



2017 Year in Review: Notable Cases Impacting Victims' Rights

Nelson v. Colorado, 137 S. Ct. 1249 (2017). Defendant-petitioners in the consolidated cases were convicted under Colorado law of various charges and ordered to pay court costs, fees, and restitution in varying amounts. One of the defendant-petitioners had her conviction reversed for trial error and, on retrial, she was acquitted of all charges. The other defendant-petitioner had one conviction reversed on direct review and the remaining conviction vacated on post-conviction review, and the state elected not to appeal or retry the case. Following defendant-petitioners' original convictions, the state received funds from each to satisfy costs and fees, as well as restitution obligations. Once their convictions were invalidated, defendant-petitioners moved for the return of these funds, and the Colorado Supreme Court held that because they did not file a claim under Colorado's Compensation for Certain Exonerated Persons statute, which requires petitioners to prove their innocence, the trial courts lacked the authority to order a refund. Defendant-petitioners appealed to the Supreme Court, arguing that their due process rights were violated by requiring them to prove their innocence before funds are returned following the invalidation of criminal convictions. In applying the *Mathews* balancing test, the Supreme Court found it to be of no consequence that petitioner-defendants "prevailed on subsequent review rather than in the first instance," as "once those convictions were erased, the presumption of their innocence was restored." Further, the Supreme Court held that "to get their money back, defendants should not be saddled with any proof burden . . . , [as] they are entitled to be presumed innocent." The Supreme Court found that Colorado's statutory scheme "fails due process measurement because defendants' interest in regaining their funds is high, the risk of erroneous deprivation of those funds under the Exoneration Act is unacceptable, and the State has shown no countervailing interests in retaining the amounts in question. To comport with due process, a State may not impose anything more than minimal procedures on the refund of exactions dependent upon a conviction subsequently invalidated." The Court reversed the district court's denial of defendants' motions for refunds of the restitution, fees, and costs paid in connection with their convictions, and remanded for further proceedings.

In a concurring opinion, Justice Alito comments that the majority's decision "overlooks important differences between restitution, which is paid to the victims of an offense, and fines and other payments that are kept by the State." Justice Alito's opinion emphasized many unique characteristics of restitution, including that restitution orders result "in a final civil judgment against the defendant in favor of the State *and the victim*" under Colorado law and that criminal convictions may be used as part of civil claims brought by victims. Indeed, as Justice Alito notes, some criminal convictions may in fact be invalidated under circumstances where the error

would not have had a negative impact in a civil proceeding (*e.g.*, Confrontation Clause violations). He also emphasized that concerns regarding the impact of the majority’s ruling extend to practical concerns relating to victims’ receipt of restitution funds. As Justice Alito questions, “Would the Court reach that conclusion [that the State has no interest in withholding a refund of certain payments] if state law mandated a refund from the recipients of the restitution? And if the States and the Federal Government are always required to foot the bill themselves, would that risk discourage them from seeking restitution—or at least from providing funds to victims until the conclusion of appellate review?” Justice Alito concludes by remarking that it “was unnecessary for the Court to issue a sweeping pronouncement on restitution. But if the Court had to address this subject to dispose of these cases, it should have acknowledged that—at least in some circumstances—refunds of restitution payments made under later reversed judgments are not constitutionally required.”

United States v. Pleitez, 876 F.3d 150 (5th Cir. 2017). Defendant was convicted of conspiracy to engage in sex trafficking of children and was sentenced to imprisonment and ordered to pay restitution. The court based the restitution amount on an addendum to defendant’s presentence report that recommended a more onerous restitution award based on a new method of calculation. Defendant was not represented by counsel when the district court amended the restitution order and entered an amended judgment. He appealed, arguing that the entry of a final restitution order or an amended judgment that imposes a more onerous restitution award constitutes a “critical stage” of trial proceedings requiring access to counsel under the Sixth Amendment. As a matter of first impression, the court agreed. Under the Sixth Amendment, a trial is unfair if the accused is denied counsel at a critical stage of his trial, and no showing of prejudice is required. A stage is determined to be “critical” when the accused requires aid coping with legal problems or assistance in meeting his adversary and substantive rights of a defendant may be affected during that type of proceeding. For this reason, the court concluded that sentencing is a critical stage of a criminal proceeding. The court continued, finding that mandatory restitution, as defendant was required to pay in this case, is a criminal penalty and part of a criminal sentence. Section 3664, the restitution statute under which restitution was awarded, does not explicitly require a hearing for increased restitution awards; however, it does imply that a defendant is entitled to an opportunity to be heard before imposing mandatory restitution. The court concluded, therefore, that the final determination of a mandatory restitution award under § 3664 constitutes a critical stage during which a defendant is entitled to the assistance of counsel. The court explained that a defendant filing objections to a PSR addendum requires aid in coping with legal problems or assistance in meeting his adversary and that before a court makes a final determination of the victim’s losses, a defendant requires the assistance of counsel to confront the government in the sentencing process, thereby ensuring the PSR’s accuracy. The court further explained that a final determination of a restitution award also implicates a defendant’s substantive rights; an order of restitution is part of the sentencing

process, and a defendant has a constitutional right at the final sentencing to respond to a definitive decision of the judge. Similarly, a defendant has a right to be present if the court modifies a sentence to make it more onerous. The court thus concluded that at a final determination of restitution, a defendant is entitled to the assistance of an attorney who plays the adversarial role necessary to ensure that the proceeding itself is fair. Because defendant did not have a lawyer during this critical stage, the court vacated the restitution order and remanded the case for further proceedings.

United States v. Minard, 856 F.3d 555 (8th Cir. 2017). Defendant was arrested after being found in possession of items—including firearms—that had been reported stolen during several burglaries. Defendant pleaded guilty to being a felon in possession of a firearm, and the trial court sentenced him to the maximum 120-month sentence. Defendant filed a Rule 35 motion, challenging the sentence and requesting a re-sentencing before a different judge. Defendant argued that during sentencing one of the burglary victims addressed the court and explained that his wife will “hear something after I’ve left for work in the morning, you know, she’s never going to get by what’s happened to us because of his irresponsible actions.” Following the victim impact statement, the judge stated: “I understand exactly what you’re saying. It happened to me, too, when my kids were little, so I know exactly what you’re talking about.” Defendant claimed that the judge’s statement revealed bias, and it was because of this bias that he received the maximum sentence. The district court denied the motion without a hearing, and defendant appealed. The appellate court rejected defendant’s claim on three grounds. First, because defendant did not object or move for recusal at sentencing, the judge’s failure to recuse him/herself following the statement must rise to the level of plain error. The court reasoned that it could not find any case in which Rule 35 relief was granted because the sentencing judge failed to recuse *sua sponte*. Second, the court explained that a judge is presumed impartial and the burden of proving impartiality requires evidence of “a deep-seated favoritism or antagonism that would make fair judgment impossible.” The court found the judge’s spontaneous expression of empathy for a crime victim following his impact statement did not meet that burden. Third, the court noted that pursuant to the Crime Victims’ Rights Act (CVRA), 18 U.S.C. § 3771, crime victims have the statutory rights “to be reasonably heard at any public proceeding in the district court involving . . . sentencing,” and “to be treated with fairness and with respect for the victim’s dignity and privacy.” The court found that the judge’s single statement that was directed at the crime victim at the end of the victim’s stressful appearance furthered the policy of encouraging crime victims to participate in the criminal justice process. For these reasons the court affirmed the judgment of the district court.

In re Deborah Lynn Partida, 862 F.3d 909 (9th Cir. 2017). Chapter 13 bankruptcy debtor was ordered to pay \$193,337 in restitution after she was convicted in 2002—upon a guilty plea—of one count of embezzlement and theft of labor union assets. At the time she filed for bankruptcy,

defendant-debtor reported owing \$218,500 in unpaid restitution. Defendant-debtor appealed the bankruptcy court's denial of her motion to hold the government in contempt for attempting to collect the restitution, arguing that the government violated the Bankruptcy Code's automatic stay. After the Bankruptcy Appellate Panel affirmed, debtor sought further review. The United States Court of Appeals for the Ninth Circuit rejected debtor's argument, concluding that the Mandatory Victim Restitution Act (MVRA), 18 U.S.C. §3663A, allows the government to collect restitution despite the automatic stay. In reaching its conclusion, the court observed that the MVRA's enforcement provision states that the government "may enforce a judgment . . . in accordance with the practices and procedures for the enforcement of a civil judgment under Federal law or State law" and "[n]otwithstanding any other Federal Law." The court found that "the plain language of the MVRA makes clear that the government can collect restitution, despite any federal laws to the contrary." The court also examined the MVRA's legislative history and found that its construction is consistent with the congressional intent for the MVRA with respect to the government's collection powers. The court further observed that its conclusion is consistent with the decisions of the Second and Sixth Circuits. For these reasons, the court affirmed the Bankruptcy Appellate Panel's decision.

United States v. Kovall, 857 F.3d 1060 (9th Cir. 2017). Two defendants pleaded guilty to charges of conspiring to commit federal programs bribery that had an effect on the award of tribal contracts. As part of their sentences, defendants were ordered to pay restitution under the Mandatory Victim Restitution Act, 18 U.S.C. §3663A (MVRA), to the Twenty-Nine Palms Band of Mission Indians ("the Tribe"), the victim of defendants' criminal conduct. Defendants appealed the restitution order, claiming that the district court abused its discretion in calculating the "other fees" amount, and the Tribe also appealed, challenging both the "direct loss" and "other fees" amounts of the restitution order. The Ninth Circuit asked the parties to address whether the Tribe could appeal restitution ordered pursuant to the MVRA. The Ninth Circuit had previously held that victims do not have standing to directly appeal restitution ordered under another restitution provision (the Victim and Witness Protection Act [VWPA]), and the Tribe argued that it nevertheless had standing to appeal restitution ordered pursuant to the MVRA. After analyzing the history and purpose of the MVRA and the VWPA, including the mandatory nature of restitution under the MVRA, the Ninth Circuit held that the Tribe, as the victim of defendants' criminal conduct, has Article III standing regarding restitution orders. The Ninth Circuit continued on, however, to observe that the "fact that a would-be litigant has Article III standing does not guarantee the right to take an appeal," as in "the federal system, there is no general right to an appeal." And, in contrast to the rules governing civil cases in federal court, the criminal rules "do not provide for a right of intervention" for appellate purposes. Because nothing in the MVRA altered those rules, the Ninth Circuit held that the MVRA does not confer on victims the right to appeal from a district court's restitution order. Similarly, the court of appeals held that nothing in the Crime Victims' Rights Act, 18 U.S.C. § 3771 (CVRA),

authorized victims themselves to pursue an appeal based on their restitution rights. Instead, the Ninth Circuit held that victims may pursue a petition for a writ of mandamus regarding their rights, including the right to restitution under the MVRA. Because the CVRA's statutory writ process satisfies due process requirements, the Ninth Circuit held that victims may not directly appeal a restitution order. Consequently, the Tribe's appeal of the restitution order was dismissed.

United States v. Osman, 853 F.3d 1184 (11th Cir. 2017). Defendant pled guilty to one count of production of child pornography, one count of distribution of child pornography, and one count of possession of child pornography in connection with his conduct regarding a very young child-victim relative. As part of the plea agreement, defendant agreed to make "full restitution" to the child-victim. At the restitution hearing, defendant challenged the government's assessment of the child-victim's future counseling needs as speculative, in light of the child-victim's very young age. The government acknowledged that the restitution estimate "necessarily would be speculative to some extent in a case involving an infant victim" but nevertheless maintained the propriety of restitution. In support of the government's position, a licensed counselor who specialized in working with child-victims of sexual abuse and domestic violence testified regarding the child-victim's likely future counseling needs, based on a meeting with the child-victim's mother and "many years of research about the consequences of early adverse life events and her extensive experience counseling victims of abuse." The trial court ordered defendant to pay \$16,250 in restitution, and defendant appealed the restitution order. On appeal, the Eleventh Circuit joined its sister circuits in holding that restitution in cases involving child pornography "may include restitution for future therapy expenses as long as the award reflects a reasonable estimate of those costs and is based on record evidence." The Eleventh Circuit also rejected defendant's challenge to the restitution order, finding the counselor's testimony sufficient to provide a "reasonable estimate" of the child-victim's counseling needs and estimates of the costs associated with that counseling. The Eleventh Circuit also rejected defendant's argument that the child-victim should later seek restitution for "losses not ascertainable at the time of the original restitution award." Because a reasonable estimate of the child-victim's losses was available, the court of appeals concluded, these costs were properly included in restitution. In addition, the Eleventh Circuit noted that Congress did not intend "to create such a cumbersome procedure for victims to receive restitution." The restitution order was affirmed.

AG ex rel. Neumann v. Hargis, 77 M.J. 501 (A. Ct. Crim. App. 2017). The victim reported to Criminal Investigation Command (CID) that another service member had sexually assaulted her. A military magistrate signed a search authorization for the victim's phone, which she unwillingly surrendered. The victim's special victim counsel (SVC) made a discovery request to the military magistrate requesting the affidavit and any other documents used in issuing the search and seizure authorization. The magistrate denied the discovery request, and the victim petitioned for

a writ of mandamus. On appeal, the court looked to its jurisdiction to issue the writ, which is limited to the court's subject matter jurisdiction over the case or controversy. To establish subject matter jurisdiction, the harm alleged must have the potential to directly affect the findings and sentence. The court found that the victim failed to establish that a de facto ruling denying discovery or compelling production of documents to an alleged victim at the pre-referral stage (there had not yet been a court martial) had the potential to affect the findings and sentence. Accordingly, the military judge lacked jurisdiction to issue the order, as did the court. The court continued that even if it did have jurisdiction, the victim had no established right to relief. To prevail on a writ of mandamus, the petitioner must show that there is no other adequate means to attain relief; that the right to issuance of the writ is clear and indisputable; and that the issuance is appropriate under the circumstances. The victim asserted that she was entitled to discovery and the production of documents under the Crime Victims' Rights Act, 18 U.S.C. § 3771, which establishes a crime victim's right to be treated with fairness and respect for the victim's dignity and privacy. The court found, "[h]owever, [that] a right to be treated with fairness, dignity, and privacy does not give a victim a right to receipt of discovery and documents without an analysis of the case status and pending legal issue." The victim also argued that the Standard Operating Procedure for Military Magistrates authorized production, because it provides that "at the request of counsel," military magistrates will provide a copy of the affidavit and authorization, among other documents. In response, the court held as follows: "Assuming 'counsel' is meant to include SVCs and a mere SOP establishes an alleged victim's right to the receipt of military magistrate's documents, an alleged victim's discovery and production request is not ripe for decision by a military judge in a non-referred case. Even an accused has no right to discovery and production of an affidavit or other documents used by a military magistrate in issuing a search and seizure authorization until the referral stage." Accordingly, the court found the writ failed to establish that jurisdiction existed at the pre-referral stage and that the victim failed to establish a per se right to discovery or the production of documents. The court then dismissed the petition.

United States v. Roblero, No. ACM 38874, 2017 WL 816145 (A.F. Ct. Crim. App. Feb. 17, 2017). At a general court-martial, defendant was convicted of two specifications of sexual assault by causing bodily harm, and received a sentence of a dishonorable discharge, forfeitures, reduction to E-1, and a reprimand. On appeal, defendant argued, *inter alia*, that his right to due process during sentencing was violated when the military judge allowed the victim to provide a written and oral unsworn statement to the court-martial members. The United States Air Force Court of Criminal Appeals disagreed, concluding that no error materially prejudicial to the rights of defendant occurred. In reaching its conclusion, the court observed that the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, has been incorporated into Article 6b of the Uniform Code of Military Justice. The court found that Article 6b affords crime victims the "right to be reasonably heard . . . at [a] sentencing hearing related to the offense." The court noted that after

defendant's trial, the President promulgated Rule for Courts-Martial 1001A, which expressly allows a victim to exercise her right to be reasonably heard by way of an unsworn statement orally, in writing, or both; the contents of a victim's statement "is limited to victim impact and matters in mitigation." The court found that the military judge did not abuse his discretion in permitting the victim to provide her oral and written unsworn statement. The court did find that the military judge abused his discretion in permitting the victim's unsworn statement to include her opinion regarding defendant's need for sex offender treatment and a recommendation of a particular sentence, however, the court determined that defendant was not prejudiced because the victim had advocated for a minimum-term confinement sentence, and defendant was sentenced to no confinement. For these and other reasons, the court affirmed the findings and sentence.

United States v. Rowe, No. ACM 38880, 2017 WL 815200 (A.F. Ct. Crim. App. Feb. 8, 2017). A general court-martial convicted defendant of attempted abusive sexual contact, attempted forcible sodomy, abusive sexual contact, and forcible sodomy, and he received a sentence of a dishonorable discharge and a 20-year confinement. On appeal, defendant argued, *inter alia*, that the military judge abused his discretion by allowing one of the victims to provide an unsworn statement during the presentencing proceedings. The United States Air Force Court of Criminal Appeals disagreed, concluding that the military judge did not abuse his discretion in this case. In reaching its conclusion, the court observed that the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, has been incorporated into Article 6b of the Uniform Code of Military Justice. The court found Article 6b affords crime victims the "right to be reasonably heard . . . at [a] sentencing hearing related to the offense." Noting that federal courts have consistently interpreted the CVRA's right to be reasonably heard at sentencing to include the right to provide an unsworn statement during presentencing proceedings, the court determined that the military judge did not abuse its discretion in reaching the same conclusion. The court also determined that the right to be reasonably heard at sentencing must mean "something different" than the pre-Article 6b practice of allowing victims to "testify" during sentencing. For these and other reasons, the court affirmed the military judge's findings and sentence.

J.M. v. Payton-O'Brien, 76 M.J. 782 (N-M. Ct. Crim. App. 2017). The military judge granted a defense motion for *in camera* review of the sexual assault victim's privileged mental health records and, after reviewing them, *sua sponte* ordered for *in camera* review production of the victim's outpatient therapy records from two additional mental health providers. After reviewing over 750 pages of the victim's mental health records, the military judge identified and heavily redacted 75 pages for potential release to the defense. The victim then filed a petition for writ of mandamus, arguing that the military judge erred in ordering production of the records without first finding that they fell under one of the seven enumerated exceptions to the privilege listed in M.R.E. 513(d). The U.S. Navy-Marine Corps Court of Criminal Appeals granted the victim's petition, set aside the military judge's ruling under M.R.E. 513, and held that the victim's records

revert to their privileged status. The court found that the military judge’s decision ordering the production and release of the victim’s records despite the plain language of M.R.E. 513—which forbids *in camera* review of psychotherapist-patient records unless an enumerated exception to the privilege applies—was based on an erroneous view of the law. The court further found that the military judge’s error in concluding that there remains a judicial ability to apply a constitutional exception to M.R.E. 513 even though that exception was abolished in 2015 was very likely to recur and was “in direct contravention to the combined efforts of Congress and the President.” The court noted, however, that there are circumstances under which “the privilege’s purpose would infringe on the accused’s weighty interests” and require the use of judicial remedies—remedies that include the use of a closed hearing to determine if even though no enumerated exception in M.R.E. 513(d) applies, “the accused’s constitutional rights still demand production or disclosure of the privileged materials.” The court explained that if the military judge so concludes, the victim must be given the opportunity to waive the privilege for *in camera* review; if after review, the military judge determines some privileged information must be disclosed to preserve defendant’s constitutional rights, the victim would then have the option to further waive privilege and allow disclosure. If the victim elects not to further waive the privilege, then the judge could consider “remedial measures” to ensure defendant’s fair trial rights, which may include: (1) striking or precluding all or part of the witness’s testimony; (2) dismissing any charge or charges, with or without prejudice; (3) abating the proceedings permanently, or for a time certain to give the witness an opportunity to reconsider; or (4) declaring a mistrial. The court noted that “the foregoing remedies are not crude devices to punish the petitioner for electing to preserve the privilege. Rather, they are precise judicial tools necessary to balance the [victim’s] privilege against the [defendant’s] constitutional rights.” The court thus granted the victim’s writ so that “[t]he military judge may properly apply [M.R.E.] 513, consistent with this writ, and take remedial actions, as necessary, to ensure the [defendant] receives a trial wherein his constitutional rights are fully protected.”

United States v. Daniels, No. 201600221, 2017 WL 1365407 (N-M. Ct. Crim. App. Apr. 13, 2017). A general court-martial convicted defendant—pursuant to his pleas—of aggravated sexual assault of a child, indecent liberties with a child and sodomy; defendant received a sentence of 118 months’ confinement, with all but four years suspended, reduction of pay grade, and a dishonorable discharge. On appeal, defendant argued that the military judge erred in two respects. First, defendant argued that the military judge erred in admitting a portion of the victim’s written and verbal unsworn statements—which asserted that defendant had not taken responsibility for his actions—because the statements do not meet the definition of victim impact as defined by R.C.M. 1001A, and they are not proper aggravation evidence under R.C.M. 1001(b)(4). The United States Navy-Marine Corps Court of Criminal Appeals disagreed, concluding that the evidence was admissible as prosecution aggravation evidence under R.C.M. 1001(b)(4), as well as crime victim impact evidence under R.C.M. 1001A. In reaching its

conclusion, the court observed that the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, has been incorporated into Article 6b of the Uniform Code of Military Justice, and Article 6b affords crime victims a right to be reasonably heard at sentence. The court explained that R.C.M. 1001A "implements" that right to be heard by "giving a victim the right to make a sworn or unsworn statement during sentencing in a non-capital case," and the scope of the victim impact testimony includes "any financial, social, psychological, or medical impact on the victim directly relating to or arising from the offense of which the accused has been found guilty." Comparing R.C.M. 1001—which allows the prosecution to present aggravation evidence "directly relating to or resulting from the offense"—with R.C.M. 1001A—which allows victim impact evidence "directly relating to or *arising* from the offense"—the court stated that R.C.M. 1001A's language makes the scope of "victim impact evidence arguably broader and more encompassing than government aggravation evidence." The court also noted that a victim's right to present an impact statement under R.C.M. 1001A is "independent of whether the victim testified during findings or is called to testify under R.C.M. 1001." Second, defendant argued that the military judge erred by admitting the victim's statement as rebuttal evidence before he had presented any evidence in the presentencing proceedings. The court disagreed, concluding that the military judge did not abuse his discretion in this regard. In reaching its conclusion, the court observed that R.C.M. 1001A delineates the procedure by which victim impact evidence should be presented, and that it provides that a victim's statement should be presented "[a]fter the announcement of findings" without requiring the statement be presented after the defense's sentencing case. The court found the military judge acted within his discretion, "in the 'interest of judicial economy and efficiency,'" to allow the victim to address the court once instead of requiring her to return a second time after the defense's case to give a victim rebuttal. In *dicta*, the court also recommended several procedures that the military judge may adopt in the future when a victim wants to present an impact statement at sentencing pursuant to R.C.M. 1001A. Among other steps, the court suggested that the military judge, rather than one of the parties, call the victim, and that hearing from the victim first, before the parties begin their presentencing cases, "may often be a best practice." For these reasons, the court affirmed the military judge's findings and sentence.

United States v. Feathers, No. 14-CR-00531-LKH-1, 2017 WL 783947 (N.D. Cal. Mar. 1, 2017) (slip copy). Defendant filed a motion to release funds that were seized as part of a Securities & Exchange Commission (SEC) enforcement action relating to the same fraudulent activities at issue in the criminal proceeding. Defendant's motion was denied, and defendant filed a motion to reconsider or for a stay of the criminal proceedings. The trial court held that defendant failed to meet the requirements for reconsideration of an interlocutory order and that, even if the court were to grant defendant leave to file a motion for reconsideration that motion would be denied, as the "manifest injustices" cited by defendant were insufficient to satisfy the requirements of the relevant rule. In considering the portion of defendant's motion asking for a stay, the court

observed that it was unaware of, and defendant failed to cite, any case in which a *criminal proceeding* had been stayed pending the outcome of a *civil proceeding*. Applying a variation of the test articulated by the Ninth Circuit in cases where the stay of a *civil proceeding* is sought during the pendency of a *criminal proceeding*, the court observed that the delay associated with a stay of the criminal proceeding may impact the availability of witnesses and documents, as well as the quality of testimony. As the court further observed, civil appeals can take multiple years to resolve, negatively impacting the government’s ability to present its case. The court also found that any burden imposed on defendant in being unable to “spend another person’s money” to retain counsel of choice was lessened by the qualifications of defendant’s current counsel. In addition, the court found that not only does judicial efficiency weigh against what may be a multi-year delay in the criminal proceedings, the victims and the public have an interest in a timely resolution of the criminal proceedings, which had been pending for two and a half years. After weighing the interests of the government, defendant, the victims, the public, and the administration of justice, the court denied defendant’s motion for the stay of the criminal proceedings pending the outcome of his appeal in the related civil case.

United States v. Stevens, 239 F. Supp. 3d 417 (D. Conn. 2017). Defendant was arrested for selling heroin lethally laced with fentanyl that resulted in the victim’s overdose and death. Six months following the arrest, defendant appeared in district court to waive indictment and enter a guilty plea to the single charge of distribution of heroin. The judge inquired whether the victim’s family was present and whether they agreed with the plea agreement. The prosecutor informed the court that he was new to the case and had not personally spoken with the victim’s family, but that through the victim-witness coordinator the victim’s family was apprised of the proceedings. The judge proceeded with the plea hearing, but withheld acceptance of the plea until the prosecution could inform him of the views of the victim’s family regarding the plea. The judge then ordered the prosecution to file a statement describing how the government had complied with its obligations under the Crime Victims’ Rights Act (CVRA), 18 U.S.C. § 3771, and “whether the victim’s family and/or estate concurs with the proposed terms of the plea agreement.” The prosecution submitted a statement informing the court that the victim-witness coordinator notified the victim’s mother that the plea agreement was reached, and that she “expressed dissatisfaction that the death of her son was not charged.” In deciding whether to accept the plea agreement after receiving this information, the court referred to the CVRA, which provides crime victims with ten individual rights. The judge noted that a court may respect the rights of victims by declining to accept a guilty plea if the government violates the CVRA, reasoning that a district court has broad discretion to reject a plea agreement in the interests of the “sound administration of justice[,]” which he concluded requires respect for the rights and interests of crime victims. Although recognizing that the government may have good reasons for not pursuing the highest charge, the court rejected the idea that the government had a good or defensible reason for not speaking to the victim’s family before it entered into a plea agreement

with defendant. In addition, the court explained that victim-witness coordinators are not prosecutors, and that the CVRA does not contemplate that the government “will outsource all ‘victim’ communications to coordinators or other administrative personnel. To the contrary, among the rights guaranteed to victims by the CVRA is the ‘reasonable right to confer with the attorney for the Government in the case.’ 18 U.S.C. § 3771(a)(5).” In addition to the right to confer, the court cautioned that the plea agreement “potentially shortchanges the victim’s family’s right to restitution, contrary to the explicit right of victims under the CVRA to full and timely restitution[,]” because it did not include the potential for payment of future lost income. The court then rejected the parties’ plea agreement, concluding that the sound administration of justice does not support acceptance of a plea agreement under circumstances in which the government “does not respect” the rights of crime victims. The court authorized the parties to renew plea proceedings, and if this occurred, the prosecution must file a memorandum addressing whether and how it fully consulted with the victim’s family prior to committing to an agreement and whether the agreement otherwise protects the victim’s right to restitution.

United States v. Benevides, No. 6:13-cr-234-Orl-31KRS, 2017 WL 474369 (M.D. Fla. Feb. 6, 2017) (order). Defendant pled guilty to conspiracy to commit bank fraud and was sentenced to a prison term and required to pay restitution in an amount to be determined at a later hearing. The day before the restitution hearing was scheduled, the victim filed a motion to intervene. He argued that he was a victim of crimes committed by defendant and sought intervention so he could present his claim for restitution. The motion also contained a request for a continuance to allow defendant’s recently-retained counsel to prepare. The court denied the victim’s motion to intervene and the restitution hearing occurred as scheduled. The court ordered defendant to pay restitution, but not to the victim. The victim filed a petition for victim restitution and a motion for reconsideration of the court’s order denying his attempt to intervene in the case. The court explained that the procedure for enforcing victims’ rights is found in the Crime Victims’ Rights Act (CVRA), 18 U.S.C. § 3771, and that the CVRA does not permit crime victims to intervene in criminal cases; accordingly, there was no error in denying the motion to intervene. The court further explained that to challenge the denial of a restitution claim, the CVRA requires that the crime victim file a petition for writ of mandamus with the court of appeals no more than 14 days after the denial. In addition, the court stated that it “could not award restitution to [the victim] without reopening the Defendant’s sentence, and the CVRA requires that such reopening must be preceded by a writ of petition for writ of mandamus filed within 14 days.” The court held that because the victim did not file within the requisite time frame, his effort to obtain restitution was procedurally barred. The motion for reconsideration was denied.

United States v. McCray, No. 1:15-cr-212-WSD, 2017 WL 6471654 (N.D. Ga. Dec. 19, 2017) (slip copy). Defendant was charged with sex trafficking of a minor and related charges. Prior to trial, the state filed several motions in limine. In part, the government moved to preclude

defendant from introducing or attempting to elicit evidence concerning the sexual behavior or history of the child victim that occurred prior to or following the child sex trafficking count, arguing it was irrelevant under Rule 401 and barred by Rule 412. Defendant sought to introduce the evidence for impeachment purposes. The court found that the impeachment evidence defendant sought to introduce regarding the victim's prostitution activities was irrelevant under Rule 401. "That the minor victim may have prostituted herself on occasions other than those alleged in the indictment does not bear on whether the Defendant used force or threatened to use force against the victim to engage in the commercial sex acts alleged in this case." Further, the court found that the impeachment value was substantially outweighed by the danger of unfair prejudice. The motion was granted. The government also moved in limine to allow the victim to remain in the courtroom during trial pursuant to the Crime Victims' Rights Act, 18 U.S.C. § 3771 (CVRA). The government argued that the victim has a statutory right to attend trial even if she is to testify at trial, and sought an advance ruling that she be permitted to remain in the courtroom throughout the entire trial and related proceedings, including pretrial conference, preliminary instructions to the jury, and others. Defendant contended that the victim could observe the proceedings remotely by video feed to eliminate the prejudicial effect of her presence. Under the CVRA, the victim may not be excluded from any public court proceeding unless the court finds by clear and convincing evidence that the witness's testimony would be materially altered if the victim heard other testimony at that proceeding. Here, defendant made no argument that the testimony would be materially altered. Further, there are safeguards in place that the testimony would not be materially altered, including that she had been interviewed by police on video and the evidence would be corroborated by other evidence. As to defendant's arguments that the victim's attendance at trial would improperly inject sympathy into the trial—"they do not provide a basis to usurp the Crime Victims' Rights Act, and a criminal defendant has no constitutional right to exclude witnesses from the courtroom." Defendant's suggestion that the victim watch by a video feed would deny her statutory right. The state's motions were granted.

United States v. Redwood, No. 16 CR 80, 2017 WL 85445 (N.D. Ill. Jan. 10, 2017) (slip copy). Defendant was charged with transferring a handgun and ammunition to a minor who intended to carry out a crime of violence and with possessing a firearm within a school zone. The charges alleged that defendant gave her 14-year-old cousin a loaded firearm and told her to shoot another 14-year-old child. The cousin subsequently used the weapon to shoot two teenage girls, killing one of them. Defendant sought to bifurcate the proceedings to exclude evidence regarding the shooting and murder of the child-victim and any evidence that defendant knew that the cousin would use the weapon for a crime of violence until a separate penalty phase after defendant was convicted of transferring the weapon and ammunition to a minor. The court denied defendant's motion, noting that courts generally do not bifurcate elements of a single offense or in cases where charges increase penalties for offenses committed under specified circumstances. The

trial court also observed that the shooting and killing of the child-victim is direct evidence supporting the charges, as well as evidence that gives force to the government's theory of motive; excising this information from the evidence would leave a "hole in the government's narrative" that could potentially undermine the government's case or result in confusion and speculation by the jury. Finally, the court emphasized that bifurcation would require the surviving child-victim and a number of other child-witnesses to have to testify twice. The court explained that the surviving child-victim is entitled to rights as a victim of crime, including the "right to be treated with fairness and respect" and the right "to proceedings free from unreasonable delay." Not only would forcing the surviving child-victim to testify twice subject her to unnecessary stress, but forcing her "to tip-toe around the most traumatic aspect" of a traumatic experience—namely, the shooting and killing of a close friend—was found by the court to be "not reasonable." In conclusion, the court noted that jury instructions "mitigate the potential unfair prejudice to defendant and therefore eliminate the need for bifurcation." Defendant's motion to bifurcate was denied with the exception of one remaining issue that the court took under advisement.

State v. Millis, 391 P.3d 1225 (Ariz. Ct. App. 2017). Defendant was convicted of one count of intentional or knowing child abuse under circumstances likely to result in death or serious physical injury and one count of first-degree murder, both of which were committed against a child-victim. Defendant appealed, arguing, *inter alia*, that the trial court erred in allowing the child-victim's mother to be accompanied at trial by a facility dog. The victim had attended pretrial hearings accompanied by a facility dog named Blake, and defendant filed a motion to exclude the facility dog from trial proceedings, arguing that victims' rights provisions in effect at the time only explicitly addressed the presence of support persons, not support animals, and that the presence of the dog would result in unfair prejudice. Following a hearing, the trial court found no legal basis for excluding the dog, though the judge expressed a personal preference that the dog not be present. Blake accompanied the child-victim's mother while she sat in the gallery during trial, but did not accompany her to the stand during her testimony. On appeal, the court of appeals acknowledged that Arizona's victims' rights protections at the time were silent regarding whether a victim may be accompanied by a support animal, but also noted that at least five other jurisdictions had approved the accompaniment of victims by support dogs under appropriate circumstances. The court of appeals rejected defendant's assertion that a dog accompanying a victim is "presumptively prejudicial." The court of appeals also cited the later-enacted Arizona statute permitting the accompaniment of a crime victim by a dog as demonstrating "the policy of the State of Arizona to accommodate crime victims' use of a dog." The court of appeals further found that the trial court considered relevant factors in exercising its discretion, including that Blake would only accompany the victim in this case as she sat in the gallery and not during testimony and its implicit finding that Blake would help prevent undue

stress during a difficult trial about the death of the victim's infant son. For these and other reasons, defendant's convictions and sentences were affirmed.

State v. Payan, No. 1 CA-CR-16-0683, 2017 WL 4127693 (Ariz. Ct. App. Sept. 19, 2017). Defendant appealed his convictions and sentences for resisting arrest and possession of marijuana on numerous grounds. In relevant part, defendant argued that the superior court improperly found that the patrol officer qualified as a victim entitled to the protections afforded by Arizona's Victims' Bill of Rights. Before trial, defendant sought a pretrial interview with the patrol officer. The court found that the patrol officer qualified as a victim and had the right to refuse a pretrial interview. The court explained that pursuant to Arizona's Victims Bill of Rights, a "victim" is a person "against whom the criminal offense has been committed." The court further noted that a victim has the right to "refuse an interview, deposition, or other discovery request by the defendant." As charged in this case and set forth by statute, a person "commits resisting arrest by intentionally preventing or attempting to prevent a person reasonably known to him to be a peace officer, acting under color of such peace officer's official authority, from effecting an arrest by [u]sing or threatening to use physical force against the peace officer or another." Prior case law makes clear that resisting arrest is not a victimless crime—rather, it is a "crime committed against a person." Further, although there is case law suggesting that resisting arrest is "event-directed," that case does not call into question the holding that resisting arrest is a crime committed against a person. Therefore, the superior court did not err by designating the patrol officer as a victim entitled to refuse pretrial interviews. The conviction was affirmed.

State v. Viliborghi, No. 1 CA-CR 16-0550, 2017 WL 3184541 (Ariz. Ct. App. July 27, 2017). Defendant, convicted after a jury trial of one count of fraudulent schemes and artifices and one count of theft, challenged her convictions and sentences. On appeal, defendant argued, *inter alia*, that the trial court erred in denying her motion to continue the trial. Defendant asserted that defense counsel needed additional time to consult with an expert to address a new theory put forth by the prosecution, and the trial court's error implicated her Sixth Amendment right to effective assistance of counsel. The Arizona Court of Appeals rejected defendant's arguments, concluding that the trial court did not abuse its discretion or otherwise err in denying defendant's motion to continue. In reaching its conclusion, the court determined that the state had not changed its theory of the case, and even assuming that it had, the state was not obligated to inform the defense of the theory under which it would proceed at trial. The court also observed that the case had been pending for two years, and the trial court had already granted defendant multiple continuances. The court further observed that the victim was waiting for a resolution, and that he has a state constitutional and statutory right to a speedy trial. For these and other reasons, the court of appeals affirmed defendant's convictions and sentences.

State v. Wein, 396 P.3d 608 (Ariz. Ct. App. 2017). Defendant was charged with many felony and misdemeanor counts of sexual assault and molestation relating to a number of acts of misconduct with two child-victims. Defendant filed a motion for a bond hearing and, during the subsequent release hearing, the state informed the trial court that the victims wanted to present impact statements through a representative. The state indicated that it was only offering the victims' statements in relation to the third requirement for holding a defendant without bond, namely, whether there were any reasonable release conditions that would protect the victim. The trial court determined that it would consider the victims' statements when determining release conditions but that it would not consider the statements in the context of determining whether defendant could be held without bond unless defendant was given the opportunity to cross-examine the victims. Without considering the victims' statements, the trial court found defendant was bondable, and the state filed a petition for special action. The court of appeals accepted special action jurisdiction, finding that the matter involved an issue of victims' pretrial rights that would otherwise be lost. Under Arizona law, victims of crime have the constitutional and statutory right to be heard at any proceeding involving post-arrest release determinations. In exercising that right, Arizona law provides that victims are not subject to cross-examination. The court of appeals in reviewing the trial court's determination held that the trial court erred in refusing to consider the victims' statements in determining whether defendant was bondable unless the victims were subjected to cross-examination. As the court found, a "victim's 'right to be heard' is meaningless if it is not tantamount to a right to have the victim's impact statement (including his/her safety concerns) be seriously considered and addressed before the determination of whether a defendant is bondable." Because hearsay is authorized at bond hearings, the court of appeals found that the victims' statements, despite being hearsay, are permitted and may be considered in such a hearing. The court of appeals vacated the bond determination and directed the trial court to hold a new hearing, "wherein it considers the victims' impact statements in undertaking the determination as to whether the state has proven [defendant] is not bondable, without subjecting the victims to compulsory cross-examination."

Facebook, Inc. v. Super. Ct., 223 Cal. Rptr. 3d 660 (Cal. Ct. App. 2017). Defendant, charged with attempted murder, served petitioner Facebook with a subpoena for the victim's records. After the trial court denied Facebook's motion to quash and ordered it to produce the records for *in camera* inspection, Facebook sought appellate review by way of a petition for a writ of mandamus. Facebook argued, *inter alia*, that the trial court abused its discretion in ordering production because the victim's records are protected from disclosure by the Stored Communications Act (SCA), part of the Electronic Communications Privacy Act of 1986 (ECPA). Facebook asserted that the SCA prohibits Facebook from disclosing the victim's records without the victim's consent or a warrant issued based on probable cause. The court of appeals agreed, concluding that the record was protected from disclosure by the SCA. In reaching its conclusion, the court observed that "the purpose of the ECPA was to give the same

Fourth Amendment protection to electronic communications as other types of communications.” The court also observed that defendants have no general constitutional right to discovery in a criminal case. The court rejected defendant’s assertion that his confrontation, compulsory process, and due process rights mandate pretrial disclosure of the records. The court determined that the Supremacy Clause prohibits the enforcement of the trial court’s order because the order cannot be enforced without requiring Facebook to violate the federal statute. In *dicta*, the court noted that defendant should try to secure the victim’s Facebook records directly from the victim. For these reasons, the court ordered the issuance of a peremptory writ of mandate directing the superior court to vacate its order denying Facebook’s motion to quash, vacate its order allowing the subpoena *duces tecum*, and enter a new order granting the motion to quash.

IAR Systems Software, Inc. v. Super. Ct., 218 Cal. Rptr. 3d 852 (Cal. Ct. App. 2017). Defendant was charged with multiple counts of embezzlement for conduct arising out of his employment. Represented by counsel, the employer-victim initiated a parallel civil proceeding arising from the same facts alleged in the criminal case. The employer-victim, and the law firm representing it, filed a writ of mandate petitioning the appellate court to vacate the criminal court’s order stating that the law firm was a member of the prosecution’s team and was subject to *Brady*’s disclosure requirements. The appellate court explained that pursuant to *Brady*: “A prosecutor has a duty to search for and disclose exculpatory evidence if the evidence is possessed by a person or agency that has been used by the prosecutor or the investigating agency to assist the prosecution or the investigating agency in its work. The important determinant is whether the person or agency has been ‘acting on the government’s behalf.’” The trial court primarily relied on three factors in deciding that the victim’s attorney’s firm was a member of the prosecution’s team: (1) email correspondence with case citations regarding defendant’s ratification defense; (2) email correspondence asking for elements of the crimes defendant would be charged with to include in the civil deposition; and (3) the government’s expressed need and inability to pay for a forensic accountant’s audit, which was then procured and financed by the victim. The court of appeals analyzed the issue in the context of agents and principals: “the issue, in essence, is whether the prosecution has exercised such a degree of control over the nongovernmental actor or witness that the actor or witness’s actions should be deemed to be those of the prosecution for purposes of *Brady* compliance.” The court noted that there is no published case holding that a private party that is also a crime victim qualifies as a member of the prosecution team for purposes of *Brady*. The court then held that members of the victim’s attorney’s firm were merely acting on behalf of a cooperating witness and their actions were consistent with the general right of crime victims to confer with the prosecution regarding defendant’s charges. Of importance, the court noted that the law firm did not have an agreement with the prosecutor’s office, the exchange of legal citations was minimal, they did not conduct legal research or investigate solely at the request of the prosecutor, it was the victim (and not the law firm) that hired and paid for the financial audit, and the prosecutor did not solicit the discovery the law firm obtained through the

parallel civil lawsuit. The court then entered a peremptory writ of mandate directing the trial court to set aside and vacate its order, with the instruction to enter a new order finding that the victim's attorney's law firm is not part of the prosecution team in this case for purposes of *Brady*.

People v. Howard, No. G051990, 2017 WL 678463 (Cal. Ct. App. Feb. 21, 2017). A district attorney filed a criminal complaint charging a husband and wife (defendants) with, *inter alia*, embezzlement and forgery arising out of a business dispute between them and their business partner (the victim). The business dispute led to the husband filing civil complaints against the victim and the victim filing a cross-complaint. Eleven months after the criminal complaint was filed, the district attorney moved to dismiss all the charges against defendants for insufficiency of evidence. The district attorney stated that he learned that the victim had given a conflicting statement at a civil deposition that undermined her credibility. At the hearing on the motion to dismiss, the victim's attorney presented the court with documents and asked that another district attorney review the evidence. The court denied the victim's request and dismissed all charges against defendants. Defendants then filed a petition for a finding of factual innocence that is at issue in this case. The victim's attorney appeared at the hearing on the petition and sought to submit 200 pages of documentary evidence in opposition. The attorney argued that the victim had standing to oppose the petition under Marsy's Law. The trial court agreed, concluding that Marsy's Law applied and dismissed the petition based solely on the victim's opposition and the documentary evidence submitted by the victim. On appeal, the appellate court found that the trial court erred in concluding that the victim had the right to participate in the proceedings on three grounds. First, the plain language of the statute pertaining to a petition for factual innocence requires a trial court to base its decision on evidence submitted by the parties, and a victim is not a party. Second, Marsy's Law does not apply to factual innocence proceedings as it is not a proceeding in which the right of the victim is at issue. The court explained that once a case has concluded in the defendant's favor, the rights of the victim are no longer at issue. In addition, the court reasoned, Marsy's law does not mention post-acquittal or post-dismissal proceedings. And finally, once a case has concluded in favor of the defendant, the victim is no longer a legal victim under Marsy's Law. Based on that reasoning, the court found that once the trial court dismissed the case the victim had no right to participate in the hearing or to oppose the petition. For these reasons, the appellate court reversed the trial court's order denying the petition for a finding of factual innocence and remanded with directions to grant the petition.

State v. Damato-Kushel, 173 A.3d 357 (Conn. 2017). A sexual assault victim petitioned for writ of error on the basis that the trial court violated his state constitutional right under Conn. Const. art. I, § 8(b)(5) to "attend the trial and all other proceedings the accused has the right to attend" by precluding him from attending in-chambers conferences related to plea negotiations in the case. In reviewing the case, the court first found that the victim had standing to seek the writ of

error because: (1) the arrest warrant was a sufficient determination of his status as a legal victim under the victims' rights constitutional amendment; (2) the trial court's denial of his request to attend pre-trial conferences was an appealable interlocutory order because the right to attend proceedings would be destroyed if appellate review was delayed until final judgment was rendered in the case; and (3) the victims' rights amendment does not bar the type of the relief requested. On the merits, the court's analysis focused on whether in-chambers, pretrial disposition conferences were "court proceedings" that the accused "has the right to attend." Defendant argued that in-chambers, off-the-record conferences were not "court proceedings" and that the defendant does not have a right to attend them, thus the victim's right did not apply. The court found that it could not discern the meaning of the provision from the text alone and looked to extra-textual sources to interpret the right. The court relied on prior case law where it found that a defendant does not have the right to attend disposition conferences. In addition, it reasoned that although defendant's counsel must be present at the conference to negotiate on behalf of defendant, this is not the same as defendant having a personal right to be present at the conference. The court noted that the privileges, rights, and responsibilities of counsel are not identical to those of defendant, and, in this situation, defendant's counsel, not the defendant, had a right to attend the conferences. The court went on to decline to interpret the victims' rights amendment to entitle victims to attend proceedings that either the defendant *or* his/her/their counsel have the right to attend. As such, the court concluded that neither the victim nor his authorized representative has the right to attend in-chambers, off-the-record disposition conferences. The court dismissed the writ of error.

State v. Skipwith, 165 A.3d 1211 (Conn. 2017). Defendant pleaded nolo contendere to manslaughter in the second degree with a motor vehicle and operation of a motor vehicle while under the influence of liquor, in connection with an incident in which defendant struck and killed the victim with his car. The victim's mother moved to vacate defendant's sentence and petitioned for writ of error coram nobis after having been erroneously deprived of her right, as a crime victim, to object to the plea agreement and make a statement at the sentencing hearing. Following a hearing, the superior court dismissed the motion and petition. The mother filed a writ of error in the Supreme Court of Connecticut. On transfer, the intermediate appellate court dismissed the writ. The mother filed a petition for certification to appeal. On appeal, the mother contended that the sentence was imposed in an illegal manner, and therefore she was entitled to have the sentence vacated. The state contended that the appellate court properly dismissed the mother's motion on the merits, and further that the court lacked jurisdiction to entertain a writ of error seeking to enforce the provisions of the victim's rights amendment. The supreme court first determined that it did have jurisdiction to hear the writ of error seeking to enforce the victim's rights amendment. The court explained that although there was no explicit language in the constitution or statute expressly conferring such authority, the right to appeal by writ of error is a common-law remedy. Thus, in the absence of any constitutional or statutory provision

depriving the court of its common-law jurisdiction over writs of error, the court has jurisdiction if a victim falls within the class of persons who are entitled to file a writ of error. There being no such provision, the court has jurisdiction. Turning to the merits, the court then determined that the appellate court was nonetheless correct in dismissing the writ because the victim sought a form of relief—an order requiring the trial court to vacate the defendant’s sentence—that is barred by the prohibition on appellate court relief contained in the victim’s rights amendment: “Although the victim’s rights amendment does not deprive victims of their right file a writ of error to enforce their constitutional rights, it also does not expand their rights to seek a form of appellate relief that previously had been barred by statute.” Because victims were barred by statute from seeking to vacate a criminal sentence for the violation of their rights when the victim’s rights amendment was adopted, the court concluded that this form of relief is barred, and therefore the appellate court’s decision was affirmed. Three judges concurred in the opinion, based on the language of the amendment, but stated that because the courts are barred from construing the amendment to create a basis for any form of appellate relief, and the legislature has not enacted any enforcement methods, the promises of the amendment are “largely illusory.” The concurring judges continued, citing *Marbury v. Madison*: “This state of affairs undermines the foundational principle, declared more than 200 years ago, that a government of laws ‘will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.’” The justices urged the legislature to take steps to prevent a similar recurrence, and urged trial courts to be vigilant and protective of victims’ rights. The justices concluded: “This case provides a stark reminder that a constitutional right, unadorned by a remedy to enforce or vindicate that right, is a hollow one. Indeed, a victim of crime who is denied her constitutional rights by a prosecutor or the court is, in a very real sense, victimized all over again. Without understating the significance of the primary victimization, this second victimization may be in some ways more odious because it is inflicted upon her by the levers and gears of the judicial system itself, the very institutional mechanism she—and all people in civilized society—relies on to have her offender held to account. We as a state must do better than this.”

Dickie v. State, 216 So. 3d 35 (Fla. Dist. Ct. App. 2017). Defendant pleaded no contest and was convicted of multiple counts of possessing child pornography, including at least one movie of a child-victim. Defendant’s counsel submitted an appellate brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), explaining that she could find no issues of merit, and the court of appeals struck the *Anders* brief and ordered merits briefing. Defendant’s judgment and sentences were then affirmed without comment, but the court wrote “to address whether the trial court’s consideration of unsworn victim impact statements” during sentencing was proper. The victim impact statements were collected through the FBI’s Child Victim Identification Program, which reuses the same victim impact statements across proceedings nationally where prosecutions relate to the possession of the images of child sexual abuse. The impact statements in this case

were drafted by the child-victims and, in some cases, the parents of the child-victims, and defendant objected to the introduction of the statements at sentencing, emphasizing that the victim impact statements were not taken under oath. After ruling on the admissibility of the statements for sentencing purposes, the trial court reviewed the victim impact statements before denying defendant's request for downward departure. On appeal, the court affirmed that sentencing courts have wide discretion regarding the factors it may consider when imposing a sentence. Florida law provides that a sentencing court "*shall permit*" a victim to submit a written statement under oath or appear before the sentencing court to make a statement under oath. The court on appeal observed that the statute's "plain language says nothing about what a sentencing court *shall not* permit, and courts have declined to read such restrictive verbiage into the statute." The court on appeal held that, in mandating that the trial court must allow all victims of crimes the opportunity to be heard under oath in connection with sentencing proceedings, "the legislature did not sub silentio create a new sentencing doctrine precluding trial courts from considering unsworn victim impact statements in fashioning a criminal sentence." This court observed that its decision conflicts with that issued by another district court of appeals, disagreeing "with *Patterson* and the proposition that unsworn victim impact statements are per se inadmissible at sentencing hearings." Instead, this court affirmed that trial courts "have the discretion to consider such statements, just as they did before passage of section 921.143(1)." Defendant's conviction and sentences were affirmed and the appellate conflict certified.

Davis v. State, 798 S.E.2d 474 (Ga. Ct. App. 2017). Defendant was convicted of aggravated sodomy of a child-victim after entering a guilty plea to that charge. Following his release from prison, defendant applied to the Georgia Board of Pardons and Paroles for a pardon, which was granted. Approximately a month after receiving his pardon, defendant moved to North Carolina without providing notice to the Sheriff's Office that he was doing so. When contacted, defendant asserted that his pardon obviated his previous requirement that he register as a sex offender. The Sheriff's Office obtained a warrant for his arrest, and the state charged defendant with failing to register as a sex offender. Defendant filed for a demurrer, arguing that the indictment was legally invalid because the pardon removed his requirement to register as a sex offender when it ordered "that all disabilities under Georgia law resulting from the above stated conviction and sentence . . . are hereby removed." The trial court denied defendant's motion, and defendant appealed. The court of appeals agreed with defendant that the requirement to register as a sex offender was a legal disability, and that the requirement was removed by the Board's pardon. Consequently, he committed no offense under Georgia law and the trial court erred in denying defendant's demurrer. Before reversing the judgment, the court took "this opportunity to express our sympathy with many of the concerns raised" The court was "deeply troubled by the fact that neither the victim nor the District Attorney's Office was ever notified that the Board was considering a pardon of [defendant's] aggravated sodomy conviction. Indeed, while the Board resisted the State's attempts at every turn to unseal [defendant's] pardon

file, one of its members did agree to speak with the District Attorney's Office about the pardon process in general. And in doing so, this board member indicated that (1) the Board has no policy of contacting the District Attorney's Office from the convicting circuit or the victim before granting a pardon, (2) no real criteria exists for granting a pardon ("It's very subjective"), and (3) *99% of all pardon requests are granted*. Suffice it to say, these averments, if true, are shocking—especially the assertion that 99% of all pardon requests are granted." Although the information about the pardon process had no bearing on this appeal, the court suggested that "the General Assembly may very well wish to investigate the manner in which the Board is currently exercising its pardon power, and then take any remedial measures that it deems necessary." The judgment of the trial court was reversed.

People v. Sevedo, 74 N.E.3d 529 (Ill. App. Ct. 2017). Defendant was indicted for threatening a police detective who testified as a state's witness during her trial on charges of armed robbery. Defendant had communicated the alleged threat against the detective and his family to a domestic violence advocate who accompanied her to court appearances as part of the counseling services provided by a local domestic violence advocacy center (the Center), and the advocate disclosed the communication to the police. The Center and its Executive Director (the Contemnors) appealed the trial court's denial of their motion to quash the state's pretrial subpoena duces tecum seeking "[a]ny and all incident reports or documents [in the Center's possession or control that were] generated in connection to the report of threats made"; they also appealed the trial court's order finding them in civil and criminal contempt and imposing a fine for their refusal to produce the documents for *in camera* review. The Contemnors argued, *inter alia*, that the trial court erred in denying their motion because the statutory domestic violence advocate-victim privilege protected the requested records, and the privilege remained intact despite the advocate's limited disclosure of the alleged threat under the exception for "imminent risk of serious bodily harm." The court of appeals agreed, concluding that the advocate-victim privilege applied to the requested records. In reaching its conclusion, the court determined that this privilege prohibits the disclosure of "any" confidential communication between a victim and an advocate made in the course of the advocate providing information, counseling or advocacy services unless the victim consents or one of the two exceptions is satisfied. The court found that the scope of the privilege is "very broad so that victims will not fear that confidential information will be disclosed to a third party." The court rejected the state's argument that the communication falls outside the scope of the privilege because it was neither communicated during a privileged counseling setting nor made as part of a conversation related to domestic violence. The court examined the statutory definition of "confidential communication"—which requires the communication to be made "in the course of providing information, counseling or advocacy"—and found that the broad language covers "any communication beyond the topic of domestic violence, even statements unrelated to the information, counseling, or advocacy being provided to the victim." The court agreed that a threat to harm the police detective falls within

the privilege's "imminent risk of serious bodily harm" exception, but rejected the state's argument that once an advocate properly discloses a confidential communication under the imminent risk exception, the communication is subject to disclosure indefinitely. The court also determined that the advocate-victim privilege is "absolute in nature," and an *in camera* review of the requested records is not necessary when the undisputed facts concerning the communication and the face of the subpoena show the records sought are protected by the privilege. The court further found that the Contemnors asserted the absolute nature of the privilege in good faith and a reversal of the contempt sanction is warranted. For these reasons, the court reversed the judgment denying the Contemnors' motion to quash and ordering the production of documents for *in camera* review; the court also reversed the contempt order and vacated the fine.

State v. Tjernagel, No. 15-1519, 2017 WL 108291 (Iowa Ct. App. Jan. 11, 2017) (slip copy). Defendant was convicted of sexual abuse and appealed, arguing, *inter alia*, that her attorney provided ineffective assistance resulting in prejudice by failing to object to: (1) expert testimony that amounted to vouching for the credibility of the child-victim; (2) the use of statistics and profiling; and (3) expert testimony providing information about child sexual abuse that defendant believed was within the common knowledge of the jurors. In giving testimony, the state's expert witness used specific examples from the child-victim's testimony of sensory memories, including the name of the television show that was playing during an instance of sexual abuse and the food he could smell, in testifying that a child who provides sensory details must be telling the truth because that level of detail cannot be coached. The expert also provided information about suggestibility and coaching in child sexual abuse cases in general and testified regarding her conclusion that the forensic interviewer did not do anything inappropriate during the forensic interviews conducted in this case. The Iowa Court of Appeals concluded that the expert crossed the line and engaged in inappropriate vouching when she commented on the specific facts of this case and when she testified that the child-victim was not "inappropriate" during the forensic interviews, as these comments implied that this child-victim was truthful and did not appear to be coached during the interviews. The court found that the expert also made other improper statements implying that the child-victim "was telling the truth about the alleged abuse simply because he testified in front of the jury at trial." The court held that defendant's trial counsel failed to perform an essential duty resulting in prejudice when he failed to object to the vouching testimony introduced by the expert and that the "numerous examples of vouching . . . were pervasive and laid the groundwork" for the emphasis on the child-victim's credibility that the state presented during closing argument. The court found no error, however, in the state's expert's use of statistics at trial. Although it is "well-established in Iowa that expert witnesses are prohibited from providing statistics suggesting children do not lie about sexual abuse," the expert's testimony cited statistics addressing how likely and at what age children who are victims of sexual abuse disclose the abuse. The court found that testimony to be appropriate, and therefore defense counsel did not render ineffective assistance in failing to

object to it. The court further found that defense counsel also did not err in failing to object to the state's expert's testimony that sex offenders can be either male or female. Finally, the court of appeals held that defendant's trial counsel did not err in failing to object to expert testimony regarding a child's capacity for details, a child's concept of time, parental responses to allegations of child sexual abuse, parental discussions of allegations of abuse with the child, and about parents escorting children to forensic interviews and children using age-appropriate language. The court explained that this expert testimony properly may have aided the jury in understanding the evidence and determining the facts at issue. The conviction was reversed and the case remanded for a new trial.

Lopez v. State, 153 A.3d 780 (Md. Ct. Spec. App. 2017). Defendant was convicted after entering *Alford* pleas to robbery and first-degree murder of one victim and kidnapping and first-degree murder of that victim's child. He was sentenced to life imprisonment without the possibility of parole. On appeal, defendant argued, *inter alia*, that the trial court erred in allowing a victim impact video to be shown during the sentencing hearing. Defendant claimed that the introduction of the video violated his rights under the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. The Court of Special Appeals of Maryland rejected defendant's arguments and held that the trial court did not abuse its discretion. In reaching its holding, the court observed that the video consisted of an approximately six-minute montage of 115 still photographs of the two victims accompanied by a bell ringing in the beginning and the end; a piano instrumental piece and a pop song; and no words other than the video's title and the credits at the end. The court explained that the United States Supreme Court's decisions on victim impact evidence—*Booth v. Maryland* and its progeny—did not address whether the Eighth Amendment applies to the admission of victim impact evidence in non-capital cases. The court concluded that even if the Eighth Amendment did apply, the type of impact evidence at issue—relating only to the personal characteristics of the victims and the impact of the crimes on the victims' family—did not violate the Eighth Amendment. The court also concluded that the admission of the video did not violate defendant's right to due process. Applying an "unduly inflammatory" standard to the due process analysis, the court found that the victim impact video offered "at most a 'quick glimpse' into the two lives extinguished by" defendant, and none of the elements—the length, the content of the photographs, or the content of the music selections—created an undue risk that defendant's life sentences were the product of an inflammatory video rather than the heinous facts of the crimes. The court noted that the sentencing proceeding took place before a judge, not a jury, and that trial judges are presumed to know how to assess potentially inadmissible evidence and how to put evidence deemed unfairly prejudicial aside when making their decision. For these and other reasons, the court affirmed the judgments.

Leiendecker v. Asian Women United of Minn., 895 N.W.2d 623 (Minn. 2017). Following four lawsuits between the parties wherein the plaintiffs were successful, plaintiffs filed a fifth suit

seeking to recover under a host of legal theories for the injuries allegedly inflicted by defendants through the four previous lawsuits. One of the defendants moved to dismiss the action on various grounds, including a claim for malicious prosecution under Minnesota’s anti-SLAPP (Strategic Lawsuit Against Public Participation) statute, Minn. Stat. §§ 554.01-.06. The anti-SLAPP statute allows parties to move for dismissal of a lawsuit on the ground that a claim against them relates to an act involving public participation. A party moving to dismiss a claim based on the anti-SLAPP law must “make a threshold showing that the underlying claim materially relates to an act of the moving party that involves public participation.” Pursuant to Minn. Stat. § 554.02(Subd.2), after the moving party makes this threshold showing, the burden of proof shifts to the responding party to produce clear and convincing evidence that the acts of the moving party are not immunized from liability. The district court dismissed most of plaintiffs’ claims, and denied defendant’s anti-SLAPP motion. On appeal, plaintiffs argue that Minn. Stat. § 554.02 is unconstitutional as applied to the malicious prosecution claim because it violates Minnesota’s right to jury trial. In resolving the issue, the Minnesota Supreme Court noted that Article I, Section 4 of the Minnesota Constitution establishes that the “right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy” and permits no exception. The court then found that malicious prosecution, as “an action for a tort” with a right to damages, is a claim at law that entitles the plaintiffs to a jury trial. In analyzing the anti-SLAPP statute’s procedure, the court found that it violated the responding party’s right to a jury trial in two ways: by transferring the jury’s fact-finding role to the district court, and requiring the responding party to meet a higher burden of proof before trial (clear and convincing evidence) than it would have to meet at trial (preponderance of the evidence). The court reasoned that a district court’s ruling on an anti-SLAPP motion necessarily decides the merits of the tort action itself. Because the court concluded that the unconstitutional portions of the statute were inseparable from the whole, it held that Minn. Stat. § 554.02 is unconstitutional when applied to claims at law alleging torts.

State v. Willis, 898 N.W.2d 642 (Minn. 2017). Defendant was convicted of aggravated forgery arising out of his use of a forged quitclaim deed to interfere with the victims’ efforts to sell a property. After a restitution hearing, the trial court ordered defendant to pay \$10,742 in restitution. On appeal, defendant argued that the trial court erred when it overruled defendant’s objections to the admission of certain pieces of evidence on the basis that the Minnesota Rules of Evidence do not apply at a restitution hearing. The court of appeals affirmed the trial court’s rulings, but the Minnesota Supreme Court concluded that the trial court erred. In reaching its conclusion, the court noted that defendant had objected on hearsay grounds to the admission of a letter from one of the victim’s attorneys describing the legal fees incurred to clear the title to the property as well as several emails. The court found that the rules of evidence expressly provide that the rules do not apply to “sentencing” proceedings, but they do not expressly exclude “restitution” hearings. The court rejected the state’s argument that the term “sentencing”

includes restitution hearings on the basis that restitution is part of a sentence. The court narrowly construed the term “sentencing” and determined that a restitution hearing is not a sentencing proceeding. The court stated that it was bound by its interpretation of the term “sentencing” from an earlier case in which it concluded that the rules of evidence apply at a *Blakely* trial. The court noted that it previously defined “sentencing” as “the proceeding at which a judge listens to the parties’ sentencing arguments; considers all the relevant facts, including the special verdicts returned at an earlier *Blakely* trial; and then announces the sentence.” The court explained that a restitution hearing is similar to a *Blakely* trial in that it is not the “imposition of a sentence” but rather the process by which a court must make factual determinations that may be used to support that sentence. The court acknowledged the policy arguments that the dissent and the state raised against the application of the rules of evidence in restitution hearings. The court also acknowledged the “serious concern that, in certain cases, restitution hearings could be used to harass or traumatize victims.” The court noted that other rules and case law provide trial courts with authority to prevent such abuse. The court further noted that it has issued a separate order directing the appropriate advisory committees to review the rules of evidence and make any necessary recommendations. For these reasons, the court reversed the court of appeals’ decision and remanded the case for further proceedings consistent with its decision.

Cathcart v. Fairly, 227 So. 3d 1176 (Miss. Ct. App. 2017). A victim who asserted that he had been bullied and physically forced to leave a neighborhood association meeting, filed petitions for writ of certiorari and mandamus, challenging decisions of the justice court finding that there was no probable cause to issue arrest warrants for the assault against him. The Circuit Court dismissed the matter without prejudice and the victim appealed. On appeal, the court found that the victim lacked standing to contest the justice court’s disposition of the prosecution. Even though misdemeanor prosecutions may be initiated by the filing of an affidavit by a victim in Mississippi, “it is axiomatic that the victim is not a party to the prosecution.” According to the court, under the Mississippi Constitution, all prosecutions must be carried on in the name of and by the authority of the state. Further, the Mississippi Code explicitly provides that a victim “does not have standing to participate as a party in a criminal proceeding or to contest the disposition of any charge.” The court also added that the rights of the victim do not include the authority to direct the prosecution of a case. The court noted that other jurisdictions to consider the issue unanimously came down the same way. The dismissal was affirmed.

Mont. Ass’n of Ctys. v. State, 404 P.3d 733 (Mont. 2017). Petitioners filed a petition for declaratory and injunctive relief challenging the constitutionality of proposed constitutional amendments concerning rights of crime victims proposed by popular initiative, commonly known as Marsy’s Law. On appeal, the court considered whether the procedure by which the initiative (CI-116) was submitted to voters conformed to Montana’s constitutional requirements. The court explained that Montana’s Constitution may be amended by popular initiative in the

manner provided by the Constitution; one check on the process is the “separate vote” requirement. Under this requirement, even if a proposed amendment relates to a single plan or purpose, it can still violate the separate vote requirement if it contains more than one amendment to the Constitution. The court found, as a matter of first impression, that a different standard, the more lenient “single subject” standard, that requires that there be a single subject to the proposed amendment, applies only when the legislature puts forward an amendment. When an amendment is proposed by initiative, the more stringent “single vote” standard applies. The court then turned to the scope of the single vote standard. The court concluded that the proper inquiry is whether, if adopted, the proposal would make two or more changes to the Constitution that are substantive and not closely related. With these standards in mind, the court turned to the changes CI-116 would make to the Constitution. The court found that CI-116 expressly amends the Constitution by adding a new section providing for specific crime victim rights. Although it did not expressly mention, repeal, or otherwise modify any other areas of the Constitution, the court found that it made several implicit substantive changes. The court found the preexisting constitutional provisions that would be substantively changed to be the grant of power to the Montana Supreme Court to govern attorney conduct; the right to bail; criminal procedure rules; rights of the accused; right to know; right of privacy; and due process. The court noted that some of these provisions are related in that they are all implicated during a criminal prosecution. “However, a broad relationship between various provisions or a broad single subject does not satisfy the narrower interpretation of the separate-vote requirement . . . because voters did not have the opportunity to convey their opinions as to each constitutional provision changed by CI-116.” The court found CI-116 to violate the separate vote requirement and for that reason to be void in its entirety. In conclusion, the court stated: “We reiterate that our decision is not based on the merits of the constitutional change proposed by CI-116. [The Constitution] clearly grants the people initiative power to popularly amend the Constitution as they deem necessary, even if an amendment affects other portions of the Constitution. However, the procedure by which the Montana Constitution is amended must comply with existing constitutional requirements.” Because the court concluded those requirements were not met, the initiative was void.

State v. Bitzas, 164 A.3d 1091 (N.J. Super. Ct. App. Div. 2017). Defendant was convicted of second degree possession of an assault firearm, fourth degree possession of a large capacity magazine, and fourth degree possession of a handgun following conviction for possessing a controlled dangerous substance, and sentenced to an aggregate term of thirteen years. The trial court had earlier severed additional counts that stemmed from the same incident involving the victim—defendant’s former girlfriend—including counts of third degree terroristic threats and fourth degree aggravated assault by pointing a firearm at or in the direction of another. Defendant appealed his convictions, arguing, *inter alia*, that he was prejudiced by the trial court’s failure to appropriately address the victim’s behavior while testifying as a witness—behavior that included continuously responding to defense counsel’s questions in a disruptive

manner, disregarding the prosecutor's instructions, deliberately mentioning extraneous information that was prejudicial to defendant, and walking out of the courtroom during her cross-examination on the first day of trial. The court agreed with defendant, vacated his convictions, and remanded for further proceedings. The court found that the trial court abused its discretion in failing to declare a mistrial. The court explained that "[a]lthough the trial judge issued curative instructions to the jury, [the victim's] obstreperous behavior eventually overwhelmed the proceedings. It soon became clear that the curative instructions could neither counteract the prejudice caused by the witness's misbehavior nor deter her from continuing to disrupt the trial." The court acknowledged that "victims of a crime have a right under our Constitution to be 'treated with fairness, compassion and respect by the criminal justice system[.]'" however "when victims testify in a criminal trial, they are subject to the authority of the judge presiding over the proceedings and must follow the judge's instructions. If a witness is unwilling or unable to adhere to a trial judge's instructions or the witness's courtroom conduct becomes so obstreperous that it interferes with the orderly administration of the trial, the judge has the authority and responsibility to take reasonable measures to restore order, preserve the decorum and solemnity of the proceedings, and protect the defendant's right to a fair trial."

State v. Harris, 404 P.3d 926 (Or. 2017). Defendant appealed his conviction for attempted misdemeanor assault, arguing that his right to confrontation under Article I, section 11 of the Oregon Constitution was violated when the trial court allowed the state to use hearsay evidence in the form of a 911 recording in lieu of the minor-victim's live testimony. The state had subpoenaed the minor-victim to testify, but learned the morning of trial that she was not going to appear. The state tried contacting the minor-victim but could not reach her. The trial court offered to continue the trial until the next morning to provide the state time to secure the witness, and the state agreed. Defendant objected to the continuance. The trial court then found that the witness was unavailable and that the 911 recording was reliable. The trial court admitted the evidence, and defendant was convicted. On appeal, defendant argued that the state did not make an adequate showing of witness unavailability. Defendant argued that the state only satisfies this obligation after exhausting every reasonable means available of securing a witness. The state argued that it only needed to show a reasonable, good-faith effort to secure the witness's presence, and that serving a prospective witness with a valid subpoena satisfies that obligation. The Oregon Supreme Court concluded that to establish unavailability for Article I, section 11 purposes, the state must show that "it was unable to produce a witness after exhausting reasonable means of doing so." The court noted that in most cases, this will require more than merely relying on a subpoena. However, in the present case, because defendant objected to the continuance, he was found to have invited error and could not complain that the state failed to exhaust other means of securing the witness. The court affirmed defendant's conviction.

State v. Gutierrez-Medina, 403 P.3d 462 (Or. Ct. App. 2017). Defendant was convicted of driving under the influence of intoxicants and third-degree assault, and was ordered to pay restitution for the victim’s medical treatment. Defendant appealed, arguing that the trial court erred when it refused to reduce the restitution amount based on the comparative fault of the victim. The court explained that Oregon’s comparative-fault scheme applies to nonintentional torts. Under that scheme, when the trier of fact determines that someone other than defendant was negligent, the trier of fact is required to determine the relative fault of those persons and apportion the claimant’s damages among them on that basis. Defendant argued that the comparative-fault scheme applies to criminal restitution because a trial court is required to determine the amount of economic damages to be ordered as restitution, and therefore the court has to consider the victim’s role in the accident because the victim could have caused a portion of the claimed economic harm. The court rejected this argument because comparative fault is not considered in civil law as part of the causation analysis—the question of apportioning fault arises only after causation is established. Further, to the extent defendant was arguing that comparative fault should apply as a consideration separate from causation, the court disagreed, finding that “the plain text of the restitution statute provides that the trial court shall award restitution ‘in a specific amount that equals the *full amount* of the victim’s economic damages as determined by the court.’” In addition, another provision in the restitution statute states that the court may award less than the full amount of the victim’s economic damages “only if” the victim consents to the lesser amount. Accordingly, the court determined that the statute “expressly forecloses the court from engaging in the type of apportionment of damages that comparative fault contemplates.” Concluding that the trial court did not err in refusing to reduce the amount of the restitution award based on the comparative fault of the victim, the court affirmed.

Doe v. State, 808 S.E.2d 807 (S.C. 2017). The victim of assault by her same-sex fiancé petitioned for original jurisdiction after not being able to obtain an Order of Protection in family court. She sought a declaration that the definitions of “household member” in the Domestic Violence Reform Act and the Protection from Domestic Abuse Act were unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment because neither affords protection from domestic abuse for unmarried, same-sex individuals who are cohabiting or formerly have cohabited. Under the statutes, “household member” is specifically defined as “a male and female who are cohabitating or formerly have cohabited.” The court found that the victim failed to establish that the statutes were facially unconstitutional because the text of the statutes does not overtly discriminate based on sexual orientation, and because there are a number of valid application of the definition of “household member.” Finding the definition not to be invalid *in toto*, the court found that the victim must use an “as-applied” challenge rather than a facial challenge. Under this challenge, the question is whether the definition of “household member” as applied denied the victim equal protection of the laws. Equal protection requires that all persons be treated alike under like circumstances and conditions, both in

privileges conferred and liabilities imposed. Using the rational basis test, the court found that the victim met her burden of showing that similarly situated persons received disparate treatment. The court found that the definition: (1) bears no relation to the legislative purpose of the Acts; (2) treats same-sex couple who live together or who have lived together differently than all other couples; and (3) lacks a rational reason to justify this disparate treatment. The court then turned to the appropriate remedy. The court declined to remedy the constitutional infirmity through severance or by invalidating the acts in their entirety. “Such a decision would result in grave consequences for victims of domestic violence. To leave these victims unprotected for any length of time would be a great disservice to the citizens of South Carolina.” The court concluded that in order to “address the important issue presented in this case and remain within the confines of the Court’s jurisdiction,” it would declare the sections unconstitutional as applied to this victim. The court therefore declared the statutes unconstitutional as applied, upholding the statutes as to opposite-sex couples, and requiring the courts to apply the statutes to same-sex couples.

In re Centerstone, No. M.2016-00308-CCA-WR-CO (Tenn. Crim. App. Jan. 17, 2017) (slip copy). Defendant in the underlying criminal matter was indicted for incest, rape, and statutory rape by an authority figure. During the pre-indictment investigation, the prosecutor’s office obtained a judicial subpoena for the mental health records of the child-victim. The judicial subpoena was served on Centerstone, a community mental health services provider operating in seventeen Tennessee counties. Centerstone informed the state that it would not comply with the subpoena, and the trial court issued a summons to appear and show cause. Centerstone filed a motion to quash the judicial subpoena. During a hearing, Centerstone’s Director of Health Information Management testified that, as a matter of course, Centerstone responds to judicial subpoenas by informing the requesting party that it should seek disclosure of records using Tenn. Code Ann. § 33-3-105(3), which governs subpoenas for confidential information and which requires a hearing and the application of a specific standard. Testimony further established that a trial court has never ordered Centerstone to disclose mental health records in order to comply with a judicial subpoena, rather than conducting the hearing required pursuant to Section 33-3-105(3). The trial court denied Centerstone’s motion to quash but granted permission to seek appellate review. On appeal, Centerstone argued that a judicial subpoena is not a valid mechanism for discovery of mental health records, which are made confidential by law, and that access, unless granted voluntarily, must follow the procedure set forth in Section 33-3-105(3); the state disagreed. As a question of first impression, the Court of Criminal Appeals analyzed the relevant statutory provisions at issue, concluding that the personal privacy interests of the subjects of the mental health records protected by Tennessee law require that they receive “pre-hearing notice and an opportunity to be heard . . . rather than being forced to rely on the holder of the mental health records to protect [their] interests after an ex parte hearing.” The Court of Criminal Appeals concluded that a judicial subpoena is an invalid mechanism for the discovery

of mental health records made confidential under Tennessee law and that, going forward, involuntary disclosure of such records must proceed in accordance with Section 33-3-105. Because the trial court did not follow this procedure and did not give the child-victim an opportunity to be heard, the trial court order was vacated and the case remanded for an appropriate hearing.

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