The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

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INTRODUCTION

The State of Tennessee Executive Order No. 87 (September 17, 2021) hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

The Council requests that applicants use the Microsoft Word form and respond directly on the form using the boxes provided below each question. (The boxes will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original hard copy (unbound) completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts as detailed in the application instructions. Additionally you must submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your original application, or the digital copy may be submitted via email to john.jefferson@tncourts.gov .

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I serve as a judge on the Tennessee Court of Criminal Appeals. Although I am appointed from the Eastern Section, I sit on cases that are heard in all three grand divisions of the state.

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

I have been licensed to practice law in Tennessee since 1999, and my Board of Professional Responsibility number is 020105.

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

I am also licensed to practice law in Georgia, and my Georgia Bar number is 309137. The date of my Georgia licensure is November 12, 2002, and my license is still active.

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

No, I have never been denied admission to, suspended or placed on inactive status by the Bar of any state.

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

JUDICIAL EXPERIENCE:

2022 to Present: **JUDGE, TENNESSEE COURT OF CRIMINAL APPEALS,** Eastern Section.

2015 to 2022: **JUDGE, SECOND DIVISION OF CRIMINAL COURT**, Eleventh Judicial District of Tennessee (Hamilton County). I also presided over the Hamilton County Drug Recovery Court during this time.

PROFESSIONAL EXPERIENCE IN THE PRACTICE OF LAW:

2006 to 2015: **CHAMBLISS, BAHNER & STOPHEL, P.C.**, 605 Chestnut Street, Chattanooga, Tennessee 37450: Shareholder (January 1, 2009 – September 29, 2015) and Associate Attorney (November 1, 2006 – December 31, 2008). My principal practice areas at Chambliss, Bahner & Stophel included municipal and governmental law; aviation law; criminal defense; civil and criminal appeals; business, commercial and banking advice and litigation; antitrust compliance; and labor and employment compliance advice and litigation.

2004 to 2006: **SHUMACKER WITT GAITHER & WHITAKER, P.C.**, 736 Market Street, Suite 1100, Chattanooga, Tennessee 37402: Associate Attorney. My principal practice areas at Shumacker included municipal and governmental law; criminal defense; and civil and criminal appeals; aviation law; commercial litigation; labor and employment law; and antitrust compliance.

2002 to 2004: **SUMMERS & WYATT, P.C.**, 500 Lindsay Street, Chattanooga, Tennessee 37403: Associate Attorney. My principal practice areas at Summers & Wyatt included criminal defense; criminal and civil appeals; labor and employment law; civil rights litigation; consumer protection and banking law; and personal injury.

1999 to 2002: **TENNESSEE SUPREME COURT**: Law Clerk to the Honorable William M. Barker, Justice, Tennessee Supreme Court. In this role, I worked with Justice Barker in the preparation and proofreading of opinions and orders from his and other chambers. This work typically involved attending oral arguments, conducting extensive legal research, comprehensively reviewing the records from the lower courts, and preparing bench memoranda.

I also assisted in the review of death sentences in capital litigation, including drafting and reviewing opinions and conducting proportionality review.

In addition, I assisted Justice Barker as needed with special projects and with his work on Supreme Court boards and commissions. Finally, I helped him to prepare as needed for the Supreme Court's annual retreat and the monthly opinion and administrative conferences with the other members of the Court.

Apart from these roles, this experience allowed me to see firsthand how outstanding judges work and how they respectfully interact with each other on a collegial court, even when disagreements arise. Given the Supreme Court's special role in our state judiciary, the experience also helped me to learn about the importance of the courts within our system of government and of their proper role in a system of separated powers.

OTHER PROFESSIONAL EXPERIENCE:

2000 to 2020: **UNIVERSITY OF TENNESSEE AT CHATTANOOGA**: Adjunct Professor of Political Science. I taught classes on various topics, including Judicial Decision Making; Presidential War and National Security Powers; Presidential Domestic Policy Powers; The Presidency and the Constitution; The Tenth Amendment & Federalism; The Establishment Clause; Constitutional Controversies Involving Separation of Church and State; Constitutional Law; Civil Liberties; and Introduction to Judicial Process.

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

I have been continuously employed since completing my legal education in 1999.

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

Because I presently serve as an appellate court judge, I am not presently engaged in the practice of law. However, for my experience in my current position, please see my responses to Questions No. 10 and 12 below.

That said, prior to my transition to the judiciary, my practice generally consisted of litigating civil and criminal matters, advising and representing municipal and local governmental entities, and serving as an arbitrator. Prior to my appointment as a criminal court judge in 2015, approximately forty percent (40%) of my practice involved civil litigation; thirty percent (30%) involved advising and representing governmental entities; twenty percent (20%) involved criminal law matters; and the remaining ten percent (10%) involved matters relating to antitrust compliance, fiduciary advice and representation, employment litigation, and non-profit representation.

As with any litigation practice, these percentages varied widely over the course of my career. In previous years, the percentage of my practice devoted to criminal law matters was as high as fifty percent (50%) and as low as ten percent (10%).

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information about your

range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

For my first three (3) years out of law school, I served as a law clerk to the Honorable William M. Barker on the Tennessee Supreme Court. My work with Justice Barker provided invaluable firsthand experience, early in my career, about the importance of the rule of law, of the proper role of the courts in our government, and how courts should exercise the judicial power responsibly, fairly, and consistently.

Prior to my transition to the judiciary in 2015, which I discuss more fully in response to Question 10 below, I was fortunate to have had broad and wide-ranging experiences in my legal career. As a general description of my previous experience in the private practice of the law, I would offer the following:

CRIMINAL LAW EXPERIENCE:

In the private practice of law, I represented both people and businesses that were accused of crimes, as well as persons and businesses who were the victims of crimes. My experience, which was in both federal and state courts in Tennessee, ranged from the lowest of state court criminal misdemeanors to federal offenses where the accused was facing a life sentence.

Substantively, I have had experience in the following types of criminal law matters:

- fraud crimes, including healthcare fraud, banking and mortgage fraud, computer fraud, credit card fraud, and retail check kiting;
- healthcare-related offenses, including Medicaid fraud and false statements, unlawful diversion of scheduled substances by physicians or physicians' office staff, obstruction of justice;
- drug and drug conspiracy offenses involving violations of the Controlled Substances Act and state drug laws, including individual possession and distribution cases and complex federal conspiracy cases involving a dozen or more other defendants. These representations included cocaine, crack cocaine, methamphetamine (and methamphetamine precursor chemicals such as iodine and red phosphorous), marijuana, ecstasy, and other controlled substances;
- violent crimes, including homicide, vehicular homicide, aggravated and especially aggravated assault, and representation of victims of domestic assault in criminal proceedings;

- theft offenses in federal and state courts, including substantial theft of property, theft by postal workers, and lesser theft offenses involving theft under $500 and shoplifting charges;

- tax offenses, including charges of federal income tax evasion and unlawful tax avoidance strategies;

- public corruption offenses involving Hobbs Act violations, including bribery of a public official;

- environmental offenses and crimes, particularly focused on asbestos abatement issues;

- misdemeanor charges, including driving under the influence of an intoxicant and other intoxication offenses, solicitation, and simple assault;

- violations of the federal Horse Protection Act; and

- weapons charges, including unlawful possession of firearms.

I also handled dependency cases in Hamilton County Juvenile Court involving allegations of drug possession, rape, and assault.

I represented defendants in post-conviction proceedings, including federal *habeas* proceedings, involving alleged ineffective assistance of counsel and violations of the *Ex Post Facto* clause through the retroactive application of parole standards.

As with representations of this type, I litigated motions involving civil liberties issues relating to violations of the Fourth Amendment, the Fifth Amendment privilege against self-incrimination, and the Sixth Amendment rights to counsel and to a speedy trial. I also had substantial experience litigating sentencing issues in federal court under the Federal Sentencing Guidelines, for both individuals and corporations, including defending against Armed Career Criminal and Career Offender designations.

I have also represented the news media, including both print and television media, in contesting the closure of federal and state courts in violation of the Free Press Clause of the First Amendment.

LOCAL AND MUNICIPAL GOVERNMENTAL EXPERIENCE:

Throughout my career in the private practice of law, I advised and represented municipal and county governments, as well as governmental authorities, agencies, and elected officials, in a variety of contexts involving municipal and constitutional law.

Substantively, I have had experience in the following types of municipal and local government matters:

- counseling as to the scope of governmental authority;
- advising as to obligations under freedom of information acts, such as the Tennessee Public Records Act, and under the Tennessee Open Meetings Act;
- advising on business and contractual issues, regulatory compliance, and legislative matters;
- representing elected officials in matters related to elections, recalls, and voting;
- prosecuting and defending actions involving False Claims Act issues;
- representing municipal governments in tort actions under the Tennessee Governmental Tort Liability Act;
- advising clients in connection with revenue bond financing and refinancing;
- advising governmental clients on constitutional matters, including the following:
    - application of the Free Speech Clause of the First Amendment, including the establishment of Free Speech zones and application of time, place, and manner restrictions;
    - application of the First Amendment's Establishment Clause;
    - defense of governmental regulations against substantive due process challenges;
    - investments by municipal governments consistent with Article II, § 29 of the Tennessee Constitution;
    - application of procedural due process requirements in employment settings;
- advising governmental clients on employment issues, including the following:
    - assisting clients in the review and revision of employee policies and handbooks;
    - developing training on employment discrimination policies and issues;
    - advising clients regarding the application of federal and state employment laws, including Title VII, the Americans with Disabilities Act, the Fair Labor Standards Act, and the Family and Medical Leave Act;

- advising clients as to requirements of the National Labor Relations Act, the Uniformed Services Employment and Reemployment Rights Act, and the Occupational Safety and Health Act;

- advising clients regarding wage requirements in federal contracts, including the Davis-Bacon Act, the McNamara-O'Hara Service Contract Act, and the Walsh-Healey Public Contracts Act;

- advising governmental clients on ethics and conflicts-of-interest issues, including the following:

  - undertaking and assisting in investigations into claims of unethical or otherwise inappropriate conduct by governmental employees or officials;

  - representing clients in the investigation of, and initial response to subpoenas served by federal authorities investigating the violation of federal statutes;

  - advising clients concerning the interpretation and application of state statutes addressing conflicts of interest, and assisting clients to develop and apply conflicts-of-interest policies that embody state-law principles and, in some cases, apply more rigorous standards to actual or potential conflicts of interest; and

  - advising clients concerning conflict of interest and ethics requirements contained in federal and state grant contracts and applicable regulations

GENERAL CIVIL LITIGATION EXPERIENCE:

Much of my career in the private practice of law involved representing people and businesses in general civil litigation matters, usually in the context of business and commercial litigation. Substantively, I have had experience in the following types of civil litigation matters:

- breach of commercial contract and lease agreements;

- complex financial and accounting matters;

- prosecution and defense of consumer protection claims, including under the Tennessee Consumer Protection Act, the Truth in Lending Act, and the Fair Debt Collection Practices Act;

- litigation and trial of actions involving claims of defamation and intentional infliction of emotional distress;

- litigation of issues arising under franchise agreements;

- fiduciary litigation relating to prosecution and defense of actions involving trustees and executors;
- litigation of dissolution of corporations, partnerships, and limited liability companies;
- prosecution of actions under RICO and other racketeering actions;
- prosecution and defense of actions involving broker and securities fraud;
- defense of banking practices under the Uniform Commercial Code;
- defense of tort actions under the Tennessee Governmental Tort Liability Act;
- trade name infringement;
- trade secret misappropriation; and
- alleged violations of non-competition agreements.

LABOR AND EMPLOYMENT EXPERIENCE:

I also had experience in areas of labor and employment law, representing businesses, employers, and employees, including experience in the following types of employment matters:

- litigating allegations of discrimination based on race, gender, and disability;
- managing investigations involving claims of sexual, racial, and religious harassment;
- prosecuting and defending alleged wrongful discharge and whistleblower claims;
- initiating and responding to unfair labor practice charges;
- negotiating collective bargaining agreements with employers and unions;
- participating in employee grievance arbitrations; and
- addressing labor organizing campaigns.

APPELLATE EXPERIENCE:

In my private practice, I had the privilege of presenting and arguing criminal and civil cases in the Tennessee Supreme Court, and I argued cases in the Tennessee Court of Criminal Appeals and the Tennessee Court of Appeals. I also argued criminal and civil cases in the United States Court of Appeals for the Sixth Circuit. Some of the cases I have personally briefed and argued appear in response to Question 9 below.

ADMINISTRATIVE AGENCY EXPERIENCE:

In my private practice, I had experience in matters before various administrative agencies, including experience in the following types of matters before administrative agencies:

Tennessee Department of Revenue

- I successfully represented clients before the State Board of Equalization relating to the assessment of property tax and tax exemptions.

Tennessee Regulatory Authority

- I assisted in the successful representation of a municipality in utility rate-making dockets.

Equal Employment Opportunity Commission / Tennessee Human Rights Commission

- I successfully represented clients before the EEOC and Tennessee Human Rights Commission against claims of unlawful employment discrimination.

Federal Aviation Administration

- I assisted in the successful defense of an action brought against a local airport pursuant to 14 C.F.R., Part 16, alleging violations of federal grant assurances.

PERSONAL WORK HABITS:

I believe that my work habits have been characterized by diligence, organization, honesty, and efficiency.

During my legal practice, it was common for me to be involved in advising governmental clients on complex issues, while simultaneously managing dozens of cases involving simple drug possession and complex federal litigation involving fifteen or more parties.

Successfully managing such a practice, while participating in law firm governance and community service, was challenging. I successfully managed these demands because I developed an organizational plan identifying priorities and then diligently working the plan.

In my judicial work at the trial level and now at the appellate level, these skills and practices have proven to be essential. Effectively managing a heavy and active trial or appellate docket requires constant attention and diligence. It also requires organization, efficient work, and an effective team. Otherwise, the results will inevitably be lengthy delays, ineffective justice, and diminishment of the court in the eyes of the public.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

Over the course of my career as a member of the bar, I had the privilege to have been included and involved in several cases of special note. Among these matters are as follows:

- *Hammond v. Harvey*, 410 S.W.3d 306 (Tenn. 2013) (briefed and argued). This case addressed the authority of civil service boards regarding pay equalization in county sheriffs' departments.
- *Littlefield v. Hamilton County Election Commission*, E2012-00489-COA-R3-CV, 2012 WL 3987003 (Tenn. Ct. App. 2012) (briefed and argued). This case involved the successful defense of a mayor against a recall petition that failed to meet fundamental state law requirements for recall and referenda petitions.
- *Hometown Folks, LLC v. S&B Wilson, Inc.*, 643 F.3d 520 (6th Cir. 2011) (briefed and argued). This case involved the defense of a breach of a purchase agreement for various restaurant franchises in excess of $17 million, and this appeal resulted in the successful vacating of a jury's verdict on damages. The trial of this case lasted approximately nine (9) days in the United States District Court.
- *United States v. Hise*, 400 F. App'x 989 (6th Cir. 2010) (briefed and argued). This case involved issues relating to the ability of a court to impose a sentence below a mandatory minimum sentence based upon substantial assistance to the government.
- *Tennessee Rand, Inc. v. Automation Indus. Group*, *LLC*, No. E2009-00116-COA-R3-CV, 2010 WL 3852317 (Tenn. Ct. App. Sept. 29, 2010) (briefed and argued). This case involved, among other things, complex accounting issues arising out of the split of sister companies. The trial of this case lasted for some twenty-five (25) days in the Hamilton County Chancery Court.
- *Dyer v. Morrow*, 499 F. App'x 505 (6th Cir. 2012) (briefed and argued). This *habeas* case involved a challenge to the retroactive application of more restrictive parole standards, as well as issues involving the ability of a court to review compliance with its orders.
- *City of Chattanooga v. Tennessee Regulatory Auth.*, No. M2008-01733-COA-R12-CV, 2010 WL 2867128 (Tenn. Ct. App. July 21, 2010) (briefed and argued in part). This case involved the review of a utility rate-making case before the Tennessee Regulatory Authority.
- *United States v. Phinazee*, 162 F. App'x 439 (6th Cir. 2006) (briefed and argued). This appeal followed a trial in which I was not personally involved, but the appeal resulted in the vacating of the sentence and remanding for resentencing.

- *United States v. Turner*, 173 F. App'x 402 (6th Cir. 2006) (briefed and argued). This case involved an appeal of a sentence imposed principally for reasons of general deterrence.
- *State v. Varner*, 160 S.W.3d 535 (Tenn. Crim. App. 2004) (briefed and argued). This case involved a successful challenge to an unconstitutional drivers' license checkpoint.
- *Brown v. Hamilton County*, 126 S.W.3d 43 (Tenn. Ct. App. 2003), *perm app. denied* Jan. 26, 2004 (briefed and argued). Following a bench trial, this case involved the successful reversal of the trial court's judgment dismissing the case under the Tennessee Governmental Tort Liability Act.
- *State v. Toliver*, 117 S.W.3d 216 (Tenn. 2003) (briefed and argued). Following a trial in which I was not personally involved, I briefed and argued this successful appeal case in the Supreme Court involving the improper joinder of offenses.

In addition, I have been involved in defending significant and high-profile criminal cases with others, such as Hugh J. Moore, including the following cases:

- *United States v. Newton*, 2:05-cr-20205 (W.D. Tenn. 2005). This case involved the defense of a former Tennessee member of the House of Representatives charged with violation of the Hobbs Act and a resulting sentence of a year and a day.
- *United States v. McConnell*, 4:12-cr-00009 (E.D. Tenn. 2012). This case involved the defense of a horse trainer charged with violation of the Horse Protection Act and a resulting sentence of probation.
- *United States v. Swafford*, 1:04-cr-00138 (E.D. Tenn. 2004). This case involved a nine-day trial of a thirty-eight-count indictment involving allegations of conspiracy to distribute ingredients while knowing that these chemicals would be used to make methamphetamine. A subsequent appeal by co-counsel reversed the conspiracy convictions upon finding that a fatal variance had occurred.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

EXPERIENCE AS AN APPELLATE COURT JUDGE:

Since September 1, 2022, I have had the privilege of serving on the Tennessee Court of Criminal Appeals. The work of this court principally involves the review of lower court decisions in criminal cases to ensure that disputes are fairly heard and considered under neutral legal principles. This court also performs the valuable task of refining factual and legal issues so that matters can be placed in the best possible position for any Supreme Court review.

To some extent, the work of a judge on an intermediate court of appeals is similar to that of the Supreme Court when the Supreme Court is acting in its adjudicative role. Both courts review decisions from lower courts and produce written opinions explaining the basis for a particular decision. Also, both courts are collegial courts that require a judge to work collaboratively with other judges, staff, and judicial assistants to decide cases and to administer the other affairs of the court.

The work of the Supreme Court is certainly more complex given its other responsibilities for the judicial system that are not shared by the lower courts. But, my experience as a judge on the Court of Criminal Appeals has been, and will be, valuable in addressing the cases that may come before the Supreme Court.

EXPERIENCE AS A TRIAL COURT JUDGE:

From 2015 through 2022, I had the privilege of working for the people of Hamilton County as a trial court judge in the criminal court for the Eleventh Judicial District. Working in this capacity was far more challenging and rewarding than I could have expected.

A sizable portion of the work of an appellate court is reviewing discretionary decisions by trial court judges. My experience as a trial court judge has helped me to identify and apply the appropriate range and limits of this discretion in a wide variety of contexts. Having experience as a trial court judge in these areas is undoubtedly beneficial to an understanding of those types of cases likely to come before the Supreme Court.

My experience as a trial judge included the following:

- ***Experience in the Substantive Criminal Law:***

  For seven years, I applied areas of substantive criminal law that our appellate courts frequently encounter. These areas include the following:

  - evaluation of the sufficiency of evidence sustaining convictions and the application of the substantive criminal law and statutory defenses to criminal liability;

  - criminal sentencing, including significant experience in offender classification; application of enhancement and mitigating factors; consecutive sentencing; factors involved in alternative sentencing; and judicial and pretrial diversion;

- the application of the Tennessee Rules of Evidence in trials and hearings, including considerable experience in applying the more complicated rules relating to character evidence, hearsay evidence, and child testimony, as well as the more common applications involving severance and consolidation, authentication, and witness competency issues;

- constitutional issues, including issues related to the First Amendment and open courts; search and seizure law; the law involving confessions, identifications, speedy trial, and ex-post facto prohibitions; as well as Sixth Amendment issues involving representation, conflicts of interest, and the effective assistance of counsel;

- bail and conditions of pretrial release;

- pretrial discovery;

- competency hearings and mental health issues;

- violations of the conditions of probation or other forms of supervised release; and

- post-conviction, habeas corpus, and coram nobis issues.

To date, the Court of Criminal Appeals has addressed some fifty-one appeals from my decisions while I was a trial court judge—or, on average, about seven appeals a year. A few cases are still pending appeal, and although I may be corrected at any time, I have been affirmed in all cases decided to date.

- ***Experience and Training in Death Penalty Litigation:***

The Tennessee Supreme Court has exclusive jurisdiction over direct appeals of verdicts imposing a sentence of death. During my time as a trial court judge, I presided over capital litigation involving three co-defendants. Although the cases were still pending at the time that I transitioned to the Court of Criminal Appeals, I presided over the cases from the initial indictment through the majority of pretrial motions.

As part of this experience, I also sought specialized training in capital litigation. In May 2019, I attended a four-day National Judicial College training for judges presiding over death penalty cases. The seminar included emphasis on the constitutional and statutory law governing capital sentencing; handling ineffective assistance of counsel issues; pretrial proceedings and scheduling; addressing expert proof and mitigation proof; managing jury selection and *Batson* issues in capital cases; reviewing special sentencing phase mechanics; and completing special training on insanity, competency, and intellectual disability issues in death penalty litigation.

- ***Experience in Complex Criminal Litigation:***

Complementing my experience in complex civil litigation from my practice, I also gained experience in managing complex criminal cases as well. My most significant set

of cases from the trial court involved a set of racketeering cases involving three capital cases and fifty-four other co-defendants in allegations of a pattern of racketeering activity and conspiracy to racketeer. These cases involved issues of first impression under Tennessee law, raised issues of complex case management, and addressed unsettled issues involving prosecutorial discretion.

- ***Experience as a Drug Recovery Court Judge:***

  Rehabilitation is a substantial and primary goal of sentencing in Tennessee, and our recovery courts have a long pedigree in this area. From the first day of my work as a trial court judge, I presided in the Hamilton County Drug Recovery Court as part of the Drug Recovery Court team. The work existed in addition to the full-time duties required by the criminal court otherwise, and the experience has been rewarding.

  The recovery court model has positively influenced my work as a judge and person in the administration of justice, even on the Court of Criminal Appeals. From a judicial perspective, the recovery court model emphasizes treating participants with empathy, fairness, and understanding. The model requires a broader understanding of how rehabilitation works and how best to work with individuals at all levels of recovery to achieve sustainable stability. When it works at its best, the model promotes individual restoration and enhances community safety.

  The recovery court model also involves the judge in collective teamwork with other people to identify and resolve issues. These skills involve understanding one's role on the team, welcoming collaboration, being flexible, showing respect, and having the ability to admit that you *may* be wrong.

  In my time with the Court of Criminal Appeals, I have found that the judicial skills used in a drug court setting bear a strong resemblance to the work of an appellate court judge. The appellate court judge also works collaboratively with other judges, staff, and judicial assistants, both in the process of deciding cases, as well as in matters of court administration. Being an effective colleague is essential to the work of a good appellate court judge.

  Currently, a few notable judges serving in our appellate courts have this valuable experience. I believe that my experience as a recovery court judge brings influences and perspectives that are particularly valuable in understanding the purposes of criminal sentencing, rehabilitation, and the administration of the criminal law more generally.

EXPERIENCE AS AN ARBITRATOR:

Between 2009 and 2015, I served as an arbitrator for the American Arbitration Association on its Commercial and Consumer panels. In this capacity, I conducted arbitrations between private parties involving several types of contract and consumer protection issues, including claims arising under the Tennessee Consumer Protection Act, the Fair Credit Reporting Act, the Truth in Lending Act, and the Fair Debt Collection Practices Act. Most of these arbitrations involved a "decision on documents," a process involving the submission of proof and briefs for decision.

On average, I had one or two arbitrations a year that required a full evidentiary hearing, typically lasting a full day, in which parties presented witness testimony and other proof before I issued a written opinion deciding the matter.

Apart from their significance to the parties involved, most of these arbitrations did not involve noteworthy issues advancing particular legal principles. However, particularly with respect to the contract claims, complicated issues arose in those arbitrations involving industry-specific contract interpretation, provision of complex services in the healthcare industry, and disputes regarding the timeliness and quality of medical equipment sold.

EXPERIENCE ON BOARD OF PROFESSIONAL RESPONSIBILITY HEARING PANELS:

For six years, I served as a member of the Board of Professional Responsibility's district hearing panels. When disciplinary actions are instituted against members of the bar, the BPR assembles a panel of three (3) members to consider charges of unethical conduct after hearing and weighing the evidence presented. In many ways, these hearing panels are similar to three-judge trial courts or three-member arbitration panels.

During my time serving on the district hearing panel, I participated in four or five such hearings where witnesses and evidence were presented. I served as the chair for one of the proceedings, and I wrote the panel's principal draft opinion in two of the cases. In every case where a court later reviewed the decision of a panel on which I served, the decision was affirmed.

11. Describe generally any experience you have serving in a fiduciary capacity, such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

I have had limited experience in these areas apart from the general practice of law. However, during my practice, I served as a court-appointed guardian ad litem, and my private practice included advising and representing private and banking trustees of private trusts. Prior to September 2015, I also served on the board of a charitable foundation, the Community Foundation of Greater Chattanooga.

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Council.

There are four additional aspects of my experience that I would highlight, including three from my work in the judiciary and one from my experience in the non-profit community.

ORGANIZATIONAL AND CASE MANAGEMENT EXPERIENCE:

In my experience clerking for Justice Barker and in my time on the Court of Criminal Appeals, it is clear that good appellate judges share a few key characteristics. While serving on a collegial court, a judge must be able to work well and respectfully with colleagues, particularly when areas of disagreement arise. Like all judges, the appellate judge must be good at thoughtful decision-making. He or she must also be able to supervise a staff, organize and manage mountains of information and paper in scores of cases, and excel in time and project management.

A deficiency in any of these areas will inevitably result in an ever-increasing backlog, which will adversely impact judicial decision-making, the interests of individual parties, and the overall functioning of the court and its other members. Although the dynamics are slightly different in a trial court setting, the experience of a trial court judge can translate well to work in the appellate courts.

In my work on the trial court, I actively managed a docket of 600-800 indictments and more than 1,900 individual charges. Each case required individual attention in terms of scheduling, docketing, and monitoring of progress as the court helped to shepherd each case to resolution.

To this end, in late 2016, I created a new case management system for the litigation of criminal cases. The system vastly reduced the number of appearances of each case on the court's docket, and it considerably shortened the average time to ultimate resolution by trial, plea, or dismissal. With that system, we were able to reduce costs and individually schedule matters and hearings, allowing victims, defendants, and participants to know precisely when a matter would be addressed.

A local editorial about the case management system appeared here: https://www.timesfreepress.com/news/opinion/times/story/2017/apr/04/sohn-better-court-scheduling-makes-better-sen/421062/

In complex litigation, such as one racketeering case involving fifty-four co-defendants and multiple counts for each defendant, I was able to work with staff, the court clerk, and the parties to develop special case management procedures to facilitate the identification and litigation of issues. This particular case also involved coordinating individual issues that could arise in a number of cases, while requiring close attention to timelines and knowing that delays in one case would necessarily impact the progress of the other fifty-three cases. Managing these cases, while also issuing several written

opinions on issues of first impression, was a helpful experience that can be used to draw upon for work with the Supreme Court.

PUBLIC TRUST AND OPEN COURTS:

Throughout my work in the judiciary, it has been especially important to me to bring the work of the court more into the community. The legitimacy of our judiciary and our courts depends upon public trust, and that trust can only be cultivated, initially, when the public can learn about the courts; identify what matters are being addressed and when; and can observe the proceedings.

Starting in 2022, I have been privileged to chair the Committee on Public Confidence in the Courts for the Tennessee Judicial Conference. This committee has a long pedigree in the conference, and it has been responsible for developing important initiatives. Re-engaging with these issues after the pandemic, we have worked to identify the causes of declining confidence, and we are currently exploring measures to combat the trend. We are also purposefully engaging with these issues among communities that may be disproportionally affected by the judicial system.

While working in the trial court, I personally built a website for the Second Division to help bring the court to the public. On that website, we provided information about the court and its operations. More importantly, we maintained on the website a full calendar of all hearings and trials scheduled to occur so that the public, the media, the bar, and case participants could see what matters are scheduled and when.

Also, starting during the pandemic, but continuing through the end of my trial court service, I broadcast our court proceedings over Cisco's WebEx videoconference platform. Using a link from our homepage, members of the media and the public, including especially victims and family members, could watch what was occurring in court without having to attend in person.

The beneficial use of this system was recognized by the Tennessee Coalition on Open Government. In a 2020 study of the pandemic's effects on the openness of our courts, the Coalition identified only one court in Tennessee that had formally addressed public streaming of court proceedings in its plan of operations: the Hamilton County Criminal Court.

A news media story on this aspect of our court may be found here: https://newschannel9.com/news/local/hamilton-county-criminal-courts-streaming-to-public-sessions-court-reset-13000-cases

Our appellate courts also provide rich public access to its dockets and proceedings. Because I believe that increasing public trust in our judiciary is essential to maintaining the rule of law, I will be committed to ensuring and improving the ability of the public to access court proceedings.

ENGAGEMENT WITH THE COMMUNITY:

Judges are members of their community and have a special responsibility to engage their community in the workings of the "third branch" of government. Our republic functions best when our community understands and appreciates how our courts and our independent juries function as part of our own government. I have attempted to facilitate this understanding by speaking with our civic groups, with our jury panels, and with our students.

As one of our more significant efforts, I worked with a local eighth-grade English teacher to bring to life *To Kill a Mockingbird*. In a series of discussions, panel interviews, and field trips to the courthouse and other places, we brought together judges, prosecutors, defense attorneys, police officers, former jurors, journalists, and members of the public to discuss the trial of Tom Robinson. Using the context of the book, we spent the day discussing in various groups what went so tragically wrong in that trial, and how we today try to ensure that those events never happen again. Although we have been interrupted by COVID-19, we were able to improve on this exercise over three years.

As another example, I have worked with the Chattanooga Bar Association and General Sessions Judge Alex McVeagh to help develop a mentoring program focused on working with diverse legal talent. The program, which also partners with local law firms and the University of Tennessee at Chattanooga, has offered the opportunity for our legal community to be purposefully engaged with issues of diversity, equity, and inclusion. More information on this important program may be found in a news article here:

https://hamiltoncountyherald.com/Story.aspx?id=12474&date=8%2F6%2F2021

If offered the opportunity to serve on our Supreme Court, I would continue to purposefully engage the community about the importance of the judiciary and to ensure diverse access in the selection of staff and clerks.

OVERSIGHT AND MANAGEMENT OF ORGANIZATIONS:

The Supreme Court is not merely a court that hears and decides cases, though this is an important—and the most visible—aspect of its work. Because it is the repository of the judicial power in Tennessee, the Supreme Court also has substantive and administrative responsibilities that touch on the legal system and the practice of law in this state. To help it fulfill these duties and responsibilities, the Court works with its staff, the Administrative Office of the Courts, and more than a dozen different boards and commissions.

In these ways, the Supreme Court is also a complex organization in our government, and experience in organizational management is important. Throughout my work in the non-profit community in Chattanooga, I have been privileged to be involved in leadership positions on boards in various organizations, including serving as the chair of organizations with multi-million dollar budgets and complex financial and human resource components. Although the day-to-day work of these operations was handled

well by the professional staff of these organizations, I have gained invaluable experience in financial and management oversight through my involvement.

Although the Supreme Court itself is certainly far more complex than any organization with which I have been affiliated, my experience in areas of oversight and management of organizations may be of assistance with the Supreme Court's less-visible substantive and administrative responsibilities.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor or similar commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

In 2022, I applied to fill a vacancy on the Tennessee Court of Criminal Appeals. The Governor's Council for Judicial Appointments met to review my application on March 3, 2022, and my name was among those submitted to Governor Bill Lee as a nominee for his consideration. Governor Lee appointed me to the position, and the Generally Assembly confirmed this appointment on April 27, 2022, to take effect on September 1, 2022.

In 2015, I applied to fill a vacancy in the position of Criminal Court Judge for the Eleventh Judicial District (Hamilton County). The Governor's Council for Judicial Appointments met to review my application in Chattanooga, Tennessee on July 25, 2015, and my name was among those submitted to Governor Bill Haslam as a nominee for his consideration. Governor Haslam appointed me to that position in September 2015.

Apart from these two applications, I have not applied for any other judicial position.

EDUCATION

14. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

UNIVERSITY OF TENNESSEE COLLEGE OF LAW

Dates of Attendance: August 1996 – May 1999
Degree Awarded: Juris Doctor, *Summa Cum Laude*
Other Aspects of Education:

- Executive Editor, *Tennessee Law Review*
- Member, Order of the Coif
- Member, Moot Court Board

UNIVERSITY OF TENNESSEE AT CHATTANOOGA

Dates of Attendance: August 1991 – May 1996
Degree Awarded: Baccalaureate, *Magna Cum Laude*
Major: Political Science with a concentration in Public Administration
Minors: Double minors in American History and Economics
Other Aspects of Education:

- Elected to Alpha Society
- Student Government Outstanding Senior in Public Administration (1995)
- University of Tennessee-Chattanooga Outstanding Male Junior (1994)
- Member of National Honor Societies for Political Science (*Pi Sigma Alpha*); Economics (*Omicron Delta Epsilon*); Business Administration (*Beta Gamma Sigma*; Chapter President); and History (*Phi Alpha Theta*)

PERSONAL INFORMATION

15. State your age and date of birth.

I am 49 years old, and my birthday is [redacted] 1973.

16. How long have you lived continuously in the State of Tennessee?

I have lived continuously in Tennessee since 1986, except for years while attending high school in Gainesville, Georgia, between 1989 and 1991.

17. How long have you lived continuously in the county where you are now living?

I have lived continuously in Hamilton County, Tennessee, since 1986, except for (i) years

attending high school in Gainesville, Georgia, between 1989 and 1991 and (ii) years attending law school at the University of Tennessee in Knoxville, Tennessee, between 1996 and 1999.

18. State the county in which you are registered to vote.

I am registered to vote in Hamilton County, Tennessee.

19. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

I have not served in the Armed Forces of the United States.

20. Have you ever pled guilty or been convicted or placed on diversion for violation of any law, regulation or ordinance other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

Other than minor traffic violations, I have not pled guilty, been convicted, or been on diversion for the violation of any law, regulation, or ordinance.

By way of full disclosure, I received, and paid fines in lieu of a hearing for, two minor speeding tickets. These charges occurred in May 1993 in the City Court for Chattanooga, Tennessee, and in April 2001 in the Gordon County, Georgia, Probate Court. I also received, and paid a fine for, a parking ticket at an expired meter in 2014 in Chattanooga, Hamilton County, Tennessee.

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No, I am not under investigation for violation of any criminal statute or disciplinary rule.

22. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

As a member of the judiciary, I have not been called upon to respond to any complaints alleging a breach of ethics or unprofessional conduct. In the interests of disclosure, however, I was

notified by the Board of Judicial Conduct that, during my time as a trial court judge, four defendants filed complaints during the course of criminal proceedings against them. However, each complaint was dismissed by the Board of Judicial Conduct without prior notification to me of the filing and without asking me to respond.

As a member of the bar, I did not have any complaints filed against me alleging any breach of ethics or unprofessional conduct.

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No, no tax lien or other collection procedure has been instituted against me within the last five years (or at any time).

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No, I have never filed for bankruptcy.

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

In August of 2018, I was named as a party in a suit brought by Mr. Monty Bell in the Circuit Court of Hamilton County, Case No. 18-C-695.

In the suit, Mr. Bell asserted, without specific allegations of fact, that I denied him procedural due process of law "in cases dating back to 1993 to present," or for some 22 years prior to my appointment to the bench. To my knowledge, I had never met or been involved with Mr. Bell in any capacity prior to the suit. Nevertheless, the suit was brought as an amendment to an existing suit also alleging claims against Hamilton County Mayor Jim Coppinger, Hamilton County Sheriff Jim Hammond, Hamilton County Attorney Rheubin Taylor, and five other individuals. I was represented by the Tennessee Attorney General's office, and the lawsuit was dismissed on the pleadings three months later on October 29, 2018.

Apart from this lawsuit, I have never been a party to any type of legal proceeding.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

UNITED WAY OF GREATER CHATTANOOGA, Chattanooga, Tennessee
Dates: Since 2010
Offices: Board Member of Governing Board of Directors (2022); Community Investment Committee, member since 2013 and former Chair and Co-Chair; Allocation Panel Volunteer Since 2010

ST. PETER'S EPISCOPAL CHURCH, Chattanooga, Tennessee
Offices: Member of Vestry (2020 to present); Lay Member Delegate to the 38th Annual Convention of the Episcopal Diocese of East Tennessee (2022); Lay Minister

CHATTANOOGA AREA LEADERSHIP PRAYER BREAKFAST, Chattanooga, Tennessee
Dates: Since 2019
Offices: Special Guests Chairperson

ROTARY CLUB OF CHATTANOOGA, Chattanooga, Tennessee
Dates: 2012 to present; Paul Harris Fellow (x2)
Offices: Assistant Sergeant at Arms (2013-2014)

CHAMBLISS CENTER FOR CHILDREN (*formerly known as the Children's Home / Chambliss Shelter*), Chattanooga, Tennessee
Dates: Board Member from 2010 through October 2015.
Offices: Past Chairperson (2015); Board Chairperson (2014), Vice Chairperson (2012, 2013)

ORANGE GROVE CENTER, Chattanooga, Tennessee
Dates: Board Member from 2011 to present
Offices: Chairperson (2018-2020); President (2015-2018); President Elect (2013-2015); and Secretary (2012-2015)

COMMUNITY FOUNDATION OF GREATER CHATTANOOGA, Chattanooga, Tennessee
Dates: Board Member from 2013 through September 2015
Offices: Although I did not hold specific offices with the Community Foundation, I served on the Program and Grants Committee throughout the term of my involvement.

TENNESSEE SUPREME COURT HISTORICAL SOCIETY
Dates: Board Member from 2014 through September 2015
Offices: Although I have not held specific offices with the Society, I served as its Membership Committee chairperson between 2014 and 2015.

ST. PETER'S EPISCOPAL SCHOOL, Chattanooga, Tennessee
Dates: Board Member from 2014 to 2015

Offices: Although I did not hold specific offices with the St. Peter's School Board, I served on its Finance Committee.

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

    a. If so, list such organizations and describe the basis of the membership limitation.

    b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

While a student at the University of Tennessee at Chattanooga, I was a member of a college fraternal organization, Lambda Chi Alpha, that limited membership based on gender. The organization did not, however, limit any membership on the basis of race, national origin, religion, sexual orientation, or other characteristics. Other than Lambda Chi Alpha, I have not been a member of any such organization, association, club or society.

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

TENNESSEE JUDICIAL CONFERENCE
Dates: Since 2015
Offices: Executive Committee member (since 2022); Chair of Committee on Public Confidence in the Courts (since 2022)

TENNESSEE SUPREME COURT'S COMMISSION ON CONTINUING LEGAL EDUCATION AND SPECIALIZATION
Dates: 2008-2013
Offices: Chairperson (2013) and Vice Chairman (2012)

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY, DISCIPLINARY DISTRICT COMMITTEE MEMBER
Dates: 2007-2012

RAY L. BROCK AND ROBERT E. COOPER AMERICAN INN OF COURT
Dates: 2003-2010: Barrister and Associate Member
2015 to Present: Judicial Master Member

TENNESSEE BAR ASSOCIATION
Dates: Since 2002
Memberships: Member of the TBA's Standing Committee on Ethics and Professional Responsibility since 2009

CHATTANOOGA BAR ASSOCIATION
Dates: Since 2002

STATE BAR OF GEORGIA
Dates: Since 2002

AMERICAN BAR ASSOCIATION
Dates: Since 1999

FEDERAL BAR ASSOCIATION
Dates: Between 2002 and 2015

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school that are directly related to professional accomplishments.

- Fellow, American Bar Foundation
- Fellow, Tennessee Bar Foundation
- Fellow, Chattanooga Bar Foundation
- Rated by Martindale-Hubble as AV Preeminent®
- Previously listed in *Best Lawyers in America*® for Criminal Defense: White Collar; Appellate Practice; Commercial Litigation; Litigation - Construction; Litigation – Insurance
- Previously listed in *Super Lawyers*®, Mid-South Region in the areas of Commercial and Business Litigation
- Previously listed each year as Rising Star in areas of Commercial and Business Litigation by *Super Lawyers*®, Mid-South Region, from 2009 to 2013
- Graduate, Tennessee Bar Association's Leadership Law Program, Class of 2007

- Outstanding Alumni - Department of Political Science, University of Tennessee at Chattanooga, 2004

30. List the citations of any legal articles or books you have published.

- Article, *Questionable Claims of Unconstitutionality: The Pardon Power*, 3 The Quarterly Journal, Chattanooga Chapter of the Federal Bar Association 1 (Summer 2014)

- Article, *Taking Care of the Affordable Care Act*, 3 The Quarterly Journal, Chattanooga Chapter of the Federal Bar Association 1 (Jan. 2014)

- Article, *Presidential War Powers: Assassinations of American Citizens Abroad*, 1 The Quarterly Journal, Chattanooga Chapter of the Federal Bar Association 1 (July 2012).

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

CLE SEMINARS AND LAW-RELATED TOPICS:

Over the last five years (or since 2017), I have given or participated in the following presentations on law-related topics:

- Presentation and Panel Participant, *Legal Ethics and the Criminal Law*, Chattanooga Bar Association, Chattanooga, Tennessee, December 8, 2022.

- Joint Presentation with the Honorable Curtis L. Collier, *Federal & State Courts 101*, "Media Law School," United States District Court, Eastern District of Tennessee, August 3, 2022.

- Presentation, *Covid-19 & the Courts: The Impact of the Pandemic on the State Judiciary*, Ooltewah-Collegedale Kiwanis Club, January 19, 2022.

- Panel Participant, *Voir Dire & Effective Jury Selection*, Ray L. Brock and Robert E. Cooper American Inn of Court, January 13, 2022.

- Presentation, *Successful Suppression Motion Litigation*, Tennessee Association of Criminal Defense Lawyers, November 23, 2020.

- Presentation, *The Mayflower Compact, Its History, Legacy & Promise for Today*, Chattanooga Area NSDAR Regents Council, November 11, 2020.

- Presentation, *The Importance of Constitutional Rights and Citizen Obligations*, Troop 800, Boy Scouts of America, May 11, 2020.

- Presentation, *The Role of the Independent Jury in our Republican Government*, Daughters of the American Revolution, Chief John Ross Chapter, March 11, 2020.

- Presentation, *The Importance of the Bill of Rights*, United States District Court, January 17, 2020.

- Presentation and Panel Participant, *Legal Ethics and the Criminal Law*, Chattanooga Bar Association, Chattanooga, Tennessee, December 13, 2019.

- Joint Presentation with the Honorable William M. Barker, *Legal Ethics*, Chattanooga Chapter of the Federal Bar Association, Chattanooga, Tennessee, September 10, 2019.

- Presentation, *On Crime and Punishment: Sentencing in State Court*, Ooltewah-Collegedale Kiwanis Club, July 17, 2019.

- Presentation, *On Crime and Punishment: Sentencing in State Court*, Hixson Kiwanis Club, July 2, 2019.

- Presentation, *The Importance of Citizenship*, Eagle Scouts Graduation for the Cherokee Area Council, Boy Scouts of America, Chattanooga, Tennessee, March 29, 2019.

- Presentation, *The Importance of an Independent Judiciary*, Lookout Valley Neighborhood Association, Chattanooga, Tennessee, February 7, 2019.

- Presentation and Panel Participant, *Legal Ethics and the Criminal Law*, Chattanooga Bar Association, Chattanooga, Tennessee, December 14, 2018.

- Presentation, *Constitutional Curiosities*, Hamilton County Republican Women's Club, Chattanooga, Tennessee, November 20, 2018.

- Presentation, *Constitution Day & The Bill of Rights*, Chattanooga Chapter of the Federal Bar Association, September 21, 2018.

- Presentation, *Of Crime and Punishment*, Chattanooga Chapter of Tennessee Society of Certified Public Accountants, September 20, 2018.

- Presentation, *Thirteen Hats in the Ring: The Roles of a Trial Judge*, Ooltewah-Collegedale Kiwanis Club, August 8, 2018.

- Joint Presentation with the Honorable Curtis L. Collier, *Federal & State Courts 101*, "Media Law School," United States District Court, Eastern District of Tennessee, March 8, 2018.

- Presentation and Panel Participant, *Legal Ethics and the Criminal Law*, Chattanooga Bar Association, Chattanooga, Tennessee, December 14, 2017.

- Presentation, *Addiction, Recovery, and the Role of Drug Recovery Courts*, Parkridge Medical Center, Annual Physicians Meeting, October 5, 2017.

- Presentation, *Rehabilitation and the Hamilton County Drug Recovery Court*, Chattanooga Civitan Club, September 15, 2017.

- Presentation, *The Constitution, Presidential Powers, and the Music of* Hamilton, Girls Preparatory School, Constitution Day, September 15, 2017.

- Presentation, *The Hamilton County Drug Recovery Court*, Ooltewah-Collegedale Kiwanis Club, July 12, 2017.

- Presentation and Panel Participant, *Legal Ethics and the Criminal Law*, Chattanooga Bar Association, Chattanooga, Tennessee, December 1, 2016.

LAW-RELATED COURSES TAUGHT:

At the University of Tennessee at Chattanooga, I have taught various courses, including a 400-level course entitled "Issues in Public Law," in fall semesters since 1999. The "Issues in Public Law" course has consisted of an in-depth study of particular areas of Constitutional Law, including the following:

- Judicial Decision-Making
- Presidential War and National Security Powers
- War Powers of the Congress and the President
- Presidential Domestic Policy Powers
- The Presidency and the Constitution
- The Tenth Amendment & Federalism
- The Establishment Clause of the First Amendment
- Constitutional Controversies Involving the Separation of Church and State

I have also taught 200- and 300-level survey courses in Civil Liberties, Constitutional Law, and Introduction to Judicial Process.

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

Effective September 1, 2022, I was appointed by Tennessee Governor Bill Lee to the office of Judge on the Tennessee Court of Criminal Appeals, Eastern Section.

On September 18, 2015, I was appointed by Tennessee Governor Bill Haslam to the office of Criminal Court Judge for the Eleventh Judicial District. I was subsequently elected to the position in August 2016, and I served the people of Hamilton County in that office until my transition to the Court of Criminal Appeals.

Other than these offices, I have not previously been a candidate or applicant for public office.

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No, I have never been a registered lobbyist at any time.

34. Attach to this application at least two examples of legal articles, books, briefs, or other legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

Please see the attached writing samples.

The attached writings reflect my own writing in their entirety, except for technical proofreading by legal assistants.

A significant part of my work on the Court of Criminal Appeals also involves producing written opinions and orders, though many of these opinions are also the product of a collaborative effort with other judges and judicial staff. I am happy to provide a list of opinions I have authored while on the Court of Criminal Appeals as well.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? ***(150 words or less)***

My first job in the law was working on this very court with an outstanding jurist, Justice Muecke Barker. Through this extraordinary opportunity, I could see and participate in the work of this important institution. The experience went far beyond the cases that came before the court. Rather, he allowed me to assist him in many areas of the court's administrative responsibilities, which are an especially significant, if less visible, part of the court's daily work. The experience forever shaped how I understand the role of judges and how courts should function in a system of separated powers.

I know firsthand that this work is exciting. The position offers the chance to engage meaningfully in the law and its development. But, more importantly, I seek the position because it offers the opportunity to make positive contributions to our government and to the administration of justice on a state-wide basis.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

Giving effect to "equal justice under law" requires a multi-layered approach. It requires elimination of educational, social, and access barriers to those seeking justice. In its administration, it requires the fair treatment of all involved. In its dispensation, it requires that similar cases be treated alike, while recognizing and giving effect to material distinctions.

I have sought to eliminate barriers by actively engaging our schools and civic groups about the importance of the courts and their independent juries. I have worked to ensure that our operations reflect our community and the people served by the court. I have embraced procedural fairness concepts so that all have a voice, are treated respectfully, and are addressed individually. I have worked intentionally to acknowledge and respect the rights of victims and defendants alike, and to ensure that our courts function as a place of retributive justice and of rehabilitative and restorative healing.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

I am seeking a position as a Justice on the Tennessee Supreme Court. The Supreme Court, which is comprised of five justices, is our state's court of last resort, and it has appellate jurisdiction over both civil and criminal cases. Importantly, the Court is also the repository of the state's judicial power, and it exercises supervisory authority over the lower courts created by the General Assembly and the practice of law generally. It also oversees several boards and commissions that assist the Court in meeting these responsibilities.

I believe that my background in civil, administrative, capital, and criminal matters, particularly in complex areas, will be beneficial to the Court in its adjudicative responsibilities. My experience with legal ethics and in the regulation of the practice of law will assist the Court in these key areas within its administrative responsibilities. Finally, I would bring a differing geographic perspective to the Court.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

I believe that to those whom much is given, much is expected. Throughout my professional career, I have been actively involved with our local nonprofit agencies helping to make our community a better place to live and work. My focus has been on helping the most vulnerable in our community, and this desire initially led me to the criminal court generally and its drug recovery court in particular.

As two other examples, I have been privileged to work with the Chambliss Center for Children in Chattanooga. This outstanding organization has several missions related to the care of our community's children and youth, including assisting parents (often single mothers) with affordable, safe, and educational daycare so that the parents may be gainfully employed. The Center also operates a successful foster care program and residential shelter to care for children who have been removed from their home environments.

I also currently work with Orange Grove Center, which is an organization that serves children and adults with intellectual disabilities. OGC is dedicated to providing educational and vocational training, and it emphasizes creativity and self-expression through art, dance, and music. OGC also provides medical services, residential care, and community integration to ensure that we celebrate the value of every life. I am a former Board president and chairperson of this exceptional organization.

Consistent with the Code of Judicial Conduct, I would continue my work with these and other community organizations with which I am involved.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Council in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

My father was especially influential in my becoming a lawyer. He was a lawyer and had been an administrative law judge in the Georgia worker's compensation system. From an early age, I learned from him about the importance of courts and lawyers for accomplishing good and about how the law, properly administered, is the great equalizer in our system of government.

There was never a question that I would try to follow in his footsteps. However, when I was fifteen, my father passed after a long struggle with cancer. This event was devastating, and due to various circumstances, his passing essentially left me alone.

Immediately after high school graduation, I found myself homeless, with nothing by way of savings or other belongings. With the help of a close friend, I was able to enter UTC, and I worked hard to pursue my goals. I also worked my way through law school with the incredible assistance of my future bride and now wife of nearly 23 years.

These experiences provided me with three important lessons:

- success is never achieved on your own—help and support are essential from close friends and family;
- focused, effective, and diligent work is critical to any task worth doing; and
- so long as one maintains hope for the future, anything is possible.

I have carried these lessons with me throughout my life, and they have been invaluable in my current position. I know that they would also serve me well on the Supreme Court.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

Yes, of course. It is not the role of a judge in our republican system of government to alter or amend a statute; question a statute's reasonableness; or substitute the judge's own policy judgments for those of the legislature.

To be faithful to this principle, it is important to know why it exists. In our system, the people, through their General Assembly, have the authority to make neutral rules of conduct that have prospective application. The role of the judge is to apply these rules faithfully to resolve disputes between parties involving past facts. Just as the legislature cannot condemn prior actions through its actions—this is the very prohibition against ex post-facto laws—our courts cannot change the rules after the game has started. In a government of and for the people, the people have the right to have their disputes resolved upon previously existing rules and law, not the unknown and malleable preferences of a judge.

These principles are especially important for a court of last resort, particularly with its supervisory authority over the judicial branch and its responsibilities in the development and administration of the law. It is true that a judge may certainly have opinions, including firmly held ones. However, the judge must always remain mindful and cognizant of the judiciary's special role in our constitutional system and of the larger consequences of straying from that role.

I hope that this philosophy can also be seen in some of the writing samples that I have submitted.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Council or someone on its behalf may contact these persons regarding your application.

A.	William M. Barker Chief Justice (ret.), Tennessee Supreme Court [redacted] Signal Mountain, Tennessee 37377
B.	Senator Bo Watson [redacted] Nashville, Tennessee 37243 Telephone: [redacted]
C.	Senator Todd Gardenhire [redacted] Nashville, Tennessee 37243 Telephone: [redacted]
D.	Representative Patsy Hazlewood [redacted] Nashville, Tennessee 37243 Telephone: [redacted]
E.	Hal Hardin, Esq. [redacted] Nashville, Tennessee 37201 Telephone: [redacted]

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the **Supreme Court of Tennessee (Eastern Grand Division)**, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended application with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this application shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: **December 12, 2022**

Signature

When completed, return this application to John Jefferson at the Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS
ADMINISTRATIVE OFFICE OF THE COURTS

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information that concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the State of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Governor's Council for Judicial Appointments to request and receive any such information and distribute it to the membership of the Governor's Council for Judicial Appointments and to the Office of the Governor.

Thomas Clifton Greenholtz
Type or Print Name


Signature

December 12, 2022
Date

020105
BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

State Bar of Georgia, No. 309137

The Governor's Council for Judicial Appointments
State of Tennessee
Application for Nomination to Judicial Office

Name: Thomas Clifton ("Tom") Greenholtz

Office Address: 633 Chestnut Street, Suite 1550
(including county) Chattanooga, Tennessee (Hamilton County) 37450

Office Phone: (423) 719-2010 Facsimile: n/a

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WRITING SAMPLES

A significant aspect of my work as an appellate court judge involves producing written opinions announcing the decision in a particular case. The audiences for these opinions are typically the trial court, lawyers, and parties, and to that end, the goals of the work product are concision and clarity. In my experience, the final opinions often reflect the collaborative work with other judges and judicial staff. However, some opinions more comprehensively reflect my own work, and I am attaching a sample to this application. I am happy to submit other samples as well.

By contrast, a large portion of that work as a trial court judge also involved resolving legal issues through written opinions. Because of the solitary work of the trial court judge, these opinions reflect my work almost in their entirety. Importantly, the audiences for these opinions were largely the Court of Criminal Appeals and the Supreme Court. As such, I typically tried to provide a full explanation of the factual and legal grounds for the decisions so as to facilitate appellate review.

Although it is difficult to select particular writing samples, I submit the following samples for consideration. It would be my pleasure to provide other samples as well.

1. ***Woodard v. State*, No. M2022-00162-CCA-R3-PC, 2022 WL 4932885 (Tenn. Crim. App. Oct. 4, 2022).**

   This opinion starts on Page Appendix – 001. As of the filing of this application, the parties have not filed an application for permission to appeal to the Supreme Court.

2. ***State v. Allen*, Memorandum Opinion Granting, in Part, Mayes Motion No. 13 (Feb. 7, 2020).**

   This opinion starts on Page Appendix – 008.

   In this case, the court addressed the intersection of Tennessee's general law of conspiracy and the more limited aspects of that law in Tennessee's anti-racketeering statutes. The opinion involves statutory interpretation and an examination of legislative history, legislative intent, and public policy issues. The opinion also addresses issues relating to the proper role of the grand jury.

   This case is final, and this decision was not appealed.

3. ***State v. Perez*, Order Denying Motion to Suppress (Nov. 11, 2021).**

   This opinion starts on Page Appendix – 037.

   In this case, the court was confronted with a seemingly unique issue of whether a discrepancy in an affidavit as to when blood was drawn rendered a later search warrant without probable cause. The issue required the court to apply unsettled and developing law, while also being mindful of the limited role of trial courts in "law development."

   Because the case was later abated by death, the decision was not appealed.

4. ***State v. Favors*, Sentencing Memorandum (Aug. 6, 2020).**

   This opinion starts on Page Appendix – 056.

   Sentencing issues are the most complicated issues faced by a criminal court. In this opinion, the court addressed the appropriate sentencing of a defendant nominally accused of multiple accounts of aggravated assault. This opinion addresses the application of mitigating and enhancing factors, issues of consecutive sentencing, and careful application of the factors considered in alternative sentencing.

   This decision was affirmed by the Court of Criminal Appeals, and the Supreme Court denied further review on January 13, 2022.

   The appellate court decision can be found at *State v. Favors*, No. E2020-01166-CCA-R3-CD, 2021 WL 3630327 (Tenn. Crim. App. Aug. 17, 2021), *perm. app. denied*, Jan. 13, 2022.

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs September 27, 2022

BERNARD WOODARD v. STATE OF TENNESSEE

Appeal from the Criminal Court for Putnam County
No. 2018-CR-818 Wesley Thomas Bray, Judge

No. M2022-00162-CCA-R3-PC

The Petitioner, Bernard Woodard, was convicted of burglary, theft, and evading arrest. He later filed a petition for post-conviction relief alleging various grounds, including that his lawyer was ineffective, that the jury was drawn from an unrepresentative venire, and that the prosecutor made improper comments during closing arguments regarding his right to remain silent. The post-conviction court summarily dismissed the petition, finding that the petition failed to state a colorable claim for relief. On appeal, the Petitioner challenges the dismissal of his petition. We hold that the post-conviction court properly dismissed claims that have been waived. However, we also hold that the Petitioner has stated colorable claims for relief by alleging sufficient facts showing that he was denied the effective assistance of trial counsel and appellate counsel. As such, we respectfully remand these claims for the appointment of counsel and further proceedings consistent with this opinion.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed in Part, Reversed in Part, Case Remanded

TOM GREENHOLTZ, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and CAMILLE R. MCMULLEN, JJ., joined.

Bernard Woodard, Hartsville, Tennessee, pro se.

Herbert H. Slatery III, Attorney General and Reporter; David H. Findley, Senior Assistant Attorney General; Mark Gore, District Attorney General, for the Appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND

The Petitioner was convicted by a jury of burglary of a building other than a habitation, theft of property valued at $2,500 or more, and felony evading arrest. *State v. Woodard*, No. M2020-01538-CCA-R3-CD, 2021 WL 5467384, at *1 (Tenn. Crim. App. Nov. 23, 2021). He was sentenced as a career offender to an effective sentence of eighteen years. *Id.* On direct appeal, the Petitioner argued that "his right to an impartial jury was violated by the racial composition of the jury venire, that the State did not establish the value of the stolen property, that the prosecutor committed misconduct in closing argument, and that the trial court erred in imposing partially consecutive sentences." *Id.* This Court found no error, and it affirmed the judgments of the trial court. *Id.*

On January 11, 2022, the Petitioner filed a pro se petition for post-conviction relief in the Putnam County Criminal Court. In the petition, the Petitioner alleged that his trial counsel was ineffective by failing to (1) object to the underrepresentation of African Americans in the jury venire; (2) file a motion for change of venue after advising the Petitioner that he "would not get a fair trial in this county"; (3) file a motion to determine the Petitioner's competency to stand trial; (4) object to the prosecutor's comments during closing arguments regarding the Petitioner's right to remain silent; (5) file a motion to quash the indictment because no African Americans were serving on the grand jury; and (6) file a notice of appeal after the Petitioner advised trial counsel that he wanted to file an appeal. The Petitioner also alleged that his appellate counsel was ineffective by failing to prepare and file a transcript of the closing argument on direct appeal. We refer to these claims herein as the Petitioner's "Sixth Amendment claims." In addition, the Petitioner raised two stand-alone claims for relief: that his jury was drawn from a venire that underrepresented African Americans and that, during the closing argument, the prosecutor impermissibly commented on the Petitioner's right to remain silent.

On January 18, 2022, the post-conviction court summarily dismissed the petition without appointing counsel or holding an evidentiary hearing. Initially, the post-conviction court found that two of the Petitioner's claims were previously determined because the Petitioner raised these claims on his direct appeal. These previously-determined claims included the Petitioner's claim regarding the prosecutor's closing argument and his claim about the selection of the grand or petit juries.

With respect to the Petitioner's Sixth Amendment claims, the post-conviction court concluded that the Petitioner raised "no colorable claim" and that he raised no "issues or points that begin to arise to a Post-Conviction Relief standard." Specifically, the post-conviction court noted that Petitioner's allegation that trial counsel was ineffective in relation to the racial composition of the jury "was raised on appeal, denied and is not a

valid basis." Next, the post-conviction court said that the Petitioner's allegation that trial counsel was ineffective by failing to request a "change in venue[] was not raised at trial nor appeal, nor is it a valid assertion for Post-Conviction Relief."

On appeal, the Petitioner challenges the summary dismissal of the post-conviction petition. For the reasons given below, we respectfully affirm in part and reverse in part the judgment of the post-conviction court. We also remand the case for the appointment of counsel and for further proceedings consistent with this opinion.

STANDARD OF APPELLATE REVIEW

Our Supreme Court has recognized that "the first question for a reviewing court on any issue is 'what is the appropriate standard of review?'" *State v. Enix*, No. E2020-00231-SC-R11-CD, 2022 WL 4137238, at *4 (Tenn. Sept. 13, 2022). An issue as to whether a post-conviction petition states a claim for relief is a question of law. *Burnett v. State*, 92 S.W.3d 403, 406 (Tenn. 2002). As such, our review of a post-conviction court's summary dismissal of a post-conviction petition is de novo. *Arnold v. State*, 143 S.W.3d 784, 786 (Tenn. 2004); *see also Abdelnabi v. State*, No. E2020-01270-CCA-R3-PC, 2022 WL 500394, at *12 (Tenn. Crim. App. Feb. 18, 2022).

ANALYSIS

On appeal, the Petitioner challenges the summary dismissal of his post-conviction petition. In response, the State argues that the Petitioner "does not challenge the [post-conviction] court's dismissal, but asserts the same claims and raises new ones." On this basis, the State asks that we affirm the dismissal of the petition.

As to the State's argument, we have a different perspective. Although the petition is not drafted well, "our courts have long recognized that pro se petitioners are not held to the same stringent drafting standards of attorneys and the resulting pleadings are to be more liberally construed." *Carter v. State*, No. E2011-01757-CCA-R3-PC, 2012 WL 6621187, at *1 (Tenn. Crim. App. Dec. 19, 2012). In this appeal, the Petitioner requests that this Court provide relief on the issues raised in the lower court, and he asks this Court to appoint counsel to represent him. We conclude that the Petitioner's request is sufficient here to challenge whether the post-conviction court properly dismissed his post-conviction petition.

The Tennessee Post-Conviction Procedure Act provides an avenue for relief "when the conviction or sentence is void or voidable because of the abridgment of any right

guaranteed by the Constitution of Tennessee or the Constitution of the United States." Tenn. Code Ann. § 40-30-103. A post-conviction proceeding is commenced by filing a written petition for relief, Tenn. Code Ann. § 40-30-104(a), and this petition "must contain a clear and specific statement of all grounds upon which relief is sought, including full disclosure of the factual basis of those grounds," Tenn. Code Ann. § 40-30-106(d). Our General Assembly has cautioned that "[a] bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings." *Id.*

When considering a timely-filed petition, a trial court must determine whether the petition alleges a colorable claim for post-conviction relief. Tenn. Sup. Ct. R. 28 § 6(B)(2). A "colorable claim" is a claim "that, if taken as true, in the light most favorable to petitioner, would entitle petitioner to relief under the Post-Conviction Procedure Act." Tenn. Sup. Ct. R. 28 § 2(H). If the court finds that the petition does state a colorable claim for relief, then the court should enter a preliminary order and appoint counsel if the petitioner is indigent and requests counsel. *Arnold*, 143 S.W.3d at 786. However, if the "facts alleged, taken as true, fail to state a colorable claim, the petition shall be dismissed." *Id.*; *see also* Tenn. Code Ann. § 40-30-106(f).

In reviewing whether the post-conviction court properly dismissed the petition, we must first determine whether the Petitioner has stated a colorable claim for post-conviction relief. In this appeal, there are essentially two categories of claims before this Court. The first category includes free-standing claims alleging a violation of various constitutional rights. The second category consists of the Petitioner's Sixth Amendment claims challenging the effectiveness of both his trial counsel and appellate counsel.

With respect to the first category of claims, the Petitioner asserts that his jury was drawn from an unrepresentative venire and that, during the closing argument, the prosecutor impermissibly commented on the Petitioner's right to remain silent. The post-conviction court held, and the State argues, that these claims have been previously determined. Although we respectfully disagree that these claims have been previously determined, we conclude that the post-conviction court properly dismissed these claims because they have been waived.

For a post-conviction claim to be "previously determined," a court of competent jurisdiction must generally have "ruled on the merits [of the issue] after a full and fair hearing." Tenn. Code Ann. § 40-30-106(h); Tenn. Sup. Ct. R. 28, § 2(E). Essentially, this rule codifies the principle that post-conviction proceedings "may not be employed to raise and relitigate or review questions decided and disposed of in a direct appeal from a conviction." *Ray v. State*, 489 S.W.2d 849, 851 (Tenn. Crim. App. 1972); *see also Patel v. State*, No. M2018-01885-CCA-R3-PC, 2019 WL 5618962, at *8 (Tenn. Crim. App. Oct.

31, 2019). As such, this rule does not typically apply in the absence of a court's ruling on the merits of the issue.

In this case, the Petitioner sought direct appellate review of his claims involving jury selection and prosecutorial closing argument. However, this Court did not rule on the merits of either issue, whether under plenary review or the plain error doctrine. Instead, we found that these claims were waived due to the Petitioner's failure to raise these issues properly in the trial court. *Woodard*, No. M2020-01538-CCA-R3-CD, 2021 WL 5467384, at *4, 6-7. As such, because these claims were not resolved on the merits after a full and fair hearing, we conclude that these claims have not been previously determined.

That said, the Petitioner's free-standing claims were nevertheless properly dismissed because they have been waived. Tennessee Code Annotated section 40-30-106(g) provides that "[a] ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented." Similar to claims that have been previously determined, section 40-30-106(g) seeks to prevent post-conviction proceedings from being used as a substitute for direct review and appeal. Essentially, a defendant may not withhold constitutional claims at trial for later litigation in post-conviction proceedings. Tenn. Code Ann. § 40-30-110(f) ("There is a rebuttable presumption that a ground for relief not raised before a court of competent jurisdiction in which the ground could have been presented is waived."); *cf. Brown v. State*, 489 S.W.2d 268, 270 (Tenn. Crim. App. 1972) ("Our procedure does not permit one the practice of deliberately withholding the timely assertion of his Constitutional rights upon his trial, to save them back for post-conviction attack in the event of a conviction.").

Here, the Petitioner could have properly presented these claims to the original trial court because they existed at the time. He also could have properly sought relief on appeal, but he failed to do so. As such, we conclude that these stand-alone constitutional claims have been waived and that the post-conviction court acted properly in summarily dismissing these claims. *See, e.g.*, *McNair v. State*, No. E2021-00219-CCA-R3-PC, 2022 WL 2115087, at *8 (Tenn. Crim. App. June 13, 2022) (finding that petitioner waived any free-standing claim regarding the composition of the petit jury by failing to present it in a proceeding before a court of competent jurisdiction in which the ground could have been presented); *Roberson v. State*, No. E2020-00643-CCA-R3-PC, 2021 WL 2373819, at *19 (Tenn. Crim. App. June 9, 2021) (finding that petitioner waived a free-standing claim regarding inappropriate closing argument by failing to present this ground on direct appeal). Because this Court may "affirm a judgment on different grounds than those relied upon by the lower courts when the lower courts have reached the correct result," *State v. Hester*, 324 S.W.3d 1, 21 n.9 (Tenn. 2010), we affirm the post-conviction court's summary dismissal of these claims.

With respect to the Petitioner's Sixth Amendment claims, however, we have a different view. If properly alleged, claims of ineffective assistance of counsel typically represent colorable grounds for post-conviction relief. *See Clark v. State*, No. W2009-01610-CCA-R3-PC, 2010 WL 890939, at *10 (Tenn. Crim. App. Mar. 12, 2010). And, importantly, a claim asserting the ineffective assistance of counsel with respect to a particular issue may be brought even when the underlying substantive issue has been waived or previously determined. *Rayfield v. State*, No. M2020-00546-CCA-R3-PC, 2021 WL 4205714, at *6 (Tenn. Crim. App. Sept. 16, 2021) (recognizing that, even if substantive claims are waived for purposes of post-conviction relief, the bar does not affect "consideration of these alleged errors as they relate to the petitioner's claim of ineffective assistance of counsel"); *Arnold v. State*, No. M2018-00710-CCA-R3-PC, 2020 WL 569928, at *39 (Tenn. Crim. App. Feb. 5, 2020) (in the context of a claim for improper prosecutorial argument, recognizing that the substantive claim was waived but stating that "we will consider the Petitioner's claim that his defense attorneys were ineffective in failing to object to the prosecutor's improper comments during closing arguments" (citing Tenn. Code Ann. § 40-30-106(g)). As such, the post-conviction court should have allowed the Petitioner's Sixth Amendment claims to proceed, even if the underlying substantive claims have otherwise been waived or previously determined.

For its part, the State argues that the Petitioner's Sixth Amendment claims should be dismissed because they "are conclusory, without any supporting proof." We agree that the claims are conclusory. But, while a post-conviction petitioner is required to "include allegations of fact supporting each claim for relief set forth in the petition," Tenn. Code Ann. § 40-30-104(e), the petitioner "is not required to *prove* any claim in his petition; instead, a petitioner need only *allege* a colorable claim," *Betts v. State*, No. M2009-01193-CCA-R3-PC, 2010 WL 2160381, at *2 (Tenn. Crim. App. May 28, 2010) (citing *Shazel v. State*, 966 S.W.2d 414, 415-16 (Tenn. 1998)) (emphasis in original). Indeed, "'[t]he ultimate success or failure of a petitioner's claims is not a proper basis for dismissing a post-conviction petition without conducting an evidentiary hearing.'" *Tuttle v. State*, No. M2018-00768-CCA-R3-PC, 2019 WL 1579685, at *6 (Tenn. Crim. App. Apr. 12, 2019) (quoting *Stuart v. State*, No. M2003-01387-CCA-R3-PC, 2004 WL 948390, at *3 (Tenn. Crim. App. May 4, 2004)).

We have examined the factual allegations contained in the petition with respect to the Petitioner's Sixth Amendment claims. Taken as true, these facts state colorable claims sufficient to survive a summary dismissal. Therefore, we conclude that the post-conviction court should appoint counsel for the Petitioner and allow him an opportunity to file an amended petition. *See* Tenn. Code Ann. § 40-30-107(b)(1).

Finally, we recognize that the Petitioner has attempted to raise additional issues in this Court that were not originally included in his post-conviction petition. Of course, we will not address issues raised for the first time on appeal. *See State v. Allen*, 593 S.W.3d 145, 154 (Tenn. 2020) ("'Generally, issues raised for the first time on appeal are waived.'" (quoting *State v. Rowland*, 520 S.W.3d 542, 545 (Tenn. 2017))). Our restraint here, though, does not preclude the Petitioner from properly raising these issues in an amended petition for post-conviction relief. *See* Tenn. Code Ann. § 40-30-107(b)(2).

CONCLUSION

We hold that the post-conviction court properly dismissed the Petitioner's free-standing claims for relief. However, we also hold that the Petitioner has stated colorable claims for relief by alleging sufficient facts showing that he was denied the effective assistance of trial counsel and appellate counsel. As such, we respectfully remand the colorable claims for relief to the post-conviction court to appoint counsel for the Petitioner and to conduct further proceedings consistent with this opinion.

_____

TOM GREENHOLTZ, JUDGE

IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE

STATE OF TENNESSEE,	)	
	)	
Plaintiff,	)	SECOND DIVISION
	)	
vs.	)	
	)	NO(s). 305636 - 305690
ARTERRIUS ALLEN, ET AL.	)	
	)	
Defendants.	)	

MEMORANDUM OPINION GRANTING, IN PART, MAYES MOTION NO. 13

This cause came before the Court upon motion by Defendant Dexter Mayes seeking the dismissal of the superseding presentment for failure to allege essential elements of a substantive offense under the Tennessee Racketeering Influenced and Corrupt Organizations Act ("**RICO Act**").[1] Mr. Mayes also seeks dismissal of Count 2 of the superseding presentment, which alleges the existence of a conspiracy to violate multiple provisions of the RICO Act. This Court has already addressed issues related to the substantive RICO offenses, and this opinion addresses only the allegations of a RICO conspiracy.

For the reasons given herein, the Court finds that the General Assembly expressly intended that conspiracy law operate more narrowly in the context of a RICO action. Thus, a RICO conspiracy brought under Tennessee law includes elements that are not typically required in other aspects of criminal conspiracy law, and these limitations also compel results that would not follow under either the federal RICO law or the racketeering laws of other states.

Our Supreme Court has held that "it is easily seen that the object of any conspiracy is the crime which the defendants conspire to commit."[2] In this case, the Grand Jury did not identify the actual substantive racketeering crime(s) that the co-conspirators agreed to commit. Instead, the Grand Jury has alleged the possible existence of at least four separate RICO conspiracies, each with different substantive objects and agreements. In so doing, the Grand Jury has failed to provide notice of "the nature and cause of the accusation" brought against the accused.[3]

Moreover, because the Grand Jury has failed to identify the object(s) of its RICO conspiracy—or the particular racketeering crime or crimes that the co-conspirators agreed to commit—the Grand Jury has also failed to allege an essential element of a Tennessee RICO

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1 *See* Tenn. Code Ann. §§ 39-12-201, *et seq.*

2 *See State v. Smith*, 273 S.W.2d 143, 146 (Tenn. 1954).

3 *See* Tenn. Const. art. I, § 9 (providing "[t]hat in all criminal prosecutions, the accused hath the right to . . . demand the nature and cause of the accusation against him, and to have a copy thereof . . .").

offense, *i.e.*, that there existed "a meeting of the minds between all co-conspirators" as to the object of the criminal conspiracy.[4]

Accordingly, the Court finds that Mayes Motion No. 13 is well taken. Although the Court grants Mr. Mayes's motion, it does so without prejudice to the Grand Jury's reconsideration and bringing of an indictment or presentment that alleges each of the essential elements of the criminal conspiracy offense and that is brought in the form required by the RICO Act.

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[4] *See* Tenn. Code Ann. § 39-12-204(f).

FACTUAL BACKGROUND

This case is part of the *Allen* cases, wherein the Defendant is presently joined with fifty-four co-defendants who are charged with involvement in a RICO enterprise and with participating in a RICO conspiracy, among other crimes, in violation of Tenn. Code Ann. § 39-12-204.[5]

With respect to Mr. Mayes, the Court has previously dismissed Count 1, though its allegations are nevertheless relevant to the analysis of Count 2. In general, Count 1 of the superseding presentment charged Mr. Mayes with violating Tenn. Code Ann. § 39-12-204(c), which criminalizes participating in an enterprise through a pattern of racketeering activity. This Count alleged the existence of a RICO enterprise consisting of a criminal gang to which the Defendants belong, and it described the general purposes of the enterprise. Count 1 also alleged that each accused had committed one or more predicate acts, which the presentment described as supporting, qualifying, or constituting criminal-gang offenses within the meaning of Tenn. Code Ann. § 40-35-121(a)(3)(B).

Count 2 of the superseding presentment purports to charge Mr. Mayes with participation in a RICO conspiracy in violation of Tenn. Code Ann. § 39-12-204(d). In general, Count 2 describes the conspirators as current "members or associates" of a criminal gang and alleges a conspiracy to "violate *any of the provisions* of Tennessee Code Annotated § 39-12-204 subsections (a), (b) *or* (c) in violation of Tennessee Code Annotated § 39-12-204(d)." Count 2 also identifies acts taken in furtherance of the conspiracy, including (1) some acts identified by offense, date, and perpetrator(s); and (2) other acts generally described as being "in the conduct of the affairs of the enterprise."

LAW AND ANALYSIS

The essential question raised by Mr. Mayes's motion is whether the presentment properly charges him with the crime of conspiring to commit a pattern of racketeering activity for a prohibited purpose under the RICO Act. Before this Court may obtain subject-matter jurisdiction in a criminal case, the Hamilton County Grand Jury must return an indictment or presentment alleging that a defendant has committed a criminal offense.[6]

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[5] The Court generally refers to these cases collectively as the "*Allen* cases," with the reference being to the first named accused in the superseding presentment.

[6] *See State v. Penley*, 67 S.W.3d 828, 834 (Tenn. Crim. App. 2001) (recognizing that "the trial court's jurisdiction to act in the matter, apart from the question of bail which we address below, is commenced when the charging instrument issues and is returned to the trial court." (citing *State v. Hammonds*, 30 S.W.3d 294, 303-04 (Tenn. 2000) (a valid indictment confers jurisdiction upon the trial court); *Dykes v. Compton*, 978 S.W.2d 528, 529 (Tenn. 1998); Tenn. R. Crim. P. 12(a) (the lead "pleading" in a criminal case in the trial court is the indictment, presentment, or information)); *see also Flinn v. State*, 354 S.W.3d 332, 334 (Tenn. Crim. App. 2010) ("The Anderson County Criminal Court obtained jurisdiction over the prosecution of the Appellant on February 7, 2006, after he was indicted in Anderson County for the murder of Mr. Beggs.").

Where an indictment fails to charge an essential element of an offense, the indictment will fail to place the defendant on notice, and the charge should be dismissed.[7] These principles also apply in conspiracy cases under Tennessee law.[8] Indeed, "if the indictment fails to include an essential element of the offense, no crime is charged and, therefore, no offense is before the court."[9] Importantly, the application of our criminal law "must be limited in scope to cases defined by the statutory language."[10]

I. GENERAL TENNESSEE LAW OF CONSPIRACY

Generally speaking, Tennessee law imposes criminal liability for persons who conspire with others to commit a criminal offense.[11] In its most simplistic formulation, two people engage in a criminal conspiracy when they agree with each other to commit an offense[12] and, then, at least one of the persons commits an "overt act" that is in "pursuance of the conspiracy."[13]

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[7] *See State v. Sharp*, No. W2018-00156-CCA-R3-CD, 2019 WL 960431, at *7 (Tenn. Crim. App. Feb. 26, 2019) (reversing and dismissing conviction for aggravated child abuse, reasoning that "although the cover sheet for the indictment listed count one as 'aggravated child abuse,' the indictment did not allege that he treated B.S. in such as manner as to inflict injury, which is an element of child abuse. Instead, the indictment alleged that he treated her in such a manner as to affect her health and welfare, which is an element of child neglect.. . . Therefore, we agree with the Appellant and the State that count one of the indictment failed to put him on notice as to which offense he must defend against, aggravated child abuse or aggravated child neglect. Accordingly his conviction of aggravated child abuse in count one must be reversed and vacated and that charge dismissed.").

[8] *See State v. Perkinson*, 867 S.W.2d 1, 5 (Tenn. Crim. App. 1992) (dismissing indictment which failed to allege that either of the defendants committed "an overt act in pursuance of [the] conspiracy," as required by statute).

[9] *See State v. Nixon*, 977 S.W.2d 119, 121 (Tenn. Crim. App. 1997) (citing *State v. Perkinson*, 867 S.W.2d 1, 5-6 (Tenn. Crim. App. 1992) (itself citing *De Jonge v. Oregon*, 299 U.S. 353, 362 (1937) ("Conviction upon a charge not made would be sheer denial of due process."); *State v. Hughes*, 371 S.W.2d 445 (Tenn. 1963) (providing that a lawful accusation is an essential jurisdictional element without which there can be no prosecution)); *State v. Dison*, 03C01-9602-CC-00051, 1997 WL 36844, at *20 (Tenn. Crim. App. Jan. 31, 1997) ("It is an elementary rule of law that an accused cannot be required to defend against, or be convicted of, a crime that is greater than the crime alleged in the charging instrument. Thus, an accused cannot be convicted of a felony if the charging instrument does not contain an essential element of the felony. Under these circumstances, the accused may only be convicted of a misdemeanor, if the charging instrument alleges the essential elements of the misdemeanor offense. An accused cannot be validly prosecuted or convicted of a criminal offense under color of a charging instrument which fails to allege a crime." (footnotes omitted)).

[10] *See State v. Amanns*, 2 S.W.3d 241, 245 (Tenn. Crim. App. 1999).

[11] *See* Tenn. Code Ann. § 39-12-103 (criminalizing conspiracy of two or more persons to commit a criminal offense).

[12] *See* Tenn. Code Ann. § 39-12-103(a) ("The offense of conspiracy is committed if two (2) or more people, each having the culpable mental state required for the offense that is the object of the conspiracy, and each acting for the purpose of promoting or facilitating commission of an offense, agree that one (1) or more of them will engage in conduct that constitutes the offense."); *see also State v. Vasques*, 221 S.W.3d 514, 522 (Tenn. 2007) ("A conspiracy is 'an agreement to accomplish a criminal or unlawful act.'" (citing *State v. Pike*, 978 S.W.2d 904, 915 (Tenn. 1998))).

[13] *See* Tenn. Code Ann. § 39-12-103(d) ("No person may be convicted of conspiracy to commit an offense, unless an overt act in pursuance of the conspiracy is alleged and proved to have been done by the person or by another with whom the person conspired.").

As the Court of Criminal Appeals has recognized, in order to commit the general offense of conspiracy, the State must prove the following essential elements:

(1) each conspirator had the culpable mental state to commit the offense;

(2) each conspirator must act for the purpose of promoting or facilitating the offense; and

(3) at least one of the conspirators must commit an overt act in furtherance of the agreement.[14]

The force of criminal conspiracy law lies in the fact that once a conspiracy is established, then all members of the conspiracy are criminally liable for the acts taken in furtherance of the conspiracy.[15] This is true even if a particular individual did not actually commit the substantive crime that is the object of the conspiracy or otherwise commit an overt act.[16] In other words, "[t]he act of any party to a conspiracy is an act of all."[17]

Nevertheless, irrespective of the label attached to any type of conspiracy, "[t]he essential feature of the crime of conspiracy is the accord—the agreement to accomplish a criminal or unlawful act."[18] This agreement "'need not be formal or expressed, and it may be proven by

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[14] *See State v. Perkinson*, 867 S.W.2d 1, 5 (Tenn. Crim. App. 1992); *see also State v. Vasques*, 221 S.W.3d 514, 521 (Tenn. 2007) (stating that conspiracy "requires the prosecution to prove that 'two (2) or more people, each having the culpable mental state required for the offense which is the object of the conspiracy and each acting for the purpose of promoting or facilitating commission of an offense, agree that one (1) or more of them will engage in conduct which constitutes such offense.'" (quoting Tenn. Code Ann. § 39-12-103(a); *State v. Thornton*, 10 S.W.3d 229, 239 (Tenn. Crim. App. 1999) (same))).

[15] *See State v. Smith*, 273 S.W.2d 143, 146 (Tenn. 1954) ("In *Williamson v. United States*, the Supreme Court of the United States said: 'But in a charge of conspiracy the conspiracy is the gist of the crime, and certainty, to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is requisite in stating the object of the conspiracy.' *See also Solomon v. State*, supra, where this Court definitely approved the statement that 'A conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy.'" (quoting *Williamson v. United States*, 207 U.S. 425, 447 (1908); *Solomon v. State*, 76 S.W.2d 331 (Tenn. 1934))); *see also State v. Lequire*, 634 S.W.2d 608, 612-13 (Tenn. Crim. App. 1981) ("Everyone entering into a conspiracy is a party to every act which has before been done by the others, and to every act by the others afterward, in furtherance of the common design. The act of one is considered the act of all and, therefore, is imputable to all." (citing *Solomon v. State*, 76 S.W.2d 331 (Tenn. 1934))).

[16] *See State v. Lequire*, 634 S.W.2d 608, 613 (Tenn. Crim. App. 1981) ("[W]here one co-conspirator commits the target crime in the absence of the other, the absent one is equally guilty as a principal.").

[17] *See State v. Cole*, 635 S.W.2d 122, 127 (Tenn. Crim. App. 1982) ("In the case of a conspiracy, a member is a party to every act which has been done by the other conspirators. The act of any party to a conspiracy is an act of all." (citations omitted)); *see also State v. Hodgkinson*, 778 S.W.2d 54, 58 (Tenn. Crim. App. 1989) ("Once a party knowingly and voluntarily joins into a conspiracy, even if he comes in after the conspiracy is formed, he becomes a principal. The requirement that the defendants had knowledge of the conspiracy is satisfied by proof he knew of the essential object of the conspiracy." (citations omitted)).

[18] *See State v. Watson*, 227 S.W.3d 622, 642 (Tenn. Crim. App. 2006) (quoting *State v. Pike*, 978 S.W.2d 904, 915 (Tenn. 1998); *State v. Hodgkinson*, 778 S.W.2d 54, 58 (Tenn. Crim. App. 1989)); *see also State v. Clayton*, No. W2018-00386-CCA-R3-CD, 2019 WL 3453288, at *7 (Tenn. Crim. App. July 31, 2019) ("The essential feature of the crime of conspiracy is the 'agreement to accomplish a criminal or unlawful act.'" (quoting *State v. Pike*, 978 S.W.2d 904, 915 (Tenn. 1998))); *State v. Bond*, No. W2018-00107-CCA-R3-CD, 2019 WL 1417871, at *5 (Tenn. Crim. App. Mar. 28, 2019) ("The essential feature of the crime of conspiracy is the

circumstantial evidence.'"[19] Rather, the "State may show the existence of a 'mutual implied understanding' between the parties to the conspiracy in order to prove the existence of a conspiratorial relationship. 'Conspiracy implies concert of design and not participation in every detail of execution.'"[20] However, "[m]ere knowledge, acquiescence, or approval of the act, without cooperation or agreement to cooperate, is not enough to constitute one a party to a conspiracy."[21]

Because the "agreement" is the *sine qua non* of a conspiracy, Tennessee criminal conspiracy law is broad, and it recognizes criminal liability for different types of conspiracies. In its most basic form, Tennessee law would punish an agreement between two people to violate the law. However, as the number of co-conspirators expands, so does the liability that an individual participant may face.

For example, Tennessee law permits criminal liability in what is known as a "wheel" or "hub and spoke" conspiracy.[22] In this type of conspiracy, individual defendants (spokes) have an agreement with a common figure (the hub), but these individuals do not otherwise deal with, or even know of, each other.[23] In other words, an individual need not have an individual "meeting of the minds" with all other co-conspirators for criminal liability for the acts of others under this circumstance. Rather, it is sufficient if each individual only has a "meeting of the minds," or an agreement as to the object of the conspiracy, with the central figure and that the individual knows that the central figure is also conspiring with other people.

Finally, and perhaps most relevant to the instant case, Tennessee's broad conspiracy law also criminalizes a single agreement to commit a number of offenses. Under this circumstance, "the person is guilty of only one (1) conspiracy, so long as the multiple offenses are the object of the same agreement or continuous conspiratorial relationship."[24] So long as there is a single agreement, multiple violations of the law taking place at different times, in different locations, or

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'agreement to accomplish a criminal or unlawful act.'" (quoting *State v. Pike*, 978 S.W.2d 904, 915 (Tenn. 1998))); *State v. Potter*, No. E2015-02261-CCA-R3-CD, 2019 WL 453730, at *33 (Tenn. Crim. App. Feb. 5, 2019) (citing *State v. Pike*, 978 S.W.2d 904, 915 (Tenn. 1998); *State v. Hodgkinson*, 778 S.W.2d 54, 58 (Tenn. Crim. App. 1989)).

[19] *See State v. Vasques*, 221 S.W.3d 514, 522 (Tenn. 2007) (quoting *State v. Pike*, 978 S.W.2d 904, 915 (Tenn. 1998)).

[20] *See State v. Martinez*, 372 S.W.3d 598, 607 (Tenn. Crim. App. 2011) (citing *State v. Shropshire*, 874 S.W.2d 634, 641 (Tenn. Crim. App. 1993)); *State v. Turner*, 675 S.W.2d 199, 203 (Tenn. Crim. App. 1984) ("'Conspiracy implies concert of design and not participation in every detail of execution.'" (quoting *Randolph v. State*, 570 S.W.2d 869, 871 (Tenn. Crim. App. 1978))).

[21] *See State v. Cook*, 749 S.W.2d 42, 44 (Tenn. Crim. App. 1987) (citing *Solomon v. State*, 76 S.W.2d 331, 334 (Tenn. 1941)).

[22] *See* Tenn. Code Ann. § 39-12-103(b).

[23] *See* Tenn. Code Ann. § 39-12-103(b) ("If a person guilty of conspiracy, as defined in subsection (a), knows that another with whom the person conspires to commit an offense has conspired with one (1) or more other people to commit the same offense, the person is guilty of conspiring with the other person or persons, whether or not their identity is known, to commit the offense.").

[24] *See* Tenn. Code Ann. § 39-12-103(c).

under different circumstances may still be punished as part of a single conspiracy.[25] In all cases, it is the object of the conspiracy—or the agreement to violate the law—that is the key to the conspiracy liability.[26]

II. THE RICO ACT AND ALLEGATIONS OF MULTIPLE AGREEMENTS TO VIOLATE THE LAW

One significant limitation found in Tennessee conspiracy law is that an indictment generally cannot allege the existence of multiple conspiracies—meaning multiple *separate* agreements to violate the same law or *separate* agreements to violate different laws—in the same count of the indictment.[27] In part, this prohibition is meant to ensure that a defendant may not be prosecuted a second time for the same conspiracy offense.[28]

This limitation is significant in the context of racketeering. As a practical matter, racketeering activity often consists of many different types of crimes and criminal conduct. When allegations are brought alleging a racketeering conspiracy, there is often difficulty in determining whether the co-conspirators actually reached different agreements to violate the law (multiple conspiracies) or whether they reached a single agreement to violate multiple laws (a single conspiracy).

This difficulty is not unique to Tennessee. In fact, it was this same difficulty that, in part, gave rise to the federal RICO law. To that end, it is helpful to review how the federal courts

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[25] *See State v. Fusco*, 404 S.W.3d 504, 529–30 (Tenn. Crim. App. 2012) ("In his testimony establishing the conspiracy, Swim discussed a single plan, and although the plan involved multiple criminal acts at two locations, it was nonetheless part of a single agreement between the two men. We conclude that the trial court erred when it refused to merge the conspiracy convictions. The case is remanded to the trial court with instructions for the judgments to reflect merger of the Defendant's conspiracy convictions."); *State v. Hardy*, No. M2008-00381-CCA-R3-CD, 2009 WL 2733821, at *10 (Tenn. Crim. App. Aug. 31, 2009) (recognizing that "[w]hen our legislature enacted the statute proscribing conspiracy, it specifically prohibited multiple conspiracy convictions in cases in which multiple offenses result from the same agreement or conspiratorial relationship" and merging convictions for conspiracy to commit especially aggravated robbery and aggravated burglary as being one agreement to violate multiple laws (citing Tenn. Code Ann. § 39-12-103(c); *State v. Farra*, No. E2001-02235-CCA-R3-CD, 2003 WL 22908104, at *11 (Tenn. Crim. App. Dec. 10, 2003))).

[26] *See State v. Smith*, 273 S.W.2d 143, 146 (Tenn. 1954) (recognizing that "it is easily seen that the object of any conspiracy is the crime which the defendants conspire to commit").

[27] *Cf. State v. Keel*, 882 S.W.2d 410, 416 (Tenn. Crim. App. 1994) ("When the evidence adduced at a trial does not correspond to the elements of the offense alleged in the charging instrument, there is a variance. Generally, the evidence establishes the commission of an offense different from the offense alleged in the charging instrument. The variance rule is predicated upon the theory that an accused cannot be charged with one offense and convicted of a completely different offense." (footnotes omitted)).

[28] *See State v. Mayes*, 854 S.W.2d 638, 641 (Tenn. 1993) (permitting immaterial variances in allegations of a conspiracy and proof at trial, but only when the "(1) the indictment otherwise sufficiently informs the defendant of the charge against him such that he will not be misled and can adequately plan a defense and (2) the variance is such that the defendant cannot be prosecuted again for the same offense due to double jeopardy principles."); *State v. March*, 494 S.W.3d 52, 75 (Tenn. Crim. App. 2010) (finding no material variance, and concluding that the "indictment sufficiently informed the defendant of the charges against him so that he could prepare his defense and not be misled or surprised at trial, and the variance did not present a danger that the defendant may be prosecuted a second time for the same offense.").

have grappled with this same question in the context of the federal RICO legislation and then to see how Tennessee purposefully deviated from that path.

A. SCOPE OF FEDERAL RICO LIABILITY

In *United States v. Elliott*, 571 F.2d 880 (5th Cir. 1978), the United States Court of Appeals for the Fifth Circuit became the first appellate court to articulate the significance of RICO's conspiracy provision for complex conspiracy prosecutions. In *Elliott*, six co-defendants were alleged to have participated in more than twenty different criminal acts. Although one defendant was implicated in all of the criminal acts, the proof did not show any single act in which all defendants acted in concert. The Government charged all six co-defendants with a conspiracy to violate subsection (c) of the federal RICO law under 18 U.S.C. § 1962(d).[29]

Under traditional notions of criminal conspiracy law, the prosecution in a single indictment would likely not have been permissible. Indeed, the *Elliott* Court admitted as much that the facts before it did not fit the permissible limits of either the wheel or the chain theory. For example, the activities were too diverse; the defendants did not know of one another or of the other activities; and no common objective united all the defendants.

Through the federal RICO law, however, the *Elliott* Court recognized that "Congress intended to authorize the single prosecution of a multi-faceted, diversified conspiracy by replacing the inadequate 'wheel' and 'chain' rationales with a new statutory concept: the enterprise."[30] That is, the essence of RICO conspiracy is not that the defendants agreed to commit various subsidiary criminal acts, any one of which might involve only a subset of the alleged members of the conspiracy, but rather that all the defendants agreed to the common objective of participating in the enterprise's affairs.

1. Limits of Traditional Conspiracy Law to Address Racketeering

In discussing the importance of the RICO conspiracy in a section entitled "RICO to the Rescue," the Fifth Circuit in *Elliott* acknowledged the limitations of traditional conspiracy law in prosecutions for enterprise crimes, focusing in particular on the requirement that all co-conspirators agree on the object of the conspiracy. In particular, the *Elliott* Court recognized that "[i]n the context of organized crime, this principle [of agreement on the objectives of the conspiracy] inhibited mass prosecutions because a single agreement or 'common objective'

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[29] *See United States. v. Elliott*, 571 F.2d 880, 900 (5th Cir. 1978).

[30] *See United States. v. Elliott*, 571 F.2d 880, 902 (5th Cir. 1978) ("In enacting RICO, Congress found that 'organized crime continues to grow' in part 'because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact'. Thus, one of the express purposes of the Act was 'to seek the eradication of organized crime . . . by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime'. Against this background, we are convinced that, through RICO, Congress intended to authorize the single prosecution of a multi-faceted, diversified conspiracy by replacing the inadequate 'wheel' and 'chain' rationales with a new statutory concept: the enterprise." (quoting Pub. L. 91-452, § 1, 84 Stat. 922 (1970))).

cannot be inferred from the commission of highly diverse crimes by apparently unrelated individuals."[31]

To remedy these limitations of traditional conspiracy law, the Fifth Circuit noted that Congress created a new criminal objective: "to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity and not merely to commit each of the predicate crimes necessary to demonstrate a pattern of racketeering activity." In broadening the nature of the agreement away from the notion of a single agreement or common objective and moving toward that of enterprise participation, the *Elliott* Court recognized that the

> gravamen of the conspiracy charge in this [RICO] case is not that each defendant agreed to commit arson, to steal goods from interstate commerce, to obstruct justice, and to sell narcotics; rather, it is that each agreed to participate, directly and indirectly, in the affairs of the enterprise by committing two or more predicate crimes. Under the statute, it is irrelevant that each defendant participated in the enterprise's affairs through different, even unrelated crimes, so long as we may reasonably infer that each crime was intended to further the enterprise's affairs. To find a single conspiracy, we still must look for agreement on an overall objective. What Congress did was to define that objective through the substantive provisions of the Act.[32]

In so recognizing, the *Elliott* Court abolished the principle that multiple conspiracies could not be charged in a single conspiracy count, and it specifically recognized that the effect of RICO "is to free the government from the strictures of the multiple conspiracy doctrine and to allow the joint trial of many persons accused of diversified crimes."[33]

2. Criticisms of *Elliott*

Although some other federal circuits adopted *Elliott*'s view of how RICO purposefully changed traditional views of conspiracy liability,[34] *Elliott*'s holding was subject to severe

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31 *See United States v. Elliott*, 571 F.2d 880, 902 (5th Cir. 1978).

32 *See United States v. Elliott*, 571 F.2d 880, 902-03 (5th Cir. 1978) (footnote omitted).

33 *See United States v. Elliott*, 571 F.2d 880, 900 (5th Cir. 1978).

34 *See, e.g.*, *United States v. Sinito*, 723 F.2d 1250, 1261 (6th Cir. 1983) ("It is unnecessary that the underlying predicate acts be interrelated as long as the acts are connected to the affairs of the enterprise. Moreover, the defendant's participation in the enterprise may take place through the offense of various crimes unrelated to one another as long as these crimes are in some way intended to further the enterprise's affairs." (citing *United States v. Elliott*, 571 F.2d at 880, 899 n. 23 (5th Cir. 1978))); *United States v. Lee Stoller Enterprises, Inc.*, 652 F.2d 1313, 1319 (7th Cir. 1981) ("Defendants here, as in most RICO cases, were alleged to have committed different predicate crimes. But in a trial on RICO charges, a particular defendant may be the victim of spillover testimony regarding other, more violent or heinous, predicate crimes. This can happen because the specific purpose of the substantive provisions of RICO is to tie together diverse parties and crimes. Under RICO, it is irrelevant that each defendant participated in the enterprise's affairs through different and unrelated crimes." (citing *United States v. Elliott*, 571 F.2d 880, 902 (5th Cir. 1978))); *United States v. Barton*, 647 F.2d 224, 237 (2d Cir. 1981) ("[I]n some instances a prosecution under [18 U.S.C. §] 371 for conspiracy to violate [18 U.S.C. §] 1962 might be improper because the goals of the conspiracy were too farflung" and citing *United States v. Elliott*, 571 F.2d 880 (5th Cir. 1978) as "upholding use of § 1962(d) to reach 'a myriopod criminal network, loosely connected but connected nonetheless,'

criticism by other courts,[35] by academics,[36] and by the American Bar Association in the early 1980s.[37] Some in academia noted that "[b]y holding that section 1962(d) is not subject to general federal conspiracy law, *Elliott* created an offense whose characteristics are unknown because they cannot be determined by reference to preexisting law."[38] Others noted that "[t]he most frequently expressed criticism [of *Elliott*'s formulation of enterprise conspiracy] is that it undermines the fundamental concept of conspiracy intent and agreement."[39] Still others took aim at *Elliott*'s holding that effectively permitted multiple different conspiracies to be jointly tried in a single trial:

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that involved arson, theft, fencing goods stolen from interstate commerce, murder, and narcotics activity, while observing that such a prosecution probably would not have been possible under § 371 because it linked 'highly diverse crimes by apparently unrelated individuals[.]'")).

[35] In part, the Fifth Circuit itself later pulled back from broad interpretations of *Elliott* urged by the Government in *United States v. Sutherland*, 656 F.2d 1181 (5th Cir. 1981). In *Sutherland*, the Fifth Circuit recognized that

> *Elliott* does not stand for the proposition that multiple conspiracies may be tried on a single "enterprise conspiracy" count under RICO merely because the various conspiracies involve the same enterprise. What *Elliott* does state is two-fold: (1) a pattern of agreements that absent RICO would constitute multiple conspiracies may be joined under a single RICO conspiracy count if the defendants have agreed to commit a substantive RICO offense; and (2) such an agreement to violate RICO may, as in the case of a traditional "chain" or "wheel" conspiracy, be established on circumstantial evidence, *i.e.*, evidence that the nature of the conspiracy is such that each defendant must necessarily have known that others were also conspiring to violate RICO.

See id. at 1194.

[36] *See, e.g.*, James F. Holderman, *Reconciling Rico's Conspiracy and "Group" Enterprise Concepts with Traditional Conspiracy Doctrine*, 52 U. Cin. L. Rev. 385, 403 (1983) ("RICO is a prosecutorial tool of immense proportions. The *Elliott* opinion stretched RICO, at least in the 'group enterprise' and conspiracy concepts, beyond its limits."); Craig M. Bradley, *Racketeering and the Federalization of Crime*, 22 Am. Crim. L. Rev. 213, 258 (1984) ("[T]he Fifth Circuit [in *United States v. Elliott*, 571 F.2d 880, 898 (5th Cir. 1978)], in adopting a very expansive view of what constituted a conspiracy under RICO, stated: 'In this case we deal with the question of whether and, if so, how a free society can protect itself when groups of people, through division of labor, specialization, diversification, complexity of organization and the accumulation of capital turn crime into an ongoing business.' The court's answer to this question was to create a crime of 'enterprise conspiracy' which was far broader than anything envisioned by Congress in a case which involved, not the Mafia, but a disorganized group of Georgia truck hijackers."); Gerard E. Lynch, *Rico: The Crime of Being A Criminal, Parts III & IV*, 87 Colum. L. Rev. 920, 951–52 (1987) ("The *Elliott* court was no doubt both sincere and accurate in stating that it would not have permitted the defendants there to have been convicted of a simple conspiracy. And whatever courts might have accepted if tested, few precedents can be found in 'traditional' conspiracy cases for agreements of the breadth and complexity of RICO illicit association cases involving diversified criminal syndicates. RICO thus may be better seen as the occasion for a change in judicial and prosecutorial policy than as a provider of new theoretical concepts." (footnote omitted)).

[37] *See* American Bar Association Section of Criminal Justice, Report to the House of Delegates 10-12 (1982) (cited in Nancy L. Ickler, *Conspiracy to Violate Rico: Expanding Traditional Conspiracy Law*, 58 Notre Dame L. Rev. 587, 615 (1983).

[38] *See* Barry Tarlow, *Rico Revisited*, 17 Ga. L. Rev. 291, 395 (1983).

[39] *See* Barry Tarlow, *Rico Revisited*, 17 Ga. L. Rev. 291, 384, 391 (1983) ("Commentators have widely criticized *Elliott*'s implication that a section 1962(d) count could include all acts occurring in the conduct of the same enterprise even if there were no other relationship. . . . The original *Elliott* doctrine has been sharply criticized by commentators. The most frequently expressed criticism is that it undermines the fundamental concept of conspiracy intent and agreement. Under *Elliott*, a defendant can intend to join a section 1962(d) conspiracy, even though he does not know the purposes, activities, and scope of the conspiracy." (citations omitted)).

> The *Elliott* court, however, seemed to overlook the fact that the multiple conspiracy doctrine is a procedural safeguard designed to protect each defendant's right to a fair trial. It is difficult to believe that Congress could have substantively overcome the procedural prejudice involved in a joint trial of loosely connected multiple conspiracies by attaching the artificial label of "enterprise" to the whole affair.[40]

For its part, the ABA recommended repealing the entire conspiracy provisions of 18 U.S.C. § 1962(d), in part, to avoid *Elliott*'s broad holding.[41]

B. TENNESSEE'S STRUGGLES TO ADOPT A RICO ACT

It was against this backdrop that the Tennessee General Assembly adopted Tennessee's RICO Act in 1986.[42] By 1986, the General Assembly had been attempting to pass RICO legislation for seven or eight years.[43] Broad RICO legislation had been introduced in both chambers every year, but it was repeatedly defeated in the House Judiciary Committee which did not favor broad RICO legislation.[44] Bills were filed in the Senate to enact a RICO law similar to that passed in Florida,[45] but, while these bills would be approved by the full Senate, the bills routinely failed to pass in the House.

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[40] *See* James Clann Minnis, *Clarifying Rico's Conspiracy Provision: Personal Commitment Not Required*, 62 Tul. L. Rev. 1399, 1416 (1988) ("The *Elliott* court, however, seemed to overlook the fact that the multiple conspiracy doctrine is a procedural safeguard designed to protect each defendant's right to a fair trial. It is difficult to believe that Congress could have substantively overcome the procedural prejudice involved in a joint trial of loosely connected multiple conspiracies by attaching the artificial label of 'enterprise' to the whole affair. This procedural problem should be given a procedural remedy. If the court determines that there are multiple conspiracies within the RICO enterprise, and that joint trial might affect 'the substantial rights' of any defendant, it should try the conspiracies separately." (footnote omitted)).

[41] *See* American Bar Association Section of Criminal Justice, Report to the House of Delegates at 12 (1982).

[42] *See* 1986 Tenn. Pub. Acts, ch. 635 (effective July 1, 1986).

[43] *See* Senate Session March 5, 1986 (Senator Person) (noting that, for the past six years, he had being trying "year after year to move" RICO legislation); *see also* House Calendar and Rules Committee March 6, 1986 (Representative Naifeh) (noting that the RICO bill has been in several forms over the past seven or eight years, and that it has failed previously "due to philosophical reasons or due to the scope of the legislation"); House General Welfare Committee February 25, 1986 (Representative Montgomery) (noting that the House Judiciary Committee "had the RICO bill for four years").

[44] *See* House Session March 12, 1986 (Speaker McWherter's comments, noting that the House Judiciary Committee, "in honest conviction" had withheld, and would not allow, a broad bill to come out of the committee); Senate Session March 5, 1986 (Senator Davis) (noting that the Senate's broad RICO legislation passed in the previous session "didn't get out of" the House Judiciary Committee and that the present, limited legislation was possible in this session only because the House assigned the bill to the General Welfare Committee instead of to the Judiciary Committee).

[45] *See* Senate Session March 5, 1986 (Senator Person) (noting that he had previously introduced a RICO bill that was patterned after Florida's law, which he characterized as being "one of the strongest RICO acts in the United States"); *See id.* (Senator Cohen noting that Florida "has the best" RICO legislation).

In 1986, both chambers were finally able to secure passage of a RICO law, though the law was significantly limited, dealing only with major drug offenses and containing other substantive limitations.[46] One of the co-sponsors, Representative Tommy Burnette, who was also the Chair of the House Judiciary Committee, noted that he historically opposed RICO legislation because "it would hurt smaller people" rather than the major dealers. He observed that when providing for "a broad spectrum of liability, you could hurt a lot of innocent people," but that he was supportive of this bill because this was "not the broad-spectrum type of legislation that has been historically passed."[47]

In fact, reflecting the years-long tug-of-war over this issue in the legislature, the limited nature of the 1986 RICO legislation was a significant source of frustration to several legislators. During the floor debates in the House, for example, Representative Chris Turner noted that he had sponsored broad RICO legislation previously, and he voiced his view that "we need something much stronger." He regretted that, with the passage of the limited bill, "I don't think we have done anything."[48] Representative Moore also noted that the bill simply was not strong enough to handle the drug issues in particular.[49]

Against this backdrop, then-Speaker Ned McWherter, who was also a co-sponsor of the limited House legislation, explained why the limited approach was offered: if the legislature wanted a RICO law "on the books" this was the only bill that could pass. He noted that he had "voted for a RICO bill in the early 1970s that covered everything," and that he was "for it then and for it since." He noted that he still personally favored a broad RICO bill, but lamented that "we can't pass broad coverage."[50]

Many of these very concerns as to the limited nature of the RICO legislation were echoed in the Senate as well. Several Senators voiced concerns that the limited bill would not effectively deal with organized crime.[51] Others, however, noted that it was "time to face reality" in that a "[b]roader bill is not coming out of the House."[52] One of the Senate co-sponsors, Senator Jim Kyle, noted that the limited bill was the House's way of "easing into RICO" and that the limited bill would allow the House to ensure that "the district attorneys are not abusing" the authority granted by the law.[53] Even despite these limitations, however, other Senators

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46 One of the significant limitations was the adoption of what became Tenn. Code Ann. § 39-12-204(e), which the Court has addressed in other orders. Representative Naifeh noted that this provision was to prevent multiple convictions for a crime and a RICO offense, and he noted that this provision was intended to make the RICO law consistent with the limitations in the Habitual Drug Offender law. *See* House Session March 12, 1986 (Representative Naifeh speaking on Amendment No. 2).

47 *See* House General Welfare Committee February 25, 1986 (Representative Burnette).

48 *See* House Session March 12, 1986 (Representative Turner's comments following passage of the bill).

49 *See* House Session March 12, 1986 (Representative Moore's comments both before and following passage of the bill).

50 *See* House Session March 12, 1986 (Speaker McWherter's comments asking members to vote for the limited RICO bill).

51 *See* Senate Session March 5, 1986 (Senators Cohen, Dunavant, Kyle).

52 *See* Senate Session March 5, 1986 (Senator Lashlee).

53 *See* Senate Session March 5, 1986 (Senator Kyle's comments in response to Senator Dunavant).

expressed concerns with RICO legislation generally, suggesting that the bill tended to presume guilt unless proven innocence.[54]

C. LIMITATIONS IN TENNESSEE'S RICO ACT

With this intention to reject a broad RICO Act, it is unsurprising that our Tennessee anti-racketeering statute contains significant limitations. As this Court has noted in previous orders, these significant limitations were manifested in both substantive and procedural forms.

Like its federal counterpart, the Tennessee RICO Act expressly prohibits conspiracies to engage in a pattern of racketeering activity for prohibited purposes, such as acquiring an interest in an "enterprise."[55] However, the RICO Act places significant limitations on the nature of liability for a RICO conspiracy under Tennessee law:

- The RICO Act specifically requires that, if the indictment charges multiple conspiracies to violate the RICO Act, then it must allege these different conspiracies in separate counts of the indictment.[56]

- The RICO Act also requires that each alleged violation contains the factual basis supporting the charge in the count of the indictment alleging the violation.[57]

- Furthermore, the RICO Act requires that the state "prove that there was a meeting of the minds *between all co-conspirators* to violate" a specific substantive provision of the RICO Act.[58]

The last of these limitations in the anti-racketeering context is unique to Tennessee law. The federal RICO law does not contain any similar limitation that a meeting of the minds exists "between all co-conspirators,"[59] and, insofar as the Court is able to determine, no other state adopting an anti-racketeering statute limits the application of its racketeering conspiracy law in this way. For example, Florida's RICO law, which was frequently cited as a model by the

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[54] *See* Senate Session March 5, 1986 (Senators Lewis).

[55] *See* Tenn. Code Ann. § 39-12-203(d).

[56] *See* Tenn. Code Ann. § 39-12-204(e) ("Multiple and alternative violations of this section [-204] shall be alleged in multiple separate counts . . . .").

[57] *See* Tenn. Code Ann. § 39-12-204(e) ("Multiple and alternative violations of this section shall be alleged in multiple separate counts, with the factual basis for the alleged predicate acts set forth in each count.").

[58] *See* Tenn. Code Ann. § 39-12-204(f) ("In order to convict a person or persons under this part, based upon a conspiracy to violate any subsection of this section, the state must prove that there was a *meeting of the minds between all co-conspirators* to violate this part and that an overt act in furtherance of the intention was committed." (emphasis added)).

[59] *See* 18 U.S.C. § 1962(d) ("It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.").

General Assembly in the years leading up to the 1986 passage of our RICO Act,[60] has never included any such limitation.

Moreover, the limitation that there be a meeting of the minds "between all co-conspirators" is also unique within Tennessee conspiracy law itself. No other statute permitting conspiracy liability in any context contains this express limitation, and our courts have not imposed such a limitation on conspiracies to violate Tennessee law. Nevertheless, as is discussed more fully below, these limitations greatly impact the allegations of the superseding presentment.

D. Effect of Prior RICO Limitations on the 2012 RICO Amendments

Following the passage of the RICO Act in 1986, these limitations may not have had a significant impact. As part of its original enactment in 1986, the General Assembly limited application of the RICO Act only to significant drug offenses, and the newly passed RICO Act was not originally intended to apply to organized crime more generally. Indeed, the original 1986 House sponsors repeatedly announced that any attempt to amend the bill to include broader application to other aspects of organized crime, including gambling, prostitution, or pornography, would result in the bill being withdrawn from consideration.[61]

In the limited context of drug trafficking, it may not be a difficult proposition to allege facts showing the presence of an agreement existing "between all co-conspirators." However, when the General Assembly amended the RICO Act in 2012 to add criminal-gang offenses to the types of prohibited racketeering activity, it significantly broadened the scope of criminal activity to which a substantive RICO liability could apply. And, as the plain language of these 2012 amendments show, multiple different types of crimes may be committed as part of the pattern of racketeering activity.

In broadening the application of the RICO Act, though, the legislature did not account for how the original 1986 limitations would affect its 2012 legislation. This resulted in a mismatch between the later intention to broaden criminal RICO exposure and the earlier mechanisms meant to restrict that very exposure.

To their credit, perhaps, the sponsors of the 2012 RICO legislation recognized this mismatch almost immediately, and in 2013, the sponsors again came forward with legislation to specifically eliminate three of the more significant limitations from 1986, including the

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[60] *See* Senate Session March 5, 1986 (Senator Person) (noting that he had previously introduced a RICO bill that was patterned after Florida's law, which he characterized as being "one of the strongest RICO acts in the United States"); *see also id.* (Senator Cohen noting that Florida "has the best" RICO legislation).

[61] *See* House General Welfare Committee February 25, 1986 (Representative Naifeh noting that he had given this commitment to others in order to gain support for a limited RICO bill addressing only drug trafficking); *see also* House Session March 12, 1986 (during debates on Amendment No. 9 proposed by Representative Moore to add obscenity and pornography to the scope of RICO predicate acts, Representative Naifeh reiterating that, if the amendment passed, he would withdraw the RICO bill from consideration).

limitations expressed in Tenn. Code Ann. § 39-12-204(e) and -204(f).[62] However, this 2013 attempt to remove these limitations failed, and although this defeat was likely due to the presence of an unrelated fiscal note attached to other unrelated aspects of the legislation,[63] the General Assembly has nevertheless left these limitations in place ever since.

Of course, it goes without saying that this Court, which is charged with applying the law as it exists, is not free to "alter or amend statutes or substitute [its] policy judgment for that of the Legislature."[64] As our Supreme Court has recognized,

> We note that even were we to agree that the State's position represents the more appropriate view regarding the scope and extent of criminal attempt liability, this Court "does not typically function as a forum for resolution of public policy issues when interpreting statutes." Consequently, we are bound by the law as it is, not as we would have it be, and to that end, we are not free to adopt constructions that are plainly contrary to the language of the statute.[65]

As such, whatever limitations may exist in the RICO Act, particularly with respect to conspiracy liability, the Court must take these limitations at face value, saying *sic lex scripta* and obeying the law's command.[66]

III. ALLEGATIONS OF THE SUPERSEDING PRESENTMENT

With these basic principles in mind, the Court now looks to the allegations of the superseding presentment. The RICO Act itself does not create a single overall "racketeering crime."[67] Rather, the RICO Act substantively creates three separate and independent crimes, each of which involves a pattern of racketeering activity that is used to achieve different goals and objects. Importantly, with respect to each of the crimes, the purpose of the racketeering

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[62] *See* 108th General Assembly, SB291 (HB1025) & SA0355 (proposing amendment to Tenn. Code Ann. § 39-12-204 to repeal subsections (e) and (f) and to redefine "pattern of racketeering activity" to include predicate acts occurring within five years of each other).

[63] As the Court has noted in an earlier opinion, it seems likely that the rejection of HB1025 in the House during the 2013 session was due to a late-filed fiscal note. The fiscal note was attached to the House bill on April 15, 2013, and it projected an increase in state expenditures of $743,900 for new incarceration as a result of the expanded predicate acts consisting of the new sexual offenses. *That same day*, April 15, 2013, the bill was tabled in the House of Representatives, and the next day, the Senate recalled SB291 which had previously passed that body.

[64] *See Coleman v. Olson*, 551 S.W.3d 686, 694 (Tenn. 2018) (citing *Armbrister v. Armbrister*, 414 S.W.3d 685, 704 (Tenn. 2013)).

[65] *See State v. Mateyko*, 53 S.W.3d 666, 677 (Tenn. 2001) (citations omitted).

[66] *See Kradel v. Piper Indus., Inc.*, 60 S.W.3d 744, 749 (Tenn. 2001) ("When the language contained within the four corners of a statute is plain, clear, and unambiguous, the duty of the courts is simple and obvious, to say *sic lex scripta*, and obey it." (quoting *ATS Southeast, Inc. v. Carrier Corp.*, 18 S.W.3d 626, 630 (Tenn. 2000) (citation and internal quotation marks omitted))).

[67] *Cf. Beck v. Prupis*, 529 U.S. 494, 512 (2000) (Stevens, J, dissenting) ("Racketeering activities, however, are not 'independently wrongful under RICO.' They are, of course, independently wrongful under other provisions of state and federal criminal law, but RICO does not make racketeering activity itself wrongful under the Act. The only acts that are 'independently wrongful under RICO' are violations of the provisions of § 1962.").

activity differs, as does the nature and function of the enterprise itself. As under federal law, the Tennessee RICO Act provides that:

1. no person may receive money from a pattern of racketeering activity and then invest those monies in any property or in an enterprise[68];

2. no person may use a pattern of racketeering activity to then acquire or maintain an interest in, or control, of an enterprise[69]; and

3. no person may participate in an enterprise through a pattern of racketeering activity.[70]

And, for present purposes, the RICO Act also prohibits conspiracies or agreements to violate one or more of these substantive racketeering crimes.[71]

A. WHAT IS THE AGREEMENT OR THE OBJECT OF THE GRAND JURY'S RICO CONSPIRACY?

Because the essence of any conspiracy is its object, or the nature of the agreement to violate the law,[72] and because the object of a RICO conspiracy is to violate a substantive RICO provision,[73] any analysis of Count 2 must first consider what the Grand Jury alleges is the object

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[68] *See* Tenn. Code Ann. § 39-12-204(a) ("It is unlawful for any person who has, with criminal intent, received any proceeds derived, directly or indirectly, from a pattern of racketeering activity or through the collection of an unlawful debt to use or invest, whether directly or indirectly, any part of the proceeds or the proceeds derived from the use or investment thereof, in the acquisition of any title to or any right, interest, or equity in, real or personal property or in the establishment or operation of any enterprise.").

[69] *See* Tenn. Code Ann. § 39-12-204(b) ("It is unlawful for any person, through a pattern of racketeering activity or through the collection of an unlawful debt, to acquire or maintain, directly or indirectly, an interest in or control of any enterprise of real or personal property.").

[70] *See* Tenn. Code Ann. § 39-12-204(c) ("It is unlawful for any person employed by, or associated with, any enterprise to knowingly conduct or participate, directly or indirectly, in the enterprise through a pattern of racketeering activity or the collection of any unlawful debt.").

[71] *See* Tenn. Code Ann. § 39-12-204(d) ("It is unlawful for any person to conspire or endeavor to violate subsection (a), (b) or (c).").

[72] *See State v. Smith*, 273 S.W.2d 143, 146 (Tenn. 1954) (recognizing that "it is easily seen that the object of any conspiracy is the crime which the defendants conspire to commit").

[73] *See United States v. Leoner-Aguirre*, 939 F.3d 310, 316 (1st Cir. 2019) ("The government's burden in proving a violation of the conspiracy offense, section 1962(d), is to show that the defendant 'knew about and agreed to facilitate' a substantive RICO violation."); *United States v. Jones*, 873 F.3d 482, 489 (5th Cir. 2017) ("To prove a RICO conspiracy, the government must establish (1) that two or more people agreed to commit a substantive RICO offense and (2) that the defendant knew of and agreed to the overall objective of the RICO offense." (citations omitted)); *Zavala v. Wal Mart Stores Inc.*, 691 F.3d 527, 539 (3d Cir. 2012) ("RICO conspiracy is not a mere conspiracy to commit the underlying predicate acts. It is a conspiracy *to violate RICO*—that is, to conduct or participate in the activities of a corrupt enterprise." (emphasis in original and (citations omitted)); *United States v. Mouzone*, 687 F.3d 207, 218 (4th Cir. 2012) ("We caution that the RICO conspiracy statute does not 'criminalize mere association with an enterprise.' Rather, as with traditional conspiracy, criminal liability will attach only to the knowing 'agreement to participate in an endeavor which, if completed would constitute a violation of the substantive statute.'" (citations omitted)); *United States v. Castro*, 89 F.3d 1443, 1450 (11th Cir. 1996) ("In order to

of its RICO conspiracy. In this case, the Grand Jury alleged the object of its conspiracy in the introductory paragraph of Count 2. In that paragraph, the Grand Jury alleged that all of the Defendants, including Mr. Mayes, "unlawfully conspired or endeavored to violate *any of the provisions* of Tennessee Code Annotated § 39-12-204 subsections (a), (b) *or* (c) in violation of Tennessee Code Annotated § 39-12-204(d) . . . ."[74]

The Grand Jury's allegations as to the object of its conspiracy are curious. Although it could have done so, the Grand Jury ***did not*** allege that Mr. Mayes agreed to violate "each" of the substantive RICO prohibitions, subsection (a), (b), *and* (c). Instead, the Grand Jury identified the objects of its alleged conspiracy in the disjunctive, or in the alternative. Although it may have been trying to track the statutory language of the RICO Act, the Grand Jury nevertheless has alleged that Mr. Mayes may have conspired to violate "any" of three separate criminal statutes.

With the allegations phrased in the disjunctive, it is not clear what the objects of the Grand Jury's RICO conspiracy are actually alleged to be. From the Grand Jury's own allegations, it could be that several different conspiracies are alleged to exist. Indeed, from a fair reading of the superseding presentment, at least four possibilities exist:

- **Possibility of a Subsection -204(a) Conspiracy.** It could be that Mr. Mayes agreed to commit the substantive crime of obtaining money from a pattern of racketeering activity and then using that money in the operation of an enterprise. The possibility of such an agreement, which could constitute a conspiracy to violate section -204(a), is supported by the allegations in paragraph 3(k) of Count 2's "Means and Methods" section.[75]

- **Possibility of a Subsection -204(b) Conspiracy:** It could also be that Mr. Mayes agreed to commit the *separate* substantive crime of maintaining an interest in an enterprise through a pattern of racketeering activity. The possibility of such an agreement, which could constitute a conspiracy to violate section -204(b), is supported by the allegations in paragraph 3(b) of Count 2's "Means and Methods" section.[76]

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prove a RICO conspiracy, the government must show an agreement to violate a substantive RICO provision."); *United States v. Sinito*, 723 F.2d 1250, 1260 (6th Cir. 1983) ("In order to prove a RICO conspiracy under 18 U.S.C. § 1962(d), the government must establish, in addition to the aforementioned elements, the existence of an illicit agreement to violate the substantive RICO provision.").

74 *See* Superseding Presentment, Count 2, introductory paragraph (emphasis added).

75 In paragraph 3(k) of the superseding presentment, the Grand Jury alleges that members of the Athens Park Bloods used proceeds of illegal activity, which may be proceeds from a pattern of racketeering activity, in the operation of the criminal-gang enterprise. *See* Superseding Presentment, § 2, ¶ 3(k); Tenn. Code Ann. § 39-12-204(a) (prohibiting any person who has received any proceeds derived from a pattern of racketeering activity to use any part of those proceeds "in the establishment or operation of any enterprise.").

76 In paragraph 3(b) of the superseding presentment, the Grand Jury alleges that defendants "maintained" their interest in the criminal-gang enterprise through a pattern of racketeering activity. *See* Superseding Presentment, § 2, ¶ 3(b); Tenn. Code Ann. § 39-12-204(a) (prohibiting any person, through a pattern of racketeering activity, to maintain an interest in, or control of, any enterprise).

- **Possibility of a Subsection -204(c) Conspiracy:** It could also be that Mr. Mayes agreed to commit the *separate* substantive crime of participating in an enterprise through a pattern of racketeering activity. The possibility of such an agreement, which could constitute a conspiracy to violate section -204(c), is supported by many of the allegations in Count 2's "Means and Methods" section.[77]

- **Possibility of Multiple RICO Agreements:** It also could be that Mr. Mayes simultaneously agreed to racketeer in multiple different ways, such as, for example, that he agreed to commit the crime of purchasing real property with racketeering money and that he also agreed to commit the separate substantive crime of obtaining an interest in an enterprise through a pattern of racketeering activity. These actions could constitute a conspiracy to violate both section -204(a) and section -204(b), as an example.

Other combinations and possibilities exist as well, and in each of these possibilities, there exists the possibility of a different substantive agreement. After all, the nature of the enterprise works differently in the various substantive RICO crimes, as does the purpose of the predicate acts and the pattern of racketeering activity. It is not sufficient simply to allege that the co-conspirators agreed to "violate RICO," as the RICO Act creates three very different substantive crimes.[78]

Because Mr. Mayes is entitled to know "the nature and cause of the accusation" brought against him, one must ask: which of the different racketeering crimes did Mr. Mayes conspire to commit? One of them? More than one of them? All of them?

One simply cannot know on the face of the Grand Jury's own presentment. And, this is a problem.

B. Is there Duplicity in the Indictment?

The fact that the superseding presentment possibly alleges more than one object, or more than one agreement, in its allegations of a RICO conspiracy gives rise to serious issues of fair notice and due process. Tennessee law has long prohibited duplicitous indictments,[79] which are

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[77] Many of the paragraphs in Count 2's "Means and Methods" section suggest the possibility of a conspiracy to violate section -204(c). For example, paragraph 3(m) alleges that defendants participated in the affairs of the criminal-gang enterprise through a pattern of racketeering activity consisting of selling controlled substances. *See* Superseding Presentment, § 2, ¶ 3(m); Tenn. Code Ann. § 39-12-204(c) (prohibiting any person associated with an enterprise to knowingly participate in the enterprise through a pattern of racketeering activity).

[78] Of course, it is possible to have a single RICO conspiracy where the object is to violate all of the substantive RICO provisions. This is why the superseding presentment would have identified an object if it alleged that the co-conspirators agreed to violate "*each* of the provisions of Tenn. Code Ann. § 39-12-204(a), (b), *and* (c)." However, this is not what the Grand Jury alleged. In alleging that the object was any/or of these possibilities, the accused is left to guess what the Grand Jury intended or as to the crime that the Grand Jury found to have been committed.

[79] *See State v. Jones*, No. E2017-00535-SCR-11-CD, 2019 WL 5956361, at *6 (Tenn. Nov. 13, 2019) (citing *State v. Lindsey*, 208 S.W.3d 432, 438 (Tenn. Crim. App. 2006) ("Generally, it is impermissible to charge two distinct offenses in a single count of an indictment."); Tenn. R. Crim. P. 8 (providing that, whether

indictments that "charge two or more distinct and separate offenses in a single-count indictment."[80] The reason for this long-standing prohibition is clear: to ensure that a defendant is provided adequate notice of the allegations; to prevent a violation of double jeopardy principles; and to ensure a unanimous jury verdict."[81]

The requirement of a unanimous jury verdict is fundamental to our protections of liberty in our Republic, and "there should be no question that the unanimity of twelve jurors is required in criminal cases under our state constitution."[82] As the United States Court of Appeals for the Sixth Circuit has recognized,

> The vice of duplicity is that a jury may find a defendant guilty on the count without having reached a unanimous verdict on the commission of any particular offense. By collapsing separate offenses into a single count, duplicitous indictments prevent the jury from convicting on one offense and acquitting on another. Therefore, duplicitous indictments implicate the protections of the Sixth Amendment guarantee of jury unanimity.[83]

Thus, where a single statute contains more than one offense, a citation generally to the statute without reference to the elements of the offense will not suffice to provide notice to the accused of the nature of the charges to be brought against him.[84] Nor may a grand jury include within a single count of an indictment all methods of committing an alleged offense.[85]

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offenses are joined in a single indictment by requirement or by permission, each offense is to be stated in a separate count)).

[80] *See State v. Johnson*, No. M2018-01216-CCA-R3-CD, 2019 WL 3074071, at *7 (Tenn. Crim. App. July 15, 2019) (quoting *State v. Burnette*, No. E2005-00002-CCA-R3-CD, 2006 WL 721306, at *2 (Tenn. Crim. App. Mar. 22, 2006)).

[81] *See State v. Lee*, No. E2017-00368-CCA-R3-CD, 2018 WL 934534, at *4 (Tenn. Crim. App. Aug. 16, 2018)) (citing *State v. Burnette*, No. E2005-00002-CCA-R3-CD, 2006 WL 721306, at *3 (Tenn. Crim. App. Mar. 26, 2006), *perm. app. denied* Sept. 5, 2006); *State v. Weilacker*, No. M2016-00546-CCA-R3-CD, 2018 WL 5099779, at *13 (Tenn. Crim. App. Oct. 19, 2018), *opinion after remand from Sup. Ct.* (same); *State v. Johnson*, No. M2018-01216-CCA-R3-CD, 2019 WL 3074071, at *7 (Tenn. Crim. App. July 15, 2019) ("[T]he purpose behind the prohibition of a duplicitous indictment is the avoidance of the following dangers: (1) failure to give the defendant adequate notice of the charges against him; (2) exposure of the defendant to the possibility of double jeopardy; and (3) conviction of the defendant by less than a unanimous jury verdict." (citations omitted)).

[82] *See State v. Brown*, 823 S.W.2d 576, 583 (Tenn. Crim. App. 1991).

[83] *See United States v. Campbell*, 279 F.3d 392, 398 (6th Cir. 2002) (citations and internal quotation marks omitted).

[84] *See State v. Sharp*, No. W2018-00156-CCA-R3-CD, 2019 WL 960431, at *7 (Tenn. Crim. App. Feb. 26, 2019) ("The reference to Tennessee Code Annotated section 39-15-402 in count one was of no assistance because that statute defines both aggravated child abuse and aggravated child neglect. Therefore, we agree with the Appellant and the State that count one of the indictment failed to put him on notice as to which offense he must defend against, aggravated child abuse or aggravated child neglect. Accordingly his conviction of aggravated child abuse in count one must be reversed and vacated and that charge dismissed.").

[85] *See State v. Weilacker*, No. M2016-00546-CCA-R3-CD, 2018 WL 5099779, at *13 (Tenn. Crim. App. Oct. 19, 2018), *opinion after remand from Sup. Ct.* ("The cause of all the problems related to this issue is the State's drafting of Count 2 as an impermissible duplicitous count in the indictment. Count 2 alleges that Defendant committed false imprisonment, by unlawfully and knowingly removing and confining the victim, and (pick your choice) accomplished it by use of a deadly weapon (especially aggravated kidnapping); in order to facilitate

These fundamental principles also apply in a prosecution under the RICO Act, as the RICO Act itself expressly prohibits duplicitous indictments. Rather, if multiple racketeering violations are alleged, the statute specifically commands that the grand jury allege each violation in a separate count and then to set forth the factual basis for that violation in that same count.[86] As such, the Grand Jury here was obliged, both as a matter of common law and by express statutory requirement, to give the Defendant fair notice of the allegations against him by alleging the presence of only one RICO conspiracy in Count 2.

It is not clear that this has occurred, however. Had the Grand Jury alleged that Mr. Mayes violated *each/all* of the RICO subsections, no duplicity issue would exist, as a single conspiracy to violate multiple statutes is clearly permissible.[87] However, by alleging that Mr. Mayes violated *any/or* of the RICO subsections, the superseding presentment appears to allege the presence of multiple different conspiracies, particularly when factual allegations exist that could support conspiracies under each theory.

If this occurred, the Grand Jury violated the express provision of the RICO Act requiring that separate racketeering violations be alleged in separate counts of the indictment, each with its own factual basis alleged.[88] Thus, if the Grand Jury intended to allege the possibility of multiple violations of the RICO Act, as it appears to have done, then it could not, consistent with the RICO Act itself, bring an amalgam of allegations supporting the commission of different substantive conspiracies in Count 2. This principal should not be controversial, and federal courts also appear to follow this same rule.[89]

Of course, when an indictment contains an ambiguity or otherwise lacks necessary information, the indictment may be found valid if other parts of the indictment can resolve the issue.[90] To this end, other parts of Count 2 could be read to limit the objective of the Grand Jury's RICO conspiracy to violate section -204(c).[91] However, because the superseding presentment expressly alleges that Mr. Mayes could have conspired to violate each one of the substantive provisions of the RICO Act, and because the Grand Jury has alleged facts that would

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commission of aggravated robbery of a person other than the victim (aggravated kidnapping); and, caused the victim to suffer serious bodily injuries (a type of especially aggravated kidnapping different than the first charge of especially aggravated kidnapping). These three charges should have been set forth in three separate counts of the indictment.").

[86] *See* Tenn. Code Ann. § 39-12-204(e).

[87] *See* Tenn. Code Ann. § 39-12-103(c).

[88] *See* Tenn. Code Ann. § 39-12-204(e).

[89] *See United States v. Tocco*, 200 F.3d 401, 410 (6th Cir. 2000) (charging in different counts separate RICO conspiracies with separate objectives, including collection of unlawful debt and engaging in a pattern of racketeering activity).

[90] *See Romero v. State*, No. E2018-00404-CCA-R3-PC, 2019 WL 2173545, at *8 (Tenn. Crim. App. May 20, 2019) (citing *State v. Nixon*, 977 S.W.2d 119, 121-22 (Tenn. 1997) (finding that the omission of the defendants' names in the body of a single-count indictment was not fatal because the defendants' names appeared on the cover sheet); *Mullins*, 571 S.W.2d at 854 (recognizing that "our Supreme Court has held that in a multi-count indictment, references in one count may be used in aid of identification allegations made in another count") (citing *Chapple v. State*, 135 S.W. 321 (1910)).

[91] For example, in paragraph 2 of Count 2's introductory paragraph, the allegations speak in the language of a conspiracy to violate section -204(c).

support a conspiracy to violate each of the substantive provisions of the RICO Act, the language in other parts of Count 2 cannot be read to eliminate the ambiguity.

Ultimately, by joining the possibility of separate and alternate conspiracies into one subsection—with the factual basis for each alleged type of conspiracy also combined and commingled with each other—the Grand Jury's allegations expressly violate subsection -204(e). In other words, the RICO Act itself *expressly prohibits* the very type of combined allegations that the Grand Jury has attempted in this case. Moreover, by failing to identify the object, or the racketeering crime(s), that Mr. Mayes agreed to commit, the Grand Jury has not performed its most essential task of providing notice to Mr. Mayes of "the nature and cause of the accusation" brought against him.[92] As such, because the manner in which the Grand Jury has brought Count 2 has itself ignored and violated the express terms of the RICO Act, Count 2 cannot stand in its present form.

C. Is a "Meeting of the Minds Between All Co-Conspirators" Properly Alleged?

The Grand Jury's failure to clearly identify the object or objects of its RICO conspiracy has a more fundamental issue: Count 2 has failed to allege that all Defendants alleged to be part of its RICO conspiracy reached "a meeting of the minds" as to the object of their conspiracy. In other words, the Grand Jury has not alleged that a meeting of the minds existed "between all" fifty-five co-defendants as to the object of the alleged conspiracy.

As recognized above, the RICO Act itself expressly provides that

> [i]n order to convict a person or persons under this part, based upon a conspiracy to violate any subsection of this section, the state must prove that there was *a meeting of the minds between all co-conspirators* to violate this part and that an overt act in furtherance of the intention was committed.[93]

No party disputes that a meeting of the minds "between all co-conspirators" is an essential element of a RICO conspiracy offense, as the statute requires proof of this fact before criminal liability may be imposed on any person in the first instance. As such, where an

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[92] *See* U.S. Const. amend. VI; *see also* Tennessee Const. art. I, § 9 (providing that "in all criminal prosecutions, the accused hath the right to . . . demand the nature and cause of the accusation against him, and to have a copy thereof . . . ."). Importantly, the Court does not hold or suggest that the trial jury ultimately seated in this case must agree as to the means used to accomplish the objects of the conspiracy, such as the commission of particular predicate acts existing as part of a pattern of racketeering activity. *See, e.g.*, *United States v. Rios*, 830 F.3d 403, 434 (6th Cir. 2016) ("But a jury need not agree on which overt act, among several, was the means by which a crime was committed. And the RICO conspiracy statute contains no requirement of some overt act or specific act at all. For that reason, we have suggested that to convict a defendant of RICO conspiracy, the jury need not be unanimous as to the specific predicate acts that the defendant agreed someone would commit." (citations and internal quotation marks omitted)). Nevertheless, the Grand Jury's allegations must be sufficiently and simply stated such that the ultimate trial jury can agree as to what the objective of the conspiracy was, or what *racketeering crime or crimes* the Defendant actually conspired to commit.

[93] *See* Tenn. Code Ann. § 39-12-204(f) (emphasis added).

indictment fails to allege the presence of this essential element, the indictment will also fail to state a RICO conspiracy offense. In such a case, this Court would not have jurisdiction to hear and decide the case.

As noted above, this essential element is unique, both *to* and *in*, Tennessee law, and it compels conclusions that are fundamentally different from, and far more restrictive than, those compelled under federal racketeering principles. As noted above, the Fifth Circuit recognized in *Elliott* that the power of the RICO conspiracy lies in the conception that the "enterprise supplies a unifying link between all the predicate acts charged, since all the predicate acts [in a subsection (c) conspiracy] must be committed in the conduct of the affairs of an enterprise."[94] This legal theory under federal law thus permits different actors to conspire with different people to commit different predicate acts, so long as all people involved are participating in the same enterprise.

However, the Tennessee requirement that a meeting of the minds must exist "between all co-conspirators" effectively eliminates the possibility, which is permitted under federal law, that separate, unrelated agreements to violate the RICO Act can be wrapped into a single RICO conspiracy. This conclusion follows because, when a meeting of the minds must exist "between all" co-conspirators, the individuals comprising the RICO conspiracy must necessarily know of, and reach an agreement with, *each and every one*[95] of the other co-conspirators as to the object of the conspiracy.[96] Indeed, if this provision were not intended to prevent the prosecution of separate objects and different participants under the umbrella of a single large RICO conspiracy, the language itself would have no meaning or purpose. And, our courts never presume that the General Assembly would enact a statute with meaningless or useless language.[97]

When a grand jury fails to allege the object of a RICO conspiracy, or the particular racketeering crime or crimes that the co-conspirators agreed to commit, it will inevitably fail to allege facts showing that a meeting of the minds existed "between all co-conspirators." That is what happened here. By not identifying the goal of its alleged conspiracy, and by expressly alleging that Mr. Mayes alternatively violated "any" of the substantive RICO prohibitions, the Grand Jury has specifically allowed for the possibility that some co-conspirators agreed to

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[94] *See United States v. Welch*, 656 F.2d 1039, 1052 (5th Cir. 1981).

[95] The phrase "between all co-conspirators" is a significant limitation. Our Supreme Court has recognized generally that the term "all" means "all." *See Culbreath v. First Tennessee Bank Nat. Ass'n*, 44 S.W.3d 518, 524 (Tenn. 2001) ("[W]e conclude that 'all liabilities' means all liabilities. We reach this conclusion not only based upon the ordinary meaning of the word 'all' but also upon consideration of the whole statute."). Indeed, the term "all" does not mean "not some, or a part, or a portion, or a few." *See State v. Good Times, Ltd.*, No. E2007-1172-COA-R3-CV, 2008 WL 4334894, at *4 (Tenn. Ct. App. Sept. 23, 2008).

As such, it would not be enough for a RICO conspirator to reach a meeting of the minds only with a central person in a hub-and-spoke conspiracy. He or she also needs to have a meeting of the minds with all other co-conspirators, including each of the members who are on different spokes of the conspiracy. This limitation is a clear departure from federal law, where the enterprise itself could form the basis of a hub conspiracy under a subsection (c) RICO conspiracy and where the RICO co-conspirators may not even know of each other.

[96] One way to avoid the practical consequences of this language, of course, is for a grand jury to allege the presence of multiple conspiracies involving a small number of participants.

[97] *See Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 526 (Tenn. 2010) ("This Court may presume that the legislature used every word deliberately and that each word has a specific meaning and purpose, did not intend to enact a useless statute . . . ." (citations and internal quotation marks omitted)).

racketeer for one or more objects—such as using racketeering funds to invest in an enterprise, for example—while other co-conspirators agreed to racketeer to achieve completely different objects—such as participation in an enterprise, as another example. If the Grand Jury cannot identify the objective(s) of its RICO conspiracy, except as being among one or more of several possible alternatives, how could it possibly allege that a meeting of the minds was reached "between all" of the alleged co-conspirators as to these objects?

In this case, the Grand Jury did not specifically allege that Mr. Mayes reached a meeting of the minds with all fifty-four of his alleged co-conspirators as to the object(s) of a RICO conspiracy.[98] It is true, as the Court has noted above, that agreements in the real world of conspiracy crimes are rarely formalized. It is more often that the actions of conspirators will reveal the object of the conspiracy and the facts of the parties' agreement.[99] There is no doubt that this is one of the reasons that the RICO Act itself specifically requires that the factual basis for the RICO conspiracy be set forth in the indictment.[100]

To that end, and in the absence of a specifically-pled allegation as to a meeting of the minds "between all" co-conspirators, it could be that the factual basis set forth by the Grand Jury could fairly allege the existence of this essential element. However, even on a fair and objective reading, the Court makes the following observations:

1. Count 2 makes no mention of Mr. Mayes at all, except to name him as one of the alleged co-conspirators in its introduction.

2. Count 2 does not allege that Mr. Mayes agreed with anyone, much less that he agreed with everyone, about what the object of any RICO conspiracy may be.

3. Count 2 does not allege that Mr. Mayes agreed with anyone, much less that he agreed with everyone, that *he* would engage in a pattern of racketeering activity for one or more of the prohibited purposes under the RICO Act.

4. Count 2 does not allege that Mr. Mayes agreed with anyone, much less that he agreed with everyone, that he would support *another person* or persons engaging in a pattern of racketeering activity for one of the prohibited purposes under the RICO Act.

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[98] This is an important point. The language of the superseding presentment does allege that the Defendants "conspired," and if the object of the conspiracy were identified, these combined allegations likely would be sufficient to establish this essential element for purposes of the indictment. In the absence of these allegations, however, the Court further identifies the factual basis set forth by the Grand Jury to determine whether the superseding presentment fairly alleges a meeting of the minds "between all" co-conspirators.

[99] *See State v. Marsh*, No. M2017-02360-CCA-R3-CD, 2019 WL 413678, at *4 (Tenn. Crim. App. Feb. 1, 2019); *see also State v. Pike*, 978 S.W.2d 904, 915 (Tenn. 1998) ("While the essence of the offense of conspiracy is an agreement to accomplish a criminal or unlawful act, the agreement need not be formal or expressed, and it may be proven by circumstantial evidence." (internal citation omitted)); *State v. Clayton*, No. W2018-00386-CCA-R3-CD, 2019 WL 3453288, at *7 (Tenn. Crim. App. July 31, 2019) ("'The unlawful confederation may be established by circumstantial evidence and the conduct of the parties in the execution of the criminal enterprise.'" (quoting *Randolph v. State*, 570 S.W.2d 869, 871 (Tenn. Crim. App. 1978))).

[100] *See* Tenn. Code Ann. § 39-12-204(e).

5. Count 2 does not allege that Mr. Mayes agreed with anyone, much less that he agreed with everyone, that he would participate himself in any of the "means and methods" alleged to evidence the Grand Jury's RICO conspiracy.

6. Count 2 does not allege that Mr. Mayes agreed with anyone, much less that he agreed with everyone, that he would support others participating in any of the "means and methods" alleged to evidence the Grand Jury's RICO conspiracy.

In fairness, the allegations of Count 2 also incorporate the factual allegations contained in Count 1 of the superseding presentment,[101] and Count 1 does allege that Mr. Mayes and others committed various criminal-gang offenses alleged to be part of a pattern of racketeering activity.[102] Therefore, it could be that these allegations of fact are sufficient, at this stage, to support the existence of an agreement "between all" defendants to violate the RICO Act.

Upon examination, however, the incorporation of Count 1 is not particularly helpful, and it may actually further highlight the deficiencies in Count 2. Prior to July 1, 2012, which was the effective date of the RICO Act, the law did not criminalize racketeering conspiracies involving criminal-gang offenses. Nevertheless, the Grand Jury has included within its RICO conspiracy at least five people whose alleged criminal-gang activity ceased *years* before that time,[103] and Mr. Mayes is not alleged to have any connection with these persons, particularly after July 1, 2012:

- The last act alleged to have been committed by co-conspirator Countess Clemons is alleged to have been committed in October 2010.[104] Mr. Mayes is not alleged to be involved at all with Ms. Clemons in 2010 or at any time after July 1, 2012.

- The last act alleged to have been committed by co-conspirator Dutchess Lykes is alleged to have been committed in 2011.[105] Mr. Mayes is not alleged to be involved at all with Ms. Lykes in 2009 or at any time after July 1, 2012.

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101 *See* Superseding Presentment, Count 2, § 1 ("All previous gang offenses which are further defined in Count One of this presentment are herein incorporated into Count Two by reference."). Of course, such pleading is perfectly permissible. *See State v. Duncan*, 505 S.W.3d 480, 490 (Tenn. 2016) ("It has long been settled that, to determine whether a single count in an indictment provides adequate notice to the defendant, the court may read that count together with other counts in the indictment. '[I]f it is reasonably clear from the averments ... that [they are] connected with and a part of the preceding count ... such a count may be considered good.'" (quoting *State v. Youngblood*, 199 Tenn. 519, 287 S.W.2d 89, 91 (Tenn. 1956))).

102 *See* Superseding Presentment, Count 1, § 2, ¶ 37.

103 Or, more properly, none of these co-conspirators is alleged to have participated in a criminal-gang offense or in a pattern of racketeering activity after these dates.

104 *See* Superseding Presentment, Count 1, § 2, ¶ 16.

105 *See* Superseding Presentment, Count 1, § 2, ¶ 35. Of course, two years prior to these acts, Ms. Lykes is also alleged to have conspired with Courtney High and others to commit arson in 2009. *See* Superseding Presentment, Count 2, ¶ 3(n)(2). Although there may be some question as to whether the crime of arson can constitute racketeering activity if it did not involve actual or threatened death or serious bodily injury, *see* Tenn. Code Ann. § 39-12-203(9), the nature of those acts is immaterial for analysis of Count 2. At worst, the arson allegations are surplusage, and they would not otherwise affect the validity of the indictment. *See State v. March*, 293 S.W.3d 576, 588 (Tenn. Crim. App. 2008) (citing *State v. Culp*, 891 S.W.2d 232, 236 (Tenn. Crim. App.

- The last act alleged to have been committed by co-conspirator Broderick Lay is alleged to have been committed in 2009.[106] Mr. Mayes is not alleged to be involved at all with Mr. Lay in 2009 or at any time after July 1, 2012.

- The last act alleged to have been committed by co-conspirator Darrius Sneed is alleged to have been committed in 2007.[107] Mr. Mayes is not alleged to be involved at all with Mr. Sneed in 2007 or at any time after July 1, 2012.

- The last act alleged to have been committed by co-conspirator Andre Thomas is alleged to have been committed in 2007.[108] Mr. Mayes is not alleged to be involved at all with Mr. Thomas in 2007 or at any time after July 1, 2012.

The inclusion of these five people in an alleged RICO conspiracy with Mr. Mayes is problematic. Although Count 2 alleges that these five people "conspired" with each other, these five people are as completely absent from any conspiracy allegations as if they did not exist in the first instance. With respect to these five people, no allegation shows even as much as their knowledge, acquiescence, or approval of the acts of others, much less their cooperation or agreement to cooperate with others to commit a violation of the RICO Act after July 1, 2012.[109]

Because the Grand Jury has not alleged any facts showing that a meeting of the minds existed "between all" co-conspirators, including these five people, to violate the RICO Act in any way after July 1, 2012, Count 2 cannot stand in its present form.[110] Importantly, this conclusion is the consequence of the limitation in section -204(f) of our RICO Act that there must be "a meeting of the minds between all co-conspirators." As such, while different arguments could be presented if these five Defendants were not part of the Grand Jury's RICO conspiracy, the fact remains that the Grand Jury specifically included these defendants within the scope of its conspiracy.

Accordingly, because the Grand Jury has not alleged facts showing that Mr. Mayes reached a meeting of the minds with each of these five other co-conspirators—or they with

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1994)); *Smith v. Myers*, No. 2005-01732-CCA-R3-HC, 2005 WL 3681656, at *2 (Tenn. Crim. App. Jan. 18, 2006) ("It is well-settled that an indictment is not defective because of the inclusion of surplusage if, after eliminating the surplusage, the offense is still sufficiently charged."). The more important issues relate to whether a meeting of minds is alleged to exist "between all" co-conspirators to violate the RICO Act.

106 *See* Superseding Presentment, Count 1, § 2, ¶ 32.

107 *See* Superseding Presentment, Count 1, § 2, ¶ 51.

108 *See* Superseding Presentment, Count 1, § 2, ¶ 53.

109 *See State v. Cook*, 749 S.W.2d 42, 44 (Tenn. Crim. App. 1987) ("Mere knowledge, acquiescence, or approval of the act, without cooperation or agreement to cooperate, is not enough to constitute one a party to a conspiracy." (citing *Solomon v. State*, 76 S.W.2d 331, 334 (Tenn. 1941))).

110 To the contrary, the superseding presentment gives no indication whatsoever that the Grand Jury found *any* facts supporting probable cause to believe that Mr. Mayes discussed with anyone, much less that he agreed with everyone, that someone would engage in a pattern of racketeering activity for a prohibited purpose. To be clear, the Court is not looking for evidence or proof to support any allegations at this stage. Rather, because the RICO Act itself contains special pleading requirements, it requires the Grand Jury to set forth the factual basis for its alleged RICO conspiracy to be alleged in this same count. *See* Tenn. Code Ann. § 39-12-204(e). The Grand Jury simply has not done so with respect to Mr. Mayes.

him—to violate the RICO Act after 2012,[111] an essential element of a RICO conspiracy is missing. Without this essential element, no RICO conspiracy has been properly alleged, and this Court lacks jurisdiction to adjudicate the claim.[112] Mr. Mayes's motion is well taken and should be granted.

IV. PUBLIC POLICY CONSEQUENCES OF TENNESSEE'S NARROW LAW

As it has done in previous orders, the Court reflects upon the practical policy decisions evident in both the limitations found in Tenn. Code Ann. § 39-12-204(e) and Tenn. Code Ann. § 39-12-204(f). As has been argued in these proceedings, Tennessee's narrow RICO Act places special burdens on the prosecution that are not faced by authorities in other states. For example, the conclusions reached here today would not necessarily follow under the federal RICO law or under the RICO acts of other states, such as Florida. In those latter examples, a subsection (c) conspiracy could properly proceed even if Mr. Mayes did not reach a meeting of the minds "between all" of his alleged co-conspirators, at least so long as each of these persons had agreed, through participation in the enterprise itself, to commit a racketeering offense in violation of the RICO Act. As the Eleventh Circuit has recognized with respect to federal law,

> [I]n proving the existence of a single RICO conspiracy, the government does not need to prove that each conspirator agreed with every other conspirator, knew of his fellow conspirators, was aware of all of the details of the conspiracy, or contemplated participating in the same related crime. A mere [a]greement to participate in the conduct of the affairs of the enterprise through a pattern of racketeering activity brings a defendant within the conspiracy regardless of the unrelatedness of the acts of other members of the conspiracy.[113]

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[111] Given the allegations of unlawful activity among these five people existing as early as 2001 in one case, it may be that the Grand Jury believed that some agreement existed prior to 2012 and continued after a "change in the law" with the effective date of the RICO amendments at that time. Even if so, the Grand Jury did not allege any participation by these five people in the RICO conspiracy after 2012. *See Agee v. State*, 111 S.W.3d 571, 577 (Tenn. Crim. App. 2003) ("If evidence exists that Petitioner participated in the conspiracy after the effective date of the change in the law, the amended law may be applied to Petitioner's criminal conduct without violating the constitution.").

[112] Other issues also exist with respect to Count 2 as well, though full analysis is not necessary to the Court's holding. To constitute a RICO conspiracy, the nature of the agreement is not simply one to commit individual or isolated offenses, even if these offenses qualify as criminal-gang offenses. Rather, the prohibited agreement is one to engage in a pattern of racketeering activity for a prohibited purpose. By statutory definition, a pattern of racketeering activity involves the *interrelation* of the crimes such that the crimes have "the same or similar intents, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics." The legislature made clear that to constitute a "pattern," the racketeering activity "cannot consist of 'isolated incidents.'" *See* Tenn. Code Ann. § 29-12-202(b)(1).

Yet, this is all that the Grand Jury has alleged in Count 2—isolated incidents of conduct without facts showing any interrelation. In other words, the State could prove every fact actually alleged by the Grand Jury in Count 2 and still not prove the conspiracy offense with respect to any co-defendant. Proof of the Grand Jury's allegations would still fail to prove a meeting of the minds "between all" co-conspirators, and it would not show interrelation between the crimes by distinguishing characteristics.

[113] *See United States v. Godwin*, 765 F.3d 1306, 1324 (11th Cir. 2014) (internal quotation marks and citations omitted).

Applying these federal principles to Mr. Mayes's case, so long as Mr. Mayes agreed to participate in the criminal gang through a pattern of racketeering activity, it would not be particularly relevant that he did not know of others in the gang; that he was unaware of all details of the gang activity; or that his own actions were unrelated to the acts of others. With our own RICO Act limitations, however, these concerns become more relevant.

One may or may not prefer these public policy consequences today, but these consequences are the natural result of the unique requirements of our Tennessee legislation that was heavily debated and carefully considered in 1986. In 2013, legislation was proposed that would have repealed both sections -204(e) and -204(f).[114] Although this Court will not ascribe particular motivations to the ultimate defeat of this 2013 legislation,[115] the prior debates are evidence that the General Assembly is, or was, aware of how others believed that these provisions placed narrow restrictions on the application of Tennessee's RICO Act.

Ultimately, if the General Assembly does not intend the consequence of this statutory language, it has the sole power to reconsider these limitations at any time. Despite any potential policy concerns voiced by others to the contrary, this Court is not free to adopt a construction that is contrary to the language adopted by our legislature.[116] After all, the General Assembly "holds the power to define criminal offenses and assess punishments for crimes. It is not this Court's role to substitute [its] policy judgments for those of the legislature."[117]

CONCLUSION

For the foregoing reasons, the Court finds that Count 2 of the superseding presentment is not consistent with key limiting provisions of the RICO Act. First, by alleging the possible existence of at least four RICO conspiracies with different substantive objects and agreements, the Grand Jury has failed to provide notice of "the nature and cause of the accusation" brought against the accused.

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[114] *See* 108th General Assembly, SB291 (HB1025) & SA0355 (proposing amendment to Tenn. Code Ann. § 39-12-204 to repeal subsections (e) and (f) and to redefine "pattern of racketeering activity" to include predicate acts occurring within five years of each other).

[115] *See Hardy v. Tournament Players Club at Southwind, Inc.*, 513 S.W.3d 427, 443 (Tenn. 2017) (recognized that subsequent "legislative inaction is generally irrelevant to the interpretation of existing statutes . . . .").

[116] *See State v. Mallard*, 40 S.W.3d 473, 480 (Tenn. 2001) ("In no case, though, is the judiciary empowered to substitute its own policy judgments for those of the General Assembly or to adopt a construction that is clearly contrary to the intent of the General Assembly."); *see also Coleman v. Olson*, 551 S.W.3d 686, 694 (Tenn. 2018) ("We do not alter or amend statutes or substitute our policy judgment for that of the Legislature." (citing *Armbrister v. Armbrister*, 414 S.W.3d 685, 704 (Tenn. 2013))); *State v. Gentry*, 538 S.W.3d 413, 420 (Tenn. 2017) ("It is not the role of this Court to substitute its own policy judgments for those of the legislature." (citing *Frazier v. State*, 495 S.W.3d 246, 249 (Tenn. 2016))).

[117] *See State v. Cabe*, No. M2017-02340-CCA-R3-CD, 2018 WL 6318151, at *3 (Tenn. Crim. App. Dec. 3, 2018) (citing *State v. Gentry*, 538 S.W.3d 413, 420 (Tenn. 2017)).

Second, the Grand Jury's alternate pleading raises concerns that the superseding presentment does not comply with Tenn. Code Ann. § 39-12-204(e). This provision requires that multiple conspiracies must be alleged in "separate counts," with the factual basis for each conspiracy set forth in that count.[118] By combining possible alternative conspiracies into a single count, the Grand Jury has failed to comply with these express provisions meant to ensure the unanimity of a jury verdict at trial; to preserve due process; and to protect against double jeopardy concerns.

Finally, by alleging the objects of the RICO conspiracy in the alternative, the Grand Jury did not comply with Tenn. Code Ann. § 39-12-204(f). By not identifying the objective(s) of its RICO conspiracy, except as being among one or more of several possible alternatives, it has failed to allege that a meeting of the minds was reached "between all" of fifty-five members of the conspiracy as to its object(s).

Because the manner in which the Grand Jury has brought Count 2 has itself violated the express terms of the RICO Act on each of these grounds, Count 2 cannot stand in its present form. As such, the Court has no choice but to **GRANT** Mayes Motion No. 13. Although the Court grants the motion, it does so without prejudice to the Grand Jury's reconsideration of an indictment or presentment that alleges each of the essential elements of a RICO conspiracy offense and that is in the form required by the RICO Act.

"Because courts cannot act where jurisdiction is lacking, a trial court has an inescapable duty to determine whether the dispute is within its subject matter jurisdiction."[119] The same flaws that exist with respect to Mr. Mayes's case also exist in every other case in which Count 2 has been brought. Noticing, therefore, the absence of its jurisdiction in each of the other consolidated cases as well—both in those formally joining, and in those not joining, in Mayes Motion No. 13[120]—the Court also dismisses Count 2 in all remaining cases.

A separate order will enter that formally resolves this Count in each of the consolidated *Allen* cases.

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[118] *See* Tenn. Code Ann. § 39-12-204(e) (emphasis added). The Grand Jury may have supposed that the statutory language describing "[m]ultiple and alternative violations of this section" refers only to the substantive RICO provisions in subsections (a), (b), and (c) and not the conspiracy provisions in subsection (d). If so, it was in error. The phrase "violations of this section" refers to the entirety of section -204, and each one of the subsections (a) through (d) similarly begin with phrase "it is unlawful for any person" to commit the acts described therein. The conspiracy provisions contained in section -204(d) describing conduct made unlawful are as much a part of "this section" as are the other RICO violations.

[119] *See Wilson v. Sentence Info. Services*, No. M1998-00939-COA-R3-CV, 2001 WL 422966, at *4 (Tenn. Ct. App. Apr. 26, 2001) (citing *Edwards v. Hawks*, 222 S.W.2d 28, 31 (Tenn. 1949)); *see also, e.g., Scales v. Winston*, 760 S.W.2d 952, 953 (Tenn. Ct. App. 1988) ("It is the duty of any court to determine the question of its subject matter jurisdiction on its own motion if the issue is not raised by either of the parties, inasmuch as any judgment rendered without jurisdiction is a nullity."); *Ward v. Lovell*, 113 S.W.2d 759, 760 (Tenn. Ct. App. 1937) ("it is the duty of the court to determine the question of its jurisdiction on its own motion; and it will not ignore a want of jurisdiction because the question is not raised or discussed by either party." (citations omitted)).

[120] As noted above, "if the indictment fails to include an essential element of the offense, no crime is charged and, therefore, no offense is before the court." *See State v. Nixon*, 977 S.W.2d 119, 121 (Tenn. Crim. App. 1997) (citing *State v. Perkinson*, 867 S.W.2d 1, 5-6 (Tenn. Crim. App. 1992)).

It is so ordered.

Enter, this the 7th day of February, 2020.

TOM GREENHOLTZ, Judge

IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE

STATE OF TENNESSEE,	)	
	)	
Plaintiff,	)	SECOND DIVISION
	)	
vs.	)	
	)	NO(s). 309983
LUIS DANIEL PEREZ,	)	
	)	
Defendant.	)	

ORDER DENYING MOTION TO SUPPRESS AND SETTING PLEA NOTICE DATE

This matter came before the Court upon the Defendant's motion to suppress the seizure of the Defendant's blood drawn after medical treatment. The blood was drawn by the hospital after the Defendant was involved in an interstate collision, and law enforcement sought to seize the sample for blood-alcohol testing.

The Defendant argues two grounds. First, the Defendant argues that the affidavit supporting the warrant application contains a discrepancy as to when the blood was drawn, and as such, the magistrate could not have found probable cause without having to make a finding. Second, even if the discrepancy is resolved in favor of the State, the affidavit does not contain information as the time the blood was drawn and therefore cannot eliminate the possibility that alcohol in the blood would have been dissipated by the time of the blood draw.

For the reasons given herein, the Court respectfully denies the Defendant's motion to suppress, and the Court sets the case for a plea notice date of January 19, 2022.[1]

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[1] To enhance readability, this opinion sometimes uses the parenthetical "cleaned up" to indicate that internal quotation marks, alterations, and citations have been omitted from quotations. *See, e.g.*, *United States v. Joiner*, 727 Fed. Appx. 821, 827 (6th Cir. 2018) (using "cleaned up" parenthetical to remove internal quotation marks, brackets, and parallel citations in quoted material); *I.L. v. Knox Cty. Bd. of Educ.*, 257 F. Supp. 3d 946, 960 n.4 (E.D. Tenn. 2017). For a more thorough discussion regarding the practicality of the parenthetical, see Jack Metzler, *Cleaning Up Quotations*, 18 J. App. Prac. & Process 143 (Fall 2017).

Filed Electronically by the Second Division on ***Thursday, November 11, 2021***

FACTUAL BACKGROUND

As alleged in this case, during the early morning hours of January 12, 2020, the Defendant was driving in the wrong lanes on Interstate 24 headed toward Missionary Ridge in Chattanooga, Tennessee. He collided with a car driven by Ms. Courtney Vaught, killing her in a violent crash. Although the Defendant himself survived the crash, he was transported to Erlanger Hospital for medical treatment by emergency personnel.

Officer Johnson with the East Ridge Police Department was one of the personnel assigned to investigate the homicide. Some ten days after the collision, he applied for a warrant to seize a sample of the Defendant's blood taken by the hospital and to have it tested to determine the alcohol content of the blood.[2]

In his affidavit supporting the warrant request, the officer informed the magistrate that "there are now located blood sample(s) taken for the purpose of medical treatment on l-12-2020 from: Luis Daniel Perez[.]" The affidavit then identified the facts believed to give rise to probable cause, and it concluded with the following request:

> For the above reasons, I, Officer Johnson #526 or any officer under my direction request Erlanger Baroness Hospital to release the blood sample(s) taken from Luis Daniel Perez on 1-15-2020, to obtain evidence of any intoxicant, marijuana, controlled substance, drug, substance affecting the central nervous system or combination thereof that impairs the driver's ability to safely operate a motor vehicle by depriving the driver of the clearness of mind and control of himself which he would otherwise possess. The presence of the above substances, drugs, intoxicants and/or its derivatives constitutes critical evidence of a violation of T.C.A. §55-10-401. The District Attorney's office has verified the presence of this blood sample, and has had a hold placed on it.

The magistrate issued the warrant on January 22, 2020, commanding Officer Johnson "to enter, search, and seize within five (5) days of this date, the person, premises, or property described

[2] In the State's earlier briefing, it raised an argument as to whether State action is sufficiently involved where the hospital conducts the blood draw. In general, the Court agrees that the taking of the sample by the hospital free from law enforcement involvement did not require compliance with constitutional requirements. However, when a law enforcement officer sought to take custody of the sample and have it tested to determine blood alcohol content, the protections of the Fourth Amendment became fully present.

above." The warrant described the blood sample was described as being "blood sample(s) taken for the purpose of medical treatment on 01-12-2020 from: Luis Daniel Perez[.]"

On March 11, 2020, the Hamilton County Grand Jury returned a presentment charging the Defendant with vehicular homicide by intoxication, among other offenses. The Defendant filed a motion to suppress the warrant commanding the seizure of his blood sample, raising two essential arguments:

1. The affidavit specifically identifies that the blood sample was "taken from Luis Daniel Perez on 1-15-2020," which was three days after the collision. Due to the rate at which alcohol dissipates in the blood over time, probable cause cannot exist to believe that this later sample contains evidence of blood alcohol content.

2. Even if the blood sample were actually taken on January 12, 2020, the warrant does not identify the actual time that the sample was taken on that day. Because the sample could have been taken as long as twenty hours after the collision, and, again considering the rate at which alcohol dissipates in the blood over time, probable cause cannot exist to believe that this earlier sample contains evidence of blood alcohol content.

For its part, the State maintains that the blood sample was taken on January 12, 2020, the day of the collision. It notes that the affidavit specifically states, "there are now located blood sample(s) taken for the purpose of medical treatment on l-12-2020 from: Luis Daniel Perez[.]" It reasons that the later reference to January 15, 2020, was simply a typographical or clerical error. It notes that the warrant proposed by Officer Johnson, which also identifies January 12, 2020, as the date on which the sample was taken, confirms this view.

With respect to the Defendant's second argument, the State argues that the affidavit was not required to list a time at which the blood sample was taken on January 12, 2020, and that probable cause nevertheless existed to believe that the sample would contain at least some evidence of the Defendant's intoxication.

The Court held an initial hearing on March 1, 2021, but due to procedural issues that are now no longer relevant, the hearing was continued. The Court reconvened the hearing on November 2, 2021, during which the State called to testify Officer Johnson, who was the investigating officer and the author of the affidavit. Officer Johnson testified that the reference in the affidavit to January 15 was an inadvertent typographical error and that he should have identified January 12 as the date that the blood sample was taken from the Defendant. He also testified that he was only aware of one blood sample taken from the Defendant and that this sample was actually taken on January 12.

Following the hearing, the Court took the motion under advisement. It now issues this opinion respectfully denying the motion to suppress.

LAW AND ANALYSIS

Both the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Tennessee Constitution protect citizens against unreasonable searches and seizures.[3] In particular, the Fourth Amendment provides that search warrants shall issue only "upon probable cause supported by Oath or affirmation." Similarly, Article I, Section 7, of the Tennessee Constitution provides, in relevant part, that

> general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offenses are not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted.

Similar requirements are found in our statutes as well, which require that "[a] search warrant can only be issued on probable cause, supported by affidavit, naming or describing the person, and particularly describing the property, and the place to be searched."[4]

Generally, "a search warrant shall be issued only on the basis of an affidavit, sworn before a 'neutral and detached' magistrate, which establishes probable cause for its issuance."[5] As our Supreme Court has made clear, the determination of probable cause is to be made from the totality of the circumstances,[6] and, as such, the

> task of the issuing magistrate is simply to make a practical, common sense decision, where given all the circumstances set forth in the affidavit before him including the "veracity" and "basis of knowledge" of persons supplying hearsay

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[3] *See* U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."); Tenn. Const. art. I, § 7 ("[T]he people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures . . . .").

[4] *See* Tenn. Code Ann. §§ 40-6-103; 40-6-104; *see also* Tenn. R. Crim. P. 41(c) (providing in relevant part, "[a] warrant shall issue only on an affidavit or affidavits sworn to before the magistrate and establishing the grounds of issuing the warrant. . . . If the magistrate is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, the magistrate shall issue a warrant identifying the property and naming or describing the person or place to be searched. . . . The finding of probable cause may be based upon hearsay evidence in whole or in part[.]"); *State v. Tuttle*, 515 S.W.3d 282, 300 (Tenn. 2017) ("In Tennessee, probable cause for issuance of a warrant is established by presenting 'a sworn and written affidavit' to the magistrate.").

[5] *See State v. Stevens*, 989 S.W.2d 290, 293 (Tenn. 1999); *State v. Frazier*, No. M2016-02134-SC-R11-CD, 2018 WL 4611624, at *3 (Tenn. Sept. 26, 2018) ("As a general rule, search warrants will not issue 'unless a neutral and detached magistrate determines that probable cause exists for their issuance.'" (quoting *State v. Tuttle*, 515 S.W.3d 282, 299 (Tenn. 2017)).

[6] *See State v. Tuttle*, 515 S.W.3d 282, 308 (Tenn. 2017).

information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.[7]

In general, the sufficiency of a search warrant affidavit "is to be determined from the allegations contained in the affidavit alone,"[8] and other information known personally by the issuing magistrate is irrelevant to the probable cause determination.[9]

In this case, the Defendant argues that Officer Johnson's affidavit does not support a probable cause finding because the date of the blood draw is indicated as being January 15, 2020, or three days following the collision. Because of the rate at which alcohol dissipates in the blood over time, the Defendant asserts that probable cause cannot exist to believe that a blood sample taken at this late date would contain evidence of blood alcohol content.

The State argues that the affidavit's reference to January 15, 2020, is simply a typographical or clerical error. It asserts that the blood draw was taken on the day of the collision, January 12, 2020, and that both the affidavit and the warrant make this clear on the first page of the respective documents. The State further argues that suppression should not be the remedy for the presence of the typographical error. The Court agrees.

A. APPLICATION OF THE EXCLUSIONARY RULE FOR CLERICAL ERRORS

The State argues that Officer Johnson's affidavit contains a simple clerical or typographical error in the description of the blood draw being conducted on January 15, 2020. Our appellate courts have specifically recognized that clerical errors "made without prejudice to

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[7] *See State v. Bryan*, 769 S.W.2d 208, 211 (Tenn. 1989) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)); *see also State v. Tuttle*, 515 S.W.3d 282, 307-08 (Tenn. 2017) (adopting "the *Gates* totality-of-the-circumstances analysis, which is, in our judgment and that of the vast majority of courts in other states, a sufficiently definite standard for assessing probable cause and much better suited to evaluating the practicalities that underlie the probable cause inquiry.").

[8] *See, e.g.*, *State v. Henning*, 975 S.W.2d 290, 297 (Tenn. 1998); *State v. Keith*, 978 S.W.2d 861, 870 (Tenn. 1998) ("Tennessee law is clear that in determining whether or not probable cause supported issuance of a search warrant only the information contained within the four corners of the affidavit may be considered."); *State v. Graves*, E2011-02471-CCA-R3-CD, 2012 WL 4757943, at *5 (Tenn. Crim. App. Oct. 4, 2012) ("The Tennessee Supreme Court has stated that 'Tennessee law is clear that in determining whether or not probable cause supported issuance of a search warrant only the information contained within the four corners of the affidavit may be considered.'" (quoting *State v. Keith*, 978 S.W.2d 861, 870 (Tenn. 1998))).

[9] *See State v. Greer*, No. E2015-00922-CCA-R3-CD, 2017 WL 2233647, at *17 (Tenn. Crim. App. May 17, 2017) ("Such probable cause must appear in the affidavit itself and judicial review of the existence of probable cause will not include looking to other evidence provided to or known by the issuing magistrate or possessed by the affiant." (cleaned up and quoting *State v. Moon*, 841 S.W.2d 336, 338 (Tenn. Crim. App. 1992) and citing *State v. Henning*, 975 S.W.2d 290, 295 (Tenn. 1998))); *State v. Saine*, 297 S.W.3d 199, 206 (Tenn. 2009) ("In determining whether probable cause supports the issuance of a search warrant, reviewing courts may consider only the affidavit and may not consider other evidence provided to or known by the issuing magistrate or possessed by the affiant.").

the defendant will not invalidate an otherwise valid search warrant."[10] So, for example, our Supreme Court has declined to apply the exclusionary rule where a clerical error appeared on the back of a warrant for filing purposes, stating that "the Courts will not permit such technical objections to prevail and defeat justice."[11] In *State v. Lay*,[12] the Court of Criminal Appeals declined to suppress a warrant that had facially inconsistent dates for its issuance arising from a clerical error by the magistrate.[13]

The Defendant argues that these authorities are not cases in which the clerical error affected the analysis of whether the warrant could be supported by probable cause. True enough. However, other cases exist where the clerical errors can be said to involve the probable cause determination. In *State v. Teague*,[14] for example, the Court of Criminal Appeals addressed a circumstance where the affidavit contained a clerical error as to the date when the officer received information from a confidential informant. The clerical error made it appear from the face of the affidavit that the information was received a year before the warrant application was made. This discrepancy gave rise to the argument that probable cause could not still exist to support a warrant due to the staleness of the information.[15]

The Court of Criminal Appeals noted that the year's-old date conflicted with other information on the face of the affidavit attesting that the informant saw the defendant with drugs "in the past 12 hours." The *Teague* Court rejected an automatic application of the exclusionary rule in this circumstance involving a clerical error in the affidavit, stating that

> A common-sense reading of this line [referencing events in the last 12 hours], together with the date the warrant was issued, conclusively shows that a clerical error took place and that the intended reference was to the year 1991 [instead of

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[10] *See State v. Szabo*, No. W2015-02264-CCA-R9-CD, 2016 WL 5851923, at *4 (Tenn. Crim. App. Oct. 6, 2016).

[11] *See Collins v. State*, 199 S.W.2d 96, 97 (Tenn. 1947) ("[In *Harvey v. State*, there] was an irreconcilable variance between the date of the affidavit and the warrant itself; not, as here, between the affidavit and warrant, on the one hand, and a nonessential notation on the back of the instrument largely for filing purposes." (distinguishing *Harvey v. State*, 60 S.W.2d 420, 420 (Tenn. 1933))).

[12] *See State v. Lay*, No. 03C01-9306-CR-00174, 1994 WL 13387, at *1 (Tenn. Crim. App. Jan. 21, 1994).

[13] *See id.* ("[I]n this case it is clear that there has been compliance with the rule. The issuing judge *correctly* dated the warrant in the first instance and no issue is raised concerning the propriety of the time endorsed thereon. The only error was that the trial judge miswrote the date and failed to include the year the second time he wrote the date. The date was correctly written above the judge's signature and the time was correctly set forth under the judge's signature. The fact that the judge incorrectly wrote the date the second time did not void the search warrant. The trial judge correctly held that the warrant was valid.").

[14] *See State v. Teague*, No. 03C01-9203-CR-93, 1992 WL 331038, at *1 (Tenn. Crim. App. Nov. 13, 1992).

[15] *See id.* ("The appellant argues that because the date appearing on the affidavit states that the affiant received information one year before the warrant was issued, the search warrant was too stale to establish probable cause." (citing *State v. Longstreet*, 619 S.W.2d 97 (Tenn. 1981))).

1990]. A common-sense evaluation of the circumstances should be made when there is indication that some error or incompleteness was found in an affidavit.[16]

More recently, in *State v. Szabo*,[17] the affidavit supporting a request for a blood-draw search warrant contained the names of two separate people, Ms. Szabo, who was the defendant, and Mr. Craig McBee, a person who was otherwise unrelated to the events. Although the affidavit was submitted to seek a warrant for Ms. Szabo's blood, and although the warrant referenced her name several times, the affidavit also identified *Mr. McBee* as the person in whose "body or blood" the evidence was sought."[18]

The trial court in *Szabo* granted a motion to suppress the results of the blood test after finding that the inclusion of a different name within the affidavit rendered the document invalid. On appeal, the Court of Criminal Appeals reversed the trial court's decision, finding that the affidavit simply contained a typographical error that remained from the use of a prior form.

Finding that suppression is not a remedy for clerical errors in an affidavit, the *Szabo* Court recognized that a "common-sense evaluation of the circumstances should be made when there is [an] indication that some error or incompleteness was found in an affidavit."[19] Importantly, to find the presence of a clerical error, the appellate court relied, in part, upon the officer's own testimony of the fact, even though this information was beyond the four corners of the affidavit.[20]

From the holdings of *Teague* and *Szabo*, it appears that a clerical error in an affidavit will not invalidate a warrant—or, stated differently, the exclusionary rule does not require suppression of evidence obtained from execution of a warrant due to a clerical error in the supporting affidavit—when:

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[16] *See id.*

[17] *See State v. Szabo*, No. W2015-02264-CCA-R9-CD, 2016 WL 5851923 (Tenn. Crim. App. Oct. 6, 2016), *perm. app. denied*, Feb. 21, 2017.

[18] *See id.* at *2.

[19] *See id.* at *4

[20] *See id.* ("We conclude that a common sense evaluation of the document would indicate an error based upon these facts. Deputy Scott's testimony further supports the conclusion that the inclusion of Craig Brandon McBee's name in the affidavit was the result of a clerical error.").

The Defendant argues that the discrepancy in the dates in this case go to the very heart of the probable cause determination. In other words, the inconsistency in the affidavit here forced the magistrate to "pick a date," or to choose among alternatives, upon which to consider the existence of probable cause. However, the same can also be said with the affidavit in *Szabo*. There, one person's blood would likely have revealed evidence of blood alcohol, and the other person's blood would not have done so. Thus, the magistrate in *Szabo* would also have been forced to "pick a person," with the existence of probable cause depending on the selection.

1. a common-sense evaluation of the affidavit indicates the presence of a likely clerical error, typically revealed by inconsistent information present in the affidavit itself;[21]

2. the clerical error is isolated, was the result of simple inadvertence,[22] and whose cause is confirmed by the officer who attested to the veracity of the document;[23]

3. the facts set forth in the affidavit, with the clerical error corrected, establish probable cause to believe that evidence of a crime is located in the place sought to be searched; and

4. the defendant has suffered no prejudice in that the warrant itself does not contain the same clerical error.[24]

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[21] *See State v. Szabo*, No. W2015-02264-CCA-R9-CD, 2016 WL 5851923, at *4 (Tenn. Crim. App. Oct. 6, 2016) ("We conclude that a common sense evaluation of the document would indicate an error based upon these facts."). In other cases where the clerical error is not apparent by reference to inconsistencies in the proffered affidavit, the question may likely be also framed as a *Franks*/*Little* issue where false or misleading information is presented to the magistrate for consideration. *See Franks v. Deleware*, 438 U.S. 154, 171 (1978); *State v. Little*, 560 S.W.2d 403 (Tenn. 1978).

Of course, even with application of *Little*, inaccurate statements in an affidavit that are the result of mere negligence or of innocent mistake are not generally sufficient to impeach an affidavit. In *State v. Hogan*, for example, the Court of Criminal Appeals concluded that a statement in the affidavit that identified the wrong motel was the result of negligence or innocent mistake, and thus denied a challenge to the affidavit. *See State v. Hogan*, No. M2017-02254-CCA-R3-CD, 2019 WL 413740, at *5 (Tenn. Crim. App. Feb. 1, 2019) ("Upon our review of the record and the applicable law, it is clear that the misstatement regarding which motel the actions took occurred in was the result of negligence or an innocent mistake. Accordingly, the defendant is not entitled to relief on this issue." (citing *Franks v. Deleware*, 438 U.S. 154, 171 (1978))).

[22] This important factor is also seen in other cases as well. For example, in *State v. Collier*, the Court of Criminal Appeals affirmed the granting of a motion to suppress where a discrepancy existed in various copies of a warrant as to when the warrant was issued. In that case, the testimony from the officer and magistrate could not explain how the discrepancies were the result of negligence or clerical error, and, as a result, "the record [did] not preponderate against the court's determination that the discrepancies were not mere technical violations or good faith mistakes." *See State v. Collier*, No. M2017-00511-CCA-R3-CD, 2017 WL 6405663, at *6 (Tenn. Crim. App. Dec. 15, 2017).

[23] *See State v. Szabo*, No. W2015-02264-CCA-R9-CD, 2016 WL 5851923, at *4 (Tenn. Crim. App. Oct. 6, 2016) ("Deputy Scott's testimony further supports the conclusion that the inclusion of Craig Brandon McBee's name in the affidavit was the result of a clerical error."); *cf. also Green v. State*, 799 S.W.2d 756, 761 (Tex. Crim. App. 1990) (suppressing warrant against claim of a clerical error in date of return when no proof was offered to show presence of clerical error: "Without even limited verification of the error as technical defect, the underlying goal of preventing mistaken execution of warrants is not served. Although the State had access to pertinent case law on this issue and was given the opportunity overnight to introduce testimony or other evidence when the hearing was reopened, the prosecution remained silent throughout the proceeding. There being a total lack of evidence corroborating the State's contention of clerical error, and having rejected the trial court's rationale that the two documents may be read together absent any such corroboration, we are constrained to hold the trial court improperly overruled appellant's Motion to Suppress evidence.").

[24] *See State v. Szabo*, No. W2015-02264-CCA-R9-CD, 2016 WL 5851923, at *4 (Tenn. Crim. App. Oct. 6, 2016) ("Finally, no prejudice enured to the Defendant as a result of the clerical error. We also note that the arresting officer, Deputy Scott, was the same officer to execute the warrant, leaving little opportunity for confusion about the identity of the person whose blood was to be drawn.").

Although *Teague* and *Szabo* were decided before our Supreme Court's recent decisions reflecting upon the operation of the Fourth Amendment's exclusionary rule, their holdings are consistent with those decisions. Since its opinion in *State v. Reynolds*[25] in 2016, our Supreme Court has examined the nature of the exclusionary rule as a remedy for possible Fourth Amendment violations. In so doing, the Supreme Court has affirmed that the purpose of the exclusionary rule is "to deter police from violations of constitutional and statutory protections."[26]

Applying this general purpose in a variety of contexts since that time, the Supreme Court has made clear that suppression is not an available remedy when officers make a "good faith" mistake in executing a warrant. For example, in *State v. Lowe*,[27] our Supreme Court recognized that a good-faith mistake may weigh against applying the Fourth Amendment exclusionary rule when the error:

- is one characterized by simple, isolated oversight or inadvertence;
- does not include conduct that is deliberate, reckless, or grossly negligent, nor does it include multiple careless errors; and
- is supported by appropriate judicial findings as to the credibility of witnesses so as to facilitate appellate review.[28]

And, in *State v. McElrath*, the Supreme Court gave guidance as to the considerations that would result in the exclusion of evidence pursuant to Tenn. R. Crim. P. 41:

> In applying Rule 41 during hearings on motions to suppress the evidence, trial judges will hereafter have discretion to consider variations of the good-faith exception as described herein. In doing so, we urge the trial courts to consider the following non-exhaustive factors: (1) whether the police error was the result of simple negligence rather than systemic error; (2) whether the error was the result of reckless disregard of constitutional requirements; (3) whether the error was isolated rather than recurrent; and (4) whether the error existed, undetected or

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[25] *See State v. Reynolds*, 504 S.W.3d 283 (Tenn. 2016).

[26] *See State v. Scott*, 619 S.W.3d 196, 204 (Tenn. 2021) (citing *Nix v. Williams*, 467 U.S. 431, 442-43 (1984)); *see also State v. Reynolds*, 504 S.W.3d 283, 312 (Tenn. 2016) ("Like the federal exclusionary rule, the purpose of the state exclusionary rule is to deter police misconduct by excluding evidence obtained by means prohibited by the Constitution." (cleaned up and citations omitted)); *State v. Davidson*, 509 S.W.3d 156, 186 (Tenn. 2016) ("When an officer has complied with constitutional requirements to obtain a warrant, but in good faith failed to comply with the state statutory and rule affidavit requirements, societal interests are not advanced when the exclusionary rule applies to exclude evidence obtained from execution of the warrant."); *State v. Porter*, No. M2020-00860-CCA-R3-CD, 2021 WL 4955719, at *13 (Tenn. Crim. App. Oct. 26, 2021) ("The reason the exclusionary rule was expanded to include evidence that is the fruit of unlawful police conduct was to deter police from violations of constitutional and statutory protections." (cleaned up and quoting *Nix v. Williams*, 467 U.S. 431, 442-43 (1984))).

[27] *See State v. Lowe*, 552 S.W.3d 842 (Tenn. 2018).

[28] *See id.* at 860 (Tenn. 2018).

uncorrected, for such an amount of time as to indicate reckless or gross negligence.[29]

To that end, the *McElrath* Court specifically held that, where "police mistakes are the result of negligence rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not 'pay its' way."[30]

The Court and the parties have spent much time discussing how the exclusionary rule would or should work in this context. Collectively, the Court and the parties have focused particularly on whether and to what extent the Supreme Court would fully adopt the "good faith" exception to the exclusionary rule recognized in *United States v. Leon*[31] and its federal progeny. And, as this Court acknowledged in those discussions, it is not at liberty to adopt a full good-faith exception to the exclusionary rule or extend the doctrine beyond its present boundaries.[32]

Nevertheless, based on its review of *Teague* and *Szabo* since the hearing, the Court believes that the Court of Criminal Appeals has *already* recognized, at least implicitly, the following principle: the exclusionary rule does not apply where an inadvertent clerical error exists in a supporting affidavit, which, when clarified, does not affect the existence of probable cause and does not prejudice a defendant. And, this recognition is fully consistent with the Supreme Court's later holdings and statements in *McElrath* and other decisions as to the operation of the exclusionary rule under Tennessee law.[33]

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[29] *See State v. McElrath*, 569 S.W.3d 565, 578 n.3 (Tenn. 2019); *see also State v. Daniel*, 552 S.W.3d 832, 835 n.5 (Tenn. 2018) ("This change [to Tenn. R. Crim. P. 41] became effective on July 1, 2018, and trial courts may now exercise discretion in determining whether acts or omissions that do not constitute constitutional violations, but that do violate only Rule 41, justify granting a motion to suppress. The implementation of this revised rule, at least for the most part, should obviate the need for this Court to determine on a case by case basis whether a good faith exception should be recognized for a technical violation of Rule 41.").

[30] *See State v. McElrath*, 569 S.W.3d 565, 578 (Tenn. 2019) (cleaned up and citing *Herring v. United States*, 555 U.S. 135, 147-48 (2009)). Of course, after recognizing this exception to the application of the exclusionary rule, the *McElrath* majority found that the facts of the case before it did not fall within the scope of the exception.

[31] *See United States v. Leon*, 468 U.S. 897 (1984).

[32] *Cf. State v. McLawhorn*, No. M2018-02152-CCA-R3-CD, 2020 WL 6142866, at *27 (Tenn. Crim. App. Oct. 20, 2020) ("As the trial court correctly noted in its order denying the motion to suppress, to the extent that the Tennessee Supreme Court has adopted the good-faith exception, its reach does not extend to the facts of this case under existing precedent. As an intermediate appellate court, we are obligated to apply existing law." (citing *State v. Pendergrass*, 13 S.W.3d 389, 397 (Tenn. Crim. App. 1999))).

[33] One may, or may not, attribute at least some of the statements in these opinions as being obiter dicta. Even if so, however, this Court is still bound to follow the dicta from higher courts. *See Holder v. Tennessee Judicial Selection Comm'n*, 937 S.W.2d 877, 882 (Tenn. 1996) ("[I]nferior courts are not free to disregard, on the basis that the statement is *obiter dictum*, the pronouncement of a superior court when it speaks directly on the matter before it, particularly when the superior court seeks to give guidance to the bench and bar. To do otherwise invites chaos into the system of justice.") (cited in *State v. Walls*, 537 S.W.3d 892, 904 n.7 (Tenn. Nov. 9, 2017)); *see also Abdur'Rahman v. State*, No. M2019-01708-CCA-R3-PD, 2020 WL 7029133, at *13 (Tenn. Crim. App. Nov. 30, 2020) ("The Tennessee Supreme Court has held that 'inferior courts are not free to disregard, on the basis that the statement is obiter dictum, the pronouncement of a superior court when it speaks directly on the matter before it[.]'" (quoting *Holder v. Tenn. Judicial Selection Comm'n*, 937 S.W.2d 877, 882 (Tenn. 1996))).

Being bound by those decisions, therefore, the question for the Court here is whether the facts of this case fall within the scope of that principle. The Court takes these factors in turn.

B. APPLICATION IN PRESENT CASE

1. Presence of a Clerical Error

The first factor is whether a common-sense evaluation of the affidavit indicates the presence of a likely clerical error. This prong can be met where the information contained in the affidavit is internally inconsistent—and perhaps reveals irreconcilable alternatives as it did in *Szabo*—and the apparent inconsistency requires some clarification to resolve.

Here, an internal inconsistency exists in Officer Johnson's affidavit between the two dates of the blood draw indicated in the affidavit. In one place, the affidavit identifies the blood draw as having been taken on January 12, and in another place, it identifies a different date.[34] This inconsistency is apparent on the face of the affidavit itself. And, because only one blood draw is at issue,[35] the two alternatives are mutually exclusive, meaning that they cannot both be simultaneously true.

It is important to the Court that the inconsistency appears on the face of the affidavit, as it did in both *Teague* and *Szabo*. The Court of Criminal Appeals has rejected arguments that a "clerical error" exists in an affidavit when an internal inconsistency is not present.[36] Although not stated as such, this principle seems to exist, in part, to prevent the State, when faced with a meritorious motion to suppress, from claiming a mistake, proffering new facts at the suppression hearing, and essentially revising the probable cause statement on the fly. No such concern is

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[34] The Defendant argues that the affidavit actually does *not* allege that the blood draw was taken on January 12. Placing emphasis on the placement of the prepositional phrase "on 1-12-2020," the Defendant argues that the affidavit actually states only that the *medical treatment* occurred on January 12. To restate the view slightly, the difference may be seen in considering the following two alternative constructions: "there are now located blood sample(s) taken for the purpose of medical treatment **on l-12-2020**" vs. "there are now located blood sample(s) taken **on 1-12-2020** for the purpose of medical treatment."

The Court understands the argument. However, it is also true that the sentence contains a veritable nesting doll of prepositional phrases such that the antecedent of the phrase "on 1-12-2020" is not immediately obvious. Because of that ambiguity, the sentence can naturally be read in multiple ways, including to state that the blood sample was, in fact, taken on January 12. The larger point, though, is this: the construction can be read naturally in multiple ways, and because it could be read as the State suggests, an inconsistency as to the date of draw still appears on the face of the affidavit suggesting the presence of a clerical error in at least one portion of the affidavit.

[35] Because the affidavit describes only a single blood draw, the face of the affidavit does not lend itself to the conclusion that multiple blood draws occurred.

[36] *See State v. Brown*, No. M2004-02101-CCA-R3-CD, 2005 WL 2139815, at *4 (Tenn. Crim. App. Aug. 30, 2005) ("In the instant case, there is no information contained in the affidavit to tie the marijuana to the appellant's address at 908 Weatherside Court, nor did the affidavit mention the appellant's name in connection with the drugs. The affidavit instead provided reason to believe that contraband could be located at the address of Brandon McDaniel at 649 Huntington Parkway. This is no mere clerical error. Accordingly, any contraband seized as a result of the search warrant for the appellant's address should have been suppressed." (citations omitted)).

present here, as a common-sense evaluation of the affidavit indicates the presence of at least one clerical error and that one must have clarification to resolve that facial inconsistency.

The Court finds that the State has introduced sufficient evidence to satisfy this first factor.

2. Degree of Fault Contributing to Clerical Error

The second factor is whether the clerical error is isolated, was the result of simple inadvertence, and whose cause is confirmed by the officer who attested to the veracity of the document. This factor is consistent with the admonition in *McElrath* that police mistakes are the result of negligence rather than systemic error or reckless disregard of constitutional requirements do not serve the purposes of the exclusionary rule.

During the hearing, Officer Johnson testified that he was the person who prepared the affidavit. He stated that the reference to January 15, 2020, on page 2 of his affidavit was a typographical error and that it instead should have read January 12, 2020. Although he did not know for certain, he believed that the erroneous date resulted either from his typing the date that he was preparing the warrant application or simply by hitting the incorrect key on the keyboard.

Based upon the Court's observation of his demeanor, the substance of the testimony, and the circumstances surrounding the preparation of the warrant application, the Court credits Officer Johnson's testimony that the January 15 date is a clerical error and that nothing more than simple negligence was involved in the creation of the error. Importantly, the clerical error represents a single and isolated error, and it is not one that is repeated throughout the affidavit or in the warrant itself. In reality, the error relates to a single digit in a single date on one page of the affidavit. Officer Johnson's testimony in this regard is essentially unimpeached.

As such, there is clearly a typographical error that either Officer Johnson or the issuing magistrate, or both, should have recognized and corrected before the warrant issued. The Court very much agrees with defense counsel that mistakes in the preparation of an affidavit can be consequential, and our Supreme Court has also made clear that "[a] police officer's duty to protect the citizens within her jurisdiction includes the duty to act with due care in the seeking and execution of search warrants, including the requirements set forth in Rule 41 and any applicable statutes."[37] Nevertheless, the Court finds that the error is the result of oversight and inadvertence and is not due to reckless, knowing, or intentional misconduct.

The Court finds that the State has introduced sufficient evidence to satisfy this second factor.

[37] *See State v. Daniel*, 552 S.W.3d 832, 841-42 (Tenn. 2018).

3. Presence of Probable Cause with Corrected Clerical Error

The third factor is whether, with the corrected error corrected, the facts set forth in the affidavit establish probable cause to believe that evidence of a crime would be located in the place sought to be searched. As specifically applied to this case, the question is whether, based on the affidavit, probable cause exists to believe that a blood sample taken on January 12, 2020, would contain evidence of blood alcohol.

The Defendant's principal argument here is that Officer Johnson's affidavit fails to identify the time during which the blood sample was taken on January 12, 2020. The Defendant asserts that the affidavit, therefore, does not exclude the possibility that the blood was drawn from the Defendant as many as 20 hours after the collision was reported to law enforcement. Because of the rate at which alcohol dissipates in the blood, the Defendant concludes that the affidavit does not contain sufficient facts to show that evidence of a crime is contained in—or, more properly, remains in—the Defendant's blood sample.

For its part, the State argues that the facts contained in Officer Johnson's affidavit show the existence of probable cause to believe that the Defendant's blood sample, which was drawn on the same day as the collision, would contain evidence of blood alcohol or other intoxicants. The Court agrees with the State.

As our Supreme Court has noted, "[p]robable cause, as its name implies, deals with probabilities."[38] As such, probable cause "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity."[39] In other words, a "guarantee is not required,"[40] and "only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause."[41]

Our courts have recognized the ephemeral nature of blood-alcohol evidence, and it has noted the impact that dissipation of blood alcohol will have upon a probable cause analysis. For example, in *State v. Wells*, the Court of Criminal Appeals noted in *dicta* that

> [a] situation in which the blood would have no evidentiary value might arise, for instance, if a law enforcement officer had probable cause to believe that the driver of a motor vehicle had committed a violation of section 55-10-401 and had previously been convicted of a DUI—triggering the statute—but the suspect was not apprehended until there was no longer probable cause to believe that any

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[38] *See State v. Tuttle*, 515 S.W.3d 282, 300 (Tenn. 2017) (cited in *State v. Martin*, No. W2018-01085-CCA-R3-CD, 2019 WL 1958103, at *3 (Tenn. Crim. App. Apr. 30, 2019)).

[39] *See District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018).

[40] *See State v. McBride*, No. M2020-00765-CCA-R3-CD, 2021 WL 3871968, at *3 (Tenn. Crim. App. Aug. 31, 2021) (quoting trial court's "proper" conclusion and finding of probable cause in the context of an IP address being "high likely" to belong to the defendant, but not guaranteed to do so).

[41] *See Illinois v. Gates*, 462 U.S. 213, 235 (1983); *see also State v. Campbell*, No. W2019-00626-CCA-R3-CD, 2020 WL 4346804, at *10 (Tenn. Crim. App. July 28, 2020) (same).

> alcohol remained in the suspect's bloodstream. In such a case, of course, there would neither be probable cause to issue a warrant for the blood draw nor exigent circumstances to uphold the search.[42]

It is likely a self-evident proposition that the relationship between the passage of time and the likelihood that blood will have evidence of intoxication is inversely relational. But, the exact proportion to which this proposition is true will vary in every case and between every individual.

During the hearing, neither side presented medical or other expert evidence to show the rate at which alcohol dissipates in the blood. For his part, the Defendant cited a case from the Texas Court of Criminal Appeals to suggest that the dissipation rate is "somewhere between 0.015 and 0.020 grams of alcohol for every one-hundred milliliters of blood."[43] Our own courts have cited testimony stating that alcohol dissipates from the bloodstream at the rate of between .01% to .02% per hour after the last drink.[44] And, in his concurring opinion in *Missouri v. McNeely* itself, Chief Justice Roberts noted that "[a]lcohol dissipates from the bloodstream at a rate of 0.01 percent to 0.025 percent per hour."[45]

In this case, the Defendant argues that it is not certain that evidence of blood alcohol would be present in blood drawn 20 hours or longer after the last consumption. Perhaps. But, probable cause does not deal with hard certainties; it "merely requires that the facts available to the officer would warrant a man of reasonable caution in the belief' that certain items may be useful as evidence of a crime."[46]

As such, if the magistrate considered the low end of the range—or a dissipation rate of .01% per hour—the magistrate could have concluded that alcohol in the Defendant's blood may have dissipated some .20% between the collision and midnight.[47] This means that, for probable cause to exist to believe the blood sample contained evidence of intoxication when taken 20

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[42] *See State v. Wells*, No. M2013-01145-CCA-R9-CD, 2014 WL 4977356, at *19 (Tenn. Crim. App. Oct. 6, 2014).

[43] *See Crider v. State*, 352 S.W.3d 704, 708 (Tex. Crim. App. 2011).

[44] *See State v. King*, No. M2008-01251-CCA-R3-CD, 2010 WL 1425580, at *5 (Tenn. Crim. App. Apr. 9, 2010) ("On cross-examination, [TBI Special Agent Little] explained that, after a person stops ingesting alcohol, his BAC level dissipates at a rate of between .01 and .02 per hour."); *State v. Jordan*, No. 01C01-9311-CC-00419, 1995 WL 353524, at *2 (Tenn. Crim. App. June 13, 1995) ("Agent Harrison testified that as the body begins to metabolize alcohol, the blood alcohol level generally decreases .01 to .02 percent per hour after the last drink.").

[45] *See Missouri v. McNeely*, 569 U.S. 141, 169 (2013) (Roberts, C.J., concurring) (citing Stripp, *Forensic and Clinical Issues in Alcohol Analysis, in Forensic Chemistry Handbook*, at 440 (L. Kobilinsky ed. 2012)).

[46] *See Texas v. Brown*, 460 U.S. 730, 742 (1983) (cleaned up); *State v. Hawkins*, 706 S.W.2d 93, 95 (Tenn. Crim. App. 1985) (same).

[47] Of course, the dissipation rate could actually have been greater than .01%, but it is also possible that the blood draw was actually taken before midnight. For the analysis of this important question, the Court assumes that the Defendant's blood sample was taken at 11:59 p m. on January 12, 2020—or the very last moment that the sample could have been taken on the correct day identified in the affidavit. The question here is not what *actually* occurred in fact, but simply whether probable cause exists to believe that the sample would have some evidence of blood alcohol.

hours later, the affidavit should contain facts showing that the Defendant was so intoxicated that it is unlikely that any blood alcohol concentration would have been completely dissipated by the time of the draw.

The affidavit does so here. The affidavit alleges that, prior to the collision, the Defendant was driving in the wrong lane of a separated interstate highway around 3:30 in the morning. The magistrate could have reasonably inferred that the Defendant must have entered the interstate by driving the wrong way on an interstate exit ramp. The affidavit further alleges that the Defendant drove some three miles, again in the wrong direction on an interstate. Given that the collision occurred on the interstate itself, the magistrate could have inferred either that (i) the Defendant did not notice the issue over the course of those three miles before colliding with oncoming traffic; or (ii) the Defendant did not take any corrective action despite being aware of the extreme danger he posed to himself and others.

The nature of the collision can also be inferred from the way that the affidavit describes the crime scene. As a result of the collision, the rear of the Defendant's vehicle came to rest *on* the wall dividing east- and west-bound interstate traffic. The Defendant's Trailblazer was so damaged that he had to be extracted from the vehicle. Ms. Vaught was killed, and her car was also so heavily damaged that her body had to be extracted from her car. From these facts, the magistrate could reasonably infer that the Defendant collided directly with Ms. Vaught without taking evasive action. Or, in other words, the Defendant did not appreciate, or did not have the capacity to appreciate, the nature of the extreme danger present and to take reasonable steps to avoid it.

The affidavit further alleges that the Defendant smelled of alcohol and had other positive indications of impairment. The extreme and reckless nature of the conduct and the violence of the impact was such that the magistrate had reasonable cause exists to believe that the Defendant was not just intoxicated, but was heavily intoxicated at the time of the collision. As such, even if the blood was not drawn until the very last minute before midnight on January 20, 2020, the magistrate still had a substantial basis to believe that the blood sample would contain at least some evidence of alcohol intoxication.[48]

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[48] Unfortunately, blood-alcohol concentrations of more than .20% or greater are not particularly unusual in these types of cases, even in the comparatively few cases that are appealed. *See, e.g.*, *State v. Downey*, No. 03C01-9103-CR-00095, 1992 WL 1404, at *1 (Tenn. Crim. App. Jan. 8, 1992) (affirming vehicular assault conviction, in part, "when the appellant, driving on the wrong side of the road, ran head on into the victim's car. The appellant's blood alcohol level was .36%."); *State v. Millican*, No. M2000-02298-CCA-R3-CD, 2002 WL 125695, at *3 (Tenn. Crim. App. Jan. 31, 2002) (affirming conviction for aggravated vehicular homicide, in part, when "[b]lood tests indicated the defendant had a blood alcohol level of .34%"); *State v. Daverson*, No. E2003-00596-CCA-R3-CD, 2003 WL 23094598, at *1 (Tenn. Crim. App. Dec. 30, 2003) (affirming conviction for DUI, in part, when "[t]he defendant agreed to take a blood alcohol test, which showed his blood alcohol level to be .31 percent"); *State v. Blackburn*, No. M1999-00295-CCA-R3-CD, 2000 WL 1130158, at *3 (Tenn. Crim. App. July 25, 2000) (affirming conviction for DUI, in part, when "the Defendant's blood had an alcohol concentration of .31 grams percent ethyl alcohol"); *State v. Bellamy*, No. E2003-02936-CCA-R3-CD, 2004 WL 1936384, at *4 (Tenn. Crim. App. Aug. 31, 2004) (affirming denial of alternative sentence for DUI involving a crash, among other convictions, stating that "[a]t the time of the accident, the appellant was driving on a revoked license and had a .30 blood alcohol level."); *State v. Watson*, No. 01C01-9707-CC-00279, 1998 WL 485508, at *1 (Tenn. Crim. App. Aug. 18, 1998)

The procedural posture in which this question is presented is important. This Court is not making a probable cause finding in the first instance, but it is reviewing the validity of a warrant issued by another magistrate. Our Supreme Court has made clear that a finding of probable cause made by the issuing magistrate is entitled to "great deference."[49] As such, a court reviewing the issuance of a search warrant should determine "whether, in light of all the evidence available, the magistrate had a substantial basis for finding probable cause"[50] or had "a substantial basis for concluding that a search warrant would uncover evidence of wrongdoing."[51]

(affirming conviction for DUI when, in part, the defendant's "blood alcohol content level was .30 percent"); *State v. Wilder*, No. 01C01-9204-CC-00125, 1994 WL 88932, at *1 (Tenn. Crim. App. Mar. 10, 1994) (affirming denial of alternative sentence in DUI case, in part, when "a breath test showed his blood alcohol level to be .30"); *State v. Humphreys*, 70 S.W.3d 752, 757 (Tenn. Crim. App. 2001) (affirming conviction for DUI, in part, where "[l]aboratory testing established that the Appellant's blood sample contained an ethyl alcohol level of .28 percent."); *State v. Brooks*, 277 S.W.3d 407, 410 (Tenn. Crim. App. 2008) (affirming conviction for DUI, in part, where "the result of the Appellant's breath alcohol test was .27%"); *State v. Bryant*, No. W2004-01245-CCA-R3-CD, 2005 WL 756252, at *1 (Tenn. Crim. App. Apr. 1, 2005) (affirming convictions for vehicular homicide and vehicular assault, in part, when "the defendant, whose blood-alcohol content was .27 percent, collided her car into a pair of motorcycles being ridden by the four victims."); *State v. Davis*, E2001-01432-CCA-R3-CD, 2002 WL 1760210, at *1 (Tenn. Crim. App. July 31, 2002) (affirming conviction for DUI, in part, when "[t]he defendant agreed to submit to a breathalyser test, which indicated a blood alcohol content of .27%."); *State v. Graves*, No. E2012-01160-CCA-R3-CD, 2013 WL 3875263, at *1 (Tenn. Crim. App. July 25, 2013) (affirming conviction for DUI, in part, where "according to the TBI report admitted into evidence, was that the Defendant had a blood alcohol level of .26%"); *State v. Tipton*, No. E2012-00038-CCA-R3-CD, 2013 WL 1619430, at *14 (Tenn. Crim. App. Apr. 13, 2013) (affirming denial of motion to withdraw guilty plea to DUI charge, noting that the defendant "had a blood alcohol content of .26 percent at the time of his arrest."); *State v. Bennington*, No. 03C01-9604-CC-00158, 1997 WL 135405, at *1 (Tenn. Crim. App. Mar. 25, 1997) (affirming conviction for DUI, in part, when the "appellant's blood alcohol level was .26%"); *State v. Goldston*, 29 S.W.3d 537, 539 (Tenn. Crim. App. 1999) (affirming conviction for driving under the influence, and stating that while "the results of the drug screen were negative, the blood alcohol tests indicated that the Defendant had a blood alcohol content of .25 percent at approximately 2:30 a m., when the tests were administered.").

Given the facts identified in the affidavit as to the nature of the collision and the circumstances leading to it, the magistrate here could have reasonably, if not easily, inferred that the Defendant was heavily intoxicated at the time. The magistrate certainly need not have discounted or rejected the likelihood that the Defendant's blood alcohol concentration was significant (and above .20%) at the time of the collision, even if other cases cited by the Defendant would not so hold by assuming greater dissipation rates. *See Crider v. State*, 352 S.W.3d 704, 708 (Tex. Crim. App. 2011) (noting that, with the passage of time, the defendant's initial blood-alcohol content must have been 0.48 or "six times the legal limit and nearly lethal").

[49] *See State v. Saine*, 297 S.W.3d 199, 207 (Tenn. 2009) ("The probable cause determination of a neutral and detached magistrate is 'entitled to "great deference" by a reviewing court.'"); *see also State v. Tuttle*, 515 S.W.3d 282, 300 (Tenn. 2017) ("Reviewing courts afford "great deference" to a magistrate's determination that probable cause exists.").

[50] *See State v. Siliski*, 238 S.W.3d 338, 365 (Tenn. Crim. App. 2007); *State v. Meeks*, 876 S.W.2d 121, 124 (Tenn. Crim. App. 1993).

[51] *See State v. Ferguson*, No. W2017-00113-CCA-R3-CD, 2018 WL 1091805, at *5 (Tenn. Crim. App. Feb. 26, 2018) ("In examining the affidavit, this court's standard of review is limited to whether the issuing magistrate had a substantial basis for concluding that a search warrant would uncover evidence of wrongdoing." (cleaned up and citing *State v. Tuttle*, 515 S.W.3d 282, 299 (Tenn. 2017))); *State v. Jones*, No. M2017-00577-CCA-R3-CD, 2018 WL 1512063, at *4 (Tenn. Crim. App. Mar. 27, 2018) ("Therefore, the standard to be employed in reviewing the issuance of a search warrant is whether, in light of all the evidence available, the magistrate had a

Giving "great deference" to the magistrate's determination of probable cause as required by law, the Court finds that the magistrate had a substantial basis for concluding that the blood sample taken on January 12, 2020, would contain at least some evidence of intoxication. Accordingly, the Court finds that, with the corrected clerical error, the facts set forth in the affidavit establish probable cause to believe that evidence of a crime would be located in the place sought to be searched.

The Court finds that the State has introduced sufficient evidence to satisfy this third factor.

4. Prejudice to the Defendant from the Clerical Error

Finally, the last factor looks to the possible prejudice that a defendant may suffer as a result of the clerical error. In this case, the Court finds that the Defendant has not suffered any prejudice as a result of the clerical error in Officer Johnson's affidavit.

The clerical error was not repeated in the text of the warrant itself. Consequently, no evidence belonging to the Defendant was seized or tested that was not the subject of the warrant or the probable cause statement. Moreover, because only one blood sample actually existed, no possibility existed of a different sample belonging to the Defendant being improperly seized. Indeed, with the clerical error corrected, the warrant describes with particularity the correct evidence to be seized.

The Court finds that the State has introduced sufficient evidence to satisfy this final factor.

CONCLUSION

For the foregoing reasons, the Court respectfully denies the motion to suppress. Based on the developments in the law from the Supreme Court and Court of Criminal Appeals, the exclusionary rule cannot be applied when the affidavit supporting a warrant had a clear typographical error that, when corrected, did not affect the probable cause determination or prejudice the Defendant.

The Court is sensitive to any holding that could appear to reduce Fourth Amendment protections.[52] The role of this Court, properly conceived, is not one of "law development." Rather, among the Court's chief duties are to apply the law faithfully as it finds it; to guard the constitutional liberties of the people; and "to abide the orders, decrees and precedents of higher

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substantial basis for finding probable cause." (cleaned up and quoting *State v. Meeks*, 876 S.W.2d 121, 124 (Tenn. Crim. App. 1993))).

[52] *See State v. Huskey*, 177 S.W.3d 868, 890 (Tenn. Crim. App. 2005) (concluding that "adopting a good faith exception under the Tennessee Constitution would unduly reduce the protections contemplated for our citizens by the Tennessee Constitution, the legislature, and the Tennessee Supreme Court.").

courts."[53] To that end, the Court wishes to emphasize the limited nature of its holding and to acknowledge what this case *does not* involve:

- This case does not involve intentional or reckless efforts by an officer to mislead the magistrate into issuing a warrant that should not have been issued.
- This case does not involve an officer who has made reckless misstatements to the magistrate to ensure the issuance of a warrant.
- This case does not involve any question as to whether the January 15, 2020 date is a clerical error.
- This case does not involve a systemic or repeated error, and the lone clerical error relates to a single digit in a single place in the affidavit.
- This case does not involve an error that is hidden from notice on the face of the affidavit such that the State could later seek revision of various "facts" under a claim of mistake.
- This case does not involve the warrant itself being infected with a material error, and the warrant itself describes with particularity the correct evidence to be seized.
- This case does not involve a seizure of evidence belonging to a third party or of evidence related to the Defendant himself as to which no probable cause actually exists.

A change in any of these essential facts could very well result in a different legal conclusion being reached.

Ultimately, though, the Court believes that the application of the exclusionary rule here would be contrary to the holdings of the Court of Criminal Appeals in *Teague* and *Szabo*. It would also be contrary to the Supreme Court's view of how the exclusionary rule operates in Tennessee, as that view had been articulated in *McElrath* and other cases since 2016. Accordingly, being bound by the law as declared by the higher courts, and under the circumstances of this particular case, the Court holds that suppression of evidence is not required

[53] *See Barger v. Brock*, 535 S.W.2d 337, 341 (Tenn. 1976); *see also State v. Irick*, 906 S.W.2d 440, 443 (Tenn. 1995) ("Moreover, it is a controlling principle that inferior courts must abide the orders, decrees and precedents of higher courts. The slightest deviation from this rigid rule would disrupt and destroy the sanctity of the judicial process. There would be no finality or stability in the law and the court system would be chaotic in its operation and unstable and inconsistent in its decisions." (cleaned up and quoting *Barger v. Brock*, 535 S.W.2d 337, 341 (Tenn. 1976))); *see also State v. Miller*, No. W2019-00197-CCA-R3-DD, 2020 WL 5626227, at *20 (Tenn. Crim. App. Sept. 18, 2020) ("We decline to [reconsider the constitutionality of the death penalty] because 'we, as an intermediate appellate court, are bound by the decisions of the Tennessee Supreme Court as to state and federal constitutional questions, and the United States Supreme Court as the ultimate authority as to federal constitutional questions.'" (quoting *State v. Pendergrass*, 13 S.W.3d 389, 397 (Tenn. Crim. App. 1999))).

by the federal or state constitutions. The Defendant's motion to suppress, therefore, is respectfully denied.

With this opinion, the Court believes that all pretrial motions are now resolved. Accordingly, the Court sets **January 19, 2022,** as the plea notice date ("**Notice Date**") in the case. Pursuant to Tenn. R. Crim. P. 11(c)(3), the Court will consider a negotiated resolution to this matter if the parties notify the Court that the parties have reached a definitive plea agreement on or before the Notice Date. [54] If the parties decide not to submit notice of a negotiated plea agreement by the Notice Date, the Court would expect to set the case for trial at that time.

Of course, the Court will still consider resolution by plea after the Notice Date. However, unless the interests of justice otherwise require, the Court will thereafter only accept a plea of guilty (or no contest) to the charges contained in the indictment(s), with sentencing to be determined by the Court.[55]

It is so ordered.

Enter:

[54] If the parties wish to submit to the Court a negotiated plea agreement for consideration *before* the Notice Date, the parties need only to contact the Court informally to set the case on the docket for resolution.

[55] *See, e.g.*, *State v. Hawkins*, 519 S.W.3d 1, 39 (Tenn. 2017) (recognizing that Rule 11(c) "indicates that the preferred practice and the ordinary practice requires the parties to advise the trial court of a plea agreement, stating that, '[e]xcept for good cause shown, the parties *shall notify* the court of a plea agreement at the arraignment or at such other time *before trial* as the court orders.'" (emphasis in original)); *Lindsey v. State*, No. M2019-00287-CCA-R3-PC, 2020 WL 5581753, at *6 (Tenn. Crim. App. Sept. 18, 2020) (recognizing that the trial court may decline to accept a plea after a plea deadline and citing Tenn. R. Crim. P. 11, Advisory Comm'n Cmt. (providing that a trial court may "impose reasonable pretrial time limits on the court's consideration of plea agreements, a practice will which allow maximum efficiency in the docketing of cases proceeding to trial on pleas of not guilty")); *Pye v. State*, No. M2011-01633-CCA-R3-PC, 2012 WL 6738392, at *7 (Tenn. Crim. App. Dec. 28, 2012) (recognizing that "a trial court does not abuse its discretion by setting a deadline for entering into a negotiated plea"); *State v. Murphy*, No. W2011-00744-CCA-R3-CD, 2012 WL 1656735, at *4 (Tenn. Crim. App. May 9, 2012) ("Given the wide discretion afforded the trial court to reject a plea agreement and the fact that the defendant has no entitlement to a specific plea agreement, we cannot say that the trial court abused its discretion by rejecting the agreement in this case on the basis of its coming after the plea deadline."); *see also State v. Hamby*, No. M2014-00839-CCA-R3-CD, 2015 WL 3862688, at *5 (Tenn. Crim. App. May 28, 2015), *perm. app. denied*, Aug. 13, 2015 (affirming rejection of plea agreement submitted after the deadline for acceptance of negotiated dispositions, and recognizing that "a defendant does not have an absolute right to have the trial court accept a guilty plea" and that the "final decision whether to accept or reject a negotiated guilty plea rests solely with the trial court"); *McGill v. State*, No. W2006-00499-CCA-R3-PC, 2007 WL 1515148, at *4 (Tenn. Crim. App. May 23, 2007) ("This procedure [of setting plea agreement deadlines] is entirely consistent with the provisions of Tenn. R. Crim. P. 11 and the trial court's authority to control the orderly process of the case and the court's docket.").

Filed Electronically by the Second Division on ***Thursday, November 11, 2021***

IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE

STATE OF TENNESSEE,	)	
	)	
Plaintiff,	)	SECOND DIVISION
	)	
vs.	)	
	)	NO(s). 308042
JAMES DURAND FAVORS III,	)	
	)	
Defendant.	)	

SENTENCING ORDER AND FINDINGS OF FACT

This cause came before the Court upon sentencing of the Defendant in the above case. On July 2, 2019, the Defendant entered a plea of guilty to four counts of aggravated domestic assault with the appropriate sentence to be determined by the Court.

The Court has held the sentencing hearing over the course of several hearing dates. The sentencing process has been further delayed in the attempt to locate a witness, Ms. Erica Thornton, for additional examination, as well as by issues related to the COVID-19 pandemic. Rather than convene an in-person proceeding to announce the sentence,[1] the Court has taken the opportunity to memorialize its findings of fact and conclusions of law in this written memorandum.

[1] Currently, "in person" court proceedings are curtailed in light of the Supreme Court's order in *In Re: COVID-19 Pandemic*, No. ADM2020-00428 (Tenn. May 26, 2020) (Order Extending State Of Emergency And Easing Suspension Of In-Person Court Proceedings). Although the Criminal Court has been approved to conduct certain in-person proceedings, the Supreme Court has been clear that in-person proceedings should be the exception rather than the rule:

> Courts should continue to conduct as much business as possible by means other than in-person court proceedings. Courts are encouraged to continue and even increase the use of telephone, teleconferencing, email, video conferencing or other means that do not involve in-person contact. All of these methods should be the preferred option over in-person court proceedings.

See id. at 2, ¶ 2. To that end, and in compliance with the Supreme Court's May 26, 2000 Order, the Court and the parties have addressed the matter "by utilizing the use of telephone, teleconferencing, email, video conferencing or other means that do not involve in-person contact." *See id.*

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I. NATURE OF CONVICTION OFFENSES

On July 2, 2019, the Defendant entered into a plea agreement whereby he agreed to plead guilty to the following offenses:

Count No. 1: **Offense Date:** March 3, 2017

Conviction Date: July 2, 2019

Conviction Offense: Aggravated Domestic Assault, Tenn. Code Ann. § 39-13-102

Count No. 2: **Offense Date:** March 3, 2017

Conviction Date: July 2, 2019

Conviction Offense: Aggravated Domestic Assault, Tenn. Code Ann. § 39-13-102

Count No. 3: **Offense Date:** March 3, 2017

Conviction Date: July 2, 2019

Conviction Offense: Aggravated Domestic Assault, Tenn. Code Ann. § 39-13-102

Count No. 4: **Offense Date:** March 3, 2017

Conviction Date: July 2, 2019

Conviction Offense: Aggravated Domestic Assault, Tenn. Code Ann. § 39-13-102

II. FACTUAL BACKGROUND

A brief overview of the factual basis for the pleas was announced by the State at the plea hearing.

> Had the State gone to trial the State would have put on proof to show that on or about April 26th of 2017 police were summoned to 5705 Uptain Road where they met a Ms. Jamiia Robinson, Judge. She would have been a witness in this matter. She would have testified that in April of 2017 she was involved in a domestic relationship with the defendant, James Favors; that their relationship was an intimate one and basically they were domestic partners and I believe at one point cohabitated together.

Ms. Robinson would have testified that on or before March the 3rd of 2017, while cohabitating with the defendant, that they had gotten into a discussion that turned violent with the defendant making accusations against her that ultimately led to her [sic] choking her, punching her, and choking her to the point of becoming almost unconscious.

The State would have offered pictures of the victim's face to corroborate these injuries and believe the pictures also would have depicted what's commonly know[n] as petechia[e] in her eyes where the red blood vessels begin to rupture in the eyes from choking. We would have offered medical testimony to show those injuries are consistent with one being choked. It would support one count of the domestic aggravated assault.

Ms. Robinson would have gone on to testify that after that incident they went back to the defendant's residence located on Gadd Road whereby she would have testified over the next several days she suffered at the hands of his violence. She would have testified that the defendant took a metal insert off the top of a stovetop that was hot and applied it to her arm against her wishes and left her with serious scarring and burning on her arm. The State would have introduced pictures of her arm to corroborate the injuries. The State would have introduced medical records. The State would have introduced testimony from a medical professional that would have corroborated her testimony.

In another count, the State would have offered evidence to show that the defendant heated up a butter knife and, while hot, applied that butter knife to her buttocks leaving permanent scarring, significant scarring to her buttocks. The State would have introduced photographic evidence of that. The State would have introduced medical records to corroborate the victim's testimony, and the State would have introduced medical professional testimony that again would have corroborated the burn marks, the serious burn marks to her buttocks.

In the last count, the State would have offered evidence from Ms. Robinson that the defendant on a separate occasion over those days and before, on or before March the 3rd, 2017, heated up a butter knife and took that butter knife and placed it on her labia, on her privates, causing second-degree burns to her genitals. The State would have offered medical records and medical professional testimony that would have corroborated the victim's testimony as to that injury and all of those injuries. She was seen by two different medical providers. I believe the records we'd introduce from both those providers and all the records would have corroborated the victim's testimony in this matter.

III. SENTENCING CONSIDERATIONS AND PRINCIPLES

In determining the appropriate sentence in this case, and pursuant to Tennessee Code Annotated sections 40-35-210 and 40-38-202, this Court has considered the following evidence:

- the evidence and exhibits presented at the plea hearing and the sentencing hearing, as well as the recorded testimony offered by witness Erica Thornton at the preliminary hearing of this case;[2]
- the presentence investigation report;
- the result of the validated risk and needs assessment conducted by the Department and contained in the presentence investigation report;
- any statistical information provided by the Administrative Office of the Courts as to sentencing practices for similar offenses in Tennessee and located at https://www.tncourts.gov/administration/judicial-resources/criminal-sentencing-statistics (latest release March 2020);
- the evidence and information offered by the parties on the mitigating and enhancement factors;
- the statements the Defendant made both in allocution and in the presentence investigation report; and
- the statements made by the victim, Ms. Robinson, offered at the sentencing hearing.

The Court has also considered the following principles:

- the principles of sentencing, including imposing punishment to prevent crime and promote respect for the law by:
    - Providing an effective general deterrent to those likely to violate the criminal laws of this state;
    - Restraining defendants with a lengthy history of criminal conduct;
    - Encouraging restitution to victims where appropriate;

[2] This testimony was offered by the parties for the Court to consider after the Court was unable, after multiple attempts, to have Ms. Thornton served with process.

- Encouraging effective rehabilitation of those defendants, where reasonably feasible, by promoting the use of alternative sentencing and correctional programs that elicit voluntary cooperation of defendants; and

- Considering available community-based alternatives to confinement and the benefits that imposing such alternatives may provide to the community when the offense is nonviolent and the defendant is the primary caregiver of a dependent child,

- the nature and characteristics of the criminal conduct involved; and

- the arguments made relating to various sentencing alternatives, including the Defendant's potential for rehabilitation or treatment.

From all of which, the Court hereby finds as follows:

IV. DETERMINATION OF SENTENCING RANGE

The first step in the sentencing process is to identify the appropriate sentencing range. As our Court of Criminal Appeals has recognized, "Code sections 40-35-105 to -112 provide for offender classification, offense classification, authorized terms of imprisonment, and sentence range, respectively. These have been described as the 'essential variables in the mathematical equation' that [are] used to determine a defendant's sentence."[3]

Insofar as the Offense Classification is concerned, each of the conviction offenses is a Class C Felony offense. The overall range of punishment for a Class C Felony Offense is not less than three (3) years and no more than fifteen (15) years.[4]

Insofar as the Offender Classification is concerned, "a defendant's offender classification is based on the defendant's prior convictions."[5] As to the Offender Classification, the Court finds the Defendant to be a Range I, Standard Offender for each of the conviction offenses.[6]

As such, based upon the Offense Classification, as well as the appropriate Offender Classification, the sentencing range for each conviction offense is not less than three (3) years and no more than six (6) years.[7]

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[3] *See State v. Menke*, 590 S.W.3d 455, 463 (Tenn. 2019) (quoting *State v. Crosland*, No. M2017-01232-CCA-R3-CD, 2018 WL 3092903, at *4 (Tenn. Crim. App. June 21, 2018) (Easter, J., dissenting)).

[4] *See* Tenn. Code Ann. § 40-35-111(b)(3).

[5] *See State v. Menke*, 590 S.W.3d 455, 463 (Tenn. 2019).

[6] *See* Tenn. Code Ann. § 40-35-105.

[7] *See* Tenn. Code Ann. § 40-35-112(a)(3).

V. CONSIDERATION OF MITIGATING AND ENHANCEMENT FACTORS

The next step in the sentencing process is to determine the length of the sentence within the applicable sentencing range. In part, these considerations are informed by the presence of mitigating and enhancement factors. Although the trial court should consider enhancement and mitigating factors, the statutory enhancement and mitigating factors are advisory only.[8] In other words, "the trial court is free to select any sentence within the applicable range so long as the length of the sentence is 'consistent with the purposes and principles of [the Sentencing Reform Act].'"[9]

Nevertheless, the mitigating and enhancing factors are important to the determination of the overall sentence. To that end, the Court has considered the following mitigating and enhancement factors:

A. CONSIDERATION OF MITIGATING FACTORS, TENN. CODE ANN. § 40-35-113

The Court first considers whether, considering all of the facts and circumstances and the victim impact statement as required by Tennessee Code Annotated section 40-38-207,[10] any mitigating factors apply. The Defendant argues that factors (3), (8), (11), and (13) apply.

1. Factor No. (3)

Mitigating Factor No. (3) provides that a mitigating circumstance that "[s]ubstantial grounds exist tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense." The Defendant argues that this factor applies because the incident was largely the result of a ritual or "mutual branding" exercise.

As an initial matter, the Court respectfully does not credit the Defendant's version of the events that occurred. According to the Defendant, the events occurring at his house over the course of several days were consensual and involved mutual infliction of branding, apparently to

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[8] *See State v. Bise*, 380 S.W.3d at 699 n.33, 704 (Tenn. 2012) ("[T]he 2005 amendments rendered advisory the manner in which the trial court selects a sentence within the appropriate range, allowing the trial court to be guided by—but not bound by—any applicable enhancement or mitigating factors when adjusting the length of a sentence."); *State v. Hatmaker*, No. E2017-01370-CCA-R3-CD, 2018 WL 2938395, at *9 (Tenn. Crim. App. June 8, 2018) ("Like enhancement factors, mitigating factors are merely advisory." (citing Tenn. Code Ann. § 40-35-210(c)(2); *Bise*, 380 S.W. 3d at 707)); *State v. Carter*, No. M2018-01329-CCA-R3-CD, 2019 WL 3856583, at *11 (Tenn. Crim. App. Aug. 16, 2019) ("Mitigating factors are advisory only, and the weight given to those factors is entirely within the trial court's discretion." (citing Tenn. Code Ann. § 40-35-210(c)(2) (2017))).

[9] *See State v. Carter*, 254 S.W.3d 335, 343 (Tenn. 2008).

[10] *See State v. Ring*, 56 S.W.3d 577, 583 (Tenn. Crim. App. 2001) ("Whenever victim impact information contains relevant and reliable evidence relating to enhancing or mitigating factors and/or any other sentencing consideration, the trial court should consider it and determine what weight, if any, should be given to that evidence.").

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symbolize mutual love. At various points, the Defendant argues that Ms. Robinson consented to the Defendant's actions and, perhaps, even enjoyed the violence visited upon her.

For her part, Ms. Robinson testified at the sentencing hearing that the events were the result of the Defendant's jealousy sparked by his belief that she had been unfaithful to him. She testified that the abuse that she suffered was related to an attempt to either punish her for the infidelity, which she denied, or to extract a confession from her.

Admittedly, the facts are not entirely consistent with either version of the events, and particularly with respect to some of the original charges brought in the case, there may be difficulty in arriving at a particular conclusion beyond a reasonable doubt. Indeed, both accounts leave several unexplained inconsistencies that would be relevant to the crimes that were initially charged.

The Court has now observed Ms. Robinson testify twice in open court. As to the acts alleged in the Information, she was firm in her testimony, and she answered questions candidly, even when the testimony included points favoring the Defendant's narrative. The testimony concerning her injuries were corroborated by other evidence, including photographs and medical records.[11] Where the testimony by Ms. Robinson and others raised questions about what occurred—or where the Court would like to have heard additional information—the testimony related to alleged acts other than those that were the subject of the plea.[12]

This last point is significant. The issues before the Court involve the specific harmful acts of aggravated assault committed by the Defendant, and while the overall context of these events is certainly important for sentencing purposes, no dispute exists that these acts occurred. In fact, the only material dispute as to these acts appears to be the motive for the Defendant's actions. The Defendant's arguments are not consistent with why he choked Ms. Robinson to the point of near unconsciousness or why he repeatedly inflicted cuts and wounds all over her body.

In this regard, the preponderance of the evidence plainly weighs on the events as described by Ms. Robinson, and the Court credits her testimony in this regard over the contrary narrative offered by the Defendant. To that end, the Court disagrees that Factor (3) applies to the conduct that is the subject of Count 1, which involved the Defendant choking Ms. Robinson to the point of near unconsciousness. No evidence in the record supports a finding that the choking of Ms. Robinson almost to the point of unconsciousness was consensual or related to a mutual declaration of love.

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[11] *See* Exhibit 13, Medical Records, at pages 34-44.

[12] Moreover, at least some testimony was inconsistent with the Defendant's own version of events as expressed in his statements to the Court and to the presentence investigator. For example, the Defendant's mother, Ms. Sise, expressed disbelief that, due to the "tight quarters" of the residence, she would not have heard the victim screaming in pain. Yet, on the other hand, and despite the severe burns to the victim, Ms. Sise also testified that she noticed nothing unusual about the victim. More importantly, she claimed to have no knowledge at all about the Defendant's own confessed methamphetamine use or the presence of methamphetamine in her house. The Court does not believe that Ms. Sise was purposefully deceitful. But, given that she was also frequently away from the premises, she may not have been in a position to be fully informed about what the Defendant himself admitted had occurred in her house.

Moreover, even if this factor could apply as a technical matter to the remaining counts on the theory offered by the Defendant, the horrific nature of the injuries described in Counts, 2, 3, and 4, in particular, are such that the conduct cannot be excused. The Court of Criminal Appeals has recognized that where the harm inflicted goes beyond what reasonably may be justifiable, this factor does not apply.[13] The excessive nature of the cuts that are the subject of Count 2;[14] the significance of the burn to the buttocks in Count 3; and the shocking and barbaric injuries supporting Count 4 are so far beyond any excuse or justification so as to remove the Defendant's conduct from the scope of Factor 3.

The Court respectfully finds that Mitigating Factor (3) does not apply to any of the four counts.

2. Factor No. (8)

Mitigating Factor (8) provides as a mitigating circumstance that "[t]he defendant was suffering from a mental or physical condition that significantly reduced the defendant's culpability for the offense; however, the voluntary use of intoxicants does not fall within the purview of this factor." As proof supporting this factor, the Defendant principally alleges that he was under the influence of methamphetamine during the time of the events. Indeed, he described the condition as a "meth-induced psychosis" in both the allocation and in the presentence investigation report.

Of course, the language of the enhancement factor itself removes this factor from consideration here, as the voluntary use of methamphetamine, even if the result of addiction, would not mitigate the sentence in this case.[15] Moreover, the Defendant has not introduced any

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[13] *See State v. Makuach*, No. M1999-01399-CCA-R3-CD, 2000 WL 711149, at *3 (Tenn. Crim. App. June 2, 2000) ("The trial court found that the defendant's actions went far beyond that which might reasonably be deemed justifiable. The trial court stated that in making this determination it relied heavily on the medical examiner's testimony. At trial the medical examiner testified that the victim was subjected to at least twenty to twenty-four blunt force blows. He stated that all but one of the victim's ribs were fractured as well as the victim's larynx. The autopsy revealed tears and bruises on the victim's heart, lungs, spleen and liver. In addition the victim had multiple external lacerations and contusions. We conclude the trial court did not err in refusing to apply this mitigating factor.").

[14] *See* Exhibit 12, Compact Disc of Photographs.

[15] *See State v. Black*, 924 S.W.2d 912, 917 (Tenn.Crim.App.1995) ("We find that Tennessee Code Annotated Section 40-35-113(8), the mitigating factor concerning the appellant's mental or physical condition, does not apply. The appellant asserts that his drug addiction is a physical or mental condition as contemplated by the statute which reduces his culpability, but the statute specifically provides that voluntary use of intoxicants is not included in this mitigating factor."); *State v. Shirer*, No. M2015-01486-CCA-R3-CD, 2016 WL 6407480, at *6 (Tenn. Crim. App. Oct. 31, 2016) ("As to the appellant's claim that she was entitled to mitigation because her addiction to painkillers caused her to commit the crimes, mitigating factor (8) provides that '[t]he defendant was suffering from a mental or physical condition that significantly reduced the defendant's culpability for the offense.' However, the factor also specifies that 'the voluntary use of intoxicants does not fall within the purview of this factor.' Moreover, this court has concluded that a defendant is not entitled to mitigation for the defendant's drug addiction when the defendant committed numerous crimes over an extended period of time without seeking treatment for the addiction. Therefore, the appellant was not entitled to mitigation of her sentences based upon her claim that her addiction caused her to commit the offenses." (citations omitted)); *State v. High*, 02C01-9312-CR-

medical proof, which may be required under this factor, to establish a causal link between the methamphetamine use and the conduct at issue.[16]

The Court respectfully finds that Mitigating Factor (8) does not apply to any of the four counts.

3. Factor No. (11)

Mitigating Factor (11) provides as a mitigating circumstance that "[t]he defendant, although guilty of the crime, committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated the criminal conduct." As to the application of this factor, the Defendant principally argues that Ms. Robinson consented to, or actually enjoyed, the violence committed against her.

The Court respectfully rejects the argument that Ms. Robinson consented to the assaults against her for the reasons given above. Moreover, Factor No. (11) is typically not present when the criminal activity is planned, and hence could be avoided;[17] or when the defendant had time to think about and reflect several times, and could have stopped his criminal conduct.[18]

In the context of this case, the Defendant's assaults upon Ms. Robinson were not the result of one-time conduct, but were part of an on-going criminal episode showing a sustained criminal intent. Some of the criminal conduct itself was prolonged, such as the asphyxiation of Ms. Robinson to the point of near unconsciousness as alleged in Count 1. Other conduct was repeated, such as the cutting of Ms. Robinson as alleged in Count 2. Still other conduct, such as

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00275, 1994 WL 553782, at *6 (Tenn. Crim. App. Oct. 12, 1994) ("In review of mitigating factor number eight, Tenn. Code Ann. § 40-35-113(8) expressly exempts the voluntary use of intoxicants to establish reduced culpability. Intoxication relating to culpability is defined by Tenn. Code Ann. § 39-11-503(d)(1) 'as a disturbance of mental or physical capacity resulting from introduction of *any* substance into the body.' This definition obviously encompasses both drugs and alcohol. Mitigating factor number eight is therefore inapplicable." (emphasis in original)).

[16] *See State v. Roush*, No. E20020-0313-CCA-R3-CD, 2003 WL 354465, at *4 (Tenn. Crim. App. Feb. 18, 2003) ("The Appellant introduced no medical proof which established a resulting cognitive disorder or mental condition that would have reduced his culpability for the crime. Accordingly, we find that the trial court was correct in not applying mitigating factor (8)."); *see also State v. Webb*, No. W2015-01809-CCA-R3-CD, 2016 WL 4060650, * 5 (Tenn. Crim. App. July 27, 2016) (finding insufficient the testimony of a sister who testified that the defendant had a head injury that reduced his culpability).

[17] *See State v. Davis*, No. M2017-00596-CCA-R3-CD, 2018 WL 1319171, at *4 (Tenn. Crim. App. Mar. 14, 2018) (trial court refusing to apply factor (11) when "the Defendant's conduct was planned and could have been avoided."); *State v. Frost*, No. M2015-02283-CCA-R3-CD, slip op. at 15 (Tenn. Crim. App. June 14, 2017) (in the context of a kidnaping case, trial court refusing to apply factor where the defendant developed and executed a plan); *State v. Stone*, No. M2018-01519-CCA-R3-CD, 2020 WL 401857, at *4 (Tenn. Crim. App. Jan. 24, 2020) (noting that the "Defendant drove to the victim's place of work, actually following the victim there and elicited a friend to come along and film the assault, which began as soon as Defendant arrived. This is a classic example of a 'sustained intent to violate the law.'").

[18] *See State v. Johnson*, No. 01C01-9510-CC-00334, 1997 WL 738582 (Tenn. Crim. App. Dec. 1, 1997).

the brutal burning and "branding" of Ms. Robinson in Counts 3 and 4, required forethought and planning to execute, and the Defendant had several opportunities to abandon the act and decline to proceed further.[19]

The Court respectfully finds that Mitigating Factor (11) does not apply to any of the four counts.

4. Factor No. (13)

Mitigating Factor (13) provides as a mitigating circumstance that the Court may consider "[a]ny other factor consistent with the purposes of this chapter." The principal argument offered in support of this factor is that the Defendant has accepted responsibility for the events, has apologized for his conduct. The Defendant also argues that the credibility of Ms. Robinson is so lacking that her testimony either cannot be credited or should give rise to consideration of residual doubt.

The Defendant has entered a plea of guilty to the charges identified in the Information, and in other contexts, the fact of a plea may be a mitigating circumstance.[20] In addition, where a defendant expresses sincere and genuine remorse, this mitigation factor will usually be present.[21] Similarly, where apologies are made to the victim or to the victim's family, weight may also be given to this factor.[22] However, our law also recognizes that the weight of this "acceptance" is

[19] For example, taking the conduct that is the subject of both Counts 3 and 4, the Defendant had to obtain the instrument or the knife; heat the stove top; place the knife on top of the stove; wait for the knife to be heated; prepare the scene to inflict the harm; and ultimately inflict grievous harm upon Ms. Robinson. At each point along this continuum, the Defendant had the opportunity to stop and reflect upon what he was doing. That the Defendant failed to do so on multiple occasions weighs in favor of finding that he had a sustained intention to violate the law.

[20] *See State v Utz*, No. M2016-01244-CCA-R3-CD, slip op. at 2 (Tenn. Crim. App. Jan. 27, 2017) (plea of guilty given some weight in sentencing as a measure of acceptance of responsibility).

[21] *See, e.g.*, *State v. Keener*, No. M2018-00730-CCA-R3-CD, 2019 WL 1873415, at *7 (Tenn. Crim. App. Apr. 26, 2019) ("Likewise, genuine remorse may be entitled to consideration" in sentencing (citing *State v. Williamson*, 919 S.W.2d 69, 83 (Tenn. Crim. App. 1995))).

[22] *See State v. Butler*, 900 S.W.2d 305, 314 (Tenn. Crim. App. 1994).

diminished if the defendant negotiates a plea that reduces his exposure to a lengthier sentence,[23] and where the defendant attempts to minimize his culpability further or to blame the victim.[24]

In this case, the Defendant's acceptance of responsibility, while present by virtue of his plea, is not entitled to significant weight. He has minimized his own responsibility by suggesting, on the one hand, that Ms. Robinson consented to his brutal conduct, and that, on the other, his actions were part of a "meth-induced psychosis."[25] Similarly, while the Court credits the Defendant's apology made during the allocution, the weight assigned to this factor is diminished for similar reasons.

Moreover, the Court finds the absence of other facts that typically weigh in favor of a mitigated sentence under this factor. For example, courts recognize that efforts to help the victim can be credited under this factor, whether that assistance is in the form of compensation for harm caused or by seeking medical assistance. In this case, however, the Defendant inflicted grievous wounds upon Ms. Robinson, but he took no action to see that she received any medical attention whatsoever. Also, although Ms. Robinson has incurred significant medical expenses due to the Defendant's actions, the record does not show that the Defendant has attempted to minimize this financial burden for her.

Notably, though, the Court does credit the Defendant's voluntary actions in returning to custody. Following the plea, the workhouse inadvertently released the Defendant pending sentencing, though it had no authority to do so. When the error was brought to his counsel's attention, the Defendant voluntarily surrendered, and he returned to custody. These actions show acceptance of responsibility in ways not manifested by other aspects of the case, and the Court accords these actions significant weight under this factor.

The Court finds that Mitigating Factor (13) applies to each of the four counts.

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[23] *See State v. Beasley*, No. M2017-00591-CCA-R3-CD, 2018 WL 4931471, at *7 (Tenn. Crim. App. Oct. 11, 2018) ("Additionally, we note that, while the Defendant did plead guilty, she negotiated a sentence cap that afforded her some relief from a lengthier sentence."); *State v. Jackson*, No. M2017-01528-CCA-R3-CD, 2019 WL 4131953, at *6 (Tenn. Crim. App. Aug. 30, 2019) (affirming sentence, noting that trial court refused to accept factor (13), stating that "the Defendant argues that under 13 any other factor consistent with the purposes of this chapter, and the fact that he entered a plea of guilty. ... We got to recognize in this case the plea agreement reflects that there was an amendment of the indictment from second degree murder, a class A felony, down to class D felony, reckless homicide, and in turn then an open plea entered to that. I could not find factor 13 is applicable simply because the Defendant was able to negotiate a plea arrangement that he viewed to be satisfactory to him.").

[24] *See State v. Ward*, No. M2017-02269-CCA-R3-CD, 2019 WL 1436151, at *29 (Tenn. Crim. App. Apr. 1, 2019) ("The Defendant's family members' testimony provided the evidence of his remorse, rehabilitative potential, and interest in religion. In contrast, in his trial testimony, the Defendant minimized his culpability for the shooting and claimed he shot the victim in self-defense.").

[25] This fact was reported by the Defendant to the presentence investigator as part of the interview for the Risk and Needs Assessment.

B. CONSIDERATION OF ENHANCEMENT FACTORS, TENN. CODE ANN. § 40-35-114

The Court next considers whether, considering all of the facts and circumstances and the victim impact statement as required by Tennessee Code Annotated section 40-38-207,[26] any enhancement factors apply. The State argues that Factors (1), (5), (6), (7), and (13) apply. In addition, the Court has considered, *sua sponte*, whether Factor (8) also applies.

1. Factor No. (1)

Enhancement Factor No. (1) provides for the enhancement of a sentence when "the defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range." In this case, the Defendant has been sentenced as a Range I, Standard Offender, which means, in part, that the Defendant does not have at least two prior felony convictions.[27] Thus, all of the Defendant's history of criminal convictions and behavior may be considered under this factor.

As established by the presentence investigation report,[28] the Defendant's criminal history of convictions consists of four (4) misdemeanor convictions, consisting of three assault convictions and one for false imprisonment. Importantly, although the previous conviction record consists only of misdemeanors, these convictions are certainly sufficient to be considered by the Court for purposes of Factor (1).[29]

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[26] *See State v. Ring*, 56 S.W.3d 577, 583 (Tenn. Crim. App. 2001) ("Whenever victim impact information contains relevant and reliable evidence relating to enhancing or mitigating factors and/or any other sentencing consideration, the trial court should consider it and determine what weight, if any, should be given to that evidence.").

[27] *See* Tenn. Code Ann. § 40-35-105 (defining standard offenders as being defendants who are not classified in one of the other ranges); Tenn. Code Ann. § 40-35-106 (defining a multiple offender, in part, as one who has "[a] minimum of two (2) but not more than four (4) prior felony convictions within the conviction class, a higher class, or within the next two (2) lower felony classes, where applicable').

[28] The parties presented significant proof as to the Defendant's prior criminal conduct. In addition, the presentence investigation report alone, without need for certified copies of convictions, can establish criminal history, including juvenile history. *See State v. Adams*, 45 S.W.3d 46, 59 (Tenn. Crim. App. 2000) ("We hold that the trial court was entitled to rely upon evidence of the juvenile offenses contained in the presentence report. This court has consistently held the presentence report to be reliable hearsay." (citing *State v. Baker*, 956 S.W.2d 8, 17 (Tenn. Crim. App. 1997) (holding that the information contained in a presentence report "is reliable because it is based upon the presentence officer's research of the records, contact with relevant agencies, and the gathering of information which is required to be included in a presentence report."))); *State v. Sexton*, No. M2018-00874-CCA-R3-CD, 2019 WL 5700889, at *5 (Tenn. Crim. App. Nov. 5, 2019) ("As to the Appellant's claim that his presentence report was inadmissible hearsay, Tennessee Code Annotated section 40-35-209(b) provides that in a sentencing hearing, reliable hearsay is admissible as long as a defendant 'is accorded a fair opportunity to rebut any hearsay evidence so admitted.' 'This court has consistently held the presentence report to be reliable hearsay.' Therefore, the trial court did not err by using the Florida convictions listed in the Appellant's presentence report to sentence him as a career offender." (quoting *State v. Adams*, 45 S.W.3d 46, 59 (Tenn. Crim. App. 2000))).

[29] *See State v. Paige*, No. W2018-02214-CCA-R3-CD, 2019 WL 7288804, at *6 (Tenn. Crim. App. Dec. 30, 2019) (upholding application of enhancement factor when prior record consisted of "a pending charge for

In addition, prior criminal conduct that formed the basis of an arrest may be considered if the conduct is established by a preponderance of the evidence.[30] In this case, the Defendant admitted during the presentence investigation that he used marijuana over a six-year period from 2009 through 2015 and that he used methamphetamine from 2015 through the instant offenses.[31] This long history of drug use certainly qualifies as criminal behavior to be considered under this factor.[32]

The Court accords significant weight to this factor for a few reasons. First, the prior criminal convictions each involve offenses against a person, and against women in particular, and this fact weighs more heavily in multiple felony cases also involving assaultive conduct against women.[33] Second, the previous assault crimes are not dated or remote in time, and, in

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simple assault and that he had prior convictions for public intoxication, possession of marijuana, driving under the influence of an intoxicant, and passing a worthless check"). Indeed, Factor No. (1) can apply even if the defendant has only been convicted of a single misdemeanor offense previously. *See State v. Hampton*, No. W2015-00469-CCA-R3-CD, slip op. at 19 (Tenn. Crim. App. Nov. 28, 2016); *see also State v. Smith*, No. W2016-01131-CCA-R3-CD, slip op. at 10 (Tenn. Crim. App. Jan. 16, 2018) (applying factor when defendant had only three misdemeanor convictions, but with the most recent being some eleven years earlier).

[30] *See State v. Broadrick*, No. M2017-01136-CCA-R3-CD, 2018 WL 4203883, at *8 (Tenn. Crim. App. Sept. 4, 2018) ("Tennessee, however, has no per se rule against considering unadjudicated conduct. Prior criminal behavior which was the basis of an arrest may be considered if it is established by a preponderance of the evidence." (citations omitted)).

[31] The defendant's testimony can establish prior criminal behavior. *See State v. Privett*, No. M2017-00539-CCA-R3-CD, 2018 WL 557924, at *4 (Tenn. Crim. App. Jan. 24, 2018) (rejecting argument of improper consideration of offenses "included in the presentence report when no corresponding judgments or juvenile records were included," when defendant's testimony established criminal history).

[32] *See State v. Hayes*, No. W2010-00309-CCA-R3CD, 2011 WL 3655130, at *6 (Tenn. Crim. App. Aug. 19, 2011) ("Additionally, the Defendant had one misdemeanor conviction, and he admitted during his interview for the presentence report that he had used illegal drugs. This criminal conduct demonstrates that the Defendant had a 'previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range.'"); *State v. Dotson*, No. W2017-01099-CCA-R3-CD, 2018 WL 2175696, at *6 (Tenn. Crim. App. May 10, 2018) ("Here, in enhancing the defendant's sentence the trial court relied on the fact that the defendant had a history of criminal behavior, in addition to those necessary to establish the appropriate range, noting the defendant had been smoking two joints of marijuana every day for years. . . . Our review of the record indicates the trial court had sufficient factual basis to enhance the defendant's sentences."); *State v. Beasley*, No. M2017-00591-CCA-R3-CD, 2018 WL 4931471, at *8 (Tenn. Crim. App. Oct. 11, 2018) ("In any event, the Defendant's long history of unlawful drug use qualifies as prior criminal behavior and supports the enhancement of the Defendant's sentences. Upon review, we discern no abuse of discretion in the trial court's imposition of mid-range sentences."); *State v. Turner*, No. E2018-01642-CCA-R3-CD, 2019 WL 5681478, at *4 (Tenn. Crim. App. Nov. 1, 2019) ("The record reflects that the Appellant began using marijuana when he was thirteen years old and that he smoked eight 'blunts' per day. The trial court even referred to his use of the drug 'most of his life' in a previous sentencing hearing. Thus, the trial court did not err in considering the Appellant's admitted marijuana use [under enhancement factor 40-35-114(1).").

[33] Where the prior criminal conduct is violent, the conduct may weigh more significantly in a case also involving violent offenses. *See State v. Carter*, No. M2018-01329-CCA-R3-CD, 2019 WL 3856583, at *10 (Tenn. Crim. App. Aug. 16, 2019) (upholding maximum sentence for aggravated robbery and aggravated assault, "On appeal, Michael Carter does not dispute the trial court's reliance on these factors. The record shows that Michael Carter was previously convicted of sixteen misdemeanors, four felonies; eleven of these prior convictions were crimes of violence, including domestic assault, assault, and aggravated assault.").

fact, the Defendant was on bail for this conduct when he committed the instant offenses.[34] Finally, the drug behavior was continuous, lasting some five or six years prior to the instant offenses and, according to the Defendant, were a factor in his committing these offenses.[35]

The Court finds that Enhancement Factor (1) applies to each of the four counts and that it should be accorded significant weight.

2. Factor No. (5)

Enhancement Factor No. (5) provides for the enhancement of a sentence when "[t]he defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense." This enhancement factor requires a finding of cruelty over and above that inherently attendant to the crime.[36] In other words, "'[e]xceptional cruelty,' when used as an enhancement factor, denotes the infliction of pain or suffering for its own sake or from gratification derived therefrom, and not merely pain or suffering inflicted as the means of accomplishing the crime charged."[37] Whether a defendant treats a victim with exceptional cruelty is "a matter of degree."[38]

"When applying this factor, a trial court should articulate the actions of the defendant, apart from the elements of the offense, which constitute exceptional cruelty."[39] Thus, for example, this factor may apply where the defendant inflicts multiple wounds or strikes;[40] where

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[34] *See State v. Dobson*, No. M2012-02361-CCA-R3-CD, 2013 WL 6175187, at *8 (Tenn. Crim. App. Nov. 25, 2013) ("Although the trial court may consider the amount of time that has passed since a prior conviction in assessing the weight to be given to that enhancement factor, it is not required to do so."); *see also State v. McKinnie*, No. W2018-00439-CCA-R3-CD, 2019 WL 911139, at *5 (Tenn. Crim. App. Feb. 21, 2019) ("The fact that the Defendant's 'last assault related offenses occurred some time ago' does not constitute an abuse of the trial court's discretion in using this enhancement factor to impose the maximum sentences.").

[35] Where criminal conduct spans years, more weight may be properly assigned to the factor. *See State v. Hatmaker*, No. E2017-01370-CCA-R3-CD, slip op. at 11 (Tenn. Crim. App. June 8, 2018) ("The record here shows six separate thefts spanning six years, totaling nearly $500,000, indicating significant criminal history. Therefore, the trial court did not abuse its discretion either in finding the criminal history enhancement factor applies to Counts 2 through 6 or in giving this factor 'significant weight.'"); *State v. Abdullah*, No. M2019-00510-CCA-R3-CD, 2020 WL 290842, at *7 (Tenn. Crim. App. Jan. 21, 2020) ("The presentence report shows that the Defendant has in excess of twenty-five convictions in at least three different counties, beginning in 1981 with the latest convictions in 2014. This evidence supports the trial court's application of enhancement factor (1), that the Defendant has a previous history of criminal convictions.").

[36] *See State v. Arnett*, 49 S.W.3d 250, 258 (Tenn. 2001).

[37] *See State v. Reid*, 91 S.W.3d 247, 311 (Tenn. 2002).

[38] *See State v. Hughes*, No. E2017-01953-CCA-R3-CD, 2018 WL 2175899, at *4 (Tenn. Crim. App. May 11, 2018) (citations omitted).

[39] *See State v. Blackwell*, No. M2016-01063-CCA-R3-CD, slip op. at 23 (Tenn. Crim. App. June 26, 2017) (citing *State v. Goodwin*, 909 S.W.2d 35, 45-46 (Tenn. Crim. App. 1995)).

[40] *See State v. Hayes*, No. W2010-00309-CCA-R3-CD, 2011 WL 3655130, at *11 (Tenn. Crim. App. Aug. 19, 2011) ("This Court has held that the infliction of multiple wounds is, in some instances, sufficient to support the application of enhancement factor (5)."); *State v. Gray*, 960 S.W.2d 598, 611 (Tenn. Crim. App. 1997) (upholding application of factor (5) in a second degree murder case where the facts showed that the victim had many

the defendant's actions amount to abuse or torture;[41] where there is a delay in seeking medical treatment;[42] and where there is a failure to call 911 or seek emergency help.[43]

In this case, the Court finds that this enhancement factor applies. As both the medical records and Ms. Robinson's testimony reveal, the Defendant inflicted multiple injuries upon Ms. Robinson. These injuries included orbital contusions and petechial hemorrhaging around the eyes; multiple contusions and abrasions over the rest of her body; a bite to her back; multiple scrapes and bruises to her legs; and a busted lip.[44] As the photographs of Ms. Robinson reveal, she was simply beaten and tortured at the hands of the Defendant.[45]

The burns inflicted upon Ms. Robinson as alleged in Counts 2, 3[46] and 4, however, represent nothing less than the torture of Ms. Robinson, and these actions by the Defendant served no purpose but to inflict pain and suffering for its own sake upon Ms. Robinson. The

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internal and external injuries other than the skull fracture that led to her death, noting the factor is "certainly applicable in this case given the traumatic and severe injuries sustained by the victim." (cited in *State v. Scott*, No. W2009-00707-CCA-R3-CD, 2011 WL 2420384, at *32 (Tenn. Crim. App. June 14, 2011)); *State v. Hughes*, No. E2017-01953-CCA-R3-CD, 2018 WL 2175899, at *4 (Tenn. Crim. App. May 11, 2018) (upholding application of factor (5) when "[t]he conduct of striking Mr. Strange's head once with the pipe supports the Defendant's conviction. The Defendant's striking Mr. Strange a second time while Mr. Strange was unable to defend himself supports a finding that the Defendant's conduct was for the purpose of inflicting pain or suffering for its own sake."); *State v. Simpson*, No. M2017-01734-CCA-R3-CD, 2019 WL 1244950, at *37 (Tenn. Crim. App. Mar. 18, 2019) ("Relative to enhancement factor (5), the record reflects that the victim received multiple sharp force injuries to her head, arms, and hands and a five inch laceration to her throat. The victim received numerous chop wounds, including one to her left palm that 'went through' the victim's left third finger, almost amputated the victim's middle finger, and injured her left first finger. Dr. Lewis testified that the coloring of some of the victim's wounds led her to conclude the victim received the wounds when the victim had low blood pressure, which could have been caused by blood loss. The length of the victim's blood trail was 383 feet, and the victim's DNA was found on the broken kitchen knife, machete, shovel, and the Defendant. The court did not abuse its discretion in applying enhancement factor (5).").

[41] This factor is most applicable in cases of abuse or torture, or where traumatic and severe injuries are sustained. *See State v. Reid*, 91 S.W.3d 247, 311 (Tenn. 2002) (noting that "[e]xceptional cruelty, 'when used as an enhancement factor, denotes the infliction of pain or suffering for its own sake or from gratification derived therefrom, and not merely pain or suffering inflicted as the means of accomplishing the crime charged.'").

[42] So, for example, this factor can apply when the victim was injured and left alone "unconscious and bleeding under such circumstances that it was unlikely that her condition would soon be discovered." *See State v. Poole*, 945 S.W.2d 93, 99 (Tenn. 1997); *see also State v. Taylor*, No. M2015-02142-CCA-R3-CD, slip op. at 17 (Tenn. Crim. App. May 16, 2017) (applying factor in criminally negligent homicide case where "[t]he four-year-old victim lay severely injured and dying for hours, and the Appellant did nothing.").

[43] *See State v. Cathey*, No. 2008-01446-CCA-R3-CD, 2010 WL 2836632, at *20 (Tenn. Crim. App. July 20, 2010) (stating that Enhancement Factor (5) applied where defendant noticed the victim was having trouble breathing and did not immediately call 911, and victim had extensive injuries)).

[44] *See* Exhibit 13, Medical Records, at pages 38-39.

[45] The medical records introduced as part of Exhibit 13 describe Mr. Robinson's appearance to the medical personnel transporting her to Cobb County: "When I enter patient[']s room[,] I can see that she has been beaten quite badly. Patient's left eye was almost swollen shut with bruising and discoloration all around it. Right eye was swollen also[,] no[t] quite as bad with small cuts to her right cheek that appeared to be a couple of days old. [Patient's] lips also have scabs of them from being busted open. . . ." *See* Exhibit 13, Medical Records, at page 8.

[46] In describing the burns to her buttocks, which are the injuries alleged in Count 3, Ms. Robinson testified that the pain was "excruciating."

medical proof revealed that Ms. Robinson suffered second-degree burns to her arm and *third-degree* burns to her inner labia. She characterized the pain from the wounds to her labia as being the "worst possible pain,"[47] and she testified that the pain she experienced from these wounds was "never-ending." The wounds were such that she was unable to urinate, and medical staff had to use a catheter to assist with these basic functions.

In point of fact, though, these descriptions of the burns do not tell the whole story. The burns to Ms. Robinson's labia were so severe that she could not be treated by any local burn unit in Chattanooga. Rather, she had to be transported to Georgia to be treated by a specialized burn unit over the course of several days. Ms. Robinson testified that even after this multi-day treatment, she could not ambulate without the assistance of a walker for some two- to three weeks following. The treatment regimen required months of follow-up care with this out-of-state burn unit.

Importantly, "exceptional cruelty" is not an element of aggravated assault.[48] The injuries inflicted upon Ms. Robinson were numerous; they amount to torture; and they were inflicted for the purpose of inflicting severe pain for its own sake. All of the injuries, but the burns, in particular, were degrading to her as a person, and as torture often does, sought to rob her of her dignity as a person.

The Court finds that Enhancement Factor (5) applies to Counts 2, 3, and 4 and that it should be accorded significant weight in these Counts.

3. Factor No. (6)

Enhancement Factor No. (6) provides for enhancement of a sentence when "[t]he personal injuries inflicted upon, or the amount of damage to property, sustained by or taken from the victim was particularly great." Typically, this factor does not apply in cases where an element of the offense involves serious bodily injury, and our Supreme Court has recognized that this factor may not apply in aggravated assault cases, as "proof of serious bodily injury will always constitute proof of particularly great injury."[49]

However, the Court of Criminal Appeals has also recognized that proof of serious psychological injuries may establish this factor. Thus, this factor may be present where the crime has resulted in emotional injuries that are more serious than those normally resulting from the offense.[50] The proof necessary to support this factor need not come in the form of expert

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[47] *See* Exhibit 13, Medical Records, at page 42.

[48] *See State v. Abdelnabi*, No. E2017-00237-CCA-R3-CD, 2018 WL 3148003, at *29 (Tenn. Crim. App. June 26, 2018) ("Initially, we note that 'exceptional cruelty' is not an element of aggravated kidnapping, especially aggravated kidnapping, or aggravated assault.").

[49] *See State v. Jones*, 883 S.W.2d 597 (Tenn. 1994) (holding that "proof of serious bodily injury will always constitute proof of particularly great injury.").

[50] *See State v. Williams*, 920 S.W.2d 247, 259 (Tenn. Crim. App. 1995) (affirming application of this factor "in rape cases in which the victims suffered depression, anxiety, and other emotional problems in addition to

testimony,[51] and the testimony of the victim may establish the presence of this factor by a preponderance of the evidence.[52]

In this case, Ms. Robinson testified that she continues to suffer, even today, with the effects of the Defendant's torture of her. She testified that she has experienced nightmares, depression, and flashbacks. She has sought and received counseling to help her deal psychologically from the events. She also testified that the events have had an impact on her own sexuality that has been long-lasting. The Court finds that each of these psychological injuries is more serious than those normally resulting from an aggravated assault and that, therefore, Ms. Robinson has suffered injuries that are particularly great.

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their physical injuries."); *State v. Hayes*, No. W2010-00309-CCA-R3CD, 2011 WL 3655130, at *10 (Tenn. Crim. App. Aug. 19, 2011) ("Initially, with regard to the trial court's application of this factor to the theft conviction, we note that factor (6) may apply to psychological injuries as a result of the incident." (citing *State v. Hunter*, 926 S.W.2d 744 (Tenn. Crim. App.1995); *State v. Smith*, 891 S.W.2d 922 (Tenn. Crim. App. 1994)); *State v. Vandenburg*, No. M2017-01882-CCA-R3-CD, 2019 WL 3720892, at *71 (Tenn. Crim. App. Aug. 8, 2019) (upholding application of Factor (6), among other reasons, even after undergoing therapy, E.L. "reported persistent and recurrent distressing recollections of the images and sounds, a sense of powerlessness and hopelessness, irritability, difficulty concentrating and hypervigilance." Dr. Cook diagnosed E.L. with PTSD and explained that reliving the trauma of the offenses "continually disrupt[ed] her academic planning and her emotional sense of wholeness."); *State v. Davis*, No. M2017-00596-CCA-R3-CD, 2018 WL 1319171, at *7 (Tenn. Crim. App. Mar. 14, 2018) (upholding application of factor (6) in the context of child rape when "the evidence supports the trial court's determination that victim's emotional injuries were particularly great, given that the Defendant was her grandfather and best friend, and that she suffered from PTSD as a result of these events, which necessitated a year of counseling.")); *State v. Blackmon*, No. W2018-01061-CCA-R3-CD, 2019 WL 3216584, at *3 (Tenn. Crim. App. July 17, 2019) (from victim impact statement alone without proof of counseling or mental health treatment, "[t]he record reflects that even though the Defendant was in jail, the victim thought someone else would kill her. She was fearful, as well, that the Defendant would kill her after his release. She was unable to eat and sleep, and she lost weight following the shooting. She said she had psychological problems and described hearing noises and thinking someone was going to kill her. The victim impact statement describes specific, objective examples of the long-lasting and significant effects that the Defendant's conduct had and continued to have on the victim. The trial court did not abuse its discretion in applying enhancement factor (6)."); *State v. Cole*, No. W2002-02826-CCA-R3-CD, 2003 WL 22309491, at *4 (Tenn. Crim. App. Oct. 8, 2003) (rape victim's psychological injuries were great because she received counseling, was absent from work, lived in fear of contracting a sexually transmitted disease, and could not return to the scene of the offense); *State v. Rosenbalm*, No. E2002-00324-CCA-R3-CD, 2002 WL 31746708, at *9 (Tenn. Crim. App. Dec. 9, 2002) (rape victim suffered particularly great psychological injury from the offense because she "became suicidal after the offense, experienced a dramatic weight loss, and performed poorly in school").

[51] *See State v. Arnett*, 49 S.W.3d 250, 260 (Tenn. 2001) (declining to require expert proof; "Instead, we hold that application of this factor is appropriate where there is specific and objective evidence demonstrating how the victim's mental injury is more serious or more severe than that which normally results from this offense. Such proof may be presented by the victim's own testimony, as well as the testimony of witnesses acquainted with the victim.").

[52] Proof supporting this factor may also come from a victim impact statement. *See State v. Blackmon*, No. W2018-01061-CCA-R3-CD, 2019 WL 3216584, at *3 (Tenn. Crim. App. July 17, 2019) ("With regard to the type of proof necessary to support the application of enhancement factor (6), our supreme court has said that expert testimony is not required and that lay testimony or a victim impact statement detailing specific, objective examples of the crime's effect on the victim is appropriately relied upon by a trial court." (citing *State v. Arnett*, 49 S.W.3d 250, 261 (Tenn. 2001))).

The Court finds that Enhancement Factor (6) applies to Counts 2, 3, and 4 and that it should be accorded more significant weight as to Count 4.

4. Factor No. (7)

Enhancement Factor No. (7) provides for enhancement of a sentence when "[t]he offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement." Our Supreme Court has recognized that, in considering this factor, a sentencing court must look to the defendant's "motive for committing the offense,"[53] and the record must contain "objective evidence of the defendant's motivation to seek pleasure or excitement" before this factor may be found.[54]

During the sentencing hearing, Ms. Robinson testified that she could not tell whether the Defendant "enjoyed" the torture. In her mind, the episode was more clearly linked to his attempt to punish her for her alleged deceit and possible unfaithfulness, and the burning, in particular, was an effort to "mark her" or make her less attractive to others. It may be that this factor is present in fact. However, the record does not contain sufficient proof at this point for the Court to make such a finding by a preponderance of the evidence.

The Court does not find that Enhancement Factor (7) applies to any of the Counts.

5. Factor No. (8)

The Court has considered, *sua sponte*, whether Factor No. (8) applies.[55] Enhancement Factor No. (8) provides for enhancement of a sentence when "[t]he defendant, before trial or sentencing, failed to comply with the conditions of a sentence involving release in the community." Under this factor, prior probation violations are appropriate for consideration,[56]

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[53] *See State v. Arnett*, 49 S.W.3d 250, 261 (Tenn. 2001); *State v. Yelton*, No. E2018-01436-CCA-R3-CD, 2019 WL 2475171, at *8 (Tenn. Crim. App. June 13, 2019) (same).

[54] *See State v. Arnett*, 49 S.W.3d 250, 262 (Tenn. 2001).

[55] Of course, a trial court "may properly raise enhancement factors on its own. '[T]he trial court is not bound by the [S]tate's recommendations or limited to only those factors presented by the State.'" *See State v. Hatmaker*, No. E2017-01370-CCA-R3-CD, slip op. at 11 (Tenn. Crim. App. June 8, 2018) (quoting *State v. Jones*, No. W2013-00335-CCA-R3-CD, 2014 WL 3002808, at *17 (Tenn. Crim. App. Jan. 29, 2014) (itself citing *State v. Franklin*, No. 02C-01-9404-CR-00081, 1994 WL 697928, at *1 (Tenn. Crim. App. Dec. 14, 1994)).

[56] *See State v. Hurt*, No. W2017-02179-CCA-R3-CD, 2020 WL 1593774, at *18 (Tenn. Crim. App. Apr. 1, 2020) (rejecting argument that prior probation violations should not be considered under this factor and noting that "our courts have held that a prior history of probation violations is sufficient for application of this enhancement factor." (citing *State v. Crowell*, No. W2017-00799-CCA-R3-CD, 2018 WL 2338209, at *9 (Tenn. Crim. App. May 23, 2018); *State v. Bumpas*, No. M2017-00746-CCA-R3-CD, 2018 WL 817289, at *7 (Tenn. Crim. App. Feb. 12, 2018))); *see also State v. Maddle*, No. M2017-01707-CCA-R3-CD, 2018 WL 2749656, at *4 (Tenn. Crim. App. June 7, 2018) (affirming application of factor [8] when "two failed opportunities to comply with a probation sentence."); *State v. Abdullah*, No. M2019-00510-CCA-R3-CD, 2020 WL 290842, at *7 (Tenn. Crim. App. Jan. 21, 2020) ("The presentence report also shows two probation violations, supporting the trial court's

and the trial court may also consider juvenile probation violations as supporting the application of this factor.[57] In this case, the Defendant has a prior violation of probation sustained by the Juvenile Court on September 17, 2007.[58]

The Court finds that Enhancement Factor (8) applies to each count. However, given the age of the probation violation, the Court does not assign much weight to the factor.

6. Factor No. (13)

Enhancement Factor No. (13) provides for enhancement of a sentence when "[a]t the time the felony was committed," the defendant had been "[r]eleased on bail or pretrial release, if the defendant is ultimately convicted of the prior misdemeanor or felony." In this case, the offenses occurred on or about March 3, 2017. At this time, the Defendant was released on pretrial conditions, including bail, from four offenses that occurred during October and December 2014. The Defendant was convicted following the entry of his guilty plea to each of these four offenses on November 15, 2017.[59]

The Court finds that Enhancement Factor (13) applies to each count. The conduct is serious, as the instant offenses were committed while the Defendant was on pretrial release, as were the offenses occurring in December 2014. The Court accords moderate to significant weight to this factor.

VI. IMPOSITION OF DETERMINATE SENTENCE

In imposing any sentence, the Court must be mindful that the length of the sentence can be "no greater than that deserved for the offense committed," and it must be "the least severe measure necessary to achieve the purposes for which the sentence is imposed."[60] Accordingly, considering all of the sentencing considerations identified by the Court earlier, the Court hereby sentences the Defendant to determinate sentences[61] as follows:

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application of enhancement factor (8), that the Defendant has previous failures to comply with the conditions of a sentence involving release.").

[57] *See State v. Jackson*, 60 S.W.3d 738, 743-44 (Tenn. 2001) ("In this case, the defendant's extensive history of juvenile criminal conduct includes two offenses that would constitute felonies if committed by an adult, thereby supporting application of factor (20). Moreover, because measures less restrictive than confinement have failed, the application of factor (8) is also proper.").

[58] *See* Exhibit 1, Second Amended Presentence Investigation Report, at 8.

[59] *See* Exhibit 1, Second Amended Presentence Investigation Report, at 7.

[60] *See* Tenn. Code Ann. § 40-35-103(2), (4).

[61] *See* Tenn. Code Ann. § 40-35-211(1) ("There are no indeterminate sentences.").

Count No. 1: Upon conviction of the offense of aggravated domestic assault in Count 1, the Court sentences the Defendant to a term of **three (3) years**,[62] as a Range I, Standard Offender.

Count No. 2: Upon conviction of the offense of aggravated domestic assault in Count 2, the Court sentences the Defendant to a term of **five (5) years**, as a Range I, Standard Offender.

Count No. 3: Upon conviction of the offense of aggravated domestic assault in Count 3, the Court sentences the Defendant to a term of **six (6) years**, as a Range I, Standard Offender.

Count No. 4: Upon conviction of the offense of aggravated domestic assault in Count 4, the Court sentences the Defendant to a term of **six (6) years**, as a Range I, Standard Offender.

VII. CONSIDERATION OF CONSECUTIVE SENTENCES

The State argues that the Court should order that all sentences be served consecutively to each other. Pursuant to Tennessee Code Annotated section 40-35-115, "consecutive sentences may be imposed any time [a] defendant has been convicted of more than one criminal offense."[63] "Because the criteria for determining consecutive sentencing 'are stated in the alternative[,] ... only one need exist to support the appropriateness of consecutive sentencing.'"[64]

As the Court of Criminal Appeals has acknowledged, imposing consecutive sentences "ensures that defendants committing separate and distinct violations of the law receive separate

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[62] *See* Tenn. Code Ann. § 40-35-211(1) ("Specific sentences for a felony shall be for a term of years or months or life, if the defendant is sentenced to the department of correction; or a specific term of years, months or days if the defendant is sentenced for a felony to any local jail or workhouse.").

[63] *See State v. Moore*, 942 S.W.2d 570, 572 (Tenn. Crim. App. 1996) (cited in *State v Austin*, No. W2017-01632-CCA-R3-CD, 2018 WL 4849141, at *13 (Tenn. Crim. App. Oct. 5, 2018)); *State v. Colbert*, No. W2017-01998-CCA-R3-CD, 2018 WL 4960225, at *2 (Tenn. Crim. App. Oct. 15, 2018) ("A trial court may order multiple offenses to be served consecutively if it finds by a preponderance of the evidence that a defendant fits into at least one of seven categories enumerated in code section 40-35-115(b).").

Although the argument is not raised here specifically, the Court of Criminal Appeals has rejected the argument that consecutive sentences cannot be imposed for multiple offenses when "[a]ll of the offenses charged ... arose out of one set of circumstances," particularly when the "Defendant committed six distinct violations of the law," many of which were based on discrete acts. *See State v Austin*, No. W2017-01632-CCA-R3-CD, 2018 WL 4849141, at *13 (Tenn. Crim. App. Oct. 5, 2018).

[64] *See State v. Lambert*, No. E2018-02298-CCA-R3-CD, 2020 WL 2027761, at *13 (Tenn. Crim. App. Apr. 28, 2020) (quoting *State v. Mickens*, 123 S.W.3d 355, 394 (Tenn. Crim. App. 2003)); *see also State v. Dickson*, 413 S.W.3d 735, 748 (Tenn. 2013) ("The statute provides that a trial court may impose consecutive sentencing if the court finds by a preponderance of the evidence that certain statutory factors are present. Only one factor is necessary for consecutive sentencing.").

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and distinct punishments. Otherwise defendants would escape the full impact of punishment for one of their offenses."[65]

However, in considering whether to order that sentences be served concurrently or consecutively, whether in whole or in part,[66] the law requires that the Court must consider that consecutive sentences

- should not be routinely imposed;
- must be "justly deserved in relation to the seriousness of the offenses;"[67]
- the length of a consecutive sentence must be "no greater than that deserved for the offense committed;"[68] and

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[65] *See State v. Robinson*, 930 S.W.2d 78, 85 (Tenn. Crim. App. 1995); *see also State v. Malone*, 928 S.W.2d 41, 44 (Tenn. Crim. App. 1995) ("The power of a trial judge to impose consecutive sentences ensures that defendants committing separate and distinct violations of the law receive separate and distinct punishments. Otherwise defendants would escape the full impact of punishment for one of their offenses."); *State v Austin*, No. W2017-01632-CCA-R3-CD, 2018 WL 4849141, at *6 (Tenn. Crim. App. Oct. 5, 2018) ("'The power of a trial judge to impose consecutive sentences ensures that defendants committing separate and distinct violations of the law receive separate and distinct punishments.'" (quoting *State v. Malone*, 928 S.W.2d 41, 44 (Tenn. Crim. App. 1995))); *State v. Thompson*, No. E2002-01710-CCA-R3CD, 2003 WL 21920247, at *5 (Tenn. Crim. App. Aug. 12, 2003) ("No doubt Defendant is correct when he surmises that there is a good possibility that he will not live to see his release from prison. The underlying principle behind consecutive sentencing, however, is not whether the length of the sentence is logical based on the age of the defendant at sentencing, but whether a defendant should 'escape the full impact of punishment for one of [his] offenses.' 'The power of a trial judge to impose consecutive sentences ensures that defendants committing separate and distinct violations of the law receive separate and distinct punishments.'" (quoting *State v. Robinson*, 930 S.W.2d 78, 85 (Tenn. Crim. App. 1995) and other citations omitted)).

[66] Of course, the trial court may impose a mixture of concurrent and consecutive sentences. *See State v. Lawrence*, No. M2018-00576-CCA-R3-CD, 2019 WL 158160, at *2 (Tenn. Crim. App. Jan. 10, 2019) (recognizing that "[a]ccording to the plain language of the statute [Tenn. Code Ann. § 40-20-111(a)], it is within the trial court's discretion to impose partial consecutive sentences." (citing *State v. Cook*, No. E2013-01441-CCA-R3-CD, 2014 WL 644700, at *2 (Tenn. Crim. App. Feb. 19, 2014) (concluding that the trial court did not abuse its discretion in imposing partial consecutive sentences); *State v. Branham*, 501 S.W.3d 577, 596-97 (Tenn. Crim. App. 2016) (same).

[67] *See* Tenn. Code Ann. § 40-35-102(1); *see also State v. Imfeld*, 70 S.W.3d 698, 708 (Tenn. 2002) ("In addition to the specific criteria in Tenn. Code Ann. § 40-35-115(b), consecutive sentencing is guided by the general sentencing principles providing that the length of a sentence be 'justly deserved in relation to the seriousness of the offense' and 'no greater than that deserved for the offense committed.'" (quoting Tenn. Code Ann. §§ 40-35-102(1) and -103(2))); *State v. Trammell*, No. E2018-00382-CCA-R3-CD, 2019 WL 6838028, at *9 (Tenn. Crim. App. Dec. 13, 2019) (noting trial court's refusal to impose complete consecutive sentences as evidence of this consideration "Further, in declining to impose complete consecutive sentencing, the trial court considered whether consecutive sentencing was 'justly deserved in relation to the seriousness of the offense' and 'no greater than that deserved for the offense committed.' As such, the trial court properly imposed consecutive sentencing in this case. The Defendant is not entitled to relief on this issue." (citing Tenn. Code Ann. § 40-35-102(1), 103(2); *State v. Imfeld*, 70 S.W.3d 698, 708 (Tenn. 2002))).

[68] *See* Tenn. Code Ann. § 40-35-103(2); *see also State v. Imfeld*, 70 S.W.3d 698, 708 (Tenn. 2002) ("In addition to the specific criteria in Tenn. Code Ann. § 40-35-115(b), consecutive sentencing is guided by the general sentencing principles providing that the length of a sentence be 'justly deserved in relation to the seriousness of the offense' and 'no greater than that deserved for the offense committed.'" (quoting Tenn. Code Ann. §§ 40-35-

- the aggregate maximum of consecutive terms must be reasonably related to the severity of the offenses involved.[69]

Insofar as the last factor is concerned, our appellate courts have recognized that the seriousness and severity of multiple offenses can be measured by the following factors, among others:

- whether the offenses endanger life, exhibit dangerous conduct, and involve weapons;[70]
- whether the offenses involve violence and multiple victims;[71]
- whether the offenses are caused by use and abuse of alcohol or drugs;[72]
- whether the victim suffers lasting effects,[73] including permanent injuries;[74]

102(1) and -103(2))); *State v. Colbert*, No. W2017-01998-CCA-R3-CD, 2018 WL 4960225, at *2 (Tenn. Crim. App. Oct. 15, 2018) (quoting Tenn. Code Ann. § 40-35-103(2) in context of consecutive sentencing principles).

[69] *See* Tenn. Code Ann. § 40-35-115, *Sentencing Commission Comments* (citing *Gray v. State*, 538 S.W.2d 391, 393 (Tenn. 1976)).

[70] *See State v. Adams*, 45 S.W.3d 46, 64 (Tenn. Crim. App. 2000) (affirming consecutive sentence on basis, in part, of offense committed on probation, when "the facts of this offense exhibited little hesitation in committing offenses where the risk to human life was almost assured. Firing rifle slugs from a shotgun at a vehicle in which you knew people were inside, it clearly indicates dangerous conduct.... We must go further. In considering the severity of the offenses themselves, his prior convictions, in taking those together and considering whether or not this extended confinement is necessary to protect society from this Defendant's unwillingness to lead a productive life, which has been exhibited by his lifestyle, transient, sporadic employment, use and abuse of alcohol, violating probation, the Court finds that the sentences should run consecutively."); *State v. Stumbo*, No. E2017-01405-CCA-R3-CD, 2018 WL 3530844, at *11 (Tenn. Crim. App. July 23, 2018) (affirming consecutive sentences based upon seriousness of the offenses when "[t]he evidence was that Defendant held a seventy-one-year-old woman at gunpoint inside her own home in the middle of the night while he raped her and threatened her family. Based on this evidence, we conclude that the length of the Defendant's sentence is justly deserved in relation to the seriousness of these offenses, and is no greater than that deserved for the offenses committed.").

[71] *See State v. Ware*, No. M2018-01326-CCA-R3-CD, 2019 WL 5837927, at *13 (Tenn. Crim. App. Nov. 7, 2019) (affirming consecutive sentences as against argument that consecutive sentences were not reasonably related to the severity of the offenses where "the Defendant's life plus 10-year aggregate sentence involved convictions with separate victims and were for violent offenses.").

[72] *See State v. Adams*, 45 S.W.3d 46, 64 (Tenn. Crim. App. 2000) (affirming consecutive sentence on basis, in part, of offense committed on probation, when "the facts of this offense exhibited little hesitation in committing offenses where the risk to human life was almost assured. Firing rifle slugs from a shotgun at a vehicle in which you knew people were inside, it clearly indicates dangerous conduct.... We must go further. In considering the severity of the offenses themselves, his prior convictions, in taking those together and considering whether or not this extended confinement is necessary to protect society from this Defendant's unwillingness to lead a productive life, which has been exhibited by his lifestyle, transient, sporadic employment, use and abuse of alcohol, violating probation, the Court finds that the sentences should run consecutively.").

[73] *See State v. Smith*, 891 S.W.2d 922, 933 (Tenn. Crim. App. 1994) (affirming consecutive sentence for offense committed while on probation, in part, "[a]s a result of his conduct, the victim sustained severe damage to her emotional well-being. In summary, the trial court properly imposed consecutive sentences.").

- whether multiple felonies have been committed;[75] and

- whether the offenses consist of separate episodes, even if the crimes arose out of one continuous chain of events.[76]

Moreover, even *lengthy* consecutive sentences may be imposed when such confinement is necessary to protect the public from further criminal activity by the defendant.[77]

A. EXTENSIVE CRIMINAL ACTIVITY, TENN. CODE ANN. § 40-35-115(B)(2)

Based upon these considerations, this Court first considers whether, by a preponderance of the evidence,[78] the proof establishes that the defendant is an offender whose record of criminal activity is extensive.[79]

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[74] *See State v. Mcleod*, No. W2018-01646-CCA-R3-CD, slip op. at 9 (Tenn. Crim. App. Sept. 26, 2019) (affirming imposition of consecutive sentences, in part, when "[t]he trial court's concern over the defendant's callousness of escalating a mere argument into a fatal shooting resulting in the death of one individual and life-long medical and physical issues for another, and subsequently lying to a jury about it, reflects a finding that consecutive sentencing was necessary to protect the public.").

[75] *See State v. Goode*, No. E2003-02139-CCA-R3-CD, 2004 WL 1562523, at *5 (Tenn. Crim. App. July 12, 2004) ("Given that the defendant committed three serious felonies in this case, was ordered to serve only one year of her effective twenty-two-year sentence in confinement, and committed another serious crime after serving only eight months of probation, we cannot conclude that the trial court abused its discretion by ordering her to serve her original sentences consecutively to her federal sentence.").

[76] *See State v. Smith*, No. 01C01-9510-CR-00337, 1996 WL 662428, at *2 (Tenn. Crim. App. Nov. 15, 1996).

[77] *See* Tenn. Code Ann. § 40-35-103(1).

[78] *See State v. Abdullah*, No. M2019-00510-CCA-R3-CD, 2020 WL 290842, at *7 (Tenn. Crim. App. Jan. 21, 2020) ("The criteria are stated in the alternative; therefore, only one need exist to support the imposition of consecutive sentencing." (citing *State v. Brannigan*, No. E2011-00098-CCA-R3-CD, 2012 WL 2131111, at *19 (Tenn. Crim. App. June 13, 2012); *see also State v. Biggs*, No. W2016-01781-CCA-R3-CD, slip op. at 5 (Tenn. Crim. App. Dec. 19, 2017) ("A trial court 'may order sentences to run consecutively if it finds by a preponderance of the evidence that one or more of the statutory criteria exists.'" (quoting *State v. Black*, 924 S.W.2d 912, 917 (Tenn. Crim. App. 1995))); *State v. Brewer*, No. E2019-00355-CCA-R3-CD, 2020 WL 1672958, at *13 (Tenn. Crim. App. Apr. 6, 2020) ("A trial court may order multiple offenses to be served consecutively if it finds by a preponderance of the evidence that a defendant fits into at least one of the seven categories in Tennessee Code Annotated section 40-35-115(b).").

[79] *See* Tenn. Code Ann. § 40-35-115(b)(2). Although the issue has not been raised, the Court notes that the law permits consideration of a defendant's criminal behavior and convictions in setting the range of sentence as well as in deciding whether sentences should be served consecutively. *See State v. Martin*, No. M2015-00818-CCA-R3-CD, slip op. at 22 (Tenn. Crim. App. Dec. 13, 2016) (citing *State v. Meeks*, 867 S.W.2d 361, 377 (Tenn. Crim. App. 1993)); *State v. Ray*, No. M2018-01765-CCA-R3-CD, 2019 WL 5295416, at *5 (Tenn. Crim. App. Oct. 18, 2019), *perm. app. granted, remanded for resentencing*, Jan. 17, 2020 ("The Appellant acknowledges that he has 'numerous misdemeanor offenses' but contends that he has only three prior felony convictions. He maintains that using his criminal convictions to establish his range of punishment, the length of the individual sentences, and the consecutive nature of the sentences, 'essentially[ ] punish[es] him for the same conduct twice.' However, '[t]here is

As the Court of Criminal Appeals has recognized, "an extensive criminal history, standing alone, is enough to justify the imposition of consecutive sentencing."[80] This is because the "primary purpose of consecutive sentences for those offenders whose record was extensive is to protect the public from an individual not likely to be rehabilitated."[81] As such, analysis of this factor may include the following considerations, among others:

- the number of *current* convictions before the Court;[82]
- the number of *previous* convictions, even if the previous convictions are only misdemeanor offenses;[83]

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no prohibition in the 1989 Sentencing Act against using the same facts and circumstances both to enhance sentences under applicable enhancement factors and to require those sentences to be served consecutively. In fact, this Court has previously held that consideration of prior criminal convictions and conduct for both enhancement and consecutive sentencing purposes is allowed.'" (quoting *State v. Meeks*, 867 S.W.2d 361, 377 (Tenn. Crim. App. 1993))).

[80] *See State v. Nelson*, 275 S.W.3d 851, 870 (Tenn. Crim. App. 2008) (cited in *State v. Brown*, No. E2018-02135-CCA-R3-CD, slip op. at 6 (Tenn. Crim. App. Oct. 22, 2019)).

[81] *See State v. Brewer*, 875 S.W.2d 298, 303 (Tenn. Crim. App. 1993).

[82] *See State v. Canter*, No. M2018-01183-CCA-R3-CD, 2019 WL 2418948, at *5 (Tenn. Crim. App. June 10, 2019) ("Additionally, 'current offenses may be used in determining criminal history for purposes of consecutive sentencing.'" (citations omitted)); *State v. Hughes*, No. M2017-00057-CCA-R3-CD, slip op. at 14 (Tenn. Crim. App. Jan. 8, 2018) ("This Court has previously held that for the purpose of consecutive sentencing, the trial court may use the convictions for which the defendant is being sentenced as evidence of an extensive record of criminal activity." (citations omitted)); *State v. Lancaster*, No. W2015-00936-CCA-R3-CD, slip op. at 5 (Tenn. Crim. App. Nov. 22, 2016) ("A trial court's consideration of the offenses for which a defendant is currently being sentenced is also proper in determining whether a defendant has an extensive criminal history." (citations omitted)); *see also State v. Patterson*, No. W2017-01481-CCA-R3-CD, 2018 WL 4677522, at *12 (Tenn. Crim. App. Sept. 28, 2018) ("However, in addition to the prior criminal convictions listed in his presentence report, the Defendant stands presently convicted of four offenses after our reversal of his aggravated child endangerment conviction. This court has held that '[c]urrent offenses may be used in determining criminal history for the purposes of consecutive sentencing.'" (citations omitted)); *State v. Frelix*, No. M2017-00388-CCA-R3-CD, 2018 WL 2722796, at *24 (Tenn. Crim. App. June 6, 2018) ("The Defendant asserts that the trial court erred in finding that he had an extensive record of criminal activity because he had no prior convictions. As the State correctly argues, this Court has held that '[c]urrent offenses may be used in determining criminal history for the purposes of consecutive sentencing.' Therefore, the trial court did not abuse its discretion in imposing consecutive sentences based upon the numerous violent offenses the Defendant committed in October 2013." (citations omitted)); *State v. McIntosh*, No. E2017-01353-CCA-R3-CD, 2018 WL 2259183, at *6 (Tenn. Crim. App. May 17, 2018) (holding that, despite absence of criminal record, "the record establishes, by a preponderance of the evidence, the defendant has an extensive record of criminal activity, committing numerous acts of abuse against the victims over several years. This extensive history of criminal behavior is sufficient to warrant ordering two of the sentences for aggravated child abuse to run consecutively.").

[83] "Trial courts can consider prior misdemeanors in determining whether a defendant has an extensive record of criminal activity" for consecutive sentencing purposes. *See State v. Dickson*, 413 S.W.3d 735, 748 (Tenn. 2013). As such, consecutive sentences may be ordered when defendant only has misdemeanor convictions, particularly if the previous convictions are of a similar nature to current offenses. *See State v. Long*, No. W2016-02471-CCA-R3-CD, 2018 WL 3203124, *1 (Tenn. Crim. App. June 29, 2018) (upholding consecutive sentences, in part, when "despite being injured in an accident while driving under the influence, the Appellant continued to drive while under the influence of various intoxicants and blatantly disregarded the rules of the road." (citing *State v. Dickson*, 413 S.W.3d 735, 748 (Tenn. 2013) (stating that although many of defendant's "convictions

- the nature of current and prior conduct, particularly if the criminal conduct is of the same or similar nature[84] or is escalating in seriousness;[85]

- whether there exists criminal *behavior* that has not been the subject of conviction,[86] including consideration of a history of unlawful substance use;[87]

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did not involve acts of violence and most constituted driving offenses, they indicate a consistent pattern of operating outside the confines of lawful behavior")); *State v. Robinson*, No. W2016-01949-CCA-R3-CD, slip op. at 7 (Tenn. Crim. App. June 20, 2017) ("Tennessee Code Annotated section 40-35-115(b)(2) does not specify that only a defendant's felony record may be taken into account but instead denotes 'criminal activity.' In fact, this court has previously found that the imposition of consecutive sentences was justified when a defendant's record of criminal activity consisted only of misdemeanors."); *State v. Allison*, No. M2017-02367-CCA-R3-CD, 2019 WL 4072139, at *14 (Tenn. Crim. App. Aug. 29, 2019), *perm. app. granted*, Jan. 15, 2019 (affirming consecutive sentencing when the defendant's "record of criminal activity is extensive, even though he hasn't had any felony convictions in the twenty-first century, the terms of consecutive sentencing addresses criminal activity, not just criminal convictions.").

[84] *See State v. Scates*, No. W2019-01274-CCA-R3-CD, 2020 WL 4386782 (Tenn. Crim. App. July 30, 2020) ("In regard to whether '[t]he defendant is an offender whose record of criminal activity is extensive,' we acknowledge that the Defendant had a relatively minor criminal history prior to this offense. However, the trial court found the Defendant's prior DUI conviction to be significant because it too involved prescription drug use which resulted in a single car crash. In this context, we agree with the trial court and conclude that the Defendant's prior DUI, combined with the four Class D felony offenses of conviction of a similar nature, satisfy the statutory criteria for consecutive sentencing.").

[85] *See State v. Atha*, No. E2018-00663-CCA-R3-CD, 2019 WL 4567498, at *19 (Tenn. Crim. App. Sept. 20, 2019) (affirming imposition of consecutive sentences, in part, when "[h]is behavior escalated over time from joyriding and passing worthless checks to violent crimes—aggravated robbery, aggravated kidnapping, and aggravated rapes that occurred under such circumstances to 'shock the conscience of' the trial court. Consecutive service of the aggravated rape sentences is amply merited in this case. The Defendant is not entitled to relief on this basis.").

[86] "[A]n extensive record of criminal activity may include criminal behavior which does not result in a conviction." *See State v. Koffman*, 207 S.W.3d 309, 324 (Tenn. Crim. App. 2006). *See also State v. Canter*, No. M2018-01183-CCA-R3-CD, 2019 WL 2418948, at *5 (Tenn. Crim. App. June 10, 2019) ("This factor has been interpreted 'to apply to offenders who have an extensive history of criminal convictions and activities, not just to a consideration of the offenses before the sentences court.' '[A]n extensive record of criminal activity may include criminal behavior which does not result in a conviction.'" (quoting *State v. Palmer*, 10 S.W.3d 638, 648 (Tenn. Crim. App. 1999) and *State v. Koffman*, 207 S.W.3d 309, 324 (Tenn. Crim. App. 2006))); *State v. Cuevas*, No. E2018-01002-CCA-R3-CD, 2019 WL 2173245, at *4 (Tenn. Crim. App. May 20, 2019) (affirming imposition of consecutive sentences, in part, when "at the sentencing hearing, the defendant testified to engaging in other conduct that constituted criminal behavior."); *State v. Gill*, No. W2018-00331-CCA-R3-CD, 2019 WL 549651, at *18 (Tenn. Crim. App. Feb. 11, 2019) ("Additionally, 'an extensive record of criminal activity may include criminal behavior which does not result in a conviction.'" (citations omitted)).

[87] *See State v. Franklin*, No. M2018-01958-CCA-R3-CD, 2020 WL 4280692, at *27 (Tenn. Crim. App. July 27, 2020) (affirming imposition of consecutive sentences, in part, when "[t]he Defendant also admitted to having used illegal drugs beginning at age fourteen until the day before the crash in this case. We note that generally, convictions are not required for this factor to be applicable."); *State v. Canter*, No. M2018-01183-CCA-R3-CD, 2019 WL 2418948, at *5 (Tenn. Crim. App. June 10, 2019) ("During its oral findings, the trial court described the defendant's five month crime spree, stating 'over about a four or five-month period, you have 14 felonies that you have been convicted of, approximately seven or eight vehicles stolen, several ATVs, and you've broken into a house.' The defendant's other charges and convictions were also discussed, including convictions for vandalism, obstruction of justice, and DUI. Finally, the trial court noted the defendant admitted to smoking marijuana daily for several years and using methamphetamine for several months prior to his arrest. After reviewing this information, the trial court found the proof 'certainly' showed the defendant was 'an offender whose record of

- the time over which the criminal activity occurred,[88] though remote activity does "not preclude the trial court from considering whether a defendant has an extensive criminal history";[89] and

- whether any criminal conduct occurred while on probation for other offenses[90]

The Court notes that prior conduct need not be violent,[91] as the criminal behavior itself "indicate[s] a consistent pattern of operating outside the confines of lawful behavior."[92]

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criminal activity is extensive.'"); *State v. Beasley*, No. M2017-00591-CCA-R3-CD, 2018 WL 4931471, at *7 (Tenn. Crim. App. Oct. 11, 2018) ("Moreover, this factor includes criminal behavior as well as convictions, and the Defendant's long-term drug use certainly constitutes criminal behavior." (citing *State v. Dickson*, 413 S.W.3d 735, 748-49 (Tenn. 2013))); *State v. Tatrow*, No. 03C01-9707-CR-00299, 1998 WL 761829, at *21 (Tenn. Crim. App. Nov. 2, 1998) ("Based on the defendant's daily use of illegal drugs for more than a year, the court found that the defendant had [an] extensive record of criminal behavior. It found that the circumstances surrounding the commission of the crimes were aggravated and that the murders were especially brutal and cruel and that two consecutive life sentences were reasonably related to the severity of the offenses. The record overwhelmingly supports these findings." (citing Tenn. Code Ann. § 40-35-115(b)(2))).

[88] The court may look to how often the criminal conduct is occurring under this factor, though this fact is also generally considered under the "professional criminal" category. *See State v. Cuevas*, No. E2018-01002-CCA-R3-CD, 2019 WL 2173245, at *4 (Tenn. Crim. App. May 20, 2019) (affirming imposition of consecutive sentences, in part, when "The defendant's presentence investigation report shows a lengthy criminal history of at least 30 convictions spanning most of the defendant's adult life. The only times that the defendant had a gap of more than a few months before accruing new convictions was during periods of incarceration."); *State v. Jackson*, No. M2019-00180-CCA-R3-CD, slip op. at 9 (Tenn. Crim. App. Oct. 21, 2019) (weighing for this factor, and professional criminal category, that "Defendant's convictions span twenty-seven years, dating back to 1991"); *State v. Hurt*, No. W2017-02179-CCA-R3-CD, 2020 WL 1593774, at *16 (Tenn. Crim. App. Apr. 1, 2020) (affirming imposition of consecutive sentences, in part, when trial court noted that for "most of his life, [the Appellant] has been arrested and charged with crimes. And, since he's been an adult, since the age of eighteen, there is probably not a period of time where you can look at more than six months or a year that [the Appellant] has not been arrested, has not been charged, has not been convicted for a variety of crimes, including property crimes and including assaultive behavior committed against other people.").

[89] *See State v. Hudson*, No. W2019-00337-CCA-R3-CD, 2020 WL 1809828, at *3 (Tenn. Crim. App. Apr. 8, 2020) ("At the core of the Defendant's challenge to his sentence is the fact that his last conviction occurred almost twenty years before the instant offenses and that he had been released from prison for almost ten years without incident. We acknowledge and common-sense dictates that the chronological remoteness of a prior criminal conviction can be a mitigating factor in sentencing. Nevertheless, the remoteness of a prior conviction does not preclude the trial court from considering whether a defendant has an extensive criminal history." (citing *State v. Ford*, No. W2007-02149-CCA-R3-CD, 2009 WL 1034522, at *5 (Tenn. Crim. App. Apr. 17, 2009); *State v. Cooper*, No. M2001-00440-CCA-R3-CD, 2002 WL 360222, at *3 (Tenn. Crim. App. Mar. 6, 2002) (noting that remoteness of past sentences is not relevant to whether a defendant has an extensive criminal history))).

[90] *See State v. Atha*, No. E2018-00663-CCA-R3-CD, 2019 WL 4567498, at *19 (Tenn. Crim. App. Sept. 20, 2019) (affirming consecutive sentences, in part, when "the Defendant previously committed several offenses while on probation.").

[91] *See State v. Moore*, No. E2017-00027-CCA-R3-CD, 2017 WL 5712999, at *9 (Tenn. Crim. App. Nov. 28, 2017) ("While the Defendant has not previously been convicted of a violent felony, the evidence does not preponderate against the trial court's finding that the Defendant's history of criminal activity, whether her admitted use of marijuana, methamphetamine, and opioids, or her prior convictions, was extensive. In addition to prior criminal convictions, an extensive record of criminal activity may include criminal behavior which does not result in a conviction.").

However, where the previous conduct is violent, it may weigh in favor of consecutive sentencing because "[w]hile rehabilitation is a laudable goal of the criminal justice system, violent offenders must be held accountable for their unlawful actions."[93]

In this case, the Defendant has four misdemeanor convictions consisting of three assault convictions and one conviction for false imprisonment.[94] The current convictions before the Court consist of four felony offenses, again for assaultive conduct.[95] In addition to these eight convictions, the Defendant has a long history of unlawful substance use, consisting of four years of marijuana use and methamphetamine use for about a year and then intermittently when with a particular friend.[96]

With the exception of his previous conviction for false imprisonment, each of the Defendant's other seven offenses involves assaultive behavior and violent criminal activity. The previous conduct has involved female victims, and the nature of the conduct has escalated in seriousness.[97] In at least one previous case, the assaultive behavior involved an attempt to use a

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[92] *See State v. Dickson*, 413 S.W.3d 735, 748 (Tenn. 2013) ("Tenn. Code Ann. § 40-35-115(b)(2) applies to the Defendant. The Defendant had numerous prior convictions. While many of these convictions did not involve acts of violence and most constituted driving offenses, they indicate a consistent pattern of operating outside the confines of lawful behavior." (footnote omitted)).

[93] *See State v. Dickson*, 413 S.W.3d 735, 749 (Tenn. 2013).

[94] The Court of Criminal Appeals has recently affirmed consecutive sentences under this factor when, despite new convictions for four felonies, the defendant had been previously convicted only of a single misdemeanor. One important consideration, however, was that the previous and current conduct were of the same or similar type of behavior. *See State v. Scates*, No. W2019-01274-CCA-R3-CD, 2020 WL 4386782 (Tenn. Crim. App. July 30, 2020) ("In regard to whether '[t]he defendant is an offender whose record of criminal activity is extensive,' we acknowledge that the Defendant had a relatively minor criminal history prior to this offense. However, the trial court found the Defendant's prior DUI conviction to be significant because it too involved prescription drug use which resulted in a single car crash. In this context, we agree with the trial court and conclude that the Defendant's prior DUI, combined with the four Class D felony offenses of conviction of a similar nature, satisfy the statutory criteria for consecutive sentencing.").

[95] *See State v. Hudson*, No. W2019-00337-CCA-R3-CD, 2020 WL 1809828, at *3 (Tenn. Crim. App. Apr. 8, 2020) (upholding consecutive sentences based upon criminal history consisting of four drug felonies and nine misdemeanors, despite last conviction occurring 20 years previous and no criminal activity in last 10 years); *State v. Carter*, No. M2017-02057-CCA-R3-CD, 2019 WL 1399878, at *6 (Tenn. Crim. App. Mar. 27, 2019) ("The trial court also found '[t]he defendant is an offender whose record of criminal activity is extensive,' with 'three felony convictions and two prior misdemeanor drug convictions'"); *State v. Ford*, No. W2015-02407-CCA-R3-CD, slip op. at 9 (Tenn. Crim. App. Mar. 3, 2017) (determination of extensive criminal activity upheld with record of 2 prior felonies and 7 misdemeanor convictions); *State v. Boykin*, No. W2018-01207-CCA-R3-CD, 2019 WL 5269026, at *8 (Tenn. Crim. App. Oct. 17, 2019) (affirming imposition of consecutive sentences, in part, when defendant had, in addition to two present convictions for aggravated child abuse, two prior convictions for aggravated robbery, and two misdemeanor convictions for driving on a suspended license and domestic assault); *State v. Otis*, No. W2016-01261-CCA-R3-CD, 2018 WL 931131, at *8 (Tenn. Crim. App. Feb. 15, 2018) (affirming imposition of consecutive sentences for extensive criminal activity when defendant's "prior record consisted of one felony conviction and eight misdemeanors").

[96] *See* Exhibit 1, Second Amended Presentence Investigation Report, at 9.

[97] The Defendant's previous conviction for assault against Erica Thornton is especially concerning, and, perhaps for this reason, has been the subject of much litigation in this proceeding. Candidly, after hearing the testimony offered by her during these proceedings and her testimony offered at the preliminary hearing of that case, the Court is unsure what actually occurred on that Christmas Eve in 2014. However, from all the surrounding

weapon against law enforcement officers. In the present offenses, the conduct ranged from choking, to punching, and to biting and cutting. The conduct then escalated to the point where a heated knife—likely constituting a deadly weapon[98]—was used multiple times to inflict terrible, grievous, and long-lasting injuries.

The Defendant's criminal behavior involving unlawful drug use is also protracted, lasting for more than five years previous to these most recent events. By the Defendant's own admission during his allocution, his drug use resulted in his being in a "meth-induced psychosis" during these horrific events and may have contributed to the events. To this extent, the Defendant's previous criminal behavior is not merely incidental or unrelated to the current events; it is part and parcel of it.

The Defendant's instant offenses also occurred over a period of time, and imposing wholly concurrent sentences fails to recognize or appreciate the multiple, separate harms that the Defendant caused.[99] The types of harms or injuries caused by the Defendant vary in their seriousness, and the punishment for the conduct described in Count 4 should be imposed in a way separate from the other types of assaultive conduct committed.

B. DANGEROUS OFFENDER, TENN. CODE ANN. § 40-35-115(B)(4)

The State strongly urges the Court to consider whether, by a preponderance of the evidence, the proof establishes that the Defendant is a dangerous offender whose behavior indicates little or no regard for human life and no hesitation about committing a crime in which the risk to human life is high.[100] This category of consecutive sentences has been recognized to

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circumstances, it does appear to the Court that the Defendant engaged in assaultive conduct against Ms. Thornton, and for purposes of the analysis here, the Court considers this history even if it is reticent to credit the more violent allegations also made.

[98] A "deadly weapon" is "[a]nything that in the manner of its use or intended use is capable of causing death or serious bodily injury." *See* Tenn. Code Ann. § 39-11-106(a)(6)(B). The Court of Criminal Appeals has recognized that a heated instrument, such as a heated coat hanger, may constitute a deadly weapon. *See State v. Medlock*, W2000-03009-CCA-R3-CD, 2002 WL 1549707, at *6 (Tenn. Crim. App. Jan. 16, 2002) ("The Appellant forced a heated coat hanger into the vagina of Ms. Readus while pouring alcohol into the vaginal area. He then sexually penetrated her with his penis. These facts support the jury's verdict of unlawful sexual penetration by force while armed with a deadly weapon, *i.e.*, coat hanger, board, and extension cord. The proof also established that the Appellant caused bodily injury to the victim. We conclude that the evidence was sufficient to convict the Appellant of two counts of aggravated rape."). The Court believes that the knife used by the Defendant here was certainly capable of causing, and did actually cause, serious bodily injury consisting of extreme physical pain, obvious disfigurement, and a substantial impairment of a function of a bodily member or organ.

[99] *See State v. Brown*, No. E2018-02135-CCA-R3-CD, slip op. at 6 (Tenn. Crim. App. Oct. 22, 2019) ("Although the Defendant argues that consecutive sentencing was improper because his convictions arose from the same criminal episode, we disagree. Accordingly, the trial court did not abuse its discretion in ordering the Defendant to serve his sentences in this case consecutively." (citing *Gray v. State*, 538 S.W.2d 391, 393 (Tenn. 1976) (rejecting petitioner's argument that "in determining whether to sentence a defendant to consecutive sentences, the trial judge is required to take into consideration the fact that all of the offenses arose out of one single criminal episode"); *State v. Palmer*, 10 S.W.3d 638 (Tenn. Crim. App. 1999))).

[100] *See* Tenn. Code Ann. § 40-35-115(b)(4). *See State v. Wilkerson*, 905 S.W.3d 933, 939 (Tenn. 1995) (a dangerous offender requires proof that the (1) sentences imposed are reasonably related to the severity of

be the most subjective of all the categories,[101] and for this reason, the record must support additional findings beyond the fact that the defendant may be labeled as a "dangerous offender."

First, the record must show that a defendant's behavior indicates little or no regard for human life. This factor has been found to exist where the victims did not resist, and where they were tortured and savagely beaten[102] and where a defendant repeatedly injures the victim causing injuries that could have been fatal and perhaps failed to call 911.[103] This factor has also been found to exist where a defendant uses substances, knowing the effect, and the substances contribute to the criminal conduct.[104]

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the offenses; and (2) that the sentences are necessary to protect the public from further criminal activity by the defendant); *State v. Williamson*, No. W2019-00437-CCA-R3-CD, 2020 WL 1274770, at *9 (Tenn. Crim. App. Mar. 16, 2020) ("In order to impose consecutive sentences on the basis that a defendant is 'a dangerous offender whose behavior indicates little or no regard for human life and no hesitation about committing a crime in which the risk to human life is high,' a trial court must also find that the sentences 'are reasonably related to the severity of the offenses' and 'are necessary in order to protect the public from further criminal acts' by the defendant." (citing *State v. Wilkerson*, 905 S.W.2d 933, 938 (Tenn. 1995); *State v. Moore*, 942 S.W.2d 570, 574 (Tenn. Crim. App. 1996))).

[101] *See State v. Pollard*, 432 S.W.3d 851, 863 (Tenn. 2013) ("[B]ecause the dangerous offender classification is the most subjective to apply, the record must also establish that the aggregate sentence reasonably relates to the severity of the offenses and that the total sentence is necessary for the protection of the public from further crimes by the defendant."); *State v. Imfeld*, 70 S.W.3d 698, 708 (Tenn. 2002) ("The need for the additional findings before imposing consecutive sentencing on the basis of the 'dangerous offender' provision arises, in part, from the fact that this category 'is the most subjective and hardest to apply.'" (citations omitted)); *State v. Lane*, 3 S.W.3d 456, 461 (Tenn. 1999) ("The requirement that a court make these specific findings before imposing a consecutive sentence on a 'dangerous offender' arises from the fact that of all of the categories for consecutive sentencing, the dangerous offender category is the most subjective and hardest to apply.").

[102] *See State v. Gathing*, No. W2016-02076-CCA-R3-CD, slip op. at 26 (Tenn. Crim. App. Jan. 19, 2018); *see also State v. Crawford*, No. E2009-02544-CCA-R3-CD, 2011 WL 2650882, at *10 (Tenn. Crim. App. July 7, 2011) ("The record established that this defendant shot his way into a home occupied by five people, including his own two children, and proceeded to create havoc within. Victims were shot, stabbed, and beaten before the defendant finally left the scene. This evidence, combined with the testimony given with regard to the fifteen years of abuse which occurred prior to this incident, amply supports the court's findings. No abuse of discretion occurred."); *State v. Reynolds*, No. M2017-00169-CCA-R3-CD, 2018 WL 6253829, at *14 (Tenn. Crim. App. Nov. 28, 2018), *denied, not for citation,* Apr. 11, 2019 (affirming consecutive sentences under this factor where defendant "engaged in the 'exceptional cruelty and the brutal beating' of the victim which resulted in her death. . . . It is clear Richardson engaged in the prolonged beating of the victim during which she suffered extensive traumatic injuries while hanging by her arms from the ceiling.").

[103] *See State v. Boykin*, No. W2018-01207-CCA-R3-CD, 2019 WL 5269026, at *15 (Tenn. Crim. App. Oct. 17, 2019) (affirming imposition of consecutive sentences, in part, when "Defendant repeatedly injured the victim by burning away significant portions of skin, breaking his hands in different incidents, leaving whip marks in different stages of healing, and causing a subdural hemorrhage which could have been fatal. Defendant did not call 911 or otherwise seek medical attention for the victim.").

[104] *See State v. Scates*, No. W2019-01274-CCA-R3-CD, 2020 WL 4386782 (Tenn. Crim. App. July 30, 2020) (affirming imposition of consecutive sentences for vehicular assault by intoxication and reckless aggravated assault, in part, finding "the record shows the Defendant's actions leading up to the accident created a situation where the risk to human life was high. Based on her prior experience with the same prescription drugs, a single-car crash, and subsequent DUI conviction, the Defendant knew that driving under those conditions was dangerous to herself and every other motorist she encountered. Yet, the Defendant chose to drive again in the same condition.").

Next, the record must show that the defendant had no hesitation about committing a crime in which the risk to human life is high. As the *Wilkerson* Court observed, "hesitation or lack of hesitation does not submit readily to proof because of its subjective nature. The more logical interpretation of this enhancement factor places the emphasis on 'risk to human life was high.'"[105] As such, this factor may exist, for example, where a defendant "committed two separate, unrelated, violent offenses within a short span of time."[106]

Third, the record must show that confinement of a defendant for an extended period of time is necessary in order to protect the public[107] from further criminal acts. This factor may exist, for example, where the crimes are intentional acts;[108] where the motive for the crimes is revenge or retaliation;[109] where a defendant has psychological and substance use disorders that contribute to history of violent crime;[110] where there has been a history of weapons use;[111] where there has been a disregard for the law, including where the instant offenses were committed

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[105] *See State v. Wilkerson*, 905 S.W.2d 933, 937 (Tenn. 1995).

[106] *See State v. Sisson*, No. E2017-01721-CCA-R3-CD, 2018 WL 3430336, at *6 (Tenn. Crim. App. July 16, 2018) (upholding consecutive sentences under this factor) (Division I); *State v. Smith*, No. W2017-01915-CCA-R3-CD, 2018 WL 4579693, at *5 (Tenn. Crim. App. Sept. 21, 2018) (upholding consecutive sentences under this factor where "Defendant was involved in a series of serious criminal offenses that resulted in the death of one of the victims."); *Churchman v. State*, No. W2017-02338-CCA-R3-PC, 2019 WL 3072106, at *5 (Tenn. Crim. App. July 12, 2019) ("Counsel thought the trial court acted within its discretion by imposing consecutive sentencing [under the dangerous offender category]. We agree. The post-conviction court found that the Petitioner committed two violent felony offenses within hours of each other.").

[107] The term "public" may also include the victim and her children. *See State v. Sharp*, No. W2018-00156-CCA-R3-CD, 2019 WL 960431, at *14 (Tenn. Crim. App. Feb. 26, 2019) ("As noted by the State, this court has upheld a trial court's ordering consecutive sentencing when the court found that "the public" included the victim and her children." (citing *State v. Mitchell*, No. M2005-01652-CCA-R3-CD, 2006 WL 1506519, at *16 (Tenn. Crim. App. June 1, 2006)).

[108] Even if the defendant has little criminal history or a benign social history, these facts may not mitigate dangerousness for intentional crimes. *See State v. Richardson*, No. W2016-00174-CCA-R3-CD, slip op. at 16 (Tenn. Crim. App. Jan. 27, 2017) ("[T]hat the actions of the defendants in *Wilkerson* and *Imfeld* were the result of intoxication and not premeditated and knowing acts, like the defendant's here, actually works against the defendant. In this case, the defendant engaged in attempted mass murder despite his benign social history; therefore, his social history provides no assurances that he is not a risk to the public in the future.").

[109] *See State v. Wren*, No. W2018-02087-CCA-R3-CD, 2019 WL 4464267, at *7 (Tenn. Crim. App. Sept. 13, 2019) (affirming imposition of consecutive sentences, in part, when "The trial court acknowledged that the victim had committed a theft but found that the Defendant acting as 'judge, jury, and executioner' in response was 'pretty disturbing,'" where the actions evidenced "'the brazenness' of the Defendant publicly executing an individual under circumstances that the State could not").

[110] *See State v. Fleming*, No. E2019-00078-CCA-R3-CD, 2020 WL 1875240, at *8, 13 (Tenn. Crim. App. Apr. 15, 2020) (affirming imposition of consecutive sentences, in part, when "[t]he trial court found that confinement for an extended period of time was necessary to protect society from 'the defendant's unwillingness to lead a productive life and the defendant's resort to criminal activity in furtherance of an antisocial lifestyle.' The trial court noted that according to the presentence report, the Defendant had been diagnosed with antisocial personality disorder, severe cannabis use disorder, severe opioid use disorder, and substance abuse psychotic disorder. The trial court found that these factors, along with the Defendant's 'only means of making a living,' justify 'a very long period of protection for the community.'").

[111] *See State v. Johnson*, No. W2016-02439-CCA-R3-CD, slip op. at 6 (Tenn. Crim. App. Jan. 5, 2018) (noting this fact as supporting application of this factor under *Wilkerson*).

while a defendant was on bond for other offenses;[112] where there have been previous failures at rehabilitation,[113] including a history of failed attempts at substance use treatment;[114] and where there has been a failure to accept responsibility for the conduct.[115]

Finally, the record must show that the aggregate length of the sentences is reasonably related to the severity of the offenses for which a defendant stands convicted.[116] Proof supporting the aggravated nature of offenses may exist where the crimes were planned;[117] the ultimate crime was the result of an escalation of conduct, starting off with simple misconduct and

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[112] *See State v. Johnson*, No. W2016-02439-CCA-R3-CD, slip op. at 6 (Tenn. Crim. App. Jan. 5, 2018) (noting this fact as supporting application of this factor under *Wilkerson*); *State v. Johnson*, No. W2017-00476-CCA-R3-CD, 2018 WL 625126, at *10 (Tenn. Crim. App. Jan. 30, 2018) (affirming imposing of consecutive sentences, noting the trial court's finding that "Defendant had an extensive criminal history, that he had not successfully completed past alternative sentences, and that he committed the current offenses while on probation."); *State v. Ross*, No. 01C01-9410-PB-00365, 1995 WL 687694, *6 (Tenn. Crim. App. Nov. 21, 1995), *perm. app. denied* May 6, 1996 (dangerous offender provision applied to a defendant, out on bond from a previous D.U.I. charge, who drank throughout the day, left a bowling alley exclaiming "I'm loaded and I ain't through yet," and then sped through a red light, causing a five-car accident that killed three victims).

[113] *See State v. Beasley*, No. M2017-00591-CCA-R3-CD, 2018 WL 4931471, at *8 (Tenn. Crim. App. Oct. 11, 2018) (affirming imposing of consecutive sentences, noting that consecutive sentences were necessary "to protect the public given the Defendant's long history of drug use, prior overdoses, loss of custody of her child, prior failures at rehabilitation, sporadic employment, and prior misdemeanor convictions.").

[114] *See State v. Pinhal*, No. M2019-01516-CCA-R3-CD, 2020 WL 3966843, at *12 (Tenn. Crim. App. July 14, 2020) (affirming imposition of consecutive sentences in a vehicular homicide case, in part, when "[t]he Defendant reported during the presentence investigation that she graduated from high school in 2009, that she began frequently drinking alcohol and smoking marijuana in 2002, that she used cocaine between 2009 and 2018, and that she frequently used methamphetamine in 2018. She admitted using heroin, as well. She had likewise entered eight substance abuse treatment programs between 2009 and 2016 but later relapsed. The Defendant, likewise, admitted at the sentencing hearing that her history showed that she generally used drugs and violated the conditions of her probation in previous cases."); *State v. Scates*, No. W2019-01274-CCA-R3-CD, 2020 WL 4386782 (Tenn. Crim. App. July 30, 2020) (affirming imposition of consecutive sentences for vehicular assault by intoxication and reckless aggravated assault, in part, finding that "given the prior unsuccessful rehabilitative efforts and her "unwillingness to lead a productive life," the trial court further determined, and we agree, that an extended sentence was necessary to protect the public from further criminal acts of the Defendant.").

[115] *See State v. Cromwell*, No. E2017-01320-CCA-R3-CD, 2018 WL 3239948, at *19 (Tenn. Crim. App. July 3, 2018) (upholding consecutive sentences on this ground, in part, where "[t]he record illustrates the defendant showed 'little remorse' for his crimes and that he was 'more worried about his truck' than his victims, as evidenced by his decision to file liens 'for what he perceives as unfair actions' by public officials involved in his prosecution."); *State v Austin*, No. W2017-01632-CCA-R3-CD, 2018 WL 4849141, at *13 (Tenn. Crim. App. Oct. 5, 2018) (upholding consecutive sentences on this ground, in part, where "[a]dditionally, the Defendant continued to maintain at the sentencing hearing that he did nothing wrong despite the overwhelming evidence of his guilt.").

[116] *See State v. Pollard*, 432 S.W.3d 851, 860 (Tenn. 2013) ("Every offender convicted of two or more dangerous crimes is not a dangerous offender subject to consecutive sentences . . . . The proof must also establish that the terms imposed are reasonably related to the severity of the offenses committed and are necessary in order to protect the public from further criminal acts by the offender." (quoting *State v. Wilkerson*, 905 S.W.2d 933, 938 (Tenn. 1995)).

[117] *See State v. Calles*, No. M2017-01552-CCA-R3-CD, 2018 WL 5307891, at *9 (Tenn. Crim. App. Oct. 25, 2018) ("The victims were targeted, the crimes were planned, the people who committed the offenses carried at least one deadly weapon, and the victims were physically abused.").

ending in serious offenses;[118] weapons were involved in the commission of the offenses;[119] a defendant abused the victim over a long period of time;[120] the victim suffered particular harm, including where there was no concern for the victim,[121] the victims were physically abused[122] or tortured,[123] and where the victim suffers life-long physical injuries,[124] or multiple injuries requiring days-long hospitalization;[125] where a defendant has a history of substance use and

[118] *See State v. Williamson*, No. W2019-00437-CCA-R3-CD, 2020 WL 1274770, at *9 (Tenn. Crim. App. Mar. 16, 2020) ("The record reflects that the trial court determined that the circumstances surrounding the offenses were 'aggravated,' noting that the offenses began as a domestic dispute, escalated into an assault, and ended with the Defendant's shooting Mr. Thompson for attempting to intervene in the Defendant's assault against Mr. Webb. The incident occurred in the presence of children.").

[119] *See State v. Calles*, No. M2017-01552-CCA-R3-CD, 2018 WL 5307891, at *9 (Tenn. Crim. App. Oct. 25, 2018) ("The victims were targeted, the crimes were planned, the people who committed the offenses carried at least one deadly weapon, and the victims were physically abused.").

[120] *See State v. Harris*, No. M2018-01680-CCA-R3-CD, 2019 WL 5704185, at *17 (Tenn. Crim. App. Nov. 5, 2019) ("With regard to the imposition of consecutive sentences, we similarly conclude that the trial court did not abuse its discretion. The court, noting the temporal duration and physical severity of the abuse inflicted upon the victim, made the necessary findings under Wilkerson to impose consecutive sentences based upon the defendant's status as a dangerous offender.").

[121] *See State v. Taylor*, No. M2015-02142-CCA-R3-CD, slip op. at 19 (Tenn. Crim. App. May 16, 2017) ("the defendant, at a minimum, demonstrated extreme callousness toward the health and welfare of the victim, and the results were fatal.") (citing *State v. Dorantes*, 331 S.W.3d 370, 292 (Tenn. 2001)) (upholding consecutive sentences where evidence suggested that defendant had previously participated in abuse of victim, was aware of present condition, and failed to assist); *State v. Beasley*, No. M2017-00591-CCA-R3-CD, 2018 WL 4931471, at *7 (Tenn. Crim. App. Oct. 11, 2018) (upholding consecutive sentences under this factor, in part, where after accident, defendant "showed no concern for the victims and appeared only to be interested in getting cigarettes")..

[122] *See State v. Calles*, No. M2017-01552-CCA-R3-CD, 2018 WL 5307891, at *9 (Tenn. Crim. App. Oct. 25, 2018) ("The victims were targeted, the crimes were planned, the people who committed the offenses carried at least one deadly weapon, and the victims were physically abused.")..

[123] *See State v. Harris*, No. M2018-01680-CCA-R3-CD, 2019 WL 5704185, at *17 (Tenn. Crim. App. Nov. 5, 2019) ("With regard to the imposition of consecutive sentences, we similarly conclude that the trial court did not abuse its discretion. The court, noting the temporal duration and physical severity of the abuse inflicted upon the victim [noting that the abuse was 'especially heinous, atrocious, and cruel' and amounted to 'torture'], made the necessary findings under Wilkerson to impose consecutive sentences based upon the defendant's status as a dangerous offender.").

[124] *See State v. Mcleod*, No. W2018-01646-CCA-R3-CD, slip op. at 9 (Tenn. Crim. App. Sept. 26, 2019) (affirming imposition of consecutive sentences, in part, when "[t]he trial court's concern over the defendant's callousness of escalating a mere argument into a fatal shooting resulting in the death of one individual and life-long medical and physical issues for another, and subsequently lying to a jury about it, reflects a finding that consecutive sentencing was necessary to protect the public.").

[125] *See State v. Scates*, No. W2019-01274-CCA-R3-CD, 2020 WL 4386782 (Tenn. Crim. App. July 30, 2020) (affirming imposition of consecutive sentences for vehicular assault by intoxication and reckless aggravated assault, in part, finding "[t]his time, the Defendant's actions resulted in a two-car crash, with four victims who sustained multiple injuries. The youngest victim, age seven, suffered a broken arm, a broken jaw, a bruise on her lung, and was hospitalized for four days." (citing *State v. Sweet*, No. E2008-00100-CCA-R3-CD, 2009 WL 2167785, at *25 (Tenn. Crim. App. July 21, 2009) and *State v. Imfeld*, 70 S.W.3d 698, 709 (Tenn. 2002) (noting that extent of victims' injuries is proper to consider in determining whether consecutive sentencing is "reasonably related" to the severity of the offense).

failed treatment and knowingly consumes intoxicants;[126] and where a defendant's conduct establishes the commission of a greater offense.[127]

During the sentencing hearing, the Court initially expressed concern as to whether the State had shown that the nature of the offenses here involved a risk to human life. In doing so, the Court was perhaps not focused on all of the acts that were the subject of the plea, including the strangulation of Ms. Robinson to the point of near unconsciousness.

In at least one other case, *State v. Freitas*,[128] the Court of Criminal Appeals found that an attempted strangulation met the requirements of the dangerous offender category when two other facts were also present: (1) there was a history of abuse by the defendant against the victim; and (2) there existed a previous assault on a third party involving a deadly weapon. According to the *Freitas* Court,

> The trial court accredited the victim's testimony that the defendant had a history of beating and assaulting both her and her son. The photographs of a prior assault on the victim by the defendant were entered into evidence at the sentencing hearing and show the victim's clothing covered in blood. The defendant also has prior convictions for aggravated assault involving a deadly weapon. This history, combined with the defendant's strangulation of the victim that was found by the trial court to have occurred by a preponderance of the evidence, indicate that the defendant had little regard for human life and posed a threat to society. The trial court did not abuse its discretion in ordering that the defendant's sentences be served consecutively.[129]

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[126] *See State v. Beasley*, No. M2017-00591-CCA-R3-CD, 2018 WL 4931471, at *8 (Tenn. Crim. App. Oct. 11, 2018) (upholding consecutive sentences under this factor, "The Defendant argues that there were insufficient aggravating circumstances to support consecutive sentencing. However, the record supports the trial court's dangerous offender finding. The Defendant, having a long history of substance abuse and prior failed attempts at treatment, drove while intoxicated with her two-year-old son in the car and caused a head-on collision with tragic consequences and, afterwards, showed no concern for the victims and appeared only to be interested in getting cigarettes. Her admission of drinking 3-4 twenty-four ounce beers within two and a half hours of putting her son in the car is simply stunning."); *State v. Pinhal*, No. M2019-01516-CCA-R3-CD, 2020 WL 3966843, at *12 (Tenn. Crim. App. July 14, 2020) (affirming imposition of consecutive sentences in a vehicular homicide case, in part, when "[t]he Defendant reported during the presentence investigation that she graduated from high school in 2009, that she began frequently drinking alcohol and smoking marijuana in 2002, that she used cocaine between 2009 and 2018, and that she frequently used methamphetamine in 2018. She admitted using heroin, as well. She had likewise entered eight substance abuse treatment programs between 2009 and 2016 but later relapsed. The Defendant, likewise, admitted at the sentencing hearing that her history showed that she generally used drugs and violated the conditions of her probation in previous cases.").

[127] *See State v. Smith*, No. W2017-01915-CCA-R3-CD, 2018 WL 4579693, at *5 (Tenn. Crim. App. Sept. 21, 2018) (affirming imposition of consecutive sentences under dangerous offender classification, in part, where "[t]he trial court found that the offenses were aggravated because Defendant's participation in the offenses was "much greater than what he was discussing here in court today"; trial court believed that defendant committed felony murder (death in commission of aggravated burglary), though defendant was convicted of reckless homicide).

[128] *See State v. Freitas*, No. W2015-02492-CCA-R3-CD, 2016 WL 5864632, at *7 (Tenn. Crim. App. Oct. 7, 2016).

[129] *See State v. Freitas*, No. W2015-02492-CCA-R3-CD, 2016 WL 5864632, at *7 (Tenn. Crim. App. Oct. 7, 2016).

Other examples exist as well where the dangerous offender classification has been affirmed for a defendant who chokes or strangles a victim, particularly where the defendant has engaged in other violent conduct previously.[130]

In this case, Ms. Robinson described the Defendant's conduct set forth in Count 2 as being strangled and choked to the point where she nearly lost consciousness. Ms. Robinson's testimony is corroborated by the medical records and pictures in the case showing the presence of petechial hemorrhaging and bruising around the eyes.[131] In addition, the Defendant repeatedly punched Ms. Robinson in the face, and he cut Ms. Robinson all over her body with a razor. On separate occasions, he also inflicted terrible burns on Ms. Robinson's arm, buttocks, and vagina. Under these circumstances, the Court finds that the Defendant had no hesitation in committing crimes in which the risk to human life was high.

The Court also finds that the confinement of the defendant for an extended period of time is necessary in order to protect the public from further criminal acts. In this case, the actions of the Defendant amounted to the torture of the victim and a depraved and indifferent disregard for her well-being. The actions appear to have been motivated, at least initially, by a desire to seek revenge for what the Defendant believed to be unfaithfulness and deceit. Some of these actions took place through the use of weapons, including a razor and a heated knife, to cause serious bodily injury, and by the Defendant's own admission, these acts occurred while he was in a "meth-induced psychosis" from the voluntary use of methamphetamine.

The Defendant has also demonstrated his disregard for the law. For example, at the time of his crimes against Ms. Robinson, the Defendant was on pretrial release for other acts of assault and domestic violence. In at least one of the previous assaults, the Defendant also

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[130] *See State v. Jones*, No. M2012-01716-CCA-R3CD, 2013 WL 5777257, at *11 (Tenn. Crim. App. Oct. 25, 2013) (affirming imposition of consecutive sentences, in part, when "[t]he Defendant forcibly entered the victim's home and sprayed her in the face with bug spray in order to subdue her. He then beat the victim, tied her up, and raped her. He threw a large sofa-like chair on top of her to restrain her."); *State v. Tipton*, No. E2009-02676-CCA-R3CD, 2011 WL 4790945, at *13 (Tenn. Crim. App. Oct. 11, 2011) ("In viewing the evidence, the trial court did not err by imposing consecutive sentencing. The victim's testimony showed that Tipton acted with little regard for human life and did not hesitate to commit crimes in which the danger to human life was high. The victim said Tipton came into her hotel room while she was asleep and violently removed her clothes. She stated that during the rapes, Tipton grabbed her throat and tried to choke her. The victim struggled to breathe and may have lost consciousness. She testified that Tipton hit her 'harder and harder' after he was unable to ejaculate. During the rapes, Tipton said he was going to jail because of his actions. The victim testified that Tipton repeatedly threatened to tie her up, gag her, and run away. The victim thought she was going to die. The malevolence of Tipton's actions is only worsened by the victim's vulnerability as a paraplegic. Testimony was also presented at the sentencing hearing about Tipton's propensity for violence on other occasions. An inmate testified that he was assaulted by Tipton in prison. Additionally, the victim said Tipton intentionally broke the windshield of her car. In considering the foregoing evidence, we conclude that Tipton was a dangerous offender under criterion (4)."); *State v. Winston*, No. 01C01-9302-CR-00069, 1994 WL 390425, at *10 (Tenn. Crim. App. July 28, 1994) (finding high risk to life in assaultive behavior including smothering and choking and affirming imposition of consecutive sentences, in part, when "[t]he defendant treated F.H. with exceptional cruelty and inflicted serious bodily injury upon her. He threatened her with death and smothered and choked her. These assaults and the defendant's prior criminal behavior reflect the defendant's tendency towards violent criminal conduct.").

[131] *See* Exhibit 12, CD of Photographs; Exhibit 13, Medical Records, at page 38-39, 43.

resisted a lawful arrest and attempted to use a taser on a female law enforcement officer to avoid being taken into custody. Finally, and as discussed above, there has been a lack of acceptance of responsibility here.

Finally, the Court also finds that the aggregate length of the sentences is reasonably related to the severity of the offenses for which the Defendant stands convicted.[132] The burning events, in particular, were planned activities, and the repeated cutting of Ms. Robinson also took foresight and planning as well. The nature of the crimes, which occurred over the course of days, started from minor conduct, but then escalated to the burning and mutilation of Ms. Robinson's body. The Defendant appeared to have no concerns for the devastating harm that he caused to Ms. Robinson, as he continued to hit, choke, and abuse Ms. Robinson repeatedly over the course of time. From these events, Ms. Robinson has suffered substantial physical and psychological injuries. It is clear to the Court that these offenses are aggravated to the point that the aggregate length of the sentences is reasonably related to the seriousness of the crimes for which the Defendant stands convicted.

C. SUMMARY

The Court finds that partial consecutive sentences are appropriate in this case pursuant to Tennessee Code Annotated sections 40-35-115(b)(2) and -115(b)(4). Alignment of the sentences in this way is justly deserved in relation to the seriousness of the offenses, and, for the reasons given above, partial consecutive sentences are not greater than that deserved for the offenses committed. Moreover, partial consecutive sentences are reasonably related to the severity of the offenses involved, and they are plainly necessary to protect the public from further criminal activity by this Defendant.[133] Accordingly, the Court orders that the sentence in Count 4 shall run consecutively to the sentences imposed in Counts 2 and 3, which, in turn, shall together run consecutively to the sentence imposed in Count 1. The Court intends to impose an effective sentence of fifteen years, as a Range I, Standard Offender.

The State has argued that the Court should impose the maximum sentence in each count and run all sentences consecutively to each other. The Court agrees with the sentiment that has motivated this argument: the Defendant's criminal conduct here was beyond callous, vicious, and cruel. The Court believes, respectfully, that the effective aggregate sentence imposed here is justly deserved; is the least severe measure necessary to achieve the purposes for which the sentence is imposed; and it is reasonably related to the severity of the offenses involved.

In addition, the Court notes that the law requires that the Court impose consecutive sentences for felony convictions committed while on bail for other offenses if a defendant is

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[132] *See State v. Pollard*, 432 S.W.3d 851, 860 (Tenn. 2013) ("Every offender convicted of two or more dangerous crimes is not a dangerous offender subject to consecutive sentences . . . . The proof must also establish that the terms imposed are reasonably related to the severity of the offenses committed and are necessary in order to protect the public from further criminal acts by the offender." (quoting *State v. Wilkerson*, 905 S.W.2d 933, 938 (Tenn. 1995)).

[133] *See* Tenn. Code Ann. § 40-35-103(1).

convicted of both offenses.[134] As such, the Court orders each of the sentences in this case to be served consecutively to the sentences imposed in Case Nos. 294769[135] and 293562.[136] It may be that these sentences have expired while this case has been pending, but the Court orders consecutive sentences as it is required to do by law.

VIII. SERVICE OF THE SENTENCE: ALTERNATIVE SENTENCING CONSIDERATIONS

Having imposed a specific determinate sentence,[137] this Court now considers whether to grant or deny an alternative sentence to incarceration. Of course, "[a]ny sentence that does not involve complete confinement is an alternative sentence."[138] "There is no bright line rule for determining when a defendant should be granted" an alternative sentence, and "[e]very sentencing decision necessarily requires a case-by-case analysis."[139] As the Court of Criminal Appeals noted in *State v. Dowdy*,

> Our sentencing considerations provide that the sentence imposed should fit the offense committed. However, it could be equally stated that the punishment

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134 *See* Tenn. R. Crim. P. 32(c)(3)(C).

135 *See* Exhibits 8 and 9.

136 *See* Exhibits 5 and 6.

137 Sentencing alternatives should be considered only after the court has imposed a specific determinate sentence. *See* Tenn. Code Ann. § 40-35-210, advisory comm'n cmts. ("Having determined the potential span of years available, the court must then impose a specific determinate sentence and, in most instances, ascertain whether a defendant should be incarcerated or whether the defendant should receive full or partial probation.").

138 *See State v. Garth*, No. E2016-00931-CCA-R3-CD, slip op. at 8 (Tenn. Crim. App. June 9, 2017) (citing *State v. Fields*, 40 S.W.3d 435 (Tenn. 2001)); *State v. Burton*, No. E2016-01597-CCA-R3-CD, 2017 WL 3923556, at *2 (Tenn. Crim. App. Sept. 7, 2017) ("Any sentence that does not involve complete confinement is an alternative sentence." (citing *State v. Fields*, 40 S.W.3d 435 (Tenn. 2001)); *State v. Woods*, No. M2017-01760-CCA-R3-CD, 2018 WL 3689491, at *4 (Tenn. Crim. App. Aug. 2, 2018) ("An alternative sentence, as granted in this case, includes an order of restitution."); *State v. Rose*, No. E2018-00244-CCA-R3-CD, 2018 WL 6787578, at *4 (Tenn. Crim. App. Dec. 26, 2018) (noting forms of alternative sentences: "When a trial court orders confinement and therefore rejects any form of alternative sentencing such as probation, split confinement, or periodic confinement, it must base the decision to confine the defendant upon the considerations set forth in Code section 40-35-103(1)[.]"); *State v. Jackson*, No. M2017-01528-CCA-R3-CD, 2019 WL 4131953, at *5 (Tenn. Crim. App. Aug. 30, 2019) ("Any sentence that does not involve complete confinement is an alternative sentence." (citing *State v. Fields*, 40 S.W.3d 435 (Tenn. 2001))); *State v. Stone*, No. M2018-01519-CCA-R3-CD, 2020 WL 401857, at *6 (Tenn. Crim. App. Jan. 24, 2020) ("The trial court ordered a sentence which included probation with all but ninety days suspended. This split confinement sentence is an alternative sentence to full incarceration."); *State v. Britton*, No. E2019-01104-CCA-R3-CD, 2020 WL 1062772, at *3 (Tenn. Crim. App. Mar. 5, 2020) ("When a trial court orders confinement and therefore rejects any form of alternative sentencing such as probation, split confinement, or periodic confinement, it must base the decision to confine the defendant upon the considerations set forth in Code section 40-35-103(1)[.]").

139 *See State v. Smith*, No. M2016-00662-CCA-R3-CD, slip op. at 9 (Tenn. Crim. App. Mar. 20, 2017) (citing *State v. Bingham*, 910 S.W.2d 448, 456 (Tenn. Crim. App. 1995)).

> *should fit the offender as well*. Indeed, individualized punishment *is the essence* of alternative sentencing.[140]

Pursuant to Tennessee Code Annotated section 40-35-103(1), sentences involving confinement should be based on the following considerations:

(A) whether "[c]onfinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct";

(B) whether "[c]onfinement is necessary to avoid depreciating the seriousness of the offense[,] or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses"; or

(C) whether "[m]easures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant."[141]

Furthermore, a defendant's potential for rehabilitation or lack thereof should be examined when determining whether an alternative sentence is appropriate.[142] Of course, "[a] trial court may deny alternative sentencing if it finds that any one of the factors found at [Tenn. Code Ann. §] 40-35-103 apply."[143]

Following the 2005 Amendments to the Sentencing Reform Act, a defendant no longer can be "presumed" to be a favorable candidate for an alternative sentence.[144] However, pursuant to Tennessee Code Annotated section 40-35-102(5), (6),[145] the Court is required to consider, though it is not bound by, whether the Defendant *may be* a favorable candidate for alternative sentencing options, in the absence of evidence to the contrary, when all of the following are present:

1. **History:** the Defendant does not possess "criminal histories evincing a clear disregard for the laws and morals of society";

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[140] *See State v. Dowdy*, 894 S.W.2d 301, 305 (Tenn. Crim. App. 1994) (emphasis added; footnote omitted).

[141] *See* Tenn. Code Ann. § 40-35-103(1)(A)-(C).

[142] *See* Tenn. Code Ann. § 40-35-103(5).

[143] *See State v. Cosby*, No. M2017-00379-CCA-R3-CD, 2018 WL 3487219, at *5 (Tenn. Crim. App. July 19, 2018) (citing *State v. Allen*, No. W2016-00505-CCA-R3-CD, 2017 WL 764552, at *4 (Tenn. Crim. App. Feb. 24, 2017); *State v. Garrett*, No. E2012-01898-CCA-R3-CD, 2013 WL 5373156, at *4 (Tenn. Crim. App. Sept. 23, 2013)).

[144] *See State v. Carter*, 254 S.W.3d 335, 347 (Tenn. 2008); *State v. Guthrie*, No. M2017-02441-CCA-R3-CD, 2019 WL 978687, at *4 (Tenn. Crim. App. Feb. 27, 2019) ("Defendant is not, as he insists, 'statutorily entitled to probation.' Rather, he is statutorily eligible for probation, which remains entirely in the discretion of the trial court.").

[145] *See* Tenn. Code Ann. § 40-35-102(6)(D) ("A court shall consider, but is not bound by, the advisory sentencing guideline in this subdivision (6)."); *see also State v. Ryan*, No. M2017-01599-CCA-R3-CD, 2018 WL 2465140, at *5 (Tenn. Crim. App. June 1, 2018) ("The guidelines regarding favorable candidates are advisory." (citing Tenn. Code Ann. § 40-35-102(6)(D)).

2. **Range:** the Defendant is a Standard or Especially Mitigated Offender, and *not* a Range II Multiple Offender or higher;

3. **Offense Class:** the Defendant is convicted of a Class C, D or E felony;

4. **Previous Convictions:** the Defendant has not been previously convicted of three or more felonies involving separate periods of incarceration or supervision; and

5. **No Offense Prohibitions:** the offense is not one for which probation is prohibited.

Based upon these factors, the Court finds that the Defendant meets most of the criteria to be considered a favorable candidate for alternative sentencing options, though the Court believes that the Defendant possesses a history of criminal behavior evidencing a clear disregard for the laws and morals of society. In any event, the Court has considered the following factors, pursuant to Tennessee Code Annotated sections 40-35-103 and -210(b), as well as *State v. Trent*,[146] in deciding to grant or deny an alternative sentence to incarceration:[147]

- the presentence investigation report;
- the defendant's physical and mental health and social history;
- the defendant's amenability to rehabilitation;
- the defendant's criminal history;
- the nature and circumstances of the offense and the need to avoid depreciating the seriousness of the offense;
- the need to provide an effective deterrent, both specifically and generally; and
- the best interests of the defendant and the public.

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[146] "[T]he guidelines applicable in determining whether to impose probation are the same factors applicable in determining whether to impose judicial diversion." *See State v. Trent*, 533 S.W.3d 282, 291 (Tenn. 2017); *State v. Demoss*, No. M2019-01583-CCA-R3-CD, 2020 WL 4199987, at *10 (Tenn. Crim. App. July 22, 2020) (same and citing *State v. Trent*, 533 S.W.3d 282, 291 (Tenn. 2017)). As such, at least some of the cases cited herein for application of various sentencing considerations arise in the context of a decision to grant or deny judicial diversion.

[147] *See State v. Burton*, No. E2016-01597-CCA-R3-CD, 2017 WL 3923556, at *2 (Tenn. Crim. App. Sept. 7, 2017) ("When considering probation, the trial court should consider the nature and circumstances of the offense, the defendant's criminal record, the defendant's background and social history, the defendant's present condition, including physical and mental condition, the deterrent effect on the defendant, and the best interests of the defendant and the public." (citing *State v. Kendrick*, 10 S.W.3d 650, 656 (Tenn. Crim. App. 1999)); *State v. Fuller*, No. W2016-00456-CCA-R3-CD, slip op. at 10 (Tenn. Crim. App. Dec. 7, 2016) (identifying factors to be considered as including the circumstances surrounding the offense, the defendant's criminal record, the defendant's social history and present condition, the need for deterrence, and the best interest of the defendant and the public (citing *State v. Goode*, 956 S.W.2d 521, 527 (Tenn. Crim. App. 1997)).

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The Court takes each of these factors in turn.

A. DEFENDANT'S CHARACTER, HISTORY, AND BACKGROUND

The Court first considers the Defendant's character, history, and background. Typically, our courts look to factors such as a defendant's character and previous actions; the defendant's physical and mental health; the defendant's social history and background; and how the defendant's confinement may impact others. In general, these considerations attempt to assess how stable a defendant's life may be, and the law often views these factors as a proxy for whether effective rehabilitation is likely. However, as recent events illustrate well, it is particularly important that these considerations not be used to favor those who come from privileged backgrounds and circumstances or to condemn those who may not.

In this case, the Defendant's physical and mental health appears to be unremarkable, at least in terms of his ability to comply with conditions of probation. For example, he characterized his own mental health as being excellent at the time of the presentence interview, though he noted that he has previous diagnoses of ADHD and depression.[148] The Defendant also said that he is not currently prescribed any medications for physical or mental health issues.

With respect to direct evidence of the Defendant's character, the Defendant did not offer any character witnesses or submit letters of reference as part of the sentencing hearing.

Otherwise, the Defendant is 28 years old. He is a graduate of Hamilton High School, and he participated in an EMT program at Chattanooga State Technical Community College. These factors generally weigh in favor of sentencing alternatives to incarceration.[149]

With respect to family relationships, the Defendant's mother reports that the Defendant has a supportive family. The presentence investigation report indicates that the Defendant has never been married, though he has a young son, a namesake. Curiously, the Defendant's son was

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[148] *See* Exhibit 1, Second Amended Presentence Investigation Report, at 9. The Court notes that, as part of the presentence investigation, the Defendant's mother reported that the Defendant suffered from other mental health issues. The Risk and Needs Assessment also identifies mental health as a significant category of need.

However, no other confirmation of these facts appears in the presentence investigation report or in the record of the case. Although the Defendant's mother testified at the sentencing hearing, for example, she did not mention these other issues or otherwise clarify the statements she gave as part of the presentence investigation. Moreover, the record does not contain mental health records or other proof from which the Court may make factual findings by a preponderance of the evidence in this regard. Aside from the Defendant's own testimony, the Court does not have a basis for finding the presence of mental health issues pose a significant barrier to rehabilitation.

[149] These factors are often considered to be positive indicators for alternative sentences. *See State v. Hampton*, W2018-00623-CCA-R3-CD, 2019 WL 1167807, at *16 (Tenn. Crim. App. Mar. 12, 2019) (in context of judicial diversion, denying diversion, in part, despite weighing in favor "He had graduated high school and had maintained long-term employment as a truck driver."); *see also State v. Dycus*, 456 S.W.3d 918, 931 (Tenn. 2015) (in context of judicial diversion); *State v. Hutchins*, No. E2016-00187-CCA-R3-CD, 2016 WL 7378803, at *5 (Tenn. Crim. App. Dec. 20, 2016) ("on path" to graduate from college) (in context of judicial diversion); *State v. Lacy*, No. W2016-00837-CCA-R3-CD, slip op. at 6 (Tenn. Crim. App. May 12, 2017) (in context of judicial diversion, "She possesses a high school diploma and some college credits toward her associate's degree.").

not otherwise mentioned in the testimony, allocution, or other proof. No proof shows that the Defendant provides monetary or other support for his son, and the record does not support a finding that the Defendant's incarceration will entail excessive hardships to any dependents.[150] Of course, in some cases, a supportive family can show the stability necessary for effective rehabilitative efforts. However, where, as here, a history of domestic violence also exists, the weight attributed to these considerations may be much diminished.[151]

With respect to the Defendant's employment history, the Defendant reported that he has had about fifty different jobs. The dates reported by the Defendant were, in some cases, significantly different from the verified employment dates. Because the over-reporting always, or nearly always, favors the Defendant, there is a question as to whether the Defendant is purposefully exaggerating his employment history or whether he is simply a bad historian.

Either way, however, the more important issue is whether there is stability in employment. There is not. It is fair to say that the Defendant's history reveals a substantial inability to hold employment for any significant period of time.[152] While the reason for the recurrent changes in work is not always indicated, the Defendant was discharged from at least one job for non-attendance,[153] and he does not appear to have been employed at all most recently in 2017. The significant instability in employment is not favorable for rehabilitative prospects.

The most prominent indicator of instability in the Defendant's life is his long history of substance use.[154] As noted above, the Defendant admitted in the presentence investigation that he used marijuana over a six-year period from 2009 through 2015 and that he used

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[150] *See* Model Penal Code § 7.01(2)(k).

[151] *See State v. Ford*, No. E2019-00684-CCA-R3-CD, 2020 WL 4193711, at *10 (Tenn. Crim. App. July 21, 2020) ("The defendant's social history is somewhat inconsistent. According to the presentence report, the defendant was close with his brother and considered him to be his primary family member. The Strong-R assessment indicates that the defendant's family was 'generally positive or pro-social' with 'minimal family conflict' and that some family members were 'generally willing to intervene and support' the defendant. In contrast, the trial court found that the defendant and the victim had 'a history ... of domestic violence, domestic assaults where teeth were knocked out, [and] punches in the ribs,' which finding is supported by the Agent Legg's summary of his investigation and the victim impact statements as included in the presentence report. Despite the defendant's having a supportive family, this factor weighs against the grant of probation in light of the defendant's history of domestic violence.").

[152] *See State v. Lewis*, No. M2016-02513-CCA-R3-CD, slip op. at 6 (Tenn. Crim. App. Aug. 22, 2017) (denying alternative sentence, in part, because "[t]he record also evinced a spotty employment history, despite Mr. Clements' testimony that the defendant had worked for him 'off and on.'").

[153] *See State v. Taylor*, No. M2015-02142-CCA-R3-CD, slip op. at 20 (Tenn. Crim. App. May 16, 2017) (in context of judicial diversion, weighing negatively that "[t]he Appellant has a consistent employment history but was fired from one job").

[154] *See State v. Taylor*, No. M2015-02142-CCA-R3-CD, slip op. at 20 (Tenn. Crim. App. May 16, 2017) (weighing negatively that "[S]he smoked marijuana from sixteen to nineteen years old."); *State v. Kiser*, No. E2018-00696-CCA-R3-CD, 2019 WL 2402962, at *14 (Tenn. Crim. App. June 6, 2019) (in context of judicial diversion, denying diversion, in part, "The record supports the trial court's conclusion that the defendant's spate of criminal activity and continued [daily] drug usage reflected poorly on his amenability to correction.").

methamphetamine from 2015 through the instant offenses.[155] The record does not show that the Defendant ever sought substance use treatment, despite his daily use, and this factor weighs against granting an alternative sentence.[156]

In a variation on the theme, the Court also notes that the Defendant has a long arrest history. While the arrest history of an accused cannot be considered as part of his or her criminal background, a history of arrests may be considered as part of the accused's social history, at least to the extent that the factor bears on instability.[157] In this case, the Defendant's arrest history is significant, and the presentence investigation report reveals some eight dismissals of criminal charges, arising on three separate occasions, before the Defendant was arrested on the instant charges. This factor weighs slightly against granting an alternative sentence.

Overall, the Court finds that this factor weighs against granting an alternative sentence. The Defendant has had the benefit of advantages that others similarly situated may not have had, including a supportive family and educational and employment opportunities. While there may also be mental health issues present, it is also clear that at least some of the instability in this area is due to the Defendant's own choices. On balance, the Court grants light to moderate weight to this factor looking to the Defendant's character, history, and background.

B. AMENABILITY TO REHABILITATION

The Court next considers the Defendant's amenability to rehabilitation. In fact, Tennessee Code Annotated section 40-35-103(5) specifically provides that this Court should consider the "potential or lack of potential for the rehabilitation or treatment of the defendant" in determining the sentence alternative or length of a term to be imposed.[158] As such, the Court

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[155] The defendant's testimony can establish prior criminal behavior. *See State v. Privett*, No. M2017-00539-CCA-R3-CD, 2018 WL 557924, at *4 (Tenn. Crim. App. Jan. 24, 2018) (rejecting argument of improper consideration of offenses "included in the presentence report when no corresponding judgments or juvenile records were included," when defendant's testimony established criminal history).

[156] *See State v. Boykin*, No. W2016-01055-CCA-R3-CD, 2017 WL 1137112, at *3 (Tenn. Crim. App. Mar. 27, 2017) ("We also note that despite the Appellant's daily use of cocaine and marijuana, he never sought treatment for his drug addiction. Thus, his potential for rehabilitation is poor."); *see also State v. Jones*, No. M2016-02277-CCA-R3-CD, slip op. at 5 (Tenn. Crim. App. June 21, 2017) (noting that "the Appellant has already completed two in-patient drug treatment programs. He has not sought treatment for more than ten years, and we agree with the trial court that his potential for rehabilitation is poor.").

[157] *See State v. Brooks*, No. W2015-00833-CCA-R3-CD, slip op. at 19 n.3 (Tenn. Crim. App. Feb. 27, 2017) ("We observe that the arrest constitutes part of the Defendant's social history even if it does not constitute part of her 'criminal record.'" (citing *State v. Madden*, No. 87-30-III, 1987 WL 12057, at *2 (Tenn. Crim. App. June 10, 1987) ("While arrests obviously do not constitute a 'criminal record,' they do comprise his 'social history.'"); *State v. Dodd*, No. W2008-01484-CCA-R9-CD, 2009 WL 2501996, at *5 (Tenn. Crim. App. Aug. 17, 2009) (noting that arrest should not be "misunderstood" to be part of defendant's "criminal record" but could be considered in evaluation of social history, mental condition, and best interest of the public))).

[158] *See State v. McLerran*, No. M2016-02005-CCA-R3-CD, slip op. at 9 (Tenn. Crim. App. Aug. 16, 2017) ("A trial court should consider a defendant's potential or lack of potential for rehabilitation when determining if an alternative sentence would be appropriate." (citing Tenn. Code Ann. § 40-35-103(5); *State v. Boston*, 938 S.W.2d 435, 438 (Tenn. Crim. App. 1996)).

considers the following factors, among others, as part of these considerations: the Defendant's previous compliance with supervision; the Defendant's behavior pending sentencing; factors bearing upon the risk of offending; the Defendant's acceptance of responsibility; expressions of remorse; the Defendant's candor and truthfulness; the Defendant's cooperation with the investigation; the Defendant's behavior toward the victim; and the Defendant's desire for rehabilitation.

As an initial matter, where measures less restrictive than confinement have frequently or recently been applied unsuccessfully to a defendant, it may reasonably appear that the defendant will be unlikely to abide by the terms of probation. In fact, the Court of Criminal Appeals has specifically recognized that "[a] defendant with a long history of criminal conduct and 'evincing failure of past efforts at rehabilitation' is presumed [to be] unsuitable for alternative sentencing."[159] In addition, Tennessee Code Annotated section 40-35-102(5) provides, among other things, that those who "evince[e] failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration."

To that end, the Court looks first to "the Defendant's prior opportunities to serve an alternative sentence that were ultimately unsuccessful,"[160] including previous successes or failures relating to pretrial release,[161] probation,[162] and juvenile-court probation.[163] As the Court

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[159] *See State v. Julian*, No. E2019-00074-CCA-R3-CD, 2019 WL 4132498, at *2 (Tenn. Crim. App. Aug. 30, 2019) (emphasis added and citing Tenn. Code Ann. § 40-35-102(5)).

[160] *See State v. Johnson*, No. M2018-01257-CCA-R3-CD, 2019 WL 1649350, at *5 (Tenn. Crim. App. Apr. 16, 2019).

[161] *See State v. Trent*, No. E2018-02239-CCA-R3-CD, 2020 WL 1899610, at *11 (Tenn. Crim. App. Apr. 17, 2020) (reversing sentence of confinement and considering success on pretrial release in favor of split-confinement, and stating that trial court could not consider dissatisfaction with minimal level of supervision when defendant complied with all requirements of that supervision: "Although the trial court might have been dissatisfied with the level and intensity of the supervision in this case, the record reflects that the Defendant complied with everything requested of him. As a result, the record does not support the court's determination that it had been 'very problematic in having him report and provide the necessary information for the probation department.'").

[162] For a sampling of recent cases, see *State v. Pinhal*, No. M2019-01516-CCA-R3-CD, 2020 WL 3966843, at *10 (Tenn. Crim. App. July 14, 2020) (affirming denial of alternative sentence, in part, when "the sentencing hearing exhibits reflect that the Defendant had received probation previously and that she violated the conditions of her release multiple times."); *State v. Montgomery*, No. M2019-00757-CCA-R3-CD, 2020 WL 2844531, at *9 (Tenn. Crim. App. June 1, 2020) (affirming denial of alternative sentence, in part, when "[t]he trial court noted however that the Defendant had failed to comply with conditions of release in relation to his multiple convictions of DUI. The Defendant also failed to comply with his conditions of release, and the trial court revoked his bond during the pendency of this case."); *State v. Crisp*, No. E2019-01223-CCA-R3-CD, 2020 WL 3172672, at *2 (Tenn. Crim. App. June 15, 2020) ("Here, the trial court determined that Defendant had a long history of criminal conduct [consisting of 21 prior felony convictions and 16 prior misdemeanor convictions]. Defendant has been unsuccessful in completing an alternative sentence multiple times. Despite Defendant's desire to make his life better and promises that he would abide by the terms of a probationary sentence, the trial court did not abuse its discretion in denying an alternative sentence. Defendant is not entitled to relief."); *State v. Rutherford*, No. E2019-01319-CCA-R3-CD, 2020 WL 1066079, at *4 (Tenn. Crim. App. Mar. 5, 2020) (affirming denial of alternative sentence, in part, when the "record establishes that the defendant's criminal history spanned more than 20 years and included numerous revocations of community-based sentences."); *State v. Gregg*, No. E2019-00843-CCA-R3-CD, 2020 WL 1066082, at *3 (Tenn. Crim. App. Mar. 5, 2020) (denying alternative sentence, in part, when "[i]n our view, the trial court did not abuse its discretion by ordering a sentence of confinement in this case. The record indicates that the defendant had a long history of criminal convictions and that he had frequently failed to comply with the terms of

of Criminal Appeals has recognized, "[t]he fact that Defendant had prior probationary sentences revoked ***alone*** would support the imposition of a sentence of confinement [pursuant to Tenn. Code Ann. § 40-35-103(1)(C)]."[164]

In this case, the Defendant has repeatedly engaged in additional criminal behavior while on pretrial release for previous offenses. For example, after having been arrested for assault in October 2014, he committed the domestic assault and false imprisonment offenses against Ms. Thornton in December of that year. While both sets of those cases were pending, the Defendant then committed the serious felony offenses against Ms. Robinson now before the Court.[165] In addition, he continued to unlawfully use controlled substances during the entire time that he was on pretrial release for those original offenses.[166] This previous conduct does not weigh in favor of granting an alternative sentence.

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his probation."); *State v. Rutherford*, No. E2019-01319-CCA-R3-CD, 2020 WL 1066079, at *4 (Tenn. Crim. App. Mar. 5, 2020) (affirming denial of alternative sentence, in part, when the "record establishes that the defendant's criminal history spanned more than 20 years and included numerous revocations of community-based sentences."); *State v. Britton*, No. E2019-01104-CCA-R3-CD, 2020 WL 1062772, at *3 (Tenn. Crim. App. Mar. 5, 2020) ("In our view, the trial court did not abuse its discretion by ordering a sentence of full confinement in this case. The record indicates that the defendant had a long criminal history littered with violent offenses and revocations of both probation and parole.").

[163] Trial court may consider juvenile probation violations. *See State v. Jarrett*, No. E2014-02131-CCA-R3-CD, 2015 WL 4511550, at *5 (Tenn. Crim. App. July 27, 2015). Trial court may also consider information used as an enhancement factor under Tenn. Code Ann. § 40-35-113(8). *See State v. Elam*, 7 S.W.3d 103, 106 (Tenn. Crim. App. 1999).

[164] *See State v. Shields*, No. M2017-00870-CCA-R3-CD, 2018 WL 623600, at *3 (Tenn. Crim. App. Jan. 30, 2018) (emphasis added); *see also State v. Gordon*, No. M2017-00649-CCA-R3-CD, 2018 WL 934533, at *4 (Tenn. Crim. App. Feb. 15, 2018) (sustaining sentence of confinement when "the Defendant has previously received the benefit of probation, determinate release and parole, yet he has repeatedly failed to successfully complete an alternative sentence. Not even multiple periods of incarceration have deterred him from committing subsequent criminal acts.").

[165] Not as significantly, but still part of the totality of the circumstances, the Defendant violated his probationary terms while in juvenile court for failing to pay restitution and for failing to report to his probation officer. *See* Exhibit 1, Second Amended Presentence Investigation Report, at 8.

[166] *See State v. Demoss*, No. M2019-01583-CCA-R3-CD, 2020 WL 4199987, at *11 (Tenn. Crim. App. July 22, 2020) (finding that "Defendant's past conduct demonstrated that he is not amenable to correction," in part when "He admitted to taking amphetamines after he was released on bail in this case. He also admitted that he tested positive for amphetamines during a drug test and that he failed to submit to a drug test on another occasion"); *State v. Dycus*, 456 S.W.3d 918, 931 (Tenn. 2015) (in context of judicial diversion); *State v. Smith*, No. M2017-00902-CCA-R3-CD, 2018 WL 1678099, at *4 (Tenn. Crim. App. Apr. 6, 2018) (in context of judicial diversion, "the Appellant's amenability to correction is poor. Although the Appellant expressed remorse for the crime, he was arrested for theft while this case was pending, and nothing indicates the theft case has been resolved in his favor."); *State v. Theus*, No. W2016-01626-CCA-R3-CD, slip op. at 18 (Tenn. Crim. App. July 12, 2017) (weighing fact that "[w]hile released on bond for the firearm offense, he was charged with the misdemeanor offenses of harassment and simple possession of marijuana and later convicted of the offenses."); *State v. Riner*, No. M2017-01839-CCA-R3-CD, 2018 WL 4201267, at *7 (Tenn. Crim. App. Sept. 4, 2018) (in context of judicial diversion, denying diversion, in part, "the Appellant tested positive for marijuana at the hearing despite her claim that she had not smoked marijuana for more than one month."); *State v. Robertson*, No. M2016-02409-CCA-R3-CD, 2018 WL 4361132, at *11 (Tenn. Crim. App. Sept. 12, 2018) (affirming denial of alternative sentence, in part, when "Over the course of three years, the Appellant committed six felonies and two misdemeanors, and he threatened two witnesses. His being indicted and convicted in case number 31906 failed to deter him from continuing to commit crimes."); *State v.*

The Court also looks to whether there are objective measures showing that a defendant is likely to re-offend. This factor can consider, among other things, the results of the defendant's Risk and Needs Assessment,[167] including where the assessment shows that the defendant shares characteristics with those who are at a moderate risk to re-offend.[168] In this case, the Defendant's Risk and Needs Assessment placed the Defendant in a group of persons at a moderate risk to re-offend.[169] The Court typically does not grant the Risk and Needs Assessment significant weight, particularly where its conclusions seem to be inconsistent with the other proof in the case.[170] Here, however, the Risk and Needs Assessment seems to be largely consistent with the proof, and even though the Needs Result can be heavily influenced by a defendant's own self-serving self-reports,[171] the Court gives weight to this factor within the context of amenability to rehabilitation.

Watkins, No. W2016-02481-CCA-R3-CD, 2017 WL 4004167, at *5 (Tenn. Crim. App. Sept. 8, 2017) (affirming denial of judicial diversion, and noting that the "trial court considered the seriousness and aggravated circumstances of the Defendant's offenses and the fact that he was arrested for a second offense after being released following the first; this, the trial court found, made him not amenable to correction.").

[167] A "validated risk and needs assessment" is "a determination of a person's risk to reoffend and the needs that, when addressed, reduce the risk to reoffend through the use of an actuarial assessment tool designed by the department that assesses the dynamic and static factors that drive criminal behavior." *See* Tenn. Code Ann. § 40-35-207(d).

[168] *See State v. Davidson*, No. M2018-00182-CCA-R3-CD, 2020 WL 211544, at *5 (Tenn. Crim. App. Jan. 14, 2020) (affirming denial of alternative sentence, in part, when "[t]he trial court found that the Defendant lacked the potential for rehabilitation and noted the Defendant's 'moderate' 'Strong R Assessment' and the court's belief the Defendant would reoffend."); *State v. Kimble*, No. M2017-02472-CCA-R3-CD, 2018 WL 5840836, at *1 (Tenn. Crim. App. Nov. 7, 2018), *perm. app. denied*, Feb. 21, 2019 (affirming denial of alternative sentence, in part, when "[t]he risk and needs assessment ascertained that the Defendant was at a 'moderate level' to re-offend.").

[169] *See* Exhibit 1, Second Amended Presentence Investigation Report, Risk & Needs Assessment, at 1.

[170] *Cf. State v. Johnson*, No. M2018-01257-CCA-R3-CD, 2019 WL 1649350, at *3 (Tenn. Crim. App. Apr. 16, 2019) ("As to the Defendant's contention that the trial court erroneously failed to consider statistics contained in the presentence report's needs assessment, thus removing the presumption of reasonableness, we disagree. The trial court stated that it was considering the needs assessment but that it viewed the assessment as invalid and unreliable. This consideration was within the trial court's discretion and does not remove the presumption of reasonableness.").

[171] *See State v. Solomon*, No. M2018-00456-CCA-R3-CD, 2018 WL 5279369, at *7 (Tenn. Crim. App. Oct. 23, 2018) ("The record reflects that the trial court considered the assessment in determining the Defendant's sentence but declined to give it any weight. This determination was not only within the trial court's discretion but is clearly supported by the evidence presented at the sentencing hearing. We share the trial court's bewilderment as to how the Defendant falls within a slightly moderate risk in the alcohol/drug use category when he has amassed four DUI convictions and other drug- and alcohol-related convictions, has undergone multiple failed attempts at rehabilitation, has continued to use drugs, and ran over two people in broad daylight while so intoxicated that he was unable to stay awake. *The assessment's conclusion that the Defendant had a low risk of reoffending is entirely inconsistent with evidence that the Defendant accumulated a large number of convictions within a relatively short period of time, had his probation revoked on multiple occasions, and was on probation when he committed the instant offenses.* Despite being afforded multiple opportunities for rehabilitation, the Defendant has continued to reoffend. We conclude that the trial court acted within its discretion in declining to give any weight to a computer-generated report derived from the Defendant's 'yes' or 'no' answers to a series of standardized questions and instead basing its decision on the other factors set forth in section 40-35-210(b)." (emphasis added)).

The Court also looks to factors such as acceptance of responsibility and remorse, and the Court of Criminal Appeals has recognized that "[a] defendant's failure to accept responsibility weighs against a grant of probation and is sufficient in and of itself to support the denial of probation."[172] Among other factors, a lack of acceptance of responsibility can be seen where a defendant minimizes his or her role in the offense,[173] including by blaming the offense on substance use or claiming that he "blacked out."[174] The lack of this important factor may also be seen where a defendant attempts to shift blame for his or her conduct by blaming others for the offense,[175] including the victim.[176]

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[172] *See State v. Ford*, No. E2019-00684-CCA-R3-CD, 2020 WL 4193711, at *9 (Tenn. Crim. App. July 21, 2020) (citing *State v. Garris*, No. M2012-01263-CCA-R3-CD, slip op. at 9-10 (Tenn. Crim. App., Nashville, Mar. 6, 2013) (stating that a "defendant's lack of candor and failure to accept responsibility ... are both acceptable grounds for the denial of both judicial diversion and probation")).

[173] *See State v. Adinolfi*, No. E2013-01286-CCA-R3-CD, 2014 WL 2532335, at *4 (Tenn. Crim. App. June 2, 2014) (in context of judicial diversion, denying diversion in part, where "the Defendant minimized his responsibility in the instant offense"); *State v. Gresham*, No. M2017-00672-CCA-R3-CD, 2018 WL 3860773, at *5-6 (Tenn. Crim. App. Aug. 14, 2018) (denying alternative sentence, in part, when "the trial court found that Defendant lacked candor and attempted to minimize his conduct, as evident in his psychosexual evaluation responses."); *State v. Wolfenbarker*, No. E2019-01386-CCA-R3-CD, 2020 WL 1856442, at *5 (Tenn. Crim. App. Apr. 14, 2020) (affirming denial of alternative sentence, in part, when "the Defendant's testimony [was] 'evasive'" and "minimized his participation in these offenses").

[174] *See State v. Addair*, No. E2018-00799-CCA-R3-CD, 2019 WL 5095652, at *7 (Tenn. Crim. App. Oct. 11, 2019) (denying alternative sentence, in part, when "From the time of his arrest, the Defendant, either explicitly or through innuendo, failed to take responsibility for his actions. He blamed alcohol, medication, suggested Ms. Berry had put something in his drink, noted that Ms. Berry was 'supposed' to be watching the kids rather than him, accused Ms. Berry and his ex-wife of setting him up, and claimed to have blacked out having no awareness of his conduct. The Defendant justified his actions on the basis that M.A. 'was fine with [him] the next day.' He expressed a lack of remorse and inability to understand that his actions were not justified, which show his lack of potential for rehabilitation.").

[175] *See State v. Anderson*, 857 S.W.2d 571, 574 (Tenn. Crim. App. 1992) (defendant's attempt to divert the blame to another for crime weighs negatively under this factor); *State v. Glover*, No. M2018-01410-CCA-R3-CD, 2019 WL 3822030, at *2-3 (Tenn. Crim. App. Aug. 15, 2019) (denying alternative sentence, in part, when "[t]he trial court questioned the Defendant's sincerity in taking responsibility because 'throughout her testimony and throughout the Strong R and presentence report, she tends to blame other people, too, and does not totally accept responsibility.' The trial court noted that the Defendant blamed her husband for the drug transaction and her co-worker for her termination.").

[176] *See State v. Hutchins*, No. E2016-00187-CCA-R3-CD, 2016 WL 7378803, at *5 (Tenn. Crim. App. Dec. 20, 2016); *State v. Hodges*, No. M2016-01057-CCA-R3-CD, slip op. at 9 (Tenn. Crim. App. July 20, 2017) ("she also blamed the victim for the offenses stating that he began pursuing her, and she eventually gave in to him."); *State v. Gillig*, No. E2010-00251-CCA-R3-CD, 2010 WL 4324380, at *7 (Tenn. Crim. App. Nov. 2, 2010) (finding confinement appropriate due to the circumstances of the offense, in part, when "the court clearly questioned the defendant's characterization of the victim as violent and manipulative, which indicates that the court considered the defendant's blaming others and failure to accept responsibility for her actions as a poor reflection on her potential for rehabilitation. At the sentencing hearing, the defendant accused Officer Carter of lying about the victim's injuries. Her proof at sentencing was to demonstrate that the victim had severe behavioral problems and may have caused her own injuries." (citations omitted)); *State v. Kubelick*, No. E2018-00408-CCA-R3-CD, 2018 WL 6787581, at *5 (Tenn. Crim. App. Dec. 26, 2018) (in context of judicial diversion, trial court denying diversion, in part, given the "Defendant's failure to take full accountability for his actions, somewhat blaming the victim"); *State v. Sluder*, No. E2019-01321-CCA-R3-CD, 2020 WL 2488772, at *3 (Tenn. Crim. App. May 14, 2020) (affirming imposing split confinement, in part, when the defendant blamed the victim for the offense, causing the

In this case, the Defendant has clearly attempted to minimize his own responsibility for the offenses. He has sought to shift blame to Ms. Robinson for his cruel conduct in Counts 3 and 4 by claiming that the actions were consensual. With respect to other conduct, he attempts to shift responsibility away from himself by claiming that his actions were part of a "meth-induced psychosis."[177] In fact, the very first sentences of his written statement provide an example of him distancing himself from his own conduct: "During my offenses[,] I was not in my right mind. I acted in a way that was not logical in a normal state of mind."[178]

With respect to true expressions of remorse, the Court does acknowledge the Defendant's apology made to Ms. Robinson during his allocution. However, even in his allocution, the Defendant also shifted responsibility away from himself, again stating that he had been smoking "a lot of meth" at the time and representing that he "would have stopped" burning Ms. Robinson if he thought she did not consent.

Overall, the Court also finds that this factor weighs against granting an alternative sentence. The Defendant's principal argument in this regard is his claim of changed outlook as a result of renewed religious faith. Even crediting the impact that renewed faith can have moving forward, however, the significance of the other factors identified above weighs against finding that the Defendant is amenable to rehabilitation. On balance, the Court grants moderate weight to this factor against granting an alternative sentence to incarceration.

C. DEFENDANT'S CRIMINAL HISTORY AND BEHAVIOR

The Court next considers the Defendant's previous criminal history and behavior. Tennessee Code Annotated section 40-35-103(1)(A) provides that confinement may be ordered when it "is necessary to protect society by restraining a defendant who has a long history of criminal conduct." In addition, Tennessee Code Annotated section 40-35-102(5) provides, among other things, that those "possessing criminal histories evincing a clear disregard for the laws and morals of society and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration."

The Court of Criminal Appeals has noted that in the sentencing determination, "few things are as relevant as the defendant's prior criminal conduct."[179] In general, this factor is

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trial court to observe that this "is just putting it on her shoulders, which gives me great concern for his ability to be rehabilitated" and concluding that "the trial court did not abuse its discretion in ordering split confinement and ordering the Defendant to serve one year in confinement and the remainder of his sentence on supervised probation.").

[177] This fact was reported by the Defendant to the presentence investigator as part of the interview for the Risk and Needs Assessment.

[178] *See* Exhibit 1, Second Amended Presentence Investigation Report, Personal Statement of Offense, at 14. Of course, the Defendant goes further to say that, with the assistance of Providence, he has now changed, recognizes his family responsibilities, and has positive plans for the future.

[179] *See State v. Davis*, No. E2007-02882-CCA-R3-CD, 2008 WL 4682238, at *4 (Tenn. Crim. App. Oct. 23, 2008) ("The court's sentencing determination should encompass the unfavorable information, as well as the favorable, and few things are as relevant as the defendant's prior criminal conduct.").

relevant because "[a] defendant with a long history of criminal conduct[180] and 'evincing failure of past efforts at rehabilitation' is presumed unsuitable for alternative sentencing."[181] "In fact, the presence of sufficient evidence to bring these considerations into play . . . would usually mean that the presumption of rehabilitative capabilities would be rebutted."[182] In analyzing this factor, this Court often looks to the following factors: the extent and nature of a defendant's prior criminal behavior; the recency and length of the defendant's prior criminal behavior; whether the previous behavior has indicated escalating seriousness; and whether and how substance use has played a role in the defendant's criminal conduct.

With respect to the nature and extent of the Defendant's previous criminal convictions, the Defendant has been convicted of four (4) misdemeanor offenses consisting of three assault convictions and one for false imprisonment. Although the Defendant has no prior felony convictions, this history of recent misdemeanor convictions[183] occurring quickly within the scope of a year may be sufficient to weigh against granting probation in consideration of other factors.[184]

More importantly, several of these previous convictions involve assaultive behavior,[185] which is of a similar type of behavior as the instant felony convictions.[186] The instant

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[180] Conduct not resulting in convictions may be considered under this factor. *See State v. Walls*, No. M2016-01121-CCA-R3-CD, slip op. at 11 (Tenn. Crim. App. July 31, 2017) ("While Defendant argues that such conduct did not result in criminal convictions, the plain language of the statute applies to 'criminal conduct' and is not limited to criminal convictions.").

[181] *See State v. Jones*, No. M2016-02277-CCA-R3-CD, slip op. at 5 (Tenn. Crim. App. June 21, 2017) (citing Tenn. Code Ann. § 40-35-102(5)); *State v. Henderson*, No. M2016-02122-CCA-R3-CD, slip op. at 5 (Tenn. Crim. App. July 6, 2017) ("As the trial court observed, the Defendant has shown many times that he is unable to successfully complete a sentence involving probation or other forms of release into the community. Accordingly, we affirm the sentencing determinations of the trial court."); *State v. Grosse*, No. M2017-02202-CCA-R3-CD, 2018 WL 6167389, at *4 (Tenn. Crim. App. Nov. 26, 2018) ("A defendant with a long history of criminal conduct and 'evincing failure of past efforts at rehabilitation' is presumed unsuitable for alternative sentencing." (citing Tenn. Code Ann. § 40-35-102(5)).

[182] *See State v. Fletcher*, 805 S.W.2d 785, 788 (Tenn. Crim. App. 1991).

[183] *See State v. Edwards*, No. W2015-01398-CCA-R3-CD, 2018 WL 2727955, at *6 (Tenn. Crim. App. June 6, 2018) (affirming denial of alternative sentence, in part, stating that "[a]s the trial court noted, in addition to the convictions she received in her late teens and twenties, the Defendant also had a fairly substantial record of more recent criminal activity, including multiple convictions for DUI and a conviction for domestic assault."); *State v. Robertson*, No. M2016-02409-CCA-R3-CD, 2018 WL 4361132, at *11 (Tenn. Crim. App. Sept. 12, 2018) (affirming denial of alternative sentence, in part, when "Over the course of three years, the Appellant committed six felonies and two misdemeanors, and he threatened two witnesses. His being indicted and convicted in case number 31906 failed to deter him from continuing to commit crimes.").

[184] *See State v. Demoss*, No. M2019-01583-CCA-R3-CD, 2020 WL 4199987, at *11 (Tenn. Crim. App. July 22, 2020) ("According to the presentence report, Defendant had no criminal record before he was discharged from the military. Since 2009 [and through 2015], however, Defendant has been convicted of six misdemeanors—four DUIs, possession of a weapon while under the influence, and contempt of court. Although Defendant's criminal record does not include any felony convictions, Defendant's criminal record does not weigh in favor of an alternative sentence for which Defendant was eligible.").

[185] *See State v. Rose*, No. E2018-00244-CCA-R3-CD, 2018 WL 6787578, at *4 (Tenn. Crim. App. Dec. 26, 2018) (affirming denial of alternative sentence, in part, *despite the defendant first serving 12 years in federal custody,* when "In determining the manner of service of the defendant's sentence, the trial court pointed to

convictions actually represent behavior that is increasing in seriousness and severity, and these considerations often weigh against granting an alternative sentence.[187]

Of course, criminal *behavior* may be considered under this factor, even if the behavior did not result in a conviction, so long as the conduct is established by a preponderance of the evidence.[188] Many times, where a defendant has a history of substance use,[189] particularly if the

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the defendant's long criminal history, the violent nature of the defendant's crimes, and the defendant's prior failure to comply with the requirements of probation. The record supports these findings. The presentence report shows the defendant's prior criminal history as spanning nearly two decades, including multiple assault and weapons convictions. Moreover, the presentence report shows that the defendant has previously violated the terms of his probation. The defendant's lengthy criminal history and previous failure to abide by the terms of his probation support the trial court's determination that confinement of the defendant was necessary in this case."); *State v. Britton*, No. E2019-01104-CCA-R3-CD, 2020 WL 1062772, at *3 (Tenn. Crim. App. Mar. 5, 2020) ("In our view, the trial court did not abuse its discretion by ordering a sentence of full confinement in this case. The record indicates that the defendant had a long criminal history littered with violent offenses and revocations of both probation and parole."); *State v. Sluder*, No. E2019-01321-CCA-R3-CD, 2020 WL 2488772, at *3 (Tenn. Crim. App. May 14, 2020) (affirming sentence of split confinement, in part, where defendant convicted of aggravated assault had been previously convicted of rape in 1989).

[186] *See State v. Robinson*, No. M2016-01957-CCA-R3-CD, 2018 WL 1378339, at *6 (Tenn. Crim. App. Mar. 19, 2018) (affirming sentence of confinement and considering factor in reckless endangerment case involving unrestrained children when "this particular [D]efendant having pled guilty on multiple occasions to child restraint devices or child restraint violations. And, in fact, on that particular day, none of these children were buckled or in a child restraint device."); *State v. Sams*, No. E2017-01837-CCA-R3-CD, 2018 WL 3700942, at *4 (Tenn. Crim. App. Aug. 3, 2018) (denying alternative sentence for misdemeanor violation of community supervision for life consisting of DUI, in part, because "more than thirty years and including multiple driving and alcohol related offenses"); *State v. Wolfenbarker*, No. E2019-01386-CCA-R3-CD, 2020 WL 1856442, at *5 (Tenn. Crim. App. Apr. 14, 2020) (affirming denial of alternative sentence, in part, when, in addition to present conviction for theft from multiple victims, the defendant's "presentence report shows multiple theft-related convictions").

[187] *See State v. McTaggart*, No. M2018-00747-CCA-R3-CD, 2019 WL 1953663, at *4 (Tenn. Crim. App. May 1, 2019) (affirming denial of alternative sentence, in part, when the trial court noted "the escalation of the types of offenses the Defendant committed from misdemeanor thefts to felony offenses in the current case."); *State v. Long*, No. W2018-01387-CCA-R3-CD, 2019 WL 1552577, at *4 (Tenn. Crim. App. Apr. 9, 2019) (in context of judicial diversion, denying diversion, in part, "the trial court considered the presentence report which indicated the defendant had two prior Class A misdemeanor convictions and numerous traffic violations. These prior crimes 'concerned' the trial court in relation to the defendant's amenability to correction as the trial court noted the defendant continued to commit crimes which were increasing in severity.").

[188] *See State v. Robinson*, 139 S.W.3d 661, 665 (Tenn. Crim. App. 2004) (in context of judicial diversion, criminal record can consist of unconvicted criminal behavior, if established by a preponderance of the evidence); *State v. Walls*, No. M2016-01121-CCA-R3-CD, slip op. at 11 (Tenn. Crim. App. July 31, 2017) ("While Defendant argues that such conduct did not result in criminal convictions, the plain language of the statute applies to 'criminal conduct' and is not limited to criminal convictions.").

[189] *See State v. Pinhal*, No. M2019-01516-CCA-R3-CD, 2020 WL 3966843, at *10 (Tenn. Crim. App. July 14, 2020) (affirming denial of alternative sentence, in part, when "[t]he Defendant, likewise, admitted long-term drug and alcohol abuse. She admitted to drinking and using marijuana beginning at age twelve or thirteen."); *State v. Arthur*, No. E2015-00348-CCA-R3-CD, 2016 WL 197715, at *4 (Tenn. Crim. App. Jan. 15, 2016) ("The Defendant's history of criminal convictions and criminal behavior lends support to the denial of an alternative sentence. The fifty-six-year-old Defendant's criminal history spanned forty years, beginning at the age of fifteen, and includes twenty-four convictions. The Defendant also admitted to chronic use of drugs and alcohol throughout his lifetime.").

substance use played a role in the instant offenses,[190] this behavior will weigh against granting an alternative sentence.[191]

The Court has analyzed the Defendant's previous criminal behavior more fully in its consideration of the length of the sentence and whether to impose consecutive sentences. The analysis there also applies here, and it is unnecessary to repeat the full analysis. Suffice to say that the Defendant's criminal history and behavior is extensive; it is violent; it is escalating in seriousness; and it is the result of unlawful substance use. The Court finds that consideration of the Defendant's criminal behavior weighs heavily against granting an alternative sentence.

D. NATURE AND CIRCUMSTANCES OF THE OFFENSE

The Court also looks to the facts and circumstances surrounding the offenses, and the nature and circumstances of the criminal conduct involved. In so doing, the Court is not bound by the conviction offenses, and it may look behind any plea bargain and consider the true nature of the offenses as they were actually committed.[192]

The Court looks to this factor, in part, because Tennessee Code Annotated section 40-35-103(1)(B) provides that confinement may be ordered when it "is necessary to avoid depreciating

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[190] *See State v. Robertson*, No. M2016-02409-CCA-R3-CD, 2018 WL 4361132, at *11 (Tenn. Crim. App. Sept. 12, 2018) ("Moreover, alcohol apparently has played a role in some of the Appellant's actions, yet he has never sought treatment. Accordingly, he lacks potential for rehabilitation. We conclude that the trial court did not abuse its discretion by denying the Appellant's request for probation.").

[191] *See State v. Beasley*, No. M2017-00591-CCA-R3-CD, 2018 WL 4931471, at *6 (Tenn. Crim. App. Oct. 11, 2018) (affirming denial of alternative sentence, in part, when trial court "determined, pursuant to Tennessee Code Annotated section 40-35-103, that the Defendant's sentences would be served in confinement. The court found that confinement was necessary to protect society by restraining a defendant who has a long history of criminal conduct given the Defendant's 'lifestyle of criminal conduct' and her 'violat[ion] [of] the law every single day that [she] use[d] and possess[ed] illegal drugs.'").

[192] *See State v. Pierce*, 138 S.W.3d 820, 828 (Tenn. 2004) (finding that the defendant would have been ineligible for probation if he had pled to the offense he actually committed); *State v. Hollingsworth*, 647 S.W.2d 937, 939 (Tenn. 1983) (recognizing that when determining whether probation is appropriate it is proper "to look behind the plea bargain and consider the true nature of the offenses committed"); *see also State v. Reno*, No. M2016-01903-CCA-R3-CD, slip op. at 19 (Tenn. Crim. App. July 18, 2017) ("The State correctly states in its brief that a court is permitted to consider evidence of the original facts that lead to a plea agreement. Nothing prohibited the court from considering the factual basis of the Defendant's conduct leading to the guilty plea." (citations omitted)); *State v. McLerran*, No. No. M2016-02005-CCA-R3-CD, slip op. at 9 (Tenn. Crim. App. Aug. 16, 2017) ("When determining whether probation is appropriate it is proper "to look behind the plea bargain and consider the true nature of the offenses committed." (citing *State v. Pierce*, 138 S.W.3d 820, 828 (Tenn. 2004) (quoting *Hollingsworth*, 647 S.W.2d at 939)); *State v. Smith*, No. W2017-01915-CCA-R3-CD, 2018 WL 4579693, at *6 (Tenn. Crim. App. Sept. 21, 2018) (affirming denial of alternative sentence, in part, when "the trial court stated that it 'may look behind any plea bargain or jury verdict and consider the true nature of the offenses actually committed' and ordered Defendant to serve his sentences in the Department of Correction because 'he actually committed a felony murder and should be sentenced to life imprisonment.' 'When determining whether probation is appropriate it is proper 'to look behind the plea bargain and consider the true nature of the offenses committed.'" (quoting *State v. Pierce*, 138 S.W.3d 820, 828 (Tenn. 2004))).

the seriousness of the offense." As the Model Penal Code notes,[193] this consideration is essentially one that seeks to avoid "fostering disrespect for the law."[194] Indeed, the Chief Reporter of the committee responsible for the development of the original Model Penal Code, Professor Herbert Wechsler, specifically recognized the importance of this consideration in sentencing:

> When the legislature declares conduct to be criminal, it affirms a purpose to forbid it, and to meet defiance of the prohibition by the moral condemnation of conviction and a judicious application of the sanctions that the law provides. The least that is demanded [in this regard] is that the disposition be so cast that it does not depreciate the gravity of the offense, whatever that may be, and *thus imply a license to commit it*."[195]

Despite the importance of this concern to sentencing decisions, the philosophy must contain a limiting principle, lest all of sentencing be reduced to this single consideration. To that end, our courts have recognized that, before confinement can be ordered as being necessary to avoid depreciating the seriousness of the offense, the circumstances of the offense as committed, apart from factors that constitute elements of the offense,[196] must be especially violent,

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[193] The Court notes these foundational considerations by the drafters of the Model Penal Code, in part, because the Sentencing Reform Act of 1989 was largely based upon the Model Penal Code. *See State v. Dowdy*, 894 S.W.2d 301, 305 (Tenn. Crim. App. 1994). Indeed, our Supreme Court has also recognized that the legislature enacted the 1989 Criminal Reform Act "that in large part adopted the American Law Institute's Model Penal Code," though a "significant portion of the Tennessee Criminal Code, however, was adopted from the Texas derivation of the Model Penal Code." *See State v. Smith*, 436 S.W.3d 751, 762 (Tenn. 2014).

[194] *See* Model Penal Code (Sentencing) § 6.06(2)(B) (Final Draft April 2017).

[195] *See* Herbert Wechsler, *Sentencing, Correction, And The Model Penal Code*, 109 Univ. of Penn. L. Rev. 465, 468 (Feb. 1961) (emphasis added). Of course, Professor Wechsler was noting this concern as a "single value when a multiplicity of values" are involved in the ultimate sentencing decision. He went further to add:

> "But how much more than this the prohibition should be taken to connote is obviously indeterminate. Deterrence (both general and special), incapacitation, and correction are all possible objectives of the sanctions that may be employed in dealing with offenders; all are means to crime prevention and as such are entitled to be weighed. But not even crime prevention is the sole value to be served. The rehabilitation of an individual who has incurred the formal condemnation of the law is in itself a social value of importance, a value, it is well to note, that is and ought to be the prime goal of correctional administration and that often will be sacrificed unduly if the choice of sanctions is dictated only by deterrence. Finally, it surely is important that the deprivations incident to dispositions not be arbitrary, excessive, or disproportionate, measured by the common sense of justice. . . .

See id. at 468-69.

[196] *See State v. Trent*, 533 S.W.3d 282, 293 (Tenn. 2017) ("[B]efore a trial court can deny probation solely on the basis of the offense itself, the circumstances of the offense as particularly committed in the case under consideration must demonstrate that the defendant committed the offense in some manner more egregious than is contemplated simply by the elements of the offense. . . . Thus, as correctly noted by the Court of Criminal Appeals below, 'a trial court may not consider factors that constitute elements of the offense in determining whether the circumstances of an offense" are sufficient to deny an alternative sentence.'").

horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree.[197]

Consequently, cases where incarceration has been ordered based upon this factor, at least in part, tend to be cases where the victim is mistreated; where the case involves excessive actions or harms; where the offenses are the result of substance or alcohol use; where the criminal actions were unprovoked; where there was a lack of hesitancy in the defendant's actions; where the nature of the criminal conduct is repeated; or where the defendant uses as a weapon, among other factors.

Some courts have found that incarceration is warranted to avoid depreciating the seriousness of an offense where the victim's injuries were especially serious,[198] severe,[199] or

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[197] *See State v. Trotter*, 201 S.W.3d 651, 654 (Tenn. 2006) ("If the seriousness of the offense forms the basis for the denial of alternative sentencing, Tennessee courts have held that "'the circumstances of the offense as committed must be especially violent, horrifying, shocking, reprehensible, offensive or otherwise of an excessive or exaggerated degree,' and the nature of the offense must outweigh all factors favoring a sentence other than confinement." (citations omitted)); *State v. Ward*, No. E2018-01781-CCA-R3-CD, 2019 WL 3244991, at *9 (Tenn. Crim. App. July 19, 2019) ("The Tennessee Supreme Court's order in *State v. Sihapanya*[, 516 S.W.3d 473, 476 (Tenn. 2014)], indicates that when the denial of alternative sentencing is based solely on a concern regarding depreciating the seriousness of the offense or solely on deterrence, this court must apply a "heightened standard of review." When alternative sentencing is denied based on the seriousness of the offense, "'the circumstances of the offense as committed must be especially violent, horrifying, shocking, reprehensible, offensive or otherwise of an excessive or exaggerated degree, and the nature of the offense must outweigh all factors favoring a sentence other than confinement.'" (quoting *State v. Trotter*, 201 S.W.3d 651, 654 (Tenn. 2006) (quoting State v. Grissom, 956 S.W.2d 514, 520 (Tenn. Crim. App. 1997))).

Note, however, that in *State v. Sihapanya*, 516 S.W.3d 473, 476 (Tenn. 2014), the Tennessee Supreme Court determined that "the heightened standard of review [from *Trotter* and *Hooper*] that applies to cases in which the trial court denies probation based on only one of these factors is inapplicable" when the trial court "combined the need to avoid depreciating the seriousness of the offense with the need for deterrence and the nature and circumstances of the offense[.]" *See State v. Guthrie*, No. M2017-02441-CCA-R3-CD, 2019 WL 978687, at *5 (Tenn. Crim. App. Feb. 27, 2019).

[198] *See State v. Key*, No. M2019-00411-CCA-R3-CD, 2019 WL 7209603 (Tenn. Crim. App. Dec. 27, 2019) denying alternative sentence, in part, when trial court found that injuries were particularly great: "The Defendant argues that Ms. Phillips was compensated for the loss of her $8,000 van and her medical expenses of an unknown amount by the $50,000 insurance settlement. The record reflects that the victims in this case suffered more than monetary loss and that the Defendant's actions caused particularly great injuries to both victims. With regard to Ms. Phillips, the record shows that she was still plagued by the residual physical effects of the wreck at the sentencing hearing, which took place approximately two and one-half years later. Ms. Phillips testified that her family had been greatly affected by the loss of Mr. Banks, who had been like a father to her children, and Mr. Banks's father testified that his family, including Mr. Banks's children and grandchildren, were likewise greatly affected by his death. Although the offense of vehicular assault contemplates serious bodily injury, the record supports the court's conclusion that Ms. Phillips's injuries were particularly great.").

[199] *See State v. Williamson*, No. W2018-01441-CCA-R3-CD, 2019 WL 2635670, at *3 (Tenn. Crim. App. June 26, 2019) (affirming denial of alternative sentence, in part, when "The evidence at trial showed that the [two-year old] victim suffered significant pain when touched, bruising and swelling all over his body, and injury to his buttocks and genitals.").

required hospitalization.[200] In addition, where the victim required counseling to address the traumatic impact of a defendant's abuse, this factor may also be present.[201]

In this case, the Defendant's treatment of Ms. Robinson cannot be fairly described as anything other than torture, both cruel and sadistic. As the Court found above, the Defendant's action served no purpose but to inflict pain and suffering for its own sake upon Ms. Robinson. The medical proof revealed that Ms. Robinson suffered second-degree burns to her arm and *third-degree* burns to her inner labia. As previously noted, she characterized the pain from the wounds to her labia as being the "worst possible pain,"[202] and she testified that the pain she experienced from these wounds was "never-ending." The wounds were such that she was unable to urinate, and medical staff had to use a catheter to assist with these basic functions.

Indeed, the burns to Ms. Robinson's labia were so severe that she could not be treated by any local burn unit in Chattanooga. Rather, she had to be transported to Georgia to be treated by a specialized burn unit over the course of several days. Ms. Robinson testified that even after this multi-day treatment, she could not ambulate without the assistance of a walker for some two- to three weeks following. The treatment regimen required months of follow-up care with this out-of-state burn unit.

This medical treatment, however, did not occur because the Defendant sought medical help for her. Indeed, he was apparently indifferent to the harm he caused, and he took no action whatsoever to see that she received any medical attention at all. Even since the offenses, he has not attempted to help minimize the financial burden that his actions have caused to Ms. Robinson, and she has been left with significant medical expenses due to the Defendant's actions.

The harm inflicted by the Defendant has continued, even after the physical healing has progressed. Ms. Robinson testified that she has experienced nightmares, depression, and flashbacks. She has sought and received psychological counseling to help her deal with these events. She also testified that the events have had an impact on her own sexuality that has been long-lasting.

Some courts have also found that incarceration may be required to avoid depreciating the seriousness of the offense where the offense was the result of drugs or alcohol use and the

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[200] *See State v. Miller*, No. M2016-02302-CCA-R3-CD, slip op. at 8 (Tenn. Crim. App. Oct. 13, 2017) (noting that the "the victim's injuries were particularly severe, necessitating four surgeries and resulting in ongoing physical and financial difficulties."); *State v. Thomas*, No. E2016-00372-CCA-R3-CD, slip op. at 8 (Tenn. Crim. App. Dec. 23, 2016).

[201] *See State v. Ryan*, No. M2017-01599-CCA-R3-CD, 2018 WL 2465140, at *5 (Tenn. Crim. App. June 1, 2018) (upholding incarceration on the basis of the seriousness of the offense, stating that "[i]n addition to the testimony about the sheer number of instances of aggravated statutory rape, the victim testified that she was emotionally traumatized and forever affected by Defendant's actions. The victim was attending counseling at the time of the sentencing hearing. It was also evident from the victim impact forms completed by the victim's father and mother that crimes herein had a substantial impact on the victim's family.").

[202] *See* Medical Records, at 42.

defendant gave no thought as to the consequences of his or her actions.[203] Here, the Defendant acknowledged that he committed the offenses while he was in a "meth-induced psychosis." Moreover, no evidence is present in the record that the Defendant ever gave any thought to the horrific harm that his actions caused or were likely to cause to Ms. Robinson. Particularly in consideration with other factors, granting an alternative sentence under these circumstances would certainly depreciate the seriousness of the Defendant's offenses.

In the Court's mind, there is no question that both the physical and psychological harm inflicted by the Defendant is truly horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree, and it weighs against a grant of alternative sentencing. The Defendant's criminal conduct was repeated in nature, occurring over the course of time, and it is seemingly part of a larger pattern of conduct against women victims.[204] The conduct as shown in Counts 3 and 4 also involved the use of a deadly weapon[205] multiple times to inflict grievous

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[203] *See State v. Cates*, No. E2014-01322-CCA-R3-CD, 2015 WL 5679825, at *12 (Tenn. Crim. App. Sept. 28, 2015) (concluding that a sentence of confinement was warranted when the trial court found that the accident involved excessive speed and alcohol and that the Defendant gave no thought to the consequences of his actions) (cited in *State v. Miller*, No. M2016-02302-CCA-R3-CD, slip op. at 9 (Tenn. Crim. App. Oct. 13, 2017)).

[204] *See State v. Lewis*, No. M2016-02513-CCA-R3-CD, slip op. at 6 (Tenn. Crim. App. Aug. 22, 2017) ("The record supports the trial court's conclusion that confinement was necessary in this case to avoid depreciating the serious nature of the defendant's convictions, including the repeated sale of heroin, a Schedule I substance, and the defendant's continuing to possess a firearm despite having been previously convicted of several felonies."); *see also State v. Reynolds*, No. E2016-01934-CCA-R3-CD, 2017 WL 3895160, at *5 (Tenn. Crim. App. Sept. 6, 2017) ("The Defendant admitted to taking drugs from the hospital over 483 times and to being intoxicated while working with patients in the emergency room. After pleading guilty to one count of theft of property valued at $1,000 or more and six counts of obtaining a controlled substance by fraud, the Defendant obtained and pled guilty to three new criminal charges. . . . Given these facts, confinement is necessary to avoid depreciating the seriousness of the offense. The trial court properly considered the sentencing principles in its alternative sentencing decision."); *State v. Ryan*, No. M2017-01599-CCA-R3-CD, 2018 WL 2465140, at *5 (Tenn. Crim. App. June 1, 2018) (upholding incarceration on the basis of the seriousness of the offense, noting the "sheer number of instances of aggravated statutory rape"); *State v. Kelley*, No. M2017-01158-CCA-R3-CD, 2018 WL 4145007, at *1 (Tenn. Crim. App. Aug. 29, 2018) (affirming denial of alternative sentence on this ground, in part, when "a sentence of full probation would depreciate the seriousness of the offense, noting that methamphetamine use was 'a real problem' in light of the number of [defendant's] arrests and convictions in recent years."); *State v. Gilley*, No. E2018-00691-CCA-R3-CD, 2019 WL 1220789, at *5 (Tenn. Crim. App. Mar. 14, 2019) (affirming finding of factor, in part, "because of the repeated criminal conduct [in thefts from new construction] and damage caused to the victims."); *State v. Walker*, No. E2018-00795-CCA-R3-CD, 2019 WL 3064058, at *4 (Tenn. Crim. App. July 12, 2019) (Second Division) (affirming sentence of confinement as necessary to avoid depreciating seriousness of offense, in part, where "The Defendant admitted to entering homes in Hamilton County on four different occasions to take property.").

[205] As noted above, a "deadly weapon" is "[a]nything that in the manner of its use or intended use is capable of causing death or serious bodily injury." *See* Tenn. Code Ann. § 39-11-106(a)(6)(B). The Court of Criminal Appeals has recognized that a heated instrument, such as a heated coat hanger, may constitute a deadly weapon. *See State v. Medlock*, W2000-03009-CCA-R3-CD, 2002 WL 1549707, at *6 (Tenn. Crim. App. Jan. 16, 2002) ("The Appellant forced a heated coat hanger into the vagina of Ms. Readus while pouring alcohol into the vaginal area. He then sexually penetrated her with his penis. These facts support the jury's verdict of unlawful sexual penetration by force while armed with a deadly weapon, *i.e.*, coat hanger, board, and extension cord. The proof also established that the Appellant caused bodily injury to the victim. We conclude that the evidence was sufficient to convict the Appellant of two counts of aggravated rape."). The Court again believes that the knife used by the Defendant here was certainly capable of causing, and did actually cause, serious bodily injury consisting of

injuries. The Court finds that the circumstances of the offense are such that granting an alternative sentence here would depreciate the seriousness of the Defendant's offenses. Indeed, the granting of probation or split confinement could have no effect other than to promote disrespect of the law as a shield against such outrageous and abusive conduct. As such, the Court finds that this factor weighs heavily against the grant of an alternative sentence.

E. CONSIDERATIONS OF DETERRENCE

Finally, the Court considers whether confinement is needed as a deterrent against similar conduct. Tennessee Code Annotated section 40-35-103(1)(B) provides that confinement may be ordered when it "is particularly suited to provide an effective deterrence to others likely to commit similar offenses." Although the language of this factor speaks only in terms of *general* deterrence—or deterrence to others[206]—the Supreme Court in *Trent* specifically recognized that considerations of deterrence involve both specific and general deterrence.[207]

As a practical matter, it is difficult to determine the deterrent effects flowing from different types of sentences. Indeed, as the Supreme Court recognized in *State v. Hooper*, "[d]eterrence is a complex psychological process, and the focus on deterrence through changes in the penalty structure or sentencing behavior represents but one part of the calculus."[208] In many cases, considerations involving deterrence may, in essence, be common-sense considerations.[209]

That said, the *Hooper* Court also identified types of cases in which deterrence is more likely to be present, or, at least, are "particularly suited" to achieve that goal.[210] For example,

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extreme physical pain, obvious disfigurement, and a substantial impairment of a function of a bodily member or organ.

[206] *See State v. Miller*, No. M2016-02302-CCA-R3-CD, slip op. at 8 (Tenn. Crim. App. Oct. 13, 2017) ("While the State argues that the trial court also relied on the fact that "confinement is particularly suited to provide an effective deterrence," the statutory language limits the deterrence factor to a consideration of the value of deterrence "to others likely to commit similar offenses." T.C.A. § 40-35-103(1)(B) (emphasis added). The trial court never considered the deterrence value of confinement to others, and it only referred to deterrence as it related to the Defendant.").

[207] *See State v. Trent*, 533 S.W.3d 282, 291 (Tenn. 2017) (requiring consideration, under factor (6), of "special and general deterrence value").

[208] *See State v. Hooper*, 29 S.W.3d 1, 9 (Tenn. 2000).

[209] *See State v. Hooper*, 29 S.W.3d 1, 10 (Tenn. 2000) ("Deterrence 'involves undemonstrable predications about human behavior, but the theory is as hard to disprove as it is to prove for the same reasons.... However, the strength of the theory is in its generality; its foundation is in common sense and there is some evidence to support it.'" (quoting *United States v. Lucas*, 2 M.J. 834, 840 (A.C.M.R.1976))).

[210] The Court notes that the heightened analysis of deterrence identified in *Hooper* generally is not required unless deterrence is the *sole* factor in denying an alternative sentence. *See State v. Sihapanya*, 516 S.W.3d 473, 476 (Tenn. 2014) ("Accordingly, the heightened standard of review that applies to cases in which the trial court denies probation based on only one of these factors is inapplicable in this case."); *State v. Trotter*, 201 S.W.3d 651, 656 (Tenn. 2006) ("*Hooper* addresses the issue of whether deterrence *alone* may support a denial of alternative sentencing and articulates the criteria for such circumstances . . . . Clearly, the trial court based the denial of alternative sentencing on considerations other than deterrence, i.e., the seriousness of the offense and the need to avoid depreciation of the offense. Because the denial of alternative sentencing is amply supported by factors other

"[a]ctions that are the result of intentional, knowing, or reckless behavior . . . are probably more deterrable than those which are not the result of a conscious effort to break the law."[211] In addition, "[r]epeated occurrences of the same type of criminal conduct by a defendant generally warrant a more emphatic reminder that criminal actions carry consequences."[212]

In this case, the Defendant's actions were, in fact, the result of intentional or knowing behavior. Moreover, the course of conduct represented repeated instances of the same type of conduct, and the Defendant has a history of assaultive behavior against women previously.

With these factors, it seems that *some* deterrent value is likely present in denying an alternative sentence to incarceration. However, the extent to which deterrence is present in fact is unclear, and the record does not contain any significant proof supporting this factor. As such, the Court weighs the need to provide a general deterrent neutrally in the analysis.

F. SUMMARY

In summary, the Court has considered the factors required by Tennessee Code Annotated sections 40-35-103 and -210(b), as well as *State v. Trent*,[213] in deciding whether to grant or deny an alternative sentence to incarceration. The Court has given weight to those factors as follows:

- the nature and circumstances of the offense and the need to avoid depreciating the seriousness of the offense are given heavy weight against the granting of an alternative sentence;

- the Defendant's criminal history is given heavy weight against the granting of an alternative sentence;

- the Defendant's amenability to rehabilitation is given moderate weight against the granting of an alternative sentence;

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than deterrence, we need not further address the *Hooper* criteria in the case under submission." (emphasis in original)); *State v. Walker*, No. M2016-00687-CCA-R3-CD, slip op. at 10 (Tenn. Crim. App. Mar. 16, 2017) ("*Hooper*, however, addressed instances where deterrence is the sole basis for imposing a sentence of confinement. That is not the issue in this case, thus we need not review this case under *Hooper*."); *State v. Glover*, No. M2018-01410-CCA-R3-CD, 2019 WL 3822030, at *3 (Tenn. Crim. App. Aug. 15, 2019) ("If however, the trial court's denial of probation was based on combining 'the need to avoid depreciating the seriousness of the offense with the need for deterrence and the nature and circumstances of the offense,' the heightened standards of review articulated in *Trotter* and *Hooper* do not apply." (quoting *State v. Sihapanya*, 516 S.W.3d 473, 476 (Tenn. 2014)).

[211] *See State v. Hooper*, 29 S.W.3d 1, 11 (Tenn. 2000).

[212] *See State v. Hooper*, 29 S.W.3d 1, 12 (Tenn. 2000).

[213] "[T]he guidelines applicable in determining whether to impose probation are the same factors applicable in determining whether to impose judicial diversion." *See State v. Trent*, 533 S.W.3d 282, 291 (Tenn. 2017); *State v. Demoss*, No. M2019-01583-CCA-R3-CD, 2020 WL 4199987, at *10 (Tenn. Crim. App. July 22, 2020) (same and citing *State v. Trent*, 533 S.W.3d 282, 291 (Tenn. 2017)).

- the Defendant's character, history, and background, on balance, are given light to moderate weight against the granting of an alternative sentence; and

- the considerations of deterrence are given no weight in favor of or against the granting of an alternative sentence.

On balance, the Court finds no factors weighing in favor of an alternative sentence, and several factors weighing moderately or heavily against the granting of an alternative sentence. As such, the Court orders that the sentences imposed above shall each be served in the Tennessee Department of Correction as a Range I, Standard Offender.

IX. SENTENCING ORDER

Accordingly, for the reasons given above, it is hereby **ORDERED** as follows:

1. **Imposition of Determinate Sentences:**

   a. **Count No. 1:** Upon conviction of the offense of aggravated domestic assault in Count 1, the Court sentences the Defendant to a term of **three (3) years**,[214] to be served in the Department of Correction as a Range I, Standard Offender.

   b. **Count No. 2:** Upon conviction of the offense of aggravated domestic assault in Count 2, the Court sentences the Defendant to a term of **five (5) years**, to be served in the Department of Correction as a Range I, Standard Offender.

   c. **Count No. 3:** Upon conviction of the offense of aggravated domestic assault in Count 3, the Court sentences the Defendant to a term of **six (6) years**, to be served in the Department of Correction as a Range I, Standard Offender.

   d. **Count No. 4:** Upon conviction of the offense of aggravated domestic assault in Count 4, the Court sentences the Defendant to a term of **six (6) years**, to be served in the Department of Correction as a Range I, Standard Offender.

2. **Alignment of Sentences:** The Court orders that the sentences shall be aligned as follows:

   a. **Count 4** shall run consecutively to **Counts 2** and **3**;

[214] *See* Tenn. Code Ann. § 40-35-211(1) ("Specific sentences for a felony shall be for a term of years or months or life, if the defendant is sentenced to the department of correction; or a specific term of years, months or days if the defendant is sentenced for a felony to any local jail or workhouse.").

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b. **Counts 2 and 3 s**hall run concurrently with each other, but each shall run consecutively to **Count 1**.

c. The intention of the Court is to impose an effective sentence of **fifteen (15) years** to be served in the Department of Correction as a Range I, Standard Offender.

d. As required by law, the sentences imposed in this case shall run consecutively to the sentences imposed in Case Nos. 294769[215] and 293562.[216]

3. **Manner of Service of Sentences:** The Court orders that each of the sentences in Counts 1, 2, 3, and 4 be served in the Tennessee Department of Correction as a Range I, Standard Offender. The Court respectfully denies the Defendant's request for an alternative sentence to incarceration as to each Count for the reasons stated above.

4. **Court Costs:** For good cause shown, and upon proof of indigency provided, the Court orders that indigent costs be assessed in these cases. For purposes of this Order, indigent costs shall consist only of taxes and fees in the following categories on the Clerk's Bill of Costs, if such taxes and fees would otherwise be assessed:

- State Tax (2508);
- Crime Compensation Fee (2511);
- County Tax (2518);
- County Expense Fee (2519);
- County Library Tax (2523);
- Court Appointed Attorney Fee (2548);
- County Drug Fee (2559);
- County Renovation Tax (2562);
- Victim Notification Tax (2580); and
- any other tax whose assessment may not be waived.

The Defendant shall be liable for payment of all such indigent costs, and execution shall issue, if necessary, for collection of the same.

5. **Right to Appeal:** Pursuant to Tenn. R. Crim. P. 37(c), the Court hereby advises the Defendant that he has the right to appeal this sentencing decision. If the Defendant chooses to exercise his right to appeal, then he or his counsel shall file a timely notice of appeal with the Clerk of the Court of Criminal Appeals in accordance with Rule 4 of the Tennessee Rules of Appellate Procedure.

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215 *See* Exhibits 8 and 9.

216 *See* Exhibits 5 and 6.

The Court finds that the Defendant is eligible to have counsel appointed to assist in the prosecution of his appeal, if any appeal is ultimately taken. To that end, the Court hereby continues the appointment of Mr. Fisher Wise for those purposes.[217] The Court extends to Mr. Wise its sincerest appreciation for his services, it and notes that the development of the proof was significantly enhanced by his work and abilities. Should a notice of appeal be filed, the Court will also order that a transcript or statement of the evidence be furnished at the State's expense.

It is so ordered.

Enter:

TOM GREENHOLTZ, Judge

[217] *See* Tenn. R. Crim. P. 37(e)(3) ("Pursuant to Tenn. Sup. Ct. Rule 13, § 1(e)(5), counsel appointed in the trial court to represent an indigent defendant shall continue to represent the defendant throughout the proceedings, including any appeals, until the case has been concluded or counsel has been allowed to withdraw by a court.").

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