

STATEMENT OF THE CASE

Defendant, Andrew G. Opatick is charged under Indictment # 05-02-00058-I with two counts of aggravated sexual assault where the victim is under the age of 13 years (N.J.S.A. 2C:14-2a(1)); two counts of sexual assault where the victim is under the age of 13 years and the offender is at least four years older than the victim (N.J.S.A. 2C:14-2b); and two counts of endangering the welfare of a child (N.J.S.A. 2C:24-4 a). The two victims in this case are minor sisters B.L. (DOB) and A.L. (DOB 11-21-96). They are the nieces of the defendant.

The jury trial of these charges is scheduled to take place in the Sussex Courthouse in Newton, New Jersey within the next several months. Both victims will be required to testify at this public trial.

The victims and their parents are represented in this criminal matter by the New Jersey Crime Victims' Law Center (NJC VLC). The NJC VLC has filed a motion on behalf of the victims, pursuant to N.J.S.A. 2A:84A-32.4 to permit A.L., a minor to testify at trial via closed circuit television, out of the view of the jury, the defendant and spectators.

SUMMARY OF THE ARGUMENT

1. The minor victim in this sexual assault criminal prosecution has standing to seek an order of the court permitting her to testify at trial outside of the view of the jury, the defendant and spectators.
2. Where there is credible evidence that there is a substantial likelihood that a minor victim of sexual assault will suffer severe emotional or mental distress if she is required to testify in open court at the criminal trial of the accused,

the court shall order that the victim's trial testimony be taken in camera, outside of the view of the defendant, the jury and the trial spectators.

I. THE MINOR VICTIM IN THIS SEXUAL ASSAULT CRIMINAL PROSECUTION HAS STANDING TO SEEK AN ORDER OF THE COURT PERMITTING HER TESTIFY AT TRIAL OUTSIDE OF THE VIEW OF THE JURY, THE DEFENDANT AND SPECTATORS.

A. The victim has express standing to seek this relief pursuant to the provisions of N.J.S.A. 2A:84A-32.4.

N.J.S.A. 2A:84A-32.4 expressly provides that in a sexual assault criminal prosecution a motion to have the victim's trial testimony taken via closed circuit television outside of the presence of the jury, defendant and spectators may be "filed by: (1) The victim or witness or the victim's attorney, parent or legal guardian." In the instant matter, this motion is filed on behalf of the victim and the victim's parents by the attorney for each of them. *See discussion, State v. Smith*, 158 N.J. 376, 383 (1999).

N.J.S.A. 2A:84A-32.4 requires that the court must conduct "a hearing in camera" to determine if the victim will be permitted to testify via closed circuit television out of the view of the defendant, jury and trial spectators. After reviewing the testimony, the court shall grant the relief requested if "there is a substantial likelihood that the witness would suffer emotional or mental distress if required to testify in open court." *Id.*

B. As a crime victim, A.L. has express standing to seek this relief under the authority of Article I, ¶22 of the New Jersey Constitution (The Victim's Rights Amendment) and N.J.S.A.52:4B-36 (The Crime Victims Bill of Rights).

Over thirty states have written victims' rights into their respective constitutions¹ and all states have written victims' rights into their statutes. The rights created by these laws are civil rights that exist independent of the other participants in the criminal justice process. *See generally*, Douglas E. Beloof, "Constitutional Implications of Crime Victims as Participants," 88 CORNELL L. REV. 282, 286 (Jan. 2003).

New Jersey is among these states. The laws of New Jersey recognize the unique and vital interests of crime victims in the criminal justice system and give crime victims participatory, procedural rights in that system. The rights given are status rights 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.

¹ *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.

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 1985 in the "Crime Victim's Bill of Rights", N.J.S.A. 52:4B-36, *et seq.* This legislation establishes certain enumerated rights of victims of crime in the criminal justice system, including the right to be "informed" and treated with "dignity and compassion by the criminal justice system", and to be "free from intimidation. 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. 1, ¶ 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.

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.

II. WHERE THERE IS CREDIBLE EVIDENCE THAT THERE IS A SUBSTANTIAL LIKELIHOOD THAT A MINOR VICTIM OF SEXUAL ASSAULT WILL SUFFER SEVERE EMOTIONAL OR MENTAL DISTRESS IF SHE IS REQUIRED TO TESTIFY IN OPEN COURT AT THE CRIMINAL TRIAL OF THE ACCUSED, THE COURT SHALL ORDER THAT THE VICTIM'S TRIAL TESTIMONY BE TAKEN IN CAMERA, OUTSIDE OF THE VIEW OF THE DEFENDANT, THE JURY AND THE TRIAL SPECTATORS.

At the in camera hearing before the court, in addition to the possible testimony of A.L., the victim may offer testimony as follows;

- B. Testimony of Jessica Platt, Ph.D – certification attached. Dr. Platt will testify that in order to prevent severe emotional distress suffered by the victim, she should be permitted to testify via closed circuit television.
- C. Testimony of Paul Kennedy, M.D. – certification attached. Dr. Kennedy will testify that the victim “would have severe re-experiencing type memories that would lead to lasting emotional damage if she had to testify in open court.”
- D. Testimony victim's mother, L.L. – certification attached. She will testify that if her daughter “is required to testify publicly in front of the jury and others in the courtroom who are all strangers to her, the situation will be emotionally overwhelming and damaging for her.

In *State v. Smith*, 158 N.J. 376, 383 (1999) the New Jersey Supreme Court address the issue in the case at bar. In *Smith*, the victim of aggravated sexual assault was eight years old at the time of the offense. At a pretrial hearing the victim testified of her fear to come to court and testify. The trial court held that the testimony would be held via closed circuit television outside of the presence of the jury and the defendant because she would be too frightened and traumatized to testify. *Id.* at 383. The Appellate Division reversed indicating that the fear had to originate with the presence of the defendant. In reversing the Appellate Division, Justice Coleman, speaking for the Supreme Court, noted:

“We reject the Appellate Division's attempt to limit application of *N.J.S.A. 2A:84A-32.4* to only those instances in which the child's incapacitating fear is derived solely from the presence of the defendant. Here, there is no clear way to differentiate among the origins of T.I.'s fears. Whether her fear was attributable to defendant, or resulted from a combination of testifying in the courtroom in the presence of defendant cannot be discerned. Defendant did not agree to waive his presence until attempts had been made to prepare the victim to testify in defendant's presence. By the time he offered to waive his presence on June 5, 1996, the traumatic effect had already undermined the truth-seeking function of the trial. A week before trial, the child demonstrated her fears when a courtroom rehearsal was attempted. Such fears by a nine-year-old sexual assault victim should not be allowed to subvert the truth which in turn frustrates the underlying truth-seeking principles of the Confrontation Clause.

“The more reasoned approach is to look at the result of the fear, not simply its origin. If the effect of the child's fear is to prevent the proper functioning of the truth-finding process, whether that fear derives from the presence of the defendant alone, or a combination of the presence of the defendant and the jury, or from the courtroom, should not lead to a different result under *N.J.S.A. 2A:84A-32.4* or the Confrontation Clause. Moreover, in a typical busy courthouse, it is impractical to seek a smaller courtroom in an attempt to possibly reduce the child-victim's fear, particularly when the child is so afraid that the attempt is not likely to succeed. *Id.* at 386-387.”

A.L. is one of the two minor victims in this criminal prosecution. A.L. 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).

CONCLUSION

For the foregoing reasons, the court should grant the victim’s motion to testify At trial in camera and outside of the view of the defendant, the jury and the trial spectators

Respectfully Submitted,

Richard D. Pompelio
New Jersey Crime Victims’ Law Center
33 Woodport Road
Sparta, NJ 07871
973-729-9342 Phone
973-729-0220 Fax
Counsel for Victim, A.L., a Minor

Dated: