IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE

STATE OF TENNESSEE,	)	
	)	
Plaintiff,	)	SECOND DIVISION
	)	
vs.	)	
	)	NO(s). 305636 - 305690
ARTERRIUS ALLEN, ET AL.	)	
	)	
Defendants.	)	

ORDER GRANTING STATE'S SEALED MOTION NO. 1

This cause came before the Court upon motion of the State, *ex parte* and pursuant to Tenn. R. Crim. P. 16(d), to extend the timeline set forth in the Case Management Order and October 29, 2018 Order, for the production of certain items of pretrial discovery. By way of background, and from the perspective of the Court, this issue follows upon the State's previous motion relating to demonstrable harm to parties and witnesses flowing from the production of certain information in the above cases.

The instant request was accompanied by an affidavit of an investigator, as well as the evidence that apparently is the subject of the underlying concerns. In considering the motion, the Court reviewed the affidavit, and the Court notes that it identifies concerns similar to those involved in the State's previous motion for a protective order. However, perhaps unlike the previous request, the submission here is not generalized or speculative.

Tennessee Rule of Criminal Procedure 16(d)(1) provides, in relevant part, that

> [a]t any time, for good cause shown, the court may deny, restrict, or defer discovery or inspection, or grant other appropriate relief. On a party's motion, the court may permit the party to make such showing, in whole or in part, by written statement that the court will inspect ex parte. If relief is granted following an ex parte submission, the court shall preserve under seal in the court records the entire text of the party's written statement.

As courts interpreting the corresponding federal rule have recognized,[1] Rule 16(d) vests courts "with broad discretion to 'limit,' 'condition,' or 'absolutely prohibit' the disclosure of discovery

[1] *Cf. 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).").

materials in criminal cases if doing so is 'in the interests of witness security."[2] While a protective order may not dispense with the State's *Brady* obligations, such an order could be appropriate "to curtail the public dissemination of sensitive discovery materials that may endanger witnesses or informants,"[3] or otherwise to "account [for] a particular danger of witness intimidation."[4] As one court has recently characterized the weight of this issue, "witness safety is paramount, and the Court cannot ignore threats to, or intimidation of, witnesses."[5]

Of course, Rule 16(d) expressly permits parties, including the State, to submit an *ex parte* request to the Court for a protective order.[6] However, even under such circumstances, the Court has obligations to all parties to ensure the inherent fairness of the proceedings. To that end, and mindful of the limited and procedural nature of the request,[7] the Court has not substantively

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[2] *See United States v. Roberts*, 793 F.2d 580, 587 (4th Cir. 1986), vacated on other grounds, 811 F.2d 257 (4th Cir. 1987); *see also United States v. Loera*, 09-CR-466-BMCS4, 2017 WL 2821546, at *2 (E.D.N.Y. June 29, 2017) (recognizing that "courts across the country and in this Circuit have long recognized and accepted the use of ex parte communications from the Government in precisely the situations at issue here. First, ex parte communications between courts and prosecutors 'have been recognized as necessary where the safety of witnesses is concerned.'" (citations omitted)); *United States v. Gomez*, CR-13-00282-PJH-DMR, 2014 WL 231984, at *3 (N.D. Cal. Jan. 21, 2014) ("In determining whether to deny, restrict, or defer discovery, courts must take into consideration 'the safety of witnesses and others, [and] a particular danger or perjury or witness intimidation.'" (quoting Fed. R. Crim. P. 16 advisory committee's notes)).

[3] *See United States v. Fine*, 413 F. Supp. 740 (W.D. Wisc. 1976); *see also United States v. Darden*, 3:17-CR-00124, 2017 WL 3700340, at *1 (M.D. Tenn. Aug. 28, 2017) ("Although the Rule does not define 'good cause,' the Advisory Committee expressly sanctions the imposition of a protective order 'where there is reason to believe that a witness would be subject to physical ... harm[.]'" (quoting *United States v. Mitchell*, 2016 WL 7076991, at *2 (D. Me. Dec. 5, 2016) and citing *United States v. Fort*, 472 F.3d 1106, 1131 (9th Cir. 2007) ("The Rules Advisory Committee specifically designed Rule 16(d)(1) to provide a mechanism to protect witness safety, and to grant considerable discretion to the district court in drafting orders under that rule.")).

[4] *See, e.g., United States v. Pelton*, 578 F.2d 701 (8th Cir. 1978); *see also United States v. Dent*, SACR 16-00029(B)-CJC, 2017 WL 1025162, at *3 (C.D. Cal. Mar. 15, 2017) ("Rule 16's advisory committee notes further provide that 'it is obvious that [a protective order] would be appropriate where there is reason to believe that a witness would be subject to physical or economic harm if his identity is revealed.'" (citing, Fed. R. Crim. P. 16 advisory committee's note to 1974 amendments; *United States v. Barbeito*, No. CR.A. 2:09-CR-00222, 2009 WL 3645063, at *1 (S.D. W. Va. Oct. 30, 2009) ("It is appropriate, however, to employ Rule 16(d) protective orders to curtail the public dissemination of sensitive discovery materials that may endanger witnesses or informants.")).

[5] *See United States v. Darden*, 3:17-CR-00124, 2017 WL 3700340, at *2 (M.D. Tenn. Aug. 28, 2017) (citing *United States v. Figueras*, 2009 WL 1364640, at *1 (W.D.N.Y. May 14, 2009) (stating that protective orders help to ensure "strong public interest in encouraging the free flow of information to law enforcement officers"); *United States v. Barbeito*, 2009 WL 3645063, at *1 (S.D.W. Va. Oct. 30, 2009) ("It is appropriate ... to employ Rule 16(d) protective orders to curtail the public dissemination of sensitive discovery materials that may endanger witnesses or informants."), but also balancing the "essential component to the Sixth Amendment right to counsel is that a defendant be allowed to assist and participate meaningfully in his own defense.").

[6] *See State v. Vanderford*, 980 S.W.2d 390, 399 (Tenn. Crim. App. 1997) ("When appropriate, the state can seek a protective order *ex parte*."); *see also United States v. Hamama*, 08-20314, 2010 WL 330375, at *2 (E.D. Mich. Jan. 21, 2010) ("It is well settled that the government may move in camera and ex parte for a protective order restricting discovery, and that the Court may hold in camera and ex parte hearings on such motions." (citations omitted)); *United States v. Aiken*, 76 F. Supp. 2d 1339, 1342 (S.D. Fla. 1999) ("The Government may seek to meet its burden of showing good cause via an *ex parte* submission, as it has sought to do here.").

[7] *See United States v. Belfast*, 06-20758-CR, 2007 WL 9705938, at *2 (S.D. Fla. Apr. 26, 2007) ("[W]hile certainly allowed, ex parte communications from the Government to the Court are disfavored because of the general concern that the Government's information will be less reliable than if it is disclosed to the Defendant."); *United States v. Hanjuan Jin*, 791 F. Supp. 2d 612, 620 (N.D. Ill. 2011) ("[B]ecause of the ex parte nature of this

reviewed the actual evidence that is the subject of the motion other than to generally survey the types of evidence subject to the motion.[8] The Court has also not met with counsel for the State or otherwise discussed the motion, its contents, or the case more generally with the State outside of the presence of any defense counsel. It is important to note that the State has not otherwise sought to meet with the Court or to provide additional information to the Court apart from its filings alone.

Based upon the evidence submitted to the Court, the Court **FINDS** and **ORDERS** as follows:

1. The Court finds that, based upon the verified information provided and believed to be reliable, good cause exists to believe that immediate dissemination of the limited discovery subject to the State's motion may jeopardize the safety of witnesses and impede the due administration of justice.[9]

   The Court finds that good cause exists to believe that a further temporary deferral in the production of this information will ensure the safety of witnesses, preserve the integrity of the discovery process, and serve the ends of justice.

   Given the limited nature of the present request and order, the Court also finds that the temporary deferral will not unduly interfere with preparation of the defense in

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motion, the Court will err on the side of protecting the interests of the Defendant in applying these standards. The Court recognizes, as the D.C. Circuit has repeatedly, that the Defendant and her counsel, 'who are in the best position to know whether information would be helpful to [her] defense, are disadvantaged by not being permitted to see the information—and thus to assist the court in its assessment.' For that reason, the D.C. Circuit has applied 'the "at least helpful" test in a fashion that gives the defendants the benefit of the doubt.'" (citations omitted)).

[8] Although not clear to the Court at this point due to its limited survey of the evidence, it *may* be that some of the evidence would be subject to limited disclosure, if any at all, as it respects some defendants. However, the Court does not reach this question given the limited nature of the State's request. *See United States v. Brown*, CR 05-B-257-NW, 2005 WL 8153944, at *1 (N.D. Ala. Aug. 25, 2005) ("If, on the other hand, the government intends to provide to all defendants a copy of all recorded statements made by other defendants to cooperating witnesses, that material is beyond the requirements of Rule 16(a). In such a case because the government is not obligated to provide the material in the first instance, it may seek reasonable limitations on the production, dissemination and use. In short, if the government intends to produce statements to defendants generally which include not only the individual defendant's statements but those of others as well, the government may as a prudential matter limit how that material is to be used.").

[9] As federal courts have recognized, "[g]ood cause exists 'when a party shows that disclosure will result in a clearly defined, specific and serious injury.'" *See In re Terrorist Attacks on September 11, 2001*, 454 F. Supp. 2d 220, 222 (S.D.N.Y. 2006) (quoting *Shingara v. Skiles*, 420 F.3d 301, 306 (3d Cir. 2005)); *see also United States v. Lazar*, 04-20017 D, 2004 WL 7331847, at *1 (W.D. Tenn. Apr. 29, 2004) ("Federal Rule of Criminal Procedure 16(d)(1) states, '[a]t any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte.' Good cause is a 'legally sufficient reason' generally used to denote the litigant's burden to show why a request should be granted." (citations omitted)).

Moreover, this showing of good cause must generally be "based on a particular factual demonstration of potential harm, not on conclusory statements." *See Anderson v. Cryovac, Inc.*, 805 F.2d 1, 8 (1st Cir. 1986); *United States v. Belfast*, 06-20758-CR, 2007 WL 9705938, at *2 (S.D. Fla. Apr. 26, 2007) ("Such '[g]ood cause is established on a showing that disclosure will work a clearly defined and serious injury to the party seeking closure.'" (citations omitted)). The verified statement submitted by the State meets this standard.

any case, but will help ensure proper disclosure of evidence under Rule 16(a) so as to facilitate preparation of a defense.[10]

2. Based upon these findings, the Court **GRANTS** the State's motion for deferral of the discovery completion date with respect to the information that is the subject of the motion. Pursuant to Paragraph VI of the Case Management Order, and with respect only to the information that is the subject of the motion, the Court holds the discovery completion date in abeyance.[11]

3. The State is requested to report to the Court, in open session on January 29, 2019, the status of measures taken with affected counsel to ensure production of the information at issue and to formally move for protective relief at that time if such additional measures are needed at that time. If any such additional measures are not needed, the Court anticipates that the State will have completed its disclosure obligations by that time, subject to its duties of continuing disclosure.

4. Pursuant to Tenn. R. Crim. P. 16(d)(1), the State's *ex parte* motion, together with the affidavit submitted in support, shall be maintained *ex parte* and under seal for appellate review, if necessary. However, this Order shall not be filed under seal.

5. This Order does not otherwise modify the terms of the Case Management Order except as provided herein.

It is so ordered.

Enter, this the 26th day of November, 2018.

TOM GREENHOLTZ, Judge

[10] *See United States v. Gomez*, CR-13-00282-PJH-DMR, 2014 WL 231984, at *4 (N.D. Cal. Jan. 21, 2014) ("The witness discovery will not be withheld altogether from Defendant. As previously ordered at the December 18, 2013 hearing, Defendant will receive the delayed witness material approximately two weeks before trial, subject to a strict protective order. This timing will allow Defendant to prepare his defense while mitigating against factually-supported concerns that release of the information may lead to witness intimidation, injury, or even death.").

[11] *See United States v. Sharma*, 6:09-CR-1-ORL-19GRJ, 2009 WL 10698017, at *2 (M.D. Fla. Mar. 17, 2009) ("In determining whether to make such a protective order, the court may take into account a variety of considerations including the safety of witnesses."); *United States v. Loera*, 09-CR-466-BMCS4, 2017 WL 2821546, at *4 (E.D.N.Y. June 29, 2017) ("[T]he Court is well within its discretion to defer the production of certain discovery related to cooperating witnesses, confidential sources, the ongoing investigation, and law enforcement techniques until later down the line.").