

# Criminal Discovery and Inspection

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

**Tennessee Judicial Conference  
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## 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 {230 S.W.3d 148} 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 prosecute the indictment. If the State neither nolle prosecute'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, including records of acts of dishonesty and psychological imbalance,

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 {2006 Tenn. Crim. App. LEXIS 44} 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).

#### **NOT 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).

## 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, in consequence, 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.**