IN THE SUPREME COURT OF TENNESSEE
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; and WSMV-TV Channel Four,**	)	
Petitioners/Appellants,	)	
v.	)	**No. M2014-00524-SC-R11-CV**
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, *et al.*,	)	
Respondent/Appellees.	)	

APPELLANTS' BRIEF

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

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 4

A. Motions to Intervene in Public Records Act Case and the Trial Court's *In Camera* Inspection of Records 5

B. Submission of Briefs and Sworn Statements, and Appellants' Motion To Strike 5

C. The Trial Court's Ruling 8

D. The Court of Appeals' Majority Decision 9

STANDARD OF REVIEW 10

ARGUMENT 11

A. The Trial Court Erred in Its Construction and Application of Tenn. R. Crim. P. 16(a)(2). 13

1. The Public Records Act Requires Broad Interpretation 13

2. Tenn. R. Crim. P. 16(a)(2) as an Exception to the Public Records Act 14

B. The Court of Appeals Erred in Not Analyzing Whether the Requested Materials Constitute "Work Product." 17

C. The Court of Appeals Erred in Creating a "Law Enforcement" Exception to the Public Records Act. 20

D. The Court of Appeals Erred in Permitting the Filing of the Government Parties' and Victim's Testimony. 23

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

Cases

Appman v. Worthington,
746 S.W.2d 165 (Tenn. 1987).....15, 16

Arnold v. City of Chattanooga,
19 S.W.3d 779 (Tenn. Ct. App. 1999).....15, 18

Biscan v. Brown,
160 S.W.3d 462 (Tenn. 2005).....11

City Press Commc'ns, LLC v. Tenn. Secondary Sch. Athletic Ass'n,
447 S.W.3d 230 (Tenn. Ct. App. 2014).....19

Coffey v. City of Knoxville,
866 S.W.2d 516 (Tenn. 1993).....25

Davis v. McGuigan,
325 S.W.3d 149 (Tenn. 2010).....24

Fowler v. Happy Goodman Family,
575 S.W.2d 496 (Tenn. 1978).....24

Globe Newspaper Co. v. Superior Court,
457 U.S. 596 (1982).....11

In re Grand Jury Subpoenas,
318 F.3d 379 (2d. Cir. 2003).....19

Griffin v. City of Knoxville,
821 S.W.2d 921 (Tenn. 1991).....7, 13

Jones v. Butler Metro. Housing Auth.,
40 Fed. Appx. 131 (6th Cir. 2002).....25

Keystone Ins. Co. v. Griffith,
659 S.W.2d 364 (Tenn. Ct. App. 1983).....24

Knoxville News-Sentinel v. Huskey,
982 S.W.2d 359 (Tenn. Cr. App. 1998).....17

Memphis Publ'g Co. v. Cherokee Children & Family Servs., Inc.,
87 S.W.3d 67 (Tenn. 2002).....10, 12, 14

Memphis Publ'g Co. v. City of Memphis,
871 S.W.2d 681 (Tenn. 1994) 25

Memphis Publ'g Co. v. Holt,
710 S.W.2d 513 (Tenn. 1986) 18, 25

Meyer Chatfield Corp. v. Century Business Svcs., Inc.,
No. 05-3673, 2010 WL 3221944 (E.D. Pa. Aug. 12, 2010) 25

Nebraska Press Ass'n v. Stewart,
427 U.S. 539 (1976) 11, 12

Schneider v. Jackson,
226 S.W.3d 332 (Tenn. 2007) 1, 13, 14, 20, 21, 22, 25

State v. Cawood,
134 S.W.3d 159 (Tenn. 2004) 7, 14

State v. Drake,
701 S.W.2d 604 (Tenn. 1985) 13, 22

State v. Koulis,
No. I-CR111479 (Williamson Co. Crim. Ct. June 5, 2006) (Bivins, J.) 13, 22

State v. Peele,
58 S.W.3d 701 (Tenn. 2001) 15

Swift v. Campbell,
159 S.W.3d 565 (Tenn. Ct. App. 2004) 1, 10, 16, 18

Tennessean v. City of Lebanon,
2004 WL 290705 (Tenn. Ct. App. Feb. 13, 2004) 7

Torres v. County of Oakland,
758 F.2d 147 (6th Cir. 1985) 25

United Kingdom v. United States,
238 F.3d 1312 (11th Cir. 2001) 18

United States v. Armstrong,
517 U.S. 456 (1996) 19

United States v. Fort,
472 F.3d 1106 (9th Cir. 2007) 19

United States v. Taylor,
608 F. Supp. 2d 1263 (D.N.M. 2009) 18

Wilson v. State,
367 S.W.3d 229 (Tenn. 2012) 17

Statutes

T.C.A. § 10-7-503(a)(2)(A) 13

T.C.A. § 10-7-505(b) 2

T.C.A. § 10-7-505(c) 14

T.C.A. § 10-7-505(d) 10

T.C.A. § 16-3-404 ..... 15, 16

T.C.A. §§ 40-38-101 *et seq* 6

Other Authorities

Fed. R. Crim. P. 16(a)(2) 18, 19

Tenn. Const. Art. I, § 35 6

Tenn. R. Civ. P. 56.05 24

Tenn. R. Crim. P. 1 15

Tenn. R. Crim. P. 1(a)-(d) 15

Tenn. R. Crim. P. 16 ..... 5, 17, 18, 20

Tenn. R. Crim. P. 16(a)(1)(C) 19

Tenn. R. Crim. P. 16(a)(2) 1, 3, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 26

Tenn. R. Evid. 602 23

U.S. Const. Amend. VI 6, 24

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in determining that the 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 in connection with investigating or prosecuting the case" or "statements made by state witnesses or prospective state witnesses."

2. Whether the Court of Appeals erred in determining that the 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 so they are not "work product," and the Tennessee Court of Appeals has 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 respondents' affidavits containing speculation, legal opinions, and conclusory statements that were contradicted by the record) for its holding that any public records "relevant to a pending or contemplated criminal action" must be exempt from disclosure under the Public Records Act.

STATEMENT OF THE CASE

This case involves fundamental questions concerning public records and open government and raises issues of statutory construction and the application of evidentiary standards in a Public Records Act case. Appellants, a coalition of media entities and a citizens group, appeal the Tennessee Court of Appeals' ruling reversing the Davidson County Chancery Court's order granting in part Appellants' Petition for Access to public records.

Appellants requested certain third-party records received by the Metropolitan Police of Nashville & Davidson County ("Metro Police") during its investigation of rape allegations involving former members of the Vanderbilt University football team, excluding any images of the alleged victim. Metro Police denied repeated requests for the records, initially citing Tennessee Rule of Criminal Procedure 16(a)(2) as the sole basis for nondisclosure and later mentioning a limited protective order in the separate criminal case. 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. The Show Cause hearing was held on March 10, 2014.

In its Memorandum Opinion issued March 12, 2014, the Trial Court held that a substantial portion of the requested records are public records which are required to be produced under the Act. (R. Vol. V at 642-43). The Trial Court denied Appellants' Motion to Strike the affidavits filed by the Government Parties and alleged victim that Appellants had argued contained improper opinions, legal conclusions and other conclusory statements, and speculation, holding that it had given the appropriate consideration to the parties' arguments and statements. (R. Vol.V at 628). The Trial Court stayed its order granting access, pending this appeal. (R. Vol. V at 651). Appellants filed a Notice of Appeal (R. Vol. V at 655-656), and their motion to expedite was granted by the Court of Appeals. (R. Vol. VI at 661 & Motion).

Pertinent to this appeal, Appellants asked the Court of Appeals to (1) affirm the Trial Court's order requiring the production of certain public records; and (2) find that substantial portions of the Affidavits filed by the Appellees should have been stricken as violative of Tennessee evidence rules. (R. Vol. VI at 801). In its ruling issued September 30, 2014, the Court of Appeals reversed the Trial Court, holding that Tennessee Rule of Criminal Procedure 16(a)(2) provides a blanket exemption from the Public Records Act for all materials "relevant to a pending or contemplated criminal action" (Ex. A., Op. at 8). The Court of Appeals held that this blanket exception applies even when those materials have been provided to the criminal defendants in discovery; *i.e.*, when the materials are not exempt from disclosure to the criminal defendants under Rule 16(a)(2). The Court of Appeals' ruling is contrary to the express language of Rule 16(a)(2) and the case law interpreting it. In addition, the Court of Appeals did not address whether the Trial Court improperly denied Appellants' Motion to Strike. Instead, the Court of Appeals relied upon Appellees' inadmissible law enforcement affidavits in reaching its ruling.

On November 26, 2014, Appellants submitted their Application for Permission to Appeal, which was granted on January 15, 2015. On appeal, Appellants ask this Court to reverse the Court of Appeals' ruling on the following bases: (a) the requested materials do not fall within the scope of Rule 16(a)(2); (b) the requested materials were produced to the defendants in the ongoing criminal proceeding and are not "work product"; (c) the appellate court's decision attempts to create a common-law law enforcement exception to the Public Records Act that this Court has expressly found does not exist; and (d) the decision relies upon improperly admitted evidence.

STATEMENT OF THE FACTS

The requested records pertain to allegations of sexual abuse which occurred on the Vanderbilt University campus on June 23, 2013, for which, after an investigation by Vanderbilt and Metro police, several former members of the Vanderbilt football team were charged for the rape or subsequent cover-up.[1] The incident and the subsequent criminal cases have caused intense scrutiny by the Vanderbilt and regional community and have attracted national public attention.

A reporter for *The Tennessean* initially made a public records request to Metro Police for copies of "[a]ny records (as that term is broadly defined in the Act) regarding the alleged rape on the Vanderbilt campus in which the [four individuals] are charged." (Compl., Ex. A, R. Vol. I at 13). This request specifically requested copies of any "text messages received or sent and videos provided and/or prepared by any third party sources." (*Id.*) The request for public records was subsequently modified to expressly exclude any portion of the request that might have covered images of the alleged victim obtained from third parties. (Compl. Ex. C. at 2, R. Vol I. at 16; Hr'g Tr. at 47:3-4, Mar. 10, 2014, R. Vol. VI. at 710). Metro Police denied the request in its entirety, citing the provisions of Tenn. R. Crim. P. 16(a)(2). *The Tennessean* through its counsel made two more requests, and both were rejected. (Compl., Exs. E-H, R. Vol. I at 23-31).

Additional media organizations and a citizen's group joined the request. This time in its denial, Metro Police noted that a protective order had been entered in the separate criminal case that applied to certain videos and photographs provided by the District Attorney to defense counsel. (Compl., Exs. G & H, R. Vol. I at 27-31). Appellants then filed their complaint against

[1] The fact that after a two-week trial in January 2015, the two former Vanderbilt players being tried were convicted has been widely reported, but that case and the events surrounding it are not part of the Record and are not at issue in this appeal.

Metropolitan Government--the governmental entity to which the public records requests had been made.

A. Motions to Intervene in Public Records Act Case 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.[3] 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 Chancellor's detailed summary (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 those allegedly involved in the incident or after the incident, as well as Vanderbilt employees including coaching staff. (Mem. Op. at 4-8, R. Vol. V at 633-637). Some, but not all, of these third party materials were obtained pursuant to search warrants and subpoenas.[4]

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

All parties were permitted to submit briefs and file sworn statements in advance of the show cause hearing. The Government Parties argued that Tenn. R. Crim. P. 16(a)(2) constituted a blanket exemption for all records in Metro Police's file. Metropolitan Government argued for some "temporal" test; *i.e.*, that public records would be open for some period of time until there was a criminal case, at which time Rule 16 would seal all investigative records until the case was "closed," after which the public records would again be open. The State argued that Rule 16

[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] In this Public Records case, filed long before any convictions in the separate criminal case, "Jane Doe" has been referred to as the alleged victim.

[4] An index of the records was submitted under seal to the Trial Court, and Appellants have not had access to that index.

should seal all records obtained in an investigation from its inception - even before a criminal case existed.

The Government Parties argued that the criminal defendants' "fair trial" rights under the Sixth Amendment to the U.S. Constitution precluded the production of public records in response to Petitioners' requests. The victim argued that she was entitled to assert, in a civil Public Records Act case, a broad "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") and T.C.A. §§ 40-38-101 *et seq*. Appellees filed Affidavits by the Chief of Police, the District Attorney General, and a paralegal in the Attorney General's Office (the latter attaching news articles). The victim submitted an affidavit. The Affidavits of the Chief of Police and District Attorney General were in significant part identical. Appellants filed a Motion to Strike substantial portions of these Affidavits because they contained improper opinion testimony, legal conclusions and other conclusory statements, and speculation. Appellants also submitted Declarations of Maria De Varenne (Editor and Director of News for multiple Gannett publications including *The Tennessean*) and Brian Haas (*The Tennessean*'s Court/Criminal Justice Reporter), 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 concerning operational aspects of their departments about what actually is filed in court or made publicly available.

The District Attorney General's Affidavit contained opinion statements that the number of news stories published about the criminal investigation and cases would make providing the criminal defendants a "fair trial" several months later (actually nine) difficult if not impossible. The Chief of Police's affidavit mirrored this conclusory opinion. The alleged victim expressed

her opinion that she feared that publicity about the case would subject her to "intimidation, harassment and abuse," reciting language from the state constitutional victim's rights provision, but omitting the language "throughout the criminal justice system."[5]

The Chief of Police and District Attorney General offered their opinions that disclosing investigative files during an ongoing prosecution might impair a criminal defendant's right to a fair trial; might "intimidate, harass, or abuse victims"; and/or might have a "chilling effect" on law enforcement investigations. (Anderson Aff. ¶ 10, R. Vol. II at 234; Johnson Aff. ¶¶ 10-11, R. Vol. II at 150). The Government Affiants failed to mention the contradictory evidence/public records submitted by the Appellants that demonstrate that in Davidson County and elsewhere, investigative records in pending criminal cases routinely are filed by the prosecutor and are publicly available. (Haas Decl. ¶¶ 3-6, R. Vol. III at 368). Multiple examples of such public filings were submitted to the Trial Court, including Davidson County sexual assault cases, which included 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).

Metropolitan Government went so far as to claim 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

[5] The Court of Appeals' decision does not address the "victims' rights" arguments raised by the victim, and accordingly those issues are not addressed in the Appellants' request for reversal of the Court of Appeals' decision. 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," but on appeal to the Court of Appeals, they did not do so. Tennessee courts have rejected efforts to impose a "privacy" exemption to the Public Records Act. *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).

General's Office previously had publicly 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 separate criminal cases are routinely filed and are judicial records.[6]

The Trial Court denied the Appellants' Motion to Strike, 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 victim's affidavits to remain part of the record in this case, and the Government Parties and victim relied on them in their entirety on appeal.

C. The Trial Court's Ruling

The Trial Court issued its Memorandum Opinion and accompanying Orders, granting in substantial part the Appellants' 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. (R. Vol. V at 642-643). Specifically, the Trial Court found that Rule 16(a)(2) did not apply to the following documents: text messages (without any photographs and videos covered by the protective order in the separate criminal case), Vanderbilt access card information, Pano-scan data (panoramic rotating line camera)

[6] 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 certainly did not violate the criminal defendants' rights.

showing a Vanderbilt University dormitory room, and e-mails recovered from potential witnesses and the criminal defendants which were not addressed to officials in the Police Department or the District Attorney General's Office. (R. Vol. V. at 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).

D. The Court of Appeals' Majority Decision

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 reliance upon inadmissible Affidavits submitted by the Government Parties and victim and certain matters regarding judicial records; however, the Court of Appeals did not address these additional issues in its opinion.

The Court of Appeals reversed the Trial Court's ruling, stating as its sole ground that the requested public 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 Rule 16(a)(2) analysis: determining whether the materials fall within the scope of that Rule. In addition, the Court relied upon the Government Parties' affidavits to find that the requested public records pertain to a pending or contemplated criminal action, without first addressing Appellants' contention that the Trial Court had improperly permitted those Affidavits. Further, the Court of Appeals ignored Appellants' arguments that all or nearly all of the requested material did not

qualify as "work product" and therefore could not meet the Tenn. R. Crim. P. 16(a)(2) exception to disclosure. *See Swift v. Campbell*, 159 S.W.3d 565, 572 (Tenn. Ct. App. 2004). Finally, by exempting all law enforcement records "relevant to a pending or contemplated criminal action," the Court of Appeals 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 dissenting opinion to the Court of Appeals' majority opinion correctly followed the first step in a 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.*).

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)).

ARGUMENT

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 must be produced under the Tennessee Public Records Act because they are not subject to exemption under Tenn. R. Crim. P. 16(a)(2) as claimed by the Government Parties. Access to these records provides essential transparency for the acts of local officials and the justice system. Public records access is a critical tool for ensuring that the public can oversee government, and determine for itself how government is operating and whether it has confidence in those operations. The importance of this right of access is amplified with respect to 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."); *Nebraska Press Ass'n*, 427 U.S. at 561 (recognizing the very high burden on prior restraints of reporting criminal cases).

This oversight is 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 by college students (particularly athletes), the handling of the investigations regarding those alleged crimes, their ultimate disposition, and the scrutiny by the federal Department of Education regarding the under-reporting and investigation of sexual abuse allegations on campuses across the country. With such high-profile cases, the media plays a fundamental role in guarding "against the miscarriage of justice." *Nebraska Press*, 427 U.S. at 561.

The Court of Appeals' majority opinion fails to follow this Court's mandate to protect these significant public interests through liberal construction of the Public Records Act. *Memphis Publ'g Co.*, 87 S.W.3d at 74. Instead, the Court of Appeals expansively construed what it stated was an exception to the Public Records Act (*i.e.*, Tenn. R. Crim. P. 16(a)(2)), and created a blanket exemption. The Court of Appeals ignored the clear language of Tenn. R. Crim. P. 16(a)(2), disregarding 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 constitute "work product," an essential element of Rule 16(a)(2).

The Court of Appeals also abdicated its duty to adhere to the rulings of this Court by creating a blanket "law enforcement" exception to the Public Records Act, which this Court has

rejected. As this Court held in *Schneider*, only the General Assembly can create 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.*

By effectively adopting a common-law "law enforcement" exception to the Public Records Act and denying Appellants' Petition, the Court of Appeals ignored substantial precedent on the significant procedural requirements which must be met to impose restrictions on public access. *See, e.g.*, *State v. Drake*, 701 S.W.2d 604, 608 (Tenn. 1985) (imposing a 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 the *Drake* standards apply to "other restrictive" measures, including a 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).

For these reasons, the Court of Appeals' decision should be reversed.

A. The Trial Court Erred in Its Construction and Application of Tenn. R. Crim. P. 16(a)(2).

1. The Public Records Act Requires Broad Interpretation

The General Assembly mandates 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 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 which the objecting governmental entity has the burden of establishing, 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 fundamental public interest, the General Assembly mandates a public entity must meet its 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.").

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

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 made their way into its investigative files, including all records obtained from third parties. As explained below, that interpretation (erroneously adopted and extended by the Court of Appeals to cover all materials "relevant to a pending or contemplated criminal action") exceeds the clear parameters of the rule.

Rule 16(a)(2) of the Tennessee Rules of Criminal Procedure 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).

Given this unambiguous language, 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 lawsuit (not merely an investigation). *See* Tenn. R. Crim. P. 1. In this case, the Court of Appeals deviated from that precedent by ignoring the Rule's text and bypassing the first element of a Rule 16(a)(2) determination.

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). The Supreme Court cannot expand the scope of these Rules or amend their language without the approval 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 records to the defense but only to the extent that those records are "made by the district attorney general or other state agents or law enforcement officers in connection with investigating or prosecuting the case" or constitute "statements made by state witnesses or prospective state witnesses." (Emphasis added).[7] 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 -- ostensibly based on *Appman v. Worthington*, 746 S.W.2d 165 (Tenn. 1987) -- that the materials in Metro Police's file fall within the exception because they are "relevant to a

[7] The Rules of Criminal Procedure "govern the procedure in all criminal proceedings conducted in all Tennessee courts of record" and to particular proceedings in general sessions courts, juvenile courts, and other inferior courts. Tenn. R. Crim. P. 1(a)-(d).

pending or contemplated criminal action." (Ex. A., Op. at 8). In *Appman*, the Tennessee Supreme Court did not -- and could not, without the General Assembly's approval -- expand the scope of Rule 16(a)(2) to exclude third-party documents from disclosure.

Appman involved an effort by defense lawyers in a criminal case, who were defending a prison inmate accused of murdering another inmate, to obtain materials from the prison's investigative officer through a separate public records lawsuit. 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 in *Appman* did not expand Rule 16(a)(2) to exempt records created by third parties from disclosure under the Public Records Act.[8] That issue appears not to have been presented, and the Supreme Court did not specifically address it. If the *Appman* Court had expanded the scope of Rule 16(a)(2), it would have violated the statutory requirement that the General Assembly must approve the adoption or amendment of any rules governing the courts. T.C.A. §16-3-404. The specific, limited request by Petitioners in the instant case for records obtained from third parties was not an issue raised or resolved in *Appman.*

Later 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*, 159 S.W.3d at 576

[8] It must be noted that *Appman* involved criminal defendants seeking records related to their own prosecutions, in a separate Public Records case. 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 been provided the requested materials in discovery. (Mem. Op. at 9 n.8, R.Vol. V at 638; Ex. B., McBrayer, J., dissenting at 3).

("*[D]ocuments of the sort covered by* Tenn. R. Crim. 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).

The Trial Court's memorandum opinion in this case makes clear that many of the documents requested by Appellants are third-party materials (*i.e.*, materials created by third parties and later collected by law enforcement) which are not excepted under the language of Tenn. R. Crim. P. 16(a)(2). (Mem. Op. at 4-8, R. Vol. V at 633-637). In its ruling reversing the Trial Court, the Court of Appeals failed to even address the argument that these third-party documents were not "reports, memoranda, or other internal state documents made by the district attorney general or other state agents or law enforcement officers," which had been extensively briefed. The Court of Appeals ignored the clear text of Rule 16(a)(2) and the cases interpreting that rule. Its decision should be reversed.

B. The Court of Appeals Erred in Not Analyzing Whether the Requested Materials Constitute "Work Product."

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" of the district attorney or other state agents or law enforcement officers. 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) provides some protection from discovery by defense lawyers and others 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).

The interpretation by Tennessee courts of Rule 16(a)(2) as a "work product" rule is a nearly universal holding. Rule 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) of the Federal Rules of Criminal Procedure only protects "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).

Further, federal courts in numerous cases have recognized that documents created by third parties do not qualify for "work product" protection, under Fed. R. Crim. P. 16(a)(2) 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)). 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."). The Government Parties' sole reliance on a case from the Court of Appeals for the Ninth Circuit, *United States v. Fort,* 472 F.3d 1106 (9th Cir. 2007), which is recognized as being an outlier, should be rejected. In addition, the Government Parties have no support for their argument that "everything in the police department's file" somehow should be characterized as "work product." Tennessee cases have previously rejected such loose claims about work product. *See, e.g.*, *City Press Commc'ns, LLC v. Tenn. Secondary Sch. Athletic Ass'n*, 447 S.W.3d 230, 241 (Tenn. Ct. App. 2014) (rejecting argument by Tennessee Secondary School Athletic Association that records which had been procured by counsel for purposes of conducting an investigation were "work product;" instead, granting petitioner's application under Public Records Act).

In its ruling in this case, the Court of Appeals made no comment upon, and did not even attempt to evaluate, whether the requested materials constitute "work product." Had it done so, it would likely have determined that many of the requested records, such as third-party text messages/emails, do not contain an attorney's or police detective's "mental impressions, conclusions, and legal theories of the case" and cannot qualify for work product protection. Neither are they witness statements under Rule 16. As the dissenting opinion points out, the requested materials were provided by the prosecution to the defense in discovery. (McBrayer, J., dissenting at 3). Therefore, those materials were not non-discoverable "work product" under Rule 16(a)(2). The required disclosure to the defense underscores the non-privileged nature of the requested material. The Record shows that in many other criminal cases, discovery materials are regularly filed by prosecutors. The District Attorney's office chose not to do so in this particular case, for whatever reason. That judicial disclosure is not necessary to create public records, but the fact that it happens frequently undercuts the State's position. The Court of Appeals did not address the fact that documents that are subject to discovery under Tenn. R. Crim. P. Rule 16 also fall under the Public Records Act.

The Court of Appeals erred in ruling that Rule 16(a)(2) exempted all of the requested records from disclosure without first determining that they constitute work product. Its decision should be reversed.

C. The Court of Appeals Erred in Creating a "Law Enforcement" Exception to the Public Records Act.

The Court of Appeals' decision, both as a legal and practical matter, 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 field interview cards generated by police

officers. The City rejected the request. The newspaper filed a Public Records suit. The city asserted 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 some federal cases[9] 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 rejected common-law "law enforcement" exception (advanced by the cities of Jackson and Nashville) and the Tenn. R. Crim. P. 16(a)(2) exemption 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

[9] The federal cases relied upon relate to the specific law enforcement privilege provided in the Freedom of Information Act ("FOIA") - not found in the Tennessee 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.

16(a)(2) is narrower than the purported, but rejected, "common-law" exception. The Supreme Court's decision in *Schneider*, therefore, does not make all materials in an "open" criminal case exempt under Rule 16(a)(2). The field cards at issue in *Schneider*, made by law enforcement agents and possibly containing potential witness statements or work product, might or might not lie within Rule 16(a)(2)'s parameters; 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 . . . 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 the Supreme Court's holding in *Schneider*, the Court of Appeals in this case essentially created a blanket common-law "law enforcement" exception to the Public Records Act by pronouncing that Rule 16(a)(2) permits all police records "relevant to a pending or contemplated criminal action" to be exempt from disclosure. (Ex. A, Op. at 8). The Court of Appeals' inattention to precedent does not end with *Schneider*: the creation of a "law enforcement" exception also undermines long-recognized standards for imposing restrictive measures in criminal cases. *See, e.g.*, *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). For these reasons, the Court of Appeals' decision should be reversed.

D. The Court of Appeals Erred in Permitting the Filing of the Government Parties' and Victim's Testimony.

The Court of Appeals relied heavily upon the Government Parties' affidavits in reaching its mistaken conclusion 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 (and the victim's) as not meeting Tennessee's evidentiary requirements. Respectfully, Appellants submit that the Court of Appeals erred in remaining silent on such an important issue while 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 evidentiary rules when attempting to defend their refusal to produce public records, thereby setting the stage for future abuses of the Act. Historically, Tennessee courts have protected the public's right of access under the Public Records Act with vigilance. For continued protection of that right, this Court should not permit governmental agencies to submit inadmissible conclusions and speculation to attempt to justify their failure to satisfy Public Records Act obligations. Future litigants will benefit from this Court's admonition that the Tennessee Rules of Evidence apply in Public Record Act proceedings.

The Affidavits by the Government Parties and the alleged victim should not have been permitted. The Trial Court declined to strike those affidavits, finding that the Court could pick and choose among the statements. However, the inadmissible statements in those affidavits remained in the record on appeal, where the Court of Appeals cited them. Those affidavits fail to comport with Tennessee evidentiary 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 Government Parties and victim should not have been permitted to provide improper testimony, offer opinions or legal conclusions, make "comparisons" which are outside those witnesses' purview as lay witnesses,[10] 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 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.[11] The affidavits submitted by the Government Parties and victim in substantial part are not based on personal knowledge. The evidence in the record (presented by Appellants) shows that their opinions (however well-meaning) are mistaken about how their agencies operate in filing discovery materials and providing information to the media. (Haas Decl. ¶¶ 3-7, R. Vol. III at 368).

In their affidavits, the Government Parties attempted to state conclusions about legal issues, some of which concerned issues that were not even presented to the Trial Court. Those affidavits asserted opinions/conclusions about the criminal defendants' right to a fair trial which (a) neither affiant 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). They

---

[10] 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 in which she quotes from the state constitutional provision regarding victims' rights. (Doe Aff. ¶ 4, R. Vol. I at 118).

[11] *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).

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 public access.[12] Further, neither the Chief of Police nor District Attorney General in opposing disclosure of anything - even judicial records - acknowledged the fundamental principle that judicial records are presumptively open to the public.

Impermissible legal conclusions and arguments are not suited for an affidavit.[13] 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."[14] The Trial Court should have stricken the opinions, arguments, and legal conclusions presented in these affidavits. The Court of Appeals erred in relying upon these inadmissible Affidavits in reaching its own mistaken conclusion. Its decision should be reversed.

---

[12] *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," despite argument from the City of Memphis and its Police Department that failure to recognize such a privilege would be "contrary to public policy."); *see also Schneider*, 226 S.W.3d at 344 (rejecting purported law enforcement privilege as a "state law" exception to the Public Records Act despite being "sympathetic to the City's concerns about the potential consequences of disclosing" the requested records); *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.")

[13] "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).

[14] *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").

CONCLUSION

Appellants respectfully that this Court reverse the ruling of the Court of Appeals on the following grounds: (a) the requested materials do not fall within the scope of Tennessee Rule of Criminal Procedure 16(a)(2); (b) the requested materials were produced to the defendants in the ongoing criminal proceeding and therefore do constitute "work product"; (c) the Court of Appeals' decision creates a common-law law enforcement exception to the Public Records Act that this Court has expressly found does not exist; and (d) the Court of Appeals' decision relies upon improperly admitted evidence.

Respectfully submitted,

Robb S. Harvey (Tenn. BPR No. 11519)
Lauran M. Sturm (Tenn. BPR No. 30828)
WALLER LANSDEN DORTCH & DAVIS LLP
511 Union Street, Suite 2700
Nashville, Tennessee 37219
Tel.: (615) 244-6380
Counsel for Petitioners/Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been served upon the following on this 23rd day of February, 2015:

by hand delivery:

James L. Charles
Lora Barkenbus Fox
Emily Herring Lamb
R. Alex Dickerson
Jennifer Cavanaugh
Assistant Metropolitan Attorneys
Metropolitan Courthouse, Suite 108
Nashville, TN 37219

Herbert H. Slatery, III
Joseph F. Whalen
Janet Kleinfelter
Deputy Attorney General
Office of Attorney General
425 5th Avenue North
Nashville, TN 37243

Douglas R. Pierce
King & Ballow
315 Union Street, Suite 1100
Nashville, TN 37201

and by First-Class U.S. mail, postage prepaid:

Adam A. Marshall
Katie Townsend
Reporters Committee for Freedom of the Press
1156 15th St. NW Suite 1250
Washington, D.C. 20005

Richard L. Hollow
Hollow & Hollow, LLC
P.O. Box 11166
Knoxville, TN 37939-1166

Counsel for Petitioners/Appellants

Courtesy copy via hand delivery to:

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

EXHIBIT A

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 09, 2014 Session

THE TENNESSEAN, ET AL. V. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, ET AL.

Appeal from the Chancery Court for Davidson County
No. 14156IV Russell T. Perkins, Chancellor

No. M2014-00524-COA-R3-CV - Filed September 30, 2014

Various media outlets made request under the Tennessee Public Records Act for access to records accumulated and maintained by the Metropolitan Nashville Police Department in the course of its investigation and prosecution of an alleged rape in a campus dormitory. When the request was refused, the outlets a filed petition in Chancery Court in accordance with Tennessee Code Annotated § 10-7-505; the State of Tennessee, District Attorney General and alleged victim were permitted to intervene. The court held the required show cause hearing and, following an *in camera* inspection, granted petitioners access to four categories of records and documents. Petitioners, as well as the Metropolitan Government and Intervenors appeal, raising numerous and various statutory and constitutional issues. We have determined that the records sought are currently exempt from disclosure due to the continuing police investigation and pending prosecution; accordingly, we reverse the judgment of the Chancery Court and dismiss the petition.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed; Petition Dismissed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P. J., M. S., joined. W. NEAL MCBRAYER, J., filed a dissenting opinion.

Robb S. Harvey and Lauran M. Sturm, Nashville, Tennessee, for the appellants, The Tennessean, Associated Press, Chattanooga Times Free Press, Knoxville News Sentinel, Tennessean 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.

Saul Solomon, Director of Law; James L. Charles, Associate Director, Lora Barkenbus Fox, Emily Herring Lamb, R. Alex Dickerson, Jennifer Cavanaugh, Assistant Metropolitan Attorneys, Nashville, Tennessee, for the appellee, The Department of Law of the Metropolitan Government of Nashville and Davidson County.

Edward Yarbrough and J. Alex Little, Nashville, Tennessee, for the intervenor, Jane Doe.

Robert E. Cooper, Jr., Attorney General and Reporter; Joseph F. Whalen, Acting Solicitor General; Janet M. Kleinfelter, Deputy Attorney General, for the intervenors-appellees, District Attorney General, Victor S. Johnson, III, and the State of Tennessee.

Douglas R. Pierce, Nashville, Tennessee, for the Amicus Curiae, Tennessee Association of Broadcasters.

OPINION

I. FACTUAL & PROCEDURAL HISTORY

On August 9, 2013, four former members of the Vanderbilt University football team were indicted on five counts of aggravated rape and two counts of aggravated sexual battery of a student at an on-campus dormitory. On October 13, a reporter for the *Tennessean* newspaper made a request of the Metropolitan Police Department under the Tennessee Public Records Act ("TPRA"), Tenn. Code Ann. § 10-7-503 *et seq.*, for "any records (as that term is broadly defined in the Act) regarding the alleged rape on the Vanderbilt campus and in which Vandenburg, Banks, Batey and McKenzie are charged" and "any records regarding the case recently concluded against Boyd by his plea bargain."[1] The request was denied and, after unsuccessfully seeking recourse through the Metropolitan Director of Law and Mayor, on February 4, 2014, the *Tennessean* and various other media outlets ("Petitioners") filed a Complaint and Petition for Access to Public Records in Davidson County Chancery Court naming the Metropolitan Government of Nashville and Davidson County as Respondent; the State and District Attorneys General were permitted to intervene, as was the victim (Ms. Doe).[2]

---

[1] Another student had previously entered a conditional guilty plea to a charge of trying to cover up the alleged rape.

[2] The State Attorney General and District Attorney General, Victor Johnson, III, moved to intervene in order to protect the interest of the State in the ongoing criminal prosecution; in addition, as more fully discussed herein, the court in which the prosecution was pending had issued a protective order prohibiting disclosure of certain material produced by the State to the defendants.

The court held a show cause hearing in accordance with the TPRA and conducted an *in camera* inspection of the records in question[3]; in a Memorandum and Final Order entered March 12, the court ordered that Petitioners be granted access to (1) text messages and emails the police department received from third parties in the course of its investigation; (2) Vanderbilt access card information; (3) reports and emails provided to the Metropolitan police department by Vanderbilt; (4) pano scan data of the Vanderbilt premises.

---

[3] The court categorized the records as follows:

1. All of the building surveillance tapes in the investigative file from three locations on the Vanderbilt University campus, including the Vanderbilt University dormitory where the alleged assault occurred - all with the image of Ms. Doe redacted;
2. All of the videos and photographs in the investigative file, except that Plaintiffs are not seeking photos or videotapes of the alleged assault or any photos or videotapes of Ms. Doe;
3. All of the text messages and e-mails that the Metropolitan Police Department received from third parties in the course of its investigation;
4. Written statements of the defendants and witnesses provided to the Metropolitan Police Department by Vanderbilt University;
5. Vanderbilt access card information;
6. Reports and e-mails provided to the Metropolitan Police Department by Vanderbilt University;
7. Metropolitan Police Department forensic tests performed on telephones and computers;
8. T.B.I. DNA reports;
9. Forensic reports prepared by private laboratories hired by the Metropolitan Police Department; and
10. The following items made or collected by the Metropolitan Police Department:
    a) police reports and supplements;
    b) search warrants;
    c) crime scene photographs;
    d) Pano-scan data relating to Vanderbilt University premises;
    e) background checks and other personal information regarding Ms. Doe, defendants, and witnesses;
    f) cell phone information obtained through several search warrants;
    g) photographic images and text messages recovered from the cell phones of five individuals who were charged with criminal offenses, except any photographs or video depicting Ms. Doe or the alleged sexual assault;
    h) statements of Ms. Doe, defendants and witnesses; and
    i) video recovered from a student witness's computer, except any photographs or videotapes depicting Ms. Doe or the alleged sexual assault.

The parties each raise issues on appeal.

II. DISCUSSION

The TPRA provides that:

> All state, county and municipal records[4] shall, at all times during business hours, which for public hospitals shall be during the business hours of their administrative offices, 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.

Tenn. Code Ann. § 10-7-503(a)(2)(A). The parties have raised a plethora of issues relative to the interpretation and application of this statute, specifically the "unless otherwise provided by state law" provision. We have determined that a common thread in these issues, which we must first address, is the extent to which the records sought are exempt from disclosure given the present posture of the criminal proceeding. This is a question of law which we review *de novo*, with no presumption of correctness of the trial court's decision. *See Memphis Publishing Co. v. Cherokee Children and Family Svcs., Inc.*, 87 S.W.3d 67, 74 (Tenn. 2002).

The Metropolitan Government as well as the State and District Attorneys General assert that the records are exempt pursuant to Rule 16 of the Tennessee Rules of Criminal Procedure, which governs discovery and inspection of information in a criminal proceeding. Section (a)(1) of the rule sets forth specific information which must be disclosed by the State; of pertinence to the issues we address, section (a)(2) provides as follows:

> Except as otherwise provided in paragraphs (A), (B), (E), and (G) of subsection (a)(1)[5], this rule does not authorize the discovery or inspection of reports, memoranda, or other internal state documents made by the district attorney general or other state agents or law enforcement officers in connection with investigating or prosecuting the case. Nor does this rule authorize discovery of statements made by state witnesses or prospective state witnesses.

---

[4] The TPRA defines "public records" to include: "All documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency." Tenn. Code Ann. § 10-7-503(a)(1)(A).

[5] These exceptions are not at issue in this appeal.

Tenn. R. Crim. P. 16(a)(2). Our review of cases which have considered the interaction between Tenn. R. Crim. P. 16 and the TPRA leads us to conclude that, in light of the pending investigation and prosecution arising out of the events for which the records were complied, access under the TPRA is not required at this time.

The question of whether records maintained by a state correctional facility in the course of its investigation into the murder of an inmate were available for inspection under the TPRA was before the court in *Appman v. Worthington*, 746 S.W.2d 165 (Tenn. 1987). In that case, attorneys representing the defendants who had been indicted for the inmate's murder subpoenaed records of the facility's investigation from the appropriate prison official; the request was refused and counsel filed a petition seeking judicial review pursuant to the TPRA. *Id.* at 166. The trial court held that the records were exempt from inspection pursuant to Tenn. R. Crim. P. 16; the Court of Appeals reversed, holding that Rule 16 only applied to the rights and duties of the parties to the criminal prosecution and not the rights of access of citizens to public records as provided by the TPRA. *Id.* On further appeal, our Supreme Court reversed the Court of Appeals' decision, holding:

> 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 and 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.

Appman, 746 S.W.2d at 166. The Supreme Court then noted that the materials sought were the result of the investigation into a murder for which several individuals were indicted for the murder and another was indicted as an accessory after the fact. *Id.* at 166–67. The court also stated that the materials were relevant to the prosecution of the persons charged with the offenses arising out of the murder and that the prosecutions had not been terminated. *Id.* at 167. Applying the Rule 16(a)(2) exception to the disclosure and inspection of categories of evidence where the files are open and relevant to pending or contemplated criminal action, which was the case in *Appman*, the court held that the materials were not subject to inspection under the Public Records Act. *Id.*

In *Schneider v. City of Jackson*, 226 S.W.3d 332 (Tenn. 2007), members of the media filed a petition under the TPRA seeking access to, *inter alia*, cards memorializing field interviews conducted by City of Jackson police officers. The request had been denied on the basis of an asserted common law law enforcement privilege; the Supreme Court held that such privilege had not been adopted in Tennessee and, therefore, was not a "state law" exception to the TPRA. *Id.* at 338, 342. The court also considered whether the cards were exempt from disclosure under Tenn. R. Crim. P. 16. *Id.* at 344. The court noted that the cards "would clearly have been exempt from disclosure under Rule 16(a)(2) and this Court's decision in *Appman*" and remanded the case to allow the City to submit to the court for *in camera* review the cards or portions of cards which the City maintained were involved in a pending criminal investigation.[6] *Id.* at 345-46.[7]

In response to the show cause order, Metro submitted, *inter alia*, the affidavit of Steve Anderson, Chief of Police, which stated in pertinent part:

> 6. MNPD officers have been investigating and gathering information relating to crimes that allegedly occurred on the Vanderbilt University campus around June 23, 2013, and the following days thereafter, for the purposes of prosecuting the perpetrators of the crimes.
>
> 7. The MNPD investigation into the matter is still an active, ongoing and open matter. The investigation is not complete. Investigators are still working to gather and analyze evidence in the case.
>
> 8. Much of the information that the MNPD has gathered in this investigation has been through subpoenas and search warrants - from defendants, potential witnesses, Vanderbilt University, Vanderbilt Police, Vanderbilt University Medical Center, and cell phone providers.

---

[6] The court ordered that the petitioners be granted immediate access to those cards which were not submitted to the court for review.

[7] The holding of *Appman* and *Schneider* that Tenn. R. Crim P. 16(a)(2) is included in the "otherwise provided by state law" language of Tenn. Code Ann. § 10-7-503(a)(2)(A), thereby exempting records relating to ongoing criminal investigations or prosecutions from the access requirement, has been applied in other cases as well. See e.g., *Capital Case Resource Center of Tennessee, Inc. v. Woodall*, No. 01-A-019104CH00150, 1992 WL 12217 (Tenn. Ct. App. Jan. 29, 1992); *Freeman v. Jeffcoat*, No. 01-A-019103CV00086, 1991 WL 165802 (Tenn. Ct. App. May 18, 1992); *Swift v. Campbell*, 159 S.W.3d 565 (Tenn. Ct. App. 2004); *Waller v. Bryan*, 16 S.W.3d 770 (Tenn. Ct. App. 1990).

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

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

In like fashion the State submitted the affidavit of District Attorney General Johnson, stating in pertinent part:

2. In late June 2013, the Metropolitan Nashville Police Department (MNPD) began investigating and gathering information relating to crimes that allegedly occurred on the Vanderbilt University campus for the purpose of prosecuting the perpetrators of the alleged crimes. Shortly thereafter, MNPD contacted my office for advice and assistance with their investigation.

3. In August, 2013, MNPD presented this case to the Grand Jury and the Grand Jury returned an indictment against four individuals charging each with five counts of aggravated rape and two counts of aggravated sexual battery. Additionally, one of the four individuals was charged with one count of unlawful photography and one count of tampering with evidence.

4. An arraignment was subsequently held at which time all four individuals pled not guilty. Currently, trial is set for two of the defendants in August; a trial date has not been set for the other two defendants.

5. Before this case was presented to the Grand Jury, MNPD's investigative file was reviewed by attorneys in my office. Once the indictment was issued by the Grand Jury against the four individuals, that investigative file became part of the prosecutorial file that was assigned to Deputy District Attorney Tom Thurman, who is handling this case for my office.

6. MNPD's investigation into this case is still active and ongoing and any additional information that MNPD collects or gathers during their investigation is provided to Deputy District Attorney Thurman and becomes part of his prosecutorial file.

It is apparent from the affidavits that the material that is the subject of the request is "relevant to a pending or contemplated criminal action" and therefore not subject to disclosure. *See Appman*, 746 S.W.2d at 166. Accordingly, the petition should be dismissed.

The fact that the police investigation and criminal prosecution are ongoing is a significant factor in our disposition of this case; this pretermits our consideration of the other issues raised.

IV. CONCLUSION

For the foregoing reasons, the judgment of the trial court is reversed and the petition dismissed.

RICHARD H. DINKINS, JUDGE

EXHIBIT B

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 9, 2014 Session

THE TENNESSEAN, ET AL. v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, ET AL.

Appeal from the Chancery Court for Davidson County
No. 14156IV Russell T. Perkins, Chancellor

No. M2014-00524-COA-R3-CV - Filed September 30, 2014

W. NEAL MCBRAYER, J., dissenting.

The Court's decision in this case excepts materials that are "relevant to a pending or contemplated criminal action" from disclosure under the Public Records Act based upon Tennessee Rule of Criminal Procedure 16(a)(2). I find such a conclusion inconsistent with a fair reading of Rule 16(a)(2) and, therefore, respectfully dissent. However, because the trial court should have considered the victim's rights, the criminal defendants' Sixth Amendment rights under the United States Constitution, and the State's interests in a fair trial before determining what materials were subject to public inspection, I would vacate the trial court's ruling and remand for further proceedings.

The Public Records Act has been described 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) (quoting *Bd. of Educ. of Memphis City Sch. v. Memphis Publ'g Co.*, 585 S.W.2d 629, 630 (Tenn. Ct. App. 1979)). The Act 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 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." Tenn. Code Ann. § 10-7-503(a)(2)(A) (Supp. 2014). The Legislature has further directed that the Act "be broadly construed so as to give the fullest possible public access to public records." Tenn. Code Ann. § 10-7-505(d) (Supp. 2014). Our Supreme Court has interpreted these provisions to create a legislatively-mandated presumption favoring openness and disclosure of government records. *Schneider v. City of Jackson*, 226 S.W.3d 332, 340 (Tenn. 2007) (citing *State v. Cawood*, 134 S.W.3d 159, 165

(Tenn. 2004); *Tennessean v. Elec. Power Bd.*, 979 S.W.2d 297, 305 (Tenn. 1998); *Arnold v. City of Chattanooga*, 19 S.W.3d 779, 785 (Tenn. Ct. App. 1999)). Absent an applicable exception, this mandate requires disclosure of public records "even in the face of serious countervailing considerations." *Id.* (quoting *Memphis Publ'g Co. v. City of Memphis*, 871 S.W.2d 681, 684 (Tenn. 1994)).

The Tennessee Supreme Court has utilized the Tennessee Rules of Criminal Procedure, and Rule 16(a)(2) in particular, as a basis for excepting materials from disclosure under the Public Records Act. *Appman v. Worthington*, 746 S.W.2d 165, 166 (Tenn. 1987).[1] In *Schneider v. City of Jackson*, 226 S.W.3d 332 (Tenn. 2007), the Supreme Court extended the Rule 16(a)(2) exception to public records requests made by citizens other than criminal defendants or their counsel. 226 S.W.3d at 341. The majority reads *Schneider* as also extending the Rule 16(a)(2) exception to materials that are "relevant to a pending or contemplated criminal action." In my view, such an extension of the Rule 16(a)(2) exception is not warranted by *Schneider*.

Although in *Schneider* the Court granted the City of Jackson an opportunity to review the field interview cards or portions of the cards to determine whether any of the information was "involved in an ongoing criminal investigation," the Court only directed such a review after finding that the "cards would clearly have been exempt from disclosure under Rule 16(a)(2)" and *Appman v. Worthington*, 746 S.W.2d 165 (Tenn. 1987). *Id.* at 345-36. Field interview cards seemingly would fall within the ambit of Rule 16(a)(2) either as a "report, memorandum, or other internal state document made by . . . law enforcement officers" or as including "statements made by state witnesses or prospective state witnesses." *See* Tenn. R. Crim. P. 16(a)(2). Witnesses described the field interview cards as the police officers' "work product." 226 S.W.3d at 337. As the court of appeals has previously explained, Tennessee Rule of Criminal Procedure 16(a)(2) "embodies the work product doctrine as it applies to criminal cases." *Swift v. Campbell*, 159 S.W.3d 565, 572 (Tenn. Ct. App. 2004).

In this case, the Metropolitan Government of Nashville and Davidson County

---

[1] In *Memphis Publishing Co. v. Holt*, 710 S.W.2d 513 (Tenn. 1986), the Supreme Court declined to apply Tennessee Rule of Criminal Procedure 16(a)(2) as an exception to the Public Records Act where the records in question were part of a closed investigative file. 710 S.W.2d at 517. The Supreme Court also noted that Rule 16(a)(2)'s "limitation on access to records applies only to discovery in criminal cases." *Id.* At the time *Holt* was decided, public records were open to inspection "unless otherwise provided by state statute." *Id.* at 515. In 1991, the Legislature replaced the phrase "state statute" with "state law." 1991 Tenn. Pub. Acts 598.

("Metro") conceded in both its brief[2] 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). Certainly, 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). As a result, I conclude, as did the trial court, that the materials sought by Petitioners were not completely excepted from disclosure under the Public Records Act by virtue of Rule 16(a)(2).

Although Tennessee Rule of Criminal Procedure 16(a)(2) does not except from disclosure all of the public records requested by the Petitioners, this determination does not end the inquiry. As the court of appeals has previously noted, by excepting from disclosure public records made confidential "by state law," statutes, the Constitution of Tennessee, the common law, and administrative rules and regulations all became potential sources of exceptions to the Public Records Act. *Swift*, 159 S.W.3d at 571-72. Exceptions may be either explicit or implicit. *See id.* at 572 (the court's role in interpreting and applying the Public Records Act "is to determine whether state law either explicitly or implicitly excepts particular records or a class of records from disclosure . . . ."). The trial court here identified three potential exceptions in addition to Rule 16(a)(2): the agreed protective order entered by the criminal court, the constitutional rights of the accused in a criminal case, and the Victims' Bill of Rights. However, having identified three potential exceptions, the trial court addressed only one, the agreed protective order. The trial court properly concluded that materials covered by the agreed protective order were excepted from disclosure under the Public Records Act. *See Ballard v. Herzke*, 924 S.W.2d 652, 662 (Tenn. 1996). As for the other two potential exceptions, the trial court deferred to the criminal court.

Having been presented with the question of whether the public records were excepted from disclosure under state law, the trial court should have addressed all potential exceptions brought to its attention by Metro and the victim.[3] Deferring such determinations to the criminal court for consideration at a later date presents the unacceptable potential for public release of materials adversely impacting the victim's rights under Article 1, § 35 of the Tennessee Constitution and Tennessee Code Annotated sections 40-38-101 through 506, the

---

[2] In its brief, Metro states "[t]he Petitioners request access to the same information that is provided to a criminal defendant in a prosecution." Metro then states that "The criminal defendant is entitled to this information pursuant to Tennessee Rule of Criminal Procedure 16 and under the supervision of the Criminal Court."

[3] I reject the notion, argued by the Petitioners, that only criminal defendants could raise Sixth Amendment rights to a "fair trial" as an exception to the Public Records Act in an action authorized by Tennessee Code Annotated section 10-7-505. Metro's general fair trial interests are sufficient to assert exceptions to public disclosure based on rights that typically belong only to criminal defendants.

criminal defendants' rights to a fair trial under the Sixth Amendment to the United States Constitution, and Metro's general fair trial interests. I would find that these rights and interests constitute "state law" exceptions to the Public Records Act.

While these exceptions might well lead to the same result reached by the majority in this case, the place for application of these exceptions in the first instance is the trial court. Therefore, I would vacate the trial court's ruling and remand for further proceedings.

W. NEAL McBRAYER, JUDGE