IN THE CIRCUIT COURT OF HARDIN COUNTY
AT SAVANNAH, TENNESSEE

ZACHARY RYE ADAMS	]	
PETITIONER	]	
	]	
VS.	]	**NO. 17-CR-10-PC**
	]	
STATE OF TENNESSEE	]	

FILED 9 DAY OF April, 2024 AT _____ AM PM
TAMMIE WOLFE, CLERK
BY Terri Wright Deputy CLERK

RESPONSE TO MOTION TO STRIKE and MOTION TO SEAL and COUNTER MOTION FOR CLARIFICATOIN ON WHAT INFORMAITON and DOCUMENTATION IS SUBJECT TO A PROTECTIVE ORDER/CONFIDENTIALITY ORDER

Comes now the Defendant, by and through Counsel, and files the following response to the motion to strike and/or seal and files this Counter Motion for Clarification on What Information and Documents is Subject to a Protective/Confidentiality Order.

I.

OVERVIEW

The Defendant Zach Adams filed an underlying writ of error coram nobis after the investigation as required by Tenn. Sup. Ct. R. 28, Sec. 6, which requires the appointed Counsel, "to review the pro se petition, file an amended petition asserting other claims which petitioner arguably has or a written notice that no amended petition will be filed, ***interview relevant witnesses***, including petitioner and prior counsel, and diligently investigate and present all reasonable claims." (emphasis added)

During the course of Counsel's work, perhaps the most pressing issue of this case presented itself: Mr. Jason Autry discussed on camera with Dr. Katie Spirko that he fabricated his testimony out of desperation and belief he was going to be found guilty if his case went to trial, despite being innocent. Mr. Adams, through Counsel, then utilized newly discovered

recanted testimony to pursue this underlying Writ of Error Coram Nobis (hereafter referred to as Writ) as allowed pursuant to *State v. Mixon*, 983 S.W.2d 661 (Tenn. 19999); *Freshwater v. State*, 160 S.W.3d 584 (Tenn. Crim. App. 2004)(holding that prisoner sentenced to 99-year sentence was of a "sufficiently significant period of time to warrant similar treatment for purposes of due process analysis" to death penalty cases that offer compelling reasons to relax the statute of limitations' rigidity on claims).

The hurdles before Mr. Adams to jump are significant, admittedly, a review would be helpful.

The law surrounding the Writ has enjoyed robust appellate debate. A Review would be helpful: the 2010 Tennessee Supreme Court case of *Harris v. State*, 3101 S.W.3d 141 (Tenn. 2010) where the logic and reasoning of Justice Koch's (and Justice Clark) concurring opinion was embraced years later in the *Nunley v. State* 552 S.W.3d 800 (Tenn. 2018) Supreme Cout case that overruled in part the majority opinion in *Harris*.

The *Nunley* case stands for the proposition that the untimeliness of a Writ is not an affirmative defense, but rather lies on the Defendant must show on its face that it is timely or support facts in its petition to equitably toll the statute of limitation, *Id.* at 828.

Embedded in the discussion about the statute of limitation is helpful analysis about the proceedings that begins with the Petition. As Justice Koch outlined in *Harris*, there is one analysis for the face of the petition and another for the actual evidentiary hearing. *Id.* at 149. "If a petition for a write of error coram nobis fails to show on its face either that it has been timely filed in accordance with Tennessee Code section 27-7-103 or specific facts showing why the petitioner is entitled to equitable tolling of the statute of limitations, the trial court is within its discretion to summarily dismiss it. *Citing Nunley, Justic Koch's concurring opinion in Harris* at

150. There is no requirement that trial courts hold an evidentiary hearing prior to dismissing a *coram nobis* petition if the petition "fails to meet necessary perquisites for granting coram nobis relief." (citations omitted) *Harris* at 150. If the averments in the petition are sufficient to warrant relief, the petition may be dismissed" prior to any reason from the state and without a hearing. *Harris* at 150; (citing *Elliot v. R.C. McNairy & Co.,k 60 Tenn. 342, 346-47 (1872)); see also 39 Am. Jur. 2d Habeas Corpus (2008)* (trial court has no duty to try the issues raised in a *coram nobis* petition unless "the verified petition on its face shows sufficient grounds for the issuance of the writ and **the necessity for a hearing thereon).**

Justice Koch gave further guidance, stating that the petition must be verified under oath and, "it is also advisable to file supporting affidavits at the same time the petition is filed." *Haris* at 151. He wrote further, [w]hile there are certainly petitions for a writ of error coram nobis that cannot be easily resolved on the face of the petition alone, *Harris v. State*, 102 S.W.3d at 593, trial courts need only conduct evidentiary hearings when they are essential. Yackle, §1:10."

More to the original point though—why did Petitioner attach the recordings of both Mr. Autry and the additional new witness? Back to *Harris.*

In *Haris*, three years after the trial, someone named "Bill" sent the District Attorney General a letter confessing to the underlying crimes for which the Defendant had been convicted. A handwriting expert was retained and identified the author in 2002. Justice Koch did not find the "Bill" Letter was sufficient grounds for the writ for precise reasons the video of Mr. Autry's video recanting was needed to attach to his pleadings.

First, the "Bill" letter was the basis of a prior post-conviction relief petition. Secondly the concurring opinion found the letter was not admissible evidence and its analysis revealed this

Autry recording is proper. The key factor in *Harris* was that the letter was anonymous and thus not a statement against interest under T.R.E. 804(b)3). Justice Koch cited *State v. Kiser*, 284 S.W.3d 227, 263-266 (Tenn 2009) in which the late Justice Clark answered in a first impression case that an *anonymous* phone call that could be considered a statement against interest is not afforded the admission through T.R.E. 804(b) because the crux of T.R.E. 804 is reliability--which is compromised by the anonymity of the declarant.

The last and final reason Justice Koch in *Harris* found that the writ of error should not be afforded by the "Bill' letter, he stated the Defendant's delay in filing a petition for writ of error was fatal. The delay was 13 years.

However, at no time did Justice Koch state that the author of the "Bill" letter should have been presented in the form of an affidavit and that made it fatal. In fact, it was never argued the letter not being an affidavit was fatal.

The Court's job is to determine if the petition and the supporting affidavits are sufficient to "justify an evidentiary hearing" and "the trial court should not determine the merits of the petition on the strength of the affidavits alone." *State v. Hart*, 911 S.W.2d 371 (Tenn. Crim. Ct. App. 1995); citing *Hicks v. State*, 571 S.W.2d 849, 852 (Tenn. Crim. App. 1978).

It bears reminding that the petition outlining factually the reason for the writ was both verified the Defendant and with supporting affidavit of Dr. Spirko and also the videos upon which the petition is based. At the evidentiary hearing, if a witness is deemed unavailable under Rule 804(a), then at least Mr. Autry's testimony will pass muster under Rule 803(b)(3) as he admits to some of the most offensive perjury imaginable and could further be admissible under

Rule 803(26) if Mr. Autry does testify. The other witness' video would be possibly admissible under Rule 803(1.2) and (25).

That is the context the State seeks to strike such exhibits or seal them. At the risk of journalistically burying the lead, Defendant does not object to the Court clerk sealing these exhibits. However, nothing herein shall be construed as placing a protective order on them. The State is free to disclose these videos to whomever they wish and likewise, the Defendant should be. The arguments of the State bear significant analysis and exploration, which is why the Defendant requests further clarification by this Court as to whether there is any protective orders or confidentiality orders regarding the same.

II.

RESPONSE TO STRIKE EXHIBITS

1. Admitted.
2. Admitted.
3. Admitted that neither Exhibit 1 and 2 are unsworn; deny Exhibit 3 contains "considerable hearsay" as Dr. Spirko has been generally retained initially by Counsel and then now by Mr. Adams' family to perform expert services. Further, for the reasons stated above, Mr. Autry's video could very well be admissible under T.R. E. 804.
4. Admitted.
5. Admitted.
6. Denied. For the reasons stated above, it is anticipated and requested that an evidentiary hearing take place in this case. Further, the Defendant is not barred from submitting further affidavits if necessary, under *State v. Hart*, 911 S.W.2d 371 (Tenn. Crim. Ct. App.

1995) that states "[a]affidavits should be filed in support of the petition or *at some point in time prior to the hearing.*" (emphasis added).

7. Admitted.
8. Admitted.
9. Admitted that *Harris v. State*, 301 S.W.3d at 152 is quoted correctly.
10. Admitted the correct law is quoted.
11. Denied that recanted testimony is not newly discovered evidence; *see* The Petition outlines the first date Mr. Autry recanted his testimony to Dr. Spirko and within 31 days, the Writ was filed. The State should be barred from asserting in the Writ case that Mr. Autry recanting is not newly discovered unless it proffers evidence that it believed Mr. Autry was dishonest when it testified—a proposition Defendant highly doubts the State will accept.
12. Admitted.
13. It is admitted that Ms. Carroll's statement is not in the form of an affidavit. However, the Defendant submits the affidavit of Dr. Spirko, and the verified petition properly authenticates the video and the statement of the witness. The video is also proper as it was work procured during Dr. Spirko's work and admissible under Rule 803(6) and Rule 703 of T.R.E. Further, under *Bland v. State*, 2022 Tenn. Crim. App. LEXIS 169, (Tenn. Crim. App. 2022) such video was appropriate. From *Bland:*

> On February 20, 2020, the Petitioner filed a petition for writ of error coram nobis, alleging newly discovered evidence. **In support, he attached a summary of an October 28, 2016 police interview with Christopher Williams and an undated hand-written letter from Mr. Williams. The police interview was at Mr.**

Williams's request and addressed numerous other crimes, most of which the police were unable to verify.

...

The coram nobis court held a hearing where two witnesses were called.

Id. at 3-5.

Further, from *Bland* : Recanted testimony may be considered newly discovered evidence under certain circumstances. See *Mixon*, 983 S.W.2d at 672. This court has concluded that a trial court should only grant a writ of error coram nobis upon the basis of newly discovered recanted testimony if:

(1) the trial court is reasonably well satisfied that the testimony given by the material witness was false and the new testimony is true; (2) the defendant was reasonably diligent in discovering the new evidence, or was surprised by the false testimony, or was unable to know of the falsity of the testimony until after the trial; and (3) the jury might have reached a different conclusion had the truth been told. *Citing State v. Ratliff*, 71 S.W.3d 291, 298 (Tenn. Crim. App. 2001) (citing *Mixon*, 983 S.W.2d at 673 n.17).

Inherent in the determination of whether a petitioner is entitled to relief based upon recanted testimony is the coram nobis court's determination of whether the witness recanting his or her testimony is credible. A petitioner is not entitled to coram nobis relief based on recanted testimony unless the coram nobis court is reasonably satisfied that the prior testimony was false and the present testimony is true. *Ratliff*, 71 S.W.3d at 298.

14. It is admitted that Mr. Autry's statement is not in the form of an affidavit. However, the Defendant submits the affidavit of Dr. Spirko, and the verified petition properly authenticates the video and the statement of the witness. Further, the State attaches an unsworn statement by Mr. Autry's counsel in Federal Court to impeach Mr. Autry's video. That this assertion—apparently believed by the State—was filed 61-days prior to the video bolsters the "newness" of the referenced claims. The video is also proper as it was work procured during Dr. Spirko's work and admissible under Rule 803(6) and Rule 703 of T.R.E. Further, the Petitioner relies upon its argument set forth in ¶13 above.

15. Admitted Dr. Spirko's affidavit is valid.

III.

SEAL EXHIBITS

16. No response required.

17. Admitted.

18. Admitted.

19. Admitted.

20. Admitted. The State's Counsel was quite gracious in her offer to work in good faith with Counsel. Nothing in any of this response or motion is intended to suggest otherwise.

21. It is admitted that no media or general member of the public has the right to discoverable information. As quoted in the referenced *Tennessean v. Metro. Gov't of Nashville & Davison Cnty*, 485 S.W.3d 857 (Tenn. 2016) case, the "Tennessee Public Records Act allows access to government records, but there are numerous statutory exceptions, including a state law exception in Tenn. Code Ann. § 10-7-503(a)(2), that shield some records from disclosure. Tenn. R. Crim. P. 16 falls within the state law exception. Rule

16 provides for the release of certain information to the defendant in a criminal case, but does not authorize the release of any information to a non-party to the case. Therefore, during the pendency of the criminal case and any collateral challenges to any conviction, Rule 16 governs the disclosure of information and only the defendant has the **right** to receive certain information." (emphasis added).

Importantly and cited below, the State seems to imply that because the Public Records Act does not give the public a right to Rule 16 material under Freedom of Information Act, Tennessee Code Annotated sections 10-7-501 through 10-7-516, then the public, non-parties, members of the media, defendants' family members, counsel's family members and lawyer friends, people offering help, etc. etc. are somehow barred from reviewing the materials if provided by the Defendant himself or through his agents. This is respectfully a fundamentally flawed interpretation of the law.

22. Denied. Both video recordings could be evidence in this case for the reasons cited above.
23. Admitted that the Exhibits are discoverable under T.R.Cr.P. 16.
24. This is crux of the issue and the need for clarification from this Court. The State cites the 11th Circuit case of *United States v. Anderson*,799 F.2d 1438, 1441, (11th Cir. 1986) for the proposition that the Defendant does not have the unfettered ability to share discovery materials with the public, which very well may undermine the "smooth functioning of the discovery process." *Id.* Respectfully, Defendant and the State have a fundamental difference of interpretation.

a. *Anderson* is attached on the best version Counsel can find from the internet as Exhibit 1. Counsel welcomes the State submitting the case in full to the Court to insure its accuracy.

b. In *Anderson*, the Government presented an indictment naming several un-indicted participants to the referenced scheme. The Defendants moved from a bill of particulars. The Government filed a bill of particulars and at the same time moved for *ex parte relief* sealing the documents. Various other attempts were made to keep these pleadings sealed, but a "keen reporter" from *The Tampa Tribune* realized something was amiss. A petition for access from the Court file of these sealed exhibits was filed by the Tribune and then a second petition was filed that was the basis of this case.

c. From the attached case, "when the government filed the notice of possible similar acts evidence along with a motion to seal the document, it, in effect, had voluntarily agreed to provide the information on the condition that the defendants not reveal the notice's contents to the public or to the press." Further, the *Anderson* court stated that, "[d]iscovery, whether civil or criminal, is essentially a private process because the litigants and the courts assume that the sole purpose of discovery is to assist trial preparation. That is why parties *regularly agree, and courts often order,* that discovery information will remain private. *Citing Myth and Reality in Protective Order Litigation,* 69 Cornell L.Rev. 1, 15(1983). **"If it were otherwise and discovery information and discovery orders were readily available to the public and the press, the consequences to the smooth functioning of the discovery would be severe."** *Id.* This entire sentence is

emboldened because the State says the Defendant should not have the right to share discovery with whoever it wants. *Anderson* dealt not with this issue—instead whether the Tampa Tribune had such a right.

d. In this case, the only agreement Defendant is aware regarding discovery of is to seal the exhibits to the Writ and PCR. Indeed Counsel has a memory that it asked the Court on its phone/zoom conference about the sealing of the exhibits about whether or not they could be disclosed otherwise and the court rightfully said nothing prohibits that.

25. Defendant welcomes the State to begin discussing and framing immediately a discovery agreement in a forthcoming new trial for the Defendant. However, Counsel submits that this is a highly visible case as the motions and trial are available through multiple YouTube channels. A published book by the TBI agent on the case, *The Untold Story of the Abduction of Holly Bobo*, Terry Lee Dicus, Jr. Kindle Direct, 2020 is available online for purchase. A post sentencing press conference by the successful prosecutor Jennifer Nichols[1], and multiple documentaries have taken place. Indeed, it would seem the Sate's confidence in the appropriateness of this conviction that they would want more light shed on this case, not less. To argue that the Court now should put an order down or there should be some implicit understanding that the Defendant cannot share any discovery with anyone beyond his Counsel is, respectively, misplaced.

26. Counsel has no objection whatsoever to barring the Court Clerk and the State of Tennessee from mandatory disclosures of the discovery and Exhibits 1 and 2 of the Writ and Amended PCR. However, barring it from mandatory disclosure under a Freedom of

[1] An interesting question was posed to ADA Nichols to comment on what aggravating factors the State was going to rely upon in support of its request for the death penalty. She said, "it is filed in the file…it's public record."

Information Act request does not bar the Defendant from sharing this information from whoever it want—absent a Court order regarding a protective order.

IV.

COUNTER MOTION FOR CLARIFCIATION ON WHAT INFORMAITON and DOCUMENTATION IS SUBJECT TO A PROTECTIVE ORDER/CONFIDENTIALITY ORDER

Stays now the Defendant, by and through Counsel, and moves the Court to clarify what information and documentation is subject to a protective order or otherwise a confidentiality order.

1. Counsel incorporates all of the above information into this Motion. Succinctly stated—the Assistant District Attorney General Nichols and Counsel have apparently a respectful disagreement as to whether Zach Adams has the "unfettered ability to share discovery material with the public" or not.
2. In *Tennessean*, the Court issued its own protective order regarding some materials.
3. Counsel knows of zero authority or interpretation of Rule 16 of the T.R.Cr.P. 16 that prohibits a Defendant from sharing discovery material with the public, his own agents, friends, family, or Counsel likewise has the ability *if* so authorized by the Defendant.
4. Indeed, an incredibly sensitive and confidential item of discovery shared in Tennessee criminal cases are the child advocacy center's forensic interviews of children in sexual abuse of children's cases. Pursuant to T.C.A. § 24-7-123(e),

> "The court shall enter a protective order to restrict the video recording used pursuant to this section from further disclosure or dissemination. The video recording shall not become a public record in any legal proceeding. The court shall order the video recording be sealed and preserved following the conclusion of the criminal proceeding.

5. The point is obvious—if Rule 16 discovery *automatically* barred disclosure, dissemination, or otherwise from becoming a public record and was already sealed from the onset, then this statute is superfluous and unnecessary.
6. Further, Counsel has participated in numerous cases in which the State seeks a protective order and at times, the Defendant does as well. This comes up frequently in competency evaluations, investigations that are ongoing in other cases, confidential informant cases, police body cameras of multiple defendants, and sensitive photos.
7. Counsel is prepared to work in good faith with the State on any request it has to bar completely confidential or otherwise sensitive information and documentation from being disclosed to third parties or even matters for attorney's eyes only. Certainly, autopsy photos, mental health records of anyone unless expressly waived by the patient, and any information regarding the victim the State wishes to protect would be ripe for such an agreement.
8. The point of this Motion though is to remove doubt or reinforce whether or not the Petitioner/Defendant Mr. Zach Adams has any ability to share discovery materials and further, whether this counsel (with approval from the Defendant) has any limitation on the same absent some forthcoming agreed order.

WHEREFORE, premises considered, the Petitioner/Defendant respectfully requests that this Court enter an Order:

1. Stating whether or not there is a blanket provision barring dissemination of all matters received in discovery by the Defendant/Petitioner Mr. Adams or produced on Mr. Adams' behalf by his agents and/or Counsel.

2. Assuming the Defendant is not barred from disseminating discover to who he sees fit, then set a hearing on what matters in discovery should be subject to a forthcoming protective order.
3. For such further and general relief to which Mr. Adams and his counsel requests regarding the issues presented above.

RESPECTFULLY SUBMITTED:

DOUGLAS THOMPSON BATES, IV (#027089)
ATTORNEY FOR ZACHARY RYE ADAMS
BATES & BATES LAW OFFICE
406 W. PUBLIC SQ., 2ND FLOOR, BATES BUILDING
P.O. BOX 1
CENTERVILLE, TN 37033
TEL: 931-729-4085 FAX: 931-729-9888
EMAIL: dtbates4@bates.law

NOTICE

THIS MOTION IS SET TO BE HEARD ON APRIL 17TH, 2024 AT 9:00 A.M. ON THE CIRCUIT COURT MOTION DOCKET HEARD AT THE HARDIN COUNTY COURTHOUSE IN SAVANNAH, TENNESSEE.

CERTIFICATE OF SERVICE

The undersigned certifies that he has on the 9 day of APRIL 2024, sent a true and correct copy of the following to the person(s) listed below in compliance with the Tennessee Rules of Civil Procedure, Rules 5 and/or 5A, by the following indicated method(s):

Jennifer Nichols
District Attorney General
18th Judicial District
113 West Main Street, 3rd Floor
Gallatin, TN 37066

☐U.S.P.S., first-class postage pre-paid
☐ Via Fax
☑ Via Email
☐ Hand-delivery by:
☐ Certified Mail, Return Receipt Requested

DGTBJ

DOUGLAS THOMPSON BATES, IV

TJOFLAT, Circuit Judge:

I.

On May 23, 1985, a federal grand jury in the Middle District of Florida returned a forty-five count, 166-page indictment against thirty defendants. The indictment charged that the Board of County Commissioners of Hillsborough County, Florida was an "enterprise" within the meaning of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961-1968 (1982), and that the defendants, who included three county commissioners and various construction contractors, real estate developers, suppliers, and lawyers, conspired to conduct and did conduct the affairs of the board through a pattern of bribery. In essence, the indictment alleged that a significant portion of local government in Hillsborough County had been corrupted.

Although the indictment named several participants in the acts of bribery who were not indicted, it also made references to participants who were neither indicted nor named. Most of the defendants filed motions for a bill of particulars that would identify those unnamed and unindicted participants, and some of the defendants also filed motions for pretrial notice of the Government's intention to use "similar act" evidence under Fed.R.Evid. 404(b). Those motions were granted by a magistrate.

In compliance with the magistrate's order, the Government filed a bill of particulars and a notice of possible similar acts evidence, but at the same time made *in camera ex parte* motions to seal the two documents. The motions to seal were granted by the district court, which, relying primarily on *United States v. Briggs,* 514 F.2d 794 (5th Cir. 1975), found that the publication of the names and possible similar acts evidence might stigmatize the "unindicted co-conspirators" as criminals without the opportunity for vindication.

In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

The bill of particulars and the notice of similar acts evidence filed by the Government never appeared on the court's docket. The motions to seal and the district court's orders sealing those documents also did not appear on the court's docket. And no hearings were held to consider the motions to seal. In short, nothing in the public record indicated that any action had been taken relating to the magistrate's order compelling a bill of particulars and notice of similar acts evidence.

Only through the keen observation of a reporter for *The Tampa Tribune* did the paper's publisher, The Tribune Company (Tribune), suspect that certain documents marked "in camera" delivered to the office of the clerk by the United States Attorney

EX 1.

were the bill of particulars and notice of similar acts and that the court had sealed them. The Tribune then filed a petition for access requesting copies of (1) any motions or memoranda filed seeking production of a bill of particulars *in camera;* (2) notices of hearing regarding the sealing of the bill of particulars; (3) transcripts of any hearing held to determine whether the bill was to be sealed; and (4) any orders issued by the court limiting public access to the bill of particulars or to other documents. The Tribune also requested a hearing on its petition.

The district court, finding a hearing to be unnecessary, granted the Tribune's petition for access and released two *in camera* orders in which the court had directed the sealing of the bill of particulars and the notice of similar acts evidence. The court noted that when it issued the orders it had considered the balancing test required by *Newman v. Graddick,* 696 F.2d 796 (11th Cir. 1983), and had determined that the factors in favor of sealing the court documents outweighed the presumption in favor of access to judicial records. The court, however, declined to reveal the Government's motions to seal, stating that "they reveal in part the sealed information and thus releasing the motions would frustrate the Court's Order."

Subsequently, the Tribune filed a second petition for access in which it sought the release of both the bill of particulars and the notice of similar acts evidence; it also renewed its request for the Government's motions to seal those documents and for a hearing. The Tribune argued that the public's constitutional and common law rights to judicial documents outweighed the Government's interest in protecting the due process rights of unindicted participants. The district court denied the petition. Relying on the balancing test of *United States v. Briggs,* 514 F.2d 794 (5th Cir. 1975), the court found that both the harm to persons named in the bill of particulars as "unindicted co-conspirators" and the harm to individuals named in the notice of similar acts evidence outweighed "the public's interest in learning the information before trial."

The Tribune has appealed the district court's order.

II.

Rule 404(b) of the Federal Rules of Evidence provides that evidence of other crimes, wrongs, or acts may be admissible to prove, among other things, motive, opportunity, and intent. Although it is obviously advantageous for defense counsel to determine before trial whether the prosecutor intends to offer similar acts evidence, the rule does not require the government to give notice of its intent to introduce such evidence. 2 J. Weinstein M. Berger, *Weinstein's Evidence* ¶ 404[19] (1985). The absence of a mandatory notice requirement does not, however, preclude the prosecution from voluntarily giving notice of similar acts evidence. *Id.* Nor is the trial judge prevented

from requiring disclosure of similar acts evidence in compliance with a pretrial Omnibus Hearing procedure consented to by the parties. *See United States v. Jackson,* 621 F.2d 216, 220 (5th Cir. 1980); *see also* 2 A.B.A., Standards for Criminal Justice ch. 11 (2d ed. 1980); Clark, *The Omnibus Hearing in State and Federal Courts,* 59 Cornell L.Rev. 761 (1974). A defense motion for pretrial notice of similar acts evidence is thus merely akin to a request for voluntary discovery.

In this case, when the Government filed the notice of possible similar acts evidence along with a motion to seal the document, it, in effect, had voluntarily agreed to provide the information on the condition that the defendants not reveal the notice's contents to the public or to the press. Simply because the Government filed the notice in compliance with a court order does not make the notice information something other than voluntary discovery. The question then becomes whether the Tribune is entitled to view a discovered document describing possible similar acts evidence.

The defendants' motion for notice of similar acts evidence cannot be regarded properly as a Fed.R.Crim.P. 12 motion requesting discovery under Fed.R.Crim.P. 16, because similar acts evidence does not fall within the categories of information — such as documents and tangible objects — that the government must furnish upon the defendant's request.

The Supreme Court has stated that the "First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." *Branzburg v. Hayes,* 408 U.S. 665, 684, 92 S.Ct. 2646, 2658, 33 L.Ed.2d 626 (1972) (plurality) (citations omitted); *see also Pell v. Procunier,* 417 U.S. 817, 833-34, 94 S.Ct. 2800, 2810, 41 L.Ed.2d 495 (1974). Thus, the press' right of access to discovered material turns on the public's right of access.

Discovery is neither a public process nor typically a matter of public record. Historically, discovery materials were not available to the public or press. *See Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 32-34, 104 S.Ct. 2199, 2207-08, 81 L.Ed.2d 17 (1984) (pretrial interrogatories and depositions "were not open to the public at common law"); *Gannett Co. v. DePasquale,* 443 U.S. 368, 396, 99 S.Ct. 2898, 2914, 61 L.Ed.2d 608 (1979) (Burger, C.J., concurring) ("[I]t has never occurred to anyone, so far as I am aware, that a pretrial deposition or pretrial interrogatories were other than wholly private to the litigants."). Moreover, documents collected during discovery are not "judicial records." Discovery, whether civil or criminal, is essentially a private process because the litigants and the courts assume that the sole purpose of discovery is to assist trial preparation. That is why parties regularly agree, and courts often order, that discovery information will remain private. Marcus, *Myth and Reality in Protective Order Litigation,* 69 Cornell L.Rev. 1, 15 (1983).

If it were otherwise and discovery information and discovery orders were readily available to the public and the press, the consequences to the smooth functioning of the discovery process would be severe. Not only would voluntary discovery be chilled, but whatever discovery and court encouragement that would take place would be oral, which is undesirable to the extent that it creates misunderstanding and surprise for the litigants and the trial judge. Litigants should not be discouraged from putting their discovery agreements in writing, and district judges should not be discouraged from facilitating voluntary discovery.

Here, the district court, in denying the Tribune's petition for access to the government's notice of similar acts evidence, merely refused to allow the Tribune access to a document not a matter of public record. *See United States v. Gurney,* 558 F.2d 1202, 1208 (5th Cir. 1977), *cert. denied,* 435 U.S. 968, 98 S.Ct. 1606, 56 L.Ed.2d 59 (1978). It follows that the district court did not err when it sealed the notice or when it denied the public and the Tribune a hearing before the document was sealed. We need not address the issue of whether a trial court must articulate reasons for denying access to material that cannot be characterized as a court document and is not a matter of public record, because the judge in this case did articulate reasons for denial.

"[I]t is unreasonable to require a district judge to hold hearings and to issue special orders with respect to every request he is presented with by the press during the course of a long trial." *United States v. Gurney,* 558 F.2d 1202, 1211 n. 15 (5th Cir. 1977), *cert. denied,* 435 U.S. 968, 98 S.Ct. 1606, 56 L.Ed.2d 59 (1978).

III.

The purpose of a true bill of particulars is threefold: "to inform the defendant of the charge against him with sufficient precision to allow him to prepare his defense, to minimize surprise at trial, and to enable him to plead double jeopardy in the event of a later prosecution for the same offense." *United States v. Cole,* 755 F.2d 748, 760 (11th Cir. 1985) (citations omitted); *see also* 8 J. Moore, *Moore's Federal Practice* ¶ 7.06[1] (2d ed. 1986). A bill of particulars, properly viewed, supplements an indictment by providing the defendant with information *necessary* for trial preparation. Generalized discovery, however, is not an appropriate function of a bill of particulars and is not a proper purpose in seeking the bill. *United States v. Colson,* 662 F.2d 1389, 1391 (11th Cir. 1981).

To allow the bill of particulars to serve as a wholesale discovery device would actually frustrate the federal discovery rule. Rule 16(b)(2) of the Federal Rules of Criminal Procedure states that the rule "does not authorize the discovery or inspection of . . . statements made . . . by government . . . witnesses, or by prospective

government . . . witnesses." A defendant who desires a list of government witnesses — or "unindicted co-conspirators" — could thus bypass the Rule 16(b) restriction on discovery by asking for and receiving a "bill of particulars" pursuant to Fed.R.Crim.P. 7(f), which simply provides that "[t]he court may direct the filing of a bill of particulars." Because a defendant has no right to obtain a list of witnesses by simply calling his request a "bill of particulars," *see United States v. Pena,* 542 F.2d 292, 294 (5th Cir. 1976), we decline to apply a mechanical rule whereby a bill of particulars is automatically accorded the status of a supplement to an indictment.

We are aware that the Third Circuit, when interpreting Rule 7(f) of the Federal Rules of Criminal Procedure, recently found that bills of particulars "were regarded by the drafters of the rules as supplements to the indictment rather than as pretrial discovery." *United States v. Smith,* 776 F.2d 1104, 1111 (3d Cir. 1985) (footnote omitted). We are not persuaded, however, that Rule 7(f) compels that conclusion.

Thus, for the reasons presented in our discussion of the notice of similar acts evidence, a bill of particulars that merely facilitates voluntary discovery is not a court document the public and press are entitled to view. A request for a list of "unindicted co-conspirators," so called, is a discovery request that is not a matter of public record and cannot be made a matter of public record by simply attaching to it the label "bill of particulars." The public and press are also not entitled to demand a hearing on whether a "discovery bill" should be sealed. Finally, it should be noted that the district court's refusal to allow the Tribune to inspect the sealed notice of similar acts evidence and the sealed bill of particulars in no way restricted the Tribune from independently obtaining the information contained in the documents by employing its own investigative techniques.

Simply because a bill of particulars may be "a proper procedure for discovering the names of unindicted coconspirators who the government plans to use as witnesses," *United States v. Barrentine,* 591 F.2d 1069, 1077 (5th Cir.), *cert. denied,* 444 U.S. 990, 100 S.Ct. 521, 62 L.Ed.2d 419 (1979), such a "discovery bill" is not entitled to the status of a public document, as is, for example, an indictment.

The district court's order sealing the notice of similar acts evidence and the bill of particulars is, accordingly,

AFFIRMED.