No. M2014-00524-COA-R3-CV

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

OPENING BRIEF OF INTERVENOR—APPELLEE JANE DOE

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ORAL ARGUMENT IS REQUESTED

April 21, 2014

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STATEMENT OF THE ISSUES

Ms. Doe is the victim of a violent crime. The petitioners have requested records that pertain to that crime—a sexual assault by multiple individuals. The release of these records would subject Ms. Doe to intimidation, harassment, and abuse; it would also undermine her dignity. The fundamental question this case presents is whether those consequences *matter*—that is, whether the Public Records Act mandates disclosure of records about a crime even if such disclosure would harm the victim.

On appeal, the petitioners have raised the following aspect of this question:

1. Whether the constitutional and statutory rights afforded to victims in Tennessee qualify as a source of exemptions from disclosure under the Public Records Act.

Because the trial court failed to address this question below, and because her objections to disclosure are broader than those of the governmental parties, Ms. Doe raises her own issues on appeal,[1] specifically:

2. Whether Ms. Doe's rights as a victim preclude disclosure of harmful records even after the criminal proceedings have concluded.

3. Whether the trial court erred when it abandoned its judicial role by (i) accepting jurisdiction over the case but declining to address all of the issues before it and (ii) directing Ms. Doe to seek relief from the criminal court.

[1] Ms. Doe raises her 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 . . . are not required."). Accordingly, Ms. Doe anticipates filing 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.").

STATEMENT OF THE CASE

On February 5, 2014, The Tennessean newspaper and a group of media companies (hereinafter "the petitioners") filed the underlying lawsuit against the Metropolitan Government of Nashville and Davidson County (hereinafter "Metro"). (R. 1).[2] On February 18, 2014, the Chancery Court (hereinafter "trial court") permitted the State of Tennessee, the District Attorney's Office for the Twentieth Judicial District, and the victim, Jane Doe, to intervene in the suit. (R. 87-91.).

On March 3, 2014, shortly before the trial court was scheduled to conduct an *in camera* review of the investigative file, Metro and the State questioned whether the court had subject matter jurisdiction to do so. (R. 322.) Two days later, the court determined that it had jurisdiction. (R. 628.). The next day, on March 6, 2014, the trial court reviewed the investigative file. (R. 336.)

On March 10, 2014, the trial court held a show cause hearing. (R. 664.) It issued its Memorandum and Order two days later, on March 12, 2014. (R. 630.)

The petitioners filed a notice of appeal on March 17, 2014. (R. 655.)

[2] The six volumes of the Record will be referred to as "R." Unpublished cases are attached as an appendix to this brief.

STATEMENT OF THE FACTS

On June 23, 2013, Ms. Doe was the victim of a violent crime. (R. 630-31). The crime was investigated by the Metropolitan Nashville Police Department ("Metro Police"), and this investigation resulted in the indictment of four individuals on multiple counts of aggravated rape and aggravated sexual battery. (R. 631.) One of the individuals also was charged with one count of unlawful photography and one count of tampering with evidence. (R. 631.) These defendants have pleaded not guilty to the charges in Davidson County Criminal Court. (R. 631.)

On October 2, 2013, Deputy District Attorney Tom Thurman and defense counsel for the four charged defendants agreed to a protective order, which the Court issued pursuant to Tenn. R. Crim. P. 16(d)(1). (R. 631.) In relevant part, this order provides 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." (R. 649.) These materials include, *inter alia*, two videos: (i) a video recorded during the assault of Ms. Doe and (ii) a surveillance video that depicts time periods before and after her assault. (R. 633-34.) According to the trial court, "[i]t appears that Ms. Doe's image may have been captured by building surveillance cameras as she lay unconscious and partially disrobed in the hall of the dormitory for some period of time." (R. 633.) There are also crime scene photographs and numerous photographs "transmitted through smart phones in close proximity in time to when the alleged rape occurred." (R. 633-34.)

The rest of the discovery is voluminous. (R. 633-37.) It includes text messages that were also sent at or near the time of the rape, emails, forensic tests performed on

telephones and computers, written and recorded statements of the defendants, "Vanderbilt access card information," and statements of Ms. Doe. (R. 634-45.)

On October 17, 2013, a reporter with *The Tennessean* made a request to Metro Police for "[a]ny records (as that term is broadly defined in the Act) regarding the alleged rape [of the victim]." (R. 13.) The email memorializing the request specifically referenced copies of *any* "text messages received or sent and videos provided and/or prepared by any third-party sources." (R. 13.) By the plain terms of the request, *The Tennessean* explicitly sought the video that depicts Ms. Doe's sexual assault. Later, in a letter from its counsel on October 28, 2013, *The Tennessean* wrote that it "would like to clarify [its] request." (R. 16.) The newspaper stated that it "has no intention of publishing the name of the alleged victim prior to trial without her permission" and claimed that it "is not interested in obtaining a copy of photographs or video taken by any of the defendants during the alleged assault." (R. 16.) Nonetheless, it reiterated its desire for other evidence of Ms. Doe's assault, including the surveillance video, as well as any text messages she may have sent or received, and any text messages referencing the assault. (R. 15-19.) Even while making this more-limited request, the petitioners knew that the evidence they requested was salacious: *The Tennessean* itself reported that the surveillance video depicts Ms. Doe being carried by four individuals with her "private area sometimes exposed." Brian Haas, *Vanderbilt accuser at first denied she was raped*, THE TENNESSEAN, Dec. 3, 2013.

The request for these records was denied (R. 21-22), and *The Tennessean* and other petitioners subsequently filed this civil action (R. 1). Ms. Doe became aware of this action on February 11, 2014, filed a motion to proceed using a pseudonym (R. 62), and

subsequently filed a motion to intervene (R. 72). The Court granted both of her motions. (R. 62; R. 90.)

On February 13, 2014, at a hearing on Ms. Doe's motion to intervene, the petitioners again attempted to "clarify" their request for records. Previously, in her motion to intervene, Ms. Doe had referenced the fact that the petitioners were aware that the surveillance video they requested as part of the lawsuit includes graphic and embarrassing depictions of her. (R. 100.) Apparently in response to this submission, petitioners' counsel asserted at the hearing—for the first time—that the petitioners did not want a copy of the *entire* surveillance video but rather would accept an edited video that depicted the period of time before and after Ms. Doe was present in the video or, alternatively, an edited video that "blurred out" or otherwise obscured her. The petitioners did not cite any authority that would permit such altered or redacted records to be made before disclosure. Nor have they amended their complaint to make this change.

On March 12, the trial court issued its Memorandum and Order, ordering the release of some—but not all—of the requested records. (R. 630.) In its Order, the trial court avoided altogether the issues raised by Ms. Doe. Because the trial court "does not hear criminal cases" and, thus, "is not usually called upon to make determinations about crime victims," it "defer[red] to the court overseeing the criminal prosecution as the court of first resort in protecting the rights of Ms. Doe under the Victims' Bill of Rights. (R. 646.) The trial court did not explain how Ms. Doe could receive relief in the Criminal Court.

The petitioners filed a notice of appeal on March 17, 2014. (R. 655.)

SUMMARY OF THE ARGUMENT

This is a case about victims' rights. In Tennessee, these rights include the ability to prevent the government from releasing records (i) that are reasonably likely to lead to intimidation, harassment, and abuse of a crime victim, or (ii) whose release is incompatible with treating the victim with dignity and compassion. These rights flow from the plain terms of the Tennessee Constitution and the Victims' Bill of Rights. They also comport with the decisions of courts throughout this country that have addressed the intersection of victims' rights and the public's right to access information that rests in the hands of the government.

Although this appeal presents an issue of first impression in Tennessee courts, it does so only in the sense that Ms. Doe is the first to ask the Court to recognize what the plain terms of the law already require, and only because of the unprecedented nature of the evidence in this case and the petitioner's request for that evidence.

The petitioners in this case make their request for records about a violent crime pursuant to the Tennessee Public Records Act, Tenn. Code Ann. §§ 10-7-501 *et seq.* (hereinafter "PRA"). Like any other statute, the PRA must be read in conjunction with the rest of the Tennessee Code, including the Victims' Bill of Rights, and its provisions are subordinate to the state constitution. To this end, the PRA explicitly provides that records can be protected from disclosure where "otherwise provided by state law." Tenn. Code Ann. § 10-7-503(2)(A).

In this case, Ms. Doe's rights as a victim qualify as a "state law" exemption from disclosure under the PRA. Specifically, as the victim of a violent crime, Ms. Doe has the right under the Tennessee Constitution "to be free from intimidation, harassment and

abuse throughout the criminal justice system." Tenn. Const. art. I, § 35b. Pursuant to the Victims' Bill of Rights, she also has the right to "[b]e treated with dignity and compassion," and the right to "[p]rotection and support with prompt action in the case of intimidation or retaliation from the defendant and the defendant's agents or friends." Tenn. Code Ann. § 40-38-102(a). These provisions have the force of law in Tennessee and, accordingly, serve as a bar to disclosure of otherwise public records when disclosure would violate their terms.

It does so here. The disclosure of records petitioners seek would subject Ms. Doe to "intimidation, harassment and abuse" and would be incompatible with treating her "with dignity and compassion." Ms. Doe was the victim of an aggravated rape that was perpetrated by multiple individuals and recorded, at least in part, by one of them. Due to the identities of the defendants, the criminal case has been covered extensively by local and national media outlets. In this atmosphere, the public release of the requested records is highly likely to result in harassment of Ms. Doe; publication of these materials has the potential to inflict substantial emotional abuse on her; and the release of the records would stand directly counter to treating Ms. Doe with dignity and compassion.

In addition to the harm that would result here, the petitioners' legal theory would adversely impact victims of similar crimes throughout the state. If the Court were to accept the petitioners' legal theory, the self-imposed limits they have placed on their own requests would be irrelevant. Other private individuals or less scrupulous media companies could obtain any evidence in any case—such as the video of Ms. Doe's assault—and disseminate it as they wish. Once that door is opened, the court has no ability to protect Ms. Doe and other victims from further harm.

There is no fair reading of the constitutional and statutory protections afforded to Ms. Doe as a crime victim that would subject these materials to public inspection and copying. Nor is there a time limit on these protections. Although the calculus of harm may change over time, the conclusion of legal proceedings does not extinguish Ms. Doe's rights, including the right to be free from harassment and abuse. The temporal reach of the victims' rights laws is particularly important because many, if not all, of the arguments against disclosure put forth by the State (such as Rule 16) last only as long as judicial proceedings continue. If only those exemptions applied, then *all* of the records in the criminal cases that resulted from the rape of Ms. Doe (including the video of that rape) would be subject to disclosure when the last defendants' appeal is concluded. Without reference to victims' rights, there would be no bar to release of these records—no matter how harmful that release might be. This cannot be the law.

Because the protections afforded to Ms. Doe extend beyond the end date of the criminal case, the trial court was correct to accept jurisdiction over her objections to the release of records. But it erred when it failed to exercise that jurisdiction—specifically, by ordering the release of records while, at the same time, directing Ms. Doe to seek relief elsewhere. This disregard for the victim was improper. The Tennessee Constitution and Code read no differently in Criminal Court than Chancery Court, and Ms. Doe should not be bounced from one to the other. If the trial court can order the release of records from a criminal case, then it can rule on the legal arguments against doing so.

On remand, this Court should direct the trial court that Ms. Doe's rights as a victim qualify as an exemption under the PRA and that, if disclosure of any record violates her rights, the offending record must not be released.

ARGUMENT

I. THE CONSTITUTIONAL AND STATUTORY RIGHTS AFFORDED TO VICTIMS IN TENNESSEE QUALIFY AS A SOURCE OF EXEMPTIONS FROM DISCLOSURE UNDER THE PUBLIC RECORDS ACT.

The petitioners in this case make their request for records related to Ms. Doe pursuant to the Tennessee Public Records Act, Tenn. Code Ann. §§ 10-7-501 *et seq.* (hereinafter "PRA"). This statute "promotes public awareness and knowledge of governmental actions and encourages governmental officials and agencies to remain accountable to the citizens of Tennessee." *Schneider v. City of Jackson*, 226 S.W.3d 332, 339 (Tenn. 2007). Because of the statute's purposes, courts "interpret the terms of the Act liberally." *Memphis Publ'g Co. v. Cherokee Children & Family Servs., Inc.*, 87 S.W.3d 67, 74 (Tenn. 2002). Like any other statute, however, the PRA must be read in conjunction with the rest of the Tennessee Code, including the Victims' Bill of Rights, and its provisions are subordinate to the state constitution. To this end, the PRA explicitly provides that records can be protected from disclosure where "otherwise provided by state law." Tenn. Code Ann. § 10-7-503(2)(A).

A. The Rights Asserted By Ms. Doe Are "Provided By State Law."

When the General Assembly amended the language of the PRA by replacing the term "state statute" with "state law" in the phrase referenced above, it "recognized . . . that circumstances could arise where the reasons not to disclose a particular record or class of records would outweigh the policy favoring public disclosure." *Swift v. Campbell*, 159 S.W.3d 565, 571 (Tenn. Ct. App. 2004). At that time, the General Assembly not only identified these circumstances in "specific exceptions . . . in the public records statutes themselves" but also "acknowledged and validated both explicit and

implicit exceptions from disclosure found elsewhere in state law." *Id.* As the amended language of the PRA contemplated, these "state law" exemptions are separate from, and in addition to, the specific statutory exceptions contained in the Act itself.

There are numerous implicit and explicit "state law" exemptions to disclosure of records that are located outside the specific provisions of the PRA. For example, Tennessee courts have held squarely that these exemptions include, *inter alia*, (i) documents sealed by a protective order entered pursuant to the Tennessee Rules of Civil Procedure, *see Ballard v. Herzke*, 924 S.W.2d 661, 662 (Tenn.1996); (ii) records protected by Tenn. R. Crim. P. 16, *see Swift*, 159 S.W.3d at 576; and (iii) documents protected by the work product doctrine, codified as Tenn. R. Civ. P 26.02, *see Arnold v. City of Chattanooga*, 19 S.W.3d 779, 786 (Tenn. Ct. App. 1999).

The sources of these exemptions are laws that neither reference the PRA nor explicitly purport to modify it. Rather, Tennessee courts have long held that the phrase "unless otherwise provided by State law" serves to bar disclosure when disclosure would conflict with the purposes and language of other state laws. In fact, the "permissible sources of exceptions from disclosure" broadly include "the common law, the rules of court, and administrative rules and regulations," as "each of these has the force and effect of law in Tennessee." *Swift*, 159 S.W.3d at 571-72. In this context, the victims' rights laws in Tennessee create another exemption from disclosure.

The petitioners claims to the contrary do not stand up to close inspection. They argue, for example that Ms. Doe's "*alleged* 'privacy' interests" do not trump the public's right of access under the PRA. App. Br. at 20 (emphasis added). This argument is a straw man. Here, Ms. Doe does not assert *alleged* rights; she asserts her specifically

enumerated rights "to be free from intimidation, harassment and abuse throughout the criminal justice system," Tenn. Const. art. I, § 35b, and to "[b]e treated with dignity and compassion." Tenn. Code Ann. § 40-38-102(a). None of the cases cited by the petitioners in their brief addresses similar concerns. Rather, each of the cases they rely upon involves assertions of a general "right to privacy" as a basis for exempting records from disclosure. The petitioners cannot cite *any* legal authority, because there is none, for the proposition that the constitutional and statutory provisions cited by Ms. Doe as creating an exemption from disclosure should *not* be considered "state law" under the PRA.

B. The People of Tennessee and Their Legislature Intended To Provide Ms. Doe With Substantive Protection, Not Empty Promises.

Ms. Doe qualifies as a victim eligible for constitutional and statutory protection because she is "[a] natural person against whom a crime was committed," and the "crime" in question was an "offense the punishment for which is a . . . felony." Tenn. Code Ann. § 40-38-302(4)(A), (a)(A).

As the victim of a violent crime, Ms. Doe has a right under the Tennessee Constitution "to be free from intimidation, harassment and abuse throughout the criminal justice system." Tenn. Const. art. I, § 35b. Pursuant to the Victims' Bill of Rights, she also has the right to "[b]e treated with dignity and compassion," and the right to "[p]rotection and support with prompt action in the case of intimidation or retaliation from the defendant and the defendant's agents or friends." Tenn. Code Ann. § 40-38-102(a).

These rights are not unique to Tennessee. On the contrary, they were enacted as part of a sweeping change in the way that governments treat victims. Over the last thirty

years, "nearly two-thirds [of the states, including Tennessee,] have passed amendments to their state constitutions granting victims' rights in the criminal justice process." Mary Margaret Giannini, *Redeeming an Empty Promise: Procedural Justice, the Crime Victims' Rights Act, and the Victim's Right to Be Reasonably Protected from the Accused*, 78 TENN. L. REV. 47, 83 (2010).[3] These states have done so "because of a perceived imbalance in the criminal justice system" whereby "victims' absence from criminal processes conflicted with a public sense of justice." Paul G. Cassell, *The Victims' Rights Amendment: A Sympathetic, Clause-by-Clause Analysis*, 5 PHOENIX L. REV. 301, 303 (2012). In promoting these changes, "[v]ictims' advocates argued that the criminal justice system had become preoccupied with defendants' rights to the exclusion of considering the legitimate interests of crime victims." *Id.* And these changes not occurred only in state legislatures; over the past twenty years, the federal government has passed multiple laws intended to protect victims. *See, e.g.*, Victims' Rights and Restitution Act of 1990, PUB. L. NO. 101-647, 104 STAT. 4789 (1990); the Crime Victims' Rights Act ("CVRA"), PUB. L. NO. 108-405, 118 STAT. 2260 (2004).

The development of victims' rights laws across the states, in Tennessee, and in Congress did not occur in a vacuum; the rights afforded by each jurisdiction generally aligned with other jurisdictions, as victims' rights advocates worked together to pass the

[3] These constitutional provisions include: Ala. Const. art. I. § 6.01; Alaska Const. art. I, § 24; Ariz. Const. art. 2, § 2.1; Cal. Const. art. 1, § 28(a)-(b); Colo. Const. art. II, § 16a; Conn. Const. art. XXIX; Fla. Const. art. 1, § 16(b); Idaho Const. art. I, § 22; Ill. Const. art. 1, § 8.1; Ind. Const. art. I, § 13(b); Kan. Const. art. 15, § 15; La. Const. art. 1, § 25; Md. Const. art. 47; Mich. Const. art. 1, § 24; Miss. Const. art. 3, § 26A(1); Mo. Const. art. 1, § 32; Neb. Const. art. I, § 28; Nev. Const. art. 1, § 8; N.J. Const. art. 1, ¶. 22; N.M. Const. art. II, § 24; N.C. Const. art. I, § 37; Ohio Const. art. I, § 10a; Okla. Const. art. 2, § 34; Or. Const. art. I, § 42; R.I. Const. art. 1, § 23; S.C. Const. art. I, § 24; Tex. Const. art. 1, § 30; Utah Const. art. I, § 28; Va. Const. art. I, § 8-A; Wash. Const. art. I, § 35; Wis. Const. art. 1, § 9m.

laws nationwide before turning their attention to similar efforts in Congress. *See* Cassell, *supra,* 5 PHOENIX L. REV. at 303. For example, the federal CVRA provides protections similar to those afforded by the Tennessee Victims' Bill of Rights. *Compare* Tenn. Code Ann. § 40-38-102(a)(1) (providing victims with the right to "[b]e treated with dignity and compassion") *with* 18 U.S.C. § 3771(a)(8) (providing victims the right "to be treated with fairness and with respect for the victim's dignity and privacy").

The similarity between victims' rights laws in Tennessee and other jurisdictions is important because courts outside of Tennessee have repeatedly addressed the intersection between victims' rights and the disclosure of information to the public. *See, e.g.*, Cassell, *supra,* 5 PHOENIX L. REV. at 315 n.115-n.120 (2012) (listing at least seven such cases in federal courts alone since 2005). These cases support the straightforward principle that Ms. Doe should not be harmed anew by the release of records that could result in intimidation, harassment, and abuse, or whose release is incompatible with her right to be treated with compassion and dignity. *See, e.g.*, *State in Interest of K.P.*, 709 A.2d 315 (N.J. Ch. Div. Dec. 29, 1997) (relying on the state's Crime Victims' Bill of Rights to deny a motion by the press to access juvenile court proceedings); *United States v. Kaufman*, No. 04-40141, 2005 WL 2648070 (D. Kan. Oct. 17, 2005) (interpreting the federal CVRA to prohibit a news station's courtroom artists from sketching the likenesses of victims); *United States v. Patkar*, No. 06-cr-00250, 2008 WL 233062 (D. Haw. Jan. 28, 2008) (relying on victims' rights laws to deny the AP's motion for access to "materials that comprised the basis of the [charged] extortion [scheme] such that if revealed, would cause damage to the reputation of the victim"); *United States v. Madoff*, 626 F. Supp. 2d 420, 425-28 (S.D.N.Y. 2009) (upholding the government's request to

withhold from the media identifying information about some of the victims pursuant to their "right to be treated with fairness and with respect for [their] dignity and privacy" under the CVRA); *United States v. Robinson*, Cr. No. 08-10309-MLW, 2009 WL 137319, at *1-3 (D. Mass. Jan. 20, 2009) (relying on the CVRA and *Patkar*, *supra*, to deny the motion of a newspaper seeking disclosure of the identity of a victim who was subject to extortion after a sex-for-fee relationship); *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").

For example, in *State in Interest of K.P.*, a trial court in New Jersey explicitly held that the state's constitutional amendment and statute protecting victims' rights created substantive rights for victims, including the right of "all victims" to be free from "pending harm." *See* 709 A.2d at 142, 143-44. In so doing, the court noted that the state's laws "mandate[] the criminal justice system to treat a victim with dignity and compassion," while "[t]he [constitutional] amendment, essentially, augmented victims' statutory rights by raising them to constitutional significance." *Id.* In this context, the court found that "ignor[ing] the victim's request [to bar media from the proceeding], despite the unquestionable harm that will result, is inconsistent with fair, compassionate and respectful treatment [of the victim]." *Id.* at 143. Because the court believed that barring the media was "necessary to exercise [its authority] to protect the victim in this case," the court found that it had the power to do so. *Id.* at 144. As a result, the court barred the media from the judicial proceeding, even in the face of strong First

Amendment considerations, after determining that the media' presence could result in a "a second victimization by the judicial process." *Id.*

All of the factors that led to the court's decision in *State in Interest of K.P.* are present here. As in New Jersey, the people of Tennessee "augmented victims' statutory rights by raising them to constitutional significance," *id.* at 143-44, when they passed via referendum a victims' rights amendment, codified at Art. I, § 35. And the considerations that led the New Jersey court to determine that it could act "to protect the victim in this case," *id.* at 144, are no different here than they were there: Like New Jersey, the Tennessee legislature has enacted a comprehensive Victims' Bill of Rights, codified at Tenn. Code Ann. §§ 40-38-100 *et seq.*, which provide a broad panoply of rights. As the New Jersey court reasoned, "[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 [to bar media]." *Id.* at 134. This reasoning is sound and should control here.

The district court in *Kaufman* made similar determinations about the impact of victims' rights on press access, albeit in the context of a federal court proceeding. There, the district court interpreted "the congressional mandate to protect the privacy and dignity of victims under the Crime Victims' Rights Act, 18 U.S.C. § 3771," to require "that sexually-graphic videos of mentally ill victims [be] shown in a manner so that they are not viewable by individuals in the [court's] gallery," including the press. *Kaufman*, *supra*, at *1-2. Further, the district court prohibited sketch artists working for local news companies from sketching the likenesses of victims. *Id.* at *4. To support this restriction,

the district court found that subsection (a)(8) of the CVRA "*require[d]* that sketch artists' activities . . . be restricted under the circumstances of this case." *Id.* (emphasis added). This section of the victims' rights statute 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). The court reasoned that, if sketch illustrations of the victims were allowed, "the victim[s] undoubtedly would . . . face considerable additional distress and loss of dignity." *Kaufman*, *supra*, at *4. Notably, the section of the federal CVRA that the district court relied upon in *Kaufman* is analogous to one of the provisions of Tennessee's Crime Victims' Bill of Rights, specifically section 40-38-102(a)(1), which provides victims with the right to "[b]e treated with dignity and compassion." Pursuant to Ms. Doe's right to be treated in this manner, the Court has ample authority—which it should exercise—to prohibit the disclosure of any records that could cause her harm or adversely impact her dignity.

The district court's decision in *Patkar* provides a good template for conducting this analysis. There, the court relied on federal victims' rights laws to deny a motion by the Associated Press for access to "materials that comprised the basis of the [charged] extortion [scheme]." *Patkar*, *supra*, at *5. Specifically, the AP sought "email communications" between the defendant and the victim that were attempts by the defendant to extort the victim. *Id.* at *2. The government resisted disclosure and argued that, if revealed, the materials "would cause damage to the reputation of the victim." *Id.* The district court agreed. In so doing, it noted that the CVRA "was intended to provide meaningful rights, and not a simple laundry list of aspirational goals as to how the government and courts should treat victims." *Id.* at *5. Through this statute, the court

explained, "Congress . . . has determined that failure to treat a victim with fairness and with respect to privacy works a clearly defined and serious injury to the victim." *Id.* The court concluded that, "[i]n order to protect [the victim's] statutory right to be treated with fairness and with respect to his privacy, good cause exists to limit disclosure of [the requested] materials." *Id.* Further, the court found that, if it had to balance the interests at stake, "the crime victim's right to be treated with fairness and respect for his privacy *clearly outweighs* any public interest in disclosure." *Id.* at *6 (emphasis added).

The court's analysis in *Patkar* has direct application here. As a preliminary matter, the moving parties rely on the same doctrine: In *Patkar*, the AP sought the requested records pursuant to the public access doctrine, *id.* at *2; here, the Tennessee "public records law is essentially a codification of the public access doctrine." *Ballard*, 924 S.W.2d at 661 (citing *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978)). Like Congress, the Tennessee legislature created *rights* for victims, rather than aspirational goals. *See, e.g.*, Tenn. Code Ann. § 40-38-101(a) ("The general assembly finds and declares that victims and witnesses shall have certain *rights* in this state and that they shall be made aware of these rights.") (emphasis added). And the Tennessee Victims' Bill of Rights, like the CVRA, "itself provides no exceptions to the rights afforded." *Patkar*, *supra*, at *6. Thus, the victims in both cases "ha[ve] an unquestionable right 'to be treated with fairness and with respect for [their] dignity and privacy." *Id.* at *5. And, finally, regardless of how the criminal case proceeds—and even after it is resolved—the victim "retains his right to be treated with fairness and with respect to his privacy." *Id.* at *5.

Taken together, *State in Interest of K.P.*, *Kaufman*, *Patkar*, and the other cases cited above, stand for the proposition that (i) victims' rights are substantive rights, (ii) that must be afforded ample consideration, especially when codified in the state constitution, and (iii) which mandate that the judicial system protect victims from harm and treat them with dignity. In each of those cases, this understanding led the court to limit or prohibit access to the media to otherwise public records when the victim objected. As in those cases, Ms. Doe objects to the petitioners' request for disclosure of records, and she asserted all of the rights afforded to her under the Tennessee Constitution and Victims' Bill of Rights.[4] As the cases described above suggest, these rights create an exemption from disclosure of certain records under the PRA.

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[4] Jane Doe asserted her rights in an affidavit filed in the trial court. (R. 118). For reasons that are unclear, the petitioners have requested that the appeals court order this affidavit stricken, allegedly because it "fail[s] to comport with Tennessee evidence requirements." App. Br. at 23. Specifically, petitioners argue that Ms. Doe's "beliefs and opinions do not constitute fact, and are unsupported by facts in the record," App. Br. at 25; they specifically attack paragraph 4 of Ms. Doe's affidavit as an example of her "offer[ing] opinions . . . which are outside [her] purview as a lay witness," App. Br. at 23 n.21. From these statements, it appears that petitioners either have not read, failed to read closely, or have ignored the actual statements in Ms. Doe's affidavit. In its entirety, paragraph 4 reads:

> I seek through the attached response to assert my rights as a crime victim under the Tennessee Constitution and state statutes, including but not limited to Tenn. Const. art. I, § 35b and the Victims' Bill of Rights. Specifically, I assert my right to protection from intimidation, harassment, and abuse throughout the criminal justice system. I also assert my right to be treated with dignity and compassion, and for the State to provide me with protection and support throughout the pendency of the criminal action.

(R. 118). Given this paragraph, it is clear that Ms. Doe seeks to "assert [her] rights," which was the purpose of the affidavit. Unless the petitioners believe she is somehow incapable of doing so, their objections are utterly frivolous and should be rejected summarily.

C. These Protections Apply In Public Records Cases.

The petitioners do not have an answer for the cases cited above. Neither below nor on appeal do they mention—let alone attempt to confront—the substantial authority that supports restricting public access to records or judicial proceedings that could harm a victim. Rather, the petitioners argue that Ms. Doe's constitutional and statutory rights simply do not exist in the context of a civil case brought under the PRA. *See* App. Br. at 19-21. To reach this sweeping conclusion, they selectively quote a clause from a footnote in an unpublished case, *Denson v. Benjamin*, 1999 WL 824346 (Tenn. Ct. App. Aug. 12, 1999) *quoted by* App. Br at 19, that does not address any relevant issue. The petitioners also misconstrue the scope of exemptions to the PRA, which can be found throughout "state law," even when the laws that create the exemption are directed at other ends—such as the Rules of Criminal Procedure.

For its part, *Denson* does not support the conclusion that petitioners seek to draw from it. There, a minor student and his parents sued the school system for negligent protection and negligent supervision after the student was tripped and seriously injured by another minor student in the school's stairway. *Denson*, *supra*, at *1-2. On appeal, the petitioners objected to the trial court's refusal to allow them to add a "negligent investigation" claim to their complaint; this claim would have asserted that the petitioners' "due process rights were violated by the alleged inadequacies of the [school system's] investigation [of the incident]." *Id.* at *2. In rejecting the due process claim, the appeals court held that "[s]uch rights do not arise in favor of an injured party in the context of school disciplinary proceedings against the party causing the injury." *Id.* In a footnote following this holding, the court noted that the petitioners had cited the

constitutional amendment that covered victims' rights, Tenn. Const. art. I, § 35, to support their due process argument, *id.* at *2 n.1, and remarked that "this amendment appears to refer only to the criminal justice system." *Id.* In context, it is difficult to determine how the court reached this conclusion or what it meant by the statement other than to say that the amendment did not apply to the facts of the case. There certainly was no analysis of the scope of the constitutional amendment or any issue presented there that would preclude the relief sought by Ms. Doe here.

On that issue, the statutory language is clear and unambiguous: Ms. Doe has a right to "[b]e treated with dignity and compassion." The state legislature did not qualify the scope of that protection or limit its expression to criminal proceedings, and the provision is clearly "state law" for purposes of the PRA. *See* Tenn. Code Ann. § 10-7-503(2)(A) (explicitly providing that records can be protected from disclosure where "otherwise provided by state law"). Notably, petitioners do not even *attempt* to explain why the statutes cited by Ms. Doe *fail* to create a substantive right in a civil *case* under the Public Records Act to preclude the disclosure of these records while Rule 16 *does* create such an exemption. *See, e.g.*, App. Br. at 15 (acknowledging that Tenn. R. Crim. P. 16(a)(2) qualifies as an exemption from disclosure under the PRA). As their silence suggests, there is no way to distinguish between Rule 16 and the Victims' Bill of Rights. Section 10-7-503(2)(A) does not require the "state law" that "otherwise provide[s]" an exemption to the PRA to specifically reference either civil cases or the PRA itself. On the contrary, the Tennessee Supreme Court has held explicitly that, *inter alia*, Rule 16 of the Tennessee Rules of Criminal Procedure provides a basis for exempting records from disclosure, *see Appman v. Worthington*, 746 S.W.2d 165, 166 (Tenn. 1987), even though

the Rules were specifically enacted to "govern the procedure in all *criminal* proceedings conducted in all Tennessee courts of record." Tenn. R. Crim. P. 1(a) (emphasis added); *see also* Advisory Commission Comment to Rule 1 ("These rules apply in cases which are clearly criminal in nature, including both misdemeanors and felonies."). If a rule of criminal procedure can create an exemption from disclosure—which it plainly does—so, too, can a statute directed at protecting victims whose cases are prosecuted within the criminal justice system.

Nonetheless, even if Ms. Doe's constitutional and statutory rights were only valid within the criminal justice system, they would apply to this case because the records requested by the petitioners are directly connected to the criminal justice system. As a practical matter, the records the petitioners seek are only available to them as public records because there is a criminal proceeding underway, and that criminal proceeding is only underway because Ms. Doe suffered sufficient harm to qualify as a victim. Moreover, the same facts that give rise to the records the petitioners seek give rise to Ms. Doe's rights as a victim under state law. And it is the petitioners who have chosen to file suit in civil court to access these records, not Ms. Doe. In this context, it would be absurd to permit the petitioners to file a civil lawsuit to access records of the criminal justice system while, at the same time, precluding Ms. Doe from asserting her rights to block that disclosure in the same forum. If the court were to adopt such a rule, it would create the irrational result that any individual could subvert the victims' rights laws simply by asking a civil court for permission to harass, intimidate, and abuse a victim. Again, this is not the law.

D. Without These Protections, The Public Records Act Would Inflict Substantial Harm On Ms. Doe And Other Victims.

The application of Ms. Doe's rights to the PRA is uncomplicated. As noted above, the PRA explicitly provides that records can be protected from disclosure where "otherwise provided by state law." Tenn. Code Ann. § 10-7-503(2)(A). Two provisions of "state law" are applicable here. First, Ms. Doe has a *constitutional* "right to be free from intimidation, harassment and abuse throughout the criminal justice system." Tenn. Const. art. I, § 35. As noted above, Ms. Doe was the victim of an aggravated rape that was perpetrated by multiple individuals and recorded in part by at least one of them. The records originally requested by the petitioners include graphic videos, photographs, and text messages that reference this sexual assault. Due to the identities of the defendants, the criminal case has been covered extensively by local and national media outlets, including television, radio, print, and online publications. In this atmosphere, the public release of records is highly likely to result in the harassment of Ms. Doe, and publication of these materials has the potential to inflict substantial emotional abuse on her. For example, as recently as February 25, 2014, some of the petitioners reported extensively on a leaked police report in such a manner that, intentionally or not, could subject Ms. Doe to harassment and abuse. *See, e.g.*, Nick Beres, *Police Interview With Alleged Vanderbilt Rape Victim, Suspect*, NewsChannel5, Feb. 25, 2014; Kimberly Curth, *Prosecutor: Someone trying to intimidate Vanderbilt rape victim*, WSMV, Feb. 24, 2014. These reports contain details that, if true, and if publicly disclosed further by the release of additional records, would result in re-victimization.[5]

[5] For ease of review, these news stories are included in the Appendix to this brief.

Further public scrutiny and harm is likely to follow if the requested records are released, and the release of the records would directly and adversely impact Ms. Doe's well-being. The possibility is neither illusory nor remote; examples abound of harassment in similar circumstances. *See, e.g.*, Mark Memmott, *Two Steubenville Girls Arrested After Allegedly Threatening Rape Victim*, NPR, Mar. 19, 2013; Mary Chastain, *Threats Made Against Sorority of Girl Who Accused Jameis Winston of Rap*e, BREITBART, Nov. 27, 2013.

In addition, there is a second provision in "state law" that exempts the requested records from disclosure: Ms. Doe has the right to "[b]e treated with dignity and compassion" and to have the State afford her with "[p]rotection and support . . . in the case of intimidation or retaliation from the defendant and the defendant's agents or friends." Tenn. Code Ann. § 40-38-102(a). These rights, standing alone, should bar disclosure of the requested records. Put simply, there is no fair reading of the statutory protections afforded to Ms. Doe as a crime victim that would open the requested materials to public inspection and copying. There can be no reasonable debate that the disclosure of records that refer to the rape of Ms. Doe, or depict any part of the crime, or any time near the crime, can plausibly be done in a manner that treats Ms. Doe with dignity and compassion. She has the right to such treatment, however, and that right supersedes whatever interest the petitioners' may have in exposing this information to public scrutiny.

Finally, the petitioners' legal theory would result in extreme harm to victims of similar crimes throughout the state. As the Court is aware, the petitioners originally requested the video recording of the rape of Ms. Doe before later stating that they were

not seeking a copy of that specific video. If the Court were to accept the petitioners' legal theory, however, other private individuals or less scrupulous media companies could obtain this video and evidence like it in similar cases throughout the state. It is the natural consequence of the petitioners' legal position that the video of the rape of Ms. Doe, which was made by a defendant rather than a law enforcement officer, should be subject to inspection and copying. The petitioners' position is plain: if a record in an investigative file is not created by the government, then it should be open to inspection. The results of this position would be bizarre. Such materials could include child pornography created by defendants, photographs of non-governmental witnesses to an ongoing sexual assault (as were taken in the highly-publicized rape case in Steubenville, Ohio), and text messages that relay between defendants the heinous acts they have committed.

Here, of course, the petitioners have promised the Court repeatedly that they are not seeking any such evidence. But what is notably lacking from the petitioners is either a rationale for that decision or a limiting principle. By backing away from requesting the most obscene and objectionable materials, the petitioners implicitly concede that some evidence in the case file should not be open to public view. They do not provide any basis for their position, however, other than their good intentions. As the Court is aware, the PRA is not a statute meant only for traditional news organizations, such as the petitioners. *Any* individual can make a request to view public records—including those records that the petitioners are too kind to request. If the Court agrees with the petitioners' position, and does not recognize the victim's right to object to, and prevent, disclosure of such records, there is no limit to the type or amount of salacious and harmful records that other

parties can procure. Once that door is opened, the court has no ability to control its further dissemination, and records like the video of Ms. Doe's rape are likely to end up on the internet. This is not hyperbole; it merely demonstrates the absurdity of the petitioners' position.

In their brief on appeal, the petitioners make the odd claim that none of these consequences matter, however, "because their requests did not include anything showing the victim's image." App. Br. at 20. This view of the facts does not square with reality. Any unnecessary public disclosure of the facts of this case has the potential to cause the harms identified in Ms. Doe's initial brief—no matter the form of the record that contains or displays such facts. To be sure, the disclosure of certain records would cause more harm than others. But it is disingenuous to pretend that the *only* interest of Ms. Doe is to keep photographs and videos of her out of the public's eye. It is not. Her privacy and dignity interests are broader.

E. These Protections Preclude Disclosure of Harmful Records Even After Criminal Proceedings Have Concluded.

Ms. Doe notes that her opposition to the petitioners' request is different from that of the governmental parties in two important ways. First, Ms. Doe does not object to the release of all possible records in the custody of Metro that relate to the criminal case at issue. Rather, she specifically objects to and opposes the release of records (i) that are reasonably likely to lead to intimidation, harassment, and abuse, and (ii) whose release is incompatible with treating her with dignity and compassion. She does not take a position about the release of other records that do not implicate these concerns.

Second, and more importantly for this appeal, Ms. Doe's objections to release persist even after the criminal case has concluded. Ms. Doe expects that the governmental

parties will argue on appeal—as they did below—that the requested records are exempt from disclosure because they are part of the investigative file of a pending criminal case. Whether or not the Court agrees with the State on this point, however, it must consider Ms. Doe's argument that the laws protecting victims' rights in Tennessee provide a separate bar to disclosure which has no time limit.

To be sure, the calculus of harm may change over time. But Ms. Doe's concerns and interests remain the same whether or not the underlying criminal proceeding is active, and the conclusion of legal proceedings does not extinguish Ms. Doe's rights, including the right to be free from harassment and abuse. *Cf. United States v. Patkar*, CR. 06-00250 JMS, 2008 WL 233062 (D. Haw. Jan. 28, 2008) (holding that, although the criminal case involving the victim had ended with the defendant's guilty plea, the victim "retains his right to be treated with fairness and with respect to his privacy" under the federal Crime Victims' Rights Act). The temporal reach of the victims' rights laws is particularly important because many, if not all, of the arguments against disclosure put forth by the State (such as Rule 16) last only as long as judicial proceedings continue. If only those exemptions applied, then *all* of the records in the criminal cases that resulted from the rape of Ms. Doe (including the video of that rape) would be subject to disclosure when the last defendants' appeal is concluded. Without reference to victims' rights, there would be no bar to release of these records—no matter how harmful that release might be. Again, this cannot be the law; the consequences for victims would be far too grave.

II. THE TRIAL COURT ERRED WHEN IT ABANDONED ITS JUDICIAL ROLE.

Because the protections afforded to Ms. Doe extend beyond the end date of the criminal case, the trial court was correct to accept jurisdiction over her objections to the

release of records. But it erred when it failed to exercise that jurisdiction—specifically, by ordering the release of records while, at the same time, directing Ms. Doe to seek relief elsewhere. This disregard of the victim was improper. The Tennessee Constitution and Code read no differently in Criminal Court than Chancery Court, and Ms. Doe should not be bounced from one to the other. If the trial court can order the release of the disputed records, then it can rule on the legal arguments against doing so.

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 21st day of April, 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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