STATEMENT OF ISSUES

The Metropolitan Government submits that Tennessee Rule of Criminal Procedure 16, as well as Article I Section 9 of the Tennessee Constitution, prohibit the Public Records Act from being interpreted to require the Metropolitan Government or the District Attorney to disclose materials in a pending criminal investigative file to the media. Rule 16 puts control over pretrial disclosure with the Criminal Court and allows some materials to be revealed to a criminal defendant before trial, some during trial, and some not at all.

The Rule does not contain any provisions requiring that the materials exchanged between the prosecution and the defense be disclosed to the media or the public. The Metropolitan Government submits that any required disclosure is tempered by the Tennessee Rules of Professional Conduct, the criminal trial court's orders and ultimately Article I Section 9 of the Tennessee Constitution. Any other interpretation of Rule 16 as an exception to the Public Records Act's would make the Public Records Act unconstitutional.

Because the Trial Court erred in holding that parts of the criminal investigative file are public record, Metro raises its own issues on appeal[1]:

I. Did the Trial Court err in determining that it had jurisdiction over a public records request involving a criminal investigative file, where Tennessee Rule of Criminal Procedure 16 places control over disclosure with the Criminal Court and the Criminal Court had already exercised jurisdiction, by issuing search warrants and subpoenas, holding pre-trial hearings, setting bail, setting a court date, and entering a protective order involving the investigative file?

[1] An appellee may raise its own issues on appeal, pursuant to T.R.A.P. 13(a) ("[A]ny question of law may be brought up for review and relief by any party. Cross-appeals, separate appeals, and separate applications for permission to appeal are not required.").

Metro also anticipates it will file a Reply Brief, as authorized by T.R.A.P. 27(c) ("If the appellee also is requesting relief from the judgment, the appellee may file a brief in reply to the response of the appellant to the issues presented by appellee's request for relief.")

II. Did the Trial Court err in creating a new "test" that allows disclosure of open investigative files, namely that "records submitted to the Metropolitan Police Department that were not developed internally and that do not constitute statements or other documents reflecting the reconstructive and investigative efforts of the Metropolitan Police Department" are public records?

III. Did the Trial Court err in giving Petitioners access to materials created by the police and subject to the criminal court's protective order?

STATEMENT OF THE CASE

Appellants filed suit against Metro on February 5, 2014. (T.R. 1)[2] The State of Tennessee, District Attorney's Office, and Victim were permitted to intervene on February 18, 2014. (T.R. 87-91)

Metro raised the issue of the Trial Court's lack of subject matter jurisdiction in its Motion to Reschedule the Court's *in camera* review of the investigative file, filed March 3, 2014. (T.R. T.R. 322) On March 5, 2014, the Court determined that it did have subject matter jurisdiction (T.R. 628) and would view the investigative file. (T.R. 318, 658) The Court reviewed the investigative file at the Davidson County District Attorney's Office on March 6, 2014. (T.R. 336)

The show cause hearing was held March 10, 2014. (T.R. 664) On March 12, 2014, the Trial Court issued its Memorandum and Order. (T.R. 630) Appellants filed a notice of appeal on March 17, 2014. (T.R. 655)

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[2] Respondent/Appellee Metropolitan Government (Metro) submits this Brief pursuant to Rule 27 of the Tennessee Rules of Appellate Procedure. The Petitioners/Appellants will be referred to as "the Petitioners," "the Appellants," or "the Tennessean *et al*."

The six volumes of the Technical Record will be referred to as "T.R." The Honorable Chancellor Russell T. Perkins will be referred to as the "Trial Court" or "Chancery Court." Unpublished and out-of-state cases are attached in a separately filed appendix.

FACTS

Appellants' Petition argues that there is a line to be drawn between evidence created by the police department, which they agree is not public, and evidence that the police gather from outside sources, which they argue must be open to the public for inspection and copying. (T.R. 1)

On this basis, Appellants seek access to the evidence gathered from outside sources by the Metropolitan Nashville Police Department (MNPD) relating to crimes that allegedly occurred on the Vanderbilt University campus around June 23, 2013. (T.R. 1) **Appellants acknowledge that the videos and pictures of the sexual assault fall into this category. (Appellants' Brief, p. 6) They say they are no longer requesting those particular materials. (*Id.*) However, if their theory of the law is adopted, those materials would be public records and must be made available prior to trial for inspection or copying by any citizen of Tennessee, unless the criminal trial court enters a protective order.**

The MNPD investigation into the matter is still an active, ongoing and open matter. The investigation is not complete. Investigators are still working to gather and analyze evidence in the case. (T.R. 234)

Much of the information that the MNPD has gathered in this investigation has been through subpoenas and search warrants - from defendants, potential witnesses, Vanderbilt University, Vanderbilt Police, Vanderbilt University Medical Center, and cell phone providers. (*Id.*)

The grand jury has indicted four individuals in this case on five counts of aggravated rape and aggravated sexual battery. One of the individuals is also charged with tampering with evidence and one count of unlawful photography (T.C.A. § 39-13-605). The trial for two of the individuals is scheduled for August 11, 2014. (*Id.*)

Based on almost forty years of experience in law enforcement[3], the Metropolitan Nashville Chief of Police believes that harmful and irreversible consequences could result from disclosing investigative files in an ongoing criminal investigation and prosecution, including in this case. These consequences include prejudicing the jury pool, harming the defendants' right to a fair trial, harming the validity of any conviction, and causing intimidation, harassment and abuse to the victim. (*Id*.)

It is essential that police investigators be able to gather materials freely and broadly, using their judgment, without fear that materials they gather and prepare for the District Attorney will be released to the public and cause prejudice to the effectiveness of the investigation[4]. (*Id.*) Public release of investigative files could cause a "chilling effect" on the willingness of witnesses to come forward and testify or offer evidence. (T.R. 150)

[3] The Tennessean *et al*. argue that "future litigants will benefit" if this Court holds that Chief Anderson's affidavit is not based on personal knowledge and should be struck as a violation of Rule of Evidence 602. Metro absolutely disagrees with the premise that Chief Anderson's affidavit was not based on personal knowledge. But perhaps more importantly, this argument fails to understand that Chief Anderson meets the definition of an expert under Rule 702, and by virtue of his "knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise."

[4] The Tennessean *et al*. have repeatedly expressed surprise at the idea that an investigative file being treated as a public record, prior to trial, could cause concern amongst public officials. But the Tennessee Supreme Court has acknowledged many times the chilling effect that the release of certain materials can have, *e.g. Schneider v. City of Jackson*, 226 S.W.3d 332, 338 (Tenn. 2007) and the harm that can occur when investigative information is released to the public prior to trial, *e.g. State v. Carruthers*, 35 S.W.3d 516, 562 (Tenn. 2000).

The MNPD's investigative file is the product of the education and investigative experience utilized by the law enforcement officers to gather relevant documents and items related to this crime. (T.R. 234) **The MNPD considers the creation of this kind of file to be an internal report created in preparation for the prosecution of a case by the District Attorney's office.** (*Id*.)

The MNPD routinely consults with the District Attorney's office during the course of an investigation about its course and the evidence gathered to date. (*Id*.) **Once the indictment was issued by the Grand Jury, the investigative file became part of the prosecutorial file assigned to the District Attorney handling the prosecution.** (T.R. 148)

OUTLINE OF ARGUMENT

I. Standard of Review.

II. The Trial Court erred in determining that it had jurisdiction over a public records request involving a criminal investigative file, because Tennessee Rule of Criminal Procedure 16 governs the release of those files and only requires their release to the criminal defendant.

III. The Trial Court erred in determining that it had jurisdiction when the Criminal Court had already exercised jurisdiction by issuing search warrants and subpoenas, holding pre-trial hearings, setting bail, setting a trial date, and entering a protective order involving the investigative file.

A. Where there is concurrent jurisdiction, the court where the case is filed first has jurisdiction.

B. If a matter "arises out of a criminal case" or pertains to a "criminal matter," it should be transferred to the criminal court.

C. The Trial Court erred by refusing to defer jurisdiction to the criminal court.

IV. The Trial Court erred by creating a new "test" that requires disclosure of open investigative files, namely that that "records submitted to the Metropolitan Police Department that were not developed internally and that do not constitute statements or other documents reflecting the reconstructive and investigative efforts of the Metropolitan Police Department" are public records.

A. The Tennessee Supreme Court and Court of Appeals have repeatedly recognized that *open criminal investigative files* are not public records.

B. The Rule 16 exception articulated in *Appman* is separate and distinct from the law enforcement privilege that was expressly rejected in *Schneider.*

C. Under the *Appman* and *Schneider* line of cases, the relevant inquiry for purposes of the Rule 16 public records disclosure exception is not the *source* of the records, but *the progress of the criminal investigation at the time the records are sought*.

V. If Petitioner's argument is adopted, and Rule 16 only protects work product from public disclosure, the Tennessean *et al*. are still not entitled to the investigative file.

A. The materials that the Police collect as part of their investigation are work product.

B. Rule 16(a)(2) does not authorize release of "statements made by state witnesses or prospective state witnesses."

C. Evidence gathered pursuant to a law enforcement subpoena or search warrant cannot be a public record.

D. Unlawful photographs and videos in the investigative file cannot be public records.

VI. The Trial Court correctly determined that the media has no First Amendment right to public records (they have the same right as a Tennessee citizen).

VII. The Trial Court erred in giving Appellants access to materials created by the police and subject to the criminal court's protective order.

ARGUMENT

I. Standard of Review.

Whether subject matter jurisdiction exists is a question of law, which this Court reviews *de novo*, with no presumption of correctness. *Northland Ins. Co. v. State*, 33 S.W.3d 727, 729 (Tenn. 2000); *Marlin Fin. & Leasing Corp. v. Burch*, 2013 Tenn. App. LEXIS 742, 10 (Tenn. Ct. App. Nov. 18, 2013). "[A] jurisdiction concurrent with the circuit and chancery courts is a jurisdiction the exercise of which is reviewable in the Court of Appeals or in [the Tennessee Supreme Court]." *In re Scalf's Adoption*, 144 S.W.2d 772, 774 (Tenn. 1940).

With respect to interpreting state statutes and evidentiary rules, "statutory construction and the application of the statute to particular facts present legal questions. Therefore, the trial court's conclusions regarding statutory interpretation are reviewed *de novo*, with no presumption of correctness." *Robinson v. Fulliton*, 140 S.W.3d 312, 317 (Tenn. Ct. App. 2003) (internal citations omitted).

II. The Trial Court erred in determining that it had jurisdiction over a public records request involving a criminal investigative file, because Tennessee Rule of Criminal Procedure 16 governs the release of those files and only requires their release to the criminal defendant.

The Petitioners request access to the same information that is provided to a criminal defendant in a prosecution. The criminal defendant is entitled to this information pursuant to Tennessee Rule of Criminal Procedure 16 and under the supervision of the Criminal Court. A threshold issue in this case is whether the Chancery Court could order the Metropolitan Government or the State to disclose this information during an active criminal case.

Tennessee Criminal Rule of Procedure 16 places sole authority and jurisdiction over discovery and inspection of investigative files with the *Criminal* Court. Importantly, Rule 16 only requires materials to be exchanged between the State and the Defendant. Some materials are revealed to a criminal defendant before trial, some during trial, and some not at all. It does not contain any provisions requiring materials to be disclosed to members of the public:

> **Rule 16. Discovery and Inspection.**
> (a) Disclosure by the State…
> (1) Information subject to disclosure. –
> (A) Defendant's oral statement. - Upon a defendant's request, the state shall disclose to the defendant the substance of any of the defendant's oral statements…
> (B) Defendant's written or recorded statement. – Upon a defendant's request, the state shall disclose to the defendant, and make available for inspection, copying, or photographing, all of the following…
> (C) Organizational defendant.- Upon a defendant's motion…the court may grant the defendant discovery of relevant recorded testimony…
> (D) Co-defendants. – Upon a defendant's request, when the state decides to place co-defendants on trial jointly, the state shall promptly furnish each defendant who has moved for discovery with all information discoverable…
> (E) Defendant's prior record. – Upon a defendant's request, the state shall furnish the defendant with a copy of the defendant's prior criminal record…
> (F) Documents and objects. – Upon a defendant's request, the state shall permit the defendant to inspect and copy…

(G) Reports of Examinations and tests. – Upon a defendant's request, the state shall permit the defendant to inspect and copy…

(2) Information not subject to disclosure. Except as provided in paragraphs (A), (B), (E), and (G) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal state documents made by the district attorney general or other state agents or law enforcement officers in connection with investigating or prosecuting the case. Nor does this rule authorize discovery of statements made by state witnesses or prospective state witnesses.

(3) Grand jury transcripts. This rule does not apply to the discovery or inspection of a grand jury's recorded proceeding, except as provided in Rule 6 and Rule 16(a)(1)(A), (B), and (C).

(4) Failure to call witness…

(b) Disclosure of Evidence by the Defendant.-

(1) Information subject to disclosure.-

(A) Documents and tangible objects. – If a defendant requests disclosure under subdivision (a)(1)(F) or (G) of this rule and the state complies, then the defendant shall permit the state, on request, to inspect and copy…

(B) Reports of Examinations and tests…the defendant shall permit the state, on request, to inspect and copy…

(2) Information not subject to disclosure…

(3) Failure to call witness…

(c) Continuing Duty to Disclose.- A party who discovers additional evidence or material before or during trial shall promptly disclose its existence to the other party, the other party's attorney, or the court…

(d) Regulating Discovery.

(1) Protective and Modifying Orders. At any time, for good cause shown, the court may deny, restrict, or defer discovery or inspection, or grant other appropriate relief. On a party's motion, the court may permit the party to make such showing, in whole or in part, by written statement that the court will inspect ex parte. If relief is granted following an ex parte submission, the court shall preserve under seal in the court records the entire text of the party's written statement.

(2) Failure to Comply with a Request. If a party fails to comply with this rule, the court may:

(A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms or conditions;

(B) grant a continuance;

(C) prohibit the party from introducing the undisclosed evidence; or

(D) enter such other order as it deems just under the circumstances…

(e) Alibi witnesses…

Tenn. R. Crim. P. RULE 16 (emphasis added).

The Public Records Act may not override the provision in Tennessee Criminal Rule of Procedure 16 limiting jurisdiction over discovery and inspection of investigative files with the Criminal Court. Rule 16 mandates only that the State and criminal defendant disclosure information to each other, it says nothing about disclosure to the public or media. Therefore Rule 16 is an exception to the Public Records Act and the government's disclosure of any information contained in its open criminal investigative file is voluntary.

The civil and criminal rules of discovery are promulgated by the Supreme Court (T.C.A. § 16-3-402) and then approved by the State Legislature (§ 16-3-404). Upon adoption, **any laws in conflict with the rules of civil or criminal procedure are of "no further force and effect.**" T.C.A. § 16-3-406; *also* *Pratcher v. Methodist Healthcare Memphis Hosps.*, 407 S.W.3d 727, 736 (Tenn. 2013) ("Conflicts between provisions of the Tennessee Rules of Civil Procedure and provisions of the Tennessee Code which cannot be harmoniously construed will be resolved in favor of the Tennessee Rules of Civil Procedure.").

A similar situation occurred in North Carolina, and the North Carolina Supreme Court determined that its rules of criminal procedure allowed disclosure to no one but the State or defendant:

> **It does seem that with nothing else appearing,** N.C.G.S. § 132-1 **provides that the recordings at issue in this case are public records which should be subject to inspection and copying by the plaintiff.** *See* *News and Observer Publishing Co. v. Poole*, 330 N.C. 465, 412 S.E.2d 7 (1992). **In this case something else does appear. Article 48 of Chapter 15A of the General Statutes provides for discovery in criminal actions.** If the Public Records Act applies to information the State procures for use in a criminal action, there would be no need for Article 48. A criminal defendant could obtain much more extensive discovery under the Public Records Act. It is illogical to assume that the General Assembly would preclude a criminal defendant from obtaining certain investigatory information pursuant to the criminal discovery statutes while at the same time mandating the release of this information to the defendant, as well as the media and general public, under the Public Records Act.

> If we were to adopt the position advocated by the plaintiffs, that Chapter 132 applies in this case, the files of every district attorney in the state could be subject to release to the public. Among the matters that would have to be released would be the names of confidential informants, the names of undercover agents, and the names of people who had been investigated for the crime but were not charged. We do not believe the General Assembly intended this result. *See News and Observer v. State*, 312 N.C. 276, 322 S.E.2d 133 (1984).
>
> One canon of construction is that when one statute deals with a particular subject matter in detail, and another statute deals with the same subject matter in general and comprehensive terms, **the more specific statute will be construed as controlling.** *Food Stores v. Board of Alcoholic Control*, 268 N.C. 624, 151 S.E.2d 582 (1966). **Article 48 deals specifically with the disclosure of criminal investigative files as opposed to the more general provisions of Chapter 132. We hold that it governs in this case and there is no provision in it for discovery by anyone other than the State or the defendant.**

Piedmont Publishing Co. v. City of Winston-Salem, 334 N.C. 595, 597-598 (N.C. 1993) (emphasis added). Metro submits that because Tennessee's rules are written similarly, the North Carolina court's reasoning should be adopted by this Court.

III. The Trial Court erred in determining that it had jurisdiction where the Criminal Court had already exercised jurisdiction by issuing search warrants and subpoenas, holding pre-trial hearings, setting bail, setting a trial date, and entering a protective order involving the investigative file.

A closely related issue is whether the Chancery Court should, or could, exercise jurisdiction over a matter where the Criminal Court had already exercised jurisdiction.

A. Where there is concurrent jurisdiction, the court where the case is filed first has jurisdiction.

Prior to this lawsuit being filed, the Davidson County Criminal Court had exercised jurisdiction over much of the criminal investigative file by ordering documents, information and materials to be produced or gathered pursuant to subpoenas and search warrants[5]. (T.R. 634) The Court held pre-trial hearings, set bail for the defendants, set a trial date (T.R. 148) and entered a protective order - which specifically prohibited the release of certain items in the investigative file:

AGREED PROTECTIVE ORDER

As evidenced by the signatures below, the State of Tennessee and the defendants have agreed that any and all photographs and videos provided in discovery by the State shall not be disseminated in any manner to any person other than the defense team. In addition to any other penalties this Court or any other body might lawfully impose, any dissemination shall be considered to be a violation of defendant's bond.

Entered this 2nd day of October, 2013.

Monte D. Watkins

Hon. Monte D. Watkins, Judge

(T.R. 30)

[5] Subpoenas and search warrants can only be granted when a judge makes a finding that the information requested has a valid law enforcement purpose (in the case of subpoenas) or probable cause (in the case of search warrants). T.C.A. § 40-17-123; T.C.A. § 40-6-103.

Two different courts cannot exercise concurrent jurisdiction over whether a criminal investigative file is exposed to the public:

> For well over a century our courts have consistently held that where two courts have concurrent jurisdiction over a matter, t**he first of those courts to acquire jurisdiction takes exclusive jurisdiction over it. Any subsequent actions must, therefore, be dismissed**. In courts of concurrent jurisdiction, that court which first acquires jurisdiction thereby acquires exclusive jurisdiction….The authority of that court first acquiring jurisdiction over the subject matter and the parties continues until the matters in issue are disposed of, and no court of coordinate authority is at liberty to interfere with its actions.

Estate of McFerren v. Infinity Transp. LLC, 197 S.W.3d 743, 746 (Tenn. 2006) (emphasis added).

Estate of McFerren involved the prior suit pending doctrine, which requires that the cases have the same subject matter and parties. In this case, the same parties are not involved (i.e. the Tennessean *et al*. have chosen not to intervene in the criminal case). But the principle that concurrent jurisdiction cannot be exercised by two different courts extends beyond the strict requirements of the prior suit pending doctrine.

For example, collateral attacks that "interfere" with a Circuit Court's "performance of its duties and functions" may not be made in Chancery Court (unless it is alleged that the Circuit Court lacked jurisdiction, which is not alleged by the Tennessean *et al*. in this case):

> **At the outset we are met with the question of whether or not a Chancery Court has the power or jurisdiction to enjoin a party to an action in the Circuit Court** from proceeding with a petition for contempt in that Court.
>
> **Patently the Chancery Court has no power to sit as a court of review to correct judgments of the Circuit Court which are merely erroneous. <u>Nor does it have the power to interfere with the Circuit Court itself in the performance of its duties and functions</u>.** But the original bill in this case alleges that the judgment of the Circuit Court is void for want of jurisdiction, and it seeks to reach not the Circuit Court itself but the defendant herein who filed the petition for contempt in the Circuit Court.

Brown v. Brown, 198 Tenn. 600, 609-610 (Tenn. 1955).

Deferring to the first court that exercises jurisdiction over a matter, and refraining from interfering with court's actions, is a long-standing principle:

> "It is a familiar principle that when a court of competent jurisdiction acquires jurisdiction of the subject matter of a case, its authority continues, *subject only to the appellate authority,* until the matter is finally and completely disposed of, and that **no court of co-ordinate authority is at liberty to interfere with its action**." 14 Am. Jur. p. 435, section 243. (Italics those of this Court.)
> This rule seems to us a reasonable and sound rule to follow. **It rests on comity and necessity in avoiding conflict** in the execution of the judgments and orders of independent courts, **and is further necessary because any other rule would lead to hopeless confusion and in the end to calamitous results for litigants.**

Haley v. Doochin, 186 Tenn. 137, 208 S.W.2d 756, 757 (Tenn. 1948) (emphasis added); *State v. Hazzard*, 743 S.W.2d 938, 940-941 (Tenn. Crim. App. 1987) (where two criminal courts have concurrent jurisdiction, the tribunal which first obtains jurisdiction retains it).

In this case, deferring Chancery litigation assures that it will not interfere with a Criminal Court's performance of its duties and functions. This is particularly important, because a criminal court judge has an "affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity." *Gannett v. DePasquale*, 443 US 368, 378 (1979).

The constitutional duty arises out of the Sixth Amendment to the United States Constitution, which is applicable to the States through the Fourteenth Amendment and guarantees a criminal defendant the "right to a speedy and public trial, by an impartial jury." Art. I, § 9, of the Tennessee Constitution contains similar guarantees to the accused, including the guarantee of a "speedy, public trial, by an impartial jury of the County in which the crime shall have been committed."

The constitutional duty not to interfere with a Criminal Court's functions was recognized by the Tennessee Court of Criminal Appeals in *State v. Drake*, where the Court discussed *DePasquale* and recognized that "the right of the public, and of the press as an information collecting agency of the public, is limited by the constitutional right of the defendant to a fair trial." 1984 Tenn. Crim. App. LEXIS 2889, 11 (overturned on unrelated grounds regarding the proper procedure for challenging a Trial Court's decision to close a hearing to the media. *State v. Drake*, 701 S.W.2d 604 (Tenn.1985)).

This duty has also been recognized by the Tennessee Supreme Court in the *Huskey* case:

> the Tennessee Supreme Court has recognized a qualified right of the public, founded in common law and the First Amendment to the United States Constitution, to attend judicial proceedings and to examine the documents generated in those proceedings. *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996). However, this right of access is not absolute and it must be balanced against other interests such as a criminal defendant's right to a fair trial. *State v. Drake*, 701 S.W.2d 604, 607 (Tenn. 1985). This balance must be carefully struck, and any restriction on public access must be narrowly tailored to accommodate the competing interest without unduly impeding the flow of information. *Id.*

Knoxville News-Sentinel v. Huskey, 982 S.W.2d 359, 362-363 (Tenn. Crim. App. 1998).

And in a case involving "gag orders" on participants in a criminal trial, the Tennessee Supreme Court recognized that information released to the public, prior to trial, can "readily jeopardize" the right to a fair trial[6]:

> **The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences**. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the

[6] At least one federal court has found that the Sixth Amendment constitutes an exception to the Public Records Act, if the Trial Court determines that pre-trial publicity will prejudice the jury pool. *United States v. Loughner*, 807 F. Supp. 2d 828, 836 (D. Ariz. 2011) (finding that the defendant's Sixth amendment right to a fair trial trumped disclosure under Arizona's public records law). The matters became public records once the trial was complete. *United States v. Loughner*, 2013 U.S. Dist. LEXIS 180907, 4 (D. Ariz.)

> fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures. …
> We conclude that the concerns raised in Gentile and Sheppard are applicable regardless of whether a party or his or her attorney is being restrained. A prejudicial statement made to the press by an attorney is not somehow less prejudicial if made by a party. In short, what matters is *what* is being said and not *who* is saying it. See Brown, 218 F.3d at 428 ("As the district court pointed out, **trial participants, like attorneys, are 'privy to a wealth of information that, if disclosed to the public, could readily jeopardize the fair trial rights of all parties.**'").

State v. Carruthers, 35 S.W.3d 516, 562 (Tenn. 2000) (emphasis added); referencing *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991), *Sheppard v. Maxwell*, 384 U.S. 333 (1966), and *United States v. Brown*, 218 F.3d 415 (5th Cir. 2000).

Appellants did not file their lawsuit in the criminal court and have not sought to intervene in the criminal matter, although the Tennessee Supreme Court has recognized the media's right to intervene to access matters involved in litigation. See *Ballard v. Herzke*, 924 S.W.2d 652, 657 (Tenn. 1996) ("we agree with those federal and state courts in other jurisdictions which have routinely found that third parties, including media entities, should be allowed to intervene to seek modification of protective orders to obtain access to judicial proceedings or records.")

Appellants insist that they may choose to file their public records lawsuit in Chancery. They are mistaken. While Chancery Court does have jurisdiction over lawsuits brought under the Public Records Act, this jurisdiction is not exclusive. Criminal Court is a "circuit" court, and therefore properly has jurisdiction over this public records lawsuit. T.C.A. §40-1-107; § 40-1-108; T.C.A. § 10-7-505(b). Appellants themselves acknowledge that "concerns about prejudice as a result of specific media coverage belong to the defense and the Criminal Court…" (Appellants' Brief, p. 18)

B. If a matter "arises out of a criminal case" or pertains to a "criminal matter," it should be transferred to the criminal court.

When *State v. Drake* reached the Tennessee Supreme Court, the Court discussed the fact that the media entities seeking access to the trial had intervened by filing a petition in the criminal court matter - but then had appealed the criminal court's decision to the Court of Appeals. 701 S.W.2d 604, *606 (Tenn. 1985). The Supreme Court held that the Court of Appeals had properly transferred the case to the Court of Criminal Appeals:

> We concur in that action [transferring the case to the Court of Criminal Appeals] because the proceeding is clearly one "arising out of a criminal case," as contemplated in T.C.A. § 16-5-108(a)(2)[7].

Id.

The same conclusion was reached in *Quillen v. Crockett*, 1995 Tenn. App. LEXIS 299, 4 (1995). In that case, the plaintiff appealed the dismissal of his circuit court suit to remove a district attorney general pro tempore to the Court of Appeals. The Court of Appeals transferred the case to the Court of Criminal Appeals, because "[t]he jurisdiction of the Court of Criminal Appeals extends to review of final judgments in criminal cases "and other cases or proceedings instituted with reference to or arising out of a criminal case."(emphasis added).

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[7] T.C.A. § 16-5-108 reads:
(a) The jurisdiction of the court of criminal appeals shall be appellate only, and shall extend to review of the final judgments of trial courts in:
(1) Criminal cases, both felony and misdemeanor;
(2) Habeas corpus and Post-Conviction Procedure Act proceedings attacking the validity of a final judgment of conviction or the sentence in a criminal case, and other cases or proceedings instituted with reference to or arising out of a criminal case;
(3) Civil or criminal contempt arising out of a criminal matter; and
(4) Extradition cases.
(b) The court or any judge of the court shall also have jurisdiction to grant petitions for certiorari and supersedeas in proper cases within its jurisdiction as provided by law. (emphasis added).

In this case, the public records lawsuit brought by the Tennessean *et al*. involves a "criminal matter," and therefore the criminal court has original jurisdiction:

> The circuit and criminal courts have original jurisdiction of all criminal matters not exclusively conferred by law on some other tribunal.

T.C.A. § 40-1-108.

This public records lawsuit pertains to a "criminal matter." As stated above, jurisdiction of public records lawsuit is not exclusively conferred on Chancery Courts – it is also placed with Circuit Courts, which includes Criminal Courts. T.C.A. § 10-7-505(b); § 40-1-107; § 40-1-108 . Therefore this case should have been transferred to the court with concurrent jurisdiction that had the duty to control pre-trial publicity (the criminal court).

The Knox County Chancery Court discussed this exact situation in a public records lawsuit involving criminal records, *Chester v. City of Knoxville*, Knox Co. Chancery No. 164305-3. (T.R. 326) In that case, the Chancellor dismissed the case, finding that decisions related to the disclosure of evidence in criminal cases are best left to the trial judges who have been assigned to hear those cases:

> Where, as here, the documents sought by the public are exclusively in the possession of the law enforcement agency or the prosecutor and are relevant to a pending criminal prosecution, the trial judge assigned to that prosecution is in a far better position to appropriately weigh the competing interests of public access and a defendant's right to fair trial than is the judge of another Court not involved in that criminal proceeding.

(T.R. 329)

The Tennessean *et al*. insist that the *Chester* decision was based on the Court of Appeals' decision in *Schneider*, which was overturned by the Tennessee Supreme Court. But a careful reading of the *Chester* memo shows that it was primarily based on *Knoxville News-Sentinel v. Huskey*'s recognition of the U.S. and Tennessee Constitution's protections for the rights of the

criminally accused ("this right of access [of the public to attend judicial proceedings and to examine the documents generated in those proceedings] is not absolute and must be balanced against other interests such as a criminal defendant's right to a fair trial.") (T.R. 327,quoting from *Huskey*).

C. The Trial Court erred by refusing to defer jurisdiction to the criminal court.

In this case, the Trial Court recognized that the lawsuit brought by the Tennessean *et al*. and the criminal prosecution were "parallel proceedings." (T.R. 644-645) The Trial Court also recognized that "where there are parallel proceedings or there is overlap between a criminal case and a civil case, the criminal case usually takes precedence." (*Id*., citing *Bell v. Todd*, 206 S.W.3d 86, 93-94 (Tenn. Ct. App. 2005)).

But instead of weighing the factors[8] set forth in *Bell v. Todd,* the Chancellor isssues an advisory opinion declaring many of the materials in the criminal investigative file to be public

[8] When a criminal matter generates a civil lawsuit for damages, a balancing test is employed:

> The decision whether or not to stay civil litigation in deference to parallel criminal proceedings is discretionary. *Microfinancial, Inc. v. Premier Holidays Int'l, Inc.*, 385 F.3d 72, 77 (1st Cir. 2004). It requires the court to balance the interests of the party seeking to postpone the civil proceeding against the possible prejudice to the party who desires the civil litigation to go forward. *Ex parte Pegram*, 646 So. 2d 644, 645-46 (Ala. 1994). This balancing process is situation-specific and requires the court to take a careful look at the particular circumstances before it. *SEC v. Dresser Indus., Inc.*, 202 U.S. App. D.C. 345, 628 F.2d 1368, 1375 (D.C. Cir. 1980). Courts customarily consider the following factors, among others, in deciding whether to stay a civil proceeding pending the resolution of a criminal case: (1) the extent to which the issues in the civil and criminal proceedings overlap; (2) the status of the criminal proceeding, (3) the plaintiff's interests in expeditious civil proceedings weighed against the prejudice to the plaintiff caused by the delay, (4) the hardship on the defendant, including the burden on the defendant if the cases go forward in tandem, (5) the convenience of both the criminal and the civil courts, and (6) the interests of third parties and the public. *Microfinancial, Inc. v. Premier Holidays Int'l, Inc.*, 385 F.3d at 78; *Maloney v. Gordon*, 328 F. Supp. 2d 508, 511 (D. Del. 2004).

Bell v. Todd, 206 S.W.3d 86, 94 (Tenn. Ct. App. 2005).

records. At the same time, the Chancery Court attempted to defer some of the disclosure issues in the lawsuit to the Criminal Court that is overseeing the criminal prosecution:

> [T]his Court defers to the court overseeing the criminal prosecution as the court of first resort in protecting the rights of Ms. Doe [the victim] under the Victim's Bill of Rights.
>
> [T]hese records have not yet been disclosed in the criminal court and have not yet been tested through the crucible of pretrial motions or the Criminal Court's rulings on evidentiary disputes. The Court, therefore, defers to the oversight of the Criminal Court over the criminal prosecution on such issues.

(T.R. 646).

Had the Chancery Court refrained from exercising jurisdiction it would not have had to issue an advisory opinion. Respectfully, the Chancery Court cannot exercise jurisdiction over a matter, release materials that may affect prejudicial pre-trial publicity, and then claim it is "deferring" to the Criminal Court. *See American Lava v. Savena,* 476 S.W.2d 639, 640 (Tenn. 1972) ("When courts have concurrent jurisdiction, the one that first acquires jurisdiction thereby obtains exclusive jurisdiction.").

If this ruling stands, chancery courts will exercise jurisdiction over cases in criminal court, by determining whether parts of an investigative file can be disclosed or inspected. They will be both interfering in that case and preventing the criminal courts from being able to fulfill their constitutional duty to prevent prejudicial pre-trial publicity. *See Gannett v. DePasquale*, 443 US 368, 378 (1979) (criminal court judge has an "affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity.")

In addition, allowing the Chancery Court subject matter jurisdiction when a criminal prosecution is already being pursued will open the established criminal discovery process between the State and a defendant to "back-door" routes for discovery through public records requests in other courts. *Konvalinka v. Chattanooga-Hamilton County Hosp. Auth.*, 249 S.W.3d

346, 360 (Tenn. 2008) (allowing public records requests to be made by a civil litigant against a government defendant).

Tennessee Rule of Criminal Procedure 16 provides for the disclosure of some specific parts (but not all)[9] of the State's proposed proof. If the Chancery Court can disclose parts of a criminal investigative file, the criminal court's authority under Rule 16 to "regulate discovery" and to "deny, restrict, or defer discovery or inspection, or grant other appropriate relief" will become a nullity.

As discussed earlier in this brief, the North Carolina Supreme Court addressed a conflict between its public records act and the rules of criminal discovery – and determined that its public records act could not override the rules governing criminal discovery. *Piedmont Publishing Co.*

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[9] There is no general constitutional right to discovery in a criminal case. *State v. Brownell*, 696 S.W.2d 362, 363 (Tenn. Crim. App. 1985). The State is under no obligation to make an investigation, or to gather evidence, for the defendant. *Id*. The Rules of Criminal Procedure allow a defendant to discover only some parts of the State's proposed proof, upon motion. *Id*.

Rule 16 does not require the government to open its files for inspection by a defendant, or to disclose the identity of witnesses to be called by it, or to identify what documents have been used before the grand jury or are to be offered in evidence at the trial. Nor is the government required under the Rule to identify handwriting or authorship of documents produced by it for the defendant's inspection. 5 A.L.R.3d 819, 2.

Rule 16 does not authorize the pre-trial discovery or inspection of statements made by government witnesses or prospective government witnesses. *United States v. Wilkerson,* 456 F.2d 57 (6th Cir. 1972), *cert. denied* 408 U.S. 926, 92 S. Ct. 2506, 33 L. Ed. 2d 337 (1972). A defendant has no pre-trial access as a matter of right to the names and the criminal records of proposed government witnesses. *United States v. Conder*, 423 F.2d 904 (6th Circ. 1970), *cert. denied* 400 U.S. 958, 27 L. Ed. 2d 267, 91 S. Ct. 357 (1970).

Rule 16 does not require disclosure of statements of the defendant made to a third party witness or to undercover agents not then known as such to the defendant. *United States v. Green,* 548 F.2d 1261, 1267 (6th Cir. 1977); *United States v. Zarattini,* 552 F.2d 753, 757 (7th Cir. 1977), *cert. denied* 431 U.S. 942, 53 L. Ed. 2d 262, 97 S. Ct. 2661 (1977). Also, statements made by co-conspirators or co-defendants are likewise undiscoverable. *United States v. Tragash,* 121 F.R.D. 59, 60 (S.D. Ohio 1988).

v. City of Winston-Salem, 334 N.C. 595, 597-598 (N.C. 1993). Metro urges that this Court adopt the reasoning of the North Carolina Supreme Court and submits that the Chancery Court erred by finding that it had subject matter jurisdiction to adjudicate this matter, rather than deferring to the Criminal Court's jurisdiction and control of the criminal matter.

IV. The Trial Court erred by creating a new "test" that requires disclosure of open investigative files, namely that that "records submitted to the Metropolitan Police Department that were not developed internally and that do not constitute statements or other documents reflecting the reconstructive and investigative efforts of the Metropolitan Police Department" are public records.

There is mandatory authority holding that open investigative files are not public records. Instead of deferring to this mandatory authority, the Chancery Court created its own test for what items in an open criminal investigative file are public records. Limiting the scope of Rule 16's exception to the Public Records Act would make the Act unconstitutional.

A. The Tennessee Supreme Court and Courts of Appeals have repeatedly recognized that *open criminal investigative files* are not public records.

The Public Records Act states:

> (2)(A)…[T]hose in charge of the records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law.

T.C.A. § 10-7-503(a (emphasis added).

The Tennessee Supreme Court recognized Tennessee Rule of Criminal Procedure 16(a)(2) as an exception to the Public Records Act in *Appman v. Worthington*, where the Tennessee Supreme Court held that "investigative files in possession of state agents or law enforcement officers," where the files were "open and relevant to pending or contemplated criminal action" were not subject to the Public Records Act. 746 S.W.2d 165, 166 (Tenn. 1987).

Appman was a public records request made by the attorney for a criminal defendant. The *Appman* Court ruled that Tennessee Rule of Criminal Procedure 16 governed the public records request and determined that the Rule was an exception to the Public Records Act, because only parts of the State's proof in a criminal case are subject to discovery or inspection by the criminal defendant. *Id.*

Relying on this Rule, the *Appman* Court rejected a public records request made by the defendant for *"all records and documents*[10] in the possession and control of Sergeant Worthington 'relating to the death of Carl Estep.'" *Id.* (emphasis added).

In making its ruling, the Supreme Court rejected the Court of Appeals' ruling. The Criminal Court of Appeals had held that Rule 16 "does not protect public records in the possession of non-prosecutorial officials[11] from inspection even though the record in question might be one which might eventually be used in a prosecution." *Appman v. Worthington*, 1986 Tenn. App. Lexis 3240; 1986 WL 8974, *5.

The Supreme Court held instead that records in the possession of non-prosecutorial officials were not public records:

> [t]his exception to disclosure and inspection does not apply to investigative files in possession of state agents or law enforcement officers, where the files have been closed and are not relevant to any pending or contemplated criminal action, but does apply where the files are open and are relevant to pending or contemplated criminal action.

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[10] A certified copy of the Chancery Court file shows that t**he *Appman* Petition requested that the Court issue an Order requiring the defendant make available for inspection "the entire record of the State of Tennessee pertaining to the investigation** of the death of Carl Estep…allow access for the purpose of inspection to any and all records pertaining to the death." (emphasis added). (T.R. 239)

[11] The "non-prosecutorial official," whose investigative file was requested was Sgt. James Worthington, an Administrative Assistant for Internal Affairs at Morgan County Regional Correctional Facility. 746 S.W.2d 165.

Id. at 166 (emphasis added).

Subsequent to *Appman*, several Tennessee Courts have been asked to consider the applicability of Rule 16 and the Tennessee Public Records Act to open criminal investigations. The Courts' decisions in each of the cases below are consistent with *Appman's* directive—that investigative files may not be accessed by the public if those files are part of an open criminal investigation:

- *Waller v. Bryan*, 16 S.W. 3d 770 (Tenn. Ct. App. 1990) (Relying on Rule 16, photos taken during an investigation were not public records during the post-conviction appeal process).

- *Freeman v. Jeffcoat*, 1991 Tenn. App. Lexis 659, 17-18 (Relying on Rule 16, "[t]he clearly declared public policy protects records of an investigation while the investigation is in progress and during the pendency of any prosecution arising out of the investigation.").

- *Capital Case Resource Center v. Woodall*, 1992 Tenn. App. Lexis 94 (Rule 16 protects open investigative files, but not closed files).

- *Ballard v. Herzke*, 924 S.W.2d 652, 662 (Tenn. 1996)("**the Public Records Act does not authorize public inspection of documents in a criminal case that are exempt from discovery by Rule 16,** Tennessee Rules of Criminal Procedure. …materials exempt from discovery by the rules of criminal procedure are not subject to inspection under the Tennessee Public Records Act.").

- *Huskey v. Knoxville News Sentinel*, 982 S.W.2d 359, 362 (Tenn. Cr. App. 1998) (**Rule 16 "is designed to maintain confidentiality with respect to materials connected to the substantative defense of a criminal prosecution**.").

- *Heck Van Tran v. State*, 1999 Tenn. Crim. App. LEXIS 307, 13 (Tenn. Crim. App. Apr. 1, 1999) "Records relevant to a pending criminal action need not be disclosed under the Tennessee Public Records Act."

- *Swift v. Campbell*, 159 S.W.3d 565, 576 (Tenn. Ct. App. 2004)("The clear public policy of Tennessee, reflected in Tenn. Code Ann. § 40-30-109(b), Tenn. S. Ct. R. 28, § 6(B)(3)(c), and (C)(7), and Tenn. R. Crim. P. 16(a)(2), is that the documents described in Tenn. R. Crim. P. 16(a)(2) are not discoverable in either proceedings to which the Tennessee Rules of Criminal Procedure apply or separate proceedings under Tenn. Code Ann. § 10-7-505 [the Public Records Act] as long as the criminal conviction associated with the records being sought is being collaterally attacked.").

- *Tennessean v. City of Lebanon*, 2004 Tenn. App. LEXIS 99, 18-20, 2004 WL 290705 (Tenn. Ct. App.). "The City correctly asserts that records relating to a pending criminal action are not subject to disclosure under the Public Records Act because they are protected by other state law, specifically Tenn. R. Crim. P. 16(a)(2)."

- *Schneider v. City of Jackson*, 226 S.W.3d 332, 341 (Tenn. 2007). This case applied the well-established *Appman* law: "Acknowledging that no statute specifically exempted these records from disclosure, **the *Appman* Court nonetheless held that Rule 16(a)(2) exempted from disclosure under the Public Records Act all "open" criminal investigative files that "are relevant to pending or contemplated criminal action."** *Schneider* applied this law to hold that field interview cards involving open investigations were "clearly" exempt from disclosure under Rule 16.

Only the Tennessee Supreme Court can reverse its holding in *Appman*. *State v. Irick*, 906 S.W.2d 440, 443 (Tenn. 1995); *Barger v. Brock*, 535 S.W.2d 337, 341 (Tenn. 1976) ("It is a controlling principle that inferior courts must abide the orders, decrees and precedents of higher courts. The slightest deviation from this rigid rule would disrupt and destroy the sanctity of the judicial process… As held in *Bloodworth v. Stuart*, 221 Tenn. 567, 428 S.W.2d 786 (1968) "the Court of Appeals has no authority to overrule or modify Supreme Court's opinions.") Simply put, ***Appman's* directive that Rule 16 provides a disclosure exception for open criminal investigative files relevant to pending or contemplated criminal actions is the law of the land until the Tennessee Supreme Court says otherwise.**

MNPD's investigative files clearly fall within the *Appman* exception to public records disclosure. There can be no doubt that the records Petitioner seeks are part of an active, ongoing, and pending criminal investigation as described in *Appman* since the information sought is relevant to a criminal investigation in which four of the defendants have been indicted, arraigned, and await trial, which is currently scheduled for August of 2014. Indeed, the records are only sought ***because of*** their relevance to a pending criminal case.

B. The Rule 16 exception articulated in *Appman* is separate and distinct from the law enforcement privilege that was expressly rejected in *Schneider*.

In *Schneider*, the City of Jackson attempted to prohibit disclosure of police-created field interview cards that memorialized the contact an officer has "while conducting some kind of investigation with a citizen." *Schneider v. City of Jackson*, 226 S.W.3d 332, 334-39 (Tenn. 2007). These cards contained blank lines on which officers could record various biographical details of the interviewee as well as the reason for the investigative stop. *Id*. at 337 (Tenn. 2007). These cards were described as "valuable tools which allow the City's police to investigate and to solve crimes." *Id*. at 337.

The City claimed that these cards were exempt from Public Records Act disclosure because of an existing law enforcement privilege. *Id*. at 337. As the Court of Appeals articulated, such a privilege protects from disclosure "the files of law enforcement officers when disclosure of the documents might impair the functioning of law enforcement." *Schneider*, 2006 Tenn. App. LEXIS 405, 41 (Tenn. Ct. App. June 14, 2006). Ultimately, the Tennessee Supreme Court disagreed, holding that there is no common law "law enforcement privilege" in Tennessee, and therefore "the law enforcement privilege is not a 'state law' exception to the Public Records Act." *Id*. at 344; *see also Swift v. Campbell*, 159 S.W.3d 565, 578 (Tenn. Ct. App. 2004).

While rejecting the privilege, the *Schneider* Court recognized that some of information in the field interview cards would be protected from disclosure, not as part of a law enforcement privilege, but as a public record under Rule 16 and *Appman*. Specifically, the Court chided the City for refusing to identify information "relevant to ongoing criminal investigations, given that these cards would clearly have been exempt from disclosure under Rule 16(a)(2) and this Court's decision in *Appman*." *Schneider*, 226 S.W.3d at 345-346 (". . . . [r]ecognizing that harmful and irreversible consequences could potentially result from disclosing files that are involved in a

pending criminal investigation, we conclude that a remand to the trial court is appropriate to allow the City an opportunity to review the field interview cards and to submit to the trial court for *in camera* review those cards or portions of cards which the City maintains are involved in an ongoing criminal investigation and exempt from disclosure.")

Ignoring the plain language of *Appman*, Petitioners suggest that Metro is seeking to protect its MNPD records in this case under a public policy exception similar to the law enforcement privilege sought in *Schneider*. (Appellants' Brief, p. 16) Suggesting that Metro is asserting a law enforcement privilege is a mischaracterization of its position. Metro recognizes that *Schneider* and *Swift* foreclose any law enforcement privilege to public records act disclosure. As discussed above, Metro's position is that its records fall squarely under the Rule 16 exception as outlined in *Appman*: records from open criminal investigative files relevant to pending or contemplated criminal actions.

C. Under the *Appman* and *Schneider* line of cases, the relevant inquiry for purposes of the Rule 16 public records disclosure exception is the *progress of the criminal investigation at the time the records are sought,* not the *source* of the records.

Schneider did more than simply foreclose the law enforcement privilege public policy exception. The Supreme Court's opinion provided a useful roadmap for identifying what was encompassed by the Rule 16 exemption to the Public Records Act versus information that might be categorized under the fabled law enforcement privilege advocated by the City. On one hand, the Court held field interview cards that "contain[ed] information relevant to an (sic) ongoing criminal investigations," were exempt from public disclosure under Rule 16 and *Appman*. *Id*. at 345. On the other hand, field interview cards that did not meet this definition were not protected from disclosure by any privilege.

In doing so, the *Schneider* Court's opinion identified a ***temporal*** distinction between protected and unprotected records that is consistent with *Appman* and its progeny. Rule 16's protections prevent the public and the media from demanding access during the pendency of a criminal case. **Police investigative records may be subject to disclosure during the initial information-gathering stage prior to an open and pending criminal investigation taking shape. *Schneider*, 226 S.W.3d at 345-346. Then, during the time period in which a criminal investigation is "open and pending," the police investigative files are protected from Public Record Act disclosure. *Id.*; *Appman*,** 746 S.W.2d at 166 (Rule 16 prohibits disclosure of entire investigatory file); *Swift v. Campbell*, 159 S.W.3d 565, 576 (Tenn. Ct. App. 2004) (Rule 16 prohibits disclosure "as long as the criminal conviction associated with the records being sought is being collaterally attacked."); *Waller v. Bryan*, 16 S.W. 3d 770, 774-75 (Tenn. Ct. App. 1999) (denying disclosure of records during pendency of post-conviction proceeding after statutory change established that Rule 16 governed post-conviction proceedings); *Heck Van Tran v. State*, 1999 Tenn. Crim. App. LEXIS 307, 13 (Tenn. Crim. App. Apr. 1, 1999) ("[s]ince criminal action was pending against petitioner's co-defendant, petitioner was not entitled to the prosecution file under the Tennessee Public Records Act."); *McLellan v. Crockett*, 1990 Tenn. Crim. App. LEXIS 9, 8 (Tenn. Crim. App. Jan. 4, 1990) (denying access to DA file during an open criminal case).

Although Rule 16 makes an open criminal investigative file an exception to disclosure through the Public Records Act, it does not prohibit the government, or defense counsel for that matter, from publishing the information shared through Rule 16. Then pretrial publicity decisions are tempered by the Tennessee Rules of Professional Conduct, specifically Rule 3.6 Trial Publicity and by Rule 3.8 Special Responsibilities of a Prosecutor.

Nor are the district attorney and defense counsel the only trial participants that must be cautious about pretrial publicity. Neither the United States Supreme Court nor the Tennessee Supreme Court will countenance the accused, witnesses, court staff or enforcement officers coming under the jurisdiction of the trial court, frustrating the trial court's affirmative duty to provide the criminal defendant a fair trial. *State v. Carruthers*, 35 S.W.3d 516, 562-563 (Tenn. 2000).

Once pretrial court proceedings begin, the original public records act, Article I, Section 17's right to an open court, moves to the forefront. Even then, Article I, Section 9's right to a fair trial can trump the public's right to view potential evidence in open court. *State v. Drake*, 701 S.W.2d 604 (Tenn. 1985); *State v. Carruthers*, 35 S.W.3d 516, 559-564 (Tenn. 2000).

Finally, once a criminal case is closed, the records are again open to the public. *Griffin v. City of Knoxville*, 821 S.W.2d 921, 923-24 (Tenn. 1991) (ordering disclosure related to suicide where there was no pending criminal case); *Memphis Publ'g Co. v. Holt*, 710 S.W.2d 513, 517 (Tenn. 1986) (holding that Rule 16 could not protect a closed criminal file from disclosure under the Public Records Act); *Capital Case Resource Center, Inc. v. Woodall*, 1992 Tenn. App. LEXIS 94, 15 (Tenn. Ct. App. Jan. 29, 1992) (superseded by statute) (Rule 16 does not protect against disclosure of evidence in a habeas corpus proceedings after criminal case has concluded); *Freeman v. Jeffcoat*, 1991 Tenn. App. LEXIS 659, 13-14 (Tenn. Ct. App. Aug. 30, 1991) (superseded by statute) (Rule 16 doesn't protect against disclosure of records in post-conviction proceeding).

Exactly when the threshold is crossed between the initial "information gathering" stage and the "ongoing investigation" stage of *Schneider* is not an issue before the Court in this case. There can be no dispute that MNPD's records are relevant to the criminal charges currently pending against the Vanderbilt student criminal defendants. As such, the records have clearly passed the threshold into the protection of Rule 16 without crossing the second threshold into a closed criminal case.

Again ignoring *Appman* and *Schneider*, Petitioners instead advocate a restrictive reading of Rule 16. They reason that since the language of Rule 16 is limited to protecting work product, then the Public Records Act exception should only be limited to internally-produced materials. What Petitioners conveniently ignore, however, is that the language of Rule 16 not only limits the ***kind*** of documents that are protected from disclosure between the prosecutor and defense counsel, it also limits ***to whom*** those unprotected documents must be disclosed: the parties to a criminal case.

The Supreme Court has already confronted the issue of whether Rule 16, as a public records act exception, is limited by its own terms or whether it should be interpreted as the basis for a much broader exception. *Appman*, 746 S.W.2d 165, 166 (Tenn. 1987). If Petitioners were correct and the relevant inquiry was the source of the records, then *Schneider* presumably would have been decided differently. In *Schneider*, the information on the field interview cards contained both biographical information (information collected from third parties) and the police officer's reason for the investigative stop (work product). But instead of directing the trial court to redact work product information, the sole direction of the Supreme Court was to redact information related to an ongoing criminal investigation. Again, this is a ***temporal*** distinction,

not a ***source*** distinction. *See also*, *McLellan v. Crockett*, 1990 Tenn. Crim. App. LEXIS 9 (January 4, 1990) (third party psychological evaluation was not a public record under Rule 16).

V. If Petitioner' argument is adopted, and Rule 16 only protects work product from public disclosure, the Tennessean *et al.* are still not entitled to the investigative file.

A. The materials that the Police collect as part of their investigation are work product.

The Tennessean *et al*. attempts to bypass *Appman* by suggesting that Rule 16(a)(2) exempts "only those documents constituting 'work product'" from disclosure. (Petition, ¶ 15)

Metro submits that this is an incorrect way to approach Rule 16 – it must be viewed as a whole. As a whole, it places jurisdiction with the Criminal Court and allows the exchange of materials between the State and defendant – there is no provision for access by the public. (See Section II of this Brief)

If Rule 16 was interpreted to allow public access, the Tennessean *et al*. would still not prevail on their argument and be allowed to access law enforcement files. Tennessee Criminal Rule 16 states broadly that law enforcement files constitutes work product:

> [T]his rule does not authorize the discovery or inspection of reports, memoranda, or other internal state documents made by the district attorney general or other state agents or law enforcement officers in connection with investigating or prosecuting the case.

Tenn. R. Crim. P. RULE 16 (a)(2)(emphasis added). The rule includes materials collected by the attorney. *Wilson v. State*, 367 S.W.3d 229, 235 (Tenn. 2012) ("An attorney's work product consists of those internal reports, documents, memoranda, and other materials that the attorney has prepared or collected in anticipation of trial." (emphasis added))

Rule 16 "conforms with and was greatly derived from its federal counterpart." *Bryant v. State,* 2004 Tenn. Crim. App. LEXIS 231, 49-50; *State v. Hicks*, 618 S.W.2d 510 (Tenn. Crim. App. 1981). Federal courts have found that Rule 16 is broader than the civil concept of "work product":

> Defendants contend that the drafters intended Rule 16(a)(2) to be a "work product" exception and, therefore, that we should limit the rule to the contours of the work product privilege codified in Federal Rule of Civil Procedure 26. **We are not persuaded that the drafters meant to limit Criminal Rule 16 to the civil "work product" doctrine.** Rule 16 itself, while encompassing government work product and having its genesis in the idea of work product, draws its boundaries more broadly than those of Civil Rule 26.
>
> … **it is clear that Rule 16(a)(2)'s protection of investigative materials extends beyond the work product privilege as defined in the civil context**. Although the Advisory Committee used the term "work product" to describe the materials discoverable under Rule 16(a)(2), it purposefully defined the Rule's scope differently than that of Rule 26. *See* Fed.R.Crim.P. 16 (1975 enactment) advisory committee's note D.
>
> As note D states, in 1975 the House of Representatives proposed to limit the materials covered by Criminal Rule 16(a)(2) to accord with Civil Rule 26. Specifically, **the House sought to exempt only "the mental impressions, conclusions, opinions, or legal theories of the attorney for the government or other government agents."** *Id.* **The Committee *rejected* that proposal and maintained the more expansive scope that includes all "reports, memoranda, or other internal government documents."** *Id.; see also In re Grand Jury Subpoenas,* 318 F.3d 379, 383 (2d Cir.2003) (noting that Rule 16 imposes a stricter limit to discovery in criminal matters than Rule 26 imposes in civil litigation).

United States v. Fort, 472 F.3d 1106, 1114-16 (9th Cir. 2007) (emphasis added). This broader definition is why the 9th Circuit held that Rule 16(a)(2) does not allow discovery of police reports that were created by local law enforcement officers. *Id*.

Other federal courts have made similar rulings. *U.S. v. Cherry*, 876 F. Supp. 547, 550-551 (S.D.N.Y.1995) (Reports created by local law enforcement officers cannot be disclosed in federal prosecutions that are based in part upon the investigative efforts of state or local agents.);

also United States v. Duncan, 586 F. Supp. 1305, 1308 (W.D. Mich 1984) (discovery of law enforcement officer's reports barred when federal authorities use those reports to prosecute); *United States v. Davidson*, 2009 U.S. Dist. LEXIS 55326, 2-3 (E.D. Tenn.) (Defendant could not discover police investigative reports because such reports fall outside the scope of Rule 16).

The collection of materials (not just the writing of notes) has been recognized as constituting work product protected materials:

> Public documents collected by or on behalf of an attorney in anticipation of litigation constitute work product because the choice of selecting which subjects to research and which documents to collect represents the attorney's or the agent's mental impressions and legal opinions about the important issues in the actual or anticipated litigation.

Stanziale v. Career Path Training Corp. (In re Student Fin. Corp.), 2006 U.S. Dist. LEXIS 86603, 46-47 (E.D. Pa. Nov. 29, 2006) (emphasis added); *also Sporck v. Peil*, 759 F.2d 312, 316 (3d Cir. 1985) ("the selection and compilation of documents by counsel in this case in preparation for pretrial discovery falls within the highly-protected category of opinion work product.")

The information collected by the police from third parties is work product, because it informs the rest of the investigation. For example, the Ohio Supreme Court has recognized that an autopsy report collected by the police is work product:

> [R]espondent states that **the autopsy reports contain information relating to the type of wounds, how they were inflicted, etc., which aid law enforcement personnel in conducting their investigation.** Respondent also states that the contents of the report are used to test the credibility of witnesses by comparing a witness' proposed testimony with details in the autopsy report….**we agree with respondent that the autopsy reports herein are exempt from disclosure as specific investigatory work product** under R.C. 149.43(A)(2)(c). The autopsy is, in itself, an investigation… we recognize that the confidentiality of the contents of an autopsy report is essential to its effective use in further investigation by law enforcement personnel.

State ex rel. Dayton Newspapers, Inc. v. Rauch, 12 Ohio St. 3d 100, 100-101 (Ohio 1984).

In this case, the Metro police collected certain materials and prepared their file for the District Attorney's Office to use in the criminal prosecution. (T.R. 234) The MNPD's investigative file is the product of the investigative experience and know-how utilized by law enforcement officers to gather relevant documents and items related to a crime. (*Id.*) MNPD routinely consults with the District Attorney's office during the course of an investigation about its course and the evidence gathered to date. *Id.* MNPD considers the creation of this kind of file to be an internal report created in preparation for the prosecution of a case by the District Attorney's office. *Id.*

For these reasons, Metro submits that the entire investigative file made by MNPD to investigate this crime is a "report … made by law enforcement officers" that is protected by Tennessee Rule of Criminal Procedure 16.

B. Rule 16(a)(2) does not authorize release of "statements made by state witnesses or prospective state witnesses."

Appellants have asserted that they are entitled to "any text messages received or sent by third persons." Tennessee Rule of Criminal Procedure 16(a)(2) provides that this rule does not "authorize discovery of statements made by state witnesses or prospective state witnesses." (emphasis added).

Tennessee Rule of Evidence 801 broadly defines a statement as "(1) an oral or written assertion or (2) nonverbal conduct of a person if it is intended by the person as an assertion." Tennessee Rule of Criminal Procedure 26.2(f) defines a witness's statement as "(1) a written statement that a witness makes and signs, or otherwise adopts or approves; or (2) A substantially verbatim, contemporaneously recorded recital of the witness's oral statement that is contained in a stenographic, mechanical, electrical or other recording or a transcription of such a statement."

A text message is a written statement sent and received by cellular phone. It is sent from a specific phone – showing that the witness makes the statement. The Trial Court provided no explanation for why it determined that the Tennessean *et al*. could have access to text messages in the investigative file, when they meet both of these broad definitions of "statements".

Text messages, as well as any other records in the investigative and prosecutorial files that constitute statements of state witnesses or prospective state witnesses under Rule 16(a)(2), are not subject to disclosure under the Tennessee Public Records Act.

C. Evidence gathered pursuant to a law enforcement subpoena or search warrant cannot be a public record.

If a state law specifies the process for obtaining a record, that process must be followed. As Chief Anderson's affidavit states, much of the evidence in the investigative file was gathered through subpoenas and search warrants. Subpoenas and search warrants are only granted when a judge makes a finding that the information requested has a valid law enforcement purpose.

For example, to issue a subpoena, the judge must find that the request will materially assist law enforcement in investigating a crime:

> **The judge shall grant the request for a subpoena to produce the documents requested if** the judge finds that the affiants have presented a reasonable basis for believing that:
> (A) A specific criminal offense has been committed or is being committed;
> (B) **Production of the requested documents will materially assist law enforcement in the establishment or investigation of the offense;**
> (C) There exists a clear and logical nexus between the documents requested and the offense committed or being committed; and
> (D) The scope of the request is not unreasonably broad or the documents unduly burdensome to produce.
> (2) If the judge finds that all of the criteria set out in subdivision (d)(1) exist as to some of the documents requested but not all of them, the judge may grant the subpoena as to the documents that do, but deny it as to the ones that do not.
> (3) If the judge finds that all of the criteria set out in subdivision (d)(1) do not exist as to any of the documents requested, the judge shall deny the request for subpoena.

T.C.A. § 40-17-123(emphasis added).

When state law gives a process for obtaining records through a subpoena, this process must be followed and respected. *State v. Fears*, 659 S.W.2d 370, 376 (Tenn. Crim. App. 1983) (privacy provisions protect medical records from members of the public, not from the courts and public officials in the performance of their official duties); *also* s*ee Givens v. Mullikin ex rel. Estate of McElwaney*, 75 S.W.3d 383, 408-09 (Tenn. 2002) (even though a physician may be required to disclose information pursuant to subpoena or court order, an implied covenant of confidentiality does not allow him to divulge this information informally without the patient's consent). A document cannot become a public record when there is a specific law determining how it is to be disseminated, even if it is in the possession of a government organization. *See State v. Cawood*, 134 S.W.3d 165, nt. 11 (Tenn. 2004).

Similarly, to obtain a search warrant, the issuing judge must find probable cause for believing evidence of criminal activity will be found. T.C.A. § 40-6-103 ("A search warrant can only be issued on probable cause, supported by affidavit, naming or describing the person, and particularly describing the property, and the place to be searched."(emphasis added)); *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 371, 129 S. Ct. 2633, 2639, 174 L. Ed. 2d 354 (2009).

The Tennessean *et al*. argue that materials obtained through search warrants are supposed to be filed with the court clerk, and therefore become public records. But the Rules of Criminal Procedure require that a "return" on the search warrant be made, with an inventory of the property taken, and filed with the clerk under certain circumstances. Tenn. Rule Crim. Pro. 41 (f) The rule does not require that the materials gathered pursuant to the search warrant be filed with the Court.

The harms involved in disclosing materials gathered by search warrant have been set forth by the Sixth Circuit at length:

> First and most obviously, because the documents must detail the government's evidence of criminal activity so as to establish probable cause for a search, they would likely identify information sources, such as wiretaps and undercover operations, the continued utility of which will be compromised by disclosure. The safety of confidential witnesses may also be compromised. The publication of search warrant documents may also reveal the government's preliminary theory of the crime being investigated and enable criminal suspects to figure out which other places are likely to be searched as the investigation continues. In addition, although the execution of the search will have already served to alert the owner or occupant of the place being searched that he may be a criminal suspect, publication of search warrant documents, by revealing the extent of the government's knowledge, could alert others that they, too, are suspects and could cause them to destroy evidence or to flee.
>
> A further concern arising from public access to search warrant documents is the fact that the government would need to be more selective in the information it disclosed in order to preserve the integrity of its investigations. This limitation on the flow of information to the magistrate judges could impede their ability to accurately determine probable cause. We are concerned also that access to the documents might reveal the names of innocent people who never become involved in an ensuing criminal prosecution, causing them embarrassment or censure.
>
> These examples are an incomplete list of the potential harms of disclosure. There are a variety of ways in which the criminal investigatory process may be harmed by making documents filed in search warrant proceedings publicly available. The critical point is that the importance of the confidentiality necessary for criminal investigations is well recognized, *see, e.g.*, *EyeCare Physicians*, 100 F.3d at 517, 519; *Times Mirror Co.*, 873 F.2d at 1215; *Goetz*, 886 F.2d at 64. Publication of search warrant documents would serve only to jeopardize that interest.

Indianapolis Star v. United States (In re Fair Fin.), 692 F.3d 424, 432-433 (6th Cir. Ohio 2012).

Matters obtained for a law enforcement purpose may be used only for the purpose they were intended, and they do not become public record simply because a police officer has them in his or her possession. *See* T.C.A. § 39-13-604(f)(5) (text messages between cell phones that are intercepted by police can be and preserved only with a court order).

It would be contrary to the clear intent of the General Assembly to allow citizens or media entities to obtain data from the police, that was gathered through the strict requirements of a law enforcement subpoena or search warrant, when the citizens or media could never qualify to obtain the information through this route themselves. For these reasons, Metro submits that evidence gathered pursuant to the specific requirements of a statute cannot be a public record.

D. Unlawful photographs and videos in the investigative file cannot be public records.

One of the individuals in this criminal case is charged with unlawful photography (T.C.A. § 39-13-605). (T.R. 234) Photographs and videos taken unlawfully are required by state law to be confiscated and, after their use as evidence, destroyed:

> Unlawful photographing in violation of privacy.
>
> (a) It is an offense for a person to knowingly photograph, or cause to be photographed an individual, when the individual has a reasonable expectation of privacy, without the prior effective consent of the individual, or in the case of a minor, without the prior effective consent of the minor's parent or guardian, if the photograph:
> (1) Would offend or embarrass an ordinary person if such person appeared in the photograph; and
> (2) Was taken for the purpose of sexual arousal or gratification of the defendant.
> (b) As used in this section, unless the context otherwise requires, "photograph" means any photograph or photographic reproduction, still or moving, or any videotape or live television transmission of any individual.
> (c) **All photographs taken in violation of this section shall be confiscated and, after their use as evidence, destroyed.**
> (d) (1) A violation of this section is a Class A misdemeanor.
> (2) If the defendant disseminates or permits the dissemination of the photograph to any other person, a violation of this section is a Class E felony.

T.C.A. § 39-13-605. Photographs in this category cannot be public records, where the legislature has mandated their confiscation and destruction.

But Appellants insisted in their Show Cause Brief that the unlawful photos and videos were public records, despite the law's requirement that they be destroyed. (T.R. 350) The Trial Court did not rule on this issue. Metro appeals that aspect of the Trial Court order and asks that this Court rule that they cannot be public records.

While the Appellants have expressed nothing but the highest motives for seeking access to the State's evidence prior to the criminal trial (to clarify the public reporting regarding this incident, bring to light additional facts regarding this incident, and protect the public's interest that this case be prosecuted without regard to perceived power, prestige or prominence) the Public Records Act does not judge motives. If the Tennessean *et al*. are successful in its legal positions, then it will have cleared the way for the most repulsive elements of society to revel in the State's evidence of sexual attacks prior to trial, at the expense of the victim, the defendants, and society as a whole.

VI. The Trial Court correctly determined that the media has no First Amendment right to public records (they have the same right as an ordinary Tennessee citizen).

The Tennessean *et al*. assert in their brief that they have a First Amendment right to public records, a right that is greater than an ordinary Tennessee citizen. This assertion is incorrect. There is no generally recognized state or federal constitutional right of access to public records. *Abernathy v. Whitley*, 838 S.W.2d 211, 214, 1992 Tenn. App. LEXIS 364, 7 (Tenn. Ct. App. 1992). Further, the Tennessee Court of Appeals has recognized that "the rights of news media to access public records are synonymous and concurrent with that of the public at large" and that "an individual citizen has as much right of access to public records as the news media." *Id.*

The Tennessee Court of Criminal Appeals has also recognized that the media has the same rights and status as the public:

> **The point to be made here is that members of the press, acting as agents of the public at large, have the same right and status as any other member of the public.** When their rights have been assailed they have the same recourse and access to the courts for redress. When a trial court puts down an order barring the press or public from a trial proceeding, or to restrain in any manner the publication of such proceedings, the First Amendment rights of the affected party must be balanced against the due process right of an accused to a fair trial.

State v. Drake, 1984 Tenn. Crim. App. LEXIS 2889, 9 (Tenn. Crim. App. June 29, 1984)

VII. The Trial Court erred in giving Appellants access to materials created by the police and subject to the criminal court's protective order.

Protective orders prevent the inspection of documents requested under the Public Records Act. *Ballard v. Herzke*, 924 S.W.2d 652, 662 (Tenn. 1996). The Chancery Court stated that it was deferring to the criminal court's protective order. This protective order prevents the dissemination of "all photographs and videos provided in discovery by the State." (T.R. 30)

Yet the Chancery Court granted Appellants access to the Pano-scan photos, even though it acknowledged that these photos had been produced to the criminal defendants through discovery. (T.R. 635, 637) This is inconsistent with its vow to honor the criminal court's protective order.

It is also inconsistent with the Chancery Court's own "test" for what constitutes a public record – the test says records developed by the police or reflecting the reconstructive or investigative efforts of the police department are not public records. It did this despite acknowledging in its memorandum that the Pano-scan was "made or collected" by the police. (T.R. 635)

Another clear error by the Chancery Court was ordering that the victim's name be redacted from the materials that must be given to the Tennessean et al. (T.R. 643) There is no law making that information private, and the Tennessean has editorialized against a proposal at the legislature that would make that information private. http://www.tennessean.com/story/opinion/editorials/2014/02/12/sexual-assault-privacy-bill-protecting-victims-or-those-in-power/5402063/

CONCLUSION

The Public Records Act may not override the provision in Tennessee Criminal Rule of Procedure 16 limiting jurisdiction over discovery and inspection of investigative files with the Criminal Court. The Metropolitan Government asks that the Trial Court's order be overturned and that Rule 16 be interpreted in the way supports the constitutional provisions at issues and therefore prevents the premature disclosure of investigations.

Respectfully submitted,

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