IN THE CIRCUIT COURT FOR THE THIRTEENTH JUDICIAL DISTRICT
COUNTY OF CUMBERLAND AT CROSSVILLE, STATE OF TENNESSEE

STATE OF TENNESSEE,	)	
	)	
Plaintiff,	)	
	)	CASE NO. 5346
v.	)	
	)	MEMORANDUM OF POINTS AND
BYRON LOOPER,	)	AUTHORITIES IN SUPPORT OF
	)	MOTION FOR NEW TRIAL
Defendant.	)	

In support of his Motion for New Trial filed September 21, 2000, Defendant Byron Looper respectfully submits the following points and authorities:

INTRODUCTION

The right of a criminal defendant to a fair trial is a fundamental right guaranteed by the United States Constitution under the Fourteenth Amendment and by Article 1, section 9 of the Tennessee Constitution. The errors which permeated the proceedings against the defendant at bar began before his arrest and continued through his trial and sentencing.

Within hours of the murder of Senator Tommy Burks, Tennessee law enforcement officials had predetermined Byron Looper's criminal responsibility and set off on a tendentious path of proof. The purported identification of Looper by the one near-witness to the killing was preceded by a flurry of effort - both clandestine and overt - to tie Defendant to the crime without any basis save a politically motivated theory. Despite the

palpable political animus driving the prosecution, the trial court refused to order the submission of a voice exemplar by the District Attorney General. This refusal ignored evidence which raised more than a colorable issue of outrageous government conduct. Cf. State v. Williams (Court of Criminal Appeals, 1991) 827 SW2d 804, 808-809.

Once Wesley Rex had "identified" Defendant, meaningful cross-examination was foreclosed by the suppression of Rex's mental health records. Thereafter, discovery - a procedure meant to provide notice to the defendant, to assure adherence to due process and to define the issues at trial - was employed by the prosecution as a mechanism for misguidance and concealment.

As the trial approached, Defendant's motion for change of venue was treated as a motion for change of venire. Jurors tainted by pre-trial publicity, notoriety of the proceedings and in some cases their own lack of candor were wrenched from their everyday lives and forced to attend a trial nearly two hundred miles from their homes and families. Jury selection was itself marred by the failure to remedy the infection stemming from biased and negative pre-trial publicity compounded by the utterances of patently prejudiced prospective jurors. The disease was left uncured: There was insufficient judicial enquiry of the venire regarding the extraneous influences impacting the decision-making process. In place of the proper screening necessary to ensure a fair and impartial jury, the prospective jurors were subjected to an inappropriate reference to Defendant's custodial status and an erroneous preoccupation with sentencing.

The only treatment the trial court offered was a band-aid whose effect if not purpose was to mask the bias, preconception and/or prejudice of the prospective jurors. At best, excessive judicial rehabilitation of clearly unqualified jurors stanched the spread of contagion; it did nothing to root out the disqualifying factors or ensure a jury without infected members.

The selected jurors were freed, however, from the benefit of any life's experience other than Anglo-American. The only minority member to survive pre-selection elimination for cause was removed on the prosecution's peremptory challenge in a stunning example of improper racial motivation. By affirming the disingenuous race-neutral explanation of the District Attorney General that the challenged prospective jurors was too educated, the Court ignored the prosecutor's acceptance of educated Anglo jurors. See Batson v. Kentucky (1986) 476 US 79, 89.

To a jury comprised exclusively of middle-class whites who had not all been candid with the court and who would not all remain alert at trial the District Attorney General addressed his Opening Statement. Without even a good-faith belief that he had evidence to support his assertion, the prosecutor told the jurors that Byron Looper had informed a political job-seeker that "thirty-five cents, the cost of a bullet" would be the only necessary expenditure in the State Senate campaign. At the time this assertion was made, the prosecution had given Defendant poor quality copies of the taped-recorded interviews of the witness who purportedly had heard the damning remarks. No transcript was

provided. By the time the job-seeker was proffered as a witness, defense counsel had prepared transcripts, provided them to the prosecution and clearly established that the remarks as represented to the jury in Opening Statement were but the wishful thinking of an overzealous prosecutor. The State was compelled to question its witness within the confines of truth: Lindsey Adams never gave the testimony the District Attorney General had promised a few days earlier.

While the prosecution was allowed to present its case relatively unfettered, the defense was hamstrung by the proceduralistic application of rules. Witnesses were excluded, testimony limited and an entire line of defense banished from the temple of justice. The consequences of such mechanistic interpretation were the apotheosis of a flawed witness and the predication of Defendant to a witness without corroboration.

The trial became a tautological exercise. Only the sentence was uncertain. When the sentence was decided, it was contrary to the law and the evidence.

I

Wesley Rex was presented by the prosecution as an eyewitness who could connect Defendant to the crime scene. Cf. Tennessee Rules of Criminal Procedure, rule 12.1(b). His capacity as such was established long before trial. Rex had previously testified at an identification examination, where his testimony was similarly protected from vigorous cross-examination.

There is no delicate way to state that which must be painfully obvious to all who

have contact with the farmhand. Wesley Rex is a developmentally disabled young man of extremely low intelligence. Yet the defense was denied access to mental health records which (1) would have brought home to the jury not only Rex's cognitive limitations but also his susceptibility to suggestion and prosecutorial manipulation and (2) would have provided sufficient information to the court-approved eyewitness identification expert to enable him to testify regarding the impact of such susceptibility and limited intelligence.

In evaluating the asserted error of suppressing Rex's mental health records, the Court cannot be unmindful of the witness's presentation at trial: Whenever the farmhand was asked about the crime, his answers were prompt and rote; simple questions less directly connected with the offense were met with hesitation and occasional bafflement.

Tennessee law provides both the prosecutor and the criminally accused with the right of unlimited cross-examination. Phipps v. State (Court of Criminal Appeals, 1971) 474 SW 2d 154. That right does not countenance a restriction of cross-examination to subjects raised on direct; enquiry may extend to any matter material to the case. Long v. State (Court of Criminal Appeals, 1980) 607 SW2d 482. Wide latitude is accorded to the cross-examining party. Huddleston v. State (Court of Criminal Appeal, 1978) 576 SW2d 8; cf. Humphreys v. State (Court of Criminal Appeals, 1975), where the wealth of the defendant's family was deemed an appropriate area of enquiry.

The right of cross-examination is essential to a fair trial. State v. Butler (1981) 626 SW2d 6. Since cross-examination is grounded on constitutional considerations, a criminal

defendant cannot be denied enquiry into relevant matters simply because such cross-examination would impinge on the rights of others. Particularly is this so when the competing interest is not constitutionally protected. See State v. Hill (Court of Criminal Appeals, 1980) 598 SW2d 815, where the statutory protection given to a juvenile had to give way to the defendant's right to impeach the witness on cross-examination.

The similarity of the competing interests in Hill and the case at bar is striking. Whatever right Wesley Rex had in protecting the privacy of his mental health records is a statutory privilege no different from a juvenile's right against disclosure of his youthful offenses. Cf. Shockley v. State (Court of Criminal Appeals, 1978) 585 SW2d 645, 650, where the appellate court held that a rape victim's right against exploration of her sexual past under TCA section 40-2445 must yield to a defendant's right to a fair trial.

The jury in the instant case was allowed only a sanitized, politically correct (and ultimately misleading) view of the only witness placing Defendant at the Burks farm at the time of the Senator's murder. The limits on the farmhand's ability to perceive, to record, to retain, to recall and to recount - the several stages from observation to testimony - were essentially declared terra prohibita by the Court's suppression of the mental health records.

The trial court's refusal to allow full examination of Wesley Rex flies in the face of Tennessee Rules of Evidence, rule 617: "A party may offer evidence that a witness suffered from impaired capacity at the time of an occurrence or testimony." Here, the

capacity of a dullard was impaired at both "the time of an occurrence [and] testimony." There is nothing to suggest that the impairment had passed since the preparation of the mental health records in question. Cf. State v. Middlebrooks (1992) 840 SW2d 317 (cert denied, 1993), which dealt with the more ephemeral issue of mental state.

Cross-examination became virtually meaningless as counsel could only gingerly question the insulated witness. Such circumscribed enquiry does not comport with the constitutional right of confrontation; it does not ensure the "accuracy of the truth-determining process." Dutton v. Evans (1970) 400 US 74, 89, 91; see also Chambers v. Mississippi (1973) 410 US 284, 93.

Any review of the legality of the restricted cross-examination of a witness must be made within the context of the particular case. Shockley, 585 SW2d at page 650. While investigatory heavy-handedness is not constitutionally proscribed, it remains a factor the court must consider. Hell-bent on making a nettlesome political gadfly the principal, indeed only suspect in the murder of a beloved state senator, the District Attorney General dispatched investigators from his office and the Tennessee Bureau of Investigation to Byron Looper's office long before there was even a concocted reason to do so. The visits with Brilla Garrett and John Bowden preceded Wesley Rex's composite drawing of the suspect.

Within hours of the murder, the prosecution's interest in Looper was communicated to the media and the name and photograph of the property assessor were broadcast on

television in connection with the crime. Indeed, Rex testified that he was not sure that Looper was the man he had seen on Monday morning, October 19, 1998 until after he heard Defendant's name on the 7:00 a.m. news broadcast the following day. The name of a man he had never met was the purported root of his certainty. Again, only access to and use of the witness's mental health records would have allowed the cross-examination contemplated by Tennessee Rules of Evidence, rule 611(b) and guaranteed by the state and federal constitutions. Cf. Chambers v. Mississippi, 410 US 284 at page 295: "The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation[.]"

II

Inappropriate restriction of cross-examination was not confined to the questioning of a witness whose protection from trenchant enquiry in a social rather than legal setting would be laudable. At trial, the prosecution presented a most unlikely hero. Despite his blatant character flaws and deliberate dissembling as a witness, Joe Bond was insulated from impeachment by the trial court's evidentiary rulings. On cross-examination, Bond denied making an unsolicited offer to sell firearms including automatic weapons to the handyman in his apartment complex. Yet Tony Richard was not allowed to testify that this had indeed occurred. The testimony was barred as collateral, a specific instance of conduct which may not be proven by extrinsic evidence under Tennessee Rules of Evidence, rule 608(b). The trial court missed the thrust of the proffered evidence: Joe

Bond had lied as a witness under oath and Tony Richard's testimony was the only means by which Defendant could prove the perjury. Cf. State v. Johnson (Court of Criminal Appeals 1984) 670 SW3d 634, where such collateral enquiry - also in a military context - was permitted.

The Court similarly barred the testimony of Amy Orr. This witness was tendered to testify regarding Sgt. Bond's obstruction of justice in a recent military investigation. Bond's attempt through death threats to suborn Ms. Orr in those proceedings was deemed a specific instance of conduct used to attack credibility. As such, it could not be established by extrinsic evidence. Tennessee Rules of Evidence, rule 608(b). Once again, the point of the proffered testimony was misapprehended: From Joe Bond's efforts to corrupt a witness in a quasi-judicial enquiry, a reasonable jury could have concluded that Bond had a comparable purpose of corrupting justice in the instant case. The excluded evidence spoke to bias and motive, both admissible to impeach a witness collaterally despite the fact that they are factors from which a jury may determine a witness's credibility. Cf. Tennessee Rules of Evidence, rule 616.

While Virginia Hill was permitted to testify as a defense witness tendered to impeach both Joe Bond and TBI Special Agent David Emerin, the trial court allowed her to revise her testimony with virtual impunity. Ms. Hill's accusations against the chief defense investigator were unanswered, not because they were accurate but because the court invoked the rule of witness sequestration capriciously and punitively.

Ron Lax was barred as a defense witness to rebut Ms. Hill's self-serving recharacterizations of her out-of-court statements because Lax had been present in court during the trial. See generally, State v. Howell (1993) 868 SW2d 238 (cert denied, 1994) regarding the ability to impeach a witness with a prior inconsistent statement. The arbitrariness of the court's ruling in this regard is underscored by the subsequent manifestation of unevenhandedness: Despite the fact that Tommy Burks' widow had previously testified under the rule and been allowed to remain after her testimony upon the prosecution's representation that she would testify no further, Charlotte Burks was recalled in clear contravention of Tennessee Rules of Evidence, rule 615 when a reprised presentation appeared tactically advantageous. A rule of evidence reciprocal in its intended application was slavishly followed to Defendant's disadvantage and blithely ignored when it suited the State's purposes. Cf. State v. Stinson (Criminal Court of Appeals, 2000) E1999 - 02082-CCA-R3-CD (slip opinion, September 9, 2000), where the prosecution was permitted to call an otherwise barred impeachment witness because of the surprise change in testimony by another witness.

III

Throughout the trial, the evidentiary and procedural rules seemed Janus-like in their application: one view for the prosecution; another view for the defense. Nowhere was this more apparent than in the peremptory preclusion of witnesses tendered to corroborate Defendant's alibi.

Tennessee Rules of Criminal Procedure, rule 12.1 sets forth the disclosure parameters when notice of alibi is demanded by the prosecution: To trigger the defendant's obligation to disclose before trial an alibi defense, the State must first give written notice of the time, date and place of the alleged offense. Upon receipt of such notice, the defendant must respond in writing and state the specific place(s) where he claims to have been at the time of the charged crime as well as the names and addresses of witnesses "upon whom the defendant intends to rely to establish such alibi." Tennessee Rules of Criminal Procedure, rule 12.1(a).

An alibi witness is one who can testify where the accused was at the time of the offense as delineated by the prosecution. Williams v. Florida (1970) 399 US 78, 90 S Ct 1983. It is thus the State that determines who is an alibi witness subject to disclosure. The defense has no general obligation of revealing the witnesses it intends to call at trial. Cf. Bray v. State (Court of Criminal Appeals, 1969) 450 SW2d 786, 787 (cert denied, 1970): "There is no rule of law in Tennessee which requires a defendant to name his witnesses at the time that the jury is being selected, and be irrevocably bound to use only those so identified."

Once the defendant has responded to the demand for alibi notice, the District Attorney General must give "written notice stating the names and addresses of the witnesses upon whom the State intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witness to be relied on to rebut testimony

of any of the defendant's alibi witnesses." Tennessee Rules of Criminal Procedure, rule 12.1(b); emphasis added. In practice, this requires that the prosecution disclose two sets of witnesses if the defendant has identified any witness (other than himself) in his response to the prosecutor's demand and only one set if the defendant has not identified any such witness. See Comment to Tennessee Rules of Criminal Procedure, rule 12.1. The mere listing of the witness in the indictment or in a supplementary pleading is not sufficient; the anticipated testimony regarding the defendant's presence at the crime scene must also be noted. Cf. State v. Hutchinson (1994) 898 SW3d 161, reaffirming that the language of Tennessee Code Annotated section 40-17-106 is directive rather than mandatory.

In the case at bar, Defendant through his then counsel, Douglas Trant, responded after an extension provided under Tennessee Rules of Criminal Procedure, rule 12.1(a) to the District Attorney General's demand for "[n]otice of whether an alibi defense will be asserted." In his Response to Request for Notice of Alibi, Mr. Trant stated that "Mr. Looper did not kill Senator Burks and was not present at Senator Burks' farm the day that he was killed." The defense attorney also reserved Defendant's right to testify at trial pursuant to Tennessee Rules of Criminal Procedure, rule 12.1(d), which provides that a defendant's right to testify in his own behalf is not limited by a failure to respond to the alibi notice demand.

As the only alibi witness, Defendant was under no obligation to respond to the

prosecutor's demand to disclose "[t]he specific place or places the defendant claims to have been at the time of [the] alleged offense." In this particular, the District Attorney General's demand followed nearly verbatim the language of Rule 12.1(a). In his last demand[1], the prosecutor employed language not used in the regulatory scheme. Specifically, the demand was for "[t]he names and addresses of the witnesses the defendant will use to support said alibi." The rule requires disclosure of "the witnesses upon whom the defendant intends to rely to establish such alibi." This distinction is not without significance.

The witnesses proffered by the defense and excluded by the Court would not have established Defendant's alibi. Only Defendant could have testified as to where he was between 6:00 a.m. and 8:45 a.m. Central Time. No other witness saw him during these hours, when he was alone in his mother's house in Flowery Branch, Georgia. But the precluded witnesses would have supported Defendant's alibi with their testimony that they saw him in Flowery Branch between 11:00 a.m. and 12:00 noon Eastern Time. While such testimony would have corroborated Defendant's alibi, it could not have established it. Thus, Defendant was under no obligation to respond further to the District Attorney General's demand for alibi notice or to disclose the witnesses in advance of presentation.

The State has persisted in its misapprehension of the disclosure requirements and

---

[1] The State's notice demands are set forth as items A, B and C of its "Motion Pursuant to Rule 12.1 of the Rules of Criminal Procedures" ; a copy of the pleading appears in the appendix hereto.

has lead the Court astray. To support its position of witness preclusion, the prosecution cited at trial State v. Coury (Court of Criminal Appeals, 1985). In Coury, the precluded witness was offered to support an undeclared defense of alibi. The trial court had properly excluded the testimony "on the grounds that no alibi notice was given as such is required by Tenn. R. Crim. P. 12.1." 697 SW3d at page 379; emphasis added. The appellate court did not find that the testimony was barred by failure to disclose the witness's name and address. Rather, it held that "none of [the excluded] testimony should have been admitted by reason of Coury's failure to comply with the alibi notice mandate of Tenn. R. Crim. P. 12.1." 697 SW3d at page 380.

The Coury rule is clear: No witness other than the defendant may testify in support of an alibi if written notice of intention to offer an alibi defense has not been given upon the State's demand therefor. Unlike the defendant in Coury, the defendant at bar should have been permitted to present to the jury his alibi-corroborating witnesses because written notice of his intention to offer the alibi defense was given to the State without objection to its particulars.

Not only did the prosecution fail to object to any perceived deficiency in Defendant's responsive pleading under Rule 12.1(a); it also failed to fulfill its obligations under Rule 12.1 (b). These obligations were triggered by Defendant's response to the State's demand for notice. No pleading was served on Defendant to give "written notice stating the names and addresses of the witnesses upon whom the State intends to rely to establish the

defendant's presence at the scene of the alleged offense." The State cannot now be heard to argue that it had no such witness and therefore no such obligation because Wesley Rex was merely corroborative of the defendant's placement at the crime scene.

The limits on the State's obligation to disclose an eyewitness to the alleged offense under Tennessee Rules of Criminal Procedure, rule 12.1(b) have been established by appellate decision. In State v. Williams (1983) 657 SW3d 405, cert denied 104 S Ct 1429, The Tennessee Supreme Court found that the prosecution had not beached its obligation of disclosure by not revealing a witness "who placed the defendant at the scene of the crime shortly after the homicide." 657 SW 2d at page 411. The only possible relevance of the undisclosed witness's testimony in Williams was to support the prosecution's position that the defendant had been at the crime scene when the offense occurred. The defendant's presence at the scene shortly after the crime had been committed was circumstantial evidence from which a jury could reasonably infer that he had been there at the time of the murder. Yet the Supreme Court unequivocally held that this witness "was not a witness to the crime." Ibid; emphasis added.

If Bendoski was not a witness "upon whom the state intend[ed] to rely to establish [William's] presence at the scene of the alleged offense" under Tennessee Rules of Criminal Procedure, rule 12.1(b), then Russell Looper, Barbara Reed and Paul Voelker were not "witnesses upon whom [Byron Looper] intend[ed] to rely to establish [his] alibi"

under rule 12.1(a). The syllogism is compelling: Sauce for the goose must also be sauce for the gander.

The witnesses proffered in support of Byron Looper's declared defense of alibi had all been identified in an in limine pleading despite the absence of a disclosure obligation under Tennessee law. See State v. Bray, supra. The State cannot claim surprise. Interstate subpoenas were issued by the Cumberland County Clerk for each of the witnesses. Their names and addresses were accurately set forth on the subpoenas which appear in the court file. Two of the witnesses had been interviewed by law enforcement within days of Senator Burks' murder. Indeed, the identity of one witness - Paul Voelker - was known to the prosecution for nearly two years before the defense became aware of him as an alibi-corroborating witness.

When defense counsel discovered a few weeks before trial that Mr. Voelker's testimony would be exculpatory of Defendant, demand was made on the prosecution for production of the witness's statement to an agent of the Georgia Bureau of Investigation. The District Attorney General's response was that Mr. Voelker's GBI statement did not reveal any Brady or Giglio material and would not be disclosed.[2] The prosecution had ample time and clear notice from the defense's discovery demand to reinterview the witness. Exclusion was not an appropriate remedy for the State's self-inflicted injury.

"Courts have inherent power to make and enforce reasonable rules of practice."

[2] A copy of Defendant's demand letter and a copy of the State's response appear in the Appendix hereto.

State v. Johnson (Court of Criminal Appeals, 1984) 673 SW2d 877, 882; emphasis added. Failure to comply with the Rules of Criminal Procedure can trigger appropriate sanctions: Nondisclosure of an alibi witness may result in the exclusion of the unrevealed witness's testimony. Rule 12.1(c). Exclusion is not, however, the only remedy or even the preferable sanction. Moreover, a breach of the rules is a prerequisite to the imposition of any penalty.

The trial court's ruling in the instant case isinappropriate and draconian. At the very least, Defendant rationally relied on Williams in not revealing the alibi-corroborating witnesses in advance of presentation. One of the circumstances the court must consider in fashioning a permissible sanction is the reason for nondisclosure. See State v. Gentry (Court of Criminal Appeals, 1998) 1998 WL 608212, perm. app. denied (Tenn. 1999), which sets forth six factors to be employed in evaluating the propriety of witness preclusion; cf. Fendler v. Goldsmith (9th Cir, 1983) 728 F2d 1181, 1188-1190.[3] Here, the defense had a good faith, case law-supported belief that the proffered witnesses did not have to be disclosed before testifying. The rationale was not only maintained in good faith; it was also objectively reasonable. Moreover, Defendant did not hide the identities or addresses of his witnesses.

The prosecution knew who the defense witnesses were and where they could be

[3] Fendler gives consideration to four factors, viz. the effectiveness of less severe sanctions, the impact of preclusion on the trial's outcome, the extent of prosecutorial surprise and whether the discovery violation was willful.

located before the trial commenced. Indeed, the State had interviewed two of the precluded witnesses as well as Reba Looper, whose alibi-corroborating testimony was allowed by the Court. Thus, "the prejudice that resulted to the government from the failure to disclose" (State v. Gentry, supra) was minimized by the prosecution's prior contact with Russell Looper and Paul Voelker and the defense-provided information that Looper, Voelker and Barbara Reed would be called to testify. Contrast Defendant's disclosure (albeit without reference to the witnesses' anticipated testimony) with the State's complete concealment of Paul Voelker. Only when confronted with defense counsel's eve-of-trial discovery of the witness did the prosecution admit that Voelker had been interviewed by law enforcement. The State's confirmation of that fact went no further, however. The prosecution has unrelentingly refused to disclose any report or witness statement relative to the interrogated individual disingenuously described as a surprise witness.

Few constitutional privileges are more fundamental to due process than a criminal defendant's right to present witnesses in his own defense. See generally, Washington v. Texas (1967) 388 US 14, 18-19; in accord, Chambers v. Mississippi, 410 US at page 302. The accused must be given the opportunity "to put before a jury evidence that might influence the determination of guilt." Pennsylvania v. Ritchie (1987) 480 US 39, 56. The right is not, however, absolute. "The adversary process could not function effectively without adherence to rules of procedure that govern the orderly presentation of facts and arguments." Taylor v. Illinois (1988) 484 US 400, 410-411. We thus operate under rules

which, inter alia, bar most hearsay and suppress unlawfully obtained evidence. But preclusion of witnesses is permissible only in extreme circumstances not present in the case at bar. See Taylor, 484 US at pages 415-417.

While "alternative sanctions are adequate and appropriate in most cases" (Taylor, 484 US at page 413), there are instances when preclusion is the proper penalty. "If a pattern of discovery violations is explicable only on the assumption that the violations were designed to conceal a plan to present fabricated testimony, it would be entirely appropriate to exclude the tainted evidence regardless of whether other sanctions would also be merited." Ibid, at page 414; emphasis added.

In Taylor, the defense hid the identify of the objectionable witness[4] and misrepresented to the court that the witness could not be located. Moreover, the witness's testimony did not correspond by any measure to the defendant's offer of proof: "[H]is testimony rather dramatically contradicted defense counsel's representations to the trial court." 484 US at page 405. Moreover, Taylor attempted to mislead the court by including in his witness list several individuals the defense had no intention of calling to testify. Ibid, at pages 403-404 and 417.

Similar circumstances do not obtain in the instant case: While under no obligation to identify his witnesses (State v. Bray, supra), Defendant disclosed them in a witness list

[4] Unlike Tennessee, Illinois requires disclosure of all defense witnesses upon demand by the prosecution. Disclosure is apparently reciprocal. See Wardius v. Oregon (1973) 412 US 470, 472 and 476.

filed with the Court before the trial commenced. The witnesses testified in jury-out hearings as represented in defense counsel's offers of proof. The record here does not give rise to "a sufficiently strong inference that 'witnesses are being found that really weren't there,' to justify the sanction of preclusion." 484 US at page 417.

In Taylor, the discovery violation was "both willful and blatant." Ibid, at page 416. Defendant's breach, if any, cannot be said to be willful in light of the Tennessee Supreme Court's holding in State v. Williams, supra. Nor was it blatant: The witnesses were identified in advance of trial. Preclusion is an appropriate sanction only in the most extreme case. Moreover, restricting preclusion to the most extreme situation in a criminal matter is dictated by due process considerations. Washington v. Texas, 388 US at page 19. "[A] trial court may not ignore the fundamental character of the defendant's right to offer the testimony of witnesses in his favor." Taylor, at page 414.

The defense in Taylor deliberately mislead the prosecution and the court by concealing witnesses and by naming witnesses it never would call to testify. Ironically in the instant case, the State, not the defendant, engaged in a similar pattern of conduct. The District Attorney General repeatedly revised his witness list: Names were added, then deleted and later restored. John Wayne Dedmon's name in particular was used tactically in the litigation equivalent of a poker bluff. When the defense called the prosecution's hand on Dedmon, his name was removed from the list only to reappear in a subsequent edition of the document. "The State may not insist that trials be run as a

'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses." Wardius v. Oregon, 412 US at page 475. Tennessee has also decried such prosecutorial tactics. See generally, State v. Street (Criminal Court of Appeals, 1988) 768 SW2d 703: The State must not lead the defendant on a proverbial "wild goose chase" by listing witnesses it has no intention of using at trial.

The prosecution's conduct reduced the trial from a search for truth to a tactical game akin to blind man's buff. "The adversary system of trial is hardly an end in itself." Williams v. Florida, 399 US at pg 82. Discovery rules should serve "to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence." Ibid.

IV

Once the guilty verdict virtually assured by enforcement of the prosecution's rules of engagement had been returned, the jury was permitted to mete out a sentence ultra vires. No Tennessee statute punishes the murder of a political candidate by life imprisonment without possibility of parole. Tennessee Code Annoted section 39-13-204(i) permits such imprisonment for life in enumerated circumstances, when "the State has proven beyond a reasonable doubt the existence of one or more of the statutory aggravating circumstances[.]" Included amongst these well-defined factors is a murder "committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties of status[.]" TCA section 39-13-204(i)(11).

If Byron Looper killed Tommy Burks, it was because Senator Burks was a candidate for public office. Such candidacy is not part of the official's lawful duties or status. A state senator is not obligated to seek reelection. No Tennessee case supports the tortured reasoning that would include the murder of an opposing candidate within the purview of the statutory scheme.[5]

McCRACKEN POSTON
TBPR# 020375
707 Georgia Avenue, Suite 204
Chattanooga, Tennessee 37402
(423) 265-5888

RON CORDOVA
CSB #053341
120 Newport Center Drive, Suite 250
Newport Beach, California 92660
(949) 759-1080

[5] Such construction would lead to absurd results: A political opponent's murder of a former legislator seeking to return to his previously held office would not be a special circumstance homicide, while the similarly motivated murder of the lowest level, locally-elected official seeking the same office would be.