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## **STATEMENT OF FACTS**

On March 14, 1996, Kathleen Stanfield Weinstein (age 45) was abducted from a shopping center on Route 37 in Toms River, New Jersey to a wooded area nearby where she was murdered. Her body was found in the wooded area three days later. At the time of her death, the victim was married to Paul Weinstein. The couple had one child, Daniel, age 6.

Defendant, Michael LaSane has been charged with murder, kidnapping, carjacking and robbery in connection with the death of the victim. In 1997 the defendant entered a plea of guilty to the murder of Mrs. Weinstein. He was sentenced to life in prison with a 30 year period of ineligibility. The defendant's conviction was subsequently overturned by the Appellate Division on the basis of ineffective assistance of counsel.

During the commission of the crime, the victim attempted to convince her abductor to release her. On her possession, and without the knowledge of the offender, the victim turned on a portable cassette recorder. The recorder was subsequently discovered and retrieved by the police authorities. The recorder contained a tape with a 46- minute recording of the victim and the defendant in which she pleaded for her life.

The trial of the defendant for the murder of Mrs. Weinstein began on February 22, 2007, almost eleven years after her death. The court granted the pre-trial request of the prosecution to play the tape to the jury as evidence of defendant's guilt. A verbatim transcript of the tape recording has been prepared and utilized in court for the purposes of the pretrial hearing. The court has released the transcript to the media, and excerpts of the entire transcript have been published and disseminated by various members of the media. In addition, the live events of the trial do date have been covered live by Court TV, have been shown on the live portion of the website of the Asbury Park Press and have been filmed and shown in part on the New York metropolitan and New Jersey

television station. A 2002 press release published on a current website of Court TV stated:

Court TV (www. Courttv.com or AOL Keyword: Court TV), a basic cable network, provides a window on the American system of justice through distinctive programming that both informs and entertains. As the destination for programming that focuses on the investigative process, Court TV broadcasts trials by day and such brand defining original programs as *Forensic Files* and popular off-network series as *NYPD Blue* in the evening. Court TV is 50% owned by AOL Time Warner, and 50% owned by Liberty Media Corp. **The network has over 70 million subscribers.** (Emphasis supplied).<sup>1</sup>

This matter comes before the court on the application of the prosecution to prevent the actual audio tape from being released to the media. The application is made by the prosecution in furtherance of the rights of the crime victims in this matter, Kathleen, Paul and Daniel Weinstein, along with the numerous relatives and friends of Kathleen. The application of the prosecutor is supported by co-counsel for the victims and by counsel for the defendant.<sup>2</sup>

The macabre sensationalism of the victim's voice on audiotape pleading for her life has created media frenzy. Once the transcript of the 46 minute tape was released by the court to the media, Kathleen's words were printed in many newspapers and repeated by newscasters on various television stations. The front page headline article of the February 22, 2007 edition of the Star Ledger, New Jersey's largest newspaper begins "*Why don't you just start all over again, not take the car?*" THE MURDER VICTIM SPEAKS". On page 4 of the newspaper, along with photos of the murder scene, the defendant and the victim's automobile, one-half of the page contains the verbatim transcript of the audiotape entitled, "*Desperate words in a bid for freedom.*"

The media has received and published every word of the 46 minute tape. What remains to be

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<sup>1</sup> Court TV News Monday February 27, 2007 at [http://www.court tv.com/archive/press/meaning\\_of\\_safe.html](http://www.court tv.com/archive/press/meaning_of_safe.html)

<sup>2</sup> The potential publication of the audiotape by the media has a direct bearing on the defendant's constitutional rights to a fair trial under the 6<sup>th</sup> Amendment. Due to the mass distribution that would take place, an effective change of venue would be precluded.

reported at this time to the public about the horror surrounding the murder of Kathleen Weinstein is her voice, its tone, its inflection, its fear and its desperation.

That is the subject matter of this application.

### **POINT 1**

#### **CRIME VICTIMS, PAUL WEINSTEIN AND DANIEL WEINSTEIN HAVE 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).**

The laws of New Jersey recognize the unique and vital interests of crime victims in the criminal justice system and give to crime victims judicially recognizable rights in the justice 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].

By constitutional and statutory mandate, Paul and Daniel Weinstein are “crime victims” entitled to all rights and remedies provided by law. N.J. Const. art. I, ¶ 22, *N.J.S.A. 52:4B-37*.

Crime victims’ rights are substantive and participatory, procedural rights afforded to victims as 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 be treated with fairness, compassion, respect and dignity, to participate in the process, to receive information about the process, to have interests adjudicated within the process, to be free

from intimidation 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 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" provides 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.

The significant impact of the Victim's Rights Amendment has been recognized by the Supreme Court of New Jersey in cases where the rights of victims are balanced against the rights of defendants in the criminal process. *See, Timmendequas*, 161 N.J. 515, 737 A.2d 55 and *State v. Muhammad*, 145 N.J. 23 (1996), where 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 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.

Where the rights of crime victims come in conflict with the claims of the media for access to information and material, the constitutional and statutory rights of the victim must prevail, and the victim has standing to assert these rights. See, e.g., *Asbury Park Press v. Ocean County Prosecutor's Office*, 374 N.J. Super. 312, 864 A.2d 446 (Law Div. 2004) [media denied access to 911 tape and transcript], *K.P.*, 311 N.J. Super. 123 [media denied access to court proceeding involving child sexual assault victim].

The recognition of the 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. Their judicially cognizable rights to fairness, compassion and respect are mandated by the State Constitution. Since these rights have been established, the New Jersey Crime Victims' Law Center has provided representation for victims in the criminal justice system in the courts of New Jersey on numerous applications to safeguard the victim's rights. In each case, the standing to assert the victim's rights was permitted by the court. In each case the victim was given a presence, and the



victim's voice was heard. The present case requires no less recognition.

## POINT II

### **THE MEDIA DOES NOT HAVE THE RIGHT UNDER THE CONSTITUTION, COMMON LAW OR STATE STATUTE TO OBTAIN A COPY OF THE AUDIOTAPE OF THE VICTIM'S LAST WORDS**

#### **A. The media does not have a right to the recording under the First Amendment to the United States Constitution.**

The right to inspect and copy judicial records by anyone, including the media, is not absolute. "The First Amendment generally grants the press no right to information about a trial superior to that of the general public," *Nixon v. Warner Communications*, 435 U.S. 589, 609 (1978).

In *Warner*, 435 U.S. 589, 609, the Supreme Court of the United States held that the First Amendment requires only that the press have the same access to a trial as does the public. While the First Amendment provides the media with the right to publicize what it has seen and heard in a court room, it does not require the court to provide the media with documents or tapes that are otherwise not available to the public. *Id.*

Every court through the exercise of its "informed discretion" has supervisory power over its own records and files. Furthermore, the court may deny access to materials that are painful and fail to serve any useful purpose in the community by catering to a morbid craving for that which is sensational. *Id.* at 598, *In re Caswell's Request*, 18 R.I. 835, 29 A. 259 (1893); *Warner* 435 U.S. 589, 597.

The Court's holding in *Warner*, has been consistently followed in limiting the media's access to protected material. In *Belo Broadcasting Corporation v. Clark*, 654 F.2d 423, 427 (5th Cir. 1981), the plaintiff media company filed requests to copy for public broadcast audiotapes of discussions between defendants and FBI agents in connection with the "Brilab" sting operation concerned with alleged bribery in awarding state employee insurance contracts in Texas. Affirming the denial of the media's request by the lower court, the Court of Appeals for the 5<sup>th</sup> Circuit opined:

Here, as in *Warner Communications*, there were "no restrictions on press access to, or publication of any information in the public domain." *Id.* at 609, 98 S.Ct. at 1318. Members of the press were allowed to listen as the tapes were played in court; transcripts were prepared and distributed for their use; reporters and broadcasters were free to report this information as they wished. **All that was denied them was the right to play these tapes over the air waves; that the Constitution does not require.** *Id.* at 427. (Emphasis supplied).

Referring to the Supreme Court's holding in *Nixon v. Warner Communications*, the court noted:

As recognized by the Court in *Warner Communications*, neither the public nor the press enjoys any constitutional right of physical access to exhibits introduced in evidence at a criminal trial. Constitutional requirements are fully satisfied by the kind of untrammelled access to the information contained therein that was afforded press and public alike in this case. *Id.*

A similar issue was addressed by the Sixth Circuit with the same result. In *United States v. Beckham*, 789 F.2d 401, 409 (6th Cir. 1986), the Court of Appeals held, "[i]f a right to copy the tapes . . . exists, it must come from a source other than the Constitution." In *Beckham*, the news media members sought permission to copy tape recordings admitted as evidence in highly-publicized criminal trial and the transcripts of those recordings. The

court emphasized that the media had no greater right to access than any member of the public. The opportunity to attend the trial and report to the public satisfied this right. In the criminal trial arena where constitutional rights were to be considered, *viz*, the sixth amendment rights of the defendant, and these rights were to be balanced against no constitutionally protected rights of the media, it was fair and reasonable to restrict the media's access to the tapes.

The Third Circuit Court of Appeals has also addressed the issue *sub judice*, holding in accord with the Supreme Court and other federal circuits. In *In re Providence Journal Co., Inc.*, 293 F.3d 1 C.A.1 (R.I.)(2002) the District Court's refusal to give to the media copies of videotape and audiotape evidence admitted in prosecution of mayor for racketeering did not violate the media's First Amendment right to publish information contained in court records open to public inspection. By affording interested members of the media ample opportunity to see and hear tapes as they were played for jury, the court fulfilled its First Amendment obligations.

In the instant matter, the constitutional rights of the victim must prevail over the desire of the media to acquire a copy of the audiotape of the victim's plea for assistance.<sup>3</sup> The media enjoys no constitutional claim to this material, and the newsworthy value of this tape, if any, has already been received and disseminated via the transcript of the tape previously released by the court.

**B. The media does not have a right to the recording under the Open Public Records Act.**

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<sup>3</sup> The defendant's 6<sup>th</sup> amendment right to a fair trial likewise outweighs the claim of the media and is sufficient to restrict the release of the audiotape.

The media is not entitled to obtain a copy of the audiotape under the authority of the New Jersey's Open Public Records Act, N.J.S.A. 47:1A-1 to 13, (hereinafter OPRA). In July, 2002 a major revision of New Jersey's public access statute occurred resulting in OPRA. During the legislative drafting process, the recognition of the constitutional and statutory rights of crime victims became an important part of the process. Language protecting the personal rights of victims to fairness, compassion, respect and dignity became a significant part of the new legislation. See discussion, In *Asbury Park Press v. Ocean County Prosecutor's Office*, 374 N.J. Super. 312, 322, 864 A.2d 446, 452 (N.J. Super. Ct. Law Div. 2004)

Section 47:1A-1 of OPRA entitled "[l]egislative findings," states, in part, "*a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy. . . .*" In *Asbury Park Press*, 374 N.J. Super. 312, 864 A.2d 446, Judge Serpentelli rejected the media's argument that these words were merely precatory, and he ruled that in protecting the state constitutional and statutory rights of crime victims, N.J.S.A. Section 47:1A-1, creates a substantive right of privacy protection.

In *Asbury Park Press* the media sought a tape of a 911 call made by a murder victim a short time before he died. The court held that the legislature intended Section 47:1A-1 to provide protection against disclosure in those instances in which a person had a reasonable expectation of privacy. *Id.* at 459. The court reviewed the legislative history of OPRA, and relied on the extensive discussion of privacy concerns in the legislative hearing, the recognition of privacy issues in the Senate statement to an earlier bill, the adoption of the Act with full

recognition of both the constitutional amendment and statutory protection of victims' rights<sup>4</sup>, the legislators' knowledge that those concerns had always been addressed either by express exemptions or a common law balancing test under the law existing prior to the adoption of the Act, and the language of Section 47:1A-1 itself. *Id.*

In *Asbury Park Press*, the court carefully considered the nature of the audiotape sought and balanced the public's need to know against the protection of individual privacy. The court commented:

[T]he court must ask how the release of the dying words of [the victim] in any way contributes to the purpose of OPRA or provides even a scintilla of insight into the functioning of government. Admittedly, the general rule is that one seeking to obtain government records need not explain why they are requested if there is a clear right to obtain them under the statute. (Citations omitted). Yet, that principle becomes less absolute if there is some protection of a privacy right afforded in the Act. Arguably, the plaintiff may find information of public worth in the manner in which the victim's call was handled. **Beyond that, how can the release of the victim's description of his distress and perhaps his last words contribute to the goals of a more informed citizenry or elimination of the evil of secrecy?**

The court has had the unpleasant task of hearing the 911 tape in camera, and of reading the transcript of the tape at the same time. It was a chilling, wrenching, lingering experience even for one not related to the victim. **The content of the tape would, in the court's judgment, offend and disturb any person of normal sensibilities. It is impossible to imagine what the impact would be on the victim's family and loved ones. It is equally inconceivable that the Legislature would have ever intended that OPRA would have been used as the instrument to put those words, either as spoken or transcribed, in the public domain. Therefore, it is beyond doubt that the victims' survivors would reasonably expect that they would never have to share their loved ones' words with an inquisitive media or curious public.** (Emphasis supplied). *Id.* at 330, 458.

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<sup>4</sup> See N.J. Const. art. I, § 22; N.J. Stat. Ann. § 52:4B-36.

*See also, Serrano v. South Brunswick Twp.*, 358 N.J. Super. 350 (App.Div. 2003) where the court noted in another 911 case that not only must the privacy rights of the parties involved in making the call be considered but also “*others who are mentioned in or affected by the calls; ...*” *Id.* At 369.

The 46 minute tape in the present matter is no less distressing or intrusive in to the personal privacy of the victims than was the short 911 tape in *Asbury Park Press*. “*It is equally inconceivable that the Legislature would have ever intended that OPRA would have been used as the instrument to put [the words of Kathleen Weinstein], either as spoken or transcribed, in the public domain.*” *Asbury Park Press*, 374 N.J. Super. 312, 330, 864 A.2d 446, 458.

The federal counterpart to OPRA is the Freedom of Information Act (FOIA) 5 U.S.C.A. sec 552. In *National Archives and Records Administration v. Favish*, 124 S.Ct. 1570, 158 L.Ed.2d 319, 72 USLW 4265, 32 Media L. Rep. 1545 (2004) a request was made under FOIA for 10 death scene photographs of the body of Vincent Foster, Jr., deputy counsel to President Clinton after had committed suicide. The Office of Independent Counsel (OIC) refused the request, invoking FOIA Exemption 7(C), which excuses from disclosure "records or information compiled for law enforcement purposes" if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy," 5 U.S.C. § 552(b) (7) (C). Favish sued to compel production. In upholding OIC's exemption claim, the District Court balanced the Foster family's privacy interest against any public interest in disclosure, holding that the former could be infringed by disclosure and that Favish had not shown how disclosure would advance his investigation. In reversing the

holding of the Ninth Circuit, the Supreme Court held:

1. FOIA recognizes surviving family members' right to personal privacy with respect to their close relative's death-scene images under Exemption 7(C)s; and
2. The Foster family's privacy interest outweighs the public interest in disclosure.

Speaking for the majority, Justice Kennedy commented:

“Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own.  
. . . .

“It is the right of privacy of the living which it is sought to enforce here. That right may in some cases be itself violated by improperly interfering with the character or memory of a deceased relative, but it is the right of the living, and not that of the dead, which is recognized. A privilege may be given the surviving relatives of a deceased person to protect his memory, but the privilege exists for the benefit of the living, to protect their feelings, and to prevent a violation of their own rights in the character and memory of the deceased.” quoting Schuylar v. Curtis, 147 N.Y. 434, 447, 42 N.E. 22, 25 (1895).  
Id. At 1578.

Referring to similar matters in the lower federal courts, Justice Kennedy commented:

“Our holding is consistent with the unanimous view of the Courts of Appeals and other lower courts that have addressed the question. See, e.g., New York Times Co. v. National Aeronautics and Space Admin., 782 F.Supp. 628, 631, 632 (D.D.C.1991) (sustaining a privacy claim under the narrower Exemption 6 with respect to an audiotape of the Space Shuttle Challenger astronauts' last words, because “[e]xposure to the voice of a beloved family member \*1580 immediately prior to that family member's death ... would cause the Challenger families pain” and inflict “a disruption [to] their peace of mind every time a portion of the tape is played within the hearing”), on remand from 920 F.2d 1002 (C.A.D.C.1990); ...” Id. at 1578-80.

*See also*; Hale v. United States Dep't of Justice, 973 F.2d 894, 902 (10th Cir. 1992) (personal

privacy interest in photographs of deceased family member), vacated and remanded on other grounds, 509 U.S. 918, on remand, 2 F.3d 1055, 1057 (10th Cir. 1993) (reaffirming privacy interest under Exemption 7(C); *Marzen v. Department of Health and Human Servs.*, 825 F.2d 1148, 1154 (7th Cir. 1987) (medical records of deceased infant exempt from disclosure based on the parents' right to privacy); *Bowen v. United States Food & Drug Admin.*, 925 F.2d 1225, 1228-1229 (9th Cir. 1991) (autopsy reports exempt based on invasion of family member's personal privacy); *Badhwar v. United States Dep't of the Air Force*, 829 F.2d 182, 186 (D.C. Cir. 1987) (autopsy reports protected based upon privacy interests of surviving family members); see Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act 9-10 (Feb. 1975); and *Katz v. National Archives & Records Admin.*, 862 F. Supp. 476, 485 (D.D.C. 1994) (holding that President Kennedy's autopsy material was exempt from disclosure because, among other things, it would cause "additional anguish" to the surviving family and would constitute a clearly unwarranted invasion of the family's privacy), *aff'd* on other grounds, 68 F.3d 1438 (D.C. Cir. 1995).

### **C. The media does not have a right to the recording under the common law.**

While there is a common law presumption of access and right of the public to inspect and copy judicial records. *Richmond Newspapers Inc., v. Virginia*, 448 U.S. 555 (1980), every court, has supervisory power over its own records and files, and access to those records and files is properly denied where a court determines that the materials might become a vehicle for an improper purpose. *Nixon*, 435 U.S. at 598.

Claims of common law right of access require a balancing between the individual's right



to access and the public's interest in the confidentiality. See *Loigman v. Kimmelman*, 102 N.J. 98, 104, 505 A.2d. 958, 961-62 (1986); *McClain v. College Hosp.*, 99 N.J. 346, 354-55, 492 A.2d 991, 995-96 (1985); and *In the Matter of Readoption With Amendments of Death Penalty Regulations*, 367 N.J. Super. 61 (App.Div. 2004) where the court discussed the relationship between OPRA and the common law right of access, noting:

With respect to the relationship between OPRA and the common-law right of access, N.J.S.A. 47:1A-9(b) provides that nothing in the Act shall be deemed to "abrogate or erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record." *The plain import of this provision, in our view, is that OPRA notwithstanding, the government may seek to withhold any public record subject to the common-law balancing test by claiming that the public interest for confidentiality outweighs the private right to access just as the citizen is entitled, pursuant to N.J.S.A. 47:1A-8, to claim that its right is superior to the public interest in confidentiality. Id. at 74.* (Emphasis supplied).

Applying the same principle as the New Jersey courts, the Pennsylvania court in *Commonwealth v. Bracey*, 15 Pa. D. & C.4th 570 (1992) denied the media access in a case involving facts similar to the case at bar. In *Bracey*, the defendant shot and killed a police officer. An audiotape was made of radio transmissions between police radio control and various patrol units, including the victim's unit. *Id.* at 572. The tape "purportedly contained the actual shots fired" and "plaintive cries for help and radio control's efforts to send assistance." *Id.* The tape was played in court and a transcript of it was entered into evidence, but the tape itself was not marked or formally entered into evidence. *Id.* 5 The press was provided the

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<sup>5</sup> The court rejected an argument that because the tape itself was not admitted into evidence it was not a "public document." *Id.* at 573. Where a tape is not played for public listening in a courtroom an argument may exist that it is not a public judicial document to which the right of common law access even attaches.

transcript of the tape, but sought the actual tape after sentencing. *Id.* at 577. Relying on *United States v. Criden*, 648 F.2d 814, 829 (3rd Cir. 1981), which held that “the presumption of access may be overcome where the rebroadcast of evidence may inflict unnecessary and intentional pain on the parties who the court reasonably finds are entitled to such protection,” the *Bracey* court prohibited the dissemination of the tape to the press. *Bracey*, 15 Pa. D. & C.4th at 577.

The court in *Bracey* found that the press was not seeking its use to “disseminate timely information but rather to enliven its broadcasts by sensationalizing the death of a police officer through his own dying cries for help.” *Id.* The court, which had presided over the trial, “was able to observe firsthand the devastating effects that the death . . . has had” on the victim’s family. *Id.* The court noted, “[t]o permit the rebroadcast of the audio tape would obviously intensify the pain unnecessarily and to no public purpose.” *Id.* at 578. “The rebroadcast of this tape will not serve the public interest and would intrude severely upon the sensitive privacy rights of the victims.” *Id.*

In *U.S. v. Webbe*, 791 F.2d 103 C.A.8 (Mo.), 1986 the 8th Circuit Court of Appeals upheld the lower court’s denial of the media’s application to copy certain portions of audio tapes admitted into evidence in mail fraud the trial, noting that the news media had attended the pretrial hearings, had reported events of trial to public and had received transcripts of tapes. The court considered the impact of the release of the tapes on the defendant’s right to a fair trial under Sixth Amendment and whether the administrative difficulties in providing access to the tapes would have adversely affected the progress of the trial and, relying on the language of the court in *Belo*, 654 F.2d at 431-34 it concluded:

We think the common law requires access to information on judicial

proceedings and all evidence of record (unless ordered sealed), but this right does not necessarily embrace copying of tapes. We favor the approach of the Fifth Circuit in *Belo Broadcasting Corp. v. Clark*, 654 F.2d at 431-34. In *Belo*, the Fifth Circuit gave deference to the determination of the district court: “When the concern is the efficient administration of justice and the provision to defendants of fair trials, the consideration of competing values is one heavily reliant on the observations and insights of the presiding judge.” 654 F.2d at 431 n. 18. *Webbe*, 791 F.2d 106.

The test for release under the common law is a balancing test to be applied by the trial judge; a test in which the judge is to utilize his “informed discretion”<sup>6</sup> “to best accommodate the interests of the parties involved, including the rights of the press.” *Id.* at 107.

### **POINT III**

**IN THE CASE AT BAR THE INTERESTS OF THE MEDIA IN OBTAINING A RELEASE OF THE AUDIOTAPE ARE OUTWEIGHED BY THE INTERESTS OF DECENCY, FAIRNESS, COMPASSION AND RESPECT FOR THE VICTIMS AND SAFEGUARDING THE RIGHTS OF THE DEFENDANT.**

The case at bar requires the court to balance interests against rights; the interests of the media in sensationalizing and dramatizing the murder of Kathleen Weinstein beyond any bounds of decency versus the interests of the two victims to some semblance of fairness, compassion, respect and dignity. The death of Kathleen Weinstein is not just about the trial of murderer but also about the survival of those she left behind. When someone is murdered, there is created a river of grief that will continue to flow until everyone who ever knew that person is dead. Paragraph 7 of the affidavit of Paul Weinstein evidences this fact:

*When I became aware that the last minutes of Katherine's life were recorded on a tape, I was struck by an overwhelming sense of protection for my wife, my son and our family. These words are not from a Law & Order TV show; they are not the words memorized by some actor. They are the last desperate and fearful words of a real person, my wife, my son's mother.*

The United States Supreme Court recognized this dynamics of victimization in the landmark victims' rights case of Payne v. Tennessee, 111 S.Ct. 2597 (1991) wherein 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."* Id., at 2615-2616. (Souter, J. concurring). (Emphasis supplied).

The State of New Jersey's recognition of the rights of crime victims is not sealed in a vacuum. It is a broad, expansive and resounding declaration that when the courts are called upon to evaluate the rights of those citizens affected by their decisions, the interests of crime victims must be placed on "equal footing."

In the instant matter, the audiotape cannot be released. "*[I]t is beyond doubt that the victims' survivors would reasonably expect that they would never have to share their loved ones' words with an inquisitive media or curious public.*" *Asbury Park Press*, 374 N.J. Super. 312,

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<sup>6</sup> Warner, 435 U.S. 589.

330, 864 A.2d 446, 458. The public already has the words it did not need to read in the first place. There is no more news to give by the media, only dollars to pull in by a further exploitation of the pain of the victims.

This court is called upon to use its experience, wisdom and understanding to bring justice to this situation. Kathleen Weinstein was not a “human island . . . . “ Her death has dramatically affected her loved ones who will remain “distinctly hurt” by her death. *Payne* , 111 S.Ct. 2515-16;” *Id.* Her husband and son have been victims for almost 11 years. They will be victims for the remainder of each of their lives. There will be no experience called closure. They will survive in a society where, in order to appear and function on a normal basis, they must call upon the personal strengths within themselves. They must smile when it is painful to do so. They must grieve in their solitude in order to not affect others. That is the essence of their privacy. And to further assault their privacy by broadcasting Kathleen’s words over the airwaves for everyone to hear is not just an affront to them but to all individuals who support and respect the words of our laws; such words being “dignity, fairness, compassion and respect.”

#### **POINT IV**

**.THE WEINSTEIN ESTATE IS THE OWNER OF THE  
COPYRIGHTED TAPE AND HAS EXCLUSIVE RIGHTS TO  
AUTHORIZE REPRODUCTION AND DISSEMINATION.**

A. THE WEINSTEIN ESTATE'S RIGHTS IN THE TAPES ARE EXCLUSIVE.

Soon after the discovery of the tape, which recorded Kathleen Weinstein's plea with her abductor to spare her life, Paul Weinstein requested that his personal attorney, Carmine R. Villani, Esq., have the tape, as well as the transcript of the tape, copyrighted so that the Weinstein estate could maintain control over the dissemination of the tape and transcript and to protect the dignity and privacy of my family and my wife. See Certification of Paul Weinstein. The United States Copyright Office issued Certificates of Copyright for both the tape and the transcription of the tape on March 10, 1997. See Certification of Carmine R. Villani, Exhibits A and B.

Subject to 17 U.S.C. sections 107 through 122, the owner of copyright under 17 U.S.C. section 106 has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

The Estate of Weinstein has never authorized release of a complete transcript of the recording, or the recording itself. See Certification of Paul Weinstein.

Typically, Copyrights provide an incentive for the creation of works by protecting the owner's use of his or her intellectual creation, allowing creators to reap the material rewards of their efforts. Without question, the subject of these copyrights are in no way typical. Certainly, the recording is newsworthy. To this end, although at the request and urging of the prosecutor, the victim's husband released a copy of the transcript with the copyright notice hand-written on it by his attorney, Carmine R. Villani. See Certification of Carmine Villani, Exhibit C. A copy of the transcript was made readily available by the *Asbury Park Press's* internet posting on February 22, 2007. See Certification of Carmine Villani. Despite the release of the transcript, the news media remains unsatisfied. Apparently, under the guise of the Fair Use Doctrine, the media outlets are not seeking to obtain copies of the actual tape recordings of the last moments of Kathleen Weinstein's life, wherein her voice can be heard pleading with her abductor to spare her life.

Admittedly, not every use of a work undermines this underlying rationale of copyright law, and because some uses of copyrighted works are desirable for policy reasons, the courts have long held that many uses of a copyrighted work do not infringe upon the copyright. Codifying these longstanding "fair use" principles, Congress in the 1976 Copyright Act laid out 17 U.S.C. section 107, which reads:

The fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include –

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The four statutory fair use factors under the copyright statute do not represent a score card that promises victory to the winner of the majority; rather, each factor is to be explored, and the results weighed together, in light of the purposes of copyright. See 17 U.S.C.A. section 107. The four factors enumerated are especially relevant to the determination of whether fair use occurred, but they are not meant to exhaust the possible considerations. Harper & Row Publishers v. Nation Enter., 471 U.S. 539, 560, 85 L. Ed. 2d 588, 105 S. Ct. 2218 (1985). Likewise, the purposes listed in the preamble are illustrations of the sorts of uses likely to qualify as fair uses rather than an exclusive list. Pacific and Southern Co. v. Duncan, 744 F.2d 1490, 1494-95 (11th Cir. 1984), cert. denied, 471 U.S. 1004 (1985).

A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work. What is necessary is a showing by a preponderance of the evidence that some meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.

As is more fully set forth below, the fact that the tape has been marked into evidence should not weigh in favor of making the recording available to the public. The transcript of the recording has been released to the public. Release of the recording itself serves no other purpose, but would not just likely, but would inevitably cause incredible harm to the victim's family.



**CONCLUSION**

Based on the foregoing it is respectfully requested that the videotape or any copy thereof no be released to the media for any reason.

Respectfully submitted,

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