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' REPLY BRIEF

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ARGUMENT

Appellants file this consolidated reply to the briefs of Metropolitan Government, the State and District Attorney General, and the alleged victim, and address the issues raised by Metropolitan Government and the alleged victim.

I. Summary of Argument

The Trial Court properly exercised jurisdiction pursuant to the explicit jurisdiction provision of the Tennessee Public Records Act, T.C.A. § 10-7-505(b), and general jurisdiction principles. Appellants filed this case in the correct court, Davidson County Chancery Court, against the proper party, Metropolitan Government, which is the records custodian through its Police Department. Metropolitan Government's preference to litigate in Davidson County Criminal Court does not place mandatory jurisdiction there.

Appellants ask that this Court affirm the Trial Court's order that Metropolitan Government produce certain public records, which correctly rejected the Government Parties' arguments that Tenn. R. Crim. P. 16(a)(2) creates a blanket "law enforcement " exemption to the Public Records Act for anything in a police investigative file, whether work product or not.[1] The Trial Court's holding comports with the express language of Tenn. R. Crim. P. 16(a)(2) and Tennessee case law, and Appellees fail to carry their burden of establishing an applicable exception.

Appellants do request a reversal of the Trial Court's decision on certain limited grounds. First, the Trial Court erred by not explicitly holding that "fair trial" interests under the Sixth

[1] The Trial Court denied the Appellants' request for certain records—namely, video and photographs taken by the accused which did not show or had been redacted to exclude any image of the alleged victim. The Trial Court found that that request should be made to the Criminal Court in connection with the Protective Order imposed on the criminal defendants' counsel by the District Attorney's Office in order to obtain the video and photographs in discovery. Appellants do not appeal the Trial Court's denial of that portion of their public records request. Despite the Appellees' focus on those records in their briefs, it is not an issue before this Court and does not need to be addressed or resolved in this appeal.

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 law" justifying nondisclosure under the Public Records Act. Appellants are not aware of any Tennessee appellate decision which has declared a criminal defendant's "right to fair trial" (or the State's claim to a concurrent "fair trial" right) to be an exemption to the Act. A determination of "fair trial" issues based on pretrial 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. That is particularly true in this case, where the record contains only speculative and conclusory opinion testimony by the Metropolitan Police Chief and District Attorney General, purportedly "on behalf of" the criminal defendants, which appear to object to pretrial publicity in general, even that created by their own agencies.

Similarly, no Tennessee court has held that "victims' rights" preclude disclosure under the Public Records Act. The Tennessee Victim's Bill of Rights has been held to have no application in a civil case, and does not give victims any enforcement rights - unlike the federal and a few out-of-state statutes upon which the alleged victim bases her arguments. It likewise does not give the government standing to enforce these rights on a victim's behalf, as Metropolitan Government and the State now appear to have recognized.[2]

Second, while holding that most materials obtained by law enforcement from third parties must be produced, the Trial Court failed to hold expressly that such records obtained pursuant to search warrant or subpoena are not only public records, but judicial records which afford even more extensive rights of access. Metropolitan Government and the State make an argument that materials obtained from third parties pursuant to search warrant or subpoena are somehow

[2] At the Trial Court, the Government Parties joined in the alleged victim's assertion of her "rights" as a purported exemption to the Public Records Act. Appellants objected to their standing to do so. On appeal, none of the Government Parties raise "victim's rights" as an exemption.

exempt from disclosure because a court is involved in the process. They cite no relevant authority for this unprecedented, and incorrect, argument. Instead, multiple courts have found that that these materials are indeed public records.

The Trial Court also erred in not striking Appellees' Affidavits because they contain opinion and speculation, are not based on personal knowledge, and/or are irrelevant. The Trial Court essentially stated that while it would not strike the Appellees' Affidavits, it would distinguish between the facts and argument contained in them, and give due consideration. Conclusory opinion statements regarding "fair trial" rights (like those in the Affidavits of the Metropolitan Police Chief and District Attorney General) carry no weight.[3] The alleged victim has no enforcement rights under the Victims' Bill of Rights, and her conclusory statements quoting language contained in the Tennessee Constitution afford no factual basis for anything in this Public Records Act case.

Last, the Trial Court erred in disregarding Appellants' asserted rights to open government and open courts under the United State and Tennessee Constitutions describing them as "without merit." These rights "enhance[] the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982). While the Trial Court should have found that the constitutional rights required disclosure of public records.

II. The Trial Court Properly Exercised Jurisdiction.

Metropolitan Government argues - at length and incorrectly - that the Trial Court did not have jurisdiction to hear this case. In reliance upon a single case from North Carolina,

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[3] The Affidavit of the Attorney General's paralegal attaching a summary of news stories from an Internet search about the criminal charges is irrelevant in this Public Records Act case. It does, however, show that the alleged victim has not been publicly identified by the news media, despite the fact that her name was made public by the State in the Indictment.

Metropolitan Government claims that Appellants can have no access to the requested records because "Rule 16 mandates only that the State and criminal defendant [disclose] information to each other." (Metro. Br. 10).

This argument ignores established Tennessee precedent that Rule 16(a)(2) operates as a limited exemption to the Public Records Act. It applies only when the requested records fall within the Rule's scope and when a criminal investigation is "open." *See, e.g., Schneider v. City of Jackson*, 226 S.W.3d 332, 346 (Tenn. 2007) (requiring redaction of information in law enforcement-generated interview cards that related to ongoing criminal investigations); *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.")

Further, the North Carolina decision in *Piedmont Publishing Co. v. City of Winston-Salem,* 334 N.C. 595, 597-98 (N.C. 1993) hinged on discovery circumvention concerns. In *McCormick v. Hanson Aggregates Southeast, Inc.*, 596 S.E.2d 431 (N.C. App. 2004), the court explained:

> *Piedmont* involved a public records request by a newspaper of audio tapes containing the radio transmissions of a police officer who had been fatally injured in a motor vehicle collision. The Supreme Court held that the rules governing discovery in criminal actions created an implicit exception to the Public Records Act and that the radio tapes fell within this exception. The Supreme Court reasoned that, if the tapes could not be obtained by a criminal defendant under the rules for criminal discovery, they could also not be available through the use of a public records request by a third party. Otherwise, a criminal defendant whose discovery request was denied by the trial court could simply ask a third person to make a public records request so as to obtain such information notwithstanding the discovery ruling.

Id. at 438-39. Appellants do not request any documents that the criminal defendants could not access under Tenn. R. Crim. P. 16(a)(2). This case therefore does not involve circumvention issues.

Contrary to Metropolitan Government's argument, this public records case does not implicate the "prior suit pending" or analogous doctrines. The prior suit pending doctrine requires that (1) the lawsuits involve identical subject matter; 2) the lawsuits be between the same parties; 3) the former lawsuit be pending in a court having subject matter jurisdiction over the dispute; and (4) the former lawsuit be pending in a court having personal jurisdiction over the parties." *West v. Vought Aircraft Industries, Inc.*, 256 S.W.3d 618, 623 (Tenn. 2008). These elements are not met here. First, this case and the pending criminal cases do not have the same subject matter. The criminal cases will determine the guilt or innocence of the defendants. The instant case will determine whether records not covered by the Criminal Court's protective order are accessible under the Public Records Act.[4] Second, Appellants are not parties to the criminal cases. Third, the Davidson County Chancery Court has jurisdiction over this public records dispute not the Criminal Court,[5] and no entity has intervened in the Criminal Court action.[6]

In accordance with the jurisdictional stipulation in the Public Records Act, T.C.A. § 10-7-505(b), Appellants properly filed a petition for access in Davidson Chancery Court. Alternatively, they could have filed in Circuit Court. *Id.* While circuit courts can exercise criminal jurisdiction, "circuit courts" and "criminal courts" are not identical. *See* T.C.A. § 16-10-

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[4] For this reason, the proceedings are also not "parallel" such that Appellants' case should be stayed.. *See Bell v. Todd*, 206 S.W.3d 86, 94 (Tenn. Ct. App. 2005) (the decision to stay is discretionary, and a primary factor in the balancing test is "the extent to which the issues in the civil and criminal proceedings overlap.").

[5] *See State v. Odom*, 2007 WL 1135516 (Tenn. Crim. App. Apr. 13, 2007) (finding that "[t]he Shelby County Criminal Court had no jurisdiction to entertain a petition for access to public records in the possession of the District Attorney's Office pursuant to the Public Records Act."). Unpublished opinions are submitted by Appendix with this brief.

[6] Metropolitan Government claims that Appellants should have intervened in the criminal proceeding instead of filing a petition for access in Davidson Chancery Court. Appellants respectfully submit that they followed the procedural requirement of the Public Records Act.

101 *et seq.* (governing "circuit and criminal courts"). If they were, the Tennessee Code would not need to address *both*. Metropolitan Government manages to argue that Davidson County Criminal Court "is a circuit court", citing T.C.A. §§ 40-1-107 & 108 (Metro Br. 16). As even a cursory reading of those statutes demonstrates, they are separate courts.[7]

The Trial Court properly found that it had jurisdiction over this action.

III. Tennessee Rule of Criminal Procedure 16(a)(2) Does Not Create A Blanket Exemption To The Tennessee Public Records Act For All Records In An Investigative File In A Criminal Case Which is Still "Open."

The Trial Court correctly held that Tenn. R. Crim. P. 16(a)(2) does not exempt from disclosure all records in an investigative file in a pending criminal case. By its express terms, Rule 16 limits the disclosure of only two categories of documents: (1) those internal documents "made by" the district attorney general or other state agents or law enforcement officials "in connection with investigating or prosecuting the case"; and (2) "statements by state witnesses or prospective state witnesses." The Trial Court's order categorizes the contents of the investigative file, and found that it mostly contains materials which fall outside of these two categories.[8] The Trial Court's ruling, in applying the plain language of Tenn. R. Crim. P. 16 and finding that the Tennessee Supreme Court has not judicially amended that rule, comports with Tennessee precedent.

A. The Trial Court's Ruling is Consistent with Tennessee Precedent.

Metropolitan Government incorrectly claims that the Appellants are asking this Court to reverse the Tennessee Supreme Court's holding in *Appman v. Worthington*, 746 S.W.2d 165 (Tenn. 1987). (Metro. Br. 25). Appellants respectfully submit that the Trial Court's holding is

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[7] T.C.A. §40-1-1-107 provides: "Original jurisdiction of criminal actions is committed to the courts of general sessions, city judges of certain towns and cities, the circuit courts, the criminal courts and the court for the trial of impeachments." Section 40-1-108 provides: "The circuit and criminal courts have original jurisdiction of all criminal matters not exclusively conferred by law on some other tribunal."

[8] R. Vol. V at 634-35.

consistent with Appman. Metropolitan Government argues that the *Appman* Court exempted "entire" investigative files no matter the source or whether it is work product (Metro. Br. 23), disregarding the plain language of Rule 16(a)(2). The *Appman* case file (exhibited to Metro's brief in the Trial Court) indicates that the "entire" file consisted of statements of inmate witnesses and "evaluative summaries" prepared by a prison sergeant. (R. Vol. II at 251-252). Such documents would appear to fall within the two specific categories of records mentioned in Rule 16(a)(2), and do not support the overbroad reading of *Appman* by the Government Parties.

Nonetheless, both Metropolitan Government and the State argue that post-*Appman* decisions exempt **all** records in open investigative files from disclosure. Those cases do not. The Trial Court recognized that the Government Parties are attempting to obtain the total "law enforcement" ban that was specifically rejected by the Tennessee Supreme Court in *Schneider*. Many of the cases cited by the Government Parties[9] discuss the long-standing principle that entire case files become available under the Public Records Act when the criminal matter is "closed"; these cases then address when a criminal proceeding is "open" or "contemplated" as opposed to "closed." These cases do not expand the scope of Tenn. R. Crim. P. 16(a)(2) to exempt internal documents not "made by" state agents, law enforcement, or the district attorney general in connection with the investigation or prosecution from public disclosure. The issue about records received from third parties was not addressed in those cases.

Other cases cited by the Government Parties recognize that *Appman*'s holding is limited 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

[9] *E.g, Freeman v. Jeffcoat*, 1991 WL 165802 (Tenn. Ct. App. Aug. 30, 1991), *Capital Case Resource Ctr. of Tennessee, Inc. v. Woodall*, 1992 WL 12217 (Tenn. Ct. App. Jan 29, 1992), *Van Tran v. State*, 1999 WL 177560 (Tenn. Crim. App. Apr. 1, 1999), and *Waller v. Bryan*, 16 S.W.3d 770 (Tenn. Ct. App. 1999).

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 v. Worthington*, . . . 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 investigation) (emphases added).

Two other cited cases deal with requested documents which were subject to a protective order. In *Ballard v. Herzke*, 924 S.W.2d 652 (Tenn. 1996), the trial court in that civil case ordered that "all responses by Defendants to discovery . . . be held by the Clerk . . . under seal, and neither the documents produced, nor the responses to Interrogatories provided, nor any other responses to discovery shall be disclosed in any manner except to Plaintiffs' counsel." *Id.* at 655. *The Tennessean* intervened to seek modification of the protective order "so that all proceedings and records would be open to the press and the public." *Id.* at 656. The court affirmed the trial court's modification of the protective order to provide access to most of the documents and found that the remaining documents were not subject to disclosure under standards pertaining to modifying protective orders. Likewise, *Huskey* involved sealed records relating to public defenders' requests for attorneys' fees and which contained work product and strategy. The newspaper intervened to ask the trial court to unseal the documents. *Id.* at 361. The trial court unsealed some of the documents (relating to fees) but held that the remaining documents were exempt under the sealing order, and was affirmed.

The protective order imposed on defense counsel in the Vanderburg case restricts the public disclosure of certain videos and photographs. In the instant case, Appellants are not appealing the Trial Court's decision declining to order the production of photos or video. It is not an issue before this Court, despite the Appellees' discussion of it.

In a departure from their positions before the Trial Court, the Government Parties attempt to adopt *Schneider* as support for their arguments. *Schneider* involved a public records request for "field interview cards" generated by law enforcement. The City argued that the cards were exempt under a law enforcement investigative privilege. The Tennessee Supreme Court rejected this argument: "The law enforcement privilege is not part of Tennessee common law and therefore does not operate as a 'state law' exception to the Public Records Act." *Id.* at 348. With respect to Rule 16(a)(2), it remanded the case "to allow the City an opportunity to review the field interview cards and to submit to the trial court for an *in camera* review those cards or portion of cards which the City maintains are involved in an ongoing criminal investigation and exempt from disclosure." *Id.* at 346.

The Government Parties have cited no case analyzing the language of Rule 16(a)(2) and finding that records that were neither "made by" internal documents nor "witness statements" are exempt from disclosure. These records clearly would be available to the criminal defendants under the Rule, and should be available to citizens under the Public Records Act. In *Appman*, the Tennessee Supreme Court did not amend Rule 16(a)(2) to expand its scope. Only the General Assembly can do so. T.C.A. § 16-3-404.

B. Rule 16(a)(2) Applies Only In Pending Criminal Lawsuits.

Metropolitan Government argues that some "temporal" limitation should be judicially imposed on the Public Records Act -- to the effect that police investigative records must be publicly available for some period of time, then all must be sealed during the pendency of a criminal investigation or lawsuit (purportedly based on Tenn. R. Crim. P. 16(a)(2)), and subsequently all records become open when a criminal lawsuit is "closed." Metropolitan Government claims that "the relevant inquiry for purposes of the Rule 16 public disclosure exception is the progress of the criminal investigation at the time the records are sought, not the

source of the records." (Metro. Br. 27). Contrary to this argument, the "temporal" aspect of a Rule 16(a)(2) analysis is that the rule concerns discovery between the State and criminal defendants after a criminal case is initiated. Rule 16 cannot constitute a defense to disclosure *either before or after* a criminal trial; it does not apply. Further, for the Government Parties to argue that the "source" of documents makes no difference is to ignore the plain language of Rule 16 that only "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" or "statements made by state witnesses or prospective state witnesses" are exempt from disclosure under the Public Records Act--and that is only **if** the government chooses to assert that exemption.

The Trial Court appropriately gave "effect to every word, phrase, clause and sentence of the [Rule] in order to carry out the legislative intent." *State v. Peele*, 58 S.W.3d 701, 704 (Tenn. 2001). The Trial Court properly 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 efforts of the Metropolitan Police Department are outside the expansive reach of Tenn. R. Crim. P. 16(a)(2)." (R. Vol. V at 642-43).

C. Rule 16(a)(2) Protects Work Product.

Appellants respectfully submit that Metropolitan Government's argument that **all** materials "collected by" law enforcement are protected under Rule 16(a)(2) as "work product" is unsupported by the caselaw. For this proposition, Metro cites *Wilson v. State*, 367 S.W.3d 229, 235 (Tenn. 2012); however, in that case, the Tennessee Supreme Court stated that "[a]n attorney's work product consists of those *internal* reports, documents, memoranda, and other materials that the attorney has prepared or collected in anticipation of trial." (emphasis added). This statement clearly refers to "internal" records - not those prepared by or collected from third

parties. *See e.g.*, WRIGHT & HENNING, FEDERAL PRACTICE AND PROCEDURE § 254 (4th ed 2009) ("[R]eports, memoranda, or *other internal government documents* made by the attorney for the government' are included to make clear that the work product of the government attorney is protected.) (emphasis added).[10] The work-product rule embodied in Tenn. R. Crim. P. 16(a)(2) "protects parties from 'learning of the adversary's mental impressions, conclusions, and legal theories of the case,' and prevents a litigant 'from taking a free ride on the research and thinking of his opponent's lawyer.'" *Swift*, 159 S.W.3d at 572 (Public Records Act case dealing with request for "personal notes and observations made by attorneys in preparation for and during court proceedings, as well as memoranda prepared by members of the district attorney general's office." *Id.* at 570) (internal citations omitted).

Metropolitan Government's heavy reliance on a decision of the U.S. Court of Appeals for the Ninth Circuit, which is recognized as being an outlier, is misplaced. *United States v. Fort*, 472 F.3d 1106 (9th Cir. 2007). No less than the United States Supreme Court has characterized Fed. R. Crim. P. 16(a)(2) as a work-product rule. *See United States v. Armstrong*, 517 U.S. 456, 463 (1996) ("Under Rule 16(a)(1)(C), a defendant may examine documents material to his defense, but, under Rule 16(a)(2) he may not examine Government work product in connection with his case."). Further, the cases cited by Metropolitan Government as "following" *Fort* do not. In *United States v. Cherry*, 876 F. Supp. 547 (S.D.N.Y. 1995), the court found that Fed. R. Civ. P. 16(a)(2) extended to reports created by local law enforcement agencies assisting the federal government. Otherwise, the work-product protection of the Rule would be "done away with entirely." *Id.* at 552. In *United States v. Duncan*, 586 F. Supp. 1305 (W.D. Mich. 1984), the court merely held that "police reports related to the investigation and prosecution of defendant"

[10] Tenn. R. Crim. P. 16 substantially conforms to the federal rule. Advisory Commission Comment to Tenn. R. Crim. P. 16.

could not be disclosed to the defendant under Federal Rule 16(a)(2). *Id.* at 1313. Likewise, in *United States v. Davidson*, 2009 U.S. Dist. LEXIS 55326 (E.D. Tenn. June 29, 2009), the Court agreed with the decision in *Cherry* and found that the defendant could not review the internal police reports in his case.

Metropolitan Government argues that all materials "collected by" Metro Police constitute work product. The cases it cites do not allow such a broad expansion of the doctrine. *Sprock v. Peil*, 759 F.2d 312 (3d Cir. 1985) involved a civil discovery dispute over a request for production of "[a]ll documents examined, reviewed, or referred to [the defendant]" in deposition preparations with his attorney. The court found that counsel's work in selecting preparation materials constituted work product: "identification of the documents as a group will reveal defense counsel's selection process, and thus his mental impressions." *Id.* at 315. The court in *Stainziale v. Career Path Training Corp. (In re Student Fin. Corp.)*, 2006 U.S. Dist. LEXIS 86603 (E.D. Pa. Nov. 29, 2006), addressed a request by a party in a bankruptcy proceeding for documents from a private investigation firm retained by attorneys for the largest creditor. *Id.* at *1-*2. The records in *Sprock* and *Stainzale* directly related to civil litigation preparation.[11] In contrast, Appellants have requested documents that were collected from third parties in a criminal investigation pursuant to judicial orders.

D. The Third-Party Text Messages And Emails Are Not "Witness Statements."

In its attempt to seal the entire investigative file, Metropolitan Government adopts an argument raised by the State in the Trial Court by arguing that third-party text messages and emails should be characterized as "witness statements" and therefore be exempted under Tenn.

[11] Another case cited by Metropolitan Government, *State ex rel. Dayton Newspapers, Inc. v. Rauch*, 12 Ohio St. 3d 100 (Ohio 1984), involved the application of a specific provision exempting, from the public records act, records disclosing "[s]pecific confidential investigatory techniques or procedures or specific investigatory work product." *Id.* at 100. No such exemption applies here.

R. Crim. P. 16(a)(2) from disclosure under the Public Records Act. (R. Vol. I at 141-143; Metro. Br. 34-35). Appellants respectfully submit that this argument has no merit; even the State has elected not to raise it on appeal. A witness statement is "(1) A written statement that the witness makes and signs, or otherwise adopts or approves; or (2) A substantially verbatim, contemporaneously recorded recital of the witness's oral statement that is contained in a stenographic, mechanical, electrical, or other recording or a transcription of such a statement." Tenn. R. Crim. P. 26.2(f); T.C.A. § 40-17-120. *See also State v. Rhoden*, 739 S.W.2d 6 (Tenn. Cr. App. 1987) ("witness statement" consisted of audio recording of witness interview); *United States v. Urena*, 2013 WL 5272933 (S.D.N.Y. Sept. 17, 2013) (finding that a 911 call was not a "witness statement" protected from disclosure to the defendant under Fed. R. Crim. P. 16(a)(2)). Witness statements generally are formally taken by law enforcement in connection with an active investigation; text messages and emails sent/received by defendants, the alleged victim, and possibly other students and coaches do not fit the definitions in the Rules and Tennessee Code.

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

A. Fair Trial Rights of Criminal Defendants

Appellants are aware of no Tennessee appellate decision in which a criminal defendant's constitutional right to fair trial has been held to constitute an exemption to the Public Records Act. The Government Parties have provided no support for their current argument.[12] The Government Parties argue in the alternative that the State's "fair trial" interest gives them a basis to prohibit disclosure of public records. Despite the absence of caselaw, the Government Parties argue that the Trial Court should have engaged in some "balancing test" to find that disclosure of any records would impinge on "fair trial" interests.

[12] On appeal, the Government Parties for the first time also mention the Tennessee constitutional provision about "fair trial" rights of criminal defendants. Tenn. Const. Art. I, § 9.

The Government Parties' argument amounts nearly to a *per se* attack on pretrial publicity--a great deal of which has been prompted by their own press conferences and other actions. (R. Vol. III at 369, ¶¶ 10-12). The Government Parties overlook authority from no less than the U.S. Supreme Court, which has stated that "pretrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically in every kind of criminal case to an unfair trial." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 565 (1976); *see also Stroble v. California*, 343 U.S. 181 (1952) (affirming a death sentence despite the prosecution's pretrial release of details of the defendant's confession). Rather, "a party seeking closure of proceedings or sealing of documents [must] establish that the procedure 'is strictly and inescapably necessary in order to protect the fair-trial guarantee." *Assoc. Press. v. U.S.D.C. for the Cent. District of California*, 705 F.2d 1143, 1145 (9th Cir. 1983). Closure is appropriate "only if specific findings are made demonstrating that that, first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights." *Press-Enterprise Co. v. Superior Court for Riverside County*, 478 U.S. 1, 14 (1986). Conclusory statements will not suffice. *Id.* at 15 ("The First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of that right. And any limitation must be 'narrowly tailored to serve that interest.'").

Tennessee Supreme Court authority--also overlooked by the Government Parties- is in accord with these cases. *See State v. Drake*, 701 S.W.2d 604, 608 (Tenn. 1985) (imposing rigorous set of procedural requirements whenever "a closure or other restrictive order is sought.") *See also State v. Koulis*, No. I-CR111479 (Williamson Co. Crim. Ct. June 5, 2006) (Bivins, J.) (recognizing that *Drake* standards apply to other restrictive measures, including

defendant's attempt to impose seal on discovery materials filed by prosecution) (interlocutory appeal denied); *State ex rel. Cincinnati Enquirer v. Sage*, 992 N.E.2d 1178, 1186-87 (Ohio 2013) (finding sealing of 911 call based on alleged fair trial concerns inappropriate where "there was no testimony from psychologists, sociologists, communications experts, media experts, jury experts, media experts, experienced trial lawyers, former judges, or others as to how pretrial disclosure of the [911 call] would impact [the defendant's] right to a fair trial" and "nothing to say that [the defendant's statements on the call] would not have been admissible at trial and submitted to the jury for its deliberations.") The defendant's failure to move for change of venue can weigh against closure. *See Stroble*, 343 U.S.at 193.

The District Attorney General and Chief of Police have offered their opinions, not based on specific facts or particular documents, that it will be difficult if not impossible for the criminal defendants to receive a fair trial. Of course, if that is the case, the prosecutor has a wide range of options to suggest to the Criminal Court for the trial scheduled several months from now-- a change of venue, a venire from a different judicial district, extensive voir dire, unlimited challenges, etc. And, the criminal defendants' lawyers will make their own strategic decisions about what motions to file.[13]

The Government Parties cite federal authorities, while failing to point out that (a) the Tennessee Public Records Act is <u>not</u> patterned on the federal Freedom of Information Act

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[13] This requirement for particularized factual support makes sense given the abundance of options available to protect a criminal defendant's right to fair trial. *See, e.g.*, *Press-Press Enterprise* at 15 ("Through *voir dire*, cumbersome as it is in some circumstances, a court can identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict. . . . The First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of that right."); *Cincinnati Enquirer*, 992 N.E.2d at 1187 (ordering a 911 call to be released because, *inter alia*, "there was no mention or consideration of why continuances, voir dire, change of venue, cautionary jury instructions, and other protective measures would not have preserved [the defendant's] right to fair trial."). Neither Government Party has demonstrated by specific facts, much less compelling proof, why these or other measures are insufficient to provide protection for the criminal defendants' rights.

("FOIA") (*see Schneider*, 226 S.W.3d at 343); and (b) the federal FOIA provides a specific exemption for the disclosure of law enforcement investigative materials that "would deprive a person of a right to a fair trial or an impartial adjudication." 5 U.S.C. § 552(b)(7)(B). In addition, the Government Parties fail to note that even in federal FOIA cases, the government's burden to show that this exemption applies "cannot be met by mere conclusory statements." *Washington Post Co. v. U.S. Dep't of Justice*, 863 F.2d 96, 101 (D.C. Cir. 1988). Rather, the government "must show how release of the particular material would have the adverse consequence that the Act seeks to guard against." *Id.* The Tennessee General Assembly has elected not to incorporate a "fair trial exemption" in the Public Records Act, however, and government agencies have the burden of justifying nondisclosure.

Other cases cited by the Government Parties do not support their arguments. *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979) is a court closure case. As explained in the dissenting opinion in *Arkansas Gazette Co. v. Goodwin*, 801 S.W.2d 284, 289 (Ark. 1990) (Glaze, J.), "the *Gannett* case dealt with the issue of excluding the press and public from a pretrial hearing and did not involve the press's or public's right to access public records from source outside a court proceeding." *Arkansas Gazette* involved a request under the state Freedom of Information Act, which - unlike the Tennessee Public Records Act - contained specific exemptions for "documents which are protected from disclosure by order or rule of court" and "undisclosed investigations by law enforcement agencies of suspected criminal activity." Ark. Code Ann. § 29-9-105(b)(6), (8). *Palm Beach Newspapers, Inc. v. Burk*, 504 So.2d 378 (Fla. 1987) involved a request for access to pretrial depositions and unfiled deposition transcripts. More importantly, in *Arkansas Gazette*, *Palm Beach*, and *Florida Freedom Newspapers, Inc. v. McCrary*, 520 So. 2d

32 (Fla. 1988), the criminal defendants requested closure or objected to the public's petition for access. In this case, only the Government Parties have raised a fair trial issue.

Since "fair trial" rights are not a recognized exemption to the Public Records Act, the Trial Court had no factual basis to justify nondisclosure even if some vague "balancing" test was permitted. Only conclusory opinions were presented. The criminal defendants may raise those issues, if they choose, in the Criminal Court prior to their trial several months from now. Accordingly, the Government Parties' challenge should be rejected.

B. Victims' Rights

No Tennessee court has found that "victims' rights" should be declared to be a new exemption to the Public Records Act, and this Court should not be the first. The alleged victim moved to intervene to assert what she contends are rights under Article I, Section 35 of the Tennessee Constitution and T.C.A. § 40-38-101. It is undisputed that the Appellants are not seeking her image (which supposedly is contained on video and in photos). Adhering to their own policies, the Appellants have not identified the alleged victim. Nonetheless, the alleged victim's argument at the Show Cause Hearing was to the effect that "victims' rights" automatically trump the right of access to public records, entitling a victim to some control over pretrial publicity and the type of information filed or presented to the Criminal Court. The alleged victim, however, cites no Tennessee authority requiring this Court to declare a new exemption to the Public Records Act.

Further, despite the alleged victim's claim that there is a "similarity between victims' rights laws in Tennessee and other jurisdictions" (Br. at 13), the non-Tennessee cases she cites are inapposite. She relies upon the federal Criminal Victims' Rights Act and the New Jersey Crime Victims' Bill of Rights (*see State in Interest of K.P.*, 709 A.2d 315 (N.J. Ch. Div. Dec. 29, 1997)), but fails to mention the fact that the Tennessee Victims' Bill of Rights does not give

victims an enforcement mechanism to assert alleged individual rights. *Compare* 18 U.S.C. § 1377(d)(1) and N.J.S. 52:4B-36(r) with Tenn. Code Ann. 40-38-101 *et seq.*[14]

The Tennessee's Victims' Bill of Rights differs from other laws in other ways. For instance, the federal statute provides "the right to be treated....with respect...for the victim's ... privacy." 18 U.S.C. § 3771(d)(1). Tennessee's act has no such provision, and Tennessee courts have rejected efforts to impose a "privacy" exemption to the Public Records Act.[15] This Court has no authority to create such an exception. *See, e.g., Schneider*, 226 S.W.3d at 344 (reiterating the Tennessee Supreme Court's "unwillingness to judicially adopt public policy exceptions to the Public Records" because those are "question(s) for the General Assembly."). This Court likewise has no authority to broaden the Victims' Bill of Rights. *See, e.g., State v. Fritz*, 1995 WL 686112, *1 (Tenn. Ct. Crim. App. Nov. 15, 1995) (refusing to extend T.C.A. § 40-38-106); *see also State v. Thomason*, 2000 WL 298695, *15 (Tenn. Ct. Crim. App. Mar. 7, 2000) ("The Victims' Bill of Rights, Tenn.Code Ann. §§ 40-38-101 to-208 (1997), is the expression of our legislature's intent 'that victims and witnesses shall have certain rights in this state and that they shall be made aware of these rights.'") (quoting T.C.A. § 40-30-101(a)). The General Assembly has stated that crime victims have certain specific rights during the criminal justice process, such as a right not to be contacted by the defendant. The alleged victim has shown no basis to allow a victim to control access to public records.

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[14] Likewise, the Tennessee Victims' Bill of Rights has no provision allowing third parties, such as the government, to assert rights on behalf of the victim. In the Trial Court, the Government Parties attempted to assert "victims' rights". On appeal, they have not done so.

[15] *State v. Cawood*, 134 S.W.3d 159, 167 (Tenn. 2004); *Griffin v. City of Knoxville,* 821 S.W.2d 921, 922 (Tenn. 1991); *Tennessean v. City of Lebanon*, 2004 WL 290705 (Tenn. Ct. App. Feb. 13, 2004), at *7. 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).

Neither does the Tennessee constitutional provision regarding victims' rights, Tenn. Const. Art. I, § 35, create an exemption to the Tennessee Public Records Act. That provision states that victims should be "treated with dignity and compassion" and "be free from intimidation, harassment and abuse throughout the criminal justice system." This provision complements statutory provisions, such as the Rape Shield Law, which help protect "the important interests of [a] sexual assault victim in avoiding an unnecessary, degrading, and embarrassing invasion of sexual privacy." Advisory Commission Comments, Tenn. R. Evid. 412. *See State v. Sheline*, 955 S.W.2d 42 (Tenn. 1997) (Tenn. R. Evid. 412 generally excludes evidence of sexual behavior of the alleged victim, other than the sexual act at issue). The alleged victim in the instant case is attempting to use the state constitutional provision to restrict news coverage about the criminal case which does not even identify her. Opinion testimony by an alleged victim quoting the state Constitution that disclosure of public records might "impair" her "dignity" or be used to "intimidate, harass or abuse" a victim is no basis for an exemption.

Contrary to the alleged victim's argument, the Trial Court did not refuse to address her claims. Instead, it held implicitly that "victims' rights" did not constitute an exemption to the Public Records Act, and stated that if she believed she had rights which she felt inclined to pursue, she should do so in the Criminal Court.

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

As Counsel for the State and District Attorney General acknowledged during the Show Cause Hearing, "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." (Hr'g Tr. at 38:22-25, Mar. 10, 2014, R. Vol. VI at 701) (although those materials have not been made available in this case). Nonetheless, the Government Parties now claim that materials obtained pursuant to search

warrants and subpoenas are not public records, arguing that such materials are investigators' "work product" and that judicial involvement in the process somehow precludes disclosure. These arguments are mistaken. "[T]he public and the press have a first amendment right of access to pretrial documents" such as materials obtained by subpoena and search warrant. *Assoc. Press*, 705 F.2d at 1145.

A. These Materials Are Not Work Product.

The State mistakenly argues that the subpoena and search warrant materials are "work product" because of the underlying investigative efforts involved. The State cites no supporting authority because it cannot. Case law is clear that search warrants, and the affidavits supporting them, are public records. *See, e.g.*, *Baltimore Sun v. Goetz*, 886 F.2d 60, 64 (4th Cir. 1989) (finding that "affidavits for search warrants are judicial records"); *Commonwealth v. George W. Prescott Publ'g Co., LLC*, 973 N.E.2d 667 (Mass. 2012) (recognizing common law right of access to search warrant materials). They were, after all, procured through the court process.

If the State's position was correct, then it could refuse to provide materials obtained pursuant to judicial process to the criminal defendants' attorneys by claiming they are "work product." Respectfully, the Government Parties cannot make such an argument. Under Rule 16, criminal defendants are permitted discovery of materials obtained by subpoena or search warrant. *See, e.g.*, *State v. Schiefelbein*, 230 S.W.3d 88 (Tenn. Crim. App. 2007) (defendant's attorney was permitted to view videotapes - seized through execution of a search warrant - at the police department). There is no such thing as a "work product" exception under Tenn. R. Crim. P. 16(a)(2) for criminal defendants and a different one that applies to the Public Records Act.

B. The Fact That A Court Played A Role In The Search Warrant/Subpoena Process Does Not Create An Exemption Under the Public Records Act.

Ignoring the specific Public Records provision, as construed by the Supreme Court, that the Act covers "'all printed material created or received by government in its official capacity'"[16], Metropolitan Government continues to argue that records obtained by search warrant or subpoena are somehow exempt because "[i]f a state law specifies the process for obtaining a record, that process must be followed." (Metro. Br. 35). Once again, Metropolitan Government fails to cite any Public Records Act cases in support of this mistaken proposition. Instead, it merely sets forth the statutory requirements for issuing a search warrant or subpoena and claims that "[i]t would be contrary to the clear intent of the General Assembly to allow citizens or media entities to obtain data from the police, that was gathered through the strict requirements of a law enforcement subpoena or search warrant, when the citizens or media could never qualify to obtain the information through this route for themselves." (*Id.* at 38). Metro's argument collapses under the weight of absent logic.

The Public Records Act serves the important function of requiring government transparency "even in the face of serious countervailing considerations." *Memphis Publ'g Co. v. City of Memphis,* 871 S.W.2d 681, 684 (Tenn. 1994); *see also Memphis Publ'g Co. v. Cherokee Children & Family Servs., Inc.*, 87 S.W.3d 67, 74 (Tenn. 2002) ("[We] 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."). Governmental entities exist to serve the public and rely upon the public for their existence. The public is not required to prove that it could subpoena records from a third party. Regrettably, Metropolitan Government's argument indicates an abandonment

[16] *Schneider*, 226 S.W.3d at 339 (quoting *Griffin* , 821 S.W.2d at 923).

of the principles of the Public Records Act. Fortunately, the Tennessee Supreme Court still vigorously supports principles of transparency.

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

Appellants filed a Motion to Strike the portions of the Appellee's Affidavits which contained conclusory, opinion "testimony" or were irrelevant. The Trial Court denied the Motion, but stated that it had "sifted all the Affidavits and Declarations and submitted in this case to give weight to the factual material as evidence and to consider as advocacy the arguments and conclusory statements contained in the Affidavits and Declarations." (Order at 1, R. Vol. V at 628). The Trial Court did not provide this Court with any guidance as to what was or was not considered. Contrary to the Government Parties' claims, Appellants are not seeking an "advisory" opinion--Appellants are entitled to have their appeal considered under Tennessee evidence principles, and Appellees are not entitled to have their entire Affidavits considered simply because the Trial Court denied the Motion to Strike. Future Public Records cases will benefit from this Court's ruling on and exclusion of the sort of conclusory, opinion testimony that the Appellees have attempted to introduce.

On appeal, the State argues that the Appellants' objection to the Government Parties' Affidavits should be rejected because they "have failed to demonstrate that admission of the affidavits was an abuse of discretion." (State Br. at 17). When reviewing a trial court decision under the abuse of discretion standard, the reviewing court typically asks "causes an injustice by applying an incorrect legal standard, reaches an illogical result, resolves the case on a clearly erroneous assessment of the evidence, or relies on reasoning that causes an injustice." *Gonsewski v. Gonsewski*, 350 S.W.3d 99, 105 (Tenn. 2011). In this case, neither the appellate court nor parties can be sure what portion of the Appellees' Affidavits the Trial Court considered. As

shown in Appellant's earlier brief, substantial portions are inadmissible under Tennessee evidence principles. The Government Parties submitted conclusory opinion arguments about pretrial publicity. The State paralegal's Affidavit submitted hundreds of irrelevant news stories from scores of media outlets. The alleged victim in her affidavit did little more than quote the language contained in the Victims' Bill of Rights, which provides no enforcement rights.

Appellants therefore ask that this Court reverse the ruling of the Trial Court on the Motion to Strike.[17]

VII. The Court Should Acknowledge That The Constitutional Rights Asserted By Appellants Are Not "Without Merit."

Appellants have asserted that their rights under both the United States and Tennessee Constitutions to free press and the examination of government proceedings entitled them to relief. (Pls.' Br. at 2, R. Vol. III at 339; Hr'g Tr. at 46:8-11, Mar. 10, 2014, R. Vol. VI at 709). The Trial Court in a footnote held those claims to be "without merit", when it should have recognized those constitutional rights as a basis for inspecting the requested records.

The Government Parties are incorrect in arguing that there is no constitutional right to access public records. *See, e.g.*, *Assoc. Press*, 705 F.2d at 1145 ("[T]he public and press have a first amendment right of access to pretrial documents in general."); *Cincinnati Enquirer*, 992 N.E.2d 1186 (balancing "the Sixth Amendment right to a fair trial with the First Amendment right of access" to a sealed record); *Knoxville News-Sentinel v. Huskey*, 982 S.W.2d 359, 362 (Tenn. Cr. App. 1998) (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

[17] Metropolitan Government suggest in its footnote 3 that the Police Chief should be treated as an "expert," clearing the way for any opinion or conclusory testimony he chose to offer. However, he was neither disclosed nor declared to be an expert. The Police Chief is a party who serves in law enforcement, which does not make him an expert about "fair trial" interests or public records in general.

Tenn. Const. Art. I, § 19). This right confers a substantial public benefit in criminal proceedings. As the United States Supreme Court has observed:

> A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

Nebraska Press, 427 U.S. at 561. *See also Globe Newspaper Co*, 457 U.S. at, 606 ("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.").

The Government Parties have ignored these important purposes served by public access to records. They have also ignored the Tennessee Supreme Court's finding that Article I, Section 19 of the Tennessee Constitution "is substantially stronger than the First Amendment." *Press, Inc. v. Verran*, 569 S.W.2d 435, 442 (Tenn. 1978). At a minimum, the Trial Court should have recognized that these constitutional rights provide a basis for disclosure of the requested records.

CONCLUSION

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

Respectfully submitted,

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Not Reported in S.W.3d, 2007 WL 1135516 (Tenn.Crim.App.)
(Cite as: 2007 WL 1135516 (Tenn.Crim.App.))

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Only the Westlaw citation is currently available.

SEE RULE 19 OF THE RULES OF THE COURT OF CRIMINAL APPEALS RELATING TO PUBLICATION OF OPINIONS AND CITATION OF UNPUBLISHED OPINIONS.

Court of Criminal Appeals of Tennessee,
at Jackson.
STATE of Tennessee
v.
Richard ODOM.

No. W2006-00716-CCA-R10-DD.
Dec. 5, 2006 Session.
April 13, 2007.

Direct Appeal from the Criminal Court for Shelby County, No. 91-07049; Chris Craft, Judge.
Marty B. McAfee and Gerald Skahan, Memphis, Tennessee, for the appellee, Richard Odom.

Michael E. Moore, Acting Attorney General and Reporter; Mark E. Davidson, Assistant Attorney General; William L. Gibbons, District Attorney General; and Robert Carter and Amy Weirich, Assistant District Attorneys General, for the appellant, State of Tennessee.

J.C. McLIN, J., delivered the opinion of the court, in which DAVID G. HAYES and JOHN EVERETT WILLIAMS, JJ., joined.

OPINION

J.C. McLIN, J.

***1** The defendant, Richard Odom, filed a motion to access closed files in the Shelby County District Attorney's Office pursuant to the Tennessee **Public Records** Act, and the state opposed said motion. After two hearings on the matter, the trial court entered an order granting the defendant's ex parte motion for the trial court to view the state's file *in camera* for specific limited exculpatory material. We granted the state's Tennessee Rule of Appellate Procedure 10(a) application for extraordinary appeal to determine whether the trial court erred in granting the defendant's ex parte motion, requiring the state to relinquish its file for *in camera* inspection by the trial court. Upon our review of the record and due consideration of the issue, we reverse and vacate the trial court's order.

PROCEDURAL BACKGROUND

In 1991, the defendant was indicted on three counts of robbery in indictment numbers 91-07051, 91-07052, and 91-07053. He was convicted by a jury of the robbery charge in indictment 91-07052 and was sentenced to six years in prison. The other indictments were dismissed in 1992. Also in 1992, the defendant was convicted of felony murder and sentenced to death. The Tennessee Supreme Court affirmed his conviction on direct appeal but remanded the case for a new sentencing proceeding. ***State v. Odom,*** 928 S.W.2d 18 (Tenn.1996). After the new sentencing proceeding, a jury again imposed the death sentence, and this court affirmed the sentence. The supreme court again remanded the case for a new sentencing proceeding. ***State v. Odom,*** 137 S.W.3d 572 (Tenn.2004).

On January 26, 2005, the defendant filed a "Motion for Access to Closed Files in the Shelby County District Attorney's Office, Pursuant to the Tennessee **Public Records** Act, T.C.A. § 10-7-503 through § 10-7-505." The defendant asserted that the files were closed and that counsel needed to explore and investigate any prior criminal charges in order to adequately represent him at re-sentencing. The state filed a response on May 12, 2005, stating that the files requested by the defendant were not closed but were part and parcel of the file currently pending re-sentencing. The motion was initially heard on May 19, 2005, and a second hearing was held on November 22, 2005. On February 16, 2006, the trial court entered an order granting the defend-

ant's ex parte motion for the trial court to view the state's file *in camera* for specific limited exculpatory material. A third hearing was held on March 31, 2006, during which the trial court reaffirmed its denial of the state's request for an interlocutory appeal under Rule 9 of the Tennessee Rules of Appellate Procedure.[FN1] The state then filed an application in this court for a Rule 10 extraordinary appeal, this court ordered the defendant to respond, and the defendant filed a response to the state's Rule 10 motion on April 28, 2006. This court granted the state's motion by order dated May 24, 2006. [FN2]

FN1. The record indicates that the state requested the Rule 9 appeal and it was denied prior to the March 31, 2006 hearing. However, the state had the court reaffirm its denial on March 31st because it was unable to find the original denial in the transcripts and no discussion of a Rule 9 appeal was included in the court's written order. From the record before us, we are unable to glean the exact date of the state's initial request for a Rule 9 appeal.

FN2. Again, we granted the state's Rule 10 motion by order dated May 24, 2006. Thereafter, the state moved for an extension of time in which to late file its brief, and this court granted that motion, giving the state until August 11, 2006 in which to file. The defendant then sought an extension of time in which to file his brief, and this court granted his motion, giving him until October 11, 2006 in which to file. Oral argument was docketed for the November 7, 2006 session; however, the defendant sought and was granted a motion to reschedule oral argument until the December session. The state then sought to have oral argument rescheduled until the January session, but this court, noting that the case had already been continued once, denied the state's motion. Oral argument was heard on December 5, 2006.

ANALYSIS

***2** On appeal, the state argues that there is no authority for the trial court to entertain an ex parte motion that results in an order requiring the state to relinquish its files for an *in camera* inspection by the trial court. The state asserts that the defendant's access to its files is a discovery matter governed by Tennessee Rule of Criminal Procedure 16.

Waiver

As an initial matter, we must address whether the state waived its objection to the trial court reviewing its records *in camera.* The defendant argues that because the trial court made an oral ruling granting his motion on May 19, 2005, and the state did not object at that time, the state waived its objection. The defendant also submits that the state also waived its objection because it did not file its application for an extraordinary appeal until April 6, 2006, which was almost a year after the trial court's oral order and three months from the date the court issued the written order.

During the May 19, 2005 hearing, the trial court addressed whether the documents should be disclosed as part of the Tennessee **Public Records** Act. The following discussion took place:

> The Court: Well, if [the defense] would ... just put [what it is looking for] in writing so that we don't talk about it. Put it in writing in a motion and what I'll do is then I'll just grant, rather than get into the Public Record's Act morass here.
>
> State: Well, Judge, I think we need to answer that question first though before we jump to the conclusion that they're-that Your Honor is entitled to go through this and pull out bits and pieces of a file. I think the question does need to be determined that this does not qualify as an open file.
>
> ....
>
> State: Or does qualify [as an open file].
>
> The Court: Okay.

would authorize a trial court to conduct an ex parte hearing on a request to remove and independently test evidence in the state's possession. *Id.* at *3. The court noted that such a request was a discovery matter and was governed by the rules of discovery applicable to the criminal proceeding. *Id.*

Tennessee Rule of Criminal Procedure 16 governs the disclosure of evidence in criminal cases. The rule provides that the state shall disclose to the defendant, upon his request, "the substance of any of the defendant's oral statements made before or after arrest in response to interrogation by any person the defendant knew was a law-enforcement officer if the state intends to offer the statement in evidence at the trial." Tenn. R.Crim. P. 16(a)(1)(A). Also upon the defendant's request, the state must "disclose ... the defendant's relevant written or recorded statements, or copies thereof, if ... the statement is within the state's possession, custody, or control; and ... the district attorney general knows-or through due diligence could know-that the statement exists; and ... the defendant's recorded grand jury testimony which relates to the offense charged." *Id.* at 16(a)(1)(B). Rule 16 also provides that, *inter alia,* books, papers, documents, and photographs must be made available for the defendant's inspection "if the item is within the state's possession, custody, or control and ... the item is material to preparing the defense." *Id.* at 16(a)(1)(F).

***4** Rule 16(d)(1) provides as follows:

> [F]or 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.

As explained by a panel of this court in *State v. Thomas Dee Huskey:*

> The plain language of this provision does not authorize a defendant to request that the court conduct an *in camera* examination of the state's files in order to ferret out discoverable information. Instead, the *in camera* review contemplated in this section is of a party's written statement explaining why the court should order the denial, restriction, or deferral of discovery. Nevertheless, the trial court may perform an *in camera* inspection of evidence in the event of a discovery dispute. *See State v. Butts,* 640 S.W.2d 37, 39 (Tenn.Crim.App.1982) (holding that although defendants are not entitled to routine access to police personnel records, upon a strong showing that the records contain information material to the defendant's case, the trial court should inspect the records *in camera* and release the items material to the defense).

Thomas Dee Huskey, No. E1999-00438-CCA-R3-CD, 2002 WL 1400059, at *65 (Tenn.Crim.App., at Knoxville, June 28, 2002), opinion on denial of reh'g, (Tenn.Crim.App., Oct. 11, 2002), *perm. app. denied* (Tenn., Feb. 18, 2003).

The state also has a continuing duty under *Brady v. Maryland,* 373 U.S. 83 (1963), to disclose any exculpatory information to the defendant. In *Brady,* the United States Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. To prove a *Brady* violation, a defendant must demonstrate that 1) he requested the information (unless the evidence is obviously exculpatory, in which case the state is bound to release the information whether requested or not); 2) that the state suppressed the information; 3) that the information was favorable to the defendant; and 4) that the information was material. *Johnson v. State,* 38 S.W.3d 52, 56 (Tenn.2001). The evidence is deemed material if "there is a reasonable probability that, had the evid-

ence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley,* 473 U.S. 667, 682 (1985).

In *State v. Caughron,* our supreme court indicated that it may be appropriate for a defendant to request that the trial court examine a specific document or evidence in the state's possession *in camera* if there is evidence that the state failed to comply with its duties under Rule 16 or the dictates of *Brady v. Maryland. See State v. Caughron,* 855 S.W.2d 526, 540-41 (Tenn.1993). However, from the record before us there is no indication that the defendant ever requested this evidence from the state pursuant to Rule 16. Therefore, because the defendant never requested the evidence *from the state,* it follows that there has been no discovery dispute which would permit the trial court to conduct an *in camera* inspection of the state's files to determine if the files contained evidence material to the defense. *See Thomas Dee Huskey,* 2002 WL 1400059, at *65.

***5** There is likewise no indication in the record that the state withheld obviously exculpatory evidence or failed to comply with a request for exculpatory evidence.[FN3] As his alternative argument in his appellate brief, the defendant in essence suggests that this court view his ex parte motion to the trial court as a request for specific exculpatory evidence that the state failed to comply with. We decline his request because there is no authority for the defendant to make a *Brady* request via an ex parte motion to the trial court that would entail the trial court "plowing" through the state's files in search of the requested information.

> FN3. We note that the trial court's order said that it was going to inspect the state's file for specific, limited exculpatory material. However, the record does not reveal that the defendant ever alleged the state was withholding exculpatory evidence, but only that he was entitled to the records because they were "closed."

We recognize that the trial court was only aiming to be expedient and fair in this matter, however, we conclude that the court erred in entertaining an ex parte motion that resulted in an order for an *in camera* inspection of the state's files when there had been no showing that the state had committed any *Brady* violations or failed to comply with the rules of discovery. The defendant cannot circumvent established procedure.

Public Records Act

We note that the record indicates that the trial court did not grant the defendant's motion under the authority of the Tennessee **Public Records** Act. However, we will briefly discuss the issue because it was addressed by the parties. The defendant argues that he is entitled to records regarding his robbery charges under the **Public Records** Act because the cases are "closed" in that the statute of limitations has expired on the two charges that were dismissed, and no appeal or post-conviction petition was taken from the robbery charge of which he was convicted. The state asserts that the records regarding the robberies are "open" because they are part and parcel of the ongoing first-degree murder case-making the records unavailable under the **Public Records** Act.

Tennessee Code Annotated section 10-7-503(a) provides that "[a]ll state, county and municipal records ... shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law." Section 10-7-504(a)(5) delineates the records and materials "in the possession of the office of the attorney general and reporter which relate to any pending or contemplated legal or administrative proceeding in which the office of the attorney general and reporter may be involved" that are not open for public inspection. The Act further provides, in section 10-7-505, that:

> (a) Any citizen of Tennessee who shall request the right of personal inspection of any state,

county or municipal record as provided in § 10-7-503, and whose request has been in whole or in part denied by the official and/or designee of the official or through any act or regulation of any official or designee of any official, shall be entitled to petition for access to any such record and to obtain judicial review of the actions taken to deny the access.

***6** (b) Such petition shall be filed in the chancery court for the county in which the county or municipal records sought are situated, or in any other court of that county having equity jurisdiction. In the case of records in the custody and control of any state department, agency or instrumentality, such petition shall be filed in the chancery court of Davidson County; or in the chancery court for the county in which the state records are situated if different from Davidson County, or in any other court of that county having equity jurisdiction; or in the chancery court in the county of the petitioner's residence, or in any other court of that county having equity jurisdiction....

We need not determine whether the records at issue are open or closed because even assuming the records are closed for purposes of the Act, it is clear from the record that the procedure used by the defendant did not comply with the statute. The defendant should have submitted a **public records** request to the District Attorney General's Office. If that request was denied, the defendant could have then filed a petition for judicial review in chancery court. The defendant did not follow this procedure. The Shelby County Criminal Court had no jurisdiction to entertain a petition for access to **public records** in the possession of the District Attorney's Office pursuant to the **Public Records** Act. The defendant is not entitled to relief under the **Public Records** Act.

CONCLUSION

We conclude that the state did not waive its objection to the trial court's order; the defendant did not follow the rules of discovery for obtaining the evidence from the state, therefore, there was no authority for the trial court to conduct an *in camera* inspection of the state's files; and the defendant did not follow the proper procedure for obtaining records under the **Public Records** Act. Accordingly, we reverse and vacate the trial court's order.

Tenn.Crim.App.,2007.
State v. Odom
Not Reported in S.W.3d, 2007 WL 1135516 (Tenn.Crim.App.)

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Not Reported in S.W.2d, 1992 WL 12217 (Tenn.Ct.App.)
(Cite as: 1992 WL 12217 (Tenn.Ct.App.))

Court of Appeals of Tennessee, Middle Section, at Nashville.
THE CAPITAL CASE RESOURCE CENTER OF TENNESSEE, INC., and Christopher M. Minton, Petitioners/Appellees/Cross-Appellants,
v.
James G. WOODALL, in his capacity as District Attorney General for the 26th Judicial District, Criminal Division, Respondent/Appellant/Cross-Appellee.

No. 01-A-019104CH00150.
Jan. 29, 1992.

Appealed from the Chancery Court of Davidson County; Davidson County, No. 91-664-III at Nashville, Robert S. Brandt, Chancellor.
Christopher M. Minton, Michael J. Passino, Nashville, for petitioners/appellees.

Charles W. Burson, Attorney General and Reporter, Jerry L. Smith, Deputy Attorney General, Nashville, for respondent/appellant.

OPINION

CANTRELL, Judge.

***1** This appeal centers on the application of the Tennessee Public Records Act, Tenn.Code Ann. §§ 10-7-101, *et seq.* (1988), ("the Act"), to a District Attorney General's denial of a request for access to the prosecution and police files on a rape/murder case by attorneys representing the person convicted of the crimes in a pending habeas corpus proceeding in federal court. Holding that the closed prosecution file was a public record pursuant to Tenn.Code Ann. § 10-7-503(a), the trial court ordered the District Attorney General to allow the petitioners to inspect it, with the exception of any investigative records of the Tennessee Bureau of Investigation ("T.B.I.") contained therein. Finding that the District Attorney General did not act in bad faith in refusing the request to examine the file, the Chancellor denied petitioners' motion for costs and attorneys' fees pursuant to Tenn.Code Ann. § 10-7-505(g). The District Attorney General and the petitioners, respectively, appeal from these two rulings.

I. Facts and Procedural History

Petitioners/appellees Capital Case Resource Center of Tennessee, Inc. ("CCRC") and Christopher Minton, an attorney affiliated with CCRC (collectively referred to as "petitioners"), represent Kenneth O'Guinn, an inmate under sentence of death in a Tennessee prison, in his currently pending federal habeas corpus proceeding. Respondent/appellant James Woodall, District Attorney General for the Twenty-Sixth Judicial District of Tennessee ("respondent"), successfully prosecuted O'Guinn on charges of rape and murder ensuing from events that occurred in Jackson, Tennessee, in May of 1981. In January, 1991, invoking Tenn.Code Ann. § 10-7-503(a), petitioners requested access to the files of the prosecutor and the City of Jackson Police Department relating to this matter. Respondent refused to disclose the files, asserting that the pendency of O'Guinn's habeas corpus proceeding rendered the files open within the meaning of *Appman v. Worthington,* 765 S.W.2d 165 (Tenn.1987), and that the files were therefore exempt from disclosure under the Public Records Act.

Petitioners filed suit in Davidson County Chancery Court to compel disclosure under section 505 of the Act. Respondent argued that petitioners lacked standing to bring the action, because they were acting on behalf of a convicted felon who would not have standing himself, since felons are not "citizens" under the laws of this State. After a full hearing, the Chancellor rejected the lack of standing argument and held that the possibility of a retrial or resentencing, in the event O'Guinn suc-

ceeds in his habeas corpus proceeding, is not a sufficient basis for maintaining the confidentiality of the prosecution file. The Chancellor also ruled that investigative documents of the T.B.I. contained in the prosecution file are exempt from disclosure pursuant to Tenn.Code Ann. § 10-7-504(a)(2). That ruling is not at issue in this appeal. The Chancellor did order respondent to prepare a list for petitioners of those documents which respondent claims are within the T.B.I. exemption, so that petitioners may evaluate and possibly contest the confidentiality claims. The trial court also noted that it was not expressing any opinion regarding the files of the City of Jackson Police Department, which was not a party to this suit.

***2** Petitioners then filed a motion for costs and attorneys' fees. Denying the motion, the Chancellor held that a court cannot impose that sanction under section 505(g) of the Act without first finding that the official acted in bad faith in refusing the request to inspect records.

II. Exemption from Public Inspection

The principal issue in this appeal is whether a prosecution file is exempt from public inspection under the Public Records Act where the person convicted of the crime, after exhausting all avenues of direct appeal, has filed a post-conviction relief proceeding, specifically a petition for the writ of habeas corpus in federal court.

The statute mandating public access to public records provides as follows:

> All state, county and municipal records and all records maintained by the Tennessee performing arts center management corporation shall at all times during business hours, be open for personal inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by state statutes.

Tenn.Code Ann. § 10-7-503(a).

The threshold question of whether a criminal investigative file qualifies as a "public record" for purposes of public inspection under the Act was addressed by the Tennessee Supreme Court in 1986. In *Memphis Publishing Co. v. Holt,* 710 S.W.2d 513 (Tenn.1986), the Court held that a closed police investigative file was a public record within the meaning of the Act and therefore subject to public inspection. In that case, the Memphis Police Department conducted an investigation of a shootout in which eight people were killed in January, 1983. Twenty-two months later, a newspaper reporter requested to inspect the investigative file. The investigation had been completed, and no criminal proceedings relevant to the incident were pending or contemplated. The reporter was denied access, and ultimately the newspaper filed a petition to compel disclosure under the Public Records Act. *Hold,* 710 S.W.2d at 515.

The Court observed that the language of Tenn.Code Ann. § 10-7-503 encompasses such records, and that Tenn.Code Ann. § 10-7-504 does not list police investigative files among the several types of records the General Assembly expressly exempted from public inspection. *Id.* at 516. The court also noted that the expungement statutes, Tenn.Code Ann. §§ 40-15-106 and 40-32-101, do not exempt closed police files from public inspection unless an order has been entered to expunge the defendant's record. *Id.* at 516-517.

The *Holt* Court also concluded that where the record in question is a closed police investigative file, Rule 16(a)(2) of the Tennessee Rules of Criminal Procedure does not create an exception to the mandate of public access to public records. Rule 16(a)(1) provides that certain categories of evidence in the State's possession must be made available to the defendant upon request. Rule 16(a)(2) provides that the State is not required to make certain other categories of information available for inspection. Excluded from discovery or inspection are:

> ***3** reports, memoranda, or other internal State

documents made by the district attorney general or other State agents or law enforcement officers in connection with the investigation or prosecution of the case or of statements made by State Witnesses or prospective State Witnesses.

Rule 16(a)(2), Tenn.R.Crim.P. However, the scope of this Rule, like all the Rules of Criminal Procedure, is limited to "criminal proceedings conducted in all courts of record in Tennessee" and certain aspects of criminal proceedings in the General Sessions Courts. Rule 1, Tenn.R.Crim.P. Noting this limitation, the Court held that Rule 16's provisions governing discovery in criminal cases have no bearing on the issue of whether the file is subject to public inspection under the Public Records Act because the file was closed and "not relevant to any pending or contemplated criminal action." *Holt,* 710 S.W.2d at 517.

Finally, the *Holt* court also rejected the argument that police investigative files should be exempt from public inspection on the basis of public policy. The Court pointed out that, whereas the original 1957 version of Tenn.Code Ann. § 10-7-503 provided that public records are subject to public inspection "unless otherwise provided by law or regulations made pursuant thereto," the statute was amended in 1984 to require that public records must be available for public inspection "unless otherwise provided by state statutes." *Id.* The Court concluded that "[b]y this amendment the legislature reserved to itself alone the power to make public policy exceptions to Tenn.Code Ann. § 10-7-503 for municipal law enforcement files." *Id.*

Respondent argues in the instant case that the district attorney general's investigative file is not a "closed" file, because it is relevant to a "contemplated" criminal proceeding, namely the retrial and/or resentencing of Kenneth O'Guinn. Of course, on one level the reprosecution of O'Guinn is in fact "contemplated": Respondent's intention to reprosecute O'Guinn if his conviction or sentence is set aside by the federal court could be viewed as simply an extension of the original decision to prosecute him. Thus, considering only the district attorney general's subjective contemplation, the status of the O'Guinn prosecution file could be described as "closed, but subject to reopening." [FN1]

> FN1. Actually, respondent testified that he personally views the case against O'Guinn to be "pending": "Until Mr. O'Guinn is executed, then as far as I am concerned the case is still active, pending, and on-going. And it is just that simple."

However, as the trial court pointed out, the same could really be said with respect to virtually *any* prosecution which has resulted in the defendant being convicted:

Under the current status of federal habeas corpus law there is no finality to criminal convictions. Convictions are subject to endless legal proceedings. The result of these habeas corpus cases is often a re-trial or resentencing, sometimes years after the original trial.

The Chancellor held that the district attorney general's contemplation of reprosecution is not a sufficient basis for exempting the file from public inspection. We think that the Chancellor's analysis and ruling are not inconsistent with the holding of the Supreme Court in *Appman v. Worthington,* 746 S.W.2d 165 (Tenn.1987).

***4** In *Appman,* the original Public Records Act petitioners were two prison inmates and their two attorneys, John E. Appman and Herbert S. Moncier. The inmates had been indicted for the murder of a fellow inmate. During pre-trial discovery in the criminal case, the indicted inmates through their attorneys made discovery requests and had a subpoena duces tecum issue requiring the Administrative Assistant for Internal Affairs at the correctional facility to produce for inspection by the attorneys any and all documents in his possession and control that were related to the inmate's death. Upon being denied access to the documents named in the subpoena, the attorneys and the indicted defendants

filed a petition for judicial review under the Public Records Act. The Chancellor held that the documents were exempt from disclosure by virtue of Rule 16, Tenn.R.Crim.P., because they were related to a criminal prosecution that was still pending.[FN2]

> FN2. The particular category of documents sought by the *Appman* petitioners became exempt from public inspection by virtue of an amendment to section 504 of the Act, effective December 11, 1985. However, since the Public Records Act petition was filed prior to the effective date of the amendment, the express statutory exemption did not apply in *Appman.*

Apparently the two attorneys appealed from the Chancellor's ruling in their individual capacities, i.e., not as the agents of their clients. The Court of Appeals reversed and remanded the case, concluding that Rule 16 governs only the discovery rights and duties of the parties in the case, " 'not the rights of citizens to access to public records.' " *Appman,* 746 S.W.2d at 166. The Supreme Court reversed the ruling of the Court of Appeals, holding that Rule 16(a)(2), Tenn.R.Crim.P., creates an exception to the mandate of Tenn.Code Ann. § 10-7-503(a), where the criminal prosecution to which the requested documents relate has "not yet been terminated." *Id.* at 167.

So stated, the *Appman* holding is no more than a restatement of the rule articulated in *Holt,* where the Public Records Act petitioner was a newspaper rather than counsel for indicted persons. The *Appman* court's reference in its holding to the fact that the petitioners-appellees were "counsel for the indicted petitioner-inmates," *Id.,* appears to be superfluous. In other words, given that the documents were relevant to a pending criminal action, the *Appman* Court would have reached the same result had the Public Records Act petitioner been a newspaper or some other person not related in any way to a party in the criminal case.

Thus *Holt* and *Appman* are controlling authority for the proposition that where prosecution files are open and are relevant to a pending or contemplated criminal action, Rule 16(a)(2) of the Tennessee Rules of Criminal Procedure creates an exception to the mandate of public access under section 503(a) of the Public Records Act. Unfortunately, these two cases offer little direction as to whether the potential reprosecution of O'Guinn should be deemed a "contemplated criminal ac- tion."

In the instant case the trial court cited *Appman* and referred to decisions from courts in other states as authority for the proposition that "[t]he mere pendency of [O'Guinn's federal habeas corpus proceeding] does not make the District Attorney's O'Guinn file one 'relevant to any pending or contemplated criminal action.' " Observing that "[t]he foundation for the *Appman* ruling is Rule 16 of the Criminal Rules," the chancellor reasoned that the Rule "applies to *pre-trial* discovery and inspection. There is nothing in Rule 16 to suggest that it applies to post-trial discovery and inspection." The chancellor further observed that "[t]here is nothing in *Appman* to suggest its scope extends to criminal cases which have been concluded. The Supreme Court was careful to point out that the prosecution 'had not yet been terminated.' "

***5** But for the seemingly interminable nature of federal habeas corpus proceedings, the prosecution of Kenneth O'Guinn for these offenses would unquestionably be concluded: As far as *direct* appeals go, his conviction has been upheld by the Supreme Court of Tennessee, and the United States Supreme Court denied certiorari. The question in this case, then, is whether the pendency of a federal habeas corpus proceeding, i.e., a *collateral* attack on the conviction has the effect of *re-opening* the case in the sense that a Public Records Act request to inspect documents in the possession of the district attorney general should be regarded as the equivalent of a *pre-trial* discovery request subject to the provisions of Rule 16(a)(2), Tenn.R.Crim.P.[FN3]

FN3. The Court in *Appman* noted that the

> Tennessee Rules of Criminal Procedure "have the force of law" in this state, inasmuch as they were adopted by a joint resolution of the General Assembly which was approved by the governor. 746 S.W.2d at 166. As a legislative enactment, as opposed to a mere policy or rule promulgated by a state agency, the Rules may serve as a basis for exempting records from disclosure pursuant to section 503(a) of the Act as amended in 1984.

Had O'Guinn been *acquitted,* it seems clear that, assuming he otherwise qualifies as a "citizen," the rule articulated in *Holt* would require respondent to allow him to inspect the prosecution file. The file would be closed and would not be relevant to any "pending or contemplated criminal action." The ease and logical clarity with which this result is derived from the provisions of the Public Records Act is attributable to the fact that acquittals, unlike convictions, are final by nature.[FN4]

> FN4. There may well be some exception to the double jeopardy rule that would allow for prosecuting a person on other charges related to the incident or series of events that was the basis for the prosecution in which he was acquitted. If that were the case, the file might be deemed relevant to a "contemplated" prosecution, even after an acquittal.

In deciding the more difficult question presented by the facts of the instant case, we agree with the Chancellor that the Supreme Court in *Holt* and *Appman* did not intend to include the potential reprosecution of a federal habeas corpus petitioner within the definition of a "pending or contemplated criminal action."

As Judge Todd pointed out in the unpublished opinion in *Freeman v. Jeffcoat,* No. 90C-1848, memorandum opinion (Tenn.Ct.App., Middle Section, filed Aug. 30, 1991), appl. perm. appeal pending (filed Sept. 30, 1991), if this Court were to hold that the filing of a post-conviction relief proceeding automatically reopens a closed investigative file for purposes of determining whether the file is subject to inspection by the citizens of Tennessee, that "would simply cause convicts or their lawyers to evade the ruling by delaying petitions for relief until after police files have been examined." *Freeman v. Jeffcoat,* slip op. at 12. Furthermore, Tenn.Code Ann. § 10-7-505(d) mandates that the Public Records Act "shall be broadly construed so as to give the fullest possible access to public records." In order to craft an exception to the mandate of section 503(a) on the basis of the facts in this case, this Court would have to construe the Act narrowly and in the opposite direction of what the General Assembly apparently intended. Therefore we conclude, as we did in *Freeman v. Jeffcoat,* that the pendency of O'Guinn's federal habeas corpus proceeding does not automatically render respondent's *O'Guinn* file relevant to a "pending or contemplated criminal action." Consequently, we hold that, on these facts, Rule 16(a)(2) of the Tennessee Rules of Criminal Procedure does not exempt the file from public inspection pursuant to the Public Records Act.

***6** The Federal Rules Governing Section 2254 Cases and the Federal Rules of Civil Procedure obviously are not state statutes. Consequently, the fact that much of the prosecution file would probably be exempt from discovery within the context of the federal habeas corpus proceeding cannot serve as a basis for exempting a public record from disclosure under the Tennessee Public Records Act. Tenn.Code Ann. § 10-7-503(a).

III. Standing

Respondent contends that the trial court erred in finding that petitioners have standing to bring this action to require disclosure because their client, a convicted felon, is not a "citizen of Tennessee" within the meaning of the Act.

Section 505 of the Act provides for judicial review when a request for access to a public record is denied. That section reads in pertinent part as fol-

lows:

(a) Any citizen of Tennessee who shall request the right of personal inspection of any state, county or municipal record as provided in § 10-7-503, and whose request has been in whole or in part denied by the official and/or designee of the official or through any act or regulation of any official or designee of any official shall be entitled to petition for access to any such record and to obtain judicial review of the actions taken to deny the access.

Tenn.Code Ann. § 10-7-505(a). Respondent asserts that petitioners' client would not be entitled to petition for access to a public record because he is a convicted felon and therefore not a "citizen" of the state under Tennessee statutes and case law. The argument is that a "non-citizen" should not be allowed to circumvent this legal bar by maintaining an action in the name of his attorneys. As authority for this proposition, respondent cites two recent opinions of this Court: *Ray v. Stanton,* No. 88-285-II (Tenn.Ct.App., Western Section, filed Feb. 24, 1989); and *Bradley v. Fowler,* No. 1837 (Tenn.Ct.App., Eastern Section, filed Mar. 4, 1991). No application for permission to appeal to the Supreme Court was timely filed in either case.

In *Ray v. Stanton,* the Western Section of this Court affirmed the trial court's dismissal of a Public Records Act petition by a convicted felon on the ground of failure to state a claim upon which relief can be granted. The Court held that the General Assembly intended that the word "citizen" in sections 503(a) and 505(a) of the Public Records Act should be defined as "a member of the body politic, entitled to exercise the ordinary rights of citizenship." *Ray v. Stanton,* slip op. at 4 (citing *State v. Cloksey,* 37 Tenn. 483 (1858)). The Court noted that such a definition accords with the definition of the word "citizen" in *Black's Law Dictionary* (5th ed.1979). *Id.* Pointing out that "[b]y virtue of T.C.A. § 40-20-112 (1982) plaintiff was rendered infamous and disqualified from exercising the right of suffrage by the judgment of conviction," the Court held that he was not a "citizen." *Id.* Consequently, the Court held that the plaintiff lacked standing to maintain the action. *Id.* at 5.

*7 In *Bradley v. Fowler,* the Eastern Section of this Court affirmed the dismissal of another convicted felon's Public Records Act petition, citing the unreported opinion in *Ray v. Stanton* as dispositive on the issue of lack of standing. *Bradley v. Fowler,* slip op. at 2.

The Middle Section of this Court has also spoken on this issue, albeit by implication rather than expressly, in the case of *Freeman v. Jeffcoat, supra.* The issue of lack of standing was not directly advanced in that case. However, the Court did recognize that the Public Records Act petition filed by attorney Freeman was "the equivalent of an application by or on behalf of [her client]." *Freeman v. Jeffcoat,* slip op. at 13. Judge Todd explained that if the pendency of a habeas corpus proceeding would not render police files exempt from disclosure to the media, "it would be entirely unjust and unacceptable to deny to a person directly interested (the accused) a privilege granted to all other members of the public." *Id.*

Obviously, the petitioner in *Freeman v. Jeffcoat* was in exactly the same relationship to a convicted felon as are the petitioners in the instant case. This Court did not dismiss attorney Freeman's petition for lack of standing. In fact, as the text quoted above illustrates, Judge Todd implicitly rejected the proposition that the client himself, a convicted felon, should be barred from maintaining an action under the Public Records Act.

In defining who is entitled to access-and to judicial enforcement of access-to public records, the General Assembly did not qualify the words "any citizen of Tennessee" so as to limit recourse to the Act to those citizens "having a proper purpose" for their request. *See* Tenn.Code Ann. §§ 10-7-503 and 10-7-505. It is undisputed that CCRC and attorney Minton are citizens of Tennessee, even if their client, under the doctrine of *Ray v. Stanton, Bradley v. Fowler,* and *State v. Cloksey,* is not.[FN5] Accord-

ingly, they are entitled to inspect and copy any "public record" as defined in section 503(a), unless some other state statute provides otherwise. *Holt,* 710 S.W.2d at 517-518. There is no statute which provides that exemption from disclosure is or may be premised on the purpose for which the citizen intends to use the requested documents.

> FN5. Although we believe the distinction should be immaterial, it appears from the record that petitioners filed their Public Records Act petition in their own names rather than in the name of their client.

Petitioners point out the absurd results that could occur if attorneys were to be denied standing to sue for access to public records pertaining to their clients who have been convicted of infamous crimes. First of all, a convict could simply ask a friend who is a "citizen" to make the request instead of his or her attorney. Would the friend, as an agent of the convict, lack standing under the Act? Under the logic advanced by respondent, arguably so, but the bar could only be enforced if the friend responded truthfully when asked to state the purpose of the request.

Another example would be an extension of the situation addressed in *Holt, supra.* The issue of standing was not expressly addressed in that case, but respondent does not suggest that members of the media would lack standing in the instant case. Under *Holt,* a reporter could obtain access, through a petition under section 505 of the Public Records Act, to information in a closed police file that the person convicted of the crime would find useful in pursuing habeas corpus relief. Under respondent's proposed construction of the term "citizen" in the Act, the convict's attorney could then read the information in the newspaper, but would lack standing under the Public Records Act to compel disclosure of the previously released file.[FN6]

> FN6. Of course, the convict might be granted leave to inspect the file-or portions of it-in the context of habeas corpus discovery, but only at the discretion of the federal district judge. However, even this limited access would be thwarted under respondent's proposed construction of section 503(a), because the file would become exempt from discovery as soon as the habeas corpus petition was filed.

***8** All of the above amply demonstrates that any citizen, including an attorney or a corporation such as CCRC, is entitled to inspect any public record, unless some state statute exempts such record from disclosure. The fact that the public records request may be intended to benefit a person deemed to be a non-citizen is immaterial. The Chancellor correctly observed that "if there is to be some limit on the scope of the open record statutes, the limit must be placed by the General Assembly, not the courts." Respondent's lack of standing argument is without merit.

IV. Costs and Attorneys' Fees

Petitioners contend that the trial court erred in denying their motion to have costs and attorney's fees assessed against respondent pursuant to Tenn.Code Ann. § 10-7-505(g). This provision of the Act, added by amendment in 1988, reads as follows:

> If the court finds that the governmental entity, or agent thereof, refusing to disclose a record knew that such record was public and willfully refused to disclose it, such court may, in its discretion, assess all reasonable costs involved in obtaining the record, including reasonable attorneys' fees, against the nondisclosing governmental entity.

Tenn.Code Ann. § 10-7-505(g). The Chancellor construed the willful refusal language of subsection (g) as requiring a finding of bad faith before costs and attorneys' fees may be assessed. Finding that there was "no evidence of bad faith," the Chancellor denied petitioners' motion.

Petitioners argue that the willful refusal standard does not require a finding of bad faith. In the al-

ternative, they argue that the record shows respondent's bad faith in refusing to disclose the file. We cannot agree with either of petitioner's arguments.

a. The "Bad Faith" Standard

We do agree with petitioners that the purpose of subsection (g) is "to discourage wrongful refusals and to encourage citizens to exercise their rights." However, implicit in petitioners' argument is the premise that *not every* refusal to disclose a public record is wrongful.

Petitioners argue that the term "willful" means no more than "intentional, purposeful, or designed." Certainly in this case respondent intentionally denied petitioners' public records request. But the statute does not authorize the sanction petitioners seek unless the official refused the request despite the fact that he or she " *knew* that such record was public." Tenn.Code Ann. § 10-7-505(g) (emphasis added).

Although the trial court emphasized the term "willful" and failed to mention the knowledge element, we think its interpretation of subsection (g) is sound. The statute expresses a "knowing and willful" standard which, in our opinion, is essentially synonymous with "bad faith."

b. Evidence of Bad Faith

The trial court heard the arguments advanced by counsel for respondent on the issue of whether the pendency of O'Guinn's federal habeas corpus petition rendered respondent's prosecution file "relevant to a pending or contemplated criminal action" within the meaning of *Holt* and *Appman.* The trial court also observed respondent testify as to why he refused petitioners' public records request. The fact that the trial court and now this Court have concluded that the file is subject to public inspection does not equate with a finding that, at the time he refused the request, respondent *knew* he was obligated to grant it. He refused the request only after being advised by the office of the Attorney General that the file was not subject to public inspection.

*9 We cannot accept petitioners' argument that respondent, by his "obdurate obstinancy," forced them to needlessly litigate "clearly established rights." We are aware of no decision by a Tennessee court, prior to *Freeman v. Jeffcoat,* on precisely the issue presented in this case. Although we have concluded that the *Appman* exemption for files relevant to "pending or contemplated" criminal cases does not encompass the facts of this case, we cannot say that respondent's arguments to the contrary were not "warranted by existing law or a *good faith* argument for the extension, modification, or reversal of existing law." Rule 11, Tenn.R.Civ.P. (emphasis added).

There is some evidence in the record that, at the time respondent refused petitioners' request for access to the file, his subjective motivation may have been his opposition to the policy of the Act with respect to allowing persons accused of crime to *ever* inspect the prosecutor's file. Nevertheless, given the lack of controlling precedent in this state at that time, we find that the evidence of record does not preponderate against a finding that he did not know the file was subject to public inspection. Nor can it be convincingly said that he reasonably should have known this. We think such a finding is implicit in the trial court's finding that "there is no evidence of bad faith."

V. Conclusion

We affirm the judgment of the trial court in all respects. With the exception of T.B.I. investigative records, for which respondent shall prepare an index, respondent is ordered to make available for petitioners' inspection the prosecution file in the *O'Guinn* case. Petitioners are not entitled to attorneys' fees.

The cause is remanded to the Chancery Court of Davidson County for the enforcement of its decree and for any other proceedings necessary. Tax the costs on appeal to the appellant Woodall.

TODD, P.J., and LEWIS, J., concur.

Tenn.App.,1992.
Capital Case Resource Center of Tennessee, Inc. v. Woodall
Not Reported in S.W.2d, 1992 WL 12217 (Tenn.Ct.App.)

END OF DOCUMENT

Not Reported in S.W.2d, 1991 WL 165802 (Tenn.Ct.App.)
(Cite as: 1991 WL 165802 (Tenn.Ct.App.))

Court of Appeals of Tennessee, Middle Section at Nashville.
Rebecca FREEMAN, Petitioner-Appellant,
v.
Lieutenant William JEFFCOAT, in his official capacity, and Metropolitan Government of Nashville and Davidson County, Respondents-Appellees.

No. 01-A-019103CV00086.
Aug. 30, 1991.
Permission to Appeal Denied by Supreme Court May 18, 1992.

No. 90C-1848, Appeal from the Fifth Circuit Court of Davidson County at Nashville, Walter C. Kurtz, Judge.
John E. Herbison, Nashville, for petitioner-appellant.

Susan Short Jones, William L. Parker, Jr., Department of Law of the Metropolitan Government of Nashville and Davidson County, Nashville, for respondents-appellees.

OPINION

TODD, Presiding Judge.

***1** The plaintiff is an attorney who was appointed to represent Reginald Reed, an inmate of the State Department of Corrections, after he filed a pro se petition for post conviction relief for denial of effective assistance of counsel at his trial for aggravated rape and armed robbery. Plaintiff sought access to police files relating to the charges of which her client was convicted. Access was refused under a police policy of keeping investigatory files confidential until final determination of applications for post conviction relief.

This suit was filed to enforce access to the police file and to enjoin the police department from denying access in similar cases.

The judgment of the Trial Court assured plaintiff of access to all records which should have been produced at the trial and that her client's rights under *Brady v. Maryland,* 373 U.S. 83 (1963) would be protected, but upon motion to dismiss or by summary judgment, the Trial Court dismissed her suit to have access to police records and all other relief.

On appeal, plaintiff does not present issues for review as required by T.R.A.P. since July 1, 1979. Instead, the appellant follows the practice which prevailed prior to the adoption of T.R.A.P. by presenting "assignments of error" with "propositions of law and fact" in support of each assignment.

The assignments of error and supporting propositions are:

A. The trial court erred in denying the Petitioner's request for inspection of governmental records.

1. The trial court wrongly denied the Petitioner an evidentiary hearing.

2. The pendency of a collateral attack on a criminal conviction does not invoke any statutory exception to the requirements of T.C.A. § 10-7-503 (a).

B. The trial court erred in dismissing the Verified Petition in this cause for failure to state a claim upon which relief can be granted as to abridgement of the Petitioner's State and/or Federal Constitutional rights.

1. The Respondents waived all affirmative defenses by failing to include such defenses in their responsive pleading.

2. No Respondent is entitled to immunity under 42 U.S.C. § 1983.

a. The Metropolitan Government has no § 1983 immunity.

b. Lieutenant Jeffcoat is not immune from suit.

3. The Respondent Metropolitan Government is amenable to suit in State court in a § 1983 action.

4. The Verified Petition in this cause states a constitutional claim upon which relief can be granted under 42 U.S.C. § 1983 and directly under the Constitution of the State of Tennessee.

a. Abridgement of rights secured by United States Constitution.

b. Abridgement of rights secured by the Constitution of Tennessee.

c. There is a private right of action for damages necessarily implied in the Constitution of the State of Tennessee.

-The Pleadings-

The complaint alleges that plaintiff's client is the subject of a final judgment of conviction from which he seeks post judgment relief, that plaintiff has sought to examine the police files relating to the subject of his conviction and that the defendant refused her access to said files on the sole ground of the pendency of a suit for post conviction relief. The suit is based upon T.C.A. § 10-7-505 (the Public Records Act) and United States Code Title 42 § 1983 (violation of constitutional or statutory rights).

***2** The prayers of the complaint are:

1. For a show cause order.

2. For an injunction to require that plaintiff or any other citizen be allowed to inspect police files under similar circumstances.

3. For a declaration that plaintiff's rights have been abridged.

4. For damages of $1.00 and attorney's fees.

The response of defendant relies upon the ruling of the Tennessee Supreme Court in *Appman v. Worthington,* Tenn.1987, 746 S.W.2d 165 which holds that where files are "open" and are relevant to pending criminal action, they are not subject to subpoena in connection with the pending criminal action.

-The Ruling of the Trial Court-

On April 18, 1990, the Trial Court entered an order as follows:

This matter was heard before this Court on the 17th day of April 1990 on Petitioner's petition for access to public records and show cause order. This Court finds as follows:

1. The Petitioner is the court-appointed lawyer for Reginald Reed in a post-conviction proceeding filed in case number 83-W-841, presently pending in this Court.

2. The Petitioner, Rebecca Freeman, is seeking the police records of Reginald Reed for use in this post-conviction proceeding.

Based on these facts and the relevant statutory and case law, including the Tennessee Supreme Court's opinion in *Appman v. Worthington,* 746 S.W.2d 165, 166 (1987), construing T.C.A. § 10-7-503, that Rule 16 of the Tenn.R.Crim.P. "... does apply where the files are open and are relevant to pending or contemplated criminal actions ...", it is the finding of this Court that during the pendency of this post-conviction proceeding the police files are not subject to inspection by Petitioner. If Reginald Reed is successful in the post-conviction proceeding, then his criminal case will once again be "live."

In the post-conviction proceeding, this Court will see that Ms. Rebecca Freeman is provided with all records that should have been produced pursuant

to Rule 26.2 of the Tenn.R.Crim.P. in the original trial and that Reginald Reed's rights under the authority of *Brady v. Maryland,* 373 U.S. 83 (1963) are protected.

It is the judgment of this Court that Rebecca Freeman's request for access to the public records of Reginald Reed is denied.

In response to plaintiff's motion for findings of fact and conclusions of law, the Trial Court entered an order stating:

1) The subject police investigative file is "open" as that word is used in the decisions of *Appman v. Worthington,* 746 S.W.2d 165, 166 (Tenn.1987), and *Memphis Publishing Company v. Holt,* 710 S.W.2d 513, 517 (Tenn.1986).

2) A proceeding for post-conviction relief is not a "criminal proceeding" within the meaning of Rule 1 of the Tennessee Rules of Criminal Procedure.

3) The Respondents have shown by a preponderance of the evidence that a statutory exception to T.C.A. § 10-7-503(a), to wit: Rule 16(b)(2) of the Tennessee Rules of Criminal Procedure, is applicable to the Petitioner's request for inspection of the subject police investigative file.

***3** It does not appear from the record that a full evidentiary hearing was held, so that the words "preponderance of the evidence" do not appear to be appropriate under the circumstances.

The first order did not deal with plaintiff's claim under 42 U.S.C. § 1983. Defendant filed a motion to dismiss this claim, attaching an affidavit of defendant stating:

Anyone wishing to inspect a police case file makes a request at the Central Records counter. On March 22, 1990, Rebecca Freeman, Petitioner, made a request to inspect the police case file relative to Reginald Reed's sex crimes. There was no current police investigation going on and when that is so, the District Attorney's Office is contacted to determine whether or not the case file is subject to public inspection. I contacted the District Attorney's Office and talked to June Armstrong, Secretary, on March 22, 1990. Ms. Armstrong told me that she would check with the assistant handling the case and advise me. On March 29, 1990, Ms. Armstrong advised me not to release the case file, that a post-conviction hearing was set for April 17, 1990. I then notified Ms. Freeman that the case file was not subject to public inspection.

Plaintiff filed a motion to amend to rely upon Article I, Sections 8, 17, and 19, and Article 11, Section 16 of the Constitution of Tennessee, and a motion for judgment on the pleadings.

The Trial Court entered an "Order of Dismissal" stating:

2. A prior order of this Court dismissed the plaintiff's statutory claims.

3. That there is no general state or federal constitutional right to access to the public records which petitioner sought;

4. That no due process or equal protection violation under the state or federal constitution occurred in the manner in which defendants processed and denied petitioner's right to access.

Petitioner's motion to amend pleadings is granted. Petitioner's motion to strike insufficient defenses is denied. On the face of the pleadings petitioner has stated no claim for which relief can be granted.

Therefore, it is the judgment of this Court that defendants' Motion to Dismiss should be granted, and it is so ORDERED, with costs taxed to the petitioner.

The ruling of the Trial Court was based in part upon insufficiency of allegations of the complaint, upon the stipulations of the parties and the uncontradicted affidavit of defendant, quoted above. The

judgment must therefore be considered at least in part a summary judgment. T.R.C.P. Rule 12.02. *Jacox v. Memphis City Bd. of Education,* Tenn.App.1980, 604 S.W.2d 872, cert. den. 449 U.S. 1114, 101 S.Ct. 927, 66 L.Ed.2d 844 (1981).

-Denial of Inspection-

T.C.A. § 10-7-503(a) states:

10-7-503. Records open to public inspection-Exceptions.-(a) All state, county and municipal records and all records maintained by the Tennessee performing arts center management corporation shall at all times, during business hours, he open for public inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by state statutes.

***4** Tennessee Rules of Criminal Procedure, Rule 16, is entitled "Discovery and Inspection", Section (a) of the rule relates to "Disclosure of Evidence by State" Subsection (1) of Section (a) is entitled "Information Subject to Disclosure". Sub-Sub Sections (A), (B), (C), and (D), list the matters which must be disclosed to an accused defendant, including his statements, his prior record, documents and tangible objects and reports of examinations and tests.

Subsection (2) under Section (a) reads as follows:

(2) Information Not Subject to Disclosure.-Except as provided in paragraphs (A), (B), and (D) 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 the investigation or prosecution of the case, or of statements made by state witnesses or prospective state witnesses.

The foregoing Subsection (2) is the basis of the decision of the District Attorney, the Police Department and the Trial Judge in denying examination of Police records by the plaintiff, who is not the accused in a criminal case and does not request examination as the attorney for an accused in a criminal case.

Rule 1, Rules of Criminal Procedure states that the Rules govern *procedure* in all *criminal cases.*

The "Discovery and Inspection" provided in Rule 16 must therefore be limited to Discovery and Inspection sought by a defendant in a criminal case.

Therefore, Subsection (2) represents a limitation of the previously stated rights of the accused in a criminal case, and cannot be interpreted as a direct limitation of the statutory right of all citizens to examine public records. *Memphis Pub. Co. v. Holt,* Tenn.1986, 710 S.W.2d 513.

The defendant and the Trial Court relied upon *Appman v. Worthington,* Tenn.1987, 746 S.W.2d 165. In that case, inmates of a state correctional facility who had been indicted for the murder of a fellow inmate obtained a subpoena *duces tecum* for records of the State Corrections Department which had investigated the murder. When the records were not produced, counsel for the inmates filed a civil action under the Public Records Act, T.C.A. § 10-7-503, et seq.

The Supreme Court observed that State Correction Department records were not at that time excepted from the Public Records Act and said:

... The exemption of the records of the Internal Affairs of the Department of Correction from inspection by the public, if any, must be on a basis other than having been given a blanket exemption. One such basis is that set forth in the Tennessee Rules of Criminal Procedure. These rules became effective on July 13, 1978, upon the governor's approval of a joint resolution of the legislature adopting the rules, and have the force of law. *See Tennessee Dep't. of Human Services v. Vaughn,* 595 S.W.2d 62 (Tenn.1980).

***5** [1] Rule 16 provides for the disclosure and inspection of categories of evidence in the possession of the state or in the possession of the defendant. However, the disclosure and inspection granted by the rule "does not authorize the discovery or inspection of reports, memoranda, or other internal state documents made by ... state agents or law enforcement officers in connection with the investigation or prosecution of the case, ..." Rule 16(a)(2) of the Rules of Criminal Procedure. This 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. *See Memphis Publishing Company v. Holt,* 710 S.W.2d 513 (Tenn.1986). *See also State v. Goodman,* 643 S.W.2d 375 (Tenn.Crim.App.1982), which holds that a fiber and hair analysis report by an F.B.I. agent was, prior to delivery of the report to the district attorney general, "within the possession, custody or control of the State" for the purposes of Rule 16(a)(1)(D), T.R.Cr.P.

... The materials sought by appellees are relevant to the prosecution of the petitioners and other inmates charged with offenses arising out of the murder of Carl Estep. These prosecutions have not yet been terminated. It necessarily follows under Rule 16(a)(2) that access to the materials in the possession of Sergeant Worthington are not subject to inspection by appellees, who are counsel for the indicted petitioner-inmates.

It is seen that the result in *Appman* was produced by the fact that Appman represented defendants in a prosecution which had not terminated (i.e., after indictment and before trial), which rendered Rule 16, Rules of Criminal Procedure applicable to the case.

Also in *Appman,* the Supreme Court regarded Rule 16(a)(2) as a statement of controlling public policy which constituted an exception to the Public Records Act, so that access was denied under the Public Records Act.

In the present case, the complaint shows on its face that the prosecution of plaintiff's client has terminated in a final judgment.

For purposes of the sufficiency of the complaint, its allegations must be taken as true. *Cornprobst v. Sloan,* Tenn.1975, 528 S.W.2d 188.

Nevertheless, the public policy limitations as recognized in *Appman* must apply to all rights asserted under the Public Records Act.

Conceding the existence of a final judgment in the prosecution based upon the investigatory file sought by plaintiff, the next question is whether the investigatory file is "open" or "closed". These two words may cause confusion because "open" means "in progress" or "active", but "open" also means subject to examination. Also, "closed" means "concluded" or "finished", but it also means "not subject to examination".

***6** The words, "ongoing", or "active" are more appropriate descriptions of a record of an investigation which has not been concluded and therefore is immune to examination.

The words "terminated" or "inactive" more appropriately describe a record of an investigation which has terminated by final judgment of conviction or other justifiable cause and is therefore subject to examination by the public.

There is no evidence that the State has renewed the investigation of the facts relating to the subject case.

It is the insistence of the defendant that a police record of an investigation which has terminated in final judgment of conviction is automatically "reactivated" or "renewed" by the pendency of a petition for post judgment relief which carries the possibility of a renewal of litigation regarding the guilt of the accused.

The filing of a petition for post judgment relief does suggest the possibility of a successful conclusion which would invalidate the final judgment and open the way for retrial of the issue of guilt. Nevertheless, this Court is unwilling to hold that the filing of a petition for post judgment relief from conviction *ipso facto,* as a matter of law, brings to life and reactivates a dormant police investigation. Such a holding would simply cause convicts or their lawyers to evade the ruling by delaying petitions for relief until after police files have been examined.

Although no published Tennessee authority has been cited or found, the same question has been recently decided by a trial court in favor of the applicant and is now pending on appeal before this Court. The decisions of courts of other jurisdictions are in accord with the position just stated.

In *Napper v. Ga. T.V. Co.,* 257 Ga. 156, 356 S.E.2d 640 (1987) news media sought to examine police files involving murder of children. The judgment of conviction for two of the murders had become final, but there was pending a habeas corpus petition to test the validity of the conviction. The Georgia Supreme Court held that the pendency of the habeas corpus proceeding was not justification for denying access of the media to the files. The only difference between the cited case and the present case is that, in the cited case, the accused was not interested directly or indirectly except as news; whereas, in the present case, the plaintiff is the attorney for the convicted accused who is seeking post conviction relief, which is the equivalent of an application by or on behalf of the accused. This Court does not regard this difference as material, for it would be entirely unjust and unacceptable to deny to a person directly interested (the accused) a privilege granted to all other members of the public. Indeed the Georgia Supreme Court has so ruled, based upon a Georgia statute. *Parker v. Lee,* 259 Ga. 195, 378 S.E.2d 677, (1989).

The Florida statute (§ 119.07(3)(d)) defines an "active" police file as one which is related to "an ongoing investigation which is continuing with a reasonable good faith anticipation of securing an arrest or prosecution in the foreseeable future, or to a pending prosecution or appeal". Such a definition is appropriate to the present case; and, in the absence of a Tennessee statute of definition, will be applied in the present case.

*7 In *State v. Kokal,* Fla.1990, 562 So.2d 324, the Supreme Court of Florida held that, under the Florida statute, a prisoner seeking post conviction relief was entitled to disclosure of public records.

State, ex rel Clark v. City of Toledo, 54 Ohio St.3rd 55, 560 N.E.2d 1313 (1990), holds that a subject of a final judgment of conviction may have access to public records to support his application for post conviction relief, despite the provisions of Criminal Procedure Rule 16.

Harrison v. Norris, La.App.1990, 569 So.2d 585 holds that a petition for post conviction relief is not a criminal proceeding which would create an exception to the Public Records Law.

T.C.A. § 10-7-505(d) provides that the Public Records Law "shall be broadly construed so as to give the fullest possible access to public records".

This Court concludes that the Tennessee Public Records Law requires full and open disclosure of police records except those which must be regarded as protected by a clear declaration of public policy. The clearly declared public policy protects records of an investigation while the investigation is in progress and during the pendency of any prosecution arising out of the investigation. The pendency of an application for post judgment relief does not *ipso facto* create an exception to the requirement of disclosure. However, final conclusion of a prosecution does not conclusively require access to the record of an investigation which is being actively pursued for bona fide legitimate reasons disclosed *in camera* to the adjudicating court.

In the present case, there is no claim of any reason for secrecy of the files to be examined ex-

cept the possibility of the necessity of a new trial if the application for post judgment relief should be successful. As stated, this claim is not sufficient to defeat the rights of the public (including plaintiff and her client) under the Public Records Act.

The first "assignment of error" is sustained.

-Violation of Rights-

In the light of the conclusions heretofore stated, the right of the plaintiff to examine the police file is clear under T.C.A. § 10-7-505, and the facts in this record. The complaint alleges that this right was denied. The affidavit does not deny that access was refused but offers an excuse which has been found invalid by this Court. Therefore it was error to peremptorily deny relief, which was essentially a dismissal for failure to state a claim for allowable relief.

42 United States Code § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...."

***8** As noted above, relying upon the affidavit of defendant, the Trial Judge rendered summary judgment of dismissal on the ground that plaintiff had not been denied due process. It appears that the denial of due process is not the only issue here, but also the denial of a right, or privilege secured by a law, i.e., the Tennessee Public Records Law.

Accordingly, it was error to enter the summary judgment of dismissal of the action under 42 U.S.C. § 1983 in relation to the denial of access to public records.

However, it was not error to dismiss for failure to state an actionable claim in the portion of the complaint which stated:

11) The Petitioner avers that an attorney retained by a wealthy prisoner for the purpose of seeking post-conviction relief would be permitted access to his client's police investigative file prior to the filing of a post-conviction petition.

12) The Petitioner avers that the policy of the Respondent Metropolitan Government or the facts described hereinabove work an invidious discrimination against court-appointed attorneys representing indigent prisoners who have filed *pro se* pleadings and in favor of retained attorneys representing wealthy prisoners.

There is no allegation that discrimination because of wealth has occurred, or that there is any policy to do so. There is only the allegation that a lawyer for a wealthy client *would be* permitted access to the files.

Such nebulous assumptions do not state a ground for judicial relief.

The judgment of dismissal is affirmed as to paragraphs 11 and 12, quoted above, which will be stricken from the complaint.

No judgment is made as to other allegations of the complaint for relief under Section 1983.

In all other respects, the dismissal of plaintiff's suit is reversed, and the cause is remanded for further proceedings. Costs of this appeal are taxed against the defendant.

Affirmed in Part, Reversed in Part, Remanded.

LEWIS and KOCH, JJ., concur.

Tenn.App.,1991.
Freeman v. Jeffcoat
Not Reported in S.W.2d, 1991 WL 165802 (Tenn.Ct.App.)

END OF DOCUMENT

Caution
As of: Apr 29, 2014

In Re: STUDENT FINANCE CORPORATION, Debtor; CHARLES A. STANZIALE, JR., CHAPTER 7 TRUSTEE OF STUDENT FINANCE CORPORATION, Plaintiff v. CAREER PATH TRAINING CORPORATION, et al. Defendants

MISC. DOCKET NO. 06-MC-69, Case No. 02-11620-JBR (Bankr. D. Del.), Adversary Proceeding, No. 04-56414 (Bankr. D. Del)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2006 U.S. Dist. LEXIS 86603

November 29, 2006, Decided
November 29, 2006, Filed; November 30, 2006, Entered

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant in an adversary bankruptcy action sought to enforce a subpoena seeking the production of documents from respondents, a private investigation firm retained by the attorneys for the largest creditor in the bankruptcy. The investigative firm, attorneys, and creditor all filed oppositions to the motions to compel and cross-moved for a protective order on the ground that the material sought was all protected attorney work product.

OVERVIEW: Because none of the respondents was a party to the adversary action, this case raised the complicated issue of whether the protection against disclosure of attorney work product could be asserted by third parties. The underlying bankruptcy litigation involved a company that provided student loans for trade schools. When the company's alleged fraud was discovered, many of the loans went into default. A large number of the loans were insured by an indemnity company that was its largest creditor. That creditor, and its attorneys, hired an investigative firm to investigate both the loan company and the schools whose students had received the loans. The purpose of the investigation was to gather facts in preparation for possible litigation contemplated against both the loan company and the schools. The court determined that, under these circumstances, disclosure of the work product implicated the purposes for the attorney work product privilege. Having determined that the work product privilege could be claimed by the non-parties, the court determined that most of the requested material was in fact work product and a sufficient showing was not made to permit its production.

OUTCOME: The court denied the motion to compel and granted the motions for a protective order as to all documents except certain electronic documents falling within the category of miscellaneous correspondence. As to these, the court ordered a more detailed index if respondents intended to claim work product privilege.

LexisNexis(R) Headnotes

Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview

[HN1] The work product privilege protects the confidentiality of papers prepared by or on behalf of attorneys in anticipation of litigation. Its purpose is to allow lawyers to prepare for litigation free from unnecessary intrusion by opposing parties and their counsel. The work product

privilege is not absolute, and work product can be produced upon a showing that the party seeking discovery has a substantial need for the materials and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview
[HN2] See *Fed. R. Civ. P. 26(b)(3).*

Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview
[HN3] By its terms, the work product privilege embodied in *Fed. R. Civ. P. 26(b)(3)* does not apply to third parties, protecting only documents prepared in anticipation of litigation or for trial by or for another party.

Civil Procedure > Discovery > Privileged Matters > Work Product > Scope
[HN4] The enactment of *Fed. R. Civ. P. 23(b)(3)* has been described by the United States Court of Appeals for the Third Circuit as only partially codifing the Hickman work product privilege. In at least one respect, federal courts have uniformly extended the work product privilege beyond the terms of *Rule 26(b)(3).* Although *Rule 26(b)(3)* is expressly limited to documents and other tangible things, federal courts have not hesitated to extend the privilege to oral statements that embody an attorney's mental impressions or work product.

Bankruptcy Law > Practice & Proceedings > Adversary Proceedings > General Overview
Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview
[HN5] Merely being a creditor in a related bankruptcy proceeding does not give a creditor any of the rights or obligations of a party to an adversary action. Just as the creditor had no obligation as a creditor to answer the complaint or serve initial disclosures, it has no right as a creditor to assert work product privilege under *Fed. R. Civ. P. 26(b)(3).*

Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview
[HN6] *Fed. R. Civ. P. 26(b)(3)* protects only work product prepared by a party's representative in its representative capacity.

Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview
[HN7] *Fed. R. Civ. P. 26(b)(3)* is not the only means for asserting work product protection in federal courts. The rule is only a partial codification of the work product privilege, and therefore leaves room for the privilege to be asserted outside its terms in appropriate cases. Courts have extended the work product privilege beyond the strict terms of *Rule 26(b)(3)* to protect intangible work product outside the documents and tangible things protected by the rule. Similarly, the privilege may be extended beyond the strict terms of the rule to protect non-parties' work product when doing so accords with the purposes of the privilege set out in *Hickman v. Taylor, 329 U.S. 495 (1947).*

Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview
[HN8] The United States District Court for the Eastern District of Pennsylvania disagrees with those courts that have assumed that *Fed. R. Civ. P. 26(b)(3)* forbids district courts from extending work product protection to third parties. Although *Rule 26(b)(3)* was intended to set out a uniform work product provision for the federal courts, nothing in the text of the rule or its history, or in the relevant advisory committee notes, suggests that it was intended to foreclose the application of the attorney work product privilege outside its terms in appropriate cases.

Civil Procedure > Pretrial Matters > Subpoenas
[HN9] *Fed. R. Civ. P. 45* expressly provides that the court from which a subpoena has issued shall quash or modify the subpoena if it requires disclosure of privileged or other protected matter and no exception or waiver applies. *Rule 45(c)(3)(A)(iii). Rule 45* does not define what privileges and protections are to be enforced under its terms, but the language is broad enough to include protection against discovery of third-party work product in appropriate cases. Nothing in *Rule 45*'s history or text indicates that it was intended to incorporate *Fed. R. Civ. P. 26(b)(3)*'s restriction of work product to parties. The Advisory Committee Notes to the 1991 revisions to the rule indicate that the authority to issue protective orders under *Fed. R. Civ. P. 45* was intended to track the general protective order provisions of *Fed. R. Civ. P. 26(c)*, but do not mention the work product provisions of *Rule 26(b).*

Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview

[HN10] *Fed. R. Civ. P. 26(c)* authorizes a court to issue a protective order for good cause shown to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense. This language is sufficiently sweeping to authorize a protective order preventing the undue burden of disclosing third-party work product in appropriate cases. Indeed, even many of those decisions which refuse to protect third party work product under *Fed. R. Civ. P. 26(b)(3)* recognize that a protective order could issue under *Rule 26(c)* to prevent disclosure of the material.

Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview

[HN11] *Hickman v. Taylor, 329 U.S. 495 (1947)* itself provides authority to protect work product outside the terms of *Fed. R. Civ. P. 26(b)(3)*, whether as to intangible work product or work product produced by third parties.

Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview

[HN12] The work product privilege protects material prepared by or on behalf of attorneys in anticipation of litigation. It extends to material prepared in anticipation of litigation by an attorney's investigators and other agents. Even if material was prepared in anticipation of another litigation, it will still be protected as work product if the anticipated litigation was related to the proceedings in which the material is to be produced.

Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview

[HN13] Even if material is protected attorney work product, it can still be produced if the party seeking discovery shows that it has a substantial need for the materials and that it cannot without undue hardship obtain the substantial equivalent of the materials by other means. There are two levels of protection for attorney work product: ordinary work product prepared in anticipation of litigation by an attorney or the attorney's agent is discoverable only upon a showing of need and hardship; core or opinion work product that encompasses mental impressions, conclusions, opinion or legal theories of an attorney or other representative of a party concerning the litigation is generally afforded near absolute protection from discovery.

Civil Procedure > Discovery > Privileged Matters > Work Product > Scope

[HN14] Scripts of questions to be used in interviewing witnesses are core attorney work product, reflecting legal strategy and decision-making concerning the important areas of inquiry with particular types of witnesses.

Civil Procedure > Discovery > Privileged Matters > Work Product > Scope

[HN15] Public documents collected by or on behalf of an attorney in anticipation of litigation constitute work product because the choice of selecting which subjects to research and which documents to collect represents the attorney's or the agent's mental impressions and legal opinions about the important issues in the actual or anticipated litigation. In addition, allowing disclosure of such information without a showing of substantial need would risk allowing opposing counsel to free-ride off an adversary's preparation.

COUNSEL: [*1] For CAREER PATH TRAINING CORPORATION, ET AL, Defendant: GERALD E. BURNS, LEAD ATTORNEY, ELIZABETH LUENING LONG, SUZANNE MARIE SWEENEY, KLETT ROONEY LIEBER & SCHORLING PC, PHILADELPHIA, PA.

For ROYAL INDEMNITY COMPANY, Movant: ALAN S. GILBERT, LEAD ATTORNEY, SONNENSCHEIN, NATH & ROSENTHAL, CHICAGO, IL; PETER F. VAIRA, LEAD ATTORNEY, VAIRA & RILEY PC, PHILADELPHIA, PA.

For SONNENSCHEIN NATH & ROSENTHALL LLP, Movant: ALAN S. GILBERT, LEAD ATTORNEY, SONNENSCHEIN, NATH & ROSENTHAL, CHICAGO, IL; PETER F. VAIRA, LEAD ATTORNEY, VAIRA & RILEY PC, PHILADELPHIA, PA; ROBERT W. GIFFORD, LEAD ATTORNEY, SONNENSCHEIN NATH & ROSENTHAL, NEW YORK, NY.

JUDGES: MARY A. McLAUGHLIN, J.

OPINION BY: MARY A. McLAUGHLIN

OPINION

MEMORANDUM AND ORDER

McLaughlin, J.

November 29, 2006

This is a miscellaneous action to enforce a subpoena issued from this Court, seeking the production of documents relevant to an adversary bankruptcy proceeding pending in the District of Delaware. The movant here, Career Path Training Corp. ("Career Path"), is a defend-

ant in the adversary action. Career Path seeks documents from a private investigation firm, The James Mintz Group ("the Mintz Group"), retained by the attorneys for the largest creditor [*2] in the bankruptcy, Royal Indemnity Co. ("Royal"). The Mintz Group, Royal, and Royal's attorneys (collectively "the respondents") have all filed oppositions to the motions to compel and have cross-moved for a protective order on the ground that the material sought is all protected attorney work product. Because none of the respondents is a party to the underlying adversary action, this raises the complicated issue of whether the protection against disclosure of attorney work product may be asserted by third parties.

I. *BACKGROUND*

The underlying bankruptcy litigation here is that of Student Finance Corporation ("SFC"), a company that provided student loans for trade schools, principally truck driver training schools. SFC would make or purchase educational loans, pool them together, and then sell them to investors as asset backed securities. [1]

1 Declaration of Alan S. Gilbert ("Gilbert Decl.") at P4, attached as Exhibit 1 to the Response of Sonnenschein, Nath, & Rosenthal LLP, Royal Indemnity Company, and the James Mintz Group to the Motion of the Career Path Schools to Overrule Objections to Subpoena and Compel Compliance with Subpoena and Cross-Motion for a Protective Order (Docket No. 5), hereinafter "Respondent's Opposition."

[*3] A. *SFC's Bankruptcy*

In the spring of 2002, SFC was forced into involuntary bankruptcy by its creditors. This bankruptcy is pending as *In re Student Finance Corp.*, No. 02-11620 (Bankr. D. Del.). The bankruptcy was precipitated by allegations that SFC had fraudulently inflated the performance of its loans and disguised the true rate of default in its loan pools by misrepresenting students' eligibility for, and ability to repay, the loans, and by allegedly making payments on the loans out of SFC's own funds. In addition, many of the trucking schools whose students received SFC loans allegedly participated in the fraud by submitting false information about the loans and by making loan payments out of school funds or out of funds provided by SFC. [2]

2 Gilbert Decl. at PP6-9; Declaration of Charles A. Stanziale, Jr. As Chapter 7 Trustee of Student Finance Corporation ("Stanziale Decl.") at P2, attached as Exhibit 4 to Respondent's Opposition.

Once SFC's alleged fraud was discovered and the true condition [*4] of SFC's loans became known, many of the loans went into default. A large number of these loans were insured against default by Royal Indemnity Company. These defaulted loans led to over $500 million in claims against Royal, which made it by far the largest creditor in SFC's bankruptcy. [3]

3 Gilbert Decl. at PP10-11; Stanziale Decl. at PP3, 5.

B. *The Mintz Group's Investigation*

In May 2003, Royal's attorneys, the law firm of Sonnenschein, Nath & Rosenthal ("Sonnenschein"), hired The Mintz Group, a firm of professional investigators, to investigate both SFC and the trucking schools whose students had received SFC loans. The purpose of the investigation was to gather information in preparation for possible litigation that Royal contemplated bringing against both SFC and the trucking schools.

The investigation was supervised and directed by Sonnenschein and involved interviews with SFC employees, as well as employees and former students of the truck driving schools. The investigation also involved the collection [*5] and review of public records including FOIA results, website reports, Lexis/Nexis searches, and asset searches. [4]

4 Gilbert Decl. at PP21-22; Declaration of Andrew B. Melnick ("Melnick Decl.") at PP2-3, 5, 7, attached as Exhibit 2 to the Respondent's Opposition.

C. *The Trustee's Lawsuit Against Royal and the Subsequent Settlement Agreement*

In June of 2003, Royal moved for the appointment of a bankruptcy trustee. In November 2003, a trustee was appointed, and that same month, the trustee instituted an adversary proceeding against Royal. Around the same time (the record is unclear as to exactly when), Royal sued SFC and several trucking schools, and was itself sued by several creditors. [5]

5 Gilbert Decl. at PP12-14, 22.

In or about October 2004, the Trustee and Royal settled the adversary proceeding between them. As part of [*6] the court-approved settlement, Royal agreed to pay $4,900,000 to the Trustee and in return received a $1,900,000 administrative claim to be paid out of the proceeds of claims by the estate against third parties. [6]

6 October 12, 2004, Settlement Agreement between Student

Finance Corporation Trustee and Royal Indemnity Company (hereinafter "Settlement Agreement") at P2, attached as Exhibit G to the Motion of the Career Path Schools to Overrule Objections to Subpoena and Compel Compliance with Subpoena (Docket No. 1) (hereinafter "Career Path's Motion"), also attached as Exhibit 1 to Attachment A of the Gilbert Decl.

As part of the settlement, the Trustee agreed to file lawsuits against the trucking companies and other third parties involved with SFC to recover money for the estate. [7] If the Trustee decided not to bring an action against a third party, the settlement agreement gave Royal the right to do so on behalf of the estate at its own cost, subject to court approval. In addition, the Trustee and Royal [*7] agreed to enter into a litigation agreement giving each other access to privileged information concerning the estate's claims. [8]

7 Gilbert Decl. at P16; Settlement Agreement at P7.

8 *Id.*

The agreement also gave Royal rights over the Trustee's ability to settle claims against third parties. The Trustee agreed to confer with Royal in good faith before agreeing to any settlement, and if Royal opposed settling, the Trustee was required to give Royal the opportunity to prosecute the claim on behalf of the estate, as long as Royal guaranteed to the estate that the recovery would exceed the rejected settlement. [9] The bankruptcy court approved the settlement agreement on October 29, 2004.

9 Settlement Agreement at P12.

D. *The Current Adversary Action and the Subpoena at Issue*

On November 1, 2004, the Trustee brought an adversary [*8] proceeding against Career Path to recover allegedly fraudulent transfers from SFC. This matter is pending as *Stanziale v. Career Path Training Corp.*, No. 04-56414 (Bankr. D. Del.). On July 28, 2005, Career Path served a subpoena *duces tecum* on the Mintz Group, issued from this district court, requiring it to produce documents in the adversary action.

The subpoena sought ten categories of documents, all pertaining to the Mintz Group's investigation into SFC and the trucking schools, including Career Path. The ten categories sought documents concerning, referring or relating to, in whole or in part:

1) any investigations into the Career Path;

2) any communications to or from the Mintz Group regarding Career Path;

3)-4) Career Path, including documents obtained from third parties;

5) the Mintz Group's investigative file;

6) any investigation performed by the Mintz Group regarding SFC;

7) SFC's business dealings with any person that provided truck driving training or education;

8) communications between the Mintz Group and the Trustee regarding SFC;

9) communications between the Mintz Group and Royal regarding SFC; and

10) [*9] any fees charged or payments received for work or services referred to in the foregoing. [10]

10 July 28, 2005 Subpoena to James Mintz Group Inc. (hereinafter "Subpoena"), attached as Exhibit A to Career Path's Motion.

E. *The Current Miscellaneous Action*

On April 12, 2006, Career Path filed this motion, seeking to compel responses to the subpoena. The Mintz Group, joined by Sonnenschein and Royal opposed the motion to compel and cross-moved for a protective order on the ground that the material sought was investigative material prepared at the direction of Sonnenschein in anticipation of litigation and was therefore protected as attorney work product.

Career Path countered by arguing that attorney-work product may be asserted only by parties and that neither the Mintz Group, nor Royal, nor Sonnenschein is a party to the underlying adversary action. Career Path also argued that, even if the material could be protected as attorney work product, the respondents had waived that privilege by submitting [*10] an inadequately detailed privilege log. The Mintz Group, Royal and Sonnenschein responded by denying that work product protection was limited to parties and arguing that, even if it were, they should be considered parties. In the alternative, if work product protection did not apply, they argued that the material requested should be protected from disclosure

under *FRCP 26(c)* as oppressive and unduly burdensome to produce.

Because the parties' briefing focused exclusively on whether work product protection was available to non-parties, the Court ordered supplemental briefing on whether, if work-product protection were available, it would apply to protect the documents at issue here from disclosure. The parties disagree as to whether the Mintz Group has submitted an adequate privilege log and whether Career Path has made an adequate showing of need for the documents to overcome work product protection, if it exists.

F. *The Documents at Issue*

Career Path concedes that the documents it requested essentially comprise the Mintz Group's entire investigative file for work performed for Sonnenschein and Royal concerning SFC and the truck driver [*11] training schools. [11] The Mintz Group has stated that these files amount to 66 Redweld (R) folders and several loose folders and 622 electronic files. The paper file alone is alleged to constitute eighteen linear feet of stacked documents. The Mintz Group has provided a 10 page index listing in summary fashion the contents of each folder, but has not provided an index of the electronic documents. [12]

11 The Career Path School's Opposition to the Amended Cross-Motion for a Protective Order (Docket No. 10) (hereinafter "Career Path's Opposition") at 2, P5.

12 Declaration of Johan Buys (hereinafter "Buys Decl.") at PP3-4, attached as Exhibit 3 to Respondent's Opposition.

The Mintz Group has represented that all of the work reflected in the investigative file was performed at Sonnenschein's request and was communicated solely to counsel. An affidavit provided in support of their motion states that "[n]early every document in each of the folders is annotated with the investigators' handwritten comments, [*12] handwritten post-it notes, or colored flags or highlighters" and that "[m]any of the handwritten comments suggest follow-up actions for further investigation or supply details of conversations between the investigator and subject." [13]

13 *Id.* at P5; Index attached to Buys Decl. at 1.

In their briefing, the parties identify four categories of documents at issue:

1) Attorney notes and memoranda;

2) Investigators' memoranda and reports to Sonnenschein, including "action lists" for the investigators;

3) Interview notes and scripts prepared by investigators;

4) Public records, including FOIA results, FOIA requests, news articles, court documents and deposition transcripts, website reports and Lexis/Nexis and asset searches. [14]

14 Categories 1, 2, and 4 are given in Career Path Schools' Supplemental Brief regarding Work Product Issues (hereinafter "Career Path's Supp. Br.") (Docket No. 16) at 6. Categories 2, 3, and 4 are given in Buys Decl. at P6

[*13] The Mintz Group also refers to a category of "miscellaneous correspondence" which constitute 15% of the electronic files at issue, but for which it has not prepared an index or a privilege log. In the course of briefing this matter, Career Path has stated it will no longer seek to discover materials prepared by an attorney for the respondents or asset searches performed on individuals or entities other than Career Path, itself. [15]

15 Career Path's Supp. Br. at 3.

II. *LEGAL ANALYSIS*

Resolving this matter requires analysis of at least two distinct issues: 1) whether non-parties in the position of the Mintz Group, Royal, and Sonnenschein may assert the attorney work product privilege; and 2) if so, whether the material sought to be protected is, in fact, work product and whether Career Group has made a sufficient showing to overcome the privilege.

A. *Are the Mintz Group, Royal, and Sonnenschein Entitled to Assert the Attorney Work Product Privilege?*

[HN1] The work product privilege protects "the confidentiality [*14] of papers prepared by or on behalf of attorneys in anticipation of litigation." *Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1428 (3d Cir. 1991), citing Hickman v. Taylor, 329 U.S. 495, 510-11, 67 S. Ct. 385, 91 L. Ed. 451 (1947).* Its purpose is to allow lawyers to prepare for litigation "free from unnecessary intrusion by opposing parties and their counsel." *Hickman at 511.* The work product privilege is not absolute, and work product can be produced upon a showing that the party seeking discovery has a substantial need for the materials and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. *In re Cendant Corp. Sec. Litig., 343 F.3d 658, 663 (3d Cir. 2003).*

1. *The History of the Work Product Privilege*

Determining whether the work product privilege is available to the third-party respondents in this case re-

quires an examination of its development. The history of the work product privilege begins with the U.S. Supreme Court's 1947 decision in *Hickman v. Taylor*. Prior to that decision, federal courts had taken a variety of approaches to protecting [*15] information prepared or gathered by an adversary or his representatives in preparation for litigation, some refusing to allow discovery of such information on grounds of relevance, hearsay or privilege, others allowing such information to be produced. Wright, Miller & Kane, 8 *Federal Practice & Procedure* § 2021 at 313-15 (3d ed. 1994). In *Hickman*, the Supreme Court resolved the issue by recognizing a qualified protection from discovery for attorney work product.

At issue in *Hickman* were witness statements taken by an attorney for a ferry company sued under the Jones Act for the death of a sailor. The plaintiff had served interrogatories asking whether witness statements had been taken and requesting that they be produced. The district court, finding the statements unprotected by attorney-client privilege, had ordered their production and held the defendant and the attorney in contempt for refusing to comply. The circuit court reversed, finding the material to be the "work product of the lawyer" and therefore privileged from discovery. *Id. at 499-500.*

On appeal, the Supreme Court began by analyzing which discovery rule was implicated by the plaintiff's request. The [*16] Court noted that the plaintiff had believed he was proceeding under *Federal Rule of Civil Procedure 33*, which governs interrogatories, but that the district court based its contempt order on both *Rule 33* and *Rule 34*, which governs production of documents, and that the circuit court had grounded its analysis in *Rule 26*, which allows depositions to be taken by testimony or written interrogatories. The Court concluded that none of these three approaches was the proper procedural vehicle for compelling the production of the witness statements taken by the defendants' attorney. The Court held that neither *Rule 33* nor *Rule 34* was applicable because they allowed discovery only against adverse parties, not against a party's attorney or agent. The proper procedure, the Court held, would have been for the plaintiff to take the attorney's deposition under *Rule 26* and attempt to force him to produce the witness statements through a subpoena duces tecum in accordance with *Rule 45. Id. at 501-505.*

The Court declined, however, to decide the case on this procedural irregularity and proceeded to recognize a qualified work product privilege. The Court concluded [*17] that "neither *Rule 26* nor any other rule dealing with discovery contemplates production under such circumstances," because the requested discovery was "simply an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties." *Id. at 510.* Absent a showing that production of attorney work product was "essential to the preparation of one's case," discovery should not be permitted. *Id.* Moreover, where work product disclosed an attorney's mental impressions and thinking, the Court doubted that any showing of necessity could ever be made. *Id. at 512-13.*

According to the *Hickman* court, the purpose of the work product privilege was to protect the ability of an attorney to perform his necessary duties for his clients. In performing his duties, "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." Were the work product of a lawyer "open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's [*18] thoughts, heretofore inviolate, would not be his own." *Id. at 510-11.*

The *Hickman* decision did not address whether the work product privilege it announced was limited to parties. Although the work product at issue was created by an attorney for a party, the language of the opinion is ambiguous. The Court refers to the purpose of the privilege as protecting attorneys from unnecessary intrusion "by opposing parties and their counsel." *Id. at 510.* Yet, the Court also broadly speaks of work product being exempt from discovery under all of the applicable federal rules: "neither *Rule 26* nor any other rule dealing with discovery contemplates production under such circumstances." *Id. at 509.* Because the Court concluded that the work product at issue in *Hickman* could only have been properly requested through a *Rule 45* subpoena duces tecum, the Court's sweeping language suggests it contemplated the work product privilege applying to such subpoenas, arguably including those directed to third parties.

After *Hickman*, federal courts disagreed over how to interpret the work product privilege. Although few courts in the aftermath of the decision directly addressed whether [*19] the privilege applied to third parties, those that did reached differing conclusions. *Compare Shepherd v. Castle, 20 F.R.D. 184, 187 (W.D. Mo. 1957)* (holding that *Hickman* did not apply to a subpoena duces tecum issued under *Rule 45* to a witness not a party to the action) *with Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 557-558 (2d Cir. 1967)* (holding that *Hickman* applied to protect materials prepared by a third party in anticipation of separate but related litigation with the party that had subpoenaed them).

In part to create a more uniform interpretation of the privilege, protection for attorney work product was codified into the Federal Rules of Civil Procedure in 1970 as *Rule 26(b)(3). See generally* 8 *Federal Practice & Pro-*

cedure at § 2023; *United Coal Companies v. Powell Constr. Co., 839 F.2d 958, 966 (3d Cir. 1988)* (work product privilege governed by uniform federal standard embodied in *Rule 26(b)(3)*). *Rule 26(b)(3)* provides in pertinent part:

> [HN2] Subject to the provisions of subdivision (b)(4) of this rule [governing expert discovery], a party may obtain discovery of documents and tangible things [*20] otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

[HN3] By its terms, the work product privilege embodied in *Rule 26(b)(3)* does not apply to third parties, protecting only documents "prepared in anticipation of litigation or for trial by or for another party." Neither the amended Rule itself nor the Advisory Committee Notes for the 1970 revisions explain why the Rule's work product protection was limited only to parties. [16]

> 16 The limitation may be an artifact of the Rule's development. The Notes explain that the revisions to *Rule 26* attempted to harmonize the work product doctrine of *Hickman v. Taylor* with the then-existing requirement under *Rule 34* that discovery could be had from another party only for "good cause." The revisions accomplished this by doing away with the "good cause" requirement, but adding a requirement based on *Hickman* that discovery of trial preparation materials may be had only on a special showing of need. Because the "good cause" requirement that *Rule 26(b)(3)* was intended to supercede was limited to parties, it may be that the *Rule 23(b)(3)* was also so limited. Alternatively, the drafters may have decided to limit the scope of the Rule to parties to best further the work product privilege's purpose of protecting the attorney's adversary role in a system of open discovery, which the Notes describe as the "the view that each side's informal evaluation of its case should be protected, that each side should be encouraged to prepare independently, and that one side should not automatically have the benefit of the detailed preparatory work of the other side." Advisory Committee Notes to the 1970 Amendment to Rule 26.

[*21] [HN4] The enactment of *Rule 23(b)(3)* has been described by the United States Court of Appeals for the Third Circuit as only "partially codifi[ng]" the *Hickman* work product privilege. *Sporck v. Peil, 759 F.2d 312, 316 (3d Cir. 1985)*; *see also In re Grand Jury Subpoenas Dated March 19, 2002 and August 2, 2002, 318 F.3d 379, 383 (2d Cir. 2003)* (work product doctrine "codified in part" in *Rule 26(b)(3)*). In at least one respect, federal courts have uniformly extended the work product privilege beyond the terms of *Rule 26(b)(3)*. Although *Rule 26(b)(3)* is expressly limited to "documents and other tangible things," federal courts have not hesitated to extend the privilege to oral statements that embody an attorney's mental impressions or work product. *In re Cendant Corp. Sec. Litig., 343 F.3d 658, 662 (3d Cir. 2003)* ("It is clear from *Hickman* that work product protection extends to both tangible and intangible work product."); *United States v. 266 Tonawanda Trail, 95 F.3d 422, 428 n.10 (6th Cir. 1996)* ("When applying the work product privilege to . . . nontangible information, the principles enunciated in [*22] *Hickman* apply, as opposed to *Rule 26(b)(3) of the Federal Rules of Civil Procedure*, which applies only to 'documents and tangible things.'"); *Alexander v. F.B.I., 192 F.R.D. 12, 17 (D.D.C. 2000)* (same); 8 *Federal Practice & Procedure* § 2024 at 337.

After the 1970 amendments, the provisions of the Federal Rules of Civil Procedure affecting work product remained unchanged until 1991. In that year, *Rule 45* was amended to streamline subpoena practice and "clarify and enlarge" the protections available to persons subpoenaed. Advisory Committee Notes to the 1991 Amendment to Rule 45. One of the many changes to the Rule was the addition of *subparagraph 45(c)*, which for the first time specified the protections available to persons subject to subpoenas. Prior to the amendment, *Rule 45* had incorporated the protections of *Rule 26*, stating that subpoenas to produce documents were subject to the provisions of *Rule 26(c). Fed. R. Civ. P. 45(d)(1)* (1990). In the 1991 revisions, this express reference to *Rule 26* was deleted and the protections available to those receiving a subpoena were spelled [*23] out in *subdivi-*

sion 45(c). That subdivision expressly provides that "[o]n timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it . . . (iii) requires disclosure of privileged or other protected matter and no exception or waiver applies." *Rule 45(c)(3)(A)*. The Advisory Committee Notes explain that *subdivision 45(c)* was "not intended to diminish rights conferred by *Rules 26-37* or any other authority" and that *subparagraph 45(c)(3)* was intended to "track[] the provisions of *Rule 26(c)*."

2. *Is Royal a "Party" for Purposes of Asserting the Work Product Privilege under Rule 26(b)(3)*

Before beginning to analyze whether third parties may assert the work product privilege, the Court must first dispense with the respondents' initial argument that Royal should be considered a party to the underlying adversary action and therefore entitled to assert work product protection under *Rule 26(b)(3)*. Royal argues it should be considered a party to the adversary action for two reasons: because, as a creditor, it is a party to SFC's bankruptcy and because its settlement agreement with the bankruptcy trustee gives it an interest in the litigation. Neither [*24] of these arguments is persuasive.

Royal's status as a creditor in SFC's bankruptcy does not make it a party to the underlying adversary action here. The adversary proceeding was brought by the bankruptcy trustee against Career Path. No creditor, including Royal, is a party to that action. Under *Federal Rule of Bankruptcy Procedure 7024*, Royal could have sought to intervene in the adversary action pursuant to the terms of *Federal Rule of Civil Procedure 24* and become a party to the action, but it did not do so. [HN5] Merely being a creditor in the related bankruptcy proceeding does not give Royal any of the rights or obligations of a party to the adversary action. Just as Royal had no obligation as a creditor to answer the complaint or serve initial disclosures, it has no right as a creditor to assert work product privilege under *Rule 26(b)(3)*.

Royal's settlement agreement does not alter Royal's status as a non-party for purposes of *Rule 26(b)(3)*. The settlement agreement gives Royal an interest in the litigation and certain rights with respect to the trustee, including the right to be consulted concerning settlement [*25] of adversary claims and under certain conditions the right to take over claims and prosecute them on behalf of the estate. It does not, however, purport to make Royal a party to adversary actions brought by the trustee. Although the settlement agreement might provide the basis for Royal to move to intervene in the adversary action, in the absence of such a motion being made and granted, the agreement does not make Royal a party.

Royal also cannot be considered a "party's representative" entitled to assert work product protection under *Rule 26(b)(3)*. [HN6] *Rule 26(b)(3)* protects only work product prepared by a party's representative in its representative capacity. *Ramsey v. NYP Holdings, Inc., No. 00-cv-3478, 2002 U.S. Dist. LEXIS 11728, 2002 WL 1402055 at *8 (S.D.N.Y. June 27, 2002)*, *citing* the Advisory Committee Notes to *Rule 26(b)(3)* (*Subdivision (b)(3)* protects materials prepared in anticipation of litigation "by or for a party or any representative *acting on his behalf*") (emphasis added). Even if Royal could be considered in some way the trustee's representative by virtue of their settlement agreement, the investigative file at issue here was prepared over a year before the settlement agreement [*26] was reached. The file was therefore not prepared on the trustee's behalf and Royal cannot be considered the trustee's representative for purposes of invoking *Rule 26(b)(3)*.

3. *As Non-Parties, Can the Respondents Nonetheless Assert the Work Product Privilege?*

Having determined that Royal is a third party to the underlying adversary action, the Court now turns to the central issue presented by the respondents' motion to quash: Can the work product privilege be asserted by those who are not parties to the underlying action for which the information is sought?

a. *Prior Decisions Addressing the Issue*

The U.S. Court of Appeals for the Third Circuit has never addressed this issue. Those courts that have considered it have, with very few exceptions, concluded that the language of *Rule 26(b)(3)* protecting only parties' work product precludes non-parties from asserting the privilege. *See, e.g., In re Subpoena served on the Cal. Pub. Util. Comm'n, 892 F.2d 778, 780-81 (9th Cir. 1989)*; *In re Polypropylene Carpet Antitrust Litig., 181 F.R.D. 680, 691 (N.D. Ga. 1998)*. [17]

17 *See also Ramsey, 2002 U.S. Dist. LEXIS 11728, 2002 WL 1402055 at *6* (collecting cases); c.f. *Hunter v. Heffernan, No. 2:94cv5340, 1996 U.S. Dist. LEXIS 9244, 1996 WL 363842 (E.D. Pa. June 28, 1996)* (stating, in dicta, that "[d]ocuments prepared by nonparties to the present litigation are unprotected" by the work product privilege); 8 *Federal Practice and Procedure* § 2024 at 206-07) ("Documents prepared for one who is not a party to the present suit are wholly unprotected by *Rule 26(b)(3)* even though the person may be a party to a closely related lawsuit in which he will be disadvantaged if he must disclose in the present suit.")

[*27] Although none states so directly, these cases implicitly view *Rule 26(b)(3)* as the sole source of authority for protecting work product from discovery. Be-

cause "the language of the rule makes clear that only parties and their representatives may invoke its protection," courts are "not free to suspend the requirement." *Cal. Pub. Util. Comm'n at 781.* Even in cases where leaving third party work product unprotected would cause hardship or inequity or frustrate the policy behind the privilege, courts have been largely unwilling to extend the doctrine beyond the terms of *Rule 26(b)(3). See, e.g., Loustalet v. Refco, Inc., 154 F.R.D. 243, 246-47 (C.D. Cal. 1993).* In *Loustalet*, even though a third-party had anticipated being involved in the litigation at issue and was a party in "closely related lawsuits," it was not permitted to assert the work product privilege because it was not a party or a party's representative as required by *Rule 26(b)(3). Id. at 247.*

A handful of decisions, however, have allowed third parties to assert work product privilege despite the limiting language of *Rule 26(b)(3). See Abdell v. City of New York, No. 05 Civ. 8453, 2006 U.S. Dist. LEXIS 66114, 2006 WL 2664313 (S.D.N.Y. Sept. 14, 2006)*; [*28] *Basinger v. Glacier Carriers, Inc., 107 F.R.D. 771, 772-73 (M.D. Pa. 1985).* [18]

> 18 There are also a handful of reported cases that assume, without discussion or analysis, that third parties can assert the work product privilege. *See, e.g., National Union Fire Ins. Co. of Pittsburgh v. Murray Sheet Metal Co., Inc., 967 F.2d 980 (4th Cir. 1992)* (quashing a third party subpoena on work product grounds); *In re Sealed Case, 272 U.S. App. D.C. 314, 856 F.2d 268, 273 (D.C. Cir. 1988)* (same). Because these cases never address the limiting language in *Rule 26(b)(3)* or provide any explanation for the basis of a third party's assertion of the privilege, they are not helpful to the Court's analysis here.

Although both reach the same conclusion, *Abdell* and *Basinger* provide different rationales for extending the privilege to non-parties. In *Abdell*, the court held that although *Rule 26(b)(3)* was limited to parties, "the work [*29] product doctrine as articulated in [*Hickman*] is broader than *Rule 26(b)(3)*" and could provide independent authority for protecting third party work product. *2006 U.S. Dist. LEXIS, [WL] at *3.* In *Basinger*, the district court relied on the general authority of *Rule 26(c)* permitting protective orders "for good cause shown" to extend *Rule 26(b)(3)* to non-parties who were potential defendants in the underlying litigation. *Id. at 772.*

Abdell concerned plaintiffs suing for wrongful arrest who sought to subpoena a processing form from the district attorney's office, which was not a party to the suit. Considering the district attorney's motion to quash, the court held that work product protection for a third party might be authorized under *Hickman.* To determine if *Hickman* applied, the court analyzed whether protecting the requested material would further the three purposes for the work product privilege articulated in *Hickman*: preventing discovery from chilling an attorney's ability to prepare his legal theories and strategies; preventing an opponent from free-loading off his adversaries' preparation, and preventing disruption of ongoing litigation. Finding that the form at issue [*30] was drafted with the understanding that it was ordinarily discoverable in a criminal case and that there were no pending criminal proceedings, the court held that none of the three purposes of *Hickman* was implicated by the production of the document and that the form was therefore not protected from discovery. *2006 U.S. Dist. LEXIS 66114, [WL] at *3-4.*

In *Basinger*, the district court considered a subpoena issued by a plaintiff in a personal injury auto accident case, seeking the investigative file of the insurer of the tavern where the defendant had been drinking before the accident. Because the tavern was not a party, *Rule 26(b)(3)* did not apply. Nonetheless, finding that the insurer had prepared the file in anticipation of possible litigation with the plaintiff and that the tavern could still be sued, the court held that work product protection identical to that in *Rule 26(b)(3)* could be authorized by the broad protective order provision of *Rule 26(c). Rule 26(c)* authorizes protective orders when required by justice to prevent oppression or undue burden, and the court held that it would be "unduly 'burdensome' and therefore, unjust, to require a non-party to deliver [work product] to a party who [*31] may subsequently join the non-party in the litigation." *Id. at 772*; *see also In re Polypropylene, 181 F.R.D. at 692* (issuing a protective order under *Rule 26(c)* to protect third party documents that "would constitute attorney work product as defined by *Rule 26(b)(3)* if [the third party] was a party to this litigation").

b. *Asserting the Work Product Privilege in this Case*

After considering the varying approaches taken by the other courts to have addressed the issue, as well as the history of the work product doctrine and the text of the applicable rules, the Court concludes that the respondents may assert the work product privilege here.

As third parties, the respondents cannot invoke work product protection under *Rule 26(b)(3).* That rule is limited by its terms to work product prepared by a party or its representative, and as discussed above, neither Royal nor Sonnenschein nor the Mintz Group is a party to the underlying adversary action here or is a party's representative.

[HN7] *Rule 26(b)(3),* however, is not the only means for asserting work product protection in federal courts. The rule is only a partial codification of the work product

privilege, *Sporck, 759 F.2d at 316,* [*32] and therefore leaves room for the privilege to be asserted outside its terms in appropriate cases. Courts have extended the work product privilege beyond the strict terms of *Rule 26(b)(3)* to protect intangible work product outside the "documents and tangible things" protected by the rule. *See Real Property, 95 F.3d at 428 n.10.* Similarly, the Court believes the privilege may be extended beyond the strict terms of the rule to protect non-parties' work product when doing so accords with the purposes of the privilege set out in *Hickman v. Taylor.*

[HN8] The court disagrees with those courts that have assumed that *Rule 26(b)(3)* forbids district courts from extending work product protection to third parties. Although *Rule 26(b)(3)* was intended to set out a uniform work product provision for the federal courts, nothing in the text of the rule or its history, or in the relevant advisory committee notes, suggests that it was intended to foreclose the application of the attorney work product privilege outside its terms in appropriate cases.

The source of the Court's authority to extend the work product privilege beyond the terms of *Rule 26(b)(3)* is three-fold. First, [HN9] *Rule 45* [*33] expressly provides that the court from which a subpoena has issued shall quash or modify the subpoena if it "requires disclosure of privileged or other protected matter and no exception or waiver applies." *Rule 45(c)(3)(A)(iii). Rule 45* does not define what privileges and protections are to be enforced under its terms, but the language is broad enough to include protection against discovery of third-party work product in appropriate cases. Nothing in *Rule 45*'s history or text indicates that it was intended to incorporate *Rule 26(b)(3)*'s restriction of work product to parties. The Advisory Committee Notes to the 1991 revisions to the rule indicate that the authority to issue protective orders under *Rule 45* was intended to track the general protective order provisions of *Rule 26(c)*, but do not mention the work product provisions of *Rule 26(b).*

Second, [HN10] *Rule 26(c)* authorizes a court to issue a protective order "for good cause shown" to protect "a party or person from annoyance, embarrassment, oppression or undue burden or expense." As found by the *Basinger* and *Polypropylene* courts, this language is sufficiently sweeping to authorize a protective order preventing the undue burden [*34] of disclosing third-party work product in appropriate cases. Indeed, even many of those decisions which refuse to protect third party work product under *Rule 26(b)(3)* recognize that a protective order could issue under *Rule 26(c)* to prevent disclosure of the material. *See Cal. Pub. Util. Comm'n at 781 n.2*; *Ramsey, 2002 U.S. Dist. LEXIS 11728, 2002 WL 1402055 at *7*; 8 *Federal Practice & Procedure* § 2024 at 356 ("To the extent that *Rule 23(b)(3)*, literally read, seems to give insufficient protection to material prepared in connection with some other litigation, the court can vindicate the purposes of the work-product rule by the issuance of a protective order under *Rule 26(c).*")

Third, [HN11] *Hickman* itself provides authority to protect work product outside the terms of *Rule 26(b)(3)*, whether as to intangible work product or work product produced by third parties. *Abdell, 2006 U.S. Dist. LEXIS 66114, 2006 WL 2664313 at *3*; *see also* 8 *Federal Practice & Procedure* § 2024 at 355 n.17 (noting that the position that *Hickman* authorizes protection of third party work product "has much to commend itself given the other areas of incomplete codification in *Rule 26(b)(3)*").

Having determined that [*35] the Federal Rules and *Hickman* authorize the Court to protect third party work product in appropriate cases, the Court must determine whether the respondents present an appropriate case.

Here, Career Path's subpoena seeks an investigative file prepared by Royal's attorneys in anticipation of litigation against SFC and the trucking schools with which it did business, including Career Path. In essence, the subpoena seeks to compel discovery of an adversary's work product prepared in anticipation of litigation against the very party issuing the subpoena. Although the exact litigation that Royal anticipated did not occur (because Royal did not sue Career Path directly), the subsequent adversary action by the trustee was brought with Royal's direct involvement. Through its settlement agreement with the trustee, Royal provided funds for the trustee to pursue adversary actions, like this one, against the trucking firms that did business with SFC. Any money collected through these adversary actions would be paid to the estate for the benefit of its creditors, the largest of whom is Royal. In addition to a financial interest in these suits, Royal also received a measure of control over [*36] the litigation, including the right to be consulted on strategy and to share privileged documents and the right, in certain circumstances, to pursue claims on the estate's behalf.

Under these circumstances, disclosure of Royal's work product implicates all the purposes for the privilege articulated in *Hickman*: preventing discovery from chilling attorneys' ability to formulate their legal theories and prepare their cases, preventing opponents from free-loading off their adversaries' preparation, and preventing disruption of ongoing litigation. *Hickman, 329 U.S. at 511*; *Abdell, 2006 U.S. Dist. LEXIS 66114, [WL] at *3-4.* Allowing a defendant in an adversary action brought by the trustee to discover creditors' attorney work product would impair those attorneys' ability to investigate their clients' potential claims and to develop

legal strategies. Allowing such discovery would also enable a defendant to utilize the creditors' investigation as his own and thereby free-ride on "wits borrowed from the adversary." *Hickman at 517* (Jackson, J., concurring). Finally, permitting work product discovery could potentially disrupt ongoing litigation by sidetracking adversary actions into collateral proceedings [*37] seeking work product from creditors. In addition, in this case, there is the possibility, albeit remote, that Royal might become a party to the adversary action under the terms of its settlement agreement with the trustee. Under the agreement, if the trustee favors settling with Career Path but Royal objects, then Royal has the right to prosecute the claim on behalf of the estate.

B. *Are the Subpoenaed Documents Work Product and, if so, Has Career Path Made a Sufficient Showing to Overcome the Work Product Privilege?*

Having determined that the respondents may assert the work product privilege, the Court can now turn to determining whether Royal has established that the requested material is in fact work product and, if it has, whether Career Path has made a sufficient showing of need to permit its production.

[HN12] The work product privilege protects material "prepared by or on behalf of attorneys in anticipation of litigation." *Westinghouse, 951 F.2d at 1428.* It extends to material prepared in anticipation of litigation by an attorney's "investigators and other agents." *United States v. Nobles, 422 U.S. 225, 238, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975).* Even if [*38] material was prepared in anticipation of another litigation, it will still be protected as work product if the anticipated litigation was related to the proceedings in which the material is to be produced. *In re Grand Jury Proceedings, 604 F.2d 798, 803 (3d Cir. 1979)* (upholding work product protection to material prepared in anticipation of related litigation). Here, the Mintz Group's investigative file was prepared on behalf of Royal's attorneys in anticipation of litigation arising from SFC's bankruptcy, including anticipated litigation against trucking schools like Career Path. The investigative file is therefore covered by the work product privilege.

[HN13] Even if material is protected attorney work product, it can still be produced if the party seeking discovery shows that it has a substantial need for the materials and that it cannot without undue hardship obtain the substantial equivalent of the materials by other means. *In re Cendant Corp., 343 F.3d at 663.* There are two levels of protection for attorney work product: "ordinary" work product prepared in anticipation of litigation by an attorney or the attorney's agent is discoverable only upon [*39] a showing of need and hardship; "core" or "opinion" work product that encompasses "mental impressions, conclusions, opinion or legal theories of an attorney or other representative of a party concerning the litigation is generally afforded near absolute protection from discovery." *Id.* (internal quotation and citation omitted).

The parties' briefing has identified four categories of materials in the requested investigative file. The Court will consider these categories separately.

1. *Attorney Notes and Memoranda*

Attorney notes and memoranda are at the center of the "core" work product category generally afforded near absolute protection. Career Path has withdrawn its request to compel production of these documents and they need not be produced.

2. *Investigators' Memoranda and Reports to Attorneys*

This category consists of "memoranda prepared by the investigators as reports to Sonnenschein concerning interviews with truck driving school personnel and former students, and SFC-related personnel." Melnick Decl. at P7; Buys Decl. at P6. Like the other documents in the investigation file, these memoranda and reports are alleged to be "annotated with the investigators' handwritten [*40] comments, handwritten post-it notes, or colored flags or highlighters" and that "[m]any of the handwritten comments suggest follow-up actions for further investigation or supply details of conversations between the investigator and subject." Buys Decl. at P5.

To the extent that annotations on the documents reflect the mental impressions and opinions of the investigating agents or the supervising attorneys, they are "core" work product largely immune from discovery, absent a showing of extraordinary need. Even to the extent the documents do not contain such annotations or those annotations can be redacted, "[m]emoranda summarizing oral interviews" may still "indirectly reveal the attorney's mental processes, his opinion work product." *In re Grand Jury Investigation, 599 F.2d 1224, 1231 (3d Cir. 1979).*

Although the Court believes these memoranda may be entitled to heightened protection as "core" work product, it is unnecessary to decide the issue because Career Path has failed to make the showing of substantial need and undue hardship required for even ordinary work product.

There are three categories of witness memoranda at issue: those relating to Career Path [*41] and its former students and employees, those relating to SFC and its employees, and those relating to other trucking schools and their former students and employees.

a. *Memoranda re Career Path and its employees and students*

With respect to documents relating to interviews with Career Path's students and former or current employees, Career Path asserts these documents "go to the heart of the trustee's case" against it and "would assist [Career Path] in identifying witnesses and information and information relating to the allegations made by the Trustee." Career Path's Supp. Br. at 8. Career Path asserts that it has substantial need for these memoranda because they were taken closer in time to the events they concern than any statements that could now be obtained from these witnesses and that the statements are therefore presumptively more accurate. Career Path also states the "itinerant nature" of trucking school students makes it difficult to track down these witnesses. Career Path has submitted an affidavit attesting to its unsuccessful efforts to track down three of its former students identified by the trustee as having relevant information. Career Path's Supp. Br. at [*42] 9-10.

Although the Court agrees with Career Path that these memoranda would be relevant to the adversary action, the Court does not believe Career Path has shown it could not obtain substantially equivalent information without undue hardship. These witnesses were Career Path's own former employees and students. Royal had no privileged access or extra information about them, and Career Path could have chosen to interview them at any time. That Career Path delayed in doing so does not establish the substantial hardship necessary to obtain attorney work product. Career Path can obtain this information in the same way as did Royal's investigators. The fact that the memoranda memorialize interviews taken closer to the events in question does not show that Career Path cannot obtain equivalent information. This case does not involve interviews with percipient witnesses to an accident or a sudden crime where a contemporaneous statement might be more reliable.

Finally, Career Path's attestation that it tried and failed to locate three former students identified by the trustee as having relevant information does not show substantial hardship. Although Career Path states in its brief that its [*43] attempt to locate these students was "timely," its affidavit gives no indication as to when this investigation was made. In the face of the likelihood that these witness memoranda contain mental impressions and conclusions of attorneys or their representatives, this showing is insufficient to prove the undue hardship necessary for production of attorney work product.

b. *Memoranda re SFC and its employees*

With respect to documents relating to interviews with SFC-related witnesses, Career Path claims this information is necessary to show whether SFC acted with intent to hinder creditors. Career Path argues it cannot obtain this information elsewhere because, due to the current and potential criminal charges from SFC's collapse, "it is likely that key SFC personnel would not give testimony or statements" to Career Path. Career Path believes SFC's principal, Andrew Yao, who has been indicted, and other SFC officials will refuse to be interviewed and will assert their *Fifth Amendment* rights if deposed. Career Path's Supp. Br. at 8, 10.

Career Path's argument that it will not be able to obtain information from SFC personnel due to the pending criminal charges is too speculative to [*44] establish undue hardship. Career Path has provided no evidence that it ever sought out or interviewed any SFC employee or that any employee refused to speak to Career Path out of fear of the pending criminal investigation. Absent any showing that Career Path has actually encountered the difficulties it assumes, Career Path has not sustained its burden to obtain Royal's work product.

c. *Memoranda re employees and students of other trucking schools*

With respect to documents relating to interviews concerning other trucking schools, Career Path claims it needs the information to support a "key part" of its defense, that Career Path did not engage in the practices that other schools are alleged to have done. It alleges that locating employees and students of these schools "four years or more after the schools closed" is "next to impossible." Career Path's Supp. Br. at 9-10.

As to these documents, Career Path has shown neither a substantial need nor an undue hardship. Career Path's stated reason for these documents, to show that other schools engaged in activities that it did not, is not compelling. Whether or not other trucking schools engaged in improper activities with SFC is [*45] of little if any relevance to whether Career Path engaged in those activities. Career Path's alleged hardship is also inadequate. Career Path offers no reason why it is only seeking these documents now "four or more years" after SFC's bankruptcy.

3. *Interview Notes and Scripts Prepared by Investigators*

This category of documents is described in an affidavit attached to one of the respondents' briefs. Melnick Decl. at P7. No description of the category is given other than that it contains "interview notes and scripts prepared by the investigators." Career Path's briefing does not respond to this category separately, but its arguments with respect to memoranda concerning witness statements apply equally here.

[HN14] Scripts of questions to be used in interviewing witnesses are core attorney work product, re-

flecting legal strategy and decision-making concerning the important areas of inquiry with particular types of witnesses. As they concern only the questions to be posed to witnesses and not the answers, they have little or no relevance to any issues in the adversary action and need not be produced.

Notes of witness statements may also be core attorney work product, containing the [*46] investigators' mental impressions of a witness. Unlike memoranda summarizing a witness interview, however, notes of an interview are more likely to contain the note-taker's record of a witness's words and demeanor and less likely to contain detailed analysis or commentary. For the reasons given above in discussing the witness memoranda, the Court believes Career Path has failed to meet its burden to allow production of the notes of witness interviews.

4. *Public Records*

This category of documents consists of public records, including FOIA results, FOIA requests, news articles, court documents and deposition transcripts, website reports and Lexis/Nexis searches about Career Path, SFC, or other trucking schools. It also includes asset searches concerning Career Path (Career Path having dropped its request for information about asset searches of other entities).

Career Path suggests that because this information is in the public domain, it is not entitled to work product protection. This is incorrect. [HN15] Public documents collected by or on behalf of an attorney in anticipation of litigation constitute work product because the choice of selecting which subjects to research and which [*47] documents to collect represents the attorney's or the agent's mental impressions and legal opinions about the important issues in the actual or anticipated litigation. *See Sporck, 759 F.2d at 315-16* (holding that the selection and compilation of publically-available and/or previously-produced documents by counsel in preparation for pretrial discovery falls within the highly-protected category of opinion work product). In addition, allowing disclosure of such information without a showing of substantial need would risk allowing opposing counsel to free-ride off an adversary's preparation. *See Hickman, 329 U.S. at 517.*

Career Path could nonetheless obtain this information upon a showing of substantial need and undue hardship, but it has failed to make the required showing. Although Career Path claims this information would be relevant to central issues in the underlying adversary action, including SFC's solvency and its intent to defraud, it has failed to make any showing as to why it cannot obtain this information itself. By definition, the documents in this category are public and therefore equally available to Career Path as to the respondents. [*48] There is no hardship, and certainly no undue hardship, to requiring Career Path to obtain these documents themselves rather than through the respondent's work product.

5. *Electronic Documents*

In addition to paper documents, the Mintz Group's investigative file also contains electronic documents. Although the respondents do not provide an index of these documents, they have provided a percentage breakdown of these documents into different categories. For the most part these categories track those for paper documents and the same analysis will apply to each category of documents, whether in paper or electronic form. One category of electronic documents, however, is new: a category for "miscellaneous correspondence" consisting of 15% of total, about which the respondents provide no further information.

In the absence of any information about this miscellaneous correspondence, the Court cannot make any findings as to whether it should be produced. Given the extensive briefing of this issue before the Court and the numerous opportunities the respondents have had to provide this information, the Court would be justified in finding the respondents' claims of privilege waived as to [*49] this correspondence. The Court, however, will exercise its discretion and allow the respondents, if they choose, to file a supplemental submission with an index of this correspondence.

An appropriate Order follows.

ORDER

AND NOW, this 29th day of November, 2006, upon consideration of the Motion to Overrule Objections to Subpoena and Compel Compliance with Subpoena Filed by Career Path Training Corporation ("Career Path") (Docket # 1) and the Cross Motion for Protective Order filed by Sonnenschein Nath & Rosenthal LLP ("Sonnenschein") (Docket # 5), and the oppositions thereto, including supplemental briefing, IT IS HEREBY ORDERED that the Career Path's Motion to Overrule Objections to Subpoena and Compel Compliance is DENIED and Sonnenschein's Cross Motion for Protective Order is GRANTED IN PART AND DENIED IN PART for the reasons set forth in the accompanying memorandum.

Career Path's Motion to Overrule Objections to Subpoena and Compel Compliance is DENIED and Sonnenschein's Cross Motion for Protective Order is GRANTED as to the following categories of documents within the subpoenaed investigative file:

1) Attorney notes and memoranda;

2) Investigators' memoranda and reports [*50] to Sonnenschein, including "action lists" for the investigators

3) Interview notes and scripts prepared by investigators;

4) Public records, including FOIA results, FOIA requests, news articles, court documents and deposition transcripts, website reports and Lexis/Nexis and asset searches.

5) Electronic documents that fall within categories 1-4.

Career Path's Motion to Overrule Objections to Subpoena and Compel Compliance is DENIED and Sonnenschein's Cross Motion for Protective Order is also DENIED as to the following category of documents within the subpoenaed investigative file:

6) Electronic documents that fall within the respondent's category of "miscellaneous correspondence."

If the respondents wish to continue to assert the attorney work product privilege as to this miscellaneous correspondence, the respondents shall submit an index of these documents showing the author, recipient, copyee, subject and date of each document within twenty (20) days of this Order. Career Path may respond to this index within fifteen (15) days of its production.

BY THE COURT:

MARY A. McLAUGHLIN, J.

Not Reported in S.W.2d, 1995 WL 686112 (Tenn.Crim.App.)
(Cite as: 1995 WL 686112 (Tenn.Crim.App.))

C
Only the Westlaw citation is currently available.

SEE RULE 19 OF THE RULES OF THE COURT OF CRIMINAL APPEALS RELATING TO PUBLICATION OF OPINIONS AND CITATION OF UNPUBLISHED OPINIONS.

Court of Criminal Appeals of Tennessee, at Jackson.
STATE of Tennessee, Appellee,
v.
James Lewis FRITZ, Appellant.

No. 02C01-9503-CC-00094.
Nov. 15, 1995.

Madison Circuit; Franklin Murchison, Judge (flagrant nonsupport).
George Morton Googe, District Public Defender, and Pamela J. Drewery, Assistant Public Defender, Jackson, for Appellant.

Charles W. Burson, Attorney General of Tennessee, and Robert W. Stack, Eugene Honea, Assistant Attorney General of Tennessee, Nashville, James G. Woodall, District Attorney General, and Donald H. Allen, Assistant District Attorney General, Jackson, for Appellee.

OPINION

JOHN K. BYERS, Senior Judge.

***1** The defendant entered a plea of guilty to flagrant non-support in violation of TENN.CODE ANN. § 39-15-101, a class E felony.

The trial judge denied probation, found the defendant to be a standard Range I offender and sentenced him to serve two years. The release eligibility for this offense is 30%. In addition to this, the trial judge ordered that when released on parole, a condition thereof would be that he make restitution in the amount of $38,000.00.[FN1]

FN1. Release from a two-year felony sentence is to probation and not to parole. TENN.CODE ANN. § 40-35-501(a)(2)-(6) . However, as with parole, this statute reflects that the terms and conditions of probation supervision after such release are to be established by the Department of Corrections, not the trial court.

The defendant raised four issues on appeal. Three of these dealt with the sentence as to length or alternative sentencing. These are now moot, as conceded by the defendant, because the sentence has been served.

The only issue for us to determine is whether the trial court could place a condition upon the parole of the defendant.

We find he cannot and find that portion of the judgment is void.

Chapter 28 Title 40 of the Tennessee Code (§§ 40-28-101 *et seq.*) creates and defines the duties of the Board of Paroles. TENN.CODE ANN. § 40-28-103(a) provides "There is hereby created a full-time, autonomous board of paroles ... which shall be autonomous in structure...."

In *State ex rel. Wade v. Norvell,* 443 S.W.2d 839, 841 (Tenn.Crim.App.1969) (concurring opinion), this Court said:

The courts have no jurisdiction to exercise authority or control or command or dominion over the Board of Probation and Paroles in the exercise of its statutory duties with reference to the parole of prisoners and allowance or forfeiture of time credits upon their sentences.

The State contends that TENN.CODE ANN. § 40-38-101 *et seq.,* the Victims' Bill of Rights, requires or allows the trial court to make restitution a part of parole. TENN.CODE ANN. § 40-38-106(2) provides that victims of crimes involving offenses

against property have a right to restitution ordered as a condition of probation or a suspended sentence or parole. The State says this gave authority for the trial court to order the defendant to make restitution as a condition of parole. We do not accept this view.

TENN.CODE ANN. § 40-38-106 does not attempt to enlarge the authority of the courts to encompass the control of the conditions of parole, which is vested in the autonomous Board of Paroles. In the absence of some indication from the legislature that the provision of restitution on parole release is to be determined by the courts, we conclude that so much of TENN.CODE ANN. § 40-38-106 that deals with restitution upon parole does not confer jurisdiction on the courts to enter such orders. What duties it imposes upon the Board of Paroles is not an issue before us to decide.

We conclude so much of the judgment of the trial court as attempted to impose restitution as a condition of parole is null and void and of no effect and is stricken from the judgment.

JONES and TIPTON, JJ., concur.

Tenn.Crim.App.,1995.
State v. Fritz
Not Reported in S.W.2d, 1995 WL 686112 (Tenn.Crim.App.)

END OF DOCUMENT

IN THE CRIMINAL COURT FOR WILLIAMSON COUNTY
AT FRANKLIN, TENNESSEE

STATE OF TENNESSEE)
)
VS.) CASE NO. I-CR111479
)
CHRIST KOULIS)

ORDER TO UNSEAL RECORDS

This cause came before the Court on the defendant's motion to seal the records filed by the State of Tennessee in response to the defendant's request for discovery in this case. This Court previously sealed the records on a temporary basis in order for the parties involved to review the records and to advise the Court of the specific records to be included in the request. During that time, this Court received a request from WSMV-TV (the Meredith Corporation) and the Tennessean to intervene in this case for the sole issue of determining whether the records should be sealed. In addition, the victim's family also filed a motion to intervene to allow the family to review the discovery filed in this case. This Court granted the motions to intervene filed by all three parties and heard argument from the parties on May 31, 2006.

In this case, the defendant argues that unsealing the records will jeopardize his right to a fair trial. The media intervenors argue that the public has a qualified right to examine public documents in judicial proceedings. The family believes it has a right to review the file with the prosecution in an effort to assist in prosecution of the case.

In deciding whether or not the records should remain sealed, this Court is guided by the precedents set by the Tennessee Appellate Courts. In *State v. Drake*, 701 S.W.2d 604 (Tenn. 1985), the Court held that the presumption of open access to public records will only be overcome by an overriding interest requiring closure to the public. In considering the defendant's request to seal the records, this Court must consider any reasonable alternatives to

sealing the records and make sure that any order sealing the records is no broader than necessary to protect the defendant's interest. *Id.* at 608.

In this case, the Court finds that the defendant's privacy interest as well as federal regulations requires that the defendant's personal medical records remain under seal. Counsel for the State and the defendant shall file an order with this Court within one week specifically identifying those records.

However, after hearing arguments of counsel, this Court cannot find that the defendant has successfully rebutted the presumption of openness attached to these public records. By filing the entire record, the State may have created a substantial issue of appeal but defendant's argument that the unsealing of the records will impact his ability to choose a fair and impartial jury is too speculative at this time. This Court cannot see into the future. Therefore, with the exception of the defendant's personal medical records remaining under seal, this Court will vacate its Order temporarily sealing the records. The family's motion to intervene is rendered moot by the Court's decision.

Jeff Bivins
Circuit Court Judge
6-4-06

Submitted by:

Kim R. Helper
Assistant District Attorney

Not Reported in S.W.3d, 2000 WL 298695 (Tenn.Crim.App.)
(Cite as: 2000 WL 298695 (Tenn.Crim.App.))

C
Only the Westlaw citation is currently available.

SEE RULE 19 OF THE RULES OF THE COURT OF CRIMINAL APPEALS RELATING TO PUBLICATION OF OPINIONS AND CITATION OF UNPUBLISHED OPINIONS.

Court of Criminal Appeals of Tennessee, at Jackson.
STATE of Tennessee, Appellee,
v.
Michael THOMASON, Appellant.

No. W1999-02000-CCA-R3-CD.
March 7, 2000.

Dwayne D. Maddox, III, D.D. Maddox, Maddox, Maddox & Maddox, Huntingdon, TN, James S. Haywood, Jr., Brownsville, TN, for the appellant.

Paul G. Summers, Attorney General & Reporter, Patricia C. Kussmann, Assistant Attorney General, Nashville, TN; Clayburn L. Peeples, District Attorney General, Shannon Poindexter, Assistant District Attorney General, Trenton, TN, for the appellee.

OPINION

GLENN.

***1** The defendant, Michael Thomason, appeals as of right his conviction by a Haywood County Circuit Court jury of four counts of sexual battery, one count of aggravated sexual battery, and one count of contributing to the delinquency of a minor. The trial court sentenced the defendant as a Range I standard offender to two years on each of the sexual battery charges; ten years on the aggravated sexual battery charge; and eleven months and twenty-nine days on the misdemeanor count of contributing to the delinquency of a minor, the sentences to be served concurrently. The defendant presents the following issues for review:

I. Whether he was deprived a fair and impartial trial because of errors of the trial court including:

(a) Failure to grant the defendant's request for a bill of particulars;

(b) Failure to require the State to elect offenses for the various victims;

(c) Failure to hold a jury-out hearing regarding testimony of other bad acts according to Rule 404(b), Tennessee Rules of Evidence, and allowing testimony as to such acts;

(d) Allowing admission of prior inconsistent testimony by one of the victims; and

(e) Reinstatement of Count 11 of the indictment after it had been severed.

II. Whether there was prosecutorial misconduct in handling the appearance of a ten-year-old victim-witness and in providing information to the victims regarding possible compensation;

III. Whether the trial court erred in refusing to instruct the jury as to possible penalties; and

IV. Whether the special verdict form submitted to the jury and the charge as to its meaning were incomprehensible.

Based upon our review, we affirm the convictions in Count 2 (sexual battery) and Count 11 (aggravated sexual battery), reverse and dismiss the conviction in Count 15 (contributing to the delinquency of a minor), and reverse and remand for a new trial the convictions in Counts 9 (sexual battery), 13 (sexual battery), and 14 (sexual battery).

PROCEDURAL BACKGROUND

The indictment of fifteen counts against the defendant consisted of the following:

Count I: rape of KF [FN1]

FN1. This court's policy is to refer to minor victims of sexual abuse by their initials rather

than their names.

Count 2: sexual battery of KF

Count 3: contributing to the delinquency of minor KF

Count 4: rape of KF

Count 5: rape of KF

Count 6: rape of BC

Count 7: rape of BC

Count 8: contributing to the delinquency of minor BC

Count 9: sexual battery of BC

Count 10: contributing to the delinquency of minor BC

Count 11: aggravated sexual battery of TH

Count 12: aggravated sexual battery of TH

Count 13: sexual battery of JC

Count 14: sexual battery of JC

Count 15: contributing to the delinquency of minor JC.

Counts 3, 8, 10, and 12 were dismissed prior to the trial at the request of the State. The defendant was found not guilty of Counts 1, 4, 5, 6, and 7. Defendant was found guilty of Counts 2, 9, 11, 13, 14, and 15.

FACTS

At the time of his trial on June 30, 1998, the defendant was a forty-six-year-old, self-employed carpet installer who lived with his ex-wife and their three children on Tom Owen Road in Brownsville. The defendant also owned a "camphouse" on River Bend Road on the Hatchie River in Haywood County. The camphouse was a trailer on the banks of the river. The defendant, his daughter, and her friends spent a great deal of time there.

***2** As part of the State's proof, each of the four victims testified. The first to testify was TH, a ten-year-old at the time of trial. TH was named as the victim in Count 11, in which the defendant was convicted of aggravated sexual battery and sentenced to ten years, and in Count 12, which was dismissed prior to the trial. TH testified that she knew the defendant because he was her next-door neighbor and a friend of her parents. She spent weekends at the camphouse with the defendant and without her parents. She testified to an incident that occurred on an unspecified weekend, when she could only recall that it was "real cold." The defendant took all her clothes off and put her in a tanning bed located in one of the bedrooms at the camphouse. He was in the room with her and was unclothed. She testified that the defendant "started feeling of me," touching her on her vagina.

On cross-examination, TH testified that the defendant's son, who was about her age, and the defendant's teenage daughter also went to the camphouse. They would watch movies and fish. When asked about the stuffed animal she was holding while testifying, TH stated that it was a Beanie Baby that her mother bought for her in a shop across the street from the courthouse.

JC, age eighteen at the time of trial and the second victim to testify, said she had known the defendant for about two years. JC met the defendant through his daughter. The two girls attended the same high school. At the time they met, JC was living with her aunt and uncle in Stanton, Tennessee. She was not getting along with her uncle, so the defendant suggested that she move into the house where he lived with his ex-wife and children. JC testified that the defendant was like a father to her. Soon after she began testifying, it became apparent that her testimony at the trial was different from that at the preliminary hearing:

A. When he would hug me, it would-it didn't mean anything like he wanted me in a different way, or when something happened it wasn't meant how I thought it was-it happened. He never touched me in my female body parts.

Q. Now, that's different from what you said at the

Preliminary Hearing, isn't it?

A. Yes.

At this point, the prosecutor was allowed to treat JC as a hostile witness.

JC testified that she moved in with the defendant in November 1996, and about three weeks later, he began touching her inappropriately. The following exchange took place between JC and the prosecutor:

Q. And what's the first incident you talked about him doing-the first thing that he did that was not appropriate?

A. When I'd come home and when I was sitting on the couch and he was just playing around with me. He'd put his-he was rubbing his hand on my leg and I took it in a different way because that's when everybody was spreading rumors that he was doing this and that to other girls.

Q. What part of your leg did he touch-did he put his hand on?

A. The inner side of my leg.

*3 Q. The inside of your leg. How far above your knee?

A. Maybe a few inches.

Q. A few inches above your knee. And you took that to be inappropriate at the time?

A. He-every parent wrestles with their kids.

She also testified as to another incident that occurred about three weeks after she had moved in with the defendant:

Q. You did say-you did tell the General Sessions Judge, though, that he put his hands inside your panties?

A. I said inside my pants.

Q. You said what?

A. Inside of my pants.

Q. I believe you were asked the question, "Inside your clothing?" by Ms. Poindexter, and you said, "Yes, ma'am." Then she said, "Inside your panties?" and you said, "Yes, ma'am." I believe you said that you backed away from him then to get away from that. Is that correct?

A. He had been drinking and I didn't know if he was playing or if he meant it, so I just left the room.

Q. Okay. Now, I believe you also said that every time he would walk by he would either hug or touch you. Did you say that?

A. Yes.

Q. Is that the way he would do?

A. He-he did me and [CT] like that. It was always-

Q. [CT], his daughter, or [KF]?

A. His daughter.

JC then testified about a third incident:

Q. Okay. And I believe you told about another incident when you had been-or when you were alone with him at the camphouse. Do you remember telling about that incident?

A. The one on the couch?

Q. When-right. When he would-you-I believe you said he had been drinking.

A. Yes.

Q. How much had he been drinking? Do you know?

A. No. I had been at work.

....

Q. Now, back to the couch. What did he do to you on that couch?

A. He just touched my leg and was just rubbing on my leg and I-I took it in a different way because we had been arguing. We hadn't been-we weren't getting along, and that's when the girls started spreading that he was touching them and messing with them and sleeping with them and-

Q. Did you testify that he took you off the couch, put you on the floor and held you down while he put his hands up your shorts?

A. Yes. That's when he was touching my leg, and I kicked him away because I didn't know if he was playing if-because he'd been drinking.

Q. Did he-did he touch you inside your panties then?

A. No.

Q. Do you remember saying that he did?

A. No. I didn't say he touched me inside of my panties.

Q. "Question-Okay. And you said his hand went up your shorts?" You answered, "Yes," to that, did you not?

A. Yes.

Q. "Question-Did they go inside your panties?" And again, you answered, "Yes," did you not?

A. I didn't remember.

Q. Where exactly did he touch you? Did you not say, "Just between my legs and on my butt"?

A. Yes.

Q. Now, is that what he did?

A. That-yes, but-

Q. How-I'm sorry. Go ahead.

A. I'm sorry.

Q. If you want to say more, please do. How did you get him off of you on that occasion?

***4** A. I kicked him off with my foot.

Q. Now, has he explained to you why that wasn't improper?

A. We talked about it several times before I moved out.

Q. Why did he tell you he was doing things like that to you?

A. Because he cared about me.

On cross-examination, JC gave the following account of her background:

My mother and father really abandoned us. They didn't want us, and we were put in Youth Services to be put in foster homes or whatever, and my aunt had taken care of me until I was five, and she wanted me, so she come to Arkansas and got me, and then I stayed with them for a while, and me and her husband just really could not get along. So, I had moved in with Mike and [the defendant's daughter].

KF, the third victim to testify, was a seventeen-year-old who had known the defendant for about six years. She was listed as the victim in Counts I, 2, 3, 4, and 5. As to those five counts, the defendant was found not guilty of Counts 1, 4, and 5, all charging rape; he was convicted of Count 2, sexual battery, and sentenced to two years; and Count 3, contributing to the delinquency of a minor, was dismissed. KF testified regarding activities at the camphouse that included smoking and drinking. The defendant supplied the cigarettes and alcohol. She also testified to having sexual intercourse with the defendant "maybe eight" times but could not recall specific times except one occasion about two weeks before her fifteenth birthday. KF was always at the camphouse when these encounters with the defendant took place. She testified that on the first occasion before her fifteenth birthday, she "kind of pushed him away. I was trying to go, but he wouldn't quit." She said the defendant raped her on that occasion. KF also testi-

fied as to another incident that happened sometime in the summer, when she was fourteen or fourteen and a half, while she was helping the defendant install vinyl flooring. On this occasion, the defendant felt of her breasts and vagina. The defendant bought her more cigarettes and a cellular phone as a way of being "nice" to her.

The fourth victim, BC, was sixteen at the time of trial, married, and expecting a baby. She was alleged to be the victim in Counts 6 and 7, charging rape; Counts 8 and 10, charging contributing to the delinquency of a minor; and Count 9, charging sexual battery. Of these five counts, the defendant was convicted only in Count 9 and sentenced to two years. Counts 6 and 7 resulted in verdicts of not guilty, and Counts 8 and 10 were dismissed.

BC testified that she had known the defendant since 1994 or 1995. She was also a friend of the defendant's daughter and often babysat the defendant's young son. BC testified that she had sexual intercourse with the defendant, but it was "not willingly." She testified the defendant raped her the first time one afternoon when she was babysitting his son. She also described an incident at the camphouse that occurred in the fall after "school had started," when the defendant gave her tequila. When questioned about the defendant's giving her tequila, she testified that it was available "[a]ny time that we wanted it. All we had to do was ask for it." On this occasion, she became drunk, passed out, and regained consciousness only to find the defendant having oral sex with her. She said that she could not remember the first time he had touched her "inappropriately" because there had been "so many times." When asked why she continued to "keep hanging out with him," she replied that she "was just scared of what he might do, or if I was to tell on him nobody would believe me so I-I didn't try to hang around Mike intentionally. I was just with [defendant's daughter] and [KF]." BC also testified to a troubled relationship with her mother who had, at one point, "pressed unruly charges" on her. The defendant told her that because of this, a judge would not believe her. Her decision to come forward with charges against the defendant was based on her feeling that she had "lived with this long enough."

***5** At the sentencing hearing, the trial court described the proof of guilt as "quite simply stated, overwhelming." The trial court described the defendant as having an "ability to detect and draw these young girls to you. You have the ability to find troubled young pubescent girls who are either without a father, without a family or without family support."

Although the defendant did not testify in the trial, ten witnesses were called in his behalf.[FN2]

> FN2. Witnesses who were minors at the time of their testimony will be identified by their initials.

Beth Estes testified that she had spoken with BC about the latter's charges against the defendant. BC told her the defendant was giving her "money and things that she needed and wanted just so she wouldn't say anything." Estes then made up a story that the defendant had "touched" her and had given her "cigarettes and things." She did not believe the "story" that BC was telling about the defendant, but she did not know whether it was true. Estes also had a conversation with JC who said that the allegations she had made against the defendant were not true. Upon cross-examination, Estes said that, prior to recanting her statement that the defendant had touched her breasts, the defendant had paid her a sum of money, less than $100, which she used to repay money she took from her "little nine-year old brother's fund raiser" to buy cocaine.

Tracy Burke testified that she overheard a conversation between JC and another young woman during which JC said the defendant's "old lawyer paid her-or was paying her $9,000.00 to say that [the defendant] didn't [touch her or any of the other girls].

Jerry Hendrix, who was JC's husband, although at the time of trial they were in the process of a divorce, testified that JC told him that "when all this was over and she got her money she was going to buy a vehicle." However, JC did not tell him what the source of these funds would be.

Gary Denevan testified that he was married to JC's aunt. JC had lived with them for about six months, and he heard JC say that she was going to receive money from "the State ... [from] a fund for those testifying...." He had also heard that JC had accused him of molesting her. Upon cross-examination, Denevan said that he had only heard about JC's accusation against him two days prior to the trial.

CC testified that she was acquainted with the defendant's daughter, as well as with KF, BC, TH, and JC. She had often stayed with the defendant's daughter at the defendant's house and had been to the camphouse where the victims alleged that the sexual acts had occurred. When asked if she had ever seen the defendant "do anything that was inappropriate with any of the girls or children that were down at the camphouse," she replied, "No. He ... treated us just like he treated his own kids." During cross-examination, she testified that the day before her testimony, she had gone with the defendant to "look at GEO Trackers."

Joe Sweat testified that he had lived with KF's mother for three years and had been told that KF had accused him of molesting her. During cross-examination, he said he heard about this claim of alleged molestation from his daughter and sister, who apparently learned of it from the defendant's sister. Sweat's sister asked KF if she had made this allegation, and KF told her she had not.

***6** Donna Jo Hughes testified that she was the best friend of the defendant's younger sister. Hughes was a beautician and, while working at her beauty shop, overheard JC say that "they wanted money" and that the defendant had not really done anything to her. Upon cross-examination, she said she had not told anyone in law enforcement about JC's statement but had told the defendant, his wife and sister, and one other person. She testified that the defendant's daughter was with JC at the beauty shop when this statement was made.

Deborah Russell testified that JC, KF, and BC came to her house to see her in October of the previous year. TH was not with them. JC told Russell they had all come over there "to discuss what we're going to say in Court against Mike." Russell thought this conversation occurred after the preliminary hearing had already been held. During cross-examination, she described her relationship with the defendant by saying, "[h]e's like a second Daddy to me. I've been around him for a long time."

CB testified that she was acquainted with the defendant's daughter, KF, BC, and JC. She was with the defendant's daughter at school when KF told them that the defendant had "never touched her." Additionally, CB testified that JC said the defendant "would never do" what KF was accusing him of.

CT, the defendant's daughter, testified that she used to be KF's best friend and she was acquainted with BC, JC, and TH. She testified as to conversations which she had with KF and JC. Apparently, KF told her that the defendant "never touched her." When CT asked KF why she was "lying" on the defendant, KF "didn't say anything." KF said that JC was a "liar" and that she was going to "whip" JC. CT testified that KF had been to the defendant's camphouse "lots of times," and had also been there alone. BC went to the camphouse on one occasion, according to CT.

During cross-examination, CT stated that the defendant treated KF "just like he treated" her. He bought cellular phones for both of them. She and KF each had their own bedrooms at the camphouse. When they went to the camphouse, CT's mother would stay home with CT's two brothers, or, if she came, she would not spend the night. CT did not know if the parents of any of the victims had confronted her mother regarding the molestation claims against the defendant.

As a rebuttal witness, an attorney who had previously represented the defendant denied that he had offered any witness "money in order to either testify or not testify in this case."

ANALYSIS

I. Fair and Impartial Trial

A. Bill of Particulars

The defendant, charged in fifteen counts involving

sexual activity with four minor girls committed at various unspecified dates over a period of forty-one months from January 1, 1994, through May 1, 1997, filed a pretrial motion according to Tennessee Rule of Criminal Procedure 7(c) seeking a bill of particulars. The defendant sought particular information "so as to adequately identify the offenses with which he is charged in the indictment in this cause and especially with respect to dates, places, times, and particular circumstances upon which the State will rely to establish the corpus delicti and the guilt of the defendant." At the argument on the defendant's motion for a bill of particulars, the district attorney stated:

*7 Your Honor, the State agrees to all of the Discovery Motions in the case. We have complied to the extent that we can. With regard to the Bill of Particulars, we have told them everything we know which does not include specific dates because we do not know specific dates, but we have provided all of the information that is available to us and we have provided locations, so to that extent we agree that the Order for Discovery should be signed.

We have also provided them with copies of statements made by witnesses. There is a statement that was taken from the defendant's daughter who is not a witness or we do not anticipate using that statement. We don't have a copy of that statement. The Department of Human Services has it. We don't have an objection to them having a copy of it, but the Court will have to order that be done.

At a later pretrial hearing, the defendant again argued for a bill of particulars, saying that "[w]e don't have specific dates which limits us as far as preparing our defense in the case." The State responded:

We have, in fact, given them what amounts to as much of a Bill of Particulars as we can in our discovery response. It does not state specific dates, but I would argue to the Court that that is almost always the case when we are dealing in cases of child sexual abuse. It is seldom that the State is ever able to say with specificity on what dates abuse occurred[.]

The trial court overruled the motion, concluding that because there was a preliminary hearing there was no need for the State to provide a bill of particulars to the defendant. The defendant argues that the preliminary hearing was not a substitute for a bill of particulars and could not supply the information that is required for the defendant to be properly prepared to defend the case.

Tennessee Rule of Criminal Procedure 7(c) provides that, "upon motion of the defendant, the court may direct the filing of a bill of particulars so as to adequately identify the offense charged." The issuance of a bill of particulars, therefore, lies in the discretion of the trial court. Appellate courts give considerable leeway to the trial court when reviewing the exercise of this discretionary authority. The purpose of a bill of particulars is to provide the defendant with enough information about the charge to prepare a defense, to avoid prosecutorial surprise at trial, and to preserve a plea of double jeopardy. *See State v. Campbell,* 904 S.W.2d 608, 611 (Tenn.Crim.App.1995). If the requested information is in the indictment [FN3] or has been provided by the State in some other satisfactory form, a bill of particulars is not required. *See State v. Hicks,* 666 S.W.2d 54, 56 (Tenn.1984) (quoting favorably 1 C. Wright, *Federal Practice and Procedure,* Criminal, § 129 (1982) at 434).

FN3. The record shows that three charges were dismissed as time-barred and one as duplicat- ive.

Although the indictment in this case was not specific as to dates for the offenses, the law in Tennessee is well established that the exact date of an offense need not be stated in the indictment unless the date is "a material ingredient in the offense." Tenn.Code Ann. § 40-13-207 (1997). Our supreme court has noted that, in many cases of child sexual abuse, "the state will be unable to offer specific dates on which the alleged offenses occurred." *State v. Byrd,* 820 S.W.2d 739, 741 (Tenn.1991). Where the State is unable to give even an approximate time by means such as reference to another event, a conviction may be affirmed "if in the course of the trial it does not appear that the defendant's defense has been hampered by the lack of specificity." *Id.* at

742; *see also State v. Ealey,* 959 S.W.2d 605, 609 (Tenn.Crim.App.1997) (finding that in cases of child sexual abuse where the State is unable to provide even approximate time or date, a conviction may nevertheless be affirmed if the defendant is unable to show that he was prejudiced by the lack of specific dates of the offenses) (quoting *State v. Speck,* 944 S.W.2d 598, 600 (Tenn.1997)).

***8** The State provided the defendant with what information it had. Additionally, the defendant was represented by prior counsel at the preliminary hearing, and his trial counsel utilized a transcript from that proceeding to cross-examine trial witnesses.

Although defense counsel argued the difficulty of using alibi testimony, the defendant did not testify, and this was never a proffered defense. There is no indication from the trial record that the defendant was anything less than completely prepared to mount a vigorous defense or that he would have done anything differently could a bill of particulars have been provided. There is no proof of prosecutorial surprise. This issue is without merit.

B. Election of Offenses and Specificity of Allegations

The defendant next agues that the trial court erred in failing to grant a judgment of acquittal on each of the counts, especially those involving JC, which included the charge of contributing to the delinquency of a minor. The defendant presses this as an "election of offenses" problem, arguing there was no proof that he gave JC any cigarettes or alcohol, or that the sexual batteries took place. The defendant further argues as to the other three victims, that "[t]here is absolutely no proof whatsoever as to any dates that these alleged occurrences happened. There's not even any years been established as far as when these offenses allegedly occurred." The defendant argues that the trial court failed to require the State to elect any one particular offense or any particular date or incident upon which the State was relying as to any particular count or victim.

In *State v. Brown,* 992 S.W.2d 389 (Tenn.1999), our supreme court analyzed the responsibility of the State, when multiple offenses have been proven, to elect that offense or offenses for which it is seeking a conviction. The court described the charges against Brown:

> The victim, M.T., who was six years of age at the time of trial, lived across the street from the defendant, James A. Brown. She first testified that two years earlier, when she was four years of age, the defendant pulled up her dress, pulled down her underwear, and "put his finger down in her private part." M.T. testified that the act occurred in Brown's trailer. She could not recall the exact date this happened, only that it was a Friday and that it was warm outside.
>
> The victim's testimony as to the number of acts committed varied. She initially testified that Brown penetrated her private part with his finger five times on the same occasion. She later said that it happened five different times, on different days. She also acknowledged that she had told the police that it happened only twice. She also testified that on a later occasion, after the alleged acts of penetration, Brown took two photographs of her with her dress pulled up and her underwear visible.
>
> *Id.* at 390.

Brown was indicted and convicted of one count of the rape of a child. At the conclusion of the trial, the court instructed the jury:

> ***9** The indictment alleges that this offense occurred during the period of time between March 1, 1993, and September 30, 1993. *The State has made an election that the alleged incident occurred between Easter, April 11, 1993, and June 30, 1993.*
>
> *Id.* at 391 (emphasis in original).

The court then explained the reasons for the requirement that the State elect the particular offense or offenses for which it is seeking a conviction, when the evidence indicates multiple offenses against the same victim:

> The requirement of election serves numerous interests: it enables the defendant to prepare for the specific charge; it protects a defendant against double jeop-

ardy; it enables the trial judge to review the weight of the evidence in its role as thirteenth juror; and it enables an appellate court to review the legal sufficiency of the evidence. The most important interest served by election, however, is to ensure that the jurors deliberate over and render a verdict based on the same offense[.]

Id. at 391 (citations omitted).

In *Brown,* the State attempted to make its election of offenses by narrowing the time frame as to when the offenses occurred from the seven-month period alleged in the indictment to a two and one-half month period. However, the court, noting that the State's narrowing of the dates had not resolved the conflicts between the victim's differing statements that the acts occurred "five times during one visit in his trailer," or "five times on different days," or "occurred [only] twice," held the election was insufficient. *Brown,* 992 S.W.2d at 392. Additionally, the court noted that the victim testified that the acts of digital penetration had occurred before the defendant had taken her photograph which the victim's mother had first seen prior to Easter, April 11, 1993. The State had elected that date as the beginning of the period when the offense had occurred. Accordingly, the court concluded that the State's election was insufficient and reversed and remanded the case for a new trial.

We will now apply the rationale of *Brown* to this matter.

Allegations of the Indictment as to KF

The defendant was tried for four counts in the indictment as to KF. Counts 1, 4, and 5 alleged the offense of rape, and Count 2 alleged sexual battery. The dates alleged as to each offense were as follows: [FN4]

> FN4. In our analysis, we are not considering those counts which were dismissed prior to the trial.

Count 1: "on the ____ day of October or November, 1995"

Count 2: "on the ____ day of May, 1995"

Count 4: "on the ____ day of February, 1996"

Count 5: "on the ____ day of June, 1996"

Testimony of KF

KF testified that her date of birth was December 8, 1980, and that the defendant first had sexual intercourse with her "a couple of weeks before [her] fifteenth birthday," which meant this act allegedly occurred shortly before December 8, 1995. This period coincides with Count 1 of the indictment, alleging that an act of rape occurred in October or November 1995. The defendant was found not guilty of Count 1.

***10** KF also testified that, on another occasion, she had gone to the camphouse with the defendant where he "touched me on my breasts and on my vagina," and she asked him to stop. She said this incident occurred in "the summer time because I was out of school," that it happened before the rape which occurred just before her fifteenth birthday, and that she was "only fourteen then or fourteen and a half." This testimony coincides with Count 2, which alleged an act of sexual battery occurring in May 1995, and for which the defendant was convicted.

Further, KF testified that "maybe eight" other acts of rape occurred, always at the camphouse. She was not able to otherwise differentiate these additional acts as to which she testified. The defendant was found not guilty as to Count 4, alleging an act of rape in February 1996, and Count 5, alleging rape in June 1996.

On the basis of this testimony, we conclude that the State sufficiently proved the act of sexual battery alleged in Count 2, and that it was done with sufficient detail so as to make certain that all jurors were considering the same alleged incident. Additionally, the victim's testimony was sufficiently detailed so as to prevent reprosecution for the same offense. Further, the defendant did not show that he was prejudiced in his defense because the allegations of Count 2 did not set out a specific date of the offense. Accordingly, as to the allegations of KF, the assignment of error is without mer- it.

Allegations of the Indictment as to BC

As to BC, the defendant was tried and found not guilty of two counts of rape (Counts 6 and 7). The defendant was convicted of one count of sexual battery (Count 9). The alleged dates for each offense were as follows:

Count 6: "on the ____ day of June, 1995"

Count 7: "on the ____ day of August or September, 1995"

Count 9: "on the ____ day of ____, 1995"

Testimony of BC

BC testified that the first time the defendant raped her was in June 1995, while she was babysitting at his house. He called her into a bedroom, held her on the bed, and raped her, according to her testimony. This testimony coincides with the allegations of Count 6, for which the defendant was found not guilty. BC testified that the next act occurred at the camphouse just after she had started school in the fall. She had gone to the camphouse with the defendant and his daughter and got drunk and passed out. When she awoke, the defendant was performing oral sex on her. She did not testify as to the specifics of any other sexual act. The defendant was also found not guilty of rape alleged in Count 7.

As to Count 9, sexual battery against BC, the State concedes that election was necessary. The indictment indicated only that the defendant committed sexual battery against BC on an unspecified day in 1995. At trial, BC was unable to remember any specific incident of sexual battery:

Q. Do you remember the first time he ever touched you inappropriately?

***11** A. No, because there's been so many times.

Q. What do you mean?

A. He's-he's always tried to touch on me-tried to touch on me, but I can't remember the first time he's ever done it.

We agree with both the State and the defendant that the State did not sufficiently elect an offense upon which to base this conviction. We, therefore, reverse the conviction for sexual battery in Count 9 and remand for a new trial. *See State v. Brown,* 992 S.W.2d 389, 392-93 (Tenn.1999).

Allegations of the Indictment as to TH

As to TH, the defendant was tried on a single count, which charged aggravated sexual battery. The indictment alleged the date as follows:

Count 11: "on a ____ day in January or February, 1996"

Testimony of TH

TH was ten years old at the time of her trial testimony. She testified that on a night she spent at the camphouse with the defendant, he took her clothes off, as well as his own, and put her in the tanning bed in his daughter's bedroom. He then started "feeling" of her and touched her on the vagina. She did not know what month this occurred, but it was "real cold."

Our supreme court, in *Brown,* traced decisions requiring less specificity in indictment allegations in cases of child sexual abuse:

We are sensitive to the fact that young children who are victims of child abuse may not be able to testify that abuse occurred on a specific date, or provide extensive details in this regard. We have therefore emphasized in *Shelton* that election may be accomplished in multiple ways:

If, for example, the evidence indicates various types of abuse, the prosecution may identify a *particular type of abuse* and elect that offense. Morever, when recalling an assault, a child may be able to describe *unique surroundings or circumstances* that help to identify an incident. The child may be able to identify an assault with *reference to a meaningful event* in his or her life, such as the beginning of school, a birthday, or a relative's visit.

These broad guidelines accommodate the practical difficulties in cases involving child victims while also

implementing the protections served by the election requirement. In short, "[a]ny description that will identify the prosecuted offense for the jury is sufficient."

Id. at 391-92 (emphasis in original) (quoting *State v. Shelton,* 851 S.W.2d 134, 138 (Tenn.1993)).

Since the defendant was tried and convicted of only one count as to TH, election of offenses was not an issue. Based upon our review, we conclude that the allegations of the indictment were sufficient and that TH testified as to the elements of aggravated sexual battery. Since the defendant has not shown prejudice because a specific date for the offense was not alleged, the assignment of error is without merit as to TH.

Allegations of the Indictment as to JC

As to JC, the defendant was tried and convicted of two counts of sexual battery (Counts 13 and 14) and one count of contributing to the delinquency of a minor (Count 15). The offenses were identified as follows:

***12** Count 13: "on the ____ day of November, 1996"

Count 14: "on the ____ day of February, 1997"

Count 15: "on a date beginning in December, 1996 and ending in May, 1997"

Testimony of JC

The indictment alleged two counts of sexual battery against JC, occurring on the "____ day of November, 1996" and the "____ day of February, 1997." However, JC testified as to three incidents of inappropriate touching, two apparently occurring around November 1996, and the third occurring at a time which was not described with precision in JC's testimony. Although JC did so reluctantly, and not in detail, she testified as to three acts of sexual battery, although only two were alleged in the indictment. Accordingly, we reverse the convictions as to Counts 13 and 14, remanding each for a new trial. In doing so, we fully recognize that the State's difficulty in making its election of offenses was caused by the substantial changes JC made in her testimony between the preliminary hearing and the trial.

Count 15, the misdemeanor count of contributing to the delinquency of JC, a minor, charged the defendant with "providing alcoholic beverages and cigarettes upon request." The time frame in the indictment is December 1996 through May 1997. The State concedes that JC did not testify that the defendant provided her with alcohol or cigarettes. Accordingly, we reverse the conviction as to Count 15 and dismiss the charge. *See* Tenn.R.App.P. 13(e) ("Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt.").

C. Other Bad Acts Testimony

The defendant argues that the trial court should have followed the procedures set out in Tennessee Rule of Evidence 404(b) regarding testimony of other bad acts of the defendant prior to allowing admission of such testimony.

Evidence that a defendant has committed some other crime independent of that for which he is being tried is generally not admissible because it is irrelevant. *See Bunch v. State,* 605 S.W.2d 227, 229 (Tenn.1980). If, on the other hand, the evidence of another crime is relevant on a contested issue at trial, the trial court must follow certain procedures before admitting the evid- ence:

(1) The court upon request must hold a hearing outside the jury's presence;

(2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;

(3) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Tenn.R.Evid. (404)(b).

At the pretrial hearing on May 28, 1998, the trial court considered the defendant's Rule 404 motion in limine. With regard to that motion, the prosecutor an-

nounced, "We know of no prior criminal history." Since the defendant did not testify, he was not cross-examined as to any bad acts. However, he has complained about the State's presenting proof, presumably through the testimony of its witnesses, as to "other bad acts on the part of the defendant as to each and every alleged victim in the indictment including acts as to certain counts of the indictment which had been dismissed, (Counts 3, 8, 10, 12), and in the non-severed cases so that all bad acts against all victims were admitted into evidence in the trial as substantive evidence as to all other victims without curative jury instructions from the trial court." However, there are no citations to the record regarding these bad acts. Accordingly, this issue is waived. Tenn.R.App.P. 27(a)(7); Tenn.Ct.Crim.App.R. 10(b).

D. Prior Inconsistent Testimony

***13** JC recanted her testimony at the preliminary hearing by testifying at trial that the defendant had never "touched me in my female body parts." Defendant argues that the trial court should not have allowed the State to introduce prior inconsistent statements.

Prior inconsistent statements of a fact witness are admissible under impeachment attack. The only requirement is that the witness be "afforded an opportunity to explain or deny the same." Tenn.R.Evid. 613(b). In this case, after the witness testified at trial that the defendant had never "touched me in my female body parts," the State was properly allowed to present prior inconsistent testimony to impeach her. *See* Tenn.R.Evid. 607 ("The credibility of a witness may be attacked by any party, including the party calling the witness.").

Thus, under the circumstances, the State was properly allowed to impeach JC with her prior inconsistent statements. The remainder of the defendant's arguments regarding the evidentiary use of the prior statements is moot in view of the reversal of the convictions as to JC.

E. Reinstatement of Severed Count

At the hearing on motions held on May 28, 1998, Counts 11 and 12, charging the defendant with aggravated sexual battery against TH, were discussed at length. The obvious problem for the State was, as the trial court noted, "you've got the same victim and the same dates." In fact, the counts were identical. Defendant argued for dismissal of both counts. The State asked to add a different date to Count 12. The trial court offered to sever both charges and try them separately, noting that the State would still, at some point, have to deal with the fact that the counts contained the same language. Both parties agreed to this. Before the hearing ended, the following exchange took place:

GENERAL PEEPLES: Could I ask you to revisit the question regarding Counts Eleven and Twelve?

THE COURT: I'll be glad to. What would you like for me to do? Put them back in there?

GENERAL PEEPLES: We'd like for you to strike one of them and leave the other one in.

THE COURT: All right. Take your choice.

GENERAL PEEPLES: It doesn't matter. They say the same thing, Your Honor.

THE COURT: You're gonna drop one. Enter an Order nolle prosequi as to Count Twelve. You've got Eleven back in there and I'll try them all in one trial.

MR. MADDOX, III: That's fine.

Defendant now argues that the "trial court was aware of the improper joining of the counts, and should have refused to reinstate Count 11 on the application of the prosecution after having previously granted the severance."

In this matter, the Haywood County Grand Jury returned a multi-count indictment against the defendant. No motion for severance was filed pursuant to Tenn.R.Crim.P. 14, and there was no "severance" as such. The matter arose when the trial court noted that Counts 11 and 12 were identical. Although the court proposed that one of these counts be severed, this was merely one of the options being discussed. The record does not reflect that there was a "severance," as contemplated by Rule 14, Tenn.R.Crim.P. and, further, the defendant agreed to the action taken, that Count 11 remain as part of the indictment and Count 12 be dis-

missed. Accordingly, this assignment is without merit.

II. Prosecutorial Misconduct

***14** Defendant argues that prosecutorial misconduct amounted to error in two ways: (1) when the assistant district attorney general brought the witness, TH, age ten, into the courtroom carrying a Beanie Baby and later, during the direct examination of TH, patted her on the shoulder, brushed the hair from her eyes, and told her, "It's almost over now, Honey"; and (2) when an employee of the prosecutor's office advised the victims of their rights under the Criminal Injuries Compensation Act.

Factors which this court may consider when reviewing a charge of prosecutorial misconduct include: (1) the intent of the prosecutor; (2) the curative measures taken by the trial court; (2) the misconduct in context and in light of the facts and circumstances of the case; (3) the cumulative effect of the remarks with any errors in the record; and (4) the relative strength or weakness of the case. *See State v. Farmer,* 927 S.W.2d 582, 590-91 (Tenn.Crim.App.), *perm. app. denied* (Tenn.1996) (citing *Judge v. State,* 539 S.W.2d 340, 344 (Tenn.Crim.App.1976)). To be entitled to relief, the defendant must show that the conduct of the prosecutor was so improper that it affected the verdict to the detriment of the defendant. *See id.*

During a bench conference, the trial court specifically addressed the defendant's vigorous objection to the presentation and handling of TH. The trial court made these observations regarding the prosecutor's actions:

THE COURT: This Court did not view it as being inappropriate. This was a young child who was obviously scared who was escorted in by what I'm informed is the Prosecutor's Witness Coordinator, quite properly so, and when I discovered how young she was I ordered her back out of the Courtroom with counsel since the Witness Coordinator had already gone until I explained to the jury that I had to qualify her. The girl was then put on the stand and was still scared to death, and it's not a teddy bear. It's a little old dog that the Mama said she bought-or she said her Mama bought her.

I know of nothing that was grossly inappropriate. The fact that counsel stepped up to counsel the child-she had her head down and she was unable to talk because she was crying, and I don't-

MR. D.D. MADDOX: Counsel touched the witness, Your Honor.

THE COURT: Counsel-

MR. D.D. MADDOX: She patted her on her head.

THE COURT: Counsel-yes, patted her on her head and pulled her hair out of her eyes. I saw that, and I wasn't about to tell her not to do it for fear of making a scene out of it. But I don't think that there was anything that was inappropriate. And incidentally, Counsel had her back to the jury so the child-they couldn't really see her-what she was doing.

The defendant must show that he was prejudiced by these acts to the extent of affecting the verdict. Defendant points to no evidence that the jury found him guilty of aggravated sexual battery against TH based on improperly elicited sympathy for the witness. We conclude that these acts did not affect the verdict. The presentation and handling of this witness/victim did not go to the heart of the essential elements of the crime charged. *See State v.. Gibson,* 973 S.W.2d 231, 245 (Tenn.Crim.App.1997), *perm. app. denied* (Tenn.1998) (in prosecution for rape of a child, the trial court did not abuse its discretion in allowing the victim to testify while holding a teddy bear). We find no error as to this issue.

***15** The defendant has also assigned as error the victims' being advised of their potential rights pursuant to the Criminal Injuries Compensation Act. The Victims' Bill of Rights, Tenn.Code Ann. §§ 40-38-101 to-208 (1997), is the expression of our legislature's intent "that victims and witnesses shall have certain rights in this state and that they shall be made aware of these rights." *Id.* § 40-38-101(a). This Act further provides, in part:

Notice to crime victims of eligibility for compensation.-The office of the district attorney general shall no-

tify in writing each victim of a violent crime who may be eligible for compensation under the Criminal Injuries Compensation Act, compiled in title 29, chapter 13, of the methods by which the victim may obtain such compensation.

Id. § 40-38-109 (Supp.1997).

Carolyn Milligan, Victim Witness Coordinator for the Twenty Eighth Judicial District of the State of Tennessee, testified that she met with the alleged victims at the preliminary hearing "[t]o explain to them their rights under the Tennessee Victim's Rights Act and to explain to them the Tennessee Criminal Injury Compensation Fund." The defendant admits that accurate information concerning the victims' compensation awards was given,[FN5] but he finds error with the timing. Defendant cites no authority other than "common fairness." This issue is without merit.

> FN5. Compensation for pain and suffering is available only to victims of sex offenses. *See* Tenn.Code Ann. § 29-13-106(c) (Supp.1998). A pain and suffering award cannot exceed $3,000. *See id.* § 29-13-107(3) (Supp.1998).

III. Instruction As To Possible Penalties

The 1998 amendment to Tenn.Code Ann. § 40-35-201(b) (Supp.1998), states:

In all contested criminal cases, except for capital crimes which are governed by the procedures contained in §§ 39-13-204 and 39-13-205, and as necessary to comply with the Constitution of Tennessee, article VI, section 14, and § 40-35-301, the judge shall not instruct the jury, nor shall the attorneys be permitted to comment at any time to the jury, on possible penalties for the offense charged nor all lesser included offenses.

This amendment applies to "all trials occurring after May 18, 1998." *Id.* Compiler's Notes.

Defendant argues that the court erred in applying this statute in his case. Defendant's trial was held on June 30 and July 1, 1998; therefore, the statute applied.

Defendant additionally argues that, even though technically applicable, the statute cannot be applied in his case because the offenses were committed prior to the effective date of the statute and to apply the law in his case would unconstitutionally deny him of substantive rights in violation of Article I, section 11 of the Tennessee Constitution, prohibiting ex post facto laws. We disagree. Section 11 of Article I states the following:

No ex post facto laws.-That laws made for the punishment of acts committed previous to the existence of such laws, and by them only declared criminal, are contrary to the principles of a free Government; wherefore no Ex post facto law shall be made.

Our supreme court has stated that the critical question in an ex post facto analysis is "whether the law changes the punishment to the defendant's disadvantage, or inflicts a greater punishment than the law allowed when the offense occurred." *State v. Pearson,* 858 S.W.2d 879, 883 (Tenn.1993). In *Miller v. State,* 584 S.W.2d 758, 761 (Tenn.1979), our supreme court adopted five broad classifications of ex post facto laws. The classifications are:

***16** 1. A law which provides for the infliction of punishment upon a person for an act done which, when it was committed, was innocent.

2. A law which aggravates a crime or makes it greater than when it was committed.

3. A law that changes punishment or inflicts a greater punishment than the law annexed to the crime when it was committed.

4. A law that changes the rules of evidence and receives [sic] less or different testimony than was required at the time of the commission of the offense in order to convict the offender.

5. Every law which, in relation to the offense or its consequences, alters the situation of a person to his disadvantage.

Amended Tenn.Code Ann. § 40-35-201(b) changed a procedure the courts and attorneys are to follow in most contested criminal cases by prohibiting the char-

ging of the jury by the trial court or the informing of the jury by attorneys of the possible penalties that apply to the crime charged or lesser included crimes. Defendant fails to produce any credible grounds for interpreting this amended statute as an ex post facto law when applied to him. This issue is without merit.

IV. Special Verdict Form

We have reviewed the special verdict form used in this case. As to Counts 2, 9, 11, 13, 14, and 15, the jury found the defendant guilty of both the first listed charge and the lesser-included listed charge and assessed a fine as to both the first charge and the lesser-included offense.[FN6] The defendant argues that this clearly demonstrates a lack of comprehension and misunderstanding on the part of the jury.

FN6. An excerpt from the special verdict form, as completed by the jurors, is illustrative:

COUNT	OFFENSE OR LESSER INCLUDED OFFENSE	MAXIMUM FINE ALLOWED	VERDICT	FINE IF ANY
2	sexual battery	$1,000	not guilty/	$1,000
	(KF-May 1995) lesser included offense:		(guilty)	
	assault	$500	not guilty/ (guilty)	$500

At the hearing on defendant's motion for a new trial, the trial court addressed this issue in the following way:

The jury verdict form was in fact given to counsel before the trial in this case and suggestions elicited as to how to make it clearer or better. For purposes of your record and in an attempt to make the job as easy as possible the counts were given to the jury out of order, but by the victim's names. In other words, if you look at them you've got all of the alleged or the now victims grouped by name to make it easier for the jurors to arrive at a verdict. They did indeed on counts 1, 4, 5, 6, and 7 come down and find the defendant properly not guilty of not only the offense, but of the lesser included offenses and then you moved in to your remaining counts there and the jury was questioned at some length as to when they came in with that verdict. This is not uncommon in taking verdicts from jurors who have great difficulty in determining whether a person could be guilty of both the lesser and the greater offenses.

Having been given the opportunity to review the jury verdict form before the trial, the defendant is in no position to argue now that it was unclear.

Defendant finally argues that the completed special verdict form is a nullity on its face and no judgment or sentence of the trial court can be allowed to stand. It is the duty of the trial court to give effect to the intention of the jurors if, after examination of the terms of the verdict, the court is able to place a construction on the terms that will uphold the verdict. *See Hogan v. Doyle,* 768 S.W.2d 259, 263 (Tenn.App.1988). A reasonable interpretation of the terms of the verdict is that the jurors intended to find the defendant guilty of the principal charge in Counts 2, 9, 11, 13, 14, and 15. The jury was carefully instructed by the trial court, and there is no indication that the jurors were confused or misled or intended any result other than that accepted by the trial court. The trial court, in reading the verdict, noted that "You've also found him guilty of the lesser included. That will be set aside since it merges or is included within the greater offense." The trial court asked the

foreman, "Have I read it correctly?" to which the foreman replied, "Yes, Your Honor." This issue is without merit.

CONCLUSION

***17** We affirm the convictions as to Counts 2 (sexual battery) and 11 (aggravated sexual battery). We reverse and remand for a new trial the convictions in Counts 9, 13, and 14, (each charging sexual battery). We reverse and dismiss the conviction in Count 15 (contributing to the delinquency of a minor).

PEAY and OGLE, JJ., concur.

Tenn.Crim.App.,2000.
State v. Thomason
Not Reported in S.W.3d, 2000 WL 298695 (Tenn.Crim.App.)

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SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
THE TENNESSEAN, et al.
v.
The CITY OF LEBANON, Tennessee.

No. M2002-02078-COA-R3-CV.
May 7, 2003 Session.
Feb. 13, 2004.

Appeal from the Chancery Court for Wilson County, No. 01014; Charles K. Smith, Chancellor.
Charles W. Cook, III, Nashville, Tennessee; Peggy F. Williams, Lebanon, Tennessee, for the appellant, the City of Lebanon, Tennessee.

Alfred H. Knight, Alan D. Johnson, Nashville, Tennessee, for the appellees/cross-appellants, The Tennessean and Warren Duzak.

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which BEN H. CANTRELL, P.J., M.S., and WILLIAM C. KOCH, JR., J., joined.

OPINION

PATRICIA J. COTTRELL, J.

***1** The City of Lebanon appeals the trial court's award of partial attorney fees to *The Tennessean* newspaper under the provisions of the Public Records Act, Tenn.Code Ann. § 10-7-501 et seq. The City argues that the trial court erred in ordering it to pay any attorney fees at all, because its refusal to make a public record available to *The Tennessean* was justified by a good faith belief that it was not required to. The newspaper argues that the trial court should have awarded it all the fees it incurred in the effort to compel the City of Lebanon to comply with the Public Records Act, instead of just a portion of those fees. We agree with *The Tennessean,* and we accordingly affirm the award of attorney fees, but modify it to include those fees that had been excluded by the trial court.

The sole issues in this appeal involve questions relating to the trial court's award of attorney fees. Since those fees arose from underlying litigation under the Public Records Act, and those records were created as the result of a private citizen's claims against the City of Lebanon, we must begin this opinion with a brief history.

I. A REQUEST UNDER THE PUBLIC RECORDS ACT

In the year 2000, the Lebanon Police Department's Drug Task Force staged a raid on a private residence within the City of Lebanon. They went to the wrong house because of a faulty search warrant, entered the house without properly identifying themselves, and wound up shooting and killing John Adams, a private citizen who was wholly unconnected with the target of the warrant.

The City of Lebanon admitted liability. Mr. Adams' widow, Lorrine Adams, did not file a complaint, and she did not initiate a lawsuit against the City of Lebanon at any time. Instead, she entered into negotiations with the City's insurance carrier, Corregis Insurance. On December 16, 2000, the parties reached a settlement agreement. One provision of the agreement was that the details of the settlement would remain confidential.

On December 19, Warren Duzak, a reporter for *The Nashville Tennessean* asked for a copy of the settlement agreement and other documents relating to it, pursuant to the Public Records Act, Tenn.Code Ann. § 10-7-501 et seq. The City Attorney denied the request.

II. COURT PROCEEDINGS

The day after the City's refusal, the City Attorney filed a Motion in the Wilson County Circuit

Court seeking a protective order to maintain the confidentiality of the settlement agreement, even though there was no litigation pending in that court between Ms. Adams and the City. The City styled its Motion "In re the Matter of John Adams, deceased and *Lorrine Adams v. City of Lebanon,* Tennessee." The motion specifically asked for a protective order to keep the "terms of the settlement agreement" confidential and stated, in pertinent part:

> The confidentiality provision was included in the Agreement to prevent any influence it may or may not have on the state's pending suit in criminal court against a former police officer involved in the wrongly executed search warrant; and, for the protection of the privacy of Mrs. Adams and the estate of John Adams. The Nashville Tennessean, a Nashville daily newspaper, now demands that the city provide a copy of the settlement agreement under the Public Records Act and the Freedom of Information Act. The City avers that revelation of the terms of the Agreement will have an adverse effect on the mediation process, which will outweigh the public's right to know, and will jeopardize the city's future use of the mediation process in settlement of civil claims against it. The city further avers that revelation of the terms of the Agreement, if made public, could influence a jury, either way, in the criminal trial now pending.

***2** A hearing on the City's motion was conducted ex parte, without notice to *The Tennessean.* Notwithstanding the jurisdictional requirements of the Public Records Act, the Circuit Court granted the protective order on December 21. The order reiterated that it had been sought "to keep confidential the terms of a settlement agreement ..." and specifically found that "the terms of the settlement agreement are entitled to a Protective Order." Despite the court's statement regarding the purpose of the motion, the court also found that any and all records of the investigation into the death of Mr. Adams were not subject to inspection under the Public Records Act. In support of the protection of the settlement agreement, the court found that Rule 31 of the Tennessee Supreme Court required that agreements resulting from mediation remain confidential.

Upon learning of the protective order, *The Tennessean* filed a Motion to Intervene and a Motion to have the Protective Order set aside on the ground of lack of jurisdiction.[FN1] The Circuit Court granted the Motion to Intervene, but denied the Motion to Set Aside. The primary basis for the court's denial was that Rule 31 authorized the confidentiality of the settlement. *The Tennessean* then appealed.

> FN1. Prior to its court filings, *The Tennessean,* through its counsel, sent a letter to the City attorney formally requesting access to the settlement agreement and correspondence relating to Ms. Adams' claim against the City.

The Tennessean also filed a Petition for Access to Public Records in the Chancery Court of Wilson County pursuant to Tenn.Code Ann. § 10-7-505. The Chancery Court conducted a hearing on the newspaper's Petition on March 8, 2001, but declined to rule, because the appeal of the Circuit Court's decision was pending, and the Chancery Court decided to withhold its decision until the Court of Appeals acted.

This court rendered its opinion on February 7, 2002. *See In re: John Adams,* No. M2001-00662-COA-R3-CV, 2002 WL 192575 (Tenn.Ct .App. Feb. 7, 2002) (No Tenn. R.App. P. 11 application filed). We held that the Circuit Court's ruling was void and of no effect because that court did not have jurisdiction to enter a protective order in this case for two reasons.

First, no Complaint had been filed, and therefore no action had been commenced to give the trial court jurisdiction to issue the protective order. Second, subject matter jurisdiction over demands for public documents is vested in the Chancery

Court under Tenn.Code Ann. § 10-7-505. We further held that the confidentiality provisions of Rule 31 did not apply in this case because the parties were never before the court and the settlement negotiations were not initiated pursuant to Rule 31.

After this Court issued its opinion, *The Tennessean* set a show cause hearing in the Chancery Court on its Petition for Access. The City's concerns about the disclosure of the records had been allayed by this time, and it tendered the requested records before the hearing. The show cause hearing was then converted into a hearing on the newspaper's request for attorney fees, which are authorized under Tenn.Code Ann. § 10-7-505(g) for a governmental entity's willful refusal to disclose a public record.

***3** On July 17, 2002, the Chancellor ruled from the bench, without an evidentiary hearing. The court found that the newspaper was entitled to the attorney fees and costs it incurred because of the filings and proceedings in Circuit Court, including its appeal of the Circuit Court's ruling. It also ruled that *The Tennessean* should be reimbursed for the costs it incurred in applying for attorney fees, other than the cost of attending the July 17 hearing. The total award amounted to $20,038.52. But the court excluded from reimbursement those costs directly arising from or generated by the newspaper's Petition for Access in the Chancery Court, which we calculate from the attorney's affidavit to amount to about $4,000. The City of Lebanon appealed the trial court's award of fees. *The Tennessean* also appealed the trial court's denial of the remainder of its requested fees.

III. ATTORNEYS FEES AND PUBLIC RECORDS

The Public Records Act makes it possible for a petitioner to recover the attorney fees and costs it incurs in the process of judicially compelling a governmental entity to comply with the provisions of the Act. Tenn.Code Ann. § 10-7-505(g) reads:

> If the court finds that the governmental entity, or agent thereof, refusing to disclose a record, knew that such record was public and willfully refused to disclose it, such court may, in its discretion, assess all reasonable costs involved in obtaining the record, including reasonable attorneys' fees, against the nondisclosing governmental entity.

The reason for this legislative exception to the general "American" rule that each party pays its own attorney fees is to discourage wrongful refusals to disclose public documents. *Contemporary Media Inc. v. City of Memphis,* No. 02A01-9807-CH00211, 1999 WL 292264, at *3 (Tenn.Ct.App. May 11, 1999) (No Tenn R.App. P. 11 application filed). It also recompenses a party who has been required to expend time and money to enforce the public's right to access to public documents. *Id.* Consequently, it furthers the purpose of the Act, which is "to give the fullest possible public access to public records." Tenn.Code Ann. § 10-7-505(d).

The statute is a limited award provision. *Memphis Publishing Co. v. City of Memphis,* 871 S.W.2d 681, 689 (Tenn.1994). The decision whether to award attorneys' fees under Tenn.Code Ann. § 10-7-505(g) is left to the discretion of the trial court, and appellate courts will not disturb that decision absent an abuse of that discretion. *Memphis Publishing Company v. Cherokee Children & Family Services, Inc.,* 87 S.W.3d 67, 80 n. 15 (Tenn.2002).

> Under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to the propriety of the decision made." A trial court abuses its discretion only when it "applies an incorrect legal standard, or reaches a decision which is against logic or reasoning or that causes an injustice to the party complaining." The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court.

***4** *Eldridge v. Eldridge,* 42 S.W.3d 82, 85 (Tenn.2001) (citations omitted).

The statute allows the court to award fees upon a finding that the governmental entity knew the record was public and willfully refused to disclose it. These two requirements have sometimes been stated as one combined standard, willfulness. Because the knowledge component of the standard implicates the issue of the clarity of the law regarding the settlement agreement's status as a public record, we begin with some basic principles.

Whether a document is a public record is, in the first instance, determined by whether it was made or received by a governmental entity pursuant to law or ordinance or in connection with the transaction of official business. Tenn.Code Ann. § 10-7-301(b); *Griffin v. City of Knoxville,* 821 S.W.2d 921, 923 (Tenn.1991). The Act creates a presumption of openness as to government documents. *Arnold v. City of Chattanooga,* 19 S.W.3d 779, 785 (Tenn.Ct.App.2000). There are specific exceptions that make otherwise public records confidential and not subject to disclosure, *see* Tenn.Code Ann. §§ 10-7-503(b) through (e) & -504, none of which are relevant herein, as well as a general exception to the access requirement where "otherwise provided by state law," Tenn.Code Ann. § 10-7-503(a), which effectively exempts from disclosure documents that are made privileged or protected from disclosure by law other than the Act itself. *Arnold,* 19 S.W.3d at 786.

The legislature has declared that when courts are called upon to decide petitions for access, the Public Records Act "shall be broadly construed so as to give the fullest possible public access to public records." Tenn.Code Ann. § 10-7-505(d). Tennessee courts have adhered to the policy of full public access and interpreted the Act liberally to further the public interest as defined by the legislature. *Memphis Publishing Co. v. Cherokee Children & Family Services, Inc.,* 87 S.W.3d at 74; *Tennessean v. Electric Power Bd. of Nashville,* 979 S.W.2d 297, 301 (Tenn.1998). When a request for access to a record is denied, the burden is placed on the governmental entity to justify nondisclosure. Tenn.Code Ann. § 10-7-505(c).

There is no dispute or question that the settlement agreement was created or received by the City in the transaction of official business and was presumptively a public record subject to disclosure under the Act. The question, therefore, is whether there existed some exception to justify the refusal of access.

IV. A DUTY TO DISCLOSE

The question of whether a settlement agreement in litigation against a city is subject to disclosure under the Public Records Act was decided in *Contemporary Media, Inc. v. City of Memphis,* No. 02A01-9807-CH00211, 1999 WL 292264 (Tenn.Ct.App. May 11, 1999) (No Tenn. R.App. P. 11 application filed). In that case, the family of a man who died in police custody had filed a civil rights lawsuit in federal court against the city. The lawsuit was settled by an agreement that included a confidentiality provision, and the city procured a "confidentiality order" which was placed under seal in the federal court lawsuit. This order reiterated the confidentiality provision, but the settlement agreement's other terms were not included. After the media requested and was denied access to the agreement by the city, *Contemporary Media* filed a petition for access in the chancery court. The city agreed that the requested documents were public records, but asserted that their disclosure was prohibited by the federal court confidentiality order. Subsequently, the federal court entered an order finding that the confidentiality order did not prohibit the city from disclosing the terms of the settlement agreement. The city then released the documents.

***5** The issue then became *Contemporary Media's* entitlement to attorney's fees it incurred in gaining access to the settlement agreement. This court stated that the first inquiry was whether the city knew that the record was public, and that question involved a determination of whether the city could make an agreement to treat the record as confidential. We found that the city could not and held:

> A governmental entity cannot enter into confidentiality agreements with regard to public records. The idea of entering into confidentiality agreements with respect to public records is repugnant to and would thwart the purpose and policy of the Act. Thus, the City could not lawfully enter into the agreement which it entered into with the ... family to keep the terms of the public record confidential.

Contemporary Media, Inc., 1999 WL 292264, at *5.

In reaching this conclusion, the court relied in part upon a 1996 Opinion of the Attorney General of Tennessee which opined that an agreement by a governmental agency to restrict public access to public records that are not exempt under law violates public policy and is unenforceable. *Id.*, at *5, quoting OP TENN. ATTY. GEN. 96-144 (December 3, 1996).

Thus, at the time *The Tennessean* made its request to the City of Lebanon, there existed an opinion of the Court of Appeals holding and an Opinion of the Attorney General indicating that the City could not agree to make the settlement document confidential and that such an agreement would not be effective to remove the settlement document from the disclosure requirements of the Public Records Act.

The City does not address this authority or attempt to explain why it does not apply or why it did not put the City on notice that the settlement agreement was a public document whose disclosure was required. Instead, the City argues that its refusal to grant access to the settlement agreement was "warranted by existing law or a good faith argument for the extension, modification or reversal of existing law."

In specific, the City argues that after it refused to disclose the settlement agreement it "sought guidance" from the Circuit Court and was thereafter entitled to rely on the Circuit Court's decisions regarding the protective order and deny access. But the City did not simply "seek guidance;" it sought and obtained ex parte a protective order in a court without jurisdiction where no case was pending in order to prevent or delay access. In fact, the City's motion stated that a protective order was necessary because the newspaper has requested access to the settlement agreement. In our earlier opinion, this court described the City's actions in seeking the protective order in Circuit Court as "an attempt to thwart the Public Records Act" and a "pre-emptive strike" for which there was no authority. *In re: the Matter of John Adams, Deceased,* 2002 WL 192575, at *3.

The question before us is not whether the City's continued refusal was justified by pending court proceedings. Instead, the relevant question is whether the City's refusal to produce the requested documents was willful and with the knowledge that the record was public.

V. THE CITY'S RATIONALE FOR REFUSING TO DISCLOSE

***6** In this appeal, the City asserts three substantive bases for refusal of access: (1) that Tennessee Supreme Court Rule 31 required that the settlement agreement remain confidential, (2) that the then pending criminal investigation of the shooting precluded disclosure of investigative reports that were also part of the City's file, and (3) that Ms. Adams' desire for confidentiality based on privacy and security concerns justified the refusal of access.

This court discussed the Rule 31 argument in its prior opinion in this matter, holding:

> Rule 31 applies to court ordered mediation, which may be ordered by the court on its own motion, or on motion of a party. *Harris v. Hall,* No. M2000-00784-COA-R3-CV, 2001 WL 21504893, at *4 (Tenn.Ct.App. Nov. 28, 2001). To be so ordered, there must therefore be an underlying matter before the court. The rule expressly does not govern private alternative dispute resolution. Sup.Ct. R. 31 § 1. Mrs. Adams

never initiated a claim against the City of Lebanon. Accordingly, the settlement mediation between Mrs. Adams and the City did not take place in the context of a Rule 31 court order. Although the courts and legislature of this State recognize and commend arbitration as a means of dispute resolution, (citation omitted), Rule 31 governing court annexed arbitration cannot be invoked here to justify a preemptive protective order in a matter that was never before the court.

In re: John Adams, 2002 WL 192575, at *7.

As this quotation makes clear, there was no legal basis for the assertion that Rule 31 exempted the settlement agreement from disclosure, either at the time the City refused the newspaper's request for the document or later. Rule 31 itself provides in its Section 1 that the standards and procedures in Rule 31 "do not affect or address the general practice of alternative dispute resolution in the private sector outside the ambit of Rule 31," which can only be called into play when there is pending an "eligible civil action," as defined in Tenn. R.S.Ct. 31 § 2(d).

As its second ground for refusing access, the City asserts that *The Tennessean's* request for access was so broad as to include investigative files or other materials relating to a pending criminal investigation into the conduct of a police officer involved in the search warrant or its execution. [FN2] The City relies upon the Circuit Court's finding in its Protective Order that the City's files related to Ms. Adams' claim contained investigative reports prepared by law enforcement agencies and the Chancery Court's observation that the newspaper was also seeking investigative reports. The City argues that not only were the investigative reports protected from disclosure, but that the mediation agreement and settlement agreement were also properly withheld "until such time as the Circuit Court determined that the criminal investigation and/or trial has concluded so that any criminal trial will be fair, impartial and just." [FN3]

FN2. In a letter written after the issuance of the protective order, the City attorney informed *The Tennessean's* attorney that she was declining the newspaper's request for access "to the settlement agreement ... and any other documents relating to her claim."

FN3. The motion for protective order, quoted earlier, the letter from *The Tennessean's* attorney referenced in footnote 1, and the letter from the City's attorney referenced in footnote 2 all refer to a request for the settlement agreement and correspondence or documents relating to that settlement. Nowhere is there mention of the criminal investigative reports. From the motion the City filed, we interpret its position at that time as concern about the potential effect on the pending or prospective criminal trial of publicity about the settlement, not the release of any investigative reports. That interpretation is consistent with the City's argument in its brief that "if the jury pool found out that the City's insurance company had settled a wrongful death suit with Ms. Adams, it is very likely that such knowledge would cause the jury to believe that the police officer was guilty" and the continuation of that argument quoted above. This is a public policy argument related to disclosure of the settlement agreement itself.

*7 The City correctly asserts that records relating to a pending criminal action are not subject to disclosure under the Public Records Act because they are protected by other state law, specifically Tenn. R.Crim. P. 16(a)(2). *Appman v. Worthington,* 746 S.W.2d 165, 166 (Tenn.1987); *Knoxville News-Sentinel v. Husky,* 982 S.W.2d 359, 361 (Tenn.Ct.Crim.App.1998). However, the mediation and settlement agreements between the City and Ms. Adams are not criminal investigative records. The fact that the City may have included those doc-

uments in the same files as police and TBI investigative reports does not make them confidential by association.

It is well-settled that a governmental entity must disclose records or portions of records that are public, even if it must delete confidential information contained in those records. *Tennessean v. Elec. Power Bd. of Nashville,* 979 S.W.2d at 303; *Hickman v. Tenn. Bd. of Paroles,* No. M2001-02346-COA-R3-CV, 2003 WL 724474, at *9-10 (Tenn.Ct.App. March 4, 2003) (No Rule 11 Perm.App. filed). Those cases placed on the governmental entity an obligation to create computer programs to produce new reports containing only public information, while eliminating confidential information. In the case before us, no such burden would be imposed on the City; all it had to do was pull the public records from its files.

Consequently, whether or not *The Tennessean's* request included confidential investigative reports, which the newspaper disputes [FN4], it is abundantly clear that *The Tennessean* requested the settlement agreement and the City refused access to the settlement agreement. It is equally clear that the confidentiality of the investigative reports has no relevance to and no effect upon the public status of the totally separate settlement agreement related to the City's potential civil liability. Thus, the City's argument as to this ground for refusing disclosure is without merit.[FN5]

> FN4. The Circuit Court, in its order refusing to set aside the protective order, specifically found that the Tennessean had requested investigative reports along with the settlement agreement and correspondence related to Ms. Adams' claim. The Petition for Access which initiated the proceeding herein states that the newspaper and its reporter had requested a copy "of this settlement agreement, along with correspondence and other documents that relate to it." There is no reference to criminal investigative reports, but it is not clear whether the chancellor interpreted the language used as broad enough to cover such reports. We simply note that the correspondence preceding this filing clearly referred to the settlement agreement, and the City never stated it considered the request as including investigative reports.
>
> FN5. Again, we are compelled to point out that the City's reliance on court action after its refusal to grant access is misplaced. The question is whether, at the time of the refusal, the City knew the record was public and willfully refused to disclose it.

The third ground for refusing access asserted by the City 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 exclusion from the Public Records Act for an otherwise public record based on the wishes of the citizen involved. The City has provided us with no such authority, but argues that it would be appropriate to adopt a "rule of reason" denying *The Tennessean* access until such time as the citizen's privacy concern abated.

Ms. Adams' sincere concerns for her privacy and security do not provide the City with a basis for refusing access to the settlement agreement. Citizens who apply for permits, apply for government jobs, buy electricity from a governmental utility, or otherwise do business with a governmental entity may share those concerns with regard to information about them contained in governmental records. Nonetheless, the General Assembly has made the policy decision that, as a general rule, the interest of the public as a whole in information about the operation of government outweighs individual privacy concerns. The General Assembly has also determined that countervailing interests outweigh full access in certain situations and has identified those situations in the Act and by providing that governmental records shall be open for inspection ... "unless otherwise provided by state law," in recog-

nition of other legal authority making a record confidential or privileged.

***8** Our courts have found that records otherwise public are not subject to disclosure under the Public Records Act because of other law prohibiting their release. *See, e.g., Ballard v. Herzke,* 924 S.W.2d 652, 661-62 (Tenn.1996); *Memphis Publishing Co. v. City of Memphis,* 871 S.W.2d at 686 (Tenn.1994); *Arnold,* 19 S.W.3d at 785-86. However, our courts have not departed from the requirement that the record be protected from disclosure by existing law. To the contrary, the Tennessee Supreme Court has consistently refused to create any public policy exception to the Public Records Act. *Tennessean v. Electric Power Bd.,* 979 S.W.2d at 301. In *Memphis Publishing Co. v. Holt,* 710 S.W.2d 513 (Tenn.1986), the court held that closed police investigative reports were public records subject to disclosure because such records were not otherwise exempted by law [FN6] and rejected an argument it should imply an exception to the Act based on public policy. The court stated:

> FN6. The statute at that time read "unless otherwise provided by state statute." *Holt,* 710 S.W.2d at 515.

> It is the prerogative of the legislature to declare the policy of the state touching the general welfare. And where the legislature speaks upon a particular subject, its utterance is the public policy of the state upon that subject....

Id. 710 S.W.2d at 517. The Court has adhered to this position .[FN7] *See Doe v. Sundquist,* 2 S.W.3d 919, 926 (Tenn.1999) (holding that the confidentiality of records is a statutory matter left to the legislature, and absent a fundamental right or other compelling reason it would not extend constitutional protection to the non-disclosure of personal information.) Thus, neither this court nor either trial court was free to substitute its public policy judgment for that expressed by the legislature in the Act or to create an exemption not otherwise provided by law. Invocations of public policy or private detriment are not in themselves legally sufficient justifications for withholding public records from citizens of Tennessee.

> FN7. The *Holt* court also referred to the then-existing provision allowing exceptions to public access only where "otherwise provided by state statute" and stated the legislature, by that language, had reserved to itself the public policy exceptions to the Act's requirement of disclosure. 710 S.W.2d at 517. Although that provision has been amended to create exceptions where "otherwise provided by law," the Court has not veered from its refusal to recognize judicial authority to create exceptions based on public policy.

None of the arguments propounded by the City to justify its denial of access is well-founded. The City has failed to meet its burden of justifying nondisclosure of the records as required by Tenn.Code Ann. § 10-7-505(c).

VI. WILLFUL REFUSAL

The trial court considered the newspaper's request for fees in the context of the two separate lawsuits involved in its efforts to obtain access to the records. The court felt that the City's preemptive action in seeking a protective order from a court without jurisdiction was wrongful and resulted in additional fees, including the fees on appeal, that *The Tennessean* would not otherwise have incurred. The trial court reasoned that the City, after its refusal, should simply have waited for *The Tennessean* to file a petition for access under the Act and let the chancellor sort through the issues and determine what was protected.

The court indicated that the City would probably have lost in such an action, with the exception of any request for criminal investigative reports. Nonetheless, the court stated it felt that if the City had just said no, "that wouldn't have been any bad faith. I feel like *The Tennessean* would have been out that amount of attorney fees as well anyway."

The court further stated:

> *9 I feel like that based upon reviewing this and the record, that the Tennessean would have been out anyway regardless of what would have happened unless the City would have just revealed all the records. I really don't think they could have turned over all of the records at that time, because there was somewhat of a criminal investigation pending. I feel like they were justified. Also, because there was a contract saying that they could not do it, I think they would have been justified at that point, and then let the Tennessean file the action in Chancery Court.[FN8]
>
> FN8. The court also observed that the City would probably have been justified in simply refusing the request "out of ignorance, if nothing else." We respectfully disagree. A governmental entity cannot remain unknowledgeable of the Public Records Act and authority interpreting it and thereby immunize itself from liability for attorneys fees. A request for access to a public record imposes a duty on the entity to inform itself of its legal obligations. The Public Records Act ensures citizens broad access to information about the operation of their governments, and a governmental entity cannot impede that access without at least attempting to ensure it is acting in compliance with that Act. The attorneys fee provision of the Act furthers the purpose of broad access. Consequently, the requirement of that provision that the entity or official "knew that such record was public" must be read to include what a reasonably prudent governmental official should have known, *i.e.,* at least the well-established law on the question.

If a refusal of access was willful and knowing, then the party seeking access may be awarded "all reasonable costs involved in obtaining the record, including reasonable attorney's fees...." Tenn.Code Ann. § 10-7-505(g). Thus, while we agree with the trial court's view of the City's detour through the Circuit Court, the City's liability for fees incurred in that action rests on the same conduct as its liability in the Chancery Court action: the validity of its refusal of access. The fees incurred by *The Tennessean* in the Circuit Court action were necessitated by the City's actions and were involved in obtaining the settlement agreement. However, so were the fees incurred in the action in Chancery Court which was properly initiated by *The Tennessean* with a petition for access.

In determining whether the refusal was justified, the court must decide whether the governmental entity knew the documents were public record and willfully refused to provide access. The Act places the burden on the refusing governmental official or entity to justify a refusal of access. Tenn.Code Ann. § 10-7-505(c). A public official can meet that burden and justify denial of access only by showing that the document at issue is not a public record or is exempt from disclosure by the exceptions enumerated in the Public Records Act or by an exception created in other law. *See Holt,* 710 S.W.2d 513.

Regardless of the sometimes varying statements expressed by this court as to a standard for determining whether the refusal was willful and knowing,[FN9] in actuality our courts have consistently applied the same analysis. That analysis emphasizes the component of the statutory standard that the entity or its officials know that the record sought is public and subject to disclosure. It evaluates the validity of the refusing entity's legal position supporting its refusal; critical to that determination is an evaluation of the clarity, or lack thereof, of the law on the issue involved. As our Supreme Court has stated, courts will not impute to a governmental entity "a duty to foretell an uncertain judicial future." *Memphis Publishing Co. v. City of Memphis,* 871 S.W.2d at 689. Accordingly, requests for fees have been denied where the question of whether the record sought was public was "not

straightforward or simple," *Id.,* 871 S.W.2d at 689, or involved "complex interpretation of controlling case law," *Memphis Publishing Co. v. Cherokee Children & Family Services,* 87 S.W.3d at 80.

> FN9. This court has, in some cases, defined the willful and knowing standard as synonymous with bad faith. *Arnold,* 19 S.W.3d at 789; *Contemporary Media,* 1999 WL 2922264, at *4-5; *Capital Case Resource Center of Tennessee, Inc. v. Woodall,* No. 01-A01-9104-CH-00150, 1992 WL 12217 (Tenn.Ct.App. Jan. 29, 1992) (no Tenn. R.App. P. 11 application filed). Despite the language used, however, the courts in each of these cases actually applied an analysis based on the state of existing law. The *Arnold* and *Contemporary Media* courts also adopted the Black's Law Dictionary definition of bad faith, which includes an element of fraud, sinister motive, dishonest purpose, ill will, or similar intent. *Arnold,* 19 S.W.3d at 789. We do not believe that inserting this element into the statutory standard is consistent with the Act or the purpose of the attorney fee provision. The equation of the knowing and willful statutory standard with bad faith was first made in the *Capital Case Resource Center* opinion, but that court did not adopt the definition used in the later opinions. In fact, the court analyzed the existence of bad faith by applying the Tenn. R. Civ. P. 11 standard of whether the argument for the refusal of access was warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. 1992 WL 12217, at *9. Thus, the *Capital Case Resource Center* court defined bad faith as the absence of Rule 11 good faith in the context of the legal arguments made. In *Combined Communications,* 1994 WL 123831 at *4, this court held that the Act's attorneys fee provision did not apply where a governmental entity's unsuccessful attempt to protect a public record from disclosure meets the Rule 11 standard. No reference was made to bad faith.

***10** In *Arnold,* the court concluded that the record did not support a finding that the City knew the documents were public records and willfully refused to disclose them, largely because the City's position that the documents were privileged was found to be correct, even though the court found the privilege had been waived. 19 S.W.3d at 789. In *Contemporary Media,* 1999 WL 2922264, at *6, the court held that because of the existence of prior legal authority contrary to the City's position, "the City must be deemed to have known that it cannot make public records confidential by agreement."

Similarly, in *Capital Case Resource Center of Tennessee, Inc.,* this court held that its ultimate decision that the record at issue was public "did not equate with a finding that, at the time he refused the request; respondent *knew* he was obligated to grant it," 1992 WL 12217, at *8. This court noted that the respondent had refused the request only after being advised by the Attorney General that the file was not subject to public inspection. The court also found that at the time the request for access was denied, the state of the law was not clear as to the type of record involved, and, therefore, the court could not say that the respondent's arguments were not "warranted by existing law or a *good faith* argument for the extension, modification, or reversal of existing law." The court held, "given the lack of controlling precedent in this state at that time, we find that the evidence of record does not preponderate against a finding that he did not know the file was subject to public inspection." *Id.* at *9. In *Combined Communications,* 1994 WL 123831, this court also applied the Rule 11 standard for good faith legal arguments, concluded there was no basis for the City's claim the documents were privileged, and stated, "It is hard to imagine a situation better calculated to frustrate the public's right to be informed of the workings of government or to thwart

the purpose of the Public Records Act." *Id.* at *8. Accordingly, the court found the City's action willful and awarded fees.

This approach of examining the grounds asserted for denial of access in view of existing law is consistent with another provision of the Act which provides that when a trial court orders disclosure, the records are to be made available to the petitioner unless there is a timely appeal and the trial court certifies that "there exists a substantial legal issue with respect to the disclosure which ought to be resolved by the appellate courts." Tenn.Code Ann. § 10-7-505(e)(2).

As explained earlier, we can find no basis in existing law for the City's refusal to provide the settlement agreement. To the contrary, existing authority, including the *Contemporary Media* holding, required disclosure, and we find no lack of clarity in that authority. Accordingly, we hold that the City's denial of access was not justified and the City is liable for all the reasonable fees the newspaper incurred in vindicating its right to access. That includes the fees incurred in the Chancery Court action as well as the Circuit Court action.

VII. CONCLUSION

***11** The trial court's order awarding attorney fees and costs to *The Tennessean* is affirmed, but is modified to include all reasonable fees and costs incurred by the newspaper in its quest for the disputed public records. This case is remanded to the Chancery Court of Wilson County for a determination of the amount to be awarded and for other proceedings consistent with this opinion. Tax the costs on appeal to the City of Lebanon.

Tenn.Ct.App.,2004.
The Tennessean v. City of Lebanon
Not Reported in S.W.3d, 2004 WL 290705 (Tenn.Ct.App.), 32 Media L. Rep. 2304

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Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
UNITED STATES
v.
Carlos **URENA**, Juan Franco, and Limet Vasquez et al., Defendants.

No. S5 11 Cr. 1032(PAE).
Sept. 17, 2013.

CORRECTED OPINION & ORDER
PAUL A. ENGELMAYER, District Judge.

***1** Three defendants in this multi-defendant racketeering case (Carlos Urena, Juan Franco, and Limet Vasquez) have moved for an order requiring the Government to reveal the redacted portions of certain recorded 911 calls that the Government has provided to them in discovery. These calls relate to a murder charged in the Indictment as a predicate act of racketeering. Dkt. 730, 754. The redactions from these recordings consist of the names, and other identifying information, of the person(s) who placed these calls. Following defendants' initial request, the Government produced some of the withheld information, leaving in dispute only the redactions from one 911 call, identified here as call number 24. Defendants argue that 911 calls such as call number 24 are subject to the disclosure requirements of Federal Rule of Criminal Procedure 16, that call number 24 meets the requirements of Rule 16, and that the recording of call number 24 should therefore be produced in its entirety to the defense. The Government argues in response that 911 calls are not required to be produced under Rule 16, because they are instead subject to the terms of the Jencks Act, 18 U.S.C. § 3500, under which pretrial disclosure of statements by government witnesses is not required. Alternatively, the Government argues, even if such calls are covered by Rule 16, it was appropriate for the Government to withhold the name and other identifying information as to the caller of call number 24, either because the name is not material to the defense or because the interests of protecting the caller's safety justified the withholding.

For the reasons that follow, the Court holds that call number 24 is subject to Rule 16 and is not subject to the Jencks Act, but that the sole redaction at issue, involving identifying information as to the 911 caller, was justified as a valid means of assuring the caller's safety. Defendants' motion is therefore denied, without prejudice to defendants' right to pursue such discovery later in the case upon an appropriate showing of need sufficient to outweigh the Government's legitimate concerns about witness safety.

I. Background

The fifth Superseding Indictment ("Ind.") in this case (Dkt.239) was returned on February 6, 2013. Relevant here, Count One charges Urena, Franco, and Vasquez, among others, with racketeering, in violation of 18 U.S.C. § 1962(c), in connection with a gang identified as the Bronx Trinitarios Gang ("BTG"). Ind. ¶¶ 1–71. Count Two charges these same defendants with participation in a racketeering conspiracy, in violation of 18 U.S.C. § 1962(d), again with the BTG identified as the racketeering enterprise. *Id.* ¶ ¶ 72–83. Among the predicate acts of racketeering identified in the Superseding Indictment are the conspiracy to murder, and the murder of, Ka'Shawn Phillips in Yonkers, New York, on September 3, 2005. *Id.* ¶¶ 9–11. Urena, Franco, and Vasquez, among others, are named in connection with those alleged racketeering acts.

***2** By letter dated March 29, 2013, Urena's counsel, upon learning that there were recordings of 911 calls made in relation to the Phillips murder, asked the Government to disclose those recordings. Dkt. 730. The Government then requested recordings of such calls from the Westchester County District Attorney's Office. Dkt. 788. On May 17, 2013, Urena's counsel, stating that he had not re-

ceived these recordings, requested a conference with the Court to discuss the matter. Dkt. 730. On May 24, 2013, the Government provided to counsel for the three defendants an electronic file containing recordings of 911 calls, which it had requested and received from the Westchester County District Attorney's Office. Dkt. 755, 788, 811. The file contained recordings of 26 phone calls, which the Government represents are all the calls it received. Dkt. 754. From these calls, however, the Government had redacted names and other personal identifying information as to "a few of the callers." Dkt. 788.

On June 3, 2013, the three defendants, in a joint letter submitted by Urena's counsel, objected to these redactions. They argued that the call was required to be produced, in its entirety, under Rule 16, and asked the Court to order the Government to promptly provide an unredacted copy of all the 911 calls. Dkt. 754.

On June 10, 2013, the Government responded. It argued that Rule 16 does not require it to produce 911 calls to defense counsel at all and that it had voluntarily produced the recordings of the various 911 calls to defense counsel, in order to assist them in their preparation for trial. Dkt. 755. Instead, the Government argued, the Jencks Act, 18 U.S.C. § 3500, governs production of witness statements, and production of Jencks Act material is not required until the witness's testimony at trial. *Id.* Further, the Government noted, in cases involving heightened safety concerns, it has waited until the evening before or the morning of the witness's testimony to disclose the name of a civilian witness, and it cited cases in which courts in this District have approved this procedure as consistent with the Jencks Act. *Id.* In any event, the Government stated, the dispute in this case had narrowed: It had now produced additional caller identification information. This production left only one caller's identifying information redacted from call number 24. *Id.; see also* Dkt. 788.

On June 20, 2013, defense counsel responded and requested a conference, Dkt. 762, which the Court held on July 1, 2013. At the end of the conference, the Court asked the parties to submit letter briefs addressing whether production of the 911 calls was required by Rule 16. Both parties submitted letters addressing that issue. Dkt. 786 (defense letter), 788 (Government letter). Defendants' letter added that defendants also requested unredacted portions of the "sprint runs," which are short summaries of the 911 calls. The Government had produced these sprint runs to defense counsel in January 2013 but redacted the same identifying information. Dkt. 786.

***3** On August 22, 2013, the Court directed the Government to provide it with a tape recording of call number 24, the remaining redacted call. The Government has aptly described that call as follows: "The caller, in near hysterics, tells the 911 operator that she is pregnant, that there is a hoard [sic] of men gathering outside her basement apartment, and that she believes that they are going to harm her and her family members." Dkt. 788. The call was placed about 15 minutes after the Phillips murder. The identifying information redacted from the call reflects that the address given by the caller was near the site of the murder. The caller reports that the men outside her window say that they just killed a man on her block.

II. Discussion

Federal Rule of Criminal Procedure Rule 16(a)(1)(E) sets out the rights of an indicted criminal defendant to production of documents and objects from the government. A defendant may request "books, papers, documents, data, photographs, tangible objects, buildings or places or copies of portions of any of these items." *Id.* The government must produce a requested item if it is "within the government's possession, custody, or control" and either "(i) the item is material to preparing the defense; (i i) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant." *Id.* An item is "material to preparing the defense" under Rule 16 "if it could be used to counter

the Government's case or bolster a defense." *United States v. Stevens,* 985 F.2d 1175, 1180–81 (2d Cir.1993). Although Rule 16 does not specifically enumerate recordings of phone calls as an item within its scope, such recordings, whether embodied in tapes or CDs or elsewhere, are, at a minimum, "tangible objects" which the defendant may request. *See United States v. Terry,* 702 F.2d 299, 312–13 (2d Cir.1983) (treating tapes of conversations as tangible objects covered by Rule 16); *United States v. Martinez,* 844 F.Supp. 975, 982 (S.D.N.Y.1994) ("[T] elephone records are discoverable objects to which the defendant is entitled."); *United States v. Feola,* 651 F.Supp. 1068, 1144 (S.D.N.Y.1987), *aff'd,* 875 F.2d 857 (2d Cir.1989), *cert. denied,* 493 U.S. 834 (1989) ("[T]elephone records are clearly included under this rule as discoverable objects to which defendants are entitled."); *cf. United States v. Nixon,* 418 U.S. 683, 700 (1974) (Fed.R.Crim.P. 17, which refers to "books, papers, documents or other objects," includes tapes of conversations); *United States v. Tucker,* 249 F.R.D. 58, 62 (S.D.N.Y.2008) (Rule 17 applies to telephone recordings).

Rule 16, however, contains an important limitation. By its terms, it does not "authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500." Fed.R.Crim.P. 16(a)(2). Section 3500 "is the exclusive vehicle for disclosure of statements made by government witnesses." *United States v. Percevault,* 490 F.2d 126, 128–29 (2d Cir.1974) (citation omitted). And unlike Rule 16, which provides for pre-trial disclosure of the materials covered, § 3500 requires disclosure only "after the witness has testified at trial." *Id.* at 129. Explaining Congress's judgment to provide for disclosure of such witness statements only at that point, the Second Circuit has stated, "[t]his unique but limited discovery device [§ 3500] represents a legislative determination that access to a witness' statements could be useful in impeaching a witness but was not intended to be utilized in preparation for trial." *Id.* In particular, the Second Circuit stated, in enacting § 3500, Congress sought to ensure "that witnesses in organized crime cases are produced alive and unintimidated before grand juries and at trial." *In re United States of America,* 834 F.2d 283, 287 (2d Cir.1987) (citation omitted).

*4 The parties' opposite positions over whether the 911 tape at issue here is covered by Rule 16 derive from their differing views as to whether the tape is covered by § 3500. The defense argues that it is not, and that the tapes are material to the preparation of the defense, capturing the contemporaneous description by an eyewitness (or ear-witness) of a gathering near the scene of the Phillips murder immediately after that murder of persons who, as described by the caller, may have participated in that murder. Thus, the defense argues, the tape is covered by Rule 16. The Government responds with three arguments. Most fundamentally, it argues that 911 phone calls are covered by § 3500 and are therefore are excluded from Rule 16 by Rule 16(a)(2); thus, the Government has no duty to produce the tape (or the redacted information within it) unless and until the 911 caller testifies at trial as a government witness. Dkt. 788. Alternatively, the Government argues, this particular 911 tape, call 24, and the identity of the caller, are not "material to the preparation of the defense," and thus fall outside Rule 16. Finally, the Government argues, even if call 24 fell within Rule 16, redaction of the caller's identifying information is justified to assure witness safety. The Court considers these three arguments in turn.[FN1]

> FN1. The ensuing analysis also applies to the redactions of the same identifying information on the sprint runs, which the Court understands to be derivative of the 911 tapes.

A. Scope of Section 3500

As noted, Rule 16(a)(2) excludes from Rule 16's coverage "statements made by prospective government witnesses," because those are governed by § 3500. Although there is little case law defining the term "statement" as used in Rule 16(a)(2), there

is ample authority defining the scope of § 3500.

Important here, the Second Circuit has instructed that "3500 material is, by its very nature, a recitation of past occurrences." *United States v. Percevault,* 490 F.2d 126, 131 (2d Ci r.1974); *accord United States v. Kimoto,* 588 F.3d 464, 491 (7th Ci r.2009) (describing a statement subject to § 3500 as " 'a recorded recital of past occurrences made by a prospective prosecution witness' " (quoting *United States v. Sopher,* 362 F.2d 523, 525 (7th Ci r.1966))); *United States v. Skillman,* 442 F.2d 542, 553–54 (8th Ci r.1971) (same); *Davis v. United States,* 413 F.2d 1226, 1231 (5th Ci r.1969) (following *Sopher*). For this reason, § 3500 material includes recordings of confessions, *Percevault,* 490 F.2d at 127–28, because they are inherently retrospective accounts of past occurrences, and statements to government agents and investigators, *see Goldberg v. United States,* 425 U.S. 94, 102 (1976), but it does not include "a concurrent tape recording of a conversation between the payer and the recipient of an alleged cash bribe," *Sopher,* 362 F.2d at 525, or a recording of a phone call between co-conspirators about an on-going conspiracy, *Skillman,* 442 F.2d at 549, 553. As the Seventh Circuit has explained, the latter recordings are not "statements" covered by § 3500 because they are "preservation[s] of a conversation just as it was spoken," not "recital[s] of past occurrences." *Sopher,* 362 F.2d at 525.

***5** This differentiation between "recitations of past occurrences," which constitute § 3500 material not available until trial, and real-time narration of events, the records of which may constitute Rule 16 material, makes sense in light of the different purposes served by Rule 16 and § 3500. A real-time narration of events may be admissible as a present sense impression, *see* Fed.R.Evid. 803(1), or an excited utterance, *see* Fed.R.Evid. 803(2). *See United States v. Shoup,* 476 F.3d 38, 42 (1 st Ci r.2007) (upholding admission of 911 call made one or two minutes immediately following event); *United States v. Abraham,* 386 F.3d 1033, 1037 (11th Cir.2004) (upholding admission of 911 call reporting that defendant used a gun to threaten girlfriend's mother and sister), *cert. denied,* 546 U.S. 934 (2005); *United States v. Hawkins,* 59 F.3d 723, 730 (8th Ci r.1995), *vacated on other grounds,* 516 U.S. 1168 (1996) (upholding admission of statements from 911 tape as a present sense impression); *Bemis v. Edwards,* 45 F.3d 1369, 1372 (9th Ci r.1995) ("Certainly, a statement by a 911 caller who is witnessing the violent arrest of a suspect by the police could qualify under either [the present sense or excited utterance] exception."); *United States v. Lloyd,* 859 F.Supp.2d 387, 395 (E.D.N.Y.2012) (admitting a 911 call under both exceptions); *United States v. Campbell,* 782 F.Supp. 1258, 1260–61 (N.D.Ill.1991) (admitting under both exceptions a 911 tape of an eyewitness's description of a gunman). Because such real-time accounts of emergency situations as they unfold may well be admissible, it is consistent with Rule 16 for defendants to gain access to them along with other potentially admissible tangible items.

In light of the authority defining § 3500 material as inherently capturing "recitation[s] of past occurrences," *Percevault,* 490 F.2d at 131, call number 24, being a 911 call reporting an ongoing crime and/or its immediate aftermath, does not qualify as § 3500 material. Call number 24 reports an emergency as it occurred. The caller describes the caller's fears about men then gathering outside her apartment. The caller's account is not "a recitation of past occurrences." *Percevault,* 490 F.2d at 131. It is instead a real-time play-by-play of events. Thus, although § 3500 "is the exclusive vehicle for disclosure of statements made by government witnesses," *Percevault,* 490 F.2d at 128–29 (citation omitted), call number 24 is not such a statement. Treating it as Rule 16, as opposed to § 3500, material will not interfere with that "exclusive vehicle." And treating it as subject to Rule 16 enables defendants to have access to potentially admissible statements early enough to aid in the preparation of their defense.

B. Materiality of Call Number 24 to the Defense

The Court turns, then, to the question whether call number 24 is discoverable under Rule 16. To qualify for Rule 16, either "(i) the item is material to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendants." Fed.R.Crim.P. 16(a)(1)(E). The Government represents that it "has no current plan to offer the call at trial," Dkt. 788, and the recording was not obtained from the defendant. The decisive question is thus whether it is "material to preparing the defense." Fed.R.Crim.P. 16(a)(1)(E).

***6** The " 'materiality standard of Rule 16 normally is not a heavy burden....' " *United States v. Stein,* 488 F.Supp.2d 350, 356 (S.D.N.Y.2007) (quoting *United States v. Lloyd,* 992 F.2d 348, 351 (D.C.Cir.1993)). *See also* 2 Charles Alan Wright et al ., *Federal Practice and Procedure Criminal* § 254 (4th ed. 2013) ("Too much should not be required in showing materiality."). Evidence is material "if it could be used to counter the government's case or to bolster a defense." *Stevens,* 985 F.2d at 1180. "There must be some indication that the pretrial disclosure of the disputed evidence would ... enable[ ] the defendant significantly to alter the quantum of proof in his favor." *United States v. Maniktala,* 934 F.2d 25, 28 (2d Cir.1991) (citation omitted). The defendant must make a *prima facie* showing of materiality, *United States v. Finnerty,* 411 F.Supp.2d 428, 431 (S.D.N.Y.2006), and must "offer more than the conclusory allegation that the requested evidence is material," *United States v. Rigas,* 258 F.Supp.2d 299, 307 (S.D.N.Y.2003). "The Government should interpret the language of Rule 16 broadly to ensure fairness to the defendant." *United States v. Martinez,* 844 F.Supp. 975, 982 (S.D.N.Y.1994).

The Court concludes that call number 24 is material to the defense to the Phillips murder. The Government argues that call number 24 is immaterial because it reflects events after the Phillips murder, not the murder itself, but that is unpersuasive. As the defendants note, the call appears to reflect events minutes after the murder, in its vicinity, and involving persons who (based on the caller's words) may have committed it. It conceivably may provide a different version of events from that presented at trial by the Government, and on that basis is material to the defense.

As the parties have noted, the words on the call as recorded are difficult to understand: The caller is in hysterics and screaming throughout most of the call. But the caller does appear to state, at 17:17 on the CD,[FN2] that there are men outside her window who say they killed a man on her block (presumably, just moments ago) and have "problems" with her husband. She also appears to describe the age and race of the men.

> FN2. The call lasts approximately four minutes. The CD containing the recording of the call contains recordings of other calls, both before and after call number 24.

The call thus describes persons who may well have been perpetrators of the murder and was made shortly after the murder occurred. The defense is entitled to use the tape to explore whether the caller's description of the persons described, and their whereabouts, are consistent with the version of events that the Government will pursue at trial. In the event that there is an inconsistency, the defense may seek to introduce the recording at trial. It is also possible that the account rendered on the tape will lead the defense to pursue other investigative leads as it readies for trial and will lead it to admissible evidence. To be sure, it is entirely possible that the descriptions on the call will prove consistent with the evidence that the Government presents at trial. It is possible that the recording will prove to be of little or no use to the defense. But at this stage, the Court cannot simply so assume: Trial is months away and the Government has not revealed the narrative of the Phillips murder to which its witnesses will testify at trial. Given that the burden for an item to qualify under Rule 16 is not heavy, the Court finds there is "some indication that the pretrial disclosure of the disputed evidence

would ... enable[ ] the defendant significantly to alter the quantum of proof in his favor." *Maniktala,* 934 F.2d at 28.

*7 That said, a redacted version of call number 24 having been produced, the Rule 16 issue here is the narrower one of whether the information identifying the caller is material. That presents a closer question. The defense has not articulated a specific theory of why the caller's identity is material, other than to state generally that the defense would like to interview the cal ler.[FN3] The Court has some doubt that a bare desire to interview a witness who placed a 911 call, uncoupled from a concrete explanation as to why interviewing that witness would "enable[ ] the defendant significantly to alter the quantum of proof in his favor," *Maniktala,* 934 F.2d at 28, makes the witness's identity material. The Court, however, need not resolve that issue here. The Court will instead assume *arguendo* that the identity of the caller here is material to the preparation of the defense because identification of eyewitnesses to the immediate aftermath of the Phillips murder may lead the defense-in some way-to develop a theory of innocence or to identify shortcomings in the Government's theory of guilt.

> FN3. The defense has not argued, for example, that the location of the caller, coupled with the timing of the call, is such that any person perceived and described by the caller at the time of the call could not plausibly have been at the scene of the Phillips murder.

C. Validity of the Redaction of Call Number 24

On the assumption that the identity of the caller on call number 24 is material to the preparation of the defense, the Court reaches the issue of whether the Government was justified, under Rule 16, in redacting the caller's identity.

Rule 16(d) (1) provides, "[a]t any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief." The Rule "authorizes the district court to limit or otherwise regulate discovery had pursuant to the Rule." *United States v. Delia,* 944 F.2d 1010, 1018 (2d Ci r.1991). "Among the considerations to be taken into account by the court will be the safety of witnesses and others, a particular danger or perjury or witness intimidation...." Fed.R.Crim.P. 16, Advisory Committee Notes, 1966 Amendment. "Although the rule does not attempt to indicate when a protective order should be entered, it is obvious that one would be appropriate where there is reason to believe that a witness would be subject to physical or economic harm if his identity is revealed." Fed.R.Crim.P. 16, Advisory Committee Notes, 1974 Amendment.

On this authority, courts commonly approve of redactions of Rule 16 material or similar means of protecting witness identity. *See United States v. Fort,* 472 F.3d 1106, 1121 (9th Ci r.2007) (approving of "the government's disclosure of redacted copies of local police reports [sought under Rule 16], where the redactions were consistent and supported by an articulated intention to protect witness identities in the context of a case in which the district court has already found a serious risk of harm to witnesses."); *United States v. Pelton,* 578 F.2d 701, 706 (8th Cir.1978) (approving the district court's decision to deny defendants access to non-exculpatory tapes of conversations under Rule 16(d)(1) in order to safeguard the safety of cooperating witnesses); *United States v. Santiago,* 174 F.Supp.2d 16, 32, 36 (S.D.N.Y.2001) (in multi-defendant case involving "violent narcotics trafficking enterprise" in the Bronx, requiring, under Rule 16, disclosure of a clearer copy of the photo array that resulted in defendant's identification, but permitting Government not to disclose identity of witness who identified him); *United States v. Bin Laden,* No. 98 Cr. 1023(LBS), 2001 WL 66314, at * 1 (S.D.N.Y. Jan. 26, 2001) (ordering production of Rule 16 material, but subject to redactions to prevent disclosure of identity of government witnesses and, "upon credible showing of danger," of non-witnesses); *cf. Roviaro v. United States,* 353 U.S. 53, 59–61 (1957) (affirming "Government's

privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that l aw," while recognizing that "[w]here the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way ... [and] the trial court may require disclosure."); *United States v. Napue,* 834 F.2d 1311, 1317 (7th Cir.1987) (although defendant has no right to list of government witnesses, a district court may in its discretion order the government to produce such a list, and may take into account concerns about witness safety). The same consideration of witness safety has been held to justify deferred production of § 3500 material. *United States v. Remire,* 400 F.Supp.2d 627, 633 (S.D.N.Y.2005) ("[C]ourts in this circuit are especially reluctant to require the disclosure of witness lists in cases such as this one that involve allegations of crimes of violence."); *United States v. Robles,* No. 04 Cr. 1036(GEL), 2005 WL 957338, at * 1 (S.D.N.Y. Apr. 22, 2005) (the disclosure of a witness list "is particularly inappropriate in this case, which involves charges of violent crimes, where the witnesses will include cooperating individuals and victims.").

***8** The Government here argues that redacting the witness's name is justified to assure witness safety. Having listened to the 911 call, the Court agrees. Based on her own words on the call, the caller on call number 24 was in fear for her life when she called 911 the night of September 3, 2005. In hysterics, she repeatedly tells the 911 operator, who tries in vain to calm her down, that she is five months pregnant, that the men outside are going to kill her, and that she does not want to die. It would be hard to invent words spoken on a call that more explicitly validate a concern about witness safety. The Court is, further, mindful that the Superseding Indictment charges that these three defendants participated in the Phillips murder; that one defendant (Urena) was a participant in a number of attempted murders; and that the BTG, with which all three defendants are alleged to have been affiliated, was responsible for a substantial number of murders in its neighborhood in the Bronx. The Court has also presided over numerous guilty pleas and sentenci ngs in connection with this case, and has reviewed sentencing materials sufficient to corroborate multiple gang members have committed numerous retributive violent actions. Although the caller of call number 24 does not explain why she is afraid that the people massed outside her door will target her, it is clear that she has this fear. It is reasonable to conclude that revealing her name or address might tend to jeopardize her safety.

The Court therefore holds that the Government has shown good cause for its redaction of the caller's identifying information. There has been no suggestion by the defense that the identity of the caller is somehow exculpatory of the defendants, or that the caller is in possession of exculpatory evidence. The analysis above would perforce be different if there were a credible claim that redacting the caller's identity deprived the defense of exculpatory evidence.

CONCLUSION

For the reasons expressed, the Court declines to order the Government, at this time, to disclose the identity of the caller on call number 24. The redaction of the caller's identity was amply justified on safety grounds. This ruling is without prejudice to the defense's right, at a later day, to pursue anew disclosure of the witness's identity, should the defense be able to articulate a more convincing theory as to why disclosure of that identity would be material to the preparation ofthe defense and sufficiently material to outweigh the Government's concerns about safety.

SO ORDERED.

S.D.N.Y.,2013.
U.S. v. Urena
Slip Copy, 2013 WL 5272933 (S.D.N.Y.)

Slip Copy, 2013 WL 5272933 (S.D.N.Y.)
(Cite as: 2013 WL 5272933 (S.D.N.Y.))

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SEE RULE 19 OF THE RULES OF THE COURT OF CRIMINAL APPEALS RELATING TO PUBLICATION OF OPINIONS AND CITATION OF UNPUBLISHED OPINIONS.

Court of Criminal Appeals of Tennessee, at Jackson.
Heck VAN TRAN, Appellant,
v.
STATE of Tennessee, Appellee.

No. 02C01-9803-CR-00078.
April 1, 1999.
Permission to Appeal Granted Sept. 20, 1999.
Permission to Appeal Granted Nov. 6, 2000.

Brock Mehler, Nashville, TN, William D. Massey, Memphis, TN, for the Appellant.

John Knox Walkup, Attorney General and Reporter, Michael E. Moore, Solicitor General, Jennifer L. Smith (On Appeal), Glenn R. Prude (At Hearing), Assistant Attorneys General, Nashville, TN, William L. Gibbons, District Attorney General, John W. Campbell, Assistant District Attorney General, Memphis, TN, for the Appellee.

OPINION

RILEY.

***1** Petitioner, Heck Van Tran, appeals from the dismissal of his petition for post-conviction relief by the Criminal Court of Shelby County. He was previously convicted on three counts of felony murder and sentenced to death on each count. Although all three convictions were affirmed on direct appeal, only one death sentence was affirmed. Petitioner now contends the trial court erred in dismissing his petition for post-conviction relief and presents the following issues for review:

1. whether the original trial court erred in failing to inquire into petitioner's competency to stand trial;

2. whether the original trial court erred in defining "reasonable doubt" in jury instructions during both the guilt and sentencing phases of the trial;

3. whether petitioner's death sentence is disproportionate punishment in light of his present mental condition;

4. whether the post-conviction court erred in refusing funding for expert services for an investigation of the jury's composition;

5. whether the post-conviction court erred in denying petitioner's request for inspection of the prosecution file to seek exculpatory evidence;

6. whether petitioner's execution is prohibited because he is mentally retarded; and

7. whether petitioner was deprived of effective assistance of counsel at his original trial.

After a careful review of the record, we find no reversible error and AFFIRM the judgment of the trial court.

PROCEDURAL HISTORY

In June 1989, a Shelby County jury found petitioner guilty of three counts of felony murder and sentenced him to death on all three counts. The three convictions were affirmed on appeal; however, only one death sentence was affirmed. *State v. Van Tran,* 864 S.W.2d 465 (Tenn.1993). The other two death sentences were set aside and remanded for resentencing. *Id.* at 490. The United States Supreme Court denied the petition for *writ of certiorari. Van Tran v. Tennessee,* 511 U.S. 1046, 114 S.Ct. 1577, 128 L.Ed.2d 220 (1994). Upon remand of the two successfully challenged sentences, petitioner received two concurrent life sentences.

Petitioner filed his petition for post-conviction relief on March 7, 1995. An evidentiary hearing was conducted in October 1997. The petition was dismissed by order entered February 13, 1998, and petitioner timely appealed to this Court. Oral arguments were heard February 10, 1999.[FN1]

FN1. Oral arguments were heard in Dyersburg, Tennessee. Students of the Lake County, Dyer County and Dyersburg school systems attended at the invitation of this Court in an effort to educate them about our judicial system.

FACTS

We incorporate the following material facts as set forth by the Supreme Court of Tennessee on direct appeal:

On the afternoon of October 20, 1987, Arthur Lee, Amy Lee, and Kai Yin Chuey were found dead in the Jade East Restaurant in Memphis. The restaurant had not yet opened for business that day, and the victims had apparently been inside making preparations for the evening. Jewelry with a wholesale value of $25,000 had been taken from the restaurant. The State's critical proof included: a statement taken from the Defendant in which he admitted his involvement in the crimes; Defendant's fingerprint on one of the jewelry cases taken during the robbery; and the eyewitness identification of the Defendant by a survivor of the robbery.

***2 ...**

The Defendant, Heck Van Tran, was born on November 8, 1966. His mother was Vietnamese; and his father, an American serviceman, died in Vietnam in 1968. The Defendant started school when he was six years old but stopped when Saigon fell. In 1983 a Catholic relief agency resettled the Defendant and his mother in Memphis. The Defendant briefly attended school before dropping out in 1984.

After his arrest by the Houston, Texas, police, Defendant gave a statement in which he acknowledged his role in the robbery and murders. He stated that he had worked briefly at the Jade East Restaurant a month or two before the crimes and that Mr. Lee had fired him because "he didn't like me" and "said I cooked too many egg rolls." The Defendant implicated Hung Van Chung, Kong Chung Bounnam and Duc Phuoc Doan in the robbery. He stated that the four men entered the back door of the restaurant and he talked to Arthur Lee "for about ten minutes before there was any shooting." The Defendant had a .22 revolver, Bounnam a .44, Chung a .22 and Doan a .25.

The Defendant described what happened after the group pulled out their guns:

Mr. Lee grabbed Nam's [Bounnam's] hand with the gun and elbowed him in the chest. Nam fell back and hit the old lady. The old lady fell on me and when she hit me it caused the gun to go off. I don't know what I hit that time. Mr. Lee then kicked Hung [Chung]. I heard Hung Chung shoot one or two times and then Mr. Lee tried to grab the gun and Hung Chung shoot him. While Mr. Lee was trying to get Hung [Chung's] gun, I told him not to or I would have to hurt him. He turned and tried to get my gun and I shot him. He fell and was moving around and I shot him in the face somewhere. Then I walked thr[ough] the door where they kept the money and gold. I looked up and saw the old lady roll over. I thought she had something in her hand. I shot her in the back of the head.

While the Defendant was in the office collecting the jewelry, he heard more shots. He stated that he did not know "who was shooting or what" or who had shot "the young girl," Amy Lee. Upon leaving the office, the Defendant saw Bounnam holding Ging Sam Lee. The Defendant told Bounnam not to hurt her. Bounnam hit Mrs. Lee on the back of the head, and all the assailants left.

Outside the restaurant, the Defendant discovered that Bounnam had been shot in the left leg near the groin. Bounnam claimed the Defendant

had shot him. The group fled in Bounnam's Camaro to an acquaintance's apartment. From there, the Defendant, Bounnam and Chung drove Chung's car to Washington, D.C. Bounnam's Camaro was left in Memphis. Doan remained in Tennessee.

From Washington, the trio drove to Houston, Texas. Once in Houston, the Defendant went to the Saigon Pool Hall and talked with a Vietnamese man about selling some gold. The man took the gold and returned in about ten minutes with $4,000.00. The Defendant paid the man $200 and divided the rest three ways. Later, Bounnam flew to North Carolina and Chung went to Dallas with a friend.

***3** On April 28, 1988, almost six months after the robbery, the Defendant was arrested in Houston....

State v. Van Tran, 864 S.W.2d at 468-69.

STANDARD OF REVIEW

The petition for post-conviction relief was filed on March 7, 1995; therefore, the prior Post-Conviction Procedure Act, Tenn.Code Ann. § 40-30-101 *et seq.,* applies and not the Post-Conviction Procedure Act of 1995, Tenn.Code Ann. § 40-30-201 *et seq.* The new Act only applies to petitions filed after May 10, 1995. Tenn.Code Ann. § 40-30-201 Compiler's Notes.

Petitioner has the burden of proving his claims by a preponderance of the evidence under the prior Act. *Tidwell v. State,* 922 S.W.2d 497, 500 (Tenn.1996). Findings of fact made by the trial court are conclusive on appeal unless the evidence preponderates against the judgment. *Cooper v. State,* 849 S.W.2d 744, 746 (Tenn.1993). Accordingly, we are bound to affirm the judgment unless the evidence in the record preponderates against the findings of the trial court. *Black v. State,* 794 S.W.2d 752, 755 (Tenn.Crim.App.1990). The burden of establishing that the evidence preponderates against the trial court's findings is on the petitioner. *Henley v. State,* 960 S.W.2d 572, 579 (Tenn.1997).

After the evidentiary hearing, Honorable William H. Williams entered a comprehensive 30-page Memorandum of Findings of Fact and Conclusions of Law. This excellent, extensive memorandum addressed each ground raised by petitioner as required by Tenn.Code Ann. § 40-30-118(b).

TRIAL COURT'S FAILURE TO INQUIRE INTO COMPETENCY

Petitioner contends that the original trial court erred in failing to inquire into his competency and trying him when he was not competent, thus violating his due process rights. Petitioner failed to raise this issue on direct appeal; therefore, it is "waived" and is not an appropriate ground for post-conviction relief. *See* Tenn.Code Ann. § 40-30-112(b)(1); *House v. State,* 911 S.W.2d 705, 714 (Tenn.1995). Furthermore, for reasons hereinafter stated, petitioner has not made an appropriate showing that the trial court had any reasonable basis to order a mental evaluation and/or declare petitioner incompetent *sua sponte.*[FN2]

FN2. The failure of trial counsel to raise the issue of petitioner's competence is discussed under petitioner's ineffective assistance of counsel claim.

This issue is without merit.

REASONABLE DOUBT JURY INSTRUCTION

Petitioner contends the trial court's definition of "reasonable doubt" was constitutionally deficient in requiring proof to a "moral certainty" and excluding "possible doubt" from the definition. This issue is "waived" since it was not raised on direct appeal. Tenn.Code Ann. § 40-30-112(b)(1). Furthermore, the trial court's "reasonable doubt" jury instruction has been held constitutional. *See Carter v. State,* 958 S.W.2d 620, 626 (Tenn.1997).

***4** This issue is without merit.

DISPROPORTIONATE SENTENCE

Petitioner contends his death sentence is disproportionate and excessive punishment in light of

his present mental condition. Specifically, he contends he is presently insane.

The Supreme Court of Tennessee conducted a proportionality analysis in the direct appeal and concluded that the death penalty was "neither excessive nor disproportionate." *State v. Van Tran,* 864 S.W.2d at 482. Therefore, the issue of proportionality has been "previously determined" and is not a proper ground for post-conviction relief. Tenn.Code Ann. § 40-30-112(a).

The Eighth Amendment to the United States Constitution prohibits the state from inflicting the death penalty upon a prisoner who is insane. *Ford v. Wainwright,* 477 U.S. 399, 410, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986); *see also Jordan v. State,* 124 Tenn. 81, 87, 135 S.W. 327, 329 (1911) (discussing common law rule that one cannot be tried, sentenced or punished while insane). However, this is not a proportionality issue.

In spite of the constitutional prohibition against the execution of an insane person, Tennessee has no specific statutory procedure by which to address this issue post-trial. Many states have statutes explicitly requiring the suspension of the execution of a prisoner who meets the legal test for incompetence. *See Ford v. Wainwright,* 477 U.S. at 408, n. 2 . The Tennessee legislature should give consideration to this issue.

Post-conviction relief is a statutory creation. Tenn.Code Ann. § 40-30-101 *et seq.* (now § 40-30-201 *et seq.*). Neither these statutes nor any other statutes make provisions to address such an issue. As an intermediate appellate court, we are reluctant to create and vest jurisdiction in the trial court and establish a procedural basis to address this issue.

Petitioner is unquestionably entitled to be heard in some forum on this issue. In the event he is not accorded a state hearing, he can certainly seek federal relief. *Ford v. Wainwright,* 477 U.S. at 410.

Accordingly, we leave this matter to the determination of the Tennessee legislature and/or the Supreme Court of Tennessee.

EXPERT SERVICES

Petitioner contends the post-conviction court erred in failing to fund his request for expert services to investigate the jury composition at his original trial. Specifically, he contends the jury selection procedures utilized in Shelby County violated the "fair cross-section" requirement of the Sixth Amendment to the United States Constitution. *See Duren v. Missouri,* 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979). He contends expert assistance would establish that college students and certain professionals constituted a "distinctive group" and were unconstitutionally excluded by statutory exemptions.

***5** The post-conviction court correctly noted the Tennessee Supreme Court's conclusion on direct appeal that petitioner failed to establish a *prima facie* violation based upon statutory exemptions for college students and certain professionals. The post-conviction court concluded this was a question of law which did not require statistical analysis.

In order to receive state funding for expert services in a post-conviction proceeding, a petitioner must demonstrate by specific factual proof that the services of an expert are necessary, and the petitioner is unable to establish that ground for post-conviction relief by other available evidence. *Owens v. State,* 908 S.W.2d 923, 928 (Tenn.1995). The determination of the need for expert services is entrusted to the sound discretion of the trial court. *State v. Cazes,* 875 S.W.2d 253, 261 (Tenn.1994).

The post-conviction court correctly concluded that this was an issue of law decided in the direct appeal. Thus, expert services would not be of assistance to the petitioner. The trial court did not abuse its discretion in refusing state funds for such expert services.

This issue is without merit.

INSPECTION OF PROSECUTION FILE

Petitioner contends the post-conviction court erred in refusing his request to inspect the prosecution file under the Tennessee Public Records Act, Tenn.Code Ann. § 10-7-503. The state contends Tenn.Code Ann. § 10-7-503 is inapplicable since the state had a pending prosecution against one of petitioner's co-defendants, Kong Chung Bounnam.

Records relevant to a pending criminal action need not be disclosed under the Tennessee Public Records Act. *Appman v. Worthington,* 746 S.W.2d 165, 166 (Tenn.1987), *Knoxville News-Sentinel v. Huskey,* 982 S.W.2d 359, 361 (Tenn.Crim.App.1998). Since criminal action was pending against petitioner's co-defendant, petitioner was not entitled to the prosecution file under the Tennessee Public Records Act.[FN3]

> FN3. Although the case of co-defendant Bounnam was pending at the time of the post-conviction hearing, petitioner alleges in his reply brief that the case has now concluded. Even if true, this does not affect the correctness of the post-conviction court's ruling. Petitioner is not precluded from seeking future relief if it is appropriate under the statute.

Petitioner contends that since he has been unable to inspect the prosecution file, his claim of the prosecution withholding exculpatory evidence should not be categorically rejected. *See Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). As the post-conviction court correctly noted, petitioner has made no showing that exculpatory evidence has been withheld. A trial court does not abuse its discretion in refusing to examine the state's entire file to seek exculpatory evidence, absent more specific information. *State v. Caughron,* 855 S.W.2d 526, 541 (Tenn.1993). Furthermore, there was no request that any files or documents be placed under seal for appellate review. Thus, we are precluded from considering the issue. *See State v. Gibson,* 973 S.W.2d 231, 244 (Tenn.Crim.App.1997); *State v. Roberts,* 755 S.W.2d 833, 836 (Tenn.Crim.App.1988). This issue is without merit.

MENTAL RETARDATION

***6** Petitioner contends that he is "mentally retarded," such that his execution is prohibited by Tenn.Code Ann. § 39-13-203. The state contends Tenn.Code Ann. § 39-13-203 is inapplicable since it was not in effect on the date of the homicide; and that, in any event, petitioner has failed to establish mental retardation.

Tenn.Code Ann. § 39-13-203(b) provides that "no defendant with mental retardation at the time of committing first degree murder shall be sentenced to death." The statute also provides:

(a) As used in this section, "mental retardation" means:

(1) Significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below;

(2) Deficits in adaptive behavior; and

(3) The mental retardation must have been manifested during the developmental period, or by eighteen (18) years of age.

Tenn.Code Ann. § 39-13-203 (effective July 1, 1990). *See* 1990 Public Acts, Chapter 1038, § 6. The homicide was committed in October 1987.

At the post-conviction hearing, petitioner presented the testimony of Dr. Andrew Adler, a psychologist who administered psychological tests to the petitioner. Dr. Adler testified that petitioner's I.Q. was 67. However, the post-conviction court found Dr. Adler misread the manual relating to I.Q. calculation. Dr. Lynn Zager, a psychologist who testified for the state, related that the proper calculation was 72, not 67.

As stated, the post-conviction court found Dr. Adler's calculation of 67 to be erroneous and Dr. Zager's calculation of 72 to be correct. The evid-

ence does not preponderate against this finding. The post-conviction court's findings are conclusive on appeal unless the evidence preponderates otherwise. *Butler v. State,* 789 S.W.2d 898, 899 (Tenn.1990); *Adkins v. State,* 911 S.W.2d 334, 341 (Tenn.Crim.App.1995). Therefore, we need not reach the issue as to whether Tenn.Code Ann. § 39-13-203 is applicable to those who commit first degree murder prior to its effective date.

This issue is without merit.

INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner contends he was deprived of effective assistance of counsel at his trial. Specifically, he contends trial counsel were ineffective in the following respects:

(1) failing to raise the issue of petitioner's competence to stand trial;

(2) failing to seek suppression of petitioner's confession based upon the denial of right to counsel and petitioner's inadequate language comprehension;

(3) failing to request support services;

(4) failing to adequately *voir dire* the jury;

(5) failing to investigate and present mitigating evidence;

(6) failing to properly address the issue of disproportionality of petitioner's death penalty on appeal;

(7) failing to object to various errors in the trial court; and

(8) failing to raise numerous other issues on appeal.

*7 Further, petitioner argues the cumulative effect of these various deficiencies rendered his trial fundamentally unfair.

A. Appropriate Standards for Effective Assistance

This Court reviews a claim of ineffective assistance of counsel under the standards of *Baxter v. Rose,* 523 S.W.2d 930 (Tenn.1975), and *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The petitioner has the burden to prove that the attorney's performance was deficient, and the deficient performance resulted in prejudice to the defendant so as to deprive him of a fair trial. *Strickland v. Washington,* 466 U.S. at 687, 104 S.Ct. at 2064; *Goad v. State,* 938 S.W.2d 363, 369 (Tenn.1996); *Overton v. State,* 874 S.W.2d 6, 11 (Tenn.1994); *Butler v. State,* 789 S.W.2d at 899.

The test in Tennessee to determine whether counsel provided effective assistance is whether his performance was within the range of competence demanded of attorneys in criminal cases. *Baxter v. Rose,* 523 S.W.2d at 936. The petitioner must overcome the presumption that counsel's conduct falls within the wide range of acceptable professional assistance. *Strickland v. Washington,* 466 U.S. at 689, 104 S.Ct. at 2065; *Alley v. State,* 958 S.W.2d 138, 149 (Tenn.Crim.App.1997); *State v. Williams,* 929 S.W.2d 385, 389 (Tenn.Crim.App.1996). Thus, in order to prove a deficiency, a petitioner must show that counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness based upon prevailing professional norms. *Strickland v. Washington,* 466 U.S. at 688, 104 S.Ct. at 2065; *Henley v. State,* 960 S.W.2d at 579; *Goad v. State,* 938 S.W.2d at 369.

In reviewing counsel's conduct, a "fair assessment ... requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland v. Washington,* 466 U.S. at 689, 104 S.Ct. at 2065. The fact that a particular strategy or tactic failed or hurt the defense, does not, standing alone, establish unreasonable representation. However, deference to matters of strategy and tactical choices applies only if those choices are informed ones and based upon adequate preparation. *Goad v. State,* 938 S.W.2d at 369; *Hel-*

lard v. State, 629 S.W.2d 4, 9 (Tenn.1982); *Alley v. State,* 958 S.W.2d at 149; *Cooper v. State,* 847 S.W.2d 521, 528 (Tenn.Crim.App.1992).

B. Testimony at Post-Conviction Hearing

***8** The following testimony was elicited at the post-conviction hearing. Arthur Quinn and Manuel Scarmoutsos were appointed by the trial court to represent petitioner. Both were experienced criminal defense attorneys. Quinn had prior trial experience in a case where the state sought the death penalty, the defendant received a life sentence, and the Supreme Court of Tennessee reversed and found defendant not guilty by reason of insanity. *See State v. Clayton,* 656 S.W.2d 344 (Tenn.1983). Scarmoutsos also had capital case experience under a previous death penalty statute.

Scarmoutsos filed a motion to suppress petitioner's confession. He did extensive investigation in Texas where the confession was given, and argued petitioner did not intelligently waive his *Miranda* rights due to his limited comprehension of the English language. This argument was rejected at trial and on appeal. *See State v. Van Tran,* 864 S.W.2d at 471-73.

Because of the devastating proof against petitioner, including fingerprint evidence, eyewitness testimony and the confession, defense counsel endeavored to negotiate a guilty plea. Although petitioner initially agreed to testify for the state during the trial of a co-defendant, petitioner changed his mind on the day of trial. Thereafter, petitioner rejected an offer of three consecutive life sentences.

Early in the attorney-client relationship, counsel had difficulty communicating with petitioner due to the language barrier. However, once an interpreter was secured, petitioner was able to understand. Based on their extensive dealings with petitioner, neither counsel felt competency was an issue.

Prior to trial, counsel retained the services of Dr. J.L. Khanna, a clinical psychologist. Based upon an examination, Dr. Khanna found petitioner to be below the average intelligence level, depressed with suicidal ideations, and under a great deal of stress. Counsel did not believe the findings of depression and stress to be unusual, especially for a person facing a capital murder trial. There was no indication from Dr. Khanna that petitioner was incompetent.

Dr. William D. Kenner, a forensic psychiatrist, testified on behalf of the petitioner at the post-conviction hearing. Dr. Kenner was appointed by the Probate Court in Davidson County in 1992 to determine whether the petitioner was competent to make decisions about his medical care. He determined that petitioner was not. Dr. Kenner was also retained by counsel in this post-conviction case and performed an evaluation in April 1997. At the time of the post-conviction hearing, Dr. Kenner believed the petitioner was suffering from chronic, severe paranoid schizophrenia.

Dr. Kenner testified that the onset of this illness is preceded by a prodromal phase that slowly develops over a number of months, sometimes years. Dr. Kenner, having read Dr. Khanna's report of April 1989, stated there was evidence of this prodromal phase in the petitioner during his trial in June 1989. Dr. Kenner also testified that the petitioner showed more progressive signs of this prodromal phase during his initial processing by the Department of Correction in September 1989.

***9** When asked whether he believed the petitioner was competent to stand trial, Dr. Kenner testified:

I think there are some indicators that would raise that question. And the indicators are that the way he handled himself is suicidal ideation, that he is having periods of confusion that he attributes to a headache.... So that those I think raise significant questions.

The other issue that I think makes it very difficult in this case is that of language and culture.

That it-these issues are much easier to pick up, to understand, in someone from the same culture who is trained to examine someone and look at it. It becomes much more difficult when you're looking at someone from a different culture with a different mother [tongue].

Dr. Kenner further testified that in his mind these indicators would have raised a need for further inquiry into the petitioner's mental state.

Dr. Murray Smith, a specialist in addictive medicine, evaluated the petitioner for purposes of the post-conviction hearing. Dr. Smith determined that at the time of the offense the petitioner was chemically dependent on drugs and alcohol dating back to when he was eleven or twelve years old. Dr. Smith also concluded that the petitioner had a sleep disorder and reactive hyperthyroidism and was in a "hypervigilant, hyperactive state" at the time of the offense.

Dr. Andrew Adler, a counseling psychologist, was qualified as an expert in measuring language intelligence and comprehension, and mental retardation. Based upon his psychological evaluation of the petitioner in February 1997, Dr. Adler concluded that the petitioner suffered from paranoid schizophrenia, post-traumatic stress disorder, and mild mental retardation. He calculated petitioner's I.Q. at 67 but was cross-examined as to the accuracy of this calculation.

According to Dr. Adler, the petitioner's vocabulary and language skills at the time of the evaluation were comparable to a first or second grader's. Dr. Adler further testified that he did not think the petitioner could have understood sufficiently to knowingly and voluntarily waive his *Miranda* rights. According to Dr. Adler, people from Southeast Asia stereotypically answer in the affirmative because they are taught to respect authority and not to offend others.

The state's witness, Dr. Lynn Zager, Clinical Director of Midtown Mental Health Center in Memphis, testified as an expert in psychology. Given the number scores Dr. Adler obtained from the petitioner's I.Q. test, Dr. Zager testified that the petitioner's I.Q. was 72, not 67. It appears from Dr. Zager's testimony that Dr. Adler simply miscalculated the result based upon petitioner's number scores.

C. Competency

Petitioner contends trial counsel were ineffective in failing to raise the issue of petitioner's competence to stand trial. The state contends petitioner was competent and there was no reason for trial counsel to raise this issue.

A summary of pertinent findings and conclusions by the post-conviction judge as set forth in his memorandum is as follows:

***10** (1) petitioner had experienced trial counsel familiar with the issue of incompetency;

(2) petitioner was able to confer with his counsel in a "reasonably intelligent manner;"

(3) Dr. Khanna, an experienced clinical psychologist who evaluated petitioner prior to trial, did not indicate that petitioner was incompetent;

(4) neither petitioner's mother, his sponsor from Catholic Charities, his friends nor any other person raised any questions concerning the petitioner's mental status at the time of trial;

(5) trial counsel "had no reasonable basis to inquire into the mental capacity of the Petitioner at that time to stand trial;"

(6) Dr. Kenner's testimony indicates petitioner would have been in the prodromal stages of schizophrenia at the time of trial;

(7) Dr. Kenner testified only that there were "possible indicators" raising the issue of competency;

(8) no expert testimony indicates that petitioner

was incompetent at the time of trial;

(9) "[t]he record does not show a scintilla of substantive proof that Petitioner was incompetent to stand trial;"

(10) petitioner was competent to stand trial;

(11) petitioner was not insane at the time of the commission of the murders; and

(12) petitioner's I.Q. is 72, not 67.

Based upon these findings, the post-conviction court concluded that neither prong of *Strickland* had been met. Specifically, the court found that trial counsel's performance was not deficient. Furthermore, the post-conviction court found petitioner was not prejudiced by trial counsel's performance since petitioner was, in fact, competent to stand trial.

After a careful review of the record, we conclude the evidence does not preponderate against these findings by the post-conviction court. Petitioner has, therefore, failed to establish that trial counsel's performance was in any way deficient, or that he was prejudiced by their performance. *See Strickland v. Washington,* 466 U.S. at 687, 104 S.Ct. at 2064; *Goad v. State,* 938 S.W.2d at 369.

This issue is without merit.

D. Suppression of Confession

Petitioner contends trial counsel were deficient in their handling of the motion to suppress his confession. Specifically, he contends they were deficient in failing to offer expert proof concerning his lack of language comprehension and in failing to challenge the confession based upon the Sixth Amendment right to counsel.

The post-conviction court found no deficiencies by trial counsel. Furthermore, the court found no prejudice since a Sixth Amendment argument would have been unsuccessful.

Counsel pursued a motion to suppress the confession at the trial level and on appeal. On appeal, the Tennessee Supreme Court specifically noted petitioner's language difficulties, yet found the petitioner to have voluntarily, knowingly and intelligently waived his *Miranda* rights. *State v. Van Tran,* 864 S.W.2d at 471-73. Petitioner has not shown that failing to retain the services of a language comprehension expert was below the range of competence demanded of attorneys practicing criminal law. Furthermore, he has not shown a reasonable probability that the utilization of such an expert would have led to suppression of the confession. *See Strickland v. Washington,* 466 U.S. at 687, 104 S.Ct. at 2064; *Baxter v. Rose,* 523 S.W.2d at 936.

***11** Additionally, petitioner has failed to establish prejudice due to the failure of trial counsel to argue a Sixth Amendment right to counsel violation. The Tennessee Supreme Court concluded the petitioner properly waived his *Miranda* rights. *State v. Van Tran,* 864 S.W.2d at 473. Petitioner has made no showing that the result would have been any different had counsel added a Sixth Amendment argument and/or Article I, § 9 Tennessee Constitution argument.

This issue is without merit.

E. Support Services

Petitioner contends trial counsel were ineffective in failing to seek necessary expert services to challenge the composition of the jury pool. Specifically, petitioner contends the statutory exemptions for college students and certain professionals deprived him of a fair cross-section of the community. This issue is discussed previously under the section *EXPERT SERVICES.* A statistical analysis would not have benefited petitioner. For the same reasons that the post-conviction court did not err in refusing such expert services, trial counsel were not deficient in failing to request such services.

This issue is without merit.

F. Voir Dire

Petitioner contends trial counsel were ineffective in the *voir dire* of the jury. Specifically, he contends trial counsel were ineffective in failing to: (1) sufficiently inquire into the content of publicity to which prospective jurors had been exposed; (2) sufficiently question if jurors would automatically impose the death penalty upon a first degree murder conviction; (3) sufficiently question if jurors could consider mitigating evidence; and (4) challenge certain prospective jurors for cause. The post-conviction court found no deficiency on the part of trial counsel.

Like the post-conviction court, we are unable to conclude that trial counsels' performance in this regard was below the range of competence demanded of attorneys in criminal cases. *See Baxter v. Rose,* 523 S.W.2d at 936. Furthermore, petitioner has not shown that there is a reasonable probability that the result of the proceeding would have been different had counsel conducted *voir dire* differently. *See Strickland v. Washington,* 466 U.S. at 694, 104 S.Ct. at 2068; *Henley v. State,* 960 S.W.2d at 579.

This issue is without merit.

G. Failure to Present Mitigation Evidence

Petitioner contends trial counsel were deficient in failing to investigate and present additional mitigating evidence. Specifically, petitioner contends trial counsel should have presented additional evidence relating to his: (1) Amerasian status; (2) dysfunctional relationship with his mother; (3) being fatherless in a patriarchal society; (4) status as a refugee in Vietnam; and (5) medical condition in explanation of his commission of the crimes.

The post-conviction court found that trial counsel conducted a proper investigation and were not deficient in presenting mitigating evidence at the penalty phase of trial. Trial counsel were aware of petitioner's cultural background and social history as a result of their investigation. They presented proof from several witnesses in the penalty phase, including an FBI agent who testified to petitioner's cooperation in locating the co-defendants; two employers who testified that petitioner was a good employee; petitioner's Catholic Charities sponsor with whom petitioner had lived; Dr. Khanna who testified about petitioner's life in Vietnam and remorse for the crimes; and petitioner's mother.

***12** Furthermore, in conducting its proportionality review, the Tennessee Supreme Court specifically noted petitioner's cooperation with the FBI, good employment history, lack of prior criminal involvement, remorse for the homicides, personal history as a child of a Vietnamese mother and an American father, difficult childhood and educational problems. *State v. Van Tran,* 864 S.W.2d at 482. Despite these findings, the court found the death penalty was not disproportionate.

First, we conclude the evidence does not preponderate against the post-conviction court's finding that trial counsel's performance was not deficient. Second, we conclude petitioner has failed to establish prejudice. In reaching the latter determination we must: (1) analyze the nature and extent of the mitigating evidence not presented; (2) consider whether substantially similar mitigating evidence was presented; and (3) consider whether there was such strong evidence of aggravating factors that the mitigating evidence would not have affected the jury's determination. *Goad v. State,* 938 S.W.2d at 371.

The suggested mitigating evidence related to petitioner's cultural and social background and his medical condition. Much of this evidence is similar to that which was presented to the jury. Furthermore, considering the nature and circumstances of the offense, and the applicability of the two aggravating circumstances of mass murder and depravity of mind, we conclude petitioner has not established a reasonable probability that the jury's determination would have been different had this evidence been presented.

This issue is without merit.

H. Proportionality of Death Sentence

Petitioner contends trial counsel were deficient in failing to properly present the issue of proportionality on direct appeal. The post-conviction court found counsel were not deficient in their appellate representation.

We conclude petitioner has failed to establish prejudice with regard to this issue. The Tennessee Supreme Court addressed the issue of proportionality and found the death penalty to be neither excessive nor disproportionate. *State v. Van Tran,* 864 S.W.2d at 482. Petitioner has not shown a reasonable probability that the result would have been different had other matters been argued on appeal.

This issue is without merit.

I. Failure to Object

Petitioner contends counsel were ineffective in failing to object to various errors in the trial court and failing to raise those issues on appeal. Specifically, he complains of counsels' failure: (1) to insure an accurate record of *voir dire;* (2) to object to the lack of jury admonitions given by the trial court under Tenn.R.Crim.P. 24(f); (3) to object to the prosecutor's sympathy argument; (4) to object to the prosecutor's argument minimizing the jury's sentencing responsibilities; (5) to object to the prosecutor's arguing outside the record; and (6) to object to the prosecutor's characterization of defendant's mitigating evidence as "excuses."

***13** The post-conviction court found that counsels' appellate performance did not fall below the range of competency of attorneys who practice criminal law.

We conclude that petitioner has not established a reasonable probability that the result would have been different if trial counsel had preserved and argued these issues. Petitioner's failure to establish the prejudice prong alleviates the necessity of addressing the deficiency prong. *See Strickland v. Washington,* 466 U.S. at 697, 104 S.Ct. at 2069; *Goad v. State,* 938 S.W.2d at 370.

This issue is without merit.

J. Unconstitutionality of the Death Penalty

Petitioner contends trial counsel were ineffective in failing to preserve and appeal various issues relating to the unconstitutionality of the death penalty. Specifically, petitioner cites thirteen constitutional deficiencies in the statutes and procedures relating to the death penalty. He contends counsel were ineffective in failing to preserve and appeal these issues. He acknowledges that prior decisions in this state have considered and rejected most of the grounds but raises them to preserve them for federal review.

On direct appeal the Tennessee Supreme Court found two aggravating circumstances were properly applied. *State v. Van Tran,* 864 S.W.2d at 478-80. The court further performed a proportionality review and found the death sentence to be appropriate. *Id.* at 482. The court also considered the constitutionality of the death penalty and death penalty statute and found no constitutional infirmity. *Id.* at 481-82. Furthermore, the constitutionality of the death penalty and death penalty statutes has consistently been upheld. *See State v. Hines,* 919 S.W.2d 573, 581-82 (Tenn.1995); *State v. Brimmer,* 876 S.W.2d 75, 83-88 (Tenn.1994); *State v. Cazes,* 875 S.W.2d at 268-70.

Petitioner has failed to establish that counsel were deficient, or that petitioner was prejudiced in any manner by the failure to raise these constitutional issues.

This issue is without merit.

K. Cumulative Errors

Finally, petitioner argues that the cumulative effect of counsels' deficiencies rendered his trial fundamentally unfair. We have reviewed each allegation of ineffective assistance of counsel and found each to be without merit. We further conclude petitioner's trial was not fundamentally unfair due to counsels' performance.

This issue is without merit.

CONCLUSION

After a careful examination of the record, we conclude that there is no reversible error; therefore, the judgment of the trial court is affirmed.

The sentence of death shall be carried out as provided by law on August 2, 1999, unless otherwise ordered by an appropriate court.

PEAY, J., and BEASLEY, Sr., S.J., concur.

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