IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	
	)	Supreme Court No._____
	)	
vs.	)	Court of Criminal Appeals
	)	No. 02C01-9609-CC-00313
	)	
ERNEST VICKERS, III,	)	Madison County Criminal
	)	
Appellant.	)	

RULE 11, T.R.A.P. APPLICATION FOR PERMISSION TO APPEAL
FROM THE COURT OF CRIMINAL APPEALS

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INTRODUCTION

Mr. Ernest Vickers, III submits this Application for Permission to Appeal pursuant to Rule 11, T.R.A.P. from the final decision of the Court of Criminal Appeals rendered on July 3, 1997 affirming his Madison County convictions for securities fraud and related theft counts. A copy of the Opinion appears in the Appendix at page 78. No petition for rehearing was filed by either party.

The other "half" of this case is presently before this Court in *State v. Vickers and Boone*, 1996 WL 260894 (Tenn. Crim. App. 1996), Application *granted* October 28, 1996, Supreme Court Case Number 02-S01-9610-C-00092, (copy attached at Appendix, page 70), which involves an appeal by the State of the dismissal of companion indictments involving Mr. Vickers' wife and Mr. Vickers' accountant, William Boone. The essential question in that appeal is whether the statute of limitations is an issue of fact to be decided by the jury or whether it is a pure issue of law to be decided by the trial judge. Mr. Vickers, the appellant here, was also a co-defendant in that case which later resulted in a hung jury on one count and a total acquittal on all of the remaining charges as to him.

In summary, Mr. Vickers operated a bank and a separate company which sold certain certificates of investment to individuals in both Henderson and Madison Counties between 1987 and 1990. The Tennessee Department of Insurance closed the investment component of the corporation in 1990 which resulted in the closure of the First National Bank of Jackson. Mr. Vickers was indicted in both Madison and Henderson Counties for securities fraud and the alleged theft of money from private investors. He was acquitted in

Henderson County and was later convicted in Madison County.

This Rule 11 Application for Permission to Appeal from the Madison County case raises several important constitutional questions and a substantial issue of statutory construction regarding defenses under the 1989 Criminal Code. First, this Court should determine whether the "advice of counsel" is a viable "defense" to allegations involving intentional or knowing crimes such as theft or security fraud. A 1928 opinion of this Court holds that Tennessee does not recognize this defense. This Court should revisit the question in light of recent statutory changes and precedent from other jurisdictions.

Secondly, this case involves a fundamental question of collateral estoppel. Mr. Vickers' acquittal in Henderson County resolved important factual issues against the State which should have precluded later prosecution in Madison County involving the same "scheme to defraud the investors." Given that Mr. Vickers affirmatively "waived venue" in Madison County the multiple-jurisdiction exception to collateral estoppel is inapplicable, thus permitting a bar to the Madison County conviction.

Lastly, Mr. Vickers asserts that this Court should review his important speedy trial claim. Here, Mr. Vickers demanded a speedy trial. The delay of almost four years in bringing him to trial severely prejudiced his ability to defend himself, particularly since one of his key witnesses -- an attorney -- died in the interim.

This Court should grant this Application for Permission to Appeal and dismiss these convictions because of a denial of speedy trial and because the Madison County convictions were barred by collateral estoppel. This Court should also adopt the "advice of

counsel" doctrine to negate *mens rea*.

QUESTIONS PRESENTED FOR REVIEW

1. **WHETHER TENNESSEE SHOULD PERMIT THE "DEFENSE" OF "ADVICE OF COUNSEL" TO NEGATE THE *MENS REA* ELEMENTS OF SECURITIES FRAUD AND THEFT-RELATED OFFENSES.**

2. **WHETHER A WAIVER OF VENUE IN ONE COUNTY OBVIATES THE APPLICATION OF THE MULTI-JURISDICTION EXCEPTION TO THE COLLATERAL ESTOPPEL DOCTRINE.**

3. **WHETHER THE DELAY OF ALMOST FOUR YEARS VIOLATED MR. VICKERS' STATE AND FEDERAL SPEEDY TRIAL RIGHTS.**

COMBINED STATEMENT OF THE CASE AND FACTS[1]

Ernest Vickers operated the First National Bank of Jackson. He also operated First National Bancshares Financial Services, Incorporated which is otherwise known as "Financial Services." Between 1987 and 1990, Financial Services issued certificates of investment to individual members of the public which were utilized to fund the First National Bancshares Corporation, which was a holding company for the First National Bank of Jackson, Tennessee. In 1990, as a result of litigation commenced by the Department of Insurance, a receiver was appointed by the Chancery Court of Davidson County for the assets of Financial Services. The First National Bank of Jackson was closed.

The Government alleged that Mr. Vickers (together with his wife and his accountant) violated the securities laws by issuing a prospectus which misrepresented the financial condition of the investment company. The "misleading" prospectus induced individuals to invest in the certificates which the Government contended were inadequately funded. The opinion of the intermediate appellate court continues the narrative:

> The receiver testified that the assets of Financial Services consisted of four vehicles, two of which were in storage, a boat,

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[1]Resolution of this appeal involves reference to the record already before this Court arising out of Henderson County and the related record of proceedings occurring in Madison County. Many of the issues were litigated together prior to the trial of either of these cases and thus reference must be made to both records. For the convenience of the Court, this Application contains an appendix reproducing appropriate parts of the record. The trial judge entered an Order on July 22, 1996 consolidating both records for purposes of the appeal of Mr. Vickers. (Appendix, page 32). Thus both records are properly before this Court. References to the record in this Application will be to the Madison County documents by date of transcript or volume number. Where reference is made to materials in the Henderson County record, this Application will make specific notation of that fact.

> and a trailer. On [September 28, 1990] it was determined that Financial Services owed in excess of 3 million dollars, including 1.8 million owed to its individual investors. The non-cash assets, primarily represented by accounts and notes payable by [Mr. Vickers] and his wife, were essentially worthless. In 1990, an attempt was made by [Mr. Vickers] to negotiate the sale of First National Bank of Jackson in order to cover all outstanding certificates of investment in Financial Services. [This effort to sell the bank eventually proved unsuccessful.] (Slip Opinion, page 2, Appendix, page 80).

On December 10, 1991, Mr. Vickers and his wife were indicted by the Madison County Grand Jury charging them with 72 counts of theft and securities fraud.[2] On September 28, 1992, the Madison County Grand Jury again indicted Mr. Vickers and his wife with 34 counts of theft and securities fraud. (Pages 1 - 53, Madison County Technical Record). Given that Mr. Vickers was convicted of the first 11 counts of this second indictment, these counts are reproduced in the Appendix commencing at page 33.

On October 5, 1992, Mr. Vickers, his wife, and his accountant, Mr. Boone, were indicted in adjacent Henderson County in a 10-count indictment alleging securities violations and theft. On November 6, 1992, after this "first" Henderson County indictment, Mr. Vickers moved for a change of venue out of Madison County. (Appendix, page 2).

[2]This massive indictment appears as Exhibit 50 in the Henderson County record.

Accompanying this motion were vast numbers of newspaper articles (which appear in the record) dealing with the extreme publicity surrounding the bank failure and Mr. Vickers' alleged participation in this affair.

On February 1, 1993, a second indictment was returned by the Henderson County Grand Jury charging Mr. Vickers, his wife, and his accountant, Mr. Boone, with 18 counts of securities fraud and theft offenses. This indictment (and an amendment) appear in the Appendix to this Application commencing at page 48.

Ten days after this second indictment in Henderson County, Mr. Vickers moved for a speedy trial in the Madison County case. (Appendix, page 5).

On March 30, 1993, the trial judge heard arguments involving the scheduling of both trials and entertained the request for a speedy trial filed on behalf of Mr. Vickers in the Madison County case.[3] As will be discussed, the trial judge determined to try the Henderson County case first because the State indicated that disposition there might well moot the trial in Madison County.

The opinion of the Court of Criminal Appeals correctly observed that the indictments in Henderson and Madison Counties (which appear in the Appendix) were similar and alleged virtually identical "schemes" to defraud investors in both counties. The

[3]The intermediate appellate court indicates in footnote 5 that the transcript of this hearing is not in the record. This is incorrect. This hearing considered both Madison and Henderson County cases and thus it was a combined transcript which appears in the Henderson County Record as the transcript labeled "A." This was addressed in the Madison County record (Appendix, page 17) and thus it will be cited in this Application. Again, the trial judge entered an order combining the records from both counties which was the only practical solution to the fact that some hearings were held in either county pertaining to indictments pending in both counties.

indictments also alleged similar times and a similar prospectus. These indictments were also similar because of the allegations in both instruments that the statute of limitations was tolled by the "concealment" of material facts.

As noted in the companion case of *State v. Jacqueline Vickers & William Boone*, *supra*, the trial judge conducted an evidentiary hearing to determine whether or not the State had sufficient evidence to put the case to the jury with regard to the statute of limitations "concealment issue." This hearing occurred on December 6 and continued until December 10, 1993. Mr. Vickers was a participant in this proceeding and actively sought dismissal of the indictments. At the conclusion of the evidentiary hearing, the trial judge dismissed the counts regarding Mr. Vickers' wife and one of the counts involving Mr. Boone. The Court then directed that Mr. Vickers and Mr. Boone proceed to trial in the Henderson County case. As we know, the State took an appeal from the dismissal of the indictments which is presently pending before this Court on the statute of limitation question.

The securities fraud and theft charges in Henderson County involving Mr. Vickers and Mr. Boone were tried commencing on March 3, 1994. As will be noted later in this Application, the trial judge granted a mid-trial judgment of acquittal as to the theft-related counts because he believed Mr. Vickers had no intent to steal. The judge permitted the securities fraud cases to go to the jury. Although the jury could not return a verdict on count one alleging a species of securities fraud, Mr. Vickers was acquitted of all of the remaining counts. The transcript of that proceeding appears in this record as a "Wayside Bill of Exceptions" as part of the record in the Madison County case, although the mid-trial ruling

on the judgment of acquittal appears in the Henderson County record.

On December 15, 1994, Mr. Vickers filed a Motion to Dismiss the Madison County indictment because of the acquittal in Henderson County as well as speedy trial violations. (Appendix, page 12). This Motion was denied. (Appendix, pages 19 and 20).

Mr. Vickers was finally tried on the Madison County cases commencing on August 8, and continuing until August 19, 1995. Mr. Vickers was convicted on the six counts of securities fraud and the five counts of theft.

The sentencing hearing occurred on September 22, 1995. The Motion for New Trial was heard on October 20, 1995 and was denied on April 22, 1996. Mr. Vickers filed a Notice of Appeal on May 16, 1996. As has been noted, the judge entered an order on July 22, 1996, consolidating the record on appeal as to both the Madison and Henderson County cases. (Appendix, page 32).

On October 28, 1996, this Court granted the Rule 11, T.R.A.P. Application of the State in the companion case from Henderson County concerning the statute of limitations issues.

On July 3, 1997, the Court of Criminal Appeals affirmed Mr. Vickers' convictions in the Madison County case. Mr. Vickers now submits this Rule 11, T.R.A.P. Application for Permission to Appeal as to the issues of collateral estoppel, speedy trial, and the question of the advice of counsel defense.

REASONS FOR GRANTING THIS APPLICATION

1. TENNESSEE SHOULD PERMIT THE "DEFENSE" OF "ADVICE OF COUNSEL" TO NEGATE THE *MENS REA* ELEMENT OF CRIMINAL OFFENSES.

The Court of Criminal Appeals observed here that the "advice of counsel" doctrine is not a defense in Tennessee. Given that this Court has already spoken to the issue, the Court of Criminal Appeals found itself without authority to modify or change this rule.

Most recently, *State v. Brewer,* 932 S.W.2d 1, 17 (Tenn. Crim. App. 1996) reviewed all of the Tennessee authorities on this issue and declined to adopt the doctrine in light of a 1928 opinion of this Court. *Brewer*, like the instant case, involved a securities fraud prosecution. This Court should now revisit the question and consider adopting the doctrine or a variation of the doctrine in light of precedent from other jurisdictions.

A.

Before addressing the authorities from other jurisdictions, it is appropriate to briefly address how this issue arose here. The Court of Criminal Appeals suggested that there was some waiver and the State will argue that the issue has not been "properly framed." This issue **was** raised below and thus the matter is now ripe for review.

It must be remembered that there were many motions heard prior to the trial of either the Henderson County or Madison County cases. These matters concerned both

indictments since there were issues common to both cases. Prior to trial in the Henderson County case, the Government requested that there be no mention of the "advice of counsel" defense. This issue was addressed on October 22, 1993 in a transcript labeled "B" appearing in the Henderson County record. In that proceeding, the Government cited this Court's opinion in *Hunter v. State*, 158 Tenn. 63, 12 S.W.2d 361 (1928) that the advice of counsel defense is "unrecognized." (Transcript of October 22, 1993, at page 64). The parties argued about the issue and finally the trial judge said that, "I don't have any problem with the proposition that advice of counsel is not a defense." (*Id.*, at page 81).

When the case was tried again in Madison County, the Government filed precisely the same motion requesting that the advice of counsel defense not be permitted. (Appendix, page 21). The motion cited this Court's opinion in *Hunter* as well as other authorities.

During the Madison County trial, Mr. Vickers' attorney tried every way possible to inject the issue without running afoul of the judge's earlier ruling. Defense counsel tried to make the analogy that the lawyers and accountants who gave Mr. Vickers' advice were like doctors who were giving an opinion about a disease. Defense counsel said that, "Mr. Vickers has got four experts telling him, you are okay, go ahead and file [the documents with the state]." (Transcript of Madison County Trial, Volume IV, page 644). The prosecutors argued that none of this was in evidence and the trial judge said: "Oh, it is." *Id.* The prosecutor responded that: "if [Mr. Vickers] told his lawyers garbage, told his CPA's garbage, that is what the prospectus is worth, garbage in, garbage out." (Volume IV of the

Madison County Record at page 646). From the prosecutor's perspective, this may have been "garbage," but Mr. Vickers earnestly contended that the bank's financial structure and the securities filings were based on what he was told by the experts who advised him.

The probation report, which appears as Exhibit 1 to this sentencing hearing, contains Mr. Vickers' statements concerning the development of the bank and the investment company. He stated, in part:

> First National Bancshares Financial Services, Inc. was established in the Spring of 1983, initially for the sole purpose of borrowing money and loaning that same money to me on an interest free basis thus eliminating excessive (IRS) investment interest expense, which would not be tax deductible. This structure was perfectly legal in the early 80's per my CPA's. The state securities division OK'd First National Bancshares Financial Services, Inc.'s securities issue with over one million dollars of my interest free loans on the books of First National Bancshares Financial Services, Inc. My holding company (First National Bancshare Corporation) also borrowed from FNBFS, Inc. with no objections from the State Securities Division. Then in 1988 my attorneys were told that if I continued to borrow directly from FNBFS Inc., that I would have to furnish my personal financial statement as a public document (which I

> considered personal and should remain confidential) thus I (with my attorneys written authority) elected to borrow from my holding company (FNBC) whereby said loans were regulated and examined by the Federal Reserve Board. The holding company had approximately a 3 million dollar line of credit with Union Planters National Bank and a 4 million dollar line of credit with FNBFS Inc. This was structured by my CPAs and my attorneys with the full knowledge of the securities division as the evidence established in the Henderson County case.
>
> Over the years I've paid hundreds of thousands of dollars in legal and CPA fees to insure that everything was done absolutely legal and proper in every respect. What more could any person have done? I consider myself a very meticulous business person. I never went beyond consideration of anything without consulting with an attorney and/or CPA specializing in that respective area. (Page 5 of Pre-Sentence Report to Exhibit 1 of Sentencing Hearing contained in Madison County record).

Throughout the cross-examination of the State's witnesses, defense counsel established that the law regarding securities regulation and registration was highly complex and technical. For example, Ms. Foster testified that she was an expert on securities law including what must be disclosed to investors. (Volume II, page 308). She said that she

always tells an individual who calls her department on questions of security law that the caller should "consult an attorney." (Volume III, page 471). Counsel for Mr. Vickers went as far as he could given the limitations imposed by the trial court on the "advice of counsel."

The issue was raised in the Motion for New Trial as follows: "The defense of 'advice of counsel' should be available to a defendant in a case of this nature which clearly involved complicated rules and regulations in a highly technical field." (Appendix, page 23). As noted, the matter was renewed in the Court of Criminal Appeals which deferred to this Court to make any alteration in the law.

B.

It is not strictly accurate to say that Tennessee does not "recognize" the advice of counsel defense. In civil cases involving malicious prosecution, a lack of probable cause may give rise to a presumption of malice. A defending party may establish probable cause by showing that the prosecution was instituted with the advice of counsel. *See, Sullivan v. Young*, 678 S.W.2d 906, 911 (Tenn. App. 1984). The advice of counsel doctrine in such cases is not available where a party fails to disclose all of the facts which are ascertainable by due diligence. *Id.* In Tennessee, it is settled that to invoke the defense of advice of counsel, the party must state not only all material facts within his or her knowledge but all facts which he or she had reasonable grounds to believe existed at the time of making the statement, or all material facts which he could have ascertained by reasonable diligence. *Id. See also*, *Carter v. Baker's Food*, 787 S.W.2d 4, 7 (Tenn. App. 1990).

Apart from the malicious prosecution context, it is true that Tennessee has

consistently declined to permit the advice of counsel defense. This Court addressed the matter in *Hunter v. State,* 158 Tenn. 63, 12 S.W.2d 361 (1928). In that case, the defendant was charged with embezzlement and defended on the proposition that the law prohibiting the appropriation of the public funds was unconstitutional and thus he acted in good faith by taking the money. *Hunter* has more to do with alleged ignorance of the law being no defense although the "advice of counsel" doctrine is certainly discussed in the opinion. *Hunter* also dwells on the distinctions between mistakes of fact and mistakes of law.

The mistake of law/mistake of fact doctrines have been addressed in the 1989 criminal code revision. T.C.A. §39-11-502 provides that ignorance or mistake of fact is a defense if the ignorance or mistake negates the mental state of the offense. The Sentencing Commission Comments make clear that this defense is "narrow" and "does not include a mistake regarding the existence or meaning of a criminal law." The Commission Comments cite *McGuire v. State,* 26 Tenn. 54 (1846) which is a delightful case also discussed at some length in *Hunter*.

While ignorance of the law is certainly no excuse or defense, a person may assert that his or her conduct was justified because the person "reasonably believes the conduct is . . . authorized by law." T.C.A. §39-11-610(a). This "reasonable belief" of the law is, in a sense, a variation the "mistake of law" doctrine.

For example, if a person thinks that it is perfectly legal to have two spouses at the same time, this may be considered only a "mistake of law" which offers no defense to bigamy. However, if the person honestly believed that there was a divorce from the first

spouse prior to the marriage to the second, then this reasonable belief in the legal proceeding might be considered a defense. This hypothetical would be valid under existing T.C.A. §39-11-610(a) which represents a departure from prior law. See the discussion in the bigamy prosecution in *Jones v. State*, 182 Tenn. 60, 184 S.W.2d 167 (1944).

In *Ratzlaf v. United States,* 114 S.Ct. 655 (1994), the Court found that to establish that a person "willfully" violated the antistructuring law, the Government must prove that the defendant acted with knowledge that his conduct was unlawful. Much of the opinion, and particularly the dissent, centered around the proposition that by imposing a "willful" requirement, the doctrine of "ignorance of the law" may well have been modified.

No one is suggesting that the Tennessee *mens rea* of "intentional" or "knowing" permits any argument that "ignorance of the law" is some excuse or defense. However, T.C.A. §39-11-610(a) certainly permits a defendant to argue that he or she "reasonably believed" that his or her conduct was authorized by law. Unquestionably, whether the belief was "reasonable" is a jury question. It is but a short step from the "reasonable belief of law" doctrine to the proposition that a person's "reasonable belief" was based upon the advice or recommendation of counsel.

Federal precedent permits "advice of counsel" to be utilized as a matter of "defense" to negate issues of intent or knowledge. Under the federal securities law, proof of good faith may be a defense to rebut a showing of willfulness. *United States v. Weiner*, 578 F.2d 757, 787 (9th Cir. 1978). Related to the defense of "good faith" is that of reliance on advice of counsel. Although not a complete bar, this defense can rebut a showing of

criminal intent and willfulness. *United States v. United Surgical Supply,* 989 F.2d 1390, 1403-04 (4th Cir. 1993) (good faith reliance on counsel is only one of the factors for the jury to consider when it determines intent).

Reliance on counsel must be reasonable and be preceded by full disclosure by the client to the attorney. *See, United States v. Conforte,* 624 F.2d 869, 877 (9th Cir. 1980). In *United States v. Benson*, 941 F.2d 598, 613 (7th Cir. 1991), the Court found that:

> If a person who truly does not know what the law requires seeks, in good faith, advice from counsel and is given wrong advice that he nevertheless believes (and has no reason to disbelieve) he does not act willfully in following that advice. A person who has a good faith belief that he is not violating the law does not act willfully. One cannot be aware that the law imposes a duty upon him and yet be ignorant of it, misunderstand the law, or believe that the duty does not exist.

In order for the defense to be successful, the defendant must show: (1) a request for advice of counsel regarding the legality of the proposed action, (2) a full disclosure of all relevant facts to counsel, (3) assurance by counsel that the action is legal, and, (4) good faith reliance on the lawyer's advice. *Carlson v. S.E.C.*, 859 F.2d 1429 (10th Cir. 1988).

A review of the federal authorities on this issue discloses that the "advice of counsel doctrine" as it relates to *mens rea* in complex criminal cases such as securities fraud,

is really not that different from the Tennessee rule which permits "advice of counsel" to impact the issue of malice in malicious prosecution civil actions. In the final analysis, the question in the civil litigation is whether the defendant acted "maliciously" (a *mens rea* concept) which can be negated by a good faith reliance on the advice of an attorney. This is precisely the same issue that deals with "intent" or "knowledge" which is central to a prosecution for theft by deception or securities fraud by deceit.

This Court should revisit the question of "advice of counsel" and should find that while it is not a true "defense" the doctrine should permit adequate proof, instructions,[4] and jury deliberation on a person's intent. Here, the trial judge made it quite clear that existing law precluded any "advice of counsel" defense and thus a fundamental component of the case was removed from the consideration of the jury. Yet, Mr. Vickers certainly had a "reasonable belief" in the existence and meaning of the law based on what his lawyers and accountants were telling him.

We live in an age where our laws have become ever more complex in highly regulated industries and occupations. These regulations frequently have criminal consequences. While ignorance of the law is not and should never be an excuse, a reasonable good faith reliance on the advice of counsel should weigh in the balance as to whether an accused individual or corporation is guilty of a criminal offense. Accordingly, this Court should grant this Application and allow both parties to fully brief the question of whether there should be any modification or alteration in the law regarding advice of counsel in criminal cases.

[4]The State complains about no special jury instructions being tendered by the defense here. There are jury instructions on this issue in *Hunter* which the defense is seeking to alter in this appeal.

2. A WAIVER OF VENUE IN ONE COUNTY OBVIATES THE APPLICATION OF THE MULTI-JURISDICTION EXCEPTION TO THE COLLATERAL ESTOPPEL DOCTRINE.

Mr. Vickers was acquitted in Henderson County of the securities violations as well as the theft-related charges save for count one which resulted in a hung jury. The acquittal effectively resolved factual disputes against the Government regarding Mr. Vickers' intent which was the entire disputed issue of fact in the Henderson County cases. Accordingly, the collateral estoppel doctrine should have barred the subsequent prosecution in Madison County which involved the same issues of a lack of criminal intent. The Court of Criminal Appeals found collateral estoppel was inapplicable because of the multiple-jurisdiction exception to that doctrine given that the crimes were committed in two separate venues. The Court of Criminal Appeals failed to recognize that Mr. Vickers waived venue by seeking a change of venue in Madison County thus precluding the application of the multiple-jurisdiction exception to the collateral estoppel doctrine. Accordingly, prosecution in Madison County should have been barred.

A.

There can be no dispute that Mr. Vickers operated a single enterprise which the Government contended "marketed fraudulent securities to obtain money from unsuspecting investors." The relevant indictments in the Madison County case and the Henderson County case appear in the Appendix. They both allege violations of the securities laws by making

certain false and misleading statements and a general scheme to defraud. There are companion counts of theft involving individual investors in both indictments.[5]

Both indictments (and both trials) involved allegations of concealment so as to toll the statute of limitations. Both indictments involve similar times and both conclude with the receivership in late 1990.

During the trial of the Henderson County indictments, the defense submitted a mid-trial motion for judgment of acquittal. These proceedings occurred on March 16, 1994 and the argument portion of the motion appears in the transcript filed in the Madison County appeal but for some reason the ruling on the motion appears in a separate transcript in the Henderson County record. Reduced to its essence, the judge found that there was no intent on the part of Mr. Vickers to defraud anyone and that he had no intention of anyone losing any money.[6]

The trial judge directed a verdict on all of the theft-related counts but permitted the securities violations to go to the jury. From the record of the actual jury trial in Henderson County, which appears in the Madison County appeal record, it is apparent that the entire case centered about Mr. Vickers' knowledge and whether or not he intended to defraud anyone. He was acquitted on all remaining counts except for one count resulting in

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[5]The Court of Criminal Appeals recognized that the Henderson County charges were similar to the Madison County charges, both of which involved allegations of filing false documents, securities fraud violations, and theft. The Court of Criminal Appeals also recognized that "similar schemes were employed to defraud investors in both Henderson and Madison Counties." (Slip Opinion, page 2, Appendix, page 80).

[6]During the later hearing in the Madison County case the same trial judge said, "I have a hard time believing that Mr. Vickers' intent was for these people not ever to get their money." Volume IV, page 609, Madison County proceeding.

a "hung jury." Is this acquittal a bar to trial in Madison County?

The Government argued that there were multiple and separate elements as between the Henderson County and Madison County cases and thus there could be no double jeopardy in light of the acquittal in Henderson County. There were separate elements-of-separate-crimes in the two indictments and thus the trial judge appropriately denied the double jeopardy motion to dismiss. (*See,* Appendix, page 20 for the May 12, 1995 Order). The Court of Criminal Appeals correctly observed that the defense later identified and litigated the collateral estoppel question during the hearing on the Motion for New Trial following the conviction in Madison County. Accordingly, the Court of Criminal Appeals elected to address the issue as should this Court.[7]

B.

Although this case does not strictly involve double jeopardy, it does concern the allied doctrine of collateral estoppel. A single criminal activity may be divided into multiple statutory crimes. If the State chooses to divide the offenses into temporally separate prosecutions, an acquittal on one offense may preclude a trial on the other offense assuming that all of the "elements" of collateral estoppel are established. First, the offenses must be part of the same "activity" or "episode." Tennessee had a form of collateral estoppel under the old "same transaction" theory. This Court altered that doctrine in *State v. Black*, 524 S.W.2d 913 (Tenn. 1975). The collateral estoppel doctrine in its current form still requires

[7]Even though double jeopardy does require an identity of offenses and same or similar elements, the Madison County and Henderson County indictments are very similar if one considers the "concealment" allegations. This Court will resolve in the pending, companion *Vickers* case as to whether concealment allegations are issues of law or fact.

that the several offenses be part of what we would have considered the "same transaction" although the test is now obviously different for double jeopardy purposes.

There can be no question that the allegations against Mr. Vickers rose out of the "same transaction." One need go no further than the "prospectus" which was common to all of the cases. This prospectus was the device which the Government alleged was utilized to defraud the investors in both counties.

Collateral estoppel also requires that as between the two offenses, the first proceeding resolved an issue of ultimate fact in the favor of the defendant. Where the issue is resolved *against* the defendant, collateral estoppel will not apply. *State v. Allen,* 752 S.W.2d 515, 516 (Tenn. Crim. App. 1988). Here, the acquittal was obviously in favor of Mr. Vickers.

Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970) imposes a third requirement for collateral estoppel, inquiring "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration" in the subsequent proceeding. One need not tarry with this component of *Ashe*. We know that the dispute in the Henderson County case involved Mr. Vickers' intent which was resolved in his favor and against the State of Tennessee. The Government could not relitigate that identical issue in a subsequent proceeding. Reduced to its essence, this is the meaning of collateral estoppel. *See, Turner v. Arkansas*, 407 U.S. 366, 92 S.Ct. 2096, 32 L.Ed.2d 798 (1972), and *Simpson v. Florida,* 403 U.S. 384, 91 S.Ct. 1801, 29 L.Ed.2d 549 (1971) both involving acquittals and a subsequent prosecution for a related

offense.

The Court of Criminal Appeals found that even though the several components of collateral estoppel might be present, the doctrine would not apply because of the multiple-jurisdiction exception given that the crimes were committed in two separate venues, Madison County and Henderson County. Since no single court had jurisdiction of both offenses, the Court of Criminal Appeals reasoned that collateral estoppel was inapplicable.

Generally, collateral estoppel requires that both charges be within the jurisdiction of a single court. Double jeopardy has an identical requirement. *See,* 4 ALR 3rd 874 (collecting cases).

The defense asserts that the multiple-jurisdiction exception to collateral estoppel is inapplicable here because Mr. Vickers waived venue in Madison County. The record reflects that on November 6, 1992, Mr. Vickers filed a Motion for a Change of Venue in Madison County after he had been indicted on October 5, 1992 in Henderson County. (Appendix, page 2).

On March 30, 1993, a hearing was conducted on pretrial motions pertinent to both the Madison County and Henderson County cases. This transcript appears in the Henderson County record. At page 50 of this transcript, the trial judge asked the prosecutor about consolidating the trials and trying them both in Madison County. The prosecutor responded that she thought it would "be a paper nightmare." Defense counsel responded that he had already filed a Motion for a Change of Venue. *Id.*

In *State v. Brown*, 64 S.W.2d 841, 849 (Tenn. 1933), this Court found that:

> It is the issue of venue which is here involved. It is well settled that the right which the Constitution gives to a defendant to be tried in the county in which the offense was committed is a personal privilege and may be waived by him. . . . This Court holds that the right to object to the locality of the trial is a personal privilege which the party may waive and *thereby confer jurisdiction*. (emphasis supplied).

By seeking a change of venue, Mr. Vickers waived any jurisdictional right regarding trial only in Madison County and thus the multiple-jurisdiction exception to the collateral estoppel doctrine would have no application here.

Other courts have considered this question and have determined that a change of venue is a waiver of any jurisdictional limitation which would then preclude a separate trial. In *People v. Taylor*, 732 P.2d 1172 (Colo. 1987), the Court found that the defense may seek a change of venue where there are multiple charges pending in several counties or jurisdictions. In *Gilkerson v. Lilly*, 288 S.E.2d 164 (W.Va. 1982), the Court considered a "waiver of jurisdiction" which might preclude prosecution in a subsequent proceeding. *Gilkerson* involves "vertical" jurisdiction rather than "lateral" venue jurisdiction but the doctrine is the same: A waiver of jurisdiction constitutes a procedural bar to a second prosecution. *See also, Cozzaglio v. State,* 709 S.W.2d 70 (Ark. 1986).

In the final analysis it must be remembered that the prosecution was brought by the State of Tennessee against Mr. Vickers. The individual counties are simply

subordinate governmental entities. The counties are not separate sovereigns such as separate states of the Union.

This Court should find that the change of venue motion filed by Mr. Vickers in Madison County was a waiver of any jurisdiction in Madison County. The multiple-jurisdiction exception to the collateral estoppel rule is simply inapplicable. Thus, collateral estoppel barred prosecution in Madison County in light of the acquittal on identical charges in Henderson County. This Court should grant Mr. Vickers' Application for Permission to Appeal so that this so-called exception does not swallow the rule and defeat the constitutional protection which the doctrine was designed to implement.

3. THE DELAY OF ALMOST FOUR YEARS IN BRINGING MR. VICKERS TO TRIAL IN MADISON COUNTY VIOLATED HIS SPEEDY TRIAL PROTECTIONS UNDER THE UNITED STATES AND TENNESSEE CONSTITUTIONS AS WELL AS RULE 48(b), TENNESSEE RULES OF CRIMINAL PROCEDURE.

The most telling comment made during all of these many proceedings was the observation of the trial judge that defense counsel had been "hollering about [a speedy trial] *for years* which has been the subject of a formal motion before, that has been ruled on." (Page 44 of the Transcript of Evidence dated April 22, 1996, found in the Madison County record) (emphasis supplied).

A.

The crimes alleged in the Madison County indictment occurred as early as December, 1987. Mr. Vickers was indicted in 1991 and was tried in 1995 in the face of a demand for speedy trial which had been pending for years. This Court should grant this Application for Permission to Appeal to enforce the speedy trial protections of the Tennessee Constitution.

It is not the office of a Rule 11 Application to dwell on facts which are more properly the subject of a brief on the merits. Nevertheless, this appeal is hampered by the unfortunate analysis of the Court of Criminal Appeals which perceived that the record was inadequate to fully address the issue. This resulted in an incorrect assessment of the various

factors which are utilized in any speedy trial analysis.

As has been noted earlier in this Application, the records of the joint pretrial motions, which were equally pertinent to the Madison County case, are lodged in the Henderson County record presently before this Court. The Order consolidating the records appears to have been ineffective in bringing the "full record" into play in Mr. Vickers' appeal.

In summary, Mr. Vickers was indicted on December 10, 1991 in Madison County. Additional indictments were returned in Madison and Henderson Counties the following year. Mr. Vickers was indicted on February 1, 1993 in Henderson County and 10 days later his attorney immediately moved for a speedy trial for a disposition of the Madison County indictments. (Appendix, page 5).

The timing of the Motion for a Speedy Trial is significant because it clearly indicated the desire of Mr. Vickers to have the Madison County case promptly litigated. It must be remembered that Mr. Vickers had also filed a Motion for a Change of Venue out of Madison County in November, 1992.

A hearing was conducted on all of these motions on March 30, 1993 which appears in the Henderson County record as "Transcript A." In the face of a motion for a severance filed by a co-defendant, the prosecutor advised the judge that if all of the defendants were kept together at the same time that the "whole universe" of this case could be resolved by a single trial of the Henderson County indictments. (Transcript of March 30, 1993, at page 57).

While the prosecution did not absolutely commit to a resolution of the entire "universe of the case" in a single trial, clearly the judge was lulled into believing that this would be true and thus the Henderson County matter was set for trial first, although the Madison County indictment had been pending for quite some time. Further, the prosecution advised that the Madison County case would take weeks to try while the Henderson County case would consume "a week at most." *Id.,* at 107.

As to Mr. Vickers' speedy trial concern, the judge said that State Court was not really equipped to handle this type of case. We are "used to fooling with burglars and cutthroats and things like that." *Id.,* at 87. Counsel for Mr. Vickers advised that he could get ready in the Henderson County case much quicker if the Government would simply withdraw the Madison County indictment. *Id.*

The trial judge then elected to try the Henderson County case first because it appeared to be a much "shorter" case and a "much less complex case" and "there may be some hope that we may never have to try the Madison County case." *Id.,* at 110. A similar Order appears in the Appendix at page 6).

As we know, the Henderson County case and its collateral motions consumed far more time than expected. The State also received the "unexpected" result of the acquittal of Mr. Vickers. Mr. Vickers then moved to dismiss the Madison County cases on double jeopardy and speedy trial grounds which the judge denied. (Appendix, pages 12 through 20). Mr. Vickers was finally brought to trial in Madison County in August, 1995. By then one of his primary witnesses had died, severely prejudicing the defense of his case.

B.

In *State v. Bishop*, 493 S.W.2d 81 (Tenn. 1973), this Court identified the four speedy trial factors as: the length of the delay, the reason for the delay, the defendant's assertion of the right to a speedy trial and, finally the prejudice to the defendant. There is no dispute as to the components of the four-part balancing test to determine if a speedy trial violation has occurred. What is in dispute is the weight to be assigned these various factors.

The length of the delay here was almost four years between the initial indictment and the eventual trial. This is more than just a "triggering" issue. *See, Doggett v. United States*, 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992) (the length of the delay is "actually a double enquiry"). *Doggett* identifies delays of more than one year as "presumptively prejudicial." 112 S.Ct. 2686, 2691, note 1. Without doubt, the delay in bringing Mr. Vickers to trial was presumptively prejudicial to him and thus this factor should weigh in his favor and heavily against the Government.

The next factor concerns the reasons for the delay. In *State v. Wood*, 924 S.W.2d 342 (Tenn. 1996), this Court identified the various types of factors which would be considered in determining the reason for a delay in bringing an individual to trial.

The Court of Criminal Appeals believed that the delay here "arose from the complex nature of the charges and the need for judicial economy." (Slip Opinion at page 3, Appendix, page 81). Thus, the Court of Criminal Appeals concluded that the reason for this lengthy delay was "neutral and valid in nature and should be weighed less heavily against the state." (Slip Opinion at page 4).

This "complex case" excuse only goes so far. The Government had "notice" of the alleged securities violations as early as 1990 when the receiver was appointed in Davidson County to take over the assets of Mr. Vickers' corporation. The criminal investigation consumed over a year and thus the Government had plenty of time to prepare its case for trial prior to the return of the initial Madison County indictment. Thus, there should have been no excuse in bringing Mr. Vickers to trial in a prompt fashion given the available preparation time before the "complex" charges were even brought.

The Court of Criminal Appeals ignored the less neutral factor of the virtually intentional delay utilized to gain a tactical advantage over the defense. By trying the later Henderson County indictment first, the Government was able to preview the defense and mold its proof to its advantage in the subsequent Madison County prosecution. In short, the Government got a "second shot" at Mr. Vickers after previewing his case. Even assuming that this delay factor was "merely negligent" on the part of the State, this reason for delay must be weighed heavily against the Government and in favor of Mr. Vickers:

> Between diligent prosecution and bad faith delay, official negligence in bringing an accused to trial occupies the middle ground. While not compelling relief in every case where bad-faith delay would make relief virtually automatic, neither is negligence automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him. It was on this point that the Court of Appeals erred and on the facts before

us, it was reversible error. *Doggett v. United States, supra,* at 2693.

The next factor concerns the demand for a speedy trial. Mr. Vickers demanded a speedy trial which must be weighed heavily against the Government particularly when one considers the timing of that demand in relation to the second Henderson County indictment. Demands for a speedy trial are rare when an accused is at liberty on bond. Nevertheless, Mr. Vickers demanded a speedy trial over two years before he was to face a jury in Madison County. It is this lengthy delay, after a demand for a prompt trial, which is remarkable and should, in and of itself, compel the conclusion that Mr. Vickers was denied a speedy trial.[8]

The final inquiry in any speedy trial analysis is the factor of defense prejudice. The degree of prejudice which must be demonstrated is inversely proportional to the delay itself. In *Doggett*, the Court observed that "such is the nature of the prejudice presumed that the weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows." 112 S.Ct., at 2693.

Mr. Vickers was prejudiced by the delay. The Court of Criminal Appeals engaged in factual debate over precisely how this prejudice impacted the defense. For

[8]The significance of the demand for a speedy trial becomes more apparent when one compares the constitutional protection to the authority of a trial judge to dismiss an indictment for unnecessary delay pursuant to Rule 48(b), Tennessee Rules of Criminal Procedure. Under this Rule, a dismissal considers the identical factors that determine a constitutional speedy trial violation except for the factor of a defendant's assertion of his right to a speedy trial. *State v. Benn*, 713 S.W.2d 308, 311 (Tenn. 1986). This Rule permits dismissal of an indictment if there has been an "unnecessary delay in bringing a defendant to trial." The State has failed to show that the delay in this case was necessary and thus dismissal is appropriate under Rule 48(b), Tennessee Rules of Criminal Procedure.

example, the Court of Criminal Appeals found little merit to the argument that, by trying the same case in Henderson County the prosecution learned the details of Mr. Vickers' defense. The Court concluded that the cases in Henderson County and Madison County were not the same because they involved different dates, different victims, and different transactions. Yet, the Court of Criminal Appeals earlier remarked that the schemes in both counties were *identical* and involved violations of the same statutes.

With respect to the loss of memory caused by the excessive delay, the Court of Criminal Appeals adopted the Government's argument that there was "no loss of memory by the witnesses." (Slip Opinion at page 4). A defense witness, Mr. Simmons, began his testimony by apologizing for his lack of memory as he attempted to recall the events of August of 1990 during a trial in August of 1995. (Volume IV of the Transcript of Evidence in the Madison County record, at page 662).

Mr. Stanley Huggins provided legal advice to Mr. Vickers and would have been an important defense witness. Unfortunately, by the time of trial in Madison County, Mr. Huggins had died. The briefs of the parties in the Court of Criminal Appeals devoted much of their attention to the significance of Mr. Huggins. The Government contended that none of his testimony would have been admissible and was not relevant to anything except perhaps repaying the victims. Apparently the Court of Criminal Appeals adopted that theory finding that Mr. Vickers suffered no "undue prejudice" from Mr. Huggins' death.

The trial judge observed that, "I think Mr. Huggins appears to me [that] he would have been an important witness, but he is not here." (Volume V of the proceedings

in Madison County at page 713). Later the judge stated that, "I would have to concede that Mr. Huggins would have been an important witness." *Id.,* at 714.

While the Government may spend much time in its pleadings before this Court complaining about the representations of defense counsel below as to Mr. Huggins, one cannot dispute the ***findings of fact made by the trial judge*** as to the significance of this important, potential defense witness.

In *Cunningham v. State*, 565 S.W.2d 890 (Tenn. Crim. App. 1977), the delay of 23 months was sufficient to result in a dismissal of the indictment where important defense witnesses became unavailable due to the passage of time. Here, we are dealing with a delay of almost twice that length with equally demonstrated prejudice to the defense.

The four-factor speedy trial test is not the end of the inquiry. A reviewing court must balance all the factors in relation to each other to determine if there was a speedy trial violation. Mr. Vickers demanded a speedy trial which weighs in his favor. The extreme length of the delay is presumptively prejudicial which also weighs in his favor. The reason for the delay weighs against the Government and heavily in favor of Mr. Vickers. Finally, the defense has demonstrated extreme prejudice. <u>All</u> the factors favor Mr. Vickers:

> The Government indeed, can hardly complain too loudly, for persistent neglect in concluding a criminal prosecution indicates an uncommonly feeble interest in bringing an accused to justice; the more weight the Government attaches to securing a

conviction, the harder it will try to get it. *Doggett v. United States*, 112 S.Ct., at 2693.

This Court should find that Mr. Vickers was deprived of his right to a speedy trial. His lawyer had been "hollering" for a speedy trial for years. The deprivation of that constitutional protection compels dismissal of those charges which the State neglected to complete in a timely fashion.

CONCLUSION

This Court should grant this Rule 11 Application for Permission to Appeal and entertain this case with the appeal presently pending in the companion litigation concerning the statute of limitations. Mr. Vickers' Appeal raises important questions of collateral estoppel, speedy trial rights, and a re-examination of the advice of counsel doctrine. For these reasons, the Application should be GRANTED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been placed in the United States Mail, postage prepaid, to Albert L. Partee, III, Senior Counsel, Enforcement Division, 425 Fifth Avenue North, Nashville, Tennessee 37243-0494, on this the 2nd day of September, 1997.

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DAVID L. RAYBIN

APPENDIX