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### STATEMENT OF FACTS

This matter comes before the Court from the Appellate division's denial of defendant's request to have the State photograph rape victim M.C., and provide the photo to defendant prior to trial. The lower court granted the request, and the Appellate Division reversed.

Defendant Marques Gilchrist was indicted by a Hudson County Grand Jury on three counts of aggravated sexual assault, kidnapping, burglary and criminal restraint as the result of an attack on victim M.C. in her home on November 20, 2003.

In advance of trial defendant filed a "motion for further discovery" in which he requested a photograph of the victim to assist him in preparing his legal defense. The thrust of his attorney's argument was that "She may be a total stranger to him or she may be someone that he remembers from a past encounter." Defendant's counsel made no proffer to the court as to the relevancy or exculpatory nature a photograph of the victim would provide. Moreover, he made no showing that the absence of such a photo would "impair Mr. Gilchrist's ability to prepare his defense."

The trial judge acknowledged that he was uncertain why defendant needed M.C.'s photograph; nevertheless, he granted defendant's motion, rationalizing, "Let's throw the law aside for a minute and let's be practical. . . ." The Appellate Division reversed, noting that "[D]efendant has failed to articulate any legitimate basis for obtaining M.C.'s photograph,. . . ."

**I. LEAVE TO APPEAR AS *AMICUS CURIAE* SHOULD BE GRANTED TO THE NEW JERSEY CRIME VICTIMS' LAW CENTER PURSUANT TO R. 1:13-9.**

The particular requirements of R. 1:13-9 are set forth in the separate Motions for Leave to Appear as *Amicus Curiae* filed by the New Jersey Crime Victims' Law Center (VLC).

N.J. Const. art. I, ¶ 22 (hereinafter "Victim's Rights Amendment" and N.J.S.A. 52:4B-36, *et seq.* (hereinafter "Crime Victims Bill of Rights")) exist because the legislature and the people of New Jersey through the adoption of the Victim's Rights Amendment have declared that a criminal justice system that is only about criminals cannot totally be about justice. Private non profit organizations such as the VLC were established and exist to safeguard the rights of the thousands of innocent individuals who become victims of violent crime each year.

For over a decade the VLC has been recognized by the courts of New Jersey as an appropriate *amicus curiae* in cases involving the rights of crime victims. The VLC has been admitted as *amicus curiae* by the Supreme Court, Superior Court Appellate Division, Superior Court Law Division, Criminal Part, Civil Part and Family Part in numerous cases affecting the rights of crime victims. The VLC has not in its thirteen years of existence ever been denied the request to appear as *amicus curiae* in a case involving the rights of crime victims. The most recent cases in which the VLC has been admitted to appear as *amicus curiae* include Asbury Park Press v. Ocean County Prosecutor, 374 N.J.Super. 312, 864 A.2d 446 (Law Div. 2004) decided Sept. 28, 2004 and State v. Charles Cullen, decided February 9, 2005 (Hon. Paul Armstrong.) In both cases, the VCCB and the VLC were granted leave to appear as *amicus curiae* by the court.

**II. THE RIGHT OF THE DEFENDANT TO CONFRONT HIS ACCUSER DOES NOT MANDATE THAT A PHOTOGRAPH OF THE RAPE VICTIM BE TAKEN AND DELIVERED TO THE DEFENDANT IN ANTICIPATION OF TRIAL WHERE DEFENDANT HAS MADE NO SHOWING THAT THE PHOTOGRAPH WOULD BE RELEVANT OR EXCULPATORY**

Defendant seeks to have his rape victim forced to suffer a further indignity of being photographed by the State and having the photograph delivered to him in anticipation of trial.

Defendant argues that he is entitled to this under the Rules of the Court governing discovery in criminal cases.

Defendant does not have a federal constitutional right to discovery in a criminal case. Weatherford v. Bursey, 429 U.S. 545 (1977); Wardius v. Oregon, 412 U.S. 470 (1973); and likewise, a defendant in a criminal matter may be denied discovery and access to information without there being any violation of his state constitutional rights. See, e.g., State v. Cusick, 219 N.J. Super. 452 (App.Div. 1987), where the court held that the trial court's refusal to grant the defendant access to files of the eight year old sexual assault victim maintained by the Division of Youth and Family Services and child treatment center did violate the defendant's state or federal right of due process or his state or federal right to confront witnesses under N.J.S.A. Const. Art. 1, par. 10 and U.S.C.A. Const. Amends. 6 and 5.

M.C., as every citizen, has a right of privacy that is protected by the Federal constitution. Griswold v. Connecticut, 381 U.S. 479, 483 (1965); and this Constitutional privacy right of the victim has been recognized in criminal prosecutions. See, e.g., United States v. Galloway, 963 F.2d 1388, 1390 (10th Cir. 1990).

In State v. D.R.H., 127 N.J. 249 (1992), The New Jersey Supreme Court addressed the issue of the defendant's

rights under the rules of discovery as contrasted to the victim's right to privacy. In D.H.R., the defendant was charged with aggravated sexual assault of a child. He moved for an order compelling the victim to submit to a second physical examination. The trial court granted defendant's motion and the Appellate Division reversed holding that the defendant failed to establish a "substantial need" for the second examination. The Supreme Court affirmed, recognizing the potential harm in the form of emotional trauma and mental distress suffered by the victim. *Id.* at 256. The Court noted:

[C]riminal discovery has its limits. For example, defendants cannot transform the discovery process into an unfocused, haphazard search for evidence. . . . Another significant limitation on defendants' discovery rights is the chilling and inhibiting effect that discovery can have on material witnesses who are subjected to intimidation, harassment, or embarrassment. *Id.* at 256. (citations omitted),

The Court commented that the victim's father "recounted the humiliation, embarrassment, and suffering endured by [the victim] from the abusive incidents, . . ." *Id.* at 261; and in considering the defendant's request for a physical examination, the Court concluded:

"Such an examination is inherently invasive and the record indicates the likelihood that it will engender significant emotional trauma and mental distress to [the victim]. *Id.*

In D.H.R., the Court discussed the significant adverse consequences that the defendant's discovery request could have upon the rape victim's emotional well being, stating:

However much weight one assigns to such consequences, they should be avoided in the absence of a substantial need by defendant to subject [the victim] to an examination that clearly outweighs whatever detrimental effects the victim may suffer. Id. at 261-62.

In the case at bar, subjecting the rape victim to being photographed by the State, and then distributing that photograph to defendant and to his attorneys will have a devastating effect on her. Such a requirement is "inherently invasive" and she will suffer "significant emotional trauma and mental distress". See, D.H.R., 127 N.J. at 261. The burden of the defendant is to demonstrate to this court that his "substantial need" to obtain a photograph of the victim clearly outweighs whatever detrimental effects the victim may suffer. Id. at 261-62.

(Emphasis supplied). The Appellate Division correctly concluded that "[D]efendant has failed to articulate any legitimate basis for obtaining M.C.'s photograph . . . ."

Defendant has failed to satisfy the substantial need test established by D.H.R., *supra*. Moreover, defendant has failed to demonstrate even a remote need for a photograph of the victim, and there can be no justification under the law to further

invade the victim's privacy. See also, State v. Michaels, 264 N.J. Super. 579 (App.Div. 1993) where the court followed D.H.R. applying the "substantial need" test in criminal discovery request involving charges of sexual abuse on a minor; and State v. R.W. 104 N.J. 14, 514 A.2d 1287 (1986) where the court upheld the denial by the lower court of defendant's request to order a psychiatric examination of the three and one-half-year-old witness solely on grounds of her age applying the "substantial need" test.

A similar issue to the case at bar has been considered by the Appellate Division of New York with the same result. In Johnson v. Brandveen, 160 A.D.2d 668, 559 N.Y.S.2d 516 (1990) the court held that the defendant in a rape case was not entitled to an order requiring the State to provide photograph of victim, since the photograph would not constitute exculpatory material and the lower court did not have the power to compel the victim to be photographed in order to create such evidence for the defendant. The court opined:

Defendant's application for the production of a photograph of the 15-year-old kidnapping and rape victim does not come within the scope of CPL § 240.20 and, despite defendant's claim of a prior relationship with the complainant, we discern no theory under which this item, which does not even



exist, constitutes exculpatory material (see *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215) . . . . *Id.* At 669.

In the instant matter, defendant has failed to demonstrate a substantial need for having a photograph of the victim taken and delivered to him in anticipation of trial. Such a photograph will lead to no relevant or exculpatory evidence and will be clearly outweighed by the detrimental effects the victim may suffer.

**III DEFENDANT'S REQUEST SHOULD BE DENIED  
BECAUSE THE RIGHTS OF THE VICTIM UNDER  
THE NEW JERSEY CONSTITUTION AND CRIME  
VICTIMS BILL OF RIGHTS OUTWEIGH THE RIGHTS  
OF THE DEFENDANT.**

Over thirty states have written victims' rights into their respective constitutions<sup>1</sup> and all states have written victims' rights into their statutes. The rights created by these laws are civil

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

rights that exist independent of the other participants in the criminal justice process. See generally, Douglas E. Beloof, "Constitutional Implications of Crime Victims as Participants," 88 CORNELL L. REV. 282, 286 (Jan. 2003).

New Jersey is among these states. The laws of New Jersey recognize the unique and vital interests of crime victims in the criminal justice system and give crime victims participatory, procedural rights in that system. The rights given are status rights that are automatically afforded to persons when they step into the legal role of "victim," and 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, *et seq.* [Crime Victims Bill of Rights].

Crime victims' rights are participatory, procedural rights afforded to independent participants in the criminal justice system immediately upon their entry into that system. As such, these rights arise simply because of an individual's status in the criminal justice system. All of these rights are about the criminal justice process; they are rights to participate in the process, to receive information about the process, to have interests adjudicated within the process, and to be safe throughout the process. See State v. Ruffin, 853 A.2D 311, 321, 371 N.J. Super. 371, 387 (App. Div. 2004) where Judge Collester 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 \(1999\)](#).

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

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

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

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

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

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

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

victims should be provided with more rights. *Id.* at 42-43.

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

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

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

New Jersey has been recognized as a national leader in respecting the rights of crime victims for well over a quarter century. It was one of the first states to provide for victim compensation under the Criminal Injuries Compensation Act of 1971

(N.J.S.A. 52:4B-1, *et seq*), and for a Crime Victim's Bill of Rights in 1985 (N.J.S.A. 52:4B-34, *et seq.*) under which was established the State and 21 county offices of victim-witness advocacy. In addition, New Jersey was just the eighth state to adopt a victim's rights amendment to its state constitution. Since 1971 there have been no less than sixty (60) new laws passed involving the rights of crime victims.

In recent years the courts in New Jersey have also been progressive in recognizing the rights of crime victims. *See, e.g.; State v. Muhammad*, 145 N.J. 23 (1996) (upholding constitutionality of death penalty victim impact statute); *State v. Fauce*, 244 N.J. Super. 499 (App. Div. 1990) (rights of the victim must be considered before the court can order that the defendant's plea be non-evidential in a civil proceeding); *State in the Interest of J.G., N.S., and J.T.*, 151 N.J. 565 (1996) (Supreme Court upholds victim's rights to require HIV testing of assailant); *State v. Timmendequas*, 161 N.J. 515 (1999) (the Constitutional rights of the victim survivors under the Victim's Rights Amendment are sufficient to warrant a change of venue in a death penalty case); *State v. Smith*, 310 N.J. Super. 140 (App. Div. 1998) (permitting child victim to testify over closed circuit television); *Gallara v. Koskovich*, 364 N.J. Super 418 (Law Div. 2003) (court upholds claim of liability of sporting goods store for guns stolen and used in the murder of two victims); *State v. Hill*, 155 N.J. Super. (App. Div. 1998) (restitution may be ordered

against defendant to pay third parties who have reimbursed a crime victim for losses suffered as a result of criminal conduct); State v. Cusumano, 396 N.J. Super. 305 (App. Div. 2004) (trial judge's act of advising those in attendance at trial that no persons would be permitted to leave or enter the courtroom while the victim was on the witness stand, constituted a reasonable and constitutionally permissible limitation on the public's right of access - relying on the Crime Victim's Bill of Rights N.J.S.A. 52:4B-36); and State in the interest of K.P., 311 N.J. Super. 123 (Chan. Div. 1997) (victim has standing to oppose petition by newspaper to open sexual assault trial of juveniles and victims have unalienable right to be present during a criminal proceeding, subject only to rules concerning sequestration.) See also, State in Interest of O.G., 274 N.J. Super. 182 (Ch. 1993) and State v. Gonzalez, (A-3912-88T4, App.Div., decided June 3, 1991), (unpublished opinion), where the court rejected the defendant's argument that the trial judge erred in permitting the female sexual assault victim to remain in the courtroom at the conclusion of her testimony, stating:

We do not turn to the issue because it has any merit, . . . Instead, we do so to compliment Judge Dios on the wisdom of allowing the victim to remain. Insensitivity to a victim's concerns can only cause disrespect for the judicial system. Here, Judge Dios prevented the potential for any disrespect and acted in a manner that can only draw accolades." Id. at 5.



The recognition of the independent civil rights of crime victims through legislation and the judicial decisions of this State mandates that the rights of crime victims must be placed on equal footing in the justice system. Each of the rights of crime victims is connected to the criminal justice process as a whole or to an individual proceeding within this process. As such, they are procedural status rights - that is, they are rights that relate to the procedural steps in the criminal justice process. Importantly, many of these procedural rights are afforded immediately upon a crime victim's entry into the criminal justice process, such as the rights to be treated with fairness, dignity and respect. Other rights accrue as the process continues because they are specific to various procedural stages of the process.

Many of the rights described in the Amendment and Bill of Rights explicitly relate to pre-conviction proceedings. The Amendment sprung from a denial of victims' rights which occurred before the offender's trial was concluded. The Bill of Rights contains 14 enumerated groups of rights afforded to victims. Only two relate to rights which arise after the conviction of the defendant. None of these rights are rights to control the criminal justice process; they are civil rights given to crime victims to participate in the process so that their unique and important interests will be adequately represented and protected within a state-run system. *See, generally,* Douglas E. Beloof, The Third Model of Criminal Process: The Victim

Participation Model, 1999 UTAH L. REV. 289 (1999). The purpose of the Amendment and Bill of Rights is to give crime victims individual, participatory status rights within the criminal justice system to protect their interests in that system even when these interests are at odds with one or more of these other participants.

The issue of sensitivity to crime victims and the restrictions placed on the release of discovery material has received considerable attention among legal writers in the past several years. See, e.g., The Victim's Right To Privacy: Imperfect Protection From The Criminal Justice System, 8 ST. JOHN'S J. LEGAL COMMENT. 205 (Fall, 1992); Raped Once, But Violated Twice: Constitutional Protections Of A Rape Victim's Privacy, 66 ST. JOHN'S LAW REV. 151 (1992); Comment, Arizona Criminal Procedure After The Victims' Bill Of Rights Amendment: Implications Of A Victim's Absolute Right To Refuse A Defendant's Discovery Request, 23 ARIZ. ST. L.J. 831 (1991).

M.C., as a crime victim, is entitled to have her rights under the New Jersey Constitution and state statutes respected in the criminal justice system. The Amendment confers upon her the right to be treated with "fairness, compassion and respect". The Bill of Rights affords to her the right to be "treated with dignity"; "to be free from intimidation"; and "to have inconveniences associated with participation in the criminal justice system minimized to the fullest extent possible". See N.J.S.A. 52:4B-36 (a) (c) & (d).

As a victim of a crime, M.C. is not just a "faceless stranger" in the criminal justice proceeding, South Carolina v. Gathers, 490 U.S. 805, 821, 109 S.Ct. 2207, 2216 (1989), (O'Connor, J. dissenting). M.C. is an integral part of this justice process, and she is cloaked with specifically mandated civil rights. Through the violent assault of the victim's person and dignity, defendant forcibly took away M.C.'s self control and her will. She will perhaps struggle for much of the remainder of her life to overcome this attack. To compel her to be photographed for one purpose; *i.e.*, so that defendant may have her picture would be a profound re-victimization of this innocent woman and a further assault on her personal dignity.

Independent of her constitutional right to privacy, M.C.'s rights as a victim of crime profoundly outweigh the interest of defendant asserted in the instant matter. Accordingly, defendant's request must also be denied on this basis.

CONCLUSION

Based on the foregoing it is respectfully requested that leave to appear as *amicus curiae* be granted to the New Jersey Crime Victims' Law Center and that the decision of the Appellate Division be upheld.

New Jersey Crime  
Victims' Law Center  
*Amicus Curiae*

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

Dated: November 21, 2005