IN THE CHANCERY COURT FOR THE TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, TENNESSEE

The Tennessean, *et al.*	)	
Petitioners,	)	
v.	)	No. 14-156-IV
The Metropolitan Government of	)	
Nashville & Davidson County,	)	
Respondent.	)	
District Attorney General Victor S. Johnson,	)	
State of Tennessee & Jane Doe,	)	
Intervenors.	)	

METROPOLITAN GOVERNMENT BRIEF OPPOSING PETITION

The Metropolitan Government adopts the *Response Of Intervenor-Defendant District Attorney General Johnson and State of Tennessee* and supplements the State's *Response* with this brief.

The Metropolitan Government submits that the police department's investigative file in this open criminal case is not an open record as defined by the Open Records Act:

- Tennessee Criminal Rule of Procedure 16 gives the Criminal Court exclusive jurisdiction over discovery and inspection of files by any person in an open criminal case.
- If the Chancery Court nevertheless were to exercise jurisdiction over the Criminal Court's case, access to the Police Department's investigative file in this open criminal case is restricted by Tennessee Criminal Rule of Procedure 16.
- If this Court were to create a distinction within the investigative file between materials created by the police and materials gathered from third parties, as urged by the Tennessean et al., evidence gathered pursuant to a law enforcement subpoena or search warrant is not a public record.
- If this Court were to create a distinction within the investigative file between materials created by the police and evidence gathered from third parties, as urged by the Tennessean et al., unlawful photographs and videos are nevertheless not public records.

BACKGROUND

The following information comes from the Affidavit of Steve Anderson, the Metropolitan Nashville Police Department Chief of Police, which is attached as Exhibit 1 to this Brief:

MNPD officers have been investigating and gathering information relating to crimes that allegedly occurred on the Vanderbilt University campus around June 23, 2013 and the following days thereafter, for the purposes of prosecuting the perpetrators of the crimes.

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

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

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

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

Disclosure also could cause a "chilling effect" on the willingness of witnesses to come forward and to offer evidence and on an investigator's willingness to take possession of some types of evidence that could result in harm upon public disclosure.

The MNPD's investigative file is the product of the education and investigative experience utilized by the law enforcement officers to gather relevant documents and items related to this crime. MNPD considers the creation of this kind of file to be an internal report created in preparation for the prosecution of a case by the District Attorney's office. MNPD routinely consults with the District Attorney's office during the course of an investigation about its course and the evidence gathered to date.

It is essential that police investigators be able to gather materials freely and broadly, using their judgment, without fear that materials they gather and prepare for the D.A. will be released to the public and cause prejudice to the effectiveness of the investigation.

Moreover, even the disclosure of a log of the evidence gathered in the investigation will serve to disclose some information about the evidence and could cause some of the consequences described above.

LAW

I. TENNESSEE RULE OF CRIMINAL PROCEDURE 16 GIVES THE CRIMINAL COURT EXCLUSIVE JURISDICTION OVER DISCOVERY AND INSPECTION OF FILES BY ANY PERSON IN AN OPEN CRIMINAL CASE.

Tennessee Criminal Rule of Procedure 16 places jurisdiction for discovery and inspection of investigative files with the Criminal Court:

> **Rule 16. Discovery and Inspection.**
> (a) Disclosure by the State…
> (b) Disclosure of Evidence by the Defendant…
> (c) Continuing Duty to Disclose.

(d) **Regulating Discovery.**

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

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

(A) **order that party to permit the discovery or inspection**; specify its time, place, and manner; and prescribe other just terms or conditions;
(B) grant a continuance;
(C) prohibit the party from introducing the undisclosed evidence; or
(D) enter such other order as it deems just under the circumstances. ...

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

Two courts cannot exercise jurisdiction over the same subject matter. Whether the doctrine is called "prior case pending," "first filed rule," or something else, two different courts cannot exercise concurrent jurisdiction over whether this pending criminal investigative file is exposed to the public. *Estate of McFerren v. Infinity Transp. LLC* (197 S.W.3d 743 (Tenn. 2006)(" The authority of that court first acquiring jurisdiction over the subject matter and the parties continues until the matters in issue are disposed of, and no court of coordinate authority is at liberty to interfere with its actions.")

Here, the criminal court has already exercised jurisdiction over much of the criminal investigative file by ordering documents, information and materials to be produced or gathered pursuant to subpoenas and search warrants[1]. Subpoenas and search warrants can only be granted when a judge makes a finding that the information requested has a valid law enforcement

[1] Much of the information that the MNPD has gathered in this investigation has been through subpoenas and search warrants - from defendants, potential witnesses, Vanderbilt University, Vanderbilt Police, Vanderbilt University Medical Center, and cell phone providers. (Affidavit of Chief Anderson, ¶ 8)

purpose (in the case of subpoenas) or probable cause (in the case of search warrants). Tenn. Code Ann. § 40-17-123; Tenn. Code Ann. § 40-6-103.

The criminal court has also exercised its jurisdiction over the investigative file by signing a protective order in this case, ordering 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." (Exhibit 2)

The Tennessee Supreme Court has discussed the balance that a Chancery Court must undertake, to control access and disclosure (to parties and the media) of information over cases in its court. *Ballard v. Herzke*, 924 S.W.2d 652, 662 (Tenn. 1996) In that case, the Court relied on Rule of Civil Procedure 26, which puts discovery and release of case files in the jurisdiction and control of the Chancellor. The Supreme Court determined that the Chancery Court had not abused its discretion in deciding to enter and later modify a protective order, and it held that the documents sealed by the protective order were not subject to inspection under the Tennessee Public Records Act. *Id.*

Likewise in this case, until the materials or information are actually offered into evidence, or until the criminal case is closed, the Criminal Court, not the Chancery Court, controls access to potential evidence. *See State v. Cawood*, 134 S.W.3d 165, nt. 11 (Tenn. 2004).

The Tennessee Supreme Court has recognized the ability of media entities to intervene to modify a protective order, in order to obtain access to judicial records. *Ballard v. Herzke*, *supra* at 657 ("we agree with those federal and state courts in other jurisdictions which have routinely found that third parties, including media entities, should be allowed to intervene to seek modification of protective orders to obtain access to judicial proceedings or records.")

But **Petitioners Tennessean et al. have never asked Judge Watkins to modify, lift or alter the terms of this protective order. Petitioners have never asked Judge Watkins to inspect the investigative file in this case and allow disclosure.** Instead, Petitioners are attempting an "end run" around his jurisdiction, by asking the Chancery Court to take over the regulation of discovery and inspection in the criminal case.

The Chancery Court jurisdiction of the Public Records Act may not override Tennessee Criminal Rule of Procedure 16's provision placing jurisdiction over discovery and inspection of investigative files with the Criminal Court. The civil and criminal rules of discovery are promulgated by the Supreme Court (TENN. CODE ANN. § 16-3-402) and then approved by the State Legislature (§ 16-3-404). Upon adoption, **any laws in conflict with the rules of civil or criminal procedure are of "no further force and effect."** TENN. CODE ANN. § 16-3-406; *also Pratcher v. Methodist Healthcare Memphis Hosps.*, 407 S.W.3d 727, 736 (Tenn. 2013) ("Conflicts between provisions of the Tennessee Rules of Civil Procedure and provisions of the Tennessee Code which cannot be harmoniously construed will be resolved in favor of the Tennessee Rules of Civil Procedure."); *also State v. Cawood*, 134 S.W.3d 159, 165 (Tenn. 2004) (disposal of public records in court's possession is controlled by Supreme Court rules)

For these reasons, Metro submits that the Criminal Court has exclusive jurisdiction over discovery and inspection of the investigative file in this case.

II. IF THE CHANCERY COURT NEVERTHELESS WERE TO EXERCISE JURISDICTION OVER THE CRIMINAL COURT'S CASE, ACCESS TO THE POLICE DEPARTMENT'S INVESTIGATIVE FILE IN THIS OPEN CRIMINAL CASE IS RESTRICTED BY TENNESSEE CRIMINAL RULE OF PROCEDURE 16.

a. RULE 16 OF THE CRIMINAL RULES OF DISCOVERY DOES NOT AUTHORIZE DISCOVERY OR INSPECTION OF LAW ENFORCEMENT FILES MADE IN CONNECTION WITH INVESTIGATING A CASE.

The Public Records Act states:

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

TENN. CODE ANN. § 10-7-503(a (emphasis added).

The phrase "unless otherwise provided by state law" encompasses the discovery rules. *Ballard v. Herzke*, 924 S.W.2d 652, 662 (Tenn. 1996) (protective order entered pursuant to the Tennessee Rules of Civil Procedure prevented the inspection of sealed documents requested under the Tennessee Public Records Act).

Tennessee Rule of Criminal Procedure 16 protects the internal investigative file of an open criminal prosecution from disclosure or inspection. Rule 16 provides for the disclosure of some (but not all)[2] parts of the State's proposed proof:

> (a) Disclosure of Evidence by the State.
> 1. Information Subject to Disclosure.
> A. Defendant's Oral Statement....
> B. Defendant's Written or Recorded Statement...
> C. Organizational Defendant...
> D. Codefendants...
> E. Defendant's Prior Record...

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[2] There is no general constitutional right to discovery in a criminal case. *State v. Brownell*, 696 S.W.2d 362, 363 (Tenn. Crim. App. 1985) The State is under no obligation to make an investigation, or to gather evidence, for the defendant. *Id.*

The Rules of Criminal Procedure allow a defendant to discover only some parts of the State's proposed proof, upon motion. *Id.* Rule 16 does not authorize pretrial discovery of the names and addresses of State's witnesses. *State v. Martin*, 634 S.W.2d 639, 643 (Tenn. Crim. App. 1982).

F. Documents and Objects....
G. Reports of Examination and Tests...

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

(b) Disclosure of evidence by the Defendant...
(c) Continuing duty to disclosure...
(d) Regulating Discovery...
(e) Alibi witnesses....

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

b. THE TENNESSEE SUPREME COURT HAS RECOGNIZED THAT RULE 16 OF THE CRIMINAL RULES OF DISCOVERY RESTRICTS DISCOVERY AND INSPECTION OF AN OPEN INVESTIGATIVE FILE.

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

Relying on this Rule, the Court rejected a public records request made for "all records and documents[3] in the possession and control of Sergeant Worthington 'relating to the death of Carl Estep'". *Id.* (emphasis added).

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[3] A certified copy of the Chancery Court file, attached as Exhibit 3 to this Brief, shows that **the *Appman* Petition requested that the Court issue an Order requiring the defendant make available for inspection "the entire record of the State of Tennessee pertaining to the investigation** of the death of Carl Estep...allow access for the purpose of inspection to any and all records pertaining to the death." (emphasis added).

In making its ruling, the Supreme Court rejected the Court of Appeals' attempt to distinguish between records in the files that were made by law enforcement and the records in the files that were made by third parties. (The Court of Appeals had held that Rule 16 did not protect access to the investigative file, because "it does not protect public records in the possession of non-prosecutorial officials[4] from inspection even though the record in question might be one which might eventually be used in a prosecution." *Appman v. Worthington*, 1986 Tenn. App. Lexis 3240; 19986 WL 8974, *5.)

The Supreme Court did not distinguish between records in the file that were created by law enforcement and any records created by third parties but gathered by law enforcement during an investigation. The *Appman* Court held instead that,"[t]his exception to disclosure and inspection does not apply to investigative files in possession of state agents or law enforcement officers, where the files have been closed and are not relevant to any pending or contemplated criminal action, but does apply where the files are open and are relevant to pending or contemplated criminal action." *Id.* at 166 (emphasis added).

The Tennessean et al.'s Petition rejects the plain language in *Appman*, arguing that the Supreme Court did not hold that "all" investigative records are exempt from disclosure or inspection under the Public Records Act. (Petition, ¶ 15) The Petition suggests that the only protected materials in a criminal investigative file are those "made by" law enforcement, the district attorney, or other state agents. *Id.*

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

But this argument ignores the case of *McLellan v. Crockett*, where the Court of Criminal Appeals rejected a newspaper's request for an item in a district attorney's file that was clearly not "made by" law enforcement, the district attorney, or other state agents. 1990 Tenn. Crim. App. LEXIS 9, 1990 WL 148[5]. In *McLellan*, the Kingsport Times-News requested a copy of a psychological evaluation of a defendant, performed at defense counsel's request, by the Watauga Mental Health Center (a private facility). After a discussion of *Appman*, the Court concluded that public access to the psychological evaluation contained in the District Attorney's file was not required and that access to "documents in the files of the District Attorney" was prohibited. *Id.* at *3.

c. RULE 16 DOES NOT JUST PROTECT WORK PRODUCT – ITS PROTECTIONS ARE BROADER.

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

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

> Defendants contend that the drafters intended Rule 16(a)(2) to be a "work product" exception and, therefore, that we should limit the rule to the contours of the work product privilege codified in Federal Rule of Civil Procedure 26. **We are not persuaded that the drafters meant to limit Criminal Rule 16 to the civil "work product" doctrine.** Rule 16 itself, while encompassing government work product and having its genesis in the idea of work product, draws its boundaries more broadly than those of Civil Rule 26.

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[5] This case has been partially overturned on unrelated grounds, regarding what entity constitutes the chief law enforcement officer of each judicial district, by *State v. Harrison*, 270 S.W.3d 21, Nt. 6 (Tenn. 2008).

> ... **it is clear that Rule 16(a)(2)'s protection of investigative materials extends beyond the work product privilege as defined in the civil context.** Although the Advisory Committee used the term "work product" to describe the materials discoverable under Rule 16(a)(2), it purposefully defined the Rule's scope differently than that of Rule 26. *See* Fed.R.Crim.P. 16 (1975 enactment) advisory committee's note D.
>
> As note D states, in 1975 the House of Representatives proposed to limit the materials covered by Criminal Rule 16(a)(2) to accord with Civil Rule 26. Specifically, **the House sought to exempt only "the mental impressions, conclusions, opinions, or legal theories of the attorney for the government or other government agents."** *Id.* **The Committee *rejected* that proposal and maintained the more expansive scope that includes all "reports, memoranda, or other internal government documents."** *Id.; see also In re Grand Jury Subpoenas,* 318 F.3d 379, 383 (2d Cir.2003) (noting that Rule 16 imposes a stricter limit to discovery in criminal matters than Rule 26 imposes in civil litigation).

United States v. Fort, 472 F.3d 1106, 1114-16 (9th Cir. 2007) (emphasis added).

Like Federal Rule 16, Tennessee Criminal Rule 16 states broadly "this rule does not authorize the discovery or inspection of reports, memoranda, or other internal state documents made by the district attorney general or other state agents or law enforcement officers in connection with investigating or prosecuting the case." Tenn. R. Crim. P. RULE 16 (a)(2)(emphasis added).

The MNPD's investigative file is the product of the investigative experience and know-how utilized by law enforcement officers to gather relevant documents and items related to a crime. (Affidavit of Chief Anderson, ¶ 12) MNPD routinely consults with the District Attorney's office during the course of an investigation about its course and the evidence gathered to date. *Id.* MNPD considers the creation of this kind of file to be an internal report created in preparation for the prosecution of a case by the District Attorney's office. *Id.*

It is essential that police investigators be able to gather materials freely and broadly, using their judgment, without fear that materials they gather and prepare for the D.A. will be released to the public and potentially prejudicing the effectiveness of the investigation. *Id.*, ¶ 13.

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

III. IF THIS COURT WERE TO CREATE A DISTINCTION WITHIN THE OPEN CRIMINAL INVESTIGATIVE FILE BETWEEN MATERIALS CREATED BY THE POLICE AND MATERIALS GATHERED FROM THIRD PARTIES, AS URGED BY THE TENNESSEAN ET AL., EVIDENCE GATHERED PURSUANT TO A LAW ENFORCEMENT SUBPOENA OR SEARCH WARRANT IS NOT A PUBLIC RECORD.

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

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

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

> (3) If the judge finds that all of the criteria set out in subdivision (d)(1) do not exist as to any of the documents requested, the judge shall deny the request for subpoena.

Tenn. Code Ann. § 40-17-123(emphasis added).

When state law gives a process for obtaining records through a subpoena, this process must be followed. *See Givens v. Mullikin ex rel. Estate of McElwaney*, 75 S.W.3d 383, 408-09 (Tenn. 2002) (even though a physician may be required to disclose information pursuant to subpoena or court order, an implied covenant of confidentiality does not allow him to divulge this information informally without the patient's consent). Therefore at the investigative stage (at the very least), the Criminal Court exercises control over the investigative file. Tenn. R. Crim. P. RULE 16; *See State v. Cawood*, 134 S.W.3d 165, nt. 11 (Tenn. 2004).

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

Therefore, the Petitioners Tennessean et al. cannot obtain data from the police, gathered through the strict requirements of a law enforcement subpoena or search warrant, when they could never qualify to obtain the information through this route themselves. For these reasons, Metro submits that evidence gathered pursuant to the specific requirements of a statute is not a public record.

IV. IF THIS COURT WERE TO CREATE A DISTINCTION WITHIN THE OPEN CRIMINAL INVESTIGATIVE FILE BETWEEN MATERIALS CREATED BY THE POLICE AND EVIDENCE GATHERED FROM THIRD PARTIES, S URGED BY THE TENNESSEAN ET AL., UNLAWFUL PHOTOGRAPHS AND VIDEOS ARE NEVERTHELESS NOT PUBLIC RECORDS.

One of the individuals in this criminal case is charged with unlawful photography (T.C.A. § 39-13-605). (Affidavit of Chief Anderson, ¶ 9) Photographs and videos taken unlawfully are required by state law to be confiscated, and after their use as evidence, destroyed:

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

TENN. CODE ANN. § 39-13-605. Photographs in this category cannot be public records, where the legislature has mandated their confiscation and destruction. For these reasons, Metro submits that evidence in this category is not a public record.

V. CONCLUSION.

In *Appman*, the Tennessee Supreme Court relied on the rules of criminal procedure to determine that the entire investigative file was not a public record. In *Ballard*, the Tennessee Supreme Court relied on the rules of civil procedure and held that the Trial Court controls access to documents in its file. Metro asks that this Court look to the rules and defer to the Criminal Court's jurisdiction over active cases in its court. If the Court determines that it does have jurisdiction, Metro asks that it rely on Criminal Rule 16 and find that the open investigative file in this case is not a public record.

Respectfully submitted,

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Certificate of Service

A copy has been emailed and mailed on this 25th day of February, 2013 to:

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