

ATTENDANCE AT TRIAL – JUVENILE COURT – HOMICIDE - BRIEF

The Juvenile Justice System and the Issue of Confidentiality:

The issue of whether to permit the victim or other members of the public to attend the family court proceedings directly relates to the protection of the juvenile charged and the policy for confidentiality respecting the proceedings. This recognition of confidentiality is historically rooted in the development of the juvenile justice system. It has, however, been significantly reevaluated and modified in recent years by the courts and state legislatures to recognize and address the rights of victims and other members of the public.¹

The juvenile court system in this country began to evolve in most states in the early 1900's. The juvenile courts, initially, did not have jurisdiction over minors accused of committing serious criminal acts and there was a tendency to treat these young alleged offenders as adults in the criminal justice system. The desire for rehabilitation instead of punishment led to considerable reform in the juvenile courts. There was an emphasis on protecting the juvenile and working toward enabling him to become a productive member of society when he became an adult. This desire for protection led to the need for confidentiality within the juvenile court system. See generally, Privacy v. Public Access To Juvenile Court Proceedings: Do Closed Hearings Protect the Child or the System? 15 B.C. THIRD WORLD L.J. 359, 368-70.

A considerable change has occurred in the juvenile justice system within the past thirty years which has been described as follows:

"[T]he philosophy of the juvenile justice system has changed dramatically with the recognition that the specialized, non-

¹ See discussion, infra, pp. 14-19.

adversarial proceedings traditionally afforded to children have often served neither to rehabilitate them, nor to assure them of fundamental constitutional protections." Id. at 371.

Due to the continued increase in serious and violent criminal conduct on the part of juveniles and the concern for victims and other members of society, there has been a continued rethinking and de-emphasis placed upon the significance of the issue of confidentiality. The courts no longer look upon the confidentiality of juvenile proceedings as an inflexible process but have determined that the competing rights of the juvenile must be weighed against the rights of other members of society in examining this issue. E.g., see Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) where the Court balanced the general public's First Amendment right of access to information to criminal trials against the victim's confidentiality interest in a juvenile proceeding and held in favor of public access.

In United States v. A.D., 28 F.3d 1353 (3rd Cir. 1994) the Third Circuit Court of Appeals addressed the confidentiality provisions of the Federal Juvenile Delinquency Act. A.D. involved two juveniles who were arrested for gang related armed robberies. Detention hearings were scheduled before a federal magistrate who determined that the Act mandated closed proceedings. Two newspapers appealed this ruling and argued that in weighing the public's right to know against the juveniles' right to confidentiality, the right of access prevailed. In holding in favor of the newspapers the Third Circuit quoted from one of its earlier decisions, stating:

"[P]ublic access to criminal proceedings promotes informed discussion of governmental affairs by providing the public with a more complete understanding of the judicial system. This public access and the knowledge gained thereby serve an important educative interest. Second, public access to criminal proceedings gives the assurance that the proceedings were conducted fairly to all concerned and promotes the public perception of fairness. Public confidence in and respect for the judicial system can be achieved only by permitting full public view of the proceedings.

See, A.D., 28 F.3d at 1357 (quoting United States v. Criden, 675 F.2d 550, 556 (3rd Cir. 1982).

The policy towards openness in the juvenile justice system and the recognition of the victim's right to be present are reflected in the number of states which have opened the juvenile courts to the members of the public. The National Center for Juvenile Justice, Pittsburgh, Pa. reported in 1994 that the following states provide for the openness of the juvenile courts to the public in most cases: Oregon, California, Utah, Colorado, New Mexico, Kansas, Oklahoma, Florida, Washington, D.C., Delaware, New York, Massachusetts, Maine, Indiana, Michigan, Minnesota, Montana and Washington.²

This trend towards openness in the juvenile justice system is clearly reflected in a recent statement on the future of the juvenile court by the National Council of Juvenile and Family Court Judges:

"Traditional notions of secrecy and confidentiality should be re-examined and relaxed to promote public confidence in the court's work. The public has a right to know how courts deal with children and families. The court should be opened to the media, interested professionals and students and, when appropriate, the public, in order to hold itself accountable, educate others, and encourage greater community participation."

See, National Council of Juvenile and Family Court Judges, Children and Families First: A Mandate For America's Courts (1995). See also, Open the Doors: A Judicial Call To End Confidentiality in Delinquency Proceedings, 21 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 393 (1995).

In 1973, as part of certain revisions by the New Jersey Legislature to the Juvenile Justice Code, provisions providing for the increased disclosure of juvenile information were enacted into law. N.J.S.A. 2A:4-65 provided for the disclosure of various types of juvenile

² See National Center for Juvenile Justice (Report 1994).

records to certain governmental agencies. See discussion, State v. Allen, 70 N.J. 474, 475-77 (1976).

In 1977, this statute was further amended to give to the victim or the victim's immediate family the right to information concerning the "identity", "offense charged", "adjudication" and "disposition" of the charges against the juvenile.

In 1983, N.J.S.A. 2A:4-65 was repealed by N.J.S.A. 2A:4A-60, which retained the language of the 1977 revision and expanded the disclosure of juvenile information. It also contained the provision for access to "any court proceeding" for victims and other members of the public with the same wording as exists today (and is before the court in this matter) as to a "substantial likelihood of specific harm" to the juvenile.

The Senate Judiciary Committee Statement accompanying the bill in this 1983 revision provided:

"This bill revised the laws concerning the disclosure of juvenile records. It is one of the several bills in the package of legislation revising the present juvenile laws. The law regulating disclosures of information pertaining to juvenile offenders must recognize two major considerations: the public's right to be informed and the rehabilitation of the juvenile. It is the balancing of these interests which form the basis of this bill." (Emphasis supplied).

In examining the issue of confidentiality in the juvenile courts, the New Jersey Supreme Court in 1976 established a flexible and practical balancing test in weighing the right of members of the public to be informed against the juvenile's right to confidentiality. In State v. Allen, 70 N.J. 474 (1976) a proposed witness for the defense in a criminal trial had previously been involved in Juvenile Court proceedings. The Prosecutor sought the psychiatric records from the juvenile proceeding involving the witness. The State moved before the Superior Court for orders to review the medical and psychiatric records and to require the witness to submit to a psychiatric examination.

The lower court granted the State's motion. The juvenile's motion for a stay of the order and leave to appeal was denied by the Appellate Division, but granted by the Supreme Court. See State v. Allen, 68 N.J. 285 (1975).

In affirming the lower court's decision which permitted disclosure, the Court spoke of the "delicate task to which the courts must address themselves" in balancing the need for disclosure against the "interest of confidentiality". See Allen, 70 N.J. 474, 484 (1976).

This balancing test applied by the Court in Allen was followed by the Appellate Division in State In The Interest of D.H., 153 N.J. Super 490 (App.Div. 1977). In D.H., three juveniles caused extensive fire damage to the Municipal Building of the Borough of Lyndhurst. The municipality's insurer paid the insurance claim and pursued a subrogation action against the juveniles. In holding that the subrogee was entitled to the names and addresses of the juveniles and their parents, the Appellate Division noted that even though the 1977 statutory amendment to N.J.S.A. 2A:4-65 (which had recently been enacted) allowed disclosure of this information, the "principles expressed in State v. Allen," would continue to govern in weighing any further request for disclosure against the juvenile's interest in confidentiality. See Allen, 153 N.J. Super. at 496.

On December 7, 1993 the New Jersey Juvenile Delinquency Commission released its report on violent juvenile crime in New Jersey. According to statistics compiled by the New Jersey State Police the arrests of teenagers for murder, rape, robbery and aggravated assault increased by 34% between 1988 and 1992. As a result, New Jersey became the fourth highest ranking state for violent crimes committed by youths.³ support this criticism."

As violent crime continues to increase in New Jersey so has the dissatisfaction of the public with the present juvenile justice system. This dissatisfaction has been evident in the

³ The Commission's Report noted:
"Critics of the juvenile system see it
largely ineffective and unable to curtail
juvenile crime. Arrest statistics appear to

amount of attention which has been given to juvenile justice reform on the part of the executive and legislative branches of the New Jersey State government.

On February 22, 1994, Governor Whitman held a meeting with county prosecutors regarding the issue of the juvenile justice system and the need for its reform in New Jersey. Within one month, with the full support of the Offices of the Governor and the Attorney General, the New Jersey State Senate introduced Senate Bill No. 893 which called for numerous revisions to N.J.S.A. 2A:4A-60, 61 and 62 which substantially increased the access to juvenile information and considerably reduced the protective wall of confidentiality.

The statutory revision became law on June 29, 1994.

Subsection (i) of N.J.S.A. 2A:4A-60 was amended as part of these statutory revisions to further recognize the rights of crime victims and give them a voice in the juvenile justice system by placing them on equal footing with the adult criminal justice system in the area of victim impact statements by adding the following language:

"[a]nd the court shall permit a victim or a family member of a victim to make a statement prior to ordering a disposition in any delinquency proceeding involving an offense that would constitute a crime if committed by an adult. The court shall have the authority to limit and control the attendance in any manner and to the extent it deems appropriate."

This and other statutory amendments clearly reflect a policy of opening up the juvenile justice system to the members of the public who have interest in the proceedings. This legislation acknowledges the importance of the victim's presence in juvenile court proceedings by giving the victim the right to make an in court predisposition statement. The right to make a statement presupposes the right of the victim to be present at the time of the making of the statement. Accordingly, the statute contemplates the presence by the victim, subject to the

reasonable exercise of discretion by the court. The statute contemplates that the court will balance the juvenile's rights to confidentiality against the rights of the victim to be present.

The Crime Victims' Movement:

One of the more significant factors in the victim's rights movement in this country occurred in 1982 when President Reagan commissioned a Task Force to study the effects of crime on its victims. In December of 1982, the President's Task Force presented its report with profound recommendations for changes at the federal, state, and local levels. After hearing the plight of thousands of crime victims throughout the country, the members of the Task Force were convinced that the criminal justice system was out of balance, stating:

"Victims have discovered that they are treated as appendages of a system appallingly out of balance. They have learned that somewhere along the way, the system has lost track of the simple truth that it is supposed to be fair and to protect those who obey the law while punishing those who break it. Somewhere along the way, the system began to serve lawyers and judges and defendants, treating the victim with institutionalized disinterest." (P.iv, President's Task Force on Victims of Crime, December, 1982)

The Task Force recommended an amendment to the Federal Constitution recognizing the rights of crime victims in the criminal justice system. Due to the difficulty in passing a federal constitutional amendment of this nature, the Task Force further recommended that each state take its' own initiative and pass victims' rights legislation and more significantly, an amendment to its' state constitution protecting the rights of crime victims.

In 1985 the State of New Jersey took a major step forward in the victims' rights movement through the passage of the "Crime Victim's Bill of Rights", N.J.S.A. 52:4B-34, et. seq. This legislation calls for victims of crime to be "informed" and treated with "dignity and

compassion by the criminal justice system." See N.J.S.A. 52:4B-36. The rights of crime victims under this statute were expanded in 1991 to permit:

(a) a victim to submit a written impact statement to be considered prior to the prosecutor's final decision as to whether to file formal charges, N.J.S.A. 52:4B-36(m); and

(b) an in person impact statement prior to sentencing, N.J.S.A. 52:4B-36(n).

The 1985 "legislative findings and declarations" to the "Crime Victim's Bill of Rights" sets forth a clear and definitive statement of the intent and purpose behind the crime victim's legislation 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 is 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 Article I, Paragraph 22 of the New Jersey Constitution which recognizes and establishes the "rights of victims of crime". This constitutional provision became the first amendment to the 1947 New Jersey Constitution in the area of human and personal rights. It was the result of considerable effort on the part of legislators, prosecutors, crime victims and various individuals who work to serve and improve the criminal justice system in the State of New Jersey.

Article I, Paragraph 22 of the New Jersey Constitution provides:

"A victim of crime shall be treated with fairness, compassion and respect by the criminal justice system.

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

The interpretive Statement to the Concurrent Resolution adopted by both Houses of the New Jersey State Legislature regarding the Constitutional Amendment provided:

"Although this amendment is not intended in any way to deny or infringe upon the constitutional rights of any person accused of a crime, it is designed to place victims on an equal footing by guaranteeing certain fundamental rights as a matter of State Constitutional imperative." (Emphasis supplied).

The Victims' Rights Amendment was a part of the national victim rights movement which was, at the time, and continues to move with significant force throughout the United States. In addition, it was a direct response to the many reports of the mistreatment of crime victims in New Jersey and the continued practice of excluding victims from the courtroom during court proceedings.

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 that "these rights are among the most fundamental and important in assuring public confidence in the criminal justice process." See Art. 1, Par. 22, N.J. Const; N.J.S.A. 52:4b-35.

The considerable amount of legislation in this State over the past ten years increasing the rights of crime victims reflects this strong desire on the part of the legislative and executive branches of our State government to afford justice to the innocent victims of crime .⁴ Lawyers now appear on behalf of victims at various stages of the criminal proceedings and courts throughout this State have become much more open and attentive to the rights of crime victims. Furthermore, victims of juvenile offenders and adult offenders have been placed on equal footing in various areas of our criminal justice system.⁵

The Crime Victim's Bill of Rights has been held to apply in juvenile court proceedings. See State in the Interest of O.G., 274 N.J. Super 182 (Ch.Div. 1993). In deciding that the rights of a crime victim under the Crime Victim's Bill of Rights, N.J.S.A. 52:4B-36(n), would apply in a juvenile court proceeding so that the victim could personally address the court prior to sentencing, Judge Fuentes stated:

"This court can find no principled reason to distinguish between victims of crime based on the age of the perpetrators who commit it. The focus of the legislation being construed is on the rights of victims. There are no punitive

⁴ See, e.g. N.J.S.A. 2C:44-2 (restitution to victims); N.J.S.A. 52:4B-36 (victim impact statement prior to sentencing), (victim impact statement prior to formal charges being filed), (victim impact statement prior to prosecutor accepting a negotiated plea); PL 1994, Ch. 132-136 (Megan's Law); N.J.S.A. 52:4B-44 (counseling assistance for victim in securing HIV testing); N.J.S.A. 2C:1-6 (expanding statute of limitations in civil matters in sexual assault cases); PL 1994, Ch. 95 (amendment to Rape Shield Law to restrict admissibility of victim's prior sexual conduct); PL 1994, Ch. 160 (established Campus Sexual Assault Victims' Bill of Rights); N.J.S.A. 2C:43-2 ("Truth in Sentencing") and N.J.S.A. 2A:4A-60 (increased access to information in the juvenile justice system).

⁵ See, e.g., the Criminal Injuries Compensation Act, N.J.S.A. 52:4B-1 provides compensation to victims and their survivors irrespective of the age of the perpetrator; the "Office of Victim Witness Advocacy" established in 1985 pursuant to N.J.S.A. 52:4B-39 provides the same services which are required under the "Crime Victim's Bill of Rights" N.J.S.A. 52:4B-34 to all victims without differentiation between adult and juvenile offenders; and the victim impact statement prior to the prosecutor's decision to file formal charges under N.J.S.A. 52:4B-36(m) is utilized by prosecutors throughout this State in both the juvenile and adult courts.

implications to the granting of these rights. There is no danger that the rehabilitative goals which distinguish juvenile court from criminal court would be endangered by the exercise of these rights by the victims of the juvenile's offenses." Id. at 7.

O.G. was decided prior to the amendment of N.J.S.A. 2A:4A-60(i) relating to victim impact testimony. The statutory amendment supports the policy behind the court's decision in O.G. of affording equal rights for crime victims throughout our system of criminal justice. It demonstrates recognition that the impact of the crime on the victim has little to do with the age of the perpetrator.

**The Lower Court's Reliance on
State in the Interest of B.J.W.
as Authority for Denying the
Victims the Right to Attend
the Proceedings was Incorrect**

In the instant matter the lower court denied the father and brother of the victim permission to attend the proceedings, relying upon the decision of the court in State in the Interest of B.J.W., 250 N.J. Super 619 (Chan. Div. 1991). In B.J.W., the court determined that it would exercise its' discretion and deny the application of a newspaper to attend and report on a family court proceeding in which a 15 year old female was accused of killing her mother and brother. There was clear evidence that the juvenile would suffer harm from the medial coverage.

The court noted, however, that the presence of others in the courtroom would not alone be sufficient to make a determination of specific harm, stating:

"Thus, it does appear to be the number of extra people who may be in the courtroom that will impact the juvenile if the public is admitted. That can be controlled. It is, rather, the likely boldly-headlined newspaper accounts of the intimate details of this family that will impact not only the juvenile,

but her other surviving family members. (Emphasis supplied). Id. at 624-25.

B.J.W. did not involve a balancing of the rights of the victims against the rights of the accused. In that case the victim and perpetrator were on the same side of the scale in opposition to the efforts of the media to make the facts of the trial public. In this case, only two people, the father and brother of the victim seek to attend. The court can control the situation in the courtroom in order to prevent any substantial likelihood of specific harm to the accused. The concern for confidentiality can be likewise controlled. In the instant matter, the victims and the accused are not on the same side of the scale and when weighing the interests of both in permitting the victims to attend, there is no supportable evidence before the court which justifies precluding the victims. See State in Interest of Presha, 291 N.J. Super. 454 (Ch. Div. 1995) where the court permitted access to a juvenile proceeding by the media applying the same analysis of N.J.S.A. 2A: 4A-60(i) as set forth in this brief.

The precise issue before the court has been previously decided by the Appellate Division in the case entitled In the Matter of M.G., a Juvenile, Complaint No. FJ-07-851-96. In M.G., a 17 year old female was charged with the murder of a 34 year old woman. The Chancery Division, Family Part, Essex County rejected the application filed on behalf of the victim's family and prohibited the parent and siblings of the homicide victim from attending the Phase I and subsequent hearings before the court. In an emergent appeal to the Appellate Division, the lower court's decision was reversed on November 1, 1995 and the family was permitted to attend all juvenile proceedings. (Da1) The Appellate Division was presented with the same arguments on behalf of the victims in M.G. as it is in the case at bar. The court accepted these arguments and ordered the emergent relief requested on behalf of the victims.

There can be no justice in a criminal justice system unless all victims are treated equally. The loss of a son or a brother is not lessened because the victim's accused killer is 16 and not 18 years of age. The state legislature has recognized this fact through the considerable amount of legislation which it has passed in the area of the recognition of victims' rights. The Governor's

Office has recognized this fact in supporting and signing this legislation into law. And the people of this State recognized this fact by casting an 84% approval in adopting the Victims' Rights Amendment.

The court in **O.G.** in commenting on the Crime Victim's Bill of Rights, noted:

"Furthermore, all of the interests which the Legislature sought to protect through this legislation, as clearly expressed by the preamble thereto, are implicated to the very same degree regardless of the age of the person who has done the victimization. The participation of victims is as necessary to the bringing to justice of juvenile delinquents as it is to that of adult criminals. Public confidence is as necessary to the success of the juvenile justice scheme as it is to that of the adult criminal justice system. Most of all, the need of a victim to be able to feel that he or she has played a part in the process of bringing the victimizer to justice is the very same no matter how old that victimizer may be. The Legislature has decided that these interests are among the most paramount in the operation of our system of criminal justice." See O.G. at 189.

The father and brother of any homicide victim are likewise victims of this homicide and they are entitled to be treated with "fairness, compassion and respect by our justice system." See Article I, Par. 22. To them, their loved one is not a "faceless stranger".⁶ His life has and will continue to have special meaning to them and it is of utmost importance for them to be present at the justice proceedings involving the trial of the person accused of his murder. As stated by Mr. Justice Souter in his concurring opinion in Payne v. Tennessee, III S.Ct. 2597 (1991):

⁶ See South Carolina v. Gathers, 490 U.S. 805, 821, 109 S.Ct. 2207, 2216 (1989), (O'Connor, J. dissenting).

"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 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." *Id.*, at 2615-2616. (Souter, J. concurring).

See also, discussion, State v. Muhammad, 145 N.J. 23, 34-35 (1996)

Balancing the Rights of the Victim and the Rights of the Juvenile

The case at bar requires the Court to make the necessary determination regarding the impact of the presence of the victim during the court proceedings. The court must not only consider the impact upon the juvenile if the victims are present, but also the impact upon the victims if they are precluded from being present. The rights of the accused must be weighed against the statutory and constitutional rights of the victim and if there is no factual finding of substantial likelihood to cause specific harm to the accused, the victim is entitled to be present. See State v. Allen, 153 N.J. Super at 496. The victims father and brother in this case, are entitled to be present because there is no valid reason to shut them out from observing the process of justice concerning the death of their loved one.

In considering this weighing process of the respective rights of those involved, Justice Benjamin N. Cardoza stated:

"Justice, though due to the accused, is due the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." Snyder v. Massachusetts, 291 U.S. 97, 122, 545. Ct. 330, 338 (1934).

The presence of the victims in the courtroom will not interfere with the proceedings. They will not be permitted to discuss what they observe. They will be sitting in the back of the courtroom and their conduct will always be subject to the control of the trial court.

As difficult and painful as it may be, the victim's survivors must bear witness to the court proceedings on his behalf. There is no evidence that, by exercising their rights as victims, a substantial likelihood of specific harm would result to the accused. The standard in the law is appropriate and a reasonable application of this standard leads to only one conclusion; that when weighing all the factors in this case, justice requires that the victims be allowed to observe the court proceedings.

It is respectfully requested that they be afforded the fairness, compassion and respect which the law provides.

CONCLUSION

Based on the foregoing it is respectfully requested that the decision of the lower court be reversed and the motion on behalf of the victims to attend the court proceedings be granted.

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