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

| | | |
|---|---|---|
| ***THE TENNESSEAN*, ASSOCIATED PRESS, *CHATTANOOGA TIMES FREE PRESS*, *KNOXVILLE NEWS SENTINEL*, TENNESSEE COALITION FOR OPEN GOVERNMENT, INC., TENNESSEE ASSOCIATED PRESS BROADCASTERS, WZTV FOX 17, WBIR-TV Channel Ten, WTVF-TV Channel Five, *THE COMMERCIAL APPEAL* and WSMV-TV Channel Four,** | ) | |
| **Petitioners/Appellants,** | ) | |
| **v.** | ) | **No. M2014-00524-COA-R3-CV** |
| **METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,** | ) | **On Appeal From the Chancery Court for the Twentieth Judicial District No. 14-156-IV** |
| **Respondent/Appellee,** | ) | |
| **and** | ) | |
| **DISTRICT ATTORNEY VICTOR S. JOHNSON, STATE OF TENNESSEE, AND JANE DOE,** | ) | |
| **Intervenors/Appellees.** | ) | |

# APPELLANTS' BRIEF

Robb S. Harvey (Tenn. BPR No. 11519)
Lauran M. Sturm (Tenn. BPR No. 30828)
WALLER LANSDEN DORTCH & DAVIS LLP
511 Union Street, Suite 2700
Nashville, Tennessee 37219
*Counsel for Appellants*

**ORAL ARGUMENT REQUESTED**

## Table of Contents

## TABLE OF AUTHORITIES

**Page(s)**

### Cases

## Statutes



## Other Authorities

## STATEMENT OF ISSUES

1. Whether the Trial Court's Order requiring the production of certain redacted public records (i.e., documents "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") should be affirmed, after the Trial Court correctly found that Tenn. R. Crim. P. 16(a)(2) does not provide a "blanket" exemption from the Public Records Act for law enforcement records (as argued by Metropolitan Government, the State of Tennessee and the District Attorney General) (collectively, the "Government Parties").

2. Whether the Trial Court erred in failing expressly to find that the arguments raised concerning "fair trial" interests of criminal defendants under the U.S. Constitution, Sixth Amendment (as asserted by the Government Parties) and victims' rights under Tenn. Const. Art. I, § 35 and T.C.A. §§ 40-38-101 *et seq.* (as asserted by all Defendants/Intervenors) are not exemptions "otherwise provided by state law" which a governmental entity may cite as an excuse for the non-disclosure of public records. T.C.A. § 10-7-503(a)(2)(A).

3. Whether the Trial Court erred in failing to acknowledge and incorporate in its Order the concession by the State of Tennessee and District Attorney General at the Show Cause Hearing that third-party materials obtained pursuant to search warrant and subpoena are public records. (Hr'g Tr. 38: 22-25, Mar. 10, 2014, R. Vol. VI at 701).

4. Whether the Trial Court erred in failing to grant Plaintiffs'/Petitioners' Motion to Strike portions of Defendants'/Intervenors' Affidavits that were not based on personal knowledge, contained speculation and conjecture, contained conclusory statements that were contradicted by Declarations and public records submitted on behalf of Plaintiffs/Petitioners, or were irrelevant.

5. Whether the Trial Court erred in dismissing Plaintiffs'/Petitioners' assertion of the constitutional rights of free press and the "examin[ation] [of] the proceedings of . . . any branch or officer of the government" (U.S. CONST. Amend. I; TENNESSEE CONST. Art. I, §§ 17 & 19) as "without merit."

## STATEMENT OF THE CASE

Public oversight of the official acts of government fuels the public's confidence in the governmental system and its processes. The public records requested in this case are not exempt under the Tennessee Public Records Act and, instead, provide essential transparency of the acts of local officials and the justice system. That the criminal matter which is the subject of the police investigation is already facing public scrutiny cannot justify the creation of a wholesale "law enforcement" exemption for records received by the Police Department of the Metropolitan Government of Nashville and Davidson County ("Metro Police") urged by the Government Parties, which previously has been rejected by the Tennessee Supreme Court. Access to public records, including judicial records, is a critical tool for ensuring that the public can oversee, and determine for itself, the confidence it has in local government.

Appellants, a coalition of media entities and a citizens' group, appeal the Davidson County Chancery Court's Order granting in part and denying in part their Complaint regarding requests to Metro Police for public records. Appellants requested certain third-party records collected/obtained by Metro Police during its investigation of alleged crimes for which four former members of the Vanderbilt football team have been charged.[1] Metro Police denied multiple requests for the records, citing Tenn. R. Crim. P. 16(a)(2) as the basis for nondisclosure. Pursuant to T.C.A. § 10-7-505(b), Appellants properly filed the Complaint/Petition in the Chancery Court for access to the records requested from Metro Police.

In its Memorandum Opinion issued March 12, 2014, the Trial Court held that certain of the requested records are subject to inspection under the Public Records Act. The Trial Court

[1] During the course of this case, it has been disclosed by the State/District Attorney General that some third-party materials have been obtained by search warrant(s) and/or subpoena(s). Despite the State's/District Attorney General's concession during the Show Cause hearing that those types of judicial records are "public records" (Hearing Tr. 38: 22-25, Mar. 10, 2014, R. Vol. VI at 701), Metropolitan Government argues that judicial records are not "public," ignoring decades of jurisprudence.

stayed its own order, pending an anticipated appeal. Appellants promptly filed a Notice of Appeal (R. Vol. V at 655-656), and a motion to expedite the appeal which has been granted. (R. VI at 661 & Motion). Plaintiffs/Appellants ask that this Court: (a) affirm the Trial Court's Order requiring the production of certain public records; (b) find that the Defendants'/Intervenors' assertions of federal constitutional "fair trial" interests and state constitutional/statutory "victims' rights" interests are not "exemptions" under the Tennessee Public Records Act; (c) find that materials obtained pursuant to search warrant and subpoena in the criminal case are judicial records and therefore "public records," as conceded by the State and District Attorney General at the Show Cause Hearing; (d) find that substantial portions of the Affidavits filed by the Defendants/Intervenors should have been stricken as violative of Tennessee evidence rules; and (e) find that Plaintiffs' assertion of federal and state constitutional principles should be considered in this case instead of being summarily dismissed.

## STATEMENT OF FACTS

In its Memorandum Opinion, the Trial Court provided a detailed "Background and Overview"[2] and set of "Facts"[3] regarding this civil public records case and the collateral criminal cases. Plaintiffs submitted two detailed Declarations (with supporting materials) which were uncontradicted, and are detailed in part below.

A. Requests for Public Records and Rejections By Metro Police

In late June 2013, Vanderbilt University Police notified Metro Police about an alleged rape that had occurred at an on-campus dormitory on June 23, 2013. (Mem. Op. p.2, R. Vol. V at 631). Metro Police began an investigation. Four individuals were indicted in August 2013 on five counts of aggravated rape and two counts of aggravated sexual battery. One of those persons also was indicted on one count of unlawful photography and one count of tampering with evidence. The four have pleaded not guilty in Davidson County Criminal Court. (*Id.*) The District Attorney General's Office imposed a protective order on the defense lawyers as a condition to producing evidence. (B. Haas, Decl. ¶19, R. Vol. III at 370). The Criminal Court signed the Protective Order without any hearing. The "Agreed Protective Order" states 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." (Mem. Op. p.2 and Ex., R. Vol. V at 631, 649-50).

---

[2] (Mem. Op. pp.2-3, R. Vol. V at 631-632).

[3] (Mem. Op. pp.4-8, R.Vol. V at 633-637). The Trial Court stated: "This recitation of 'Facts' is offered in the same view that courts list the factual allegations in a civil complaint when considering a motion to dismiss for failure to state a claim. The Court is not adopting this statement of 'Facts' as findings of fact." (Mem. Op. p.4 n.3, R. Vol. V at 633). However, the Trial Court's "Fact" section is informed by its own *in camera* review of materials produced in this case by the Defendants/Intervenors, and which have not been provided to the Appellants. In addition, according to the Record provided to this Court by the Clerk and Master of the Davidson County Chancery Court, there are three items filed under seal, which have not been provided to the Appellants. The Trial Court noted that the subsection of its Memorandum Opinion entitled "The Records in Question" (*id.* at 7-8, R. Vol. V at 636-37) constituted a "statement of the evidence under Tenn. R. App. P. 24(c) regarding the Court's *in camera* inspection of the records." (*Id.* at 7 n.4, R. Vol. V at 636)

A *Tennessean* reporter made a public records request to Metro Police for copies of "[a]ny records (as that term is broadly defined in the Act) regarding the alleged rape on the Vanderbilt campus in which the [four individuals] are charged" and "[a]ny records regarding the case recently concluded against Boyd by his plea bargain."[4] (Compl., Ex. A, R. Vol. I at 13). This request specifically requested copies of any "text messages received or sent and videos provided and/or prepared by any third party sources." (*Id.*) The request for public records was subsequently modified to delete any request for images of the alleged victim.[5] (Compl. Ex. C. at 2, R. Vol I. at 16; Hr'g Tr. at 47:3-4, Mar. 10, 2014, R. Vol. VI. at 710). Metro Police denied the request, relying in particular upon the provisions of Tenn. R. Crim. P. 16(a)(2). *The Tennessean* renewed its request in a letter from counsel, and Metro Police again rejected the request. *The Tennessean* then directed its request for the public records to Mayor Karl Dean, who previously had served as Public Defender and later as Metropolitan Law Director. Metro Police denied the renewed request. (Compl., Ex. F, R. Vol. I at 26).

Plaintiffs' counsel made a renewed public records request, adding additional requestors. Metro Police denied the last request, and further noted (for the first time) that a protective order had been entered in the ongoing criminal case that applied to videos and photographs. (Compl., Exs. G & H, R. Vol. I at 27-31). Plaintiffs/Appellants then filed their complaint against Metropolitan Government--the governmental entity to which the public records requests had been made.

---

[4] Chris Boyd is another Vanderbilt student and has entered a conditional guilty plea to a charge of trying to help cover up the alleged rape. (Mem. Op. p.2 n.1, R. Vol. V at 631).

[5] The record is clear that Plaintiffs/Appellants disclaimed any request to the Trial Court for images of the alleged victim--despite arguments suggesting otherwise by Defendants/Intervenors. The Trial Court in its Memorandum Opinion declined to grant Plaintiffs/Appellants access to any video, deciding instead that a request for that material should be made to the Criminal Court of Davidson Court since those materials are subject to the "Agreed Protective Order." (Mem. Op. p.14, R. Vol. V at 643). On appeal, no request is made for any video, even any video which could be redacted to exclude images of the alleged victim. That issue therefore is not before this Court, and Appellants urge this Court not to take up issues that have not been presented to it.

B. Motions to Intervene and the Trial Court's *In Camera* Inspection of Records

The Attorney General, on behalf of the District Attorney General and the State of Tennessee, moved to intervene. The alleged victim filed a separate motion to intervene. At an expedited hearing, the Trial Court granted both motions to intervene.[6] The Government Parties argued that the Davidson County Criminal Court, not the Chancery Court, had proper jurisdiction over the case. The Trial Court tentatively determined, at a second expedited hearing, that jurisdiction properly lies in Chancery Court under the Tennessee Public Records Act. The Trial Court considered more arguments against jurisdiction by Defendants/Intervenors at the Show Cause Hearing, but ultimately ruled it had jurisdiction over this case. (Mem. Op.p.14, R. Vol. V at 643).

The Trial Court decided to conduct an *in camera* inspection of the records, and did so over the objections of the Government Parties.[7] Based upon filings by those parties, as well as the detailed summary in the Chancellor's Opinion (Mem. Op. pp.4-8, R. Vol. V at 633-637), Metro Police's file includes substantial materials obtained from third parties, including materials obtained pursuant to search warrants and subpoenas. An index of the records has been submitted under seal, but Appellants have not had access to the index.

The Show Cause Hearing was continued at Defendants' request to March 10, 2014.

C. Submission of Briefs and Sworn Statements, and Appellants' Motion To Strike

All parties were permitted to submit briefs and file sworn statements in advance of the Show Cause Hearing. The Government Parties argued that Tenn. R. Crim. P. 16(a)(2) was a

---

[6] Plaintiffs did not oppose the motion to intervene filed by the State and District Attorney General. With respect to the alleged victim's motion to intervene, Plaintiffs proposed to the Trial Court that the alleged victim participate as an amicus rather than a party-intervenor, since public records cases may involve multiple and even scores of "interested" parties who want to have some say.

[7] The Trial Court, in consideration of the "Agreed Protective Order" signed by the Criminal Court, chose not to examine the photographs or video in the investigative file.

blanket exemption for all records in Metro Police's file, and further argued that the criminal defendants' "fair trial" rights under the Sixth Amendment to the U.S. Constitution precluded Plaintiffs' requests for public records. The alleged victim submitted a brief in which she argued that she had "victim's rights" under Tenn. Const. Art. I, § 35 ("the right to be free from intimidation, harassment and abuse throughout the *criminal justice system.*") (emphasis added) and T.C.A. §§ 40-38-101 *et seq.* which precluded the Plaintiffs' rights to public records--even judicial records--regarding the criminal cases. The Government Parties purported to join in the arguments about "victims' rights," without standing to do so.[8] The Appellees filed Affidavits by the Chief of Police, the District Attorney General, the alleged victim, and a paralegal in the Attorney General's Office. The Affidavits of the Chief of Police and District Attorney General were in significant part identical.

The District Attorney General submitted an Affidavit to the effect that in his opinion, the number of news stories published about the criminal investigation and cases would make providing the criminal defendants a "fair trial" in several months difficult if not impossible. The Chief of Police echoed this. The alleged victim opined about her fear that publicity about the case would subject her to "intimidation, harassment and abuse." Plaintiffs/Appellants filed a Motion to Strike substantial portions of Defendants'/Intervenors' Affidavits.

Plaintiffs submitted Declarations of Maria De Varenne (Editor and Director of News for multiple Gannett publications including *The Tennessean*) and Brian Haas (Court/Criminal Justice

---

[8] The Government Parties attempt to do more than express support for the alleged victim; they purport to have some substantive right to assert "victims' rights" under the state constitution and statute. Plaintiffs/Appellants objected to their standing to do so. The Victims' Bill of Rights (cited by the alleged victim) "appears to apply only to the criminal justice system." *Denson v. Benjamin*, 1999 WL 824346, at *2 n.1 (Tenn. Ct. App. Aug. 12, 1999) (not considering the constitutional amendment in a negligence case).The statutory provisions implementing this constitutional amendment are found in Tennessee Code, Title 40, "Criminal Procedure." The alleged victim has identified no substantive rights applicable in a *civil case* under the Public Records Act to preclude the disclosure of public records. The Government Parties have shown no right to raise the argument in a public records case. All unpublished decisions cited in this Brief are being submitted to the Court.

Reporter for *The Tennessean*) which contained factual statements about public records made available by government agencies in criminal cases, in part correcting conclusory averments made by the Chief of Metro Police and District Attorney General. For example, Metropolitan Government claimed that "even the disclosure of a log of the evidence gathered in the investigation" could impair the criminal defendants' rights to a "fair trial" (Metro. Gov't Br. 3, R. Vol. II at 219) ignoring the fact that the District Attorney General's Office previously had filed the exhibit list in the Criminal Court. (Haas Decl. ¶ 18, R. Vol. III at 370). Exhibit lists such as that one are routinely filed, are required, and are judicial records. The Trial Court in its Memorandum Opinion listed categories of records which it reviewed during the *in camera* inspection of the investigative file. The Trial Court's publication did not violate the criminal defendants' rights. The Chief of Police and District Attorney General offered their opinions that disclosing investigative files during an ongoing criminal prosecution could impair a criminal defendant's right to a fair trial; "intimidate, harass, or abuse victims"; and have a "chilling effect" on law enforcement investigations. (Johnson Aff. ¶¶ 10-11, R. Vol. II at 150; Anderson Aff. ¶ 10, R. Vol. II at 234). The Government Affiants overlooked the fact that in practice, in Davidson County and elsewhere, investigative records in pending criminal cases are routinely filed by the prosecutor and are available for public inspection. (Haas Decl. ¶¶ 3-6, R. Vol. III at 368). As shown by the submissions to the Trial Court, these public filings in pending cases include sexual assault cases, including records obtained from third parties.[9] Law enforcement

[9] Counsel for the State and District Attorney General claimed at the Show Cause Hearing that the files "must be" in closed cases. (Hr'g Tr. 38:16-21, Mar. 10, 2014, R. Vol. VI at 701). The State is simply incorrect and ignores the undisputed record. (Haas Decl. ¶ 4, R. Vol. III at 368).

also regularly releases materials obtained from third parties such as surveillance video. (*Id.* ¶ 5, R. Vol. III at 368).[10]

The Record demonstrates that the alleged victim has not been publicly identified by the Appellants or any other media organization. (Hr'g Tr. 88:9-13, Mar. 10, 2014, R. Vol. VI at 751; and Roberts Aff., Exs. 1-3, R. Vol. II at 155-199). This is consistent with the policy of *The Tennessean* and other media not to identify a victim of sexual abuse without her or his permission. (De Varenne Decl. ¶ 10, R. Vol. V at 594).

The Trial Court denied the Appellants' Motion to Strike by Order entered March 11, 2014. (R. Vol. V at 628 - 629).

D. Summary of Trial Court's Ruling

The Trial Court issued its Memorandum Opinion and accompanying Orders, granting in part and denying in part the Plaintiffs' requests for public records. In its decision, the Trial Court recognized that Metro Police's file contains public records, and held in part 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 outside the expansive reach of Tenn. R. Crim. P. 16(a)(2)" and therefore are subject to production. (Mem. Op. at 13-14, R. Vol. V at 642-643).

Specifically, the Trial Court found that Appellants are entitled to inspect text messages, Vanderbilt access card information, Pano-scan data relating to Vanderbilt University premises, and e-mails recovered from potential witnesses and the criminal defendants which were not addressed to officials related to the Police Department or the District Attorney General's Office.

[10] The suggestion by the Chief of Police and the District Attorney General that professional law enforcement investigators might somehow be persuaded to fail to perform their sworn obligations by the possibility of public scrutiny of their actions merits some public discussion -- not because it is supported by facts in the record, but because of the high public offices of the persons making that suggestion. Plaintiffs remain confident in the ability of law enforcement to perform the functions entrusted to them by the public.

(*Id.* at 14). The Trial Court ruled that the "fair trial" interests and "victims' rights" which had been asserted in opposition to the requests would be more appropriately considered in connection with the criminal case against the former Vanderbilt players and therefore by the Criminal Court.

The Trial Court dismissed the remainder of the Complaint and stated in a footnote that "[t]o the extent Plaintiffs are asserting constitutional claims implicating the freedom of the press under the federal and/or Tennessee Constitution, the Court dismisses these claims as being without merit." (Mem. Op. 18 n.14, R. Vol. V at 647).

The Trial Court certified its ruling as final under Tenn. R. Civ. P. 54 (*id.* at 18, R. Vol V at 647), and issued a stay of its Order to permit an appellate court to consider the "sensitive material and unique questions of law" involved prior to Appellants' inspection of the public records.

## ARGUMENT

The Plaintiffs/Appellants prevailed in substantial part in the Trial Court; however, the Trial Court imposed a stay upon release of public records and certain holdings or omissions in its decision, which resulted in the filing of this appeal. Appellants respectfully submit that the Trial Court correctly determined that Tenn. R. Crim. P. 16(a)(2) does not create a blanket "law enforcement" exemption to the records' disclosure, as had been argued by the Government Parties.[11] Appellants submit that the Trial Court erred in failing to hold specifically that (1) "fair trial" interests under the Sixth Amendment of the United States Constitution and "victims' rights" under Tenn. Const. Art. I, § 35 and T.C.A. §§ 40-38-101 *et seq.* are not exemptions "otherwise provided by state law" upon which a governmental entity may rely to reject public records requests; (2) third-party materials obtained pursuant to search warrants and subpoenas are judicial records subject to public inspection, as conceded by counsel for the State and District Attorney General; (3) portions of Appellees' Affidavits are inadmissible because they contain opinion and speculation, are not based on personal knowledge, and/or are irrelevant; and (4) the constitutionally-protected rights to freedom of the press and to "examine the proceedings of . . . any branch or officer of the government" (U.S. CONST. Amend I; TENN. CONST. Art. I., §§ 17 & 19) should be taken into account in this case.

[11] Appellants request the prompt production of the redacted public records which the Trial Court held are not subject to an exemption under the Tennessee Public Records Act and should be released. Appellants are not appealing the Trial Court's ruling with respect to videos or photos which the Trial Court stated are subject to the "Agreed Protective Order" imposed by the District Attorney General and signed by the Criminal Court.

## Standard of Review

Determinations under the Tennessee Public Records Act are questions of law, reviewed *de novo*. *Memphis Publ'g Co. v. Cherokee Children & Family Servs., Inc.*, 87 S.W.3d 67, 74 (Tenn. 2002). This Court's holding will "hinge[] upon principles of statutory construction, for [the] decision whether [the requested] records are subject to the Act is controlled by the meaning of the term 'public records' as used in the Act." *Id.* A reviewing court must "broadly construe[] [the Act] so as to give the fullest possible public access to public records." T.C.A. § 10-7-505(d). Thus, this Court must "interpret the terms of the Act liberally to enforce the public interest in open access to the records of state, county, and municipal governmental entities." *Memphis Publ'g Co.*, 87 S.W.3d at 74. In addition, issues of constitutional interpretation are questions of law, reviewed "de novo without any presumption of correctness given to the legal conclusions of the courts below." *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 836 (Tenn. 2008).

### I. Tennessee Rule of Criminal Procedure 16(a)(2) Does Not Create a Blanket Exemption to the Public Records Act For All Records In An Investigative File In A Criminal Case Which Is Still "Open."

The Trial Court correctly rejected the Government Parties' argument that Tenn. R. Crim. P. 16(a)(2) creates an all-inclusive "law enforcement" privilege under the Tennessee Public Records Act which exempts the entirety of a police investigative file during the pendency of a criminal case. The Trial Court also correctly rejected the Government Parties' argument that Tennessee courts in *Appman v. Worthington*, 746 S.W.2d 165 (Tenn. 1987) and its progeny somehow managed to amend the Tennessee Rules of Criminal Procedure by judicial fiat, and envelop third-party materials in an exemption when the plain language of the Rule clearly does not support their position.[12] Tenn. R. Crim. P. 16(a)(2) provides:

[12] The Government Parties in their briefs cited several Tennessee cases and claimed that those cases stand for the proposition that all records in an "open" investigative file are exempt. Those cases do not stand for that broad

> [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. Nor does this rule authorize discovery of statements made by state witnesses or prospective state witnesses.

(Emphasis added).

The rules of criminal procedure "are the law of [the] State." *Arnold v. City of Chattanooga*, 19 S.W.3d 779, 785 (Tenn. Ct. App. 1999). Courts cannot expand the scope of these rules or amend their language. That authority lies only within the province of the General Assembly. T.C.A. § 16-3-404. As such, Tennessee courts must treat a rule of criminal procedure as a statute and construe it as written "so that no part will be inoperative, superfluous, void or insignificant . . . and give effect to every word, phrase, clause and sentence of the act in order to carry out the legislative intent." *State v. Peele*, 58 S.W.3d 701, 704 (Tenn. 2001).

By its express terms, Tenn. R. Crim. P. 16(a)(2) allows law enforcement or a District Attorney General to decline to produce public records but only to the extent that those records are "**made by** the district attorney general or other state agents or law enforcement officers" or constitute "statements made by state witnesses or prospective state witnesses." (Emphasis added). It does **not** exempt all materials in Metro Police's files from disclosure.

Despite the clear language of the Rule, the Government Parties argued that the holding in *Appman v. Worthington*, 746 S.W.2d 165 (Tenn. 1987), protected **all** requested records from public inspection. In *Appman*, the Tennessee Supreme Court did not--and could not--expand the scope of Rule 16(a)(2) to exclude third-party documents from disclosure.

*Appman* involved an effort by criminal defense lawyers, who were defending an inmate accused of murdering another prison inmate, to obtain materials from the prison's investigative

---

proposition, and there is no indication that any Tennessee appellate court heretofore has considered the plain language of Tenn. R. Crim. P. 16(a)(2), which allows the review of certain third-party records not otherwise exempted.

officer. The records at issue consisted of "statements from inmate witnesses," "statements from officers and employees of the Morgan County Regional Facility and from the mother and wife of the victim," and "evaluative summaries" of the investigation. (Metro Notice of Filing, Ex. 2, R. Vol. II at 251-252). These records all appear to fall within the scope of Rule 16(a)(2) as either witness statements or summary documents "made by" the prison investigator. Thus, the Tennessee Supreme Court did **not** expand Rule 16(a)(2) to exempt records created by third parties from disclosure under the Public Records Act.[13] If the Court in *Appman* had done so, it would have violated the statutory requirement that only the General Assembly can adopt or amend rules governing the courts. T.C.A. § 16-3-404. The specific, limited request by Appellants in the instant case for records obtained from third parties was not addressed in *Appman*.

Subsequent Tennessee cases have recognized that *Appman*'s holding applies to those documents "covered by" Tenn. R. Crim. P. 16(a)(2). *See, e.g.*, *Swift v. Campbell*, 159 S.W.3d 565, 576 (Tenn. Ct. App. 2004) ("*[D]ocuments of the sort covered by* Tenn. Crim. R. P. 16(a)(2) that are in the possession of the Office of the District Attorney General. . . are not public records because they are among the class of records excepted from disclosure by state law."); *Knoxville News-Sentinel v. Huskey*, 982 S.W.2d 359, 361 (Tenn. Cr. App. 1998) ("In *Appman[,]* . . . the Court reasoned that Rule 16's protection of *certain material* from discovery constituted an exception to the Public Records Act inspection in an active criminal prosecution.") (emphasis added).

---

[13] *Appman* also involved criminal defendants seeking records related to their prosecutions. As the Tennessee Court of Appeals has noted, "There is a palpable difference between persons who seek governmental records to ensure governmental responsibility and public accountability and those who seek to avoid the requirements and limitations of the Tennessee Rules of . . . Procedure by invoking the public records statutes to obtain information not otherwise available to them through discovery." *Swift v. Campbell*, 159 S.W.3d at. at 575-76. Concerns about circumvention of discovery rules is **not** at issue in the instant case. (Mem. Op. p.9 n.8, R.Vol. V at 638).

The State and District Attorney General urged the Trial Court to follow a single trial court decision. In *Chester v. City of Knoxville*, No. 163405-3 (Knox Co. Chan. Ct. Nov. 8, 2006), the trial court stated that police records (focused on video taken from a police cruiser) relating to a pending criminal prosecution were exempt based in part on a Tennessee Court of Appeals decision *that was later reversed.* As noted in *Chester*, the court in *Schneider v. City of Jackson,* 2006 WL 1644369 (Tenn. Ct. App. June 14, 2006) "recognized a common law 'law enforcement privilege' which would prevent the disclosure of records in the possession of a law enforcement agency." *Chester*, No. 163405-3, at 3. The Tennessee Supreme Court later expressly held in *Schneider* that such a purported privilege does not exist:

> In adopting the law enforcement privilege, the Court of Appeals in the instant case stated: "Given the importance of the interests protected by the law enforcement privilege, we find that it must be recognized under Tennessee common law." This statement indicates that the Court of Appeals failed to recognize the significance of this Court's prior decisions refusing to adopt "public policy" exceptions to the Public Records Act. . . . Although we are sympathetic to the City's concerns about the potential consequences of disclosing [the police records], the General Assembly, not this Court, establishes the public policy of Tennessee.

*Schneider v. City of Jackson*, 226 S.W.3d 332, 343-44 (Tenn. 2007).

The Trial Court in the instant case properly recognized that "exempting all the [requested] records from review under Tenn. R. Crim. P. 16(a)(2) would be tantamount to adopting a law enforcement privilege for pending criminal cases that may not be necessarily called for by the language of" the Rule. (Mem. Op. at 13, R. Vol. V at 642). The Trial Court therefore correctly held 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 outside the

expansive reach of Tenn. R. Crim. P. 16(a)(2)" and thus subject to disclosure. (Mem. Op. at 13-14, R. Vol. V at 642-643).[14]

## II. The Asserted Rights of Criminal Defendants and Victims Do Not Constitute "State Law" Exemptions to the Public Records Act.

In this public records case, Defendants/Intervenors attempted to embroil the Trial Court in making decisions about potential issues pertaining to the criminal cases which may or may not even be presented to the Criminal Court, depending on what the criminal defendants and the alleged victim decide to raise in the criminal cases. The Trial Court in the instant case appropriately declined their attempt. Appellants ask that this Court recognize that a criminal defendant's Sixth Amendment "fair trial" interests and an alleged victim's state constitutional and statutory rights are not "state law" exemptions under the Public Records Act.

### A. Criminal Defendants' "Fair Trial" Rights

In the Trial Court, the Government Parties made a speculative argument that disclosure of the requested records would engender excessive pretrial publicity and thereby impair the criminal defendants' Sixth Amendment rights to a "fair trial." They argued that the criminal defendants' fair trial rights should be characterized as an exception to the Public Records Act, and should apply in this case. No Government Party demonstrated that it had standing to raise this concern on behalf of the criminal defendants.[15] The Government Parties' argument boils down to an argument -- unsupported by specific facts -- that several months from now, the

---

[14] The Trial Court determined that it would not order the production of the "photographic or videographic images" in the investigative file, as these records were covered by the "Agreed Protective Order" entered by the Criminal Court and Plaintiffs/Appellants should seek relief from the Criminal Court if they wanted to pursue those materials. (Mem. Op. at 14, R. Vol. V at 643). Appellants do not appeal that holding, and so video and photos do not need to be addressed in this appeal.

[15] In the brief filed prior to the Show Cause Hearing, the State and District Attorney General did not make an argument asserting that the State had a separate right to a fair criminal trial. Counsel made a passing reference to the State's fair trial interests at the Show Cause Hearing. (Hr'g Tr. 9:4-6; 29:24-30:21, Mar. 10, 2014, R. Vol. VI at 672, 692-93). Unlike a criminal defendant's right to a "fair trial," the State's interest is not constitutional. *See, e.g.*, *State v. Carruthers*, 35 S.W.3d 516, 563 (Tenn. 2000) (comparing criminal defendants' Sixth Amendment rights to the State's general fair trial "interests").

criminal defendants will be unable to be afforded a "fair trial" anywhere in the State of Tennessee before any venire.

Presumably, if in the future the criminal defendants' counsel decide to argue about fair trial issues (such as by requesting a different venue or a venire from another judicial district), they will do so. In general, concerns about alleged prejudice as a result of specific media coverage belong to the defense and the Criminal Court--not the police or prosecution which appear to be doing all in their power to obtain convictions. *See, e.g.*, Tenn. R. Crim. P. 21(a) ("The court may change venue of a criminal case on the defendant's motion or on its own initiative with the defendant's consent."). None of the criminal defendants has filed such a motion, and two of those defendants are set for trial in September 2014. The Criminal Court has a host of options for ensuring that the criminal defendants will receive a fair trial. Appellants have confidence in the Criminal Court's abilities to address these concerns. Appellants ask this Court to reject the Government Parties' conclusory and speculative assertions that pretrial publicity regarding cases of public interest leads inexorably to a constitutional deprivation.

The Trial Court appropriately found that the Criminal Court would and should address pretrial publicity concerns if any are brought to its attention. (Mem. Op. 17, R. Vol. V at 646). "Fair trial" issues under the Sixth Amendment to the U.S. Constitution are not an exemption to the Tennessee Public Records Act, and should not be decided by the Chancery Court despite the Government Parties' requests. Clearly, on the speculative and conclusory record presented by the Government Parties, a finding of a constitutional deprivations would have been clear error. Appellants respectfully request that this Court hold that "fair trial" interests do not constitute a Public Records Act exemption.

## B. "Victims' Rights"

In the Trial Court, the alleged victim offered her opinion that release of the requested public records would violate her rights under Tenn. Const. Art. I, § 35 ("the right to be free from intimidation, harassment and abuse throughout the *criminal justice system.*") (emphasis added) and T.C.A. §§ 40-38-101 *et seq.*[16] She argued that the state protections for "victims' rights" should be adopted as an exemption to the Tennessee Public Records Act, without any case support, any recognition of the Appellants' constitutionally-protected interests in reporting and newsgathering, or any suggestion of how such an amorphous and unrecognized "exemption" should apply.[17] Victims have had statutory protections in Tennessee since at least 1990, and the constitutional provision was adopted in 1998--yet there is no Tennessee case support for the alleged victim's arguments in the instant case.

Appellants presented multiple bases for the Trial Court to conclude that the alleged victim's arguments concerning state constitutionally- and statutorily-based "rights" are not exemptions under the Public Records Act and should not be considered. First, the state constitutional and statutory protections afforded victims appear to apply only in *criminal proceedings*. In what appears to be the only Tennessee case on the issue (and none of the Defendants/Intervenors cited anything to the contrary), the Tennessee Court of Appeals declined to apply "victims' rights" in a civil case. *Denson*, 1999 WL 824346, at *2 n.1. The Tennessee Code provides victims with certain specific rights in criminal court, such as the right to be

---

[16] It is unclear what of the investigative file has been provided to or reviewed by the alleged victim, although from her filings she has seen at least some of it.

[17] The Government Parties attempted to assert the same rights--quoting the state constitutional language--even though they lack standing to do so. The alleged victim provides no specifics about her argument--just a general objection to adherence to the Public Records Act. Without a specific argument on this point, Appellants do not know what she thinks might "intimidat[e], harass[], and abuse" her. It appears that she wants to object to news coverage in general.

afforded a secure waiting room prior to testifying (T.C.A. § 40-38-102(b)(2)) and the right to object to continuances in order to obtain a speedy trial (T.C.A. § 40-38-116).

Second, Appellants submitted that because their requests did not include anything showing the victim's image, the Trial Court had no need to address the alleged victim's constitutional argument. *See Henderson v. City of Chattanooga*, 133 S.W.3d 192, 215 (Tenn. Ct. App. 2003) ("[U]nder Tennessee law, our courts will not decide constitutional issues unless resolution is absolutely necessary for determination of the case and the rights of the parties. If an issue can be resolved on non-constitutional grounds, 'courts must avoid deciding constitutional issues.'"). As noted previously, no Appellant or other member of the media has publicly identified the alleged victim--even though her identity is known because of the State's indictment. (Haas Decl. ¶ 16, R. Vol. III at 370).

Third, Tennessee courts in multiple Public Records Act cases have rejected objections based on alleged "privacy" interests, which are akin to the alleged victim's arguments. *See, e.g.*, *State v. Cawood*, 134 S.W.3d 159, 167 (Tenn. 2004) (declining "to make a public records exception" based on a criminal defendant's alleged privacy rights but noting that "it is within the prerogative of the legislature to do so.")[18]; *Griffin v. City of Knoxville*, 821 S.W.2d 921, 922 (Tenn. 1991) (denying petition for appeal by decedent's widow on lower courts' finding that suicide notes were public records despite her asserted privacy interests); *Tennessean v. City of Lebanon*, 2004 WL 290705, at *7 (Tenn. Ct. App. Feb. 13, 2004) ("The third ground for refusing access is that Ms. Adams wanted the terms of the agreement to be kept confidential because of her concerns for her personal privacy and security. We can find no legal authority supporting an

[18] In *Cawood*, the State took a position on privacy rights aligning with that of Appellants in the instant case: "The State responds that neither this Court nor the United States Supreme Court has recognized that an individual's informational right to privacy supersedes the State's right to maintain information on matters of public interest." 134 S.W.3d at 167 (rejecting a court's announced intention to dispose of court records).

exclusion from the Public Records Act for an otherwise public record based on the wishes of the citizen involved.").

The Trial Court found that the arguments about "victims' rights" should be dealt with in the Criminal Court--if they are asserted in that proceeding--and not in this public records case. (Mem. Op. at 17, R. Vol. V at 646). Appellants respectfully request that this Court hold that "victims' rights" do not constitute a "state law" exemption to the Tennessee Public Records Act.

### III. Third-Party Materials Obtained Pursuant To Search Warrant And Subpoena Are Public Records.

Appellants learned after filing the Complaint that search warrants and subpoenas had been used by law enforcement to obtain third-party materials. Those materials are part of the public records requests and, based on the Trial Court's Memorandum Opinion, those materials (or at least part of them) are among the records ordered to be released. Metropolitan Government argued that records obtained by search warrant or subpoena are exempt from the Public Records Act because "[i]f a state law specifies the process for obtaining a record, that process must be followed." (Metro. Br. 12, R. Vol. II at 228). Metropolitan Government cited no Public Records Act cases in support of this mistaken proposition[19], which Counsel for the State and District Attorney General squarely rejected during the Show Cause Hearing. *See* Hr'g Tr. at 38:22-25, Mar. 10, 2014, R. Vol. VI at 701 ("[W]e would note that the search warrants and subpoenas that have been issued in the criminal case involved here are all public record and can be obtained by the Plaintiffs.").

---

[19] Metropolitan Government relies upon *Givens v. Mullikin ex rel Estate of McElwaney*, 75 S.W.3d 383 (Tenn. 2002) for this argument, based on the court's finding that "even though a physician may be required to disclose information pursuant to a subpoena or court order, an implied covenant of confidentially does not allow him to divulge this information informally without the client's consent." (Metro Br. at 13, R. Vol II at 229). This argument has no merit. Appellants in the instant case made a formal request for records under the statutory scheme enacted by the General Assembly. No "implied confidentiality" interest is at stake here. Metropolitan Government has cited none.

Public records include materials gathered by law enforcement, whether or not they are introduced as "evidence." *See, e.g.*, *Griffin*, 821 S.W.2d at 924 (Supreme Court held that the deceased's handwritten notes, obtained by police during an investigation, constituted public records not subject to an exemption). Further, when materials are filed with a court, they became quintessential public records. "Traditional public records are those filed with a court." *Cawood*, 134 S.W.3d at 165 n.9. Materials obtained in connection with court-issued search warrants are supposed to be filed with the court clerk (Tenn. R. Crim. P. 41(f)) and are presumptively "open," whether under the First Amendment or common law (and, as discussed below, the Tennessee Constitution). *See, e.g.*, *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 64 (4th Cir. 1989)("The Supreme Court has recognized that the press and the public have a common law qualified right of access to judicial records." (citing *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, at 597–99 (1978)).

Appellants ask that this Court hold that the third-party materials obtained by search warrant or subpoena are "court records" subject to disclosure under the Public Records Act.

## IV. Appellants' Motion To Strike Should Have Been Granted Under Tennessee Evidence Principles.

Appellees chose to file four Affidavits--by the Chief of Police, the District Attorney General, the alleged victim, and a paralegal--none of which, in substantial part, met standards of admissible proof under Tennessee law. Appellants filed a Motion to Strike the portions of Appellees' Affidavits which contained speculation and opinion, conclusory statements, and statements not based on personal knowledge as contradicted by the Declarations and public records submitted by Appellants.[20] The Trial Court elected to deny the Motion to Strike, stating that it had "sifted all the Affidavits and Declarations and submitted in this case to give weight to

[20] The Motion to Strike also asked that the paralegal's Affidavit identifying scores of news articles printed off the Internet be stricken as offering irrelevant information.

asserting the truth of matters contained therein, are **not** admissible "inferences."[25] The opinions, arguments and legal conclusions presented in the Affidavits of the Chief of Police and District Attorney General should have been stricken. Likewise, the Trial Court should have stricken substantial portions of the alleged victim's Affidavit. Her beliefs and opinions do not constitute fact, and are unsupported by facts in the record.

## V. The Court Should Acknowledge that the Constitutional Rights Asserted by Appellants Provide a Basis for Relief.

Appellants asserted substantive rights under the United States and Tennessee Constitutions to free press and the examination of government proceedings. (Pls.' Br. at 2, R. Vol. III at 339; Hr'g Tr. at 46:8-11, Mar. 10, 2014, R. Vol. VI at 709). Appellants ask that these constitutional rights be recognized as providing a basis for access to the requested public records.[26]

The First Amendment to the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom . . . of the press." A "major purpose" of the First Amendment is to

> protect the free discussion of governmental affairs. . . . The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.

---

couched as a legal conclusion on the ultimate issue of fact is helpful to the court, and consequently such opinion testimony is inadmissible).

[25] *See Jones v. Butler Metro. Housing Auth.*, 40 Fed. Appx. 131, 134-35 (6th Cir. 2002) (affirming district court's decision to strike affidavits of plaintiff and her coworkers where they "consisted mainly of hearsay, rumors, conclusory allegations and subjective beliefs"). *See also Meyer Chatfield Corp. v. Century Business Svcs., Inc.*, 2010 WL 3221944, at *2 (E.D. Pa. Aug. 12, 2010) ("[D]espite Plaintiff's efforts to characterize [the witness'] testimony as a 'surmise' 'based on observations,' it is clear that [the] challenged testimony is merely his speculation about [a third party's] thought process, and as such is inadmissible").

[26] In its Memorandum Opinion, the Trial Court in a footnote summarily dismissed the constitutional protections as "without merit." (Mem. Op. p. 18 n.14, R. Vol. V at 647).

*Mills v. Alabama*, 384 U.S. 214, 218-19 (1966). The First Amendment's public oversight protections extend to criminal proceedings. *Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 457 U.S. 596, 606 (1982) ("Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole. . . . [I]n the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process - an essential component in our structure of self-government."). Given this fundamental right of access, an attempt "to inhibit the disclosure of sensitive information, [requires a showing] that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501, 510 (1984).

Article I, Section 17 of the Tennessee Constitution provides that "all courts shall be open." "Supreme Court Rule 11(VII)(b) reflects this same principle, providing that 'it is the policy of the Tennessee Judicial Department that all courts of this state shall be open and available for the transaction of business.'" *Lynch v. City of Jellico*, 205 S.W.3d 384, 394 (Tenn. 2006).

Article I, Section 19 of the Tennessee Constitution provides "[t]hat the printing press shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof." The Tennessee Supreme Court unanimously held in a seminal libel case that this provision is "a substantially stronger provision than that contained in the First Amendment to the Federal Constitution . . . in that it is clear and certain, leaving nothing to conjecture and requiring no interpretation, construction or clarification." *Press, Inc. v. Verran*, 569 S.W.2d 435, 442 (Tenn. 1978). This constitutional right is so fundamental that "any stumbling block to the complete

freedom of the press 'to examine [and publish] the proceedings . . . of any branch or officer of the government' is regarded as constitutionally suspect, and at the very threshold there is a presumption against the validity of any such impediment." *Id.* at 442 (unanimously reiterated by the Supreme Court in *Ferguson v. Union City Daily Messenger, Inc.*, 845 S.W.2d 162, 165 (Tenn. 1992)).

Under the federal and state Constitutions, Appellants have a right of access to judicial records. *Huskey*, 982 S.W.2d at 362 (noting the "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" and the similar right "presumably extend[ed]" by Section 19). This right of access "provides public scrutiny over the court system which serves to (1) promote community respect for the rule of law, (2) provide a check on the activities of judges and litigants, and (3) foster more accurate fact finding." *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996). The Public Records Act "essentially . . . codif[es] . . . the public access doctrine." *Id.* at 661. Any restrictions limiting the access to these records "must be narrowly tailored to accommodate the competing interests without unduly impeding the free flow of information." *Huskey*, 982 S.W.2d at 363.

Appellants submit that these broad constitutional provisions, particularly under Art. I, § 19 of the Tennessee Constitution, should be held to apply to their public records requests, which involve more than just judicial records. The Tennessee Supreme Court in *Dorrier v. Dark*, 537 S.W.2d 888, 892 (Tenn. 1976), emphasizing the broad remedial purposes of the Open Meetings Act, recognized the interplay between that Act and Tenn. Const. Art. I, §19: "Clearly, the Open Meetings Act implements the constitutional requirement of open government." The Tennessee Attorney General in 1995 recognized that Art. I, §19 precluded a governmental entity from

imposing a ban on video or photography equipment at city council meetings. (1995 Tenn. AG LEXIS 134 (Dec. 28, 1995)). The Public Records Act similarly serves a broad remedial purpose and is to be liberally construed to provide transparency and open government. *Memphis Publ'g Co. v. Cherokee Children and Family Serv., Inc.*, 87 S.W.3d 67, 79 (Tenn. 2002); *see also* T.C.A. §10-7-505(d). Neither the Open Meetings Act nor the Public Records Act can be construed in any way inimical to the Tennessee Constitution.

Appellants ask that this Court recognize the constitutional protections regarding their public records requests.[27]

[27] Appellants recognize that that those opposing public records requests frequently cite a 1992 appellate decision, *Abernathy v. Whitley*, 838 S.W.3d 211 (Tenn. Ct. App. 1992), for the overbroad statement that "[t]here is no generally recognized state or federal constitutional right of access to public records." *Id.* at 214. *Abernathy* involved a plaintiff seeking records relating to a post-conviction proceeding. The plaintiff prevailed in part in the trial court, with the exception of her request for Tennessee Bureau of Investigation ("TBI") records, which are specifically exempted under T.C.A. § 10-7-504(a)(2). The appellate court rejected the plaintiff's argument that Art. I, § 19 of the Tennessee Constitution trumped the General Assembly's right to specifically exempt TBI records from the Public Records Act. The instant case, however, involves no specific exemption or constitutional conflict.

## CONCLUSION

For the foregoing reasons, Appellants respectfully ask that their appeal be granted and they be provided the relief requested.

Respectfully submitted,

Robb S. Harvey (Tenn. BPR No. 11519)
Lauran M. Sturm (Tenn. BPR No. 030828)
WALLER LANSDEN DORTCH & DAVIS LLP
511 Union Street, Suite 2700
Nashville, Tennessee 37219
Tel.: (615) 244-6380
Fax: (615) 244-6804
*Attorneys for Plaintiffs/Petitioners/Appellants*

## CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been served by hand delivery upon the following:

Lora Barkenbus Fox
Emily Herring Lamb
Jennifer Cavannah
Assistant Metropolitan Attorneys
Metropolitan Courthouse, Suite 108
P. O. Box 196300
Nashville, TN 37219

Janet Kleinfelter
Deputy Attorney General
Office of Attorney General
P. O. Box 20207
Nashville, TN 37202

Edward M. Yarbrough
J. Alex Little
Bone McAllester North, PLLC
511 Union Street, Suite 1600
Nashville, TN 37219

on this the 7th day of April, 2014.

Counsel for Appellants