

## **FACTS & PROCEDURAL HISTORY**

Defendant, William Boston was indicted in July 2004 by the Cumberland County Grand Jury, along with Thomas S. Nevius, Jr. for the murder of Ruth Walker in violation of N.J.S.A.2C:11-3. (A-1). Defendant was also charged with burglary, possession of a weapon and conspiracy. The jury selection process in the trial of the defendant has commenced, and the beginning of the trial is imminent. By letter dated February 1, 2007, defense counsel, the State of New Jersey, Office of the Public Defender furnished to the Cumberland County prosecutor a list of proposed witnesses which named over 120 named individuals as possible witnesses. Among this voluminous list are thirteen members of the victim's immediate family who wish to be present during this public trial.

Included in defendant's witness list were nine (9) members of the victim's family, none of whom are named by the prosecution as witnesses<sup>1</sup>, and each of whom has filed a certification as part of this motion in which each states under oath:

3. *The defendant in this case has named me as a witness on his behalf. I have no independent knowledge of facts that are material or relevant to the charges against the defendant.*
4. *I loved my [/mother/ sister/aunt] and it is very important to me as her survivor to be present during the trial to bear witness on her behalf to the trial of the man accused of causing her death.*
5. *I respectfully ask the court to permit me to be present during this public trial, as it is apparent that the reason the defense has placed my name on his witness list is to improperly remove me, a member of the victim's family, from the courtroom.*

---

<sup>1</sup> See status of each individual named, infra, pp. 9 – 10.

Also included in defendant's witness list were four members of the victim's family, each of whom is named by the prosecution as a witness,<sup>2</sup> and each of these four (4) individuals has filed a certification as part of this motion indicating that [his/her] knowledge of relevant facts of this case is very limited, stating the following under oath:

....

3. . . . *Except for this particular information and any other questions asked of me relating to it, I have no independent knowledge of any other facts that are material to or relevant to the charges against the defendant.*
4. *The defendant in this case has named me as a witness on his behalf. I understand that I will be sequestered from the trial prior to the completion of my testimony. I respectfully request that upon the completion of my testimony, if the defendant seeks to have the sequestration continued for the remainder of the trial, that his counsel present to the court the reasons for keeping me sequestered.*
5. *It is very important to me as a survivor of the victim Ruth Walker to be present during the trial when I will no longer be needed as a witness. I respectfully ask the court to permit me to be present during this public trial, as it is apparent that the reason the defense has placed my name on his witness list is to improperly remove me, a member of the victim's family, from the courtroom.*

There has been no proffer made to the court by defense counsel as to the reason why any of these thirteen (13) individuals named as a prospective witness should be sequestered. There is no factual basis for naming any of them as witnesses, and there is no good faith basis for sequestering them from attendance at this public trial of the alleged killer of their loved one.

Furthermore, there has been no be proffer made to the court by defense counsel as to the reason why each of the four (4) individuals who will give limited testimony on behalf of the State should be sequestered after they testify during the State's case. Each

---

<sup>2</sup> Id.

will be subject to cross examination by the defense, and there is no factual basis for naming any of these individuals as witnesses for the defense. Likewise, there is no good faith basis for sequestering each of them after completing their testimony.

The sequestration of each of the thirteen (13) close members of the victim's immediate family, including many of them who fall within the definition of "victim" under the New Jersey Constitution, N.J. Const. art. I, ¶ 22 [Victim's Rights Amendment], is an impermissible violation of their civil rights under the New Jersey Constitution, *Id.*; and statutes of New Jersey, N.J.S.A. 52:4B-34, *et seq.* [Crime Victims Bill of Rights].

This matter comes before the court on the motion of The New Jersey Crime Victims' Law Center, legal counsel for each of the thirteen (13) individuals improperly named by the defendant as proposed witnesses on his behalf for an order of this court permitting them to attend this public trial.

## **ARGUMENT**

### **I. THE CONSTITUTION AND STATUTES OF NEW JERSEY MANDATE THAT THE RIGHTS OF CRIME VICTIMS IN THE CRIMINAL JUSTICE PROCESS BE FULLY RECOGNIED AND THE VICTIMS HAVE STANDING TO ASSERT THESE RIGHTS.**

Over the past quarter century more than thirty states have written victims' rights into their respective constitutions, and all states have written victims' rights into their statutes. The rights created by these laws are civil rights that exist independent of the other participants in the criminal justice process. *See generally*, Douglas E. Beloof,

Constitutional Implications of Crime Victims as Participants, 88 CORNELL L. REV. 282, 286 (Jan. 2003).

New Jersey has been a leader among these states. The laws of New Jersey recognize the unique and vital interests of crime victims in the criminal justice system and give to crime victims procedural and substantive rights in that system. State in the Interest of K.P., 311 N.J. Super. 123, 135-136 (Ch. Div. 1997).

The constitutional and statutory rights afforded to victims of violent crime are status rights that are automatically provided to persons when they step into the legal role of “victim,” and they are independent of the facts of the alleged crime, any defense asserted, or the conviction of defendant. See N.J. Const. art. I, ¶ 22 [Victim’s Rights Amendment] and N.J.S.A. 52:4B-36. [Crime Victims Bill of Rights]. All of these rights are about the presence of the victim in the criminal justice process. They include rights to participate in the process, to receive information about the process, to have interests adjudicated within the process, to be safe and free from intimidation, and to be treated with fairness, compassion, respect and dignity throughout the process. Many of these rights are participatory in practice but they are substantive in nature. K.P., 311 N.J. Super. 123. Their objective is to give to the victim a role, a function and a voice in the criminal justice proceedings. See State v. Ruffin, 853 A.2D 311, 321, 371 N.J. Super. 371, 387 (App. Div. 2004) where Judge Collester commented:

*The rights of a crime victim are independent of the prosecutor. They are derived from common law and in this State, from the Constitution, N.J. Const. art. I, ¶ 22, and the Crime Victim's Bill of Rights, N.J.S.A. 52:4B-34 to -38. See, State v. Timmendequas, 161 N.J. 515, 737 A.2d 55 (1999).*

In K.P., the Record newspaper petitioned the trial court to be present in the courtroom during the sexual assault trial of the juvenile defendants. The court held that

under the authority of the Victims' Rights Amendment, Art. 1, ¶ 22 and the Crime Victims Bill of Rights, N.J.S.A.52:4B-36 the victim had standing to oppose the newspaper's petition.

Over the past 14 years, the New Jersey Crime Victims' Law Center has directly represented victims in the criminal justice system in the courts of New Jersey on numerous applications to safeguard the victim's rights under the authority of the Victims' Rights Amendment and the Crime Victims Bill of Rights. In each case, the standing to assert the victim's rights was granted by the court.

The rights of crime victims in the criminal justice system in New Jersey were first established in the "Crime Victim's Bill of Rights", N.J.S.A. 52:4B-34, *et seq.* This legislation that enumerates various rights for victims of crime to be "informed" and treated with "dignity and compassion by the criminal justice system" became law in 1985. The "legislative findings and declarations" to the Crime Victims Bill of Rights demonstrate the importance of the crime victim in the justice process:

*The Legislature finds and declares that without the participation and cooperation of crime victims and witnesses, the criminal justice system would cease to function. The rights of these individuals should be given full recognition and protection. The Legislature has the responsibility to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process. In furtherance of this, the improved treatment of these persons should be assured through the establishment of specific rights. These rights are among the most fundamental and important in assuring public confidence in the criminal justice system. (Emphasis supplied). N.J.S.A. 52:4B-35.*

On November 5, 1991 at the general election, the voters of the State of New Jersey adopted the Victim's Rights Amendment to the New Jersey Constitution.

N.J. Const. Art. I, ¶ 22 (the Victim's Rights Amendment). The Amendment provides:

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

The purpose of the Victim's Rights Amendment was to place crime victims on "equal footing"<sup>3</sup> with the defendant in the criminal justice system by requiring that victims' be accorded full recognition by the justice system. *See, e.g., State v. Muhammad*, 145 N.J. 23 (1996), where Justice Garibaldi, speaking for the majority, stated:

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

The Victim's Rights Amendment was the result of considerable effort on the part of legislators, prosecutors, crime victims and various individuals who sought to bring

---

<sup>3</sup> N.J. Const. art. I, ¶ 22 Interpretive Statement

equal justice for crime victims into the criminal justice system in the State of New Jersey. It established certain rights for crime victims that are guaranteed "as a matter of State Constitutional imperative" along with such further constitutionally recognized and protected "rights and remedies as may be provided by the Legislature. *See*, N.J. Const. Art. I, ¶ 22 and Interpretive Statement. The Victim's Rights Amendment guarantees to a crime victim the right to be present at all public judicial proceedings along with the right to be treated with fairness, compassion and respect by those who work in the criminal justice system. "*Unfair practices that deny crime victims fairness, compassion and respect are unconstitutional under the amendment.*" State in the Interest of K.P., 311 N.J. Super. 123, 135-136 (Ch. Div. 1997).

The Victims' Rights Amendment in the State of New Jersey formed a part of the national victim rights movement that has continued to this day to move with significant measure throughout the United States. The Victim's Rights Amendment was a direct response to the many reports of the lack of recognition and respect for crime victims in New Jersey that routinely included the practice of excluding the victims from the justice process.

The effect of the Victim's Right Amendment in New Jersey has been substantial in that there has been a clearly recognizable effort on the part of the executive, legislative and judicial branches of our State government to provide "fairness, compassion and respect" to crime victims and to continually reinforce the legislative intent under the Crime Victim's Bill of Rights that "these rights are among the most fundamental and important in assuring public confidence in the criminal justice process." *See* N.J.S.A. 52:4b-35.

Attached to this brief as part of the appendix are copies of the legislative history of the Victim's Rights Amendment taken from the State of New Jersey's official files maintained at the State Library, Trenton, New Jersey. Included in the appendix are the following:

1. Assembly Concurrent Resolution No. 85 (ACR 85) adopted October 15, 1990; (A-8);
2. Transcript of public hearing before Assembly Judiciary, Law and Public safety Committee December 17, 1990; (A-11);
3. Exhibits and written submissions made a part of the public hearing record made at the Assembly Judiciary, Law and Public Safety Committee December 17, 1990; (A-30 to A-63);
4. Report of the Senate Judiciary Committee on ACR 85; <sup>4</sup> (A-64).

In his testimony before the Assembly Judiciary, Law and Public Safety Committee, Attorney General Robert Del Tufo stated:

*“Moreover, 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 had 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.*

*“The proposed constitutional amendment will expressly require that victims of crime be treated fairly and with compassion by the criminal justice system; it will also help to prevent victims from being excluded from proceedings. On the latter score, protection for crime victims by constitution rather than simply by statute is important. The rights of the accused are set out in the constitution and the rights of a victim should be given, if not equal, at least recognizable constitutional status. This will aid victims if and when their exclusion from the courtroom is sought.”* (A-30 & A-31) (Emphasis supplied).

---

<sup>4</sup> Due to time constraints, the Appendix does not include the testimony before the Senate. Several of the individuals who testified before the General Assembly gave similar testimony before the Senate.



The co- sponsor of the concurrent resolution, Assemblyman Alex DeCroce testified:

*“We, in New Jersey, have recognized that crime victims are often treated poorly and in response to this, statutorily established in 1985, the Crime Victims’ Bill of Rights. We have seen, however, that the rights established in the statute pale in comparison to those protected by the Constitution.*

*“Constitutional rights will always supercede those in statute. It is time to recognize basic constitutional rights of the victim; mainly the right of victims to be present, subject to the rules of sequestration adopted by the courts.”* (Emphasis supplied).

Testifying as a crime victim and victim advocate before the committee, James O’Brien stated:

*“We will find people as we’ve talked about before, such as Mrs. Hoffman, who sat outside a courtroom and watched the door of the courtroom which was closed for 33 days during the trial of the man accused of killing her daughter, simply because the defense attorney did not want her in the room to gain sympathy for the victim.”* (Emphasis supplied).

New Jersey has been recognized as a national leader in respecting the rights of crime victims for well over a quarter century. It was one of the first states to provide for victim compensation under the Criminal Injuries Compensation Act of 1971 (N.J.S.A. 52:4B-1, *et seq*), and for a Crime Victim’s Bill of Rights in 1985 (N.J.S.A. 52:4B-34, *et seq.*) under which was established the State and 21 county offices of victim-witness advocacy. In addition, New Jersey was just the eighth state to adopt a victim’s rights amendment to its state constitution. Since 1971 there have been more than seventy (70) new laws passed involving the rights of crime victims; the most important being the first amendment to the 1947 New Jersey Constitution in the area of human rights, the Victim’s Rights Amendment, N.J. Const. Art. I, ¶ 22.<sup>5</sup>

---

<sup>5</sup> A major issue surrounding the passage of the Victim’s Rights Amendment centered on amending the State Constitution. In order to assure rights to crime victims, it was necessary to change the State

**II. N.J. CONST. ART. I, ¶ 22 AND THE JUDICIAL  
DECISIONS OF THE STATE OF NEW JERSEY  
PRECLUDE THE SEQUESTRATION OF  
THE THIRTEEN MEMBERS OF THE VICTIM'S  
FAMILY AT THE TRIAL OF THE DEFENDANT**

**A. Status of each Victim's Family Member Sequestered by Defendant**

Thirteen (13) members of Ruth Walker's immediate family have been placed on defendant's witness list which totals over 120 individuals. The court has granted the defendant's request to sequester all witnesses, including these members of the victim's family. The status of each of these individuals is as follows:

- #1 Hilda Parilla – victim's sister – not a witness;
- #2 Latisha Colon – victim's niece – not a witness;
- #3 Ivonne Walker - victim's sister – not a witness;
- #4 John Walker - victim's nephew – not a witness;
- #5 Jose Walker - victim's son – not a witness;
- #6 Juan Walker - victim's brother – not a witness;
- #7 Luis Walker - victim's brother – not a witness;
- #8 Marvin Walker - victim's brother – not a witness;
- #9 Yamil Walker - victim's nephew – not a witness.
- #10 Sandra Carrasquillo – victim's daughter-in-law - she is named on the State's witness list, and her testimony is limited to her observations and actions when she arrived on the crime scene.
- #11 Luis Castro - victim's future son-in-law - is named on the State's witness list, and his testimony is limited to her observations and actions when he arrived on the crime scene.
- #12 Anthony Reyes - victim's son - he is named on the State's witness list, and his testimony is limited to the fact that he was aware of certain interactions between the defendant and his mother that occurred prior to the day she was killed and also, he came to the area of the crime scene and observed his mother lying on the bedroom floor.
- #13 Janira Walker – victim's daughter - she is named on the State's witness list, and her testimony is limited to her observations when she arrived on the crime scene, and the fact that she made several telephone calls to her mother on the day of her murder.

---

Constitution to reflect the importance of these rights. This is apparent from much of the legislative history. See Appendix (A-11 through A-63).

## **B. The Victims**

Eight (8) of the fourteen (14) family members of the victim named as witnesses by the defendant are her children and siblings. Under the authority of the Victim's Rights each of them is constitutionally protected as "victims of crime." They are:

- #1 Hilda Parilla – victim's sister
- #3 Ivonne Walker - victim's sister
- #5 Jose Walker - victim's son
- #6 Juan Walker - victim's brother
- #7 Luis Walker - victim's brother
- #8 Marvin Walker - victim's brother
- #12 Anthony Reyes - victim's son
- #13 Janira Walker - victim's daughter

Each of these individuals has the right under the New Jersey Constitution to be present during the trial of the defendant unless "properly sequestered" after they complete their testimony. Two of them are scheduled to testify on behalf of the State (Anthony Reyes and Janira Walker). As stated in their certifications, their testimony is very limited.

*"Except for this particular information and any other questions asked of me relating to it, I have no independent knowledge of any other facts that are material to or relevant to the charges against the defendant".*

Regarding the remaining six (6) victims who are not scheduled to testify, there is no basis for denying their constitutional rights, and accordingly, they must be permitted to attend the trial, unless the defense can present to the court a good faith showing as to why each of these individuals may be called by him as a witness and what material and relevant testimony by them will be presented.

The attempted sequestration of these eight (8) members of the victim's family who are also "crime victims" under the State Constitution exemplifies one of the major ills in the justice system that the Victim's Rights Amendment sought to cure. The Statement to ACR 85 provides:

*This provision would ensure, for example, that no victim could be prevented from attending a public trial or other public judicial proceeding unless he or she were subject to being called or recalled as a witness at the proceeding. In other words, a court could only "sequester" a victim prior to the victim completing his or her testimony as a witness. If a victim is not a witness, or once any testimony has been given and the victim is no longer subject to being recalled as a witness, he or she could not thereafter be denied the right to attend the public judicial proceeding, unless of course, the person's conduct was so disruptive as to warrant exclusion on the grounds of contempt of court. This provision is intended to preclude the abuse by defense counsel of the witness sequestration practice. (A-10).*

### **C. The Remaining Survivors**

Five (5) of the survivors of Ruth Walker technically do not fall under the definition of "victim" under N.J. Const. Art. I, ¶ 22. Nevertheless, they have a special personal interest in this matter, because, like the other survivors, each individual ". . . loved her . . . and it is very important . . . as her survivor to be present during the trial to bear witness on her behalf to the trial of the man accused of causing her death." See Certification of each, paragraph 1.

Two (2) of these individuals are scheduled to testify on behalf of the State (Sandra Carrasquillo and Luis Castro). As with the other two (2) victims who are scheduled to testify on behalf of the State, both of these individuals have "*no independent knowledge of any other facts that are material to or relevant to the charges against the defendant*". Regarding the other three (3) non victims, each has ". . .*no independent knowledge of*

*facts that are material or relevant to the charges against the defendant.” See*  
Certifications of each.

#### **D. Judicial Decisions Affecting Sequestration**

The general rule is that the determination whether to grant an order of sequestration in a criminal trial rests in the discretion of the trial judge. State v. Tillman, 122 N.J.Super. 137, 299 A.2d 419, (A.D. 1973). In the absence of prejudice to defendant, a violation of a court’s sequestration order does not constitute reversible error. Id., State v. Smith, 55 N.J. 476, 485, 262 A.2d 868 (1969), cert. den. 400 U.S. 949, 91 S.Ct. 232, 27 L.Ed.2d 256 (1970); State v. Michalis, 99 N.J.L. 31, 34, 122 A. 538 (Sup.Ct.1923).

Trials are public proceedings, open to all of the public. No person should be impermissibly excluded from attending a public trial. Sequestration is intended to be exercised in the interests of justice, not as a tactic to circumvent justice and the respect for the constitutional rights of the members of the public. The reason for sequestration is to prevent prospective witnesses from hearing what the other witnesses detail in their evidence, *“for the less a witness hears of another’s testimony the more likely is he to declare his own knowledge simply and unbiased.”* State v. Zellers, 7 N.J.L. 220, 226 (Sup.Ct.1824); State v. DiModica, 40 N.J. 404, 192 A.2d 825 (1963); State v. Williams, 29 N.J. 27, 148 A.2d 22 (1959) and from. In DiModica, the New Jersey Supreme Court held that where the defendant’s application for sequestration of two identification witnesses was not made until after the completion of the direct examination of a third identification witness for the State, the refusal of the trial court to order sequestration did

not constitute reversible error because it did not result in prejudice to defendant. State v. DiModica, 40 N.J. 404, 192 A.2d 825 (1963).

Sequestration in criminal cases is not an automatic rule. It cannot be exercised arbitrarily or capriciously by the court. There must be an exercise of “sound discretion” by the court. DiModica, 40 N.J. 413, 192 A.2d 830. Commenting on the exercise of “sound discretion” by the court, Justice Perskie noted:

*What does this phrase mean? Its meaning finds classic expression in the words used by Lord Mansfield in Rex v. Wilkes, 4 Burr. 2527, 2530, which read as follows: ‘But discretion, when applied to a court of justice means sound discretion, guided by law. It must be governed by rule not by humor. It must not be arbitrary, vague and fanciful, but legal and regular.’ Cf. State v. Then, 114 N.J.L. 413, 416, 177 A. 87. If I understand this definition it means that the exercise of a discretionary power must be bottomed on the cardinal factors of sound reason, fairness and justice.*

Cintas v. American Car & Foundry Co., 38 A.2d 193, 194, 34 Backes 305, 306-307 (N.J.Err. & App. 1944) (J. Perskie dissenting).

The rule permitting the sequestration of a member of the public must take into consideration the legal rights afforded to third parties reflecting public policy and the interests of justice that support attendance at trial. For example, the Juvenile Justice Code, 2A:4A-40, et seq. recognizes the right of a juvenile's parent to be present during the juvenile's trial. . In State ex rel. V.M.363 N.J.Super. 529, 833 A.2d 692 (A.D.,2003), the court held that the parent’s right to attend is paramount over the acknowledged goals of sequestration of witnesses, citing as authority the decision of the Supreme Court in DiModica, 40 N.J. 413, 192 A.2d 830 and the language in Zellers, 7 N.J.L. 220, 226. State ex rel. V.M.363 N.J.Super. 529, 833 A.2d 692 N.J.Super. State ex rel. V.M.363 N.J.Super. 533, 833 A.2d 694-695 N.J.Super.

In addition to relying on the policy of the Juvenile Justice Code that supports parental presence at trial as a basis for its decision, the court in V.M. further concluded that the refusal to permit the mother of the juvenile to attend the court proceedings was a “manifest abuse of discretion” by the trial court where the lower court failed to make inquiry into the reasons for the sequestration, noting:

*Furthermore, still another reason exists why the court's decision to exclude V.M.'s mother from the delinquency adjudication hearing was a manifest abuse of discretion. Aside from her being a potential witness, the court was not told of the anticipated subject matter of her testimony. Without that information, the judge was not in a position to decide the sequestration request. See Lopez v. House of Coffee, Inc., 332 N.J.Super. 364, 366, 753 A.2d 755, 756 (Ch.Div.1998) (proper exercise of discretion to sequester contemplates context in which request made and whether person to be sequestered is a party). (Emphasis supplied).*

State ex rel. V.M. 363 N.J.Super. 536, 833 A.2d 696.

In Lopez the court discussed New Jersey Evidence Rule 615 which states that “[a]t the request of a party or on the court's own motion, the court may, in accordance with the law, enter an order sequestering witnesses.” The court noted; however, that “These rules obviously imbue the court with discretion in ruling upon such an application, but provide little guidance as to how that discretion should be exercised.” N.J.R.E. 615.

### **E. Other Jurisdictions**

In State v. Johnson, 132 N.H. 279, 564 A.2d 444 (S.Ct.1989), the Supreme Court of New Hampshire held that a sexual assault victim could properly testify on rebuttal after listening to testimony of the defense witnesses, even if the victim had violated sequestration order. In Johnson, The court was called upon to examine its evidence rule 615 entitled “Exclusion Of Witnesses. Rule 615 provided :

At the request of a party the court shall in criminal cases and may in civil cases order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person or a victim of the crime, . . .

Speaking for the New Hampshire Supreme Court, Justice David Souter noted that the evidence rule provided an exception to the rule of sequestration. The court referred to its prior holding in State v. Hamel, 130 N.H. 615, 547 A.2d 223 (N.H.,1988). In Hamel, the defendant was convicted as an accomplice to robbery. At trial the defendant requested that the victim be sequestered and the court refused. On appeal the Supreme Court of New Hampshire affirmed, holding that: (1) the trial court was not authorized to sequester the victim as a witness, and (2) the trial court did not abuse its discretion by failing to order State to present allegedly inebriated victim as the first witness so that he would not color his testimony by listening to other witnesses. The court noted that the victim, who testified after the police officer and heard that officer's testimony before he testified, gave no "testimony that so mirrored that of Officer Kinney as to lead to the conclusion that Roy colored his own testimony to conform to that of Officer Kinney." Hamel, 130 N.H. 618, 547 A.2d 225.

In State v. Brevelle, 270 So.2d 852 (LA 1973) the Supreme Court of Louisiana affirmed the defendant's theft conviction and upheld the refusal of the trial judge's decision to sequester the victim. The Louisiana rules of evidence permitted a trial judge to sequester witnesses, and modify sequestration orders "in the interest of justice." Id. at 856. The court concluded that there was no evidence in the record that "an injustice was done, nor that defendants were prejudiced in any way." Id.



In Stith v. State, 411 S.E.2d 532 , 201 Ga.App. 621, (Ga.App.1991) the defendant's conviction for kidnapping, armed robbery and aggravated assault was upheld by the Georgia Court of Appeals who rejected the defendant's argument that permitting the State to reopen its case so that the victim could make an in-court identification of defendant as gunman based on the sound of the defendant's voice during his trial testimony was not an abuse of the court's discretion on the theory that the rule of sequestration was violated. The court commented that “ *The purpose of the rule of sequestration is to prevent a witness who has not testified, or who has not completed his or her testimony, from overhearing and having his or her testimony affected by the testimony of another witness....*” Id. at 533, 622 (citations omitted).

In U.S. v. Langston, 50 M.J. 514, Army Ct. Crim.App. (1999) the Army Court of Criminal Appeals affirmed the decision of the military Judge to permit the victim/witnesses to be present during the trial of the defendant for assault and indecent exposure. The court held that the military judge must decide if the presence of the victim-witnesses will jeopardize the fairness of the trial, and in making the determination, the trial judge must decide whether or not a victim-witness's testimony would be materially contaminated or affected if that person was later called to testify on the merits or sentencing. Commenting on the policy reasons behind the rule of sequestration, the court noted:

*Similar to the federal rule upon which Mil.R.Evid. 615 is patterned, the exclusion of a prospective witness from hearing the trial testimony of another witness “is to prevent witnesses from shaping their testimony to match another's and to discourage fabrication and collusion.” United States v. Miller, 48 M.J. 49, 58-59 (1998) and United States v. Gittens, 39 M.J. 328, 331-32 (C.M.A.1994)(both cases citing with approval United States v. Croom, 24 M.J. 373, 375 (C.M.A.1987)). Id. at 516.*

#### **F. Sequestration is not Proper in the Case at Bar**

The only evidence before this court regarding the knowledge, testimony or possible testimony of the thirteen (13) members of Ruth Walker's family is set forth in each of their certifications. The defendant has presented nothing. The eight (8) individuals who are defined as "crime victims" under the New Jersey Constitution plus the five (5) other family members may not be excluded from attending this public trial unless the defendant can make a good faith showing to the court that he intends to call them as witnesses in his case along with a statement of the subject matter of their testimony. The amendment to the New Jersey Constitution reflects a resounding public policy to treat crime victims with "fairness, compassion, and respect." Accordingly, a sequestration of these individuals without a sufficient showing that there is a genuine and just reason for keeping them away from this public courtroom constitutes an unfair practice that denies these crime victims fairness, compassion and respect and is therefore, unconstitutional under the New Jersey Constitution. K.P., 311 N.J. Super. 123, 135-136 (Ch. Div. 1997).

Furthermore, a court ordered sequestration of any of the thirteen (13) members of the victim's family must be based on "*sound discretion, guided by law. It must be governed by rule not by humor. It must not be arbitrary, vague and fanciful, but legal and regular.*" Cintas, 38 A.2d 193, 194, 34 Backes 305, 306-307; DiModica, 40 N.J. 413, 192 A.2d 830.

The defendant has not proffered to this court “*the anticipated subject matter of [the] testimony.*” he intends to elicit from each of the thirteen (13) survivors of Ruth Walker he has named as witnesses. V.M., 363 N.J. Super. 536, 833 A.2d 696. The granting of a sequestration order without a thorough examination by the court of the proposed subject matter of testimony intended by the defendant from these individuals may constitute a “*manifest abuse of discretion*” by the court. Id.

Several months before “[o]ver 1,200,000 citizens voted for the Victim's Rights Amendment”<sup>6</sup> on November 5, 1991, the Supreme Court of the United States decided the landmark victims rights case in which it reversed prior precedent and upheld victim impact testimony in death penalty cases. Declaring that the rights of survivors of homicide must be fully recognized and understood by the courts, and that the victim does not live his or her life in solitary isolation., Justice Souter, in his concurring opinion in Payne v. Tennessee, III S.Ct. 2597 (1991), stated:

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

[Emphasis supplied].

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

---

<sup>6</sup> Muhammad, 145 N.J. 23, 42, 43

The thirteen (13) survivors of Ruth Walker have been placed on the defendant's witness list to keep them out of the courtroom during the public trial of the defendant. The attempted sequestration of these survivors represents exactly what the Victim's Rights Amendment sought to cure 16 years ago. Unless, the defendant can establish a sufficient reason under the law for keeping these individuals from exercising their rights, it is improper to prevent them from attending this trial like any other member of the public.

**CONCLUSION**

Based on the foregoing it is respectfully requested that the motion for an order permitting attendance at the trial by the thirteen (13) survivors of the victim be granted.

New Jersey Crime Victims' Law Center

By \_\_\_\_\_  
Richard D. Pompelio, Esq.

Dated: April 29, 2007