

Memorandum in Response to Defendant's Motion Opposing the Client's Victim-Impact Statements and Restitution Requests

I. Captions

[omitted]

II. Statement of Facts

[omitted]

III. Legal Argument

A. Sarah and Valerie Karth's victim-impact statements should be permitted because they are both considered to be crime victims as defined by Franklin Crime Victim's Rights Act (FCVRA).

A crime victim is a person "directly" and "proximately" harmed by a crime. Franklin Crime Victims' Rights Act ("FCVRA") §55(b). Under the FCVRA, a crime victim has the right to be reasonably heard at any public proceeding in the district court involving a sentencing, and the right to full and timely restitution. See FCVRA §55(a). This encompasses making a victim-impact statement at a defendant's sentencing hearing.

The legislative history of FCVRA indicates that the term "crime victim" should be interpreted "broadly." *Berg*. Franklin courts require a purported crime victim to demonstrate: (1) that the defendant's conduct was a cause in fact of the victim's injuries; and (2) that the purported victim was proximately harmed by that conduct. *Jones*. To determine cause-in-fact, courts look at whether there is a direct causal connection between the defendant's conduct and the harm caused to the victim. *Berg*. To determine proximate cause, courts look at whether the harm was a foreseeable result of the defendant's conduct. If the "harm was within the zone of risk resulting from the defendant's conduct," then the defendant's conduct is the proximate cause of the victim's harm. *Id.* The closer the relationship between the actions of the defendant and the harm sustained, the more likely that a court will find that proximate harm exists. *Jones*.

Here, Sarah and Valerie should have the opportunity to read the victim-impact statements and seek restitution because they are crime victims under FCVRA.

- (1) Valerie Karth is a crime victim under Franklin law because her physical harm was a direct result of Clegane's conduct, and it was foreseeable that selling fireworks to a minor could cause personal injury or property damage to others.
 - (a) Clegane's conduct was the cause-in-fact of Valerie's harm because he supplied the minor with the fireworks.

In *Berg*, the victim was a passenger in a car driven by the defendant's girlfriend. The victim was killed in a car accident that occurred after the defendant purchased alcohol, illegally provided the alcohol to his girlfriend, and allowed the girlfriend to drive, even though he knew she was previously convicted for a DUI and was underage. The defendant was convicted of supplying alcohol to a minor. The court allowed the parents of the deceased victim to present victim-impact statements on her behalf at the defendant's sentencing hearing. The court reasoned that the defendant's conduct was the "cause in

fact” of the victim’s death because the victim would not have died if the defendant never provided his girlfriend with the alcohol.

Here, similar to Berg, Clegane’s illegal conduct, selling fireworks to a minor in violation of Franklin Criminal Code § 305, was the direct causal connection between the defendant’s conduct and the harm caused to the Valerie and her garage because it directly caused physical harm to Valerie and her garage. If Clegane did not supply fireworks to the minor, the minor would not have been able to ignite them, and Valerie’s person and property would not have been damaged.

Also, in Hackett, the court allowed a restitution claim by an insurance company against the defendant for damage caused by one of the defendant’s coconspirators. The defendant’s coconspirator started a fire by placing chemicals the defendant had supplied on a hot plate, which caused extensive property damage. The court found that Hackett had knowledge and understanding about the nature of the drug-manufacturing enterprise and his coconspirator’s activities. Thus, even though there were “multiple links in the causal chain,” Hackett’s conduct was a cause-in-fact of the resulting property damage.

Here, similar to Hackett, although there were multiple links in the causal chain, Clegane had knowledge and understanding that selling fireworks to anyone, especially a minor, could cause harm to others because fireworks are dangerous explosives, especially when ignited by minors. Thus, Clegane’s sale of the fireworks was the cause in-fact of Valerie’s injuries.

Although Clegane might argue Valerie’s case is similar to Jones, this argument is misplaced because the victim in Jones could not read her victim statement at sentencing because she could not prove the defendant’s sale of cocaine to her ex-boyfriend resulted in her ex-boyfriend physically abusing her. The court held there was insufficient evidence to support a causal connection.

Here, Valerie’s case is different than Jones because if the Clegane never sold the fireworks, the minor would not have been able to ignite them, and no harm would have resulted. In Jones, it was unknown whether the drugs actually caused the ex-boyfriend to harm the victim in Jones.

Thus, similar to Hackett (or Berg), where the defendants knew that supplying alcohol and chemicals to certain individuals might cause harm to others, Clegane’s conduct was the cause-in-fact of Valerie’s harm because he supplied the minor with fireworks knowing the minor would ignite them and possibly cause harm to others.

- (b) Clegane’s conduct was the proximate cause of Valerie’s harm because it was foreseeable and he should have known selling fireworks to the minor could harm others.

In Berg, the court held that the defendant’s conduct was the “proximate cause” because it was reasonably foreseeable that his 19-year-old girlfriend, who had a DUI, might crash the car and injure other passengers if given alcohol. The court stated that the resulting harm to the victim was within the zone of risk of the defendant’s conduct because there was an intuitive relationship between the harm and conduct.

Here, Valerie’s harm was in the “zone of risk” of Clegane’s conduct because fireworks are inherently dangerous, and it is well-known they can cause injury to others. Although

Clegane was not present when the minor ignited the fireworks, any reasonable person would have “foreseen” that the minor might hurt others because the minor stated, “I can’t wait to show these to my friends—I’m going to give everyone a big surprise.”

Clegane claims the minor looked like he was in his twenties and that the minor’s statements did not raise any red flags, but Clegane’s claims are not credible under the circumstances because the minor’s statements should have warned Clegane that he was planning to set off the fireworks in the vicinity of others to surprise them, which means the fireworks could cause physical harm or damage to property.

Clegane might also try to rely on Jones, where the court held the victim was not a victim under FCVRA because she provided no evidence to connect her injuries to the cocaine and could not prove that domestic violence injuries were a foreseeable consequence of drug dealing. The court reasoned that the defendant’s acts were not closely related because the ex-boyfriend ingested the drugs and made the conscious decision to intentionally abuse the victim. No facts suggested the defendant knew the ex-boyfriend intended to abuse the girlfriend.

However, Valerie’s case is different because the statements made by the minor are strong evidence that he was planning to ignite the fireworks, which are dangerous explosives, around others and it is foreseeable that explosives will cause damage if used near property and people. The only intervening act was the minor’s decision to set off the fireworks, which was foreseeable because the minor told Clegane he intended to give everyone a big surprise. Thus, just as the defendant in Berg disregarded the risk that his girlfriend would drive drunk and crash the car, Clegane ignored the warning signs that a young man purchasing professional-grade, dangerous fireworks was going to set off the fireworks around others.

Therefore, Clegane’s act of selling fireworks is “closely related” to the harm and the property damage and injuries Valerie suffered were foreseeable.

Thus, Clegane’s conduct was the cause-in-fact and proximate cause of Valerie’s harm, and Sarah should be allowed to read Valerie’s victim-impact statements at the sentencing.

- (2) Sarah Karth is a crime victim under Franklin law because Clegane’s conduct directly caused her psychological damage, and it is foreseeable that selling fireworks to a minor could cause personal injury to someone and cause psychological damage to their family members.

A person does not need to suffer physical harm to qualify as a crime victim under the FCVRA. In Humphrey, the defendant was driving while texting and hit and killed the father of two minor children. The court ordered the defendant to pay restitution for the loss of child-support income to the two minor children even though neither was physically harmed by the defendant’s conduct. The court reasoned that the FCVRA requires only that a person be “directly and proximately harmed” by an offense, and that “the term ‘harm’ embraces physical, financial, and psychological damage.” FCVRA § 56(b)(2).

Here, Sarah’s case is similar to Humphrey because although she was not present when the fireworks exploded and did not suffer physical injuries, she suffered emotional harm and psychological damage, which makes her a victim in her own right. Sarah suffered her own personal trauma from seeing her beloved sister suffer from injuries in the hospital and because she worried that Valerie would not recover.

Since, as discussed above, Clegane’s conduct was the cause-in-fact of Valerie’s harm, he also

caused Sarah's harm because she saw a family member physically injured. If Clegane never sold the fireworks to the minor, then the minor would have never set them off, Valerie would not have been severely injured, and Sarah would never have been subjected to seeing her sister in a coma for months.

Clegane may argue that he was not the proximate cause of Sarah's harm, but this is a weak argument because it is foreseeable that Sarah would be distraught and depressed if her sibling was in a coma for several months and it was unknown whether Valerie would wake up. Like in *Berg*, where the victim's death was within the zone of risk caused by the defendant's decision to give his underage girlfriend alcohol, someone suffering emotional distress after his or her family member is hospitalized due to the fireworks explosion is within the zone of risk of Clegane's decision to sell fireworks to a minor. Also, like in *Humphrey*, where the loss of child-support income was within the zone of risk of killing someone while texting and driving, it is reasonably foreseeable that family members might be psychologically damaged if Clegane sold dangerous fireworks to a minor who injured the family member's loved one.

Thus, Clegane's conduct was the cause-in-fact and proximate cause of Sarah's harm, and she should be allowed to read both her and Valerie's victim-impact statements at the sentencing.

In conclusion, both Sarah and Valerie are crime victims under FCVRA because Clegane was the cause of their harm.

B. Sarah Karth may serve as Valerie Karth's representative because Valerie is incapacitated and Sarah is a suitable family member.

FCVRA § 55(b)(2) states that if a crime victim is "under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim . . . , family members, or any other persons appointed as suitable by the court may assume the crime victim's rights under this Act." In *Humphrey*, the court allowed the ex-wife of the deceased party to act as a suitable representative for their two minor children for purposes of the FCVRA restitution claim for loss of child-support income on behalf of their children.

Here, Sarah is a suitable representative because Sarah is a 35-year-old responsible adult who can speak effectively for her sister. Valerie meets the statutory definition of "incapacitated" because she was severely injured, was in a coma for months, and is still hospitalized and unable to directly participate in the proceedings. Sarah is Valerie's sister, which means she is a family member and can assume Valerie's right under FCVRA, which includes reading a victim-impact statement at the sentencing. Furthermore, Sarah is the only family member who can represent her sister's rights because Valerie's father is deceased, and their mother is too traumatized and frail to act as Valerie's representative.

Therefore, Sarah is the most suitable representative to represent her sister under the FCVRA.

C. This court should order Clegane to pay restitution because Valerie and Sarah Karth are entitled to restitution under FCVRA § 55(a)(6) and Clegane has not demonstrated an inability to pay.

Victims of a Franklin offense have the "right to full and timely restitution under section 56." FCVRA § 55(a)(6). Under FCVRA § 56(d), in awarding restitution to crime victims, the court must consider three factors: (1) public policy that favors requiring criminals to compensate for damage and injury to their victims; (2) the financial burden placed on the victim and those who provide services to the victim as a result of the criminal conduct of the defendant; and (3) the financial resources of the defendant. Franklin law creates a rebuttable presumption that the defendant is financially capable of paying restitution and places the burden of rebutting the presumption on the defendant.

- (1) Public policy favors requiring Clegane to compensate Valerie and Sarah's harm because he sold fireworks to a minor knowing the minor would likely harm others.

In Hackett, the court required the defendant to pay restitution to an insurance company for property damage caused by a fire that was set by his coconspirator because the defendant supplied the chemicals needed and had knowledge and understanding that the illegal methamphetamine manufacture enterprise could harm others.

Like Hackett, the illegal sale of professional-grade fireworks to a minor presents risk of grave harm to innocent bystanders. By requiring Clegane to compensate Valerie and Sarah, it will deter others from similarly selling dangerous fireworks to kids, especially when they know the minor intends to ignite them around others to cause a "big surprise." Moreover, minors are unlikely to have insurance or assets that may be available to pay for damage caused by an accident, which further supports holding the person who knowingly sold the fireworks to the minor responsible for the damages caused by the fireworks being ignited.

Thus, because Clegane enabled the minor to obtain powerful, dangerous fireworks, public policy should hold him responsible for compensating Valerie and Sarah for their harms.

- (2) Clegane should compensate Valerie and Sarah because his decision to illegally sell fireworks to a minor created a financial burden on the sisters.

Here, Valerie and Sarah suffered a financial burden because their damages total over \$200,000. Valerie's damages consist of \$22,000 in medical expenses, \$40,000 in future medical expenses, \$120,000 in lost wages, and \$17,000 in property damage. Sarah's damages include \$1,500 for therapy. All these damages are a reasonably foreseeable result of selling fireworks to a minor who might ignite them near people or property.

Clegane's argument that the restitution the sisters are seeking is excessive and not supported by evidence is weak. First, there is ample evidence of the sisters' losses because Sarah's statements in the client interview depict, in specific terms, how both she and Valerie have been affected by the fireworks incident. Also, Sarah has documents to prove the amounts for both Valerie and herself that quantify their financial losses through medical bills and therapy expenses (receipts), lost income (paystubs), and property damage (estimates from contractors). Second, the amount is not excessive because it does not even include requests for pain and suffering, despite Valerie being in a coma for several months, and Sarah nearly seeing her sister die. In fact, Valerie is still in the hospital more than six months later, which suggests her recovery will be slow and difficult. As for Sarah's therapy, \$1,500 is both reasonable and modest for someone who has endured six months of trauma.

Thus, Clegane should compensate Valerie and Sarah because the sisters are suffering these financial burdens because Clegane failed to act responsibly when he broke the law by selling explosive fireworks to a minor.

- (3) Clegane should compensate Valerie and Sarah because he has not showed an inability to pay.

A defendant is presumed to have the ability to pay restitution unless the defendant establishes the inability to pay by a preponderance of the evidence." FCVRA § 56(c). This is a rebuttable presumption, with the burden placed on the defendant to demonstrate the inability to pay. Humphrey.

Here, Clegane has the financial resources available to pay restitution because he owns four fireworks retail businesses in the state of Franklin. If Clegane was destitute, it is unlikely he would have multiple storefronts. Multiple storefronts suggest that he has generated enough profit to support the continuance and expansion of his fireworks business. Moreover, nothing in Clegane's motion states that he is unable to pay restitution. The court can infer that operating four firework retail businesses shows Clegane has the capital and access to substantial financial resources to compensate the sisters for their injuries.

Thus, Clegane has not rebutted the presumption that he is financially capable of paying restitution.

Therefore, the court should order Clegane to pay restitution to both Valerie and Sarah.

D. CONCLUSION

In conclusion, this court should allow Sarah to read both victim-impact statements, pertaining to herself and on behalf of Valerie as an authorized representative. Additionally, the court should order Clegane to pay restitution to both Valerie and Sarah.