IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	**Court of Criminal Appeals**
	)	**Case No. M2001-01853-CCA-R3-CD**
vs	)	
	)	
	)	
JAMES NOBLE PAGE,	)	
	)	
Appellant.	)	

ON APPEAL AS OF RIGHT FROM THE
MONTGOMERY COUNTY CRIMINAL COURT

BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

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INTRODUCTION

This is an appeal by James Page from his Montgomery County conviction for murder in the second degree. James Page – a fifteen-year-old boy – was involved in an altercation with another boy. There was no dispute that during the altercation Mr. Page struck the other boy in the head a single time with a bat. James Page insisted that he had not struck the other boy that hard and certainly did not foresee that the boy would die from the blow. Expert testimony focused on Mr. Page's diminished capacity to fully appreciate the consequences of his actions in view of his mental problems and lack of maturity.

At the trial there was only one contested issue: did James Page "knowingly" kill the other boy. On appeal there is also only one issue: whether it is proper for the trial judge to instruct the jury on the entire terminology of the *mens rea* of "knowingly" which includes definitions of (1) "nature of conduct", (2) "circumstances surrounding conduct" as well as (3) "result of conduct" or, as asserted in this appeal, whether the judge's instruction on "knowingly" should only be confined to the statutory result-of-conduct definition. The resolution of this question is of enormous consequence not only to Mr. Page but impacts all Tennessee murder trials.

In the second-degree murder case of *State v. Dupree* (decided four days after Mr. Pages' trial) this Court held that it was error to fail to instruct on the statutory result-of-conduct definition of "knowingly" where the judge instructed only on the "conduct" and "nature of conduct" definitions. Implicit in the *Dupree* decision was a finding that the "conduct" and "nature of conduct" definitions should not be instructed at all since the

verdict of the jury could rest on one of these other improper definitions, thus altering the government's burden of proof .

Mr. Page's case presents the question in its pure form since the judge here instructed on all three definitions of "knowingly" – and did so in the disjunctive – as is common practice throughout our state. *State v. Ducker*, 27 S.W.3d 889, 896 (Tenn. 2000) held that murder is ONLY a result-of -conduct offense. More recently, *State v. Ely*, 48 S.W. 3d 710, 724-725 (Tenn. 2001) reaffirmed *Ducker* and found that if "the jury believed that Ely was 'aware...that [his] conduct [was] reasonably certain to cause [death],' i.e., a knowing killing, it may have convicted him of second degree murder." This, of course, is the exclusive test for the *mens rea* of murder in the second degree. It remains only to squarely hold that jury instructions for murder must not only <u>*include*</u> the result-of-conduct definition (*Dupree*) but, as presented here, must also <u>*exclude*</u> the conduct and circumstances definitions. Any other holding is inconsistent with *Ducker* and now also *Ely* as well as every other American jurisdiction which has considered the question.

To assist the Court in resolving the issues presented in this appeal, this record includes copies of the relevant briefs in *Ely* which were filed as exhibits below. In addition, this Brief contains suggested homicide jury instructions which this Court might wish to utilize as means to illustrate not only what was wrong with jury instructions here but also to assist the Bench and Bar with formulating appropriate instructions for future cases should this Court agree that a "bright line" rule should be adopted.

This Brief also addresses the inevitable question of whether the erroneous instructions were harmless or not. It is here that the mischief caused by the inclusion of the additional, erroneous *mens rea* definitions become most apparent. Whether James Page "knowingly" killed the other boy was the ONLY matter in debate at trial. The prosecutors relied on the prohibited *mens rea* definitions throughout the trial and repeatedly admonished the jury to rely on the judge's instructions regarding the "proper test" for "knowing." Given that the judge told the jury that "knowing" could be established by proof that the accused was "aware of his conduct" and the prosecutors reminding the jury that James conceded that he was aware that he was hitting the other boy, a murder conviction was inevitable.

Not once during the entire trial was it suggested that James Page was "aware of the reasonable certainty" that he would cause the other boy's death which is the proper test for the result-of-conduct mental element of murder in the second degree. Indeed, the State's jury argument conceded that this third part of the "test" was absent from the proof but that this was "not necessary" to convict given the other two alternative "tests" for "knowing" which were contained in the judge's instruction.

Given that the instructional errors impacted burden of proof and unanimity requirements the errors here are of constitutional magnitude. Thus, any assessment of harmlessness must cast the burden on the government to show an absence of prejudice beyond a reasonable doubt. The defense is comfortable that the government will be unable to establish that the error here was constitutionally harmless and thus this conviction should be reversed.

DESIGNATION OF THE RECORD

The record in this case consists of 15 volumes. The Technical Record is contained in volumes I - IV, consisting of the orders, motions and minute entries and will be referred in this Brief as "T.R. ___, page___. " There are 11 volumes of testimony: 10 trial transcripts and a single transcript from the hearing on the Motion for a New Trial. Each transcript is referred to in this Brief by volume and page number, i.e. "Volume V, page 23."

DESIGNATION OF THE PARTIES

The Appellant will be referred to as "James Page." The Appellee will be referred to as the "State."

STATEMENT OF THE ISSUES

1. Whether the jury instructions for the offense of murder in the second degree were erroneous as being in violation of the burden of proof requirements of T.C.A. § 39-11-201 in that they permitted the jury to return a verdict of guilty if the jury found that the defendant acted "knowingly" which was defined as acting with "an awareness that his conduct is of a particular nature" or "that a particular circumstance exists" or "that the conduct was reasonably certain to cause the result;" said jury instructions being improper in that the offense of murder in the second degree does not contain mental element definitions dealing with "the nature of conduct" nor the "circumstances of conduct" but that the offense of murder in the second degree is exclusively devoted only to the "result of conduct."

2. Whether the jury instructions for the offense of murder in the second degree were erroneous as being in violation of the burden of proof requirements of T.C.A. § 39-11-201 in that the instructions permitted the jury to return a verdict of guilty, if the jury found that the defendant acted "intentionally" where it was his conscious objective or desire "either to cause a particular result or to engage in particular conduct," because the offense of murder has no "particular conduct" element but is a crime devoted only to its result.

3. Whether the improper jury instructions regarding the definitions of the mental states of the charged offense were improper by permitting a conviction for elements not present in the statute thus violating the defendant's federal and state constitutional due process protections and his rights to trial by jury which require that the government prove every element of the offense beyond a reasonable doubt in that, by permitting a conviction to rest on non-statutory elements of the offense, the defendant's federal and state constitutional rights were violated.

4. Whether the jury instructions for the offense of murder in the second degree were erroneous because the jury instructions allowed a verdict to be returned which was not unanimous in that the mental state definition instructions were in the disjunctive in violation of the defendant's federal and state rights to a jury trial and right to a unanimous verdict.

5. Whether the jury instruction concerning the "evidence of mental state" as it pertains to the voluntary intoxication question and the capability of the defendant to form a mental state improperly referred to mental state definitions which were not part of the statutory definitions of the offenses by adding improper "conduct elements" and improper "circumstances surrounding conduct elements" to the definitions of the various mental states so as to violate the defendant's right to present a complete defense as required by due process by compromising the psychiatric testimony as it relates to the diminished capacity evidence and the impact of alcohol.

6. Whether the State has established that the constitutionally improper jury instructions were harmless beyond a reasonable doubt.

7. Whether it is necessary to determine if this Court's opinion in *State v. Dupree* is "retroactive" to a trial occurring four days prior to the release of the *Dupree* decision given that case law limiting the definition of murder in the second degree to only the "result of conduct" mental state component had been in effect no later than July 14, 2000 in *State v. Ducker*, 27 S.W.3d 889 (Tenn. 2000).

8. Whether the jury instructions regarding voluntary manslaughter were erroneous as being in violation of the burden of proof requirements of T.C.A. § 39-11-201 given that these instructions continued to utilize the disjunctive definitions of intentional and knowing.

9. Whether the jury instructions on reckless homicide were erroneous as being in violation of the burden of proof requirements of T.C.A. § 39-11-201 because the instructions related to a requirement that the defendant disregard a risk "either that a particular result would occur or that a particular circumstance exists," in that reckless homicide is a crime defined by its result and not a "particular circumstance."

10. Whether the jury instructions on the offense of criminally negligent homicide were erroneous as being in violation of the burden of proof requirements of T.C.A. § 39-11-201 because it permitted a verdict of guilt upon a finding that the defendant should have been aware "that the circumstances exist or the result will occur," in that negligent homicide is a crime defined by its result and not a "particular circumstance."

11. Whether the jury instructions for the offense of voluntary manslaughter, reckless homicide and criminally negligent homicide were erroneous because in that they allowed a verdict to be returned which was not unanimous in that the mental state definition instructions were in the disjunctive in violation of the defendant's federal and state rights to a jury trial and right to a unanimous verdict.

12. Whether the improper jury instructions regarding the definitions of the mental states of the lesser-included offenses were improper by permitting a conviction for elements not present in the statute thus violating the defendant's federal and state constitutional due process protections and his rights to trial by jury which require that the government prove every element of the offense beyond a reasonable doubt in that, by permitting a conviction to rest on non-statutory elements of the offense, the defendant's federal and state constitutional rights were violated.

STATEMENT OF THE CASE

On November 13, 1999, Mr. Page and the victim, Christopher Jones, became involved in an altercation. Mr. Page struck Mr. Jones a single time with a baseball bat. Mr. Jones subsequently died as a result of his injuries. Since Mr. Page was only fifteen years-of-age at the time, the initial proceedings in this matter occurred in Juvenile Court. Eventually, Mr. Page was transferred for trial as an adult. On March 6, 2000, Mr. Page was indicted for murder in the second degree. (T.R. I, pages 1-2).

The trial of this matter commenced on January 22, 2001 and continued until January 26, 2001 whereupon the jury found Mr. Page guilty of murder in the second degree. (T.R. I, page 119). On March 14, 2001, the judge imposed a sentence of fifteen years. (T.R. II, page 183).

On March 14, 2001, the defense filed a Motion for New Trial. (T.R. II, page 184). An Amended Motion for New Trial was filed on April 26, 2001. (T.R. III, page 250).

On July 6, 2001, the trial judge heard oral argument on the motion and denied same from the bench. (Volume XV, page 74). [1] A Notice of Appeal was filed on July 12, 2001. (T.R. IV, page 485).

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[1] The court reporter erroneously put on the face of the transcript the date June 6, 2001; this is an error of no consequence but the hearing was on July 6, 2001. There are other references in the record to the fact that the hearing on the initial Motion for New Trial was on July 6, 2001 rather than June 6, 2001 as reflected on the face of the transcript. For example, exhibit 1 to the hearing of July 6, 2001 shows on its face that the exhibit was filed and marked and dated on July 6, 2001.

On July 17, 2001, the defense filed a Second Amended Motion for New Trial calling to the attention of the trial judge recent authority by the Supreme Court which had been released on July 13, 2001. (T.R. IV, page 454).

On July 25, 2001, the judge entered a written order denying the initial Motion for New Trial which had been heard on the "13th day of July, 2001 (sic)." (T.R. IV, page 483).

On August 3, 2001, the trial judge considered and took under advisement the Second Amended Motion for New Trial which had been filed by the defense on July 17, 2001. (See T.R. IV, page 484).

The trial court clerk filed the record with the Court on October 15, 2001, stemming from the Notice of Appeal. On December 20, 2001 this Court ordered the appeal to proceed. (Appendix, page 154).

STATEMENT OF THE FACTS AT THE JURY TRIAL

STATE'S PROOF

DETECTIVE ROBERT MILLER

Detective Robert Miller is with the Detective Division of the Clarksville Police Department. (Volume VIII, page 48). On November 13, 1999, Detective Miller was called to respond to the scene of the altercation which occurred on Golf Club Lane (Volume VIII, page 48). Detective Miller first met with two witnesses, Pamela and Tommy Hicks, at the police station to interview them and then proceeded to the scene and observed what appeared to be blood on the roadway. (Volume VIII, pages 49-50).

DETECTIVE SAMUEL KNOLTON, JR.

Detective Samuel Knolton, Jr. is a detective with the Clarksville Police Department as a criminal investigator and crime scene diagramer. (Volume VIII, page 70). On November 13, 1999, Detective Knolton prepared a diagram of the crime scene area at Golf Club Lane and Crossland Avenue. (Volume VIII, page 71).

DETECTIVE GARY HODGES

Detective Gary Hodges is in the criminal investigation division and is a member of the Crime Scene Unit with the Clarksville Police Department. On November 13, 1999, Detective Hodges was called on to take photographs of a crime scene on Golf Club Lane.

(Volume VIII, page 83-84). Detective Hodges stated that this was not a homicide call, that it was a call for aggravated assault. (Volume VIII, page 102).

STEPHEN SPURLOCK

Mr. Stephen Spurlock was employed by the Montgomery County EMS on November 13, 1999, when he responded to a call at the intersection of Golf Club Lane and Crossland Avenue. (Volume VIII, pages 109-110). When Mr. Spurlock arrived at the scene he went towards the victim, Mr. Chris Jones, who was lying face down, and began his medical assessment. (Volume VIII, page 114). Mr. Spurlock secured Mr. Jones to the spine board and transported him to Clarksville Memorial Hospital. (Volume VIII, pages 118-119).

DAVID SPEARS

On November 13, 1999, Mr. David Spears lived at 1465 Golf Club Lane and was a volunteer fireman. (Volume VIII, page 125). Around 9:00 p.m. on November 13, 1999, Mr. Spears was driving down Golf Club Lane and noticed a young man, Mr. Jones, lying in the street. Mr. Spears stopped to ask the two people with him what had happened and then called 911. (Volume VIII, pages 126-127). When the ambulance arrived Mr. Spears assisted in taking off the Mr. Jones' jacket and putting him on the spine board. (Volume VIII, page 127). Mr. Spears noticed a knife in Mr. Jones' jacket in the left breast pocket. (Volume VIII, page 127). After assisting in loading Mr. Jones into the ambulance, Mr. Spears gave the knife to one of the police officers at the scene. (Volume VIII, page 128). Mr. Spears then

drove the ambulance to the hospital and helped unload Mr. Jones and get him into the emergency room. (Volume VIII, pages 128-129).

PAMELA HICKS

Mrs. Pamela Hicks, who was thirty-nine, resided with her then sixteen year-old son Tommy Hicks and his best friend Chris Jones, the deceased, who was eighteen years old. (Volume VIII, pages 143-144). At the time, Ms. Hicks was engaged to Mr. Jones. (Volume VIII, page 189).

On November 13, 1999, Ms. Hicks, Tommy Hicks, and Mr. Jones went for a walk to pick up aluminum cans from the roadside. (Volume VIII, page 149). Ms. Hicks testified that during their walk Mr. Jones was carrying a knife, about eight to ten inches long, which Ms. Hicks had previously bought for him. (Volume VIII, pages 146-147). She testified that she had a nickname for Chris Jones which was "Blade" because he loved knives. (Volume VIII, page 192). Ms. Hicks stated that Mr. Jones always carried his knife so that it was in sight. (Volume VIII, page 193). Ms. Hicks also testified that she was carrying a knife as well in her own pocket. (Volume VIII, Page 150).

Ms. Hicks testified that while they were walking, her son Tommy said that his pants were loose. At this point Mr. Jones took his knife from the sheath on his belt and put the knife inside his jacket and gave Tommy his belt to help him keep his pants up. (Volume VIII, pages 193-194).

Ms. Hicks testified that while they were walking down Crossland they saw a truck coming towards them in the other lane. (Volume VIII, page 154). When the truck went past them something was said by the occupants but she did not hear or understand what was said. (Volume VIII, page 155). Ms. Hicks testified that in response to what was said Mr. Chris Jones stuck up his middle finger to the occupants in the truck. (Volume VIII, page 192).

Ms. Hicks stated that the truck turned around and Mr. Chris Jones told her and her son to step over, further off the road, into the grassy area. (Volume VIII, page 155). After the truck passed them from behind there was a ball bat extended out of the passenger's window. (Volume VIII, page 156). Ms. Hicks testified that all of their knives, at this point, were inside their jacket pockets. (Volume VIII, page 157). The next time Ms. Hicks saw the truck it was parked and she saw four gentlemen standing beside the truck. (Volume VIII, page 158). Ms. Hicks stated that things were being said but she could not understand what was said. (Volume VIII, page 159). Ms. Hicks did state that at some point she heard someone ask "are you going to stab me with that?" (Volume IX, page 59).

Ms. Hicks testified that at this point she and Mr. Chris Jones were walking down the street, holding hands, and as they started to cross a field she heard a sound from behind. (Volume VIII, pages 167-168). Ms. Hicks said that a ball bat fell, struck Mr. Jones and he took about four or five stumbling steps and fell in the road. (Volume VIII, page 168). Ms. Hicks testified that she did not actually see the ball bat hit Mr. Jones but she heard the sound. (Volume VIII, page 168). Ms. Hicks also stated that she did not see who swung the bat but only saw somebody run past her son, Tommy. (Volume VIII, page 169). Ms. Hicks stated

that she never realized that somebody was coming up behind them. (Volume VIII, page 170).

Ms. Hicks testified that after Mr. Chris Jones was hit, the person ran past them and he and everybody else jumped into the truck and took off. (Volume VIII, page 171).

Ms. Hicks testified that an ambulance arrived and they put Mr. Chris Jones onto a stretcher, put him in the ambulance, and took him to the hospital. (Volume VIII, page 173).

Ms. Hicks testified that she has difficulty hearing and has poor night vision. (Volume IX, page 51). She stated that the night in question, Mr. Chris Jones had told her to keep her head down and eyes toward the ground, so she really could not see what was going on. (Volume IX, page 52). Ms. Hicks also stated that if Mr. Jones had his knife out, she did not remember seeing it. (Volume IX, page 52).

Ms. Hicks testified that Mr. Chris Jones had told her that "there was going to be trouble." Mr. Jones also told her "you got to make your fist firmer, roll your hand up - - put this knife in your fist and roll your hand up around it and it will make your punch stronger." (Volume IX, page 54).

TOMMY HICKS

Mr. Tommy Hicks is the son of Pamela Hicks and best friend of Mr. Chris Jones, the deceased. On November 13, 1999, Tommy was with Ms. Hicks and Mr. Jones when they went for a walk to pick up cans from the side of the road.

Tommy testified that he was carrying a knife in his right pocket that was about six inches in length. (Volume IX, pages 78-79). Tommy also stated that while walking along the roadside a truck came by and he heard some of the remarks that were made, though he was not sure of what they were. (Volume IX, page 84). Tommy later testified that he did hear someone ask, "Why did you drop out of school?" (Volume IX, page 104).

Tommy further testified that Mr. Chris Jones had a knife on him and that he had it out at on point in his left hand. (Volume IX, pages 88-89). He also testified that the handle of Mr. Jones' knife was about four inches and the blade was about six inches in length. (Volume IX, page 99).

Tommy testified that the only two places Mr. Jones had his knife, that he knew of, was clipped onto his belt and in his jacket pocket. (Volume IX, pages 99-100). Tommy stated that he was not sure where Mr. Jones had his knife when he was struck with the bat. (Volume IX, page 100).

Tommy testified that he did not see anything in the boys' hands across the street. He also testified that he saw Mr. Jones take his knife out and he had it in his hand when the boys stopped and were across the street. (Volume IX, pages 106-107).

BRIAN RADER
(Driver of the truck)

In the fall of 1999, Brian Rader was a sixteen year old high school senior. Mr. Rader testified that David Smith, Manuel Pritzl, Dennis Pritzl, Kris Perrone, James Page and

himself would pal around together on a weekend basis, usually over at Manuel and Dennis Pritzl's house. (Volume IX, pages 135-136).

Mr. Rader testified that on November 13, 1999, he and his friends got together over at the Pritzl's house. (Volume IX, page 138). When Mr. Page arrived at the house, Mr. Rader stated that he seemed like he was upset and was really quiet. (Volume IX, page 141-142). Mr. Rader stated that Mr. Page later told him that he had an argument with his mother earlier in the day. (Volume IX, page 142).

Mr. Rader testified that he and Chip, Manuel's mom's boyfriend, went to the store to buy some beer. He stated that it was not unusual for the group of boys to drink beer when they got together on the weekend. (Volume IX, page 146-147). Mr. Rader further testified that he did observe the other five boys consume some of the beer. (Volume IX, page 150). Mr. Rader admitted that he was not sure how much beer they consumed because he had been gone for the majority of the time. (Volume X, page 232).

Mr. Rader testified that Mr. Page was getting very loud and laughing quite a bit. (Volume X, page 232). He stated that Mr. Page was "a little tipsy." (Volume X, page 252).

Mr. Rader testified that the group decided to go to the bowling alley to "look for girls and stuff" and they took Mr. Rader's truck. (Volume IX, page 156-157). While they were proceeding down Crossland Avenue they saw three individuals walking off the road in the grassy area. (Volume IX, page 164). As they approached the three individuals, Mr. Rader stated that Mr. Page yelled out the window "ooh, you're ugly." After Mr. Page yelled out the window, Mr. Rader heard that the individuals "flipped them off." Mr. Rader stated that he

turned around because Mr. Page wanted him to stop the truck so he pulled on to a side road. (Volume IX, page 165).

When the truck stopped everyone got out except for Mr. Rader. (Volume IX, page 166). Mr. Rader testified that the individuals were walking by and Mr. Page was yelling at them asking them why they flipped them off. Mr. Rader then stated that the individuals yelled back "because of what you said." (Volume IX, page 167).

Mr. Rader testified that the three individuals continued to walk in the same direction and at that point he saw one of the individuals display a pretty big knife. (Volume IX, page 168-169). He stated that the individual "just kept walking kind of flashing it. Making sure we knew it was there." (Volume IX, page 170).

At this point, Mr. Rader testified that Mr. Page came back to the truck and told him that he needed something to protect himself with and he asked him if he still had those bats in the truck. (Volume X, page 247).

After Mr. Jones was hit with the bat, everybody was yelling "go, go, go, go, go" and there was a lot of noise coming out of his truck. (Volume X, pages 272-273). Mr. Rader testified that Manuel Pritzl and Mr. Page were both screaming "yeah" and going "whoo."

Mr. Rader testified that they did not think Mr. Page had swung the bat that hard until they found out on Monday that Mr. Jones was dead. (Volume X, page 279).

Mr. Rader testified that when they drove back down towards the bowling alley that they were surprised to see an ambulance because he did not think that Mr. Page had hit Mr. Jones that hard and no one else did either. (Volume X, page 280). He also stated that while

in the car driving by the ambulance that Mr. Page did not make any remarks and was pretty quiet. (Volume X, page 282). He also stated that the entire car was quiet and they "were sitting there like man, we couldn't believe it."

Mr. Rader testified that the reason for keeping Mr. Page away from his mother while at the bowling alley was because he was "reeking of beer." (Volume X, page 282).

DAVID ALLEN SMITH

During the summer and fall of 1999, David Smith was a high school student at Montgomery Central High School. (Volume X, pages 324-325). Mr. Smith testified that on November 13, 1999, he and his five friends got together sometime that night at Manuel Pritzl's house. (Volume X, page 326-327). Mr. Smith stated that he saw Mr. Pritzl and Mr. Page drinking that night. (Volume X, page 331). According to Mr. Smith, Mr. Page actually drank the "majority of the beers." (Volume X, page 391).

Mr. Smith testified that as their truck passed the three individuals walking in the road he remembered Mr. Page yelling out the window "hey." Mr. Smith stated that "it was just a yell." (Volume X, page 339). He then stated that Manuel Pritzl knocked on the back of the window from the bed of the truck and said that one of the persons on the side of the road had "flipped us off." (Volume X, pages 339-340).

Mr. Smith testified that the last time they stopped is when he saw Mr. Chris Jones with the "shiny object" in his hand. (Volume X, page 403).

Mr. Smith testified that after Mr. Chris Jones had been hit and they returned back to the house, he saw Mr. Page and Manuel Pritzl drinking more beer. (Volume X, page 360). He also stated that Mr. Page said "he didn't think he swung the bat that hard." Mr. Smith agreed that he did not think that it was "a serious thing at that point." (Volume X, page 411).

DENNIS PRITZL

Dennis Pritzl has known Mr. Page for eight or nine years and they went to the same school. (Volume XI, page 3-4). Mr. Pritzl testified that he and the other five boys would usually hang out over at his house. (Volume XI, page 7). At that time, Mr. Pritzl was eighteen and Mr. Page was only fifteen. (Volume XI, page 64). Mr. Page was the youngest one in the group. (Volume XI, page 66).

On November 13, 1999, the group of boys met up over at the Pritzl's house. (Volume XI, page 8). Mr. Pritzl testified that on that night it was a "mutual thing" to get beer. (Volume XI, page 10). Mr. Pritzl also stated that Mr. Page had consumed seven beers before leaving the house the first time (Volume XI, pages 14-15), and Mr. Page's speech was a "little bit slurred." (Volume XI, page16).

When the boys passed the three individuals walking in the road, Mr. Pritzl testified that he heard Mr. Page say "hey" and that he was "yelling, not in a mean way, but just hey, as a friendly hey." (Volume XI, page 19). Mr. Pritzl remembers Mr. Page saying that they had "flipped them off" and that they were all mad about it. (Volume XI, page 20). Mr. Pritzl stated that when the truck stopped, he jumped out and took off his necklace and put his wallet

in the truck. He thought there was going to be a fight because they had flipped them off and made them mad. (Volume XI, pages 21-22). Mr. Pritzl testified that they were all yelling "obscene words" at the three individuals . (Volume XI, page 22).

Mr. Pritzl testified that once the three individuals were directly in front of them, he could see that Mr. Chris Jones had a knife and "he was flipping it in his hand." (Volume XI, Page 23). Mr. Pritzl also stated that "I know he was flipping it in his hand because he could hold onto the blade and then flip it onto the hand and so forth." (Volume XI, page 63). At this point, Mr. Pritzl testified that Mr. Page got a bat from the truck and kept his distance as he followed Mr. Jones. (Volume XI, pages 24-25).

Mr. Pritzl also testified that his brother Manuel said something to the three individuals about Mr. Jones being a "drop-out" and then he threw a piece of bark at them. (Volume XI, pages 28-29).

After Mr. Jones was hit and the boys returned to the house, Mr. Pritzl stated that they were a little shocked and excited. He stated that Mr. Page was acting a little hyper and scared. (Volume XI, pages 38). Mr. Pritzl also stated that Mr. Page had mentioned, at the house, that Mr. Chris Jones had turned around and was going to stab him. (Volume XI, page 41).

Mr. Pritzl testified that the reason they only stayed at the bowling alley for about fifteen minutes was because Mr. Page's mom was there and Mr. Page had alcohol on his breath and they did not want her to know. (Volume XI, page 42).

Mr. Pritzl testified that when they found out Mr. Jones had died, Mr. Page said "he was scared and he didn't know he had hit him that hard." (Volume XI, page 45). Mr. Pritzl stated that Mr. Page was "scared and nervous." (Volume XI, page 83).

MANUEL PRITZL

On November 13, 1999. Manuel Pritzl was a seventeen year old high school student. Mr. Pritzl has known Mr. Page for about eight years and they were best friends. (Volume XI, pages 87-89).

Mr. Pritzl testified that the decision to have Mr. Meriwether purchase beer on November 13, 1999, was a "group decision." (Volume XI, page92). He testified that he thought Mr. Page drank about six or seven beers that night, (Volume XI, page 140), and Mr. Page was "buzzed." (Volume XI, page 96).

Mr. Pritzl testified that when he saw the three individuals walking, he recognized Mr. Chris Jones as one of them. (Volume XI, page 105). He stated that Mr. Jones just "kept on walking and he was twirling a knife in his hands" when they were yelling obscenities at them. (Volume XI, pages 105-106).

Mr. Pritzl testified that while Mr. Page was walking behind Mr. Jones, Mr. Page was saying to him "what are you - - going to stab me with that?" He then heard Mr. Jones say "you better leave me alone if you know what is good for you." (Volume XI, pages 113-114).

Once the boys arrived back at Mr. Pritzl's house, he stated Mr. Page "was hyped up

about it but then he turned mellow again and - - because he didn't think he hit him that hard. He goes I didn't hit him that hard, you know?" (Volume XI, page 117).

Mr. Pritzl testified that they really did not talk about getting rid of the bat. Mr. Pritzl stated that he burned the bat because he "figured it would be the best." He also stated that he burned it in his front yard in a "little barrel, barbeque looking thing." Mr. Pritzl testified that Mr. Page was only there "[f]or like two minutes of it" and that Mr. Page did not pour any lighter fluid on it, only he did. Mr. Pritzl stated that he did know that it was potential evidence. (Volume XI, pages 124-125). Mr. Pritzl went to court for burning the bat and was convicted of it. (Volume XI, page 146).

Mr. Pritzl testified that on Monday morning they learned that Mr. Chris Jones was dead and he stated that "we were all about sick to our stomachs." (Volume XI, Page 123). Mr. Pritzl stated that after reading the article, Mr. Page said, "I'm getting sick and he threw away his coke in the garbage can and just leaned against the wall and closed his eyes for a second." Mr. Pritzl stated that Mr. Page was just shaking his head and said "I can't believe this." (Volume XI, page 145-146).

KRIS PERRONE

Kris Perrone is a seventeen year old high school student at Northwest High School. Mr. Perrone has known Mr. Page all of his life. (Volume XI, pages 147-148). Mr. Perrone testified that he and the five other boys would hang together on weekends on a regular basis and that it was normal to get a buzz on. (Volume XI, page 152).

Mr. Perrone testified that on November 13, 1999, the group got together that night at the Pritzl's house. (Volume XI, pages 152-153). On the way to the bowling alley Mr. Perrone heard Mr. Page say "hey" to the three individuals walking down the roadway. (Volume XI, page 158-159). Mr. Perrone stated after Mr. Page said, "hey", Mr. Jones "threw the middle finger." (Volume XI, page 159).

Mr. Perrone testified that he saw a weapon in Mr. Jones' hand. (Volume XI, page 162). Mr. Perrone stated that it was a knife and Mr. Jones was holding it down at his side. (Volume XI, page 163).

Mr. Perrone testified that he learned of Mr. Jones' death at the bus stop. (Volume XI, page 179). He stated that after he, Mr. Pritzl, and Mr. Page read the newspaper article about Mr. Jones, they "were just shocked." (Volume XI, page 180). Mr. Perrone stated that Mr. Page "started looking sick" after he read the article. (Volume XII, page 219).

OFFICER JAMISON WIROLL

Officer Jamison Wiroll is a police officer with the Clarksville Police Department. (Volume XII, page 220). Officer Wiroll was called to respond to an incident on Golf Club Lane on November 13, 1999. (Volume XII, page 221).

Officer Wiroll testified that he was aware that there was a knife recovered at the scene and he saw the knife. (Volume XII, pages 227-228). Officer Wiroll stated that he was the one who recovered the knife at the scene. (Volume XII, page 230).

DETECTIVE ERIN WILLIAM KELLETT

Detective Erin Kellett is a police officer with the Clarksville Police Department in the criminal investigation division. (Volume XII, page 241). Detective Kellett interviewed Mr. Page at Clarksville High School regarding the November 13, 1999 incident. (Volume XII, page 242). Mr. Page told Detective Kellett that he was at Manuel Pritzl's house at first, and then they left the house at approximately 9:30 to go to the bowling alley. Since Mr. Page's mother was at the bowling alley, they left and went back to Manuel Pritzl's house. (Volume XII, page 245). Later during the interview, Mr. Page asked Detective Kellett "if he could ask [him] a question and he stated that it wasn't anything incriminating or anything." Detective Kellett told him that he could and then "[Mr. Page] asked [him] what was going to happen to these other people that were in question, Manuel Pritzl and them?" Detective Kellett then told Mr. Page that "it really depends on what they did." Mr. Page stated that "[they] didn't help him, that they stayed in the truck. They stayed at the truck." (Volume XII, page 246).

THOMAS LIVINGSTONE

Mr. Thomas Livingstone resides at 1525 Golf Club Lane. (Volume XII, page 259). Mr. Livingstone testified that he found eyeglasses in his front yard which belonged to Mr. Chris Jones. (Volume XII, pages 261-262).

DAVID BOYCE JONES

Mr. David Jones is the father of Mr. Chris Jones, the deceased. (Volume XII, pages 270-271). Mr. David Jones testified that the eyeglasses found by Mr. Livingstone were his son's glasses. (Volume XII, page 277).

DR. BRUCE PHILLIP LEVY

Dr. Bruce Levy is employed by the State of Tennessee as the Chief Medical Examiner and also serves as the County Medical Examiner for Metro Nashville Davidson County. (Volume XII, page 280). Dr. Levy stated that he performed an autopsy on Mr. Chris Jones. (Volume XII, page 285). Dr. Levy also stated that the cause of death of Mr. Jones was "blunt force injuries of head." (Volume XII, page 291).

DEFENDANT'S PROOF

JAMES PAGE

On November 13, 1999 Mr. James Page was fifteen years old and lived with his mother Donna Page. (Volume XII, page 336). On that day, Mr. Page and his mother got into a pretty loud argument. (Volume XII, 338). Mr. Page testified that "It was pretty loud. We were like yelling back and forth and we got - - just kept on going and it got bad - - I didn't want to be there anymore so I just left the house and slammed my door, I just slammed the door to the outside and just tried to cool off." (Volume XII, page 338).

Later that day Mr. Page's mom dropped him off at the Pritzl's house. (Volume XII, page 338). Mr. Page testified that the other boys arrived at different times and it was a mutual agreement to get some beer. (Volume XII, page 339).

Mr. Page testified that "[a] lot of times like if I am having problems or something like that, if I am really depressed or something like that, I would drink; therefore, I wouldn't have to worry about it." (Volume XII, page 339). Mr. Page stated that when the school year and basketball started he didn't drink as much as he did during the summer. He also stated that over the summer smoking marijuana was a pretty occasional thing. (Volume XII, page 341). Mr. Page stated that he had his first drink when he was a little kid and that his father gave it to him. (Volume XII, page 369). He also stated that he started drinking on a regular basis when he was thirteen or fourteen. (Volume XII, page 369).

Mr. Page testified that on November 13, 1999, two cases of beer were bought by Mr. Meriwether - an eighteen pack for Mr. Page and the other boys and a case for Mr. Meriwether. (Volume XII, page 342). Mr. Page also testified that earlier that afternoon he "might have had some chips or something like that." But he "never had a meal or anything." (Volume XII, page 342).

Mr. Page testified that he drank ten or eleven beers that evening and that he was feeling drunk when they left for the bowling alley. (Volume XII, page 343-344).

Mr. Page testified that when they saw the three people walking on the right side of the road he "heard somebody yell from the back of the truck, so [Mr. Page] yelled out the window hey." When asked why he did that he stated that he "didn't have any particular

reason. [He] just heard somebody else yell and so [he] did as well." (Volume XII, page 375). He stated that "[e]verybody was like you know, they flipped us off, they flipped us off, and we decided to stop the truck." (Volume XII, page 346).

Mr. Page testified that while he was outside of the truck he saw one of the people crossing the street "flipping a knife....[l]ike end over end, type thing like you flip it and catch it, flip it and catch it." He stated that "[e]verybody was like you know, he's got a knife." (Volume XII, page 347). Mr. Page stated that Mr. Jones "had the knife clinched in his right hand." (Volume XII, page 353).

When Mr. Page was asked why he wanted Mr. Rader to turn the truck around he stated that "when we saw the knife and everybody kind of got quiet, and got in the truck, [he] personally felt intimidated and [he] wanted to go back." (Volume XII, page 350). Mr. Page stated that "[a]t the time, it just seemed like the thing to do. Like you flipped us off, and like kind of disrespecting us in a way." (Volume XII, page 377).

Mr. Page testified he "had the baseball bat because [Mr. Jones] had the knife and to [him] it kind of evened the score." (Volume XII, page 351). Mr. Page stated that he "just wanted to intimidate him, back him down" and that carrying a bat was his "response to him flipping a knife." (Volume XII, page 386). Mr. Page also testified that the only exchange of words between him and Mr. Chris Jones was that Mr. Page asked him "are you going to stab me with that?" and Mr. Jones replied "leave me alone before you get hurt." (Volume XII, page 352).

Mr. Page testified that he "didn't intend to hit [Mr. Jones] anywhere with the bat, [he] just swang"... "[b]ecause [Mr. Jones] started to turn around and [he] got scared." (Volume XII, page 353). Mr. Page stated that he never said that he wanted to hit Mr. Jones. (Volume XII, page 355).

Mr. Page testified that when the boys drove by the scene and saw the ambulance and police cars that he "was scared and worried, [he] didn't know what happened or anything like that." (Volume XII, page 356).

Mr. Page testified that on Monday morning Manuel Pritzl told him about Mr. Jones passing away and they were "in disbelief, [they] just kind of sat around like in awe about it." Mr. Page stated that they didn't believe it at first so they read about it in the newspaper. Mr. Page stated that "[a]s soon as [he] read it, [he] just kind of closed [his] eyes for a minute.... [He] felt really sick,....just sick to [his] stomach and just like scared all at the same time." (Volume XII, pages 359-360).

Mr. Page admitted that he and Manuel Pritzl decided to get rid of the evidence and that Manuel Pritzl burned the bat. Mr. Page did not help burn the bat, he "was just there." (Volume XII, page 410-411).

Mr. Page testified that he had no reason to do what he did that night. (Volume XII, page 363). He also stated that he did not intend to hit Mr. Jones in the head. (Volume XII, page 414).

DR. KEITH CARUSO

Dr. Keith Caruso is a medical doctor who specializes in general and forensic psychiatry. (Volume XIII, page 88). Dr. Caruso has interviewed the Defendant, Mr. Page, a total of three times; in December of 1999 and January 2000 for a total of 11 hours. (Volume XIII, page 96).

Dr. Caruso described Mr. Page as sometimes "cocky" and that "he tries to present himself as more self-assured than he really is." He also stated that Mr. Page could be "somewhat defensive." Dr. Caruso testified that Mr. Page "minimized a lot of the troubles that he had previously growing up with having his father leave the home [and] things of that nature. How this really didn't have any affect on him when, in fact, [Dr. Caruso] felt a lot of these things really did." (Volume XIII, page 101). Mr. Page was abandoned by his father when he was younger and that was very difficult for him. (Volume XIII, page 118).

Dr. Caruso testified that Mr. Page "wants to make what he perceives as a good impression. [Dr. Caruso] thinks he wants to impress the other boys that he's with. [Mr. Page] doesn't want to admit that he's frightened, and that's why he's done what he's done." (Volume XIII, page 105). Dr. Caruso states that Mr. Page is the youngest in the group at 15, and everyone else is 16, 17, or 18 and he is "trying to show off for them." (Volume XIII, page 117). Dr. Caruso thinks that there were a number of things that played into this and he thinks that at issue for Mr. Page was trying to impress these boys and let them know that he belonged. (Volume XIII, page 119).

Dr. Caruso testified that "[o]n the night of the offense, because of [the] state of alcohol intoxication [Mr. Page] did not have the....substantial capacity to form the necessary mental state for the knowing killing of Chris Jones." (Volume XIII, page 97). Dr. Caruso estimated on the basis of roughly 10 beers that at the time of the offense Mr. Page's blood alcohol level was between point 16 and point 23. (Volume XIII, page 108). Dr. Caruso stated that Mr. Page had not eaten a meal since breakfast and only snacked throughout the day so there wasn't anything in his stomach to help absorb the alcohol. (Volume XIII, page 109).

Dr. Caruso testified that a factor in basing his opinion was that Mr. Page stated "his intent was to intimidate Chris Jones initially, not that he had intended to attack him." He also stated that Mr. Page's "inexperience with violence" was another factor in basing his opinion. (Volume XIII, page 97).

Dr. Caruso testified that Mr. Page had expected Mr. Chris Jones to be intimidated, which did not appear to be the case when Mr. Jones wielded the knife. (Volume XIII, page 98). Dr. Caruso stated that there was further evidence that Mr. Jones anticipated that a fight was going to ensue and was preparing or giving instructions to others about how they would fight just before being hit with the bat. (Volume XIII, page 98).

Dr. Caruso testified that Mr. Page was seeking to intimidate Mr. Chris Jones and that Mr. Jones just did not realize that this was just a "macho standoff game for [Mr. Page]." Dr. Caruso believes that "there's evidence there of the impaired judgment and the situation. A lot had to do with alcohol intoxication." (Volume XIII, pages 102-103).

Dr. Caruso testified that he thinks Mr. Page "erroneously feels that he's defending himself. He's provoked this situation, but he doesn't recognize that at this point. And [Mr. Page] feels he's hitting and running away so that he can get away without being harmed himself." (Volume XIII, pages 103-104).

Dr. Caruso testified that Mr. Page's alcohol intoxication "caused him behavioral changes...such as impaired judgment, such as increased aggressiveness, and impairment in his social functioning, essentially, increased impulsivity." In addition, Mr. Page reported that he was "reeling as he walked" and others noted that he was "slurring his speech." (Volume XIII, page 99).

Dr. Caruso testified that Mr. Page "had not expected that his actions, even when he struck Mr. Jones, he did not expect that [Mr. Jones] was going to die. The way he perceived it at that moment was that [Mr. Jones] was turning on him with the knife, and at that point he struck him erroneously believing he was defending himself, and not knowing....how hard he had struck him. Not expecting that this was going to result in his death." (Volume XIII, page 100).

Dr. Caruso believes that Mr. Page's statements to his friends that "he didn't think he hit him that hard" and that "he was surprised when they pointed out that he had" support the fact that Mr. Page did not knowingly kill Mr. Jones. Furthermore, a number of the boys remarked that Mr. Page was "quite shocked when he learned the following Monday that [Mr. Jones] had died. That he had not believed that he struck him that hard." (Volume XIII, page

104-105). Dr. Caruso stated that "[t]his is a kid who had not recognized his own strength at that point." (Volume XIII, page 105).

Dr. Caruso testified that Mr. Page showed a lot of remorse and was "somewhat relieved that he had been caught because at least he knew he was going to be punished. He didn't know what it would be like to try to live with this otherwise." (Volume XIII, page 102).

ARGUMENT

Issues 1 Through 3. SINCE MURDER IN THE SECOND DEGREE IS ONLY A "RESULT OF CONDUCT OFFENSE," JURY INSTRUCTIONS REGARDING THE DEFINITIONS OF "KNOWING" OR "INTENTIONAL" WHICH PERMIT A CONVICTION IF THE DEFENDANT WAS "AWARE OF HIS CONDUCT OR CIRCUMSTANCES SURROUNDING HIS CONDUCT" OR IF IT WAS HIS "CONSCIOUS OBJECTIVE OR DESIRE TO ENGAGE IN THE CONDUCT" ARE IMPROPER AS VIOLATING THE BURDEN OF PROOF REQUIREMENT OF T.C.A. §39-11-201 AS WELL AS VIOLATING THE REQUIREMENT THAT THE GOVERNMENT PROVE EVERY ELEMENT OF THE OFFENSE BEYOND A REASONABLE DOUBT IN THAT, BY PERMITTING A CONVICTION TO REST ON NON-STATUTORY ELEMENTS OF THE OFFENSE, THE DEFENDANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO BE CONVICTED ONLY ON STATUTORY ELEMENTS OF THE CRIME ARE VIOLATED.

Issue 4. THE DISJUNCTIVE MENTAL STATE DEFINITION INSTRUCTIONS VIOLATED THE DEFENDANT'S FEDERAL AND STATE RIGHTS TO A JURY TRIAL AND RIGHT TO A UNANIMOUS VERDICT.

Issue 5. THE IMPROPER DISJUNCTIVE MENTAL STATE DEFINITION INSTRUCTIONS VIOLATED THE DEFENDANT'S RIGHT TO PRESENT A COMPLETE DEFENSE BY COMPROMISING THE PSYCHIATRIC TESTIMONY AS IT RELATES TO THE DIMINISHED CAPACITY EVIDENCE AND THE IMPACT OF ALCOHOL.

Issue 6. THE STATE CANNOT ESTABLISH THAT THE CONSTITUTIONALLY IMPROPER JURY INSTRUCTIONS WERE HARMLESS BEYOND A REASONABLE DOUBT AND THUS REVERSAL IS REQUIRED

In this case there was no dispute that Mr. Page struck the deceased. The ONLY question was as to Mr. Page's state of mind at the time. Thus, proper instructions as the definitions of the various *mens rea* terms were critical.

Mr. Page asserts that this Court should reverse this conviction and grant a new trial because of the fundamental errors in the jury instructions regarding the definitions of the mental states pertaining to the charged and lesser included crimes. The improper instructions compromised Mr. Page's right to a unanimous jury verdict by permitting deliberation of disjunctive *mens rea* terms, several of which were inapplicable to the offense. The problem was compounded in the "intoxication" instruction given the inclusion of erroneous mental element definitions.

Mr. Page was charged with homicide. The State was required to prove that Mr. Page "knowingly" killed the deceased. Homicide is a result of conduct offense. The crime is not concerned with the defendant's conduct or collateral circumstances but rather whether the government has proven beyond a reasonable doubt that the accused was aware that his or her actions were reasonably certain to cause the victim's death: i.e. the result proscribed by the homicide statute.

In this case the jury instructions allowed a conviction for murder if the state could prove that Mr. Page acted "with awareness that his conduct is of a particular nature." This is clearly erroneous in the context of homicide. Mr. Page may well have been aware that he was swinging a bat but may have been unaware that this would result in the death of Mr. Jones.

The jury instructions also allowed a conviction for murder if the State could prove that Mr. Page acted "with an awareness that a particular circumstance exits." What circumstance? The crime of homicide contains no collateral circumstance element yet the jury could have

convicted Mr. Page if they were satisfied that Mr. Page " knowingly" struck Mr. Jones. This is not the test for murder or any other species of homicide. Because the jury instructions allowed a verdict to rest on *mens rea* definitions that are NOT contained in the homicide statute a new trial must be granted.

The trial judge agreed with these propositions and held that *State v. Dupree*, 2001 WL 91794 (Tenn. Crim. App. 2001), no permission to appeal sought, (Appendix, page 145), mandated *mens rea* instructions only as to the "result of conduct" and that jury instructions including "nature of conduct" or "circumstances surrounding conduct" definitions in homicide cases were improper. However, because *Dupree* was decided four days after the trial here, the trial judge found that *Dupree* was not controlling because it was "not retroactive." (Volume XV, pages 73-74). This is simply wrong: Tennessee cases have held for some time that homicide is only a "result of conduct crime."

The trial judge was of the notion that he could not grant a new trial until an appellate court squarely held that jury instructions regarding other irrelevant mental state definitions are improper. This case presents this Court with that opportunity.

A.

The trial court's instructions to the jury on the mental elements of the offenses were as follows:

SECOND DEGREE MURDER

Any person who commits second degree murder is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant unlawfully killed the alleged victim; and

(2) that the defendant acted knowingly.

A person acts "knowingly" if that person acts with an awareness:

(1) that his conduct is of a particular nature;

or

(2) that a particular circumstance exists,

or

(3) that the conduct was reasonably certain to cause the result.

The requirement of "knowingly" is also established if it is shown that the defendant acted intentionally.

A person acts "intentionally" when that person acts with a conscious objective or desire either:

(1) to cause a particular result;

or

(2) to engage in particular conduct,

VOLUNTARY MANSLAUGHTER

Any person who commits voluntary manslaughter is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following elements:

(1) that the defendant unlawfully killed the alleged victim;

and

(2) that the defendant acted intentionally or knowingly;

and

(3) that the killing resulted from a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner.

The distinction between voluntary manslaughter and second degree murder is that voluntary manslaughter requires that the killing result from a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner.

"Intentionally" and "knowingly" have previously been defined.

RECKLESS HOMICIDE

Any person who commits the offense of reckless homicide is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements,

(1) that the defendant killed the alleged victim;

and

(2) that the defendant acted recklessly.

A person acts "recklessly" if that person is aware of but consciously disregards a substantial and unjustifiable risk either:

(1) that a particular result will occur;

or

(2) that a particular circumstance exists.

The risk must be of such nature and degree that disregarding it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

The requirement of "recklessly" is also established if it is shown that the defendant acted intentionally or knowingly.

"Intentionally" and "knowingly" have previously been defined.

CRIMINALLY NEGLIGENT HOMICIDE

Any person who commits criminally negligent homicide is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant's conduct resulted in the death of the alleged victim;

and

(2) that the defendant acted with criminal negligence.

"Criminal negligence" means that a person 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.

The requirement of criminal negligence is also established if it is shown that the defendant acted intentionally, knowingly or recklessly, each of which have previously been defined.

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EVIDENCE OF MENTAL STATE

The state must prove beyond a reasonable doubt the culpable mental state of the accused. Culpable mental state means the state of mind of the accused at the time of the offense. This means that you must consider all of the evidence to determine the state of mind of the accused at the time of the commission of the offense. The state of mind which the state must prove is contained in the elements of the offense(s) as outlined in these instructions.

In this case, you have heard evidence that the defendant might have suffered from the effects of intoxication which could have affected his capacity to form the culpable mental state required to commit a particular offense.

If you find from the evidence that the defendant's capacity to form a culpable mental state may have been affected, then you must determine beyond a reasonable doubt what the mental state of the defendant was at the time of the commission of the offense to determine which offense, if any, he committed.

Voluntary intoxication is not a defense to prosecution for an offense. If a person voluntarily becomes intoxicated and, while in that condition, commits an act which would be a crime if he were sober, he is fully responsible for his conduct. It is the duty of persons to refrain from placing themselves in a condition which poses a danger to others.

“Intoxication” means disturbance of mental or physical capacity resulting from the introduction of any substance into the body.

“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.

While voluntary intoxication is not a defense to prosecution for a crime, it is relevant in determining the defendant's culpable mental state. The culpable mental states discussed in these instructions are: "intentionally", "knowingly" and "recklessly". Each culpable mental state is defined in these instructions. You may consider whether voluntary intoxication affects or prevents the formation of the required culpable mental state in determining whether the essential culpable mental state element has been proven by the state beyond a reasonable doubt.

> In determining the reckless culpable mental state, if the defendant is unaware of a risk, because of voluntary intoxication, the defendant's unawareness is immaterial and is no defense to that element in the prosecution of the offense.

Technical Record, Volume I, pages 99-117, Trial Record, Volume XIV, pages 2-31, and Exhibit 1 to Motion for New Trial which is reproduced in full in the separate Appendix commencing at page 6.

B.

The controlling mental state for murder in the second degree is "knowingly." That *mens rea* is defined under T.C.A. § 39-11-302(b) as follows:

> "Knowing" refers to a person who acts knowingly with respect to the **conduct** or to the **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.

This definition contains terms such as "circumstances surrounding the conduct," the "nature of the conduct," and the "result of the person's conduct." These three terms identify the three types of material elements of criminal offenses which are used as part of the definitions of *mens rea* under the modern Tennessee Criminal Code.

It is important to understand that the definitions of the various mental states are different depending on the type of material element contained in the offense. It is also important to recognize that not all crimes contain all material element types.

Tennessee's utilization of the three element types is certainly not unique. All modern code jurisdictions utilize variations of the same terminology first proposed by the Model Penal Code in 1955:

> The draft acknowledges four different kinds of culpability: purpose [intentional], knowledge, recklessness and negligence. It also recognizes that the material elements of offenses vary in that they may involve (1) the nature of the forbidden conduct, or (2) the attendant circumstances, or (3) the result of conduct. With respect to each of these three types of elements, the draft attempts to define each of the kinds of culpability that may arise. The resulting distinctions are, we think, both necessary and sufficient for the general purposes of penal legislation. The purpose of articulating these distinctions in detail, is of course, to promote the clarity of definitions of specific crimes and to dispel the obscurity with which the culpability requirement is often treated when such concepts as "general criminal intent," "*mens rea,*" "presumed intent," "malice," "willfulness," "scienter" and the like must be employed. (Model Penal Code, Draft No. 4, Comments §2.02, page 124 (1955)).

The Model Penal Code utilizes the three element-types within the four *mens rea* definitions. As will be noted, the Tennessee version utilizes similar definitions of *mens rea* but, most importantly, also incorporates the same concepts of the "nature of conduct," the "circumstances surrounding conduct," and the "result of conduct."

T.C.A. § 39-11-302 defines the four mental states: intentional, knowledge, reckless and criminal negligence. It is critical to recognize that the definition of the four mental states are different depending on whether one is modifying the "nature of conduct," the "result of conduct," or the "circumstances surrounding the conduct" elements.

The different element types can be seen in T.C.A. § 39-11-302(a), which defines "intentional." The term "intentional" refers to a "person who acts intentionally with respect to the nature of the conduct or the result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result."

The term "intentional," only contains definitions for two elements types, but these definitions differ depending on the type of element. With respect to crimes proscribing the "nature of conduct," the definition of intentionally requires that the person have a "conscious objective or desire to engage in the conduct." With regard to crimes proscribing a "result of conduct," the definition of intentionally requires the person have a "conscious objective or desire to . . . cause the result."

It is important that the jury be instructed ONLY as that PART of the definition of the mental state relevant to the element-type of the offense. If an offense contains no "conduct elements" the jury is not to be instructed that the defendant can be convicted if he or she "desired to engage in the conduct." To do so seriously distorts the government's burden of proof since the defendant can be convicted based on a definitional component of a mental element which is not part of the crime.

The definition of "knowing" under T.C.A. § 39-11-302(b), can also be divided into the various element-types. With respect to the "conduct" element, "knowing" requires that a person act "knowingly with respect to the conduct ... when the person is aware of the nature of the conduct." With respect to the "circumstances" element, the definition of "knowing" requires that the person act "knowingly with respect to ... the circumstances surrounding the

conduct when the person is aware ... that the circumstances exist." With respect to the "result of conduct," 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."

Recklessness, under T.C.A. § 39-11-302, contains separate definitions for "circumstances surrounding the conduct" and the "result of conduct." For the "circumstances" element, "recklessness" refers to a person "who acts recklessly with respect to circumstances surrounding the conduct ... when the person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist." With respect to the "result" element, "recklessness" refers to a person "who acts recklessly with respect to ... the result of the conduct when the person is aware of but consciously disregards a substantial and unjustifiable risk that ... the result will occur."

Criminal negligence is defined under T.C.A. § 39-11-302(d). With respect to "circumstances surrounding conduct," the definition of "criminal negligence" provides that "a person acts with criminal negligence with respect to the circumstances surrounding that person's conduct ... when the person ought to be aware of a substantial and unjustifiable risk that the circumstances exist." With respect to the "result of conduct" element, "criminal negligence" provides that a person acts "with criminal negligence with respect to ... the result of that conduct when the person ought to be aware of a substantial and unjustifiable risk that ... the result will occur."

The various element types appear throughout the four mental state definitions. It should be observed, however, that three of the four mental states do not contain definitions

for all three of the element types. This can be better illustrated by reference to the chart which appears in the separate Appendix commencing at page 3.

Just as the various element types do not always appear in each definition of the four mental states, neither do all element-types appear in all criminal statutes. Some crimes have only "nature of conduct" elements such as "knowingly" selling drugs. Other crimes have additional "circumstances surrounding the conduct" elements which are collateral to the defendant's conduct. For example, selling alcohol to a minor requires that the Government prove that the defendant knew or was reckless about whether the recipient was a minor. This age factor is described as a "circumstance surrounding the conduct," which frequently has a separate mental element. Lastly, crimes may have "result" elements which describe the offense in terms of its consequences to someone or something. Assaultive crimes are an example of "result of conduct" offenses, homicide being the classic case.

Tennessee case law already recognizes that different elements or components of statutes may have different mental states.[2] What is less well-understood is that the various mental elements are themselves descriptive of <u>different</u> elements which differ depending on the type of element one is modifying. One does not "lump" all these definitions together. Where an offense is only a result of conduct crime, such as homicide, for example, then <u>only</u>

[2]*State v. Howard*, 926 S.W.2d 579, 587 (Tenn. Crim. App. 1996), is an example of different mental states applying to different elements of the crime: "When an offense has different *mens rea* for separate elements, the trial court must set forth the mental state for each element clearly so that the jury can determine whether the State has met its burden of proof." 926 S.W.2d 579, 587. *See also,* LaFave, *Substantive Criminal Law* §§ 3.4-3.7 (West, 1986), for a superb discussion of the four Model Penal Code mental states, which are comparable to those in our criminal code.

the "result of conduct" *mens rea* definitions components are necessary for an analysis of whether the accused has violated the statute.

The concepts of "nature of conduct," and "circumstances surrounding the conduct," and "result of conduct" are found not only within the definitions of the *mens rea* terms themselves but are addressed in the statute which governs the State's burden of proof. T.C.A. § 39-11-201 provides, in relevant part, that:

> (A) No person may be convicted of an offense unless each of the following is proven beyond a reasonable doubt: ....
>
> The **conduct, circumstances surrounding the conduct,** *or* **a result of the conduct** described in the definition of the offense; [and]
>
> The culpable mental state required . . .

If one reads T.C.A. § 39-11-201(a)(1) in conjunction with the components of the various culpable mental states in T.C.A. § 39-11-302, it should be apparent that our current crimes can be divided into various types of elements: a "nature of conduct" element, a "result of conduct" element, or a "circumstances surrounding conduct" element. The mental states modify the element-types which themselves are descriptive of the elements of crime.

One has but to determine the type of element present in a particular crime to ascertain the appropriate mental state definition. If, for example, the crime at issue is defined by only the "nature of the defendant's conduct," then we need address only those portions of the mental states which deal with the "nature of defendant's conduct." A court can also assess the sufficiency of the evidence based on the relevant definition of the mental state at issue as it applies to the type of element defined by the crime.

Consideration of an irrelevant component of the mental state violates T.C.A. §39-11-201(a)(1) since it alters the State's burden of proving the elements of the crime beyond a reasonable doubt. The distinction is whether the crime is defined by a nature-of-conduct element or a result of conduct element which then dictates the appropriate *mens rea* definition.

In the context of homicide it can be seen that homicide can only be a "result" offense. The homicide statute does not proscribe the means by which the homicide is committed. To illustrate: firing a weapon is the "nature of conduct." However, the murder statute does not "care" as to how the homicide is committed, but rather focuses on the death of another human being, which is the "result." A person can intentionally fire a weapon but only be careless about where the bullet lands and, thus, be guilty of, at most, a negligent homicide rather than premeditated murder.

Stated in another fashion, it is not the means by which the assailant slays his victim which makes the crime murder. Rather, it is the killing itself – the result – which is criminal. Thus, intentional murder is where the State proves it was a person's conscious objective or desire to cause the result of death.[3]

[3]The definition of "knowing" makes the distinction between "nature of conduct" and "result of conduct" even more clear. T.C.A. § 39-11-302(b) contains two sentences; one for awareness of conduct (and circumstances surrounding conduct), and another definitional sentence for "result of conduct." To establish that a defendant was aware of his or her conduct is one thing; to prove that he or she was aware of the reasonable certainty of the proscribed result is something else entirely. A "knowing" homicide is only concerned with the "result" (death) and not the "nature of conduct" of how that death is produced. Tennessee also has reckless homicide and negligent homicide. Like intentional and knowing homicide, reckless and negligent homicides are only concerned with the result element. Given that all homicides only require a killing, there is no difference between this result component for any degree of homicide. Only the result of conduct definitions of the four mental states distinguish the several types of homicide. That all four mental states contain definitions for "results" (but not "nature of conduct") further illustrates that homicide is only a result-element-offense.

The legislature could not have spoken more clearly on this topic since T.C.A. § 39-11-201(a), makes the mental states and the several element types required components of the State's burden of proof. The several mental state definitions are obviously designed to also apply to the separate element-types since they use the same terminology. The point here, of course, is that the mental state definitions are different depending on whether one is considering a "nature of conduct," "result of conduct," or "circumstances" element.

An appropriate analysis of the *mens rea* terminology can be found in *State v. Wilson*, 924 S.W.2d 648 (Tenn. 1996) which involved a fellow who was firing shots at a house. Fortunately, no one was actually hit by the bullets. To establish aggravated assault the government was required to prove that the defendant intentionally or knowingly caused the victims to fear imminent bodily injury by his use of a weapon. The prosecutor could not prove that the defendant was cognizant that anyone was in the house. The conviction was reversed. Why? The Court found that the "defendant could not shoot for the purpose of causing fear or shoot with the reasonable certainty that fear would be caused absent an awareness that someone was inside." (924 S.W.2d 648, 651). This controlling language was lifted directly from the "result of conduct" definitions of "intentional" and "knowing."

Aggravated assault deals with actual harm to the victim or that the victim fears immediate harm. These are clearly "result of conduct" concepts. Given that the defendant in *Wilson* was not cognizant that people were inside, he could not have had the specific purpose ("intentional") of causing fear to anyone, nor could he have been aware of the reasonable certainty ("knowing") that fear would be caused to anyone. Thus, he could not be guilty of "intentional" or "knowing" aggravated assault. Using a "nature of conduct"

definition would have dictated a contrary conclusion since the "conduct" (firing the gun at a house) was clearly intentional conduct.[4]

T.C.A. § 39-11-201(a)(1) requires that the Government prove the defendant's conduct, or circumstances surrounding the conduct, or the result of the defendant's conduct as "described in the definition of the offense." Some crimes, *i.e.* selling drugs, proscribe the "nature of conduct." Some do not. Other offenses, *i.e.* murder, proscribe the "result of the conduct." Some do not. Some offenses have additional "circumstances surrounding the conduct" which must be established by the State to sustain a conviction.

The government is also required to establish the culpable mental state "as the definition of the offense requires with respect to each element of the offense." T.C.A. § 39-11-301. The various mental states thus contain separate definitions depending upon whether one is dealing with the "nature of conduct element" or the "result of conduct element" or "circumstances surrounding the conduct." If a crime has no "nature of conduct" element, for example, then there is no "nature of conduct" *mens rea* component for that crime.

There is nothing remarkable about this analysis of our statutes. Texas, another Model Penal Code state, has construed virtually identical *mens rea* terminology in a similar fashion. In *Cook v. State*, 884 S.W.2d 485 (Tex. Crim. App. 1994), the Texas Court of last resort found that intentional murder is a "result" offense and that the "conduct" definition of intention is inapplicable to homicide.

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[4] *Wilson* was quick to point out that a conviction could have been sustained for a reckless *mens rea* crime. 924 S.W.2d, at 652. This is clearly correct given that firing into a dwelling creates a substantial risk of harm whether one is cognizant of people actually being inside or not. Again, this is a "result" analysis.

In *State v. Ducker*, 27 S.W.3d 889 (Tenn. 2000) , *cert. denied* 121 S.Ct. 1202, 149 L.Ed.2d 116 (2001) our Supreme Court relied on Texas authority to find that murder is ONLY a result-of-conduct offense:

> "A result-of-conduct offense requires that the culpable mental state accompany the result as opposed to the nature of the conduct. See *generally Wallace v. State*, 763 S.W.2d 628 (Tex.Ct.App.1989). The focus is on whether the actor possessed the required culpability to effectuate the result that the legislature has specified. Generally, an offense may be classified as a result-of-conduct offense when the result of the conduct is the only element contained in the offense.
>
> An example of a result-of-conduct offense is second degree murder, which is defined as a 'knowing killing of another.' Tenn.Code Ann. § 39-13-210(a)(1). In second degree murder, the result of the conduct is the sole element of the offense. The 'nature of the conduct' that causes death or the manner in which one is killed is inconsequential under the second degree murder statute. The statute focuses purely on the result and punishes an actor who knowingly causes another's death. The intent to engage in conduct is not an explicit element of the state's case in second degree murder. Accordingly, a result-of-conduct crime does not require as an element that an actor engage in a specified course of conduct to accomplish the specified result."

At, 896.

An instruction on ALL the definitions of "knowingly," when only the result-type is proscribed, drastically alters the State's burden of proof in any criminal case. The danger is that a jury could convict based on a mental element component that was not part of the definition of the crime. See *State v. Patton*, 280 Mont. 278, 930 P.2d 635, 643 (1996) ("conduct" instruction improper since it allowed jury to convict defendant of homicide "solely on basis that he consciously engaged in conduct without regard to whether [the resulting] harm was intended").

Tennessee has adopted the view that charging the jury on the wrong definition of "knowingly" may constitute reversible error. In *State v. Dupree*, 2001 WL 91794 , Tenn Crim. App. January 30, 2001 (Appendix, page 145), this Court held that, where the defendant claimed he did not mean to kill, it was reversible error to instruct the jury on the "conduct" definition of "knowingly." That case, as well as *State v. Ducker, supra*, should settle any dispute as to the state of the law in this jurisdiction. Those cases should also resolve the disposition of this appeal.

C.

The verdict of the jury can well be different depending on whether one is modifying a "nature of conduct" element or a "result of conduct" element. If the trial judge charges BOTH where only one is proper, this not only lessens the government's burden of proof but it ALSO compromises the defendant's right to a unanimous jury very since we do not know which jurors used the improper *mens res* definition.[5]

In *VanArsdall v. State*, 919 S.W.2d 626, 633-634 (Tenn.Crim.App.1995) the Court held it was improper to instruct on the entire statutory list of sexual acts contained in the statute:

> "The failure to require election was compounded by the instructions given the jury. Although the indictment alleged that appellant 'transported' the minor, the court instructed the jury that conviction could be based on promoting, employing, using, assisting, or transporting. Further, although the state specified that the sexual or simulated sexual activity was masturbation, the

[5] In the Appendix to *State v. Dupree*, this Court reproduced the relevant portion of Judge Hayes' opinion in *Ducker*. As regards the instructions on multiple definitions of *mens rea* terminology this Court observed: "The [trial] court cannot give the jury the choice of which definition to apply to the crime charged, rather the statute defining the crime dictates which definition of 'knowingly' is appropriate as to each element."

> court instructed the jury on the entire panoply of sexual activity set forth in the statute. Thus, the jury was free to convict if appellant promoted, employed, used, assisted or transported a minor to participate in the performance or in the production of material which includes the minor engaging in sexual activity or simulated sexual activity. The trial judge should have required the state to elect at the close of its proof the offense upon which it was proceeding. After election, the judge was obligated to charge the jury as to that offense. '[T]he instruction ... should be limited to the precise offense alleged in the charging instrument to the exclusion of the remaining theories.' "

In Mr. Page's case the trial judge instructed the jury on ALL three components of "knowing" and did so in the disjunctive. This compounded the problem. An instruction in the disjunctive is improper and violates the defendant's right to have ALL the jurors deliberate and return a verdict on the SAME elements of the crime. See *State v. Forbes*, 918 S.W.2d 431, 445-446 (Tenn. Crim. App. 1995) (disjunctive jury instruction).

The defense asserts that the alternative instructions on ALL the *mens rea* definitions of the charged and lesser included offenses violated the defendant's right to a jury trial and a unanimous verdict under the federal and state constitutions.

D.

The failure to properly instruct the jury as to the *mens rea* definitions also contaminated the instructions regarded the intoxication issue. The relevant instruction as to intoxication was as follows:

> "While voluntary intoxication is not a defense to prosecution for a crime, it is relevant in determining the defendant's culpable mental state. The culpable mental states discussed in these instructions are: "intentionally", "knowingly" and "recklessly," [and criminal negligence]. Each culpable mental state is defined in these instructions. You may consider whether

> voluntary intoxication affects or prevents the formation of the required culpable mental state in determining whether the essential culpable mental state element has been proven by the state beyond a reasonable doubt."

How could the jury assess the impact of Mr. Page's intoxication as to the "formation of the required culpable mental state[s]" without a proper instruction as to what those mental states were? The improper instructions on the definitions of the various mental states as previously addressed in this Brief violated the defendant's right to due process by compromising the psychiatric testimony as it relates to the diminished capacity evidence and the impact of alcohol.

By giving additional and improper definitions of said culpable mental states the jury could have accepted diminished capacity or alcoholism as it relates to the required and proper *mens rea* but still found the defendant guilty because the alcoholism or diminished capacity might not have impacted the *mens rea* as defined by the improper instructions. Given that those instructions were couched in the disjunctive, the evidence of the alcohol and diminished capacity was compromised and prevented Mr. Page from presenting a constitutionally protected defense.

The constitution guarantees a criminal defendant a meaningful opportunity to present a complete defense. *Crane v. Kentucky,* 106 S.Ct. 2142 (1986). By injecting *mens rea* definitions which had nothing to do with the elements of the offense the trial court prevented Mr. Page from being able to constitutionally defend against the real statutory element definitions as to the result-of-conduct components of the *mens rea* definitions of intentionally, knowingly, recklessly and criminal negligence as it relates to murder in the second degree and the lesser offenses. Further discussion of this issue

is unnecessary; Mr. Page was severely prejudiced in presenting the only defense he had by the improper *mens rea* jury instructions.

E.

The preceding discussion illustrates the profound impact of the improper *mens rea* instructions in this trial. This defendant was prejudiced by the instructions because his mental state was the ONLY issue here. There is a significant difference in the various mental states. How they are defined makes a significant difference in the verdict.

"Knowing" refers "to a person who acts knowingly with respect to [his or her] conduct . . . when the person is aware of the nature of [his or her] conduct . . . ." As noted in the Sentencing Commission comments to T.C.A. § 39-11-302, a "defendant acts knowingly . . . when he or she is aware of the conduct . . . ."

The word "knowing" is defined as to **result** offenses as follows: "a person acts knowingly with respect to a result of [his or her] conduct when the person is aware that [his or her] conduct is reasonably certain to cause the result." The Sentencing Commission comments to this section provide that "a defendant acts knowingly . . . when he or she is . . . practically certain that the conduct will cause the result irrespective of his or her desire that the . . . result will occur."

There is a huge difference between the definition of "nature of conduct" and the "result of conduct." One may be aware of one's conduct but be unaware that the conduct is reasonably certain to cause a specific result.

For purposes of analysis it is helpful to address the two other mental states of recklessness and negligent to illustrate that while Mr. Page acted negligently and perhaps even recklessly, he did not act knowingly. Again, recall that reckless and negligent homicide are a single-element "result of conduct" offenses and, thus, only the "result of conduct" definitions are relevant.

Pursuant to T.C.A. § 39-11-302(c), a person "acts recklessly with respect to the . . . result of [his or her] conduct when the person is aware of but consciously disregards a substantial and unjustifiable risk that 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 of the circumstances as viewed from the accused person's standpoint."

T.C.A. § 39-11-302(d) provides that a person acts with "criminal negligence with respect to the result of [his or her] conduct when the person ought to be aware of a substantial and unjustifiable risk that 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 of the circumstances as viewed from the accused person's standpoint."

Both recklessness and criminal negligence require "a substantial and unjustifiable risk" that the "result will occur." Both also require that the risk constitute a "gross deviation" from the standard of care of an ordinary person. The difference is that recklessness requires that the government prove that the accused had a subjective awareness of the substantial risk that the result would occur. Negligence, on the other

hand, uses an objective standard inquiring as to whether the defendant "ought to be aware" of the risk that the result would occur. It is inattentive risk creation.

These definitions must be contrasted with "knowing" which requires actual awareness of much more than just a substantial risk. For a "knowing" result of conduct offense, the State must prove that the defendant is actually "aware that [his or her] conduct is reasonably certain to cause the result" proscribed by law. "Reasonably certain" is equated by the Sentencing Commission with "practically certain," and thus these words can be used interchangeably in this Brief.[6]

Under the Model Penal Code, a "purposeful (intentional) or knowing" homicide is treated the same for punishment purposes. As is discussed in the comments to the Model Penal Code, an intentional or knowing killing "may not rest merely on a finding that the defendant purposely or knowingly did something that had death of another as its natural and probable consequence. Rather, the prosecution must establish that the defendant engaged in conduct with the conscious objective of causing death of another or at least with awareness that death of another was practically certain to result from his act." *Model Penal Code and Commentaries,* Official Draft, Part II, § 21.02, *Commentary*, pages 20-21 (American Law Institute, 1980). Examples of "practical or substantial certainty of death" include instances where E intends to kill his mother F for her life insurance and places a bomb on an airplane which E knows is carrying both F and G. Even though E "may regret the necessity of killing G and thus not desire that

[6]The Sentencing Commission comments have been consistently relied on by the courts in construing and interpreting the statutes drafted by the Sentencing Commission. See the extensive citation of examples in *State v. Blouvett*, 904 S.W.2d 111, 113 (Tenn. 1995).

result, he knows that the death of G is substantially certain to follow from his act" and thus he is guilty of murder whether intended or not. (*LaFave*, § 3.5, p. 304).

In *United States v. Meling*, 47 F.3d 1546 (9th Cir. 1995), the court was interpreting a federal sentencing guideline which provided for a higher punishment "if the death was caused intentionally or knowingly." The court adopted the Model Penal Code definition that a defendant acts "knowingly" if "he is aware that it is practically certain that his conduct will cause the result." The defendant, attempting to kill his wife for the insurance benefit, fed her a capsule of cyanide-laced Sudafed. Although she survived, the defendant was worried that he might be suspected in the poisoning and concocted a scheme to divert official attention elsewhere. Therefore, he laced five packages of Sudafed with lethal amounts of cyanide and planted them on drugstore shelves resulting in the death of two people. The court found that the result was "knowing":

> Callously disregarding the suffering he might inflict, Meling had the basest of motives: He wanted to divert attention from his heinous attempt to kill his wife for profit. Acting without compassion, Meling calculated that a few random deaths would throw the FBI off his trail. To this end, he laced five packages of Sudafed with poison, intending that they be ingested by unsuspecting victims and knowing that these victims would die a horrible death. The only detail missing from Meling's calculus was the identity of the people he would kill. That he was unaware of the victim's identities, however, does not make his conduct any less culpable. Meling was aware to a practical certainty that someone -- perhaps as many as five people -- would die to help save his skin. 47 F.3d, at 1558.

A more apt example of "knowingly" can be found in *State v. Bordis*, 905 S.W.2d 214 (Tenn. Crim. App. 1995), where a man and his wife allowed their baby to slowly starve to

death. Even though the defendant may not have desired the result, a jury "could have determined that the proof established that the defendant was aware that his conduct was reasonably certain to have caused the death of the victim." 905 S.W.2d, at 225.

Mr. Page's momentary act is distinguishable from these cases. He did not act "knowingly" as to the RESULT (the death of Mr. Jones) which is what second degree murder is all about. It is true that this issue is for a jury to determine. It is also true that only a properly instructed jury can return a reliable verdict.

When construed in the light of relevant Tennessee law the proper homicide instructions are as follows:

SECOND DEGREE MURDER

Any person who commits second degree murder is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant unlawfully killed the alleged victim; and

(2) that the defendant acted knowingly.

With respect to second degree murder, a person acts "knowingly" if [the State proves beyond a reasonable doubt] that the person acts with an awareness that his [or her] conduct was reasonably certain to cause the death of the alleged victim. [The term "reasonably certain" means practical certainty.]

The requirement of "knowingly" is also established if it is shown that the defendant acted intentionally.

With respect to second degree murder, a person acts "intentionally" when he [or she] acts with a conscious objective or desire to cause the death of the alleged victim.

VOLUNTARY MANSLAUGHTER

Any person who commits voluntary manslaughter is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following elements:

(1) that the defendant unlawfully killed the alleged victim;

and

(2) that the defendant acted intentionally or knowingly;

and

(3) that the killing resulted from a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner.

The distinction between voluntary manslaughter and second degree murder is that voluntary manslaughter requires that the killing result from a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner.

"Intentionally" and "knowingly" have previously been defined.

RECKLESS HOMICIDE

Any person who commits the offense of reckless homicide is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements,

(1) that the defendant killed the alleged victim;

and

(2) that the defendant acted recklessly.

With respect to reckless homicide, a person acts “recklessly” if he [or she] is aware of but consciously disregards a substantial and unjustifiable risk that the alleged victim will be killed.

The risk must be of such nature and degree that disregarding [the risk of the victim's death] 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.

The requirement of "recklessly" is also established if it is shown that the defendant acted intentionally or knowingly.

"Intentionally" and "knowingly" have previously been defined.

CRIMINALLY NEGLIGENT HOMICIDE

Any person who commits criminally negligent homicide is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant's conduct resulted in the death of the alleged victim;

and

(2) that the defendant acted with criminal negligence.

With respect to criminally negligent homicide, a person acts with criminal negligence when he [or she] ought to be aware of a substantial and unjustifiable risk that the alleged victim will be killed.

The risk must be of such a nature and degree that the failure to perceive [the risk of the victim's death] 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.

The requirement of criminal negligence is also established if it is shown that the defendant acted intentionally, knowingly or recklessly, each of which have previously been defined.

These instructions should have been charged to the jury here. At the next trial the jury will deliberate ONLY as to whether Mr. Page (without or with provoked passion) was aware

that it was reasonably certain that Mr. Jones would die [murder in the second degree or voluntary manslaughter], or whether Mr. Page was aware of the substantial risk that Mr. Jones would die [reckless homicide], or whether Mr. Page should have been aware of the substantial risk that Mr. Jones would die [involuntary manslaughter]. Since the deliberation of the jury in this case was NOT confined to these fundamental issues a new trial must be granted.

F.

The State may agree that the pattern jury instructions given here were incorrect but will set up some defenses to the granting of a new trial. The government will argue that these issues are waived because of a failure to make a contemporaneous objection. This is of no merit since there is no requirement that there be a trial objection to the erroneous inclusion of an improper jury instruction. Rule 30(b), Tennessee Rules of Criminal Procedure provides that "after the judge has instructed the jury, the parties shall be given opportunity to object, out of the hearing of the jury, to the content of an instruction given or the failure to give a requested instruction, but failure to make objections shall not prejudice the right of a party to assign the basis of the objection as error in support of a motion for a new trial." Following this rule, the Tennessee Supreme Court has adopted the view that a party may "challenge in the motion for new trial for positive errors in the instructions despite the failure to object at trial." *State v. Lynn*, 924 S.W.2d 892, 899 (Tenn. 1996).

Since the issues here are "positive errors" and not "omissions," this Court may reach the merits of the question which was raised in great detail in the Motion for New Trial (T.R.

II, page 184), and the Amended Motion for a New Trial (T.R. III, page 250). There is no waiver here.

G.

The State may argue that while the instructions were erroneous, they were subject to harmless error. Harmless error analysis requires an examination of the type of error involved because of the different burden of proof requirements. In *State v. Harris*, 989 S.W.2d 307, 314 -315 (Tenn. 1999) the Court held that:

> "To resolve the issue in this appeal we must first determine whether the error complained of is constitutional or statutory. The answer to this question is important because the test for harmlessness of constitutional errors differs from that for non-constitutional errors. First, once a constitutional error is found, the burden shifts to the State to prove harmlessness; the burden does not shift to the state for non-constitutional errors. Second, the standard which applies to assess the harm or prejudice resulting from constitutional errors is more exacting than the standard which applies to non-constitutional errors. ...
>
> For example, in Tennessee, non-constitutional errors will not result in reversal unless the error affirmatively appears to have affected the result of the trial on the merits, or considering the whole record, the error involves a substantial right which more probably than not affected the judgment or would result in prejudice to the judicial process. *Tenn.R.Crim. P. 52(a); Tenn. R.App.P. 36(b), State v. Cook, 816 S.W.2d 322, 326 (Tenn. 1991); State v. Williams, 977 S.W.2d 101, 105 (Tenn. 1998)*. In contrast, a constitutional error *will* result in reversal unless the reviewing court is convinced "beyond a reasonable doubt" that the error did not affect the trial outcome. *Chapman v. California, 386 U.S. 18, 87 S.Ct 824, 17 L.Ed.2d 705 (1967); Howell, 868 S.W.2d at 260; Cook, 816 S.W.2d at 326; Tenn.R.Crim. P.52(a)."*

The defense asserts that the instructional errors in Mr. Page's case were of constitutional dimension. As noted earlier, the disjunctive jury instruction implicated the defendant's right to a unanimous jury verdict which is unquestionably a constitutional matter. The inclusion of the improper alternative elements of the crime allowed the verdict of the jury to rest upon "elements" which were not statutory elements of the offense. In other

words, by articulating different *mens rea* requirements the verdict could well have rested on those alternative elements, thus drastically altering the governments burden of proof. It is beyond debate that the government must prove all elements of the offense beyond a reasonable doubt. Where the government may obtain a conviction on less than all of the statutory elements then the defendant's federal and state constitutional rights to trial by jury have been violated.

With regard to constitutional errors regarding a jury instruction on the element of the offense, courts look to whether the element at issue was factually contested at trial or whether the issue was not litigated by the defense. Where the issue was contested, the constitutionally defective instruction is seldom harmless. Where there is no dispute, the error is almost always harmless.

In *State v. Ducker*, 27 S.W.3d 889 (Tenn. 2000) the Supreme Court found that the error in failing to charge the jury that it was required to find beyond a reasonable doubt that the victims were six years of age or less, which was an essential element of aggravated child abuse, was harmless constitutional error. In that case the entire trial centered about whether the defendant knowingly abused her children by leaving them in a hot car for nine hours. The Tennessee Supreme Court held that the instructional error on the statutory age-element was harmless because the evidence was uncontroverted that the children were less than six years of age and the defendant never contested this question.

In Mr. Page's case the harmless error factors look to the question of whether the critical mental state issues were disputed. While there was never any disagreement here that

Mr. Page struck the victim with the bat, his mental state was disputed throughout the trial. As Mr. Love told the jury in his opening statement:

> "These things, some of the central things that we agree upon, primarily that 15-year old James Page swung a baseball bat and struck Chris Jones. We believe the evidence will show that he struck, he got in too deep - - he got into a situation and it became intimidation and he was in so deep that he over-reacted. . . . Then later, there is a discussion between James Page and these other boys and there is no understanding of how hard he swung. They may agree (sic) with the discussions, but these boys are going to tell you over and over again that James Page was saying I didn't swing the bat that hard."

(Trial Transcript, Volume VIII, January 23, 2001, page 25, line 21, through page 26, line 10).

In closing argument the defense argued that this was not murder but was a reckless act or negligent act and that Mr. Page "ought have known that he was in too deep." (Trial Transcript, January 26, 2001, Volume XIII, page 167, lines 14-15).

Recall that the only material *mens rea* element for criminally negligent homicide is that the state must prove that the accused "ought to be aware of a substantial and unjustifiable risk" that the alleged victim will be killed. This is in accord with the defense position throughout the trial.

The only material *mens rea* elements for second degree murder are that the government must prove beyond a reasonable doubt that the accused "acts with an awareness that his conduct was reasonably certain to cause the death of the alleged victim" or, if intentionally, that the accused "acts with a conscious objective or desire to cause the death of the alleged victim." Here, there was no proof that Mr. Page intended to cause the victim's death. As a practical matter there was no proof that Mr. Page even acted with an awareness that his conduct was reasonably certain to cause the death of the alleged victim. Recall, that

second degree murder uses a subjective standard, that being the *mens rea* of the accused and not an objective analysis of what a reasonable person might do or be aware of, as is the case with negligent homicide. This is a critical distinction.

The uncontroverted proof in this record is that, at worst, Mr. Page should have known that death might result from the blow. Mr. Page did not believe that he had struck the victim that hard and was absolutely shocked that the victim had died. There are multiple references in the record to these facts:

> Q. [by Mr. Love] Didn't James say I didn't swing the bat that hard?
>
> A. [by Brian Rader] We all thought that it wasn't that hard until we found he was dead on Monday.

Trial Transcript, January 24, 2001, Volume X, page 279, lines 18 - 22.

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> Q. [by Mr. Love] James, when he was - - when James was in the car with you he didn't make any remarks as you drove by and saw the ambulance; did he?
>
> A. [by Brian Rader] No, sir.
>
> Q. He was pretty quite; wasn't he?
>
> A. Yes, sir.
>
> Q. Your entire car was quite; wasn't it?
>
> A. We were sitting there like man, we couldn't believe it.

Trial Transcript, Volume X, January 24, 2001, page 282, lines 3 - 14.

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Q. [by Mr. Love] And Brian Rader just instantly speeds away; doesn't he?

A. [by David Smith] Yes.

Q. And you drive back to Pritzl's house?

A. Yes.

Q. When you get back to Pritzl's house James is saying he didn't think he swung the bat that hard; isn't he?

A. Yes.

Trial Transcript, January 24, 2001, Volume X, p. 410, lines 3 - 12.

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Q. [by Mr. Love] What happened to [the bat]?

A. [by Dennis Pritzl] First James demonstrated how he had done it and then threw the bat on the side of the house.

Q. Now, how close were you to James when you got back to the house?

A. I don't remember.

Q. Were you standing anywhere near him?

A. I don't remember.

Q. When James demonstrated this swing, how far did his hands go up?

A. He demonstrated it like this (indicating), it wasn't up like this or anything, he just demonstrated like this, I don't remember how he did it.

Q. Did he tell you that he swung, didn't think he swung that hard?

A. Yes, he did.

Transcript of the Evidence, January 25, 2001, Volume XI, page 76, lines 4 - 19.

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Q. [by General Crenshaw] How was James acting at that time?

A. [Manuel Pritzl] He was just still - - I mean, first he was hyped up about it but then he turned mellow again and - - because he didn't think he hit him that hard. He goes I didn't hit him that hard, you know?

Transcript of the Evidence, January 25, 2001, Volume XI, page 117, lines 5 - 11.

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Q. [by Mr. Love] So when you went to school on the 14th, as you drove in that morning, did you know that Chris Jones had passed away?

A. [by Manuel Pritzl] Not until we got to school.

Q. When you went to Ms. Whitfield's room and looked in the newspaper, did you see James read the newspaper as well?

A. Yes.

Q. Did you observe anything about James at that point?

A. I could tell that he was getting, you now, he had a facial expression.

Q. Was it - - could you - - what were his facial expressions?

Q. After he had read it, he just said I'm getting sick and he threw away his coke in the garbage can and just leaned against the wall and closed his eyes for a second.

Transcript of the Evidence, January 25, 2001, Volume XI, page 145, lines 6 - 23.

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Q. [by General Crenshaw] When you were at school, did you learn some news about Chris Jones?

A. [by Kris Perrone] At the bus stop, I did.

Q. What did you learn?

A. That Christopher Jones was dead.

Q. When you got to school, did you talk to James and Manuel about that?

A. James took me to school that day.

Q. So did you talk about it on the ride to school?

A. Not on the ride to school, right when we got out of the car.

Q. Okay, and did you read about that?

A. We got together and - - me and Manuel Pritzl and James Page got together and went down to Ms. Whitfield's classroom, she's a Phys Ed teacher and we got a newspaper and we read it from there.

Q. And after you read the newspaper, did you have any conversation?

A. Not really, we just - - we were just shocked.

Transcript of the Evidence, January 25, 2001, Volume XI, page 179, lines 22 - 25 and page 180, lines 1 - 17.

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Q. [by Mr. Love] What did you do with Ms. Whitfield's room?

A. [by Kris Perrone] We got a newspaper to see what happened.

Q. Did you see if, in fact, Chris Jones was dead?

A. Yes, sir.

Q. And you saw the article in the newspaper?

A. Yes, sir.

Q. Did you watch James look at the article in the newspaper?

A. Yes, sir.

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Q. [by Mr. Love] As James looked at the article in the newspaper, did you notice anything about him?

A. He started looking sick.

Transcript of the Evidence, January 25, 2001, Volume XII, page 218, lines 15 - 25 and page 219, lines 12 - 15.

In contrast to the above evidence the government never asked a single question of any witness as to whether Mr. Page knew he was reasonably certain to kill the victim by the blow. Recall that the improper pattern jury instructions contain the added "elements" of whether the defendant knows "that his conduct is of a particular nature," or whether the defendant knows that a "particular circumstance exists," or whether the person "intends to engage in a particular conduct." In this case government focused exclusively on these supposed *mens*

rea components which were absolutely irrelevant for purposes of any species of homicide.

This was most apparent during the cross-examination of Dr. Caruso and Mr. Page.

> Q. [By General Carney] Isn't it true, Dr. Caruso, that James Page knew that he had the bat in his hand?
>
> A. [By Dr. Keith Caruso] Yes, he knew he had the bat in his hand.
>
> Q. Okay. Isn't it true that James Page knew when he raised the bat? Raised the bat up?
>
> A. He was acting impulsively at that moment, but he did know he was raising a bat, yes.
>
> Q. Isn't it true, Dr. Caruso, that he knew when he swung the bat?
>
> A. He knew that he was swinging it, yes.
>
> Q. And isn't it true, Dr. Caruso, that James Page intended to strike Christopher Jones?
>
> A. I would say that while he did not intend to kill him, and he did not intend to hurt him, he intended to strike him, yes.

Trial Transcript, January 26, 2001, Volume XIII, pp. 114 - 115.

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> Q. [By General Crenshaw] Okay, you were aware that you had a bat in your hand, weren't you? When you followed across in that field?
>
> A. [By Mr. Page] Yes, sir.
>
> Q. You knew you were holding the bat in your hand?
>
> A. Yes, sir.

Q. And you were aware when you picked the bat up, is that correct, when you raised it up?

A. Yes, sir.

Q. Okay, and you were aware when you swung it at James Page, weren't you?

THE COURT: You misspoke.

GENERAL CRENSHAW: I'm sorry, you're right, Your Honor. The late hour. You were aware when you swung it at Chris Jones, weren't you?

THE WITNESS: Yes, sir, I knew I swung.

Q. It is your testimony you didn't intend to him in the head, is that right?

A. Yes, sir, I didn't intend to hit him in the head.

Q. But you did intend to hit him, is that correct?

A. At the very last minute, yes sir, I swung the bat.

Q. And you knew you were swinging the bat?

A. Yes, sir.

Q. And you intended to hit him with the bat?

A. Yes, sir. When I swung the bat, I intended to hit him.

GENERAL CRENSHAW: That's all for now, Your Honor.

Trial Transcript, January 25, 2001, Volume XII, pp. 413 - 414.

This cross-examination was calculated to satisfy the supposed *mens rea* "elements" of murder which, as noted, are really non-elements of the offense. This was calculated to convict the defendant based on admissions of "elements" which should never have been

considered by the jury. This became most apparent in the government's effort to block the testimony of Dr. Caruso:

> [By General Crenshaw to the Court]: In Dr. Caruso's reports he references what he relied upon, and there were different reports relied upon - - additional reports relied upon; in other words, purported witness interviews by investigators for the preparation of the last report as opposed for the preparation of the first report, and resulted in a highly different statement of facts. We think that's prejudicial and unfair to the State. And for not timely complying with our request or supplying that background information we object to Dr. Caruso's testimony or to the receipt of his report.
>
> Finally, the State would argue that Dr. Caruso's report is intended to submit evidence under the *Hall* case and *Fipps* (phonetic spelling) case that the Defendant lacked the ability to form the intent to act knowingly on the date in question because of a mental disease or defect to wit: Alcoholism. The State's position today is that at that - - this point that is a moot issue.
>
> Last night in cross-examination of the Defendant he was asked if he knew he was carrying the bat when he left the truck. He responded in the affirmative. Last night during cross-examination of the Defendant he knew - - he was asked if he knew he was raising the bat; and he replied in the affirmatively. And last night during cross–examination he was asked if he knew when he swung the bat; and responded in the affirmative. And finally last night during cross-examination he was asked did he intentionally swing the bat to hit Chris Jones; and he answered in the affirmative.
>
> Those admissions constitute the test for acting knowingly, which is an alternative test separated by the word "or." And the first part of the definition of knowingly has been completely satisfied by the cross-examination last night and the admissions made by the Defendant. And, therefore, we think any further testimony on the issue of the Defendant's ability to form the intent has now become moot.

Trial Transcript, January 26, 2001, Volume XIII, pages 8 - 10.

It is apparent that the prosecutor was using the prohibited, extra *mens rea* elements out of the pattern jury instructions to argue that even the defendant's expert was irrelevant. Indeed, the prosecutor focused on the disjunctive "or" and said nothing about the real mental element of homicide regarding the defendant's subjective awareness of inflicting death.

The error was most profound when the prosecutors made their closing arguments to the jury. The prosecutors repeatedly referenced what the defendant "knew" as if that had something to do with the statutory "elements" of the offense:

> [By General Carney to the Jury]: "You heard testimony last night from the Defendant that he wanted to scare them. Screw this. Let's turn the truck around. I still felt disrespected. When I swung the bat I intended to hit him; was his exact words. When I swung the bat I intended to hit him. He knew what he was going out there, Ladies and Gentlemen. He knew all along the way what was going on.
>
> Sure, he may have been drinking some beer. You've got to decide that. Did he know what he was doing when he was doing it out there on the street?
>
> You heard Dr. Caruso and the questions that I asked him this morning. One: He knew that he had the bat. Secondly: He knew when he raised the bat. He knew when he swung the bat. And he intended to strike Chris when he swung the bat. The testimony wasn't he didn't intend to hit him in the head. He didn't think that.
>
> I say he intended to hit him in the head because there are witnesses that you all heard testimony from of what he said. He said it when they turned that truck around. You all heard that, and I'm not going to repeat it. What he wanted to do.
>
> And let's talk just a bit about what he had knowledge of, and how he acted knowingly. And the Judge will give you the definitions of that. And read those and study them.

But I'm going to go through a checklist with you about what he knew and when he knew it. First thing is he wanted to go to the mall. Had an attitude problem. He wanted to go to the mall. And what did he want to do? He wanted to fight.

He initiated this instance by hollering out the window you're ugly. He got out of the truck and approached them. He knew what he was doing when he did that. He came back to the truck to get the bat. He knew what he was doing when he did that. He got the bat, turned around and went back towards the three. He knew what he was doing when he did that. He came back, got in the truck. Kept the bat between his legs. He knew what he was doing when he did that.

Then the next thing he did with the bat, what did he do? Stuck it out the window of the truck so Brian could swerve over. Stick it partially out of the truck where he could hit him. He knew what he was doing when he did that. Got back in the truck. Kept the bat between his legs and pondered what he wanted to all the way up to Crossland and Golf Club Lane.

When he got up there, what did he say? Fuck it; turn the truck around. That's what he said. One of the boys heard that. He said he said screw it; turn the truck around. You all determine what was said out there. And when he said it he knew what he said. He knew what he was doing when he said it.

Turned around and came back. He knew what he was doing when he got out of the truck. He knew what he was doing when he followed them up the road. He knew what he was doing when he crossed over and started behind them in the field.

Every single step that he took - - and you all look at that big diagram. Every single step that he took going in that - - in that grassy area up there he knew what he was doing, because he was going in the direction with these people. He knew what he was doing when he was hollering at them.

He knew what he was doing when the - - when he said to these - - said to Chris, hey, you going to stab me with that? You going to stab me with that? Instigating it on. Are you going to

stab me with that? He knew what he was doing when he was saying those things. He knew what he was doing when he carried the bat in his hand all across that field. You all look at those measurements in that diagram.

He knew what he was doing, Ladies and Gentlemen, when he snuck up behind them in a cowardly act, raised that bat, swung it. Because he intended to hit him in the head with the bat. Why? Because he felt intimidated? Intimidated from three people walking away from him the whole time? How are you intimidated from that? Oh, he had a knife, yeah. It was put up at the time he got struck.

Comes running back to the truck. This is right after it happened. He knew what he was doing when he started running; didn't he? He knew what he was doing when he threw the bat up in the back. He knew what he was doing when he jumped in the truck. He knew what he was doing when he hollered out.

They get back to the house. Now, we have to have a recreatement of it. Some of the witnesses said they didn't see what happened until James told them what happened. Told them in what way? Recreated the incident way. He knew what he was doing when he did that. He remembered, Ladies and Gentlemen, what he did. Not as if he had some kind of black out.

He knew what he was doing. He knew what he was doing because he had the memory to recreate it. To tell it again. <u>He knew what he was doing.</u>

When they came back he knew what he was doing when he intentionally didn't stop to aide them, to tell the police what had happened, to even claim self-defense. You heard that last night on the witness stand. He knew what he was doing when they went to the bowling alley. He knew what he was doing when they came back to the house. And we all know he knew what he was doing after it was all over, because they intended to make up an alibi which was later broken.

His own admission last night on the witness stand that he knew what he was doing when he swung the bat and that he intended to hit Chris.

Transcript of Trial, Volume XIII, January 26, 2001, pages 153-159.

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[By General Crenshaw to the Jury]: You know, the court will instruct you, in my opinion, what the State has to prove for you to find the Defendant guilty of the crime charged, which is second degree murder. And I believe the Court's going to tell you that for you find the Defendant guilty the State must prove beyond a reasonable doubt - -

MR. LOVE: Object. Beyond the scope.

THE COURT: Overruled.

GENERAL CRENSHAW: The following essential elements: One, that the Defendant unlawfully killed the alleged victim. That fact is no longer contested. It has never been contested by the Defense that the Defendant's actions did not result in the death of Christopher Boyce Jones. It was admitted in opening statement, and now in final argument this afternoon.

Mr. Love tells you that he doesn't think there's evidence to support self-defense. So, if it wasn't self-defense as admitted by Defense Counsel just to you a few moments ago, then it was an unlawful killing. So, element one that the Defendant unlawfully killed the alleged victim is admitted by the Defense, and not contested.

The second thing the State has to cause - - or excuse me, has to prove beyond a reasonable doubt is that the Defendant acted knowingly. And I expect the Judge to define that term for you in the written instructions he will both read to you and give to you to take to the jury room. And I expect that definition to include that the person acts knowingly if a person acts with an awareness that his conduct is of a particular nature.

Well, there is no disputing that both James Page and his expert witness, Dr. Keith Caruso, testified last night and today respectively that James Page knew that he carried a bat in his hand as he crossed the field; that James Page knew when he raised the bat in his hand; that James Page knew when he swung the bat, and that James Page intended to strike Chris Jones. So, the Defendant clearly was aware that his conduct was of a particular nature. He acted knowingly.

Nothing else is required to prove that the Defendant acted knowingly. And you will see and read the Judge's instructions which say that. And you've taken an oath to follow the law, and we ask you to do so.

Knowingly can also be proven in two other ways. And that is if a person acts with an awareness that a particular circumstance exists, or that the conduct was reasonably certain to cause the result.

Well, I don't think there's much reasonable doubt - - - strike that. The State doesn't contend that James Page knew or intended - - started out premeditatedly to kill Christopher Boyce Jones. But a person under the law, as it will be charged to you by the Judge, doesn't have to intend to kill. If you - - you act knowingly if you know what you're doing. If you consciously make the choice to do it. And Mr. Page certainly was aware of the choices he was making when he swung the bat intending to hit Chris Jones.

It isn't even necessary for the Defendant to be found guilty of murder in the second degree that he intended to hit him in the head. The fact that he intended to hit him shows he acted knowingly, because knowingly, the Court will instruct you, also includes the term of acting intentionally.

Those are the two necessary elements for the jury to find the Defendant guilty of murder in the second degree. There can be no doubt that those two elements have been proven beyond any reasonable doubt, as the Court will define that term for you. ...

Transcript of Trial, Volume XIII, January 26, 2001, pages 182 - 186, lines 19 - 20.

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> [by General Crenshaw to the Jury] You know the number of beers drank, the best friends of James Page told you that the highest estimate of any of his best friends was seven. The only person who's testified to more than seven is the Defendant. No one else. And unless he was so intoxicated that it constitutes evidence that he didn't act knowingly, then it doesn't reduce this crime from murder in the second degree.
>
> Now, I've already gone over with you how knowingly is defined. You can read it in the instructions for yourself.

Transcript of Trial, Volume XIII, January 26, 2001, pages 190-191, lines 18 - 7.

The State argued over and over about the various alternative *mens rea* elements of "knowingly" which are not proper statutory elements of the offense of murder. However, when it came to the correct definition, that of whether "the conduct was reasonably certain to cause the result" the prosecutor conceded that: "The State doesn't contend that James Page knew or intended - - started out premeditatedly to kill Christopher Boyce Jones." (Transcript of Trial, Volume XIII, January 26, 2001, page 185, lines 15 - 20).

The error in this case is of constitutional magnitude. Consequently the burden shifts to the State to prove harmlessness beyond a reasonable doubt. In this case the defendant's mental state was not just an issue, it was the only issue. In this case there was no evidence that Mr. Page acted "knowingly" as that term is properly used in the homicide statute. Mr. Page was not aware that his act of swinging the bat and hitting the boy in the head was reasonably certain to cause his death. Page did not believe that he had hit the boy that hard. No one had.

Instead, the proof was that Mr. Page should have been aware of the high risk death might occur. This, of course, is the test for criminally negligent homicide and not murder. Unless the government can now show that the proof of murder was absolutely overwhelming and that the *mens rea* issue was not seriously contested, this Court must grant Mr. Page a new trial. For example, had the defense been one of alibi then arguably *mens rea* would have been an irrelevant consideration and harmless error could perhaps be present. That is certainly not the case here. Thus, the State is incapable of proving harmless constitutional error beyond a reasonable doubt.

H.

It is one of the most elementary propositions of law that a jury is presumed to follow the instructions of the court. *State v. Cribbs,* 967 S.W.2d 773, 784 (Tenn. 1998). By following the improper instructions the jury could have convicted Mr. Page unlawfully by relying upon improper elements. It is true that a portion of the instruction given here was correct but there were other inconsistent and contradictory instructions regarding supposed *mens rea* "elements." This in no way corrects the improper instructions:

> "Instructions as a whole must be consistent and harmonious, not conflicting and contradictory. . . . Where instructions given to the jury for their guidance present contradictory and conflicting rules which are unexplained, and where following one would or might lead to a different result than would obtain by following the other, the instructions are inherently defective. This is true although one of the instructions correctly states the law applicable to the facts of the case, since the correct instruction cannot cure the error in the contradictory erroneous instruction."

State v. Stephenson, 878 S.W.2d 530, 555 (Tenn. 1994).

For all of the above reasons, the defense respectfully submits that the jury instructions given in this case were improper. These improper instructions were certainly not harmless beyond a reasonable doubt. Accordingly, the error is fatal and a new trial must be granted.

Issue 7. IT IS NOT NECESSARY TO DETERMINE IF THIS COURT'S OPINION IN *STATE V. DUPREE* IS "RETROACTIVE" TO A TRIAL OCCURRING FOUR DAYS PRIOR TO THE RELEASE OF THE *DUPREE* DECISION GIVEN THAT CASE LAW LIMITING THE DEFINITION OF MURDER IN THE SECOND DEGREE TO ONLY THE "RESULT OF CONDUCT" MENTAL STATE COMPONENT HAD BEEN IN EFFECT NO LATER THAN JULY 14, 2000 IN *STATE V. DUCKER*, 27 S.W.3D 889 (TENN. 2000).

A.

The trial judge was of the notion that the exclusive "result-of-conduct" requirement of "knowing" for murder in the second degree is not the law, notwithstanding controlling Tennessee Supreme Court authority. (Volume XV, page 71). In support of this proposition, the State argued below that *State v. Ducker*, 27 S.W. 3d 889 (Tenn. 2000) is purely *dicta* and should not be followed.

The State's Trial Brief argued below that the Tennessee Supreme Court in *Ducker* was only "illustrating" that second degree murder was a result-of-conduct crime. (T.R. III, page 260). To the contrary, this was a major premise of the *Ducker* opinion. This should be obvious because the Tennessee Supreme Court held that there are offenses in Tennessee which are only result-of-conduct crimes:

> "A result-of-conduct offense requires that the culpable mental state accompany the result as opposed to the nature of the conduct. *See* generally *Wallace v. State*, 763 S.W.2d 628 (Tex. Ct. App. 1989). The focus is on whether the actor possessed the required culpability to effectuate the result that the legislature has specified. Generally, an offense may be classified as a result-of-conduct offense when the result of the conduct is the only element contained in the offense. An example of a result-of-conduct offense is second degree murder which is defined as a 'knowing killing of another.' "

State v. Ducker, 27 S.W.3d 889, 896 (Tenn. 2000).

This language could hardly be described as *dicta* given that this holding was central to the finding that aggravated child abuse was a multiple element offense containing both a "nature of conduct element" as well as a "result-of-conduct element." For the reasons expressed earlier in this brief, the defense reasserts that murder can only be a result-of-conduct offense given that it only contains a single element. Thus, *Ducker* is controlling authority.

The State attempted to persuade the trial judge to ignore *State v. Dupree*, 2001 WL 91794 (Tenn. Crim. App. 2001) by pronouncing that *Dupree* is "fatally flawed" (T.R. III, page 264). The State fails to demonstrate the fatal flaw. There is nothing "flawed" about *Dupree*: it is just another application of *Ducker*.

In *Dupree*, the trial judge only charged two of the definitions of "knowing" and also omitted an instruction on the result-of-conduct definition. The *Dupree* instruction not only omitted a critical definition of the only mental state at issue, but also permitted a conviction on definitions which were not part of the mental state of murder in the second degree. Thus,

the central holding in *Dupree* is not only did the judge fail to charge the proper definition of "knowing" but also that the instruction of the two irrelevant definitions was wrong:

> "The instruction utilized in this case stating that the 'knowing' mental state could be established by showing that the defendant was aware that his conduct was of a particular nature or that particular circumstances existed was improper and placed a lesser burden on the State than required for this result-of-conduct offense."

State v. Dupree, 2001 WL 91794, (Appendix, page 147). This is exactly the situation here and this Court could not say this any differently save giving the Bench and Bar examples of proper jury instructions in homicide cases.

The State below made a passing argument that *Dupree* is distinguishable on the facts because the defendant there complained that his assault on the victim was "an accident." An "accident" is where someone does not intend for the result to occur. In short, was the accused in *Dupree* aware that his handling of the weapon was reasonably certain to cause the result of death?

In *Dupree* this Court evaluated the evidence in a light most favorable to the State and concluded that the evidence presented to the jury in *Dupree* was sufficient to support the conviction. However, this Court concluded that the plainly erroneous jury instructions undermined any confidence in the judgment. Likewise, our case here is indistinguishable from *Dupree* since James Page and other witnesses repeatedly indicated that Page was unaware that this boy would die. Thus, the erroneous jury instructions undermine all reasonable confidence in the jury's verdict here.

The differences in *Dupree* and the present facts are only marginal. The point here is that the burden of proof should have been on the State to show that Mr. Page was aware of the reasonable certainty that the victim would die. The State was relieved of that burden by instructions which permitted a conviction if the State could show only Mr. Page's "conduct" or the "circumstance surrounding the conduct." The State has never argued that these instructions were correct in any manner.

Moreover, this Court should well consider the fact that the State relied exclusively on the prohibited mental element definitions throughout the entire trial! Indeed, as pointed out earlier in this Brief, the State disavowed the result-of-conduct definition of knowing in closing arguments to the jury. The prosecutor should not now be heard to say he proved something which he had argued to the jury was unnecessary. The improper jury instructions were not harmless particularly given the way the State capitalized on these instructions to acquire a conviction. This Court should not follow the government's position that *Ducker* and its progeny should simply be ignored.

B.

The defense also relies on the very recent Tennessee Supreme Court case of *State v. Ely*, 48 S.W.3d 710 (Tenn. 2001) (Appendix, page 129) which involved two murder convictions. Actually there were two entirely separate defendants in *Ely* whose appeals were consolidated by the Supreme Court. It should be more helpful to discuss these cases separately.

One of the defendants in *Ely* was Laconia Bowers. Mr. Bowers was involved in the drug business. He approached some people in a van, and, apparently upset over some drug transaction, fired at the people in the van, killing one person. As to the sufficiency of the evidence, the Supreme Court found that by firing a handgun in the direction of the van containing the three people, Bowers could have been convicted of murder in the second degree. The Court held that this "clearly falls within the definition of knowing conduct because Bowers had to be aware that he was reasonably certain to strike and kill one of those people." *State v. Ely*, 485 S.W.3d, at page 724. There is nothing remarkable about this language. It is just another example of result-of-conduct homicide.

The State may argue that Mr. Bowers' appeal in *Ely* is somehow similar to the facts in Mr. Page's case so as to justify the erroneous jury instructions here. A pistol is a deadly weapon *per se*. A baseball bat is not a deadly weapon *per se* and that, of course, is difference enough.

The State argued below that the way the victim was struck here and the "force of the blow" all resulted in second degree murder. (T.R. III, page 267). Of course this is not the test. It is not what some objective observer might think. Rather, second degree murder uses a subjective standard since the State must prove that the defendant himself or herself "was aware" of the "reasonable certainty that death would result."

The vital importance and crucial difference of the subjective standard used in second degree murder can be illustrated by comparing the various standards used in homicide. Those differences in the degrees of homicide are plainly obvious once we compare the

subjective standard of second degree murder with the objective standard used in negligent homicide. Thus, if we were to ignore the different standards or merge them all into one objective rationale as the State tries to persuade, we would be left with the inescapable conclusion that there is no difference between the degrees of culpability in homicide cases. In short, the State really seems to be asking this Court to ignore the law and recreate the standard for second degree murder in the instant case. All roads do not lead to Rome.

Recall that the facts in this case demonstrate that Mr. Page struck the deceased but a single time. Mr. Page immediately ran from the scene perhaps fearing that the deceased had only suffered a glancing blow and would be on his feet in moments to pursue and harm Mr. Page particularly given that he was armed with a knife. Moreover, if Mr. Page wanted to be "reasonably certain" that he had killed the victim, then Mr. Page surely would have struck the victim multiple blows, but of course that is not what occurred.

Mr. Page's state of mind was central to this case and indeed, was the only issue which was litigated. Mr. Page, as well as the witnesses, all testified that they had no idea that the boy had died which obviously meant that there was no idea that he had been killed by the single blow. The instant case is of far different circumstance than firing a pistol in a crowed van which is calculated to cause death by definition.

In *Ely* the Supreme Court properly utilized only the result-of-conduct analysis to access the sufficiency of the evidence regarding Mr. Bowers' portion of the appeal. This is important since that portion of the *Ely* opinion supports rather than detracts from Mr. Page's arguments here.

C.

As noted, there were two separate appeals in *Ely*, one involving Mr. Bowers and the other involving Curtis Ely. The companion appeal involving Mr. Ely is worth discussing here both with regard to the facts and the suggestion in this companion appeal that proof of "the nature of conduct or the result-of-conduct" can support a conviction for murder in the second degree.

With respect to Mr. Ely, the evidence showed that "intruders broke into the home of seventy-year-old William Bond and repeatedly struck him over the head with a brick, killing him." *State v. Ely*, 48 S.W.3d, at page 714. The opinion continues to relate that the intruders took several pieces of electronic equipment from the home and thus one can glean that Mr. Bond was killed in the middle of a burglary.

It is important to note that the facts in *Ely* involved the repeated striking of the victim with a brick. While the Supreme Court's opinion does not disclose how many blows were struck, clearly there were several, since the earlier opinion of the Court of Criminal Appeals describes the cause of death as "numerous blows to the head with a brick." *State v. Ely*, Court of Criminal Appeals, Appendix, page 86. The Court of Criminal Appeals also stated later in the opinion that "the victim was unquestionably beaten to death with a brick and robbed,. . . ." Appendix, page 88.

Certainly a jury could conclude from all of these facts that the Mr. Ely was aware that he was reasonably certain to cause death by inflicting "numerous blows to the head [of the victim] with a brick." It is the repeated beating which allows the jury to conclude that the

accused there was aware that it was reasonably certain that death would result. This factual situation in *Ely* is significantly different than the facts here involving Mr. Page since, as has been noted, there was but a single strike and death was certainly unanticipated.

In the original opinion in *Ely,* the Tennessee Supreme Court assessed the sufficiency of the evidence as to Mr. Ely's appeal as follows:

> Our review of the record leads us to conclude that there was, however, sufficient evidence from which reasonable jurors could have convicted Ely of second degree murder, reckless homicide, or criminally negligent homicide. If the jury believed that Ely was present, it may have reasonably concluded that his actions in either repeatedly striking the victim over the head with a brick, or assisting co-defendant Carden as he did so, constituted *at least* criminally negligent, reckless, or knowing conduct. Certainly one who participates in beating another person over the head with a brick "ought to be aware of a substantial and unjustifiable risk [death] will occur." If the jury believed this theory of the offense, it could have convicted Ely of criminally negligent homicide. Tenn. Code Ann. § 39-11-302(d). Alternatively, an ordinary person engaging in such conduct would be aware of the "substantial and unjustifiable risk that [death] will occur." If the jury believed that Ely was aware of, but consciously disregarded, such risk, it could have convicted him of reckless homicide. Tenn. Code Ann. § 39-11-302(c). Similarly, participation in beating a victim over the head with a brick is conduct "reasonably certain to cause [death]." Tenn. Code Ann. § 39-11-302(b). If the jury believed that Ely was "aware of the nature of the conduct or that [his] conduct [was] reasonably certain to cause [death]," *i.e.*, a knowing killing, it may have convicted him of second degree murder. We believe that a conviction for any of these three lesser-included offenses was supported by the evidence, and that failure to instruct these offenses was error.

Slip opinion page 15 (Appendix, page 111).

The result-of-conduct analysis in *Ely* supports Mr. Page's position that the killing in our case could constitute lesser offenses depending on whether Mr. Page's mental state was recklessness or negligence. These two mental states turn on the distinctions of whether Mr. Page was aware of or should have been aware of the high risk that the victim might have

died. This is unquestionably of a different magnitude than being actually aware of the reasonable certainty of death which is what the "knowing" mental state requires for murder.

There is, however, unfortunate language in *Ely* which suggests that being aware of the "nature of conduct" or being aware of the "result" is sufficient to sustain a verdict of murder in the second degree:

> If the jury believed that Ely was "aware of the nature of the conduct or that [his] conduct [was] reasonably certain to cause [death]," *i.e.*, a knowing killing, it may have convicted him of second degree murder.

Slip opinion page 15 (Appendix, page 111). This "nature of conduct or result-of-conduct" language which appears in *Ely* lends support to the State's position here. Thus, it is deserving of some discussion.

The only possible response to this just quoted portion of *Ely* is that the Tennessee Supreme Court's inclusion of the alternative "nature of conduct" language was simply inadvertent. This is not the first time that inappropriate mental state definitions have found their way into appellate opinions.

On February 16, 1999 the Tennessee Supreme Court released an opinion in *State v. Millen* dealing with the "transferred intent" doctrine. The following language appeared in the opinion:

> "The statutes, however, further make clear that a defendant may also be charged, tried, and convicted of premeditated and deliberate murder as well. The legislature has broadly defined an "intentional" act as: "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." Tenn. Code Ann. § 39-11-302(a) (1991) (emphasis added). **Accordingly, a plain reading of this statute as applied**

> **to first degree murder indicates *that a defendant's conscious objective need not be to kill a specific victim, i.e., cause a given result, but rather to "engage in the conduct"* constituting first degree murder. In short, if the evidence demonstrates that the defendant *intended to engage in the conduct of first degree murder,* and that he did so with premeditation and deliberation, then the killing of another, even if not the intended victim (i.e., intended result), is first degree murder.**"

State v. Millen (February 16, 1999 opinion) (Appendix, page 47, slip opinion pages 7-8).

The defendant in *Millen* filed a petition to rehear as to the "transferred intent" issue. (Appendix, page 50). The Tennessee Association of Criminal Defense Lawyers also filed an *Amicus* Brief to that petition. (The *Amicus* Brief appearing at Appendix, page 57). However, the *Amicus* Brief ALSO pointed out that homicide is a "result-of-conduct" crime and that the "nature of conduct" language should not be utilized in determinating the sufficiency of the evidence for that offense. On April 26, 1999 the Supreme Court entered the following Order:

> "The appellant, Bryant Dewayne Millen, through counsel, has filed a petition for rehearing in this appeal pursuant to Tenn. R. App. P. 39(a). A motion to proceed as amicus curiae and a brief in support of the appellant's petition for rehearing has been filed by the Tennessee Association of Criminal Defense Lawyers.
>
> After due consideration, it is ORDERED that the petition and the motion to proceed as *amicus curiae* is denied. It is further ORDERED, however, that the attached opinion is hereby substituted for the opinion filed on February 16, 1999, without change to the judgment already entered in this matter and without the further taxing of costs.

State v. Millen (Order of April 26, 1999) (Appendix, page 76).

The reissued opinion is identical to the first opinion except for the following paragraph:

> "The statutes, however, further make clear that a defendant may also be charged, tried, and convicted of premeditated and deliberate murder as well. The legislature has broadly defined an "intentional" act as: "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." Tenn. Code Ann. § 39-11-302(a) (1991) (emphasis added). **A plain reading of this statute as applied to first degree murder indicates that a defendant's conscious objective need not be to kill a specific victim. Rather, the statute simply requires proof that the defendant's conscious objective was to kill a person, i.e., *"cause the result."* In short, if the evidence demonstrates that the *defendant intended to "cause the result,"* the death of a person, and that he did so with premeditation and deliberation, then the killing of another, even if not the intended victim (i.e., intended result), is first degree murder."**

State v. Millen (April 26,1999 opinion) (Appendix, page 84, slip opinion page 8).

The reissued Opinion obviously altered the original "nature of conduct" mental state definition to the "result" definition. So that there is absolutely no doubt about the matter here are the two opinions side-by-side :

First Version:

Accordingly, a plain reading of this statute as applied to first degree murder indicates *that a defendant's conscious objective need not be to kill a specific victim, i.e., cause a given result, but rather to "engage in the conduct"* constituting first degree murder. In short, if the evidence demonstrates that the defendant *intended to engage in the conduct of first degree murder,* and that he did so with premeditation and deliberation, then the killing of another, even if not the intended victim (i.e., intended result), is first degree murder.

Amended Version:

A plain reading of this statute as applied to first degree murder indicates that a defendant's conscious objective need not be to kill a specific victim. Rather, the statute simply requires proof that the defendant's conscious objective was to kill a person, i.e., *"cause the result."* In short, if the evidence demonstrates that the *defendant intended to "cause the result,"* the death of a person, and that he did so with premeditation and deliberation, then the killing of another, even if not the intended victim (i.e., intended result), is first degree murder.

State v. Millen is now published at 988 S.W.2d 164 (Tenn. 1999) in its revised form. *Millen* is thus further authority for the proposition that homicide is exclusively a result-of-conduct crime as the defense has argued throughout this Brief.

But what of the questionable "conduct or result-of-conduct" language in *Ely* ? This is inexplicably contrary to the revised opinion in *Millen* as well as *State v. Ducker*, 27 S.W.3d 889, 896 (Tenn. 2000) which held that murder is only a result-of-conduct offense:

> "A result-of-conduct offense requires that the culpable mental state accompany the result as opposed to the nature of the conduct. See *generally Wallace v. State*, 763 S.W.2d 628 (Tex. Ct. App. 1989). The focus is on whether the actor possessed the required culpability to effectuate the result that the legislature has specified. Generally, an offense may be classified as a result-of-conduct offense when the result of the conduct is the only element contained in the offense.
>
> An example of a result-of-conduct offense is second degree murder, which is defined as a "knowing killing of another." Tenn. Code Ann. § 39-13-210(a)(1). In second degree murder, the result of the conduct is the sole element of the offense. The "nature of the conduct" that causes death or the manner in which one is killed is inconsequential under the second degree murder statute. The statute focuses purely on the result and punishes an actor who knowingly causes another's death. The intent to engage in conduct is not an explicit element of the state's case in second degree murder. Accordingly, a result-of-conduct crime does not require as an element that an actor engage in a specified course of conduct to accomplish the specified result."

27 S.W.3d, at 896.

Although the "conduct or result-of- conduct" dichotomy was not actually at issue in *Ely* it became so by virtue of the unfortunate language contained in the opinion. Consequently, the defendant in *Ely* filed a petition to rehear pointing out the discrepancy and requesting that the Supreme Court modify its opinion so as to make it consistent with its earlier opinion in *Ducker*. See, Petition to Rehear in *State v. Ely*, Appendix, page 115.

The Petition to Rehear filed by Mr. Ely pointed out the allegedly erroneous language in the original Opinion and suggested some alterations:

> "Permitting a conviction based on an irrelevant definitions of "knowingly" – when only the result-type is proscribed – drastically alters the State's burden of proof in any criminal case. The danger is that a jury could convict based on a mental element component that was not part of the definition of the crime. *See State v. Patton*, 280 Mont. 278, 930 P.2d 635, 643 (1996) ("conduct" instruction improper since it allowed jury to convict defendant of homicide "solely on basis that he consciously engaged in conduct without regard to whether [the resulting] harm was intended"). This is why the following portions (~~stricken where inappropriate~~ or underlined where text added) of this Court's opinion in petitioner's case should be modified:
>
> 'Our review of the record leads us to conclude that there was, however, sufficient evidence from which reasonable jurors could have convicted Ely of second degree murder, reckless homicide, or criminally negligent homicide. If the jury believed that Ely was present, it may have reasonably concluded that his actions in either repeatedly striking the victim over the head with a brick, or assisting co-defendant Carden as he did so, constituted *at least* criminally negligent homicide, reckless homicide, or ~~knowing~~ ~~conduct~~ second degree murder . Certainly one who participates in beating another person over the head with a brick "ought to be aware of a substantial and unjustifiable risk [death] will occur." If the jury believed this theory of the offense, it could have convicted Ely of criminally negligent homicide. Tenn. Code Ann. § 39-11-302(d). Alternatively, an ordinary person engaging in such conduct would be aware of the "substantial and unjustifiable risk that [death] will occur." If the jury believed that Ely was aware of, but consciously disregarded, such risk, it could have convicted him of reckless homicide. Tenn. Code Ann. § 39-11-302(c). Similarly, participation in beating a victim over the head with a brick is conduct "reasonably certain to cause [death]." Tenn. Code Ann. § 39-11-302(b). If the jury believed that Ely was "aware ~~of the nature of the conduct or~~ that [his] conduct [was] reasonably certain to cause [death]," *i.e.*, a knowing killing, it may have convicted him of second degree murder. We believe that a conviction for any of these three lesser-included offenses was supported by the evidence, and that failure to instruct these offenses was error'. "

Appendix, pages 116-117.

The pertinent portion of the State's Brief on Petition to Rehear (contained in the Appendix at page 124 and in this record at T.R. IV, page 478) was as follows:

> "The State agrees that the element of knowing for the offense of second degree murder relates to the result of the defendant's conduct, not the nature of the defendant's conduct. See *State v. Ducker*, 27 S.W.3d 889, 896 (Tenn. 2000)(characterizing second degree murder as a result-of-conduct offense). Therefore, the State agrees that, to the extent that the eighth sentence of the above-quoted paragraph would permit the 'knowing' element of second degree murder to be proved by a showing that Ely was aware 'of the nature of the conduct,' the statement is in conflict with §39-13-210 and *Ducker*. *See* Rule 39(a) T.R.A.P.. Accordingly, the State agrees that sentence eight should be modified as suggested by Ely.
>
> However, the second sentence of that paragraph is a correct statement of the law. The sentence's reference to 'criminally negligent, reckless, or knowing conduct' is an accurate description of the acts prohibited by the statutory offenses of criminally negligent homicide, reckless homicide, and second degree murder. Each statute requires some conduct or action by the defendant accompanied by a particular mental state. Tenn. Code Ann. § 39-13-212 (criminally negligent homicide) ('criminally negligent conduct which results in death'); § 39-13-215 (reckless homicide) ('reckless killing of another'); § 39-13-210 (second degree murder) ('knowing killing of another'). Sentence two is not in conflict with a statute, prior decision, or other principle of law. Therefore, Ely's suggested. modification of sentence two is unwarranted."

Appendix, pages 125-126.

On July 13, 2001 the Supreme Court issued a *Per Curiam* Order rejecting the State's argument and granting the Petition to Rehear which modified that portion of the original Opinion precisely as suggested by Mr. Ely:

> "Our review of the record leads us to conclude that there was, however, sufficient evidence from which reasonable jurors could have convicted Ely of second degree murder, reckless homicide, or criminally negligent homicide. If the jury believed that Ely was present, it may have reasonably concluded that his actions in either repeatedly striking the victim over the head with a brick, or assisting co-defendant Carden as he did so, constituted at least criminally negligent homicide, reckless homicide, or second degree

murder. Certainly one who participates in beating another person over the head with a brick "ought to be aware of a substantial and unjustifiable risk [death] will occur." If the jury believed this theory of the offense, it could have convicted Ely of criminally negligent homicide. Tenn. Code Ann. § 39-11-302(d). Alternatively, an ordinary person engaging in such conduct would be aware of the "substantial and unjustifiable risk that [death] will occur." If the jury believed that Ely was aware of, but consciously disregarded, such risk, it could have convicted him of reckless homicide. Tenn.Code Ann. § 39-11-302(c). Similarly, participation in beating a victim over the head with a brick is conduct "reasonably certain to cause [death]." Tenn.Code Ann. § 39-11-302(b). If the jury believed that Ely was "aware...that [his] conduct [was] reasonably certain to cause [death]," i.e., a knowing killing, it may have convicted him of second degree murder. We believe that a conviction for any of these three lesser-included offenses was supported by the evidence, and that failure to instruct these offenses was error."

State v. Ely, 48 S.W. 3d 710, 724-725 (Tenn. 2001), Appendix, page 141.

The modified Opinion was accompanied by an Order:

"ORDER GRANTING DEFENDANT'S PETITION TO REHEAR PER CURIAM"

The defendant, Curtis Jason Ely, has respectfully filed a petition to rehear the opinion of this Court filed on June 5, 2001. In his petition, the defendant alleges that due to particular wording used in its opinion, the Court may have characterized the offense of second degree murder as a nature-of-conduct offense and changed the nature of the State's burden of proof on retrial. Upon request by this Court, the State has filed a response to the petition, and although it agrees that some language in the opinion may inaccurately characterize the offense of second degree murder, it believes that other changes are unwarranted.

We have previously recognized that second degree murder is a result-of-conduct offense, see *State v. Ducker*, 27 S.W.3d 889, 896 (Tenn. 2000), and consequently, the mens rea required for that offense accompanies only its resulting harm, not the nature of the defendant's conduct. Although we did not intend to depart from this reasoning in the present case, some statements in the opinion of this Court may admittedly indicate otherwise.

Therefore, upon due consideration, we conclude that the Defendant's Petition to Rehear is well taken and should therefore be GRANTED. Accordingly, for good and sufficient reasons appearing to the Court, the

> opinion previously entered in this case on June 5, 2001, is hereby withdrawn, and the Clerk of the Court is hereby directed to file the amended and substituted opinion of the Court accompanying this Order. The judgment of this Court previously entered remains unchanged.
>
> Costs associated with this petition are waived."

State v. Ely, 48 S.W. 3d 710, 728 (Tenn. 2001), Appendix, page 129.

The modified *Ely* Opinion, when read in conjunction with the pleadings of the State and Defense on Petition to Rehear and the Supreme Court's *Per Curiam* Order, leave no doubt that *Ducker* is not mere *dictum*. Murder is only a result of conduct crime. This doctrine applies on appeal AND at the trial. That the Supreme Court in *Ely* considered the issue in the context of what the JURY had to consider when Mr. Ely's case would be tried anew should resolve the question of the content of jury instructions concerning *mens res* definitions. It remains only to squarely hold that jury instructions must not only *include* the result-of-conduct definition (*Dupree*) but, as presented here, must also *exclude* the conduct and circumstances definitions when the defendant is charged with murder.

D.

The trial judge found that the defense argument here had merit and that he had now altered his jury instructions in light of *State v. Dupree*, 2001 WL 91794 (Tenn. Crim. App. 2001), no permission to appeal sought. See Volume XV, page 33: "And this Court has modified its instruction in this regard on the strength – on the authority I should say, of *Dupree*." However, the trial judge denied a new trial here because he found that *Dupree* was not controlling because it was "not retroactive" to this trial occurring four days earlier.

Volume XV, pages 73-74. The defense asserts that "retroactivity is not an issue here. *Ducker* was the law some six month earlier.

It could be argued that the law prior to *Ducker* was unsettled. This Court first addressed the question in *State v. Garrison*, 1995 WL 555067 (Tenn. Crim. App. 1995) (Appendix, page 37) and held that homicide can involve more than just "result of conduct" definitions. To that extent, with all due respect, *Garrison* is wrongly decided. More recently this Court held in *State v. Kelly*, 1998 WL 712268 (Tenn. Crim. App. 1998) (Appendix, page 25) that murder is an offense defined by the result, not by the offender's conduct.

The Supreme Court touched on the issue in *State v. Millen*, 988 S.W.2d 164 (Tenn. 1999) if, as has been noted earlier, one is aware of the distinctions between the opinion when it was first released and the opinion in its current form after the petition to rehear was considered. Clearly, however, *State v. Ducker* resolved the matter by holding that murder in the second degree is only a result of conduct crime: "Accordingly, a result-of-conduct crime does not require as an element that an actor engage in a specified course of conduct to accomplish the specified result." 27 S.W.3d, at 896.

Since *Ducker,* appellate courts have utilized only the "result of conduct" standard in assessing the sufficiency of the evidence on appeal. See e.g. *State v. Kelley*, 34 S.W.3d 471, 478 (November 20, 2000) ("Shooting at a car from a distance of one to one and one-half car lengths is reasonably certain to result in the death of an occupant").

It is ludicrous to suggest that while appellate courts only use the "result of conduct standard" on appeal that a trial judge can also instruct the jury that it may convict on the " nature of conduct" and " circumstances surrounding conduct" definitions as well. Since

Ducker held that "a result-of-conduct crime does not require as an element that an actor engage in a specified course of conduct to accomplish the specified result" one cannot instruct the jury about "elements" which are not part of the definition of the mental state of the crime. This appeal is no more complicated than this basic proposition.

Assuming this Court finds that *Dupree* and not *Ducker* marks the point from which trial judges should alter their jury instructions in murder cases, [7] it is clear that *Dupree* should apply here since this case was in the "pipeline" when *Dupree* was rendered. When the Supreme Court releases an opinion involving an entirely new doctrine of law, the Court frequently articulates how that doctrine will impact pending cases and appeals. For example, in *State v. Dyle*, 899 S.W.2d 607 (Tenn. 1995), the Supreme Court discussed a new jury instruction on witness identification. At page 612, the Court held that "this ruling is applicable to cases now on appeal and those cases tried after the release of this opinion." This meant that the opinion was given "pipeline" application.

In *State v. Walker*, 905 S.W.2d 554 (Tenn. 1995), the Court held that persons under criminal sentence who present themselves for incarceration but are turned away by the sheriff, may consider the sentence satisfied under certain circumstances. The Supreme Court held, at page 557, that "we are also persuaded that the rule announced today should be prospective only and should apply only to cases tried or retried after the date of this opinion and in cases on appeal in which the issue has already been raised."

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[7] Marking the alteration from *Dupree* and not *Ducker* is a epic leap in light of the Order granting the Petition to rehear in *State v. Ely*, 48 S.W. 3d 710 (Tenn. 2001) which reaffirmed *Ducker.* Nevertheless, this Brief will address the "retroactivity" issue since the trial judge here based his ruling on the proposition that *Dupree* was not "retroactive." As a practical matter, the law has not changed since the new code went into effect in 1989. Murder has been an exclusively result- of- conduct crime for the last dozen years.

In *State v. Enochs*, 823 S.W.2d 539 (Tenn. 1991), the Court found that the thirteenth juror rule applied to all cases which were pending on direct review at the time the rule was reinstated and became effective. Lawyers who raised the issue prior to the release of *Enochs*, obtained a new trial for their clients after *Enochs* was rendered. *See e.g., State v. Barone*, 852 S.W.2d 216, 218 (Tenn. 1993).

This "pipeline" doctrine is not limited only to criminal cases. In *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992), the Supreme Court adopted new rules regarding comparative fault. At page 58, the Court held that the opinion would apply to "all cases tried or retried after the date of this opinion and all cases on appeal in which the comparative fault issue has been raised at an appropriate stage in the litigation." Identical language can be found in *McClung v. Delta Square Partnership*, 937 S.W.2d 891, 905 (Tenn. 1996) (landlord liability for crimes committed against innocent third parties by criminals on the premises); *Broadwell v. Holmes*, 871 S.W.2d 471, 477 (Tenn. 1994) (parental immunity); and *Hataway v. McKinley*, 830 S.W.2d 53, 60 (Tenn. 1992) (the "*lex loci delicti*" choice of law doctrine in a wrongful death action).

On occasion a Court neglects to articulate how a decision will "run" and must resolve the question in a later appeal:

> "We are constrained to note, however, that the absence of language directing the retroactivity of the *Jordan* decision was a product of oversight rather than the result of a judicial decision to limit Jordan to prospective application only. ... We hold that *Jordan* [loss of consortium damages were recoverable under wrongful death statute] applies retroactively to: (1) all cases tried or retried after the date of our decision in Jordan; and (2) to all cases pending on appeal in which the issue decided in Jordan was raised at an appropriate time. We are aware that our holding will require retrial of some cases and the expenditure of additional judicial resources. Still, we cannot perpetuate

> denial of retroactive application of *Jordan* when that result was not our intention."

Hill v. City of Germantown, 31 S.W.3d 234, 240 (Tenn. 2000). More frequently the appellate courts give a new decision pipeline application even without an express decision articulating retroactivity. For example, *State v. Rickman*, 876 S.W.2d 824 (Tenn. 1994) (limitations on proof-of-other-crimes in child sex abuse cases) did not articulate how it would apply in the future. Yet, the Supreme Court itself applied *Rickman* to pipeline appeals. See e.g. *State v. McCary*, 922 S.W.2d 511 (Tenn. 1996), and *State v. Dutton*, 896 S.W.2d 114 (Tenn. 1995), as did this Court in *State v. Woodcock*, 922 S.W.2d 904 (Tenn. Crim. App. 1995). See also *State v. Stokes*, 24 S.W.3d 303 (Tenn.2000) (*State v. Burns* applied to determine lesser-included offense in case which was in appellate "pipeline" prior to release of Supreme Court's *Burns* opinion).

There is nothing in this Court's *Dupree* decision which even remotely suggests that it will apply only prospectively so as to deny relief in earlier cases where the issue was properly raised later in the motion for a new trial and on appeal. Indeed, *Dupree* itself gave *Ducker* pipeline application:

> "In fairness to the trial court, we recognize that our disposition is primarily controlled by *State v. Ducker, supra*, which was decided by the Tennessee Supreme Court long after the trial of this case."

Appendix, page 148.

Given the constitutional consequences of the improper jury instructions at issue here, at least pipeline retroactivity should govern in this and future cases where the issue has been

properly raised. Thus, applying *Ducker* (or *Dupree*) to this case it is clear that this conviction should be reversed for the reasons addressed in the previous issues.

Issues 8 through 12. THE JURY INSTRUCTIONS REGARDING THE LESSER INCLUDED OFFENSES OF VOLUNTARY MANSLAUGHTER, RECKLESS HOMICIDE AND CRIMINALLY NEGLIGENT HOMICIDE WERE ERRONEOUS FOR THE REASONS ADDRESSED IN THE FIRST SEVEN ISSUES REGARDING MURDER IN THE SECOND DEGREE.

The jury instructions for the lesser included offenses of voluntary manslaughter, reckless homicide and criminally negligent homicide repeated the improper *mens rea* definitions for all the relevant mental states of intentionally, knowingly, recklessly and with criminal negligence. See Technical Record, Volume I, pages 99-117, Trial Record, Volume XIV, pages 2-31, and Exhibit 1 to Motion for New Trial, reproduced in full in the Appendix commencing at page 6, with the instructions for the lesser offenses appearing at Appendix, pages 10-13. What has been addressed in the preceding seven issues applies equally to these lesser offense as well, given that the jury will also be deliberating on these offense during the next trial. Thus, this Court should address the merits of these separate claims regarding the instructions regarding the lesser included crimes and limit the consideration of the jury to only the result-of-conduct definitions of these several mental states.

CONCLUSION

For all of the above reasons, the defense respectfully submits that the jury instructions given in this case were statutorily and constitutionally improper. These improper instructions were certainly not harmless beyond a reasonable doubt and thus this conviction should be reversed and a new trial should be granted.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Document has been sent via United States Mail to Deputy State Attorney Gordon Smith, Cordell Hull Building, Second Floor, 426 Fifth Avenue North, Nashville, Tennessee 37243, on this the ____ day of January, 2002.

_____
David L. Raybin

APPENDIX

(Contained in Separate Volume)