No. M2018-02011-COA-R3-CV

IN THE COURT OF APPEALS FOR THE STATE OF TENNESSEE
MIDDLE DIVISION AT NASHVILLE

SCRIPPS MEDIA, INC. and PHIL WILLIAMS,
Petitioners/Appellants,

v.

TENNESSEE DEPARTMENT OF MENTAL HEALTH AND SUBSTANCE ABUSE SERVICES and TENNESSEE BUREAU OF INVESTIGATION
Respondents/Appellees,

ON APPEAL FROM THE CHANCERY COURT FOR
DAVIDSON COUNTY, TENNESSEE
CASE NO. 18-835-II

BRIEF OF AMICI CURIAE THE ASSOCIATED PRESS, GANNETT CO., INC., GATEHOUSE MEDIA, LLC, GRAY TELEVISION GROUP, INC., SINCLAIR BROADCAST GROUP, INC., THE TENNESSEE COALITION FOR OPEN GOVERNMENT, AND TRIBUNE MEDIA COMPANY IN SUPPORT OF PETITIONERS/APPELLANTS

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STATEMENT OF THE ISSUES

Pursuant to Tennessee Rule of Appellate Procedure 31, The Associated Press, Gannett Co., Inc., GateHouse Media, LLC, Gray Television Group, Inc, Sinclair Broadcast Group, Inc., the Tennessee Coalition for Open Government, and Tribune Media Company. (collectively, "Amici"), by and through their undersigned counsel, respectfully submit the following brief in support of Appellants Scripps Media, Inc. ("Scripps") and Phil Williams ("Williams") (collectively, "Channel 5"). Amici agree with the Statement of the Issues and arguments presented by Channel 5 and write to offer additional arguments regarding why the requested public records are not exempt pursuant to Tennessee Rule of Criminal Procedure 16 ("Rule 16") in the custody of Appellees the Tennessee Department of Mental Health and Substance Abuse Services (the "Department") and the Tennessee Bureau of Investigation (the "TBI") (collectively, the "State").

STATEMENT OF THE FACTS

Amici are publishers and broadcasters who operate in Tennessee, along with a Tennessee-based open government advocacy group, all of whom are dedicated to governmental transparency. Amici have an interest in this case because it will directly limit the ability of journalists in Tennessee, like those employed by the Amici, to provide Tennessee's citizens with information from public records – the news media's traditional role as government watchdogs. Amici adopt the statement of facts set forth by Channel 5 in its Brief.

STANDARD OF REVIEW

The proper standard of review in this case is de novo "with no presumption of correctness attaching to the rulings of the courts below." *State v. Ferrante*, 269 S.W.3d 908, 911 (Tenn. 2008) (explaining that de novo standard applies for both statutory construction and construction of the Tennessee Rules of Criminal Procedure cases).

INTRODUCTION

Public discourse and governmental oversight – the lifeblood of our democracy – suffer every time a public record is made exempt, including when a court unduly broadens an exemption. In Tennessee, these crucial aspects of our democracy are suffering a death by a thousand cuts. At last count there are 564 statutory exemptions to the Public Records Act in the Tennessee Code.[1] This does not include exemptions found in other state law, like Rule 16.

The question at the heart of this case is whether the Tennessee Supreme Court's decision in the *Tennessean*[2] case, that Rule 16 prohibits the release of investigative files in the hands of the investigating agencies during the pendency of criminal cases and any collateral challenges to criminal convictions, should be extended to include public records made and kept by non-investigating or prosecuting state agencies, which are made and kept by those state agencies in the ordinary course of business. The trial court held that "the holding in the *Tennessean* mandates a broad protection for documents in the possession of an investigating agency relevant to a pending or contemplated criminal action, even if the documents originated from another State agency and were created in the ordinary course of business." (T.R. 121, Order at 3.)

The trial court's expansive reading of Rule 16 and the related Supreme Court precedent is inconsistent with the rules of construction for public records cases and the language of Rule 16. As the trial court explained, this case is also factually distinct from the *Tennessean* case:

> [t]he notable difference between the facts in *Tennessean* and the present case is that the requests were directed to non-investigative State agencies, and the records were developed and retained by

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[1] The Tennessee Office of Open Records Counsel has a database of statutory exemptions, which currently totals 564 distinct statutory exemptions. The database can be found at: https://apps.cot.tn.gov/PublicRecordsExceptions.

[2] *Tennessean v. Metro. Gov't of Nashville & Davidson Cnty.*, 485 S.W.3d 857 (Tenn. 2016) (the "*Tennessean*").

> those agencies in the ordinary course of business. They were not created for or through an investigation, but rather became part of the investigation after it was commenced.

(T.R. 130, Order at 12.) This case also does not raise the same public policy concerns regarding fair trial rights as the *Tennessean* case. Persuasive authority from Florida, a state with a similar public records law, also supports reversal.

Rule 16 should not be interpreted to exempt records that are made and retained in connection with a public agency's ordinary course of business, unrelated to an investigation or prosecution. Those same public records may be exempt under Rule 16 in the hands of the state agents charged with investigating or prosecuting an allegation of crime, but that should not make them exempt in the original public agency's custody. Because such a ruling is contrary to the language of Rule 16, case law interpreting it, and Tennessee's rules of construction in public records cases, the trial court should be reversed.

ARGUMENT

I. Application of Rule 16 to Public Records Custodians Who Made the Requested Records in the Ordinary Course of Business Unrelated to an Investigation or Prosecution Is Inconsistent with the Rules of Construction in Public Records Act Cases, the Language of Rule 16, and the Tennessee Supreme Court's *Tennessean* Decision.

A. The Chancery Court's Ruling Expansively Construed Rule 16 and its Related Precedent in Violation of the Rules of Construction for Public Records Cases.

The rules of construction for Public Records Act cases are well-established. The purpose of the Public Records Act is "to apprise the public about the goings-on of its governmental bodies." *Memphis Publishing Co. v. City of Memphis*, 871 S.W.2d 681, 687 (Tenn. 1994); *see also Memphis Publ'g Co. v. Cherokee Children & Family Servs.*, 87 S.W.3d 67, 74 (Tenn. 2002) (citation omitted) (the Public Records Act "serves a crucial role in promoting accountability in

government through public oversight of governmental activities"). To further this important policy, the General Assembly has specified that the Public Records Act "shall be broadly construed so as to give the fullest possible access to public records." Tenn. Code Ann. § 10-7-505(d). Thus, Tennessee's courts have held that the Public Records Act is a "clear mandate in favor of disclosure." *The Tennessean v. Electric Power Bd.*, 979 S.W.2d 297, 305 (Tenn. 1998). The Chancery Court disregarded the applicable rules of construction and this failure supports reversal.

As a result of the General Assembly's statutory mandate, the right of access to public records is very broad. *Gautreaux v. Internal Med. Educ. Found., Inc.*, 336 S.W.3d 526, 529 (Tenn. 2011) (citing *City of Memphis*, 871 S.W.2d at 684) (explaining that the Tennessee Supreme Court "has interpreted the legislative mandate of the Public Records Act to be very broad and to require disclosure of government records even when there are significant countervailing considerations"). Consistent with the required broad construction of the Public Records Act, public records are presumptively open and "the burden is placed on the governmental agency to justify nondisclosure of the records." *City of Memphis*, 871 S.W.2d at 684 (citing Tenn. Code § 10-7-505(c)).

In order to fully effectuate the broad legislative mandate in favor of disclosure, exemptions to the Public Records Act should be narrowly construed. This is a logical corollary of the Public Records Act's language and the interpretive case law. Like Tennessee, Florida[3] requires that its Public Records Act be construed broadly to effectuate its clear public purpose and that the burden is on the public body to show an exemption applies. *Barfield v. Sch. Bd. of*

[3] The Tennessee Supreme Court has described Florida's public records law as being "similar to Tennessee's." *Cherokee Children & Family Servs.*, 87 S.W.3d at 74.

Manatee Cnty., 135 So. 3d 560, 561-62 (Fla. Dist. Ct. App. 2014). To that end, Florida's courts have also held that courts must narrowly construe exemptions. *Id.* Such a rule would likewise be consistent with Tennessee's approach to public records.

Standards matter. Despite the clear mandate in favor of disclosure, the Chancery Court in this case did not "broadly construe the Public Records Act so as to give the fullest possible access to public records," Tenn. Code Ann. § 10-7-505(d), but instead, broadly construed the asserted exemption, Rule 16, and its related precedent, so as to remove records from public access in the hands of, not the investigating or prosecuting state agents, but the records' original custodian who made them in the course of their ordinary business, unrelated to an investigation or prosecution. (T.R. 121, Order at 3 ("The Court … finds that the holding in *Tennessean* mandates *broad* protection….) (emphasis added)); *id.* at 13 ("the Court's intention in *Tennessean* appears to be for a *broad* application of the Rule 16 exemption…) (emphasis added).) The Chancery Court's ruling is in violation of the clear rules of construction for public records cases and should be reversed.

B. Rule 16 Only Applies to Records Made in Connection with Investigating or Prosecuting a Criminal Case.

Rule 16 governs discovery in criminal cases. *Memphis Publishing Co v. Holt*, 710 S.W.2d 513, 517 (Tenn. 1986). The State argued and the trial court held that Rule 16 barred release of the requested public records. (T.R. 131, Order at 13; T.R. 92-93, Response at 12-13; T.R. 53-54, Verified Petition Ex. P.) Rule 16(a)(2) provides that a criminal defendant is not entitled to "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*" except in specified circumstances. Tenn. R. Crim. P. 16(a)(2) (emphasis added). The Supreme Court has held that this provision also acts

as an exemption to the Public Records Act. *Tennessean*, 485 S.W.3d at 870-71. But the rule's plain language expressly applies only to documents created by "state agents", like "law enforcement officers", and only when made "in connection with an investigation or prosecution." Nothing in the plain language extends Rule 16(a)(2) outside of an investigation or prosecution, let alone to documents still in the originating agency's possession.

In this case, Williams sent public records requests to TBI and the Department seeking public records dating back to November 2016 that the two agencies made in the ordinary course of their business. (T.R. 121-22, Order 3-4.) The records sought related to employees at the agencies who were alleged to have "engaged in an extra-marital affair" and "used state property and/or funds to engage in such affair." (T.R. 81, Response at 1.) The Tennessee Department of Safety and Homeland Security's Tennessee Highway Patrol, the Tennessee Comptroller's Office and the District Attorney for the 20th Judicial District – not the agencies that received Williams' records request – investigated the allegations. (T.R. 81-82, Response at 1-2.) While it appears that the TBI and the Department provided documents to the investigating agencies, neither investigated or prosecuted the allegations themselves. (*Id.*)

The State argued that if a public record is exempt in one public body's hands, it is exempt in all public bodies' hands. (Hearing Tr. 51:13-16.) This argument is inconsistent with the language of Rule 16(a)(2), which requires that documents to be withheld must be "made ... in connection with investigating or prosecuting the case." The public records here were not made by TBI or the Department in connection with investigating or prosecuting a criminal case. They were made in the ordinary course of the public agencies' business. Transfer of copies of these administrative public records to other state entities who are investigating an allegation of

wrongdoing should not transform them into ones exempt under Rule 16 in the original custodian's hands.

For example, under the State's position, if the TBI investigated wrongdoing by a public official, everything it seized or obtained as part of its investigation would be exempt under Rule 16 until the investigation or prosecution had concluded. What if: a high-level official in the Department of Education who dealt with school district budgets is accused of embezzlement that implicates money budgeted by the department to school districts throughout Tennessee; and, as part of its investigation, the TBI copies the hard drive from his computer? Under the State's argument, everything on the seized hard drive would be exempt because it was gathered as part of the investigation.

The hard drive would likely include a massive amount of information, from operational and administrative documents, to emails and electronic calendars, most of it unrelated to the investigation. Most of the documents would be public record in the Department of Education's hands. If the public official had the school district budgets for every school district in Tennessee on his hard drive, would these budgets then be exempt from public disclosure in the hands of the school districts themselves? Under the State's argument below, they would be. This is an absurd result, which courts should avoid. *Tennessean*, 485 S.W.3d at 872 (citing *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 527 (Tenn. 2010)). And what if the TBI asserted its "forever" exemption, Tenn. Code § 10-7-504(a)(1)(B)? Would the contents of the hard drive be exempt under that provision, even in the hands of school districts throughout Tennessee forever? Under the State's argument, it seems likely. The State's advocated rule sweeps up too much information and reads Rule 16's language much too broadly.

Consistent with the Amici's position, this Court narrowly interpreted both Rule 16 and Tennessee Supreme Court Rule 31 in *Tennessean v. City of Lebanon*, No. M2002-02078-COA-R3-CV, 2004 Tenn. App. LEXIS 99 (Tenn. Ct. App. Feb. 13, 2004).[4] There, the newspaper sought and was denied access to a settlement agreement between the City of Lebanon and the widow of a citizen killed during a police raid. *Id.* at *2-3. The City argued that "Tennessee Supreme Court Rule 31 required that the settlement agreement remain confidential" and that Rule 16 barred production. *Id.* at *16-22. This Court held that these arguments were so unsupported by existing law that attorneys' fees were awarded to the newspaper. *Id.* at *33.

Tennessee Supreme Court Rule 31 "applies to court ordered mediation, which may be ordered by the court on its own motion, or on motion of a party." *City of Lebanon*, 2004 Tenn. App. LEXIS 99, at *16 (quoting *In re: John Adams*, No. MM2001-00662-COA-R3-CV, 2002 Tenn. App. LEXIS 113, at *7 (Tenn. Ct. App. Feb. 7, 2002)).[5] There was no court ordered mediation, however, because the widow never filed a claim in court for her husband's death, but instead negotiated with the City outside of the judicial process. *Id.* at *16-17. Thus, Rule 31 did not exempt the requested settlement agreement. *Id.*

Regarding Rule 16, the City argued that it barred disclosure of the settlement agreement because "the mediation agreement and settlement agreement were ... properly withheld 'until such time as the Circuit Court determined that the criminal investigation and/or trial has concluded so that any criminal trial will be fair, impartial and just.'" *Id.* at *19. This Court held that the mediation and settlement agreements "are not criminal investigative records" and that

[4] The focus of the case was whether attorneys' fees should be awarded to the requester, but the Court discussed the merits of the public entity's arguments against disclosure in that context.

[5] The cited *In re: John Adams* opinion was later withdrawn.

"[t]he fact that the City may have included those documents in the same files as police and TBI investigative reports does not make them confidential by association." *Id.* at *20.

It is also inconsistent with the purpose of the Tennessee Rules of Criminal Procedure for the rules to apply to governmental entities or agents who are not conducting a criminal investigation or prosecution. "Since 1978, The Tennessee Rules of Criminal Procedure have governed the procedure in all trial court criminal proceedings." *Tennessean*, 485 S.W.3d at 866 (citations omitted). "Tennessee Rule of Criminal Procedure 1(a) provides that the rules apply to criminal proceedings in all courts of record." *Id.* at 866 n.18. In this case, neither TBI nor the Department were at any point involved in a criminal proceeding in a court of record.[6] Neither TBI nor the Department were involved in the ensuing investigation other than to supply the investigators with public records that each of the public bodies make and keep in the ordinary course of their business. This should not be enough to bring the requested public records in the TBI and Department's hands under Rule 16's limited exemption.

Rule 16 is not unlimited in reach. Rule 16(a)(2)'s exemption is limited by the requirement that the records asserted to be exempt must be made "in connection with investigating or prosecuting the case." Rule 16 should not stretch so far as to exempt public records, such as those in this case, that are made by a public agency in the ordinary course of business, unrelated to an investigation, even if the public records are, at some point, provided to law enforcement. It is contrary to the language of Rule 16 and the general reach of the

[6] "In Tennessee, the adversarial judicial process is initiated at the time of the filing of the formal charge, such as an arrest warrant, indictment, presentment, or preliminary hearing in cases where a warrant was not obtained prior to the arrest." *State v. Huddleston*, 924 S.W.2d 666, 669 (Tenn. 1996) (citations omitted) (discussing in the context of when the Sixth Amendment right of counsel attaches).

Tennessee Rules of Criminal Procedure to hold that the requested public records are exempt under Rule 16 in the hands of TBI and the Department. Therefore, the Chancery Court's ruling should be reversed.

C. The *Tennessean* Case Does Not Control the Outcome Here Because of the Factual Distinctions Between the Two Cases.

Rather than focusing on the language of Rule 16, the Chancery Court summed up the substantive question before it as "whether the *Tennessean* case is sufficiently analogous to the present case, or whether its findings can be construed with such breadth, so as to support the State's position" that the requested records were exempt under Rule 16. (T.R. 120, Order at 2.) But as the trial court noted, there is a crucial factual difference between this case and the *Tennessean* case:

> [t]he notable difference between the facts in *Tennessean* and the present case is that the requests were directed to non-investigative State agencies, and the records were developed and retained by those agencies in the ordinary course of business. They were not created for or through an investigation, but rather became part of the investigation after it was commenced.

(T.R. 130, Order at 12.) The trial court held that "the rule in *Tennessean* applies to documents in the possession of an investigating agency relevant to a pending or contemplated criminal action and affords those records blanket protection pursuant to Rule 16." (T.R. 131, Order at 13.) The trial court further explained that "even though the records are not of the same nature or character as the records sought in *Tennessean*, the Court's intention in *Tennessean* appears to be for a broad application of the Rule 16 exemption to protect any documents in an investigative file from disclosure." (*Id.*) But this stretches the *Tennessean* case too far.

In that case, *The Tennessean* newspaper sought "to inspect any records regarding the alleged rape on the Vanderbilt University campus in which [the defendants] were charged" and

included specific requests for "text messages received or sent and videos provided and/or prepared by any third party source." 485 S.W.3d at 860. The request was made to the investigating agents, the Nashville Police Department, after the accused were indicted. *Id.* at 859. The question before the Court was whether there was "a right to inspect a police department's criminal investigative file while the criminal cases arising out of the investigation are ongoing." *Id.* at 859. But the case did not address the question here – whether public records made in the ordinary course of a state agency's business are exempt from disclosure in the hands of those agencies when the records are sought for a criminal investigation or prosecution.

Because the *Tennessean* case does not directly support the State's position, it argued that another Tennessee Supreme Court decision, *Appman v Worthington*, 746 S.W.2d 165 (Tenn. 1987), is factually analogous. The State argued that the public records request in that case was not made to the prosecutor, but instead to the custodian of the records, the Department of Corrections. (T.R. 95, Response at 15 (citing *Appman*, 746 S.W.2d at 167); *see also* Hearing Tr. 52:17-53:3 (arguing that the public records sought in *Appman* were "prepared in the ordinary course of business by the Department of Corrections").) But this argument is factually flawed.

In *Appman*, the custodian of the records investigated the alleged crime, and the requested public records were unquestionably made in connection with the investigation. *Appman*, 746 S.W.2d at 165-66 (noting that the request was made of the Department of Corrections employee who had begun the investigation in question). In fact, the Supreme Court explained that "[t]he memoranda, documents and records sought to be inspected by appellees in this case are the results of the investigation by Internal Affairs of the Department of Correction..." *Id.* at 166-67; *see also id.* at 165 ("this appeal presents the issue of whether records of the investigation into the death of an inmate of a state correctional facility are available for inspection..."). The Court

held that Rule 16 barred production of the Department of Corrections investigative file because "[t]he materials sought ... are relevant to the prosecution of the petitioners and other inmates charged with offenses arising out of the murder" and "[t]hese prosecutions have not yet been terminated." *Id.* at 167. *Appman* does not support the State's position.

Neither *Appman* nor the *Tennessean* case is factually similar to this one. In this case, the public records requests "were made to the State agencies that produced and maintained the subject records in the ordinary course of business, and not as part of a criminal investigation." (T.R. 120, Order at 2.) "Moreover, the records were not requested because they were part of an investigative file, but rather as normal business records." (*Id.*) This crucial distinction means that the *Tennessean* case does not control here.[7] Because neither TBI nor the Department were the investigating bodies for the short-lived criminal investigation and because the public records were in no sense made by TBI or the Department in connection with an investigation or prosecution, the public records sought are not exempt pursuant to Rule 16 and should have been produced.

II. This Case Does Not Implicate the Fair Trial Rights of Criminal Defendants.

In the trial court, the State argued as a matter of public policy[8] that "[t]he Sixth Amendment right of a fair trial is paramount in this instance over the public's right to know." (Hearing Tr. 50:7-9.) In its argument, however, the State failed to recognize the fact that

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[7] To the extent the trial court relied upon this Court's decision in the *Tennessean* case, such reliance is improper because the Tennessee Supreme Court specifically noted that its decision affirmed the Court of Appeals result, but the Court specified that it did so "on other grounds." 485 S.W.3d at 874.

[8] The Tennessee Supreme Court has declined to make public policy exceptions to the Public Records Act "because it is within the prerogative of the legislature to do so." *State v. Cawood*, 134 S.W.3d 159, 167 (Tenn. 2004).

criminal defendants regularly receive fair trials consistent with the Sixth Amendment even when there is a great deal of pretrial publicity about the accused and their alleged crimes available to the public.

In its fair trial rights argument, the State discussed a murder trial from Atlanta in 1913.[9] (Hearing Tr. 48:22-23; 49:2-50:4.) The State described the reporting by Atlanta's newspapers as: "[s]ome reported facts, some reported innuendo, some reported their own theories as to who killed [the victim], and all of them clamored for someone to be arrested and held accountable." (*Id.* 49:9-12.) The State further noted that the defendant "was convicted in a circumstance where the crowd outside the courthouse was so loud and so large that the jurors, themselves, were intimidated by the presence of the throng." (*Id.* 49:15-18.) While the case highlighted by the State is tragic and historically notable, it bears no resemblance to either the facts of this case or the law on fair trials in the 21st Century.

Courts regularly conduct high profile criminal trials in which significant amounts of information is public without violating the fair trial rights of the accused. One reason is that "[j]urors are not that fragile." *In re Murphy-Brown, LLC*, 907 F.3d 788, 798 (4th Cir. 2018). Generally, factual information, like that sought here, does not threaten a defendant's fair trial rights. *See Patton v. Yount*, 467 U.S. 1025, 1032-33 (1984) (discussing fact that "purely factual articles" were part of pretrial publicity during voir dire for trial that was found to be constitutional); *Murphy v. Florida*, 421 U.S. 794, 802 (1975) (noting that the pretrial publicity was "largely factual in nature" when rejecting the defendant's claim that the publicity was

[9] This case appears to be *Frank v. Mangum*, 237 U.S. 309 (1915), which likely would have been decided differently if it was tried today given the U.S. Supreme Court's rulings, like those discussed in *State v. Bates*, 804 S.W.2d 868, 877 (Tenn. 1991).

inflammatory). Similarly, prominence of publicity "does not necessarily produce prejudice." *Skilling v. United States*, 561 U.S. 358, 381 (2010). "[P]re-trial publicity - even pervasive, adverse publicity - does not inevitably lead to an unfair trial." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 554 (1976). As the U.S. Supreme Court has explained, "the decided cases 'cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process.'" *Id.* at 565 (quoting *Murphy*, 421 U.S. at 799). In no small part this is because

> It is not required [...] that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin v. Dowd, 366 U.S. 717, 722-23 (1961).

It is only in the rarest occasions that publicity is found to have contributed to a fair trial rights violation. As the Tennessee Supreme Court has explained, the U.S. Supreme Court's decisions in that vein have "involved extremely inflammatory publicity and media conduct creating a corruptive carnival atmosphere that deprived the proceedings of 'the solemnity and sobriety' required for due process." *State v. Bates*, 804 S.W.2d 868, 877 (Tenn. 1991) (discussing *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965);

Rideau v. Louisiana, 373 U.S. 723 (1963)). There is nothing to suggest that this matter might be at risk of becoming this sort of circus-like atmosphere.

Even if there was a significant risk of the type of inflammatory or prejudicial (as opposed to factual) publicity that is necessary to threaten a defendant's fair trial rights, a court still has a variety of tools at its disposal to seat an impartial jury.[10] For example, voir dire has been found to be "an essential means for protecting" the right to a fair trial. *Warger v. Shauers*, 135 S. Ct. 521, 528-29 (2014) (citations omitted). The Tennessee Supreme Court has specifically explained that

> [w]here the crime is highly publicized, the better procedure is to grant the defendants individual, sequestered, voir dire, but it is only where there is a "significant possibility" that a juror has been exposed to potentially prejudicial material that individual voir dire is mandated.

State v. Howell, 868 S.W.2d 238, 247 (Tenn. 1993) (citations omitted). Another powerful tool to address pretrial publicity concerns is a change of venue pursuant to Tennessee Rule of Criminal Procedure 21.

The right to a fair trial is a serious matter, but the State's attempt to raise its specter here ignores the state of the law today. The requested public records, which are comprised of administrative records related to two employees at two different state agencies, do not raise Sixth Amendment fair trial rights concerns. Such a policy argument is a red herring and should be treated as such by this Court.

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[10] The fact that a theoretical trial in this case would be in Nashville would greatly reduce, if not eliminate, the very remote possibility of prejudice to the fair trial rights of a defendant. *Skilling*, 561 U.S. at 382 ("Given this large, diverse pool of potential jurors, the suggestion that 12 impartial individuals could not be empaneled is hard to sustain.").

III. Florida Precedent Illustrates the Potential Problems with the State's Broad Interpretation of Tennessee Rule of Criminal Procedure 16.

Tennessee's courts have limited experience[11] with attempts to shroud one public agency's public records in secrecy because another public agency requests those public records as part of a criminal investigation or prosecution. Florida[12] has dealt with this very issue on numerous occasions in both appellate decisions and attorney general opinions. The logic of these persuasive authorities supports reversal of the Chancery Court's decision.

The foundation for Florida's analogous cases is a line of decisions that reject attempts to transfer responsibility for public records to another agency. In *Tober v. Sanchez*, 417 So. 2d 1053, 1054 (Fla. Dist. Ct. App. 1982), the court addressed the following question:

> whether the official charged by law with maintenance of public records ... may transfer actual physical custody of the records to the County Attorney and thereby avoid compliance with a request for inspection under the Public Records Act...

In answering no, the Court explained that

> [t]o permit an agency head to avoid his responsibility simply by transferring documents to another agency or office would violate the stated intent of the Public Records Act, as well as the rule that a statute enacted for the benefit of the public is to be accorded a liberal construction.

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[11] The lone decision from this Court, its sister court the Criminal Court of Appeals, or the Tennessee Supreme Court on facts similar to those here was *Chattanooga Publishing Co. v. Hamilton County Election Commission*, No. E2003-00076-COA-R3-CV, 2003 Tenn. App. LEXIS 767 (Tenn. Ct. App. Oct. 31, 2003). This case is discussed in detail by Channel 5 in its brief.

[12] The Tennessee Supreme Court has described Florida's public records law as being "similar to Tennessee's." *Cherokee Children & Family Servs.*, 87 S.W.3d at 74; *see also Electric Power Bd.*, 979 S.W.2d at 302 (citing Florida case law).

Id. (citing *City of Miami Beach v. Berns*, 245 So. 2d 38 (Fla. 1971)); *see also Chandler v. City of Sanford*, 121 So. 3d 657, 659-60 (Fla. Dist. Ct. App. 2013) (holding that the city could not refuse to produce unredacted public record where the redaction was ordered by a prosecuting body).

In a decision last year related to the tragic Parkland shooting, a Florida appellate court applied these principles to a situation analogous to this case. *State Attorney's Office of the Seventeenth Judicial Circuit v. Cable News Network, Inc.*, 251 So. 3d 205 (Fla. Dist. Ct. App. 2018). There, a coalition of media entities sought access to footage from surveillance cameras at the high school where the shooting took place. *Id.* at 207-08. The footage was a public record in the hands of the school board but was subpoenaed and seized by the local sheriff's office as part of the criminal investigation. *Id.*

The focus of the case was whether the requested footage was exempt under Florida's active criminal investigation exemption. *Id.* at 211. In ruling that the exemption did not apply, the court explained that "the criminal investigative information exemption 'does not exempt other public records from disclosure simply because they are transferred to a law enforcement agency.'" *Id.* at 212 (citations omitted); *see also Tribune Co. v. Cannella*, 438 So. 2d 516, 523 (Fla. Dist. Ct. App. 1983) (en banc) *rev'd on other grounds*, 458 So. 2d 1075 (Fla. 1984)[13] (holding that personnel files of police officers involved in a shooting, which were compiled before the shooting, were not covered by the criminal investigative exemption)

A long line of Florida Attorney General Opinions stands for the same proposition as *Tober* and *CNN*. In the first such opinion, the Florida Attorney General explained that

> public records compiled by the Office of the Capital Collateral Representative are not converted into criminal investigative or intelligence information which is exempt from s. 119.07(1), F.S.,

[13] The Florida Supreme Court addressed different legal issues than those discussed here, which were not appealed to the Florida Supreme Court. *Cannella*, 458 So. 2d at 1077 n.1.

> by the transfer of such records or copies thereof to the Florida Department of Law Enforcement. Therefore, unless some exemption from the Public Records Law attaches to such records *as they are maintained by CCR*, the provisions of s. 119.07(1), F.S., regarding production and copying would apply.

Op. Att'y Gen. Fla. 88-25 (1988) (emphasis added). Other Florida Attorney General Opinions have reached similar results in similar situations. Op. Att'y Gen. Fla. 2006-04 (2006) (stating that records of a public agency "are subject to disclosure even though some of those records may have been provided to the Florida Department of Law Enforcement in the course of a criminal investigation"); Op. Att'y Gen. Fla. 2001-75 (2001) ("It is well established in Florida that the exemption for active criminal intelligence and investigative information does not exempt other public records from disclosure simply because they are transferred to a law enforcement agency."); Op. Att'y Gen. Fla. 92-78 (1992) (holding that "an otherwise disclosable public record is not removed from public scrutiny merely because it has been subpoenaed by the state attorney's office").

The State argues the opposite – that if a public record is exempt in one public body's hands, it is exempt in all public body's hands. (Hearing Tr. 51:13-16.) This is a recipe for subversion of the Public Records Act. Just as the Tennessee Supreme Court found that the privatization of public services should not be a means for subverting "the public's fundamental right to scrutinize the performance of public services and the expenditure of public funds," *Cherokee Children & Family Servs.*, 87 S.W.3d at 78, neither should a criminal investigation be permitted to shield otherwise public records in the hands of their regular custodian.

CONCLUSION

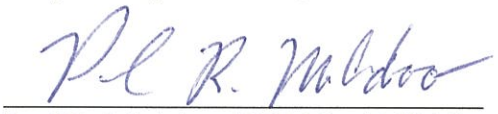
"As Mr. Justice Brandeis observed, 'sunlight is the most powerful of all disinfectants.'" *Press, Inc. v. Verran*, 569 S.W.2d 435, 443 (Tenn. 1978) (citation omitted). Yet the State seeks to shroud even more public records in secrecy. The State seeks to stretch Rule 16

past its natural limits to encompass public records that were made in the ordinary course of a public agency's business, unrelated to a criminal investigation. The justification for this argument is that other state agents sought those public records for a criminal investigation. In this case, Rule 16 is a square peg trying to fit in a round hole. It simply does not fit.

The facts of this case also do not fit within the language of Rule 16 and are not factually analogous to the Tennessee Supreme Court's decisions interpreting the rule. Together with the well-established rules of construction for Public Records Act cases, Rule 16 should not apply to the requested public records in the hands of TBI and the Department. The inapplicability of the public policy arguments advanced by the State further buttresses this conclusion as do persuasive decisions from Florida, which has a similar public records law.

Amici respectfully request that this Court reverse the trial court and hold that the public records requested from TBI and the Department are not exempt under Rule 16.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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