IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE

STATE OF TENNESSEE,	)	
	)	
Plaintiff,	)	SECOND DIVISION
	)	
vs.	)	
	)	NO(s). 300192, 304497
COURTNEY HIGH,	)	
	)	
Defendant.	)	

ORDER GRANTING, IN PART, MOTION FOR PROTECTIVE ORDER

This cause came to be heard on June 20, 2018 before the Court upon petition/motion of the Defendant, Courtney High, seeking a protective order preventing further disclosure of a recorded statement made by him because of concerns for his personal safety. For its part, the State argues that the statement contains possibly exculpatory information as it relates to other parties in the larger action in *State v. Allen, et al.*

Rule 16 of the Tennessee Rules of Criminal Procedure grants authority to this Court to regulate pretrial discovery.[1] As part of this general authority, the Court may issue protective orders, upon good cause shown, that "deny, restrict, or defer discovery or inspection, or grant other appropriate relief."[2]

For present purposes, the Court acknowledges the State's duty to disclose information that is exculpatory or favorable to an accused.[3] This duty of disclosure "extends to all 'favorable information' irrespective of whether the evidence is admissible at trial."[4] This duty arises, of course, as part of the constitutional protections affording the criminally accused the right to a fair trial, as guaranteed both by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and by the "Law of the Land" Clause of Article I, section 8 of the Tennessee Constitution.[5]

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[1] *See* Tenn. R. Crim. P. 16(d).

[2] *See* Tenn. R. Crim. P. 16(d)(1).

[3] *See Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Johnson v. State*, 38 S.W.3d 52, 55-56 (Tenn. 2001).

[4] *See State v. Conkin*, No. E2015-01286-CCA-R3-CD, 2016 WL 4708356, at *10 (Tenn. Crim. App. Sept. 7, 2016) (citing *State v. Robinson*, 146 S.W.3d 469, 512 (Tenn. 2004) (itself citing *Johnson v. State*, 38 S.W.3d 52, 56 (Tenn. 2001)); *see also State v. Moss*, No. W2016-01973-CCA-R3-CD, slip op. at 8 (Tenn. Crim. App. Jan. 5, 2018) (same).

[5] *See Johnson v. State*, 38 S.W.3d 52, 55-56 (Tenn. 2001).

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On the other hand, if the safety concerns identified by counsel are legitimate, these concerns are entitled to weight as well. The Court would note that the parties have not yet introduced proof setting forth the extent to which these concerns are present in fact, though the Court would credit the likelihood of these concerns being legitimate, at least in part, given the nature of what has been alleged.[6]

Balancing these concerns, and seeking to maintain the status quo while the action is proceeding pending further developments of the case, the Court believes that both concerns can be accommodated, while permitting other affected parties the subsequent opportunity to be heard. Accordingly, for good cause shown, the Court hereby **ORDERS** as follows pursuant to Tenn. R. Crim. P. 16(d)(1):

1. Subject to restrictions imposed below, the State shall produce information contained in this statement that is either "favorable to [an] accused,"[7] or is subject to disclosure pursuant to Tenn. R. Crim. P. 16(a)(1)(F), including evidence that

   - provides some significant aid to a defendant's case;
   - furnishes corroboration of a defendant's story;
   - calls into question a material, although not indispensable, element of the prosecution's version of the events;[8] or
   - challenges the credibility of a key prosecution witness.[9]

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6 *Cf. United States v. Mitrovic*, 286 F.R.D. 683, 688 (N.D. Ga. 2012) (entering protective order pursuant to Fed. R. Crim. P. 16(d) prohibiting disclosure of witnesses beyond attorneys' eyes only, even though "[t]he Government does not supply specific information demonstrating the existence of a real, present threat to any particular witness. But the threats that the Government generally describes are reasonably conceivable in a crime of violence such as this, particularly where some victims or witnesses may be beyond the jurisdiction of U.S. law enforcement.").

Although decisions interpreting Fed. R. Crim. P. 16 are not binding on this Court, the courts of this state have sometimes looked to such interpretations as some persuasive authority in deciding questions arising under Tenn. R. Crim. P. 16. *See State v. Huskey*, No. E1999-00438-CCA-R3-CD, 2002 WL 1400059, at *59 (Tenn. Crim. App. June 28, 2002) ("In determining the proper standard, we believe that it is appropriate to refer to federal authority interpreting Rule 16(a), Fed. R. Crim. P., because our Rule 16 conforms with and was greatly derived from its federal counterpart."); *State v. Peters*, No. E2014-02322-CCA-R3-CD, 2015 WL 6768615, at *6 (Tenn. Crim. App. Nov. 5, 2015) ("In determining whether the requested discovery is material, this Court has looked to federal authority interpreting the analogous Federal Rule of Criminal Procedure 16(a)."); *but see State v. Readus*, 764 S.W.2d 770, 773 (Tenn. Crim. App. 1988) (in context of interpreting Tenn. R. Crim. P. 5, denying that "[b]ecause of the format similarity between our state rules and the federal rules of criminal procedure, it is natural to assume an intention on the part of our drafters to embrace federal applications and interpretations.").

7 *See Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Johnson v. State*, 38 S.W.3d 52, 55-56 (Tenn. 2001). It may be that the entire statement could be favorable to an accused. Nothing in this order is intended to limit the State's duty in any way to provide the statement, whether in whole or in part, to any party where the duty to disclose exists. Rather, the purpose of this order is only to restrict the manner in which the statement, in whole or in part, is to be disclosed after the duty to disclose has been identified by the State.

8 *See Baker v. State*, No. M2015-02152-CCA-R3-PC, slip op. at 17 (Tenn. Crim. App. Jan. 23, 2017) (noting that favorable evidence need not directly refute the State's theory of the offense so long as it "provides some significant aid to the defendant's case." (citing *Johnson*, 38 S.W.3d at 56))/

2. Any such disclosure by the State shall only be to counsel for an accused and shall be limited to "attorneys' eyes only."

   a. For purposes of this protective order, "attorneys' eyes" shall include an investigator and staff personnel working directly with the attorneys in this case.

   b. All persons to whom disclosure is made shall first sign an acknowledgment of receipt of this protective order, to be prepared by the State, and such acknowledgments shall be filed with the Court in the individual cases though which disclosure is made.

3. No person to whom disclosure of the statement is made—whether such person is legal counsel or other permitted persons—shall further disclose or disseminate the contents of the statement to any person not specifically permitted in this protective order, including to his or her client, absent further order of this Court.[10]

4. Before disclosure of the contents of the statement may be disclosed in *any* open court proceedings, the State and defense counsel are requested to make known to the Court that protected information is to be disclosed in a proceeding, and are requested to obtain direction on how to produce such information during those proceedings.

5. Upon request of counsel to whom such disclosure has been made, the Court shall reconsider this protective order in individual cases to permit further disclosure necessary for preparation of a defense. During any such hearing, Mr. High will

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[9] *See State v. Bargery*, No. W2016-00893-CCA-R3-CD, slip op. at 103 (Tenn. Crim. App. Oct. 6, 2017) ("The prosecution's duty to disclose *Brady* material also applies to evidence affecting the credibility of a government witness, including evidence of any agreement or promise of leniency given to the witness in exchange for favorable testimony against an accused." (citing *Giglio v. United States*, 405 U.S. 150, 154-55 (1972) (requiring the prosecution to reveal the contents of plea agreements with key government witnesses); *Johnson v. State*, 38 S.W.3d 52, 56 (Tenn. 2001)); *State v. Moss*, No. W2016-01973-CCA-R3-CD, slip op. at 6 (Tenn. Crim. App. Jan. 5, 2018) ("Both impeachment evidence and exculpatory evidence fall within the *Brady* rule." (citing *United States v. Bagley*, 473 U.S. 667, 676 (1985)).

[10] *Cf. United States v. Eldridge*, No. 09CR329A, 2010 WL 3749060, at *7 (W.D.N.Y. Sept. 20, 2010) (granting protective order in a criminal RICO case including provisions for disclosure of evidence only to counsel under an "attorneys' eyes only" provision); *United States v. Cervantes*, No. CR 12-792 YGR, 2015 WL 6552710, at *2 (N.D. Cal. Oct. 28, 2015) (noting use of attorneys' eyes only protective order between parties in a criminal RICO case); *see also United States v. Lee*, 374 F.3d 637, 652 (8th Cir. 2004) (recognizing that, pursuant to Fed. R. Crim. P. 16(d), a district court may for good cause shown, limit a defendant's discovery to attorneys' eyes only, provided that the order does "not impermissibly limit [the accused's] communications with his attorneys," such as, for example, by imposing a "blanket proscription" against the accused communicating with counsel or by prohibiting the accused to be "informed about all other matters and to discuss them with counsel."); *United States v. Garcia*, No. CR 15-4275 JB, 2017 WL 2290963, *43 (D.N.M. May 2, 2017) (noting that "[a] benefit of this rule [Fed. R. Crim. P. 16] is that the Court can be creative and flexible in creating disclosure orders. It can order disclosure for attorney's eyes only. It can deny the production to protect the CI. In other words, rather than a blanket, fixed rule, the Court can fashion a disclosure order that gets the defendant and/or counsel anything they need, and still try to protect the CI's safety as much as possible.").

be afforded an opportunity to be heard and produce evidence that further disclosure will affect his health or safety.

It is so ordered.

Enter, this the 25th day of June, 2018.

TOM GREENHOLTZ, Judge