

## DEFENSE ACCESS TO VICTIMS' HOMES

by Joanna Tucker Davis

When a crime is committed inside a person's residence, the resulting harm encompasses more than just the crime itself. A victim's sense of safety, privacy and security in his or her own home is also violated. Regaining a feeling of safety and security, and reclaiming the sense that one's home is a sanctuary, rather than a crime scene, is crucial to healing from the effects of the crime. Too often, however, victims have to endure a second invasion of the very place that should be their private refuge – court orders forcing victims to open up their home to the defense as part of the criminal discovery process. This article details the state of the law nationally regarding whether a defendant is allowed access to a victim's home or to a private residence.

There are few published cases on this issue. An electronic search revealed only eight cases that have squarely addressed the question of whether a defendant should be granted access to a private home to prepare for a criminal trial. In five of the cases – cases in California, Illinois, New York, Oregon, and Vermont – courts denied defendants access to a private residence.

While the Oregon Supreme Court held that there is no basis for such an order, courts in the four other states articulated a need to balance the defendant's interests against the homeowner's privacy

interests. Illinois, California, Vermont, and New York courts all then found that the balance tipped in favor of the homeowner.

In *State ex. rel. Beach v. Norblad*, 781 P.2d 349, 350 (Or. 1989), the Oregon Supreme Court granted a petition for a writ of mandamus filed by a murder victim's widow and directed the trial court to vacate its order granting the defendant access to the widow's home. The court held that since the victim's widow was not a party to the case, and counsel had "not identified any



other basis (and we know of none) under which the defendant trial judge could at this stage of the proceedings issue such an order," the victim was "under no obligation to obey an order that the defendant trial judge lacked authority to issue." *Id.*

*Norblad* is the only case in which a court denied the defense request under the rationale that the trial court lacked the authority even to issue such an order. Other states have not questioned the authority for such an order but have instead denied a defendant's request for

access to a victim's home on the basis that the defendant's showing was insufficient to overcome the victim's privacy rights.

For example, when the Illinois Appellate Court considered the issue of access to a victim's home, it did not even reach the privacy concerns of the victim. Instead, the court found unpersuasive defendant's argument that he needed access to a burglary victim's bedroom at night to take photographs in order to show the jury the nature of the lighting. *People v. Poole*, 462 N.E.2d 810, 813 (Ill. App. Ct. 1984). The court noted that it was not possible to reproduce the many factors that would have influenced the lighting on the night in question, an individual's ability to see objects at different light levels could not be discerned from photographs, and defense counsel had made no showing that it was even possible to take a picture that would accurately depict the lighting levels at night. *Id.*

In California, the Court of Appeals issued a writ of mandate overturning a trial court's order allowing defense access to the victim's home. *Bullen v. Superior Ct.*, 251 Cal. Rptr. 32, 33-34 (Cal. Ct. App. 1988). The appellate court held that the victim's "fundamental right to privacy free from judicially mandated intrusion into her home" could only be overcome by a *prima facie* showing of sufficient "good cause" and "plausible justification" for the intrusion. *Id.* at 34. In *Bullen*,

defense counsel had asserted that the defense team needed access to “view the scene of the crime, observe spatial distance, investigate possible defense theories and to generally prepare examination and cross-examination of key witnesses.” *Id.* (citations omitted). The appellate court found this showing “conclusional” and “inadequate to support judicially compelled access to petitioner’s home with the resulting deprivation of her right to privacy in and freedom from unwanted intrusion into her home” and therefore ordered the trial court to vacate its order allowing defense access into the victim’s home. *Id.*

In a case that did not involve a crime victim but rather subsequent occupants of the house where the crime took place, the Vermont Supreme Court held that the occupant’s right to privacy could only be overcome by a showing of sufficient reason for the inspection. *State v. Muscari*, 807 A.2d 407, 418 (Vt. 2002). The defendant in *Muscari* refused to make any showing at the trial level of the need for access, claiming it violated attorney work-product privilege (an argument that the Vermont Supreme Court rejected). *Id.* The court also noted that, in light of the evidence at trial and that the defendant had been given crime scene photos, it was unclear how seeing the scene first hand would have changed the defense strategy or justified the intrusion into a private home. *Id.* The Vermont Supreme Court, therefore, found no error in the trial court’s denial of the defense request for access into the home. *Id.*

A New York trial court applied the test articulated in *Bullen in People v. Nicholas*, 599 N.Y.S.2d 779 (N.Y. Sup. Ct. 1993), and found that the defendant had failed to “demonstrate any compelling reason for access to the complainant’s residence sufficient to outweigh the complainant’s constitutional right to privacy.” *Id.* at 783. The court noted that the defendant, who had been provided crime scene photographs of the apartment in question and had lived in the apartment in the past,

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made only a “speculative showing” that did not meet his “necessary prima facie burden of showing that inspection of the crime scene would yield relevant material evidence, not already provided, necessary for the preparation of the defense case.” *Id.*

Of the three courts that have held that defense access should be allowed, only the Minnesota Court of Appeals failed to consider a victim’s or witness’s privacy interests. The two remaining states (Virginia and Florida) articulated balancing tests between the homeowner’s privacy rights and the defendant’s due process rights. Courts in both of those states found that defendant’s due process rights outweighed the homeowner’s privacy rights.

In *State v. Lee*, 461 N.W.2d 245, 246 (Minn. Ct. App. 1990), a defendant indicted for first degree murder requested that the prosecutor give the defense access to the victims’ home, which was the scene of the crime. The prosecutor refused the request, “citing the objections of the victims’ family, and opposed the motion to compel discovery on the grounds that the house was no longer in the ‘possession or control’ of the prosecution.” *Id.* The defendant then made a motion to the trial court to compel discovery and, when denied, brought a petition for a writ of mandamus to the Court of Appeals. *Id.* The Court of Appeals, in issuing the writ, did not discuss the defendant’s or the victims’ constitutional rights except to note that the time, place and manner of the inspection were to be appropriately restricted. The court, instead, relied on Minnesota’s discovery rules, holding that the term “possession and control” of the prosecutor should “not be so narrowly construed as to limit defense access to premises which the prosecution has processed for evidence of crime and to which it may arrange similar access for the defense” and that defendant was to be allowed “complete” discovery. *Id.* at 247.

The Virginia Court of Appeals held that a trial court should not have denied defendant access to the crime scene, a private home belonging to a witness to the crime, but held that the error was harmless. *Henshaw v. Commonwealth*, 451 S.E.2d 415, 416 (Va. Ct. App. 1994). While

acknowledging that there is no general right to discovery in a criminal case, the court held:

If an accused establishes that inspecting, photographing, or measuring the crime scene is relevant and material, he is entitled to access, subject to such reasonable limitations and restrictions as the trial judge may impose, unless due to special circumstances the private citizen's constitutional right to privacy outweighs the accused's right to view or inspect the premises.

*Id.* at 420. The court then held that the defendant's desire to measure distances between objects and observe the crime scene was a sufficient showing to order access in light of the fact that the victim had not shown any "special circumstances that would preclude [the homeowner] being required to make the premises available for inspection." *Id.*

In Florida, the District Court of Appeal, citing *Henshaw* as "a case on all fours," acknowledged the victim's right to privacy but concluded it was outweighed by the defendant's due process rights. *State v. Gonsalves*, 661 So.2d 1281, 1282 (Fla. Dist. Ct. App. 1995). The defendant in *Gonsalves* was charged with burglarizing the victim's home. The police took pictures both inside and outside the home. *Id.* at 1281. The defendant made a motion to take additional photos and to personally inspect the home; the victim objected to the further photography, afraid that

it would lead to another burglary. *Id.* The trial court, over the victim's objections, granted the defense motion, but limited the photographs to the portion of the house where the break-in took place and to the window through which the victim had seen the defendant. *Id.* The court held, with very limited discussion of the reasons, that the defendant had "good cause" that outweighed the victim's privacy interests. *Id.*

defendant has access, when and for how long the access is granted, and who will be allowed entry into the residence. ■

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In sum, with two exceptions – Oregon and Minnesota – the courts that have addressed this issue have all developed a balancing test between the defendant's interests in preparing for trial and the homeowner's privacy interests, and then applied the test to the facts before them, with differing results. If faced with a defense request for access to a victim's home, a victim's attorney should look to his or her own state's discovery law, prepare arguments regarding a victim's constitutional and statutory privacy rights, and marshal any facts that demonstrate that it is unnecessary to give the defendant access to the home. If a court is inclined to grant a defendant's request, an attorney should ask the court for protective measures to be set in place such as limiting the area(s) to which the