IN THE SUPREME COURT OF TENNESSEE

***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; and WSMV-TV Channel Four,**	)	
Petitioners/Appellants,	)	
v.	)	**COURT OF APPEALS OF TENNESSEE AT NASHVILLE**
METROPOLITAN GOVERNMENT,	)	**Case No. M2014-00524-COA-R3-CV**
Respondent/Appellee,	)	
And	)	**CHANCERY COURT FOR DAVIDSON COUNTY**
DISTRICT ATTORNEY VICTOR S. JOHNSON; STATE OF TENNESSEE; AND JANE DOE,	)	**Case No. 14-156-IV**
Intervenors/Appellees.	)	

APPLICATION OF PETITIONERS FOR PERMISSION TO APPEAL

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APPLICATION FOR PERMISSION TO APPEAL

Pursuant to Rule 11 of the Tennessee Rules of Appellate Procedure, Petitioners, a coalition of media organizations and a citizens group, respectfully make this Application for permission to appeal to the Tennessee Supreme Court from the judgment of the Tennessee Court of Appeals at Nashville, entered September 30, 2014. Petitioners did not file a petition for rehearing. A copy of the Court of Appeals' opinion is attached hereto as Exhibit A.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in determining that requested public records are exempt from disclosure under the Public Records Act pursuant to Tennessee Rule of Criminal Procedure 16(a)(2), when those materials do not fall within the scope of Rule 16(a)(2) as "reports, memoranda, or other internal documents made by the district attorney general or other state agents or law enforcement officers" or "statements made by state witnesses or prospective state witnesses."

2. Whether the Court of Appeals erred in determining that requested public records are exempt from disclosure under the Public Records Act pursuant to Tennessee Rule of Criminal Procedure 16(a)(2), when the prosecution already has provided these discoverable materials to the defendants in the ongoing criminal proceeding, and the Tennessee Court of Appeals has previously recognized that only "work product" materials are exempt from discovery under Rule 16(a)(2) in *Swift v. Campbell*, 159 S.W.3d 565, 572-73 (Tenn. Ct. App. 2004).

3. Whether the Court of Appeals' decision creates a common-law law enforcement exception to the Public Records Act, a position previously rejected by the Tennessee Supreme Court in *Schneider v. Jackson*, 226 S.W.3d 332 (Tenn. 2007).

4. Whether the Court of Appeals erred in relying upon inadmissible evidence (in the form of affidavits containing speculation, legal opinions, and conclusory statements that were contradicted by the record) for its pronouncement that any public records "relevant to a pending or contemplated criminal action" must be exempt from disclosure under the Public Records Act.

FACTS RELEVANT TO QUESTIONS PRESENTED FOR REVIEW

Petitioners, a coalition of media entities and a citizens group, requested certain third-party records received by the Metropolitan Police of Nashville & Davidson County ("Metro Police") during its investigation of alleged crimes for which four former members of the Vanderbilt football team have been charged.[1] Metro Police denied repeated requests for the records, citing Tenn. R. Crim. P. 16(a)(2) as the sole basis for nondisclosure. Pursuant to T.C.A. § 10-7-505(b), Appellants filed a Complaint/Petition in the Chancery Court for access to the records requested from Metro Police.

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

The Attorney General, on behalf of the District Attorney General and the State of Tennessee, moved to intervene.[2] The alleged victim filed a separate motion to intervene. At an expedited hearing, the Trial Court granted both motions to intervene. The Trial Court decided to conduct an *in camera* inspection of the records, over the objections of the Government Parties. Based upon filings by those parties, as well as the detailed summary in the Chancellor's Opinion (Mem. Op. at 4-8, R. Vol. V at 633-637), Metro Police's file includes substantial materials obtained from third parties, including text messages and emails among these allegedly involved in or after the incident, as well as Vanderbilt employees including coaching staff. Some, but not all, of these third party materials were obtained pursuant to search warrants and subpoenas.[3]

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[1] A *Tennessean* reporter made the initial public records request to Metro Police for copies of "[a]ny records (as that term is broadly defined in the Act) regarding the alleged rape on the Vanderbilt campus and in which [the four individuals] are charged," including copies of any "text messages received or sent and videos provided and/or prepared by any third-party sources." (Compl., Ex. A, R. Vol. I at 13). The request for public records was subsequently modified to exclude any images of the alleged victim. (Compl. Ex. C. at 2, R. Vol I at 16; Hr'g Tr. at 47:3-4, Mar. 10, 2014, R. Vol. VI at 710). After multiple denials for public records from Metro Police, additional requesters joined the Public Records Act request. (Compl., Ex. G, R. Vol. I at 27-28).

[2] Collectively, Metropolitan Government of Nashville & Davidson County, the District Attorney, and the State of Tennessee are hereinafter referred to as the "Government Parties."

[3] An index of the records has been submitted under seal and Petitioners have not had access to that index.

B. Submission of Briefs and Sworn Statements, and Petitioners'/Appellants' Motion To Strike

All parties were permitted to submit briefs and file sworn statements in advance of the Show Cause Hearing. The Government Parties argued that Tenn. R. Crim. P. 16(a)(2) constituted a blanket exemption for all records in Metro Police's file, and further argued that the criminal defendants' "fair trial" rights under the Sixth Amendment to the U.S. Constitution precluded Petitioners' requests for public records. The alleged victim submitted a brief in which she argued that she was entitled to assert, in a civil Public Records Act case, a "right" to "victims' rights" under Tenn. Const. Art. I, § 35 ("the right to be free from intimidation, harassment and abuse throughout the *criminal justice system.*") (emphasis added) and T.C.A. §§ 40-38-101 *et seq*. The alleged victim argued that her "rights" precluded the Petitioners' rights to public records--even judicial records--regarding the criminal cases. The Government Parties purported to join in the arguments about "victims' rights," although they lacked standing to do so.[4] The Intervenors filed Affidavits signed by the Chief of Police, the District Attorney General, the alleged victim, and a paralegal in the Attorney General's Office. The Affidavits of the Chief of Police and District Attorney General were in significant part identical.

The District Attorney General submitted an Affidavit to the effect that in his opinion, the number of news stories published about the criminal investigation and cases would make providing the criminal defendants a "fair trial" several months later difficult if not impossible.

[4] The Government Parties attempt to do more than express support for the alleged victim; they purport to have some substantive right to assert "victims' rights" under the state constitution and statute. Petitioners/Appellants objected to their standing to do so. The Tennessee Court of Appeals has found that the Victims' Bill of Rights "appears to refer only to the criminal justice system." *Denson v. Benjamin*, No. 01A019810CV00571, 1999 WL 824346, at *2 n.1 (Tenn. Ct. App. Aug. 12, 1999) (not considering the constitutional amendment in a negligence case). The statutory provisions implementing this constitutional amendment are found in Tennessee Code, Title 40, "Criminal Procedure." The alleged victim has identified no substantive rights applicable in a *civil case* under the Public Records Act to preclude the disclosure of public records. The Government Parties have shown no right to raise the argument in a Public Records case. All unpublished decisions cited in this Brief are being submitted to the Court.

The Chief of Police mirrored this conclusory opinion in his Affidavit. The alleged victim expressed her opinion that she feared that publicity about the case would subject her to "intimidation, harassment and abuse." No member of the Coalition, or for that matter, any member of the press, has publicly identified the alleged victim - even though the State identified her in the indictment. Petitioners filed a Motion to Strike substantial portions of the Affidavits because they contained improper opinion testimony, legal conclusions and other conclusory statements, and speculation.

Petitioners submitted Declarations of Maria De Varenne (Editor and Director of News for multiple Gannett publications including *The Tennessean*) and Brian Haas (Court/Criminal Justice Reporter for *The Tennessean*), which contained factual statements about public records made available by government agencies in criminal cases, in part correcting conclusory and inaccurate statements made by the Chief of Police and District Attorney General. For example, Metropolitan Government claimed that "even the disclosure of a log of the evidence gathered in the investigation" could impair the criminal defendants' rights to a "fair trial" (Metro. Gov't Br. 3, R. Vol. II at 219), ignoring the fact that the District Attorney General's Office previously had filed the Exhibit List in the Criminal Court. (Haas Decl. ¶ 18, R. Vol. III at 370). Exhibit lists such as the one filed in the ongoing criminal cases are routinely filed, are necessary, and are judicial records.[5]

The Chief of Police and District Attorney General offered their opinions that disclosing investigative files during an ongoing criminal prosecution might impair a criminal defendant's right to a fair trial; "intimidate, harass, or abuse victims"; and/or have a "chilling effect" on law enforcement investigations. (Anderson Aff. ¶ 10, R. Vol. II at 234; Johnson Aff. ¶¶ 10-11, R.

[5] The Trial Court in its Memorandum Opinion listed categories of records which it reviewed during the in camera inspection of the investigative file. (Mem. Op. at 5-8, R. Vol. V at 634-37). The Trial Court's disclosure in its opinion did not violate the criminal defendants' rights.

Vol. II at 150). The Government Affiants overlooked the fact that in practice (as shown by *The Tennessean's* courts reporter), in Davidson County and elsewhere, investigative records in pending criminal cases are routinely filed by the prosecutor and are available for public inspection. (Haas Decl. ¶¶ 3-6, R. Vol. III at 368). Multiple examples were filed in the trial court in this case. As shown by the submissions to the Trial Court, these public filings in pending criminal cases include sexual assault cases, including records obtained from third parties. Law enforcement also regularly releases materials obtained from third parties such as surveillance video in robberies and assaults. (*Id.* ¶ 5, R. Vol. III at 368).

The Trial Court denied the Appellants' Motion to Strike portions of the Affidavits, stating that it had "sifted all the Affidavits and Declarations 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." (R. Vol. V at 628). The Trial Court did not indicate the test it had used to distinguish the "factual material" versus "arguments and conclusory statements" and did not identify the statements of the affiants that fell into each category. The trial court allowed the Government Parties' and alleged victim's affidavits to remain part of the record in this case.

C. The Trial Court's Ruling

The Trial Court issued its Memorandum Opinion and accompanying Orders, granting in substantial part but denying in part the Petitioners' requests for public records. In its decision, the Trial Court recognized that Metro Police's file contains public records, and held in part that "records submitted to the Metropolitan Police Department that were not developed internally and that do not constitute statements or other documents reflecting the reconstructive and investigative efforts of the Metropolitan Police Department are outside the expansive reach of

Tenn. R. Crim. P. 16(a)(2)" and therefore are subject to production. (Mem. Op. at 13-14, R. Vol. V at 642-643). In reaching this ruling, the Trial Court expressly found that "exempting all the records from review under Tenn. R. Crim. P. 16(a)(2) would be tantamount to adopting a law enforcement privilege for pending criminal cases." (Mem. Op. at 13, R. Vol. V at 642).

The Trial Court acknowledged that the Davidson County Criminal Court had some months before entered a protective order preventing the disclosure by counsel in the criminal cases of videos or photographs produced by the State in discovery, and gave deference to that protective order. (Mem. Op. at 2, 14, R. Vol. V at 631, 643).[6] The Trial Court also ruled that the "fair trial" interests and "victims' rights" which had been asserted in opposition to the requests would be more appropriately considered in connection with the criminal cases against the former Vanderbilt players and therefore by the Davidson County Criminal Court. The Trial Court issued a stay of its Order to permit an appellate court to consider the "sensitive material and unique questions of law" involved prior to Petitioners' inspection of the public records. (Order at 1, R. Vol. V at 651).

D. The Court of Appeals' Opinion

On appeal to the Court of Appeals, Petitioners/Appellants requested affirmance of the Trial Court's ruling that Rule 16(a)(2) does not provide a "blanket exception" to the Public Records Act and that any requested materials "that were not developed internally and that do not constitute statements or other documents reflecting the reconstructive and investigative efforts of the Metropolitan Police Department" should be disclosed. (R. Vol. VI at 801). Petitioners also requested review of the Trial Court's rulings about its consideration of inadmissible Affidavits submitted by the Intervenors and Metropolitan Government and certain matters regarding

[6] Petitioners have stated repeatedly that they do not seek any videos or photographs of the alleged victim. (Petr's Resp. Br. at 19, R. Vol. III at 356).

judicial records (*id.*), but the Court of Appeals did not address these additional issues in its opinion.[7]

The Court of Appeals reversed the Trial Court's ruling, stating as its sole ground that the requested police records are "relevant to a pending or contemplated criminal action." (Ex. A, Op. at 8). In doing so, the Court of Appeals bypassed the first step in undertaking a Tenn. R. Crim. P. 16(a)(2) analysis: determining whether the materials fall within the scope of that Rule. Additionally, the Court of Appeals ignored Petitioners' arguments that all or nearly all of the requested material did not qualify as "work product" and therefore could not meet the Rule 16(a)(2) exception to disclosure. *See Swift*, 159 S.W.3d at 572. Further, the Court of Appeals, by exempting all law enforcement records "relevant to a pending or contemplated criminal action," effectively created a blanket common-law "law enforcement exception" to the Public Records Act, which the Tennessee Supreme Court has expressly held does not exist. (Ex. A, Op. at 8).

The dissent to the majority opinion correctly performed the first step of the Rule 16(a)(2) analysis and determined that "the materials making up Metro's records regarding the alleged rape on the Vanderbilt campus, as described by the trial court, would not all fall within the description of documents found in Rule 16(a)(2)." (McBrayer, J., dissenting at 3) (attached hereto as Exhibit B). As a result, the dissent stated "that the materials sought by Petitioners were not completely excepted from disclosure under the Public Records Act by virtue of Rule 16(a)(2)." (*Id.*).

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[7] The Court of Appeals' opinion undercuts the well-established principle that judicial records are "public." Petitioners requested certain materials obtained from third parties via search warrant and subpoena. On appeal, Petitioners asked the Court to find that these records are subject to disclosure under the Public Records Act because the materials obtained are judicial records. (R. Vol. VI at 801). In its opinion, the Court of Appeals did not even address whether Metropolitan Government should have produced these materials as judicial records. Instead, it held that the entire Metro Police file - from any source - was exempt from disclosure because the Court found that it related "to a pending or contemplated criminal action." (Ex. A, Op. at 8).

STANDARD OF REVIEW

Determinations under the Tennessee Public Records Act are questions of law, reviewed *de novo*. *Memphis Publ'g Co. v. Cherokee Children & Family Servs., Inc.*, 87 S.W.3d 67, 74 (Tenn. 2002). A court's holding will "hinge[] upon principles of statutory construction, for [the] decision whether [the requested] records are subject to the Act is controlled by the meaning of the term 'public records' as used in the Act." *Id.* A reviewing court must "broadly construe[] [the Act] so as to give the fullest possible public access to public records." T.C.A. § 10-7-505(d). Thus, this Court must "interpret the terms of the Act liberally to enforce the public interest in open access to the records of state, county, and municipal governmental entities." *Memphis Publ'g Co.*, 87 S.W.3d at 74.

This Court reviews evidentiary decisions under an abuse of discretion standard. *Biscan v. Brown*, 160 S.W.3d 462, 468 (Tenn. 2005). A lower court abuses its discretion by "'appl[ying] an incorrect legal standard, or reach[ing] a decision which is against logic or reasoning that causes an injustice to the party complaining.'" *Id.* (quoting *Mercer v. Vanderbilt Univ., Inc.*, 134 S.W.3d 121, 131 (Tenn. 2004)).

REASONS SUPPORTING REVIEW BY THE SUPREME COURT

Tennessee Rule of Appellate Procedure 11(a) provides the well-settled factors this Court considers when addressing this application: (1) the need to secure uniformity of decision; (2) the need to secure settlement of important questions of law; (3) the need to secure settlement of questions of public interest; and (4) the need for the exercise of this Court's supervisory authority. This case satisfies each factor.

A. The Need to Secure Uniformity of Decision

The majority decision of the Court of Appeals has created a lack of uniformity relating to the intersection of the Public Records Act and Tenn. R. Crim. P. 16(a)(2) in at least three respects. For these reasons, the Supreme Court should grant this Application.

First, Tennessee courts have consistently found that Tenn. R. Crim. P. 16(a)(2) constitutes an exception to the Public Records Act ***only when*** (1) the records at issue fall within the scope of the Rule; and (2) they relate to an ongoing criminal action. The Court of Appeals deviated from that precedent by ignoring the first element.

Tenn. R. Crim. P. 16(a)(2) provides:

> [T]his rule does not authorize the discovery or inspection of reports, memoranda, or other internal state documents *made by the district attorney general or other state agents or law enforcement officers* in connection with investigating or prosecuting the case. Nor does this rule authorize discovery of statements made by state witnesses or prospective state witnesses.

(Emphasis added).

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

By its express terms, Tenn. R. Crim. P. 16(a)(2) allows law enforcement or a District Attorney General to decline to produce public records **but only to the extent** that those records are "**made by** the district attorney general or other state agents or law enforcement officers" or

constitute "statements made by state witnesses or prospective state witnesses." (Emphasis added). It does **not** exempt all materials in Metro Police's files from disclosure.

Despite the clear language of the Rule, the majority opinion of the Court of Appeals determined--puportedly based on *Appman v. Worthington*, 746 S.W.2d 165 (Tenn. 1987)--that all materials in Metro Police's file fall within the exception because they are "relevant to a pending or contemplated criminal action." (Ex. A., Op. at 8). In *Appman*, the Tennessee Supreme Court did not--and could not--expand the scope of Rule 16(a)(2) to exclude third-party documents from disclosure.

Appman involved an effort by criminal defense lawyers, who were defending a prison inmate accused of murdering another inmate, to obtain materials from the prison's investigative officer. The records at issue consisted of "statements from inmate witnesses," "statements from officers and employees of the Morgan County Regional Facility and from the mother and wife of the victim," and "evaluative summaries" of the investigation. (Metro Notice of Filing, Ex. 2, R. Vol. II at 251-252). It appears that all those records fall within the scope of Tenn. R. Crim. P. 16(a)(2) as either witness statements or summary documents "made by" the prison investigator. Thus, the Tennessee Supreme Court did **not** expand Rule 16(a)(2) to exempt records created by third parties from disclosure under the Public Records Act.[8] If the Supreme Court in *Appman* had done so, it would have violated the statutory requirement that only the General Assembly may adopt or amend rules governing the courts. T.C.A. § 16-3-404. The specific, limited request

[8] *Appman* also involved criminal defendants seeking records related to their own prosecutions. As the Tennessee Court of Appeals has noted, "There is a palpable difference between persons who seek governmental records to ensure governmental responsibility and public accountability and those who seek to avoid the requirements and limitations of the Tennessee Rules of . . . Criminal Procedure by invoking the public records statutes to obtain information not otherwise available to them through discovery." *Swift*, 159 S.W.3d at 575-76. Concern about circumvention of discovery rules is **not** at issue in the instant case, as the criminal defendants were not making the request, and the record shows that they have obtained the requested materials in discovery. (Mem. Op. at 9 n.8, R.Vol. V at 638; Ex. B., McBrayer, J., dissenting at 3).

by Petitioners in the instant case for records obtained from third parties was neither an issue nor resolved in *Appman*.

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

Second, the Court of Appeals' opinion ignores another essential component of the required analysis under Tenn. R. Crim. P. 16(a)(2): a determination of whether the requested material constitutes "work product." Tennessee courts treat Rule 16(a)(2) as a "work product" rule. *See, e.g.*, *Wilson v. State*, 367 S.W.3d 229, 235-36 (Tenn. 2012) ("The [work product] doctrine 'has a vital role in assuring the proper functioning of the criminal justice system' and, as applicable to criminal proceedings, is embodied in Tennessee Rule of Criminal Procedure 16(a)(2).") (internal citations omitted); *Swift*, 159 S.W.3d at 572-73 ("[T]he [work product] doctrine 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.' . . . The version of the doctrine applicable to criminal proceedings is found in Tenn. R. Crim. P. 16(a)(2).") (internal citations omitted).

As such, Tenn. R. Crim. P. 16(a)(2) protects only against the discovery of governmental work product. *See, e.g., Swift*, 159 S.W.3d at 575 ("[F]rom *Memphis Publ'g Co. v. Holt* to *Waller v. Bryan*, the courts have demonstrated that they will decline to permit litigants against the state to obtain more discovery than Tenn. R. Crim. P. 16 permits when a criminal investigation is in process [or] a criminal prosecution is pending."); *Arnold v. City of Chattanooga*, 19 S.W.3d 779, 786 (Tenn. Ct. App. 1999) (holding that the Public Records Act does not mandate disclosure of documents protected by the work product doctrine).[9]

Third, the Court of Appeals' decision essentially creates a blanket common law "law-enforcement" exception to the Public Records Act--an exception that the Tennessee Supreme Court squarely rejected in *Schneider v. City of Jackson*, 226 S.W.3d 332 (Tenn. 2007). In *Schneider, The Jackson Sun* requested to field interview cards generated by police officers. The City rejected the request. The newspaper filed a petition for access under the Public Records Act. Prior to the show cause hearing, the City claimed that the field interview cards were "privileged documents not subject to disclosure under the Public Records Act because they concerned 'police tactics on investigation.'" *Schneider*, 226 S.W.3d at 336. The trial court "rejected the City's arguments that Tennessee law recognizes the law enforcement privilege as an exception to the Public Records Act and held that the law enforcement privilege [did] not exempt the field interview cards from disclosure." *Id.* at 338. The Court of Appeals considered

[9] Tenn. R. Crim. P. 16 substantially conforms to the federal rule (Advisory Commission Comment to Tenn. R. Crim. P. 16.), and federal courts routinely find that Rule 16(a)(2) protects only "work product." *See, e.g., United Kingdom v. United States*, 238 F.3d 1312, 1321 (11th Cir. 2001) (Rule 16(a)(2) incorporates the work product doctrine in criminal cases); *United States v. Taylor*, 608 F. Supp. 2d 1263, 1268 (D.N.M. 2009) ("The work product privilege . . . protects the attorney's mental processes. . . . [It] 'clearly applies to memoranda prepared by an attorney in contemplation of litigation which set forth the attorney's theory of the case and his litigation strategy.' . . . Federal Rule of Criminal Procedure 16(a)(2) recognizes the work product privilege.") (internal citations omitted).

some federal cases[10] and found a broad law enforcement exception, holding that it precluded disclosure of records within its scope. *Id.* at 339, 342.

The Supreme Court emphatically rejected the "law enforcement privilege," holding:

> Having examined the Public Records Act and prior Tennessee decisions, we conclude that the law enforcement privilege has not previously been adopted as a common law privilege in Tennessee and should not be adopted herein. As a result, the law enforcement privilege is not a 'state law' exception to the Public Records Act. . . . Whether [it] should be adopted as an exception to the [Act] is a question for the General Assembly.

Id. at 344. However, the Supreme Court remanded the case to the trial court to "allow the City an opportunity to review the field interview cards and to submit to the trial court . . . those cards or portions of cards which the City maintains are involved in an ongoing criminal investigation and exempt from disclosure [under Rule 16(a)(2)]." *Id.* at 346.

The *Schneider* decision demonstrates that the so-called common-law law enforcement exception and the Tenn. R. Crim. P. 16(a)(2) exception are not one and the same: materials in the hands of law enforcement that the Government Parties argue should fall under some broad, but unrecognized, common-law exception do not necessarily fall within the scope of Rule 16(a)(2). By its plain language, Rule 16(a)(2) is narrower than the purported common-law exception. *Schneider*, therefore, emphatically does not make all materials in an "open" criminal case exempt under Rule 16(a)(2). The field cards at issue in that case, made by law enforcement agents and containing potential witness statements and work product, might lie within Rule 16(a)(2)'s parameters, although the record on that point was not established. *Id.* at 337; *see also* Ex. B., McBrayer, J., dissenting at 2 ("Field interview cards seemingly would fall within the ambit of Rule 16(a)(2) as a 'report, memorandum, or other internal state document made by . . .

[10] The federal cases relied upon relate to the specific law enforcement privilege provided in the Freedom of Information Act ("FOIA") - not found in the Public Records Act - which exempts from disclosure law enforcement investigative materials. "[T]he Public Records Act is not patterned upon FOIA" and does not contain a law enforcement exemption. *Schneider*, 226 S.W.3d at 343.

law enforcement officers' or as including 'statements made by state witnesses or prospective state witnesses. . . . [and] [w]itnesses described the field interview cards as the police officers' 'work product'").

Despite *Schneider*'s clear holding, the Court of Appeals in this case essentially created a blanket common-law "law enforcement" exception to the Public Records Act by pronouncing that all police records "relevant to a pending or contemplated criminal action" are exempt from disclosure. (Ex. A, Op. at 8).

This Court should accept review to correct this lack of uniformity between the Tennessee Supreme Court and Court of Appeals regarding the scope of Tenn. R. Crim. P. 16(a)(2)'s protection.

B. The Need to Secure Settlement of Important Questions of Law

This case presents a fundamental question which the Court of Appeals answered contrary to the Rule and the case law addressing it: does Rule 16(a)(2) exempt records neither (1) "made by" the district attorney general, other state agents, or law enforcement officers; nor (2) constituting "witness statements"? In other words, are documents which are subject to discovery under Tenn. R. Crim. P. Rule 16 nonetheless exempt from disclosure under the Public Records Act? This case also raises important issues about the proper standards for evidentiary proof in a Public Records Act proceeding.

1. Tenn. R. Crim. P. Rule 16(a)(2) Applied as an Exception to the Public Records Act

The General Assembly has mandated that "[a]ll state, county, and municipal records shall, at all times during business hours . . . be open for personal inspection by any citizen of this state, and those in charge of the records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law." T.C.A. § 10-7-503(a)(2)(A). This Court has therefore

described the Public Records Act as an "all-encompassing legislative attempt to cover all printed material created or received by government in its official capacity." *Griffin v. City of Knoxville*, 821 S.W.2d 921, 923 (Tenn. 1991). Absent some exception to be established by the objecting governmental entity, the Act requires disclosure of public records "even in the fact of serious countervailing considerations." *Schneider*, 226 S.W.3d at 340. Because "the Act serves a crucial role in promoting accountability in government through public oversight of governmental activities," *Memphis Publ'g Co.*, 87 S.W.3d at 74, Tennessee courts "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." *Id.*

Given this important public interest, the General Assembly has required that the government bear the burden of establishing a specific, express exemption to justify a refusal to produce public records. T.C.A. § 10-7-505(c); *State v. Cawood*, 134 S.W.3d 159, 165 (Tenn. 2004) ("If an item meets the criteria set forth in sections 10–7–301(6) and 10–7–503, and is not within the enumerated categories of confidential records in section 10–7–504, then the documents are presumed to be open to the public. If the government does not disclose records, then the justification for nondisclosure must be shown by a preponderance of the evidence.").

In this case, Metro Police has asserted that Tenn. R. Crim. P. 16(a)(2) constitutes a "state law" exception that exempts from disclosure **all** records which have found their way into its investigative files, including all records obtained from third parties. While several Tennessee cases address the interplay between the Public Records Act and Rule 16(a)(2), none answer the precise question raised here: does Rule 16(a)(2) (contrary to its language) somehow create a blanket exemption to the Public Records Act for records not "made by" the District Attorney general, law enforcement, or other state agent (or constituting "witness statements") and that

must be produced to defense counsel? In this case, the requested materials have been provided to the defendants in the criminal case[11] and thus fall outside the Rule's scope. Nonetheless, the Government Parties assert Rule 16(a)(2) as a blanket bar to disclosure. The dissent points out this incongruity: "In this case, [Metro] conceded in both its brief and at oral argument that the materials sought by the Petitioners had been provided to the criminal defendants, placing the materials outside the scope of materials described in Rule 16(a)(2)." (Ex. B., McBrayer, J., dissenting, at 2-3).

Numerous federal courts have recognized that documents created by third parties do not qualify for "work product" protection, under Fed. R. Crim. P. 16(a)(2) (which nearly mirrors Tenn. R. Crim. P. 16 on this point) or otherwise. *See, e.g.*, *In re Grand Jury Subpoenas*, 318 F.3d 379, 384-85 (2d. Cir. 2003) ("[T]he principle underlying the work product doctrine—sheltering the mental processes of an attorney as reflected in documents prepared for litigation—is not generally promoted by shielding from discovery materials in an attorney's possession that were prepared neither by the attorney nor his agents."); *Evergreen Trading, LLC ex rel. Nussdorf*, 80 Fed. Cl. 122, 138 (Fed. Cl. 2007) ("[T]he work product doctrine does not shield from discovery documents created by third parties.") (citing *United States v. Nobles*, 422 U.S. 225, 238-39 (1975)).

The application of Tenn. R. Crim. P. 16(a)(2) to Public Records Act requests for documents generated by third parties, and discoverable by defendants in criminal cases, is an important question of law that the Supreme Court should resolve.

[11] As noted above, a protective order in the criminal case prohibits the lawyers in that case from distributing photographs or videos obtained from the State in discovery, and the Trial Court enforced that order in its ruling. Petitioners do not seek any third-party records covered by that protective order.

2. The Evidentiary Requirements in Public Records Act Proceedings

The Court of Appeals relied heavily upon the Government Parties' affidavits in reaching its conclusion - which Petitioners submit is mistaken - that **all** documents "relevant to a pending or contemplated criminal action" are exempt from disclosure. (Ex. A, Op. at 6-8). The Court of Appeals made no effort to even address the argument - briefed extensively by the Parties - that the Trial Court should have stricken these affidavits as not meeting Tennessee's evidentiary requirements. Respectfully, Petitioners submit that the Court of Appeals erred in not considering this important issue and in quoting extensively and relying upon those affidavits. Opponents of the Tennessee Public Records Act should not be permitted to bypass fundamental and well-settled Tennessee evidence rules when attempting to defend their refusal to produce public records, thereby setting the stage for future abuses of the Act. Future litigants will benefit from this Court's admonition that the Tennessee Rules of Evidence apply in Public Record Act proceedings.

The Affidavits by Metropolitan Government and the Intervenors fail to comport with Tennessee evidence requirements. Rule 602 of the Tennessee Rules of Evidence provides in pertinent part: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." In the Trial Court, the Defendants and Intervenors should not have been permitted to provide "testimony" about ultimate issues, offer opinions or legal conclusions, make "comparisons" which are outside the witness' purview as a lay witness,[12] speculate about whether the criminal defendants can receive a "fair trial" or what sort of pre-trial publicity there might be, state fears or feelings as if they are

[12] Examples include but are not limited to the District Attorney General's and Chief of Police's criticism of news coverage in general, and speculation and opinion that they believe the Defendants' Sixth Amendment rights to a fair trial will be violated if any of the requested materials are produced. (Anderson Aff. ¶¶ 10-11; Johnson Aff. ¶¶ 8-10, R. Vol. II at 234 & Vol. II at 149-150). An example from the alleged victim's Affidavit is her opinion based upon her quotation of the state constitutional provision regarding victims' rights. (Doe Aff. ¶ 4, R. Vol. I at 118).

facts, or purport to state "facts" which are contradicted by the public records submitted with, and facts contained, in Appellants' Declarations.

Tennessee law is clear that affidavits which are not based on personal knowledge must be stricken.[13] The Affidavits signed by the Chief of Police and District Attorney General in substantial part are not based on personal knowledge. The evidence in the record (presented by a reporter who covers criminal cases and courts in Davidson County) shows that their opinions (however well-meaning) are mistaken about how their agencies operate in filing discovery materials and making public records available. (Haas Decl. ¶¶ 3-7, R. Vol. III at 368).

In their affidavits, the Chief of Police and District Attorney General attempted to state conclusions about legal issues, some of which concerned issues that were not even presented to the Trial Court. Both asserted opinions/conclusions about the criminal defendants' right to a fair trial which (a) neither had standing to assert; and (b) were not supported by specific facts about particular requested information or specific news coverage of the actions of their agencies. (Anderson Aff. ¶¶ 10-11; Johnson Aff. ¶¶ 8-10; R. Vol. II at 234 & Vol. II at 149-150). Both also alleged in conclusory statements that disclosure of the requested records could lead to a "chilling effect" on investigative efforts and witness cooperation. (Anderson Aff. ¶¶ 10-11; Johnson Aff. ¶ 11; R.Vol. II 234 & Vol. II at 150). The Tennessee Supreme Court previously--and on more than one occasion--has considered this purported concern and rejected it in favor of

[13] *See, e.g.*, *Davis v. McGuigan*, 325 S.W.3d 149, 170 (Tenn. 2010) (trial court erred by failing to strike deposition and affidavit testimony that was "nothing more than conjecture about [a third-party's] beliefs and intent"); *Fowler v. Happy Goodman Family*, 575 S.W.2d 496, 498 (Tenn. 1978) (Petitioner's own belief does not constitute "such facts as would be admissible in evidence" under Tenn. R. Civ. P. 56.05 nor does "belief" of a third-party's knowledge or intent show that that affiant is competent to testify to the matters stated therein). "Belief, no matter how sincere, is not equivalent to [personal] knowledge." *Keystone Ins. Co. v. Griffith*, 659 S.W.2d 364, 366 (Tenn. Ct. App. 1983).

public access.[14] Further, neither the Chief of Police nor District Attorney General acknowledged the fundamental principle that judicial records are presumptively open.

Impermissible legal conclusions and arguments are not suited for an affidavit.[15] Bald statements regarding the beliefs and understandings of third parties, offered for the purpose of asserting the truth of matters contained therein, are **not** admissible "inferences."[16] The Trial Court should have stricken the opinions, arguments and legal conclusions presented in the Affidavits of the Chief of Police the District Attorney General.

Historically, courts in this state vigilantly have protected the public's right of access under the Public Records Act. For continued protection of that right, the courts should not permit governmental agencies to justify their refusal to disclose public records with inadmissible evidence. This Court should therefore settle the important question of the evidentiary requirements applicable in Public Records Act proceedings.

C. The Need to Secure Settlement of Questions of Public Interest

The Public Records Act "promot[es] accountability in government through public oversight of governmental activities," *Memphis Publ'g Co.*, 87 S.W.3d at 74, and therefore

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[14] *See Memphis Publ'g Co. v. Holt*, 710 S.W.2d 513, 517-518 (Tenn. 1986) (declining to imply a "municipal law enforcement investigative file" exception to the Public Records Act because "[i]t is the prerogative of the legislature to declare the policy of the State."); *see also Schneider*, 226 S.W.3d at 344 (rejecting purported law enforcement privilege as a "state law" exception to the Public Records Act); *Memphis Publ'g Co. v. City of Memphis*, 871 S.W.2d 681, 685 (Tenn. 1994) (describing decision in *Holt* to not "create a public policy exception for the files of law enforcement agencies.")

[15] "The legal conclusions to be drawn from facts is a judicial function and only the court may reach legal conclusions." *Coffey v. City of Knoxville*, 866 S.W.2d 516, 519 (Tenn. 1993) (witness testimony as to the applicable legal conclusion to be drawn from an asserted fact should not have been permitted). *See also Torres v. County of Oakland*, 758 F.2d 147, 150-51 (6th Cir. 1985) (holding that neither a lay nor a fact witness opinion which is couched as a legal conclusion on the ultimate issue of fact is helpful to the court, and consequently such opinion testimony is inadmissible).

[16] *See Jones v. Butler Metro. Housing Auth.*, 40 Fed. Appx. 131, 134-35 (6th Cir. 2002) (affirming district court's decision to strike affidavits of plaintiff and her coworkers where they "consisted mainly of hearsay, rumors, conclusory allegations and subjective beliefs"). *See also Meyer Chatfield Corp. v. Century Business Svcs., Inc.*, No. 05-3673, 2010 WL 3221944, at *2 (E.D. Pa. Aug. 12, 2010) ("[D]espite Plaintiff's efforts to characterize [the witness'] testimony as a 'surmise' 'based on observations,' it is clear that [the] challenged testimony is merely his speculation about [a third party's] thought process, and as such is inadmissible").

serves a significant public interest. The Court of Appeals' opinion impinges on this important right of access by expanding Tenn. R. Crim. P. 16(a)(2) to create a blanket "law enforcement" exemption.

Public oversight of the official acts of government fuels the public's confidence in the governmental system and its processes. Respectfully, the public records requested in this case are not exempt under the Tennessee Public Records Act. Access to these records provides essential transparency for the acts of local officials and the justice system. Access to public records is a critical tool for ensuring that the public can oversee, and determine for itself, the confidence it has in local government. The importance of this right of access becomes even more apparent 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 Ass'n v. Stewart, 427 U.S. 539, 560-61 (1976). *See also Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982) ("Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole. . . . [I]n the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process - an essential component in our structure of self-government.").

This oversight becomes particularly important in criminal proceedings that raise issues of state and national concern. The alleged crimes in this case have resulted in significant public interest, not only because of the prominence of Vanderbilt University in the community, state and nation, but also because of the larger public discussion regarding crimes allegedly committed

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*, 427 U.S. at 565; *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). In addition, it ignores substantial precedent on the significant procedural requirements which must be met to restrict public access. *See Press-Enterprise Co. v. Superior Court for Riverside County*, 478 U.S. 1, 14 (1986) ("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.'") (internal citations omitted); *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."); *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) (Pet'r Not. of Filing, R. Vol. V at 625-26).

This Court has vowed to protect the public's fundamental right of access, "even in the face of serious countervailing considerations" such as the impact of pretrial publicity. *Schneider*, 226 S.W.3d at 340. Petitioners respectfully submit that the Supreme Court should grant this Application.

D. The Need for the Exercise of the Supreme Court's Supervisory Authority

The Court of Appeals reversed the Trial Court's ruling without giving consideration to all of the legal issues examined by the Trial Court and raised on appeal; in particular, the interpretation of the clear, unambiguous language of Tenn. R. Crim. P. 16(a)(2). As described

above, the Court of Appeals disregarded the prerequisite that the requested materials must be "made by" the district attorney general or other state agents or law enforcement officers or constitute "witness statements" in order for the Rule to apply. It also failed to consider whether the requested materials qualified as "work product."

The Court of Appeals also abdicated its duty to follow the rulings of this Court by, in reliance upon improperly admitted affidavits, establishing a "law enforcement" exception to the Public Records Act that this Court previously rejected. As the *Schneider* Court found, only the General Assembly can make such an exception to the Act, and it has not done so. *Schneider*, 226 S.W.3d at 344. The Court of Appeals cannot "judicially adopt public policy exemptions to the Public Records Act." *Id.* Because the Court of Appeals overstepped its role, this Court should exercise its supervisory authority and accept Petitioners' Application.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant the Application for Permission to Appeal in order to secure uniformity of decisions, secure settlement of important questions of law, secure settlement of questions of public interest, and exercise this Court's supervisory authority.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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4845-7570-9472

APPENDIX OF UNPUBLISHED CASES

Denson v. Benjamin, No. 01A019810CV00571, 1999 WL 824346 (Tenn. Ct. App. Aug. 12, 1999)

Meyer Chatfield Corp. v. Century Business Svcs., Inc., No. 05-3673, 2010 WL 3221944 (E.D. Pa. Aug. 12, 2010)

State v. Koulis, No. I-CR111479 (Williamson Co. Crim. Ct. June 5, 2006)