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- Before relying on any case summary, an attorney must independently review and analyze the case, including any subsequent history.

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## I. SPECIFIC VICTIMS' RIGHTS

### A. Right to Courtroom Accommodations

*Hibbs v. State*, 683 S.E.2d 329 (Ga. Ct. App. 2009). Defendant was convicted of three counts of aggravated child molestation. He appealed, arguing that allowing the victim to testify via video violated his Sixth Amendment right to confrontation because he was not allowed to cross-examine the victim about (1) the juvenile charges pending against the victim; and (2) the fact that the victim was in juvenile custody at the time he gave his testimony. The court overturned defendant's conviction on Sixth Amendment grounds. It found that, while the state had an interest in maintaining the confidentiality of juvenile proceedings, this interest was outweighed by defendant's Sixth Amendment right to confrontation. Here, the court found that this right was violated because defendant's right to cross-examine was limited when he was not allowed to ask about the victim's "juvenile status," which could potentially have shown that the victim slanted his testimony in favor of the state so as to obtain more favorable treatment in his own case.

### B. Right to Due Process, Fairness, Dignity, and Respect

*United States v. Pinke*, No. 09-01-01-JSS, 2009 WL 4432669 (E.D. Ky. Dec. 2, 2009) (slip copy). In a case involving a prisoner-on-prisoner stabbing, defendant sought to compel the victim to testify regarding whether the victim thought defendant "was trying to murder him." The government objected, contending, *inter alia*, that defendant's ability to compel the victim's testimony was limited by the victims' rights under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, "to be reasonably protected from the accused" and "to be treated with fairness and respect for the victim's dignity and privacy." The court rejected this argument, stating that "[t]o the extent § 3771 might allow a victim to avoid testifying in

a criminal trial—no court opinion to [this court’s] knowledge has considered the possibility—that right must yield to defendant’s right to compel the testimony of witnesses in his favor.” The court further noted that the question was “. . . less about what § 3771 requires and more about whether the Rules of Evidence permit the compelled testimony.” Upon analyzing Federal Rule of Evidence 701, the court sustained the government’s objection to compelling the victim to testify. Noting, *inter alia*, that a clear video depiction of the entire assault was already before the jury, the court found that the victim’s lay opinion as to defendant’s state of mind would not necessarily be helpful to the jury in forming a sound basis for an opinion of defendant’s intent.

*In re Raheem v. N.Y. State Bd. of Parole*, 66 A.D.3d 1270 (N.Y. App. Div. 2009). Petitioner was granted parole after serving thirty-four years of his sentence for multiple convictions arising out of a robbery that involved hostages and the murder of a police officer. After being notified of petitioner’s impending release, a number of the victims of petitioner’s crimes were granted an opportunity to give victim impact statements. Two of the hostages, one of the injured police officers, and members of the slain officer’s family gave statements describing the effect of petitioner’s crimes upon their lives. Subsequently, the parole board scheduled a hearing to consider whether to rescind its grant of parole, citing the victim impact information as the basis for the hearing. Petitioner sought a writ of prohibition to stop the parole board from holding the rescission hearing, arguing that the parole board exceeded its jurisdiction in initiating rescission proceedings. The trial court dismissed petitioner’s application and petitioner appealed, arguing that the law authorizing the rescission of a parole release based upon “significant information, which existed . . . where such information was not known by the [parole] board” did not apply because the information was not new information—the parole board could have anticipated the impact of the crimes on the victims. The court found this argument meritless, noting that because the victims had never been personally interviewed by the probation department and none of the victims had previously submitted any victim impact statements, “[the victims] actual subjective experience is clearly significant information previously unknown to [the parole board].” Petitioner also argued that the parole board acted outside of its statutory and regulatory authority in holding victim

impact hearings after a parole determination was made. The court rejected this argument as well, finding that state law does not require that victim impact statements be submitted prior to the parole determination to be considered, and, while the relevant law regarding victim impact statements contemplates that such statements will precede parole determinations, it also provides that “[the parole board] may waive any filing deadlines or other limitations on the victims’ right to be heard so as to ‘ensur[e] that crime victims are treated with fairness, sensitivity, and dignity.’” The court found that because the relevant laws “are intended to facilitate the right of victims to be heard, limited only by practical considerations, they should not be interpreted so as to preclude victims from exercising the rights that they are meant to promote.” The court then held that inasmuch as the board did not exceed its jurisdiction, the trial court properly denied petitioner’s request for a writ of prohibition.

*Commonwealth v. Boich*, 982 A.2d 102 (Pa. Super. Ct. 2009). The Commonwealth of Pennsylvania appealed from a court order requiring the victim to submit to an involuntary psychiatric examination for purposes of determining her competency to testify at trial. Defendant’s motion to require the examination was based primarily on the victim’s inability to remember certain details of, and her use of substances during, the evening in question. On appeal, the court reversed the ruling and remanded for further proceedings, finding that “a court ought not to order an involuntary psychiatric examination of a witness unless the record unequivocally demonstrates a compelling need for the examination.” The court determined that defendant had not established a “compelling need” for the examination because he attacked the victim’s credibility, but did not address her competency. The court further noted that “[a]ny attempt to ‘dig up’ potential past emotional disturbances through an intrusive psychiatric evaluation, where the record does not indicate that [the victim] suffers from a diagnosed mental condition, is contrary to the purpose of court-ordered psychiatric examinations and will likely only further embarrass and harass the victim.”

*State v. Worthen*, Nos. 20080128, 20080163, --- P.3d ---, 2009 WL 4573714 (Utah Dec. 8, 2009). Defendant, charged with ten counts of aggravated sexual abuse of his adopted daughter, moved for an in camera inspection of the victim’s mental health records under an exception to the psychotherapist-patient privilege,

which allows access to otherwise privileged records when a party's physical, mental, or emotional condition is an element of any claim or defense. The district court granted the motion, and the state appealed. After the court of appeals affirmed the lower court decision, the state and the guardian ad litem representing the victim successfully petitioned for certiorari review. One issue raised in the guardian ad litem's petition and addressed by the court was whether the court of appeals erred by failing to consider the state's constitutional and statutory victims' rights provisions when rendering its decision. Amici curiae filed a brief addressing this issue in which they argued that, in affirming the trial court, the court of appeals failed to meet its general obligation to ensure the fair administration of justice and its specific obligations to victims under state law. The supreme court recently affirmed the court of appeals without ruling on whether the lower court had erred in failing to take Utah's victim's rights protections into account when considering an exception to the victim's psychotherapist-patient privilege. The court stated that it would not decide the issue because the statutory provision under which appellate courts are obligated to consider all arguments relating to victims' rights was not triggered because nothing in the record indicated that the trial court's adverse ruling had been appealed on victims' rights grounds. Nevertheless, the court discussed briefly the arguments raised in the guardian ad litem's and amici curiae's briefs, concluding that victims' rights would "support considerable policy-based arguments for supporting evidentiary privileges," but that even such strong policy considerations could not mandate analysis by the court of appeals where the issue had not been properly preserved for appellate review.

### C. Right to be Heard

*United States v. McElroy*, No. 09-11810, 2009 WL 3807157 (11th Cir. Nov. 16, 2009) (slip copy). Defendant was sentenced to 20 years in prison following his conviction for two counts of receiving child pornography. He challenged his sentence on numerous grounds, including that the government's introduction of nine victim impact statements under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, was improper because it had not been established that they were "victims" of his crime. Specifically, he argued that the children in the images found on his computers were not directly and proximately harmed by his conduct because they were victims of the

creation of the pornography depicting them, not victims of his receipt and distribution of the images. The court rejected this argument and affirmed the sentence. In reaching this decision, the court found that the children were "victims" for the purposes of the CVRA because "the distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children, and the harm to the child is exacerbated by this circulation." The court concluded that, as "victims" under the CVRA, the victims had a right to be heard at sentencing pursuant to the statute.

*In re Raheem v. N.Y. State Bd. of Parole*, 66 A.D.3d 1270 (N.Y. App. Div. 2009). Petitioner was granted parole after serving thirty-four years of his sentence for multiple convictions arising out of a robbery that involved hostages and the murder of a police officer. After being notified of petitioner's impending release, a number of the victims of petitioner's crimes were granted an opportunity to give victim impact statements. Two of the hostages, one of the injured police officers, and members of the slain officer's family gave statements describing the effect of petitioner's crimes upon their lives. Subsequently, the parole board scheduled a hearing to consider whether to rescind its grant of parole, citing the victim impact information as the basis for the hearing. Petitioner sought a writ of prohibition to stop the parole board from holding the rescission hearing, arguing that the parole board exceeded its jurisdiction in initiating rescission proceedings. The trial court dismissed petitioner's application and petitioner appealed, arguing that the law authorizing the rescission of a parole release based upon "significant information, which existed . . . where such information was not known by the [parole] board" did not apply because the information was not new information—the parole board could have anticipated the impact of the crimes on the victims. The court found this argument meritless, noting that because the victims had never been personally interviewed by the probation department and none of the victims had previously submitted any victim impact statements, "[the victims] actual subjective experience is clearly significant information previously unknown to [the parole board]." Petitioner also argued that the parole board acted outside of its statutory and regulatory authority in holding victim impact hearings after a parole determination was made. The court rejected this argument as well, finding that state law does not require that victim impact statements be submitted prior to the parole determination to be

considered, and, while the relevant law regarding victim impact statements contemplates that such statements will precede parole determinations, it also provides that “[the parole board] may waive any filing deadlines or other limitations on the victims’ right to be heard so as to ‘ensur[e] that crime victims are treated with fairness, sensitivity, and dignity.’” The court found that because the relevant laws “are intended to facilitate the right of victims to be heard, limited only by practical considerations, they should not be interpreted so as to preclude victims from exercising the rights that they are meant to promote.” The court then held that inasmuch as the board did not exceed its jurisdiction, the trial court properly denied petitioner’s request for a writ of prohibition.

#### D. Right to Notice

*United States v. Freedman*, No. 5:08CR335, 2009 WL 3784961 (N.D. Ohio Nov. 10, 2009) (slip copy). In a mail fraud case involving approximately 19,000 victims, the government moved to provide notice to the victims by publication or news release. Finding that the number of crime victims in the case made it impracticable to accord them all the rights guaranteed by the Crime Victims’ Rights Act (CVRA), 18 U.S.C. § 3771, the court granted the government’s motion. In reaching this decision, the court noted that the government’s proposal to give notice via the Sun, the Globe, the National Examiner, and the National Enquirer was a “reasonable procedure” that would give effect to the CVRA without unduly complicating or prolonging the proceedings because those publications were “representative of the market from which a large victim population was contacted in this case.”

*In re Raheem v. N.Y. State Bd. of Parole*, 66 A.D.3d 1270 (N.Y. App. Div. 2009). Petitioner was granted parole after serving thirty-four years of his sentence for multiple convictions arising out of a robbery that involved hostages and the murder of a police officer. After being notified of petitioner’s impending release, a number of the victims of petitioner’s crimes were granted an opportunity to give victim impact statements. Two of the hostages, one of the injured police officers, and members of the slain officer’s family gave statements describing the effect of petitioner’s crimes upon their lives. Subsequently, the parole board scheduled a hearing to consider whether to rescind its grant of parole, citing the victim impact information as the basis for the hearing. Petitioner

sought a writ of prohibition to stop the parole board from holding the rescission hearing, arguing that the parole board exceeded its jurisdiction in initiating rescission proceedings. The trial court dismissed petitioner’s application and petitioner appealed, arguing that the law authorizing the rescission of a parole release based upon “significant information, which existed . . . where such information was not known by the [parole] board” did not apply because the information was not new information—the parole board could have anticipated the impact of the crimes on the victims. The court found this argument meritless, noting that because the victims had never been personally interviewed by the probation department and none of the victims had previously submitted any victim impact statements, “[the victims] actual subjective experience is clearly significant information previously unknown to [the parole board].” Petitioner also argued that the parole board acted outside of its statutory and regulatory authority in holding victim impact hearings after a parole determination was made. The court rejected this argument as well, finding that state law does not require that victim impact statements be submitted prior to the parole determination to be considered, and, while the relevant law regarding victim impact statements contemplates that such statements will precede parole determinations, it also provides that “[the parole board] may waive any filing deadlines or other limitations on the victims’ right to be heard so as to ‘ensur[e] that crime victims are treated with fairness, sensitivity, and dignity.’” The court found that because the relevant laws “are intended to facilitate the right of victims to be heard, limited only by practical considerations, they should not be interpreted so as to preclude victims from exercising the rights that they are meant to promote.” The court then held that inasmuch as the board did not exceed its jurisdiction, the trial court properly denied petitioner’s request for a writ of prohibition.

*In re Taylor*, OSB No. 09-20, Order Approving Stipulation for Discipline (Or. Sept. 18, 2009). A complaint was filed with the Oregon State Bar Professional Responsibility Board against an attorney related to his representation of an individual charged with raping a teenager. As part of the representation of his client, the attorney moved to obtain the victim’s Department of Human Services (DHS) records. The court denied his motion on the ground that the attorney had failed to identify any exculpatory evidence that would likely exist in these records. After the court’s

ruling, the attorney provided his investigator with one or more blank signed subpoenas for service on potential additional trial witnesses. The investigator used one of these blank subpoenas to issue a subpoena duces tecum to the victim's high school for the production of all of her education records. Neither the attorney nor his investigator had any reason to believe that the records contained exculpatory information, and neither one of them obtained permission from the victim or the court to acquire the records. The school responded to the subpoena by sending a copy of the victim's school records directly to the attorney, in violation of a provision of Oregon law limiting the disclosures that a school can make from a student's education record. Rather than return the records or notify the school that they had been improperly disclosed, the attorney reviewed them, forwarded portions of them on to his client, and used the information contained in them to support his second motion to obtain the victim's DHS records. The court granted that second motion, and, after an in camera inspection of the DHS records, delivered redacted DHS documents to the parties. Upon learning that the attorney had obtained the victim's school records, the victim's attorney moved to suppress both the school and DHS records on the ground that both had been improperly obtained. The court granted the motion. A complaint was then filed against the attorney with the Oregon State Bar relating to his conduct in this case, and the attorney and the Bar ultimately entered into a stipulation for discipline. As part of the stipulation, the attorney admitted to violating Oregon's Rules of Professional Conduct by failing to make reasonable efforts to ensure that the conduct of a nonlawyer over whom he had direct supervisory authority was compatible with his professional obligations, by ratifying misconduct by a nonlawyer employee, and by engaging in conduct that was prejudicial to the administration of justice. The Oregon State Disciplinary Board approved the stipulation and publicly reprimanded the attorney for these violations.

#### E. Right to Privacy

*State v. Worthen*, Nos. 20080128, 20080163, --- P.3d ---, 2009 WL 4573714 (Utah Dec. 8, 2009). Defendant, charged with ten counts of aggravated sexual abuse of his adopted daughter, moved for an in camera inspection of the victim's mental health records under an exception to the psychotherapist-patient privilege, which allows access to otherwise privileged records when a party's physical, mental, or emotional condition

is an element of any claim or defense. The district court granted the motion, and the state appealed. After the court of appeals affirmed the lower court decision, the state and the guardian ad litem representing the victim successfully petitioned for certiorari review. One issue raised in the guardian ad litem's petition and addressed by the court was whether the court of appeals erred by failing to consider the state's constitutional and statutory victims' rights provisions when rendering its decision. Amici curiae filed a brief addressing this issue in which they argued that, in affirming the trial court, the court of appeals failed to meet its general obligation to ensure the fair administration of justice and its specific obligations to victims under state law. The supreme court recently affirmed the court of appeals without ruling on whether the lower court had erred in failing to take Utah's victim's rights protections into account when considering an exception to the victim's psychotherapist-patient privilege. The court stated that it would not decide the issue because the statutory provision under which appellate courts are obligated to consider all arguments relating to victims' rights was not triggered because nothing in the record indicated that the trial court's adverse ruling had been appealed on victims' rights grounds. Nevertheless, the court discussed briefly the arguments raised in the guardian ad litem's and amici curiae's briefs, concluding that victims' rights would "support considerable policy-based arguments for supporting evidentiary privileges," but that even such strong policy considerations could not mandate analysis by the court of appeals where the issue had not been properly preserved for appellate review.

#### F. Right to Protection

*United States v. Pinke*, No. 09-01-01-JSS, 2009 WL 4432669 (E.D. Ky. Dec. 2, 2009) (slip copy). In a case involving a prisoner-on-prisoner stabbing, defendant sought to compel the victim to testify regarding whether the victim thought defendant "was trying to murder him." The government objected, contending, *inter alia*, that defendant's ability to compel the victim's testimony was limited by the victims' rights under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, "to be reasonably protected from the accused" and "to be treated with fairness and respect for the victim's dignity and privacy." The court rejected this argument, stating that "[t]o the extent § 3771 might allow a victim to avoid testifying in a criminal trial—no court opinion to [this court's]

knowledge has considered the possibility—that right must yield to defendant’s right to compel the testimony of witnesses in his favor.” The court further noted that the question was “. . . less about what § 3771 requires and more about whether the Rules of Evidence permit the compelled testimony.” Upon analyzing Federal Rule of Evidence 701, the court sustained the government’s objection to compelling the victim to testify. Noting, *inter alia*, that a clear video depiction of the entire assault was already before the jury, the court found that the victim’s lay opinion as to defendant’s state of mind would not necessarily be helpful to the jury in forming a sound basis for an opinion of defendant’s intent.

### G. Right to Refuse to Testify

*United States v. Pinke*, No. 09-01-01-JSS, 2009 WL 4432669 (E.D. Ky. Dec. 2, 2009) (slip copy). In a case involving a prisoner-on-prisoner stabbing, defendant sought to compel the victim to testify regarding whether the victim thought defendant “was trying to murder him.” The government objected, contending, *inter alia*, that defendant’s ability to compel the victim’s testimony was limited by the victims’ rights under the Crime Victims’ Rights Act (CVRA), 18 U.S.C. § 3771, “to be reasonably protected from the accused” and “to be treated with fairness and respect for the victim’s dignity and privacy.” The court rejected this argument, stating that “[t]o the extent § 3771 might allow a victim to avoid testifying in a criminal trial—no court opinion to [this court’s] knowledge has considered the possibility—that right must yield to defendant’s right to compel the testimony of witnesses in his favor.” The court further noted that the question was “. . . less about what § 3771 requires and more about whether the Rules of Evidence permit the compelled testimony.” Upon analyzing Federal Rule of Evidence 701, the court sustained the government’s objection to compelling the victim to testify. Noting, *inter alia*, that a clear video depiction of the entire assault was already before the jury, the court found that the victim’s lay opinion as to defendant’s state of mind would not necessarily be helpful to the jury in forming a sound basis for an opinion of defendant’s intent.

### H. Right to Restitution

*In re Amy*, 591 F.3d 792 (5th Cir. 2009). After the court denied the victim’s restitution request in *United*

*States v. Paroline*, No. 6:08-CR-61, --- F. Supp. 2d ---, 2009 WL 4572786 (E.D. Tex. Dec. 7, 2009), the victim petitioned the Fifth Circuit Court of Appeals for a writ of mandamus. In her petition, the victim argued that the district court was wrong to conclude that the statute mandating restitution for victims of child exploitation, 18 U.S.C. § 2259, requires a showing that defendant’s possession of images depicting the victim’s sexual abuse was the “proximate cause” of the victim’s losses. In reviewing the petition, the court stated that, under Fifth Circuit case law, the victim’s petition was subject to traditional mandamus review, which requires that (1) the petitioner has “no other adequate means” of obtaining the requested relief; (2) the petitioner has demonstrated a “clear and indisputable” right to the issuance of the writ; and (3) the issuing court is satisfied that the writ is “appropriate under the circumstances.” The court found that the first requirement was met because it was likely that the victim had no other means of obtaining review, referencing case law holding that a victim may not bring an appeal from a final judgment based on a violation of her rights under the Crime Victims’ Rights Act (CVRA), 18 U.S.C. § 3771. The court nonetheless denied the petition upon finding that the victim failed to meet the second requirement. Specifically, after reviewing case law from other jurisdictions, the court rejected the victim’s argument that Section 2259 does not require a showing of proximate cause because “[a]lthough this circuit has not yet construed the proximate cause requirement under Section 2259, it is neither clear nor indisputable that [the victim’s] contentions regarding the statute are correct.” The dissent, on the other hand, found that the victim had met all three mandamus requirements. Agreeing with the majority that the victim had “no other adequate means” of obtaining relief from the district court’s decision, the dissent also found that she met the third requirement because “a mandamus petition is the means Congress has provided to enable crime victims to defend their rights in criminal proceedings, *see* [subsection (d)(3) of the CVRA], and because there are no prudential reasons for denying the petition under the current circumstances . . . .” With respect to the second requirement, the dissent found that the district court had committed clear error because its decision to not order restitution contravened the text of Section 2259, as well as Congress’s intent in enacting a statute that gave the victims of child pornography broad restitution rights.

*United States v. Berk*, No. 08-CR-212-P-S, --- F. Supp. 2d ---, 2009 WL 3451085 (D. Me. Oct. 26, 2009). Defendant pleaded guilty to possessing material involving the sexual exploitation of children. The government requested restitution for two victims, “Amy” and “Vicky,” in the amounts of \$3,367,854 and \$151,002.91, respectively, pursuant to 18 U.S.C. § 2259, which mandates restitution for child-victims of sexual exploitation for “the full amount of the victim[s]’ losses.” These amounts were based on, *inter alia*, the victims’ ongoing mental health expenses and lost income, and had been calculated prior to defendant’s conviction and submitted in criminal cases against other defendants. The district court held that the individuals identified in the pornographic material were “victims” for the purposes of 18 U.S.C. § 2259, as it is widely accepted among jurisdictions that possessing pornography causes harm to the individuals depicted therein. Nevertheless, in analyzing the amount of restitution to which the victims were entitled from defendant, the court determined that Section 2259 authorized restitution only for the losses proximately caused by the conduct underlying the offense of the conviction. For this reason, the court found that the victims were limited to restitution for losses specifically attributable to defendant’s possession of the pornographic materials, and that such losses could not be determined until after defendant’s conviction. Because the victims were entitled to restitution only if the government could show that “upon learning of defendant’s conduct the victims suffered any additional loss above and beyond what they had previously experienced,” and because the government had not produced any such evidence in this case, the court declined to order restitution.

*United States v. Paroline*, No. 6:08-CR-61, --- F. Supp. 2d ---, 2009 WL 4572786 (E.D. Tex. Dec. 7, 2009). Defendant was convicted of possession of material involving the sexual exploitation of children. One of the victims depicted in the material requested \$3,367,854 in restitution pursuant to 18 U.S.C. § 2259, which mandates restitution for child-victims of sexual exploitation for “the full amount of the victim[‘s] losses.” The restitution figure included costs for future psychological care, future lost income, and attorney’s fees. In reviewing the restitution request, the court held that the child seeking restitution was a “victim” for the purposes of Section 2259, which defines a “victim” as any “individual harmed as a result of a commission of a crime under [the Sexual Exploitation and Other Abuse

of Children Chapter of Title 18].” The court also held—contrary to the victim’s position—that Section 2259 requires a showing that defendant’s possession of images depicting the victim’s sexual abuse was the proximate cause of her injuries. Because the court determined that the government had failed to show that defendant’s possession of the images proximately caused victim’s losses, the court denied the restitution request. The court explained its decision as follows: “There is no doubt that everyone involved with child pornography—from the abusers and producers to the end-users and possessors—contribute to [the victim’s] ongoing harm. The Court is sympathetic to [the victim] and the harm that she has undoubtedly experienced and will continue to experience for the rest of her life. . . . Although [a showing of proximate cause] may seem like an impossible burden for the Government, the Court is nevertheless bound by the requirements of the statute.” After the court denied the victim’s restitution request, she petitioned for a writ of mandamus, which was denied in *In re Amy*, 591 F.3d 792 (5th Cir. 2009).

## II. STANDING

### A. Definition of “Victim”

*United States v. McElroy*, No. 09-11810, 2009 WL 3807157 (11th Cir. Nov. 16, 2009) (slip copy). Defendant was sentenced to 20 years in prison following his conviction for two counts of receiving child pornography. He challenged his sentence on numerous grounds, including that the government’s introduction of nine victim impact statements under the Crime Victims’ Rights Act (CVRA), 18 U.S.C. § 3771, was improper because it had not been established that they were “victims” of his crime. Specifically, he argued that the children in the images found on his computers were not directly and proximately harmed by his conduct because they were victims of the creation of the pornography depicting them, not victims of his receipt and distribution of the images. The court rejected this argument and affirmed the sentence. In reaching this decision, the court found that the children were “victims” for the purposes of the CVRA because “the distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children, and the harm to the child is exacerbated by this circulation.” The court concluded that, as “victims” under the CVRA, the victims had a right to be heard at sentencing pursuant to the statute.

*United States v. Berk*, No. 08-CR-212-P-S, --- F. Supp. 2d ---, 2009 WL 3451085 (D. Me. Oct. 26, 2009). Defendant pleaded guilty to possessing material involving the sexual exploitation of children. The government requested restitution for two victims, “Amy” and “Vicky,” in the amounts of \$3,367,854 and \$151,002.91, respectively, pursuant to 18 U.S.C. § 2259, which mandates restitution for child-victims of sexual exploitation for “the full amount of the victim[s]’ losses.” These amounts were based on, *inter alia*, the victims’ ongoing mental health expenses and lost income, and had been calculated prior to defendant’s conviction and submitted in criminal cases against other defendants. The district court held that the individuals identified in the pornographic material were “victims” for the purposes of 18 U.S.C. § 2259, as it is widely accepted among jurisdictions that possessing pornography causes harm to the individuals depicted therein. Nevertheless, in analyzing the amount of restitution to which the victims were entitled from defendant, the court determined that Section 2259 authorized restitution only for the losses proximately caused by the conduct underlying the offense of the conviction. For this reason, the court found that the victims were limited to restitution for losses specifically attributable to defendant’s possession of the pornographic materials, and that such losses could not be determined until after defendant’s conviction. Because the victims were entitled to restitution only if the government could show that “upon learning of defendant’s conduct the victims suffered any additional loss above and beyond what they had previously experienced,” and because the government had not produced any such evidence in this case, the court declined to order restitution.

*United States v. Paroline*, No. 6:08-CR-61, --- F. Supp. 2d ---, 2009 WL 4572786 (E.D. Tex. Dec. 7, 2009). Defendant was convicted of possession of material involving the sexual exploitation of children. One of the victims depicted in the material requested \$3,367,854 in restitution pursuant to 18 U.S.C. § 2259, which mandates restitution for child-victims of sexual exploitation for “the full amount of the victim[‘s] losses.” The restitution figure included costs for future psychological care, future lost income, and attorney’s fees. In reviewing the restitution request, the court held that the child seeking restitution was a “victim” for the purposes of Section 2259, which defines a “victim” as any “individual harmed as a result of a commission of a crime under [the Sexual Exploitation and Other Abuse

of Children Chapter of Title 18].” The court also held—contrary to the victim’s position—that Section 2259 requires a showing that defendant’s possession of images depicting the victim’s sexual abuse was the proximate cause of her injuries. Because the court determined that the government had failed to show that defendant’s possession of the images proximately caused victim’s losses, the court denied the restitution request. The court explained its decision as follows: “There is no doubt that everyone involved with child pornography—from the abusers and producers to the end-users and possessors—contribute to [the victim’s] ongoing harm. The Court is sympathetic to [the victim] and the harm that she has undoubtedly experienced and will continue to experience for the rest of her life. . . . Although [a showing of proximate cause] may seem like an impossible burden for the Government, the Court is nevertheless bound by the requirements of the statute.” After the court denied the victim’s restitution request, she petitioned for a writ of mandamus, which was denied in *In re Amy*, 591 F.3d 792 (5th Cir. 2009).

*State v. Lampien*, No. 36115, --- P.3d ---, 2009 WL 4928357 (Idaho Oct. 2, 2009). Defendant pleaded guilty to harboring a felon and was sentenced to five years in prison. Defendant appealed, arguing that the district court abused its discretion in finding that the police and probation officers who were shot by the felon were victims of her crime and in allowing them to testify at her sentencing. Defendant also argued that even if the officers were victims of her crime, her plea bargain was breached when they recommended jail time as part of their testimony at sentencing. The court held that the district court did not abuse its discretion in determining that the officers were victims of defendant’s crime of harboring and protecting a felon because “but for [defendant] allowing [the felon] to hide in her apartment, the officers would not have been injured when entering her apartment.” The court further held that both direct and proximate causation requirements were satisfied because “[t]he district court may reasonably have concluded that defendant should have foreseen the possibility of her actions leading to violent consequences.” The court also rejected defendant’s argument that the plea agreement binding “the State” to recommend probation was breached by the victims’ testimony recommending jail time. The court concluded that in giving the testimony at sentencing, the officers were exercising their rights under Idaho’s victims’ rights statutes and not acting as agents of the State. As a result, the officers were not

bound by the terms of the plea agreement.

*J.S. v. J.F.*, 983 A.2d 115 (N.J. Super. Ct. App. Div. 2009). A New Jersey appellate court affirmed the entry of a final restraining order in favor of the victim, a paid escort, under the Prevention of Domestic Violence Act. Defendant argued that, as a paid escort, the victim did not qualify for protection under the Act, which applies to individuals in a “dating relationship.” The court rejected this argument, stating that the standard for what constitutes a “dating relationship” should be “liberally construed in favor of finding a dating relationship, because the Act itself is to be liberally construed in favor of the legislative intent to eradicate domestic violence. Stated another way, the Act embodies a strong public policy against domestic violence.”

### B. Victim Standing

*State v. Worthen*, Nos. 20080128, 20080163, --- P.3d ---, 2009 WL 4573714 (Utah Dec. 8, 2009). Defendant, charged with ten counts of aggravated sexual abuse of his adopted daughter, moved for an in camera inspection of the victim’s mental health records under an exception to the psychotherapist-patient privilege, which allows access to otherwise privileged records when a party’s physical, mental, or emotional condition is an element of any claim or defense. The district court granted the motion, and the state appealed. After the court of appeals affirmed the lower court decision, the state and the guardian ad litem representing the victim successfully petitioned for certiorari review. One issue raised in the guardian ad litem’s petition and addressed by the court was whether the court of appeals erred by failing to consider the state’s constitutional and statutory victims’ rights provisions when rendering its decision. Amici curiae filed a brief addressing this issue in which they argued that, in affirming the trial court, the court of appeals failed to meet its general obligation to ensure the fair administration of justice and its specific obligations to victims under state law. The supreme court recently affirmed the court of appeals without ruling on whether the lower court had erred in failing to take Utah’s victim’s rights protections into account when considering an exception to the victim’s psychotherapist-patient privilege. The court stated that it would not decide the issue because the statutory provision under which appellate courts are obligated to consider all arguments relating to victims’ rights was not triggered because nothing

in the record indicated that the trial court’s adverse ruling had been appealed on victims’ rights grounds. Nevertheless, the court discussed briefly the arguments raised in the guardian ad litem’s and amici curiae’s briefs, concluding that victims’ rights would “support considerable policy-based arguments for supporting evidentiary privileges,” but that even such strong policy considerations could not mandate analysis by the court of appeals where the issue had not been properly preserved for appellate review.

### C. Waiver of Rights

*State v. Lampien*, No. 36115, --- P.3d ---, 2009 WL 4928357 (Idaho Oct. 2, 2009). Defendant pleaded guilty to harboring a felon and was sentenced to five years in prison. Defendant appealed, arguing that the district court abused its discretion in finding that the police and probation officers who were shot by the felon were victims of her crime and in allowing them to testify at her sentencing. Defendant also argued that even if the officers were victims of her crime, her plea bargain was breached when they recommended jail time as part of their testimony at sentencing. The court held that the district court did not abuse its discretion in determining that the officers were victims of defendant’s crime of harboring and protecting a felon because “but for [defendant] allowing [the felon] to hide in her apartment, the officers would not have been injured when entering her apartment.” The court further held that both direct and proximate causation requirements were satisfied because “[t]he district court may reasonably have concluded that defendant should have foreseen the possibility of her actions leading to violent consequences.” The court also rejected defendant’s argument that the plea agreement binding “the State” to recommend probation was breached by the victims’ testimony recommending jail time. The court concluded that in giving the testimony at sentencing, the officers were exercising their rights under Idaho’s victims’ rights statutes and not acting as agents of the State. As a result, the officers were not bound by the terms of the plea agreement.

*State v. Worthen*, Nos. 20080128, 20080163, --- P.3d ---, 2009 WL 4573714 (Utah Dec. 8, 2009). Defendant, charged with ten counts of aggravated sexual abuse of his adopted daughter, moved for an in camera inspection of the victim’s mental health records under an exception to the psychotherapist-patient privilege, which allows access to otherwise privileged records

when a party's physical, mental, or emotional condition is an element of any claim or defense. The district court granted the motion, and the state appealed. After the court of appeals affirmed the lower court decision, the state and the guardian ad litem representing the victim successfully petitioned for certiorari review. One issue raised in the guardian ad litem's petition and addressed by the court was whether the court of appeals erred by failing to consider the state's constitutional and statutory victims' rights provisions when rendering its decision. Amici curiae filed a brief addressing this issue in which they argued that, in affirming the trial court, the court of appeals failed to meet its general obligation to ensure the fair administration of justice and its specific obligations to victims under state law. The supreme court recently affirmed the court of appeals without ruling on whether the lower court had erred in failing to take Utah's victim's rights protections into account when considering an exception to the victim's psychotherapist-patient privilege. The court stated that it would not decide the issue because the statutory provision under which appellate courts are obligated to consider all arguments relating to victims' rights was not triggered because nothing in the record indicated that the trial court's adverse ruling had been appealed on victims' rights grounds. Nevertheless, the court discussed briefly the arguments raised in the guardian ad litem's and amici curiae's briefs, concluding that victims' rights would "support considerable policy-based arguments for supporting evidentiary privileges," but that even such strong policy considerations could not mandate analysis by the court of appeals where the issue had not been properly preserved for appellate review.

### III. ENFORCEMENT

#### A. Multiple Victim Cases

*United States v. Freedman*, No. 5:08CR335, 2009 WL 3784961 (N.D. Ohio Nov. 10, 2009) (slip copy). In a mail fraud case involving approximately 19,000 victims, the government moved to provide notice to the victims by publication or news release. Finding that the number of crime victims in the case made it impracticable to accord them all the rights guaranteed by the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, the court granted the government's motion. In reaching this decision, the court noted that the government's proposal to give notice via the Sun, the Globe, the National Examiner, and the National

Enquirer was a "reasonable procedure" that would give effect to the CVRA without unduly complicating or prolonging the proceedings because those publications were "representative of the market from which a large victim population was contacted in this case."

#### B. Writs – Mandamus

*In re Amy*, 591 F.3d 792 (5th Cir. 2009). After the court denied the victim's restitution request in *United States v. Paroline*, No. 6:08-CR-61, --- F. Supp. 2d ---, 2009 WL 4572786 (E.D. Tex. Dec. 7, 2009), the victim petitioned the Fifth Circuit Court of Appeals for a writ of mandamus. In her petition, the victim argued that the district court was wrong to conclude that the statute mandating restitution for victims of child exploitation, 18 U.S.C. § 2259, requires a showing that defendant's possession of images depicting the victim's sexual abuse was the "proximate cause" of the victim's losses. In reviewing the petition, the court stated that, under Fifth Circuit case law, the victim's petition was subject to traditional mandamus review, which requires that (1) the petitioner has "no other adequate means" of obtaining the requested relief; (2) the petitioner has demonstrated a "clear and indisputable" right to the issuance of the writ; and (3) the issuing court is satisfied that the writ is "appropriate under the circumstances." The court found that the first requirement was met because it was likely that the victim had no other means of obtaining review, referencing case law holding that a victim may not bring an appeal from a final judgment based on a violation of her rights under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771. The court nonetheless denied the petition upon finding that the victim failed to meet the second requirement. Specifically, after reviewing case law from other jurisdictions, the court rejected the victim's argument that Section 2259 does not require a showing of proximate cause because "[a]lthough this circuit has not yet construed the proximate cause requirement under Section 2259, it is neither clear nor indisputable that [the victim's] contentions regarding the statute are correct." The dissent, on the other hand, found that the victim had met all three mandamus requirements. Agreeing with the majority that the victim had "no other adequate means" of obtaining relief from the district court's decision, the dissent also found that she met the third requirement because "a mandamus petition is the means Congress has provided to enable crime victims to defend their rights in criminal proceedings, *see* [subsection (d)(3)]

of the CVRA], and because there are no prudential reasons for denying the petition under the current circumstances . . . .” With respect to the second requirement, the dissent found that the district court had committed clear error because its decision to not order restitution contravened the text of Section 2259, as well as Congress’s intent in enacting a statute that gave the victims of child pornography broad restitution rights.

#### IV. STANDARD OF REVIEW

*In re Amy*, 591 F.3d 792 (5th Cir. 2009). After the court denied the victim’s restitution request in *United States v. Paroline*, No. 6:08-CR-61, --- F. Supp. 2d ---, 2009 WL 4572786 (E.D. Tex. Dec. 7, 2009), the victim petitioned the Fifth Circuit Court of Appeals for a writ of mandamus. In her petition, the victim argued that the district court was wrong to conclude that the statute mandating restitution for victims of child exploitation, 18 U.S.C. § 2259, requires a showing that defendant’s possession of images depicting the victim’s sexual abuse was the “proximate cause” of the victim’s losses. In reviewing the petition, the court stated that, under Fifth Circuit case law, the victim’s petition was subject to traditional mandamus review, which requires that (1) the petitioner has “no other adequate means” of obtaining the requested relief; (2) the petitioner has demonstrated a “clear and indisputable” right to the issuance of the writ; and (3) the issuing court is satisfied that the writ is “appropriate under the circumstances.” The court found that the first requirement was met because it was likely that the victim had no other means of obtaining review, referencing case law holding that a victim may not bring an appeal from a final judgment based on a violation of her rights under the Crime Victims’ Rights Act (CVRA), 18 U.S.C. § 3771. The court nonetheless denied the petition upon finding that the victim failed to meet the second requirement. Specifically, after reviewing case law from other jurisdictions, the court rejected the victim’s argument that Section 2259 does not require a showing of proximate cause because “[a]lthough this circuit has not yet construed the proximate cause requirement under Section 2259, it is neither clear nor indisputable that [the victim’s] contentions regarding the statute are correct.” The dissent, on the other hand, found that the victim had met all three mandamus requirements. Agreeing with the majority that the victim had “no other adequate means” of obtaining relief from the district court’s decision, the dissent also found that she met the third requirement

because “a mandamus petition is the means Congress has provided to enable crime victims to defend their rights in criminal proceedings, *see* [subsection (d)(3) of the CVRA], and because there are no prudential reasons for denying the petition under the current circumstances . . . .” With respect to the second requirement, the dissent found that the district court had committed clear error because its decision to not order restitution contravened the text of Section 2259, as well as Congress’s intent in enacting a statute that gave the victims of child pornography broad restitution rights.

#### V. CONSTITUTIONAL ISSUES RELATED TO VICTIMS’ RIGHTS

##### A. Right to Confrontation

*Hibbs v. State*, 683 S.E.2d 329 (Ga. Ct. App. 2009). Defendant was convicted of three counts of aggravated child molestation. He appealed, arguing that allowing the victim to testify via video violated his Sixth Amendment right to confrontation because he was not allowed to cross-examine the victim about (1) the juvenile charges pending against the victim; and (2) the fact that the victim was in juvenile custody at the time he gave his testimony. The court overturned defendant’s conviction on Sixth Amendment grounds. It found that, while the state had an interest in maintaining the confidentiality of juvenile proceedings, this interest was outweighed by defendant’s Sixth Amendment right to confrontation. Here, the court found that this right was violated because defendant’s right to cross-examine was limited when he was not allowed to ask about the victim’s “juvenile status,” which could potentially have shown that the victim slanted his testimony in favor of the state so as to obtain more favorable treatment in his own case.

*State v. Galindo*, 774 N.W.2d 190 (Neb. 2009). Defendant was sentenced to death following his conviction on five counts of first degree murder, six counts of use of a deadly weapon to commit a felony, one count of robbery, and one count of burglary. Defendant’s convictions stemmed from his participation in a bank robbery that resulted in the shooting deaths of four bank employees and one customer. He challenged his sentence on numerous grounds, including that the trial court erred in allowing the three-judge sentencing panel to consider victim impact statements. Specifically, he argued that the victim impact statements were improperly admitted because:

(1) the Nebraska statutes governing the imposition of the death penalty did not explicitly identify victim impact statements as something to be considered by the sentencing panel; (2) the victim impact statements violated his Sixth Amendment confrontation right; and (3) the statements were neither limited to those contained in the presentence investigation report nor to those of the victims' "nearest surviving relative." The court rejected defendant's arguments regarding the victim impact statements *in toto*, concluding that there was no error stemming from the sentencing panel's consideration of those statements. In reaching this conclusion, the court explained that the death penalty statutes' silence regarding victim impact statements should not be construed as a prohibition on their consideration because the state's victims' rights statutes specifically provide for the admissibility of such statements. It further held that the sentencing panel did not err in considering the impact statements because consideration of the statements was fully within the sentencing court's discretion.

#### B. Right to Compulsory Process

*United States v. Pinke*, No. 09-01-01-JSS, 2009 WL 4432669 (E.D. Ky. Dec. 2, 2009) (slip copy). In a case involving a prisoner-on-prisoner stabbing, defendant sought to compel the victim to testify regarding whether the victim thought defendant "was trying to murder him." The government objected, contending, *inter alia*, that defendant's ability to compel the victim's testimony was limited by the victims' rights under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, "to be reasonably protected from the accused" and "to be treated with fairness and respect for the victim's dignity and privacy." The court rejected this argument, stating that "[t]o the extent § 3771 might allow a victim to avoid testifying in a criminal trial—no court opinion to [this court's] knowledge has considered the possibility—that right must yield to defendant's right to compel the testimony of witnesses in his favor." The court further noted that the question was ". . . less about what § 3771 requires and more about whether the Rules of Evidence permit the compelled testimony." Upon analyzing Federal Rule of Evidence 701, the court sustained the government's objection to compelling the victim to testify. Noting, *inter alia*, that a clear video depiction of the entire assault was already before the jury, the court found that the victim's lay opinion as to defendant's state of mind would not necessarily

be helpful to the jury in forming a sound basis for an opinion of defendant's intent.

## VI. EVIDENTIARY ISSUES RELATED TO VICTIMS' RIGHTS

### A. Confidentiality

*State v. Worthen*, Nos. 20080128, 20080163, --- P.3d ---, 2009 WL 4573714 (Utah Dec. 8, 2009). Defendant, charged with ten counts of aggravated sexual abuse of his adopted daughter, moved for an *in camera* inspection of the victim's mental health records under an exception to the psychotherapist-patient privilege, which allows access to otherwise privileged records when a party's physical, mental, or emotional condition is an element of any claim or defense. The district court granted the motion, and the state appealed. After the court of appeals affirmed the lower court decision, the state and the guardian ad litem representing the victim successfully petitioned for certiorari review. One issue raised in the guardian ad litem's petition and addressed by the court was whether the court of appeals erred by failing to consider the state's constitutional and statutory victims' rights provisions when rendering its decision. Amici curiae filed a brief addressing this issue in which they argued that, in affirming the trial court, the court of appeals failed to meet its general obligation to ensure the fair administration of justice and its specific obligations to victims under state law. The supreme court recently affirmed the court of appeals without ruling on whether the lower court had erred in failing to take Utah's victim's rights protections into account when considering an exception to the victim's psychotherapist-patient privilege. The court stated that it would not decide the issue because the statutory provision under which appellate courts are obligated to consider all arguments relating to victims' rights was not triggered because nothing in the record indicated that the trial court's adverse ruling had been appealed on victims' rights grounds. Nevertheless, the court discussed briefly the arguments raised in the guardian ad litem's and amici curiae's briefs, concluding that victims' rights would "support considerable policy-based arguments for supporting evidentiary privileges," but that even such strong policy considerations could not mandate analysis by the court of appeals where the issue had not been properly preserved for appellate review.

**B. Hearsay**

*Commonwealth v. Monteiro*, 914 N.E.2d 981 (Mass. Ct. App. 2009). Defendant was convicted of three counts of forcible rape of a child. Under Massachusetts law, evidence that a sexual assault victim made an out-of-court report of the crime is admissible to corroborate the victim's in-court testimony. However, in order to avoid unfair prejudice to defendant, the Commonwealth was only permitted to introduce the testimony of the first person to whom the victim reported the sexual assault. At trial, testimony was received not just from the first person to whom the victim reported, but also from the victim's mother and the district attorney's office, and further testimony was given about additional reports to others, including a social worker. The court found that the introduction of this evidence was in error. The court also rejected the prosecution's argument that the evidence was admissible under an exception to the hearsay rule, finding that the additional evidence was cumulative, prejudicial, and served no separate function from the first complaint evidence. Accordingly, the court reversed the conviction and remanded for further proceedings.

**C. Lay Opinion Testimony**

*United States v. Pinke*, No. 09-01-01-JSS, 2009 WL 4432669 (E.D. Ky. Dec. 2, 2009) (slip copy). In a case involving a prisoner-on-prisoner stabbing, defendant sought to compel the victim to testify regarding whether the victim thought defendant "was trying to murder him." The government objected, contending, *inter alia*, that defendant's ability to compel the victim's testimony was limited by the victims' rights under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, "to be reasonably protected from the accused" and "to be treated with fairness and respect for the victim's dignity and privacy." The court rejected this argument, stating that "[t]o the extent § 3771 might allow a victim to avoid testifying in a criminal trial—no court opinion to [this court's] knowledge has considered the possibility—that right must yield to defendant's right to compel the testimony of witnesses in his favor." The court further noted that the question was "... less about what § 3771 requires and more about whether the Rules of Evidence permit the compelled testimony." Upon analyzing Federal Rule of Evidence 701, the court sustained the government's objection to compelling the victim to testify. Noting, *inter alia*, that a clear

video depiction of the entire assault was already before the jury, the court found that the victim's lay opinion as to defendant's state of mind would not necessarily be helpful to the jury in forming a sound basis for an opinion of defendant's intent.

**D. Privilege**

*State v. Worthen*, Nos. 20080128, 20080163, --- P.3d ---, 2009 WL 4573714 (Utah Dec. 8, 2009). Defendant, charged with ten counts of aggravated sexual abuse of his adopted daughter, moved for an in camera inspection of the victim's mental health records under an exception to the psychotherapist-patient privilege, which allows access to otherwise privileged records when a party's physical, mental, or emotional condition is an element of any claim or defense. The district court granted the motion, and the state appealed. After the court of appeals affirmed the lower court decision, the state and the guardian ad litem representing the victim successfully petitioned for certiorari review. One issue raised in the guardian ad litem's petition and addressed by the court was whether the court of appeals erred by failing to consider the state's constitutional and statutory victims' rights provisions when rendering its decision. Amici curiae filed a brief addressing this issue in which they argued that, in affirming the trial court, the court of appeals failed to meet its general obligation to ensure the fair administration of justice and its specific obligations to victims under state law. The supreme court recently affirmed the court of appeals without ruling on whether the lower court had erred in failing to take Utah's victim's rights protections into account when considering an exception to the victim's psychotherapist-patient privilege. The court stated that it would not decide the issue because the statutory provision under which appellate courts are obligated to consider all arguments relating to victims' rights was not triggered because nothing in the record indicated that the trial court's adverse ruling had been appealed on victims' rights grounds. Nevertheless, the court discussed briefly the arguments raised in the guardian ad litem's and amici curiae's briefs, concluding that victims' rights would "support considerable policy-based arguments for supporting evidentiary privileges," but that even such strong policy considerations could not mandate analysis by the court of appeals where the issue had not been properly preserved for appellate review.

## VII. PROCEDURAL ISSUES RELATED TO VICTIMS' RIGHTS

### A. Discovery

*In re Taylor*, OSB No. 09-20, Order Approving Stipulation for Discipline (Or. Sept. 18, 2009). A complaint was filed with the Oregon State Bar Professional Responsibility Board against an attorney related to his representation of an individual charged with raping a teenager. As part of the representation of his client, the attorney moved to obtain the victim's Department of Human Services (DHS) records. The court denied his motion on the ground that the attorney had failed to identify any exculpatory evidence that would likely exist in these records. After the court's ruling, the attorney provided his investigator with one or more blank signed subpoenas for service on potential additional trial witnesses. The investigator used one of these blank subpoenas to issue a subpoena duces tecum to the victim's high school for the production of all of her education records. Neither the attorney nor his investigator had any reason to believe that the records contained exculpatory information, and neither one of them obtained permission from the victim or the court to acquire the records. The school responded to the subpoena by sending a copy of the victim's school records directly to the attorney, in violation of a provision of Oregon law limiting the disclosures that a school can make from a student's education record. Rather than return the records or notify the school that they had been improperly disclosed, the attorney reviewed them, forwarded portions of them on to his client, and used the information contained in them to support his second motion to obtain the victim's DHS records. The court granted that second motion, and, after an in camera inspection of the DHS records, delivered redacted DHS documents to the parties. Upon learning that the attorney had obtained the victim's school records, the victim's attorney moved to suppress both the school and DHS records on the ground that both had been improperly obtained. The court granted the motion. A complaint was then filed against the attorney with the Oregon State Bar relating to his conduct in this case, and the attorney and the Bar ultimately entered into a stipulation for discipline. As part of the stipulation, the attorney admitted to violating Oregon's Rules of Professional Conduct by failing to make reasonable efforts to ensure that the conduct of a nonlawyer over whom he had direct supervisory

authority was compatible with his professional obligations, by ratifying misconduct by a nonlawyer employee, and by engaging in conduct that was prejudicial to the administration of justice. The Oregon State Disciplinary Board approved the stipulation and publicly reprimanded the attorney for these violations.

*Commonwealth v. Boich*, 982 A.2d 102 (Pa. Super. Ct. 2009). The Commonwealth of Pennsylvania appealed from a court order requiring the victim to submit to an involuntary psychiatric examination for purposes of determining her competency to testify at trial. Defendant's motion to require the examination was based primarily on the victim's inability to remember certain details of, and her use of substances during, the evening in question. On appeal, the court reversed the ruling and remanded for further proceedings, finding that "a court ought not to order an involuntary psychiatric examination of a witness unless the record unequivocally demonstrates a compelling need for the examination." The court determined that defendant had not established a "compelling need" for the examination because he attacked the victim's credibility, but did not address her competency. The court further noted that "[a]ny attempt to 'dig up' potential past emotional disturbances through an intrusive psychiatric evaluation, where the record does not indicate that [the victim] suffers from a diagnosed mental condition, is contrary to the purpose of court-ordered psychiatric examinations and will likely only further embarrass and harass the victim."

*State v. Worthen*, Nos. 20080128, 20080163, --- P.3d ---, 2009 WL 4573714 (Utah Dec. 8, 2009). Defendant, charged with ten counts of aggravated sexual abuse of his adopted daughter, moved for an in camera inspection of the victim's mental health records under an exception to the psychotherapist-patient privilege, which allows access to otherwise privileged records when a party's physical, mental, or emotional condition is an element of any claim or defense. The district court granted the motion, and the state appealed. After the court of appeals affirmed the lower court decision, the state and the guardian ad litem representing the victim successfully petitioned for certiorari review. One issue raised in the guardian ad litem's petition and addressed by the court was whether the court of appeals erred by failing to consider the state's constitutional and statutory victims' rights provisions when rendering its decision. Amici curiae filed a brief addressing this

issue in which they argued that, in affirming the trial court, the court of appeals failed to meet its general obligation to ensure the fair administration of justice and its specific obligations to victims under state law. The supreme court recently affirmed the court of appeals without ruling on whether the lower court had erred in failing to take Utah's victim's rights protections into account when considering an exception to the victim's psychotherapist-patient privilege. The court stated that it would not decide the issue because the statutory provision under which appellate courts are obligated to consider all arguments relating to victims' rights was not triggered because nothing in the record indicated that the trial court's adverse ruling had been appealed on victims' rights grounds. Nevertheless, the court discussed briefly the arguments raised in the guardian ad litem's and amici curiae's briefs, concluding that victims' rights would "support considerable policy-based arguments for supporting evidentiary privileges," but that even such strong policy considerations could not mandate analysis by the court of appeals where the issue had not been properly preserved for appellate review.

#### VIII. VICTIM IMPACT STATEMENTS

*United States v. McElroy*, No. 09-11810, 2009 WL 3807157 (11th Cir. Nov. 16, 2009) (slip copy). Defendant was sentenced to 20 years in prison following his conviction for two counts of receiving child pornography. He challenged his sentence on numerous grounds, including that the government's introduction of nine victim impact statements under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, was improper because it had not been established that they were "victims" of his crime. Specifically, he argued that the children in the images found on his computers were not directly and proximately harmed by his conduct because they were victims of the creation of the pornography depicting them, not victims of his receipt and distribution of the images. The court rejected this argument and affirmed the sentence. In reaching this decision, the court found that the children were "victims" for the purposes of the CVRA because "the distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children, and the harm to the child is exacerbated by this circulation." The court concluded that, as "victims" under the CVRA, the victims had a right to be heard at sentencing pursuant to the statute.

*State v. Lampien*, No. 36115, --- P.3d ---, 2009 WL 4928357 (Idaho Oct. 2, 2009). Defendant pleaded guilty to harboring a felon and was sentenced to five years in prison. Defendant appealed, arguing that the district court abused its discretion in finding that the police and probation officers who were shot by the felon were victims of her crime and in allowing them to testify at her sentencing. Defendant also argued that even if the officers were victims of her crime, her plea bargain was breached when they recommended jail time as part of their testimony at sentencing. The court held that the district court did not abuse its discretion in determining that the officers were victims of defendant's crime of harboring and protecting a felon because "but for [defendant] allowing [the felon] to hide in her apartment, the officers would not have been injured when entering her apartment." The court further held that both direct and proximate causation requirements were satisfied because "[t]he district court may reasonably have concluded that defendant should have foreseen the possibility of her actions leading to violent consequences." The court also rejected defendant's argument that the plea agreement binding "the State" to recommend probation was breached by the victims' testimony recommending jail time. The court concluded that in giving the testimony at sentencing, the officers were exercising their rights under Idaho's victims' rights statutes and not acting as agents of the State. As a result, the officers were not bound by the terms of the plea agreement.

*State v. Galindo*, 774 N.W.2d 190 (Neb. 2009). Defendant was sentenced to death following his conviction on five counts of first degree murder, six counts of use of a deadly weapon to commit a felony, one count of robbery, and one count of burglary. Defendant's convictions stemmed from his participation in a bank robbery that resulted in the shooting deaths of four bank employees and one customer. He challenged his sentence on numerous grounds, including that the trial court erred in allowing the three-judge sentencing panel to consider victim impact statements. Specifically, he argued that the victim impact statements were improperly admitted because: (1) the Nebraska statutes governing the imposition of the death penalty did not explicitly identify victim impact statements as something to be considered by the sentencing panel; (2) the victim impact statements violated his Sixth Amendment confrontation right; and (3) the statements were neither limited to those

contained in the presentence investigation report nor to those of the victims' "nearest surviving relative." The court rejected defendant's arguments regarding the victim impact statements *in toto*, concluding that there was no error stemming from the sentencing panel's consideration of those statements. In reaching this conclusion, the court explained that the death penalty statutes' silence regarding victim impact statements should not be construed as a prohibition on their consideration because the state's victims' rights statutes specifically provide for the admissibility of such statements. It further held that the sentencing panel did not err in considering the impact statements because consideration of the statements was fully within the sentencing court's discretion.

*In re Raheem v. N.Y. State Bd. of Parole*, 66 A.D.3d 1270 (N.Y. App. Div. 2009). Petitioner was granted parole after serving thirty-four years of his sentence for multiple convictions arising out of a robbery that involved hostages and the murder of a police officer. After being notified of petitioner's impending release, a number of the victims of petitioner's crimes were granted an opportunity to give victim impact statements. Two of the hostages, one of the injured police officers, and members of the slain officer's family gave statements describing the effect of petitioner's crimes upon their lives. Subsequently, the parole board scheduled a hearing to consider whether to rescind its grant of parole, citing the victim impact information as the basis for the hearing. Petitioner sought a writ of prohibition to stop the parole board from holding the rescission hearing, arguing that the parole board exceeded its jurisdiction in initiating rescission proceedings. The trial court dismissed petitioner's application and petitioner appealed, arguing that the law authorizing the rescission of a parole release based upon "significant information, which existed . . . where such information was not known by the [parole] board" did not apply because the information was not new information—the parole board could have anticipated the impact of the crimes on the victims. The court found this argument meritless, noting that because the victims had never been personally interviewed by the probation department and none of the victims had previously submitted any victim impact statements, "[the victims] actual subjective experience is clearly significant information previously unknown to [the parole board]." Petitioner also argued that the parole board acted outside of its statutory and regulatory authority in holding victim

impact hearings after a parole determination was made. The court rejected this argument as well, finding that state law does not require that victim impact statements be submitted prior to the parole determination to be considered, and, while the relevant law regarding victim impact statements contemplates that such statements will precede parole determinations, it also provides that "[the parole board] may waive any filing deadlines or other limitations on the victims' right to be heard so as to 'ensur[e] that crime victims are treated with fairness, sensitivity, and dignity.'" The court found that because the relevant laws "are intended to facilitate the right of victims to be heard, limited only by practical considerations, they should not be interpreted so as to preclude victims from exercising the rights that they are meant to promote." The court then held that inasmuch as the board did not exceed its jurisdiction, the trial court properly denied petitioner's request for a writ of prohibition.

## IX. MISCELLANEOUS ISSUES RELATED TO VICTIMS' RIGHTS

### A. Rules of Professional Conduct

*In re Taylor*, OSB No. 09-20, Order Approving Stipulation for Discipline (Or. Sept. 18, 2009). A complaint was filed with the Oregon State Bar Professional Responsibility Board against an attorney related to his representation of an individual charged with raping a teenager. As part of the representation of his client, the attorney moved to obtain the victim's Department of Human Services (DHS) records. The court denied his motion on the ground that the attorney had failed to identify any exculpatory evidence that would likely exist in these records. After the court's ruling, the attorney provided his investigator with one or more blank signed subpoenas for service on potential additional trial witnesses. The investigator used one of these blank subpoenas to issue a subpoena duces tecum to the victim's high school for the production of all of her education records. Neither the attorney nor his investigator had any reason to believe that the records contained exculpatory information, and neither one of them obtained permission from the victim or the court to acquire the records. The school responded to the subpoena by sending a copy of the victim's school records directly to the attorney, in violation of a provision of Oregon law limiting the disclosures that a school can make from a student's education record. Rather than return the records or notify the school

that they had been improperly disclosed, the attorney reviewed them, forwarded portions of them on to his client, and used the information contained in them to support his second motion to obtain the victim's DHS records. The court granted that second motion, and, after an in camera inspection of the DHS records, delivered redacted DHS documents to the parties. Upon learning that the attorney had obtained the victim's school records, the victim's attorney moved to suppress both the school and DHS records on the ground that both had been improperly obtained. The court granted the motion. A complaint was then filed against the attorney with the Oregon State Bar relating to his conduct in this case, and the attorney and the Bar ultimately entered into a stipulation for discipline. As part of the stipulation, the attorney admitted to violating Oregon's Rules of Professional Conduct by failing to make reasonable efforts to ensure that the conduct of a nonlawyer over whom he had direct supervisory authority was compatible with his professional obligations, by ratifying misconduct by a nonlawyer employee, and by engaging in conduct that was prejudicial to the administration of justice. The Oregon State Disciplinary Board approved the stipulation and publicly reprimanded the attorney for these violations.

#### **B. Tort Liability of Government Actors**

*Lacey v. Village of Palatine*, 904 N.E.2d 18 (Ill. 2009). The estate representative of the victim, who was murdered by her former boyfriend, sued police officers and the towns that employed them for willfully and wantonly breaching their duties to the victim under the Illinois Domestic Violence Act (the Act). Defendants moved to dismiss on the ground that they were not subject to the limitations on governmental employee tort immunity provided for in the Act because they were not enforcing the Act at the time of the murder. The trial court granted their motion; the victim appealed, and the appellate court reversed. Defendant subsequently appealed the reversal, and the Illinois Supreme Court affirmed the trial court. In reaching its decision, the court acknowledged that defendants were aware of the former boyfriend's significant history of domestic abuse, multiple violations of orders of protection, and statements to an acquaintance before the murder that he planned to kill the victim. It also noted that, while defendants had investigated the former boyfriend and provided protection to the victim upon first learning of his murder plot, they had ceased that investigation and protection months before the

murder took place. The court focused on this time lapse, concluding that, despite the victim's multiple requests to the police to reopen their investigation and provide her with continued protection, "nothing new" had happened during the intervening months to warrant enforcement of the Act at the time of the murder. The court found that because the Act did not apply to the conduct at issue, defendants benefitted from absolute immunity from the claims and the trial court properly dismissed the case. ■

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