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STATEMENT OF FACTS

The New Jersey Victims of Crime Compensation Board (hereinafter “VCCB”) and the New Jersey Crime Victims’ Law Center (hereinafter “VLC”) are public and private victims’ rights agencies respectively. This brief is submitted jointly on behalf of both agencies in support of the application of each victims’ rights agency to appear as *amicus curiae* and argue on behalf of the rights of the crime victims in the motion filed on their behalf to compel the appearance at sentencing of the defendant Charles Cullen.

Defendant Charles Cullen has entered pleas of guilty in the Superior Court of New Jersey, Somerset County to the murder of thirteen innocent victims. He has also pleaded guilty to the attempted murder of two other individuals. His sentencing date before the court has not been scheduled as yet.

During the court proceeding when the defendant will be sentenced for his crimes, the survivors of the thirteen murder victims and the attempted murder victims are entitled to deliver to the court an in person oral victim impact statement. N.J.S.A. 52:4B-36 (n). A list of the victims of murder and attempted murder by Charles Cullen are set forth in Appendix (A-1). Attached to this brief are certifications from several victim survivors. Each certification below attests to the intent and desire of the victim to deliver to the court an in person oral victim impact statement.

1. Certification of Mary Strenko (A-2);
2. Certification of Jean Hoff (A-6);
3. Certification of John Michael Shanagher (A-9);
4. Certification of Lucille Gall (A-12).

Through his attorney, the defendant has indicated that he will not attend the sentencing

proceedings. Accordingly, when each of the victims delivers his/her victim impact statement, the individual solely responsible for each of these crimes will not be present to hear the voices and see the faces of the victims he has created through his criminal acts. In a news article in the Star Ledger dated October 17, 2004 entitled "Cullen to avoid victims' relatives -Serial killer elects to skip sentencings" the following wording appears:

“Serial killer Charles Cullen has decided he won't appear for sentencings in New Jersey courts, according to his attorney, thereby avoiding the face-to-face wrath of his victim's relatives.

"It's Charlie's call and he has been of the mind to have as few court appearances as possible," Deputy Public Defender Johnnie Mask said. "If at the time of any sentence proceeding he's still of that mind, he might just choose to waive his appearance."

The thirteen murder victims collectively are survived by parents, grandparent's spouses, children, grandchildren, brothers and sisters, and a network of other relatives and resulting in thousands of victims of these crimes. Under the authority of Article 1, paragraph 22 of the New Jersey Constitution (the Crime Victim's Rights Amendment), (Adopted December 5, 1991); N.J.S.A. 52:4B-34, et seq., (the New Jersey Crime Victim's Bill of Rights) and N.J.S.A. 52:4B-1, et seq., (the Criminal Injuries Compensation Act of 1971), the parents, grandparents, spouses, children and siblings of the individual victims named in A-1 are direct victims of these multiple crimes of murder and each is entitled to the full protection of the statutes and Constitution of the State of New Jersey.

QUESTIONS PRESENTED

- 1. SHOULD LEAVE TO APPEAR AS *AMICUS CURIAE* BE GRANTED TO THE NEW JERSEY VICTIMS OF CRIME COMPENSATION BOARD AND TO THE NEW JERSEY CRIME VICTIMS' LAW CENTER?**
- 2. SHOULD THE DEFENDANT BE COMPELLED BY THE COURT TO ATTEND THE SENTENCING PROCEEDINGS, AND BE PRESENT WHEN THE VICTIMS DELIVER THEIR ORAL VICTIM IMPACT STATEMENT TO THE COURT?**

LEGAL ARGUMENT

POINT I

LEAVE TO APPEAR AS *AMICUS CURIAE* SHOULD BE GRANTED TO THE NEW JERSEY VICTIMS OF CRIME COMPENSATION BOARD AND THE NEW JERSEY CRIME VICTIMS' LAW CENTER PURSUANT TO R. 1:13-9

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. The attached certifications of several of Charles Cullen's murder victims attest to this fact. The deaths of each of the innocent victims whose names

appear on A-1 are also about the survival of those they left behind.

N.J. Const., Article I, par.22 (hereinafter “Victim’s Rights Amendment”), N.J.S.A. 52:4B-34, et seq., (the New Jersey Crime Victim’s Bill of Rights) and N.J.S.A. 52:4B-1, et seq., (the Criminal Injuries Compensation Act of 1971), exist because the criminal justice system recognizes that a criminal justice system that is only about criminals cannot be about justice. Governmental agencies, like the VCCB and private non profit organizations such as the VLC were established and exist to safeguard the rights of the thousands of innocent individuals who become victims of violent crime each year.

It is on behalf of these victims and all victims of crime who have a right to a presence and a voice in the justice process that the VCCB and the VLC seek leave to appear as *amicus curiae* in this matter.

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-36, et. seq. This legislation that calls 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 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., Article 1, par. 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 Victims' Rights Amendment in the State of New Jersey formed a part of the national victim rights movement which has continued to move with significant measure throughout the United States. The Victims' 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 significant impact of the Victim's Rights Amendment on the criminal justice process has been recognized by the courts of this State. In State v. Muhammad, 145 N.J. 23 (1996), 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 a 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.

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 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 no less than sixty (60) new laws passed involving the rights of crime victims. (See A-14 through 23). Furthermore, there are presently pending in the New Jersey Legislature at least fifty (50) pieces of legislation affecting crime victims. (See A-24 through 26).

In recent years the courts in New Jersey have also been progressive in recognizing the rights of crime victims. See, e.g.; State v. Muhammad, 145 N.J. 23 (1996) (upholding constitutionality of death penalty victim impact statute); State v. Fauce, 244 N.J. Super. 499 (App.Div. 1990) (rights of the victim must be considered before the court can order that the defendant's plea be non-evidential in a civil proceeding); State in the Interest of J.G., N.S., and J.T., 151 N.J. 565 (1996) (Supreme Court upholds victim's rights to require HIV testing of assailant); State v. Timmendequas, 161 N.J. 515 (1999) (the Constitutional rights of the victim survivors under the Victim's Rights Amendment are sufficient to warrant a change of venue in a death penalty case); State v. Smith, 310 N.J. Super. 140 (App. Div. 1998) (permitting child

victim to testify over closed circuit television); Gallara v. Koskovich, 364 N.J. Super 418 (Law Div. 2003) (court upholds claim of liability of sporting goods store for guns stolen and used in the murder of two victims); 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) (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); and 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.) 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. The issues presented to this Court directly affect the rights of victims of crime throughout the State of New Jersey. The New Jersey Victims of Crime Compensation Board and the New Jersey Crime Victims' Law Center respectfully request permission to appear in this matter as *amicus curiae* in order to advocate these rights and give victims a direct voice in this matter.

POINT II

THE DEFENDANT SHOULD BE COMPELLED BY THE COURT TO ATTEND THE SENTENCING PROCEEDINGS, AND BE PRESENT WHEN THE VICTIMS DELIVER THEIR ORAL VICTIM IMPACT STATEMENT TO THE COURT.

A. The rights of the victims to fairness, compassion, respect and dignity in making an in person victim impact statement at the sentencing proceedings pursuant to Article 1, par. 22 of the New Jersey Constitution and N.J.S.A. 52:4b-36 (The Crime Victims Bill Of Rights) outweigh the right of the defendant to refuse to attend the sentencing proceedings.

Defendant Charles Cullen has no constitutional or statutory right to refuse to be present during the sentencing proceedings. Any asserted legal authority on his part to refuse to be present would appear to be derived from R. 3:21-4(b), which states:

“Sentence shall not be imposed unless the defendant is present or has filed a written waiver of the right to be present. Before imposing sentence the court shall address the defendant personally and ask the defendant if he or she wishes to make a statement in his or her own behalf and to present any information in mitigation of punishment. The defendant may answer personally or by his or her attorney.”

The rights of the victims originate with the State Constitution (Article 1, paragraph 22) and the statutes of New Jersey (N.J.S.A. 52:4B-36). These rights far outweigh the rights of the defendant in the case at bar, and a balancing of the respective rights of the parties mandates that the defendant be compelled to be present during the sentencing proceedings when the victims

deliver to the court their in person victim impact statements.

In the first weeks of 1991, the members of the New Jersey legislature began their aggressive efforts to have a Victims' Rights Amendment placed on the public ballot for the November 1991 general election. Having already formulated the language of the proposed amendment, the Legislature sought to make an immediate statement which would evidence its commitment to victims' rights. That statement was the enactment on March 1, 1991 of the in-person victim impact statement. N.J.S.A. 52:4B-36(n) added to the existing Crime Victims' Bill of Rights the right "[t]o make, prior to sentencing, an in-person statement directly to the sentencing court concerning the impact of the crime." The law also provided, "[t]his statement is to be made in addition to the statement permitted for inclusion in the presentence report by N.J.S.A. 2C:44-6." In order to give the crime victim the real opportunity to meaningfully exercise this right, the Assembly Judiciary, Law and Public Safety Committee emphasized in its official statement:

“The bill further requires that county prosecutor offices assist crime victims in preparing the statement for consideration by the prosecutor regarding whether to prosecute. Finally, the bill would require each county prosecutor’s office to notify crime victims of the right to make the in-person statement to the sentencing court concerning the impact of the crime.” Id.

The Supreme Court of the United States has ruled that the victim has a substantial right to be included in the criminal justice proceedings. This declaration of the rights of the victim is demonstrated in the Court's decision to permit victim impact testimony in capital murder cases. In Payne v. Tennessee, 111 S.Ct. 2597 (1991), the Court reversed its prior holding in Booth v. Maryland, 107 S.Ct. 2529 (1987), and held that it was appropriate under the Federal Constitution to give the victim a voice in the process by permitting victim impact testimony in death penalty cases. By giving the victim a voice, the Court likewise, gave the victim meaning and value in

the courts.

In a landmark victims' rights decision in 1996, the New Jersey Supreme Court followed the holding of the Court in Payne when it upheld the constitutionality of the recently enacted New Jersey statute N.J.S.A. 2C:11-3c(6) which permitted victim impact testimony in death penalty cases. See State v. Muhammad, 145 N.J. 23 (1996). Commenting on the important historical development of victims' rights in the State of New Jersey, the court in Muhammad commented:

The victim impact statute is merely one of the latest efforts by the Legislature to increase the participation of crime victims in the criminal justice system. In 1971, the Legislature enacted the Criminal Injuries Compensation Act of 1971, N.J.S.A. 52:4B-1 to -33. In 1985, the Legislature enacted the Crime Victim's Bill of Rights, N.J.S.A. 52:4B-34 to -38, which granted crime victims and witnesses certain rights, including the right to be treated with dignity, the right to be informed about the criminal justice process, and the right to be told about available remedies and social services. The following year, the Legislature amended N.J.S.A. 2C:44-6 to allow family members of murder victims to include a written statement in the defendant's presentence report. In 1991, the Legislature amended the Crime Victim's Bill of Rights to provide victims with the opportunity to submit to a representative of the county prosecutor's office a written statement about the impact of the crime on the family and to allow victims to make in-person victim impact statements in non-capital cases directly to the sentencing court. N.J.S.A. 52:4B-36. Id. at 33.

The reference by the court in Muhammad to N.J.S.A. 52:4B-36 and the right of a crime victim to become a part of the court proceedings by permitting an in-person impact statement prior to sentencing is most significant because that legislation became the first effort to implement the intent of the Victims' Rights Amendment. See N.J.S.A. 52:4B-36(n).

The words of the victim survivors in the attached certifications exemplify the purpose and

the intent of the Victim's Rights Amendment and the victim impact legislative provision.

Mary Strenko

“8. Along with so many other innocent victims, Charles Cullen took control of the life of our son Michael in his hands. As an individual who held himself out as a nurse, a healer, he looked into our eyes, as we looked to him for help and compassion. He saw our pain; he saw our anguish. Then, he turned away, and committed one murder after another.

“9. My husband Tom and I ask this court tell Charles Cullen that he is no longer in control. When he took our son from us, he shattered every fiber of our being. It is as important to me as breathing air to have Charles Cullen once again look into my eyes to personally see and to hear of the anguish he has caused. He never gave my son Michael a chance to speak but with an arrogance and hatred inside of him that I cannot fathom, Cullen sought to snuff out the life of this beautiful young man.” (A-3, A-4).

Jean Hoff

“5. I truly believe that the purpose of the victim impact statement is to give the victims the sole opportunity to bring the corners of justice together and confront the painful reality of the offender's violent act. This cannot happen without Charles Cullen being present to hear what the other victims and I have to say; not because he needs to hear it, but because the justice process must hear it with him present. To me it is simply accountability, and justice requires accountability.

“6. As difficult as it will be to speak before this court at sentencing with my dad's killer present, I know that, for my father, Cullen must be present. His presence will be a recognition that justice is about what is right, and it is the right thing for the killer of an innocent and good man to be required to be present when his loved ones, the victims left behind, speak of the painful damage caused by Cullen's crimes.”
(A-7).

Each individual victim of Charles Cullen is not just a "faceless stranger" in the criminal case

of State of New Jersey v. Charles Cullen; South Carolina v. Gathers, 490 U.S. 805, 821, 109 S.Ct. 2207, 2216 (1989), (O'Connor, J. dissenting). The lives of each of these victims will continue to have special meaning to all who knew and loved them. Each victim leaves behind a long list of loved ones who now must not allow this special meaning to be diluted by the criminal justice system whose reason for existence is based on the fact that there are victims of crime.

The words of Justice Souter in his concurring opinion in Payne v. Tennessee, III S.Ct. 2597 (1991), are profoundly applicable to the essence of this application before the court:

"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).

Each victim in this case was once a living, breathing and vibrant individual whose life brought joy and pleasure to their family and friends. To deny their loved ones 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 denies their status as crime victims. More egregiously, however, it denies the existence of each victim, the unnamed but most important party of the case of State v. Charles Cullen.

For over a decade, Cullen played judge, jury and executioner as he coldly and arbitrarily snuffed out the lives of his victims, one at a time. Their loved ones and friends sat quietly in the public courtroom throughout the plea agreement proceedings of this matter. They watched and listened as the man, cloaked in the constitutional protections of the justice system, matter of factly addressed the court about each of his crimes involving each of his victims. They had no right to speak to the court or to the defendant; just sit and listen and somehow, try to hold themselves together so as not to disrespect or disrupt the justice proceeding.

But soon it will be the time for the victims to speak, to the court and to the killer of their loved one. The right of the victim to deliver a victim impact statement in open court is perhaps the single most important right of a crime victim under the Crime Victims Bill of Rights. N.J.S.A. 52:4B-36 (n). No one can better represent the murder victim at the sentencing proceeding than that individual's loved one. The inclusion of the victim in the justice process converts a system of the mechanical processing criminals to one of truth and reality, because what is most real in this proceeding is that innocent people have been killed for no reason, and the lives of their survivors have been irrevocably shattered. The words of the victims attached to this brief are most persuasive.

John Michael Shanagher

“6. My father was 83 years old when Cullen killed him. He was known by all as “Jack”. My dad was a hard working, honest and generous man who always put his family first. He treasured each day of his life and the lives of his loved ones. My mom should not have become a victim at the age of 80, but she did. Jack's children, grandchildren and great grandchildren should not have been forced to become crime victims for the rest of our lives, but we have. Charles Cullen gave us no fairness, no compassion and no respect. Now he seeks to add further insult to injury by declaring that if he does not have the courage to face us and hear our words, then we have to once again accept his arrogance.”
(A-10, A-11).

“7. My dad was a very direct man. If he had something to say to you, he wanted to look you in the eye and tell you the truth about how he felt. When I speak before the court and give the impact statement on behalf of my family, I truly believe that my father will be right there with me. Many of my words will be his words. And Cullen must be there to look at my face and hear these words.

Lucille Gall

“4. Cullen is a murderer. I sincerely believe that the other victims and I should have some kind of right to address him in a formal situation. If the justice system is fair, then some consideration must be given to the victims. I have not seen Cullen since my brother was in the hospital. It is very important to me to see his face and say what I have to say. Not only does Cullen need to hear my words, but the justice system needs to have him present when I speak on behalf of my family.

“5. My brother’s life had so much meaning to so many people. The words evidencing the impact of our loss will be delivered to the court, and the individual who caused this loss should not be permitted to dismiss this impact in the same manner that he dismissed my brother’s life.” (A-13).

The remedies afforded to the victims by the justice system can never make this situation totally right for the victims; but it can take a major step by giving real meaning to the word *justice*. It is this real meaning that the victims seek by having Cullen there, sitting quietly as they had to do several months ago. And this time, they have the opportunity to speak, and he and the justice system will have the opportunity to hear their words. That is the closest the victims will ever get to achieving justice in these proceedings. Nevertheless, it is so critically important and necessary to them.

The constitutional rights of the victims to "fairness, compassion and respect" are substantive

rights which cannot be summarily rejected or denied. See State in the Interest of K.P., 311 N.J. Super. 123, 135-36 (Ch. Div. 1997), where the court stated:

The first substantive provision of the Victims' Rights Amendment provides that victims of crime "shall be treated with fairness, compassion and respect by the criminal justice system." N.J. Const. art. I, par. 22. 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. [FN9] "Ensuring the right of victims to appropriate treatment is perhaps the most fundamental of all rights for victims. In the absence of further legislative elaboration, the words of the provision carry their ordinary dictionary definitions. Id.

Since 1991 the State Legislature and the courts of this State have made significant advances in respecting the Victims' Rights Amendment by increasing the recognition of the rights of crime victims. To deny the victim's request in the case at bar is to deny the important advances which have been made on behalf of crime victims in the State of New Jersey. There was a time, before the victims' rights movement began in this country, when the criminal justice system was one sided and one dimensional. The scale of justice had no room for the crime victim. That has all changed in the last decade and a half due significantly to the wisdom of the judicial, legislative and executive branches of our government. There is now a balancing to the scale of justice, and as noted by the most respected Justice Benjamin Cardoza:

[J]ustice, though due the accused, is due to 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, 54 S.Ct. 330, 338, 78 L.Ed. 674 (1934) *See also*, Muhammad, supra, 145 N.J. at 45-46; K.P., supra, 311 N.J. Super. At 139.

B. R. 3:21-4(b) mandates that the defendant be personally present at the sentencing proceedings except for the portion where the court delivers the imposition of penalty, and to permit the defendant to absent himself from the entire proceedings may constitute a denial of his right to allocution resulting in reversible error in the sentencing proceedings.

New Jersey law mandates that “Any action taken by the court in imposing sentence shall be subject to review by an appellate court.” The lower court must make specific findings of fact, and “where such findings are not fairly supported on the record before the trial court”, the defendant may seek a sentence modification. N.J.S.A. 2C:44-7. A presentence investigation report ordered pursuant to N.J.S.A. 2C:44-6 and R. 3:21-2 is subject to the defendant’s review and comment. The victim impact statements delivered by the victims at sentencing under N.J.S.A.52:4B-36(n) are subject to comment by the defendant after they given. The sentencing proceeding is much more than a declaration of punishment by the court. It is an exercise in due process where the rights of the defendant must be carefully considered at each stage of the proceeding. In a case such as the one at bar where the defendant is being sentenced for thirteen murders and two attempted murders which will likely result in life in prison for him, the court must assure that the defendant’s rights are safeguarded, whether the defendant wants to or not. Allowing Cullen to dictate the tenor of the proceedings by declaring a blanket waiver of his presence is an invitation to the court for reversible error.

The defendant may waive his right to be present at the time the sentence is “imposed” by the court, but at no other stage of the proceedings. R. 3:21-4(b) provides “Sentence shall not be

imposed unless the defendant is present or has filed a written waiver of the right to be present.” The defendant’s appearance is not mandated only at that moment of the sentencing proceedings when everyone has had their say, and it is now the time for the judge to “impose” the sentence. In all other aspects of the sentencing process, the defendant must be present. The remaining language of the rule specifically requires the defendant’s presence:

“Before imposing sentence the court shall address the defendant personally and ask the defendant if he or she wishes to make a statement in his or her own behalf and to present any information in mitigation of punishment. The defendant may answer personally or by his or her attorney.” *Id.* (Emphasis supplied).

This provision gives deference to the defendant’s right of allocution. To deny the defendant his right of allocution in the case *sub judice*, where he is facing the most serious form of punishment other than death may constitute a denial of his rights to procedural due process under the Federal and State Constitutions. See State v. Marnin, 108 N.J.Super. 442, 445 (App. Div. 1970). The defendant’s right of allocution is a “personal” right, and the court must make inquiry of the defendant directly and personally in order to safeguard this right. Statements by defendant’s counsel concerning what he discussed with the defendant before the proceedings are insufficient. See generally, State v. Bey, 161 N.J. 233, 275-277 (1999) and State v. Cerce, 46 N.J. 387 (1966). The trial court should engage in a colloquy with the defendant to apprise him of his right of allocution. State v. Bey, *supra* at 275.

The precise manner in which the sentencing proceedings are conducted lies within the discretion of the sentencing judge. N.J.S.A. 2C:44-6. While Charles Cullen may desire to refrain from being present during these proceedings, his desire is subordinate under the law to the rights of the crime victims and the duty of the court to protect his right to due process of law.

Charles Cullen will suffer no impairment of any defined constitutional or statutory right if the court compels his attendance at the sentencing proceedings. However, the rights of the victims will not be so safeguarded if Cullen is allowed to arbitrarily victimize so many innocent people one more time.

The victims in this most horrible tragedy pray for justice and for finality to the court proceedings. Emotionally, they cannot take the chance that Cullen's refusal to attend the proceedings could lead to a remand for another sentencing. This prayer for justice and finality is perhaps best stated by Mary Strenko, the mother of the defendant's youngest victim, 21 year old Michael Strenko.

“10. But Cullen cannot snuff out the lives or the wills of the survivors he has left behind. I believe in my heart that although he has refused to give justice, he will nevertheless, be required to observe justice. He will be forced to accept that he no longer has control over anyone; not even himself. And I pray that this justice will be mandated when he is compelled to look into our faces and hear our voices and realize that despite his crimes, our lived ones will continue to live on.” (A-4)

CONCLUSION

Based on the foregoing it is respectfully requested that the application of the Victims of Crime Compensation Board and the New Jersey Crime Victims' Law Center for leave to appear as *amicus curiae* be granted, and that the relief requested in the motion filed on behalf of the victims be granted.

Respectfully submitted,

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State of New Jersey
Victims of Crime Compensation Board

Dated: December 20, 2004