MENTAL HEALTH ISSUES IN CRIMINAL CASES

GETTING THE RECORDS

INSANITY DEFENSE: You've Got to Be CRAZY to Use It

DIMINISHED CAPACITY: Less Than You Think
&
COMPETENCY TO BE TRIED AND FRIED

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Competency Hearing:

Prosecutor To Defendant On Witness Stand :
" SO, YOU CLAIM TO BE IN A STATE OF CONFUSION ? "

Defendant's Answer:
" NO SIR. I AM IN THE STATE OF TENNESSEE."

Judge :
" General, HE SEEMS JUST FINE TO ME."

Current as of 9/6/05

PART 1 Obtaining Medical Records for Mental Health Evaluations

Mental health evaluations are critical in determining such issues as insanity, diminished capacity, competency to stand trial, and sentencing mitigation. Mental health evaluations are only as good as the information provided to the psychiatrist or psychologist. Too frequently we send our clients off for an evaluation without a lick of documentation beyond the warrants or the indictment.

A psychological evaluation certainly must consider what the defendant tells the doctor. However, the defendant may not be aware of his or her problems and thus fail to identify relevant facts or sources of information.

It is up to the attorney to provide historical information to the doctor. Typically this can begin with a good social history which considers mental health problems of family members.[1] Prior mental health commitments,[2] as well as subsequent evaluations are relevant and may be admissible at the trial or hearing.[3]

Prior medical records are thus critical to the mental health evaluation process. Even though they may constitute hearsay, medical records may form the basis of expert opinion.[4]

[2] See, *State v. Clayton*, 656 S.W.2d 344 (Tenn. 1983).

[3] See, *Bond v. State*, 129 Tenn. 75, 165 S.W. 229 (1914).

[4] Rule 703, Tennessee Rules of Evidence.

In most instances attorneys simply prepare a release for the client to execute which is then sent off to the hospital or other healthcare provider.[5] Unfortunately, this is not always an accurate method of acquiring prior medical records. My experience has been that mental health records are seldom kept appropriately and that one does not always receive everything on the first pass.

We have discovered that while mental health files are frequently kept in a central location, doctors frequently keep their personal notes in their office and do not "merge" the files until some later time. Files are often kept in as many as three different locations. This has resulted in numerous inadequate record responses.

The solution is that you should make personal contact with the custodian and, in more critical cases, the doctor or his or her personal secretary. Another way of ensuring accurate records is to compare the records that you do receive with the billing documents. An absence of documents for a billing event is a good clue to missing records.

Finally, one set of records will almost always lead to a discussion of additional records. A mental health evaluation in a criminal case is like an onion. The bottom layers are only revealed until you first find the top ones and peel them off. Once all the records have been acquired then the doctor can evaluate the defendant appropriately and make an accurate determination of important mental health issues.

PART 2 The Act and the Mental State

SELECTED TENNESSEE MENTAL STATE STATUTES

39-11-201 Burden of proof.

(a) No person may be convicted of an offense unless each of the following is proven beyond a reasonable doubt:

(1) The conduct, circumstances surrounding the conduct, or a result of the conduct described in the definition of the offense;

(2) **The culpable mental state required**;

(3) The negation of any defense to an offense defined in this title if admissible evidence is introduced supporting the defense; and

(4) The offense was committed prior to the return of the formal charge.

(b) In the absence of the proof required by subsection (a), the innocence of the person is presumed.

(c) A person charged with an offense has no burden to prove innocence.

(d) Evidence produced at trial, whether presented on direct or cross- examination of state or defense witnesses, may be utilized by either party.

(e) No person may be convicted of an offense unless venue is proven by a preponderance of the evidence.

(f) If the issue is raised in defense, no person shall be convicted of an offense unless jurisdiction and the commission of the offense within the time period specified in title 40, chapter 2 are proven by a preponderance of the evidence.

HISTORICAL NOTES

Sentencing Commission Comments. This section codifies the prior Tennessee principles regarding burdens of proof. The presumption of innocence and reasonable doubt doctrines remain unaltered and a defendant is entitled to a jury charge on those issues.

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39-11-203 Defense.

(a) A defense to prosecution for an offense in this title is so labeled by the phrase: "It is a defense to prosecution under ... that ..."

(b) The state is not required to negate the existence of a defense in the charge alleging commission of the offense.

(c) The issue of the existence of a defense is not submitted to the jury unless it is fairly raised by the proof.

(d) If the issue of the existence of a defense is submitted to the jury, the court shall instruct the jury that any reasonable doubt on the issue requires the defendant to be acquitted.

(e)(1) A ground of defense, other than one (1) negating an element of the offense or an affirmative defense, that is not plainly labeled in accordance with this part has the procedural and evidentiary consequences of a defense.

(2) Defenses available under common law are hereby abolished.

HISTORICAL NOTES

Sentencing Commission Comments. This section describes the procedural consequences of criminal defenses. The defendant has the burden of introducing admissible evidence that a defense is applicable. If the defense is at issue, the state must prove beyond a reasonable doubt that the defense does not apply.

Subsection (d) outlines the content of a jury charge on a defense and codifies prior case law.

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39-11-204 Affirmative defense.

(a) An affirmative defense in this title is so labeled by the phrase: "It is an affirmative defense to prosecution under ...., which must be proven by a preponderance of the evidence, that ...," or words of similar import.

(b) The state is not required to negate the existence of an affirmative defense in the charge alleging commission of the offense.

(c)(1) If a person intends to rely upon an affirmative defense, the person shall, no later than ten (10) days before trial, notify the district attorney general in writing of the intention, or at such time as the court may direct naming the affirmative defense(s) to be asserted, and file a copy of the notice with the clerk.

(2) Except as provided herein, if there is a failure to comply with the provisions of this subsection, the affirmative defense may not be raised; provided, that this shall not limit the right of the person to testify on the person's own behalf.

(3) The court may, for cause shown, allow late filing of the notice or grant additional time to the parties to prepare for trial or make other orders as may be appropriate.

(4) Evidence of an intention to raise an affirmative defense, which is later withdrawn, is not admissible in any civil or criminal proceeding against the person who gave the notice of the intention.

(5) The provisions of this subsection shall only apply in courts of record.

(d) The issue of the existence of an affirmative defense may not be submitted to the jury unless it is fairly raised by the proof and notice has been provided according to subsection (c).

(e) If the issue of the existence of an affirmative defense is submitted to the jury, the court shall instruct the jury that the affirmative defense must be established by a preponderance of the evidence.

HISTORICAL NOTES

Sentencing Commission Comments. This section prescribes the form, and the procedural and evidentiary consequences of an affirmative defense. A defense is an "affirmative defense" only if so designated in the criminal code.

Since the matters at issue in affirmative defenses are peculiarly within the defendant's knowledge, the defendant has the burden of raising the issue and proving, by a

preponderance of evidence, the existence of the affirmative defense. To ensure that the prosecution is not surprised by the defendant's use of an affirmative defense, subsection (d) requires the defendant to provide the prosecutors with written notice of the intent to use an affirmative defense. Under subsection (c), good cause for late filing is intended to include failure of or delays in discovery.

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39-11-501 Insanity.{ effective 1995 }

(a) It is an affirmative defense to prosecution that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature or wrongfulness of such defendant's acts. Mental disease or defect does not otherwise constitute a defense. The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

(b) As used in this section, "mental disease or defect" does not include any abnormality manifested only by repeated criminal or otherwise antisocial conduct.

(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.

DISCUSSION

The components of the modern insanity affirmative defense include the following: First the defense must establish that the defense existed "at the time of the offense." This is identical to the prior statute and, indeed, has always been the law. Thus, in *Forbes v. State*, 559 SW.2d 318 (Tenn.1977) this Court held that a defendant had to establish non-remission at the time of the crime where the defendant was suffering from episodic insanity.

The defense must also establish a second component by showing a "severe mental disease or defect." The prior statute required only a mental disease or defect. Under the current law the disease or defect must be "severe."

Third, the defense must establish that the defendant was "unable appreciate the nature or wrongfulness of [his or her] acts." This portion of the current law (as well as the similar provision of the statute it replaced[2]) is frequently called the cognitive prong as opposed to the now discarded, separate volitional prong.

It is important to note that the current cognitive prong is NOT: "did he know the difference between right and wrong, doctor?" The current law is more subtle.

[2] "Insanity is a defense to prosecution if, at the time of such conduct, as a result of mental disease or defect, the person lacked substantial capacity either to appreciate the wrongfulness of the person's conduct or to conform that conduct to the requirements of law." quoted in *State v. Sparks*, 891 S.W.2d 607, 614 (Tenn. 1994).

The current law (as well as the prior statute) does not use the word "know" but rather employs the term "appreciate" which connotes a requirement of a fuller understanding or rather the lack thereof of the nature or wrongfulness of one's acts. One might realize ("know") that pushing a person off a building will cause the person to fall but there is a lack of appreciation that this will cause the person to be injured or killed. A failure of "appreciation" is also caused by delusional thinking. Thus insanity can exist even though the defendant possessed some surface knowledge of the nature of his or her act and that such act was wrong but failed to fully "appreciate" the wrongfulness of the conduct. [3]

The person's failure to "appreciate" applies to the "nature or wrongfulness" of the harmful acts. The "nature" of the act deals with a person who does not recognize, for example, that he or she is firing a pistol but instead believes the gun is a harmless squeeze spray-bottle. This is usually the most extreme species of insanity since there is a perceptual delusion.

The new insanity statute (as well as prior statute) also refers to a failure to appreciate the "wrongfulness" of his or her acts. Under Tennessee law "wrongfulness" or "wrong" is not to be equated with just "criminality" or "illegality." In other words, a defendant might "appreciate" that his or her actions were illegal and that he might be subject to punishment but still be incapable of appreciating the greater wrongfulness of the act in its more general and moral sense and thus still meet the statutory definition of insanity. This is particularly the case where the defendant acts at the behest of God: the "deific-decree." See, Morris, *"God Told Me to Kill ," Religion or Delusion?,* 38 San Diego L. Rev. 973 (2001).

The issue of the "definition" of "wrong" is summarized by Professor LaFave:

> "If the defendant does not know the nature and quality of his act, then quite obviously he does not know that his act is "wrong" and this is true without regard to the interpretation given to the word "wrong." For example, a madman who believes that he is squeezing lemons when he chokes his wife to death does not know the nature and quality of his act and likewise does not know that it is legally and morally wrong. On the other hand, as noted above, a defendant might know the nature and quality of his act (especially if that is taken to refer only to the physical consequences), but yet not know that it is "wrong." The extent to which such situations might arise, however, depends upon whether the *M'Naghten* test refers to legal wrong or moral wrong: "A kills B knowing that he is killing B, and knowing that it is illegal to kill B, but under an

[3] One need but consult any dictionary to see that "appreciate" has a different meaning from "know": "**Appreciate 1.** To recognize the quality, significance, or magnitude of: *appreciated their freedom.* **2.** To be fully aware of or sensitive to; realize: *I appreciate your problems.*" *American Heritage Dictionary.*

> insane delusion that the salvation of the human race will be obtained by his execution for the murder of B, and that God has commanded him (A) to procure that result by those means. A's act is a crime if the word "wrong" means illegal. It is not a crime if the word wrong means morally wrong."
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> The *M'Naghten* judges did not make clear what construction they were giving to the word "wrong." At one point they said that a persons is punishable if "he knew at the time of committing such crime that he was acting contrary to law;' by which expression we . . . mean the law of the land." But at another point they observed: "If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered on the principle that everyone must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable."
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> In England, *M'Naghten* is now read as requiring that the defendant know that the act was legally wrong. In this country, however, the question of whether wrong means legally or morally wrong has not been clearly resolved. The issue has very seldom been raised; this part of the *M'Naghten* test is simply given to the jury without explanation. In the few cases in which the matter has been put into issue, some have held that the defendant must not have known that the act was legally wrong, while other have interpreted "wrong" to mean morally wrong. Some courts have held that the defendant must not have realized that he act was wrong *and* punishable, but have not made it clear whether this refers to both moral and legal wrong or only one of the two."

LaFave, Substantive Criminal Law § 4.2, 442-443 (West 1986) (Footnotes omitted).

At the end of the nineteenth century American jurisdictions followed the English rule that for the defendant to be insane he or she must not "know" that his act was criminal in the sense that it was illegal. This more limited view was expanded by most jurisdictions either by a court decision or legislation beginning in the early twentieth century to include "moral wrongness." See, *People v. Schmidt*, 110 N.E. 945 (N.Y. 1915) an excellent opinion by Judge, later Justice, Cardozo. In *Schmidt*, Judge Cardozo stated that juries generally should be allowed to consider whether a defendant who claimed that he acted on a command from God was capable of perceiving that his act was morally wrong. 110 N.E., at 949. The term "wrong" is now interpreted by most jurisdictions as a more general "wrong" against society as opposed to the more restrictive "criminal" or "legal" awareness. *State v. Wilson*, 700 A.2d 633 (Conn. 1997)

Has Tennessee ever made a choice between adopting "wrongfulness" in its broader sense or in using the term "criminality" in its more narrow, "legal" meaning? In *Graham v. State*, 547 S.W.2d 531, 543 (Tenn. 1977) the Court adopted the Model Penal Code definition of insanity which, in relevant part, requires that the accused lacks the substantial capacity "to appreciate the wrongfulness of his conduct." Justice Henry observed that "it will be noted that we have used the word 'wrongfulness' in the place of 'criminality' so that the rule requires an appreciation of the wrongfulness of conduct as opposed to its criminality." This passage should remove all doubt that "wrongfulness" should be interpreted in a broader sense consistent with holding in the Connecticut case addressed above and other American jurisdictions.

The *Graham* test for insanity was adopted by the Tennessee legislature as part of the Sentencing Reform Act of 1989. The 1995 affirmative defense alteration of our insanity law retained the identical language regarding the cognitive prong of the insanity test to the effect that the accused would be "unable to appreciate the . . . wrongfulness of such defendant's acts."

When the legislature enacted the 1995 affirmative defense provision it was well aware of the existence of *Graham's* "wrongfulness" concept and did not utilize the more restrictive "criminality" language. Many jurisdictions interpret "wrongfulness" as suggested here. See e.g. *State v. Crenshaw*, 659 P.2d 488 (Wash. 1983), and *People v. Alverez*, 763 F.2d 1036 (9th Cir. 1985). See also, *United States v. McGraw*, 515 F.2d 758 (9th Cir. 1975) noting that five Circuit Courts of Appeal utilize the doctrine that "wrongfulness" means moral wrongfulness rather than "criminal" wrongfulness.

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39-11-503 Intoxication.

(a) Except as provided in subsection (c), intoxication itself is not a defense to prosecution for an offense. However, intoxication, whether voluntary or involuntary, is admissible in evidence if it is relevant to negate a culpable mental state.

(b) If recklessness establishes an element of an offense and the person is unaware of a risk because of voluntary intoxication, the person's unawareness is immaterial in a prosecution for that offense.

(c) Intoxication itself does not constitute a mental disease or defect within the meaning of § 39-11-501. However, involuntary intoxication is a defense to prosecution if, as a result of the involuntary intoxication, the person lacked substantial capacity either to appreciate the wrongfulness of the person's conduct or to conform that conduct to the requirements of the law allegedly violated.

(d) The following definitions apply in this part, unless the context clearly requires otherwise:

(1) "Intoxication" means disturbance of mental or physical capacity resulting from the introduction of any substance into the body;

(2) "Involuntary intoxication" means intoxication that is not voluntary; and

(3) “Voluntary intoxication” means intoxication caused by a substance that the person knowingly introduced into the person’s body, the tendency of which to cause intoxication was known or ought to have been known.

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HISTORICAL NOTES

Sentencing Commission Comments. Under prior Tennessee law, intoxication was not a defense unless it was so extreme as to negate a finding of the specific intent which was an essential element of the offense charged. See State v. Adkins, 653 S.W.2d 708 (Tenn. 1983). Subsection (a) retains this rule, permitting intoxication to be considered whenever the intoxication prevents the defendant from forming the required mental state.

Subsection (b) makes it clear that voluntary intoxication can never negate awareness of a risk where recklessness is sufficient to establish a culpable mental state of an offense.

Involuntary intoxication may suffice to negate any essential element of a defense including recklessness. The commission recognizes that a defendant who is not responsible for his or her intoxicated condition and either cannot control his or her own conduct or is unable to appreciate its wrongfulness because of the intoxicated condition should be excused from criminal responsibility. Subsection (c) also preserves the rule that intoxication does not in and of itself constitute a mental disease or defect, sufficient to constitute insanity, unless the intoxication is found to be involuntary.

The definition of intoxication is sufficiently broad to include all substances which alter mental or physical capacity, including alcohol, marijuana, glue sniffing, and heroin.

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39-11-502 Ignorance or mistake of fact.

(a) Except in prosecutions for violations of §§ 39-13-504(a)(4) and 39- 13-522,{ sex crimes against those under age 13 } ignorance or mistake of fact is a defense to prosecution if such ignorance or mistake negates the culpable mental state of the charged offense.

(b) Although a person’s ignorance or mistake of fact may constitute a defense to the offense charged, the person may be convicted of the offense for which the person would be guilty if the fact were as the person believed.

HISTORICAL NOTES

Sentencing Commission Comments. This section recognizes a defense where the mental element of the offense is negated by the defendant’s ignorance or mistake of fact. It is a narrow defense and does not include a mistake regarding the existence or meaning of a criminal law.

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39-11-611 Self-defense.

(a) A person is justified in threatening or using force against another person when and to the degree the person reasonably believes the force is immediately necessary to protect against the other's use or attempted use of unlawful force. The person must have a reasonable belief that there is an imminent danger of death or serious bodily injury. The danger creating the belief of imminent death or serious bodily injury must be real, or honestly believed to be real at the time, and must be founded upon reasonable grounds. There is no duty to retreat before a person threatens or uses force.

(b) Any person using force intended or likely to cause death or serious bodily injury within the person's own residence is presumed to have held a reasonable fear of imminent peril of death or serious bodily injury to self, family or a member of the household when that force is used against another person, not a member of the family or household, who unlawfully and forcibly enters or has unlawfully and forcibly entered the residence, and the person using the force knew or had reason to believe that an unlawful and forcible entry occurred.

(c) The threat or use of force against another is not justified if the person consented to the exact force used or attempted by the other individual.

(d) The threat or use of force against another is not justified if the person provoked the other individual's use or attempted use of unlawful force, unless:

(1) The person abandons the encounter or clearly communicates to the other the intent to do so; and

(2) The other nevertheless continues or attempts to use unlawful force against the person.

(e) The threat or use of force against another is not justified to resist a halt at a roadblock, arrest, search, or stop and frisk that the person knows is being made by a law enforcement officer, unless:

(1) The law enforcement officer uses or attempts to use greater force than necessary to make the arrest, search, stop and frisk, or halt; and

(2) The person reasonably believes that the force is immediately necessary to protect against the law enforcement officer's use or attempted use of greater force than necessary.

HISTORICAL NOTES

Sentencing Commission Comments. This section codifies much of the common law doctrine of self defense. The defense is applicable to the use or threatened use of force and to both ordinary force and deadly force. Threats are included because under some circumstances they constitute offenses.

Subsection (a) allows the justification of self defense to persons who reasonably believe they are imminently threatened with force or are actually attacked and who react with the force reasonably necessary to protect themselves. The test of "reasonable belief" places the emphasis on the defendant's reliance upon reasonable appearances rather than exposing the defendant to the peril of criminal liability where appearances were deceiving and no actual danger existed. The test is threefold: the defendant must

reasonably believe he is threatened with imminent loss of life or serious bodily injury; the danger creating the belief must be real or honestly believed to be real at the time of the action; and the belief must be founded on reasonable grounds. Under this section, there is no duty to retreat, which changes Tennessee law. Subsection (b) is a restatement of a prior Tennessee statute which created a presumption that a person using force against an intruder in the residence held a reasonable fear of imminent death or serious injury.

Subsections (c), (d) and (e) are restrictions to the defense. Subsections (c) and (d) continue the traditional rule that the defendant claiming justification should be free from fault in bringing on the necessity of using force. Subsection (c) recognizes that persons who consent to the force used against them are prohibited from utilizing self defense in responding to that use of force. Examples would be mutual combatants or participants in contact sports. The defense, however, is available if the force used against the defendant exceeded the scope of the defendant's consent.

Subsection (d) also restricts the defense by codifying the traditional concept of the initial aggressor. In order to use the defense, the initial aggressor must withdraw or communicate an intent to withdraw and the force must continue despite this communication. See Irvine v. State, 104 Tenn. 132, 56 S.W. 845 (1900); Gann v. State, 214 Tenn. 711, 383 S.W.2d 32 (1964).

Subsection (e) represents a policy decision by the commission that the street is not the proper forum for determining the legality of an arrest. To a large extent, the rule is designed to protect citizens from being harmed by law enforcement officers. Research has shown that citizens who resist arrest frequently are injured by trained officers who use their skills and weapons to protect themselves and effectuate the arrest. If the defendant knows it is a law enforcement officer who has stopped or arrested him or her, respect for the rule of law requires the defendant to submit to apparent authority. The justification is restored if the law enforcement officer uses greater force than necessary under the circumstances and the defendant acts under reasonable belief that his or her acts are necessary for self-protection.

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39-13-202 First degree murder.

(a) First degree murder is:

(1) A premeditated and intentional killing of another;

(2) A killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse, aggravated child neglect or aircraft piracy; or

(3) A killing of another committed as the result of the unlawful throwing, placing or discharging of a destructive device or bomb.

(b) No culpable mental state is required for conviction under subdivision (a)(2) or (a)(3) except the intent to commit the enumerated offenses or acts in such subdivisions.

(c) A person convicted of first degree murder shall be punished by:

(1) Death; (2) Imprisonment for life without possibility of parole; or (3) Imprisonment for life.

(d) As used in subdivision (a)(1) "premeditation" is an act done after the exercise of reflection and judgment. "Premeditation" means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.

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TN ST s 39-13-202 DEATH PENALTY

(i) No death penalty or sentence of imprisonment for life without possibility of parole shall be imposed but upon a unanimous finding that the state has proven beyond a reasonable doubt the existence of one (1) or more of the statutory aggravating circumstances, which are limited to the following: …….

(j) In arriving at the punishment the jury shall consider, as heretofore indicated, any mitigating circumstances which shall include, but are not limited to, the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

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(7) The youth or advanced age of the defendant at the time of the crime;

(8) The capacity of the defendant to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected the defendant's judgment; and

(9) Any other mitigating factor which is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing.

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39-13-210 Second degree murder.

(a) Second degree murder is:

(1) A knowing killing of another; or

(2) A killing of another which results from the unlawful distribution of any Schedule I or Schedule II drug when such drug is the proximate cause of the death of the user.

(b) Second degree murder is a Class A felony.

HISTORICAL NOTES

Sentencing Commission Comments. This section defines second degree murder and makes clear that the requisite mens rea for second degree murder is the "knowing" killing of another or that the killing be done recklessly as a result of unlawful distribution of a Schedule I or Schedule II drug. This section should always be read in conjunction with the first degree murder, voluntary manslaughter and criminally negligent homicide statutes.

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39-13-211 Voluntary manslaughter.

(a) Voluntary manslaughter is the intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner.

(b) Voluntary manslaughter is a Class C felony.

HISTORICAL NOTES

Sentencing Commission Comments. While the terminology is slightly different from the common law definition of voluntary manslaughter, the basic principles of voluntary manslaughter remain intact in this section. First, the defendant's "passions" must be produced by "adequate provocation" which would lead a "reasonable person" to act in an irrational manner. The latter phrase "irrational manner" is utilized so as to encompass a broad consideration of mental states produced by adequate provocation. This section should also be read in conjunction with § 39-13-201, which defines a "deliberate act" as one performed with a cool purpose [definition deleted by 1995 amendment of § 39-13-201]. If the state proves a premeditated and deliberate killing of another, meaning that the state has proven the absence of passion or provocation, then, under § 39-13-202, the defendant should be adjudged guilty of first degree murder. The fact-finder may consider lesser included offenses of second degree murder or voluntary manslaughter.

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39-13-215 Reckless homicide.

(a) Reckless homicide is a reckless killing of another.

(b) Reckless homicide is a Class D felony.

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39-13-212 Criminally negligent homicide.

(a) Criminally negligent conduct which results in death constitutes criminally negligent homicide.

(b) Criminally negligent homicide is a Class E felony.

HISTORICAL NOTES

Sentencing Commission Comments. Criminally negligent homicide is an offense which is new to Tennessee. It replaces involuntary manslaughter. The mens rea for criminally negligent homicide is defined in § 39-11-302(d), which makes clear that simple negligence, as defined in civil law, is insufficient for criminal liability. Rather, criminal negligence requires "a substantial and unjustifiable risk" and the risk must be of such a nature and degree that "the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the person's standpoint."

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40-35-113 Mitigating factors. {{ applies to all non-death penalty cases }}

If appropriate for the offense, mitigating factors may include, but are not limited to:

(2) The defendant acted under strong provocation;

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

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(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;

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(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.

§39-11-302 Definitions of culpable mental state.

(a) "**Intentional**" refers to a person who acts intentionally with respect to the *nature of the conduct* or to a result of the conduct when it is the person's conscious objective or desire to *engage in the conduct* or cause the result.

(b) "**Knowing**" refers to a person who acts knowingly with respect to *the conduct* or to **circumstances surrounding the conduct** when the person is aware of the *nature of the conduct* or **that the circumstances exist**. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.

(c) "**Reckless**" refers to a person who acts recklessly with **respect to circumstances surrounding the conduct** or the result of the conduct when the person is aware of but consciously disregards a substantial and unjustifiable risk that **the circumstances exist** or the result will occur. The risk must be of such a nature and degree that its disregard 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.

(d) "**Criminal negligence**" refers to a person who acts with criminal negligence with respect to the **circumstances surrounding that person's conduct** or the result of that conduct when the person ought to be aware of a substantial and unjustifiable risk that the **circumstances exist** or the result will occur. The risk must be of such a nature and degree that the failure to perceive it 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.

Raybin's Tennessee Mental State Definition Chart

This chart illustrates each of the four mental state definitions as to each of the three possible elements of crimes defined in the Tennessee criminal code. The elements involve the "nature of the conduct," the "result of the conduct," or the "circumstances surrounding the conduct," as described in the definition of the offense. T.C.A. § 39-11-201(a)(1). Not all crimes contain all elements. Most crimes contain either "nature of conduct" elements or "result of conduct" elements. "Circumstances surrounding conduct" is almost always an added element. As this chart illustrates, the four mental states contain different definitions for the three different types of elements. **To determine the proper mental state definition, first ascertain the type of element for the offense which then dictates the applicable portion of the mental state definition for that element of the offense.** *This chart alternates gender to assist in illustration.*

	TYPE OF ELEMENT		
	"nature of the defendant's conduct"	"result of the defendant's conduct"	"circumstances surrounding the defendant's conduct"
intentional T.C.A. 39-11-302(a)	He acts intentionally when it is his conscious objective or desire to engage in the conduct	She acts intentionally when it is her conscious objective or desire to cause the result	(no definition)
knowing T.C.A. 39-11-302(b)	He acts knowingly when he is aware of the nature of his conduct	She acts knowingly when she is aware that her conduct is reasonably certain to cause the result	He acts knowingly when he is aware that the circumstances exist
reckless T.C.A 39-11-302(c)	(no definition)	She acts recklessly when she is aware of but consciously disregards a substantial and unjustifiable risk that the result will occur	He acts recklessly when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist
criminal negligence T.C.A. 39-11-302(d)	(no definition)	She acts with criminal negligence when she ought to be aware of the substantial and unjustifiable risk that the result will occur	He acts with criminal negligence when he ought to be aware of the substantial and unjustifiable risk that the circumstances exist

Application Notes for Chart

(a) Crimes consist of one or more of three different types of elements. One of these elements concerns the "nature of the defendant's conduct." For example, it is a crime to *knowingly sell* drugs. T.C.A. § 39-17-417. Applying the "nature of the conduct" definition of knowingly indicates that the defendant must be "aware" that he is selling drugs to be guilty of the offense.

(b) Another element concerns the "result of the defendant's conduct." Assault is defined as *recklessly* causing bodily injury to another. T.C.A. § 39-13-101 (1). This is a crime defined by its result. Thus, to be guilty of the crime, the defendant must be aware of but consciously disregards a substantial and unjustifiable risk that the victim will suffer bodily injury as a result of her conduct. Assault can also be committed intentionally or knowingly. The relevant "result of conduct" definitions of intentionally or knowingly apply.

(c) "Circumstances surrounding the conduct" refers to elements collateral to the defendant's conduct such as the age of the victim, for example. Thus, if the crime is defined as intentionally selling beer to a person the defendant *knows* to be a minor, the defendant must know (be "aware") that the person is a minor to be guilty of the crime.

(d) Crimes may contain multiple elements that have different mental states. See, *State v. Howard,* 926 S.W.2d 579 (Tenn. Crim. App. 1996). Thus, in the example of *intentionally* selling beer to a person the defendant *knows* to be a minor, the selling of the beer is the "nature of the defendant's conduct" and thus the intentional "nature of conduct" definition applies. As in application note (c) the age of the minor is a "circumstance surrounding the conduct" which would be defined by the relevant language of "knowingly."

(e) The chart also illustrates that three of the four mental states do not contain definitions for all three element types. One may "know"or even be "reckless" about whether the circumstances surrounding one's conduct exist. However, one does not "intend" circumstances surrounding conduct. Similarly, one does not act recklessly or negligently as to the "nature of conduct" since the definitions of those mental states do not modify that element. All four mental states contain a definition for those crimes that have a "result of conduct" element. Homicide is a classic example. Thus, one can intentionally, knowingly, recklessly, or negligently kill another person and be guilty of various grades of homicide.

(f) The four mental states can modify an element of the crime, but only as the "definition of the offense requires."T.C.A.§ 39-11-301(a). Another statute supplies a mental state – intentionally, knowingly, or recklessly – where the element is silent as to a required mental state. T.C.A.§ 39-11 - 301(c). This dictates an inquiry as to the type of element since not all mental states contain definitions applicable to all elements. Thus, if it is a crime to "sell beer to a minor," the selling of beer is a nature of conduct element that could be done either intentionally or knowingly but not recklessly since recklessness does not modify a "nature of conduct" element. The age of the recipient of the beer is a circumstance surrounding conduct and thus knowingly or recklessness would apply since they both modify "circumstances surrounding conduct." Intentionally could not apply here because it lacks a "circumstances surrounding conduct" definition. Thus the crime of "selling beer to a minor" would occur where the accused intentionally or knowingly sold beer to a person where the accused knew, or was reckless about whether, the person was a minor.

PART 3 Diminished Capacity.

***State v. Hall,* 958 S.W.2d 679, 690 (Tenn.1997).**

"Evidence of a defendant's mental condition can be relevant and admissible in certain cases to rebut the mens rea element of an offense." Abrams, 935 S.W.2d at 402. We deferred until "another day" further development of the rule of " 'diminished capacity.' " Id. Another day has arrived.

We begin with a brief historical review. The rule of diminished capacity originated in Scotland more than a century ago and was designed "to reduce the punishment of the 'partially insane' from murder to culpable homicide, a non-capital offense." The doctrine was widely accepted in other countries before it gained acceptance in American jurisdictions. Id. In modern application, diminished capacity is not considered a justification or excuse for a crime, but rather an attempt to prove that the defendant, incapable of the requisite intent of the crime charged, is innocent of that crime but most likely guilty of a lesser included offense. Thus, a defendant claiming diminished capacity contemplates full responsibility, but only for the crime actually committed. In other words, "diminished capacity" is actually a defendant's presentation of expert, psychiatric evidence aimed at negating the requisite culpable mental state. "Properly understood, it is ... not a defense at all but merely a rule of evidence."

It was that proper description of "diminished capacity" that was adopted by the Court of Criminal Appeals in Phipps. Indeed, while recognizing that diminished capacity is not an enumerated defense under the 1989 revision of the criminal code. See Tenn.Code Ann. §§ 39-11-501--621 (1991 Repl. & Supp.1996), the Court of Criminal Appeals in Phipps concluded that a defendant's capacity to form the requisite mental state to commit an offense is an issue in criminal prosecutions because the general criminal law in Tennessee provides that "[n]o person may be convicted of an offense unless ... [t]he culpable mental state required is proven beyond a reasonable doubt," Tenn.Code Ann. § 39-11-201(a)(2) (1991 Repl.). We agree with that conclusion, and in addition observe that the negation of an element of a criminal offense is recognized as a defense in Tennessee. Tenn.Code Ann. § 39-11-203(e)(2) ("A ground of defense, other than one (1) negating an element of the offense ... ").

Under Tennessee law, evidence is deemed relevant if it tends to "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401 Moreover, relevant evidence is generally admissible in Tennessee, unless its probative value is substantially outweighed by its prejudicial effect. Tenn. R. Evid. 402 and 403. Since the general criminal law requires that mental state be proven by the State beyond a reasonable doubt, it is certainly a "fact of consequence" to the outcome of a criminal prosecution. Therefore, evidence which tends to prove or disprove the required mental state is relevant and generally admissible under Tennessee law.

In addition to the general relevance rules, expert testimony in Tennessee is governed by Rule 702, Tenn. R. Evid. which provides:

If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

Under this evidentiary rule, expert testimony regarding the defendant's incapacity to form the required mental state must "substantially assist the trier of fact to understand the evidence or to determine a fact in issue." Though the facts or data upon which the expert testimony is based need not be admissible in evidence, they must be made known to the expert at or before the hearing and must be of a type reasonably relied upon by experts in the particular field. Rule 703, Tenn. R. Evid. In fact, under Tennessee law, "[t]he court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness." Rule 703, Tenn. R. Evid. Of course, as with most other evidentiary questions, the admissibility of expert opinion testimony is a matter which largely rests within the sound discretion of the trial court.

Therefore, to gain admissibility, expert testimony regarding a defendant's incapacity to form the required mental state must satisfy the general relevancy standards as well as the evidentiary rules which specifically govern expert testimony. Assuming that those standards are satisfied, psychiatric evidence that the defendant lacks the capacity, because of mental disease or defect, to form the requisite culpable mental state to commit the offense charged is admissible under Tennessee law. As the intermediate court recognized [t]o find otherwise would deprive a criminal defendant of the right to defend against one of the essential elements of every criminal case. In effect, then, such a finding would deprive the defendant of the means to challenge an aspect of the prosecution's case and remove the burden of proof on that element in contravention of constitutional and statutory law. While the law presumes sanity it does not presume mens rea. Due process requires that the government prove every element of an offense beyond a reasonable doubt.

To avoid confusion, however, we caution that such evidence should not be proffered as proof of "diminished capacity." Instead, such evidence should be presented to the trial court as relevant to negate the existence of the culpable mental state required to establish the criminal offense for which the defendant is being tried. [FN9]

FN9. Our holding closely resembles the American Law Institute's Model Penal Code which does not mention the term "diminished capacity," but nevertheless provides that "[e]vidence that the defendant suffered from a mental disease or defect shall be admissible whenever it is relevant to prove that the defendant did or did not have the state of mind which is an element of the offense." A.L.I. Model Penal Code § 4.02(1) (Official Draft 1962). The Comment to that Section explains: "[i]f states of mind such as deliberation or premeditation are accorded legal significance, psychiatric evidence should be admissible when relevant to prove or disprove their existence to the same extent as any other relevant evidence."

Part 4 Competency to Stand Trial and Burden of Proof

***State v. Reid,* 164 S.W.3d 286 (Tenn. 2005)**

The defendant argues that the trial court erred in finding that he was competent to stand trial and in placing the burden of proof upon him to establish incompetency to stand trial. The State responds that the trial court's rulings were correct.

The Fourteenth Amendment to the United States Constitution and Article I, section 8 of the Tennessee Constitution prohibit the trial of a person who is mentally incompetent. **To be competent to stand trial, a defendant in a criminal case must have " 'the capacity to understand the nature and object of the proceedings against him, to consult with counsel and to assist in preparing his defense.' ".**

As a threshold issue, we must determine who bears the burden of proof to establish a defendant's competency or incompetency. Although we have never addressed this precise issue, [FN5] the Court of Criminal Appeals has concluded that the burden of establishing incompetence to stand trial rests with the defendant. In Oody, the defendant presented a clinical psychologist who testified that the defendant was borderline retarded, psychotic, and incompetent to be tried. The State, on the other hand, presented testimony from two psychologists who stated that the defendant was malingering and was competent, as well as the testimony of officers who related the defendant's ability to communicate to them. The Court of Criminal Appeals placed the burden on the defendant to establish incompetence by a preponderance of the evidence and upheld the trial court's finding that the defendant was competent to stand trial. Id. at 559-60; see also State v. Leming, 3 S.W.3d 7, 14 (Tenn.Crim.App.1998) (applying same standard).

FN5. This Court's decisions in State v. Black, 815 S.W.2d 166 (Tenn.1991), and Jordan v. State, 124 Tenn. 81, 135 S.W. 327 (1911), did not squarely address the issue. Instead, the holding in Black upheld the trial court's decision that the defendant was competent, see Black, 815 S.W.2d at 173, and the holding in Jordan involved a plea of insanity as a defense to the charged offense. Jordan, 135 S.W. at 329.

The Oody standard is consistent with the United States Supreme Court's holding that defendants may properly be required to establish their incompetency by a preponderance of the evidence. Medina v. California, 505 U.S. 437, 446, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992). In Medina, the Court held that a statute requiring defendants to establish their incompetency by a preponderance of the evidence did not violate due process. In reaching that conclusion, the Court observed:

Based on our review of the historical treatment of the burden of proof in competency proceedings, the operation of the challenged rule, and our precedents, we cannot say that the allocation of the burden of proof to a criminal defendant to prove incompetence "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

Id. (quoting Patterson v. New York, 432 U.S. 197, 202, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977)). Moreover, the Court emphasized that "[o]nce a State provides a defendant access to procedures for making a competency evaluation, ... we perceive no basis for holding that due process further requires the State to assume the burden ... of persuading the trier of fact that the defendant is competent to stand trial." Id. at 449, 112 S.Ct. 2572.

In contrast, the United States Supreme Court has invalidated an Oklahoma statute that required defendants to prove their incompetency by clear and convincing evidence. Cooper v. Oklahoma, 517 U.S. 348, 369, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996). In reaching its holding, the Court observed that forty-six states and the federal government either required the prosecution to establish a defendant's competency or required defendants to establish incompetency by a preponderance of the evidence. Id. at 360-62, 116 S.Ct. 1373. The Court further emphasized that the "clear and convincing evidence standard affects a class of cases in which the defendant has already demonstrated that he is more likely than not incompetent." Id. at 364, 116 S.Ct. 1373.

We have reviewed the approaches taken in other jurisdictions, and in our view the better reasoned choice is the standard that requires defendants to establish their incompetency by a preponderance of the evidence. This standard was identified by the Court of Criminal Appeals in 1991, and it has been applied since that time with no apparent difficulty or prejudice to either the defense or the prosecution. Oody, 823 S.W.2d at 559; Leming, 3 S.W.3d at 14. Indeed, placing the preponderance burden on defendants appears to strike an appropriate balance in several respects:

After balancing the equities ... the burden of proof may constitutionally rest on the defendant.... The main concern of the prosecution ... is that a defendant will feign incompetence in order to avoid trial. If the burden of proving incompetence rests on the government, a defendant will have less incentive to cooperate in psychiatric investigations.... A defendant may also be less cooperative in making available friends or family who might have information about the defendant's mental state. States may therefore decide that a more complete picture of a defendant's competence will be obtained if the defense has the incentive to produce all the evidence in its possession. Finally, the preponderance of the evidence standard is consistent with due process. Id. at 446, 112 S.Ct. 2572.

Part 5 Competency to Be Executed.

In *Van Tran v. State*, 6 S.W.3d 257 (Tenn.1999),the Tennessee Supreme Court adopted a "cognitive test," for determining competency for execution, and held that under Tennessee law a **prisoner is not competent to be executed "if the prisoner lacks the mental capacity to understand the fact of the impending execution and the reason for it."** Id. at 266. Van Tran established a procedure whereby a prisoner alleging incompetency to be executed was required to make a "threshold showing" in the trial court where he was convicted "that his or her competency to be executed is genuinely in issue." Id. at 268. The Court explained what was meant by "threshold showing" as follows:

[W]e adopt a rule that places the burden on the prisoner to make a threshold showing that he or she is presently incompetent. This burden may be met by the submission of affidavits, depositions, medical reports, or other credible evidence sufficient to demonstrate that there exists a genuine question regarding petitioner's present competency. In most circumstances, the affidavits, depositions, or medical reports attached to the prisoner's petition should be from psychiatrists, psychologists, or other mental health professionals. If the trial court is satisfied there exists a genuine disputed issue regarding the prisoner's present competency, then a hearing should be held.

Id. at 269 (citations omitted). The purpose of this threshold requirement is to avoid conclusory petitions and specious claims of incompetency made solely for the purposes of delaying execution. Id. at 268-69.

END END