NATIONAL CRIME VICTIM LAW INSTITUTE

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2019 Year in Review: Spotlight on Post-Conviction Victim Impact Statements, Restitution, Rights to Notice and Privacy, and More

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This product was supported by Grant No. 2017-VF-GX-K026, *awarded by the Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, 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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Abatement *Ab Initio*

I. State Courts

Commonwealth v. Hernandez, 118 N.E.3d 107 (Mass. 2019). Defendant appealed as of right following his convictions for murder in the first degree and other offenses, but died while waiting assembly of the record for appeal. The Superior Court dismissed the notice of appeal, vacated the convictions, and dismissed the indictments under the doctrine of abatement *ab initio*. The commonwealth applied for direct appellate review, urging the court to abandon the doctrine. The court concluded that the doctrine of abatement *ab initio* was "outdated and no longer consonant with the circumstances of contemporary life, if, in fact, it ever was." In reaching this conclusion, the court noted that Massachusetts had very few cases applying the doctrine, and none explaining the rationale other than that it appeared to be the majority approach when adopted; now, most jurisdictions were turning away from the doctrine. Thus, although when the doctrine was established in Massachusetts it may have been the preferred or majority approach, that is no longer the case. The court recognized the importance of stare decisis, but further recognized the doctrine was not absolute. Considering the consequences of abatement *ab initio* to victims and family members of the defendant, the court found it to be appropriate to examine the reasons underlying the doctrine: finality and punishment. Although the finality principle is fundamental to our system of justice, it is no longer presumed that a defendant is innocent after conviction; rather, a convicted defendant is presumed guilty despite the pendency of appeal. As to the punishment principle, although punishment is a major goal of the criminal justice system, there are other interests that also need to be considered: "through State Constitutions, statutes, and other avenues, the justice system acknowledges the rights and interests of the victims of crime." The court recognized that "[w]hen a serious crime has been committed, the victims and survivors, witnesses, and the public have an interest that the guilty not only be punished but that the community express its condemnation with firmness and confidence." The court concluded that the correct course was to dismiss the appeal as moot and note in the trial court record that the conviction removed the defendant's presumption of innocence, but that the conviction was appealed and neither affirmed nor denied because the defendant died. The trial judge's order allowing the defendant's motion to abate prosecution, dismissing the defendant's notice of appeal, vacating his convictions, and dismissing the indictments was reversed.

Payton v. State, 266 So. 3d 630 (Miss. 2019). Defendant, convicted of rape and kidnapping, died before his appeal brief was due and his appointed counsel moved for abatement *ab initio* to void the entire criminal proceeding. When considering the motion, the court sought supplemental briefing to address, *inter alia*, the ramifications of the state's constitutional and statutory victims' rights laws on *Gollott v. State*, 646 So. 2d 1297 (Miss. 1994), a case in which the state supreme court had upheld the doctrine of abatement *ab initio*. In addressing this question, the court noted that Mississippi had adopted its constitutional and statutory victims' rights provisions after *Gollott* was decided. Upon reviewing the history of these provisions, the court observed that the victims' rights laws formally recognized crime victims and afforded them substantial rights within the criminal justice process, including "the right to be provided information by law enforcement, the right to confer with the prosecuting attorney, the right to receive a transcript of the proceedings, *the right to be present throughout all proceedings*, and the right to participate

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during any entry of a plea of guilty, sentencing or restitution proceeding." The court went on to recognize that "[i]n the decades since *Gollott* departed from established precedent . . . [t]he landscape has changed to protect victims from being traumatized again." The court then looked to other jurisdictions for guidance. As the court noted, the Alaska Supreme Court had addressed similar concerns in 2011, when it considered the doctrine of abatement *ab initio* in light of that state's comprehensive victims' rights laws. Ultimately, the Alaska court rejected the doctrine as contrary to victims' legal rights. The court noted that this rejection follows a trend—states such as Alabama, Idaho, Montana, Washington, Colorado, Nevada, and Maryland had already rejected abatement *ab initio* due to victim-based concerns. After reviewing the court decisions from other jurisdictions, the Mississippi Supreme Court concluded that "[b]ecause of the increased recognition of crime victims in both our Constitution and statutory law, we find that departure from the abatement *ab initio* doctrine is necessary to avoid the perpetuation of pernicious error. . . . The abatement *ab initio* doctrine tramples upon victims' rights by denying victims 'fairness, respect and dignity.' Moreover, we find that the policies undergirding stare decisis—consistency and definiteness in the law—are not served by continued application of the abatement *ab initio* doctrine." Ultimately, the court followed Alaska, adopting an approach that "strikes a balance between the rights of the victim with the rights of the accused." Specifically, the court overruled *Gollott* and held that, if a criminal defendant dies while the defendant's appeal is pending, the conviction is not abated and the appeal is dismissed as moot, unless the defendant's estate or personal representative substitutes in for the defendant and elects to continue the appeal. The court reasoned that "[b]ecause our Constitution balances the rights of the accused with the rights of the victim, we—as guardians of the Constitution—can do no less. [Defendant] has been accorded his constitutional rights; [the victim] shall be accorded hers." Recognizing that the abatement *ab initio* doctrine originated, in part, to avoid financially punishing a defendant's family, the court emphasized that, although it "decline[d] to abate a deceased appellant's criminal conviction *ab initio*, [it] 'd[id] not preclude courts from abating financial penalties still owed to the county or State, as opposed to restitution owed to victims, where the death of a defendant pending an appeal creates a risk of unfairly burdening the defendant's heirs.'" Because neither the estate nor a personal representative of defendant moved for substitution in this case, the court dismissed defendant's appeal as moot and left his conviction intact.

State v. Al Mutory, 581 S.W.3d 741 (Tenn. 2019). Defendant was convicted of reckless homicide and sentenced to three years of incarceration. Defendant appealed, but before the Court of Criminal Appeals could rule on the matter, defendant died. Defendant's attorney then filed a motion asking the court to apply the doctrine of abatement *ab initio*, which the Tennessee Supreme Court adopted in 1966 and which "render[s] the defendant as if he or she had never been charged." The state opposed the motion, arguing that the doctrine "no longer fits within Tennessee's jurisprudence" because of an amendment to the Tennessee Constitution that guarantees victims of crime certain rights in connection with criminal proceedings. The Court of Criminal Appeals rejected the state's argument because the constitutional amendment did not specifically address the doctrine of abatement *ab initio* and because it believed the decision to overturn longstanding precedent was "best left to the legislature." The state sought leave to appeal to the Tennessee Supreme Court, and the Tennessee Supreme Court granted the state's application to determine whether Tennessee should continue to apply the doctrine of abatement

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ab initio when a criminal defendant dies during the pendency of an appeal as of right from a conviction. The Tennessee Supreme Court noted that a number of other jurisdictions have reconsidered the viability of abatement *ab initio* in recent years, "particularly in light of other changes in the legal landscape concerning the rights of victims." The Tennessee Supreme Court reviewed this history of the doctrine of abatement *ab initio*, as well as the development of victims' rights, both in the context of abatement *ab initio* generally and under Tennessee law. Ultimately, the Tennessee Supreme Court concluded that "the doctrine of abatement ab initio must be abandoned because it is obsolete, its continued application would do more harm than good, as it is inconsistent with the current public policy of this State, as reflected in the constitution, in statutes, and in recent judicial decisions. Changes to Tennessee law in the arena of victims' rights have expanded the purpose of the criminal justice system well beyond the 'cardinal principle[]' of 'punishment.' . . . Furthermore, abatement ab initio prioritizes the reputation of a deceased criminal and the financial interests of the criminal's estate over society's interest in the just condemnation of a criminal act and a victim's right to restitution. . . . We can no longer countenance a doctrine that causes so much harm to the living for the sake of the dead." The Tennessee Supreme Court abandoned the doctrine of abatement *ab initio* and expressly overruled its decisions in cases involving the doctrine to the extent they conflict with this holding. The judgment of the Court of Criminal Appeals abating defendant's conviction was overruled, the appeal was dismissed, and the judgment of the trial court reinstated.

<u>Right to be Heard</u>

I. State Courts

In re Lemar L., No. 1 CA-JV 18-0180, 2019 WL 613223 (Ariz. Ct. App. Feb. 14, 2019). Juvenile offender challenged a juvenile court order requiring him to register as a sex offender until his twenty-fifth birthday. On appeal, juvenile offender argued, *inter alia*, that the court erred in considering statements from the victims at the review hearing for the order because it was such a "late stage in the proceeding." The appellate court concluded that juvenile offender had waived this argument when he failed to raise it at the hearing and cited no authority to support his assertion of error. In reviewing juvenile offender's claim, the court of appeals found that, waiver aside, there was no error on the record. Noting that state law affords victims the right "to be present at court proceedings" and "to be heard before the court makes a decision on release, negotiation of a plea, scheduling and disposition," the court concluded that the victims had a right to be heard on the two issues resolved at the review hearing: the dispositional issue of juvenile offender's registration and his release back into the community. The court went on to reject juvenile offender's argument that the lower court was "improperly influenced by the victims" based on the lower court's statement that it would afford the victims' statements their appropriate weight, its heavy reliance on juvenile offender's psychosexual report, and its decision to allow juvenile offender and his mother to speak at the hearing. For these and other reasons, the court of appeals affirmed the lower court's decision.

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Right to Notice

I. Federal District Courts

United States v. Perkins, No. CR06-0114-LRR, 2019 WL 1578367 (N.D. Iowa Apr. 3, 2019) (slip copy). Defendant moved for a reduced sentence pursuant to the recently-enacted "First Step Act" (FSA). Under the FSA, which is retroactive, a court may impose a reduced sentence for certain "covered offenses," in particular, violations of the Controlled Substances Act. In this case, defendant was sentenced for a covered offense and his sentence could have been lower had the FSA 2010 been in effect. Accordingly, the court has the authority to reduce his sentence. Further, the government agreed that defendant was entitled to a sentence of time served. "Because defendant was convicted of a covered offence, the question becomes what comes next." The court noted that courts have struggled with what mechanism to use to grant relief when the FSA applies—whether the FSA permits a full resentencing or whether a simple modification of sentence would suffice. The court found that a full resentencing was not required, nor was defendant's presence required in the event of a sentence reduction. Accordingly, the court reduced the sentence to time served, with a reduction in his term of supervised release. The government requested a ten-day stay in the implementation of the court's order to review the defendant for possible civil commitment as a sexually dangerous person, to notify victims and witnesses of the release, to notify law enforcement officials and sex registration officials of the release, and to permit adequate time to collect DNA samples. The court approved the delay. So ordered.

United States v. Armachain, No. 1:17 CR 104, 2019 WL 4559368 (W.D.N.C. Sept. 19, 2019) (order). Defendant pleaded guilty to engaging in a sexual act with a minor under the age of 12 within Indian territory. Before sentencing, he moved for temporary release on bond to attend the funeral services of his daughter. The government took no position with respect to the request. The court found that defendant's desire to attend the funeral services of his daughter was compelling but that other considerations counseled against allowing the motion. The court explained that the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, was designed to protect victims and guarantee them some involvement in the criminal justice process. The court further explained that the Act provides victims with certain rights, including the right to be reasonably protected from the accused, the right to reasonable, accurate, and timely notice of any public court proceeding involving the crime or of any release of the accused, the right to be reasonably heard at any public proceeding in the district court involving release, and the right to be treated with fairness and with respect for their dignity and privacy. The court noted that defendant's motion did not include "any information about the potential impact of the Motion on the victim of Defendant's crime," and that the Government did not provide information as to whether the victim and her family were aware of the motion or whether they objected or consented to it. The court noted that it also lacked information as to whether the victim or her family might be at the funeral service. Accordingly, defendant's request was denied.

United States v. Tagliaferri, 13 Cr. 115 (RA), 2019 WL 6307494 (S.D.N.Y. Nov. 25, 2019) (slip copy). Defendant, convicted of investment advisor fraud, securities fraud, wire fraud and violations of the Travel Act, moved for a sentence reduction due to his serious health conditions. Finding that defendant was transferred to home confinement since filing his motion and was able

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to access the medical care he sought, the court denied the motion. Defendant then filed for an expedited reconsideration of his motion for a sentence reduction. Ultimately, the court concluded that the circumstances of defendant's home confinement obviated the need for granting him the requested relief. Noting that although defendant may prefer not to abide by the Bureau of Prison's approval process for accessing medical care and obtaining other basic necessities while in home confinement, he still had access to such medical care and necessities. Moreover, the court reasoned, the sentencing court had been clear that it considered defendant's poor health when imposing a sentence at the bottom of the range established by the Sentencing Guidelines. The sentencing court had also emphasized that defendant had committed a significant offense by defrauding victims of millions of dollars, stripping them of their "livelihood, their savings, [and] what they hoped to pass on to their children and their grandchildren." For all of these reasons, the court concluded that, although defendant suffered from a variety of serious medical conditions, compassionate release was not warranted given the circumstances of his home confinement. The court denied defendant's motion for a sentence reduction and for expedited reconsideration of his motion accordingly. Based on this denial of defendant's request, the court found that the victims did not need to be formally notified or heard from under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771.

United States v. Vance, No. 1:94-CF-0022-1, 2019 WL 4491333 (W.D. Va. Sept. 18, 2019) (slip copy). Under newly-decided Supreme Court precedent, the court determined that defendant's conviction must be vacated. He had been convicted of an attempted bombing, which affected between 700 and 1400 victims. The government filed a motion to authorize alternative procedures for crime victim notification under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771. Among other rights, crime victims are entitled to reasonable, accurate, and timely notice of the release of the accused. "When a court finds that the number of crime victims makes it impracticable to accord them individual notice of their rights as outlined in the statute, the court shall fashion a procedure to provide notice that does not unduly complicate or prolong the proceedings." The business where the bomb was left was sold, and the government had no record or names of the people who worked at the business where the bomb was planted. The government contended that the 700 to 1400 people who worked in the business were victims of the intended bombing and entitled to notification. Because direct notification was impossible, the government proposed posting a notice directed to individuals who were working at the business on the date of the bombing, alerting them to the fact that defendant will be released. They proposed the following methods: publication in the local newspaper; submitting the notice to local television stations with a request that it be included on their websites; posting the notice on the United States Attorney's Office website; posting links to the notice on the United States Attorney's Office Twitter feed; and requesting that the sheriff's office and police department share a link to the notice on their social media feeds. Defendant objected to the notification, arguing that it was overbroad because there was no evidence that the employees at the company suffered any direct and proximate harm from the intended bombing, and thus they were not victims. The court noted that who qualifies as a victim for notification purposes should be approached inclusively, stating that it "can see no benefit to parsing the meaning of the term 'victim' or in excluding anyone to whom the CVRA was meant to apply." Accordingly, the court found that the victims as identified by the government were entitled to notice. Given the

number of victims and the fact that their locations were unknown, the court further found that the alternative means of notification suggested by the government were reasonable.

II. State Courts

In re Chapman, 121 N.E.3d 1280 (Mass. 2019). The victims of an offender who had been confined as a sexually dangerous person sought to enjoin his release from a treatment center. The victims' request was denied and they petitioned for review. In their petition, the victims alleged a number of deficiencies in the processing of their offender's discharge. In addressing these claims, the court noted that although the state's victims' bill of rights affords crime victims a number of rights, nothing in this law "alter[s] the fundamental rule that it is the Commonwealth, and the Commonwealth alone, that prosecutes criminal cases and commitment petitions and defends discharge petitions. By enacting the victims' bill of rights, the Legislature gave victims the right to be kept informed about and to participate in a limited way in these cases, but it did not give them a judicially cognizable role in their prosecution." Because the victims' claims about the deficiencies in processing of their offender's discharge did not implicate any of their specific rights under the victims' bill of rights, the court held that the victims' lacked standing to bring these claims. The court also held that the victims did not have a statutory right as private attorneys general to employ the Supreme Judicial Court's extraordinary power of general superintendence to resolve their claims or enjoin their offender's release. The victims, who had been enrolled in the victim notification registry for defendant, also claimed that they were not given proper advance notice of their offender's imminent discharge. The court did not reach the question of whether the victims had standing to assert such a claim because it found that, even if the claim was properly brought, the victims were not entitled to have their offender's release enjoined because: (1) the offender had not yet been released from custody, so the notice that they in fact received was necessarily in advance of any release; (2) the statute guaranteeing the victims the right to notice of an offender's discharge from a treatment center provides that this notice is to be given "[u]pon discharge", and this notice requirement was met when Department of Correction employees informed the victims of the possibility of the offender's release based on a finding that he was no longer "sexually dangerous"; and (3) even if the victims' statutory right to notice had been violated, a lack of notice would not justify enjoining the offender's release from custody. For these reasons, the court upheld the earlier denial of their petition to enjoin the offender's release.

<u>Right to Privacy</u>

I. Federal District Courts

United States v. Gordon, 1:19-cr-00007-JAW, 2019 WL 6112838, (D. Me. Nov. 18, 2019) (slip copy). A jury found defendant guilty of mail fraud and two counts of copyright infringement for selling thousands of pirated videos online. Following trial, the government moved to seal documents that had been received unsealed and unredacted into evidence during the public trial. The documents contained, among other things, the names, addresses and other information pertaining to the thousands of victims in the case. Defendant did not oppose the motion to seal. The trial court delayed ruling on the motion. In so doing, the court reasoned that once a

document is deemed a judicial record, a common law right of public access attaches and the document is presumptively public. Once a document comes within the scope of common-law right of access, the court noted, "only the most compelling reasons can justify non-disclosure of judicial records." The court found that because the documents in question were admitted into evidence, they were therefore unquestionably judicial records to which the presumption of public access applied. With this legal grounding, the court then looked to whether a court may seal a document that was entered into evidence at trial unsealed. After examining the substance of the various exhibits in question, the court could not determine why the government was seeking to have them sealed. Excepting one document—a spreadsheet containing the names of victims with their email addresses—that could not be redacted and that the court found would be protected from disclosure by the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, the court found that the government's motion was insufficient to justify sealing. The court criticized the government's motion to seal as being barely over three pages and making no effort to differentiate among redactable, sealable and publicly-accessible exhibits. Furthermore, the court found that it did not matter that defendant did not oppose the motion because the defendant did not represent the privacy interests of the victims. The court then provided the government two weeks to comply with *United States v. Kravetz*, 706 F.3d 47 (1st Cir. 2013), which requires a district court to "determine whether the parties have offered sufficient justification for sealing, and to articulate the reasons for its decision." In deferring its final ruling for two weeks, the court informed the government that if it wanted a particular document sealed, it needed to provide the court with its specific basis for sealing the document.

II. State Courts

In re Jamison v. Watson, 176 A.D.3d. 1405 (N.Y. App. Div. 2019). Defendant-petitioner, serving a prison sentence for robbery, attempted assault and criminal trespass, challenged the denial of a Freedom of Information Law (FOIL) request that he submitted to the New York Office of Victim Services (OVS). In his FOIL request, defendant-petitioner sought information about whether the victims of his crimes had received any services from OVS. The lower court found that the denial of defendant-petitioner's request was rationally based; it dismissed the petition accordingly. The appellate court affirmed, finding that the sought records were statutorily exempt from disclosure. In reaching this decision, the appellate court stated that exemptions from disclosure under FOIL must be narrowly construed to provide maximum access to government records. The court then observed that OVS records are confidential under state statute, subject to four exceptions, none of which applied to the records at issue. FOIL expressly provides that a governmental agency may deny access to records that are specifically exempted from disclosure by state statute. As such, the court found that the statutorily confidential nature of the OVS records meant that they could not be disclosed under FOIL. The court concluded its decision by finding that defendant-petitioner was not entitled to disclosure of redacted records because OVS had met its burden by establishing that the full records were exempt from disclosure. For all of these reasons, the appellate court affirmed the lower court's decision.

People v. P.V., 100 N.Y.S.3d 496 (N.Y. Crim. Ct. 2019). Victim-movant pleaded guilty to charges of disorderly conduct, prostitution and loitering for the purpose of engaging in prostitution, as part of eight separate cases. The victim then moved to vacate the judgments of

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conviction entered in each case and dismiss the filed accusatory instruments, arguing that she was compelled and coerced to engage in the charged crimes because she was a victim of sex trafficking. The state consented to vacatur in four of the cases but contested as to the rest, arguing that the victim had failed to establish that she was a victim of sex trafficking during interviews at the time of the underlying arrests in the earlier matters. The state also objected to vacatur of the disorderly conduct case against the victim as the charge was not prostitution-related. Before evaluating the victim's motion, the court stated that the legal name and arrest aliases of the victim, a transgender woman, would be removed from the caption and other personally identifying factual information redacted from the text of the decision. Noting that it had "discretion to permit a party to remain anonymous when the matter implicates 'a privacy right so substantial as to outweigh the customary and constitutionally embedded presumption of openness in judicial proceedings,'" the court stated that, as a victim of sex trafficking, it was clear that the victim had "already suffered violence, ridicule and economic loss as a result of her gender orientation. Accordingly, the court exercises its discretion to protect defendant's anonymity because the matters regarding gender orientation addressed in the instant cases are sensitive and highly personal in nature, and may further subject defendant to physical, mental and economic harm, ridicule and personal embarrassment if publicized." Turning to the victim's request that her convictions be vacated, the court explained that state law allows sex trafficking victims to vacate prostitution-related convictions if they can establish that the charges were the result of having been a victim of sex trafficking. The purpose of the statute is "to ameliorate the wrong caused by imposing convictions on persons who lacked agency over their acts due to their victimization by their traffickers." Upon reviewing the victim's testimony, the court concluded that her initial inability to recognize her status as a victim of trafficking when questioned by the state was not dispositive. As the court observed, it was understandable that "she was unable to recognize [the trafficker's] form of coercive control in light of the more violent experiences she endured as a sex trafficking victim from her subsequent traffickers." The court therefore held that the victim was a victim of sex trafficking throughout the time she was convicted of prostitution-related offenses and vacated those convictions. The court found, however, that the express language of the statute precluded it from vacating the disorderly conduct conviction because the underlying arrest was not prostitution-related, even though the conviction stemmed from a fight with another sex worker that the victim was involved in because she was afraid of her trafficker, who was present at the time. The court observed that, "despite its noble aims, the statute has the unintended effect of depriving many trafficking victims from obtaining post-conviction relief." The court explained that although the "current statute may result in inequitable outcomes, any change must originate from the legislature. . . . At the very least, a change in the law eliminating the requirement that the arrest charge be for prostitution or loitering would free courts from the constraints of this limiting statutory language which deprives identified victims of sex trafficking of the relief they deserve."

<u>Right to Prompt Disposition</u>

I. State Courts

People v. Lamoureux, 255 Cal. Rptr. 3d 253 (Cal. Ct. App. 2019). Defendant was convicted of conspiracy to commit robbery and felony murder in 2013 and re-sentenced in 2016 following an

appeal. In 2018, California enacted Senate Bill No. 1437, which, *inter alia*, "restricted the circumstances under which a person can be liable for murder under the felony-murder rule" and also established a procedure under which qualifying individuals who had been previously convicted of felony murder could petition the court to vacate their murder conviction and obtain resentencing on any remaining counts. Defendant filed a petition to vacate her first degree felony murder conviction and obtain sentencing, and the trial court denied the petition, finding that Senate Bill 1437 was invalid for a number of reasons, including that the resentencing provisions deprived crime victims of constitutional rights afforded by the Victims' Bill of Rights Act of 2008 (Marsy's Law). Defendant appealed the denial of her petition, and the court of appeals—after conducting a detailed analysis of Senate Bill 1437—concluded that Senate Bill 1437 was valid and reversed the trial court's order denying defendant's petition. Regarding victims' rights, the court of appeals found that the establishment of the post-conviction petition process did not violate victims' right to "a speedy trial and prompt and final conclusion of the case and any related post-judgment proceedings," as Marsy's Law did not "categorically foreclose the creation of any new postjudgment proceedings not in existence at the time Marsy's Law was approved." The court further found that although safety of the victim and of the public are not considerations pertinent to whether the court may vacate a murder conviction and resentence petitioner, these factors may be considered during the resentencing proceeding.

<u>Right to Protection</u>

I. Opinions/Reports of State Crime Victims' Rights' Boards

State of Wis. Crime Victims Rights Bd., *The Right to Reasonable Protection from the Accused Throughout the Criminal Justice Process* (Mar. 22, 2019), https://www.doj.state.wi.us/sites/default/files/ocvs/CVRB/CVRB%20RR%2034.pdf. Pursuant to statutory authority, the Crime Victims Rights Board (Board) is authorized to issue reports and recommendations concerning the securing and provision of crime victims' rights and services. This report was issued after review of a complaint before the Board alleging a violation of a victim's constitutional right to reasonable protection from the accused throughout the criminal justice process by an elected clerk of the court. The victim was a victim of felony child sexual assault. As an adult, she requested a copy of the case file from the trial judge's clerk. The clerk told the victim that she must make a written request to see the records and must use her full legal name and home address in making the request. The victim asked to use her maiden name to shield her current name out of a concern for her safety, but the clerk refused. The victim provided her full name and address as instructed in a written records request that became part of the public record. When the victim's name appeared in the case record history, she contacted the clerk of court to remove the public entry of her name. The clerk of court removed the name and replaced it with "victim." The victim subsequently filed a complaint with the Wisconsin Department of Justice, which was ultimately reviewed by the Board. She argued that by requiring her to put her married name, she was unreasonably and unnecessarily put at risk from the offender, who did not previously know her new name. The Board determined the victim's right to protection was violated, and the clerk bore responsibility for the court's faulty policy as the custodian of the records filed in the county's circuit court. The Board expressed concern that the clerk still endorsed the practices that resulted in the disclosure of the victim's name, and did

not offer a solution that would be protective of victims in similar situations in the future; rather, the clerk's conclusion was that the only course of action was to correct such errors after the fact if they are brought to the attention of the office. In the Report, the Board found that the clerk and all employees, agencies, and officials of the state share responsibility in enacting and promoting policies to ensure that victims are treated with fairness, dignity and respect for their privacy. The Board noted that although crime victims' privacy cannot be shielded absolutely during the criminal justice process, public policy nonetheless "demands the balancing of victims' interests with competing interests." Further, it is "the duty of the state to earnestly perform this task of balancing through deliberate consideration and awareness of the standards set forth in statute and in the constitution." The Board continued: "All too often, the rights of victims are an afterthought or incorrectly viewed as a suggestions or 'best practice' or even a courtesy to provide if possible. It is imperative that those with authority over policies that impact victims are cognizant of, and take action to protect, victims' rights with a sense of purpose befitting a constitutional mandate."

Right to Restitution

I. Federal Appellate Courts

Hester v. United States, 139 S. Ct. 509 (2019). Defendants, convicted after guilty pleas to conspiracy to launder money and other offenses, appealed the Ninth Circuit Court of Appeal's decision affirming the district court's restitution order. Defendants argued, *inter alia,* that the restitution order violated Supreme Court precedent in *Apprendi v. New Jersey* and *Southern Union Co. v. United States* because the allegations supporting restitution were neither charged nor proven to the jury beyond a reasonable doubt. The Supreme Court denied defendants' petition for a writ of certiorari. In a concurring opinion, Justice Alito addressed defendants' argument that under *Apprendi* and its progeny, the Sixth Amendment requires the jury to find the facts that support a restitution order. Justice Alito stated that the Supreme Court precedent is premised upon "a questionable interpretation of the original meaning of the Sixth Amendment" and determined that "fidelity to original meaning counsels against further extension of these suspect precedents." Justices Gorsuch and Sotomayer wrote in dissent observing the "increasing role" restitution plays in federal criminal sentencing and noting the negative consequences, including the suspension of voting rights and reincarceration that offenders may face for failure to pay restitution. Next, the dissenting Justices examined Supreme Court precedent requiring a jury to find "any fact that triggers an increase in a defendant's 'statutory maximum' sentence" and explained that the term "statutory maximum" refers to "the harshest sentence the law allows a court to impose based on facts a jury has found or the defendant has admitted." They noted the "statutory maximum for restitution is usually *zero,* because a court can't award *any* restitution without finding additional facts about the victim's loss"; and "it would seem to follow that a jury must [also] find any facts necessary to support a (nonzero) restitution order." Rejecting the government's argument that the Sixth Amendment did not apply to restitution, the dissenting Justices observed that the Sixth Amendment's right to a jury trial "expressly applies '[i]n all criminal prosecutions.'"

United States v. Rothenberg, 923 F.3d 1309 (11th Cir. 2019). Defendant, convicted of possessing child pornography, appealed the district court's restitution order requiring him to pay nine victims a total of $142,600 in restitution. Specifically, defendant argued that: (1) the district court's restitution order was flawed as to all of the victims because it failed to calculate and disaggregate the victims' losses as caused by the initial abuser, distributors and other possessors from those he caused; and (2) there was no competent evidence to support the restitution award as to eight of the victims. In reviewing defendant's appeal, the court noted that 18 U.S.C. § 2259(a) mandates restitution in child pornography cases, and that *Paroline v. United States*, 572 U.S. 434 (2014), established a proximate-cause requirement and set forth a list of factors that courts are to consider when making such a calculation. Under *Paroline*, a court must impose restitution in an amount that reflects a particular defendant's relative role in the continuing traffic in pornographic images of a child-victim. The appellate court concluded that when evaluating child pornography restitution awards under *Paroline* it must "consider whether, in light of the *Paroline* factors, the district court arrived at a restitution amount that lies within the general range of reasonable restitution awards dictated by the facts of the case." The court continued that, in doing so, it must "give due deference to the district court's determination" and "so long as the district court acknowledges that it has considered the *Paroline* factors and the defendant's arguments regarding restitution, we will not vacate a restitution award solely on the basis that the district court did not address each factor explicitly." Noting that the Eleventh Circuit Court of Appeals had yet to address whether, under *Paroline*, district courts must formally disaggregate a victim's losses between the original abuser, distributer and subsequent possessors, the court looked to relevant decisions from other circuit courts for guidance. Based on its survey of these decisions and its review of *Paroline*, the court concluded that "a district court is not required to determine, calculate, or disaggregate the specific amount of loss caused by the original abuser-creator or distributor of child pornography before it can decide the amount of the victim's losses caused by the later defendant who possesses and views the images." The court went on to state that "even if a victim's total loss estimate includes losses caused both by the original abuser-creator, the distributors, and other possessors, the district court need only indicate in some manner that it has considered that the instant defendant is a possessor, and not the initial abuser or a distributor, and has assigned restitution based solely on the defendant possessor's particular conduct and relative role in causing those losses." Upon finding that the district court met this requirement, the appellate court rejected defendant's disaggregation argument. The court also rejected defendant's argument "that the district court erred in creating restitution disparities between himself and other possessors by 'impos[ing] restitution in amounts substantially above the average [for other possessors] without providing any explanation at all.'" In reaching this decision, the court stated that "a district court is not required to say why it did not follow or disagreed with restitution orders as to the same victim imposed by other courts." The court next addressed defendant's sufficiency of the evidence argument. Defendant claimed that the district court erred as to six of these victims when it relied on loss estimates that were based on psychological evaluations conducted before the victims learned of defendant's criminal possession of their images. The court rejected this argument, finding that, under *Paroline*, the government does not need to show that a child pornography victim was aware of, and specifically harmed by, a specific defendant-possessor's conduct; instead, it only needs to establish "that the victim suffered losses from the traffic in her images and that the defendant contributed to those losses by possessing her images, regardless of whether the victim was

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specifically aware of the defendant's conduct." Defendant also claimed that the district court erred in awarding restitution to two victims who did not submit psychological or economic reports detailing their losses. The appellate court found that a signed declaration by one of the victim's attorneys stating the victim's need for therapy and/or medical care was sufficient evidence to support the victim's restitution request. With respect to the other victim, the court concluded that there was not sufficient evidence to support a restitution request, where a restitution cover letter by the victim's attorney and the victim's impact statement did not provide any estimate of what the victim's total losses might be. The court vacated the restitution award as to this one victim and remanded for further proceedings consistent with its opinion.

United States v. Mendenhall, 945 F.3d 1264 (10th Cir. 2019). Defendant pleaded guilty to possessing, receiving and concealing three specific stolen firearms, which were ultimately recovered and returned to the pawn shop from which they were stolen. Defendant was not charged with, nor did he accept responsibility for, the underlying burglary of the pawn shop or any other related acts. As part of defendant's sentence, he was ordered to pay restitution to the pawn shop for the "loss of firearms not recovered, wages for employees to conduct inventory, loss of revenue for closing of business . . . and cleanup/repairs." Defendant appealed the restitution order as unauthorized by the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663A, because the losses ordered in restitution were not a direct and proximate result of the offense for which he was indicted and convicted. The Tenth Circuit agreed, concluding that the losses ordered in restitution did not result from defendant's offense of conviction; instead, the losses ordered arose from the underlying burglary of the pawn shop. Because defendant was not convicted of the burglary and did not agree to pay restitution for those losses as part of the plea agreement, the restitution order was vacated.

In re Brown, 932 F.3d 162 (4th Cir. 2019). Defendant pleaded guilty to three traffic violations relating to a collision she caused while driving under the influence of alcohol. The victim, who suffered serious injuries that required at least seven surgeries within a year of the collision, requested restitution for lost past wages as an electrician during the period of time between the collision and the sentencing hearing. In support of his restitution request, the victim submitted federal tax returns, an affidavit detailing his physical struggles, and a letter from his doctor indicating that the victim was using a walker and would require twice-weekly physical therapy for the next six months. The doctor's note predicted that the victim would be unable to resume his regular full-time work as an electrician for a year to year and a half from the time of the injury. The victim told the court that he did not intend to pursue any civil action against defendant and that he was not requesting restitution for future medical expenses. The trial court, finding "no reason not to believe" the victim's accounting of loss, nevertheless declined to order restitution because, *inter alia*, it found that the magistrate court was not "the appropriate forum to determine restitution." The trial court advised the victim to seek restitution in a civil suit so that the victim could conduct discovery and deal with "big figures." The victim filed a petition for a writ of mandamus before the Fourth Circuit challenging the denial of restitution. On review, the Fourth Circuit first affirmed that the victim was entitled to petition the court of appeals for a writ of mandamus under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, as the statutory provision authorizes petitions from actions taken by magistrate judges in their role as "an arm of the district court." The Fourth Circuit further found that the magistrate

judge “failed to articulate the balancing analysis” required by the CVRA. Specifically, the court was required to: “(1) make fact findings specific to two statutory factors—’the need to provide restitution to a victim,’ and ‘the burden on the sentencing process posed by determining complex issues of facts’—and (2) then explicitly balance these two factors.” Because the court abused its discretion in failing to state why the burden of complexity or delay in sentencing outweighed the victim’s need for restitution, the case was remanded with instructions to “conduct and explain on the record its balancing analysis in determining whether to award restitution.” The Fourth Circuit further clarified that case law discussing the difficulty of calculating restitution for future lost earnings would have limited applicability in the context of past lost earnings, that the “availability of civil remedies” should not be a controlling factor, and that any consideration of medical expenses not sought by the victim in restitution would be irrelevant to the determination of restitution for the past lost earnings actually sought by the victim.

II. Federal District Courts

United States v. Whitley, 354 F. Supp. 3d 930 (N.D. Ill. 2019). Defendant, convicted of one count of sex trafficking of children, was ordered to pay $246,286.59 in restitution to the four minor victims. The court determined that restitution was mandatory under the Victims of Trafficking and Violence Protection Act (VTVPA) and the Mandatory Victims Restitution Act (MVRA). The court found that the government had failed to satisfy its statutory duty to the victims by requesting no restitution at all before the court reminded it that restitution was mandatory, and by requesting only approximately $15,000 initially for the victims’ future mental health expenses before seeking the $246,286 award after sentencing. Stating that it has its own duty to determine the appropriate restitution award, the court set forth reasons to justify the restitution order. First, the court determined that “a victim suffers a compensable loss even if she did not pay for it out of pocket.” For this reason, regardless of whether the government or other sources have incurred out of pocket losses on behalf of the victims, the court found that defendant owes restitution for the victims’ past mental health treatment, participation in residential programs and any expenses incurred during their participation in the investigation and prosecution of the case. Second, the court determined that the victims will certainly incur future losses beyond medical and mental health expenses, and those losses include expenses for transportation, housing, education, legal assistance and substance abuse treatment, among others. Further, the court observed that recent studies estimate the total lifetime financial burden for child sexual abuse victims at over $210,000 per victim. The court noted that the $246,286.59 award, divided among the four victims, means each victim will receive $61,571.65—which “does its best to help restore the victims to well-being” but “does not come close to the average lifetime costs of child sexual abuse victims.” For these reasons, the court concluded that the restitution amount was proper. The court ordered the establishment of a trust in the names of the four minor victims and directed the government to deposit the restitution award into that trust. The court concluded with *dicta* warning that “the criminal justice system is failing survivors by forcing them to bear the permanent costs of their own trafficking.” The court explained that although the law mandates restitution for all trafficking victims, “the government does not routinely request it and courts rarely award it in sex trafficking cases.” The court further observed that “only 31% of sex-trafficking victims received restitution, compared to 94% of

labor-trafficking victims." The court stated that "it is time for the executive and judicial branches to step up and do their[] [jobs]" or else the law "will remain mandatory in name only."

United States v. Graham, No. 2:17-cr-00153-JAW, 2019 WL 6999109 (D. Me. Dec. 20, 2019) (slip copy). A victim of sex trafficking requested that mandatory restitution be ordered, even though the attorney for the government did not provide the probation officer with a listing of the amounts subject to restitution at least 60 days before sentencing, as established by statute. The government had been in contact with the victims of defendant's criminal conduct, each of which had previously indicated that they did not want to seek restitution. When the government learned the day before sentencing that this victim had changed her mind and wanted to seek restitution, the government compiled the information and presented it to both defendant and the probation officer the next day, which was the day of sentencing. Defendant argued that because the government did not comply with the 60-day requirement, the trial court should not order defendant to pay restitution. After analyzing the statutory provision, the trial court determined that the 60-day time limitation does "not present a jurisdictional bar to the imposition of restitution and the Court retains authority to do so." Indeed, as the trial court observed, "[w]hile it is unfortunate that restitution cannot always be handled neatly and quickly, it would be more unfortunate still if a victim's understandable hesitancy to enter a possibly long-term financial relationship (however remote and intermediated) with her victimizer deprived her of the opportunity to—within a reasonable period—change her mind and request restitution for some of the damage caused by a defendant's criminal act." Restitution was ordered in the amount of $9,450.

United States v. Lyon, 374 F. Supp. 3d 605 (N.D. Tex. 2019). The United States filed a complaint seeking to foreclose its criminal restitution judgment liens against real property in which the defendant-property owner—who was ordered to pay restitution as part of his sentence for making a false statement to a bank and then later for wire fraud—had an interest. The government named the defendant-property owner, his then-wife, and two entities with liens against the defendant-property owner, including the victim of the wire fraud, as defendants in the foreclosure action. The government moved for summary judgment, and the victim moved for equitable distribution of the foreclosure proceedings. The magistrate recommended that the government's motion for summary judgment be granted. The victim filed objections. On appeal, the court framed the issue as whether it had the authority to order a pro rata distribution of the proceeds derived from the foreclosure of a criminal restitution judgment lien where a second-in-time restitution order had been entered for the benefit of a different victim of a different, subsequent crime committed by the same criminal defendant. The court concluded that it did not have this authority. The Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663, makes restitution mandatory for certain crimes and sets forth detailed procedures for issuing and enforcing restitution orders. It authorizes the government to enforce a restitution order in the same manner that it recovers fines "and by all other available means." An order of restitution made pursuant to the MVRA is a lien in favor of the United States as if it were a federal tax lien. Accordingly, when the first restitution order was entered, a lien was attached to the property as if it were a federal tax lien, and when the second restitution order was entered, a separate lien attached. Priority under federal law is governed by the "first in time, first in right" rule. Under this rule, priority is given to the lien first perfected. The lien that was attached to the

first restitution order was perfected first. Accordingly, the criminal debt owed under the first restitution order must be paid before the criminal debt owed under the second order. The victim contended that the criminal restitution statutes indicate that all victims should be made whole in an equitable manner, and that the court should therefore fashion an equitable plan for dividing restitution under the two restitution orders to the victims of both orders, and not prefer the victim under the first restitution order. The court disagreed, finding that the MVRA's distribution scheme only applies to victims in the same case. The victim further argued that district courts have statutory and inherent authority to make necessary equitable adjustment to restitution distributions. However, the court found that there is extremely limited authority under the MVRA to modify a restitution order that has already been entered. This is because a restitution order is a final judgment, and can be modified post-judgment only under limited circumstances. Accordingly, because neither the MVRA nor the other criminal restitution statutes give the district court the authority to modify a restitution order to permit pro rata distribution to a victim of a separate, subsequent crime who later obtains a separate order of restitution, the court could not order the relief requested. Therefore, the "first in time, first in right" rule applied, and the victim's motion for equitable distribution of foreclosure proceeds among all of defendant's victims was denied.

United States v. Mahoney, No. CR18-0090-JCC, 2019 WL 1040402 (W.D. Wash. Mar. 5, 2019) (slip copy). Defendant pleaded guilty to three counts of travel with intent to engage in a sexual act with a minor and one count of enticement of a minor. Pursuant to 18 U.S.C. § 2429, district courts "shall order restitution" in the full amount of the victim's losses for certain specified sex offenses, including the type of which defendant was convicted. The government sought restitution for past and future therapy expenses. Defendant argued that the victim should not receive restitution upfront for ongoing therapy, but that she should seek an amended restitution order once future therapy costs had been incurred. The court found that "[d]efendant's position is not supported by the law." The court explained that both the statute and case law make clear that future medical expenses are appropriate. The government also sought restitution for various medical bills related to the victim's hospitalization due to a suicide attempt and other PTSD-related injuries. The court found that the government sufficiently proved that defendant's crime was the causal connection of these harms and that the victim was entitled to restitution for her hospitalizations. The government also sought restitution for money she loaned to defendant when he was sexually abusing her. Defendant argued that the money was not related to any material element of his crime and was therefore not appropriate for restitution. The court disagreed: "The restitution statute entitles victims to recoup 'lost income' and 'any other relevant losses incurred.' Here, the money [the victim] loaned Defendant is both directly and proximately related to his crimes of conviction. Defendant's crimes involve the abuse of a minor, and [the victim] loaned Defendant the money during the time he was sexually abusing her—a time when she was especially vulnerable and susceptible to Defendant's requests for money. Furthermore, [the victim's] loans helped enable Defendant to continue perpetrating crimes against her." The court therefore concluded that the victim loaned defendant $5,000 as a direct and proximate result of his abuse. The government and defendant also moved to seal certain documents related to restitution. The court found that there was good cause to seal the documents filed in support of the restitution award, including medical bills and other correspondence containing sensitive

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materials. However, the remainder of the motions to seal were denied as the documents did not contain information that was not already made public in the complaint and other documents.

III. State Courts

E.H. v. Slayton, No. 1 CA-SA 19-0004, 2019 WL 1220746 (Ariz. Ct. App. Mar. 14, 2019). When accepting the pleas of three defendants for the murder of a six-year-old boy, the court ordered that each defendant was jointly and severally liable for restitution, which it capped at $500,000. The court put off determining the amount of restitution pending completion of defendants' sentences. The murder victim's sister, through counsel, objected to each of the pleas, arguing that the restitution caps violated her state constitutional and statutory rights to full restitution. In a special action before the court of appeals, the victim argued that: (1) the state improperly waived her right to restitution by agreeing to the caps; (2) the superior court's imposition of the caps deprived her of her rights under the state's constitutional victims' rights provisions, known as the Victims Bill of Rights (VBR); and (3) the superior court improperly deprived her of her statutory rights to full participation in the criminal proceedings when it did not permit her counsel to sit in the well of the courtroom. At the time of the special action, the victim had not yet filed for restitution to recover the economic losses caused by the defendants' crimes against her brother. In reviewing the victim's arguments, the court noted the state's reliance on pre-VBR cases when arguing that defendants have a due-process right to know the maximum amount of restitution to which the plea may subject them. Ultimately, the court declined to accept jurisdiction of the special action because it was unclear, at this stage of the proceedings, whether the decision to cap restitution would prejudice the victim. Without explanation, the court also declined to accept jurisdiction over the victim's contention that the court violated her rights by refusing to allow her attorney to sit in the well of the courtroom. One judge issued a special concurrence "to note the presence of a purely legal question of statewide importance that has apparently lain unresolved for more than a quarter century and which requires our supreme court to reconsider its case law." As the concurrence explained, the state and defendants relied upon a series of pre-VBR court decisions to support the contention that "a victim's constitutional right to restitution is subordinate to a criminal defendant's right to 'knowingly, intelligently, and voluntarily' enter into a plea agreement that places a cap on restitution, even over the victim's objection." The concurrence reasoned that evaluating the impact of the VBR on these decisions requires "an examination of the federal and state due process requirements for defendants entering into a plea agreement weighed against victims' state constitutional rights to full restitution."

State v. Curtis, No. 2 CA-CR 2018-0266, 2019 WL 6336523 (Ariz. Ct. App. Nov. 19, 2019). Defendant was convicted of child molestation, and the court sentenced him to a 17-year term of incarceration. The court did not order restitution at the time of sentencing, instead retaining jurisdiction during the period of defendant's incarceration at the state's request, so that future counseling expenses could be ordered if the child-victim chose to seek additional counseling. Defendant appealed, arguing that the trial court lacked authority to order restitution for counseling expenses incurred after the date of sentencing and that the court erred in retaining jurisdiction over restitution for the entirety of his prison sentence. The court of appeals disagreed, noting that victims have a constitutional right to receive restitution from the convicted

person who caused their losses, including future losses. The court of appeals further found that, to effectuate the purpose of Arizona's restitution provisions of making victims whole, trial courts must be "permitted to exercise jurisdiction beyond sentencing to order restitution for a victim's future economic loss not calculable at the time of sentencing." Because child-victims often seek counseling years after the original offense, the court found no error in the trial court retaining jurisdiction over restitution for the duration of defendant's 17-year sentence. The conviction and sentence were affirmed.

State v. Leal, 455 P.3d 327 (Ariz. Ct. App. 2019). Defendant was convicted of first-degree murder and was ordered to pay restitution for the victim's funeral expenses to the Quechan Indian Tribe, which had paid for the expenses. Defendant appealed, arguing that the Tribe was not a victim entitled to restitution and that the expenses were routine government expenses of the Tribe and therefore not subject to restitution. The court of appeals analyzed the two different statutory bases for restitution under Arizona law—Chapters 6 and 8 of Title 13—concluding that under Chapter 8 of Title 13, restitution is not limited to those who meet the definition of "victim" but instead focuses on any "person" who has suffered loss, which may include entities and "contemplate[s] a wider group of persons to whom a defendant may be ordered to pay restitution than [under Chapter 6]." Because the Tribe satisfies the definition of "person" under the Chapter 8 provisions governing restitution, the court of appeals found no error in ordering defendant to pay restitution to the Tribe. The court of appeals further concluded that, irrespective of whether a statute requiring notice to federally recognized tribes of the death of a tribal member and the opportunity to provide for burial or other arrangements applied, the payment of the funeral expenses was proper. As the court of appeals observed, the victim's family or even a reimbursing entity who paid for the funeral would have been entitled to recover the expenses in restitution; "[t]hat the Tribe did so directly does not, somehow, make the restitution order here improper[,]" as an entity that stands in the shoes of a victim is entitled to restitution. Defendant's conviction and sentence, including the restitution order, were affirmed.

State v. Patel, 452 P.3d 712 (Ariz. Ct. App. 2019). Defendant, convicted of violating a statute that criminalizes moving violations that cause serious physical injury or death, was ordered by the municipal court to pay $61,191.99 in restitution to the victim. On appeal, the superior court reversed on the ground that the restitution amount exceeds the restitution cap set forth in the statute. The state appealed to the Arizona Court of Appeals, and the court reversed, holding that the statute's restitution cap is unconstitutional. In reaching its holding, the court observed that the Arizona Constitution guarantees a victim's right to "prompt restitution" from the convicted offender. The court determined that it must presume that the voters who passed the constitutional amendment in 1990 were aware that the restitution statute in effect at the time of the amendment required courts to award restitution "in the full amount of" a victim's economic loss. In so determining, the court rejected defendant's argument that the statutory cap is a proper exercise of the legislature's authority to define, implement, preserve and/or protect victims' constitutional rights, in part, because a cap does not advance victims' right to restitution. The court also rejected defendant's argument that recognizing a constitutional right to full restitution would deny a criminal defendant's constitutional right to have a civil jury determine the victim's claim for damages. For these reasons, the court concluded that the constitutional right to prompt

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restitution "implicates the full restoration of a victim's economic loss." Accordingly, the court reversed the superior court's order and reinstated the municipal court's restitution order.

State v. Quijada, 439 P.3d 815 (Ariz. Ct. App. 2019). Defendant, convicted of facilitating the theft of the victim's property, petitioned for post-conviction relief regarding a restitution order. In her petition, defendant argued that: (1) she was denied due process when she was not afforded the opportunity to question the victim at a restitution hearing; (2) the court had insufficient evidence for the restitution order; and (3) the court incorrectly characterized her post-conviction relief arguments as presenting new evidence. After considering defendant's petition, the court ordered supplemental briefing on a number of issues, including: (1) whether a criminal defendant has a constitutional right to cross-examine a victim in connection with the victim's restitution claim when the amount is contested; (2) whether a victim must testify at a restitution hearing and the significance of a victim's refusal to do so; and (3) what evidence must be presented to the superior court to prove a restitution claim. With respect to defendant's first claim, the appellate court agreed that the lower court violated defendant's due process rights when it issued a restitution order without first allowing defendant to question the victim. In reaching this conclusion, the court found that due process requires that a defendant be allowed the opportunity to contest the information upon which restitution is based, to present relevant evidence, and to be heard. The court then found that defendant could not meaningfully contest the basis of the restitution order without talking to the victim for two reasons: (1) the victim was the only person who could explain the large discrepancies between her final restitution statement and the two statements that came before it; and (2) the victim was the only person who could substantiate the values of the items that were stolen. The court emphasized that it was not holding "that defendants have an unconditional due-process right to question any victim who submits evidence or statements to support a restitution claim." The court went on to explain that "victims have a right under the Arizona Constitution 'to be free from intimidation, harassment, or abuse, throughout the criminal justice process.' . . . A defendant's due-process protections must not be converted into tools to subject victims to unnecessary and potentially injurious court proceedings. But where events or circumstances call the veracity or accuracy of evidence concerning restitution into doubt, and the defendant cannot adequately challenge that evidence without questioning the victim in open court under oath, due process requires that the defendant be given the opportunity to do so." The court then examined whether, on remand, the victim could be subpoenaed to a restitution hearing if she refused to appear voluntarily. To resolve this issue, the court considered whether the constitutional, statutory, and procedural rights afforded to victims in Arizona allow a victim to refuse to appear and testify at a restitution hearing. Based on case law, the court held that these legal rights did not entitle victims to "an unconditional right to refuse to appear and testify at restitution proceedings." The court qualified this holding by emphasizing that "a defendant does not have an unconditional right to compel a victim to testify at a restitution hearing." For instance, a court may exercise its considerable discretion to determine the relevancy and admissibility of evidence by quashing a subpoena that seeks testimony from a victim that is irrelevant or in violation of the victim's constitutional or statutory rights. The court next held that if a victim does not comply with a subpoena to testify at a restitution hearing, the court may not hold the victim in contempt, but must consider the victim's refusal to testify when deciding whether the state has met its burden of proof. In reaching this decision, the court stressed that it "firmly reject[ed] any notion that a victim who disobeys a

subpoena to appear and testify at a restitution hearing may be arrested and held in contempt" for two reasons: (1) because subjecting a victim to the threat of arrest and punishment for failing to appear at a restitution hearing violates the victim's constitutional right "[t]o be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process"; and (2) because restitution is not a criminal punishment, which means that "the remedies necessary to cure a deprivation of due process during restitution proceedings need not be as severe as those that may be required at trial." The court concluded its opinion by holding that the "expenses associated with installing a home security system may be recoverable as restitution if they were incurred 'in an effort to restore the victim's equanimity' following the criminal offense." Based on all of these considerations and conclusions, the court granted the petition for review and granted relief in part. It also vacated the lower court's restitution award and remanded for proceedings consistent with its opinion.

Crump v. Super. Ct. of L.A. Cty., 249 Cal. Rptr. 3d 611 (Cal. Ct. App. 2019). Defendant—the Southern California Gas Company—pleaded no contest to one misdemeanor count of failure to immediately report the release of a hazardous material, in exchange for the dismissal of other counts relating to a months-long gas leak that caused damage to thousands of residents and businesses located near the site of the leak. More than 7,000 petitioners sought to set aside the plea agreement and obtain restitution as victims of defendant's criminal conduct. The victims' litigation with respect to their rights occurred before the trial court and before the Appellate Division of the Superior Court, and ultimately a petition for a writ of mandate was filed in the Court of Appeals. The Court of Appeals analyzed the victims' rights and concluded, *inter alia*, that victims may not seek enforcement of their right to restitution by direct appeal from a criminal judgment or order but may, "in those rare instances where the trial court fails in its duty to order restitution from the convicted wrongdoer to the victims of the crime," instead "do what petitioners have done in this case: seek a writ of mandate." The Court of Appeals affirmed the lower court's determination that restitution was limited to losses that resulted from the three-day delay in reporting the leak and, despite agreeing that the evidence presented at the sentencing hearing was insufficient to demonstrate damages resulting from the delay itself, nevertheless ordered a re-hearing on restitution so the victims could provide information relating to any losses arising from the delayed reporting, as the scope of the previous hearing and the legal parameters of the previous proceeding relating to restitution had been unclear. The case was remanded with instructions to conduct a further hearing "to determine what, if any, damages were caused only by the three-day delay in reporting the leak to the proper authorities . . . ."

People v. Allen, 254 Cal. Rptr. 3d 134 (Cal. Ct. App. 2019). Defendant pleaded guilty to committing felony welfare fraud in 1993, 1997, and 2000 and to felony perjury in 2000. At sentencing in each case, defendant was ordered to pay restitution, along with various fines and fees. In 2018, defendant filed petitions seeking discretionary expungement of her convictions, arguing that she had been rehabilitated. The state opposed the expungement requests because, *inter alia*, defendant still owed approximately $9,000 in restitution. The trial court denied the petitions because of the unpaid restitution obligations and defendant appealed, arguing that the denial violated her due process or equal protection rights because she was financially unable to pay restitution. The court analyzed victims' constitutional right to full restitution—which the court stated cannot be bargained away, limited, or waived—and concluded that denying

expungement based on defendant's unpaid restitution obligations does not violate due process or equal protection guarantees. The court remanded to the trial court for further proceedings, including to determine whether defendant had actually satisfied her restitution obligations with respect to the convictions in the year 2000 and, if so, to re-evaluate the petition with respect to those convictions and whether discretionary exercise of expungement is warranted for those offenses.

People v. Dueñas, 242 Cal. Rptr. 3d 268 (Cal. Ct. App. 2019). Defendant, an indigent and homeless mother of young children, pleaded no contest to driving with a suspended license. The Superior Court imposed sentence, which included fees and fines, and defendant appealed, arguing that the fees and fines were imposed without considering her ability to pay. The court ruled that the only reason defendant could not pay the fine and fees was her poverty, and using the criminal process to collect a fine she cannot pay is unconstitutional. The court concluded that due process of law requires the trial court to conduct an ability to pay hearing and ascertain a defendant's present ability to pay before it imposes court facilities and court operations assessments. To hold otherwise would punish an indigent defendant in a way it does not punish a wealthy defendant. In most cases, a defendant who has successfully fulfilled the conditions of probation has an absolute statutory right to have the charges against him dismissed. But if a probationer cannot afford the mandatory restitution fine, he is barred from earning the right to have his charges dropped and to relief from the penalties and disabilities of the offense for which he has been on probation, even if all other conditions have been complied with. Further, the execution of any restitution fine imposed under Penal Code 1202.4(b) must be stayed unless and until the trial court holds an ability to pay hearing, and concludes that the defendant has the present ability to pay the restitution fine—even though the statute bars the judge from considering a defendant's ability to pay unless the judge is considering increasing the fine above the statutory minimum. (Note that this provision is different from Penal Code 1202.4(f), which concerns restitution based on a direct victim's loss.) Accordingly, the court reversed the order and remanded the case to the trial court to stay the execution of the restitution fine until the state proves that she had gained an ability to pay.

People v. Granger, No. E069355, 2019 WL 1011035 (Cal. Ct. App. Mar. 4, 2019). Defendant pleaded guilty to two counts of conspiracy to commit grand theft, was sentenced to various terms and conditions of probation, and agreed to pay restitution to the victim. At the end of the probationary period, defendant had not paid off the restitution amount. Defendant moved to expunge the record of her conviction under section 1203.4. The court explained that there are three circumstances in which a defendant may apply for relief under 1203.4: (1) if she has fulfilled the conditions of probation for the entire period; (2) if she has been discharged before the termination of probation; or (3) in a court's discretion and in the interests of justice. Here, it is undisputed that, as a condition of probation, the trial court ordered defendant to pay victim restitution, and the full amount had not been paid. The court found that cases directly interpreting section 1203.4 motions after a defendant had completed his or her probation for the entire period have consistently held that defendants who had not fully paid the restitution ordered had not fulfilled the conditions of their probation, and therefore, were not entitled to section 1203.4 relief. The court further found that none of the other circumstances providing a basis for expungement existed: probation was not terminated early; and the interests of justice did not

require expungement. In reaching this decision, the court rejected defendant's assertion that denying relief for failure to fully satisfy a victim's restitution order creates an inequity between equally culpable individuals because some victims choose not to seek restitution. "[A] victim's right to restitution is constitutional; it cannot be bargained away by the People and must be included in the court's sentence unless compelling and extraordinary reasons exist to the contrary." The court found no error.

People v. Grundfor, 251 Cal. Rptr. 3d 586 (Cal. Ct. App. 2019). Defendant pled no contest to driving under the influence and injuring another person, and the Superior Court ordered restitution in the amount of $178,000 for attorney fees. The fees were incurred during litigation between the victim and defendant's insurance company and represented a 40% contingency fee of the recovery. Defendant appealed arguing that the victim had entered into a settlement agreement with the insurance company wherein she would not receive attorney fees. In the alternative, defendant argued that if attorney fees were appropriate, the court erred by not apportioning the amount paid between those incurred to recover economic losses (recoverable in restitution) and non-economic losses (not recoverable in restitution). The appellate court first found that courts are required to order restitution for actual and reasonable attorney fees that are not offset in a settlement. Looking to the settlement, the court concluded that the victim's civil settlement and the state's interest in seeking restitution are independent of each other, and one did not bar the other. The court rejected defendant's argument that the public policy of encouraging civil settlements outweighed the public policy of seeking restitution. In addition, the court rejected defendant's argument that the court awarded restitution for collection of noneconomic damages, which is not authorized. The court found that the trial court did not abuse its discretion when it found that defendant had not met the burden of proving an award of noneconomic damages. The court reasoned that the victim had future medical costs that were five times the amount of the settlement, and the trial court could reasonably credit all the attorney fees to recovery of economic damages. Finally, the appellate court rejected defendant's argument that the court should have used the Lodestar method of calculating restitution. The court reasoned that any rational calculation method is acceptable, and the contingency fee, which was reasonable under the circumstances of the case, was the actual amount paid to the attorney. The court affirmed the restitution order.

Systemax, Inc. v. Fiorentino, 283 So. 3d 415 (Fla. Dist. Ct. App. 2019). Defendant, corporate director and Chief Executive of Technology Products for Systemax, Inc. (Systemax), resigned following allegations of fraud and simultaneously entered into a settlement agreement with Systemax to surrender 11 million dollars in assets. Defendant, later charged by the federal government with conspiracy to commit securities fraud and to impede and impair the Internal Revenue Service, entered into a plea agreement. As a part of the sentence, defendant was ordered to pay $35,867,883 in restitution to Systemax, which is the basis for this appeal. After Systemax recorded the restitution judgment, defendant: (a) filed a counterclaim seeking declaratory and injunctive relief; (b) made a Section 55.5095 objection to the enforcement of the federal judgment; and (c) recorded a lis pendens as to the foreign judgment, claiming that the settlement agreement precluded enforcement of the restitution order and that 18 U.S.C. § 3664(m)(1) only allowed the federal government to enforce a restitution order. After Systemax filed responsive pleadings and a hearing was held on the matter, the court: (a) rejected

defendant's argument that enforcement of the restitution order was prohibited by the settlement agreement, as "criminal restitution is 'a separate and distinct remedy from that of the [previously settled] civil case'"; and (b) concluded that only the United States government can enforce the lien. This appeal followed, addressing the sole issue of "whether [federal statute] 18 U.S.C. § 3664(m)(1)(B)[, also known as the Mandatory Victim Restitution Act (MVRA),] authorizes a criminal victim to pursue collection of a federal restitution order in state court." The Third District Court of Appeal, finding no Florida or federal precedential case law on this narrow issue, relied on statutory interpretation of the MVRA, holding "that Section 3664(m)(1) does not permit a private victim, like Systemax, to pursue collection of a restitution order in its favor in state court." The court found that 18 U.S.C. § 3664 (m)(1)(B), "[o]ther sections of the MVRA," statutes amended by the MVRA, and the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, provide guidance on this issue, and highlighted the absence of explicit procedural, enforcement mechanisms and the term "enforcement" in subsection (B) of § 3664(m)(1). The court further held that "[f]or present purposes, Systemax must abide by the MVRA and defer to the federal government for collection of the unpaid restitution[;] [and,] [i]n this connection, [that] the government can avail itself of federal law as well as state law mechanisms." The court affirmed in part, and reversed in part.

Toole v. State, 270 So. 3d 371 (Fla. Dist. Ct. App. 2019). Defendant pleaded guilty to dealing in stolen property and false verification or ownership to a pawnbroker and was ordered to pay close to $10,000 in restitution. Defendant appealed the restitution order, arguing that the restitution amount was not only for items pawned, but for all items missing by the victim (outside of the those relevant to the charges), and that the victim merely "guesstimated" the replacement value of items rather than providing the true fair market value of replacement. The court explained that under Florida law, the state bears the burden of demonstrating the amount of loss sustained by the victim as a result of the offense. Fair market value can be established by direct testimony using four factors: (1) the original market cost; (2) the manner in which the item was used; (3) the general condition and quality of the item; and (4) the percentage of depreciation. The victim here met the first factor, but not the others. Accordingly, the testimony was insufficient to establish fair market value. The court noted that restitution "continues to be a perplexing uphill battle for victims," and that Floridians recently amended the Constitution in part to address restitution. However, "[d]espite the statute, the rules, the case law, and the constitutional amendment, proving restitution continues to be difficult for victims, and receiving compensation for their loss continues to be elusive." The court noted that it had previously suggested a legislative fix by adding language into the restitution statute that the court is not bound by fair market value as the sole standard for determining restitution amounts, but rather may exercise its discretion to further the purposes of restitution. However, the statute has not yet been amended. Accordingly, the court reversed the restitution award, but certified the following question to the Florida Supreme Court as a matter of great public importance: Is the formula for determining restitution based on the fair market value of the victim's property still viable after the passage of the Constitutional victims' rights amendment, or should a trial court no longer be bound by fair market value as the sole standard for determining restitution amounts, and instead exercise discretion to further the purposes of restitution? Reversed.

State v. Dempster, No. 18-0673, 2019 WL 719028 (Iowa Ct. App. Feb. 20, 2019). Defendant, convicted of vehicular homicide, was ordered to pay $150,000 in victim restitution. Shortly after the court approved the restitution payment plan, defendant notified the court that the parents of the victim had received two $100,000 insurance payments, one from defendant and one from the owner of the vehicle. The victim's parents released defendant from liability as a result of these payments, and defendant asked that the restitution plan be amended to reflect that his restitution obligation was satisfied. The court issued an order stating that the civil settlement satisfied the restitution payment in its entirety. The state did not appeal the order. More than a month later, the victim's parents wrote a letter to the court requesting reconsideration of the order on the grounds that the $100,000 from the vehicle owner's insurer should not have offset defendant's $150,000 restitution obligation. In response to this letter, the court clarified its order to only apply to insurance proceeds paid on behalf of defendant from his personal liability coverage. Defendant moved to set aside the clarifying order, the court denied his motion, and he appealed. The court of appeals reversed and vacated the clarifying order on the ground that the victims' parents lacked standing to challenge the restitution order. The state then filed an application to amend the restitution plan, which the court granted. Defendant appealed, arguing that the district court lacked jurisdiction to revisit the clarifying order and that case law mandated an offset of both insurance payments. On appeal, the court found that the state's failure to appeal the order stating that the civil settlement satisfied defendant's restitution obligation foreclosed it from collaterally attacking the order. Because the state's application to amend the restitution plan was an impermissible attempt to revisit an unappealed order, the trial court's order granting the application was also impermissible. For these reasons, the appellate court reversed the order granting the state's application to amend the order. In doing so, the court noted that its holding "effectively eliminates [defendant's restitution] obligation."

In re G.R., 205 A.3d 917 (Md. 2019). Juvenile defendant was adjudicated delinquent after he pleaded "involved" to charges of robbery, second-degree assault, and openly carrying a dangerous weapon. Following the restitution hearing, juvenile was ordered to pay restitution, including for the cost of rekeying household locks belonging to family members of the victim when their keys were stolen from the victim's backpack during the course of the robbery. Juvenile appealed. The appellate court vacated a portion of the restitution order to the extent juvenile was ordered to pay restitution for the costs of rekeying locks, based on the determination that the decision to rekey locks was not the direct result of the theft of the victim's backpack. The state petitioned for and was granted certiorari review. The court explained that Maryland's restitution statute provides that a juvenile may be ordered to pay restitution for certain expenses suffered as a "direct result" of the delinquent act. The court found that the value of the locks was substantially decreased when the keys were removed from the possession of the victim during the course of the underlying robbery. Household locks and the corresponding keys "ensure the sanctity and security of the home." Even though the locks themselves were not damaged as a result of the theft of the keys, there was nonetheless a substantial decrease in their value when the keys were stolen, because it brought into question the underlying security of the homes: "A victim can only be left to wonder whether future intrusions on the sanctity of the home may occur as a result of the stolen keys." The substantial decrease in the security of the homes could only be remedied by the return of the keys without them being copied, or by the rekeying of the locks. Accordingly, the decision to rekey was not an intervening event, as the locks' substantial

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decrease in value could be directly attributed to the robbery. This was true even though substantial time passed between the robbery and the decision to rekey the locks. The judgment of the appellate court was reversed. In reaching this decision, the court affirmatively stated that it was not relying on any tort or reasonableness standard with regard to causation: "We take this opportunity to reaffirm that importing any tort causation analysis into the direct result standard [of the restitution statute] would straightforwardly contravene the plain language of the statute."

State v. Oner, No. 2018-0538, 2019 WL 5260247 (N.H. Oct. 17, 2019). Defendant agreed to plead guilty to offenses arising out of illegal racing on an interstate and a collision with the victim's vehicle that resulted in injuries to both the adult victim and her young daughter, who was also in the car. After the negotiated plea was reached, defendant fled the country and did not appear at sentencing. Some years later, defendant returned to the United States and turned himself in. Shortly before trial on the charges, defendant pled guilty subject to a plea agreement that provided a capped amount of restitution. Following a hearing where the adult victim offered testimony and a summary of the medical expenses incurred as a result of the injuries, the court ordered restitution in the highest amount possible within the cap: $100,149.47. Defendant appealed, arguing that the state failed to prove the causal connection between the collision and the adult victim's injuries and that his due process rights were violated because the adult victim did not submit supporting documentation in addition to her testimony and a summary of the medical expenses incurred at the restitution hearing. In reviewing the record, the court found no error in the trial court's finding that the medical treatment for the adult victim's injuries was a result of the collision and was not due to a pre-existing condition, as the nature, frequency, intensity and treatment of the adult victim's headaches were different from the migraines the adult victim had previously experienced. With respect to the victim's testimony and the summary of medical expenses admitted into evidence at the restitution hearing, the court also found no error, as defendant was provided with a packet of the victim's medical bills in advance and the court did not rely on any undisclosed evidence in determining the amount of restitution to be paid. The restitution order was affirmed.

Matter of Helmer, 202 A.3d 1261 (N.J. 2019). In this disciplinary matter, allegations arose that a private attorney engaged in unethical conduct and improperly influenced the prosecution of two individuals by, among other things, urging the prosecutor to pursue criminal charges, testifying before a grand jury, and advocating for restitution for his client. The Office of Attorney Ethics (OAE) filed a disciplinary complaint against the attorney based on several rules of professional conduct alleging, in relevant part, that it was improper for the attorney to attempt to obtain restitution for his client in a criminal case while civil proceedings were ongoing under Rule 3.4(g) of the Rules of Professional Conduct. Rule 3.4(g) requires attorneys to refrain from presenting or threatening to present criminal charges to obtain an improper advantage in a civil mater. The special master concluded that the OAE failed to prove that the attorney violated the rules, and that there was "nothing wrong" with the attorney's attempt to obtain restitution for his client while the civil proceedings were ongoing. The special master relied on the Crime Victim's Bill of Rights, which protects the rights of crime victims to be informed about available remedies and be compensated for their loss whenever possible, and a New Jersey statute that states that an order of restitution in a criminal case does not act as a bar to civil recovery by the victim. Taken together, these provisions require the conclusion that a crime victim may be represented by

counsel and simultaneously seek both criminal restitution and civil recovery for the same loss. Further, the OAE did not demonstrate how the attorney's conduct could have given rise to an improper advantage in a civil matter. A majority of the disciplinary review board (DRB) agreed with the special master's dismissal with regard to 3.4(g), but found that his conduct amounted to conduct that was prejudicial to the administration of justice under Rule 8.4(d). The court granted the attorney's petition for review. On appeal, the court noted that at the center of the matter were questions about efforts to obtain restitution for the client. Victims are entitled to seek restitution, and can pursue restitution in both civil and criminal arenas. However, in this case the issue was not whether private counsel could pursue restitution through the criminal process, but rather the manner in which it was done. "To be clear, it would be unacceptable -- and prejudicial to the administration of justice -- for a private attorney to manipulate the criminal process by drafting charges, causing prosecutors to present them, and causing an inappropriately high bail to be set to serve as restitution for the attorney's client. In the unlikely event that might happen, it would amount to a perversion of the justice system." However, the court concluded that while the attorney's conduct "pushed the envelope," there was insufficient evidence to conclude that he orchestrated or induced such a scheme. "Although he actively encouraged a criminal prosecution and advocated for restitution for his client, to place primary responsibility on [the attorney] for what occurred overlooks the role and decision-making authority of the prosecution team." The court concluded that although the attorney did not follow best practices, there was insufficient evidence to find a violation of Rule 8.4(d). The formal complaint was dismissed.

State v. Isaza, No. A-5600-17T5, 2019 WL 321135 (N.J. Super. Ct. App. Div. Jan. 25, 2019). Defendant appealed the restitution order related to his guilty plea in an assault case on the ground that he was denied an appropriate restitution hearing. He argued that his restitution hearing was improper because the victim failed to appear to testify regarding the expenses he incurred as a result of defendant's actions. After repeated attempts to schedule the restitution hearing with the victim present, the court ruled that the victim must appear and be subject to cross-examination, or the state must provide a "very, very detailed" certification as to the victim's actual losses, the amount of loss attributable to defendant, and whether the victim had insurance or attempted to mitigate his damages. At a hearing two weeks later, defendant asked the court to dispense with any restitution because the victim failed to appear or provide a detailed certification. The court ordered restitution over defendant's objection. On appeal, the court noted that the rules of evidence do not strictly apply in a restitution hearing. It found that any restrictions on the presentation of evidence at such a hearing must be reasonable and that defendants must have a meaningful opportunity to cross-examine any witnesses, where warranted. The court stressed that it was not suggesting that a victim invariably must be present and be subjected to cross-examination at a restitution hearing; for, as the court noted, it had a statutory responsibility to guard against subjecting a victim to intimidation, harassment, or abuse due to the victim's involvement in the criminal justice system. The court found that a live witness was necessary to determine restitution in this case because the record contained numerous discrepancies regarding the amount of restitution owed to the victim. For this reason, it reversed the restitution order and remanded for a restitution hearing where the victim or another appropriate witness would be available for cross-examination.

Mikhlov v. Festinger, 102 N.Y.S.3d 170 (N.Y. App. Div. 2019). The victim of a mail fraud scheme filed a petition for writ of execution and turnover order on a restitution judgment entered in federal court against the perpetrator of the scheme. The victim sought, *inter alia*, payment out of the sale of real property owned by the perpetrator's wife, but financed and improved by the perpetrator. The court granted the wife's motion to dismiss, and the victim appealed. In reviewing the victim's appeal, the court found that the criminal conduct qualifying for mandatory restitution took place prior to the enactment of the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663. As such, the court concluded that an earlier restitution statute, the Victim and Witness Protection Act (VWPA), applied to the victim's claim. The court then found that the victim had no standing under the VWPA to bring a proceeding for a writ of execution and turnover order on a restitution order. In reaching this decision, the court noted that the plain language of the VWPA does not specify the means by which a victim may collect restitution and "case law shows that although a restitution order operates 'in the same manner as a civil judgment' for enforcement purposes under the VWPA, it does not constitute a civil judgment and does not provide a private cause of action for victims." The court further noted that, even if the MVRA were applicable, the victim would not have standing under that statute either as it also does not grant victims a private right of action. For these reasons, the court affirmed the lower court's dismissal of the case.

State v. Strom, 921 N.W.2d 660 (N.D. 2019). Defendant was convicted of misapplication of property in excess of $50,000 and sentenced to jail time and ordered to pay restitution in the amount of $690,910.67. Defendant appealed, arguing that the court abused its discretion in awarding restitution because it did not consider her ability to pay as required by North Dakota statute. Both defendant and the state framed the issue on appeal as whether article I, § 25 of North Dakota's Constitution overrode the statute requiring the district court to consider the defendant's ability to pay when determining restitution. Defendant argued that the constitutional provision and statute could be reconciled; the state argued that they could not. Under North Dakota's statute, the court must consider the ability of the defendant to pay restitution. Under the Constitution, a crime victim has a "right to full and timely restitution in every case and from each offender for all losses suffered by the victim as a result of the criminal or delinquent conduct." The provision is clear that the victim is entitled to "full" restitution for "all losses," leaving "no room for implication that the commonly understood meaning would permit any reduction of the restitution amount in consideration of the defendant's ability to pay." Awarding less would not make the victim whole, and would not be "full" restitution. Accordingly, the constitutional provision and statute irreconcilably conflicted. The court further found that the statute was enacted before the provision was adopted; therefore, the portion of the statute requiring defendant's ability to pay to be considered was implicitly repealed. The court noted that this decision was limited only to the setting of the award of restitution: "We do not completely preclude consideration of ability to pay. There may be times when such consideration may be appropriate, i.e., when determining the time or manner of payment or whether a defendant's failure to pay is willful." Finding no abuse of discretion, the restitution award was affirmed.

State v. Allen, --- N.E.3d ---, No. 2018-0705, 2019 WL 6204946 (Ohio Nov. 21, 2019). Defendant, convicted of forgery, appealed a restitution order requiring payment to the banks

where defendant had cashed forged checks. The court of appeals reversed the lower court and vacated the order on the ground that the account holders, not the banks who reimbursed them, were the victims of defendant's forgery. The state appealed. On appeal, the supreme court observed that state law authorizes a trial court to order restitution to a "victim" who suffers economic loss, but that the state's restitution law does not define the term "victim". After considering how defendant's check-cashing scheme harmed the banks, the court found it apparent that the banks were "victims" of defendant's crimes "under any plausible, common-sense understanding of the word 'victim'." Specifically, the court observed that three considerations, when taken together, established that the banks were "victims": "the banks having lost something in which they had a property interest at the moment of the crime, the banks bearing the economic loss by operation of statute, and the banks having been the targets of [defendant's] crimes." Holding that the banks were "victims" within the meaning of Ohio's restitution statute and that they suffered an economic loss as the result of defendant's forgery, the court reversed the intermediate court's decision and reinstated the restitution order.

State v. Gutierrez-Medina, 442 P.3d 183 (Or. 2019). Defendant pled guilty to driving under the influence of intoxicants (DUII) and third-degree assault, and the court ordered him to pay restitution for the costs associated with the victim's medical treatment. Defendant was driving under the influence of intoxicants late at night when he struck the victim, who had walked onto the road in a dark area that was not marked for pedestrian crossing. Defendant objected to the state's request for restitution in the amount of the victim's full medical bills, arguing that the victim's own negligence was the primary cause of the collision and urged the trial court to apply the civil doctrine of comparative fault to reduce the requested restitution. The trial court rejected defendant's argument and ordered defendant to pay the victim's full medical expenses in restitution. Defendant appealed, and the Court of Appeals affirmed the judgment of the circuit court, holding that the text of the restitution statute, Or. Rev. Stat. § 137.106, expressly precludes the court from applying comparative fault principles to apportion damages. The Oregon Supreme Court allowed review and agreed with the appellate court's decision, but not its reasoning. The court concluded that defendant's conviction for third-degree assault established that he was aware that he was using a deadly or dangerous weapon in a way that created a substantial risk of serious physical injury and that he consciously disregarded that risk. For this reason, the court found that defendant's conviction for third-degree assault established that he acted with a culpable mental state greater than gross negligence and therefore the doctrine of comparative fault would not be available in a civil action. Because the court held that the defense of comparative fault would be unavailable to defendant in a hypothetical civil action for the same injury, it declined to address the issue of whether the restitution statute precludes trial courts from reducing the amount of restitution when the victim is partly at fault for the injury. Affirmed on other grounds.

State v. Gilroy, 435 P.3d 799 (Or. Ct. App. 2019). Defendant appealed a supplemental judgment imposing over $16,000 in restitution after the victim sustained injuries from defendant, who was driving while intoxicated. He argued that the trial court violated his right to due process under the Fourteenth Amendment when the court allowed testimony of the victim's insurer that was based on hearsay statements by the victim. The victim was not present for cross examination. Defendant argued that the court's decision in *State v. Johnson*, in which the court held that a

defendant may be entitled to due process confrontation rights in probation revocation proceedings, should be extended to restitution proceedings. However, he did not advance an argument as to why *Johnson* should apply, other than noting that a criminal defendant's due process rights continue during sentencing and the amount of restitution in question was significant. The state argued that defendant has no due process right to confront witnesses in restitution hearings. The court stated that defendant did not address the differences between restitution and probation revocation hearings and, in light of this failure, rejected his arguments, holding that he failed to establish that his due process rights were violated.

Commonwealth v. Tanner, 205 A.3d 388 (Pa. Super. Ct. 2019). Defendant, former secretary-treasurer of Shenango Township, filed a pro se petition under the Post Conviction Relief Act after being convicted of forgery, theft and related charges. He appealed on several grounds, including that the restitution component of his sentence to Shenango Township was illegal and must be vacated, because the Township was not a victim under the restitution statute. The court began by describing that under Pennsylvania's restitution statute, a victim is defined as an "individual against whom a crime has been committed. . . ." Further, Pennsylvania precedent establishes that the text of the restitution statute "envisages 'victims' as 'persons' commonly understood." Therefore, the court concluded that a victim must be "a human being, not a government agency." As such, the Township could not be a victim under the restitution statute, and the restitution judgment was void and unenforceable as an illegal award. The court also examined sua sponte whether defendant was obligated to pay restitution to an insurance company. The court explained that an insurance company is only entitled to restitution if it is an "individual," which it is not, or if it has compensated a victim for a loss. Thus, an insurance company is only entitled to receive restitution when it compensates a victim. Here, the insurance company compensated the Township, however, because the court concluded that the Township was not a victim, the restitution award to the insurance company was also illegal, void and unenforceable. The Commonwealth argued that the restitution component of the sentence was not illegal because it was the product of a negotiated plea agreement—in exchange for defendant agreeing to pay restitution in the full amount of stolen funds, the Commonwealth agreed to offer a significantly lesser sentence of incarceration than he would have been exposed to had a jury convicted him. The court was "not persuaded by the Commonwealth's argument that because this matter involves a negotiated plea agreement, specific performance of the plea's terms should be enforced irrespective [of Pennsylvania Supreme Court precedent about the definition of victim]." The court continued: "Importantly the Commonwealth's argument fails to recognize that [defendant's] restitution claim implicates a legality of sentence issue. While it is imperative to enforce a contract between two parties, it is also well-settled law that a contract with an illegal term is void and unenforceable." Because the agreement could not be performed without violating a statute, it was illegal and could not be enforced. Having found the sentence to be illegal, the court vacated defendant's guilty plea in its entirety: defendant and the Commonwealth entered into the plea negotiations with the shared misapprehension that the Township was a victim entitled to restitution and this tainted the parties' negotiations at the outset. The case was remanded for proceedings consistent with the decision.

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Victim Impact Statements

I. Federal Appellate Courts

United States v. Berrios-Miranda, 919 F.3d 76 (1st Cir. 2019). Defendant appealed from his sentence for kidnapping for ransom, arguing that the trial court violated his rights when it denied his request to challenge the reliability of the victim's testimony through cross-examination at a resentencing hearing. In analyzing defendant's claim, the court noted that there is no Sixth Amendment right to cross-examine at sentencing. It also found that defendant had all the due process that was required under the circumstances: advance access to the victim statements that the resentencing court considered and a meaningful opportunity to comment on the information upon which his sentence was based. The court further stressed that the district court could consider any evidence with a sufficient indicia of reliability at sentencing. Defendant's own testimony corroborated the victim statements that he took issue with, which were contained in a presentence report and the transcripts from a co-defendant's trial before the same judge. The court concluded that, "even if the victim had not been cross-examined at trial, it would still be within the district court judge's discretion, on this record, to consider the victim's testimony at sentencing." For these reasons, the appellate court held that the district court did not err when it disallowed cross-examination of the victim at defendant's resentencing. Accordingly, it affirmed the lower court's decision.

II. Federal District Courts

Patel v. United States, Crim. No. 1:17-CR-277-ELR-JCF-1, Civ. No. 1:18-CV-2952-ELR-JCF, 2019 WL 572142 (N.D. Ga. Jan. 4, 2019). Defendant, convicted of passport fraud and money laundering, sought to vacate his sentence. Defendant's conviction stemmed from his participation in a scheme in which callers posed as government agents, told their victims that the victims had an outstanding deportation order or tax debt, and threatened the victims with immediate arrest unless they agreed to pay significant amounts of money. Defendant, a "runner" in the scheme, used gift cards loaded with the victims' money to purchase money orders that were then deposited into bank accounts. He sought to vacate his sentence on the ground that his counsel was constitutionally ineffective because, *inter alia*, counsel failed to argue that it was highly prejudicial for the government to introduce victim impact statements at sentencing because defendant did not participate in, or have actual knowledge of, the telephone scam. In response to this argument, the government stated that defendant's counsel had no grounds to object to the victim impact statements because the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, and Federal Rule of Criminal Procedure 32 required that the court, probation department, and the government prosecutors actively seek out information about the impact of defendant's crimes on the victims. Additionally, the government noted that defense counsel had emphasized at sentencing the distinction between defendant's conduct and the conduct of the callers who extorted the victims by phone. The court agreed with the government that defendant could not demonstrate that some further actions on defense counsel's part would have affected the outcome of the case. For these and other reasons, the court recommended that the motion to vacate be denied.

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Andersen v. City of Chicago, No. 16 C 1963, 2019 WL 423144 (N.D. Ill. Feb. 4, 2019). Plaintiff, exonerated of murder after spending twenty-seven years in prison, sued defendant police officers, among others, for his wrongful conviction. Defendant-officers moved to compel non-party state prisoner review board to comply with a subpoena for records and to produce documents it withheld, including victim impact statements submitted to the board in response to plaintiff's clemency petitions. The board argued that the impact statements were irrelevant to plaintiff's civil rights action because they made no mention of the criminal investigation or prosecution. In response, defendant-officers argued, *inter alia*, that the statements could shed light on disputed issues; have impeachment value at trial; and provide the only means of obtaining certain information since many of the individuals who gave impact statements were now deceased. The court concluded that these relevancy arguments had merit and that the victim impact statements satisfied the threshold requirements for document production under Federal Rule of Civil Procedure 26(b)(1). In reaching this conclusion, the court rejected the board's argument that the statements should be immune from disclosure given state constitutional and statutory provisions guaranteeing crime victims "[t]he right to notice and to a hearing before a court ruling on a request for access to any of the victim's records, information, or communications which are privileged or confidential by law." The court noted that it was not required to apply these state laws when determining whether victim impact letters are privileged at the clemency stage under federal law. It then declined the board's request that it find, as a matter of comity, that the privacy interests of those who submitted victim impact letters outweighed defendant-officers' interest in discovering the documents, given their irrelevance to plaintiff's claims. The court based its denial of the board's request on two grounds: (1) its conclusion that the victim impact statements were sufficiently relevant to plaintiff's civil action; and (2) the board's failure to show that the procedural protections of notice and hearing before access create an evidentiary privilege for victim impact statements in civil cases under state law. For these and other reasons, the court granted defendant-officers' motion to compel production of the victim impact statements, subject to a confidentiality order already in place.

United States v. Allen, No. 16-10141-EFM, 2019 WL 195031 (D. Kan. Jan. 15, 2019) (slip copy). Defendants were convicted of conspiracy to use a weapon of mass destruction, conspiracy to interfere with civil rights, and obstruction of justice. They appealed on several grounds, and also filed a motion to exclude the government's submission of approximately 20 victim impact videos. The victims were residents of an apartment complex that defendants had targeted in their bomb plot. The government argued that the individuals were entitled to have their testimony heard under the Crime Victims' Rights Act (CVRA), 18 U.S.C. §3771. The court explained that the CVRA guarantees every victim of a federal crime the right to be reasonably heard at sentencing. The court further explained that a "crime victim" is defined as "a person directly and proximately harmed" by a federal crime. Defendants contested the residents' status as "victims." First, they argued the CVRA does not apply to inchoate crimes like conspiracy. The court disagreed. "The CVRA uses extraordinarily broad language—applying to any 'Federal offense'—and the statute gives no indication that conspiracies, or any other federal crime, is excluded from that definition." The court also dismissed defendants' "slippery slope" argument that their testimony would open the floodgates to anyone with any connection to the apartment complex, noting that the court would have judicial discretion should any additional victims seek to provide impact statements. Defendants further argued that the

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videos would be unduly prejudicial, pointing to the court's pretrial order excluding all residents from testifying for just that reason. However, the court did not consider that pretrial order to be of great relevance in the context of victim impact statements. "Victim impact statements have a different purpose than trial testimony, which the jury relies on in determining Defendants' guilt." Because the residents had no actual knowledge of the conspiracy, their testimony would not have been helpful at trial. However, at sentencing, the court would not be unduly influenced, and the victims are entitled to be heard. The motion to exclude the testimony was denied.

III. Military Courts

United States v. Hamilton, 78 M.J. 335 (C.A.A.F. 2019). Defendant pleaded guilty to possession and distribution of child pornography and wrongful distribution of child pornography. During sentencing, the court admitted victim impact statements offered as government exhibits and authenticated by members of law enforcement absent any indication either that the victims intended their statements to be used in this particular prosecution or that a designee was appropriate under the rule. The court explained that a victim has a right to be reasonably heard at a sentencing hearing related to the crime in which they were the victim. The court explained, however, that the right to be reasonably heard requires that the victim be contacted, given the choice to participate in a particular case, and, if they choose to make a statement, offer the statement themselves, through counsel, or through a victim's designee where appropriate. The court found that here, the statements were made through law enforcement: law enforcement officers are not victim's counsel, and no showing was made that they either were appointed or could be appointed as a victim's designee for these victims. The court continued, finding that although detectives in this case represented to the military judge that the victims generally requested that their statements be submitted in cases involving their images, such all-encompassing requests do not satisfy the procedures outlined for the introduction of victim impact statements. Furthermore, the right to be reasonably heard provided by the rule belongs to the victim, not to the trial counsel. "This is not a mechanism whereby the government may slip in evidence in aggravation that that would otherwise be prohibited by the Military Rules of Evidence, or information that does not relate to the impact from the offense of which the accused is convicted." In this case, the court concluded that trial counsel appropriated the victims' rights in order to admit the government's evidence in aggravation; therefore, the victim statements were improperly admitted. However, the court found that there was no prejudice because the admission did not substantially influence the adjudged sentence. Affirmed.

United States v. Ballard, 79 M.J. 675 (A.F. Ct. Crim. App. 2019). Defendant was convicted pursuant to his pleas and in accordance with a pretrial agreement of a number of offenses relating to the sexual assault of three child-victims over the course of many years. At the time one of the child-victims reported the abuse to her school, defendant had been retired from the Air Force for less than a week. The Acting Secretary of the Air Force, on request, approved defendant's recall to active duty so that he could be tried by court-martial. During trial, defendant conceded jurisdiction of the court-martial but requested that the military judge find he could not be sentenced to a punitive discharge or reduction in grade because he was a retiree; the military judge rejected defendant's requests, finding that punitive discharge and reduction to the grade of E-1 were authorized punishments. Defendant appealed, arguing for the first time that the court-

martial did not have jurisdiction over a retiree to bring charges arising out of conduct that occurred pre-retirement. The court of appeals disagreed, concluding that Congress acted within its constitutional authority in permitting court-martial jurisdiction of retired members of a regular component of the armed forces who are entitled to pay. Because defendant was a retired member of the regular Air Force entitled to retirement pay at the time he was recalled to active duty for purposes of facing a court-martial and because he committed all of the offenses to which he pleaded guilty while on active duty, court-martial jurisdiction was properly established. The court of appeals further declined to reduce defendant's sentence where the post-trial processing delay exceeded a presumptively unreasonable period of 120 days by 15 days to allow the child-victims and their family members to provide written impact statements and to allow defendant a full 10 days to respond to them. The findings and sentence were affirmed.

United States v. Cook, No. ACM 39367, 2019 WL 1040334 (A.F. Ct. Crim App. Mar. 4, 2019). Defendant was convicted, in accordance with his pleas, of possession of child pornography. Defendant appealed his sentence, arguing that the military judge abused his discretion when he admitted a victim impact letter from a named victim's mother when there was no evidence showing that either the victim or the victim's mother was aware of defendant's court martial. The mother's letter addressed the challenges of having to explain the process to her daughter every time her daughter's pictures were found and the hundreds of emails she received whenever her daughter was identified in a new case. The letter was accompanied by an affidavit of the lead investigator of crimes against the child victim depicted in the series in which he stated that the mother's letter was prepared in anticipation of cases like those against defendant. Under Rules of Courts-Martial 1001A, the victim of an offense of which the accused has been found guilty may make an unsworn statement and not be cross-examined. However, this statement must be made and offered with respect to a specific defendant. Here, there was no evidence that the victim was even aware of defendant or his court-martial, or that she chose to offer the statement with respect to this particular defendant. Further, the investigator's assertion that the child victim's mother wished to submit the victim impact statement was insufficient to establish that the victim personally exercised her right to be heard under 1001A. "The affidavit is essentially an attempt by the Government to assert the right on the victim's behalf." Despite the error, the court found no prejudice given the strength of the government's case and other relevant factors. Finding no prejudice, the sentence was affirmed.

United States v. LaSalle, No. ACM 38831, 2019 WL 3991102 (A.F. Ct. Crim. App. Aug. 21, 2019). The minor-victim of defendant's attempt to persuade her into sexual activity, testified at defendant's original trial, but did not do so at the rehearing on sentence. Instead, she submitted a written unsworn statement for consideration by the court at rehearing. Defendant objected to the court's consideration of her unsworn statement because Rule for Court-Marital 1001A, permitting an unsworn statement from the victim, had not yet been promulgated at the time of the original trial. The military judge overruled the objection and defendant asserted the trial judge abused his discretion. In overruling the trial defense counsel's objection at the rehearing, the military judge cited the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, as providing victims a right to be reasonably heard at sentencing. The court noted that federal courts have interpreted this right to include allowing an unsworn victim impact statement at sentencing. Finding no abuse of discretion based on the court's reliance on the CVRA, the court affirmed.

United States v. Cornelison, 78 M.J. 739 (A. Ct. Crim. App. 2019). Defendant appealed his convictions for multiple crimes, including the rape, assault and battery of the victim. On appeal, defendant challenged the form and substance of the victim's statement during a presentencing proceeding. During this proceeding, the victim gave an unsworn statement in question-and-answer format prior to the close of the government's case. The government's counsel conducted the questioning of the victim. On appeal, defendant argued, *inter alia*, that: (1) the victim's unsworn statement was improperly included as part of the government's presentencing case and that the court-martial, not the government, should have called on the victim to make her statement; and (2) the trial court erred in allowing the trial counsel to participate in the victim's unsworn statement. In analyzing the first argument, the court noted that a victim's right to give an unsworn statement under Courts-Martial Rule 1001A is independent of the rule-based right of the government and the defense to call the same victim to testify. The court explained that, although Rule 1001A is not clear as to when a victim may exercise this independent right to be heard, case law provides that the victim should give an impact statement between the prosecution's and defense counsel's respective presentencing cases. The appellate court concluded that defendant was technically correct that the court-martial, not the government, should have called the victim; nonetheless, as a practical matter, the court held that the timing of the victim's testimony did not prejudice defendant. With respect to defendant's second argument, the court found that Rule 1001A does not contemplate either trial counsel or defense counsel participating in a victim's unsworn statement through a question-and-answer exchange. Relying on an earlier court decision, the appellate court stated that, the victim's right to be heard under 1001A "belongs to the victim, and is separate and distinct from the government's right to offer victim impact statements in aggravation." It concluded that although a military judge may allow a victim to give an unsworn statement in a question-and-answer format, Rule 1001A "requires that the victim's own counsel—not the trial counsel, defense counsel, or the court-martial—be the individual who asks the victim such questions." Although the appellate court found that the lower court erred when it allowed the prosecution to participate in the victim's statement, it again found that defendant failed to demonstrate that this technical violation of Rule 1001A caused him any material prejudice. For these and other reasons, the court affirmed defendant's convictions.

United States v. Marasco, No. 201800213, 2019 WL 333589 (N-M. Ct. Crim. App. Jan. 25, 2019). Defendant appealed multiple convictions related to his sexual assault of the victim on the ground that, *inter alia*, the victim's impact statement contained inadmissible comments. When considering defendant's appeal, the court noted that the rules for courts-martial guarantee crime victims the right to be reasonably heard at sentencing. Under these rules, the content of the statement may include any financial, social, psychological or medical impact on the victim that is directly related to or arising from the crimes of conviction. Upon reviewing the victim's statement, the court concluded that the statement was "unquestionably emotional" as it recounted the victim's feeling on the night defendant attacked her and how the attack changed her life, but that none of it violated the rules governing victim impact statements. The court found that the challenged portions of the statement, such as Bible quotations, were, at worst, "irrelevancies and [the court] trust[s] that the military judge gave them no weight." For this and other reasons, it affirmed the lower court's findings and sentence.

IV. State Courts

Graham v. State, 440 P.3d 309 (Alaska Ct. App. 2019). Defendant, convicted of murdering two teenage girls, appealed his sentence on the ground that it was excessive. The court of appeals found four legal errors in the sentencing judge's analysis of the case and remanded the case for re-sentencing. It also found that, given certain aspects of the sentencing proceeding, the original trial court judge should not preside over the proceedings on remand. The appellate court first took issue with the sentencing judge's decision to allow the victims' families to supplement their oral statements with DVDs containing photographic montages of the victims, set to music. Finding that the delivery of victim impact statements in this manner was "almost guaranteed to heighten the emotions of everyone in the courtroom—including the judge," the court of appeals concluded that such videos were not an aspect of the families' right to make a victim impact statement. Acknowledging that victims are entitled to use technology in presenting their statements, the court found that the "videos in this case differed from the norm" because it was unclear how the content was relevant to the judge's evaluation of the proper sentence and the musical accompaniment enhanced the emotional response engendered by childhood photographs. The appellate court also took issue with the lower court's decision to allow two police officers and an attorney from the Office of Victims' Rights to deliver victim impact statements, as per the requests of the victims' families. Without explaining why the officers and attorney could not speak on behalf of the deceased victims under the statute governing victim impact statements, the court found that the content of their statements improperly played on the judge's emotions. The appellate court also expressed concern with the judge's sentencing remarks, which suggested that retribution was "one of the judge's motivations for imposing an unprecedented sentence in [defendant's case]". Ultimately, the court of appeals found that the lower court's decision appeared to have been influenced by the principle of retribution, which was not permissible under state law. It concluded, therefore, that a different judge should handle defendant's resentencing.

Taylor v. State, 264 So. 3d 1135 (Fla. Dist. Ct. App. 2019). Defendant was convicted of aggravated assault with a deadly weapon. He appealed, arguing that accepting the victim's unsworn statement at sentencing was fundamental error. During the sentencing, the victim, who was in the courtroom, was emotionally unable to verbally address the court. In lieu of testimony, the state offered the victim's unsworn written statement and other documents. Defense counsel did not object to the admission of the statement, but asked to cross-examine the victim about the statement. On appeal, the court found there to be no fundamental error, stating "[i]t is debatable whether a court's acceptance of an unsworn witness statement is error at all" given a current conflict between Florida's first and second district. Because defendant did not preserve the argument that a court's consideration of an unsworn witness statement is error, the court did not decide which district's opinion was persuasive. The court also found that even if there were error, it did not rise to the level of fundamental error: "Here, it is not apparent from the record that the circuit court relied on the victim's unsworn statement in sentencing the defendant to prison, rather than to probation as the defendant requested. The circuit court just as easily could have relied on victim's wife's testimony at the sentencing hearing, which also discussed the victim's injuries and trauma from the assault. Or the trial court could have relied upon the very violent

nature of the assault itself. Additionally, the three-year sentence was well within the court's discretion to impose and less than the maximum of five years allowed by statute and recommended by the state." The sentence was affirmed.

People v. Olson, 126 N.E.3d 765 (Ill. App. Ct. 2019). Defendant appealed orders revoking his probation and sentencing him to six years' imprisonment for aggravated domestic battery. He contended that the trial court erred in refusing to allow the victim to withdraw her written victim impact statement. The court explained that the state's Rights of Crime Victims and Witnesses Act gives a victim the right to present an oral or written victim impact statement; however, the Act is not a basis for appellate relief for a defendant. The court found therefore that defendant lacked standing to complain about it. The court further found that there is no provision in the Act for withdrawing a victim impact statement once it has been given. Here, the court allowed the victim to speak freely at the second sentencing hearing and to explain the changes from the prior written statement. The court concluded that the Act requires nothing more. The court also concluded that although the victim may recommend a sentence, the ultimate decision belongs to the trial court. Moreover, as the court noted, the ordinary rules of evidence are relaxed during sentencing, and as long as the evidence is relevant and reliable, the court may rely on evidence in aggravation or mitigation. Thus, the court was entitled to rely on the victim's assertions in her earlier written statement. Defendant further argued that the court erred in refusing to consider the nonstatutory mitigating factor that the victim wished defendant to receive probation. The court found that the lower court carefully balanced the aggravating and mitigating factors, including the victim's change in position, and concluded that a prison sentence was necessary to protect the victim and her daughter, as well as to deter others from committing similar offenses. Affirmed.

Keene v. State, 118 N.E.3d 801 (Ind. Ct. App. 2019). Defendant appealed the denial of his petition to expunge a stalking conviction, arguing that his due process rights were violated when the trial court admitted into evidence a letter written by the victim, defendant's ex-wife, because he did not have the opportunity to cross-examine her. In reviewing defendant's claim, the court looked to the state's expungement statute, which explicitly provides that victims of the offense may submit a statement in support of or in opposition to the petition. The court found that the statute contemplates the submission of a victim's written statement with no accompanying requirement that the victim be present for cross-examination; as such, the lower court's decision comported with the statute's plain language. The court next considered whether the right to confrontation under the United States and Indiana Constitutions extends to expungement proceedings, which it concluded were civil in nature, but looked for guidance in case law discussing victim impact statements in the context of criminal sentencing. From this case law, it found that defendants do not have a right to cross-examine a victim who has provided a victim impact statement at sentencing. It went on to state that the purpose of victim impact statements in expungement proceedings is the same as that in criminal proceedings: to guarantee that the victim's interests are fully and effectively represented when the trial court makes its decision. The court then noted that, although individuals have a significant interest in seeking expungement, that interest does not approach the interest of a criminal defendant whose liberty is at stake at sentencing. As such, it concluded that expungement petitioners do not have the right to cross-examine victims who provide victim statements as authorized by statute. For these

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reasons, the court concluded that the expungement statute was neither unconstitutional on its face nor as applied. It affirmed the trial court's denial of defendant's expungement petition accordingly.

State v. Hintze, No. 18-1418, 2019 WL 1056082 (Iowa Ct. App. Mar. 6, 2019). Defendant appealed following his conviction for extortion, claiming that the court abused its discretion when it permitted the victim's mother to provide a victim impact statement after the victim died under unrelated circumstances. The court explained that during her testimony, the victim's mother mentioned unproven or unprosecuted offenses against defendant. The court found that the victim's mother did not fall within the statutory definition of victim and that "[t]he authority to submit victim impact statements is wholly statutory and limited to specific persons." The court noted, however, that even if a party has no standing to provide a victim statement, it does not require vacation of the sentence unless prejudice results. However, a district court may not consider unproven or unprosecuted offenses in sentencing a defendant unless the facts before the court reveal that the defendant committed the offense, or the defendant admits it. The court concluded in this case that "[t]he mother's statement was hostile, bitter, and exhibited a desire for retribution" against defendant. The court also concluded that the statement introduced facts not otherwise in the record and included serious allegations that mirrored defendant's prior offenses. Accordingly, the court held that the mother's statement resulted in the introduction of prejudicial information into the sentencing court's consideration in that she introduced facts and unproven crimes outside the record of the plea. The sentence was vacated and remanded for resentencing before a different judge.

People v. Bell, No. 341392, 2019 WL 845835 (Mich. Ct. App. Feb. 21, 2019) (per curiam). Defendant appealed his convictions for manslaughter and other crimes, arguing, *inter alia*, that the trial court violated his right to be sentenced based on accurate information when it considered the oral victim impact statement of the victim's mother, which included unproven allegations against defendant. Defendant did not challenge the accuracy of the mother's victim impact statement contained in a presentence investigation report. In reviewing defendant's appeal, the court acknowledged that the information contained in the oral impact statement went beyond describing the impact of defendant's conduct. It found the oral nature of the impact statement was critical to its resolution of the case, however: "This Court's concerns about the accuracy of presentence investigation reports stem from the fact that 'the presentence report follows the defendant to prison; it may have ramifications for purposes of security classification or parole consideration when appropriate.' Oral impact statements do not implicate these concerns." The appellate court went on to find that, even if the trial court had improperly considered the allegations made by the victim's mother at the sentencing hearing, the error was harmless and did not warrant remanding the case to the trial court for resentencing. For this and other reasons, it affirmed the lower court.

Shockley v. State, 579 S.W.3d 881 (Mo. 2019) (en banc). Defendant moved for post-conviction relief following his conviction for first-degree murder. In relevant part, he argued that the court erred in denying his claim that trial counsel were ineffective for failing to object to victim impact evidence exhibits admitted during the penalty phase, which included a funeral casket photograph, a video montage shown at the victim's funeral, and a drawing by the victim's son depicting

defendant shooting the victim. He argued that the exhibits individually and collectively were so inflammatory they injected passion, prejudice and arbitrariness into the penalty phase. On appeal, defendant's attorney stated that he did not object to the evidence for a variety of strategic reasons. Defendant pointed to a New Jersey opinion in which the court found that it was ineffective assistance of counsel when the defendant's attorney failed to object to the admission of a 17-minute video montage. In this case, in contrast, the video montage was only four minutes, and focused on relatively uninflammatory images such as pictures of the victim from childhood through adulthood. "While there are some similarities to the videos in [the New Jersey case], the victim's video was significantly shorter, not produced professionally, and did not contain photographs of the victim's headstone, poems, a variety of music, or television news coverage." Accordingly, the court declined to follow the New Jersey case. Rather, the court agreed that the attorney gave strategic reasons for not objecting to the victim impact evidence presented during the penalty phase. Moreover, defendant could not demonstrate the outcome of the trial would have been different had his counsel objected. The court found no clear error.

Piagentini v. N.Y. State Bd. of Parole, 176 A.D.3d 138 (N.Y. App. Div. 2019). Defendant in the underlying criminal proceeding was convicted of two counts of murder for the deaths of two police officers and was sentenced to two prison terms of 25 years to life, to run concurrently. Between 2004 and 2016, defendant in the underlying criminal case appeared before the Board of Parole seven times, with each appearance resulting in the denial of parole. In anticipation of the eighth appearance, petitioner—the widow of one of the deceased police officers—submitted a victim impact statement to the Board of Parole. Following the eighth parole proceeding, defendant in the underlying criminal proceeding was granted release on parole supervision. Shortly after issuing its decision, the Board of Parole discovered documents that had not been reviewed and issued an amended decision reflecting that they had been reviewed. The victim-petitioner sent the Board of Parole letters asking it to suspend the release and conduct a rescission hearing, and when the Board of Parole did not reply, an Article 78 proceeding was commenced, seeking to compel the Board of Parole to vacate its release decision and conduct a new hearing. The initial filings alleged that the Board of Parole failed to consider the petitioner-victim's impact statement, but after learning through answering papers that the Board of Parole in fact reviewed the statement, the petitioner argued instead that the Board of Parole "virtually ignored" the statement and that the Board of Parole's decision demonstrated "irrationality bordering on impropriety." The court dismissed the petition due to petitioner's lack of standing and also concluded that the petition would fail on its merits, even had standing been found, and petitioner appealed the ruling and dismissal. Two judges of the appellate division concluded that the victim-petitioner lacked standing to challenge the ultimate determination of the Board of Parole, finding that the victim's right to provide an impact statement does not "allow victims to control the criminal process or collateral proceedings" and holding that "[a]s the inmate/parolee and the Board are the only parties to parole determination, and the Board cannot challenge its own determination, the inmate/parolee is the only person with standing to challenge the substantive determination regarding parole. . . . By analogy to criminal actions, crime victims are not parties to parole proceedings and do not have standing to challenge parole determinations." The appellate division concluded that the legislature "did not envision the possibility of challenges being raised to determinations granting parole" and surmised that, instead, "the Board's functioning as a whole is balanced by, and will be tempered by, the power of the

Governor to appoint and the Senate to confirm Board members." In a concurring opinion, one judge found that the victim-petitioner satisfied the tripartite test for standing with respect to her right that the Board of Parole consider her victim impact statement, to "assure that the Board has in fact considered her victim impact statement. To hold otherwise, would shield a Board decision that actually disregarded the submission of a victim's representative from judicial review — a consequence that should not and need not be tolerated." In this case, however, the concurring judge determined that the Board of Parole considered the victim impact statement. Consequently, the concurring judge concluded that the petition was properly dismissed and concurred in the result. In a dissenting opinion, one judge agreed that although a "crime victim does not have standing to challenge the ultimate decision of respondent Board of Parole . . . to grant or deny parole," the victim has standing to assert a violation of her right to have the Board consider her statement. The dissenting judge found that the only impact statement mentioned by the Board was from one of the victims' family members that favored granting parole and "made no reference to petitioner's victim impact statement that opposed it." The dissenting judge found the reference to an impact statement reflecting one viewpoint regarding release while failing to reference an impact reflecting another to be "arbitrary and capricious" and would remand to the Board of Parole to reopen the hearing for the purpose of addressing the petitioner's victim impact statement.

State v. Taft, No. H-18-003, 2019 WL 1869120 (Ohio Ct. App. Apr. 26, 2019) (slip copy). Defendant was indicted on five counts of rape and sexual battery against a minor. Defendant reached a plea agreement based on his guilty plea to two counts of sexual battery. During sentencing, the court heard the witness statement written by the victim, age 16, through the victim's "big sister" from a youth outreach program. On appeal, defendant argued that the court erred by denying him his due process right to examine witnesses during sentencing because the court allowed a third party to read the victim's hearsay statements, which included statements regarding additional criminal conduct by defendant. The court explained that a victim of a crime has a right to make a statement to the court prior to it imposing sentence on the defendant; that the victim may do so through a representative; and that the designated representative can exercise the rights of the victim. Therefore, if the victim chooses to make a statement at sentencing, the trial court is required to consider the statement along with all other sentencing considerations. Although the statute at issue provides that victim impact statements may present information relevant to the imposition of sentence in the case, the statute does not expressly limit the content of the statement—it only sets forth what the court is required to consider. Other information is not forbidden by statute. The court further described that relevant information can include facts relating to charges in the same case that were dismissed. For these reasons, the court held that the trial court properly allowed the victim's "big sister" to read the letter that the victim wrote; the victim had the right to make a statement at sentencing and was statutorily permitted to designate someone else to speak to the court on her behalf. The court further held that the content of the statement was proper because the victim's descriptions of defendant's crimes were related to the charges that the state dismissed in exchange for defendant's guilty pleas, and nothing in the plea agreement prevented the court from considering the dismissed charges at sentencing. Accordingly, the court found no error. Affirmed.

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Commonwealth v. Frein, 206 A.3d 1049 (Pa. 2019). Defendant was convicted of first-degree murder and sentenced to death. On appeal, he argued, in relevant part, that the admission of extensive victim impact evidence was prejudicial and implicated his right to due process and the prohibition against cruel and unusual punishment. The Pennsylvania Sentencing Code permits the introduction of two types of victim impact evidence during the penalty phase of a capital trial: evidence about the victim and evidence regarding the impact that the death of the victim had on the family. The court explained that the admission of victim impact evidence is within the sound discretion of the trial court, which must balance the evidentiary value of the evidence against the potential dangers of unfairly prejudicing the accused, inflaming the passions of the jury, or confusing the jury. The court noted that in this case the state introduced victim impact evidence, including testimony from the victim's wife, through which images of the victim were introduced; a video of the victim graduating from the state police academy; and testimony from several colleagues and family members. On appeal, the court stated that "[w]ithout question, the victim impact evidence admitted by the trial court in the instant case was extensive, arguably unnecessarily so." Nevertheless, the court found no error because the jury found several aggravating factors, but no mitigating factors, in reaching its verdict. Pursuant to Pennsylvania law, a jury is only to consider victim impact evidence if both mitigating and aggravating circumstances are found. Having failed to show that the jury considered the victim impact evidence, the defendant failed to establish a basis for relief. Notwithstanding, defendant maintained that the victim impact evidence was so overwhelming that it amounted to an additional super aggravating circumstance that violated his due process and Eighth Amendment rights. The court rejected this argument, citing to prior decisions in which the court had rejected similar arguments. Affirmed.

Commonwealth v. Eldred, 207 A.3d 404 (Pa. Super. Ct. 2019). Defendant, convicted of several sex crimes against the minor-victim, moved to modify his sentence and to subject the victim to examination at the hearing on that motion. After the trial court denied this motion, defendant appealed. On appeal, defendant argued, *inter alia*, that the trial court should not have found the victim's impact statement to be credible. In the statement, the victim stated that defendant's criminal conduct against her had caused her emotional distress and made her unable to form romantic attachments. Defendant argued that the victim's subsequent pregnancy by her boyfriend was proof that she exaggerated the emotional impact of his sexual abuse and that his sentence should be reduced accordingly. Defendant's filing failed to comply with certain procedural requirements; the court held this failure to be fatal to his appeal. Even if defendant had properly preserved his claims for review, the court found that their lack of merit would preclude relief. In reaching this conclusion, the court noted that although "the law is not entirely clear as to the precise scope of rights a defendant has to rebut an impact statement, there is no constitutional or evidentiary basis for relief under the circumstances of this case." The court further noted that defendant conceded that "there is no rule, case or statute that specifically contemplates that by submitting an impact statement, a victim is subject to questioning at a sentencing hearing." The court went on to explain that, in the context of sentencing, due process includes the ability of a defendant to rebut the evidence against him, but it "does not include the ability to cross-examine adverse witnesses post-trial because the Sixth Amendment to the United States Constitution 'does not apply in sentencing hearings.'" Despite the sentencing court's decision to preclude the victim's cross-examination as to her impact statement, it stipulated that

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the victim was pregnant on the date of the sentence modification hearing. Although defendant sought to establish at the hearing that the victim was pregnant at the time she wrote her impact statement, the trial court reasoned that this fact, even if true, was irrelevant for the purposes of sentencing because "[a]ll of the things that she advised the Court of how her life was affected by this crime, by this sex crime against a minor, does not necessarily mean that any of that was untrue because she's now pregnant. One doesn't equal the other." Given the leeway defendant received and the irrelevance of the evidence he sought to elicit, the appellate court concluded that he "had sufficient opportunity to rebut the victim's impact statement, meaning that his due process rights were not violated." For these reasons, the court affirmed defendant's sentence.

State v. Shoemaker, 7 Wash. App. 2d 1007 (Wash. Ct App. 2019). Defendant appealed the standard range sentence imposed after her plea of guilty to burglary and theft. She contended that the trial court denied her request for a drug offender sentencing alternative after improperly considering adjudicative factual information from victim representatives. Alternatively, she contended that her trial lawyer provided ineffective assistance of counsel when he failed to object to that information. The court explained that Washington's Constitution grants certain "basic and fundamental rights" to victims of crime, including the right to "attend trial and all other court proceeding the defendant has the right to attend, and to make a statement at sentencing . . . subject to the same rules of procedure which govern the defendant's rights." If the victim is unavailable the prosecutor may identify a representative to exercise the victim's right. A corollary provision requires the sentencing court to consider arguments from the victim as to the sentence to be imposed. This information must be considered in sentencing. The court held that, since no constitutional impediment had been shown, "a victim making a statement at sentencing has as much right to present evidence as do other participants." The court further explained that evidentiary rules do not apply to a sentencing hearing, and a sentencing judge is not limited to consideration of facts that would be admissible at trial. The court found that here, there was no reason to find the information presented by the victim representative to be any less reliable than the information the court sought or received from others during the sentencing hearing. Further, defendant raised no objection to the information provided at the time of the hearing, and did not request a separate evidentiary hearing. The court thus found no error. The court further found that defendant did not demonstrate that that her counsel's failure to object to the information provided by the victim representatives amounted to deficient representation, or that she was prejudiced by the admission. Affirmed.

<u>Victims' Rights in Habeas Corpus Proceedings</u>

I. Federal District Courts

Armstrong v. Ryan, No. CV-15-00358-TUC-RM, 2019 WL 1254653 (D. Ariz. Mar. 19, 2019). Defendant-petitioner was convicted in state court of murdering his sister and her fiancé and received a death sentence. His convictions were affirmed on appeal, and he filed a writ of habeas corpus in federal court. As part of the habeas proceedings, defendant-petitioner filed a motion with the district court seeking access to certain victim-family members. Defendant-petitioner argued that the state statute granting victims the right to refuse to be interviewed by the defendant did not apply to the federal habeas proceedings directly or through the adoption of its

specific limitations under the federal Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771. The court granted defendant-petitioner's motion and the government filed a motion for reconsideration, which was joined by the victims. In analyzing the motion to reconsider, the court observed that respondents relied upon the same cases that they had relied upon in earlier briefs and that the court had previously found distinguishable. As the court had noted before, "no prior District of Arizona case addressing the victim contact issue presented 'the complex factual issues alleged here: that the victims in the case are also family members who represent a potentially untapped and primary source of mitigation to which [p]etitioner was denied access by application of state law, and that [p]etitioner has now been informed that [p]etitioner's mother refuses to receive correspondence from [p]etitioner's defense team during federal habeas proceedings.'" The court then reiterated its earlier conclusions on the matter, including that the CVRA did not, formally or informally, require the enforcement of the victims' state statutory rights in federal habeas proceedings. It also observed that the victims did not have "a right to directly file, or join in [r]espondent's filing, in this habeas proceeding." The court further explained that while the victims may assert their rights under the CVRA, their motion in this instance did not "assert or ask for enforcement of a specific right under the CVRA. Nonetheless, the [c]ourt recognizes that it is the [c]ourt's duty to ensure victims' rights under the CVRA are protected in this habeas proceeding." It concluded that its earlier holding "does not mean that defense counsel's conduct toward victims in this case is without constraint. The CVRA establishes 'the right to be treated with fairness and with respect for the victim's dignity and privacy.' The Court expects all counsel in this case to comply with the protections provided by the CVRA." For all of these reasons, the court denied the motion for reconsideration.

Africa v. Oliver, No. 18-4235; 18-4236, 2019 WL 95455 (E.D. Pa. Jan. 2, 2019) (slip copy). Defendant-petitioners filed actions under 28 U.S.C. § 2254 asserting that decisions of the Pennsylvania Board of Probation and Parole to deny them parole violated their substantive due process rights. During the parole process, the parole board voluntarily produced to defendant-petitioners most of the documents contained in their files, but withheld the letters and statements of victims collected by the victim advocate regarding the defendant-petitioners. Before the court were defendant-petitioners' motions to compel discovery. The court explained that the rules governing habeas cases permits courts to authorize discovery in habeas corpus proceedings for good cause; good cause is demonstrated when specific allegations before the court show reason to believe that the defendant-petitioners may, if the facts are fully developed, be able to demonstrate that they are entitled to relief. The court concluded that good cause existed for discovery of records from the Office of the Victim Advocate. The court found that this information would permit defendant-petitioners to investigate the extent to which any input from the victims influenced the parole board's decisions. The court further found that it may also inform whether the parole board's decisions were arbitrary and whether the justifications provided by the parole board in its notices of decision were pretext. The parole board contended that the documents should not be subject to production because they were protected under Pennsylvania law, in particular the section of Pennsylvania's Constitution that provides that certain information victims provide to the board shall not be released to the inmate. However, the court concluded that defendant-petitioners in this case asserted a violation of their federal constitutional rights, and thus any state law privileges were not applicable. The court then concluded that a protective order would be sufficient to protect the rights of the victims while

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allowing for discovery of potentially relevant information. Accordingly, the motions to compel production of the Office of Victim Advocate documents were granted subject to a protective order.

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