 291 P.3d 727 (Or. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Refuse Discovery Requests.”

E. Waiver of Rights

1. By Prosecutor

United States v. Zagon, No. 2:11-cr-65-GZS, 2012 WL 1253057 (D. Me. Apr. 13, 2012) (slip copy).

*For full case summary, see “Specific Victims’ Rights – Right to Restitution – Jurisdiction.”

State v. Nuckols, 274 P.3d 536 (Ariz. Ct. App. 2012).

*For full case summary, see “Specific Victims’ Rights – Right to Restitution – Jurisdiction.”

2. By Victim

In re Allen, 701 F.3d 734 (5th Cir. 2012) (per curiam). *For full case summary, see “Specific Victims’ Rights – Right to be Heard.”

United States v. Zagon, No. 2:11-cr-65-GZS, 2012 WL 1253057 (D. Me. Apr. 13, 2012) (slip copy).

*For full case summary, see “Specific Victims’ Rights – Right to Restitution – Jurisdiction.”

United States v. Citgo Petroleum Corp., --- F. Supp. 2d ---, Crim. Action No. C-06-563, 2012 WL 4068675 (S.D. Tex. Sept. 14, 2012) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to be Heard.”

State v. Nuckols, 274 P.3d 536 (Ariz. Ct. App. 2012).

*For full case summary, see “Specific Victims’ Rights – Right to Restitution – Jurisdiction.”

IV. STANDARD OF REVIEW

A. Mandamus

In re Allen, 701 F.3d 734 (5th Cir. 2012) (per curiam). *For full case summary, see “Specific Victims’ Rights – Right to be Heard.”

In re Amy Unknown, 701 F.3d 749 (5th Cir. 2012) (en banc). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Causation.”

United States v. Citgo Petroleum Corp., --- F. Supp. 2d ---, Crim. Action No. C-06-563, 2012 WL 4068675 (S.D. Tex. Sept. 14, 2012) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to be Heard.”

V. CONSTITUTIONAL ISSUES RELATED TO VICTIMS’ RIGHTS

A. Right of Access – Public and Media

Kovaleski v. State, 103 So. 3d 859 (Fla. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Courtroom Accommodations – Closed Courtroom.”

Jack Doe I v. Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 280 P.3d 377 (Or. 2012) (en banc). *For full case summary, see “Specific Victims’ Rights – Right to Due Process, Fairness, Dignity, and Respect.”

Koenig v. Thurston County, 287 P.3d 523 (Wash. 2012) (en banc). *For full case summary, see “Specific Victims’ Rights – Right to Due Process, Fairness, Dignity, and Respect.”

B. Defendant’s Right to Confrontation

United States v. DeLeon, 678 F.3d 317 (4th Cir. 2012). Defendant was convicted of the second-degree murder and assault of his eight-year-old stepson. On appeal, defendant argued, *inter alia*, that the trial court admitted statements made by the child-victim during a meeting with a social worker in violation of his Confrontation Clause rights. Approximately five months before he was killed, the child-victim and his family met with a licensed social worker who worked for the Air Force Family Advocacy Program. The child-victim’s teacher had

referred the child-victim to the program after she saw a bruise on his forehead. The social worker met with the child-victim and his family members individually, and during the course of his interactions with the social worker, the child-victim told her that defendant punished him by spanking him with an open hand and a belt and by forcing him to hold a hammer while leaning down. The child-victim told the social worker that the bruise on his forehead was caused when defendant punished the child-victim for running away by forcing the child-victim to lie on the floor while defendant kneeled and stood on his back. The Fourth Circuit noted that the social worker’s meeting with the child-victim and his family members was not conducted in response to an ongoing emergency. Further, the evidence did not support a finding that either the child-victim or the social worker intended the meeting to develop information for use in a criminal prosecution. To the contrary, the purpose of the meeting was to provide treatment and assistance to the family. Because the social worker did not act “at the behest of law enforcement,” because there was no evidence suggesting that the purpose or intent of the meeting was to preserve evidence, and because the primary purpose of the communications was to develop a treatment plan, the Fourth Circuit held that the statements were nontestimonial. Consequently, their admission at trial did not violate defendant’s Sixth Amendment rights. For this reason, among others, the judgment of the district court was affirmed.

United States v. Ramos-Cruz, 667 F.3d 487 (4th Cir. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Privacy – Identifying Information.”

Valdivia v. Brown, No. CIV. S-94-671 LKK/GGH, 2012 WL 219342 (E.D. Cal. Jan. 24, 2012). *For full case summary, see “Specific Victims’ Rights – Right to be Heard.”

Kerdpoka v. State, 724 S.E.2d 419 (Ga. Ct. App. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Courtroom Accommodations – Other.”

Perry v. Commonwealth, --- S.W.3d ---, No. 2010–SC–000833–MR, 2012 WL 5274733 (Ky. Oct. 25, 2012). Defendant, convicted of sodomy involving his adopted minor-son and sentenced to 45 years in prison, challenged his conviction on several grounds.

Defendant argued, *inter alia*, that the trial court erred by (1) denying his motion for an independent psychological examination of the child-victim and a competency hearing, and (2) disallowing, as impeachment evidence, the introduction of the child-victim's other allegedly false claims of sexual abuse and sexual conduct. The Kentucky Supreme Court agreed. First, the court concluded that the trial court should have allowed an independent psychological evaluation of the child-victim to determine if the child-victim was competent to testify. In reaching its conclusion, the court found the record raised serious questions about whether the child-victim's use of psychotropic drugs or existing psychological problems may have impacted his memory or ability to tell the truth. Second, the court concluded that the trial court erred when it denied defendant's request to admit ten allegedly false and inconsistent prior claims of sexual abuse and other sexual conduct involving strangers and relatives that were made around the same time that the child-victim accused defendant of abuse. In reaching its holding, the court observed that in certain cases, a defendant's right to confront witnesses and right to a fair trial entitles him to cross-examine a witness about a pattern of prior false claims to establish a motive to lie. The court also observed that admitting allegedly false prior accusations of sexual abuse without substantial proof of their falsity prejudices crime victims. Relying on an earlier Kentucky Supreme Court decision addressing this issue, the court stated that evidence of a prior allegation is admissible if the proponent shows that the allegation is "demonstrably false," *i.e.*, the prior accusation has "a distinct and substantial probability of being false." The court found that the existing record suggests that all of the other allegations could be "demonstrably false" and therefore subject to cross-examination. The court cautioned that demonstrably false claims are admissible only if they also satisfy other applicable evidentiary rules, including the probative value versus undue prejudice balancing test. The court further cautioned that to the extent some of the allegedly false allegations concern the child-victim's prior sexual behavior (such as claims involving his attempted rape of two girls and consensual sex with peers), they may be inadmissible under the state's rape shield rule. The court then reversed defendant's conviction and remanded for a new trial.

State v. Pollock, 284 P.3d 1222 (Or. Ct. App. 2012). Defendant appealed his conviction of six counts

of first-degree sodomy, arguing that the trial court erred by admitting the child-victim's prior out-of-court statements that defendant had sexually abused her, violating his Confrontation Clause rights under the Sixth Amendment. During the trial, the child-victim testified first and was asked if she remembered making statements in a previously recorded interview with a child welfare caseworker and if the statements were true. After the child-victim's testimony, the state introduced a DVD containing the child-victim's interview with the child welfare caseworker and called the child-victim's mother as a witness to testify about statements the child-victim made to her about the abuse. The court rejected defendant's arguments and affirmed his conviction. First, the court held that even though the child-victim's statements in the DVD were testimonial, because the child-victim adopted the statements during direct examination, the child-victim was available for cross-examination on these issues. The court noted that it was defendant's choice whether to ask the child-victim questions about the statements on cross-examination or to recall the child-victim after the DVD was introduced. Second, the court of appeals rejected defendant's argument that the child-victim's out-of-court statements to her mother were testimonial, and that defendant did not have an adequate opportunity to cross-examine the child-victim about the statements. The court held instead that the child-victim's statements to her mother were non testimonial or the functional equivalent because they were casual remarks made during a conversation while riding in the car without law enforcement present.

State v. Toohey, 816 N.W.2d 120 (S.D. 2012). Following a jury trial, defendant was convicted of the first degree rape of a child. On appeal, defendant argued, *inter alia*, that the child-victim was not available for cross examination at trial and that the admission of the child-victim's previous statements violated his Sixth Amendment Confrontation Clause rights. After the rape, the child-victim described defendant's inappropriate contact with her to her mother and to a forensic interviewer. At trial, the child-victim often failed to respond to questions from the prosecutor about what defendant did to her. The child-victim's mother and the forensic interviewer were called to testify about what the child-victim had previously told them about the rape. Defendant argued that, although the child-victim was physically present in court, she was effectively unavailable as a witness, which denied him his right

to cross-examine her. Further, defendant argued that because the child-victim was unavailable for cross-examination, her hearsay statements to her mother and to the forensic interviewer were admitted in violation of the Sixth Amendment. The South Dakota Supreme Court noted that a “troublesome issue” arises when a child-victim is physically available to testify but is too young to be subjected to cross-examination, as a witness’s unavailability can be premised on mental limitations, as well as on physical absence. The fact that the child-victim in this case did not answer many of the prosecution’s questions (and particularly those focused on the act of penetration), however, did not necessarily mean that she was unavailable for confrontation purposes: the “fact that a witness’s testimony is unsatisfactory does not render the witness unavailable.” The Confrontation Clause does not guarantee defendants the right to “cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” Although several courts have interpreted the Supreme Court’s decision in *Crawford v. Washington*, 541 U.S. 36 (2004), as meaning that even a witness with no memory of the events in question may be constitutionally present and available for cross-examination under *Crawford*, the child-victim in this case did more than “simply appear in court,” as she was able to testify about when and where the incidents occurred, the details leading up to the rape, and what was said. On cross-examination, defense counsel asked the child-victim about, *inter alia*, her age, her school activities, her acquaintance with defendant and his wife, the abandoned farmhouse where the rape occurred, the clothing she wore, and the others she spoke with about the rape. The child-victim responded to all of defense counsel’s questions; defense counsel “chose not to ask questions about penetration” and did not challenge the child-victim’s competency as a witness on appeal. The court concluded that the child-victim was available for cross-examination and that defendant was not denied his Confrontation Clause right to cross-examination. For this reason, and other reasons, defendant’s conviction was affirmed.

State v. Nguyen, 293 P.3d 236 (Utah 2012). *For full case summary, see “Specific Victims’ Rights – Right to Protection – Other.”

C. Defendant’s Right to Counsel

United States v. Catoggio, 698 F.3d 64 (2nd Cir. 2012) (per curiam). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Collection.”

D. Defendant’s Right to Due Process

Gagne v. Booker, 680 F.3d 493 (6th Cir. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Privacy – Other.”

United States v. Aleo, 681 F.3d 290 (6th Cir. 2012). *For full case summary, see “Specific Victims’ Rights – Right to be Heard.”

United States v. Valencia-Riascos, 696 F.3d 938 (9th Cir. 2012). *For full case summary, see “Specific Victims’ Rights – Right to be Present.”

United States v. Gatewood, No. CR. 11-08074-PCT-JAT, 2012 WL 2286999 (D. Ariz. June 18, 2012) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to Privacy – Identifying Information.”

United States v. Shepard, No. CR 10-1032-TUC-CKJ, 2012 WL 113027 (D. Ariz. Jan. 13, 2012) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to Due Process, Fairness, Dignity, and Respect.”

Valdivia v. Brown, No. CIV. S-94-671 LKK/GGH, 2012 WL 219342 (E.D. Cal. Jan. 24, 2012). *For full case summary, see “Specific Victims’ Rights – Right to be Heard.”

Carter v. Bigelow, 869 F. Supp. 2d 1322 (D. Utah 2011). *For full case summary, see “Specific Victims’ Rights – Right to Due Process, Fairness, Dignity, and Respect.”

State v. Munger, No. 2 CA-SA 2012-0034, 2012 WL 2859991 (Ariz. Ct. App., July 12, 2012) (memorandum decision). *For full case summary, see “Specific Victims’ Rights – Right to Confer.”

In re David, 135 Cal. Rptr. 3d 855 (Cal. Ct. App. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Protection – Other.”

People v. Spence, 151 Cal. Rptr. 3d 374 (Cal. Ct. App. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Courtroom Accommodations – Support Person Presence – Trial.”

People v. Herrera, 272 P.3d 1158 (Colo. App. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Privacy – Victim Records.”

Perry v. Commonwealth, --- S.W.3d ---, No. 2010–SC–000833–MR, 2012 WL 5274733 (Ky. Oct. 25, 2012). *For full case summary, see “Constitutional Issues Related to Victims’ Rights – Defendant’s Right to Confrontation.”

State v. Dykes, 728 S.E.2d 455 (S.C. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Protection – Other.”

State v. Jonathan B., --- S.E.2d ---, No. 11-0282, 2012 WL 5898025 (W. Va. Nov. 20, 2012). *For full case summary, see “Specific Victims’ Rights – Right to Privacy – Other.”

E. Defendant’s Right to Equal Protection

Bunn v. State, 728 S.E.2d 569 (Ga. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Protection – Other.”

F. Defendant’s Right to Fair Trial

Doe v. Boland, 698 F.3d 877 (6th Cir. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Causation.”

Averilla v. Lopez, 862 F. Supp. 2d 987 (N.D. Cal. 2012). *For full case summary, see “Constitutional Issues Related to Victims’ Rights – Defendant’s Right to Confrontation.”

United States v. Gatewood, No. CR. 11-08074-PCT-JAT, 2012 WL 2286999 (D. Ariz. June 18, 2012) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to Privacy – Identifying Information.”

United States v. Jim, No. CR 10-2653JB, 2012 WL 119599 (D. N.M. Jan. 8, 2012) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to be Present.”

People v. Spence, 151 Cal. Rptr. 3d 374 (Cal. Ct. App. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Courtroom Accommodations – Support Person Presence – Trial.”

Perry v. Commonwealth, --- S.W.3d ---, No. 2010–SC–000833–MR, 2012 WL 5274733 (Ky. Oct. 25, 2012). *For full case summary, see “Constitutional Issues Related to Victims’ Rights – Defendant’s Right to Confrontation.”

Wright v. Commonwealth, --- S.W.3d ---, No. 2011-SC-000191-MR, 2012 WL 5274736 (Ky. Oct. 25, 2012). Defendant was convicted of fleeing or evading police, assault, possession of marijuana, and being a persistent felony offender. Defendant appealed his conviction, arguing that the jury instruction on the domestic violence element of the offense of fleeing or evading police was erroneous. An element of the charge is that defendant and victim must be a “member of an unmarried couple.” However, the trial court failed to instruct the jury on the definition of the statutory phrase “member of an unmarried couple.” The court found that the jury instruction was thus too broad because, absent the inclusion of this phrase, “mere roommates could be charged with having domestically abused one another.” Further, the court found the error to be prejudicial, stating “it is error to convict a defendant of a crime when the jury has not been properly instructed on the elements of the crime.” Accordingly, appellant’s conviction and sentence relating to the fleeing and evading and the persistent felony offender charges were reversed and remanded to the trial court for further proceedings consistent with the opinion.

People v. Grissom, 821 N.W.2d 50 (Mich. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Privacy – Other.”

State v. Dye, 283 P.3d 1130 (Wash. Ct. App. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Courtroom Accommodations – Other.”

State v. Jonathan B., --- S.E.2d ---, No. 11-0282, 2012 WL 5898025 (W. Va. Nov. 20, 2012). *For full case summary, see “Specific Victims’ Rights – Right to Privacy – Other.”

G. Defendant's Right to be Free from Unlawful Search and Seizure

State v. Handy, 44 A.3d 776 (Vt. 2012). *For full case summary, see "Specific Victims' Rights – Right to Access Information and Documents – Other."

H. Defendant's Right to Jury Trial

Canty v. State, 733 S.E.2d 64 (Ga. Ct. App. 2012). Defendant, convicted of child molestation and aggravated sexual battery, challenged his conviction on two grounds. First, defendant argued that the trial court erred by allowing a forensic interview specialist to testify about child abuse accommodation syndrome because this expert testimony improperly invaded the province of the jury. Second, defendant argued that the trial court erred by allowing a second forensic interviewer who interviewed the child-victim to testify that she had not observed any indication that the child-victim had been subject to the phenomenon of "suggestion" prior to or during the interview. Defendant claimed that such expert testimony improperly bolstered the credibility of the child-victim. The Georgia Court of Appeals rejected defendant's arguments, first finding that the expert witness did not give improper opinion testimony such as opining that the child-victim had been abused or that the child-victim's inability to take the stand to testify against defendant was a result of having been abused by defendant. Rather, the court determined that this expert witness only testified generally about the child abuse accommodation syndrome, the behaviors that abused children often exhibit, and her interview with the child-victim. The court explained that this testimony, even when considered together with the prosecutor's comment that the child abuse accommodation syndrome testimony was relevant to understanding what the jury observed in the courtroom the previous day (when the child-victim was unable to testify), did not answer the ultimate issue of whether defendant had abused the child-victim. The court also rejected defendant's second argument, explaining that it has repeatedly held that an expert witness may testify that he/she had not observed any evidence of coaching or deception during forensic interviews. The court concluded that because this expert witness did not directly comment on the child-victim's credibility, she did not improperly address the ultimate issue of whether defendant molested the child-victim. For these reasons, the court affirmed the judgment.

People v. Wass, No. 302263, 2012 WL 832859 (Mich. Ct. App. Mar. 13, 2012) (per curiam). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Causation."

State v. N.R.L., 277 P.3d 564 (Or. Ct. App. 2012). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Ability to Pay."

I. Defendant's Right to Privacy

State v. Handy, 44 A.3d 776 (Vt. 2012). *For full case summary, see "Specific Victims' Rights – Right to Access Information and Documents – Other."

J. Defendant's Rights Related to Punishment

United States v. Rangel, 688 F.3d 972 (9th Cir. 2012). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Ability to Pay."

United States v. King, Criminal No. 08-66-01, 2012 WL 1080297 (E.D. Pa. Apr. 2, 2012) (slip copy). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Collection."

VI. EVIDENTIARY ISSUES RELATED TO VICTIMS' RIGHTS

A. Consent - Sexual Assault

Gagne v. Booker, 680 F.3d 493 (6th Cir. 2012). *For full case summary, see "Specific Victims' Rights – Right to Privacy – Other."

State v. Jimenez, 270 P.3d 405 (Or. Ct. App. 2012). Defendant was convicted of first-degree rape, along with numerous other offenses, in connection with the rape and assault of his former girlfriend. Defendant assigned error to the trial court's denial of his motion for judgment of acquittal on the rape charge because the victim testified that she did not feel forced into having sexual intercourse with defendant. The appellate court initially affirmed without opinion, and the Oregon Supreme Court remanded the case back to the appellate court for reconsideration in light of the Oregon Supreme Court case *State v. Marshall*. The facts of the case are relevant to the outcome of the decision and are as follows. Defendant threatened the victim while a friend stood by with a baseball bat. He forced the victim to drive him to her mother's house and stole her money. He left the house, and

then threatened to break into the house with friends. Upon returning to the victim's house, he threw a drink at her, demanded oral sex, and then forced her to comply when she refused. Shortly thereafter, his demeanor changed and he asked the victim if she wanted to have sex. The victim testified that she assented and "didn't feel forced" and did not say yes out of fear. Based on these facts, the court once again affirmed, finding that *Marshall* did not change the analysis. In that case, the court stated, the Oregon Supreme Court examined the physical force aspect of forcible compulsion; however, in this case the state focused on the threat aspect of forcible compulsion, contending that defendant's conduct constituted an express or implied threat to harm the victim. Here, a rational jury could find that defendant communicated an intent to inflict harm on the victim that was sufficient to compel her to submit to the sexual conduct at issue. Although the victim testified that she did not submit to sexual conduct because of fear, the jury was free to disbelieve that testimony and base its decision on the circumstances under which the sexual contact occurred. Thus, the court found that the trial court properly denied defendant's motion for judgment of acquittal on the charge of first degree rape.

B. Discovery

1. Brady Materials

United States v. Gatewood, No. CR. 11-08074-PCT-JAT, 2012 WL 2286999 (D. Ariz. June 18, 2012) (slip copy). *For full case summary, see "Specific Victims' Rights – Right to Privacy – Identifying Information."

United States v. Shepard, No. CR 10-1032-TUC-CKJ, 2012 WL 113027 (D. Ariz. Jan. 13, 2012) (slip copy). *For full case summary, see "Specific Victims' Rights – Right to Due Process, Fairness, Dignity, and Respect."

People v. Herrera, 272 P.3d 1158 (Colo. App. 2012). *For full case summary, see "Specific Victims' Rights – Right to Privacy – Victim Records."

2. Victim Records

United States v. Shepard, No. CR 10-1032-TUC-CKJ, 2012 WL 113027 (D. Ariz. Jan. 13, 2012) (slip copy). *For full case summary, see "Specific

Victims' Rights – Right to Due Process, Fairness, Dignity, and Respect."

N.G. v. Superior Court, 291 P.3d 328 (Alaska Ct. App. 2012). *For full case summary, see "Specific Victims' Rights – Right to Privacy – Victim Records."

People v. Herrera, 272 P.3d 1158 (Colo. App. 2012). *For full case summary, see "Specific Victims' Rights – Right to Privacy – Victim Records."

3. Other

United States v. Avila, CR 11-126-PHX-JAT, 2012 U.S. Dist. LEXIS 5286 (D. Ariz. Jan. 18, 2012). *For full case summary, see "Specific Victims' Rights – Right to Access Information and Documents – Other."

State v. Bray, 291 P.3d 727 (Or. 2012). *For full case summary, see "Specific Victims' Rights – Right to Refuse Discovery Requests."

C. Expert Testimony

State v. Favoccia, 51 A.3d 1002 (Conn. 2012). Defendant was convicted of two counts of risk of injury to a child resulting from his sexual abuse of the child-victim. The court of appeals reversed defendant's judgment of conviction, and the state appealed. On appeal, the state argued that the court of appeals improperly concluded that: (1) the trial court had abused its discretion in admitting into evidence four statements by an expert witness, each to the effect that the victim exhibited behaviors consistent with those of sexual abuse victims; and (2) reversal was required because these improper evidentiary rulings were not harmless error. The state supreme court affirmed the court of appeals' reversal, concluding that the four statements at issue were improperly admitted into evidence and that it did "not have a fair assurance that those improprieties did not substantially sway the jury's verdict." The court found that although expert witnesses may testify about general behavioral characteristics of sexual abuse victims, they cross the line into impermissible vouching and ultimate-issue testimony when they opine that a particular victim has exhibited those general behavioral characteristics. The court reasoned that, although expert witnesses may properly testify about specialized knowledge that is

not known to the average person, the determination of credibility of a witness is solely the function of the jury. The court also found that the trial court's error was not harmless because there was no physical evidence; the case turned entirely on the credibility of the victim, which was bolstered by the inadmissible expert testimony. The court also reasoned that the jury's inability to come to a decision on the more serious charge of sexual assault in the second degree indicated that the case was a close one, making it more likely that the inadmissible evidence substantially swayed the jury. There were two dissenting opinions. The first dissent concluded that, although the trial court should not have permitted the portion of the expert testimony that linked the victim's specific conduct to the conduct of victims of child sexual abuse generally, the testimony was not harmful to defendant and therefore reversal of the conviction was unwarranted. The second dissent concluded that testimony linking a victim's behavior to the behavior generally exhibited by sexual abuse victims should be admissible because that rule would be more in line with the state rules of evidence, precedent, the reasoning of the majority of jurisdictions, and avoid form over substance results.

Canty v. State, 733 S.E.2d 64 (Ga. Ct. App. 2012). *For full case summary, see "Constitutional Issues Related to Victims' Rights – Defendant's Right to Jury Trial."

State v. White, 288 P.3d 985 (Or. Ct. App. 2012). Defendant was charged with numerous counts, including rape, sexual abuse, and strangulation. The trial court ruled that because defendant did not intend to use the victim's five-year delay in reporting the abuse to impeach her credibility, expert testimony regarding "delayed reporting" was not relevant to any fact at issue in the case and should be excluded. The government appealed, arguing that the expert testimony is relevant to explain possible reasons for the delay and to counter a possible inference that the victim's delay in reporting the abuse means that it did not occur. The court of appeals reversed the trial court's ruling, concluding that "the expert testimony is independently relevant to help explain why the complainant delayed reporting the abuse and to counter the inference that the delay is indicative of fabrication." The court reasoned that the victim's delay in reporting alleged abuse is an inherent weakness in the state's case and the state is entitled to address that weakness in its case-in-chief.

D. Hearsay

1. Accommodations for Child Victims

Bunn v. State, 728 S.E.2d 569 (Ga. 2012). *For full case summary, see "Specific Victims' Rights – Right to Protection – Other."

State v. Toohey, 816 N.W.2d 120 (S.D. 2012).

*For full case summary, see "Constitutional Issues Related to Victims' Rights – Defendant's Right to Confrontation."

State v. Nguyen, 293 P.3d 236 (Utah 2012). *For full case summary, see "Specific Victims' Rights – Right to Protection – Other."

2. Other

United States v. DeLeon, 678 F.3d 317 (4th Cir. 2012). *For full case summary, see "Constitutional Issues Related to Victims' Rights – Defendant's Right to Confrontation."

United States v. Gatewood, No. CR. 11-08074-PCT-JAT, 2012 WL 2286999 (D. Ariz. June 18, 2012) (slip copy). *For full case summary, see "Specific Victims' Rights – Right to Privacy – Identifying Information."

Valdivia v. Brown, No. CIV. S-94-671 LKK/GGH, 2012 WL 219342 (E.D. Cal. Jan. 24, 2012). *For full case summary, see "Specific Victims' Rights – Right to be Heard."

State v. Pollock, 284 P.3d 1222 (Or. Ct. App. 2012). *For full case summary, see "Constitutional Issues Related to Victims' Rights – Defendant's Right to Confrontation."

E. Privilege - Statutory

N.G. v. Superior Court, 291 P.3d 328 (Alaska Ct. App. 2012). *For full case summary, see "Specific Victim's Rights – Right to Privacy – Victim Records."

F. Rape Shield

Gagne v. Booker, 680 F.3d 493 (6th Cir. 2012). *For full case summary, see "Specific Victims' Rights – Right to Privacy – Other."

People v. Herrera, 272 P.3d 1158 (Colo. App. 2012).

*For full case summary, see “Specific Victims’ Rights – Right to Privacy – Victim Records.”

Perry v. Commonwealth, --- S.W.3d ---, No. 2010–SC–000833–MR, 2012 WL 5274733 (Ky. Oct. 25, 2012). *For full case summary, see “Constitutional Issues Related to Victims’ Rights – Defendant’s Right to Confrontation.”

People v. Grissom, 821 N.W.2d 50 (Mich. 2012).

*For full case summary, see “Specific Victims’ Rights – Right to Privacy – Other.”

State v. Jonathan B., --- S.E.2d ---, No. 11-0282, 2012 WL 5898025 (W. Va. Nov. 20, 2012). *For full case summary, see “Specific Victims’ Rights – Right to Privacy – Other.”

G. Relevance

Gagne v. Booker, 680 F.3d 493 (6th Cir. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Privacy – Other.”

Averilla v. Lopez, 862 F. Supp. 2d 987 (N.D. Cal. 2012). *For full case summary, see “Constitutional Issues Related to Victims’ Rights – Defendant’s Right to Confrontation.”

N.G. v. Superior Court, 291 P.3d 328 (Alaska Ct. App. 2012). *For full case summary, see “Specific Victim’s Rights – Right to Privacy – Victim Records.”

People v. Herrera, 272 P.3d 1158 (Colo. App. 2012).

*For full case summary, see “Specific Victims’ Rights – Right to Privacy – Victim Records.”

Perry v. Commonwealth, --- S.W.3d ---, No. 2010–SC–000833–MR, 2012 WL 5274733 (Ky. Oct. 25, 2012). *For full case summary, see “Constitutional Issues Related to Victims’ Rights – Defendant’s Right to Confrontation.”

VII. PROCEDURAL ISSUES RELATED TO VICTIMS’ RIGHTS

A. Jury Instructions

Wright v. Commonwealth, --- S.W.3d ---, No. 2011-SC-000191-MR, 2012 WL 5274736 (Ky.

Oct. 25, 2012). *For full case summary, see “Constitutional Issues Related to Victims’ Rights – Defendant’s Right to Fair Trial.”

State v. Jonathan B., --- S.E.2d ---, No. 11-0282, 2012 WL 5898025 (W. Va. Nov. 20, 2012). *For full case summary, see “Specific Victims’ Rights – Right to Privacy – Other.”

B. Venue

United States v. Jahani, No. 1:11-cr-00302-CMA, 2012 WL 6107097 (D. Colo. Dec. 10, 2012) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to be Present.”

VIII. VICTIM IMPACT STATEMENTS

In re Allen, 701 F.3d 734 (5th Cir. 2012) (per curiam). *For full case summary, see “Specific Victims’ Rights – Right to be Heard.”

United States v. Aleo, 681 F.3d 290 (6th Cir. 2012). *For full case summary, see “Specific Victims’ Rights – Right to be Heard.”

United States v. Bolze, No. 10-6243, 2012 WL 34374 (6th Cir. Jan. 9, 2012). Defendant pleaded guilty to three counts of wire fraud and three counts of money laundering in connection with his operation of a \$21 million dollar Ponzi scheme for over six years, affecting over one hundred victims. During sentencing, the district court, relying in part on oral victim impact statements from unsworn victim-witnesses, found that the offense warranted a vulnerable victim sentencing enhancement. On appeal, defendant argued, *inter alia*, that the vulnerable victim enhancement should not have been applied because the district court could not consider unsworn victim impact testimony during sentencing. The court affirmed the district court’s order, holding that under the federal sentencing guidelines a district court may consider all information relevant to sentencing, regardless of whether or not it would be admissible at trial. The court further found that the Crime Victims’ Rights Act (CVRA), 18 U.S.C. § 3771, “gave the district court express authority to consider victim impact statements.” As such, the court found “no fault with the district court’s decision to consider all of the victim impact statements submitted, whether sworn or unsworn[,]” and affirmed.

Jimenez v. Waller, No. 12-1884, 2012 WL 6644065 (7th Cir. Nov. 5, 2012) (slip opinion). *For full case summary, see “Specific Victims’ Rights – Right to Access Information and Documents – Other.”

United States v. Rizzolo, No. 11-10384, 2012 WL 1095221 (9th Cir. Apr. 3, 2012) (memorandum). *For full case summary, see “Specific Victims’ Rights – Right to be Heard.”

United States v. Egan, No. 10 Cr. 191(JFK), 2012 WL 3839412 (S.D.N.Y. Sept. 5, 2012) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to be Heard.”

United States v. Citgo Petroleum Corp., --- F. Supp. 2d ---, Crim. Action No. C-06-563, 2012 WL 4068675 (S.D. Tex. Sept. 14, 2012) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to be Heard.”

IX. CHILD VICTIMS

United States v. Kearney, 672 F.3d 81 (1st Cir. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Attorney Fees.”

United States v. Burgess, 684 F.3d 445 (4th Cir. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Causation.”

United States v. DeLeon, 678 F.3d 317 (4th Cir. 2012). *For full case summary, see “Constitutional Issues Related to Victims’ Rights – Defendant’s Right to Confrontation.”

In re Amy Unknown, 701 F.3d 749 (5th Cir. 2012) (en banc). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Causation.”

United States v. Kebodeaux, 687 F.3d 232 (5th Cir. 2012) (en banc). *For full case summary, see “Specific Victims’ Rights – Right to Protection – Other.”

Doe v. Boland, 698 F.3d 877 (6th Cir. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Causation.”

United States v. Aleo, 681 F.3d 290 (6th Cir. 2012). *For full case summary, see “Specific Victims’ Rights – Right to be Heard.”

United States v. Evers, 669 F.3d 645 (6th Cir. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Causation.”

United States v. Laraneta, 700 F.3d 983 (7th Cir. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Calculation Method.”

In re Amy, 698 F.3d 1151 (9th Cir. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Causation.”

Marsh v. County of San Diego, 680 F.3d 1148 (9th Cir. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Privacy – Photographs and Audio/Video Recordings.”

In re Sealed Case, 702 F.3d 59 (D.C. Cir. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Causation.”

United States v. Gatewood, No. CR. 11-08074-PCT-JAT, 2012 WL 2286999 (D. Ariz. June 18, 2012) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to Privacy – Identifying Information.”

United States v. Veazie, No. 2:11-cr-00202-GZS, 2012 WL 1430540 (D. Me. Apr. 25, 2012) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Causation.”

United States v. Olivieri, No. 09-743 (WHW), 2012 WL 1118763 (D.N.J. Apr. 3, 2012) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Causation.”

United States v. Martin, No. 2:10-CR-95, 2012 WL 3597436 (E.D. Tenn. Aug. 20, 2012) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Causation.”

United States v. Tallent, 872 F. Supp. 2d 679 (E.D. Tenn. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Calculation Method.”

People v. Spence, 151 Cal. Rptr. 3d 374 (Cal. Ct. App. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Courtroom Accommodations – Support Person Presence – Trial.”

People v. Padilla-Lopez, 279 P.3d 651 (Colo. 2012).

*For full case summary, see “Specific Victims’ Rights – Right to Restitution – Other.”

People v. Herrera, 272 P.3d 1158 (Colo. App. 2012).

*For full case summary, see “Specific Victims’ Rights – Right to Privacy – Victim Records.”

State v. Favoccia, 51 A.3d 1002 (Conn. 2012). *For full case summary, see “Evidentiary Issues Relating to Victim’s Rights – Expert Witnesses.”

Kovaleski v. State, 103 So. 3d 859 (Fla. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Courtroom Accommodations – Closed Courtroom.”

Bunn v. State, 728 S.E.2d 569 (Ga. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Protection – Other.”

Canty v. State, 733 S.E.2d 64 (Ga. Ct. App. 2012).

*For full case summary, see “Constitutional Issues Related to Victims’ Rights – Defendant’s Right to Jury Trial.”

Kerdpoka v. State, 724 S.E.2d 419 (Ga. Ct. App. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Courtroom Accommodations – Other.”

Perry v. Commonwealth, --- S.W.3d ---, No. 2010–SC–000833–MR, 2012 WL 5274733 (Ky. Oct. 25, 2012). *For full case summary, see “Constitutional Issues Related to Victims’ Rights – Defendant’s Right to Confrontation.”

Jack Doe I v. Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 280 P.3d 377 (Or. 2012) (en banc). *For full case summary, see “Specific Victims’ Rights – Right to Due Process, Fairness, Dignity, and Respect.”

State v. Pollock, 284 P.3d 1222 (Or. Ct. App. 2012). *For full case summary, see “Constitutional Issues Related to Victims’ Rights – Defendant’s Right to Confrontation.”

State v. White, 288 P.3d 985 (Or. Ct. App. 2012).

*For full case summary, see “Evidentiary Issues Related to Victims’ Rights – Expert Testimony.”

State v. Toohey, 816 N.W.2d 120 (S.D. 2012).

*For full case summary, see “Constitutional Issues Related to Victims’ Rights – Defendant’s Right to Confrontation.”

State v. Nguyen, 293 P.3d 236 (Utah 2012). *For full case summary, see “Specific Victims’ Rights – Right to Protection – Other.”

State v. Shepherd, --- A.3d ---, No. 2010-336, 2012 WL 5275420 (Vt. Oct. 26, 2012). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Causation.”

Koenig v. Thurston County, 287 P.3d 523 (Wash. 2012) (en banc). *For full case summary, see “Specific Victims’ Rights – Right to Due Process, Fairness, Dignity, and Respect.”

State v. Jonathan B., --- S.E.2d ---, No. 11-0282, 2012 WL 5898025 (W. Va. Nov. 20, 2012). *For full case summary, see “Specific Victims’ Rights – Right to Privacy – Other.”

X. MISCELLANEOUS ISSUES RELATED TO VICTIMS’ RIGHTS

A. 42 U.S.C. § 1983 Civil Rights Actions

Jimenez v. Waller, No. 12-1884, 2012 WL 6644065 (7th Cir. Nov. 5, 2012) (slip opinion). *For full case summary, see “Specific Victims’ Rights – Right to Access Information and Documents – Other.”

Marsh v. County of San Diego, 680 F.3d 1148 (9th Cir. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Privacy – Photographs and Audio/Video Recordings.”

Slater v. Clarke, 700 F.3d 1200 (9th Cir. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Protection – Other.”

Vance-Zschoche v. Dodd, No. 3:11-cv-85-ST, 2012 WL 92979 (D. Or. Jan. 11, 2012) (slip copy). Pro se plaintiff filed a civil lawsuit in federal district court alleging Section 1983 and various crime victims’ rights act violations against pro se defendant, a former employee of a now defunct company that had operated a drug rehabilitation program alleged to have abused and tortured plaintiff. The parties agreed to resolve the case by stipulating to

a dismissal of the lawsuit with a condition that the court seal the entire case record and issue an order that permanently restrains (1) all agents, founders, and former staff of the company from any contact with the parties, and (2) plaintiff's former spouse from having any contact with plaintiff. The federal district court denied the stipulated request. First, the court concluded that the parties had failed to show a compelling reason to support sealing the entire case file. The court determined that it could only seal certain court documents to protect plaintiff's contact information, and it removed the parties' addresses from the public docket. Second, the court concluded that the pleadings provided no basis for the court to enjoin the conduct of non-parties to the case. With regard to plaintiff's ex-spouse, the court reasoned that federal courts have no jurisdiction over domestic relations matters. Lastly, the court concluded that the complaint failed to state a claim over which a federal court has subject matter jurisdiction. In reaching this conclusion, the court found, *inter alia*, that the federal laws that provide plaintiff with crime victims' rights to receive certain information and to administrative compensation do not authorize a cause of action for damages against defendant. For these and other reasons, the court dismissed the case with prejudice.

B. Compensation

United States v. Schmidt, 675 F.3d 1164 (8th Cir. 2012). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Causation."

C. Habeas Corpus Petitions

Gagne v. Booker, 680 F.3d 493 (6th Cir. 2012). *For full case summary, see "Specific Victims' Rights – Right to Privacy – Other."

Averilla v. Lopez, 862 F. Supp. 2d 987 (N.D. Cal. 2012). *For full case summary, see "Constitutional Issues Related to Victims' Rights – Defendant's Right to Confrontation."

Outar v. Khahaiifa, No. 10-CV-3956 (MKB)(JO), 2012 WL 6698710 (E.D.N.Y. Sept. 25, 2012) (slip copy). *For full case summary, see "Specific Victims' Rights – Right to Due Process, Fairness, Dignity, and Respect."

Carter v. Bigelow, 869 F. Supp. 2d 1322 (D. Utah 2011). *For full case summary, see "Specific Victims' Rights – Right to Due Process, Fairness,

Dignity, and Respect."

In re David, 135 Cal. Rptr. 3d 855 (Cal. Ct. App. 2012). *For full case summary, see "Specific Victims' Rights – Right to Protection – Other."

D. Parallel Criminal and Civil Proceedings

1. Discovery

State v. Bray, 291 P.3d 727 (Or. 2012). *For full case summary, see "Specific Victims' Rights – Right to Refuse Discovery Requests."

2. Restitution

United States v. Gallion, No. 11-6187, 2012 WL 5374121 (6th Cir. Nov. 2, 2012) (slip copy). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Collection."

United States v. Michelson, Crim. No. 09-748-01 (FLW), 2012 WL 1079626 (D.N.J. Mar. 30, 2012) (slip copy). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Calculation Method."

People v. Eli, B230731, 2012 WL 1264463 (Cal. Ct. App. Apr. 16, 2012). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Attorney's Fees."

People v. Perez, B236949, 2012 WL 1717161 (Cal. Ct. App. May 16, 2012). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Attorney's Fees."

E. Professional Ethics and Rules of Conduct

United States v. Aleo, 681 F.3d 290 (6th Cir. 2012). *For full case summary, see "Specific Victims' Rights – Right to be Heard."

Johnson v. Dep't of Pub. Safety Standards and Training, 293 P.3d 228 (Or. Ct. App. 2012). *For full case summary, see "Specific Victims' Rights – Right to Refuse Discovery Requests."

F. Sex Offender Registries

United States v. Kebodeaux, 687 F.3d 232 (5th Cir. 2012) (en banc). *For full case summary, see

“Specific Victims’ Rights – Right to Protection – Other.”

State v. Dykes, 728 S.E.2d 455 (S.C. 2012). *For full case summary, see “Specific Victims’ Rights – Right to Protection – Other.” ■

This project was supported in part by Grant Nos. 2010-VF-GX-K014, 2010-VF-GX-K004, and 2012-VF-GX-K013, awarded by the Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice, and Grant No. 2012-TA-AX-K030, awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, and conclusions or recommendations expressed in this document are those of the author(s) and do not necessarily represent the official position or policies of the U.S. Department of Justice.

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