

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.

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]. These rights are about recognizing and respecting the victim in the criminal justice process. *Id.* *See* discussion, *State v. Timmendequas*, 161 N.J. 515, 554-555, 737 A.2d 55, 76-77 (1999).

Victims’ civil rights include, *inter alia*, the right to be present, to be notified, to be heard, 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. *Id.* Many of these rights are participatory in practice but they are substantive in nature. *State in the Interest of K.P.*, 311 N.J. Super. 123, 135-136 (Ch. Div. 1997). 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, *N. J. Const. Art. I, ¶ 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. *K.P.* has been cited as authority nationally for the proposition of victim standing.

Over the past 15 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. Recently, the Superior Court of New Jersey, Cumberland County granted standing to thirteen (13) homicide survivors who filed a motion to reverse the court's sequestration order in the murder trial of State v. William Boston, Indictment No. 04-10-0985-I.

Crime Victims Bill of Rights

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.

The Victim's Rights Amendment

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 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 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. *"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."* *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.

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.

Accordingly, in light of the constitutional requirement that crime victims be placed on equal footing¹, there are times when the defendant's rights will give way to the rights of the victim where the benefits to the defendant "*are outweighed by other important considerations*", such as the victim's rights under the Constitution and Statutory Bill of Rights. *State v. Gilchrist*, 381 N.J.Super. 138, 147, 885 A.2d 29, 35 (App.Div.2005).

II. THE GRANDMOTHER AND SIBLINGS OF THE HOMICIDE VICTIM ARE PERMITTED TO DELIVER TO THE COURT AS PART OF THEIR IN-PERSON VICTIM

¹ *N.J. Const. Art. I, ¶ 22*, Interpretive Statement

**IMPACT STATEMENT AT SENTENCING A SHORT 2
MINUTE 42 SECOND DVD PICTORIAL VIEWING OF
THE SEVEN YEAR OLD VICTIM'S SHORT LIFE.**

The victim's grandmother, Phyllis Matthey-Johnson and his twin brothers James and Jeziah will deliver in person victim impact statements at the sentencing of the two offenders. *N.J.S.A. 52:4B-36 (n)*. By constitutional mandate, they are defined to be "victims." *N.J. Const. Art. I, ¶ 22*. The rights of crime victims under the New Jersey Constitution to "fairness, compassion and respect" are not rights of limitation, but are meant to be viewed broadly, and given "full recognition and protection" by the courts. *Muhammad*, 145 N.J. 23, 43. They are self executing rights subject to the exercise of sound discretion by the courts. *See discussion, K.P.*, 311 N.J. Super. 123, 135-136 (Ch. Div. 1997). The legislative purpose of these rights "equal footing" with the defendant in the criminal justice system by requiring that victims' be accorded full recognition by the justice system. *See N.J. Const. art. I, ¶ 22 Interpretive Statement See, e.g., In Muhammad*, 145 N.J. 23 (1996), speaking for the majority, Justice Garibaldi 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).*

Statements at Sentencing

A crime victim, including a survivor of homicide, is entitled to submit a victim impact statement to the county probation department to be included in the presentence report. N.J.S.A. 2C:44-6(b) (3). The statement “may include the nature and extent of any physical or psychological or emotional harm or trauma suffered by the victim, the extent of any loss to include loss of earnings or ability to work suffered by the victim and the effect of the crime upon the victim’s family.” *Id.* Although the statute does not require that the victim impact statement be in writing, it is usually in written form. The practice of many trial courts at sentencing, especially in homicide cases, is to permit wide latitude in receiving writings from individuals who have been impacted by the death of the victim. *See discussion*, Pompelio certification, p. 8, ¶ 15.

The importance of the presentence investigation impact statement is evidenced by the fact that the victim is required to receive assistance in the preparation of the statement by the probation department, *N.J.S.A. 2C:44-6(b) (3)* and by the Division of Criminal Justice or county prosecutor’s office. *N.J.S.A. 52:4B-44 (16)*.

In addition to the victim statement to be submitted with the presentence report, a victim possesses the right “To make prior to sentencing, an in-person statement directly to the sentencing court concerning the impact of the crime. *N.J.S.A. 52:4B-36 (n)*. There is no required form for this in-person statement, and the courts have been liberal over the past sixteen years in giving victims this one opportunity during the entire court proceedings to address the court and speak of the impact of the harm caused by the convicted offender.

The right of the victim to address the court at sentencing is not a procedural limitation placed on the victim, but actually a broad, expansive civil right to fairness,

compassion and respect. *K.P.*, 311 N.J. Super. 123 (Chan. Div. 1997). Likewise, the right to display a photo of the victim taken before the homicide is not a limitation on the victim but a response by the legislature to violation of these rights by a sentencing judge. Practice by the courts over the past decade have indicated that the statement may take several forms and as part of the statement, photos, power points, certain objects and other visual items may be included in order to give deference to the right of the victim to make a presentation to the court that recognizes the victim's right to "fairness, compassion and respect" under the constitution, *N.J. Const. Art. I, ¶ 22*, and "dignity and compassion" under the Crime Victim's Bill of Rights in 1985 (*N.J.S.A. 52:4B-36(a)*).

The courts are continually called upon to assess the impact on the defendant of the civil rights of the victim. All but a few of these instances do not reach the level of a reported decision. In those reported cases where the rights of victims have been at issue, the courts of New Jersey have consistently protected the rights of crime victims in criminal court proceedings. Examples of reported decisions in which the rights of victims, although not specifically set forth, were nevertheless recognized, include: *State in Interest of O.G.*, 274 N.J. Super. 182 (Ch. 1993) - (a victim of a crime for which juvenile has been adjudicated delinquent may personally address court prior to sentencing of that juvenile, although no such a right is set forth in the statute); *State v. Faunce*, 244 N.J. Super. 499 (App. Div. 1990) - (before a court can order that the defendant's plea be non-evidential in a civil proceeding, it must specifically consider the rights of the victim); *State v. Timmendequas*, 161 N.J. 515 (1999) - (the Constitutional rights of the victim survivors to fairness, compassion and respect under the Victim's Rights Amendment are sufficient to preclude a change of venue in a death penalty case even though the

constitution and Bill of Rights give no such right to the victim to oppose a change of venue request by the defendant; *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) - (the 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); *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.); and *State v. Gilchrist*, 381 N.J. Super. 138 (App. Div. 2005) (defendant can not compel the state to take and provide a photo of the sexual assault victim to defendant as part of discovery.

The victim in this case was once a living, breathing and vibrant little boy whose life brought joy and pleasure to his family and friends. His survivors have the right to address the court at sentencing in a manner that acknowledges the significance of their loss. The DVD of the victim lasting less than three minutes and showing just 28 photos of Viktor respects his life and fairly and permitting it to be shown compassionately acknowledges the loss by his survivors. By denying this pictorial presentation will result in a denial to victim survivors of their constitutional right to be respected as crime victims, and to exercise their constitutional and statutory rights by giving meaning to their victim impact statements. *K.P.*, 311 N.J. Super. 123, 135-136. The Supreme Court

of the United States has recognized that the sentencing process in homicide cases must respect the fact that the victim did not live his life in solitary isolation. Speaking for the court in *Payne v. Tennessee*, III S.Ct. 2597 (1991), Justice Souter 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).

Discretion of Sentencing Judge

The sentencing of a criminal defendant cannot be a rigid and inflexible process. It must be one in which the court balances the rights of the defendant with the rights of the victim. The objective of any sentencing proceeding must be to provide fairness to both the defendant and to the victim. In a case involving homicide, the existence and presence of the survivors, also victims, must be likewise considered so that these victims' rights are respected. Accordingly, the sentencing judge is given considerable discretion in the management of the process.

The discretion of the sentencing judge is apparent in the statutory scheme that sets forth the sentencing procedures. N.J.S.A. 2C:44-6. The sentence of trial court is presumed to be reasonable, and an appellate court should not modify the sentence unless it is unduly punitive or there is a clear showing of an abuse of discretion. *State v. Davis*, 175 N.J.Super. 130, 417 A.2d 1075 (A.D.1980), *certification denied* 85 N.J. 136, 425 A.2d 291. *See also, State v. Moore*, 178 N.J.Super. 417, 429 A.2d 397 (A.D.1981), *certification denied* 87 N.J. 406, 434 A.2d 1083.

The appellate review of a sentencing decision calls for a determination of whether correct sentencing guidelines or presumptions have been followed, whether there is substantial evidence in the record to support findings of fact upon which the sentencing court based its application of those guidelines, and whether, in applying guidelines to relevant facts, the trial court clearly erred by reaching a conclusion that could not have reasonably been made. *State v. Roth*, 95 N.J. 334, 471 A.2d 370 (1984).

In this application the court is called to exercise its sound discretion in permitting the victims to exercise their constitutional rights. 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 request of the victims in this matter is for the court to place the victims on “equal footing” through the use of its discretionary power guided by principles of “reason, fairness and justice.” *Id.*

The DVD

The presentation of the short 2 minute 42 second DVD depicting a few moments in the life of the victim is a reasonable supplement to the words of the victim’s family members. It is a reasonable application of a homicide survivor’s right to display a photo of the victim as part of the victim impact statement, and it is in accord with accepted practice in New Jersey. The DVD contains nothing prejudicial, unless the court can conclude that the face of the victim and the statement to the court that he was once a vibrant, living beautiful boy being with people who cared about him is by itself prejudicial.

There is no statutory limitation to the form and manner in which a victim statement is made to the court at sentencing. For example, the courts have permitted DVD’s, videos, power point presentations, multiple photo collage, personal objects of the victim such as athletic jerseys and classmate art posters. In each there was no evidence that the rights of the defendant were adversely impacted. *See discussion, Pompelio certification, p. 8, ¶ 15.*

There is no reported decision in New Jersey on the use of videos at sentencing. Considering the discretion afforded the sentencing judge in New Jersey and the policy behind permitting impact statements at sentencing , it is not surprising. Other courts have addressed the issue and have upheld the presentation of a video at sentencing. *See, e.g.,*

State v. Leon, 132 P.3d 462 (Idaho 2006) where the court held that a digital video disc (DVD) containing video and photographic images of the victim alone and with her young children and other family members was admissible victim-impact evidence at sentencing as valid exercise of victim's right to be heard. In *Leon* the defendant argued that that any practice not specifically permitted by statute must, therefore, be excluded. The Court of Appeals of Idaho rejected such an argument noting that, there are two victim impact statement statutes; one calling for a written impact statement to accompany the presentence report and the other to be made orally at sentencing. Since the statute permitting the in court statement did not have restrictions or exclusions, the video was proper under the definition of the victim-survivor's right to be heard. Similarly in New Jersey, N.J.S.A. 52:4B-36 (n) is not limited in its scope, and it is permissible, within the judge's discretion to permit a video.

In death penalty cases where the risk of prejudice before the jury is much more profound, and strict review of victim impact testimony must be maintained, videos have, nevertheless been permitted by courts in other states. The Court of Appeals of Maryland in *Whittlesey v. State*, 340 Md. 30, 665 A.2d 223, 230 (1995), ruled that a 90-second videotape of the murder victim playing the piano was relevant and admissible. In *State v. Gray*, 887 S.W.2d 369, 389 (Mo.1994), the court held that a videotape of the victim's family at Christmas, presented during the sentencing phase of a capital trial, was admissible. In *State v. Allen*, 128 N.M. 482, 994 P.2d 728, 751 (1999), the court found that a three-minute videotape of the victim on a camping trip had probative value, and did not unfairly prejudice by its admission as victim impact evidence. Furthermore, in *State v. Anthony*, 776 So.2d 376, 393-94 (La.2000), during the testimony of the victim's

husband, the prosecution introduced a brief videotape depicting portions of the victim's life. The Louisiana Supreme Court found that all evidence was properly admitted and upheld the death sentence.

In the case at bar, the showing of this short inaudible DVD will not impact the sentence in any manner. The defendants are being sentenced under a negotiated plea bargain. The showing of the DVD affords the victim's family a degree of fairness compassion, respect and dignity by the sentencing court. That is the court's obligation under the constitution and statutes. The rights of the victims and the defendants will be recognized and respected by the court, and neither will be harmed. A true balance will be achieved.

On June 20, 1997, for the first time in a New Jersey courtroom, a videotape of the victim was during the sentencing hearing in *State v. Robert Kinzel*. The victim's family was represented by the New Jersey Crime Victims' Law Center who made application to the court for permission to show the video. The application was joined by the prosecutor. The defendant had pled guilty to manslaughter in the death of the victim, 14-year-old Shannon Wittkopp. Pompelio Certification, p.6, ¶ 11. Since then the courts in New Jersey have permitted pictorial presentations of the victim in various forms including DVD's , videos and the like.

In her certification, Phyllis Matthey-Johnson states:

The purpose of this request is not to convince the court to impose a harsher penalty on the two people who should have cared for Viktor the most. This request is not about them at all. It is about bringing into the public courtroom, that has been so darkened by the acts of these

individuals, a light of hope and healing for Viktor's brothers, for me, and for the many people who feel the loss of this beautiful boy. The victim impact process will be about the survival of those of us who have been left behind to respect and rejoice in Viktor's life and the acknowledgement by this court that we are entitled to fairness, compassion and respect.

Matthey-Johnson Certification, p. 2, ¶ 5.

This application is not about the defendants. It is not a tribute to the victim. It is a recognition by the justice system that the victim is not a "faceless stranger"² and "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." *Payne*, 111 S.Ct. 2616.

CONCLUSION

Based on the foregoing it is respectfully requested that the application of the victims to show the DVD of the victim be granted.

New Jersey Crime Victims' Law Center

By _____
Richard D. Pompelio, Esq.

Dated: May 8, 2007

² *South Carolina v. Gathers*, 490 U.S. 805, 821, 109 S.Ct. 2207, 2216 (1989), (O'Connor, J. dissenting).