SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000176-01T5

GERALDINE CLEMENTE,	:	Civil Action
	:	
Plaintiff-Appellant	:	On appeal from the
v.	:	Superior Court of New Jersey
	:	Chancery Division, Family Part
MICHAEL CLEMENTE	:	Monmouth County
	:	Docket No: FM-13-899-00A
Defendant	:	
	:	Sat Below:
	:	Hon. Louis F. Locasio

BRIEF OF AMICUS CURIAE
AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY FOUNDATION

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae American Civil Liberties Union of New Jersey Foundation (ACLU-NJ) is a private non-profit, non-partisan membership organization dedicated to the principle of individual liberty embodied in the Constitution. Founded in 1960, the ACLU-NJ has approximately 8,000 members in the State of New Jersey. The ACLU-NJ is the state affiliate of the American Civil Liberties Union, which was founded in 1920 for identical purposes, and is composed of over 300,000 members nationwide.

ACLU-NJ strongly supports the right to privacy and the right to be free from unreasonable searches and seizures. For privacy cases, see, e.g., Planned Parenthood v. Farmer, 165 N.J. 609 (2000) (challenging parental notification law based on right to privacy and equal protection grounds); Doe v. Poritz, 142 N.J. 1 (1995) (challenging disclosure of information pertaining to sex offenders based on right to privacy, to due process, and to be free from ex post facto punishment); Dendrite International v. John Doe No.3, 342 N.J. Super. 134 (App. Div. 2001) (involving right to post anonymous messages on Internet web sites); E.B. v. Verniero, 119 F.3d 1198 (3d Cir. 1997) (Megan's Law challenge). For search and seizure cases, see, e.g., State v. Carty, No. 49, 995 (N.J. argued Oct. 8, 2001) (involving right of troopers to conduct "consent" searches); State v. Ravatto, __ N.J. __, 77A.2d 301, 2001 N.J. Lexis 930 (2001) (involving forcible taking of blood from defendant); Joye v. Hunterdon, No. A-3017-00T2 (App. Div. appeal filed February 8, 2001) (challenging student drug testing policy); Brewley v. Borough of Paramus, No. 00-CV-3525 (D.N.J. filed June 30, 2000) (representing plaintiffs suing borough for unlawful search and seizure and use of excessive force). It has also participated as amicus curiae and in other capacities in

numerous cases involving rights guaranteed by the federal and state constitutions. V.C. v. M.J.B., 163 N.J. 200, 218 (2000); J.B. v. M.B., __ N.J. __, 2001 N.J. Lexis 955 (2001); Boy Scouts of America v. Dale, 160 N.J. 562 (1999), rev'd, 530 U.S. 640 (2000); South Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Elementary Sch., 150 N.J. 575 (1997); State in Interest of J.G., 151 N.J. 565 (1997); Mourning v. Correctional Medical Services, 300 N.J. Super. 213 (App. Div.), certif. denied, 151 N.J. 468 (1997); Rutgers Council of AAUP Chapters v. Rutgers, 298 N.J. Super. 442 (App. Div. 1997), certif. denied, 153 N.J. 48 (1998); C.K. v. New Jersey Dep't of Health & Human Servs., 92 F.3d 171 (3d Cir. 1996); Presbytery of New Jersey v. Florio, 902 F. Supp. 492 (D.N.J. 1995), aff'd, 99 F.3d 101 (3d Cir. 1996), cert. denied, 117 S. Ct. 1334 (1997); Liang v. Immigration and Naturalization Service, 206 F.3d 308 (3d Cir. 2000), petition for cert. filed, 69 USLW 3346 (Nov. 2, 2000); United States v. Velasquez, 37 F. Supp.2d 663 (D.N.J. 1999).

The participation of amicus curiae will assist this Court in the resolution of the issues of public importance raised by this case by providing the legal context, both state and federal, in which to analyze the facts of this case. The participation of amicus curiae is particularly appropriate in cases with "broad implication," Taxpayers Assoc. of Weymouth Twp. v. Weymouth Twp., 80 N.J. 6 (1976), *cert. denied*, 430 U.S. 977 (1977), or in cases of "general public interest." Casey v. Male, 63 N.J. Super. 255 (Co. Ct. 1960). This is just such a case.

ARGUMENT

I. COURT-ORDERED SURVEILLANCE IN THE HOME VIOLATES THE PARTIES' FUNDAMENTAL RIGHTS OF RESIDENTIAL PRIVACY AND TO BE FREE FROM UNWARRANTED SEARCH AND SEIZURE

In both scope and intrusiveness, the order from which this appeal is taken is unprecedented. It opens the home, the most private of places, to comprehensive outside scrutiny. The surveillance it requires is constant, pervasive and inescapable. On a continuing daily basis, it exposes and records the most intimate activities of its two adult subjects, their children, and anyone else who might be present. All this is done without any government interest, much less a compelling government interest, justifying the intrusion on fundamental rights. As such, it violates the parties' right to privacy and right to be free from unreasonable searches and seizures.[1]

The trial court 's order of July 31, 2001 provides that:

> There shall be audio and video surveillance of every room in Geraldine Clemente's house except the bathrooms. There shall be audio and video surveillance of every room in Michael Clemente's house except the bathrooms. Each party shall pay for the cost of the installation of this equipment in their own house. The purpose of said surveillance shall be so that the other party can see and hear what is going on in the other's home and can verify same through said equipment. The original audio and videotapes that are generated through this surveillance shall be exchanged between the parties every five (5) days. The tapes generated by the surveillance on Geraldine Clemente's house, shall be totally outside of her care, custody and control and likewise the tapes made from the surveillance on Michael Clemente's house shall be totally outside of his care, custody and control. If they so desire, each party shall be entitled to a copy of the tapes generated from the surveillance on their own house. The audio/visual tapes generated in compliance with this Order may be presented as evidence in future proceedings between the parties. The

[1] This Court may, and should, reach constitutional issues not raised below, where, as here, justice and the public interest demand it. Deerfield Estates, Inc. v. East Brunswick Tp., 62 N.J. 115 (1972); Meeker v. Meeker, 52 N.J. 59 (1968).

> collection of the original tapes, the exchange of said tapes as well as any copying thereof, shall all be performed by a bonded security company.

This order is unconstitutional on its face. To permit such a video surveillance regime in an individual's home is to violate the core value of the First, the Fourth, and the Fourteenth Amendments, as well as of their state constitutional analogues. No governmental interest is weighty enough to compromise these constitutional guarantees of individual privacy, integrity and autonomy.

Indeed, this is a simple case -- for even if there might exist some extraordinary circumstance that would justify the trial court's order, nothing remotely resembling that circumstance is present here. The Clementes were divorced on May 10, 2001, and frequently sought judicial intervention to resolve visitation and financial issues before and after the judgment of divorce. Their sixteen-year-old daughter complained that Michael Clemente was verbally abusive. There are no allegations of criminal conduct.[2] Based on this allegation of verbal abuse, the trial court ordered video surveillance in every room, except the bathrooms, of both parties' homes. The trial court declined to stay its surveillance order pending appeal. This Court granted a stay on October 1, 2001.

A. The Surveillance Order Violates the Fourth Amendment on its Face

The trial court's order is as shocking and bizarre as it is unjustified. The order has the Orwellian effect of turning both Geraldine and Michael Clemente, their children, and anyone else who enters their homes, into unwilling participants in a never-ending reality television show. The order subjects both parties to omnipresent surveillance, scrutiny, and criticism.

[2] These are the relevant facts as understood by amicus, to which the entire record has not been provided.

The installation of cameras in the two homes of adverse litigants constitutes a court-ordered search, albeit one to be carried out by the adverse parties rather than by the court itself or authorized law enforcement personnel. As such, it is subject to the confines of the Fourth Amendment -- and it dismally fails to meet the standards the amendment requires.

The Fourth Amendment provides that

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by an Oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

"The basic purpose of this Amendment … is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." Berger v. New York, 388 U.S. 41, 53 (1967). See also Weeks v. United States, 232 U.S. 383, 391 (1914) ("The effect of the Fourth Amendment is to put the courts of the United States … under limitations and restraints as to the exercise of such power … and to forever secure the people … against all unreasonable searches and seizures under the guise of law"). The Fourth Amendment right of privacy is enforceable against the states through the Due Process Clause of the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 25, 27 (1961).

The Fourth Amendment clearly embodies the fundamental right of privacy in the home. "At the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Kyllo v. United States, __ U.S. __, 2001 U.S. Lexis 4487 (2001) (thermal imaging), quoting Silverman v. United States, 365 U.S. 505, 511 (1961). The aphorism that "a man's house is his castle" dates from at least 1604, and the

Fourth Amendment has continuously been cited to for the concern with having the doors of citizens' homes "broken open" by the government. See Wilson v. Layne, 526 U.S. 603, 610 (1999) (media ride-along violates the 4th Amendment).

The Fourth Amendment creates basic requirements: probable cause to believe that a specific crime has been or will be committed, supported by oath or affirmation, and a particular description of the person, place or thing to be searched. These Fourth Amendment requirements apply to video surveillance, and court orders may be stricken if the government - in this case, the family part judge - fails to follow these requirements. United States v. Mesa-Rincon, 911 F.2d 1433 (10th Cir. 1990). Indeed, electronic surveillance, which uses technology to "break open doors," now poses far greater threats to privacy than the physical searches and seizures that the Fourth Amendment was originally envisioned to prohibit. See, e.g., Kyllo v. United States, supra.

The trial court's order clearly offends the search and seizure requirements, as it compels general invasions of the sanctity of both parties' homes and the privacy of their lives without reciting any particularized facts showing that any particular offense has been or is being committed. As such, through the trial court's order, "[t]he purpose of the probable-cause requirement of the Fourth Amendment, to keep the state out of constitutionally protected areas until it has reason to believe that a specific crime has been or is being committed, is wholly aborted." Berger, 388 U.S. at 59.

B. The Order Fails Every Rational Statutory Criterion Relating to Electronic Surveillance

The trial court's surveillance order not only fails the probable cause and particularity requirements of the Fourth Amendment, but also every fundamental criterion adopted by the state legislature and Congress to meet the government's

constitutional obligations in using video surveillance. United States v. Karo, 468 U.S. 705 (1984) (higher degree of probable cause for more intrusive searches).

In Berger, supra, 388 U.S. 41 (1967), and Katz v. United States, 389 U.S. 347 (1967), the United States Supreme Court ruled that electronic surveillance was a search and seizure covered by the privacy protections of the Fourth Amendment. In Berger, the Court condemned lengthy, continuous or indiscriminate electronic surveillance, but in Katz it indicated that short surveillance, narrowly focused on interception of a few conversations, was constitutionally acceptable if approved by a judge in advance. In the legislative responses that followed, Congress and the state legislature have established fundamental criteria for electronic searching, based on the probable cause and particularity requirements of the Fourth Amendment.

The requirements for electronic interception are higher than for standard searches. Electronic surveillance picks up private conversations, most of which will usually have nothing to do with any illegal activity, over a long period of time. Because it is indiscriminate, and because people regard their conversations as more private than their possessions, electronic interception poses a greater potential threat to personal privacy than physical searches. “Television surveillance is identical *in its indiscriminate character* to wiretapping and bugging. It is even more invasive of privacy, just as a strip search is more invasive than a pat-down search, but it is not more indiscriminate: the microphone is as ‘dumb’ as the television camera; both devices pick up anything within their electronic reach, however irrelevant to the investigation.” United States v. Torres, 751 F.2d 875, 885 (7th Cir. 1984) (emphasis in original). Accordingly the requirements for a valid intercept warrant are higher than those for conventional searches.

The New Jersey Wiretapping and Electronic Surveillance Control Act, N.J.S.A. 2A:156A et seq., is the legislature's carefully considered and constitutionally valid effort to implement the requirements of the Fourth Amendment with regard to the unconventional type of order that is used to authorize electronic surveillance. The statute is clearly written to conform to the constitutional requirements of the Fourth and Fourteenth Amendments as explicated by the United States Supreme Court in Berger, Katz, and their progeny. It provides that wiretap order must state (1) that the judge is authorized to issue the order; (2) the identity of the person whose communications are to be intercepted; (3) the character and location of the place to be surveilled; (4) a particular description of the type of communication to be intercepted and a statement of the "particular offense to which it relates"; (5) the identity of the investigator or law enforcement officer who is authorized to intercept the communications; and (6) the period of time during which interception is authorized. N.J.S.A. 2A:156A-12.

Congress adopted similar guidelines for electronic surveillance in Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-20, and the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-11 (1982).

These legislative efforts protect privacy from intrusion even in cases where, in contrast to this case, the police power is invoked, there are allegations of criminal conduct, and there may be a compelling governmental interest in safety and law enforcement. Six fundamental criteria serve the probable cause and particularity requirements of the Fourth Amendment in the criminal context:

> (1) The court must have jurisdiction to authorize a surveillance order;
>
> (2) There must be a showing of probable cause that a particular person is committing, has committed, or is about to commit a crime;

> (3) The order must particularly describe the place to be searched and the things to be searched in accordance with the Fourth Amendment;
>
> (4) The order must be sufficiently precise so as to minimize the recording of activities not related to the crimes under investigation;
>
> (5) The judge issuing the order must find that normal procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or appear to be too dangerous; and
>
> (6) The order must not allow the period of surveillance to be longer than necessary to achieve the objective of the authorization.

See United States v. Williams, 124 F.3d 411, 416 (3d Cir. 1997); Mesa-Rincon, supra, 911 F.2d at 1437; Torres, supra, 751 F.2d at 882.

The trial court order overwhelmingly fails these criteria. In this case, a family part judge ordered surveillance of two households where there have been no allegations of criminal conduct. The order does not identify any specific illegal conduct that it seeks to uncover; to the contrary, the order mandates indiscriminate surveillance of all activity in almost every room of the houses and, thus, surveillance of anyone who comes into either house. There is no description of the type of communication to be intercepted; the order permits the parties to surveil everything that occurs outside the bathrooms. The order does not contain a particular description of criminal conduct to be recorded, unlawful communications to be intercepted, or offenses to which the police power would apply.

As mentioned, the trial court found no probable cause for belief that the Clementes were committing, had committed or were about to commit a particular offense. There is no allegation of criminal conduct whatsoever. Neither parent has been accused of physical abuse. Indeed, even if allegations existed which amounted to criminal

conduct, the trial court's obligation would have been to explore other remedies, through DYFS, a restraining order, or supervised visitation, at the very least.

Nowhere does the order require that the interception be conducted in such a way as to minimize the interception of communications not otherwise subject to interception. The purpose of the minimization requirement is to avoid the recording of activity by persons with no connection to the conduct under investigation, who happen to enter an area covered by a camera. Mesa-Rincon, 911 F.2d at 1441. The New Jersey statute provides that "every order entered shall require that interception begin and terminate as soon as practicable, and be conducted in such a manner as to minimize or eliminate the interception of such communications not otherwise subject to interception." N.J.S.A. 2A:156A-12. The trial court's order plainly violates both the letter and the spirit of this provision.

The lack of adequate judicial supervision is also stunning. The order does not provide for reports to the court; to the contrary, it orders the adverse parties to exchange tapes with each other. It does not prevent redisclosure; it gives the parties free rein to peer at each other, invite third parties to peer with them, and to make copies of tapes for any purpose at all. Third parties crossing the thresholds of the Clementes' homes will likewise be recorded indiscriminately, for no reason at all, without notice, without regard to the interests of the parties or the court.

Finally, the order allows the interception to continue indefinitely, for an unspecified period unrelated to achieving any clear objective. This violates statutory provisions that were clearly important to the legislature and Congress. See, e.g., N.J.S.A. 2A:156A-12 (20-day limit for electronic surveillance).

C. The Trial Court's *Parens Patriae* Authority Must Be Exercised Within Constitutional Limits

The surveillance order may have been the trial court's effort to exercise its *parens patriae* authority over a family conflict – yet, as explained above, it clearly exceeded its boundaries of permissible authority. It has inserted itself into a family dispute in a manner that creates a tyrannical police state, conferring superhuman powers of observation, following the adverse parties from room to room, permitting them to monitor more than one room at a time, and compiling a permanent record of facial expressions, verbal inflections, and fleeting exchanges, both good and bad. Indeed, far from curing the acrimony in the family, the order would empower the Clementes to harass and tyrannize each other on a scale that did not exist during the marriage.

The *parens patriae* power derives from the inherent equitable authority of the sovereign to protect those persons within the state who cannot protect themselves because of an innate legal disability. In re Grady, 85 N.J. 235, 259 (1981). The Clementes are competent adults and suffer no legal disability.

As for the best interests of the children, the order utterly fails them. Assuming the state's interest in the children is compelling, the *parens patriae* authority does not empower the trial court, in fashioning such an order, to circumvent the fundamental limitations placed on the power of the government over individual citizens. The government's interest is hardly compelling when all a court has before it is the unsolicited suggestion of a teenager. Video surveillance is not the best, much lest the least restrictive way of protecting the state's interest in the child or the family. Counseling, anger management, supervised visitation, and other resources are available in lieu of a 24-hour peep show.

D. The Order Violates the Reasonable Expectation of Privacy in the Home

One reason the confines of the Fourth Amendment must be strictly adhered to in a case such as this is that the privacy of the home embodies a fundamental right, woven into the very fabric of the Constitution. Berger, 388 U.S. at 50. As such, it may not be violated unless the state - in this case, the trial court - identifies a compelling governmental interest, and meets a heavy burden to prove that it has adopted the least restrictive means to serve that governmental interest. See, e.g., Roe v. Wade,410 U.S. 113 (1973) (intrusions upon fundamental privacy rights subject to strict scrutiny). Here, there simply is no governmental interest, much less a compelling government interest, that could begin to justify the intrusion imposed by the surveillance order.

Further, courts have held that because video surveillance is so menacing to privacy, the level of scrutiny to be applied is extraordinarily strict. Arizona v. Hicks, 480 U.S. 321, 325 (1987); Maryland v. Garrison, 480 U.S. 79, 87 (1987). Video surveillance is an extraordinarily intrusive method of searching. Mesa-Rincon, 911 F.2d at 1442. "It [is] inarguable that television surveillance is exceedingly intrusive, especially in combination (as here) with audio surveillance, and inherently indiscriminate, and that it could be grossly abused - to eliminate personal privacy as understood in modern Western nations." Torres, supra, 751 F.2d at 882.

The order grossly violates fundamental First Amendment values as well. It is obviously meant to encourage self-censorship, suppressing speech and other protected forms of expression. Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 759 (1988). It fails strict scrutiny under the First Amendment for the same reasons applicable

in the Fourth Amendment context. Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

There is no governmental interest, much less a compelling interest, involved in this case. The order compels the adverse parties to undress in front of cameras in their bedrooms or retreat to the bathroom, but does not explain the reasons for compelling the adverse parties to spy on each other. Verbal abuse, even if it exists, does not rise to the level of a compelling interest. Further, the trial court made no effort to tailor its order to serve the needs of the state. Most notably, the order extends to the mother's home, for which no allegations of verbal abuse have been made.

In contrast to this trial court's decision, many courts have recognized that, if ever there was a reasonable expectation of privacy, divorcing litigants have one in their homes. In Scott v. Scott, 277 N.J. Super. 601 (Ch. Div. 1994), the court imposed punitive damages upon an ex-husband for "willful and wanton disregard of the privacy interests of his wife," id. at 616, when he surreptitiously taped her telephone conversation. In M.G. v. J.C., 254 N.J. Super. 470, 473 (Ch. Div. 1991), the court sanctioned an ex-husband who taped his ex-wife's telephone conversations and disclosed their content to a third party. See also State v. Lane, 279 N.J. Super. 209 (App. Div. 1995) (husband unlawfully taped telephone calls between his ex-wife and her mother); Cacciarelli v. Boniface, 325 N.J. Super. 133 (Ch. Div. 1999) (father had authority to consent for his children and tape their telephone conversations with their mother); D'Onofrio v. D'Onofrio, 2001 N.J. Super. Lexis 365, (App. Div. September 11, 2001).

Clearly, this case is unprecedented in New Jersey for the simple reason that the trial court's order extends far beyond the limits of what any reasonable person would

consider appropriate. To place audio and video surveillance in every room of someone's house is in fact so highly offensive it would meet the requirements for the tort of unreasonable intrusion upon seclusion.

The Restatement (Second) of Torts § 652(b) describes the tort of unreasonable intrusion thus:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to the reasonable person.

See also Tellado v. Time Life Books, Inc., 643 F. Supp. 904 (D.N.J. 1986); Figured v. Paralegal Technical Services, 231 N.J. Super. 251, 256 (App. Div. 1989); Bisbee v. John C. Conover Agency, 186 N.J. Super. 335, 339 (1982) (adopting Restatement analysis).

An intrusion is "highly offensive" if, as here, it involves activities which would be of a "highly intimate nature," such as would occur in the privacy of one's bedroom. Medical Lab. Management Consultants v. ABC, 30 F.Supp.2d 1182, 1188 (D. Ariz 1998). See also Speer v. Department of Rehabilitation & Correction, 646 N.E.2d 273 (Ohio Ct. Cl. 1994) (monitoring in area of workplace generally considered private, such as restroom, would constitute actionable invasion of privacy); Shulman v. Group W Prods., Inc., 955 P.2d 469 (Cal. 1998). The United States Court of Appeals for the Eighth Circuit has in fact held individuals liable for this tort for utilizing video cameras to videotape persons changing clothes – exactly the type of personal activity which the court-ordered video cameras in this case would capture and which would have to be turned over to the ex-spouse. Doe v. B.P.S. Guard Services, Inc., 945 F.2d 1422 (8th Cir. 1992).

Simply put, the surveillance order at issue is not only outrageous and unprecedented, but fails every standard of review, under every tier of scrutiny contemplated by the federal constitution, and must be stricken.

II. THE ORDER VIOLATES THE PRIVACY PROVISIONS OF THE NEW JERSEY STATE CONSTITUTION

Under the State Constitution, privacy takes the form of a right to be free from state interference on illegitimate grounds. The trial court's order violates this fundamental right.

The New Jersey Supreme Court finds the right of privacy in two paragraphs of Article I of the state constitution, even though the word "privacy" does not appear anywhere in the charter. Paragraph 7 of Article I provides a privacy right in the context of search and seizure:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated….

The first paragraph of Article I provides that

> All persons are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying life and liberty, of acquiring, possessing and protecting property and of pursuing and obtaining safety and happiness.

With respect to both paragraphs, the New Jersey Supreme Court has departed from the federal constitutional standard. "Although the state constitution may encompass a smaller universe than the federal constitution, our constellation of rights may be more complete." Right to Choose v. Byrne, 91 N.J. 287, 300 (1982).

In State v. Alston, 88 N.J. 211, 227-228 (1981), for example, the Court stated that the "reasonable expectation of privacy" was a vague standard subject to the potential for inconsistent and capricious application, which may run contrary to the state constitution. Thus, telephone billing records are private under the state constitution, though not under the Fourth Amendment. State v. Hunt, 91 N.J. 338 (1982).

As to search and seizure, the trial court's order offends the state constitution for the reasons it violates the Fourth Amendment. "A warrantless search is presumed invalid unless it falls within one of the recognized exceptions to the warrant requirement." State v. Cooke, 163 N.J. 657, 664 (2000).

As a source of individual freedoms (in contrast to the United States Constitution, which grants limited enumerated powers to the federal government), the state constitutions recognizes liberty interests more extensive than those independently protected by the Federal Constitution, Mills v. Rogers, 457 U.S. 291, 300 (1982). See generally, Brennan, "State Constitutions and the Protection of Individual Rights." 90 Harvard L. Rev. 489 (1977).

The New Jersey Supreme Court has recognized privacy as a fundamental right, from conception, Right to Choose, supra, to the "right to die." In re Quinlan, 70 N.J. 10 (1976), cert. denied. sub nom. Garger v. New Jersey, 429 U.S. (1976).

Governmental interference with the right to privacy found in Article I can be justified only by a compelling state interest. State v. Saunders, 75 N.J. 200, 217 (1977). "Whether one defines that concept as a right to intimacy and a freedom to do intimate things, or a right to the integrity of one's personality, the crux of the matter is that governmental regulation of private personal behavior under the police power is sharply

limited." Id. at 213. This principle applies to the first paragraph of Article I as well as the seventh. See, e.g., Quinlan, 70 N.J. At 41 ("We think that the state's interest *contra* weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims."); State v. Baker, 81 N.J. 99, 109 (1979) (privacy extends to the right of unrelated people to live as a single unit); In re Grady, 85 N.J. 235, 250 (1981) (the right to sterilization, which "bears so vitally upon a matter of deep personal privacy may also be considered an integral aspect of the 'natural and inalienable' right of all people to enjoy and pursue their individual well-being and happiness"); Right to Choose v. Byrne, 91 N.J. 287 (1982) (individual privacy would be sufficient to restrict the legislature's exercise of authority); Greenberg v. Kimmelman, 99 N.J. 552 (1985) (the right to familial association is "a vital part of life in a free society"); Doe v. Poritz, 142 N.J. 1 (1995) (privacy interest in home address); Planned Parenthood v. Farmer, 165 N.J. 609 (2000) (parental notification statute unduly burdened the right of minors to make the intensely personal decision whether to become parents); V.C. v. M.J.B., 163 N.J. 200, 218 (2000) (privacy extends to the fundamental right of a legal parent to the care, custody and nurture of one's child); J.B. v. M.B., __ N.J. __, 2001 N.J. Lexis 955 (2001) (rights of personal intimacy, marriage, sex, family, and procreation provide framework for resolving dispute regarding frozen embryos).

With respect to privacy, the government's burden is heavier under the New Jersey Constitution than under the federal. In Grady, the Supreme Court noted that "governmental intrusions into privacy rights may require more persuasive showing of a public interest under our state constitution than under the federal constitution." 85 N.J. at 249. Moreover, "even if the governmental purpose is legitimate and substantial, the

invasion of the fundamental right of privacy must be minimized by utilizing the narrowest means which can be designed to achieve the public purpose." In re Martin, 90 N.J. 295, 318 (1982) (balance government's need of information against the individual's right of confidentiality).

This means that the trial court had a compelling obligation to make a strong connection between the need for its surveillance and the governmental interest to be served. There being no governmental interest, much less any rationale for surveillance, the order must be stricken.

The surveillance order insults the most treasured and fundamental privacy interest guaranteed by the federal and state constitutions and, as such, demands the highest level of scrutiny. No governmental interest can overcome the insult.

CONCLUSION

For all the reasons set forth above, this Court should reverse the trial court's order requiring the parties to place audio and video surveillance equipment in their homes.

Grayson Barber
GRAYSON BARBER, L.L.C.

Edward Barocas
AMERICAN CIVIL LIBERTIES UNION
OF NEW JERSEY FOUNDATION

Dated: October 31, 2001