

# **Protecting the Rights of the Victim at the Plea and Sentencing Proceedings**

*“We are to keep the balance true.”*

**Richard Pompelio, Esq.**

## **OUTLINE OF DISCUSSION**

1. The Victim’s Attorney – asserting your appearance.
2. The Initial Impact Statement
3. Assessing restitution and compensation issues
4. Making Victim’s views on plea bargain known as soon as possible
5. The never-ending process of establishing credibility
6. Force your way into the plea negotiations
7. Documenting everything – use of affidavits
8. Appearance at plea
9. Obtaining plea documents
10. What to do if a plea is put through without the victim’s knowledge
11. Assisting client with written and oral impact statements for sentencing
12. Deciding who will submit and deliver statements
13. Notifying prosecutor in advance of special issues
14. Special issues at sentencing – delivering the victim impact statement
  - a. Defendant refuses to appear at sentencing
  - b. Use of photograph of homicide victim
  - c. Use of videotape of victim
  - d. Use of power point presentation
  - e. Death penalty cases
  - f. Restitution
15. Having your brief ready
16. Being prepared for surprises

## SUPPORT INFORMATION

### THE PLEA BARGAIN

#### **Victims' rights justifying participation**

*Constitutional Right* NJ Constitution – Article 1, paragraph 22.

A victim of a crime shall be treated with fairness, compassion and respect by the criminal justice system. A victim of a crime shall not be denied the right to be present at public judicial proceedings except when, prior to completing testimony as a witness, the victim is properly sequestered in accordance with law or the Rules Governing the Courts of the State of New Jersey. A victim of a crime shall be entitled to those rights and remedies as may be provided by the Legislature. For the purposes of this paragraph, "victim of a crime" means: a) a person who has suffered physical or psychological injury or has incurred loss of or damage to personal or real property as a result of a crime or an incident involving another person operating a motor vehicle while under the influence of drugs or alcohol, and b) the spouse, parent, legal guardian, grandparent, child or sibling of the decedent in the case of a criminal homicide.

*Statutory Right* N.J.S.A. 52:4B-36. Rights of crime victims and witnesses

The Legislature finds and declares that crime victims and witnesses are entitled to the following rights:

- a. To be treated with dignity and compassion by the criminal justice system;
- b. To be informed about the criminal justice process; . . .
- g. To be notified if presence in court is not needed; . . .
- i. To be compensated for their loss whenever possible; . . .
- k. To be advised of case progress and final disposition; . . .
- m. To submit a written statement about the impact of the crime to a representative of the county prosecutor's office which shall be considered prior to the prosecutor's final decision concerning whether formal criminal charges will be filed; . . .

## *The Criminal Courts*

### Superior Court

**R 3:9-2 Pleas** The court, in its discretion, may refuse to accept a plea of guilty  
...

**R. 3:9-2** ....For good cause shown the court may, in accepting a plea of guilty, order that such plea not be evidential in any civil proceeding. If a plea of guilty is refused, no admission made by the defendant shall be admissible in evidence against the defendant at trial.

**R. 3:9-3 (e) Withdrawal of Plea.** If at the time of sentencing the court determines that the interests of justice would not be served by effectuating the agreement reached by the prosecutor and defense counsel or by imposing sentence in accordance with the court's previous indications of sentence, the court may vacate the plea or the defendant shall be permitted to withdraw the plea.

**R 3:9-3(g) Plea Cut Off.** After the pretrial conference has been conducted and a trial date set, the court shall not accept negotiated pleas absent the approval of the Criminal Presiding Judge based on a material change of circumstance, or the need to avoid a protracted trial or a *manifest injustice*.

...

Supreme Court Commentary .... "One example of manifest injustice is a sexual assault case in which the victim is a child: if the trial is likely to have a substantial adverse impact on the child, the court may grant waiver."

### Municipal Court

**Rule 7:6-2.(d) Plea Agreements.**

Plea agreements may be entered into only pursuant to the Guidelines and accompanying Comment issued by the Supreme Court, ... provided, however, that:

(3) the prosecuting attorney represents to the court that the complaining witness and the victim, if the victim is present at the hearing, have been consulted about the agreement;

*A.L.R. Commentary* 91 A.L.R.5th 343 VALIDITY, CONSTRUCTION, AND APPLICATION OF STATE CONSTITUTIONAL OR STATUTORY VICTIMS' BILL OF RIGHTS - §38.  
Limitation on plea bargaining

There is case law considering whether state constitutional or statutory victims' rights provisions provided limitations on plea bargaining. Explaining that a statute ([Cal. Penal Code §](#)

[1192.7](#)), which prohibited plea bargaining in certain criminal cases unless a reduction or dismissal would not result in a substantial change in sentence reflected the wishes of the voters as stated in a Victims' Bill of Rights, [Cal. Const. art. 1, § 28](#), in [People v. Arauz, 5 Cal. App. 4th 663, 7 Cal. Rptr. 2d 145 \(2d Dist. 1992\)](#), reh'g denied and opinion modified, (May 13, 1992), the court concluded that as long as the sentence a judge imposed as a result of a plea bargain was substantially the same sentence the judge would have imposed had there been no plea bargain, the sentence was proper. Accordingly, the court ruled that a plea bargain entered by a defendant who was charged with driving under the influence with five prior convictions of driving under the influence did not violate the statute even though the defendant received a sentence of two years plus a consecutive eight-month term for a subordinate offense and the maximum punishment the defendant could receive was three years and eight months, as the defendant received the same punishment from the judge on pleading guilty as he would have had he been convicted.

*Right of court to reject plea* - [People V. Sales, 129 Misc.2d 731, 493 N.Y.S.2d 945 \(1985\)](#)

Defendant had agreed to plead guilty to charge of attempted robbery in exchange for sentence of one year. However, at sentencing, victim appeared and gave court first-hand account of the crime. The Supreme Court, Kings County, Lewis L. Douglass, Acting J., held that court could decline to impose agreed upon sentence, provided defendant was offered opportunity to withdraw plea, in light of victim's testimony. The court commented:

It is well established that where information comes to the attention of the sentencing court which was not available at the time the plea bargain and such information makes the agreed upon sentence inappropriate, the court is not bound by its promise, provided the court gives to the defendant the opportunity to withdraw the plea ([People v. Selikoff, 35 N.Y.2d 227, 360 N.Y.S.2d 623, 318 N.E.2d 784](#)). The issue here is whether the description and the impact of the crime as described by the victim is new information which would authorize the rejection of the original plea bargain.\*733 Public policy suggests that the criminal justice system not only be open, but that it be perceived as open and fair to all of the participants, the prosecutors, the defendants and the crime victims. No system can be perceived as fair and open if it would prohibit the crime victim from communicating his or her views to the court and would prohibit the sentencing judge from reacting to those views. 947 The public policy of recognizing the importance of the views of the crime victim was recognized in the 1982 amendment to the criminal procedure law which requires that the pre-sentence report "contain an analysis of the victim's version of the offense, (and) the extent of injury or economic loss or damage" to the victim ([CPL 390.30](#) subd. 3). [\[FN2\]](#)

*Right of State to withdraw plea offer - Reed v. Becka, 333 S.C. 676, 511 S.E.2d 396 (1999)*

The State entered into plea negotiations which resulted in no agreement. Later, the State orally offered to allow Becka to plead guilty to ABHAN. After counsel for Becka orally accepted the offer, the Solicitor consulted Victim's family. Upon learning Victim attempted suicide and suffered depression and post traumatic stress disorder stemming from the alleged attack, the State moved to withdraw the plea offer. Victim moved to invalidate the plea offer. Becka objected to the withdrawal of the plea. The Circuit Court, denied motion, and state and victim's parents appealed. The Court of Appeals held that: (1) victim of crime does not have a right to veto plea agreement, and (2) as matter of first impression, state could withdraw plea offer.

### **THE SENTENCING PROCEEDING**

*Writing to the court before sentencing People v. Michael M., 124 Misc.2d 300, 302-303, 475 N.Y.S.2d 774-777 (1984) held that defendant, charged with sodomy of a 22-month-old infant, moved for recusal. The County Court, Nassau County, Raymond Harrington, J., held that neither fact that friends of victim had written to the trial judge demanding "justice," nor fact that court was aware of plea offer made by defense counsel required recusal.*

Excerpts from court's decision ( Judge HARRINGTON):

"The Courtroom is the focal point of the entire criminal justice system ... Particularly for the victim, the judge is the personification of justice." (*President's Task Force Report on Victims of Crime*, December, 1983, p. 73.) Certainly the trial judge should ideally be perceived as "the personification of justice" by *everyone* involved in the system, including the defendant. More particularly, however, victim's rights in the criminal justice system are now being asserted more forcefully than ever before. (Laws of 1984, ch. 94, eff. April 24, 1984, Art. 23 of *Executive Law*, Fair Treatment Standards for Crime Victims Act.) Certainly these rights have long languished, overwhelmed by other considerations. Victims' rights should be recognized, asserted and protected by the judiciary

without doing harm to fundamental rights of defendants. The Court, ever mindful of balancing those rights, is asked to disqualify itself from presiding over this matter 775 because prior to a resolution of this case, \*301 the victim's family and friends have written to this trial judge demanding "justice". Is a defendant's right to a fair trial compromised by the trial judge being aware of the outrage of the alleged victim's friends and family? Are communications by the victim's family to the trial judge prior to verdict or plea an appropriate manner for the victim to exercise *his right* to participate in plea and sentence negotiations? Should these communications be encouraged or discouraged?

In this case the defendant, sixteen years old, is indicted for the crime of Sodomy in the First Degree. It is alleged that he anally sodomized a twenty-two month old infant. By the nature of these charges, it is understandable that those closest to this incident have responded with intense feelings.

....

In the first instance, what the defendant has characterized as a "deluge" of letters is not fittingly so described. Without commenting on the relevancy, poignancy and literary quality of any of the letters received by the Court, the defendant has certainly "won the battle" on any quantifiable basis.

On the other hand, this Court perceives little or no distinction between the manner in which this case has proceeded, including the submission of letters, and a myriad of other cases that have come before this trial judge. Indeed, many more notorious cases before this and other Courts have resulted in larger and more vociferous outcries from the victims and, indeed, the entire community.

....

Recently the National Conference of the Judiciary on the Rights of Victims of Crime issued a *Statement of Recommended Judicial Practices* [published by the National Institute of Justice, U.S. Department of Justice (April, 1984).] (See, \*\*776 NYLJ, May 1, 1984, pp 1 and 36.) This manifesto was the product of a conference of judges of courts of general jurisdiction of all our states at the American Bar Association's National Judicial College. Those recommendations state, in part, that "... victims shall be allowed to participate and, where appropriate, to give input through the prosecutor ... 'concerning' ... plea and sentence negotiations." (Cf. *Fair Treatment Standards \*303 for Crime Victims, supra.*) Furthermore "victim impact statements prior to sentencing should be encouraged and considered." ([CPL 390.30\[3\]](#) as amd. by Laws of 1982, ch. 612, eff. Nov. 1, 1982.)

....

The better practice is that the prosecutor and defense counsel should try to funnel through their offices all communications to the Court concerning pending matters, and to submit the same on notice to their adversary. The Court is mindful that citizens have their own constitutional rights to communicate with the Courts as

their elected public officials, whether on behalf of the defendant or the alleged victim. Counsel cannot reasonably be expected to control every exercise of freedom of speech by individual citizens, whether they be friends of the victim or the defendant, or are just concerned members of the public.

*Right of court to impose restitution even if not a part of plea bargain* People v. Jackson, 143

A.D.2d 473, 532 N.Y.S.2d 590 (1988) Defendant was convicted in the County Court, Chemung County, Danaher, J., upon defendant's plea of guilty to robbery in first degree and criminal possession of weapon in third degree. Defendant appealed. The Supreme Court, Appellate Division, Weiss, J., held that imposition of full restitution totalling \$1,750 to victims of two of defendant's armed robberies was proper, although defendant claimed that restitution was not part of his plea bargain and should not have been imposed as part of his sentence.

*Rejecting the plea agreement at sentencing* - State v. Sears, 208 W.Va. 700, 542 S.E.2d 863

(WVa. 2000) – authority of court to reject plea agreement based on impact of crime on victim

Court noted:

In our country, it has long been recognized that plea bargaining "is an essential component of the administration of justice." Santobello v. New York, 404 U.S. 257, 260, 92 S.Ct. 495, 498, 30 L.Ed.2d 427, 432 (1971). However, defendants do not have an absolute right to have a guilty plea accepted. "West Virginia Rules of Criminal Procedure, Rule 11, gives a trial court discretion to refuse a plea bargain." Syllabus Point 5, State v. Guthrie, 173 W.Va. 290, 315 S.E.2d 397 (1984). "There is no absolute right under either the West Virginia or the United States Constitutions to plea bargain. Therefore, a circuit court does not have to accept every constitutionally valid guilty plea merely because a defendant wishes so to plead." Syllabus Point 2, State ex rel. Brewer v. Starcher, 195 W.Va. 185, 465 S.E.2d 185 (1995). "A court may reject a plea in exercise of sound judicial discretion." Santobello, 404 U.S. at 262, 92 S.Ct. at 498, 30 L.Ed.2d at 433.

Our Rule 11 is modeled after Rule 11 of the Federal Rules of Criminal Procedure and provides a detailed set of standards and procedures to govern the plea bargain process. Myers v. Frazier, 173 W.Va. 658, 664, 319 S.E.2d 782, 788 (1984). Id at \*\*867 \*704

.....

As to what is meant by a plea bargain being in the public interest in the fair administration of justice, . . . we believe that consideration must be given not only to the general

public's perception that crimes should be prosecuted, but to the interests of the victim as well. Id.

**Right of victim to deliver a written impact statement**

N.J.S.A. 2C:44-6 The presentence report shall also include a report on any compensation paid by the Victims of Crime Compensation Board as a result of the commission of the offense and, in any case where the victim chooses to provide one, a statement by the victim of the offense for which the defendant is being sentenced. The statement may include the nature and extent of any physical harm or psychological or emotional harm or trauma suffered by the victim, the extent of any loss to include loss of earnings or ability to work suffered by the victim and the effect of the crime upon the victim's family. The probation department shall notify the victim or nearest relative of a homicide victim of his right to make a statement for inclusion in the presentence report if the victim or relative so desires. Any such statement shall be made within 20 days of notification by the probation department.

The presentence report shall specifically include an assessment of the gravity and seriousness of harm inflicted on the victim, including whether or not the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, disability, ill-health, or extreme youth, or was for any other reason substantially incapable of exercising normal physical or mental power of resistance.

**Right of victim to deliver An oral impact statement**

**52:4B-36. Crime Victims Bill of Rights**

The Legislature finds and declares that crime victims and witnesses are entitled to the following



rights:

. . . .

n. To make, prior to sentencing, an in-person statement directly to the sentencing court concerning the impact of the crime.

This statement is to be made in addition to the statement permitted for inclusion in the presentence report by [N.J.S.2C:44-6](#).

In any homicide prosecution the victim's survivor may display directly to the sentencing court at the time of this statement a photograph of the victim taken before the homicide; . . . .

### **The Case of Charles Cullen**

#### **Facts**

Defendant Charles Cullen has entered pleas of guilty in the Superior Court of New Jersey, Somerset County to the murder of thirteen innocent victims. He has also pleaded guilty to the attempted murder of two other individuals. His sentencing date before the court has not been scheduled as yet. During the court proceeding when the defendant will be sentenced for his crimes, the survivors of the thirteen murder victims and the attempted murder victims are entitled to deliver to the court an in person oral victim impact statement. N.J.S.A. 52:4B-36 (n).

Through his attorney, the defendant indicated that he will not attend the sentencing proceedings. Accordingly, when each of the victims delivers his/her victim impact statement, the individual solely responsible for each of these crimes will not be present to hear the voices and see the faces of the victims he has created through his criminal acts. In a news article in the Star Ledger dated October 17, 2004 entitled "Cullen to avoid victims' relatives -Serial killer elects to skip sentencings" the following wording appears:

“Serial killer Charles Cullen has decided he won't appear for sentencings in New Jersey courts, according to his attorney, thereby avoiding the face-to-face wrath of his victim's relatives.

"It's Charlie's call and he has been of the mind to have as few court appearances as possible," Deputy Public Defender Johnnie Mask said. "If at the time of any sentence proceeding he's still of that mind, he might just choose to waive his appearance."

### **CULLEN - Summary of Arguments presented to the court**

#### **1. Crime victims are afforded rights because of their status in the criminal justice system.**

Over thirty states have written victims' rights into their respective constitutions<sup>1</sup> and all states have written victims' rights into their statutes. The rights created by these laws are civil rights that exist independent of the other participants in the criminal justice process. *See generally*, Douglas E. Beloof, "Constitutional Implications of Crime Victims as Participants," 88 CORNELL L. REV. 282, 286 (Jan. 2003).

New Jersey is among these states. The laws of New Jersey recognize the unique and vital interests of crime victims in the criminal justice system and give crime victims participatory, procedural rights in that system. The rights given are status rights – they are automatically afforded to persons when they step into the legal role of “victim,” and are independent of the

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<sup>1</sup> *See, e.g.*, Ala. Const. Amend. No. 557; Alaska Const. art. I § 24; Ariz. Const. art. II §2.1; Cal. Const. art. I §28; Colo. Const. art. II, § 16a; Conn. Const. Art. 1, § 8; Fla. Const. art. I, § 16(b); Ill. Const. art. I, § 8.1; Idaho Const. Art. I, § 22; Ind. Const. Art. 1, § 13(b); Kan. Const. art. 15, § 15; La. Const. Art. I, § 13; Md. Const. Declaration of Rights, art. 47; Mich. Const. art. I, § 24; Miss. art. 3, § 26A; Mo. Const. art. I, § 32; Neb. Const. art. I, § 28; Nev. Const. art 1, § 8; N.J. Const. art. I, ¶ 22; N.M. Const. art. II, § 24; Ohio Const. art. I, § 10A; Okla. Const. art. II, § 34; Or. Const. art. I, § 42; R.I. Const. art. 1, § 23; S.C. Const. art. I, § 24(B); Tenn. Const. Art. 1, § 35; Tex. Const. art. I, § 30; Utah Const. art. I, § 28; Va. Const. art. I, § 8-A; Wash. Const. art. 1, § 25; Wis. Const. art. I, § 9m. In addition, in April 2004, S. 2329, which sets forth victims' rights and provides for non-discretionary mandamus review, was passed by the United States Senate 96-1, and is awaiting action in the House of Representatives. *See* Congressional Record, 108 Cong. 2d Sess., April 22, 2004, p. S.4279-80.

facts of the alleged crime, any defense asserted, or the conviction of defendant. *See* N.J.S.A. 52:4B-34 *et seq.*

This fact is recognized in N.J.S.A. 52:4B-2 which, for the purpose of receiving compensation from the Victims of Crime Compensation Board (hereinafter, V.C.C.B.), under the Criminal Injuries Compensation Act of 1971 defines a “victim” as “a person who is injured or killed by any act or omission of any other person which is within the description of any of the offenses specified in [N.J.S.A. 52: 4B-11].” Among these offenses is murder, manslaughter, sex related crimes, kidnapping, drunk driving and offenses related to domestic violence. Furthermore, a victim of these offenses is entitled to an award of compensation by the V.C.C.B. “whether or not any person is prosecuted or convicted of any offense arising out of such act or omission.” N.J.S.A. 52:4B-10(c).

At the moment the victim died, the victim’s survivors<sup>2</sup> became victims under the law. And as a result of their legal status as victims, they are entitled to certain Constitutional and statutory rights. They are afforded constitutional and statutory rights because of their status and regardless of the defense asserted or the conviction of a defendant.

Crime victims’ rights are participatory, procedural rights afforded to independent participants in the criminal justice system immediately upon their entry into that system. As such, these rights arise simply because of an individual’s status in the criminal justice system. All of these rights are about the criminal justice process – they are rights to participate in the

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<sup>2</sup> N.J. Const. art. I, ¶ 22 which defines “victim of crime” as:

a) a person who has suffered physical or psychological injury or has incurred loss of or damage to personal or real property as a result of a crime or an incident involving another person operating a motor vehicle while under the influence of drugs or alcohol, and b) the spouse, parent, legal guardian, grandparent, child or sibling of the decedent in the case of a criminal homicide.

process, to receive information about the process, to have interests adjudicated within the process, and to be safe throughout the process. See *State v. Ruffin*, 853 A.2D 311, 321, 371 N.J. Super. 371, 387 (App. Div. 2004) where Judge Collester noted:

FN3. In seeking to support his position, the assistant prosecutor commented "we prosecute on behalf of the victim" and "we protect the victim's rights." Such comments oversimplify both the power of the prosecutor and the rights of the victim. As chief law enforcement officer within a county designated to prosecute the criminal business in this State, [N.J.S.A. 2A:158-4](#), the prosecutor may at times take discretionary actions in conflict with the interests and desires of victims. See, [State v. Hessen](#), 145 N.J. 441, 678 A.2d 1082 (1996); [State v. Hermann](#), 80 N.J. 122, 402 A.2d 236 (1979); [State v. Ward](#), 303 N.J. Super. 47, 696 A.2d 48 (App.Div.1997); [State v. Kraft](#), 265 N.J. Super. 106, 625 A.2d 579 (App.Div.1993); [State v. Mitchell](#), 164 N.J. Super. 198, 395 A.2d 1257 (App.Div.1978). The rights of a crime victim are independent of the prosecutor. They are derived from common law and in this State, from the Constitution, *N.J. Const.* art. I, ¶ 22, and the Crime Victim's Bill of Rights, [N.J.S.A. 52:4B-34](#) to -38. See, [State v. Timmendequas](#), 161 N.J. 515, 737 A.2d 55 (1999).

The rights of crime victims in the criminal justice system in New Jersey were first established in the "Crime Victim's Bill of Rights", N.J.S.A. 52:4B-36, *et seq.* This legislation that calls for victims of crime to be "informed" and treated with "dignity and compassion by the criminal justice system" became law in 1985. The "legislative findings and declarations" to the "Crime Victim's Bill of Rights" provides a definitive statement of the intent and purpose to recognize and respect the rights of crime victims:

The Legislature finds and declares that without the participation and cooperation of crime victims and witnesses, the criminal justice system would cease to function. The rights of these individuals should be given full recognition and protection. The Legislature has the responsibility to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process. In furtherance of this, the improved treatment of these persons should be assured through the establishment of specific rights. These rights are among the most fundamental and important in assuring public confidence in the criminal justice system.

See N.J.S.A. 52:4B-35.

The thirteen murder victims collectively are survived by parents, grandparent's spouses, children, grandchildren, brothers and sisters, and a network of other relatives and resulting in thousands of victims of these crimes. Under the authority of Article 1, paragraph 22 of the New Jersey Constitution (the Crime Victim's Rights Amendment), (Adopted December 5, 1991); N.J.S.A. 52:4B-34, et seq., (the New Jersey Crime Victim's Bill of Rights) and N.J.S.A. 52:4B-1, et seq., (the Criminal Injuries Compensation Act of 1971), the parents, grandparents, spouses, children and siblings of the individual victims named in A-1 are direct victims of these multiple crimes of murder and each is entitled to the full protection of the statutes and Constitution of the State of New Jersey.

The New Jersey Victims of Crime Compensation Board (hereinafter "VCCB") and the New Jersey Crime Victims' Law Center (hereinafter "VLC") are public and private victims' rights agencies respectively. This brief is submitted jointly on behalf of both agencies in support of the application of each victims' rights agency to appear as *amicus curiae* and argue on behalf of the rights of the crime victims in the motion filed on their behalf to compel the appearance at sentencing of the defendant Charles Cullen.

**2. Leave to appear as amicus curiae should be granted to the new jersey victims of crime compensation board and the new jersey crime victims' law center pursuant to R. 1:13-9.**

When someone is murdered, there is created a river of grief that will continue to flow until everyone who ever knew that person is dead. The attached certifications of several of

Charles Cullen's murder victims attest to this fact. The deaths of each of the innocent victims whose names appear on A-1 are also about the survival of those they left behind.

N.J. Const., Article I, par.22 (hereinafter "Victim's Rights Amendment"), N.J.S.A. 52:4B-34, et seq., (the New Jersey Crime Victim's Bill of Rights) and N.J.S.A. 52:4B-1, et seq., (the Criminal Injuries Compensation Act of 1971), exist because the criminal justice system recognizes that a criminal justice system that is only about criminals cannot be about justice. Governmental agencies, like the VCCB and private non profit organizations such as the VLC were established and exist to safeguard the rights of the thousands of innocent individuals who become victims of violent crime each year.

It is on behalf of these victims and all victims of crime who have a right to a presence and a voice in the justice process that the VCCB and the VLC seek leave to appear as *amicus curiae* in this matter.

The rights of crime victims in the criminal justice system in New Jersey were first established in the "Crime Victim's Bill of Rights", N.J.S.A. 52:4B-36, et. seq. This legislation that calls for victims of crime to be "informed" and treated with "dignity and compassion by the criminal justice system" became law in 1985. The "legislative findings and declarations" to the "Crime Victim's Bill of Rights" provides a definitive statement of the intent and purpose to recognize and respect the rights of crime victims:

The Legislature finds and declares that without the participation and cooperation of crime victims and witnesses, the criminal justice system would cease to function. The rights of these individuals should be given full recognition and protection. The Legislature has the responsibility to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process. In furtherance of this, the improved treatment of these persons should be assured through the establishment of

specific rights. These rights are among the most fundamental and important in assuring public confidence in the criminal justice system.

See N.J.S.A. 52:4B-35.

On November 5, 1991 at the general election, the voters of the State of New Jersey adopted the Victim's Rights Amendment to the New Jersey Constitution. This amendment became law on December 5, 1991 and was the result of considerable effort on the part of legislators, prosecutors, crime victims and various individuals who sought to bring equal justice for crime victims into the criminal justice system in the State of New Jersey. It established certain rights for crime victims that are guaranteed "as a matter of State Constitutional imperative" along with such further constitutionally recognized and protected "rights and remedies as may be provided by the Legislature. See, N.J. Const., Article 1, par. 22 and Interpretive Statement. The Amendment guarantees to the crime victim the right to have presence in the criminal justice system along with the right to be treated with fairness, compassion and respect by those who work in the criminal justice system. See, Id. Interpretive Statement. Recognizing the impact of the amendment, the court in State in the Interest of K.P., 311 N.J. Super. 123 (Ch. Div. 1997) stated:

This provision effects a fundamental change in the criminal justice system. Instead of adopting a two-party State v. Defendant, paradigm, this provision requires that the system consider interests of third parties, specifically crime victims. Unfair practices that deny crime victims fairness, compassion and respect are unconstitutional under the amendment. Id. at 135-36.

The Victims' Rights Amendment in the State of New Jersey formed a part of the national victim rights movement which has continued to move with significant measure throughout the United States. The Victims' Rights Amendment was a direct response to the many reports of the

lack of recognition and respect for crime victims in New Jersey that routinely included the practice of excluding the victims from the justice process.

The significant impact of the Victim's Rights Amendment on the criminal justice process has been recognized by the courts of this State. In State v. Muhammad, 145 N.J. 23 (1996), Justice Garibaldi, speaking for the Court, stated:

Unlike most interpretations of constitutional provisions, we need not surmise what the founders intended when they drafted the Victim's Rights Amendment. We know exactly what the founders of this constitutional amendment intended--fair treatment for victims. To hold the victim impact statute unconstitutional would require us to ignore the Victim's Rights Amendment and the will of the electorate that overwhelmingly approved the constitutional amendment. Over 1,200,000 citizens voted for the Victim's Rights Amendment while only 223,248 people voted against it. Manual of New Jersey, Two Hundred and Fourth Legislature (First Session) 1992, at 903. Beginning with the passage of the Criminal Injuries Compensation Act of 1971 (N.J.S.A. 52:4B-1 to -33), the people of New Jersey, speaking through the Legislature, have repeatedly expressed a very strong "public attitude" that victims should be provided with more rights. Id. at 42-43.

The respect for this "public attitude" was noted by Justice (then Judge) Pashman in New Jersey Sports & Exposition Auth. v. McCrane, 119 N.J.Super. 457, 476-77, 292 A.2d 580 (Law Div.1971), aff'd as modified, 61 N.J. 1, 292 A.2d 545, appeal dismissed, 409 U.S. 943, 93 S.Ct. 270, 34 L.Ed.2d 215 (1972), where he stated:

It must be remembered that the greatest danger to people from the exercise of the judicial power is that there may be a usurpation by the courts of the people's right to express in law, by overwhelming numbers of their elected legislators, their collective reasoning. Id. at 42.

The effect of the Victims' Right Amendment in New Jersey has been substantial in that there has been a clearly recognizable effort on the part of the executive, legislative and judicial



branches of our State government to provide "fairness, compassion and respect" to crime victims and to continually reinforce the legislative intent under the Crime Victim's Bill of Rights that "these rights are among the most fundamental and important in assuring public confidence in the criminal justice process." See N.J.S.A. 52:4b-35.

New Jersey has been recognized as a national leader in respecting the rights of crime victims for well over a quarter century. It was one of the first states to provide for victim compensation under the Criminal Injuries Compensation Act of 1971 (N.J.S.A. 52:4B-1, et seq), and for a Crime Victim's Bill of Rights in 1985 (N.J.S.A. 52:4B-34, et seq.) under which was established the State and 21 county offices of victim-witness advocacy. In addition, New Jersey was just the eighth state to adopt a victim's rights amendment to its state constitution. Since 1971 there have been no less than sixty (60) new laws passed involving the rights of crime victims. (See A-14 through 23). Furthermore, there are presently pending in the New Jersey Legislature at least fifty (50) pieces of legislation affecting crime victims. (See A-24 through 26).

In recent years the courts in New Jersey have also been progressive in recognizing the rights of crime victims. See, e.g.; State v. Muhammad, 145 N.J. 23 (1996) (upholding constitutionality of death penalty victim impact statute); State v. Fauce, 244 N.J. Super. 499 (App.Div. 1990) (rights of the victim must be considered before the court can order that the defendant's plea be non-evidential in a civil proceeding); State in the Interest of J.G., N.S., and J.T., 151 N.J. 565 (1996) (Supreme Court upholds victim's rights to require HIV testing of assailant); State v. Timmendequas, 161 N.J. 515 (1999) (the Constitutional rights of the victim survivors under the Victim's Rights Amendment are sufficient to warrant a change of venue in a death penalty case); State v. Smith, 310 N.J. Super. 140 (App. Div. 1998) (permitting child

victim to testify over closed circuit television); Gallara v. Koskovich, 364 N.J. Super 418 (Law Div. 2003) (court upholds claim of liability of sporting goods store for guns stolen and used in the murder of two victims); State v. Hill, 155 N.J. Super. (App. Div. 1998) (restitution may be ordered against defendant to pay third parties who have reimbursed a crime victim for losses suffered as a result of criminal conduct); State v. Cusumano, 396 N.J. Super. 305 (App.Div. 2004) (trial judge's act of advising those in attendance at trial that no persons would be permitted to leave or enter the courtroom while the victim was on the witness stand, constituted a reasonable and constitutionally permissible limitation on the public's right of access – relying on the Crime Victim's Bill of Rights N.J.S.A. 52:4B-36); and State in the interest of K.P., 311 N.J. Super. 123 (Chan. Div. 1997) (victim has standing to oppose petition by newspaper to open sexual assault trial of juveniles and victims have unalienable right to be present during a criminal proceeding, subject only to rules concerning sequestration.) The recognition of the rights of crime victims through legislation and the judicial decisions of this State mandates that the rights of crime victims must be placed on equal footing in the justice system. The issues presented to this Court directly affect the rights of victims of crime throughout the State of New Jersey. The New Jersey Victims of Crime Compensation Board and the New Jersey Crime Victims' Law Center respectfully request permission to appear in this matter as *amicus curiae* in order to advocate these rights and give victims a direct voice in this matter.

**3. The defendant should be compelled by the court to attend the sentencing proceedings, and be present when the victims deliver their oral victim impact statement to the court.**

**A. The rights of the victims to fairness, compassion, respect and dignity in making an in person victim impact statement at the sentencing proceedings pursuant to Article 1, par. 22 of the**

**New Jersey Constitution and N.J.S.A. 52:4b-36  
(The Crime Victims Bill Of Rights) outweigh the  
right of the defendant to refuse to attend the  
sentencing proceedings.**

Defendant Charles Cullen has no constitutional or statutory right to refuse to be present during the sentencing proceedings. Any asserted legal authority on his part to refuse to be present would appear to be derived from R. 3:21-4(b), which states:

“Sentence shall not be imposed unless the defendant is present or has filed a written waiver of the right to be present. Before imposing sentence the court shall address the defendant personally and ask the defendant if he or she wishes to make a statement in his or her own behalf and to present any information in mitigation of punishment. The defendant may answer personally or by his or her attorney.”

The rights of the victims originate with the State Constitution (Article 1, paragraph 22) and the statutes of New Jersey (N.J.S.A. 52:4B-36). These rights far outweigh the rights of the defendant in the case at bar, and a balancing of the respective rights of the parties mandates that the defendant be compelled to be present during the sentencing proceedings when the victims deliver to the court their in person victim impact statements.

In the first weeks of 1991, the members of the New Jersey legislature began their aggressive efforts to have a Victims' Rights Amendment placed on the public ballot for the November 1991 general election. Having already formulated the language of the proposed amendment, the Legislature sought to make an immediate statement which would evidence its commitment to victims' rights. That statement was the enactment on March 1, 1991 of the in-person victim impact statement. N.J.S.A. 52:4B-36(n) added to the existing Crime Victims' Bill of Rights the right "[t]o make, prior to sentencing, an in-person statement directly to the

sentencing court concerning the impact of the crime." The law also provided, "[t]his statement is to be made in addition to the statement permitted for inclusion in the presentence report by N.J.S.A. 2C:44-6." In order to give the crime victim the real opportunity to meaningfully exercise this right, the Assembly Judiciary, Law and Public Safety Committee emphasized in its official statement:

“The bill further requires that county prosecutor offices assist crime victims in preparing the statement for consideration by the prosecutor regarding whether to prosecute. Finally, the bill would require each county prosecutor’s office to notify crime victims of the right to make the in-person statement to the sentencing court concerning the impact of the crime.” Id.

The Supreme Court of the United States has ruled that the victim has a substantial right to be included in the criminal justice proceedings. This declaration of the rights of the victim is demonstrated in the Court's decision to permit victim impact testimony in capital murder cases. In Payne v. Tennessee, 111 S.Ct. 2597 (1991), the Court reversed its prior holding in Booth v. Maryland, 107 S.Ct. 2529 (1987), and held that it was appropriate under the Federal Constitution to give the victim a voice in the process by permitting victim impact testimony in death penalty cases. By giving the victim a voice, the Court likewise, gave the victim meaning and value in the courts.

In a landmark victims’ rights decision in 1996, the New Jersey Supreme Court followed the holding of the Court in Payne when it upheld the constitutionality of the recently enacted New Jersey statute N.J.S.A. 2C:11-3c(6) which permitted victim impact testimony in death penalty cases. See State v. Muhammad, 145 N.J. 23 (1996). Commenting on the important historical development of victims' rights in the State of New Jersey, the court in Muhammad commented:

The victim impact statute is merely one of the latest efforts by the Legislature to increase the participation of crime victims in the criminal justice system. In 1971, the Legislature enacted the Criminal Injuries Compensation Act of 1971, N.J.S.A. 52:4B-1 to -33. In 1985, the Legislature enacted the Crime Victim's Bill of Rights, N.J.S.A. 52:4B-34 to -38, which granted crime victims and witnesses certain rights, including the right to be treated with dignity, the right to be informed about the criminal justice process, and the right to be told about available remedies and social services. The following year, the Legislature amended N.J.S.A. 2C:44-6 to allow family members of murder victims to include a written statement in the defendant's presentence report. In 1991, the Legislature amended the Crime Victim's Bill of Rights to provide victims with the opportunity to submit to a representative of the county prosecutor's office a written statement about the impact of the crime on the family and to allow victims to make in-person victim impact statements in non-capital cases directly to the sentencing court. N.J.S.A. 52:4B-36. Id. at 33.

The reference by the court in Muhammad to N.J.S.A. 52:4B-36 and the right of a crime victim to become a part of the court proceedings by permitting an in-person impact statement prior to sentencing is most significant because that legislation became the first effort to implement the intent of the Victims' Rights Amendment. See N.J.S.A. 52:4B-36(n).

The words of the victim survivors in the attached certifications exemplify the purpose and the intent of the Victim's Rights Amendment and the victim impact legislative provision.

**Mary Strenko**

“8. Along with so many other innocent victims, Charles Cullen took control of the life of our son Michael in his hands. As an individual who held himself out as a nurse, a healer, he looked into our eyes, as we looked to him for help and compassion. He saw our pain; he saw our anguish. Then, he turned away, and committed one murder after another.

“9. My husband Tom and I ask this court tell Charles Cullen that he is no longer in control. When he took our son from us, he shattered every fiber of our being. It is as important to me as breathing air to have Charles Cullen once again look into my eyes to personally see and to hear of the anguish he has caused. He never gave my son Michael a chance to speak but with an arrogance and hatred inside of him that I cannot fathom, Cullen sought to snuff out the life of this beautiful young man.” (A-3, A-4).

**Jean Hoff**

“5. I truly believe that the purpose of the victim impact statement is to give the victims the sole opportunity to bring the corners of justice together and confront the painful reality of the offender's violent act. This cannot happen without Charles Cullen being present to hear what the other victims and I have to say; not because he needs to hear it, but because the justice process must hear it with him present. To me it is simply accountability, and justice requires accountability.

“6. As difficult as it will be to speak before this court at sentencing with my dad's killer present, I know that, for my father, Cullen must be present. His presence will be a recognition that justice is about what is right, and it is the right thing for the killer of an innocent and good man to be required to be present when his loved ones, the victims left

behind, speak of the painful damage caused by Cullen's crimes."  
(A-7).

Each individual victim of Charles Cullen is not just a "faceless stranger" in the criminal case of State of New Jersey v. Charles Cullen; South Carolina v. Gathers, 490 U.S. 805, 821, 109 S.Ct. 2207, 2216 (1989), (O'Connor, J. dissenting). The lives of each of these victims will continue to have special meaning to all who knew and loved them. Each victim leaves behind a long list of loved ones who now must not allow this special meaning to be diluted by the criminal justice system whose reason for existence is based on the fact that there are victims of crime.

The words of Justice Souter in his concurring opinion in Payne v. Tennessee, III S.Ct. 2597 (1991), are profoundly applicable to the essence of this application before the court:

"Every defendant knows, if endowed with the mental competence for criminal responsibility, that the life he will take by his homicidal behavior is that of a unique person, like himself, and that the person to be killed probably has close associates, "survivors," who will suffer harms and deprivations from the victim's death. **Just as defendants know that they are not faceless human ciphers, they know that their victims are not valueless fungibles, and just as defendants appreciate the web of relationships and dependencies in which they live, they know that their victims are not human islands, but individuals with parents or children, spouses or friends or dependents.** Thus, when a defendant chooses to kill, or to raise the

**risk of a victim's death, this choice necessarily relates to a whole human being and threatens an association of others, who may be distinctly hurt."**

Id., at 2615-2616. (Souter, J. concurring).

Each victim in this case was once a living, breathing and vibrant individual whose life brought joy and pleasure to their family and friends. To deny their loved ones their constitutional right to be respected as crime victims, and to exercise their constitutional and statutory rights by giving meaning to their victim impact statements denies their status as crime victims. More egregiously, however, it denies the existence of each victim, the unnamed but most important party of the case of State v. Charles Cullen.

For over a decade, Cullen played judge, jury and executioner as he coldly and arbitrarily snuffed out the lives of his victims, one at a time. Their loved ones and friends sat quietly in the public courtroom throughout the plea agreement proceedings of this matter. They watched and listened as the man, cloaked in the constitutional protections of the justice system, matter of factly addressed the court about each of his crimes involving each of his victims. They had no right to speak to the court or to the defendant; just sit and listen and somehow, try to hold themselves together so as not to disrespect or disrupt the justice proceeding.

But soon it will be the time for the victims to speak, to the court and to the killer of their loved one. The right of the victim to deliver a victim impact statement in open court is perhaps the single most important right of a crime victim under the Crime Victims Bill of Rights. N.J.S.A. 52:4B-36 (n). No one can better represent the murder victim at the sentencing proceeding than that individual's loved one. The inclusion of the victim in the justice process converts a system of the mechanical processing criminals to



one of truth and reality, because what is most real in this proceeding is that innocent people have been killed for no reason, and the lives of their survivors have been irrevocably shattered. The words of the victims attached to this brief are most persuasive.

**John Michael Shanagher**

“6. My father was 83 years old when Cullen killed him. He was known by all as “Jack”. My dad was a hard working, honest and generous man who always put his family first. He treasured each day of his life and the lives of his loved ones. My mom should not have become a victim at the age of 80, but she did. Jack’s children, grandchildren and great grandchildren should not have been forced to become crime victims for the rest of our lives, but we have. Charles Cullen gave us no fairness, no compassion and no respect. Now he seeks to add further insult to injury by declaring that if he does not have the courage to face us and hear our words, then we have to once again accept his arrogance.”

(A-10, A-11).

“7. My dad was a very direct man. If he had something to say to you, he wanted to look you in the eye and tell you the truth about how he felt. When I speak before the court and give the impact statement on behalf of my family, I truly believe that my father will be right there with me. Many of my words will be his words. And Cullen must be there to look at my face and hear these words.

**Lucille Gall**

“4. Cullen is a murderer. I sincerely believe that the other victims and I should have some kind of right to address him in a formal situation. If the justice system is fair, then some consideration must be given to the victims. I have not seen Cullen since my brother was in the hospital. It is very important to me to see his face and say what I have to say. Not only does Cullen need to hear my words, but the justice system needs to have him present when I speak on behalf of my family.

“5. My brother’s life had so much meaning to so many people. The words evidencing the impact of our loss

will be delivered to the court, and the individual who caused this loss should not be permitted to dismiss this impact in the same manner that he dismissed my brother's life." (A-13).

The remedies afforded to the victims by the justice system can never make this situation totally right for the victims; but it can take a major step by giving real meaning to the word *justice*. It is this real meaning that the victims seek by having Cullen there, sitting quietly as they had to do several months ago. And this time, they have the opportunity to speak, and he and the justice system will have the opportunity to hear their words. That is the closest the victims will ever get to achieving justice in these proceedings. Nevertheless, it is so critically important and necessary to them.

The constitutional rights of the victims to "fairness, compassion and respect" are substantive rights which cannot be summarily rejected or denied. See State in the Interest of K.P., 311 N.J. Super. 123, 135-36 (Ch. Div. 1997), where the court stated:

The first substantive provision of the Victims' Rights Amendment provides that victims of crime "shall be treated with fairness, compassion and respect by the criminal justice system." N.J. Const. art. I, par. 22. This provision effects a fundamental change in the criminal justice system. Instead of adopting a two-party State v. Defendant, paradigm, this provision requires that the system consider interests of third parties, specifically crime victims. Unfair practices that deny crime victims fairness, compassion and respect are unconstitutional under the amendment. [FN9] "Ensuring the right of victims to appropriate treatment is perhaps the most fundamental of all rights for victims. In the absence of further legislative elaboration, the words of the provision carry their ordinary dictionary definitions. Id.

Since 1991 the State Legislature and the courts of this State have made significant advances in respecting the Victims' Rights Amendment by increasing the recognition of

the rights of crime victims. To deny the victim's request in the case at bar is to deny the important advances which have been made on behalf of crime victims in the State of New Jersey. There was a time, before the victims' rights movement began in this country, when the criminal justice system was one sided and one dimensional. The scale of justice had no room for the crime victim. That has all changed in the last decade and a half due significantly to the wisdom of the judicial, legislative and executive branches of our government. There is now a balancing to the scale of justice, and as noted by the most respected Justice Benjamin Cardoza:

[J]ustice, though due the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.

Snyder v. Massachusetts, 291 U.S. 97, 122, 54 S.Ct. 330, 338, 78 L.Ed. 674 (1934) *See also*, Muhammad, *supra*, 145 N.J. at 45-46; K.P., *supra*, 311 N.J. Super. At 139.

**B. R. 3:21-4(b) mandates that the defendant be personally present at the sentencing proceedings except for the portion where the court delivers the imposition of penalty, and to permit the defendant to absent himself from the entire proceedings may constitute a denial of his right to allocution resulting in reversible error in the sentencing proceedings.**

New Jersey law mandates that “Any action taken by the court in imposing sentence shall be subject to review by an appellate court.” The lower court must make specific findings of fact, and “where such findings are not fairly supported on the record before the trial court”, the defendant may seek a sentence modification. N.J.S.A. 2C:44-

7. A presentence investigation report ordered pursuant to N.J.S.A. 2C:44-6 and R. 3:21-2 is subject to the defendant's review and comment. The victim impact statements delivered by the victims at sentencing under N.J.S.A.52:4B-36(n) are subject to comment by the defendant after they given. The sentencing proceeding is much more than a declaration of punishment by the court. It is an exercise in due process where the rights of the defendant must be carefully considered at each stage of the proceeding. In a case such as the one at bar where the defendant is being sentenced for thirteen murders and two attempted murders which will likely result in life in prison for him, the court must assure that the defendant's rights are safeguarded, whether the defendant wants to or not. Allowing Cullen to dictate the tenor of the proceedings by declaring a blanket waiver of his presence is an invitation to the court for reversible error.

The defendant may waive his right to be present at the time the sentence is "imposed" by the court, but at no other stage of the proceedings. R. 3:21-4(b) provides "Sentence shall not be imposed unless the defendant is present or has filed a written waiver of the right to be present." The defendant's appearance is not mandated only at that moment of the sentencing proceedings when everyone has had their say, and it is now the time for the judge to "impose" the sentence. In all other aspects of the sentencing process, the defendant must be present. The remaining language of the rule specifically requires the defendant's presence:

"Before imposing sentence the court shall address the defendant personally and ask the defendant if he or she wishes to make a statement in his or her own behalf and to present any information in mitigation of punishment. The defendant may answer personally or by his or her attorney." Id. (Emphasis supplied).

This provision gives deference to the defendant's right of allocution. To deny the defendant his right of allocution in the case *sub judice*, where he is facing the most serious form of punishment other than death may constitute a denial of his rights to procedural due process under the Federal and State Constitutions. See State v. Marnin, 108 N.J.Super. 442, 445 (App. Div. 1970). The defendant's right of allocution is a "personal" right, and the court must make inquiry of the defendant directly and personally in order to safeguard this right. Statements by defendant's counsel concerning what he discussed with the defendant before the proceedings are insufficient. See generally, State v. Bey, 161 N.J. 233, 275-277 (1999) and State v. Cerce, 46 N.J. 387 (1966). The trial court should engage in a colloquy with the defendant to apprise him of his right of allocution. State v. Bey, *supra* at 275.

The precise manner in which the sentencing proceedings are conducted lies within the discretion of the sentencing judge. N.J.S.A. 2C:44-6. While Charles Cullen may desire to refrain from being present during these proceedings, his desire is subordinate under the law to the rights of the crime victims and the duty of the court to protect his right to due process of law. Charles Cullen will suffer no impairment of any defined constitutional or statutory right if the court compels his attendance at the sentencing proceedings. However, the rights of the victims will not be so safeguarded if Cullen is allowed to arbitrarily victimize so many innocent people one more time.

The victims in this most horrible tragedy pray for justice and for finality to the court proceedings. Emotionally, they cannot take the chance that Cullen's refusal to attend the proceedings could lead to a remand for another sentencing. This prayer for

justice and finality is perhaps best stated by Mary Strenko, the mother of the defendant's youngest victim, 21 year old Michael Strenko.

“10. But Cullen cannot snuff out the lives or the wills of the survivors he has left behind. I believe in my heart that although he has refused to give justice, he will nevertheless, be required to observe justice. He will be forced to accept that he no longer has control over anyone; not even himself. And I pray that this justice will be mandated when he is compelled to look into our faces and hear our voices and realize that despite his crimes, our lived ones will continue to live on.” (A-4)

*Death Penalty Cases: Commentary* - 5 Tex. Wesleyan L. Rev. 121, Fall, 1998 -  
VICTIM IMPACT TESTIMONY IN TEXAS: THE NEED FOR REFORMATION  
AND CLARIFICATION

Victim Impact Testimony, also referred to as victim impact statements or evidence, has played an important and controversial role in the sentencing phase of capital murder trials. Victim impact statements are "statement[s] read into the record during the sentencing phase of a criminal trial to inform the court about the impact of the crime on the victim and the victim's family." [FN1] Over the last ten years, the use and type of victim impact testimony allowed during the punishment phase has become hotly debated and thoroughly discussed among the Justices of the Supreme Court and the several states. The issue is whether victim impact testimony can be admitted in the sentencing phase of a capital murder trial without compromising the rights of the defendant. Thus, a process of balancing the constitutional rights of the defendant against the rights of victims' families to speak out for the victim is evolving.

The debate focuses on the relevancy and adequacy of victim impact testimony. Many scholars disagree as to what types of victim impact evidence, if any, should be considered. Opponents argue that allowing a victim's family to explain the victim's moral character, reputation, personal qualities, and characteristics is not relevant to the moral blameworthiness and culpability of the convicted murderer. [FN2] As Justice Powell argued in *Booth v. Maryland*, [FN3] victim impact testimony is irrelevant to the defendant's culpability and blameworthiness because "defendants rarely select their victims based on whether the murder will have an effect on anyone other than the person murdered." [FN4] It has been further argued that allowing victim impact testimony will create a "utilitarian assessment" of harm caused by the defendant. [FN5] For example, a defendant who murders a drunken, homeless prostitute will not be judged as having caused as much harm as a defendant who has murdered a prominent businessman with a family. [FN6] The actual harm caused and blameworthiness of the defendant may be equal in both murders, but the jury will punish the second defendant much more harshly. [FN7] Thus, victim impact testimony will result in different \*122 sentences for the same or similar crimes. However, this argument assumes that the jury will view the life and

social worth of the businessman more highly than the life of the prostitute. Others argue that the impact of the victim's murder on the family and society is quite relevant at the sentencing phase. As one writer commented, "To suggest that the impact of a victim's murder is not relevant to a defendant's sentencing is to marginalize the crime." [FN8] Moreover, it seems that Justice Powell's statement only supports the use of victim impact testimony. [FN9] The defendant's act of committing a murder does not end when he takes an individual's life. Murder is much more than that. It paralyzes the lives of the victim's family and friends, as well as society. At the time of the crime, a defendant may not know the victim personally and may not understand the overall consequences to the family or society. However, logic and moral conscience tell us that the defendant can appreciate that his actions will create consequences beyond his act. [FN10] "It is this callous disregard of 'whether the murder will have an affect on anyone other [than] the person murdered' that makes [victim impact testimony] relevant." [FN11] Allowing the victim's family and friends to testify about the effects of the defendant's action on them and society gives the defendant and the jury a clear picture of his moral culpability and blameworthiness.

In the most well known case involving victim impact testimony, *Payne v. Tennessee*, [FN12] the Supreme Court paved the way for states to permit the admission of victim impact testimony. In *Payne*, the Court held that victim impact testimony is essentially admissible, but it left the ultimate decision of admissibility to the discretion of the individual states. [FN13]

Since *Payne*, the Texas Court of Criminal Appeals [FN14] has made several attempts to address the admissibility of victim impact testimony in capital sentencing cases, but the court's decisions have only confused the situation. This Note discusses the confusion and inconsistencies of these decisions and advocates that the Texas Court of Criminal Appeals permit the use of all victim impact evidence in capital murder sentencing proceedings.

Part I of this Note defines victim impact evidence and summarizes the development of victim impact testimony in capital murder cases.

**Vulnerability of victim** 73 A.L.R.5th 383 – COMMENTARY- VULNERABILITY OF VICTIM AS AGGRAVATING FACTOR UNDER STATE SENTENCING GUIDELINES, William D. Bremer, J.D.

In sentencing a convicted criminal under state sentencing guidelines, the vulnerability of a victim often may be considered as an aggravating factor. Courts have addressed the application of various aspects of vulnerability, such as age, which have been asserted in applying state sentencing provisions based on the vulnerability of a victim. For example, in *State v. Peterson*, 25 Kan. App. 2d 354, 964 P.2d 695, 73 ALR5th 789, 73 A.L.R.5th 789 (1998), involving the conviction of an odd-job worker for the robbery and aggravated burglary committed against a 75-year-old couple for whom he had worked, the court upheld trial court's finding that the victims were vulnerable due to their age and this was known or should have been known by the defendant. The court also held that the victims' vulnerability due to their age constituted a substantial and compelling reason for departure, stating that Kan. Stat. Ann. 1997 Supp. 21-4716(b)(2)(A), made it clear that the vulnerability of the victim was an aggravating factor that might be considered in determining whether substantial and compelling reasons existed for departure. Thus, the

court found that the district court was within its discretion in imposing an upward duration departure sentence. This annotation collects and analyzes cases addressing the application of various factors asserted to lead to the vulnerability of victims as justifying an upward departure from state sentencing guidelines.