ALTERNATIVE SENTENCING

PROBATION, COMMUNITY CORRECTIONS, DIVERSION, MODIFICATION AND REVOCATION

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Judge Chris Craft
Criminal Court Division VIII
30th Judicial District at Memphis

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ALTERNATIVE SENTENCING

A defendant has the presumption of an alternative sentence if he/she is convicted of a C, D or E felony as a Range One standard offender. T.C.A. § 40-35-102(6) and *State v. Smith*, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994). Where a defendant is entitled to the statutory presumption of alternative sentencing, the State has the burden of overcoming the presumption with evidence to the contrary. *State v. Bingham*, 910 S.W.2d 448, 455 (Tenn. Crim. App. 1995) , overruled on other grounds by *State v. Hooper*, 29 S.W.3d 1, 9 (Tenn. 2000) . "Conversely, the defendant has the burden of establishing his suitability for full probation, even if the defendant is entitled to the statutory presumption of alternative sentencing." *Id*. This presumption can be overcome by "evidence to the contrary." T.C.A. § 40-35-102(6), guided by T.C.A. § 40-35-103. *Bingham* at 454. If the defendant has a criminal history evincing "clear disregard for the laws and morals of society" or "failure of past efforts at rehabilitation," he/she does not deserve an alternative sentence. *State v. Bonestel*, 871 S.W.2d 163, 167 (Tenn. Crim. App. 1993). The defendant also must not have committed the "most severe offense" or evince "failure at past efforts at rehabilitation."

This presumption can be rebutted by the facts contained in the presentence report, the State's proof, the defendant's or his witness' testimony, or any other source made a part of the record. *State v. Parker*, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996).

WHAT IS EVIDENCE TO THE CONTRARY IN DENYING ALTERNATIVE SENTENCING?

Guidance as to what constitutes evidence to the contrary may be found in the following sentencing considerations contained in T.C.A. § 40-35-103(1):

(A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is especially suited to provide an effective deterrence to others likely to commit similar offenses; or

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

DEPRECIATING THE SERIOUSNESS OF THE OFFENSE

For T.C.A. § 40- 35-103(B) to apply, the circumstances of the offense "as committed, must be 'especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree,' and the nature of the offense must outweigh all factors favoring probation." *State v. Cleavor*, 691 S.W.2d 541, 543 (Tenn. 1985); *State v. Hartley*, 818 S.W.2d 370, 374-75 (Tenn. Crim. App. 1991). In *State v. Zeolia*, 928 S.W.2d 457, 462 (Tenn. Crim. App. 1996), the savage kicking of a blind retarded man was sufficiently horrifying, shocking, etc., to deny an alternative sentence.

The trial judge cannot deny an alternative sentence on the basis of the amount of the theft alone, because the amount of money or property involved was taken into consideration by the legislature in setting the grade of felony and level of punishment.

EFFECT OF DEATH OF THE VICTIM

"[T]he fact that the death of another results from the defendant's conduct does not, alone, make the offense sufficiently violent to justify a denial of probation nor can it be viewed as sufficient evidence to overcome the presumption in T.C.A. § 40- 35-102(6)." *State v. Butler*, 880 S.W.2d 395, 400-01 (Tenn. Crim. App. 1994); *see also State v. Bingham*, 910 S.W.2d 448, 454-55 (Tenn. Crim. App. 1995). .... While this Court appreciates the tragedy of the loss of a human life, a denial of probation solely on this basis for an offense the legislature has made subject to probation would be inappropriate under the 1989 Sentencing Act." *State v. Batey*, 35 S.W.3d 585, 588-89 (Tenn. Crim. App. 2000) (denying probation because the defendant had a long history of smoking marijuana).

CAN'T DENY BECAUSE OF SOCIAL HISTORY ALONE

In reversing a trial judge's denial of an alternative sentence because of the defendant's "sorry social history," The court held that the "defendant's "social history" must be considered in determining whether to grant probation. *Stiller v. State*, 516 S.W.2d 617, 620 (Tenn. 1974). However, social history is not specifically mentioned by the code as a factor to be used in overcoming the presumption of suitability for alternative sentences. *See* Tenn. Code Ann. § 40-35-103(1)(A)-(C) (1997)." *State v. Nunley*, 22 S.W.3d 282, 286 (Tenn. Crim. App. 1999).

DETERRENCE

Before the judge can deny an alternative sentence for deterrence, there must be something in the proof that the sentence will have a deterrent effect in the jurisdiction on others besides the defendant. A finding of deterrence can't be merely conclusory. *State v. Bingham*, 910 S.W.2d 448, 455 (Tenn. Crim. App. 1995). But there are exceptions for embezzlement cases, see *State v. Millsaps*, 920 S.W.2d 267, 271 (Tenn. Crim. App. 1995), and DUI, drug trafficking and child sex abuse cases. *See State v. Leggs*, 955 S.W.2d 845, 851 (Tenn. Crim. App. 1997) ("It is our opinion that the need to deter violent, unlawful behavior by those individuals entrusted with the custodial control over others, especially those incapacitated by mental retardation, is obvious."); *see also State v. Lutry*, 938 S.W.2d 431, 435 (Tenn. Crim. App. 1996) ("We have held that these offenses, by their very nature, need no extrinsic proof to establish the deterrent value of punishment. Cases in which fraud is involved, including forgery cases, seem to compose such a category.").

CAN'T DENY BECAUSE OF AMOUNT OF MONEY INVOLVED

The trial judge cannot deny an alternative sentence on the basis of the amount of the theft alone, because the amount of money or property involved was taken into consideration by the legislature in setting the grade of felony and level of punishment. The judge can consider the extent of the victim's financial loss (Tenn. Code Ann. § 40-35-114(6)), if not figured in deciding the grade of the offense. *State v. Zeolia*, 928 S.W.2d 457, 462 (Tenn. Crim. App. 1996).

LACK OF TRUTHFULNESS

The presumption of alternative sentence can be overcome if there is a finding that the

defendant was untruthful and failed to accept responsibility for his/her crimes. *State v. Zeolia*, 928 S.W.2d 457, 463 (Tenn. Crim. App. 1996) (“the appellant's credibility and willingness to accept responsibility for his crime are circumstances germane to his rehabilitation potential. *State v. Dowdy*, 894 S.W.2d 301, 306 (Tenn. Crim. App. 1994). *See also* Tenn. Code Ann. § 40-35-103(5). Lack of credibility shows lack of rehabilitation potential. *State v. Leggs*, 955 S.W.2d 845, 851-52 (Tenn. Crim. App. 1997).

SPLIT CONFINEMENT (Tenn. Code Ann. § 40-35-306)

Even though the defendant has a presumption of an alternative sentence, he/she still has the burden to show justification for full probation. *State v. Bingham*, 910 S.W.2d 448, 455-56 (Tenn. Crim. App. 1995). The trial judge can satisfy alternative sentencing by "split confinement" under Tenn. Code Ann. § 40-35-306, which is one of the alternative sentencing options offered in Tenn. Code Ann. § 40-35-104. *State v. Dowdy*, 894 S.W.2d 301, 304 (Tenn. Crim. App. 1994). Although the sentencing comments to Tenn. Code Ann. § 40-35-306 speak of split confinement or "shock probation" as a valuable means of combining both incarceration and rehabilitation, unless the judge puts a reason for it on the record, he/she may get reversed. *State v. Clifton*, 880 S.W.2d 737, 744-45 (Tenn. Crim. App. 1994).

PROBATION

(Tenn. Code Ann. § 40-35-303)

CRITERIA TO CONSIDER

“Defendant's argument that "the State failed to rebut the [statutory] presumption in favor of granting probation" has no merit, for, no such "presumption" favoring probation exists. To meet the burden of establishing suitability for full probation, the defendant must demonstrate that probation will "subserve the ends of justice and the best interest of both the public and the defendant." ..... The following criteria, while not controlling the discretion of the sentencing court, shall be accorded weight when deciding the defendant's suitability for probation:

(1) the nature and [circumstances] of the criminal conduct involved, Tenn. Code Ann. § 40-35- 210(b)(4);

(2) the defendant's potential or lack of potential for rehabilitation, including the risk that during the period of probation the defendant will commit another crime, Tenn. Code Ann. § 40-35- 103(5);

(3) whether a sentence of full probation would unduly depreciate the seriousness of the offense, Tenn. Code Ann. § 40-35-103(1)(B); and

(4) whether a sentence other than full probation would provide an effective deterrent to others likely to commit similar crimes, Tenn. Code Ann. § 40-35-103(1)(B).

Denial of full probation may be based solely upon the circumstances of the offense when they are of such a nature as to outweigh all other factors favoring probation. In determining whether to grant or deny full probation, additional considerations include the defendant's criminal record; social history and present condition of the defendant, including his or her mental and physical

conditions where appropriate; defendant's amenability to correction and general attitude, including behavior since arrest, home environment, current drug usage, emotional stability, past employment, general reputation, marital stability, family responsibility, and the best interests of both the defendant and the public. A defendant is eligible for full probation where the sentence received by the defendant is eight years or less [10 years or less for crimes committed on or after 6/7/05 under the new sentencing law], subject to some statutory exclusions ... ." *State v. Blackhurst*, 70 S.W.3d 88, 97 (Tenn. Crim. App. 2001).

PROBATION CONDITIONS (Tenn. Code Ann. § 40-35-303(d))

The authority to impose conditions on probation is granted in Tenn. Code Ann. § 40-35-303(d):

> Whenever a court sentences an offender to supervised probation, the court shall specify the terms of the supervision and may require the offender to comply with certain conditions which may include, but are not limited to:
> (1) Meet the offender's family responsibilities;
> (2) Devote the offender to a specific employment or occupation;
> (3) Perform without compensation services in the community for charitable or governmental agencies;
> (4) Undergo available medical or psychiatric treatment ...
> (5) Pursue a prescribed secular course of study or vocational training;
> (6) Refrain from possessing a firearm or other dangerous weapon;
> (7) Remain within prescribed geographical boundaries and notify the court or the probation officer of any change in the offender's address or employment;
> (8) Submit to supervision by an appropriate agency or person, and report as directed by the court;
> (9) Satisfy any other conditions reasonably related to the purpose of the offender's sentence and not unduly restrictive of the offender's liberty, or incompatible with the offender's freedom of conscience, or otherwise prohibited by this chapter; or
> (10) Make appropriate and reasonable restitution to the victim or the family of the victim involved pursuant to § 40-35-304.

A trial court has great latitude in determining the conditions of probation. *State v. Burdin*, 924 S.W.2d 82, 85 (Tenn. 1996) . The primary purpose of a sentence of probation is rehabilitation of the defendant. *Id.* at 86 . Furthermore, trial courts are not permitted to impose punishments which are "beyond the bounds of traditional notions of rehabilitation." *Id.* at 87; *see also State v. Mathes*, 114 S.W.3d 915, 918 (Tenn. 2003) .

RESTRICTING DEFENDANT'S LIVELIHOOD

Prohibiting a defendant from engaging in his legal means of livelihood is usually improper. "We conclude that a probation condition that deprives a defendant of the opportunity to pursue lawful employment should be closely scrutinized. This is especially true in the case of a professional whose conduct is regulated by a regulatory agency." *State v. Robinson*, 139 S.W.3d 661, 666-67 (Tenn. Crim. App. 2004) (reversing the trial court's order prohibiting the defendant,

a pharmacist, from practicing pharmacy as a condition of probation because "the powers of the Tennessee Board of Pharmacy are adequate to regulate the defendant's conduct within the profession"). *See, e.g., United States v. Pastore*, 537 F.2d 675, 683 (2d Cir. 1976) (requiring attorney convicted of filing false tax returns to resign from bar held improper); *Thomas v. State*, 710 P.2d 1017, 1018 (Alas. App. 1985) (prohibiting commercial fisherman convicted of stealing crab pots from engaging in commercial fishing held improper); *Hussey v. State*, 504 So. 2d 796, 797 (Fla. App. 1987) (prohibiting defendant convicted of various charges from engaging in work in the carnival business held improper); *State v. Graham*, 91 Ohio App. 3d 751, 633 N.E.2d 622, 625 (Ohio App. 1993) (prohibiting certified public accountant convicted of securities violations involving numerous victims from providing accounting services to the general public, but allowing employment for a private company, held proper).

ORDERING DEFENDANT TO LEGITIMATE CHILDREN

"We disagree with the trial court that [the defendant] has an "obligation" to legitimate her children and that her failure to do so shows she is not meeting her family responsibilities. While child support obligations are mandatory and a parent may be criminally prosecuted for failure to support, Tennessee law does not impose an obligation on the mother of an illegitimate child to take steps to legitimate that child. .... Furthermore, we do not find that this condition is proper under the "catch-all" provision, subsection (9) of Tennessee Code Annotated section 40-35-303(d) , which provides that a court may specify a condition of probation that is "reasonably related to the purpose of the offender's sentence and not unduly restrictive of the offender's liberty, or incompatible with the offender's freedom of conscience, or otherwise prohibited by this chapter."" *State v. Mathes*, 114 S.W.3d 915, 918 (Tenn. 2001).

"BEYOND THE BOUNDS" CONDITIONS

"The condition of probation from which the defendant appeals is that the defendant place in the front yard of the residence where he now lives with his mother in the Frayser suburb of Memphis, a four-by-eight foot sign with black letters over a yellow background stating: "Warning, all children. Wayne Burdin is an admitted and convicted child molester. Parents beware." The court ordered that the sign be maintained for a period of six months during which the defendant would be under house arrest. In removing this probation condition, the court stated that "Section 40-35-303(d)(9) cannot be read as granting unfettered authority to the courts to impose punishments which are beyond the bounds of traditional notions of rehabilitation. The consequences of imposing such a condition without the normal safeguards of legislative study and debate are uncertain. Posting the sign in the defendant's yard would dramatically affect persons other than the defendant and those charged with his supervision. In addition to being novel and somewhat bizarre, compliance with the condition would have consequences in the community, perhaps beneficial, perhaps detrimental, but in any event unforeseen and unpredictable. Though innovative techniques of probation are encouraged to promote the rehabilitation of offenders and the prevention of recidivism, this legislative grant of authority may not be used to usurp the legislative role of defining the nature of punishment which may be imposed." *State v. Burdin*, 924 S.W.2d 82, 87 (Tenn. 1996) (emphasis supplied).

CONDITIONS WHICH ARE TOO HARSH

The trial judge cannot order conditions which are too harsh, like requiring the defendant to work undercover for the police. In determining if the trial court abused its' discretion in imposing harsh conditions, a "reasonableness test" should be adopted using *State v. Stiller*, 516 S.W.2d 617, 620 (Tenn. 1974). "The conditions imposed must be reasonable and realistic and must not be so stringent as to be harsh, oppressive or palpably unjust." *State v. Dowdy*, 894 S.W.2d 301, 306 (Tenn. Crim. App. 1994).

FREEDOM FROM RELIGIOUS CONDITIONS

If Alcoholics Anonymous or other treatment programs at issue contain religious components (twelve step programs referring to a "higher power," etc.) and there are no alternative secular treatment programs offered, then to require a defendant to attend or participate in such a treatment program against his/her wishes would constitute a violation of the Establishment Clause. *See Arnold v. Tenn. Bd. of Paroles*, 956 S.W.2d 478, 484 (Tenn. 1997).

DENIAL OF PROBATION

Denial of probation can be based solely on untruthfulness. *State v. Jenkins*, 733 S.W.2d 528, 535 (Tenn. Crim. App. 1987), cited in *State v. Dowdy*, 894 S.W.2d 301, 303 (Tenn. Crim. App. 1994), along with U.S. Supreme Court cases. "It is unrealistic to assume that someone who has just pled guilty to a felony conviction, who then offers perjured testimony to the court, denies any criminal wrongdoing for the offense for which they have just pled, and in general is unrepentant is someone who could immediately return to their community and be expected to assume a role as a functioning, productive and responsible member of society." Lack of candor is indicative of a lack of hope for rehabilitation. *State v. Williamson*, 919 S.W.2d 69, 84 (Tenn. Crim. App. 1995).

It is also permissible to deny probation on one factor alone, like the circumstances of the offense ["there was absolutely no justification for this killing, and the defendant has accepted no responsibility for her actions"]. *State v. Gurley*, 919 S.W.2d 635, 639 (Tenn. Crim. App. 1995). *State v. Boggs*, 932 S.W.2d 467, 477 (Tenn. Crim. App. 1996). Circumstances of the offense and the defendant's abuse of a position of private trust alone can also be sufficient to deny. *State v. Boston*, 938 S.W.2d 435, 438 (Tenn. Crim. App. 1996).

It is OK to deny probation because the defendant admitted to a greater offense (rape of a child) but plead to a lesser offense. "It is proper to look behind the plea bargain and consider the true nature of the offense committed." *State v. Pierce*, 138 S.W.3d 820, 828 (Tenn. 2004). In order to deny any alternative sentence based upon the seriousness of the offense, the circumstances of the offense as committed must be especially horrifying, shocking, reprehensible, offensive or otherwise of an excessive or exaggerated degree, and the nature of the offense must outweigh all other factors favoring a sentence other than confinement. *State v. Bingham*, 910 S.W.2d 448, 454 (Tenn. Crim. App. 1995).

DEATH OF VICTIM

An unlawful killing is more serious for sentencing purposes than many other crimes, but if there was no intent to kill, this fact will not preclude probation. See discussion of this issue

and cases in *State v. Clifton*, 880 S.W.2d 737, 745-46 (Tenn. Crim. App. 1994) (defendant guilty of criminally negligent homicide in firing a gun in the general direction of another person). But exceptional circumstances must also be shown in order to support full probation in cases involving the death of another person. *State v. Ramsey*, 903 S.W.2d 709, 714 (Tenn. Crim. App.1995) (injury or death was likely and foreseeable where the defendant was "driving fast and carelessly on a hilly, curvy road and [the defendant] consciously disregarded that risk by driving in such a manner."). *But see State v. Bingham*, 910 S.W.2d 448, 454 (Tenn. Crim. App. 1995) to the apparent contrary, along with *State v. Housewright*, 982 S.W.2d 354, 358 (Tenn. Crim. App. 1997).

DETERRENCE

"As to deterrence, our supreme court has outlined the considerations sufficient to deny probation on the sole ground of deterrence. *See State v. Hooper*, 29 S.W.3d 1, 3 (Tenn. 2000). The five factors are:

> (1) Whether other incidents of the charged offense are increasingly present in the community, jurisdiction, or in the state as a whole.
> (2) Whether the defendant's crime was the result of intentional, knowing, or reckless conduct or was otherwise motivated by a desire to profit or gain from the criminal behavior.
> (3) Whether the defendant's crime and conviction have received substantial publicity beyond that normally expected in the typical case.
> (4) Whether the defendant was a member of a criminal enterprise, or substantially encouraged or assisted others in achieving the criminal objective.
> (5) Whether the defendant has previously engaged in criminal conduct of the same type as the offense in question, irrespective of whether such conduct resulted in previous arrests or convictions.

Id. at 10-12." *State v. Bottoms*, 87 S.W.3d 95, 103 (Tenn. Crim. App. 2001).

Denial of probation due to the finding of deterrent effect in the community must be based on proof in the record, and not a mere conclusory opinion of the trial judge. *State v. Ashby*, 823 S.W.2d 166, 170 (Tenn. 1991). In order to rely on general deterrence as a justification for a period of confinement, evidence must be presented that shows "confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses." Tenn. Code Ann. § 40-35-103(1)(B) (1997). The evidence presented should "indicate some special need or consideration relative to that jurisdiction which would not be addressed by the normal deterrence inherent in any criminal activity."" *State v. Hartley*, 818 S.W.2d 370, 375 (Tenn. Crim. App. 1991).

JURISDICTION

If consecutive sentences individually are less than 8 yrs, [ten years under the new sentencing act] the judge can still probate the defendant even if the total is more than the statutory maximum. *State v. Goode*, 956 S.W.2d 521, 527 (Tenn. Crim. App. 1997).

Even though the defendant is sentenced to the department of correction, the trial judge

still has jurisdiction to consider probation until the defendant leaves the county. Tenn. Code Ann. § 40-35-212(d) and *State v. Blackstock*, 19 S.W.3d 200, 211 (Tenn. 2000).

LENGTH OF PROBATIONARY PERIOD

If two sentences are served consecutively, the probation on each must be consecutive. *State v. Connors*, 924 S.W.2d 364 (Tenn. Crim. App. 1996).

If, while on probation, the defendant is given a jail sentence for a new case to run consecutively to the probated case, that sentence tolls the probationary period until he is released from parole expiration on the intervening sentence. Then his probation starts running again. *State v. Malone*, 928 S.W.2d 41, 44 (Tenn. Crim. App. 1995).

On a misdemeanor sentence, the judge cannot put the defendant on probation for 11 months and 29 days if he /she has already served part of it. The days served must be subtracted. *State v. Watkins*, 972 S.W.2d 705-06 (Tenn. Crim. App. 1998).

Once a probation violation warrant issues, the probationary period is interrupted, so that if the defendant is arrested for a new crime even after his/her probation would have expired, the new offense can still be used to violate probation if the warrant was pending. *State v. Clark*, 970 S.W.2d 515-16 (Tenn. Crim. App. 1998) The judge can put the defendant back on probation for no more than 2 years, pursuant to Tenn. Code Ann. § 40-35-308(c).

RESTITUTION (Tenn. Code Ann. § 40-35-304)

"The purpose of restitution is not only to compensate the victim but also to punish and rehabilitate the guilty." *State v. Johnson*, 968 S.W.2d 883, 885 (Tenn. Crim. App. 1997). Tenn. Code Ann. § 40-35-304 sets out the procedures the trial court must follow in ordering restitution "as condition for probation." The amount of restitution is limited by statute to the victim's "pecuniary loss," which includes:

> (1) All special damages, but not general damages, as substantiated by evidence in the record or as agreed to by the defendant; and
>
> (2) Reasonable out-of-pocket expenses incurred by the victim resulting from the filing of charges or cooperating in the investigation and prosecution of the offense; provided, that payment of special prosecutors shall not be considered an out-of-pocket expense.

Tenn. Code Ann § 40-35-304(e). The amount ordered to be paid "does not have to equal or mirror the victim's precise pecuniary loss. Moreover, the sum must be reasonable." *State v. Smith*, 898 S.W.2d 742, 747 (Tenn. Crim. App. 1994). Tennessee law further mandates that, "The court shall specify at the time of the sentencing hearing the amount and time of payment or other restitution to the victim and may permit payment or performance in installments." Tenn. Code Ann. § 40-35-304(c) . Any payment or performance schedule established by the court shall not extend beyond the probation expiration date. Tenn. Code Ann. § 40-35-304(g)(2). "In its determinations as to restitution, a trial court must ascertain both the amount of the victim's loss and the amount which the defendant can reasonably be expected to pay. A victim seeking restitution must present sufficient evidence so the trial court can make a reasonable determination as to the amount of the victim's loss. We note that "while this Court agrees that the strict rules of damages are somewhat relaxed when determining the propriety and calculating the amount of restitution, the rules are not completely discarded. . . . This Court fears that if the

burden of proof that is required in cases of restitution is allowed to drop far below that required in the civil courts of this State, then our criminal courts will become a haven for 'victims' who think their losses might not meet the level of proof necessary to recover in a civil case." *State v. Bottoms*, 87 S.W.3d 95, 106-07 (Tenn. Crim. App. 2001).

In determining the amount and method of payment of restitution, the trial court must consider "the financial resources and future ability of the defendant to pay or perform." Tenn. Code Ann. § 40-35-304(d) ; *see also State v. Johnson*, 968 S.W.2d 883, 886 (Tenn. Crim. App. 1997) ("The trial court, in determining restitution, must also consider what the appellant can reasonably pay. An order of restitution which obviously cannot be fulfilled serves no purpose for the appellant or the victim."); *State v. Smith*, 898 S.W.2d 742, 747 (Tenn. Crim. App. 1994) ("The trial court must further set an amount of restitution that the appellant can reasonably pay within the time that he will be within the jurisdiction of the trial court."). The period during which the defendant can be made to pay restitution extends only until the expiration of the sentence imposed by the trial court. Tenn. Code Ann. § 40-35-304(g)(2) . The unpaid portion of the amount ordered to be paid through restitution can be converted to a civil judgment. See Tenn. Code Ann. § 40-35-304(h)(2).

RESTITUTION TO INSURANCE COMPANIES

Insurance companies, if paid as a result of a policy, are not to get restitution! *State v. Alford*, 970 S.W.2d 944, 947 (Tenn. 1998). But if the insurance company is the victim [as in the crime of filing a fraudulent insurance claim] then restitution is permitted. *State v. Cross*, 93 S.W.3d 891, 892 (Tenn. Crim. App. 2002).

DOCUMENTATION OF LOSS

"Because the state did not strictly comply with Tenn. Code Ann. § 40-35-304(b) (1990) that requires "the presentence service officer to include in the presentence report documentation regarding the nature and amount of the victim's pecuniary loss," he was unable to argue for or against an appropriate amount of restitution. Furthermore, appellant's counsel noted in his sentencing memorandum and his amended sentencing memorandum, both filed before the sentencing hearing, that the amount of pecuniary loss was not documented in the presentence report as required by Tenn. Code Ann. § 40-35-304 (b) (1990). The state admits that the trial court failed to order documentation regarding the amount of the victim's loss in the presentence report. .... In this case, the presentence report contains nothing about the victim's losses. The appellant was ordered to pay restitution in an undetermined amount not only for the victim's rehabilitation expenses but also for his lost wages. Appellant's argument that had he received any information before the sentencing hearing of the victim's lost wages, he could have argued for a more appropriate amount in restitution, is persuasive. He should be afforded this information at a new hearing. .... This Court has recognized lost wages as part of a restitution order. Tenn. Code Ann. § 40-35-304(e)(1) (1990) states that restitution be made only where special damages are "substantiated by evidence in the record." After reviewing the record in this case, this Court believes that the victim's testimony about his wages, which was unchallenged by the appellant, was sufficient to warrant restitution for lost wages." *State v. Johnson*, 968 S.W.2d 883, 884-87 (Tenn. Crim. App. 1997).

REVOCATION OF PROBATION

(Tenn. Code Ann. § 40-35-311)

Tenn. Code Ann. § 40-35-311 - Procedure to revoke suspension of sentence or probation.

(a) Whenever it comes to the attention of the trial judge that any defendant, who has been released upon suspension of sentence, has been guilty of any breach of the laws of this state or has violated the conditions of probation, the trial judge shall have the power to cause to be issued under such trial judge's hand a warrant for the arrest of such defendant as in any other criminal case. ....

(b) Whenever any person is arrested for the violation of probation and suspension of sentence, the trial judge granting such probation and suspension of sentence, the trial judge's successor, or any judge of equal jurisdiction who is requested by such granting trial judge to do so shall, at the earliest practicable time, inquire into the charges and determine whether or not a violation has occurred, and at such inquiry, the defendant must be present and is entitled to be represented by counsel and has the right to introduce testimony in the defendant's behalf.

(c) (1) A laboratory report regarding a defendant's drug test may be admissible in probation revocation proceedings, even though the laboratory technician who performed the test is not present to testify, when accompanied by an affidavit containing at least the following information:

(A) The identity of the certifying technician;

(B) A statement of qualifications from the certifying technician;

(C) A specific description of the testing methodology;

(D) A statement that the method of testing was the most accurate test for this particular drug;

(E) A certification that the test results were reliable and accurate;

(F) A declaration that all established procedures and protocols were followed; and

(G) A statement of acknowledgment that submission of false information in the affidavit may subject the affiant to prosecution for the criminal offense of perjury pursuant to § 39-16-702.

(2) Notwithstanding the provisions of subdivision (c)(1), the judge shall, upon seasonable objection and for good cause shown, require that the laboratory technician appear and testify at the probation revocation hearing.

(3) If the state intends to introduce a laboratory report and affidavit in lieu of the live testimony of the laboratory technician as authorized by this subsection (c), it shall provide the defendant or the defendant's attorney, if known, with a copy of the report and affidavit at least five (5) days prior to the revocation hearing.

(d) .....

(e) .....

A judge can issue a warrant for violation of probation without a petition having first been filed by the state. *State v. Conner*, 919 S.W.2d 48, 50 (Tenn. Crim. App. 1995).

The trial judge can reset the revocation hearing to allow the State to put on more proof if the judge wishes; there is no "double jeopardy" in a revocation hearing. *State v. Gregory*, 946 S.W.2d 829, 831 (Tenn. Crim. App. 1997).

If a defendant is serving consecutive probations, the judge can revoke the one which has not yet started, but not one which has already expired. *State v. Anthony*, 109 S.W.3d 377, 380-82 (Tenn. Crim. App. 2001) .

Revocation must be shown by a preponderance of the evidence. Tenn. Code Ann. § 40-35-311(d). Reliable hearsay is admissible if opposing party is awarded an opportunity to rebut it. Tenn. Code Ann. § 40-35-209(b). The presentence report is precisely the type of hearsay contemplated by the statute. *State v. Wall*, 909 S.W.2d 8, 9-10 (Tenn. Crim. App. 1994); *State v. Lewis*, 917 S.W.2d 251, 257 (Tenn. Crim. App. 1995).

Although due process requires the judge to make a written statement of his/her reasons for revocation of probation or community corrections, where the judge made adequate findings on the record and reasons for those findings, the due process requirement of a written statement is satisfied by a transcript of the judge's oral findings should there be an appeal. *State v. Liederman*, 86 S.W.3d 584, 591 (Tenn. Crim. App 2002).

Due process considerations in revoking or modifying probation are set out in *State v. Merriweather*, 34 S.W.3d 881, 884-86 and n. 5 (Tenn. Crim. App. 2000).

The trial judge, instead of revoking the probation, can modify the conditions and extend it for up to 2 more years. *State v. Hunter*, 1 S.W.3d 643, 648 (Tenn. 1999) (holding that at the conclusion of a probation revocation hearing, a trial court could either commence execution of the judgment as it was originally entered, crediting only time served in confinement, or modify the defendant's conditions of supervision and extend his probationary period for up to two years, *see* Tenn. Code Ann. § 40-35-308 ; but the trial court could not increase the defendant's original sentence) (*citing State v. Bowling*, 958 S.W.2d 362, 364 (Tenn. Crim. App. 1997)).

WHEN CAN THE JUDGE REVOKE PROBATION?

If the warrant is issued timely, the judge can revoke probation for acts committed after the probation period would have expired, because issuance of the warrant tolls the expiration of the probation. The expiration period is tolled when the warrant is issued, not when it is served on the defendant. *State v. Shaffer*, 45 S.W.3d at 555. Once the warrant is issued, if it is served on the defendant after probation has expired when he or she is arrested for a new offense, that new offense may be used to revoke probation. *See also State v. Clark*, 970 S.W.2d at 515-16.

If the defendant appeals his conviction, the appeal stays the sentence, and tolls the period of revocation, because it delays the start of the probationary period. *State v. Lyons*, 29 S.W.3d at 50.

The judge is also permitted to revoke a defendant's probation before the defendant finishes a split confinement sentence and begins probation, while he is on appeal & out on bond. *State v. Stone*, 880 S.W.2d at 747-49, *cited in State v. Smith*, 909 S.W.2d at 473. See also *State v. Malone*, 928 S.W.2d at 45.

The judge can also revoke a defendant's probation for crimes committed prior to the defendant's being given probation if the judge didn't know about those crimes when he/she placed the defendant on probation! *State v. Stubblefield*, 953 S.W.2d at 225. The court in *State v. Williams*, 52 S.W.3d at 122, held that "revocation may be predicated upon criminal offenses committed before a probationary sentence is imposed. Revocation on this basis depends on knowledge or ignorance of the offenses at the time the suspended sentence is imposed. If the offenses were known before probation was granted, there is a presumption that the prior acts were part of the earlier sentencing equation, and they should not be used for revocation. On the other hand, offenses not disclosed at the time probation is granted may be considered for revocation purposes. No due process notice concerns arise because 'the defendant is deemed to have notice that his or her conduct must conform to the requirements of the law from the time of the law's enactment.'"

When a defendant is given two consecutive probations, the judge can revoke one that has not begun yet, but cannot revoke one that has ended (*i.e.*, if the defendant receives two consecutive three year probations on two consecutive three year sentences, for a total of 6 years probation, in the fourth year only the second three year sentence can be revoked.) *State v. Anthony*, 109 S.W.3d at 380-82.

USE OF HEARSAY IN THE REVOCATION HEARING

Reliable hearsay is admissible if the opposing party is awarded an opportunity to rebut it. Tenn. Code Ann. § 40-35-209(b). The presentence report is precisely the type of hearsay contemplated by the statute. *State v. Wall*, 909 S.W.2d at 9-10; *State v. Lewis*, 917 S.W.2d at 257.

Unless admitted without objection, a judge can't use a mere drug report of a "hot" drug screen to revoke. There must be proof of good cause why the tester is not present *and* also proof of the reliability of the test report. *See State v. Duke*, 902 S.W.2d at 426, and *State v. Gabel*, 914 S.W.2d at 563, *citing State v. Wade*, 863 S.W.2d at 406. But in *State v. Gregory*, 946 S.W.2d at 831, cost of travel of the tester was considered good cause for not having the expert in court.

EFFECT OF APPEAL OR DELAY BEFORE BEGINNING PROBATION

If the defendant appeals his conviction, the appeal stays the sentence, and tolls the period of revocation. *State v. Lyons*, 29 S.W.3d 48, 50 (Tenn. Crim. App. 1999). If the defendant is serving a split confinement sentence, or is out on bond during an appeal, and violates his probation, the trial court can revoke his/her probation before it has even begun. Any other conclusion would allow a defendant to commit indiscriminate criminal acts between the grant of probation and the commencement of the probationary term without consequence. *State v. Conner*, 919 S.W.2d 48, 50 (Tenn. Crim. App. 1995) (a court may revoke a term of probation based upon acts committed after the imposition of a sentence but before the commencement of the probationary term); *State v. Stone*, 880 S.W.2d 746, 748 (Tenn. Crim. App. 1994).

If the trial judge's decision to deny probation is reversed by the appellate courts with a remand to the trial court to place the defendant on probation, but the defendant has committed new offenses in the meantime, rather than disobey the appellate court's mandate, "the most

straightforward course of action would be for the trial court to grant full probation with terms and conditions, after which revocation proceedings could be instituted." *State v. Williams*, 52 S.W.3d 109, 122 (Tenn. Crim. App. 2001).

REVOCATION FOR NON-PAYMENT OF COSTS/FINES

Before probation is revoked because of nonpayment of costs and fees, the trial judge must determine the underlying reason for the non-payment. If it is a willful non-payment, the probation may be revoked. If due to inability to pay, the defendant may not be sent to jail. *State v. Massey*, 929 S.W.2d 399, 402 (Tenn. Crim. App. 1996). But the judge can issue a warrant, rather than a petition to show cause, to initiate the proceeding because the reason for non-payment is not known at time of issuance.

VIOLATION BY A DIFFERENT JUDGE

"In 1997, the legislature amended Code section 40-35-311(b) by adding the following emphasized language: "The trial judge granting such probation and suspension of sentence, the trial judge's successor, or any judge of equal jurisdiction who is requested by such granting trial judge to do so shall . . . determine whether or not a violation has occurred." *State v. Cox*, 53 S.W.3d 287, 295 (Tenn. Crim. App. 2001).

SEX OFFENDERS MUST BE EVALUATED FOR RISK, BY STATUTE, BUT POLYGRAPH RESULTS CANNOT BE USED IN MAKING PROBATION DECISION

"A convicted sex offender who is seeking probation must submit to an evaluation for the purposes of identifying and assessing the offender's risk of re-offending and potential for treatment and to establish a treatment plan and procedures for monitoring behavior. Tenn. Code Ann. § 39-13-705 (2003). The evaluation report "shall be included as part of the pre-sentence report and shall be considered by the court in determining the sentencing issues stated in this section." Tenn. Code Ann. § 39-13-705(b) (2003). The evaluation must be performed according to the standardized procedures developed and prescribed by the Sex Offender Treatment Board ("Board"). See Tenn. Code Ann. § 39-13-704(d)(1) (2003).6 While the Legislature has given the Board authority to develop and prescribe standardized procedures for conducting the evaluations, it is important to note that no statutes mandate or encourage the Board to prescribe the use of polygraph examinations as part of a standardized procedure for conducting the evaluations. Polygraph examinations are mentioned in a separate statutory subsection, Tennessee Code Annotated section 39-13-704(d)(2) , but the statute relates only to the use of polygraph examinations in the treatment and monitoring of sex offenders who have been "placed on probation, incarcerated with the department of correction, placed on parole, or placed in community corrections." Tenn. Code Ann. § 39-13-704(d)(2) (2003). Therefore, this statutory provision authorizes polygraph examinations for treatment and monitoring that occurs after a sentencing decision has been made." *State v. Pierce*, 138 S.W.3d 820, 824-25 (Tenn. 2004).

MODIFICATION OF PROBATION

Tenn. Code Ann. § 40-35-308(c) - Modification, removal or release from conditions of probation.

(a) During the term of probation supervision, the sentencing court, on its own motion, or on application of a probation and parole officer, district attorney general or the defendant, may:

(1) Modify any condition;

(2) Remove a condition; or

(3) Release the defendant from further supervision; provided, that release from supervision shall not discharge the defendant from the remainder of the sentence, and the defendant shall remain within the jurisdiction and authority of the sentencing court until the sentence fully expires. During such period, the defendant's probation is subject to revocation.

(b) The court may not make the conditions of supervision more onerous than those originally imposed, except pursuant to a revocation proceeding as provided by law.

(c) Notwithstanding the actual sentence imposed, at the conclusion of a probation revocation hearing, the court shall have the authority to extend the defendant's period of probation supervision for any period not in excess of two (2) years.

Due process considerations in revoking or modifying are set out in *State v. Merriweather*, 34 S.W.3d 881, 884-86 and n. 5 (Tenn. Crim. App. 2000).

The trial judge, instead of revoking the probation, can modify the conditions and extend it for up to 2 more years. *State v. Hunter*, 1 S.W.3d 643, 648 (Tenn. 1999) (holding that at the conclusion of a probation revocation hearing, a trial court could either commence execution of the judgment as it was originally entered, crediting only time served in confinement, or modify the defendant's conditions of supervision and extend his probationary period for up to two years, *see* Tenn. Code Ann. § 40-35-308 ; but the trial court could not increase the defendant's original sentence) (*citing State v. Bowling*, 958 S.W.2d 362, 364 (Tenn. Crim. App. 1997).

COMMUNITY CORRECTIONS

(Tenn. Code Ann. § 40-36-106)

"The purpose of the Community Corrections Act of 1985 was to provide an alternative means of punishment for "selected, nonviolent felony offenders in front-end community based alternatives to incarceration." Tenn. Code Ann. § 40-36-103. Even in cases where the defendant meets the minimum requirements of the Community Corrections Act of 1985, however, the defendant is not necessarily entitled to be sentenced under the Act as a matter of law or right. *State v. Taylor*, 744 S.W.2d 919 (Tenn. Crim. App. 1987). The following offenders are eligible for Community Corrections:

(1) Persons who, without this option, would be incarcerated in a correctional institution;
(2) Persons who are convicted of property-related, or drug/alcohol-related felony offenses or other felony offenses not involving crimes against the person as provided in title 39, chapter 2 [repealed], parts 1-3 and 5-7 or title 39, chapter 13, parts 1-5;
(3) Persons who are convicted of nonviolent felony offenses;
(4) Persons who are convicted of felony offenses in which the use or possession of a weapon was not involved;
(5) Persons who do not demonstrate a present or past pattern of behavior indicating violence;
(6) Persons who do not demonstrate a pattern of committing violent offenses; and Tenn. Code Ann. § 40-36-106(a) (emphasis added)." *State v. Kendrick*, 10 S.W.3d 650, 656 (Tenn. Crim. App. 1999).

PERSONS NOT OTHERWISE ELIGIBLE

An offender who does not meet the minimum criteria under Tenn. Code Ann. § 40-36-106(a) and is considered unfit for probation due to substance abuse or mental problems may still be eligible for community corrections under Tenn. Code Ann. § 40-36-106(c) . Before an offender may be sentenced pursuant to subsection (c), the offender must be found eligible for probation. *State v. Staten*, 787 S.W.2d 934, 936 (Tenn. Crim. App. 1989). Second, the court must determine that (1) the offender has a history of chronic alcohol, drug abuse, or mental health problems; (2) these factors were reasonably related to and contributed to the offender's criminal conduct; (3) the identifiable special need(s) are treatable, and (4) the treatment of the special need could be best served in the community rather than in a correctional institution. *State v. Boston*, 938 S.W.2d 435 (Tenn. Crim. App. 1996).

WHAT IF SPLIT CONFINEMENT ORDERED EXCEEDS THE "RED" DATE?

"We conclude that the release eligibility statute does not apply to a community corrections sentence. First, we note the obvious-that the release eligibility statute and the community corrections statute are in different chapters of the code. In fact, this Court has previously acknowledged that "community corrections is a distinctly different sentencing scheme than probation." *Carpenter v. State*, 136 S.W.3d 608, 611 (Tenn. 2004) . Further, one of the purposes of the release eligibility statute is to reduce overcrowding in jails. See Tenn. Code Ann. § 40-36-104(4) (2003). Sentences which are solely performed in a community corrections program do not involve a period of confinement and thus do not affect the overcrowded conditions in the state prison system. Therefore, to the extent that a sentence of community corrections does not include confinement, we conclude that the release eligibility statute does not apply. [The crux of the defendant's argument was that her confinement sentence of one year exceeds her release eligibility date of 10.8 months.]" *State v. Sutton*, 166 S.W.3d at 690-91.

REVOCATION AND RE-SENTENCING

The trial judge can increase the defendant's sentence if he/she violates community corrections, but cannot increase it outside the original range pled to by the defendant, even though he/she may be in actuality in a higher range. "Once [the plea is] accepted, at least as to

range, to permit a later enhancement beyond the original range violates fundamental concepts of justice." *State v. Patty*, 922 S.W.2d 102, 104 (Tenn. 1995). The statute which grants the trial court's authority over such proceedings as the one *sub judice* provides that:

> The court shall also possess the power to revoke the sentence imposed at any time due to the conduct of the defendant..., and the court may presentence the defendant to any appropriate sentencing alternative, including incarceration, for any period of time up to the maximum sentence provided for the offense committed, less any time actually served in any community based alternative to incarceration.

T.C.A. § 40-36-106(e)(4) . The judge may increase the sentence because violation may warrant a different type of sentence or incarceration, but not for the sole purpose of punishing the defendant for violating his/her community corrections program. *State v. Crook*, 2 S.W.3d 238, 240 (Tenn. Crim. App. 1998). Therefore, the state can't plea-bargain with an agreement that the defendant will be sentenced to a greater amount if he violates. *Id.* at 241.

"The Tennessee Criminal Sentencing Reform Act of 1989 and the Community Corrections Act of 1985 are *in pari materia*. *See State v. Taylor*, 744 S.W.2d 919, 920 (Tenn. Crim. App. 1987). Consequently, when a trial court opts to impose a sentence which exceeds the length of the initial sentence based on a breach of the terms of the sentence, the trial court must conduct a sentencing hearing pursuant to the Tennessee Criminal Sentencing Reform Act of 1989. See Tenn. Code Ann. §§ 40-35-209(a) and -210 (a) through (e). If the trial court opts to enhance the sentence, the court must state its reasons for imposing a new sentence on the record. Tenn. Code Ann. §§ 40-35-209(c) and -210(f)-(g). Tenn. Code Ann. § 40-35-209(c) provides in part that the record of the sentencing hearing "shall include specific findings of fact upon which application of the sentencing principles was based." Tenn. Code Ann. § 40-35-210 provides in part:

> (f) Whenever the court imposes a sentence, it shall place on the record either orally or in writing what enhancement or mitigating factors it found, if any, as well as findings of fact as required by § 40-25-209.
>
> (g) A sentence must be based on evidence in the record of the trial, the sentencing hearing, the presentence report, and, the record of prior felony convictions filed by the district attorney general with the court as required by § 40-35-202(a).

These statutory provisions are mandatory." *State v. Ervin*, 939 S.W.2d 581, 583-84 (Tenn. Crim. App. 1996) .

SENTENCING OUTSIDE THE COUNTY

If a sentence to the local workhouse is imposed, it must be served in the county of conviction pursuant to Tenn. Code Ann. § 41-2-103. However, if there is no community corrections program in place in that county, the trial judge may sentence the defendant to a community corrections program outside the county. *State v. Anderson*, 7 S.W.3d 100,101-103 (Tenn. Crim. App. 1999).

"**BOOT CAMP" VIOLATIONS**

The trial judge can't sentence a defendant to a community corrections sentence when the defendant violates "boot camp" probation from the Department of Correction, by statute, but may

extend his/her probation instead. *State v. Bowling*, 958 S.W.2d 362, 363-64 (Tenn. Crim. App. 1997).

JUDICIAL DIVERSION

(Tenn. Code Ann. § 40-35-313)

FACTORS TO CONSIDER IN GRANTING OR DENYING JUDICIAL DIVERSION:

(A) The accused's amenability to correction
(B) The circumstances of the offense
(C) The accused's criminal record
(D) The accused's social history
(E) The status of the accused's physical and mental health
(F) The deterrence value to the accused as well as others
(G) Whether judicial diversion will serve the interests of the public as well as the accused.

State v. Parker, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996).

The record must reflect that the court has weighed all of the above factors in reaching its determination. *See State v. Bonestel*, 871 S.W.2d 163, 168 (Tenn. Crim. App. 1993).

Additional factors to be considered are the defendant's attitude, his behavior since arrest, his home environment, current drug usage, emotional stability, past employment, general reputation, family responsibilities, and the attitude of law enforcement. *See State v. Washington*, 866 S.W.2d 950, 951 (Tenn. 1993).

"The court may defer further proceedings against a qualified defendant and place such defendant on probation upon such reasonable conditions as it may require without entering a judgment of guilty and with the consent of the qualified defendant. Such deferral shall be for a period of time not less than the period of the maximum sentence for the misdemeanor with which the person is charged, or not more than the period of the maximum sentence of the felony with which the person is charged. Tenn. Code Ann. § 40-35-313(a)(1)(A)." *State v. Turco*, 108 S.W.3d 244, 246 (Tenn. 2003) . The period of diversion must also not be less than the minimum sentence for any felony offense. *State v. Porter*, 885 S.W.2d 93, 95 (Tenn. Crim. App. 1994).

The judge cannot impose jail time or "shock incarceration" as part of diversion, because there is not a conviction. *State v. Johnson*, 15 S.W.3d 515, 517 n.1 (Tenn. Crim. App. 1999)

Class B felonies are not eligible. The defendant would have to plead guilty to a lesser included offense to get judicial diversion. *State v. Brooks*, 943 S.W.2d 411, 412-13 (Tenn. Crim. App. 1997).

As judicial diversion is not an alternative sentence, there is no presumption as to it. *State v. Bingham*, 910 S.W.2d 448, 456 (Tenn. Crim. App. 1995).

VALID/INVALID REASONS TO DENY DIVERSION

Pleading guilty to multiple offenses does not automatically disqualify a defendant from

judicial diversion. *State v. Harris*, 953 S.W.2d 701, 704-05 (Tenn. Crim. App. 1996).

Past marijuana use may be enough to deny diversion. *State v. Beverly*, 894 S.W.2d 292, 293-94 (Tenn. Crim. App. 1994).

Untruthfulness may be enough to deny diversion. *State v. Anderson*, 857 S.W.2d 571, 574 (Tenn. Crim. App. 1992)

Committing an offense over an extended time period may be a sufficient reason for denial. *State v. Robinson*, 139 S.W.3d 661, 665 (Tenn. Crim. App. 2004).

Violation of public trust as reason for denial. *State v. Lane*, 56 S.W.3d 20, 27 (Tenn. Crim. App. 2000) .

Refusal to admit guilt is <u>not</u> a sufficient reason to deny diversion. *State v. Lewis*, 978 S.W.2d 558, 567 (Tenn. Crim. App. 1997).

NO NEGOTIATED PLEA ALLOWED

"[O]ur Sentencing Act never contemplated that a contingency type of plea agreement would be attached to the diversion, which would usurp the sentencing authority of the trial judge following a termination of diversion. We interpret the term "proceed as otherwise provided" following revocation of judicial diversion probation to mean that a sentencing hearing should be held pursuant to the considerations of Tennessee Code Annotated section 40-35-210 (2003) and principles of sentencing." *State v. Judkins*, 185 S.W.3d 422, 426 (Tenn. Crim. App. 2005).

TERMINATION OF DIVERSION

"If it is alleged that a defendant on judicial diversion has violated the terms and conditions of diversionary probation, the trial court should follow the same procedures as those used for ordinary probation revocations. These procedures are set forth in Tennessee Code Annotation section 40-35-311 (Supp. 2001). *Id*. When a trial court learns a defendant has allegedly violated his or her probation, the trial court should issue a probation revocation warrant. .... Generally, revocation may occur only within the probationary period. *[S]ee* Tenn. Code Ann. § 40-35-310 (1997). However, if a probation revocation warrant is issued within the term of probation, it tolls the limitation of time in which the court may act to revoke probation. The filing of a probation violation report during the probation term is insufficient to toll the limitations period. Thus, it is the filing of a revocation warrant, not the report, that tolls the limitations period. .... In summary, we conclude that the revocation of judicial diversion based upon violations of diversionary probation conditions is guided by the same requirements as those for the revocation of ordinary probation. The revocation must be initiated during the diversionary period by the filing of a revocation warrant or by the proper filing of the state's petition to revoke." *Alder v. State*, 108 S.W.3d 263, 266-67 (Tenn. Crim. App. 2002)(citations omitted).

When you need help!

Don't hesitate to call another judge, even at home! Also feel free to e-mail me any time at **christopher.craft@shelbycountytn.gov** with any criminal issues, or call my chambers at (901) 222-3209. I keep my computer on at the bench and can usually respond more quickly to an e-mail with a case from my outlines or a suggestion if I have one. If you call me during the day, rather than sending an e-mail, I will call you back at the next recess.

PATTERN JURY INSTRUCTIONS

Please also contact me if you have any questions about pattern criminal jury charges, or need a charge that's not in the Red Book (T.P.I. Crim, volume 7). I also welcome any suggestions about additions to the index to make it more user-friendly, and requests for new jury instructions to be included in the next edition, or corrections to existing charges.

We regularly update our TPI – Crim. website. For the current case law on lesser-included offenses by offense type, updates to the instructions in the Red Book (published every October), and new jury instructions on new legislation, please access the TPI Committee's website. You first go to the AOC website at at www.tncourts.gov, and then:

1. click on "JUDGES" in the black column to the left, then
2. click on "Pattern Jury Instructions" under "Legal Resources."

Then click on either

Updates to instructions

or

Lesser included offenses

TENNESSEE
CRIMINAL PROCEDURE

(THE TEN MOST FREQUENTLY USED RULES)
(Rule 16 - Discovery - is treated in detail in another handout)

Tennessee Judicial Academy
Thursday, August 21, 2014
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 23 - WAIVER OF JURY TRIAL (BENCH TRIAL)

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).

6. 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.

7. 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.*

8. TRCP 31 - VERDICT

Hung juries happen so seldom that the trial judge often forgets the new procedure adopted recently regarding polling the foreperson on agreement on lesser offenses:

> (2) Procedures When No Unanimous Verdict. — If the court instructs the jury on one or more lesser included offenses and the jury reports that it cannot unanimously agree on a verdict, the court shall address the foreperson and inquire whether there is disagreement as to the charged offense and each lesser offense on which the jury was instructed. The following procedures apply:
>
> (A) The court shall begin with the charged offense and, in descending order, inquire as to each lesser offense until the court determines at what level of the offense the jury has disagreed;
>
> (B) The court shall then inquire if the jury has unanimously voted not guilty to the charged offense.
>
> (i) If so, at the request of either party, the court shall poll the jury as to their verdict on the charged offense.
>
> (ii) If it is determined that the jury found the defendant not guilty of the charged offense, the court shall enter a not guilty verdict for the charged offense.
>
> (C) The court shall then inquire if the jury unanimously voted not guilty as to the next, lesser instructed offense.
>
> (i) If so, at the request of either party the court shall poll the jury as to their verdict on this offense.
>
> (ii) If it is determined that the jury found the defendant not guilty of the lesser offense, the court shall enter a not guilty verdict for that offense.
>
> (D) The court shall continue this inquiry for each lesser instructed offense in descending order until the inquiry comes to the level of the offense on which the jury disagreed.
>
> (E) The court may then declare a mistrial as to that lesser offense, or the court may direct the jury to deliberate further as to that lesser offense as well as any remaining offenses originally instructed to the jury.
>
> (e) Poll of Jury. — After a verdict is returned but before the verdict is recorded, the

court shall—on a party's request or on the court's own initiative—poll the jurors individually. If the poll indicates that there is not unanimous concurrence in the verdict, the court may discharge the jury or direct the jury to retire for further deliberations.

If the jury is hung, a suggested question to ask each juror individually, after stating the question ahead of time, is "Do you feel that further deliberations are likely to yield a verdict?" You should never ask them for numbers (2-10, 4-8, etc.).

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.

If you are given another judge's trial due to death or disability of the trial judge, Tenn. Code Ann. § 40-18-119 creates a presumption that the trial judge acted as 13th juror and approved the verdict.

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.

EVIDENCE IN CRIMINAL TRIALS

Tennessee Judicial Academy
Thursday, August 21, 2014
Judge Chris Craft
Criminal Court Division VIII
30th Judicial District at Memphis

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TENN. R. EVID. 105 - (JURY INSTRUCTIONS RESTRICTING USE OF PROOF)

Under this rule, if evidence admissible for one purpose is not admissible for another purpose, the court on request shall restrict the evidence to its proper scope and instruct the jury accordingly. Failure to request a limiting instruction waives this issue on appeal. *See State v. Wingard*, 891 S.W.2d 628, 634 (Tenn. Crim. App. 1994).

For example, on an audio tape between the mother of a child rape victim's mother and the defendant, monitored by police, the mother's statements are not hearsay because not offered for truth of the matter asserted, but the judge must give a special charge to the jury that only the defendant's statements can be considered for guilt or innocence. Any prejudicial remarks of other parties should be redacted, if possible. *State v. Gibson*, 973 S.W.2d 231, 244 (Tenn. Crim. App. 1997). Again, failure to request such a limiting instruction waives this issue.

Upon timely objection, the trial court should exclude a prior inconsistent statement when offered as substantive evidence of guilt or innocence (unless it is properly admitted under 803(26)), and upon request should instruct the jury that the prior statement may only be considered as to the credibility of the witness. *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000).

TENN. R. EVID. 106 - (RULE OF COMPLETENESS)

The Rule of Completeness only applies to written statements, not oral ones. *Denton v. State*, 945 S.W.2d 793, 801 (Tenn. Crim. App. 1996). It states that if one part of written or recorded statement is introduced, the opposing party can introduce another portion when fairness so requires. The defense cannot introduce a separate self-serving statement of the defendant, however, as it is not an admission by a party-opponent under TENN. R. EVID. 803(1.2)(A). There is nothing to guarantee its trustworthiness, and would open up the rule to obvious abuse. Otherwise "an accused could create evidence for himself by making statements in his favor for subsequent use at his trial to show his innocence." *State v. Brooks*, 909 S.W.2d 854, 862-3 (Tenn. Crim. App. 1995) *See also State v. Bolster*, 945 S.W.2d 776, 787-8 (Tenn. Crim. App. 1996) for a discussion of this issue.

However, if part of the same statement is self-serving, Rule 106 may apply. "Rule 106 reflects the concern for fairness ..., that the trier of fact be permitted to assess related information without being misled by hearing only certain portions of evidence. .... Accordingly, it appears that where the prosecution introduces a statement made by the defendant, the trial court may in the interest of fairness order that the remainder of the statement be admitted as well under Rule 106. Indeed, it would not be consistent with fundamental fairness to allow the prosecution to introduce only the most incriminating portions of a defendant's statement without regard to the overall context or relevant exculpatory portions found in the same statement." *State v. Keogh*, 18 S.W.3d 175, 182-3 (Tenn. 2000). Also, when offered to show the detective's bias [that he didn't investigate the alibi, etc.,] the statement is not hearsay, and should be allowed. *See State*

v. Bolster, 945 S.W.2d 776, 784 (Tenn. Crim. App. 1996), containing a thorough discussion of self-serving defendant hearsay statements.

TENN. R. EVID. 403 - (WEIGHING TEST)

Not all prejudice is unfair under this Rule. “Unfair prejudice” is defined as “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.” *State v. Daboecia*, 953 S.W.2d 649, 654 (Tenn. 1997) Also please note that Rule 403's burden is “substantially outweigh,” and Rule 404(b) is only “outweigh,” as evidence of other bad acts carries a significant danger of unfair prejudice.

Admissibility of photographs is governed by *State v. Banks*, 564 S.W.2d 947 (Tenn. 1978). The judge must first determine that the photo is relevant, then whether the probative value is outweighed by unfair prejudice. In *Banks*, the our supreme court recognized "the inherently prejudicial character of photographic depictions of a murder victim...." In adopting Federal Rule of Evidence 403 as its test for admissibility, the court suggested a variety of factors for consideration by the trial judge. The "value of photographs as evidence, ... their accuracy and clarity ... whether they were taken before the corpse was moved ... [and] the inadequacy of the testimonial evidence in relating the facts to the jury" are appropriate factors.” *Id*. at 951.

TENN. R. EVID. 404(b) - (OTHER CRIMES, WRONGS, OR ACTS)

The trial judge should take a restrictive approach to 404(b) evidence “because 'other act' evidence carries a significant potential for unfairly influencing a jury." .... The exceptions to the rule are when the evidence is offered to prove the motive of the defendant, his identity, his intent, the absence of mistake, opportunity, or as a part of a common scheme or plan. .... Our supreme court recently spoke on the procedure used to determine whether a prior crime or bad act fell within an exception to the rule:

> If evidence that the defendant has committed a crime separate and distinct from the one on trial is relevant to some matter actually in issue in the case on trial, and if its probative value as evidence is not outweighed by its prejudicial effect upon the defendant, then such evidence may be properly admitted.

State v. Howell, 868 S.W.2d 238, 254 (Tenn. 1993).” *State v. Moss*, 13 S.W.3d 374, 383 (Tenn. Crim. App. 1999).

If the unfair prejudice outweighs the probative value or is dangerously close to tipping the scales, the judge must exclude it despite its relevance. *State v. Drinker*, 909 S.W.2d 13, 16 (Tenn. Crim. App. 1995).

The judge must determine the offered evidence is relevant to an issue other than the defendant’s character and should state on the record the specific issue on which it is relevant. Then the judge must conduct a balancing test on whether or not the relevance outweighs unfair prejudice. *State v. Hoyt*, 928 S.W.2d 935, 944 (Tenn. Crim. App. 1995).

Rule 404(b) places the burden upon the defendant to request a jury out hearing. *State v. Carroll*, 36 S.W.3d 854, 869 (Tenn. Crim. App. 1999). In that case, a prejudicial part of defendant’s statement was read out, and there was no objection made pretrial by the defendant,

even though he got the statement in discovery and knew it would be read. The issue was waived as he never requested a jury out hearing.

Tenn. R. Evid. 404b states that "The conditions which must be satisfied before allowing such evidence are:

(1) **The court upon request must hold a hearing** outside the jury's presence;

(2) **The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence**;

(3) **The court must find proof of the other crime, wrong, or act to be clear and convincing**; and

(4) **The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice**."

404(b) ONLY APPLIES TO ACTS OF THE DEFENDANT, NOT TO ACTS OF A VICTIM OR WITNESS

404(b) only applies if the evidence pertains to crimes, wrongs or acts of the defendant in a criminal case. If the crimes, wrongs or acts were committed by a victim or other witness, 403, 607, 608 or 609 should be used to determine admissibility.

> Rule 404(b) applies to "evidence of other crimes, wrongs or acts" of the person on trial, and excludes evidence of such acts only when offered for the purpose of proving character or trait of character. Evidence of crimes, wrongs or acts, if relevant, are not excluded by Rule 404(b) if they were committed by a person other than the accused and are only conditionally excluded if committed by the accused.

State v. Dubose, 953 S.W.2d 649, 653 (Tenn. 1997)(citations omitted), *cited in State v. Stevens*, 78 S.W.3d 817, 837 (Tenn. 2002).

"The word 'person' in Rule 404(b) has been construed to refer solely to the defendant in a criminal prosecution. *State v. Stevens*, 78 S.W.3d 817 (Tenn. 2002)." 2005 Advisory Commission Comment to 404(b).

THE PROCEDURE FOR DECIDING 404(b) ISSUES

The trial judge should adopt the following procedure:

FIRST - determine if the evidence is relevant under 401. If not relevant, exclude it under 402 ("Evidence which is not relevant is not admissible").

SECOND - determine if the evidence reflects on the character of the defendant. If not, decide admissibility under 403 (admit unless "its probative value is substantially outweighed by the danger of unfair prejudice").

THIRD - If the evidence reflects on the defendant's character, use 404(b) and 1) hold a hearing outside the jury's presence, 2) exclude unless determining that a material issue exists other than conduct conforming with a character trait, and state on the record the material issue, the ruling, and the reasons for admitting the evidence, 3) exclude unless finding proof of the other crime, wrong, or act to be clear and convincing; and 4) still exclude it if its probative value

is outweighed by the danger of unfair prejudice.

WEIGHING PROCESS

The Supreme Court in *State v. James*, 81 S.W.3d 751 (Tenn. 2002), summarized the 404(b) weighing process as follows:

> Only after the court finds that the proffered evidence is relevant does the court then weigh the probative value of that evidence against the risk that the evidence will unfairly prejudice the trial. If the court, in its discretionary authority, finds that the probative value is substantially outweighed by its prejudicial effect, the evidence may be excluded. Tenn. R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ."). Clearly, Rule 403 is a rule of admissibility, and it places a heavy burden on the party seeking to exclude the evidence. Excluding relevant evidence under this rule is an extraordinary remedy that should be used sparingly and persons seeking to exclude otherwise admissible and relevant evidence have a significant burden of persuasion. However, when the evidence to be admitted consists of "other crimes, wrongs, or acts" that reflect upon the character of the accused, the procedure set forth in Rule 404(b) should be followed ... . If, after hearing the evidence, the trial court finds that the evidence does not implicate the accused, the weighing of probative value against unfair prejudice will be made pursuant to Rule 403. If the court finds that the evidence reflects upon the character of the accused, the weighing will be made pursuant to Rule 404(b). The theory underlying Rule 404(b) is that the admission of other-acts evidence poses a substantial risk that a trier of fact may convict the accused for crimes other than those charged. The general rule excluding evidence of other crimes is based on the recognition that such evidence easily results in a jury improperly convicting a defendant for his or her bad character or apparent propensity or disposition to commit a crime. Consequently, to minimize the risk of unfair prejudice accompanying the introduction of other-acts evidence, Rule of Evidence 404(b) establishes several protective procedures that must be followed before other-acts evidence is admissible. First, upon request, the trial court must hold a jury-out hearing on the admissibility of other- acts evidence to determine whether the evidence is relevant to prove a material issue other than the character of the accused. Second, upon a finding of relevance, the court must find and state on the record the specific issue to which the evidence is relevant. Nevertheless, the other-acts evidence will only be admitted when the court balances the probative value of the evidence against its prejudicial effect and concludes that the evidence lacks sufficient probative value to outweigh the danger of unfair prejudice presented by such evidence. Tenn. R. Evid. 404(b). If the procedures in Rule 404(b) are substantially followed, the trial court's decision will be given great deference and will be reversed only for an abuse of discretion.

Id. at 757-59 (citations and quotes omitted).

WHAT IS CLEAR AND CONVINCING?

In *State v. Holman*, 611 S.W.2d 411 (Tenn. 1981), the defendant was charged with theft of a wrist watch. Over the defendant's objection, the trial court allowed the state to introduce evidence that the defendant had previously stolen another wrist watch in the same manner he had stolen the watch at issue. The trial court also denied the defendant the opportunity to prove that he had been acquitted for the previous crime. The Supreme Court reversed the conviction, reasoning that the effect of any acquittal is to render less than "clear and convincing" the proffered evidence that the defendant committed the prior crime. For such evidence to have any relevance or use in the case on trial, the jury would have to infer that, despite the acquittal, the defendant nevertheless was guilty of the prior crime. No such inference can properly be drawn from an acquittal. Evidence of a crime for which the defendant was acquitted can never be admissible as evidence of a prior crime in a trial, despite its relevance on issues other than propensity. *State v. Shropshire*, 45 S.W.3d 64, 75-76 (Tenn. Crim. App. 2000).

WEIGHING UNFAIR PREJUDICE

In determining whether exclusion is required by Rule 404(b), the issue is not whether the evidence is prejudicial, but whether it is ***unfairly*** prejudicial. The Supreme Court has emphasized that "unfair prejudice" is defined as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *State v. Vann*, 976 S.W.2d 93, 103 (Tenn. 1998). Although the 403 test is "substantially outweigh," the 404(b) test is only "outweigh," as evidence of other bad acts carries a significant danger of unfair prejudice. If the unfair prejudice outweighs the probative value or is even dangerously close to tipping the scales, the judge must exclude it despite its relevance. *State v. Gilliland*, 22 S.W.3d 266, 272 (Tenn. 2000).

WHAT REASONS MAY BE GIVEN FOR ADMISSION?

> If evidence that the defendant has committed a crime separate and distinct from the one on trial is relevant to some matter actually in issue in the case on trial, and if its probative value as evidence is not outweighed by its prejudicial effect upon the defendant, then such evidence may be properly admitted.

State v. Howell, 868 S.W.2d 238, 254 (Tenn. 1993).

> Unlike Federal Rule of Evidence 404(b) which generally bars evidence of other crimes, wrongs, or acts, the corresponding Rule in Tennessee does not specifically enumerate the purposes for which such evidence may be offered. The issues to which evidence of other acts may be relevant were not listed by the Advisory Commission so that lawyers and judges would "use care in identifying the issues to be addressed by the Rule 404(b) evidence." Neil P. Cohen, *et al.*, Tennessee Law of Evidence § 404.6, at 169 n.457 (3d ed. 1995). Therefore, in every case in which evidence of other crimes, wrongs, or acts is offered, the trial judge should carefully scrutinize the relevance of the evidence and the reasons for which it is being offered.

State v. Gilliland, 22 S.W.3d 266, 271 (Tenn. 2000).

> The typical reasons for admission cited by this Court are the "motive of the defendant, intent of the defendant, the identity of the defendant, the absence of mistake or accident if that is a defense, and, rarely, the existence of a larger continuing plan, scheme, or conspiracy of which the crime on trial is a part." *See, e.g., Bunch v. State*, 605 S.W.2d 227, 229 (Tenn. 1980). In Tennessee Law of Evidence, the authors state that "completion of the story" may also be relevant basis for admission under Rule 404(b). Cohen, *et al.*, *supra*, § 404.6, at 169.

Gilliland, 271 at n. 6.

USE 405(a) and (b), NOT 404(b), WITH SELF-DEFENSE ISSUES

Evidence of a "pertinent character trait" may be offered by a criminal defendant or "by the prosecution to rebut the same" pursuant to Tenn. R. Evid. 404(a)(1). However, the Rules limit the use of positive character evidence by the criminal defendant, or the state's use of negative evidence to rebut the same to reputation or opinion testimony via a "character" witness. *See* Tenn. R. Evid. 404(a)(1), 405(b). Inquiry into "specific instances of conduct" may be made only when cross-examining the character witness, and extrinsic evidence of specific instances of the defendant's misconduct, 404(b) evidence, is not permitted by 405(a) ("In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. After application to the court, inquiry on cross-examination is allowable into relevant specific instances of conduct"). *See* N. Cohen, Tennessee Law of Evidence § 405.3, at 196 (3d ed. 1995), and *Spadafina v. State*, 77 S.W.3d 198, 212 (Tenn. Crim. App. 2000).

In cases involving self-defense, a distinction must be made between (1) prior bad acts of the victim to prove the victim was the initial aggressor and (2) knowledge of those past acts by the defendant to show reasonable fear. The accused alone may testify as to knowledge of bad acts to show state of mind, but others may testify to show the victim was likely the first aggressor. *State v. Hill*, 885 S.W.2d 357, 361-2 (Tenn. Crim. App. 1994). When attempting to show the victim was the first aggressor, the defendant cannot use Rule 404(a)(2) to show specific bad acts in the past, but must instead use opinion and reputation evidence under 405(a). *See State v. Ruane*, 912 S.W.2d 766, 779-81 (Tenn. Crim. App. 1995) for an excellent discussion of 404 vs. 405.

SEX CRIMES

Our Supreme Court has soundly rejected a sex offense exception to rule 404(b) regarding the state's ability to admit evidence of prior crimes or bad acts against the defendant. The court has stressed that the "general rule excluding evidence of other crimes is based on the recognition that such evidence easily results in a jury improperly convicting a defendant for his or her bad character or apparent propensity or disposition to commit a crime regardless of the strength of the evidence concerning the offense on trial." *Rickman*, 876 S.W.2d at 828. Thus, evidence of sex crimes and acts by the defendant not charged in the charging instrument, if admissible at all, must

be relevant to identity, motive, common scheme or plan, intent or the rebuttal of accident or mistake defenses. *State v. Wyrick*, 62 S.W.3d 751, 776 (Tenn. Crim. App. 2001).

It is error to admit other evidence of sex crimes (in a sex case) under 404(b) unless the evidence is relevant to an issue other than a defendant's propensity to commit a sex crime, or the evidence relates to other sex crimes that occurred within the time period covered by the charge of the indictment. Character evidence cannot be used to prove that a person did a certain act because the person had a propensity to commit it. However, when specific, criminal intent must be shown, evidence of other crimes or acts may be admitted to show the requisite intent for the offense charged. *State v. Tizard*, 897 S.W.2d 732, 73-4 (Tenn. Crim. App. 1994).

SEX CRIMES EXCEPTION FOR CHILD VICTIMS

Although the Supreme Court in *State v. Rickman*, 876 S.W.2d 824 (Tenn. 1994), expressly declined to establish a "sex crimes exception" to the general rule that evidence of uncharged crimes is inadmissible, it did carve out a narrow exception for child victims. While upholding the general rule, excluding evidence of other crimes or bad acts as irrelevant and prejudicial, 876 S.W.2d at 829, they established a "narrow, special rule" which allowed the state "some latitude in the prosecution of criminal acts committed against young children who are frequently unable to identify a specific date on which a particular offense was committed." *Id*. at 828. Evidence of other sex crimes against a child victim may be admitted when the indictment is not time specific and when the sex crimes occurred within the time frame included in the indictment. 876 S.W.2d at 829. However, the state must elect at the close of its proof the particular incident for which a conviction is sought, as a means of assuring the constitutional right of the accused to a unanimous verdict. *Id.* *See State v. McCary*, 119 S.W.3d 226, 243-44 (Tenn. Crim. App. 2003). If the crimes alleged occurred outside the time frames in the indictment, 404(b) applies, and the exception does not. *State v. Hoyt*, 928 S.W.2d 935, 947 (Tenn. Crim. App. 1995).

PRIOR ACTS AGAINST A VICTIM

The Supreme Court has held that evidence of prior acts of violence against the victim are admissible under Rule 404(b) because the evidence is relevant to show the defendant's hostility toward the victim, malice, intent, and a settled purpose to harm the victim. *State v. Smith*, 868 S.W.2d 561, 574 (Tenn. 1993). However, a panel of the Court of Criminal Appeals interpreted this ruling as automatically allowing these prior acts without first performing a 404(b) analysis. In *State v. Gilley*, 173 S.W.3d 1, 6-7 (Tenn. 2005), our Supreme Court further clarified *Smith* by holding that

> [t]here are no exceptions in Rule 404(b) for cases involving evidence of a defendant's prior acts of physical abuse committed against a victim. ... In *Smith*, evidence of prior violent acts committed by the defendant against the victims was admitted in the defendant's trial for first degree murder. On appeal, this Court observed that the evidence "was admitted not to prove the Defendant acted in accord with this character but as part of the proof establishing his motive for the killings." *Id*. at 574 . This Court also observed that the probative value of the evidence was not outweighed by the danger of unfair

prejudice. *Id*.

Our decision in *Smith* did not establish a per se rule allowing the admission of evidence of prior acts of physical abuse committed by a defendant against a victim, nor did our decision abandon the requirement that such evidence must be relevant to a material issue at trial. To the contrary, we stated that the evidence was relevant to the defendant's motive. *Id*. at 574 . Moreover, the evidence of motive was also circumstantial evidence of identity, which was a material issue at trial in light of the defendant's alibi defense. *See id.* at 568 ; see also Neil Cohen *et al.*, Tennessee Law of Evidence § 4.04(9), p. 4-84 (4th ed. 2000) ("Although motive itself is rarely an issue in a case, it is often circumstantial proof of some other important matter, such as identity, intent, or lack of accident."). Given these principles, the Court of Criminal Appeals' broad interpretation of *Smith* was error.

Accordingly, because there is no per se rule of admissibility under Rule 404(b) for prior acts of abuse committed by a defendant against a victim, the trial court must, on remand, consider the admissibility of the State's proposed evidence by applying the specific safeguards set forth in Rule 404(b).

LATER ACTS AGAINST A VICTIM

Tennessee courts allow the admission of evidence of subsequent crimes, wrongs, or acts when they bear on the issues of identity, intent, continuing scheme or plan, or rebuttal of accident, mistake, or entrapment. The plain language of 404(b) uses the phrase "other crimes, wrongs, or acts" rather than "prior crimes, wrongs, or acts." Thus, Rule 404(b) would permit the introduction of evidence of subsequent acts to establish one's intent during a prior act in appropriate cases. In determining whether to allow the admission of evidence of subsequent crimes, wrongs, or acts in a given case, trial courts should be mindful of “the similarity of the offenses or acts and the proximity in time.” *See State v. Elkins*, 102 S.W.3d 578, 583-84 (Tenn. 2003).

OLD INJURIES IN CHILD ABUSE CASES

If other, old injuries are sought to be admitted, Rule 401, 402 and 403 should be used, if the defendant is not the cause. If the defendant is identified as the cause, or *could* be the cause. 404(b) should be used. *State v. Lacy*, 983 S.W.2d 686, 692-93 (Tenn. Crim. App. 1997). Before the old injuries are admissible, there must be 1) clear and convincing evidence the defendant was the cause of the injuries, 2) there must be a material issue other than conduct conforming with that pertinent character trait, and 3) the probative value must outweigh danger of unfair prejudice.
See State v. Robertson, 988 S.W.2d 690, 695 (Tenn. Crim. App. 1998), for a great discussion.

IDENTITY

An inference of identity arises when the elements of a different offense and the charged offense are sufficiently distinctive that one can conclude that the person who committed the one also committed the other. "It is not required that the other crime be identical in every detail to the offense on trial. The evidence must support the inference that the defendant, who committed the

[other] acts, is the same person who committed the offense on trial." *State v. Electroplating, Inc.*, 990 S.W.2d 211, 224 (Tenn. Crim. App. 1998)(citations omitted).

> One such example is given in *State v. Stout*, 46 S.W.3d 689, 718 (Tenn. 2001):
>
> Thus, proof of the [second] carjacking was properly admitted to prove identity. It was also properly admitted to show defendant's guilty knowledge and intent. Defendant maintained that he was present when [the first victim] was kidnapped, robbed and killed, but that he did not have any knowledge that these crimes were going to be committed, and that he did not intend for these crimes to occur. That he was out riding around with the very same people he claimed committed the [first] crimes just a few hours later, during which a strikingly similar crime was committed, serves to undercut his protestations of innocent presence.

In deciding whether or not to grant a severance of offenses, 404(b) must be considered. While severance 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 (404(b)) in that they are so related to each other that proof of one tends to establish the others. There is a good discussion of this, including a definition of "signature crimes" and the fact that the offenses need not be identical in *State v. McKnight*, 900 S.W.2d 36, 50 (Tenn. Crim. App. 1994).

ADMISSION TO SHOW CONTEXTUAL BACKGROUND (OR COMPLETION OF THE STORY SO AS NOT TO CONFUSE THE JURY)

If the contextual evidence is relevant to an issue other than criminal propensity and its probative value is not outweighed by the danger of unfair prejudice, then that evidence may be properly admissible. *State v. Gilliland*, 22 S.W.3d 266, 271 (Tenn. 2000) .

> Events do not occur in a vacuum, and in many cases, knowledge of the events surrounding the commission of the crime may be necessary for the jury to realistically evaluate the evidence. This is not to say, however, that background evidence is always admissible or even appropriate, especially when the evidence would not serve to substantially assist the jury in its understanding of the issues or place the material evidence in its proper context. Further, background evidence may be particularly inappropriate when it consists of other crimes, wrongs, or acts that are not part of the same criminal transaction. A careful balance must be maintained so as not to allow background evidence to rupture the general prohibition against evidence offered only to show criminal propensity. .... Accordingly, we hold that contextual background evidence, which contains proof of other crimes, wrongs, or acts, may be offered as an "other purpose" under Rule 404(b) when exclusion of that evidence would create a chronological or conceptual void in the presentation of the case and that void would likely result in significant jury confusion concerning the material issues or evidence in the

case.

Id. at 272. In *State v. Goodwin*, 143 S.W.3d 771, 780-81 (Tenn. 2004), the Supreme Court held that

> In certain situations, the state may offer evidence of prior crimes, wrongs or acts that are relevant only to provide a contextual background for the case. *See State v. Gilliland*, 22 S.W.3d 266, 272 (Tenn. 2000) . To do so,
>
> > the state must establish, and the trial court must find, that (1) the absence of the evidence would create a chronological or conceptual void in the state's presentation of its case; (2) the void created by the absence of the evidence would likely result in significant jury confusion as to the material issues or evidence in the case; and (3) the probative value of the evidence is not outweighed by the danger of unfair prejudice.
>
> *Id.* Applying this standard to the facts of this case, we conclude that the facts that led to the assault charges would have been admissible in a trial on the charges of felony reckless endangerment and criminally negligent homicide. The crimes of criminally negligent homicide and felony reckless endangerment require the finder of fact to determine whether the conduct of the defendant "constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint." Tenn. Code Ann. §§ 39-11-302(c) , (d) (2003) (emphasis added). Therefore, the absence of evidence of the surrounding circumstances would result in jury confusion as to material issues in the case. Certainly, in order to place the defendant in the woods with a gun, the state would be able to put on proof that there had been a previous altercation in the neighborhood during which the defendant was armed. Additionally, the state would be able to show that the police had been called and that when the police arrived, the defendant fled into the nearby woods.

DRIVING ON A REVOKED LICENSE

It may be error when trying a DUI for a trial judge to allow evidence that the defendant was also driving on a revoked license, if this is done solely to suggest the defendant may have committed a prior DUI in the past. In *State v. Fleece*, 925 S.W.2d 558, 560-61 (Tenn. Crim. App. 1995), the judge was reversed because the prosecutor had improperly created the inference that the defendant had a previous conviction for driving under the influence by repeatedly questioning the defendant about restrictions on his license while waving the folder from the previous case in front of the jury.

PRIOR FELONY CONVICTION AS AN ELEMENT OF THE OFFENSE

In *State v. James*, 81 S.W.3d 751 (Tenn. 2002), the defendant was tried for aggravated robbery, especially aggravated kidnapping, and attempted felony escape, and offered to stipulate that he was serving time on a felony, rather than have the state put on proof of the defendant's previous convictions of especially aggravated robbery, second degree murder, and especially aggravated kidnapping. The Court in *James* ruled that the state did not have to accept the

stipulation, but if it did not, the state should not have been allowed to put on proof of the convictions.

> Accordingly, we hold that when the sole purpose of introducing evidence of a defendant's prior convictions is to prove the status element of the offense, and when the defendant offers to stipulate his status as a felon, the probative value of the evidence is, as a matter of law, outweighed by the risk of unfair prejudice. Therefore, in this limited instance, the trial court should have accepted the defendant's stipulation in lieu of disclosing the names or nature of his previous convictions, as the latter evidence had little probative value and was likely to provoke the jury's prejudice.

Id. at 762.

POSSESSION OF HANDGUNS

If legal possession of a handgun is relevant, 404(b) does not prohibit it, because it is not necessarily a crime or wrongful act.

> Under Tennessee law, it is a crime to carry a firearm or large knife with the "intent to go armed." See Tenn. Code Ann. § 39-17-1307 (2003). Nevertheless, weapons of the type described by [the witness], a double-bladed knife and a small caliber weapon, may be lawfully possessed under a variety of circumstances. See Tenn. Code Ann. § 39-17-1308 (2003). In our view, the ownership of these weapons, standing alone, does not constitute a crime. The testimony that [the witness] saw the defendant in the possession of weapons similar to those used in the crimes did not necessarily constitute evidence of a bad act. Because of the weapons' similarity to those described by the victim [], the evidence was especially probative as to the identity of the perpetrator. The trial court did not err by admitting the testimony of [the witness].

State v. Reid, 213 S.W.3d 792, 813-14 (Tenn. 2006).

PORNOGRAPHIC MATERIAL

> In our view, the fact that the police discovered various pornographic media in the defendant's possession was probative as it tended to corroborate the account provided by each victim that the defendant used pornography as a means of seduction. Magazines and videotapes that each victim could identify as that the defendant kept in his briefcase would be relevant and not so prejudicial as to preclude admission into evidence. The same conclusion cannot be reached with regard to those magazines and videotapes which could not be identified by either victim. Other than serving as "propensity" evidence, which would typically be inadmissible, those items would have little probative value and would likely engender substantial prejudice. Thus, the items should have been excluded. See Tenn. R. Evid. 404(b)(3). Even under the more stringent requirements of Tennessee Rule of Evidence 403, which requires that probative value be substantially outweighed by unfair prejudice before evidence will be excluded, pornographic magazines and

videotapes not identified by either victim should not have been admitted.

State v. McCary, 119 S.W.3d 226, 245-46 (Tenn. Crim. App. 2003).

POVERTY OF THE DEFENDANT

The Supreme Court in *State v. Reid*, 213 S.W.3d 792, 814-15 (Tenn., 2006), held that

> evidence that a defendant is poor, without more, has little probative value. As observed by the Ninth Circuit Court of Appeals, "A rich man's greed is as much a motive to steal as a poor man's poverty. Proof of either, without more, is likely to amount to . . . unfair prejudice with little probative value." *Mitchell*, 172 F.3d at 1108-09. The better rule, therefore, is that the State must introduce proof of "something more" than a defendant's poverty in order to meet the threshold of relevance necessary for admission.
>
> In this instance, "something more" was proof that despite the loss of his job without severance pay, the defendant had made several cash purchases totaling in excess of $ 800, had sought to invest $ 3000, and had over $ 1000 in coins in his possession at the time of his arrest. That the defendant had no legitimate source of income following the termination of his employment, coupled with proof of these expenditures shortly after the robbery, was relevant, circumstantial evidence of the commission of the crimes. Accordingly, the trial court did not err in admitting testimony about his financial condition at the time of the crimes.

TENN. R. EVID. 405(a) - (HOW TO SHOW 404 EVIDENCE)

When attempting to show the victim was the first aggressor, the defendant cannot use Rule 404(a)(2) to show specific bad acts in the past, but must instead use opinion and reputation evidence under 405(a). *See State v. Rune*, 912 S.W.2d 766, 779-81 (Tenn. Crim. App. 1995) for an excellent discussion of 404 vs. 405.

"Though inquiries into specific instances of conduct serve valid impeachment purposes, to prevent the jury from hearing inadmissible and potentially prejudicial allegations about the defendant's character, Rule 405 includes certain procedural prerequisites which must be satisfied before such inquiries are permissible. First, an attorney must make application to the court before utilizing a specific instance of conduct to impeach a character witness. Since the rule provides no time limit, application may be made immediately before the question is asked, but if opposing counsel is unable to respond because of surprise, a recess may be appropriate. Second, Rule 405 mandates that the trial court, upon request, conduct a hearing outside the jury's presence to determine whether inquiries into specific instances of conduct are permissible. During this jury-out hearing, the trial court must determine whether the specific instance of conduct about which inquiry is proposed is relevant to the character trait about which the witness has testified. .... Because of the potential for evidence manufacturing, and because a person accused of a crime is more likely to be the subject of rumor and innuendo, reports of specific instances of conduct which do not arise until after a crime has been committed are inherently suspect and may not form the basis for inquiry under Rule 405. In addition, a trial court should exercise caution in permitting inquiry under Rule 405 if the character witness subject to impeachment first heard

reports of the specific instance of conduct after the crime occurred. Under those circumstances, to establish a reasonable factual basis, the prosecution must offer some proof at the jury-out hearing that the specific instance of conduct had been reported before the crime occurred." *State v. Nesbitt*, 978 S.W.2d 872, 881-3 (Tenn. 1998).

TENN. R. EVID. 412 - (RAPE SHIELD LAW)

Three exceptions to Rule 412 - if 1) to rebut or explain scientific or medical evidence, 2) to explain semen, injury, disease or knowledge of sexual matters, and 3) if sex was so distinctive it agrees with the defendant's story and tends to prove consent. *State v. Sheline*, 955 S.W.2d 42, 46 (Tenn. 1997) defines "pattern" of sexual conduct, which must be very unusual and distinctive. Cross-examination will be limited if it violates Rule 412, but under some instances it may violate the defendant's right to confrontation. *Id*. at 47. Rule 412, by its provisions, also "recognizes that[,] despite the embarrassing nature of the proof, sometimes the accused can only have a fair trial if permitted to introduce evidence of the alleged victim's sexual history. Tenn. R. Evid. 412 advisory comments (1991)." *State v. Brown*, 29 S.W.3d 427, 430 (Tenn. 2000)

TENN. R. EVID. 607 - (WHO MAY IMPEACH?)

Rule 607 provides that "the credibility of a witness may be attacked by any party, including the party calling the witness." A party may not call a witness to testify for the primary purpose of introducing a prior inconsistent statement that would otherwise be inadmissible. Impeachment cannot be a "mere ruse" to present to the jury prejudicial or improper testimony. In such circumstances, striking the testimony and providing a curative instruction may be insufficient to render the error harmless, because the jury is unlikely to consider the prior statement for credibility purposes only and may view it as substantive evidence." *State v. Jones*, 15 S.W.3d 880, 882 (Tenn. Crim. App. 1999)(citations omitted).

TENN. R. EVID. 608(a) - (REPUTATION)

The rule says that the "credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) the evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked."

TENN. R. EVID. 608(b) - (PRIOR BAD CONDUCT)

Where the State wishes to cross-examine about conduct probative of truthfulness or untruthfulness, the judge must hold a hearing outside the jury's presence and determine that 1) the conduct has probative value, and 2) that a reasonable factual basis exists for the inquiry. TENN. R. EVID. 608(b)(1) . It is unprofessional conduct to ask a question which implies the existence of a factual predicate which the attorney can't support by evidence. State v. *Fillpot*, 882 S.W.2d 394, 404 (Tenn. Crim. App. 1994), citing ABA Standards.

"Under Rule 608(b), extrinsic proof of [a witness's] prior arrests would not be admissible in court. The appropriate avenue was to .... request a jury-out hearing pursuant to Rule 608(b)(1), and attempt to cross-examine him about his prior arrest for perjury." *State v. Hall*, 976 SW2d 121, 149 (Tenn. 1998).

State v. Dooley, 29 S.W.3d 542, 551 (Tenn. Crim. App. 2000) -- A "question by question determination of whether the witness may claim a Fifth Amendment privilege is the appropriate procedure to resolve the problem of a witness who is reluctant to testify because of potentially incriminating answers to questions asked on cross-examination. A trial witness other than the accused in a criminal prosecution may not claim a blanket Fifth Amendment immunity from giving relevant testimony simply because certain questions which may be asked on cross-examination might elicit incriminating answers. The witness should be required to answer those questions seeking to elicit relevant non-incriminating information in the witness' possession. If the witness is asked for incriminating information on cross-examination he may claim the Fifth Amendment privilege at that time. Indeed, this the rationale behind that portion of Tenn. R. Evid. 608(b)(3) which provides in pertinent part:

> The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility."

TENN. R. EVID. 609 - (IMPEACHMENT WITH PRIOR CRIMES)

When having a 609 hearing, the judge should make findings of fact on the record of 1) relevance of the prior conviction to credibility and 2) the amount of unfair prejudice. *State v. Dixon*, 983 S.W.2d 661, 674 (Tenn. 1999).

The defendant need not testify at trial to later challenge the judge's ruling, and need not make an offer of proof to preserve the issue for appeal, but may want to in order to show prejudice. *State v. Galore*, 994 S.W.2d 120, 122 (Tenn. 1999).

"The mere fact a prior conviction of the accused is identical or similar in nature to the offense for which the accused is being tried does not, as a matter of law, bar the use of the conviction to impeach the accused as a witness. The appellate courts of this state have held that the offenses of burglary and theft are "highly probative of credibility," because these crimes involve dishonesty. *State v. Baker*, 956 S.W.2d 8, 15 (Tenn. Crim. App. 1997). *See also State v. Blevin*, 968 S.W.2d 888, 893 (Tenn. Crim. App. 1997), in which 6 prior burglary convictions were used to impeach on a burglary trial.

Using "a felony involving dishonesty" to lessen the unfair prejudice is improper. The nature of the prior offense used for impeachment must be identified so as "to avoid confusion and speculation on the part of the jury" and to "permit the jury to properly evaluate the conviction's probative value on the issue of credibility." *State v. Taylor*, 993 S.W.2d 33, 34-5 (Tenn. 1999)

Felony offenses not involving dishonesty are not as probative of credibility, and crimes of violence tend to be more unfairly prejudicial. Prior to trial, it's best to research prior holding of appellate courts on 609 issues involving the defendant's prior criminal history. There are many cases with previous findings. *See, e.g., State v. Thompson*, 36 S.W.3d 102, 111-113 (Tenn. Crim. App. 2000), for long list of cases.

TENN. R. EVID. 612 - (PRESENT MEMORY REFRESHED)

When an opposing witness is having his memory refreshed, do not allow the witness to read from the document, as it is not the evidence. The memory is. A good example of this type of evidence is in *State v. Matais*, 969 S.W.2d 418 (Tenn. Crim. App. 1997). Only if the document is admitted as past recollection recorded, under TENN. R. EVID. 803(5), can it be made an exhibit.

TENN. R. EVID. 613 - (PRIOR STATEMENTS OF WITNESSES)

A witness cannot be impeached with extrinsic evidence of a prior inconsistent statement unless 1) the witness is asked about that statement and 2) the witness denies or equivocates having made the statement. *State v. Martin*, 964 S.W.2d 564, 565 (Tenn. 1998).

Rule 613 requires only an inconsistency in the testimony, not a contradiction. *State v. Jones*, 15 S.W.3d 880, 892 (Tenn. Crim. App. 1999).

FRESH COMPLAINT

The fact that "fresh complaint" is made is admissible for adult victims only in the State's proof to rebut a possible negative inference of the victim's silence, but not details of the complaint are allowed on direct examination. After the victim's credibility has been attacked, but not before, details of the complaint are admissible as a prior consistent statement [but if this is done, always ask for an instruction that a prior consistent statement is not to be considered as substantive evidence]. *State v. Livingston*, 907 S.W.2d 392, 395 (Tenn. 1995). Above rule of fresh complaint does not apply to child victims of abuse, whether sexual or non-sexual because juries do not assume that a child will complain immediately, or that the child will fabricate. A child's statement still may be admissible under another hearsay exception, such as excited utterance, statement of condition, or statement for purposes of medical diagnosis and treatment. *See also State v. Speck*, 944 S.W.2d 598, 602 (Tenn. 1997). The line between an adult and a child for *Livingston* purposes is 13 years old. *State v. Schaller*, 975 S.W.2d 313, 321 (Tenn. Crim. App. 1997).

TENN. R. EVID. 615 - (THE RULE)

This sequestration rule applies to rebuttal witnesses as well, but the State may call them in rebuttal even if they hear defense proof if 1) the State claims genuine surprise and 2) they can demonstrate a need. The 1997 amendment also allows the State to designate a representative, such as a crime victim, to remain as a matter of right. See the Committee Comments.

Defense attorneys being post-convicted may be allowed to be present during the petitioner's proof if the State considers the attorney under attack to be essential to presentation of case. "Given the special circumstances which arise in a post-conviction proceeding in which a

petitioner claims that his trial attorney was ineffective, it is entirely reasonable to conclude that the trial attorney's presence would be essential for the presentation of the state's case. *Palmer v. State*, 108 S.W.3d 887, 898 (Tenn. Crim. App. 2002).

TENN. R. EVID. 701 - (LAY OPINION TESTIMONY)

"Under Tenn. R. Evid. 701(a), a lay witness may testify in the form of an opinion or inference only when the opinion or inference is:

(1) rationally based on the perception of the witness and

(2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

A lay witness is allowed to testify as to his or her opinion "in situations where a witness 'cannot readily and with equal accuracy and adequacy' testify without an opinion." Tenn. R. Evid. 701, Advisory Commission Comments." *State v. Dooley*, 29 S.W.3d 542, 549 (Tenn. Crim. App. 2000).

For example, judge should not have allowed a witness to testify a defendant was "weird" and suspected he shot the victim, but it would be permissible for him to describe weird conduct. *State v. Schafer*, 973 S.W.2d 269, 275 (Tenn. Crim. App. 1997).

Rescue squad member who pulled defendant from car was allowed to give opinion as to his being the driver of car, as he had pulled hundreds of persons from cars. He would have qualified as an expert under 702 because of his extensive experience, skill and experience, but also his testimony was based on his perception and was helpful to gain a clear understanding of his testimony under 701(a). *State v. Lee*, 969 S.W.2d 414, 416 (Tenn. Crim. App. 1997).

TENN. R. EVID. 702 - 704 - (EXPERT WITNESSES & TESTIMONY)

TEST FOR EXPERT TESTIMONY

"Tennessee Rule of Evidence 702 is more stringent than its federal counterpart. As a matter of contrast, while Fed. R. Evid. 702 requires only that the evidence "assist the trier of fact," Tenn. R. Evid. 702 requires that expert testimony "substantially assist the trier of fact. . . ." "This distinction indicates that the probative force of the testimony must be stronger before it is admitted in Tennessee." *McDaniel v. CSX Transp., Inc*., 955 S.W.2d 257, 264 (Tenn. 1997). In *McDaniel*, we discussed the principles guiding a trial court's determination whether to admit scientific or technical evidence. First, the evidence must be relevant to a fact at issue in the case. Tenn. R. Evid. 401, 402. Second, the expert must be qualified by specialized knowledge, skill, experience, training, or education in the field of expertise, and the testimony in question must substantially assist the trier of fact to understand the evidence or determine a fact in issue. Tenn. R. Evid. 702... Finally, when the expert witness offers an opinion or states an inference, the underlying facts or data upon which the expert relied must be trustworthy. Tenn. R. Evid. 703 ... The reliability of scientific evidence is determined by considering the following nonexclusive list of factors: (1) whether the scientific evidence has been tested and the methodology with which it has been tested; (2) whether the evidence has been subjected to peer review or publication; (3) whether a potential rate of error is known; (4) whether . . . the evidence is generally accepted in the scientific community; and (5) whether the expert's research in the field has been conducted

independent of litigation." *State v. Coley*, 32 S.W.3d 831, 835 (Tenn. 2000).

ULTIMATE ISSUE OF FACT

"The testimony with which the defendant takes issue occurred when the prosecutor asked both doctors whether it would be child abuse for an adult male to hold a young child's arm against a kerosene heater, causing second degree burns. Both doctors stated that this would be child abuse. .... Rule 704, Tenn. R. Evid., provides that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." However, opinion testimony is not admissible on an ultimate issue if the jury could readily draw its own conclusions on the matter without the aid of the witness' opinion. .... In addition, expert opinion testimony must "substantially assist the trier of fact to understand the evidence or determine a fact in issue . . . ." In the present case, we believe that the trial court erred by allowing the testimony. The jury did not need the doctors' opinions in this regard to determine whether the defendant committed the crimes with which he was charged, nor did the testimony substantially assist the jury in any way. We also note that to the extent that the doctors' opinions ostensibly related to a "medical" as opposed to a "legal" definition of child abuse, the opinions were irrelevant to the case and potentially confusing to the jury." *State v. Turner*, 30 S.W.3d at 360.

Experts cannot testify to whether or not the defendant was insane at the time of the crime. T.C.A. 39-11-501(c) ("No expert witness may testify as to whether the defendant was or was not insane as set forth in subsection (a). Such ultimate issue is a matter for the trier of fact alone.")

General and unparticularized expert testimony concerning eyewitness identification testimony, not specific to the witness in question, is inadmissible under 702. *State v. Coley*, 32 S.W.3d 831 (Tenn. 2000).

It is permissible for an expert to testify about DNA samples prepared by his underlings under 703, as the right of confrontation does not extend to these witnesses. Under evidentiary rule 703, "an expert witness may base an opinion upon clearly inadmissible hearsay, if the type of hearsay is one that would be reasonably relied upon by experts in that situation." *State v. Kennedy*, 7 S.W.3d 58, 66 (Tenn. Crim. App. 1999).

CHILD ABUSE EXPERTS

Having social worker testify to fact that abused children often forget dates of offenses is error, even if the witness is not qualified as an expert. *State v. Bolin*, 922 S.W.2d 870, 874 (Tenn. 1996). But a "child abuse expert" was approved to testify if she testifies only as a doctor and only testifies as to her actual observations. *State v. Lacy*, 983 S.W.2d 694 (Tenn. Crim. App. 1997)Lacy-983 SW2d 694-95. (Testifying to bruises and burns "that appeared to have been abusive in nature because of the pattern marks of the injuries" is permissible, but expert testimony describing the behavior of an allegedly sexually abused child is not reliable and should not be used.) Opinion if only based on observation of injuries is allowed, but opinion based on behavior is not. *State v. Ashburn*, 914 S.W.2d 108, 108 (Tenn. Crim. App. 1995).

No expert can give testimony about symptoms of post-traumatic stress syndrome exhibited by victims of child abuse. It does not "substantially assist" a jury because it attempts

to evaluate the credibility of witnesses, a task which a jury is capable of performing without expert testimony, and it is not reliable proof as to the question of whether a defendant committed the specific crime of which he or she is accused. *State v. Ballad*, 855 S.W.2d 557, 562 (Tenn. 1993).

TENN. R. EVID. 801 - (WHAT IS HEARSAY?)

"Our rules of evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). A "statement" is then defined as an oral or written assertion or nonverbal conduct intended as an assertion. Tenn. R. Evid. 801(a). "Assertion" is not defined in the Rules, but "has the connotation of a forceful or positive declaration." See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 109 (1985 ed.). The definition of 'statement' assumes importance because the term is used in the definition of hearsay in subdivision (c). The key to the definition is that nothing is an assertion unless intended to be one. See Advisory Committee's Note, Fed. R. Evid. 801(a). Consequently, the effect of the definition of "statement" is to exclude from the operation of the hearsay rule "all evidence of conduct, verbal or nonverbal, not intended as an assertion." See Advisory Committee's Note, Fed. R. Evid. 801(a); see also Advisory Commission Comments, Tenn. R. Evid. 801. In determining whether certain conduct constitutes an assertion, the Advisory Committee Note provides "It can scarcely be doubted that an assertion made in words is intended by the declarant to be an assertion. Hence, verbal assertions readily fall into the category of the statement." Advisory Committee's Note, Fed. R. Evid. 801. Notwithstanding, not all verbal utterances are readily ascertainable as assertions, such as the case now before this court. An utterance must, in order to be an assertion, be offered with the intent to state that some factual proposition is true." *State v. Land*, 34 S.W.3d 516, 525 (Tenn. Crim. App. 2000).

TENN. R. EVID. 803 - (HEARSAY AND *CRAWFORD v. WASHINGTON*)

The latest significant case on *Crawford* is *State v. Cannon*, 254 S.W.3d 287, 302-03 (Tenn. 2008), which sets out the history as follows:

> Prior to the release of our opinion in *Maclin*, the United States Supreme Court had granted certiorari in *Washington v. Davis*, 154 Wn.2d 291, 111 P.3d 844 (Wash. 2005) (en banc), *cert. granted*, 546 U.S. 975, 126 S. Ct. 547, 163 L. Ed. 2d 458 (2005); and *Hammon v. State*, 829 N.E.2d 444 (Ind. 2005), *cert. granted*, 546 U.S. 976, 126 S. Ct. 552, 163 L. Ed. 2d 459 (2005), to expand on the testimonial/nontestimonial dichotomy. In this consolidated appeal, the United States Supreme Court abrogated our decision in *Maclin* by holding that:
>
> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Davis v. Washington*, 547 U.S. 813, 126 S. Ct.

2266, 2273-74, 165 L. Ed. 2d 224 (2006). Both *Davis* and *Hammon* concerned statements made by victims of domestic assault to the police or to persons viewed as agents of the police, e.g., 911 emergency operators. At issue in *Davis* were statements made by the victim to a 911 emergency operator, reporting that her former boyfriend was assaulting her. *Id*. at 2271. The 911 emergency operator asked a series of questions aimed at determining the nature of the complaint, whether the threat was ongoing, the identity of the assailant, and the location of the assailant. *Id*. The victim did not appear at trial, and over defense objection, the trial court allowed the prosecution to play an audio recording of the victim's 911 emergency call. *Id*. A jury convicted *Davis. Id.*

The primary purpose test adopted in *Davis* requires courts to examine the context in which a statement is given. The *Davis* Court recognized that the nature of police interrogations may change as they are conducted. The Court noted that the victim in *Davis* "was speaking about events as they were actually happening rather than 'describ[ing] past events[.]'" *Id*. at 2276 (emphasis in original). The Court held that the *Davis* victim's "interrogation objectively indicate[d] its primary purpose was to enable police assistance to meet an ongoing emergency." *Id*. at 2277. Since the statements were made to obtain police assistance in an ongoing emergency, the Court held the statements were nontestimonial. *Id.*

After *Davis*, we again addressed the testimonial/nontestimonial dichotomy in *Lewis*. In *Lewis*, we recognized the Supreme Court's further departure from *Roberts* and acknowledged that the primary purpose test enunciated in *Davis* governs confrontation clause analysis. *Lewis*, 235 S.W.3d at 145. **To summarize then, under both the United States and the Tennessee Constitutions, the appropriate analysis for determining whether an out-of-court statement may be admitted into evidence without violating an accused's right of confrontation is as follows. A court must first determine whether the statement is testimonial or nontestimonial. Statements are testimonial if the primary purpose of the statement is to establish or to prove past events potentially relevant to later criminal prosecutions. A testimonial statement is inadmissible unless the State can establish that: "'(1) the declarant is unavailable and (2) the accused had a prior opportunity to cross-examine the declarant**.'" *Id*. at 143 (quoting *Maclin*, 183 S.W.3d at 345). If the statement is nontestimonial, the Confrontation Clause does not apply, and the statement must be analyzed under the "traditional limitations upon hearsay evidence." *Davis*, 126 S. Ct. at 2273; *see also Lewis*, 235 S.W.3d at 145 (holding that "[i]t is our view, therefore, that a *Roberts* analysis for nontestimonial evidence is not necessary to satisfy the state constitution's 'face-to-face' requirement and *Crawford* and its progeny establish appropriate guidelines").

COMPUTER RECORDS

Not hearsay! A witness is required to testify the computer system is accurate [not necessarily the keeper of records], but these records are not covered by the hearsay rule. *State v. Hall*, 976 S.W.2d 121, 147 (Tenn. 1998).

CONSTITUTIONAL RIGHT TO PUT HEARSAY ON AS DEFENSE

"The Sixth Amendment and the Due Process Clause of the Fourteenth Amendment clearly guarantee a criminal defendant the right to present a defense which includes the right to present witnesses favorable to the defense. .... The constitutional right to present a defense has been held to "trump" the rule against hearsay in at least two United States Supreme Court decisions..... The facts of each case must be considered carefully to determine whether the constitutional right to present a defense has been violated by the exclusion of evidence. Generally, the analysis should consider whether: (1) the excluded evidence is critical to the defense; (2) the evidence bears sufficient indicia of reliability; and (3) the interest supporting exclusion of the evidence is substantially important." *State v. Brown*, 29 S.W.3d 427, 434-5 (Tenn. 2000)(citations omitted). *See State v. Flood*, 219 S.W.3d 307, 315-19 (Tenn. 2007) and *State v. Summers*, 159 S.W.3d 586, 595 (Tenn. Crim. App. 2004) for a good analysis of how to make this ruling.

IN A SENTENCING HEARING

Reliable hearsay may be admitted if the opposing party is accorded a fair opportunity to rebut any hearsay evidence so admitted. The trial court is also required to consider the presentence report before imposing sentence. Tenn. Code Ann. § 40-35-210(b)(2). Moreover, the Tennessee Criminal Sentencing Reform Act of 1989 contemplates that much of the information contained in a presentence report will be hearsay. However, the information is reliable because it is based upon the presentence officer's research of the records, contact with relevant agencies, and the gathering of information which is required to be included in a presentence report. See Tenn. Code Ann. § 40-35-205. *State v. Baker*, 956 S.W.2d 8, 17 (Tenn. Crim. App. 1997)

VICTIM IMPACT STATEMENT

"[C]onstitutional rights have a broader reach before a determination of guilt than they do thereafter in a sentencing hearing. .... The United States Constitution does not restrict a sentencing judge to consideration of information received in open court. Williams v. New York, 337 U.S. 241, 251, 93 L. Ed. 1337, 69 S. Ct. 1079 (1949). In Williams, the United States Supreme Court reasoned as follows:

> We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination. And the modern probation report draws on information concerning every aspect of a defendant's life. The type and extent of this information make totally impractical if not impossible open court testimony with cross-examination.

Id., 337 U.S. at 250. Based upon this rationale, our conclusion is that consideration of written victim impact statements pursuant to Tennessee Code Annotated, section 40-38-205 does not violate the Confrontation Clause of the United States Constitution. Such evidence, however, must be reliable and the defendant must have a fair opportunity to rebut the statement. Tenn. Code Ann. § 40-35-209(b)." HOWEVER -- "The statute provides for a statement from a victim or an immediate family member of a homicide victim. Tenn. Code Ann. § 40-38-203(1). The statement should address "financial, emotional, and physical effects of the crime . . . and specific

information about the victim, the circumstances of the crime, and the manner in which it was perpetrated." Tenn. Code Ann. § 40-38-203(2). In our view, the statements included on the standard form were properly considered by the trial court. The source of the information is readily identifiable; the statements bear the author's signature and are responsive to the questionnaire. The poster with the handwritten notation, the letter to MM from the victim's employer, and the excerpt from the employer's newsletter should not have been admitted or considered by the sentencing court because they are not identifiable statements of the victim's immediate family. See Tenn. Code Ann. § 40-38-203(1)." *State v. Moss*, 13 S.W.3d 374, 385 (Tenn. Crim. App. 1999).

TENN. R. EVID. 803(1.2)E - (STATEMENT OF CO-CONSPIRATOR)

"[F]or a statement to be admissible under this exception, the prosecution must establish: 1) that there is evidence of the existence of a conspiracy and the connection of the declarant and the defendant to that conspiracy; 2) that the declaration was made during the pendency of the conspiracy; and 3) that the declaration was made in furtherance of the conspiracy. .... These requirements must be established by a preponderance of evidence. *See State v. Stamper*, 863 S.W.2d 404, 406 (Tenn. 1993). .... [T]here is no bright-line test or precise definition for determining whether a statement has been made during the course of the conspiracy. The commission of the offense that was the goal of the conspiracy does not necessarily end the conspiracy, nor does it preclude the possibility that the conspiracy encompassed later statements regarding concealment of the offense. .... At the same time, the commission of the offense also does not imply that the conspiracy automatically included all later statements pertaining to the concealment of the offense. .... Accordingly, in the absence of a bright-line test, we conclude that Tenn. R. Evid. 803(1.2)(E) requires that a court examine all of the factors and circumstances of the case. .... Generally, a conspiracy to conceal the commission of the charged crime may not be automatically implied to permit the use of hearsay statements made by co-conspirators. . . . The court should analyze the facts of the case to determine if in fact there was an agreement to conceal, to determine the closeness in time of the concealment to the commission of the principal crime, and to determine the reliability of these statements." *State v. Henry*, 33 S.W.3d 797, 802-3 (S. Ct. 2000).

Great discussion of this exception in *State v. Alley*, 968 S.W.2d 314, 316-17 (Tenn. Crim. App. 1997). *See also State v. Hutchison*, 898 S.W.2d 161, 169-70 (Tenn. 1994), noting that casual conversations are not made "in furtherance of" the conspiracy unless they somehow advance the objectives of the conspiracy. If so, the trial judge must find explicitly on the record at some point during the trial, out of the presence of the jury, that a conspiracy was more likely than not to have existed.

TENN. R. EVID. 803(2) - (EXCITED UTTERANCE)

"[S]tatements "relating to a startling event or condition made while the declarant is under the stress of excitement caused by the event or condition" are admissible as an exception to the hearsay rule. The rationale for admitting such statements, known as "excited utterances," is

twofold: First, since this exception applies to statements where it is likely there was a lack of reflection-- and potential fabrication-- by a declarant who spontaneously exclaims a statement in response to an exciting event, there is little likelihood, in theory at least, of insincerity. . . . Second, ordinarily the statement is made while the memory of the event is still fresh in the declarant's mind. This means that the out-of-court statement about an event may be more accurate than a much later in-court description of it. ....

[FIRST], there must be a startling event or condition. As noted ... the "possibilities are endless" because "any event deemed startling is sufficient." As another treatise has stated, the "event must be sufficiently startling to suspend the normal, reflective thought processes of the declarant." Although the "startling event" is usually the act or transaction upon which the legal controversy is based, such as an assault or accident, the exception is not limited to statements arising directly from such events; rather, a subsequent startling event or condition which is related to the prior event can produce an excited utterance. In *United States v. Napier*, 518 F.2d 316 (9th Cir., 1975), the victim was beaten and hospitalized. Upon returning home, she saw a photograph of the defendant and said, "He killed me." The Court held that the statement was an excited utterance related to the startling event of seeing the defendant's picture. Similarly, in *State v. Carpenter*, 773 S.W.2d 1 (Tenn. Crim. App. 1989), the victim's statement occurred not when she discovered a theft of money, but rather when the defendant returned to the scene of the offense. The Court of Criminal Appeals determined that the victim's "comments resulted from the suspect's return to the scene rather than the theft itself" and that the statements were "so spontaneous as to embody all the required elements of reliability."

[SECOND], that the statement "relate to" the startling event or condition, is likewise broad. As stated in Tennessee Law of Evidence, supra, "considerable leeway is available," because the statement "may describe all or part of the event or condition, or deal with the effect or impact of that event or condition."

[THIRD], that the statement be made while the declarant is under the stress or excitement from the event or condition, relates most directly to the underlying rationale for the exception. In *State v. Smith*, 857 S.W.2d 1, 9 (Tenn.), cert. denied, 510 U.S. 996 (1993), we said that "the ultimate test is spontaneity and logical relation to the main event and where an act or declaration springs out of the transaction while the parties are still laboring under the excitement and strain of the circumstances and at a time so near it as to preclude the idea of deliberation and fabrication." The time interval is but one consideration in determining whether a statement was made under stress or excitement: Other relevant circumstances include the nature and seriousness of the event or condition; the appearance, behavior, outlook, and circumstances of the declarant, including such characteristics as age and physical or mental condition; and the contents of the statement itself, which may indicate the presence or absence of stress. The declarant does not have to be a participant in the startling event or condition, and statements made in response to questions may still be admissible if the declarant is under the excitement or stress of the event." *State v. Gordon*, 952 S.W.2d 817, 819-21 (Tenn. 1997)(most citations omitted).

TENN. R. EVID. 803(3) - (STATE OF MIND)

Statements of the victim expressing fear of the defendant are not admissible to show the defendant's guilt, only the victim's actions. *State v. Leming*, 3 S.W.3d 7, 17-18 (Tenn. Crim. App. 1998).

If a 2 year old child victim of burning was startled when the defendant's name was mentioned, this could be admitted as nonverbal hearsay to show the victim's state of mind, but the state of mind of the victim is not relevant as to whether the defendant burned the victim. *State v. Burns*, 29 S.W.3d 40, 47 (Tenn. Crim. App. 1999).

TENN. R. EVID. 803(4) - (MEDICAL DIAGNOSIS AND TREATMENT)

Statements in medical records given for the primary purpose of medical diagnosis and treatment are nontestimonial. *State v. Cannon*, 264 S.W.3d 287, 303 (Tenn. 2008).

See State v. Williams, 920 S.W.2d 247, 256 (Tenn. Crim. App. 1995) for a full discussion of this exception. Even when statements are made to someone who will not provide treatment, the statement is still admissible under Rule 803(4), "provided that such statements are for the purpose of diagnosis and treatment of a medical or physical problem."

Statements made to a doctor identifying a perpetrator who is in the household may be pertinent to diagnosis and treatment of emotional and psychological injury. *State v. Stinnett*, 958 S.W.2d 329, 333 (Tenn. 1997).

AS TO CHILDREN:

In order to determine the admissibility under Rule 803(4) of a statement made by a child-declarant, the judge must conduct an evidentiary hearing outside the jury's presence. *State v. McLeod*, 937 S.W.2d 867, 869 (Tenn. 1996). .

Statements of a child may not be admissible if patient is a small child and can't understand the importance of a medical history. The delay may be the determining factor. There is a thorough discussion of all aspects of this issue as to children in *State v. Gordon*, 952 S.W.2d 817, 821-22 (Tenn. 1997).

"Courts should not presume that a statement made by a child to a medical service provider is inadmissible merely because there is little or no testimony by the child concerning motivation for making the statement. Rather, in making the determination under Tenn. R. Evid. 803(4), courts should consider the totality of the circumstances to determine whether a particular statement was made for the purposes of diagnosis and treatment. A statement improperly influenced by another, one made in response to suggestive or leading questions, or inspired by a custody battle or family feud deserves especially careful scrutiny because such statement may have been made for purposes other than diagnosis and treatment." *State v. Stinnett*, 958 S.W.2d 329, 332 (Tenn. 1997).

TENN. R. EVID. 803(5) - (PAST RECOLLECTION RECORDED)

Great example in *State v. Matais*, 969 S.W.2d 418, 422 (Tenn. Crim. App. 1997), that started out as a 612 attempted present recollection refreshed. The proponent must show 1) a written record 2) that the witness once had knowledge 3) an insufficient recollection at present 4)

the statement was adopted by the witness 5) the record was made while memory was fresh and 6) it accurately reflected his knowledge.

TENN. R. EVID. 803(6) - (RECORDS OF REGULARLY CONDUCTED ACTIVITY)

The "business records" exception - "Even assuming that a business record under Tenn. R. Evid. 803(6) qualifies as an "original" document, the State was required to establish the following prerequisites to application of the business records exception to the hearsay rule: (1) the records "custodian or other qualified witness" must testify; (2) the record must have been made at or near the time of the event, act, or condition; (3) a person with personal knowledge of the recorded event must have transmitted the information; (4) this person must have possessed a business duty to record the information; and (5) the record must have been made and kept in the regular course of business." *State v. Carroll*, 36 S.W.3d 854, 869 (Tenn. Crim. App. 1999). See also *Alexander v. Inman*, 903 S.W.2d 686, 700 (Tenn. App. 1995)("to be considered qualified, a witness must be personally familiar with the business's record-keeping systems and must be able to explain the record-keeping procedures").

TENN. R. EVID. 803(8) - (PUBLIC RECORDS AND REPORTS)

Police reports are excluded from this rule. *State v. Thompson*, 36 S.W.3d 102, 109 (Tenn. Crim. App., 2000).

History in hospital records or autopsy reports that are 2nd and 3rd person hearsay are not admissible. *State v. Robinson*, 971 S.W.2d 30, 39 (Tenn. Crim. App. 1997).

TENN. R. EVID. 803(26) - (CHILDREN'S STATEMENTS)

This relatively new rule of evidence is attempting to be used by prosecutors to attempt to bolster their victim's testimony in child sex abuse cases <u>as substantive evidence</u>, but the rule states that Tenn. R. Evid. 613(b) is a prerequisite. Therefore, <u>the statement can only be entered as substantive evidence if it is inconsistent</u> with the witness's testimony.

> To be admissible as substantive evidence via Rule 803(26), a statement must first be admissible as a prior inconsistent statement via Rule 613(b). That rule provides that "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless and until the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." Tenn. R. Evid. 613(b). Thus, when a witness testifies in a manner that is inconsistent with a previous statement, the witness's testimony may be impeached with the prior inconsistent statement. Tenn. R. Evid. 613(b). Extrinsic evidence of the prior inconsistent statement is inadmissible, however, unless the witness denies making the statement or equivocates about making it. *State v. Martin*, 964 S.W.2d 564, 567 (Tenn. 1998). "Extrinsic evidence of a prior inconsistent statement remains

> inadmissible when a witness unequivocally admits to having made the prior statement." Id. Extrinsic evidence of a prior inconsistent statement is also admissible when a witnesses testifies inconsistently at trial and then testifies that he or she does not recall making the prior inconsistent statement. *Id*. (*State v. Kendricks*, 947 S.W.2d 875, 881 (Tenn. Crim. App. 1996)). Nothing in this rule permits the admission of a witness's prior statement in its entirety.

State v. Ackerman, 397 S.W.3d 617 638(Tenn. Crim. App. 2012).

VIDEO OF FORENSIC INTERVIEW

The state may be able to use Tenn. Code Ann. § 24-7-123 to admit a child forensic interview, but must first jump through all of the procedural hoops in that statute, which requires the trial judge to make numerous findings of fact. As of the date of this handout (8/21/14), the statute has been found to be constitutional in several as yet unpublished Court of Criminal Appeals cases.

TENN. R. EVID. 804 - (HEARSAY WHEN DECLARANT UNAVAILABLE)

It is only admissible when the evidence fits one of the four types in 804(b), and the witness is unavailable as defined in 804(a). *State v. Hall*, 8 S.W.3d 593, 603 (Tenn. 1999).

When declarant unavailable, the *Henderson* rule must be followed, that 1) the evidence is not crucial or devastating, 2) the State made a good-faith effort to obtain the declarant, and 3) that the evidence bears its own indicia of reliability. *State v. Henderson*, 554 S.W.2d 117, 119-20 (Tenn. 1977), *cited in State v. Fillpot*, 882 S.W.2d 394, 406 n. 23 (Tenn. Crim. App. 1994).

TENN. R. EVID. 804(b)(2) - (DYING DECLARATION)

State v. Lewis, 235 S.W.3d 136, 147-50 (Tenn. 2007), sets out the five elements which must be present to show a dying declaration, holding that *Crawford* doesn't apply to these.

TENN. R. EVID. 804(b)(3) - (STATEMENT AGAINST INTEREST)

"The defendant's argument that the letter purportedly written by Michael Andre Johnson was admissible as a declaration against penal interest is without merit. The defendant made no showing that Johnson was "unavailable" to testify, as is required by Rule 804 before such a statement can be admitted as an exception to the hearsay rule. No explanation was given as to why Johnson was not present at the trial. There was no showing that any attempt had been made to locate Johnson or that process had been issued to compel his attendance. Further, Johnson did not appear in court and assert his Fifth Amendment privilege against self-incrimination. Thus, the letter allegedly written by him was hearsay which was not admissible pursuant to an exception to the hearsay rule." *State v. Cureton*, 38 S.W.3d 64, 79 (Ct. Crim. App. 2000).

TENN. R. EVID. 804(b)(6) - FORFEITURE BY WRONGDOING

State v. Ivy, 188 S.W.3d 132, 147 (Tenn. 2006), held that the following principles apply to the application of the forfeiture by wrongdoing exception: 1) the rule does not limit the subject matter of the statements; 2) the rule is not limited to statements made when a formal charge or judicial proceeding is pending against the defendant; 3) the trial court must conduct a jury-out hearing to determine whether statements are admissible; 4) the trial court must find that a preponderance of the evidence establishes "that the defendant was involved in or responsible for procuring the unavailability of the declarant"; and 5) the trial court must find that a preponderance of the evidence establishes "that a defendant's actions were intended, at least in part, to procure the absence of the declarant."

TENN. R. EVID. 1001-2 - (BEST EVIDENCE RULE)

"As long as a proper foundation is presented for admission of a photograph into evidence, a defendant cannot complain successfully that the photograph is inadmissible simply because a "better picture" would have been more helpful to the defendant's theory of the case." *State v. Harris*, 30 S.W.3d 345, 349 (Tenn. Crim. App. 1999).

THE BEST EVIDENCE RULE ONLY APPLIES TO WRITINGS, RECORDINGS AND PHOTOGRAPHS

THE DOCTRINE OF CURATIVE ADMISSIBILITY ("OPENING THE DOOR")

When evidence is ordinarily inadmissible, it can be introduced when the defense "opens the door," to counteract taking unfair advantage of the rules of evidence. "Most often employed in criminal cases where the "door" to a particular subject is opened by defense counsel on cross-examination, the doctrine of curative admissibility permits the State, on redirect, to question the witness to clarify or explain the matters brought out during, or to remove or correct unfavorable inferences left by, the previous cross-examination. ....This doctrine provides that "where a defendant has injected an issue into the case, the State may be allowed to admit otherwise inadmissable evidence in order to explain or counteract a negative inference raised by the issue defendant injects." ..... (in the interest of fairness, otherwise inadmissible evidence may be admitted to the extent necessary to remove prejudice when a party opens the door to its admission); .... (doctrine of "curative admissibility" allows one party to introduce evidence that might otherwise be excluded to counter unfair prejudicial use of the same evidence by the opposing party).... In other words, "if A opens up an issue and B will be prejudiced unless B can introduce contradictory or explanatory evidence, then B will be permitted to introduce such evidence, even though it might otherwise be improper." .... The rule is derived from the fundamental guarantee of fairness. That is, the rule operates to prevent one party from manipulating the rules of evidence so as to leave the jury with feelings about the case that are unjustified, even though the jury's emotional response to the case is, theoretically, not a consideration in determining admissibility. .... Specifically, in a criminal case, "the rule operates to prevent an accused from successfully gaining exclusion of inadmissible prosecution evidence and then extracting selected pieces of this evidence for his own advantage, without the

Government being able to place them in their proper context." ....Notwithstanding, the doctrine's applicability is limited by, "the necessity of removing prejudice in the interest of fairness." ....It is not an unconstrained remedy permitting introduction of inadmissible evidence merely because the opposing party brought out evidence on the same subject. The rule is protective and goes only so far as is necessary to shield a party from adverse inferences and is not to be converted into a doctrine for injecting prejudice. ....Only that evidence which is necessary to dispel the unfair prejudice resulting from the cross-examination is admissible. ....(introduction of incompetent or irrelevant evidence by a party opens the door to admission of otherwise inadmissible evidence only to extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence). Since the application of the doctrine of curative admissibility is based on the notion that the jury might be misled if contradictory evidence was excluded, the doctrine should not justify admission of that evidence when it is likely to do more harm in this respect than good. ....When constitutional rights are involved, the court must be particularly certain that the case is appropriate for curative admissibility by requiring a clear showing of prejudice before the open the door rule of rebuttal may be involved....” *State v. Land*, 34 S.W.3d 516, 530-32 (Tenn. Crim. App. 2000).

CRIMINAL TRIAL PROBLEMS

Tennessee Judicial Academy
Thursday, August 21, 2014
Judge Chris Craft
Criminal Court Division VIII
30th Judicial District at Memphis

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1. PROBLEMS WITH THE JURY

a. AMBIGUOUS VERDICT

If the trial court considers the verdict unclear, the judge should request the jury to return to deliberations with a direction to amend the verdict and put it in proper form. *State v. Smith*, 836 S.W.2d 137, 143 (Tenn. Crim. App. 1992). Although a judge may not arbitrarily refuse to accept a jury's verdict and may not coerce the jury to reach a verdict, "the judge is entitled to satisfy herself that the jurors have truly rendered a unanimous verdict. The judge's concern may arise from words uttered by a juror, the improbability of a particular verdict or combination of verdicts, or even a juror's demeanor." *State v. Jordan*, 116 S.W.3d 8, 20 (Tenn. Crim. App. 2003).

b. DELIBERATIONS WITH EXHIBITS

"Unless for good cause the court determines otherwise, the jury shall take to the jury room for examination during deliberations all exhibits and writings, except depositions, that have been received in evidence." Tenn. R. Crim. P. 30.1. The Rule Comments say that this rule, applicable in criminal cases only, is mandatory unless the judge, either on motion of a party or sua sponte, determines that an exhibit should not be submitted to the jury. Among the reasons why a particular exhibit might not be submitted are that the exhibit may endanger the health and safety of the jurors, the exhibit may be subjected to improper use by the jury, or a party may be unduly prejudiced by submission of the exhibit to the jury.

c. HUNG JURY [DEADLOCK]

REMEMBER TO FOLLOW TRCP 31(d) and ask if a verdict had been reached as to the charged offense, or any lesser offense.

The judge must **never allow the jurors to give the numbers in their division**. The judge must also, before declaring a mistrial, follow the procedure in the 2005 amendment to Tenn. R. Crim. P. 31 to determine if they have reached a unanimous verdict of not guilty to the charged offense or any lesser included offense. Prior to this point, the judge may consider charging, or re-charging, the jury as to T.P.I. – Crim. 43.02 (Deadlocked jury charge).

"The trial court's first error occurred when the trial judge directed the foreperson to "tell me the numerical division," and the foreperson responded, "Okay. On the first is 11 to 1; second, it was 10 to 2; voluntary, it was 10 to 2; and aggravated assault, of course, it was 12 to 0, since he confessed." This was an improper request on the part of the trial court. Where a jury is unable to reach a verdict, our supreme court has held that **the trial judge must follow the procedure set forth in *Kersey v. State*, 525 S.W.2d 139 (Tenn. 1975). Specifically, when a jury reports its inability to come to a unanimous decision, *Kersey* directs the trial judge to "admonish the jury, at the very outset, not to disclose their division or whether they have entertained a prevailing view**." *Id.* at 141 (emphasis added). *Kersey* is quite explicit on this point. In fact, **"the only permissive inquiry [a trial judge may make] is as to progress and the jury may be asked whether it believes it might reach a verdict after further deliberations.**" *Id.* (emphasis added). Thereafter, a trial judge may give supplemental instructions in accordance with specific guidelines provided in *Kersey* if the court feels that further deliberations might be productive. *See id.* **We emphasize that until the jury reaches a verdict, "no one--not even the trial judge--has any right, reason or power to question the specifics of its deliberative efforts. . . .**

Such inquiry is error." .... The trial court also erred by failing to adhere to established legal procedures concerning the declaration of a mistrial. These procedures are important, for exceptions to the prohibition against double jeopardy permit a retrial of a defendant where a "manifest necessity" exists for the mistrial. ....**Great caution must be exercised when declaring a mistrial based on manifest necessity because, "where the ruling is mistaken or abused, the defendant may not be reprosecuted." .... One example of "manifest necessity" long recognized as a sufficient reason for declaring a mistrial is the inability of a jury to reach a unanimous verdict. .... Since unanimity is required, when a jury returns with a vote which is split, the trial court has the power and the duty to return the jury to the jury room with instructions that their verdict must be unanimous. .... A permissible alternative is to question the jury as to whether it believes a verdict might be possible after further deliberations. .... For "it is only when there is no feasible and just alternative to halting the proceedings that a manifest necessity is shown."** Upon hearing that the jury's vote was split on the issue of guilt for the charge of attempted first degree murder, the trial court in the case *sub judice* summarily dismissed the jury without making any inquiries as to whether a valid verdict might be obtained or if the jury was hopelessly deadlocked. .... [W]here a trial judge declines to exercise the preferred alternative of instructing the jury further and/or request that it continue to deliberate for the purpose of returning a consistent verdict, a finding of manifest necessity to summarily conclude the trial is precluded. ” *State v. Skelton*, 77 S.W.3d 791, 798-99 (Tenn. Crim. App. 2001) .

d. JURY QUESTIONS

OF WITNESSES - Jurors may only ask questions of witnesses at the discretion of the judge pursuant to the manner set out in Tenn. R. Crim. P. 24.1(c).

OF THE COURT DURING DELIBERATIONS - The trial court has the authority to respond to jury questions to the court with a supplemental instruction (which should be in writing), but should admonish them not to place undue emphasis on the new instruction and to consider it in conjunction with the entire charge, or it may be reversible error. *State v. Forbes*, 918 S.W.2d 431, 451 (Tenn. Crim. App. 1995).

"The proper method of fielding questions propounded by the jury during deliberations is to recall the jury, counsel, the defendant(s), and the court reporter back into open court and to take the matter up on the record."... "the preferable response to a juror's inquiry about parole is to instruct the jury to limit their deliberations to the instructions given them at the close of the evidence." *State v. Burns*, 979 S.W.2d 276,295 (Tenn. 1998).

e. REMOVAL OF JURORS DURING TRIAL

Both the defendant and the State are entitled to a fair trial by unbiased jurors, and it is the duty of the trial judge to discharge any juror who for any reason cannot or will not do his duty in this regard. Tenn. R. Crim. P. 24(e) clearly contemplates the replacement of a juror with an alternate if, at any time prior to the jury's withdrawal to consider its verdict, the trial court finds the juror to be unable or disqualified to perform that juror’s duties. The determination of whether a juror is unable or disqualified to perform his duties lies within the sound discretion of the trial court..... The defendant bears the burden of demonstrating that the trial court abused its discretion and that he the defendant was prejudiced by the substitution.” *State v. Goltz*, 111 S.W.3d 1, 4 (Tenn. Crim. App. 2003).

In *State v. Dellinger*, 79 S.W.3d 458, 494 (Tenn. 2002), the trial judge did not remove a juror whose wife offered him a bribe from the defendant, because the juror reported it and said he could still be fair. This was held to be OK.

Whether to remove jurors during trial and substitute alternates, when juror becomes disqualified to perform his duties lies in the discretion of the judge. It is the court's duty to do so if the juror can't discharge his duty and give both sides a fair trial. *State v. Forbes*, 918 S.W.2d 431, 451 (Tenn. Crim. App. 1995).

There are two types of jurors, *propter defectum* and *propter affectum*. Once the jury is sworn, *propter defectum* objections [blood relation to victim, not a citizen, etc.], are waived. *State v. Brock*, 940 S.W.2d, 577, 579 (Tenn. Crim. App. 1996).

It was in the discretion of the judge not to declare a mistrial when a juror's father died during deliberations. The Juror said he would continue deliberations and judge said he would stop the trial if no verdict reached so the juror could go to the funeral. Held OK. *State v. Mathis*, 969 S.W.2d 418, 422 (Tenn. Crim. App. 1997).

f. SELECTION OF JURORS

i. *BATSON* ISSUES

A state's use of peremptory challenges to intentionally exclude jurors of the defendant's race violates the defendant's right to equal protection. *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). The Court upheld this principle in *Powers v. Ohio*, but eliminated the requirement that the defendant and the potential juror share the same race. 499 U.S. 400, 415, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991) . A defendant seeking to raise a *Batson* claim must first make a prima facie showing of purposeful discrimination against a prospective juror. *Batson*, 476 U.S. at 93-94 . The defendant must establish "that a consideration of all the relevant circumstances raises an inference of purposeful discrimination." *Woodson v. Porter Brown Limestone Co.*, 916 S.W.2d 896, 903 (Tenn. 1996) . If a prima facie showing of purposeful discrimination is established, the burden then shifts to the state to establish a neutral basis for the challenge. *Batson*, 476 U.S. at 97. The trial court must give specific reasons for each of its factual findings in ruling on peremptory challenges. *Woodson*, 916 S.W.2d at 906 . This should include the reason the objecting party has or has not established a prima facie showing of purposeful discrimination. The trial court's findings are to be accorded great weight and will not be set aside unless they are clearly erroneous. *Id.* All of this is spelled out great detail in *State v. Robinson*, 146 S.W.3d 469, 505 (Tenn. 2004).

<u>The trial judge must make findings of fact when entertaining a Batson challenge!</u>

> [T]his Court has instructed trial courts that, when making a determination regarding a *Batson* objection, they "must carefully articulate specific reasons for each finding on the record, i.e., whether a prima facie case has been established; whether a neutral explanation has been given; and whether the totality of the circumstances support a finding of purposeful discrimination." *Woodson*, 916 S.W.2d at 906. Thus, we are initially constrained to point out that the trial court's findings on Defendant's *Batson* objections at trial are barely adequate to permit our review. After each of defense counsel's objections, the trial court failed to make a specific finding that a prima facie

> case of purposeful discrimination had been made. .... Nor did the trial court offer much commentary on the State's proffered reasons for its strikes, or render detailed findings about its reasons for overruling each of Defendant's *Batson* claims. We are especially concerned about the trial court's failure to make specific findings ... .

State v. Hugueley, 185 S.W.3d 356, 372 (Tenn. 2005).

"We acknowledge that some of the trial court's language in this case appears to indicate that it simply rejected a facially race-neutral explanation offered by the defendant. .... (The race-neutral explanation need not be persuasive, or even plausible. Unless a racially discriminatory intent is inherent in the proponent's explanation, the reason offered will be deemed race neutral.) However, despite the imprecise phraseology used by the trial court, the record makes clear that the court engaged in the required in-depth analysis of all the circumstances before reseating Moore on the jury, and did not impermissibly shift the burden of persuasion to the defendant. The court took pains to articulate its findings on the record, and it had the opportunity - which we do not - to assess the demeanor of the prospective juror and defense counsel, and to evaluate their credibility. On appeal, this Court accords great deference to the trial court's findings, and will not set them aside unless clearly erroneous. .... Although a trial court must accept a facially race-neutral explanation for purposes of determining whether the proponent has satisfied his burden of production, this does not mean that the court is bound to believe the explanation in making its [final] determination. In other words, while the court may find that a proffered explanation is race-neutral, the court is not required, in the final analysis, to find that the proffered explanation was the actual reason for striking the juror. If the court determines that a race or gender based motive was behind the challenge, the juror may not be excluded. In making its determination, the trial court must look to the totality of the circumstances for rarely will a party admit that its purpose in striking a juror was discriminatory. Accordingly, the trial court may infer discriminatory intent from circumstantial evidence. The factfinder's disbelief of the reasons put forth by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination, and . . . no additional proof of discrimination is required. Additionally, the court may consider whether similarly situated members of another race were seated on the jury or whether the race-neutral explanation proffered by the strikes' proponent is so implausible or fantastic that it renders the explanation pretextual. The trial court may also consider the demeanor of the attorney who exercises the challenge which is often the best evidence of the credibility of his proffered explanations. .... (trial court "has the power to disbelieve even a race-neutral explanation offered by the prosecution"). The record supports the trial court's ruling in this case. Defendant struck eight white jurors consecutively. *See Batson*, 476 U.S. at 97 ("a 'pattern' of strikes against . . . jurors [of a particular race] . . . might give rise to an inference of discrimination.") The only black juror defendant struck worked for the Division of Corrections. The defendant's explanation for striking Moore rested primarily on Moore's demeanor, and the trial judge was in a much better position to evaluate both Moore's demeanor and defense counsel's credibility than is this Court. The trial judge's findings are not clearly erroneous, and this issue is therefore without merit. *State v. Stout*, 46 S.W.3d 689, 711 (Tenn. 2001).

"The trial court erred in its application of parts two and three of the *Batson* test. As previously stated, the trial court's findings are anything but specific, and it is not entirely clear what method the trial court used to arrive at its ultimate finding on this issue. However, it appears that what happened in this case is that once the State satisfied part one of the *Batson* test by raising a prima facie case of discrimination, the trial court erroneously combined parts two and three and placed the burden on Defendant both to propose race-neutral reasons for the challenges and then prove that the race-neutral reasons where in fact the actual reasons. This was improper. As the United States Supreme Court has explained, "the ultimate burden of persuasion regarding [discriminatory] motivation rests with, and never shifts from, the opponent of the strike." .... It is absolutely clear that after the State satisfied part one of the *Batson* test, Defendant satisfied part two by offering race-neutral reasons for the challenges. At this point, the trial court should have applied part three of the test by determining whether, under the totality of the circumstances, the State had met its burden of showing that the race-neutral reasons offered by Defendant were only a pretext for purposeful discrimination. Instead, the trial court never engaged in the type of analysis required by part three." *State v. Spratt*, 31 S.W.3d 587, 596-97 (Tenn. Crim. App. 2000).

ii. INDIVIDUAL VOIR DIRE AND QUESTIONNAIRES

"Rule 24 grants trial courts the authority to permit individual voir dire:

> The court, upon motion of a party or on its own motion, may direct that any portion of the questioning of a prospective juror be conducted out of the presence of the tentatively selected jurors and other prospective jurors.

Tenn. R. Crim. P. 24(a). Generally, the trial judge has the discretion to control voir dire, including any determination as to whether prospective jurors should be individually questioned. *State v. Oody*, 823 S.W.2d 554, 563 (Tenn. Crim. App. 1991); *see also State v. Jefferson*, 529 S.W.2d 674, 682 (Tenn. 1975). The prevailing practice in this state is to examine the jurors collectively rather than individually. *Oody*, 823 S.W.2d at 563; *Bouchard v. State*, 554 S.W.2d 654, 659 (Tenn. Crim. App. 1977). Individual voir dire is mandated only when there is a significant possibility that a prospective juror has been exposed to potentially prejudicial material. *State v. Claybrook*, 736 S.W.2d 95 (Tenn. 1987); *Sommerville v. State*, 521 S.W.2d 792, 797 (Tenn. 1975)." *State v. Price*, 46 S.W.3d 785, 812 (Tenn. Crim. App. 2000).

The trial judge may deny a motion to submit a written questionnaire to jurors. It is in the judge's discretion. *State v. Shepherd*, 902 S.W.2d 895, 904 (Tenn. 1995).

iii. PRETRIAL PUBLICITY AND CHANGE OF VENUE

"The fact that a juror has been exposed to pre-trial publicity does not by itself warrant a change in venue. *See State v. Mann*, 959 S.W.2d 503, 532 (Tenn. 1997) . A court must instead consider a number of factors, including the nature and extent of pre-trial publicity, the degree of publicity in the area from which the venire will be drawn, the existence of hostility or demonstrations against the defendant, and the length of time between the pre-trial publicity and the trial. *See Hoover*, 594 S.W.2d at 746 . A court must also consider the effect that pre-trial publicity may have on jury selection. See id. Relevant factors in this regard include the size of the area from which the venire will be drawn, the potential jurors' familiarity with the pre-trial publicity, the effect on potential jurors shown during jury selection, and the defendant's use of peremptory challenges and for-cause challenges. See id.

The trial court has the discretion to determine whether to grant a change of venue, and its decision will be reversed only for a clear abuse of discretion. *See Dellinger*, 79 S.W.3d at 481 . Moreover, before a conviction will be reversed for the trial court's failure to grant a change of venue, an accused must establish "that the jurors who actually sat were biased and/or prejudiced." *Id.; see also Mann*, 959 S.W.2d at 532 .

The record demonstrates that the trial court did not abuse its discretion in denying Davidson's motion for a change of venue. The trial court considered numerous relevant factors and determined that the nature and conduct of the pre-trial publicity was informative but not sensational or unfairly prejudicial. Moreover, although the news accounts affected the area in which the venire was later selected, the trial court found that most of the pre-trial publicity occurred several months before the trial and was not prejudicial or pervasive either shortly before or during the trial.

The record also demonstrates that the trial court conducted a meticulous and detailed jury selection process from August 4 to August 19, 1997. The voir dire examination involved over two hundred potential jurors. As Davidson asserts, approximately twenty percent of the jurors knew of his prior criminal record, and ten percent of the jurors were familiar with Jackson's family. The trial court, however, removed nearly half of the venire by excusing for cause all potential jurors who could not set aside their opinions of the case. .... An individual examined during voir dire is not required to have a complete lack of knowledge of the facts and issues to be selected as a juror. *See State v. Pike*, 978 S.W.2d 904, 924 (Tenn. 1998) (appendix). As the United States Supreme Court has said, it is "sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 723, 6 L. Ed. 2d 751, 81 S. Ct. 1639 (1961) ; *see also Mann*, 959 S.W.2d at 531 (recognizing that jurors may be selected to hear a trial if they are able to set aside an opinion and render a verdict based on the evidence in court).” *State v. Davidson*, 121 S.W.3d 600, 611-13 (Tenn. 2003).

“A trial court's method of conducting jury voir dire in a criminal case must comport with constitutional due process notions of fundamental fairness. However, under the constitutional standard . . .,"the relevant question is not whether the community remembered the case, but whether the jurors . . . had such fixed opinions that they could not judge impartially the guilt of the defendant." .... The law does not require that the jurors be "ignorant of the facts and issues involved." Id. "Jurors may sit on a case, even if they have formed an opinion on the merits of the case, if they are able to set that opinion aside and render a verdict based upon the evidence presented in court." With respect to the method of conducting voir dire, Tennessee courts have recognized that "where the crime is highly publicized, the better procedure is to grant the defendant individual, sequestered voir dire, but it is only where there is a 'significant possibility' that a juror has been exposed to potentially prejudicial material that individual voir dire is mandated." .... Concerning the content of voir dire questioning, "both the degree of exposure [to potentially prejudicial information] and the prospective juror's testimony as to his or her state of mind shall be considered in determining [a juror's] acceptability." Tenn. R. Crim. P. 24(b)(2). However, the presence of pretrial publicity does not mean that voir dire "questions regarding the content of any publicity to which [prospective] jurors have been exposed" are constitutionally required. .... Even under Rule 24, “if the prospective juror has seen or heard and remembers

information that will be developed in the course of trial, or that may be inadmissible but is not so prejudicial as to create a substantial risk that his or her judgment will be affected, the prospective juror's acceptability shall depend on whether the testimony as to impartiality is believed." Tenn. R. Crim. P. 24(b)(2). .... In summary, individual, sequestered voir dire is not required unless the case is highly publicized and there exists a significant possibility that prospective jurors have been exposed to prejudicial information. .... Otherwise, "prospective jurors who have been exposed to information which will be developed at trial are acceptable, if the court believes their claims of impartiality." .... Although several prospective jurors indicated an awareness of the case as a result of local newspaper articles, the record reflects a benign interest in the case. .... there were no indications that strong feelings or opinions about the case had developed among the prospective jurors or that the newspaper reports were sensational or provocative.*"Spadafina v. State*, 77 S.W.3d 198, 207-09 (Tenn. Crim. App. 2000).

"'Extensive knowledge in the community of either the crimes or the putative criminal is not sufficient by itself to render a trial unconstitutionally unfair," and the court may not presume unfairness based solely upon the quantity of publicity "in the absence of a 'trial atmosphere . . . utterly corrupted by press coverage.'" *Dobbert v. Florida*, 432 U.S. 282, 303, 97 S. Ct. 2290, 2303, 53 L. Ed. 2d 344 (1977) (quoting *Murphy v. Florida*, 421 U.S. 794, 798, 95 S. Ct. 2031, 2035, 44 L. Ed. 2d 589 (1975)); *State v. Grooms*, 653 S.W.2d 271, 274 (Tenn. Crim. App. 1983) (affirming the denial of a change of venue when the publicity had greatly decreased by the time of trial). Corruption of the trial atmosphere can result from inflammatory publicity immediately before trial or from the influence of the news media pervading the proceedings "either in the community at large or in the courtroom itself." *Murphy*, 421 U.S. at 798-99, 95 S. Ct. at 2035. On the other hand, the court will not presume that the jury's exposure to news reports regarding the defendant's prior convictions or the charged offense without more deprives the defendant of due process. *Id.* at 799, 95 S. Ct. at 2036. .... the information contained in the August 18, 1999 article is not inflammatory, and the bulk of the article corresponds to the testimony given at the defendant's trial." *State v. Crenshaw*, 64 S.W.3d 374, 387 (Tenn. Crim. App., 2001).

g. SEQUESTRATION [& VIOLATION]

"[A] trial judge has the discretion to allow the separation of tentatively selected jurors prior to the time the jurors are sworn to try the case, so long as appropriate admonitions are administered. *See State v. McKay*, 680 S.W.2d 447, 453 (Tenn. 1984) . Where such separation occurs, as it did in this case, "it is not grounds for reversal or a new trial unless it can be affirmatively shown that prejudice resulted from the separation." Id.

In this case, before the jurors left the courthouse on the evening before they were sworn, the trial judge instructed them not to discuss the case among themselves; not to allow anyone to discuss the case with them; and not to "read, listen, or watch any media accounts of this hearing." During the brief hearing on this matter, there was no evidence adduced demonstrating that any prejudice had resulted from the jurors' separation. Nor was there any evidence to this effect adduced at the motion for new trial. Accordingly, no grounds for reversal or a new trial have been established, and this issue is therefore without merit." *State v. Vaughan*, 144 S.W.3d 391, 405 (Tenn. Crim. App. 2003).

However, sequestered jurors are <u>not</u> allowed to drive to and from their hotel and the courthouse in separate cars. The burden is on the State to show no prejudice to defendant. That

judge was reversed for this in *State v. Bondurant*, 4 S.W.3d 662, 673 (Tenn. 1999).

It was held not reversible that 2 sequestered jurors left to buy beer (!) as long as they didn't talk with the store clerk about the trial. *State v. Spadafina*, 952 S.W.2d 444, 452 (Tenn. Crim. App. 1996).

2. PROBLEMS WITH THE DEFENDANT

a. PRESENCE OF DEFENDANT AT VOIR DIRE

The defendant has the right to be at every stage of the trial, including voir dire, unless waives. See TRCP 43(a). Voluntary absence after trial starts or in-court misbehavior can constitute waiver, but "the court should indulge every reasonable presumption against waiver." Mere absence when trial is called is not sufficient to show waiver. The judge was reversed when the defendant missed the first part of jury selection, even though no prejudice shown, as this was plain error regarding a fundamental right, and can never be treated as harmless. *Muse*, 967 S.W.2d 764, 766-68 (Tenn. 1998). See the more recent case of *State v. Far*, 51 S.W.3d 222, 226 (Tenn. Crim. App. 2001), in which the defendant refused to be present for the trial, but the judge never got him to waive it on the record, so the conviction was reversed. "The record must reflect that the accused had knowledge of his right and personally waived the right either in writing or in open court."

b. PRISON CLOTHES & SHACKLES

Ordinarily, a defendant may not be forced to appear in shackles or in prison garb. *Estelle v. Williams*, 425 U.S. 501, 504-05, 96 S. Ct. 1691, 1693, 48 L. Ed. 2d 126 (1976). However, the defendant can waive his right to appear in civilian clothes if he fails to take the opportunity provided him to change. *State v. Bradfield*, 973 S.W.2d 937, 945 (Tenn. Crim. App. 1997). In most cases, the trial judge must honor a defendant's request to be tried in civilian clothing. However, failure to do this is OK if the defendant had a reasonable opportunity to appear in civilian clothes but failed to do so. *See State v. Zonge*, 973 S.W.2d 250, 257 (Tenn. Crim. App. 1997).

> "Although we are disinclined at this point to hold that a stun belt may not be used as an in-court restraint on a criminal defendant, ... the use of a stun belt implicates many of the same principles as the use of shackles. We are loathe to approve the use of a stun belt without a finding of necessity simply because a stun belt is ordinarily not visible. Accordingly, we conclude that the principles and procedures set forth in *Willocks* apply to the use of a stun belt as an in-court restraint. .... [T]here is a legal presumption against the use of in-court restraints. *Willocks v. State*, 546 S.W.2d at 821. To justify the use of restraints, the State bears the burden of demonstrating necessity that serves a legitimate interest, such as preventing escape, protecting those present in the courtroom, or maintaining order during trial. *State v. Thompson*, 832 S.W.2d at 580; *Willocks v. State*, 546 S.W.2d at 820. The trial court should consider all relevant circumstances, including without limitation: (1) the defendant's circumstances, such as record of past behavior, temperament, and the desperateness of his or her situation; (2) the state of the courtroom and courthouse; (3) the defendant's physical condition; and (4) whether there is a less

onerous but adequate means of providing security. *Lakin v. Stine*, 431 F.3d 959, 964 (6th Cir. 2005); *Kennedy v. Cardwell*, 487 F.2d at 110-11. The trial court should consider the relevant circumstances against the backdrop of affording the defendant the physical indicia of innocence, ensuring the defendant's ability to communicate with counsel, protecting the defendant's ability to participate in his or her defense and offer testimony in his or her own behalf, and maintaining a dignified judicial process. *See Deck v. Missouri*, 544 U.S. at 630-32.

Mobley v. State, 397 S.W.3d 70, 99-100 (2012). Whether shackles or a stun belt is used, the trial court must make particularized findings, and the better practice is to hold a hearing on the issue so that factual disputes may be resolved and evidence surrounding the decision may be adduced and made part of the record. *Willocks v. State*, 546 S.W.2d at 822. The decision to require the use of shackles or a stun belt is addressed to the sound discretion of the trial court. *State v. Thompson*, 832 S.W.2d at 580. Should the restraining device inadvertently become visible to the jury, the trial court should give cautionary instructions that it should in no way affect the jury's determinations. *Willocks*, 546 S.W.2d at 822.

c. *PRO SE* ISSUES

i. *Pro se* questions on voir dire of the defendant

If a defendant wants to represent himself, "the trial judge must conduct an intensive inquiry as to his ability to represent himself." Ask the following questions on the record, which are listed in the appendix to *Smith v. State*, 987 S.W.2d 871, 877-78:

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 $ 50 ($ 25 if a misdemeanor) 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): {S.W.2d 878} 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.

ii. Other *pro se* issues

Pro se litigants, including *pro se* prisoners, have a right to fair and equal treatment by the courts. However, the courts may not prejudice the rights of other parties in order to be "fair" to parties who decide to represent themselves. Thus, the courts should not allow *pro se* litigants, including incarcerated prisoners, to shift the burden of the litigation to the courts or to their adversaries. *Hessmer v. Miranda*, 138 S.W.3d 241, 244-45 (Tenn. Ct. App. 2003).

The trial court is not required to interrupt the trial to explain procedural rules, legal terms, or consequences of the litigant's actions. *State v. McCary*, 119 S.W.3d 226, 258 (Tenn. Crim. App. 2003).

"The defendant also claims that the trial court erred by permitting him to represent himself at each of the trials. Every person has a constitutional right to represent himself. U.S. Const. amend. VI; Tenn. Const. art. I, § 9; *Faretta v. California*, 422 U.S. 806, 818-820, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975). In *State v. Herrod*, 754 S.W.2d 627 (Tenn. Crim. App. 1988), this court ruled that the exercise of the right of self- representation is based upon three conditions:

(1) The defendant must timely assert his right to self-representation;
(2) the exercise of the right must be clear and unequivocal; and
(3) the defendant must knowingly and intelligently waive his right to assistance of counsel.

Id. at 629-30. A defendant need not have legal training or experience in order to competently and intelligently elect self-representation. *Faretta*, 422 U.S. at 835. .... A judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances

in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered." *State v. McCary*, 119 S.W.3d 226, 257-58 (Tenn. Crim. App. 2003).

When the trial judge is contemplating trying two defendants, and one is *pro se*, the judge should first become familiar with the warnings given in *State v. Carruthers*, 35 S.W.3d 516, 553 (Tenn. 2000).

"[T]here are certain perils a defendant faces when representing himself at trial. Knowing when to object during argument obviously is one of those perils. While the trial court can intervene sua sponte and take curative measures when the argument becomes blatantly improper, *see, e.g., State v. Cauthern*, 967 S.W.2d 726, 737 (Tenn. 1998), the trial court must exercise its discretion and should not exert too much control over the arguments. The judge does not serve as a pro se defendant's counselor during trial. The judge should intervene only when requested or when the judge deems proper in the interest of justice." *State v. Carruthers*, 35 S.W.3d 516, 578 (Tenn. 2000).

"We decline to hold that a trial court must provide extensive and detailed warnings when a defendant's conduct illustrates that he or she understands the right to counsel and is able to use it to manipulate the system. We conclude that an implicit waiver may appropriately be found, where, as here, the record reflects that the trial court advises the defendant the right to counsel will be lost if the misconduct persists and generally explains the risks associated with self-representation." *State v. Carruthers*, 35 S.W.3d 516, 549 (Tenn. 2000). "The sanction is appropriate under the circumstances and commensurate with Carruthers' misconduct. We reiterate that a finding of forfeiture is appropriate only where a defendant egregiously manipulates the constitutional right to counsel so as to delay, disrupt, or prevent the orderly administration of justice. Where the record demonstrates such egregious manipulation a finding of forfeiture should be made and such a finding will be sustained, even if the defendant is charged with a capital offense. Persons charged with capital offenses should not be afforded greater latitude to manipulate and misuse valuable and treasured constitutional rights. Id. at 550.

iii. "Hybrid" representation (elbow counsel)

""Elbow counsel," "standby counsel," "advisory counsel," and "arm chair counsel" are terms used interchangeably, under our case law.

"Both the United States and Tennessee Constitutions guarantee the right of an accused to self-representation ***or*** to representation by counsel. U.S. CONST. amend. VI ; TENN. CONST. art. I, § 9; *Faretta v. California*, 422 U.S. 806, 807, 95 S. Ct. 2525, 2527, 45 L. Ed. 2d 562 (1975); *State v. Northington*, 667 S.W.2d 57, 60 (Tenn. 1984). The right to self-representation and the right to counsel have been construed to be alternative ones; that is, **one has a right either to be represented by counsel *or* to represent himself**, to conduct his own defense. *State v. Small*, 988 S.W.2d 671, 673 (Tenn. 1999). "Waiver of one right constitutes a correlative assertion of the other. . . . [A] criminal defendant cannot logically waive or assert both rights. *State v. Burkhart*, 541 S.W.2d 365, 368 (Tenn. 1976). Neither the United States Constitution nor the Tennessee Constitution grants the accused the right to "hybrid representation," i.e., permitting both the defendant and counsel to participate in the defense. *Id*. at 371 . It is entirely a matter of

grace for a defendant to represent himself and have counsel, and such privilege should be granted by the trial court only in exceptional circumstances. *Melson*, 638 S.W.2d at 359. "**Hybrid representation" should be permitted "sparingly and with caution and only after a judicial determination that the defendant (1) is not seeking to disrupt orderly trial procedure and (2) that the defendant has the intelligence, ability and general competence to participate in his own defense.**" *Burkhart*, 541 S.W.2d at 371. The length of a trial or the involvement of the death penalty does not *per se* constitute "exceptional circumstances." *Melson*, 683 S.W.2d at 359. One of the most fundamental responsibilities of a trial court in a criminal case is to assure that a fair trial is conducted. *State v. Franklin*, 714 S.W.2d 252, 258 (Tenn. 1986) (citation omitted). The decision whether to permit "hybrid representation" rests entirely within the trial court's discretion and will not be overturned in the absence of a clear abuse of that discretion. *See State v. Berry*, 141 S.W.3d 549, 574 (Tenn. 2004), with facts clearly showing why allowing the defendant and his attorneys to represent him at the same time can cause lots of problems.

d. VOIR DIRE OF DEFENDANT (*STATE V. MOMON*)

Momon v. State, 18 S.W.3d 152, 162 (Tenn. 1999) - Since the right to testify is fundamental, the defendant must waive that right in open court. "At any time before conclusion of the proof, defense counsel shall request a hearing, out of the presence of the jury, to inquire of the defendant whether the defendant has made a knowing, voluntary, and intelligent waiver of the right to testify. This hearing shall be placed on the record and shall be in the presence of the trial judge. **Defense counsel is not required to engage in any particular litany, but counsel must show at a minimum that the defendant knows and understands that**:

> **(1) the defendant has the right not to testify, and if the defendant does not testify, then the jury (or court) may not draw any inferences from the defendant's failure to testify;**
> **(2) the defendant has the right to testify and that if the defendant wishes to exercise that right, no one can prevent the defendant from testifying;**
> **(3) the defendant has consulted with his or her counsel in making the decision whether or not to testify; that the defendant has been advised of the advantages and disadvantages of testifying; and that the defendant has voluntarily and personally waived the right to testify.**

Defense counsel is generally in the best position to voir dire the defendant concerning a wavier of the right to testify, and the hearing outlined above will avoid any possible perceived pitfalls of mandating direct questioning by the trial court itself. Since the right to testify is the mirror image of the right to remain silent, there is an inherent risk that a trial judge participating in the questioning may cast an unflattering light on the right not to testify. .... Under normal circumstances, therefore, the trial judge should play no role in this procedure, unless the judge believes there is evidence that the defendant is not making a valid waiver of the right to testify. In such a case, the trial judge is obliged to question the defendant directly to the extent necessary to ensure a valid waiver."

3. PROBLEMS WITH ELECTION OF OFFENSES

a. SEPARATE, DISCRETE ACTS

If more than one criminal act may be considered by the jury, the judge must force the State to elect which offense it will submit to the jury, to ensure a unanimous verdict. The event the jury must consider should be spelled out in the jury instructions. The judge must do this even if the defense makes no motion for the State to elect. Election usually is required in child sexual assault cases in which more than one assault event is raised in the proof, in adult sexual assault cases in which more than one sexual act or site on the victim is involved, and in child abuse cases in which more than one injury to the child is shown. For guidance as to how to word the election and how not to elect, with reference to birthdays, places, etc., *see State v. Brown*, 992 S.W.2d 389, 392 (Tenn. 1999). The State has a duty to either limit the proof or prepare its case so that it can elect and distinguish the offenses testified to. After trying a case alleging 85 counts of rape of a child, from the time the victim was four until she was ten, a trial judge was reversed by failing to require the State to make an election of offenses, because the victim did not testify as to the specifics of each incident, only that the abuse occurred about twice a month during a six-year period. *State v. Brown*, 375 S.W.3d 565, 573-576 (Tenn. Crim. App. 2011). That case contains a good summary of why we must make the State elect.

The State must be told to elect at the end of the State's case in chief, not after all the proof. *State v. Ellis*, 89 S.W.3d 584, 595 (Tenn. Crim. App. 2000).

"Although the defense apparently did not request an election of offenses, we have stressed that the election requirement is a responsibility of the trial court and the prosecution and, therefore, does not depend on a specific request by a defendant. See State v. Walton, 958 S.W.2d at 727 ("plain error is an appropriate consideration for an appellate court whether properly assigned or not") ..... As our cases have made crystal clear, the prosecution's failure to elect was an error that was "fundamental, immediately touching [upon] the constitutional rights of [the] accused." *Burlison v. State*, 501 S.W.2d at 804. We also reject the State's alternative argument that the failure to comply with the election requirement was harmless simply because the jury rejected the defendant's alibi defense and accredited the victim's testimony. We have earlier said in this regard:

> It has been suggested that when a defendant denies all sexual contact with the victim, but the proof is sufficient to support guilty verdicts beyond a reasonable doubt on all of the offenses in evidence, an election is unnecessary. . . . An appellate court's finding that the evidence is sufficient to support convictions for any of the offenses in evidence is an inadequate substitute for a jury's deliberation over identified offenses."

State v. Kendrick, 38 S.W.3d 566, 569 (Tenn. 2001).

"Questions regarding jury unanimity generally arise in cases where the prosecution presents evidence to the jury that tends to show more than one criminal offense, but the underlying indictment is not specific as to the offense for which the accused is being tried. *State v. Brown*, 762 S.W.2d 135, 136-37 (Tenn. 1988); *Burlison v. State*, 501 S.W.2d 801 (Tenn. 1973). To insure that the jury renders a unanimous verdict in those cases, the trial judge has an affirmative duty to require the State to elect upon which offense it is submitting for the jury's consideration. *Tidwell v. State*, 922 S.W.2d 497, 501-502 (Tenn. 1996); *State v. Shelton*, 851

S.W.2d 134, 139 (Tenn. 1993). Similarly, questions of jury unanimity may arise in cases where an accused is indicted and prosecuted for a single offense, but the jury is permitted to consider multiple criminal acts of the type which, if found beyond a reasonable doubt, would each support a conviction of the charged offense. *See State v. Brown*, 823 S.W.2d at 581-82. To avoid a "patchwork" verdict of guilt in those cases, the trial judge must "augment the general unanimity instruction to insure that the jury understands its duty to agree unanimously to a particular set of facts." *Id*. at 583." *State v. Lemacks*, 996 S.W.2d 166, 170 (Tenn. 1999).

"When the evidence does not establish that multiple offenses have been committed, however, the need to make an election never arises. To this end, this Court has made a distinction between multiple discrete acts that individually constitute separate substantive offenses and those offenses that punish a single, continuing course of conduct. In cases when the charged offense consists of a discrete act and proof is introduced of a series of acts, the state will be required to make an election. In cases when the nature of the charged offense is meant to punish a continuing course of conduct, however, election of offenses is not required because the offense is, by definition, a single offense. .... Continuing offenses generally stem from a single motivation or scheme, although such offenses can be committed by multiple discrete acts occurring over a period of time. For example, in *State v. Hoxie*, 963 S.W.2d 737 (Tenn. 1998), we concluded that the offenses of stalking and telephone harassment were continuing offenses because the statutory language contemplated a series of discrete actions amounting to a continuing course of conduct. *Id*. at 743. In concluding that the offense punished a single continuing course of conduct, we stated that while the offenses involved numerous discrete parts, the defendant was not in danger of receiving a non-unanimous jury verdict. *Id.* ("While we agree with the Court of Criminal Appeals that the unlawful actions which constitute the offense of stalking may in some instances be separate distinct crimes, we conclude that when the only offense charged requires proof of a continuous course of conduct, the election requirement does not apply."). .... Likewise, in *State v. Legg*, 9 S.W.3d 111 (Tenn. 1999), we concluded that the offense of kidnaping was a continuing offense based upon the language of the statute and the nature of the offense. We analyzed the statutory elements of "removal" and "confinement" and noted that the very nature of removal or confinement did not lend itself to division into segments of time with various points of termination. Furthermore, we stated that "an act of removal or confinement does not end merely upon the initial restraint, and a defendant continues to commit the crime at every moment the victim's liberty is taken." *Id*. at 117. Because the terms "removal" and "confinement" contemplated a continued state of being restrained, we held that the General Assembly must have intended to punish a continuing course of conduct by using these terms.

Although the appellants in this case argue that child abuse through neglect may "be seen as multiple occasions of neglect, each of which results in serious bodily injury," these cases illustrate that a continuing offense may be composed of multiple discrete acts where a single scheme or motivation is present. Nevertheless, we have previously stated that we will find that an offense punishes a continuing course of conduct "only when 'the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that [the legislature] must assuredly have intended that it be treated as a continuing one.'" *Id*. at 116 (quoting *Toussie v. United States*, 397 U.S. 112, 115, 25 L. Ed. 2d 156, 90 S. Ct. 858 (1970)). In deciding whether an offense is a continuing one, therefore, this Court will look to the

statutory elements of the offense and determine whether the elements of the crime themselves contemplate punishment of a continuing course of conduct. *See id.*" *State v. Adams*, 24 S.W.3d 289, 294 (Tenn. 2000).

b. CONTINUING OFFENSES

One does not have to elect when the crime is one of continuing conduct, such as stalking, or telephone harassment in *State v. Hoxie*, 963 S.W.2d 737, 742-43 (Tenn. 1998), or in child abuse from neglect, in *State v. Adams*, 24 S.W.3d 289, 294 (Tenn. 2000) "[T]he General Assembly intended for the offense of aggravated child abuse through neglect to punish a continuing course of knowing conduct beginning with the first act or omission that causes adverse effects to a child's health or welfare. Indeed, it would be an absurd construction to hold that criminal child neglect is complete as soon as the child's health and welfare are first adversely affected, especially when the child remains in this condition for a substantial period of time. Neglect simply does not lend itself to division into segments of discrete acts each having various points of termination. *Cf. State v. Legg*, 9 S.W.3d 111, 117 (Tenn. 1999). Rather, a more reasonable construction of the offense supports the view that the offense continues until the person responsible for the neglect takes reasonable steps to remedy the adverse effects to the child's health and welfare caused by the neglect." *Adams*, at 296.

c. CRIMINAL RESPONSIBILITY

The state need not elect between prosecution as a principal actor and prosecution for criminal responsibility. *State v. Anthony Hodges*, 7 S.W.3d 609, 625 (Tenn. Crim. App. 1999).

d. DIFFERENT THEORIES

If the State asks the jury for conviction on different theories (such as DUI by driving or exercising control) they do not need to elect. The defendant would be guilty either way. *State v. Butler*, 108 S.W.3d 845, 850 n.3 (Tenn. 2003).

e. SEX OFFENSES

For a good case on how not to elect in sex cases, because the way the judge allowed the election did not ensure a unanimous verdict, *see State v. Walton*, 958 S.W.2d 724, 727 (Tenn. 1997). The State cannot use the "grab bag" approach.

"Recognizing the practical difficulties present in applying the election requirement in cases of child sexual abuse, our supreme court has further provided the following broad guidelines: By insisting upon election, we emphasize that the state is not required to identify the particular date of the chosen offense. . . . If, for example, the evidence indicates various types of abuse, the prosecution may identify a particular type of abuse and elect that offense. . . . Moreover, when recalling an assault, a child may be able to describe unique surroundings or circumstances that help to identify an incident. The child may be able to identify an assault with reference to a meaningful event in his or her life, such as the beginning of school, a birthday, or a relative's visit. . . . Any description that will identify the prosecuted offense for the jury is sufficient. In fulfilling its obligation under *Burlison* [, 501 S.W.2d 801, 804 (Tenn. 1973)] to ensure that an election occurs, the trial court should bear in mind that the purpose of election is to ensure that each juror is considering the same occurrence. If the prosecution cannot identify an event for which to ask a conviction, then the court cannot be assured of a unanimous decision. *Shelton*, 851 S.W.2d at 137-138 (citation and footnote omitted). Again, with respect to Count One of the indictment, the State relied upon both the victim's and the appellant's statements concerning multiple incidents during which the appellant rubbed

his penis against AP's vagina. In *State v. Brown*, 823 S.W.2d 576, 584 (Tenn. Crim. App. 1991), we did observe that "in a case where the evidence shows that the defense is, simply, a denial that any offense occurred and that the evidence in favor of the state's position is of a similar quality as to each offense proven and is derived from the same witness[es], then it is extremely difficult to imagine that a potential exists of the jury splitting its findings. Nevertheless, our supreme court cast doubt upon this observation in *Tidwell*, 922 S.W.2d 497, 501 (Tenn. 1996), when it specifically rejected the State's argument that, when a victim is unable to recount any specifics about multiple incidents of abuse except that the defendant engaged her in sexual intercourse on numerous occasions, "'jury unanimity is attained . . . because, although the jury may not be able to distinguish between the various acts, it is certainly capable of unanimously agreeing that they took place in the number and manner described.'" *See also e.g., State v. Thomason*, 2000 Tenn. Crim. App. LEXIS 229, No. W1999-02000-CCA-R3-CD (No. 02C01-9903-CC-00086), 2000 WL 298695, at *10 (Tenn. Crim. App. at Jackson, March 7, 2000)(holding that the State did not sufficiently elect an offense upon which to base a conviction of sexual battery when the victim testified concerning multiple incidents in 1995 when the defendant "touched [her] inappropriately" but could not recall any specific incident)." *State v. Ellis*, 89 S.W.3d 584, 596 (Tenn. Crim. App. 2000).

f. SEXUAL BATTERY AND THE *PHILLIPS* ANALYSIS

Sometimes multiple offenses may be only one crime - the sexual battery statute uses the plural "parts" rather than the singular "part." Therefore, the statute contemplates that the element of "sexual contact" may be established by proof that the defendant touched more than one of the areas included within the definition of "intimate parts." If the entire instance of sexual contact occurs quickly and virtually simultaneously, then only one offense has occurred. If more than one touching has occurred the trial judge needs to do a *Phillips* analysis, set out in *State v. Johnson*, 53 S.W.3d 628, 633 (Tenn. 2001), citing *State v. Phillips*, 924 S.W.2d 662 (Tenn. 1996), as follows: the judge must weigh (1) the nature of the acts committed by the defendant; (2) the area of the victim's body invaded by the defendant's sexually assaultive behavior; (3) the time elapsed between the defendant's discrete acts of sexually assaultive conduct; (4) the defendant's intent in the sense that the lapse of time may indicate a newly formed intent to again seek sexual gratification or inflict abuse; and (5) the cumulative punishment.

Criminal Discovery and Inspection

Tenn. R. Crim. P. 16 and *Brady v. Maryland*

Tennessee Judicial Academy
Thursday, August 21, 2014
Judge Chris Craft
Criminal Court Division VIII
30th Judicial District at Memphis

RULE 16. DISCOVERY AND INSPECTION. —

(a) Disclosure of Evidence by the State. —

(1) Information Subject to Disclosure. —

(A) Defendant's Oral Statement. — Upon a defendant's request, the state shall disclose to the defendant the substance of any of the defendant's oral statements made before or after arrest in response to interrogation by any person the defendant knew was a law-enforcement officer if the state intends to offer the statement in evidence at the trial;

(B) Defendant's Written or Recorded Statement. — Upon a defendant's request, the state shall disclose to the defendant, and make available for inspection, copying, or photographing, all of the following:

(i) the defendant's relevant written or recorded statements, ..., if:

(I) the statement is within the state's possession, custody, or control; and

(II) the district attorney general knows–or through due diligence could know–that the statement exists; and

(ii) the defendant's recorded grand jury testimony ... .

(C) Organizational Defendant. ... .

(D) Codefendants. — Upon a defendant's request, when the state decides to place codefendants on trial jointly, the state shall promptly furnish each defendant who has moved for discovery under this subdivision with all information discoverable under Rule 16(a)(1)(A), (B), and (C) as to each codefendant.

(E) Defendant's Prior Record. — Upon a defendant's request, the state shall furnish the defendant with a copy of the defendant's prior criminal record, if any, that is within the state's possession, custody, or control if the district attorney general knows–or through due diligence could know–that the record exists.

(F) Documents and Objects. — Upon a defendant's request, the state shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings, or places ... if the item is within the state's possession, custody, or control and:

(i) the item is material to preparing the defense;

(ii) the government intends to use the item in its case-in-chief at trial; or

(iii) the item was obtained from or belongs to the defendant.

(G) Reports of Examinations and Tests. — Upon a defendant's request, the state shall permit the defendant to inspect and copy or photograph the results or reports of physical or mental examinations, and of scientific tests or experiments if:

(i) the item is within the state's possession, custody, or control;

(ii) the district attorney general knows–or through due diligence could know–that the item exists; and

(iii) the item is material to preparing the defense or the state intends to use the item in its case-in-chief at trial.

(2) Information Not Subject to Disclosure. — Except as provided in paragraphs (A),

(B), (E), and (G) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal state documents made by the district attorney general or other state agents or law enforcement officers in connection with investigating or prosecuting the case. Nor does this rule authorize discovery of statements made by state witnesses or prospective state witnesses.

(3) Grand Jury Transcripts. — This rule does not apply to the discovery or inspection of a grand jury's recorded proceedings, except as provided in Rule 6 and Rule 16(a)(1)(A), (B), and (C).

(4) Failure to Call Witness. — The fact that a witness's name is furnished under this rule is not grounds for comment on a failure to call the witness.

(b) Disclosure of Evidence by the Defendant. —

(1) Information Subject to Disclosure. —

(A) Documents and Tangible Objects. — If a defendant requests disclosure under subdivision (a)(1)(F) or (G) of this rule and the state complies, then the defendant shall permit the state, on request, to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions of these items if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to introduce the item as evidence in the defendant's case-in-chief at trial.

(B) Reports of Examinations and Tests. — If the defendant requests disclosure under subdivision (a)(1)(F) or (G) of this rule and the state complies, the defendant shall permit the state, on request, to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to introduce the item as evidence in the defendant's case-in-chief at trial; or

(iii) the defendant intends to call as a witness at trial the person who prepared the report, and the results or reports relate to the witness's testimony.

(2) Information Not Subject to Disclosure. — Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of:

(A) reports, memoranda, or other internal defense documents made by the defendant or the defendant's attorneys or agents in connection with the investigation or defense of the case; or

(B) a statement made by the defendant to the defendant's agents or attorneys or statements by actual or prospective state or defense witnesses made to the defendant or the defendant's agents or attorneys.

(3) Failure to Call Witness. — The fact that a witness's name is on a list furnished under this rule is not grounds for comment on a failure to call the witness.

(c) Continuing Duty to Disclose. — A party who discovers additional evidence or material before or during trial shall promptly disclose its existence to the other party, the other party's

attorney, or the court if:

(1) the evidence is subject to discovery or inspection under this rule, and

(2) the other party previously requested, or the court ordered, its production.

(d) Regulating Discovery. —

(1) Protective and Modifying Orders. — At 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.

(2) Failure to Comply with a Request. — If a party fails to comply with this rule, the court may:

(A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms or conditions;

(B) grant a continuance;

(C) prohibit the party from introducing the undisclosed evidence; or

(D) enter such other order as it deems just under the circumstances.

(e) Alibi Witnesses. — Discovery of alibi witnesses is governed by Rule 12.1.

NO CONSTITUTIONAL RIGHT TO GENERAL DISCOVERY

"There is no constitutional right to general discovery in a criminal case. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987); *Weatherford v. Bursey*, 429 U.S. 545, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977). The State is not obliged to make an investigation or to gather evidence for the defendant. *See State v. Reynolds*, 671 S.W.2d 854, 856 (Tenn. Crim. App. 1984). The discovery rules do not require disclosure of information not known by the State. Tenn. R. Crim. P. 16(a). Rule 16 permits the defendant to discover any statements made by him, his prior record, documents and tangible objects, and reports of tests and examinations, but only to the extent that the information is in the "possession, custody, or control of the state." *Id*.; *see also State v. Martin*, 634 S.W.2d 639 (Tenn. Crim. App. 1982) (Rule 16 does not provide for the discovery of prosecution witnesses)." *State v. Schiefelbein*, 230 S.W.3d 88, 147-48 (Tenn. Crim. App. 2007).

RULE 16 DOES NOT COVER DISCOVERY OF WITNESS NAMES OR STATEMENTS

Rule 16 does not require nor authorize pretrial discovery of the names and addresses of the State's witnesses. *State v. Martin*, 634 S.W.2d 639, 643 (Tenn. Crim. App. 1982). The obligation of the State to furnish witness names is a statutory one, derived from Tenn. Code Ann.§ 40-17-106, which states as follows:

> It is the duty of the district attorney general to endorse on each indictment or presentment, at the term at which the indictment or presentment is found, the names of the witnesses as the district attorney general intends shall be summoned in the cause ... .

Section 40-17-106 is directory only and does not necessarily disqualify a witness whose name does not appear on the indictment from testifying. *State v. Street*, 768 S.W.2d 703, 710-711 (Tenn. Crim. App. 1988). If the name of a witness the State intends to call is not listed on the indictment, the State should ordinarily give the defense notice, but lack of notice is not fatal.

> 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. *Id.* A defendant will be entitled to relief for nondisclosure only if he or she can demonstrate prejudice, bad faith, or undue advantage. *Id*. 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).

Because prejudice, bad faith or undue advantage is the key issue, the judge should, at a minimum, first allow the defense to interview the witness to prevent surprise and have a hearing as to materiality and prejudice prior to his/her testimony, making findings on the record.

> "Initially, the defendant contends that the trial court erred by permitting Lisa McClure, whose identity had not been previously disclosed by the state, to testify at trial that the victim informed her of his desire to live. The defendant argues that the trial court should have either continued the trial or granted a mistrial so as to permit the defense an opportunity to properly investigate.
>
> .... The purpose of furnishing names on an indictment or presentment is to prevent surprise to the defense. *State v. Melson*, 638 S.W.2d 342, 364 (Tenn. 1982) . Evidence should not be excluded except when the defendant is actually prejudiced by the failure to comply with the rule and when the prejudice cannot otherwise be eradicated. *State v. Baker*, 751 S.W.2d 154, 164-65 (Tenn. Crim. App. 1987) ; *State v. Morris*, 750 S.W.2d 746, 749 (Tenn. Crim. App. 1987) ; *State v. James*, 688 S.W.2d 463, 466 (Tenn. Crim. App. 1984) . 'In this context, it is not the prejudice which resulted from the witnesses testimony but the prejudice which resulted from the defendant's lack of notice which is relevant.' *State v. Jesse Eugene Harris*, 1989 Tenn. Crim. App. LEXIS 449, No. 88-188-III, slip op. at 8 (Tenn. Crim. App., at Nashville, June 7, 1989).
>
> .... The record demonstrates, and the defendant concedes, that the state did not withhold the witness's name in bad faith. Rather, the assistant district attorney learned of Ms. McClure's knowledge of relevant circumstances the evening before trial. In ruling favorably to the state, the trial judge observed that the proffered testimony was relevant to the defense claim of suicide. Defense counsel was given an opportunity to interview Ms. McClure. Additionally, the trial court limited her testimony to the victim's statement that

he was "not ready to die yet."

In our view, Ms. McClure's testimony was relevant, but cumulative. Other witnesses testified that the victim was not suicidal at the time of his death. Although the defense should have been notified earlier by the state, if with reasonable diligence it should have known about her knowledge of the statement, the substance of Ms. McClure's testimony was not a surprise. The claim of a possible suicide and the state's desire to rebut the claim were well known to the defense. Any error was harmless."

State v. Wilson, 164 S.W.3d 355, 362-63 (Tenn. Crim. App. 2003).

PROCEDURE FOR DISCLOSURE OF NAMES OF CONFIDENTIAL INFORMANTS

The State has a privilege, subject to certain limitations, to withhold from the accused the identity of a confidential informant.

> The privilege is based on public policy and seeks to encourage citizens to assist in crime detection and prevention by giving information to law enforcement officials without unduly exposing themselves to the danger inherent in such laudable activity and to make possible their continued usefulness in future disclosures that the revelation of their identity would probably hamper and prevent. This Court has held that a defendant has no constitutional right to require disclosure of the informant's identity, and the decision is left to the discretion of the trial court.

House v. State, 44 S.W.3d 508, 512 (Tenn. 2001). A defendant is also not entitled to disclosure of a confidential informant's identity when the defendant's sole and exclusive reason for seeking the identity is to attack the validity of a search warrant. *State v. Ash*, 729 S.W.2d 275, 278 (Tenn. Crim. App. 1986). However, in order to afford the defendant a fair trial, sometimes the identity of an informant is required.

> There is no fixed rule regarding when the state must divulge the identity of a confidential informant to the defendant. Whether the state should be required to disclose the identity of a confidential informant is a matter which addresses itself to the sound discretion of the trial court. The trial court must decide this question on a case by case basis, taking into consideration the facts peculiar to each case. However, there are certain factual circumstances which entitle the defendant to discover the identity of a confidential informant.
>
> The state is required to divulge the identity of a confidential informant to the defendant when: (a) disclosure would be relevant and helpful to the defendant in presenting his defense and is essential to a fair trial, (b) the informant was a participant in the crime, (c) the informant was a witness to the crime, or (d) the informant has knowledge which is favorable to the defendant.

State v. Vanderford, 980 S.W.2d 390, 396-97 (Tenn. Crim. App. 1997) (citations omitted). The defendant has the burden to prove by an preponderance of the evidence that the identification is

material to one of above 4 factors. *Id*. In Vanderford, the defendant demanded discovery of the two audio tapes of undercover buys made with the defendant that were used to get a search warrant. As the State was only trying the defendant for possession with intent to sell of the drugs seized pursuant to the of warrant, and not the two sales, he was not entitled to copies of the tapes of the prior sales. *Id.* at 399.

Either side can also ask for *ex parte* order of protection under Rule 16(d), and its granting or denial can be appealed under seal.

> The state may shield the identity of a material confidential informant seeking a protective order pursuant to Tenn. R. Crim. P. 16(d)(1). When appropriate, the state can seek a protective order *ex parte*. Cases involving confidential informant-defendant conversations qualify for an *ex parte* hearing. If the rule was otherwise, the state's ability to protect the identity of the informant would be an effort in futility.

Vanderford, supra, at 399. The appellate court can review the *ex parte* granting of a protective order under Rule 16(d)(1), providing that

> 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.

The trial judge may have to use other measures to both guarantee a fair trial and also protect the informant, such as having the State produce the informant for an *in camera* meeting with defense counsel and the court. In *House, supra* at 515, the Court concluded that

> a trial court, in its discretion, may order an in camera examination of the informant as an alternative to denying or ordering pretrial disclosure. Trial courts should, however, explore whether other means of proof might obviate the informant's testimony. *Cf. State v. Russell*, 580 S.W.2d 793 (Tenn. Crim. App. 1978) (giving trial court discretion to examine informant in camera only upon trial court's finding, after an evidentiary hearing, that matter could not be disposed of absent informant's testimony).

If the trial judge nevertheless orders the production of the informant’s name, the State is free to nolle prosequi the indictment. If the State neither nolle prosequi’s the indictment nor produces the informant, the trial judge may dismiss the indictment pursuant to *State v. Collins*, 35 S.W.3d 582, 585 (Tenn. Crim. App. 2000):

> Although Tennessee Rule of Criminal Procedure 16(d)(2) does not specifically provide that a trial court may dismiss an indictment when a party fails to comply with a discovery order, we believe that authority is apparent under the provision granting the court the authority to "enter such other order as it deems just under the circumstances."

MUST BE IN THE STATE'S POSSESSION, CUSTODY OR CONTROL

"The record indicates that the photograph was taken by Chief Graves on the morning of trial. Clearly, the State could not have shown the photograph to Appellant before the day of trial because the photograph did not exist before that time. Because [Rule 16(a)(1)(F)] only applies to documents and tangible objects that are 'within the possession, custody or control of the state,' [Rule 16(a)(1)(F)] was not violated in this case. *See, e.g., State v. Hutchison*, 898 S.W.2d 161, 167-68 (Tenn. 1994) (holding that where the State did not have certain documents in its control until the middle of the trial, introduction of the documents did not violate Rule 16)." *State v. Harris*, 30 S.W.3d 345, 349 (Tenn. Crim. App. 1999).

STATE DOES NOT HAVE TO FURNISH MATERIAL ALREADY ACCESSIBLE TO THE DEFENDANT

Rule 16 does not obligate the State "to furnish the appellant with information, evidence, or material which is available or accessible to him or which he could obtain by exercising reasonable diligence. " *State v. Dickerson*, 885 S.W.2d 90, 92 (Tenn. Crim. App. 1993) (statement the defendant made to a psychiatrist was equally available to the defendant). When defense counsel is granted complete access to the State's file, "the State is not obliged to determine whether defense counsel is aware of each and every item in the file. That is the function of defense counsel to whom the file is opened." *State v. Quincy L. Henderson*, 1998 Tenn. Crim. App. LEXIS 531, No. 02 C01-9706-CR-00227, 1998 WL 242608, at *4.

RULE 16 ALSO APPLIES TO SENTENCING

The State is obligated to give the defendant copies of certified copies of prior convictions if it intends to introduce them at the sentencing hearing. They are discoverable under Rule 16(a)(1)(F) and (G). *See State v. Anderson*, 894 SW2d 320, 322-23 (Tenn. Crim. App. 1994).

STATEMENTS AND PRIOR RECORDS OF ADULT WITNESSES

Rule 16 does not require the State to give witness statements or the witness's prior records to the defense prior to trial (unless required by *Brady*, discussed below). However, Rule 26.2 requires the production of witness statements upon request after that witness has testified on direct examination. Any portion not relevant to the direct testimony may be redacted.

The prior record of a witness is also not discoverable. However, some defense attorneys ask for this information for impeachment purposes, asserting that it is exculpatory under Brady. They also assert that even though local records may be equally available to both sides, other convictions located on the NCIC (National Crime Information Center), an FBI database, is available to the State to the exclusion of the defense. In *Irick v. State*, 973 S.W.2d 643, 657 (Tenn. Crim. App. 1998), the State appealed the trial court's granting of the defense's motion for witness records, asserting that the trial court abused its discretion because Rule 16(a)(1)(E) only provided that upon the defendant's request the state must furnish a copy of the defendant's prior criminal record and did not require the production of criminal records of witnesses. Citing *Graves v. State*, 489 S.W.2d 74, 83 (Tenn. Crim. App. 1972), the *Irick* court held that although

not required to, a trial court may grant such a request in the interest of justice.

JUVENILE WITNESS RECORDS

Juvenile records of witnesses is complicated by Tenn. Code Ann. § 37-1-153, which mandates that records of the court in a proceeding under this part are open to inspection only by:

(1) The judge, officers and professional staff of the court;
(2) The parties to the proceeding and their counsel and representatives;
(3) A public or private agency or institution providing supervision or having custody of the child under order of the court;
(4) A court and its probation and other officials or professional staff and the attorney for the defendant for use in preparing a presentence report in a criminal case in which the defendant is convicted and who prior thereto had been a party to the proceeding in juvenile court; and
(5) With permission of the court, any other person or agency or institution having a legitimate interest in the proceeding or in the work of the court.

Although there could be many things in juvenile records that could be used to impeach a witness, such as psychological reports,

> Code section 37-1-153 makes it clear that such documents are not subject to disclosure at anytime. See T.C.A. § 37-1-153(c) ("Notwithstanding the provisions of this section, if a court file or record contains any documents other than petitions and orders, including, but not limited to, a medical report, psychological evaluation or any other document, such document or record shall remain confidential.") Because the documents were not subject to disclosure at any time to any person, the petitioner has failed to establish that the State suppressed the information.

Berry v. State, 366 S.W.3d 160, 180 (Tenn. Crim. App., 2011).

CHILD SEX ABUSE STATEMENTS, SUMMARIES, COMPLAINTS AND RECORDS

Child sex abuse forensic interviews, statements, summaries and records are not discoverable pursuant to Rule 16 unless the State will be introducing the forensic interview in its case in chief as an exhibit. They are also confidential pursuant to Tenn. Code Ann. § 37-1-612.

> Before trial, the state did not provide the defendant with a copy of the summary of the forensic interview conducted with the victim at the Children's Advocacy Center. The defendant asserts that the summary contained exculpatory evidence and as such, failure to disclose the information constituted a Brady violation, as well as a violation of Rule 16 ... . Additionally, the defendant argues that he was deprived of an opportunity to investigate the extent to which the victim's testimony was tainted as a result of her interview. .... Under Rule 26.2, the state has no obligation to provide a defendant with a copy of a witness statement until after the witness has testified. Rule 26.2(f) defines "statement" as follows:

> (1) A written statement that the witness makes and signs, or otherwise adopts or approves; or (2) A substantially verbatim, contemporaneously recorded recital of the witness's oral statement that is contained in a stenographic, mechanical, electrical, or other recording or a transcription of such a statement.
>
> The summary does not meet the definition of a "statement" under Rule 26.2 because it is not signed or adopted by the victim, and it is not a verbatim recording of what the victim said. As such, the state had no obligation to produce the summary under Rule 26.2.
>
> However, because Tennessee Code Annotated section 37-1-612 makes reports of child sexual abuse confidential, we do not reach the question of whether the summary is subject to disclosure under Rule 16. ... Although the statute identifies exceptions to the prohibition against production of child sexual abuse reports, this court has held that production to individuals accused of child sexual abuse is not among the exceptions. *See* T.C.A. § 37-1-612(c)(1)-(7); *State v. Gibson*, 973 S.W.2d 231, 244 (Tenn. Crim. App. 1997); *State v. Clabo*, 905 S.W.2d 197, 201 (Tenn. Crim. App. 1995). The defendant, who is accused of child sexual abuse, wanted access to the interview to obtain inconsistencies in the victim's statements. However, we conclude that the defendant was not entitled to those records and that he is not entitled to relief on this issue.

State v. Biggs, 218 S.W.3d 643, 661-62 (Tenn. Crim. App. 2006)(some citations omitted).

> In his first issue the defendant contends that the trial court erred in denying the defendant's request to review records from Child and Family Services. We respectfully disagree. We doubt these records are discoverable because of the prohibition contained in Tenn. R. Crim. P. 16(a)(2).
>
> Even if discoverable, however, documents within the control or custody of the State may be inspected or copied by the defendant only if these documents are material to the preparation of the defense or are intended to be used by the State as evidence in chief at trial. *State v. Brown* 552 S.W.2d 383, 386 (Tenn. 1977); see also Tenn. R. Crim. P. [16(a)(2)].
>
> In the case at bar, the Child and Family Service's records were not material in the preparation of the defense. The defense wished to use the records to establish inconsistencies in the victims' statements. The records might have helped to impeach the victims or weaken their credibility, but they were not exculpatory. We find that the intended uses of the records by the defense do not constitute a material use.

State v. Clabo, 905 S.W.2d 197, 201 (Tenn. Crim. App. 1995).

DISCOVERABLE IF REPORTS FROM A STATE AGENCY?

> Initially, we observe that neither party has stated why the defendant is or is not entitled to the [Sexual Assault Crisis Center] file or if the contents of the file are privileged. Nothing, including the contents of the file itself, indicates whether the SACC is a state agency. *See, e.g. State v. Carter*, 682 S.W.2d 224, 226 (Tenn. Crim. App. 1984) (holding that Rule 16, Tenn. R. Crim. P., did not entitle the defendant to discover records of a

psychologist whom the victim consulted two months following the aggravated rape because these records were not in the possession, control, or custody of the state). Nor does the record reflect whether a psychologist, a psychiatrist, or a certified social worker compiled the file. See Tenn. Code Ann. §§ 24-1-207 (communications between a patient and psychiatrist in the course of a therapeutic counseling relationship are privileged), 63-11-213 (confidential communications between a client and a psychologist are privileged to the same extent as attorney-client communications), 63-23-107 (confidential communications between a client and a certified social worker are privileged to the same extent as communications with psychologists and psychiatrists).

State v. Wyrick, 62 S.W.3d 751, 789 (Tenn. Crim. App. 2001).

EXPERT "RAW DATA" USED FOR TESTIMONY

In *State v. Schiefelbein*, 230 S.W.3d 88, 147-48 (Tenn. Crim. App. 2007), the defense complained that it was not given the "raw data" from psychological tests the defendant was given by the State's expert witness. The Court held as follows:

> Tennessee Rule of Evidence 705 states that an expert "may testify in terms of opinion or inference and give reasons without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination."
>
> Rule 16 does not apply to mandate disclosure of the defendant's oral statements to [the State's expert because he] is not a "person the defendant knew [to be] a law-enforcement officer." See Tenn. R. Crim. P. 16(a)(1)(A). In addition, Rule 26.2 does not apply in this case because the statement the defendant sought was not a "statement of the witness," [the expert], but the defendant's own statement. See Tenn. R. Crim. P. 26.2.
>
> In *State v. Henry Eugene Hodges*, No. 01-C-01-9212-CR-00382, 1995 Tenn. Crim. App. LEXIS 428 (Tenn. Crim. App., Nashville, May 18, 1995), the State sought the clinical notes of the defendant's expert. *Id*. The court noted that "the trial court has the discretion to require that the underlying facts and data used by the expert to formulate the opinions be provided to the other party." 1995 Tenn. Crim. App. LEXIS 428 at *51 (citing Tenn. R. Evid. 705). The court further stated that,
>
> > [a]s a general rule, a trial court will require disclosure of the underlying data of the expert's opinion when the court 'believes that the party opponent will be unable to cross-examine effectively and the reason for such inability is other than the prejudicial nature of such facts or data . . . .Id. (quoting Moore's Federal Practice § 705.10 at VII-73). The court then held that the trial court did not abuse its discretion in requiring the defendant to produce his expert's clinical notes because it would have been "extremely difficult, if not impossible, for the assistant district attorney general to cross-examine [the defense expert] without access to the notes." *Id.*
>
> Initially, we note that the interests of justice are better served in these situations when the court at least reviews the requested materials *in camera*. Then, after exercising its discretion in deciding the issue, the court could place the materials under seal, if

necessary, for purposes of facilitating appellate review.

NO RECIPROCAL DISCOVERY OF DEFENSE INTERVIEWS OF WITNESSES

In *State v. Wyrick*, 62 S.W.3d 751, 789 (Tenn. Crim. App. 2001), the trial judge granted the state's pretrial motion that the defendant not be allowed to introduce certain documents or tangible evidence because he failed to provide reciprocal discovery as required by Rule 16(b). In ruling that the defense had not violated Rule 16(b), the court held that

> the requirement that the defendant provide reciprocal discovery does not extend to "reports, memoranda, or other internal defense documents made by the . . . defendant's . . . agents in connection with the investigation or defense of the case" or to statements made by witnesses for the state or the defense to the defendant's agents. Tenn. R. Crim. P. 16(b)(2). .... A defense investigator's report of an interview with the victim constitutes work product, which is excluded from reciprocal discovery by Rule 16(b)(2).

***BRADY* MATERIAL (AND *BAGLEY* TEST FOR MATERIALITY)**

In *Jordan v. State*, 343 S.W.3d 84, 96-97 (Tenn. 2010), the Court set out the basics for when exculpatory, material evidence must be disclosed by the State, and the four prong test that must be shown by the defense:

> In *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of the prosecution." 373 U.S. at 87; *see also Sample v. State*, 82 S.W.3d 267, 270 (Tenn. 2002). In *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), the Supreme Court held that both exculpatory and impeachment evidence fall under the *Brady* rule.
>
> The duty to disclose extends to all "favorable information" regardless of whether the evidence is admissible at trial. *Johnson v. State*, 38 S.W.3d 52, 56 (Tenn. 2001). However, the state "is not required to disclose information that the defendant already possesses or is able to obtain." *State v. Marshall*, 845 S.W.2d 228, 233 (Tenn. Crim. App. 1992). Nor is the state required to disclose information which is not possessed by or under the control of the prosecution or other governmental agency. *Id*.
>
> Before an accused is entitled to relief under this theory, he must establish several prerequisites: (a) the defendant requested the information, unless the information was obviously exculpatory; (b) the prosecution must have suppressed the evidence; (c) the evidence suppressed must have been favorable to the accused; and (d) the evidence must have been material. *See Johnson*, 38 S.W.3d at 56; *see also Bagley*, 473 U.S. at 674-75; *Brady*, 373 U.S. at 87; *State v. Edgin*, 902 S.W.2d 387, 389 (Tenn. 1995).
>
> "Information that is favorable to the accused may consist of evidence that 'could exonerate the accused, corroborate[ ] the accused's position in asserting his innocence, or possess[ ] favorable information that would have enabled defense counsel to conduct further and possibly fruitful investigation regarding the fact that someone other than the

appellant killed the victim.'" *Johnson*, 38 S.W.3d at 56 (quoting *Marshall*, 845 S.W.2d at 233). Additionally, favorable evidence includes evidence that "'challenges the credibility of a key prosecution witness.'" *Id*. at 57 (quoting *Commonwealth v. Ellison*, 376 Mass. 1, 379 N.E.2d 560, 571 (Mass. 1978)). In *Johnson*, our supreme court cited with approval a Nevada case stating that evidence is favorable under *Brady* if "it provides grounds for the defense to attack the reliability, thoroughness, and good faith of the police investigation, to impeach the credibility of the state's witnesses, or to bolster the defense case against prosecutorial attacks." *Id.* (citing *Mazzan v. Warden, Ely State Prison*, 116 Nev. 48, 993 P.2d 25, 37 (Nev. 2000)).

Evidence is considered material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the results of the proceeding would have been different. *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995); *Edgin*, 902 S.W.2d at 389. In *Kyles*, the United States Supreme Court explained that "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal . . . ." *Kyles*, 514 U.S. at 434. Rather, the question is whether the defendant received a fair trial, "understood as a trial resulting in a verdict worthy of confidence," in the absence of the suppressed evidence. *Id*. In order to prove a *Brady* violation, a defendant must show that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id*. at 435; *see also Strickler v. Greene*, 527 U.S. 263, 289-90, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999). The Court in *Kyles* urged that the cumulative effect of the suppressed evidence be considered to determine materiality. 514 U.S. at 436. Thus, the materiality of the suppressed evidence must be evaluated within the context of the entire record as to how it impacts the innocence or guilt of the accused. ..... While there is "'no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case[,]'" *State v. Walker*, 910 S.W.2d 381, 389 (Tenn. 1995) (quoting *Moore v. Illinois*, 408 U.S. 786, 795, 92 S. Ct. 2562, 33 L. Ed. 2d 706 (1972)), in Tennessee, there is not a bright line rule regarding whether the state discharges its obligation under *Brady* when it purports to open its files to the defendant. ..... Following the reasoning in *Strickler*, we conclude that the state's open file policy did not discharge its affirmative duty under *Brady* to disclose favorable, material evidence to the defendant. The defendant was entitled to rely on the state's assertion that it provided him with its entire file. Therefore, defense counsel's testimony, as accredited by the post-conviction court, that he was unaware of Exhibit 9, the knife, and the March 13 memo, leads us to the conclusion that the state did not disclose those items of evidence to the defendant. However, the state was only obligated to disclose those items if they were both favorable and material to the defendant. ..... When the outcome of a trial is "only weakly supported by the record," the impact of any error is greater than when the outcome has "overwhelming record support." *See Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In this case, as shown by this court's opinion from the direct appeal, the evidence was only marginally sufficient to sustain the verdict. Furthermore, the state represented to the jury that the police "did the best they could,"

> indicating that the police investigation was thorough and reliable. The petitioner was unable to present evidence to contradict the state's characterization of the investigation. We have previously concluded that the state withheld evidence that was favorable to the petitioner in that he might have used the evidence to impeach the police investigation. After carefully reviewing the record, "we cannot be reasonably confident that every single member of the jury," after hearing evidence impugning the police investigation, would have found the petitioner guilty because the margin of sufficiency was so slim that any favorable evidence would be material. *See Johnson*, 38 S.W.3d at 59. Therefore, our confidence in the outcome of the trial is undermined, and we conclude that the favorable evidence withheld by the state was cumulatively material to the determination of the petitioner's guilt or innocence.
>
> Having found that all four elements of a *Brady* violation are present, we must remand this case to the Blount County Circuit Court for a new trial. *See Johnson*, 38 S.W.3d at 63.

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 v. United States*, 405 U.S. 150, 154-55, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) (requiring the prosecution to reveal the contents of plea agreements with key government witnesses); *Johnson*, 38 S.W.3d at 56 . 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) . However, this duty does not extend to information that the defense already possesses, or is able to obtain, or to information not in the possession or control of the prosecution or another governmental agency. *State v. Marshall*, 845 S.W.2d 228, 233 (Tenn. Crim. App. 1992) .

In order to prove a due process violation under Brady, the defendant must show the state suppressed "material" information. *Brady*, 373 U.S. at 87 ; *State v. Edgin*, 902 S.W.2d 387, 389 (Tenn. 1995) . Undisclosed information is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682 (citations omitted); *Johnson*, 38 S.W.3d at 58 . Furthermore, a reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Id*. To establish materiality, an accused is not required to demonstrate "by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) . Therefore, "the question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* *See State v. Robinson*, 146 S.W.3d 469, 512-13 (Tenn. 2004).

In *Johnson v. State*, 38 SW3d 52, 55 (Tenn. 2001), the Court held that

> there is '"no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case."' .... This Court has held on several occasions that in order to establish a *Brady* violation, four elements must be shown by the defendant:
>
> 1) that the defendant requested the information (unless the evidence is obviously exculpatory, in which case the State is bound to release the information whether requested or not);
> 2) that the State suppressed the information;
> 3) that the information was favorable to the accused; and
> 4) that the information was material.
>
> .... Information that is favorable to the accused may consist of evidence that "could exonerate the accused, corroborate[] the accused's position in asserting his innocence, or possess[] favorable information that would have enabled defense counsel to conduct further and possibly fruitful investigation regarding the fact that someone other than the appellant killed the victim." .... As the Massachusetts Supreme Court has articulated the standard, "the *Brady* obligation comprehends evidence which provides some significant aid to the defendant's case, whether it furnishes corroboration of the defendant's story, calls into question a material, although not indispensable, element of the prosecution's version of the events, or challenges the credibility of a key prosecution witness."

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." *State v. Philpott*, 882 SW2d 394, 402 (Tenn. Crim. App., 1994).

The court in *State v. King*, 905 S.W.2d 207, 212 (Tenn. Crim. App. 1995), held as follows regarding failure to furnish prior records of State witnesses:

> the criminal history of a victim is not the kind of information the State has a duty to produce pursuant to Rule 16 of the Tennessee Rules of Criminal procedure. Further, as to the *Brady* claim, the defendant has not shown nor does the record reveal that the State possessed the more recent charges against the victim. The defendant concludes that with this information he would have been able to "absolutely" impeach the victim regarding his statement which gave the appearance that he had not been in trouble since 1982 or 1983. Again, the record does not indicate that these charges were known to the parties during the trial. Even if the State should have found these charges, in light of the extensive cross-examination of the victim regarding a laundry list of past convictions and prison sentences, any error is harmless beyond a doubt.

"When exculpatory evidence is equally available to the prosecution and the accused, the accused 'must bear the responsibility of [his] failure to [diligently] seek its discovery." *State v. Parker*, 932 S.W.2d 945, 954 n. 23 (Tenn. Crim. App. 1996) (citations omitted).

REMEDY AND SANCTIONS FOR NONCOMPLIANCE WITH RULE 16 AND *BRADY*

When a party, in this case the State, fails to fully comply with the rules of discovery, Tennessee Rule of Criminal Procedure 16(d)(2) provides as follows:

> Failure to Comply with a Request. — If a party fails to comply with this rule, the court may:
>
> (A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms or conditions;
> (B) grant a continuance;
> (C) prohibit the party from introducing the undisclosed evidence; or
> (D) enter such other order as it deems just under the circumstances.

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, letting the defense talk to witnesses, or excluding evidence or testimony. The most significant factor is whether the defendant has been prejudiced. See *State v. Smith*, 926 S.W.2d 267, 269-70 (Tenn. Crim. App. 1995).

In a heroin trial, over the defendant's objection, the trial court admitted into evidence a TBI Crime Laboratory report which showed the substance seized from the vehicle was heroin, and the weight of the heroin, even though the laboratory report was not provided to him pre-trial pursuant to timely and appropriate discovery request. The State asserted that the failure to comply with the rules of discovery was inadvertent. The State had timely notified the defendant of a TBI lab report pending after the substance had been sent for analysis. The defendant wanted the trial court to prevent the State from putting on any proof that the substance was, in fact, heroin.

As a remedy for the State's discovery violation, the trial court stopped the trial for the day, to be resumed the next morning, and had the forensic scientist remain in the courtroom to be available to be interviewed by defense counsel and specifically found that there was no prejudice to the defendant. On appeal, the court held:

> The remedy provided by the trial court in this case for the State's inadvertent transgression fully complied with what Tennessee Rule of Criminal Procedure Rule 16(d)(2) provides "may" be done by a trial court. Defendant is not entitled to relief on this issue.

State v. Martinez, 372 S.W.2d 598, 619-20 (Tenn. Crim. App., 2010).

In *State v. Downey*, 259 S.W.3d 723, 736-37 (Tenn. 2008), when the State played a video-taped statement of the defendant to the jury in an especially aggravated robbery trial the defense realized that the first part of the tape, showing investigators telling the defendant about

the possible range of punishment for the crimes of which he was accused, was neither given to the defense nor played in court at the suppression hearing. Outside the presence of the jury, the trial court and counsel for both parties determined that the first few minutes of the interview were not copied when a duplicate of the original was made for the State and the defense. The defendant moved for the charges against him to be dismissed. However, instead of declaring a mistrial, the trial court sanctioned the State by excluding the use of the tape at trial. On appeal, the Court held as follows:

> Although Rule 16 does not explicitly provide as one of the sanctions the dismissal of the indictment after failure to comply with a discovery request or order, the rule does provide that the court may enter such sanction "as it deems just under the circumstances." Tenn. R. Crim. P. 16(d)(2)(D). This opened-ended language of the Rule authorizes the dismissal of an indictment in certain circumstances when a court would otherwise have "no effective sanction for failure to comply with its order." *State v. Collins*, 35 S.W.3d 582, 585 (Tenn. Crim. App. 2000); *see also State v. Freseman*, 684 S.W.2d 106, 107 (Tenn. Crim. App. 1984) (suggesting that if a trial court has the authority to dismiss a case as a sanction for failure to comply with discovery orders, it is implied authority pursuant to Tenn. R. Crim. P. 16(d)(2)). However, the Rule provides the court with many other methods for assuring compliance without resorting to such extreme measures. A trial court has wide discretion in fashioning a remedy for non-compliance with a discovery order, and the sanction should fit the circumstances of the case. *See Collins*, 35 S.W.3d at 585.
>
> In this case, the trial court determined that the appropriate sanction was to prohibit the introduction of the videotape by the State. The court was able to give a curative instruction to the jury regarding the portion of the video that had been played, which contained the discussion of possible sentence ranges, thus negating any prejudice that may have occurred. Given the discretion afforded the trial court in fashioning the penalty, we conclude that the trial court's decision to suppress the videotape was sufficient penalty for the State's discovery violation.

In *State v. Gann*, 251 S.W.3d 457-58 (Tenn. Crim. App. 2007), the defendant asserted that the State violated the rules of discovery by failing to turn over an audible tape recording of the December 6 conversation between the defendant and another person and that, inconsequence, the trial court should not have permitted a witness to relay portions of that conversation during his testimony. The defense objected to the testimony on the basis that the tape they had received from the State was inaudible and that they had not been provided with a transcript of the conversation. The prosecutor stated that he was unaware that the defense was unable to listen to the tape, that no transcript had been prepared, and that the witness was merely referring to the notes he had prepared after listening to the tape. The defense agreed that the witness could testify as to what he heard while monitoring the conversation but contended that he should not be allowed to reference either the tape or his notes. The trial court ruled that the notes could be used to refresh his recollection and that they would have to be provided to the defense prior to cross-examination. The State agreed to allow defense counsel access to equipment to listen to the

tape. The court held:

> Exclusion of evidence is a "drastic remedy and should not be implemented unless there is no other reasonable alternative." [citing *State v. Smith*, 926 S.W.2d 267, 270 (Tenn. Crim. App. 1995)]
>
> In this instance, the record does not support the defendant's claim. Although the defendant contends that the State violated the rules of discovery by providing defense counsel with an inaudible tape, the prosecutor stated, and defense counsel agreed, that the State had not been made aware of any problem with the tape prior to trial. There was no proof that the State had intentionally provided a faulty tape. In addition, the record establishes that no transcript of the tape was prepared and thus none was disclosed. The trial court provided defense counsel with an opportunity to listen to the tape and examine [the witness's] notes prior to cross-examination. This was an appropriate remedy under the circumstances.

Whatever remedies or sanctions you impose, be mindful of Tenn. R. Crim. P. 2, which states as follows:

> **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.**

FINDINGS OF FACT IN EVIDENTIARY RULINGS AND AT SENTENCING

Tennessee Judicial Academy
Thursday, August 21, 2014
Judge Chris Craft
Criminal Court Division VIII
30th Judicial District at Memphis

RULE 403 - Exclusion of relevant evidence - "Although relevant, evidence may be excluded if its **probative value is substantially outweighed** by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

RULE 404(b)- Evidence of other crimes, wrongs, or acts - "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes. The conditions which must be satisfied before allowing such evidence are:

(1) The court upon request must hold a hearing outside the jury's presence;

(2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence; and

(3) The court must exclude the evidence if its **probative value is outweighed** by the danger of unfair prejudice."

RULE 405(a) - Reputation or Opinion - "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. After application to the court, inquiry on cross-examination is allowable into relevant specific instances of conduct. The conditions which must be satisfied before allowing inquiry on cross-examination about specific instances of conduct are:

(1) The court upon request must hold a hearing outside the jury's presence,

(2) The court must determine that a reasonable factual basis exists for the inquiry, and

(3) The court must determine that the probative value of a specific instance of conduct on the character witness's credibility **outweighs its prejudicial effect** on substantive issues."

RULE 608 (b)- Specific Instances of Conduct. "The conditions which must be satisfied before allowing inquiry on cross-examination about such conduct probative solely of truthfulness or untruthfulness are:

(1) The court upon request must hold a hearing outside the jury's presence and **must determine that the alleged conduct has probative value** and that a reasonable factual basis exists for the inquiry;

(2) The conduct must have occurred no more than ten years before commencement of the action or prosecution, but evidence of a specific instance of conduct not qualifying under this paragraph (2) is admissible if the proponent gives to the adverse party sufficient advance notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence and the court **determines in the interests of justice that the probative value** of that evidence, supported by specific facts and circumstances, **substantially outweighs its prejudicial effect**; and

(3) If the witness to be impeached is the accused in a criminal prosecution, the State must give the accused reasonable written notice of the impeaching conduct before trial, and the court upon request must determine that **the conduct's probative value on credibility outweighs its unfair prejudicial effect** on the substantive issues. ....

(c) Juvenile Conduct. - Evidence of specific instances of conduct of a witness committed while the witness was a juvenile is generally not admissible under this rule. The court may, however, allow evidence of such conduct of a witness other than the accused in a criminal case if the conduct would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination in a civil action or criminal proceeding."

RULE 609 - Impeachment by evidence of conviction of crime "If the witness to be impeached is the accused in a criminal prosecution, the State must give the accused reasonable written notice of the impeaching conviction before trial, and the court upon request must determine that the conviction's **probative value on credibility outweighs its unfair prejudicial effect** on the

substantive issues. The court may rule on the admissibility of such proof prior to the trial but in any event shall rule prior to the testimony of the accused. .... Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed between the date of release from confinement and commencement of the action or prosecution; if the witness was not confined, the ten-year period is measured from the date of conviction rather than release. Evidence of a conviction not qualifying under the preceding sentence is admissible if the proponent gives to the adverse party sufficient advance notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence and the court determines in the interests of justice that **the probative value of the conviction**, supported by specific facts and circumstances, **substantially outweighs its prejudicial effect**. .... (d) Juvenile Adjudications. - Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, allow evidence of a juvenile adjudication of a witness other than the accused in a criminal case if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination in a civil action or criminal proceeding.

TWO SUGGESTED GENERIC SENTENCING ORDERS FOLLOW, TO BE USED AS A WRITTEN FINDING OF FACT, OR AS A GUIDE IN MAKING ORAL FINDINGS AT THE SENTENCING HEARING. ONE IS FOR CRIMES COMMITTED PRIOR TO JUNE 7, 2005. THE OTHER IS FOR CRIMES COMMITTED ON OR AFTER JUNE 7 2005. ALSO INCLUDED IS A WAIVER OF EX POST FACTO CONSIDERATION FOR THOSE DEFENDANTS COMMITTING OFFENSES PRIOR TO JUNE 7, 2005 WHO ELECT TO BE SENTENCED UNDER THE 2005 SENTENCING ACT.

STATE OF TENNESSEE)

)

VS.) Indictment No. _____

) Count No. _____

_____,)

DEFENDANT)

SENTENCING FINDINGS OF FACT FOR OFFENSES COMMITTED PRIOR TO JUNE 7, 2005

This cause came on to be heard on the sentencing of the defendant on a conviction for the offense of _____. In determining the appropriate sentence for this offense, this Court has considered the evidence presented at the trial and/or sentencing hearing, the presentence report, the sentencing principles embodied in Tenn. Code Ann. § 40-35-103 and any arguments made as to alternative sentencing, the nature and characteristics of the criminal conduct involved, the evidence and information offered on enhancing and mitigating factors, any statement the defendant made, if any, on his own behalf about sentencing, and the defendant's potential for rehabilitation or treatment.

FROM ALL OF WHICH THE COURT FINDS AS FOLLOWS:

RANGE OF SENTENCE

The defendant is found to be:

_____ AN ESPECIALLY MITIGATED OFFENDER (Tenn. Code Ann. § 40-35-109)
(1) The defendant has no prior felony convictions; AND
(2) The court finds mitigating, but no enhancement factors.

_____ A RANGE ONE STANDARD OFFENDER (Tenn. Code Ann. § 40-35-105)

_____ A RANGE TWO MULTIPLE OFFENDER (Tenn. Code Ann. § 40-35-106)
(1) A minimum of two (2) but not more than four (4) prior felony convictions within the conviction class, a higher class, or within the next two (2) lower felony classes, where applicable; OR
(2) One (1) Class A prior felony conviction if the defendant's conviction offense is a Class A or B felony.

_____ A RANGE THREE PERSISTENT OFFENDER (Tenn. Code Ann. § 40-35-107)
(1) Any combination of five (5) or more prior felony convictions within the conviction class or higher, or within the next two (2) lower felony classes, where applicable; OR
(2) At least two (2) Class A or any combination of three (3) Class A or Class B felony convictions if the defendant's conviction offense is a Class A or B felony.

_____ A CAREER OFFENDER (Tenn. Code Ann. § 40-35-108)
(1) Any combination of six (6) or more Class A, B or C prior felony convictions, and the defendant's conviction offense is a Class A, B or C felony; OR
(2) At least three (3) Class A or any combination of four (4) Class A or Class B felony convictions if the defendant's conviction offense is a Class A or B felony; OR
(3) At least six (6) prior felony convictions of any classification if the defendant's conviction offense is a Class D or E felony.

ENHANCEMENT FACTORS (Tenn. Code Ann. § 40-35-114)

The Court finds the following enhancement factors which are not themselves essential elements of this offense:

_____ (1) The offense was an act of terrorism, or was related to an act of terrorism;
_____ (2) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;
_____ (3) The defendant was a leader in the commission of an offense involving two (2) or more criminal actors;
_____ (4) The offense involved more than one (1) victim;
_____ (5) A victim of the offense was particularly vulnerable because of age or physical or mental disability, including, but not limited to, a situation where the defendant delivered or sold a controlled substance to a minor within one thousand feet (1,000 ft.) of a public playground,

public swimming pool, youth center, video arcade, low income housing project, or church;

_____ (6) The defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense;

_____ (7) The personal injuries inflicted upon or the amount of damage to property sustained by or taken from the victim was particularly great;

_____ (8) The offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement;

_____ (9) The defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community;

_____ (10) The defendant possessed or employed a firearm, explosive device or other deadly weapon during the commission of the offense;

_____ (11) The defendant had no hesitation about committing a crime when the risk to human life was high;

_____ (12) The felony resulted in death or bodily injury or involved the threat of death or bodily injury to another person and the defendant has previously been convicted of a felony that resulted in death or bodily injury;

_____ (13) During the commission of the felony, the defendant willfully inflicted bodily injury upon another person, or the actions of the defendant resulted in the death of or serious bodily injury to a victim or a person other than the intended victim;

_____ (14) The felony was committed while on any of the following forms of release status if such release is from a prior felony conviction:

(A) Bail, if the defendant is ultimately convicted of such prior felony;

(B) Parole;

(C) Probation;

(D) Work release; or

(E) Any other type of release into the community under the direct or indirect supervision of the department of correction or local governmental authority;

_____ (15) The felony was committed on escape status or while incarcerated for a felony conviction;

_____ (16) The defendant abused a position of public or private trust, or used a special skill in a manner that significantly facilitated the commission or the fulfillment of the offense;

_____ (17) The crime was committed under circumstances under which the potential for bodily injury to a victim was great;

_____ (18) The defendant committed the offense while on school property;

_____ (19) A victim, under § 39-15-402, suffered permanent impairment of either physical or mental functions as a result of the abuse inflicted;

_____ (20) If the lack of immediate medical treatment would have probably resulted in the death of the victim under § 39-15-402;

_____ (21) The defendant was adjudicated to have committed a delinquent act or acts as a juvenile that would constitute a felony if committed by an adult;

_____ (22) The defendant, who was provided with court-appointed counsel, willfully failed to pay

the administrative fee assessed pursuant to § 40-14-103(b)(1); or

_____ (23) The defendant intentionally selects the person against whom the crime is committed or selects the property that is damaged or otherwise affected by the crime in whole or in part because of the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin, ancestry or gender of that person or of the owner or occupant of that property. However, this subsection should not be construed so as to permit the enhancement of a sexual offense on the basis of gender selection alone.

MITIGATING FACTORS (Tenn. Code Ann. § 40-35-114)

The Court finds the following mitigating factors:

_____ (1) The defendant's criminal conduct neither caused nor threatened serious bodily injury;

_____ (2) The defendant acted under strong provocation;

_____ (3) Substantial grounds exist tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;

_____ (4) The defendant played a minor role in the commission of the offense;

_____ (5) Before detection, the defendant compensated or made a good faith attempt to compensate the victim of criminal conduct for the damage or injury the victim sustained;

_____ (6) The defendant, because of youth or old age, lacked substantial judgment in committing the offense;

_____ (7) The defendant was motivated by a desire to provide necessities for the defendant's family or the defendant's self;

_____ (8) The defendant was suffering from a mental or physical condition that significantly reduced the defendant's culpability for the offense; however, the voluntary use of intoxicants does not fall within the purview of this factor;

_____ (9) The defendant assisted the authorities in uncovering offenses committed by other persons or in detecting or apprehending other persons who had committed the offenses;

_____ (10) The defendant assisted the authorities in locating or recovering any property or person involved in the crime;

_____ (11) The defendant, although guilty of the crime, committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated the criminal conduct;

_____ (12) The defendant acted under duress or under the domination of another person, even though the duress or the domination of another person is not sufficient to constitute a defense to the crime; or

_____ (13) Any other factor consistent with the purposes of this chapter: _____

_____

_____

_____

FINDINGS ON CONSECUTIVE SENTENCING

DISCRETIONARY CONSECUTIVE SENTENCING

This Court finds in ordering consecutive sentencing that:

_____ The defendant is a professional criminal who has knowingly devoted such defendant's life to criminal acts as a major source of livelihood;

_____ The defendant is an offender whose record of criminal activity is extensive;

_____ The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;

_____ The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high; and all three of the following factors apply:

_____ (a) the circumstances surrounding the commission of the offense are aggravated,

_____ (b) confinement for an extended period of time is necessary to protect society from the defendant's unwillingness to lead a productive life and the defendant's resort to criminal activity in furtherance of an anti-societal lifestyle, and

_____ (c) the aggregate length of the sentences reasonably relates to the offense of which the defendant stands convicted.

_____ The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;

_____ The defendant is sentenced for an offense committed while on probation; or

_____ The defendant is sentenced for criminal contempt.

_____ The defendant has additional sentences not yet fully served.

MANDATORY CONSECUTIVE SENTENCING

This Court finds that:

_____ The defendant committed a felony while on parole or other release program.

_____ The defendant committed a felony while on bail for a felony for which the defendant was ultimately convicted.

_____ The defendant committed an escape or a felony committed while on escape.

PROBATION CONSIDERATIONS

This Court has also considered the following if deciding to grant or deny an alternative sentence to incarceration:

_____ The presentence report, if not waived.
_____ The defendant's physical/mental condition and social history.
_____ The facts and circumstances surrounding the offense, and the nature and circumstances of the criminal conduct involved.
_____ The prior criminal history of the defendant, or lack thereof.
_____ The previous actions and character of the defendant.
_____ Whether or not the defendant might reasonably be expected to be rehabilitated, and the defendant's potential or lack of potential for rehabilitation, including the risk that during the period of probation the defendant will commit another crime
_____ Whether or not it reasonably appears that the defendant will abide by the terms of probation.
_____ Whether or not the interests of society in being protected from possible future criminal conduct of the defendant are great.
_____ Whether or not measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.
_____ Whether or not a sentence of full probation would unduly depreciate the seriousness of the offense.
_____ Whether or not confinement is particularly suited to provide an effective deterrent to others likely to commit similar offenses.
_____ Whether or not the offense was particularly enormous, gross or heinous.

THE DEFENDANT IS HEREBY SENTENCED TO a term of _____ in the

_____ County jail

_____ Local workhouse

_____ Department of Correction

concurrent with _____

consecutive to _____

and a fine of $_____ .

Alternative sentence, if any: _____

_____

_____

_____

The above findings are hereby ordered to be made a part of the record in this cause.

IT IS SO ORDERED this _____ day of _____, 20____.

_____

_____

JUDGE

STATE OF TENNESSEE)
)
VS.) Indictment No. _____
) Count No. _____
_____,)
DEFENDANT)

SENTENCING FINDINGS OF FACT FOR OFFENSES COMMITTED ON OR AFTER JUNE 7, 2005

This cause came on to be heard on the sentencing of the defendant on a conviction for the offense of _____. In determining the appropriate sentence for this offense, this Court has considered the evidence presented at the trial and the sentencing hearing, the presentence report, the principles of sentencing and arguments made as to sentencing alternatives, the nature and characteristics of the criminal conduct involved, the evidence and information offered by the parties on the mitigating and enhancement factors, any statistical information provided by the administrative office of the court as to sentencing practices for similar offenses in Tennessee located at http://www.tncourts.gov/administration/judicial- resources/criminal-sentencing-statistics, and any statement the defendant made, if any, on his own behalf about sentencing, and the defendant's potential for rehabilitation or treatment.

FROM ALL OF WHICH THE COURT FINDS AS FOLLOWS:

RANGE OF SENTENCE

The defendant is found to be:

_____ AN ESPECIALLY MITIGATED OFFENDER (Tenn. Code Ann. § 40-35-109)
(1) The defendant has no prior felony convictions; AND
(2) The court finds mitigating, but no enhancement factors.

_____ A RANGE ONE STANDARD OFFENDER (Tenn. Code Ann. § 40-35-105)

_____ A RANGE TWO MULTIPLE OFFENDER (Tenn. Code Ann. § 40-35-106)
(1) A minimum of two (2) but not more than four (4) prior felony convictions within the conviction class, a higher class, or within the next two (2) lower felony classes, where applicable; OR
(2) One (1) Class A prior felony conviction if the defendant's conviction offense is a Class A or B felony.

_____ A RANGE THREE PERSISTENT OFFENDER (Tenn. Code Ann. § 40-35-107)
(1) Any combination of five (5) or more prior felony convictions within the conviction class or higher, or within the next two (2) lower felony classes, where applicable; OR
(2) At least two (2) Class A or any combination of three (3) Class A or Class B felony convictions if the defendant's conviction offense is a Class A or B felony.

_____ A CAREER OFFENDER (Tenn. Code Ann. § 40-35-108)

(1) Any combination of six (6) or more Class A, B or C prior felony convictions, and the defendant's conviction offense is a Class A, B or C felony; OR
(2) At least three (3) Class A or any combination of four (4) Class A or Class B felony convictions if the defendant's conviction offense is a Class A or B felony; OR
(3) At least six (6) prior felony convictions of any classification if the defendant's conviction offense is a Class D or E felony.

ENHANCEMENT FACTORS (Tenn. Code Ann. § 40-35-114)

The Court finds the following enhancement factors which are not themselves essential elements of this offense:

_____ (1) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;

_____ (2) The defendant was a leader in the commission of an offense involving two or more criminal actors;

_____ (3) The offense involved more than one victim;

_____ (4) A victim of the offense was particularly vulnerable because of age or physical or mental disability;

_____ (5) The defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense;

_____ (6) The personal injuries inflicted upon, or the amount of damage to property, sustained by or taken from the victim was particularly great;

_____ (7) The offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement;

_____ (8) The defendant, before trial or sentencing, failed to comply with the conditions of a sentence involving release in the community;

_____ (9) The defendant possessed or employed a firearm, explosive device, or other deadly weapon during the commission of the offense;

_____ (10) The defendant had no hesitation about committing a crime when the risk to human life was high;

_____ (11) The felony resulted in death or serious bodily injury or involved the threat of death or serious bodily injury to another person and the defendant has previously been convicted of a felony that resulted in death or serious bodily injury;

_____ (12) During the commission of the felony, the defendant intentionally inflicted serious bodily injury upon another person, or the actions of the defendant resulted in the death of or serious bodily injury to a victim or a person other than the intended victim;

_____ (13) At the time the felony was committed, one of the following classifications was applicable to the defendant:

(A) Released on bail or pretrial release, if the defendant is ultimately convicted of the prior misdemeanor or felony;
(B) Released on parole;
(C) Released on probation;

(D) On work release;
(E) On community corrections;
(F) On some form of judicially ordered release;
(G) On any other type of release into the community under the direct or indirect supervision of any state or local governmental authority or a private entity contracting with the state or a local government;
(H) On escape status; or
(I) Incarcerated in any penal institution on a misdemeanor or felony charge or a misdemeanor or felony conviction;

_____ (14) The defendant abused a position of public or private trust, or used a professional license in a manner that significantly facilitated the commission or the fulfillment of the offense;

_____ (15) The defendant committed the offense on the grounds or facilities of a pre-kindergarten through grade twelve public or private institution of learning when minors were present;

_____ (16) The defendant was adjudicated to have committed a delinquent act or acts as a juvenile that would constitute a felony if committed by an adult;

_____ (17) The defendant intentionally selected the person against whom the crime was committed or selected the property that was damaged or otherwise affected by the crime in whole or in part because of the defendant's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin, ancestry or gender of that person or of the owner or occupant of that property; however, this enhancement factor should not be construed to permit the enhancement of a sexual offense on the basis of gender selection alone;

_____ (18) The offense was an act of terrorism, or was related to an act of terrorism;

_____ (19) If the defendant is convicted of the offense of aggravated assault pursuant to ' 39-13-102, the victim of the aggravated assault was a law enforcement officer, firefighter, correctional officer, youth services officer, probation and parole officer, a state registered security officer/guard, an employee of the department of correction or the department of children's services, an emergency medical or rescue worker, emergency medical technician or paramedic, whether compensated or acting as a volunteer; provided, that the victim was performing an official duty and the defendant knew or should have known that the victim was such an officer or employee;

_____ (20) If the defendant is convicted of the offenses of rape pursuant to ' 39-13-503, sexual battery pursuant to ' 39-13-505, or rape of a child pursuant to ' 39-13-522, the defendant caused the victim to be mentally incapacitated or physically helpless by use of a controlled substance [only for offenses committed on or after 5/15/12: or controlled substance analogue];

_____ (21) If the defendant is convicted of the offenses of aggravated rape pursuant to ' 39-13-502, rape pursuant to ' 39-13-503, rape of a a child pursuant to ' 39-13-522 or statutory rape pursuant to ' 39-13-506, the defendant knew or should have known that at the time of the offense the defendant was HIV positive; or

_____ (22) If the defendant is convicted of the offenses of aggravated arson pursuant to ' 39-1-302 or vandalism pursuant to ' 39-14-408, the damage or destruction was caused to a structure, whether temporary or permanent in nature, used as a place of worship and the defendant knew or should have known that it was a place of worship.

_____ (23) [for offenses committed on or after 7/1/07] The defendant is an adult and sells to, or gives or exchanges a controlled substance [only for offenses committed on or after 5/15/12: or controlled substance analogue] or other illegal drug with a minor.

_____ (24) [for offenses committed on or after 7/1/08] The offense involved the theft of property and, as a result of the manner in which the offense was committed, the victim suffered significant damage to other property belonging to the victim or for which the victim was responsible.

MITIGATING FACTORS (Tenn. Code Ann. § 40-35-114)

The Court finds the following mitigating factors:

_____ (1) The defendant's criminal conduct neither caused nor threatened serious bodily injury;

_____ (2) The defendant acted under strong provocation;

_____ (3) Substantial grounds exist tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;

_____ (4) The defendant played a minor role in the commission of the offense;

_____ (5) Before detection, the defendant compensated or made a good faith attempt to compensate the victim of criminal conduct for the damage or injury the victim sustained;

_____ (6) The defendant, because of youth or old age, lacked substantial judgment in committing the offense;

_____ (7) The defendant was motivated by a desire to provide necessities for the defendant's family or the defendant's self;

_____ (8) The defendant was suffering from a mental or physical condition that significantly reduced the defendant's culpability for the offense; however, the voluntary use of intoxicants does not fall within the purview of this factor;

_____ (9) The defendant assisted the authorities in uncovering offenses committed by other persons or in detecting or apprehending other persons who had committed the offenses;

_____ (10) The defendant assisted the authorities in locating or recovering any property or person involved in the crime;

_____ (11) The defendant, although guilty of the crime, committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated the criminal conduct;

_____ (12) The defendant acted under duress or under the domination of another person, even though the duress or the domination of another person is not sufficient to constitute a defense to the crime; or

_____ (13) Any other factor consistent with the purposes of this chapter: _____

_____
_____
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_____
_____
_____
_____
_____

FINDINGS ON CONSECUTIVE SENTENCING

DISCRETIONARY CONSECUTIVE SENTENCING

This Court finds in ordering consecutive sentencing that:

_____ The defendant is a professional criminal who has knowingly devoted such defendant's life to criminal acts as a major source of livelihood;

_____ The defendant is an offender whose record of criminal activity is extensive;

_____ The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;

_____ The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high; and all three of the following factors apply:

_____ (a) the circumstances surrounding the commission of the offense are aggravated,

_____ (b) confinement for an extended period of time is necessary to protect society from the defendant's unwillingness to lead a productive life and the defendant=s resort to criminal activity in furtherance of an anti-societal lifestyle, and

_____ (c) the aggregate length of the sentences reasonably relates to the offense of which the defendant stands convicted.

_____ The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;

_____ The defendant is sentenced for an offense committed while on probation; or

_____ The defendant is sentenced for criminal contempt.

_____ The defendant has additional sentences not yet fully served.

MANDATORY CONSECUTIVE SENTENCING

This Court finds that:

_____ The defendant committed a felony while on parole or other release program.
_____ The defendant committed a felony while on bail for a felony for which the defendant was ultimately convicted.
_____ The defendant committed an escape or a felony committed while on escape.

PROBATION CONSIDERATIONS

This Court has also considered the following if deciding to grant or deny an alternative sentence to incarceration:

_____ The presentence report, if not waived.
_____The defendant's physical/mental condition and social history.
_____ The facts and circumstances surrounding the offense, and the nature and circumstances of the criminal conduct involved.
_____ The prior criminal history of the defendant, or lack thereof.
_____ The previous actions and character of the defendant.
_____ Whether or not the defendant might reasonably be expected to be rehabilitated, and the defendant's potential or lack of potential for rehabilitation, including the risk that during the period of probation the defendant will commit another crime
_____ Whether or not it reasonably appears that the defendant will abide by the terms of probation.
_____ Whether or not the interests of society in being protected from possible future criminal conduct of the defendant are great.
_____ Whether or not measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.
_____ Whether or not a sentence of full probation would unduly depreciate the seriousness of the offense.
_____ Whether or not confinement is particularly suited to provide an effective deterrent to others likely to commit similar offenses.
_____ Whether or not the offense was particularly enormous, gross or heinous.

THE DEFENDANT IS HEREBY SENTENCED TO a term of _____ in the

_____ County jail

_____ Local workhouse

_____ Department of Correction

concurrent with _____

consecutive to _____

and a fine of $_____ .

Alternative sentence, if any:

_____

_____

_____

_____

The above findings are hereby ordered to be made a part of the record in this cause.

IT IS SO ORDERED this _____ day of _____, 20____.

_____

_____

JUDGE

IN THE _____ COURT OF _____ COUNTY, TENNESSEE

_____ JUDICIAL DISTRICT

STATE OF TENNESSEE)
)
VS.) No. _____
)
_____,)
DEFENDANT)

WAIVER OF EX POST FACTO PROTECTIONS

My true name is _____ _____ and my attorney is _____ _____. It has been fully explained to me that as I have been convicted of an offense

committed prior to June 7, 2005, I have a constitutional right to be sentenced under the law which was in effect at the time of the offense. I have been advised by my attorney concerning the difference in the sentencing law in existence at the time of my offense, and the law which was enacted for offenses committed on or after June 7, 2005. In the exercise of my own free will and choice, and without any threats or pressures of any kind, or promises of gain or favor from any source whatever, and being fully aware of the action I am taking, I do hereby in open Court request that I be allowed to be sentenced under the laws that are in effect for offenses committed on or after June 7th, 2005, and expressly waive and give up any constitutional right that I might have not to be subject to any sentencing law enacted after the commission of the offense for which I have been convicted.

_____

DEFENDANT

_____

_____

Attorney for Defendant

ENTERING GUILTY PLEAS

Tennessee Judicial Academy
Thursday, August 21, 2014
Judge Chris Craft
Criminal Court Division VIII
30th Judicial District at Memphis

THE GUILTY PLEA AND RULE 11

A guilty plea is really a bench trial on a plea of guilty, with stipulated facts, and with the jury waived. The judge can decide to accept or reject the plea, and can accept or reject the defendant's waiver of right to trial by jury and other constitutional rights. Unless this trial is conducted correctly, its resulting conviction and sentence may be reversed and remanded. If the attorney for the defendant failed to insure that the defendant waived the right to a jury trial knowingly and voluntarily, the attorney may be open to a bar complaint or a malpractice suit. Therefore, the trial judge must ask the right questions and inform the defendant of all his/her rights, and substantially comply with Rule 11. Tenn. R. Crim. P. 11(e) states the requirements for a plea, but need not be followed to the letter to have a valid plea of guilty entered. Other things not included in Rule 11 may also invalidate the plea agreement.

THE JUDGE'S JOB

Boykin v. Alabama, 395 U.S. 238, 242 (1969) held that the record must show any guilty plea has been made voluntarily, understandingly and knowingly. If it is not voluntarily and knowing, it has been entered in violation of due process and is, therefore, void. The record must show an understanding of a waiver of three important federal constitutional rights: (1) the privilege against compulsory self incrimination guaranteed by the fifth amendment, (2) the right to trial by jury and (3) the right to confront one's accusers. Our Tennessee Supreme Court in *State v. Neal*, 810 S.W.2d 131, 137-38 (Tenn. 1991) held that "we do not mean to adopt a substantial compliance doctrine that would be anything less than full compliance with the heretofore set out requirements. While absolutely literal compliance with the advice to be given is not required, expressing the sense of the substance of the required advice to a guilty-pleading defendant is. That would be substantial compliance.... Substantial compliance is not error. Where there is substantial compliance the root purpose of the prescribed litany has been served and the guilty plea passes due process scrutiny because it was made voluntarily and understandingly." *See Wilson v. State*, 899 S.W.2d 648, 651-52 (Tenn. Crim. App. 1994).

FACTUAL BASIS AND NATURE OF THE PLEA

The trial judge should make sure he record reflects the defendant understands the nature of the offense to which he/she is pleading, and that there is a factual basis for it, or the plea may be set aside on a post-conviction hearing. The best way to do this is to describe the elements the state must prove to convict him/her of the offense to which he/she is pleading guilty.

> The transcript of the plea submission hearing reflects that the trial judge advised the defendant of the possible penalty for facilitation of first degree murder, but the trial court did not, in accordance with Rule 11(c)(1), explain to the defendant the nature of the offense of facilitation of first degree murder or determine that the defendant understood the offense to which he was entering a plea.

State v. Crowe, 168 S.W.3d 731, 749 (Tenn. 2005).

Lack of a factual basis for the plea is not a basis for post-conviction relief by itself, but it may contribute to the "totality of the circumstances reflecting an unknowing or involuntary plea." *Powers v. State*, 942 S.W.2d 551, 555 (Tenn. Crim. App. 1996). In *Sexton v. State*, 151 S.W.3d 525, 533 (Tenn. Crim. App. 2004), in which no facts at all of the robbery that defendant pled to were mentioned, that court held that "an insufficient factual basis does not, *per se*, rise to the level of a constitutional violation relative to a plea being involuntary, unknowing, or not understood." In a plea of nolo contendere, no factual basis need be stipulated to, as Tenn. R. Crim. P. 11(b)(3) states that "Before entering judgment on a guilty plea, the court shall determine that there is a factual basis for the plea." *State v. Crowe*, 168 S.W.3d 731, 746-47 (Tenn. 2005). However, it is wise to listen to the recitation of the stipulated facts to ensure all of the elements of the offense have been satisfied.

MAKE THE DEFENDANT STATE HE/SHE IS PLEADING GUILTY

> "Best practice mandates that trial courts ask "How do you plead?" and that defendants respond. Such a practice is "strongly preferred," and trial courts in Tennessee must be "vigilant to ensure that a defendant affirmatively states his plea for the record." *Grandia*, 18 F.3d at 187. All trial courts should adhere to this long-time practice to ensure that defendants plead guilty knowingly and voluntarily and thereby receive due process of law. It is the rare instance where, as here, the facts and circumstances of a case demonstrate that a defendant pled guilty without the trial court asking "How do you plead?" and the defendant responding "Guilty." Therefore, trial courts in Tennessee should continue their practice of not only following the dictates of *Boykin*, *Mackey*, Neal, and Rule 11 but also of asking the defendant "How do you plead?" and having the defendant respond."

Lane v. State, 316 S.W.3d 555, 568-69 (Tenn. 2010).

IS THE "MULTIPLE GUILTY PLEA" VALID?

The plea is not necessarily valid just because the judge recites the "guilty plea litany." This is not enough. The defendant must also give some affirmative indication that he understands his rights and the ramifications of his guilty plea. This is why **multiple guilty pleas are dangerous**. They are only valid as long as each defendant is addressed individually to establish this on the record. *See State v. Moten*, 935 S.W.2d 416, 420 (Tenn. Crim. App. 1996).

> This Court has indicated that **en masse guilty plea hearings do not comply with our state's mandates**. *See State v. McClintock*, 732 S.W.2d 268, 273 (Tenn. 1987). We since have recognized, however, that a trial court substantially complies with the mandates of *Boykin*, *Neal*, and Rule 11 of the Tennessee Rules of Criminal Procedure when the trial court communicates the entire litany of rights and other required information "to multiple defendants in the presence of their respective attorneys, so long as the number involved is not so great as to make individual understanding unlikely; and provided that each defendant is addressed individually to establish on the record the understanding and agreement of each defendant." *Neal*, 810 S.W.2d at 137-38 .

> Therefore, while we caution trial courts against conducting group plea hearings, such hearings do not constitute per se violations of *Boykin, Neal*, and Rule 11 of the Tennessee Rules of Criminal Procedure.

State v. Howell, 185 S.W.3d 319, 331 (Tenn. 2006) (emphasis supplied).

With multiple defendants, the judge must make sure 1) that the "litany" is given to them in the presence of their attorneys, 2) that the number of defendants is not so great as to make individual understanding unlikely; and 3) that each defendant is addressed individually to establish on the record the understanding and agreement of each one of them. Even though *Boykin* is satisfied with this process, the better practice is for the judge to solicit separate responses from each defendant. *See Wilson*, 899 SW2d at 651-2, *citing Neal*, 810 SW2d at 137-8.

WHAT ADVICE IS CONSTITUTIONALLY REQUIRED?

Our appellate courts sometimes tell us that certain things are required in the plea, and then change their minds later. For example, *State v. McClintock*, 732 S.W.2d 268 (Tenn. 1987) held that the judge must tell the defendant his or her conviction can be used to enhance his punishment later. Then in *Adkins v. State*, 911 S.W.2d 334, 348 (Tenn. Crim. App. 1994), we were told they didn't really have to, after all. The failure of an attorney to advise a defendant of consequences of the plea as to collateral matters is not ineffective, but gross mis-advice (as to parole eligibility, etc.) is. There is a good discussion of this, with lots of cases cited, in *Adkins* at 348.

The judge must advise of direct consequences, not collateral ones - so the plea will be set aside if, for instance, the judge fails to advise a defendant that he/she is subject to community supervision for life. Sex registration is collateral and remedial, but community supervision for life is punitive and direct, and therefore lack of that knowledge may render the plea involuntary and unknowing.

> "However, neither our federal nor state constitution requires that an accused be apprised of every possible or contingent consequence of pleading guilty before entering a valid guilty plea. Courts are constitutionally required to notify defendants of only the direct consequences -- not the collateral consequences -- of a guilty plea. *Brady*, 397 U.S. at 755; *Blankenship*, 858 S.W.2d at 905. In *Blankenship*, we observed that "[b]y contrast, some consequences are considered 'collateral,' rather than 'direct.'" 858 S.W.2d at 905. The distinction between a collateral and a direct consequence has often been formulated as turning on "whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment."

Ward v. State, 315 S.W.3d 461, 466-67 (Tenn. 2009). Therefore, in Nagele v State, 353 S.W.3d 112, 114 (Tenn. 2011), because " the trial court failed to warn the defendant of the mandatory nature of lifetime community supervision, as is required by our ruling in *Ward*, and the State was unable to establish that the error was harmless beyond a reasonable doubt, the judgment of the Court of Criminal Appeals is reversed and the cause is remanded to the trial court to permit the defendant to withdraw his plea of guilt."

The judge is not required to tell a sex offender he would have to complete a sex offender

program before becoming eligible for parole, pursuant to TCA 41-21-235. *Wilson*, 899 SW2d at 652.

Adequate notice of the charges is a constitutional requisite, but the judge doesn't have to explain every element of each offense in the guilty plea. *Sneed v. State*, 942 S.W.2d 567, 569 (Tenn. Crim. App. 1996).

The judge also does not have to tell the offender things he or she should already know. In *Bailey v. State*, 924 S.W.2d 918, 919 (Tenn. Crim. App. 1995), the defendant attempted to have his plea set aside, saying that had he known his parole would be revoked and run consecutive to the time he received on his plea he would have gone to trial, and that his attorney was ineffective in not advising him of this. The Court dismissed his post-conviction petition without a hearing, holding that it was obvious anyone would know this, and his attorney was not required to inform him of this fact.

In *McKinley v. State*, 910 S.W.2d 465, 467 (Tenn. Crim. App. 1995), a defendant with 17 prior felony convictions pled guilty to a life sentence as a habitual criminal. The 17 convictions were subsequently set aside. When he attempted to set aside his plea to the life sentence, his plea was held to be voluntary and knowing. The defendant had waived the possibility that the prior convictions might later be voided when he entered his plea of guilty.

ACCEPTING/REJECTING PLEA AGREEMENTS

The judge retains discretion to accept or reject the plea. If he or she rejects part of the plea (such as probation, etc.) the judge must tell the defendant he or she is not bound by that part of the agreement. Then the defendant may withdraw from the plea. *Goosby v. State*, 917 S.W.2d 700, 706 (Tenn. Crim. App. 1995).

The judge may also reject the plea if he or she decides guilt should be decided by a jury. In *State v. Hines*, 919 S.W.2d 573, 578 (Tenn. 1995), a judge was upheld for rejecting a plea to two consecutive life sentences, because he thought the punishment was too lenient!

THE *HICKS* PLEA

In *Hicks v. State*, 945 S.W.2d 706 (Tenn. 1997), the Tennessee Supreme Court refused to overturn a plea bargain sentence that provided for a Range II incarceration with a Range I release eligibility. The Court concluded that the agreed range could not be attacked on appeal where the prosecution and defendant negotiated in good faith and without fraud, holding that the legislature's failure to limit the use of offender classification and release eligibility as plea bargaining tools evinced the legislature's intent to permit the practice. *Id.* at 709. They did not condone departures from the maximum and minimum sentencing guidelines imposed by the 1989 Act, however, and so there are limits on plea bargaining. *See McConnell v. State*, 12 S.W.3d 795, 797-98 (Tenn. 2000). The judge may reject a *Hicks* plea on general principles, however, if it is too contorted, unusual or shocking to the conscience. Therefore it would be better to negotiate within the proper range and percentage whenever possible.

ALFORD ("BEST INTEREST") PLEAS

Under *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970), a defendant may enter a plea of guilty even though protesting his innocence, if he feels the plea is in his best

interest. The plea must represent a "voluntary and intelligent choice among the alternative courses of action open to the defendant." However, the right to enter an *Alford* plea is not absolute. Tenn. R. Crim. P. 11 provides not only for acceptance of any proposed plea agreement but also for a rejection. There is no constitutional right to plea bargain. Even if the offer by the state is accepted by the defense, the trial court is under no duty to approve the agreement. *Alford,* 400 U.S. at 38. For example, in a case in which the defendant performs a sexual act in front of little girl and made her simulate the same act, the judge can reject a plea involving immediate probation if the judge feels the defendant should acknowledge guilt to get probation. *VanArsdall v. State*, 919 S.W.2d 626, 630 (Tenn. Crim. App. 1995).

There also must be a factual basis for the plea, and the judge must find it is a voluntary and knowing "best interest plea." There is a great discussion of the *Alford* plea in *Hicks*, 983 SW2d at 247. Merely because a defendant enters a guilty plea only to avoid a sentence of death or greater punishment does not make the plea involuntary.

COMPETENCY TO UNDERSTAND PLEA

When it is believed that an accused is incompetent to stand trial or waive his or her rights, it is the duty of the court to conduct a hearing for the purpose of inquiring into the competence of the accused, and, where warranted, ordering a psychiatric examination and evaluation of the accused. This duty exists even in the absence of a motion seeking such a hearing. *Berndt v. State*, 733 S.W.2d 119, 122 (Tenn. Crim. App. 1987). *See also* Tenn. Code Ann. §33-7-301 (a). Failure to order a hearing when the evidence raises a sufficient doubt as to an accused's competence to stand trial or enter a guilty plea deprives the accused of due process of law. *United States v. White*, 887 F.2d 705, 709 (6th Cir. 1989). The test for when a competency hearing is required before allowing a plea is set out in *Moten*, 935 SW2d at 420-1.

ILLEGAL PLEAS

Many conditions warrant consecutive sentences by statute, and any plea attempting to run them concurrent is invalid. For example, a plea running defendant's sentence concurrent with a violation of parole is illegal and void. *Charlton v. State*, 987 S.W.2d 862, 866 (Tenn. Crim. App. 1998).

Others are:

A plea for an offense committed while on work release. Tenn. Code Ann. § 40-28-123

A felony committed while on bail for a felony, and the defendant is convicted of both offenses. Tenn. R. Crim. P. 32(c)(2) and *State v. Burkhart*, 566 S.W.2d 871, 873 (Tenn. 1978).

A felony committed while on escape. Tenn. Code Ann. § 39-16-605.

The following offenses must be served at 100% with no possibility of parole, or are illegal - Tenn. Code Ann. § 40-35-501(i):

Murder in the first degree;
Murder in the second degree;
Especially aggravated kidnapping;
Aggravated kidnapping;
Especially aggravated robbery;

Aggravated rape;
Rape;
Aggravated sexual battery;
Rape of a child; [no 15% credits allowed for this offense - T.C.A.40-35-501(i)(3)]
Aggravated arson
Aggravated child abuse.
Aggravated rape of a child;
Sexual exploitation of a minor involving more than one hundred (100) images;
Aggravated sexual exploitation of a minor involving more than twenty-five (25) images; or
Especially aggravated sexual exploitation of a minor.

Although defendants may earn up to 15% sentence credits, they will never get parole, and the plea is not to that offense at "85% parole eligibility." There is also no such thing as "life with parole" for Murder First Degree. It is "Life with possibility of release after 51 years."

MUST ADVISE DEFENDANT OF COMMUNITY SUPERVISION FOR LIFE

When a trial court has not informed a defendant of a direct consequence of his or her guilty plea, "the judgment of conviction must be set aside unless the State proves that the error was harmless beyond a reasonable doubt." *Ward v. State*, 315 S.W.3d 461, 476 (Tenn. 2009). Although having to register as a sex offender has been found not to be a direct consequence of the plea but only a collateral one, having to be sentenced to community supervision for life is a direct consequence. *Id.* at 472-76. Therefore, "in order for a guilty plea to any of the offenses in Tenn. Code Ann. § 39-13-524(a) to have been knowingly and voluntarily made, an accused must know and understand the mandatory nature of lifetime community supervision." *State v. Nagele*, 353 S.W.3d 112, 120 (Tenn. 2011). Those offenses are:

Aggravated Sexual Battery
Rape
Aggravated Rape
Rape of a Child
Aggravated Rape of a Child
Attempt to Commit any of the five above offenses

WITHDRAWING OR SETTING ASIDE THE PLEA

Withdrawal of a plea is governed by Tenn. R. Crim. P. 32(f). There are lots of examples of when you can and when you cannot withdraw a plea in *State v. Turner*, 919 S.W.2d 346, 354-55 (Tenn. Crim. App. 1995).

There are three ways a judge can set aside a plea: 1) any fair and just reason before sentence is imposed, 2) to correct manifest injustice after sentencing but before the judgment is final (30 days later) and 3) if there is a finding that the plea is not knowing, intelligent, etc., or obtained through violation of a constitutional right. Tenn. R. Crim. P. 32(f) and *Newsome v. State*, 995 S.W.2d 129, 133 (Tenn. Crim. App. 1998) (holding that even if there is proof that someone else confessed to the murder after the plea is final, that is not sufficient grounds to set

aside the plea, as it doesn't affect the voluntariness). In such a case, executive clemency would be the only way to obtain relief.

A defendant has the burden of establishing that he should be allowed to withdraw his guilty plea to prevent a manifest injustice. *State v. Turner*, 919 S.W.2d 346, 355 (Tenn. Crim. App. 1995). Although Rule 32(f) does not define "manifest injustice," courts have identified circumstances that meet the manifest injustice standard necessary for withdrawal of a plea. *See Turner*, 919 S.W.2d at 355. Withdrawal to correct manifest injustice is warranted where: (1) the plea was entered through a misunderstanding as to its effect, or through fear and fraud, or where it was not made voluntarily; (2) the prosecution failed to disclose exculpatory evidence as required by *Brady*, and this failure to disclose influenced the entry of the plea; (3) the plea was not knowingly, voluntarily, and understandingly entered; and (4) the defendant was denied the effective assistance of counsel in connection with the entry of the plea.

The guilty plea becomes final thirty days after entry of the judgment of conviction unless a timely notice of appeal or motion to withdraw the plea is filed. A notice of appeal removes jurisdiction from the trial court. As a trial court has no power to amend its judgment once the judgment becomes final, it must be filed within 30 days. *State v. Green*, 106 S.W.3d 646, 648-50 (Tenn. 2003).

Tenn. R. Crim. P. 11.

(a) Plea Alternatives. —

(1) In General. — **A defendant may plead not guilty, guilty, or nolo contendere**. The court shall enter a plea of not guilty if a defendant refuses to plead or if a defendant corporation, limited liability company, or limited liability partnership fails to appear.

(2) Nolo Contendere. — **A defendant may plead nolo contendere only with the consent of the court**. Before accepting a plea of nolo contendere, the court shall consider the views of the parties and the interest of the public in the effective administration of justice.

(3) Conditional Plea. — A defendant may enter a conditional plea of guilty or nolo contendere in accordance with Rule 37(b).

(b) Considering and Accepting a Guilty or Nolo Contendere Plea. —

(1) Advising and Questioning the Defendant. — **Before accepting a guilty or nolo contendere plea, the court shall address the defendant personally in open court and inform the defendant of, and determine that he or she understands, the following**:

(A) **The nature of the charge to which the plea is offered**;

(B) the **maximum possible penalty** and any **mandatory minimum penalty**;

(C) if the defendant is not represented by an attorney, the right to be represented by counsel–and if necessary have the court appoint counsel–at trial and every other stage of the proceeding;

(D) **the right to plead not guilty** or, having already so pleaded, to persist in that plea;

(E) **the right to a jury trial**;

(F) **the right to confront and cross-examine adverse witnesses**;

(G) **the right to be protected from compelled self-incrimination**;

(H) if the defendant pleads guilty or nolo contendere, **the defendant waives the right to a trial and there will not be a further trial of any kind except as to sentence**; and

(I) if the defendant pleads guilty or nolo contendere, **the court may ask the defendant questions about the offense to which he or she has pleaded. If the defendant answers these questions under oath, on the record, and in the presence of counsel, the answers may later be used against the defendant in a prosecution for perjury or aggravated perjury**.

(2) Insuring That Plea Is Voluntary. — Before accepting a plea of guilty or nolo contendere, **the court shall address the defendant personally in open court and determine that the plea is voluntary and is not the result of force, threats, or promises** (other than promises in a plea agreement). The court shall also inquire whether the defendant's willingness to plead guilty or nolo contendere results from **prior discussions between the district attorney general and the defendant or the defendant's attorney**.

(3) Determining Factual Basis for Plea. — Before entering judgment on a guilty plea, **the court shall determine that there is a factual basis for the plea**.

(c) Plea Agreement Procedure. —

(1) In General. — The district attorney general and the defendant's attorney, or the defendant when acting pro se, may discuss and reach a plea agreement. The court shall not participate in these discussions. If the defendant pleads guilty or nolo contendere to a charged offense or a lesser or related offense, **the plea agreement may specify that the district attorney general will**:

(A) **move for dismissal of other charges**;

(B) **recommend, or agree not to oppose the defendant's request for, a particular sentence, with the understanding that such recommendation or request is not binding on the court**; or

(C) **agree that a specific sentence is the appropriate disposition of the case**.

(2) Disclosing a Plea Agreement. —

(A) Open Court. — The parties shall disclose the plea agreement in open court on the record, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(B) Timing of Disclosure. — Except for good cause shown, the parties shall

notify the court of a plea agreement at the arraignment or at such other time before trial as the court orders.

(3) Judicial Consideration of a Plea Agreement. —

(A) Rule 11(c)(1)(A) or (C) Agreement. — **If the agreement is of the type specified in Rule 11(c) (1)(A) or (C), the court may accept or reject the agreement pursuant to Rule 11(c)(4) or (5), or may defer its decision until it has had an opportunity to consider the presentence report**.

(B) Rule 11(c)(1)(B) Agreement. — **If the agreement is of the type specified in Rule 11(c)(1)(B), the court shall advise the defendant that the defendant has no right to withdraw the plea if the court does not accept the recommendation or request**.

(4) Accepting a Plea Agreement. — If the court accepts the plea agreement, the court shall advise the defendant that it will embody in the judgment and sentence the disposition provided in the plea agreement.

(5) Rejecting a Plea Agreement. — **If the court rejects the plea agreement, the court shall** do the following on the record and in open court (or, for good cause, in camera):

(A) **advise the defendant personally that the court is not bound by the plea agreement**;

(B) **inform the parties that the court rejects the plea agreement and give the defendant an opportunity to withdraw the plea**; and

(C) **advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than provided in the plea agreement**.

(d) Inadmissibility of Pleas, Offers of Pleas, and Related Statements. — The admissibility of a plea, plea discussion, or any related statement is governed by Tennessee Rule of Evidence 410.

(e) Record of Proceedings and Written Plea. — There shall be a verbatim record of the proceedings at which the defendant enters a plea. If there is a plea of guilty or nolo contendere, the record shall include the inquiries and advice to the defendant required under Rule 11(b) and (c). The plea of guilty or nolo contendere shall be reduced to writing and signed by the defendant.

RELATIVELY SHORT GUILTY PLEA

[PLACE DEFENDANT UNDER OATH]

WHAT IS YOUR FULL TRUE NAME PLEASE?

I AM SHOWING YOU A "PETITION FOR WAIVER OF TRIAL BY JURY AND REQUEST FOR ACCEPTANCE OF PLEA OF GUILTY" - DO YOU RECOGNIZE THIS DOCUMENT?

IS THAT YOUR SIGNATURE AT THE BOTTOM, RIGHT HAND CORNER?

THIS WAIVER CONTAINS ALL YOUR RIGHTS CONCERNING THIS OFFENSE. BEFORE I CAN HEAR THIS GUILTY PLEA, YOU ARE GOING TO HAVE TO WAIVE EACH AND EVERY ONE OF THESE RIGHTS. DID YOUR ATTORNEY EXPLAIN THIS TO YOU AND GO OVER THESE RIGHTS WITH YOU? DO YOU FEEL YOU UNDERSTAND THESE RIGHTS?

AMONG THESE RIGHTS IS YOUR RIGHT TO HAVE A TRIAL BY JURY, AND LET THE JURY DECIDE YOUR GUILT OR INNOCENCE INSTEAD OF ALLOWING ME TO CONVICT YOU TODAY WITHOUT A TRIAL. DO YOU UNDERSTAND THIS?

YOU HAVE A RIGHT TO HAVE YOUR ATTORNEY CROSS-EXAMINE THE WITNESSES AGAINST YOU IN FRONT OF THE JURY WITH YOU IN THE COURTROOM, TO MAKE SURE THEY ARE TELLING THE TRUTH, AND NOT MAKING UP LIES ABOUT WHAT YOU DID. DO YOU UNDERSTAND THIS?

YOU ALSO HAVE A RIGHT TO CALL YOUR OWN WITNESSES TO SHOW YOU ARE INNOCENT. THE STATE HAS TO PROVE YOUR GUILT BEYOND A REASONABLE

DOUBT - YOU DON'T HAVE TO PROVE YOU ARE INNOCENT - BUT IF YOU WANT TO CALL WITNESSES AND YOUR ATTORNEY GIVES ME A LIST OF THEIR NAMES ON A SUBPOENA, I WILL ORDER YOUR WITNESSES TO COME TO COURT AND FORCE THEM TO TESTIFY FOR YOU. EVEN IF I HAVE TO HAVE THE SHERIFF FIND THEM, ARREST THEM OR BRING THEM FROM ANOTHER STATE, I'LL GET THEM HERE FOR YOU TO TESTIFY IN YOUR TRIAL. DO YOU UNDERSTAND THIS?

YOU ALSO HAVE THE RIGHT TO TESTIFY AND TELL YOUR STORY TO THE JURY. IF YOU DECIDED YOU DIDN'T WANT TO TESTIFY, I WOULD NOT ALLOW ANYONE TO CALL YOU AS A WITNESS AND I WOULD TELL THE JURY THEY CAN'T HOLD THAT AGAINST YOU, BECAUSE YOU HAVE A RIGHT NOT TO TESTIFY AGAINST YOURSELF IN YOUR OWN TRIAL. DO YOU UNDERSTAND THIS?

IF YOU WERE CONVICTED BY THE JURY OF _____ AS CHARGED IN **[COUNT ___ OF]** THE INDICTMENT, WHICH IS A CLASS ____ **[FELONY] [MISDEMEANOR]**, I WOULD HAVE TO SENTENCE YOU TO SOMEWHERE BETWEEN _____ AND _____ YEARS, AND THE JURY COULD FINE YOU **[BETWEEN ___ AND ___ DOLLARS] [ANY AMOUNT UP TO ____ DOLLARS]**. IN THIS CASE, THE STATE IS ALLOWING YOU TO PLEAD TO:

[EITHER]

_____ AS CHARGED IN THE INDICTMENT, TO A SENTENCE OF _____ AND A FINE OF _____. IS THAT YOUR AGREEMENT WITH THE STATE OF TENNESSEE?

[OR]

_____ AS INCLUDED IN THE INDICTMENT, WHICH IS A CLASS ____ **[FELONY] [MISDEMEANOR]**. IF THE JURY HAD FOUND YOU GUILTY OF THIS OFFENSE, I WOULD HAVE TO SENTENCE YOU TO SOMEWHERE BETWEEN _____ AND _____ YEARS, AND THE JURY COULD FINE YOU **[BETWEEN ___ AND ___ DOLLARS] [ANY AMOUNT UP TO ____ DOLLARS]**. IN THIS CASE,

THE STATE IS ALLOWING YOU TO PLEAD TO_____ AS INCLUDED IN THE INDICTMENT, TO A SENTENCE OF _____ AND A FINE OF _____. IS THAT YOUR AGREEMENT WITH THE STATE OF TENNESSEE?

IF YOU HAD BEEN CONVICTED AFTER A TRIAL, AND I HAD SENTENCED YOU, YOU WOULD HAVE AN ABSOLUTE RIGHT TO APPEAL YOUR CASE TO THE COURT OF CRIMINAL APPEALS, AND I WOULD GIVE YOU A FREE ATTORNEY AND A FREE APPEAL IF YOU COULD NOT AFFORD ONE. DO YOU UNDERSTAND THIS?

BUT WHEN YOU ENTER THIS PLEA OF GUILTY TODAY, YOU ARE NOT ONLY GIVING UP ALL THE RIGHTS I HAVE EXPLAINED TO YOU AND THE ONES YOUR ATTORNEY WENT OVER WITH YOU IN THIS WAIVER, BUT YOU ARE ALSO GIVING UP THE RIGHT TO APPEAL THIS CONVICTION, AND IT'S GOING TO BE ON YOUR RECORD FROM NOW ON [UNLESS YOU COMPLETE DIVERSION SUCCESSFULLY]. DO YOU UNDERSTAND THIS?

IS THERE ANYTHING ELSE YOU DON'T UNDERSTAND ABOUT THIS PLEA AGREEMENT, OR ANYTHING YOU WANT ME TO EXPLAIN FOR YOU THAT YOU ARE CONFUSED ABOUT?

ARE YOU ENTERING THIS PLEA FREELY AND VOLUNTARILY, WITHOUT ANY THREATS OR PRESSURES OR PROMISES? THANK YOU. YOU MAY STEP DOWN.

THE COURT FINDS THE DEFENDANT'S PLEA IS BEING FREELY AND VOLUNTARILY ENTERED, KNOWINGLY AND INTELLIGENTLY MADE, AND ACCEPTS THIS PLEA OF GUILTY.

MORE THOROUGH GUILTY PLEA

[AFTER OATH OR AFFIRMATION]

WHAT IS YOUR FULL TRUE NAME PLEASE?

HOW FAR DID YOU GET IN SCHOOL?

[IF DIDN'T GRADUATE OR GET GED] DO YOU HAVE A PROBLEM READING?

I AM GOING TO ASK YOU SOME QUESTIONS ABOUT YOUR DECISION TO PLEAD GUILTY. BEFORE I DO THIS, THE RULES SAY I HAVE TO WARN YOU THAT BECAUSE YOU ARE UNDER OATH AND THIS IS A FELONY CASE, ANYTHING THAT YOU SAY TO ME DURING THIS PLEA HAS TO BE TRUE OR YOU CAN BE CHARGED WITH AGGRAVATED PERJURY, WHICH CARRIES BETWEEN 2 AND 12 YEARS IN THE STATE PENITENTIARY. DO YOU UNDERSTAND THIS?

I AM SHOWING YOU A "PETITION FOR WAIVER OF TRIAL BY JURY AND REQUEST FOR ACCEPTANCE OF PLEA OF GUILTY" - DO YOU RECOGNIZE THIS?

IS THAT YOUR SIGNATURE AT THE BOTTOM, RIGHT HAND CORNER?

THIS WAIVER CONTAINS ALL YOUR RIGHTS CONCERNING THIS OFFENSE UNDER THE TENNESSEE AND UNITED STATE CONSTITUTIONS. BEFORE I CAN HEAR THIS GUILTY PLEA YOU ARE GOING TO HAVE TO WAIVE EACH AND EVERY ONE OF THESE RIGHTS. DO YOU UNDERSTAND THIS?

DID YOUR ATTORNEY **[READ THIS WAIVER TO YOU]** EXPLAIN THIS TO YOU AND

GO OVER ALL THESE RIGHTS WITH YOU?
DO YOU FEEL YOU UNDERSTAND THESE RIGHTS?

AMONG THESE RIGHTS IS YOUR ABSOLUTE RIGHT TO HAVE A TRIAL BY JURY, AND LET THE JURY DECIDE YOUR GUILT OR INNOCENCE INSTEAD OF ALLOWING ME TO CONVICT YOU TODAY WITHOUT A TRIAL. DO YOU UNDERSTAND THIS?

YOU ALSO HAVE A RIGHT TO HAVE YOUR ATTORNEY CROSS-EXAMINE THE WITNESSES AGAINST YOU AT THAT TRIAL IN FRONT OF THE JURY WITH YOU IN THE COURTROOM, TO MAKE SURE THEY ARE TELLING THE TRUTH, AND NOT MAKING UP LIES ABOUT WHAT YOU DID. DO YOU UNDERSTAND THIS?

YOU ALSO HAVE A RIGHT TO PUT WITNESSES ON SHOWING YOUR INNOCENCE. THE STATE HAS TO PROVE YOUR GUILT BEYOND A REASONABLE DOUBT - YOU DON'T HAVE TO PROVE ANYTHING - BUT IF YOU WANT TO CALL WITNESSES AND YOUR ATTORNEY GIVES ME A LIST OF THEIR NAMES ON A SUBPOENA,I WILL ORDER YOUR WITNESSES TO COME TO COURT AND FORCE THEM TO TESTIFY FOR YOU. EVEN IF I HAVE TO HAVE THE SHERIFF FIND THEM, ARREST THEM OR BRING THEM FROM ANOTHER STATE, I'LL GET THEM HERE FOR YOU TO TESTIFY IN YOUR TRIAL. DO YOU UNDERSTAND THIS?

YOU ALSO HAVE THE RIGHT TO TESTIFY AND TELL YOUR STORY TO THE JURY. IF YOU DECIDED NOT TO TESTIFY, I WOULD NOT ALLOW YOU TO BE CALLED AS A WITNESS AND I WOULD TELL THE JURY THEY CAN'T HOLD THAT AGAINST YOU, BECAUSE YOU HAVE A RIGHT NOT TO TESTIFY AGAINST YOURSELF IN YOUR OWN TRIAL. DO YOU UNDERSTAND THIS?

IF YOU WERE CONVICTED BY THE JURY OF _____ AS CHARGED IN **[COUNT ___ OF]** THE INDICTMENT, WHICH IS A CLASS ____ **[FELONY]**

[MISDEMEANOR], THE STATE WOULD HAVE HAD TO PROVE TO THE JURY, BEYOND A REASONABLE DOUBT, THAT **[HERE STATE THE ELEMENTS AS CONTAINED IN THE INDICTMENT]**. IF THE STATE HAD PROVED THESE ELEMENTS TO THE JURY, I WOULD HAVE TO SENTENCE YOU TO SOMEWHERE BETWEEN _____ AND _____ YEARS, AND THE JURY COULD FINE YOU **[BETWEEN ___ AND ___ DOLLARS] [ANY AMOUNT UP TO ____ DOLLARS]**. IN THIS CASE, THE STATE IS ALLOWING YOU TO PLEAD TO:

[EITHER]

_____ AS CHARGED IN THE INDICTMENT, TO A SENTENCE OF _____ AND A FINE OF _____. IS THAT YOUR AGREEMENT WITH THE STATE OF TENNESSEE?

[OR]

_____ AS INCLUDED IN THE INDICTMENT, WHICH IS A CLASS ____ **[FELONY] [MISDEMEANOR]**. IF THE JURY HAD FOUND YOU GUILTY OF THIS OFFENSE, THE STATE WOULD HAVE HAD TO PROVE TO THE JURY, BEYOND A REASONABLE DOUBT, THAT **[HERE STATE THE ELEMENTS AS CONTAINED IN THE LESSER INCLUDED OFFENSE]**. IF THE STATE HAD PROVED THESE ELEMENTS TO THE JURY I WOULD HAVE TO SENTENCE YOU TO SOMEWHERE BETWEEN _____ AND _____ YEARS, AND THE JURY COULD FINE YOU **[BETWEEN ___ AND ___ DOLLARS] [ANY AMOUNT UP TO ____ DOLLARS]**. IN THIS CASE, THE STATE IS ALLOWING YOU TO PLEAD TO_____ AS INCLUDED IN THE INDICTMENT, TO A SENTENCE OF _____ AND A FINE OF _____. IS THAT YOUR AGREEMENT WITH THE STATE OF TENNESSEE?

IF YOU HAD BEEN CONVICTED AFTER A TRIAL, AND I HAD SENTENCED YOU, YOU WOULD HAVE AN ABSOLUTE RIGHT TO APPEAL YOUR CASE TO A THE COURT OF CRIMINAL APPEALS, AND I WOULD GIVE YOU A FREE ATTORNEY AND A FREE APPEAL IF YOU COULD NOT AFFORD ONE. DO YOU UNDERSTAND THIS?

BUT WHEN YOU ENTER THIS PLEA OF GUILTY TODAY, YOU ARE GIVING UP NOT ONLY ALL THE RIGHTS I HAVE EXPLAINED TO YOU TODAY, AND THE ONES YOUR ATTORNEY WENT OVER WITH YOU IN THIS WAIVER, BUT ALSO THE RIGHT TO APPEAL THIS CONVICTION, AND THIS CONVICTION IS GOING TO BE ON YOUR RECORD FROM NOW ON. DO YOU UNDERSTAND THIS?

BECAUSE OF THIS CONVICTION ON YOUR RECORD, IF YOU COMMIT ANOTHER OFFENSE, YOUR PUNISHMENT WILL BE A LOT WORSE NEXT TIME, BECAUSE YOU MAY BE RANGE 2, RANGE 3 OR A CAREER OFFENDER. DO YOU UNDERSTAND THIS?

IS THERE ANYTHING ELSE YOU DON'T UNDERSTAND, OR ANYTHING YOU WANT ME TO EXPLAIN FOR YOU THAT YOU ARE CONFUSED ABOUT?

ARE YOU ENTERING THIS PLEA FREELY AND VOLUNTARILY, WITHOUT ANY THREATS OR PRESSURES OR PROMISES? THANK YOU. YOU MAY STEP DOWN.

THIS COURT FINDS THAT THE DEFENDANT'S PLEA IS BEING FREELY AND VOLUNTARILY ENTERED, KNOWINGLY AND INTELLIGENTLY MADE, AND ACCEPTS THE PLEA.

[IF A PLEA OF GUILTY TO MURDER FIRST DEGREE, THE TRIAL JUDGE SHOULD ALSO REVIEW THE ELEMENTS OF THE OTHER FOUR DEGREES OF HOMICIDE AS POSSIBLE LESSER INCLUDED VERDICTS, AND GO OVER THE BIFURCATED SENTENCING PROCEDURE WITH THE DEFENDANT]

IF ASKING FOR A PROBATION OR DIVERSION HEARING

WE ARE GOING TO HAVE A HEARING [TODAY] [ON _____] TO DETERMINE WHETHER OR NOT YOU GET PROBATION [OR DIVERSION]. I CAN'T TELL YOU WHAT I'M GOING TO DO UNTIL AFTER WE HAVE THE HEARING. WE WILL HAVE THE PRE-SENTENCE REPORT AND ANY WITNESSES THAT YOU WISH TO HAVE TESTIFY. THE STATE CAN CALL WITNESSES. YOU CAN TESTIFY IF YOU WANT TO, BUT YOU DON'T HAVE TO. AFTER THE HEARING I WILL MAKE MY DECISION. I CAN GIVE YOU COMPLETE PROBATION FOR UP TO ____ YEARS, OR I CAN MAKE YOU SERVE UP TO ONE YEAR OF THIS SENTENCE, EITHER STRAIGHT OR ON WEEKENDS, AND THEN GIVE YOU PROBATION, OR I CAN DENY YOUR PROBATION AND YOU WILL HAVE TO START SERVING YOUR SENTENCE [TODAY] [THAT DAY]. THERE ARE NO GUARANTEES - YOU MAY GET PROBATION AND YOU MAY NOT GET PROBATION. DO YOU UNDERSTAND THIS? KNOWING ALL THIS DO YOU STILL WISH TO ENTER THIS PLEA OF GUILTY?

IF *ALFORD* OR "BEST INTEREST" PLEA

YOUR ATTORNEY SAYS YOU ARE ENTERING THIS PLEA AS AN *ALFORD* PLEA, OR A "BEST INTEREST" PLEA, STATING THAT YOU ARE NOT GUILTY OF THIS OFFENSE, BUT YOU WISH TO ACCEPT THE STATE'S OFFER AND PLEAD GUILTY ANYWAY BECAUSE YOU FEEL THAT IF YOU WENT TO TRIAL AND WERE CONVICTED, YOU FEEL YOU MIGHT GET A LOT MORE TIME. IS THAT CORRECT?

DO YOU UNDERSTAND THAT EVEN THOUGH YOU STATE YOU ARE NOT GUILTY, THAT WHEN YOU ENTER THIS PLEA TODAY YOU ARE STILL CONVICTED OF THIS OFFENSE AND IT HAS THE SAME EFFECT ON YOUR RECORD AS IF YOU HAD ENTERED A REGULAR GUILTY PLEA AND ADMITTED YOUR GUILT?

IS THIS WHAT YOU WANT TO DO?

DO YOU FEEL THIS IS IN YOUR BEST INTEREST?

IF DOMESTIC ASSAULT PLEA

DO YOU REALIZE THAT ONCE YOU ARE CONVICTED OF THIS DOMESTIC ASSAULT OFFENSE, YOU CAN NEVER CARRY, POSSESS OR OWN A FIREARM AGAIN, OR YOU WILL BE IN VIOLATION OF FEDERAL LAW?

IF THERE WILL BE COMMUNITY SUPERVISION FOR LIFE

(Aggravated Sexual Battery, Rape, Aggravated Rape, Rape of a Child, Aggravated Rape of a Child, or Crim. Attempt to commit any of these five offenses)

BECAUSE YOU ARE ENTERING A GUILTY PLEA TO _____ _____, YOU ARE SUBJECT TO COMMUNITY SUPERVISION FOR LIFE. THIS MEANS THAT AFTER YOU HAVE SERVED YOUR SENTENCE YOU WILL STILL BE UNDER THE JURISDICTION, SUPERVISION AND CONTROL OF THE DEPARTMENT OF CORRECTION IN THE SAME MANNER AS A PERSON UNDER PAROLE SUPERVISION, AND VIOLATION OF THAT SUPERVISION IS EITHER A CLASS A MISDEMEANOR OR A CLASS E FELONY, DEPENDING ON WHETHER OR NOT YOU HAVE ONLY VIOLATED A CONDITION OR COMMITTED A NEW CRIME. DO YOU UNDERSTAND THAT?

What Every Judge Should Know About Criminal Law

Tennessee Judicial Academy

August 21, 2014

GUILTY PLEAS

What is a guilty plea?

- It is basically a trial
- The jury is waived
- The facts are stipulated
- The judge must ensure that the record shows any guilty plea has been made voluntarily, understandingly and knowingly. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969)
- All pleas are controlled by TRCP 11.

Is it knowingly made?

Rule 11(b): Considering and Accepting a Guilty or Nolo Contendere Plea. —

(1) Advising and Questioning the Defendant. — **Before accepting a guilty or nolo contendere plea, the court shall address the defendant personally in open court and inform the defendant of, and determine that he or she understands, the following**:

- (A) **The nature of the charge**;
- (B) the **maximum possible penalty** and any **mandatory minimum penalty**;
- (C) **the right to counsel** on appeal;
- (D) **the right to plead not guilty**;
- (E) **the right to a jury trial**;
- (F) **the right to confront and cross-examine adverse witnesses**;
- (G) **the right to be protected from compelled self-incrimination.**

(I)- **the court may ask the defendant questions about the offense to which he or she has pleaded. If the defendant answers these questions under oath, on the record, and in the presence of counsel, the answers may later be used against the defendant in a prosecution for perjury or aggravated perjury**. (But not at trial, per TRE 410)

(J) if the defendant pleads guilty or nolo contendere, it may have an effect upon the defendant's immigration or naturalization status, and, if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the immigration consequences of a plea. (add to page 10!)

Is it voluntary?

(2) Insuring That Plea Is Voluntary. — Before accepting a plea of guilty or nolo contendere, **the court shall address the defendant personally in open court and determine that the plea is voluntary and is not the result of force, threats, or promises** (other than promises in a plea agreement).

Must be a factual basis

- (3) Determining Factual Basis for Plea. — Before entering judgment on a guilty plea, **the court shall determine that there is a factual basis for the plea**.
- Not applicable to nolo contendere pleas
- Be careful with inchoate lessers, like solicitation, which may not fit the facts, and sexual offenses with age limits.

Collateral consequences

- The judge is not required to tell a sex offender he/she would have to complete a sex offender program before becoming eligible for parole, pursuant to TCA 41-21-235, or that the defendant will have to register as a sex offender. However, the judge must tell the defendant he/she is subject to community supervision for life.

Crimes in 40-35-501(i), (j) and (k)

- Aggravated Robbery on or after 7/1/10: 85%, but can earn sentence credits down to 70%.
- Second Agg. Robbery (or prior Esp Agg Robbery) on or after 1/1/08: served at 100%, but can earn sentence credits down to 85%
- Attempted Murder First Degree where victim suffers serious bodily injury on or after 7/1/13: 85%, but can earn sentence credits down to 75%.

- Aggravated child neglect or endangerment on or after 7/1/13: 70%, but can earn sentence credits down to 55%
- Aggravated Assault resulting in death on or after 7/1/13: 75%, but can earn sentence credits down to 60%.

Accepting/Rejecting Guilty Pleas

- The judge is free to accept or reject the plea. If rejects part of the plea (such as probation, etc.) the judge must tell the defendant he/she is not bound by that part of the agreement, and the defendant may withdraw it.
- The judge may also reject the plea if he/she decides guilt should be decided by a jury. *State v. Hines*, 919 S.W.2d 573, 578 (Tenn. 1995).

Multiple Guilty Pleas

"This Court has indicated that **en masse guilty plea hearings do not comply with our state's mandates**. [But] a trial court substantially complies with … Rule 11 … when the trial court communicates the entire litany of rights and other required information "to multiple defendants in the presence of their respective attorneys, so long as the number involved is not so great as to make individual understanding unlikely; and provided that each defendant is addressed individually to establish on the record the understanding and agreement of each defendant." …

… Therefore, while **we caution trial courts against conducting group plea hearings**, such hearings do not constitute per se violations of *Boykin*, *Neal*, and Rule 11 of the Tennessee Rules of Criminal Procedure. *State v. Howell*, 185 S.W.3d 319, 331 (Tenn. 2006)(emphasis supplied).

Alford **and** ***Hicks*** **pleas**

Alford, or "best interest" pleas do not have to be accepted, particularly if you feel the defendant is not being truthful or the sentence, particularly diversion or probation, is left up to you. See p. 19 for suggested voir dire.

Hicks pleas are pleas to one range with parole eligibility out of another range, allowed by *Hicks v. State*, 945 S.W.2d 706 (Tenn. 1997).

Illegal concurrent pleas

- A plea concurrent with a violation of parole is illegal and void.
- A plea concurrent with an offense committed while on work release.
- A felony committed while on bail for a felony, and the defendant is convicted of both offenses.
- A felony committed while on escape.

CRIMINAL PROCEDURE

Rules 8, 13 and 14

- Rule 8 -Joinder of offenses and/or defendants
- Rule 13 - Consolidation or Severance
- Rule 14 - Severance of offenses/defendants
- The confusion is further multiplied unless you first begin with three questions:

  Which Rule should you use?

  Whose burden is it?

  What standard applies?

“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," …. 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). **Have a 404(b) hearing**.

More Confusion

- There is also "mandatory joinder" and "permissive joinder," cases on each set out on pp. 3-6 of the handout.
- "Common scheme or plan" and "Continuing plan or conspiracy" definitions are on pp. 6-8
- Make sure you handle this pretrial, eliciting alleged facts to be proved at trial from attorneys.
- If handled by consent, **put it on the record**.

Severance of Defendants

Reasons include:

Inconsistent pleas

Bruton problems

Reasons do not include:

Mutually antagonistic defenses, unless there is "compelling prejudice."

Disparity in the evidence alone.

TRCP 12(b)(2)

The following **must** be raised before trial:

(A) a motion alleging a defect in the institution of the prosecution;

(B) a motion alleging a defect in the indictment, presentment, or information [other than lack of jurisdiction];

(C) a motion to suppress evidence;

(D) a Rule 16 request for discovery; and

(E) a Rule 14 motion to sever or consolidate.

TRCP 12(f)

Unless the court grants relief for good cause, **a party waives any defense, objection, or request by failing to comply with**:

(1) **rules requiring such matters to be raised pretrial**;

(2) any deadline set by the court under Rule 12(c); or

(3) any deadline extension granted by the court.

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.

TRCP 23 – Bench Trial

(b)(1) Timing. The defendant may waive a jury trial at any time before the jury is sworn.

(2) Procedures. A waiver of jury trial must:

(A) be in writing;

(B) have the consent of the district attorney general; and

(C) have the approval of the court.

The defense attorney **cannot waive** for the defendant.

The judge should advise the defendant in open court of 4 things:

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).

TRCP 29 – Judgment of Acquittal

Is the evidence **insufficient** to warrant a conviction?

The trial court must favor the state with the strongest legitimate view of the evidence, including all reasonable inferences, and **discard any countervailing evidence**.

This is a question of law only. The trial judge must **disregard any defense proof** that conflicts with the state proof.

TRCP 44(b) – Waiver of Counsel

(1) Actions by Court. Before accepting a waiver of counsel, **the court shall**:

(A) advise the accused in open court of the right to the aid of counsel at every stage of the proceedings; and

(B) determine whether there has been a competent and intelligent waiver of such right by inquiring into the background, experience, and conduct of the accused …

(2) Written Waiver. A waiver of counsel shall be in writing.

(3) Record of Waiver. An accepted waiver of counsel shall be in the record.

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).

Use the questions in the Appendix to **Smith**, listed on p. 13 of your handout.

Appoint standby counsel??

TRCP 2

"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."

- 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.

FINDINGS OF FACT IN EVIDENTIARY RULINGS AND SENTENCING

Source of Evidentiary Error

- Most errors in trial evidentiary rulings are caused because the judge used the wrong standard or failed to place his/her findings on the record.

- 90% of the error comes from failing to enunciate the correct standard and findings on only 5 rules of evidence:

403 – Exclusion of Relevant Evidence

404(b) – Evidence of other crimes, wrongs or acts [of the defendant]

405(a) – Reputation or opinion

608(b) – Specific instances of conduct

609 – Impeachment by evidence of conviction of crime

- The state wants to admit prejudicial evidence. It doesn't implicate other crimes, wrongs or acts of the defendant, but it's still prejudicial.
- The evidence is relevant, but you find the probative value of the evidence is outweighed by it's unfair prejudice.
- What do you do? Allow it or exclude it?

Standard for 403

"Although relevant, evidence may be excluded if its **probative value is substantially outweighed** by the danger of unfair prejudice"

Rule of Inclusion

Standard for 404(b)

The court must exclude the evidence if its **probative value is outweighed** by the danger of unfair prejudice."

Rule of Exclusion

"The conditions which must be satisfied before allowing [404(b)] evidence are:

(1) The court upon request **must hold a hearing outside the jury's presence**;

(2) **The court must determine** that a material issue exists other than conduct conforming with a character trait and

must upon request **state on the record** the material issue, the ruling, and the reasons for admitting the evidence; and

(3) The court **must exclude** the evidence if its **probative value is outweighed** by the danger of unfair prejudice."

404(b) only applies to defendants!

"The word 'person' in Rule 404(b) has been construed to refer solely to the defendant in a criminal prosecution. *State v. Stevens*, 78 S.W.3d 817 (Tenn. 2002)." 2005 Advisory Commission Comment to 404(b).

KNOW THE STANDARDS AND PROCEDURE FOR ALL 5 RULES!

Sentencing

T.C.A. § 40-35-210 (e) -

"When the court imposes a sentence, **it shall place on the record**, either **orally or in writing**, what enhancement or mitigating factors were considered, if any, as well as the reasons for the sentence, in order to ensure fair and consistent sentencing."

Appellate review

T.C.A. § 40-35-401(d) – "When reviewing sentencing issues …, including the granting or denial of probation and the length of sentence, **the appellate court shall conduct a de novo review** on the record of the issues. **The review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct**."

"This means that if the trial court followed the statutory sentencing procedure, **made findings of fact that are adequately supported in the record**, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing, **one may not disturb the sentence**." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

"If the trial court followed the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and …**the trial court's findings are adequately supported by the record**, then we may not modify the sentence **even if we would have preferred a different result**." *State v. Pike*, 978 S.W.2d 904, 926-27 (Tenn. 1998).

New Sentencing Requirement

- **T.C.A. § 40-35-401(b)(6) is new**

  "any statistical information provided by the administrative office of the court as to sentencing practices for similar offenses in Tennessee"

EVIDENCE IN CRIMINAL TRIALS

CRIMINAL TRIAL PROBLEMS

Problems with the Jury

Problems with the Defendant

Problems with Election

Hung Jury (see p. 3)

Never, ever, ask the jury what their numbers are.

Quotes from *State v. Skelton*, 77 S.W.3d 791, 798-99 (Tenn. Crim. App. 2001):

"The trial court's first error occurred when the trial judge directed the foreperson to "tell me the numerical division … "”

"Okay. On the first is 11 to 1;

second, it was 10 to 2;

voluntary, it was 10 to 2;

and aggravated assault, of course, it was 12 to 0, since he confessed."

“This was an improper request on the part of the trial court.”

- “our supreme court has held that the trial judge must follow the procedure set forth in *Kersey v. State*, 525 S.W.2d 139 (Tenn. 1975). **Specifically, when a jury reports its inability to come to a unanimous decision, *Kersey* directs the trial judge to "admonish the jury, at the very outset, not to disclose their division or whether they have entertained a prevailing view**." *Id.* at 141 … *Kersey* is quite explicit on this point. In fact, **"the only permissive inquiry [a trial judge may make] is as to progress and the jury may be asked whether it believes it might reach a verdict after further deliberations.**" *Id.*

“We emphasize that until the jury reaches a verdict**, "no one--not even the trial judge--has any right, reason or power to question the specifics of its deliberative efforts. . . . Such inquiry is error**."”

“Since unanimity is required, when a jury returns with a vote which is split, the trial court has the power and the duty to return the jury to the jury room with instructions that their verdict must be unanimous. .... A permissible alternative is to question the jury as to whether it believes a verdict might be possible after further deliberations. .... For "it is only when there is no feasible and just alternative to halting the proceedings that a manifest necessity is shown."

TRCP 31 (d)(2)

"If the court instructs the jury on one or more lesser included offenses and the jury reports that it cannot unanimously agree on a verdict, **the court shall address the foreperson** and inquire whether there is disagreement as to the charged offense and each lesser offense on which the jury was instructed. The following procedures apply:

(A) The court shall begin with the charged offense and, in descending order, inquire as to each lesser offense until the court determines at what level of the offense the jury has disagreed;

(B) The court shall then inquire if the jury has unanimously voted not guilty to the charged offense.

(i) If so, at the request of either party, the court shall poll the jury as to their verdict on the charged offense.

(ii) If it is determined that the jury found the defendant not guilty of the charged offense, the court shall enter a not guilty verdict for the charged offense.

(C) The court shall then inquire if the jury unanimously voted not guilty as to the next, lesser instructed offense.

(i) If so, at the request of either party the court shall poll the jury as to their verdict on this offense.

(ii) If it is determined that the jury found the defendant not guilty of the lesser offense, the court shall enter a not guilty verdict for that offense.

(D) The court shall continue this inquiry for each lesser instructed offense in descending order until the inquiry comes to the level of the offense on which the jury disagreed.

(E) The court may then declare a mistrial as to that lesser offense, or the court may direct the jury to deliberate further as to that lesser offense as well as any remaining offenses originally instructed to the jury.

PROBLEMS WITH THE DEFENDANT

Absent Defendant at Trial

The defendant has the right to be at every stage of the trial, including voir dire, unless waives. Voluntary absence after trial starts or in-court misbehavior can constitute waiver, but "the court should indulge every reasonable presumption against waiver." Mere absence when the trial is called is not sufficient to show waiver.

TRCP 43 – Presence of Defendant

(a) Presence Required. Unless excused by the court on defendant's motion or as otherwise provided by this rule, the defendant shall be present at:

(1) the arraignment;

(2) every stage of the trial, including the impaneling of the jury and the return of the verdict; and

(3) the imposition of sentence.

(b) Continued Presence Not Required. The further progress of the trial, to and including the return of the verdict and imposition of sentence, shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present:

(1) Voluntary Absence. Voluntarily is absent after the trial has commenced, whether or not he or she has been informed by the court of the obligation to remain during the trial; or

(2) Disruptive Conduct. After being warned by the court that disruptive conduct will result in removal from the courtroom, persists in conduct justifying exclusion from the courtroom.

(c) Procedure After Voluntary Absence or Removal.

(1) Representation by Counsel. If a trial proceeds in the voluntary absence of the defendant or after the defendant's removal from the courtroom, he or she must be represented in court by counsel.

(2) Disruptive Conduct. If the defendant is removed from the courtroom for disruptive behavior under Rule 43(b)(2):

(A) Access to Counsel After Removal. The defendant shall be given reasonable opportunity to communicate with counsel during the trial; and

(B) Periodic Review of Removal. The court shall determine at reasonable intervals whether the defendant indicates a willingness to avoid creating a disturbance if allowed to return to the courtroom. The court shall permit the defendant to return when the defendant so signifies and the court reasonably believes the defendant.

In *State v. Muse*, 967 S.W.2d 764, 766-68 (Tenn. 1998), the judge was reversed when the defendant missed the first part of jury selection, even though no prejudice was shown, as this was plain error regarding a fundamental right, and can never be treated as harmless.

In *State v. Far*, 51 S.W.3d 222, 226 (Tenn. Crim. App. 2001), the defendant refused to be present for the trial, but the judge never got him to waive on the record, so the conviction was reversed. "The record must reflect that the accused had knowledge of his right and personally waived the right either in writing or in open court."

Prison Clothes and Shackles

- Ordinarily, a defendant may not be forced to appear in shackles or in prison garb. *Estelle v. Williams*, 425 U.S. 501, 504-05, 96 S. Ct. 1691, 1693, 48 L. Ed. 2d 126 (1976). However, the defendant can waive his right to appear in civilian clothes if he fails to take the opportunity provided him to change. *State v. Bradfield*, 973 S.W.2d 937, 945 (Tenn. Crim. App. 1997).

In most cases, the trial judge must honor a defendant's request to be tried in civilian clothing. However, failure to do this is OK if the defendant had a reasonable opportunity to appear in civilian clothes but failed to do so. *See State v. Zonge*, 973 S.W.2d 250, 257 (Tenn. Crim. App. 1997).

Pro Se Issues

Never allow the defendant to self-represent without going through the ***Smith*** questions.

If there are co-defendants, read the warnings given in *State v. Carruthers*, 35 S.W.3d 516, 553 (Tenn. 2000). You may need to grant a severance.

The trial court is not required to interrupt the trial to explain procedural rules, legal terms, or consequences of the litigant's actions. *State v. McCary*, 119 S.W.3d 226, 258 (Tenn. Crim. App. 2003).

Remember Penny White's question …

Are you a balls and strikes judge, or a justice seeker judge? Both types are worthy aspirational goals.

Pro Se Closing Argument

"[T]here are certain perils a defendant faces when representing himself at trial. Knowing when to object during argument obviously is one of those perils. While the trial court can intervene *sua sponte* and take curative measures when the argument becomes blatantly improper, …the trial court must exercise its discretion and should not exert too much control over the arguments. The judge does not serve as a *pro se* defendant's counselor during trial. The judge should intervene only when requested or when the judge deems proper in the interest of justice." *State v. Carruthers*, 35 S.W.3d 516, 578 (Tenn. 2000).

Forfeiture of Right to Counsel

"a finding of forfeiture is appropriate only where a defendant egregiously manipulates the constitutional right to counsel so as to delay, disrupt, or prevent the orderly administration of justice. Where the record demonstrates such egregious manipulation a finding of forfeiture should be made and such a finding will be sustained, even if the defendant is charged with a capital offense." *Carruthers* at 550.

Avoid "Hybrid" counsel

"The right to self-representation and the right to counsel have been construed to be alternative ones; that is, **one has a right either to be represented by counsel *or* to represent himself … Hybrid representation should be permitted "sparingly and with caution and only after a judicial determination that the defendant (1) is not seeking to disrupt orderly trial procedure and (2) that the defendant has the intelligence, ability and general competence to participate in his own defense**"

It's best to appoint "advisory counsel," to sit outside the bar but be available to answer the defendant's questions. If the defendant changes his mind or waives the right to be present through misconduct, advisory counsel can step in and take over.

ELECTION OF OFFENSES

Separate, Discrete Acts

If more than one criminal act may be considered by the jury, the judge must force the State to elect which offense it will submit to the jury, to ensure a unanimous verdict. The only event the jury must consider should be spelled out in the jury instructions. The judge must do this **even if the defense makes no motion** for the State to elect, due to double jeopardy considerations.

"Although the defense apparently did not request an election of offenses, we have stressed that the election requirement is a responsibility of the trial court and the prosecution and, therefore, does not depend on a specific request by a defendant. … As our cases have made crystal clear, the prosecution's failure to elect was an error that was 'fundamental, immediately touching [upon] the constitutional rights of [the] accused.'"

When?

The State must be told to elect at the end of the State's case in chief, not after all the proof. *State v. Ellis*, 89 S.W.3d 584, 595 (Tenn. Crim. App. 2000).

The trial judge should give a copy of T.P.I. – Crim. 42.25 to the State and ask them to fill in the blanks. Once the election is announced and approved, the defense may present its MJA.

For guidance as to how to word the election and how not to elect - with reference to birthdays, places, etc., *see State v. Brown*, 992 S.W.2d 389, 392 (Tenn. 1999).

One need not elect in continuing offenses, such as child neglect, harrassing phone calls, stalking, etc.

The state need not elect between prosecution as a principal actor and prosecution for criminal responsibility. *State v. Anthony Hodges*, 7 S.W.3d 609, 625 (Tenn. Crim. App. 1999).

If the State asks the jury for conviction on different theories (such as DUI by driving or exercising control) they do not need to elect. The defendant would be guilty either way. *State v. Butler*, 108 S.W.3d 845, 850 n.3 (Tenn. 2003).

Sexual Offenses

When instructing on sexual offenses, particularly ones involving children, see the cases on pp. 17-18 of the handout describing how to elect and how not to elect. They get very complicated.

Sexual Battery and the *Phillips* Analysis

The sexual battery statute uses the plural "parts" rather than the singular "part." Therefore, the statute contemplates that the element of "sexual contact" may be established by proof that the defendant touched more than one of the areas included within the definition of “intimate parts.”

If the entire instance of sexual contact occurs quickly and virtually simultaneously, then only one offense has occurred. If more than one touching has occurred the trial judge needs to do a *Phillips* analysis, set out in *State v. Johnson*, 53 S.W.3d 628, 633 (Tenn. 2001), citing *State v. Phillips*, 924 S.W.2d 662 (Tenn. 1996). The judge must weigh 5 things:

(1) the nature of the acts committed by the defendant;

(2) the area of the victim's body invaded by the defendant's sexually assaultive behavior;

(3) the time elapsed between the defendant's discrete acts of sexually assaultive conduct;

(4) the defendant's intent in the sense that the lapse of time may indicate a newly formed intent to again seek sexual gratification or inflict abuse; and

(5) the cumulative punishment.

ALTERNATIVE SENTENCING

(SEE PAGE 2)

LESSER INCLUDED OFFENSES

Never look at the facts of the case until you have already determined the lesser included offenses from the indictment.

The facts of the case do not change the lessers. The indictment never changes.

Only after hearing all the proof do you decide whether or not to *charge* a particular lesser.

Crim. Att. Murder 1st Degree

Proof in the case – The defendant goes into a man's apartment, pulls out a gun and shoots him 6 times. The victim lives and ID's him in court.

What are the lessers?

Crim. Att. Murder 2nd

Crim. Att. Vol. Manslaughter

Reckless Endangerment (*not* with a D/W!)

Especially Aggravated Robbery

- Aggravated Robbery (Weapon)
- Aggravated Robbery (Serious Bodily Injury)
- Robbery
- Aggravated Assault (Weapon)
- Aggravated Assault (Serious Bodily Injury)
- Reckless Aggravated Assault
- Reckless Endangerment (w/ Weapon)
- Theft
- Assault
- Reckless Endangerment

Criminal Attempt?

Part (c) of the *Burns* test, which makes an attempt a lesser-included offense, applies "to situations in which a defendant attempts to commit . . . either the crime charged or a lesser-included offense, but no proof exists of the completion of the crime." *State v.* Marcum, 109 S.W.3d at 303 (Tenn. 2002).

HELP!

For help with jury instructions or anything else, see the last page of the last handout in the Criminal Law section for my phone #, e-mail address and website for updates to jury instructions.