

## **THE RIGHTS OF CRIME VICTIMS**

### **THE AMERICAN SYSTEM OF CRIMINAL JUSTICE A PLACE FOR THE VICTIM?**

#### **Introduction**

On March 14, 1987, Susan Green, age 25, was found dead in her apartment in Somerset County, New Jersey. She had been sexually assaulted and brutally stabbed.

Two days later a co-worker, John Reed, told his roommate, Fran Varga, that he had found Susan dead in her apartment. Varga called the police and she and Reed agreed to meet the police at the crime scene and then at the County Prosecutor's Office. Varga telephoned an attorney who sent an associate to the Prosecutor's Office to inquire about representing either Reed, Varga or both of them.

During the questioning of Reed, the investigators followed the guidelines set forth by the United States Supreme Court in 1986 in the case of Moran v. Burbine. In that case the Court held that the police are not obligated to inform a suspect of the presence of a lawyer at the police station if he waives his right to see a lawyer and does not request to speak to one.

Having been given the standard Miranda rights by the investigators, Reed was specifically advised of his right to legal counsel. He waived this right on three separate occasions; he did not ask to speak to an attorney and confessed to the crime. He was not informed, prior to the confession, of the presence of the attorney. Furthermore, the attorney was not permitted to speak with Reed during the interrogation.

Reed was indicted for murder and aggravated sexual assault and the prosecutor sought the death penalty. At the trial, Reed was convicted of knowing murder and aggravated criminal sexual contact. A hearing on the imposition of the death penalty was held before the same jury.

The victim's family, both privately and publicly, requested that the Prosecutor refrain from seeking the death penalty. Their pleas were not based upon any opposition to the death penalty. As the victim's mother stated, "We knew that the Supreme Court would overturn the

death penalty and we did not think that we could emotionally and physically survive another trial."

The testimony of the coroner revealed that Susan had been stabbed fifty-three times and sustained a fractured skull.

At the conclusion of the death penalty hearing, the court instructed the jury in accordance with the applicable law. The jury found that the State had not met its burden and, Reed was spared the death penalty. The Court then sentenced him to life in prison without parole eligibility for thirty (30) years.

In 1991 the Appellate Division overturned the murder conviction on the basis that the jury was not given the opportunity to find Reed guilty of passion/provocation manslaughter instead of murder. The Court, however, rejected the Defendant's contention that his right against self-incrimination had been violated, and therefore, his confession was deemed admissible. Reed petitioned for certification to the New Jersey Supreme Court asserting that the police violated his right against self-incrimination, thereby rendering his confession inadmissible.

On July 23, 1993 the New Jersey Supreme Court reversed the murder conviction and ruled that Reed's confession was inadmissible because his common law right against self-incrimination had been violated. Justice Robert L. Clifford, the lone dissenter, argued that since the defendant did not ask for an attorney, the investigators had no duty to inform him of the presence of one at the police station.

The prosecutor has indicated that he will retry Reed. Without the use of the confession a conviction will be difficult.

In reviewing the New Jersey Supreme Court's decision in State v. Reed, there is clearly strong support in legal theory for the decision of the Court.

Dave and Debbie Green do not understand the legal theories behind the New Jersey Supreme Court's decision in State v. Reed. They do not understand how a jury could conclude that, after stabbing their daughter fifty-three times, Reed did not intend to kill her. And they do

not understand why, in over six years, they have been denied "justice" in the death of their daughter.

Dave and Debbie Green do understand, however, what is real to them. They once had four living children and now they have only one. They have lost two sons to illness and their only daughter to murder. They also understand that while the law, as applied to all, must have definable limits, their pain, their anguish and their extreme loneliness have no bounds.

The retrial of Reed is scheduled for early 1994. In a few months it will be the seven year anniversary of Debbie's death. She would have been thirty-two years old. Her mother speaks of constant nightmares about the upcoming trial indicating that, "I must be there for my daughter, but I expect no justice."

The director of a nationally known grief and counselling program noted:

"For parents who have lost a child, the grief cycle sometimes lasts five or six years, and when there's the extra anguish of murder, it can be much, much longer. Each parent lives in his own personal hell, reliving the death a thousand times, a million times."

There is perhaps no greater nor more disturbing evil than the senseless infliction of crime upon its victims. It is an evil which invades and irrevocably alters the innocence and beauty of the every day experiences, which are so often taken for granted. No longer can a discussion about crime be limited to those individuals who have been accused or convicted of violating the criminal laws. Crime is also about the often forgotten victims and their survivors.

Many individuals prefer to limit their discussions of crime to those forums where the true feeling of the painful impact of crime can at best, be observed from a distance. But crime does not take place in the classroom, or within the conference room or the private rooms of the media executives whose decisions impact upon the content of what we see, read and hear. It takes place on the streets and in people's homes, without reason and without explanation. And when it does, it sweeps away not only the present, but also the past and future of its victims. As a victim of incest recently stated:

He robbed me of my childhood. I have so much difficulty functioning as an adult because I have no past as a child to draw upon for strength."

Violent crime devastates one out of every four families in this state and throughout this country. Each minute, three persons are physically injured due to crime, thirty-three individuals become crime victims and \$25,000.00 in property is stolen or destroyed during criminal activity. One murder occurs every twenty-one minutes in this country and every five minutes one individual will be raped. These statistics become even more devastating when we realize that a substantial number of all serious crimes, such as rape, are never reported to the police. Estimates obtained from the National Crime Survey suggest that less than fifty percent all violent crimes are ever reported.

Bonnie Garland was a bright, loving, twenty year old student at Yale with her entire future ahead of her. When she was savagely and brutally murdered by Richard Herrin, a fellow student, her parents were forced to face the reality of how individuals in our society too often forget the victim and the victim's survivors. As the local social, academic and religious circles rallied around the admitted killer, they pushed aside and finally negated, the existence of this young woman who was the victim. Her value became a casualty in the legal and social process which transformed the murderer into the victim. Commenting on this case, Dr. Willard Gaylin, an expert in the area of human behavior and crime stated:

The killing of Bonnie Garland was not just the theft of a young girl's birthright, not just an unbearable pain inflicted on her family and friends; it was an assault on the social order that makes human life possible. The killing of Bonnie Garland, first by Richard Herrin and then again by a legal and cultural process, which seemed to forget that she had ever existed, endangers us all. In our compassion for the criminal, we must remain vigilant in defense of social good, for the sake of those innocent living and yet unborn.

Too often, a criticism of the treatment of crime victims is limited to what takes place in the courts. We often criticize the judges for their lack of justice. This criticism is often inaccurate because by the time the accused is brought to trial, the criminal justice process is very

nearly half over. And since it is almost half over for the accused, it likewise, is almost half over for the victim; because they started together.

Immediately upon the commission of the criminal act, the rights of the actor are elevated to a status of constitutional recognition and protection. And it is mandatory that along each step of the way, the accused shall be afforded all of these rights, by all of the participants, without the slightest exception.

Where within our concept of what we call the criminal justice system, does the victim belong? Does the victim have a place, and if so, whose obligation is it to secure this place? Perhaps, if we understand the following passage from Dr. Gaylin's description of the plight of Bonnie Garland's survivors, then we might understand that there is a reality and a truth in the criminal justice system which must be acknowledged:

"Or mechanisms of identification and empathy are central to our concepts of what is good and what is right. From the day of the killing, (the accused) attracted a host of concerned and compassionate defenders. When one person kills another, there is immediate revulsion at the nature of the crime. But in a time so short as to seem indecent to the members of the personal family, the dead person ceases to exist as an identifiable figure. To those individuals in the community of good will and empathy, warmth and compassion, only one of the key actors in the drama remains with whom to commiserate--and that is always the criminal. The dead person ceases to be a part of everyday reality, ceases to exist. She is only a figure in a historic event. We inevitably turn away from the past, toward the ongoing reality. And the ongoing reality is the criminal; trapped, anxious, now helpless, isolated, often badgered and bewildered. He usurps the compassion that is justly his victim's due. He will steal his victim's moral constituency along with her life.

Many of the individuals in this state who have been labelled as crime victim advocates have themselves been victims of crimes. Most of them, however, have already been through the criminal justice system. It is too late for them to correct the indignities and harsh realities of their own personal experiences; however, it is not too late to help the many others who will be thrust innocently and blindly into the process. When you have been a victim of a crime you understand what it is like for someone else to be a victim.

After the Assembly Judiciary Committee released ACR 85, the concurrent resolution which ultimately became the Crime Victims' Constitutional Amendment (Article I, Par. 22), the New Jersey Law Journal editorialized, in October of 1990:

"It is difficult for a prosecutor to make the judgments necessary to protect the public place with a victim's claque at his elbow."

"Revenge by the victim or his family was once the victim's right, but since medieval times, crime has offended against the king's peace, and has been pursued and punished by the dispassionate judgment of the law, not the outraged honor of the tribe."

Those who advocate the rights of crime victims do so out of a sense of understanding and compassion. To suggest for one moment that anyone who calls for a constitutional amendment or any other law to support the rights of crime victims, does so out of revenge or such other similar motive is to approach the issue from an unenlightened standpoint, and perhaps, a too firmly implanted root of prejudice. As stated by Kenneth Eikenberry, Attorney General of the State of Washington and Member of President Reagan's 1982 Task Force on the Victims of Crimes:

"I thought my life's experiences had prepared me for the effect of testimony by the dozens of victims of crime willing to come before the Presidential Task Force on Victims of Crime and relive their tragedy so that others might learn from it. Not true, I was shocked! Perhaps the most important lesson I learned from my Task Force experience is that a discussion of victims' rights should not occur until the discussants have first shared the experience of crime victims."

### **VICTIMS' RIGHTS - A GRASS ROOTS MOVEMENT**

The recognition and respect for the rights of crime victims in the United States has been characterized as a "grass roots movement". In order to better understand the process of the victims' rights movement, an examination of the various accomplishments over the past quarter century may be necessary.

Prior to 1965, the victims of crime had little place in the criminal justice system. The evolutionary process of the criminal justice system has reached the point where crime victims have been excluded and so routinely rejected that they have become alienated by the bureaucracy of the system and indifferent to the individuals employed by it.

The fact that most crime victims find it so difficult an experience when forced into a situation where they perceive themselves as having no purpose or importance has naturally resulted in the substantial non reporting of crimes and refusal to cooperate by many crime victims. Who does the criminal justice system truly serve? Certainly not the innocent individuals who have and will suffer the often irrevocable effects of crime.

In the 1970's, as the crime rate continued on its rise, the frustration and disenchantment with the criminal justice system increased on the part of many Americans, as its failures became more evident through feelings of rejection on the part of victims, higher recidivism rates, and a disenchantment with the increased financial costs to society in supporting this system. People became more aware that the criminal justice system was not serving the individuals whom it was designed to protect, that it had lost a truly positive purpose in society and was deemed by many to be failing the taxpayers who supported it.

Throughout the 1970's various victims' groups began to form and the legislatures in other states responded to the needs of crime victims. As the rights of victims received more attention, the grass roots movement began to take hold.

In 1972 victim assistance programs were created in Missouri, California and Washington, D.C. and in 1974 victim assistance programs were established in Florida and Indiana.

The first "Victims Rights Week" was formally recognized in 1975 and in the same year the National Organization for Victim Assistance (NOVA) was formed.

In 1976, the first victim impact statement was created in the State of California and the National Organization for Women (NOW) established its first task force and national conference on battered women. Also in that year, Nebraska became the first state to abolish the marital rape exemption.

The public began to become more aware of violence in the home and in 1976 Oregon became the first state to enact legislation mandating arrest in domestic violence cases.

In 1978 the Child Abuse and Treatment Act was passed by Congress and three Victims' Organizations, which would later have a significant effort on the crime victims movement were formed. The National Coalition Against Sexual Assault (NCASA), the National Coalition Against Domestic Violence (NCADV) and Parents of Murdered Children (POMC) were all founded in 1978.

Future legal historians may well call the 1980's the decade in which a start was finally made toward recognizing victims of crime as central characters in the criminal process, worthy of concern, respect, and compassion.

Crime victims have also been the subject of a good deal of legislation. The 1982 Omnibus Victim and Witness Protection Act requires use of victim impact statements at sentencing in Federal criminal cases, greater protection of Federal victims and witnesses from intimidation by defendants or their associates, restitution by offenders to victims of Federal crimes, guidelines for fair treatment of victims and witnesses in Federal criminal cases, and more stringent bail laws. The Comprehensive Crime Control Act and the Victims of Crime Act of 1984 authorize Federal funds for State victim compensation and victim assistance programs. These funds are distributed by the Office of Justice Programs, through its Office for Victims of Crime and Bureau of Justice Assistance.

In 1980 Mothers Against Drunk Driving (MADD) was formed and Congress passed the Missing Children Act. The first "Crime Victims Bill of Rights" was passed in Wisconsin and the attention to domestic violence continued as NCADV established the Domestic Violence Awareness Week and held its first national conference in Washington, D.C.

More than thirty-five States have enacted comprehensive legislation protecting the interests of the victim, compared with four before 1982. State victim compensation programs have continued to expand (each of the fifty States and the District of Columbia now have some type of program), as have victim assistance services throughout the country.



In 1981 President Reagan proclaimed the first annual National Victims of Crime Week in order to focus attention on victim problems. In April 1982 he established the President's Task Force on Victims of Crime.

In December, 1982, the President's Task Force presented its report with profound recommendations for changes at the federal, state, and local levels. After hearing the plight of thousands of crime victims throughout the country, the members of the Task Force were convinced that the criminal justice system is out of balance:

Victims have discovered that they are treated as appendages of a system appallingly out of balance. They have learned that somewhere along the way, the system has lost track of the simple truth that it is supposed to be fair and to protect those who obey the law while punishing those who break it. Somewhere along the way, the system began to serve lawyers and judges and defendants, treating the victim with institutionalized disinterest.

(P.iv, President's Task Force on Victims of Crime,

December, 1982)

In recommending an amendment to the Federal Constitution, the Task Force reported:

"In applying and interpreting the vital guarantees that protect all citizens, the criminal justice system has lost an essential balance. It should be clearly understood that this Task Force wishes in no way to vitiate the safeguards that shelter anyone accused of crime; but it must be urged with equal vigor that the system has deprived the innocent, the honest, and the helpless of its protection.

"The guiding principle that provides the focus for constitutional liberties is that government must be restrained from trampling the rights of the individual citizen. The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be redressed. To that end it is the recommendation of this Task Force that the Sixth Amendment to the Constitution of the United State be augmented.

We propose that the Amendment be modified to read as follows:

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defense. Likewise, the victim, in every criminal prosecution shall have the right to be present and to be heard at all critical states of judicial proceedings.

"We do not make this recommendation lightly. The Constitution is the foundation of national freedom, the source of national spirit. But the combined experience brought to this inquiry and everything learned during its progress

affirm that an essential change must be undertaken; the fundamental rights of innocent citizens cannot adequately be preserved by any less decisive action. In this we follow Thomas Jefferson, who said: 'I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind. As that become more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times'".

By the time the Task Force report was published, the voters of California had already enacted legislation giving victims the right to allocution at felony sentencing hearings, i.e., the right to speak. Proposition 8, California's Victims' Bill of Rights, included Penal Code Section 1191.1, which specifies the following:

"The victim of any crime, or the next of kin of the victim if the victim has died, has the right to attend all sentencing proceedings under this chapter and shall be given adequate notice by the probation officer of all sentencing proceedings concerning the person who committed the crime.

"The victim or next of kin has the right to appear, personally or by counsel, at the sentencing proceeding and to reasonably express his or her views concerning the crime, the person responsible, and the need for restitution. The court in imposing sentence shall consider the statements of victims and next of kin made pursuant to this section and shall state on the record its conclusion concerning whether the person would pose a threat to public safety if granted probation...."

To study California's implementation of the new right to allocution at felony sentencing, the National Institute of Justice sponsored an exploratory study by the Center for Research, McGeorge School of Law, University of the Pacific.

Victims, judges and prosecutors were interviewed and were specifically asked if this allocution provision was necessary and effective. They responded as follows:

**Victims' perspectives:** The victims interviewed indicated that making a statement at sentencing had two main potential effects--an emotional effect on the victim and a perceived effect on the sentence. Over half the appearing victims (54 percent) reported they felt different after making their statement to the judge. Of these, 59 percent expressed positive feelings of satisfaction or relief, 25 percent felt angry, fearful or helpless, and 10 percent felt dissatisfied.

Less than half (45 percent) of those victims who spoke at sentencing felt their participation affected the sentence. Even those who felt they had an effect were inclined to view

the sentence as too lenient. In fact, they held this view in the same proportion as persons who had no involvement in sentencing at all. Most discouraged were those who made statements but felt they were not heeded; 82 percent of these victims thought the sentence was too light.

Victims who spoke at sentencing were often the victims of serious crimes, yet as a group they reported a higher frequency of probation sentences in their cases than those who did not appear.

Despite infrequent use of the allocution right and mixed reactions to it, over 80 percent of all victims interviewed indicated that the existence of the right was important. Victims also expressed a strong desire for more information about the right and the progress and dispositions of their cases.

**Officials' perspective:** Two-thirds of the judges saw no need for the allocution right.

An equally large majority of district attorneys thought it was needed. Judges pointed out that the presentence report provides all the necessary information. One judge wrote:

Any review of the impact of victim's statements should not fail to take into account the rules of court sentencing criteria. By the time that the victim comes to court, a well-prepared probation report having been reviewed by a well-prepared judge leaves little room for modification of an intended decision. A victim's emotional appeal to the court cannot carry more weight in place of the facts and criteria.

When asked whether the right was "effective," 81 percent of probation officers answered "minimally or not at all" (often because of the role of victim impact statements) compared with 69 percent of judges and 48 percent of prosecutors; less than two percent indicated that the right had been very successful. Sixty-six percent of district attorneys, compared with 40 percent of judges, thought that victim appearances increased the amount (as opposed to the frequency) of restitution awarded.

Judges indicated that, while the actual appearances had little overall impact on the sentences, they believed the right had benefits:

---It does allow victims to air their grievances or "get it off their chest." To this extent they may feel the system is paying more attention to them.

---Prop. 8 has been a real significant step toward victim recognition and awareness. It is as important as a public statement as it is as a court tool.

Prosecutors wrote:

---Judges are constrained by law, logic, and justice. In a majority of cases nothing the victim says is really going to impact.

---Members of the judiciary who were responsive to victims' rights before, continue to be so, and others who place defendant's rights paramount... also continue.

As the crime victim movement continued in the 1980's, the U.S. Department of Justice created The Office for Victims of Crime (OVC) in 1983 to implement the Task Force recommendations. In addition an ad hoc committee of National Victims' Rights leaders was formed to study the Task Force recommendations.

In the same year the U.S. Attorney General established a Task Force on Family Violence and also issued guidelines for Federal victim and witness assistance. The first National Conference of the Judiciary on Victims of Crime was held and President Reagan proclaimed the first "National Missing Children's Day."

There was a considerable amount of activity in the area of victims' rights in 1984. The Federal Victims of Crime Act (VOCA), Federal Justice Assistance Act, National Minimum Drinking Age Act and the Federal Missing Childrens' Assistance Act and the Federal Family Violence Prevention and Services Act were all passed in 1984. In addition, the Federal Bureau of Prisons established a victim/witness notification system and the First National Symposia on Child Molestation and Sexual Assault were offered by the Office for victims of Crime.

In 1985 The National victim Center was founded to promote the rights and needs of violent crime victims, and to educate Americans about the devastating effect crime has on our society. The Center has offices in New York City, Washington, D.C. and Fort Worth, Texas.

Today there are almost 8,000 victim service and criminal justice organizations in all fifty states which benefit from the National Victim Center's programs and services. These groups

serve a wide range of constituents, including victims of child abuse and neglect, sexual assault, family violence, elder abuse, drunk driving, hate violence, and survivors of homicide victims.

The Center's many programs include:

- Training and technical assistance to strengthen the abilities of victim advocates and criminal justice officials to assist and support crime victims;
- An extensive resource library which contains over 10,000 documents on every aspect of violent crime, criminal justice and victimology;
- The Crime Victims' Litigation Project with 5,000 cases and authorities to assist victims' attorneys in civil litigation cases;
- A legislative data base containing 17,500 victims' rights statutes in all fifty states and at the Federal level to support the Center's efforts to protect the victims' rights through strong laws;
- A public awareness program which provides resources and experts for over 1,000 news media nationwide; and
- A National Speakers' Bureau with experts and authorities on victims' issues.

Also in 1985, a group of victim advocates from throughout the country met informally at a conference sponsored by The National Organization for Victim Assistance (NOVA) and Mothers Against Drunk Drive (MADD) to take the Task Force's recommendation seriously and study its implications. In January, 1986, NOVA sponsored a national symposium to address the question, "Is it Time for a Constitutional Amendment for Victim Rights?"

A group of those dedicated to the idea continued to collect information and meet together until February, 1987, and when became a more formal coalition named Victims' Constitutional Amendment Network (Victims CAN). Coalition members include representatives from:

- The National Organization for Victim Assistance (NOVA)
- National Victim Center
- Mothers Against Drunk Driving (MADD)
- Parents of Murdered Children
- Childhelp USA
- Justice for Crime Victims of America

Justice for Surviving Victims  
Victims of Crime Advocacy League  
Crime Victims Committee of the American Bar Assn.  
Campaign California, as well as two attorneys in private practice and Washington  
State Attorney General Kenneth Eikenberry.

At the same 1987 meeting, the coalition voted to focus its attention on State  
Constitutional Amendments rather than on statutory changes or amending the United States  
Constitution as recommend by the Presidential Task Force.

State Constitutional Amendments were preferred for several reasons:

First, State Constitutional Amendments would grant crime victims a  
meaningful and voluntary opportunity to participate in the criminal justice system.  
They are a modest remedy to assure that the victim's voice will be heard... not a  
veto, but a voice.

Second, while over forty states had enacted Victim Bills of Rights which  
were well intentioned, it is now clear that by their own terms, they lack a method  
of enforcement. State Constitutional Amendments will remove this defect by  
giving victims a constitutionally protected right of participation.

Third, it was felt that under our current system of law, the rights of the  
defendant were protected constitutionally. In the name of equal justice, victim  
rights should also be imbedded constitutionally.

Victims CAN had a steering committee of up to fifteen members and an Advisory  
Council of unlimited number was drawn from experts in Constitutional Law, the judiciary, the  
legislature, and the bar.

Victims CAN encouraged in each state the formation of a committee of individuals --  
victims, prosecutors, law enforcement officials, judges, elected officials, and concerning citizens  
-- capable of obtaining political and private sector support to enact state constitutional  
amendments for victim rights. Suggested wording of the amendment was:

The victim of crime or a representative shall have the right to be  
informed of, to be present at, and to be heard at all criminal justice  
proceedings at which the defendant has such rights subject to the  
same rules of evidence which govern defendants' rights.

Furthermore, in 1987 Florida crime victim advocates responded to the legislature's five consecutive years of letting the constitutional amendment die without a vote by conducting a petition drive which generated thousands of signatures to support the amendment. Florida legislators agreed to re-introduce the amendment, and it was passed.

In 1988 constitutional amendments were introduced in California, Connecticut, Delaware, South Carolina, Arizona, Washington and Michigan. Three amendments, in Washington, Delaware and Arizona, were defeated in Committee. The Florida amendment was placed on the November 1988 ballot, where it garnered support from almost 90 percent of the electorate. The Michigan amendment, also approved by the legislature and placed on the ballot, passed with 80 percent of the vote in November 1988.

In 1989 crime victims' constitutional amendments were introduced in Maryland, Texas, and Ohio and re-introduced in Washington. The Texas and Washington amendments passed and were ratified by the voters in November 1989. By the end of the 1989 legislative session, the Maryland and Ohio bills were still pending. South Carolina and Wisconsin advocates began exploring the possibility of introducing the amendment that year. Arizona advocates, led by the Attorney General, planned to launch an initiative/petition drive to secure a constitutional amendment.

In 1990 Arizona advocates successfully gathered the required signatures and the amendment was voted upon and passed in the November general election. Constitutional amendments were introduced in New York, New Jersey, Illinois and Wisconsin. Oregon advocates launched a initiative/petition drive and advocates in North Carolina, New Mexico, Vermont, Indiana, South Carolina, and Colorado have formed coalitions to prepare for constitutional amendment campaigns.

In 1991 Colorado introduced their bill on the first day of National Victims Rights Week. Two weeks and one day later, the bill was unanimously passed by both the House and the Senate. ballot for approval in 1992.

Missouri's amendment was voted on by an overwhelming margin on the last day of the 1991 session. Representatives from virtually every victim organization in the state worked diligently for over two years to ensure the legislation was passed.

On November 1, 1991 the voters of the State of New Jersey would have the opportunity to approve an amendment to the New Jersey Constitution respecting the rights of crime victims.



## **VICTIMS' RIGHTS IN NEW JERSEY - BEFORE THE "MOVEMENT"**

The Crime Victims' Movement in the State of New Jersey began to gain recognition in the latter part of the 1980's. There had been several small crime victim groups established in the State during the 1980's.

Prior to the Crime Victims' Movement in New Jersey taking hold there had been recognizable efforts in the part of the State Legislative and Attorney Generals's office to address the rights of crime victims. Beginning in 1971 with the passage of the Criminal Injuries Compensation Act", perhaps without realizing it, the leaders and public officials of the State of New Jersey began to lay the foundation for our state being recognized today as one of the leading states in the nation for the recognition and advocacy of the rights of crime victims.

The "Criminal Injuries Compensation Act of 1971", N.J.S.A. 52:4B-1, et seq. established the Violent Crimes Compensation Board as part of the Executive Branch of the State Government. The law provides for compensation to victims of crime and in the case of death, to their survivors.

The following losses or expenses were deemed reimbursable:

- a. expenses actually and reasonably incurred as a result of the personal injury or death of the victim,
- b. loss of earning power as a result of total or partial incapacity of such victim,
- c. pecuniary loss of the dependents of the deceased victim, and
- d. any other pecuniary loss resulting from the personal injury or death of the victim which the board determines to be reasonable.

L.1971, c. 317, & 12, eff. Oct. 4, 1971.

Payments were authorized to be made:

- a. to or on behalf of the victim,
- b. in the case of the personal injury of the victim, where the compensation is for pecuniary loss suffered or expenses incurred by any person responsible for the maintenance of the victim, to that person, or
- c. in the case of the death of the victim, to or for the benefit of the dependents of the deceased victim, or any one or more of such dependents.

Without specifically defining a "victim", the statute provided that payment may be made for personal injury or deaths which resulted from being the victim of various crimes of violence listed in the criminal code.

A significant step in the implementation of this Act came in 1980 with the passage of N.J.S.A. 2C:43-3.1 which provided that in addition to any fine or penalty imposed by the Court there would be an additional penalty, which was a monetary payment, to the Violent Crimes Compensation Board by anyone convicted of a crime of violence.

In 1982, the Criminal Injuries Compensation Act of 1971 was amended to establish a victim counselling service to provide counselling to victims. The counseling service was also directed to provide the following additional services:

The service shall provide assistance to victims without charge, which assistance shall include information and advice relative to filing a claim with the board, emergency food and clothing, employment opportunities, referral to other social service agencies, and in obtaining legal advice or representation.  
L.1982, c. 192, & 2.

The Act was further supplemented in 1983 to void contracts for profit by any person convicted or accused of crime "unless the contract provides for payment of the monies in escrow to the Violent Crimes Compensation Board..." (N.J.S.A. 52:4B-26).

For the first time in the Criminal Injuries Compensations Act, the term "victim" was defined. The 1983 supplement stated:

As used in this act:

- a. "Victim" means any person who suffers personal injury or death or incurs loss of or injury to personal or real property as a result of the crime;
- b. "Victim's representative" means one who represents or stands in the place of a victim, including but not limited to a spouse, parent, relative, guardian, dependent, heir, or executor.

L.1983, c. 33, & 2, eff. Jan. 26, 1983.

1985 witnessed a significant step in the recognition of the right of crime victims in the State of New Jersey with three major pieces of legislation:

1. The "Crime Victims' Bill of Rights" - N.J.S.A. 52:4B-34
2. The establishment of the "Office of Victim Witness Advocacy" - N.J.S.A. 52:4B-39
3. The Drunk Driving Victims' Bill of Rights - N.J.S.A. 39:4-50.9

The legislative findings and declarations in the enactment of the "Crime Victims' Bill of Rights" stated a strong policy behind the enforcement of victims' rights.

"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 is assuring public confidence in the criminal justice system."

The specific rights established were set forth in N.J.S.A.

52:4B-36 as follows:

- a. To be treated with dignity and compassion by the criminal justice system;
- b. To be informed about the criminal justice process;
- c. To be free from intimidation;
- d. To have inconveniences associated with participation in the criminal justice process minimized to the fullest extent possible;
- e. To make at least one telephone call provided the call is reasonable in both length and location called;
- f. To medical assistance if, in the judgment of the law enforcement agency, medical assistance appears necessary;
- g. To be notified if presence in court is not needed;
- h. To be informed about available remedies, financial assistance and social services;
- i. To be compensated for their loss whenever possible;
- j. To be provided a secure, but not necessarily separate, waiting area during court proceedings;
- k. To be advised of case progress and final disposition;
- l. To the prompt return of property when no longer needed as evidence;

In establishing the Office of Victim Witness Assistance, the 1985 law required that a statewide victim-witness information program be provided which shall:

- a. Provide victims or their representatives with information about the availability of social and medical services, especially emergency and social services available in the victim's immediate geographical area;

- b. Provide victims or their representatives with information about possible compensation under the "Criminal Injuries Compensation Act of 1971," P.L.1971, c. 317 (C.52:4B et seq.) and of the sentencing court's authority to order restitution under chapter 43 of Title 2C of the New Jersey Statutes;
- c. Provide victims or their representatives with information about how to contact the appropriate county office of victim-witness advocacy and the appropriate county prosecutor's office;
- d. Provide a 24-hour toll-free hotline telephone number for victims and witnesses to call with inquiries concerning the information and services available pursuant to this act.
- e. Provide victims and witnesses with a detailed description of the rights established under the Crime Victim's Bill of Rights created by P.L.1985 c. 249 (C.52:4B et seq.);
- f. Gather available information from victim assistance programs throughout the country and make that information available to the Office of Victim-Witness Advocacy, police agencies, hospitals, prosecutors' offices, the courts, and other agencies that provide assistance to victims of crimes; and
- g. Sponsor conferences to bring together personnel working in the field of victim assistance and compensation to exchange methods and procedures for improving and expanding services to victims. L.1985, c. 404, § 4.

A critical step in establishing a Crime Victims' Service Network came with the passage of N.J.S.A. 52:4B-45 provided that a victim-witness coordinator shall be appointed in each county to carry out the purposes of the new law.

The Rights of Victims of drunk driving were given specific recognition by the legislature in 1985 with the establishment of the "Drunk Driving Victims Bill of Rights," N.J.S.A. 39:4-

50.9. Victims of drunk driving would now have the right to:

- a. Make statements to law enforcement officers regarding the facts of the motor vehicle accident and to reasonable use of a telephone;
- b. Receive medical assistance for injuries resulting from the accident;
- c. Contact the investigating officer and see copies of the accident reports and, in the case of a surviving spouse, child or next of kin, the autopsy reports;
- d. Be provided by the court adjudicating the offense, upon the request of the victim in writing, with:
  - 1. Information about their role in the court process;
  - 2. Timely advance notice of the date, time and place of the defendant's initial appearance before a judicial officer, submission to the court of any plea agreement, the trial and sentencing;
  - 3. Timely notification of the case disposition, including the trial and sentencing;

4. Prompt notification of any decision or action in the case which results in the defendant's provisional or final release from custody; and
  5. Information about the status of the case at any time from the commission of the offense to final disposition or release of the defendant;
- e. Receive, when requested from any law enforcement agency involved with the offense, assistance in obtaining employer cooperation in minimizing loss of pay and other benefits resulting from their participation in the court process;

The 1985 law establishing the Crime Victims Bill of Rights called for the Attorney General to implement standards "to ensure that the rights of crime victims are enforced" (NJSA 52:4B-44)

On April 24, 1987 Attorney General Carey Edwards established "interim standards" to ensure rights of crime victims. One year later on April 21, 1988 he established "general standards" which followed the language of the statute as to the enumerated rights to be protected.

During the 1980's as the issue of victims rights began to come to the forefront, more victims were questioned and more victims began to tell their stories of being revictimized in the justice system.

It was common to hear such comments by victims during this time as: "I was victimized all over again by the criminal justice system." Such criticisms from the victims perspective were correct because when a victim dealt with one prosecutor, one victim witness coordinator, and one judge, this represented the totality of the victim's dealings in the justice system. Consequently, these certain individuals did represent to the victim the entire "criminal justice system."

The State of New Jersey has twenty-one (21) County Prosecutors Offices and too often the type of fairness and sensitivity of treatment received by the victim depends upon the county in which the crime occurred.

Extensive interviews and discussions have been held with crime victims in New Jersey concerning their experiences in the criminal justice system over the past decade of the 1980's. The complaints and criticisms are overwhelmingly similar. They reflect in many cases a lack of compassion and understanding on the part of the certain Prosecutors and Judges. Likewise, in

many others, they reflect the anger, frustration, confusion and loneliness and complete helplessness on the part of innocent people who were not only devastated by the accused but lost in this criminal justice system where they have no place. They often create a picture of the history of crime victims in this state, where, in order to achieve justice we have focused so much on the rights of the accused, that there was simply little thought given to the victim. Perhaps it had something to do with the constitutional protections afforded the accused and the lack of same for the victim.

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Extensive interviews and discussions have been held with crime victims concerning their experiences in the criminal justice system over the past decade of the 1980's. The complaints and criticisms are overwhelmingly similar. They reflect in many cases a lack of compassion and understanding on the part of the Prosecutor's and the Courts. Likewise, in many others, they reflect no more than a history; a history where in order to achieve justice we focused so hard on the rights of the accused, that there was simply little thought given to the victim. Perhaps it had something to do with the constitutional protections afforded the accused and the lack of same for the victim.

**VICTIMS' RIGHTS IN NEW JERSEY**  
**THE DRIVE FOR THE AMENDMENT**

In 1989 New Jersey State Assemblyman Alex DeCroce became very upset over the murder of a teenage boy whose parents he had known. As his friend began to suffer the indignities experienced by so many crime victims at the time, he felt the necessity to do whatever he could on behalf of the innocent victims of crime.

Assemblyman DeCroce, quietly and without any public discussion researched the status of the law of crime victims in the United States. He read the results of President Reagan's Task Force. He concluded that the State of New Jersey needed an amendment to the State Constitution recognizing the Rights of Crime Victims and introduced into the State Assembly ACR 85, a concurrent resolution establishing the rights of crime victims, which provided:

"A victim of crime shall be entitled to due process of law, including the right to be informed of, to be present at, and to be heard at appropriate criminal justice proceedings, and the Legislature may further define the extent of these rights through legislation."

Soon thereafter, Senator John Dorsey introduced into the State Senate SCR 104, which was identical to the concurrent resolution introduced into the Assembly. The Crime Victims' Coalition began a petition drive supporting the amendment and an aggressive program to obtain the support of individual legislators was also well on its way.

The procedure for amending the New Jersey Constitution had been analyzed by the Coalition and was submitted along with the proposed amendment to many of the Legislators throughout the State. There was a possibility that the proposed Constitutional Amendment could be placed on the ballot at the General Election in November, 1990 if the concurrent resolution was passed by three-fifths majority in both houses of the legislature and published in a newspaper in each county ninety days before the general election:

In order for the proposed amendment to be voted on by the entire body of both houses of the Legislature the concurrent resolution was required to be referred to the Judiciary Committee of each house for hearings. The immediate problem was fully recognized by the Coalition.

Without the necessary bipartisan support of the Legislative and Executive branches of the government, a hearing on the merits of the proposed amendment would simply not take place.

Members of the legislature were urged to support the right of the victims of crime to a hearing in each house of the legislature, however, it appeared that political considerations could overshadow the efforts being made.

In March of 1990 the Crime Victims Coalition announced the "Drive for the Amendment" at a press conference held at the State House Annex in Trenton. With numerous crime victims present, along with various members of the Legislature including the sponsors of the Amendment, the Coalition publicly stated its firm commitment to seek nothing less than a passage of an Amendment to the New Jersey Constitution.

In speaking for all victims of crime, Coalition Chairman, James O'Brien stated:

"We don't want to take any rights away from the Defendant. Just as the rights of the Defendant's are constitutionally protected, in the name of equal justice, victims' rights must become a part of our basic law."

During the Spring and into the Summer of 1990 the proposed amendment could not gain the necessary support for a hearing in the judiciary committees of each House. Due to time constraints, it became apparent that the Amendment would not be on the ballot at the General Election of 1990.

At the time the Executive Branch of the Government did not support an Amendment to the State Constitution, nor did many of the Democratic legislators. Governor Jim Florio publicly stated that an amendment was not necessary, as the rights of victims could be safeguarded under existing "due process" considerations. Attorney General Robert J. Del Tufo had deep reservations about amending the Constitution and felt that a more rigorous and effective enforcement of the existing crime victim statutes could accomplish the same purpose.

The members of the Coalition knew that the statutes had failed and would continue to fail, however, the Attorney General and many others felt that amending the Constitution was too



drastic a measure. The examples of poor treatment of victims of crime had not as yet been sufficiently convincing enough to change the minds of the Governor, the Attorney General and members of the Legislature.

Apparently, they needed to witness, first hand, more concrete examples. In the next few months they would.

In the summer of 1990 Florence Hoffman sat in the back row of a courtroom in Newton, New Jersey. It was obvious that where she sat she was straining to hear any part of the testimony, for the court in placing her there, probably did not realize that she suffered from hearing loss.

Florence Hoffman had been the subject of considerable legal argument over the past three days as the result of the attempts by the defense attorneys to have her removed not only from the courtroom, but also the courthouse. At one point the suggestion was made that she even be banned from the entire town of Newton until the trial was over. Florence Hoffman did not wish to be in that courtroom. However, she had no choice.

Florence Hoffman was the bereaved mother of Amie Hoffman who was brutally murdered by the man who sat a table, separate and apart from his attorneys because he had allegedly threatened them with bodily harm. If for no other reason, Florence Hoffman had to be in that courtroom for her daughter to bear witness to the justice proceeding involving Amie's killer.

James Jerry Koedatich had already been found guilty of this murder and sentenced to death once only to have the Supreme Court of New Jersey overturn the sentence. Now, eight years after the crime, the retrial on the death penalty was taking place.

The attorney for Koedatich argued for the removal of Mrs. Hoffman and gave the true reason defense attorneys don't want a victim or survivor in the courtroom. He did not want the jury reminded by Mrs. Hoffman's presence that there was once a living, breathing, young girl named Amie Hoffman, whose life had been taken for no apparent reason by the defendant. The

defense attorney referred to Mrs. Hoffman "as a living, walking victim impact statement" and "so much emotional baggage."

Over the continuing protest of Koedatich's attorney Mrs. Hoffman was finally allowed to sit in the back row of the courtroom surrounded by people so as to hide the jurors' view of her.

In upholding the right of Mrs. Hoffman to be present, the Trial Judge, Donald Collester stated in his ruling: "This is a public courtroom which is open to members of the public, all members of the public. And our courts must be open to members of the public because history teaches that when things go on that are hidden from the public, people tend to think the worst, and history also teaches us that sometimes they are right."

After reviewing a transcript of the defense attorney's argument in the Koedatich trial and after having been required to send the State Victim-Witness Coordinator to address the harsh manner in which another family was being treated by a County Prosecutor's office, Attorney General DeLufo realized that the crime victims Bills of Rights was not effective and the only way the rights of crime victims would be advanced was through an amendment to the State Constitution. After much discussion and debate, ACR 85 was modified to state:

A victim of 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.

On October 15, 1990 the Assembly Judiciary Committee heard testimony from several individuals in support of the proposed amendment and reported the concurrent resolution (ACR 85) out of committee and referred it to the Assembly floor for a vote.

The nature of the testimony is exemplified by the following:

"There have lately been outrageous incidents in which crime victims and/or their families have been excluded from the courtroom on the ground that their presence would generate such undue sympathy in the minds of the jurors as to prevent a fair trial for the defendant. A public trial should mean just that. And those who have their lives forever maimed and changed by violent acts are not only part of the public but also have a special standing to be present and to observe the system at work."

Robert J. Del Tufo,  
New Jersey Attorney General

"For many people, it's important that we, as public servants, recognize that the criminal justice system as it exists today is failing. It's failing society because it has no positive purpose. It will have a positive purpose once this amendment becomes law because I think people will look at the criminal justice system in a different manner, and they will realize that what's all about crime is the victim of a crime and not necessarily the criminal. There are times when people are accused of a crime and convicted and sentenced, and at some point in time that sentence is over and their incarceration is over. For victims of crimes the sentence is never over, and the incarceration is never over."

Richard D. Pompelio  
Victim and Victims' Advocate

Governor Florio held a press conference on the same day and showed a considerable change in position, stating:

"I know that the accused have rights. They should get a fair trial and every protection to which the law entitles them. But sometimes things go too far. And we have to do something." But more importantly, it's time we stopped treating the victims like the bad guys, and recognized them for what they truly are -- victims who have suffered."

"Changing the Constitution is not something that is done lightly. But if that's what it takes to put victims on an equal footing with the criminal, that's what we have to do."

The members of the Coalition would see the proposed amendment pass the Assembly by a vote of 72-0 on January 17, 1991. The battle, however, was far from being over. The Senate President strongly opposed an amendment to the Constitution and without his approval the matter would not be heard in the Judiciary Committee.

The status of the amendment at the time is clearly reflected in the following excerpts from the Memorandum of Senate Associate Counsel, Kenneth A. Raatz dated 12/16/90 to the Minority Leader:

"The Constitutional Amendment approach is supported by the Attorney General, and according to the Crime Victims' Rights Coalition, also by the Governor. ACR-85Acs is expected to pass the Assembly without any difficulty. However, apparently the Senate President, Senator John Lynch, believes that a Constitutional Amendment is not necessary and that the same rights could be guaranteed to crime victims by statute.

James K. O'Brien, Chairman of the New Jersey Coalition of Crime Victims' Organizations and Richard D. Pompelio, Legal Counsel to the Coalition are going to meet with Senator Lynch after the first of the year in an attempt to persuade him of the necessity of a Constitutional amendment.

I have discussed the situation with Mr. O'Brien and Mr. Pompelio and it is our collective feeling that there may be reasons in addition to the question of whether or not a Constitutional Amendment is necessary involved. I am attempting to find out whether or not that may be the case from the Senate Democratic staff.

The Coalition has submitted a twenty-nine page brief to Senator Lynch that directly addresses the issue of why a Constitutional Amendment is necessary. In my opinion it

does so in an eloquent and persuasive manner. However, at my suggestion a condensed version of the brief is going to be written for submission to Senator Lynch and the Senators on the Judiciary committee. I offered my services in that regard, but Mr. O'Brien and Mr. Pompelio for obvious reasons wanted to write an abbreviated version of the Coalition's brief themselves."

After substantial discussion, debate and sometimes awkward attempts at lobbying on the part of Coalition members, Senator Lynch either changed his mind or simply succumbed to the pressure. In any event the proposed amendment was scheduled for hearing before the Senate Judiciary Committee on May 1, 1991. The committee approved the measure, 7-0 and sent it to the full Senate for further consideration.

The public comments about the proposed constitutional amendment were numerous and varied; some reflecting a keen insight into the reasoning behind the amendment and others demonstrating a total lack of it. The following are a few examples:

"But we do not believe that amending the constitution to palliate the feelings of victims of crime is either necessary or proper. The public justification offered for the amendment is that it will do little or nothing not already accomplished by the two applicable statutes, but it will make victims feel better. We fear that it may do far more, and we suspect that some of its proponents intend just that. But the goal of our criminal process is not revenge, but justice. Law enforcement is too serious a matter to entrust to emotion, however understandable that emotion might be."

Editorial, New Jersey Law Journal  
10/25/90

"The amendment would represent a fundamental change in our criminal justice process, and also something of a risk. But it appears at this state anyway to be a change for the better, and a risk worth taking."

Editorial, Daily Record 10/12/90

"People are going to push this as far as they can push it... who knows where it's going to lead."

Professor Robert Williams,  
Rutgers Law School

"The Amendment is "a demagogic proposal aimed squarely at the defense table ..."

Alan Silber, Esq., Vice President,  
Association of Criminal Defense Lawyers

"I suspect that this is a Constitutional Amendment that would fit with the tenor of the times"

Richard Rober, Director,  
Program for N.J. Affairs,  
Woodrow Wilson School of Public and  
International Affairs, Princeton University

"Law enforcement is firmly behind this amendment. It's time for the rights of victims to be recognized formally in the social compact that bind us all - our constitution."

Robert DeLufo  
New Jersey Attorney General

September 19, 1991

On June 14, 1991, the proposed amendment was put up for a vote before the State Senate and passed 36-0, with one abstention.

On November 5, 1991, 84 percent of the voters gave their approval to the first constitutional expansion of citizens' rights in the State of New Jersey since our State Constitution was adopted in 1947.

**THE IMPACT OF THE CRIME VICTIM'S MOVEMENT AND**  
**THE CONSTITUTIONAL AMENDMENT IN NEW JERSEY**

It has been four (4) years since the Crime Victims' Movement began to gain momentum in the State of New Jersey and two (2) years since the adoption of the Constitutional Amendment. Crime victim advocates had argued and continue to argue that the recognition of crime victims will bring a positive purpose into the criminal justice system. The critics have expressed reservation and concern over the rights of defendants and the increased pressure which would be placed on an already overburdened criminal justice system. There has been a considerable amount of legislation proposed in the New Jersey legislature over the past few years as a direct response to the crime victims movement. The following legislation has been passed as a function of the increased awareness of the rights of crime victims:

**CLEMENCY:**

In April, 1992, Governor Florio requested a meeting with victims' rights advocates regarding their views on the use of clemency by the Governor. On April 16, he issued a memorandum directing his chief counsel, to make sure "appropriate government officials receive immediate notice of all clemencies or pardons granted by me." As a result of the discussions and the Governor's strong support of the rights of crime victims, Senate Bill No. 783 was soon introduced and became law:

Governor Florio's new policy broke a strong tradition of non-public disclosure followed by his predecessor, Thomas Kean. Governor Kean had commuted seventy sentences and issued fifty pardons during his eight years in office and it has been reported that he told "no one outside his closest circle of advisors about most of them."

Former Governor Brendan Byrne granted eighty-eight pardons and commuted fourteen sentences during his eight years in office. Many of his clemencies were also not made public and seldom were press releases issued by his office disclosing information on individuals pardoned.

New Jersey's clemency law gives the Governor greater latitude than in most states and is considered one of the most secret processes in the nation.

On January 25, 1993, N.J.S.A. 2A:167-3.1 was enacted to provide the following:

On or before March 1 of each year, the Governor shall report to the Legislature each reprieve, pardon and commutation granted, stating the name of the convicted person, the crime for which the person was convicted, the sentence imposed, its date, the date of the pardon, reprieve or commutation and the reasons for granting same.

### **DOMESTIC VIOLENCE:**

In June, 1992 the New Jersey Attorney General released the ninth annual report on domestic violence. In accordance with State Police Uniform crime statistic there were 55,698 domestic violence offenses in 1991 and 19,127 arrests. Less than one-half of domestic violence incidents are reported to police each year. These were the largest numbers since the New Jersey State Police began keeping such statistics in 1983.

In 1991 there were 34,319 assaults, 120 charges of criminal restraint, thirty-two cases of false imprisonment, 2,768 cases of criminal mischief, 382 burglaries and 17,887 incidents of harassment, all being considered domestic disputes.

In 1991 there were sixty-one murders growing out of domestic disputes, twenty kidnappings, eighty-two sexual assaults, nineteen cases of criminal sexual contact and eight charges of lewdness.

Overall, women were the victims in 84.6 percent of the cases in 1991. In more than half of the incidents, children were either involved or present when the violence occurred. Children were involved in nine percent of the incidents of domestic violence and present for forty-four percent.

On November 12, 1991, Governor Florio signed into law the Prevention of Domestic Violence Law, N.J.S.A. 2C:25-17 et seq. The following excerpts from the "Legislative findings



and declaration" clearly reflect the strong policy of the Legislature in responding to this social illness:

The Legislature finds and declares that domestic violence is a serious crime against society; that there are thousands of persons in this State who are regularly beaten, tortured and in some cases even killed by their spouses or cohabitants; that a significant number of women who are assaulted are pregnant; that victims of domestic violence come from all social and economic backgrounds and ethnic groups; that there is a positive correlation between spousal abuse and child abuse; and that children, even when they are not themselves physically assaulted, suffer deep and lasting emotional effect from exposure to domestic violence. It is therefore, the intent of the Legislature to assure the victims of domestic violence the maximum protection from abuse the law can provide.

Provisions of the new act which are designed to afford the victims more protection are:

1. The mandatory arrest requirement which states that a police officer must arrest and take into custody a domestic violence suspect and must sign a criminal complaint against the person if the victim exhibits signs of injury caused by an act of domestic violence.
2. The police officer can seize any weapon on the premises if there is probable cause to believe that an act of domestic violence was committed and when there is a reasonable belief on the part of the officer that the weapon would expose the victim to bodily injuries.
3. The police officer must take into consideration the right of the victim to defend herself; and
4. The court may issue temporary restraining orders to a person, even if that person is not physically present.
5. The new law added homicide, terroristic threats and criminal trespass to the already existing ten offenses and defines a "victim of domestic violence" to be a person:

1. who is eighteen years of age or older, or
2. who is an unemancipated minor, and
3. who has been subjected to domestic violence by "a) a spouse, b) a former spouse, c) any other person who is a present or former household member, or d) a person with whom the victim has a child in common." N.J.S.A. 2C:25-3(d).

**PAROLE:**

The parole Act of 1979 was amended, effective June 29, 1989 (N.J.S.A. 30:4-123.55 (f)) to provide:

"(I)f an inmate incarcerated for murder is recommended for parole by the assigned board member or the appropriate board panel, parole shall not be certified until a majority of the full parole board, after conducting a hearing, concurs in that recommendation."

That section was further supplemented, effective August 5, 1993 to add the following language:

"The board shall notify the victim's family of that hearing and family members shall be afforded the opportunity to testify in person or to submit written statements."

## STALKING:

On January 5, 1993, the New Jersey antistalking law (N.J.S.A. 2C:12-10) went into effect. It is intended to protect victims who are repeatedly followed and threatened and is modeled after the 1990 California statute. The bill provided that a person is guilty of stalking if he purposely and repeatedly follows or harasses another person and makes a credible threat with the intent to place that person in reasonable fear of death or serious bodily injury. Stalking would be punishable as a crime of the fourth degree. Crimes of the fourth degree are punishable by a term of imprisonment of up to eighteen months, or a fine of up to \$7,500, or both.

If the defendant commits the crime of stalking in violation of an existing court order prohibiting the behavior, the offense would be graded as a crime of the third degree which is punishable by a term of imprisonment of three to five years, or a fine of up to \$7,500 or both.

A second or subsequent offense of stalking which involves an act of violence or a credible threat of violence against the same victim would also be punishable as a crime of the third degree.

In the fall of 1984, Kimberly Poland's photo appeared in a Maine newspaper as the winner of a local beauty contest. That picture will haunt her and her family for the rest of their lives.

Since the day after the picture was published, a man she never met has stalked Poland with threatening phone calls, letter, and visits. The man (identified by the family only as John Doe) has been arrested for harassment and sent to a mental institution and to jail for violating stay-away orders. But each time he is released, he harasses the Polands and does his best to track down Kimberly.

"Despite the threats Doe has made against our lives, despite the repeated violations of restraining orders, despite the professional assessment of him as dangerous, both the district attorney and our own attorney have said that nothing can be done until Doe has "done something," Kimberley's mother, Sandra, told the Senate Judiciary Committee in Congress last

year. "What is the 'something' they must wait for him to do? Kidnap Kimberly? Rape her? Kill her? Would you be willing to sit back and wait for this to happen to your daughter or your son?"

Little by little, a picture of who is stalking whom - and why - is beginning to emerge. Like child sexual abuse, staking is a pattern of criminal behavior that becomes more evident when given a name and when given recognition.

It is estimated that five percent of women in the general population will be stalked at some time in their lives. A study by the Federal Bureau of Investigation reported that ninety percent of women killed by their husbands or boyfriends in 1991 were stalked before the attack.

About ninety to ninety-five percent of victims are women being stalked by someone they were involved with romantically, said David Beatty, director of public affairs for the National Victim Center in Arlington, Virginia. In many instances, he said, harassment spirals into violence.

## VICTIM COMPENSATION:

In December of 1991, the Violent Crimes Compensation Board (VCCB) was three million dollars in debt, according to its chairman, Jacob Taporek. Claims were taking up to two years to process and the Board was able to pay only seventy-five percent of the amount approved for payment once a claim was determined to be eligible.

On December 23, 1991, Public Law 1991, Chapter 329 was enacted. The purpose of this legislation was to provide increased financial aid to victims through the increased funds available for payment to victims and also, to provide a more effective and efficient manner for the VCCB to obtain money owed to the fund.

The law provided for:

1. An increase in monetary assessments to Violent Crimes Compensation Board by amending N.J.S.A. 2C:43-3.1:
  - \* to refer to the charge as an additional "assessment" instead of an additional "penalty";
  - \* to increase the minimum amount an individual convicted of a crime of violence must pay from thirty dollars to one hundred dollars;
  - \* to increase the minimum amount an individual convicted of a petty disorderly offence, a disorderly offense or criminal offense not resulting in death or injury must pay from thirty dollars to fifty dollars;
  - \* to increase the assessment for an adjudication of delinquency, established under N.J.S.A. 2A-23 from fifteen dollars to thirty dollars;
  - \* to provide a funding mechanism for the Criminal Disposition and Revenue Collection Fund.
  
2. The Law further established a revision of the criteria for imposing fines and restitution (N.J.S.A 2C:44-2) by providing that the court shall sentence a defendant to pay restitution in addition to a sentence of imprisonment or probation that may be imposed if:

- (1) The victim, or in the case of a homicide, the nearest relative of the victim, suffered a loss; and
- (2) The defendant is able to pay or, given a fair opportunity, will be able to pay restitution.

The statutory provision further states:

“In determining the amount and method of payment of restitution, the court shall take into account all financial resources of the defendant, including the defendant's likely future earnings, and shall set the amount of restitution so as to provide the victim with the fullest compensation for loss that is consistent with the defendant's ability to pay. The court shall not reduce a restitution award by any amount that the victim has received from the Violent Crimes Compensation Board, but shall order the defendant to pay any restitution ordered for a loss previously compensated by the Board to the Violent Crimes Compensation Board. If restitution to more than one person is set at the same time, the court shall set priorities of payment.”

The act further provides:

"The ordering of restitution pursuant to this section shall not operate as a bar to the seeking of civil recovery by the victim based on the incident underlying the criminal conviction. Restitution ordered under this section is to be in addition to any civil remedy which a victim may possess, but any amount due the victim under any civil remedy shall be reduced by the amount ordered under this section to the extent necessary to avoid double compensation for the same loss, and the initial restitution judgment shall remain in full force and effect."

3. N.J.S.A. 2c:45-1 and 2 now establish the requirement that the Court may order the payment of any assessment to the VCCB and any restitution to the victim be a condition of probation and if the defendant does not satisfy this condition to pay, he/she may not be discharged from probation until such payment is made.
4. A further emphasis on the defendant's obligation to make restitution through an amendment to the presentence investigation and report section of the statute (N.J.S.A. 2C:44-6), was also provided in the law, to require:

\* the presentence investigation shall include an analysis of the defendant's financial resources, employment history and debts, including any amount owed for a fine, assessment or restitution ordered in accordance with the provisions of Title 2C;

- \* the presentence investigation shall include a report on any compensation paid by the VCCB as a result of the commission of the offense;
  - \* the information concerning the defendant's financial resources shall be made available upon request to the VCCB or to any officer authorized to collect payment on an assessment, restitution or fine.
5. A uniform system for tracking and collection of assessments, fines, restitutions and penalties was authorized by enacting N.J.S.A. 50:4B-8.1. (On February 1, 1993, this law was further amended to provide that the VCCB shall use the monies deposited in the Criminal Disposition and Revenue Collection Fund to defray its cost incurred in developing, implementing, operating and improving the Board's component of the uniform system for tracking.
  6. The sixth significant change to the existing law provided by P.L. 1991, Ch. 329 provided for an amendment to the summary collection for nonpayment provisions (N.J.S.A. 2C:46-2) to require that if a defendant fails to make any payment due as a VCCB assessment or restitution to the victim, a motion may be made by the State or County Office of Victim and Witness Advocacy to the Court. The Court shall thereupon issue a summons or warrant of arrest for his/her appearance.

This statutory revision states that the court shall afford the person notice and an opportunity to be heard on the issue of default. Failure to make any payment when due shall be considered a default. The standard of proof shall be by a preponderance of the evidence, and the burden of establishing good cause for a default shall be on the person who has defaulted.

- (1) If the court finds that the person has defaulted without good cause, the court shall:
  - (a) Order the suspension of the driver's license or the nonresident reciprocity driving privilege of the person;
  - (b) Prohibit the person from obtaining a driver's license or exercising reciprocity driving privileges until the person has made all past due payments; and

- (c) Notify the Director of the Division of Motor Vehicles of the action taken.
- (2) If the court finds that the person defaulted on payment of a fine without good cause and finds that the default was willful, the court may also impose a term of imprisonment to achieve the objective of the fine.



### **VICTIM IMPACT STATEMENTS:**

Prior to March of 1991, the victim had no input into the prosecutor's considerations on whether formal charges would be filed against someone accused of a criminal act. Victims commonly complained that the prosecutor's office had never taken a detailed statement from them. Furthermore, the victim was never notified that the prosecutor had decided not to charge the individual with a crime or that the prosecutor had downgraded the charges and disposed of the matter.

In addition, the only input into the sentencing of the convicted person on the part of the victim was limited to a statement to the probation department to be included in the presentence report pursuant to N.J.S.A. 2C:44-6.

On March 1, 1991, with Concurrent Resolution ACR 85 having passed the Assembly, the support for crime victims was continuing to mount. Assembly Bill A-2892, co-sponsored by Assembly Judiciary Committee Chairwoman Marlene Lynch Ford, was signed into law by Governor Florio. This law gave the victim the right to speak and imposed upon the prosecutor the obligation to listen. The act provided that the Crime Victims' Bill of Rights (N.J.S.A. 52:4B-36) was amended to confer upon crime victims and witnesses the following additional rights:

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; and

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.A. 2C:44-6.

The act further requires that the Attorney General shall, through the Office of Victim-Witness Advocacy in the Division of Criminal Justice in the Department of Law and Public Safety and in consultation with the county prosecutors, promulgate standards for law enforcement agencies to ensure that the rights of crime victims are enforced.

These standards place the obligation upon shall the Office of Victim-Witness Advocacy in the Division of Criminal Justice and each county prosecutor's office to provide the following services upon request for victims and witnesses involved in the prosecution of a case.

1. Assistance to victims in submitting a written statement to a representative of the county prosecutor's office about the impact of the crime prior to the prosecutor's final decision concerning whether formal charges will be filed.
2. Notification to victims of the right to make an in-person statement, prior to sentencing, directly to the sentencing court concerning the impact of the crime.

### **THE EXECUTIVE BRANCH**

It has always been believed by crime victims and crime victims' advocates that much of the unfair treatment experienced by crime victims over the years was a direct function of the sensitivity or lack of sensitivity on the part of the staff of the office of the prosecutor charged with prosecuting the crime. Perhaps the most significant change which has occurred for the benefit of crime victims has been the substantial improvement in the treatment of crime victims by the offices of the various prosecutors throughout the state of New Jersey.

Just a few years ago the New Jersey Prosecutor's association, as a body, strongly opposed the Constitutional Amendment recognizing the rights of crime victims. That position has changed substantially and a considerable amount of credit must be given to the office of the Attorney General and his staff. On many occasions the changes, which may be subtle, had great importance to the victims of the crime.

# **THE APPLICATION AND IMPACT OF THE VICTIMS' RIGHTS AMENDMENT ON THE NEW JERSEY SYSTEM OF CRIMINAL JUSTICE - A BALANCING OF RIGHTS**

## **INTRODUCTION**

During the drive for the Constitutional Amendment a considerable awareness of the plight of crime victims developed not only, among the members of the public, but also among the members of the Executive, Legislative and Judicial branches of government. Many of the critics of the Constitutional Amendment focused their attention on the specific wording of the amendment and apparently failed to see the broad picture of what the amendment truly sought to accomplish.

Many of the members of the Crime Victims' Coalition who were substantially active in bringing the drive for the Constitutional Amendment to the public forefront constantly referred to the entire process as a social revolution. It was truly felt that by inserting the positive purpose of the support of crime victims into the criminal justice, the entire administration of criminal justice would improve through a careful and continual balancing of rights between the defendant and the victim.

Article 1 Paragraph 22 of the New Jersey Constitution confers upon the victims of crime the right to be treated with "fairness, compassion and respect by the criminal justice system". The clearly definable right which is set forth in the amendment is the right "to be present at public judicial proceedings...." The rights conferred by this amendment in conjunction with the Crime Victims' Bill of Rights, N.J.S.A. 52:4B-36 et seq. the authority to have the law recognize and respect the rights of crime victims.

It was the intention of the proponents of the amendment that there would not be any marked or drastic change in the overall administration of criminal justice. It was and continues to be the intention of the crime victim advocates as follows:

1. That the drive for the Constitutional Amendment created and will continue to create a substantial awareness of the victims of crime in the justice proceeding and this awareness would be reflected in the attitude toward the victims of crime by the individual judges, prosecutors, their staff, members of the legislature, and public in general.
2. That based upon a continued and developing understanding and awareness of the plight of crime victims, sound and positive legislation would be developed to address the numerous problems within the criminal justice system as we become aware of them.
3. That by advocating the rights of the crime victim in court in a manner which is positive and completely respectful of the rights of the defendant, that the courts will begin to feel more secure in recognizing and addressing the rights of crime victims in the various court proceedings.

As the crime victim movement began to strengthen in the State of New Jersey in the past few years, numerous issues have arisen and will continue to arise regarding the balancing of the rights of the accused and the victim in the various stages of the court process. The following constitutes the important areas of concern for not only the court but also the victim's attorney and the defense attorney. It is crucial that the court and the attorneys for the defendants realize that the function of the crime victim within the court process is not adversarial but more often than not is based upon survival. The concept of "second or double victimization" is not just a theory. It is a reality and the crime victim's major objective is to survive this real life situation and not focus primarily on any revenge toward the defendant.

1. Defendant's first appearance and application for bail:

R3:4-1 (Procedure after arrest) provides that a person arrested, with or without a warrant, shall be taken "without unnecessary delay before the court...." It may very well be argued that when the accused is brought before the court this would constitute a "public judicial proceeding" and the victim's constitutional rights requires him/her to be present. The intention of the

Constitutional Amendment was not to create such a rigid or inflexible application of constitutional rights on the part of the victim and a reasonable application of the amendment and the rights of the victim in a situation such as this should clearly be that unless there are other significant factors, the right of the accused to be brought before a court without unreasonable delay should not in any way be impeded by the failure of the victim to attend any proceeding once being informed.

The common procedure as set forth in R3:4-2 may create problems for the victim unless the prosecutor is diligent in contacting the victim and informing him/her of what is about to take place. It has been a common situation that once the complaint is filed and the defendant is brought before the court for his/her "first appearance" as referred to in R3:4-2 the defendant shall be admitted to bail. Often times this procedure would take place without the victims being informed that it was taking place. Too often, the day after the court appearance the victim would read in the newspaper about the events which transpired in court. A recognition of the victim's rights under the Constitutional Amendment should preclude such an occurrence, however, it does continue to take place.

The 1991 Amendment to N.J.S.A. 52:4B-36 to provide for the victim impact statement prior to the prosecutor's final decision concerning whether formal criminal charges will be filed reflected a strong intention on the part of the Legislature to enforce the victim's right to be present at the defendant's first appearance before the court.

If proper procedure is followed by both the prosecutor and the courts then there will be no delay or injustice to the defendant. Likewise, at the time of the defendant's first appearance the prosecutor will be better informed because of his/her required review of the victim impact statement and the court will be better informed in addressing any considerations of bail as oftentimes, in violent crimes, no contact restrictions must be placed upon the accused.

## **BAIL:**

In a recent matter a sixteen year old boy was charged with committing acts of delinquency when he attacked and attempted to sexually assault a seventeen year old female student on school premises during school hours. The juvenile was charged with aggravated sexual assault.

The court initially ordered the boy to be released on his own recognizance subject to a condition that he was to have "no contact" with the victim. The matter immediately went to trial and the boy was adjudicated a delinquent in that he was deemed to have violated the provisions of N.J.S.A. 2C:14-3 (Aggravated Criminal Sexual Contact)

The mere presence of the perpetrator at school caused extreme emotional distress for the victim and often times when the boy would see her at school, while he did not talk to her, he made certain gestures or gave her certain looks which caused her considerable emotional upset. The presence of the boy at school caused the victim to refuse to attend school and due to her emotional state she was compelled to psychological counseling.

At the recommendation of the county prosecutor, the victim, through her attorney, made an application to the court to modify her prior order and require that the boy be removed from school for the remainder of the school year, which was the victim's final semester in school.

A hearing was held before the court in which the victim's attorney presented evidence, by way of the testimony of the victim, as to the impact of the boy on her while at school. The attorney for the juvenile strongly objected to any claim by the victim that the perpetrator should be removed.

The attorney for the victim argued to the court argued that the "no contact" order had to be viewed and interpreted in light of what "contact" meant to the victim and that in order for the court's no contact order to have any meaning whatsoever it had to be considered not only from the conduct of the perpetrator but also the impact upon the victim. The attorney for the victim argued to the court that as a victim of a crime this young girl was entitled to the constitutional protections of Article 1 Paragraph 22 and the further protections of N.J.S.A. 52:4B-36. The

court was compelled to recognize the right of the victim to be treated with fairness, compassion and respect and in weighing her rights against those of the perpetrator to a public education, the court concluded that the right of the victim, in this case, outweighed the right of the convicted juvenile. The court ordered that he be removed from the school for the remainder of the school year.

This case, which occurred in Morris County in 1993, was extremely significant in that:

- a) The County Prosecutor's Office realized that the victim needed assistance and an advocate on her behalf and consequently sought to provide independent legal counsel for her.
- b) The court entertained a direct application on behalf of the victim who is technically a party to the matter to see that the victim's attorney was allowed to present evidence at a hearing before the court.
- c) The court based its decision on a balancing of the rights of the victim and the perpetrator. It is most significant that the court was able to apply a relatively standard no contact order to a situation where the term meant one thing to the perpetrator and something else to the victim.

This was a case in which the court not only recognized and respected the rights of the crime victim but carefully balanced them against the rights of the individual convicted of the crime and achieved a proper result.

## **PRETRIAL MOTIONS AND INTERLOCUTORY APPEALS**

Prior to the passage of the Constitutional Amendment it was common practice among prosecutors' offices that the victim was not present at the argument before the court on pretrial motions and interlocutory appeals because the victim was never advised of same. It has been commonly heard among victims of crime that they have learned to rely heavily on the members of the media for information regarding the proceedings involving the defendant. It has been a common occurrence for the victim to read the local newspaper and discover that a motion had been heard before the court the previous day. It has also been common practice for a victim to be telephoned by a member of the media to comment on an event in the proceedings that the victim or the victim's family did not know about. In one case which received careful attention by the State Attorney General's Office several years ago, the father of the murder victim was telephoned on a Friday evening by a reporter from the New Jersey Network Television station. He was asked if he was going to attend the appellate argument the following Monday morning. All the boy's father knew was that several months earlier the assignment judge had dismissed the indictment and instead of reindicting the defendant the prosecutor filed an appeal. The boy's father had no idea when and where the appellate argument was to take place, as he had never been informed by the prosecutor's office.

At the time the Crime Victims' Bill of Rights N.J.S.A. 52:4B-36 was in effect however, it was routinely ignored by this particular prosecutor's office and in others throughout the State.

The victim clearly has the right to be informed of and attend all pretrial motions and appellate arguments and if the prosecutor's office does not inform the victim of same there is clearly a denial of the victim's rights under Article 1 Paragraph 22. A further issue develops if the victim wishes to file a brief in opposition to any motion of the defendant or in any interlocutory appeal. Victims of crime may argue that because these are public judicial proceedings that they have the right to be present then they should also have the right to be heard.



Crime victim advocates will not support the victim routinely taking a unilateral in any criminal proceeding by way of seeking to submit legal briefs and appearing at the oral argument of the matter. ACR 85 in its original form gave the victim the right "to be heard". There was a substantial concern on the part of the office of the Attorney General and many of the county prosecutors that by giving the victim this right there would be a serious obstacle created to the effective prosecution of the matter.

It is the position of crime victims advocates in the State of New Jersey and throughout the country that there are and will be numerous matters in which it will be important to file in amicus curiae brief in issues relating to the recognition, respect and advancement of victims' rights. The attitude of victims rights advocates is that this should be accomplished only in conjunction with and under the approval of the office of the prosecutor in the case. It must always be understood on the part of victims advocates that unless the conduct of the prosecutor is violating the rights of the victim the victim should not interfere with the proceedings by seeking to intervene in the criminal court process.

## **PRE-TRIAL INTERVENTION**

R.3:28 sets forth the provisions for the defendant's application for Pre-Trial Intervention (PTI). The rule does not state that certain types of offenses will preclude the defendant from being admitted into the PTI program. As to the nature of the offenses for which Pre-Trial Intervention may be granted the Supreme Court guidelines indicate that they are "victimless" types of offenses.

Prior to the adoption of the Constitutional Amendment two situations arose in Court relative to the status of the victim in the pre-trial intervention process. The cases took place in different counties.

I. In one matter a young man was attacked with a knife by a young woman at a party which was attended by both of them. The victim suffered severed tendons in one arm which required surgery. He not only had permanent physical damage, but he was compelled to obtain psychological assistance as a result of the attack. He was compelled to leave his employment because he could no longer function due to his physical disability.

The defendant was originally charged with aggravated assault and she applied for admission into the Pre-Trial Intervention program. The victim was unaware when the matter went before the Court and the Court did not have any information regarding the severity of the crime nor its impact upon the victim. The defendant was granted admission into the Pre-Trial Intervention program.

Upon discovering that the defendant had been approved for Pre-Trial Intervention, the victim contacted a private attorney who persuaded the office of the prosecutor to seek a rehearing on the PTI application, however, with input from the victim to be provided to the court. The victim did prepare a statement, nevertheless, Pre-Trial Intervention was ultimately granted to the defendant.

The victim of the crime became extremely distraught over the fact that he felt that he had been denied justice and that the defendant was able to escape her obligation to answer for the criminal act. The young man's emotional distress heightened considerably and on his 21st

birthday he walked into a liquor store, purchased a bottle of liquor and drank most of it. As his car was parked with the young man sitting behind the wheel, he was approached by a police officer. The young man left in his vehicle and a high speed chase ensued. The young man struck a tree and died as a result of the accident.

In discussing the accident with the young man's mother, she indicated that he was so emotionally distraught over the fact the defendant had been granted approval into the PTI program that he developed an extreme disdain for the court and the police authorities. His mother was sure that his emotional state played an important factor in his decision to drive away from the police officer at a high rate of speed.

II. A young woman who had recently graduated from college with a degree in landscape architecture had decided to move back home to the state of New Jersey with her new husband in order to become a member of her father's engineering firm. On their way back to New Jersey the couple was traveling in their car and in the opposite direction, but in their lane, was traveling another vehicle at a high rate of speed. The driver of the other vehicle was a young man and several of his friends were passengers in his vehicle. There is evidence that the driver of the vehicle and his friends had been inhaling the gas from aerosol cans and this may have contributed to the driver's condition.

The vehicle in which the young woman was traveling was struck head on by the other vehicle and she was killed. The young man was ultimately charged with a violation of N.J.S.A. 2C:11-5 (death by auto). The defendant applied for admission to the pre-trial intervention program and the prosecutor filed a formal objection with the Court.

At the hearing before the Court on the Defendant's request for admission to the PTI program, the Judge criticized the prosecutor for being insensitive to the situation of this young man. Indicating that the prosecutor was not justified in objecting to the defendant's application for admission into the Pre-Trial Intervention Program.

Over the strong objection of the Prosecutor, the Court granted PTI approval to the defendant. The young woman's father and husband were in Court at the time and both became

visibly upset. The Court showed little sensitivity to each of the victim's survivors and ordered the young woman's husband removed from the Courtroom.

The prosecutor appealed the decision of the Court and the Appellate Division reversed the decision of the lower court. The young man was ultimately tried and convicted of the offense.

Each of the above situations happened within less than two years from the adoption of the Constitutional Amendment. Each demonstrates the necessity for applying the provisions of the Amendment to the pre-trial intervention phase of any criminal proceeding. It is a public judicial proceeding and the victim should not be excluded.

It appears, from a review of these two cases, that the Supreme Court guidelines must be followed more closely in terms of the nature of the crime for which pre-trial intervention approval is granted. Under the existing Supreme Court guidelines, it is questionable that each of the two above defendants in the referenced cases should not have been approved for pre-trial intervention.

## **PLEA BARGAINING**

If there is one area in which victims of crime are very critical of the prosecutors and courts, it is in the area of plea bargaining. Victims have shown a considerable lack of trust and confidence in the criminal justice system when asked to comment on the manner in which plea bargains are accomplished.

Most victims of crime do not believe that "the punishment can fit the crime" and when the original charge is further reduced by the prosecutor and accepted by the court, the dissatisfaction and upset on the part of the victim usually will increase.

The problems encountered by crime victims over the past years in the area of plea bargaining usually are the result of the failure on the part of the office of the prosecutor to develop an adequate level of communication and understanding with the victim. Too often, the victim does not understand the weaknesses in the prosecutor's case and the decision making process on the part of the prosecutor in considering the plea bargain in the matter. Victims of crime often say that they view the justice system as nothing more than an "assembly line" and they criticize the prosecutor for being the engineer of the revolving door justice system which is not sensitive to their right and feelings. How often can the prosecutor adequately explain to the victim's survivors that a particular homicide charge is being downgraded for certain reasons. Usually, the prosecutor cannot. In the past, the prosecutor often did not try very hard.

There has been a concern on the part of law enforcement and the criminal defense bar that by allowing the victim to have any say whatsoever in the plea bargaining would cause a major in the machinery of justice. In theory, the concerns are quite legitimate. In practice, over the past few years, in conjunction with the Victims Rights Movement and the drive for the Constitutional Amendment, the victim's legal advocate has been instrumental in assisting all parties, including the victim, in achieving acceptable and understandable plea bargains in certain cases. Which the Amendment set forth in public law in 1991 Chapter 324 later opportunities are now available for the negotiation of appropriate plea bargains which are more than fair to the defendant and are acceptable to the victim.

During the drive for the Constitutional Amendment, victims advocates were often called upon to emphasize that their intentions were not to seek vengeance upon the criminal but to obtain compassion and fairness for the victim while accomplishing a more positive purpose to the criminal justice system. Two examples of criminal cases which occurred in two different counties in the past three years demonstrate the objectives of the crime victims amendment.

I. A woman was physically assaulted by a man whom she had been dating for a short period of time. On one occasion he became so violent that he caused a substantial amount of damage to her automobile with a use of a hammer.

The individual was charged with aggravated assault and malicious damage to property and he sought admission into the Pre-Trial Intervention Program. The Prosecutor strenuously objected to the defendant's application and he was denied approval to PTI.

The victim was made well aware that while there had been substantial damage to her automobile, she would have little chance in collecting on a civil judgment against the defendant. Though the use of private legal counsel who was actively involved in the plea negotiations, a plea bargain was struck which not only was satisfactory to the defendant but also provided for immediate restitution to the victim and additional penalties to the defendant which was satisfactory to the victim.

II. A vehicle driven by the defendant in a reckless manner was involved in an accident which caused the death of another man. The victims family so strongly felt that the defendant's conduct was so reprehensible that he should be charged with murder. While the defendant was indicted for manslaughter, it was apparent to the prosecutor that a conviction for even death by auto would be very difficult based upon certain proof problems specific to this case.

The victims family had difficulty in understanding the position of the prosecutor and all of the various criticisms of prosecutors by victims in the area of plea bargaining stated by the victims family.

A private counsel engaged by the victims family to advocate their rights sought to intervene into the plea bargain discussions. After lengthy discussions and meetings in which the attorney served as a buffer between the victims family and the prosecutor's office, a plea bargain was struck which assured the victims family that the defendant would receive a definite period of incarceration. Not only was the victim's family satisfied with the efforts of the prosecutor at the conclusion of the matter, but they also were able to fully understand that the prosecutor was very concerned about them and was working very diligently on their behalf.

## TRIAL AND SENTENCING

HOFFMAN I: On November 23, 1982, James Jerry Koedatich murdered Amy Hoffman and twelve days later he murdered Deirdre O'Brien. Koedatich was arrested by the police authorities and in 1984, the trial for the murder of Amy Hoffman took place in the Superior Court in Morris County. Prior to trial the defense submitted a list of witnesses and included thereon the name of the victim's mother, Florence Hoffman.

At the trial, the Prosecutor called Mrs. Hoffman to the stand to testify briefly as to the circumstances under which she found her daughter's automobile when she went to look for her at Amy's place of employment. The direct testimony lasted just a few minutes and the cross-examination took even less time.

As Mrs. Hoffman left the witness stand to resume her seat in the courtroom, the defense objected to her presence in the courtroom during the remaining portion of the State's case. The defendant argued that based upon the existing law relating to witness sequestration in criminal cases this type of application should be routinely granted. Supporting the defendant's position were such cases as State v. DiModica, 40 N.J. 404 (1963), State v. Connolly, 120 N.J. Super 511 (App. Div. 1972) and State v. Green, 129 N.J. Super 157 (App. Div. 1974).

Florence Hoffman was required to leave the courtroom and for the remainder of the trial, she sat on a bench outside the courtroom.

Mrs. Hoffman was never called as a witness by the defense and it is highly unlikely that the defense attorney ever intended to call her as a witness. The Defense Attorney sought to accomplish the removal of Florence Hoffman from the courtroom during the trial with the intention of also removing her daughter from the trial in the minds of the jury.

Mrs. Hoffman learned that day, as many victims of crime have learned before and after her that within the confines of rules of the justice system, this case had nothing to do with her child. She would also learn that in the arena of the criminal courtroom, the rights which are continuously discussed and argued are "Constitutional Rights." Koedatich was protected by



numerous Constitutional Rights and Mrs. Hoffman had none which afforded her any relief in the criminal court process. To Mrs. Hoffman, the term "justice" had little meaning.

The indignities which Florence Hoffman was forced to suffer in 1984 and 1990 in the criminal court system cannot be compared to the devastation she sustained in the murder of her daughter. These indignities, however, were not necessary and they should not have taken place. The Constitutional Amendment and the substantial emphasis on the rights of crime victims in the past several years by the Executive, Legislative and Judicial branches of government have clearly demonstrated that human feelings and emotions should not necessarily be left outside of the courtroom.

The response of the legislature in March of 1991 by allowing the victim could give an oral impact statement at the time of sentencing, was a critical step in advancing the causes of victims' rights in the State of New Jersey. It not only gave meaning to the Constitutional Amendment which would be adopted several months later by the people of the State of New Jersey, it clearly shows that by balancing the rights of the victim against the rights of the defendant, justice would have a new meaning.

The arguments in Hoffman II by the Defense Attorney for keeping Mrs. Hoffman out of the courtroom, the court house, and the entire town of Newton, New Jersey were based on the United States Supreme Court decision in Booth v. Maryland, 107 S. Ct. 2529 (1987) and South Carolina v. Gathers, 109 S. Ct. 2207 (1989) . The basis of defendant's argument was that the mere presence of Mrs. Hoffman constituted victim impact evidence and therefore, violated Koedatich's right under the 8th Amendment to the U.S. Constitution as constituting "cruel and unusual punishment."

The decision of the trial court in Hoffman II was a significant step in the recognition and respect for the rights of crime victims in the State of New Jersey due to the fact that there were no laws in effect at the time clearly permitting the presence of the victim's mother. If the trial had taken place after the effective date of the Constitutional Amendment (which was December

5, 1991) the court could have relied upon Mrs. Hoffman's constitutional right to be present as support for the decision.

A further problem arises in a review of Hoffman II in that the arguments of the defense attorney as to the exclusion of Mrs. Hoffman may be as viable today as they were in 1990, despite Article I, Par. 22.

On June 27, 1991 the United State Supreme Court, in the case of Payne v. Tennessee, 111 S.Ct. 2597 (1991) overruled both the Maryland and South Carolina cases, Supra. In Payne v. Tennessee, the defendant was convicted by a Tennessee jury of first degree murders of Charisse Christopher and her two year old daughter and of first degree assault upon, with intent to murder, Charisse's three year old son Nicholas. The brutal crimes were committed in the victim's apartment after Charisse resisted Payne's sexual advances. During the sentencing phase of the trial, Payne called his parents, his girlfriend and a clinical psychologist, each of whom testified as to various mitigating aspects of his background and character. The State called Nicholas' grandmother who testified that the child missed his mother and baby sister. In arguing for the death penalty, the prosecutor commented on the continuing effects on Nicholas of his experience and on the effects of the crimes upon the victims' family.

The jury sentenced Payne to death on each of the murder counts. The State Supreme Court affirmed, rejecting the defendant's contention that the admission of the grandmother's testimony and the State's closing argument violated his 8th Amendment rights under Booth v. Maryland and South Carolina v. Gathers.

The Court in Payne held that the 8th Amendment did not erect a per say bar prohibiting a capital sentencing jury from considering "victim impact" evidence relating to the victims personal characteristics and the emotional impact of the murder on the victim's family; nor did it preclude the prosecutor from arguing such evidence at a capital sentencing hearing.

While Payne v. Tennessee may be the law of the land with respect to the United States Supreme Court, the New Jersey Supreme Court in a similar case may decide to the contrary. This was done by the New Jersey Supreme Court in State v. Reed relative to the issue of the right

against self incrimination. Furthermore, in State v. Gerald 133 N.J. 40 (1988) the New Jersey Supreme Court has stated:

"The Supreme Court has also observed that in capital cases, as in other constitutional contexts, the states "are free to provide greater protections in their criminal justice system than the Federal Constitution requires." California v. Ramos, 463 U.S. 992, 1013-14, 103 S.Ct. 3446, 3460, 77 L.Ed. 2d 1171, 1188-89 (1993). Resort to a state-constitutional analysis is especially appropriate in light of the fact that "capital punishment is a matter of particular state interest or local concern and does not require a uniform national policy \*\*\*." Ramsuer, Supra, 106 N.J. at 167 (citing State v. Hunt, supra, 91 N.J. at 366 (Handler, J., concurring)). Id at 76.

If we look back to the scene in the Newton courtroom on a warm summer day, we see Florence Hoffman sitting in a corner in the back of the courtroom with other trial spectators sitting in front of her. As she is no more than five feet tall, she can hardly be seen. Approximately 30 to 40 feet in front of her at a long counsel table filled with papers sits a man in a camouflage suit with a bandanna around his head, making indecent gestures to the press and other members of the public while his attorney stands before the court and makes the argument similar to that which was made in 1990.

While Florence Hoffman will not be required to once again suffer the revictimization of the nightmarish experiences which she has had in the criminal justice system, there will always be a substantial fear for other victims of crime that the following argument may someday be accepted:

"Your Honor, on behalf of the defendant, I request that the victim's family be removed from this courtroom and that the jury should not be permitted to see them at any time between now and the conclusion of this trial. I realize that under Article I, Paragraph 22 of the New Jersey Constitution they have the right to be present. However, in balancing their right to be present under the New Jersey Constitution to be protected against "cruel and unusual punishment" the rights of the defendant must prevail.

"This court should not follow the holding of the United States Supreme Court of Payne v. Tennessee because that case relied upon the 8th amendment to the Federal Constitution which, as we know in the State of New Jersey, does not afford sufficient protection against cruel and unusual punishment. State v. Gerald has told us that the protections against cruel and unusual punishment under the

New Jersey State Constitution afford the defendant greater protection than they do under the Federal Constitution. And While the Court in Payne v. Tennessee stated that the victim should not be treated as a "faceless stranger" or a "valueless fungible" the mere presence of the victims family injects into this proceeding the human factor of emotion. And we know your Honor that this proceeding has nothing to do with emotions or any other human feelings upon which the jury may draw in rendering its decision.

"The rights of the victims family must give way to the rights of the defendant in this case."

Under similar circumstances in the future, the facts in Hoffman II may once again be revisited; only this time the victim's family will have a constitutional right to be present and the authority of the decision of the Supreme Court in Payne v. Tennessee. We do not feel comfortable, however, that the decision of the court may be the same as it was in the Summer of 1990.