

Crime Victim Law Update

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I. SPECIFIC VICTIMS' RIGHTS

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

United States v. Graham, No. 12-CR-311, 2013 U.S. Dist. LEXIS 2992 (W.D.N.Y. Jan. 8, 2013). Defendant was charged with three violations of federal sex trafficking laws, specifically the sexual exploitation of minor girls and women in commercial sex acts. One of the victims was still a minor at the time of trial. The other two were 18 or older, although one had been a minor at the time of the trafficking. The government made a motion *in limine* seeking a protective order preventing the use of any of the victims' full names during the trial, and keeping confidential the identities of the minor victims. Defendant opposed the motion. The court began by explaining that under The Child Victims' and Child Witnesses' Rights Act, 18 U.S.C. § 3509(d)(3)(A), a protective order may be issued concealing the identity of a minor victim. On this basis, the court found it was appropriate to conceal the identity of the one minor victim. However, the court determined that it was appropriate to conceal the identities of all the victims, including the two adult victims, under additional statutory authority and case law. The court noted that the Crime Victims' Rights Act, 18 U.S.C. § 3771, provided statutory support for protecting these victims because it requires that crime victims be reasonably protected from the accused, and that they be treated with fairness and respect for their dignity and privacy. Additionally, referencing case law from multiple jurisdictions, the court stated that protective orders may be granted in favor of protecting an adult victim

of sex trafficking because of the legitimate and substantial concern over “the likely adverse personal, professional and psychological consequences of publically linking their identities to their past lives as sex workers.” Applying this general law to the facts of the case, the court found that all three victims' identities should be protected given the explicit nature of the testimony, concerns raised in the mental health evaluations, and possible safety issues. Although the court noted that the public did have a First Amendment interest in access to full information, here the possibility of detrimental effects from disclosure outweighed this interest. Accordingly, the government's request for a protective order preventing the use and disclosure of the full names of the victims during trial was granted.

In re Vicks, 295 P.3d 863 (Cal. 2013). Life prisoner appealed the trial court's denial of his petition for a writ of habeas challenging the Board of Parole Hearings' decision denying him parole for five years under Marsy's Law, the state Victims' Bill of Rights Act of 2008. Among other arguments, the prisoner asserted that the Marsy's Law amendments that increased the statutory period of time between parole hearings violated the Ex Post Facto clauses of the state and federal constitutions when applied to life inmates convicted before the effective date of the amendments. The California Supreme Court disagreed, holding that the relevant amended statutes, whether on their face or as applied to the prisoner, do not violate the Ex Post Facto clauses. In reaching its decision, the court explained that the relevant inquiry is whether the amended statutes create a significant risk of prolonging the life prisoners' incarceration. The court rejected the prisoner's

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assertion that Marsy's Law impermissibly requires the Board to consider the views and interests of the crime victims before it makes its decision concerning the proper deferral period and whether to advance a parole hearing date. The court found that even before Marsy's Law, the Board was required to consider the crime victims' views in deciding whether to release a prisoner on parole. In light of this fact, the court determined that Marsy's Law's additional requirement that the Board consider the victims' views before deciding the date for the next parole hearing does not create a significant risk of prolonging a prisoner's incarceration. The court observed that requiring the Board to consider the victims' views allows it to consider information and arguments relevant to the issue of the victims' "safety and thus suitability for parole." The court further observed that the requirement also serves to fulfill a principal purpose of Marsy's Law: providing crime victims with the right to "due process" by affording them an opportunity to be heard in proceedings concerning the prosecution, punishment, and release of those who victimized them" and ensuring that the "victims are treated with respect and dignity." The court explained that in another context, it has previously acknowledged that there is an "important due process interest in recognizing the dignity and worth of the individual by treating him as an equal, fully participating and responsible member of society." Because "due process" requires affording procedural protections to individuals "to protect important dignitary values" or to ensure a perception of fairness in the process, the court concluded that "it is not critical that a victim's participation be relevant to the ultimate decision; rather, what is important is that the victim be acknowledged and respected."

B. Right to be Heard

Gentry v. Sinclair, 705 F.3d 884 (9th Cir. 2013). Defendant was convicted by a jury of first degree murder with special circumstances and sentenced to death. After his conviction was affirmed on appeal, and his petition for post-conviction relief was denied, defendant sought federal habeas relief on numerous grounds, including that the admission of a victim impact statement violated the Ex Post Facto and Due Process Clauses of the Constitution. The Ex Post Facto clause prohibits the government from passing laws that impose a new punishment or increase punishment for a crime committed before the passage of the law. One category of prohibited laws is:

“Every law that alters the legal rules of evidence, and receives less, or different, testimony than the law required at the time of the commission of the offense, in order to convict the offender.” The court found that the decision in *Payne v. Tennessee*, 501 U.S. 808 (1991), which lifted the constitutional bar against the admission of victim impact statements in capital cases and was decided subsequent to the commission of the crime, did not “lessen the degree or amount of evidence required to impose the death sentence,” and accordingly did not fall within the type of evidence prohibited by the Ex Post Facto Clause. Defendant also argued that the admission of victim impact evidence amounted to a due process violation because it significantly impaired the defense by denying him: (1) time to investigate the victim’s father, who made the victim impact statement; and (2) the ability to voir dire jury members about victim impact testimony. The court found that defendant’s due process claim failed as well, as the change in evidentiary rules did not alter the elements of the crime or the requirements for conviction. The court found that defendant had sufficient notice for due process purposes that his conduct was criminal—there was no lawful conduct that was made unlawful by a retroactive reinterpretation of a statute. Additionally, the court found that the admission of victim impact evidence did not change the requirements for imposing the death penalty or prevent defendant from arguing the fundamental elements of his defense. The court concluded, instead, that defendant received notice that the state would present victim impact testimony and that he had the opportunity to cross-examine and test the witness. Finally, the court concluded that the inability to voir dire potential jurors relating to victim impact evidence did not render the trial fundamentally unfair because other lines of questioning during voir dire adequately addressed jurors’ impartiality when faced with “emotionally inflammatory” evidence. The denial of habeas relief was affirmed.

Lott v. Trammell, 705 F.3d 1167 (10th Cir. 2013). Petitioner was convicted of two counts of first degree murder and sentenced to death in state court for the rape and murder of two elderly victims. During the sentencing phase, the trial court allowed one of the victim’s granddaughter to give a victim impact statement that included her personal opinion that the proper punishment is death. After exhausting his state remedies, petitioner filed a petition for a writ of habeas corpus in federal court, arguing,

inter alia, that the state appellate court improperly determined that the admission of the granddaughter’s testimony was harmless beyond a reasonable doubt. The federal district court denied habeas relief, and the United States Court of Appeals for the Tenth Circuit affirmed. In reaching its decision, the federal appellate court noted that the proper standard of review is whether the constitutional error, if any, had a “substantial and injurious effect” on the outcome of the sentencing phase. Applying this standard, the court first determined that the admission of the victim’s testimony opining about the appropriate sentence violated petitioner’s federal constitutional rights under *Booth v. Maryland*. The court then concluded that this constitutional violation did not have a substantial and injurious effect on the jury’s sentencing determination under the circumstances of this case given: (1) the brevity of the victim’s testimony; (2) the “cruel and brutal nature of the crimes”; (3) the “overwhelming evidence” of petitioner’s guilt; and (4) petitioner’s admission of having committed two subsequent similar rapes against other elderly victims.

United States v. Thetford, --- F. Supp. 2d ---, No. 2:11-cr-495-KOB-HGD, 2013 WL 1309851 (N.D. Ala. Mar. 29, 2013). Defendant pleaded guilty to, among other charges, wire fraud in connection with stealing the victims’ boat. The victims filed a pro se letter, which was treated by the court as a motion to reopen plea, alleging that the government failed to take possession of and return to them the boat stolen by defendant and that the government failed to bring criminal charges against the third-party purchaser of the boat. The court recognized that the victims were statutory victims under the Crime Victims’ Rights Act, 18 U.S.C. § 3771, and as such had certain rights. The court first considered whether the victims were entitled to reopen the plea. Citing to 18 U.S.C. § 3771(d)(5), the court noted that victims may make a motion to reopen a plea or sentence, but only if each of three conditions were met: (1) the victims asserted and were denied the right to be heard; (2) the victims petitioned for a writ of mandamus within 14 days; and (3) the accused did not plead to the highest offense charged. Emphasizing the conjunctive nature of these three requirements, the court determined that the victims in this case did not meet the statutory requirements because the accused had pleaded to the highest offense charged. As to the victims’ overarching complaints regarding the boat not being returned to them and the government’s failure to

charge the individual who received the boat, the court noted that, although the victims were not entitled to have the plea reopened, they were still entitled to enforce certain of their CVRA rights, including the right to be reasonably heard at sentencing and the right to full and timely restitution. The court explained that the victims could seek restitution for the boat at the sentencing proceeding, but that the government retained broad prosecutorial discretion, and the CVRA did not transfer that discretion to victims: “Not only do victims not have a veto, they do not have the right to dictate Government strategy or demand how to prosecute.” Accordingly, the victims’ motion was denied.

In re Vicks, 295 P.3d 863 (Cal. 2013). *For full case summary, see “Specific Victims’ Rights – Right to Due Process, Fairness, Dignity and Respect.”

C. Right to Privacy

1. Identifying Information

United States v. Graham, No. 12-CR-311, 2013 U.S. Dist. LEXIS 2992 (W.D.N.Y. Jan. 8, 2013). *For full case summary, see “Specific Victims’ Rights – Right to Due Process, Fairness, Dignity, and Respect.”

2. Other

United States v. Graham, No. 12-CR-311, 2013 WL 321568 (W.D.N.Y. Jan. 28, 2013) (slip copy). Defendant was charged with three violations of federal sex trafficking laws, specifically the sexual exploitation of minor girls and women in commercial sex acts. One of the victims was still a minor at the time of trial. The other two were 18 or older, although one had been a minor at the time of the trafficking. Following a seven day jury trial, defendant was convicted of all three counts. At the beginning of trial, the government filed a pretrial motion requesting that the trial court prohibit defendant from eliciting or presenting any evidence concerning the victims’ sexual behavior during any time period other than those alleged in the indictment, but that the government be permitted to introduce evidence of sexual behavior, including sexual relations with defendant, during the time periods charged in the indictment. Defendant objected, arguing that exclusion of information about the victims’ sexual behavior and acts of prostitution during other time periods would violate his Fifth

Amendment right to present a defense, as well as his Sixth Amendment right to confrontation. The court disagreed, ruling from the bench that either party may present evidence of the victims’ sexual behavior and/or prostitution during only the time periods charged in the indictment. At the time of the bench ruling, the trial court indicated that it would file a written decision explaining the reasons underlying its ruling. In its written decision, the court surveyed case law addressing the federal rape shield provision in the context of sex trafficking, agreeing with other jurisdictions that the type of evidence sought by defendant to be introduced “falls clearly within the type of propensity or character evidence barred” by the rape shield provision. The court reasoned that evidence of sexual behavior during dates other than those charged in the indictment “bears little relevance” to the sex trafficking charges, as separate sexual behavior “does not tend to prove” that defendant did or did not engage in the criminal conduct, and defendant was not prohibited from questioning the adult victim about whether she engaged in the activities alleged in the indictment of her own volition and without defendant’s assistance. Furthermore, with respect to the child-victims, the court found that minors “cannot consent to engage in prostitution” and prohibited defendant from introducing any sexual behavior from other time periods to suggest that the child-victims “agreed or consented to” the acts alleged in the indictment. Because “a witness’s sexual morals is not a proper basis for impeachment” and any probative impeachment value the evidence may have is “clearly overshadowed” by its risk of unfair prejudice, the court granted the government’s pretrial motion.

State v. Obeta, No. A12-0260, 2013 WL 869954 (Minn. Ct. App. Mar. 11, 2013). Defendant, convicted of criminal sexual assault following a retrial, appealed his conviction on several grounds. First, defendant argued that the trial court abused its discretion and violated his constitutional right to present a defense and to confront witnesses by denying his motion to admit evidence of the victim’s prior sexual conduct history to support defendant’s consent defense. The appellate court rejected this argument, holding that the trial court did not abuse its discretion by excluding this evidence under the state’s rape shield law. In reaching its holding, the court found that the victim’s history of occasional consensual sexual activity is irrelevant to the charge of rape in this case without evidence of a pattern of

clearly similar sexual behavior constituting *modus operandi*. The court concluded that defendant had failed to establish the existence of such a pattern. Second, defendant argued that the trial court abused its discretion and violated his constitutional right to confront witnesses by prohibiting the defense from cross-examining the victim about her prior allegation of assault against her ex-boyfriend, which defendant contends was a false charge. The court agreed that the trial court erred but concluded that the error was harmless beyond a reasonable doubt. The court reasoned that allowing the requested cross-examination would not have helped defendant because the record shows that the victim planned to deny that she had made a false accusation. Third, defendant argued that the trial court abused its discretion when it allowed the prosecutor to introduce the victim's recorded out-of-court statements to the nurse. The appellate court rejected this argument, finding that defendant has waived any objections to this evidence by failing to specifically object to the relevant portions of the taped interview during trial. Lastly, defendant argued that the cumulative effect of the trial court's evidentiary errors operated to deprive him of a fair trial. The appellate court rejected this argument on the ground that the only error it found was harmless beyond a reasonable doubt. For these reasons, the court denied defendant's request for a new trial and affirmed the judgment of conviction.

D. Right to Protection

United States v. Graham, No. 12-CR-311, 2013 U.S. Dist. LEXIS 2992 (W.D.N.Y. Jan. 8, 2013). *For full case summary, see "Specific Victims' Rights – Right to Due Process, Fairness, Dignity, and Respect."

In re Vicks, 295 P.3d 863 (Cal. 2013). *For full case summary, see "Specific Victims' Rights — Right to Due Process, Fairness, Dignity and Respect."

E. Right to Restitution

1. Ability to Pay

In re The Morning Star Packing Co., 711 F.3d 1142 (9th Cir. 2013). Corporate victims of defendant's offense filed a petition for mandamus in response to the district court's decision to deny restitution. On review, the Ninth Circuit held that the district court erred in relying, in part, on a determination that assessing restitution would be an unduly complex and

time-consuming exercise, based on its conclusions that defendant would be financially unable to satisfy any restitution award and the victims could pursue relief through civil actions. The court explained that the victims sought restitution pursuant to the Mandatory Victim Restitution Act (MVRA), 18 U.S.C. § 3663A, which provides that courts "shall order restitution to each victim in the full amount of each victim's losses," without consideration of "the economic circumstances of the defendant" and without consideration of the availability of recovery through a civil lawsuit. The court further explained that only in narrow circumstances may a court decline to order restitution, where, based on facts in the record, "determining complex issues of fact" relating to restitution would complicate or prolong sentencing to such a degree that "the need to provide restitution to any victim is outweighed by the burden on the sentencing process." The court concluded, however, that to the extent that the district court's denial rested on the complicated nature of determining restitution, the record is unclear whether the district court conducted the required balancing test. The court then granted the victims' petition for a writ of mandamus, and the district court was ordered to vacate its previous judgment with respect to restitution and conduct further proceedings consistent with the appellate court's opinion.

2. Causation

United States v. Gamble, 709 F.3d 541 (6th Cir. 2013). Defendants, convicted of possession or receipt of child pornography after a guilty plea, appealed their respective district courts' awards of over \$1 million in restitution to "Vicky," one of the child-victims depicted in the child sex abuse images. Each defendant was held jointly and severally liable for "the full amount of the victim's losses" under 18 U.S.C. § 2259, the mandatory restitution statute for child exploitation cases. On appeal, defendants argued, *inter alia*, that Section 2259 imposes a proximate causation requirement for all losses, and that the trial courts erred in concluding that the proximate causation requirement only applies to the "catch-all category" in the statute. The United States Court of Appeals for the Sixth Circuit agreed. The court concluded that only losses proximately caused by defendants' offenses are recoverable in restitution under Section 2259. In reaching its conclusion, the court followed an earlier case, *United States v. Evers*, and its holding that the proximate

causation requirement applies to all categories of losses in Section 2259. The court explained that this requirement means that the government must establish that the losses were a “reasonably foreseeable” consequence of defendants’ conduct. The court observed that every federal circuit but one that has considered this issue has reached the same conclusion. Because the district courts did not require such a showing, the court reversed the restitution orders in both cases. In dicta, the court also cautioned that the district courts on remand should attempt to apportion liability rather than impose joint and several liability when proximately caused harms are not clearly traceable to a particular defendant. The court stated that joint and several liability would improperly hold defendants responsible for losses that they did not cause. It also reasoned that the burden for coordinating contribution from offenders all over the country should fall to the government and not to the individual defendants who are not as well positioned to seek contribution. For these and other reasons, the court reversed the restitution orders and issued a general remand that granted the district courts discretion to admit new evidence or argument and consider the restitution awards de novo.

United States v. Fast, 709 F.3d 712 (8th Cir. 2013). Defendant pleaded guilty to charges of receiving and distributing child pornography and was ordered to pay \$3,333 in restitution to “Vicky,” one of the child-victims depicted in the child sex abuse images. Vicky challenged the restitution award by direct appeal and in a petition for a writ of mandamus, arguing that the trial court erred when it failed to grant her request for over \$950,000 in restitution for the full amount of her losses, as required by 18 U.S.C. § 2259, the mandatory restitution statute for child exploitation cases. Vicky asserted that the proximate causation requirement in Section 2259 applies only to the “catch-all category” in the statute, and the restitution amount that she sought under the other categories of the statute is recoverable without showing defendant proximately caused those losses. The United States Court of Appeals for the Eighth Circuit granted defendant and the government’s motion to dismiss Vicky’s direct appeal, holding that she lacks standing to appeal because she is not a party to the case. In reaching its holding, the court determined that the Crime Victims’ Rights Act, 18 U.S.C. § 3771 (CVRA), does not grant a crime victim party status for purposes of a direct appeal; it only grants a crime

victim the right to petition for mandamus relief. The court also denied Vicky’s petition for a writ of mandamus on the ground that she had failed to show that the district court “clearly and indisputably erred,” one of the traditional conditions for mandamus relief. In reaching its decision, the court concluded that only losses proximately caused by defendant’s offenses are recoverable in restitution under Section 2259, and that the government has not shown that defendant “caused the entirety” of the claimed losses. The court also rejected Vicky’s request to hold defendant jointly and severally liable for the full amount of her losses on the basis that joint and several liability under Section 2259 is only proper when there are multiple defendants in a single case.

In re Amy, 710 F.3d 985 (9th Cir. 2013). Defendant was convicted of distributing child sex abuse images after a guilty plea. “Amy” and “Vicky,” two of the child-victims depicted in the images, filed a petition for a writ of mandamus challenging the trial court’s denial of their requests for restitution pursuant to the Crime Victims’ Rights Act, 18 U.S.C. § 3771. The victims argued that the trial court erred in applying prior Ninth Circuit case law and concluding that 18 U.S.C. § 2259, the mandatory restitution statute for child exploitation cases, imposes a general proximate cause requirement for restitution. The court rejected this argument and declined to overrule prior case law that requires that proximate causation exist between the offense and the victims’ losses. The victims also argued that the trial court abused its discretion by failing to award any restitution. The court agreed. The court determined that the record shows that the victims had provided sufficient evidence to establish a causal connection between defendant’s criminal conduct and their losses. For this reason, the court granted the petition in part and directed the trial court, on remand, to vacate its judgment with respect to restitution and conduct further proceedings to determine the amount of restitution owed to the victims.

State v. Straub, 292 P.3d 273 (Idaho 2013). Defendant pleaded guilty to vehicular manslaughter per gross negligence, resulting from his having driven his pick-up truck under the influence of alcohol and struck and killed the victim, a bicyclist. As part of the plea agreement, defendant was required to serve a jail term, pay a fine, and pay restitution. A hearing on restitution resulted in the trial court ordering approximately \$550,000 to be paid to the victim’s

family, which included funeral expenses, counseling costs to date, medical insurance premiums, legal expenses, future medical insurance premiums, and lost wages. Defendant appealed the restitution order to the extent it required payment of future medical insurance premiums and future lost wages. The court first determined that the appeal was not prohibited by the terms of the plea agreement, but that defendant did not have a right to jury trial on the restitution issue. The court then turned to the substance of the appeal. The court held that Idaho's restitution statute allows for a victim's recovery of any actual economic loss that results from defendant's criminal conduct, which can include lost wages and medical costs. It concluded that actual out-of-pocket medical expenses and lost wages up to the date of sentencing may be included in a restitution order. However, the court determined that the lower court abused its discretion by awarding lost wages after the point of sentencing. Relying on the language of the restitution statute that the economic loss be "actually suffered," the court concluded that "[w]hile lost wages are allowed under statute, awarded wages are limited to the quantifiable out-of-pocket losses at the time of the restitution award." The court also concluded that it was an abuse of discretion to award restitution for the family's acquisition of medical insurance for continuation of COBRA coverage because the acquisition of medical insurance was not a "direct" consequence of the criminal conduct. Accordingly, the restitution order was vacated and remanded to the trial court.

State v. Hamilton, 110 So. 3d 256 (La. Ct. App. 2013). Defendant was convicted after a guilty plea of one count of bank fraud against one victim, Gibbsland Bank. Pursuant to the plea agreement, the state dismissed the bank fraud count involving another victim, Citizen's Bank. As part of his sentence, the trial court ordered defendant to pay restitution to both bank victims as a condition of parole. On appeal, defendant challenged his sentence arguing, *inter alia*, that the trial court erred by (1) ordering restitution as a condition of parole, and (2) ordering restitution to Citizen's Bank. The court agreed with both arguments. First, the court concluded that the trial court had no authority to order restitution as a condition of parole. In reaching its conclusion, the court found that under state law, a trial court may order restitution as a condition of a defendant's probation; but only the parole board may impose conditions on a defendant's parole. Because full restitution is mandatory under

the state bank fraud statute, the court determined that it must remand this matter for resentencing to allow the trial court to impose a proper restitution order. Second, the court concluded that the trial court had no authority to order restitution to Citizen's Bank. In reaching its conclusion, the court determined that the bank fraud statute only requires defendant to pay restitution to "the victim and any other person who has suffered a financial loss as a result of the offense" that was prosecuted. Because defendant was not convicted of any offense involving Citizen's Bank, the court found that restitution was not authorized by the bank fraud statute. The court also found that a separate statute authorizes trial courts to order restitution to "other victims of the defendant's criminal conduct" so long as such restitution was made part of the plea agreement. However, the court observed that defendant's plea agreement did not include a restitution provision with regard to Citizen's Bank. For these and other reasons, defendant's sentence was affirmed in part, vacated in part, and remanded for resentencing.

3. Future Lost Income

State v. Straub, 292 P.3d 273 (Idaho 2013). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Causation."

4. Joint and Several Liability

United States v. Gamble, 709 F.3d 541 (6th Cir. 2013). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Causation."

United States v. Fast, 709 F.3d 712 (8th Cir. 2013). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Causation."

5. Jurisdiction

United States v. Pileggi, 703 F.3d 675 (4th Cir. 2013). Defendant, convicted of conspiracy to commit wire fraud, wire fraud, and other crimes arising out of a fraudulent sweepstakes scheme that targeted elderly victims, was sentenced to 600 months of imprisonment and ordered to pay over \$4.2 million in restitution. In his first appeal, defendant challenged the prison term. The court of appeals held that the trial court erred in imposing the 600-month term, vacated the judgment, and "remanded the case for 'further proceedings consistent with [its] decision.'" On remand, the trial court imposed a sentence of 300

months of imprisonment, granted the government's request to reconsider the restitution award, and increased the restitution amount to over \$20 million. In this second appeal, defendant argued that the trial court had no authority to amend the restitution amount. Applying the mandate rule, the court of appeals held that the trial court erred when it amended the amount of restitution on remand. In reaching its holding, the court explained that the mandate rule generally bars the litigation of issues that are foregone on appeal or otherwise waived by the parties. The court found that the mandate issued in the first appeal addressed only defendant's 600-month prison sentence; therefore, the opinion directed the trial court to correct only the prison term upon resentencing. The court distinguished the United States Supreme Court's decision in *Pepper v. United States*, 131 S. Ct. 1229 (2011), explaining that the appellate court in *Pepper* had set aside defendant's "entire sentence and remanded for a de novo resentencing"; therefore, "the remand order had 'effectively wiped the slate clean,'" and the new trial judge was not required to adhere to the prior sentencing judge's sentencing plan. The court also found that the government had waived any challenge to the restitution amount by not raising it in the first appeal. The court rejected the government's argument that the trial court nevertheless has discretion to reconsider the restitution amount. First, the court disagreed with the government's contention that controlling legal authority had changed dramatically after the first appeal to justify the decision to reconsider the amount of restitution. Second, the court was not persuaded by the government's argument that the original restitution order, if uncorrected, will result in a serious injustice to the crime victims. The court found that the new restitution amount was based simply on a more detailed analysis of old information that the government had possessed before the original sentencing rather than new information brought forth by the victims. As a result, the court determined that the government had not shown good cause for its failure to request an amended restitution order pursuant to 18 U.S.C. § 3664 before the resentencing. For these reasons, the court vacated the restitution order and remanded with instruction to the trial court to reinstate the original restitution order.

State v. Hamilton, 110 So. 3d 256 (La. Ct. App. 2013). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Causation."

6. Other

In re The Morning Star Packing Co., 711 F.3d 1142 (9th Cir. 2013). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Ability to Pay."

United States v. Davis, 706 F.3d 1081 (9th Cir. 2013). Defendant pleaded guilty to one count of conspiracy to commit money laundering and thirty counts of money laundering and aiding and abetting. The court ordered defendant to forfeit \$1.29 million to the United States Department of Justice (DOJ) and to pay \$95,000 in restitution to the Federal Bureau of Investigation (FBI) for the cost of the operation that led to his arrest. Defendant appealed the forfeiture amount arguing that the court's order impermissibly resulted in the federal government's double recovery, and that the forfeiture amount should be off-set by the restitution. The court rejected defendant's argument on the basis that forfeiture and restitution "differ in nature, kind and purpose." Whereas forfeiture's purpose is punishment, the court explained, restitution's purpose is to compensate and make a victim whole. The court reasoned that money levied as a punitive fine does not double the money intended to compensate for a victim's loss, therefore whether DOJ and FBI were technically the same entity was irrelevant. The court noted that defendant "ha[d] not raised the issue of whether the FBI is properly a 'victim' under the restitution statute, and we therefore do not consider that question." The court affirmed the district court's order.

United States v. Thetford, --- F. Supp. 2d ---, No. 2:11-cr-495-KOB-HGD, 2013 WL 1309851 (N.D. Ala. Mar. 29, 2013). *For full case summary, see "Specific Victims' Rights – Right to be Heard."

People v. Holman, 214 Cal. Rptr. 3d 164 (Cal. Ct. App. 2013). Defendant was convicted after guilty pleas in three cases on charges relating to the possession and sale of drugs, receipt of a stolen vehicle, and probation violations. The trial court ordered her to complete a drug treatment program and pay \$600 in restitution fines as a condition of probation. After defendant completed the treatment program, the court terminated her probation terms early, set aside her guilty pleas, dismissed all charges, and suspended and dismissed all unpaid fines. The state appealed, arguing that the trial court lacked the authority or discretion to suspend or dismiss the

\$500 in unpaid restitution fines. The court of appeals rejected the state's argument. The court concluded that the restitution fines were properly suspended and dismissed. In reaching its decision, the court observed that this case involves only restitution fines, which are paid to the state restitution fund for disbursement by the Victim Compensation Program; direct restitution to the victim is not at issue because the offenses did not involve harm to a direct victim. The court noted that the purpose of the restitution fine is punishment; whereas the purpose of direct victim restitution is "to reimburse the victim for economic losses caused by the defendant's criminal conduct." The court explained that the trial court had statutory authority to release defendant from "all penalties and disabilities resulting from the offense[s]" after dismissing the charges upon early termination of probation, and payment of restitution fines fall within the scope of such "penalties and disabilities." The court also found that suspension of unpaid restitution fines during the probationary period created an implied promise, made part of the plea bargain, that unpaid restitution fines would remain suspended and dismissed upon successful completion of the treatment program. For these reasons, the court affirmed the judgment.

F. Right to Return of Property

United States v. Thetford, --- F. Supp. 2d ---, No. 2:11-cr-495-KOB-HGD, 2013 WL 1309851 (N.D. Ala. Mar. 29, 2013). *For full case summary, see "Specific Victims' Rights – Right to be Heard."

II. STANDING

A. Definition of "Victim"

United States v. Davis, 706 F.3d 1081 (9th Cir. 2013). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Other."

United States v. Hall, 704 F.3d 1317 (11th Cir. 2013). Defendant, an office assistant in a gynecological and obstetric health care office who sold private patient information to two other individuals, pleaded guilty to conspiracy to commit bank fraud, conspiracy to commit identity theft and access device fraud, and wrongfully obtaining and transferring individually identifiable health information for personal gain. Defendant appealed from her sentence, arguing that the trial court erred in applying a four-level

enhancement for misappropriating the identification of 141 victims whose private information she sold, where defendant's co-conspirators obtained fraudulent credit cards using the information of only 12 of these victims. The sentencing enhancement is based on the number of victims, which is defined for the purpose of this guideline to mean "any individual whose means of identification was used unlawfully or without authority." The trial court had found that defendant misused the private information of all 141 victims when she sold it to her co-conspirators. On appeal, the Eleventh Circuit disagreed, finding that the transfer of victims' information to defendant's co-conspirators was separate from its use and that the "personal identifying information was not used . . . until [defendant's] co-conspirators secured the fraudulent credit cards." Because all but 12 of the individuals whose information was sold by defendant did not qualify as "victims" under the relevant sentencing enhancement, the court held that the trial court erred in applying the four-level enhancement. The court then vacated defendant's sentence and remanded the case for resentencing.

United States v. Thetford, --- F. Supp. 2d ---, No. 2:11-cr-495-KOB-HGD, 2013 WL 1309851 (N.D. Ala. Mar. 29, 2013). *For full case summary, see "Specific Victims' Rights – Right to be Heard."

State v. Hamilton, 110 So. 3d 256 (La. Ct. App. 2013). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Causation."

III. ENFORCEMENT

A. Multiple Victim Cases

In re The Morning Star Packing Co., 711 F.3d 1142 (9th Cir. 2013). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Ability to Pay."

B. Remedies for Rights Violations

1. Voiding Plea, Sentence, or Parole Decision

United States v. Thetford, --- F. Supp. 2d ---, No. 2:11-cr-495-KOB-HGD, 2013 WL 1309851 (N.D. Ala. Mar. 29, 2013). *For full case summary, see "Specific Victims' Rights – Right to be Heard."

C. Writs – Mandamus

In re The Morning Star Packing Co., 711 F.3d 1142 (9th Cir. 2013). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Ability to Pay.”

United States v. Thetford, --- F. Supp. 2d ---, No. 2:11-cr-495-KOB-HGD, 2013 WL 1309851 (N.D. Ala. Mar. 29, 2013). *For full case summary, see “Specific Victims’ Rights – Right to be Heard.”

D. Waiver of Rights – By Prosecutor

United States v. Pileggi, 703 F.3d 675 (4th Cir. 2013). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Jurisdiction.”

IV. STANDARD OF REVIEW

A. Mandamus

In re The Morning Star Packing Co., 711 F.3d 1142 (9th Cir. 2013). *For full case summary, see “Specific Victims’ Rights – Right to Restitution – Ability to Pay.”

V. CONSTITUTIONAL ISSUES RELATED TO VICTIMS’ RIGHTS

A. Right of Access – Public and Media

Richardson v. Ploughe, No. 12-cv-01828-REB, 2013 WL 427064 (D. Colo. Feb. 4, 2013) (slip copy). Defendant was found guilty of forgery, possession of forgery devices, wrongful possession of a journal or seal, violations of a restraining order, harassment by stalking, and offering a false instrument for recording. Defendant’s convictions were based, in part, on the fact that defendant filed thirteen lawsuits against the victim in order to “overwhelm her with lawsuits and bring her to financial ruin if she would not communicate with him.” Defendant lost all arguments on direct appeal and filed a pro se Application for a Writ of Habeas Corpus, arguing, *inter alia*, that Colorado’s anti-stalking statute is unconstitutionally vague and overbroad—both on its face and as applied in this case—and that the charging document failed to adequately notify him of the conduct underlying his prosecution. The habeas court rejected defendant’s arguments, agreeing with the state supreme court’s analysis that the statute

was neither vague nor overbroad on its face, because the legislature meant to criminalize only conduct that involves a “severe intrusion[] upon the victim’s personal privacy and autonomy, with an immediate and long-lasting impact on quality of life as well as risks to security and safety of the victim and persons close to the victim.” Similarly, the court found that the limited scope of the acts encompassed by the statute mandated a finding that its sweep was not unconstitutionally overbroad. The court also found that the state court’s determination that the constitutional right to access the courts does not encompass a right to file abusive lawsuits was not contrary to established Supreme Court precedent; to the contrary, the Supreme Court has noted that “since sham litigation by definition does not involve a bona fide grievance, it does not come within the first amendment right to petition.” Further, as the Tenth Circuit has ruled repeatedly, “the right of access to the courts is neither absolute nor unconditional, and there is no constitutional right of access to the courts to prosecute an action that is frivolous *or malicious*.” With respect to defendant’s allegation that the indictment did not specifically allege facts showing how he accomplished the offense of stalking, the court held that any defect did not prevent defendant from preparing a meaningful defense, as defendant was sufficiently notified of the conduct at issue when the victim testified about the specific conduct underlying the offense at a preliminary hearing roughly a year before defendant’s trial. The court denied defendant’s Application for a Writ of Habeas Corpus and dismissed the case with prejudice.

United States v. Graham, No. 12-CR-311, 2013 U.S. Dist. LEXIS 2992 (W.D.N.Y. Jan. 8, 2013). *For full case summary, see “Specific Victims’ Rights – Right to Due Process, Fairness, Dignity, and Respect.”

B. Defendant’s Right to Confrontation

United States v. Graham, No. 12-CR-311, 2013 WL 321568 (W.D.N.Y. Jan. 28, 2013) (slip copy). *For full case summary, see “Specific Victims’ Rights – Right to Privacy – Other.”

State v. Obeta, No. A12-0260, 2013 WL 869954 (Minn. Ct. App. Mar. 11, 2013). *For full case summary, see “Specific Victims’ Rights – Right to Privacy – Other.”

State v. Valle, 298 P.3d 1237 (Or. Ct. App. 2013) (en banc). Defendant appealed from his conviction on charges of first degree sodomy and second degree sexual abuse, arguing that the trial court erred in excluding evidence that the child-victim—defendant’s step-daughter—had applied for a U visa. Defendant argued that the child-victim’s application for a visa allowing her to stay in the United States because of her status as a victim of sexual abuse was relevant impeachment evidence as the visa application could allow the jury to infer that the child-victim had a personal interest in testifying in a manner consistent with her application for an opportunity to remain in the country. The court agreed, holding that the trial court’s exclusion of the evidence was reversible error, and remanded for a new trial. The court began by noting that a party is entitled to impeach a witness with evidence regarding the witness’s bias or interest, and that this is “particularly true for a defendant in a criminal case[.]” as defendant’s Confrontation Clause right “includes the right to question a witness about circumstances from which a jury could reasonably infer that the witness has a motive to testify in a certain manner.” The court further noted that all defendant needed to show for admission of the impeachment evidence was that it was relevant on the ground that it “had a tendency, however slight, to demonstrate that [the child-victim] had a personal interest in testifying against him.” The court found that defendant successfully laid this foundation for admission of the impeachment evidence because: “Simply put, [the child-victim] had applied for an opportunity to stay in the country on the ground that she had been abused; based on that fact, a jury could reasonably infer that she had a personal interest in testifying in a manner consistent with her application for that opportunity.” The court then held that because defendant’s proffered impeachment evidence was relevant, and because it was necessary to make an initial showing of the child-victim’s self-interest, the trial court erred in excluding it. The court rejected the dissent’s view that the trial court correctly excluded the evidence of the child-victim’s application for a U visa because defendant failed to present sufficient evidence of a “conditional fact”—the victim’s belief or understanding that her eligibility depended on her testimony. The court explained that the evidence that the child-victim had applied for a U visa on the ground that she was a victim of abuse was self-contained, requiring no additional information to make it relevant.

C. Defendant’s Right to Due Process

Gentry v. Sinclair, 705 F.3d 884 (9th Cir. 2013). *For full case summary, see “Specific Victims’ Rights – Right to be Heard.”

Richardson v. Ploughe, No. 12-cv-01828-REB, 2013 WL 427064 (D. Colo. Feb. 4, 2013) (slip copy). *For full case summary, see “Constitutional Issues Related to Victims’ Rights – Right of Access – Public and Media.”

United States v. Meregildo, --- F. Supp. 2d ---, No. 11 Cr. 576(WHP), 2013 WL 364217 (S.D.N.Y. Jan. 31, 2013). Defendant and other members of a street gang were indicted on narcotics and racketeering charges for selling drugs and murdering rival drug dealers. While incarcerated and awaiting trial, a co-defendant who became a cooperative government witness posted status updates on a Facebook account that was created by a friend. Defendant moved to compel the government to obtain and disclose the contents of that Facebook account, arguing that the cooperative witness was a member of the government’s prosecution team and thus subject to its disclosure obligation under *Brady v. Maryland*, 373 U.S. 83 (1963). The district court rejected defendant’s argument, concluding that the government had no obligation to acquire and disclose the requested information. In reaching its conclusion, the court noted that *Brady* is a remedial rule created to protect defendants’ due process rights while preserving the adversarial nature of the criminal justice system; it is not a rule of discovery and “does not require the government to act as a private investigator and valet of the defendant, gathering evidence and delivering it to opposing counsel.” The court determined that under the totality of the circumstances, the cooperative witness was neither a member of the prosecution team nor an arm of the prosecutor. The court explained that the government did not have actual or constructive knowledge of the witness’s Facebook information, and it did not have possession of the Facebook information. The court also found that at the time of the motion, the witness no longer had access to the Facebook account’s log-in information; instead, it was in the exclusive possession of the witness’s friend, a third party. The court further found that defendant had sufficient information to attack the witness’s credibility at trial because after moving to compel, defendant’s private investigator acquired a complete log of the Facebook

account. For these reasons, the court denied defendant's motion.

D. Defendant's Right to No Ex-Post Facto Laws

Gentry v. Sinclair, 705 F.3d 884 (9th Cir. 2013). *For full case summary, see "Specific Victims' Rights – Right to be Heard."

In re Vicks, 295 P.3d 863 (Cal. 2013). *For full case summary, see "Specific Victims' Rights – Right to Due Process, Fairness, Dignity and Respect."

E. Defendant's Right to Fair Trial

Richardson v. Ploughe, No. 12-cv-01828-REB, 2013 WL 427064 (D. Colo. Feb. 4, 2013) (slip copy). *For full case summary, see "Constitutional Issues Related to Victims' Rights – Right of Access – Public and Media."

United States v. Graham, No. 12-CR-311, 2013 WL 321568 (W.D.N.Y. Jan. 28, 2013) (slip copy). *For full case summary, see "Specific Victims' Rights – Right to Privacy – Other."

State v. Obeta, No. A12-0260, 2013 WL 869954 (Minn. Ct. App. Mar. 11, 2013). *For full case summary, see "Specific Victims' Rights – Right to Privacy – Other."

F. Defendant's Rights Related to Punishment

Lott v. Trammell, 705 F.3d 1167 (10th Cir. 2013). *For full case summary, see "Specific Victims' Rights – Right to be Heard."

United States v. Hall, 704 F.3d 1317 (11th Cir. 2013). *For full case summary, see "Standing – Definition of 'Victim.'"

VI. EVIDENTIARY ISSUES RELATED TO VICTIMS' RIGHTS

A. Consent - Sexual Assault

State v. Obeta, No. A12-0260, 2013 WL 869954 (Minn. Ct. App. Mar. 11, 2013). *For full case summary, see "Specific Victims' Rights – Right to Privacy – Other."

B. Discovery – Brady Materials

United States v. Meregildo, --- F. Supp. 2d ---, No. 11 Cr. 576(WHP), 2013 WL 364217 (S.D.N.Y. Jan. 31, 2013). *For full case summary, see "Constitutional Issues Related to Victims' Rights – Defendant's Right to Due Process."

C. Hearsay – Medical Treatment

State v. Obeta, No. A12-0260, 2013 WL 869954 (Minn. Ct. App. Mar. 11, 2013). *For full case summary, see "Specific Victims' Rights – Right to Privacy – Other."

D. Rape Shield

United States v. Graham, No. 12-CR-311, 2013 WL 321568 (W.D.N.Y. Jan. 28, 2013) (slip copy). *For full case summary, see "Specific Victims' Rights – Right to Privacy – Other."

State v. Obeta, No. A12-0260, 2013 WL 869954 (Minn. Ct. App. Mar. 11, 2013). *For full case summary, see "Specific Victims' Rights – Right to Privacy – Other."

E. Relevance

United States v. Graham, No. 12-CR-311, 2013 WL 321568 (W.D.N.Y. Jan. 28, 2013) (slip copy). *For full case summary, see "Specific Victims' Rights – Right to Privacy – Other."

In re Vicks, 295 P.3d 863 (Cal. 2013). *For full case summary, see "Specific Victims' Rights – Right to Due Process, Fairness, Dignity and Respect."

State v. Obeta, No. A12-0260, 2013 WL 869954 (Minn. Ct. App. Mar. 11, 2013). *For full case summary, see "Specific Victims' Rights – Right to Privacy – Other."

State v. Valle, 298 P.3d 1237 (Or. Ct. App. 2013) (en banc). *For full case summary, see "Constitutional Issues Related to Victims' Rights – Defendant's Right to Confrontation."

VII. PROCEDURAL ISSUES RELATED TO VICTIMS' RIGHTS

A. Voir Dire

Gentry v. Sinclair, 705 F.3d 884 (9th Cir. 2013).

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

VIII. VICTIM IMPACT STATEMENTS

Gentry v. Sinclair, 705 F.3d 884 (9th Cir. 2013).

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

Lott v. Trammell, 705 F.3d 1167 (10th Cir. 2013).

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

In re Vicks, 295 P.3d 863 (Cal. 2013). *For full case summary, see "Specific Victims' Rights – Right to Due Process, Fairness, Dignity and Respect."

IX. CHILD VICTIMS

United States v. Gamble, 709 F.3d 541 (6th Cir. 2013). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Causation."

United States v. Fast, 709 F.3d 712 (8th Cir. 2013). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Causation."

In re Amy, 710 F.3d 985 (9th Cir. 2013). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Causation."

United States v. Graham, No. 12-CR-311, 2013 U.S. Dist. LEXIS 2992 (W.D.N.Y. Jan. 8, 2013). *For full case summary, see "Specific Victims' Rights – Right to Due Process, Fairness, Dignity, and Respect."

United States v. Graham, No. 12-CR-311, 2013 WL 321568 (W.D.N.Y. Jan. 28, 2013) (slip copy). *For full case summary, see "Specific Victims' Rights – Right to Privacy – Other."

State v. Valle, 298 P.3d 1237 (Or. Ct. App. 2013) (en banc). *For full case summary, see "Constitutional Issues Related to Victims' Rights – Defendant's Right to Confrontation."

X. MISCELLANEOUS ISSUES RELATED TO VICTIMS' RIGHTS

A. Habeas Corpus Petitions

Lott v. Trammell, 705 F.3d 1167 (10th Cir. 2013).

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

Richardson v. Ploughe, No. 12-cv-01828-REB, 2013 WL 427064 (D. Colo. Feb. 4, 2013) (slip copy). *For full case summary, see "Constitutional Issues Related to Victims' Rights – Right of Access – Public and Media."

In re Vicks, 295 P.3d 863 (Cal. 2013). *For full case summary, see "Specific Victims' Rights – Right to Due Process, Fairness, Dignity and Respect."

B. Parallel Criminal and Civil Proceedings

1. Restitution

In re The Morning Star Packing Co., 711 F.3d 1142 (9th Cir. 2013). *For full case summary, see "Specific Victims' Rights – Right to Restitution – Ability to Pay."

C. Tort Liability – Of Victims

Richardson v. Ploughe, No. 12-cv-01828-REB, 2013 WL 427064 (D. Colo. Feb. 4, 2013) (slip copy). *For full case summary, see "Constitutional Issues Related to Victims' Rights – Right of Access – Public and Media." ■

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



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