TENNESSEE JUDICIAL CONFERENCE
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CRIMINAL LAW UPDATE: 2021-2022

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UNITED STATES SUPREME COURT
2021-2022 TERM

SIXTH AMENDMENT; CONFRONTATION; OPENING THE DOOR: 8-1
Hemphill v. New York, 595 U.S ___, 142 S.Ct. 681, 211 L.Ed.2d 534 (2022)

In 2006, a stray 9mm bullet killed a 2-year-old child after a street fight in the Bronx. Eyewitnesses described the shooter as wearing a blue shirt or sweater. Police determined that Ronnell Gilliam was involved and he at first indicated that his best friend, Nicholas Morris, was the shooter. A search of Morris' apartment revealed a 9mm cartridge and three .357 caliber bullets. Gilliam later recanted and identified his cousin, Darrell Hemphill, as the shooter. The police did not believe the recantation and prosecuted Morris for the homicide and possession of the 9mm gun. Eventually the State agreed to dismiss the murder charges against Morris if he pled guilty to possession of a .357 weapon in exchange for a time served sentence. In 2011, Hemphill's DNA was found on a blue sweater that had been recovered shortly after the crime in Gilliam's apartment. In 2013, Hemphill was indicted for murder. At trial, Hemphill raised a third-party defense and argued that Morris was the shooter and introduced evidence that a 9mm cartridge had been recovered from Morris' apartment shortly after the crime. Morris was out of the country and unable to testify at the trial. Over objection, the State was allowed to introduce into evidence a portion of the transcript of Morris' plea allocution in which he admitted to possession of a .357 handgun. The State argued that admission of this evidence was necessary because Hemphill had misled the jury with proof that the 9mm cartridge had been found in Morris' apartment. HELD: Admission of the plea allocution transcript violated the Defendant's Sixth Amendment right to confront the witnesses against him. The statements were testimonial and Hemphill had been given no opportunity for cross-examination. The State's argument that Hemphill "opened the door" by introducing "misleading" evidence cannot trump the requirements of the Sixth Amendment. Court "does not decide today the validity of the common-law rule of completeness as applied to testimonial hearsay." That rule is not applicable to these facts so the matter is not before this Court.
CONCURRENCE: Implied waiver of Sixth Amendment could come from a failure to object or when a defendant engages in a course of conduct that is incompatible with a demand to confront adverse witnesses. If a Defendant introduces the statement of an unavailable declarant, the rule of completeness would allow the prosecution to introduce other portions of the statement even if there had been no cross-examination.

Consider State v. Vance, 596 S.W.3d 229 (Tenn. 2020): Fact that door has been opened does not permit all evidence to pass through the door in response. Response must be relevant and proportional and limited to what is necessary to correct the unfair prejudice.

JURY QUESTIONNAIRES; VOIR DIRE QUESTIONS; TRIAL JUDGE BROAD DISCRETION; DEATH PENALTY:
United States v. Tsarnaev, 595 U.S. __, 142 S.Ct. 1024, 212 L.Ed.2d 140 (2022)

On April 15, 2013, brothers Dzhokhar and Tamerlan Tsarnaev planted and detonated two homemade pressure-cooker bombs near the finish line of the Boston Marathon, killing three and wounding hundreds. Three days later, as the police were closing in, the brothers fled. In the process, they murdered an MIT campus police officer, carjacked a graduate student, and fought a street battle with police during which Dzhokhar inadvertently ran over and killed Tamerlan. Dzhokhar was eventually captured and indicted for 30 crimes, including 17 capital offenses. The trial judge used a 100 question screening form to cull down the 1,373 prospective jurors to 256. The questionnaire asked each juror what media sources they followed, how much they consumed, whether they had ever commented on the bombings in letters, calls, or online posts, and most importantly whether any of the information had caused them to form an opinion about the case. However, the trial judge excluded from the form one question that asked each juror to list the facts they had learned about the case from the media and other sources. The trial court felt that the question was unfocused and risked producing unmanageable data. He also believed it wrongly emphasized what jurors knew before coming to court as opposed to their ability to be unbiased. Before jury selection began, the judge again denied a request to ask each jury what they had learned about the case from the media. Jury selection lasted three weeks during which the defense attorneys were allowed to ask follow-up questions about a prospective juror's media consumption based on answers to the questions in the questionnaire and at voir dire. The Defendant was found guilty. In his sentencing hearing, he sought to introduce evidence that his deceased brother had been involved in a triple homicide in Waltham, Massachusetts. The defense theory was that the deceased brother had masterminded the Boston bombing and pressured the defendant to participate. The trial judge excluded the evidence relating to the Waltham murders as lacking relevance or alternatively that whatever relevance it had was outweighed by the danger of confusing the issues. The Court of Appeals reversed the conviction finding that the trial judge abused his discretion in refusing to include the publicity questions in the screening form and in excluding the evidence of the unrelated homicide. HELD: Reversed. The trial judge did not abuse his discretion in refusing to allow the question. The judge's decision was reasonable and well within his discretion. The trial judge also did not abuse his discretion in excluding the evidence pertaining to the unrelated homicides. Although evidence in a death penalty proceeding may be admissible regardless of its admissibility under the rules of evidence governing regular criminal trials, death penalty proceedings are not "evidentiary free-for-alls." Federal law allows the district court in a death penalty case to excluded evidence if the probative value of the evidence is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury. Application of this rule does not violate the Eighth Amendment or Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982).

POST-CONVICTION; NO REQUIREMENT OF EFFECTIVE ASSISTANCE OF COUNSEL: 5-3
Shinn v. Martinez Ramirez, 596 U.S. ___, 142 S.Ct. 1718, 212 L.Ed.2d 713 (2022)

Ineffective assistance of counsel in state post-conviction proceeding by failing to adequately develop the record to support the allegation in the state post-conviction proceeding cannot be used as cause to excuse the procedural default. Under § 2254 [federal habeas corpus] the trial court has no authority to conduct an evidentiary hearing or otherwise consider evidence beyond the state court record based simply on a claim that post-conviction counsel was ineffective in failing to develop the record in state court. Effective assistance of counsel in state post-conviction proceedings is not required by the Constitution.

DOUBLE JEOPARDY; DUAL SOVEREIGNTY DOCTRINE:
Denezpi v. United States, 596 U.S. ___, 142 S.Ct. 1838, 213 L.Ed.2d 141 (2022) 6-3

Defendant was involved in an incident in which it was alleged that he sexually assaulted a woman on Ute Mountain Ute Reservation. He was charged with various crimes in the Court of Indian Offenses (not a Tribal Court) and he pled guilty to assault and battery, a crime which was enacted by the tribe as a tribal ordinance and made enforceable in the Court of Indian Offenses, pursuant to the Code of Federal Regulations, so long as the Assistant Secretary of the Federal Bureau of Indian Affairs approves of the criminal offense. He was sentenced to 140 days imprisonment. Six months after completing his sentenced he was charged in federal court with a violation of the USC "aggravated sexual abuse in Indian country. He moved to dismiss on double jeopardy grounds. The District Court denied the motion and after a trial in which the defendant was found guilty, he was sentenced to 360 months imprisonment. The Tenth Circuit affirmed concluding that the second prosecution in federal court did not constitute double jeopardy because the first prosecution was based on the tribe's sovereign inherent power. HELD: The Double Jeopardy Clause prohibits separate prosecutions for the same offense; it does not prohibit successive prosecutions by the same sovereign. Here, the defendant's first prosecution was for a tribal offense, the second was for a federal offense. Defendant insists that the dual sovereignty doctrine does not apply when successive prosecutions are undertaken by a single sovereign. Defendant argues that the dual sovereignty doctrine is concerned not only with who defines the offense, but also with who *prosecutes* the offense. We need not sort out whether prosecutors in this court exercised tribal or federal authority because even if they were the same sovereign, the crime was not "for the same offense." So long as a separate sovereign defines the offense it does not matter if the successive prosecutions were prosecuted by the same sovereign. DISSENT: The Court of Indian Offenses is part of the federal government. The first conviction was for a federal offense as approved by the Code of Federal Regulations, not for a tribal crime.

CONFESSIONS; MIRANDA; PROPHYLACTIC; NO CAUSE OF ACTION; § 1983:
Vega v. Tekoh, 597 U.S. ___, 142 S.Ct, 2095, 213 L.Ed.2d 479 (2022) 5-3

Tekoh was questioned by Los Angeles County Sherriff's Deputy Carlos Vega at the medical center where Tekoh worked regarding the reported sexual assault of a patient. Vega did not inform Tekoh of his Miranda rights and he eventually gave a written statement apologizing for touching a patient's genitals. Tekoh was prosecuted for unlawful sexual penetration. His written statement was introduced against him at trial, but the jury found him not guilty. Tekoh sued Vega under § 1983 seeking damages for violation of his Fifth Amendment rights. The Ninth Circuit held that the use of an un-Mirandized statement against a defendant in a criminal proceeding violates the Fifth Amendment and may support a § 1983 claim against an officer who obtained the statement. HELD: A violation of the Miranda rules does not provide a basis for a § 1983 claim. (1) The Miranda rules are "prophylactic" and as a result a violation of those rules does not necessarily constitute a violation of the Fifth Amendment. Although Miranda is "constitutionally based" and has "constitutional underpinnings," a violation of Miranda is not itself a violation of the Constitution. (2) Although § 1983 may also be brought for a violation of "federal law," considering the prophylactic nature of the rule we believe that allowing the victim of a Miranda violation to sue for money damages would have little additional deterrent effect.

TENNESSEE SUPREME COURT
2021-2022

SUFFICIENCY OF EVIDENCE; PREMEDITATION; 404(B) GANG AFFILIATION:
State v. Reynolds, 635 S.W.3d 893 (Tenn. 2021)

Sufficiency: Defendant Jeremy Reynolds was convicted of premeditated murder after a trial in which the State was permitted to introduce evidence related to gang membership. CCA found the evidence sufficient to show defendants criminal responsibility for killing, but insufficient to show "premeditation."
FACTS: The victim, Wendell Washington arrived home from work alone, parked his car, and walked onto his front porch. As his girlfriend attempted to open the front door to greet him, she heard a voice she did not recognize and the front door was pulled shut from the outside. She then heard a "commotion" outside and one or two gunshots followed by a "bunch" of other gunshots. After she went outside she found the victim alive, but mortally wounded. Although no one saw who was outside with the victim, 911 calls made at the time indicated that a white SUV was seen driving erratically through a stop sign shortly after the gunshots. Seven minutes after the first 911 call, a security camera recorded a light-colored SUV arriving at the Erlanger Hospital emergency room. Two individuals exited the vehicle and carried the defendant into the hospital. The two other men then left. One of the men was later identified as Deaunte **Duncan**. At the hospital a .40 caliber jacketed hollow point bullet was removed from the defendant. In addition, two bullet holes were found in the right pocket of the defendant's jacket consistent with having been fired from inside his jacket pocket. Although experts could not determine the specific gun from which the .40 caliber bullet was fired, they were able to conclude that it most likely was fired from a Glock.

The victim carried a .40 caliber Glock which was found beside him on the front porch. The live bullets left in the gun were the same brand and type found in the defendant at the hospital. The victim was shot a total of seven times. The only bullet recovered was a .38 caliber corresponding to one of the gunshots to the back. Nevertheless,.45 caliber ammunition was found on the defendant at the hospital. The medical examiner testified that the evidence was consistent with a close-range gunshot to the victim's chest, followed by the victim's body rotating with four gunshots to the back of the victim's arm and two gunshots to the victim's back. At the crime scene police recovered two .40 caliber shell casings, two .45 caliber bullets and five .45 caliber shell casings. The .45 caliber bullets and shell casings were all fired from the same gun.

Approximately three months later a .45 caliber Hi-Point handgun was found in the car of Gerald **Jackson**. Ballistics showed it was the gun that fired the .45 caliber bullets at the scene of the victim's homicide. However, Gerald Jackson was in the penitentiary at the time of the crime.
Supreme Court: We reverse the holding of the CCA and conclude that the evidence was sufficient to support a finding of premeditation.

> "Considering all the evidence, a rational jury could conclude not only that the Defendant armed himself for an encounter that he initiated, but also that the Defendant was face to face with the victim on the porch. Furthermore, a rational jury could conclude that the Defendant shot the victim in the chest at close range. The proof also supports a conclusion that the victim attempted to retreat when he turned away from the Defendant and headed toward the front door, which was his only escape route. As the victim turned toward the door, he was shot four times in the back of the left arm and twice in the back. The wounds to the back were the fatal wounds, The Defendant and his companions then fled the scene, leaving the victim mortally wounded on the front porch."

404(b): The trial court admitted evidence that the defendant, Jackson and Duncan were members of the Gangster Disciples to prove the identity of the defendant as the perpetrator and providing necessary contextual background.

CCA found no error in admission of the gang membership evidence—through the testimony of an investigator, gang validation forms and three photographs, but found that the trial court abused its discretion by admitting background information about the Gangster Disciples and the origins of various gang signs. The CCA went on to find error (1) in allowing an officer to testify that the handgun recovered from Jackson was during the investigation of two robberies and (2) the mention of gang members names who were unconnected to the case.

Supreme Court: The trial court did not err in admitting the evidence of gang membership. Given the facts, an association between the defendant, Jackson and Duncan was relevant to link the defendant to the murder weapon. Further the gang validation forms were evidence that established this common gang membership and the photographs provided important contextual background to support the connection of the three men. There was minimal danger of any unfair prejudice from any of this evidence. Admission of background information and origin of gang signs was not reversible error. Testimony about gang hand signs was relevant to explain the photographs. Explanation of six-point star that appeared in photograph was relevant. Explanation of defendant's 720 tattoo was relevant as establishing defendant as member of gang, but explanation of 360 ideology was not and carried the danger of unfair prejudice. However, Defendant failed to carry burden of proving that this error more probably than not affected the verdict. Admission of evidence that murder weapon was discovered in connection to an investigation of two other robberies was irrelevant but too tangential to have probably changed the outcome of the trial. Likewise evidence of the names of gang members not connected to the case on trial was too tangential to have probably changed the outcome of the trial. Neither would entitle defendant to relief as plain error.

See n. 23: ***Would 404(b) apply to evidence of gang membership of Duncan and Jackson or would Rule 403?***

PROBATION REVOCATION; TWO-STEP PROCESS; STANDARD ON APPEAL:
State v. Dagnan, 641 S.W.3d 751 (Tenn. 2022).

Defendant pled guilty to theft as a Range II Offender and was placed on probation for six years. After his sixth probation violation hearing the trial court explained that it was conducting a two-step analysis. The court first found that Defendant violated his probation. "As for the second consideration, based on the evidence presented at the hearing and numerous factors including Defendant's character, prior criminal history, mental health and addiction, and the nature of the offense, the court concluded that the appropriate consequence for his violation was to fully revoke probation." Defendant was ordered to serve the balance of his sentence in custody. CCA affirmed with concurrence calling into question the standard of review on appeal of the decision of a trial court as to the consequences of a revocation of probation. Permission to Appeal was granted to clarify procedure. HELD: Probation revocation is a two-step process by which the trial court first determines whether to revoke probation and second the appropriate consequence upon revocation. Although it is a two-step process, both steps can be determined in a single proceeding. There is no need for a separate sentencing hearing. Whether to revoke probation and the consequences of that revocation rests in the sound discretion of the trial court and will not be overturned on appeal absent a finding of an abuse of discretion. "We emphasize that these are two distinct discretionary decisions both of which must be reviewed and addressed on appeal." Thus, "[o]n appeal from a trial court's decision revoking probation, the standard of review is abuse of discretion with a presumption of reasonableness so long as the trial court places sufficient findings and the reasons for its decisions as to revocation and the consequence on the record." Absent sufficient findings by the trial court, the appellate court may conduct de novo review or remand to the trial court to make such findings). Although the court's findings do not have to be particularly lengthy or detailed, the court must place sufficient findings and reasons on the record both as to its decision to revoke and the separate discretionary decision as to the consequence of the revocation. Consideration of such factors as the number of prior violations, the seriousness of the violation, the defendant's criminal history and his or her character are examples of proper considerations with regard to the discretionary decision as to the consequence of the violation).

DEATH PENALTY; DEATH QUALIFICATION; STANDARD OF REVIEW:
State v. Miller, 638 S.W.3d 136 (Tenn. 2021)

Defendant was convicted of first degree premeditated and felony murder along with numerous other crimes. The jury found the presence of two aggravating circumstances: (i)(2) prior felony involving violence and (i)(7) killing in the commission of an aggravated robbery and imposed the death penalty. **Supreme Court:** A trial judge's finding of bias of a juror because of his or her views of capital punishment should be reversed only

when the judge abuses his or her discretion. In this case the trial judge did not abuse his discretion with regard to any of his rulings during jury selection. In addition, trial judge did not err in allowing, during the sentencing stage, the admission of a video of a prior robbery committed by the defendant. The State was authorized to introduce this evidence as it was relying on the (i)(2) statutory aggravating circumstance [prior felony involving violence] and T. C. A. § 39-13-204 authorizes either party to admit evidence concerning the facts and circumstances of the prior crime and suggests that Rule 403 should not routinely prevent the admission of such evidence.

SPEEDY TRIAL; STANDARD OF REVIEW; 404(b) WITNESSES:
State v. Moon, 644 S.W.3d 72 (Tenn. 2022)

PROCEDURAL HISTORY: Defendant was shot on December 17, 2017. On March 7, 2018, Defendant filed a motion for speedy trial. On March 8, 2018, Defendant was bound over to the action of the grand jury. He was indicted on April 10, 2018, for attempted first degree murder, resisting arrest, aggravated assault and two counts of possession of a firearm in the commission of a dangerous felony. Defendant's trial was first set for November 28, 2019, but was moved, over objection for the Defendant, to February 1, 2019 due to a scheduling conflict with a three-year old rape case. On January 16, 2019, Defendant moved to dismiss the indictment for a denial of speedy trial. The motion was denied on February 7, 2019. The trial began on February 11, 2019, and concluded on February 14, 2019, with the jury finding the Defendant guilty of attempted second degree murder and employment of a firearm in the commission of a dangerous felony. FACTS: Police officer and Defendant had a confrontation in a trailer park in Tullahoma. The officer contended that the Defendant pulled a gun on him during a scuffle and as a result the officer shot the defendant five times in self-defense. The Defendant offered another version of the events, acknowledging that he had a gun but that he never pulled it out, but it did fall out of his pants after he was shot by the officer. Another police officer testified that he recovered the gun on the ground but he did not see it in the Defendant's hand. The defense called several witnesses who were at the scene, all of whom said they did not see a gun in the Defendant's hand. The main witness for the defense was Larry Woods. During cross-examination of Mr. Woods, the State sought permission to question him about prior bad acts of drug dealing out of his trailer. Apparently, he had been indicted for selling drugs out of his trailer three months prior to the incident at issue. The State reasoned that his evidence indicated motivation not to be honest as to the events in question. The trial judge allowed the questioning finding the allegation that Mr. Woods was selling drugs was probative "as it gives a complete story of the motivation, bias, and other things that involve witnesses and a complete story of the crime."
CCA: There was no violation of the right to a speedy trial. In addition, although harmless error, trial judge erred in allowing State to impeach a defense witness with prior bad acts of alleged drug dealing. Trial judge did not comply with Rule 404(b) requirements such that we will review the matter de novo. Evidence did not establish prior act of drug

dealing by clear and convincing evidence. In addition, the evidence was not relevant to any material issue in the case and, as such, its probative value was not outweighed by its prejudicial effect.
SUPREMES: Application granted to consider (a) proper standard of review for a speedy trial claim and (b) whether the trial court committed reversible error in allowing the impeachment evidence. HELD: The standard of review as to the issue whether a defendant has been denied the right to a speedy trial is de novo with respect to whether the court correctly interpreted and applied the law, with deference to the trial court's findings of fact unless the evidence preponderates otherwise. Applying the four factors of Barker v. Wingo, the Defendant right to a speedy trial was not violated. While we agree with the CCA determination that the trial court erred in allowing the impeachment evidence, we disagree with the determination that it constituted harmless error. We reverse the judgment of the CCA and the judgment of the trial court is vacated and we remand to the trial court. **Footnote 10:** "We note that whether the statutory extension of Rule 404(b) by and through the Channon Christian Act is constitutional is not at issue in this case, and our holding does not attempt to answer that question as it has not been raised by either party."

EXPUNGEMENT ORDER; T.B.I.AUTHORITY:
Recipient of Final Expunction v. Rausch, 645 S.W.3d 160 (Tenn. 2022)

Defendant successfully completed judicial diversion and requested expungement of his records. The State, acting through an assistant district attorney general consented to the expungement and the trial judge signed and entered an agreed, joint proposed expungement order. No appeal was taken from the order and it became final. Upon receipt of the order the T.B.I. refused to expunge the records based upon T.C.A. § 40-32-101(a)(1)(D) which specifically makes sexual offenses ineligible for expunction. Plaintiff sued T.B.I seeking declaratory and injunctive relief. HELD: T.B.I. has no authority to refuse to comply with a final expungement order issued by a court of record.

POST-CONVICTION; MODIFIED STRICKLAND; FAILURE TO FILE MOTION TO SUPPRESS:
Phillips v. State, 647 S.W.3d 389 (Tenn. 2022)

In this case it was alleged that trial counsel provided ineffective assistance of counsel by failing to file and/or litigate a motion to suppress the Defendant's statements given to the police for an alleged Fourth Amendment violation by failing to provide a prompt judicial determination of probable cause as required by Gerstein v. Pugh, 420 U.S. 103 (1975) and its progeny. Tennessee Supreme Court granted Rule 11 to clarify how the two-prong Strickland standard is modified when there is an allegation of ineffective assistance of counsel for failure to litigate a motion to suppress on Fourth Amendment grounds. HELD: In order to prove ineffective assistance of counsel based on counsel's

failure to file and litigate a motion to suppress evidence on Fourth Amendment grounds, the Petitioner must prove: (1) a suppression motion would have been meritorious; (2) counsel's failure to pursue the motion was objectively unreasonable; and (3) but for counsel's objectively unreasonable omission, there is a reasonable probability that the verdict would have been different absent the excludable evidence. If the Petitioner fails to prove even one of the three elements, the inquiry ends. In this case, the Defendant was given a Gerstein hearing within (7) seven hours of his arrest and there was no showing that the seven hour delay was an unreasonable delay for an improper purpose. The motion would not have been successful. Since the motion lacked merit defense counsel cannot be said to have acted unreasonably. Furthermore, assuming for sake of argument that the motion would have been successful, petitioner has failed to show that the end result would have been different. There was abundant eyewitness testimony to support the convictions.

SENTENCING; DRUG-FREE SCHOOL AND NON-SCHOOL ZONES:
State v. Linville, 647 S.W.3d 344 (Tenn. 2022)

Defendants convicted of manufacturing, delivering, selling or possession [T.C.A. § 39-17-417] of drugs within a drug free *school* zone [referring to any public or private elementary, middle or secondary school] are (a) to be sentenced one (1) classification higher than the law would provide otherwise and (b) must serve the minimum sentence for the applicable range of sentence. A defendant who is convicted the same type drug offense, but for a crime committed within a drug free [*non-school*] zone [meaning a preschool, child care agency, public library, recreational center or park] are not to be sentenced one classification higher, but must also serve the minimum sentence for the applicable range of sentence.

CRIMINAL SAVINGS STATUTE; REPEAL NOT LESSOR PENALTY:
State v. Marvin Maurice Deberry, 2022 WL 3725314 (Tenn. Aug, 30, 2022)

This case involves the interpretation of the criminal savings statute which provides:

> [w]hen a penal statute or penal legislative act of the state is repealed or amended by a subsequent legislative act, the offense, as defined by the statute or act being repealed or amended, committed while the statute or act was in full force and effect shall be prosecuted under the act or statute in effect at the time of the commission of the offense…..in the event the subsequent act *provides for a lesser penalty*, any punishment imposed shall be in accordance with the subsequent act.

Tenn. Code Ann. § 39-11-112 (emphasis added).

Defendant committed the criminal offense of driving while being a MVHO in 2018 and was convicted of the same by a jury of his peers on May 15, 2019. Effective July 1, 2019, the legislature repealed the statute creating the offense. On July 8, 2019, the trial judge entered a judgment of conviction and sentenced the defendant to a five year split sentence. Later, in conjunction with the motion for new trial, the trial judge accepted the defense argument that by repealing the statute the legislature provided a "lesser penalty" under the savings statute. Accordingly, the trial judge entered an amended judgment of conviction, but provided no punishment. CCA affirmed. HELD: "We hold that a statute that repeals a criminal offense does not 'provide for a lesser penalty' within the meaning of the criminal savings statute. Rather a person who commits an offence that is later repealed should be convicted *and sentenced* under the law in effect when the offense was committed unless the legislature provides otherwise." CCA reversed, amended judgment of trial court vacated, and original judgment reinstated.

PROSECUTORIAL MISCONDUCT; CLOSING ARGUMENT; PLAIN ERROR REVIEW: State v. Tyler Ward Enix, No E2020-00231-SC-R11-CD, 2022 WL 4137238 (Tenn. Sept. 13, 2022)

The Defendant was alleged to have stabbed his ex-wife to death in her apartment and then fled the state with her car, her ATM card, and their two year-old daughter. The victim was stabbed forty-seven (47) times and the evidence that Defendant committed the killing and took the car and ATM card was simply overwhelming. At trial, the defense did not contest the fact that the Defendant committed the stabbings, but claimed he did so in a state of passion. He also claimed that the thefts were after-the-fact and not a part of the killing. The Defendant was convicted of premeditated first-degree murder and especially aggravated robbery. Defense counsel made no contemporaneous objections to the prosecutor's closing argument during the trial, but claimed in the motion for new trial that the prosecutor committed prosecutorial misconduct during closing argument (1) when he pounded the table 47 times and declared himself out of breath; (2) when he asserted that the Defendant broke the victims iPhone; (3) when he suggested that the Defendant was fleeing to Canada; and (4) when he referred to the Defendant as a "coward." CCA: The Court of Criminal Appeals reviewed the claim under the standards applicable to "plain error" review and concluded that the defense had failed to establish that the failure to object was not a tactical decision. The Tennessee Supreme Court granted permission to appeal to clarify the appropriate standard of review for claims of prosecutorial misconduct during closing argument when a defendant fails to contemporaneously object but later raises the claim in a motion for new trial. HELD: Plain error, not plenary review, is the appropriate standard of review. To the extent that State v. Hawkins, 519 S.W.3d 1 (Tenn. 2017) is inconsistent with this decision, it is overruled. Applying plain error review in this case we need not consider whether the defense failed to object for tactical reasons. In order to establish plain error a substantial right of the defendant must have been adversely affected to the

defendant's prejudice. In this case, the evidence was so overwhelming that the alleged errors could not have adversely affected the defendant. Affirmed.

JURY INSTRUCTIONS; WRITTEN V. ORAL; SCOPE OF REVIEW FOR UNPRESERVED AND UNPRESENTED ISSUES; NOTICE:
State v. Lynn Frank Bristol, 2022 WL 5295777 (Tenn. 2022)

Defendant was indicted for sexual battery and rape of a child for incidents involving his step-daughter. He was convicted of two counts of aggravated sexual battery. During the trial, the judge orally instructed the jury. There were no objections to the charge. The motion for new trial did not contain any allegations with regard to the jury instructions nor was there any mention of a problem when the motion for new trial was heard. The Defendant appealed not raising any issue with regard to the instructions so there was no transcript of the jury instructions contained in the appellate record. On appeal the Defendant did not raise any issue in his Brief or at oral argument regarding the jury instructions. Two months after the oral argument the CCA ordered a supplemental record be prepared which included a transcript of the jury instructions. The CCA order indicated that it was needed for "complete review of the issues raised on appeal." After receiving the supplemental record, the CCA rendered its opinion rejecting all the arguments actually raised on appeal but reversing for "plain error" due to failure to comply with Tenn. R. Crim. P. 30 which says that instructions shall be reduced to writing and read to the jury. The written jury instructions contained in the record were not consistent with the oral charge as revealed by the transcript. The written charge had deficiencies. The State then filed a Petition to Rehear and attached to the Petition written jury instructions that it had obtained from a review of the trial court file that were consistent with the transcript of the oral jury charge and did not contain the deficiencies. The State requested a remand for a second supplemental record so that the Judge could determine whether the original jury instructions contained in the record were the correct ones or whether the second set of written instructions found by the State were the actual instructions given to the jury. Thereafter, the CCA received the second supplemental record containing the same written jury instructions which had been attached to the State's Petition to Rehear. Unfortunately, the supplemental record was only certified by the "Clerk" and not by the "Judge." CCA denied the Petition to Rehear on the bases that the Judge had not explained the discrepancies. SUPREME COURT: The Supreme Court granted the State permission to appeal to clarify the scope of an appellate court's limited discretionary authority to consider unpreserved and unpresented issues. In the Order the Court also provided, "Additionally, the trial court is ordered to make a written determination of whether the written jury instructions transmitted originally with the appellate record, the written jury instructions transmitted to the Court of Criminal Appeals in a supplemental record, or some other version of written jury instructions accurately reflect the written instructions provided to the jury at trial." Pursuant to that order the trial judge clarified that the written jury instructions originally contained in the appellate record were incorrect due to a copying error and

that the instructions sent in the second supplemental record were the actual written instructions submitted to the jury. HELD: CCA abused its discretion granting relief on an unpreserved and unpresented issue without giving the parties notice and an opportunity to be heard. Court discusses basic principles (1) that generally an appellate court's authority will only be extended to issues presented for review and (2) that an appellate court's jurisdiction is "appellate only." Court explains underlying rationale for such rules. Court notes various exceptions citing T.R.A.P 13(b), 36(a) and (b) including "plain error" but cautions that even in these situations the parties are entitled to fair notice and an opportunity to be heard *prior* to the Court reaching an opinion. Court finds no need for remand to CCA, reverses CCA and reinstates the Defendant's convictions.

CASES PENDING IN TENNESSEE SUPREME COURT

PREMEDITATION; WAIVER OF MIRANDA BY JUVENILE:
State v. Kemontea Dovon McKinney, 2022 WL 42565 (Tenn. Crim. App. Jan. 5, 2022)
Oral Argument set for December, 2022, ETSU SCALES

Defendant was convicted of aggravated robbery, first-degree premeditated murder, first-degree felony murder and theft. CCA found evidence of premeditation insufficient and modified that conviction to second degree murder. They also concluded that trial judge erred in admitting the pretrial statement of the Defendant and ordered a new trial. Although officer read Defendant his Miranda rights he did so in a monotone and then asked the Defendant to sign to acknowledge that his rights had been read to him. Defendant acknowledged that he understood his rights, but officer did not ask Defendant if he wished to waive his rights. He just started asking questions. State granted Rule 11.

GANG ENHANCEMENT; NOTICE REQUIREMENTS:
State v. Dashun Shackleford, 2022 WL 81833 (Tenn. Crim. App. March 18, 2022)
Oral Argument set for December, 2022, ETSU SCALES

The Defendant was convicted in Knox County on a twenty (20) count indictment of four (4) counts each of aggravated robbery against four (4) victims and four corresponding counts of criminal gang offense enhancement. After merging many of the counts, the Defendant was sentenced to twenty (20) years with an eighty-five percent RED. The CCA reversed finding insufficient evidence as to the gang enhancement and that the State filed to comply with the applicable notice requirements.

BRADY; ACCOMPLICE COROBORATION:
State v. Tony Thomas and Laronda Turner, 2021 WL 5015255 (Tenn. Crim. App. Oct. 28, 2021). *Oral Argument set for November 29, 2022.*

Both Defendants were convicted of three counts of first-degree premeditated murder. They appealed (1) challenging the sufficiency of the evidence based primarily on a claim that their accomplice's testimony was not sufficiently corroborated; (2) contending that the trial judge should have granted a motion to dismiss due to a Ferguson violation by failing to preserve photographic lineups and the co-defendant's cell phone; (3) that a new trial should have been ordered due to a Brady violation; (4) that the trial court committed error when it *sua sponte* prohibited the introduction of a printout of the co-defendant's message to his girlfriend implicating himself in the murders, and in doing so, made an improper comment of the evidence; and (5) that the trial judge erred in the jury instructions by including language, "or either of them" throughout the instructions. CCA affirmed in a 2-1 opinion noting that the evidence corroborating the accomplice's testimony as to Defendant Turner was less than that as to Defendant Thomas, but sufficient and that there was no showing that the inconsistent statement not disclosed to the defense was "material" under the Brady rule. DISSENT: The corroboration was insufficient as to Defendant Turner and I would reverse and dismiss as to her. The State's Brady violation also entitles both to a new trial.

RESTITUTION; FINAL JUDGMENT:
State v. Johnny Summers Cavin, 2021 WL 512029 (Tenn. Crim. App. Nov. 3. 2021)
Oral Argument held September 7, 2022

Defendant pled guilty to various offenses including burglary and theft of property and was sentenced to 2 years and 6 months consecutive to a probation violation. In a subsequent restitution hearing the trial court ordered the Defendant to pay $5,500 in restitution. Defendant appealed claiming that the trial court did not have jurisdiction to order restitution and that the amount was improper as the victim's pecuniary loss was not substantiated and the trial court did not consider the Defendant's ability to pay. CCA dismissed appeal saying it was without jurisdiction.

RESTITITUION; FINAL JUDGMENT:
State v. Joseph Gevedon, 2021 WL 5561056 (Tenn. Crim. App. Nov. 29, 2021)
Oral Argument held September 7, 2022

Defendant pled guilty to various offenses including DUI and agreed to three (3) consecutive eleven-month, twenty-nine day sentences. He was granted probation for all but 96 hours. At the time of sentencing, Defendant also agreed to a restitution hearing to be held at a later date. Before that hearing was conducted the Defendant's probation was revoked. The trial judge also ordered the Defendant to pay $30,490.76 in restitution. The Defendant appealed. CCA dismissed appeal saying it was without

jurisdiction. Order granting Rule 11 asked for briefing on (1) whether a trial court's judgment is "final" when judge orders restitution but does not specify a payment schedule; (2) whether trial court abused discretion without considering the future ability to pay when the judge revoked probation and order incarceration for nearly there years and (3) whether trial court erred in converting the restitution to a civil judgment without following Tenn. Code Ann. § 40-35-304(h).

POLICE OFFICER ACTING OUTSIDE JURISDICTION:
State v. Corey Forest, 2021 WL 1979084 (Tenn. Crim. App. May 18, 2021)
Oral Argument held April 6, 2022

Defendant was arrested for possession of cocaine found during a traffic stop which was made by a City of Columbia police officer outside the city limits. The trial court denied a motion to suppress based on a claim that the stop was illegal since the officer had no authority. CCA affirmed finding the officer could act as a private citizen. Rule 11 grant stated: "the Court is particularly interested in the parties addressing the permissible scope of activities for a law enforcement officer acting as a private citizen under Tenn. Code Ann. § 40-7-109."

FORGERY BY ELECTRONIC SUBMISSIONS:
State v. Ronald Lyons et al., 2021 WL 1083703 (Tenn. Crim. App. March 22, 2021)
Oral Argument held April 6, 2022

Defendants who were upset with various government officials electronically submitted baseless lien filings against them the Secretary of State. The Defendants were convicted of multiple counts of forgery and fraudulent filing of liens. CCA affirmed. Rule 11 indicated Court's concern for the sufficiency of the evidence as to the forgeries.

CONSECUTIVE SENTENCING; EXTENSIVE RECORD:
State v. Quinton Devon Perry, 2021 WL 2563039 (Tenn. Crim. App. June 22, 2021)
Oral Argument held April 5, 2022

Defendant pled guilty to several counts of aggravated sexual exploitation as well as sexual exploitation of a minor were the number of exploitive materials exceeded twenty-five. The trial court ordered partial consecutive sentencing on the basis that the Defendant had an extensive record of criminal activity. In Split opinion CCA affirmed finding that "extensive record" could be supported based primarily on the number of images in the case. DISSENT: "The record shows the trial court justified consecutive sentencing based solely upon the number of convictions to which the Defendant pleaded guilty without consideration of the pervasiveness of the Defendant's illegal behavior. There is no question that the Defendant knowingly transferred or exchanged 174 images of child pornography as charged in the multiple count indictment. While this

conduct was repulsive and repugnant, there was no proof in the record that the Defendant engaged in a continuous course of downloading or uploading the materials for the year long period alleged in each of the twenty-four counts of the indictment."

JUVENILES:
State v. Tyshon Booker, 2020 WL 1697367 (Tenn. Crim. App. April 8, 2020)
Last Oral Argument held February 24, 2022)

Is mandatory life sentence for murder committed by a juvenile unconstitutional?

Court of Criminal Appeals – Selected Cases

CONFEDERATE MEMORABILIA IN JURY ROOM; HEARSAY; 803(26):
State v. Tim Gilbert, 2021 WL 5755018 (Tenn. Crim. App. 2021)

Defendant was convicted of various crimes including aggravated assault in Giles County Circuit Court. Case reversed for two reasons. First, the jury was exposed to extraneous prejudicial information when it deliberated in a jury room filled with confederate memorabilia. Second, trial court erred in admitting entirety of a witness' pretrial statement under Tenn. R. Evid. 803(26). Rather than admit the recording in its entirety, it should have been redacted to only introduce the prior inconsistent statements that witness denied or was equivocal about making. **Note: Permission to Appeal Denied: Not for Citation**.

CONFEDERATE MEMORABILIA IN JURY ROOM:
State v. Martin, 2022 WL 3364793 (Tenn. Crim. App. Aug. 16, 2022)

Defendant convicted of various drug crimes in Giles County Circuit Court. Raised issue of confederate memorabilia for first time in motion for new trial. CCA evaluated under plain error standard and affirmed. No juror testified that they were aware that the memorabilia was related to the confederacy.

MUST MAKE FINDINGS OF FACT WHEN RULING ON POST-CONVICTIONS
Cole v. State, 2022 WL 1040006 (Tenn. Crim. App. April 7, 2022):
When determining the merits of a post-conviction petition, the Post-Conviction Procedure Act requires the post-conviction court to make written findings of fact and conclusions of law. A trial court's final disposition of a petition for post-conviction relief "shall set forth in the order or a written memorandum of the case all grounds presented, and shall state the findings of fact and conclusions of law with regard to each such ground. Without sufficient factual findings and conclusions of law, we are unable to properly address the merits of Petitioner's claims. .... Accordingly, we reverse the

judgment of the post-conviction court and remand for further proceedings consistent with this opinion."

THE RIGHT TO SPEEDY TRIAL APPLIES TO PROBATION VIOLATION HEARINGS:

State v. McBrien, 2022 WL 1025068 (Tenn. Crim. App. April 6, 2022):

Defendant pled guilty to a 6 year sentence in 2000 and was placed on probation. He then moved to another county, was re-arrested, and a probation warrant was issued for his arrest in 2005 for absconding and being convicted for new crimes. He was rearrested several times over the years, and the original district was notified to place a detainer on him while in custody, but never did. He was finally arrested for violation of probation in 2020. The defendant asserted his right to a speedy trial was violated, arguing a fifteen-year delay in pursuing the probation violation warrant was inherently prejudicial and attributable to bureaucratic neglect or indifference. The trial judge disagreed and violated his probation, but the CCA stated that because the warrant was not issued until well after the defendant's sentence had expired, or would have expired had the original warrant been timely served and acted upon, and the defendant was denied the right to a speedy trial, the judgment of the trial court was reversed.

JUROR MISCONDUCT: PRESUMPTION OF PREJUDICE:

State v. Montella, 2022 WL 1040126 (Tenn. Crim. App. April 7, 2022)

In a sexual battery trial, a juror raised his hand when asked if he knew the victim's family, but testified at the motion for new trial that he was not asked any more questions about that by the attorneys, and that it had been 6 years since he had interacted with the victim's parents. Although he at first didn't recognize the name of the victim, he testified that he recognized her when she testified during the trial and didn't reveal that fact to the judge or the attorneys. He also testified that in deciding the case, he had been neither biased nor prejudiced. The proof at the motion for new trial showed that he had wished the victim's father a "happy birthday" on Facebook months before the trial, and was Facebook friends with the victim's. The judge denied the motion for new trial, finding the juror credible. The CCA reversed because "When a juror willfully conceals (or fails to disclose) information on voir dire which reflects on the juror's lack of impartiality, a presumption of prejudice arises." When asked a question reasonably calculated to produce an answer, a juror's silence is "tantamount to a negative answer," and the evidence preponderated against the trial court's findings that the juror did not willfully conceal information about his relationship with the victim's parents. The case was remanded back for a new trial.

SUFFICIENCY OF EVIDENCE: FORCE OR COERCION IN RAPE TRIAL:

State v. Perry, 2022 WL 1025069 (Tenn. Crim. App. April 6, 2022)

After his conviction for rape, the defendant appealed, asserting that a constructive amendment of the indictment and a fatal variance occurred when the indictment

charged him with rape by force or coercion but the proof at trial showed rape without consent, so the evidence was insufficient to support his conviction. He contended that while there was substantive proof that he penetrated the victim, there was no substantive proof that he used physical force to do so. However, the CCA found that "the victim, a thirteen-year-old female, testified that the Appellant was on top of her, that she told him to stop, and that she tried to push him away. The Appellant, a grown man, refused to get off of the victim and penetrated her. The victim said that the penetration hurt and that she bled afterward. Taken in the light most favorable to the State, the evidence shows that the victim resisted the Appellant. Therefore, we have no hesitation in concluding that the Appellant used force to accomplish the penetration."

SEX OFFENDER STATUS SUBSTANTIALLY MORE PREJUDICIAL THAN PROBATIVE:

State v. Higgins, 2022 WL 1310831 (Tenn. Crim. App. May 2, 2022)

Defendant was convicted of possession with intent to sell and felon in possession of a firearm, which arose from a residential search conducted because both the defendant and the person with whom he was living were registered sex offenders. The defendant, in a motion in limine, argued that his status as a sex offender was irrelevant to the issues presented at trial and that any probative value in evidence of his status was outweighed by the danger of unfair prejudice. The State confirmed that the officers were at defendant's residence to conduct a sex offender registry check. The trial court agreed that the defendant's status as a sex offender was irrelevant and granted the defendant=s motion, stating, "I'm not going to allow the State to ask any of its witnesses about him being on the sex offender registry or that they are there to conduct any search pursuant to any kind of sex offender registry." "They can just say that we were there to do a home visit or whatever they want to say and as part of our duties we have the right to search his residence." However, at trial when the officer was asked by the prosecutor "What exactly are your job responsibilities?" the officer responded "I work in the PSU unit which supervises registered sex offenders." "And as part of your job responsibilities, do you conduct resident searches?" Officer Miller: "I do." The defendant objected. The prosecutor apologized and explained that because Officer Miller was in the courtroom when the trial court made its ruling and instructed the witnesses not to mention the sex offender registry, he had "assumed he would leave that out." The defendant argued that, although Mr. Miller did not say that the defendant was a sex offender, "the implication is that he was on the sex offender registry from what he said." The defendant declined the trial court's offer to "instruct the jury to disregard that comment," insisting "that the comment blurted out is just very prejudicial" and that such an instruction would only serve to emphasize the issue. The trial court denied the motion for a mistrial, noting in particular that the officer did not say "specifically" that he supervised the defendant as a sex offender. The officer later testified that the defendant was not under his direct supervision, trying to lessen the

impact of this on the jury. In deciding the appeal, the CCA cited *State v. Bell*, 512 S.W.3d 167, 188 (Tenn. 2015) for the proposition that our supreme court has recognized three nonexclusive factors that a reviewing court should consider when determining whether the trial court should have granted a mistrial because of inappropriate testimony before the jury: "(1) whether the State elicited the testimony, or whether it was unsolicited and unresponsive; (2) whether the trial court offered and gave a curative jury instruction; and (3) the relative strength or weakness of the State's proof." The trial court offered to instruct the jury to disregard the comment, but the defendant declined, observing that such an instruction would only serve to draw the jury's attention to the issue. The court's offer of a curative instruction and the defendant's subsequent refusal "for tactical reasons" are typically "significant to the analysis" when considering the refusal to grant a mistrial. *Nash*, 294 S.W.3d at 547. "This is not an instance, however, when the defendant did not attempt to prevent the admission of such testimony. He filed a motion in limine, which the trial court granted in the most forceful language possible. He asked the trial court to specifically instruct the witnesses not to make any reference at all to the sexual offender registry. At that point, the defendant had done all he could to prevent the admission of any evidence related to his being on the sex offender registry. Thus, [the officer's] testimony, which clearly implied that the defendant was on the sex offender registry, was so irrelevant and inflammatory that counsel correctly surmised that a curative instruction would only serve to draw more attention to the issue. Given that the three factors outlined above are not mandatory and given counsel's efforts to exclude the evidence prior to trial," and the weakness of the state's proof linking the drugs and gun to the defendant rather than his roommate, the case was reversed and remanded back to the trial court for a new trial.

COMMUNITY SUPERVISION FOR LIFE CAN'T BE ADDED BY CONSENT IF NOT STATUTORY; GUILTY PLEA PURSUANT TO *STATE V. HICKS:*

State v. Boykin, 2022 WL 1639275 (Tenn. Crim. App. May 24, 2022)

Originally charged with rape, The defendant entered a plea of guilty to four counts of sexual battery by an authority figure pursuant to *State v. Hicks*, 945 S.W.2d 706, 709 (Tenn. 1997), agreeing to be sentenced outside his proper range to a lower parole percentage. Pursuant to the plea agreement, he was sentenced to concurrent fifteen-year sentences in the Tennessee Department of Correction with release eligibility after serving thirty percent of the sentences. The Defendant was also required to register as a sex offender and agreed to be subject to community supervision for life. Thereafter, the Defendant filed a motion to correct his sentence pursuant to Tennessee Rule of Criminal Procedure 36.1, alleging that "[t]he trial court erred in holding that the lifetime community supervision portion of [the Defendant's] sentence is legal, where the statutory authority for that provision mandates lifetime supervision for certain offenses but not the offenses for which [the Defendant] was convicted." The trial court denied the

motion after a hearing, and the defendant appealed. The CCA held that "hybrid" sentences involving a sentence length in one range but utilizing a different range classification for purposes of calculating the release eligibility date are permissible. *See State v, Hicks*, 945 S.W.2d 706. However, the sentence length may not exceed the statutory maximum. *See Hoover*, 215 S.W.3d 776. "The sentencing guidelines of the 1989 Act are jurisdictional and binding on trial courts." *McConnell v. State*, 12 S.W.3d 795, 800 (Tenn. 2000). Thus, a court must "ascertain and give effect to the legislature's intent without unduly restricting or expanding a statute's coverage beyond its intended scope." *Hicks*, 945 S.W.2d at 707. Because the sentence of community supervision for life commenced immediately upon the expiration of the term of imprisonment imposed upon the person by the court or upon the person's release from regular parole supervision, whichever first occurs, T.C.A. Section 39-13-524 (2018) (subsequently amended), and the community supervision requirement is punitive and carries "significant" consequences, including the payment of a supervision fee and regular reporting to a parole officer who has the discretion to impose conditions of supervision, both because the Sentencing Act does not authorize the imposition of community supervision for life for sexual battery by an authority figure, and because a sentence involving service of fifteen years followed by community supervision for life exceeds the fifteen-year maximum allowable sentence for the offense, imposing that condition even with the defendant's consent during a plea is illegal. The case was remanded back to the trial judge for correction of the judgments.

DUTY TO RETREAT; ELECTION OF OFFENSES IN BENCH TRIALS; DOUBLE JEOPARDY:

State v. Jackson, 2022 WL 1836930 (Tenn. Crim. App. June 3, 2022)

Defendant was originally charged with three counts of first degree murder of one victim (premeditated murder, murder during a robbery and murder during a kidnapping) and especially aggravated robbery of two other persons. He was convicted of three counts of second degree murder and two counts of aggravated assault after a bench trial. He was engaged in a drug transaction in a motel room when he produced a firearm, hit one aggravated assault victim with a firearm, breaking his cheekbone and nose, and held him and the homicide victim at gunpoint. When another person arrived at the motel room and the defendant brandished his weapon at her, the homicide victim jumped on top of the defendant, who shot him nine times while the other two victims ran away. He claimed self-defense, that he was being robbed by the victims. The trial court merged the three homicide offenses and imposed an aggregate sentence of twenty-five years in prison. The defendant objected to the trial court's determination that the defendant had a duty to retreat prior to using force. In applying the statutory law of self-defense, a trial court must make a threshold determination regarding whether the defendant has a duty to retreat, deciding "whether the State has produced clear and convincing evidence that the defendant was engaged in unlawful activity such that the "no duty to retreat"

instruction would not apply," using the procedures in Tennessee Rule of Evidence 404(b). *Perrier*, 536 S.W.3d at 403. He also argued that his possession of a firearm had no "nexus" to the offense as an illegal act. The CCA stated that whether or not the firearm had a "nexus," it was uncontested that the defendant was selling drugs, so he clearly was engaged in unlawful activity. The defendant also objected that the State did not elect which underlying felony would be the subject of the felony murder counts. The CCA held that regardless of that argument, there is no need for the State to make an election, because in a bench trial, there is no possibility of the trier of fact rendering a non-unanimous verdict, so the doctrine of election for the purpose of unanimity has no application. In Count Three, the trial judge was equivocal about the defendant's guilt, stating "So, I guess, it would have to be a not guilty, wouldn't it." The minute entry for that day stated that the defendant was found not guilty of felony murder, and at the sentencing hearing the prosecutor noted that there was a conviction on Count 3 not reflected in the presentence report because the court "had found him not guilty" on Count 3 and "clarified afterwards" that it found him guilty of the lesser included offense of second degree murder. The trial court confirmed that "I think we had already adjourned and I just sent that correction by e-mail or something, as I recall. On appeal, although the defendant had attached the trial judge's email correcting the verdict to his appeal, he argued that the court's adjournment was the equivalent of discharging a jury and that it had no authority to change its judgment after court had adjourned, and that once the trier of fact has been discharged, the imposition of a conviction is a violation of double jeopardy. *State v. Green*, 995 S.W.2d 591, 614 (Tenn. Crim. App. 1998). The State responded that the verdict was not final until sentencing. The CCA held that, because the apparent verdict was recorded in the minutes of the court after it adjourned, the acquittal was final, and that by later altering the judgment, the prohibition against double jeopardy was violated, and remanded back t the trial court for a corrected judgment of acquittal as to count three, which had previously been merged with the other second degree murder counts.

POSTCONVICTION NOT ALLOWED FOR VIOLATION OF PROBATION HEARINGS:
Scott v. State, 2022 WL 2071034 (Tenn. Crim. App. June 9, 2022)
The petitioner pleaded guilty to sale of .5 grams or more of cocaine, and the trial court imposed an eight-year sentence to be served on supervised probation. A probation violation report was issued, alleging in part that Petitioner had been arrested and convicted of aggravated robbery in McMinn County. Following a hearing, the trial court fully revoked Petitioner's probation, which was affirmed on appeal. He then filed a *pro se* petition for post-conviction relief, claiming that he received ineffective assistance of counsel at his probation revocation hearing, which was dismissed, because the Post-Conviction Procedure Act "does not permit the filing of a petition under its provisions to attack collaterally the validity of a proceeding to revoke the suspension of

sentence and/or probation." *Young v. State*, 101 S.W.3d 430, 433 (Tenn. Crim. App. 2002). However, the supreme court has held "that the issue of ineffective assistance of counsel in a revocation of a *community corrections* sentence may be raised in a post conviction proceeding," *Carpenter v. State*, 136 S.W.3d 608, 612 (Tenn. 2004) (noting that "revocation of a community corrections sentence, unlike the revocation of probation, presents the additional issue of resentencing").

ERROR TO ALLOW PROOF AT TRIAL OF *MIRANDIZING* THE DEFENDANT:
State v. Blackman, 2022 WL 2353297 (Tenn. Crim. App. June 29, 2022)
Defendant was convicted after a jury trial of two counts of aggravated sexual battery, a Class B felony, and received concurrent nine-year sentences to be served at one hundred percent. On appeal, he contended that the evidence was insufficient to support the convictions and that the trial court erred by allowing a law enforcement officer to testify that he invoked his right not to speak with the officer. During Sergeant Stanfill's testimony, he stated that the defendant was transported to the police department "where we attempted to interview him later on." The State asked if the defendant cooperat[ed] in that interview," and Sergeant Stanfill answered, "No, he chose not to." Defense counsel objected and stated, "Fifth Amendment, Your Honor. Can we approach?" At the bench, defense counsel advised the trial court that the defendant did not speak with Sergeant Stanfill because the defendant invoked his right to counsel and, therefore, that the State should not be allowed to ask Sergeant Stanfill about the defendant's interview. The State responded, "What I asked is whether he cooperated or not. If he asserted his right to counsel, I think he's free to say he asserted his right to counsel." Defense counsel maintained that the sergeant's testimony was improper under the Fifth Amendment. The trial court asked if defense counsel could cite any cases in support of his position, and defense counsel said that he did not know of any specific cases but that "if a defendant invokes his right . . . to an attorney under the Fifth Amendment, . . . that fact is not to be referenced and to be held against him in any way whatsoever." The trial judge overruled the objection and allowed the officer to testify to giving the defendant his *Miranda* rights, and telling the jury what they were, and that the defendant exercised his right to remain silent until he had representation. After another witness testified and a recess had been taken, the trial judge called the attorneys to the bench and told them they could not elicit any more testimony about the defendant's exercising his right to remain silent, that the prosecutor could not mention it in his closing argument, and offered to give a curative instruction to the jury. In his final charge to the jury, he instructed them that "Now, the Defendant is presumed innocent, and the burden is on the State to prove his guilt beyond a reasonable doubt. He is not required to give any statement to law enforcement, and his election not to do so cannot be considered for any purpose against the Defendant, nor can any inference be drawn from such fact." The CCA held as follows:

The Fifth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution generally provide a privilege against self-incrimination to individuals accused of criminal activity, which includes a right to remain silent. Case law establishes that a defendant may not be punished at trial for exercising his constitutional right to remain silent. *See Doyle v. Ohio*, 426 U.S. 610, 618 (1976); *Braden v. State*, 534 S.W.2d 657, 660 (Tenn. 1976). Therefore, the prosecution generally may not comment about a defendant's post-arrest, post-Miranda silence. *See Braden*, 534 S.W.2d at 660; *State v. Marlin C. Goff*, No. E2005-02090-CCA-R3-CD, 2006 WL 2633008, at *10 (Tenn. Crim. App. at Knoxville, Sept. 14, 2006). Likewise, a law enforcement officer should not comment about a defendant's post-arrest arrest or post-Miranda silence. *State v. Pender*, 687 S.W.2d 714, 719 (Tenn. Crim. App. 1984); *Honeycutt,* 544 S.W.2d 912, 917 (Tenn. Crim. App. 1976). Nevertheless, an improper comment regarding the invocation of the right to remain silent may be considered a harmless error that does not require the grant of a mistrial. The CCA then found that even though allowing that testimony was error, the case against the defendant was so strong that the error did not affect the verdict, and affirmed the convictions.

ERROR CORAM NOBIS; EQUITABLE TOLLING OF STATUTE OF LIMITATIONS; RIGHT TO A HEARING:

Clardy v. State, 2022 WL 2679026, (Tenn. Crim. App. July 12, 2022)

The petitioner was convicted in a 2005 shooting of one count of first degree premeditated murder, two counts of attempted first degree premeditated murder, and three counts of reckless endangerment. His defense was "mistaken identity." The trial court imposed a life sentence. His appeal and subsequent post-conviction petition were denied, and in 2020 he filed a petition for a writ of error coram nobis, alleging newly discovered evidence in the form of an affidavit showing that he did not participate in the crime, because another man had used the gun shown to have fired the bullets which killed the victim in another crime a few weeks later, and the man claimed he didn't know the petitioner. The petitioner acknowledged that he did not file the petition within the applicable statute of limitations but said he was entitled to an equitable tolling. The State agreed, and it asked the trial court for an equitable tolling and to hear the case on its merits. The coram nobis court, noting that it was not bound by the State's concession, dismissed the petition as untimely, repeatedly asking if the State thought the Petitioner was "actually innocent," contending that such a finding was necessary to apply an equitable tolling of the statute of limitations. The State informed the court that it did not believe that "actual innocence" was the appropriate standard and that, based upon the affidavit, the State believed that further investigation was necessary to determine why the two weapons used in the shooting were found in the possession of Mr. Dantwan Collier and Mr. Thomas Collier, respectively, who did not know the peitioner. The affidavit, it said, ruled out that the two men were acting in concert with the Petitioner.

The CCA, after an review of the caselaw on *coram nobis* petitions, held that to be entitled to equitable tolling, a prisoner must demonstrate with particularity in the petition: (1) that the ground or grounds upon which the prisoner is seeking relief are Alater arising@ grounds, that is grounds that arose after the point in time when the applicable statute of limitations normally would have started to run; [and] (2) that, based on the facts of the case, the strict application of the statute of limitations would effectively deny the prisoner a reasonable opportunity to present his or her claims. Based on its *de novo* review, it concluded that the ballistics evidence and affidavit were discovered after the expiration of the limitations period and were, therefore later arising. It also found that strict application of the statute of limitations would effectively deny the petitioner a reasonable opportunity to present his claims. As the State claimed before the coram nobis court, an adequate investigation into whether the affidavit was true was important to serve the ends of justice. The State's interest in preventing stale litigation is outweighed by the Petitioner's interest in presenting his meaningful claim. "[A] petition for a writ of error coram nobis need not show that the result of the proceeding would have been different had the evidence been available at trial. The petition need only show that the newly discovered evidence, had it been admitted at trial, may have resulted in a different judgment." *Nunley v. State*, 552 S.W.3d 800, 818 (Tenn. 2017). Therefore, it found that the Petitioner was entitled to an equitable tolling of the statute of limitations, and remanded the case for a hearing on the merits of the petition.

DIVING ON SUSPENDED LICENSE; SUFFICIENCY OF THE EVIDENCE:
State v. Beets, 2022 WL 3592681 (Tenn. Crim. App. August 23, 2022)
Defendant was convicted after a jury trial of possession with intent to sell more than .5 grams of methamphetamine within 1,000 feet of a private school, simple possession of heroin, hydrocodone, and marijuana, and driving on a suspended license. On appeal, he argued that the evidence was insufficient to establish that he sold drugs in a drug-free zone or that his license had been suspended. Although his drug convictions were affirmed, his conviction for driving on a suspended license was reversed. The CCA held that the officer's testimony at trial that a check of the "NCIC" showed that the defendant's driver's license had been suspended in April 2017 was insufficient to support his conviction of driving on a suspended license. To support a conviction for driving on a suspended license, the State must establish beyond a reasonable doubt that the defendant's license was suspended at the time he was driving. This is easily done by submitting a certified copy of the defendant's driving record. The State did not make even this most rudimentary effort to establish the status of the defendant's license. Without some showing that the "NCIC" records reviewed by the officer were, in fact, an accurate reflection of the status of the defendant's driver's license, his testimony about the "NCIC" records cannot, standing alone, support the defendant's conviction. Accordingly, his conviction for that offense was reversed and dismissed.

VEHICULAR HOMICIDE INELIGIBLE FOR PROBATION; CONFLICTING STATUTES:
State v. Robinson, 2022 WL 4004153 (Tenn. Crim. App. September 2, 2022)
Defendant pled guilty to vehicular homicide by intoxication, aggravated assault, resisting arrest, and driving without a license. The trial court imposed an effective ten-year sentence to be served on probation with periodic confinement each year near Christmas and each victim's birthday. On appeal, the State argues that the trial court erred by granting probation because the defendant was not statutorily eligible for probation on a conviction for vehicular homicide by intoxication. The trial judge felt that the defendant was eligible for probation due to a conflict in the statutes. In this case, the defendant pled guilty to vehicular homicide by intoxication. T.C.A. Section 39-13-213(a)(2). The vehicular homicide statute provides that "Any sentence imposed for a first violation of subdivision (a) (2) shall include a mandatory minimum sentence of forty-eight (48) hours of incarceration. The person shall not be eligible for release from confinement on probation pursuant to 40-35-303 until the person has served the entire forty-eight minimum mandatory sentence." 39-13-213(b)(2)(B). However, T.C.A. Section 40-35-303(a), the probation statute, provides in pertinent part: "A defendant shall be eligible for probation under this chapter if the sentence actually imposed upon the defendant is ten (10) years or less; however, no defendant shall be eligible for probation under this chapter if convicted of a violation of [39-13-213(a)(2), plus several other statutes for other offenses]." As 40-35-303(a) was amended in 2017, after 39-13-213(a)(2) was last amended in 2015, the Legislature's intent to make a defendant convicted of vehicular homicide by intoxication ineligible for probation is clearly and unambiguously expressed in the language of the amendment to the probation statute, which was enacted after the amendment to the vehicular homicide statute setting forth the mandatory minimum sentences for defendants convicted of vehicular homicide by intoxication. Defendant's ineligibility for probation precludes her from a sentence of split confinement, periodic confinement, or any other form of alternative sentencing. Therefore, the trial court in this case erred by granting Defendant probation followed by periodic confinement for her vehicular homicide by intoxication conviction.

APPOINTING INTERPRETER; TENN. R. CRIM. P. 28; SUPREME COURT RULE 42:
State v. Serghei, 2022 WL 4242408 (Tenn. Crim. App. September 15, 2022)
Defendant was issued a citation alleging that he "failed to move over for officer traffic stop (lights on). Following a bench trial, the trial court found him guilty of violating T.C.A. 55-8-132(b), a Class B misdemeanor, and imposed a sentence of thirty days suspended to unsupervised probation and a fine of one hundred dollars. Following a thorough review of the record and applicable law, the CCA determined that the defendant had limited English proficiency, that the trial court failed to comply with Tennessee Supreme Court Rule 42 by appointing an interpreter, and that proceeding with the trial when the defendant did not have the necessary means to communicate violated his constitutional

right to testify and to be heard. He had filed a motion pursuant to Tennessee Rules of Criminal Procedure 28 and Tennessee Supreme Court Rule 42 seeking to have the trial court "approve and/or appoint a Russian interpreter" for his bench trial. In the motion, he claimed that his "primary language is Turkish and [that] he speaks and understands the Russian language" and that, when Defendant "was present in [c]ourt [prior to setting his case for trial he had] difficulty understanding and answering the [c]ourt's questions to him because he has a limited ability to speak and understand the English language." Part, and occasionally all, of the defendant's responses to questions asked by defense counsel, the State, or the trial court, were characterized by the court reporter as- "(indiscernible)" at forty-nine places in the approximately sixteen pages of transcript containing his testimony. The Court cited to the preamble to Supreme Court Rule 42 which states that

> Many persons who come before the courts are partially or completely excluded from full participation in the proceedings due to limited English proficiency ("LEP"). It is essential that the resulting communication barrier be removed, as far as possible, so that these persons are placed in the same position as similarly situated persons for whom there is no such barrier.

For that reason, the Court remanded the case for a new trial in accordance with Tennessee Rule of Criminal Procedure 28 (allowing the trial judge to appoint an interpreter) and Tennessee Supreme Court Rule 42.

SENTENCING AND THE STATISTICAL INFORMATION FROM THE AOC:

State v. Richmond, 2022 WL 4372220 (Tenn. Crim. App. September 22, 2022)

The defendant pled guilty nine counts of sexual exploitation of a minor by electronic means, a Class B felony. Pursuant to the plea agreement, he received an effective sixteen-year sentence as a Range I, standard offender with the trial court to determine the manner of service of the sentence. After a sentencing hearing, the trial court ordered that he serve the sentence in confinement. On appeal, the Defendant claims that he was denied due process at sentencing because the trial court, among other things, failed to consider the required statistical information provided by the AOC. At the conclusion of the proof in the sentencing hearing, , the trial court stated that it had considered seven of the eight factors listed in Tennessee Code Annotated section 40-35-210(b). However, the trial court said that he was unable to consider the remaining factor, statistical information provided by the AOC as to sentencing practices for similar offenses in Tennessee, explaining that he couldn't get on the website. The CCA held that "the trial court had a statutory duty to consider the statistical information and erred by failing to do so. When the trial court fails to make the requisite findings, this court can either conduct a de novo review or remand the case to the trial court to consider the requite factors. State v. Pollard, 432 S.W.3d 851, 864 (Tenn. 2013). We think that de novo review is appropriate in this case and that the trial court's error does not necessitate reversal of the trial court's sentencing decision."

RESTITUTION: AMOUNT AND FUTURE ABILITY TO PAY:

State v. Appelt, 2022 WL 2236316 (Tenn. Crim. App. April 7, 2022)

Defendant was convicted after trial of vandalism of property valued more than $1,000 but less than $2,500, a Class E felony. After a sentencing hearing, the trial court sentenced him as a Range I, standard offender to two years to be served as four months in confinement followed by supervised probation and ordered that he pay $2,000 in restitution. On appeal, the defendant contended, among other things, that the trial court erred by setting his amount of restitution at $2,000 because the trial court relied on an "arbitrary estimate" to determine the restitution amount and did not consider the defendant's ability to pay. The State acknowledged on appeal that the trial court failed to consider the defendant's ability to pay. T.C.A. 40-35-304(a) provides that "[a] sentencing court may direct a defendant to make restitution to the victim of the offense as a condition of probation." The amount must be based on the victim's pecuniary loss. See T.C.A. 40-35-304(b). "Pecuniary loss" consists of special damages and out-of-pocket expenses incurred by the victim relative to investigation and prosecution of the crime. Tenn. Code Ann. 40-35-304(e). All restitution orders must be determined via the procedure in Tennessee Code Annotated section 40-35-304. See Tenn. Code Ann. 40-35-304(g). The procedure requires, among other things, that the court "specify at the time of the sentencing hearing the amount and time of payment . . . and may permit payment or performance in installments." Tenn. Code Ann. 40-35-304(c). The procedure also requires that the court "consider the financial resources and future ability of the defendant to pay or perform." Tenn. Code Ann. 40-35-304(d). "[T]he trial court, in determining restitution, must also consider what the appellant can reasonably pay. An order of restitution which obviously cannot be fulfilled serves no purpose for the appellant or the victim." In ordering restitution in this case, the trial court simply stated at the conclusion of the sentencing hearing that "[t]he court is also ordering that Mr. Appelt pay restitution to the laundromat owner. . . . So restitution to [the victim] in the amount of $2,000[.]" The Court did not find the trial court abused its discretion by setting the amount of restitution at $2,000. However, the trial court did not consider the defendant's ability to pay or specify the time or amount of payment. Therefore, the trial court's order of restitution was reversed, and the case was remanded to the trial court for a hearing on the matter of restitution.

This result should be compared with State v. Thomas, 2021 WL 286736 (Tenn. Crim. App. January 28, 2021), in which the defendant pleaded guilty to theft of property valued at $60,000 or more, but less than $250,000 and, pursuant to a plea agreement, the trial court ordered the Defendant to serve twelve years on community corrections. At a subsequent restitution hearing, the trial court imposed a restitution amount of $151,385, to be paid at a rate of $75 per month. That defendant appealed as well, and the CCA affirmed the case in part, but remanded the case for the trial court to order a

presentence report and determine the restitution amount, distinct from the pecuniary loss, by considering the Defendant's financial resources and ability to pay. On remand, the trial court ordered a restitution amount of $92,225 to be paid monthly according to a graduated payment schedule.

Court Amends Rule 10B Regarding Disqualification/Recusal of Judges

The Tennessee Supreme Court today issued an order amending Tenn. Sup. Ct. R. 10B in response to a petition filed by the Tennessee Trial Judges Association (TTJA) asking the court Ato provide judges with authority to summarily deny repetitive recusal motions filed pursuant to section 1.01 of Tenn. Sup. Ct. R. 10B, to provide appellate courts with a means of supplementing the record in Rule 10B appeals, to state that the scope of appellate review and relief in Rule 10B appeals is limited to affirming or reversing a trial court=s decision on a recusal motion, and to describe the procedures that should be followed on remand from an appellate court=s order reversing a trial court=s denial of a recusal motion.@

Supreme Court Amends Rule on E-Filing

The Tennessee Supreme Court today adopted amendments to Rule 46 regarding electronic filing. The revised rule replaces the prior transitional Rule 46 and continues to authorize parties to e-file documents voluntarily. Read the order, which went into effect on July 1.

2022 CRIMINAL PUBLIC ACTS

PC 643, eff. 3/11/22, amends 40-11-113 to add “continuous sex abuse of a child” to the list of felonies for which “the judge shall revoke bail immediately, notwithstanding sentencing hearings, motions for a new trial, or related post-guilt determination hearings.” The others listed are Murder First Degree, Solicitation to Commit Murder First Degree, any Class A Felony, RICO Act violations, Aggravated Kidnapping, Aggravated Robbery, Rape, Aggravated Sexual Battery, Aggravated Child Abuse, Neglect or Endangerment, Adulteration of Foods, Liquids or Pharmaceuticals, Schedule I drug possession with intent or other drug possession with intent in certain amounts, Aggravated Sexual Exploitation of a Minor and Especially Aggravated Sexual Exploitation of a Minor.

PC 718, eff. 7/1/22, adds Aggravated Rape to the list of felonies one can commit in also committing felony murder, and dictates that “A killing of another in the perpetration or attempted perpetration of an aggravated rape, rape, rape of a child, or aggravated rape of child” can only be punished by death or life without possibility of parole.

PC 800, eff. 4/8/22, amends 40-11-302(e)(1) by changing “Where the collateral pledged is cash, or an item readily converted to cash such as a certificate of deposit, the professional bondsman's capacity shall be not less than ten (10) times the amount of the collateral pledged” to "fifteen (15) times the amount of the collateral pledged" in determining the total capacity of bonds a bonding company can make in that district.

PC 804, eff. 7//1/22, amends 39-17-402(12) to expand the definition of drug paraphernalia to include pill press devices and pieces of a pill press device, unless the pill press device or piece is used by a person or entity that lawfully possesses drug products in the course of legitimate business activities, including a pharmacy or pharmacist licensed by the board of pharmacy; a wholesale drug distributor, or its agents, licensed by the board of pharmacy; and a manufacturer of drug products, or its agents, licensed by the board of pharmacy.

PC 828, eff. 7/1/22, amends 40-11-150 to read as follows:

(1) Following the arrest of a person for the offense of aggravated assault, [involving serious bodily injury, a deadly weapon or strangulation] in which the alleged victim of the offense is a domestic abuse victim as defined in 36-3-601, the court or magistrate shall make a finding whether there is probable cause to believe the respondent:

(A) Caused serious bodily injury, as defined in 39-11-106, to the alleged domestic abuse victim;
(B) Strangled or attempted to strangle the alleged domestic abuse victim; or
(C) Used or displayed a deadly weapon, as defined in 39-11-106.

(2) If the court or magistrate finds probable cause to believe that one (1) or more of the circumstances [A, B or C] did occur, unless the court or magistrate finds the offender no longer poses a threat to the alleged victim or public safety:

(A) The court or magistrate may, in addition to the twelve-hour hold period and victim notification requirements in subsection (h), extend the twelve-hour hold period up to twenty-four (24) hours after the time of arrest; and

(B) Prior to the offender's release on bond, the court or magistrate shall issue a no contact order containing all of the bond conditions set out in this section that are applicable to the protection of the domestic abuse victim.

PC 899, eff. 7/1/22, amends 39-14-503 to increase the penalty for mitigated criminal littering from a Class C misdemeanor punishable by a $50 fine to a Class B misdemeanor punishable by a $500 fine.

PC 907, eff. 4/22/22, amends 43-27-101 to create an exception to certain offenses for persons transporting hemp concentrate with a THC content that does not exceed 5 percent from the place where the concentrate was produced to a place where the concentrate will be diluted into products with a THC content that does not exceed 0.3 percent.

PC 910, eff. 7/1/22, amends 55-10-405(b) to make a prior conviction for the offense of boating under the influence treated the same as a prior conviction for driving under the influence of an intoxicant for purposes of determining punishment for a violation of driving under the influence of an intoxicant; and a violation of driving under the influence of an intoxicant is treated the same as a prior conviction for boating under the influence for purposes of determining punishment for boating under the influence.

PC 920, eff. 7/1/22, enacts a new way in 39-13-605 to commit Unlawful Photography. The standard way involves taking pictures for sexual arousal or gratification and can be a Class E or D felony. This PC expands the offense of unlawful photography to include the photographing of an individual without the consent of the individual, if the photograph includes an unclothed intimate area of the individual and would be considered offensive or embarrassing by the individual; was taken for the purpose of offending, intimidating, embarrassing, ridiculing, or harassing the victim; and was disseminated by the defendant to any other person or the defendant threatened to disseminate, or permitted the dissemination of, the photograph. It is a B misdemeanor with a second offense being an A misdemeanor.

PC 923, eff. 7/1/22, amends 39-17-318 to add an additional way to commit Unlawful Exposure. This crime is committed as follows:

A person commits unlawful exposure who, with the intent to cause emotional distress, distributes an image of the intimate part or parts of another identifiable person or an image of an identifiable person engaged in sexually explicit conduct if:

(1) The image was photographed or recorded under circumstances where the parties agreed or understood that the image would remain private; and

(2) The person depicted in the image suffers emotional distress.

The phrase "identifiable person" means a person who is identifiable from the image itself or from information transmitted in connection with the image. Therefore, the victim in the photograph need not be recognizable from the photograph itself as long as the distributor names that victim.

PC 927, eff. 4/29/22, allows resentencing for defendants enhanced by the drug-free school zone statute. It states that

> the court that imposed a sentence for an offense committed under this section that occurred prior to September 1, 2020, may, upon motion of the defendant or the district attorney general or the court's own motion, resentence the defendant pursuant to subsections (a)-(g). The court shall hold an evidentiary hearing on the motion, at which the defendant and district attorney general may present evidence. The defendant shall bear the burden of proof to show that the defendant would be sentenced to a shorter period of confinement under this section if the defendant's offense had occurred on or after September 1, 2020. The court shall not resentence the defendant if the new sentence would be greater than the sentence originally imposed or if the court finds that resentencing the defendant would not be in the interests of justice. In determining whether a new sentence would be in the interests of justice, the court may consider:
>
> > (A) The defendant's criminal record, including subsequent criminal convictions;
> > (B) The defendant's behavior while incarcerated;
> > (C) The circumstances surrounding the offense, including, but not limited to, whether the conviction was entered into pursuant to a plea deal; and
> > (D) Any other factors the court deems relevant.
>
> (2) If the court finds that the defendant is indigent, using the criteria set out in 40-14-202(c), the court shall appoint counsel to represent the defendant on such a motion.
> (3) The court shall not entertain a motion made under this subsection (h) to resentence a defendant if:
>
> > (A) A previous motion made under this subsection (h) to reduce the sentence was denied after a review of the motion on the merits;
> > (B) Resentencing the defendant to a shorter period of confinement for this offense would not reduce the defendant's overall sentence or lead to an earlier release; or
> > (C) The defendant has previously applied to the governor for a grant of executive clemency on or after December 2, 2021, for the same offense and has been denied.
>
> (4) This subsection (h) does not require a court to reduce any sentence pursuant to this section.

This statute only applies to sentencing for offenses committed before September 1, 2020.

PC 944, eff. 7/1/22, requires the board of parole, in making a parole determination for an offender convicted of a homicide, to consider whether the offender obstructed or continues to obstruct the ability of law enforcement to recover the remains of the victim.

PC 952, eff. 7/1/22, amends 40-35-210 to require the trial judge to do the following:

(e)(1) In order to ensure fair and consistent sentencing, at a sentencing hearing the court shall place on the record, either orally or in writing, the following:

(A) What enhancing or mitigating factors were considered, if any;

(B) The reasons for the sentence; and

(C) For a sentence of continuous confinement, the estimated number of years and months the defendant will serve before becoming eligible for release.

(2) The department of correction shall provide the court with a form to assist in determining the estimation referenced in subdivision (e)(1)(C).

(3) The estimation provided pursuant to subdivision (e)(1)(C) is not a basis for post-conviction relief or for a direct appeal of the defendant's sentence.

PC 964, eff. 7/1/22 and 1/1/23, makes various changes to the ignition interlock requirements for people convicted of driving under the influence (time limits to get one with a restricted license, etc.) and creates a licensing system for ignition interlock manufacturers, service centers, technicians, and subcontractors, to be administered by the Department of Safety.

PC 976, eff. 7/1/22, allows the Board of Judicial Conduct to investigate

any case in which an active judge is suffering from a temporary or permanent disability, physical or mental, that would substantially interfere with the prompt, orderly, and efficient performance of the judge's duties. As used in this subsection (a), temporary or permanent disability includes, but is not limited to, substance abuse or dependency, the repeated and consistent inability to stay alert during court proceedings, impairment of cognitive abilities that render the judge unable to function effectively, and any other documented or diagnosed physical or mental behavioral condition adversely affecting the administration of justice.

The Board then may refer the matter to TLAP, and if TLAP "notifies the board in writing that the judge in the matter is uncooperative or has failed to comply with the recommendations issued under the program, the board may order the judge to submit to a physical or mental evaluation by an appropriately licensed healthcare provider chosen by the board." The Board has to pay for the exam.

This PC also puts a statute of limitation of one year on complaints, from when the complainant "knew or reasonably should have known of the alleged misconduct."

PC 981, eff. 7/1/22, amends 40-35-311(a) to allow for a violation of probation to begin by summons in some cases. But it was then repealed and reworded by PC 1060, below.

PC 985, eff. 7/1/22, amends 39-15-401(h), the Aggravated Child Neglect and Child Neglect offenses, to add "adverse effects on the emotional and mental health and welfare of the child" to the definition of "adversely affect the child's health and welfare." The jury charge has been adjusted to read as follows:

> "Adversely affect the child's health and welfare" may include, but is not limited to *[the natural effects of starvation or dehydration]* ***[only for offenses committed on or after 7/1/22:*** *adverse effects on the emotional and mental health and welfare of the child]* ***[only for offenses committed on or after 7/1/19:*** *acts of female genital mutilation, as defined in 39-13-110.]*

It also makes operating an unlicensed day care facility a Class E felony.

PC 986, eff. 7/1/22, adds to Title 55, Chapter 8, Part 2 a new Class C misdemeanor punishable by a $50 fine and community service work, for camping along a controlled-access highway or entrance or exit ramp. It also expands the reach of the Equal Access to Public Property Act of 2012, under which it is a Class E felony offense for a person to camp on property owned by the state knowing that the area on which the camping occurs is not specifically designated for use as a camping area. This applies the offense of unauthorized camping to all public property.

PC 988, eff. 7/1/22, amends 40-35-501 to create many more 100% crimes with no credits for release eligibility, and many more crimes for which there is only a 15% allowable credit for release eligibility. For the following offenses, the defendant "shall serve one hundred percent (100%) of the sentence imposed by the court undiminished by any sentence reduction credits the person may be eligible for or earn. The person is permitted to earn credits pursuant to "41-21-236 for satisfactory program performance, and those credits may be used for the purpose of increased privileges, reduced security classification, or for any purpose other than the reduction of the sentence imposed by the court:
(A) Attempted first degree murder;
(B) Second degree murder;
(C) Vehicular homicide [due to the driver's or operator's intoxication];
(D) Aggravated vehicular homicide;
(E) Especially aggravated kidnapping;
(F) Especially aggravated robbery;
(G) Carjacking; and
(H) Especially aggravated burglary.

For the following offenses, the defendant can earn credits pursuant to 41-21-236 for satisfactory program performance that may be used to reduce by up to fifteen percent (15%) the percentage of the sentence imposed by the court that the person must serve before becoming eligible for release on parole, but it shall not alter the sentence expiration date.

(A) Aggravated assault, either intentional, knowing or reckless, if the offense involved the use of a deadly weapon;
(B) Aggravated assault involving strangulation;
(C) Aggravated assault if the offense resulted in serious bodily injury to or the death of another;
(D) Aggravated assault against a first responder or nurse, if the offense involved the use of a deadly weapon;
(E) Aggravated assault against a first responder or nurse resulting in serious bodily injury, death or strangulation.
(F) Voluntary manslaughter;
(G) Vehicular homicide involving reckless driving, drag racing or in a construction zone;
(H) Reckless homicide;
(I) Aggravated kidnapping;
(J) Involuntary labor servitude;
(K) Trafficking persons for forced labor or services;
(L) Aggravated robbery;
(M) Aggravated burglary;
(N) Aggravated arson;
(0) Possessing or using a firearm or antique firearm during commission of or attempt to commit a dangerous felony;
(P) The manufacture, delivery, or sale of a controlled substance ... where the instant offense is classified as a Class A, B, or C felony and the person has two (2) or more prior convictions for the manufacture, delivery, or sale of a controlled substance classified as a Class A, B, or C felony, prior to or at the time of committing the instant offense; and
(Q) Criminally negligent homicide.

PC 999, eff. 7/1/22, amends 40-11-118)(a) to allow court clerks to accept cash bail "by means of a debit card or mobile cash application and, if the clerk accepts such methods of payment, may charge a fee to pay for any cost charged to the clerk."

PC 1000, amends 39-17-1366 to require the department of safety to conduct a name-based criminal history record check every four years after a person is issued a concealed handgun carry permit, and allows the department to revoke the permit if the person is ineligible to possess a firearm.

PC 1001, eff. 1/1/23, enacts the "Tennessee Abortion-Inducing Drug Risk Protocol Act," making it an E Felony with up to a $50,000 fine for a non-physician to dispense abortion pills, or for a physician not to deliver them in person after an exam and pregnancy verification and to not keep certain records and convey certain warnings to the patient. As abortion is now illegal in Tennessee, this bill regulating abortion is most likely rendered moot, if not repealed next year or amended by the legislature, because *Dobbs v. Jackson Women=s Health Org*., 142 S. Ct. 2228 (2022), has overruled *Roe v. Wade*, which has activated the Criminal Abortion law enacted in

2019 at 39-15-213. It became effective 30 days from the overruling of *Roe* and is a Class C felony.

PC 1002, eff. 7/1/22, amends 39-17-902, the obscenity statute, which formerly exempted possession or distribution of obscene matter in -902(e) if "the obscene material is possessed by a person having scientific, educational, governmental or other similar justification." It modifies that exemption to add that the "educational justification exception established in subdivision (e)(1) does not apply if the obscene material is possessed by a person with the intent to send, sell, distribute, exhibit, or display the material to a minor." It also adds that the local education agency must provide computers with anti-pornography software, and verify that the digital or online materials do not violate the obscenity statutes and that they "[f]ilter, block, or otherwise prevent access to pornography or obscenity through one's use of the digital or online materials" and verify, in writing, that the provider's technology prevents a user from sending, receiving, viewing, or downloading materials that are obscene.

PC 1015, eff. 7/1/22, amends 39-13-314 to require that a defendant convicted of human trafficking who has a driver's license must be issued one bearing a designation sufficient to enable a law enforcement officer to identify the bearer of the license as a person who has been convicted of a human trafficking offense, and amends 55-50-353 to require the Department of Safety to issue one.

PC 1022, eff. 7/1/22, creates the offense of Aggravated Reckless Driving, a Class A misdemeanor, for a defendant who

> (1) Commits the offense of reckless driving, as defined in § 55-10-205; and
> (2) Intentionally or knowingly impedes traffic upon a public street, highway, alley, parking lot, or driveway, or on the premises of a shopping center, trailer park, **apartment** house complex, or any other premises accessible to motor vehicles that are generally frequented by the public at large.

One problem with this statute is that it also states that "In addition to the penalty authorized by subdivision (b)(1), the court may assess a fine of two thousand five hundred dollars ($2,500)" to be collected and given to licensed alcohol, drug, and mental health treatment facilities, programs sanctioned by the governor's Drug Free Tennessee program and 501(c)(3) organizations whose primary mission is to educate the public on the dangers of illicit drug use, alcohol abuse, or to render treatment for alcohol and drug addiction. As the Tennessee Constitution requires fines over $50 to be assessed by a jury, this assessment would be unconstitutional.

PC 1025, eff. 7/1/22, amends 39-13-518 to add two more felonies that can be used to commit sexual abuse of a child to the list of eight others that, if a total of three were committed, would make a defendant guilty of this offense:. It adds Trafficking for a commercial sex act pursuant to 39-13-309 if the victim was a minor, and Promoting prostitution pursuant to

39-13-515 if the victim was a minor.

The act also changes 39-13-518(c), the extremely complicated sentencing structure for this crime, which depends on the age of the child victim and the degrees of the three felonies (A, B or C) and how many were A's, B's, C's, etc. The punishment for this offense can be a Class A, B, or C felony, depending on the type and number of sexual offenses committed during the offense.

PC 1027, eff. 7/1/22, amends 40-32-101(g)(1)(C), to revise the eligibility requirements for a person to qualify as an "eligible petitioner" for purposes of petitioning for expunction of public records concerning a conviction for a felony or misdemeanor committed prior to November 1, 1989.

The conviction cannot be expunged if the offense for which the person was convicted:

(a) had as an element the use, attempted use, or threatened use of physical force against the person of another;

(b) involved, by its nature, a substantial risk that physical force against the person of another would be used in the course of committing the offense;

(c) involved the use or possession of a deadly weapon;

(d) was a sexual offense for which the offender is required to register as a sexual offender or was a sexual offense involving a minor;

(e) resulted in the death, serious bodily injury, or bodily injury of a person;

(f) involved the use of alcohol or drugs and a motor vehicle;

(g) involved the sale or distribution of a Schedule I controlled substance or a Schedule II controlled substance in an amount listed in 39-17-417(i);

(h) involved a minor as the victim of the offense; or

(1) resulted in causing the victim or victims to sustain a loss of sixty thousand dollars ($60,000) or more.

PC 1033, eff. 7/1/22, amends 40-32-105, the statute which allows a human trafficking victim to expunge convictions related to being trafficked, to require several things, such as remaining free of alcohol or drug abuse and not getting any more convictions for at least a year, no deadly weapons, etc. One of these requirements had been that one of the person's convictions had to be for prostitution. This PC eliminates that requirement for expungement.

PC 1038, eff. 7/1/22, amends 39-17-1302 to remove a short-barrel rifle or shotgun from the list of weapons the possession, manufacture, transport, repair, or sale of which is illegal.

PC 1042, eff. 7/1/22, amends 39-14-602 to raise the punishment for several types of computer tampering, that were formerly B and C misdemeanors, to A misdemeanors.

PC 1054, eff. 5/25/22, amends 39-17-402 to add quadriplegia as a qualifying medical condition for the lawful possession of cannabis oil.

PC 1056, eff. 5/25/22, known as "Ethan's, Hailey's, and Bentley's Law," added the requirement that a sentencing court must order a defendant who has been convicted of vehicular homicide or aggravated vehicular homicide due to intoxication, and in which the victim of the offense was the parent of a minor child, to pay restitution in the form of child maintenance to each of the victim's children until each child reaches 18 years of age and has graduated from high school (or the class to which the child belonged graduated from high school, if the child does not finish high school).

PC 1058, eff. 7/1/22, amends 40-39-215 to prohibit a sexual offender, violent sexual offender, or a violent juvenile sexual offender, whose victim was a minor, from knowingly renting or offering for rent a swimming pool, hot tub, or other body of water to be used for swimming that is located on property owned or leased by the offender or otherwise under the control of the offender.

40-39-215 also prohibited offenders from attracting or enticing minors to be in their presence by wearing clown costumes, driving ice cream trucks or working in certain professions, etc., for that purpose. This PC creates an exception to this requirement if the offender is the parent of the minor being attracted or enticed to be present.

PC 1060, eff. 7/1/22, repeals PC 981's changes and amends again 40-35-311(a) as follows:

> (1) Whenever it comes to the attention of the trial judge that a defendant who has been released upon suspension of sentence has been guilty of a breach of the laws of this state or has violated the conditions of probation, the trial judge shall have the power to cause to be issued under the trial judge's hand:
>
> (A) A warrant for the arrest of the defendant as in any other criminal case; or
>
> (B) For a technical violation brought by a probation officer, and subject to the discretion of the judge, a criminal summons.
>
> (2) Regardless of whether the defendant is on probation for a misdemeanor or felony, or whether the warrant or summons is issued by a general sessions court judge or the judge of a court of record, a probation officer or a peace officer of the county in which the probationer is found may execute the warrant or serve the summons.

40-35-311(d)(1), is also amended by adding the following language at the end of the subdivision:

> If the trial judge finds by a preponderance of the evidence that the defendant has violated the conditions of probation and suspension of sentence, then the court may revoke the defendant's probation and suspension of sentence, in full or in part, pursuant to 40-35-310. The court may sentence the defendant to a sentence of probation for the remainder of the unexpired term.

It also deletes (d)(3), which had stated the following:

> As used in this subsection (d), "technical violation" means an act that violates the terms

or conditions of probation but does not constitute a new felony, new class A misdemeanor, zero tolerance violation as defined by the department of correction community supervision sanction matrix, or absconding.

PC 1062, eff. 7/1/22, creates the new crimes of Especially Aggravated Rape, Especially Aggravated Rape of a Child and Grave Torture.

Especially Aggravated Rape is aggravated rape accompanied by two (2) or more of the following circumstances:
(1) The defendant tortures the victim during the commission of the offense;
(2) The defendant mutilates the victim during the commission of the offense;
(3) The defendant also commits the offense of kidnapping or false imprisonment against the victim;
(4) The defendant also commits the offense of involuntary labor servitude or trafficking for a commercial sex act against the victim;
(5) The defendant has, at the time of the commission of the offense, more than one (1) prior conviction for a sexual offense or a violent sexual offense;
(6) The offense occurs during an attempt by the defendant to perpetrate first degree murder;
(7) The defendant subjects the victim to extreme cruelty during the commission of the offense;
(8) The defendant's commission of the offense involved more than one (1) victim; or
(9) The defendant knows or has reason to know that the victim is mentally defective, mentally incapacitated, physically helpless or a vulnerable adult, as defined in § 39-15-501.

It is a Class A felony, punishable only by life without parole (Range III if the defendant is a juvenile).

Especially Aggravated Rape of a Child is unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if the victim is less than 18, accompanied by three (3) or more of the following circumstances:
(1) The defendant tortures the victim during the commission of the offense;
(2) The defendant mutilates the victim during the commission of the offense;
(3) The defendant also commits the offense of kidnapping or false imprisonment against the victim;
(4) The defendant also commits the offense of involuntary labor servitude or trafficking for a commercial sex act against the victim;
(5) The defendant has, at the time of the commission of the offense, more than one (1) prior conviction for a sexual offense or a violent sexual offense;
(6) (A) The defendant is, at the time of the offense, in a position of trust, or has supervisory or disciplinary power over the victim by virtue of the defendant's legal, professional, or occupational status and uses the position of trust or power to accomplish the sexual penetration; or
(B) The defendant has, at the time of the offense, parental or custodial authority over the victim by virtue of the defendant's legal, professional, or occupational status and uses the position to accomplish the sexual penetration;

(7) The offense occurs during an attempt by the defendant to perpetrate first degree murder;
(8) The defendant subjects the victim to extreme cruelty during the commission of the offense;
(9) Force or coercion is used to accomplish the act, and the defendant is armed with a weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a weapon;
(10) The defendant causes serious bodily injury to the victim;
(11) The defendant's commission of the offense involved more than one victim; or
(12) The defendant knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless.

It is a Class A felony, punishable only by life without parole (Range III if the defendant is a juvenile).

Grave Torture is the infliction of severe physical and mental pain and suffering upon the victim with the intent to perpetrate first degree murder accompanied by three (3) or more of the following:
(1) The defendant also commits against the victim the offense of especially aggravated rape, aggravated rape, especially aggravated rape of a child, or aggravated rape of a child;
(2) The defendant also commits the offense of kidnapping or false imprisonment against the victim;
(3) The defendant has, at the time of the commission of the offense, more than one (1) prior conviction for a sexual offense or a violent sexual offense;
(4) The defendant mutilates the victim during the commission of the offense;
(5) Force or coercion is used to accomplish the act, and the defendant is armed with a weapon or an article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon;
(6) The defendant's commission of the offense involved more than one (1) victim; or
(7) The defendant knows or has reason to know that the victim is mentally defective, mentally incapacitated, physically helpless or a vulnerable adult.
Grave torture is a Class A felony and shall be punished by life without parole or death (Range III if the defendant is a juvenile).

The new statute states that a punishment of death shall not be imposed until at least the thirtieth day following the occurrence of either of the following circumstances:

> (i) The issuance of the judgment in a decision of the United States Supreme Court overruling, in whole or in relevant part, *Kennedy v. Louisiana*, 554 U.S. 407 (2008), thereby allowing the use of the death penalty as punishment for an offense involving the infliction of severe physical and mental pain and suffering upon the victim with the intent to perpetrate first degree murder that does not result in the death of the victim; or
> (ii) The ratification of an amendment to the Constitution of the United States approving the use of the death penalty as punishment for the conviction of an offense involving the infliction of severe physical and mental pain and suffering upon the victim with the intent to perpetrate first degree murder that does not result in the death of the victim.

This PC also amends all of the statutes regarding the jury's considerations of aggravating circumstances, etc.. for imposing the death penalty to include the words Grave Torture along side Murder First Degree.

PC 1081, eff. 5/2722, creates a new crime, making it a class D felony for anyone to operate an unlicensed facility providing care to elderly or vulnerable persons once it has been published on a newly created registry of unlicensed facilities and they have been given notice of the publication.

PC 1089, eff. 7/1/22, creates 39-13-316, Aggravated Human Trafficking. To be guilty of this offense, a defendant has to commit either involuntary labor servitude, trafficking persons for forced labor or services, trafficking for a commercial sex act, patronizing prostitution or promoting prostitution, with the victim being under 13 years of age. It is punishable as a Class A felony with the minimum sentence at Range II. It also states that although usually after a person sentenced to community supervision pursuant to 39-13-524 has been on supervision for a period of fifteen (15) years, the person may petition the sentencing court for release from community supervision, that does not apply to those convicted of Aggravated Human Trafficking by way of trafficking for a commercial sex act, patronizing prostitution or promoting prostitution, and the board of parole may require, as a mandatory condition of supervision that the person be enrolled in a satellite-based monitoring program for the full extent of the person's term of supervision.

This PC also amends 39-13-307 to make involuntary servitude a Class A felony if the victim was more than twelve (12) years of age but less than eighteen (18) years of age.

It also amends 39-13-308 to make trafficking for forced labor or services a Class A felony if the victim was more than twelve (12) years of age but less than eighteen (18) years of age.

It also amends 39-13-309 to make trafficking for a commercial sex act a Class A felony if the victim of the offense is a child more than twelve (12) years of age but less than eighteen (18) years of age.

It also makes promoting prostitution of a person more than twelve (12) years of age but less than eighteen (18) years of age or a person with an intellectual disability a Class A felony.

Lastly, it makes Aggravated Human Trafficking created by PC 1089 a 100% crime with no credits at all for early release. The credits may only be used "for the purpose of increased privileges, reduced security classification, or for a purpose other than the reduction of the sentence imposed by the court."

PC 1105, eff. 7/1/22, amends 39-14-505 to make aggravated criminal littering a class E felony instead of an A misdemeanor if the littering involved more than eight (8) tires that were placed, dropped, or thrown for a commercial purpose, and adds the definition of "tire" to the statute.

PC 1106, eff. 7/1/22, enacts "Joker's Law," which makes it "an offense to knowingly and unlawfully cause serious bodily injury to or kill a police dog, fire dog, search and rescue dog, service animal, or police horse without the owner's effective consent," which is now a Class D

felony when it was formerly an E felony, and amends 39-14-205 to make this crime on all other animals punishable the same as theft, considering the value and cost of the animal.

PC 1110, eff. 7/1/22, amends many statutes:

24-7-120 allows for the child victim of certain sex offenses to testify outside the courtroom without the defendant being present by closed-circuit television due to trauma to the child. Rather than having to be 13 years of age or younger at the time the offense was committed to allow this, the age has now been increased to under 18 years of age.

It amends several statutes in Title 36, Article 3, chapter 6 to add sexual exploitation of a minor and "a human trafficking offense" as offenses for which one can obtain an *ex parte* order of protection.

It amends 39-11-502 to state that it is not a defense to prosecution for a violation of Trafficking for a commercial sex act, Promoting prostitution, Soliciting sexual exploitation of a minor or Exploitation of a minor by electronic means that the person charged was ignorant or mistaken as to the age of a minor victim.

39-13-309 is amended to add that

> if it is determined after a reasonable detention for investigative purposes that a victim of trafficking for a commercial sex act under this section is under eighteen (18) years of age, then that person is immune from prosecution for prostitution as a juvenile or adult. A law enforcement officer who takes a person under eighteen (18) years of age into custody as a suspected victim under this section shall, upon determination that the person is a minor, provide the minor with the telephone number for the Tennessee human trafficking resource center hotline, notify the department of children's services, and release the minor to the custody of a parent or legal guardian or transport the minor to a shelter facility designated by the juvenile court judge to facilitate the release of the minor to the custody of a parent or guardian.

It is also now a defense to Trafficking for a commercial sex act, including as an accomplice or co-conspirator, that a minor charged with trafficking for a commercial sex act was so charged for conduct that occurred because the minor is also a victim of trafficking or involuntary labor servitude.

40-32-101, the expungement statute, is amended to state that a person is not entitled to the expunction of such person's records if:

> (a) The person is charged with an offense, is not convicted of the charged offense, but is convicted of an offense relating to the same criminal conduct or episode as the charged offense, including a lesser included offense; provided, however, any moving or nonmoving traffic offense shall not be considered an offense as used in this subdivision ... or
>
> (b) The person is charged with multiple offenses or multiple counts in a single indictment and is convicted of:
>
> (1) One (1) or more of the charged offenses or counts in the indictment; or

(2) An offense relating to the same criminal conduct or episode as one (1) of the offenses charged in the indictment, including a lesser included offense.

[This subdivision] does not apply if the person is a victim of a human trafficking offense, the conviction is a result of victimization, and the person is applying for expunction relief under 40-32-105.

Sentencing mitigating factor #12 listed in 40-35-113, which states "The defendant acted under duress or under the domination of another person, even though the duress or the domination of another person is not sufficient to constitute a defense to the crime" now has added at the end "including a misdemeanor or non-violent felony committed while the defendant was a victim of human trafficking or a commercial sex act."

Section 40-38-119, setting forth the rights of victims of a sexually-oriented crime, is amended by amending (b)(2) to state that the victim has a right to have "a support person of the victim's choosing present during any forensic medical examination and during any interview with law enforcement, the prosecuting attorney, the defendant, or the defendant's attorney, and to have a support person present in the courtroom when the victim is testifying against the defendant."

This PC also raises the punishment for Involuntary servitude, Trafficking for forced labor, Trafficking for a commercial sex act and Promoting prostitution to a Class A felony if the victim was a minor, and states that "Patronizing prostitution from a person who is younger than eighteen (18) years of age, has an intellectual disability, or is a law enforcement officer posing as a minor is punishable as Trafficking for commercial sex acts."

PC 1134, eff. 7/1/22, amends 40-11-118(d) to say that unless the court determines that the requirement would not be in the best interest of justice and public safety, when the court is determining the amount and conditions of bail to be imposed upon a defendant who has been charged with DUI, vehicular assault, aggravated vehicular assault, vehicular homicide or aggravated vehicular homicide due to alcohol use, the court shall require the defendant to operate only a motor vehicle equipped with a functioning ignition interlock device if: .
(i) The offense resulted in a collision involving property damage;
(ii) A minor was present in the vehicle at the time of the alleged offense;
(iii) The defendant's driver license has previously been suspended for refusing the test, or
(iv) The defendant has a prior conviction for reckless driving, reckless endangerment, DUI, vehicular assault, aggravated vehicular assault, vehicular homicide or aggravated vehicular homicide.

If the court imposes an interlock device, then the defendant must demonstrate compliance with the condition by submitting proof of ignition interlock installation to the district attorney general's office within ten (10) days of being released on bail. If the court determines the defendant is indigent, the court shall order the portion of the costs of the device that the defendant is unable to pay be paid by the electronic monitoring indigency fund.

If the court does not require the defendant to operate only a motor vehicle equipped with

a functioning ignition interlock device, then the court shall include in its order written findings on why the requirement would not be in the best interest of justice and public safety.

If the defendant has one (1) or more prior convictions for any of the listed offenses and is not subject to the requirements of subsection (f) [mandating a transdermal device if the defendant is charged with vehicular assault or vehicular homicide and has a prior conviction], then the court shall also consider the use of special conditions for the defendant, including the following:
(A) The use of transdermal monitoring devices or other alternative alcohol monitoring devices. If the court orders the use of a monitoring device and determines the defendant is indigent, then the court shall order the portion of the costs of the device that the defendant is unable to pay be paid by the electronic monitoring indigency fund.
(B) The use of electronic monitoring with random alcohol or drug testing; or
(C) Pretrial residency in an in-patient alcohol or drug rehabilitation center.
"Court" includes any person authorized to take bail.

PC 1136, eff. 7/1/22, amends 39-13-102 to make intentional, knowing or reckless aggravated assault by display or use of a deadly weapon punishable one felony class higher if it was committed by discharging a firearm from within a motor vehicle.

PC 1142, eff. 7/1/22, enacts 39-16-506 to create a Class E felony for Coercion of a Public Servant. This crime is committed as follows:

> An employer, or an agent of an employer acting on behalf of the employer, commits an offense who by means of coercion:
> (1) Influences or attempts to influence an employee who is a public servant to vote or not to vote in a particular manner; or
> (2) Influences or attempts to influence an employee who is a public servant to resign as a public servant or unnecessarily recuse themselves from a public body with the intent to influence the action or inaction of a public body.