



Crime Victim Law Update

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I. SPECIFIC VICTIMS' RIGHTS

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

In re Olesen, No. 11-4190, 2011 WL 5357631 (10th Cir. Nov. 4, 2011) (slip copy). The petitioner-victim initiated a mandamus proceeding, requesting that the Tenth Circuit direct the district court assigned to the habeas proceedings brought by the man convicted of murdering his mother to: 1) reconsider the petitioner-victim's motion to dismiss defendant's remaining habeas claims, in light of the petitioner-victim's rights under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771; 2) afford petitioner-victim his CVRA rights not to be excluded from public court proceedings, to be reasonably heard, to proceedings free from unreasonable delay, and to be treated with fairness and respect for the victim's dignity and privacy in all future proceedings; and 3) avoid further delay and present a scheduling order to resolve the remaining habeas-related issues by the end of the year, if the district court's reconsideration of the petitioner-victim's motion does not result in a dismissal of defendant's petition. Defendant's habeas action began in the district court in 2002 and had been subject to delays not initiated by the petitioner-victim. Although the Tenth Circuit acknowledged the petitioner-victim's repeated assertion of his rights and agreed with the petitioner-victim that a "more than nine-and-a-half year delay is too long," it held that it was bound by prior precedent to apply the "traditional standards for obtaining mandamus relief," invoking this remedy "only in extraordinary situations." The court recognized that the district court did not specifically address the petitioner-

victim's claims, as it merely acknowledged that the petitioner-victim had asserted his CVRA rights. But the court found that because the district court acknowledged the petitioner-victim's filing, albeit obliquely, the petitioner-victim's right to mandamus relief is not clear and indisputable. "In so ruling," however, the Tenth Circuit encouraged "district courts when confronted with a CVRA motion to do more than simply acknowledge the assertion of CVRA rights and to expressly address the rights asserted." With respect to the petitioner-victim's argument regarding unreasonable delay, the court found the question to be "close" but ultimately concluded that the prejudice and delay experienced by the petitioner-victim did not "overcome [defendant's] due process right to have his habeas case decided," in light of the fact that the briefing schedule set by the district court ensures that the habeas action "will soon be concluded by a final ruling by the district court." The court denied the petition for a writ of mandamus.

United States v. Rand, No. 11-600088-CR, 2011 WL 4949695 (S.D. Fla. Oct. 18, 2011) (order). Defendant was indicted on numerous counts relating to child pornography and filed a number of pretrial motions, including a motion to compel discovery from one of the child-victims in the form of the child-victim's phone and memory card. The magistrate judge entered his Report and Recommendation denying the motion, and defendant filed his objections. In particular, defendant argued that it was inconsistent to require him to turn over certain information found on his electronic media, but not similarly require the child-victims to turn over the same sort of information. Relying on the rights to be protected from the accused and to be treated with fairness

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and respect for the victim's dignity and privacy found in the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, the court upheld the magistrate's recommendation. The court stated that the child-victim's phone and memory card contain private information, including images of the child-victim and her family. If an electronic copy of the evidence is disseminated, there is "no ability to ensure what may happen to those images, whether they may be altered in some manner or duplicated or used in any manner to harass the victim." Thus, finding the magistrate's ruling was not clearly erroneous or contrary to law, defendant's objection was overruled.

Carter v. Bigelow, 869 F. Supp. 2d 1322 (D. Utah 2011). Defendant-petitioner was convicted of murder and sentenced to death. Approximately 17 years later, and as part of the long procedural history of this case, defendant-petitioner pursued habeas relief in federal court. The state-respondent filed a motion to dismiss for lack of prosecution, and the victim's representative also sought dismissal to protect the rights established by the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, including his rights to proceedings free from unreasonable delay and his right to be treated with fairness. After the district court denied the requests to dismiss the action, the victim's representative sought a writ of mandamus from the Tenth Circuit Court of Appeals, directing the district court to: reconsider its denial of the state's motion to dismiss the defendant-petitioner's claims; afford the victim his CVRA rights in all future proceedings; and avoid all further unwarranted delay. Defendant-petitioner opposed the request, and informed the Tenth Circuit that he intended to file a motion with the district court to amend his petition and a renewed motion to stay based on newly alleged claims not included in his current petition. The Tenth Circuit denied the writ of mandamus, but encouraged the district court to "hold firm to the briefing schedule and to decide the case promptly after briefing is completed." The state-respondent and the victim representative then filed motions to strike defendant-petitioner's motions to amend and stay the proceedings, which the district court granted. In so holding, the district court acknowledged that defendant-petitioner had a due process right to have his case decided, but that this right must be balanced against the victim's CVRA rights not to be excluded from court proceedings, to be heard, to proceedings free from unreasonable delay, and to be treated with fairness and respect. Because defendant-petitioner

had ignored the specific guidance from the Tenth Circuit on how to correctly amend his petition, and to protect the victim's right to be free from unreasonable delay and to be treated with fairness, the court held that striking defendant-petitioner's motions to amend and to stay was appropriate. About nine months later, in *Carter v. Bigelow*, No. 2:02-CV-326 TS, 2012 U.S. Dist. LEXIS 129810 (D. Utah Sept. 11, 2012), the district court held that, after consideration of the briefing by all parties on the merits of defendant-petitioner's remaining claims, the writ of habeas corpus was denied and ordered that the case be closed.

B. Right to be Heard

In re Andrich, 668 F.3d 1050 (9th Cir. 2011). The petitioner-victims sought a writ of mandamus pursuant to the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, or the court's traditional mandamus authority under 28 U.S.C. § 1651, arguing that the district court improperly denied their motion to participate in the case as crime victims and to be heard at defendant's sentencing. In reviewing the petition, the court of appeals concluded that the petitioners did not meet their burden of showing that the district court either clearly erred as a matter of law or abused its discretion. For this reason, the court denied the request for relief under both the CVRA and the traditional mandamus authority.

In re Olesen, No. 11-4190, 2011 WL 5357631 (10th Cir. Nov. 4, 2011) (slip copy). *For full case summary, see "Specific Victims' Rights – Right to Due Process, Fairness, Dignity, and Respect."

C. Right to be Present

In re Olesen, No. 11-4190, 2011 WL 5357631 (10th Cir. Nov. 4, 2011) (slip copy). *For full case summary, see "Specific Victims' Rights – Right to Due Process, Fairness, Dignity, and Respect."

D. Right to Privacy

United States v. Rand, No. 11-600088-CR, 2011 WL 4949695 (S.D. Fla. Oct. 18, 2011) (order). *For full case summary, see "Specific Victims' Rights – Right to Due Process, Fairness, Dignity, and Respect."

People v. Ojeda, 2011 Guam 27, No. CRA10-011, 2011 WL 6937376 (Guam Dec. 23, 2011). Defendant, who was convicted of sex crimes involving a minor, appealed, arguing that the trial court violated his Sixth Amendment rights by preventing him from eliciting information from the child-victim about a prior sexual assault committed by a third party. The nurse who examined the child-victim testified at trial that she could not determine precisely when the trauma to the child-victim's genitals occurred. Defendant attempted to admit evidence of a prior sexual assault to establish an alternative source of the child-victim's injuries, but the trial court, relying on defendant's failure to comply with Guam's rape shield statute's notice provisions and potential trauma to the child-victim, refused to allow defendant to cross-examine the child-victim on that topic. Defendant was, however, allowed to introduce some evidence of a prior assault through cross-examination of other witnesses. Guam's rape shield statute contains an exception allowing the introduction of past sexual conduct if "such evidence . . . is evidence of sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was . . . the source of . . . injury." The court observed that the 15-day notice-and-hearing requirement that is incorporated into the rape shield provision protects victims from harassment and unnecessary invasions of privacy. Despite the fact that defendant failed to comply with the notice requirement, the appellate court concluded that the potential probative nature of the child-victim's excluded testimony outweighed the procedural requirements in this case. The court acknowledged the trial court's interest in protecting the child-victim from trauma and an invasion of her privacy; however, it concluded that the restrictions placed on defendant's right to confront the child-victim were "disproportionate to the purposes these restrictions are designed to serve." Although evidence of a possible prior sexual assault by a third party was elicited during cross-examination of other witnesses, the court concluded that such "bare information about a prior sexual assault" does not "pass constitutional muster if the evidence does not provide sufficient information for a meaningful defense." To ensure a fair trial, the court concluded that defendant "should have been afforded the opportunity to elicit conclusive evidence of" the prior assault by the third party. Because the trial court should have allowed defendant greater latitude in cross-examining the child-victim about

the prior assault or otherwise provided defendant with an adequate means of preserving his rights to confrontation and to present a defense, the court vacated defendant's convictions and remanded for a new trial.

People v. Maxwell, 961 N.E.2d 964 (Ill. App. Ct. 2011). Defendant was convicted of several counts of criminal sexual assault and abuse. On appeal, he argued, *inter alia*, that his Sixth Amendment right to cross-examination was violated when the trial court sustained an objection to a question posed to a witness on cross-examination regarding whether it was possible the alteration of the child-victim's hymen could have happened by sexual intercourse with someone other than defendant. Although the trial court based its ruling on the rape shield statute, defendant argued the evidence should have been admitted under an exception to rape shield allowing introduction of the victim's prior sexual activity when constitutionally required. The court found no error, noting that defendant made no offer of proof that the child-victim had been sexually active with anyone else. Although the rape shield statute does not have a specific mechanism in place for the method of introducing evidence of the victim's prior sexual activity with a third person, the court, by analogy to a provision relating to prior sexual activity with defendant, determined that the statute requires a preliminary showing that "reasonably specific information as to the date, time and place" be made at an in camera hearing before such evidence will be admissible. The court continued: "the mere theoretical possibility that the alleged victim had sex with someone else has little probative value compared to the danger of humiliating the alleged victim by calling into question his or her chastity – a tactic the rape-shield statute is intended to prevent." Because defendant provided no evidence implicating any particular third party, it was not error for the trial court to sustain the state's objection.

E. Right to Prompt Disposition

In re Olesen, No. 11-4190, 2011 WL 5357631 (10th Cir. Nov. 4, 2011) (slip copy). *For full case summary, see "Specific Victims' Rights – Right to Due Process, Fairness, Dignity, and Respect."

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

Dignity, and Respect."

F. Right to Protection

1. Government's Duty to Protect Victims of Abuse

United States v. Rand, No. 11-600088-CR, 2011 WL 4949695 (S.D. Fla. Oct. 18, 2011) (order). *For full case summary, see "Specific Victims' Rights – Right to Due Process, Fairness, Dignity, and Respect."

2. Protective Orders

Davis v. State, 73 So. 3d 304 (Fla. Dist. Ct. App. 2011). Defendant was charged with lewd or lascivious battery and child abuse by impregnation. He pled no contest and entered into a plea agreement. After the acceptance of the plea but before sentencing, defendant provided notice of his intent to depose the child-victim, a Category A witness, indicating that the deposition would lead to evidence that the sex was consensual, which could be used to mitigate the charge. He stated he had an absolute right to the deposition under a Florida statute that allows a defendant to depose anyone whom the prosecutor has listed as a Category A witness. The state moved for a protective order, and the trial court granted it, stating that criminal defendants did not have the right to discovery once the case proceeds to sentencing. On appeal, the court rejected defendant's argument that he had an absolute right to depose Category A witnesses, stating that this categorization was based on the witnesses' ability to contribute toward a determination of guilt or innocence. Once the trial stage is complete, the witness categories become irrelevant because guilt or innocence has already been determined. However, the court rejected the trial court's determination that defendants have no right to conduct discovery in preparation for sentencing. The court stated that the language of the rule does not prohibit its application to sentencing hearings, and new evidentiary issues requiring discovery may exist at sentencing, and that therefore the rule applies to sentencing. Although defendant does not have an absolute right to conduct a deposition, the court must exercise its discretion on the state's motion for a protective order: it must weigh the possibility that the deposition would uncover evidence pertinent to sentencing against such factors as the victim's age and emotional

state, defendant's ability to obtain evidence from other sources, and whether the state entered into the plea agreement based on the state's desire to protect the victim from the ordeal of testifying. Although the trial court did not do this in this instance, the court ultimately determined the error was harmless, because there was sufficient other evidence that the sex was consensual on the record. Accordingly, the court affirmed the issuance of the protective order.

State v. Trivitt, 268 P.3d 765 (Or. Ct. App. 2011). Defendant was found in contempt of court for violating a restraining order issued pursuant to the Family Abuse Prevention Act (FAPA). Defendant appealed. Under the restraining order, defendant was prohibited from, among other things, "intimidating, molesting, interfering with or menacing [the victim—her former boyfriend], or attempting to intimidate, molest, interfere with or menace [the victim] directly or through third parties." While the order was in place, defendant posted a sign on the victim's then-girlfriend's driveway stating that the victim had genital herpes. The trial court found that this behavior "interfered" with the victim, and found defendant in contempt for violating the FAPA order. On appeal, defendant argued that posting the sign did not "interfere" with the victim within the meaning of the FAPA statute, and that the court's interpretation of "interfere" was overly broad. The court looked to the language of FAPA, which provides in pertinent part that the respondent may be "restrained from intimidating, molesting, interfering with or menacing the petitioner[.]" and where "interfere" is subsequently defined as "to interpose in a manner that would reasonably be expected to hinder or impede a person in the petitioner's situation." Relying on the fact that this definition did not adopt the broader definition that existed in case law at the time of the FAPA statute's drafting, which included the language "to take part in the concern of others," the court concluded that the FAPA definition "suggest[s] a direct interference with the person protected under a FAPA order . . ." The court continued that this narrow definition supported the purpose behind FAPA restraining orders: "The purpose of a FAPA restraining order is to protect a victim of domestic abuse from further abuse. . . . [I]nterfering within the context of the statute simply could not encompass defendant's conduct, which did not constitute more than offensive behavior." Accordingly, the contempt order was reversed.

3. Other

United States v. Rand, No. 11-600088-CR, 2011 WL 4949695 (S.D. Fla. Oct. 18, 2011) (order). *For full case summary, see "Specific Victims' Rights – Right to Due Process, Fairness, Dignity, and Respect."

United States v. Cassidy, 814 F. Supp. 2d 574 (D. Md. 2011). Defendant was charged under a federal interstate stalking statute, 18 U.S.C. § 2261A(2)(A), for using an information network to engage in harassing conduct that caused substantial emotional distress to a person in another state. The victim, A.Z., is a leader of a Buddhist sect known as KPC. Defendant lied about his name and religious affiliation to attend a retreat with A.Z. and other members of KPC. After defendant was confronted about his beliefs and membership in KPC, he left the retreat, taking a Buddhist nun with him. In the wake of his departure, defendant used Twitter and Blogs to harass KPC and A.Z. Examples of his Tweets include: "(A.Z.): somebody throw a couple shots of gin in the bitch & get her back on Twitter: shes [sic] fun 2 play with" and "I have just one thing I want to say to (A.Z.), and its [sic] form [sic] the heart: do the world a favor and go kill yourself. P.S. Have a nice day." After the indictment was issued, defendant filed a motion to dismiss the indictment arguing, *inter alia*, that the stalking statute violated the First Amendment. The court held that the statute includes a content-based restriction on speech because it "limits speech on the basis of whether that speech is emotionally distressing" to another person. Although defendant's speech may have inflicted substantial emotional distress on A.Z., the court found his speech to be protected, as it did not fall into any of the recognized exceptions to the First Amendment, namely, "obscenity, fraud, defamation, true threats, incitement or speech integral to criminal conduct." Citing several cases, the court concluded: "Because the Government's interest in criminalizing speech that inflicts emotional distress is not a compelling one, the statute does not survive strict scrutiny." The court analogized Twitter and Blogs to a bulletin board, remarking that the victim had the ability to "protect her 'own sensibilities simply by averting' her eyes from the Defendant's Blog and not looking at, or blocking his Tweets." The court rejected the government's argument that the statute regulates conduct and not speech, holding that even if the government's interest was deemed sufficiently compelling, the restriction was greater than necessary

to further that interest. The court granted defendant's motion to dismiss the indictment.

G. Right to Refuse Discovery Requests

Davis v. State, 73 So. 3d 304 (Fla. Dist. Ct. App. 2011). *For full case summary, see "Specific Victims' Rights – Right to Protection – Protective Orders."

H. Right to Restitution

1. Ability to Pay

Del Valle v. State, 80 So. 3d 999 (Fla. 2011). Defendant pleaded guilty to cocaine possession and theft, and was sentenced to probation and ordered to make monthly restitution payments to the victim as a condition of his probation. After defendant failed to make the required monthly payments, the trial court found defendant in violation of the terms of probation and revoked probation. The trial court then modified the terms of probation to require that defendant attend a special boot camp as a condition of probation. The trial court also extended probation for two years with early termination upon successful completion of the boot camp. On appeal, defendant argued, *inter alia*, that: (1) the trial court erred in revoking probation without inquiring about defendant's ability to pay and determining that the violation of probation was willful; and (2) the Florida statute that addresses probation revocation upon a probationer's failure to pay restitution was unconstitutional because it did not require the state to prove willfulness, and it required defendant to prove inability to pay by "clear and convincing" evidence. The court of appeals affirmed. Upon review, the Florida Supreme Court agreed with defendant's arguments in relevant part and reversed the court of appeal's decision. First, relying on earlier case law addressing the circumstances under which a probationer may be imprisoned for failing to pay a fine or restitution, the court held that the trial court committed fundamental error in revoking probation without inquiring into defendant's ability to pay and without determining whether defendant had the ability to pay but willfully refused to do so. In reaching its holding, the court explained that that a probationer's due process rights guarantee that he cannot be imprisoned solely because of an inability to pay a monetary obligation. The court also observed that a boot camp program is a form of incarceration. Second, the court held that one provision of the

parole revocation statute at issue was unconstitutional. In reaching this holding, the court concluded that the statute can be construed to require the state to provide sufficient evidence to establish that a probationer "willfully" failed to pay a monetary obligation before the burden shifts to the probationer to prove inability to pay. However, the court concluded that the statute was unconstitutional to the extent that it required a probationer to prove inability to pay by "clear and convincing evidence" when the state only bears the burden of proving a probation violation by a preponderance of the evidence.

2. Attorney Fees

United States v. Bahel, 662 F.3d 610 (2d Cir. 2011). Defendant was convicted of a number of federal charges, including four counts of fraud that deprived the United Nations—the victim and his former employer—of its right to honest services. On appeal, defendant raised several arguments, including, *inter alia*, that the district court erred in calculating the amount of restitution owed. First, defendant argued that the restitution order improperly included an award of attorney's fees. Specifically, defendant asserted that under the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663A, only attorneys' fees that were "necessary" expenses may be awarded; because the victim retained outside counsel to represent it in this matter as opposed to using its in-house counsel, defendant contended that the attorneys' fees incurred were unnecessary. The court of appeals rejected defendant's argument. The court explained that nothing in the case law limits restitution to the cost of in-house counsel, and nothing in the record suggests that retaining outside counsel in connection with an internal fraud was uncommon. The court also noted that defendant had not claimed that the fees themselves were unreasonable or that any specific task billed was unnecessary. Second, defendant argued, for the first time on appeal, that the restitution order improperly included the amount of salary that the victim paid during the period defendant was suspended pending investigation of the conduct underlying the conviction. Specifically, defendant asserted that his salary was beyond the scope of the MVRA because the victim had not claimed a financial loss resulting from defendant's conduct. The court also rejected this argument. The court explained that where, as here, an employer-victim paid for honest services but received something less in return, there was no doubt

that the employer suffered some financial loss. The court concluded that the district court did not commit error when it ordered defendant to repay only the amount of salary that defendant received while he provided no services at all to the victim. For these and other reasons, the court affirmed the judgment of conviction.

United States v. Fast, 820 F. Supp. 2d 1008 (D. Neb. 2011). Following defendant's child pornography conviction, one of his victims, "Vicky," moved for restitution in the amount of \$952,759.81, pursuant to 18 U.S.C. § 2259, which mandates that restitution be made to child-victims of sexual exploitation for "the full amount of the victim[s'] losses." The court noted that the structure and language of § 2259(b) (3) imposes a proximate causation requirement for restitution recovery only on the portion of the statute referring to "other losses" suffered by the victim. The court compared § 2259 with other restitution statutes to support its conclusion that proximate cause is only required to be shown for the "catchall category of harms," which reflects Congress's choice to "abandon a global requirement of proximate causation." Further, the court found that although "Vicky" suffered loss and injury after the date of defendant's first offense, the nature of that injury and amount of that loss were neither clear nor precise. The court calculated the expenses reasonably incurred by the victim's counsel as totaling \$9,863.84, and valued "Vicky's" medical and psychiatric care, occupational therapy and lost income at \$10,000, although "the precise amount of loss may be much higher." The court ultimately ordered defendant to pay "Vicky" \$19,863.84 in restitution, holding that defendant's restitution obligation is joint and several with all persons who have been convicted of child pornography offenses and ordered to pay restitution to "Vicky."

3. Calculation Method

United States v. Bahel, 662 F.3d 610 (2d Cir. 2011). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Attorney's Fees."

United States v. Johnston, No. 3:10CR-62-H, 2011 WL 5122636 (W.D. Ky. Oct. 28, 2011) (slip copy). Defendant pled guilty to knowingly receiving child pornography and was sentenced to 15 years in prison, followed by a life term of supervised release. The government filed a motion for restitution to

compensate one of the child-victims depicted in the images possessed by defendant, whom the court characterized as an "end user" of the exploitative material. Noting that the Sixth Circuit has not explicitly addressed the issue of restitution in the context of possessing images of child sexual abuse, the district court analyzed the split in opinions in the other circuits and aligned "with the majority of circuits" in holding that "victims' injuries must be proximately caused by the possession of their images." The district court held that the government failed to "establish how [d]efendant's possession is the proximate cause of specific injuries," citing as potential examples of evidence that may prove to be sufficient "when the victim became aware of [d]efendant's possession, how this impacted the victim, and whether the victim has since suffered medical expenses or other challenges." Because the court found insufficient evidence of proximate cause, as well as insufficient evidence supporting the amount of restitution requested, the motion for restitution was denied.

United States v. Fast, 820 F. Supp. 2d 1008 (D. Neb. 2011). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Attorney's Fees."

United States v. Lundquist, 847 F. Supp. 2d 364 (N.D.N.Y. 2011). Defendant was convicted of receiving and possessing child pornography. The government requested that defendant be ordered to pay restitution in the amount of \$3,384,917 to "Amy," a child-victim depicted in the images of child sexual abuse. Defendant objected to the court's proposed amount of restitution (\$37,126.50) and requested an evidentiary hearing. The court extended the deadline for its decision to allow time to analyze the Second Circuit's decision in *United States v. Aumais*, 656 F.3d 147 (2d Cir. 2011). In this decision, the court decided five issues: 1) whether the court was required to hold an evidentiary hearing before ruling on the restitution issue; 2) whether "Amy" qualifies as a victim entitled to restitution; 3) whether the law limits recoverable losses to those proximately caused by defendant's offenses; 4) the amount of losses that were caused by defendant; and 5) whether defendant should be held jointly and severally liable for the full amount of "Amy's" losses. Addressing the first two issues, the court found that "Amy" was a victim under the statute and that an evidentiary hearing was not necessary under the circumstances

because “Amy’s” losses were ascertainable at least ten days before sentencing and because copies of the documents supporting these losses were provided to defendant within the required time frame. Although the court believed that “certain flaws . . . appear to exist in the Second Circuit’s rationale regarding . . . proximate-causation,” it followed the Second Circuit’s ruling in *Aumais* in finding that a victim’s losses must be proximately caused by defendant’s offense. The court noted that whether proximate cause exists “requires a *policy* determination rather than a purely *factual* determination.” Regardless of whether the court applied the “foreseeability standard,” the “direct-consequences standard,” or the “risk standard” employed by various courts, the court found that defendant’s crime proximately caused “Amy’s” losses. Because two of the expert reports submitted by “Amy” were drafted after defendant’s arrest, the court did not find the Second Circuit’s holding in *Aumais* to preclude a finding of proximate cause; furthermore, the court noted its disagreement with any requirement that a victim know a particular defendant downloaded a particular image when the injuries “stem, in large part, from the fact that [the victim] does not know who is downloading her pornographic images from the Internet.” However, even if such knowledge is required by law, the court found it to have been established, as “Amy” was referred twice for re-evaluation by a professional during the time period between defendant’s arrest and his guilty plea, to determine to what extent she was continuing to be re-victimized as a result of knowledge that individuals were exchanging and viewing her images on the Internet. The court determined that because losses must only be “*reasonably* quantified,” the court found, based on a fraction of the successful prosecutions with restitution requests submitted on behalf of “Amy,” that defendant was responsible for 1/113th (or \$29,754.19) of “Amy’s” losses, which includes future counseling expenses and lost wages. In the alternative, the court found that it would be reasonable to award either \$150,000 in presumptive damages or \$5,000 in nominal damages in restitution. Finally, the court concluded that defendant would be held jointly and severally liable for the full \$3,381,159.00 in restitution that “Amy” has not already been paid, with the government and “Amy’s” representative ensuring that “Amy” does not receive a “double recovery” of any money ordered in restitution.

United States v. Klein, 829 F. Supp. 2d 597 (S.D. Ohio 2011). Defendant pled guilty to one count of receiving child pornography and one count of conspiring to advertise child pornography. “Amy,” one of the child-victims portrayed in the images of child sexual abuse possessed by defendant, submitted a letter and other documentation in connection with her request for restitution. The government asserted that the court is required to award “Amy” restitution in the full amount of her losses. Defendant challenged restitution, asserting that the court cannot determine with reasonable certainty “what if any of the alleged harm was proximately caused by” defendant. After remarking on concerns relating to the timeliness of the request for restitution, the court found “Amy” to be a victim who is entitled to restitution by statute. The court focused primarily on the issue of causation, specifically whether the government proved by a preponderance of the evidence that “Amy’s” losses were proximately caused by defendant’s conduct. Although acknowledging that the “psychological reports and Amy’s victim statement leave no doubt that she has suffered tremendously as a victim of child pornography,” the district court found that none of the evidence submitted on behalf of “Amy” made any reference to defendant. Consequently, there was “no evidence upon which the Court could reasonably calculate the measure of specific harm done to the victim, that was proximately caused by [defendant’s] conduct.” The court recognized the burden placed on victims to “establish separate and/or additional harm that was proximately caused by each and every [d]efendant caught possessing [the child-victims’] images,” as “these child pornography images are being found almost on a daily basis.” While the court acknowledged the difficulty of updating a “request for restitution daily,” it nevertheless held that the government must establish that the victim’s loss was proximately caused by the defendant’s possession of the victim’s image. In light of the lack of evidence upon which to analyze the amount of losses proximately caused by defendant’s conduct, the court granted in part the government’s request for restitution and ordered nominal damages of \$5,000 to be paid to “Amy.”

People v. Allen, 813 N.W.2d 806 (Mich. Ct. App. 2011). Defendant pled guilty to attempting to commit prescription fraud. As part of defendant’s sentence, she was ordered to pay approximately \$5,700 in restitution to Blue Cross Blue Shield. Defendant

appealed, arguing that the trial court erred when it found that Blue Cross had suffered a loss as a result of defendant's course of criminal conduct. The loss Blue Cross claimed stemmed from its investigation costs of defendant's fraud. The amount was determined by multiplying the investigator's hourly rate and multiplying that by the amount of hours she spent investigating. The investigator was a salaried employee, who testified she would have been paid the same amount without regard to defendant's attempted fraud. The court noted that under art. I, § 24 of Michigan's Constitution and the state's Crime Victim's Rights Act, the court shall order that defendant make full restitution to any victims of the defendant's course of conduct. It continued that "course of conduct" must be given broad construction to best effectuate the intent of the legislature. Additionally, "the Legislature plainly intended to shift the burden of losses arising from criminal conduct . . . from crime victims to the perpetrators of the crimes" Although the investigator was a salaried employee, and would have received the same salary regardless of whether the crime was committed, Blue Cross still suffered a loss. The investigation department had an indefinite number of claims to investigate and the investigator could have spent the hours investigating other crimes. Accordingly, Blue Cross essentially lost the time value of the hours that the investigator spent investigating defendant's fraud rather than another fraud. Thus, the court concluded, the trial court did not clearly err when it found that Blue Cross suffered a direct financial loss as a result of defendant's course of conduct.

State v. Yocum, 269 P.3d 113 (Or. Ct. App. 2011). Defendant was convicted of four counts of first-degree burglary, and ordered to pay restitution to the victim in the amount of \$18,000, representing the replacement cost of the victim's stolen pair of diamond earrings. Defendant appealed the restitution order, arguing that the court erred in imposing restitution in that amount because there was insufficient evidence regarding the earrings' value. At the restitution hearing, the state presented evidence that a jeweler, relying on the victim's description of the earrings, had estimated the replacement cost to be between \$18,000 and \$22,000, along with the victim's testimony regarding how the earrings were a gift from her father to her mother, that her father was very wealthy, that her mother had a habit of wearing good quality jewelry, and the victim's drawing and description of the earrings. The victim acknowledged

she had no pictures of the earrings and that she could not personally speak to the color, grade, and carat weight of the diamonds. The court found this evidence to be sufficient, stating that "the record shows that the trial court considered the evidence – the victim's description of her family history and the jeweler's estimate – sufficient to support its ultimate decision of imposing restitution in the amount of \$18,000. The trial court, as factfinder, was entitled to weigh the evidence presented and reach that conclusion." Accordingly, the award was affirmed.

4. Causation

United States v. Johnston, No. 3:10CR-62-H, 2011 WL 5122636 (W.D. Ky. Oct. 28, 2011) (slip copy). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Calculation Method."

United States v. Fast, 820 F. Supp. 2d 1008 (D. Neb. 2011). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Attorney's Fees."

United States v. Hagerman, 827 F. Supp. 2d 102 (N.D.N.Y. 2011). Defendant was convicted of receiving and possessing child pornography. The government sought restitution for "Vicky," a child-victim portrayed in the images of child sexual abuse possessed and received by defendant. The government sought restitution, submitting a letter and accompanying exhibits from "Vicky's" attorney in support of "Vicky's" request for \$975,917.64 in restitution. Defendant opposed the request and requested an evidentiary hearing. During sentencing, the court reserved its decision on the issue of restitution, issuing this order some months later. As an initial matter, the court found that an evidentiary hearing was unnecessary and that "Vicky" is a victim of defendant's crime. After noting the Second Circuit's position that losses subject to restitution must be proximately caused by defendant's offense, the court outlined its objections to the Second Circuit's reasoning "in the event the Second Circuit has occasion to revisit the issue." The court continued on to note that "resolving the issue of whether 'proximate causation' exists requires a *policy* determination rather than a purely *factual* determination – whether a defendant's conduct was of such a nature that he or she *should* be held responsible for it." The court found that, whether it applied the "foreseeability standard," the "direct-

consequences” standard, or the “risk standard” employed by various jurisdictions, defendant proximately caused “Vicky’s” losses. The court rejected the argument that evidence must support the finding that the victim “knew that the particular defendant in question downloaded a particular image of her on a particular occasion” for three reasons: 1) such knowledge is not required for proximate cause to exist where the victim’s injuries stem in large part from the fact that she does not know who was downloading her images from the Internet; 2) this requirement would render the statute as providing relief that would be extremely difficult to grant, thereby violating the principle that statutes are presumed not to intend impossible results; and 3) this requirement would violate the spirit of the law that prohibits victims from having to participate in any phase of a restitution order. Yet even if such evidence were required, the court found that it existed in this case. The court explained that the amount of restitution could be reasonably quantified as sixty-eight one hundredths of one percent of all of “Vicky’s” harm, based on the fact that approximately 146 defendants have been successfully prosecuted for unlawfully possessing or receiving images of “Vicky’s” child sexual abuse. The court held defendant responsible for this percentage of “Vicky’s” total recoverable losses (\$6,636.24), holding in the alternative that this amount constitutes reasonable restitution as nominal damages. Finding that joint and several liability is permitted by statute, the court held defendant jointly and severally liable for \$975,917.64 in restitution and ordered that defendant pay however much of this amount remains unpaid. The court further ordered that the government, the probation office, and “Vicky’s” representative ensure that “Vicky” does not receive “double recovery” during the enforcement and/or collection of the judgment against defendant.

United States v. Lundquist, 847 F. Supp. 2d 364 (N.D.N.Y. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Calculation Method.”

United States v. Klein, 829 F. Supp. 2d 597 (S.D. Ohio 2011). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Calculation Method.”

People v. Allen, 813 N.W.2d 806 (Mich. Ct. App. 2011). *For full case summary, see “Specific

Victims’ Rights – Right to Restitution – Calculation Method.”

5. Collection

United States v. Wilson, 659 F.3d 947 (9th Cir. 2011). Defendant pled guilty to counts of mail and wire fraud, among other charges, arising from his operation of a fraudulent investment scheme. After the district court granted the government’s application for a preliminary order of criminal forfeiture to seize funds in defendant’s accounts, two of the victims of defendant’s Ponzi scheme petitioned for an ancillary hearing. The victim-petitioners argued that their interest in the forfeited property was superior to that of the government and asserted their rights to the property. The trial court held that: the victim-petitioners lacked prudential standing; their interest in the funds ceased when the funds were transferred by them to defendant; and any remaining interest of the victim-petitioners’ in the funds was inferior to the government’s interest. On appeal, the Ninth Circuit reversed and remanded, holding that the victim-petitioners had prudential standing to petition the court for the forfeited property and that their interest in the funds was superior to that of the government. The court found that the district court erred in applying the “zone of interests” test, because where Congress broadly opens the remedy to “any person” without qualification—as was the case with the forfeiture statute—the test is not applicable. The court also found that the victim-petitioners had an interest in their property prior to the transfer of the funds to defendant, and that California law established a constructive trust in their favor at the time the fraud was perpetrated, without further court action. The court explained that on remand, victim-petitioners will be required to meet the burden of proof under the forfeiture statute regarding their entitlement to the funds.

Del Valle v. State, 80 So. 3d 999 (Fla. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Ability to Pay.”

6. Future Lost Income

United States v. Fast, 820 F. Supp. 2d 1008 (D. Neb. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Attorney’s Fees.”

United States v. Lundquist, 847 F. Supp. 2d 364 (N.D.N.Y. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Calculation Method.”

7. Joint and Several Liability

United States v. Fast, 820 F. Supp. 2d 1008 (D. Neb. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Attorney’s Fees.”

United States v. Hagerman, 827 F. Supp. 2d 102 (N.D.N.Y. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Causation.”

United States v. Lundquist, 847 F. Supp. 2d 364 (N.D.N.Y. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Calculation Method.”

8. Jurisdiction

State v. Condon, 264 P.3d 1288 (Or. Ct. App. 2011). Defendant, convicted of attempted first-degree assault with a firearm after a guilty plea, appealed the trial court’s award of \$333,149 in restitution to the victim. Relying on a state statute that requires courts to determine restitution within 90 days of entry of the judgment unless “good cause” exists for an extension of time, defendant argued that the trial court erred when it imposed restitution past the 90-day deadline. The court of appeals rejected defendant’s argument and affirmed the restitution judgment. The court concluded that the trial court correctly determined that there was “good cause” for the delay. In reaching its conclusion, the court found that the victim’s mother made diligent efforts to gather all the supporting documentation within the 90-day period. The court also found that the victim’s mother was unable to finish the task until a few days past the deadline due to the severity of the victim’s injuries, the large quantity of documentation involved, and a situation in which some medical bills had been inadvertently misplaced by the victim.

State v. Gruver, 268 P.3d 760 (Or. Ct. App. 2011). Defendant appealed her conviction for theft, challenging the trial court’s award of restitution to the victim. Defendant argued that the trial court erred in imposing restitution in the absence of

sufficient evidence of the value of the merchandise that she stole or the repair costs for the property she damaged. The state argued that defendant’s failure to object to the restitution award precluded her from challenging the award on appeal and that the trial court did not err in awarding restitution because the prosecution’s restitution schedule submitted to the trial court established the nature and amount of the victim’s damages. The court disagreed with the state that defendant’s failure to assert her statutory right to a hearing constituted a waiver of appellate review of the restitution award. Nevertheless, the court affirmed the trial court’s judgment, holding that because witnesses had testified at trial about the victim’s damages, the trial court did not plainly err in awarding restitution.

State v. Landreth, 265 P.3d 89 (Or. Ct. App. 2011). Defendant, convicted of unauthorized use of a vehicle, appealed the trial court’s award of restitution. Relying on a state statute that requires courts to determine restitution within 90 days of entry of the judgment unless “good cause” exists for an extension of time, defendant argued that the trial court erred when it held the restitution hearing 98 days after the entry of the judgment of conviction. In particular, defendant argued that: (1) the trial had no authority to even consider the issue of restitution because it failed to make a determination of “good cause” within the 90-day period; and (2) the record does not support the court’s finding of “good cause.” The court of appeals rejected defendant’s arguments. First, the court concluded that nothing in the text or context of the statute requires the trial court to make the good cause determination within 90 days. Second, the court concluded that the trial court correctly found that there was good cause to hold the restitution hearing outside the 90-day period. The court explained that the delay in the case was not caused by prosecutorial inadvertence, neglect or inattentiveness; rather, the record shows that the delay was caused by the victim’s illness. For these reasons, the court affirmed the judgment.

State v. Martinez, 265 P.3d 92 (Or. Ct. App. 2011). Defendant, convicted of second-degree assault after a guilty plea, appealed the trial court’s award of \$2,914 in restitution to the victim. Relying on a state statute that requires courts to determine restitution within 90 days of entry of the judgment unless “good cause” exists for an extension of time, defendant argued that the trial court erred when it imposed restitution

several months past the deadline. The court of appeals rejected defendant's argument and affirmed the restitution judgment. The court concluded that the trial court correctly determined that there was "good cause" for the delay. In reaching its conclusion, the court found that the state legitimately waited to file its restitution motion toward the end of the 90-day period because it was awaiting a decision from the victim's compensation program to ensure that the requested restitution judgment would identify the correct recipient. The court also found that the subsequent delays in scheduling the restitution hearing were caused by the appointment of new counsel for defendant and difficulties in arranging defendant's presence at the hearing.

State v. Unis, 264 P.3d 1286 (Or. Ct. App. 2011). Defendant was convicted of theft charges, and the trial court awarded restitution. A judgment awarding \$851 in restitution was entered within 90 days of entry of the judgment of conviction, as required by a state statute. Over five months later, the trial court amended the judgment and increased the amount of restitution to \$2,570. On appeal, defendant argued that the trial court erred in finding there was "good cause" to award the increased amount of restitution beyond the 90-day period. The court of appeals rejected defendant's argument and concluded that the trial court did not err in finding there was good cause for the delay. In reaching its conclusion, the court found that the victim had timely notified the state's restitution specialist that the amount initially awarded as restitution was incorrect; however, the record shows that the restitution specialist's illness impaired her work and contributed to the state's delay in seeking the correct amount of restitution. The court also explained that the requisite "good cause" under the statute should not be so narrowly interpreted in way that would undermine the legislative goal of providing crime victims with full restitution in a timely manner. For these reasons, the court affirmed the judgment.

9. Other

United States v. Metz, 791 F. Supp. 2d 533 (N.D. W.Va. 2011). Defendant pled guilty to embezzlement from a credit union by an employee and money laundering. As part of her judgment, defendant was ordered to make restitution to two victims—the National Credit Union Association (NCUA) and Elks Lodge, both of whom were considered direct victims.

The court set aside a period of 90 days during which the United States could bring to the court's attention other parties who may be entitled to restitution, including 38 individuals who previously filed claims. The court noted that the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, defines "crime victim" as "a person directly and proximately harmed as a result of the commission of a Federal offense." The court further noted that only a victim of the offense of conviction is entitled to receive restitution under 18 U.S.C. §§ 3663 and 3663A, and that when a crime is committed against a financial institution, the victim is the institution, not the depositors, creditors, employees, or shareholders. The court concluded that the NCUA, as liquidating agent, is the entity entitled to legal status as victim for purposes of court-ordered restitution. Others adversely affected by the institution's failure are recognized as claimants, and are only entitled to have their losses compensated by the NCUA. Here, the NCUA provided each member with an opportunity to submit documents in support of claimed financial losses. But based on the documents submitted, the court found that no evidence had been uncovered to connect their losses to defendant's embezzlement. Accordingly, the court refused to order that defendant make restitution to these claimants.

Del Valle v. State, 80 So. 3d 999 (Fla. 2011). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Ability to Pay."

State v. Condon, 264 P.3d 1288 (Or. Ct. App. 2011). *For full case summary, see "Specific Victims' Rights — Right to Restitution — Jurisdiction."

State v. Gruver, 268 P.3d 760 (Or. Ct. App. 2011). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Jurisdiction."

State v. Landreth, 265 P.3d 89 (Or. Ct. App. 2011). *For full case summary, see "Specific Victims' Rights — Right to Restitution — Jurisdiction."

State v. Martinez, 265 P.3d 92 (Or. Ct. App. 2011). *For full case summary, see "Specific Victims' Rights — Right to Restitution — Jurisdiction."

State v. Unis, 264 P.3d 1286 (Or. Ct. App. 2011). *For full case summary, see "Specific Victims' Rights — Right to Restitution — Jurisdiction."

State v. Yocum, 269 P.3d 113 (Or. Ct. App. 2011).
*For full case summary, see “Specific Victims’ Rights – Right to Restitution – Calculation Method.”

II. STANDING

A. Definition of “Victim”

United States v. Hagerman, 827 F. Supp. 2d 102 (N.D.N.Y. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Causation.”

United States v. Lundquist, 847 F. Supp. 2d 364 (N.D.N.Y. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Calculation Method.”

United States v. Klein, 829 F. Supp. 2d 597 (S.D. Ohio 2011). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Calculation Method.”

United States v. Metz, 791 F. Supp. 2d 533 (N.D. W.Va. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Other.”

B. Victim Standing – Criminal Justice System

1. Trial Court

United States v. Wilson, 659 F.3d 947 (9th Cir. 2011).
*For full case summary, see “Specific Victims’ Rights – Right to Restitution – Collection.”

2. Appellate Court

In re Andrich, 668 F.3d 1050 (9th Cir. 2011). *For full case summary, see “Specific Victims’ Rights – Right to be Heard.”

III. ENFORCEMENT

A. Remedies for Rights Violations

Del Valle v. State, 80 So. 3d 999 (Fla. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Ability to Pay.”

B. Writs – Mandamus

In re Andrich, 668 F.3d 1050 (9th Cir. 2011). *For full case summary, see “Specific Victims’ Rights – Right to be Heard.”

In re Olesen, No. 11-4190, 2011 WL 5357631 (10th Cir. Nov. 4, 2011) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to Due Process, Fairness, Dignity, and Respect.”

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

IV. STANDARD OF REVIEW – MANDAMUS

In re Andrich, 668 F.3d 1050 (9th Cir. 2011). *For full case summary, see “Specific Victims’ Rights – Right to be Heard.”

In re Olesen, No. 11-4190, 2011 WL 5357631 (10th Cir. Nov. 4, 2011) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to Due Process, Fairness, Dignity, and Respect.”

V. CONSTITUTIONAL ISSUES RELATED TO VICTIMS’ RIGHTS

A. Defendant’s Right to Confrontation

People v. Ojeda, 2011 Guam 27, No. CRA10-011, 2011 WL 6937376 (Guam Dec. 23, 2011). *For full case summary, see “Specific Victims’ Rights – Right to Privacy – Other.”

People v. Maxwell, 961 N.E.2d 964 (Ill. App. Ct. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Privacy – Other.”

B. Defendant’s Right to Due Process

In re Olesen, No. 11-4190, 2011 WL 5357631 (10th Cir. Nov. 4, 2011) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to Due Process, Fairness, Dignity, and Respect.”

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

Dignity, and Respect.”

Del Valle v. State, 80 So. 3d 999 (Fla. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Ability to Pay.”

C. Defendant’s Right to No Ex-Post Facto Laws

Ditullio v. Boehm, 662 F.3d 1091 (9th Cir. 2011). As part of a criminal prosecution, defendant pled guilty to one count of conspiracy to engage in human trafficking and, as part of that plea, admitted that between 2001 and December 22, 2003, he conspired with others to provide controlled substances to several minors and recruited them to engage in sexual activity. In a subsequent civil action, the plaintiff alleged that she was one of the victims identified in the plea agreement and sought compensatory and punitive damages under the Trafficking Victims Protection Act (TVPA), 18 U.S.C. § 1589. After denying the plaintiff-victim’s motion for summary judgment and defendant’s motion to dismiss for failure to state a claim, the district court certified two issues for interlocutory appeal: (1) whether the TVPA permits recovery of punitive damages; and (2) whether the TVPA’s civil action provision, 18 U.S.C. § 1595, which became effective on December 19, 2003, applies retroactively to conduct occurring before its effective date, particularly when the perpetrator may have engaged in trafficking after the statute’s effective date. The Ninth Circuit found that the TVPA did not clearly specify whether punitive damages were available; accordingly, it looked to principles of common law. The court noted that punitive damages are generally available in tort, and that the TVPA civil remedy provision creates a cause of action for tortious conduct that is ordinarily intentional and outrageous. The court also stated that Congress’s purposes in enacting the TVPA, including increased protection for victims of trafficking and punishment of traffickers, supported an award of punitive damages. The court then concluded that punitive damages are available under § 1595 of the TVPA. As to retroactivity, the court found that § 1595 changed substantive law and attached new legal burdens to violations of the TVPA in that it permitted trafficking victims to recover compensatory and punitive damages. Accordingly, it cannot apply retroactively to conduct that occurred before its effective date unless there were no disfavored retroactive consequences. The plaintiff-victim argued

that applying the statute retroactively would not have disfavored retroactive consequences because, *inter alia*, defendant’s conduct was not completed before the statute took effect, and should be viewed as a continuing violation. But relying on Ninth Circuit precedent, the court found that permitting recovery for conduct occurring before the effective date would be an impermissible retroactive application: “No authority supports the position that a civil provision increasing liability for the entirety of a continuing violation does not have a retroactive consequence.” Accordingly, the court reversed the district court’s determination that punitive damages are available under the TVPA, and affirmed the district court’s conclusion that § 1595 cannot be applied retroactively to create liability for conduct occurring before December 19, 2003.

D. Defendant’s Right to Equal Protection

Del Valle v. State, 80 So. 3d 999 (Fla. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Ability to Pay.”

E. Defendant’s Right to Fair Trial

People v. Ojeda, 2011 Guam 27, No. CRA10-011, 2011 WL 6937376 (Guam Dec. 23, 2011). *For full case summary, see “Specific Victims’ Rights – Right to Privacy – Other.”

F. Defendant’s Rights Related to Punishment

Del Valle v. State, 80 So. 3d 999 (Fla. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Ability to Pay.”

G. Separation of Powers

Nelson v. State, --- S.W.3d ---, No. CR 11–336, 2011 WL 4840590 (Ark. Oct. 13, 2011). Defendant was convicted on four counts of sexual assault. Defendant argued for reversal on several grounds, including, *inter alia*, that reversal was required because the state’s rape shield statute violated separation of powers. Defendant relied on a recent Arkansas court decision that held that a statute that dictated procedure was unconstitutional as a violation of the separation of powers doctrine because rules regarding pleading, practice, and procedure are solely the responsibility of the court. The court

rejected defendant's argument, holding that the rape shield statute was distinguishable from the statute at issue in the recent decision because the rape shield statute did not act as a categorical bar to the admission of evidence of a victim's sexual conduct, but instead vested a great deal of discretion as to its admissibility with the court. "This feature of the rape-shield statute vesting wide discretion in the circuit court is the means by which the statute survives Appellant's separation-of-powers challenge." Thus, because the rape shield statute did not supplant the court's rulemaking power and ability to control the admissibility of evidence in the courts, it did not violate the separation of powers doctrine.

VI. EVIDENTIARY ISSUES RELATED TO VICTIMS' RIGHTS

A. Confidentiality

People v. Gabriesheski, 262 P.3d 653 (Colo. 2011). Defendant was charged with two counts of sexual assault on a child by one in a position of trust, arising out of allegations made against him by his sixteen-year-old stepdaughter. Before trial, the child-victim recanted and the prosecution provided notice of its intent to call as witnesses the child-victim's guardian ad litem and the social worker assigned to the case. According to the prosecution's offer of proof, these witnesses were prepared to offer testimony relating to their "knowledge of attempts by the mother to pressure her daughter to recant." Defendant objected, invoking, *inter alia*, the privileged nature of communications between the child-victim and the attorney appointed as her guardian ad litem. The trial court ruled that neither the guardian ad litem nor the social worker would be permitted to testify at trial. In light of this ruling, the prosecution was unable to go forward, and the court dismissed the charges without prejudice. The prosecution appealed, and the court of appeals affirmed the trial court's ruling, holding, *inter alia*, that the attorney-client privilege protected communications between the guardian ad litem and the child-victim. As the court of appeals reasoned, because a Chief Justice Directive subjects guardians ad litem to "all of the rules and standards of the legal profession," this necessarily created an attorney-client relationship between the child-victim and her attorney guardian ad litem. Colorado's Supreme Court reversed, holding, *inter alia*, that an attorney-client relationship is not formed between a child-victim and the guardian ad litem.

The court reasoned that although guardians ad litem are required by statute to be licensed attorneys, the guardian ad litem does not represent "the interests of either the petitioner or respondents in the litigation, or even the demands or wishes of the child." Rather, the guardian ad litem is "statutorily tasked with assessing and making recommendations to the court concerning the best interests of the child." The court acknowledged that guardians ad litem are required by the Chief Justice Directive to adhere to the Rules of Professional Conduct, but concluded that this does not create an attorney-client relationship between a guardian ad litem and a child-victim. As the court explained, nothing about the guardian ad litem appointment "suggests an *advocate* to serve as counsel for the child as distinguished from a *guardian*, charged with representing the child's best interests." Consequently, the court was unwilling to "impute to the statutory guardian ad litem-child relationship the legislatively-imposed, evidentiary consequences of an attorney-client relationship," in the absence of clearer legislative intent to do so. In a strongly worded dissent, two Justices disagreed with the majority's decision in its entirety. The dissenters argued, *inter alia*, that the majority's decision "will have devastating effects on the ability of guardians ad litem to fully represent the best interests of children in dependency and neglect proceedings" and pointed out that "guardians ad litem will be required to disclose information about their wards even when it is not in the child's best interest to do so." The dissenters viewed the majority's opinion as being "at odds with a child's fundamental right to be represented in court" and as "fail[ing] to protect the legal rights of children." The dissenters contended that the "better outcome, and the one intended by [Colorado's] statutory scheme, recognizes the attorney-client privilege, but permits the guardian ad litem to decide whether to assert the privilege on behalf of the child."

B. Discovery

United States v. Rand, No. 11-600088-CR, 2011 WL 4949695 (S.D. Fla. Oct. 18, 2011) (order). *For full case summary, see "Specific Victims' Rights – Right to Due Process, Fairness, Dignity, and Respect."

People v. Gabriesheski, 262 P.3d 653 (Colo. 2011). *For full case summary, see "Evidentiary Issues Related to Victims' Rights – Confidentiality."

Davis v. State, 73 So. 3d 304 (Fla. Dist. Ct. App. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Protection – Protective Orders.”

C. First Complaint Rule

Commonwealth v. Aviles, 958 N.E.2d 37 (Mass. 2011). Defendant was convicted of rape of a child and indecent assault and battery on a child under the age of 14. Defendant appealed, challenging, *inter alia*, the admission of testimony concerning a “second complaint” made by the victim. Under Massachusetts’ “first complaint” doctrine, rather than admitting evidence testimony from multiple complaint witnesses, courts limit the testimony to that of one witness who, where feasible, was the first person told of the sexual assault. The victim is not permitted to testify that she told others apart from the first complaint witness, even when details of the conversation have been omitted. In this case, the victim first reported to her mother that defendant had “touched” her, but did not provide further details. Several years later, after seeing defendant’s picture on television, she reported to her grandmother that defendant had raped her. The victim testified at trial that she disclosed the rape to her grandmother. The court found that the victim’s testimony that she told her grandmother of the rape was not admissible under the first complaint doctrine, stating that this testimony “was essentially the same as permitting her grandmother to testify, thereby lending improper credence to [the victim’s] account.” But the court further stated that the first complaint doctrine does not prohibit the admission of evidence that is otherwise independently admissible. Here, the evidence was independently admissible to rebut a charge of fabrication. Defendant had alleged that the report was due to her wanting to move back in with her grandmother; however, the report took place several years after she had already returned to her grandmother’s house. Thus, her testimony became relevant to a contested issue at trial and was not merely a repetition of the fact of her complaint and corroboration of her own accusations. Accordingly, the judgments were affirmed. The court then reassessed the first complaint doctrine, noting that the case presented “an opportunity to assess its continued vitality.” The court concluded that the doctrine should be retained, but that the scope of appellate review of decisions on the admissibility of first complaint evidence should be modified. Rather

than continuing to be treated as an evidentiary rule, the violation of which would always be deemed error, the court instead stated “it makes greater sense to view the doctrine as a body of governing principles to guide a trial judge on the admissibility of first complaint evidence.” This would give judges greater flexibility in determining the scope of admissible evidence, and appellate courts would review the trial court’s determination under an abuse of discretion standard.

D. Privilege

People v. Gabriesheski, 262 P.3d 653 (Colo. 2011). *For full case summary, see “Evidentiary Issues Related to Victims’ Rights – Confidentiality.”

E. Rape Shield

Nelson v. State, --- S.W.3d ---, No. CR 11–336, 2011 WL 4840590 (Ark. Oct. 13, 2011). *For full case summary, see “Constitutional Issues Related to Victims’ Rights – Separation of Powers.”

People v. Ojeda, 2011 Guam 27, No. CRA10-011, 2011 WL 6937376 (Guam Dec. 23, 2011). *For full case summary, see “Specific Victims’ Rights – Right to Privacy – Other.”

People v. Maxwell, 961 N.E.2d 964 (Ill. App. Ct. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Privacy – Other.”

VII. CHILD VICTIMS

Ditullio v. Boehm, 662 F.3d 1091 (9th Cir. 2011). *For full case summary, see “Constitutional Issues Related to Victims’ Rights – Defendant’s Right to No Ex-Post Facto Laws.”

United States v. Rand, No. 11-600088-CR, 2011 WL 4949695 (S.D. Fla. Oct. 18, 2011) (order). *For full case summary, see “Specific Victims’ Rights – Right to Due Process, Fairness, Dignity, and Respect.”

United States v. Johnston, No. 3:10CR-62-H, 2011 WL 5122636 (W.D. Ky. Oct. 28, 2011) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Calculation Method.”

United States v. Fast, 820 F. Supp. 2d 1008 (D. Neb. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Attorney’s Fees.”

United States v. Hagerman, 827 F. Supp. 2d 102 (N.D.N.Y. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Causation.”

United States v. Lundquist, 847 F. Supp. 2d 364 (N.D.N.Y. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Calculation Method.”

United States v. Klein, 829 F. Supp. 2d 597 (S.D. Ohio 2011). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Calculation Method.”

People v. Gabriesheski, 262 P.3d 653 (Colo. 2011). *For full case summary, see “Evidentiary Issues Related to Victims’ Rights – Confidentiality.”

Davis v. State, 73 So. 3d 304 (Fla. Dist. Ct. App. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Protection – Protective Orders.”

People v. Ojeda, 2011 Guam 27, No. CRA10-011, 2011 WL 6937376 (Guam Dec. 23, 2011). *For full case summary, see “Specific Victims’ Rights – Right to Privacy – Other.”

People v. Maxwell, 961 N.E.2d 964 (Ill. App. Ct. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Privacy – Other.”

Commonwealth v. Aviles, 958 N.E.2d 37 (Mass. 2011). *For full case summary, see “Evidentiary Issues Related to Victims’ Rights – First Complaint Rule.”

VIII. MISCELLANEOUS ISSUES RELATED TO VICTIMS’ RIGHTS

A. Parallel Criminal and Civil Proceedings

Ditullio v. Boehm, 662 F.3d 1091 (9th Cir. 2011). *For full case summary, see “Constitutional Issues Related to Victims’ Rights – Defendant’s Right to No Ex-Post Facto Laws.”

B. Civil Forfeiture

United States v. Wilson, 659 F.3d 947 (9th Cir. 2011). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Collection.”

C. Habeas Corpus Petitions

In re Olesen, No. 11-4190, 2011 WL 5357631 (10th Cir. Nov. 4, 2011) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to Due Process, Fairness, Dignity, and Respect.”

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

D. Professional Ethics and Rules of Conduct

People v. Gabriesheski, 262 P.3d 653 (Colo. 2011). *For full case summary, see “Evidentiary Issues Related to Victims’ Rights – Confidentiality.”

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