TENNESSEE
CRIMINAL PROCEDURE

(THE TEN MOST FREQUENTLY USED RULES)

Tennessee Judicial Academy
Thursday, August 22, 2013
Judge Chris Craft
Criminal Court Division VIII
30th Judicial District at Memphis

1. TRCP 5.1 – PRELIMINARY EXAMINATION

a. Limited in purpose and scope

"It is unnecessary for the magistrate to hear more of the state's proof than is necessary to establish probable cause, and the magistrate may terminate the hearing at any time that probable cause has been established and the accused has been afforded the opportunity to cross-examine the witnesses called by the state and to present defense proof reasonably tending to rebut probable cause. There is no right of the accused to call as witnesses all of the state's witnesses and question them. The magistrate may permit the accused to call witnesses summoned by the state, if in the exercise of a sound discretion the magistrate determines such testimony to be of use to the magistrate in determining probable cause, or the absence thereof. To repeat, the scope of the hearing is under the control of the magistrate, in the exercise of a sound discretion and governed by principles of fundamental fairness. The purpose of the hearing is to adjudicate the existence or absence of probable cause, and not to discover the state's case." Advisory Commission Comments.

b. State must act in good faith

The State cannot, in bad faith, try to deprive defendant of his or her hearing by intentionally not putting on enough proof, putting on only proof that is objectionable (hearsay, etc.), or proof that is constitutionally suspect. While a preliminary hearing is not constitutionally required, it is a critical stage of a criminal prosecution mandated by statutory law and is an adversary proceeding at which the usual rules of evidence apply (except that Rule 5.1 does allow hearsay documentary proof of ownership and written reports of expert witnesses). *See Moore v. State*, 578 S.W.2d 78, 80 (Tenn. 1979) (citing *Coleman v. Alabama*, 399 U.S. 1, 90 S. Ct. 1999, 26 L. Ed. 2d 387(1970); *Waugh v. State*, 564 S.W.2d 654 (Tenn. 1978); *McKeldin v. State*, 516 S.W.2d 82 (Tenn. 1974)). As an example of the "bad faith" rule, when the State in bad faith failed to oppose a motion to suppress in a preliminary hearing, and then presented the case to the grand jury for indictment, thereby depriving the defendant of a preliminary hearing, the resultant indictment was dismissed. *State v. Golden*, 941 S.W.2d 905 (Tenn. Crim. App. 1996).

c. Duty to record proceedings

The Rule requires that preliminary hearing proceedings "be preserved by electronic recording or its equivalent" and "be made available for listening to by the defendant or defendant's counsel to the end that they may be apprized of the evidence introduced upon the preliminary examination." However, failure to preserve that recording may be found to be harmless error. *State v. Butts*, 640 S.W.2d 37, 38 (Tenn. Crim. App. 1982); *see also State v. Carter*, 970 S.W.2d 509, 511-12 (Tenn. Crim. App. 1997); *State v. Bohanan*, 745 S.W.2d 892, 896 (Tenn. Crim. App. 1987). The Rule contains no sanctions if the preliminary hearing tape turns up missing, but the state is required to turn it over to the defendant if it is in the state's possession. *Carter*, *supra*, at 511.

2. **TRCP 8, 13 & 14 – JOINDER, CONSOLIDATION & SEVERANCE**

IF BY CONSENT, MAKE A CLEAR RECORD

> Although the prosecution stated that the parties had an informal understanding that the indictments would be tried together, the simple fact is that the record does not reflect that the prosecution made a written or oral motion for consolidation prior to trial or that the parties had entered into an agreed order of consolidation prior to the first day of trial. *See Spicer v. State*, 12 S.W.3d 438, 444 n.6 (Tenn. 2000) (indicating that a motion for consolidation should be filed "sometime earlier than the day of the trial when the jury is waiting in the hall"). Because of the prosecution's tardiness in moving to consolidate the indictments, the State must share responsibility with the defendant for the absence of a clear agreement and the lack of clarity in the record. that the indictments are consolidated if by consent.

State v. Toliver, 117 S.W.3d 216, 227 (Tenn. 2003).

WHICH RULE DO YOU USE? WHOSE BURDEN? WHAT STANDARD?

> The holding in *State v. Dotson*, 254 S.W.3d 378, 386-87 (Tenn. 2008):
>
> In order to consolidate separate indictments under Rule 8(b) of the Tennessee Rules of Criminal Procedure, the offenses need only be "of the same or similar character," an easily achievable standard in many instances. Tenn. R. Crim. P. 8(b)(2). A defendant, however, has a right under Rule 14(b)(1) of those rules to the "severance of offenses permissively joined [under Rule 8(b)(2)], unless the offenses are parts of a common scheme or plan and the evidence of one offense 'would be admissible upon the trial of the others.'" *Spicer v. State*, 12 S.W.3d 438, 443 (Tenn. 2000) (quoting Tenn. R. Crim P. 14(b)(1)).
> In *Spicer*, we confirmed that "when a defendant objects to a pre-trial consolidation motion by the state, the trial court must consider the motion by the severance provisions of Rule 14(b)(1) [of the Tennessee Rules of Criminal Procedure], not the 'same or similar character' standard of Rule 8(b)." *Id.* "The primary inquiry into whether a severance should have been granted under Rule 14 is whether the evidence of one crime would be admissible in the trial of the other if the two counts of indictment had been severed." *State v. Burchfield*, 664 S.W.2d 284, 286 (Tenn. 1984). When there is an objection to a motion to consolidate, the State bears the burden of producing evidence to establish that the consolidation is proper. *State v. Toliver*, 117 S.W.3d 216, 228 (Tenn. 2003) (citing Spicer, 12 S.W.3d at 447).
> The procedure is well established. Before a trial court may deny a severance request, it must hold a hearing on the motion and conclude from the evidence and argument presented at the hearing that (1) the multiple offenses constitute parts of a common scheme or plan; 6 (2) evidence of one of the offenses is relevant to some material issue in

the trial of the other offenses; and (3) the probative value of the evidence of the other offenses is not outweighed by the prejudicial effect that admission of the evidence would have on the defendant. *Spicer*, 12 S.W.3d at 445; *see also* Tenn. R. Evid. 404 (b)(3).

***STATE v. JEREMY GARRETT*, 331 S.W.3d 392 (Tenn. 2011)**

Recently, our Supreme Court revisited the issues of which rule applies, who has the burden of proof and the duties of the trial court. In *Garrett*, the defendant committed an aggravated robbery on March 28, 2004. The next day, he committed another aggravated robbery; however, during the second robbery, the victim was shot and killed. In July 2004, the Grand Jury indicted the defendant for the first aggravated robbery. In September 2004, the Grand Jury indicted the defendant for felony murder and especially aggravated robbery. Months later, the State moved to consolidate the indictments "on the grounds that the offenses charged constitute parts of a common scheme or plan and/or the offenses charge are of the same or similar character." The defendant objected to the consolidation. Without holding an evidentiary hearing, the trial court granted the State's motion. The trial court's order granting the State's motion simply stated, "the offenses charged in the captioned indictments constitute parts of a common scheme or plan and/or the offense charged are of the same or similar character." The defendant was convicted on all counts.

In reversing the decision of the trial court, our Supreme Court took the "opportunity to emphasize, once again, the proper procedure." Again, the Court reminded us that

> Where the State initially seeks to consolidate separate indictments, it must establish only one thing: that the offenses are *either* (1) "parts of a common scheme or plan," *or* (2) that the offenses are "of the same or similar character." Tenn. R.Crim. P. 8(b). *See also Spicer,* 12 S.W.3d at 443. If the defendant objects to the consolidation of offenses that would otherwise be permissible under Rule 8(b), however, the offenses may *not* be tried together unless *two* criteria are met: (1) "the offenses are parts of a common scheme or plan *and* " (2) "the evidence of one would be admissible in the trial of the others." Tenn. R.Crim. P. 14(b)(1) (emphasis added). *See also Denton,* 149 S.W.3d at 12–13. "Consequently, when a defendant objects to a pre-trial consolidation motion by the [S]tate, the trial court must consider the motion by the severance provisions of Rule 14(b)(1), not the ... [provisions] of Rule 8(b)." *Spicer,* 12 S.W.3d at 443. Therefore, where a defendant seeks to prevent the consolidation of offenses,
>
> > the "primary issue" to be considered ... is whether evidence of one offense would be admissible in the trial of the other[s] if the ... offenses remained severed. *See State v. Burchfield,* 664 S.W.2d 284, 286 (Tenn.1984). In its most basic sense, therefore, any question as to whether offenses should be tried separately pursuant to Rule 14(b)(1) is "really a question of evidentiary relevance." *State v. Moore,* 6 S.W.3d 235, 239 (Tenn.1999); *see also Shirley,* 6 S.W.3d at 248.
>
> *Spicer,* 12 S.W.3d at 445.

The Court also reminded us that

> If the State seeks the consolidation of offenses under Rule 13(a) and the defendant objects, "the prosecution bears the burden of producing evidence to establish that consolidation is proper." *Toliver,* 117 S.W.3d at 228 (citing *Spicer,* 12 S.W.3d at 447). And, the trial court *must* hold a hearing in order to gather the information necessary to adjudicate the issue:
>
> > Before consolidation is proper, the trial court must conclude from the evidence and arguments presented at the hearing that: (1) the multiple offenses constitute parts of a common scheme or plan, Tenn. R.Crim. P. 14(b)(1); (2) evidence of [one] offense is relevant to some material issue in the trial of all the other offenses, Tenn. R. Evid. 404(b)(2); *Moore,* 6 S.W.3d at 239; and (3) the probative value of the evidence of other offenses is not outweighed by the prejudicial effect that admission of the evidence would have on the defendant, Tenn. R. Evid. 404(b)(3).
>
> *Spicer,* 12 S.W.3d at 445 (as clarified by *Dotson,* 254 S.W.3d at 386 n. 5). *See also Dotson,* 254 S.W.3d at 387 (recognizing that the procedure a trial court must follow upon a defendant's request that offenses be severed is "well established" and includes the requirement of an evidentiary hearing). Given the analysis that a trial court must undertake in order to determine whether separate offenses may be consolidated for trial over the defendant's objection, the necessity of a hearing is obvious. Moreover, by holding a hearing and issuing findings of fact and conclusions of law, a trial court ensures that, on review, the appellate courts will have an adequate record from which to determine whether the trial court erred upon an allegation that it improperly consolidated offenses. *See Spicer,* 12 S.W.3d at 445. Accordingly, we emphasize both the need for a hearing and the equally important requirement that the trial court support its ensuing ruling with findings of fact and conclusions of law. *See id.*

State v. Garrett, 331 S.W.3d 392, 403 (Tenn. 2011).

MANDATORY JOINDER OF OFFENSES

All crimes based on the same conduct, or arising from the same criminal episode known to the state within the jurisdiction, must be tried at the same time, unless severed pursuant to Rule 14. For example, when six men are robbed at the same time in the same place, the state can't try the defendant for each robbery in a separate trial. *See Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). *See also State v. Ramsey*, 903 S.W.2d 709, 713 (Tenn. Crim. App. 1995) for other cases and examples of offenses consolidated or "merged," and the proper analysis for the court to follow, and *State v. Hall*, 976 S.W.2d 121, 146 (Tenn. 1998) for a good discussion of this topic.

All crimes arising from the same incident that are not lesser included offenses of another crime charged in the indictment must be charged in separate counts of that indictment (or

separate indictments tried at the same time.) Failure to do so precludes the state from later retrying the defendant for crimes not charged in the original indictment. *State v. Gilliam*, 901 S.W.2d 385, 389 (Tenn. Crim. App. 1995).

PERMISSIVE JOINDER OF OFFENSES

Crimes separated by time which constitute parts of a common scheme or plan or are of the same or similar character may be tried at the same time. However, before two offenses may be joined under TRCP 8(b), TRCP 14(b) requires that the judge find that Tenn. R. Evid. 404(b) is complied with procedurally. Generally, evidence of other crimes is inadmissible because the evidence lacks relevance and may lead the jury to make an improper inference of guilt. *State v. Hallock*, 875 S.W.2d 285, 290 (Tenn. Crim. App. 1993). However, such evidence is relevant if admitted to show motive, intent, guilty knowledge, identity, absence of mistake or accident, or "a common scheme or plan for commission of two or more crimes so related to each other that proof of one tends to establish the other." *State v. Hoyt*, 928 S.W.2d 935, 944 (Tenn. Crim. App. 1995); *State v. Edwards*, 868 S.W.2d 682, 691 (Tenn. Crim. App. 1993); *But cf. State v. Hallock*, *supra*, at 292 (finding that the mere existence of a common scheme or plan is not a proper justification for admitting evidence of other crimes); *State v. Shirley*, 6 S.W.3d 243 (Tenn. 1999) (the use of a black ski mask, gloves and a gun is simply not so unusual that would be distinct modus operandi making them signature crimes.) .

In order to determine whether the evidence falls under any of these exceptions, the judge must hold a pre-trial hearing. Following the hearing, the judge must state the reason for allowing the evidence and then must conduct a balancing test weighing the probative value of the evidence against its unfair prejudicial effect. Tenn. R. Evid. 404(b). *See also State v. McKnight*, 900 S.W.2d 36, 51 (Tenn. Crim. App. 1994). Making a good record is especially important in cases involving sexual offenses, as proof of other sex crimes is always extremely prejudicial. *See*, *i.e.*, *State v. Hoyt*, 928 S.W.2d 935, 944 (Tenn. Crim. App. 1995), finding consolidation to be error because the times of sex abuse offenses were too vague, and *State v. Schaller*-975 S.W.2d 313, 319 (Tenn. Crim. App. 1997), upholding consolidation because the facts were so similar.

DEFINITION OF "COMMON SCHEME OR PLAN" AND "CONTINUING PLAN OR CONSPIRACY"

State v. Hoyt, 928 S.W.2d 935, 943 (Tenn. Crim. App. 1995) describes the three types of common scheme or plan evidence, "signature crimes," "continuing plan or conspiracy" and "same transaction" crimes, defining and elaborating on each one with cases cited. "Signature crimes" is discussed in some detail in *State v. Moore*, 6 S.W.3d 235, 239-40 (Tenn. 1999).

State v. Denton, 149 S.W.3d 1 (Tenn. 2004, rejects the state's "continuing plan or conspiracy theory" as a reason to consolidate multiple sexual offenses-

> Consolidation of multiple offenses against a single defendant for a single trial is governed by Rules 8, 13, and 14 of the Tennessee Rules of Criminal Procedure. The interaction of these rules has been previously analyzed by this Court in a recent line of cases. *See State v. Toliver*, 117 S.W.3d 216 (Tenn. 2003) (involving a defendant charged with child abuse in two separate indictments, with the trial court consolidating these indictments for a

single trial); *Spicer v. State*, 12 S.W.3d 438 (Tenn. 2000) (defendant charged under two separate indictments which were consolidated in a single trial); *State v. Moore*, 6 S.W.3d 235 (Tenn. 1999) (involving a single indictment charging multiple offenses, with the defendant requesting that certain offenses be severed and tried separately); *State v. Shirley*, 6 S.W.3d 243 (Tenn. 1999) (defendant charged with multiple offenses in single indictment and requested offenses be tried separately).” .... “Turning to the first part of the test under Rule 14(b), there are three types of common scheme or plan evidence: (1) offenses that reveal a distinctive design or are so similar as to constitute "signature" crimes; (2) offenses that are part of a larger, continuing plan or conspiracy; and (3) offenses that are all part of the same criminal transaction. Shirley, 6 S.W.3d at 248 .” .... “We have previously held that the test for finding "signature" crimes is "'not whether there was evidence that a defendant committed both crimes, but whether there was a unique method used in committing the crimes.'" *Moore*, 6 S.W.3d at 241 (quoting *Young v. State*, 566 S.W.2d 895, 898 (Tenn. Crim. App. 1978)) . Under such circumstances, "'the modus operandi employed must be so unique and distinctive as to be like a signature.'" *Id*. at 240 (quoting *State v. Carter*, 714 S.W.2d 241, 245 (Tenn. 1986)) . The evidence of the other offenses must have such unusual particularities and be "'so unique that proof that the defendant committed the other offense fairly tends to establish that he also committed the offense with which he is charged.'" *Id*. (quoting *Bunch v. State*, 605 S.W.2d 227, 231 (Tenn. 1980)) . However, simply because the defendant may have committed a series of crimes "'does not mean that they are part of a common scheme or plan.'" Id. at 231 (quoting *State v. Peacock*, 638 S.W.2d 837, 840 (Tenn. Crim. App. 1982)) .” .... “even assuming arguendo that these offenses were all "signature crimes," they still could not be consolidated unless evidence of one was admissible upon the trial of the others. Tenn. R. Crim. P. 14(b)(1). Indeed, we have previously held that when the theory of common scheme or plan is grounded upon a distinctive design or "signature" crime, usually the only reason to allow admission of other offenses is to establish the identity of the defendant. *Moore*, 6 S.W.3d at 239 . In the case before us identity is not an issue. Therefore, instead of using the signature crime theory to establish that the defendant was the perpetrator of the crimes, the State apparently sought consolidation of the offenses simply in an effort to bolster the testimony of each individual victim through the accumulated testimony concerning other unrelated allegations.” .... “The State also argues, for the first time in this Court, that the defendant's acts constitute a common scheme or plan because they are part of a larger, continuing plan or conspiracy. Although the crimes all involved sexual misconduct and contained some similarities, a larger, continuing plan or conspiracy "involves not the similarity between the crimes, but [rather] the common goal or purpose at which they are directed." *State v. Hoyt*, 928 S.W.2d 935, 943 (Tenn. Crim. App. 1995) overruled on other grounds, *Spicer*, 12 S.W.3d at 447 . The State submits that the defendant's acts were part of a larger plan that had one single goal-that of achieving sexual release. The argument that sex crimes can be construed as part of a continuing plan or conspiracy merely by the fact that they are committed for sexual gratification has previously been rejected. *See Moore*, 6 S.W.3d at 240 (stating that two offenses of child rape do not create a larger conspiracy); *State v. Hallock*, 875

S.W.2d 285, 290 (Tenn. Crim. App. 1993) (holding that mere fact that crimes were committed for sexual gratification is insufficient to constitute a continuing plan or conspiracy). A larger plan or conspiracy in this context contemplates crimes committed in furtherance of a plan that has a readily distinguishable goal, not simply a string of similar offenses.

SEVERANCE OF DEFENDANTS

TRCP 14(c)(2) dictates that the judge should sever defendants before trial if it is deemed necessary to protect a defendant's right to a speedy trial (*i.e.*, when one defendant needs a continuance and another has been in jail a long time) or it is deemed appropriate to promote a fair determination of the guilt or innocence of one or more defendants. The judge may sever during trial with consent of the defendant to be severed.

"The test to be applied by this Court in determining whether the trial court abused its discretion is whether the Defendant was "clearly prejudiced."" *State v. Dotson*, 254 S.W.3d 378, 390-91.Similarly, the state is entitled to have the guilt determined and punishment assessed in a single trial where two or more persons are charged jointly with a single crime, unless to do so would unfairly prejudice the rights of the defendants. *State v. Howell*, 34 S.W.3d 484, 491 (Tenn. Crim. App. 2000).

i. **Inconsistent pleas**

In *Goosby v. State*, 917 S.W.2d 700, 704-05 (Tenn. Crim. App. 1995), the issue of whether to sever when one co-defendant intends to plead guilty in front of the jury, without a plea-bargain agreement, is discussed, with a list of cases.

ii. ***Bruton* problems**

Under TRCP 14(c), a defendant may request severance if the co-defendant's statement refers to the defendant, but is inadmissible against him (*Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), holding the admission of a co-defendant's confession implicating the defendant in a joint trial violates the defendant's constitutional right of confrontation.) In such a case, the judge must either exclude the statement, delete references to the defendant (redaction) in order to hold a joint trial, or grant a severance. A motion to sever is discretionary with the trial court, and the court's decision will not be reversed unless it clearly prejudiced the defendant. *State v. Hutchison*, 898 S.W.2d 161, 166 (Tenn. 1994), citing *State v. Coleman*, 619 S.W.2d 112, 116 (Tenn.1981).

Although former law held that if two confessions were "interlocking," they were both admissible against each defendant even if one or both failed to testify, *Cruz v. New York*, 481 U.S. 186, 193, 107 S. Ct. 1714, 1719 (1987) has eliminated the "interlocking" confession exception, reasoning that a co-defendant's confession may be "devastating" to the defendant and violative of the Confrontation Clause, even if it overlaps material facts in a confession made by the defendant. Therefore, "where a non-testifying co-defendant's confession incriminating the defendant is not directly admissible against the defendant, ... the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him." *King v. State*, 989 S.W.2d 319, 328-29 (Tenn. 1999).

iii. **Mutually antagonistic defenses or different evidence**

"While 'mutually antagonistic' defenses may mandate severance in some circumstances, they are not prejudicial per se. Due to the difficulty in establishing prejudice, relatively few convictions have been reversed for failure to sever on these grounds. Mere attempts to cast the blame on the other will not, standing alone, justify a severance on the grounds that the respective defenses are antagonistic. The defendant must go further and establish that a joint trial will result in compelling prejudice, against which the trial court cannot protect, so that a fair trial cannot be had." *State v. Ensley*, 956 S.W.2d 502, 509 (Tenn. Crim. App. 1996).

Disparity in the evidence against the defendants is not alone sufficient to warrant the grant of a severance. *State v. Howell*, 34 S.W.3d 484, 491 (Tenn. Crim. App. 2000), cited in *State v. Mickens*, 123 S.W.3d 355, 382-83 (Tenn. Crim. App. 2003).

SEVERANCE OF OFFENSES

See **Permissive Joinder of Offenses**, and **Definition of "Common Scheme or Plan"** above. TRCP 14(b) mandates that a defendant's offenses be severed unless 1) the offenses are part of a common scheme or plan ***and*** 2) evidence of one is admissible against the other in the state's case in chief. If the offenses are already consolidated in an indictment, the defendant has the burden of showing they should be severed. If the offenses are contained in separate indictments, the state has the burden of showing they should be consolidated.

While severance of defendants is ordinarily a matter which rests within the sound discretion of the trial court, that general rule is not necessarily applicable to the severance *of* offenses. To qualify as "parts of a common scheme or plan" and be joined for a single trial, the offenses must be so similar in modus operandi and occur within such relative close proximity in time and location to each other that there can be little doubt that the offenses were committed by the same person. First the offenses must appear to constitute a common scheme or plan. Secondly, the circumstances must fall within the exception to the general rule prohibiting evidence of other crimes (Tenn. R. Evid. 404(b)) in that they are so related to each other that proof of one tends to establish the others. *State v. McKnight*, 900 S.W.2d 36, 50 (Tenn. Crim. App. 1994).

3. TRCP 12(b, f) – MOTIONS WHICH MUST BE RAISED PRIOR TO TRIAL

The following must be raised prior to trial: (1) Defenses and objections based on defects in the institution of the prosecution, (2) non-jurisdictional defects in the indictment, (3) motions to suppress, (4) requests for discovery, and (5) requests for severance or consolidation. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial constitutes a waiver, but the court for cause shown may grant relief from the waiver. In *State v. Putt*, 955 S.W.2d 640, 647-8 (Tenn. Crim. App. 1997), the trial judge refused to hear an otherwise valid motion to suppress on the day of trial, and was affirmed.

4. TRCP 12.2 NOTICE OF MENTAL DEFENSE

If a defendant intends to rely upon the defense of insanity, the defendant must file a written notice of that intention. If this is not done timely the defense of insanity can't be raised.

Notice of any expert witnesses must also be filed "relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of his or her guilt," short of insanity.

After the notice is served on the state, the judge may order a mental exam at state request, and the defendant does not have the right to an attorney during the exam. The state is not limited to a single expert or a single exam. *State v. Martin*, 950 S.W.2d 20, 21-22 & n. 2 (Tenn. 1997). Any statements of the defendant, or "fruits" of the evaluation, may be used by state only for impeachment or rebuttal of a mental defense offered. If the defendant fails to give notice when required, or refuses to submit to an examination when ordered, the judge may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant's mental condition. If the defendant withdraws a mental defense prior to trial, the notice is not admissible in the trial.

In a death penalty case, *see State v. Reid*, 981 S.W.2d 166, 174 (Tenn. 1998) for the proper procedure for regulating discovery and possible psychological mitigation proof in the sentencing phase. In *Buchanan v. Kentucky*, 483 U.S. 402, 107 S. Ct. 2906, 97 L. Ed. 2d 336 (1987), it is suggested that the evidence gained by the state in its mental exam of the defendant may be used only to rebut or impeach defendant's proof, and if it is the only means of doing so; it may not include incriminating statements about the crime; and it must not exceed the scope of the purpose for which the evaluation was requested. To this extent a defendant has waived the privilege against self-incrimination by requesting the examination. *State v. Thompson*, 768 S.W.2d 239, 248 (Tenn. 1989). When a capital defenant asserts a mental defense, he waives the right to raise a 5th amendment challenge to the state's use of evidence obtained through the psych evidence to rebut the defense. *State v. Bush*, 942 S.W.2d 489, 502 (Tenn. 1997).

5. **TRCP 16 – DISCOVERY AND INSPECTION**

THE STATE MUST TURN OVER:

a. **Defendant's statements**

i. **Written or recorded statements of defendant** if within possession, custody or control of the state, the existence of which is known, or may become known, to the prosecutor.

The state has a duty to ask all witnesses. *State v. Davis*, 823 S.W.2d 217, 219 (Tenn. Crim. App. 1991).

ii. **Oral statement of defendant** if to be offered at trial in response to interrogation by a police officer.

State v. Black, 745 S.W.2d 302, 307 (Tenn. Crim. App. 1987). Includes written summaries, interpretation of statements and memoranda of interview, even if not verbatim or signed. *State v. Delk*, 692 S.W.2d 431 (Tenn. Crim. App. 1985).

iii. **Recorded grand jury testimony of defendant**.

See Tiller v. State, 600 S.W.2d 709 (Tenn. 1980).

b. **Prior record of defendant**

Within possession, custody or control of the state. Certified copies of convictions to be used at sentencing also should be turned over. *State v. Anderson*, 894 S.W.2d 320 (Tenn. Crim. App. 1994).

c. **Documents and tangible objects**

Within possession, custody or control of the state. The state is not responsible if the documents are kept by civilians. *State v. Hutchison*, 898 S.W.2d 161, 168 n. 4 (Tenn. 1994). They also must be material to the defense, or used by state in its case in chief, or obtained from or belong to the defendant.

d. **Exam and Test Reports**

Must be within the possession, custody or control of the state, material to the defense and intended for use in the state's case in chief. *See State v. Middlebrooks*, 840 S.W.2d 317, 333 (Tenn. 1992); *State v. Fox*, 733 S.W.2d 116 (Tenn. Crim. App. 1987); *State v. Aucoin*, 756 S.W.2d 705 (Tenn. Crim. App. 1988).

e. **Not subject to disclosure**

i. **Investigative reports, memoranda and other internal work product**, including rough notes where formal report has been produced. *State v. Irick*, 762 S.W.2d 121 (Tenn. 1988)

ii. **Statements of witnesses**, whether called or uncalled. These are covered by Rule 26.2. No duty to turn over criminal records of witnesses, either. *State v. Newsom*, 744 S.W.2d 911 (Tenn. Crim. App. 1987). The judge may require the state to turn over prior records of its witnesses "in the interest of justice" if the judge wishes, but this is not required. *Irick*, at 657.

iii. **Information used in rebuttal**. *State v. Aucoin*, 756 S.W.2d 705 (Tenn. Crim. App. 1988).

f. **Not covered by Rule 16**

i. **Child Sex Abuse Complaints**

These are confidential pursuant to T.C.A. §37-1-612, and cannot be disclosed to the defendant, who is not listed as an exception in sections (b) and (c). *State v. Gibson*, 973 S.W.2d 231, 244 (Tenn. Crim. App. 1997). If requested, the trial judge may examine them *in camera* if requested to look for exculpatory evidence, but the judge is not listed as an exception either.

ii. **Names of Witnesses**

"The State is directed to list "the names of such witnesses as [it] intends shall be summoned in the cause" on the charging indictment. T.C.A. § 40-17-106 (1990 Repl.). The purpose of this statute is to prevent surprise to the defendant at trial and to permit the defendant to prepare his or her defense to the state's proof. However, this duty is merely directory, not mandatory. *State v. Harris*, 839 S.W.2d 54, 69 (Tenn. 1992). The State's failure to include a witness' name on the indictment will not automatically disqualify the witness from testifying. A

defendant will be entitled to relief for non-disclosure only if he or she can demonstrate prejudice, bad faith, or undue advantage. The determination of whether to allow the witness to testify is left to the sound discretion of the trial judge. *State v. Underwood*, 669 S.W.2d 700, 703 (Tenn. Crim. App. 1984)." *State v. Kendricks*, 947 S.W.2d 875, 883 (Tenn. Crim. App. 1996). *See also State v. Allen*, 976 S.W.2d 661, 667 (Tenn. Crim. App. 1997).

If the state calls a witness not listed on the indictment, and the defense objects, before the judge allows the witness to testify it is a good practice to allow the defense to interview that witness during a recess, so that the defense will know the substance of the proffered testimony and will be better able to claim prejudice, bad faith, or undue advantage before the judge rules on the objection.

iii. **Confidential Informants**

The general rule is that a confidential informant's identity is privileged, due to public policy, especially when the defendant wants the name to attack a search warrant. For purposes of trial, it is in the discretion of trial judge to force disclosure on a case by case basis. The state must divulge the CI's name when essential to the defense and a fair trial, if 1) the CI was a participant in the crime, or 2) was a witness to the crime, or 3) has knowledge favorable to the defense. The defense has the burden of proving by a preponderance of the evidence that the CI's identity is material to one of the above 3 factors. *State v. Vanderford*, 980 S.W.2d 390, 397 (Tenn. Crim. App. 1997). As an example, when defendant is being tried for a 3rd drug sale, he is not allowed discovery of the first two undercover buy audio tapes used to set up the 3rd buy. *Id*. at 399. The state can ask for an *ex parte* order of protection under TRCP 16(d)(1), file a written statement under seal, and its granting can be appealed under seal.

g. **Exculpatory Evidence (*Brady* material)**

The basic test for whether or not an item is exculpatory is set out in *Irick v. State*, 973 S.W.2d 643, 657 (Tenn. Crim. App. 1998). The duty to disclose exculpatory evidence extends to all "favorable information" irrespective of whether the evidence is admissible at trial. *Johnson v. State*, 38 S.W.3d 52, 56 (Tenn. 2001) . 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. *Giglio*, 405 U.S. at 154 ; *Johnson v. State*, 38 S.W.3d 52, 56 (Tenn. 2001). While Brady does not require the state to investigate for the defendant, it does burden the prosecution with the responsibility of disclosing statements of witnesses favorable to the defense. *State v. Reynolds*, 671 S.W.2d 854, 856 (Tenn. Crim. App. 1984).

Upon request, the prosecution has a compelling duty to furnish the accused with any exculpatory evidence that pertains to the accused's guilt or innocence or the punishment which may be imposed. Suppression by the prosecution of evidence favorable to an accused in light of a proper request violates due process if the evidence is material. *State v. Philpott*, 882 S.W.2d 394, 402, *citing Brady v. Maryland*, 373 U.S. 83 (1963).

Evidence that could be used to impeach state witnesses is exculpatory, but the prosecutor is not required to deliver his whole file to the defendant, but only that which, if suppressed, would deprive him of a fair trial. *State v. Walker*, 910 S.W.2d 381, 389 (Tenn. 1995). The prior record of the victim so the defendant can impeach him is not the kind of information the state has

a duty to produce. *State v. King*, 905 S.W.2d 207, 212 (Tenn. Crim. App. 1995).

Before the prosecutor is required to disclose information, it 1) must be material, 2) must be favorable, and unless obviously exculpatory, must be timely requested. *Philpott*, at 402, citing many federal and state cases. The defendant has the burden of proving a constitutional violation by a preponderance of the evidence. *State v. Edgin*, 902 S.W.2d 387, 389 (Tenn. 1995).

What is material? There was a good discussion in *Edgin* of when information is material, depending on whether there is a general or specific request. But then on rehearing the Tennessee Supreme Court changed the definition because of new U.S. Supreme Court cases. Further discussion and a 4 prong test were next set out in *State v. Brewer*, 932 S.W.2d 1, 19 (Tenn. Crim. App. 1996) with more cases cited. Then another case, *State v. Jefferson*, 938 S.W.2d 1, 17 (Tenn. Crim. App. 1996) defines material information as "whether in its absence [the defendant] received a fair trial, resulting in a verdict worthy of confidence."

"The prosecution's *Brady* obligations include not only a duty to disclose exculpatory information, but also a duty to search possible sources for such information" but "this duty is limited to examining non-trivial prospects of material exculpatory information." *Foster v. State*, 942 S.W.2d 548, 550 (Tenn. Crim. App. 1996). The prosecutor's duty is not limited to "competent" or "admissible" evidence, but includes all "favorable information." The prosecutor's failure to disclose is not excused even if not in bad faith. *Philpott* at 402.

The state's duty does <u>not</u> extend to information the defense already possesses or is able to obtain or to information not in the possession or control of the prosecution. *Wooden v. State*, 898 S.W.2d 752, 755 (Tenn. Crim. App. 1994); *State v. Brewer*, 932 S.W.2d 1, 19 (Tenn. Crim. App. 1996). When exculpatory evidence is equally available to the state and the defense, the defendant must bear the responsibility of his failure to discover it. *State v. Parker*, 932 S.W.2d 945, 954 & n. 23 (Tenn. Crim. App. 1996). See also *State v. Eldridge*, 951 S.W.2d 755, 778 (Tenn. Crim. App. 1997), in which the police lost a knife. Since the police were unaware of the exculpatory nature of the knife, there was no bad faith when it turned up missing.

h. **Remedy for Noncompliance with Rule 16**

Exclusion of the evidence is a drastic remedy and should not be implemented unless there is no other reasonable alternative. The trial judge has the discretion to fashion an appropriate remedy, such as a continuance, etc. A significant factor is whether or not the defendant has been prejudiced. *State v. Smith*, 926 S.W.2d 267, 269-70 (Tenn. Crim. App. 1995).

6. <u>TRCP 23 - WAIVER OF JURY TRIAL (BENCH TRIAL)</u>

A defendant can waive a jury trial at any time, up until the jury is sworn. Although it is the better practice to have a written waiver, one is not necessary if the record affirmatively shows the defendant understood the right to a jury trial right and waived it after the judge advised the defendant in open court. The defense attorney cannot waive for the defendant. The judge should advise the defendant that 1) the defendant is entitled to have 12 members of the community decide his innocence or guilt; 2)the defendant may take part in jury selection; 3) the jury verdict must be unanimous; and 4) if a jury is waived, the court alone decides guilt or innocence. *State v. Ellis*, 953 S.W.2d 216, 220-22 (Tenn. Crim. App. 1997).

The state has a right to a jury trial too, and the defendant can't waive a jury trial without permission of the prosecutor. *State v. Vickers*, 970 S.W.2d 444, 446 (Tenn. 1998).

7. TRCP 24 - JURY CHALLENGES

There are 15 peremptory challenges each for capital cases, 8 for felonies and 3 for misdemeanors. One for each alternate. *See also* T.C.A. §40-18-118. Note section (f) of Rule 24, allowing for undesignated alternates. This procedure keeps the entire jury interested and gives each side an extra peremptory challenge to use against the entire panel for each alternate used. At the end of the trial, jurors are drawn off by random lot to reduce the panel to 12.

8. TRCP 29 – MOTION FOR JUDGMENT OF ACQUITTAL

This rule empowers the trial judge to direct a judgment of acquittal when the evidence is insufficient to warrant a conviction either at the time the state rests or at the conclusion of all the evidence. At the point the motion is made, the trial court must favor the state with the strongest legitimate view of the evidence, including all reasonable inferences, and discard any countervailing evidence. *State v. Anderson*, 880 S.W.2d 720, 726 (Tenn. Crim. App. 1994).

It is a question of law only. The trial judge must disregard any defense proof that conflicts with the state proof. *State v. Campbell*, 904 S.W.2d 608, 611 (Tenn. Crim. App. 1995); *State v. Adams*, 916 S.W.2d 471, 473 (Tenn. Crim. App. 1995).

A motion for judgment of acquittal made at end of the state's proof is waived if the defendant puts on proof. *State v. Ball*, 973 S.W.2d 288, 292 (Tenn. Crim. App. 1998). At the end of all the proof, "[t]he standard by which the trial court determines a motion for judgment of acquittal at that time is, in essence, the same standard which applies on appeal in determining the sufficiency of the evidence after a conviction. That is, "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979)." *Id.*

9. TRCP 33(d) – 13TH JUROR RULE

The judge must weigh the evidence and the credibility of the witnesses and may grant a new trial if the judge disagrees with the verdict, but the new trial will be held with a different judge. *State v. Dankworth*, 919 S.W.2d 52, 54-55 (Tenn. Crim. App. 1995), has a long discussion of this rule, its purpose, and the reason for its passage by the legislature after its abolishment in case law. If the judge says nothing, it is assumed by the appellate courts that the judge approves of the verdict. Even if the appellate court disagrees with judge, it can do nothing, for it cannot act as a 13th juror. Although the defendant cannot be retried if appellate courts find the evidence insufficient, he or she can be retried if the judge finds the proof insufficient under the 13th juror rule. *State v. Bryan*, 990 S.W.2d 231, 237 (Tenn. Crim. App. 1998). There is no double jeopardy problem.

10. TRCP 44 – RIGHT TO AND ASSIGNMENT OF COUNSEL

Warning regarding *pro se* defendants: When a defendant wants to proceed *pro se*, "the trial judge must conduct an intensive inquiry as to his ability to represent himself." *Smith v. State*, 987 S.W.2d 871, 877 (Tenn. Crim. App. 1998). Quoting from the appendix in that case (slightly altering to conform exclusively to Tennessee courts):

When a defendant states that he wishes to represent himself, you should . . . ask questions similar to the following:

(a) Have you ever studied law?

(b) Have you ever represented yourself or any other defendant in a criminal action?

(c) You realize, do you not, that you are charged with these crimes: (Here state the crimes with which the defendant is charged.)

(d) You realize, do you not, that if you are found guilty of the crime charged in Count I the court must impose an assessment of at least $ _____ and could sentence you to as much as ___ years in prison and fine you as much as $____?

(Then ask him a similar question with respect to each other crime with which he may be charged in the indictment or information.)

(e) You realize, do you not, that if you are found guilty of more than one of those crimes this court can order that the sentences be served consecutively, that is, one after another?

(f) You realize, do you not, that if you represent yourself, you are on your own? I cannot tell you how you should try your case or even advise you as to how to try your case.

(g) Are you familiar with the Tennessee Rules of Evidence?

(h) You realize, do you not, that the Tennessee Rules of Evidence govern what evidence may or may not be introduced at trial and, in representing yourself, you must abide by those rules?

(i) Are you familiar with the Tennessee Rules of Criminal Procedure?

(j) You realize, do you not, that those rules govern the way in which a criminal action is tried in this court?

(k) You realize, do you not, that if you decide to take the witness stand, you must present your testimony by asking questions of yourself? You cannot just take the stand and tell your story. You must proceed question by question through your testimony.

(l) (Then say to the defendant something to this effect): I must advise you that in my opinion you would be far better defended by a trained lawyer than you can be by yourself. I think it is unwise of you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the rules of evidence. I would strongly urge you not to try to represent yourself.

(m) Now, in light of the penalty that you might suffer if you are found guilty and in light of all of the difficulties of representing yourself, is it still your desire to represent yourself and to give up your right to be represented by a lawyer?

(n) Is your decision entirely voluntary on your part?

(o) If the answers to the two preceding questions are in the affirmative, [and in your opinion the waiver of counsel is knowing and voluntary,] you should then say something to the following

effect: "I find that the defendant has knowingly and voluntarily waived his right to counsel. I will therefore permit him to represent himself."

(p) You should consider the appointment of standby counsel to assist the defendant and to replace him if the court should determine during trial that the defendant can no longer be permitted to represent himself. *Smith v. State*, 987 S.W.2d 871 (Tenn. Crim. App. 1998) (Appendix).

Notwithstanding the preceding paragraph (p) concerning "standby counsel":

"Elbow counsel" [which the supreme court wants called "advisory counsel"] is not a constitutional requirement, and is entirely in the discretion of the trial judge. "Such privilege should be granted by the trial court only in exceptional circumstances," and is entirely a "matter of grace." Hybrid representation, where the attorney helps in the trial itself, should be allowed "sparingly and with caution." *State v. Small*, 988 S.W.2d 671, 673 (Tenn. 1999). Whether to appoint advisory counsel depends on the nature and gravity of the charges, the factual and legal complexity of the proceedings, and the intelligence and legal acumen of the defendant.

A FINAL WORD OF ADVICE -

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure:

(a) simplicity in procedure;

(b) fairness in administration; and

(c) the elimination of:

(1) unjustifiable expense and delay; and

(2) unnecessary claims on the time of jurors.

Tenn. R. Crim. P. 2.

Therefore, when in doubt, keep it simple, and do what you think will allow for the fairest determination of the issues, with the least expense and delay to all parties concerned.