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This Court should refrain from addressing constitutional issues if they can be avoided. Following this principle, the Court should vacate the Chancellor's advisory *Memorandum and Final Order* and dismiss this case for lack of jurisdiction. Short of that, the Court could vacate the Chancellor's advisory *Memorandum and Final Order* and transfer this case to the Criminal Court of Appeals, who could then presumably send it down to the Criminal Trial Court for an adjudication on the merits. This will allow the Criminal Trial Court to carry out the affirmative constitutional duties embodied in Rule 16 - to limit prejudicial pretrial publicity, provide the criminal defendants with a fair trial and protect the rights of the Victim.

If this Court exercises jurisdiction over this case, the Public Records Act should be interpreted to avoid conflicting with the Sixth Amendment of the United States Constitution; as well as avoid conflicting with Article I, § 9[1] and § 35 and with Article II, § 1 and § 2 of the Tennessee Constitution. The Tennessee Rules of Criminal Procedure Rule 16's exception to the Public Records Act must be interpreted broadly enough to keep the Act constitutional, not lead to absurd results, and must conform to the Supreme Court's previous decisions in *Appman v. Worthington*, 746 S.W.2d 165 (Tenn. 1987) and *Schneider v. City of Jackson*, 226 S.W.3d 332, 341 (Tenn. 2007), which held that criminal investigative files that are relevant to pending criminal actions are not public records.

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[1] Appellants assert in their Reply Brief at footnote 12) that the Court of Appeals Brief is the first time Metro has raised Article I, §9. To the contrary, it was discussed at the trial level and is mentioned by the Trial Court in its Memorandum and Final Order, T.R. 645 (" The Metropolitan Government and the State assert that disclosure of records contained in an active criminal case could violate the criminal defendants' § Amendment constitutional right to a fair trial in their criminal cases and the state constitutional guarantee of a "speedy, public trial, by an impartial jury of the County in which the crime shall have been committed." Tenn. Const. art. I, § 9.").

ARGUMENT

I. THE METROPOLITAN GOVERNMENT'S INTERPRETATION OF RULE 16 ALLOWS THE COURT TO AVOID HOLDING THE PUBLIC RECORDS ACT UNCONSTITUTIONAL WHEN APPLIED TO OPEN CRIMINAL INVESTIGATIONS.

A. The Court Must Adopt An Interpretation That Avoids Constitutional Conflict.

It is the Court's duty to adopt a construction that will sustain a statute and avoid constitutional conflict - if any reasonable construction exists that satisfies the requirements of the Constitution. *Davis-Kidd Booksellers v. McWherter*, 866 S.W.2d 520, 529 (Tenn. 1993) When faced with a choice between two constructions, one of which will sustain the validity of the statute and avoid a conflict with the Constitution, and another which renders the statute unconstitutional, the Court must choose the former. *Id.* at 529-530.

The Metropolitan Government interprets Rule 16 of the Tennessee Rules of Criminal Procedure to only require the exchange of investigative materials between the State and criminal defense counsel. Nowhere in Rule 16 does it require that the materials exchanged between the prosecution and the defense be disclosed to the media or the public. The Metropolitan Government's reading, which is based on the plain language of Rule 16, allows the Public Records Act to be read without impinging on the constitutional rights of criminal defendants and victims, while maintaining the separation of powers between the Legislature and the Judiciary.

On the other hand, the Tennessean *et al.* ask the Court to interpret Rule 16's exception to the Public Records Act in a manner that would effectively amend Rule 16 to say something it does not say (that public access is allowed); and effectively nullify Tenn. Sup. Ct. R. 8, RPC 3.6 ("Trial Publicity") and 3.8 ("Special Responsibilities of a Prosecutor"), which limit the release of information in the prosecutor's file.

Under the Tennessean *et al.*'s interpretation of Rule 16:

- The Criminal Court could not fulfill its affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity, because evidence in the possession of the police and District Attorney could be accessed by the media and the public;
- The Criminal Court could not fulfill its duty under Rule 16 to regulate "discovery and inspection" of the investigative file, because a public records request for the investigative file could be granted by another court; and
- Tenn. Sup. Ct. R. 8, RPC 3.6 and 3.8 would become meaningless, pitting the Legislature against the Judiciary.

B. The Appellants' Interpretation Of Rule 16's Exception To The Public Records Act Would Make the Public Records Act Unconstitutional.

The Public Records Act would be found unconstitutional in this context because the Criminal Court must have control over the open investigative file, or there is no way for it to fulfill its affirmative constitutional duty to manage prejudicial pretrial publicity. *Gannett v. DePasquale*, 443 US 368, 378 (1979). The victim must have the ability to raise constitutional objections pursuant to Tennessee Constitution Art. I, § 35, or those rights are meaningless. Pre-trial publicity must be controlled, in order to provide the criminal defendant with a fair trial. *State v. Carruthers,* 35 S.W.3d 516, 562-563 (Tenn. 2000). The Tennessean *et al.*'s incorrect interpretation of Rule 16's exception to the Public Records Act would have the ironic effect of making the Act unconstitutional.

The Tennessean *et al.*'s response to the unconstitutional implications of its interpretation is to suggest that constitutional harms caused by the release of the information can be addressed "several months from now" by the criminal defendants. (Appellants' Reply Brief, p. 17) But the U.S. Supreme Court does not treat these potential harms so cavalierly:

> Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by "impartial" jurors, and an outcome affected by extrajudicial statements would violate that fundamental right. *See, e. g.,Sheppard*, 384 U.S. at 350-351; *Turner v. Louisiana*, 379 U.S. 466, 473, 13 L. Ed. 2d 424, 85 S. Ct. 546 (1965) (evidence in criminal trial must come solely from witness stand in public courtroom with full evidentiary protections). Even if a fair trial can ultimately be ensured through voir dire, change of venue, or some other device, these measures entail serious costs to the system. Extensive voir dire may not be able to filter out all of the effects of pretrial publicity, and with increasingly widespread media coverage of criminal trials, a change of venue may not suffice to undo the effects of statements such as those made by [attorney] petitioner.

Gentile v. State Bar of Nev., 111 S. Ct. 2720, 2745 (U.S. 1991) (emphasis added); *also Estes v. Texas,* 381 U.S. 532 (1965) (the right to a fair trial is the most fundamental of all freedoms and one which must be preserved at all costs).

The Supreme Court has held that the potential for prejudice must be addressed before the release of materials:

> Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused... If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences.

Sheppard v. Maxwell, 384 U.S. 333, 362-363 (U.S. 1966) (emphasis added).

The potential for prejudice is the reason that the Tennessee Supreme Court has promulgated Rule 16, placing the authority over discovery and inspection of the prosecution's file with the Criminal Court, and is surely the reason the Tennessee Supreme Court promulgated RPC 3.6 and 3.8.

C. The Appellants' Interpretation Of Rule 16's Exception To The Public Records Act Violates The Separation Of Powers Between The Legislature And The Judiciary.

The Tennessee Supreme Court promulgated[2] Rule 16 because the separation of powers doctrine places responsibility on the judicial branch to ensure that parties receive a fair trial. *Florida Freedom Newspapers, Inc. v. McCrary*, 520 So. 2d 32 (Fla. 1988). The *Flowers Freedom* case was a public records request for pretrial discovery materials that had been provided to the criminal defendant. Under the Florida public records law, the public ordinarily has access to such materials once they are given to the defendant. But the Trial Court temporarily sealed access until a jury could be selected and sequestered.

The press filed suit, taking an "absolutist" position and arguing that the Court was creating a "public policy exception." *Id.* The Florida Supreme Court disagreed, holding that the right to a fair trial was not a "policy exception." Ignoring the right to a fair trial would render the public records act unconstitutional:

> Our refusal in *Wait*, *City of North Miami*, and *Rose* to create as a matter of public policy the particular exceptions at issue does not mean that there may not be instances where orderly court procedures or a respect for constitutional rights require that court files be closed. Second, **under the separation of powers doctrine, it is the responsibility of the judicial branch to ensure that parties receive a fair trial.** In the case of a criminal defendant, the right to a fair trial includes the right to an impartial jury in the county where the crime was allegedly committed. The United States Supreme Court has characterized the right to a fair trial as the most fundamental of all freedoms and one which must be preserved at all costs. *Estes v. Texas,* 381 U.S. 532, 14 L. Ed. 2d 543, 85 S. Ct. 1628

[2] The Rules of Criminal Procedure are promulgated by the Supreme Court (T.C.A. § 16-3-402), and approved by the General Assembly (T.C.A. § 16-3-404).

> (1965). Moreover, to safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity. *Sheppard v. Maxwell*, [384 U.S. 333, 16 L. Ed. 2d 600, 86 S. Ct. 1507 (1966)] *supra*. And because of the Constitution's pervasive concern for these due process rights, a trial judge may surely take protective measures even when they are not strictly and inescapably necessary. *Gannett Co. v. DePasquale*, 443 U.S. 368, 378, 61 L. Ed. 2d 608, 99 S. Ct. 2898 (1979). A*ccord Palm Beach Newspapers, Inc. v. Burk*, 504 So.2d 378, 380 (Fla. 1987) ("where a defendant's right to a fair trial conflicts with the public's right of access, it is the right of access which must yield"); *Bundy v. State*, 455 So.2d 330, 338 (Fla. 1984) (a balancing test between the right of public access and a defendant's right to a fair trial must be applied so as to recognize the weightier considerations of the defendant).
>
> **If, as the press urges, chapter 119 [the Florida Public Records Act] was read and applied so as to violate the constitutional separation of powers doctrine or the right to a fair trial, we would be obliged to declare the statute unconstitutional.** Instead, we hold that when correctly interpreted and applied there is no conflict between the statute and the constitutional authority of the judicial branch to take such measures as are necessary to obtain orderly proceedings and a fair trial.

Id. at 34-35 (emphasis added).

The Tennessee Supreme Court has similarly relied on the separation of powers doctrine to determine that general laws allowing public access to government meetings cannot, constitutionally, negate the Rules that it promulgates governing judicial processes. For example, in *Smith County Education Assoc. v. Anderson*, the Court held that the Rules of Professional Responsibility, requiring attorney-client privileges be kept, were not overridden by the Open Meetings Act. 676 S.W. 2d 328 (Tenn. 1984). If the Open Meetings Act had been interpreted to override the attorney-client privilege, the Court would have determined that the Act violated Article II, Section 1 and 2 of the Tennessee Constitution (the separation of powers). *Id.* at 333. Instead, the Court held:

> We conclude that the Legislature did not intend for the coverage of the Act to include this situation.

Id. at 334; *also see Arnold v. City of Chattanooga*, 19 S.W. 3d 779, 786 (Tenn. Ct. App. 1999) (work product is based on Rules of Professional Responsibility and attorney's work product is not subject to the Public Records Act).

The Metropolitan Government submits that this is one of the reasons why the Tennessee Supreme Court ruled as it did in *Appman* – when it noted that Rule 16, a rule promulgated by the Supreme Court, prevented the disclosure of materials under the Criminal Court's jurisdiction (an open criminal matter). 746 SW.2d 165, 166 (Tenn. 1987). In making this decision, the Supreme Court rejected the Court of Appeals position that Rule 16 had no role in limiting the public records request.

The Court of Appeals in *Appman* repeatedly emphasized that the documents at issue "were not the records of any prosecutorial agency of the State." 1986 Tenn. App. LEXIS 3240. at 13. But the Supreme Court was not concerned that the materials came from a third party (the Department of Corrections). In reversing the Court of Appeals, the Supreme Court instead broadly stated that Rule 16 applied to investigative files "*in [the] possession* of state agents or law enforcement officers," "where the files are *open and are relevant to pending or contemplated criminal action.*" 746 S.W. 2d 165, 166 (emphasis added).

The separation of powers doctrine does not allow a general law to override judicial responsibilities, and the Courts will strive not to interpret statutes in this manner:

> [T]he legislature can have no constitutional authority to enact rules, either of evidence or otherwise, that strike at the very heart of a court's exercise of judicial power...Among these inherent judicial powers are the powers to hear facts, to decide the issues of fact made by the pleadings, and to decide the questions of law involved. ... a "court's constitutional function to independently decide controversies is impaired if it must depend on, or is limited by, another branch of government in determining and evaluating the facts of the controversies it must adjudicate." Id. Consequently, **any legislative enactment that purports to remove the discretion of a trial judge in making determinations of logical or**

legal relevancy impairs the independent operation of the judicial branch of government, and no such measure can be permitted to stand.

If strictly construed, section 39-17-424 would represent a legislative attempt to remove a judge's discretion to determine what evidence is logically or legally relevant to an ultimate fact of consequence. Moreover, to the extent that a strict interpretation of the statute's mandatory language would preempt Rules of Evidence 401, 402, and 404(b), the statute would work to undermine, rather than to supplement, judicial determinations of logical and legal relevancy.

Nevertheless, while section 39-17-424 could be read in this manner, we will not lightly presume that the legislature intended to usurp the role of the courts in exercising the judicial power of the state. Indeed, because we give all legislative enactments a strong presumption of constitutionality, *Petition of Burson*, 909 S.W.2d 768, 775 (Tenn. 1995), **we will presume that the legislature did not intend to infringe upon the proper exercise of the judicial power** in this state and that therefore, it did not intend for courts to strictly construe this statute in the manner adopted by the lower courts.

State v. Mallard, 40 S.W.3d 473, 482-483 (Tenn. 2001) (emphasis added).

D. The Chancery Court and Court of Appeals Are Without Jurisdiction To Grant The Appellants The Relief They Seek.

The Appellants now concede, as the Chancery Court did, that the Chancery Court should not and cannot perform the detailed factual finding necessary to determine the level of pretrial publicity that can be allowed in an ongoing criminal case, (Appellant's Reply Brief, p. 2; Chancellor's Memorandum and Order, T.R. 645-646). Therefore, the Chancellor's advisory opinion should be vacated and this case should either be dismissed or transferred to the Criminal Court of Appeals, for remand to the Criminal Trial Court for adjudication.

Transferring appeals to the Criminal Court of Appeals is appropriate for matters "arising out of a criminal case." *State v. Drake*, 701 S.W.2d 604 (Tenn. 1985). In *Drake*, the Tennessee Supreme Court discussed the fact that the media entities seeking access to the trial had intervened by filing a petition in the criminal court matter - but then had appealed the criminal court's decision to the Court of Appeals. 701 S.W.2d 604, 606 (Tenn. 1985).

The Supreme Court held that the Court of Appeals had properly transferred the case to the Court of Criminal Appeals:

> We concur in that action [transferring the case to the Court of Criminal Appeals] because the proceeding is clearly one "arising out of a criminal case," as contemplated in T.C.A. § 16-5-108(a)(2)[3].

Id.

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

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

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

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

T.C.A. § 40-1-108. For these reasons, the the Chancellor's advisory opinion should be vacated and this case either be dismissed or transferred to the Criminal Court of Appeals, for remand to the Criminal Trial Court.

The Tennessean *et al.* incorrectly assert that Metro has asserted a "per se attack on pretrial publicity." (Appellants' Reply Brief, p. 14) They also suggest that our Constitutions cannot be an "exception" to the Public Records Act. (Appellants' Reply Brief, p.17: "'fair trial rights' are not an exception to the Public Records Act.")

The Metropolitan Government is not making a per se attack on pretrial publicity or asserting a policy exception to the Public Records Act. The Metropolitan Government has no quarrel with Rule 16 or RPC 3.6 and 3.8, all of which allow pretrial publicity to a certain extent, under the watchful eye of the Criminal Trial Court. The Metropolitan Government simply asks that this Court interpret Rule 16 and the Public Records Act in a manner that upholds its constitutionality, by allowing the Criminal Trial Court to permit a fair trial.

II. THE MORE SPECIFIC STATUTE DEALING WITH A SUBJECT CONTROLS OVER THE MORE GENERAL.

The Tennessean *et al.*'s Reply continues its puzzling insistence that the Metropolitan Government is asking the Court to create a "blanket" or "total" "law enforcement exception." (Appellants' Reply Brief pp. 1, 6, 7) The Metropolitan Government has never asked the Court to create any kind of law enforcement exception.

The Metropolitan Government has asked the Court to determine that the Public Records Act does not override the Tennessee Rule of Criminal Procedure 16, which governs disclosure of open investigative files and does not contain any provisions requiring that the materials exchanged between the prosecution and the defense be disclosed to the media or the public. This

exact issue was litigated in North Carolina, and its Supreme Court held that the rule of criminal procedure required disclosure of an open investigative file to no one but the defendant:

> Article 48 [the statute governing discovery in criminal actions] deals specifically with the disclosure of criminal investigative files as opposed to the more general provisions of Chapter 132 [the Public Records Act]. We hold that it governs in this case and **there is no provision in it for discovery by anyone other than the State or the defendant.**

Piedmont Publishing Co. v. City of Winston-Salem, 334 N.C. 595, 597-598 (N.C. 1993) (emphasis added). The Court's reasoning was that the more specific statute (the criminal rule of discovery controlled disclosure of criminal investigative files) controlled over the general (the public records act). *Id.* at 598.

The Vermont Supreme Court has likewise held that the general right to access public records cannot trump rules that specify restrictions on access:

> Thus, notwithstanding the general right of access to public records under the PRA, the more specific and exacting legislative requirements that a retiring governor's official correspondence be placed in the state archives and that such records be made "accessible only in accord with" the special terms or conditions restricting their use, must control. The statutes, in short, evince an express legislative intent to authorize the "special term" restricting access to the former Governor's archived records.

Judicial Watch, Inc. v. State, 2005 VT 108, 8 (Vt. 2005) (emphasis added).

Tennessee similarly follows the rule of statutory construction that the more specific statute controls over the more general. *Graham v. Caples*, 325 S.W.3d 578, 582 (Tenn. 2010) ("Where a conflict is presented between two statutes, a more specific statutory provision takes precedence over a more general provision."); *Dobbins v. Terrazzo Machine & Supply Co.*, 479 S.W.2d 806, 809 (Tenn. 1972) (quoting from *Woodroof v. City of Nashville*, 183 Tenn. 483, 192 S.W.2d 1013(1946): "where the mind of the legislature has been turned to the details of a subject

and they have acted upon it, a statute treating the subject in a general manner should not be considered as intended to effect the more particular provision.")

Moreover, a statute's meaning is to be determined, not from special words in a single sentence or section, but from the act taken as a whole, and viewing the legislation in the light of its general purpose. *Cummings v. Sharp*, 173 Tenn. 637, 642 (Tenn. 1938); *Loftin v. Langsdon*, 813 S.W.2d 475, 478 (Tenn. Ct. App. 1991).

The Metropolitan Government asks that this Court determine that Rule 16, a specific statute addressing open criminal investigative files, controls over the broad and general terms of the Public Records Act. This interpretation is consistent with the Tennessee Supreme Court decisions holding that Rule 16 limits access to open criminal investigative files that are requested under the Tennessee Public Records Act. *Appman v. Worthington*, 746 S.W.2d 165 (Tenn. 1987); *Schneider v. City of Jackson*, 226 S.W.3d 332, 341 (Tenn. 2007).

III. THE TENNESSEAN'S INTERPRETATION OF THE RULE 16 EXCEPTION TO THE PUBLIC RECORDS ACT WOULD LEAD TO ABSURD RESULTS.

A. Statutes Are Interpreted To Avoid Absurd Results.

The Tennessean *et al.* try to distinguish the North Carolina Supreme Court's interpretation of the Rules of Criminal Procedure, in the *Piedmont Publishing* case on the grounds that it was trying to prevent discovery circumvention. (Appellants' Reply Brief, p. 4) But what the Court was really doing was interpreting its Rules to avoid the absurdity of discovery circumvention.

The North Carolina Supreme Court determined that its interpretation (limiting required disclosure to the criminal defendant, rather than allowing public access) was the intent of the General Assembly, because reading the Rules of Criminal Procedure and Public Records Act any other way would lead to an absurd result - the public would have greater access to evidence than a criminal defendant:

> If the Public Records Act applies to information the State procures for use in a criminal action, there would be no need for Article 48 [the statute governing discovery in criminal actions]. A criminal defendant could obtain much more extensive discovery under the Public Records Act. It is illogical to assume that the General Assembly would preclude a criminal defendant from obtaining certain investigatory information pursuant to the criminal discovery statutes while at the same time mandating the release of this information to the defendant, as well as the media and general public, under the Public Records Act.

Piedmont Publishing Co. v. City of Winston-Salem, 334 N.C. 595, 597-598 (N.C. 1993).

Tennessee similarly follows the rule of "reductio ad absurdum," which means that courts "are required to construe terms reasonably and not in a fashion which will lead to an absurd result." *McClellan v. Board of Regents of the State Univ.*, 921 S.W.2d 684, 689 (Tenn. 1996); *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 313 (Tenn. 2005) ("We are constrained against adopting an interpretation of any statute that would lead to absurd results...The petitioner's interpretation would necessarily result in a conclusion that lethal injections of death row inmates may be carried out only by veterinarians or other technicians described in this Act. We decline to adopt such an interpretation of these statutory provisions.")

B. The Tennessean *et al.*'s Interpretation Of The Rule 16 Exception Would Lead To Absurd Results.

The Tennessean *et al.* have asked the Courts to read the Public Records Act in a way that amends the plain language of Rule 16. The Tennessean *et al.*'s interpretation would put the Tennessean (and all Tennessee citizens) in the shoes of criminal defendants – with the right to access materials in the police (and District Attorney's) files.

But, the Tennessean would be able to obtain the materials earlier in an ongoing criminal investigation than the criminal defendant, because it would not be subject to the limitations and timeline[4] for exchange of discovery that is mandated by Rule 16 and the U.S. Constitution. The Tennessean also would be able to publish and comment on substantive evidence in the case (unlike the prosecutor and criminal defense attorney, who are limited by Rules of Professional Conduct 3.6 and 3.8).

Further, the Tennessean *et al.* insist they may file for access to the records in Chancery Court, and thereby avoid[5] the Criminal Court's duty[6] to regulate discovery ("At any time, for good cause shown, the court may deny, restrict, or defer discovery or inspection...." Tenn. R. Crim. Pro. 16(d)(1)), evade the Criminal Court's duty to control pre-trial publicity (*Gannett v.*

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[4] One of the most obvious ways that criminal defendant would get less access to an investigative file than the public involves statements of witnesses. Tenn. R. Crim. P. 26 Production of Statements of Witnesses—commonly referred to as "the Jencks Rule" after the U.S. Supreme Court's decision in *Jencks v. U.S.*, 353 U.S. 657, (1957)— requires that statements of testifying witnesses to be turned over to opposing counsel ***only after that witness testifies at trial***. Tenn. R. Crim. P. 26(a). In other words, if a witness testifies, statements of that witness are then provided to opposing counsel (immediately before the opposing counsel cross-examines the witness). If a witness never testifies, a statement is never produced.

The Tennessean *et al.*'s proposed interpretation of Rule 16 would directly conflict with Rule 26, since the State would be required to turn over *Jencks* material to the public, under the Public Records Act, even though that material would ***never be turned over to the criminal defendant***, unless and until the State chose to have that witness testify.

[5] The Tennessean *et al.* acknowledge that the Chancery Court is not in a position to determine whether the release of the open investigative file will affect the criminal defendant's right to a fair trial: "A determination of "fair trial" issues based on pre-trial publicity about a criminal case set for trial months from now would require a detailed factual finding that the Trial Court in a Public Records Act case should not and cannot perform." (Appellants' Reply Brief, p. 2)

[6] The Advisory Commission considered this duty to be very important: "The continuing duty to disclose set out in section (c), and the flexibility of the court's regulation of discovery as set out in section (d), are deemed to be very important." (Comments to Tenn. R. Crim. Procedure 16, emphasis added).

DePasquale, 443 US 368, 378 (1979)), and sidestep the Victim's rights that the voters of Tennessee gave her when they amended the Tennessee Constitution to add Art. I, § 35. **In other words, the Tennessean *et al.* are asking to have the benefits of Rule 16 (access to the investigative file) without having to follow the restrictions of Rule 16 or the "fair trial" parameters placed upon the parties that operate under Rule 16.**

The Tenneean *et al.*'s interpretation would also mean that the Tennessean would be able to access materials that the police could only obtain through a search warrant or subpoena. And it would mean that any citizen of Tennessee would be able to access violent or sexually explicit videos of criminal behavior, simply by sending a public records request to the police.

The General Assembly passed both Rule 16 and the Public Records Act, but any law in conflict with the rules of criminal procedure are of "no further force and effect." T.C.A. § 16-3-406; *also Pratcher v. Methodist Healthcare Memphis Hosps.*, 407 S.W.3d 727, 736 (Tenn. 2013).

Again, Rule 16 does not contain any provisions requiring that the materials exchanged between the prosecution and the defense be disclosed to the media or the public[7], and the Public Records Act did not amend Rule 16. That would lead to absurd results, as well as make the Public Records Act unconstitutional.

[7] An additional absurd result would be that career criminals could ask for updates each week on any evidence gathered on them. And any member of the public could obtain sensitive materials gathered by the police during their investigation (such as credit card numbers that had been disclosed through a credit card data breach online).

IV. TRIAL IS THE TIME FOR PUBLIC DISCLOSURE OF THE EVIDENCE.

Prior to trial, discussion of evidence is extremely limited:

> The outcome of a criminal trial is to be decided by impartial jurors, who know as little as possible of the case, based on material admitted into evidence before them in a court proceeding. Extrajudicial comments on, or discussion of, evidence which might never be admitted at trial and ex parte statements by counsel giving their version of the facts obviously threaten to undermine this basic tenet.

Gentile v. State Bar of Nev., 111 S. Ct. 2720, 2742 (U.S. 1991).

The Rules of Professional Conduct[8] prevent attorneys involved in a criminal case from making statements that the lawyer knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding[9]. RPC 3.6. The prosecutor must refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused. RPC 3.8(f).

Even non-attorney participants in a trial may be prevented from releasing information they receive about the case, if it will violate a criminal defendant's right to a fair trial:

> Although litigants do not "surrender their First Amendment rights at the courthouse door," *In re Halkin*, 194 U. S. App. D. C., at 268, 598 F.2d, at 186, those rights may be subordinated to other interests that arise in this setting. For instance, on several occasions this Court has approved restriction on the communications of trial participants where necessary to ensure a fair trial for a criminal defendant. ... "In the conduct of a case, a court often finds it necessary to restrict the free expression of participants, including counsel, witnesses, and jurors." *Gulf Oil Co. v. Bernard,* 452 U.S. 89, 104, n. 21 (1981).

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[8] The Rules of Professional Conduct are an exception to the Public Records Act. *Arnold v. City of Chattanooga*, 19 S.W. 3d 779, 786 (Tenn. Ct. App. 1999) (attorney's work product is protected from discovery under the Public Records Act); *The Tennessean v. Tenn. Dep't of Pers.*, 2007 Tenn. App. LEXIS 267, 31 (Tenn. Ct. App. 2007) ("the attorney-client privilege and work product doctrine provide exceptions to the disclosure requirements of the Act.")

[9] There are unusual circumstances where attorneys involved in a criminal court case may need to disclose information regarding a criminal investigation, such as where the police need assistance in obtaining evidence from the public, or where a warning is appropriate to prevent harm to an individual or the public interest. Tenn. Rules of Prof. Conduct 3.6 (5), (6).

Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32 (U.S. 1984)(newspaper that was defendant in a libel action could be restrained from publishing materials about the plaintiff and their supporters to which it had gained access through court-ordered discovery); *also Gentile v. State Bar of Nev.*, 111 S. Ct. 2720, 2743-2744 (U.S. 1991) ("We expressly contemplated that the speech of those participating before the courts could be limited.")

But this changes at trial. Barring the very rare circumstance where a proceeding is closed to the public (*State v. Drake*, 701 S.W.2d 604, 607 (Tenn. 1985)), the media has "an absolute right to publish any information that is disseminated during the course of [a] trial." *State v. Montgomery*, 929 S.W.2d 409, 412 (Tenn. Ct. Crim. App. 1996). "Thus, 'those who see and hear what transpired [in open court] can report it with impunity." *Id.* (quoting *Craig v. Harney*, 331 U.S. 367, 374 (1947)). This right of the media to report information and evidence once it has been presented at trial has been repeatedly upheld by the Supreme Court. *Id.* at 412-13 (collecting cases: *Sheppard v. Maxwell*, 384 U.S. 333 (1966), *Neb. Press Ass'n v. Stuart*, 427 U.S. 539 (1976), and *Oklahoma Pub. Co. v. District Court of Oklahoma*, 430 U.S. 308 (1977)).

The Metropolitan Government does not seek to infringe on the Appellants' right to report on the evidence once it is presented at trial. What it is seeking in this case is to prevent the premature prejudicial disclosure of an open criminal investigation, outside of the safeguards put in place by our Constitutions, the Rules of Criminal Procedure and the Code of Professional Conduct.

CONCLUSION

"The right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965). Rule 16 and the Public Records Act can, and must, be interpreted harmoniously, in a manner that upholds their constitutionality and the constitutional rights of those they affect. Rule 16 protects the integrity of the criminal judicial process by requiring that the Criminal Court exercise jurisdiction and control over open criminal investigative files.

The Metropolitan Government asks that Rule 16 and the Public Records Act be read together in a manner that conforms with the requirements of the U.S. Constitution and the Tennessee Constitution. Justice Holmes expressed the undeviating rule for our courts over a century ago:

> The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether private talk or public print.

Sheppard v. Maxwell, 384 U.S. 333, 351, 863 S.Ct. 1507, 16 L. d. 2d 600 (1966); *Paterson v. Colorado*, 205 US 454, 462; 27 SCt 556; 51 L.Ed. 879 (1907). The Metropolitan Government's interpretation of Rule 16's exception to the Public Records Act is consistent with this constitutional safeguard. Clearly, "[t]he Legislature did not intend for the coverage of the Act to include this situation." *Smith County Education Assoc. v. Anderson*, at 334.

Respectfully submitted,

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