

**IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION, AT NASHVILLE**

THE TENNESSEAN, ET AL.,
Petitioners—Appellees,

v.

**METROPOLITAN GOVERNMENT OF NASHVILLE
AND DAVIDSON COUNTY,**
Respondent—Appellant,

**DISTRICT ATTORNEY VICTOR JOHNSON,
STATE OF TENNESSEE,
JANE DOE,**
Intervenors—Appellees.

ON APPEAL FROM THE CHANCERY COURT
FOR THE TWENTIETH JUDICIAL DISTRICT
THE HONORABLE RUSSELL S. PERKINS, CHANCELLOR
CASE No. 14-156-IV

**REPLY BRIEF
OF INTERVENOR—APPELLEE JANE DOE**

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ARGUMENT

The Public Records Act does not mandate disclosure of records about a crime if such disclosure would result in harm to the victim.

This is the fundamental argument that Ms. Doe makes on appeal, and it is firmly rooted in Tennessee law. Specifically, the constitutional and statutory rights afforded to victims bar disclosure of records under the Public Records Act in two limited circumstances: (i) when those records are reasonably likely to lead to intimidation, harassment, and abuse of a crime victim, or (ii) when release of the requested records is incompatible with treating the victim with dignity and compassion. These rights are “provided by state law,” and thus are indistinguishable from other exemptions recognized by this Court. By enacting these laws to protect victims, the people of Tennessee and their Legislature have created substantive rights rather than empty promises.

Ms. Doe does not propose a blanket prohibition on newsgathering, or seek to “control . . . pretrial publicity,” as the petitioners cynically suggest. *See* App. Reply Br. at 17. On the contrary, her position reflects the common-sense judgment of the people of Tennessee and their representatives in the Legislature that a victim should not suffer additional harm at the hands of the government—whether that result flows from the procedures used in court or, as here, from the public release of information about the victim and the crime that she has suffered. This rule does not require the Court to adopt an exemption from disclosure on public policy grounds nor substitute its views for those of the Legislature. On the contrary, Ms. Doe only seeks to enforce the law as it is written.

The petitioners disagree. They present the Court with the argument that the victims’ rights provisions do not mean what they say and—more broadly—that crime

victims have *no* rights in the context of a public records case. Under the petitioners' view of the law, victims who will be harmed by the release of records gathered in the course of a police investigation have no recourse—*none*—to prevent disclosure of those records. This position is extreme. It is unsupported by legal authority. And, as the brevity and guile of the arguments in their reply brief make clear, the petitioners simply do not have a good answer for why this Court should ignore the plain text of Tennessee law.

Throughout their reply brief, the petitioners fail to fairly address or rebut the legal arguments put forth by Ms. Doe. Nor do they offer any substantive arguments of their own. Consider each of their arguments: (i) They claim that this Court should not recognize a victims' rights exemption because it is an issue of first impression; (ii) They allege that the cases cited in Ms. Doe's brief are "inapposite" because Tennessee's victims' rights laws do not provide an enforcement mechanism; (iii) They argue that, because Tennessee law does not use the word "privacy," this Court has no authority to protect a victim from harm; and (iv) They assert that the constitutional provision protecting victims' rights merely "complements statutory provisions, such as the Rape Shield Law," and has no independent force. None of these arguments has merit.

The petitioners' first argument should be dismissed out of hand. Petitioners argue that "[n]o Tennessee court has found that 'victims' rights' should be declared to be a new exemption to the Public Records Act, and this Court should not be the first." App. Br. at 17. But, of course, the same was true whenever this Court has been confronted with an assertion of an implied exemption for the first time. *See Ballard v. Herzke*, 924 S.W.2d 661, 662 (Tenn.1996) (recognizing exemption for records under civil protective order); *Swift v. Campbell*, 159 S.W.3d 565, 576 (Tenn. Ct. App. 2004) (recognizing exemption

for records protected by Rule 16); *Arnold v. City of Chattanooga*, 19 S.W.3d 779, 786 (Tenn. Ct. App. 1999) (recognizing exemption for records protected by Tenn. R. Civ. P. 26.02). As in those cases, the fact that this case is the first case in which the asserted exemption is raised says nothing about the legal merits of that exemption. This is not a case where numerous courts have rejected Ms. Doe’s position and she is asking this Court to buck the trend. It is simply a matter of first impression, and this Court should address the asserted exemption on the merits.

The second argument of petitioners fares no better. Confronted with numerous cases in which courts have read victims’ rights provisions to provide substantive rights to victims, *see* Doe Opening Br. at 13-18 (detailing six such cases), the petitioners respond by baldly claiming (without any supporting legal argument) that these cases are “inapposite,” *see* App. Reply Br. at 17. They then level the accusation that Ms. Doe “fail[ed] to mention the fact that the Tennessee Victims’ Bill of Rights does not give victims an enforcement mechanism to assert alleged individual rights.” App. Reply Br. at 17-18. The petitioners proceed to cite provisions of federal law and New Jersey law that they suggest are to the contrary. *Id.* But their single-sentence rejoinder and citation is highly misleading.

It is misleading because petitioners take the New Jersey statute and case law out of context. They attempt to distinguish the case cited by Ms. Doe, *State in Interest of K.P.*, 709 A.2d 315 (N.J. Ch. Div. Dec. 29, 1997), by citing a provision of New Jersey law—subsection (r) of N.J. Stat. Ann. § 52:4B-36—that provides victims with standing “in any court before which a proceeding implicating the rights of the victim is being held.” Their argument (albeit brief and implicit) is that, because New Jersey has such a

statute on the books and Tennessee does not, then the holding in *State in Interest of K.P.* is not relevant to this case. But the petitioners neglect to mention, or fail to notice, that sub-section (r) was not enacted and added to the New Jersey Crime Victim's Bill of Rights until 2012, which was more than fifteen (15) years after *State in Interest of K.P.* was decided. *See* 2012 NJ Sess. Law Serv. Ch. 27 (ASSEMBLY 2380) (West) (amending § 52:4B–36 to add language and new sub-sections). In fact, subsection (r) codifies the holding of *K.P.*, which found that “the legislative intent [of the New Jersey Crime Victim's Bill of Rights] is more in line with considering the victim's position [on litigated issues] as opposed to ignoring it.” 709 A.2d at 320. Thus, *K.P.* is particularly relevant to the present case: neither New Jersey in 1997 nor Tennessee today has an explicit “standing” provision for victims. Nonetheless, the New Jersey court stated that

[i]t is difficult . . . to imagine that the Legislature intended to give victims these expansive rights, yet specifically intended that they should not be a factor for a court to consider when there is compelling evidence that a detrimental effect upon a victim will occur if the court ignored their request.

709 A.2d at 320. The same reasoning applies here with respect to public records requests.

The petitioners' attempt to distinguish federal law suffers from similar flaws. Although it is true that federal law provides victims with an explicit enforcement mechanism in 18 U.S.C. § 3771(d),¹ the cases cited by Ms. Doe in her opening brief do not rely on that provision. *See United States v. Kaufman*, No. 04-40141, 2005 WL 2648070 *1 (D. Kan. Oct. 17, 2005) (noting that the court directed, on its own motion, that graphic videos not be displayed to the public trial audience “[i]n light of the congressional mandate to protect the privacy and dignity of victims under the Crime

¹ The petitioners' reply brief mistakenly cites this statute as “18 U.S.C. § 1377(d)(1).” App. Reply Br. at 18. They mean to refer to § 3771(d)(1).

Victims' Rights Act, 18 U.S.C. § 3771"); *United States v. Patkar*, No. 06-cr-00250, 2008 WL 233062 (D. Haw. Jan. 28, 2008) (denying the AP's motion for access to the case file even without the victim's participation in the proceeding); *United States v. Madoff*, 626 F. Supp. 2d 420, 425-28 (S.D.N.Y. 2009) (upholding a request by the government, rather than the victims, to withhold identifying information about some of the victims); *United States v. Robinson*, Cr. No. 08-10309-MLW, 2009 WL 137319, at *1-3 (D. Mass. Jan. 20, 2009) (deny the motion of a newspaper seeking disclosure of the identity of a victim again without that victim's participation in the proceeding); *Gueits v. Kirkpatrick*, 618 F. Supp. 2d 193, 198 n.1 (E.D.N.Y. 2009) *rev'd on other grounds*, 612 F.3d 118 (2d Cir. 2010) (deciding *sua sponte* not to publish the victim's name in a court decision "out of respect for her dignity and privacy"). In all of these cases, the federal courts analyzed the substantive provisions of the federal law rather than the procedural provision cited by the petitioners. Accordingly, the petitioners' alleged distinction does nothing to actually distinguish the holdings of these cases—all of which recognize that victims' rights laws should be treated as "meaningful rights, and not [as] a simple laundry list of aspirational goals as to how the government and courts should treat victims." *Patkar*, *supra*, at *5.

The petitioners' third argument is equally unpersuasive. Although the rights afforded to victims in the federal Crime Victims Rights' Act ("CVRA") are almost perfectly aligned with those in Tennessee law, the petitioners attempt to distinguish them. They do so by creating a straw man. Specifically, the petitioners note that the CVRA includes the word "privacy" and Tennessee law does not. They then allege that Ms. Doe is attempting to assert a "'privacy' exemption to the Public Records Act" and that "[t]his Court has no authority to create such an exception." App. Reply Br. at 18. But Ms. Doe

has never made this argument. She does not assert a vague “privacy” interest; she asserts an interest to be free from “intimidation, harassment and abuse” and to “[b]e treated with dignity and compassion.” These rights are explicitly enumerated in Article I, § 35 of the Tennessee Constitution and Tenn. Code Ann. § 40-38-102(a). Moreover, even when making this argument, the petitioners hide the ball by redacting the federal statute. *See* App. Reply Br. at 18. When read in full, the complete federal provision affords victims “[t]he right to be treated with fairness and with respect for the victim’s dignity and privacy.” 18 U.S.C. § 3771(a)(8). This language is closely analogous to Tennessee law, which affords victims “the right to . . . [b]e treated with dignity and compassion.” Tenn. Code Ann. § 40-38-102(a)(1). Both jurisdictions place an emphasis on the “dignity” of the victim. Yet nowhere in their briefs do the petitioners grapple with these terms or even attempt to explain how the requested release of records would be consistent with treating Ms. Doe with “dignity and compassion.”

This is not the only argument of petitioners that collapses upon close examination. For example, they claim in their summary of argument that “[t]he Tennessee Victim’s Bill of Rights has been held to have no application in a civil case.” App. Reply Br. at 2. Notably, they do not cite any case to support this proposition nor mention the argument again in their brief. And if, by that statement, the petitioners meant to refer to the case of *Denson v. Benjamin*, 1999 WL 824346 (Tenn. Ct. App. Aug. 12, 1999), which they cite in their opening brief, then their description of it here is simply incorrect. As Ms. Doe explained in her opening brief, *see* Doe Br. at 19-20, *Denson* cannot be contorted to “hold” anything of the sort.

The petitioners' fourth assertion is similarly without merit. They contend that the constitutional amendment protecting victims' rights under the Tennessee Constitution, Art. I, § 35, does not "create an exemption to the Tennessee Public Records Act" but only "complements statutory provisions, such as the Rape Shield Law." App. Reply Br. at 19. They cite no legal authority on this point. Nor can they; the argument is wholly inconsistent with the constitutional structure of government in the United States, whereby our federal and state constitutions supersede and constrain the power of our legislative bodies. More importantly, the argument fails to account for the actual language of the constitutional provision. Although the crime victims' amendment says nothing about complementing statutory provisions, it does say explicitly that "victims *shall* be entitled to the following basic rights . . ." Tenn. Const. Art. I, § 35 (emphasis added).

By this very simple language, the people of Tennessee made it clear that, through the victims' rights amendment, they have bestowed certain "basic rights" on victims of crime. And, contrary to the petitioners' argument, this language is important. The term "rights" is variously defined as "[s]omething that is due to a person by just claim, legal guarantee, or moral principle," such as "the right of liberty," or "[a] power, privilege, or immunity secured to a person by law," such as "the right to dispose of one's estate." BLACK'S LAW DICTIONARY, right (9th ed. 2009). As these definitions demonstrate, the people of Tennessee have provided Ms. Doe, as a victim of crime, with a "legal guarantee" and "privilege." Through this appeal, she asks that this guarantee be honored.

The petitioners' position would upend the promise Tennessee has made to its victims. And they know it, which is why they have repeatedly run away from the consequences of their arguments. This case does not present a hypothetical. If the

petitioners' theory prevails, then the Public Records Act affirmatively *requires* the State to provide the video of Ms. Doe's rape to any citizen of this state who requests it. This is true because, according to the petitioners' theory, the record was created by a third party (one of the defendants in the criminal case) rather than the government, and thus does not fall within the exemptions implicitly created by Rule 16. And there is no other bar to disclosure because Ms. Doe has no rights in the context of a public records. This is an absurd result. And it cannot be the law.

To be sure, the petitioners might argue that the most graphic photographs and videos in this case are subject to a protective order, so the harm Ms. Doe fears is illusory. But the protection of the Criminal Court's order has its limits. When the criminal case is over, and any appeals or post-conviction petitions are fully adjudicated, the Criminal Court will lose jurisdiction. At the point, the same question arises: What protects Ms. Doe from the harm of disclosure? Her answer is simple. The victims' rights provisions of Tennessee law protect her from "intimidation, harassment, and abuse" and ensure that she is treated with "dignity and compassion."

For their part, the petitioners have no answer. Throughout this case, they have sought to avoid the obvious consequence of their legal position—that a victim who will be harmed by the release of records gathered in the course of a police investigation has no recourse to prevent disclosure of those records, no matter the severity of the harm. Their evasion has taken three forms: (i) They have disavowed their original requests for graphic videos and photographs and repeatedly asserted that they are not at issue in this litigation, *see, e.g.*, App. Opening Br. at 6 n.5; App. Opening Br. at 17 n.14; App. Reply Br. at 1, (ii) They have repeatedly belittled the potential harm that could be done to Ms. Doe as a

result of their litigation, *see, e.g.*, App. Opening Br. at 20 (suggesting that the only interest of Ms. Doe is not having her identity exposed to the public); App. Reply Br. at 17 (same); and (iii) They have purposefully misstated the scope of protection that Ms. Doe seeks, characterizing it cynically as an attempt “to control access to public records,” App. Reply Br. at 18. This litigation strategy reveals more than the petitioners’ attitude toward the victim; it reveals that they cannot respond to the reasonable concern of Ms. Doe (and victims like her) that, if the petitioners’ arguments are adopted by this Court, she (and other victims) will suffer. The petitioners silence is telling.

There is no question that journalism is a noble pursuit and that journalists are brave. Reporters across the globe regularly subject themselves to danger and risk life and limb to stand in harm’s way to report the news from war zones and disaster areas. But the media organizations in this case do not have the courage of their convictions. They should acknowledge to the Court that, if they win in this case, there is nothing stopping a tabloid or off-color website from requesting—and receiving—the photographs and videos that the petitioners have disavowed. If that is a principle they wish to fight for in this litigation, they should say so.

But they do not, likely because they recognize that this result would be absurd. If the victims’ rights provisions do not bar the public disclosure of the records in this case—whose public release would inflict substantial harm on Ms. Doe—then they do nothing, and the laborious process of amending the state constitution to create these “rights” was a meaningless exercise. Ms. Doe takes a contrary view. She believes the people of Tennessee meant what they said when they voted to protect victims.

CONCLUSION

For the reasons detailed above, Ms. Doe respectfully requests that the judgment of the chancery court be reversed and remanded with instructions for the court to determine whether the release of the requested records would violate Ms. Doe's rights as a victim and, if so, forever bar the release of the offending records.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of May, 2014, a true and exact copy of the foregoing has been forwarded, via U.S. Mail, postage prepaid, to the following:

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