

Crime Victim Law Update

July - September 2009

- This is an index of crime victims' rights court opinions issued in the United States during July - September of 2009. This index is intended for educational purposes only. NCVLI makes no warranty regarding the current status of the cases cited or summarized.
- Before relying on any case summary, an attorney must independently review and analyze the case, including any subsequent history.

TABLE OF CONTENTS

	pg.
I. SPECIFIC VICTIMS' RIGHTS	1
A. Right to be Heard	1
B. Right to Notice	2
C. Right to Privacy	3
D. Right to Restitution	4
E. Right to Return of Property	7
F. Right to be Treated with Fairness, Dignity, and Respect	7
II. DEFINITION OF "VICTIM"	9
III. APPELLATE REVIEW & WRITS OF MANDAMUS	10
IV. CONSTITUTIONAL ISSUES RELATED TO VICTIMS' RIGHTS	11
A. Defendant's Right to Confrontation	11
B. Defendant's Right to Present Evidence	11
C. First Amendment Right of Access	12
D. No Ex-Post Facto Laws	12
V. EVIDENTIARY ISSUES RELATED TO VICTIMS' RIGHTS	13
A. Hearsay	13
B. Prior Bad Acts	14
C. Rape Shield	14
VI. PROCEDURAL ISSUES RELATED TO VICTIMS' RIGHTS	15
A. Access to Presentence Report	15
B. Courtroom Accommodations	15
C. Discovery	15
D. Multiple Victims	16
E. Victim Standing – Civil	16
F. Victim Standing – Criminal	17
G. Victim Impact Statements	18

I. SPECIFIC VICTIMS' RIGHTS

A. Right to be Heard

FEDERAL – 3D CIR.

United States v. Clark, No. 08-1808, 2009 WL 1931172 (3d Cir. July 7, 2009). Defendant pleaded guilty to receiving and distributing child pornography. The National Center for Missing and Exploited Children identified two of the minors in the pornographic images. The mother of one child, the other child, and the other child's parents submitted victim impact statements at sentencing. The names of the victims and their families were redacted from the statements. Defendant appealed his sentence, arguing that the district court violated his due process rights by considering the victim impact statements because they were "unsubstantiated, unrelated, irrelevant and unreliable" hearsay. Defendant also objected to the statements because they were not specifically written with reference to his sentencing. The circuit court rejected defendant's arguments, reasoning that the minors were identified as subjects in the pornographic material in defendant's possession. As such, the court found that they were victims of defendant's crime with rights under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, including the right to be reasonably heard in all public proceedings involving sentencing. The court reasoned that federal law does not require child pornography victims to write a new statement every time someone is sentenced for possessing a pornographic image of him or her. It also found no error in redacting the victims' names from the statements, as the practice was consistent with the provision of the CVRA guaranteeing victims the right to be treated with fairness and with respect for their dignity and privacy. Finally, the court held that the victim impact statements were not inadmissible hearsay because the confrontation clause does not bar the inclusion of such statements in the context of sentencing proceedings, and the federal

rules permit the introduction of relevant information, provided it has a sufficient indicia of reliability to support its probable accuracy. The court reasoned that the statements “easily” met this standard of reliability because the Child Victim Identification Program had identified them as the subjects of pornographic material.

FEDERAL – D. UTAH

United States v. Mitchell, No. 2:08CR125DAK, 2009 WL 3181938 (D. Utah Sept. 28, 2009). Defendant moved to preclude the introduction of all lay witness testimony at his competency hearing. One of the lay witnesses scheduled to testify was the victim of defendant’s crime. At a hearing regarding the admissibility of the victim’s testimony, defendant argued, inter alia, that the victim’s lay observations about him were irrelevant to the competency question, and that the victim’s opinion evidence would be more prejudicial than probative. The court disagreed, holding that the victim’s testimony was relevant and admissible. The court also noted that defendant’s motion to preclude introduction of the victim’s testimony might implicate the victim’s rights under the Crime Victims’ Rights Act (CVRA), 18 U.S.C. § 3771. It observed that although the CVRA does not grant victims an affirmative right to be heard at a competency hearing, such an omission from the statute “may have been a recognition that the victim’s testimony would usually be allowed as relevant in these types of evidentiary hearings whereas it may be excluded from more procedural hearings. Or it may be an acknowledgment that the admission of testimony at such hearings would be governed more appropriately by the rules of evidence.” The court concluded that, although the CVRA does not grant an affirmative right to be heard at a competency hearing, its “intent is to provide a victim with appropriate access to the proceedings and it dictates that the victim has a right to be ‘treated with fairness.’” Yet, upon finding the victim’s testimony relevant and admissible under the Federal Rules of Evidence, the court declined to determine whether a victim should be allowed to testify at competency hearings generally under the CVRA.

B. Right to Notice

FEDERAL – W.D.N.C.

United States v. Peralta, No. 3:08cr233, 2009 WL 2998050 (W.D.N.C. Sept. 15, 2009). In a case involving the identity theft of approximately 2,500 residents of Puerto Rico, the government moved for

alternative victim notification procedures under the Crime Victims’ Rights Act (CVRA), 18 U.S.C. § 3771. The government proposed the issuance of a press release containing specific information about defendants’ sentencing hearings as a reasonable alternative to actual notice to each victim at his or her residential address. The court agreed, and found that the proposed procedure would give effect to the CVRA, as long as the press release was sent to every daily newspaper in Puerto Rico, in addition to any other location selected by the government.

CALIFORNIA

Kling v. Superior Court of Ventura County, 99 Cal. Rptr. 3d 149 (Cal. Ct. App. 2009). Defendant sought a writ of prohibition to compel the trial court to vacate its order granting the prosecution’s motion to unseal transcripts of *in camera* hearings related to subpoenas *duces tecum* that defendant served on third parties. The appellate court granted the petition, concluding that, absent “exceptional circumstances,” the prosecution is not entitled to know who or what a defendant subpoenas, unless the defendant decides to use the subpoenaed documents at trial. In reaching this decision, the court found that California’s discovery rules authorize trial courts to order *in camera* hearings to determine whether a defendant is entitled to subpoenaed documents. It further found that, although the prosecution must receive notice of such a hearing, its ability to participate in the hearing is limited. The court rejected the government’s argument that it must know what records are being sought by defendant and reviewed by the court in order to fulfill its obligations under California’s crime victims’ rights laws. Instead, it found that the state’s victims’ rights provisions do not authorize the prosecutor to participate in the *in camera* hearing unless a victim has requested that the prosecutor enforce his or her constitutional rights. The court noted, though, that the prosecution’s “compelled silence may be broken when the court calls upon it to ‘address any questions that the trial court has.’” The court concluded that such a scenario is likely to occur when the subpoena concerns “the privacy rights of third parties.”

PENNSYLVANIA

Commonwealth v. Makara, 980 A.2d 138 (Pa. Super. Ct. 2009). During the criminal proceedings against defendant for multiple counts of child sexual offenses, defendant sought disclosure of two minor-victims’ counseling and educational records. The trial court summarily granted the disclosure request. One of the

record-holding institutions moved for reconsideration. After the court failed to act on its motion, the record-holding institution appealed. Upon finding that neither the minor-victims nor the record-holding institutions were given notice of defendant's initial motion, the appellate court vacated the disclosure order and remanded the case "for a hearing consistent with due process on the motion seeking disclosure of the records."

C. Right to Privacy

CALIFORNIA

Kling v. Superior Court of Ventura County, 99 Cal. Rptr. 3d 149 (Cal. Ct. App. 2009). Defendant sought a writ of prohibition to compel the trial court to vacate its order granting the prosecution's motion to unseal transcripts of *in camera* hearings related to subpoenas *duces tecum* that defendant served on third parties. The appellate court granted the petition, concluding that, absent "exceptional circumstances," the prosecution is not entitled to know who or what a defendant subpoenas, unless the defendant decides to use the subpoenaed documents at trial. In reaching this decision, the court found that California's discovery rules authorize trial courts to order *in camera* hearings to determine whether a defendant is entitled to subpoenaed documents. It further found that, although the prosecution must receive notice of such a hearing, its ability to participate in the hearing is limited. The court rejected the government's argument that it must know what records are being sought by defendant and reviewed by the court in order to fulfill its obligations under California's crime victims' rights laws. Instead, it found that the state's victims' rights provisions do not authorize the prosecutor to participate in the *in camera* hearing unless a victim has requested that the prosecutor enforce his or her constitutional rights. The court noted, though, that the prosecution's "compelled silence may be broken when the court calls upon it to 'address any questions that the trial court has.'" The court concluded that such a scenario is likely to occur when the subpoena concerns "the privacy rights of third parties."

MARYLAND

State v. WBAL-TV, 975 A.2d 909 (Md. Ct. Spec. App. 2009). At the conclusion of defendant's trial for first degree murder and first degree rape, a television station, WBAL-TV (WBAL), moved to access and copy portions of DVD and audio recordings of defendant's graphic confessions. The state and defendant opposed the

motion, and the parents of the murder victim moved to seal or limit inspection of the recordings, all of which had been introduced as exhibits at trial. The circuit court granted WBAL's motion for access and denied the victims' motion to seal. The victims, the state, and defendant appealed; WBAL then filed a motion to dismiss, and concurrently agreed to further redaction of the DVD and audiotape. On appeal, the victims and the state argued that the circuit court abused its discretion by granting WBAL access to the recordings because (1) the victims' constitutional rights "to be treated . . . with dignity, respect, and sensitivity during all phases of the criminal justice process" outweighed WBAL's right to access and copy the court records, and (2) copies of the full transcripts of the DVD and the audiotape, already received by WBAL, were sufficient to satisfy local rules governing access to court records. The victims further argued, *inter alia*, that airing the recordings of the "graphic details of [the] murder" would cause them "substantial and irreparable harm." The prosecution similarly argued that, contrary to the lower court's conclusion, there was nothing "speculative" about the "greater negative impact" that airing the recordings would have on the victims, and that the victims' interests in lessening harmful and painful publicity "should be a significant factor in assessing whether copies of criminal exhibits should be handed out after the trial." The court rejected these arguments, holding that the victims' constitutional rights did not preclude the trial court from exercising its discretion regarding access to the exhibits; instead, the court found that the constitutional rights of victims in Maryland to due consideration in "all phases of the criminal justice process" does not "provide victims with an absolute right to veto a request to access and copy court records." As such, the appellate court affirmed the lower court's decision to grant WBAL's motion for access, affirmed the court's denial of the victims' motion to seal, and remanded the case to the circuit court for further redaction of the DVD and audiotape, as agreed to by WBAL.

PENNSYLVANIA

Commonwealth v. Makara, 980 A.2d 138 (Pa. Super. Ct. 2009). During the criminal proceedings against defendant for multiple counts of child sexual offenses, defendant sought disclosure of two minor-victims' counseling and educational records. The trial court summarily granted the disclosure request. One of the record-holding institutions moved for reconsideration. After the court failed to act on its motion, the record-holding institution appealed. Upon finding that neither

the minor-victims nor the record-holding institutions were given notice of defendant's initial motion, the appellate court vacated the disclosure order and remanded the case "for a hearing consistent with due process on the motion seeking disclosure of the records."

D. Right to Restitution

FEDERAL – 2D CIR.

United States v. Battista, 575 F.3d 226 (2d Cir. 2009). Defendant, convicted of conspiracy to transmit wagering information in relation to an NBA gambling scandal, appealed the district court's imposition of restitution. Defendant argued, *inter alia*, that: (1) the NBA was not a "victim" of his offense under either the Mandatory Victims' Restitution Act (MVRA) or the Victim and Witness Protection Act (VWPA); (2) restitution was improper under the VWPA because defendant was financially unable to pay the ordered amount; and (3) the NBA's attorney's fees and investigative costs were not recoverable under either restitution statute. The appellate court disagreed, holding that the NBA was a "victim" for the purposes of the VWPA because it was "directly and proximately harmed" by defendant's crime. In reaching this conclusion, the court noted that, although defendant did not defraud the association directly, defendant's co-conspirators used nonpublic information belonging solely to the NBA to place illegal wagers on its games. The court also noted that defendant's criminal conduct and "offense" of conspiracy "encompasses not just his own acts but also those of his co-conspirators." Because the court held that restitution was properly imposed pursuant to the VWPA, it did not address defendant's arguments under the MVRA. With respect to defendant's argument regarding his inability to pay, the court held that restitution was appropriate under the VWPA, given defendant's assets, including his wife's salary, and his potential to earn income in the future. Finally, the court held that certain attorney's fees incurred by the NBA were recoverable as "other expenses" under the VWPA. As such, the court affirmed the district court's order of restitution.

FEDERAL – 2D CIR.

United States v. Pearson, 570 F.3d 480 (2d Cir. 2009). Defendant pleaded guilty to multiple counts of producing, transporting, receiving, and possessing child pornography. The indictment specifically alleged that defendant produced pornographic material using

two identified minor females. At sentencing, an expert witness testified that, as a result of defendant's crimes, the girls had a number of mental health issues that would require treatment and services over their lifetimes. The expert estimated the number and cost of periodic psychiatric evaluations, regimen of medications, personal counseling, and group counseling over each girl's lifetime; he estimated the future medical expenses of one victim to be \$2,002,732, and the expenses of the other victim to be \$921,976. The district court, without explanation, found that these amounts did not reliably predict the victims' future losses and ordered restitution for a total of \$974,902. In reviewing the district court's final restitution order, the court of appeals held that the mandatory restitution requirement of the Sexual Exploitation and Other Abuse of Children Act, 18 U.S.C. § 2259, authorized compensation for future counseling expenses. In reaching this holding, the court adopted the analysis of three other circuits that have found that the statute authorizes restitution for future medical expenses. Although the court agreed that the district court properly included future medical expenses in the restitution order, it stated that it could not determine whether the district court's final order was a reasonable estimate of the cost of future counseling because the district court had not provided an explanation for awarding the lower amount. The court declined to offer a view on the reasonableness of the restitution amount; instead, it vacated the order and remanded the case, directing the district court to provide a more thorough explanation of the basis for its restitution determination.

FEDERAL – 6TH CIR.

United States v. Elson, 577 F.3d 713 (6th Cir. 2009). Defendant pleaded guilty to conspiracy to obstruct a grand jury investigation of a debtor's scheme to conceal his assets from creditors, among others. Defendant's participation in the conspiracy consisted of arranging for the purchase of judgments against the debtor by third parties whom the debtor controlled. As part of the plea agreement, defendant agreed to "pay restitution to victims of the conspiracy to defraud orchestrated by [the debtor]," pursuant to the Mandatory Victims Restitution Act (MVRA). As part of defendant's sentence, he was ordered to pay restitution jointly and severally with three co-defendants in the amount of \$2,492,424.66. Defendant appealed the restitution award, arguing, *inter alia*, that (1) the district court applied the wrong statute when ordering restitution; (2) one of the victims was not entitled to restitution because it was not a "victim" of the conspiracy to obstruct the grand jury investigation;

and (3) the district court improperly awarded the other victim restitution for attorney's fees. The appellate court rejected defendant's arguments and affirmed the restitution order. In reaching this decision, the court found, *inter alia*, that the application of the MVRA did not violate the Ex Post Facto Clause of the federal constitution because defendant engaged in "related but uncharged conduct" after the statute's enactment date and because his conduct was part of the larger conspiracy to defraud the victims. The appellate court also found that the lower court was correct to consider defendant's involvement in the broader conspiracy to defraud creditors when determining his restitution obligation, even if such conduct was not an overt act supporting his obstruction conviction. The court further held that it was not bound by the terms of the plea agreement to apply the restitution statute that preceded the MVRA, as the agreement was properly viewed as a "recommendation or request" to the court regarding sentencing. The court also held that attorney's fees were properly included in the restitution award and that defendant could not offset this restitution obligation based on a settlement agreement with the victim because the record demonstrated the victim was never compensated for that loss.

FEDERAL – 9TH CIR.

United States v. Berger, 574 F.3d 1202 (9th Cir. 2009). Defendant was convicted on twelve counts of conspiracy, loan fraud, falsifying corporate books, and securities fraud, in connection with his operation of an electronics wholesale business. As part of his sentence, defendant was ordered to pay approximately \$3.14 million in restitution to the victims of his fraud. The district court ordered that defendant's share of the proceeds from the sale of an apartment complex that he co-owned be deposited with the court and disbursed to the victims who were entitled to restitution. Defendant's ex-wife appealed, arguing that the district court erred by failing to award her a one-half interest in the proceeds from the sale. The court rejected her argument and affirmed the district court's order. The court concluded that, even though defendant's ex-wife was not guilty of any criminal wrongdoing in connection with the fraud, her community property interest in the proceeds from the sale of the property was subject to defendant's obligations under the restitution order. In reaching this conclusion, the court reasoned that, unlike criminal forfeiture, which is an *in personam* judgment against a person convicted of a crime, a restitution order under the Mandatory Victim Restitution Act operates as a lien

in favor of the United States on all property and rights of the person ordered to pay restitution. Pursuant to California community property laws, a community estate is liable for a debt incurred by either spouse before or during their marriage. As such, the court concluded proceeds from the apartment's sale were subject to defendant's obligations under the restitution order.

ARIZONA

State v. Lewis, 214 P.3d 409 (Ariz. Ct. App. 2009). Defendant was convicted of drive-by shooting and acquitted of aggravated assault resulting in serious physical injury. The charges stemmed from an incident in which defendant, and possibly his brother, fired shots from a car toward a house party. The court ordered restitution in the amount of \$12,448.94 to cover the medical expenses of the victim, who was shot in the shoulder. Defendant appealed, arguing that the court erred in ordering restitution because he was acquitted of aggravated assault against her and the state had failed to prove that he, not his brother, fired the shot that injured the victim. The court rejected defendant's arguments and affirmed the restitution order, holding that the record contained sufficient evidence to support the award. In reaching this decision, the court explained that Arizona law supports the award of restitution in such a situation, as it provides that "a defendant may be held responsible for all of the damage or loss caused to a victim where criminal conduct was undertaken in concert with others." Because the court found that the victim's loss was reasonably related to the drive-by shooting, it found the restitution order was valid regardless of whether defendant fired the bullet that hit the victim.

LOUISIANA

State v. Portie, No. 2008-KA-1580, 2009 WL 2960704 (La. Ct. App. Sept. 16, 2009). Defendant was convicted of attempted theft of property valued at \$500 or more. As a special condition of probation, defendant was ordered to pay \$2,500 in restitution to the victim, representing the victim's insurance premium, and approximately \$35,000 to the insurance company. Defendant appealed. The court found the order requiring that \$2,500 be paid to the victim in restitution was proper under Louisiana law, but that the portion of the order requiring payment to the insurance company was invalid. The court stated that the insurance company was not a direct victim of the crime because its involvement in the matter was based solely on a contractual obligation between itself and the victim. Thus, restitution to the insurance company would more

properly be determined in civil court. Accordingly, this portion of the judgment was remanded for a decision consistent with the appellate court's opinion.

MONTANA

State v. Coluccio, II, 214 P.3d 1282 (Mont. 2009). Defendant appealed his conviction of vehicular homicide while under the influence, arguing, *inter alia*, that the sentencing court erred in ordering him to pay the deceased victim's wife \$1,400,000 in restitution for future counseling services, home repair services, lost income, and expenses that her friends incurred in traveling to attend the trial and sentencing hearing. The appellate court found that Montana law generally authorizes restitution for counseling costs, home repair services, and lost income, but not costs incurred by a victim's friends in providing the victim with moral support. The court, however, went on to find that the restitution award in this case was not substantiated by evidence on the record. In reaching this conclusion, the court reviewed the victim's testimony at the sentencing hearing, which included statements that she was "at a loss" when calculating counseling costs, "assumed" future home repair expenses, that her husband had the "potential" to earn \$92,000 a year, and that she did not know how an attorney-friend prepared the lost income figures that she presented in court. The court then remanded the case for a determination of the correct amount of restitution to be imposed.

PENNSYLVANIA

Commonwealth v. Nuse, 976 A.2d 1191 (Pa. Super. Ct. 2009). Defendant, who pleaded guilty to accidents involving damage to an attended vehicle and driving with a suspended license, appealed the sentencing court's imposition of restitution as a condition of probation. Specifically, defendant argued that the court erred by ordering restitution because the victim's financial loss resulted from the accident, not from her criminal act of leaving the scene of an accident involving damage to the attended vehicle. The appellate court disagreed, concluding that the "indirect" connection between the victim's loss and defendant's criminal conduct was sufficient to support the restitution order. In reaching this conclusion, the court noted that when restitution is imposed as a condition of probation, the required nexus between a victim's loss and the criminal conduct at issue is more "relaxed" than when restitution is imposed as a part of the defendant's sentence.

WISCONSIN

State v. Woodford, No. 2009AP935-CR, 2009 WL 2871219 (Wis. Ct. App. Sept. 9, 2009). Upon entering into a plea agreement on a battery charge, defendant was sentenced to one year probation, required to take an anger management class, and ordered to pay restitution in the amount of approximately \$38,000. Defendant completed the anger management class and made monthly restitution payments of \$200 during the one-year probationary period. When the trial court then extended defendant's probation to ensure continued payment to the victim, defendant appealed. The appellate court noted that although the law had put an "increased emphasis on a victim's right to compensation," defendant could not be put on probation indefinitely. The proper remedy was to reduce the outstanding restitution balance to a civil judgment. The court reversed the order extending probation accordingly.

WYOMING

Abromats v. Wood, 213 P.3d 966 (Wyo. 2009). During plea negotiations regarding various crimes related to a traffic accident, defendant attempted to condition payment of restitution on the accident victim's release of civil liability. After the prosecutor agreed to this condition, Crisis and Referral Emergency Services (C.A.R.E.S.), a victims' services organization, informed the victims that defendant was taking action in the criminal case to impede their rights in future civil litigation. The victims then submitted an impact statement to the prosecutor through C.A.R.E.S., in which they clarified that they had not agreed to release defendant from civil liability. Defendant and her husband subsequently sued the victims, arguing that two statements in the victim impact statement were libelous. The victims moved for summary judgment, which the district court granted. Defendant and her husband, as plaintiffs in the civil action, appealed. The victims cross-appealed, requesting that the court: (1) uphold the dismissal of plaintiffs' claims; and (2) find that (a) neither of the statements were libel per se, and (b) their statements were protected by the doctrine of absolute immunity, as witnesses in a judicial proceeding. The appellate court affirmed the lower court's decision, and agreed with the victims that the doctrine of absolute immunity applied. Specifically, the court held that a crime victim's statement to a victims' services provider for submission to the court, which is not published to anyone else for any other purpose, cannot support a claim for libel because such a victim has absolute

immunity when making statements as a witness in a judicial proceeding. In reaching this decision, the court stated: “The victim of a crime is an integral part of many criminal investigations and we can think of few participants in the judicial process more in need of protection. In addition, a court is required to seek information about restitution to victims under Wyoming law and the court and the prosecutor are required to communicate with the victim about that and other matters. . . . It is vital that victims feel free to speak openly during that process.”

E. Right to Return of Property

LOUISIANA

Dennis v. Wiley, No. 2009 CA 0236, 2009 WL 3164426 (La. Ct. App. Sept. 11, 2009). Twenty years ago, an unknown assailant raped the victim at knife point. As part of the criminal investigation, a rape kit was conducted and other evidence was collected from the plaintiff, including her clothing and items from her home. The victim’s rapist was never identified, and her case remained open. Fourteen years after the rape, a local serial rapist and killer received extensive media coverage. Upon viewing this coverage, the victim identified him as her rapist and asked the police to re-examine the rape kit and other evidence collected during the initial investigation. The Sheriff’s Office then learned that the evidence had been mislabeled as evidence of a crime that could no longer be prosecuted; as a consequence, it had been destroyed eight years earlier, pursuant to a court order. The victim subsequently sued the Sheriff’s Office for negligent infliction of mental anguish and emotional distress. At trial, she testified that learning that the evidence was mistakenly destroyed caused her to relive the emotional terror, trauma, and distress that had accompanied the initial attack; she also testified that learning of the Sheriff’s Office’s conduct caused her to feel extremely fearful, vulnerable, humiliated, and revictimized. The trial court found the Sheriff’s Office liable and concluded that the victim was entitled to \$50,000 in damages. The Sheriff’s Office appealed, arguing that it did not have a duty to preserve evidence obtained during the investigation of a crime for the benefit of the crime victim. The court of appeals agreed, concluding that any duty that the Sheriff’s Office has to preserve evidence obtained in a criminal investigation is for the benefit of the general public and the District Attorney, not the victim. It reversed the trial court’s judgment

accordingly. One justice issued a concurring opinion, disagreeing with the majority’s conclusion that the Sheriff’s Office had no special duty to the victim to preserve the evidence. The concurrence found that such a duty existed under Louisiana’s crime victims’ rights provisions, which obligate law enforcement both to afford crime victims basic procedural protections and to “expeditiously return any stolen or other personal property to victims or victims’ families when no longer needed as evidence.”

F. Right to be Treated with Fairness, Dignity, and Respect

FEDERAL – 3D CIR.

United States v. Clark, No. 08-1808, 2009 WL 1931172 (3d Cir. July 7, 2009). Defendant pleaded guilty to receiving and distributing child pornography. The National Center for Missing and Exploited Children identified two of the minors in the pornographic images. The mother of one child, the other child, and the other child’s parents submitted victim impact statements at sentencing. The names of the victims and their families were redacted from the statements. Defendant appealed his sentence, arguing that the district court violated his due process rights by considering the victim impact statements because they were “unsubstantiated, unrelated, irrelevant and unreliable” hearsay. Defendant also objected to the statements because they were not specifically written with reference to his sentencing. The circuit court rejected defendant’s arguments, reasoning that the minors were identified as subjects in the pornographic material in defendant’s possession. As such, the court found that they were victims of defendant’s crime with rights under the Crime Victims’ Rights Act (CVRA), 18 U.S.C. § 3771, including the right to be reasonably heard in all public proceedings involving sentencing. The court reasoned that federal law does not require child pornography victims to write a new statement every time someone is sentenced for possessing a pornographic image of him or her. It also found no error in redacting the victims’ names from the statements, as the practice was consistent with the provision of the CVRA guaranteeing victims the right to be treated with fairness and with respect for their dignity and privacy. Finally, the court held that the victim impact statements were not inadmissible hearsay because the confrontation clause does not bar the inclusion of such statements in the context of sentencing proceedings, and the federal rules permit the

introduction of relevant information, provided it has a sufficient indicia of reliability to support its probable accuracy. The court reasoned that the statements “easily” met this standard of reliability because the Child Victim Identification Program had identified them as the subjects of pornographic material.

FEDERAL – 9TH CIR.

Thomas v. Mundell, 572 F.3d 756 (9th Cir. 2009). The county attorney and DUI victims sued the Arizona Superior Court for injunctive and declaratory relief, arguing that special Spanish-speaking and Native American DUI courts violated their federal constitutional and statutory rights. The district court dismissed the plaintiffs’ claims for lack of standing, and the court of appeals affirmed. In reaching its conclusion, the appellate court noted that the DUI courts at issue serve a penal, not compensatory function; as such, any minor alterations that the Superior Court made to certain probation programs when incorporating the specialized DUI courts did not cause “any concrete injury to the individual plaintiffs as victims of DUI probationers.” The court also rejected the victims’ argument that the separate DUI courts deprive them of their rights to “justice and due process” under the Arizona Crime Victims’ Bill of Rights. The court noted that “each of the individual plaintiffs have seen the perpetrator of their respective crimes tried and convicted for the charged DUI offense in the Superior Court,” and that the plaintiffs had cited “no authority for the proposition that their rights to ‘justice and due process’ also encompass an interest in the administration and operation of non-compensatory post-conviction probation programs such as the separate DUI courts.”

FEDERAL – D. UTAH

United States v. Mitchell, No. 2:08CR125DAK, 2009 WL 3181938 (D. Utah Sept. 28, 2009). Defendant moved to preclude the introduction of all lay witness testimony at his competency hearing. One of the lay witnesses scheduled to testify was the victim of defendant’s crime. At a hearing regarding the admissibility of the victim’s testimony, defendant argued, *inter alia*, that the victim’s lay observations about him were irrelevant to the competency question, and that the victim’s opinion evidence would be more prejudicial than probative. The court disagreed, holding that the victim’s testimony was relevant and admissible. The court also noted that defendant’s motion to preclude introduction of the victim’s testimony might implicate the victim’s rights under the Crime Victims’ Rights Act

(CVRA), 18 U.S.C. § 3771. It observed that although the CVRA does not grant victims an affirmative right to be heard at a competency hearing, such an omission from the statute “may have been a recognition that the victim’s testimony would usually be allowed as relevant in these types of evidentiary hearings whereas it may be excluded from more procedural hearings. Or it may be an acknowledgment that the admission of testimony at such hearings would be governed more appropriately by the rules of evidence.” The court concluded that, although the CVRA does not grant an affirmative right to be heard at a competency hearing, its “intent is to provide a victim with appropriate access to the proceedings and it dictates that the victim has a right to be ‘treated with fairness.’” Yet, upon finding the victim’s testimony relevant and admissible under the Federal Rules of Evidence, the court declined to determine whether a victim should be allowed to testify at competency hearings generally under the CVRA.

MARYLAND

State v. WBAL-TV, 975 A.2d 909 (Md. Ct. Spec. App. 2009). At the conclusion of defendant’s trial for first degree murder and first degree rape, a television station, WBAL-TV (WBAL), moved to access and copy portions of DVD and audio recordings of defendant’s graphic confessions. The state and defendant opposed the motion, and the parents of the murder victim moved to seal or limit inspection of the recordings, all of which had been introduced as exhibits at trial. The circuit court granted WBAL’s motion for access and denied the victims’ motion to seal. The victims, the state, and defendant appealed; WBAL then filed a motion to dismiss, and concurrently agreed to further redaction of the DVD and audiotape. On appeal, the victims and the state argued that the circuit court abused its discretion by granting WBAL access to the recordings because (1) the victims’ constitutional rights “to be treated . . . with dignity, respect, and sensitivity during all phases of the criminal justice process” outweighed WBAL’s right to access and copy the court records, and (2) copies of the full transcripts of the DVD and the audiotape, already received by WBAL, were sufficient to satisfy local rules governing access to court records. The victims further argued, *inter alia*, that airing the recordings of the “graphic details of [the] murder” would cause them “substantial and irreparable harm.” The prosecution similarly argued that, contrary to the lower court’s conclusion, there was nothing “speculative” about the “greater negative impact” that airing the recordings would have on the victims, and that the victims’ interests

in lessening harmful and painful publicity “should be a significant factor in assessing whether copies of criminal exhibits should be handed out after the trial.” The court rejected these arguments, holding that the victims’ constitutional rights did not preclude the trial court from exercising its discretion regarding access to the exhibits; instead, the court found that the constitutional rights of victims in Maryland to due consideration in “all phases of the criminal justice process” does not “provide victims with an absolute right to veto a request to access and copy court records.” As such, the appellate court affirmed the lower court’s decision to grant WBAL’s motion for access, affirmed the court’s denial of the victims’ motion to seal, and remanded the case to the circuit court for further redaction of the DVD and audiotape, as agreed to by WBAL.

PENNSYLVANIA

Commonwealth v. Makara, 980 A.2d 138 (Pa. Super. Ct. 2009). During the criminal proceedings against defendant for multiple counts of child sexual offenses, defendant sought disclosure of two minor-victims’ counseling and educational records. The trial court summarily granted the disclosure request. One of the record-holding institutions moved for reconsideration. After the court failed to act on its motion, the record-holding institution appealed. Upon finding that neither the minor-victims nor the record-holding institutions were given notice of defendant’s initial motion, the appellate court vacated the disclosure order and remanded the case “for a hearing consistent with due process on the motion seeking disclosure of the records.”

II. DEFINITION OF “VICTIM”

FEDERAL – 2D CIR.

United States v. Battista, 575 F.3d 226 (2d Cir. 2009). Defendant, convicted of conspiracy to transmit wagering information in relation to an NBA gambling scandal, appealed the district court’s imposition of restitution. Defendant argued, *inter alia*, that: (1) the NBA was not a “victim” of his offense under either the Mandatory Victims’ Restitution Act (MVRA) or the Victim and Witness Protection Act (VWPA); (2) restitution was improper under the VWPA because defendant was financially unable to pay the ordered amount; and (3) the NBA’s attorney’s fees and investigative costs were not recoverable under either restitution statute. The appellate court disagreed, holding that the NBA was a “victim” for the purposes of the VWPA because it was “directly and proximately harmed” by defendant’s

crime. In reaching this conclusion, the court noted that, although defendant did not defraud the association directly, defendant’s co-conspirators used nonpublic information belonging solely to the NBA to place illegal wagers on its games. The court also noted that defendant’s criminal conduct and “offense” of conspiracy “encompasses not just his own acts but also those of his co-conspirators.” Because the court held that restitution was properly imposed pursuant to the VWPA, it did not address defendant’s arguments under the MVRA. With respect to defendant’s argument regarding his inability to pay, the court held that restitution was appropriate under the VWPA, given defendant’s assets, including his wife’s salary, and his potential to earn income in the future. Finally, the court held that certain attorney’s fees incurred by the NBA were recoverable as “other expenses” under the VWPA. As such, the court affirmed the district court’s order of restitution.

FEDERAL – 6TH CIR.

United States v. Elson, 577 F.3d 713 (6th Cir. 2009). Defendant pleaded guilty to conspiracy to obstruct a grand jury investigation of a debtor’s scheme to conceal his assets from creditors, among others. Defendant’s participation in the conspiracy consisted of arranging for the purchase of judgments against the debtor by third parties whom the debtor controlled. As part of the plea agreement, defendant agreed to “pay restitution to victims of the conspiracy to defraud orchestrated by [the debtor],” pursuant to the Mandatory Victims Restitution Act (MVRA). As part of defendant’s sentence, he was ordered to pay restitution jointly and severally with three co-defendants in the amount of \$2,492,424.66. Defendant appealed the restitution award, arguing, *inter alia*, that (1) the district court applied the wrong statute when ordering restitution; (2) one of the victims was not entitled to restitution because it was not a “victim” of the conspiracy to obstruct the grand jury investigation; and (3) the district court improperly awarded the other victim restitution for attorney’s fees. The appellate court rejected defendant’s arguments and affirmed the restitution order. In reaching this decision, the court found, *inter alia*, that the application of the MVRA did not violate the Ex Post Facto Clause of the federal constitution because defendant engaged in “related but uncharged conduct” after the statute’s enactment date and because his conduct was part of the larger conspiracy to defraud the victims. The appellate court also found that the lower court was correct to consider defendant’s involvement in the broader conspiracy

to defraud creditors when determining his restitution obligation, even if such conduct was not an overt act supporting his obstruction conviction. The court further held that it was not bound by the terms of the plea agreement to apply the restitution statute that preceded the MVRA, as the agreement was properly viewed as a “recommendation or request” to the court regarding sentencing. The court also held that attorney’s fees were properly included in the restitution award and that defendant could not offset this restitution obligation based on a settlement agreement with the victim because the record demonstrated the victim was never compensated for that loss.

III. APPELLATE REVIEW & WRITS OF MANDAMUS

FEDERAL – 6TH CIR.

United States v. Siler, 571 F.3d 604 (6th Cir. 2009). Defendants pleaded guilty to violating the victim’s constitutional rights while arresting him. The victim and his wife subsequently filed a civil suit. Following discovery in the civil action, the victims moved for access to defendants’ presentence reports (PSRs) in the criminal case, arguing that the Crime Victims’ Rights Act (CVRA), 18 U.S.C. § 3771, and local court rules supported the release of the PSRs. The district court denied the motion based on its conclusion that, *inter alia*, the CVRA does not afford victims a general right to obtain PSRs. The victims appealed the district court’s orders denying their request, and, in the alternative, sought relief under the CVRA and the All Writs Act, 28 U.S.C. § 1651. In its review of the victims’ appeal and writ petitions, the court found that, although the victims did not formally intervene in the criminal action, they were treated by all sides as *de facto* parties. As such, the court concluded that case law from other United States Circuit Courts of Appeals supported its holding that it had appellate jurisdiction under 28 U.S.C. § 1291 over the district court’s final orders denying access to the PSRs. Nonetheless, the appellate court upheld the lower court’s denial of the victims’ motions and denied the victims’ mandamus petitions. It based this decision on its conclusions that (1) there was no apparent authority for the release of such documents in the specific context of the case, and (2) even if the lower court had authority to grant the victims’ motions, it did not abuse its discretion in denying them because a PSR is confidential and nonpublic in nature and the victims failed to show a “special need” to access the PSRs. With respect to the first conclusion, the court explained that the victims’

requests, which were filed long after the defendants’ criminal trials were over, fell outside of the protections of the CVRA, which only affords victims participatory rights in the criminal justice process. The appellate court also agreed with the lower court that the CVRA does not provide an independent right to obtain PSRs, and that, even if it did, the statute would not apply to the victims’ requests here because they were not seeking access to the PSRs for the purpose of participating in a criminal proceeding.

FEDERAL – 6TH CIR.

Moldowan v. City of Warren, 578 F.3d 351 (6th Cir. 2009). Defendant was convicted of kidnapping, assault with intent to commit murder, and two counts of criminal sexual conduct in the first degree. On retrial, defendant was acquitted of all charges and released. He brought suit under federal and Michigan state law against numerous individuals and entities connected with the original conviction, as well as the victim, arguing that they had violated his civil and constitutional rights. The victim and others moved for summary judgment, which the trial court denied. On appeal, the victim argued that she should not be included in the suit because, as a witness in a criminal proceeding, she enjoyed absolute immunity arising out of her testimony at trial. Before reaching the merits, the appellate court considered whether it had jurisdiction over the interlocutory appeal, or whether it must wait until final disposition by the trial court. The appellate court found the trial court’s decision should be immediately reviewed based on public policy; it reasoned that “[d]eclining to consider [the victim’s] appeal ultimately would create a significant disincentive for other victims of rape and sexual assault to come forward and testify against their attackers,” thereby undermining the effective administration of justice. Having determined that the appellate court could review the victim’s absolute immunity defense, the court concluded that, to the extent defendant’s claims against the victim rested on an assertion that she perjured herself when testifying, the victim was entitled to absolute immunity. The court also found that the defendant failed to state a claim for conspiracy, malicious prosecution, or intentional infliction of emotional distress against the victim.

IV. CONSTITUTIONAL ISSUES RELATED TO VICTIMS' RIGHTS

A. Defendant's Right to Confrontation

FEDERAL – 3D CIR.

United States v. Clark, No. 08-1808, 2009 WL 1931172 (3d Cir. July 7, 2009). Defendant pleaded guilty to receiving and distributing child pornography. The National Center for Missing and Exploited Children identified two of the minors in the pornographic images. The mother of one child, the other child, and the other child's parents submitted victim impact statements at sentencing. The names of the victims and their families were redacted from the statements. Defendant appealed his sentence, arguing that the district court violated his due process rights by considering the victim impact statements because they were "unsubstantiated, unrelated, irrelevant and unreliable" hearsay. Defendant also objected to the statements because they were not specifically written with reference to his sentencing. The circuit court rejected defendant's arguments, reasoning that the minors were identified as subjects in the pornographic material in defendant's possession. As such, the court found that they were victims of defendant's crime with rights under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, including the right to be reasonably heard in all public proceedings involving sentencing. The court reasoned that federal law does not require child pornography victims to write a new statement every time someone is sentenced for possessing a pornographic image of him or her. It also found no error in redacting the victims' names from the statements, as the practice was consistent with the provision of the CVRA guaranteeing victims the right to be treated with fairness and with respect for their dignity and privacy. Finally, the court held that the victim impact statements were not inadmissible hearsay because the confrontation clause does not bar the inclusion of such statements in the context of sentencing proceedings, and the federal rules permit the introduction of relevant information, provided it has a sufficient indicia of reliability to support its probable accuracy. The court reasoned that the statements "easily" met this standard of reliability because the Child Victim Identification Program had identified them as the subjects of pornographic material.

ILLINOIS

People v. Bryant, 909 N.E.2d 391 (Ill. Ct. App. 2009). Defendant was convicted of two counts of predatory criminal sexual assault of a child. The victim, who was seven at the time of trial, was permitted to testify by closed-circuit television because the court found that she would suffer emotional distress if required to testify in person. The court also allowed into evidence hearsay statements by the victim's social worker, a child protective services worker, and a nurse practitioner, under an Illinois statute allowing for the admission of hearsay statements in sex abuse cases where the victim is under age 13 and the court makes specific findings. On appeal, defendant argued that the trial court's findings were insufficient for the purposes of this statute. The court found that defendant waived this argument by failing to raise it earlier. The court also found that defendant's claim failed on the merits because the trial court's findings about the victim's inability to testify in person were sufficient to allow her to testify by alternate means. Second, defendant argued that admission of the various witnesses' hearsay statements violated his constitutional right to confrontation because the hearsay witnesses were permitted to testify about the two charges against defendant, even though the victim only testified about one of the charges at trial. The court disagreed, finding that defendant's confrontation rights were satisfied because the victim was present for cross-examination and answered defendant's questions. Therefore, the victim did "appear" and was "present," as required by the confrontation clause, and the hearsay witnesses were permitted to testify about the second charge.

B. Defendant's Right to Present Evidence

WISCONSIN

State v. Jones, 773 N.W.2d 225 (Table) (Wis. Ct. App. 2009). Defendant, charged with sexually assaulting two minors, appealed the denial of his pretrial motion to admit video recordings of police interviews with each victim regarding unrelated charges that they had made against other men. Defendant argued that the videos were admissible to show that each victim had made prior untruthful allegations of sexual assault or, in the alternative, that the admission of the recordings was necessary to protect his constitutional right to present evidence to the jury. The court agreed with defendant that such evidence was admissible under the exception to Wisconsin's rape shield law for prior untruthful

allegations, but rejected his constitutional argument. As the court noted, the rape shield exception only applies if a defendant establishes a sufficient factual basis that the complainant has made prior allegations of sex assault that were untruthful, the evidence is material to a fact at issue in the case, and there is sufficient probative value to outweigh its inflammatory and prejudicial nature. The lower court had based its analysis of the applicability of this exception on whether defendant had conclusively proven that the victims' allegations were untruthful. The appellate court found that the lower court erred in this analysis, and stated that the appropriate standard under which to review such an argument is whether a reasonable jury could reasonably infer that the girls had been untruthful. As such, the court reversed the denial of defendant's motion, and remanded the case with instructions to the trial court to apply the correct standard when determining truthfulness. With respect to defendant's constitutional claim, the court stated that a defendant must show that the prior untruthful allegations "clearly occurred" to establish a violation of the right to present evidence in his or her defense. Because defendant's offer of proof did not meet this standard, the appellate court found that the denial of defendant's motion did not violate his constitutional right.

C. First Amendment Right of Access

MARYLAND

State v. WBAL-TV, 975 A.2d 909 (Md. Ct. Spec. App. 2009). At the conclusion of defendant's trial for first degree murder and first degree rape, a television station, WBAL-TV (WBAL), moved to access and copy portions of DVD and audio recordings of defendant's graphic confessions. The state and defendant opposed the motion, and the parents of the murder victim moved to seal or limit inspection of the recordings, all of which had been introduced as exhibits at trial. The circuit court granted WBAL's motion for access and denied the victims' motion to seal. The victims, the state, and defendant appealed; WBAL then filed a motion to dismiss, and concurrently agreed to further redaction of the DVD and audiotape. On appeal, the victims and the state argued that the circuit court abused its discretion by granting WBAL access to the recordings because (1) the victims' constitutional rights "to be treated . . . with dignity, respect, and sensitivity during all phases of the criminal justice process" outweighed WBAL's right to access and copy the court records, and (2) copies of the full transcripts of the DVD and the audiotape, already received by WBAL, were sufficient to satisfy local

rules governing access to court records. The victims further argued, *inter alia*, that airing the recordings of the "graphic details of [the] murder" would cause them "substantial and irreparable harm." The prosecution similarly argued that, contrary to the lower court's conclusion, there was nothing "speculative" about the "greater negative impact" that airing the recordings would have on the victims, and that the victims' interests in lessening harmful and painful publicity "should be a significant factor in assessing whether copies of criminal exhibits should be handed out after the trial." The court rejected these arguments, holding that the victims' constitutional rights did not preclude the trial court from exercising its discretion regarding access to the exhibits; instead, the court found that the constitutional rights of victims in Maryland to due consideration in "all phases of the criminal justice process" does not "provide victims with an absolute right to veto a request to access and copy court records." As such, the appellate court affirmed the lower court's decision to grant WBAL's motion for access, affirmed the court's denial of the victims' motion to seal, and remanded the case to the circuit court for further redaction of the DVD and audiotape, as agreed to by WBAL.

D. No Ex-Post Facto Laws

FEDERAL – 6TH CIR.

United States v. Elson, 577 F.3d 713 (6th Cir. 2009). Defendant pleaded guilty to conspiracy to obstruct a grand jury investigation of a debtor's scheme to conceal his assets from creditors, among others. Defendant's participation in the conspiracy consisted of arranging for the purchase of judgments against the debtor by third parties whom the debtor controlled. As part of the plea agreement, defendant agreed to "pay restitution to victims of the conspiracy to defraud orchestrated by [the debtor]," pursuant to the Mandatory Victims Restitution Act (MVRA). As part of defendant's sentence, he was ordered to pay restitution jointly and severally with three co-defendants in the amount of \$2,492,424.66. Defendant appealed the restitution award, arguing, *inter alia*, that (1) the district court applied the wrong statute when ordering restitution; (2) one of the victims was not entitled to restitution because it was not a "victim" of the conspiracy to obstruct the grand jury investigation; and (3) the district court improperly awarded the other victim restitution for attorney's fees. The appellate court rejected defendant's arguments and affirmed the restitution order. In reaching this decision, the court found, *inter alia*, that the application of the MVRA

did not violate the Ex Post Facto Clause of the federal constitution because defendant engaged in “related but uncharged conduct” after the statute’s enactment date and because his conduct was part of the larger conspiracy to defraud the victims. The appellate court also found that the lower court was correct to consider defendant’s involvement in the broader conspiracy to defraud creditors when determining his restitution obligation, even if such conduct was not an overt act supporting his obstruction conviction. The court further held that it was not bound by the terms of the plea agreement to apply the restitution statute that preceded the MVRA, as the agreement was properly viewed as a “recommendation or request” to the court regarding sentencing. The court also held that attorney’s fees were properly included in the restitution award and that defendant could not offset this restitution obligation based on a settlement agreement with the victim because the record demonstrated the victim was never compensated for that loss.

V. EVIDENTIARY ISSUES RELATED TO VICTIMS’ RIGHTS

A. Hearsay

FEDERAL – 3D CIR.

United States v. Clark, No. 08-1808, 2009 WL 1931172 (3d Cir. July 7, 2009). Defendant pleaded guilty to receiving and distributing child pornography. The National Center for Missing and Exploited Children identified two of the minors in the pornographic images. The mother of one child, the other child, and the other child’s parents submitted victim impact statements at sentencing. The names of the victims and their families were redacted from the statements. Defendant appealed his sentence, arguing that the district court violated his due process rights by considering the victim impact statements because they were “unsubstantiated, unrelated, irrelevant and unreliable” hearsay. Defendant also objected to the statements because they were not specifically written with reference to his sentencing. The circuit court rejected defendant’s arguments, reasoning that the minors were identified as subjects in the pornographic material in defendant’s possession. As such, the court found that they were victims of defendant’s crime with rights under the Crime Victims’ Rights Act (CVRA), 18 U.S.C. § 3771, including the right to be reasonably heard in all public proceedings involving sentencing. The court reasoned that federal law does not require child pornography victims to write

a new statement every time someone is sentenced for possessing a pornographic image of him or her. It also found no error in redacting the victims’ names from the statements, as the practice was consistent with the provision of the CVRA guaranteeing victims the right to be treated with fairness and with respect for their dignity and privacy. Finally, the court held that the victim impact statements were not inadmissible hearsay because the confrontation clause does not bar the inclusion of such statements in the context of sentencing proceedings, and the federal rules permit the introduction of relevant information, provided it has a sufficient indicia of reliability to support its probable accuracy. The court reasoned that the statements “easily” met this standard of reliability because the Child Victim Identification Program had identified them as the subjects of pornographic material.

ILLINOIS

People v. Bryant, 909 N.E.2d 391 (Ill. Ct. App. 2009). Defendant was convicted of two counts of predatory criminal sexual assault of a child. The victim, who was seven at the time of trial, was permitted to testify by closed-circuit television because the court found that she would suffer emotional distress if required to testify in person. The court also allowed into evidence hearsay statements by the victim’s social worker, a child protective services worker, and a nurse practitioner, under an Illinois statute allowing for the admission of hearsay statements in sex abuse cases where the victim is under age 13 and the court makes specific findings. On appeal, defendant argued that the trial court’s findings were insufficient for the purposes of this statute. The court found that defendant waived this argument by failing to raise it earlier. The court also found that defendant’s claim failed on the merits because the trial court’s findings about the victim’s inability to testify in person were sufficient to allow her to testify by alternate means. Second, defendant argued that admission of the various witnesses’ hearsay statements violated his constitutional right to confrontation because the hearsay witnesses were permitted to testify about the two charges against defendant, even though the victim only testified about one of the charges at trial. The court disagreed, finding that defendant’s confrontation rights were satisfied because the victim was present for cross-examination and answered defendant’s questions. Therefore, the victim did “appear” and was “present,” as required by the confrontation clause, and the hearsay witnesses were permitted to testify about the second charge.

B. Prior Bad Acts

SOUTH CAROLINA

State v. Wallace, 683 S.E.2d 275 (S.C. 2009). The intermediate appellate court reversed defendant's conviction for sexually abusing his minor step-daughter on the ground that evidence of defendant's sexual abuse of the victim's older sister was improperly admitted. The supreme court disagreed, and affirmed defendant's conviction. In reaching this decision, the court explained that prior bad act evidence could be admitted if the evidence is relevant and fits within an exception to South Carolina Rule of Evidence 404(b), which bars the admission of evidence of defendant's other bad acts. The court found that the evidence of defendant's abuse of the victim's older sister fell under the exception to Rule 404(b) that allows for the admission of prior bad acts to show a common scheme or plan. The court based this finding on the close degree of similarity between the two acts of abuse, including defendant's relationship to the victims, the age and location of the victims at the time the abuse began, and what defendant told both victims to prevent them from disclosing the abuse to others. Because of the similarities in the class of victim, timing, place, and warning outweighed any dissimilarity, the court concluded that the probative value of the evidence substantially outweighed the danger of unfair prejudice. As such, the court found that the sister's testimony was properly admitted under an exception to Rule 404(b).

C. Rape Shield

NEVADA

Sonia F. v. Eighth Judicial District Court, 215 P.3d 705 (Nev. 2009). A minor rape victim filed a civil action through her guardian against her offender. During discovery, defendant filed a motion to compel the victim to submit to an independent medical examination to address her claims for emotional damages. The district court granted the request, finding that the victim had put her emotional and mental condition at issue. The victim moved for a protective order under Nevada's rape shield law to prevent defendant and the psychologist from questioning her about her sexual history. The motion was denied, and the victim filed an emergency petition with the Nevada Supreme Court, seeking clarification of the application of Nevada's rape shield law to civil cases. The Nevada Supreme Court held that the "plain and unambiguous" language of the statute,

which used the terms "prosecution" and "accused," required that the rape shield statute only be applied in criminal cases. However, the court noted that discovery in civil sexual assault cases was still bound by Nevada's discovery rules, which require that inquiries be relevant and reasonably calculated to lead to the discovery of admissible evidence. Thus, the court stated, lower courts can issue protective orders in order to protect a sexual assault victim from "annoyance, embarrassment, [or] oppression" where necessary.

WISCONSIN

State v. Jones, 773 N.W.2d 225 (Table) (Wis. Ct. App. 2009). Defendant, charged with sexually assaulting two minors, appealed the denial of his pretrial motion to admit video recordings of police interviews with each victim regarding unrelated charges that they had made against other men. Defendant argued that the videos were admissible to show that each victim had made prior untruthful allegations of sexual assault or, in the alternative, that the admission of the recordings was necessary to protect his constitutional right to present evidence to the jury. The court agreed with defendant that such evidence was admissible under the exception to Wisconsin's rape shield law for prior untruthful allegations, but rejected his constitutional argument. As the court noted, the rape shield exception only applies if a defendant establishes a sufficient factual basis that the complainant has made prior allegations of sex assault that were untruthful, the evidence is material to a fact at issue in the case, and there is sufficient probative value to outweigh its inflammatory and prejudicial nature. The lower court had based its analysis of the applicability of this exception on whether defendant had conclusively proven that the victims' allegations were untruthful. The appellate court found that the lower court erred in this analysis, and stated that the appropriate standard under which to review such an argument is whether a reasonable jury could reasonably infer that the girls had been untruthful. As such, the court reversed the denial of defendant's motion, and remanded the case with instructions to the trial court to apply the correct standard when determining truthfulness. With respect to defendant's constitutional claim, the court stated that a defendant must show that the prior untruthful allegations "clearly occurred" to establish a violation of the right to present evidence in his or her defense. Because defendant's offer of proof did not meet this standard, the appellate court found that the denial of defendant's motion did not violate his constitutional right.

VI. PROCEDURAL ISSUES RELATED TO VICTIMS' RIGHTS

A. Access to Presentence Report

FEDERAL – 6TH CIR.

United States v. Siler, 571 F.3d 604 (6th Cir. 2009). Defendants pleaded guilty to violating the victim's constitutional rights while arresting him. The victim and his wife subsequently filed a civil suit. Following discovery in the civil action, the victims moved for access to defendants' presentence reports (PSRs) in the criminal case, arguing that the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, and local court rules supported the release of the PSRs. The district court denied the motion based on its conclusion that, *inter alia*, the CVRA does not afford victims a general right to obtain PSRs. The victims appealed the district court's orders denying their request, and, in the alternative, sought relief under the CVRA and the All Writs Act, 28 U.S.C. § 1651. In its review of the victims' appeal and writ petitions, the court found that, although the victims did not formally intervene in the criminal action, they were treated by all sides as *de facto* parties. As such, the court concluded that case law from other United States Circuit Courts of Appeals supported its holding that it had appellate jurisdiction under 28 U.S.C. § 1291 over the district court's final orders denying access to the PSRs. Nonetheless, the appellate court upheld the lower court's denial of the victims' motions and denied the victims' mandamus petitions. It based this decision on its conclusions that (1) there was no apparent authority for the release of such documents in the specific context of the case, and (2) even if the lower court had authority to grant the victims' motions, it did not abuse its discretion in denying them because a PSR is confidential and nonpublic in nature and the victims failed to show a "special need" to access the PSRs. With respect to the first conclusion, the court explained that the victims' requests, which were filed long after the defendants' criminal trials were over, fell outside of the protections of the CVRA, which only affords victims participatory rights in the criminal justice process. The appellate court also agreed with the lower court that the CVRA does not provide an independent right to obtain PSRs, and that, even if it did, the statute would not apply to the victims' requests here because they were not seeking access to the PSRs for the purpose of participating in a criminal proceeding.

B. Courtroom Accommodations

ILLINOIS

People v. Bryant, 909 N.E.2d 391 (Ill. Ct. App. 2009). Defendant was convicted of two counts of predatory criminal sexual assault of a child. The victim, who was seven at the time of trial, was permitted to testify by closed-circuit television because the court found that she would suffer emotional distress if required to testify in person. The court also allowed into evidence hearsay statements by the victim's social worker, a child protective services worker, and a nurse practitioner, under an Illinois statute allowing for the admission of hearsay statements in sex abuse cases where the victim is under age 13 and the court makes specific findings. On appeal, defendant argued that the trial court's findings were insufficient for the purposes of this statute. The court found that defendant waived this argument by failing to raise it earlier. The court also found that defendant's claim failed on the merits because the trial court's findings about the victim's inability to testify in person were sufficient to allow her to testify by alternate means. Second, defendant argued that admission of the various witnesses' hearsay statements violated his constitutional right to confrontation because the hearsay witnesses were permitted to testify about the two charges against defendant, even though the victim only testified about one of the charges at trial. The court disagreed, finding that defendant's confrontation rights were satisfied because the victim was present for cross-examination and answered defendant's questions. Therefore, the victim did "appear" and was "present," as required by the confrontation clause, and the hearsay witnesses were permitted to testify about the second charge.

C. Discovery

CALIFORNIA

Kling v. Superior Court of Ventura County, 99 Cal. Rptr. 3d 149 (Cal. Ct. App. 2009). Defendant sought a writ of prohibition to compel the trial court to vacate its order granting the prosecution's motion to unseal transcripts of *in camera* hearings related to subpoenas *duces tecum* that defendant served on third parties. The appellate court granted the petition, concluding that, absent "exceptional circumstances," the prosecution is not entitled to know who or what a defendant subpoenas, unless the defendant decides to use the subpoenaed documents at trial. In reaching this decision, the court

found that California's discovery rules authorize trial courts to order *in camera* hearings to determine whether a defendant is entitled to subpoenaed documents. It further found that, although the prosecution must receive notice of such a hearing, its ability to participate in the hearing is limited. The court rejected the government's argument that it must know what records are being sought by defendant and reviewed by the court in order to fulfill its obligations under California's crime victims' rights laws. Instead, it found that the state's victims' rights provisions do not authorize the prosecutor to participate in the *in camera* hearing unless a victim has requested that the prosecutor enforce his or her constitutional rights. The court noted, though, that the prosecution's "compelled silence may be broken when the court calls upon it to 'address any questions that the trial court has.'" The court concluded that such a scenario is likely to occur when the subpoena concerns "the privacy rights of third parties."

NEVADA

Sonia F. v. Eighth Judicial District Court, 215 P.3d 705 (Nev. 2009). A minor rape victim filed a civil action through her guardian against her offender. During discovery, defendant filed a motion to compel the victim to submit to an independent medical examination to address her claims for emotional damages. The district court granted the request, finding that the victim had put her emotional and mental condition at issue. The victim moved for a protective order under Nevada's rape shield law to prevent defendant and the psychologist from questioning her about her sexual history. The motion was denied, and the victim filed an emergency petition with the Nevada Supreme Court, seeking clarification of the application of Nevada's rape shield law to civil cases. The Nevada Supreme Court held that the "plain and unambiguous" language of the statute, which used the terms "prosecution" and "accused," required that the rape shield statute only be applied in criminal cases. However, the court noted that discovery in civil sexual assault cases was still bound by Nevada's discovery rules, which require that inquiries be relevant and reasonably calculated to lead to the discovery of admissible evidence. Thus, the court stated, lower courts can issue protective orders in order to protect a sexual assault victim from "annoyance, embarrassment, [or] oppression" where necessary.

PENNSYLVANIA

Commonwealth v. Makara, 980 A.2d 138 (Pa. Super. Ct. 2009). During the criminal proceedings against defendant for multiple counts of child sexual offenses, defendant sought disclosure of two minor-victim's counseling and educational records. The trial court summarily granted the disclosure request. One of the record-holding institutions moved for reconsideration. After the court failed to act on its motion, the record-holding institution appealed. Upon finding that neither the minor-victims nor the record-holding institutions were given notice of defendant's initial motion, the appellate court vacated the disclosure order and remanded the case "for a hearing consistent with due process on the motion seeking disclosure of the records."

D. Multiple Victims

FEDERAL – W.D.N.C.

United States v. Peralta, No. 3:08cr233, 2009 WL 2998050 (W.D.N.C. Sept. 15, 2009). In a case involving the identity theft of approximately 2,500 residents of Puerto Rico, the government moved for alternative victim notification procedures under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771. The government proposed the issuance of a press release containing specific information about defendants' sentencing hearings as a reasonable alternative to actual notice to each victim at his or her residential address. The court agreed, and found that the proposed procedure would give effect to the CVRA, as long as the press release was sent to every daily newspaper in Puerto Rico, in addition to any other location selected by the government.

E. Victim Standing – Civil

FEDERAL – 6TH CIR.

Moldowan v. City of Warren, 578 F.3d 351 (6th Cir. 2009). Defendant was convicted of kidnapping, assault with intent to commit murder, and two counts of criminal sexual conduct in the first degree. On retrial, defendant was acquitted of all charges and released. He brought suit under federal and Michigan state law against numerous individuals and entities connected with the original conviction, as well as the victim, arguing that they had violated his civil and constitutional rights. The victim and others moved for summary judgment, which the trial court denied. On appeal, the victim argued that she should not be included in the suit because, as a witness in a criminal proceeding, she enjoyed

absolute immunity arising out of her testimony at trial. Before reaching the merits, the appellate court considered whether it had jurisdiction over the interlocutory appeal, or whether it must wait until final disposition by the trial court. The appellate court found the trial court's decision should be immediately reviewed based on public policy; it reasoned that "[d]eclining to consider [the victim's] appeal ultimately would create a significant disincentive for other victims of rape and sexual assault to come forward and testify against their attackers," thereby undermining the effective administration of justice. Having determined that the appellate court could review the victim's absolute immunity defense, the court concluded that, to the extent defendant's claims against the victim rested on an assertion that she perjured herself when testifying, the victim was entitled to absolute immunity. The court also found that the defendant failed to state a claim for conspiracy, malicious prosecution, or intentional infliction of emotional distress against the victim.

FEDERAL – 9TH CIR.

Thomas v. Mundell, 572 F.3d 756 (9th Cir. 2009). The county attorney and DUI victims sued the Arizona Superior Court for injunctive and declaratory relief, arguing that special Spanish-speaking and Native American DUI courts violated their federal constitutional and statutory rights. The district court dismissed the plaintiffs' claims for lack of standing, and the court of appeals affirmed. In reaching its conclusion, the appellate court noted that the DUI courts at issue serve a penal, not compensatory function; as such, any minor alterations that the Superior Court made to certain probation programs when incorporating the specialized DUI courts did not cause "any concrete injury to the individual plaintiffs as victims of DUI probationers." The court also rejected the victims' argument that the separate DUI courts deprive them of their rights to "justice and due process" under the Arizona Crime Victims' Bill of Rights. The court noted that "each of the individual plaintiffs have seen the perpetrator of their respective crimes tried and convicted for the charged DUI offense in the Superior Court," and that the plaintiffs had cited "no authority for the proposition that their rights to 'justice and due process' also encompass an interest in the administration and operation of non-compensatory post-conviction probation programs such as the separate DUI courts."

F. Victim Standing – Criminal

FEDERAL – 6TH CIR.

United States v. Siler, 571 F.3d 604 (6th Cir. 2009). Defendants pleaded guilty to violating the victim's constitutional rights while arresting him. The victim and his wife subsequently filed a civil suit. Following discovery in the civil action, the victims moved for access to defendants' presentence reports (PSRs) in the criminal case, arguing that the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, and local court rules supported the release of the PSRs. The district court denied the motion based on its conclusion that, *inter alia*, the CVRA does not afford victims a general right to obtain PSRs. The victims appealed the district court's orders denying their request, and, in the alternative, sought relief under the CVRA and the All Writs Act, 28 U.S.C. § 1651. In its review of the victims' appeal and writ petitions, the court found that, although the victims did not formally intervene in the criminal action, they were treated by all sides as de facto parties. As such, the court concluded that case law from other United States Circuit Courts of Appeals supported its holding that it had appellate jurisdiction under 28 U.S.C. § 1291 over the district court's final orders denying access to the PSRs. Nonetheless, the appellate court upheld the lower court's denial of the victims' motions and denied the victims' mandamus petitions. It based this decision on its conclusions that (1) there was no apparent authority for the release of such documents in the specific context of the case, and (2) even if the lower court had authority to grant the victims' motions, it did not abuse its discretion in denying them because a PSR is confidential and nonpublic in nature and the victims failed to show a "special need" to access the PSRs. With respect to the first conclusion, the court explained that the victims' requests, which were filed long after the defendants' criminal trials were over, fell outside of the protections of the CVRA, which only affords victims participatory rights in the criminal justice process. The appellate court also agreed with the lower court that the CVRA does not provide an independent right to obtain PSRs, and that, even if it did, the statute would not apply to the victims' requests here because they were not seeking access to the PSRs for the purpose of participating in a criminal proceeding.

G. Victim Impact Statements

FEDERAL – 3D CIR.

United States v. Clark, No. 08-1808, 2009 WL 1931172 (3d Cir. July 7, 2009). Defendant pleaded guilty to receiving and distributing child pornography. The National Center for Missing and Exploited Children identified two of the minors in the pornographic images. The mother of one child, the other child, and the other child's parents submitted victim impact statements at sentencing. The names of the victims and their families were redacted from the statements. Defendant appealed his sentence, arguing that the district court violated his due process rights by considering the victim impact statements because they were "unsubstantiated, unrelated, irrelevant and unreliable" hearsay. Defendant also objected to the statements because they were not specifically written with reference to his sentencing. The circuit court rejected defendant's arguments, reasoning that the minors were identified as subjects in the pornographic material in defendant's possession. As such, the court found that they were victims of defendant's crime with rights under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, including the right to be reasonably heard in all public proceedings involving sentencing. The court reasoned that federal law does not require child pornography victims to write a new statement every time someone is sentenced for possessing a pornographic image of him or her. It also found no error in redacting the victims' names from the statements, as the practice was consistent with the provision of the CVRA guaranteeing victims the right to be treated with fairness and with respect for their dignity and privacy. Finally, the court held that the victim impact statements were not inadmissible hearsay because the confrontation clause does not bar the inclusion of such statements in the context of sentencing proceedings, and the federal rules permit the introduction of relevant information, provided it has a sufficient indicia of reliability to support its probable accuracy. The court reasoned that the statements "easily" met this standard of reliability because the Child Victim Identification Program had identified them as the subjects of pornographic material.

WYOMING

Abromats v. Wood, 213 P.3d 966 (Wyo. 2009). During plea negotiations regarding various crimes related to a traffic accident, defendant attempted to condition payment of restitution on the accident victim's release of civil liability. After the prosecutor agreed to this condition, Crisis and Referral Emergency Services

(C.A.R.E.S.), a victims' services organization, informed the victims that defendant was taking action in the criminal case to impede their rights in future civil litigation. The victims then submitted an impact statement to the prosecutor through C.A.R.E.S., in which they clarified that they had not agreed to release defendant from civil liability. Defendant and her husband subsequently sued the victims, arguing that two statements in the victim impact statement were libelous. The victims moved for summary judgment, which the district court granted. Defendant and her husband, as plaintiffs in the civil action, appealed. The victims cross-appealed, requesting that the court: (1) uphold the dismissal of plaintiffs' claims; and (2) find that (a) neither of the statements were libel per se, and (b) their statements were protected by the doctrine of absolute immunity, as witnesses in a judicial proceeding. The appellate court affirmed the lower court's decision, and agreed with the victims that the doctrine of absolute immunity applied. Specifically, the court held that a crime victim's statement to a victims' services provider for submission to the court, which is not published to anyone else for any other purpose, cannot support a claim for libel because such a victim has absolute immunity when making statements as a witness in a judicial proceeding. In reaching this decision, the court stated: "The victim of a crime is an integral part of many criminal investigations and we can think of few participants in the judicial process more in need of protection. In addition, a court is required to seek information about restitution to victims under Wyoming law and the court and the prosecutor are required to communicate with the victim about that and other matters. . . . It is vital that victims feel free to speak openly during that process." ■

This project was supported by Grant No. 2008-DD-BX-K001 awarded by the Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice. Points of view in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.